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PROCEEDINGS

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

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BY

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NOTES

[1] Retired June 15, 2016, under constitutional limitation as to age.
[2] Retired June 4, 2016, under constitutional limitation as to age.

* See General Statutes § 51-50i.

Unless otherwise indicated, the statute book referred to in this volume as the General Statutes is the Revision of 1958, revised to 2015; the Practice Book is the Connecticut Practice Book (Current Ed.) as supplemented by rules of court published in the Connecticut Law Journal.

The month given at the top of each page is that within which the opinion was published in the Connecticut Law Journal.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

WILLIAM D. HART *v.* FEDERAL EXPRESS CORPORATION ET AL.
(SC 19523)

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson, Js.

Syllabus

The defendants, F Co., a parcel delivery service, and its workers' compensation claims administrator, appealed from the decision of the Compensation Review Board affirming the decision of the Workers' Compensation Commissioner finding that the plaintiff had suffered a compensable work-related injury and awarding him temporary total disability benefits. The plaintiff had been employed with F Co. since 1987 as a courier to deliver packages along a specified route, with certain deliveries required to be made by certain times throughout the day, and had an unblemished employment record prior to 2009. In early 2009, the plaintiff's delivery area was enlarged, increasing the number of stops and the associated driving time. On September 15, 2009, due to a large inventory of parcels to deliver, the plaintiff was significantly behind schedule and was under great stress. The day was hot and the plaintiff's truck was not air-conditioned, and by late afternoon, after having had no time for a lunch break, to hydrate, or to use a restroom, the plaintiff began to feel ill. While at a fire station, one of his scheduled stops, fire personnel detected an abnormal heart rhythm, and they called an ambulance. He was brought to the emergency room of a local hospital where his heart rhythm devolved into a form of irregular accelerated heartbeat and tests showed he had low potassium levels due to dehydration. He was also diagnosed with hypertension. He was discharged from the hospital the next day with instructions to take certain medications and to follow up with a cardiologist, and was placed on medical leave. Between late

2009 and early 2012, the plaintiff was examined by various health care professionals, including health care professionals retained by the defendants, and was diagnosed with various physical and psychological symptoms or conditions related to the September, 2009 incident. The plaintiff's medically excused absence from work expired in August, 2010. Six months after the September incident, F Co. had declined the plaintiff's request to return to work part-time, and subsequently informed the plaintiff that he would not have a position to return to when he was able to work. The plaintiff never sought alternative employment. Following a formal hearing, the commissioner concluded that the plaintiff had suffered physical and psychological injuries arising out of and in the course of his employment, and that the plaintiff was temporarily totally incapacitated from September 15, 2009, through August 7, 2010, and he awarded the plaintiff total incapacity benefits for that time period. The defendants appealed to the review board, which affirmed the commissioner's findings and award, and the defendants appealed. *Held*:

1. The defendants could not prevail on their claim that the board improperly upheld the commissioner's findings that the plaintiff suffered compensable physical and psychological injuries arising out of his employment, there being sufficient evidence in the record to support the commissioner's findings; five medical experts, including the defendants' own cardiology expert, opined that the plaintiff's conditions of employment aggravated or could have aggravated his underlying heart problems and that, on September 15, 2009, those conditions caused him to suffer dehydration and resulting mineral deficiencies that precipitated his heart problems, psychiatric experts opined that the plaintiff's psychological injuries resulted from the life-threatening trauma he suffered as a result of the atrial fibrillation he experienced and the resulting need for emergency medical treatment, the commissioner credited that expert evidence, and this court was compelled to defer to the commissioner's findings.

2. This court could not conclude that the board improperly upheld the commissioner's finding that the plaintiff was temporarily totally incapacitated through August 10, 2010, the commissioner having properly concluded that, even if the plaintiff had no physical restrictions related to his heart condition, it was reasonable for his treating physicians to hold him out of work throughout this period until they were able to complete their diagnoses and settle on a treatment regimen that would protect him from both the physical and psychological stresses of work; moreover, the commissioner found the opinion of the defendants' expert that the plaintiff was only partially incapacitated less credible than that of the plaintiff's treating physician, and nothing in this court's review of the record compelled it to disturb the commissioner's finding.

Argued December 14, 2015—officially released April 19, 2016

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Second District finding that the plaintiff had suffered a compensable work-related injury and awarding temporary total disability benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the defendants appealed. *Affirmed*.

David A. Kelly, with whom was *Ryan D. Ellard*, for the appellants (defendants).

Robert B. Keville, with whom was *Roger T. Scully*, for the appellee (plaintiff).

Opinion

ESPINOSA, J. This case arises from an incident in which the plaintiff, William D. Hart (claimant), allegedly suffered heart problems and associated psychological injuries during the course of his employment as a courier for the named defendant, Federal Express Corporation (FedEx). The Workers' Compensation Commissioner for the Second District (commissioner) found that both the claimant's physical and psychological injuries were compensable under the Workers' Compensation Act (act), General Statutes § 31-275 et seq., and awarded him total incapacity benefits covering a period of approximately forty-seven weeks. FedEx and its claims administrator, the defendant Sedgwick CMS, Inc., appeal from the decision of the Compensation Review Board (board) upholding the commissioner's findings and award. On appeal, the defendants contend that neither the claimant's physical nor his psychological injuries are compensable under the act and, in the alternative, that the commissioner's award was excessive. We disagree and, accordingly, affirm the decision of the board.

The following facts, as found by the commissioner, and procedural history are relevant to the disposition of this appeal. The claimant was employed by FedEx from 1987 through September 15, 2009, the claimed date of injury at issue in this case. The claimant worked as a courier, delivering packages to customers along a specified route. His daily job duties involved inspecting his vehicle and inventorying and loading parcels onto the vehicle. After doing so, he would confer with his manager about the number of stops to be made, and then drive from the FedEx terminal in the town of Norwich to his assigned delivery territory in the town of Stonington, including the Mystic and Pawcatuck areas.

Once in his delivery area, the claimant would spend the first part of the morning, until 10:30 a.m., making priority overnight deliveries in Mystic. He would then begin making the next round of morning deliveries in and around the borough of Stonington (borough), to be completed by noon. He would then proceed into Pawcatuck and on into North Stonington. After completing all of his deliveries and pickups for the day, the claimant would return to Norwich, stopping at a gas station to top off his truck.

The claimant, who was forty-seven years old on the claimed date of injury, was avid about physical fitness. He would rise each day at 4 a.m. and work out at the gym for as long as two hours before going to work. He engaged in intense gym workouts, including weightlifting and " 'cardio' " components, as many as six times per week, and he also went running approximately three times each week.

The claimant's job requirements were demanding as well. His delivery area encompassed the tourist attractions of Mystic; Pawcatuck, which is the gateway to the beaches in Westerly, Rhode Island; and the heavily traveled Route 1 corridor between those towns. Day-

time driving in this area, particularly during the summer tourist season, is challenging, and is complicated by having to cross the Route 1 drawbridge over the Mystic River. The claimant's workday averaged ten to twelve hours. Nevertheless, he was, by all accounts, a dedicated and hardworking employee who took great satisfaction in his job. He received a notable award for his service in 2004, and had an unblemished employment record prior to 2009.

In early 2009, however, the claimant came under the direction of a new manager and the demands of his job began to escalate. His delivery area was enlarged, increasing the number of stops and the associated driving time. The claimant's typical " 'stop count' " climbed to 12.5 per hour, leaving less than five minutes on average for him to drive to and complete each delivery. The claimant asked his managers for help, but was told that nothing could be done.

FedEx policy provides that each driver receive a one-half hour daily lunch break. FedEx also has strict standards for the timeliness of deliveries, however, and drivers are judged and graded on their ability to satisfy FedEx customers and complete assigned stops by the appointed deadlines. Owing to the increasing size of his delivery area and the traffic demands of the tourist season, during the summer of 2009, the claimant often was unable to find time even for bathroom breaks or his lunch break before 4:30 p.m. The claimant's managers were made aware that his route had become unworkable, but they took no steps to mitigate the situation and, according to the claimant, continued to increase the demands of his route.

At the end of one shift in June, 2009, the claimant made his usual refueling stop in Norwichtown before returning to the nearby FedEx terminal. After refueling, however, he failed to secure the cap properly on the

truck's fill pipe. When he arrived at the terminal yard, he smelled diesel fuel and realized that a small amount of fuel had spilled out of the fill pipe. The claimant reported the spillage to the office manager, who promptly called the fire department and the police. The incident ultimately involved the intervention of a hazardous materials team and federal occupational health officials. The claimant, who believed that FedEx had overreacted, was sent home. Upon returning to work for his next shift, the claimant was reprimanded for the fuel spill incident. On June 24, 2009, he received a written warning regarding that incident. At the same time, FedEx gave the claimant another written warning, stating that, when he took time off in May, 2009, he had exceeded his allotment of scheduled time off. The claimant testified that this overage was the result of how FedEx chose to account for five days he had been out of work when his mother died, classifying only three of the five days as bereavement leave.

Having always worked hard to be a model employee, the claimant was greatly distressed by this turn of events. Between the written warnings and the steady increases in his workload—allegedly disproportionate to those of other drivers—the claimant began to think he was being set up by FedEx and, for the first time, worried about losing his job.

On September 15, 2009, the claimant began his work day as usual. After taking inventory of the parcels, however, he concluded that his schedule would require fifteen delivery stops per hour, or one stop every four minutes on average. After loading his vehicle, he became convinced that this was too many stops and that it would be impossible for him to complete all the deliveries in the allotted time. When he reported his stop count to the manager on duty, the claimant asked if some of the stops could be assigned to another driver. This request was refused.

The day was "hot" and the claimant's assigned truck had a transparent roof to help illuminate the shelves of parcels in the back. This type of roof tended to create a greenhouse effect, increasing the temperature inside the truck when the weather was warm. The vehicle was not air-conditioned.

The claimant proceeded that morning to his assigned delivery area and began making his priority overnight deliveries. He was rushing, but did manage to make all of his deliveries in Mystic by the 10:30 a.m. deadline, with the exception of one stop where the customer was not present to sign for a package that required a signature. The claimant then drove to the borough, where he needed to complete his deliveries by noon. At approximately 11:40 a.m., the claimant arrived at a stop on Tipping Rock Road and concluded that the long driveway to the house was too narrow and overgrown to drive his truck down. With only twenty minutes left to complete his morning deliveries, he opted not to walk the parcel to the house. Instead, he attached the parcel in the mailbox post and then left a voice message on the customer's phone. He just managed to finish his remaining borough stops by noon. The claimant then proceeded in the direction of Pawcatuck, making his " 'SOS deliveries,' " all of which needed to be completed by 3 p.m. After that, he was scheduled to make his " 'E2' " deliveries, which needed to be completed by 4:30 p.m., at which time he was scheduled to make some pickups before returning to Norwich.

As the claimant was rushing to complete his " 'SOS deliveries,' " he received a complaint from the Tipping Rock Road customer. Given the written warnings he had received in June, this complaint caused him significant concern as he continued his route. Then, as the claimant approached Pawcatuck, he received instruction to return to Mystic, on the opposite side of Stonington, to reattempt delivery of the parcel that was not

signed for that morning. The claimant requested that the customer be asked to meet him at a midway point, but his manager rejected this request, so the claimant had to drive back to Mystic. When he returned to the location, the customer again was not present to sign for the package, and the claimant had to spend additional time filling out a detailed report before departing again for Pawcatuck to resume his route.

By this time, the claimant was significantly behind schedule and under great stress. He had not had time to stop for food or drink or to use the restroom, and he was hot and sweating. To further complicate matters, on his way back to Pawcatuck, he encountered traffic delays, as the local high school was dismissing its students. By then, he was one full hour behind schedule in his deliveries and would need to complete an impossible thirty stops per hour.

As he rushed through his stops, running between his truck and the customers' houses carrying heavy packages, the claimant began to feel ill and light-headed. He noticed a fluttering sensation in his chest and a shortness of breath, along with a growing sense of panic. His pace started to slow as he felt increasingly winded and more panicky. Fearing that he would be written up again, the claimant pressed on for approximately one hour before concluding that he could not finish his route. He stopped at the fire station on Liberty Street in Pawcatuck, where he was scheduled to make a delivery, and called FedEx for a substitute driver. He took time to organize his remaining parcels for the next driver, then went into the fire station, made his scheduled delivery, and only then asked to be checked out by fire personnel. His heart rate was found to be more than 200 beats per minute, and an ambulance was called. The claimant was rushed to Backus Hospital in Norwich, where he came under the care of Amr Atef,

a cardiologist. An electrocardiogram showed that, at one point, his heartbeat was 300 beats per minute.

Emergency room testing showed that the claimant presented with arrhythmia, an abnormal heart rhythm, known as " 'atrial flutter.' " Atrial flutter is caused by an electrical " 'short-circuit' " in the right atrium of the heart, which serves as the heart's natural pacemaker. At some point while the claimant was in the emergency room, his heart rhythm devolved into atrial fibrillation, a form of irregular tachycardia, or irregular accelerated heartbeat. Blood work taken at the hospital showed that the claimant had low potassium levels, known as hypokalemia, a potential result of dehydration.

The claimant remained in the hospital overnight and, with medication, his heartbeat eventually returned to normal. The diagnosis on discharge the next afternoon was " 'paroxysmal atrial flutter and fibrillation.' " The claimant also was diagnosed with hypertension. Although the arrhythmic episode had resolved, the claimant was kept on beta-blocker medication, and was advised to take aspirin and to monitor his potassium intake. He was placed on medical leave until September 26, 2009, and instructed to follow up with a cardiologist, who would have him wear a heart monitor to check for repeats of the arrhythmia. When the claimant saw Atef for a follow-up appointment on September 30, 2009, the palpitations had stopped, his heart rhythms were normal, and the claimant was feeling well. Although Atef suspected that the September 15, 2009 incident had been an isolated one, he instructed the claimant to remain out of work until they received the heart monitor results.

On October 1, 2009, the claimant resumed his workouts at the gym, but he initially kept his workouts less stressful than they had been before the incident. At an appointment with Atef on November 6, 2009, the

claimant reported that he had returned to the gym " 'without any significant difficulty, but . . . continue[d] to have anxiety and stress.' " The claimant reported having intermittent palpitations, particularly around the time of the first informal hearing on his workers' compensation claim on October 30, 2009. Atef opined that the claimant was doing well from a cardiac standpoint but continued to be " 'very stressed out about work.' " Because the cardiac event monitor the claimant had been wearing showed that he was still having episodes of paroxysmal atrial arrhythmia, Atef increased the claimant's dosage of beta-blocker medication and referred him to a cardiac electrophysiologist. Atef advised the claimant to avoid dehydration, but offered no specific instructions regarding his level of activity. He did agree that the claimant should not return to work until after his cardiac consultation and he also recommended that the claimant see his primary care physician to discuss medication for anxiety.

Between late 2009 and early 2012, the claimant was seen at varying times by seven health care professionals for symptoms or conditions related to the September 15, 2009 incident: Atef; Roger El-Hachem, the claimant's primary care physician; Steven L. Zweibel, the Director of Cardiac Electrophysiology at Hartford Hospital; Kevin J. Tally, a cardiologist who examined the claimant for FedEx; Michele Chenevert, a licensed family therapist and clinical social worker; Mahmoud Okasha, the psychiatrist who supervised Chenevert; and Donald R. Grayson, a psychiatrist who examined the claimant for FedEx. These professionals each offered: (1) diagnoses of the claimant's physical and mental health conditions; (2) accounts of the etiology of these conditions; (3) medication and treatment recommendations; and (4) opinions as to the claimant's level of disability and ability to resume work. This lengthy evaluation and

treatment history, which is detailed in the decision of the commissioner, may be summarized as follows.

With respect to the claimant's physical condition, the treating and evaluating physicians generally agreed that the claimant suffered from atrial flutter, atrial fibrillation, and hypertension. In July, 2010, the results of a second thirty day heart monitor test showed that he continued to experience intermittent recurrence of atrial flutter with rapid ventricular response. Although El-Hachem initially opined that the claimant also had hypertensive cardiomyopathy, defined by the commissioner as damage to the heart muscle, he later concluded —and Tally concurred—that the claimant did not actually have cardiomyopathy.

With respect to the claimant's mental health condition, El-Hachem referred the claimant for a psychiatric evaluation in May, 2010, after the claimant reported that he had been experiencing anxiety and depression. During his evaluation and subsequent therapy sessions, the claimant reported feeling depressed, overwhelmed, stressed, anxious, humiliated, embarrassed, and resentful. He also reported difficulties with sleep and concentration, and a tendency to avoid any objects or places that he identified with FedEx. These symptoms were magnified at times when the claimant had communications or interactions with FedEx, or around the anniversary of the September 15, 2009 incident. At times, the claimant associated his mental health symptoms with the heart problems he experienced on that date. For example, he reported that he was angry that he had been pressured to the extent that he was transported and admitted to the hospital with atrial fibrillation and could have died; that his mind raced with fears that his arrhythmia would recur or that he would die; and that he experienced flashbacks and " 'vivid dreams' " of the 2009 ambulance ride. At other times, he appeared to associate his symptoms with resentment over how

FedEx had treated him as an employee, the perceived unfairness of his situation, the stresses associated with his ongoing legal battle with FedEx, and his reactions to being out of work and to the associated financial stresses.

Chenevert diagnosed the claimant with adjustment disorder with anxiety and depression, and rated his level of functioning at 65 out of 100. Okasha diagnosed him with post-traumatic stress disorder (PTSD) and generalized anxiety disorder, which, the psychiatrist opined, resulted in the claimant " 'being almost homebound' " and suffering from dysphoria, anxiety, weight loss, insomnia, and an inability to relax or concentrate. Grayson agreed that the claimant was not consciously or unconsciously fabricating or amplifying his symptoms, and diagnosed him with PTSD, major depressive disorder, panic disorder with agoraphobia, and hypochondriasis.

There was general agreement, then, as to the nature of the claimant's physical and psychological health problems. With respect to the cause or etiology of these conditions, there also was general agreement among the medical experts that, although the claimant's atrial fibrillation and arrhythmia likely preexisted the events of September 15, 2009, the physical stress, dehydration, and psychological anxiety that he experienced on that day could have aggravated the condition and caused it to manifest. El-Hachem opined that " 'if a person has an underlying atrial fibrillation, stress could increase the heart rate enough to make the condition symptomatic.' " Zweibel likewise opined that " 'stress and anxiety could be a contributing factor to these arrhythmias [but] may not be the sole etiology.' " At one point, Zweibel went so far as to state that " 'the physical stress of [the claimant's] job at FedEx was a significant contributing factor in the development of his cardiac arrhythmias.' " He later backed off this statement, how-

ever, and took the position that stress and anxiety can bring on an arrhythmia. Even Tally, who examined the claimant on behalf of FedEx, while opining that the development of an atrial arrhythmia could be attributed to his hypertension, also acknowledged that once the claimant was in arrhythmia, the physical conditions and stress under which he worked that day could have sped up his heart rate and thereby " 'aggravated his uncontrolled atrial arrhythmias.' " Tally later more definitively opined that one could presume, given the claimant's symptoms and history, that physical activity on September 15, 2009, aggravated the claimant's underlying arrhythmia, although he questioned whether the events of that date changed the course of the illness in any substantial way. The psychiatrists, Okasha and Grayson, both agreed with Tally that the claimant's work at FedEx aggravated his cardiac problems, and they further opined that his work was the cause of or a significant factor in the development of his PTSD. Okasha explained that " '[t]he consequences of being disabled from his employment and the fear of future cardiac episodes have resulted in symptoms that fulfill the criteria for [PTSD. The claimant] experienced an event that involved serious injury and a threat to his physical integrity. His response involved intense fear, helplessness, and horror. He suffers from recurrent and intrusive distressing recollections and dreams of the event.' "

To treat his heart conditions, the claimant was, at various times, prescribed metoprolol, lisinopril, Diovan, and aspirin. His physicians also recommended that the claimant undergo an ablation procedure, during which surgeons would scar his heart to disrupt the atrial fibrillation, but the claimant declined to do so, and his metoprolol dose was increased instead. For his mental health issues, the claimant was prescribed Lexapro and Klonopin. He underwent weekly therapy sessions, as well as monthly appointments for psychiatric medication

management. By the summer of 2012, however, Grayson did not believe that these treatments had resulted in maximum medical improvement and he recommended that the claimant be treated by a PTSD specialist and that alternative medications be considered.

The only question on which there was a significant divergence of opinions among the medical experts was with respect to the claimant's level of disability and his ongoing inability to work. Following the events of September 15, 2009, the claimant repeatedly sought and obtained from his various treating physicians notes indicating that he was not medically cleared to return to work. There is some indication, however, that his physicians at times were reluctant to continue issuing these notes, or had doubts as to whether the claimant was totally incapacitated.

As previously noted, in September, 2009, Atef advised the claimant to remain out of work until he received the results of a heart monitor test. In early November, Atef, after having reviewed the test results, agreed that the claimant should not return to work until after he had a cardiac consultation.

On January 7, 2010, El-Hachem excused the claimant from work for an additional month. On January 25, 2010, after having received a letter from the claimant stating that his employer did not care about his well-being and that he was not " 'emotionally, physically or mentally ready' " to return to the work environment, El-Hachem opined that the claimant was temporarily totally disabled " 'due to atrial fibrillation and hypertensive cardiomyopathy.' "[1] Because " 'aggravating factors' " such as anxiety and stress can worsen symptoms of heart palpitations, El-Hachem indicated that " 'the

[1] As we previously have noted, El-Hachem later concluded that there was insufficient evidence to support a diagnosis of cardiomyopathy.

best thing to do is to have him rest or give him some time to recover until we figure out what's going on.' "

On April 15, 2010, during an examination by Tally, the claimant reported working out on a treadmill at a 15.2 percent grade and a pace of 4.2 miles per hour for thirty minutes, something Tally stated that most people could not do for even three minutes. Tally opined the claimant was only 10 percent to 11 percent disabled and that he could return to work. " 'As a cardiologist,' " he wrote, " 'I would not disable him from work at this time as it appears his [heart] rhythm is under adequate control with current metoprolol; nor has he suffered malignant hemodynamic effect such as syncope from his arrhythmia.' "

On April 23, 2010, during a deposition, El-Hachem was confronted with the claimant's testimony about these recent intense workouts. El-Hachem described these sessions as a type of stress test that the claimant obviously was passing. So long as the claimant did not have fibrillation during these workouts, El-Hachem stated, he would not consider him to be totally incapacitated. Ultimately, El-Hachem conceded that he might need to reconsider his earlier opinion to that effect. Nevertheless, on May 26, 2010, El-Hachem gave the claimant a note to permit additional medical leave from work until June 26, 2010, in order to give him time to use the cardiac event monitor.

When the claimant returned to El-Hachem on June 26, 2010, El-Hachem did not issue a new disability note. On July 8, 2010, however, Atef agreed to extend the medical leave for another thirty days, because the claimant was due to have a psychiatric evaluation. Atef issued a note keeping the claimant out of work due to "recurrent cardiac arrhythmia, hypertension and persistent anxiety." Atef informed the claimant, however, that he would not be able to give him any further extensions.

The claimant's medically excused absence from work thus expired on August 7, 2010.

Lastly, the record reveals that the claimant has not sought alternative employment since September 15, 2009. Approximately six months after the September 15, 2009 incident, the claimant approached FedEx seeking to return to work on a part-time basis. FedEx declined his request, taking the position that giving the claimant part-time work would amount to a transfer, and that company policy precluded employees from requesting transfers within one year of having received a written warning. Later in 2010, FedEx informed the claimant that he would not have a job to return to when he was able to work. In therapy, the claimant expressed that he was hesitant to seek other employment, lest he jeopardize his long-term disability and his case against FedEx. To bolster his spirits, however, in the period following his injury he did resume working out at the gym, helped to paint his father's house and to clear snow from the roof, and kept busy helping neighbors. He was granted Social Security disability benefits in May, 2012.

Following a formal hearing, the commissioner concluded that the claimant had sustained physical and psychological injuries arising out of and in the course of his employment. Specifically, the commissioner found that, prior to the date of injury, the claimant had a subclinical heart condition of which he was unaware and that did not require treatment or interfere with his ability to engage in heavy physical labor. On September 15, 2009, FedEx subjected the claimant to unmanageable workload demands and forced him to work at an unreasonably rapid pace, without allowing time to take breaks for food, hydration, or even personal comfort. As a result, the claimant became dehydrated, which resulted in depressed potassium levels and left him more susceptible to cardiac arrhythmia. In addition, the

commissioner found that these unreasonable demands resulted in psychological stress, which, in tandem with the physical exertion of rushing to keep up with his schedule, elevated the claimant's heart rate in excess of 200 beats per minute and caused a supraventricular tachycardiac event that required emergency transport and hospitalization. As a result of the day's events, the claimant's heart condition was aggravated significantly and worsened to the point of requiring long-term, posthospital treatment, medication, and monitoring. The commissioner also concluded that the physical trauma that the claimant experienced on September 15, 2009, and the ensuing emergency treatment were substantial factors causing him to develop PTSD and related psychological symptoms.

With respect to the claimant's ability to work, the commissioner found that it was reasonable for the claimant's cardiologist and primary care physician to exercise caution in monitoring his condition and response to treatment before clearing him for work, and, therefore, that he was temporarily totally incapacitated for purposes of General Statutes § 31-307 (a)[2] from September 15, 2009, through August 7, 2010, the final date to which Atef found the claimant to be disabled. The commissioner found no credible evidence, however, that the claimant remained disabled after that time, or that he was ready and willing to seek and accept alternative employment. Consistent with these findings, the commissioner determined that the claimant was entitled to total incapacity benefits, pursuant to § 31-307 (a), from September 15, 2009, until August 7, 2010, and he awarded benefits accordingly. The commis-

[2] General Statutes § 31-307 (a) provides in relevant part: "If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury . . . ."

sioner denied the claimant's requests for partial or total incapacity benefits for the period after August 7, 2010.

The defendants filed a motion to correct several of the commissioner's findings. The commissioner denied all of the requested corrections, other than to clarify that the period of temporary total disability awarded to the claimant amounted to forty-six weeks and four days, rather than forty-six weeks and seven days as originally stated. The defendants appealed from the commissioner's decision to the board, which affirmed the findings and award. The defendants appealed from the decision of the board to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. We now affirm.

I

The defendants first argue that the board improperly upheld the commissioner's findings that the claimant suffered compensable physical and psychological injuries arising out of his employment. The resolution of these claims depends in no small part on the standard by which we must review the commissioner's findings. We therefore begin by setting forth the well established standard of review applicable to workers' compensation appeals.

"The commissioner has the power and duty, as the trier of fact, to determine the facts"; (internal quotation marks omitted) *Gartrell* v. *Dept. of Correction*, 259 Conn. 29, 36, 787 A.2d 541 (2002); and "[n]either the . . . board nor this court has the power to retry facts." (Internal quotation marks omitted.) *Tracy* v. *Scherwitzky Gutter Co.*, 279 Conn. 265, 272, 901 A.2d 1176 (2006); see also Regs., Conn. State Agencies § 31-301-8. "The conclusions drawn by [the commissioner] from the facts found [also] must stand unless they result from

an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . [Moreover, it] is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and review board. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's timetested interpretation . . . .

"Furthermore, [i]t is well established that, in resolving issues of statutory construction under the act, we are mindful that the act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation. . . . Accordingly, [i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act. . . . [T]he purposes of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes." (Citations omitted; internal quotation marks omitted.) *Sullins* v. *United Parcel Service, Inc.*, 315 Conn. 543, 550–51, 108 A.3d 1110 (2015). With these principles in mind, we turn to the defendants' claims on appeal.

A

The defendants first argue that the commissioner's finding that the claimant's heart condition arose out of his employment on September 15, 2009, is unsupported by the record. Specifically, the defendants contend that (1) it is "counterintuitive" to think that a "physical specimen" such as the claimant could have been "even phased" by having to run back and forth from his truck in the heat carrying heavy packages, and (2) "the sheer reality is that most employers ask a great deal of their workers," and the stresses associated with the claimant's work at FedEx were nothing out of the ordinary. On the basis of these assumptions, the defendants posit that the physical and psychological stresses associated with the claimant's employment on the date in question could not have triggered his episodes of cardiac arrhythmia and tachycardia and the onset of hypertension. We are not persuaded.

We begin by noting that, to be compensable under the act, a personal injury sustained by an employee must arise both (1) out of and (2) in the course of his employment. General Statutes § 31-284 (a). "Speaking generally, an injury arises out of an employment when it occurs in the course of the employment and as a proximate cause of it." (Internal quotation marks omitted.) *Blakeslee* v. *Platt Bros. & Co.*, 279 Conn. 239, 244–45, 902 A.2d 620 (2006). It is well established that, when an employee has a preexisting, asymptomatic medical condition, and that condition is aggravated by injuries sustained during the course of his employment and thereafter becomes symptomatic and necessitates treatment, the injury is deemed to have arisen out of the employment and is compensable. As we have explained: "[There is] no difference between a fresh infection and the awakening of an old one. The [workers' compensation] statute is not concerned with pathology, but with industry disability; and a disease is no disease until it

manifests itself. Few adults are not diseased, if by that one means only that the seeds of future troubles are not already planted; and it is a [commonplace] that health is a constant warfare between the body and its enemies; and infection mastered, though latent, is no longer a disease, industrially speaking, until the individual's resistance is again so far lowered that he succumbs." (Internal quotation marks omitted.) *Smith* v. *State*, 138 Conn. 620, 624–25, 88 A.2d 117 (1952), quoting Judge Learned Hand in *Grain Handling Co.* v. *Sweeney*, 102 F.2d 464, 466 (2d Cir.), cert. denied, 308 U.S. 570, 60 S. Ct. 83, 84 L. Ed. 478 (1939); see also *Deschenes* v. *Transco, Inc.*, 288 Conn. 303, 322, 953 A.2d 13 (2008) (noting that employer must take employee in state of health in which it finds him). Our sister courts routinely have applied this rule in the context of work-related episodes of cardiac arrhythmia or tachycardia.[3]

In the present case, the defendants argue that the commissioner was required to reject the opinions of five medical experts, all of whom, with knowledge of the claimant's exemplary physical condition and impressive exercise regimen, opined that his conditions of employment did aggravate or could have aggravated his heart problems. Most notably, the defendants' own cardiology

[3] See, e.g., *Crescent Towing & Salvage Co.* v. *Collins*, 228 Fed. Appx. 447, 448–49 (5th Cir. 2007); *Dept. of Correction* v. *Industrial Commission*, 182 Ariz. 183, 187, 894 P.2d 726 (App. 1995); *Oxley* v. *Sattler*, 710 So. 2d 261, 265 (La. App. 1998), writ denied as improvidently granted, 739 So. 2d 183 (La. 1999); *Carson Tahoe Regional Healthcare* v. *Jain*, Docket No. 54725, 2010 WL 5135239 (Nev. December 9, 2010); *Sullivan* v. *Sysco Corp.*, 199 App. Div. 2d 849, 849–50, 606 N.Y.S.2d 77 (1993); *Morley* v. *State Accident Ins. Fund*, 23 Or. App. 82, 84–86, 541 P.2d 160 (1975); see also *Sullins* v. *United Parcel Service, Inc.*, supra, 315 Conn. 551–52 (stating principle with respect to heart disease generally); J. Asselin, Connecticut Workers' Compensation Practice Manual (1985) p. 54 (advising that, in determining whether heart disease arises out of employment, commissioner should consider whether, in period leading up to attack, claimant worked under extreme temperatures or performed activities requiring unusual exertion or emotional stress).

expert testified that "one could presume, given the claimant's symptoms and history, that physical activity on September 15, 2009, aggravated [his] underlying rhythm." "[T]he trier of fact—the commissioner—was free to determine the weight to be afforded to that evidence." *Marandino* v. *Prometheus Pharmacy*, 294 Conn. 564, 594, 986 A.2d 1023 (2010). After reviewing all of the relevant evidence of record, the commissioner rejected the defendants' theory, and we will not disturb that finding on appeal.

In this regard, we cannot help but observe that, in their briefs to this court, the defendants studiously have avoided any mention of certain noteworthy facts, facts that were found by the commissioner and that are supported by adequate evidence in the record. In arguing that the claimant's employment could not have been a proximate cause of his physical injuries, for example, the defendants neglect to discuss the following facts: that the claimant was required to spend a ten to twelve hour day working in an unair-conditioned truck that magnified the ambient heat; that although this "dedicated, hardworking" employee had repeatedly informed his managers at FedEx that his delivery schedule had become unworkable, they continued to increase his stop count; that this delivery schedule not only left no time for the claimant to take his allotted lunch break from the time he began work at 7 a.m. or 8:30 a.m. until after 4:30 p.m., but that there was not even time for him to stop for hydration or to use the restroom during that period; and that, as a result of these factors, he became dehydrated and potassium depleted on the date in question, leaving him especially vulnerable to certain forms of cardiac arrhythmia. We are skeptical of the defendants' suggestion that most Connecticut employers require similarly situated employees to labor under such conditions.

Nor have the defendants offered any authority for their "intuitive" belief that an individual who is capable of exercising intensely necessarily is immune from the types of work-related physical and psychological stresses that might aggravate a latent heart condition. Rather, the defendants' intuitions were contradicted by the preponderance of expert medical evidence in the record, which the commissioner credited. We are compelled to defer to those findings. See *Fair* v. *People's Savings Bank*, 207 Conn. 535, 539–40, 542 A.2d 1118 (1988).

B

We next consider the defendants' argument that the claimant's PTSD and other psychological injuries are not compensable under the act. The defendants contend that, as a matter of law, compensation for those injuries was barred by General Statutes § 31-275 (16) (B) (iii). That statute provides that, for purposes of the act, a compensable personal injury "shall not be construed to include . . . [a] mental or emotional impairment that results from a personnel action, including, but not limited to, a transfer, promotion, demotion or termination . . . ." General Statutes § 31-275 (16) (B) (iii). The defendants argue that the events that the commissioner identified as causes of the claimant's PTSD and other psychological injuries—the arrhythmia and tachycardia he experienced on September 15, 2009, and the ensuing ambulance ride and hospitalization—actually arose from and were merely components of (1) the claimant's preexisting anxieties over having received two reprimands in June, 2009, which gave rise to a fear that he would lose his job if he were to receive another reprimand, and (2) the stresses he suffered after the events of September 15, 2009, as a result of being out of work and prosecuting a contested compensation claim. Accordingly, the defendants contend, the claimant's

psychological injuries resulted from a personnel action and are not compensable. We are not persuaded.

We recognize that there is evidence in the record to support the defendants' theory that, both prior to and on the claimed date of injury, the claimant experienced worry and anxiety with respect to his employment situation with FedEx. There also is evidence that such feelings persisted in the months following the injury, during which time the claimant was unable to resume his employment with FedEx and the parties engaged in a contentious legal dispute. The commissioner found, however, that other factors arising from the claimant's employment, factors that were unrelated to any actual or potential[4] personnel actions, also were substantial factors in causing his PTSD and associated anxiety, panic, and depression. See *Marandino* v. *Prometheus Pharmacy*, supra, 294 Conn. 591 (for purposes of workers' compensation, claimant need only establish that employment was substantial factor causing claimed injury). Specifically, the commissioner found that the claimant's PTSD resulted from the September 15, 2009 attack of atrial fibrillation and resulting need for emergency medical treatment, which led the claimant to fear that he would die of a heart attack and to feel unsafe when traveling far from his treating physicians. Although the commissioner agreed that the loss of the

[4] Even if we were to accept the defendants' theory of the etiology of the claimant's psychological injuries, the defendants conceded at oral argument before this court that their theory depends on the assumption that the claimant suffered significant stress and anxiety on September 15, 2009, out of a fear that he would be reprimanded or fired if he were unable to satisfy FedEx's performance expectations. The defendants, however, were unable to identify anything in the text or history of § 31-275 (16) (B) (iii) suggesting that that provision applies to mental or emotional impairments arising from a *potential or hypothetical* employment action, or one that an employee fears might occur. Because we must defer to the commissioner's finding that the claimant's PTSD did not arise primarily from such fears, however, we need not determine whether such fears, taken alone, could implicate the statutory exception in the absence of any actual adverse personnel action.

claimant's job likely aggravated his psychological condition, the commissioner expressly rejected the defendants' theory that personnel considerations were the primary cause of his anxiety and effectively eclipsed all other contributing factors. Rather, the commissioner credited the opinions of the psychiatric experts that "the emotional trauma of having a cardiac malfunction, requiring emergency transport with advanced life support to a hospital—where he then required prolonged emergency measures to restore his heart to a sustainable heartbeat—represents a life-threatening event that was sufficient to cause PTSD."

The commissioner further found that the September 15, 2009 attacks of arrhythmia and tachycardia that precipitated the claimant's PTSD arose not only from employment-related anxieties but also, to a substantial extent, from (1) physical and mental exhaustion resulting from having to race to meet an unreasonable and unmanageable delivery schedule on a hot day in heavy traffic, and (2) dehydration and mineral depletion resulting from having to work long hours in a hot truck without adequate opportunity to eat, drink, or use a restroom. There is sufficient evidence in the record to support the commissioner's findings in this regard; see part I A of this opinion; and the defendants have failed to provide any plausible explanation as to how the dehydration and resultant mineral deficiencies that precipitated the claimant's heart problems and associated PTSD could have been the result of personnel decisions, real or imagined. We are compelled again to defer to the commissioner's factual findings. Accordingly, we conclude that the board properly upheld the commissioner's determination that the claimant's psychological as well as physical injuries were compensable under the act.

II

The defendants next argue that, even if the claimant's injuries arose out of his employment and were compensable, the commissioner went astray in concluding that those injuries entitled him to total incapacity benefits for the entire period from September 15, 2009 through August 7, 2010. We have defined total incapacity as "the inability of the employee, because of his injuries, to work at his customary calling or at any other occupation which he might reasonably follow." (Internal quotation marks omitted.) *Rayhall* v. *Akim Co.*, 263 Conn. 328, 350, 819 A.2d 803 (2003). The defendants offer two arguments as to why the claimant was capable of resuming work of some sort prior to August 7, 2010.[5] First, they contend that the claimant could not have been totally disabled for that entire period if he was able to return to the gym a mere two weeks after the incident and to resume his normal vigorous workouts by the spring of 2010. Second, the defendants argue that the opinions of the treating physicians who excused the claimant from work during the nearly forty-seven weeks in question are, for a variety of reasons, not credible, and that the commissioner instead should have credited the opinion of the defendants' expert, who only would have excused the claimant from work for less than that time period. We disagree.

Once again, the defendants' arguments challenge the commissioner's factual findings and credibility determinations and, therefore, must overcome a heavy burden. See R. Carter et al., 19 Connecticut Practice Series: Workers' Compensation Law (Supp. 2015–2016) § 8:37, p. 163 ("the determination of whether a claimant is totally incapacitated is a factual one, and particularly impervious to appellate review" [internal quotation marks omitted]). With respect to the defendants' first

[5] See footnote 6 of this opinion.

argument, the commissioner found that the claimant was able to resume his gym workouts over time without difficulty but also found that the claimant remained "very stressed out about work" and continued to suffer related bouts of paroxysmal atrial arrhythmia. The commissioner concluded that, even if the claimant had no physical restrictions on account of his heart condition, it was reasonable for his treating physicians to hold him out of work during the period in question to observe and monitor his condition and his response to treatment. During that time period, the claimant saw various physical and mental health professionals for diagnostic and treatment purposes, underwent several periods of prolonged heart monitoring, weighed whether to undergo surgical treatment, and experimented with various medications to treat his heart conditions and anxiety. Indeed, at the time the claimant met with the defendants' psychiatric expert, Grayson, in August, 2010, Grayson recommended that the claimant continue to experiment with alternative medications and treatment modalities so as to better control his mental health conditions. In light of the commissioner's well substantiated finding that the claimant, despite his impressive physical condition and fitness regimen, nevertheless had suffered work-related heart injuries and associated PTSD on September 15, 2009; see part I A of this opinion; we cannot gainsay the commissioner's ultimate conclusion that it was a reasonable precaution for the claimant's treating physicians to keep him fully out of work until they were able to complete their diagnoses and settle on a treatment regimen that would protect him from both the physical and psychological stresses of work.

The defendants' second argument—that the various physicians who recommended that the claimant remain completely out of work after November 18, 2009, were not credible, and that the commissioner instead should

have credited the opinions of the defendants' expert, who concluded that he was only partially incapacitated—likewise founders against our standard of review. See *Marandino* v. *Prometheus Pharmacy*, supra, 294 Conn. 594 ("[t]he credibility of the witnesses and the weight to be accorded to their testimony is for the trier of fact" [internal quotation marks omitted]); *Nicotra* v. *Bigelow*, *Sanford Carpet Co.*, 122 Conn. 353, 359, 189 A. 603 (1937) ("[a] conclusion reached by a commissioner by comparison and examination of conflicting professional opinion . . . can rarely be found erroneous"). In the present case, the commissioner found the opinion of the defendants' expert, Tally, to be less persuasive than that of the claimant's treating physicians, and nothing in our review of the record compels us to disturb that finding. Accordingly, we reject the defendants' argument that the board improperly upheld the commissioner's finding that the claimant was temporarily totally incapacitated until August 7, 2010.[6]

[6] To the extent that the defendants also argue that, as a matter of law, a physician's note that keeps a patient out of work for precautionary reasons cannot constitute evidence that the patient is totally incapacitated unless the note expressly opines that the patient is incapable of working in any capacity, we decline to review this claim because it is inadequately briefed. See *Stafford* v. *Roadway*, 312 Conn. 184, 188 n.4, 93 A.3d 1058 (2014). We do note, however, that the board, when construing § 31-307 (a), has afforded wide latitude to commissioners with respect to the types of evidence they may consider in evaluating whether a claimant is totally disabled. See *O'Connor* v. *Med-Center Home Health Care, Inc.*, 140 Conn. App. 542, 554, 59 A.3d 385, cert. denied, 308 Conn. 942, 66 A.3d 884 (2013). The board has refrained from requiring any specific type of evidence, and has permitted the fact finder to extrapolate unemployability from various sources. Id., 554–55. In particular, the board has affirmed an award of total incapacity benefits even in the absence of medical evidence categorically stating that a claimant was totally unable to work. Id., 555. The board's interpretation of the statute is consistent with the remedial purposes of the act, and also with the approach followed by other jurisdictions, which have concluded that a workers' compensation commissioner may find an employee totally disabled on the basis of a note from a physician that recommends that the employee remain out of work for a specified period of time but does not expressly opine that the employee is totally disabled or unable to work in

The decision of the Compensation Review Board is affirmed.

In this opinion the other justices concurred.

THE NEIGHBORHOOD ASSOCIATION, INC. *v.* JILL M. LIMBERGER ET AL.
(SC 19509)

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson, Js.

Syllabus

Pursuant to the provision ([Rev. to 2011] § 47-258 [m] [3]) of the Common Interest Ownership Act (act) (§ 47-200 et seq.), the executive board of a common interest community may commence an action against unit owners to foreclose liens for unpaid common charges if it has either voted to institute the particular foreclosure proceeding or it has previously adopted a "standard policy that provides for foreclosure against that unit."

The plaintiff association, N, brought an action against the defendant, L, the owner of a condominium unit in N's common interest community, to foreclose a statutory lien for allegedly delinquent common expenses, fees and costs. In 2011, acting through its executive board, N adopted a policy it called its " 'standard collection policy' pursuant to . . . § 47-258 (m)." The policy authorized N's attorney to commence a foreclosure action if a unit owner owed an amount equal to or greater than two months common charges, and held owners responsible for attorney's fees and costs incurred by N to collect or in attempting to collect outstanding common charges. N did not notify unit owners that the policy would be considered at its executive board meeting prior to adoption, and thereafter did not give unit owners notice that it had been adopted. L filed a motion to dismiss N's action, alleging that the trial court lacked subject matter jurisdiction because N failed either to vote to commence a foreclosure against her particular unit or to adopt a standard foreclosure policy pursuant to the act. The trial court denied the motion, concluding that N's foreclosure policy was an internal business operating procedure, not a rule as defined in a provision of the act (§ 47-202 [31]), and, therefore, was not subject to the notice and comment procedures for the adoption of unit owners' association rules set forth

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any capacity. See, e.g., *Marriott at Wardman Park* v. *Dept. of Employment Services*, 85 A.3d 1272, 1277 (D.C. 2014); *Blair* v. *Wal-Mart Stores, Inc.*, 818 So. 2d 1042, 1051 (La. App. 2002); *Corbin* v. *Moody's Restaurant*, Me. Workers' Compensation Board No. 05-019096 (May 15, 2006).

in a provision of the act (§ 47-261b). Following a trial, the court rendered judgment of foreclosure by sale, and L appealed. *Held*:

1. This court concluded that standard foreclosure policies adopted pursuant to § 47-258 (m) (3) are rules as defined in § 47-202 (31), and a unit owners association's executive board is required to follow the notice and comment procedures prescribed in § 47-261b prior to the adoption of such policies; although a standard foreclosure policy is not designated expressly as either an internal business operating procedure or a rule, and an internal business operating procedure is not defined in the act, a rule is defined in the act in expansive terms, and a review of the legislative history of the act and extratextual sources suggests that internal business operating procedures would address daily business activities and not policies, such as foreclosure policies, that impact unit owners' rights and obligations, directly or indirectly.

2. The trial court improperly denied the defendant's motion to dismiss, this court having concluded that N's failure to adopt a standard foreclosure policy in accordance with the notice and comment procedures required for rules deprived the trial court of subject matter jurisdiction; the right to foreclose a common charges lien is characterized as a statutory right of action and the act's condition precedent to commencing a foreclosure action—that an executive board either votes to institute a particular action or to adopt a standard foreclosure policy—is jurisdictional, and here, N did not properly satisfy either condition precedent.

(*Two justices dissenting in one opinion*)

Argued November 5, 2015—officially released April 26, 2016

Procedural History

Action to foreclose a common charges lien on a certain condominium unit owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Tolland, where the court, *Sferrazza*, *J.*, denied the named defendant's motion to dismiss and granted in part the plaintiff's motion to strike the named defendant's special defenses; thereafter, the case was tried to the court, *Hon. Lawrence C. Klaczak*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment in favor of the plaintiff; subsequently, the court, *Sferrazza*, *J.*, awarded the plaintiff attorney's fees and rendered judgment of foreclosure by sale, from which the named defendant appealed. *Reversed; judgment directed.*

Keith Yagaloff, for the appellant (named defendant).

Kristie Leff, with whom was *Ronald J. Barba*, for the appellee (plaintiff).

Opinion

McDONALD, J. Under Connecticut's Common Interest Ownership Act (act), General Statutes § 47-200 et seq., the executive board of a common interest community may commence an action against a unit owner to foreclose a lien for common charges under specified conditions, including that it either has voted to institute the particular foreclosure proceeding or has previously adopted a standard foreclosure policy under which that foreclosure would be authorized. General Statutes (Rev. to 2011) § 47-258 (m) (3).[1] The present case requires us to determine whether a standard foreclosure policy is a "rule" subject to the act's notice and comment requirements and, if so, whether the failure to adhere to those procedural requirements is a jurisdictional defect. The defendant Jill M. Limberger[2] appeals[3] from the judgment of foreclosure by sale rendered by the trial court in favor of the plaintiff, The Neighborhood Association, Inc. The dispositive issue on appeal is whether the trial court properly concluded that the plaintiff's standard

[1] General Statutes (Rev. to 2011) § 47-258 (m) (3) provides: "An association may not commence an action to foreclose a lien on a unit under this section unless . . . the executive board has either voted to commence a foreclosure action specifically against that unit or has adopted a standard policy that provides for foreclosure against that unit."

Hereinafter all references to § 47-258 are to the 2011 revision of the General Statutes unless otherwise noted.

[2] Connecticut Housing Finance Authority, EdConn Federal Credit Union, Capital One, Jefferson Radiology, P.C., Palisades Acquisition, LLC, and Achieve Financial Credit Union were also named as defendants. Limberger is the only defendant who is a party to this appeal and, for convenience, all references herein to the defendant are to Limberger.

[3] The defendant appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

foreclosure policy is an "internal business operating procedure"—not a rule—and, thus, not subject to the notice and comment requirements for a rule. See General Statutes § 47-261b. We conclude that the standard foreclosure policy is a rule and that the rule-making requirements are jurisdictional. Accordingly, we reverse the judgment of the trial court with direction to dismiss the plaintiff's action.

The record reveals the following undisputed facts and procedural history. The defendant owns a condominium unit in The Neighborhood, a common interest community subject to the provisions of the act. The plaintiff is the homeowner's association for The Neighborhood. The plaintiff acts through its executive board (board), which is elected by the plaintiff's members. The board's powers are defined by "The Declaration of The Neighborhood" (declaration). The declaration gives the board the power to, inter alia, adopt and amend bylaws, rules and regulations, collect assessments for common expenses, engage in litigation, and impose late fees and other charges.

In 2010, the board adopted a "Standard Foreclosure Policy" by way of resolution (2010 policy). That policy authorized the plaintiff's attorney to commence a foreclosure action if, within thirty days of a written demand, (1) the unit owner failed to either bring his or her account current or agree to and follow a payment plan that would bring the account current within six months, and (2) the unit owner owed a sum equal to or greater than two months common charges. According to the plaintiff's property manager, this policy was solely an "internal document . . . ."

On advice of new counsel, in March, 2011, the board voted to adopt a different policy (2011 policy). The 2011 policy provides that it is being adopted as the plaintiff's " 'standard collection policy' pursuant to . . . § 47-258

(m)." The 2011 policy differs in various respects from the 2010 policy. Like its predecessor, however, the 2011 policy authorizes the board's attorney to commence a foreclosure action if a unit owner owes an amount equal to or greater than two months common charges. The policy further provides, inter alia: "Homeowners are expected to pay their monthly common expenses on the first of each month and to maintain a zero balance. If there is a balance due equal to two . . . months of common expenses it will be referred to counsel for foreclosure. . . . [H]omeowners will be responsible for any attorney's fees and collection costs incurred to collect or in attempting to collect outstanding [c]ommon [e]xpenses including a [$225] attorney's fee for the initial demand letter which amount may change from time to time." The policy then prescribes the order in which any payments received will be applied to the various components of the debt, with the oldest monthly common expenses paid first, interest paid second, late fees paid third, outstanding fines paid fourth, special assessments paid fifth, and attorney's fees and other collection costs paid last. The board neither notified unit owners that the policy would be considered at its March, 2011 meeting nor thereafter gave unit owners notice that it had adopted the policy.

The plaintiff subsequently commenced the present action against the defendant, seeking to foreclose a statutory lien for allegedly delinquent common expenses, attorney's fees, and other costs. The defendant filed a motion to dismiss the action on the ground that the court lacked subject matter jurisdiction due to, inter alia, the plaintiff's failure either to vote to commence a foreclosure action against the defendant's unit or to adopt a standard foreclosure policy pursuant to the notice and comment requirements of the act. The plaintiff opposed the motion, claiming that its policy was an internal business operating procedure, not a rule, and therefore it was

not subject to the notice and comment procedures for rules.

After an evidentiary hearing, the trial court, *Sferrazza*, *J.*, denied the defendant's motion to dismiss. The court concluded that the board was not required to give unit owners notice of the policy because the policy was an internal business operating procedure. The court rejected the literal meaning of rule as defined in the act, which includes a policy that governs the "conduct of persons"; General Statutes § 47-202 (31); reasoning that such an "expansive interpretation . . . would subsume the exemption of [internal business operating procedures] because every operating procedure entails the regulation of persons to some extent." Instead, the trial court adopted a narrower interpretation under which "the definition of 'rule' is aimed at the conduct of residents and visitors of condominium units and the use and appearance of the physical facility . . . ."

The case then proceeded to trial before the court. Following trial, the court, *Hon. Lawrence C. Klaczak*, judge trial referee, rendered judgment for the plaintiff and, subsequently, the court, *Sferrazza*, *J.*, entered a judgment of foreclosure by sale. This appeal followed.

The defendant's dispositive claim is that the trial court improperly denied her motion to dismiss because it improperly concluded that the board's policy is an internal business operating procedure rather than a rule. Specifically, the defendant contends that her interpretation is supported by the following four factors: (1) the plain meaning of the words "adopt" and "policy"; (2) comments to the Uniform Common Interest Ownership Act of 2008 (uniform act), on which our act is modeled; (3) comments to the Uniform Common Interest Owners Bill of Rights Act; and (4) the purpose behind the relevant sections of the act, which she asserts is to protect

unit owners. See Unif. Common Interest Ownership Act of 2008, § 1-103, comment (28), 7 U.L.A. (Pt. 1B) 246 (2009); Unif. Common Interest Owners Bill of Rights Act, § 2, comment (7), 7 U.L.A. (Pt. 1B) 189–90 (2009). In addition, the defendant contends that the failure to comply with the procedures for properly adopting a rule is a jurisdictional defect. The plaintiff responds that the trial court properly ascribed a commonsense and contextual meaning to "rule." It asserts that, because its policy directs the conduct of its counsel, not unit owners and their visitors, it is an internal business operating procedure. We agree with the defendant that the policy is a rule and that failure to adopt such a rule in accordance with the notice and comment requirements is a jurisdictional defect.

Our standard of review following a trial court's ruling on a motion to dismiss is plenary as to its ultimate legal conclusion. *Dorry* v. *Garden*, 313 Conn. 516, 521, 98 A.3d 55 (2014); see id., 521–24 (explaining scope of inquiry differs depending on status of record, whether evidentiary hearing is required and other considerations). In resolving the specific question in this case, we apply our well established principles of statutory construction. See General Statutes § 1-2z (setting forth plain meaning rule); *Teresa T.* v. *Ragaglia*, 272 Conn. 734, 742, 865 A.2d 428 (2005) ("[w]hen a statute is not plain and unambiguous, we also seek interpretive guidance from the legislative history of the statute and the circumstances surrounding its enactment, the legislative policy it was designed to implement, the statute's relationship to existing legislation and common-law principles governing the same general subject matter").

I

We begin with the substantive question of whether a standard foreclosure policy is a rule, because if it is not, there clearly is no potential jurisdictional defect.

To answer that question, we examine the relevant provisions of the act.

Section 47-258 addresses common interest community liens and their enforcement. An association has a statutory lien on a unit for common charges and other assessments attributable to the unit imposed against its unit owner. General Statutes (Rev. to 2011) § 47-258 (a). Such liens may be foreclosed "in like manner as a mortgage on real property." General Statutes (Rev. to 2011) § 47-258 (j). General Statutes (Rev. to 2011) § 47-258 (m) prescribes three conditions that must be met before such an action may be commenced: "An association may not commence an action to foreclose a lien on a unit under this section unless: (1) The unit owner, at the time the action is commenced, owes a sum equal to at least two months of common expense assessments based on the periodic budget last adopted by the association . . . (2) the association has made a demand for payment in a record . . . and (3) the executive board has either voted to commence a foreclosure action specifically against that unit or has adopted a standard policy that provides for foreclosure against that unit." Section 47-258 does not, however, prescribe the procedure for adopting a standard foreclosure policy.

What procedure, if any, is required under the act turns on the meaning of General Statutes § 47-261b and the relevant definitions of the key terms therein. The principal subject of § 47-261b is unit owners' association (association) rules. Subsection (a) of § 47-261b requires a board to give unit owners notice of its intention to adopt, amend or repeal a rule as well as the opportunity to comment on the proposed change. Subsection (b) requires an association to give unit owners notice of a board's subsequent action on the rule and a copy of any new or amended rule. Subsections (c) through (f) prescribe limitations on certain matters that the association may address in a rule. For example,

subsection (d) provides that an association may not prohibit the display of state flags or signs for candidates for election, but may adopt rules governing the time, place, size, number, and manner of such displays.[4] Finally, subsection (g) provides that an "association's internal business operating procedures need not be adopted as rules."

A standard foreclosure policy is not designated expressly as either an internal business operating procedure or a rule. The act does not define "internal business operating procedures." A rule, however, is defined in expansive terms. A " '[r]ule' means a policy, guideline, restriction, procedure or regulation of an association, however denominated . . . which is not set forth in the declaration or bylaws and which governs the conduct of persons or the use or appearance of property."[5] General Statutes § 47-202 (31). Similarly, " '[p]erson' " is expansively defined as "an individual, corporation, limited liability company, business trust, estate, trust, partnership, association, joint venture, public corporation, government, governmental subdivision or agency,

[4] The dissent attempts to extrapolate from these specified limitations on the association's rule-making authority a broad principle by which to ascertain whether standard foreclosure policies are rules. There is no support, however, textual or extratextual, for the dissent's inferential leap. For all we know, these matters may have been specified simply because they were a common subject of complaints by unit owners against associations. Indeed, one of the matters addressed in § 47-261b (d), limitations on the display of flags, was of such concern that it inspired federal legislation a few years before the passage of Public Acts 2009, No. 09-225, § 34. See Freedom to Display the American Flag Act of 2005, Pub. L. No. 109-243, 120 Stat. 572 (2006).

[5] General Statutes § 47-202 (31) provides: " 'Rule' means a policy, guideline, restriction, procedure or regulation of an association, however denominated, *which is adopted by an association pursuant to section 47-261b* which is not set forth in the declaration or bylaws and which governs the conduct of persons or the use or appearance of property." (Emphasis added.)

We note that, because § 47-261b encompasses both categories of procedures that a board may adopt—rules and internal business operating procedures—the phrase referring to this section does not inform our analysis.

instrumentality or any other legal or commercial entity." General Statutes § 47-202 (24).

These definitions make it abundantly clear that, even if we were to agree with the plaintiff that its standard foreclosure policy exclusively governs the conduct of its attorney, the policy still would fall within the plain meaning of a rule as defined by the act. Had the legislature intended to limit rules to those policies that govern the conduct of unit owners or their visitors, it readily could have done so. Instead, the legislature provided that rules include policies that govern the conduct of "persons," an all-encompassing term. General Statutes § 47-202 (31).

That this capacious meaning was intended is supported by concurrent actions by the legislature in 2009. In the same public act, the legislature added the rule-making provision; Public Acts 2009, No. 09-225, § 34 (P.A. 09-225), codified at § 47-261b; added the definition of a rule, and amended the already broad definition of person to make it even more comprehensive. P.A. 09-225, § 1. In that same public act, the legislature increased unit owners' rights with respect to information about and participation in board meetings, protections that would be further advanced by an expansive interpretation of rules subject to notice and comment requirements. See P.A. 09-225, § 25, codified at General Statutes § 47-250.

We nevertheless recognize that application of the literal meanings of person and rule would effectively render the exception for internal business operating procedures superfluous. Under a literal interpretation, a board policy to cash checks received by the association on Wednesdays would be a rule because it would not be set out in the declaration or bylaws and it would govern the conduct of the person cashing the check. "It is a basic tenet of statutory construction that the

legislature [does] not intend to enact meaningless provisions. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or word is superfluous, void or insignificant." (Internal quotation marks omitted.) *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010). A proper definition of rule, therefore, must give some reasonable field of operation to the term internal business operating procedure. At the same time, that field of operation presumably must be quite limited in scope given that rule is defined so broadly, internal business operating procedure is undefined, and exceptions are generally construed narrowly.

Accordingly, we conclude that it is appropriate to consider extratextual sources to the extent that they can illuminate any limiting principle. We first turn to the legislative history of P.A. 09-225, which enacted the relevant changes to the act. Public Act 09-225 was the product of a study group created by the Connecticut Law Revision Commission to consider amendments made to the uniform act in 2008, on which our original act was modeled. See 52 H.R. Proc., Pt. 31, 2009 Sess., p. 9861; *Weldy* v. *Northbrook Condominium Assn., Inc.*, 279 Conn. 728, 735, 904 A.2d 188 (2006). Representative Gerald M. Fox III explained that the "goals of the study committee were to provide significant new rights to individual unit owners when dealing with the association's elected board of directors" and that the study committee "also wanted to enhance the association's authority to address issues that arise in the daily life of the common interest community . . . ." 52 H.R. Proc., supra, p. 9862. Representative Arthur J. O'Neill noted that P.A. 09-225 would provide "new protections for unit owners facing foreclosure" by delaying commencement of foreclosure actions. Id., p. 9866.

The prefatory note and comments to the 2008 amendments to the uniform act, which contains a rules provision similar in all material respects to § 47-261b, suggest a broader purpose for P.A. 09-225, § 34. See generally *Alvord Investment, LLC* v. *Zoning Board of Appeals*, 282 Conn. 393, 404 n.9, 920 A.2d 1000 (2007) (citing prefatory note to 1994 version of uniform act). The prefatory note in the 2008 version of the uniform act explains that there "has been considerable publicity across the country regarding alleged abuse in the foreclosure process when unit owners fail to pay sums due the association. To address this specific issue, the [uniform] [a]ct proposes new and considerable restrictions on the foreclosure process as it applies to common interest communities." Unif. Common Interest Ownership Act of 2008, prefatory note, 7 U.L.A. (Pt. 1B) 225 (2009). The comment to the uniform act's counterpart to § 47-261b further explains: "[T]he 'association's internal business operating procedures need not be adopted as rules'. This distinction permits the association's executive board or its management company to adopt or amend at will the wide variety of internal management procedures that govern the association's daily business activities—as opposed to the conduct of persons or the use and appearance of property. It may be helpful to provide a few examples of what the drafters contemplate might be typical internal business procedures that need not be adopted as rules:

"The association wishes to solicit bids from potential contractors for a particular [project] or service and adopts a procedure for soliciting, reviewing and accepting those bids.

"The board approves a management contract with an outside management company. The management contract contains various procedures governing how the manager is going to carry out its duties with regard to the management of the association.

"The recreation committee adopts a sign-up procedure for using the pool table in the clubhouse." Id., § 1-103, comment (28), p. 246.

These extratextual sources yield the following considerations. The legislative history of P.A. 09-225 suggests that internal business operating procedures cannot be policies that could lead to abuse in the foreclosure process. The examples in the uniform act of internal business operating procedures suggest that such procedures would address daily business activities and not policies that impact unit owners' rights and obligations, directly or indirectly.

We need not decide, however, a clear line of demarcation between rules and internal business operating procedures. Instead, we need only decide into which category standard foreclosure policies fall in light of these limiting principles.

A comparison of the two policies adopted by the boardin the present case is instructive.[6] That comparison demonstrates that such policies may determine: (1) who will decide whether to commence a foreclosure action (the 2011 policy authorizes the property manager or the board to refer the matter to the plaintiff's attorney, whereas the 2010 policy authorizes the board only); (2) what amount of delinquency will trigger a foreclosure action (the statutory minimum or greater); (3) how unit owner payments will be allocated to the outstand-

[6] Although the parties dispute which policy is controlling in the present case, that fact is not material to our resolution of this appeal. Both policies were submitted as full exhibits in the trial court. Even if we assume that the 2011 policy is the sole operative policy because it superseded the 2010 policy, as the plaintiff contends, either both policies are rules or both are internal business operating procedures. Otherwise, if the 2010 policy is a rule but the 2011 policy is an internal business operating procedure, the plaintiff could not repeal the former in favor of the latter without giving unit owners notice and the opportunity to comment on the proposed change. General Statutes § 47-261b.

ing debt (principal, interest, attorney's fees, etc.); (4) the circumstances under which attorney's fees will begin to accrue; (5) the conditions under which unit owners may avoid foreclosure following delinquency; and (6) demand requirements before commencing foreclosure. Indeed, the change from the 2010 policy to the 2011 policy: reduced the two written demands (one by the association and one by the attorney) before commencement of a foreclosure action to a single demand by the attorney; eliminated the thirty day grace period to bring the owner's account current to avoid foreclosure; and eliminated the option of a six month payment plan to avoid foreclosure. Of course, because the unit owners were never given notice of the policies, they could not comment on whether such changes should be made.

Given the real and substantial effect that such matters could have on the circumstances under which unit owners will incur financial obligations and potentially lose their residence, we cannot reasonably construe the policy as anything but a rule. To conclude otherwise would render an absurd result. Under the plaintiff's proffered interpretation of the act, associations would be required to give unit owners notice and the opportunity to comment regarding policies on matters as inconsequential as the placement of bird feeders outside units but would not be required to afford notice and an opportunity to comment on a policy prescribing conditions relating to the foreclosure of the unit owner's property.

Finally, we note that deeming standard foreclosure policies to be rules creates no impediment to a board's timely and effective fulfillment of its responsibilities. The adoption or amendment of such policies would not occur routinely.

The plaintiff nevertheless advances several arguments for characterizing standard foreclosure policies as internal business operating procedures, none of

which we find sufficiently persuasive. First, the plaintiff argues that the purpose of § 47-258 (m), according to a treatise authored by one of the members of the study committee, is to provide the board with the ability to prescribe and have knowledge of the foreclosure criteria used by its property manager or legal counsel in deciding when and how to foreclose. See 1 D. Caron & G. Milne, Connecticut Foreclosures (5th Ed. 2011) § 13-1:9, p. 657 (Section 47-258 [m] was "intended to create a set of objective prerequisites to an association's foreclosure. A particular concern leading to the adoption of this provision was the business practice of some associations to retain a management company or law firm to oversee foreclosures, and the association had little knowledge of which units were in foreclosure, and the extent of the default that preceded the decision to foreclose. Although, as an alternative to unit-by-unit voting to foreclose, the association may still enter into such arrangements with a management company or law firm, it may only do so after it has adopted a standard policy establishing the criteria to be satisfied before a foreclosure can commence."). The plaintiff's argument is beside the point. The fact that the policy provides such objective criteria does not eliminate the effect of such criteria on unit owners. Moreover, to the extent that the foreclosure criteria are intended in part to protect unit owners, as the plaintiff itself concedes, notice and comment requirements better protect unit owners from arbitrary collection policies.

Second, the plaintiff claims that, "[a]s an alternative to adopting a collection policy, the . . . board can vote to commence a foreclosure specifically against a unit. . . . It would yield an absurd result and not harmonize with the statute to require that the standard collection policy be adopted as a rule, yet allow this process to be circumvented by a simple board vote to foreclose." (Citation omitted.) We note that, with a limited excep-

tion, the act still requires a lesser form of notice and comment for matters addressed in board meetings, even if not rules.[7] See General Statutes (Rev. to 2011) § 47-250 (b) (1) through (6). We do not agree, therefore, that the alternative basis for commencing a foreclosure action is fundamentally at odds with a heightened notice and comment requirement for standard policies.

Third, the plaintiff argues, and the dissent agrees, that the standard foreclosure policy at issue *in this case* cannot be a rule because a rule addresses a matter that is not set forth in an association's declaration; General Statutes § 47-202 (31); and the plaintiff's declaration does address unit owners' obligations to pay assessments and the plaintiff's right to foreclose due to unpaid assessments. We disagree. The plaintiff's declaration simply tracks the statutory language that existed before P.A. 09-225 added the rule-making provision and the limitations on associations' right to foreclose, including the adoption of a standard foreclosure policy. That declaration does not address the procedures, rights, and limitations set forth in the board's foreclosure policies, previously discussed. Merely restating statutory rights, of which unit owners already are legally deemed to have notice, does not provide notice to unit owners of significant information bearing on the potential loss of their unit.

The flaw in the position of the plaintiff and the dissent is aptly illustrated by the following example. Section 47-261b (d) specifies that an association may adopt "rules governing the time, place, size, number and man-

[7] General Statutes (Rev. to 2011) § 47-250 (b) (8) permits the board to act by unanimous consent as documented in a record authenticated by all its members, instead of meeting. The statute requires, however, prompt notice to all unit owners of any action taken by unanimous consent. General Statutes (Rev. to 2011) § 47-250 (b) (8). We question whether it would be consistent with the intention of P.A. 09-225 to routinely vote on foreclosures by unanimous consent. We need not address that issue in the present case.

ner of [flag] displays," rules that necessarily would be subject to the notice and comment requirement. Suppose that the declaration incorporated this statutory language. Following the logic of the plaintiff and the dissent, if the board later adopted a policy requiring all flags to be no larger than four inches by six inches and to be displayed only on holidays, that policy would not be subject to the notice and comment requirement because the right of the association to regulate the time and size of flag displays has been set forth in the declaration. Such a result plainly would contravene the legislature's intent, because the statute clearly envisions that such policies will be promulgated as rules subject to notice and comment. Accordingly, we are not persuaded that a declaration's incorporation of statutory rights or limitations excuses a board from complying with the rule-making requirements for matters that otherwise plainly fall within the meaning of a rule.

Accordingly, we conclude that standard foreclosure policies are rules that require notice and comment before adoption. To the extent that the plaintiff's concerns arise from the expansive definitions in the act, its recourse lies with the legislature.

II

In light of our conclusion that a foreclosure policy is a rule, we consider the defendant's contention that the plaintiff's failure to adopt a standard foreclosure policy in accordance with the rule's notice and comment requirements deprived the trial court of subject matter jurisdiction. We agree.

Because a "determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *Sastrom* v. *Psychiatric Security Review Board*, 291 Conn. 307, 314, 968 A.2d 396 (2009). It is well established that "there is a presumption in favor of subject matter

jurisdiction, and we require a strong showing of legislative intent" to overcome that presumption. *Williams* v. *Commission on Human Rights & Opportunities*, 257 Conn. 258, 266, 777 A.2d 645 (2001). Nonetheless, we are persuaded that such an intention is manifested in the act's condition precedent to commencing a foreclosure action, namely, in the absence of a board vote to institute the particular foreclosure action, the proper adoption of a standard foreclosure policy that would authorize that action.

In ascertaining legislative intent, our case law has distinguished between conditions imposed on the commencement of a statutorily created right of action and statutory conditions imposed on an action existing under the common law. The former generally is deemed to be jurisdictional, whereas the latter is not. See *Stec* v. *Raymark Industries, Inc.*, 299 Conn. 346, 371, 10 A.3d 1 (2010) (distinguishing its jurisdictional conclusion from conclusion reached in *Commissioner of Transportation* v. *Kahn*, 262 Conn. 257, 811 A.2d 693 [2003], because "it was important that the statute [in *Stec*] served as a mechanism to enforce the common-law right to compensation for governmental takings, as opposed to a time limitation on the enforcement of a right specifically created by statute"). Thus, in the context of a time limit for commencing litigation, this court explained the distinction as follows: "A statute of limitations is generally considered to be procedural, especially where the statute contains only a limitation as to time with respect to a right of action and does not itself create the right of action. . . . Where the limitation is deemed procedural and personal it is subject to being waived unless it is specifically pleaded because the limitation is considered merely to act as a bar to a remedy otherwise available. . . . Where, however, a specific time limitation is contained within a statute that creates a right of action that did not exist at com-

mon law, then the remedy exists only during the prescribed period and not thereafter. . . . The courts of Connecticut have repeatedly held that, under such circumstances, the time limitation is a substantive and jurisdictional prerequisite . . . .'' (Citations omitted; internal quotation marks omitted.) *Ecker* v. *West Hartford*, 205 Conn. 219, 231–32, 530 A.2d 1056 (1987).

Although this issue arises most frequently in the context of time limits, this court also has held that other condition precedents to the commencement of a statutory cause of action are jurisdictional. See *Forbes* v. *Suffield*, 81 Conn. 274, 275, 70 A. 1023 (1908) (''The right to maintain an action against a municipality for the recovery of damages for personal injuries resulting from defective highways, exists only by force of [the applicable statute], which defines and limits the right and prescribes the conditions under which it may exist. . . . The giving of this notice [within a prescribed time] is expressly made a condition precedent to any right of action. Until it is given no such right exists.''); see also *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 5, 931 A.2d 837 (2007) (timely service of notice to quit in summary process actions jurisdictional); *Goodson* v. *State*, 232 Conn. 175, 180, 653 A.2d 177 (1995) (This court concluded that the trial court lacked jurisdiction due to an absence of pending arbitration when a party sought relief under the statute permitting the court to issue an order pendent lite upon the application of '' 'any party to the arbitration . . . .' '' We reasoned: '' 'The statute confers a definite jurisdiction upon a judge and it defines the conditions under which such relief may be given . . . . In such a situation jurisdiction is only acquired if the essential conditions prescribed by statute are met. If they are not met, the lack of jurisdiction is over the subject-matter and not over the parties.' '').

In certain instances, the legislature may be deemed to have manifested an intention not to create a jurisdictional bar even when it imposes a condition upon a statutorily created right of action when doing so could frustrate the purpose of the statute or would be inconsistent with other terms in the statute. See, e.g., *Commission on Human Rights & Opportunities* v. *Savin Rock Condominium Assn., Inc.*, 273 Conn. 373, 381, 870 A.2d 457 (2005) (time limit prescribed for Commission on Human Rights and Opportunities to investigate complaint and make final administrative disposition not jurisdictional when statute explicitly provided that Commission on Human Rights and Opportunities retained jurisdiction over complaint in cases wherein it failed to complete its investigation within prescribed period).

Application of these principles persuades us that the act's condition precedent to commencing a foreclosure action—that a board either votes to institute the particular action or to adopt a standard foreclosure policy—is jurisdictional. "Liens for delinquent common expense assessments on individual units within an association are creatures of statute. . . . In addition to creating the lien and authorizing its foreclosure, § 47-258, contrary to the tenet that the priority of liens is governed by the common law rule that first in time is first in right . . . carves out an exception and grants a priority to the lien for common expense assessments." (Citations omitted.) *Hudson House Condominium Assn., Inc.* v. *Brooks*, 223 Conn. 610, 614, 611 A.2d 862 (1992). Although strict foreclosure is a common-law process; *Society for Savings* v. *Chestnut Estates, Inc.*, 176 Conn. 563, 568, 409 A.2d 1020 (1979); we conclude that the right to foreclose the common charges lien is more properly characterized as a statutory right of action.

The statutory language indicates that the legislature intended the three conditions necessary for commenc-

ing an action to foreclose a common charges lien to be jurisdictional prerequisites. General Statutes (Rev. to 2011) § 47-258 (m) provides that "[a]n association *may not commence* an action to foreclose a lien on a unit owner under this section *unless*" it satisfies certain prescribed conditions. (Emphasis added.) The legislature could have phrased the requirement that a board adopt a policy or vote to commence proceedings as a limitation on a court's ability to grant relief. Cf. General Statutes § 45a-100 (k) ("the court shall not grant relief under this section if"). Instead, it phrased the requirement as a condition precedent to the commencement of the action itself. Thus, the adoption of a standard foreclosure policy is "a condition precedent to any right of action. Until [a vote is taken or a procedure is adopted] no such right exists." *Forbes* v. *Suffield*, supra, 81 Conn. 275. Because the plaintiff did not properly satisfy either condition precedent, the trial court should have granted the defendant's motion to dismiss.

The judgment is reversed and the case is remanded with direction to grant the defendant's motion to dismiss and to render judgment dismissing the plaintiff's action.

In this opinion PALMER, EVELEIGH, ESPINOSA and ROBINSON, Js., concurred.

ROGERS, C. J., with whom ZARELLA, J., joins, dissenting. I respectfully dissent from the majority opinion because I believe that a standard foreclosure policy may be adopted as an internal business operating procedure and need not be adopted as a rule. In reading its decision, I believe the majority ignores both the statutory definition of a rule and improperly expands the scope of the protections set forth in the standard foreclosure policy provision, General Statutes (Rev. to 2011) § 47-

258 (m) (3),[1] which is part of Connecticut's Common Interest Ownership Act (act), General Statutes § 47-200 et seq.

The text of § 47-258 (m) (3) addressing the commencement of a foreclosure action, like the one in the present case brought by the plaintiff, The Neighborhood Association, Inc., against the defendant Jill M. Limberger,[2] the owner of a condominium unit in The Neighborhood, a common interest community, is silent as to whether the foreclosure policy must have been adopted pursuant to the rule requirements contained in the act. Instead, § 47-258 (m) (3) simply provides that the executive board of a unit owner's association (association), such as the plaintiff, must either vote to commence a foreclosure action specifically against a unit or have adopted a standard policy that provides for foreclosure against that unit. Therefore, we must look to other sections of the statutory scheme for guidance.

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning,

[1] General Statutes (Rev. to 2011) § 47-258 (m) provides: "An association may not commence an action to foreclose a lien on a unit under this section unless: (1) The unit owner, at the time the action is commenced, owes a sum equal to at least two months of common expense assessments based on the periodic budget last adopted by the association pursuant to subsection (a) of section 47-257; (2) the association has made a demand for payment in a record; and (3) the executive board has either voted to commence a foreclosure action specifically against that unit or *has adopted a standard policy that provides for foreclosure against that unit.*" (Emphasis added.)

Section 47-258 has been amended since the time of the events relevant to this action. See Public Acts 2013, No. 13-156, § 1. Subsequent references herein to § 47-258 are to the 2011 revision.

[2] See footnote 2 of the majority opinion for a listing of other defendants in this action who are not parties to this appeal.

General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Joseph General Contracting, Inc.* v. *Couto*, 317 Conn. 565, 586, 119 A.3d 570 (2015). "It is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." (Internal quotation marks omitted.) *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010).

I begin with the statutory definition to determine whether the standard foreclosure policy needs to be adopted as a rule. General Statutes § 47-202 (31) provides: " 'Rule' means a policy, guideline, restriction, procedure or regulation of an association, however denominated, which is adopted by an association pursuant to section 47-261b which is not set forth in the declaration or bylaws and which governs the conduct of persons or the use or appearance of property." More precisely, a rule "means a policy . . . which is not set forth in the declaration or bylaws . . . ." General Statutes § 47-202 (31). It is undisputed that in the present case, The Declaration of The Neighborhood (declaration) does give the unit owners notice of the plaintiff's right to foreclose.[3] In fact, the language of the declaration

[3] Section 19.4 of the declaration provides in relevant part: "(a) The [a]ssociation has a statutory lien on a [u]nit for any assessment levied against that [u]nit or fines imposed against its [u]nit [o]wner from the time the assessment or fine becomes delinquent. . . .

"(c) Recording of this [d]eclaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this [s]ection is required. . . .

closely tracks the language of § 47-258, which details an association's statutory lien and methods of enforcement. See generally General Statutes (Rev. to 2011) § 47-258 (a), (d) and (j).[4] Because the right of the plaintiff to foreclose is set forth in § 19.4 (g) of the declaration, it is clear to me that this policy falls outside the definition of a rule.[5]

While I believe that the text of the definition is dispositive, I note that the majority concedes that the definition of a "rule" set forth in § 47-202 (31) cannot be construed so broadly that it applies to *any* policy or procedure of the association that applies to *any* person, because such a construction would read out General Statutes § 47-261b (g), which provides that "[a]n association's internal business operating procedures need not be adopted as rules."[6] Through its examination of extra-

"(g) The [a]ssociation's lien may be foreclosed in like manner as a mortgage on real property. . . ."

[4] General Statutes (Rev. to 2011) § 47-258 provides in relevant part: "(a) The association has a statutory lien on a unit for any assessment attributable to that unit or fines imposed against its unit owner. . . .

"(d) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required. . . .

"(j) The association's lien may be foreclosed in like manner as a mortgage on real property. . . ."

[5] By way of example, the majority argues that under my analysis, if one of the rule-making provisions was incorporated into the declaration, notice and comment would then not be required. It is clear to me, however, that if an association were to make such a claim, it would be obvious that it was trying to wrongfully circumvent the rule-making section, which requires notice and comment for that subject matter. See footnote 7 of this opinion. In contrast, there is no foreclosure provision language that requires notice and comment.

[6] In further support of its conclusion that a standard policy for foreclosure must be adopted as a rule, the majority quotes the prefatory note of the Uniform Common Interest Ownership Act of 2008 (uniform act), on which our act was modeled, which provides that it "proposes new and considerable restrictions on the foreclosure process as it applies to common interest communities." Unif. Common Interest Ownership Act of 2008, prefatory note, 7 U.L.A. (Pt. 1B) 225 (2009). Nothing in this prefatory note, however, compels the conclusion that the legislature intended that standard foreclosure policies must be adopted as rules. I agree that, *together*, all of the procedures, criteria, and specific restrictions adopted in the act help protect

textual sources, the majority draws the "limiting principle" that business operating procedures cannot be "policies that impact unit owners' rights and obligations, directly or indirectly." A review of § 47-261b, the rule-making provision, however, provides more reasonable limiting parameters.[7] Subsections (c) through (f)

unit owners facing foreclosure. For instance, an association cannot bring a foreclosure action unless the owner owes at least two months of fees and the association has made a demand for payment. Nevertheless, the comments of the uniform act placing similar restraints on foreclosure recognize that these special procedures "[*t*]*aken together*" would "respond in a concise but responsible way to the widespread reports of abuses in this field." (Emphasis added.) Id., § 3-116, comment (7), p. 380.

[7] General Statutes § 47-261b provides: "(a) At least ten days before adopting, amending or repealing any rule, the executive board shall give all unit owners notice of: (1) The executive board's intention to adopt, amend or repeal a rule and shall include with such notice the text of the proposed rule or amendment, or the text of the rule proposed to be repealed; and (2) the date on which the executive board will act on the proposed rule, amendment or repeal after considering comments from unit owners.

"(b) Following adoption, amendment or repeal of a rule, the association shall give all unit owners notice of its action and include with such notice a copy of any new or amended rule.

"(c) Subject to the provisions of the declaration, an association may adopt rules to establish and enforce construction and design criteria and aesthetic standards. If an association adopts such rules, the association shall adopt procedures for enforcement of those rules and for approval of construction applications, including a reasonable time within which the association must act after an application is submitted and the consequences of its failure to act.

"(d) A rule regulating display of the flag of the United States must be consistent with federal law. In addition, the association may not prohibit display, on a unit or on a limited common element adjoining a unit, of the flag of this state, or signs regarding candidates for public or association office or ballot questions, but the association may adopt rules governing the time, place, size, number and manner of those displays.

"(e) Unit owners may peacefully assemble on the common elements to consider matters related to the common interest community, but the association may adopt rules governing the time, place and manner of those assemblies.

"(f) An association may adopt rules that affect the use of or behavior in units that may be used for residential purposes, only to:

"(1) Implement a provision of the declaration;

"(2) Regulate any behavior in or occupancy of a unit which violates the declaration or adversely affects the use and enjoyment of other units or the common elements by other unit owners; or

"(3) Restrict the leasing of residential units to the extent those rules are reasonably designed to meet underwriting requirements of institutional

of § 47-261b detail the matters that an association may address in a rule. See General Statutes § 47-261b (c) (construction and design criteria and aesthetic standards, procedures for enforcement and procedures for association's failure to act within reasonable time on construction application); General Statutes § 47-261b (d) (time, place, size, number and manner of flag displays); General Statutes § 47-261b (e) (time, place and manner of peaceful assemblies on common elements); General Statutes § 47-261b (f) (use of or behavior in residential units). In my view, the provisions of § 47-261b (c) through (f) support the conclusion that the core legislative intent of the rule-making provisions was to ensure that unit owners would have notice of and an opportunity to weigh in on a proposed rule that would affect rights that are traditionally associated with private home ownership or constitutionally protected speech rights.[8]

lenders that regularly make loans secured by first mortgages on units in common interest communities or regularly purchase those mortgages, provided no such restriction shall be enforceable unless notice thereof is recorded on the land records of each town in which any part of the common interest community is located. Such notice shall be indexed by the town clerk in the grantor index of such land records in the name of the association.

"(g) An association's internal business operating procedures need not be adopted as rules.

"(h) Each rule of the association must be reasonable."

[8] The majority appears to conclude that § 47-261b sheds no light on what is a rule, as the majority fails to conduct the previously discussed analysis using § 47-261b. See *Hartford/Windsor Healthcare Properties, LLC* v. *Hartford*, 298 Conn. 191, 198, 3 A.3d 56 (2010) ("[i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction" [internal quotation marks omitted]). I would conclude, however, that the legislature intended that any policies or procedures that relate to the matters described in subsections (c) through (f) of § 47-261b *must* be adopted by rule. Indeed, the majority does not contend otherwise. Thus, by negative implication, the statute sheds light on the legislative intent regarding the types of policies and procedures that need *not* be adopted as a rule. See General Statutes § 47-261b (g). Contrary to what the majority suggests, this look to the broader statutory scheme provides a *limiting* principle to the literal interpretation of a "rule," which is far less broad than those the majority proposes.

An association's standard foreclosure policy is removed from such concerns. An ordinary homeowner does not have a property or constitutional right to notice and comment regarding the specific foreclosure procedures that will apply to the foreclosure of his or her home. Rather, homeowners are aware that if they have a mortgage, the mortgagee can foreclose and they must only receive notice of foreclosure for the action to proceed. See, e.g., General Statutes § 49-24b (a) ("a mortgagee who desires to foreclose upon a mortgage encumbering residential real property of a mortgagor shall give notice to the mortgagor by registered or certified mail, postage prepaid, at the address of the residential real property that is secured by such mortgage, in accordance with the relevant notice provisions of this chapter"). Similarly, unit owners are deemed to be on notice of the association's lien and therefore its ability to foreclose, even without all the details that a standard foreclosure policy could provide. See General Statutes (Rev. to 2011) § 47-258 (d) ("Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required."); General Statutes (Rev. to 2011) § 47-258 (j) ("[t]he association's lien may be foreclosed in like manner as a mortgage on real property").

In other words, there is nothing in the language of the statute regarding rules that suggest that if a standard foreclosure policy meets the protections afforded in the statute that its adoption requires notice and comment. See, e.g., *Rene Dry Wall Co.* v. *Strawberry Hill Associates*, 182 Conn. 568, 573, 438 A.2d 774 (1980) (stating that despite fact that mechanic's lien legislation is remedial in nature, which counseled "generous construction" in favor of lien, it did not permit court to extend mechanic's lien beyond that authorized by stat-

ute). It is undisputed that both policies here do meet those baseline protections.

Finally, other language in the statutory scheme also supports the conclusion that a standard foreclosure policy need not be adopted as a rule. Section 47-258 (m) (3) authorizes the board to vote on a unit-by-unit basis on foreclosure, in which case the unit owners would not receive rule-like notice and comment. Thus, the legislature clearly did not intend that notice and ability to comment were necessary in a foreclosure situation.

For all the foregoing reasons, I am not persuaded by the majority's analysis and would hold that a standard foreclosure policy is an internal business operating procedure and therefore not subject to the act's rule-making provisions.

I respectfully dissent.

WALTER HINDS *v.* COMMISSIONER OF CORRECTION
(SC 19393)
(SC 19394)

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald, Robinson and DiPentima, Js.*

Syllabus

The petitioner, who had been convicted of sexual assault in the first degree and kidnapping in the first degree in connection with his assault of the sixteen year old victim in a parking lot as she walked home from work, sought a writ of habeas corpus, claiming that there had been constitutional error in the trial court's kidnapping instruction, and that cumulative trial errors, which had been deemed harmless on direct appeal, had

* This appeal originally was argued before a panel of this court consisting of Chief Justice Rogers, and Justices Palmer, Zarella, Eveleigh, McDonald and Robinson. Thereafter, Chief Judge DiPentima was added to the panel and she has read the briefs and listened to a recording of the oral argument prior to participating in this decision.

violated his right to due process and to a fair trial. At the petitioner's criminal trial, the court had instructed the jury on the elements of abduction and restraint in accordance with the established law at that time regarding kidnapping. On direct appeal to the Appellate Court following his conviction, the petitioner claimed four improprieties, none of which related to the jury instruction on kidnapping. The Appellate Court concluded that three separate improprieties had occurred but each was harmless, and affirmed the trial court's judgment. This court declined the petitioner's petition for certification to appeal. Thereafter, in *State* v. *Salamon* (287 Conn. 509), this court overruled an interpretation of this state's kidnapping statute to which it had adhered for more than three decades, and concluded that in order to be convicted of the crime of kidnapping in conjunction with another crime, a defendant must intend to prevent a victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime, thereby excluding from kidnapping those confinements or movements of a victim that are merely incidental to and necessary for the commission of the other crime against that victim. Subsequently, in *Luurtsema* v. *Commissioner of Correction* (299 Conn. 740), this court determined that its holding in *Salamon* applied retroactively to collateral attacks on final judgments. The petitioner then filed his two count petition for a writ of habeas corpus, and the respondent, the Commissioner of Correction, asserted procedural default as an affirmative defense to each count, as well as failure to state a cognizable claim with respect to the count of cumulative trial error. The habeas court granted the petition as to the first count and ordered a new trial on the kidnapping charge, concluding that the petitioner had proved that he was entitled to a *Salamon* limiting instruction and that it was not clear beyond a reasonable doubt that the verdict on the kidnapping charge would have been the same had the jury been given the instruction. The habeas court rejected the respondent's procedural default defense, reasoning that *Luurtsema* required such a result and that good cause existed for trial counsel's failure to seek a *Salamon* type instruction because established law would have made such a request for an instruction futile. The habeas court denied the petition as to the second count, concluding that a due process claim of cumulative harm had not been recognized in this state. The petitioner and the respondent filed separate appeals with the Appellate Court, which affirmed the habeas court's judgment. The Appellate Court determined that the proper framework to address the petitioner's instructional error claim in light of the procedural default defense alleged by the respondent was the cause and prejudice standard. The Appellate Court concluded that the cause standard had been met because there was no reasonable basis for the petitioner to have asked for an instruction that had been rejected by controlling decisional law, and that, although the habeas court's decision suggested that it improperly had placed the burden on the respondent

to show that the omission of the *Salamon* instruction was harmless, the petitioner had demonstrated the requisite actual and substantial prejudice because, under the facts of his case, the proper instruction would have required the jury to consider whether the victim's restraint and abduction were merely incidental to the sexual assault. The Appellate Court further concluded that a claim of cumulative error as a violation of due process was not cognizable under Connecticut law. On the granting of certification, the respondent and the petitioner filed separate appeals with this court. *Held*:

1. The habeas court properly determined that the petitioner was entitled to a new trial on the kidnapping charge due to the omission of a proper instruction on kidnapping in accordance with *Salamon*, this court having concluded that its retroactive ruling in *Luurtsema* applied, irrespective of whether the kidnapping instruction was challenged in the criminal proceedings, and the petitioner's *Salamon* claim was not subject to procedural default: the evidence here warranted a new trial because the state could not prove that the omission of the *Salamon* instruction was harmless beyond a reasonable doubt, as a properly instructed jury reasonably could have concluded that the petitioner's actions in moving the victim from the parking lot where he accosted her to an adjacent area did not have sufficient independent significance from his intention to commit sexual assault as to warrant a conviction of kidnapping in the first degree, these actions preceding the sexual assault having been a continuous, uninterrupted course of conduct lasting only seconds, there was no evidence that the risk of harm to the victim was made appreciably greater by her being moved, and the victim's physical ability to summon help was impaired solely due to the nature of the sexual assault; moreover, even under the more stringent prejudice standard for procedurally defaulted claims relied on by the Appellate Court, because of the close alignment in time and place of the victim's restraint and abduction to the sexual assault, there was a substantial likelihood that reasonable jurors would have concluded that the petitioner did not intend to restrain the victim for any purpose other than the commission of the sexual assault, and the state would have failed to meet its burden of proving beyond a reasonable doubt that the petitioner's conduct in moving the victim had sufficient independent significance to warrant a conviction of kidnapping in the first degree.

(*Three justices dissenting in two separate opinions*)

2. The petitioner could not prevail on his claim that the Appellate Court improperly affirmed the habeas court's judgment insofar as it concluded that a claim of cumulative trial error as a violation of due process was not cognizable under Connecticut law; this court concluded that, even if it were to recognize the cumulative error doctrine as articulated in the federal courts and to deem it applicable to habeas proceedings, the trial improprieties in the petitioner's case did not justify relief under that doctrine, as none of those improprieties directly related to and

impacted an identified right essential to a fair trial or was so significant as to render it highly doubtful that the petitioner had received a fair trial, and the improprieties were not so pervasive throughout the trial such that they presented a colorable basis for application of the cumulative error doctrine.

Argued October 6, 2015—officially released April 26, 2016

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Cobb*, *J.*; judgment granting the petition in part, from which the respondent and the petitioner filed separate appeals with the Appellate Court, *Lavine*, *Alvord* and *Bishop*, *Js.*, which affirmed the habeas court's judgment, and the respondent and the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Jo Anne Sulik, supervisory assistant state's attorney, with whom, on the brief, were *Kevin D. Lawlor*, state's attorney, *Erika L. Brookman*, assistant state's attorney, and *Mary M. Galvin*, former state's attorney, for the appellant in Docket No. SC 19393 and the appellee in Docket No. SC 19394 (respondent).

Adele V. Patterson, senior assistant public defender, for the appellee in Docket No. SC 19393 and the appellant in Docket No. SC 19394 (petitioner).

Opinion

McDONALD, J. In 2002, the petitioner, Walter Hinds, was convicted of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1) and kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A).[1] Three years after the

[1] General Statutes § 53a-70 (a) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person . . . or by the threat of use of force against such other person . . . which reasonably causes such person to fear physical injury to such person . . . ."

General Statutes § 53a-92 (a) provides in relevant part: "A person is guilty of kidnapping in the first degree when he abducts another person and . . .

petitioner's judgment of conviction was final, this court overruled an interpretation of our kidnapping statutes to which it had adhered in the face of numerous challenges over more than three decades, under which the crime of kidnapping did not require that the restraint used be more than that which was incidental to and necessary for the commission of another crime against the victim. See *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008). Subsequently, this court determined that the holding in *Salamon* overruling that overly broad interpretation applied retroactively to collateral attacks on final judgments. See *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 751, 12 A.3d 817 (2011) (*Luurtsema II*). The principal issues in the present case are whether the petitioner's failure to challenge our longstanding interpretation of kidnapping in his criminal proceedings requires him to overcome the bar of procedural default, and what constitutes the proper standard for assessing whether the petitioner is entitled to a new trial on that charge.

Upon our grants of certification, the respondent, the Commissioner of Correction, and the petitioner separately appealed from the Appellate Court's judgment, which affirmed the judgment of the habeas court granting in part and denying in part the petitioner's petition for a writ of habeas corpus and ordering a new trial on the kidnapping charge. *Hinds* v. *Commissioner of Correction*, 151 Conn. App. 837, 839, 97 A.3d 986 (2014). In his certified appeal, the respondent contends that the Appellate Court applied the wrong cause and prejudice standards in concluding that the petitioner had overcome his procedural default of a challenge to the kidnapping instruction and therefore could prevail on the merits. In the petitioner's appeal, he contends that the Appellate Court improperly affirmed the habeas court's

(2) he restrains the person abducted with intent to (A) inflict physical injury upon him or violate or abuse him sexually . . . ."

judgment insofar as it concluded that a due process claim based on the cumulative effect of trial errors that individually were harmless is not cognizable under Connecticut law.

With respect to the respondent's appeal, we conclude that *Luurtsema II*'s retroactivity decision compels the conclusion that challenges to kidnapping instructions in criminal proceedings rendered final before *Salamon* are not subject to the procedural default rule. We fur ther conclude that the petitioner is entitled to a new trial on the kidnapping charge because the omission of a *Salamon* instruction was not harmless beyond a reasonable doubt. With respect to the petitioner's appeal, we conclude that, even assuming we were to recognize cumulative trial error as a basis for a due process violation, the improprieties in the petitioner's criminal trial would not rise to such a level. Therefore, we affirm the judgment of the Appellate Court.

The jury reasonably could have found the following facts in support of the kidnapping and sexual assault convictions, none of which the petitioner disputed except his identity as the perpetrator.[2] On August 28, 2000, at approximately 9 p.m., sixteen year old K[3] left the Super Stop & Shop supermarket in Milford on foot to head to a friend's apartment that was approximately five minutes away. En route, K cut through the property of In-Line Plastics Tool Company (In-Line Plastics). As she approached the property, K noticed a pickup truck exit the driveway of In-Line Plastics, but then reenter

[2] We have omitted facts relevant to events that occurred after the petitioner's interactions with the victim, which provided additional support for the petitioner's convictions, as they are not relevant to our resolution of the issues in this habeas action. See *State* v. *Hinds*, 86 Conn. App. 557, 559–63, 861 A.2d 1219 (2004), cert. denied, 273 Conn. 915, 871 A.2d 372 (2005).

[3] In accordance with our policy of protecting the privacy interests of the victims of sexual assault, we decline to identify the victim. See General Statutes § 54-86e.

and come to a stop in the parking area. As she walked past the truck, she turned around and observed that the driver had exited the vehicle and was walking behind her. She continued walking and, upon turning around again, she saw that the driver was right behind her and wearing only underwear and a sleeveless shirt. Although it was nighttime, the lights on the surrounding buildings sufficiently illuminated the area to enable K to see the face of the driver, the petitioner.

At that point, K started to run through the parking lot of In-Line Plastics, in the direction of some trees between the back parking lot and the route to her friend's apartment. The petitioner ran after K, grabbed her, and put one of his hands around her waist and his other hand over her mouth. He instructed her not to scream or he would kill her. The petitioner then threw K down and dragged her by the legs to a grassy area between the In-Line Plastics parking lot and a small house, behind an overgrown bush where it was darker. The petitioner sat on K's chest with his legs on the outside of her arms so she could not move and instructed K to open her mouth. He inserted his penis into her mouth and forced her to perform fellatio on him, ejaculating into her mouth. The petitioner then patted her on the cheek and told her she could leave. Too afraid to move, K remained where she was. As the petitioner walked back toward his truck, K pleaded with him not to kill her, telling him that she would not tell anybody what had happened. The petitioner turned around and looked at K, again enabling her to see his face. He then entered his truck and drove away. K's description of her attacker and his truck eventually led to the petitioner's identification and arrest.

The record reflects the following procedural history. At trial, the jury was instructed, without objection, on the elements of abduction and restraint in accordance with established law regarding kidnapping. Following

his conviction of sexual assault in the first degree and kidnapping in the first degree, the defendant claimed on direct appeal that the trial court had committed four improprieties. See *State* v. *Hinds*, 86 Conn. App. 557, 558–59, 861 A.2d 1219 (2004), cert. denied, 273 Conn. 915, 871 A.2d 372 (2005). None related to the jury instruction on kidnapping. The Appellate Court separately examined each of the claimed improprieties, and concluded that three improprieties had occurred but each was harmless. Id., 563–77. Accordingly, it affirmed the judgment of conviction. Id., 577. This court denied the petitioner's petition for certification to appeal. See *State* v. *Hinds*, 273 Conn. 915, 871 A.2d 372 (2005).

Thereafter, this court issued its decisions in *Salamon* and *Luurtsema II*, respectively overruling its overly broad interpretation of our kidnapping statutes and deeming the interpretation pursuant to *Salamon* to apply retroactively. Following the appointment of habeas counsel, the petitioner filed a second amended petition for a writ of habeas corpus. Therein, he alleged that: (1) there was constitutional error in the kidnapping instruction, pursuant to *Salamon* and *Luurtsema II*; and (2) there were cumulative trial errors that violated his right to a fair trial. The respondent asserted procedural default as affirmative defenses to both counts, as well as failure to state a cognizable claim with respect to the second count. The habeas court granted the petition as to the first count, concluding that the petitioner had proved that he was entitled to the *Salamon* limiting instruction and that it was not clear beyond a reasonable doubt that the verdict on the kidnapping charge would have been the same had the jury been given the instruction. The habeas court rejected the respondent's procedural default defense, reasoning that *Luurtsema II* compelled such a result and that good cause existed for trial counsel's failure to seek a *Salamon* instruction in any event because firmly established law would have

made a request for such an instruction futile. The habeas court denied the petition as to the second count, concluding that a due process claim of cumulative harm had not been recognized in Connecticut.

Both parties appealed from the judgment, and the Appellate Court consolidated the appeals. See *Hinds* v. *Commissioner of Correction*, supra, 151 Conn. App. 839 n.1. Although the Appellate Court affirmed the habeas court's judgment; id., 839; it adopted different reasoning with respect to the kidnapping instruction. It determined that the proper framework for addressing that claim in light of the procedural default defense is the cause and prejudice standard set forth in *Wainwright* v. *Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977), as adopted by this court in *Johnson* v. *Commissioner of Correction*, 218 Conn. 403, 409, 589 A.2d 1214 (1991). See *Hinds* v. *Commissioner of Correction*, supra, 151 Conn. App. 852–53. The Appellate Court concluded that the cause standard had been met because there was no reasonable basis for the petitioner to have asked for an instruction that had been rejected by controlling decisional law. Id., 855. The Appellate Court further concluded that, although the habeas court's decision suggested that it improperly had placed the burden on the respondent to prove that the omission of the *Salamon* instruction was harmless; id., 855–56; the petitioner had demonstrated the requisite actual and substantial prejudice. Id., 858–59. The court cited the close alignment in time and place of the victim's restraint and abduction to the sexual assault and the fact that the proper instruction would have required the jury to consider whether the restraint and abduction were merely incidental to the sexual assault. Id., 859. In sum, it concluded that "[t]he failure to give a *Salamon* instruction, under the facts presented at trial, substantially deprived the petitioner of his constitutional right to have the jury properly informed of the meaning of

the language of the kidnapping charge." Id. The parties' certified appeals to this court followed.

In our review of the issues raised, we are mindful that, while "[t]he underlying historical facts found by the habeas court may not be disturbed unless the findings were clearly erroneous . . . [q]uestions of law and mixed questions of law and fact receive plenary review." (Internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 174, 982 A.2d 620 (2009). Because the certified appeals do not involve challenges to facts found, we apply plenary review.

I

We begin with the respondent's appeal challenging the Appellate Court's affirmance of the habeas court's judgment insofar as it granted the petitioner a new trial on the kidnapping charge. The respondent does not challenge the Appellate Court's conclusion that the habeas court properly determined that a *Salamon* limiting instruction would apply under the facts of the present case. Rather, he contends that the Appellate Court did not correctly apply the legal standard for assessing cause and prejudice to overcome procedural default. With respect to cause, he contends that *Salamon* itself disproves the Appellate Court's determination that the law on kidnapping was settled at the time of the petitioner's criminal trial. He further contends that, even if the law was settled, futility does not establish cause. At oral argument, the respondent suggested that, if this court were inclined to accept the petitioner's futility argument, it would be preferable to create a limited exception for *Salamon* claims rather than to change the law on procedural default. With respect to prejudice, the respondent contends that the prejudice necessary to overcome procedural default can only be established if the petitioner demonstrates that he would

not have been convicted had the jury been charged in accordance with *Salamon*, a burden that the petitioner cannot meet.

In response, the petitioner first contends that the habeas court properly concluded that there had not been a procedural default. The petitioner asserts that the respondent failed to plead and prove that affirmative defense. The petitioner further asserts that the habeas court properly concluded that *Luurtsema II* compels the conclusion that there had been no default because that decision examined the policies underlying procedural default and found them to be outweighed by the importance of providing a habeas corpus remedy for persons convicted prior to *Salamon* under the incorrect interpretation of kidnapping.[4] Alternatively, the petitioner contends that the Appellate Court properly concluded that he had established cause and prejudice to excuse any procedural default. We agree with the petitioner that *Luurtsema II* effectively resolved the procedural default question such that the doctrine does not apply to his *Salamon* claim. We further conclude that the petitioner has established his entitlement to a new trial on his kidnapping charge.

A

To address the questions before us, it is necessary to provide some background regarding the extraordinary circumstances preceding and following our decision in *Salamon*. Under our Penal Code, the hallmark of a kidnapping is an abduction, a term that is defined by incorporating and building upon the definition of

[4] Justice Zarella's contention that "the parties have not raised the issue of whether the rule should be replaced in their separate appeals to this court" is beside the point. The petitioner does not make such a sweeping argument, but instead argues that procedural default does not apply *in this case* because, under *Luurtsema II*, there is no default of a *Salamon* claim. If there is no default, there is no basis to engage in the cause and prejudice analysis to determine whether procedural default is excused.

restraint.[5] *State* v. *Salamon*, supra, 287 Conn. 530; see also footnote 1 of this opinion (defining kidnapping in first degree). In 1977, this court squarely rejected a claim that, when the abduction and restraint of a victim are merely incidental to some other offense, such as sexual assault, that conduct cannot form the basis of a guilty verdict on a charge of kidnapping. See *State* v. *Chetcuti*, 173 Conn. 165, 170–71, 377 A.2d 263 (1977). The court pointed to the fact that our legislature had declined to merge the offense of kidnapping with sexual assault or with any other felony, as well as its clearly manifested intent in the kidnapping statutes not to impose any time requirement for the restraint or any distance requirement for the asportation. Id. On numerous occasions between that decision and the present petitioner's criminal trial, this court reiterated that position. See, e.g., *State* v. *Wilcox*, 254 Conn. 441, 465–66, 758 A.2d 824 (2000); *State* v. *Amarillo*, 198 Conn. 285, 304–306, 503 A.2d 146 (1986); *State* v. *Vass*, 191 Conn. 604, 614, 469 A.2d 767 (1983); *State* v. *Johnson*, 185 Conn. 163, 177–78, 440 A.2d 858 (1981), aff'd, 460 U.S. 73, 103 S. Ct. 969, 74 L. Ed. 2d 823 (1983); *State* v. *Briggs*, 179 Conn. 328, 338–39, 426 A.2d 298 (1979), cert. denied, 447 U.S. 912, 100 S. Ct. 3000, 64 L. Ed. 2d 862 (1980); *State* v. *DeWitt*, 177 Conn. 637, 640–41, 419 A.2d 861 (1979); *State* v. *Lee*, 177 Conn. 335, 342–43, 417 A.2d 354 (1979). The court appeared to leave open the possibility that there could be a factual situation in which the asportation or restraint was so miniscule that a conviction of kidnapping would constitute an absurd

[5] " 'Abduct' means to restrain a person with intent to prevent his liberation by either (A) secreting or holding him in a place where he is not likely to be found, or (B) using or threatening to use physical force or intimidation." General Statutes § 53a-91 (2).

" 'Restrain' means to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent. . . ." General Statutes § 53a-91 (1).

and unconscionable result that would render the statute unconstitutionally vague as applied. See *State* v. *Troupe*, 237 Conn. 284, 315, 677 A.2d 917 (1996); *State* v. *Tweedy*, 219 Conn. 489, 503, 594 A.2d 906 (1991). A kidnapping conviction predicated on the movement of the sexual assault victim from one room in her apartment to another, however, was deemed not to constitute such a result. *State* v. *Tweedy*, supra, 503.

In *State* v. *Luurtsema*, 262 Conn. 179, 203–204, 811 A.2d 223 (2002) (*Luurtsema I*), decided a few months after the present petitioner's criminal trial concluded, this court foreclosed the possibility of an absurd or unconscionable result as a matter of statutory interpretation. In that case, the defendant, Peter Luurtsema, had moved the victim from the couch to the floor, forced the victim's legs apart, and manually choked her while attempting to perpetrate a sexual assault. Id., 200. The defendant was convicted of attempt to commit sexual assault in the first degree, kidnapping in the first degree, and assault in the second degree. This court again rejected the request to interpret our kidnapping statute so as to require that the restraint and abduction to support kidnapping exceed that which is incidental to the commission of another crime. In accordance with the consistent refrain of the decisions that preceded it, the court in *Luurtsema I* concluded that, in light of the express statutory terms, "[t]he defendant's interpretation of the kidnapping statute is simply not the law in this state." (Internal quotation marks omitted.) Id., 202.

Six years later, in *Salamon*, the court was persuaded to reexamine the broad, literal interpretation to which it had adhered for more than three decades. See *State* v. *Salamon*, supra, 287 Conn. 513–14. In concluding that it must overrule its long-standing interpretation, the court went beyond the language of the kidnapping statutes to consider sources that it previously had overlooked. It explained: "Upon examination of the common

law of kidnapping, the history and circumstances surrounding the promulgation of our current kidnapping statutes and the policy objectives animating those statutes, we now conclude the following: Our legislature, in replacing a single, broadly worded kidnapping provision with a gradated scheme that distinguishes kidnappings from unlawful restraints *by the presence of an intent to prevent a victim's liberation*, intended to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are *merely incidental to and necessary for* the commission of another crime against that victim. Stated otherwise, to commit a kidnapping in conjunction with another crime, a defendant must *intend* to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime." (Emphasis added.) Id., 542.

Following that decision, Luurtesma filed a habeas petition seeking to have the holding in *Salamon* applied retroactively to his case. *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 743. In *Luurtsema II*, this court concluded as a matter of state common law that policy considerations weighed in favor of retroactive application of *Salamon* to collateral attacks on judgments rendered final before that decision was issued. In response to a host of arguments advanced by the state against retroactivity, the court concluded: "We are not unsympathetic to the legitimate concerns . . . relating to the general importance of preserving the finality of criminal convictions. . . . [H]owever, we are convinced that . . . in cases such as this, the interests of finality must give way to the demands of liberty and a proper respect for the intent of the legislative branch." Id., 766.

B

With this background in mind, we turn to the question of whether the petitioner's *Salamon* claim is subject to the doctrine of procedural default because of his failure to challenge his kidnapping instruction in his criminal proceedings. We conclude that it is not.[6]

Although our court has often recognized that we are not bound by federal postconviction jurisprudence; see *Small* v. *Commissioner of Correction*, 286 Conn. 707, 720, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*,

[6] Because we conclude that the petitioner's *Salamon* claim is not subject to procedural default, we need not consider the petitioner's alternative argument that the Appellate Court properly determined that he established good cause to excuse any default under *Reed* v. *Ross*, 468 U.S. 1, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984), in light of this court's repeated rejection of a *Salamon* type claim. In *Reed*, the United States Supreme Court identified three situations in which a new constitutional rule might emerge from that court, which, if applied retroactively, would result in a circumstance in which counsel would have had no reasonable basis in existing law to seek habeas relief. Id., 17. One such situation was that court's overruling of its precedent. Id. The court reasoned that, in that situation, "the failure of a defendant's attorney to have pressed such a claim before a state court is sufficiently excusable to satisfy the cause requirement." Id. Subsequent case law has raised questions about the scope of this good cause exception. See, e.g., *Bousley* v. *United States*, 523 U.S. 614, 622–23, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (distinguishing novel claims from futile claims); *Engle* v. *Isaac*, 456 U.S. 107, 130–34, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982) (same); but see *Peck* v. *United States*, 106 F.3d 450, 456 (2d Cir. 1997) (concluding that petitioner "demonstrated 'cause' for his failure to pursue on direct appeal his contention of instructional error because this court had definitively resolved the question as to the proper jury instruction regarding scienter and the Supreme Court had not agreed to review the issue prior to the deadline for [the petitioner] to file an appeal"). Neither *Bousley* nor *Engle*, however, involved claims that would have required the United States Supreme Court or the state's highest court to overrule those courts' precedents. Justice Zarella's dissenting opinion does not, in our view, fairly address the question of whether three decades of precedent from the highest reviewing court renders a legal argument challenging that precedent not merely futile, but one for which the petitioner would have no reasonable basis in existing law, even if the claim cannot be deemed "novel" because it previously has been raised in some form. In light of our resolution of this appeal on different grounds, we leave those questions for another day.

555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008); *Valeriano* v. *Bronson*, 209 Conn. 75, 83 n.7, 546 A.2d 1380 (1988); *Vena* v. *Warden*, 154 Conn. 363, 366, 225 A.2d 802 (1966); we have adopted the procedural default standard prescribed in *Wainwright* v. *Sykes*, supra, 433 U.S. 87. See *Jackson* v. *Commissioner of Correction*, 227 Conn. 124, 132, 629 A.2d 413 (1993); *Johnson* v. *Commissioner of Correction*, supra, 218 Conn. 409. "Under this standard, the petitioner must demonstrate good cause for his failure to raise a claim at trial or on direct appeal and actual prejudice resulting from the impropriety claimed in the habeas petition. . . . [T]he cause and prejudice test is designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on appeal for reasons of tactics, inadvertence or ignorance . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 567–68, 941 A.2d 248 (2008). The cause and prejudice requirement is not jurisdictional in nature, but rather a prudential limitation on the right to raise constitutional claims in collateral proceedings. *Taylor* v. *Commissioner of Correction*, 284 Conn. 433, 447 n.18, 936 A.2d 611 (2007).

The prudential considerations underlying the procedural default doctrine are principally intended to vindicate two concerns: federalism/comity and finality of judgments. See *Coleman* v. *Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); *Murray* v. *Carrier*, 477 U.S. 478, 495, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986); *Crawford* v. *Commissioner of Correction*, supra, 294 Conn. 180–81; *Jackson* v. *Commissioner of Correction*, supra, 227 Conn. 134; see also *Brecht* v. *Abrahamson*, 507 U.S. 619, 635, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) ("The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the [s]tate's interest in the final-

ity of convictions that have survived direct review within the state court system. . . . We have also spoken of comity and federalism. The [s]tates possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the [s]tates' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." [Citations omitted; internal quotation marks omitted.]). Of course, in state habeas proceedings, only finality and the constellation of issues related thereto are implicated. See *James L.* v. *Commissioner of Correction*, 245 Conn. 132, 142 n.11, 712 A.2d 947 (1998) (noting that statutory constraints on federal court jurisdiction over federally filed writs of habeas corpus "reflect congressional views of federalism and comity that are not pertinent to the exercise of state court jurisdiction over state habeas corpus cases").

In *Luurtsema II*, this court engaged in a comprehensive analysis of finality considerations when deciding to apply *Salamon* retroactively to collateral attacks on final judgments.[7] *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 765–73. The court addressed in turn five rationales advanced by the state in support

[7] The respondent and Justice Zarella argue that *Luurtsema II* has no precedential value because the main opinion, to which we refer, was a plurality decision, and there were three separate concurring opinions. Justice Katz' concurring opinion rested on due process, rather than common-law grounds, but she expressly addressed the ground on which the plurality rested its decision and stated: "I wholly agree with the plurality's thoughtful explanation as to why we should reject the state's call to adopt a per se rule against retroactivity and its equally persuasive rejection of the state's arguments against affording relief to the petitioner in the present case." *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 791. Her sole disagreement with the majority's resolution of that issue was its recognition of the possibility of unusual circumstances in which retroactivity would not apply. Id. Thus, a majority of the court rejected the state's policy arguments relating to finality.

of either adopting a per se rule against retroactive relief or denying relief in Luurtsema's case: "(1) the fact that law enforcement relied on the old interpretation of the kidnapping statutes while trying the petitioner; (2) the fact that the retroactive application of *Salamon* has no deterrent value or remedial purpose; (3) the fear that our courts will be 'flooded' with habeas petitions from other inmates convicted under § 53a-92 (a) (2) (A); (4) the difficulty of retrying such cases where significant time has elapsed since conviction; and, perhaps most importantly (5) the concern that victims will be retraumatized by again having to testify and endure another round of judicial proceedings." Id., 765. This court did not find any of these rationales a sufficient basis, individually or collectively, for withholding retroactive application of *Salamon* to collateral attacks on final judgments. Id., 766–73. Accordingly, application of the procedural default bar to protect finality of judgments seems inconsistent with the reasoning in *Luurtsema II* that "the interests of finality must give way to the demands of liberty and a proper respect for the intent of the legislative branch."[8] Id., 766; see also id., 759 ("under our system of justice, considerations of finality simply cannot justify the continued incarceration of someone who did not commit the crime of which he stands convicted").

[8] We are mindful that federal courts have concluded that procedural default will bar application of a retroactive holding. See, e.g., *Ilori* v. *United States*, 198 Fed. Appx. 543, 545 (7th Cir. 2006); *United States* v. *McCrimmon*, 443 F.3d 454, 462 n.44 (5th Cir. 2006); *United States* v. *Pettigrew*, 346 F.3d 1139, 1143–45 (D.C. Cir. 2003); see also *Bousley* v. *United States*, 523 U.S. 614, 620, 622, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (deeming court's limiting interpretation of criminal statute not barred by retroactivity principles but barred by procedural default). As we previously have explained, federal habeas review is constrained by statutory, constitutional, and prudential considerations other than finality of judgments. We also note that the court's retroactivity analysis in *Luurtsema II* was not premised on federal retroactivity or constitutional jurisprudence. Instead, it relied exclusively on state common law.

Other aspects of the court's reasoning bolster our conclusion that this holding was not intended to afford relief to only those petitioners who could avoid or overcome the procedural default bar. The court in *Luurtsema II* extensively considered limitations on its retroactivity ruling, but did not cite procedural default as such a limitation.[9] Availability of that doctrine and its heightened prejudice standard would have been a natural response to the state's floodgates argument had the court intended the doctrine to apply. Instead, the court responded: "There is little doubt that some petitioners will come forward contending that they are serving substantially longer sentences than are prescribed by the criminal code, as properly construed. In its brief, however, the state has identified only five such petitions[10] that have been filed in the more than two years since we decided *Salamon* and [*State* v. *Sanseverino*, 291 Conn. 574, 969 A.2d 710 (2009)].[11] At oral argument before this court, the state declined to provide additional information as to the number of present inmates

[9] Luurtsema's challenge to his jury instruction on direct appeal was acknowledged in the context of providing background to the case and the law leading up to *Salamon*, its sole significance being that Luurtsema's criminal case was the most recent occasion on which the court had reiterated its long-standing interpretation of kidnapping. See *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 745–46. This challenge was never mentioned in the retroactivity analysis. See id., 751–73. This omission was not an oversight. The court later mentioned this fact in a different part of the opinion when summarily rejecting Luurtsema's argument that he should not have to face retrial because he had challenged his jury instruction at trial. Id., 774.

[10] It does not appear from our review that any of these petitions were advanced by petitioners who had challenged their kidnapping instructions in their criminal proceedings. See *Luurtsema* v. *Commissioner of Correction*, Conn. Supreme Court Records & Briefs, September Term, 2010, State's Brief pp. 3–4 n.2.

[11] *State* v. *Sanseverino*, supra, 291 Conn. 579, 595, which superseded in part *State* v. *Sanseverino*, 287 Conn. 608, 949 A.2d 1156 (2008), was a companion case to *Salamon* in which this court applied the holding in *Salamon* without reaching the constitutional vagueness challenge raised by the defendant.

who might have a colorable claim under *Salamon*. Of the 1.5 percent of [D]epartment of [C]orrection inmates incarcerated for kidnapping or unlawful restraint, one can reasonably assume that only a small subset will fall within the ambit of *Salamon*. Of those, we expect that courts will be able to dispose summarily of many cases where it is sufficiently clear from the evidence presented at trial that the petitioner was guilty of kidnapping, as properly defined, [such] that any error arising from a failure to instruct the jury in accordance with the rule in *Salamon* was harmless. See, e.g., *State* v. *Hampton*, 293 Conn. 435, 463–64, 978 A.2d 1089 (2009). Likewise, we doubt the state will expend the resources to retry cases where it is reasonably clear that a petitioner could not have been convicted of kidnapping under the correct interpretation of the statute." (Footnotes altered.) *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 769–70.

One particular aspect of this response is telling. The court cited the harmless error standard for direct appeal —a standard wholly inconsistent with the actual prejudice standard for procedurally defaulted claims—as the limiting mechanism for colorable but ultimately nonmeritorious claims. Id., 770. Compare *State* v. *Hampton*, supra, 293 Conn. 463 (on direct appeal, "the test for determining whether a constitutional [impropriety] is harmless . . . is whether it appears beyond a reasonable doubt that the [impropriety] complained of did not contribute to the verdict obtained" [internal quotation marks omitted]), with *United States* v. *Frady*, 456 U.S. 152, 170, 172, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982) (in procedurally defaulted claim, petitioner must prove that impropriety "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions," such that, with proper instruction, there was "substantial likelihood" that jury

would not have convicted petitioner [emphasis omitted]).

In the present case, the respondent's procedural default argument rests on the same finality concerns that were deemed insufficiently weighty in *Luurtsema II*. Those concerns carry little weight in the present case because we can have a fair assurance that the state would effectively be in the same position even if the petitioner had raised a *Salamon* type challenge in his criminal proceedings. Not only was there a three decades long history preceding the petitioner's criminal trial of rejecting such a challenge, but mere months after the petitioner's trial, the court in *Luurtsema I* again rejected such a challenge. See *State* v. *Luurtsema*, supra, 262 Conn. 202. Thus, we are not persuaded that the state would suffer any greater burden with respect to retrial if the petitioner prevails in this habeas action than it would have suffered had the petitioner challenged his kidnapping instruction in his criminal proceedings.

In sum, we conclude that the court in *Luurtsema II* determined that retroactive relief is available for all collateral attacks on judgments rendered final prior to *Salamon*, irrespective of whether the kidnapping instruction was challenged in the criminal proceedings, as long as the evidence warrants such relief. Accordingly, the petitioner's *Salamon* claim is not subject to procedural default.

C

In light of this conclusion, we turn to the question of whether the petitioner is entitled to a new trial due to the omission of a proper instruction on kidnapping in accordance with *Salamon*. This determination requires us to consider the legal parameters set forth in *Salamon*, and the standard for assessing whether the omis-

sion of such guidance to the jury requires reversal of the petitioner's kidnapping conviction.

In *Luurtsema II*, the court indicated that the proper standard to make such an assessment would be the harmless error standard applied on direct appeal. See *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 770, citing *State* v. *Hampton*, supra, 293 Conn. 463–64. That is the standard that was applied by the habeas court in the present case and has been applied in several other cases. See, e.g., *Eric M.* v. *Commissioner of Correction*, 153 Conn. App. 837, 845, 108 A.3d 1128 (2014), cert. denied, 315 Conn. 915, 106 A.3d 308 (2015); *St. John* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-11-4003987-S, 2013 WL 1277284 (March 7, 2013); see also *Epps* v. *Commissioner of Correction*, 153 Conn. App. 729, 738, 740, 104 A.3d 760 (2014) (determining that petitioner must overcome procedural default but applying direct appeal harmless error standard in prejudice analysis); *Nogueira* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-14-4006033-S, 2015 WL 4172992 (June 10, 2015) (same); *Smith* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-08-4002747-S, 2011 WL 4582841 (September 13, 2011) (same).

On direct appeal, "[i]t is well established that a defect in a jury charge which raises a constitutional question is reversible error if it is reasonably possible that, considering the charge as a whole, the jury was misled. . . . [T]he test for determining whether a constitutional error is harmless . . . is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. . . . A jury instruction that improperly omits an essential element from the charge constitutes harmless error [only] if a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by

overwhelming evidence, such that the jury verdict would have been the same absent the error . . . .'' (Citation omitted; internal quotation marks omitted.) *State* v. *Fields*, 302 Conn. 236, 245–46, 24 A.3d 1243 (2011). The failure to charge in accordance with *Salamon* is viewed as an omission of an essential element; id.; and thus gives rise to constitutional error. See *State* v. *LaFleur*, 307 Conn. 115, 125, 51 A.3d 1048 (2012).

We note that, except for the fact that this standard imposes the burden of persuasion exclusively on the state, it is effectively the same standard that this court applies in habeas proceedings when such an error is advanced through a claim of ineffective assistance of counsel. See *Small* v. *Commissioner of Correctio*n, supra, 286 Conn. 728 (The court cited the direct appeal harmless error standard and then explained: ''Because the petitioner raises his claim that he suffered harm as a result of the trial court's failure to instruct the jury on attempt via his claims of ineffective assistance of counsel, our review is limited to the issue of whether, under *Strickland*,[12] the petitioner can demonstrate that trial counsel's failure to object to the erroneous charge or appellate counsel's failure to challenge it on appeal prejudiced him. We therefore . . . assess whether there is a reasonable probability that, if the issue were brought before us on direct appeal, the petitioner would have prevailed.'' [Footnote added.]).

Under this harmless error standard, it is clear that the petitioner is entitled to a new trial. ''[T]o commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime.'' *State* v. *Salamon*, supra, 287 Conn. 542. ''[A] defendant may

[12] See *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

be convicted of both kidnapping and another substantive crime if, at any time prior to, during or after the commission of that other crime, the victim is moved or confined in a way that has independent criminal significance, that is, the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime. Whether the movement or confinement of the victim is merely incidental to and necessary for another crime will depend on the particular facts and circumstances of each case. . . . For purposes of making that determination, the jury should be instructed to consider the various relevant factors, including the nature and duration of the victim's movement or confinement by the defendant, whether that movement or confinement occurred during the commission of the separate offense, whether the restraint was inherent in the nature of the separate offense, whether the restraint prevented the victim from summoning assistance, whether the restraint reduced the defendant's risk of detection and whether the restraint created a significant danger or increased the victim's risk of harm independent of that posed by the separate offense." (Footnote omitted.) Id., 547–48.

In light of these parameters, we cannot conclude "beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error . . . ." (Internal quotation marks omitted.) *State* v. *Fields*, supra, 302 Conn. 246. As *Salamon* makes clear, when the evidence regarding the perpetrator's intent is susceptible to more than one interpretation, that question is one for the jury. The petitioner's actions in the present case were a continuous, uninterrupted course of conduct lasting minutes. The petitioner could not accomplish the sexual assault without grabbing K and bringing her to the ground.[13] He

[13] In his dissent, Justice Eveleigh concludes that "the kidnapping had already occurred when [K] was restrained and knocked down in the parking

released K as soon as the sexual assault was completed. Thus, the essential fact is the movement of K. K's asportation from the spot where she was grabbed to the site of the sexual assault, however, appears to have been a matter of yards and accomplished in a matter of seconds.[14] Although that movement took K from the lit parking lot to the adjacent dark ground by a bush, an act that undoubtedly reduced the risk of detection in one regard, it also brought K in very close proximity to an occupied residence in the lot adjacent to the parking lot. There is no evidence that the risk of harm to K was made appreciably greater by the asportation in and of itself.[15] A properly instructed jury reasonably could conclude that the petitioner's intention in moving K from the lit lot to the dark, grassy area was to prevent her from being able to get a good look at his face, because he could not perform in the lit space, or simply to avoid the hard paved surface while kneeling on the ground.

Under the deficient instruction, however, the jury effectively was compelled to conclude that the petitioner committed kidnapping in the first degree once it credited K's account. See footnotes 1 and 5 of this

lot." It is difficult to imagine how a sexual assault can be perpetrated without grabbing the victim, and the feasibility of accomplishing a sexual assault while the victim and the perpetrator are standing in the middle of a parking lot seems rather remote.

[14] Although the evidence did not establish a precise distance or time, because such facts would not have been significant in the absence of a *Salamon* instruction, the most reasonable inference from the numerous photographic exhibits and K's testimony is that the distance and time of the asportation were minimal. Put differently, it would be unreasonable to infer from the evidence that the asportation took minutes rather than seconds.

[15] By concluding that the asportation did not create a significant danger or increase K's risk of harm independent of that posed by the sexual assault, we do not intend to diminish the fact that K's fear of suffering harm was likely made greater by having been moved from a lit spot to one where it was dark.

opinion. With the proper instruction, the jury would have to consider whether the state had proved beyond a reasonable doubt that the petitioner's intention in committing these actions had sufficient independent significance from his intention to commit the sexual assault as to warrant a conviction of kidnapping in the first degree. The aforementioned facts provided a logical basis for it to conclude that they did not. Therefore, the state could not prove that the omission of the *Salamon* instruction was harmless beyond a reasonable doubt. Accordingly, the petitioner is entitled to relief under our established harmless error standard.

We note that this court has not had the occasion to consider whether, even in the absence of procedural default, a more stringent standard of harm should apply in collateral proceedings. In *Brecht* v. *Abrahamson*, supra, 507 U.S. 623, a bare majority of the United States Supreme Court departed from its history of more than 200 years of parity between direct appeals and habeas corpus proceedings for constitutional claims. See R. Hertz & J. Liebman, 2 Federal Habeas Corpus Practice and Procedure (6th Ed. 2011) § 31.1, pp. 1679–80. Citing federalism, comity, finality and other prudential considerations, the court determined that habeas proceedings require a standard that imposes a less stringent burden on the state when the constitutional error is not structural. *Brecht* v. *Abrahamson*, supra, 634 ("an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment" [internal quotation marks omitted]); see also id., 643 (Stevens, J., concurring). The court in *Brecht* determined that the same standard for determining whether habeas relief must be granted for nonconstitutional error applies, namely, whether the error "had substantial and injurious effect or influence in determining the jury's verdict." (Internal quotation marks omitted.) Id., 637. "The determinative consideration . . . is not the strength of

the evidence or the probability of conviction at a hypothetical retrial absent the error. Rather, the relevant question is whether the error substantially affected the actual thinking of the jurors or the deliberative processes by which they reached their verdict." (Footnote omitted.) R. Hertz & J. Liebman, supra, § 31.4 [d], p. 1720. Because the state bears the burden of proof, "where the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error," the petitioner must win. *O'Neal* v. *McAninch*, 513 U.S. 432, 437, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995); see id., 438 ("The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." [Emphasis omitted; internal quotation marks omitted.]).

Brecht and its progeny have raised numerous questions as to the precise standard to be applied in determining whether a particular type of error is harmless, and what degree of certainty as to whether that standard has been met.[16] See *Peck* v. *United States*, 102

[16] Justice Scalia's concurrence in *California* v. *Roy*, 519 U.S. 2, 6, 117 S. Ct. 337, 136 L. Ed. 2d 266 (1996), joined by Justice Ginsburg, appears to have sown some of the seeds of confusion. See id., 6, 7 (Scalia, J., concurring) (The concurring justices agreed that the standard in *Brecht* applied in a habeas case but concluded with respect to instructional error: "A jury verdict that [a criminal defendant] is guilty of the crime means, of course, a verdict that he is guilty of each necessary element of the crime. . . . Formally, at least, such a verdict did not exist here: The jury was never asked to determine that [the defendant] had the 'intent or purpose of committing, encouraging, or facilitating' his confederate's crime. . . . The absence of a formal verdict on this point cannot be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise. To allow the error to be cured in that fashion would be to dispense with trial by jury. . . . *The error in the present case can be harmless only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict did find without finding this point as well.*" [Citations omitted; emphasis altered.]). Some courts have relied on this concurrence as providing a functional equivalent test for an

F.3d 1319, 1320 (2d Cir. 1996) (Newman, C. J., concurring) (attempting "to identify and illuminate uncertainties that have been created by the way the [United States] Supreme Court has explicated its recent harmless error jurisprudence in the context of constitutional errors" as to these questions); R. Hertz & J. Liebman, supra, § 31.4 [a], p. 1708 (citing questions left open by *Brecht* and its progeny). Some courts, like the Second Circuit, have decided that the *Brecht* harmless error standard serves as the actual prejudice component for excusing procedurally defaulted claims, thus similarly analyzing defaulted and nondefaulted claims. See *Peck* v. *United States*, 106 F.3d 450, 456–57 (2d Cir. 1997) (citing cause and actual prejudice procedural default standard from *United States* v. *Frady*, supra, 456 U.S. 167–68, but applying standard in *Brecht* of " 'substantial and injurious effect or influence in determining the jury's verdict' " as actual prejudice standard). We need not decide in the present case whether to enter the fray by adopting the standard in *Brecht* and the uncertainties that accompany it. Nevertheless, because the dissenting justices' conclusion that the petitioner is not entitled to a new trial due to his failure to establish the actual prejudice to overcome a procedurally defaulted claim appears to signal a retreat from our holdings in *Salamon* and *Luurtsema II*, we take this opportunity to explain why the petitioner would prevail even under the more stringent standard applied by the dissents.

This court has suggested that we would apply the standard in *United States* v. *Frady*, supra, 456 U.S. 152, for the prejudice showing required to overcome procedural default. See *Johnson* v. *Commissioner of Correction*, supra, 285 Conn. 570–71; *Valeriano* v. *Bronson*, supra, 209 Conn. 84. Under *Frady*, the petitioner

omitted element in a jury instruction. See, e.g., *United States* v. *McDonald*, 150 F.3d 1301, 1304 (10th Cir. 1998); *Smith* v. *Horn*, 120 F.3d 400, 418 (3d Cir. 1997).

"must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." (Emphasis omitted.) *United States* v. *Frady*, supra, 170. In applying that standard, the court indicated that the petitioner would have to demonstrate that, with the proper instruction, there was a "substantial likelihood" that the jury would not have found the petitioner guilty of the crime of which he was convicted. Id., 172; see also *United States* v. *Pettigrew*, 346 F.3d 1139, 1144 (D.C. Cir. 2003) (equating substantial likelihood standard in *Frady* to "reasonable probability that, but for [the errors], the result of the proceeding would have been different" [internal quotation marks omitted]). Substantial likelihood or reasonable probability does not require the petitioner to demonstrate that the jury more likely than not would have acquitted him had it properly been instructed. See *Strickler* v. *Greene*, 527 U.S. 263, 280, 297–98, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (Souter, J., concurring in part and dissenting in part) (agreeing with majority that " 'reasonable probability' " under *Brady*[17] does not require defendant to show that different result is more likely than not, but suggesting that, because term is misleading, " 'significant possibility' would do better at capturing the degree to which the undisclosed evidence would place the actual result in question, sufficient to warrant overturning a conviction or sentence"); *United States* v. *Hernandez*, 94 F.3d 606, 610 (10th Cir. 1996) ("[t]here appears to be little or no difference in the operation of the 'materiality' [*Brady*] and 'prejudice' [*Frady*] tests"); *People* v. *Versteeg*, 165 P.3d 760, 765 (Colo. App. 2006) ("[A] showing of actual prejudice under *Frady* generally depends on an inference that the error affected the

[17] See *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (state's suppression of material, exculpatory evidence).

outcome. This is the same showing of prejudice that is required for *Strickland* or *Brady* errors.'' [Internal quotation marks omitted.]). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* v. *Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

As even the dissenting justices purportedly concede in the present case, this standard does not require the petitioner to show that there was insufficient evidence to convict him under *Salamon* to prevail. Insufficient evidence would require the petitioner to meet an even higher standard than the inapplicable more probable than not standard. See *State* v. *Bennett*, 307 Conn. 758, 763, 59 A.3d 221 (2013) (''[i]n reviewing a sufficiency of the evidence claim, we construe the evidence in the light most favorable to sustaining the verdict, and then determine whether from the facts so construed and the inferences reasonably drawn therefrom, the trier of fact reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt''). A recent decision, however, in which this court concluded that it was a ''close case'' under that higher standard, illustrates why there is a substantial likelihood that a properly charged jury would not have convicted the petitioner. See *State* v. *Ward*, 306 Conn. 718, 736, 51 A.3d 970 (2012). In *Ward*, this court reviewed a trial court's judgment setting aside a verdict finding the defendant guilty of kidnapping but leaving the defendant's sexual assault conviction intact, which required the court to view the evidence in the light most favorable to supporting the jury's verdict. Id., 729–30. In reversing the trial court's judgment, this court explained: ''Although this is a close case, we conclude that the jury, which had been instructed on the applicable legal principles in accordance with *Salamon*, reasonably could have found that the defendant's confinement or movement of the victim was not merely

incidental to the sexual assault. The victim, who weighed a mere 100 pounds, testified that she could not escape because the defendant was twice her size and held her very tightly. By moving the victim away from the kitchen door, the defendant made the possibility of escape even more remote. From this testimony, it was reasonable for the jury to conclude that the defendant could have sexually assaulted the victim without threatening to kill her and without continuously holding the knife sharpening tool to her neck and, therefore, that the force used by the defendant exceeded the amount necessary to commit the sexual assault. It was also reasonable to infer that the defendant, by engaging in this conduct, intended to frighten and subdue the victim to prevent her from struggling, trying to escape or summoning assistance. In light of the evidence, the jury also reasonably could have concluded that the defendant increased the risk of harm to the victim by holding the pointed metal knife sharpening tool to her neck and by moving her away from the kitchen door, which not only made it less likely that she would escape, but also made it less likely that the crime would be detected. . . . Moreover, given the disparity in size and strength between the defendant and the victim, it was reasonable for the jury to conclude that the defendant did not need to move the victim from the kitchen in order to sexually assault her. If he intended to move her to a location that was more comfortable for him, he could have quickly moved her to the bedroom and onto the bed. Instead, he moved her from the kitchen to the bedroom, and ultimately onto the floor. Finally, although the incident lasted ten to fifteen minutes, the sexual assault itself lasted only two minutes.'' (Citation omitted; footnote omitted.) Id., 736–37.

By contrast, in the present case, the petitioner's actions preceding the sexual assault appear to have taken seconds. He released K as soon as he completed

the sexual assault. Although the asportation of K to a darker spot could help avoid detection, a jury reasonably could conclude that the petitioner had moved K from the parking lot to the nearby grass for his comfort. Her ability to escape was not diminished by moving her to the grass by the bush because this placed K closer to an occupied residence. The petitioner used no weapon to threaten K and thus did not increase the risk of harm to her on that basis. Except for the brief moment when the petitioner placed his hand over K's mouth, her physical ability to summon help was impaired solely due to the nature of the sexual assault. If the facts of *Ward* present a close case as to whether there was sufficient evidence to support a kidnapping conviction, then the facts in the present case would clearly undermine confidence in the petitioner's conviction due to the omission of a *Salamon* instruction.

The cases cited by the dissenting justices in support of their position all involve determinations of sufficient evidence to support a kidnapping conviction, not determinations of substantial likelihood of actual prejudice. Unlike *Ward*, however, the cases cited from other jurisdictions are not particularly persuasive because, although they consider a similar legal standard to ours, they give no indication of whether the evidence was merely sufficient or well in excess of that necessary to convict. Indeed, the fact that these cases involved far longer periods of restraint, far greater distances of asportation, continued restraint after completion of the nonkidnapping offenses, or numerous, distinct acts of restraint and asportation demonstrates why the present case is sufficiently close to require a new trial. See *Yearty* v. *State*, 805 P.2d 987, 993 (Alaska App. 1991) (defendant's restraint of victim "went significantly beyond that which was merely incidental to the sexual assault" when defendant pulled victim off of bike path, "dragged him to a secluded area several hundred feet

away, and there held him captive for almost an hour"); *State* v. *Gordon*, 161 Ariz. 308, 315–16, 778 P.2d 1204 (1989) (The "[d]efendant went beyond the restraint [kidnapping] inherent in the ultimate crime [of sexual assault]—he held the victim on the floor, hit her with his fists, and strangled her. Thus, the manner in which he committed the kidnapping added to the victim's suffering and increased her harm or risk of harm beyond that inherent in the ultimate crime."); *Lee* v. *State*, 326 Ark. 529, 531, 932 S.W.2d 756 (1996) (defendant followed victim, grabbed her around her neck while she was on public sidewalk, and "dragged her approximately one city block to the back of the school building where there was no light," where he raped her); *People* v. *Robertson*, 208 Cal. App. 4th 965, 973, 146 Cal. Rptr. 3d 66 (2012) (defendant ordered victim to enter dark garage, locked door with key, grabbed victim from behind, and ordered her to walk toward front of garage where large tub full of water was located; when victim refused, defendant pushed her forward toward tub and ordered her to lie down; victim did not scream or struggle when defendant sexually assaulted her near tub because she was afraid that defendant would throw her in tub and drown her); *People* v. *Johnson*, 26 N.E.3d 586, 589–90 (Ill. App.) (defendant forcibly moved victim from sidewalk to vacant lot, where he completed sexual act before moving her across alley to area between two garages where he raped her twice), appeal denied, 39 N.E.3d 1007 (Ill. 2015).

The cases from this court cited by the dissenting justices yield even less support. See *State* v. *Sanseverino*, supra, 291 Conn. 574; *State* v. *DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008). Those cases involved direct appeals reviewing verdicts rendered in the absence of a *Salamon* instruction. In both cases, it seemed unlikely that the state had sufficient evidence to prevail on retrial but the court thought it appropriate to afford the state

the opportunity to marshal additional evidence in support of the new standard. See *State* v. *Sanseverino*, supra, 584–85; *State* v. *DeJesus*, supra, 439 (ordering new trial because "any insufficiency in proof was caused by the subsequent change in the law under *Salamon*, rather than the government's failure to muster sufficient evidence"). In *State* v. *Salamon*, supra, 287 Conn. 549–50, the court concluded that it could not say that the defendant's restraint of the victim *necessarily* was incidental to his assault of the victim, and thus it was a factual question for a properly instructed jury.[18] The dissenting justices' reliance on these cases is troubling insofar as it suggests that they view *Salamon* as inapplicable to cases in which even the slightest movement or restraint of the victim beyond that which is absolutely essential to the commission of the nonkidnapping offense is established.

The cases cited by the dissenting justices indicate that they have failed to give meaningful effect to three critical, related aspects of the holding in *Salamon*. First, by focusing solely on whether there was any restraint or asportation beyond that *necessary* for the commission of the sexual assault, the dissenting justices ignore the "incidental to" language in *Salamon*. See id., 542 ("merely incidental to and necessary for the commis-

[18] The court noted: "The victim testified that the defendant, after accosting her, forcibly held her down for five minutes or more. Although the defendant punched the victim once and shoved his fingers into her mouth, that conduct was very brief in contrast to the extended duration of the defendant's restraint of the victim. In light of the evidence, moreover, a juror reasonably *could* find that the defendant pulled the victim to the ground primarily for the purpose of restraining her, and that he struck her and put his fingers in her mouth in an effort to subdue her and to prevent her from screaming for help so that she could not escape. In such circumstances, we cannot say that the defendant's restraint of the victim *necessarily* was incidental to his assault of the victim. Whether the defendant's conduct constituted a kidnapping, therefore, is a factual question for determination by a properly instructed jury." (Emphasis added; footnote omitted.) *State* v. *Salamon*, supra, 287 Conn. 549–50.

sion of another crime against that victim"); accord id., 547. Restraint may be incidental to a sexual assault that is not necessary for its commission. Second, the dissenting justices give no meaningful effect to the requirement that the additional restraint or asportation have "independent criminal significance . . . ." Id., 547. The court in *Salamon* indicated that unlawful restraint, not kidnapping, would be the proper charge in the absence of such independent significance. See id., 548 ("because the confinement or movement of a victim that occurs simultaneously with or incidental to the commission of another crime ordinarily will constitute a substantial interference with that victim's liberty, such restraints still may be prosecuted under the unlawful restraint statutes"); see also id., 546 (indicating alignment of interpretation in *Salamon* with "majority view regarding the construction of statutes delineating the crime of kidnapping . . . the salutary effect of which is to prevent the prosecution of a defendant on a kidnapping charge in order to expose him to the heavier penalty thereby made available, [when] the period of abduction was brief, the criminal enterprise in its entirety appeared as no more than an offense of robbery or rape, and there was lacking a genuine kidnapping flavor" [citations omitted; internal quotation marks omitted]).

Finally, and related to the two preceding concerns, the dissenting justices do not recognize that the degree and nature of the restraint or asportation bears on the ultimate question—the perpetrator's *intent* in taking these actions. See id., 532 ("the proper inquiry for a jury evaluating a kidnapping charge is not whether the confinement or movement of the victim was minimal or incidental to another offense against the victim *but, rather, whether it was accomplished with the requisite intent*, that is, to prevent the victim's liberation" [emphasis added]); id., 542 ("[o]ur legislature, in replac-

ing a single, broadly worded kidnapping provision with a gradated scheme *that distinguishes kidnappings from unlawful restraints by the presence of an intent to prevent a victim's liberation*, intended to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are merely incidental to and necessary for the commission of another crime against that victim" [emphasis added]). Indeed, it was the ambiguity in the distinction between the intent to commit a kidnapping and the intent to commit an unlawful restraint that was at the heart of the analysis in *Salamon*. See id., 534 ("Those previous decisions [by our court] . . . have not explored the parameters of that intent, in particular, how the 'intent to prevent [a victim's] liberation'; General Statutes § 53a-91 [2]; that is, the intent necessary to establish an abduction, differs from the intent 'to interfere substantially with [a victim's] liberty'; General Statutes § 53a-91 [1]; that is, the intent necessary to establish a restraint. Certainly, when an individual intends to interfere substantially with another person's liberty, he also intends to keep that person from escaping, at least for some period of time; in other words, he intends to prevent that person's liberation. Thus, the point at which an intended interference with liberty crosses the line to become an intended prevention of liberation is not entirely clear."). Although the perpetrator's conduct is circumstantial evidence from which the jury infers such intent; see *State* v. *Smith*, 198 Conn. 147, 154–55, 502 A.2d 874 (1985); it is the degree and nature of the restraint or asportation that informs that inference.

Although we underscore that a determination of sufficient evidence to support a kidnapping conviction is not the appropriate yardstick by which to assess the likelihood of a different result, we note a recent decision by Judge Mullins that reflects a more nuanced and

appropriate comparison of cases with regard to these essential aspects of *Salamon*. See *Mitchell* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-10-4003542-S (February 27, 2014) (57 Conn. L. Rptr. 776). "Although no minimum period of restraint or degree of movement is necessary for the crime of kidnapping, an important facet of cases where the trial court has failed to give a *Salamon* instruction and that impropriety on appellate review has been deemed harmless error is that longer periods of restraint or greater degrees of movement demarcate separate offenses. See *State* v. *Hampton*, supra, 293 Conn. 463–64 (defendant confined victim in a car and drove her around for approximately three hours before committing sexual assault and attempted murder); *State* v. *Jordan*, [129 Conn. App. 215, 222–23, 19 A.3d 241 (2011)] (evidence showed the defendant restrained the victims to a greater degree than necessary to commit the assaults even though assaultive behavior spanned entire forty-five minute duration of victims' confinement) [cert. denied, 302 Conn. 910, 23 A.3d 1248 (2011)]; *State* v. *Strong*, [122 Conn. App. 131, 143, 999 A.2d 765] (defendant's prolonged restraint of victim while driving for more than one hour from one town to another not merely incidental to threats made prior to the restraint) [cert. denied, 298 Conn. 907, 3 A.3d 73 (2010)]; and *State* v. *Nelson*, [118 Conn. App. 831, 860–62, 986 A.2d 311] (harmless error when defendant completed assault and then for several hours drove victim to several locations) [cert. denied, 295 Conn. 911, 989 A.2d 1074 (2010)]. Thus, as these cases demonstrate, multiple offenses are more readily distinguishable—and, consequently, more likely to render the absence of a *Salamon* instruction harmless—when the offenses are separated by greater time spans, or by more movement or restriction of movement.

"Conversely, multiple offenses occurring in a much shorter or more compressed time span make the same

determination more difficult and, therefore, more likely to necessitate submission to a jury for it to make its factual determinations regarding whether the restraint is merely incidental to another, separate crime. In those scenarios, where kidnapping and multiple offenses occur closer in time to one another, it becomes more difficult to distinguish the confinement or restraint associated with the kidnapping from another substantive crime. The failure to give a proper *Salamon* instruction in those scenarios is more likely to result in harmful error precisely because of the difficulty in determining whether each crime has independent criminal significance. See *State* v. *Thompson*, [118 Conn. App. 140, 162, 983 A.2d 20 (2009)] (within fifteen minutes defendant entered victim's car, pushed her behind a building and sexually assaulted her) [cert. denied, 294 Conn. 932, 986 A.2d 1057 (2010)]; *State* v. *Flores*, [301 Conn. 77, 89, 17 A.3d 1025 (2011)] (defendant's robbery of victim in her bedroom lasted between five and twenty minutes); *State* v. *Gary*, [120 Conn. App. 592, 611, 992 A.2d 1178] (defendant convicted of multiple sexual assaults and an attempted sexual assault that were 'in close temporal proximity to the defendant's restraint of the victim'; thus court determined evidence reasonably supports a finding that the restraint merely was incidental to the commission of other crimes, namely, sexual assaults and attempted sexual assault; lack of *Salamon* instruction harmful error) [cert. denied, 297 Conn. 910, 995 A.2d 637 (2010)]." *Mitchell* v. *Warden*, supra, 57 Conn. L. Rptr. 781–82.

This discussion effectively illustrates why the petitioner's claim would succeed even under the more stringent prejudice standard for procedurally defaulted claims. The close alignment in time and place of K's restraint and abduction to the sexual assault calls into serious question whether reasonable jurors would conclude that the petitioner intended to restrain K for any

purpose other than the commission of the sexual assault. Accordingly, there is a substantial likelihood that reasonable jurors would conclude that the state failed to meet its burden of proving beyond a reasonable doubt that the conduct had sufficient independent signifi cance to warrant a conviction of kidnapping in the first degree. Accordingly, the Appellate Court properly concluded that the habeas court's judgment should be affirmed insofar as it granted the petitioner a new trial on his kidnapping conviction.

II

We turn next to the petitioner's appeal, which challenges the Appellate Court's determination that a claim of cumulative trial error as a violation of due process is not cognizable under Connecticut law. See *Hinds* v. *Commissioner of Correction*, supra, 151 Conn. App. 860, citing *State* v. *Samuels*, 273 Conn. 541, 562, 871 A.2d 1005 (2005), and *State* v. *Reddick*, 33 Conn. App. 311, 338–39, 635 A.2d 848 (1993), cert. denied, 228 Conn. 924, 638 A.2d 38 (1994). The petitioner contends that the United States Supreme Court and every federal Circuit Court of Appeals recognize that trial errors individually insufficiently harmful to warrant a new trial may by their cumulative effect deprive a defendant of a fair trial in violation of his right to due process. He further contends that Connecticut case law does not bar such a claim, and would violate the supremacy clause of the federal constitution if it did.

The respondent contends that this claim was procedurally defaulted due to the petitioner's failure to raise it in his direct appeal, and that the petitioner failed to establish cause and prejudice to overcome the default. The respondent alternatively contends that the failure to recognize claims of cumulative error does not violate due process under federal law, and even if such claims were cognizable, the petitioner would not be entitled

to relief on this basis. We conclude that, even if we were to recognize the cumulative error doctrine as articulated in the federal courts and to deem it applicable to habeas proceedings, the trial improprieties in the present case would not justify relief under that doctrine.

Federal case law in which the " 'cumulative unfairness' " doctrine; *United States* v. *Al-Moayad*, 545 F.3d 139, 178 (2d Cir. 2008); has required reversal of a conviction essentially seems to fall into one or more of the following categories: (1) the errors directly related to and impacted an identified right essential to a fair trial, i.e., the right to a presumption of innocence or the right to present witnesses in one's own defense; (2) at least one of the errors was so significant as to render it highly doubtful that the defendant had received a fair trial and the remaining errors created the additional doubt necessary to establish that there was serious doubt about the fairness of the trial, which is necessary to reverse a conviction; or (3) the errors were pervasive throughout the trial.[19] The trial improprieties identified

[19] See, e.g., *Chambers* v. *Mississippi*, 410 U.S. 284, 297–303, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (application of state rules violated right of accused to present witnesses in his own defense, in combination with right to present defense); *Taylor* v. *Kentucky*, 436 U.S. 478, 486–90, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (instructional errors impaired right to presumption of innocence); *United States* v. *Haynes*, 729 F.3d 178, 197 (2d Cir. 2013) (defendant was improperly tried in shackles, trial court did not fulfill its obligation to investigate allegation of juror misconduct, court gave improper jury charge regarding obligations of deadlocked jury regarding further deliberations, and lay and expert testimony was erroneously admitted, all occurring in context of relatively short trial during which jury deliberated for approximately eight hours before returning deadlock note, "when considered together . . . call into serious doubt whether the defendant received the due process guarantee of fundamental fairness"); *United States* v. *Al-Moayad*, supra, 545 F.3d 178 (The improper admission of certain documentary evidence and the testimony of two witnesses " 'cast such a serious doubt on the fairness of the trial' as to warrant reversal of the defendants' convictions. That doubt is especially grave when we also take into account the district court's erroneous admission of the mujahidin form, the wedding video, and the Croatian last will and testament, as well as its questionable handling of the derivative entrapment issue."); *Gaines* v. *Kelly*, 202 F.3d 598, 605–606 (2d Cir. 2000) (cumulative effect of instructional errors

in the petitioner's direct appeal do not fall within any of these categories.

The Appellate Court identified three improprieties. First, it determined that the trial court improperly admitted into evidence a photograph showing the petitioner with his underwear pulled down around his knees, with black tape covering the part of the photograph showing his genitals, taken when the petitioner was incarcerated. *State* v. *Hinds*, supra, 86 Conn. App. 572–74. The state had used this photograph to rebut the petitioner's misidentification theory premised in part on testimony that he never wore underwear. Id., 572. The Appellate Court determined that the photograph was not probative because it had been taken two years after the assault, but that its admission was harmless because it was cumulative of testimony, admitted without objection, that the petitioner had been wearing underwear when the photograph was taken. Id., 573–74. Second, the Appellate Court determined that there was an insufficient evidentiary basis to support the consciousness of guilt jury instruction regarding certain purportedly false statements made by the petitioner during the police investigation as to where he was staying and how long he had been in town. Id., 563–68. The court concluded

impaired right to have state prove elements of offense beyond reasonable doubt); *United States* v. *Fields*, 466 F.2d 119, 120–21 (2d Cir. 1972) (cumulative effect of instructional errors impaired right to have state prove each element of offense beyond reasonable doubt); *United States* v. *Guglielmini*, 384 F.2d 602, 605–607 (2d Cir. 1967) (total effect of errors, including trial judge's conduct suggesting bias in favor of prosecution created "firm impression that the defendants did not receive the fair trial to which our law entitles them," bolstered by prosecutorial improprieties in cross-examination and argument, as well as improper reasonable doubt charge cast serious doubt on fairness of trial).

We note that, to the extent that some of these cases involve multiple defects in a jury charge relating to the same concern; see, e.g., *Taylor* v. *Kentucky*, supra, 436 U.S. 486–90; *Gaines* v. *Kelly*, supra, 202 F.3d 605–606; we question whether they should be characterized as involving cumulative error rather than simply an improper jury charge on a matter.

that the statements were neither made in an effort to exculpate the petitioner nor connected to the crimes, but that the instruction was harmless given the strength of the state's case, in particular, the close match of the victim's description of her attacker and his vehicle to the petitioner and his truck. Id., 568–69. Third, the Appellate Court determined that the trial court improperly had failed to give the jury a supplemental answer correcting its earlier inaccurate answer to the jury's question as to whether a witness had testified regarding the date and time on a security recording of the Super Stop & Shop parking lot showing a vehicle similar to the one identified by the victim. Id., 569–71. The court deemed this error harmless because the correct information would have tended to inculpate the petitioner. Id., 571.

The petitioner claims that "the combined effect of [these improprieties] rendered [his] defense of misidentification far less persuasive, in violation of the constitutional right to a fair trial." We are not persuaded that improprieties of this magnitude present a colorable basis for application of the cumulative error rule applied by the federal courts. Therefore, we need not consider whether our case law is in conflict with federal law.

The judgment of the Appellate Court is affirmed.

In this opinion ROGERS, C. J., and PALMER and DiPENTIMA, Js., concurred.

ZARELLA, J., with whom EVELEIGH and ROBINSON, Js., join, dissenting. The majority concludes that the procedural default rule does not apply to challenges to kidnapping instructions in criminal actions that proceeded to final judgment before we changed our interpretation of the kidnapping statutes in *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), but, rather, should be replaced by a standard that provides

retroactive relief in the form of a new trial for all collateral attacks on such judgments if the reviewing court determines that the omission of a *Salamon* instruction was not harmless beyond a reasonable doubt. I respectfully disagree. Neither party has questioned on appeal to this court whether the procedural default rule should be replaced by a different standard. Accordingly, the issue has not been properly raised or briefed. In addition, the majority relies on reasoning in *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 12 A.3d 817 (2011), that was supported by only a plurality of this court and did not consider procedural default as a potential bar to habeas claims based on the omission of a *Salamon* instruction. As a consequence, *Luurtsema* does not compel the conclusion that the procedural default rule should not be applied in these cases, as the majority claims. Furthermore, the majority's decision to abandon the procedural default rule and adopt a different standard injects unnecessary incongruity into our law and undermines legitimate and settled expectations regarding the ability of petitioners to raise new claims that have not been raised at trial or in the Appellate Court. Finally, insofar as I deem the procedural default rule to be the proper legal standard for habeas review of *Salamon* claims, the petitioner, Walter Hinds, did not establish good cause for failing to seek a *Salamon* instruction at trial or for failing to raise the issue of its omission on direct appeal. For the reasons discussed in Justice Eveleigh's dissenting opinion, the petitioner also did not establish that he suffered actual prejudice under the facts and circumstances of this case. I would thus conclude that the Appellate Court incorrectly determined that the petitioner satisfied the two-pronged test of good cause and actual prejudice required to overcome procedural default.

I

I begin with the majority's sua sponte decision to abandon the procedural default rule on the basis of this

court's reasoning in *Luurtsema* and to replace it with an entirely new standard that would require a reviewing court to determine whether the omission of a *Salamon* instruction was not harmless beyond a reasonable doubt. As previously noted, the parties have not raised the issue of whether the rule should be replaced in their separate appeals to this court. Both parties instead address the merits of the Appellate Court's conclusion that the petitioner established the good cause and actual prejudice required under the rule to allow habeas review of his jury instruction claim. In fact, the respondent, the Commissioner of Correction, citing *Johnson* v. *Commissioner of Correction*, 218 Conn. 403, 409, 589 A.2d 1214 (1991) (adopting cause and prejudice as "the appropriate standard for reviewability in a habeas corpus proceeding of constitutional claims not adequately preserved at trial because of procedural default"), specifically emphasizes in his brief that he is not challenging the Appellate Court's consideration of the procedural default rule in its review of the petitioner's claim, but only the manner in which the court applied the rule. The majority also acknowledges that the respondent is contending only that "the Appellate Court did not correctly apply the legal standard for assessing cause and prejudice to overcome procedural default." Although the petitioner purportedly makes a brief, secondary argument that procedural default is not a bar to habeas review pursuant to the reasoning in *Luurtsema*, even *he* never goes so far as to suggest that the procedural default rule should be replaced by an entirely different standard.[1] It is thus improper for the majority to consider the issue in the present case without the

[1] The petitioner makes this relatively brief argument in the middle of his twenty-one page discussion of the procedural default rule and the conclusion of the habeas court and the Appellate Court that the petitioner had demonstrated the good cause and actual prejudice required under the rule to bar a procedural default.

input of the parties who appealed to this court.[2] See,

[2] The majority describes the parties' failure to raise such a claim as "beside the point." Footnote 4 of the majority opinion. I strongly disagree with this cavalier dismissal of such an obvious and important omission. If the majority wishes to address whether the procedural default rule should be replaced by a different standard in the context of a *Salamon* claim, it must do so by following the court's routine practice of ordering the parties to file supplemental briefs on the issue, as we have done when reexamining the standard of review for resolving habeas claims alleging ineffective assistance of counsel; see, e.g., *Small* v. *Commissioner of Correction*, 286 Conn. 707, 715 n.5, 946 A.2d 1203 (2008) (ordering supplemental briefing on issue of appropriate standard of review in habeas proceedings for claims of ineffective assistance of counsel premised on failure of trial and appellate counsel to raise, at trial and on direct appeal, respectively, issue of lack of instruction on essential element of crime charged), cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008); *Ghant* v. *Commissioner of Correction*, 255 Conn. 1, 11 n.7, 761 A.2d 740 (2000) (ordering supplemental briefing on standard to be applied in assessing ineffective assistance of counsel claim); and in numerous other cases involving a wide variety of issues. See, e.g., *In re Shane M.*, 318 Conn. 569, 587 and n.16, 122 A.3d 1247 (2015) (ordering supplemental briefing to consider appropriate standard of review of trial court's finding that parent has failed to achieve sufficient rehabilitation); *State* v. *Kalphat*, 285 Conn. 367, 374 and n.11, 939 A.2d 1165 (2008) (ordering supplemental briefing concerning standing of defendant to challenge legality of search); *Brown* v. *Soh*, 280 Conn. 494, 500, 909 A.2d 43 (2006) (ordering supplemental briefing on impact of prior decision on exculpatory contracts signed by public users of commercial recreational services); *State* v. *DeCaro*, 280 Conn. 456, 468–69, 908 A.2d 1063 (2006) (ordering supplemental briefing regarding whether, in light of trial court's finding regarding compliance with subpoena, judgment should be affirmed); *State* v. *Kirby*, 280 Conn. 361, 387, 908 A.2d 506 (2006) (ordering supplemental briefing on whether certain statements properly admitted at trial); *Dark-Eyes* v. *Commissioner of Revenue Services*, 276 Conn. 559, 568 n.9, 887 A.2d 848 (ordering supplemental briefing on impact of United States Supreme Court decision involving city's assessment of property taxes against Indian tribe), cert. denied, 549 U.S. 815, 127 S. Ct. 347, 166 L. Ed. 2d 26 (2006); *Almada* v. *Wausau Business Ins. Co.*, 274 Conn. 449, 454–55, 876 A.2d 535 (2005) (ordering supplemental briefing on impact of prior decision on claim of tortious processing of workers' compensation claim); *Location Realty, Inc.* v. *General Financial Services, Inc.*, 273 Conn. 766, 771, 873 A.2d 163 (2005) (ordering supplemental briefing on applicability of particular statute to issue on appeal); *Bloom* v. *Gershon*, 271 Conn. 96, 105–106, 856 A.2d 335 (2004) (ordering supplemental briefing on impact of prior decision on whether Claims Commissioner had authority to permit apportionment complaint against state); *Nussbaum* v. *Kimberly Timbers, Ltd.*, 271 Conn. 65, 70, 856 A.2d 364 (2004) (ordering supplemental briefing on whether

e.g., *Sabrowski* v. *Sabrowski*, 282 Conn. 556, 560, 923 A.2d 686 (2007) (reviewing court limited to resolving claims raised by parties); *Ghant* v. *Commissioner of Correction*, 255 Conn. 1, 17, 761 A.2d 740 (2000) ("[i]t is not appropriate to engage in a level of review that is not requested" [internal quotation marks omitted]).

II

Notwithstanding this significant threshold problem, even if the parties had raised and briefed the issue, I do not agree with the majority's reliance on the reasoning in *Luurtsema* to abandon application of the procedural default rule when petitioners in habeas cases bring *Salamon* claims. The majority concludes that *Luurtsema* "effectively resolved the procedural default question such that the doctrine does not apply to [the petitioner's] *Salamon* claim." In the majority's view, *Luurtsema* determined, as a matter of state common law, that policy considerations weigh in favor of retroactive application of *Salamon* to collateral attacks on

enforceability of arbitration provision in contract is question to be decided in first instance by arbitrator); *Pikulski* v. *Waterbury Hospital Health Center*, 269 Conn. 1, 6 n.3, 848 A.2d 373 (2004) (ordering supplemental briefing on applicability of recent decision to issue raised on appeal); *Mandell* v. *Gavin*, 262 Conn. 659, 662 n.3, 816 A.2d 619 (2003) (ordering supplemental briefing on meaning of statutory term); *Cox Cable Advisory Council* v. *Dept. of Public Utility Control*, 259 Conn. 56, 62 n.8, 788 A.2d 29 (ordering supplemental briefing on whether federal legislation preempted action of advisory council to local cable television company), cert. denied, 537 U.S. 819, 123 S. Ct. 95, 154 L. Ed. 2d 25 (2002); *Darien* v. *Estate of D'Addario*, 258 Conn. 663, 670, 784 A.2d 337 (2001) (ordering supplemental briefing on meaning of statutory terms and relationship of certain statutes to one another); *Quarry Knoll II Corp.* v. *Planning & Zoning Commission*, 256 Conn. 674, 699–700, 780 A.2d 1 (2001) (ordering supplemental briefing on whether statutory amendment should be retroactively applied); *Oxford Tire Supply, Inc.* v. *Commissioner of Revenue Services*, 253 Conn. 683, 689, 755 A.2d 850 (2000) (ordering supplemental briefing on whether statutory amendment should be retroactively applied); *State* v. *Hart*, 221 Conn. 595, 607–608 n.10, 605 A.2d 1366 (1992) (ordering supplemental briefing on whether, after defendant has raised issue of drug dependency, state or defendant has burden of proof under statutory scheme and what standard applies).

judgments rendered final before *Salamon* was decided; see *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 766–67 (plurality opinion). Accordingly, application of the procedural default rule to protect the finality of judgments would be inconsistent with the reasoning in *Luurtsema* that "the interests of finality must give way to the demands of liberty and a proper respect for the intent of the legislative branch." Id., 766 (plurality opinion). In further support of this conclusion, the majority adds that *Luurtsema* failed to explicitly consider procedural default as a limitation on its decision. In my view, however, the majority misunderstands *Luurtsema* and its potential effect, if any, on the disposition of *Salamon* claims in habeas proceedings.

I begin by noting that the analysis in *Luurtsema* on which the majority relies was endorsed by a plurality of three panel members, with one other member of the panel concurring only in the judgment and two other members concurring only in the result. As a consequence, the plurality's analysis in *Luurtsema* does not govern in the present case because it does not reflect the decision of a majority of the panel members.

To better understand the precedential value of *Luurtsema*, I briefly review the opinions in that case. Initially, the habeas court reserved two questions for resolution by this court: "(1) whether [this court's decisions in] *Salamon* and [*State* v. *Sanseverino*, 287 Conn. 608, 949 A.2d 1156 (2008), overruled in part by *State* v. *DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008), and modified in part after reconsideration en banc by *State* v. *Sanseverino*, 291 Conn. 574, 969 A.2d 710 (2009)] apply retroactively in habeas corpus proceedings; and (2) whether those cases apply in the petitioner's case in particular." *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 743 (plurality opinion). All six members of the panel in *Luurtsema* agreed that both questions should be answered in the affirmative. Different panel members,

however, relied on different rationales in reaching that conclusion.

With respect to the first question, a plurality of three justices opted not to characterize the *Salamon* decision as a clarification of the kidnapping statute that should be given full retroactive effect under a federal due process analysis. Id., 751. The plurality instead chose to decide the retroactivity question under state common law, and, therefore, adopted "a general presumption in favor of full retroactivity for judicial decisions that narrow the scope of liability of a criminal statute. That presumption, however, would not necessarily require that relief be granted in cases where continued incarceration would not represent a gross miscarriage of justice, such as where it is clear that the legislature did intend to criminalize the conduct at issue, if perhaps not under the precise label charged. In situations where the criminal justice system has relied on a prior interpretation of the law so that providing retroactive relief would give the petitioner an undeserved windfall, the traditional rationales underlying the writ of habeas corpus [also] may not favor full retroactivity." Id., 764. The plurality emphasized that, "in the *Salamon* context in particular, any exceptions to the general presumption in favor of full retroactivity are likely to be few and far between." Id. The plurality then rejected each of the state's five policy arguments for adopting a per se rule against retroactive relief or for denying relief to the petitioner, Peter Luurtsema. Id., 765–72. With respect to the second reserved question, the plurality determined that this court's interpretation of the kidnapping statutes in *Salamon* should apply retroactively to Luurtsema because his case did not fall within any exception to the rule discussed therein and there appeared to be no evidence that Luurtsema intended to restrain the victim more than was necessary to conduct the underlying sexual assault. Id., 773–74.

In her concurrence, which no other justice joined, Justice Katz concluded, unlike the plurality, that the *Salamon* decision represented a clarification of the kidnapping statute that should be given full retroactive effect under federal due process law. See id., 775. Although she agreed with the plurality's explanation as to why the court should reject the state's general policy arguments for adopting a per se rule against retroactivity and the state's arguments against affording relief to Luurtsema; id., 791; she disagreed with the plurality's decision to permit exceptions to the rule of retroactivity in order to, as the plurality explained, "guard against certain fringe cases . . . ." Id. She explained that the plurality had crafted "a novel rule of retroactivity under our common-law authority," and that, "even if it were necessary to decide [the] case under our common-law authority, we should adopt a per se rule that decisions narrowing the interpretation of criminal statutes apply retroactively." Id., 775. Justice Katz further criticized the plurality's approach as "unclear" and discussed various hypothetical situations in which questions might arise regarding the retroactivity of decisions narrowing the interpretation of criminal statutes. Id., 793. Justice Katz thus concurred only in the judgment. Id., 797.

In Justice Palmer's separate concurrence, he expressed "agree[ment] with much of the plurality opinion and concur[red] in the result . . . ." Id. He also explained, however, that he did not believe the court should decide the question of whether to adopt a per se rule in favor of full retroactivity under our common law, observing that the court "need not resolve the issue to decide the . . . case because, as the plurality also conclude[d], [Luurtsema was] entitled to full retroactivity regardless of whether we adopt[ed] such a rule." Id.

Justice McLachlan also issued a separate opinion in which he "reluctantly" concurred in the result. Id., 798. He explained that he would have "prefer[red] to follow

our long-standing principle of finality of judgments and would deny [Luurtsema] the relief that he [sought], [but he was] compelled to follow the precedent established by *Salamon* . . . .'' Id., 799.

This court has recognized that, ''[w]hen a fragmented [c]ourt decides a case and no single rationale explaining the result enjoys the assent of [a majority of the] [j]ustices, the holding of the [c]ourt may be viewed as the position taken by those [m]embers who concurred in the judgments on the narrowest grounds . . . .'' (Internal quotation marks omitted.) *State* v. *Ross*, 272 Conn. 577, 604 n.13, 863 A.2d 654 (2005), quoting *Marks* v. *United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). In *Luurtsema*, Justice Katz was the only concurring panel member who explicitly adopted any part of the plurality's reasoning. As previously discussed, she agreed with the plurality's rationale for rejecting the state's general arguments for a per se rule against retroactivity; *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 791; but she did not agree with the plurality's ''novel rule of retroactivity under our common-law authority . . . .'' Id., 775. She instead argued for a per se rule in favor of full retroactivity under a federal due process analysis. See id., 791. Justice Palmer agreed with ''much of the plurality opinion''; id., 797; but did not distinguish those parts with which he agreed from those with which he disagreed. See id., 797–98. Justice McLachlan did not agree with any part of the plurality's reasoning but merely stated that he felt ''compelled to follow the precedent established by *Salamon* . . . .'' Id., 799. Accordingly, it does not appear that any of the three concurring justices explicitly agreed with the plurality's decision to adopt a ''general presumption in favor of full retroactivity'' or with its description of the scope of, or exceptions to, this general presumption. Id., 764. I thus believe that the majority's assertion that the plurality's reasoning in

Luurtsema "*compels the conclusion* that challenges to kidnapping instructions in criminal proceedings rendered final before *Salamon* are not subject to the procedural default rule"; (emphasis added); is legally unsupportable.[3] The only parts of the plurality opinion that appear to have any precedential value are the court's affirmative answers to the reserved questions of whether *Salamon* and *Sanseverino* apply retroactively in habeas corpus proceedings and to Luurtsema,

[3] The majority states that the plurality opinion in *Luurtsema* has precedential value because Justice Katz "agree[d] with the plurality's thoughtful explanation as to why we should reject the state's call to adopt a per se rule against retroactivity and its equally persuasive rejection of the state's arguments against affording relief to [Luurtsema]," her "sole disagreement [being] with the [plurality's] resolution of [the retroactivity] issue . . . [and] its recognition of the possibility of unusual circumstances in which retroactivity would not apply." (Internal quotation marks omitted.) Footnote 7 of the majority opinion. The majority, however, misses the point that a majority of the panel members in *Luurtsema* failed to reach agreement on the crucial issue of how the retroactivity decision of the court should be applied. As previously discussed, Justice Katz supported a per se rule in favor of full retroactivity; *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 791; the plurality supported a general presumption in favor of retroactivity subject to certain qualifications that Justice Katz deemed unworkable; id., 764 (plurality opinion); see id., 791 (*Katz*, *J.*, concurring); Justice Palmer expressed his hesitation to support a per se rule in favor of full retroactivity at that time; see id., 797–98; and Justice McLachlan concurred in the judgment with little explanation. See id., 798–99. Given these differing views, it cannot be said that *Luurtsema* has any precedential value with respect to the critical question before this court of the standard that should be applied when considering the retroactive application of *Salamon* in a habeas proceeding. The fact that Justice Katz may have agreed with the plurality's explanation as to why it rejected the state's policy arguments in favor of a per se rule against retroactivity simply does not relate to this question. Moreover, even if it did, our well established law provides that the holding of a fragmented court "may be viewed [only] as the position taken by those [m]embers who concurred in the judgments on the *narrowest* grounds . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Ross*, supra, 272 Conn. 604 n.13. Accordingly, the majority cannot view Justice Katz' concurring opinion, together with the opinion of the plurality, as supporting the conclusion that the procedural default rule does not apply to *Salamon* claims because Justice Katz had the *broadest* view of retroactivity, not the narrowest, which means that the plurality opinion in *Luurtsema* has no legal effect, contrary to what the majority would like to believe.

in particular, because those are the narrowest grounds on which a majority of the panel clearly agreed.

In addition to the fact that the plurality's reasoning in *Luurtsema* has no precedential value, procedural default was not addressed by any of the panel members, most likely because Luurtsema's counsel had the foresight to ask the trial court for a *Salamon*-type instruction eight years before *Salamon* was decided. Id., 774 (plurality opinion). Accordingly, in *Luurtsema*, the respondent did not raise a procedural default defense, and that case provides no guidance as to the applicability of the procedural default rule when a petitioner who has not requested a *Salamon* instruction at trial or raised the issue on direct appeal makes a *Salamon* claim in a subsequent habeas proceeding.

Moreover, I am not the first to note the lack of guidance in *Luurtsema* as to the applicability of procedural default to a *Salamon* claim. In *Smith* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. TSR-CV-08-4002747-S (September 13, 2011), a habeas case decided only eight months following the publication of *Luurtsema*, the court observed that the issue of procedural default was ''absent and therefore never discussed by the Supreme Court'' in *Luurtsema* and that this court ''never had occasion in [*Luurtsema*] to consider the effect of procedural default with respect to the retroactive application of *Salamon*.'' The court in *Smith* thus considered the respondent's affirmative defense of procedural default in that case and determined that the petitioner, Lawrence R. Smith, had established the good cause and actual prejudice required to overcome the default. Id. Thereafter, the respondent routinely raised the affirmative defense of procedural default when habeas petitioners sought a new trial because of the trial court's omission of a *Salamon* instruction, and petitioners never challenged the propriety of the defense, opting instead to argue that their

claims had not been barred by the procedural default rule. See *Hinds* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. TSR-CV-09-4003234-S (August 21, 2012), aff'd sub nom. *Hinds* v. *Commissioner of Correction*, 151 Conn. App. 837, 97 A.3d 986, cert. granted, 314 Conn. 928, 928–29, 101 A.3d 273 (2014); *Epps* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. TSR-CV-06-4001167-S (November 7, 2012), aff'd sub nom. *Epps* v. *Commissioner of Correction*, 153 Conn. App. 729, 104 A.3d 760 (2014); *Barile* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. TSR-CV-10-4003798-S (August 13, 2013); *Farmer* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. TSR-CV-12-4004510-S (May 8, 2014); *Wilcox* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. TSR-CV-11-4004205-S (September 17, 2014), rev'd sub nom. *Wilcox* v. *Commissioner of Correction*, 162 Conn. App. 730, 129 A.3d 796 (2016); *Davis* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. TSR-CV-11-4004289-S (October 6, 2014); *Robles* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. TSR-CV-12-4004528-S (December 16, 2014); *Nogueira* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. TSR-CV-14-4006033-S (June 10, 2015). Indeed, in one recent case in which the habeas court noted that the respondent had not raised procedural default as an affirmative defense, the court suggested that such a defense would have been appropriate. See *Betancourt* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. TSR-CV-12-4004762-S (January 12, 2016) ("[The] court is of the opinion that this claim is susceptible to the special defense of procedural default if raised by the respondent. However, this was not the case."). Similarly, when three of the foregoing habeas cases, including the present case, were appealed to the Appellate Court, that court considered the habeas court's

ruling with respect to the respondent's procedural default defense in each case without hesitation. See *Wilcox* v. *Commissioner of Correction*, supra, 739, 746, 749–50 (reversing judgment of habeas court, which had concluded that petitioner's claim was not procedurally defaulted, on ground that petitioner had failed to meet heavy burden of demonstrating actual prejudice due to absence of *Salamon* instruction); *Epps* v. *Commissioner of Correction*, supra, 736, 738, 742 (affirming judgment of habeas court, which had concluded that petitioner's claim was not procedurally defaulted, on ground that petitioner had established good cause and actual prejudice due to absence of *Salamon* instruction); *Hinds* v. *Commissioner of Correction*, supra, 855–60 (affirming judgment of habeas court granting habeas petition in part and concluding that petitioner had demonstrated good cause and actual prejudice due to absence of *Salamon* instruction). It thus has been universally understood by multiple petitioners, the respondent, every habeas court that has considered the issue, and the Appellate Court following *Luurtsema* that procedural default is an appropriate defense to a *Salamon* claim.

III

Because procedural default was never addressed in *Luurtsema*, it was left for future courts to decide how the retroactivity decision should be applied when habeas petitioners seek new trials because of the omission of a *Salamon* instruction. I freely acknowledge at the outset that, in my view, this court's decisions in *Salamon* and *Sanseverino* should not be applied retroactively. Thus, if I had been a panel member in *Luurtsema*, I would have answered the first reserved question in the negative and the second reserved question by limiting the application of *Salamon* and *Sanseverino* to the petitioner in *Luurtsema*. In fact, I strongly favor reconsideration of the decision in *Luurtsema* for the

five policy reasons rejected by the plurality and Justice Katz in their respective opinions. These reasons include "(1) the fact that law enforcement relied on the old interpretation of the kidnapping statutes while trying the petitioner; (2) the fact that the retroactive application of *Salamon* has no deterrent value or remedial purpose; (3) the fear that our courts will be 'flooded' with habeas petitions from other inmates convicted under [the kidnapping statutes]; (4) the difficulty of retrying such cases where significant time has elapsed since conviction; and . . . (5) the concern that victims will be retraumatized by again having to testify and endure another round of judicial proceedings." *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 765 (plurality opinion). Of particular concern to me is that retroactive application of *Salamon* and *Sanseverino* will have no deterrent value, will make the retrial of cases that originally were tried up to three decades ago difficult to replicate, and may force victims who have recovered in part from the original crime and the first trial to reexperience their former pain and suffering.

Absent reconsideration by this court of the retroactivity issue, I would limit retroactive application of *Salamon* and *Sanseverino* to cases tried before *Luurtsema* in which a defendant, unlike the petitioner in the present case, either sought a *Salamon*-type instruction at trial, as counsel did in Luurtsema's case; *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 774 (plurality opinion); or raised a claim on direct appeal relating to the omission of such an instruction, as the defendant did in *State* v. *Hampton*, 293 Conn. 435, 455, 978 A.2d 1089 (2009), and Luurtsema also did in his direct appeal. See *State* v. *Luurtsema*, 262 Conn. 179, 200, 811 A.2d 223 (2002). I take this position because a criminal defendant who is convicted under the law in effect at the time he committed the crime cannot be

said to suffer any harm from this limited application of *Salamon* and *Sanseverino*, having been put on notice of the consequences of his conduct. To the extent petitioners raise *Salamon* claims for the first time in habeas proceedings, however, I believe it is absolutely necessary to apply the procedural default rule when determining whether these claims are reviewable out of respect for the consistency of our procedural default law and for the principle of the finality of judgments.

In rejecting a per se rule against retroactivity, the court in *Luurtsema* left open several potential options for reviewing such claims, there being no majority in favor of any particular approach. Among these options are (1) a per se rule in favor of full retroactivity, as advocated by Justice Katz; id., 791; (2) a general presumption in favor of full retroactivity subject to a few limited exceptions, as advocated by the plurality; see id., 764; or (3) an approach that allows for the limited retroactivity of *Salamon* and *Sanseverino* under an appropriate standard of review.

The majority in the present case appears to reject the first two options in favor of the third option of limited retroactivity, but under a newly created and simplified standard that requires a reviewing court to consider whether omission of the instruction was "not harmless beyond a reasonable doubt." Like the majority, I also reject the first two options. I nonetheless disagree with the majority's decision to create an entirely new standard because it represents a significant and unjustifiable departure from Connecticut's well established procedural default rule, which is the standard that is generally applied by reviewing courts in these circumstances.

The procedural default rule provides that the petitioner in a habeas proceeding "must demonstrate good cause for his failure to raise a claim at trial or on direct

appeal and actual prejudice resulting from the impropriety claimed in the habeas petition." (Emphasis omitted.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 567, 941 A.2d 248 (2008). Thus, to the extent a petitioner does not seek or object to the lack of a *Salamon* instruction at trial or raise the issue on direct appeal, his claim is subject to procedural default unless he is able to demonstrate good cause and actual prejudice for his failure to do so. See, e.g., id. We have stated that "[t]he existence of cause for a procedural default must ordinarily turn on whether the [petitioner] can show that some objective factor external to the defense impeded counsel's efforts to comply with the [s]tate's procedural rule." (Internal quotation marks omitted.) Id., 568. For example, "a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . or . . . some interference by officials . . . would constitute cause under this standard." (Internal quotation marks omitted.) Id. With respect to actual prejudice, a petitioner must show "not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." (Emphasis omitted; internal quotation marks omitted.) *Murray* v. *Carrier*, 477 U.S. 478, 494, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986).

Although it may be difficult for habeas petitioners who raise *Salamon* claims to establish the good cause and actual prejudice required to overcome procedural default, it is not impossible. Moreover, application of the procedural default rule when reviewing *Salamon* claims in habeas proceedings is consistent with our traditional respect for the finality of judgments and the purpose and policies underlying the Great Writ. As the respondent notes, the writ of habeas corpus is intended as "a special and extraordinary writ." *McClain* v. *Robinson*, 189 Conn. 663, 668, 457 A.2d 1072 (1983). It is thus

available to address "fundamental unfairness or miscarriage of justice"; *Bunkley* v. *Commissioner of Correction*, 222 Conn. 444, 461, 610 A.2d 598 (1992), overruled in part on other grounds by *Small* v. *Commissioner of Correction*, 286 Conn. 707, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008); and "not merely an error which might entitle [the petitioner] to relief on appeal." (Internal quotation marks omitted.) *Safford* v. *Warden*, 223 Conn. 180, 190, 612 A.2d 1161 (1992). The habeas petitioner "does not come before the [c]ourt as one who is innocent, but on the contrary as one who has been convicted by due process of law . . . ." (Internal quotation marks omitted.) *Summerville* v. *Warden*, 229 Conn. 397, 423, 641 A.2d 1356 (1994). Accordingly, the petitioner "bears a heavy burden of proof" when attacking a presumptively valid conviction. *Lubesky* v. *Bronson*, 213 Conn. 97, 110, 566 A.2d 688 (1989). Lastly, because this court has recognized that a "habeas . . . petition may not be employed as a substitute for a direct appeal"; *Summerville* v. *Warden*, supra, 429; it makes no sense to abandon the cause and prejudice standard in favor of a harmless error standard generally applicable to a direct appeal in the relatively narrow category of cases involving *Salamon* claims.

I fully appreciate the liberty interests of petitioners who believe that they have been unfairly convicted and incarcerated for crimes they did not commit. The procedural default rule, however, provides an appropriate mechanism for reviewing *Salamon* claims because it does not forbid petitioners from bringing these claims. It simply requires petitioners to establish good cause and actual prejudice for failing to raise the claims at trial or on direct appeal. Furthermore, the cause and prejudice standard has been applied consistently in habeas proceedings without any apparent problem for more than two and one-half decades. See *Crawford* v.

Commissioner of Correction, 294 Conn. 165, 186, 982 A.2d 620 (2009) ("[s]ince *Jackson* [v. *Commissioner of Correction*, 227 Conn. 124, 629 A.2d 413 (1993)], this court consistently and broadly has applied the cause and prejudice standard to trial level and appellate level procedural defaults in habeas corpus petitions"). Thus, abandoning that standard in favor of a different standard for the specific purpose of deciding *Salamon* claims would create an incongruity in our law that would encourage other petitioners to seek exceptions to, and potentially undermine, the procedural default rule.

The majority's *only* justifications for abandoning the rule are derived from reasoning in *Luurtsema* that did not reflect the views of a majority of this court. The first justification is that "application of the procedural default bar to protect finality of judgments seems inconsistent with the reasoning in [*Luurtsema*] that 'the interests of finality must give way to the demands of liberty and a proper respect for the intent of the legislative branch.' " Text accompanying footnote 8 of the majority opinion, quoting *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 766 (plurality opinion). As previously discussed, however, the court in *Luurtsema* did not adopt a per se rule in favor of full retroactivity. The court merely held that *Salamon* and *Sanseverino* should apply retroactively in answering "yes" to both reserved questions because it was unable to achieve a majority consensus on the scope of its holding. Insofar as there was any agreement whatsoever on the issue, a plurality of three justices concluded that, although there should be a general presumption in favor of full retroactivity, "there are various situations in which to deny retroactive relief may be neither arbitrary nor unjust"; *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 760; and, accordingly, the court should

grant only limited exceptions to this general presumption. See id., 764.

The majority next observes that *Salamon* claims should not be subject to procedural default in habeas proceedings because *Luurtsema* did not cite procedural default as a limitation on its retroactivity ruling, which the majority claims would have been a "natural response to the state's floodgates argument . . . ." This justification is equally unpersuasive. The failure of the court in *Luurtsema* to consider the procedural default bar indicates nothing about its views on the subject because procedural default was not an issue in that case, Luurtsema's counsel having sought a *Salamon* type instruction at Luurtsema's trial. There is thus no support for the majority's speculation that the plurality's failure to discuss procedural default in *Luurtsema* meant that it did not view procedural default as a limitation on a habeas court's review of a *Salamon* claim. If that had been the case, the plurality surely would have expressed its view directly.

The majority's final justification for abandoning the procedural default rule is that "[t]he court [in *Luurtsema*] cited the harmless error standard for direct appeal . . . as the limiting mechanism for colorable but ultimately nonmeritorious claims." The plurality in *Luurtsema*, however, was not discussing the issue of whether harmless error or the procedural default rule should be applied to *Salamon* claims in habeas proceedings when it made a passing reference to the harmless error standard. Rather, the plurality was considering the state's policy argument that "a finding of retroactivity would flood the court system with habeas petitioners seeking to overturn kidnapping convictions . . . ." (Internal quotation marks omitted.) *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 769. In responding to that argument, the plurality cited *State* v. *Hampton*, supra, 293 Conn. 463–64, in which the

defendant had raised a *Salamon* claim in his direct appeal, to make the point that there was no evidence that the court would be flooded with petitioners seeking new trials, but, instead, "courts [would] be able to dispose summarily of many cases where it is sufficiently clear from the evidence presented at trial that the petitioner was guilty of kidnapping, as properly defined, [and] that any error arising from a failure to instruct the jury in accordance with the rule in *Salamon* was harmless." *Luurtsema* v. *Commissioner of Correction*, supra, 769–70. As a consequence, the plurality's reference to harmless error in this completely different context cannot be taken as its considered view regarding the standard that should be applied in reviewing *Salamon* claims in habeas proceedings.

IV

Applying the procedural default rule in the present case, I would conclude that the petitioner has not demonstrated good cause for or actual prejudice from his failure to seek a *Salamon*-type instruction at trial or to raise the issue on direct appeal. This court has stated that "[t]he cause and prejudice test is designed to prevent full review of issues in habeas . . . proceedings that counsel did not raise at trial or on appeal for reasons of tactics, inadvertence or ignorance . . . ." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 285 Conn. 567–68. In addition, "[b]ecause [c]ause and prejudice must be established conjunctively, [the court] may dispose of [the procedurally defaulted] claim if the petitioner fails to meet either prong." (Internal quotation marks omitted.) *Thorpe* v. *Commissioner of Correction*, 73 Conn. App. 773, 780, 809 A.2d 1126 (2002).

With respect to the first prong of the test, the petitioner alleged in his habeas pleadings that his claim of an improper jury instruction was not procedurally

defaulted because "futility provided him good cause for not previously raising the claim" and because he "lacked a reasonable basis for raising the . . . claim at either the trial or appellate level based on a long line of consistently adverse case law, beginning with *State* v. *Chetcuti*, 173 Conn. 165 [377 A.2d 263] (1977), which adopted the definition of kidnapping that the petitioner was convicted under." The petitioner also alleged that his "criminal trial and direct appeal were both decided before the *Salamon* decision in 2008, and he had no reason to believe that a challenge to the kidnapping instruction held any merit before that [decision]." Although the Appellate Court agreed with this reasoning; see *Hinds* v. *Commissioner of Correction*, supra, 151 Conn. App. 854–55; I do not.

As previously explained, "[t]he existence of cause for a procedural default must ordinarily turn on whether the [petitioner] can show that some objective factor external to the defense impeded counsel's efforts to comply with the [s]tate's procedural rule." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 285 Conn. 568. Thus, for example, "a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . or . . . some interference by officials . . . would constitute cause under this standard." (Internal quotation marks omitted.) Id.

Mindful of these principles, I do not believe that futility is a persuasive argument because Connecticut's decisional law interpreting the kidnapping statutes was not settled at the time of the petitioner's trial in 2002 and his direct appeal in 2004. In *Salamon*, this court observed that it "never [had] undertaken an extensive analysis of whether our kidnapping statutes warrant the broad construction that [the court had] given them." *State* v. *Salamon*, supra, 287 Conn. 524. Justice Katz likewise explained in her concurring opinion in *Luurt-*

sema that "*Salamon* rested on grounds that never had been considered by this court. Not only was it the first time that this court examined the intent element of the kidnapping statutes and the first time that we examined the circumstances surrounding the statutes' enactment, but it also was the first time that this court considered the meaning of the statute en banc. . . . Our reexamination was prompted in part by an issue expressly left open in our prior decisions regarding whether the existing interpretation could lead to bizarre, and therefore legislatively unintended, results." (Citation omitted.) *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 786 (*Katz*, *J.*, concurring). Accordingly, there was no reason for the petitioner to believe that it would have been futile to raise such a claim.

There also was a reasonable basis at the time of the petitioner's trial and direct appeal on which to challenge this court's interpretation of the kidnapping statutes because, even though the court had supported a broad interpretation of the statutes on a number of occasions over a lengthy period of time, defendants continued to challenge it, and at least two members of the court expressed contrary views in concurring and dissenting opinions issued around the time of the petitioner's trial and direct appeal in 2002 and 2004, respectively. See *State* v. *Luurtsema*, supra, 262 Conn. 208–209, 211 (*Katz*, *J.*, dissenting in part) (noting that, although kidnapping did not merge with sexual assault under Connecticut law, court had indicated that "there may be factual situations in which charging a defendant with kidnapping based upon the most minuscule movement would result in an absurd and unconscionable result," such as when kidnapping is "integral or incidental to the crime of rape" [internal quotation marks omitted]); *State* v. *Niemeyer*, 258 Conn. 510, 528, 529, 782 A.2d 658 (2001) (*McDonald*, *C. J.*, concurring) (expressing view that kidnapping statute should apply only "to true

kidnapping situations and not . . . to crimes . . . in which some confinement or asportation occurs as a subsidiary incident," and that evidence of restraint by defendant in that case supported kidnapping conviction because "[t]he jury could find that restraint was not merely incidental to the assault" [internal quotation marks omitted]); but see, e.g., *State* v. *Vass*, 191 Conn. 604, 614, 469 A.2d 767 (1983) (rejecting defendant's claim that court improperly denied request to charge jury that he could not be convicted on kidnapping count if jury found kidnapping was " 'integral or incidental' " to crime of rape because "[t]hat [was] not the law in this state"); *State* v. *Briggs*, 179 Conn. 328, 338, 426 A.2d 298 (1979) (rejecting defendant's request to adopt "merger doctrine" that would preclude prosecution for kidnapping that is " 'merely incidental' " to sexual assault), cert. denied, 447 U.S. 912, 100 S. Ct. 3000, 64 L. Ed. 2d 862 (1980); *State* v. *Chetcuti*, supra, 173 Conn. 168–69 (rejecting challenge to kidnapping statutes as unconstitutional on ground they can be applied to other criminal activity to which kidnapping is only incidental and subsidiary).[4]

Rather than view this history of continuing challenges to the court's interpretation of the kidnapping statutes as a reason to conclude that there was no reasonable basis to raise a *Salamon* claim or that such a claim would be futile, the petitioner should have understood

[4] In *Correia* v. *Rowland*, 263 Conn. 453, 820 A.2d 1009 (2003), this court also recognized the United States Supreme Court's holding in the context of procedural default that, "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable . . . procedures." (Internal quotation marks omitted.) Id., 463, quoting *Reed* v. *Ross*, 468 U.S. 1, 16, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984). Even if the present claim was a constitutional claim, however, the frequency with which prior defendants raised it or this court discussed it prior to or around the time of the trial and direct appeal of the petitioner in the present case clearly demonstrates that it is not a novel claim.

the dissenting opinion of Justice Katz in 2002 and the concurring opinion of Chief Justice McDonald in 2001, in which they questioned this court's broad interpretation of the kidnapping statutes, as an invitation to raise the claim again in the hope that the court would revisit the issue and alter its interpretation, as it did in *Salamon* only a few years later. As this court has previously stated, "[t]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 218 Conn. 422, quoting *Murray* v. *Carrier*, supra, 477 U.S. 486–87. A habeas petitioner also "may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 422. I would therefore conclude that the petitioner did not establish good cause for failing to seek a *Salamon* type instruction at trial or for failing to raise a claim on direct appeal regarding the trial court's failure to give such an instruction, as other defendants had done.

In light of this conclusion, there is no need to address whether the petitioner satisfied the second prong of the test required under the procedural default rule. I nonetheless agree with Justice Eveleigh's thorough analysis of this issue in his dissenting opinion and with his conclusion that the petitioner did not demonstrate that he suffered actual prejudice because of the trial court's failure to give the jury a *Salamon* instruction.

For all of the foregoing reasons, I respectfully dissent.

EVELEIGH, J., with whom ZARELLA and ROBINSON, Js., join, dissenting. I respectfully dissent. I respect-

fully disagree with the majority that the habeas court properly granted the petitioner, Walter Hinds, a new trial on the charge of kidnapping in the first degree. Specifically, I would conclude that the petitioner has not demonstrated actual prejudice because he has not shown that there is a substantial likelihood that the jury would not have found that the petitioner's restraint of the victim in the parking lot and subsequent removal to the woods constituted a crime of independent legal significance. I also agree with and join Justice Zarella's dissent. In particular, I agree with Justice Zarella that the respondent, the Commissioner of Correction, "did not raise a procedural default defense" in *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 774, 12 A.3d 817 (2008), and that, therefore, that case "provides no guidance as to the applicability of the procedural default rule when a petitioner who has not requested a *Salamon*[1] instruction at trial or raised the issue on direct appeal makes a *Salamon* claim in a subsequent habeas proceeding." (Footnote added.) I also agree with Justice Zarella that, because the petitioner himself does not "suggest that the procedural default rule should be replaced by an entirely different standard," it is "improper for the majority to consider [this] issue in the present case without the input of the parties who appealed to this court."

In *State* v. *Salamon*, 287 Conn. 509, 542, 949 A.2d 1092 (2008), this court concluded that "to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime." In *Salamon*, this court cautioned that its holding did "not represent a complete refutation of the principles established [in its] prior kidnapping jurisprudence." Id., 546. This court further observed that, in order to prove a

[1] *State* v. *Salamon*, 287 Conn. 509, 542, 949 A.2d 1092 (2008).

kidnapping, "the state is not required to establish any minimum period of confinement or degree of movement." Id. The court noted, however, that when the "confinement or movement is merely incidental to the commission of another crime . . . the confinement or movement must have exceeded that which was necessary to commit the other crime." Id.

This court explained as follows: "[I]n other words . . . the test . . . to determine whether [the] confinements or movements involved [were] such that kidnapping may also be charged and prosecuted when an offense separate from kidnapping has occurred asks whether the confinement, movement, or detention was merely incidental to the accompanying felony or whether it was significant enough, in and of itself, to warrant independent prosecution." (Internal quotation marks omitted.) Id., 547. "[A] defendant may be convicted of both kidnapping and another substantive crime if, at any time prior to, during or after the commission of that other crime, the victim is moved or confined in a way that has independent criminal significance, that is, the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime." Id.

In addition, the *Salamon* court listed a number of factors to be considered by the fact finder, in its determination of whether a separate crime existed, including the nature and duration of the victim's movement or confinement by a defendant, whether the movement or confinement occurred during the commission of a separate offense, whether the restraint was inherent in the nature of the separate offense, whether the restraint prevented the victim from summoning assistance, whether the restraint reduced the risk of detection, and whether the restraint created a significant danger or increased the victim's risk of harm independent of that posed by the separate offense. Id., 548.

On the basis of my review of these factors annunciated by this court in *Salamon*, I cannot conclude that, had the jury in the present case received the instruction in accordance with *Salamon*, there is a substantial likelihood that it would not have convicted the petitioner for kidnapping in the first degree. Accordingly, I would conclude that the petitioner has failed to meet his burden of establishing actual prejudice in this case. Therefore, I respectfully dissent.

I agree with the facts and procedural history set forth by the majority. I disagree with the majority that the petitioner's *Salamon* claim is not subject to the doctrine of procedural default. Instead, I agree with the Appellate Court that the procedural default rule should apply in the present case. "In essence, the procedural default doctrine holds that a claimant may not raise, in a collateral proceeding, claims that he could have made at trial or on direct appeal in the original proceeding and that if the state, in response, alleges that a claimant should be procedurally defaulted from now making the claim, the claimant bears the burden of demonstrating good cause for having failed to raise the claim directly, and he must show that he suffered actual prejudice as a result of this excusable failure." *Hinds* v. *Commissioner of Correction*, 151 Conn. App. 837, 852, 97 A.3d 986 (2014).

"In Connecticut, the procedural default rule set forth in [*Wainwright* v. *Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977)], was adopted and applied to state habeas corpus petitions in *Johnson* v. *Commissioner of Correction*, 218 Conn. 403, 409, 589 A.2d 1214 (1991). Since *Johnson*, a habeas petitioner is barred from asserting a claim in a habeas petition that could have been raised in the underlying criminal proceeding unless he is able to demonstrate good cause for having failed to raise such a claim and actual prejudice resulting from the failure to raise the claim in the crimi-

nal proceedings." *Hinds* v. *Commissioner of Correction*, supra, 151 Conn. App. 852–53.

The majority's conclusion that the petitioner's claim in the present case is not subject to the doctrine of procedural default effectively overrules this court's jurisprudence in *Johnson* and its progeny. I disagree with such an approach, particularly because no party has asked us to do so in the present case.

Accordingly, I would conclude that the petitioner in the present case "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." (Emphasis omitted.) *United States* v. *Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982). I further agree with the majority that "the petitioner would have to demonstrate that, with the proper instruction, there was a substantial likelihood that the jury would not have found the petitioner guilty of the crime of which he was convicted." (Internal quotation marks omitted.) Therefore, the outcome of this collateral proceeding depends on whether, if the jury had been given the charge now required by *Salamon*, there is a substantial likelihood that it would have convicted the petitioner of kidnapping in the first degree.

Turning to this question, we look to *Salamon* for guidance because, in *Salamon*, this court interpreted the intent element of the offense and found that "the proper inquiry for a jury evaluating a kidnapping charge is not whether the confinement or movement of the victim was minimal or incidental to another offense against the victim but, rather, whether it was accomplished with the requisite intent, that is, to prevent the victim's liberation." *State* v. *Salamon*, supra, 287 Conn. 532. The evidence need not establish that the restraint

was disconnected from the sexual assault. Instead, the evidence must show that the perpetrator intended to restrain the victim beyond what was necessary to commit the sexual assault. Id., 542.

In the present case, the state clearly presented sufficient evidence from which a reasonable jury could find that the petitioner intended "to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime." Id.; see also *State* v. *Ward*, 306 Conn. 718, 737–38, 51 A.3d 970 (2012) (sufficient evidence existed to establish requisite intent where defendant moved "the victim away from the kitchen door to the more secluded bedroom"). In this collateral proceeding, the only relevant evidence presented in the trial transcript shows that the petitioner's restraint of the sixteen year old victim was not "merely incidental to the accompanying felony [but was, rather] significant enough, in and of itself, to warrant independent prosecution." (Internal quotation marks omitted.) *State* v. *Salamon*, supra, 287 Conn. 547.

At the conclusion of the criminal trial, the jury credited the state's evidence and found the petitioner guilty of kidnapping beyond a reasonable doubt. That evidence showed that the petitioner identified the victim and then pursued her. When she noticed him—and realized the danger of the situation—the young woman panicked and began running. Unfortunately, the petitioner caught her. He then covered her mouth to stop her from screaming and summoning help. Indeed, he threatened to kill her if she renewed her screaming. Under these circumstances, it is more than reasonable to infer that the petitioner, "by engaging in this conduct, intended to frighten and subdue the victim to prevent her from struggling, trying to escape or summoning assistance." *State* v. *Ward*, supra, 306 Conn. 736. Next, while still in the parking lot, the petitioner knocked the victim to

the pavement.[2] He could have committed the intended sexual assault at this moment. Instead, he chose to drag her across the parking lot. I disagree with the majority's analysis that this was a "continuous, uninterrupted course of conduct . . . ." Once the petitioner knocked the victim to the ground and restrained her, he could have accomplished the sexual assault, but instead he dragged the victim into the woods and sexually assaulted her.

The majority states that "the essential fact is the movement of [the victim]." I agree insofar as an analysis of the sexual assault is necessary. In my view, the kidnapping had already occurred when the victim was restrained and knocked down in the parking lot. The majority further states that the victim's "asportation from the spot where she was grabbed to the site of the sexual assault, however, appears to have been a matter of yards and accomplished in a matter of seconds." In my view, however, this statement does not pay sufficient deference to one of the key elements of *Salamon* which is that "the state is not required to establish any minimum period of confinement or degree of movement." *State* v. *Salamon*, supra, 287 Conn. 546. Therefore, the exact distance or degree of confinement is not essential to my analysis. Furthermore, the distance is

[2] The majority asserts that "[i]t is difficult to imagine how a sexual assault can be perpetrated without grabbing the victim, and the feasibility of accomplishing a sexual assault while the victim and the perpetrator are standing in the middle of a parking lot seems rather remote." See footnote 13 of the majority opinion. The majority seems to be asserting that dragging the victim behind the large overgrown bush in the adjacent lot was incidental to the sexual assault because the assault could not be performed while they were both standing. The majority's position, however, ignores the evidence in the present case. The evidence in the present case established that the petitioner knocked the victim to the ground while they were both still in the parking lot. Therefore, the asportation of the victim to the dark area behind a large overgrown bush in an adjacent yard was not necessary or incidental to the assault.

not even among the factors this court identified as appropriate considerations in *Salamon*.[3]

In the present case, only after the petitioner had dragged the victim by her legs into the woods did he commence his sexual assault. It was at that point that the restraint "merely incidental to and necessary for" the commission of the sexual assault began. Id., 542. That restraint commenced when he "sat on her chest with his feet on the outside of her arms and instructed [the victim] to open her mouth." *State* v. *Hinds*, 86 Conn. App. 557, 559, 861 A.2d 1219 (2004), cert. denied, 273 Conn. 915, 871 A.2d 372 (2005). The petitioner could have sexually assaulted the victim in the parking lot when he first saw her and ultimately subdued her. When she became suspicious, she ran. The petitioner chased, restrained, and threatened her. He delayed the sexual assault. He then threw her to the ground. After she lay helpless on the pavement, he dragged her across the parking lot and into a secluded location. It was only after he had transported her to this place, hidden in a dark area behind a large overgrown bush, that he imposed the restraint incidental to and necessary to accomplish the assault.[4] In moving the victim to this

[3] The majority asserts that the victim's "asportation from the spot where she was grabbed to the site of the sexual assault, however, appears to have been a matter of yards and accomplished in a matter of seconds." The majority does not provide and I cannot find, a citation for either of these measurements. Indeed, the only evidence in the file establishes that the area where the victim was first apprehended and knocked down was a lit parking lot with multiple cars and that she was dragged up onto grass and around to a dark area in the rear of a large overgrown shrub. Although the majority relies on the fact that the shrub was located in the yard of an occupied home, there is no evidence that the petitioner had any idea that the home was occupied. There is no evidence that there were any lights on inside the home. The only evidence regarding the home is that the police officer interviewed the occupant who said he was home, but that he usually did not hear many outside noises because of noise caused by window air conditioners installed in his home and the motor from the factory next door.

[4] The majority asserts that "the dissenting justices ignore the 'incidental to' language in *Salamon*" and "give no meaningful effect to the requirement that the additional restraint or asportation have 'independent criminal signifi-

location, the petitioner increased the odds of the follow-

cance . . . .' " I disagree. In fact, it is the majority that does not appropriately examine the restraint in the present case in accordance with this court's instructions in *Salamon*. In *Salamon*, this court explained as follows: "Upon examination of the common law of kidnapping, the history and circumstances surrounding the promulgation of our current kidnapping statutes and the policy objectives animating those statutes, we now conclude the following: Our legislature, in replacing a single, broadly worded kidnapping provision with a gradated scheme that distinguishes kidnappings from unlawful restraints by the presence of an intent to prevent a victim's liberation, intended to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are merely incidental to and necessary for the commission of another crime against that victim. Stated otherwise, to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime." *State* v. *Salamon*, supra, 287 Conn. 542. Accordingly, my analysis of whether the restraint used by the petitioner against the victim in the present case was necessary for the commission of the sexual assault is exactly what *Salamon* instructs.

Furthermore, my analysis of the facts in the present case is consistent with this court's prior case law. See, e.g., *State* v. *Ward*, supra, 306 Conn. 738. In *Ward*, this court concluded that "the jury, which had been instructed on the applicable legal principles in accordance with *Salamon*, reasonably could have found that the defendant's confinement or movement of the victim was not merely incidental to the sexual assault." Id., 736. As grounds for our conclusion, we relied on the following facts: "The victim, who weighed a mere 100 pounds, testified that she could not escape because the defendant was twice her size and held her very tightly. By moving the victim away from the kitchen door, the defendant made the possibility of escape even more remote. From this testimony, it was reasonable for the jury to conclude that the defendant could have sexually assaulted the victim without threatening to kill her and without continuously holding the knife sharpening tool to her neck and, therefore, that the force used by the defendant exceeded the amount necessary to commit the sexual assault. It was also reasonable to infer that the defendant, by engaging in this conduct, intended to frighten and subdue the victim to prevent her from struggling, trying to escape or summoning assistance. In light of the evidence, the jury also reasonably could have concluded that the defendant increased the risk of harm to the victim by holding the pointed metal knife sharpening tool to her neck and by moving her away from the kitchen door, which not only made it less likely that she would escape, but also made it less likely that the crime would be detected. . . . Moreover, given the disparity in size and strength between the defendant and the victim, it was reasonable for the jury to conclude that the defendant did not need to move the victim from

ing: (1) that the victim would suffer injuries from being dragged across the hard surface of the pavement; (2) that any cries for help would not be heard by others; (3) that the victim would be further terrorized by the isolation; (4) that she would not be visible to any one passing by; and (5) that the petitioner could avoid detection. In other words, his movement of the victim "not only made it less likely that she would escape, [it] also made it less likely that the crime would be detected." *State* v. *Ward*, supra, 306 Conn. 737. Any other interpretation of the evidence, which has already been credited by the jury that found him guilty beyond a reasonable doubt, would result in granting the petitioner immunity for chasing the victim, halting her screams for help, threatening her life, knocking her to the ground, dragging her across a parking lot and inflicting injuries.

I further disagree with the majority's contention that "[t]here is no evidence that the risk of harm to [the victim] was made appreciably greater by the asportation in and of itself." Instead, I would conclude that a reasonable jury could infer that the very act of asportation of

the kitchen in order to sexually assault her. If he intended to move her to a location that was more comfortable for him, he could have quickly moved her to the bedroom and onto the bed. Instead, he moved her from the kitchen to the bedroom, and ultimately onto the floor. Finally, although the incident lasted ten to fifteen minutes, the sexual assault itself lasted only two minutes." (Citation omitted; footnote omitted.) Id., 736–37. Ultimately, we concluded that "although the defendant did not confine the victim for a lengthy period of time or move her a significant distance, the facts and circumstances of the present case, considered as a whole, support the jury's determination that the restraint of the victim was not merely incidental to or an inherent part of the sexual assault. Our decision is not based on any single fact, but on the cumulative effect of the evidence adduced at trial." (Footnote omitted.) Id., 738.

Similarly, in the present case, the petitioner did not need to threaten to kill her or drag her to the secluded dark area behind the overgrown bush in order to assault her. Accordingly, I would conclude that the facts establish that the petitioner restrained the victim beyond that which was necessary for and incidental to the sexual assault and that such restraint has independent criminal significance.

the victim constituted a risk of physical harm. In my view, no reasonable jury would find that the petitioner's actions merely were incidental or necessary to the commission of the sexual assault. On the basis of the evidence presented to the jury and the habeas court, the petitioner has failed to demonstrate that he suffered an "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." (Emphasis omitted.) *United States* v. *Frady*, supra, 456 U.S. 170.

Moreover, a consideration of the factors enumerated by this court in *Salamon*, which are important to determining whether the kidnapping constitutes a crime of independent legal significance, further supports my position. The amount of time that elapsed during the confinement and the length of asportation are not essential to the state's case. First, the nature and duration of the victim's confinement was distinct from the sexual assault. The confinement occurred in the parking lot, while the sexual assault took place in the woods. Second, the movement or confinement did not occur during the commission of the sexual assault, but prior thereto. The victim was pushed to the ground and restrained in the parking lot. Subsequently, she was dragged by her legs across the parking lot to the woods. Third, the restraint in the parking lot was not inherent to the sexual assault in the woods. A separate restraint occurred in the woods. Fourth, the restraint certainly prevented the victim from summoning assistance. Fifth, the restraint reduced the petitioner's risk of detection because he dragged the victim from the illuminated parking lot to the darkness of the woods. I do not agree with the majority that "[a]lthough that movement took [the victim] from the lit parking lot to the adjacent dark ground by a bush, an act that undoubtedly reduced the risk of detection in one regard, it also brought [the victim] in very close proximity to an occupied residence

in the lot adjacent to the parking lot." The essential point is that he had already restrained the victim in the parking lot. I would conclude that a reasonable jury could have found that the petitioner removed the victim from the lit parking lot to the darkness of the woods to avoid detection. Sixth, the restraint created a significant danger and increased the victim's risk of harm because the petitioner threatened to kill the victim and dragged her by the legs across the pavement of the parking lot. Indeed, the act of asportation itself certainly increased the risk of harm to the victim. A review of these factors demonstrates that the evidence in the present case established that the confinement and movement of the victim was not incidental to the assault, but was accomplished so as to prevent the victim's liberation.[5]

On the basis of the foregoing, I would conclude that all of the *Salamon* factors have been satisfied and that the petitioner has failed to prove that there is a substantial likelihood that the jury would not have found the petitioner guilty of kidnapping if it had been instructed pursuant to *Salamon*. Indeed, it is difficult to conceive that anyone could conclude that a separate offense, independent of the sexual assault, had not occurred when the petitioner restrained the victim in the parking lot. Certainly, if the sexual assault had never occurred, the petitioner's actions constituted the independent crime of kidnapping.

It is helpful to compare the present case to a few cases wherein this court determined that the defendant

[5] The majority asserts that "the dissenting justices do not recognize that the degree and nature of the restraint or asportation bears on the ultimate question—the perpetrator's *intent* in taking these actions." (Emphasis in original.) I disagree. *Salamon* instructs that a number of factors are appropriate in making the ultimate determination of whether the confinement or movement of the victim was accomplished with the intent to prevent the victim's liberation. See *State* v. *Salamon*, supra, 287 Conn. 542. Indeed, the majority ignores these factors.

was entitled to a new trial, under *Salamon*, because a reasonable jury could conclude that the conduct alleged to be a kidnapping could be incidental to either a sexual assault or an assault. First, in *Salamon*, wherein the defendant had grabbed the victim on the back of the neck, causing her to fall onto the steps at a train station, held her down by her hair, punched the victim in the mouth and attempted to thrust his fingers down her throat while she was screaming, this court reversed the kidnapping conviction and remanded for a new trial.[6] *State* v. *Salamon*, supra, 287 Conn. 513–15. Second, in *State* v. *Sanseverino*, 291 Conn. 574, 577–81, 969 A.2d 710 (2009), the court held that, upon reconsideration, the state could retry the defendant on the charge of kidnapping when the defendant had followed the victim to the back room of a bakery, grabbed her by her shoulders and pushed her against a wall and a metal shelving unit and then sexually assaulted her. Finally, in *State* v. *DeJesus*, 288 Conn. 418, 422–23, 953 A.2d 45 (2008), the defendant had sexually assaulted the victim on two separate occasions in two rooms of a supermarket. This court ordered a new trial so that the trial court could instruct the jury pursuant to *Salamon*. Id., 428. These cases are distinguishable from the present case because, unlike *Salamon*, *Sanseverino* and *DeJesus*, in the present case, there is a clearly defined separate incident unrelated to the ultimate sexual assault, and the petitioner removed the victim from the point of initial restraint in order to avoid detection. In both *DeJesus* and *Sanseverino*, the sexual assaults took place in a confined area and there was no evidence of any asportation. In *Salamon*, there was no movement

[6] In reaching this conclusion, however, this court explicitly stated that "a juror reasonably could find that the defendant's restraint of the victim was *not* merely incidental to his assault of the victim" noting, in particular, that "[t]he victim testified that the defendant, after accosting her, forcibly held her down for five minutes or more." (Emphasis added.) *State* v. *Salamon*, supra, 287 Conn. 549–50.

from the point of the initial attack. In all of those previous cases, the issue was solely whether the amount of restraint exercised was incidental to the assaults or whether the length of the restraint went beyond the time necessary to commit the assaults. In my view, the present case is not a close question, but rather represents a fact pattern in which no reasonable jury could conclude that the initial restraint was incidental to the sexual assault.

A review of cases from other jurisdictions in which courts have found that there is sufficient evidence to support a separate conviction for kidnapping bolsters my conclusion that the petitioner has failed to demonstrate that there is a reasonable probability that, but for the lack of a *Salamon* instruction, the result of the trial would have been different. See, e.g., *Yearty* v. *State*, 805 P.2d 987, 993 (Alaska App. 1991) (defendant's restraint of victim ''went significantly beyond that which was merely incidental to the sexual assault'' where defendant pulled victim off of bike path, "dragged him to a secluded area several hundred feet away, and there held him captive for almost an hour''); *State* v. *Gordon*, 161 Ariz. 308, 316, 778 P.2d 1204 (1989) (affirming consecutive sentences on kidnapping and sexual assault charges because "the manner in which [the defendant] committed the kidnapping added to the victim's suffering and increased her harm or risk of harm beyond that inherent in the ultimate crime''); *Lee* v. *State*, 326 Ark. 529, 531, 932 S.W.2d 756 (1996) (affirming convictions for rape and kidnapping convictions where defendant began to follow victim, then grabbed victim around her neck while she was on public sidewalk and "dragged her approximately one city block to the back of the school building where there was no light" where he raped her); *People* v. *Robertson*, 208 Cal. App. 4th 965, 986–97, 146 Cal. Rptr. 3d 66 (2012) (affirming defendant's kidnapping conviction where

"record contain[ed] substantial evidence from which a reasonable trier of fact could conclude beyond a reasonable doubt that the movement was more than merely incidental and increased the risk of harm above and beyond that inherent in the crime of rape"); *People* v. *Johnson*, 26 N.E.3d 586, 589–90 (Ill. App.) (affirming conviction for kidnapping where the defendant forcibly moved victim from sidewalk to vacant lot, then to area between two garages off of alley), appeal denied, 26 N.E.3d 586 (Ill. 2015). Although in these cases, the courts were considering whether there was sufficient evidence to support a separate kidnapping conviction, they demonstrate that the petitioner in the present case has not met his burden of proving actual prejudice.

In the present case, the petitioner has failed to demonstrate that he suffered actual prejudice as a result of the trial court's failure to instruct the jurors, pursuant to *State* v. *Salamon*, supra, 287 Conn. 546, that a restraint that is "merely incidental to the commission of another crime" could not serve as the basis of a kidnapping conviction. The petitioner cannot satisfy his burden of demonstrating that it is reasonably likely that the jury would have acquitted him of the kidnapping charge if given the *Salamon* instruction. Indeed, the petitioner has failed to prove any of the *Salamon* factors in his favor. Instead, an analysis of all of the factors demonstrates that the petitioner committed a crime of independent legal significance when, prior to sexually assaulting this sixteen year old, he also increased the risk of harm to her and then dragged her into a secluded location to avoid detection. In my view, the petitioner has not met his burden of demonstrating actual prejudice and, therefore, I would conclude that the judgment of the Appellate Court should be reversed and that the case should be remanded to that court with direction to reverse the judgment of the habeas court and to

remand the case to the habeas court with direction to deny the petition for a writ of habeas corpus.

Therefore, I respectfully dissent.

STATE OF CONNECTICUT *v.* ROBERT KING (SC 19339)

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson, Js.

Syllabus

The defendant, who was convicted of both intentional and reckless assault in the first degree in connection with an incident in which he stabbed the victim multiple times, appealed to the Appellate Court, claiming that his conviction of both charges was legally inconsistent and that he had been prosecuted based on a theory of guilt of which he did not have notice. The defendant became involved in an argument with N over an unpaid loan, and as the argument escalated, the defendant began waving a knife around in a small, enclosed area. When N attempted to wrest the knife from the defendant, the victim approached the defendant and intervened in the altercation, first verbally entreating the parties to separate and eventually attempting to physically separate the defendant and N. The defendant threw the victim against the wall and, when she attempted to move, he stabbed her rapidly several times. During the altercation, the victim suffered four stab wounds. After a jury returned its verdict finding the defendant guilty of both intentional and reckless assault, the defendant filed a motion for a new trial, arguing that the verdict was legally inconsistent. The trial court denied the motion, and the defendant appealed to the Appellate Court, which concluded that the evidence in the record did not permit the jury to find other than that the defendant had intentionally assaulted the victim as part of one continuous act. That court further concluded that the defendant had been deprived of his due process right to notice that he could be convicted of both charges because the state had tried the two assault charges in the disjunctive. The Appellate Court reversed the judgment of conviction and remanded the case for a new trial. On the granting of certification, the state appealed to this court. *Held*:

1. The Appellate Court improperly concluded that the defendant's conviction of both intentional and reckless assault was legally inconsistent, this court having concluded that the jury reasonably could have found that the defendant's conduct amounted to two separate acts that occurred in two separate phases, during which he first acted recklessly in swinging the knife at N when the victim was attempting to intervene and inflicting a stab wound to the victim at that time, and he then acted intentionally

when he threw the victim up against a wall and stabbed her an additional three times; moreover, even under the defendant's version that the assault occurred in one intentional episode, the defendant's conviction of both charges was not legally inconsistent, as the requisite mental states for the charges of intentional and reckless assault in the first degree are not mutually exclusive, the defendant's act of stabbing the victim was consistent with two different mental states that related to two different results, and the jury reasonably could have found that the defendant stabbed the victim intending to cause serious injury to her and that he also recklessly engaged in conduct that created a risk of the victim's death.

2. The Appellate Court improperly concluded that the defendant had been deprived of his due process right to notice that he could be convicted of both intentional and reckless assault in the first degree, the defendant having had constitutionally sufficient notice of the charges and the manner in which he was convicted having satisfied the requirements of due process; the substitute information contained a charge for each offense, the state introduced evidence at trial that described an intentional assault in which the defendant grew angry with the victim and stabbed her after she had intervened in his altercation with N as well as the defendant's written statement that described an accidental stabbing of the victim that occurred when he was flailing the knife at N, the state took no action at trial that would have induced the defendant to refrain from defending against all of the evidence that had been introduced or to believe that the evidence introduced related to only one charge and not to the other, the trial court's instructions to the jury regarding the two charges indicated that there were two separate charges and that the jury was to reach a verdict on both charges, and the prosecutor's closing argument to the jury that contained an isolated ambiguous statement could not serve as a basis to conclude that the defendant had no notice of the charges against him.

(*Three justices dissenting in one opinion*)

Argued November 10, 2015—officially released May 3, 2016

Procedural History

Substitute information charging the defendant with two counts of the crime of assault in the first degree, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Prescott*, *J.*; verdict of guilty; thereafter, the court denied the defendant's motion for a new trial and rendered judgment in accordance with the verdict, from which the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Keller* and *Bishop*, *Js.*, which reversed the trial court's

judgment and remanded the case for a new trial, and the state, on the granting of certification, appealed to this court. *Reversed; judgment directed.*

Jennifer F. Miller, deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, *Margaret Gaffney Radionovas* and *Jayne Kennedy*, senior assistant state's attorneys, and *Emily D. Trudeau*, deputy assistant state's attorney, for the appellant (state).

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

Opinion

ESPINOSA, J. In this certified appeal, we must determine whether a jury's verdict convicting the defendant, Robert King, of both intentional and reckless assault is inconsistent as a matter of law. The state appeals, following our grant of certification,[1] from the judgment of the Appellate Court reversing the conviction of the defendant of two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (1) and (3).[2] *State* v. *King*, 149 Conn. App. 361, 363, 87 A.3d 1192 (2014). The state argues that the Appellate Court improperly

[1] We granted the state's petition for certification, limited to the following two issues: (1) "Did the Appellate Court properly determine that the jury [verdict] finding the defendant guilty of both intentional and reckless assault [was] legally inconsistent and, therefore, had to be reversed?" and (2) "If the answer to the first question is in the affirmative, did the Appellate Court properly determine that a new trial was the correct remedy?" *State* v. *King*, 312 Conn. 917, 917–18, 94 A.3d 642 (2014). The state has not briefed the second certified issue and concedes that a new trial would be the proper remedy.

[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; or . . . (3) under circumstances evincing an extreme indifference to human life he recklessly engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person . . . ."

concluded that the verdict was legally inconsistent because (1) the jury could have found the defendant guilty of both intentional and reckless assault on the basis of the evidence before it, and (2) the mental states required by both offenses correspond to separate results and, therefore, are not mutually exclusive. Additionally, the state contends that the Appellate Court erroneously conflated the question of whether the defendant's due process right to notice had been violated with the question of whether the verdict was legally consistent. The proper, independent analysis of the due process issue, according to the state, demonstrates that the defendant's due process right to notice of the charges against him was not violated.[3] We agree with the state that the verdict against the defendant is consistent as a matter of law. We further conclude that the defendant had sufficient notice of the charges against him. Accordingly, we reverse the judgment of the Appellate Court.

The jury reasonably could have found the following facts. On December 18, 2010, Kyle Neri and Angela Papp went to visit the victim, Kristen Severino, at her residence in Waterbury. Neri and Papp had spent the day getting high on crack cocaine and continued to do so with the victim once they arrived at her residence. While the three were sitting in the victim's apartment, the defendant entered and began to argue with Neri over an unpaid $10 loan that Neri owed the defendant. As the argument between Neri and the defendant continued to escalate, the defendant went to the apartment's kitchen and returned, brandishing a steak knife. The defendant began waving the knife around and

[3] We address this question although we did not originally certify it. In its briefing and at oral argument before this court, the state requested that we address the Appellate Court's application of due process notice analysis in the present case given that the Appellate Court's decision rests heavily on the application of due process principles.

shouting at Neri and Papp as Neri attempted to physically wrest the knife from the defendant's control.

The victim then intervened in the altercation by attempting to persuade the defendant that Neri should not die over a $10 debt. When her verbal entreaties proved unsuccessful, the victim attempted to physically separate the combatants as the defendant continued to swing the knife at Neri. The defendant then threw the victim against a wall and waved the knife in front of her face. The victim attempted to move and the defendant rapidly stabbed her several times; he then fled the scene.

Neri and Papp left the apartment and Papp flagged down a patrolling police officer, who then entered the apartment with Papp and called an ambulance. Upon arriving at the hospital, the victim received emergency surgery on four stab wounds to her abdomen. The treating physician stated that had the victim not been brought to the hospital and received treatment, she likely would have bled to death from her wounds.

The defendant was arrested and charged in a substitute information with both intentional and reckless assault in the first degree. A jury trial was held in April, 2012, at which Neri, Papp, and the victim all testified. On the basis of the witnesses' testimony and a written statement by the defendant that was read into evidence, the jury found the defendant guilty of both charges. On April 23, 2012, the defendant filed a motion for a new trial pursuant to Practice Book § 42-53, arguing that the convictions were legally inconsistent. The trial court denied the defendant's motion, stating that the jury reasonably could have found that the victim was initially stabbed when the defendant was recklessly swinging the knife around and that the defendant then intentionally stabbed the victim when she intervened in the conflict between the defendant and Neri. The defendant appealed to the Appellate Court, arguing that his convic-

tions were legally inconsistent and prosecuted based on a theory of guilt of which he had never been notified. Id. The Appellate Court agreed with the defendant and reversed the judgment of conviction and remanded the case for a new trial. Id., 376. This certified appeal followed.

I

In the present case, the state argues that the Appellate Court erroneously concluded that the defendant's convictions for intentional and reckless assault were legally inconsistent. In its analysis, the Appellate Court reasoned that "[n]othing in the record" would have permitted the jury to find other than that the defendant intentionally assaulted the victim as part of "one continuous act, unbroken in time and character." Id., 374. As a fair reading of the record reveals that the jury could have credited the defendant's account that he accidentally stabbed the victim while flailing the knife at Neri and also credited the testimony of the other witnesses that the defendant intentionally stabbed the victim after she intervened, we agree with the state and conclude that the defendant's convictions are not legally inconsistent. Furthermore, even if the Appellate Court was correct that the record reflects that the state presented evidence that the attack was one continuous act; id.; our decision in *State* v. *Nash*, 316 Conn. 651, 114 A.3d 128 (2015), controls, and the defendant's convictions are not inconsistent as a matter of law.

Convictions are legally inconsistent when "a conviction of one offense requires a finding that negates an essential element of another offense of which the defendant has also been convicted." Id., 659. When confronted with such a claim we carefully examine the elements of both offenses. Id.; *State* v. *Hinton*, 227 Conn. 301, 313, 630 A.2d 593 (1993). In examining a claim of legal inconsistency, we must "closely examine

the record to determine whether there is any plausible theory under which the jury reasonably could have found the defendant guilty of both offenses." *State* v. *Nash*, supra, 316 Conn. 663. Additionally, "in determining whether two mental states are mutually exclusive, the court must consider each mental state as it relates to the particular result described by the statute." Id., 664. The question of whether two convictions are legally inconsistent is a question of law, over which we exercise plenary review. Id., 659.

In the present case, the parties describe the assault perpetrated by the defendant in two different ways. The defendant argues that under the evidence presented, the jury reasonably could have found that there was only one continuous intentional assault on the victim and that for the jury to have also found a reckless assault would be legally inconsistent. Conversely, the state argues that, under the same evidence, the jury reasonably could have found that the assault occurred in two phases, beginning first as a reckless assault and then evolving into an intentional assault. We conclude that under either the defendant's version or the state's version, the verdict is not legally inconsistent.

Our recent decision in *Nash* addressed substantially similar issues to those raised in the present case.[4] In *Nash*, the defendant, Kevin Nash, grew angry with his friend, Tyrell Knott, when Knott began to spread rumors about Nash's sexuality. Id., 655. In order to "teach . . . a lesson" to Knott, Nash drove to Knott's home, entered the backyard, and fired four or five shots from a handgun at the second story of Knott's house. Id. One of the bullets penetrated the wall of the house and struck Knott's sister in the left buttock. Id. She was transported

[4] The Appellate Court released its decision in the present case on April 8, 2014, and we therefore recognize that the Appellate Court did not have the advantage of relying on the reasoning of our decision in *Nash*, which was not decided until May 5, 2015.

to the hospital, successfully treated, and released. Id. Following his arrest, Nash was charged and convicted of, inter alia, the same offenses as the defendant in the present case: intentional assault in the first degree in violation of § 53a-59 (a) (1) and reckless assault in the first degree in violation of § 53a-59 (a) (3). Id., 656.

On appeal to this court, Nash argued that his convictions for both intentional and reckless assault in the first degree, based on the same conduct, were legally inconsistent. Id., 654. We disagreed and upheld Nash's convictions "because the two mental states required to commit the offenses relate to different results." Id., 666. We observed that the "jury could have found that [Nash] intended only to injure another person when he shot into [Tyrell's house] but that, in doing so, he recklessly created a risk of that person's death in light of the circumstances surrounding his firing of the gun into the dwelling." Id., 667. Given the evidence before it, the jury reasonably could have found that Nash possessed the requisite mental states to convict him of both intentional and reckless assault in the first degree. Id., 667–68. Thus, the crimes of reckless and intentional assault are not in and of themselves legally inconsistent.

We recognize that convictions are legally consistent if there is "any plausible theory" under which the jury reasonably could have found the defendant guilty of both of the offenses that the defendant claims are legally inconsistent. Id., 663. At trial in the present case, the jury heard two accounts of the assault. First, the defendant's written statement,[5] provided to a detective and introduced into evidence by the state without objection from the defense, described the stabbing as an accident that occurred when he was swinging the knife at Neri and the victim attempted to physically separate the combatants. In the defendant's account, he and Neri "got into

[5] The defendant chose not to testify at trial.

a tussle. [Neri] was trying to take the knife from me. I know it was getting rough. That was when [the victim] got into the middle of us. She was trying to break us up." While the victim was in between the defendant and Neri, the defendant began "swinging the knife at [Neri]. In the middle of that, [the victim] started screaming . . . . That's when I realized that she was hurt. At first, I ain't know what was wrong, but then I thought about it. That's when I knew that I had stabbed her." Thus, if the jury credited the defendant's statement, it could have found that the defendant's act of swinging a knife at Neri in close quarters while the victim was between them demonstrated "an extreme indifference to human life," and, that by doing so, the defendant "recklessly engage[d] in conduct which create[d] a risk of death to another person," as required by § 53a-59 (a) (3) for a conviction of reckless assault in the first degree.

Second, the testimony of Neri, Papp, and the victim portrayed the defendant as intentionally stabbing the victim after the victim interfered in the defendant's altercation with Neri. According to Neri, the victim injected herself into the argument, stated that "nobody's going to get stabbed over $10," and offered to pay the defendant the money herself. The defendant then put "the knife to her face and [told] her to shut the fuck up." After the victim attempted to move away, the defendant "stab[bed] her three times" on the "left side" of her "stomach area." Consistent with Neri's account, Papp testified that the defendant "started swinging the knife on [the victim]" and "stabbing her . . . over and over and over, just going into [the victim]." Likewise, the victim testified that she approached the defendant and told him "that nobody should die and I would get him the money, nobody needs to be killed tonight." The victim stated that the defendant then "threw me up against the wall and put the knife in my face and was

screaming at me . . . and yelling at me and calling [me] a bitch . . . .'' The victim testified that the defendant then ''stabbed me . . . [i]n my stomach right here, and three times over here on the side.'' The jury reasonably could have credited the combined testimony of the victim, Papp, and Neri to conclude that the defendant acted with ''intent to cause serious physical injury'' in violation of § 53a-59 (a) (1) when he stabbed the victim at least three times with a steak knife.

We therefore agree with the state that the jury reasonably could have found that the defendant's conduct amounted to two separate acts. As the defendant was charged with both reckless and intentional assault,[6] the jury could have found that the defendant was guilty of both crimes by stabbing the victim while recklessly swinging the knife at Neri and then intentionally stabbing the victim after she intervened and the defendant threw her against the wall. The state's exhibits 14 and 15 showed, and the Appellate Court noted, that the victim had *four* stab wounds, and as Neri testified that he only witnessed the defendant stab the victim *three* times, the jury could have attributed the fourth stab wound to the defendant's testimony describing the stabbing as an accident that occurred when the victim got in between the combatants. See *State* v. *King*, supra, 149 Conn. App. 364 n.2 (recognizing that photographic evidence at trial established that there were *four* stab wounds). Accordingly, the defendant's convictions are not legally inconsistent under the state's argument that the assault occurred in two reckless and intentional phases, respectively.

Additionally, we observe that under the defendant's version that the assault only occurred in one intentional episode, the convictions are not legally inconsistent,

[6] The specifics of how the defendant was charged and how the case was presented to the jury are discussed in greater detail in part II of this opinion.

as the requisite mental states for the two convictions are not mutually exclusive. As is clear from our recent decision, a defendant may be convicted of crimes that require differing mental states, so long as those states relate to different criminal results. *State* v. *Nash*, supra, 316 Conn. 668–69; cf. *State* v. *King*, 216 Conn. 585, 594, 583 A.2d 896 (1990). The present case is akin to our decision in *Nash*. Like Nash's act of firing multiple shots from a handgun into the second story of his friend's home, the jury reasonably could have found that when the defendant stabbed the victim, he intended to "cause serious injury to" her and that he also "recklessly engaged in conduct which [created]" a risk of the victim's death. See *State* v. *Nash*, supra, 666 n.15, 666–68. That is, the defendant's act of stabbing the victim is consistent with two different mental states, each related to two different results. Thus, even under the defendant's argument, the reasoning of *Nash* controls and the verdict returned by the jury is not legally inconsistent.[7]

II

We next determine whether the Appellate Court properly concluded that the defendant was deprived of his due process right to notice that he could be convicted under both of the charges brought against him. Although the Appellate Court somewhat overlaid its due process and consistency of the verdict analyses, its decision rested heavily on its determinations concerning the defendant's due process rights. *State* v. *King*, supra, 149 Conn. App. 375. We conclude, however, that the

[7] Conversely, our decision in *State* v. *King*, supra, 216 Conn. 585, is distinguishable from the present case on these very grounds. In *King*, the defendant was convicted of both attempt to commit murder and reckless assault after he ignited the cell of a fellow prisoner using an improvised incendiary device. Id., 586, 588. We held that the defendant's convictions could not stand, as the mental states for the intentional crime of attempt to commit murder and the crime of reckless assault were mutually exclusive because the defendant could not have both intentionally and recklessly lit the cell on fire. Id., 594–95.

defendant had constitutionally sufficient notice of the charges being brought against him.

The following procedural facts are necessary to resolve the question of whether the defendant had proper notice of the charges against him. Following his arrest, the defendant was charged in a two count substitute information with two crimes: assault in the first degree in violation of § 53a-59 (a) (1) and assault in the first degree in violation of § 53a-59 (a) (3). See footnote 2 of this opinion. At trial, the state did not present the evidence in a manner that related specifically to one charge or the other. After the state rested its case, the court discussed with the defendant his decision not to testify and indicated the possible sentences he could face if convicted. The court specifically noted to the defendant that he could be "convicted under both sub[-divisions]" and explained how that would affect his sentence. Prior to closing argument, the court informed the jury that "to the extent that what [an attorney] says about the law differs from what I say, you have to follow my legal instructions . . . if there's any discrepancy you've got to follow my instructions." During closing argument, the prosecutor stated to the jury: "You may be wondering why there are two charges. You have a variety of evidence to draw from and I don't know what you'll find credible. If you find [the defendant's] statement credible, he's saying he's waving the knife around, he's angry with [Neri], and [the victim] jumps in the middle, if you believe [the defendant's] statement you would look more to the assault one, reckless indifference."

Following closing argument, the court instructed the jury and informed it that it "must decide which testimony to believe and which testimony not to believe. You may believe all, none or any part of any witness' testimony." The court also reminded the jury that "arguments and statements by the attorneys in final argument

or during the course of the case are not evidence." The court then explained the charges against the defendant to the jury, noting that the defendant was "charged with two crimes." The court next explained the elements of each crime to the jury. Following the delivery of the jury charge, the court asked whether counsel had any objection to the charge. Neither counsel objected. At no point in the court's instructions did it suggest that the jury could not convict the defendant of both charges.

In considering the defendant's inconsistent verdict claim on appeal, the Appellate Court observed that "[i]n determining whether a verdict is legally and logically inconsistent . . . a reviewing court must also consider the way in which the state presented the case to the jury." *State* v. *King*, supra, 149 Conn. App. 371. Accordingly, the Appellate Court concluded that "[w]hile the charging document in the present matter did not articulate that the two counts of assault in the first degree were made in the disjunctive, our review of the record and transcripts confirms that the state presented the case in that manner." Id., 373. Relying on the prosecutor's closing argument and the manner in which the state presented its evidence, the Appellate Court determined that the defendant was deprived of his due process right to notice that both charges were being brought against him, and reversed the judgment of conviction and remanded the case for a new trial. Id., 375–76.

On appeal before this court, the state argues that the Appellate Court improperly applied the theory of the case analysis by intertwining it with its legal consistency of the verdict analysis. Accordingly, the state contends that when analyzed properly, the defendant had sufficient notice that he could be convicted of both charges and that the Appellate Court erred in concluding otherwise. In response, the defendant argues that the Appellate Court properly concluded that the state tried the

two assault charges in the disjunctive and that he was deprived of his due process right to notice that he could be convicted of both charges. We agree with the state.

As a preliminary matter, we observe that the Appellate Court indeed blended its due process analysis with its legal consistency of the verdict analysis rather than evaluating those two separate claims independently. Although both claims arise from the same underlying fundamental concern—namely, whether a defendant's convictions were arrived at fairly and legitimately—they are ultimately separate issues and reviewing courts should evaluate them as such. The Appellate Court framed its analysis in the following manner: "[I]n making our assessment of whether the jury's verdict in the matter violates the defendant's due process right because, given the manner in which he was prosecuted and the evidence in support of his culpability, he was convicted after an inconsistent verdict, we look first to the evidence and argument presented to the jury." Id., 373. Thus, the Appellate Court's statement of the analytic framework under which to evaluate claims of legal inconsistency appears to combine both our existing legal consistency analysis as outlined in *Nash* and part I of this opinion with the due process analysis we conduct when the state alters its theory of the case on appeal.

A determination of whether a defendant has received constitutionally sufficient notice of the charges to be brought against him at trial is guided by the following framework. A fundamental tenet of our due process jurisprudence is that "[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Cole* v. *Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948). Accordingly, the United States Supreme Court has explained that "[t]o uphold a conviction on a charge that was neither alleged in an indict-

ment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *Dunn* v. *United States*, 442 U.S. 100, 106, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979). Reviewing courts, therefore, cannot affirm a criminal conviction based on a theory of guilt that was never presented to the jury in the underlying trial. *Chiarella* v. *United States*, 445 U.S. 222, 236, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980).

Principles of due process do not allow the state, on appeal, to rely on a theory of the case that was never presented at trial. *State* v. *Carter*, 317 Conn. 845, 853–55, 120 A.3d 1229 (2015). Although we recognize that the finder of fact may consider all of the evidence properly before it, in order for us to uphold the state's theory of the case on appeal, that theory must have been "not merely before the jury due to an incidental reference, but as part of a coherent theory of guilt that, upon [review of] the principal stages of trial, can be characterized as having been presented in a focused or otherwise cognizable sense." (Internal quotation marks omitted.) *State* v. *Robert H.*, 273 Conn. 56, 83, 866 A.2d 1255 (2005). Essentially, the state may not "pursue one course of action at trial and later, on appeal, argue that a path [it] rejected should now be open to [it] . . . . To rule otherwise would permit trial by ambuscade." (Internal quotation marks omitted.) *State* v. *Scruggs*, 279 Conn. 698, 719, 905 A.2d 24 (2006). Accordingly, on appeal, the state may not construe evidence adduced at trial to support an entirely different theory of guilt than the one that the state argued at trial. See *State* v. *Fourtin*, 307 Conn. 186, 207–10, 209 n.18, 52 A.3d 674 (2012).

Whether a defendant has received constitutionally sufficient notice of the charges of which he was convicted may be determined by a review of the relevant

charging document, "the theory on which the case was tried and submitted to the jury," and the trial court's jury instructions regarding the charges. See, e.g., *Dunn* v. *United States*, supra, 442 U.S. 106. Upon our review of the substitute information, the state's evidence, and the trial court's jury instructions, we conclude that the defendant in the present case had notice of the charges being brought against him and that his due process rights were not thereby violated. Although the state prosecuted the case at times in a manner that was less than precise, we conclude that the state presented to the jury "in a focused or otherwise cognizable sense" that the defendant could be convicted of both charges and that such a theory was not a mere " 'incidental reference.' " *State* v. *Robert H.*, supra, 273 Conn. 83.

First, the substitute information charged the defendant with both reckless and intentional assault, and not one offense *or* the other. Our previous decisions have long recognized that the information serves to notify the defendant of the charges against which he must defend at trial. See *State* v. *James*, 247 Conn. 662, 679, 725 A.2d 316 (1999); *State* v. *Tanzella*, 226 Conn. 601, 608, 628 A.2d 973 (1993); *State* v. *Spigarolo*, 210 Conn. 359, 382, 556 A.2d 112, cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989); see also Practice Book § 36-13 ("[t]he information shall state for each count the official or customary citation of the statute, rule, regulation, or other provision of law which the defendant is alleged to have violated"). The substitute information in the present case contains two separate charges—one for each offense—and nothing in the charging document indicates that it was the state's intent to prosecute the charges in the alternative rather than to present both charges to the jury at trial.[8] Further-

[8] The dissent arrives at the unsupported conclusion that, although the substitute information contains both charges, both the substitute information and the jury instructions are "fairly open-ended" and, therefore, do not provide notice to the defendant. See footnote 9 of the dissenting opinion. The purpose of the information is to provide a defendant with notice of the

more, had the defendant been unclear about the charges presented in the substitute information, he could have moved for the state to file a bill of particulars pursuant to Practice Book § 41-20.

Second, nothing in the manner in which the state prosecuted the case encouraged the defendant to craft his defense in a certain way or to forsake defending against evidence he believed the state would not present. In that regard, the present case is readily distinguishable from our decision in *Scruggs* in which we determined that the due process right of the defendant was violated because the state influenced defense strategy by putting the defendant on notice of its theory of the case but later argued in support of the conviction based on a theory that it had not previously relied on and that the defendant was not on notice to defend against. *State* v. *Scruggs*, supra, 279 Conn. 718. In *Scruggs*, the defendant was charged with risk of injury to a child and, at trial, the state, in its arguments against the defendant's motion for a judgment of acquittal at the close of the state's case, asserted its theory that the living conditions in the defendant's home were a risk to *any* child, rather than to the victim in the particular case who suffered from serious mental and physical health issues. Id., 717–18. We concluded that the state's representation did not place the defendant on notice that she could be convicted if the state proved merely that the living conditions in her apartment presented a risk to the particularly fragile victim. We concluded, therefore, that the state could not argue to uphold the conviction on those grounds and, furthermore, that the statute the defendant had been convicted of violating was unconstitutionally vague as applied to her conduct. Id., 718–19.

charges against him and the jury instructions serve as a reflection of those charges. To discount their significance only because charging instruments and jury instructions follow a similar format in every case would dramatically and unnecessarily narrow the ken of our due process inquiry in this context.

Although the state in the present case did not present its evidence in a manner that specifically related to one charge or the other, after our review of the state's evidence as a whole it is clear that the state intended to try both charges in the substitute information.[9] As fully outlined in part I of this opinion, the state called Papp, Neri, and the victim as witnesses. The testimony of all three witnesses described—with some minor variations between the accounts—an intentional assault in which the defendant grew angry with the victim and intentionally stabbed her after she intervened in the defendant's conflict with Neri. Accordingly, this particular evidence supported the state's charge of intentional assault. In addition to the evidence describing an intentional assault, the state also introduced the defendant's written statement that described an accidental stabbing of the victim while the defendant was flailing the knife at Neri.[10] The content of the defendant's statement is clearly evidence supporting the charge of reckless assault and not intentional assault. Thus, the state introduced evidence to support both charges listed in the substitute information.

We agree with the state that the prosecutor's failure to specifically delineate the evidence between the

[9] As the dissent correctly observes, much of the case law concerning the theory of the case doctrine initially developed in the context of sufficiency of the evidence claims. See *State* v. *Robert H.*, supra, 273 Conn. 82–83. To be clear, the defendant in the present case does not claim that the evidence is insufficient to sustain his convictions, but rather that his convictions were legally inconsistent and that he was not on notice that he could be convicted of both charges. Throughout its analysis, the dissent appears at times to view the present case through the lens of a sufficiency of the evidence claim. This is evident in the dissent's hefty reliance on *State* v. *Carter*, supra, 317 Conn. 856, in which we resolved the defendant's claims on sufficiency grounds and not under the theory of the case doctrine.

[10] As the defendant did not testify at trial, the statement was read into evidence by Detective George Tirado of the Waterbury Police Department, who initially interviewed the defendant and took his statement following the defendant's arrest on unrelated drug charges.

charges is not equivalent to a prosecutor who does specify the evidence underlying a charge and then subsequently adopts a different evidentiary justification for that charge. Indeed, a jury may consider all evidence properly before it and, as we determined in part I of this opinion, the jury in the present case reasonably could have found that the defendant was guilty of both charges based on that evidence—regardless of how the state organized it. Furthermore, the state took no action at trial that would have induced the defendant to refrain from defending against all of the evidence that had been introduced or to believe that the evidence introduced related to only one charge and not to the other. As the defendant was charged in a two count substitute information, and the state introduced evidence on both of the charges and did not foreclose the defendant's reliance on that evidence in any manner, the defendant should have been alerted that he would have to defend against both charges.

Third, the court's jury instructions, as a reflection of the charging document, demonstrate that the defendant had notice of his potential to be convicted of both offenses. In delivering its instructions, the trial court informed the jury that the defendant was "charged with two crimes" and instructed the jury to determine "whether the accused is guilty or not guilty of each of the crimes charged in the information and whether your verdict is unanimous as to each charge." The trial court then explained the elements of both reckless and intentional assault to the jury. When the trial court asked both counsel if they had any comments or objections to the jury instructions as they were delivered, neither counsel objected.

Thus, the trial court's jury instructions regarding the two charges reaffirm their status in the substitute information as two separate and distinct charges, rather than charges in the alternative. In explaining the two charges

to the jury, the trial court never stated or implied that the two offenses were prosecuted in the alternative, and that the jury would have to make a decision between the charges if it were to find the defendant guilty.[11] Although the Appellate Court correctly recognized that the trial court never explicitly informed the jury that it could deliver a guilty verdict on both charges, it also never instructed the jury that it could find the defendant guilty only on one charge but not the other. *State* v. *King*, supra, 149 Conn. App. 366. Additionally, had either the state or the defendant disagreed with the trial court's instructions on the charges, counsel had the opportunity to object or to ask the court to clarify its instructions, yet they did not do so. The trial court's instructions did recognize, however, that there were two charges, and instructed the jury to reach a verdict on both charges. Thus, on the basis of the charges listed in the substitute information, the evidence introduced by the state at trial, and the trial court's jury instructions on the charges, the defendant had sufficient notice that he could be convicted of both intentional and reckless assault.

Finally, because the defendant, the Appellate Court, and the dissenting justices all rest their conclusions on the due process claim in part on the content of the prosecutor's closing argument, we briefly address the significance of closing argument in this context. See id., 373. In addition to the substitute information, the state's reliance on the evidence presented at trial, and the jury instructions, the state's closing argument is another factor that is relevant to reviewing courts when

[11] Although not reflected in the jury instructions, it was evidently the understanding of the trial court that the defendant was being prosecuted on both charges and could be convicted of both. While discussing with the defendant his decision not to testify, the trial court outlined the possible sentences the defendant was facing if convicted and informed the defendant what his potential sentence would be if convicted of both charges listed in the substitute information.

determining whether the state presented a particular theory of the case at trial. See *Dunn* v. *United States*, supra, 442 U.S. 106 n.4; *Cola* v. *Reardon*, 787 F.2d 681, 694 (1st Cir.) ("summation is one of various factors that must be considered in inquiries under *Dunn*"), cert. denied, 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986). Summation, therefore, can often provide a reviewing court with needed clarity in those cases where the state's theory at trial is not clear upon review of the other factors.[12] Although closing arguments are one of several factors we examine in a theory of the case analysis, we also recognize that closing arguments are often ambiguous and imprecisely phrased given that most attorneys do not appear before the jury like an actor on the stage with every word, phrase, and inflection memorized and exhaustively rehearsed in advance. See *State* v. *Warholic*, 278 Conn. 354, 368, 897 A.2d 569 (2006) ("closing arguments of counsel . . . are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear" [internal quotation marks omitted]).

In the present case, the defendant relies on a statement that the prosecutor made during closing argument. That statement, however, was ambiguously phrased in such a way that makes it difficult for us to

[12] When examining the evidence at trial, we may also consider how the state presented and relied on that evidence during any "legal argument" on dispositive motions. *State* v. *Robert H.*, supra, 273 Conn. 83. Such an inquiry falls within the purview of our analysis of how the state relied on the evidence at trial and is therefore distinct from our examination of the state's closing arguments. Our decision in *Robert H.* is illustrative of this approach. In *Robert H.*, the defendant moved for a judgment of acquittal following the close of the state's case and prior to presenting his own defense. Id., 61. In argument in response to the defendant's motion, the prosecutor articulated the exact evidentiary bases supporting each charge against the defendant. Id., 61–62. Accordingly, the state was thereafter bound by the theory of the defendant's guilt that it presented in its legal argument against the defendant's motion. Id., 84–85.

draw any definite conclusions from the closing argument regarding the state's theory of the case. The prosecutor briefly touched on the two charges while addressing the jury during summation: "You may be wondering why there are two charges. You have a variety of evidence to draw from and I don't know what you'll find credible. If you find [the defendant's] statement credible . . . you would look more to the assault [charge], reckless indifference." It is somewhat ambiguous as to what the prosecutor was actually attempting to convey to the jury with this statement. Had the prosecutor meant to frame the charges in the disjunctive, she could have clearly stated to the jury that crediting the defendant's statement would support a conviction of reckless assault whereas crediting the testimony of the victim, Neri, and Papp would support a conviction of intentional assault. Likewise, the prosecutor could have stated that the evidence overall was sufficient to demonstrate the defendant's guilt as to both charges and that if the jury were to credit the defendant's statement *and* the witnesses' testimony, the defendant could be convicted of both offenses. As stated, however, the prosecutor's words did not clearly convey either of these options to the jury. The Appellate Court interpreted these remarks to conclude that the state had prosecuted its case in the disjunctive and that the defendant could be convicted of only one offense or the other. *State* v. *King*, supra, 149 Conn. App. 373. It is apparent, however, that the Appellate Court's blending of its due process and legal consistency analyses had the unintended consequence of improperly refocusing the target of its inquiry. The Appellate Court determined that the state's failure to marshal the evidence in a particular manner during closing argument for the *jury* amounted to a lack of sufficient notice for the *defendant*. Id., 373–74. In doing so, the Appellate Court heavily relied on the content of the prosecutor's closing argument

to support its conclusion that the two charges were prosecuted in the disjunctive. Id., 373.

The prosecutor's statement that the Appellate Court found to be determinative is an isolated, ambiguous statement made to the jury. That statement alone, when placed in the context of the entire trial—the substitute information, the evidence presented by the state, the court's jury instructions—cannot serve as a basis for us to conclude that the defendant had no notice of the charges against him. A decision reversing the defendant's convictions on the basis of one unclear statement and against the combined weight of the information, evidence, and jury instructions would therefore rest on an infirm foundation.[13] We have never held that a prosecutor's single, unclear statement during closing argument can deprive a defendant of his due process right to notice. For us to do so would grant a windfall benefit to the defendant completely incommensurate with the harm—if any—suffered due to a prosecutor's lack of clarity during closing argument. This is particularly apparent in the present case, where the prosecutor's statement was a comment on the law that the jury was to apply, and the trial court specifically instructed the jury that it was to rely on the statements of law pronounced by the trial court and *not* the attorneys.[14]

In conclusion, when viewed in the context of the substitute information, the state's evidence at trial, and the jury instructions, the defendant had sufficient notice that he could be convicted of both reckless and inten-

[13] We respectfully disagree with the approach of the dissent, which relies solely on the prosecutor's statement during closing argument to the exclusion of the contents of the substitute information and the jury instructions and which does not address the state's reliance on the evidence introduced at trial.

[14] Indeed, the trial court even interrupted the prosecutor's closing argument to ensure that the jury understood this distinction once the prosecutor began to comment on the law of the case during her argument.

tional assault. Accordingly, the manner in which the defendant was convicted satisfies the requirements of due process.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to render judgment affirming the judgment of the trial court.

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

ROBINSON, J., with whom PALMER and McDONALD, Js., join, dissenting. I respectfully disagree with the majority's decision to reverse the judgment of the Appellate Court, which had overturned the convictions of the defendant, Robert King, of two counts of intentional and reckless assault in the first degree in violation of General Statutes § 53a-59 (a) (1) and (3),[1] on the ground that they were based on a legally inconsistent verdict that did not reflect the theory of the case that the prosecutor had presented to the jury at trial. *State* v. *King*, 149 Conn. App. 361, 373–76, 87 A.3d 1193 (2014). Our recent decision in *State* v. *Nash*, 316 Conn. 651, 665–69, 114 A.3d 128 (2015), constrains me to agree with the majority's ultimate conclusion in part I of its opinion that the defendant's convictions for both intentional and reckless assault are—at least conceptually—not legally inconsistent under the state's theory of the case that was presented at trial,[2] namely, that the defen-

[1] 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 . . . or (3) under circumstances evincing an extreme indifference to human life he recklessly engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person . . . ."

[2] I emphatically disagree with the majority's legal inconsistency analysis to the extent that it relies on a factual predicate, embraced by the trial court in ruling on the defendant's postverdict motions, that the victim's four stab wounds resulted from two separate acts by the defendant, the first act

dant stabbed the victim, Kristen Severino, four times in a single episode when she interfered in a fight between the defendant and her friend, Kyle Neri, over a $10 debt.[3] I nevertheless disagree with part II of the majority's opinion, which concludes that the convic-

inflicting one wound recklessly, followed by an intentional act that inflicted three more wounds. In my view, consideration of this multiple act factual predicate is purely academic in light of the state's actual theory of the case. Specifically, I agree with the Appellate Court's conclusion, not challenged by the majority, "that the evidence was not presented at trial in a manner suggestive of more than one assault. In order to affirm the defendant's conviction, we would have to find that the prosecutor presented the stabbing as two offenses; one committed intentionally and another committed recklessly. Nothing in the record supports such a conclusion." *State* v. *King*, supra, 149 Conn. App. 374; see also id. ("[A]ll witnesses testified that the assault occurred quickly, within a short span of time and, essentially, as one continuous act. There was no testimony elicited at trial that there was any temporal break between knife thrusts or distinguishing one thrust from another in any manner."). Although I agree with the majority that the legal inconsistency and theory of the case issues in this appeal are doctrinally separate inquiries, I nevertheless agree with the defendant that, as a practical matter, the legal consistency of the verdict must be considered in light of the state's theory of the case at trial. In my view, the Appellate Court's analysis reflects that reality, rather than use a kaleidoscopic lens of post hoc rationalization that runs far afoul of the due process theory of the case principles set forth in, for example, *Dunn* v. *United States*, 442 U.S. 100, 106–107, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979), and *State* v. *Robert H.*, 273 Conn. 56, 82–83, 866 A.2d 1255 (2005). See *State* v. *King*, supra, 372–74.

[3] I note that the Appellate Court decided this case without benefit of our recent decision in *State* v. *Nash*, supra, 316 Conn. 668, which rejected a defendant's argument "that two convictions are mutually exclusive if they require the jury to find that a defendant simultaneously acted intentionally and recklessly and, in doing so, caused the same result to the victim." We concluded instead that "[t]he relevant inquiry in determining whether two convictions are mutually exclusive is whether the opposing mental states relate to the same result, not whether both convictions relate to the same injury." Id. In *Nash*, we held that the evidence and the state's theory in a case wherein the defendant retaliated against a person for spreading rumors about him by firing several shots into the second story of that person's home, striking that person's sister, supported convictions of both intentional and reckless assault in violation of § 53a-59 (a) (1) and (3). Id., 668–69. We concluded that "the defendant's convictions for intentional and reckless assault in the first degree are not legally inconsistent because the two mental states required to commit the offenses relate to different results. More specifically, in order to find the defendant guilty of those offenses, the jury

tions for both intentional and reckless assault did not violate the defendant's due process right to notice under the theory of the case principles articulated in *Dunn* v. *United States*, 442 U.S. 100, 106, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979), and *State* v. *Robert H.*, 273 Conn. 56, 82–83, 866 A.2d 1255 (2005). I agree with the defendant's claim that the record, and in particular the prosecutor's closing and rebuttal arguments, demonstrates that the state presented its case to the jury in a manner that hedged its bets with respect to the defendant's mental state, and did not contemplate obtaining convictions for both intentional and reckless assault. Like the Appellate Court, I conclude that the convictions of both intentional and reckless assault ran afoul of due process principles holding that "an appellate court cannot affirm a conviction on the basis of an argument newly fashioned after conviction and not presented at trial." *State* v. *King*, supra, 373. Because I would affirm the judgment of the Appellate Court, I respectfully dissent.

I agree with the background facts and procedural history stated by the majority and I need not repeat them in full here. I also agree with the majority's general recitation of the applicable constitutional principles governing the due process issue in this appeal, namely, whether the defendant received constitutionally adequate notice under *Dunn* v. *United States*, supra, 442 U.S. 106, that the state sought to convict him of both reckless and intentional assault. In principles first artic-

was required to find that the defendant intended to injure another person and that, in doing so, he recklessly created a risk of that person's death. In light of the state's theory of the case, there was nothing to preclude a finding that the defendant possessed both of these mental states with respect to the same victim at the same time by virtue of the same act or acts. In other words, the jury could have found that the defendant intended only to injure another person when he shot into [the sister's] bedroom but that, in doing so, he recklessly created a risk of that person's death in light of the circumstances surrounding his firing of the gun into the dwelling." (Footnotes omitted.) Id., 666–67.

ulated in the context of sufficiency of the evidence claims,[4] we have emphasized the "important doctrine" precluding the state from "chang[ing] the theory of the case on appeal." *State* v. *Robert H.*, supra, 273 Conn. 82. "The 'theory of the case' doctrine is rooted in principles of due process of law. . . . In *Dunn*, the United States Supreme Court explained: 'To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused.' . . . The court further stated that 'appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial.' . . . Subsequently, in *Chiarella* v. *United States*, 445 U.S. 222, 237 n.21, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980), the United States Supreme Court observed that an isolated reference at trial to the theory of the case advanced on appeal is constitutionally insufficient to sustain a conviction on appeal.

"The [United States] Court of Appeals for the First Circuit applied the *Dunn* principles in *Cola* v. *Reardon*, 787 F.2d 681 (1st Cir.), cert. denied, 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986), a federal habeas

[4] These due process principles keep us from evaluating the sufficiency of the evidence in a "vacuum" when applying the "well established principles" that "when evaluating the evidence in support of a conviction, we generally do not confine our review to only that evidence relied on or referred to by counsel during the trial. Rather, we construe all relevant evidence in the record, as well as the reasonable inferences drawn therefrom, in a light most favorable to sustaining the verdict. . . . Furthermore, we defer to the [fact finder's] assessment of the credibility of the witnesses based on its first hand observation of their conduct, demeanor and attitude. . . . We also assume that the fact finder is free to consider all of the evidence adduced at trial in evaluating the defendant's culpability, and presumably does so, regardless of whether the evidence is relied on by the attorneys." (Citations omitted; internal quotation marks omitted.) *State* v. *Robert H.*, supra, 273 Conn. 81–82.

action . . . . In *Cola*, there was evidence in the record that would have been sufficient to sustain the petitioner's conviction, but the Court of Appeals held that the state appellate court should not have considered that evidence in support of the conviction because it was not part of the state's theory of the case at trial. . . . In reaching that result, the Court of Appeals interpreted *Dunn* and its progeny as follows: '[I]n order for any appellate theory to withstand scrutiny under *Dunn*, it must be shown to be not merely before the jury due to an incidental reference, *but as part of a coherent theory of guilt that, upon* [*review of*] *the principal stages of trial, can be characterized as having been presented in a focused or otherwise cognizable sense*.' . . . We conclude that this statement is an accurate synthesis of *Dunn* and *Chiarella*. We therefore adopt it as the standard by which to gauge whether evidence introduced at trial, but not relied on by the state in its legal argument, is properly cognizable by an appellate court when evaluating the sufficiency of the evidence." (Citations omitted; emphasis added.) *State* v. *Robert H.*, supra, 273 Conn. 82–83. In evaluating whether a coherent theory of guilt is properly before the jury during the principal stages of the trial, we conduct a wide-ranging review of the charging instrument, the jury instructions, witness examinations, and the prosecutor's factual and legal arguments, such as summations and responses to dispositive motions. See, e.g., *Cola* v. *Reardon*, supra, 693–94; *State* v. *Carter*, 317 Conn. 845, 854–55, 120 A.3d 1229 (2015); *State* v. *Fourtin*, 307 Conn. 186, 208–209, 52 A.3d 674 (2012); see also footnote 9 of this dissenting opinion.

I respectfully disagree with the majority's conclusion that the state tried this case in a way that apprised the defendant that the state intended to obtain convictions for both reckless and intentional assault. See *State* v. *Nash*, supra, 316 Conn. 666–67 ("[i]n light of the state's

theory of the case, there was nothing to preclude a finding that the defendant possessed both of these mental states with respect to the same victim at the same time by virtue of the same act or acts''). I begin by acknowledging that, although the substitute information and jury instructions do not specifically describe reckless and intentional assault in the first degree as charges in the alternative, they similarly do not specifically state that the jury might be asked to return a guilty verdict on both counts.[5] The remainder of the record demonstrates, however, that the state presented its theory of the case to the jury in the alternative with respect to the applicable mental states, which bars it from

[5] Beyond the simply stated substitute information, the trial court instructed the jury in relevant part that the defendant "is charged in two counts in the information. *That is legal language for saying that he's charged with two crimes*. In count one of the information, the defendant is charged with the crime of assault in the first degree in violation of [§ 53a-59 (a) (1)]. If you unanimously find that the state has proven beyond a reasonable doubt each of the essential elements of this crime and disproven beyond a reasonable doubt the justification of self-defense, you shall find the defendant guilty of the crime charged in count one of the information. If you unanimously conclude that the state has failed to prove beyond a reasonable doubt any of the elements of this offense or failed to disprove self-defense, then you shall find the defendant not guilty of the crime charged in count one.

"In count two of the information, the defendant is charged with the crime of assault in the first degree in violation of [§ 53a-59 (a) (3)]. If you unanimously find that the state has proven beyond a reasonable doubt each of the essential elements of this crime and disproven beyond a reasonable doubt the justification of self-defense, you shall find the defendant guilty of the crime charged in count two of the information. If you unanimously conclude that the state has failed to prove beyond a reasonable doubt any of the elements of this offense or failed to disprove self-defense, then you shall find the defendant not guilty of the crime charged in count two.

"When you return to the courtroom, *you will be asked whether the accused is guilty or not guilty of each of the crimes charged in the information* and whether your verdict is unanimous as to each charge." (Emphasis added.)

After providing this overview of the charges, the trial court then instructed the jury as to the specific elements of intentional and reckless assault in the first degree, without using any transitional language specifically instructing the jury that it could find the defendant guilty of either or both charges.

arguing otherwise to save the convictions on appeal.[6] In particular, after discussing the events leading up to the defendant's act of stabbing the victim, the prosecutor argued in her summation that: "I have two charges. . . . The first is assault in the first degree with a dangerous instrument. . . .

"In both charges, the state has to prove that it's [the defendant] that was involved; the second element, the intent to cause serious physical injury. . . .

"Intent to cause serious physical injury: the things that—in the testimony that you heard, are the use of a knife. Now, no one says that [the defendant] gets a pillow, a spatula, a butter knife; he gets a steak knife, something that you commonly use to cut something more difficult than say, butter or peanut butter, or something like that. They all talk about the thrusting motion, all . . . said a thrusting motion, at least three times, in the direction of [the victim].

"You heard that [the defendant] came in and says, my name is—I'm Black Rob. They call me Black Rob for a reason, because I kill people. Why does that matter? That's what is—he's trying to scare everybody. He's ranting at [Neri] over this money. He comes in and is angry. And if you look at [the defendant's] statement . . . you will read where he says, 'I was pissed. After

[6] I agree with the majority that the state intended to "try both charges in the substitute information," and that the information fulfilled its purpose of informing the defendant that he was charged with both intentional and reckless assault. I disagree, however, with the majority's criticism that I, reach an "unsupported conclusion" that improperly "discount[s]" the significance of the information and jury instructions on the ground that they "follow a similar format in every case," in a manner that "dramatically and unnecessarily narrow[s] the ken of our due process inquiry in this context." See footnote 8 of the majority opinion. Given the various interpretations that could be ascribed to the evidence adduced in this trial that supported either of the offenses charged, I view the prosecutor's summation as presenting her view of what the state ultimately hoped to accomplish at the trial, once the evidence was actually put before the jury.

[Neri] was pointing the gun at me, I was real pissed.' He's angry. [The victim] says, 'It felt like I was being punched in the stomach.' Those are things that you can use to cause—use to factor in intent to cause serious physical injury."

After arguing that the evidence satisfied the "serious physical injury" and "dangerous instrument" elements with respect to the intentional assault charge, the prosecutor stated: "Now there's the second charge, assault one, reckless indifference: a conduct creating a risk of death, recklessness, extreme indifference to human life and causes serious physical injury.

"*You may be wondering why there are two charges. You have a variety of evidence to draw from and I don't know what you'll find credible. If you find* [*the defendant's*] *statement credible, he's saying he's waving the knife around, he's angry with* [*Neri*], *and* [*the victim*] *jumps in the middle, if you believe* [*the defendant's*] *statement you would look more to the assault one, reckless indifference.*"[7] (Emphasis added.)

The prosecutor did not discuss the concept of reckless indifference in any detail, and instead went on to argue about the credibility of the testifying witnesses and the defendant's statement to the police. The prosecutor then concluded her closing argument by stating that: "I believe after the six of you deliberate, hear the judge's instructions, and apply the facts of the case as you've heard them, you will find [the defendant] guilty

[7] With respect to the defendant's statement, admitted into evidence through the testimony of a police detective, the prosecutor argued that the defendant had said: "[Y]es, I stabbed [the victim]. He talks about a gun. He's the only person that talks about a gun. And there will be a self-defense charge given, but the first thing you have to believe is, did [Neri] have a gun? No one else says that but [the defendant] and he has an interest in the outcome of the case. . . . It's an uncorroborated explanation by [the defendant] after he's had time to think."

beyond a reasonable doubt of assault in the first degree, dangerous instrument."

In her rebuttal argument, the prosecutor again did not argue the concept of recklessness in any detail, but instead responded to the defendant's proffered theory of self-defense by arguing that the version of events set forth in the defendant's statement gave rise to the duty to retreat, thus defeating his justification of self-defense.[8] The prosecutor also argued that there was no evidence of a gun, as claimed in the defendant's statement, and that the defendant's self-defense justification was unbelievable, asking: "Does [it] make any sense . . . to protect yourself from a gun with a knife?"

The prosecutor continued: "Yes, [the victim] said it was an accident. I got in the middle of things. She got in the middle of [Neri] and [the defendant]. She tried to diffuse the situation. 'No one needs to die tonight,'

[8] The defendant advanced a theory of self-defense, positing that he picked up a knife to use in self-defense after Neri had threatened him with a gun during the dispute over the $10. The defendant argued that the evidence did not support the prosecution's argument that he "came [into the apartment] and automatically [stabbed the victim multiple times], because [she] didn't sit down quick enough," asking: "Does that make sense? Or does it make sense what [the defendant] said to the police the next day or that same day?" The defendant argued that the victim got "in the middle of it" and was stabbed when the defendant used a knife to defend himself from the gun wielding Neri. The defendant emphasized that the more sensible version of the events was that this was not "an unprovoked stabbing" over $10, but that the fight, "where the apartment [was destroyed] and the dresser [was pushed] over and [the victim intervenes and] gets stabbed in the process," was "part of a larger . . . issue . . . ."

Relying on these facts, the defendant argued: "I want you to use your common sense when you think about this case, what the evidence was. Does it make sense that this was an unprovoked stabbing or does it ring true to what my client is telling you in his statement? Does that make more sense, that this was a brawl, a fight between [Neri] and my client, after [Neri] threatened him with a gun, and . . . that this was essentially an accident? She got in the middle. [The victim] got in the middle of [Neri] and [the defendant] and that's how she got stabbed. If you do that, I am confident that you will return a verdict of not guilty."

and she got stabbed. She put herself in the middle of that situation, not—not literally in the middle of the knife-swinging, but she says I put myself in the middle of something."

Ultimately, the prosecutor concluded her rebuttal argument by stating that: "*I believe we have proven to you beyond a reasonable doubt assault first with a dangerous instrument.*" (Emphasis added.)

I conclude that there is nothing in the prosecutor's summation that remotely hints that the state presented to the jury a "coherent theory of guilt . . . in a focused or otherwise cognizable sense"; (internal quotation marks omitted) *State* v. *Robert H.*, supra, 273 Conn. 83; that the defendant was guilty of *both* intentional and reckless assault. Beyond the prosecutor's explanation before the jury of why there were two charges in this case, which is a statement that plainly contemplates a case charged in the alternative depending on the jury's finding as to the applicable mental state, her statement with respect to the state's desired verdict indicates just such a unitary view of the case. The prosecutor did not ask for a conviction on "both" or "all counts," and her description of the verdict desired was in the singular insofar as she concluded both her closing and rebuttal arguments by asking the jury to convict the defendant of "assault in the first degree, dangerous instrument" and "assault first with a dangerous instrument," respectively. Moreover, the prosecutor paid minimal attention to the recklessness charge, and did not spend any time describing the elements of the offense of reckless assault in an attempt to relate them to the evidence in the record; it appeared to be a mere afterthought. Thus, I believe that the majority stretches the word "ambiguous" beyond all comprehension when it uses it to describe the prosecutor's closing argument, and calls it "difficult . . . to draw any definite conclusions from

the closing argument regarding the state's theory of the case."

The majority acknowledges that a "[s]ummation . . . can often provide a reviewing court with needed clarity in those cases where the state's theory at trial is not clear upon review of the other factors." The majority's actual willingness to relieve the state from the theory put forth in its closing arguments is, however, at drastic odds with nearly one decade's worth of case law since *State* v. *Robert H.*, supra, 273 Conn. 83, which applies the due process principles of *Dunn* v. *United States*, supra, 442 U.S. 106–107.[9] For example, in *State* v. *Fourtin*, supra, 307 Conn. 188, we considered whether there was sufficient evidence of "physical helplessness" to sustain a defendant's conviction for attempt to commit sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (3). In particular, we determined "whether, at the time of the alleged sexual assault, the victim was physically able to convey a lack

[9] I acknowledge the state's argument that cases such as *State* v. *Fourtin*, supra, 314 Conn. 209–10, which consider closing arguments to divine the theory of the case, are an improper extension of the theory of the case doctrine from *Cola* v. *Reardon*, supra, 787 F.2d 693–94. The state argues that the notice purpose of the doctrine requires the state to do no more than be consistent with the theories posited before the defendant puts on his case, such as through the substitute information, legal arguments in response to motions for judgment of acquittal, and confirming jury instructions. I disagree. First, the federal decisions that this court relied upon in *State* v. *Robert H.*, supra, 273 Conn. 82–83, reviewed the summations of the prosecutor and defense counsel, along with the charging instrument and jury instructions, to determine the prosecution's theory of the case. See *Dunn* v. *United States*, supra, 442 U.S. 106–107; *Cola* v. *Reardon*, supra, 693. Second, particularly in cases like this one, wherein the substitute information and instructions are fairly open-ended, adoption of the state's position in this appeal—which seemingly is endorsed by the majority's relegation of closing arguments only to a clarifying role—would leave prosecutors free to argue virtually anything in order to obtain a conviction and then save it on appeal, however factually or legally flawed the trial prosecutor's legal theory might be. Most significantly, it also would deprive the defendant of the crucial opportunity to identify and counter significant aspects of the state's case *before* the jury renders its verdict.

of consent or unwillingness to an act." Id., 207. We held that the theory of the case doctrine barred the state from making an appellate argument that the severely disabled victim's acts of biting, scratching, screeching, kicking, or groaning were not communicative, and were " 'merely emblematic of her multiple disabilities,' " reasoning as follows: "*At no time during the trial*, *including* cross-examination, *closing argument or rebuttal*, did the state challenge or dispute testimony establishing that the victim communicated displeasure through biting, kicking, scratching, screeching or groaning. Indeed, the state itself elicited much of this testimony, albeit in an attempt to establish for the jury that the victim was credible and perfectly capable of communicating her likes and dislikes. Nor did the state contend or otherwise suggest that these behaviors were simply manifestations of the victim's disabilities rather than volitional, communicative acts intended to express displeasure. Likewise, the state did not proceed on the theory that the victim's behaviors merely reflected generalized anger or frustration.

"To the contrary, *the prosecutor expressly told the jury during closing argument that the victim*, 'according to all accounts, was very vocal, very active, and, if in fact she felt that . . . [people were not understanding] what she was saying, I believe [that] everybody [who has] testified here [has indicated that] she would throw up her arms and say "stop." ' *During closing argument*, the prosecutor also noted that the victim was 'very limited in terms of . . . what type of information she can pass on to you,' and that she had 'some difficulty expressing herself . . . .' At no time, however, did the state even raise the notion that the victim was unable to communicate an unwillingness to an act." (Emphasis altered; footnote omitted.) Id., 208–209.

Similarly, in *State* v. *Carter*, supra, 317 Conn. 855, we recently observed that "neither the substitute information nor the court's instructions to the jury identified the target of the attempt to commit assault charge" arising from his act of pointing a gun at a police officer. We relied, however, on the state's closing argument as "conclusively demonstrat[ing]" its theory of the case, namely, that the police officer was the person "at whom the defendant's intent was directed." Id. We observed that the Appellate Court's view that the case was a theory of mistaken identity or transferred intent arising from the defendant's previously stated intention to shoot a " 'white dude' " in a bar was "a narrative in direct conflict with the one advanced in the state's closing argument." Id., 855–56; see also id., 856 (not considering whether Appellate Court's apparent theory of case doctrine violation required reversal of conviction because evidence was "sufficient to demonstrate the defendant's intent under the theory that the state argued to the jury"); *State* v. *Webster*, 308 Conn. 43, 57–59, 60 A.3d 259 (2013) (reviewing closing argument to determine whether state improperly raised theory of course of conduct leading to narcotics sale, rather than actual physical transfer, to sustain conviction of sale of narcotics). The majority's restrictive application of the theory of the case doctrine is, therefore, inconsistent with this court's actual practice in the decade since it decided *State* v. *Robert H.*, supra, 273 Conn. 83.[10]

[10] Numerous recent decisions from the Appellate Court hold similarly. See, e.g., *State* v. *Davis*, 163 Conn. App. 458, 465–69, 136 A.3d 257 (2016) (noting lack of specificity in information and relying on closing argument to conclude that state's theory of murder case was accessorial liability or liability under *Pinkerton* v. *United States*, 328 U.S. 640, 647–48, 66 S. Ct. 1180, 90 L. Ed. 1489 [1946], rather than liability as principal); *State* v. *James E.*, 154 Conn. App. 795, 834–35, 112 A.3d 791 (2015) (rejecting claim that state should be precluded from defending double jeopardy claim on appeal arising from two convictions of assault of elderly person by arguing that "there were two separate and distinct crimes" because, inter alia, "the prosecutor did not present the two . . . charges as alternatives during closing argument").

Guided by these recent Connecticut cases applying the theory of the case doctrine in connection with the state's closing arguments, I conclude that the state presented the charges of reckless and intentional assault to the jury as alternatives, rather than in an effort to obtain multiple convictions arising from the same act. As the defendant aptly observes, the state adopted a trial strategy in which it primarily argued that the defendant had "intentionally stabbed the victim four times," but "hedged its bet" by positing that, "even on [the defendant's] version of the stabbing (which the state hotly disputed), he recklessly assaulted the victim." Accordingly, I agree with the Appellate Court's conclusion that the theory of the case doctrine precludes the state from advancing arguments on appeal that would save the defendant's convictions from reversal.[11] See *State* v. *King*, supra, 149 Conn. App. 374–75.

[11] The majority posits that the prosecutor's statement was "isolated" and "ambiguous," and that "[w]e have never held that a prosecutor's single, unclear statement during closing argument can deprive a defendant of his due process right to notice. For us to do so would grant a windfall benefit to the defendant completely incommensurate with the harm—if any—suffered due to a prosecutor's lack of clarity during closing argument. This is particularly apparent in the present case, where the prosecutor's statement was a comment on the law that the jury was to apply, and the trial court specifically instructed the jury that it was to rely on the statements of law pronounced by the trial court and not the attorneys." (Emphasis omitted.) I disagree with the majority's characterization of the state's argument as "isolated," "ambiguous," and a pure statement of the law. The prosecutor's closing arguments in this relatively simple case were short, with the initial summation occupying only seven pages of transcript and the rebuttal barely two pages. Thus, the prosecutor's sole, but clear, explanation of why the state pursued two charges against the defendant is not "isolated" given the relative brevity of this argument. Further, that portion of the prosecutor's argument was *not* a purportedly objective statement of the black letter law, which is, of course, the province of the trial court, but rather, an articulation of the state's strategy for obtaining a conviction even if the jury were to credit the defendant's statement or portions thereof.

Finally, I disagree that the defendant would obtain any kind of "windfall" as a result of my conclusion. Insofar as the trial court sentenced the defendant concurrently on the two convictions, all the state had to do to avoid reversal on appeal was ask the trial court to vacate one of them in response to the defendant's postverdict motions, and the defendant would not have served

I would, therefore, affirm the judgment of the Appellate Court. Accordingly, I respectfully dissent.

BARBARA A. IZZARELLI *v.* R.J. REYNOLDS TOBACCO COMPANY (SC 19232)

Zarella, Eveleigh, McDonald, Espinosa, Robinson and Vertefeuille, Js.

Syllabus

The plaintiff sought to recover damages from the defendant cigarette company for personal injuries she sustained as a result of having smoked the defendant's cigarettes for twenty-five years. After she was successfully treated for cancer, the plaintiff brought an action in federal court under theories of strict liability and negligent design pursuant to the product liability statute (§ 52-572m), alleging that the defendant had designed and manufactured a tobacco product with heightened addictive properties that delivered more carcinogens that increased the user's risk of cancer. The defendant denied that allegation, and claimed that the product defect identified by the plaintiff was merely the inherent risk common to all tobacco products insofar as all cigarettes contain nicotine and carcinogens. The defendant contended that the plaintiff's claim that cigarettes are unreasonably dangerous was in contravention to the limiting provision in comment (i) to § 402A of the Restatement (Second) of Torts that "[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful." Section 402A of the Restatement (Second), which was adopted in Connecticut as a matter of state common law, requires a plaintiff in an action for strict product liability to prove that the product was in a defective condition unreason-

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one less day in prison. Cf. *State* v. *Nash*, supra, 316 Conn. 669–70 n.19 (noting that defendant did not raise double jeopardy claim and that trial court had merged intentional and reckless assault convictions, and had sentenced him only on intentional assault conviction); see also *State* v. *Miranda*, 317 Conn. 741, 755–56, 120 A.3d 490 (2015) (discussing use of contingent vacatur of convictions in lieu of merger as double jeopardy remedy). Second, subject to double jeopardy protections not at issue in this appeal, my conclusion does nothing to preclude the state from obtaining multiple convictions under the same statute potentially even for the same act, so long as the state actually pursues that strategy at trial. See, e.g., *State* v. *Wright*, 319 Conn. 684, 696, 127 A.3d 147 (2015) (state may obtain multiple convictions for aggravated sexual assault of minor for single act that violates General Statutes § 53a-70c [a] [1] and [6] without committing double jeopardy violation).

ably dangerous to the consumer or user, and comment (i) provides that for a product to be considered "unreasonably dangerous the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Under Connecticut law, this definition became known as the ordinary consumer expectation test. The defendant further claimed that a jury's determination of whether its cigarettes were unreasonably dangerous should be governed by the ordinary consumer expectation test, and not the modified consumer expectation test, pursuant to which consumer expectations are only one factor used in the multifactor risk-utility test to assess liability. In prejudgment and postjudgment motions, the United States District Court for the District of Connecticut concluded that the plaintiff's claim alleged that the defendant's cigarettes were uniquely designed and manufactured in such a way as to make them different from other cigarettes. The District Court concluded that, with respect to the law governing product liability actions, although Connecticut derived the definition of "unreasonably dangerous" from comment (i) to § 402A, there was no evidence that Connecticut also had adopted the limitations in comment (i), including "[g]ood tobacco." The District Court instructed the jury on both the ordinary and modified consumer expectation tests as alternative bases for liability, concluding that the modified test was appropriate because the plaintiff's evidence had demonstrated the complex design of the defendant's cigarettes and the potential inability of the ordinary consumer to form proper safety expectations. That court further concluded that a verdict for the plaintiff under the modified consumer expectation test would not amount to a ban on all cigarettes as the defendant alleged, given the unique design of the defendant's cigarettes. The jury returned a verdict for the plaintiff, but the verdict form did not indicate whether the strict liability verdict was premised on the ordinary consumer expectation test or the modified consumer expectation test. The defendant then appealed to the United States Court of Appeals for the Second Circuit, which determined that Connecticut law was unsettled as to whether the plaintiff's product liability cause of action was precluded by comment (i) to § 402A. The Second Circuit certified to this court a question of law regarding the applicability of comment (i) to an action against a cigarette manufacturer based on evidence that its cigarettes were purposefully manufactured without regard to the resultant increase in a user's exposure to carcinogens but in the absence of evidence of adulteration or contamination. This court accepted certification but deemed it appropriate, pursuant to the invitation of the Second Circuit, to modify the question as necessary or to answer other necessary or relevant questions, in order to consider the scope and application of the modified consumer expectation test to the resolution of the question presented. *Held* that under Connecticut product liability law, the modified consumer expectation test is the

primary strict product liability test, and the sole test applicable to the present case, and the ordinary consumer expectation test is reserved for those limited cases in which a product fails to meet the ordinary consumer's legitimate, commonly accepted minimum safety expectations, and this court, having concluded that the obvious danger exceptions in comment (i) to § 402A of the Restatement of Torts (Second), including good tobacco, are not dispositive under the multifactor modified consumer expectation test and do not present a per se bar to recovery under that test, answered the certified question in the negative: the plaintiff here properly could proceed only under the modified consumer expectation test, pursuant to which she was required to establish the defect in the defendant's cigarettes through the use of expert testimony on cigarette design and manufacture and the feasibility of an alternative design, as the ordinary consumer expectation test was inapplicable because a cigarette that exposes the user to carcinogens and the attendant risk of cancer cannot be said to fail to meet an ordinary consumer's legitimate, commonly accepted minimum safety expectations; moreover, recognition of the modified consumer expectation test as the default test for design defect claims provides a safety incentive to manufacturers that is consonant with this state's public policies to encourage the design of products to be less dangerous without unreasonably compromising cost or utility.

(*Two justices concurring separately in one opinion*)

Argued April 22, 2015—officially released May 3, 2016

Procedural History

Action to recover damages for personal injuries sustained as a result of the allegedly negligent design, manufacture and distribution of defective cigarette products by the defendant, and for other relief, brought to the United States District Court for the District of Connecticut and tried to the jury before *Underhill*, *J.*; verdict and judgment for the plaintiff, from which the defendant appealed to the United States Court of Appeals for the Second Circuit, *Jacobs*, *C. J.*, and *Cabranes* and *Wesley*, *Js.*, which certified to this court a question of law regarding the applicability of comment (i) to § 402A of the Restatement (Second) of Torts to an action against a cigarette manufacturer premised on strict liability in the absence of evidence of adulteration or contamination.

David S. Golub, with whom were *Jonathan M. Levine* and, on the brief, *Marilyn J. Ramos*, for the appellant (plaintiff).

Theodore M. Grossman, pro hac vice, with whom were *Jeffrey J. White* and, on the brief, *Frank F. Coulom, Jr.*, and *Kathleen E. Dion*, for the appellee (defendant).

George Jepsen, attorney general, *Gregory T. D'Auria*, solicitor general, and *Phillip Rosario*, *Jonathan J. Blake* and *Thomas J. Saadi*, assistant attorneys general, filed a brief for the state of Connecticut et al. as amici curiae.

Edward L. Sweda, Jr., pro hac vice, and *Michael J. Walsh* filed a brief for the Public Health Advocacy Institute as amicus curiae.

Kathleen L. Nastri and *Jeffrey R. White*, pro hac vice, filed a brief for the American Association for Justice as amicus curiae.

Opinion

McDONALD, J. We have been asked by the United States Court of Appeals for the Second Circuit to consider whether the "[g]ood tobacco" exception to strict products liability contained in comment (i) to § 402A of the Restatement (Second) of Torts[1] precludes an action in this state against a cigarette manufacturer for including additives and manipulating the nicotine in its cigarettes in a manner that ultimately increases the user's risk of cancer. See 2 Restatement (Second), Torts § 402A, comment (i), pp. 352–53 (1965). The defendant, R.J. Reynolds Tobacco Company, appealed to that court

[1] Comment (i) to § 402A of the Restatement (Second) of Torts provides in relevant part: "The rule stated in this [s]ection applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. . . . Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. . . ."

from the judgment of the United States District Court for the District of Connecticut in favor of the plaintiff, Barbara A. Izzarelli, a former smoker and cancer survivor, on an action brought pursuant to Connecticut's Product Liability Act (liability act), General Statutes § 52-572m et seq. Pursuant to General Statutes § 51-199b (d), we accepted certification with respect to the following question from the Second Circuit: "Does [comment (i) to § 402A] preclude a suit premised on strict products liability against a cigarette manufacturer based on evidence that the defendant purposefully manufactured cigarettes to increase daily consumption without regard to the resultant increase in exposure to carcinogens, but in the absence of evidence of adulteration or contamination?"[2] See *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, 731 F.3d 164, 169 (2d Cir. 2013).

[2] Although not essential to our analysis, we note our interpretation of two phrases in the certified question: "purposefully manufactured" and "adulteration or contamination." First, we assume that the Second Circuit used "purposefully manufactured" to mean designed, thus distinguishing a design defect from a manufacturing defect. A manufacturing defect cannot be purposeful, and the plaintiff only proceeded under the theory of a design defect. A design defect occurs when the product is manufactured in conformity with the intended design but the design itself poses unreasonable dangers to consumers. Second, we assume that "adulteration or contamination" was intended to mean the inclusion of ingredients that are not found in other cigarette brands or that create a different danger than those commonly known to arise from use of that product. See, e.g., The American Heritage Dictionary of the English Language (5th Ed. 2011) (defining adulterate as "[t]o make impure by adding extraneous, improper, or inferior ingredients," and defining contaminate as "[t]o make impure or unclean; corrupt by contact or mixture"); Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) (defining adulterate as "to corrupt, debase, or make impure by the addition of a foreign or inferior substance," and defining contaminate as "to soil, stain, corrupt, or infect by contact or association . . . to make inferior or impure by admixture . . . to make unfit for use by the introduction of unwholesome or undesirable elements"). Although some courts have determined that chemical additives can render a cigarette "adulterated"; see, e.g., *Naegele* v. *R.J. Reynolds Tobacco Co.*, 28 Cal. 4th 856, 864–65, 50 P.3d 769, 123 Cal. Rptr. 2d 61 (2002); the Second Circuit could not have ascribed a similar meaning because there was evidence in the present case of scores of additives in the cigarette brand at issue. See footnote 4 of this opinion.

This case requires us to revisit our seminal strict product liability precedent, *Potter* v. *Chicago Pneumatic Tool Co.*, 241 Conn. 199, 694 A.2d 1319 (1997), and to clarify the proper purview of the two strict liability tests recognized in that case: the ordinary consumer expectation test and the modified consumer expectation test. We conclude that the modified consumer expectation test is our primary strict product liability test, and the sole test applicable to the present case. Because the obvious danger exceptions to strict liability in comment (i) to § 402A of the Restatement (Second), including "[g]ood tobacco," are not dispositive under the multifactor modified consumer expectation test, we answer the certified question in the negative.

The District Court's ruling on the defendant's motion for a new trial and its renewed motion for judgment as a matter of law sets forth the following facts that the jury reasonably could have found, which we supplement with relevant procedural history. *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, 806 F. Supp. 2d 516 (D. Conn. 2011). The relevant time frame in this case spans from the early 1970s, when the plaintiff first began to smoke, until the late 1990s, when she was diagnosed with, and treated for, cancer. The defendant has manufactured Salem King (Salem) cigarettes, the menthol cigarette brand smoked by the plaintiff, since 1956. Id., 520. In the early 1970s, the defendant identified certain weaknesses in its brand. Id., 521. One of the concerns identified was that almost one half of Salem users were light smokers, meaning that they smoked one to fifteen cigarettes per day. In an effort to capture a larger share of its desired market, the defendant modified Salem's design. Id.

The defendant's internal research had disclosed two important factors concerning nicotine, a naturally occurring but addictive component of tobacco. First, the form of the nicotine affects the rate at which it is absorbed

and delivers its " 'kick' " to the smoker. Id. Of nicotine's two principal forms, bound and free, free nicotine (also known as freebase nicotine) moves through the body's blood/brain barrier faster and provides the smoker with a higher and more immediate kick. Addiction liability increases in relation to the amount and speed of the delivery of free nicotine.[3] Second, there is an effective dose range of nicotine necessary to maintain addiction. Id. The lowest nicotine yield (nicotine actually delivered to the smoker) that would maintain addiction requires the smoker to receive between five and eight milligrams of nicotine daily. Id., 523.

The defendant modified its Salem cigarettes in a manner that took both of these factors into account. The defendant had identified seven methods for manipulating the nicotine kick of its cigarettes, which it incorporated into its product. Id., 522. Among those methods was adding ammonia compounds to turn the nicotine into its more potent freebase form. Adding acetaldehyde, one of scores of chemicals added to Salem cigarettes,[4] would cut the harshness of the nicotine while reinforcing its effects. Id., 523. Lowering nicotine levels below those naturally occurring could be achieved through various processes whereby the nicotine is extracted from the tobacco leaf and added back at the desired level. The defendant understood that increasing the free nicotine would enhance the addictive properties of Salem cigarettes, while decreasing the nicotine

[3] Addiction liability refers to the percentage of people who try a drug and become addicted to it. According to evidence produced before the District Court, addiction liability for nicotine is approximately 80 to 85 percent. The level of addiction is impacted by various factors, including genetics, stress level, socioeconomic status, and age of initiation. See *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, supra, 806 F. Supp. 2d 521 n.2.

[4] The plaintiff introduced at trial a twenty-four page list of hundreds of additives used by the defendant in Salem's manufacture, among which were solvents, glue, and coolants, including Freon.

yield of the cigarettes would increase the number of cigarettes needed to meet the smoker's addiction demand. Id.

The fact that the smoker would need to smoke more cigarettes to satisfy his or her addiction had two obvious consequences. First, the smoker would purchase more cigarettes. Second, the smoker would be exposed to more carcinogens, specifically, "tar." Id. " 'Tar' " is the tobacco industry term for all byproducts of smoking other than water and nicotine. Id. Tar yield is affected by numerous factors, including the type of filter, the type of paper, how the paper is ventilated, the length and composition of the cigarette, and the blend of the tobacco. Id.

By the early 1970s, the defendant had lowered the nicotine yield in Salem cigarettes from its 1956 level of 3.1 milligrams to 1.3 milligrams—a level determined to be optimal to maintain addiction. Id. At that time, Salem cigarettes contained fifteen to nineteen milligrams of tar, an amount that exceeded the level in its main competitor for menthol cigarettes, Kool. Id. The defendant had the capability of reducing the level of tar in its cigarettes to one milligram or less; in fact, two of its brands had two milligrams of tar in 1973. Id. Thus, the defendant manipulated the natural effect of nicotine through the use of additives, tobacco formulation, and other methods. In so doing, the defendant enhanced the addictive nature of the product, increased the number of cigarettes smoked by its consumer, and ultimately delivered a higher level of carcinogens to the consumer as compared to other cigarettes. Because the causal relationship between smoking and cancer is dose related, increasing the Salem smoker's exposure to carcinogens increased the likelihood of cancer. Id., 523–24.

The plaintiff began smoking in the early 1970s, when she was approximately twelve years old. She quickly

became severely addicted, eventually smoking two to three packs of Salem cigarettes daily. Id., 524. Throughout the period when the plaintiff smoked, a warning from the Surgeon General of the United States that smoking is dangerous to one's health appeared on the packaging of Salem cigarettes. See id., 527 n.4.

In 1996, at age thirty-six and after smoking for twenty-five years, the plaintiff was diagnosed with cancer of the larynx. Id., 524. A person with the plaintiff's smoking history has between a 6.9 and 20 times greater chance of developing laryngeal cancer than a nonsmoker. Id. To treat her cancer, the plaintiff's larynx was removed and she received radiation. In 1997, the plaintiff quit smoking. She is cancer free, but continues to have various disabilities and problems related to her laryngectomy. Id.

After the plaintiff's cancer diagnosis and treatment, she commenced the present product liability action in federal court under theories of strict liability and negligent design.[5] At trial, the crux of the factual dispute was whether the defendant had designed and manufactured a tobacco product with heightened addictive properties that delivered more carcinogens than necessary. Id., 520. In addition to denying that allegation, the defendant also argued that the product "defect" identified by the plaintiff was merely the inherent risk common to all tobacco products insofar as all cigarettes contain nicotine and carcinogens. Id. As such, the defendant characterized the plaintiff's action as impermissibly claiming that cigarettes generally are unreasonably

[5] In addition to her product liability claim, the plaintiff alleged a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., for unlawful youth marketing. The District Court granted the defendant's motion for judgment on that count, but considered evidence relating to youth marketing in rejecting the defendant's challenges to the verdict under the ordinary consumer expectation test. The judgment on the CUTPA count was not challenged on appeal to the Second Circuit.

dangerous, in contravention to the proviso in comment (i) to § 402A of the Restatement (Second) that "[g]ood tobacco" (i.e., an ordinary, unadulterated cigarette) is not unreasonably dangerous. The defendant made a related claim that the determination whether Salem cigarettes are unreasonably dangerous is exclusively governed by the ordinary consumer expectation test, as defined by comment (i) to § 402A, not the modified consumer expectation test that the plaintiff sought to apply. Id., 527. The defendant argued that application of the modified consumer expectation test would be improper because that test (a) only applies to products based on complex designs, which it claimed cigarettes are not, and (b) is conflict preempted by federal law because it could yield a result that in effect would require cigarette manufacturers to cease production to avoid liability, in contravention of Congress' decision to permit the sale of tobacco products. Id., 537.

The District Court rejected these claims in prejudgment and postjudgment motions. With respect to the plaintiff's theory of the case, the court concluded that the plaintiff's claim alleged, and the evidence demonstrated, that Salem cigarettes are uniquely designed and manufactured in such a way to make that product different from other cigarettes. Id., 526 n.3. With respect to the governing law, the court concluded that, although Connecticut derives an essential definition for product liability actions from comment (i) to § 402A of the Restatement (Second), there is no evidence that Connecticut has adopted the limitations in comment (i), including "[g]ood tobacco." Id., 536. The court further concluded that the jury properly could be instructed on the modified consumer expectation test. The court reasoned that this test was appropriate because the evidence demonstrated the complex design of cigarettes and the potential inability of the ordinary consumer (a beginner smoker, often a youth or minor) to

form proper safety expectations. Id., 537. Finally, the court concluded that a verdict for the plaintiff on that test under the plaintiff's theory of the case would not amount to a ban on all cigarettes given the evidence of the unique design of Salem cigarettes. Id.

Ultimately, the court decided to instruct the jury on both the ordinary and modified consumer expectation tests as alternative bases for liability. Id., 527, 535–36. In its instructions applicable to both tests, the District Court cautioned: "For [the] plaintiff to meet her burden of proving . . . that Salem . . . cigarettes are defective, she must show that the Salem . . . cigarettes were 'unreasonably dangerous' to her, the user. . . . With respect to cigarettes in general, I instruct you that cigarettes are not defective merely because nicotine and/or carcinogenic substances may be inherent in the tobacco from which such cigarettes are manufactured." Id., 535. The jury returned a verdict in favor of the plaintiff, finding the defendant liable for both strict liability and negligent design.[6] The verdict form did not indicate whether the jury's strict liability verdict was premised on the ordinary consumer expectation test or the modified consumer expectation test.

In accordance with the defendant's request, the jury assessed comparative responsibility for the plaintiff's injuries, attributing 42 percent to the plaintiff and 58

[6] In light of this verdict, the plaintiff objected to the formulation of the certified question because she contended that comment (i) to § 402A of the Restatement (Second) applies only to product liability claims premised on strict liability and not to those premised on negligence. In another product liability action brought against a different cigarette manufacturer after the present case commenced, the United States District Court for the District of Connecticut certified questions to this court regarding whether comment (i) to § 402A applies to a product liability claim for negligence under our act as well as whether punitive damages awarded under that act are common-law punitive damages limited to litigation costs or statutory punitive damages. See *Bifolck* v. *Philip Morris, Inc.*, Docket SC 19310. That case has been argued and the decision is pending.

percent to the defendant. After reducing the damages in accordance with the verdict, the District Court rendered judgment in the plaintiff's favor in the amount of $7,982,250 in compensatory damages, as well as punitive damages and offer of judgment interest.[7]

The defendant appealed to the Second Circuit, renewing, inter alia, its claim that the plaintiff's product liability cause of action is foreclosed by comment (i) to § 402A of the Restatement (Second) because comment (i) precludes liability of a seller of good tobacco. Because the Second Circuit deemed Connecticut law to be unsettled regarding this matter, it certified a question of law to this court regarding the preclusive effect of comment (i) on a strict product liability claim.

Before this court, the plaintiff argues: (1) the ordinary consumer expectation test, on which both comment (i) to § 402A and its good tobacco example are predicated, has been superseded as a matter of Connecticut law in favor of the modified consumer expectation test, under which consumer expectations are but one factor in assessing liability; (2) even under the ordinary consumer expectation test, the good tobacco exception in comment (i) to § 402A is limited to raw tobacco and does not require proof of "adulteration" or "contamination" of the cigarettes; and (3) public policy considerations militate against applying comment (i) to § 402A in a manner that would immunize cigarette manufacturers from strict liability for design defects. In response, the defendant contends that, because the only question before this court is whether comment (i) to § 402A precludes an action against a cigarette manufacturer premised on an unadulterated cigarette, a question that arises in connection with the ordinary consumer expectation

[7] The total amount of the judgment awarded to the plaintiff was $28,079,626.27, which, in addition to compensatory damages, included $3,970,289.87 in punitive damages, $15,777,352 in prejudgment offer of judgment interest, and $349,739.40 in postjudgment offer of judgment interest.

test, the plaintiff's argument relating to the modified consumer expectation test is outside the scope of the certified question and should not be addressed. Moreover, it contends that the modified test is an improper test for unadulterated, generic cigarettes. As to the ordinary consumer expectation test that it claims should govern, the defendant contends that, because the addictive and cancer causing properties of cigarettes have been well-known since at least the 1960s, jurisdictions espousing the standard in comment (i) to § 402A have routinely dismissed claims predicted on such alleged defects and this court should conclude likewise.

I

To resolve these competing contentions, it is necessary to provide some background on the development of Connecticut's strict product liability law. In 1965, Connecticut became one of the first jurisdictions to adopt, as a matter of state common law, § 402A of the Restatement (Second) of Torts, which had been adopted the previous year by the American Law Institute. See *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 241 Conn. 214, citing *Garthwait* v. *Burgio*, 153 Conn. 284, 289–90, 216 A.2d 189 (1965). Section 402A recognized an action for strict product liability in tort without the requirement of privity between the seller and the consumer or proof of manufacturer fault. See *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 210–11; Restatement (Third), Torts, Products Liability, introduction, p. 3 (1998). The elements of a strict liability action that this court derived from § 402A required the plaintiff to prove: "(1) the defendant was engaged in the business of selling the product; (2) *the product was in a defective condition unreasonably dangerous to the consumer or user*; (3) the defect caused the injury for which compensation was sought; (4) the defect existed at the time of the sale; and (5) the product

was expected to and did reach the consumer without substantial change in condition." (Emphasis added.) *Giglio* v. *Connecticut Light & Power Co.*, 180 Conn. 230, 234, 429 A.2d 486 (1980); accord *Rossignol* v. *Danbury School of Aeronautics, Inc.*, 154 Conn. 549, 562, 227 A.2d 418 (1967); *Garthwait* v. *Burgio*, supra, 289.

This court derived our definition of unreasonably dangerous, the second element of our strict liability test, from comment (i) to § 402A of the Restatement (Second): "To be considered unreasonably dangerous, the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." (Internal quotation marks omitted.) *Slepski* v. *Williams Ford, Inc.*, 170 Conn. 18, 23, 364 A.2d 175 (1975), quoting 2 Restatement (Second), supra, § 402A, comment (i), p. 352; accord *Giglio* v. *Connecticut Light & Power Co.*, supra, 180 Conn. 234. This definition eventually came to be known under our law as the ordinary consumer expectation test. See *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 241 Conn. 222.

Although our courts repeatedly have applied this definition, they have never referred to the related explanation or illustrations in comment (i) to § 402A. Comment (i) to § 402A of the Restatement (Second) of Torts provides in full: "The rule stated in this [s]ection applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from overconsumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. This is not what is meant by 'unreasonably dangerous' in this [s]ection. The article sold must be dangerous to an extent beyond that which

would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. *Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous.* Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous." (Emphasis added.)

To place comment (i) in its proper context, it is important to recognize that § 402A was adopted at a time when products liability historically had focused on manufacturing defects, particularly with respect to food safety issues, before design defects and inadequate safety warnings had become well established theories of strict product liability. See *Blue* v. *Environmental Engineering, Inc.*, 215 Ill. 2d 78, 89, 828 N.E.2d 1128 (2005) ("[h]istorically, the focus of products liability law was initially on manufacturing defects"); V. Schwartz, "The Restatement, Third, Torts: Products Liability: A Model of Fairness and Balance," 10 Kan. J.L. & Pub. Policy 41, 42 (2000) ("None of the cases cited in support of § 402[A] discussed design liability. All of the cases concerned products that were mismanufactured."); 1 D. Owen & M. Davis, Products Liability (4th Ed. 2014) § 8.3, pp. 712–14 (explaining historical development of rule in light of defective food products); see also Restatement (Third), supra, introduction, p. 3 ("[§] 402A had little to say about liability for design defects or for products sold with inadequate warnings"). This focus is reflected in the examples given in comment (i) of

unreasonably dangerous products, i.e., contaminated butter or mismanufactured whiskey.[8]

In 1979, our legislature adopted our product liability act. See Public Acts 1979, No. 79-483. That liability act required all common-law theories of product liability to be brought as a statutory cause of action. See General Statutes § 52-572n. However, the liability act neither expressly codified our common-law definition of defective product under § 402A and comment (i) nor supplanted it with its own definition. But see General Statutes § 52-572q (providing elements for failure to warn defect). A significant change under the liability act was the adoption of comparative responsibility in lieu of contributory fault, so that a plaintiff's recovery could be reduced in proportion to his or her responsibility for the injury but not barred, no matter how high the degree of fault. See General Statutes §§ 52-572*l* and 52-572o, legislatively overruling *Hoelter* v. *Mohawk Service, Inc.*, 170 Conn. 495, 505–506, 365 A.2d 1064 (1976) (importing contributory negligence concept and applying it to strict product liability).

As product liability jurisprudence began to develop beyond its historical focus to include design defects and failure to warn defects, many jurisdictions found the ordinary consumer expectation test to be an inadequate tool. See Restatement (Third), supra, § 1, comment (a), pp. 6–7 ("it soon became evident that § 402A, created to deal with liability for manufacturing defects, could not appropriately be applied to cases of design defects or defects based on inadequate instructions or

[8] Comment (i) to § 402A deems whiskey containing a dangerous amount of fusel oil to be unreasonably dangerous. Fusel oil is produced during alcoholic fermentation. 5 The New Encyclopaedia Britannica (15th Ed. 1998) p. 60. It is mildly toxic, but in small concentrations gives the whiskey flavor and body. A. Connelly, "The Science and Art of Whisky Making," The Guardian, August 27, 2010, available at http://www.theguardian.com/science/blog/2010/aug/23/science-art-whisky-making.

warnings"). Most obviously, one could not simply compare the defective product to others in the product line to make an objective assessment of the consumer's expectations of the product. See id., § 2, comment (a), pp. 15–16 ("In contrast to manufacturing defects, design defects and defects based on inadequate instructions or warnings are predicated on a different concept of responsibility. . . . [S]uch defects cannot be determined by reference to the manufacturer's own design or marketing standards because those standards are the very ones that plaintiffs attack as unreasonable. Some sort of independent assessment of advantages and disadvantages, to which some attach the label 'risk-utility balancing,' is necessary."); *Ford Motor Co.* v. *Pool*, 688 S.W.2d 879, 881 (Tex. App. 1985) ("Manufacturing defect cases involve products which are flawed, i.e., which do not conform to the manufacturer's own specifications, and are not identical to their mass-produced siblings. The flaw theory is based upon a fundamental consumer expectancy: that a mass-produced product will not differ from its siblings in a manner that makes it more dangerous than the others. Defective design cases, however, are not based on consumer expectancy, but on the manufacturer's design of a product which makes it unreasonably dangerous, even though not flawed in its manufacture."), aff'd in part and rev'd in part on other grounds, 715 S.W.2d 629 (Tex. 1986).

For this and other reasons principally related to problems of proof, many jurisdictions adopted a multifactor "risk-utility" balancing test for design defect cases in lieu of, or in addition to, the consumer expectation test. See, e.g., *Caterpillar Tractor Co.* v. *Beck*, 593 P.2d 871, 884 (Alaska 1979); *Barker* v. *Lull Engineering Co.*, 20 Cal. 3d 413, 435, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); *Armentrout* v. *FMC Corp.*, 842 P.2d 175, 183 (Colo. 1992) (en banc); *Radiation Technology, Inc.* v. *Ware*

Construction Co., 445 So. 2d 329, 331 (Fla. 1983); *Ontai* v. *Straub Clinic & Hospital, Inc.*, 66 Haw. 237, 243, 659 P.2d 734 (1983); *Lamkin* v. *Towner*, 138 Ill. 2d 510, 529, 563 N.E.2d 449 (1990); *Thibault* v. *Sears, Roebuck & Co.*, 118 N.H. 802, 807–809, 395 A.2d 843 (1978); *Turner* v. *General Motors Corp.*, 584 S.W.2d 844, 848 (Tex. 1979); see also 1 D. Owen & M. Davis, supra, § 8.15, p. 762 ("during the 1980s . . . the consumer expectation test gradually lost ground to risk-utility in their battle for supremacy as independent tests of design defectiveness" [footnote omitted]). When the Restatement (Third) of Torts was adopted by the American Law Institute in 1997, it deemed the consumer expectation test inappropriate for design defects and abandoned that test in favor of a risk-utility test that focused on the availability of a feasible, safer alternative. Restatement (Third), supra, § 2 (b); id., § 2, comment (g), pp. 27–28. Under the Restatement (Third) of Torts and the various jurisdictions' risk-utility tests, consumer expectations were a relevant, but not necessarily dispositive, consideration in determining whether there was a design defect. Restatement (Third), supra, § 2, comment (d), p. 20; id., § 2, reporters' note, comment (d) (IV) (C), pp. 84–87.

In 1997, in *Potter*, this court considered the viability of our ordinary consumer expectation test for design defect cases. See *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 241 Conn. 206–23. The defendants in that case had requested that the court abandon that test for such cases in favor of the risk-utility test in the second tentative draft of the Restatement (Third) of Torts.[9] Id., 215. The court declined to adopt the test in the draft

[9] The American Law Institute adopted the final version of the Restatement (Third) of Torts shortly after this court rendered its decision in *Potter*. As the concurring opinion explains, the Restatement (Third) made a point of responding to the criticism in *Potter* of its test and explaining how its final draft addressed those criticisms. See Restatement (Third), supra, § 2, reporters' note, comment (d) (II) (C), pp. 71–73.

Restatement (Third). Id., 217–19. The court viewed an absolute requirement of proof of a feasible alternative design to impose an undue burden on plaintiffs and to preclude claims that should be valid even in the absence of such proof. Id., 217–18.

Although the court in *Potter* maintained its allegiance to § 402A, it acknowledged criticisms of the ordinary consumer expectation test and decided that some change in our law was necessary because that test also could preclude relief for valid claims. Id., 219–20. In particular, the court pointed to the problem of complex products for which a consumer might not have informed safety expectations. Id., 219. The court was concerned, however, with shifting the focus to the conduct of the manufacturer and in turn abandoning strict liability. Id., 221–22. Accordingly, the court decided to adopt a test that would incorporate risk-utility factors into the ordinary consumer framework. Id., 220–21. Under the "modified" consumer expectation test, the jury would weigh the product's risks and utility and then inquire, in light of those factors, whether a "reasonable consumer would consider the product design unreasonably dangerous." Id., 221. The court's sample jury instruction incorporated the definition of unreasonably dangerous from comment (i) to § 402A of the Restatement (Second) and then provided a nonexclusive list of factors that could be used to determine what an ordinary consumer would expect.[10] Id., 221 n.15. "The availability of a feasible

[10] "Under this formulation, a sample jury instruction could provide: 'A product is unreasonably dangerous as designed, if, at the time of sale, it is defective to an extent beyond that which would be contemplated by the ordinary consumer. In determining what an ordinary consumer would reasonably expect, you should consider the usefulness of the product, the likelihood and severity of the danger posed by the design, the feasibility of an alternative design, the financial cost of an improved design, the ability to reduce the product's danger without impairing its usefulness or making it too expensive, and the feasibility of spreading the loss by increasing the product's price or by purchasing insurance, and such other factors as the claimed defect indicate are appropriate.' " *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 241 Conn. 221 n.15.

alternative design is a factor that a plaintiff may, rather than must, prove in order to establish that a product's risks outweigh its utility." Id., 221.

The court in *Potter* emphasized that it would "not require a plaintiff to present evidence relating to the product's risks and utility in every case. . . . There are certain kinds of accidents—even where fairly complex machinery is involved—[that] are so bizarre that the average juror, upon hearing the particulars, might reasonably think: Whatever the user may have expected from that contraption, it certainly wasn't that. . . . Accordingly, the ordinary consumer expectation test [would be] appropriate when the everyday experience of the particular product's users permits the inference that the product did not meet minimum safety expectations." (Citation omitted; internal quotation marks omitted.) Id., 222. In other words, the ordinary consumer expectation test would be appropriate when the incident causing injury is so bizarre or unusual that the jury would not need expert testimony to conclude that the product failed to meet the consumer's expectations. The court also indicated that instructions regarding both tests could be given to the jury, if supported by the evidence. Id., 223.

Potter was decided at a point in time when Connecticut design defect jurisprudence was not well developed. Indeed, as the present case illustrates, because actions under our liability act often have been brought in federal court, this court has had limited opportunities to do so. Subsequent case law and commentary has indicated that *Potter* was not clear as to when resort to each test would be appropriate and under what circumstances both tests properly could be submitted to a jury. See generally D. Fisher, "Connecticut's Jury Instruction on Design Defect Is Defective: A Second Look at *Potter* v. *Chicago Pneumatic Tool*," 84 Conn. B.J. 325 (2010) (complaining that *Potter* left uncertainties); J. Farley

et al., "Recent Developments in Connecticut Products Liability Law: Breaking New Ground in Design Defect Cases," 73 Conn. B.J. 41, 41–44 (1999) (same); compare *Savage* v. *Scripto-Tokai Corp.*, 266 F. Supp. 2d 344, 350 (D. Conn. 2003) (rejecting defendant's argument that, in Connecticut, ordinary products are subject to ordinary test, while complex products may be subject to modified test, as "a misreading of *Potter*"), with *Moss* v. *Wyeth, Inc.*, 872 F. Supp. 2d 162, 166 (D. Conn. 2012) (limiting modified test to complex products), *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, supra, 806 F. Supp. 2d 527, 537 (treating modified test as standard for complex product designs), and *Netherlands Ins. Co.* v. *Tin Ceiling Xpress, Inc.*, Superior Court, judicial district of Windham, Docket No. CV-12-6005760-S, 2014 WL 7495053, *3 (October 30, 2014) (equating modified test to malfunction theory). The present case is a paradigmatic example of the confusion left in *Potter*'s wake. The defendant contends that, under *Potter*, only the ordinary consumer expectation test applies to the present case because the modified test is limited to complex designs for which consumers lack safety expectations. The plaintiff contends that, under *Potter*, the modified consumer expectation test is the default test with the ordinary test limited to res ipsa type cases, in which the consumer's minimum expectations of the product have not been met. We have not been presented with an opportunity since *Potter* to address squarely our design defect standards. We therefore take this opportunity to revisit *Potter* and dispel the ambiguity created by it, with the advantage of hindsight informed by almost two decades of subsequent developments in product liability law.[11]

[11] The concurring justices would go further and take this occasion to adopt the test in the Restatement (Third) of Torts. We decline to consider that issue in the present case principally because neither party sought to have the jury charged under the Restatement (Third) test, which would have required the jury to make a finding that was not required under either of our current tests, namely, that there was a feasible, safer alternative.

II

At the outset, we address the defendant's contention that our analysis must be limited to the ordinary consumer expectation test because the modified consumer expectation test falls outside of the scope of the certified question. Simply put, we disagree. The certified question asks: "Does [comment (i) to § 402A] preclude a suit premised on strict products liability against a cigarette manufacturer based on evidence that the defendant [designed] cigarettes to increase daily consumption without regard to the resultant increase in exposure to carcinogens, but in the absence of evidence of adulteration or contamination?" As we have explained in part I of this opinion, § 402A of the Restatement (Second) is the governing standard for both tests and the definition in comment (i) of unreasonably dangerous plays a role in each test. See *D'Ascanio* v. *Toyota Industries Corp.*, 309 Conn. 663, 673 n.5, 72 A.3d 1019 (2013) (citing standard under § 402A as governing all strict product liability actions); see also *Reed* v. *Tiffin Motor Homes, Inc.*, 697 F.2d 1192, 1197 (4th Cir. 1982) (risk-utility test "finds its roots in [c]omment [i] to § 402A"). Even if, however, the modified consumer expectation test did not fall within the scope of the certified question, we may reformulate a question certified to us. See General Statutes § 51-199b (k). Pursuant to § 51-199b (f) (3), the Second Circuit invited us to modify the question as necessary or answer other questions that we deem relevant. See *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, supra, 731 F.3d 169. Accordingly, it is proper for us to consider the scope and application of the modified consumer expectation test as it bears on our resolution of the present case.

Although the plaintiff did present evidence on that matter, the jury was free to conclude that Salem cigarettes are unreasonably dangerous even if it did not credit that evidence. Therefore, we conclude that it is appropriate and sufficient in the present case to clarify the circumstances under which the existing tests apply rather than adopt a new legal standard.

For the reasons set forth subsequently, we reach the following conclusions regarding the standards for a strict product liability action based on defective design generally and in the present case. Under *Potter*, the modified consumer expectation test is our primary test. The ordinary consumer expectation test is reserved for cases in which the product failed to meet the ordinary consumer's *minimum* safety expectations, such as res ipsa type cases. A jury could not reasonably conclude that cigarettes that cause cancer fail to meet the consumer's minimum safety expectations. Therefore, the plaintiff was required to proceed under the modified consumer expectation test. Comment (i) to § 402A of the Restatement (Second) does not present a per se bar to recovery under the modified consumer expectation test. Accordingly, the answer to the certified question is "no."

To begin, we acknowledge that there is language in *Potter*, as well as in subsequent Connecticut case law, that could support each of the following interpretations of our strict liability standards for design defects: (1) the ordinary consumer expectation test is the primary test, with the modified consumer expectation test reservedexclusively for complex product designs for which an ordinary consumer could not form safety expectations (simple/complex divide); (2) the modified consumer expectation test is the default test, with the ordinary consumer expectation test reserved for products that fail to meet minimum safety expectations; and (3) a plaintiff may elect to proceed under either test or both tests, such that, even if the claim fails under the ordinary consumer expectation test, the plaintiff may prevail under the modified consumer expectation test with the assistance of expert testimony.[12]

[12] We note that our case law subsequent to *Potter* also recognizes the malfunction theory as a basis for establishing strict product liability. See *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 99 A.3d 1079 (2014); *Metropolitan Property & Casualty Ins. Co.* v. *Deere & Co.*, 302 Conn. 123, 25 A.3d 571 (2011). "The malfunction theory allows a plaintiff in a product

We are not persuaded that *Potter* intended to draw a simple/complex divide. The court in *Potter* pointed to the problem in proving consumers' safety expectations for complex products because that concern was implicated in the case before the court and was the most obvious misfit for the ordinary consumer expectation test. *Potter* involved pneumatic hand tools alleged to be defective because they exposed users to excessive vibration, which in turn caused permanent vascular and neurological damage to the users' hands. *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 241 Conn. 202–204. The plaintiffs relied on expert testimony from various engineers and industry standards to prove their case.[13]

liability action to rely on circumstantial evidence to support an inference that an unspecified defect attributable to a product seller was the most likely cause of a product malfunction when other possible causes of the malfunction are absent." *White* v. *Mazda Motor of America, Inc.*, supra, 612. This theory does not fall squarely within either the ordinary or modified consumer expectation test, but to some extent overlaps with both tests. See id., 622, 632–33 n.9. It applies when the product fails to perform as manifestly intended, which is at issue under the ordinary test, but expert testimony also may be required in certain cases, which is relevant under the modified consumer test. See id., 632 n.9 ("The malfunction theory is not an alternative to expert testimony, nor is it proven simply on the basis of the expectations of the consumer. The malfunction theory is an alternative to proving the existence of a specific defect that is based on the argument that a malfunction resulted from an unspecified defect in the product because there is no other reasonably possible cause of the malfunction. . . . In fact, we have made clear that many claims under the malfunction theory will require expert testimony." [Citation omitted.]). Because the defect is unspecified (and perhaps unspecifiable), it "does not depend on a design or manufacturing defect." Id., 633 n.9. Neither party claims that this theory applies to the present case, and we therefore need not address it.

[13] Although the plaintiffs' evidence and theory of the case set forth in *Potter* would seem to fall squarely within the purview of the modified consumer expectation test, we presume that the court in *Potter* analyzed the defendants' claim challenging the sufficiency of the evidence to establish a design defect under the ordinary consumer expectation test because: (a) it was the only standard recognized at the time of trial; (b) the modified consumer expectation test still asked the jury to decide whether the product failed to meet those expectations; and (c) the defendant had requested an instruction requiring the plaintiff to prove a feasible alternative design, a requirement that this court rejected. Therefore, we presume that the court in *Potter* implicitly adopted the modified consumer expectation test prospectively.

Id., 204–206. Notably, although concerns about proof for complex products was foremost in the court's mind when adopting the modified test, the court stated no limitations on the circumstances in which that test could be applied. Instead, all of the limitations discussed were in reference to the application of the ordinary consumer expectation test. See id., 222–23 (The court cited to bizarre accidents as examples of when resort to the ordinary consumer test would be appropriate, and noted: "[T]he jury should engage in the risk-utility balancing required by our modified consumer expectation test when the particular facts do not reasonably permit the inference that the product did not meet the safety expectations of the ordinary consumer. . . . Furthermore, instructions based on the ordinary consumer expectation test would not be appropriate when, as a matter of law, there is insufficient evidence to support a jury verdict under that test. . . . In such circumstances, the jury should be instructed solely on the modified consumer expectation test we have articulated today." [Citations omitted.]).

Moreover, a simple/complex divide would not be ideal because the line between these categories is not always clear. See id., 269 n.2 *(Berdon, J.*, concurring) (criticizing majority for failure to provide such guidance); D. Fisher, supra, 84 Conn. B.J. 333 ("it would be helpful to provide guidance as to *how* the court decides whether a case is 'complex' or 'simple' " [emphasis in original]). Indeed, one could readily categorize the defendant's Salem cigarettes as a complex product because of the hundreds of ingredients incorporated into Salem cigarettes, as well as the myriad physical, chemical and biochemical variables that were considered in designing that product. Cf. *Evans* v. *Lorillard Tobacco Co.*, 465 Mass. 411, 428, 990 N.E.2d 997 (2013) (noting that evidence established that cigarette is "highly engineered product"); *Smith* v. *Brown & Wil-*

liamson Tobacco Corp., 275 S.W.3d 748, 796 (Mo. App. 2008) (same). Alternatively, one could view the defendant's cigarettes as a simple product if characterized as nothing more than a nicotine delivery system that carries a known risk of causing cancer.

We observe that other jurisdictions that apply both a consumer expectation test and a risk-utility test have rejected the simple/complex divide. See, e.g., *Mikolajczyk* v. *Ford Motor Co.*, 231 Ill. 2d 516, 528–41, 901 N.E.2d 329 (2008) (rejecting argument that risk-utility test is only test to be applied if product is complex and if injury occurred in circumstances unfamiliar to average consumer and that consumer expectation test is reserved for cases involving simple products or everyday circumstances); *Calles* v. *Scripto-Tokai Corp.*, 224 Ill. 2d 247, 250, 864 N.E.2d 249 (2007) ("In Illinois, two tests are employed when determining whether a product is unreasonably dangerous under a strict liability design-defect theory—the consumer-expectation test and the risk-utility test. In this case, we are asked to consider whether there is a 'simple product' exception to the application of the risk-utility test. That is, we must decide whether a product which is deemed 'simple' and its dangers 'open and obvious' will be per se exempt from the risk-utility test and subject only to the consumer-expectation test. We decline to adopt such a per se rule."); see also *Soule* v. *General Motors Corp.*, 8 Cal. 4th 548, 568–69, 882 P.2d 298, 34 Cal. Rptr. 2d 607 (1994) (The court rejected the defendant's argument "that the consumer expectations test is improper whenever . . . a complex product, or technical questions of causation are at issue. Because the variety of potential product injuries is infinite, the line cannot be drawn as clearly as [the defendant] proposes. But the fundamental distinction is not impossible to define. The crucial question in each individual case is whether the circumstances of the product's failure permit an inference that

the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers."); *Soule* v. *General Motors Corp.*, supra, 570 (explaining that risk-utility test was only proper test in that case, not because product was complex but because jury required expert testimony to determine whether product was not reasonably safe).

Although some of the shortcomings of the ordinary consumer expectation test have been best illustrated in relation to complex designs, the concerns with this test have never been limited to such designs. See, e.g., J. Beasley, Products Liability and the Unreasonably Dangerous Requirement (1981) p. 88 (asserting that consumer expectation test has "little logical application to new products, where no expectation of safety may have developed, or to obscure products with a limited market, where the number of consumers is not conducive to a clear consensus," and also noting opposite problem, that "if an entire industry rejects a safe design and uses an unsafe one, the unsafe one may have become expected"); see also S. Birnbaum, "Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence," 33 Vanderbilt L. Rev. 593, 613–15 (1980) (discussing generally applicable concerns with ordinary consumer expectation test). One significant concern has been that the ordinary consumer expectation test, which deems unreasonable only those dangers that would not be anticipated by an ordinary consumer, could preclude recovery whenever a product's dangers were open and obvious. W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984) § 99, pp. 698–99; A. Weinstein et al., Products Liability and the Reasonably Safe Product (1978) pp. 45–46 ("The difficulty with [the ordinary consumer expectation] test is that it suggests that a manufacturer has fulfilled all his duties to the consumer if the product's dangers are open and obvious. In many instances

manufacturers have been absolved from liability when an obvious danger caused serious injury, even though that injury could have been averted by a design modification that would not have added significantly to the cost of the product or impaired its usefulness.").

The court in *Potter* had no occasion to address this concern. Nonetheless, it is evident that limiting the modified test to complex products for which the consumer could not form safety expectations would be antithetical to the public policies informing our product liability law. A consequence of such a limitation would be to immunize manufacturers even when they readily could have reduced or eliminated the product's danger. It could also immunize manufacturers for design decisions that increase the risk of known dangers, as in the present case. Our legislature's express rejection of comparative or contributory negligence as a bar to recovery in a strict liability action would be in tension with a sweeping immunity based solely on the consumer's knowledge. Cf. *Calles* v. *Scripto-Tokai Corp.*, supra, 224 Ill. 2d 262 (reaching same conclusion in light of legislature's rejection of assumption of risk as bar to strict products liability). Moreover, *Potter* expanded our product liability tests to remove impediments to recovery.[14] Cf. 1 D. Owen & M. Davis, supra, § 8.4, pp. 715–16

[14] We also note that precluding liability solely because the product's dangers were open and obvious would be in tension with this court's resolution of an issue in *Potter*. The court in *Potter* held that a jury may properly consider "state of the art" evidence—"the level of relevant scientific, technological and safety knowledge existing and reasonably feasible at the time of design"—in determining whether a product was defectively designed and unreasonably dangerous. *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 241 Conn. 250. The court underscored that "state of the art refers to what is technologically feasible, rather than merely industry custom. . . . Obviously, the inaction of all the manufacturers in an area should not be the standard by which the state of the art should be determined. . . . Accordingly, [a] manufacturer may have a duty to make products pursuant to a safer design even if the custom of the industry is not to use that alternative." (Citations omitted; internal quotation marks omitted.) Id., 250–51. The fact that an industry universally may design a product in a manner that poses a particular danger may provide notice to consumers of such a danger. To

("[a]lthough the consumer expectations standard was conventionally viewed as more protective to plaintiffs than the risk-utility standard, it now is clear that courts have used the consumer expectations test most frequently to *deny* recovery to plaintiffs in cases involving obvious design hazards" [emphasis in original; footnote omitted]).

More fundamentally, providing such immunity would remove an important incentive to improving product safety. For this reason, there has been a clear and overwhelming trend in other jurisdictions to allow consumers to pursue defective product design claims despite open and obvious dangers, usually under a multifactor risk-utility test. See Restatement (Third), supra, § 2, reporters' note, comment (d) (IV) (C), pp. 84–87; see, e.g., *Barker* v. *Lull Engineering Co.*, supra, 20 Cal. 3d 425 ("we flatly rejected the suggestion that recovery in a products liability action should be permitted *only* if a product is more dangerous than contemplated by the average consumer, refusing to permit the low esteem in which the public might hold a dangerous product to diminish the manufacturer's responsibility for injuries caused by that product" [emphasis in original]); *Ogletree* v. *Navistar International Transportation Corp.*, 269 Ga. 443, 444, 500 S.E.2d 570 (1998) ("The overwhelming majority of jurisdictions have held that the open and obvious nature of the danger does not preclude liability for design defects. . . . Moreover, academic commentators are almost unanimous in their criticism of the rule." [Citations omitted.]); *Calles* v. *Scripto-Tokai Corp.*, supra, 224 Ill. 2d 262 (expressing concern that "[a]doption of a [per se] rule [excepting simple products with open and obvious dangers from analysis under the risk-utility test] would essentially absolve manufacturers from liability in certain situations even though

preclude liability due to such notice would negate the evidentiary value of the state of the art.

there may be a reasonable and feasible alternative design available that would make a product safer, but which the manufacturer declines to incorporate because it knows it will not be held liable"); see also 1 D. Owen et al., Products Liability (3d Ed. 2000) § 8:3, p. 447 (consumer expectation test limited by open and obvious doctrine "perniciously rewards manufacturers for failing to adopt cost-effective measures to remedy obviously unnecessary dangers to human life and limb"); J. Beasley, supra, p. 89 ("One of the greatest dangers of the [c]omment [i] [to § 402A] standard is that it encourages the perpetuation of poor manufacturing and design practices. The more uniformly a certain shoddiness is allowed to go unrestrained, the more it comes to be expected. . . . The trouble with a 'consumer expectation' test is that it allows an industry to set its own standards with no check upon its own self-interest.").

Making the modified consumer expectation test our default test for design defect claims, and reserving the ordinary consumer expectation test for those products that fail to meet legitimate, commonly accepted minimum safety expectations, provides a safety incentive that is consonant with our state's public policies. Moreover, such a framework is the only one that can be reconciled with this court's direction in *Potter* that the jury could be instructed on both tests if supported by the evidence. Allowing the jury to consider both tests is only logical if the standard, and not merely the nature of proof, differs under each test. If the two tests were merely alternative methods of proving the same standard—the product failed to meet the ordinary consumer's expectations—then a jury's verdict that this standard was not met under one test could not logically be reconciled with a verdict that this standard was met under the other test. Either the product met the ordinary consumer's expectations, or it did not. If, however, one

test sets the floor for recovery—a product that meets *minimum* safety expectations—then a verdict for the defendant on that test logically could be reconciled with a plaintiff's verdict on a test that sets a higher standard. Cf. *Barker* v. *Lull Engineering Co.*, supra, 20 Cal. 3d 426 n.7 ("The flaw in the . . . analysis [of the Restatement (Second)] . . . is that it treats such consumer expectations as a 'ceiling' on a manufacturer's responsibility under strict liability principles, rather than as a 'floor.' . . . [P]ast . . . decisions establish that at a minimum a product must meet ordinary consumer expectations as to safety to avoid being found defective." [Emphasis omitted.]). In other words, a product might meet the consumer's minimum safety expectations because the product's dangers are known or obvious but nonetheless be defective because it could have been designed to be less dangerous without unreasonably compromising cost or utility (e.g., a table saw lacking a safety guard). See id., 430 ("a product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies 'excessive preventable danger,' or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design").[15]

Accordingly, we hold that, under our product liability law, the ordinary consumer expectation test is reserved for those limited cases in which a product fails to meet a consumer's legitimate, commonly accepted minimum

[15] We note that Illinois avoids this problem through a different approach. That state allows the parties' theory of the case and evidence to dictate which test applies. If the evidence under either party's theory implicates the risk-utility test, that broader test, which incorporates the factor of consumer expectations, is the sole test to be applied by the finder of fact. See *Mikolajczyk* v. *Ford Motor Co.*, supra, 231 Ill. 2d 556. Thus, because Illinois does not allow a jury to make findings on both tests, there is no risk of an inconsistent verdict.

safety expectations. Expert testimony on product design is not needed to prove the product's defect, nor is the utility of the product's design an excuse for the undisclosed defect. See *Soule* v. *General Motors Corp.*, supra, 8 Cal. 4th 567 ("the consumer expectations test is reserved for cases in which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the design" [emphasis omitted]); A. Twerski & J. Henderson, "Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility," 74 Brook. L. Rev. 1061, 1108 (2009) ("overwhelming majority of cases that rely on consumer expectations as the theory for imposing liability do so only in res ipsa-like situations in which an inference of defect can be drawn from the happening of a product-related accident"). All other cases should be determined under the modified consumer expectation test.

With this clarification of our law, it is evident that the plaintiff in the present case properly could proceed only under the modified consumer expectation test. A cigarette that exposes the user to carcinogens and the attendant risk of cancer cannot be said to fail to meet an ordinary consumer's legitimate, commonly accepted minimum safety expectations.[16] To establish the defect, the plaintiff's case required expert testimony on ciga-

[16] We recognize that a different conclusion might be warranted in cases in which the plaintiff (or decedent) began smoking before warning labels were mandated by federal law. See *Guilbeault* v. *R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 271 (D.R.I. 2000) ("most of the courts considering the common knowledge of the general disease-related health risks of smoking have placed common knowledge at least at 1966 and some before"); see, e.g., *Spain* v. *Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1194 (11th Cir. 2004); *Insolia* v. *Philip Morris, Inc.*, 216 F.3d 596, 600 (7th Cir. 2000); *Estate of White* v. *R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 432–33 (D. Md. 2000); *Tillman* v. *R.J. Reynolds Tobacco Co.*, 871 So. 2d 28, 33 (Ala. 2003); *Miele* v. *American Tobacco Co.*, 2 App. Div. 3d 799, 802, 770 N.Y.S.2d 386 (2003).

rette design and manufacture, as well as the feasibility of an alternative design. The defendant contends, however, that applying the modified consumer expectation test to cigarettes would be improper because it would effectively result in a de facto ban on cigarettes, in violation of our legislature's "ratifi[cation]" of this court's adoption of comment (i) to § 402A in our product liability act and Congress' declaration that cigarettes are a legal product. See *Food & Drug Administration* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 136–37, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) (concluding that, because Congress had demonstrated that it foreclosed removal of tobacco products from market, Federal Drug Administration [FDA] was precluded from regulating tobacco products when FDA's statutory mandate would require it to ban them in light of its determination that such products cannot be made safe for intended use). We are not persuaded.

Our legislature did not ratify this court's previous adoption of comment (i) to § 402A when it enacted the liability act. Neither § 402A nor comment (i) is expressly or implicitly referenced in the liability act. Cf. S.C. Code Ann. § 15-73-30 (2005) ("[c]omments to § 402A of the Restatement of Torts, Second, are incorporated herein by reference thereto as the legislative intent of this chapter");[17] Wn. Rev. Code Ann. § 7.72.030 (3) (West 2007) ("[i]n determining whether a product was not reasonably safe under this section, the trier of fact shall consider whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer"). *Potter* plainly reflects this court's understanding that, except where preempted by the

[17] We note that, even when a legislature has adopted the Restatement (Second) of Torts and identified its comments as legislative intent, a court has concluded that such action did not express an "intention to foreclose court consideration of developments in products liability law." *Branham* v. *Ford Motor Co.*, 390 S.C. 203, 220, 701 S.E.2d 5 (2010).

liability act, the legislature left the development of product liability standards to the common law. The court would have been required to reject the defendant's request in *Potter* to adopt the Restatement (Third) standard had the legislature effectively codified comment (i) to § 402A of the Restatement (Second). Instead, the court rejected the Restatement (Third) standard after considering its merits.

With regard to the defendant's preemption argument, we have two responses. Insofar as this argument implicates federal preemption and evidentiary issues, we believe such matters should be resolved by the Second Circuit. Insofar as the defendant contends that application of the modified consumer expectation test to circumstances like the present case could effectively allow a jury to ban commonly used and useful products, thus usurping our legislature's authority over such matters, we find such concerns too speculative to warrant a contrary rule. We have every confidence that the possibility of such outlier verdicts could be addressed through a motion for judgment notwithstanding the verdict. Cf. *Calles* v. *Scripto-Tokai Corp.*, 358 Ill. App. 3d 975, 982, 832 N.E.2d 409 (2005) ("in very extreme cases [i.e., products with very low production costs], courts may make the determination that the cost-benefit analysis under the risk-utility test strongly favors the manufacturer and there is no need to send the case to [the] jury because no reasonable jury could find for the plaintiff" [internal quotation marks omitted]), aff'd, 224 Ill. 2d 247, 864 N.E.2d 249 (2007); *Hernandez* v. *Tokai Corp.*, 2 S.W.3d 251, 261 (Tex. 1999) ("the issue of whether the product is unreasonably dangerous as designed may nevertheless be a legal one if reasonable minds cannot differ on the risk-utility analysis considerations").

Finally, we note that other jurisdictions applying some form of risk-utility test to design defect claims

against cigarette manufacturers have found no impediment to the application of that test if the plaintiff identifies some defect specific to the cigarette brand(s) at issue and/or a reasonably safer alternative.[18] See *Philip Morris USA, Inc.* v. *Arnitz*, 933 So. 2d 693, 695 (Fla. App.) (affirming judgment in favor of plaintiff on design defect theory based on claim that, while plaintiff knew that smoking posed health risk, consumers did not know of increased risk posed by defects in product where manufacturer: used additives or flavorants to overcome body's natural defenses to inhaling smoke, thus making cigarettes easier to inhale; used as many as 110 to 115 total additives and that some additives changed form of nicotine to freebase nicotine, which can lead to greater nicotine addiction; and used " 'flue-cured' " tobacco, which increased level of carcinogenic tobacco specific nitrosamines in tobacco), review denied, 946 So. 2d 1071 (Fla. 2006); *Evans* v. *Lorillard Tobacco Co.*, supra, 465 Mass. 428–29, 431 (The court affirmed the verdict for the plaintiff, who established that cigarettes are a highly engineered product, that the defendant manipulated its product to give smokers particular doses of tar and nicotine, that the defendant

[18] Indeed, even in jurisdictions analyzing such claims under the consumer expectation test, courts have recognized that products liability actions properly may be brought against cigarette manufacturers if they have manipulated the product design to be more dangerous or have made their product different than other cigarettes. See *Hearn* v. *R.J. Reynolds Tobacco Co.*, 279 F. Supp. 2d 1096, 1106 (D. Ariz. 2003); *Thomas* v. *R.J. Reynolds Tobacco Co.*, 11 F. Supp. 2d 850, 852–53 (S.D. Miss. 1998); *Burton* v. *R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1522 (D. Kan. 1995); *Kotler* v. *American Tobacco Co.*, 731 F. Supp. 50, 51–52 (D. Mass.), aff'd, 926 F.2d 1217 (1st Cir. 1990), cert. granted and judgment vacated on other grounds, 505 U.S. 1215, 112 S. Ct. 3019, 120 L. Ed. 2d 891 (1992); *Dujack* v. *Brown & Williamson Tobacco Corp.*, Superior Court, judicial district of Tolland, Docket No. X07-00728225-S, 2001 WL 34133836, *1–2 (November 13, 2001); *Naegele* v. *R.J. Reynolds Tobacco Co.*, 28 Cal. 4th 856, 865, 50 P.3d 769, 123 Cal. Rptr. 2d 61 (2002); *King* v. *Philip Morris, Inc.*, Docket No. 99-C-856, 2000 WL 34016358, *8–9 (N.H. Super. November 2, 2000); *Schwarz* v. *Philip Morris, Inc.*, 206 Or. App. 20, 65–66, 135 P.3d 409 (2006), aff'd, 348 Or. 442, 235 P.3d 668 (2010).

maintained the addictive level of nicotine, and that the plaintiff had proposed as a reasonable alternative a cigarette without menthol in which the carcinogens in the tar are at a level that is relatively safe and where the level of nicotine is nonaddictive. "We do not accept [the defendant's] implicit suggestion that every cigarette, to be a cigarette, must contain levels of tar that cause a high risk of cancer and levels of nicotine that are addictive."); *Haglund* v. *Philip Morris, Inc.*, Docket No. 012367C, 2009 WL 3839004, *1, 3, 9–10 (Mass. Super. October 20, 2009) (The court denied a motion for summary judgment, applying a feasible, safer alternative design test under § 2 of the Restatement [Third] of Torts under an implied warranty theory, where the plaintiff alleged that the defendant manipulated nicotine levels via cigarette construction technology and tobacco blend selection, increasing free nicotine and increasing inhalability through tobacco processing, including the specification of flavorants, additives and smoke chemistry. The jury must weigh the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.); *Smith* v. *Brown & Williamson Tobacco Corp.*, supra, 275 S.W.3d 796 (jury that was not limited in factors to determine if defective product unreasonably dangerous properly returned verdict for plaintiff where evidence went beyond categorical attack on danger of cigarettes in general and instead demonstrated specific design choices that had potential to affect plaintiff's health during time period she smoked, including evidence that cigarettes were highly engineered product, different from other cigarettes, contained menthol to numb throat and make it easier to inhale more deeply and allowed more nicotine to be delivered to body); *Tomasino* v. *American Tobacco Co.*, 23 App. Div. 3d 546, 548–49, 807 N.Y.S.2d 603 (2005)

(concluding that defendants' motions for summary judgment were properly denied and rejecting their contention that they were entitled to judgment because cigarettes were in condition reasonably contemplated by ultimate consumer); *Miele* v. *American Tobacco Co.*, 2 App. Div. 3d 799, 801, 805, 770 N.Y.S.2d 386 (2003) (The court reversed the lower court's ruling granting the defendants' motions for summary judgment because the evidence that "the tobacco companies opted not to develop, pursue, or exploit available technologies to reduce the toxins in cigarettes which cause disease, sufficed to raise an issue of fact as to whether the foreseeable risk of harm posed by cigarettes could have been reduced or avoided by the adoption of a reasonable alternative design by the manufacturer respondents. It is ineluctable that, based upon the evidence presented by the plaintiff, a jury may determine that the tobacco companies' objective was to entrap the cigarette smoker to preserve and enhance their economic objectives."); *Semowich* v. *R.J. Reynolds Tobacco Co.*, Docket No. 86-CV-118, 1988 WL 86313, *3–4 (N.D.N.Y. August 18, 1988) (rejecting defendant's argument that comment [i] to § 402A of the Restatement [Second] precluded plaintiff's claim because, to extent that comment [i] suggests cigarettes cannot be defective, it does not represent New York law, but noting that plaintiff must present evidence that product, as designed, was not reasonably safe because there was substantial likelihood of harm and it was feasible to design product in safer manner).

Finally, we turn to the question of whether comment (i) to § 402A of the Restatement (Second) is a per se bar to the plaintiff's recovery under the modified consumer expectation test. We conclude that it is not.

Comment (i) to § 402A serves a limited role under the modified consumer expectation test. Although the modified test asks the jury to weigh various factors

through the ultimate lens of the consumer's expectations, as a functional and practical matter that weighing process supplants the definition in comment (i) of unreasonably dangerous.[19] Cf. *Wright* v. *Brooke Group Ltd.*, 652 N.W.2d 159, 169–70 (Iowa 2002) (concluding that comment [i] to § 402A does not apply after court adopted risk-utility test). In other words, the factors that the court in *Potter* identified essentially provide the jury with information that a fully informed consumer would know before deciding whether to purchase the product. See *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 241 Conn. 221. When the consumer has specific product expectations that differ from those factors, those too may be factored into the weighing process. It could be that, in a given case, the consumer's expectations of the product would be the determinative factor. See *Blue* v. *Environmental Engineering, Inc.*, supra, 215 Ill. 2d 87 ("[u]nder the risk-utility test, the open and obvious nature of the risk is just one factor to be considered within this range of considerations and it will only serve to bar the liability of the manufacturer where it outweighs all other factors to be considered in weighing the inherent risks against the utility of the product as manufactured"); *Delaney* v. *Deere & Co.*, 268 Kan. 769, 792–93, 999 P.2d 930 (2000) (rejecting open and obvious danger as precluding recovery and instead making that fact merely one of several informing consumer's expectations); *Evans* v. *Lorillard Tobacco Co.*, supra, 465 Mass. 428 (noting that under risk-utility test, "because reasonable consumer expectations are simply one of many factors that may be considered and not necessarily the determinative factor, the plaintiff was not obligated to prove that Newport cigarettes were

[19] A question remains whether the incorporation of the ordinary consumer's expectations into our modified test as our focal point would preclude a strict product liability claim on behalf of a foreseeable, but unintended user. Nonetheless, we have no occasion to resolve that question in the present case.

more dangerous than consumers reasonably expected"); *Tomasino* v. *American Tobacco Co.*, supra, 23 App. Div. 3d 548–49 ("The mere fact that a risk presented by a product design is open and obvious, or generally known, and that the product thus satisfies expectations . . . may substantially influence or even be ultimately determinative on risk-utility balancing in judging whether the omission of a proposed alternative design renders the product not reasonably safe. It follows that, while disappointment of consumer expectations may not serve as an independent basis for allowing recovery under [the design defect theory], neither may conformance with consumer expectations serve as an independent basis for denying recovery. Such expectations may be relevant in both contexts, but in neither are they controlling . . . ." [Citations omitted; internal quotation marks omitted.]).

To allow the ordinary consumer's awareness of the product's potential danger to preclude recovery as a matter of law, however, would make Connecticut an outlier and defeat our intention in relegating the ordinary consumer expectation test to a more limited role.[20] Indeed, irrespective of the incorporation of the definition of unreasonably dangerous from comment (i) to

[20] We are not oblivious to the irony that a member of an industry that for decades *disputed* the addictive effect and dangerous health hazards associated with smoking seeks to shield itself from liability by asserting that such dangers were well-known to the ordinary consumer. As the United States Court of Appeals for the Seventh Circuit aptly observed: "If there were such a thing as moral estoppel, the outcome of this appeal would be plain. For decades tobacco companies have assured the public that there is nothing to fear from cigarettes, yet they now slough off lawsuits . . . by professing that everybody knew all along that smoking was risky. In taking this litigation stance, the cigarette makers either are suffering from amnesia or are acknowledging that their propaganda over the years has been ineffectual. Judicial estoppel, however, applies only to inconsistent positions adopted in litigation, and punishing hypocrisy is something left to a court of another realm." *Insolia* v. *Philip Morris, Inc.*, 216 F.3d 596, 598 (7th Cir. 2000).

§ 402A into the modified test, it would be contrary to the public policy of this state to incorporate the exceptions in comment (i) insofar as they would immunize a manufacturer from liability for manipulating the inherently dangerous properties of its product to pose a greater risk of danger to the consumer. See *Witherspoon* v. *Philip Morris, Inc.*, 964 F. Supp. 455, 466 (D.D.C. 1997) ("The infamous comment [i] following § 402A appears to be on very shaky ground currently. Attitudes and knowledge about cigarettes have changed immensely since the comment was written and there is at least some authority that comment [i] is no longer a reasonable explanation of unreasonably dangerous.").

We answer the certified question "no."

No costs shall be taxed in this court to either party.

In this opinion EVELEIGH, ROBINSON and VERTEFEUILLE, Js., concurred.

ZARELLA, J., with whom ESPINOSA, J., joins, concurring. I agree with the majority's answer to the certified question but not its analysis because I believe we should replace the dual design defect standards announced in *Potter* v. *Chicago Pneumatic Tool Co.*, 241 Conn. 199, 219–23, 694 A.2d 1319 (1997), with the more modern standard for design defect claims set forth in the Restatement (Third) of Torts, Products Liability.

This case presents our first occasion to directly consider our design defect standards since *Potter* was decided nearly twenty years ago. *Potter* formulated our standards at a time when design defect law was in transition. Courts had acknowledged that the ordinary consumer expectations test, derived from comment (i) to § 402A of the Restatement (Second) of Torts, was ill-suited for judging product design cases because it did not provide sufficient guidance to juries and was

often used to deny recovery to plaintiffs for product related injuries. See, e.g., 1 D. Owen & M. Davis, Products Liability (4th Ed. 2014) § 8:4, pp. 714–16. In its place, courts overwhelmingly turned to the risk-utility test, an alternative to the ordinary consumer expectations test, which allows a jury to assess a product design by weighing factors relating to its risks and benefits against those of possible design alternatives. Id., §§ 8:6 through 8:7, pp. 722–26.

Sensitive to criticisms of the ordinary test, *Potter* created the "modified" consumer expectations test by incorporating risk-utility factors into the existing consumer expectations test. *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 241 Conn. 220, 222; see id., 221. In formulating its standards, however, *Potter* rejected the approach of a draft form of the Restatement (Third) of Torts, Products Liability, which required, as an essential part of its risk-utility test, that a plaintiff present evidence of a reasonable alternative design. See id., 214–19, 221. Such evidence allows for a jury to assess the manufacturer's chosen design by comparing it against the costs and benefits of adopting a safer alternative. See 1 D. Owen & M. Davis, supra, § 8:10, p. 739. In *Potter*, the court expressed concern that requiring this proof might harm a plaintiff by placing too many evidentiary hurdles along the path to recovery by, for example, forcing the plaintiff to present expert testimony in every case. See *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 217–19.

Both of *Potter*'s tests were ill-conceived, however, and they remain problematic today, even with the majority's clarification of when each test should be applied. The problems with *Potter*'s standards are not limited to their lack of clarity. More fundamentally, its rejection of a reasonable alternative design requirement leaves a jury applying its standards without any objective

basis against which to assess the product design at issue.

Since *Potter* was decided, a consensus has emerged among courts and commentators that, in design defect cases, proof of some safer and reasonable alternative design is generally necessary to provide the jury with an objective basis for assessing whether a manufacturer's chosen design is defective. See 1 D. Owen & M. Davis, supra, § 8:10, p. 739 ("[C]ost-benefit analysis of an alternative design lies at the heart of design defectiveness. . . . [D]esign defectiveness is usually best resolved by risk-utility analysis, the purpose of which is to determine whether the risk of injury might have been reduced or avoided if the manufacturer had used a feasible alternative design." [Footnotes omitted; internal quotation marks omitted.]). Proof of a reasonable alternative design allows the jury to compare the manufacturer's design against safer alternatives to decide whether the manufacturer could reasonably have made a safer product. See, e.g., id.

Reflecting this consensus, the Restatement (Third) requires proof of a reasonable alternative design. See Restatement (Third), Torts, Products Liability § 2 (b), p. 14 (1998). Notably, however, the Restatement (Third), which was adopted shortly after *Potter* was decided, resolves *Potter*'s stated concerns by incorporating appropriate exceptions to the reasonable alternative design requirement and by making clear that expert testimony is not required in all cases to satisfy this obligation. See id., § 2, comment (e), pp. 21–22; id., § 3, p. 111; id., § 4 (a), p. 120.

In light of these developments favoring the use of a pure risk-utility balancing standard based on proof of a reasonable alternative design, I believe that we should take this rare opportunity to reconsider our design

defect standards rather than simply clarifying and reaffirming them, as the majority does today.[1]

On the basis of my review of the Restatement (Third), I am persuaded that we should now adopt the approach set forth therein as an accurate statement of our law controlling design defect claims. The Restatement (Third) has resolved the concerns identified in *Potter* and provides a clearer and fairer method for resolving design claims. Because the Restatement (Third) does not rely on the standards contained in § 402A of the Restatement (Second) of Torts, and does not provide an absolute bar to an action against a cigarette manufacturer for defective design, I join in the majority's answer to the certified question, although not its analysis.

I

JUDGING DESIGN DEFECTS: RISK-UTILITY BALANCING AND REASONABLE ALTERNATIVE DESIGN EVIDENCE

A

Restatement (Third)'s Design Defect Test

Consistent with our product liability law, the Restatement (Third) recognizes three distinct categories of product defect claims: manufacturing defects, design defects, and marketing defects, also called a failure to warn. Restatement (Third), supra, § 2 (a), (b) and (c),

[1] The majority declines this opportunity principally because the parties in the present case each relied on *Potter* in their arguments before the United States Circuit Court of Appeals for the Second Circuit. See footnote 11 of the majority opinion. In my view, however, we should not limit our analysis to clarifying and reaffirming *Potter* because, as I note in this opinion, *Potter*'s standards were flawed when they were adopted nearly twenty years ago and remain so today. Moreover, the certified question from the Second Circuit provides that "[t]he Connecticut Supreme Court may modify this question as it sees fit and add any pertinent questions of Connecticut law that the [c]ourt chooses to answer." *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, 731 F.3d 164, 169 (2d Cir. 2013).

p. 14; see also *Hurley* v. *Heart Physicians, P.C.*, 278 Conn. 305, 315, 898 A.2d 777 (2006) ("[a] product may be defective due to a flaw in the manufacturing process, a design defect or because of inadequate warnings or instructions" [internal quotation marks omitted]). Recognizing that each of these categories of defects presents different circumstances, the Restate-ment (Third) adopts separate liability standards for each category. See Restatement (Third), supra, § 2 (a), (b) and (c), p. 14. The present case implicates our standards for the second category, design defects. See id., § 2 (b), p. 14.

For design defect claims, the Restatement (Third) uses a risk-utility balancing test that allows a jury to decide liability by comparing the risks and benefits of the manufacturer's design against the risks and benefits of adopting a safer alternative. See id. At its core, the risk-utility test asks "whether the safety benefits of remedying a design danger [are] worth the costs." 1 D. Owen & M. Davis, supra, § 8:6, p. 723. It requires a plaintiff challenging a product design to show that the manufacturer could reasonably have designed its product to be safer. See id.; see also T. Jankowski, "Focusing on Quality and Risk: The Central Role of Reasonable Alternatives in Evaluating Design and Warning Decisions," 36 S. Tex. L. Rev. 283, 320 (1995). The jury then compares the risks and benefits of the manufacturer's design against the risks, benefits, and costs of adopting the proposed alternative. See 1 D. Owen & M. Davis, supra, § 8:10, pp. 739–41; see also, T. Jankowski, supra, 343. Consistent with the approach of the Restatement (Third), a "vast majority" of courts and commentators agree that the risk-utility balancing test provides the best standard for judging design defect claims. *Evans* v. *Lorillard Tobacco Co.*, 465 Mass. 411, 426, 990 N.E.2d 997 (2013); see also 1 D. Owen & M. Davis, supra, § 8:6, p. 724 ("the risk-utility test appears to have become America's preferred

test for design defectiveness"); A. Twerski & J. Henderson, "Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility," 74 Brook. L. Rev. 1061, 1067 (2009) ("virtually every major torts scholar who ha[s] looked carefully at the issue of design defect over the past several decades ha[s] embraced risk-utility balancing").

Under the risk-utility test set forth in the Restatement (Third), a product "is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller . . . and the omission of the alternative design renders the product not reasonably safe . . . ." Restatement (Third), supra, § 2 (b), p. 14. To guide its analysis, the Restatement (Third) provides the jury with a number of factors to weigh in determining whether, in light of these factors, adopting a safer design was possible without greatly increasing the product's costs or risks or greatly diminishing its usefulness. See id., § 2, comment (f), p. 23. These factors include (1) the likelihood and magnitude of foreseeable risks of harm posed by the product's design, (2) the instructions and warnings given with the product, (3) consumer expectations about the product and its usage, (4) the safety risks and benefits of alternative designs, and (5) the feasibility of adopting an alternative design, including effects on the product's cost, functionality, longevity and appearance. See id. Because the relevance and importance of each factor will vary in each case depending on the nature of the evidence, the plaintiff is not required to present evidence regarding every factor to establish his case. See id. If the jury determines that the manufacturer could reasonably have adopted the safer alternative, the manufacturer's design may be deemed not reasonably safe, and thus defective. See id., § 2 (b), p. 14.

Notably, unlike the ordinary consumer expectations test from § 402A of the Restatement (Second) of Torts, the risk-utility test does not treat consumer expectations as dispositive but as one factor among many for the jury to weigh. See *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 241 Conn. 213 and n.10. In making consumer expectations a nondispositive factor, the risk-utility test avoids many of the bars to liability associated with the ordinary consumer expectations test—especially those relating to open and obvious dangers and injuries to foreseeable but unintended users and bystanders. See, e.g., Restatement (Third), supra, § 2, comment (g), pp. 27–28. Thus, a jury may still find a manufacturer liable for obvious product dangers if it finds that the risks posed by a product's design could be mitigated by adopting a reasonable alternative. See 1 D. Owen & M. Davis, supra, § 8:10, pp. 739–41; see also Restatement (Third), supra, § 2, comment (d), p. 20.

Moreover, as I will discuss, the Restatement (Third) does not require expert testimony to establish proof of a reasonable alternative design and recognizes that proof of an alternative design is unnecessary in some limited circumstances. See Restatement (Third), supra, § 2, comment (f), pp. 23–24.

B

Need for Reasonable Alternative Design Evidence

The Restatement (Third) standard is consistent with modern design defect jurisprudence, which recognizes that design defect claims are best decided under a risk-utility standard using proof of a reasonable alternative design, subject to appropriate exceptions.

The need for proof of an alternative design to establish defectiveness in a design case arises from the unique considerations presented by these types of claims. In any product defect case, a jury needs an

objective basis against which to compare the product at issue to determine whether the product was defective. See, e.g., T. Jankowski, supra, 36 S. Tex. L. Rev. 292. In manufacturing defect cases, the objective basis for comparison is inherent in the nature of the claim: the plaintiff alleges that the individual unit he received was not manufactured according to its intended design and that this deviation caused harm. See 1 D. Owen & M. Davis, supra, § 7:1, pp. 651–52. To determine whether the unit at issue was in fact defective, a jury need only compare the plaintiff's unit against the intended design to determine whether the two are different.

A design defect case lacks a similar inherent objective basis for comparison. In cases involving design defect claims, the plaintiff's challenge does not concern the individual unit he purchased but the product's specifications. See id., § 8:1, p. 708. In other words, a design defect claim alleges that, although a product may have been manufactured properly according to its design, the intended design chosen by the manufacturer was not reasonably safe. See id. ("unlike a manufacturing defect claim, which implicates merely a single product unit, a design defect claim challenges the integrity of the entire product line and so pierces to the very core of the manufacturer's enterprise"). Any judgment that a product design is defective, therefore, "condemns the entire product line" and not just the unit that the plaintiff purchased. Id. Because a design claim calls the design itself into question, the jury needs some objective basis other than the specifications against which to compare the design at issue in determining whether it was not reasonably safe and thus defective. See Restatement (Third), supra, § 1, comment (a), p. 7 ("when the product unit meets the manufacturer's own design specifications, it is necessary to go outside those specifications to determine whether the product is defective").

The lack of an inherent objective basis for comparison in design cases has made formulating a proper standard for design defect claims a difficult task for courts. See, e.g., 1 D. Owen & M. Davis, supra, § 8:1, p. 702 ("[e]lusive as an elf, the true meaning of 'design defect' largely escaped capture by court or commentator until quite recently, and the search therefor has led inexorably to consternation and confusion"); see also 3A American Law of Products Liability (3d Ed. 2007) § 28:5, p. 15 (noting that courts have struggled with standard in design defect cases because such cases do not lend themselves to "readily ascertainable" objective standard).

Following the adoption of § 402A of the Restatement (Second) of Torts, courts attempted to apply its consumer expectations standards to design defect claims. See 1 D. Owen & M. Davis, supra, § 8:3, pp. 713–14. This entails asking a jury whether the product's design met the expectations of the product's ordinary consumers. See 2 Restatement (Second), Torts § 402A, comment (i), p. 352 (1965). If the product falls short of those expectations, it may be deemed defective. See id. The consumer expectations test was created, however, with manufacturing defects in mind. A. Twerski & J. Henderson, supra, 74 Brook. L. Rev. 1063. For example, a product unit that was made differently from its intended design because of a mistake in the manufacturing process can be understood to disappoint the expectations of its consumers. See id., 1064, 1067. With respect to manufacturing claims, the intended or expected design of the product provides an objective basis for determining the expectations of consumers. 1 D. Owen & M. Davis, supra, § 7:2, pp. 653–54.

As the majority observes in its opinion, however, the consumer expectations test proved unsuitable for resolving many types of design defect claims because that standard was too vague to supply an objective basis

for assessing product designs. See id., § 5:16, p. 448; id., § 8:5, pp. 720–21; see also A. Twerski & J. Henderson, supra, 74 Brook. L. Rev. 1067 (explaining that consumer expectations test has been widely rejected in design cases "as unworkable and unwise"). Consumers often have little or no knowledge about how safe a product design should be and whether it could be made safer. 1 D. Owen & M. Davis, supra, § 5:16, p. 448 ("consumers often have no meaningful idea how safely the product really ought to perform in various situations"). This is especially true for products with complex designs and those that fail in complex ways. See, e.g., *Pruitt* v. *General Motors Corp.*, 72 Cal. App. 4th 1480, 1483, 86 Cal. Rptr. 2d 4 (1999) ("[t]he deployment of an air bag is, quite fortunately, not part of the everyday experience of the consuming public" [internal quotation marks omitted]); R. Dickerson, "Products Liability: How Good Does a Product Have To Be?," 42 Ind. L.J. 301, 307 (1967) ("What, for instance, should the law do about tractors that overturn, surgical implants that break, and rear-engined automobiles that tend to swerve at high speeds?"). Similar problems arise with new products. See R. Dickerson, supra, 307 ("[t]he most troublesome situations are those in which consumer attitudes have not sufficiently crystallized to define an expected standard of performance"). Moreover, expectations often vary between different consumers of the same product, and consumers may have expectations about safety that are beyond what is feasible for manufacturers to meet. See, e.g., D. Fischer, "Products Liability—The Meaning Of Defect," 39 Mo. L. Rev. 339, 349–50 (1974) ("[e]xpectations as to safety will not always be in line with what the reasonable manufacturer can achieve because the average consumer will not have the same information as experts in the field"). As a result, design defect tests based on consumer expectations often leave a jury with little meaningful guidance when it considers whether a

product design is defective, and may lead it to condemn entire product lines without any true understanding of the product's risks and benefits and whether the product could be made safer without eliminating its utility. See A. Twerski & J. Henderson, supra, 1066–67.[2]

The inherent limitations of the ordinary consumer expectations test have led courts and commentators to search for a different standard for design defect cases. Many courts have abandoned the consumer expectations test entirely for design defect claims, whereas some courts have restricted it, as the majority does today, to a small category of cases in which the existence of a design defect is more obvious.[3] See 1 D. Owen & M. Davis, supra, § 5:17, p. 450; see also T. Jankowski, supra, 36 S. Tex. L. Rev. 326; A. Twerski & J. Henderson, supra, 74 Brook. L. Rev. 1101. Courts have instead looked to the risk-utility standard as a better standard for resolving design defect claims. 1 D. Owen & M. Davis, supra, § 8:6, pp. 722–25 and nn. 1–6 (collecting authorities).

As more and more jurisdictions have embraced the risk-utility test in the decades after the adoption of § 402A, a consensus has emerged that design defect claims are best resolved by using risk-utility balancing to compare the manufacturer's chosen design against safer alternatives to determine whether it was feasible

[2] For a discussion of other design defect standards that have been considered and rejected, see T. Jankowski, supra, 36 S. Tex. L. Rev. 312–14 (discussing application of " 'deviation from the norm' " and " 'reasonable fitness for intended purpose' " standards to design defect claims).

[3] The consumer expectations test continues to be used in other contexts in which consumer expectations tend to be well formed and more uniform. See Restatement (Third), supra, § 2, comment (h), p. 28 (noting that consumer expectations continue to play strong role in resolution of specialized product defect claims involving food products and used products); see also J. Phillips, "Consumer Expectations," 53 S.C. L. Rev. 1047, 1061–63 (2002) (discussing modern applications of consumer expectations standard).

for the manufacturer to have created a safer product. See, e.g., A. Twerski & J. Henderson, supra, 74 Brook. L. Rev. 1094 ("[r]easonable alternative design is the answer to the comparative balancing process"); see also 1 D. Owen & M. Davis, supra, § 8:10, pp. 740–41 ("[a]s modern products liability developed after the promulgation of . . . § 402A [of the Restatement (Second) of Torts], courts and commentators alike increasingly recognized the logical and practical necessity in most types of design defect cases that plaintiffs prove that their harm would have been prevented if the manufacturer had adopted some alternative design"); annot., "Burden of Proving Feasibility of Alternative Safe Design in Product Liability Action Based on Defective Design," 78 A.L.R.4th 154, 157 (1990) ("The reasonableness of choosing from among various alternative product designs and adopting the safest one if it is feasible is not only relevant in a design defect action, but is at the very heart of the case. The essential inquiry is whether the design chosen was a reasonable one from among the feasible choices of which the defendant was aware or should have been aware. This feasibility is a relative, rather than an absolute, concept; the more scientifically and economically feasible the alternative is, the more likely it is that the product will be found to be defectively designed.").

This approach of comparing the merits of a product's design against possible alternatives recognizes that a jury cannot meaningfully assess whether a product design is defective without knowing what design alternatives are available, and the risks, benefits, and costs associated with adopting an alternative design. As one commentator has explained: "At the center of a rational process for evaluating design . . . decisions is the requirement of a reasonable alternative proposed by the claimant. This requirement is both eminently fair

and necessary. If manufacturer decisions based on complex tradeoffs are being challenged as wrong, it is necessary to understand the alternative decision proposed [that] is being advanced as right." (Footnote omitted; internal quotation marks omitted.) T. Jankowski, supra, 36 S. Tex. L. Rev. 292. Notions of design safety are not absolute, and no product design can ever be entirely accident proof, and, thus, the defectiveness of a manufacturer's chosen design depends largely on whether it could have been made safer by the adoption of some alternative design feature. See D. Owen, "Defectiveness Restated: Exploding the 'Strict' Products Liability Myth," 1996 U. Ill. L. Rev. 743, 754–55. After all, it is generally not unreasonable for a manufacturer to market a product with adequate warnings that serves a useful purpose and cannot feasibly be made any safer. See 1 D. Owen & M. Davis, supra, § 8:10, p. 741 ("Without affirmative proof of a feasible design alternative, a plaintiff usually cannot establish that a product's design is defective. Put otherwise, there typically is nothing wrong with a product that simply possesses inherent dangers that cannot feasibly be designed away."); J. Phillips, "The Standard for Determining Defectiveness in Products Liability," 46 U. Cin. L. Rev. 101, 104 n.18 (1977) ("a manufacturer's product can hardly be faulted if safer alternatives are not feasible" [internal quotation marks omitted]). Moreover, given the significant consequences at stake when a design defect claim is asserted—the condemnation of an entire line of products—it is only fair that some safer alternative be proposed before allowing a jury to declare a product design defective. See 1 D. Owen & M. Davis, supra, § 8:10, p. 741. When, however, it is established that the manufacturer could reasonably have adopted a safer design, it is fair to hold a manufacturer responsible for failing to adopt it. Cf. id., § 8:12, p. 754.

C

Concerns with *Potter*'s Modified Standard and Its Rejection of a Reasonable Alternative Design Requirement

In creating the modified consumer expectations standard, *Potter* replaced our reliance on the ordinary consumer expectations standard from comment (i) to § 402A of the Restatement (Second) of Torts with a similarly problematic standard. Just as with the consumer expectations test, *Potter*'s modified standard also fails to provide jurors with an objective basis for judging a product's design. *Potter* created the modified consumer expectations standard by incorporating risk-utility factors into the ordinary consumer expectations analysis, but without any requirement of a reasonable alternative design. See *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 241 Conn. 221. As the majority discusses in its opinion, the court in *Potter* declined to adopt a *draft* form of the Restatement (Third) because it interpreted the draft to require proof of a reasonable alternative design in all cases and without exception. See id., 214–19, 221. The court in *Potter* feared that adopting such a requirement would harm plaintiffs by creating too heavy of an evidentiary burden. Id., 217–19. As a result, the court emphasized, when it created the modified standard, that the availability of a reasonable alternative design was only one factor for the jury to consider rather than a requirement in every case. Id., 221. Without this requirement, however, *Potter*'s modified standard does no better than the ordinary consumer expectations test in providing the jury with an objective basis against which to assess a product's design.

Standards relying on some form of risk-utility balancing without an accompanying requirement of a reasonable alternative design have proven problematic, both in theory and in practice. These standards are not truly

risk-utility standards. The risk-utility test and the reasonable alternative design requirement go hand in hand because a proposed alternative design is necessary to provide an objective basis for comparison against the manufacturer's chosen design. The risk-utility test itself does not supply the basis for comparison; rather, it provides only the considerations that guide the comparison. As one commentator has succinctly explained, "one simply cannot talk meaningfully about a risk-benefit defect in a product design until and unless one has identified some design alternative (including any design omission) that can serve as the basis for a risk-benefit analysis." G. Schwartz, "Foreword: Understanding Products Liability," 67 Cal. L. Rev. 435, 468 (1979). Other commentators agree. See, e.g., 1 D. Owen & M. Davis, supra, § 8:10, p. 739 ("cost-benefit analysis of an alternative design lies at the heart of design defectiveness"); T. Jankowski, supra, 36 S. Tex. L. Rev. 292 (explaining that reasonable alternative design requirement "is a sine qua non of the risk-utility process" [emphasis omitted]); T. Jankowski, supra, 326 ("the gravitational pull in design defect cases has been toward the risk-utility balance and its concomitant, the reasonable alternative design"); A. Twerski & J. Henderson, supra, 74 Brook. L. Rev. 1094 ("[w]hen one does risk-utility balancing one must judge the product on trial and compare it with some hypothetical design that could have been adopted").

The risk-utility test, which traces its roots to the famed *Carroll Towing* decision; *United States* v. *Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947); is predicated entirely on the notion that some alternative measure could have been taken to avoid the plaintiff's harm, and the test was developed as a tool for comparing the allegedly defectively designed product to its alternatives. See, e.g., T. Jankowski, supra, 36 S. Tex. L. Rev. 319 ("[t]he key observation to be made is that the risk-

utility test, in order to evaluate the appropriateness of the [design] at issue . . . requires some standard . . . for comparison"); A. Twerski & J. Henderson, supra, 74 Brook. L. Rev. 1094 ("When one does risk-utility balancing one must judge the product on trial and compare it with some hypothetical design that could have been adopted. Reasonable alternative design is the answer to the comparative balancing process; it is not a factor in the equation as to whether the product was reasonably designed.").

A risk-utility analysis without a reasonable alternative design lacks an objective basis for comparison, leaving the jury with only vague guidance about whether a product design is defective. Without a proposed alternative, the jury is left to compare the product's *own* risks against its *own* benefits, which essentially is like asking the jury to imagine a world with the product and without the product, and to decide which is preferable. M. Green, "The Schizophrenia of Risk-Benefit Analysis in Design Defect Litigation," 48 Vand. L. Rev. 609, 617 n.38 (1995). This puts the jury in the position of having to decide not whether the product could have been made safer, but whether a particular product should have been sold at all—commonly referred to as absolute or category liability, a concept courts have been hesitant to embrace, even in strict liability cases. See A. Twerski & J. Henderson, supra, 74 Brook. L. Rev. 1069 ("American courts have never imposed category liability, mainly because they intuitively . . . and correctly . . . understand that it would constitute an abuse of judicial power to decide which broad categories of products should not be distributed at all"). Imposing liability for a product, despite the absence of reasonable alternatives, could deprive consumers of an otherwise useful product if the risk of adverse verdicts prompts the manufacturer either to cease production or to significantly increase the cost of the product, rendering it

prohibitively expensive for some consumers. Moreover, allowing juries to hold manufacturers liable even if the product serves some useful purpose and cannot reasonably be made any safer risks turning manufacturers into insurers of their products. See, e.g., T. Jankowski, supra, 36 S. Tex. L. Rev. 324 ("Any logical treatment must recognize that a manufacturer's [design] decision can only be 'wrong' in the context of 'right' alternatives that were available. . . . Without this requirement, the manufacturer becomes an insurer of the product." [Footnote omitted.]). Even the court in *Potter* acknowledged that this kind of absolute liability is antithetical to our product liability laws. See *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 241 Conn. 210 ("strict tort liability does not transform manufacturers into insurers, nor does it impose absolute liability"); see also *Metropolitan Property & Casualty Ins. Co.* v. *Deere & Co.*, 302 Conn. 123, 137, 25 A.3d 571 (2011) (liability standards that essentially convert manufacturers into insurers of their products would be "contrary to the purposes of our product liability laws").

Perhaps because of these theoretical shortcomings, jurisdictions that purport to reject a reasonable alternative design requirement nevertheless appear to require this proof as a practical matter. See, e.g., A. Twerski & J. Henderson, supra, 74 Brook. L. Rev. 1094–95. For example, commentators have noted that, despite *Potter*'s rejection of a requirement that the plaintiff establish a reasonable alternative design, courts applying the standard established in *Potter* have required this proof in practice. See id., 1068, 1102. In researching product liability cases brought under Connecticut law, these commentators discovered that, at least as of 2009, there were *no* reported cases involving traditional design defect claims since *Potter* that have been submitted to a jury *without* proof of a reasonable alternative design. See id. Ironically, even the plaintiff in *Potter* had pre-

sented extensive evidence of design alternatives. See *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 241 Conn. 204–206. So did the plaintiff, Barbara A. Izzarelli, in the present case.

D

Exceptions to Reasonable Alternative Design Requirement

Courts that have rejected a reasonable alternative design requirement typically do so out of fear of burdening plaintiffs by placing too many evidentiary hurdles along their path to recovery. See, e.g., id., 217–19; see also 1 D. Owen & M. Davis, supra, 8:10, p. 745. *Potter* specifically noted two areas of concern in this regard. First, the court was concerned that it would require expert testimony in every case, including in res ipsa-like cases in which the jury can infer the existence of a defect from circumstantial evidence. See *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 241 Conn. 217–18. Second, the court observed that some product designs could be considered unreasonably dangerous, even if no reasonable alternative design existed. Id., 219.

The Restatement (Third) resolves these concerns, however. First, with respect to the concerns about requiring expert testimony, the comments to the Restatement (Third) explain that expert testimony is not required to meet the alternative design requirement in every case. Restatement (Third), supra, § 2, comment (f), p. 23. The Restatement (Third) does not require plaintiffs to propose or build an entire new prototype of the product—the plaintiff need only show that the manufacturer could reasonably have designed a safer alternative. Id., p. 24. In many instances, a plaintiff can accomplish this without expert testimony. See id., p. 23. For example, no expert testimony is needed when the plaintiff can show that competing products on the

market would be safer or when the availability of a safer design is obvious to a layperson.[4] Id.

Second, the Restatement (Third) also expressly recognizes several exceptions to its alternative design requirement. Although, as I discussed previously, courts are justifiably hesitant to impose liability on manufacturers when no safer alternative is available, the Restatement (Third) recognizes that there are circumstances when some consideration other than a design alternative provides a sufficient and fair basis for imposing liability. In each of these instances, a test other than risk-utility balancing is used to determine liability.

First, no such evidence is needed if the product design violates a statute or a regulation. See id., § 4 (a), p. 120. In these cases, proof that the design violates existing law alone is a sufficient consideration to impose liability because manufacturers should not sell products that legislatures or regulatory authorities have decided to ban. See id.

Second, a plaintiff need not proffer alternative design evidence when the product design at issue is manifestly unreasonable. See id., § 2, comment (e), pp. 21–22. The Restatement (Third) acknowledges that, in rare and extreme cases, a product design may be so obviously unacceptable that a manufacturer can fairly be held liable for harm even if no safer alternative is feasible. Id. In these limited instances, a jury may "conclude that

[4] The comments provide the following examples: "[W]hen a manufacturer sells a soft stuffed toy with hard plastic buttons that are easily removable and likely to choke and suffocate a small child who foreseeably attempts to swallow them, the plaintiff should be able to reach the trier of fact with a claim that buttons on such a toy should be an integral part of the toy's fabric itself (or otherwise be unremovable by an infant) without hiring an expert to demonstrate the feasibility of an alternative safer design. Furthermore, other products already available on the market may serve the same or very similar function at lower risk and at comparable cost. Such products may serve as reasonable alternatives to the product in question." Restatement (Third), supra, § 2, comment (f), pp. 23–24.

liability should attach without proof of a reasonable alternative design" when "the extremely high degree of danger posed by [a product's] use or consumption so substantially outweighs its negligible social utility that no rational, reasonable person, fully aware of the relevant facts, would choose to use, or to allow children to use, the product."[5] Id., p. 22.

Finally, the Restatement (Third) also does not require proof of design alternatives in res ipsa-like cases, in which the very circumstances of a product's failure provide strong evidence that it was defective; for these types of cases, the Restatement (Third) does not require direct evidence of a specific defect. See id., § 3, p. 111. Instead, it relies on the malfunction theory, which allows a jury to infer the existence of some product defect from the nature of the product's failure, together with evidence showing that its failure was not caused by something other than a defect. See id., § 3, comment (b), p. 112. Because a plaintiff need not identify a specific defect in the product, no alternative design evidence is needed.[6] See id. Consider, for example, a new television that catches fire in a living room during normal use. The plaintiff need not prove that the manufacturer should have adopted a safer design. Liability is

[5] The Restatement (Third) uses as an example a novelty item that has little utility but potential to cause significant harm: an exploding cigar used for pranks. It acknowledges that a jury could hold the manufacturer "liable for the defective design of the exploding cigar even if no reasonable alternative design was available that would provide similar prank characteristics. The utility of the exploding cigar is so low and the risk of injury is so high as to warrant a conclusion that the cigar is defective and should not have been marketed at all." Restatement (Third), supra, § 2, illustration (5), p. 22.

[6] Because malfunction theory cases do not turn on proof of a specific manufacturing or design defect, the precise nature of the defect remains undetermined. See Restatement (Third), supra, § 3, comment (b), pp. 111–12. A finding of liability therefore does not condemn the entire product line, making the consequences of liability under the malfunction theory much less devastating to a manufacturer and thus making it fairer to impose liability without requiring proof of a feasible alternative.

instead predicated on the notion that, in the absence of other possible causes, televisions do not ordinarily catch fire during normal use in the absence of some product defect. See, e.g., *Liberty Mutual Ins. Co.* v. *Sears, Roebuck & Co.*, 35 Conn. Supp. 687, 691, 406 A.2d 1254 (1979). As the majority notes, we have already adopted the malfunction theory from the Restatement (Third). See *Metropolitan Property & Casualty Ins. Co.* v. *Deere & Co.*, supra, 302 Conn. 137–39.

These exceptions address each of *Potter*'s stated concerns about requiring alternative design evidence. Notably, the reporters' note to the Restatement (Third) expressly compares *Potter*'s concerns about the reasonable alternative design requirement with the exceptions adopted in the Restatement (Third): "The Connecticut Supreme Court's analysis in *Potter* is, in actuality, perfectly consistent with this Restatement," and it is recommended that, "when the issue is next before [that] court, [it] may find it easier to accept the Restatement as consistent with its position as articulated in *Potter*. Whatever ambiguities in the earlier draft may have misled the court in this regard, those ambiguities have since been eliminated." Restatement (Third), supra, § 2, reporters' note to comment (d), pp. 72–73.

II

THE RESTATEMENT (THIRD)'S FUNCTIONAL APPROACH TO DESIGN DEFECT CLAIMS

There are additional considerations that favor adoption of the Restatement (Third) for design defect cases. In adopting the risk-utility test, the Restatement (Third) defines its standard "functionally" by focusing on the unique considerations at issue in design defect cases, rather than relying on traditional liability doctrines like strict liability, negligence, contract, warranty, etc. Id., § 2, comment (n), p. 35. This function based approach is in keeping with the modern consensus that different

types of product defect cases—manufacturing defect, design defect, marketing defect—each present issues for juries to consider and thus require tests tailored to the type of defect alleged. The older approach of defining product defect standards set forth in the Restatement (Second) of Torts, which used a one-size-fits-all strict liability test (the consumer expectations standard), proved difficult to apply in many product defect cases. Courts and commentators have since turned to defining product liability standards based on the type of defect alleged, without resort to traditional tort liability doctrines. See 1 D. Owen & M. Davis, supra, § 8:1, p. 707 ("[The consumer expectations standard of the Restatement (Second) reflected a] quest by courts for a general definition of 'defectiveness,' commonly viewed in early products liability as embracing a single principle applicable to any type of case. As products liability law has matured, however, most courts and commentators have come to understand that meaningful evaluation of the acceptability of a product's dangers logically turns on considerations that vary contextually depending [on] whether the problem was one of manufacture, design, or the absence of sufficient warnings." [Footnotes omitted.]).

The Restatement (Third)'s functional approach to design defect cases provides a number of benefits. First, by defining its design defect standard in terms of the unique considerations involved in design defect cases, rather than by resorting to traditional doctrinal liability theories, its risk-utility standard blends beneficial aspects of strict liability and negligence theories without their accompanying drawbacks. Second, relying on a single, unified standard for design defect claims improves clarity by avoiding the confusion and risk of inconsistent verdicts that could result from submitting a claim to a jury under multiple tests and theories (e.g., under the ordinary consumer expectations test, the

modified test, and a negligent design theory). Third, adopting a unified standard is consistent with our Product Liability Act, General Statutes § 52-572m et seq., which was intended to simplify pleadings and product liability claims under a single cause of action. I now address each consideration in greater detail.

A

Blending Strict Liability and Negligence

Consistent with the modern approach to design defect claims, the Restatement (Third) recognizes that the risk-utility test is neither a strict liability nor a negligence standard, but reflects a blend of the two, and thus displaces those theories in design defect cases. For example, it resembles a negligence balancing standard inasmuch as it requires a jury to balance foreseeable risks of harm against the costs of adopting safer, alternative measures. See 1 D. Owen & M. Davis, supra, § 5:36, p. 501 (noting that risk-utility test is "based on principles of foreseeability and balance that underlie the law of negligence"). At the same time, the risk-utility test embraces strict liability principles because a manufacturer cannot defend itself on the ground that it used reasonable care in selecting its chosen design or that its design is consistent with others used in the industry; as long as the plaintiff demonstrates that the manufacturer could reasonably have adopted a safer alternative, a jury can find liability without regard to the level of care that the manufacturer exercised in selecting its design. See id., § 5:29, p. 476 (noting that strict liability principles permit liability even if manufacturer used reasonable care in making product).

Some courts, including this court in *Potter*, have claimed that the introduction of risk-utility factors into design defect jurisprudence should not be construed as a departure from strict liability principles, and that the focus of the jury's inquiry must remain on the prod-

uct, not on the manufacturer's conduct. See, e.g., *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 241 Conn. 221–22. This is an artificial distinction. See 1 D. Owen & M. Davis, supra, § 5:29, p. 480 (noting that, with respect to design defect cases, there is no practical distinction between strict liability and negligence tests, although "there remains a dwindling, yet stubborn, contingent of courts that cling tenaciously to the view that the doctrines of negligence and strict liability in tort are and must be kept conceptually distinct"). One court explained the fiction as follows: "Although many courts have insisted that the risk-utility tests they are applying are not negligence tests because their focus is on the *product* rather than the manufacturer's *conduct* . . . the distinction on closer examination appears to be nothing more than semantic. As a common-sense matter, [under the risk-utility test] the jury weighs competing factors presented in evidence and reaches a conclusion about the judgment or decision (*i.e.*, *conduct*) of the manufacturer. The underlying negligence calculus is inescapable." (Citation omitted; emphasis in original.) *Prentis* v. *Yale Mfg. Co.*, 421 Mich. 670, 687–88, 365 N.W.2d 176 (1984); see also S. Birnbaum, "Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence," 33 Vand. L. Rev. 593, 610 (1980) ("When a jury decides that the risk of harm outweighs the utility of a particular design [such that the product is not as safe as it should be], it is saying that in choosing the particular design and cost tradeoffs, the manufacturer exposed the consumer to [a] greater risk of danger than [it] should have. Conceptually and analytically, this approach bespeaks negligence.").

Because the risk-utility analysis resembles a blend of both strict liability and negligence principles, the Restatement (Third) does not recognize separate negli-

gence and strict liability tests and uses only the risk-utility test as the proper test for all design defect cases. See Restatement (Third), supra, § 2, comment (n), p. 35. Thus, a jury should not receive both a risk-utility and a negligence instruction; only the risk-utility test may be submitted to a jury in cases involving a design defect claim.

The Restatement (Third)'s functional approach combines beneficial aspects of strict liability and negligence theories without their accompanying drawbacks. For example, under the Restatement (Second)'s strict liability test, the ordinary consumer expectations test, a plaintiff can be barred from recovering if his harm was caused by a danger open and obvious to the ordinary consumer, even if the manufacturer could have prevented the danger with a reasonable design modification. See 1 D. Owen & M. Davis, supra, § 8:5, pp. 718–19. The Restatement (Third) eliminates this impediment and, instead, makes the obviousness of a product's danger only one factor for a jury to consider, thereby removing a potential bar to recovery while still allowing the jury to consider evidence on this issue. See Restatement (Third), supra, § 2, comment (g), pp. 27–28.

The Restatement (Third) also avoids trappings often associated with negligence and even contract based theories of recovery, including the requirement that a plaintiff show duty or privity as a prerequisite to recovery. Much of the purpose for moving to strict liability in the first place was to avoid these requirements, which were used by defendants to block recovery in some instances. See id., § 1, comment (a), p. 6. Similar to the strict liability test, the Restatement (Third) expressly omits any privity or duty requirement; a plaintiff need only show that his harm was caused by a defect in the defendant's product to have standing to recover, even

if the plaintiff was not a purchaser or a user of the product. Id., § 1, p. 5; id., § 2, p. 14.[7]

Moreover, although the Restatement (Third)'s risk-utility test displaces negligence tests in cases involving design defect claims, it does not prevent plaintiffs from introducing evidence relating to fault when that evidence is relevant to the risk-utility calculus. The Restatement (Third) explains: "In connection with a claim under §§ 1 and 2 and related provisions of this Restatement, the evidence that the defendant did or did not conduct adequately reasonable research or testing before marketing the product may be admissible (but is not necessarily required) regardless of whether the claim is based on negligence, strict liability, or implied warranty of merchantability. Although a defendant is held objectively responsible for having knowledge that a reasonable seller would have had, the fact that the defendant engaged in substantial research and testing may help to support the contention that a risk was not reasonably foreseeable. Conversely, the fact that the defendant engaged in little or no research or testing may, depending on the circumstances, help to support the contention that, had reasonable research or testing been performed, the risk could have been foreseen. Moreover, as long as the requisites in [the risk-utility test] . . . are met, the plaintiff may in appropriate instances—for example, in connection with comparative fault or punitive damage claims—show that the defect resulted from reckless, [wilfully] indifferent, or intentionally wrongful conduct of the defendant." Id., § 2, comment (n), p. 35.

[7] In Connecticut, questions of privity and duty are governed by statute. See General Statutes § 52-572n (b) (claim may be asserted regardless of whether claimant purchased product from or entered into contract with product seller). So are other negligence related considerations, like comparative fault. See General Statutes § 52-572o (setting forth comparative fault standards for product liability claims).

Finally, it is also important to emphasize that the Restatement (Third)'s risk-utility test displaces other, traditional standards of liability only when the plaintiff seeks recovery for harm caused by a design defect *existing at the time of sale*; the risk-utility test does not apply to design related claims involving the manufacturer's conduct *after* the sale. See id., p. 37. Thus, for example, although only the risk-utility test would apply in a case alleging that an airbag design was defective *when it was sold to the plaintiff*, the risk-utility test would not apply to a separate claim alleging that the manufacturer should have issued a recall of the airbag when it learned that its design was unreasonably causing harm. For that type of claim, the Restatement (Third) acknowledges that negligence could remain an appropriate standard. See id.

B

Avoiding Inconsistent Verdicts

This simplified approach of using a single test for all design defect claims also serves an important practical purpose: to avoid the confusion and inconsistent verdicts that could result from submitting two separate standards to a jury to determine the existence of a single defect. For example, suppose a court submits a design defect case to the jury and gives both a risk-utility and a negligent design instruction, and the jury finds for the defendant on the risk-utility theory and for the plaintiff on the negligence theory. The two verdicts are logically inconsistent. If the jury decides that no design defect existed at the time of sale under the risk-utility test, then the manufacturer should not be deemed negligent for selling a product that is not defective.[8] See 1 D. Owen & M. Davis, supra, § 5:29, pp. 481–83. Courts and commentators offer varying expla-

[8] Of course, a manufacturer separately may be deemed negligent for failing to recall a product with a latent defect that was not foreseeable at the time of sale.

nations for how a jury could reach such inconsistent conclusions. Most explanations involve an acknowledgment that the jury would most likely have been confused in using two standards to decide essentially the same question. See id., p. 483. Worse still, an inconsistent verdict could be the result of a compromise based on considerations other than the jury's proper application of the law to the facts. See id. Sound product liability law should be structured to avoid such results. See id. ("[w]hatever the reason, such findings logically make no sense, are offensive to sound jurisprudence, and ordinarily should not be tolerated").

Mindful of this concern, the Restatement (Third) emphasizes that courts should instruct the jury in a design defect case only on the risk-utility test, regardless of the label a court applies to it. The Restatement (Third) explains that "two or more factually identical [defective design] claims . . . should not be submitted to the trier of fact in the same case under different doctrinal labels. Regardless of the doctrinal label attached to a particular claim, design . . . claims rest on a risk-utility assessment. To allow two or more factually identical risk-utility claims to go to a jury under different labels, whether 'strict liability,' 'negligence,' or 'implied warranty of merchantability,' would generate confusion and may well result in inconsistent verdicts." Restatement (Third), supra, § 2, comment (n), pp. 35–36.[9]

[9] For example, in adopting the Restatement (Third) approach to design defect claims, the Iowa Supreme Court eliminated use of doctrinal reference in design defect cases: "We question the need for or usefulness of *any* traditional doctrinal label in design defect cases because, as comment *n* points out, a court should not submit both a negligence claim and a strict liability claim based on the same design defect since both claims rest on an identical risk-utility evaluation. . . . Moreover, to persist in using two names for the same claim only continues the dysfunction . . . . Therefore, we prefer to label a claim based on a defective product design as a design defect claim without reference to strict liability or negligence." (Citation omitted; emphasis in original.) *Wright* v. *Brooke Group Ltd.*, 652 N.W.2d 159, 169 (Iowa 2002).

Formulating liability tests based on the type of defect alleged rather than trying to frame them within traditional doctrinal categories thus improves the clarity and predictability of product liability law and thereby reduces confusion. See 1 D. Owen & M. Davis, Products Liability (4th Ed. Supp. 2015) § 5:38, p. 15; see also Restatement (Third), supra, § 2, comment (n), pp. 35–36.

C

Product Liability Act

Adopting the Restatement (Third) approach would be fully consistent with—and help to fulfill—the purpose of Connecticut's Product Liability Act (act), General Statutes § 52-572m et seq., which was intended to simplify product liability actions by requiring a plaintiff to bring all claims against product sellers for product related harm within a single statutory cause of action. See General Statutes §§ 52-572m (b) and 52-572n (a). Prior to the act, product liability claims could be brought under numerous, separate causes of action, each invoking different theories of liability (e.g., negligence, breach of contract, strict liability, and breach of warranty). Each was subject to different statutes of limitations and defenses. To eliminate this patchwork of claims and various pleading requirements, the legislature created a single statutory cause of action, subject to one set of limitations and defenses. This cause of action encompassed all types of claims against product sellers, irrespective of the underlying theory. See *Lynn* v. *Haybuster Mfg., Inc.*, 226 Conn. 282, 292, 627 A.2d 1288 (1993) ("The intent of the legislature was to eliminate the complex pleading provided at common law: breach of warranty, strict liability and negligence. . . . [T]he act was intended to merge various theories into one cause of action rather than to abolish all prior existing rights." [Citations omitted.]). Thus, according

to the act, "[a] product liability claim . . . shall be in lieu of all other claims against product sellers, including actions of negligence, strict liability and warranty, for harm caused by a product." General Statutes § 52-572n (a). The act defines a "product liability claim" to include "all actions based on the following theories: Strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation or nondisclosure, whether negligent or innocent." General Statutes § 52-527m (b).

Although the legislature aggregated existing product liability theories under a single cause of action, it did not provide any substantive elements to decide liability, with the exception of claims based on inadequate warnings, which are not at issue in the present case. See General Statutes § 52-572q (b). Instead, the legislature relied on existing common law to provide those standards and left their further development to the courts. See, e.g., *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 241 Conn. 229–30, 245–46 n.34 (refining design defect standards after adoption of act). Our current law, under *Potter*, allows plaintiffs to plead multiple theories of recovery for a single alleged design defect, as long as they do so under the heading of a single "product liability" cause of action. Thus, a plaintiff seeking to recover for a design defect can presently bring a claim premised on many different theories, including for strict liability under the modified consumer expectations test and the ordinary consumer expectations test, and for negligent design under standard principles of negligence. Using multiple tests to address the same essential question sows confusion.

Consistent with the act's purpose of simplification, adopting the Restatement (Third) standard would streamline design defect claims. Using a single standard tailored specifically to design defect claims would do

away with the need to plead or prove separate strict liability and negligence theories and avoids the confusing use of multiple theories to address the same underlying issue—whether the manufacturer chose a reasonably safe product design.

D

Rejection of the Restatement (Third) in Other Jurisdictions

I recognize that some other jurisdictions have also considered and rejected the Restatement (Third)'s design defect standard. See, e.g., *Aubin* v. *Union Carbide Corp.*, 177 So. 3d 489, 510–12 (Fla. 2015); *Tincher* v. *Omega Flex, Inc.*, 628 Pa. 296, 390, 104 A.3d 328 (2014). I find the arguments in these cases unpersuasive. Cases rejecting its approach seem concerned primarily with abandoning the strict liability principles of § 402A of the Restatement (Second) of Torts or imposing burdens on plaintiffs. These concerns, however, appear to me to elevate form over substance and do not reflect the practical considerations involved in design defect cases, which I have explored previously in this opinion. See, e.g., M. Green, "The Unappreciated Congruity of the Second and Third Torts Restatements on Design Defects," 74 Brook. L. Rev. 807, 808–11, 832–36 (2009); T. Jankowski, supra, 36 S. Tex. L. Rev. 318–24; A. Twerski & J. Henderson, supra, 74 Brook. L. Rev. 1106, 1108; C. Perkins, note, "The Increasing Acceptance of the Restatement (Third) Risk Utility Analysis in Design Defect Claims," 4 Nev. L.J. 609, 611–12 (2004).

III

WE SHOULD ADOPT THE RESTATEMENT (THIRD) FOR DESIGN CLAIMS

In light of the foregoing, I would accept the invitation of the reporters of the Restatement (Third) to reconsider the standard that this court employs in design

defect cases and to adopt the approach for resolving design defect claims described in §§ 1, 2 and 4 of the Restatement (Third). Doing so will bring our design defect law in line with current product liability jurisprudence and eliminate our reliance on the now outdated consumer expectations standard from the Restatement (Second), which has proven ill-suited for design defect claims.

Adopting the Restatement (Third) approach will not substantially upend our current design defect law. We have already taken a step toward the Restatement (Third) model by adopting the malfunction theory from § 3 of the Restatement (Third). See *Metropolitan Property & Casualty Ins. Co.* v. *Deere & Co.*, supra, 302 Conn. 139–41. Our adoption of the malfunction theory has already supplanted the ordinary consumer expectations standard in such cases, leaving little reason to retain that standard, especially in light of the limited role that the majority has given to it today. See M. Green, "The Unappreciated Congruity of the Second and Third Torts Restatements on Design Defects," supra, 74 Brook. L. Rev. 834–35 (explaining that malfunction theory "encompasses the kinds of cases that were the model for [the ordinary consumer expectations test in §] 402A"); J. Henderson & A. Twerski, "The Products Liability Restatement in the Courts: An Initial Assessment," 27 Wm. Mitchell L. Rev. 7, 21 (2000) (discussing malfunction theory and noting that "most of the cases cited by courts supporting a consumer expectations test are of [the res ipsa] genre"); J. Hoffman, "Res Ipsa Loquitur and Indeterminate Product Defects: If They Speak for Themselves, What Are They Saying?," 36 S. Tex. L. Rev. 353, 377–78 (1995) (explaining similarities between malfunction theory and ordinary consumer expectations test); A. Twerski & J. Henderson, supra, 74 Brook. L. Rev. 1101 (explaining that modern application of ordinary consumer expectations test is

typically "confined . . . to cases that instantiate res ipsa-like product failures").

In addition, *Potter*'s modified consumer expectations test has already introduced risk-utility concepts into our law. See *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 241 Conn. 221–22. Although the modified test nominally rejects an alternative design requirement; id., 221; our courts are already requiring this evidence as a matter of practice. See A. Twerski & J. Henderson, supra, 74 Brook. L. Rev. 1068, 1102. Adopting the Restatement (Third) will thus bring our standards in line with their actual application and thus provide more consistent guidance to courts and juries applying our law.

I would therefore disavow any continued reliance on the ordinary or modified consumer expectations standards and recognize only the risk-utility test from §§ 1, 2 and 4 of the Restatement (Third) as the appropriate test for design defect claims.[10] Res ipsa-like claims would continue to be governed by the malfunction theory that we adopted in *Metropolitan Property & Casualty Ins. Co.*

IV

APPLICATION OF RESTATEMENT (THIRD) TO CERTIFIED QUESTION

Applying the risk-utility test to the present case, the answer to the certified question is simple: comment (i) to § 402A of the Restatement (Second) of Torts should no longer be the law of this state for design defect claims, and the Restatement (Third) does not contain

[10] I recognize that we have adopted separate standards for resolving some specialized types of design defect claims, namely, for prescription drugs. See *Vitanza* v. *Upjohn Co.*, 257 Conn. 365, 376, 778 A.2d 829 (2001). Because liability for the design of those specialized products is not at issue in the present case, I do not consider whether we should also apply the Restatement (Third) to claims involving those products.

a similar provision. The expectations of consumers, and even consumer awareness of open and obvious dangers, are not dispositive considerations in the risk-utility inquiry. The comments to the Restatement (Third) explain that, "[e]arly in the development of products liability law, courts held that a claim based on design defect could not be sustained if the dangers presented by the product were open and obvious. [The risk-utility test] does not recognize the obviousness of a design-related risk as precluding a finding of defectiveness." Restatement (Third), supra, § 2, comment (d), p. 20. The comments further explain that the risk-utility test "rejects conformance to consumer expectations as a defense. The mere fact that a risk presented by a product design is open and obvious, or generally known, and that the product thus satisfies expectations, does not prevent a finding that the design is defective." Id., § 2, comment (g), p. 28. Consumer expectations are, instead, one factor for the jury to consider when weighing the risks and benefits of a product design. Id., § 2, comment (f), p. 23.

Consequently, I agree with the majority that we should answer the certified question in the negative. Because I cannot join the majority's analysis in support of this conclusion, however, I respectfully concur in the result only.

JAMES T. COSTELLO ET AL. *v.* GOLDSTEIN AND PECK, P.C., ET AL.
(SC 19475)

Rogers, C. J., and Palmer, Zarella, McDonald, Espinosa, Robinson and Vertefeuille, Js.

Syllabus

The plaintiff married couple sought damages from the defendant law firm and two attorneys, commencing a legal malpractice action by way of a complaint and a writ of summons. The name entered on the recognizance

in the summons was the maiden name of the wife. The defendants filed a motion to dismiss the complaint, claiming that the trial court lacked personal jurisdiction over them because the summons was defective due to the lack of a recognizance by a third party or a certification of the plaintiffs' financial responsibility as required by the statute (§ 52-185) pertaining to the filing of a bond or recognizance for the prosecution of an action. The plaintiffs opposed the motion, claiming that § 52-185 only applied to a plaintiff who is not an inhabitant of this state, and that the signature of the assistant clerk taking the recognizance attested to their financial responsibility. At oral argument on the motion, the plaintiffs further claimed that, as spouses, they could enter into recognizances for each other. Two months later, the trial court issued its order granting the defendants' motion to dismiss, noting that § 52-185, the rules of practice, and case law indicated that a plaintiff could not enter into a recognizance for himself or herself, and that only a third party may enter into a recognizance. The court deemed the summons defective and, on the same day that it granted the defendants' motion to dismiss, it rendered judgment dismissing the action, from which the plaintiffs appealed to the Appellate Court. The trial court thereafter issued an articulation, acknowledging that § 52-185 (d) and an applicable rule of practice (§ 8-5 [b]) permitted a court to order a plaintiff to file a bond to cure a defective summons even after a motion to dismiss had been filed, but that the plaintiffs' insistence on maintaining their legal arguments precluded it from ordering the plaintiffs to file a bond to cure the defect. The trial court's articulation further stated that the plaintiffs failed to request that they be allowed to file a bond and they failed to file a motion to reargue, instead electing to pursue an appeal. The Appellate Court thereafter issued a per curiam opinion, summarily affirming the trial court's judgment, and the plaintiffs, on the granting of certification, appealed to this court. *Held* that the Appellate Court improperly affirmed the trial court's judgment dismissing the plaintiffs' complaint for failure to comply with § 52-185, this court having concluded that the trial court improperly failed to afford the plaintiffs an opportunity to file a bond before it dismissed the action in accordance with the remedial provisions of § 52-185 (d) and Practice Book § 8-5 (b): the trial court's failure to recognize its authority to act to order the filing of a bond in the absence of an admission by the plaintiffs that the summons was defective or a request by them to file a bond, constituted an abuse of its discretion, and, to the extent that the trial court's articulation suggested that it believed that an order to the plaintiffs to file a bond before dismissing the action would have been futile, there was no basis in the record to support such a belief and declining to issue an order on that basis also would have been an abuse of its discretion; furthermore, this court concluded that it was unnecessary to address the trial court's construction of the recognizance requirements under § 52-185, as the filing of a bond by the plaintiffs would have rendered

moot any objection to the form of the recognizance and the action would have proceeded on its merits, and because the recognizance and bond requirements of § 52-185 were substantively altered after the parties had filed their briefs in this court, there would be little value to providing guidance on the application of the repealed provision; moreover, the articulation having indicated that the trial court would have allowed the plaintiffs to file a bond if they had been willing to do so, and the plaintiffs having represented to this court that they had been willing to file a bond to avoid dismissal of their action, this court remanded the case to the trial court to afford them that opportunity.

Argued January 27—officially released May 3, 2016

Procedural History

Action to recover damages for, inter alia, legal malpractice, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Sommer*, *J.*, granted the defendants' motion to dismiss for lack of personal jurisdiction and rendered judgment thereon, from which the plaintiffs appealed to the Appellate Court, *Gruendel*, *Keller* and *Borden*, *Js.*, which affirmed the trial court's judgment, and the plaintiffs, on the granting of certification, appealed to this court. *Reversed; judgment directed; further proceedings.*

Dorothy Smulley Costello, self-represented, with whom, on the brief, was *James T. Costello*, self-represented, the appellants (plaintiffs).

Sean E. Boyd, with whom was *Nadine M. Pare*, for the appellees (defendants).

Opinion

McDONALD, J. The plaintiffs, James T. Costello and Dorothy Costello, proceeding as self-represented parties, brought a legal malpractice action against the defendants, Goldstein and Peck, P.C., William J. Kupinse, Jr., and Andrew M. McPherson. The trial court rendered judgment dismissing the action after granting the defendants' motion to dismiss the complaint on

the ground that the writ of summons (summons) failed to provide either a recognizance[1] by a third party or a certification of the plaintiffs' financial responsibility as required by General Statutes § 52-185 (a)[2] and Practice Book §§ 8-3 (a)[3] and 8-4 (a).[4] The Appellate Court summarily affirmed the judgment of dismissal; *Costello* v. *Goldstein & Peck, P.C.*, 155 Conn. App. 905, 109 A.3d 552 (2015); and we granted the plaintiffs' petition for certification to appeal to this court.[5] We conclude

[1] "A recognizance is an obligation acknowledged before some court for a certain sum, with condition that the plaintiff shall prosecute a suit pending in court, or for the prosecution of an appeal. . . . A recognizance is in effect a bond as to its obligation. . . . It imports an acknowledgment. . . . Personal appearance is essential to an oral acknowledgment." (Citations omitted; internal quotation marks omitted.) *Palmer* v. *Des Reis*, 136 Conn. 232, 233, 70 A.2d 141 (1949). The purpose of the recognizance is to ensure "that the plaintiff shall prosecute his action to effect and answer all costs for which judgment is rendered against him." General Statutes § 52-185 (a).

[2] General Statutes § 52-185 (a) provides: "If the plaintiff in any civil action is not an inhabitant of this state, or if it does not appear to the authority signing the process that the plaintiff is able to pay the costs of the action should judgment be rendered against him, the plaintiff shall enter into a recognizance to the adverse party with a financially responsible inhabitant of this state as surety, or a financially responsible inhabitant of this state shall enter into a recognizance to the adverse party, that the plaintiff shall prosecute his action to effect and answer all costs for which judgment is rendered against him. The recognizance shall not be discharged by any amendment or alteration of the process between the time of signing and of serving it."

Section 52-185 was substantively amended effective October 1, 2015. Public Acts 2015, No. 15-85, § 14. Unless otherwise indicated, we refer in this opinion to the 2015 revision of the statute.

[3] Practice Book § 8-3, titled "Bond for Prosecution," essentially mirrors § 52-185 (a). See footnote 2 of this opinion.

[4] Practice Book § 8-4, titled "Certification of Financial Responsibility," provides in relevant part: "(a) . . . [I]n all actions wherein costs may be taxed against the plaintiff, no mesne process shall be issued until the recognizance of a third party for costs has been taken, unless the authority signing the [summons] shall certify thereon that he or she has personal knowledge as to the financial responsibility of the plaintiff and deems it sufficient. . . ."

[5] We granted the plaintiff's petition for certification limited to the following issue: "Did the Appellate Court properly affirm the trial court's dismissal of the complaint for failure to comply with . . . § 52-185?" *Costello* v. *Goldstein & Peck, P.C.*, 316 Conn. 916, 113 A.3d 71 (2015).

that the trial court improperly failed to afford the plaintiffs an opportunity to file a bond to avoid dismissal of the action. Accordingly, we reverse the Appellate Court's judgment.

The record reveals the following undisputed facts. The plaintiffs, a married couple, commenced the present action by way of a complaint and a summons.[6] The name entered for the recognizance in the summons was "Dorothy A. Smulley," which is the maiden name of Dorothy Costello. The defendants moved to dismiss the complaint, claiming that the trial court lacked personal jurisdiction over them because the summons was defective due to the lack of either a recognizance by a third party or a certification of the plaintiffs' financial responsibility. The plaintiffs opposed the motion, arguing that the requirements under § 52-185 apply only to plaintiffs who are not inhabitants of this state and that the signature of the assistant clerk taking the recognizance attested to their financial responsibility.

The trial court heard oral argument on the motion. In addition to the arguments advanced in their opposition to the motion, the plaintiffs contended that nothing prevented one spouse from entering into a recognizance for the other spouse. At one point, the court indicated that it agreed with the defendants' interpretation of the statute, but also questioned whether the plaintiffs could enter into recognizances for each other. It indicated at the close of argument that it would issue a decision on the basis of the papers filed by the parties.

[6] The record reflects an appearance filed by James T. Costello on behalf of himself. In response to questions at oral argument before this court, Dorothy Costello represented that she also had filed an appearance. Our review of the record reveals no such appearance. Nonetheless, the defendants argued that she should be deemed a party for purposes of the recognizance because she always had held herself out as such, including before this court. For purposes of this opinion, we assume, without deciding, that Dorothy Costello is a party plaintiff to this case.

Approximately two months later, the trial court issued an order granting the motion to dismiss. The order noted that no case law had adopted the plaintiffs' interpretation of § 52-185. The order further noted that the rules of practice and case law indicate that a plaintiff cannot enter into a recognizance for himself or herself and that only a third party may enter into a recognizance. Accordingly, the court deemed the summons defective. On the same day that the court granted the defendants' motion to dismiss, it rendered judgment dismissing the case.

The plaintiffs appealed from the trial court's judgment to the Appellate Court and filed a motion for articulation from the trial court. The plaintiffs requested an articulation as to the standard that the trial court had applied to determine that: (1) the summons was defective; (2) the judgment of dismissal was in accord with this court's position on amendable recognizance defects; and (3) that remedial provisions—General Statutes §§ 52-123, 52-126, 52-128 and Practice Book § 8-5 (b)—did not apply.

Over the defendants' objection, the trial court issued an articulation. In response to the second and third requests, the articulation acknowledged that § 52-185 (d) and Practice Book § 8-5 (b) permit a court to order a plaintiff to file a bond to cure a defective summons, as well as the fact that a defective summons is amendable even after a motion to dismiss has been filed. See *Franchi* v. *Farmholme, Inc.*, 191 Conn. 201, 208, 464 A.2d 35 (1983). The articulation then explained: "The plaintiffs had several options under Connecticut rules of practice to correct their errors. First, the plaintiffs could have requested the remedy provided by Practice Book [§] 8-5 (b) which would have provided a period of two weeks within which time to submit a proper recognizance and bond. The plaintiffs did not, during argument, nor have they to date requested the remedy

provided in Practice Book § 8-5 (b). Had the plaintiffs so requested or had [the] plaintiffs at any time filed a bond the court would have deemed the defect to have been cured. Had the plaintiff[s] filed the recognizance in proper form as required under § 52-185 and therefore cured the defective process, the court would have been able to order the clerk to treat the filing of the plaintiffs' recognizance as if the summons were amended to include same. This was the procedure which the court was prepared to follow, but the plaintiffs chose not to cure the defect, electing, rather, to maintain the position argued at short calendar for the two months that passed between the court taking the papers at short calendar and the court granting the motion to dismiss, i.e., that the same person can file an action as a plaintiff and use a different name to satisfy the recognizance requirement. Because of the plaintiffs' insistence on this threshold issue, the court was unable to reach the remedy provided by [Practice Book §] 8-5 (b). Thus, the plaintiffs' insistence regarding the identity of the party signing the recognizance precluded the court from ordering a bond to be filed within two weeks. . . . Nonetheless, had the plaintiffs acknowledged the requirement that the recognizance required the signature of a third party, the court would have then proceeded to order the plaintiffs to file a bond, thereby curing the defect as provided in Practice Book § 8-5 (b). It is unfortunate that this did not occur."

The court also opined that the plaintiffs could have filed a motion to reargue to establish their intention to cure the defective recognizance, but elected instead to pursue their appeal. The court noted that it had neglected to state in its original order that it had "always been willing" to allow the plaintiffs to cure the defect, and that it still would be willing to allow them to do so if they requested such an opportunity by way of a motion to reargue.

The Appellate Court thereafter issued a per curiam opinion summarily affirming the judgment of dismissal. *Costello* v. *Goldstein & Peck, P.C.*, supra, 155 Conn. App. 905. The plaintiffs' certified appeal to this court followed. See footnote 5 of this opinion.

The plaintiffs' argument is twofold. First, they contend that the trial court's interpretation of § 52-185 was incorrect and based on an omission of the controlling phrase referring to a plaintiff who is "not an inhabitant of this state. . . ."[7] Second, the plaintiffs claim that the trial court's articulation evidences that it improperly shifted the burden to them to seek remedial measures that they did not know existed and of which they were not informed, when the authority rested with the court. They contend that the trial court had the authority to order them to file a bond to cure the "circumstantial" defect in the summons, and had it done so, they would have complied.

We conclude that the judgment must be reversed because the trial court improperly failed to afford the plaintiffs an opportunity to file a bond before it dismissed the action in accordance with the remedial provisions under the statute and the rule of practice. We conclude that it is unnecessary to address the trial court's construction of the recognizance requirements under § 52-185 for two reasons. First, the filing of a bond, which the plaintiffs represent that they would have done had they known that they could do so to avoid dismissal, would have rendered moot any objection to the form of the recognizance and the action would have

[7] The plaintiffs also argue that the defendants waived their right to challenge the trial court's jurisdiction over them by filing a general appearance, a motion for an extension of time, and an objection to the plaintiffs' motion to transfer venue. We decline to address this issue because the plaintiffs did not raise it before the trial court or the Appellate Court. See *Southport Congregational Church–United Church of Christ* v. *Hadley*, 320 Conn. 103, 119 n.21, 128 A.3d 478 (2016).

proceeded on the merits. Second, the recognizance and bond requirements of § 52-185 were substantively altered, effective October 1, 2015, after the parties had filed their briefs in this court.[8] See Public Acts 2015, No. 15-85, § 14. Accordingly, there is little value to providing guidance on the application of the repealed provision.[9]

The requirements under our statutes and rules of practice raise a question of law, to which we apply plen-

[8] General Statutes (Supp. 2016) § 52-185 provides in relevant part: "(a) No bond or recognizance for prosecution is required from a party in any civil action unless the judicial authority, upon motion and for good cause shown, finds that a party is not able to pay the costs of the action and orders that the party give a sufficient bond or enter into a recognizance to an adverse party with a financially responsible person to pay taxable costs. . . .

"(d) Any party failing to comply with an order of the judicial authority to give sufficient bond or recognizance may be nonsuited or defaulted."

We note that the corresponding rules of practice have not yet been amended to conform to this change. See Practice Book §§ 8-3 through 8-5; see generally *Harnage* v. *Lightner*, 163 Conn. App. 337, 361 and n.16, 137 A.3d 10 (2016) (discussing legislative intent and quoting Judiciary Committee testimony of Honorable Patrick L. Carroll III, then deputy chief court administrator, in support of amendment limiting circumstances under which recognizance is required in which he stated that recognizance bond "unnecessarily increases the burden on self-represented [plaintiffs] . . . and does not provide any realistic security for costs of an action" [internal quotation marks omitted]).

[9] We feel compelled to note, however, that the record does not support the plaintiffs' serious accusation that the defendants intentionally misrepresented the text of § 52-185 (a) in order to mislead the trial court by omitting the introductory, and, in the plaintiffs' view controlling, phrase: "If the plaintiff in any civil action is not an inhabitant of this state, or . . . ." The defendants' memorandum of law in support of their motion to dismiss properly indicated that they had omitted text from the beginning of § 52-185 (a) by quoting it in relevant part as follows: "[I]f it does not appear to the authority signing the process . . . ." This approach conforms to the standard practice of legal citation, which directs that: "An ellipsis should never be used to begin a quotation . . . . Where the beginning of the quoted sentence is being omitted, capitalize the first letter of the quoted language and place it in brackets if it is not already capitalized . . . ." The Bluebook: A Uniform System of Citation (20th Ed. 2015) § 5.3, p. 85. During oral argument to the trial court, the defendants acknowledged, on three occasions, the language on which the plaintiffs relied and explained why they believed it did not control.

ary review and settled rules of construction. See General Statutes § 1-2z (plain meaning rule); *Brennan* v. *Brennan Associates*, 316 Conn. 677, 684, 113 A.3d 957 (2015) (statute); *Wexler* v. *DeMaio*, 280 Conn. 168, 181–82, 905 A.2d 1196 (2006) (rule of practice); cf. *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007) (distinguishing trial court's interpretation of Code of Evidence, subject to plenary review, from court's application of correct view of law, subject to review for abuse of discretion).

Remedies for a failure to comply with the recognizance or certification requirements under § 52-185 (a) and Practice Book §§ 8-3 and 8-4; see footnotes 2 through 4 of this opinion; are respectively provided in § 52-185 (d) and Practice Book § 8-5. The statute provides in relevant part: "If there has been a failure to comply with the provisions of this section . . . the validity of the [summons] and service shall not be affected unless the failure is made a ground of a plea in abatement [currently a motion to dismiss].[10] If such plea in abatement is filed and sustained or if the plaintiff voluntarily elects to cure the defect by filing a bond, the court shall direct the plaintiff to file a bond to prosecute in the usual amount. Upon the filing of the bond, the case shall proceed in the same manner and to the same effect as to rights of attachment and in all other respects as though the failure had not occurred. . . ." (Footnote added.) General Statutes § 52-185 (d).

Practice Book § 8-5 provides in relevant part: "(a) When there has been a failure to comply with the provisions of [§§] 8-3 and 8-4; the validity of the [summons] and service shall not be affected unless the neglect is made a ground of a motion to dismiss.

[10] "A motion to dismiss . . . has replaced the plea in abatement as the vehicle for challenging the court's jurisdiction . . . ." *Concept Associates, Ltd.* v. *Board of Tax Review*, 229 Conn. 618, 625, 642 A.2d 1186 (1994).

"(b) If the judicial authority, upon the hearing of the motion to dismiss, directs the plaintiff to file a bond to prosecute in an amount deemed sufficient by the judicial authority, the action shall be dismissed unless the plaintiff complies with the order of the judicial authority within two weeks of such order.

"(c) Upon the filing of such bond, the case shall proceed in the same manner and to the same effect as to rights of attachment and in all other respects as though the neglect had not occurred. . . ."

In considering the scope and application of these remedial provisions, we are mindful that "[i]t is our expressed policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court. . . . The design of the rules of practice is both to facilitate business and to advance justice; they will be interpreted liberally in any case where it shall be manifest that a strict adherence to them will work surprise or injustice. . . . Our practice does not favor the termination of proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure." (Internal quotation marks omitted.) *Boyles* v. *Preston*, 68 Conn. App. 596, 603, 792 A.2d 878, cert. denied, 261 Conn. 901, 802 A.2d 853 (2002).

In accordance with this policy, we observe that it is common practice in the Superior Court either to deny or to reserve judgment on a motion to dismiss premised on a defective recognizance and to order the plaintiffs to file a bond or to provide an opportunity to otherwise cure that defect.[11] See, e.g., *Thompson* v. *Esserman*,

[11] Although the trial court's articulation cited a few Superior Court cases in which a motion to dismiss was granted without providing an opportunity to cure, we agree with Judge Devine's assessment of the case law: "While some courts have immediately dismissed complaints for such failure . . . many others have granted the plaintiff two weeks to file recognizance before dismissal. . . . The latter approach seems more faithful to the Practice

Superior Court, judicial district of New Haven, Docket No. CV-12-5034209-S (October 3, 2012); *Samuel* v. *Children's Advocacy Center*, Superior Court, judicial district of Hartford, Docket No. CV-10-5034917-S (July 12, 2011); *Ridgefield Bank* v. *Stones Trail, LLC*, Superior Court, judicial district of Stamford, Docket No. CV-02-0188226-S (April 2, 2003); *Quinones* v. *Armstrong*, Superior Court, judicial district of Hartford, Docket No. CV-02-0816230 (November 21, 2002); *Loughery* v. *Commissioner of Correction*, Superior Court, judicial district of Hartford, Docket No. CV-01-0812161-S (July 9, 2002); *Greenview Associates* v. *Milford*, Superior Court, judicial district of Ansonia-Milford at Milford, Docket No. CV-92-039982-S (January 11, 1993).

The defendants contend, however, that the trial court has discretion whether to order the posting of a bond. Specifically, they posit that the statute and the rule of practice are in conflict, because the former mandates that the court order the posting of a bond when there has been a failure to enter into a valid recognizance or provide a certification of financial responsibility, whereas the latter vests the court with discretion to make such an order. They further contend that the rule of practice trumps the statute when such a conflict exists. We conclude that, even assuming without deciding that the defendants are correct as to each of these points, the trial court nonetheless plainly abused its discretion.

"While it is normally true that this court will refrain from interfering with a trial court's exercise of discretion . . . this presupposes that the trial court did in fact exercise its discretion. [D]iscretion imports something more than leeway in decision-making. . . . It means a legal discretion, to be exercised in conformity

Book." (Citations omitted.) *Traylor* v. *State*, Superior Court, judicial district of New London, Docket No. CV-13-5014624-S (January 9, 2014).

with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (Internal quotation marks omitted.) *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 239, 654 A.2d 342 (1995). "[T]he court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court." (Internal quotation marks omitted.) *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 16, 776 A.2d 1115 (2001). Whether the trial court failed to exercise discretion because it concluded that it was compelled to act in a particular fashion is a matter to which we apply plenary review. See *Wichers* v. *Hatch*, 252 Conn. 174, 181–82, 745 A.2d 789 (2000).

The trial court's articulation reflects its belief that it had no authority to act in the absence of an admission by the plaintiffs that the summons was defective or a request by them to file a bond. The articulation stated in relevant part: "Because of the plaintiffs' insistence on this threshold issue [that the recognizance was proper], the court was *unable* to reach the remedy provided by [Practice Book §] 8-5 (b). Thus, the plaintiffs' insistence regarding the identity of the party signing the recognizance *precluded* the court from ordering a bond to be filed within two weeks." (Emphasis added.) Neither the statute nor the rule of practice, however, imposes any such restraint. As such, the court's failure to recognize its authority to act constituted an abuse of discretion. See *State* v. *Lee*, 229 Conn. 60, 73–74, 640 A.2d 553 (1994) ("[i]n the discretionary realm, it is improper for the trial court to fail to exercise its discretion"); *State* v. *Martin*, 201 Conn. 74, 88, 513 A.2d 116 (1986) ("[w]here, as here, the trial court is properly called upon to exercise its discretion, its failure to do so is error").

To the extent that the trial court's articulation could be interpreted to suggest that it believed that an order to file a bond before dismissing the action would have been futile, as the defendants contend, there is simply no basis in the record to support such a belief. At oral argument on the motion to dismiss, the plaintiffs undoubtedly were unequivocal that the recognizance complied with the requirements under the statute and rules of practice. They never stated, however, that they would be unwilling to cure a defect should one be determined to exist that would require dismissal of the action. Although the plaintiffs did not request, in the alternative, an opportunity to cure should the court conclude that dismissal was required, the failure to make such a request cannot reasonably be equated with a refusal to comply with an order of the court to undertake some action to cure the defect.[12] Cf. *Royster* v. *Crown Towing*, Superior Court, judicial district of New Haven, Docket No. CV-11-5033931-S (December 21, 2011) (plaintiffs repeatedly asked for extensions of time to correct defective recognizance and repeatedly failed to cure). At no time during that argument did the court raise the subject of bond or any other cure, which is in tension with this court's repeated guidance that "[t]his court has always been solicitous of the rights of [self-represented] litigants and, like the trial court, will endeavor to see that such a litigant shall have the opportunity to have his case fully and fairly heard so far as such latitude is consistent with the just rights of any adverse party."

[12] Although the trial court's articulation cited the plaintiffs' decision to appeal rather than file a motion to reargue, the plaintiffs' appeal could not have played any role in the trial court's assessment of whether to order the plaintiffs to file a bond prior to granting the motion to dismiss and rendering judgment thereon. Similarly, we disagree with the defendants' reliance on the fact that the articulation indicated that the court was amenable to allowing them to cure the defect even after they had appealed if they filed a motion to reargue and asserted therein their intention to cure the defect. This aspect of the articulation reinforces the view that the trial court improperly believed that a request by the plaintiffs to cure was a condition precedent to its ability to order the plaintiffs to file a bond.

Conservation Commission v. *Price*, 193 Conn. 414, 421 n.4, 479 A.2d 187 (1984); accord *New Haven* v. *Bonner*, 272 Conn. 489, 497–98, 863 A.2d 680 (2005); *Connecticut Light & Power Co.* v. *Kluczinsky*, 171 Conn. 516, 519, 370 A.2d 1306 (1976).

Additionally, the trial court's statements during that hearing did not give the plaintiffs clear notice that the court had concluded that dismissal was required. To the contrary, although the court expressed a view that Dorothy Costello could not enter into a recognizance for herself, it questioned whether the plaintiffs could enter into recognizances for each other. The court did not issue an oral ruling, instead indicating that a decision would be forthcoming that would be decided on the basis of the parties' submissions to the court. Indeed, because the statute contemplates that the trial court will order a bond to be filed after a plea in abatement (motion to dismiss) has been "filed *and sustained*"; (emphasis added) General Statutes § 52-185 (d); the plaintiffs reasonably could have believed that a ruling on the motion to dismiss would not require judgment to be immediately rendered dismissing the action. Accordingly, any assumption that it would have been futile to order the plaintiffs to file a bond would have been speculative. Consequently, declining to issue such an order on this basis also would have been an abuse of discretion.

Notably, the articulation unambiguously indicated that the court would have allowed the plaintiffs to file a bond if they were willing to do so. Because the plaintiffs have represented to this court that they had been willing to file a bond to avoid dismissal of their action, we conclude that the case should be remanded to the trial court to afford them that opportunity. On remand, the parties are free to address to what extent, if any, the recent amendments to § 52-185 bear on the plaintiffs'

obligations, a matter that was not addressed before this court. See footnote 8 of this opinion.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to that court for further proceedings consistent with this opinion.

In this opinion the other justices concurred.

MARIAN PIKULA *v.* DEPARTMENT OF SOCIAL SERVICES
(SC 19533)

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson, Js.

Syllabus

The plaintiff appealed to the trial court from the decision of an administrative hearing officer for the defendant Department of Social Services upholding the department's denial of her application for financial and medical assistance under the state administered Medicaid program. The plaintiff was a beneficiary of a testamentary trust with an established value of approximately $169,745. The trust provided that the trustee shall distribute as much of the trust's net income as he "may deem advisable" to provide properly for the plaintiff's maintenance and support, and that the trustee may incorporate income not so distributed into the principal of the trust. The trust further provided the trustee with the "sole and absolute discretion" to make disbursements from the trust principal. The department denied the plaintiff's application for Medicaid benefits on the ground that her assets, including the value of the trust, exceeded Medicaid limits. The hearing officer upheld the department's denial, and the plaintiff subsequently appealed to the trial court. The trial court determined that the trust was a general support trust and that, therefore, its assets were available to the plaintiff for the purpose of determining Medicaid eligibility. The trial court rendered judgment dismissing the plaintiff's administrative appeal, and the plaintiff appealed. *Held* that the trial court improperly dismissed the plaintiff's appeal from the hearing officer's decision, this court having concluded that the trust was a supplemental needs trust and that the assets contained within it were therefore not available to the plaintiff for the purpose of determining Medicaid eligibility: the language of the trust indicated that the testator intended that the trustee need only use as much income from the trust

as he deemed advisable for the plaintiff's maintenance, that the trustee was to have sole and absolute discretion to make distributions from the principal of the trust to the plaintiff, and that the trustee's discretion was not limited by any standards with respect to making expenditures or distributions; furthermore, the conclusion that the testator intended to create a supplemental needs trust rather than a general support trust was bolstered by the factual circumstances surrounding the establishment, including the amount of the trust, as the assets of the trust would be quickly exhausted if they were applied to the plaintiff's general maintenance.

Argued January 25—officially released May 10, 2016

Procedural History

Appeal from the decision by a hearing officer for the defendant upholding the denial of the plaintiff's application for certain state long-term care benefits, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Schuman, J.*; judgment dismissing the appeal, from which the plaintiff appealed. *Reversed; judgment directed.*

J. Colin Heffernan, with whom, on the brief, was *John C. Heffernan*, for the appellant (plaintiff).

Patrick B. Kwanashie, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (defendant).

Opinion

EVELEIGH, J. The plaintiff, Marian Pikula, appeals from the judgment of the trial court dismissing her appeal from the decision of an administrative hearing officer for the defendant, the Department of Social Services (department),[1] denying her application for benefits under the state administered Medicaid program

[1] We note that the Commissioner of Social Services acts on behalf of the department. For the sake of simplicity, references in this opinion to the department include the Commissioner of Social Services.

(Medicaid)[2] because her assets, in the form of a testamentary trust, exceeded prescribed Medicaid limits. We conclude that the trial court should not have dismissed the appeal on the ground that the hearing officer correctly determined that the trust was an asset available to the plaintiff. Accordingly, we reverse the judgment of the trial court.

The following undisputed facts, as found by the trial court, are relevant to this appeal. "In 1989, John Pikula, the plaintiff's father, executed a will containing a testamentary trust for his two daughters: Dorothy McKee and the plaintiff. When John Pikula died in 1991, the trust became effective and the Probate Court appointed a trustee."

The testamentary language creating the trust provided as follows: "A. Until [the plaintiff] shall die, the [t]rustee shall pay to or spend on behalf of [the plaintiff] as much of the net income derived from this trust fund as the [t]rustee may deem advisable to provide properly for [her] maintenance and support and may incorporate any income not so distributed into the principal of the fund at the option of the [t]rustee.

"B. I hereby authorize and empower the [t]rustee in his sole and absolute discretion at any time and from time to time to disburse from the principal for any of the trust estates created under this [will], even to the point of completely exhausting the same, such amount as he may deem advisable to provide adequately and properly for the support and maintenance of the current income beneficiaries thereof, any expenses incurred by reason of illness and disability. In determining the amount of principal to be so disbursed, the [t]rustee

[2] "Medicaid is a federal program that provides health care funding for needy persons through cost-sharing with states electing to participate in the program." (Internal quotation marks omitted.) *Corcoran* v. *Dept. of Social Services*, 271 Conn. 679, 683 n.4, 859 A.2d 533 (2004).

shall take into consideration any other income or property which such income beneficiary may have from any other source, and the [t]rustee's discretion shall be conclusive as to the advisability of any such disbursement and the same shall not be questioned by anyone. For all sums so distributed, the [t]rustee shall have full acquittance."

In March, 2012, the plaintiff entered a long-term care facility. At that time, she applied for financial and medical assistance under Medicaid. At the time she applied for Medicaid benefits, the trust value was approximately $169,745.91. In May, 2013, the department denied the plaintiff's application for Medicaid benefits on the ground that her assets, including the trust, exceeded the relevant asset limits.

The plaintiff then requested a hearing to contest the department's decision. The hearing occurred in October, 2013. Thereafter, on December 20, 2013, the hearing officer issued a decision upholding the department's denial of the plaintiff's Medicaid benefits because the trust was an asset that was available to her and, therefore, her assets exceeded the regulatory limits.

The plaintiff subsequently requested reconsideration of the decision pursuant to General Statutes § 4-181a (a) (1) (A). Her motion was denied. Pursuant to General Statutes §§ 17b-61 and 4-183, the plaintiff appealed from the hearing officer's decision to the Superior Court.

In her complaint, the plaintiff alleged, inter alia, that, under the terms of the department's policy manual and applicable case law, the trust assets are not available to the plaintiff. Specifically, the plaintiff asserted that, under the terms of the trust, the assets of the trust are not available to her because she is not entitled to receive trust principal and the trustee has sole and absolute discretion regarding trust expenditures and his deci-

sions cannot be challenged by anyone.[3] The trial court rendered judgment dismissing the plaintiff's appeal, concluding that the hearing officer properly determined that the trust in this case was an available asset and that, therefore, the plaintiff's assets disqualified her from Medicaid eligibility.

The plaintiff appealed from the trial court's judgment of dismissal to the Appellate Court. Thereafter, we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

On appeal to this court, the plaintiff claims that the trial court improperly upheld the hearing officer's conclusion that the trust was an asset available to the plaintiff as defined by relevant Medicaid regulations. Specifically, the plaintiff claims that the testator intended to create a discretionary, supplemental needs trust, the assets of which should not be considered available for Medicaid purposes. The department, however, contends that the testamentary language indicates that the testator intended the trust to provide for the plaintiff's general support, in which case it would constitute an asset available to the plaintiff. We agree with the plaintiff that the testator intended to create a discretionary, supplemental needs trust and, therefore, we further agree that the trust corpus and income may not

[3] In her complaint, the plaintiff also alleged that the hearing officer was barred by the doctrine of collateral estoppel from determining that the trust was a "general support trust" or that the assets were "available" to the plaintiff because the Probate Court had previously decided that the trust was a supplemental needs trust and that the plaintiff could not force the trustee to make any distributions. The trial court determined that the doctrine of collateral estoppel did not bar the hearing officer from determining that the trust was a general needs trust for the purpose of determining the plaintiff's eligibility for Medicaid benefits. On appeal, the plaintiff asserts that the trial court improperly determined that the hearing officer was not collaterally estopped from determining that the trust was a general needs trust. Because we conclude that the trial court improperly upheld the hearing officer's conclusion that the trust was a general needs trust and available to the plaintiff, we need not reach the issue of collateral estoppel.

be considered to be available to the plaintiff for the purpose of determining eligibility for Medicaid benefits.

We begin by setting forth our applicable standard of review. Resolution of this issue requires us to determine whether the hearing officer properly construed the terms of the trust instrument. "The construction of a will presents a question of law . . . . *Canaan National Bank* v. *Peters*, 217 Conn. 330, 335, 586 A.2d 562 (1991). As we previously have stated . . . [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . *Board of Education* v. *Commission on Human Rights & Opportunities*, 266 Conn. 492, 504, [832 A.2d 660] (2003)." (Internal quotation marks omitted.) *Corcoran* v. *Dept. of Social Services*, 271 Conn. 679, 698, 859 A.2d 533 (2004).

Given the nature of the plaintiff's claim, namely, that the trial court improperly upheld the hearing officer's determination that the trust in the present case was a general needs trust for the purpose of eligibility for Medicaid benefits, "[o]ur analysis begins with an overview of the [M]edicaid program. The program, which was established in 1965 as Title XIX of the Social Security Act and is codified at 42 U.S.C. § 1396 et seq. ([M]edicaid act), is a joint federal-state venture providing financial assistance to persons whose income and resources are inadequate to meet the costs of, among other things, medically necessary nursing facility care. . . . The federal government shares the costs of [M]edicaid with those states that elect to participate in the program, and, in return, the states are required to comply with requirements imposed by the [M]edicaid act and by the [S]ecretary of the Department of Health and Human Services. . . . Specifically, participating states are required to develop a plan, approved by the [S]ecretary of [H]ealth and [H]uman [S]ervices, containing rea-

sonable standards . . . for determining eligibility for and the extent of medical assistance to be provided. . . .

"Connecticut has elected to participate in the [M]edicaid program and has assigned to the department the task of administering the program. . . . Pursuant to General Statutes §§ 17b-262 and 17b-10, the department has developed Connecticut's state [M]edicaid plan and has promulgated regulations that govern its administration. . . .

"The [M]edicaid act requires that a state's [M]edicaid plan make medical assistance available to qualified individuals. 42 U.S.C. § 1396a (a) (10). The term medical assistance means payment of part or all of the cost of . . . care and services . . . [including] nursing facility services . . . . 42 U.S.C. § 1396d (a); see *Catanzano* v. *Wing*, 103 F.3d 223, 229 (2d Cir. 1996). Participating states are required to provide coverage to certain groups and are given the option to extend coverage to various other groups. The line between mandatory and optional coverage primarily is drawn in 42 U.S.C. § 1396a (a) (10) (A): mandatory coverage is specified in 42 U.S.C. § 1396a (a) (10) (A) (i); and optional coverage is set forth in subsection (a) (10) (A) (ii). In [M]edicaid parlance, individuals who qualify for [M]edicaid benefits pursuant to those subsections are referred to as the categorically needy because, in general, they are eligible for financial assistance under Titles IV-A (Aid to Families with Dependent Children) or XVI (Supplemental Security Income for the Aged, Blind, and Disabled) of the Social Security Act.

"Under the [M]edicaid act, states have an additional option of providing medical assistance to the medically needy—persons who . . . lack the ability to pay for their medical expenses but do not qualify as categorically needy solely because their income exceeds the

income eligibility requirements of the applicable categorical assistance program. . . . The medically needy become eligible for [M]edicaid, if the state elects to cover them, by incurring medical expenses in an amount sufficient to reduce their incomes below the income eligibility level set by the state in its [M]edicaid plan. See 42 U.S.C. § 1396a (a) (17) (in determining eligibility, state must take costs . . . incurred for medical care into account); see also 42 C.F.R. § 435.301. Only when they spend down the amount by which their income exceeds that level, are [medically needy persons] in roughly the same position as [categorically needy] persons . . . [because then] any further expenditures for medical expenses . . . would have to come from funds required for basic necessities. *Atkins* v. *Rivera*, [477 U.S. 154, 158, 106 S. Ct. 2456, 91 L. Ed. 2d 131 (1986)]. Connecticut has chosen to cover the medically needy . . . .

"The [M]edicaid act, furthermore, requires participating states to set reasonable standards for assessing an individual's income and resources in determining eligibility for, and the extent of, medical assistance under the program. 42 U.S.C. § 1396a (a) (17) . . . . The resources standard set forth in Connecticut's state [M]edicaid plan for categorically needy and medically needy individuals is $1600. General Statutes §§ 17b-264 and 17b-80 (c); [Dept. of Social Services, Uniform Policy Manual] § 4005.10 . . . . Consequently, a person who has available resources; see 42 U.S.C. § 1396a (a) (17) (B); in excess of $1600 is not eligible to receive benefits under the Connecticut [M]edicaid program even though the person's medical expenses cause his or her income to fall below the income eligibility standard. . . . *Ahern* v. *Thomas*, 248 Conn. 708, 713–16, 733 A.2d 756 (1999)." (Citation omitted; internal quotation marks omitted.) *Palomba-Bourke* v. *Commissioner of Social Services*, 312 Conn. 196, 203–206, 92 A.3d 932 (2014).

This court has stated that, "[u]nder applicable federal law, only assets actually available to a medical assistance recipient may be considered by the state in determining eligibility for public assistance programs such as [Medicaid]. . . . A state may not, in administering the eligibility requirements of its public assistance program . . . presume the availability of assets not actually available . . . ." (Citations omitted; emphasis omitted.) *Zeoli* v. *Commissioner of Social Services*, 179 Conn. 83, 94, 425 A.2d 553 (1979). This principal "has served primarily to prevent the [s]tates from conjuring fictional sources of income and resources by imputing financial support from persons who have no obligation to furnish it or by overvaluing assets in a manner that attributes nonexistent resources to recipients." *Heckler* v. *Turner*, 470 U.S. 184, 200, 105 S. Ct. 1138, 84 L. Ed. 2d 138 (1985).

To resolve the issue on appeal, we must determine whether the assets in the testamentary trust were available to the plaintiff. "For the purposes of determining eligibility for the Medicaid program, an available asset is one that is actually available to the applicant or one that the applicant has the legal right, authority or power to obtain or to have applied for the applicant's general or medical support. If the terms of a trust provide for the support of an applicant, the refusal of a trustee to make a distribution from the trust does not render the trust an unavailable asset." General Statutes (Supp. 2016) § 17b-261 (c).[4] For Medicaid purposes, general support trusts are considered available because a beneficiary can compel distribution of the trust income. See General Statutes § 52-321. In other words, the benefi-

[4] We note that § 17b-261 has been amended by our legislature since the events underlying the present appeal. See, e.g., Public Acts 2015, No. 15-69, § 17. These amendments are not, however, relevant to the present appeal. For the sake of simplicity, all references to § 17b-261 in this opinion are to the revision appearing in the 2016 supplement to the General Statutes.

ciary has a "legal right . . . to obtain" the funds. See General Statutes (Supp. 2016) § 17b-261 (c). Conversely, supplemental needs trusts, in which a trustee retains unfettered discretion to withhold the income, are not considered available to the beneficiary. *Connecticut Bank & Trust Co.* v. *Hurlbutt*, 157 Conn. 315, 327, 254 A.2d 460 (1968) (spendthrift trust not open to alienation or assignment by anyone until income paid over to beneficiary); *Bridgeport-City Trust Co.* v. *Beach*, 119 Conn. 131, 141, 174 A. 308 (1934) (beneficiary may not alienate or assign interest of spendthrift trust).

"It is well settled that in the construction of a testamentary trust, the expressed intent of the testator must control. This intent is to be determined from reading the instrument as a whole in the light of the circumstances surrounding the testator when the instrument was executed, including the condition of his estate, his relations to his family and beneficiaries and their situation and condition. *Gimbel* v. *Bernard F. & Alva B. Gimbel Foundation, Inc.*, 166 Conn. 21, 26, 347 A.2d 81 (1974). Therefore, in determining whether the assets of a testamentary trust are available to a beneficiary, this court considers whether the testator intended to create a supplemental needs trust or a general support trust. See *Zeoli* v. *Commissioner of Social Services*, supra, 179 Conn. 91–92." (Internal quotation marks omitted.) *Corcoran* v. *Dept. of Social Services*, supra, 271 Conn. 700.

"A trust which creates a fund for the benefit of another, secures it against the beneficiary's own improvidence, and places it beyond the reach of his creditors is a spendthrift trust. *Carter* v. *Brownell*, 95 Conn. 216, 223, 111 A. 182 [1920]. Section 52-321 . . . provides that trust fund income is not subject to the claims of creditors of the beneficiary if the trustee is granted the power to accumulate or withhold trust income or if the income has been expressly given for the support of the benefi-

ciary or his family. See *Cromwell* v. *Converse*, 108 Conn. 412, 424–25, 143 A. 416 [1928] . . . ." (Citation omitted.) *Zeoli* v. *Commissioner of Social Services*, supra, 179 Conn. 88; see also Restatement (Third), Trusts § 58 (2003) ("[i]f the terms of a trust provide that a beneficial interest shall not be transferable by the beneficiary or subject to claims of the beneficiary's creditors, the restraint on voluntary and involuntary alienation of the interest is valid").

Accordingly, to resolve the issue on appeal, we must determine whether John Pikula intended to create a supplemental needs trust or a general support trust. In making this determination, we agree with both parties and the trial court that prior case law from this court provides the appropriate framework within which to examine this issue. Specifically, *Zeoli* v. *Commissioner of Social Services*, supra, 179 Conn. 83, and *Corcoran* v. *Dept. of Social Services*, supra, 271 Conn. 679, guide our analysis of this issue.

First, in *Zeoli* v. *Commissioner of Social Services*, supra, 179 Conn. 84–88, this court concluded that the testator intended to create a supplemental needs trust for the plaintiffs, his two disabled daughters.[5] In doing

[5] The language of the trust in *Zeoli* provided as follows: "All of the rest, residue and remainder of my property and estate, real, personal or mixed, of whatsoever the same may consist and wheresoever the same may be situated, all of which is hereinafter referred to as my residuary estate, shall be disposed of as follows:

"(a) I give, devise and bequeath one-half . . . of my residuary estate unto my son . . . to be his absolutely and forever;

"(b) I give, devise and bequeath one-half . . . of my residuary estate to my [t]rustee hereinafter named in trust [nevertheless], to hold in a single trust for and until the death of the survivor of my daughters, to invest and reinvest the principal of such trust and to dispose of the net income and principal thereof as follows:

"To pay or apply so much of the net income or the principal of such trust to or among either one or both of my daughters as shall be living from time to time during the term of such trust, and in such proportions and amounts as my [t]rustee shall determine in his absolute and uncontrolled discretion. Such amounts of net income or principal may be paid or applied without

so, this court recognized that "[t]o determine the discretionary powers provided, it is necessary to ascertain the dispositive intention as expressed by the language of the entire will in the light of the circumstances surrounding the testator when the instrument was executed, including the condition of his estate, his relations to his family and beneficiaries and their situation and condition." (Internal quotation marks omitted.) Id., 89; see also *Rosa* v. *Palmer*, 177 Conn. 10, 13, 411 A.2d 12 (1978); *Gimbel* v. *Bernard F. & Alva B. Gimbel Foundation, Inc.*, supra, 166 Conn. 26; *Colonial Bank & Trust Co.* v. *Stevens*, 164 Conn. 31, 37, 316 A.2d 768 (1972); *Connecticut Bank & Trust Co.* v. *Lyman*, 148 Conn. 273, 279, 170 A.2d 130 (1961). On the basis of these principles, this court concluded that "the testator's intent was to provide the trustee with sufficient flexibility to use the funds under the trust solely for supplemental support. Both the surrounding circumstances and the language of the will militate in favor

regard to equality of distribution and regardless of whether any one of my daughters may be totally deprived of any benefit hereunder. My [t]rustee, in exercising his absolute and uncontrolled discretion, shall not be required to consider the amount of income from other sources of any beneficiary or the amount of any beneficiary's independent property or the extent to which any beneficiary may be entitled to support by a parent or any other person. The judgment of my [t]rustee as to the allocation of the net income or principal of this trust among the beneficiaries shall be final and conclusive upon all interested persons and upon making such payments or application my [t]rustee shall be fully released and discharged from all further liability or accountability therefor. My trustee shall not be required to distribute any net income of such trust currently and may, in his absolute and uncontrolled discretion, accumulate any part or all of the net income of such trust, which such accumulated net income shall be available for distribution to the beneficiaries as aforesaid.

"Without in any way limiting the absolute discretion of my [t]rustee, it is my fond hope that my trustee pay or apply the net income or principal of the trust for the maintenance, support, education, health and general welfare of those of my daughters who my [t]rustee believes would benefit most from a share of the income of this trust after considering the income of the beneficiaries from other sources." (Internal quotation marks omitted.) *Zeoli* v. *Commissioner of Social Services*, supra, 179 Conn. 86–87 n.2.

of this interpretation. The trust established by [the testator's] will clearly recognizes the obvious incapacity of his daughters to care for themselves. As the amount held under trust, approximately one-half of his entire estate, indicates, the [testator] was a person of modest means. Presumably, the funds under the trust would not provide for general support of his daughters in an institution for much more than a few months. Moreover, at the time of the will's execution and at the time of the testator's death, the daughters were not receiving medical assistance payments and the testator could not know if and how soon such benefits would become available." (Footnotes omitted.) *Zeoli* v. *Commissioner of Social Services*, supra, 90.

This court further explained that "[t]he trust grants the trustee in express terms the power both to discriminate totally against either of the beneficiaries by withholding all income and to disregard funds that might be available to either of the beneficiaries. On the other hand, in precatory language, the trust provides that the trustee apply 'the net income or principal of the trust for the maintenance, support, education, health and general welfare of those of my daughters who my [t]rustee believes would benefit most from a share of the income of this trust after considering the income of the beneficiaries from other sources.'

"In granting the trustee the ability to discriminate against either of the beneficiaries as well as to consider other sources of funds available to the beneficiaries, the testator reveals an intent to provide for only the supplementary support of his daughters. The combination of express and precatory terms in the will attempts to grant the trustee flexibility to provide the support that would benefit either of the beneficiaries the most, that is, imposing on the trustee the legal duty to furnish only supplementary support. If the testator had desired to create a trust for general support, it would have been

simple to do so and no discriminatory provision would have been necessary or desirable." (Footnote omitted.) Id., 90–91. On the basis of the terms of the trust, this court concluded that the testator had intended to create a supplemental needs trust and that those assets were not available to the daughters for the purpose of determining their eligibility for Medicaid benefits. Id., 97.

In 2004, this court again confronted whether a trust was available for the purpose of Medicaid eligibility in *Corcoran* v. *Dept. of Social Services*, supra, 271 Conn. 679. In *Corcoran*, this court acknowledged that the testamentary language reflective of the testator's intent in *Corcoran* was markedly different than that used in *Zeoli*. Id., 701. Specifically, this court explained that "[i]n *Zeoli*, the trust instrument was replete with references to the 'absolute and uncontrolled discretion' afforded the [trustee] in [his] decision-making process. . . . In addition to the overt references to the unfettered discretion of the [trustee], the court in *Zeoli* deemed the provision authorizing the trustee to discriminate among the beneficiaries when making distributions highly probative of the vast level of discretion the testator intended to confer on the trustee." (Citation omitted.) Id. This court then compared the testamentary language in *Corcoran*, explaining that "the testator granted the trustees 'sole discretion' to make distributions and provided them with factors to consider when making 'discretionary distributions . . . .' This language is not as strong as that used in *Zeoli* and suggests that the testator in the present case intended to confer a lesser amount of discretion." (Footnote omitted.) Id., 701–702.

This court further reasoned as follows: "The principal distinction between *Zeoli* and [*Corcoran*], however, is the manner in which the respective testators expressed their intentions regarding the use of the trust funds. In

Zeoli, after establishing the trust, the testator provided in his will that it [was his] fond hope that [his] trustee pay or apply the net income or principal of the trust for the maintenance, support, education, health and general welfare of [the beneficiaries] . . . . [In *Zeoli*, the] court interpreted this to mean that [t]he combination of express and precatory terms in the will attempts to grant the trustee flexibility to provide the support that would benefit either of the [daughters] the most, that is, imposing on the trustee the legal duty to furnish only supplementary support." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id., 702. This court, however, found the testamentary language in *Corcoran* to be distinguishable from that in *Zeoli*. Id. In *Corcoran*, the testator created the trust with the following language: "If [the plaintiff] is then living, the trust established for her shall be retained by my trustees to hold, manage, invest and reinvest said share as a [t]rust [f]und, paying to or expending for the benefit of [the plaintiff] so much of the net income and principal of said [t]rust as the [t]rustees, in their sole discretion, shall deem proper for her health, support in reasonable comfort, best interests and welfare . . . ." (Emphasis omitted; internal quotation marks omitted.) Id., 703. This court relied on the fact that the trustees did not have absolute discretion, instead their sole discretion was "limited by the ascertainable standard of the plaintiff's 'health, support in reasonable comfort, best interests and welfare . . . .' " Id. On the basis of these distinctions, this court concluded that the testamentary trust in *Corcoran* did not display the testamentary intent to provide only for the plaintiff's supplemental needs and, therefore, was a general needs trust available to the plaintiff. Id.

These cases provide a framework for considering the language of the trust in the present case. Specifically, in *Zeoli* and *Corcoran*, this court identified and examined

several factors that are useful in determining whether a particular testamentary trust is intended to be a general needs trust or a supplemental needs trust—namely, the amount and nature of the trustee's discretion with regards to trust income and principal, any limitations or guiding principles within which the trustee must operate, and the factual circumstances regarding the establishment of the trust, including the amount of the trust.

With these factors in mind, we examine the language of the testamentary trust in the present case. The relevant portions of the testamentary trust in the present case provides as follows: "I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal and mixed, of whatever nature and wheresoever situated, including all property that I may acquire or become entitled to after the execution of this will to [the trustee] in trust, nevertheless . . . for the benefit of . . . [the plaintiff] . . . and [McKee] . . . . Said [t]rustee shall hold, manage and control all of the aforesaid property as a trust estate with all of the rights and powers subject to limitations herein enumerated for the following uses and purposes:

"A. Until [the plaintiff] shall die, the [t]rustee shall pay to or spend on behalf of [the plaintiff] as much of the net income derived from this trust fund as the [t]rustee may deem advisable to provide properly for [her] maintenance and support and may incorporate any income not so distributed into the principal of the fund at the option of the [t]rustee.

"B. I hereby authorize and empower the [t]rustee in his sole and absolute discretion at any time and from time to time to disburse from the principal for any of the trust estates created under this [will], even to the point of completely exhausting the same, such amount as he may deem advisable to provide adequately and

properly for the support and maintenance of the current income beneficiaries thereof, any expenses incurred by reason of illness and disability. In determining the amount of principal to be so disbursed, the [t]rustee shall take into consideration any other income or property which such income beneficiary may have from any other source, and the [t]rustee's discretion shall be conclusive as to the advisability of any such disbursement and the same shall not be questioned by anyone. For all sums so distributed, the [t]rustee shall have full acquittance."

First, the language set forth previously in this opinion indicates that the trustee in the present case need only use as much income from the trust "as the [t]rustee may deem advisable" to the plaintiff. The testamentary language further provides that any unused income may be returned to the trust principal. Although the language in the present case indicates that the trustee may use the net income for the maintenance and support of the plaintiff, the fact that the trustee is only required to use as much income as he "may deem advisable" to provide for such maintenance, indicates that the testator intended for the trustee to have complete discretion in determining what, if any, of the income was to be used for the plaintiff's maintenance. Furthermore, the fact that the trust provides that any unused income may be returned to the principal of the trust indicates that the testator did not intend to provide for the general needs of the plaintiff. The trust was only valued at approximately $169,745; therefore, it is unlikely that the income of the trust would have been significant enough to provide for the plaintiff's maintenance at the time the testator executed his will in 1989 or when the trust was established in 1991.

Furthermore, the testamentary language in the present case provides that the trustee has "sole and absolute discretion" to make disbursements from the principal

of the trust. The trust further provides that the trustee's discretion "shall be conclusive as to the advisability of any such disbursement and the same shall not be questioned by anyone." Furthermore, the trust provides a release from liability for the trustee regarding any distributions of principal. On the basis of the foregoing, it is clear that no person can compel the trustee to disburse any principal to the plaintiff. We conclude that the language regarding the discretion of the trustee in the present case is analogous to the language providing absolute and sole discretion to the trustee in *Zeoli*.

Next, we examine whether the trust in the present case contains any limitations or guiding principles within which the trustee must operate. In the present case, the trust mentions "support" and "maintenance" in both the section providing for expenditure of the income and the section addressing disbursement of principal. Nevertheless, in each of these sections the "support" and "maintenance" language is followed or preceded by language allowing the trustee broad discretion to do so only if he deems it advisable. Unlike the language of the trust in *Corcoran*, nothing in the present trust mentions a standard by which the trustee shall make the expenditures or distribution. In *Corcoran*, this court relied on language that the trustees shall "hold, manage, invest and reinvest said share as a [t]rust [f]und, paying to or expending for the benefit of [the plaintiff] so much of the net income and principal of said [t]rust as the [t]rustees, in their sole discretion, shall deem proper for her health, support in reasonable comfort, best interests and welfare . . . ." (Emphasis omitted; internal quotation marks omitted.) *Corcoran* v. *Dept. of Social Services*, supra, 271 Conn. 703. This court reasoned that the language of the trust in *Corcoran* acted as a limitation on the discretion of the trustees because it provided a standard within which the trustees must operate in making expenditures. Id.

On the other hand, the language of the trust in *Zeoli*, provided that "[w]ithout in any way limiting the absolute discretion of my [t]rustee, it is my fond hope that my trustee pay or apply the net income or principal of the trust for the maintenance, support, education, health and general welfare of those of my daughters who my [t]rustee believes would benefit most from a share of the income of this trust after considering the income of the beneficiaries from other sources." (Internal quotation marks omitted.) *Zeoli* v. *Commissioner of Social Services*, supra, 179 Conn. 87 n.2. This court concluded in *Zeoli* that "[t]he combination of express and precatory terms in the will attempts to grant the trustee flexibility to provide the support that would benefit either of the beneficiaries the most, that is, imposing on the trustee the legal duty to furnish only supplementary support." Id., 91. We conclude that the language in the present case is more similar to that language in *Zeoli* and provides that the trustee is required to provide only supplemental support.

We next consider the factual circumstances regarding the establishment of the trust, including the amount of the trust. In *Zeoli*, this court considered the fact that the testator's estate was a modest $9500 in 1975. Id., 85. This court reasoned that, because the beneficiary had a mental impairment that required institutionalization, the modest trust assets would be exhausted quickly if it was treated as a general needs trust. Id., 90. This court reasoned that these factual circumstances weighed in favor of understanding that the testator did not intend for the trust to be a general support trust. Id. In *Corcoran*, however, this court concluded that the testator intended to create a general support trust with a significantly larger estate—approximately $854,307. *Corcoran* v. *Dept. of Social Services*, supra, 271 Conn. 682.

In the present case, the testator had a relatively small estate. Indeed, the trust assets in the present case consisted mainly of the plaintiff's primary residence, the testator's home. In March, 2012, after the home was sold, the trust assets totaled $169,745.91. Much like the situation in *Zeoli*, the assets of the present trust would be quickly exhausted if they were applied to the expenses related to the plaintiff's impairment for which she has sought residential placement. Accordingly, we conclude that the factual circumstances surrounding the establishment of the trust in the present case further bolster our conclusion that it is a supplemental needs trust.

On the basis of the foregoing, we conclude that the trial court improperly dismissed the plaintiff's appeal from the decision of the hearing officer determining that the trust in the present case is a general support trust and that, therefore, the assets are available to the plaintiff. Instead, we conclude that the trust in the present case is a supplemental needs trust and that, therefore, the assets are not available to the plaintiff for the purpose of determining eligibility for Medicaid benefits.

The judgment is reversed and the case is remanded to the trial court with direction to render judgment sustaining the plaintiff's appeal.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* DANTE SMITH
(SC 19322)

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald, Espinosa and Vertefeuille, Js.

Syllabus

The defendant appealed to this court from the judgment of the Appellate Court affirming the judgment of conviction, rendered after a jury trial,

of two counts of assault in the second degree. Following an attack of the victim by six people, he identified the defendant and another person as two of the individuals who had assaulted him with a baseball bat and several firearms. Thereafter, the police processed the crime scene and secured the area where a crowd had gathered. On the basis of the information provided by the victim, the police had reason to believe that the defendant, who had approached them at the crime scene, had participated in the assault. The police informed the defendant that he was being handcuffed for safety reasons in order to protect themselves and the crowd. The defendant stated that he understood that he was not under arrest. The police then asked the defendant if he had any weapons and he was searched. Thereafter, in response to questions from the police concerning the location of the weapons and his accomplice, the defendant gave a conflicting account of the incident with the victim and he made certain incriminating statements. At the police station, the defendant received *Miranda* warnings and he repeated the statements he made to the police at the crime scene. The trial court denied the defendant's motion to suppress, concluding that the stop of the defendant was justified, that the length and intrusiveness of the stop was lawful, and that the investigative detention and questioning was properly continued, especially in light of the police officers' concern for public safety and their own safety and the extremely brief duration. The trial court further concluded that the statements made at the police station were given after the defendant had been advised of his *Miranda* rights and that he waived those rights when he repeated the statements made to the police at the crime scene. On appeal to the Appellate Court, the defendant claimed that the denial of his motion to suppress violated his fifth amendment rights because he was subjected to custodial interrogation without *Miranda* warnings at the crime scene. The Appellate Court concluded that the public safety exception was applicable without deciding whether the defendant was in custody for purposes of *Miranda* and, consequently, that the crime scene questioning of the defendant was justified and the subsequent questioning at the police station following the *Miranda* warnings was permissible. On appeal to this court, the defendant claimed that the trial court improperly denied his motion to suppress certain incriminating statements that he made to the police at the crime scene and later at the police station during his booking. Specifically, he claimed that he was not lawfully detained, that he was in custody at the crime scene because he was handcuffed, that the public safety exception did not apply to the interrogation, and that his statements were inadmissible because he did not receive *Miranda* warnings. He further claimed that due to the impropriety of the crime scene, his statements at the police station were also inadmissible. *Held* that the trial court properly denied the defendant's motion to suppress, this court having concluded both that the public safety exception was applicable and, therefore, the determination of whether the defendant

was in custody for purposes of *Miranda* was unnecessary, and that the defendant's challenge with respect to his statements at the police station also failed because the crime scene questioning was legitimate: the Appellate Court properly concluded that the public safety exception applied, the record having indicated that on arrival at the crime scene, the police spoke with the victim, who was seriously injured and who made statements that he was beaten with a baseball bat and that a gun was involved, the police had a legitimate concern that they were in a volatile situation involving both unsecured weapons and as many as five assailants who had absconded in the vicinity, and a crowd of neighborhood residents had gathered at the crime scene; furthermore, the specific questions that the police asked the defendant were permissible under the public safety exception, as they were related to an objectively reasonable need to protect the police and the public from any immediate danger; accordingly, because the public safety exception applied to the police conduct at the crime scene, the defendant's incriminating statements at the police station following the *Miranda* warnings were admissible.

(*One justice concurring separately*)

Argued December 16, 2015—officially released May 10, 2016

Procedural History

Substitute information charging the defendant with two counts each of the crimes of assault in the first degree and robbery in the first degree, and with one count each of the crimes of larceny in the third degree, carrying a pistol without a permit and criminal possession of a pistol, brought to the Superior Court in the judicial district of Middlesex, geographical area number nine, where the court, *Jongbloed*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the jury before *Jongbloed*, *J.*; verdict and judgment of guilty of two counts of the lesser included offense of assault in the second degree, from which the defendant appealed to the Appellate Court, *Lavine*, *Robinson* and *Peters*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Raymond L. Durelli, assigned counsel, for the appellant (defendant).

Laurie N. Feldman, special deputy assistant state's attorney, with whom were *Russell C. Zentner*, senior assistant state's attorney, and, on the brief, *Peter A. McShane*, state's attorney, for the appellee (state).

Opinion

ROGERS, C. J. This certified appeal requires us to construe the scope of the public safety exception to *Miranda*[1] as articulated in *New York* v. *Quarles*, 467 U.S. 649, 657, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984). The defendant, Dante Smith, appeals from the judgment of the Appellate Court affirming the judgment of conviction, rendered after a jury trial, of two counts of assault in the second degree in violation of General Statutes § 53a-60 (a) (1). See *State* v. *Smith*, 149 Conn. App. 149, 160, 86 A.3d 524 (2014). The defendant claims that the trial court improperly denied his motion to suppress his statements made (1) at the crime scene and (2) later at the police station during his booking. Because we conclude that the public safety exception applied, we affirm the judgment of the Appellate Court.

The following facts, which the jury reasonably could have found, and procedural background are relevant to the defendant's claim. "On the night of March 9, 2010, the victim, Justin Molinaro, was driving his Audi [A6] in the vicinity of Maplewood Terrace, a public housing complex in Middletown known to be a high crime area. As he drove past the complex, two unidentified men flagged him down and informed him that his cousin, the defendant, wanted to speak with him. The victim drove his car into a parking lot at Maplewood Terrace, where he saw the defendant get into the backseat of another car. The victim exited his Audi and asked the defendant what he wanted. While the victim was waiting for the defendant, he saw Tykeem Privott, who was also in the car with the defendant. The victim noticed

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

that Privott had a supply of marijuana on his lap and began to chastise Privott for his drug use. As the victim talked to Privott, the defendant got out of the car wielding a Louisville Slugger aluminum baseball bat, which he used to strike the victim on the head. The blow knocked the victim to the ground, and the victim asked the defendant, '[W]hat the hell is going on?' The other occupants of the vehicle then exited the car and began to kick and punch the victim as he lay on the ground.

"Privott picked up the Louisville Slugger and swung it at the victim, striking him on the back of his neck. The defendant choked the victim and told him to 'go to sleep, motherfucker.' The defendant ordered his accomplices to go through the victim's pockets, which they did, taking his cell phone, wallet, and the keys to the Audi.

"As the assailants left, the victim stumbled to his feet. He found his car keys in a patch of grass near the parking lot. The defendant, however, reappeared and said, 'What, you didn't have enough yet?' and pointed a black handgun in the victim's face. The defendant took the keys to the Audi and said, 'This shit is mine.' The victim then saw Privott, who was now also holding a handgun. Privott asked the defendant, 'Do you want me to pop this motherfucker?' The defendant then turned and left in the Audi.

"The victim walked to a nearby house and called 911. He reported to the dispatcher the details of the assault and carjacking. While on the telephone with the dispatcher, the victim saw the Audi double back, headed in the direction of Maplewood Terrace. He told the dispatcher that six people were returning in his car with guns, and he asked the dispatcher to send help.

"The police arrived on the scene, and police officers attended to the victim [who flagged them down]. One

police officer later stated that the victim looked 'like an alien' because the area around his left eye was bloodied, swollen, and disfigured. The swelling around the victim's eyes rendered him nearly blind. The victim was gasping for breath and making statements to the effect of, 'I don't want to die.' When asked what happened, the victim responded, 'Dante Smith and Tykeem Privott did this. Dante had a bat and Tykeem had a gun.' The victim faded in and out of consciousness and his respiration was irregular. Emergency workers arrived and transported him to the hospital.

"After treating the victim, the police processed the crime scene and secured the area surrounding Maplewood Terrace, where a crowd had gathered. Approximately forty minutes after the assault took place, a black male calmly approached [Detectives] Dan Smith and Nicholas Puorro [of the Middletown Police Department]. As he drew near, he stated, 'I am Dante Smith, my grandmother said the police were looking for me.'

"On the basis of the information provided by the victim, the police had reason to believe that the defendant was involved in an assault that involved both firearms and a baseball bat. The police informed the defendant that they had to place him in handcuffs for safety reasons, and that they had an obligation to protect both themselves and the surrounding crowd. The defendant stated that he understood, and that he also understood that he was not under arrest.

"The police asked the defendant whether he had any weapons; he replied that he did not. The police frisked the defendant, but found no weapons. The defendant was asked whether he knew where the weapons were, to which he responded, 'What weapons?' When asked about Privott, the defendant denied knowing him. The defendant was then asked what happened that evening. The defendant stated that he had been involved in a

fight with the victim, and that he and the victim were cousins. He told the police that the victim had called him and wanted to go for a ride. The defendant stated that once he was in the car with the victim, the victim wanted to go and buy drugs. The defendant stated that he did not want to buy drugs and wanted to get out of the car. When the victim did not stop the vehicle, the defendant stated that he punched the victim in the face several times.

"Upon hearing the defendant's narrative, the police informed him that it appeared as if the victim had been struck with a baseball bat, and that the injuries occurred to the left side of his face, which was inconsistent with the defendant's story that the victim was driving. The defendant grew frantic and stopped cooperating with the police, stating, 'Do what you got to do, arrest me, arrest me.' The defendant was placed under arrest and transported to police headquarters." Id., 151–53. At the police station, the defendant repeated the statements he made to the police at the crime scene after receiving *Miranda* warnings. Id., 154.

"The defendant was charged in a seven count amended information, which included two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (1). The defendant thereafter filed a motion to suppress the statements he made to the police at the crime scene and during his booking at the police station, arguing that they were inadmissible pursuant to *Miranda* . . . . A hearing on the motion to suppress was held during which the defendant argued that the statements he made to the police while he was handcuffed at the crime scene should be suppressed because he was in police custody and interrogated without having received *Miranda* warnings." (Citation omitted.) Id., 153–54. The trial court denied the motion, finding in its memorandum of decision both that "the *Terry*[2]

[2] *Terry* v. *Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

stop [of the defendant] was amply justified and the length and intrusiveness of the stop were lawful pursuant to *Terry*" and, despite the defendant's argument that he should have been given his *Miranda* rights or had the handcuffs removed immediately after the pat-down revealed no weapons, that "under all the circumstances, the investigative detention was properly continued, especially in view of the officers' concerns for public safety and their own safety and the extremely brief duration, one to two minutes at most."[3] "The [trial]

[3] We note that several courts have held that the fact that a seizure of an individual did not rise to the level of a de facto arrest under *Terry* does not necessarily mean that the seizure did not also constitute custody for purposes of *Miranda*. See, e.g., *United States* v. *Newton*, 369 F.3d 659, 673, 675–79 (2d Cir.) (citing cases and holding that, even though defendant was in handcuffs, *Terry* stop of defendant was reasonable, but he was in custody for *Miranda* purposes, and nevertheless public safety exception applied), cert. denied, 543 U.S. 947, 125 S. Ct. 371, 160 L. Ed. 2d 262 (2004). We further note that, if a proper *Terry* stop constitutes custody for *Miranda* purposes, the public safety exception to *Miranda* would not permit the police to ask the seized person any and all questions. Rather, as we discuss later in this opinion, to come within the exception, questions must "relate to an objectively reasonable need to protect the police or the public from any immediate danger . . . ." (Internal quotation marks omitted.) *State* v. *Betances*, 265 Conn. 493, 503, 828 A.2d 1248 (2003), quoting *New York* v. *Quarles*, supra, 467 U.S. 659 n.8.

Although the trial court focused primarily on the reasonableness of the defendant's seizure under *Terry*, the Appellate Court characterized the trial court's ruling as a finding that "the defendant was not in custody at the crime scene, and alternatively, that the public safety exception to *Miranda* applied." *State* v. *Smith*, supra, 149 Conn. App. 154. We agree with the Appellate Court that the trial court did find that there were legitimate public safety concerns and, although the trial court did not make express findings that the specific questions were related to an objectively reasonable need to protect the public or the police, we may undertake that analysis because it is a mixed question of law and fact, and we have factual findings and undisputed testimony concerning the questions and manner of the interrogation. We emphasize that in these circumstances, the trial court ordinarily should perform a *Miranda* custody analysis and not rely solely on *Terry* for custody or, alternatively, examine the questions the officers asked for application of the public safety exception, if custody is assumed. See *State* v. *Mangual*, 311 Conn. 182, 193–95 and nn.11 and 12, 85 A.3d 627 (2014) (recognizing that, based on reasoning from *Berkemer* v. *McCarty*, 468 U.S. 420, 439–40, 104 S. Ct. 3138, 82 L. Ed. 2d 317 [1984], not every seizure

court also found, with respect to the statements made at the police station during his booking, that the defendant was properly advised of his *Miranda* rights and that he waived his rights when, during his booking, he repeated the statement[s] he made to the police at the crime scene.

"Following a trial, the jury found the defendant guilty of two counts of the lesser included offense of assault in the second degree in violation of § 53a-60 (a) (1), and rejected the defendant's claim of self-defense. The defendant was found not guilty of all other charges. The court merged the two assault convictions and sentenced the defendant to a total effective term of five years incarceration, execution suspended after forty months, followed by five years probation with special conditions." (Citation omitted.) *State* v. *Smith*, supra, 149 Conn. App. 154.

On appeal to the Appellate Court, the defendant argued that the trial court's denial of his motion to suppress his statements to the police violated his fifth amendment rights and that he was subjected to custodial interrogation without *Miranda* warnings at the crime scene. Id. The Appellate Court disagreed and held that the *Quarles* public safety exception did apply without deciding whether the defendant was in custody for the purposes of *Miranda*. Id., 155, 159. Consequently, because the questioning at the crime scene of the defendant was justified, the Appellate Court found the doctrine articulated in *Missouri* v. *Seibert*, 542 U.S. 600, 616–17, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004),

constitutes custody for purposes of *Miranda*, *Miranda* custody analysis involves initial inquiry into whether reasonable person would have thought he was free to leave, akin to *Terry* seizure analysis, but, if person is seized, custody analysis also involves additional inquiry of whether reasonable person would have understood his freedom of action to have been curtailed to degree associated with formal arrest [quoting *United States* v. *Newton*, supra, 369 F.3d 672]); see also *State* v. *Betances*, supra, 265 Conn. 503.

which requires the suppression of a subsequent, voluntary confession when the police intentionally violate *Miranda* in obtaining the initial confession, to be inapplicable to the statements made later at the police station during the defendant's booking. *State* v. *Smith*, supra, 149 Conn. App. 159–60. This certified appeal followed.[4]

On appeal to this court, the defendant contends that he was not lawfully detained under *Terry* and was, instead, the subject of custodial interrogation at the crime scene. He further contends that the public safety exception did not apply to the interrogation, and that his statements were inadmissible. Due to the impropriety of the crime scene interrogation, the defendant argues that his statement made at the police station was also inadmissible under *Seibert*. The state counters that the public safety exception applied and thus a determination of custody is unnecessary, and that the propriety of police conduct at the crime scene defeats the *Seibert* claim with regard to the defendant's statements at the police station.

We conclude that the public safety exception applied and, accordingly, we need not decide whether the defendant was in custody for the purposes of *Miranda*.[5] We

[4] This court granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly affirm the trial court's denial of the defendant's motion to suppress statements he made at the crime scene and at the police station?" *State* v. *Smith*, 311 Conn. 954, 97 A.3d 984 (2014).

[5] The defendant contends that the Appellate Court improperly declined to determine whether he was in custody before determining whether the public safety exception to *Miranda* applied. See *State* v. *Smith*, supra, 149 Conn. App. 155 ("[b]ecause we agree with the state that the public safety exception applies to the facts of this case, we do not need to decide whether the defendant was in custody for the purposes of *Miranda*"). We disagree. The Appellate Court properly assumed that the defendant was in custody because, if he was *not* in custody, *Miranda* would not apply in the first instance and the defendant could not prevail on his claim. Thus, the Appellate Court simply gave the defendant the benefit of the doubt, which we do as well.

further conclude that, because the crime scene questioning was legitimate, the defendant's argument regarding the police station statements fails as the *Seibert* doctrine is inapplicable. Accordingly, we affirm the judgment of the Appellate Court.

"Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Betances*, 265 Conn. 493, 500, 828 A.2d 1248 (2003).

Normally, "[w]hen a suspect is taken into custody, the *Miranda* warnings must be given before any interrogation takes place. . . . The primary purpose of the *Miranda* warnings is to ensure that an accused is aware of the constitutional right to remain silent before making statements to the police. . . . Two threshold conditions must be satisfied in order to invoke the warnings constitutionally required by *Miranda*: (1) the defendant must have been in custody; and (2) the defendant must have been subjected to police interrogation. . . . The defendant bears the burden of proving custodial interrogation. . . . [T]he definition of interrogation [for purposes of *Miranda*] can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response. . . . The test as to whether a particular question is likely to elicit an incriminating response is objective; the subjective intent of the police officer is relevant but not conclusive and the relationship of the questions asked to the crime committed is highly relevant." (Citations omitted; emphasis in original; internal quotation

marks omitted.) Id., 500–501. "[T]he ultimate determination . . . of whether a defendant already in custody has been subjected to interrogation . . . presents a mixed question of law and fact over which our review is plenary . . . ." (Internal quotation marks omitted.) *State* v. *Edwards*, 299 Conn. 419, 428, 11 A.3d 116 (2011).

There is an exception to the *Miranda* requirement, however, in certain situations where public safety concerns are implicated. The United States Supreme Court articulated the public safety doctrine in *New York* v. *Quarles*, supra, 467 U.S. 657, and "reasoned that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the [f]ifth [a]mendment's privilege against self-incrimination." (Internal quotation marks omitted.) *State* v. *Betances*, supra, 265 Conn. 503. In those situations, the police officers' questions "must relate to an objectively reasonable need to protect the police or the public from any immediate danger . . . ." (Internal quotation marks omitted.) Id., quoting *New York* v. *Quarles*, supra, 659 n.8.

"In *Quarles*, a young woman approached two police officers in their patrol car and informed them that a man armed with a gun had just raped her. . . . She described her assailant and told the officers that the man had just entered a nearby supermarket. . . . The officers entered the supermarket, located a man, Benjamin Quarles, who matched the description given and apprehended him after a brief pursuit through the store. . . . One officer frisked Quarles and detected an empty shoulder holster before handcuffing him. . . . Before reading him his *Miranda* rights, the officer asked Quarles where the gun was, and Quarles responded, the gun is over there. . . . Quarles subsequently was charged with criminal possession of a weapon. . . . The trial judge granted, and the New York Court of Appeals affirmed, Quarles' motion to suppress both the

gun and the statement because the officer had not given him his *Miranda* warnings. . . .

"The United States Supreme Court, however, reversed the New York Court of Appeals' decision. . . . It held that both the statement and the gun were admissible under the public safety exception because the concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*. . . . Furthermore, the court explained that the exception simply [frees officers] to follow their legitimate instincts when confronting situations presenting a danger to the public safety. . . . The court decline[d] to place officers . . . in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them." (Citations omitted; internal quotation marks omitted.) *State* v. *Betances*, supra, 265 Conn. 502–503.

We agree with the Appellate Court that, based on all the surrounding circumstances, the public safety exception applied in the present case. On arrival at the scene of the assault, the police spoke to the victim, who was seriously injured and who made statements that he had been beaten with a baseball bat,[6] that a gun had been involved, and that six people had been involved, includ-

[6] The defendant challenges the factual finding that a baseball bat is a dangerous instrument, but we do not find, under the circumstances, that this finding was clearly erroneous. Considering all the circumstances, the trial court could have found that the bat had recently been used as a dangerous instrument and that the public was in danger from it as well as the gun involved in the assault.

ing the defendant. The victim had also told the dispatcher that six people were coming back to the scene with guns. *State* v. *Smith*, supra, 149 Conn. App. 152. At that point, the police had a legitimate concern that they were in a volatile situation involving both unsecured weapons and as many as five assailants who had just absconded in the vicinity of Maplewood Terrace. See id., 158. There were a number of individuals in the area at the time that had come out of their residences and gathered at the crime scene. Id. We therefore conclude, as the Appellate Court did, that the unaccounted for dangerous weapons and coassailants posed a threat to the public safety of innocent bystanders, the investigating officers, and the defendant himself. See id., 159, citing *New York* v. *Quarles*, supra, 467 U.S. 657, and *State* v. *Betances*, supra, 265 Conn. 504.

We further conclude that the specific questions that the police asked the defendant were permissible under the public safety exception. To determine whether the police questioning comported with the public safety exception, we must ascertain whether the questions the police asked were "relate[d] to an objectively reasonable need to protect the police or the public from any immediate danger . . . ." (Internal quotation marks omitted.) *State* v. *Betances*, supra, 265 Conn. 503. These pre-*Miranda* questions "may not be investigatory in nature or designed solely to elicit testimonial evidence from a suspect." (Internal quotation marks omitted.) *United States* v. *Estrada*, 430 F.3d 606, 612 (2d Cir. 2005). Although the public safety exception is a "narrow" exception to *Miranda*; *State* v. *Betances*, supra, 503; "a question need not be posed as narrowly as possible, because [p]recision crafting cannot be expected in the circumstances of a tense and dangerous arrest. . . . Thus, a question that plainly encompasses safety concerns, but is broad enough to elicit other information, does not necessarily prevent application of the public

safety exception when safety is at issue and context makes clear that the question primarily involves safety." (Citation omitted; internal quotation marks omitted.) *United States* v. *Estrada*, supra, 612.

After frisking the defendant and finding no weapons, the police asked him where the weapons were. The defendant concedes that if the public safety exception applies, then this question was reasonably grounded in public safety concerns. The police then asked the defendant about Privott, which the defendant argues was investigatory in nature. This question, however, directly related to their safety concerns, as the police had reason to believe that Privott was the person who was in possession of the gun and could be in the immediate area. See *New York* v. *Quarles*, supra, 467 U.S. 657 ("[s]o long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it").

Then the defendant was asked "what happened . . . ?"[7] Again the defendant challenges this as investigatory in nature. Puorro testified at the suppression hearing, however, that he asked the defendant if there were any weapons that they should be aware of around the complex because he was concerned about a civilian coming into the possession of a gun or weapon and then proceeded to ask him "what happened, if he knew anything, if he was involved in this assault because this is what the victim had said and [the defendant] said that he had been involved in an assault with [the victim], but he had not used any weapons." (Internal quotation

[7] The Appellate Court stated that the question posed to the defendant was " 'what happened here . . . ?' " *State* v. *Smith*, supra, 149 Conn. App. 157 n.1. Although this subtle difference does not affect our analysis, we refer to the question asked as "what happened" because it is more consistent with the record.

marks omitted.) *State* v. *Smith*, supra, 149 Conn. App. 157 n.1.[8] Puorro further testified that "[t]he reason [the defendant] wasn't advised at the time is our concern was public safety and the exigency of the weapons being discarded in the area where all these civilians were now out watching. There were children around. Basically we just wanted to know if there [were] guns in the area. We didn't care so much [about] the specifics, but if there [were] guns in the area that could harm us or civilians that were out there." Under these specific circumstances, it is reasonable to conclude that the question was focused on obtaining information about the unaccounted weapons and five other assailants still at large who could have been in the crowd. Thus, the overall nature and context of the questions related to the objectively reasonable need to protect the public from immediate danger. *State* v. *Smith*, supra, 157 n.1. Although the question was somewhat broad, "[p]recision crafting cannot be expected in the circumstances of a tense and dangerous arrest."[9] (Internal quotation

[8] The Appellate Court misstated that it was Detective Smith's testimony.

[9] "To be sure, the public safety exception does not permit officers to pose questions designed *solely* to elicit testimonial evidence from a suspect. . . . Thus, to fall within the exception, a question must have some rational relationship to defusing the perceived danger." (Citation omitted; emphasis in original; internal quotation marks omitted.) *United States* v. *Newton*, 369 F.3d 659, 679 n.8 (2d Cir.), cert. denied, 543 U.S. 947, 125 S. Ct. 371, 160 L. Ed. 2d 262 (2004). Thus, "what happened?" in a public safety situation will not always be considered related to public safety concerns. See *United States* v. *Estrada*, supra, 430 F.3d 612–14 ("[W]e expressly have not condoned the pre-*Miranda* questioning of suspects as a routine matter. . . . We reiterate, however, that the exception must not be distorted into a per se rule as to questioning people in custody . . . and emphasize that the exception will apply only where there are sufficient indicia supporting an objectively reasonable need to protect the police or the public from immediate harm." [Citations omitted; internal quotation marks omitted.]).

The concurrence suggests that our contextual approach may sanction a pretextual approach. To the contrary, our approach simply recognizes both "the need for flexibility in situations where the safety of the public and the officers are at risk . . . [and that] the public safety exception [is] a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of the circumstances in a given case."

marks omitted.) *United States* v. *Estrada*, supra, 430 F.3d 612.

The defendant's second claim is that, although the police read him his rights prior to his making incriminating statements at the police station, those statements are inadmissible pursuant to *Missouri* v. *Seibert*, supra, 542 U.S. 616–17. In *Seibert*, the United States Supreme Court held that if "the police deliberately violate *Miranda* in the first instance, and then obtain the same confession with proper *Miranda* warnings at a later time, the defendant's confession is tainted and inadmis-

(Citation omitted; internal quotation marks omitted.) Id., 612. Moreover, in *Estrada*, one of the factors the court found persuasive was that "the objective facts did not suggest that the questioning was a subterfuge . . . designed solely to elicit testimonial evidence from a suspect . . . but instead that the questioning was generally targeted at a safety concern . . . ." (Citations omitted; internal quotation marks omitted.) *United States* v. *Ferguson*, 702 F.3d 89, 94 (2d Cir. 2012), quoting *United States* v. *Estrada*, supra, 430 F.3d 612, 613. While we are sensitive to the concerns the concurrence expresses, as in *Estrada*, "[t]here is no suggestion or facts in this case to indicate that the questions were a subterfuge for collecting evidence and were thus investigatory." *United States* v. *Estrada*, supra, 613. The trial court is in the best position to evaluate the credibility of the officers and identify those facts that could indicate subterfuge or not. Notwithstanding the concurrence's assumption that the other assailants had fled the scene, its assertion that they did not pose an imminent risk of harm forty to fifty minutes after the assault, and its observation that the police were able to manage the volatile situation without requesting that residents return to their homes the trial court nevertheless credited the testimony of the detectives and found that the overall detention was justified in view of the detectives' legitimate concerns for public safety at the time. See *United States* v. *Ferguson*, supra, 95–96 (applying public safety exception where 911 call was made approximately one hour before defendant's arrest and subsequent interrogation, yet, in that case, those "brief amounts of time did not diminish the officers' objectively reasonable need to protect the public from the realistic possibility that [the defendant] had hidden his gun in public, creating an imminent threat to public safety"). Because of the trial court's finding and because the questioning was generally targeted at a safety concern regarding unaccounted for weapons and assailants, we cannot say that, in this case, the questioning was a subterfuge. See *United States* v. *Simmons*, 661 F.3d 151, 156 (2d Cir. 2011) ("[w]e are not persuaded that this limited questioning was prohibitively 'investigatory in nature' or a subterfuge for collecting testimonial evidence").

sible." *State* v. *Smith*, supra, 149 Conn. App. 159; see *Missouri* v. *Seibert*, supra, 617. Because we hold that the public safety exception applied to the police conduct at the crime scene, the doctrine in *Seibert* is inapplicable to the defendant's statements at the police station.[10]

The judgment of the Appellate Court is affirmed.

In this opinion PALMER, ZARELLA, EVELEIGH, ESPINOSA and VERTEFEUILLE, Js., concurred.

McDONALD, J., concurring. I agree with the majority that the public safety exception to the dictates of *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), applied to the present case because the police officers had a legitimate concern about whether the defendant, Dante Smith, was armed, and whether the weapons identified by the victim, Justin Molinaro, could have been disposed of in a place where a child or other civilian might find them.[1] Here, however, well after the victim provided the police with an account of the attack and was transported for medical treat-

[10] The trial court found that the defendant knowingly and intelligently waived his *Miranda* rights at the police station. The defendant does not challenge this finding.

[1] In the present case, the circumstantial evidence indicating that the defendant or any accomplice actually discarded a weapon, let alone discarded one in a place accessible to the public, is not as strong as it could be. Cf. *New York* v. *Quarles*, 467 U.S. 649, 651–52, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984) (public safety threat when defendant seen fleeing into grocery store with gun and was later apprehended in store wearing empty gun holster and without gun in his possession). It is important, therefore, to identify the basis for an inference that he, or his accomplices, could have done so. Such an inference is supported in the present case under the totality of the following considerations: the victim's ability to name the defendant and some of his accomplices as his attackers; the possibility that the victim's attackers saw him on his cell phone as they returned to the scene and assumed that the police had been summoned; and an officer's trial testimony that perpetrators often discard or secrete their weapons after committing a crime.

ment, the defendant returned to the scene to speak with the police and was handcuffed before questioning commenced. One of the questions thereafter posed to the defendant was, "What happened?" I cannot agree that this question fell within the scope of the narrow public safety exception. Neither the majority's opinion nor my own research reveals a case in which any other court has concluded that such an open-ended question was properly "circumscribed by the exigency which justifies it"; *New York* v. *Quarles*, 467 U.S. 649, 658, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984); under circumstances akin to the present case. The majority's approval of such a question under the facts of this case is an unprecedented, and unwarranted, expansion of this limited exception to *Miranda*. I would conclude that the trial court improperly failed to suppress the defendant's inculpatory narrative that this impermissibly broad question predictably elicited. Because, however, the admission of the defendant's statements at the scene was harmless error, I concur in the judgment.

It is well settled that pre-*Miranda* questions "may not be investigatory in nature or designed solely to elicit testimonial evidence from a suspect." (Internal quotation marks omitted.) *United States* v. *Estrada*, 430 F.3d 606, 612 (2d Cir. 2005). Statements "are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis* v. *Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

As the majority purportedly recognizes, public safety gives rise to a *narrow* exception to the requirement that *Miranda* warnings be given before a custodial interrogation takes place. *New York* v. *Quarles*, supra, 467 U.S. 658; see also *Oregon* v. *Elstad*, 470 U.S. 298, 317, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985) (reaffirming nar-

row scope of exception). The rationale articulated by the United States Supreme Court for this exception is that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the [f]ifth [a]mendment's privilege against self-incrimination." *New York* v. *Quarles*, supra, 657. Significantly, the court in *Quarles* explained that the "exception will not be difficult for police officers to apply because in each case *it will be circumscribed by the exigency which justifies it*. . . . [P]olice officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." (Emphasis added.) Id., 658–59; see, e.g., id., 659 ("The facts of this case clearly demonstrate that distinction and an officer's ability to recognize it. [The officer] asked only the question necessary to locate the missing gun before advising [the] respondent of his rights.").

In determining whether a particular question is justified under the public safety exception, some courts have focused on the narrow scope of the exception, as well as the application of the exception in *Quarles*, and have determined that the question itself must be narrowly tailored to the actual safety concern. See, e.g., *United States* v. *Mengis*, Docket No. 04-CR-508-BR, 2006 WL 2552993, *3 (D. Or. August 31, 2006); *People* v. *Cressy*, 47 Cal. App. 4th 981, 989, 55 Cal. Rptr. 2d 237 (1996), review denied, 1996 Cal. LEXIS 6214 (Cal. October 30, 1996); *State* v. *Johnson*, 46 Kan. App. 2d 387, 395, 264 P.3d 1018 (2011), review denied, 293 Kan. 1111 (2012); *State* v. *Strozier*, 172 Ohio App. 3d 780, 791, 876 N.E.2d 1304 (2007), review denied, 116 Ohio St. 3d 1506, 880 N.E.2d 482 (2008); *State* v. *Spotted Elk*, 109 Wn. App. 253, 260, 34 P.3d 906 (2001). For example, one court concluded that an officer's question to an arrestee, "Do you have anything on your person I need

to be concerned about?"; (internal quotation marks omitted) *State* v. *Spotted Elk*, supra, 256; was impermissible because it could elicit information pertaining not only to items that could injure the officer conducting the search (weapons, drug needles, etc.) but also to contraband, like drugs. Id., 260.

I agree with the majority's decision not to adopt this narrowly tailored approach. In my view, such an approach would impose an unrealistic burden on officers and ignore the exigent and unfolding nature of the circumstances justifying the public safety exception. Instead, I agree with the United States Court of Appeals for the Second Circuit and other courts that have concluded that questions "need not be posed as narrowly as possible, because [p]recision crafting cannot be expected in the circumstances of a tense and dangerous arrest. . . . Thus, a question that *plainly encompasses safety concerns*, but is broad enough to elicit other information, does not necessarily prevent application of the public safety exception when safety is at issue *and context makes clear that the question primarily involves safety*." (Citation omitted; emphasis added.) *United States* v. *Estrada*, supra, 430 F.3d 612; see also *United States* v. *Newton*, 369 F.3d 659, 678 (2d Cir.) (recognizing that "public safety questions are framed spontaneously in dangerous situations" and that "[p]recision crafting cannot be expected in such situations"), cert. denied, 543 U.S. 947, 125 S. Ct. 371, 160 L. Ed. 2d 262 (2004). The limiting principles under this standard ensure that public safety is not a guise for an end run around *Miranda* while adequately accommodating the realities of the circumstances in which such concerns are present.

Although the majority purports to rely on the standard set forth by the Second Circuit, a review of public safety cases from that circuit and others demonstrates that the majority has not faithfully applied it. In those

cases, courts carefully considered the focus of each question to determine whether it was framed in a manner that was more likely to elicit incriminating information rather than information related to the public safety concern at issue. See, e.g., *United States* v. *Reyes*, 353 F.3d 148, 153 (2d Cir. 2003) (The court cited with approval the United States Court of Appeals for the Tenth Circuit, which "found that the officers' focused questions addressed a real and substantial risk to the safety of the officers and were not designed to acquire incriminating evidence [but] solely to protect the officers, as well as the arrestee, from physical injury. . . . [*T*]*he risk of incrimination is limited to* [*nonresponsive*] *answers* [*such as in this case, when the suspect provides more information than requested*] . . . ." [Citations omitted; emphasis altered; internal quotation marks omitted.]).

A few examples demonstrate the reasoning applied in those cases. In *United States* v. *Newton*, supra, 369 F.3d 663, 679, the defendant, a convicted felon on parole, was asked whether he had any " 'contraband' " in his house. In discussing *Newton* in a subsequent case, the court noted that it found this question permissible because, "while the officer's question about 'contraband' could include items not presenting immediate safety concerns, the question plainly encompassed weapons, and the defendant's response indicated that he understood it along those lines." *United States* v. *Estrada*, supra, 430 F.3d 612. In *United States* v. *Khalil*, 214 F.3d 111, 121 (2d Cir.), cert. denied sub nom. *Mezer* v. *United States*, 531 U.S. 937, 121 S. Ct. 326, 148 L. Ed. 2d 262 (2000), the defendant was asked, inter alia, whether he had intended to kill himself in detonating a bomb that he had built. The court concluded that this question fell within the scope of the exception because it "had the potential for shedding light on the bomb's stability." Id. In *United States* v. *Reyes*, supra, 353 F.3d

150–51, before the police handcuffed or conducted a pat-down search of the defendant, they asked him whether he had " 'anything on him' " or " 'anything inside [his] pocket' " that could hurt the officers. Although the defendant responded that he had drugs in his vehicle, the court concluded that "the arresting officer's questions were sufficiently limited in scope and were not posed to elicit incriminating evidence. See [*New York* v. *Quarles*, supra, 467 U.S. 658–59]. Police cannot be faulted for the unforeseeable results of their words or actions." *United States* v. *Reyes*, supra, 154. In *United States* v. *Simmons*, 661 F.3d 151, 153–54 (2d Cir. 2011), the officers, who had escorted a complainant into his apartment to retrieve his belongings after the complainant reported that his roommate, the defendant, had displayed a gun during an argument a few days earlier, asked the defendant, inter alia, whether he had had a dispute with the complainant. The court concluded that this question was permissible because it "had the potential to shed light on the volatility of the situation and the extent to which [the defendant] harbored potentially violent resentment toward [the complainant]," whose presence the officers sought to secure. Id., 156. In sum, in all of these cases, although the question was broader than necessary to elicit information solely related to the public safety concern, it "plainly encompasse[d]" that concern, and the "context [made] clear that the question *primarily* involve[d] safety." (Emphasis added.) *United States* v. *Estrada*, supra, 612.

Those questions stand in stark contrast to the open-ended question in the present case: "What happened?" Although such a question might be proper under limited circumstances, this was not such a case. To understand why, it is useful to examine cases in which courts have been confronted with a similarly broad, generalized question.

In *Bowling* v. *State*, 289 Ga. 881, 882, 717 S.E.2d 190 (2011), an officer providing back up at the scene of a shooting asked a suspect "[w]hat happened?" The Supreme Court of Georgia concluded that this "inquiry did not fall within the public safety exception. When [the officer] arrived, the other officers already understood the general nature of the situation, and as soon as [the officer] arrived, he heard [the defendant] yelling that he had shot [the victim] and that it was an accident. Under the circumstances, the existing exigency facing officers was locating the gun, and [the officer's] broader inquiry about what happened was not focused on this issue. Compare [*New York* v. *Quarles*, supra, 467 U.S. 659] (officer 'asked only the question necessary to locate the missing gun')." *Bowling* v. *State*, supra, 889; see also *People* v. *Olachea*, Docket No. E040239, 2007 WL 1874751, *6, 10 (Cal. App. June 29, 2007) (" '[w]hat do you got going on here?' " was not permissible question because it was "a broad question calling for an infinitely variable response"); *People* v. *Libran*, Docket No. 2006QN062774, 2007 WL 543451, *3 (N.Y. Misc. January 18, 2007) (officer's question of " 'what happened' " deemed impermissible) (decision without published opinion, 14 Misc. 3d 1234[A], 836 N.Y.S.2d 502 [2007]).

By contrast, courts have recognized that public safety demands may justify a more open-ended question when the nature of the threat is indeterminate, and the exigent circumstances are still unfolding while the officers are on the scene. In *United States* v. *Williams*, 181 F.3d 945, 953 (8th Cir. 1999), cited with approval by the Second Circuit; see *United States* v. *Reyes*, supra, 353 F.3d 152; the United States Court of Appeals for the Eighth Circuit sanctioned an inquiry to an arrested drug dealer in his apartment—"Is there anything we need to be aware of?"—that prompted the defendant to respond that he had a gun in the closet. (Internal quotation marks omitted.) *United States* v. *Williams*, supra, 953.

The court in *Williams* explained that although the question "did not specifically refer to weapons or safety concerns," it plainly encompassed such matters. Id., 953 n.13. "The fact that the question was also broad enough to elicit other information [did] not prevent application of the public safety exception when safety was at issue." Id. "[T]he officers could not have known if any armed individuals were present in the apartment or preparing to enter the apartment within a short period of time. Similarly, the officers could not have known whether other hazardous weapons were present in the apartment that could cause them harm if they happened upon them unexpectedly or mishandled them in some way." (Footnote omitted.) Id., 953–54; see also *United States* v. *McKee*, 157 F. Supp. 3d 879, 891 (D. Nev. 2016) (officers' questions to defendant, whose wife was found stabbed short distance from their home, including " 'what happened?' " were permissible because at that point officers "did not know what had happened, whether a perpetrator might be lurking about the home, or whether weapons were in the area"); *State* v. *Vickers*, 159 Ariz. 532, 535, 539, 768 P.2d 1177 (1989) (officer permissibly asked defendant, who had lit fire, what happened and whether victim was dead in order to make strategic plan as to which persons needed to be rescued first who were endangered by fire); *State* v. *Santiago*, Docket No. 01CA007798, 2002 WL 388901, *1, 4 (Ohio App. March 13, 2002) (officers responding to 911 call who entered apartment and observed defendant lying facedown covered in blood permissibly asked what happened, because at that point in time "the officers did not know if there were other people involved, who could still be in the apartment lying in wait, and did not know the type and location of weapon used, if any"); *State* v. *Kuloglija*, Docket No. 65809-3-I, 2013 WL 616375, *4 (Wn. App. February 19, 2013) ("[C]oncern for victim safety and urgency to control a dangerous

situation necessitated [the officer's] questions. When [the officer] came across [the defendant], [the defendant] was lying face down, covered in blood, and clearly injured. . . . [The officer] testified that at that point, he thought [the defendant] was another victim and he 'didn't know what was going on.' . . . When he asked [the defendant] what happened, there was an objectively reasonable need to secure the scene and locate other possible victims or a fleeing suspect." [Footnote omitted.]) (decision without published opinion, 173 Wn. App. 1017 [2003]).

In the present case, the circumstances are akin to *Bowling*, where the officers understood the nature of the public safety threat but nevertheless asked an impermissibly broad, open-ended question.[2] See also *People* v. *Libran*, supra, 2007 WL 543451, *2–3 ("Unlike a situation which is confusing or unfolding, [the officer] arrived at the store after the crime had been committed. [One of the store's security guards] expressly implicated the defendant. Although a police officer's question of 'what happened' is often permissible as investigatory to clarify the situation, in this case, [the officer] 'transcended the boundary between an attempt to clarify the situation and an attempt to elicit a statement.' "). The majority implicitly concedes that the question "what happened" would be impermissible in isolation because it relies on questions relating to weapons that preceded that inquiry to provide the necessary narrowing context. Even assuming that prior questions may provide the requisite context, the majority's approach is unpersuasive under the circumstances of the present case.

[2] As I explain later, the officers' conduct at the scene makes clear that they were not under the impression that the victim's assailants were then present at the scene or likely to return to the scene. Indeed, in discussing the nature of the public safety concern, no officer cited such a possibility as one of his concerns.

Simply put, the facts here tell a different story. The victim had given a statement and had been transported for medical treatment when the defendant returned approximately forty or fifty minutes after the assault, upon learning that the police were looking for him. The officers initially told the defendant that "he was going to be detained while [they] *investigated* [*the*] *incident*." (Emphasis added.) The defendant was then asked questions to ascertain whether he had a weapon on him and whether he knew where the weapons are. He responded in the negative to both questions. It was after this exchange that the officers asked what happened.

An objectively reasonable listener would not have concluded that the latter question was focused on, or even necessarily related to, the current location of the weapons. Questions relating to the weapons had been asked and answered. Those initial questions were stated using the present verb tense. The broad question "what happened" was phrased in the past tense. A reasonable listener would have assumed from the expanded scope and change of verb tense, as well as the fact that questions relating to weapons had been asked and answered, that the police were shifting the discussion to a different topic. Cf. *Davis* v. *Washington*, supra, 547 U.S. 828–29 ("This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot . . . evolve into testimonial statements . . . once that purpose has been achieved. . . . This presents no great problem. Just as, for [f]ifth [a]mendment purposes, police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect, *New York* v. *Quarles*, [supra, 467 U.S. 658–59], trial courts will recognize the point at which, for [s]ixth [a]mendment purposes, statements in response to interrogations become testimo-

nial.'' [Citations omitted; internal quotation marks omitted.]). Consistent with the initial stated purpose of his detention, the defendant reasonably would have assumed that the officer's question as to "what happened" was investigatory in nature, intended to elicit a narrative of the assault. The defendant's response indicates that this is precisely how he understood the question. Cf. *United States* v. *Newton*, supra, 369 F.3d 679 (citing defendant's response indicating that he understood question to encompass presence of weapons as indicative that question was focused on public safety); *United States* v. *Reyes*, supra, 353 F.3d 154 (deeming it significant that questions were not posed in manner that would naturally elicit incriminating evidence). Indeed, in response to his narrative, the officers challenged the defendant's account of the manner in which the victim had been injured. Cf. *United States* v. *Reyes*, supra, 154–55 ("It is not without significance that, after [the defendant] gave the incriminating response about having drugs in his car, the officer asked no further questions. The arresting officer's disinclination to exploit the situation suggests that his question was a reasonable attempt to insure his personal safety in the midst of a search." [Internal quotation marks omitted.]).

I also am not persuaded that the fact that the victim had informed the police that six people were involved in the assault justified the broad question that elicited the defendant's inculpatory narrative. I begin with the observation that, although an inference could be drawn from the victim's statement to the 911 operator that some or all of the defendant's accomplices may have been armed with guns,[3] the trial court's opinion indi-

[3] The majority states that "[t]he victim had also told the [911] dispatcher that six people were coming back to the scene with guns." Although this statement is correct, it is important to clarify that it related to the victim's observation while on the telephone with the dispatcher, namely, that the defendant and his accomplices were returning to the scene in the victim's stolen vehicle at that time. The defendant and his accomplices thereafter

cates that it did not draw such an inference. Instead, it appears to have credited the evidence only insofar as it established the presence of a single gun, as the court repeatedly and exclusively referred to "a gun." "Missing accomplices cannot be equated with missing guns in the absence of evidence that the accomplice presents a danger to the public 'requiring immediate action by the officers beyond the normal need expeditiously to solve a serious crime.' " *State* v. *Hazley*, 428 N.W.2d 406, 411 (Minn. App. 1988), review denied, 1988 Minn. LEXIS 763 (Minn. September 28, 1988).

Nonetheless, even if we were to adopt that inference, it would be impermissible to ask the defendant what happened for two reasons similar to those previously articulated. First, this question did not on its face or in context plainly relate to the current whereabouts of these accomplices.[4] There are numerous instances in which police officers have varyingly framed a question to properly accomplish that end. See, e.g., *United States* v. *Johnson*, Docket No. 03-40068-01-RDR, 2003 WL 22715856, *3 (D. Kan. September 9, 2003) (citing cases in which questions were deemed permissible when suspect was asked if he was alone, if anyone else was inside dark building, where his companion was, and where another suspect was located). In fact, it was only in response to a specific question about the other assailant identified by name by the victim that the defendant indicated that this other person had not been involved.

left the vehicle at the scene. There was no evidence that the defendant's accomplices intended to return to the scene of the crime after returning the vehicle. As I explain later, the conduct of the police would not support such an inference.

[4] I recognize that any statement or question "that the police should know is reasonably likely to evoke an incriminating response from a suspect . . . amounts to interrogation" for purposes of *Miranda*; (internal quotation marks omitted) *State* v. *Ramos*, 317 Conn. 19, 29, 114 A.3d 1202 (2015); and thus the public safety exception is not inapplicable simply because a question is likely to elicit such a response.

Second, in cases in which properly framed questions were deemed justified to elicit information as to the whereabouts or the number of accomplices, those accomplices presented an objective and immediate threat to the safety of the officers or members of the public. See, e.g., *Fleming* v. *Collins*, 954 F.2d 1109, 1113 (5th Cir. 1992) (permissible for officers responding to silent alarm in bank robbery to ask wounded defendant encountered near bank who had been with him because situation was still volatile and officer had reason to fear for officers' safety at time she asked question); *United States* v. *Johnson*, supra, 2003 WL 22715856, *3 (permissible for officer chasing suspects fleeing from bank robbery into apartment complex to ask captured suspect how many persons were involved and who they were because "events were unfolding rapidly" and officer was unsure what dangers he faced from other suspects); *Howard* v. *Garvin*, 844 F. Supp. 173, 175 (S.D.N.Y. 1994) (permissible to ask suspect how many people were with him at scene of robbery while hostages were being held because information was needed for immediate public safety and questions did not relate to what perpetrator had done, even though responses were indicative of guilt); *Hill* v. *State*, 89 Md. App. 428, 433–34, 598 A.2d 784 (1991) (after apprehending two of three robbery suspects who fled crime scene at residential complex, at least one of whom was in possession of gun, it was permissible for police officer to ask where third suspect was because situation was volatile, officers reasonably believed that third suspect could have retaliated by opening fire, and armed suspect posed danger to police team and to people who traversed in area where robbery and flight had occurred); *Commonwealth* v. *Clark*, 432 Mass. 1, 11, 13–14, 730 N.E.2d 872 (2000) (permissible for officer who arrived first at scene of shooting after report that state trooper and civilian had been shot to ask injured defendant whether he was

alone because question served to discover whether there were other individuals nearby who might pose risk to public safety when shooting took place near residential neighborhood, civilians from neighborhood had begun to gather near scene, and weapon had not yet been found); *People* v. *Adams*, 225 App. Div. 2d 506, 640 N.Y.S.2d 37 (upon finding defendant and two of potentially five accomplices in rear of warehouse that they had just robbed, during which numerous shots had been fired, officer's inquiry as to how many perpetrators there were and whether they had any guns was permissible because it was intended to clarify situation and not to elicit admissions), appeal denied, 88 N.Y.2d 932, 647 N.Y.S.2d 166 (1996); *People* v. *Ratliff*, 184 App. Div. 2d 667, 668, 584 N.Y.S.2d 871 (1992) ("With scores of people outside the club where a robbery took place and the defendant and one codefendant in custody, the question posed to the defendant as to the number and whereabouts of the remaining robbers was more for the purpose of clarifying the situation and ascertaining for safety reasons the location of possible weapons, than to secure evidence of a crime . . . . The record further demonstrates that the officer's questioning of the defendant about his codefendants was part of the continuous action of apprehending the defendant, handcuffing him, and escorting him to the police vehicle while the danger to the public from his armed confederates had not yet been eliminated . . . ." [Citations omitted; internal quotation marks omitted.]).

In the present case, there is no evidence that, at the time the officer questioned the defendant forty or fifty minutes after the assault had occurred, his accomplices posed a present or imminent risk of harm to the officers, the public generally, or any person specifically other than the victim, who was known to many or all of the perpetrators. In fact, the officers' conduct suggests the contrary. One officer, describing the situation at the

time of the defendant's return, indicated that, "[b]y this time, the craziness of the scene had died down." The officers "were kind of milling around, doing a neighborhood canvass." Although neighborhood residents also were "milling around," there is no indication that the police advised them to return to their homes. The fact that the assailants had left the victim's car running with the door ajar indicated that the assailants had fled the scene. Indeed, at the suppression hearing, the officers repeatedly identified discarded weapons as the exigent threat and never indicated that they believed that they were in imminent danger.[5] My research has not revealed a single case in which the flight of a potentially armed suspect, in and of itself, was deemed to justify such an open-ended question. Indeed, the narrow public safety exception to *Miranda* would largely swallow the rule if this fact alone justified such a question.

Under these circumstances, it is manifestly unreasonable to conclude that "[the] context makes clear that the question primarily involve[d] safety"; *United States* v. *Estrada*, supra, 430 F.3d 612; and therefore was permissible under the public safety exception to *Miranda*. I have grave concerns that the majority's contextual approach sanctions a pretextual approach—bootstrapping public safety questions to purely investigatory questions to make an end run around *Miranda*.[6] Cf.

[5] Only one officer mentioned any concern other than the location of the weapons at the suppression hearing. That officer stated: "We still had another suspect out there with a possibility he had a gun on him." This statement obviously refers to a single suspect, presumes that this suspect is still in possession of his weapon, and that the suspect has fled from the scene.

[6] I am not suggesting that the officers in the present case engaged in a subterfuge. Rather, I am pointing out that the majority's approach provides a road map for how to engage in one whenever a colorable public safety threat exists. The majority appears to miss the point that the officers' purpose can evolve from one that is permissible to another that is impermissible either by virtue of a change in circumstances (public safety concern has been ameliorated) or by a change in the nature of the questions posed. Moreover, although an overly broad question may be evidence of a subterfuge, application of the public safety exception ultimately does not depend

United States v. *Simmons*, supra, 661 F.3d 156 ("[w]e are not persuaded that this limited questioning was prohibitively 'investigatory in nature' or a subterfuge for collecting testimonial evidence"). Accordingly, the trial court improperly denied the defendant's motion to suppress his statement at the crime scene in response to the question "[w]hat happened?"

Nonetheless, I conclude that the admission of this statement was harmless beyond a reasonable doubt. The defendant's crime scene statement was largely redundant in light of his subsequent, more detailed statement at the police station that was admitted into evidence through the testimony of the officer who took the statement. The defendant's sole claim with regard to harm is that a few inconsistencies between his statement at the scene and his police station statement or his trial testimony undermined his credibility. I am not persuaded.

The defendant admitted at the police station and at trial to having assaulted the victim. At trial, the defendant claimed to have acted in self-defense. The jury had before it a plethora of evidence other than the defendant's crime scene statement from which it could have concluded that the defendant's theory was not credible, including physical evidence that conflicted with the defendant's account of the altercation, the absence of a claim of self-defense in the defendant's statement at the police station, and various inconsistencies between his police station statement and his trial testimony.[7] Accordingly, the limited inconsistencies

on the officers' subjective intent. *New York* v. *Quarles*, supra, 467 U.S. 656. Therefore, the officers in the present case may have intended their question to elicit information related to public safety concerns—a permissible purpose—but nonetheless impermissibly framed the question in a manner that was not reasonably conducive to accomplishing that purpose.

[7] The defendant also claims that his police station statement was inadmissible pursuant to *Missouri* v. *Seibert*, 542 U.S. 600, 617, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004), under which suppression of a subsequent, voluntary confession is required when police intentionally violated *Miranda* in

between the defendant's crime scene statement on the one hand and his police station statement and trial testimony on the other hand were minor in comparison to other evidence from which the jury could have concluded that the defendant was not credible.

Moreover, we have recognized that "statements obtained in violation of *Miranda*, if not the product of improper police coercion, are admissible for impeachment purposes." *State* v. *Mangual*, 311 Conn. 182, 192 n.10, 85 A.3d 627 (2014). The trial court found that the officers who interrogated the defendant at the scene "at no time engaged in any coercive police activity whatsoever . . . ." I am not persuaded that this finding was clearly erroneous. The state was therefore entitled to use the defendant's crime scene statement to impeach the defendant. The state did just that when it recalled the officers who interrogated the defendant at the crime scene and elicited some of the very inconsistencies that the defendant claims were harmful. Although a state's witness commented on one of these inconsistencies during the state's case-in-chief, the jury nevertheless properly heard that same evidence in the state's rebuttal. I am therefore compelled to conclude that the admission of the defendant's statement in response to the question "[w]hat happened?" was harmless beyond a reasonable doubt. I therefore respectfully concur in the judgment.

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obtaining an initial confession. I agree with the state that the record is inadequate to review this unpreserved claim. See *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). The trial court did not make the requisite factual findings necessary to prevail on a *Seibert* claim, and there are not undisputed facts in the record from which we could make such a determination as a matter of law.

WILLIAM C. STYSLINGER III *v.* BREWSTER PARK, LLC, ET AL.
(SC 19489)

Rogers, C. J., and Palmer, Zarella, McDonald, Espinosa, Robinson and Vertefeuille, Js.

Syllabus

The plaintiff sought a court order to dissolve the defendant limited liability company, B Co., and to appoint a receiver to wind up B Co.'s business affairs as a result of the alleged breach of fiduciary duties by the defendant member, W. The plaintiff's former wife, J, and W were the only two members of B Co. As part of a marriage dissolution settlement agreement, J assigned her membership rights to the plaintiff. J was to remain a member of B Co. until, pursuant to statutes (§§ 34-172, 34-179), the plaintiff was admitted to membership in B Co. by W. The plaintiff had requested membership status, however, he had not been granted that status by W. Although the parties agreed that as an assignee, the plaintiff had the right to receive distributions resulting from J's membership interest in B Co., the plaintiff claimed that W had refused to make distributions to the plaintiff while making distributions to himself, and that W had refused to allow the plaintiff to inspect B Co.'s books and records. The defendants moved to dismiss the complaint on the ground that the plaintiff, as an assignee, lacked standing to seek the orders to dissolve and to wind up B Co.'s affairs because only members could seek such relief under the Connecticut Limited Liability Company Act (§ 34-100 et seq.). The trial court agreed that the plaintiff did not have standing to seek that relief and, because he had not requested any other form of relief with any specificity, the court rendered judgment dismissing his complaint. The plaintiff appealed from that judgment, claiming that the act granted him standing to seek the winding up of B Co.'s business affairs and distribution of its assets even in the absence of a dissolution. *Held* that the trial court properly dismissed the plaintiff's complaint because the act does not provide an assignee, like the plaintiff here, with standing to seek the winding up of the affairs of a limited liability company in the absence of a dissolution of that company: a specific provision (§ 34-170 [a] [3]) of the act expressly states that an assignment of a membership interest does not dissolve the limited liability company or entitle the assignee to participate in the management and affairs of the company, or to become or exercise any rights of a member; moreover, pursuant to the dissolution provision (§ 34-206) of the act, the winding up of a limited liability company's business affairs is triggered only by a dissolution, which occurs by any event specified in the company's articles of organization or operating agreement, by a vote to dissolve by the majority of the company's members, or by a

decree of judicial dissolution pursuant to statute (§ 34-207), and because none of those events had occurred here, J retained the sole right under the act to exercise her membership rights and to protect her membership interests.

Argued December 15, 2015—officially released May 17, 2016

Procedural History

Action for, inter alia, a judgment dissolving the named defendant, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hon. Michael Hartmere*, judge trial referee, granted the defendants' motion to dismiss and, exercising the powers of the Superior Court, rendered judgment thereon for the defendants, from which the plaintiff appealed. *Affirmed.*

Joel Z. Green, with whom, on the brief, was *Linda Pesce Laske*, for the appellant (plaintiff).

Andrew M. McPherson, with whom, on the brief, was *William J. Kupinse, Jr.*, for the appellees (defendants).

Opinion

VERTEFEUILLE, J. In this appeal, we must determine whether the assignee of a membership interest in a Connecticut limited liability company (LLC) has standing to seek a court order forcing the winding up of the affairs of an LLC in the absence of the LLC's dissolution. We conclude that the assignee does not have standing to do so.

The named defendant, Brewster Park, LLC (Brewster Park), is an LLC with a business address in Fairfield that owns, maintains, and leases residential housing units in Bridgeport and Trumbull. It has two members: the defendant Michael Weinshel[1] and Joyce Styslinger, a nonparty to this action who is the former spouse of the plaintiff, William C. Styslinger III. As part of a marriage

[1] References to Brewster Park and Weinshel jointly are to the defendants; individual references are by name.

dissolution settlement agreement, Joyce Styslinger assigned her membership interest in Brewster Park to the plaintiff. The parties agree that, under General Statutes §§ 34-170 and 34-172, the plaintiff, as assignee, has the right to receive distributions resulting from Joyce Styslinger's membership interest in Brewster Park, while Joyce Styslinger remains a member of Brewster Park unless and until the plaintiff is admitted to membership by Weinshel, the other member of Brewster Park. See General Statutes §§ 34-172 and 34-179. The plaintiff has requested membership status, but has not been granted it by Weinshel. Brewster Park also has not made any distributions to the plaintiff, despite the plaintiff's demand.

The plaintiff filed the present action against Brewster Park and Weinshel claiming, among other things, that Weinshel has breached his fiduciary duties to Brewster Park and the plaintiff by refusing to make distributions to the plaintiff while taking distributions for himself, and by refusing to allow the plaintiff to inspect Brewster Park's books and records. In his complaint, the plaintiff sought the following forms of relief: (1) an order dissolving Brewster Park; (2) the appointment of a receiver to wind up its affairs and distribute its assets; and (3) "[s]uch other and further relief as in law or equity may appertain."

The defendants moved to dismiss the complaint on the ground that the plaintiff, as an assignee, lacked standing to seek orders to dissolve and wind up the affairs of Brewster Park because only members could seek this relief under the Connecticut Limited Liability Company Act (act), General Statutes § 34-100 et seq. The plaintiff responded that both the act and principles of equity gave him standing to pursue the dissolution and the winding up of affairs, even as an assignee, as a remedy for Weinshel's wrongful conduct.

The trial court agreed with the defendants that the plaintiff did not have standing to seek a dissolution or a winding up of Brewster Park's affairs. Because the plaintiff did not request with specificity any other form of relief besides a dissolution and a winding up of the affairs, the court rendered judgment dismissing the complaint.[2] The trial court also denied a motion by the plaintiff to reconsider its ruling. The plaintiff appealed from the judgment of dismissal to the Appellate Court and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

On appeal, the plaintiff no longer argues that he has standing to seek the dissolution of Brewster Park. Instead, he claims that the act grants him standing to seek a winding up of Brewster Park's affairs and distribution of its assets even in the absence of a dissolution. We disagree, and affirm the trial court's judgment.

[2] The plaintiff claims on appeal that he is also entitled to pursue other forms of relief besides a winding up of Brewster Park's affairs, including money damages for Weinshel's wrongful conduct. In dismissing the complaint, however, the trial court noted that the plaintiff had failed to specifically request money damages and thus could not sustain such a claim. We agree with the trial court.

Assuming for the sake of argument that an assignee is entitled to seek some other relief, including money damages, for wrongful conduct on the part of the members or managers of an LLC, the plaintiff did not explicitly ask for any other relief besides a court-ordered dissolution and winding up of Brewster Park's affairs in his complaint. Although the plaintiff requested "[s]uch other and further relief as in law or equity may appertain," the trial court properly concluded that a more specific request was necessary to put the defendants on notice that the plaintiff was seeking some other form of relief besides dissolution and winding up. As the Appellate Court has explained, a catchall prayer for relief such as " 'such other relief as the court deems necessary and just' is too amorphous to be a claim for money damages." *Solomon* v. *Hall-Brooke Foundation, Inc.*, 30 Conn. App. 129, 134, 619 A.2d 863 (1993); see also *Stern* v. *Connecticut Medical Examining Board*, 208 Conn. 492, 501, 545 A.2d 1080 (1988) ("In an ordinary civil case, the general rule is that a prayer for relief must articulate with specificity the form of relief that is sought. . . . A party who fails to comply with this rule runs the risk of being denied recovery." [Citations omitted.]).

"As a preliminary matter, we set forth the standard of review. A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [decision to] grant . . . the motion to dismiss will be de novo. . . .

"The issue of standing implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . [I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute. . . .

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . ." (Citations omitted; internal quotation marks omitted.) *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 213–14, 982 A.2d 1053 (2009).

The question of whether the plaintiff, as assignee of a membership interest in an LLC, has standing to bring his claims under the act, presents an issue of statutory construction, also a question of law over which our review is plenary. Well established principles guide our interpretation. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . [General Stat-

utes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . [W]e are [also] guided by the principle that the legislature is always presumed to have created a harmonious and consistent body of law . . . . [T]his tenet of statutory construction . . . requires us to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction." (Internal quotation marks omitted.) *Hartford/Windsor Healthcare Properties, LLC* v. *Hartford*, 298 Conn. 191, 197–98, 3 A.3d 56 (2010).

We begin our analysis with the nature of LLCs and the law that governs them. Our common law does not recognize LLCs, which were first created by statute in Connecticut in 1993. Public Acts 1993, No. 93-267. An LLC is a distinct type of business entity that allows its owners to take advantage of the pass-through tax treatment afforded to partnerships while also providing them with limited liability protections common to corporations. See, e.g., 51 Am. Jur. 2d 818, Limited Liability Companies § 1 (2011); see also General Statutes § 34-133 (setting forth members' limited liability protections). The act establishes the right to form an LLC and all of the rights and duties of the LLC, as well as all of the rights and duties of members and assignees. It permits the members to supplement these statutory provisions by adopting an operating agreement to govern the LLC's affairs. See, e.g., General Statutes § 34-140 (c) (permitting members to adopt operating agreement governing LLC's affairs, provided agreement is consis-

tent with act). It is undisputed in the present case, however, that Brewster Park does not have an operating agreement to supplement the rights and duties established in the act.

The provisions of the act relating to winding up an LLC's affairs inextricably link the winding up process to a dissolution, and therefore must be read together with the statutes governing the dissolution of an LLC. See, e.g., General Statutes §§ 34-206 through 34-209. Tellingly, the provisions governing a winding up of the affairs of an LLC are found within the provisions governing the dissolution process. The statutory provisions with regard to both dissolution and winding up of affairs are found within the portion of the act entitled "DISSOLUTION." General Statutes §§ 34-206 through 34-216. Reading the winding up and dissolution statutes together, the act creates a clear progression from dissolution to winding up the affairs, demonstrating that a winding up is not an independent event, but is an integral part of the dissolution process. Once an event of dissolution occurs, the LLC winds up its affairs, distributes its assets, and then terminates its business operations. See, e.g., *Mukon* v. *Gollnick*, 151 Conn. App. 126, 131–32, 92 A.3d 1052 (2014).

The act provides only a single mechanism for triggering a winding up of an LLC's affairs: an event of dissolution. Section 34-206 provides in relevant part that "[a] limited liability *company is dissolved and its affairs shall be wound up* upon the happening" of one of three events: (1) any event of dissolution specified in the LLC's articles of organization or operating agreement; (2) a vote to dissolve by the majority of the LLC's members; or (3) the entry of a decree of judicial dissolution under General Statutes § 34-207. (Emphasis added.) Under § 34-207, only a member or someone on the member's behalf may apply for a decree of dissolution, and a decree may enter only if the court determines

that "it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement."[3] General Statutes § 34-207. There are no other mechanisms in the act for triggering a winding up of the affairs.

Moreover, the provisions of the act governing the winding up process presuppose that the LLC has already dissolved prior to winding up its affairs. For instance, General Statutes § 34-208 (a) (1) explains who may carry out the winding up process and vests this power in "the *members* or managers who have authority . . . to manage the limited liability company *prior to dissolution* . . . ." (Emphasis added.) Section 34-209 (a) sets out the powers of members and managers to bind the LLC after dissolution, providing in relevant part that, "*after dissolution* of the limited liability company, each of the *members having authority to wind up the limited liability company's business and affairs* can bind the limited liability company . . . (1) [*b*]*y any act appropriate for winding up* the limited liability company's business and affairs or completing transactions *unfinished at dissolution* . . . ." (Emphasis added.) In addition, General Statutes § 34-210, the sole provision among the dissolution sections of the act that governs the final distribution of the LLC's assets, provides in relevant part that, "[u]pon the *winding up* of a limited liability company, the assets shall be distributed as follows . . . ." (Emphasis added.)

In the present case, none of the events of dissolution specified in § 34-206 has occurred and the plaintiff

[3] By contrast, our Uniform Partnership Act; General Statutes § 34-300 et seq.; expressly permits transferees of a partnership interest to ask a court to dissolve and wind up the affairs of a partnership. See, e.g., General Statutes §§ 34-348 (b) and 34-372 (6). We find this difference significant and strongly suggestive of the fact that the legislature did not intend to provide an assignee of a membership interest in an LLC with the right to wind up the affairs of the LLC.

therefore cannot trigger a winding up of Brewster Park's affairs. First, the plaintiff has not alleged that Brewster Park's articles of organization have triggered a dissolution and it has no operating agreement. Second, the plaintiff has not alleged that its members voted to dissolve. Third, because the plaintiff is not a member of Brewster Park, he cannot pursue a judicial dissolution under § 34-207. Unless and until the plaintiff is admitted to membership, Joyce Styslinger continues to hold the sole power to exercise the rights accompanying her membership interest; see General Statutes §§ 34-170 (a) (4) and 34-172 (d); and she has not sought a judicial dissolution of Brewster Park in this action. Because no event of dissolution has occurred, and the plaintiff cannot force a judicial dissolution under § 34-207 as an assignee, we conclude that the act does not grant the plaintiff standing to seek a winding up of Brewster Park's affairs.

The plaintiff argues that his right to force a winding up of Brewster Park's affairs is found in § 34-208 (a). We disagree. That subsection pertains only to who may carry out the winding up process once it has been triggered by dissolution; it does not provide authority for an assignee to trigger a winding up in the first place. Section 34-208 (a) (1) provides in relevant part that, by default, the winding up may be carried out "by the members or managers who have authority . . . to manage the limited liability company prior to dissolution . . . ." Alternatively, "if one or more of the members or managers of the limited liability company have engaged in wrongful conduct, or upon other cause shown," the statute permits any member or an assignee to apply to the Superior Court to ask the court to carry out the winding up process in place of the members and managers. General Statutes § 34-208 (a) (2). Thus, under § 34-208 (a), if an LLC has dissolved, but the members or managers had engaged in wrongful conduct

or for other cause shown, an assignee can apply to the Superior Court to have the court perform the winding up process instead of the members or managers. Nothing in § 34-208, however, permits an assignee to apply to the Superior Court to force the commencement of a winding up process absent a dissolution under § 34-206.

Apart from having no support from the text of the act, the plaintiff's interpretation of § 34-208, allowing an assignee to force a winding up of affairs without a dissolution of the LLC, would undermine the statutory scheme for LLCs, thus leading to absurd results. Under the act, an assignee is a passive recipient of the economic benefit of a membership interest and is barred by the act from participating in the management of the LLC's business or exercising any right of membership unless and until the assignee is admitted as a member. General Statutes § 34-170 (a) (2) through (4). The act expressly provides that "an assignment of a limited liability company membership interest does not dissolve the limited liability company or entitle the assignee to participate in the management and affairs of the limited liability company or to become or exercise any rights of a member . . . ." General Statutes § 34-170 (a) (3). Instead, the rights and duties of membership remain vested in the assignor until the assignee is admitted to membership. General Statutes §§ 34-170 (a) (4) and 34-172 (d). Recognizing that assignees have no role to play in managing the LLC's affairs, the act shields them from any liabilities that a member might have; General Statutes § 34-170 (a) (5); including, for example, for capital contributions. See General Statutes § 34-151 (describing member liability for capital contributions to LLC). Instead, the assignor member continues to hold the obligations of membership, including for capital contributions, and continues to owe a duty of good faith to the LLC. See, e.g., General Statutes §§ 34-140, 34-141 and 34-151.

The plaintiff's interpretation of the act is directly contrary to these limitations on the rights of an assignee, and would exalt rights of assignees to a level on par with those of members in the face of the act's clear intention to the contrary. Only members may vote to dissolve an LLC and wind up its affairs. General Statutes § 34-206 (2). Only a member or someone on his behalf may apply to a court for a judicial dissolution forcing a winding up of an LLC. General Statutes § 34-207. If an assignee could obtain a judgment effecting a winding up of the LLC's affairs without a dissolution, the assignee would hold the power to force a termination of the LLC's business operations, giving the assignee undue leverage over the members. In the present case, Joyce Styslinger, rather than the plaintiff, retains the sole right under the act to exercise her membership rights and to protect her membership interests.

There is only one provision of the act that places the rights of assignees on par with the members, and the power to exercise this right is available to assignees only *after* the LLC has dissolved. As we have previously explained, § 34-208 permits assignees, after a dissolution, to ask the Superior Court to conduct the winding up process in the stead of its members and managers, "if one or more of the members or managers of the limited liability company have engaged in wrongful conduct, or upon other cause shown." General Statutes § 34-208 (a) (2). Providing assignees this power after a dissolution and during a winding up process is wholly consistent with the limited role that the act grants to assignees. The assignee's interest in receiving distributions from the LLC becomes primary after an LLC dissolves. After dissolution, the purpose of the LLC is no longer to maintain its business operations, but to wind up its affairs so that the LLC's assets may be liquidated and distributed to its members or their assignees. General Statutes §§ 34-206 through 34-211. Thus, only after

a dissolution does the act permit an assignee to petition the court to protect his or her then primary interest in receiving a share of the LLC's assets. General Statutes § 34-208 (a) (2).

We therefore conclude that the act does not provide an assignee such as the plaintiff with standing to seek the winding up of the affairs of an LLC in the absence of a dissolution of that LLC.[4] Accordingly, the trial court properly dismissed the plaintiff's complaint.

The judgment is affirmed.

In this opinion the other justices concurred.

MARIA F. MCKEON *v.* WILLIAM P. LENNON (SC 19470)

Rogers, C. J., and Palmer, Zarella, Eveleigh, Espinosa and Vertefeuille, Js.

Syllabus

The plaintiff, whose marriage to the defendant was dissolved in 2007, appealed to the Appellate Court from postjudgment rulings by the trial

[4] The plaintiff has also claimed that he is classically aggrieved under the common law or principles of equity, but we disagree. The act permits "principles of law and equity [to] supplement" the act only to the extent that they are not "displaced" by the act's provisions. General Statutes § 34-242 (b). Thus, even if we assume, for the sake of argument, that the common law or equitable principles would otherwise grant an assignee standing to seek a winding up of an LLC's affairs, we nevertheless conclude that these principles are displaced by the provisions of the act discussed previously herein that expressly limit an assignee's role and prevent an assignee from forcing the dissolution or winding up of the LLC.

In support of this claim, the plaintiff cites the Delaware Chancery Court decision in *In re Carlisle Etcetera LLC*, 114 A.3d 592 (Del. Ch. 2015), but we find that decision inapposite because Delaware law concerning assignments of membership interests in an LLC differs markedly from that in Connecticut. Under Delaware law, an assignment leaves both the member and the assignee without the power to assert the rights of membership at issue unless and until the assignee is admitted to membership. Id., 597–601. The court in *In re Carlisle Etcetera LLC* resolved this lacuna by granting equitable standing to the assignee. Id., 601–607. Connecticut law, by contrast, does not result in a similar void because the assignor continues to hold the exclusive power to exercise the rights of membership until the assignee becomes a member. General Statutes §§ 34-170 (a) (4) and 34-172 (d).

court denying the plaintiff's 2008 and 2010 motions for upward modification of child support and granting the defendant's 2010 motion for downward modification of child support. The Appellate Court affirmed the rulings, concluding, inter alia, that the modification of child support orders pursuant to the applicable statute (§ 46b-86 [a]) was subject to the same requirements for the modification of alimony orders, as set forth in this court's decision in *Dan* v. *Dan* (315 Conn. 1). The Appellate Court also concluded that the trial court had not abused its discretion in declining to consider income from certain of the defendant's stock options and restricted stock, as well as certain employment perquisites, in calculating his gross income for the purpose of determining whether there had been a substantial change in his financial circumstances following the dissolution of the parties' marriage. *Held*:

1. The Appellate Court incorrectly relied on *Dan* in determining that both alimony and child support orders are subject to the same modification requirements under § 46b-86 (a) and incorrectly concluded that the plaintiff was required to show additional circumstances, beyond an increase in the defendant's income, to justify an upward modification of the child support award issued in connection with the parties' judgment of dissolution; unlike in the case of alimony awards, in which a substantial increase in a supporting spouse's income, standing alone, ordinarily will not justify the granting of a motion for an upward modification in alimony when the amount of the original award was and continues to be sufficient to fulfill the purpose of maintaining the standard of living that the supported spouse enjoyed during the marriage or to provide temporary support in order to allow the supported spouse to become self-sufficient, child support awards are based on the income of both parents and the premise that a child should receive the same proportion of parental income that he or she would have received if the family had remained together, and, therefore, a trial court may consider a substantial increase in a supporting parent's income, standing alone, as sufficient justification for the granting of a motion for the upward modification of a child support award.

2. The Appellate Court incorrectly determined that the trial court had not abused its discretion in excluding income the defendant derived from certain exercised stock options and restricted stock that vested following the dissolution judgment in calculating his gross income for the purpose of determining whether it should grant the plaintiff's 2008 motion for an upward modification of child support: pursuant to the guidelines for child support set forth in the applicable state regulation (§ 46b-215a-1 [11]), exercised stock options or restricted stock that has vested ordinarily should be considered in calculating a party's gross income for the purpose of determining child support because they constitute "deferred or incentive-based compensation" under § 46b-215a-1 (11) (A) (iv) of the regulations and are not specifically excluded under the guidelines, stock options always have been understood as a form of

incentive-based compensation, and this court previously has interpreted the definition of gross income in the child support guidelines broadly to include items that, in effect, increase the amount of a parent's income that is available for child support; accordingly, because there was an ambiguity in the record regarding the amount of income the defendant received from these stock options and reserved stock, and the trial court did not make a finding as to whether such income was derived from stock benefits awarded prior to or after the dissolution judgment, the case was remanded to the trial court for it to reconsider the plaintiff's 2008 motion in light of this court's conclusion that the decision in *Dan* did not apply to the modification of child support orders and for additional findings regarding whether the exercised stock options or vested restricted stock was awarded following the dissolution judgment and, if so, the amount of income derived from those sources.

3. The Appellate Court correctly determined that the trial court, in ruling on the plaintiff's 2010 motion for modification, had not abused its discretion in excluding certain exercised stock options and restricted stock from the defendant's gross income on the ground that these exercised stock options and restricted stock, which were awarded before the parties' marriage was dissolved, were to be divided as marital property and not to be considered for purposes of alimony or child support pursuant to the dissolution court's original property distribution order, and the parties had not challenged that portion of the dissolution court's order on appeal.

4. The Appellate Court correctly determined that the trial court had not abused its discretion when it excluded certain perquisites that the defendant received from his employer in calculating his gross income for the purpose of determining whether to grant the plaintiff's motions for upward modification of child support; the plaintiff had failed to meet her burden of identifying how much, if any, of the alleged perquisites constituted food, shelter, transportation or other basic needs, and most of the perquisites would have been deducted from income in any event under the applicable state regulation (§ 46b-215a-2b [c] [2] [C] and [F]) because they primarily constituted employer contributions to mandatory retirement plans or to medical, hospital, dental or health insurance premiums.

Argued January 27—officially released May 17, 2016

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Shluger, J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Shluger, J.*, denied the plain-

tiff's motions for modification of child support, and the plaintiff appealed to the Appellate Court, *Robinson* and *Lavery*, *Js.*, with *Lavine*, *J.*, concurring in part and dissenting in part, which reversed the trial court's rulings and remanded the case for further proceedings; subsequently, the court, *Suarez*, *J.*, granted the defendant's motion to modify child support and denied the plaintiff's motion to modify child support, and the plaintiff appealed to the Appellate Court; thereafter, on remand from the earlier Appellate Court decision, the court, *Suarez*, *J.*, denied the plaintiff's motions for modification of child support, and the plaintiff appealed to the Appellate Court, where the appeals were consolidated; subsequently, the Appellate Court, *Gruendel*, *Lavine* and *Mullins*, *Js.*, affirmed the trial court's rulings, and the plaintiff, on the granting of certification, appealed to this court. *Reversed in part*; *further proceedings*.

Campbell D. Barrett, with whom were *Jon T. Kukucka* and, on the brief, *Johanna S. Katz*, for the appellant (plaintiff).

Debra C. Ruel, with whom were *Anne C. Dranginis* and *James M. Ruel*, for the appellee (defendant).

Giovanna Shay, *Lucy Potter*, *Anne Louise Blanchard*, *Shelley White* and *Steve Dembo* filed a brief for Greater Hartford Legal Aid et al. as amici curiae.

Louise Truax and *Leslie Jennings-Lax* filed a brief for the American Academy of Matrimonial Lawyers, Connecticut Chapter, as amicus curiae.

Samuel V. Schoonmaker IV and *Wendy Dunne DiChristina* filed a brief for the Connecticut Bar Association as amicus curiae.

Opinion

ZARELLA, J. In this certified appeal, we address two important issues relating to child support orders. The

first issue is whether the Appellate Court properly concluded, based on this court's reasoning with respect to the modification of alimony orders in *Dan* v. *Dan*, 315 Conn. 1, 10, 105 A.3d 118 (2014), that the supported party must show circumstances beyond the increased income of the supporting party to establish the substantial change in circumstances required to justify the modification of a child support order under General Statutes § 46b-86 (a). The second issue is whether the trial court should consider exercised stock options, restricted stock and employment perquisites in calculating the supporting party's gross income to determine whether there has been a substantial change in circumstances under § 46b-86 (a). The plaintiff, Maria F. McKeon, claims that the Appellate Court, in affirming the trial court's denial of her two separate motions to modify the original child support order, incorrectly concluded that alimony and child support orders are subject to the same modification requirements under § 46b-86 (a), and, therefore, the court improperly applied the reasoning in *Dan* when denying her motions. See *McKeon* v. *Lennon*, 155 Conn. App. 423, 434, 109 A.3d 986 (2015). The plaintiff also claims that the Appellate Court incorrectly concluded that the trial court had not abused its discretion in declining to consider income from stock options, restricted stock and employment perquisites received by the defendant, William P. Lennon, as part of his executive compensation package when calculating the defendant's gross income for the purpose of determining whether there had been a substantial change in his financial circumstances following the dissolution of the parties' marriage. See id., 440, 441. The plaintiff thus seeks reversal of the Appellate Court's judgment and a remand to the trial court to consider these sources of income in deciding the plaintiff's motions. The defendant agrees with the plaintiff that the Appellate Court's reliance on the reasoning in *Dan*

was improper but characterizes that reliance as dictum. He also argues that the trial court properly calculated his gross income without considering his stock benefits and employment perquisites, and, therefore, the Appellate Court properly upheld the trial court's conclusion that the plaintiff did not establish the substantial change in circumstances required for the granting of her motions. We reverse in part the judgment of the Appellate Court.

The following relevant facts are set forth in the Appellate Court's opinion. "[This appeal] arise[s] from a series of postjudgment motions related to the parties' 2007 dissolution of marriage. The plaintiff and [the] defendant were married on August 29, 1981. During their twenty-six year marriage, the parties had three children. In 2005, the plaintiff initiated an action for dissolution of marriage. On December 31, 2007, the court rendered judgment dissolving the marriage . . . and [issued] various orders.

"In the dissolution judgment, the court made several relevant factual findings. The court found that the defendant was a vice president at Electric Boat [Corporation], earning a base salary of $225,420, an annual bonus, stock options, restricted stock awards, and a pension. The court found that the plaintiff was a highly skilled and capable corporate attorney, who in the past had sometimes earned in excess of the defendant's salary. In the years leading up to the divorce, the plaintiff had worked part-time in order to be the primary caregiver to their three children. Despite working part-time, she had been able to earn gross income of $78,500 from mid-July, 2007, through December 12, 2007.

"The court issued various orders in connection with the dissolution judgment, including child custody, division of assets of the marriage, and alimony and child support. First, the dissolution judgment set out a par-

enting plan regarding the parties' two minor children. The parties were to share joint legal custody of the children, but the plaintiff's home would serve as the children's primary residence. Next, the dissolution judgment ordered the defendant to pay the plaintiff $439 per week in child support for the parties' two minor children. The dissolution judgment also ordered the parties to each pay 50 percent of the cost of the children's child care, their [after-school] care and transportation, and their private school tuition. The judgment ordered the parties to share all costs over $150 for the children's extracurricular activities, while the plaintiff was ordered to pay for all costs under $150.

"The dissolution judgment also awarded alimony to the plaintiff in the amount of $900 per week for a period of fourteen years. This order was modifiable, but not terminable, upon the plaintiff's remarriage or cohabitation. [In addition] [t]he court awarded the plaintiff . . . [an irrevocable 50 percent interest in all stock options awarded, granted or otherwise credited to the defendant as of the date of dissolution and] an irrevocable interest in the defendant's future annual employment bonuses, executive stock options, and awards of restricted stock. [Specifically] [t]he plaintiff was to receive 50 percent of the defendant's bonuses, stock options, and restricted stock awarded in 2008, 2009, and 2010. The plaintiff was to then receive 40 percent of the defendant's bonuses [future stock options, and restricted stock awarded] in 2011, 2012, and 2013, and . . . 30 percent [of the defendant's bonuses, future stock options, and restricted stock] awarded to him in each year from 2014 through 2021. [The trial court added in its memorandum of decision issued in connection with the dissolution judgment that 'all stock options that have been awarded, granted or otherwise credited to the defendant prior to the dissolution of

marriage shall be divided as part of the property settlement and shall not be alimony or child support.']

"In May, 2008, [less] than six months after the dissolution judgment was rendered, the plaintiff filed a motion for modification in which she requested, inter alia, that child support be raised from $439 per week to $1700 per week. On June 10, 2008, the court denied the motion without a hearing. From that [ruling], the plaintiff appealed to [the Appellate] [C]ourt, which heard argument on the matter on November 18, 2010. [See] *McKeon* v. *Lennon*, 131 Conn. App. 585, 27 A.3d 436, cert. denied, 303 Conn. 901, 31 A.3d 1178 (2011). On appeal, [the Appellate] [C]ourt concluded that the trial court improperly [had] denied the plaintiff's motion without first conducting a hearing, and, therefore . . . reversed the judgment and remanded the matter to the trial court for further proceedings. Id., 599–600, [613–14]. . . .

"While the appeal of the 2008 motion for modification was pending before [the Appellate] [C]ourt, the plaintiff filed another motion for modification of child support with the trial court on April 22, 2010. The plaintiff's motion requested the court to increase the defendant's child support obligation in light of the plaintiff's increased expenses, her decreased net income, and the defendant's increased income since the dissolution judgment. On July 14, 2010, the defendant filed his own motion for modification of child support on the basis that one of their two minor children had turned eighteen years old and had graduated [from] high school. The court scheduled a hearing on both motions in May, 2011.

"On May 25, May 26, and June 1, 2011, the trial court held a contested hearing on the plaintiff's and the defendant's motions for modification. On October 20, 2011, the court . . . [granted] the defendant's 2010 motion for modification and den[ied] the plaintiff's 2010 motion

for modification. The court ordered the defendant's child support obligation to be reduced from $439 per week to $400 per week. This modification reflected the change from support for two minor children, to support for only one minor child. From [these rulings], the plaintiff appealed . . . .

"On April 25, 2012, pursuant to [the Appellate] [C]ourt's remand, the trial court held a contested hearing on the plaintiff's 2008 motion for modification. Prior to the hearing, the plaintiff had also filed a motion for attorney's fees and a motion for contempt. At the hearing, the parties presented evidence on all three motions. As a result of the complicated procedural history of this case, the court was required to determine whether it could consider all changes in circumstances since the 2007 dissolution judgment, or whether it was limited to looking back to only 2011, when the court ruled on the 2010 motions for modification.

"In November, 2012, the court issued its memorandum of decision, denying the plaintiff's motion for modification of child support, motion for attorney's fees, and motion for contempt. In doing so, the court considered the circumstances of the parties going back to the 2007 dissolution judgment [through April 25, 2012]. Further, the court found that the 2011 child support modification order was in accordance with the child support guidelines and remained equitable and appropriate given the circumstances of the case. From these [rulings], the plaintiff also appealed . . . ." (Footnote omitted.) *McKeon* v. *Lennon*, supra, 155 Conn. App. 425–29.

On appeal to the Appellate Court, the plaintiff claimed, inter alia, that the trial court improperly had granted the defendant's motion for modification of child support, denied her motions for modification of child support, modified the defendant's child support obligation by decreasing his weekly obligation and denied

her motions for contempt and for attorney's fees. Id., 425. The Appellate Court disagreed and affirmed the trial court's rulings on all issues. Id., 425, 451. With respect to the plaintiff's motions for an upward modification of the defendant's child support obligation, the Appellate Court concluded that "both alimony and child support orders are subject to the same modification requirements under § 46b-86 (a)," and that, "under *Dan*, the plaintiff must show additional circumstances, beyond the defendant's increased income, to establish a substantial change in circumstances justifying a modification of child support." Id., 434. After considering the increase in the defendant's income, the Appellate Court further concluded that the trial court had not abused its discretion in denying the plaintiff's motions. Id. This certified appeal, relating only to the Appellate Court's determination regarding the trial court's rulings on the plaintiff's motions for modification of the defendant's child support obligation, followed.[1]

I

The plaintiff first claims that the Appellate Court incorrectly concluded that alimony and child support orders are subject to the same modification requirements, and, therefore, the court improperly applied the reasoning in *Dan* concerning alimony orders in affirming the trial court's denial of her motions for modification of child support. She claims that, by extending this court's holding in *Dan* to child support orders, the Appellate Court has profoundly altered Connecti-

[1] This court granted the plaintiff's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly determine, based upon this court's decision in *Dan* v. *Dan*, [supra, 315 Conn. 1], that the trial court correctly determined that the plaintiff had not established a substantial change in circumstances in regard to her 2008 and 2010 motions for modification [of child support]?" *McKeon* v. *Lennon*, 317 Conn. 901, 114 A.3d 166 (2015).

cut law in a manner that will have a negative impact on thousands of Connecticut families. The defendant agrees with the plaintiff that the Appellate Court improperly relied on *Dan* in affirming the trial court's denial of her motions but characterizes that reliance as dictum. He also points out that the trial court never concluded that alimony and child support orders are subject to the same modification requirements when determining that the plaintiff had failed to establish a substantial change in circumstances at the hearing on her motions. We conclude that the reasoning in *Dan* regarding alimony orders does not apply to child support orders.

It is well established that interpretation of the statutory scheme governing child support orders in domestic relations cases constitutes a question of law. See, e.g., *Maturo* v. *Maturo*, 296 Conn. 80, 88, 995 A.2d 1 (2010); *Unkelbach* v. *McNary*, 244 Conn. 350, 357, 710 A.2d 717 (1998). Accordingly, whether the Appellate Court properly interpreted the statutory scheme in the present case is subject to our plenary review. See, e.g., *Maturo* v. *Maturo*, supra, 88.

We begin with § 46b-86 (a), which addresses the modification of alimony and child support orders.[2] The stat-

[2] Although alimony and child support orders are calculated on the basis of several overlapping factors, the court also considers several additional factors specific to spouses and children, respectively, in calculating such orders. For example, under General Statutes § 46b-82 (a), the court determines whether alimony should be awarded, and the amount and duration of the award, after considering the length of the marriage, the causes for its termination, "the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment." In comparison, the court calculates child support pursuant to the child support guidelines and the factors set forth in General Statutes § 46b-84 (d), which include "the respective abilities of the parents to provide such maintenance and the amount thereof," and "the age, health, station, occupation, earning capacity, amount

ute provides in relevant part: "[A]ny final order for the periodic payment of permanent alimony or support . . . may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party . . . ." General Statutes § 46b-86 (a). In *Dan*, we concluded that "an increase in the supporting spouse's income, standing alone, ordinarily will not justify the granting of a motion to modify an alimony award . . . [because] [t]here is little, if any, legal or logical support . . . for the proposition that a legitimate purpose of alimony is to allow the supported spouse's standard of living to match the supporting spouse's standard of living after the divorce, when the supported spouse is no longer contributing to the supporting spouse's income earning efforts. Rather, the weight of authority is to the contrary. We are persuaded by the reasoning of these cases, namely, that, *when the amount of the original alimony award was and continues to be sufficient to fulfill the purpose of the award*, *whether that purpose was to maintain permanently the standard of living of the supported spouse at the level that he or she enjoyed during the marriage or to provide temporary support in order to allow the supported spouse to become self-sufficient*, *an increase in the income of the supporting spouse*, *standing alone*, *is not a sufficient justification to modify an alimony award.* In short, when the sole change in circumstances is an increase in the income of the supporting spouse, and *when the initial award was and continues to be sufficient to fulfill the intended purpose of that award*, we can conceive of no reason why the supported spouse, whose marriage to the supporting spouse has ended and who no longer contributes anything to the supporting spouse's income

and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child."

earning efforts, should be entitled to share in an improved standard of living that is solely the result of the supporting spouse's efforts." (Citations omitted; emphasis altered; footnotes omitted.) *Dan* v. *Dan*, supra, 315 Conn. 10–15.

In contrast, child support orders are calculated under the Connecticut child support guidelines and are based on the income shares model;[3] Child Support and Arrearage Guidelines (August 1, 2005) preamble, p. ii; which has a different purpose. The income shares model considers the income of both parents and "presumes that the child should receive the same proportion of parental income as he or she would have received if the parents lived together." Id.; accord *Maturo* v. *Maturo*, supra, 296 Conn. 93. Accordingly, "the determination of a parent's child support obligation must account for all of the income that would have been available to support the children had the family remained together." *Jenkins* v. *Jenkins*, 243 Conn. 584, 594, 704 A.2d 231 (1998); see also *Dowling* v. *Szymczak*, 309 Conn. 390, 408, 72 A.3d 1 (2013) ("the calculation of child support is based on the income shares model and the parties' combined net income rather than on the actual costs associated with raising a child"). This means that, unlike when considering a request for the modification of an alimony order, the trial court may consider a substantial increase in the supporting spouse's income, standing alone, as sufficient justification for granting a motion to modify a child support order to ensure that the child receives the same proportion of parental income that he or she would have received if the parents had remained together.[4]

[3] "The guidelines are accompanied by a preamble that is not part of the regulations but is intended to assist in their interpretation." *Maturo* v. *Maturo*, supra, 296 Conn. 92–93.

[4] General Statutes § 46b-86 (a) clarifies that "[t]here shall be a rebuttable presumption that any deviation of less than fifteen per cent from the child support guidelines is not substantial and any deviation of fifteen per cent or more from the guidelines is substantial." Accordingly, an increase or

We therefore conclude,[5] in light of the different purposes of alimony and child support, that the Appellate Court improperly relied on *Dan* in determining that "both alimony and child support orders are subject to the same modification requirements under § 46b-86 (a)"; *McKeon* v. *Lennon*, supra, 155 Conn. App. 434; and that the court improperly concluded that the plaintiff was required to show additional circumstances, beyond the increase in the defendant's income, to justify modification of the child support award.[6] See id., 434–36.

II

The plaintiff next claims that the Appellate Court improperly upheld the trial court's denial of her motions for modification because the trial court did not consider the defendant's exercised stock options, restricted stock or employment perquisites for the years in ques-

decrease in the supporting party's income that satisfies this standard presumably would justify a request for modification of child support. The statute nonetheless provides that the court shall continue to consider other factors when evaluating such a request: "In determining whether to modify a child support order based on a substantial deviation from such child support guidelines the court shall consider the division of real and personal property between the parties set forth in the final decree and the benefits accruing to the child as the result of such division. After the date of judgment, modification of any child support order issued before, on or after July 1, 1990, may be made upon a showing of such substantial change of circumstances, whether or not such change of circumstances was contemplated at the time of dissolution." General Statutes § 46b-86 (a).

[5] We note that all of the amici curiae agree with our conclusion.

[6] The Appellate Court initially observed that the plaintiff's earning capacity had remained the same, the plaintiff had failed to establish a significant increase in her expenses and, even though the defendant's base salary and bonuses had increased since the dissolution judgment, the increase was not substantial. *McKeon* v. *Lennon*, supra, 155 Conn. App. 432–34. The court then cited *Dan* in concluding that the plaintiff must show additional circumstances, beyond the defendant's increased income, to establish the "substantial change in circumstances" required to justify modification of the child support order. Id., 434.

tion when calculating his gross annual income.[7] The plaintiff thus argues that the conclusions of the trial court and the Appellate Court that the plaintiff failed to establish a substantial change in the defendant's financial circumstances were not based on a correct understanding of the components of his income. The defendant responds that the trial court acted within its discretion in concluding that the plaintiff had failed to establish a substantial change in his financial circumstances and that, even if the trial court had considered income from the defendant's stock benefits and employment perquisites, a review of the guidelines worksheet entered into evidence by the plaintiff herself demonstrates that the court would not have found a change in his circumstances sufficient to justify an increase in his child support obligation. The defendant also argues that the plaintiff has ignored the fact that he pays one half of their youngest son's private secondary education expenses as child support. We agree in part with each of the parties.

The following additional facts are relevant to our resolution of this claim. On January 18, 2008, less than three weeks after the judgment of dissolution was rendered, the plaintiff filed a motion for reconsideration and/or reargument, in which she raised numerous issues pertaining to the division of the parties' pension plans, the children's medical coverage, life insurance, child support, asset valuation, account transfers and

[7] We address this issue because we view it as implicated in the certified question of whether the Appellate Court properly relied on the reasoning in *Dan* when concluding that the plaintiff had not established a substantial change in circumstances sufficient to support her 2008 and 2010 motions for modification of child support, and both parties have briefed the issue extensively. See footnote 1 of this opinion. In contrast, we do not consider the effect of the trial court's exclusion of the defendant's bonus from its calculation of his gross income because that issue was not directly briefed by the parties, although the plaintiff refers to the bonus as contributing to the increase in the defendant's income following the dissolution.

taxes. With respect to child support, the plaintiff's only claim relating to the trial court's calculation of the defendant's gross income was that the court had not included the monetary value of the defendant's employment perquisites and his in-kind compensation. Neither party appealed from the trial court's denial of this motion.

Thereafter, in May, 2008, and April, 2010, the plaintiff filed motions for modification of the child support order. In its memorandum of decision on the plaintiff's 2010 motion, which was the first motion decided, the trial court found that the defendant's base salary in 2011 was $260,000 and that his annual bonus was $175,000. The court also found that, although the defendant had exercised stock options in the amount of $190,361 after the judgment of dissolution was rendered, the options were subject to the dissolution court's property distribution order that stock options and restricted stock awards granted to the defendant prior to the dissolution judgment be divided as property and not be considered as alimony or child support. The court thus concluded that any income the defendant received from the exercised stock options could not be counted because doing so would result in "double-dipping." (Internal quotation marks omitted.) *Maturo* v. *Maturo*, supra, 296 Conn. 97 n.9. The court further found that the defendant's annual bonus of $175,000 had been considered by the court and divided between the parties at the time of the dissolution judgment, and, therefore, it also could not be considered a second time in determining whether there had been a change in the defendant's circumstances. The court finally found, with respect to $59,484 in employment perquisites the defendant received in 2011, that the plaintiff's failure to identify how much, if any, of that amount constituted basic maintenance or special needs, which are considered a component of gross income as in-kind compensa-

tion under the governing regulations; see Regs., Conn. State Agencies § 46b-215a-1 (11) (A) (vi); prevented the court from including any of this amount in its calculation of the defendant's gross income. The court thus concluded that, because the defendant's base salary had increased only $35,000, from $225,000 on the date of the dissolution judgment to $260,000 in 2011, there had been no substantial increase in his income under the child support guidelines.

The court conducted a similar analysis approximately one year later in its memorandum of decision on the plaintiff's 2008 motion for modification. The court found that the defendant's base salary as of April 25, 2012, was $270,000 and that he had received a bonus in 2012 of $185,000. The court again noted the provision in the dissolution judgment order that stock options and restricted stock awards granted to the defendant prior to the dissolution judgment were to be divided as part of the property settlement and not considered as alimony or child support. The court thus concluded that, although the defendant continued to receive and exercise stock options as part of his executive compensation, his past and future options were subject to the court's property distribution order and could not be counted as income, as doing so would result in double-dipping. The court added that it could not consider the $55,807 in employment perquisites the defendant received in 2012 because the plaintiff had failed to identify which items satisfied the definition of eligible perquisites in the statutory regulations. Although the court did not state, as it did in its memorandum of decision on the 2010 motion for modification, that it would not count the defendant's bonus because the bonus had been considered and divided at the time of the dissolution judgment, it ultimately concluded that the plaintiff had failed to show a substantial change in the defen-

dant's circumstances from the date of the dissolution judgment to the present.

The plaintiff appealed from the trial court's rulings on her motions for modification to the Appellate Court, which consolidated the appeals for review.[8] See *McKeon* v. *Lennon*, supra, 155 Conn. App. 427 and n.1. The Appellate Court affirmed the rulings with little analysis. The court briefly referred to the trial court's findings regarding the increase in the defendant's base salary and bonus in its decision on the plaintiff's 2010 motion. See id., 433–34. It then concluded that the plaintiff had not established that there had been a substantial change in the defendant's circumstances because, under *Dan*, the plaintiff was required to show additional circumstances beyond the defendant's increased income to justify an upward modification of his child support obligation.[9] See id., 434. With respect to the plaintiff's 2008 motion, the Appellate Court also concluded, after an equally perfunctory reference to the trial court's findings on the defendant's base salary and bonuses during the years following the dissolution judgment, that the plaintiff had not established a substantial change in the defendant's circumstances. Id., 435–36. The Appellate Court did not address the trial court's findings regarding the defendant's employment perquisites in its discussion of the plaintiff's motions. See generally id., 434–36.

The Appellate Court subsequently considered the trial court's exclusion of the defendant's exercised

[8] As the Appellate Court noted, these appeals were consolidated with several other appeals by the plaintiff from various rulings by the trial court. See *McKeon* v. *Lennon*, supra, 155 Conn. App. 427 n.1.

[9] Despite this assertion, the Appellate Court appeared to agree with the trial court's analysis, which was conducted prior to the issuance of this court's decision in *Dan*, and concluded that there had not been a substantial increase in the defendant's income under the guidelines. See *McKeon* v. *Lennon*, supra, 155 Conn. App. 434.

stock options and restricted stock from its income calculations when ruling on the defendant's motion for a downward modification of his child support obligation. Id., 438. The court noted that the trial court's exclusion of the stock benefits was based on its finding that the benefits previously had been considered and divided as part of the property settlement. See id., 438–40. In response to the plaintiff's argument that income from the stock options and restricted stock constituted deferred compensation, the Appellate Court stated that it was the plaintiff's burden to distinguish between stock awarded before and after the dissolution, and that the plaintiff had failed to present evidence that the stock options the defendant had exercised during the period in question were awarded after the dissolution. See id., 439–40. With respect to the restricted stock, the court explained that, in addition to the fact that there was evidence indicating that the stock at issue was part of the property distribution, the defendant's testimony regarding when the stock vested indicated that it had not vested at the time of the plaintiff's motions. See id. The Appellate Court thus concluded that the trial court properly had excluded the exercised stock options and restricted stock from the defendant's gross income. Id., 440. The Appellate Court also concluded, with respect to the defendant's employment perquisites, that there was "nothing in the record to undermine . . . confidence in the court's factual findings, and [it thus] defer[red] to [the trial court's] sound judgment in reaching its conclusions." Id., 443.

We begin with the standard of review. "The well settled standard of review in domestic relations cases is that this court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . [T]he foundation for this standard is that the trial court is in a clearly advantageous position to assess the per-

sonal factors significant to a domestic relations case . . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law. . . . The question of whether, and to what extent, the child support guidelines apply, however, is a question of law over which this court should exercise plenary review." (Citations omitted; internal quotation marks omitted.) *Tuckman* v. *Tuckman*, 308 Conn. 194, 200, 61 A.3d 449 (2013).

A

We turn first to the question of whether the Appellate Court properly upheld the trial court's decision to exclude the defendant's exercised stock options and restricted stock from its calculation of his gross income for the years in question. General Statutes § 46b-84 (a) provides in relevant part: "Upon or subsequent to the annulment or dissolution of any marriage or the entry of a decree of legal separation or divorce, the parents of a minor child of the marriage, shall maintain the child according to their respective abilities, if the child is in need of maintenance. . . ." The statute further provides: "In determining whether a child is in need of maintenance and, if in need, the respective abilities of the parents to provide such maintenance and the amount thereof, the court shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child." General Statutes § 46b-84 (d).

In addition to these provisions regarding the obligation of parents to provide child support, the legislature has established a commission to issue child support guidelines "to ensure the appropriateness of criteria for the establishment of child support awards . . . . Such guidelines shall ensure . . . that current support . . . shall be based on the income of both parents and the obligor's ability to pay." General Statutes § 46b-215a (a). As previously discussed, the guidelines "are predicated upon the concept that children should receive the same proportion of parental income that they would have received had the family remained intact. Child Support and Arrearage Guidelines, [supra, preamble, p. ii]. Toward that end, the guidelines are income driven, rather than expense driven. At each income level, the guidelines allocate a certain percentage of parental income to child support. The percentage allocations contained in the guidelines aim to reflect the average proportions of income spent on children in households of various income and family sizes, and contain a built-in self-support reserve for the obligor. [See id., p. iii]. The result is that the guidelines incorporate an allocation of resources between parents and children that the legislature has decided is the appropriate allocation. Consequently, our interpretation of the guidelines must seek to preserve this allocation." *Unkelbach* v. *McNary*, supra, 244 Conn. 357–58. In order to achieve this goal, however, "the determination of a parent's child support obligation must account for *all* of the income that would have been available to support the children had the family remained together." (Emphasis added.) *Jenkins* v. *Jenkins*, supra, 243 Conn. 594. "[T]he party seeking the modification bears the burden of demonstrating that such a change has occurred." (Internal quotation marks omitted.) *Olson* v. *Mohammadu*, 310 Conn. 665, 672, 81 A.3d 215 (2013).

Section 46b-215a-1 (11) of the Regulations of Connecticut State Agencies defines "gross income" as "the

average weekly earned and unearned income from all sources before deductions, including but not limited to the items listed in subparagraph (A) of this subdivision, but excluding the items listed in subparagraph (B) of this subdivision." Subparagraph (A) lists twenty-two sources of income,[10] one of which is "profit sharing, [and] deferred and incentive-based compensation . . . ." Regs., Conn. State Agencies § 46b-215a-1 (11) (A) (iv). Subparagraph (B) lists six sources of excluded income,[11] none of which is relevant in the present case.

[10] These are: "(i) salary; (ii) hourly wages for regular, overtime and additional employment not to exceed 45 total paid hours per week; (iii) commissions, bonuses and tips; (iv) profit sharing, deferred and incentive-based compensation and severance pay; (v) tribal stipends and incentives; (vi) employment perquisites and in-kind compensation (any basic maintenance or special need such as food, shelter or transportation provided on a recurrent basis in lieu of or in addition to salary or wages); (vii) military personnel fringe benefit payments; (viii) benefits received in place of earned income including, but not limited to, workers' compensation benefits, unemployment insurance benefits, strike pay and disability insurance benefits; (ix) veterans' benefits; (x) Social Security benefits paid to the parent for the parent's own needs, provided when the parent whose income is being determined receives both Supplemental Security Income (SSI) and Social Security disability or retirement benefits, the Social Security income inclusion shall not exceed $5 per week; (xi) Social Security dependency benefits paid on behalf of a child whose support is being determined, which are based on the earnings record of the parent whose income is being determined; (xii) net proceeds from contractual agreements; (xiii) pension and retirement income; (xiv) rental income after deduction of reasonable and necessary expenses; (xv) estate or trust income; (xvi) royalties; (xvii) interest, dividends and annuities; (xviii) self-employment earnings, after deduction of all reasonable and necessary business expenses; (xix) alimony being paid by an individual who is not a party to the support determination; (xx) adoption subsidy benefits received by the custodial parent for the child whose support is being determined; (xxi) lottery and gambling winnings, prizes and regularly recurring gifts (except as provided in subparagraph [B] [vi] of this subdivision); and (xxii) education grants (including fellowships or subsidies, to the extent taxable as income under the Internal Revenue Code)." Regs., Conn. State Agencies § 46b-215a-1 (11) (A).

[11] These are: "(i) support received on behalf of a child who is living in the home of the parent whose income is being determined; (ii) Supplemental Security Income (SSI) payments, including those received on behalf of a child who is living in the home of the parent whose income is being determined; (iii) Social Security disability or Social Security retirement benefits

In considering these income inclusions and exclusions, the preamble to the child support guidelines instructs that "gross income includes all kinds of earned and unearned income not specifically excluded" and that the "list of inclusions is illustrative and not exhaustive." Child Support and Arrearage Guidelines, supra, preamble, p. ix.

Applying these guidelines, we conclude that exercised stock options and restricted stock that has vested[12] ordinarily should be considered components of a party's gross income for purposes of calculating child support because they constitute "deferred or incentive-based compensation"; Regs., Conn. State Agencies § 46b-215a-1 (11) (A) (iv); and are not specifically excluded under the guidelines. The fact that the applicable guidelines in 2005 did not define deferred or incentive-based compensation as including such benefits is irrelevant. Stock options always have been understood as a form of incentive-based compensation. See, e.g., Black's Law Dictionary (6th Ed. 1990) (stock option is "often granted to management and key employees as a form of incentive compensation"). Moreover, "[w]e have previously interpreted broadly the definition of gross income contained in the guidelines to include items that, in effect, increase the amount of a parent's income that is available for child support purposes."[13] *Unkelbach* v.

in excess of $5 per week, when the parent also receives SSI; (iv) federal, state and local public assistance grants; (v) earned income tax credit; and (vi) the income and regularly recurring contributions or gifts of a spouse or domestic partner." Regs., Conn. State Agencies § 46b-215a-1 (11) (B).

[12] Restricted stock is considered income in the year that it vests rather than the year in which it is exercised. See *Maturo* v. *Maturo*, supra, 296 Conn. 97–98 n.9.

[13] To the extent any ambiguity remains, the amended 2015 child support guidelines have settled the point by clarifying that incentive-based income includes "stock options, restricted stock, restricted stock units, phantom stock, stock appreciation rights and other forms of delayed or deferred compensation." Child Support and Arrearage Guidelines (July 1, 2015) preamble, p. xvi.

McNary, supra, 244 Conn. 360, citing *Jenkins* v. *Jenkins*, supra, 243 Conn. 591–95.

In the present case, the trial court explained in its memorandum of decision on the plaintiff's 2010 motion for modification that it did not include $190,361 from the defendant's exercised stock options as a component of his income because the options were subject to the dissolution court's property distribution order that stock options and restricted stock awards granted to the defendant prior to the dissolution judgment be divided as property and not be considered as alimony or child support. Neither party took issue with this provision of the dissolution order when the plaintiff filed her motion for reconsideration and/or reargument, and neither party appealed from the dissolution judgment on that ground. Accordingly, given the parties' acceptance of this provision, the Appellate Court correctly determined that the trial court had not abused its discretion in excluding the exercised stock options and restricted stock from the defendant's gross income on the ground that they were part of the original property distribution order.

The trial court's reasoning when deciding the plaintiff's 2008 motion, in which the court considered the defendant's income from the date of the dissolution judgment through April 25, 2012, was more ambiguous. Although the court again referred to the fact that the dissolution order provided that stock benefits awarded to the defendant prior to the dissolution judgment were to be divided as part of the property settlement and not considered as alimony or child support, the court did not state how much income the defendant had received from the exercised stock options or the restricted stock and did not make a finding as to whether this income was derived from stock benefits awarded prior to or following the dissolution judgment. The court merely stated that the defendant had contin-

ued to receive and exercise stock options as part of his executive compensation and that, because his past and *future* stock options were subject to the court's property distribution order, the funds received from their exercise could not be counted as income. For the reasons previously discussed, we disagree with the trial court that the defendant's income from the exercised stock options and restricted stock awarded as compensation following the dissolution judgment is barred from inclusion in the defendant's gross income by the dissolution order. Thus, to the extent the defendant received income from those sources, such income should have been counted as part of his gross income for the years in question. For example, the record indicates that, in the year 2012, the defendant received more than $53,000 from the vesting on January 3, 2012, of restricted stock that he was awarded on March 5, 2008, following the dissolution judgment. There may be additional evidence in the record that the defendant received income from other exercised stock options or restricted stock that vested following the dissolution judgment and thus was not part of the property distribution. Accordingly, in light of this ambiguity in the trial court's decision, we conclude that the Appellate Court incorrectly determined that the trial court, in its ruling on the plaintiff's 2008 motion for modification, had not abused its discretion in excluding the income derived from these sources when calculating the defendant's gross income.[14]

[14] In light of the parties' acceptance of the provision in the present dissolution decree that the defendant's stock options and restricted stock "shall be divided as part of the property settlement and *shall not be alimony or child support*"; (emphasis added); we reject as irrelevant the plaintiff's arguments that (1) the Appellate Court misapplied our case law on the trial court's loss of jurisdiction over property distributed in accordance with a dissolution decree, (2) the trial court erroneously determined that to include income from stock options and restricted stock awarded prior to the dissolution judgment would be double-dipping, and (3) the plaintiff was deprived of the fairness and consistency required by the child support guidelines because the erroneous calculation of the defendant's income resulted in a child support order based on an incorrect presumptive range. If the plaintiff

Rather, the case must be remanded to the trial court for the purpose of reconsidering the plaintiff's 2008 motion for an upward modification of the defendant's child support obligation in light of our conclusion that *Dan* does not apply and that additional findings must be made as to whether any of the exercised stock options and restricted stock that vested during the time in question were awarded following the dissolution judgment, and, if so, the value of those benefits.

B

We next consider the trial court's decision to omit the defendant's alleged employment perquisites from its calculation of the defendant's gross income when deciding the plaintiff's motions for modification. Section 46b-215a-1 (11) (A) (vi) of the Regulations of Connecticut State Agencies includes in its definition of gross income "employment perquisites and in-kind compensation (any basic maintenance or special need such as food, shelter or transportation provided on a recurrent basis in lieu of or in addition to salary or wages) . . . ."

The record indicates that the defendant received $59,484 in employment perquisites in 2011 and $55,807 in 2012, which, according to the plaintiff's exhibits, consisted almost entirely of employer contributions to the

did not agree with one or more provisions in the dissolution decree, she should have sought to preclude them from the decree or filed an appeal from the dissolution judgment on that ground. Additionally, to the extent the plaintiff relies on *Maturo* for the proposition that income from stock options and restricted stock distributed as property should be included in the defendant's gross income, that reliance was improper because the court in *Maturo* did not directly discuss that issue, and there is no indication in *Maturo* whether the dissolution decree in that case included a provision similar to the provision at issue in the present case, which provided that the stock benefits were part of the property settlement and not to be considered as alimony or child support. See *Maturo* v. *Maturo*, supra, 296 Conn. 97–98 n.9.

defendant's retirement and health insurance plans.[15] The child support guidelines, however, provide that such contributions are to be deducted from a parent's gross income in order to determine the net income available for child support. See Regs., Conn. State Agencies § 46b-215a-2b (c) (2) (C) and (F) (repealed July 1, 2015) (providing for deductions from parent's gross income of employer contributions to mandatory retirement plans and to medical, hospital, dental or health insurance premium payments for parent and parent's legal dependents).

In the present case, the trial court excluded the employment perquisites from its calculations of the defendant's gross income when ruling on both motions because it concluded that the plaintiff had failed to meet her burden of identifying how much, if any, of the perquisites constituted food, shelter, transportation or other basic needs pursuant to § 46b-215a-1 (11) (A) (vi) of the Regulations of Connecticut State Agencies. Although this factual finding and the trial court's ultimate decision to exclude the employment perquisites were correct, we also note that most of the perquisites would have been deducted in any event under § 46b-215a-2b (c) (2) (C) and (F) when calculating the parties' net income. We thus conclude that the Appellate Court properly determined that the trial court did not abuse its discretion in excluding the employment perquisites from its calculation of the defendant's gross income in its rulings on the plaintiff's motions for modification.[16]

The judgment of the Appellate Court is reversed with respect to its determination that alimony and child support orders are subject to the same modification requirements, and its determination that the trial court,

[15] For example, the record indicates that, in 2012, the defendant received $55,807 in employment perquisites consisting of $39,344 in contributions to his retirement plans and $16,463 in contributions to his health and other insurance premiums. Of that $16,463, $2219 was allocated to various life, accident and disability insurance premiums.

[16] Because they are outside the scope of the certified question, we do not address the defendant's arguments that his child support obligation includes payment of one half of his youngest child's secondary private school expenses or that the plaintiff's income worksheet indicates that, even if the

in ruling on the plaintiff's 2008 motion for modification of child support, did not abuse its discretion in excluding income derived from stock options awarded and exercised and restricted stock awarded and vesting following the dissolution judgment in its calculation of the defendant's gross income, and the case is remanded to the Appellate Court with direction to remand the case to the trial court to make findings as to whether any of the exercised stock options and restricted stock that vested postdissolution were awarded as compensation following the dissolution judgment, and, if so, how much income was derived from those sources, and to reconsider the plaintiff's 2008 motion for modification in light of those findings and in accordance with our determination that child support orders are not subject to the same modification requirements as alimony orders; the judgment of the Appellate Court is affirmed in all other respects.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JEFFREY T. CONNOR (SC 19421)

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald, Robinson and Vertefeuille, Js.*

Syllabus

After a jury trial in which the defendant represented himself, he was convicted of multiple crimes in connection with the kidnapping of his former wife. Due to the fact that the defendant had suffered a stroke and exhibited signs of mental illness, there had been extensive pretrial proceedings in order to permit the trial court to ascertain the defendant's competency both to stand trial and to discharge his court-appointed counsel and represent himself. The trial court determined that the defendant was competent to stand trial and, pursuant to then existing case

trial court had considered the stock benefits, his support obligation would have remained within the proper range.

* This case was originally scheduled to be argued before a panel of this court consisting of Chief Justice Rogers and Justices Palmer, Zarella, Eveleigh, McDonald, Robinson and Vertefeuille. Although Justice Palmer was not present at oral argument, he has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

law, ruled that the defendant was also competent to waive his right to counsel and represent himself. Following his conviction, the defendant appealed to this court, claiming that he was entitled to a new trial because the trial court improperly permitted him to represent himself. While the defendant's appeal was pending before this court, the United States Supreme Court in *Indiana* v. *Edwards* (554 U.S. 164) clarified that individual states could adopt standards for determining a defendant's competency for self-representation that were more demanding than the standard used for determining a defendant's competency to stand trial. This court exercised its supervisory authority and adopted such a higher standard in the defendant's appeal. This court held that when a trial court is presented with a mentally ill or mentally incapacitated defendant who, having been found competent to stand trial, elects to represent himself, that court also must ascertain whether the defendant is competent to conduct the trial proceedings without the assistance of counsel. In order to provide the trial court in the defendant's criminal trial with the opportunity to make a determination whether he was competent to represent himself in accordance with the newly announced standard, this court then remanded the case to the trial court to make that determination using any and all relevant information. Before the remand proceedings were completed, the trial judge who conducted the defendant's criminal trial was elevated to the Appellate Court, and a second judge assumed responsibility for the proceedings at the remand hearing. The trial judge executed an affidavit based on her recollections of the defendant's criminal trial, concluding that the defendant had demonstrated that he was sufficiently capable of carrying out the basic tasks needed to present his own defense without the assistance of counsel. The remand judge held a hearing in which he outlined his plan to make a determination whether the defendant had been competent to represent himself on the basis of a review of the trial transcripts, the trial judge's affidavit, and oral argument from the parties, which evidence this court had approved using on remand to make such a determination. The remand judge then issued a memorandum of decision in which he determined, largely on the basis of the trial judge's affidavit, that the defendant had been able to perform the basic tasks needed to defend himself at trial without the assistance of counsel and, accordingly, that he had been competent to represent himself at the time of trial. The defendant appealed from that decision to the Appellate Court, claiming that the remand court could not have determined that he was competent to represent himself on the basis of the evidence properly before that court. The state claimed that the evidence established that the remand court properly concluded that the defendant had been competent to represent himself. The Appellate Court, at oral argument, questioned whether there had been discussion of making the trial judge available for cross-examination and whether there had been any objection to the manner in which her affidavit had been received, but that court did not

thereafter instruct the parties to file supplemental briefs concerning those issues. The Appellate Court reversed the remand court's judgment, concluding that the court did not conduct a meaningful hearing because the indeterminate state of the record precluded the remand court from retrospectively determining the defendant's competency with the degree of reliability that would have accompanied a competency determination contemporaneous with his trial. The Appellate Court further concluded that because a procedurally adequate competency determination was no longer possible, the defendant was entitled to a new trial. On the granting of certification, the state appealed to this court, claiming that the Appellate Court improperly reversed the remand court's judgment on the ground that the remand hearing was procedurally flawed, which issue the Appellate Court had raised sua sponte in derogation of this court's decision in *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.* (311 Conn. 123). In that case, this court concluded that an unpreserved issue may be raised and decided by an appellate court only if exceptional circumstances existed, the parties were afforded an opportunity to be heard on the issue, and there was no unfair prejudice to the party against whom the issue was to be decided. *Held*:

1. This court concluded that the Appellate Court's judgment determining that the defendant was entitled to a new trial because the remand proceedings were procedurally flawed was based on an unpreserved issue that that court had raised sua sponte: the Appellate Court analyzed as a threshold matter, in light of the fact that the trial judge at the criminal trial had not presided over the remand proceedings, whether the circumstances and evidence allowed any other trier of fact to make any competency determination at all, whereas the parties in their briefs to the Appellate Court had focused exclusively on whether the remand court properly determined that the defendant had been competent to represent himself on the basis of the evidence properly presented; this court's conclusion that the appeal was decided on an issue not raised by the defendant was further supported by the facts that the defendant did not object to the remand judge conducting the hearing, did not attempt to introduce any new documentary evidence or witness testimony other than his medical records, did not seek to have the trial judge from his criminal trial testify, did not argue that the trial judge's affidavit was lacking in any way, did not question whether the remand judge had the ability to make a competency determination, and did not claim that the evidence before the remand judge was insufficient or unreliable to make a competency determination.
2. The Appellate Court abused its discretion by deciding sua sponte the defendant's appeal on the basis of an unpreserved issue that had not been raised by the parties without satisfying the requirements articulated in *Blumberg Associates Worldwide, Inc.*, that court having failed to provide the state with a meaningful opportunity to be heard on the

dispositive issue by failing to order the parties to file supplemental briefs or by failing to direct the parties to be prepared to address that issue during oral argument; accordingly, because the state raised a colorable claim that it was unfairly prejudiced by the Appellate Court's consideration of the issue in that it would have proceeded differently had the claim been raised at the remand hearing, and because the defendant failed to meet his burden to overcome that presumption of prejudice by advancing any argument as to why the state could not have proceeded differently at the remand hearing, the judgment was reversed and the case was remanded to the Appellate Court with direction to consider the issue raised in the defendant's appeal to that court.

Argued January 26—officially released May 17, 2016

Procedural History

Substitute information charging the defendant with the crimes of kidnapping in the first degree, robbery in the third degree, robbery involving an occupied motor vehicle, larceny in the third degree and stalking in the first degree, brought to the Superior Court in the judicial district of Hartford, where the court, *Espinosa*, *J.*, granted the defendant's motion to proceed by self-representation; thereafter, the case was tried to the jury before *Espinosa*, *J.*; verdict and judgment of guilty of kidnapping in the first degree, robbery in the third degree, robbery involving an occupied motor vehicle and larceny in the third degree, from which the defendant appealed to this court, which remanded the case for further proceedings to determine if the court, *Espinosa*, *J.*, would have denied the defendant's motion to proceed by self-representation due to mental illness or mental incapacity; subsequently, the court, *Schuman*, *J.*, after a hearing, determined that the court, *Espinosa*, *J.*, properly granted the defendant's motion to proceed by self-representation, and the defendant appealed to the Appellate Court, *Sheldon* and *Schaller*, *Js.*, with *Bear*, *J.*, concurring and dissenting, which reversed the trial court's judgment and remanded the case for a new trial, from which the state, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Anne Mahoney* and *Denise B. Smoker*, senior assistant state's attorneys, for the appellant (state).

Mary Boehlert, assigned counsel, for the appellee (defendant).

Opinion

McDONALD, J. In *State* v. *Connor*, 292 Conn. 483, 487, 533, 973 A.2d 627 (2009), this court remanded the criminal case of the defendant, Jeffrey T. Connor, to the trial court with direction to reconsider the defendant's competency to represent himself in light of a new standard that this court adopted in the defendant's direct appeal. Following that remand, the trial court concluded that the defendant had been competent to represent himself, and the defendant challenged that decision before the Appellate Court as an abuse of discretion. See *State* v. *Connor*, 152 Conn. App. 780, 100 A.3d 877 (2014). The dispositive issue in the state's certified appeal is whether the Appellate Court properly reversed the trial court's judgment on the ground that the remand hearing was procedurally flawed. The state contends that the Appellate Court raised this issue sua sponte in derogation of *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 162–64, 84 A.3d 840 (2014) (*Blumberg*). We agree and, accordingly, reverse the judgment of the Appellate Court and remand the case to that court with direction to consider the issue raised in the defendant's appeal.

The record reveals the following undisputed facts and procedural history. The defendant was charged with a number of crimes[1] in connection with the abduction

[1] The charges included kidnapping in the first degree, robbery in the third degree, robbery involving an occupied motor vehicle, larceny in the third degree, and stalking in the first degree. See *State* v. *Connor*, supra, 292 Conn. 486, 503.

of his former wife. *State* v. *Connor*, supra, 292 Conn. 486, 488. The extensive pretrial proceedings reflected repeated attempts by the trial court to ascertain the defendant's competency both to stand trial and to discharge his court-appointed counsel and represent himself. Id., 489. The defendant's competency had been called into doubt due to the fact that he had suffered a debilitating stroke and exhibited signs of mental illness. Id., 490–91. The efficacy of these proceedings was complicated by the defendant's refusal to cooperate with the medical professionals tasked with evaluating him and his intermittent unresponsiveness in court. Id., 491–92, 497. In reliance on the opinion of several medical professionals, the trial court, *McMahon*, *J.*, concluded that the defendant's refusal to cooperate was " 'volitional' "; id., 495; and the trial court, *Miano*, *J.*, thereafter concluded that the defendant was "malingering," and found him competent to stand trial. Id., 499.

The defendant's case proceeded to trial before Judge Espinosa,[2] who similarly concluded that the defendant's unresponsiveness during jury selection reflected his continued " 'malingering.' " Id., 500–501. The defendant explained that he had previously refused to cooperate because he did not want his appointed counsel to represent him, and requested that he be permitted to represent himself. Id., 501. After defense counsel summarized the history of the case with respect to the defendant's competency and desire to represent himself, Judge Espinosa canvassed the defendant, asking him questions about, inter alia, his educational background and his ability to recall information pertinent to his case. Id., 501–502. Judge Espinosa ultimately concluded that

[2] On March 16, 2011, Judge Espinosa was sworn in as a judge of the Appellate Court. On March 6, 2013, she was sworn in as an Associate Justice of the Supreme Court. Because this appeal involves matters that occurred before Justice Espinosa's appointment to the Supreme Court, and for clarity, we refer to Justice Espinosa as Judge Espinosa in this opinion.

the defendant was "competent to represent himself. He is articulate, he's lucid, he knows what he's doing. He . . . devised a calculated plan to disrupt the trial in front of Judge Miano because he wasn't getting his way with his lawyer . . . ." (Internal quotation marks omitted.) Id., 503. Judge Espinosa therefore permitted the defendant to represent himself, but appointed his defense counsel as standby counsel. Id. A jury convicted the defendant on all but one of the charges against him. Id., 504.

The defendant directly appealed from the judgment of conviction to this court, claiming, inter alia, that Judge Espinosa had improperly found that he was competent to represent himself. Id., 505. At the time of the defendant's trial, our courts were bound by federal case law that had indicated that "a [criminal] defendant who has been found competent to stand trial as a matter of state law . . . also is competent to waive the right to counsel. Application of a stricter competency test in the latter analysis than was used in the former would place an unconstitutional burden in the exercise of the defendant's federal constitutional right of self-representation." *State* v. *Day*, 233 Conn. 813, 825, 661 A.2d 539 (1995), overruled in part by *State* v. *Connor*, 292 Conn. 483, 528 n.29, 973 A.2d 627 (2009). While the defendant's appeal was pending, however, the United States Supreme Court clarified that individual states may adopt standards for determining whether a defendant is competent to represent himself that are more demanding than the standard used for determining whether a defendant is competent to stand trial. See *Indiana* v. *Edwards*, 554 U.S. 164, 177–78, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008). Accordingly, although a more stringent standard was not constitutionally mandated, this court elected to adopt such a standard in the defendant's appeal pursuant to the exercise of our supervisory authority. *State* v. *Connor*, supra, 292 Conn.

528 n.28. Under this standard, when a trial court is presented with a mentally ill or mentally incapacitated defendant who has been found competent to stand trial; id., 527; a defendant's competency to represent himself would depend "on his ability to carry out the basic tasks needed to present his own defense without the help of counsel . . . notwithstanding any mental incapacity or impairment serious enough to call that ability into question." (Citation omitted; internal quotation marks omitted.) Id., 530.

The court noted, however, that, "[b]ecause *Edwards* had not been decided prior to the conclusion of the trial in the present case, Judge Espinosa had no alternative, in light of our holding in *State* v. *Day*, supra, 233 Conn. 825, but to permit the defendant to represent himself once it was determined that he was competent to stand trial. We therefore do not know whether Judge Espinosa would have granted the defendant's request to represent himself if she had had the authority to deny the request in accordance with *Edwards* and our holding in the present case. Consequently, the case must be remanded for a determination by the court, *Espinosa*, *J.*, as to whether the defendant then was competent, notwithstanding any mental disability, to conduct the trial proceedings by himself. In making this determination, the trial court, which . . . is 'best able to make [such a] fine-tuned mental capacity [decision], tailored to the individualized circumstances of a particular defendant'; *Indiana* v. *Edwards*, supra, 554 U.S. 177; should consider any and all relevant information, including, but not limited to, the extent to which the defendant's competence to represent himself may have been affected by mental illness, by the stroke that he had suffered, and by any memory problems that he may have experienced as a result of that stroke. The court also should evaluate the extent to which the defendant may have been feigning mental problems. Because of

the defendant's refusal to cooperate with the various evaluation teams that had been assembled to assess his competency, it is difficult to discern whether the defendant suffered from a mental illness that, alone or in combination with his stroke, may have rendered him incompetent to represent himself. Accordingly, the trial court may seek to have the defendant examined again if it appears that such an examination would be helpful in resolving the issue presented on remand." (Footnotes omitted.) *State* v. *Connor*, supra, 292 Conn. 528–29. The court noted that, if the trial court elected to do an evaluation and the defendant persisted in refusing to cooperate, "the trial court would have no choice but to make a determination concerning the defendant's competency to represent himself at the trial that is limited generally to its recollection of the proceedings and its review of the trial transcript and arguments of counsel." Id., 529 n.31.

In early 2011, Judge Espinosa began the remand proceedings, but was elevated to the Appellate Court before they could be completed. See footnote 2 of this opinion. In September, 2011, Judge Schuman assumed responsibility for the remand proceedings. In January, 2012, Judge Espinosa executed an affidavit based on her recollections of the defendant's trial. Judge Espinosa's affidavit stated, inter alia, that the defendant had "appeared to be engaged in every aspect" of his trial, had "demonstrated an understanding of the evidence presented," and had "carried out the basic tasks needed to present his own defense in a manner similar to other self-represented" parties that had appeared before her. She acknowledged that the defendant had made certain "irrelevant" statements, but opined that they appeared to be calculated attempts to elicit sympathy from the jury. Judge Espinosa further attested that the defendant had "demonstrated that he was sufficiently capable of

carrying out the basic tasks needed to present his own defense without the assistance of counsel."

Judge Schuman subsequently held two hearings. At the first hearing, Judge Schuman outlined his plan to make a determination regarding the defendant's competency to represent himself on the basis of the trial transcripts, Judge Espinosa's affidavit,[3] and oral argument from the parties. At the end of the hearing, Judge Schuman appointed counsel for the defendant because he was unresponsive. At the second hearing, the court granted defense counsel's request to admit the defendant's medical records from the Department of Correction. At no point did anyone object to Judge Schuman conducting the proceedings or to the procedure proposed by Judge Schuman to make the competency determination.[4]

Judge Schuman thereafter issued a memorandum of decision in which he determined that the defendant had been competent to represent himself at the time of his trial. Judge Schuman first set forth a summary of the defendant's conduct during trial, gleaned from the trial transcripts. He then turned to the defendant's medical records and explained why he had declined to give them any weight. He noted that the medical professionals who had formed opinions about the defendant's competency to stand trial had not observed the defendant at trial and would not be helpful in assessing the legal question of whether the defendant could adequately represent himself despite any mental impairment. Finally, he set forth Judge Espinosa's observations, as reflected in her affidavit. In his analysis, Judge Schuman acknowledged that the transcripts had revealed some

[3] The timing and process whereby Judge Espinosa's affidavit was actually entered as a court exhibit is not clear from the record.

[4] Although the defendant's brief to this court argues to the contrary, at oral argument he conceded that no objection had been made to Judge Schuman presiding over the proceedings.

troubling issues regarding the defendant's ability to represent himself. Nonetheless, he concluded that the most serious charges against the defendant were not readily defensible and noted Judge Espinosa's opinion that some of the defendant's actions may have been attempts to gain sympathy from the jury. In conclusion, Judge Schuman noted: "Judge Espinosa has made the critical finding that the defendant, while lacking technical proficiency, could perform the basic tasks needed to defend himself without the assistance of counsel. That finding establishes that the defendant's performance has met the ultimate standard that applies in this context. . . . The court must give considerable deference to this finding because Judge Espinosa heard the trial. Reading the transcript is no substitute for the opportunity, which only Judge Espinosa had, to observe whether the defendant had a reasonable understanding of how the trial process worked, to assess whether his occasional unorthodoxy represented fumbling ineptitude or wilful strategy, and to measure just how well the defendant interacted with the jury. Based largely on Judge Espinosa's firsthand assessment of the defendant's performance, the court concludes that the defendant was competent to represent himself at trial." (Citation omitted.)

The defendant appealed to the Appellate Court from the judgment, claiming in his brief to that court that "the trial court abused its discretion when it erroneously concluded that the [defendant] was competent to represent himself at trial despite his mental illness or mental incapacity." Specifically, the defendant argued "that the evidence in this case . . . presents a substantial basis for the [trial court] to have found that [the defendant] was incompetent to represent himself at trial." In support of that claim, the defendant cited the behavior and diagnoses documented in his medical records, the fact that his competency had been questioned on numer-

ous occasions prior to trial, and his behavior at trial evidenced in the trial transcripts. In its brief, the state responded by contending that the evidence, particularly Judge Espinosa's affidavit, established that the trial court properly concluded that the defendant was competent to represent himself.

The Appellate Court reversed the trial court's judgment, concluding that the trial court "did not conduct a meaningful hearing to evaluate retrospectively the competency of the defendant. Indeed, the indeterminate state of the record precluded the court from retrospectively determining the defendant's competency with the degree of reliability that would have accompanied a competency determination contemporaneous with the defendant's trial." *State* v. *Connor*, supra, 152 Conn. App. 795–96. The court further determined that, because "of the unorthodox sequence of events on remand" and the fact that eight years had passed since the defendant's trial, a "procedurally adequate competency determination" was "no longer possible" because it "would be unduly and impermissibly speculative"; id., 810–11; and the defendant was entitled to a new trial.[5] Id., 817.

The state thereafter filed a motion for reconsideration or reargument en banc, claiming that the Appellate Court had violated *Blumberg* by raising sua sponte the issue of whether the defendant had received a meaningful hearing. The Appellate Court denied the state's motion.

We then granted the state's petition for certification to appeal to this court, limited to the following issues:

[5] Judge Bear issued a separate opinion concurring in part and dissenting in part, in which he primarily took issue with the majority's conclusion that Judge Espinosa could not conduct another remand proceeding because she had made herself a material witness and, therefore, the proper remedy was a new trial. *State* v. *Connor*, supra, 152 Conn. App. 817, 827–29.

(1) "Did the Appellate Court properly consider whether the trial court's remand hearing was procedurally flawed?"; and (2) "If the answer to the first question is in the affirmative, did the Appellate Court properly conclude that the defendant's convictions must be vacated?" *State* v. *Connor*, 315 Conn. 903, 903–904, 104 A.3d 757 (2014). With respect to the first question, the state claims that the defendant never raised, and therefore waived, any claim that the remand proceedings were procedurally flawed, and, accordingly, the Appellate Court's decision to resolve the appeal sua sponte on this basis violated *Blumberg*. The defendant contends that the Appellate Court properly decided the appeal on the basis of issues raised by the parties, but argues that, even if the Appellate Court raised the procedural issue sua sponte, doing so was proper under *Blumberg*. We agree with the state's argument on the first certified question, and therefore need not reach the second certified question.

Our appellate courts generally do not consider issues that were not raised by the parties. *Blumberg*, supra, 311 Conn. 164. This is because "our system is an adversarial one in which the burden ordinarily is on the parties to frame the issues . . . ." Id. There are, however, well established exceptions to this rule. In *Blumberg*, we surveyed our case law in which we have made such exceptions and categorized the circumstances under which reviewing courts properly may raise and decide unpreserved issues. Id., 161–64. We noted that an appellate court has discretion to raise an unpreserved issue if three conditions are met: (1) exceptional circumstances exist; (2) the parties have been afforded an opportunity to be heard on the issue; and (3) there is no unfair prejudice to the party against whom the issue is to be decided. Id., 128.

Before turning to the question of whether those conditions were satisfied in the present case, we must

determine whether the defendant asserted a claim that the remand proceedings were procedurally flawed or whether the Appellate Court raised this issue sua sponte. Although we apply the abuse of discretion standard to the question of whether the Appellate Court properly determined that the *Blumberg* conditions were satisfied; id., 167–68; this threshold waiver question is subject to plenary review. See *State* v. *Davis*, 311 Conn. 468, 477, 88 A.3d 445 (2014); *State* v. *Commins*, 276 Conn. 503, 510, 886 A.2d 824 (2005), overruled on other grounds by *State* v. *Elson*, 311 Conn. 726, 754, 91 A.3d 862 (2014); cf. *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 299, 94 A.3d 553 (2014) (interpretation of pleadings subject to plenary review). We conclude that the defendant did not raise the issue on which the appeal was decided, and, therefore, the Appellate Court raised it sua sponte.

The record reveals the following additional facts and procedural history relevant to our resolution of this issue. The remand hearing proceeded before Judge Schuman without the defendant or his counsel interposing any objections. Other than his medical records, admitted over the state's objection, the defendant did not attempt to introduce any new documentary evidence or witness testimony. Defense counsel acknowledged that they had sought out mental health professionals to evaluate the trial transcripts, but those professionals had indicated that they would be unable to render any kind of a significant opinion on that basis. The defendant never sought to have Judge Espinosa testify, nor did he argue that her affidavit was lacking in any way. Indeed, defense counsel argued before Judge Schuman "that we have before us the affidavit of Judge Espinosa, on one hand, and the transcripts on the other, and in between are medical records from the Department of Correction, which I would suggest to the court . . . would put to rest the idea . . . whether or not

[the defendant] was, at the time, suffering from any mental illness.'' At the close of the hearings, in response to the state's reliance on Judge Espinosa's affidavit, defense counsel stated: "I suppose the simplest thing for the court to do here, because [the case] was remanded specifically to Judge Espinosa for a finding, is to just . . . accept her affidavit at face value and move on." Nonetheless, defense counsel noted that he disagreed with the conclusions that Judge Espinosa had drawn from the conduct displayed by the defendant. When Judge Schuman later asked how much deference he should give to the affidavit, defense counsel stated: "I am under no illusion that you won't give deference at all; as I said, I disagree with it. I disagree with it heartily, but she was the judge and it was returned to her for her opinion.''

Following Judge Schuman's decision, the defendant claimed in his brief to the Appellate Court that "the trial court abused its discretion when it erroneously concluded that the [defendant] was competent to represent himself at trial despite his mental illness or mental incapacity." In support of that claim, the defendant argued "that the evidence in this case . . . presents a substantial basis for the [trial court] to have found that [the defendant] was incompetent to represent himself at trial.'' The defendant cited the information documented in his medical records, the fact that his competency had been questioned on numerous occasions prior to trial, and his behavior at trial as evidenced by the trial transcripts. The defendant argued that the evidence in his case was comparable to that in *Indiana* v. *Edwards*, supra, 554 U.S. 177–78, wherein the trial court had concluded that the defendant was not competent to represent himself despite his competency to stand trial. In the present case, the defendant's analysis of his claim made no reference to Judge Espinosa's affidavit; he simply acknowledged its filing and conclu-

sion in his preliminary statement of the facts and procedural history of the case. The state's responsive brief contended that the evidence, particularly Judge Espinosa's affidavit, established that the trial court properly concluded that the defendant was competent to represent himself.

In its opinion, the Appellate Court initially broadly framed the issue before it as whether the trial court "improperly determined that [the defendant] was competent to represent himself . . . ." *State* v. *Connor*, supra, 152 Conn. App. 795. The Appellate Court then noted that, although such determinations ordinarily would be made at a time substantially contemporaneous with a mentally ill or incapacitated defendant's request for self-representation, that did not happen in the present case. The Appellate Court noted that retrospective (or nunc pro tunc)[6] competency determinations are generally disfavored and only permissible when they are the product of a meaningful hearing. Id., 801. The Appellate Court further explained: "In the present case, by way of remanding the matter to the trial court with direction to render a nunc pro tunc competency determination, our Supreme Court implicitly determined that it was permissible for the trial court to render such a determination at that time. The implied permissibility of the nunc pro tunc competency determination, however, was predicated on the assumption that Judge Espinosa would conduct the remand proceedings, as was plainly set forth in our Supreme Court's mandate to the trial court. . . . Judge Espinosa, however, did not conduct the remand proceedings. . . . Our Supreme Court's mandate to the trial court did not

[6] Nunc pro tunc means "now for then" and is used, inter alia, to refer to competency determinations made after the time at which the underlying proceeding took place, in the present case, the defendant's criminal trial. *State* v. *Connor*, supra, 152 Conn. App. 799–800; see also Black's Law Dictionary (10th Ed. 2014).

account for such a contingency and, consequently, in order to resolve the defendant's claim on appeal that the competency determination was improper, we must examine the basis of and grounds of Judge Schuman's determination that the defendant was competent to represent himself . . . .'' (Citations omitted; footnotes omitted.) Id., 802–804.

The court noted that, although this court had assumed that Judge Espinosa's determination would require the exercise of discretion, Judge Schuman did not, under the circumstances, make the discretionary determination that this court had sought from Judge Espinosa. Id., 803 n.21. The court reasoned that, ''[b]ecause the judges of our Superior Court do not have a collective consciousness, Judge Schuman's conclusion as to what Judge Espinosa would have done in a circumstance that she never contemplated would not have been an exercise of discretion, but a legal fiction.''[7] Id.

In considering whether Judge Schuman had conducted a ''meaningful,'' and therefore permissible, retrospective competency hearing, the Appellate Court defined a meaningful hearing as one in which ''the state of the record, together with such additional evidence as may be relevant and available, permits an accurate assessment of the defendant's condition at the time of the original . . . proceedings.'' (Internal quotation marks omitted.) Id., 804. The Appellate Court explained that the ''primary object'' of its inquiry into whether the defendant had received a meaningful hearing was ''to determine whether the quantity and quality of the evidence would have permitted the court on remand to reliably reconstruct the defendant's competency at the time of trial.'' Id., 805.

[7] This fact rebukes the defendant's claim that the Appellate Court reviewed Judge Schuman's decision under the abuse of discretion standard.

The Appellate Court then proceeded to analyze whether the remand hearing had been meaningful by applying a four factor test often used by federal courts to determine whether a nunc pro tunc hearing to determine a defendant's competency to stand trial is meaningful. Id., 804–805. Specifically, the Appellate Court considered: (1) the amount of time that had elapsed between the defendant's trial and the competency determination; (2) the availability of medical evidence that was contemporaneous with the trial; (3) statements by the defendant in the trial record; and (4) the availability of individuals who were in a position to interact with the defendant before and during trial. Id. Applying this test, the court first noted that the competency determination occurred approximately six years after trial. Id., 805. The court then effectively determined that the defendant's medical records were not reliable evidence as to his competency to represent himself because they were from a time period preceding his trial, they included many illegible entries, and they contained other entries using medical terminology that could not be understood without the aid of expert testimony.[8] Id., 805–806. The court next determined that the defendant's statements at trial were "of minimal utility without a proper understanding of [the defendant's] mental state at that time," which it concluded could not have been accurately assessed given the state of the contemporaneous medical evidence that was available to the court. Id., 806–807. Insofar as some of the defendant's statements seemed to indicate that he may have been competent to represent himself, the Appellate Court reasoned that those statements could have been the product of mental illness. Id., 807. Finally, the Appellate Court determined that, although Judge Espinosa had

[8] The Appellate Court nevertheless faulted the trial court for refusing to give weight to the defendant's medical records. *State* v. *Connor*, supra, 152 Conn. App. 793 n.11.

observed the defendant during the relevant time, her "live testimony would have been necessary insofar as her affidavit set forth what we can characterize only as conclusory statements regarding the defendant's ability to represent himself during trial . . . ." Id. The court noted that Judge Espinosa's affidavit had been made without knowledge of the defendant's subsequently admitted medical records and that her ultimate opinion conflicted with her statements at trial regarding the defendant's competency.[9] Id., 808–809. In balancing these factors, the Appellate Court ultimately concluded that the trial court had not conducted a meaningful hearing. Id., 809–10.

From our review of this record, it is apparent that, although the Appellate Court's initial framing of the issue—whether the trial court "improperly determined that [the defendant] was competent to represent himself"—was consistent with the parties' dispute at its broadest level; id., 795; its decision was based on an issue that was not raised by the parties. The defendant

[9] The Appellate Court noted: "[I]nsofar as [Judge Espinosa's] affidavit indicated that she believed the defendant was capable of carrying out the basic tasks needed to present his own defense without counsel, the trial transcript offers a conflicting statement: '[If] you represent yourself, you're not going to walk out of here free, I can tell you that. *Because you are not capable*, you think you are, you think you know what you're doing, but you're not.' " (Emphasis in original.) *State* v. *Connor*, supra, 152 Conn. App. 808–809. Contrary to the Appellate Court, we believe that the latter statement, read in proper context, indicates that Judge Espinosa was warning the defendant that he lacked the skills to *successfully* represent himself. See *State* v. *Connor*, supra, 292 Conn. 529–30 ("We emphasize that the issue to be decided on remand is not whether the defendant lacked the technical legal skill or knowledge to conduct the trial proceedings effectively without counsel. Indeed, it appears quite clear that he did lack such skill or knowledge. That fact, however, has no bearing on whether he was competent to represent himself for purposes of *Edwards*. Rather, the determination of his competence or lack thereof must be predicated solely on his ability to 'carry out the basic tasks needed to present his own defense without the help of counsel' . . . notwithstanding any mental incapacity or impairment serious enough to call that ability into question." [Citation omitted.]).

challenged the substantive basis of Judge Schuman's decision, claiming that certain evidence proved that he was not competent to represent himself. By contrast, the Appellate Court decided whether, in light of the fact that Judge Espinosa had not presided over the remand proceedings, any other trier of fact could have made a determination regarding the defendant's competency given the substantial amount of time that had passed and the state of the record. The Appellate Court effectively concluded that, although this court had approved the making of a competency determination on the basis of a review of the trial transcripts, oral argument of the parties, and Judge Espinosa's personal observations, those same considerations constituted an inadequate basis to afford the defendant a meaningful competency hearing.

The defendant never questioned Judge Schuman's ability to make a competency determination, whether because a significant amount of time had elapsed since the defendant's trial or because Judge Schuman had not presided over that trial. The defendant never claimed, either before the Appellate Court or the trial court, that the evidence was insufficient or unreliable such that Judge Schuman *could not* make a determination regarding his competency. Indeed, the defendant conceded that Judge Schuman properly could afford substantial deference to Judge Espinosa's conclusions in her affidavit, arguing only that the court should find the evidence contained in the defendant's medical records a more compelling basis to reach a contrary conclusion. The defendant did not claim, nor could he claim, that Judge Schuman improperly precluded him from introducing evidence relevant to his competency. Therefore, any such claims would have been waived by the defendant.

In other words, the parties focused exclusively on whether the trial court properly determined that the defendant was competent to represent himself on the

basis of the evidence properly before it, whereas the Appellate Court analyzed as a threshold matter whether the circumstances and evidence allowed the trial court to make any competency determination at all.[10] Although the Appellate Court considered the evidence that the parties cited, it did so through the lens of whether the evidence provided the defendant with a meaningful hearing, not whether the trial court made a proper determination on the basis of that evidence. Indeed, the Appellate Court weighed this evidence against the passage of time, a consideration that neither party raised at any stage of the proceedings. We therefore are compelled to conclude that the Appellate Court decided the appeal on the basis of an issue that it raised sua sponte.

In light of this conclusion, we turn to the question of whether the requirements for raising an unpreserved issue sua sponte were satisfied. As previously noted, we review the Appellate Court's decision as to this matter for an abuse of discretion. *Blumberg*, supra, 311 Conn. 167–68. Although the state contends that none of the *Blumberg* requirements was satisfied, we focus on two of them: (1) whether the parties were given an opportunity to be heard on the issue; and (2) whether there was unfair prejudice to the state, the party against whom the issue was decided. Id., 128.

[10] We acknowledge that the Appellate Court varyingly framed the issue before it, making it difficult to characterize with precision the ultimate issue on which it based its decision. For example, it initially framed the issue as whether the hearing was meaningful, but later characterized the trial court's error as having "fail[ed] to resolve the doubt as to the defendant's *competency*." (Emphasis in original.) *State* v. *Connor*, supra, 152 Conn. App. 814. The parties agreed, however, that the trial court had resolved that doubt, but took different positions as to whether the court's resolution was the correct one. Thus, irrespective of how it framed the issue, the Appellate Court decided that some procedural flaw rendered the judgment improper. The Appellate Court did not simply decide the substantive issue raised by the parties under plenary review, rather than the abuse of discretion standard sought by the parties.

With respect to the opportunity to be heard, the record reveals the following relevant facts. Prior to oral argument, the Appellate Court did not order the parties to file supplemental briefs on the question of whether the defendant had been given a meaningful hearing. The Appellate Court did not issue an order directing the parties to be prepared to discuss that issue at oral argument. The issue arose for the first time during the state's rebuttal argument through questions by the Appellate Court panel. The panel questioned the state, for example, on whether there had been any discussion of making Judge Espinosa available for cross-examination and whether there had been any objection to the manner in which her affidavit was received. The Appellate Court thereafter did not instruct the parties to file supplemental briefs concerning these issues.

The court in *Blumberg* specifically phrased the requirement that a party be heard on an issue as "an opportunity . . . to be heard *by way of supplemental briefing* . . . ." (Emphasis added.) Id., 161–62; see also id., 157 n.26 (citing "the requirement that parties must be given an opportunity to brief an issue that the reviewing court has raised sua sponte"). Our case law also has established that if "the Appellate Court decides to address an issue not previously raised or briefed, it may do so only after requesting supplemental briefs from the parties or allowing argument regarding that issue." *State* v. *Dalzell*, 282 Conn. 709, 715, 924 A.2d 809 (2007), overruled in part on other grounds by *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 162 n.34, 84 A.3d 840 (2014).

Consistent with this jurisprudence, this court, on occasion, has issued orders instructing parties to be prepared to discuss certain issues at oral argument without ordering supplemental briefing on those issues. See, e.g., *Gould* v. *Freedom of Information Commis-*

sion, 314 Conn. 802, 808 n.9, 104 A.3d 727 (2014) (whether plaintiff was aggrieved); *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, 311 Conn. 29, 35 n.6, 84 A.3d 1167 (2014) (whether jurisdiction existed for cross appeal); *Broadnax* v. *New Haven*, 284 Conn. 237, 240 n.4, 932 A.2d 1063 (2007) (whether final judgment existed); *Board of Education* v. *Nonnewaug Teachers' Assn.*, 273 Conn. 28, 31, 866 A.2d 1252 (2005) (impact of recently issued decision). Principally, this court has used this procedure when a jurisdictional concern comes to this court's attention after the parties have filed their briefs, which is a matter that the court is required to address even if not raised by the parties. *Blumberg*, supra, 311 Conn. 128.

Thus, it is clear that, at a minimum, the parties must be provided sufficient notice that the court intends to consider an issue. It is implicit that an opportunity to be heard must be a *meaningful* opportunity, in order to satisfy concerns of fundamental fairness. See id., 156 n.24 ("[f]undamental fairness dictates that a party must be afforded the opportunity to address an unpreserved claim on appeal"). The parties must be allowed time to review the record with that issue in mind, to conduct research, and to prepare a response. A meaningful opportunity is not provided when a party is asked a question about a different claim, not previously raised, for the first time at oral argument. Moreover, the Appellate Court's questions in the present case did not make clear that it intended to decide whether a retrospective competency proceeding was permissible and that it would make such a determination under a test that had not been raised in the briefs of either party. Accordingly, the Appellate Court failed to provide the state with an opportunity to be heard on the dispositive issue.

If the absence of such an opportunity was the only concern in the present case, we could remand the case to the Appellate Court to afford the parties that opportu-

nity. See, e.g., *Haynes* v. *Middletown*, 306 Conn. 471, 475, 50 A.3d 880 (2012). The state also contends, however, that it was unfairly prejudiced by the fact that this issue was never raised before the trial court. The state argues that it would have proceeded differently had the defendant objected to the procedure used by Judge Schuman. Specifically, the state contends, if the defendant had objected to having any judge other than Judge Espinosa conduct the remand proceedings, it would not have objected to Judge Espinosa[11] conducting the proceedings or would have actively sought to have her do so.[12]

Unfair prejudice may be found "when a party demonstrates that it would have presented additional evidence or that it otherwise would have proceeded differently if the claim had been raised at trial. . . . Moreover, because it may be difficult for a party to prove definitively that it would have proceeded in a different manner and, as a result, would suffer unfair prejudice if the reviewing court were to consider the unpreserved issue, once that party makes a colorable claim of such prejudice, the burden shifts to the other party to establish that the first party will not be prejudiced by the review-

[11] The justices of the Supreme Court and the judges of the Appellate Court are also judges of the Superior Court. General Statutes §§ 51-198 (a), 51-197c (a), and 51-165 (6).

[12] The state also claims in its reply brief that, had it known that there was a concern about the availability of individuals "who were in a position to interact with the defendant before and during trial"; *State* v. *Connor*, supra, 152 Conn. App. 805; it would have presented testimony from other persons who had had such interactions, and it also would have joined in a request of the defendant to have the remand hearing litigated before Judge Espinosa. Although it is debatable whether this argument is sufficiently distinct from the prejudice argument in the state's main brief and thus should not be considered; see *State* v. *Jose G.*, 290 Conn. 331, 341 n.8, 963 A.2d 42 (2009) ("[i]t is a well established principle that arguments cannot be raised for the first time in a reply brief" [internal quotation marks omitted]); we need not resolve this question because the state's principal prejudice argument is sufficient.

ing court's consideration of the issue." (Citations omitted.) *Blumberg*, supra, 311 Conn. 156–57.

In the present case, the state has made a colorable claim that it was unfairly prejudiced. Had the state known that it should have sought to have Judge Espinosa preside over the remand proceedings, it thereby could have alleviated the Appellate Court's concerns regarding the substance of her affidavit. General Statutes § 51-197c (f) provides a mechanism that would have allowed Judge Espinosa to preside over the remand proceedings notwithstanding her elevation to the Appellate Court. Section 51-197c (f) allows Appellate Court judges to preside over trial court matters with the permission of the Chief Justice of the Supreme Court when "the public business may require it."[13]

The defendant has failed to advance any argument as to why the state could not have sought to have Judge Espinosa preside over the proceedings or why such an attempt would have been futile. The defendant has accordingly failed to meet his burden to overcome the presumption that the state was unfairly prejudiced. We conclude, therefore, that the Appellate Court abused its discretion by deciding the appeal on the basis of an unpreserved issue because the requirements articulated in *Blumberg* were not met.

[13] The Appellate Court panel disagreed whether Judge Espinosa could preside over the proceedings if it reversed the judgment rendered by Judge Schuman because Judge Espinosa had filed an affidavit, thereby potentially making herself a material witness. Compare *State* v. *Connor*, supra, 152 Conn. App. 812 n.26, with id., 828–29 (*Bear*, *J.*, concurring and dissenting); see also Code of Judicial Conduct, Rule 2.11 (a) (5) (C) (judge shall disqualify himself or herself in any proceeding in which judge's impartiality might reasonably be questioned, including where judge "was a material witness concerning the matter"). The defendant does not argue that Judge Espinosa could not have presided over the proceedings for this reason. Indeed, had the defendant timely raised any of the concerns expressed by the Appellate Court before Judge Schuman, these concerns arguably could have been resolved before Judge Espinosa's affidavit was admitted as a court exhibit. See footnote 3 of this opinion.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to consider the claim raised by the defendant in his appeal to that court.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* RUSSELL PEELER (SC 18125)

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson, Js.

Syllabus

The defendant, who was convicted of, inter alia, two counts of capital felony and sentenced to death in connection with the shooting deaths of the victims, appealed to this court, challenging the constitutionality of his death sentences. *Held* that the defendant's appeal was controlled by *State* v. *Santiago* (318 Conn. 1), in which this court concluded that, in light of the legislation (P.A. 12-5) repealing the death penalty prospectively, the imposition of the death penalty for persons who committed capital crimes prior to the enactment of that legislation violated the state constitution; accordingly, the defendant's death sentences were vacated, and the case was remanded with direction to impose a sentence of life imprisonment without the possibility of release for each count of capital felony.

(*Five justices concurring in three separate opinions*; *two justices dissenting in two separate opinions*)

Argued January 7—officially released May 26, 2016*

Procedural History

Amended information charging the defendant with two counts of the crime of capital felony and one count each of the crimes of murder and conspiracy to commit murder, brought to the Superior Court in the judicial

* May 26, 2016, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

This case originally was argued before the same panel of justices on July 10, 2014. This court granted the state's request for supplemental argument on November 30, 2015, which was heard on January 7, 2016.

district of Fairfield, where the guilt phase of the proceedings was tried to the jury before *Ford*, *J.*; verdict of guilty; thereafter, during the penalty phase of the proceedings, the jury could not reach a unanimous verdict with respect to either of the two capital felony counts; subsequently, the court, *Ford*, *J.*, rendered judgment of guilty in accordance with the verdict and sentenced the defendant to a term of life imprisonment without the possibility of release, and the state and the defendant filed separate appeals with this court; thereafter, this court affirmed the defendant's convictions but reversed the sentence of life imprisonment without the possibility of release and remanded the case to the trial court for a new penalty phase hearing; on remand, the jury found the existence of one or more aggravating factors and one or more nonstatutory mitigating factors, and that the aggravating factor or factors outweighed the mitigating factor or factors, and the court, *Devlin*, *J.*, rendered judgment imposing two sentences of death, from which the defendant appealed to this court. *Reversed in part*; *judgment directed.*

Mark Rademacher, assistant public defender, with whom was *Lisa J. Steele*, for the appellant (defendant).

Harry Weller, senior assistant state's attorney, with whom, on the brief, were *Kevin T. Kane*, chief state's attorney, *John C. Smriga*, state's attorney, *Jonathan Benedict*, former state's attorney, *Susan C. Marks*, supervisory assistant state's attorney, *Marjorie Allen Dauster* and *Joseph Corradino*, senior assistant state's attorneys, and *Matthew A. Weiner*, assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. A jury found the defendant, Russell Peeler, guilty of, among other things, one count of capital felony in violation of General Statutes (Rev. to 1999) § 53a-54b (8) and one count of capital felony in violation

of General Statutes (Rev. to 1999) § 53a-54b (9) in connection with the 1999 shooting deaths of a woman and her young son, and, following a capital sentencing hearing, the trial court, *Devlin*, *J.*, rendered judgment imposing two death sentences.[1] This appeal of the defendant's death sentences is controlled by *State* v. *Santiago*, 318 Conn. 1, 122 A.3d 1 (2015), in which a majority of this court concluded that, following the enactment of No. 12-5 of the 2012 Public Acts (P.A. 12-5), executing offenders who committed capital crimes prior to the enactment of P.A. 12-5 would offend article first, §§ 8 and 9, of the Connecticut constitution. See, e.g., *Conway* v. *Wilton*, 238 Conn. 653, 658–62, 680 A.2d 242 (1996) (explaining scope of and rationale for rule of stare decisis). Our conclusion that the defendant's death sentences must be vacated as unconstitutional in light of *Santiago* renders moot the defendant's other appellate claims.

The judgment is reversed with respect to the imposition of two sentences of death and the case is remanded with direction to impose a sentence of life imprisonment without the possibility of release on each capital felony count; the judgment is affirmed in all other respects.

In this opinion ROGERS, C. J., and PALMER, EVELEIGH, McDONALD and ROBINSON, Js., concurred.

ROGERS, C. J., concurring. Just as my personal beliefs cannot drive my decision-making, I feel bound by the doctrine of stare decisis in this case for one simple reason—my respect for the rule of law. To reverse an important constitutional issue within a period of less than one year solely because of a change in justices on

[1] The facts and procedural history of the case are presented more fully in *State* v. *Peeler*, 271 Conn. 338, 343–57, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005).

the panel that is charged with deciding the issue, in my opinion, would raise legitimate concerns by the people we serve about the court's integrity and the rule of law in the state of Connecticut.

Having carefully considered the arguments presented by the parties, I am not persuaded by the state's contention that principles of stare decisis should not control the outcome of this case. Although I agree that "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, *Boys Markets, Inc.* v. [*Retail Clerks Union, Local 770*], 398 U.S. 235, 241 [90 S. Ct. 1583, 26 L. Ed. 2d 199] (1970), it is indisputable that stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon an arbitrary discretion. The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton). See also *Vasquez* v. *Hillery*, 474 U.S. 254, 265 [106 S. Ct. 617, 88 L. Ed. 2d 598] (1986) (stare decisis ensures that the law will not merely change erratically and permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals)." (Internal quotation marks omitted.) *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989). "[N]o judicial system could do society's work if it eyed each issue afresh in every case that raised it. . . . Indeed, the very concept of the rule of law underlying our own [c]onstitution requires such continuity over time that a respect for precedent is, by definition, indispensable." (Citation omitted.) *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 854, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); see also *George* v. *Ericson*, 250 Conn. 312, 318, 736 A.3d 889 (1999) ("Stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is

relatively unchanging, it saves resources and it promotes judicial efficiency. . . . It is the most important application of a theory of [decision-making] consistency in our legal culture and it is an obvious manifestation of the notion that [decision-making] consistency itself has normative value." [Citation omitted; internal quotation marks omitted.]).

"While stare decisis is not an inexorable command . . . particularly when we are interpreting the [c]onstitution . . . even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." (Citations omitted; internal quotation marks omitted.) *Dickerson* v. *United States*, 530 U.S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). "Such justifications include the advent of subsequent changes or development in the law that undermine a decision's rationale . . . the need to bring [a decision] into agreement with experience and with facts newly ascertained . . . and a showing that a particular precedent has become a detriment to coherence and consistency in the law . . . ." (Citations omitted; internal quotation marks omitted.) *Payne* v. *Tennessee*, 501 U.S. 808, 849, 111 S. Ct. 2579, 115 L. Ed. 2d 720 (1991) (Marshall, J., dissenting).

When neither the factual underpinnings of the prior decision nor the law has changed, "the [c]ourt could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from [the prior decision]. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, supra, 505 U.S. 864.

I cannot identify any change or development in the law since the decision in *State* v. *Santiago*, 318 Conn.

1, 122 A.3d 1 (2015), was issued or any new experiences or facts that have come to light. Because there also has been no showing that the substance of the opinion has or will become a detriment to coherence and consistency in the law, applying the doctrine of stare decisis is appropriate. Moreover, although the state has now had an opportunity to present new arguments in the present case that it had no reason to present in *Santiago* because it was not on notice that this court would consider them, the three members of the current court who were in the majority in that case have rejected those arguments on the merits and the fourth member of the majority in *Santiago*, Justice Norcott, had for many years before that decision expressed his view that the death penalty is unconstitutional per se. See, e.g., *State* v. *Rizzo*, 303 Conn. 71, 203, 31 A.3d 1094 (2011) (*Norcott, J.*, dissenting) ("the death penalty per se is wrong, violates the state constitution's prohibition against cruel and unusual punishment [and] . . . our statutory scheme for the imposition of the death penalty cannot withstand constitutional scrutiny because it allows for arbitrariness and racial discrimination in the determination of who shall live or die at the hands of the state" [internal quotation marks omitted]), cert. denied, 568 U.S. 836, 133 S. Ct. 133, 184 L. Ed. 2d 64 (2012). Accordingly, it is clear that, if these issues had been raised and briefed in *Santiago*, the result would have been no different. In fact, the only change that has occurred is a change in the makeup of this court, which occurred after oral argument in *Santiago* but before the decision was released. I strongly believe that, in and of itself, a change in the membership of this court within a relatively short period of time cannot justify a departure from the basic principle of stare decisis, especially on an issue of such great public importance.[1]

[1] In their dissenting opinions, Justice Zarella and Justice Espinosa cite numerous decisions in which this court has overruled one of its decisions. Anyone who has had an opportunity to read those decisions will discover that there is no inconsistency between the position that I took in the decisions in

See *Payne* v. *Tennessee*, supra, 501 U.S. 850 (Marshall, J., dissenting) (change in court's personnel "has been almost universally understood *not* to be sufficient to warrant overruling a precedent" [emphasis in original]); *Taylor* v. *Robinson*, 196 Conn. 572, 578, 494 A.2d 1195 (1985) (*Peters*, *C. J.*, concurring) ("[a] change in the constituency of this court is not a sufficiently compelling reason to warrant departure from a [recent decision]"), appeal dismissed, 475 U.S. 1002, 106 S. Ct. 1172, 89 L. Ed. 2d 291 (1986); *Tileston* v. *Ullman*, 129 Conn. 84, 86, 26 A.2d 582 (1942) ("a change in the personnel of the court affords no ground for reopening a question which has been authoritatively settled"), appeal dismissed, 318 U.S. 44, 63 S. Ct. 493, 87 L. Ed. 603 (1943). Any other conclusion would send the message that, whenever there is a hotly contested issue in this court that results in a closely divided decision, anyone who disagrees with the decision and has standing to challenge it need only wait until a member of the original majority leaves the court to mount another assault. In my view, that would be a very dangerous message to send. See *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, supra, 505 U.S. 854 ("no judicial system could do society's work if it eyed each issue afresh in every case that raised it"); *Wheatfall* v. *State*, 882 S.W.2d 829, 843 (Tex. Crim. App. 1994) (If new personnel were the reason to overrule precedent, "this

which I joined and the position that I take in the present case. Of particular significance, I would emphasize that, in many of the cases relied upon by the dissenting justices in which this court has overruled a recent decision, at least one member of the majority on the original decision that was being overruled reconsidered and joined with the majority in the subsequent overruling decision. In contrast, in the present case, it is perfectly clear that all of the members of the majority in *Santiago* continue to believe in the correctness of their decision, and the *only* change is the replacement of Justice Norcott by Justice Robinson.

With respect to Justice Espinosa's account of the panel changes that occurred prior to our decision in *Santiago*, suffice it to say that this court followed its standard procedures in determining which justices would sit on all phases of that case.

[c]ourt would be forced to reconsider every decision of . . . our [c]ourt upon changes in membership. Such an endeavor would defeat one of the essential purposes of stare decisis."), cert. denied, 513 U.S. 1086, 115 S. Ct. 742, 130 L. Ed. 2d 644 (1995).

Regardless of any reliance on the majority decision in *Santiago*, or lack thereof, stability in the law and respect for the decisions of the court *as an institution*, rather than a collection of individuals, in and of themselves, are of critically important value, especially on an issue of such great public significance as the constitutionality of the death penalty.[2] See *Vasquez* v. *Hillery*, supra, 474 U.S. 265 (stare decisis "ensure[s] that the law will not merely change erratically, but will develop in a principled and intelligible fashion"); *George* v. *Ericson*, supra, 250 Conn. 318 ("[decision-making] consistency itself has normative value" [internal quotation marks omitted]); *People* v. *Hobson*, 39 N.Y.2d 479, 491, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976) (It would be

[2] I agree with much of Justice Zarella's analysis in his dissent in the present case, which, distilled to its essence, argues that, if a past decision was manifestly incorrect and there has been no reliance on it, principles of stare decisis may not require the court to stand by that decision. In *Santiago*, however, Justice Zarella, Justice Espinosa and I explained at great length why we believed that the majority decision was incorrect; see *State* v. *Santiago*, supra, 318 Conn. 231–341 (*Rogers, C. J.*, dissenting); id., 341–88 (*Zarella, J.*, dissenting); id., 388–412 (*Espinosa, J.*, dissenting); and we were unable to persuade the majority. The three members of that majority who are also in the majority in the present case continue to believe that *Santiago* was *not* manifestly incorrect, and there is every reason to believe that the fourth member, Justice Norcott, would agree with them because of his unwavering belief that the death penalty is per se unconstitutional. See *State* v. *Rizzo*, supra, 303 Conn. 202 n.1, 203 (*Norcott, J.*, dissenting). When it is clear that the same majority in a prior recent decision that this court is considering overruling continues to believe that the case was correctly decided, I cannot conclude that a mere change in membership of the court justifies overruling that decision. When that has been the *only* intervening change, stability is the overriding consideration. "For it is an established rule to abide by former precedents, where the same points come again in litigation; as well [as] to keep the scale of justice even and steady, *and not liable to waver with every new judge's opinion* . . . ." (Emphasis added.) 1 W. Blackstone, Commentaries on the Laws of England (1775) p. 69.

"scandalous for a court to shift within less than two years because of the replacement of one of the majority in the old court by one who now intellectually would have preferred to have voted with the old minority and the new one. The ultimate principle is that *a court is an institution and not merely a collection of individuals* . . . . This is what is meant, in part, as the rule of law and not of men." [Emphasis added.]). Indeed, I believe that overruling the flawed majority decision in *Santiago* under these circumstances would inflict far greater damage on the public perception of the rule of law and the stability and predictability of this court's decisions than would abiding by the decision. See *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, supra, 505 U.S. 864 ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the [g]overnment. No misconception could do more lasting injury to this [c]ourt and to the system of law which it is our abiding mission to serve . . . ." [Citation omitted; internal quotation marks omitted.]), quoting *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 636, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974) (Stewart, J., dissenting).[3]

Accordingly, I concur in the majority opinion.

[3] I emphasize that I express no view on the question of whether the legislature could constitutionally reinstitute the death penalty by repealing No. 12-5 of the 2012 Public Acts and its prospective abolition of the death penalty and reenacting a death penalty statute that applied to all defendants, regardless of the date of their offense. The majority in *Santiago* also recognized that this is an open question. See *State* v. *Santiago*, supra, 318 Conn. 86 n.88 ("[w]e express no opinion as to the circumstances under which a reviewing court might conclude, on the basis of a revision to our state's capital felony statutes or other change in [the five objective indicia of society's evolving standards of decency], that capital punishment again comports with Connecticut's standards of decency and, therefore, passes constitutional muster"); see id., 52–86 (discussing indicia). In any event, the policy issue of whether to attempt to reinstate a constitutional death penalty is now in the hands of the legislature.

PALMER, J., with whom EVELEIGH and McDONALD, Js., join, concurring. In *State* v. *Santiago*, 318 Conn. 1, 122 A.3d 1 (2015), a majority of this court concluded that, following the legislature's April, 2012 decision to abolish the death penalty for all future offenses; see Public Acts 2012, No. 12-5 (P.A. 12-5); capital punishment no longer comports with the state constitutional prohibition against cruel and unusual punishment. See *State* v. *Santiago*, supra, 10, 86, 118–19, 140; see also Conn. Const., art. I, §§ 8 and 9. Specifically, we determined that to execute individuals convicted of committing capital felonies prior to April, 2012, now that the legislature has determined that the death penalty is neither necessary nor appropriate for any crimes committed after that date, no matter how atrocious or depraved, would be out of step with contemporary standards of decency and devoid of any legitimate penological justification. See *State* v. *Santiago*, supra, 9, 14–15. Accordingly, we vacated the death sentence of the defendant in that case, Eduardo Santiago, and we ordered that he be resentenced to life in prison without the possibility of release. Id., 140.

The present appeal is brought by another defendant, Russell Peeler, who, like Santiago, committed a capital felony and was sentenced to death prior to the enactment of P.A. 12-5. Ordinarily, our determination in *Santiago* that the death penalty is no longer constitutional would control the outcome of the present case as well, and the defendant and others similarly situated would be entitled to resentencing consistent with our decision in *Santiago*. The state, however, has argued that *Santiago* was decided without the benefit of adequate briefing by the parties and that, as a result, the majority in *Santiago* made a series of legal and historical errors that led to an incorrect decision. Indeed, the state goes so far as to contend that our decision in *Santiago* was

so unjust, and so completely devoid of legitimacy, that it should be afforded no precedential value and now may be overturned, only nine months later, merely because the composition of this court has changed.

I agree with and join the per curiam opinion in this case, in which the majority concludes that *Santiago* remains binding and valid authority, and that other convicted capital felons who have been sentenced to death are, therefore, entitled to be resentenced forthwith consistent with that decision. I write separately because I categorically reject any suggestion that the parties did not have the opportunity to brief these issues in *Santiago*, or that the court in that case overlooked key authorities, arguments, or historical developments that, if properly considered, would have resulted in a different outcome. We already have explained at some length why the parties, and particularly the state, had a full and fair opportunity to address the issues on which our decision in *Santiago* was based. See id., 120–26; see also *State* v. *Santiago*, 319 Conn. 935, 936–40, 125 A.3d 520 (2015) (denying state's motion for stay of execution of judgment in *Santiago* pending resolution of appeal in present case). In this concurring opinion, I briefly address the state's principal historical and legal arguments and explain why they are unpersuasive.

I

HISTORICAL ANALYSIS

The state first argues that, in *Santiago*, we "relied on flawed historical analysis to justify [our] departure from well established principles of law . . . ." Specifically, the state contends that we incorrectly concluded that, prior to the adoption of the 1818 constitution, Connecticut courts were authorized to review the constitutionality of allegedly cruel and unusual punishments. In reality, the state contends, the authority to review and determine the propriety of a punishment

always has rested solely with the legislature. In so arguing, the state fundamentally misunderstands the relevant Connecticut history, this court's precedents, and the basis of our decision in *Santiago*. Although a full review of the relevant history and the scope of the state's confusion in this regard lies beyond the ambit of this opinion, I briefly address three of the most significant flaws in the state's analysis.

First, the state misperceives the purpose of the discussion in part I of our decision in *State* v. *Santiago*, supra, 318 Conn. 15–46, and the role that that discussion played in the outcome of the case. Our goal in part I of *Santiago* was not to establish that this court has the constitutional authority to strike down legislatively enacted punishments as impermissibly cruel and unusual. There was no need to establish that principle because, as the defendant explains, and as the state ultimately concedes, the state lost that argument decades—if not centuries—ago. Just four years after the adoption of the 1818 constitution, Chief Justice Stephen Titus Hosmer, writing for the Connecticut Supreme Court of Errors, rejected the asserted "omnipotence of the legislature" with respect to punitive sanctions such as imprisonment and clarified that the review of such laws was properly within the purview of the judiciary. *Goshen* v. *Stonington*, 4 Conn. 209, 225 (1822); see also C. Collier, "The Connecticut Declaration of Rights Before the Constitution of 1818: A Victim of Revolutionary Redefinition," 15 Conn. L. Rev. 87, 97 (1982) ("the delegates to the Connecticut [c]onstitutional [c]onvention of 1818 overrode the protestations of the Federalist old republicans who still clung to a faith in legislative supremacy and the common law to uphold all of the natural rights of individuals"). More recently, in *State* v. *Lamme*, 216 Conn. 172, 179–80, 579 A.2d 484 (1990), and again in *State* v. *Ross*, 230 Conn. 183, 249, 646 A.2d 1318 (1994), cert. denied, 513 U.S.

1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995), we rejected the state's argument that our state constitution confers the authority to determine what constitutes cruel and unusual punishment solely on the legislature.[1] Our purpose in part I of *Santiago*, then, was merely to trace in greater detail than we previously had the origins and contours of our state constitutional freedoms from cruel and unusual punishment. In other words, the question we considered in *Santiago* was the *scope* of the rights at issue, and not which branch of government is charged with securing their enforcement.[2]

The second fundamental flaw in the state's historical analysis is its suggestion that, prior to 1818, Connecticut

[1] The state, while ultimately acknowledging that the court in *Ross* "employed an independent analysis of the facial validity of a [capital] sentence," suggests that we did so principally to review the procedural safeguards that must be followed before the death penalty may be imposed, and not to review the constitutionality of the punishment itself. This argument ignores the fact that, in both *State* v. *Ross*, supra, 230 Conn. 245–52, and *State* v. *Rizzo*, 303 Conn. 71, 184–201, 31 A.3d 1094 (2011), cert. denied, 568 U.S. 836, 133 S. Ct. 133, 184 L. Ed. 2d 64 (2012), we purported to conduct a comprehensive analysis of precisely the question presented in *Santiago* and the present case, namely, whether, as a general matter, the death penalty had come to offend the state constitutional prohibition against cruel and unusual punishment, either because it fails to comport with contemporary standards of decency or because it no longer serves any legitimate penological purpose. The fact that capital punishment survived constitutional scrutiny in *Ross* and *Rizzo* but failed to do so in *Santiago* does not indicate that we applied a less deferential standard of review in the latter case, as the state contends. Rather, it simply reflects the fact that the legislature's prospective abolition of the death penalty in 2012 fundamentally reshaped the penological landscape and thus altered our constitutional calculation.

[2] I further note that the state's argument that our reliance on *State* v. *Smith*, 5 Day (Conn.) 175 (1811), was misplaced because that decision failed to address the constitutionality of the sentence at issue proves little and less. I will return to the holdings and implications of *Smith*. For now, suffice it to say that one should not expect that a case decided in 1811, seven years before the adoption of this state's first formal constitution, would speak to the constitutionality of the sentence in question. Rather, to reiterate, in *Santiago*, we cited to pre-1818 authority such as *Smith* and *Lung's Case*, 1 Conn. 428 (1815), merely as evidence of the well established common-law freedoms from cruel and unusual punishment that were incorporated into the due process provisions of the 1818 constitution. This court's power of judicial review was never in question.

courts played no role in securing our common-law and statutory freedoms from cruel and unusual punishment. In *Santiago*, we reviewed numerous instances and contexts in which *each* of the three branches of government at times sought to temper what were perceived as cruel or unusual punishments. With respect to the judiciary, for example, we noted agreement among scholars of early Connecticut history that (1) magistrates enforced the criminal law during the colonial period so as to avoid needless cruelty, especially with regard to capital crimes; *State* v. *Santiago*, supra, 318 Conn. 29–31; (2) Connecticut courts began to nullify dubious capital sentences as early as the 1660s; id., 31–32 n.27; and (3) in the years leading up to the adoption of the 1818 constitution, ''courts were adopting a milder practice in applying the capital law.'' (Internal quotation marks omitted.) Id., 36. Indeed, the very source on which the state relies explains at the outset how this preconstitutional history sowed the seeds that ultimately blossomed into this court's judicial review authority: ''When we speak of law in early Connecticut—legislation, adjudication, and executive administration—we speak of the law of the magistrates.'' E. Goodwin, The Magistracy Rediscovered: Connecticut, 1636–1818 (1981) p. 11. ''The Puritan's peculiar concept of the magistracy was . . . a unique contribution to the development of later concepts of independent judiciaries, distinct functions for courts of law, and even, perhaps, the distinctively American notion of judicial review.'' Id. In *Lamme*, having reviewed this history, we concluded that ''the most significant aspect of the pre-1818 declaration of rights is that it had constitutional overtones even though it was statutory in form. The [d]eclaration and supplementary statutes relating to individual rights were grounded in the Connecticut common law and viewed as inviolate. Abridgements perpetrated by the government were considered void on their face *and courts were to refuse*

to enforce them." (Emphasis added; internal quotation marks omitted.) *State* v. *Lamme*, supra, 216 Conn. 179, quoting C. Collier, supra, 15 Conn. L. Rev. 94; see also *Binette* v. *Sabo*, 244 Conn. 23, 79, 710 A.2d 688 (1998) (*Katz*, *J.*, concurring in part and dissenting in part). Accordingly, although the state is certainly correct that the legislature played a central role in establishing and enforcing our traditional freedoms from cruel and unusual punishment during Connecticut's preconstitutional era, the state has offered no reason to conclude, counter to well established authority, that the legislature has been the exclusive guardian of those freedoms.[3]

Of course, any discussion of the relationship between the judicial and legislative authorities during the preconstitutional era, and especially prior to the creation of this court in 1784, must be qualified by the recognition that the General Court, which, at the end of the seventeenth century, was renamed the General Assembly, blended and simultaneously exercised both judicial and lawmaking functions during that period. See, e.g., H. Cohn & W. Horton, Connecticut's Four Constitutions

[3] The other cases on which the state relies are readily distinguishable or otherwise fail to support the propositions for which the state cites them. See, e.g., *State* v. *Lamme*, supra, 216 Conn. 183 (indicating that cases on which state relies in construing article first, § 9, are not binding precedent); *State* v. *Davis*, 158 Conn. 341, 358–59, 260 A.2d 587 (1969) (relying on fact that five successive legislatures had declined to abolish death penalty in holding that penalty complied with *federal* constitution), vacated in part, 408 U.S. 935, 92 S. Ct. 2856, 33 L. Ed. 2d 750 (1972); *State* v. *Williams*, 157 Conn. 114, 120–21, 249 A.2d 245 (1968) (when sentence that ultimately was imposed was not illegal, failure of jail physician to provide certain medication prior to trial did not constitute cruel and unusual punishment), cert. denied, 395 U.S. 927, 89 S. Ct. 1783, 23 L. Ed. 2d 244 (1969); *Simborski* v. *Wheeler*, 121 Conn. 195, 197–98, 201, 183 A. 688 (1936) (challenge to form of execution was based on statutory rather than constitutional ground). Although the state suggests that the United States Supreme Court vacated *Davis* on other grounds, in truth, it was precisely this court's determination that legislative authorization insulated the death penalty from constitutional review that the Supreme Court rejected, in light of its decision in *Furman* v. *Georgia*, 408 U.S. 238, 239–40, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

(1988) p. 21; E. Goodwin, supra, pp. 33–35, 52–54. In some sense, then, any discussion of whether the legislature or the judiciary was responsible for securing the people's freedom from cruel and unusual punishment is academic. In any event, it is clear that the adoption of the state's first formal constitution in 1818 was motivated in no small part by a desire to create an independent judiciary tasked with securing those basic constitutional liberties, and that these changes embodied a rejection of the belief "that republican government with legislative supremacy was the best safeguard of personal liberties." (Internal quotation marks omitted.) *State* v. *Lamme*, supra, 216 Conn. 180; see also *Starr* v. *Pease*, 8 Conn. 541, 546–48 (1831) (declaration of rights contained in 1818 constitution imposed limitations on excessive powers previously wielded by legislature); H. Cohn & W. Horton, supra, p. 23 (call for independent judiciary was primary reason for constitutional convention).

The third fundamental flaw in the state's historical analysis is the state's failure to adequately and accurately document its theory that the freedoms from cruel and unusual punishment enshrined in the state constitution arose from and were limited to legislative efforts to circumscribe the harsh and arbitrary punishments imposed by colonial magistrates. Although the state weaves a lengthy and intriguing narrative in support of this theory, the state's account is sparse on citation, and, it must be said, one searches the cited authorities in vain for the propositions that the state attributes to them. Nowhere in the cited text, for example, does Professor Lawrence B. Goodheart state that the Ludlow Code of 1650—from which article first, § 9, of the state constitution derives its origins—was drafted to address public concerns that magistrates were wielding excessive power or imposing arbitrary penal sanctions. See L. Goodheart, The Solemn Sentence of Death: Capital

Punishment in Connecticut (2011) pp. 11–12. Quite the contrary. In the section of his book on which the state relies, Goodheart explains that the colonists generally deferred to the magistrates' interpretation of Biblical authority; see id., p. 9; and he discusses at some length the key role that the magistrates played in securing fundamental liberties and tempering the colonies' draconian capital statutes: "The statutes are deceptive as to what occurred in practice. The laws represented a religious ideal, a public declaration, as the 1672 [colonial] code put it, of what was 'suitable for the people of Israel.' The judicial system was much more lenient. The courts aspired to be scrupulous and fair. There was concern to balance individual protection with the greater good. Drawing on centuries of English tradition, the Puritans upheld civil rights, including . . . no torture [and] no cruel or barbarous punishments . . . . Attorneys did not usually function in either colony; the wise and impartial rule of the magistrates was deemed sufficient." (Footnotes omitted.) Id., p. 14.

The state's reliance on Everett Goodwin's book, The Magistracy Rediscovered: Connecticut, 1636–1818, is similarly misplaced. The state cites page 103 of Goodwin's book for the proposition that, in the state's words, "Connecticut's history is unique in selecting the legislature as the body 'safeguarding' citizens from abusive, unlegislated, court-imposed punishments, and not the other way around." The cited passage, however, contains no mention whatsoever of abusive, court-imposed punishments. Rather, Goodwin merely discusses the fact that, as a general matter, Connecticut's early legal system relied less on English common law than did the other American colonies. E. Goodwin, supra, p. 103. He also references the evolution in Chief Justice Zephaniah Swift's thinking with respect to the separation of powers; although Swift initially believed in the primacy of the legislature; see id., pp. 99–100, 103; he ultimately

came to conclude that, because the legislature is vulnerable to " 'undue and improper influence' "; id., p. 114; the courts must play an important role with respect to the constitutional review of statutes. See id., pp. 99, 101, 103, 109–10, 114, 160 n.34. In other parts of his book, Goodwin explains that the colonists codified an extreme version of the criminal law but "[left] the mitigation to the discretion of the [m]agistrate"; (internal quotation marks omitted) id., p. 27; and that the discretion invested in the magistrates reflected the Puritans' confidence in their wisdom and godliness. Id., p. 30. Like Goodheart, then, Goodwin provides little support for the state's account.

The other sources on which the state relies likewise fail to support—and in some cases flatly belie—the state's theory that Connecticut's traditional freedoms from cruel and unusual punishment originated from and were limited to a commitment to statutory law as a bulwark against abusive judicial sentencing practices. William Holdsworth, for example, explains that magistrates in both the Connecticut and New Haven colonies "repeatedly avoided imposing the full penalties prescribed by . . . [law]"; W. Holdsworth, Law and Society in Colonial Connecticut, 1636–1672 (1974) p. 124 (unpublished doctoral dissertation, Claremont Graduate School); and that, although Connecticut's first criminal statutes were more severe than those of Massachusetts, Connecticut's colonial code actually "placed fewer restrictions on the discretionary powers of the magistrates, and increased the penalties they could impose for certain crimes . . . ." Id., p. 132. Holdsworth explains that "these differences reflect a greater consensus in Connecticut between rulers and ruled and a greater degree of trust of the one for the other, but they also reflect the *growth* in magisterial power . . . ." (Emphasis added.) Id.[4] The state's heavy reliance

[4] The portions of Holdsworth's dissertation suggesting that early criminal statutes were enacted in response to concerns over the abuse of magisterial

on the language of Ludlow's Code also misses the point. Ludlow's Code authorized not only those punishments established by express legislative enactment, but also, in the absence of a controlling statute, penal sanctions imposed on the basis of the magistrates' own understanding of "the word of God." (Internal quotation marks omitted.) L. Goodheart, supra, p. 12.

Even more troubling is the state's representation that this court's decision in *Pratt* v. *Allen*, 13 Conn. 119, 125 (1839), stands for the proposition that, "[w]ith the exception of moving the judiciary to an independent body, the 1818 constitution *'left the legislative department as it found it.'* " (Emphasis added.) The state uses the quoted passage from *Pratt* in an attempt to demonstrate that the judiciary, which, the state alleges, had no authority to review the appropriateness of legislatively imposed punishments under the colonial common law, obtained no greater authority in this respect under the 1818 constitution. The state, however, neglects to account for the sentence in *Pratt* immediately preceding the one that it quotes. The full passage reads as follows: "The [constitution of Connecticut], so far as it respects the legislature, is conversant princi-

discretion primarily refer to the prevalence of such concerns in *Massachusetts*. See W. Holdsworth, supra, pp. 104, 109, 167–71. The state fails to acknowledge that Holdsworth repeatedly emphasizes that such concerns were less pronounced in the Connecticut and New Haven colonies and that, in fact, those colonies continued to *increase* the authority and discretion of the magistrates after the adoption of Ludlow's Code. See id., pp. 104, 132, 137, 152–53, 171–72. As Holdsworth concludes, "[Ludlow] omitted most of the Bay Colony's liberties and permitted the magistrates greater discretion in dealing with many crimes. At one time, Connecticut's leaders were distrustful of magisterial discretion, but they became less anxious about it once they assumed the mantle of authority themselves, trusting themselves to deal sternly but justly with the multitude of problems that beset their commonwealth." Id., pp. 171–72; but see J. Trumbull, Historical Notes on the Constitutions of Connecticut, 1639–1818 (1901) pp. 9, 42 (noting that prominent founders of Connecticut, such as Thomas Hooker, founded colony to escape magisterial tyranny that they perceived in Massachusetts).

pally with its organization, the authority of its separate branches, and the privileges of its members. But we look in vain for the character of its legislative acts *any further than as they are*, *in some measure*, *restrained*, *by the bill of rights*. In short, *with few limitations*, it left the legislative department as it found it." (Emphasis added.) *Pratt* v. *Allen*, supra, 125. The only fair reading of *Pratt*, then, is that the creation of an independent judiciary was *not* the only change effected by the state constitution, as the state suggests. Rather, the highlighted portions of the foregoing passage, which the state omits, clearly indicate that the constitution, in tandem with the creation of an independent judiciary, constrained the authority of the legislature to enact laws that infringe our basic liberties.

A thorough review of the cited historical sources and our related cases thus leaves one with the discomforting impression that the state, in its apparent zeal to retain the death penalty, has mischaracterized not only this court's precedents but history itself. For all of these reasons, I reject the state's contention that this court, in *Santiago*, relied on a flawed historical analysis or exercised its powers of judicial review in a manner precluded by either tradition or precedent.

II

DELAYS AND INFREQUENCY OF IMPLEMENTATION

The state's next argument is that, in *Santiago*, we improperly considered the infrequency with which the death penalty is imposed in Connecticut, as well as the lengthy delays in carrying out capital sentences, in determining that capital punishment no longer comports with contemporary standards of decency and no longer serves any legitimate penological purpose. Specifically, the state contends that (1) this court rejected these arguments in *State* v. *Rizzo*, 303 Conn. 71, 191–94,

31 A.3d 1094 (2011), cert. denied, 568 U.S. 836, 133 S. Ct. 133, 184 L. Ed. 2d 64 (2012), (2) nothing has changed since our decision in *Rizzo* to justify a different outcome, and (3) in any event, our conclusion that delays in carrying out capital sentences render the punishment unconstitutional is precluded by this court's decision in *State* v. *Smith*, 5 Day (Conn.) 175 (1811). I consider each argument in turn.

Nothing in our decision in *Rizzo* precluded the result we reached in *Santiago*. In *Rizzo*, we looked at the growing infrequency of capital sentencing and executions throughout the country. See *State* v. *Rizzo*, supra, 303 Conn. 192–94 and nn. 89–94. At that time, we did not reject out of hand the argument of the defendant, Todd Rizzo, that the death penalty had come to be so rarely used in the United States as to constitute cruel and unusual punishment. Nor did we specifically consider recent developments in this state. Rather, we recognized that both capital sentences and executions were declining in number nationwide, and we acknowledged that several of the likely causes of those declines suggested diminishing public support for capital punishment. See id., 192–94. At the same time, however, we noted that the decline also might reflect other, short-term factors, such as the economic recession, supply shortages of one of the lethal injection drugs, and temporary uncertainty about the legal status of capital punishment pending the United States Supreme Court's decision in *Baze* v. *Rees*, 553 U.S. 35, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008). *State* v. *Rizzo*, supra, 192–94. We also noted that the number of executions carried out nationally in 2007 and 2008, although a recent low, remained substantially higher than during the early 1990s, just prior to our decision in *State* v. *Ross*, supra, 230 Conn. 183. See *State* v. *Rizzo*, supra, 192. Accordingly, and in light of the fact that capital punishment remained legal in most states; see id., 190; we could

not conclude at that time that infrequency of imposition alone was sufficient evidence that the death penalty had become impermissibly cruel and unusual. See id., 194. Because capital punishment remained legal, and so presumably retained some deterrent value, we also did not have cause at that time to consider whether lengthy delays in carrying out capital sentences deprived capital punishment of its retributive value.

Much has changed since *Rizzo*. Two additional states—Maryland and Nebraska—have abolished capital punishment.[5] The number of executions carried out nationally has continued to decline, falling by more than one third from 2011 to 2015, and is now lower than at any time since 1991.[6] The number of new capital sentences imposed likewise continues to fall; the total fell by nearly 40 percent between 2011 and 2015, and is now by far the lowest of the post-*Furman*[7] era.[8] It has been more than one decade since the last execution was carried out in New England (Michael Ross, who essentially volunteered to die, in 2005), and more than five decades since the one before that (Joseph Taborsky in 1960). That this is all true even though many of the short-term factors we considered in *Rizzo* no longer apply strongly suggests that the persistent, long-term declines in capital punishment are just what they appear to be—evidence that contemporary standards of

[5] Death Penalty Information Center, "States With and Without the Death Penalty," available at http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited May 12, 2016) (Maryland abolished death penalty in 2013, and Nebraska abolished death penalty in 2015).

[6] See Death Penalty Information Center, "Executions by Year," available at http://www.deathpenaltyinfo.org/executions-year (last visited May 12, 2016) (detailing number of executions in United States since 1976).

[7] *Furman* v. *Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

[8] See Death Penalty Information Center, "Death Sentences by Year: 1976–2014," available at http://www.deathpenaltyinfo.org/death-sentences-year-1977-2009 (last visited May 12, 2016); Death Penalty Information Center, "2015 Sentencing," available at http://www.deathpenaltyinfo.org/2015-sentencing (last visited May 12, 2016).

decency have evolved away from execution as a necessary and acceptable form of punishment. Significantly, the Death Penalty Information Center has published its 2015 year-end summary, and the statistics for 2015 continue to reflect a substantial decline in the imposition and implementation of the death penalty nationwide.[9] If anything, the pace of decline is accelerating.

Since our decision in *Rizzo*, a number of respected jurists also have concluded that the infrequent imposition and delayed execution of the death penalty call its constitutionality into question. See, e.g., *Glossip* v. *Gross*, 576 U.S. 863, 923–46, 135 S. Ct. 2726, 192 L. Ed. 2d 761 (2015) (Breyer, J., with whom Ginsburg, J., joins, dissenting); *Jones* v. *Chappell*, 31 F. Supp. 3d 1050, 1065–67 (C.D. Cal. 2014) (Carney, J.), rev'd sub nom. *Jones* v. *Davis*, 806 F.3d 538 (9th Cir. 2015). At the same time, new legal scholarship has emerged that powerfully debunks the state's argument that the rarity with which the death penalty is imposed in Connecticut merely indicates that our capital felony statutes are working as intended, and that the ultimate punishment is being reserved for the very worst offenders.[10]

Most significant, however, is the fact that, in 2012, the year after we decided *Rizzo*, the legislature enacted P.A. 12-5, which prospectively abolished the death penalty in Connecticut. Legislative abolition fundamentally altered the constitutional calculation we conducted in

[9] See generally Death Penalty Information Center, "The Death Penalty in 2015: Year End Report," available at http://www.deathpenaltyinfo.org/documents/2015YrEnd.pdf (last visited May 12, 2016).

[10] See J. Donohue, Capital Punishment in Connecticut, 1973–2007: A Comprehensive Evaluation from 4686 Murders to One Execution (2011) pp. 131–46, available at http://www.deathpenaltyinfo.org/documents/DonohueCTStudy.pdf (last visited May 12, 2016) (finding little relationship between egregiousness and rate at which cases are charged as capital felonies, and noting that, of seventeen offenders potentially chargeable with capital felony murder for hire, only thirteen were charged capitally and only one—Santiago—was sentenced to death).

Rizzo. It cast in a new light all of the various factors pointing to reduced societal acceptance of capital punishment. It swept away the most compelling arguments that capital punishment serves legitimate penological functions. And it reflected the awareness of the legislature that the infrequency with which the death penalty is imposed and the slowness with which it is carried out dramatically undermine its ability to serve a valid retributive function and to secure justice and peace for the families of murder victims. See *State* v. *Santiago*, supra, 318 Conn. 103 and n.99. In light of these dramatic, recent changes in the constitutional landscape, it is difficult to comprehend how the state can argue with a straight face that "[t]here is nothing new under the sun . . . ." (Footnote omitted.)

Lastly, I am not persuaded by the state's assertion that *State* v. *Smith*, supra, 5 Day (Conn.) 175, a case decided two decades before the invention of the typewriter, somehow precludes the result this court reached in *Santiago*. *Smith* was the first published case in which this court considered whether two sentences of imprisonment may be imposed to run consecutively without offending the state's common-law prohibition against cruel and unusual punishment. See id., 178. Because "such ha[d] been the usage of our courts, for many years past," we concluded that postponing the commencement of the second term of imprisonment until the first had been completed was neither unprecedented nor cruel. Id., 179. Nowhere in the court's brief discussion of that issue, however, did it consider or decide any of the novel questions raised in *Santiago* and in the present appeal: (1) whether a method of punishment that is only imposed a few times per decade and only carried out a few times per century may be deemed to violate contemporary standards of decency; (2) whether the retributive value of a punishment—both to the offender and to the victims—dissipates when

decades pass before it is carried out; and (3) whether the various procedural safeguards established by the federal and state legislatures and courts, which permit individuals on death row to pursue nearly endless appellate and postconviction remedies, reflect society's reluctance to impose the ultimate punishment and unwillingness to see it imposed erroneously. For these reasons, there is no doubt that, in *Santiago*, we properly considered the actual practices of this state with respect to the imposition and carrying out of capital sentences in concluding that capital punishment constitutes what has come to be seen as cruel and unusual.

III

RACIAL DISPARITIES AND PROSECUTORIAL DISCRETION

The state next contends that, in *Santiago*, when we observed that "the selection of which offenders live and which offenders die appears to be inescapably tainted by caprice and bias"; *State* v. *Santiago*, supra, 318 Conn. 106–107; we improperly relied on statistical evidence suggesting that people of color who offend against white victims are more likely than other offenders to be capitally charged and sentenced to death. The state argues that (1) a court in a habeas case currently pending on appeal before this court rejected these statistical claims; see *In re Death Penalty Disparity Claims*, Docket No. TSR-CV-05-4000632-S, 2013 WL 5879422 (Conn. Super. October 11, 2013); (2) studies that have documented racial disparities in other jurisdictions are not relevant to this state because, in the 1970s, Connecticut enacted the narrowest capital sentencing scheme in the country, and (3) in any event, such claims were not properly before us in *Santiago*.

The short answer to the state's arguments is simply to reiterate what we stated in *Santiago*: the question of whether there are presently statistically significant

racial disparities in the imposition of the death penalty in Connecticut was not before us in that case, as it is not before us in the present case, and we did not reach or rely on any such conclusion in holding the death penalty unconstitutional. See *State* v. *Santiago*, supra, 318 Conn. 109 n.104. What we did consider in *Santiago*—on the basis of an abundance of legal scholarship, persuasive federal and state authority, a thorough review of the relevant history, and our knowledge of human nature—was the proposition that any sentencing scheme that allows prosecutors not to seek and jurors not to impose the death penalty for any reason "*necessarily opens the door*" to caprice and bias of various sorts, racial or otherwise. (Emphasis added.) Id., 108. In other words, we agreed, as a matter of law, with those judges and scholars who have concluded that such a system cannot, in principle, ensure that the ultimate punishment will be imposed fairly and objectively, as it must be. The factual question of the extent to which the undisputed facial disparities in Connecticut's capital charging and sentencing system do in fact result from subconscious racial biases never entered into our analysis.[11]

The state's argument to the contrary—that Connecticut law does not afford jurors unlimited discretion to find mitigating factors—is unavailing. "It is well established that federal constitutional . . . law establishes a minimum national standard for the exercise of individual rights . . . ." (Internal quotation marks omitted.) *State* v. *Miller*, 227 Conn. 363, 379, 630 A.2d 1315 (1993); see also *State* v. *Santiago*, supra, 318 Conn. 18–19 (rule applies to eighth amendment protections). The United

[11] Nor did we conclude in *Santiago* that Connecticut's prosecutors have exercised their discretion with anything less than complete professionalism. In *Santiago*, we opined only that, in light of the constraints imposed by federal law, it is virtually impossible to exercise such discretion so as to ensure that the imposition of the death penalty, writ large, will not be arbitrary and capricious.

States Supreme Court repeatedly has instructed that juries must retain the discretion to consider any potentially mitigating factors when deciding whether to impose a capital sentence,[12] and the supremacy clause of the federal constitution bars both our legislature and this court from abridging that discretion. It is true that the United States Supreme Court has explained, and we have recognized, that the states remain free to channel the *manner* in which jurors exercise their broad discretion, such as by instructing that mitigating factors should be considered in light of "all the facts and circumstances of the case." (Internal quotation marks omitted.) *State* v. *Ross*, supra, 230 Conn. 284; see also id. (ultimately concluding that "[t]he instructions as given did not preclude the jury from giving mitigating force to *any* fact, taken alone or taken in conjunction with any other facts presented" [emphasis added]). Ultimately, however, there is nothing in the law of Connecticut or in this court's precedents that prevents a capital jury from considering racial, ethnic, or other such factors when deciding whether to impose the ultimate punishment. None of the cases cited by the state are to the contrary.

Because we did not rely on any factual finding of recent racial disparities in *Santiago*, and we do not do so now, it is not necessary to address fully the state's first and second arguments. I would, however, briefly note my disagreement with each.

With respect to *In re Death Penalty Disparity Claims*, I do not understand the court in that case to

[12] See, e.g., *Johnson* v. *Texas*, 509 U.S. 350, 361, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993); see also *Walton* v. *Arizona*, 497 U.S. 639, 663, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990) (Scalia, J., concurring in part and concurring in the judgment) (opining that state cannot preclude consideration of defendant's racial beliefs as mitigating evidence), overruled in part on other grounds by *Ring* v. *Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

have rejected the petitioners' claim that there is statistically significant evidence that people of color who kill white victims are capitally charged, and thus placed at risk of death, at a much higher rate than are other offenders, and that those disparities cannot reasonably be accounted for by innocuous, nonracial factors. Rather, I understand the court to have acknowledged that there are significant racial disparities in capital charging (but not sentencing) in Connecticut; see *In re Death Penalty Disparity Claims*, supra, 2013 WL 5879422, *19, *24–25; but to have concluded that, as a matter of federal constitutional and discrimination law, such disparities do not impair the validity of capital sentences imposed in this state. See id., *7, *10, *16–18, *22–25. The court further concluded, as a matter of law, that the constitution of Connecticut affords no greater protections than does federal law in this regard. Id., *3, *8. Whether the court in *In re Death Penalty Disparity Claims* was correct with respect to the latter conclusion is a question that this court has yet to answer.

Turning to the state's second argument, I am troubled by its repeated contention that the abundant evidence of racial disparities in other jurisdictions is irrelevant to the Connecticut experience because, "[i]n response to *Furman* [v. *Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)], Connecticut enacted the narrowest capital sentencing scheme in the country." The state relies on the following footnote in a 1980 law review article to support its proposition: "Connecticut's capital punishment law is unique in one regard. It enumerates five mitigating circumstances. But it states that the sentence shall not be death, if any mitigating factor exists, whether statutorily defined or not. In other words, unlike the practice in every other state (except to some extent Colorado), a Connecticut jury, once it finds a mitigating fact, whether enumerated or not, does not

have the power to balance or weigh the mitigating fact against any aggravating fact that may be present. The very existence of a mitigating fact precludes a death sentence." S. Gillers, "Deciding Who Dies," 129 U. Pa. L. Rev. 1, 104 n.10 (1980). Setting aside the question of whether the quoted passage even stands for the proposition for which the state cites it, the state is well aware that Connecticut's capital punishment law has *not* been as Gillers describes it for more than two decades. In 1995, the legislature amended General Statutes (Rev. to 1995) § 53a-46a to eliminate the provision on which the state relies. See Public Acts 1995, No. 95-19, § 1. Since then, juries in capital cases in Connecticut have balanced aggravating and mitigating factors in deciding whether to impose the ultimate punishment, just as they do in our sister states. In addition, any past idiosyncrasies in Connecticut's capital *sentencing* scheme are simply irrelevant to the central question of whether minority defendants accused of offending against white victims are capitally *charged* at a disproportionately high rate.

IV

EXECUTION OF THE INNOCENT

The state next contends that, in *Santiago*, we improperly considered the possibility that an innocent person may be erroneously executed as one reason why the death penalty fails to serve a legitimate retributive purpose. Although the state does not dispute the growing body of research that recently persuaded two justices of the United States Supreme Court that capital punishment is likely unconstitutional for this reason; see *Glossip* v. *Gross*, supra, 576 U.S. 909–15 (Breyer, J., with whom Ginsburg, J., joins, dissenting); the state contends that the possibility of error is no longer a concern in this state because none of the eleven men

currently subject to a sentence of death in Connecticut has professed his innocence.

Even if this were true, and even if it were properly subject to judicial notice, the state simply ignores the fact that, under P.A. 12-5, new prosecutions can still be brought at any time for capital felonies committed prior to April, 2012. Of the thousands of murders committed in Connecticut over the past several decades, some of which would be death eligible, many remain unsolved.[13] Accordingly, it is not at all unlikely that, if the death penalty were to remain available, the state would continue to seek it for some who have been accused of committing those crimes, with the possibility that an innocent person could wrongly be sentenced to die. Indeed, in the four years since the legislature prospectively abolished capital punishment, one additional offender has been sentenced to death,[14] and at least one other likely would have been capitally charged if not for our decision in *Santiago*.[15] The state is fully aware of this possibility, as both the majority and a dissenting justice discussed it in *Santiago*. See *State* v. *Santiago*, supra, 318 Conn. 106 and n.102; id., 397 (*Espinosa*, *J.*, dissenting). I am, therefore, perplexed as to why the state continues to press this argument.

V

STATUTORY INTERPRETATION

The state next contends that, in *Santiago*, we improperly departed from our ordinary approach to questions of statutory interpretation. The basis of the state's

[13] See, e.g., Division of Criminal Justice, State of Connecticut, "Cold Cases—Open," available at http://www.ct.gov/csao/cwp/view.asp?a=1798&q=291462 (last visited May 12, 2016).

[14] See *State* v. *Roszkowski*, Superior Court, judicial district of Fairfield, Docket No. FBT-CR-06-0218479-T.

[15] See *State* v. *Howell*, Superior Court, judicial district of New Britain, Docket No. HHB-CR-15-0279874-T.

objection is not entirely clear. For example, the state contends that, in *Santiago*, we failed to make what it considers to be "the required predicate finding that the language of [P.A. 12-5] itself is ambiguous," but, in the very next paragraph of its brief, the state quotes our conclusion in *Santiago* that "the policy judgments embodied in the relevant legislation are ambiguous." *State* v. *Santiago*, supra, 318 Conn. 89; see also id., 89 n. 91 (discussing textual ambiguity); id., 59–73 (considering competing interpretations of statutory text). More fundamentally, the state appears to assume that *Santiago* presented a conventional question of statutory interpretation, for which we are constrained to follow the dictates of General Statutes § 1-2z, which embodies the plain meaning rule. At the same time, the state also appears to recognize that claims that a penal sanction constitutes cruel and unusual punishment are reviewed according to a unique standard of review that requires us to assess "what a penal statute *actually indicates* about contemporary social mores." (Emphasis in original.) Id., 72 n.62.

In any event, to the extent that it was not transparent from our decision in *Santiago*, I take this opportunity to clarify that a claim that a penal sanction impermissibly offends contemporary standards of decency is not a question of statutory interpretation subject to § 1-2z and the attendant rules of construction.[16] When a reviewing court considers whether a challenged punishment is excessive and disproportionate according to current social standards, legislative enactments are just one—albeit the most important—factor to be considered. Moreover, our goal in evaluating those enactments is not merely to determine what the legislature intended to accomplish through the enabling legislation (the

[16] For the same reasons, the state's argument that our decision in *Santiago* was precluded by Connecticut's savings statutes, General Statutes §§ 1-1 (t) and 54-194, also misses the mark.

touchstone of statutory interpretation), but also to understand what the legislation *says and signifies* about our society's evolving perspectives on crime and punishment. In that respect, we look not only to the words of the statute, but also to its legislative history, the aspirations and concerns that were before the legislature as it deliberated, and, to the extent we can perceive them, the political motivations and calculations that affected or effected the outcome of those deliberations. The latter, as much as anything else, offer a portal into what the final legislative product indicates about our contemporary standards of decency.

VI

RETRIBUTION AND VENGEANCE

The state next argues that, in *Santiago*, we incorrectly concluded that the death penalty now lacks any legitimate penological purpose because, among other things, the legislature's decision to retain it on a retroactive only basis was intended primarily to satisfy a public thirst for vengeance toward two especially notorious inmates, rather than to accomplish permissible retributive purposes. The state counters that (1) the legislature regularly and properly crafts penal statutes in response to public reactions to specific notorious and vicious crimes, and (2) P.A. 12-5 was crafted to make good on a promise to the families of murder victims that death would be repaid with death, and making good on such a promise is a legitimate manifestation of retributive justice.

Although it is undoubtedly true that the legislature is naturally responsive to powerful public sentiments, in the arena of criminal law as in other areas, that alone does not insulate a penal statute from constitutional scrutiny. As we explained in *Santiago*, if the mere fact that a punishment arose out of the democratic process established that it served a legitimate penological pur-

pose, then the eighth amendment and its state constitutional counterparts would be largely superfluous. See id., 134–35. Rather, as the United States Supreme Court explained in *United States* v. *Brown*, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965), "in a representative republic . . . [in which] the legislative power is exercised by an assembly . . . [that] is sufficiently numerous to feel all the passions [that] actuate a multitude . . . yet not so numerous as to be incapable of pursuing the objects of its passions . . . barriers [must] be erected to ensure that the legislature [does] not overstep the bounds of its authority . . . ." (Emphasis omitted; internal quotation marks omitted.) Id., 443–44. "Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents [that afterward] prove fatal to themselves." (Internal quotation marks omitted.) Id., 444. The court further emphasized that, in a government of divided powers in which each checks the others, the judiciary must play a central role in tempering the legislature's "[peculiar] susceptib[ility] to popular clamor," especially with respect to the levying of punishments against particular infamous persons. (Internal quotation marks omitted.) Id., 445. It is that task that we undertook in *Santiago*.

With respect to promises made to families and friends of the victims, we all have deep compassion for those who have been made to suffer the curse of crime. See, e.g., *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 772, 12 A.3d 817 (2011). As we explained in *Santiago*, however, whatever vows the state has made that it will seek and impose the ultimate penalty have proved to be unkeepable. Of the thousands of heinous murders that have been committed in Connecticut in the last six decades, only two have resulted in executions, and those only after the offenders renounced

their appellate and habeas remedies and, in essence, volunteered to die. For the countless other families and secondary victims, the promise that they will find "restoration and closure"[17] in the hangman's noose, or an infusion of sodium thiopental, has proved to be a false hope. The vast majority of even the worst of the worst offenders are never sentenced to die, and, for the minuscule number who are, the delays are endless. Accordingly, although I am sensitive to the state's plea, I remain convinced that the death penalty, as it has been implemented in Connecticut over the past one-half century, serves no useful retributive purpose.[18]

VII

CONSTITUTIONAL TEXT

The state next argues that the death penalty can never be held unconstitutional because "it is expressly permitted by the Connecticut constitution." The state further argues that our reliance in *Santiago* on *People* v. *Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, cert. denied, 406 U.S. 958, 92 S. Ct. 2060, 32 L. Ed. 2d 344 (1972);[19] see *State* v. *Santiago*, supra, 318 Conn. 131; was misplaced because that decision has been the subject of some judicial and scholarly criticism. Instead, the state recommends for our consideration a concurring opinion authored by Justice Antonin Scalia, who opines that

[17] The state notes in its brief that maintaining the death penalty could serve a retributive purpose by "providing a sense of restoration and closure to victims and their families . . . ."

[18] The state, which quotes from the Book of Ecclesiastes in its brief, would do well to consider the following passage therefrom: "Better not vow at all than vow and fail to pay." Ecclesiastes 5:5, in The New English Bible: Old Testament (Oxford University Press & Cambridge University Press 1970) p. 931.

[19] We relied on *Anderson* for the proposition that "incidental references to the death penalty in a state constitution merely acknowledge that the penalty was in use at the time of drafting; they do not forever enshrine the death penalty's constitutional status as standards of decency continue to evolve . . . ." *State* v. *Santiago*, supra, 318 Conn. 131.

"[i]t is impossible to hold unconstitutional that which the [c]onstitution explicitly contemplates." (Emphasis omitted.) *Glossip* v. *Gross*, supra, 576 U.S. 894 (Scalia, J., with whom Thomas, J., joins, concurring).

The dissenting justices in *Santiago* raised similar objections. See, e.g., *State* v. *Santiago*, supra, 318 Conn. 246–47 (*Rogers*, *C. J.*, dissenting); id., 353–54 (*Zarella*, *J.*, dissenting). The majority responded to them at some length in that decision; see id., 129–32; and no useful purpose would be served by rehashing those arguments here. I would, however, make a few additional points.

Regardless of whether one considers *Anderson* itself to be persuasive authority, recent scholarship both vindicates the reasoning of that case and sheds light on the defects in Justice Scalia's position. As Professor Joseph Blocher explains, "some supporters of the death penalty continue to argue . . . that the death penalty must be constitutional because the [f]ifth [a]mendment explicitly contemplates it. The appeal of this argument is obvious, but its strength is largely superficial, and is also mostly irrelevant to the claims being made against the constitutionality of capital punishment. At most, the references to the death penalty in the [constitution] may reflect a founding era assumption that it was constitutionally permissible at that time. But they do not amount to a constitutional authorization; if capital punishment violates another constitutional provision, it is unconstitutional." J. Blocher, "The Death Penalty and the Fifth Amendment" (December 16, 2015) p. 1 (unpublished manuscript), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6227&context=faculty_scholarship; see also B. Ledewitz, "Judicial Conscience and Natural Rights: A Reply to Professor Jaffa," 10 U. Puget Sound L. Rev. 449, 459 (1987) ("The fifth amendment represents a limitation on capital punishment, that it was not to be carried out in the future as it had been in the past. One could hardly call the

due process clause an endorsement of capital punishment.").

The state's argument appears to be that, with respect to the Connecticut constitution in particular, the due process clause of article first, § 8, cannot form the basis for holding capital punishment unconstitutional when that same clause authorizes the state to impose the death penalty, as long as it affords adequate due process of law. As the aforementioned authorities explain, however, this argument rests on two conceptual errors. First, a declaration of rights such as that contained in article first of the Connecticut constitution, or the federal Bill of Rights, is not a grant of governmental authority; rather, it delineates the rights and freedoms of the people *as against the government*. See *State* v. *Conlon*, 65 Conn. 478, 488–89, 33 A. 519 (1895); see also J. Blocher, supra, pp. 3, 8–9. For the state to suggest that one right (to be free from cruel and unusual punishment) bars the exercise of another *right* (presumably, to execute capital felons) is to fundamentally misunderstand the nature of the freedoms enshrined in article first. States have powers, and the people have rights vis-à-vis the exercise of those powers; there is no governmental *right* to kill.

A second, related conceptual error is the state's apparent failure to distinguish necessary from sufficient conditions. See J. Blocher, supra, p. 9. Article first, § 8, of the Connecticut constitution, as amended by article seventeen and twenty-nine of the amendments, which provides in relevant part that "[n]o person shall be . . . deprived of life . . . without due process of law . . . [or] held to answer for any crime, punishable by death . . . unless upon probable cause," indicates that, to the extent that the death penalty is otherwise permissible and authorized by law, it may be imposed only after the defendant is afforded adequate due process. In other words, due process is a *necessary* condition for the

imposition of the death penalty, and article first, § 8, as amended, thereby restricts the circumstances under which that penalty may be imposed. There is no textual support, however, for the state's apparent belief that article first, § 8, as amended, makes the provision of due process a *sufficient* condition for the imposition of capital punishment, so that the state is authorized to carry out executions as long as it has complied with the requirements of due process. Of course, as we explained in *State* v. *Ross*, supra, 230 Conn. 249–50, the fact that the founders expressly referenced capital punishment in the state constitution, and the fact that such references were retained when article first, § 8, was amended at the most recent constitutional convention in 1965, provides strong evidence that, at those times, capital punishment was seen to be a legal and permissible penalty that comported with standards of decency of the day. But that implies at most that the death penalty is not unconstitutional per se, at all times and under all circumstances. As Blocher explains, "one could grant Justice Scalia's argument that the death penalty is not 'categorically impermissible' while maintaining that the conditions for its constitutional use are not currently satisfied and perhaps never will be." J. Blocher, supra, p. 5.

VIII

STARE DECISIS

Lastly, the state argues that, to the extent that *Santiago* was wrongly decided and resulted in an unjust outcome, the principle of stare decisis, that is, the duty of a court to adhere to established precedent, does not require that we uphold the conclusion that capital punishment offends the state constitution. The state itself concedes, however, that "a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it . . . ." (Citation omit-

ted; internal quotation marks omitted.) *State* v. *Alvarez*, 257 Conn. 782, 793–94, 778 A.2d 938 (2001). The state has provided neither reasons nor logic to justify overruling our recent decision in *Santiago*.[20]

First, having fully reviewed the state's arguments and the authorities on which it relies, I find no reason to conclude that *Santiago* was wrongly decided, let alone unjust. The state has not pointed to any controlling cases that we overlooked, persuasive arguments that we failed to consider, or fatal defects in our reasoning. Most of the state's arguments are ones that we expressly considered and rejected in *Santiago*, and the others fail to hold up under scrutiny or simply miss the point. In a disturbing number of instances, the authorities on which the state relies do not even support the proposition for which the state cites them.

Second, the state has failed to identify any case, and I am not aware of any, in which a court of last resort has reversed its own landmark constitutional ruling after a matter of just months. For this court to entomb the death penalty in *Santiago*, and then to exhume and revivify it nine months later, would be unprecedented and would make a mockery of the freedoms enshrined in article first of the state constitution. If the people of Connecticut believe that we have misperceived the

[20] Justice Espinosa, in her dissenting opinion in the present case, repeatedly suggests that *Santiago* is not binding precedent because it was decided on the basis of the subjective moral beliefs of the majority, contrary to precedent and in violation of our sworn duty to follow the law. We already have said everything that needs to be said with respect to these baseless assertions. See *State* v. *Santiago*, supra, 318 Conn. 86 n.89. With respect to the issue of stare decisis, we merely reiterate that our decision in *Santiago* did not overturn controlling precedent but, rather, applied the well established evolving standards of decency test in the context of a fundamentally new and different legal landscape, in which capital punishment has been legislatively abolished—an issue of first impression never before addressed by this or any other court prior to the adoption of P.A. 12-5. Justice Espinosa's reliance on *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 234, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995), therefore, is misplaced.

scope of that constitution, it now falls on them to amend it.[21]

Finally, I question whether a decision in this case to overrule *Santiago*, and to revive the death penalty for the defendant in the present case, could survive federal constitutional scrutiny. The defendant in *Santiago* has received the benefit of our decision therein, namely, that capital punishment is an excessive and disproportionate punishment, and that he no longer may be executed. The state now proposes that we reauthorize the death penalty[22] and proceed to execute the defendant, Peeler, solely on the basis of the fact that a different panel of this court, having considered essentially the same arguments only months later, might reach a different result. Nothing could be more arbitrary than to execute one convicted capital felon who committed his offense prior to the enactment of P.A. 12-5 but to spare another, solely on the basis of the timing of their appeals. For this reason as well, I reject the state's request that we overrule *Santiago* and revive the death penalty in Connecticut.

ROBINSON, J., concurring. I join the majority's decision not to disturb *State* v. *Santiago*, 318 Conn. 1, 9, 122 A.3d 1 (2015),[1] which held that, "in light of the

[21] Whether capital punishment might be reinstated in Connecticut by means other than a constitutional amendment is not before us in this case. See *State* v. *Santiago*, supra, 318 Conn. 86 n.88.

[22] I take no position on the question of whether, following our decision in *Santiago*, this court has the power to reauthorize the death penalty without new enabling legislation. Compare *Jawish* v. *Morlet*, 86 A.2d 96, 97 (D.C. 1952) (statute held to be unconstitutional is "not void in the sense that it is repealed or abolished" but remains dormant, and may be revived by subsequent judicial decision), with *Dascola* v. *Ann Arbor*, 22 F. Supp. 3d 736, 744–46 (E.D. Mich. 2014) (decision holding statute unconstitutional essentially nullifies statute, and if court should later determine that it does in fact pass constitutional muster, legislature must reenact it).

[1] Unless otherwise noted, all references to *Santiago* in this opinion refer to *State* v. *Santiago*, supra, 318 Conn. 1.

governing constitutional principles and Connecticut's unique historical and legal landscape . . . following its prospective abolition, this state's death penalty no longer comports with contemporary standards of decency and no longer serves any legitimate penological purpose. For these reasons, execution of those offenders who committed capital felonies prior to April 25, 2012, would violate the state constitutional prohibition against cruel and unusual punishment." My decision to join the majority's decision to reverse the death sentence of the defendant, Russell Peeler, is significantly informed by the unique position that I hold as the only active member of this court who did not sit to decide *Santiago*, which was a four to three decision. In my view, stare decisis considerations of this court's institutional legitimacy and stability are at their zenith in this particular case, given that the *only* thing that has changed since this court decided *Santiago* is the composition of this court.[2] Having considered *Santiago* in

[2] I wish to explain my position that this court properly considered this constitutional issue, namely, the constitutionality of the death penalty in the wake of No. 12-5 of the 2012 Public Acts, in the first instance in *Santiago*, notwithstanding the fact that it was published well after I joined the court and its panel ultimately included a recently retired justice. In particular, I emphasize that I do not view the court's actions in *Santiago* as in any way precluding me from exercising my duty to decide this significant issue as a matter of first impression.

I recognize that some concerns have been expressed about this court's decision to consider the constitutionality of the death penalty in the wake of Public Act 12-5 in the first instance in *Santiago*, rather than in this case, given this court's policy and practice of deciding important constitutional issues with a full and current panel of this court whenever possible. See W. Horton, "One Thought on *State* v. *Santiago*," Horton, Shields & Knox Appellate Blog (October 28, 2015), available at http://hortonshieldsknox.com/one-thought-on-state-v-santiago (last visited May 16, 2016) ("it looks bad for a court when, notwithstanding a constitutional provision that a justice must stop holding office at age [seventy], a newly appointed justice has to sit on the sidelines for months, and in this one case years, while a justice over age [seventy] decides very important cases with which the new justice may disagree"); see also D. Klau, "Supreme Court to Rehear Arguments in Death Penalty Case," Appealingly Brief (December 1, 2015), available at http://appealinglybrief.com/2015/12/01/supreme-court-to-rehear-

light of the arguments raised by the parties in this

arguments-in-death-penalty-case (last visited May 16, 2016) (describing court's position vis-à-vis *Santiago* and present case as "uncomfortable").

By way of background, I note that Governor Dannel P. Malloy appointed me to this court in December, 2013, to the seat on this court vacated by the mandated retirement of Justice Flemming L. Norcott, Jr. The constitutionality of the death penalty in the wake of Public Act 12-5 was argued in *Santiago* on April 23, 2013, approximately six months prior to Justice Norcott attaining the constitutionally mandated age of retirement. Justice Norcott then continued to participate in deliberations as a member of that panel, including consideration of the state's subsequent motions for reconsideration and to stay, in accordance with General Statutes § 51-198 (c). Justice Norcott's vote to join the slender majority in *Santiago* ended a career on this court in which he had been a leading voice against the constitutionality of the death penalty. See, e.g., *State* v. *Santiago*, 305 Conn. 101, 307 n.166, 49 A.3d 566 (2012); *State* v. *Breton*, 264 Conn. 327, 446–47, 824 A.2d 778 (2003) (*Norcott*, *J.*, dissenting).

I respectfully disagree with the concerns expressed about Justice Norcott's continued participation in *Santiago*, to my apparent exclusion from the opportunity to decide this issue tabula rasa. In my view, Justice Norcott's continued deliberation in *Santiago* pursuant to § 51-198 (c) was wholly proper and appropriate under the letter and purpose of that statute, despite the fact that his participation lasted for nearly two years following my elevation to what had been his seat on this court. To allow prudential concerns about the exclusion of a newly appointed justice to disenfranchise Justice Norcott from his continued participation in *Santiago* nearly eight months into deliberations on that case—particularly given the magnitude of the issues considered therein—would have raised the constitutionally unsavory specter of running out a football game clock on the office of a member of this court in a case argued well before his retirement and the appointment of his successor. See *Honulik* v. *Greenwich*, 293 Conn. 641, 661–62, 980 A.2d 845 (2009) (This court upheld the constitutionality of § 51-198 [c] and noted that it relieved a retiring justice from the obligation to "arbitrarily . . . cease hearing new cases at some point prior to reaching seventy, effectively cutting his or her term of office short, and without the possibility of a replacement. If a justice must cease all Supreme Court case work on the date of his seventieth birthday, then, by necessity, he is divested of the full authority and responsibility of his office many months before that date."). This is particularly so, given that the circumstances leading to the lengthy deliberation may well have been completely out of Justice Norcott's control. See id., 662 (noting that some cases result "despite all good faith efforts," in "misjudgment as to the time required to dispose of an appeal or delay due to unforeseen difficulties").

Thus, the timing of my participation in deciding this issue reflects nothing more than the following facts: (1) the constitutionality of the death penalty following the enactment of Public Act 12-5 is an issue of law common to

appeal, I conclude that it is not so clearly wrong that we should risk damaging this court's institutional stability by overruling it. Put differently, because it would imperil our state's commitment to the rule of law for it to appear that a change in the composition of the court resulted in the immediate retraction of a landmark state constitutional pronouncement, I join in the court's decision to uphold *Santiago*.

The background legal principles governing the doctrine of stare decisis are well established. "The doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it." (Internal quotation marks omitted.) *State* v. *Salamon*, 287 Conn. 509, 519, 949 A.2d 1092 (2008). "This court has repeatedly acknowledged the significance of stare decisis to our system of jurisprudence because it gives stability and continuity to our case law. . . . Stare decisis is a formidable obstacle to any court seeking to change its own law. . . . It is the most important application of a theory of [decision-making] consistency in our legal culture and it is an obvious manifestation of the notion that [decision-making] consistency itself has normative value. . . . Stare decisis does more than merely push courts in hard cases, where they are not convinced about what justice requires, toward decisions that conform with decisions made by previous courts. . . . The doctrine is justified because it allows for predictability in the ordering of conduct, it promotes the necessary per-

numerous cases on this court's docket; (2) accordingly, some case had to be the first to consider the issue, with *Santiago* being the first ready case in line; (3) the length of the court's deliberations in *Santiago* were consistent with the gravity of the issue before the court and the length of the numerous opinions published in that case; and (4) once this court decided *Santiago*, it became necessary to resolve other death penalty cases as they became ready for consideration, with the present case being the first direct appeal in line after the conclusion of proceedings in *Santiago*.

ception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency. . . .

"As this court has stated many times, [t]he true doctrine of stare decisis is compatible with the function of the courts. . . . [T]here is no question but that [a] decision of this court is a controlling precedent until overruled or qualified. . . . [S]tare decisis . . . serve[s] the cause of stability and certainty in the law—a condition indispensable to any well-ordered system of jurisprudence . . . .

"Whether stare decisis serves the interests of judicial efficiency, protection of expectations, maintenance of the rule of law, or preservation of judicial legitimacy, however, is not dispositive. The value of adhering to precedent is not an end in and of itself, however, if the precedent reflects substantive injustice. Consistency must also serve a justice related end. . . . When *a prior decision is seen so clearly as error* that its enforcement [is] for that very reason doomed . . . the court should seriously consider whether the goals of stare decisis are outweighed, rather than dictated, by the prudential and pragmatic considerations that inform the doctrine to enforce a clearly erroneous decision. Stare decisis is not an inexorable command. . . . The court must weigh [the] benefits [of stare decisis] against its burdens in deciding whether to overturn a precedent it thinks is unjust. The rule of stare decisis may entail the sacrifice of justice to the parties in individual cases, but, far from being immune from considerations of justice, it must always be tested against the ends of justice more generally. . . .

"Indeed, this court has long believed that although [s]tare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, [it] is not an absolute impediment to change. . . . [S]tability should not be confused with perpetuity.

If law is to have a current relevance, courts must have and exert the capacity to change a rule of law when reason so requires. . . . [I]t is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience. . . . The United States Supreme Court has said that when it has become convinced of former error, it has never felt constrained to follow precedent. . . .

"[One] well recognized exception to stare decisis under which a court will examine and overrule a prior decision . . . [is when that prior decision] is *clearly wrong*. . . . The doctrine [of stare decisis] requires a clear showing that an established rule is incorrect and harmful before it is abandoned. . . . Because stare decisis is not a rule of law but a matter of judicial policy . . . it does not have the same kind of force in each kind of case so that adherence to or deviation from that general policy *may depend upon the kind of case involved, especially the nature of the decision to be rendered that may follow from the overruling of a precedent*." (Citations omitted; emphasis altered; footnote omitted; internal quotation marks omitted.) *Conway* v. *Wilton*, 238 Conn. 653, 658–61, 680 A.2d 242 (1996). "In short, consistency must not be the only reason for deciding a case in a particular way, if to do so would be unjust. Consistency obtains its value best when it promotes a just decision." Id., 662.

Guided by these general principles, I first observe that the timing of our consideration of the present case renders stare decisis considerations particularly strong with respect to the public's perception of this court's legitimacy in its exercise of its core function of constitutional interpretation. See *State* v. *Ferguson*, 260 Conn. 339, 367, 796 A.2d 1118 (2002) ("[w]e will not revisit the same issues we so recently have decided"). In con-

trast to other cases, wherein the passage of time has yielded factual or legal developments that serve as a basis for a challenge to the decision under attack; see, e.g., *Campos* v. *Coleman*, 319 Conn. 36, 37–38, 123 A.3d 854 (2015) (overruling *Mendillo* v. *Board of Education*, 246 Conn. 456, 495–96, 717 A.2d 1177 [1998], and recognizing derivative cause of action for loss of parental consortium by minor child); *State* v. *Salamon*, supra, 287 Conn. 522–28 (interpretation of kidnapping statutes); all that has changed since *Santiago* was decided "is the composition of this [c]ourt, which is not a valid reason for ignoring stare decisis principles." *Haynes* v. *State*, 273 S.W.3d 183, 187 (Tex. Crim. App. 2008), overruled on other grounds by *Bowen* v. *State*, 374 S.W.3d 427 (Tex. Crim. App. 2012); see also *Wheatfall* v. *State*, 882 S.W.2d 829, 843 (Tex. Crim. App. 1994) (The court rejected the argument that it "should consider the changing membership of the [United States] Supreme Court in our review of their precedent" because "this [c]ourt would be forced to reconsider every decision of the [United States] Supreme Court or our [c]ourt upon changes in membership. Such an endeavor would defeat one of the essential purposes of stare decisis."), cert. denied, 513 U.S. 1086, 115 S. Ct. 742, 130 L. Ed. 2d 644 (1995). Indeed, as this court observed more than seventy years ago, "a change in the personnel of the court affords no ground for reopening a question which has been authoritatively settled." *Tileston* v. *Ullman*, 129 Conn. 84, 86, 26 A.2d 582 (1942), appeal dismissed, 318 U.S. 44, 63 S. Ct. 493, 87 L. Ed. 603 (1943); accord *Herald Publishing Co.* v. *Bill*, 142 Conn. 53, 62, 111 A.2d 4 (1955) ("[a] change in the personnel of the court never furnishes reason to reopen a question of statutory interpretation").

The New York Court of Appeals has described the benefits of decisional stability in the face of the changing composition of the court, aptly stating that it "would

have been scandalous for a court to shift within less than two years because of the replacement of one of the majority in the old court by one who now intellectually would have preferred to have voted with the old minority and the new one. The ultimate principle is that a court is an institution and not merely a collection of individuals; just as a higher court commands superiority over a lower not because it is wiser or better but because it is institutionally higher. This is what is meant, in part, as the rule of law and not of men." *People* v. *Hobson*, 39 N.Y.2d 479, 491, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976); see also *People* v. *Taylor*, 9 N.Y.3d 129, 148, 878 N.E.2d 969, 848 N.Y.S.2d 554 (2007) ("Stare decisis is deeply rooted in the precept that we are bound by a rule of law—not the personalities that interpret the law. Thus, the closeness of a vote bears no weight as to a holding's precedential value as a controversy settled by a decision in which a majority concur should not be renewed without sound reasons . . . ." [Citation omitted; internal quotation marks omitted.]); S. Wachtler, "Stare Decisis and a Changing New York Court of Appeals," 59 St. John's L. Rev. 445, 455–56 (1985) (describing "necessary balance between stability and innovation," and stating that "[j]udiciously applied in a proper case, the doctrine of stare decisis will allay the fears of those who look with apprehension upon the ongoing personnel changes in the [New York] Court of Appeals").

Put differently, for me to join this court and near immediately disturb this court's so recently decided landmark decision in *Santiago* would require me, in the words of Justice Thurgood Marshall, to embrace the principle that "[p]ower, not reason, is the new currency of this [c]ourt's decisionmaking." *Payne* v. *Tennessee*, 501 U.S. 808, 844, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) (Marshall, J., dissenting); see id. (Justice Marshall dissented from the court's decision to overrule

Booth v. *Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 [1987], and *South Carolina* v. *Gathers*, 490 U.S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 [1989], and to permit the admission of victim impact evidence during the penalty phases of capital trials because "[n]either the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this [c]ourt did."). I agree with Justice Marshall that "stare decisis is important not merely because individuals rely on precedent to structure their commercial activity but because fidelity to precedent is part and parcel of a conception of the judiciary as a source of impersonal and reasoned judgments. . . . Indeed, this function of stare decisis is in many respects even more critical in adjudication involving constitutional liberties than in adjudication involving commercial entitlements. Because enforcement of the [federal] [b]ill of [r]ights and the [f]ourteenth [a]mendment [to the United States constitution] frequently requires this [c]ourt to rein in the forces of democratic politics, this [c]ourt can legitimately lay claim to compliance with its directives only if the public understands the [c]ourt to be implementing principles . . . founded in the law rather than in the proclivities of individuals." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Payne* v. *Tennessee*, supra, 852–53 (Marshall, J., dissenting).[3]

[3] In dissenting in *Payne*, Justice Marshall described the majority's decision to distinguish the importance of stare decisis in cases "involving property and contract rights, where reliance interests are involved" from those "involving procedural and evidentiary rules," particularly when "decided by the narrowest of margins, over spirited dissents" as creating a "radical new exception to the doctrine of stare decisis," applicable to prior decisions with single vote margins. (Internal quotation marks omitted.) *Payne* v. *Tennessee*, supra, 501 U.S. 845, 851. He observed that "the continued vitality of literally scores of decisions must be understood to depend on nothing more than the proclivities of the individuals who now comprise a majority of this [c]ourt." (Emphasis omitted.) Id., 851. Justice Marshall eloquently stated that "the majority's debilitated conception of stare decisis would destroy the [c]ourt's very capacity to resolve authoritatively the abiding conflicts between those with power and those without. If this [c]ourt shows so little respect for its own

My sensitivity to stare decisis in this case is heightened by the fact that we are called on to reconsider the court's conclusion in *Santiago* that the death penalty is now unconstitutional under our state's constitution. "[I]f the doctrine of stare decisis has any efficacy under our case law, death penalty jurisprudence cries out for its application. Destabilizing the law in these cases has overwhelming consequences . . . ." *Zakrzewski* v. *State*, 717 So. 2d 488, 496 n.5 (Fla. 1998) (Anstead, J., concurring), cert. denied, 525 U.S. 1126, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999); accord *State* v. *Waine*, 444 Md. 692, 702, 122 A.3d 294 (2015) (observing that "[w]here the [c]ourt has previously recognized a new [s]tate constitutional standard as fundamental to due process, deference to that precedent ensures the constancy upon which due process endures"). Indeed, in *People* v. *Taylor*, supra, 9 N.Y.3d 129, Judge Robert S. Smith of the New York Court of Appeals explained in his concurring opinion his decision to join the majority in overturning a death sentence obtained under an unconstitutional death penalty procedure statute—despite dissenting three years before in *People* v. *LaValle*, 3 N.Y.3d 88, 99, 817 N.E.2d 341, 783 N.Y.S.2d 485 (2004), in which the court had invalidated that statute.[4] Judge Smith explained that the "policies underly-

precedents, it can hardly expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind. . . . By signaling its willingness to give fresh consideration to any constitutional liberty recognized by a [five to four] vote 'over spirited dissen[t]' . . . the majority invites state actors to renew the very policies deemed unconstitutional in the hope that this [c]ourt may now reverse course, even if it has only recently reaffirmed the constitutional liberty in question." (Citations omitted.) Id., 853–54. In sum, Justice Marshall stated: "Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women, or the indigent. Inevitably, this campaign to resurrect yesterday's 'spirited dissents' will squander the authority and the legitimacy of this [c]ourt as a protector of the powerless." Id., 856.

[4] In *LaValle*, the New York Court of Appeals considered the constitutionality of a statute requiring the trial judge to inform the jury that its deadlock with respect to a sentence of death or life without parole would require the judge to sentence the defendant to a lesser sentence of life imprisonment

ing the doctrine of stare decisis, which include stability, predictability, respect for our predecessors and the preservation of public confidence in the courts, are at their strongest where, as here, a court is asked to change its mind although nothing else of significance has changed. No one suggests that any development in the last three years, either in the law or the law's effect on the community, has changed the context in which *LaValle* was decided. *Indeed, we are asked to revive the very same statute held invalid in LaValle—not a theoretically impossible step, but a radical one. So far as I can tell, we have never done such a thing, and the occasions on which other courts have done it are rare* . . . ." (Citation omitted; emphasis added.) *People* v. *Taylor*, supra, 156.

Guided by these authorities, I am not convinced that any analytical shortcomings in *Santiago* surpass the significant stare decisis concerns that would accompany overruling that landmark decision. See, e.g., *Dickerson* v. *United States*, 530 U.S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000) ("[w]hether or not we would agree with [the] reasoning [of *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)] and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now"). Specifically, I have reviewed the opinions and briefs filed in *Santiago*, and determined that the majority in that case did not unreasonably read the record and the authorities

with parole eligibility after twenty to twenty-five years. *People* v. *LaValle*, supra, 3 N.Y.3d 116. The court held that this statutory instruction was unconstitutionally coercive and that the court had to strike the statute subject to legislative repair because, under the state constitution, "the absence of any instruction is no better than the current instruction under our constitutional analysis," and "[l]ike the flawed deadlock instruction, the absence of an instruction would lead to death sentences that are based on speculation, as the [l]egislature apparently feared when it decided to prescribe the instruction." Id., 128.

when it concluded that: (1) the issues decided therein were raised by the parties, thus affording the state notice and an opportunity to brief them, had it elected to do so; and (2) the death penalty now is cruel and unusual punishment under our state's constitution in the wake of the death penalty's prospective repeal in No. 12-5 of the 2012 Public Acts. Although reasonable jurists certainly could—and most emphatically did—disagree about the merits of *Santiago*, I do not view the majority's decision in that case as so fundamentally flawed that it warrants overruling so soon after it was decided.[5]

[5] In his well researched and scholarly dissenting opinion, Justice Zarella crafts a test intended to mitigate the seemingly subjective nature of the existing stare decisis inquiry by requiring the court to engage in a multifactor balancing analysis after making a threshold determination that the precedent under attack is, for whatever reason, wrongly decided. Justice Zarella's test does not, however, accommodate for degrees of wrong, insofar as he observes that, "[i]n addition to placing too little value on precedent, the wrongness of a previous decision should not factor into the stare decisis calculus because it is difficult to quantify or measure the degree of a particular decision's wrongness," noting that "the merits determination is independent of, and has no impact on, the stare decisis analysis."

I respectfully disagree with Justice Zarella's refusal to consider the relative degree of "wrong" in engaging in his stare decisis analysis. First, with no qualitative control other than the balancing of costs of maintaining versus eliminating a prior decision, it appears to be receptive to overruling precedent in a way that undercuts the salutary features with respect to promoting stability in the law. Second, this approach ironically appears to overrule certain well established principles of stare decisis, namely that: (1) the prior decision must be shown to be "*clearly wrong*" with a "clear showing that an established rule is incorrect and harmful"; (emphasis added; internal quotation marks omitted) *Conway* v. *Wilton*, supra, 238 Conn. 660–61; and (2) "a court should not overrule its earlier decisions unless the *most cogent* reasons and *inescapable logic* require it." (Emphasis added; internal quotation marks omitted.) *State* v. *Salamon*, supra, 287 Conn. 519.

In my view, the precedential value of an older decision, unquestionably correct when decided, might well erode over time as the result of relevant changes in law and policy, thus rendering a decision to overrule it less of a shock to the stability of the court and the law. See S. Burton, "The Conflict Between Stare Decisis and Overruling in Constitutional Adjudication," 35 Cardozo L. Rev. 1687, 1703–1704 (2014) (describing threshold factors to examine before deciding merits of whether to overrule precedent, including: "[1] notice and predictability; [2] legal developments that make the precedent

Thus, I emphasize my disagreement with the state's argument, in its supplemental brief and at oral argument before this court, that the recency of the court's decision in *Santiago* renders it an appropriate candidate for overruling, insofar as there has been minimal reliance on it to this point, and that the doctrine "carries less force when the court is asked to reconsider constitutional rulings because, unlike in statutory interpretation cases, the legislature lacks the ability to correct a judicial mistake." See, e.g., *State* v. *Salamon*, supra, 287 Conn. 523 ("[p]ersons who engage in criminal misconduct, like persons who engage in tortious conduct, rarely if at all will . . . give thought to the question of what law would be applied to govern their conduct if they were to be apprehended for their violations" [internal quotation marks omitted]); *Conway* v. *Wilton*, supra, 238 Conn. 661 (force of stare decisis is "least compelling [when the ruling revisited] may not be reasonably supposed to have determined conduct of the

anomalous; [3] the precedent's workability; [4] reliance on the precedent; [5] the quality of the precedent court's reasoning; and [6] changes in factual circumstances that erode the precedent's justification" [footnotes omitted]). Without the benefit of the lessons learned from watching a precedent's value evolve over time, I would require a far greater showing of error—near akin to that required to justify reconsideration of a decision under Practice Book § 71-5—to justify the overruling of a decision of extremely recent vintage, wherein nothing has changed other than the parties and the composition of the court. In my view, such an overruling would be appropriate only if the original decision evinced a complete misunderstanding of the governing legal principles, particularly if compounded by lack of meaningful adversarial input from the parties to the earlier case. See *State* v. *DeJesus*, 288 Conn. 418, 437 and n.14, 953 A.2d 45 (2008) (considering case law not addressed in *State* v. *Sanseverino*, 287 Conn. 608, 625, 949 A.2d 1156 [2008], and overruling *Sanseverino*, which held, without briefing from parties, that appellate remedy in case when jury was not instructed in accordance with *Salamon* was judgment of acquittal rather than new trial before properly instructed jury); see also *State* v. *Sanseverino*, 291 Conn. 574, 574–75, 969 A.2d 710 (2009) (following *DeJesus* in revised opinion issued after grant of state's motion for reconsideration); *State* v. *Sanseverino*, supra, 287 Conn. 663 (*Zarella*, *J.*, dissenting) (observing that majority decided remedy issue sua sponte with no argument or briefing from parties).

litigants" [internal quotation marks omitted]). I agree with Justice Palmer's observation in his opinion in the present case that the watershed nature of this court's decision in *Santiago* creates, in essence, a different kind of reliance concern beyond the arithmetically measurable reliance considered at oral argument before this court and emphasized by Justice Zarella in his dissenting opinion.[6] See L. Powe, "Intragenerational Constitutional Overruling," 89 Notre Dame L. Rev. 2093, 2104 (2014) (concluding that "reliance is rarely a factor in any decision about stare decisis in a case that does not involve economics" but observing that "[p]erhaps reliance in the noneconomic sphere internalizes . . . the [c]ourt's view of the likely public reaction to a formal overruling"). That reliance concern is particularly heightened in the death penalty context, insofar as I can imagine nothing that would appear more shockingly arbitrary than for this court to invalidate the death penalty in *Santiago* and render a final judgment sparing the defendant in that case,[7] and then—with the substitution of a newly appointed justice—immediately overrule *Santiago* and hold that the defendant and his

[6] At oral argument before this court, the state and members of the court discussed the concept of reliance by considering hypothetical questions about whether this court could ever overrule its constitutional pronouncement in *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 957 A.2d 407 (2008), namely, that the previous state statutory prohibition against same sex marriage violated the constitution of Connecticut. Notwithstanding the United States Supreme Court's recent decision in *Obergefell* v. *Hodges*, 576 U.S. 644, 651–81, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015), I recognize that the reliance concerns attendant to *Kerrigan* were numerically greater than those present in this case, insofar as the legislature changed the statutory scheme and thousands of our state's citizens were married in the eight years since this court's decision in *Kerrigan*. Given the life interest at issue here, I suggest that the reliance interests on *Santiago* of the defendant and others presently exposed to the death penalty differ only in kind, and not degree, from those of the couples who were married as a result of *Kerrigan*.

[7] The defendant in *Santiago* has already been resentenced to life imprisonment in accordance with this court's decision in that case. See *State* v. *Santiago*, 319 Conn. 935, 125 A.3d 520 (2015) (denying state's motion for stay of judgment).

counterparts on death row could potentially face execution.[8] Putting aside the obvious equal protection consequences highlighted by Justice Palmer, this result, as demonstrated by very recent experience in one of our sister states, would at the very least strongly *appear* to stem solely from when the defendant's appeals were filed and scheduled and the composition of the panels that heard their cases.[9] See *State* v. *Petersen-Beard*,

[8] Justice Zarella criticizes my position with respect to stare decisis as flawed by the logical fallacy of "post hoc ergo propter hoc, or after this, therefore resulting from it." See Black's Law Dictionary (10th Ed. 2014) (defining "post hoc ergo propter hoc" as "[t]he logical fallacy of assuming that a causal relationship exists when acts or events are merely sequential"). He understands my view to be that, "[b]ecause the present appeal has been decided after a change in the court's membership, the change in the membership caused or was the reason to overturn *Santiago*." I believe Justice Zarella misunderstands my position, which simply is one of correlation, *not* causation. As a theoretical matter, had the *Santiago* panel remained intact, it is theoretically possible that one member of the majority could have defected and voted in this case to overrule *Santiago*. Thus, I agree that, as a purely theoretical matter, the change in panel is merely correlative, rather than causational with respect to the potential overruling of *Santiago*. I, however, do not share Justice Zarella's optimism about the probable collective understanding on the part of those who are asked to accept our court's decisions as a consistent statement of what the law is, with respect to the potential overruling of *Santiago*. Hence, Justice Zarella and I irreconcilably, but respectfully, disagree about the public perception issues that would attend the overruling of *Santiago* so soon after it was decided. See also footnote 9 of this concurring opinion.

To this end, I firmly disagree with Justice Zarella's observation that my position with respect to stare decisis in the present case amounts to a "suggestion that this court is bound, now and forever, to follow any decision, right or wrong, unless the panel that decided the previous case is identical to the panel that wishes to overrule that case." I do not believe any such thing, and to take such a position, would, as Justice Zarella observes, stand in contrast to the historical record. Indeed, as a practical matter, such a position would immobilize our case law and render it completely unable to adapt to changes in law and society. My prudential concerns with respect to the panel change and public perception concern the posture of this particular case, which is unique with respect to the juxtaposition of the controversy of the issue and the timing of the argument and decision.

[9] A very recent series of decisions in one of our sister states tells a cautionary tale about the perception of instability created by the rapid overruling of decisions upon the change of a state Supreme Court's membership. In *Doe* v. *Thompson*, 304 Kan. 291, 324–28, 373 A.3d 750 (2016), and two companion cases, *State* v. *Redmond*, 304 Kan. 283, 288–90, 371 P.3d

900 (2016), and *State* v. *Buser*, 304 Kan. 181, 190, 371 P.3d 886 (2016), the Kansas Supreme Court concluded, in four to three decisions, that certain 2011 amendments to that state's sex offender registration act—such as extension of registration periods, special notations on driver's licenses, and increased "active" availability of registrant information online—were punitive, rather than regulatory, in nature; this rendered their retroactive application to previously convicted sex offenders a violation of the ex post facto clause set forth in article one, § 10, of the United States constitution. One of the four jurists comprising the majority in those cases was a trial court judge who was temporarily assigned to hear cases because of a vacancy on the court created when one of the justices was appointed to a seat on the United States Court of Appeals for the Tenth Circuit. See *Doe* v. *Thompson*, supra, 328 n.1; *State* v. *Redmond*, supra, 290 n.1; *State* v. *Buser*, supra, 190 n.1.

A new justice, Caleb Stegall, was subsequently appointed to the vacancy on the Kansas Supreme Court. After hearing argument in *State* v. *Petersen-Beard*, 304 Kan. 192, 192–93, 377 P.3d 1127 (2016), Justice Stegall authored a four to three decision, which was released on the same day as *Doe*, *Redmond*, and *Buser*, and overruled those decisions. Id. The majority opinion in *Petersen-Beard* adopted large portions of the dissenting opinion in *Doe*, and concluded that the 2011 amendments to the sex offender registration act were not punishment and, therefore, could not be held to constitute cruel and unusual punishment under the Kansas constitution or the eighth amendment to the United States constitution. Id., 197–211. As Justice Johnson, the author of the majority opinion in *Doe*, *Redmond*, and *Buser*, explained in his dissent, the court's conclusion in *Petersen-Beard* did not affect the judgments obtained in the prior three cases, notwithstanding a court-ordered delay in publication pending argument and a decision by a "newly constituted court" in *Petersen-Beard*, the "apparent rationale [of which] was to make the holding in [*Doe*, *Redmond*, and *Buser*] applicable solely to the parties in those cases." Id., 213; see also id. ("Plainly stated, all of those litigants won on appeal, and the [2011] amendments cannot be applied to them. But they had to wait for many months—unnecessarily in my view—to reap the benefits of their respective wins. I find that to be a denial of justice.").

Interestingly, neither the majority nor the dissent in *Petersen-Beard* considered the doctrine of stare decisis, as it affected the Kansas court's obligation to follow its own recent precedents, with respect to that decision. Reaction to the rapid overruling was, however, widely noticed, and primarily attributed to the change in personnel of the Kansas Supreme Court. One scholarly commentator, Professor David Post, described the Kansas Supreme Court's action in *Petersen-Beard*, which required "all other . . . sex offenders in the state with convictions before 2011" to register, while sparing the defendants in *Doe*, *Redmond*, and *Buser*, as "seem[ing] to violate the very fundamental notion, embedded in our idea of 'due process of law,' that like cases are to be treated alike—someone in precisely the same situation . . . will have to register . . . while [the defendants in *Doe*, *Redmond*, and *Buser*] will not." D. Post, "In a Single Day, the Kansas Supreme Court Issues Important Constitutional Opinions—and Overrules Them,"

304 Kan. 192, 192–93, 377 P.3d 1127 (2016) (four to three decision overruling three separate four to three decisions issued by differently constituted panel on same day). This would be the nadir of the rule of law in the state of Connecticut.[10] Put differently, I find no

Washington Post (April 25, 2016), available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/25/in-a-single-day-the-kansas-supreme-court-issues-important-constitutional-opinions-and-overrules-them (last visited May 16, 2016). Discussing the change in the court's personnel, Professor Post describes as "a bit unseemly" the fact that "[t]his strange circumstance seems to have come about because the Kansas court was short-handed." Id.; see also D. Weiss, "Kansas Supreme Court Issues Three Opinions Then Overrules Them on the Same Day," ABA J. (April 25, 2016), available at http://www.abajournal.com/news/article/kansas_supreme_court_issues_three_opinions_then_overrules_them_on_the_same (last visited May 16, 2016) ("[t]he reason for the change in stance was a new justice who joined the court, taking the place of a senior district judge who was filling a vacancy"); S. Greenfield, "What a Difference a Day Makes, Kansas Edition," Simple Justice: A Criminal Defense Blog (April 26, 2016), available at http://blog.simplejustice.us/2016/04/26/what-a-difference-a-day-makes-kansas-edition (last visited May 16, 2016) (An article observing that *Petersen-Beard* was inconsistent with the doctrine of stare decisis, and stating that the "problem arose because one seat at the Kansas Supreme Court was filled by one [judge in *Doe*, *Redmond*, and *Buser*], and another [judge in *Petersen-Beard*]. The [c]ourt was split, three to three, on the issue, so that last [vote] was the tie breaker."); T. Rizzo, "Sex Offenders Win and Lose in 'Peculiar' Rulings by the Kansas Supreme Court," Kansas City Star (April 22, 2016), available at http://www.kansascity.com/news/local/crime/article73328242.html (last visited May 16, 2016) (quoting state attorney general's description of decisions as "peculiar" and stating that "[t]he highly unusual circumstance appear[s] to be the result of a one-justice change in the makeup of the court").

Although public reaction should not sway our decisionmaking, I cannot ignore the likelihood, vividly illustrated by the reaction to the Kansas Supreme Court's recent decision in *Petersen-Beard*, that such rapid overruling of a major constitutional precedent would be attributed solely to the change in the court's composition. This indicates to me that overruling *Santiago* would present the risk of shaking our citizens' confidence in our court as an institution, betraying it as a collection of individuals who make seemingly arbitrary decisions. As I stated previously, the majority's analysis in *Santiago* is not so unreasonable or fundamentally flawed as to justify taking that risk in the public's confidence in this court, and the judiciary as a whole.

[10] Thus, I find wholly unpersuasive the state's arguments that *Santiago* "is no obstacle to this court issuing a correct legal decision on the question of whether capital punishment violates the state constitution," and that "the

substantive or procedural errors in *Santiago* whose magnitude justifies incurring the massive risk to our court's credibility as an institution that the state asks us to undertake.

Accordingly, I join in the judgment of the court.

ZARELLA, J., dissenting. "I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion [on] the democratic process in order that the [c]ourt might save face. With some reservation concerning decisions that have become so embedded in our system of government that return is no longer possible . . . I agree with [United States Supreme Court] Justice [William O.] Douglas: 'A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the [c]onstitution [that] he swore to support and defend, not the gloss [that] his predecessors may have put on it.' . . . Or as the [United States Supreme] Court itself has said: '[W]hen convinced of former error, [the] [c]ourt has never

only result in [this case] that could undermine the public faith in the integrity of this court . . . would be an affirmance of *Santiago* . . . based on the principle of stare decisis. If [this] court believes that *Santiago* . . . properly decided that capital punishment violates the Connecticut constitution, then it should so hold. But if a majority of this court believes that *Santiago* . . . is incorrect, justifying affirmation of that breach through a statement that the court believes it tied its own hands would have a deleterious effect . . . on the public's perception of the procedural fairness of the criminal justice system and diminish public confidence in the rule of law." (Citation omitted; internal quotation marks omitted.) In my view, any concerns in the public's confidence about this court's technical fidelity to the adversarial appellate decision-making process in *Santiago*—a matter on which the majority and dissent in that case disagreed energetically—are drastically outweighed by the public perception of arbitrariness that would result from the defendant in that case, Eduardo Santiago, getting to live, and the defendant in the present case facing the prospect of lethal injection, for no reason beyond the fact that Santiago's case happened to come up first on this court's docket and was heard by a slightly different panel of this court. See footnote 2 of this concurring opinion.

felt constrained to follow precedent. In constitutional questions, where correction depends [on] amendment and not [on] legislative action [the] [c]ourt throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.' " (Citation omitted.) *South Carolina* v. *Gathers*, 490 U.S. 805, 825, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989) (Scalia, J., dissenting), overruled in part on other grounds by *Payne* v. *Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991).

I think my colleagues and I are well advised to carefully consider the words of Justice Antonin Scalia, particularly Chief Justice Rogers and Justice Robinson, who choose to uphold this court's decision in *State* v. *Santiago*, 318 Conn. 1, 122 A.3d 1 (2015), not because they have decided that that decision is right, but because of the dictates of stare decisis and concerns over the legitimacy of this court. I cannot fathom how Chief Justice Rogers and Justice Robinson believe they respect the rule of law by supporting a decision that is completely devoid of any legal basis or believe it is more important to spare this court of the purported embarrassment than to correct demonstrable constitutional error. Of course, it is possible that Justice Robinson believes that *Santiago* is correct, although he has not told us so. As I shall explain subsequently in this opinion, this approach prevents Justice Robinson from conducting—or at the very least from demonstrating to the public and to this court that he has undertaken—a full, fair, and objective analysis of the benefit and costs of applying stare decisis to *Santiago*.

I need not further swell the Connecticut Reports with a lengthy exposition on why *Santiago* is wrong. It suffices to say that the majority in that case employed an improper legal standard and wrongfully usurped the legislature's power to define crime and fix punishment, and the six factors set forth in *State* v. *Geisler*, 222

Conn. 672, 685, 610 A.2d 1225 (1992), support the conclusion that capital punishment remains consistent with the social mores of this state and is not cruel and unusual punishment in light of the passage of No. 12-5 of the 2012 Public Acts (P.A. 12-5). See generally *State* v. *Santiago*, supra, 318 Conn. 341–88 (*Zarella*, *J.*, dissenting). Instead, the primary object of this dissent is to bring order to our inconsistent and irreconcilable stare decisis jurisprudence by articulating a defensible and objective stare decisis standard. Then, in applying that standard in the present case, I will show why affording stare decisis effect to *Santiago* creates more harm than it does good. Finally, I will explain why overruling *Santiago* will enhance, not diminish, the integrity and legitimacy of this court.

I

STARE DECISIS

The concurring justices in the present case contend that the dictates of stare decisis require that we stand by our decision in *Santiago*.[1] In her concurring opinion,

[1] It would be careless of me if I failed to mention that stare decisis has never been prominent in our capital punishment jurisprudence. Indeed, past justices convinced of the death penalty's unconstitutional status were unmoved by the doctrine of stare decisis and continually declined to join the court's decisions upholding capital punishment. For example, dissenting in part from the majority opinion in *State* v. *Ross*, 230 Conn. 183, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995), Justice Berdon concluded that capital punishment was facially unconstitutional under our state constitution because it did not comport with the contemporary standards of decency. Id., 286–87, 319, 334 (*Berdon*, *J.*, dissenting in part). Despite this court's contrary holding in that case; id., 256; Justice Berdon continued to dissent in capital cases, arguing that the death penalty was per se unconstitutional. See, e.g., *State* v. *Cobb*, 251 Conn. 285, 523, 743 A.2d 1 (1999) (*Berdon*, *J.*, dissenting), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000); *State* v. *Webb*, 238 Conn. 389, 551, 680 A.2d 147 (1996) (*Berdon*, *J.*, dissenting); *State* v. *Breton*, 235 Conn. 206, 260, 663 A.2d 1026 (1995) (*Berdon*, *J.*, dissenting). Similarly, the first time Justices Norcott and Katz decided a capital punishment case, they, too, felt unconstrained by precedent, such as *Ross*. In *Webb*, Justice Katz joined Justice Berdon's dissent, concluding that the death penalty was facially unconstitutional; *State* v. *Webb*, supra, 551; and Justice Norcott

concluded, in dissent, that the Connecticut capital penalty scheme violated the state constitution's prohibition against cruel and unusual punishment, although he would not say that the death penalty was unconstitutional in all cases. See id., 566–67 (*Norcott*, *J.*, dissenting). Subsequently, in *Cobb*, Justice Norcott joined Justices Berdon and Katz in their belief that the death penalty was unconstitutional in all cases. See *State* v. *Cobb*, supra, 543 (*Norcott*, *J.*, dissenting); see also id., 522–23 n.1 (*Berdon*, *J.*, dissenting). Both Justices Norcott and Katz maintained their position throughout their tenure on this court; see, e.g., *State* v. *Santiago*, 305 Conn. 101, 307 n.166, 49 A.3d 566 (2012) (Justice Norcott, writing for the majority, declined to examine constitutional challenge to capital punishment because it had been recently rejected by majority of this court in *State* v. *Rizzo*, 303 Conn. 71, 184, 201, 31 A.3d 1094 [2011], cert. denied, 568 U.S. 836, 133 S. Ct. 133, 184 L. Ed. 2d 64 [2012], but he maintained that he remained steadfast in his own conclusion that death penalty does not comport with Connecticut constitution), superseded in part by *State* v. *Santiago*, 318 Conn. 1, 122 A.3d 1 (2015); *State* v. *Rizzo*, supra, 202 (*Norcott*, *J.*, dissenting) ("I continue to maintain my position that the death penalty has no place in the jurisprudence of the state of Connecticut" [internal quotation marks omitted]); *State* v. *Colon*, 272 Conn. 106, 395, 864 A.2d 666 (2004) (*Norcott*, *J.*, concurring) (Justice Norcott indicated that he continued to adhere to his " 'ongoing position' " that death penalty is unconstitutional but joined majority because judgment of court did not result directly in imposition of death, as court reversed defendant's death sentence), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005); *State* v. *Colon*, supra, 395 (*Katz*, *J.*, concurring and dissenting) ("I maintain my belief that the death penalty fails to comport with contemporary standards of decency and thereby violates our state constitution's prohibition against cruel and unusual punishment" but "concur . . . because . . . I have an obligation to decide the issue before the court" [internal quotation marks omitted]); *State* v. *Peeler*, 271 Conn. 338, 464, 857 A.2d 808 (2004) (*Katz*, *J.*, with whom *Norcott*, *J.*, joins, dissenting) ("[a]dhering to . . . view that the death penalty is, in all circumstances, cruel and unusual punishment prohibited by the constitution"), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005); *State* v. *Rizzo*, 266 Conn. 171, 313–14, 833 A.2d 363 (2003) (*Norcott*, *J.*, concurring) (noting continued belief that death penalty cannot " 'be administered in accordance with the principles of fundamental fairness set forth in our state's constitution' " but joining majority because decision related to procedural safeguards in imposing ultimate punishment and did not directly result in imposition of death sentence); *State* v. *Rizzo*, supra, 266 Conn. 314 (*Katz*, *J.*, concurring and dissenting) ("I maintain my belief that the death penalty . . . violates our state constitution's prohibition against cruel and unusual punishment. . . . Nevertheless, I address the issue pertaining to the burden of persuasion for the imposition of the death penalty because . . . I have an obligation . . . to decide the issue before the court . . . ." [Citation omitted; internal

States, 530 U.S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000), states: "[T]he doctrine [of stare decisis] carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." (Internal quotation marks omitted.) Then, quoting Justice Thurgood Marshall's dissenting opinion in *Payne* v. *Tennessee*, supra, 501 U.S. 849 (Marshall, J., dissenting), she provides the fol-

quotation marks omitted.]); *State* v. *Reynolds*, 264 Conn. 1, 254, 836 A.2d 224 (2003) (*Katz*, *J.*, dissenting) (maintaining belief that death penalty violates state constitution's prohibition against cruel and unusual punishment), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004); *State* v. *Courchesne*, 262 Conn. 537, 583–84, 816 A.2d 562 (2003) (*Norcott*, *J.*, concurring) (maintaining opposition to constitutionality of death penalty but joining majority because it addressed narrow procedural question and because imposition of death penalty would not necessarily follow as direct consequence of majority's decision); *State* v. *Courchesne*, supra, 584–85 (*Katz*, *J.*, concurring and dissenting) (same); *State* v. *Webb*, 252 Conn. 128, 147, 750 A.2d 448 (*Norcott*, *J.*, dissenting) (expressing continued opposition to death penalty), cert. denied, 531 U.S. 835, 121 S. Ct. 93, 148 L. Ed. 2d 53 (2000); *State* v. *Webb*, supra, 252 Conn. 147 (*Katz*, *J.*, dissenting) ("I continue to believe that the death penalty . . . violates our state constitution's prohibition against cruel and unusual punishment"); despite this court's numerous decisions to the contrary. See, e.g., *State* v. *Rizzo*, supra, 303 Conn. 201 ("[w]e conclude that the death penalty, as a general matter, does not violate the state constitution"); *State* v. *Colon*, supra, 383 (rejecting invitation to reconsider decisions holding death penalty constitutional because court was not convinced that previous decisions were wrong); *State* v. *Reynolds*, supra, 236–37 (same); *State* v. *Webb*, supra, 238 Conn. 401 (disagreeing with defendant's claim that "the death penalty statutes facially violate . . . article first, §§ 8 and 9, of the Connecticut constitution"); *State* v. *Ross*, supra, 251 (rejecting claim that death penalty is cruel and unusual in all circumstances).

In my view, it is appropriate for our capital punishment jurisprudence to take little notice of stare decisis. The stakes in capital cases are high—life or death—and it is unlikely that any justice of this court will be unsure of the constitutional status of the ultimate punishment, whether he or she believes that it is constitutional or unconstitutional. It seems that the best decision-making policy in this arena, in which our holdings are of great constitutional, moral, and practical magnitude, is to allow each justice to reach an independent judgment regarding the death penalty's constitutionality, while giving little weight to stare decisis. In the present case, however, the concurring justices heavily weigh stare decisis and thereby prevent each justice from reaching an independent judgment regarding the constitutionality of the death penalty.

lowing special justifications: "the advent of subsequent changes or development in the law that undermine[s] a decision's rationale . . . the need to bring [a decision] into agreement with experience and with facts newly ascertained . . . and a showing that a particular precedent has become a detriment to coherence and consistency in the law . . . ." (Internal quotation marks omitted.) The majority in *Payne*, however, noted that the "[c]ourt has never felt constrained to follow precedent" when the "governing decisions are unworkable or are *badly reasoned* . . . ." (Emphasis added; internal quotation marks omitted.) *Payne* v. *Tennessee*, supra, 827; see also *Seminole Tribe* v. *Florida*, 517 U.S. 44, 63, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) ("[The court has] always . . . treated stare decisis as a principle of policy . . . and not as an inexorable command . . . . [W]hen governing decisions are unworkable or are badly reasoned, [the] [c]ourt has never felt constrained to follow precedent. . . . [The court's] willingness to reconsider [its] earlier decisions has been particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible." [Citations omitted; internal quotation marks omitted.]). In demanding some " 'special justification' " to overrule *Santiago*, Chief Justice Rogers overlooks contrary statements by both the United States Supreme Court and this court. The United States Supreme Court has often stated that it is not bound to follow unworkable or *badly reasoned* precedents. See, e.g., *Vieth* v. *Jubelirer*, 541 U.S. 267, 306, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004); see also *Smith* v. *Allwright*, 321 U.S. 649, 665, 64 S. Ct. 757, 88 L. Ed. 987 (1944) ("when convinced of *former error*, [the] [c]ourt has never felt constrained to follow precedent" [emphasis added]). In addition, we have often stated that we are free to overrule decisions that are clearly wrong. See, e.g., *Conway* v. *Wilton*, 238 Conn. 653, 660, 680 A.2d 242 (1996)

("[one] well recognized exception to stare decisis under which a court will examine and overrule a prior decision . . . [is when that prior decision] is *clearly wrong*" [emphasis added; internal quotation marks omitted]); see also *State* v. *Salamon*, 287 Conn. 509, 514, 526–27, 542–44, 949 A.2d 1092 (2008) (ultimately rejecting more than thirty years of this court's jurisprudence on Connecticut's kidnapping laws because majority of court was convinced it was wrong).

There is little doubt that Chief Justice Rogers overlooks the clearly wrong exception in our and the United States Supreme Court's stare decisis jurisprudence because it would lead her to no other conclusion than that *Santiago* must be overruled. A cursory reading of Chief Justice Rogers' dissent in *Santiago* reveals beyond any doubt that she strongly feels that the majority's decision in *Santiago* is obviously wrong. In fact, her belief that *Santiago* was completely wrong was central to her dissent in that case and not merely an observation made in passing. She described the majority's analysis in *Santiago* as "fundamentally flawed"; *State* v. *Santiago*, supra, 318 Conn. 231 (*Rogers*, *C. J.*, dissenting); and "a house of cards, falling under the slightest breath of scrutiny." Id., 233 (*Rogers*, *C. J.*, dissenting). She further stated that it was "riddled with non sequiturs . . . [a]lthough to enumerate all of them would greatly and unnecessarily increase the length of [her dissent]." Id., 242 (*Rogers*, *C. J.*, dissenting). In *Santiago*, Chief Justice Rogers could uncover "no legitimate legal basis for finding the death penalty unconstitutional under either the federal or the state constitution"; id., 276 (*Rogers*, *C. J.*, dissenting); leading her to conclude that the majority in *Santiago* "improperly decided that the death penalty must be struck down because it offends the majority's subjective sense of morality." Id., 277 (*Rogers*, *C. J.*, dissenting).[2] In her

[2] See also *State* v. *Santiago*, supra, 318 Conn. 277–78 (*Rogers*, *C. J.*, dissenting) ("The majority's decision to strike down the death penalty in its

dissent to this court's denial of the state's motion for argument and reconsideration of *Santiago*, Chief Justice Rogers further demonstrated how flawed she thought the decision in *Santiago* is. She stated: "Indeed, if there was ever any doubt, it is now inescapably clear that the three main pillars of the majority's analysis have no foundation . . . ." *State* v. *Santiago*, 319 Conn. 912, 919, 124 A.3d 496 (2015) (*Rogers*, *C. J.*, dissenting). In addition, she wrote: "By denying the state's motion for argument and reconsideration, the majority merely reconfirms my belief that it has not engaged in an objective assessment of the constitutionality of the death penalty under our state constitution. Instead, the majority's conclusion that the death penalty is unconstitutional constitutes a judicial invalidation, without constitutional basis, of the political will of the people." (Internal quotation marks omitted.) Id., 920 (*Rogers*, *C. J.*, dissenting). In light of Chief Justice Rogers' repeated expressions regarding the fallacy of the majority opinion in *Santiago*, it is no wonder she now overlooks the clearly wrong exception to our stare decisis jurisprudence. She could not reasonably rely on stare decisis if she acknowledged that exception.

Chief Justice Rogers' action highlights a deeper problem with our case law on stare decisis. Our jurisprudence on stare decisis is constructed on contradictory principles inconsistently applied.[3] The concurring opin-

entirety is a judicial invalidation, without constitutional basis, of the political will of the people. It is this usurpation of the legislative power—not the death penalty—that violates the societal mores of this state as expressed in its fundamental law."); id., 341 (*Rogers*, *C. J.*, dissenting) ("the majority has addressed issues that the defendant did not raise, has relied on extra-record materials that the parties have not had an opportunity to review or to rebut, has failed to provide the state with an opportunity to respond to its arguments and conclusions and, finally, in reaching the decision that it has today, has unconstitutionally usurped the role of the legislature").

[3] This inconsistent application is best illustrated by a juxtaposition of cases in which this court overruled precedent with cases in which this court has upheld precedent. In many instances in which this court decides to overrule a previous case, it is not due to the clarity of the error in the

ions of Justices Palmer and Robinson in the present

previous case or because the most cogent reasons and inescapable logic required it. Instead, it is simply because a majority of the members of the panel reaches a different conclusion than the majority of the previous panel. See, e.g., *Campos* v. *Coleman*, 319 Conn. 36, 43, 123 A.3d 854 (2015) (overruling *Mendillo* v. *Board of Education*, 246 Conn. 456, 717 A.2d 1177 [1998], in recognizing new cause of action after reconsidering five policy factors court addressed in *Mendillo* and simply reaching different conclusion regarding weight and balance of those factors, and stating that it "now agree[s] with the concurring and dissenting opinion in *Mendillo* that the public policy factors favoring recognition of [the] cause of action . . . outweigh those factors disfavoring recognition"); *State* v. *Salamon*, 287 Conn. 509, 542, 949 A.2d 1092 (2008) (overruling more than thirty years of precedent interpreting Connecticut's kidnapping statutes, which had not required proof that defendant had restrained victim for longer period or to greater degree than necessary to commit other charged crimes without explaining why, or even if, that prior precedent was clearly wrong); *Craig* v. *Driscoll*, 262 Conn. 312, 328–30, 340, 813 A.2d 1003 (2003) (implicitly overruling more than one century of case law denying common-law negligence action against purveyor of alcoholic beverages for injuries caused by intoxicated patron without so much as stating that case law was wrong, justifying new cause of action on basis that it would further objectives of state's Dram Shop Act, which was enacted with knowledge that no common-law negligence action would lie for such injuries, and overruling *Quinnett* v. *Newman*, 213 Conn. 343, 568 A.2d 786 [1990], which concluded that legislature had occupied field when it enacted Dram Shop Act, but noting that such conclusion was inconsistent with court's holding to contrary in *Kowal* v. *Hofher*, 181 Conn. 355, 436 A.2d 1 [1980]). Contrarily, in instances in which we uphold precedent, we trumpet the clearly wrong and most cogent reasons and inescapable logic standards. See, e.g., *State* v. *Ray*, 290 Conn. 602, 614–16, 966 A.2d 148 (2009) (denying defendant's invitation to overrule prior cases concluding that, under General Statutes § 21a-278 [b], defendant must prove that he or she is drug dependent, noting that, "[i]f [it had been] writing on a blank slate, [it] might [have found] persuasive the defendant's argument[s]," and noting that defendant's arguments were supported by statute's text, chronology of statutes, and legislative history but were raised and rejected in *State* v. *Hart*, 221 Conn. 595, 605 A.2d 1366 [1992], and defendant had presented "no developments in the law, no potential for unconscionable results, no irreconcilable conflicts and no difficulties in applying [the court's] construction of § 21a-278 [b]" and therefore had not demonstrated that previous cases were clearly wrong or that most cogent reasons and inescapable logic required overruling of them). To further illustrate our inconsistent application of this doctrine, I point the reader to the countless cases in which we overrule precedent without even a mere mention of stare decisis. In fact, my research has uncovered at least twenty-six such cases since I have joined this court. See, e.g., *Grey* v. *Stamford Health System, Inc.*, 282

case suffer from similar shortcomings.[4] Both fail to recognize the presence of certain characteristics that generally result in our affording of less stare decisis effect to a previous decision. At the very least, Justices Palmer and Robinson should explain why these characteristics are not important for purposes of the present case. For example, *Santiago* announces a rule that applies in criminal cases. In such context, we have often stated that "[t]he arguments for adherence to precedent are least compelling . . . when the rule to be discarded may not be reasonably supposed to have determined the conduct of the litigants . . . ." (Internal quotation marks omitted.) *State* v. *Salamon*, supra, 287 Conn. 523. This is especially true in the present case because the rule in *Santiago* was announced after the defendant in the present case, Russell Peeler, engaged in criminal conduct and was tried, convicted, and sentenced to death. In addition, neither Justice Palmer nor Justice Robinson explains why *Santiago* should not receive less deference in light of the fact that it is a constitutional holding. See, e.g., *Seminole Tribe* v. *Florida*,

Conn. 745, 757, 924 A.2d 831 (2007); *Batte-Holmgren* v. *Commissioner of Public Health*, 281 Conn. 277, 289, 914 A.2d 996 (2007); *Kerrigan* v. *Commissioner of Public Health*, 279 Conn. 447, 455, 904 A.2d 137 (2006); *RAL Management, Inc.* v. *Valley View Associates*, 278 Conn. 672, 691, 899 A.2d 586 (2006); *Right* v. *Breen*, 277 Conn. 364, 377, 890 A.2d 1287 (2006); *Alexson* v. *Foss*, 276 Conn. 599, 608 n.8, 887 A.2d 872 (2006); *State* v. *Singleton*, 274 Conn. 426, 438, 876 A.2d 1 (2005); *State* v. *Cruz*, 269 Conn. 97, 106, 848 A.2d 445 (2004); *State* v. *Crawford*, 257 Conn. 769, 779–80, 778 A.2d 947 (2001), cert. denied, 534 U.S. 1138, 122 S. Ct. 1086, 151 L. Ed. 2d 985 (2002); see also footnote 30 of this opinion (citing cases spanning from 2007 to 2016). In highlighting the cases cited in this footnote and footnote 30 of this opinion, I do not mean to suggest that any of the overrulings were improper. I express no opinion in that regard. Instead, I use these cases simply to illustrate the point that our jurisprudence in this area is weak and inconsistent.

[4] I note that a plurality of justices, Justices Palmer, Eveleigh, and McDonald, need not resort to stare decisis because they continue to believe that *Santiago* is correct. Thus, any discussion of stare decisis as a rationale for affirming *Santiago* is unnecessary. Nonetheless, those justices do address stare decisis.

supra, 517 U.S. 63 ("[the court's] willingness to reconsider [its] earlier decisions has been particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible" [internal quotation marks omitted]); see also *State* v. *Lawrence*, 282 Conn. 141, 187, 920 A.2d 236 (2007) (*Katz*, *J.*, dissenting) ("[i]ndeed, it is well recognized that, in a case involv[ing] an interpretation of the [c]onstitution . . . claims of stare decisis are at their weakest . . . [when the court's] mistakes cannot be corrected by [the legislature]" [internal quotation marks omitted]).

The inconsistent application of stare decisis leaves this court open to criticism that it is employing that doctrine to reach ideologically driven or politically expedient results, a real threat to this court's integrity and institutional legitimacy.[5] Due to the underdevelopment of our stare decisis case law, that doctrine can be easily manipulated to reach a desired result. Thus, I take this opportunity to articulate a principled framework for the application of stare decisis.[6] Then, I will

[5] The United States Supreme Court has suffered such criticism at the hands of numerous academic writers precisely because it has inconsistently applied its stare decisis doctrine. See, e.g., C. Cooper, "Stare Decisis: Precedent and Principle in Constitutional Adjudication," 73 Cornell L. Rev. 401, 402 (1988) (characterizing stare decisis as "a doctrine of convenience, to both conservatives and liberals" and stating that "[i]ts friends, for the most part, are determined by the needs of the moment"); M. Paulsen, "Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?," 86 N.C. L. Rev. 1165, 1209 (2008) ("Notions of 'judicial integrity' would seem to require acknowledgment that stare decisis is a doctrine of convenience, endlessly pliable, followed only when desired, and almost always invoked as a makeweight. . . . [I]t [is] a 'Grand Hoax.' ").

[6] In the process of articulating an objective stare decisis framework, it will be necessary to overrule, at least in part, our current stare decisis jurisprudence. That irony is not lost on me. This overruling, however, is justified under the analysis I set forth subsequently in this opinion. Briefly, there is no doubt that our stare decisis doctrine has been relied on by individuals and the branches of government. See part I A 1 of this opinion (addressing reliance interests in stare decisis). In fact, each time an individ-

demonstrate why, in the present case, stare decisis should not be applied to this court's decision in *Santiago*.

Before I delve into the stare decisis framework and application, it is important that I address two preliminary matters. First, stare decisis has both a vertical and horizontal component. See, e.g., W. Consovoy, "The Rehnquist Court and the End of Constitutional Stare Decisis: *Casey*, *Dickerson* and the Consequences of Pragmatic Adjudication," 2002 Utah L. Rev. 53, 55. Vertical stare decisis refers to the principle that the decisions of this court are binding on the lower courts of this state. Id.; see also Black's Law Dictionary (10th Ed. 2014) p. 1626 (defining vertical stare decisis as "[t]he doctrine that a court must strictly follow the decisions handed down by higher courts within the same jurisdiction"). On the other hand, horizontal stare decisis addresses when this court should adhere to its own earlier decisions. See W. Consovoy, supra, 55; see also Black's Law Dictionary, supra, p. 1626 (defining horizontal stare decisis as "[t]he doctrine that court, esp[ecially] an appellate court, must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself"). The balance of this opinion concerns only horizontal stare decisis.

Second, in my view, stare decisis has two modes of operation. As a general matter, stare decisis, Latin for "to stand by things decided"; (internal quotation marks

ual or government agency, including a court, relies on a decision of this court, it is implicitly relying on stare decisis and the belief that we will not overrule such a decision. Those interests, however, are outweighed by the costs of adhering to our current jurisprudence on this point. First, and most important, our current doctrine is unworkable and unpredictable. See footnotes 3 and 30 of this opinion; see also part I A 2 c of this opinion (explaining cost of unworkability and uncertainty). Second, it is likely that only this court can bring order to the chaos in our stare decisis jurisprudence. See part I A 2 a of this opinion (discussing cost of error correction). Because the doctrine is, in essence, a principle of judicial decision-making, it seems unlikely that the General Assembly could legislate on the matter.

omitted) Black's Law Dictionary, supra, p. 1626; is a doctrine that directs a court to adhere to its earlier decisions or to the decisions of courts that are higher in a jurisdiction's judicial hierarchy. More specifically, however, the doctrine operates in two distinct manners. First, the doctrine functions automatically in most cases. I will call this mode of operation the rule of precedent. Under this aspect of stare decisis, the court assumes that its prior decisions are correct and relies on such decisions in deciding the case before the court. Under the rule of precedent, our previous decisions are the bricks of the foundation on which the pending case will be decided. Moreover, we rely on such decisions, in large part, simply because they were decided prior in time, that is, because they are precedent. Each time this court cites a previous case to support a proposition, the rule of precedent mode of operation of stare decisis is implicitly at work. Second, stare decisis operates more explicitly and directly when we reconsider a previous decision or line of decisions. In this context, the doctrine provides a framework for determining whether the court should continue to abide by a past decision, even though it may be wrong. It is this distinct mode of operation—more particularly, the framework it provides—that I will address in this opinion. With these preliminary ideas in mind, I now turn to articulating a principled doctrine of stare decisis.

A

A Principled Doctrine of Stare Decisis

As I just explained, stare decisis guides this court's determination of whether it should adhere to a previous erroneous decision. Implicit in this framing of stare decisis is that the court must decide whether the decision being reconsidered is wrong before it applies the doctrine of stare decisis.[7] In fact, and as I explain later

[7] I acknowledge that this court's past practice may not have required that we first decide whether the previous decision was correct. As I will explain in this part of my opinion, however, deciding the merits question as a

in this part of my opinion, the stare decisis analysis cannot be completely conducted unless the court has determined if, and more importantly, why, the previous decision is incorrect. Moreover, the court need not resort to the doctrine of stare decisis if it concludes that the previous decision is correct. See R. Fallon, "Stare Decisis and the Constitution: An Essay on Constitutional Methodology," 76 N.Y.U. L. Rev. 570, 570 (2001). In such circumstances, the court can simply affirm the case on the basis of its merits. Id.

I do not mean to suggest, however, that the wrongness of the previous decision is part of the stare decisis calculus. It is *not*. Indeed, it is fundamental that we avoid conflating the merits and stare decisis considerations. The reasons should be obvious. If a case could be overruled simply because a majority of justices believes it had reached the wrong conclusion, precedent would have no independent value, and stare decisis would be a hollow doctrine. See F. Schauer, "Precedent," 39 Stan. L. Rev. 571, 575–76 (1987) (argument based on precedent places value on past decision merely because it was decided in past, despite present belief that past decision was erroneous); see also *Hubbard* v. *United States*, 514 U.S. 695, 716, 115 S. Ct. 1754, 131 L. Ed. 2d 779 (1995) (Scalia, J., concurring in part and concurring in the judgment) (explaining that court must give reasons for ignoring stare decisis, "reasons that go beyond mere demonstration that the overruled [decision] was wrong . . . otherwise the doctrine would be no doctrine at all"). Moreover, the oft-repeated adage that, "in most matters it is more important that the applicable rule of law be settled than that it be settled right"; *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S. Ct. 443, 76 L. Ed. 815 (1932) (Brandeis, J., dissenting); would be empty of

threshold matter, and keeping such determination independent of the stare decisis analysis, provides a more objective, and therefore principled, approach to stare decisis.

any meaning. In addition to placing too little value on precedent, the wrongness of a previous decision should not factor into the stare decisis calculus because it is difficult to quantify or measure the degree of a particular decision's wrongness. See J. Fisch, "The Implications of Transition Theory for Stare Decisis," 13 J. Contemp. Legal Issues 93, 105 (2003). The ability to distinguish between the degrees of wrongness of previous cases becomes necessary, however, if wrongness is part of the stare decisis calculus. That is, if a lesser degree of error is tolerable but a higher degree of error is intolerable, some mechanism is needed to measure and distinguish degrees of error; but developing such a mechanism is prohibitively difficult. See id. Thus, when we reconsider a previous decision of this court, the stare decisis framework is applied only after we have determined that the previous decision is incorrect, irrespective of how wrong it is. Moreover, the merits determination is independent of, and has no impact on, the stare decisis analysis.[8]

Under this construction of stare decisis, the fact that Chief Justice Rogers and Justice Robinson rely on the doctrine of stare decisis to uphold *Santiago* suggests that they both believe that decision is wrong. Of course, there can be no question that Chief Justice Rogers believes the decision in *Santiago* is wrong. I am unsure whether Justice Robinson believes *Santiago* is wrong because he does not tell us, but, because he did not join Justice Palmer's concurrence and instead relies on stare decisis rather than the merits to uphold *Santiago*, I am left to conclude that he likely does believe that *Santiago* was incorrectly decided.[9]

[8] I recognize that, previously in this opinion, I criticized Chief Justice Rogers for overlooking the clearly wrong exception to our stare decisis jurisprudence. I did so, however, to point out this court's inconsistent application of stare decisis, not to suggest that a previous decision's wrongness should continue to be part of this court's stare decisis calculus.

[9] I acknowledge that Justice Robinson does not agree that the merits and stare decisis analyses are distinct and separate. Instead, he considers the

The doctrine of stare decisis naturally raises the following question: what justifies a doctrine that counsels this court to adhere to certain erroneous decisions? We have repeatedly stated that "[t]he doctrine is justified because it allows for predictability in the ordering of

degree of a precedent's wrongness to be a component in deciding whether a prior decision should be given stare decisis effect. He gives two reasons why he cannot agree with a stare decisis framework, such as the one presented in this opinion, that does not consider a precedent's relative degrees of wrongness. I will address each of these concerns in turn but first note that this court's decisions are either right or wrong. To what degree a decision is wrong does not, in the end, change the fact that it is wrong. This point is particularly important in constitutional adjudication, such as in the present case. Our constitution is the supreme law of this state, and all judges have sworn an oath to uphold it. If a case purporting to expound on the constitution is wrong as to its meaning or application, that case is in conflict with the constitution, and the mere fact that the case might be only slightly wrong, whatever that might mean, does not save it. This is why the degree to which a precedent is wrong is irrelevant to the stare decisis calculus.

With respect to Justice Robinson's concerns, he first states that the stare decisis analysis set forth in this opinion "appears to be receptive to overruling precedent in a way that undercuts the salutary features with respect to promoting stability in the law." Footnote 5 of Justice Robinson's concurring opinion. This point highlights a theoretical difference in our views. Justice Robinson, it appears, believes that stability in the law, in and of itself, has some normative value worthy of protection. Thus, if a prior decision of this court is only slightly wrong, he might sustain it for the sake of preserving stability. In my view, however, stability has no normative value independent of the protection of actual reliance interests, as I explain in part I A 1 of this opinion, and, therefore, it is the degree of reliance, not wrongness, that I consider to be important in a stare decisis analysis. See, e.g., *State* v. *Salamon*, supra, 287 Conn. 520 (noting that adherence to precedent and, thereby, in my view, stability, "is not an end in and of itself" [internal quotation marks omitted]). Insofar as Justice Robinson might be suggesting that stability in our case law is important because it engenders public reliance on our decisions, I submit that such an interest is equally protected by a stare decisis analysis focused on assessing the reliance a decision has garnered.

Second, Justice Robinson argues that my approach "overrule[s] certain well established principles of stare decisis, namely, that: (1) the prior decision must be shown to be '*clearly wrong*' with a 'clear showing that an established rule is incorrect and harmful' . . . and (2) 'a court should not overrule its earlier decisions unless the *most cogent* reasons and *inescapable logic* require it.' " (Citation omitted; emphasis in original.) Footnote 5 of Justice Robinson's concurring opinion. I have acknowledged this irony and

conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency." *Conway* v. *Wilton*, supra, 238 Conn. 658–59. Moreover, "it gives stability and continuity to our case law." Id., 658. Undoubtedly, this desire to achieve stability and consistency in our law is born from respect for the rule of law. See, e.g., *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 854, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) ("[i]ndeed, the very concept of the rule of law underlying [the United States] [c]onstitution requires such continuity over time that a respect for precedent is, by definition, indispensable"). If fidelity to or concern for the rule of law justifies the doctrine of stare decisis, at least in part, then it is important that we understand what is encompassed in that ideal. At its essence, the rule of law is the concept that governmental power is exercised under, and constrained by, a framework of laws, not individual preference or ideology. J. Waldron, "Stare Decisis and the Rule of Law: A Layered Approach," 111 Mich. L. Rev. 1, 3 (2012). As Professor Randy J. Kozel aptly observed, this idea can helpfully be understood by comparison to its converse, the rule of individuals; see R. Kozel, "Settled Versus Right: Constitutional Method and the Path of Precedent," 91 Tex. L. Rev. 1843, 1857 (2013); and Thomas Paine captured the concept when he proclaimed "that so far as we approve of monarchy, that in America the law is king. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other." T. Paine, Common Sense and Other Writings (2005) p. 44. Thus, adherence to the doctrine of stare decisis creates the appearance, and at times the reality, that this court is guided and constrained by the law—both written law, the constitu-

have explained why our stare decisis jurisprudence should be overruled. See footnote 6 of this opinion.

tion and statutes, and decisional law, the rules set forth in the decisions of this court—and not the whim of its individual members.

What should be obvious, however, is that application of stare decisis can come into tension with the rule of law as well. For example, if this court, upon later consideration, concludes that our earlier reading of a constitutional provision was incorrect but nonetheless decides, due to stare decisis, to follow that erroneous reading, we have entrenched the *rule of individuals*—those individuals who comprised this court at the time of the earlier decision—rather than the rule of law. See J. Waldron, supra, 111 Mich. L. Rev. 7. This tension is particularly problematic in the context of constitutional adjudication, in which the text of the constitution, and not the construction given to it by this court, is the binding and supreme law.[10] Id. After all, and in the words of Justice Douglas, a judge must remember, "above all else that it is the [c]onstitution [that] he swore to support and defend, not the gloss [that] his predecessors may have put on it." W. Douglas, "Stare Decisis," 49 Colum. L. Rev. 735, 736 (1949).

Perhaps because of this inherent and unavoidable tension, we have long held that stare decisis is not an absolute impediment to change in our case law. See, e.g., *White* v. *Burns*, 213 Conn. 307, 335, 567 A.2d 1195 (1990). Instead, we have called for a balancing of the benefits and burdens of stare decisis, noting we "should seriously consider whether the goals of stare decisis are outweighed, rather than dictated, by the prudential and pragmatic considerations that inform the doctrine to enforce a clearly erroneous decision." (Internal quotation marks omitted.) *State* v. *Salamon*, supra, 287

[10] This natural tension is less apparent and problematic when this court considers stare decisis in the context of the common law, because the source of the common law is precedent, and not a written constitution or code. Moreover, the common law has developed incrementally and over time.

Conn. 520; see also *State* v. *Miranda*, 274 Conn. 727, 733, 878 A.2d 1118 (2005) ("there are occasions when the goals of stare decisis are outweighed by the need to overturn a previous decision in the interest of reaching a just conclusion in a matter"). Unfortunately, we have never taken the opportunity to articulate the prudential and pragmatic considerations or to outline the benefits and burdens of stare decisis. It is this task to which I now turn.

The remainder of this part of the opinion articulates a principled balancing test this court should employ when determining whether to afford stare decisis effect to a previous decision that it is convinced is wrong or about which it has serious doubts. The balancing test I advocate includes four factors, one benefit and three costs. On the benefit side of the scale is the protection of reliance interests. The countervailing weights, that is, the costs of adhering to an erroneous judicial decision, are the (a) cost of error correction, (b) cost to the constitutional order, and (c) cost of unworkability or uncertainty. Each of these four factors will be discussed in this opinion. The analysis of each factor and the weighing of the benefit factor against the cost factors occur only after the court has concluded that the precedent in question is wrong.

1

Benefit of Stare Decisis—Protection of Reliance Interests

At first glance, it would appear that the benefits of stare decisis are stability and constancy in the law. See, e.g., *Conway* v. *Wilton*, supra, 238 Conn. 658 ("[t]his court has repeatedly acknowledged the significance of stare decisis to our system of jurisprudence because it gives stability and continuity to our case law"). We have acknowledged, however, that adherence to precedent, and thereby stability and constancy, "is not an end in

and of itself"; (internal quotation marks omitted) *State* v. *Salamon*, supra, 287 Conn. 520; and, therefore, there must be some other interest protected or policy served by stability and consistency that is the benefit of stare decisis.

Upon reviewing our cases and the academic literature on stare decisis, I conclude that the benefit served by stare decisis is the protection of reliance interests.[11] In

[11] Chief Justice Rogers and Justice Robinson both claim that maintenance of the court's legitimacy is also a benefit of stare decisis. Perhaps at a superficial level they are correct, but, upon deeper reflection, it becomes clear that the court's legitimacy comes from fidelity to the rule of law. See part II of this opinion. At times, the rule of law will counsel us to follow precedent, and, in such cases, adherence to the dictates of stare decisis does contribute to the court's institutional legitimacy. Other times, however, fidelity to the rule of law will require us to depart from erroneous judicial decisions. In such cases, after fair and careful consideration and impartial application of the applicable law, this court's legitimacy is not harmed simply because it has decided to depart from a previous erroneous ruling. Thus, for these reasons, I do not believe that this court's legitimacy is an appropriate factor to be considered in the stare decisis calculus. Moreover, if Chief Justice Rogers and Justice Robinson were right, we could rarely, if ever, overrule precedent. See part II of this opinion.

In the past, we have also cited the conservation of resources and judicial efficiency as justifications for stare decisis. See, e.g., *Conway* v. *Wilton*, supra, 238 Conn. 659. It seems to me that these benefits, however, are reasons to adhere to precedent in general and not justifications for the continued adherence to wrong decisions specifically. In the words of then Judge, later Justice, Benjamin N. Cardozo, "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." B. Cardozo, The Nature of the Judicial Process (1921) p. 149. Thus, following precedent conserves resources and fosters efficiency because it prevents the court from having to consider every possible issue, in every case. For example, if a criminal defendant claims that he has been tried and convicted in violation of the state constitution's prohibition against double jeopardy, he need not first argue that the due process clause of article first, § 8, of the state constitution prohibits double jeopardy. Instead, he may rely on our cases holding to that effect. See, e.g., *State* v. *Gonzalez*, 302 Conn. 287, 314–15, 25 A.3d 648 (2011). Thus, adherence to precedent creates efficiency and conserves resources by allowing litigants to rely and build on our past decisions in order to frame their arguments and focus our attention on the unique issues that arise in their case, rather than having

fact, two of the stare decisis justifications we have articulated in the past indirectly acknowledge the importance of protecting reliance interests. As I noted previously in this opinion, stare decisis is justified because "it allows for predictability in the ordering of conduct . . . [and] promotes the necessary perception that the law is relatively unchanging . . . ." *Conway* v. *Wilton*, supra, 238 Conn. 658–59. Thus, as long as the law is predictable and relatively constant, citizens can rely on it in planning their affairs.

We have also directly recognized the importance of reliance interests when deciding whether to apply the doctrine of stare decisis. For example, in cases involving tort or criminal law, we often remark that "[t]he arguments for adherence to precedent are least compelling . . . when the rule to be discarded may not be reasonably supposed to have determined the conduct of the litigants . . . ." (Internal quotation marks omitted.) *State* v. *Salamon*, supra, 287 Conn. 523; accord *O'Connor* v. *O'Connor*, 201 Conn. 632, 644, 519 A.2d 13 (1986). In *Salamon*, this court was confronted with whether an accused could be convicted under a kidnapping statute, General Statutes § 53a-94, even though the restraint involved in the kidnapping of the victim was incidental to the commission of another criminal offense; see *State* v. *Salamon*, supra, 513; a question we had answered in the affirmative more than thirty years earlier and reaffirmed on a number of occasions. See, e.g., *State* v. *Chetcuti*, 173 Conn. 165, 170, 377 A.2d 263 (1977), overruled by *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008). On that occasion, however, the court decided to reexamine, and ultimately to depart from, our settled construction of the kidnapping statute. See *State* v. *Salamon*, supra, 542. Justice Palmer, writing for a majority of the court in *Salamon*, reasoned that

to start from ground zero. When we decide to reexamine a previous decision, however, as we have in the present case, little efficiency results from adherence to stare decisis after briefs are filed and arguments are heard.

the court was justified in reexamining and abandoning *Chetcuti* and its progeny, in part, because there was no reason to believe that criminals had adjusted their conduct on the basis of the court's interpretation of criminal statutes. See id., 523 ("[p]ersons who engage in criminal misconduct . . . rarely if at all will . . . give thought to the question of what law would be applied to govern their conduct if they were to be apprehended for their violations" [internal quotation marks omitted]). The lack of reliance, Justice Palmer stated, weighed in favor of reconsidering the court's past cases. Id.

This court similarly cited reliance, or the lack thereof, in overruling prior precedent in *Conway* v. *Wilton*, supra, 238 Conn. 677. In *Conway*, we reconsidered whether municipalities and their employees were owners under the Connecticut Recreational Land Use Act (act), General Statutes (Rev. to 1995) § 52-557f et seq., and, therefore, entitled to immunity from liability for injuries occurring on land the municipality holds open to the public for recreational use. Id., 655, 657–58. Only four and one-half years earlier, we had determined that the statute's language was clear and unambiguous and held that municipalities were owners for purposes of the act. See *Manning* v. *Barenz*, 221 Conn. 256, 260, 603 A.2d 399 (1992), overruled by *Conway* v. *Wilton*, 238 Conn. 653, 655, 680 A.2d 242 (1996). Nevertheless, in *Conway*, we concluded that the act should not apply to municipal landowners and overruled *Manning*; *Conway* v. *Wilton*, supra, 655, 676; reasoning, in part, that it could not reasonably be supposed that the defendant municipality tailored its conduct due to our holding in *Manning*. Id., 677. Moreover, we noted that there was no evidence that municipalities across the state had decided to forgo liability insurance under the assumption that *Manning* shielded them from liability.[12] Id.

[12] *Salamon* and *Conway* are but two examples in which this court has decided to revisit and overrule its prior decisions because the discarded

Fostering and protecting reliance interests are important because, as Professor Jeremy Waldron has commented, creating a sense that the law can be relied on allows people to better exercise their liberty. J. Waldron, supra, 111 Mich. L. Rev. 9. Although legal constraint is inescapable in the modern era, freedom is nonetheless possible, Professor Waldron states, "if people know in advance how the law will operate, and how they must act to avoid its having a detrimental impact on their affairs." J. Waldron, "The Concept and the Rule of Law," 43 Ga. L. Rev. 1, 6 (2008). Stated differently, if the law is relatively unchanging and known, individuals can anticipate, when facing new situations, how they will be treated by the law and plan their conduct accordingly.[13]

cases had not conjured any meaningful reliance. Other examples abound. See, e.g., *Mueller* v. *Tepler*, 312 Conn. 631, 647, 655, 95 A.3d 1011 (2014) (in limiting rule in *Gurliacci* v. *Mayer*, 218 Conn. 531, 590 A.2d 914 [1991], Chief Justice Rogers reasoned "that allowing a plaintiff to maintain a loss of consortium claim under . . . circumstances [in which she was not married to the injured person because such marriage was prohibited by law would] not impair preexisting expectations or reliance interests in any serious way"); *State* v. *DeJesus*, 288 Conn. 418, 479 n.2, 953 A.2d 45 (2008) (*Palmer*, *J.*, concurring) (reasoning that lack of "any material reliance" on previous decision gives stare decisis little force); *Commission on Human Rights & Opportunities* v. *Board of Education*, 270 Conn. 665, 681, 855 A.2d 212 (2004) (overruling *Morel* v. *Commissioner of Public Health*, 262 Conn. 222, 811 A.2d 1256 [2002], and *Lisee* v. *Commission on Human Rights & Opportunities*, 258 Conn. 529, 782 A.2d 670 [2001], in part because neither case is type that engenders significant reliance interest); *Craig* v. *Driscoll*, 262 Conn. 312, 349–50, 813 A.2d 1003 (2003) (*Sullivan*, *C. J.*, dissenting) (stare decisis dictated that court not create common-law negligence action against purveyor of alcohol because legislature, in enacting Dram Shop Act, relied on long established common law rejecting such claim); *Ozyck* v. *D'Atri*, 206 Conn. 473, 484, 538 A.2d 697 (1988) (*Healey*, *J.*, concurring) (noting reason "stare decisis applies with special force to decisions affecting titles to land is the special reliance that such decisions mandate"); *O'Connor* v. *O'Connor*, supra, 201 Conn. 645 ("[o]ur refusal to adhere to . . . [prior precedent] . . . does not defeat any legitimate prelitigation expectations of the parties founded in reliance on our prior decisions").

[13] Commercial actors provide an informative example. Such actors routinely rely on judicial decisions when forming contracts or structuring corporate organizations. See, e.g., *Citizens United* v. *Federal Election Com-*

Given the importance of reliance interests, such interests must be a central focus of our stare decisis calculus. Thus, we need to develop a framework in which to directly analyze what, if any, reliance interests a particular court precedent has engendered. The starting point, of course, is identifying the forms of reliance interests that may exist. One commentator has aptly organized these interests into four categories: specific reliance; governmental reliance; court reliance; and societal reliance. See R. Kozel, "*Stare Decisis* as Judicial Doctrine," 67 Wash. & Lee L. Rev. 411, 452 (2010).

Specific reliance arises when an individual or group conforms its behavior to rules announced by the court. For example, the United States Supreme Court has long held that stare decisis has special force in cases involving contract or property law. See, e.g., *Payne* v. *Tennessee*, supra, 501 U.S. 828 ("[c]onsiderations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved"); see also T. Lee, "Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court," 52 Vand. L. Rev. 647, 691–98 (1999) (tracing property and contract distinction back to early nineteenth century United States Supreme Court cases). That court has explained that cases announcing property or contract rules are entitled to greater stare decisis weight because "[everyone] would suppose that after the decision of [the] court, in a matter of that kind,

mission, 558 U.S. 310, 365, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (reliance interests are important considerations in contract cases because parties act in conformance with existing legal rules when structuring transactions); *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, 504 U.S. 298, 317, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992) (declining to overrule previous rule because it "has engendered substantial reliance and has become part of the basic framework of a sizable industry"). If the law was in constant flux, however, commercial actors would be unable to rely on it, resulting in either a chilling of commercial activities or frequent upsetting of expectations, thereby causing a waste of resources.

[they] might safely enter into contracts, upon the faith that rights thus acquired would not be disturbed." *Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443, 458, 13 L. Ed. 1058 (1851). It has also been observed that upsetting cases that establish rules of property can be injurious to many titles because, in conveying property, individuals rely on existing property and contract rules. See, e.g., *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 486–87, 44 S. Ct. 621, 68 L. Ed. 1110 (1924); see also, e.g., *Ozyck* v. *D'Atri*, 206 Conn. 473, 484, 538 A.2d 697 (1988) (*Healey, J.*, concurring) (noting reason "stare decisis applies with special force to decisions affecting titles to land is the special reliance that such decisions mandate"). Conversely, we have opined that cases establishing rules of tort or criminal law receive diminished stare decisis weight, reasoning that such cases, particularly unintentional tort cases, are unlikely to influence individual behavior. See, e.g., *State* v. *Salamon*, supra, 287 Conn. 523 ("[p]ersons who engage in criminal misconduct, like persons who engage in tortious conduct, rarely if at all will . . . give thought to the question of what law would be applied to govern their conduct if they were to be apprehended for their violations" [internal quotation marks omitted]); *O'Connor* v. *O'Connor*, supra, 201 Conn. 645 (abandoning this court's categorical allegiance to place of injury test when determining what law should apply in tort cases, reasoning that departing from precedent would not upset any expectations of litigants because they will rarely "give thought to the question of what law would be applied to govern their conduct if it were to result in injury" [internal quotation marks omitted]).

The Executive and Legislative Branches, along with local governments, also rely on this court's decisions. In *Craig* v. *Driscoll*, 262 Conn. 312, 813 A.2d 1003 (2003), Chief Justice Sullivan invoked legislative reliance in his dissent, urging the court to adhere to the status quo.

See id., 348–50 (*Sullivan*, *C. J.*, dissenting). In *Craig*, this court created a common-law negligence action against a purveyor of alcohol who negligently serves alcohol to an intoxicated person who subsequently causes injuries to another person. See id., 314, 339–40. Prior to our holding in *Craig*, however, the general rule provided by the common law was that no such action shall lie against a purveyor of alcohol. See id., 322. Moreover, in *Quinnett* v. *Newman*, 213 Conn. 343, 344, 568 A.2d 786 (1990), overruled in part by *Craig* v. *Driscoll*, 262 Conn. 312, 813 A.2d 1003 (2003), this court held that Connecticut's Dram Shop Act occupied the field and therefore provided the injured person's sole remedy against a purveyor of alcohol for injuries caused by an intoxicated person. Nonetheless, the court in *Craig* decided to overrule *Quinnett* and the common law's long-standing general rule. *Craig* v. *Driscoll*, supra, 329. Chief Justice Sullivan contended, however, that the court should continue to decline to recognize the common-law cause of action and abide by the holding in *Quinnett*, reasoning that the legislature had enacted the Dram Shop Act in reliance on this court's common-law jurisprudence. Id., 344, 349–50 (*Sullivan*, *C. J.*, dissenting). In crafting a recovery scheme, the legislature was aware that no common-law cause of action ever had existed for plaintiffs to recover for the negligent service of alcohol, and, therefore, the Dram Shop Act reflected the legislature's judgment as to when such recovery should be allowed. See id., 349 (*Sullivan*, *C. J.*, dissenting). This court undermined the legislative scheme, however, by recognizing a common-law cause of action. See id. In such cases, according to Chief Justice Sullivan, the legislature's reliance on this court's prior precedent counseled strongly in favor of applying stare decisis.[14] Id., 349–50 (*Sullivan*, *C. J.*, dissenting).

[14] Chief Justice Sullivan's legislative reliance argument was vindicated approximately four months after our decision in *Craig* when the legislature passed No. 03-91 of the 2003 Public Acts (P.A. 03-91), abrogating our holding in *Craig*, at least with respect to intoxicated patrons who are twenty-one

The judiciary, including this court, also relies on our precedent. Under this form of reliance, our cases, as well as those of the Appellate Court and the trial courts, build on one another, resulting in the development of a doctrinal structure. Cf. R. Kozel, supra, 67 Wash. & Lee L. Rev. 459. For example, this court has established a state double jeopardy jurisprudence that is founded on our recognition in *Kohlfuss* v. *Warden*, 149 Conn. 692, 695, 183 A.2d 626, cert. denied, 371 U.S. 928, 83 S. Ct. 298, 9 L. Ed. 2d 235 (1962), that, despite the absence of a double jeopardy clause in the state constitution, the due process clause of article first, § 9, of the Connecticut constitution of 1818, which now appears in article first, § 8, of the Connecticut constitution of 1965, embraces a common-law rule against double jeopardy.

The final form of reliance is societal reliance. Unlike the three previous forms of reliance, societal reliance is concerned with perception, not behavior. A court's precedents, particularly its constitutional precedents, have the ability to shape a society's "perceptions about our country, our government, and our rights." R. Kozel, supra, 67 Wash. & Lee L. Rev. 460. The United States Supreme Court case of *Dickerson* v. *United States*, supra, 530 U.S. 428, is instructive. In *Dickerson*, the court considered, among other things, whether *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), should be overruled insofar as it requires the suppression of an arrestee's unwarned statements. See *Dickerson* v. *United States*, supra, 432, 443. Chief Justice William Rehnquist, writing for the court, declined to do so. Id., 443. Instead, he noted that the stare decisis principles weighed heavily against departing from *Miranda* because "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our

years of age or older. See P.A. 03-91, § 1, codified at General Statutes (Rev. to 2005) § 30-102.

national culture." Id. Undoubtedly, the focal point was not on individual arrestees and police officers and whether they order their behavior on the basis of *Miranda*. Instead, the court's attention was drawn to how *Miranda* warnings have pervaded American culture. See id. The court clarified this point in *Arizona* v. *Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), in referring to *Dickerson*: "In observing that *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture . . . the [c]ourt was referring not to police reliance on a rule requiring them to provide warnings but to the broader societal reliance on that individual right." (Citation omitted; internal quotation marks omitted.) Id., 349–50. As *Dickerson* suggests, the rules, principles, and rights established by court precedent can become part of the citizenry's consciousness. See R. Kozel, supra, 67 Wash. & Lee L. Rev. 462. Disturbing such precedents may affect our understanding of government and the relationship between citizens and the government. See id.

After the court has assessed and articulated the reliance interests of each category just described, it should turn to an examination of the disruption that would be caused if the precedent relied on is overruled. An assessment of the disruptive effect of overruling precedent considers the adjustment costs that would arise from the need to modify behavior tailored to conform with the precedent the court is contemplating overruling. See R. Kozel, "Precedent and Reliance," 62 Emory L.J. 1459, 1486 (2013). Questions the court might consider when evaluating disruption costs include whether the overruling would (1) create a need for significant restructuring of corporate organizations or commercial transactions, (2) call into question the enforceability of contracts or title to real property, (3) cause a significant reordering of individual conduct, including risk shifting

arrangements such as insurance policies, (4) upset a duly enacted legislative scheme and require the development of a new regulatory regime, (5) undermine the foundational decisions of a robust judicial doctrine, and (6) affect the broader, societal understanding of our constitutional system. Assessing the reliance engendered by a previous case and the costs that would arise from overruling such a case is the first step this court should undertake in balancing the benefit and costs of applying stare decisis to that case.

2

Costs of Stare Decisis

Once the benefit of applying stare decisis and adhering to precedent has been uncovered and quantified, the court must consider the burdens of applying stare decisis. Generally speaking, the burdens of applying stare decisis are the costs that result from perpetuating judicial error. As I noted previously in this opinion, there are three costs for the court to consider, and I will consider each in turn.

The first cost is the cost of error correction. In evaluating this cost, I consider whether the judicial error was constitutional or statutory in nature, because the cost of error will vary depending on its nature. Second, I evaluate the cost to the constitutional order. In assessing this cost, I ask if and how the error disrupts the constitutional order. Third, and finally, I consider the cost of the unworkability or uncertainty of the erroneous decision. Under this prong, I consider the difficulty of implementing or the uncertainty created by the erroneous decision.

a

Cost of Error Correction

The United States Supreme Court has long recognized that stare decisis has diminished force when the

precedent in question interprets or applies the constitution, as opposed to a statute. See, e.g., *Burnet* v. *Coronado Oil & Gas Co.*, supra, 285 U.S. 406–407 (Brandeis, J., dissenting) ("in cases involving the [f]ederal [c]onstitution . . . [the] [c]ourt has often overruled its earlier decisions"); see also *Agostini* v. *Felton*, 521 U.S. 203, 235, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (noting that stare decisis "is at its weakest" in constitutional adjudications). The court has justified this constitutional-statutory dichotomy by explaining the relative difficulty of correcting constitutional error as compared to correcting statutory error. See, e.g., *Agostini* v. *Felton*, supra, 235. When a court reaches an erroneous conclusion about the meaning or application of the constitution, such an error can be corrected only by judicial decision or constitutional amendment. See id. Conversely, when a court improperly interprets a statute, the legislature, through a simple majority, can correct such error. See *Burnet* v. *Coronado Oil & Gas Co.*, supra, 406 (Brandeis, J., dissenting). At least one justice of this court has, in the past, approved of this reasoning. See *State* v. *Lawrence*, supra, 282 Conn. 187 (*Katz*, *J.*, dissenting) ("it is well recognized that, in a case involv[ing] an interpretation of the [c]onstitution . . . claims of stare decisis are at their weakest . . . where [the court's] mistakes cannot be corrected by [the legislature]" [internal quotation marks omitted]). Although the court does not discuss it in these terms, it can fairly be said that the preservation of judicial constitutional error imposes greater costs than the preservation of statutory error due to the limited recourse of the people to correct such error. See K. Lash, "The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory," 89 Notre Dame L. Rev. 2189, 2195–97 (2014). Professor Kurt T. Lash has explained that, "[b]ecause remedying judicial errors involving constitutional interpretation remains beyond the ordinary reach of the democratic

process, this heightens the potential 'cost' of such errors." Id., 2196. The cost of correcting constitutional error in Connecticut is particularly significant due to our onerous constitutional amendment process, which allows Connecticut citizens to directly call for constitutional change only once every twenty years.[15]

b

Cost to the Constitutional Order

The preservation of judicial constitutional error may result in costs beyond those arising from the difficulty of correcting such an error. Such costs result when a

[15] The Connecticut constitution may be amended in one of two ways. First, any legislator may propose an amendment. See Conn. Const., amend. VI. The proposed amendment must be approved either by three fourths of the members of each house of the General Assembly or by at least a majority of the members of each house in two successive sessions of the General Assembly. Conn. Const., amend. VI. Once so adopted, the amendment is presented to the people for their approval at the next general election. Conn. Const., amend. VI. To become effective, it must receive the support of a majority of the electors voting on the amendment. Conn. Const., amend. VI.

Second, the constitution may be amended at a convention called for such purpose. See Conn. Const., art. XIII, § 1. A constitutional convention can be called by either the General Assembly or the people. See Conn. Const., art. XIII, §§ 1 and 2. The General Assembly may convene a constitutional convention by a two-thirds vote of the members of each house. Conn. Const., art. XIII, § 1. A convention can be convened in this way at any time not earlier than ten years since the convening of a prior convention. Conn. Const., art. XIII, § 1. Alternatively, every twenty years, the people are presented, at a general election, with the question of whether a constitutional convention shall be convened. See Conn. Const., art. XIII, § 2. If a majority of the electors voting on such question call for a convention, a convention will be convened. See Conn. Const., art. XIII, § 2. Any proposals from a constitutional convention to amend the constitution will become effective when approved by a majority of the people voting thereon. See Conn. Const., art. XIII, § 4.

As is evident from the foregoing discussion, amending the Connecticut constitution is no easy task. It requires supermajoritarian or successive majoritarian action by the General Assembly, accompanied by approval of a majority of the state's citizens. If the General Assembly does not propose constitutional amendments or call a constitutional convention for that purpose, the citizens have the opportunity to call such a convention and to propose amendments only once every twenty years.

judicial decision alters or disturbs the state polity. A brief digression into our constitutional history and theory is needed to better understand this harm.

A fundamental principle of American government and constitutions, including the constitutions of the many states, is popular sovereignty. See A. Amar, "The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem," 65 U. Colo. L. Rev. 749, 749–51 (1994). In essence, popular sovereignty is the theory that, in a free society, the people hold the power, and the government has only that power the people delegate to it. Id., 762–66 (explaining founding era understanding of republican government). The delegation of power occurs through the adoption of a constitution, which establishes the government and delegates the power among the branches. See id., 764. Through this delegation, the people may reserve certain rights to themselves, limiting the government's power to act in particular areas. Also central to popular sovereignty is the people's ability to alter or abolish the established government, a right they exclusively hold. See id., 749, 762–64. That is, only the people, and not the governmental institutions they have ordained, can alter the structure and powers of government. See id.

The colonial citizens of Connecticut were no strangers to the ideals embodied in popular sovereignty. In fact, evidence dating back to the 1630s demonstrates that the populace of the Connecticut colony adopted the popular sovereignty principles. See, e.g., W. Horton, "Law and Society in Far-Away Connecticut," 8 Conn. J. Intl. L. 547, 549–50 (1993). In a 1638 sermon, Puritan Reverend Thomas Hooker expounded on these principles. See H. Cohn, "Connecticut Constitutional History: 1636–1776," 64 Conn. B.J. 330, 332–33 (1990). Specifically, Reverend Hooker stressed that the civil power resided with the people, the people had the authority

to elect their political leaders, and the people established the limits within which their political leaders could act. See id. This sermon, it is argued by many, was the catalyst of the Fundamental Orders of 1639.[16] See, e.g., id., 333–34; see also W. Horton, The Connecticut State Constitution: A Reference Guide (2d Ed. 2012) p. 5. The Fundamental Orders contained "the germs of a great principle—the principle of self-government based on a limited measure of popular control." (Internal quotation marks omitted.) H. Cohn, supra, 335. This form of government and the popular sovereignty principles on which it was founded continued under the Charter of 1662,[17] after Connecticut's signing of the Declaration of Independence in 1776,[18] and are embod-

[16] I acknowledge that not all scholars and historians believe that Reverend Hooker's sermon was political in nature or that it inspired the Fundamental Orders of 1639. See M. Besso, "Thomas Hooker and His May 1638 Sermon," 10 Early Am. Stud. 194, 197, 207 (2012). There have been many interpretations of Reverend Hooker's sermon. Some historians have suggested it pronounced and advocated new principles for government, which later appeared in the Fundamental Orders. See id., 202–206. Others have argued that Reverend Hooker's ideas were not original but representative of local practices, and that the sermon's ultimate goal was to advocate for a form of civil government. See id., 206–207. Still other historians suggest that Reverend Hooker's sermon was not politically motivated at all but espoused a religious message. See id., 207. Whether Reverend Hooker's sermon was the catalyst for the Fundamental Orders, simply reflected popular understanding of government at the time, or was a religious message is unimportant for present purposes. What is important is that it embodied the spirit and beliefs of the time, and those beliefs embraced the principles of popular sovereignty.

[17] In 1662, the Fundamental Orders were supplanted by the Charter of 1662 granted by King Charles II, although the structure of government was left largely unchanged. See H. Cohn, supra, 64 Conn. B.J. 337–39. The Charter of 1662 remained in effect at least until the signing of the Declaration of Independence in 1776, except for a short, eighteen month period in the 1680s when Connecticut was annexed as part of the Dominion of New England. See id., 340–42; see also W. Horton, "Connecticut Constitutional History: 1776–1988," 64 Conn. B.J. 355, 357 (1990).

[18] In 1776, Connecticut, along with the other colonies, declared its independence from England. W. Horton, "Connecticut Constitutional History: 1776–1988," 64 Conn. B.J. 355, 357 (1990). Rather than abandoning the Charter of 1662 for a new constitution, however, the General Assembly simply removed any reference to the English monarch and declared that the government established by the Charter would remain the "civil constitution of this state . . . ." (Internal quotation marks omitted.) Id.

ied in the 1818 and 1965 state constitutions. Indeed, the principle is explicitly expressed in article first, § 2, of the Connecticut constitution: "All political power is inherent in the people, and all free governments are founded on their authority . . . ."

With this historical and theoretical background in mind, I return to discussing the costs inherent in follow-

In the years after declaring independence from England and leading up to the constitutional convention of 1818, whether Connecticut had a constitution became a contentious issue. See R. Purcell, Connecticut in Transition: 1775–1818 (1918) pp. 177–80, 243–46, 249–50, 259–61. The arguments that the state had no constitution sounded in theories of popular sovereignty. See id., pp. 177–80, 243–46. For example, if the people were the fountain of power, which was the belief in Connecticut, the Charter of 1662, it was argued, could not be the state's constitution because it was adopted by the General Assembly, not the people. See id., pp. 177–80. John Leland stated in 1802: "The people of Connecticut have never been asked, by those in authority, what form of government they would choose; nor in fact, whether they would have any form at all. For want of a specific constitution, the rulers run without bridle or bit, or anything to draw them up to the ringbolt." (Internal quotation marks omitted.) Id., p. 245. Moreover, the General Assembly could amend or revoke any law it wanted, including those set forth in the Charter. Id., pp. 255–56.

Likewise, those who argued that there was a constitution in Connecticut also relied on popular sovereignty. Judge Zephaniah Swift wrote: "Indeed no form of government could have been valid, unless approved, and adopted by the people in convention, or in some other way." 1 Z. Swift, A System of the Laws of the State of Connecticut (1795) p. 57. In fact, Judge Swift acknowledged that once Connecticut ratified the Declaration of Independence, thereby severing its ties with England, the people had the right to establish a new form of government, if they had seen fit. Id. Nonetheless, Judge Swift believed that the Charter of 1662 continued as the constitution of Connecticut. See id., pp. 56–57. He theorized that the real legitimacy of state government arose, not so much from the Charter, but from the people's assent to be governed as described by the Charter. See id., pp. 57–58. Even if the Charter was the sole basis of the government's power, Judge Swift argued, it still remained valid. See id., p. 58. Although the Charter, and the government it established, would have become invalid after Connecticut declared its independence from England, "the subsequent conduct of the people, in assenting to, approving of, and acquiescing in the acts of the legislature," established the validity of the Charter's continuation. Id.

Whether a constitution existed in Connecticut between 1776 and 1818 is unimportant for present purposes. What is important is that the debate on that issue illustrated the prominence of popular sovereignty in Connecticut in the years leading up to the 1818 constitutional convention. Moreover, this debate was the impetus, at least in part, for that convention.

ing erroneous constitutional decisions. In constitutional adjudication, we must take special care to ensure that we are enforcing the will of the people as expressed in their constitution. Because the ultimate power rests in the people and has been allocated to the separate branches of government, it is our duty to ensure that each branch, including the judiciary, does not usurp the power of its coequal branches. It is especially important that we take pains to restrain *this branch*, because a usurpation of legislative or executive power is, in effect, a usurpation of the people's power. It is true that the constitution entrenches certain fundamental principles, such as the freedom of the press, to immunize them from majoritarian control; however, most political and policy questions have been left to democratic rule, that is, majority control through the elected branches of government. In such cases, the people exercise their power and carry out or vindicate their will at the ballot box. Thus, it is essential that we not immunize from majoritarian control those questions that the people have left to the political process. To do so would be to misappropriate the power of the people.[19]

When we erroneously interpret or apply the constitution in ways that upset the governmental structure or intrude on the democratic process by frustrating the majoritarian government, we levy a cost on the constitutional order. See, e.g., K. Lash, "Originalism, Popular Sovereignty, and *Reverse* Stare Decisis," 93 Va. L. Rev. 1437, 1442 (2007). Professor Lash provides a taxonomy that is helpful in understanding and evaluating such errors and the costs they impose. See id., 1457–61. He organizes judicial error in constitutional cases into two

[19] Examples of what I view as this court's overreach abound. See, e.g., *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 244–45, 990 A.2d 206 (2010); *Office of the Governor* v. *Select Committee of Inquiry*, 271 Conn. 540, 544–45, 858 A.2d 709 (2004); *Sheff* v. *O'Neill*, 238 Conn. 1, 3–4, 678 A.2d 1267 (1996).

broad parameters, namely, intervention versus nonintervention, and immunity versus allocation. Id., 1454. He explains his classifications as follows: "First, courts may wrongfully intervene in the political process or they may wrongfully fail to intervene. Second, judicial error may involve a question of immunity (whether the government has any power over a given subject) or a question of allocation (which governmental institution has power over a given subject)." (Emphasis omitted.) Id. The degree of harm imposed on popular sovereignty and the constitutional order, of course, varies with the type of error; see id., 1457–61; and, as Professor Lash explains, depends on how intrusive the error is on the political process. See id., 1456–57.

I will begin with errors of allocation that, generally speaking, impose the smallest amount of harm on our constitutional order. See id., 1457–58. Allocation cases are those involving questions of separation of powers. See id., 1455. When the court erroneously allocates power to the wrong branch of government, the harm is minimal because, in most cases, the political process can correct such error. See id., 1457. For example, if we incorrectly determine that the Executive Branch has a power the constitution does not grant that branch, the people can reject such error by electing a governor who will not exercise the wrongly allocated power. Id., 1457–58. Allocation errors that appropriate power to the judiciary from the political branches are more problematic due to the court's insulation from the political process. See id., 1455, 1458. In such cases, the costs inflicted on the constitutional system are dependent on the ability of the other branches to correct such error. See id., 1458. For example, if the judicial usurpation of authority can be corrected through the General Assembly's ability to define the jurisdiction of the court, the costs are minimal. See id.; see also Conn. Const., art. V, § 1 ("[t]he powers and jurisdiction of these courts

shall be defined by law"). If, however, the political process cannot correct such error, the costs are significant and of the same kind as discussed in erroneous cases of immunity intervention, which I discuss subsequently in this opinion. See K. Lash, supra, 93 Va. L. Rev. 1458.

Cases of immunity involve the question of whether a particular issue is subject to political resolution; see id.; that is, whether the constitution has entrenched a principle, such as the freedom of the press, or left a question to the democratic process, such as general economic legislation. Immunity errors come in two forms, nonintervention and intervention. See id., 1459. A nonintervention error imposes fewer costs on the constitutional order than does an intervention error. See id. Erroneous nonintervention occurs when the court fails to intervene, thereby overlooking a principle entrenched in the constitution and leaving it to the political process. See id., 1454, 1459. Such error does undermine the legitimacy of our constitutional system by allowing a simple majority in the General Assembly to trump the entrenched will of the people; nonetheless, the costs generated by erroneous nonintervention are limited because the issue remains subject to majority control. See id., 1459. Thus, if the court fails to protect a right entrenched in the constitution, the people can mobilize and, through the General Assembly, act to protect such right through legislation. See id.

On the other hand, intervention error occurs when the court entrenches a principle in the constitution that, under a proper reading of the document, has no constitutional status. See id., 1455. Such error inflicts the greatest costs on popular sovereignty and the constitutional order because it often removes from the political process an issue that the constitution left to that process. See id., 1460–61. Worse yet, the people have only one avenue to correct such error, namely, constitutional amendment, which requires either supermajoritarian

action by the General Assembly or awaiting the electorate's next opportunity to call a constitutional convention.[20] See footnote 15 of this opinion.

In sum, judicial error in constitutional cases can frustrate the ideals of popular sovereignty and majority rule, thereby disturbing the constitutional order. The costs imposed by such a disruption should factor into this court's stare decisis calculus. Cases that involve the greatest costs are those of erroneous immunity intervention and erroneous usurpation of power by the court; in those cases, such usurpation cannot be corrected or mitigated by the political branches.[21]

c

Cost of Unworkability or Uncertainty

Perpetuating unworkable rules or uncertain judicial decisions also imposes costs. This principle naturally

[20] *Lochner* v. *New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), provides an instructive example of intervention error. In that case, the United States Supreme Court struck down a state labor law; see id., 57–58, 64; holding, among other things, that the right of an employee and an employer to enter into an employment contract was protected by the due process clause of the fourteenth amendment. Id., 53 ("[t]he right to purchase or to sell labor is part of the liberty protected by [the fourteenth] amendment [to the United States constitution], unless there are circumstances [that] exclude [that] right"). If, upon reconsideration, the United States Supreme Court had continued to adhere to the holding in *Lochner* and its progeny, the result would have been to immunize certain labor policies from majoritarian and legislative consideration. See *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, supra, 505 U.S. 861 (observing that overruling of *Adkins* v. *Children's Hospital*, 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785 [1923], by *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 400, 57 S. Ct. 578, 81 L. Ed. 703 [1937], "signaled the demise of *Lochner*").

[21] In fact, Professor Lash argues that such cases should receive reverse stare decisis treatment, that is, the presumption should be for overruling, not sustaining, such cases. See K. Lash, supra, 93 Va. L. Rev. 1442, 1458, 1461. We need not go so far as to declare that such cases are presumptively invalid; it is sufficient to say that, in order to sustain such cases under the doctrine of stare decisis, the reliance interests to be protected must be extremely significant.

flows from the justifications for stare decisis. That is, if stare decisis is a defensible doctrine because it creates predictability and stability in the law; see, e.g., *Conway* v. *Wilton*, supra, 238 Conn. 658; then decisions that create uncertainty "undermine, rather than promote, the goals that stare decisis is meant to serve." *Johnson* v. *United States*, U.S. , 135 S. Ct. 2551, 2563, 192 L. Ed. 2d 569 (2015). It would be ironic to adhere to an uncertain precedent under the guise of stare decisis. Often, this principle arises when the court finds a previously announced rule to be unworkable or when it discovers that a particular precedent has come into conflict with another case or line of cases.[22] There is no reason, however, why the same principle should not apply when a case, despite not being unworkable or creating conflict in court jurisprudence, creates uncertainty. See, e.g., *Citizens United* v. *Federal Election Commission*, 558 U.S. 310, 379, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (Roberts, C. J., concurring) ("[I]f adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its stare decisis effect is also diminished. This can happen in a number of circumstances, such as when the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases . . . and when the precedent's underlying reasoning has become so discredited that the [c]ourt cannot keep the precedent alive

[22] See, e.g., *Montejo* v. *Louisiana*, 556 U.S. 778, 792, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009) ("the fact that a decision has proved unworkable is a traditional ground for overruling it" [internal quotation marks omitted]); *Lawrence* v. *Texas*, 539 U.S. 558, 577, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (noting that *Bowers* v. *Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 [1986], can be overruled because it creates uncertainty insofar as its central holding was inconsistent with other United States Supreme Court precedent); *Helvering* v. *Hallock*, 309 U.S. 106, 119, 60 S. Ct. 444, 84 L. Ed. 604 (1940) ("stare decisis is . . . not a mechanical formula of adherence to the latest decision . . . when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience").

without jury-rigging new and different justifications to shore up the original mistake."); *United States* v. *Dixon*, 509 U.S. 688, 711–12, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993) (overruling earlier case in part because it created confusion).

In summary, under this framework, the court weighs the benefit and costs of adhering to prior cases. The court would employ a four step test in assessing whether to adhere to stare decisis. In step one, the court will consider the merits of the case under reconsideration. If it concludes that the previous case is correct, it will reaffirm that decision on the merits, and the inquiry will end. On the other hand, if the court should conclude that the previous decision is wrong, it should continue on to steps two through four. In step two, the court will analyze the benefit of adhering to the precedent case. This analysis involves the evaluation of one factor, namely, the reliance interests. In assessing whether the case being reconsidered has engendered any reliance, the court must methodically work through each category of reliance interests—specific, governmental, court, and societal—and catalog how each group has ordered its behavior on the basis of the erroneous decision. It must further assess what disruption would result if the case is overruled. Next, in step three, the court would evaluate the costs of adhering to the erroneous decision, which requires the evaluation of three factors. Those factors include the (a) costs of correcting the judicial error, (b) costs the error imposes on the constitutional order, and (c) costs of unworkability or uncertainty. After the costs have been identified and evaluated, the court will move to the fourth and final step: the court would compare the benefit to the costs of adhering to the decision. If the reliance interests and the disruption costs that would arise from overruling the decision outweigh the costs of perpetuating judicial error, the previous decision will be afforded

stare decisis effect, and the court will be bound to follow it. If, however, the costs of preserving judicial error outweigh any reliance interests, the decision under reconsideration will be afforded no stare decisis effect, and it should be overruled.

B

Application of Principled Doctrine of Stare Decisis to *Santiago*

The court's adoption of the four step test outlined in part I A of this opinion would result in a more consistent and principled application of the doctrine of stare decisis. In fact, applying this approach would shield this court from the appearance that the doctrine of stare decisis is used as a tool to reach a preferred result. I will now apply this framework in the present case to consider whether stare decisis should be applied to our decision in *Santiago*.

1

Step One: The Merits of *Santiago*

As I previously observed, it would serve no purpose to lengthen this dissent with further explanation as to why *Santiago* was wrongly decided. Instead, it suffices to say that, for the reasons Chief Justice Rogers, Justice Espinosa, and I provided in our dissenting opinions in *Santiago*, that decision was wrong then and continues to be wrong now.

2

Step Two: The Lack of Reliance *Santiago* Has Engendered

In part I A of this opinion, I explained that reliance interests can generally be placed into four categories: specific reliance; governmental reliance; court reliance;

and societal reliance. I will consider each category in turn.

It cannot genuinely be argued that *Santiago* has garnered any specific reliance. The individuals currently on death row have not acted in reliance on our holding in *Santiago*. Indeed, the conduct that resulted in their convictions and death sentences occurred long before we issued our decision in *Santiago*. Moreover, we have often stated that stare decisis has less force in criminal cases precisely because those cases do not beget reliance interests. E.g., *State* v. *Salamon*, supra, 287 Conn. 523. For example, Justice Palmer wrote for the majority in *Salamon*: "Persons who engage in criminal misconduct . . . rarely if at all will . . . give thought to the question of what law would be applied to govern their conduct if they were to be apprehended for their violations." (Internal quotation marks omitted.) Id. Some might suggest that there has been specific reliance on *Santiago* because certain death row inmates have filed motions to vacate their death sentences. That argument misses the mark. The relevant conduct, the commission of a capital crime, was committed before this court decided *Santiago*. That certain inmates are now trying to capitalize on this court's error is simply opportunistic.

There similarly has been no governmental or court reliance. Neither the Legislative Branch nor the Executive Branch has taken action in the wake of and in reliance on *Santiago*. The legislature has not enacted a new punishment scheme for capital crimes, and the governor has not taken steps to implement a new punishment scheme. Cf. *Craig* v. *Driscoll*, supra, 262 Conn. 349 (*Sullivan*, *C. J.*, dissenting) ("the doctrine of stare decisis has particular force in this case because of the long-standing nature of the common law [on] which our legislature has relied in crafting the remedies available to parties such as the plaintiffs"). Moreover, neither

this court nor any other court in this state has relied on *Santiago* to decide cases. Significantly, a judicial doctrine has not been built on the foundation of *Santiago*. In fact, courts that have been asked to apply the central holding of *Santiago* have elected to stay the proceedings and to await our decision in the present case.

Finally, *Santiago* has not amassed any societal reliance. As I discussed previously, societal reliance refers to the people's perception of our constitutional system and the relationship between themselves and government. The people of Connecticut have hardly had time to absorb our decision in *Santiago*, and, thus, there has been little time for that decision to become part of Connecticut's consciousness. *Santiago* simply has not garnered, at least presently, the same level of social and historical significance as the United States Supreme Court's decisions in, for example, *Brown* v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), or *Miranda* v. *Arizona*, supra, 384 U.S. 436, and it would be disingenuous to suggest otherwise. The principles expounded on in *Brown* have become part and parcel of who we are as a society, and *Miranda* is central to the people's understanding of their relationship with law enforcement. It cannot seriously be suggested that *Santiago* has reached the same, or even similar, status. Whether the people of this state and country believe that capital punishment is, in all cases and under all circumstances, unconstitutional is far from a foregone conclusion, and, therefore, *Santiago* does not represent a foundational legal norm.

Clearly, there is not a scintilla of reliance on *Santiago*. Neither society nor the government has changed its behavior to comport with that decision. Moreover, *Santiago* is far from being part of our state consciousness. Even if it could be argued that there has been some reliance on *Santiago*, such reliance would surely be

unreasonable. This court's decision in *Santiago* was released August 25, 2015, at a time when the present appeal was pending. On September 4, 2015, the state filed a motion for argument and reconsideration of our decision in *Santiago*, a motion we denied on October 7, 2015. See *State* v. *Santiago*, supra, 319 Conn. 912. *On that very day*, we also ordered supplemental briefing in this case, addressing, among other things, the effect of the judgment in *Santiago*. Thus, in an apparent moment of double speak, this court declined to reconsider *Santiago* and called its legitimacy into question. What's more, the judgment in *Santiago* was not even final when we ordered supplemental briefing in this case. See *State* v. *Santiago*, 319 Conn. 935, 125 A.3d 520 (2015) (denying state's motion for stay of judgment on October 30, 2015).

In light of the complete lack of reliance on *Santiago*, there is no need to consider the disruptive effect that overruling *Santiago* would have. Obviously, if there has been no reliance, there are no reliance interests to disrupt.

3

Step Three: Assessing the Costs of Perpetuating *Santiago*'s Error

Because there has not been even the slightest bit of reliance on *Santiago*, only the most trivial of costs will be necessary to tip the scale in favor of not affording stare decisis effect to *Santiago*. The costs of preserving *Santiago*, however, are stifling, not trivial. I will address each of the three costs outlined previously in this opinion. Those costs are the costs of error correction, costs to the constitutional order, and costs of unworkability or uncertainty.

a

The Uncertainty of *Santiago*

For the sake of brevity and clarity, I will first consider the creation of uncertainty. There is a great irony in

arguing that the dictates of stare decisis would have this court stand by a previous case that creates uncertainty. *Santiago* is such a case. I do not suggest—nor could I—that *Santiago* announced an unclear rule of law or a test that will be unworkable in future cases. Nonetheless, the majority opinion in that case created an immense ambiguity, an ambiguity that has left a dark cloud of uncertainty over the powers of government.

The uncertainty arises from the majority's mode of analysis. In order to determine that the death penalty is now offensive to our state constitution, the majority employed a hybrid analysis of its own creation. As I noted in my dissent in *Santiago*, the majority's approach in that case fell somewhere between a per se analysis and a statutory analysis; *State* v. *Santiago*, supra, 318 Conn. 342 (*Zarella, J.*, dissenting); and, under that approach, the majority reached the amorphous conclusion that, in light of the legislature's adoption of P.A. 12-5, the death penalty no longer comports with the state's contemporary standards of decency, no longer serves any legitimate penological purposes, and, therefore, is prohibited by the state constitution. See id., 9.

I admit that parsing the 140 page majority opinion in *Santiago* can be a difficult and, at times, perplexing task. After giving that decision careful, thorough, and thoughtful consideration, however, I concluded that the majority had not determined that the death penalty is per se unconstitutional, and the majority in *Santiago* had not disputed that conclusion. See id., 341–42 (*Zarella*, *J.*, dissenting). Although the majority in *Santiago* never explicitly states that its holding was not per se, it seemed to suggest as much. For example, in a footnote, the majority acknowledged that "society's standards of decency need not always evolve in the same direction. We express no opinion as to the circumstances under which a reviewing court might conclude, on the basis of a revision to our state's capital felony

statutes or other change in these indicia, that capital punishment again comports with Connecticut's standards of decency and, therefore, passes constitutional muster." Id., 86 n.88. A logical reading of this passage suggests that some action short of a constitutional amendment, such as a repeal of P.A. 12-5, would suffice to render the death penalty constitutional in Connecticut. In addition, the majority concluded its decision by holding "that capital punishment, *as currently applied*, violates the constitution of Connecticut." (Emphasis added.) Id., 140. A plurality of justices in the present case, however, has caused me to query whether my reading of the majority opinion in *Santiago* was incorrect. Justice Palmer, the author of the majority opinion in *Santiago*, and two other members of the majority in *Santiago* now maintain that, "[i]f the people of Connecticut believe that we have misperceived the scope of [the state] constitution, it now falls on them to amend it." Text accompanying footnote 21 of Justice Palmer's concurring opinion. If, however, the holding in *Santiago* was not per se, why is a constitutional amendment necessary to reinstate capital punishment? The plurality notes that the issue of whether capital punishment may be reinstated in this state by means other than a constitutional amendment is not before us in this case; see footnote 21 of Justice Palmer's concurring opinion; and, therefore, the plurality expresses no opinion on that question. See id. The plurality simply creates further confusion regarding the ultimate holding in *Santiago*.

It is now obvious that *Santiago* has created a great degree of uncertainty, and continuing that uncertainty will impose costs. It is true that this court's decisions will often generate some amount of uncertainty. That uncertainty, however, concerns whether the law announced in a case will apply under different factual circumstances. For example, in *Campos* v. *Coleman*, 319 Conn. 36, 57, 123 A.3d 854 (2015), this court recog-

nized a cause of action for loss of parental consortium. The court did not decide, however, the outer limits of that claim. See, e.g., id., 46. We did not determine whether a stepchild, who has not been legally adopted by his or her stepparent, would be permitted to bring such a claim if the stepparent is injured. Id. In addition, we left open whether the cause of action extends to parental type relationships in which the parental figure is not a biological or legal parent of the child. Id. Thus, our decision in *Campos* created some degree of uncertainty as to the extent of liability in certain tort cases. This type of uncertainty, however, is to be expected, and is tolerable, particularly in common-law adjudication, where incremental development of the law is preferred. The uncertainty created by *Santiago*, and evinced by Justice Palmer's concurring opinion in the present case, however, is of a different kind and degree. Due to the meandering reasoning in *Santiago*, members of the legislature, as well as this court, are uncertain of what, if any, authority the legislature has to enact a capital felony statutory scheme in the future. This uncertainty is intolerable and imposes significant costs on our system of government.

b

Santiago's Tax on Our Constitutional Order

Closely related to the cost of this uncertainty are the costs *Santiago* places on our constitutional order. When a judicial decision erroneously immunizes an issue from majoritarian control and mistakenly allocates power to the judiciary, when such allocation cannot be corrected by majoritarian action, it taxes our constitutional order greatly. See K. Lash, supra, 93 Va. L. Rev. 1458, 1460–61.

I will first address *Santiago*'s specious immunization of capital punishment from majoritarian control. I will explain how the court has created a constitutional right

when none existed. It will then be necessary, due to the contorted reasoning of the majority in *Santiago*, to consider whether the issue of capital punishment has been removed from majoritarian control.

In concluding that the death penalty is unconstitutionally cruel and unusual, the majority in *Santiago* created a right that is not grounded in Connecticut's constitution. As I explained in my dissent in *Santiago*, a cursory textual analysis of the constitution reveals numerous references to capital punishment and capital offenses.[23] *State* v. *Santiago*, supra, 318 Conn. 353–55 (*Zarella*, *J.*, dissenting). The entrenchment of these references in our state constitution suggests that the people of Connecticut have conferred on their government the power to impose the ultimate punishment. More specifically, they bestowed that authority on the legislature. See, e.g., *State* v. *Darden*, 171 Conn. 677, 679–80, 372 A.2d 99 (1976) ("the constitution assigns to the legislature the power to enact laws defining crimes and fixing the degree and method of punishment . . . within the limits and according to the methods therein provided"). The majority in *Santiago* swept away those textual references by suggesting they were "incidental" and "merely acknowledge that the penalty was in use at the time of drafting . . . [and] do not forever enshrine the death penalty's constitutional status as standards of decency continue to evolve . . . ." *State* v.

[23] See Conn. Const., art. I, § 8 ("[n]o person shall be . . . deprived of *life*, liberty or property without due process of law" [emphasis added]); Conn. Const., amend. IV ("no person shall, for a *capital offense*, be tried by a jury of less than twelve jurors without his consent" [emphasis added]); Conn. Const., amend. XVII ("[i]n all criminal prosecutions, the accused shall have a right . . . to be released on bail upon sufficient security, except in *capital offenses*, where the proof is evident or the presumption great" [emphasis added]); Conn. Const., amend. XVII ("[n]o person shall be held to answer for any crime, *punishable by death* or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law" [emphasis added]).

Santiago, supra, 131. In so doing, however, the majority ignored two important events. First, the delegates to the 1965 constitutional convention expressly rejected a proposed amendment that would have made capital punishment unconstitutional. Journal of the Constitutional Convention of Connecticut 1965, p. 111. Second, in 1972, article first, § 19, of the Connecticut constitution was amended to provide that "no person shall, *for a capital offense*, be tried by a jury of less than twelve jurors without his consent." (Emphasis added.) Conn. Const., amend. IV. In light of these events, it cannot be said that the constitutional references to capital punishment are merely incidental. Together, the textual references to capital punishment and capital crimes, and the rejection of the proposed abolition of the death penalty at the 1965 constitutional convention, entrench capital punishment in our state constitution, thereby requiring a constitutional amendment to make the death penalty unconstitutional under all circumstances.[24] Moreover, by embedding the death penalty in the state constitution, the people expressed their opinion that the punishment is not, and cannot be, per se unconstitutional.

Although it is clear that *Santiago* created a right not provided by the constitution, it is less clear whether it immunizes capital punishment from majoritarian control. As I discussed previously in this part of my opinion, the precise holding of *Santiago* is uncertain. In that case, the majority seemed to suggest that whether the death penalty could be imposed remained subject to majoritarian decision. See, e.g., *State* v. *Santiago*, supra, 318 Conn. 86 n.88 ("[w]e express no opinion as to the circumstances under which a reviewing court might conclude . . . that capital punishment again comports

[24] I note my belief that the textual references alone are sufficient to secure capital punishment's constitutional status. The events of the 1965 constitutional convention simply make me more resolute in my conclusion.

with Connecticut's standards of decency"). In the present case, however, Justice Palmer, along with two other justices, suggests that, under *Santiago*, the death penalty may be per se unconstitutional and that perhaps capital punishment may be reinstated through constitutional amendment only. See text accompanying footnote 21 of Justice Palmer's concurring opinion. If this latter reading is correct, preserving the error in *Santiago* will impose significant costs on the constitutional order because it has removed from the political process a matter that the constitution has expressly left to that process. If, on the other hand, the former reading is correct, and capital punishment can be reinstated by the legislature—for example, by repealing P.A. 12-5—then the costs of this court's error, although still existent, are less significant. This uncertainty surely has a chilling effect on the legislature. Even if the legislature has the authority to reinstate the death penalty, it may be reluctant to do so for fear that such action is unconstitutional under the majority's reasoning in *Santiago*. This chilling effect increases the costs that arise from continued adherence to *Santiago*.

Regardless of whether *Santiago* immunizes capital punishment from majoritarian control, it does impose allocation costs on the constitutional order. Moreover, the allocation error cannot be corrected through majoritarian action and, therefore, levies substantial costs on the constitutional order. As I just explained, the people have enshrined capital punishment with constitutional status. Furthermore, defining crime and fixing punishment are part of the legislative, not judicial, power. See, e.g., *State* v. *Darden*, supra, 171 Conn. 679–80. Thus, by conferring the legislative power on the General Assembly, the people determined that it is that body who shall define capital crimes. See Conn. Const., art. III, § 1 ("[t]he legislative power of this state shall be vested in . . . the general assembly"). It is true that

the General Assembly, when defining crime and fixing punishment, must act within the limits of the constitution; *State* v. *Darden*, supra, 679–80; and one limit the constitution places on the legislature's power to define crime and to fix punishment is the prohibition on cruel and unusual punishment. See, e.g., *State* v. *Ross*, 230 Conn. 183, 246, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995). In sum, the people have determined that capital punishment is, at least in certain circumstances, constitutional. They expressed such belief in our constitution. Moreover, the people granted the General Assembly the power to define capital crimes. At the same time, however, the people implicitly prohibited the imposition of cruel and unusual punishment, a prohibition enforced by the Judicial Branch. Even if it is assumed, for the sake of argument, that the constitutional provision generally prohibiting cruel and unusual punishment is inconsistent with the enshrining of capital punishment with constitutional status, it is rudimentary that we read conflicting provisions of statutes and of the constitution, so far as is possible, to be consistent and to give effect to every word and provision thereof. Thus, the most probable reading of these seemingly conflicting commands is that the people determined that capital punishment is a constitutional punishment for the most heinous of crimes. In so doing, they determined that there are particular situations in which the death penalty is a constitutional punishment. Thus, under our current constitution, the death penalty cannot be held unconstitutional in all cases and under all circumstances. In addition, the people left for the legislature the decision of which crimes shall be capital crimes. Of course, in the exercise of that power, the legislature could determine that it will not impose the death penalty as a punishment for any crime. Moreover, the legislature's power is checked by our duty to enforce

the prohibition against cruel and unusual punishment. In this context, our duty is limited to determinations of whether the death penalty is unconstitutional as applied to certain crimes or certain persons, or as carried out, and not whether the death penalty, in and of itself, is cruel and unusual. In *Santiago*, we exceeded the outer bounds of this duty by determining that the death penalty no longer comports with the state's contemporary standards of decency and by concluding that it thus can never be imposed. Our decision was not limited to an as applied determination. Thus, we have usurped the power of the legislature to define capital crimes and to fix the appropriate punishment.

To compound our affront to the legislature's power, this court's power grab cannot be corrected through majoritarian action. Even if it is assumed that the legislature could reinstate the death penalty by, for example, repealing P.A. 12-5, it appears that the ultimate decision regarding whether the constitution permits the imposition of capital punishment rests with this court. The majority in *Santiago* stated: "We express no opinion as to the circumstances under which *a reviewing court* might conclude . . . that capital punishment again comports with Connecticut's standards of decency and, therefore, passes constitutional muster." (Emphasis added.) *State* v. *Santiago*, supra, 318 Conn. 86 n.88. And, in the present case, a plurality of justices suggests that reinstating the death penalty may require a constitutional amendment, but it reserves that question for another day. See footnote 21 and accompanying text of Justice Palmer's concurring opinion. The majority in *Santiago* contorted our constitutional order by concluding that this court will decide when the death penalty, in and of itself, is again constitutional. See *State* v. *Santiago*, supra, 86 n.88. As I have explained, our constitution enshrined capital punishment with constitutional status and left to the legislature decisions

regarding if and when it should be imposed, subject to limited, as applied, review by this court. Now, however, the legislature cannot reinstate a capital punishment scheme *at all* without the approval of this court or perhaps, as the plurality states, only through a constitutional amendment. This is an intolerable seizure of legislative power by this court, an error that apparently can be corrected through constitutional amendment only. Thus, the only reasonable conclusion I can reach is that continuing to follow the erroneous decision in *Santiago* will levy great costs on the constitutional order of Connecticut because, in that decision, this court altered the balance of power created by the people.

c

The Costs of Correcting *Santiago* Are Likely Significant

Finally, I turn to the difficulty of error correction and the costs it imposes. Erroneous constitutional decisions create greater costs than erroneous statutory or common-law decisions because of the difficulty in correcting such error. See, e.g., *Agostini* v. *Felton*, supra, 521 U.S. 235 (stare decisis "is at its weakest when [a court] interpret[s] the [c]onstitution because [its] interpretation can be altered only by constitutional amendment or by overruling [its] prior decisions"). When we improperly interpret the constitution, that error can be corrected only by constitutional amendment or by decision of this court. E.g., id. When, on the other hand, we improperly interpret or apply a statute or common-law rule, the legislature can correct our mistake through simple, majoritarian action. Thus, because *Santiago* is a constitutional decision, perpetuation of its error will impose a significant cost. Even if the legislature could reinstate the death penalty notwithstanding our decision in *Santiago*, the damage caused by the decision would remain. Without a constitutional amendment or

the overruling of *Santiago*, the reasoning of that case will remain intact. If the reasoning remains, so does the usurpation of legislative power, because, in *Santiago*, the majority indicated that *a reviewing court* would serve as the arbiter of whether and when capital punishment will again comport with contemporary standards of decency in Connecticut. The difficulty of correcting our error, therefore, is significant, particularly given the restrictive method of constitutional amendment in Connecticut. See footnote 15 of this opinion.

4

Step Four: Weighing the Benefit and Costs of Affording *Santiago* Stare Decisis Effect

The imbalance between the reliance interests that would be protected and the costs that would result from adhering to *Santiago* is so clear that I almost need not express it. The weighing in the present case is akin to using an elephant (costs of giving stare decisis effect to *Santiago*) as a counterweight for a mouse (reliance interests). In all actuality, using a mouse to represent the reliance interests at stake is far too generous. Not a single individual or institution, including this state's government, has acted in reliance of our decision in *Santiago*. In fact, that decision's legitimacy was placed on shaky ground from the beginning because we questioned its precedential effect before the judgment in that case was final; see *State* v. *Santiago*, supra, 319 Conn. 935 (denying state's motion for stay of judgment); and, therefore, even if there had been any reliance on *Santiago*, it would have been unreasonable. The costs of adhering to that decision, however, are astronomical. First, and most significant, *Santiago* has upset the balance of governmental power created by our constitution. In that case, this court took for itself a power that

always has resided in the legislature. Moreover, the only way to restore the equilibrium of governmental power is by amending the state constitution, which is no easy task. Second, the ultimate holding of *Santiago* is unclear. Third, that decision may or may not have immunized capital punishment from majoritarian control, despite the people's intention, expressed through the constitution, to allow the democratic and political processes to determine if and when the ultimate punishment might be imposed. Finally, if this court does not now overrule *Santiago*, a constitutional amendment is the only certain way to correct this court's overreaching. On balance, it is clear that the costs far outweigh the benefit of applying stare decisis to *Santiago*, and therefore, that decision should be overruled.[25]

II

THE COURT'S INSTITUTIONAL LEGITIMACY

In their concurring opinions, Chief Justice Rogers and Justice Robinson focus primarily on concerns over this court's legitimacy. Chief Justice Rogers argues that overruling *Santiago* within one year of deciding that case simply because there has been a change in court membership would call into question the integrity of

[25] Chief Justice Rogers misstates my stare decisis analysis when she asserts: "[D]istilled to its essence, [Justice Zarella's analysis asserts] that, if a past decision was manifestly incorrect and there has been no reliance on it, principles of stare decisis may not require the court to stand by that decision." Footnote 2 of Chief Justice Rogers' concurring opinion. As I have clearly stated, stare decisis does not require us to stand by a decision if "the costs of preserving judicial error outweigh any reliance interests . . . ." Part I A 2 c of this opinion. Although Chief Justice Rogers is partially correct insofar as stare decisis *does not* require a court to adhere to a manifestly incorrect decision that has engendered no reliance, her recitation of my test requires too much. Under my approach, stare decisis does not apply if the costs of adhering to an erroneous decision outweigh the reliance interests that would be upset by overruling that decision. Thus, if a case has not garnered any reliance, it could be overruled if adherence to such decision would impose the slightest of costs, regardless of whether it is *manifestly* wrong.

this court and our commitment to the rule of law. Similarly, Justice Robinson concludes that the present case turns on the "stare decisis considerations of this court's institutional legitimacy and stability . . . ." Text accompanying footnote 2 of Justice Robinson's concurring opinion. He continues by stating that, if this court were to now overrule *Santiago*, it would appear that an important constitutional case was retracted simply due to a change in court personnel. I am not unsympathetic to my colleagues' concerns over the legitimacy of the court. Indeed, I agree that it would be a travesty if we were to overrule our previous cases simply because they no longer comport with the personal and ideological beliefs of a majority of the justices of this court. That, however, is not this case. Moreover, the idea that we may subordinate our oath to uphold the constitution to concerns about this court's public appearance is incomprehensible. See Conn. Const., art. XI, § 1.

The arguments in the concurring opinions of Chief Justice Rogers and Justice Robinson rest on faulty premises. First, they both seem to suggest that overturning court precedent is inconsistent with the rule of law. For example, Chief Justice Rogers apparently feels bound by *Santiago* because of her "respect for the rule of law," and Justice Robinson concludes that we should follow *Santiago* because to do otherwise "would imperil our state's commitment to the rule of law . . . ." Second, and far more bizarre, Chief Justice Rogers and Justice Robinson contend that the change in court membership is an insufficient reason to overturn *Santiago* in the present case. Of course, I agree that a change in court personnel cannot justify overruling an earlier decision; that fact, however, would not serve as the basis for overruling *Santiago*. Instead, we would overrule *Santiago* because, one, the reasoning of the majority opinion in that case was inherently flawed and led to an erroneous conclusion, and, two, a weighing

of the benefit and costs of applying the doctrine of stare decisis dictates that it should not be applied to our decision in *Santiago*.

I will further expound on the flaws in both of these premises, but, before I do, I will briefly explain from what source the court derives its legitimacy. This court's legitimacy arises from the willingness of the people of Connecticut to accept and obey the court's decisions and is "a product of substance and perception . . . ." *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, supra, 505 U.S. 865. That acceptance is a product of our fidelity to the rule of law, that is, our "legitimacy depends on making *legally principled decisions* under circumstances in which their principled character is sufficiently plausible to be accepted by the [people of this state]." (Emphasis added.) Id., 866; see also T. Tyler & G. Mitchell, "Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights," 43 Duke L.J. 703, 796–99 (1994) (concluding, after literature review and empirical study, that United States Supreme Court's contention in *Casey* that judicial legitimacy comes from objective and neutral decision-making finds strong support). Stated differently, the court receives and maintains its legitimacy by deciding cases through the objective and dispassionate application of the law and by ignoring how such cases will be perceived by the public. Cf. *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, supra, 958 (Rehnquist, C. J., concurring in the judgment in part and dissenting in part).

It appears that Chief Justice Rogers and Justice Robinson understand that this institution's legitimacy comes from a fidelity to the rule of law. They take the argument one step further, however, and conflate stare decisis with the rule of law. To be sure, at times, adherence to precedent serves the ideals of the rule of law,

but, as I discussed in part I A of this opinion, blindly following precedent can also result in a great cost on the rule of law. I can think of no case in which this reality has been more readily apparent than in the present case. In her dissenting opinion in *Santiago*, Chief Justice Rogers stated: "[B]ecause there is no legitimate legal basis for finding the death penalty unconstitutional under either the federal or the state constitution, I can only conclude that the majority has improperly decided that the death penalty must be struck down because it *offends the majority's subjective sense of morality*." (Emphasis added.) *State* v. *Santiago*, supra, 318 Conn. 276–77 (*Rogers*, *C. J.*, dissenting). Then, in dissent to this court's denial of the state's motion for argument, which the state had filed after we issued our decision in *Santiago*, she wrote: "By denying the state's motion for argument and reconsideration, the majority merely reconfirms my belief that it has *not* engaged in an objective assessment of the constitutionality of the death penalty under our state constitution." (Emphasis added.) *State* v. *Santiago*, supra, 319 Conn. 920 (*Rogers*, *C. J.*, dissenting). In light of Chief Justice Rogers' belief that the majority opinion in *Santiago* was driven by the individual predilections of the justices who had joined that opinion, her contention in the present case that the rule of law binds her to that decision, as Justice Scalia might say, "taxes the credulity of the credulous." *Maryland* v. *King*, 569 U.S. 435, 466, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013) (Scalia, J., dissenting). Out of a so called "respect for the rule of law," Chief Justice Rogers shows that ideal the greatest disrespect by entrenching, *into our constitutional jurisprudence no less*, what she perceives to be the rule of individuals.

In addition, if this court's legitimacy is truly a matter of "*substance and* perception"; (emphasis added) *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, supra, 505 U.S. 865; then, certainly, we must

acknowledge and correct plain error. Id., 983 (Scalia, J., concurring in the judgment in part and dissenting in part). Insofar as it is perception that Chief Justice Rogers and Justice Robinson are worried about, the answer is simple. To prevent the appearance that we are a court driven by the whim of a majority of the justices, we must carefully obey the rule of law. We do so by applying an objective and transparent standard to weigh the benefit and costs of giving *Santiago* stare decisis effect. Applying objective standards in a neutral way, and then articulating the reasons for our holding, will placate any appearance that this court is governed by people rather than by laws. After all, the rule of law, at its essence, is governmental decision-making within a framework of *laws*. As Professor Daniel A. Farber so aptly put it in a slightly different context, it is understandable for justices to be troubled by the perception that they are acting, not on the basis of their interpretation of the law but, rather, on the basis of the personal proclivities of a majority of the justices. See D. Farber, "The Rule of Law and the Law of Precedents," 90 Minn. L. Rev. 1173, 1197 (2006). "The proper response, however, is for those [j]ustices to consider the merits of the case with particular care, to guard against any unconscious influences from political pressures [or personal belief] one way or the other, and then to explain their reasoning with clarity to the public." Id. As I have already discussed, the careful application of an objective stare decisis standard clearly dictates that this court should not uphold *Santiago* on the basis of stare decisis. To do otherwise would disserve, and not enhance, the integrity of this court.

I now turn to the second premise of Chief Justice Rogers' and Justice Robinson's contentions, namely, that the change in this court's membership between *Santiago* and the present case *is the reason* we would

overturn *Santiago*.[26] Their reasoning suffers from the logical fallacy of post hoc ergo propter hoc, or "after this, therefore resulting from it." Black's Law Dictionary, supra, p. 1355; see also id. (defining "post hoc ergo propter hoc" as "[t]he logical fallacy of assuming that a causal relationship exists when acts or events are merely sequential"). Their reasoning is simple. Because the present appeal has been decided after a change in the court's membership, the change in the membership is the reason to overturn *Santiago*. The flaw in this argument should be evident. If this court now were to overturn *Santiago*, it would not be because Justice Robinson replaced Justice Norcott. Certainly, the change in court membership may be a circumstance under which the overruling occurs, but it is nothing more than pure happenstance. Instead, the actual reasons for overruling *Santiago*, as I have already stated, would be, one, a majority of the justices believes that decision is not supported by the law and, two, after

[26] It would be remiss of me not to note that the quandary regarding the change in court membership is entirely a problem of the court's creation. This court had the opportunity and idea to decide the present appeal before the appeal in *Santiago*, thereby allowing the full and current panel of the court to decide whether the prospective repeal of the death penalty set forth in P.A. 12-5 made it unconstitutional to carry out the death sentences then in place. In fact, the present appeal was originally argued on July 10, 2014, more than one year before *Santiago* was decided on August 25, 2015. Nevertheless, the court decided, despite our policy to have important constitutional issues decided by the full and current panel of this court, to answer the novel question raised by the passage of P.A. 12-5 in *Santiago*, with a panel that included a justice who had long since reached the mandatory retirement age. Moreover, and as Justice Espinosa correctly notes in her dissenting opinion in the present case, the panel that decided an earlier appeal in *Santiago*; see *State* v. *Santiago*, 305 Conn. 101, 49 A.3d 566 (2012); in which the court did not reach the contention of the defendant, Eduardo Santiago, that the death penalty was per se unconstitutional, was different from the panel that decided Santiago's later appeal to this court in *State* v. *Santiago*, supra, 318 Conn. 1. I do not suggest it was improper for Justice Norcott to remain on the panel in *Santiago*. In fact, he was well within his right to do so under General Statutes § 51-198 (c). Instead, my concern is only over the order in which *Santiago* and the present appeal were decided.

weighing the benefit and costs of stare decisis, a majority of the justices concludes that *Santiago* is not deserving of stare decisis effect.[27]

Even more troubling than the fallaciousness of this argument is its suggestion that this court is bound, now and forever, to follow any decision, right or wrong,

[27] Justice Robinson suggests that I am overly optimistic about the public's ability to look past the panel change and to understand that the overruling of this court's recent decision in *Santiago* would not be because of the panel change but because, as I have just explained, a majority of the justices in the present case have concluded that (1) *Santiago* is wrong, and (2) the costs of adhering to *Santiago* greatly outweigh the benefit. See footnote 8 of Justice Robinson's concurring opinion. As a "cautionary tale," he refers to a recent decision of the Kansas Supreme Court, namely, *State* v. *Petersen-Beard*, Docket No. 108,061, 2016 WL 1612851 (Kan. April 22, 2016). Footnote 9 and accompanying text of Justice Robinson's concurring opinion. In that case, which was released April 22, 2016, the Kansas Supreme Court overruled three of its "prior" decisions, all also released April 22, 2016. *State* v. *Petersen-Beard*, supra, 2016 WL 1612851, *1. Arguments in the three prior decisions had been heard approximately one year before argument in *Petersen-Beard*, by a panel that contained a trial judge who was sitting by designation of the Chief Justice while a vacant seat on the court was filled. That seat was filled, and the new panel heard *Petersen-Beard*, reaching, as Justice Robinson notes, the opposite conclusion. Justice Robinson then notes that "the rapid overruling was . . . widely noticed, and primarily attributed to the change in personnel of the Kansas Supreme Court." Footnote 9 of Justice Robinson's concurring opinion. Justice Robinson does not refer to any evidence, however, that the public is outraged or has lost confidence in the court due to this overruling. Instead, he refers to a few legal scholars who observe the panel change and concurrent change in the court's position. See id. The brunt of the consternation noted by the scholars and the dissenting justices in *Petersen-Beard*, however, seems to be over the court's decision to delay the release of the three overruled cases for approximately eight months in order to draft the opinion in *Petersen-Beard*, which overruled those cases, thereby delaying the relief afforded the individual defendants and depriving similarly situated individuals of the benefit of the holding of the three overruled cases. In fact, the dissenting justices in *Petersen-Beard* do not even allude to stare decisis or the dangers of overruling a recent decision when the only change is in the composition of the panel. Thus, I respectfully disagree that *Petersen-Beard* illustrates why this court should refrain from overruling *Santiago*.

Finally, in response to a concern that Justice Palmer raises in his concurring opinion, I would like to note that *Petersen-Beard* provides an example of a court of last resort quickly reversing its own constitutional ruling.

unless the panel that decided the previous case is identical to the panel that wishes to overrule that case. Such a rule would completely ignore the past practice of this court. In fact, I have yet to uncover, despite considerable research, a case in which a panel overruling a previous decision of this court was identical to the panel that decided the case being overruled. This has held true even when we have overruled a decision only shortly after it was released. For example, in *State* v. *DeJesus*, 288 Conn. 418, 437, 953 A.2d 45 (2008), we overruled a conclusion we reached seven weeks earlier in *State* v. *Sanseverino*, 287 Conn. 608, 625–26, 641, 949 A.2d 1156 (2008), superseded in part, 291 Conn. 574, 969 A.2d 710 (2009). Despite the passage of such little time, the panels in both cases were not identical. *Sanseverino* was decided by Chief Justice Rogers and Justices Norcott, Katz, Palmer, and me. See *State* v. *Sanseverino*, supra, 287 Conn. 608. Justices Vertefeuille and Sullivan, however, were also members of the panel in *DeJesus*. See *State* v. *DeJesus*, supra, 418. Perhaps some might argue that the panel change did not impact our decision to overrule *Sanseverino*, but that fact is of no legal significance. It has likewise been observed that many overruling decisions in the United States Supreme Court were issued after a change in court membership.[28]

In response, I imagine that Chief Justice Rogers and Justice Robinson would echo the arguments made by

[28] Professor Thomas R. Lee, in discussing factors that might explain the United States Supreme Court's tendency to overrule prior decisions, stated: "One statistical study has suggested, for example, that the [c]ourts that have disproportionately altered precedent have been characterized by significant changes in membership. . . . A familiar example is the Hughes Court, which overturned [fifteen] precedents during its last nine years after the [c]ourt's entire membership was transformed between 1937 and 1941. . . . Similarly, most of the Warren Court's decisions overruling precedent were handed down after Justice [Felix] Frankfurter's retirement in 1962, while most of the Burger Court's overruling decisions came after [Justice] Douglas' retirement in 1975." (Citations omitted.) T. Lee, supra, 52 Vand. L. Rev. 650 n.14.

one of our colleagues at oral argument in the present case. At oral argument, it was suggested that some change in circumstances or law, other than a change in court personnel, is necessary to justify overruling a prior decision. Perhaps they would justify this court's previous departures from precedent, despite the changes in court composition, by explaining that "[e]xperience can and often does demonstrate that a rule, once believed sound, needs modification to serve justice better." (Internal quotation marks omitted.) *George* v. *Ericson*, 250 Conn. 312, 318, 736 A.2d 889 (1999). And, of course, this justification would undoubtedly explain some of our past overruling decisions. It does not, however, explain why we should be restrained from overruling a case that was demonstrably wrong when decided, has not engendered any reliance, and imposes significant costs on society simply because a justice who decided it has been replaced. In fact, the United States Supreme Court required nothing more when it overruled *Bowers* v. *Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), in *Lawrence* v. *Texas*, 539 U.S. 558, 577–78, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003). See *Lawrence* v. *Texas*, supra, 577, 578 (noting that "*Bowers* was not correct when it was decided," that it was not correct when court overruled it, and that "[t]he holding in *Bowers* . . . ha[d] not induced detrimental reliance"). It is worth noting that the court that decided *Lawrence* was almost entirely different from the court that decided *Bowers*. Only Chief Justice Rehnquist and Justices O'Connor and Stevens sat on both cases. Compare id., 561, with *Bowers* v. *Hardwick*, supra, 187. Moreover, in *DeJesus*, this court did not rely on any arguments or experience that was not presented by the dissenting justice in *Sanseverino*. See *State* v. *DeJesus*, supra, 288 Conn. 529 (*Katz*, *J.*, dissenting); see also *State* v. *Sanseverino*, supra, 287 Conn. 641–42 (*Zarella*, *J.*, dissenting). Instead, the

majority in *DeJesus* merely concluded that *Sanseverino* was wrong. See *State* v. *DeJesus*, supra, 437. If a change in court membership could prevent a subsequent court from considering a previous court's decision, "segregation would be legal, minimum wage laws would be unconstitutional, and the [g]overnment could wiretap ordinary criminal suspects without first obtaining warrants." *Citizens United* v. *Federal Election Commission*, supra, 558 U.S. 377 (Roberts, C. J., concurring). Surely, such a rule is not sound policy.

Perhaps realizing the illogicality of a rule that would prohibit this court from overruling an erroneous decision simply because a member of the majority that reached such decision has left the court, Chief Justice Rogers suggests that we employ an even more unreasonable test. See footnote 2 of Chief Justice Rogers' concurring opinion. She acknowledges that a manifestly incorrect decision that has engendered no reliance may be overturned. See id. In determining whether a prior decision is manifestly incorrect, however, she is guided not by what a majority of the current justices thinks but by what the majority of the justices in the prior decision thinks, or might think if they still occupied a seat on our bench.[29] See id. Thus, the salient question

[29] There is a great irony in Chief Justice Rogers' reasoning that gives me pause. While she is occupied with explaining that she, Justice Espinosa, and I have already espoused, "at great length," why we think *Santiago* is incorrect; footnote 2 of Chief Justice Rogers' concurring opinion; noting that Justices Palmer, Eveleigh, and McDonald continue to believe that *Santiago* was correctly decided, and speculating about how Justice Norcott would rule, she overlooks the elephant in the room: What does Justice Robinson, *a current member of this court sitting on this case*, think?

Of course, this is not the only problem that stems from Chief Justice Rogers' reasoning, although it is the most important. She correctly notes the obvious, namely, that stare decisis does not require this court to stand by a manifestly incorrect decision that has not been relied on. See id. She then states: "In *Santiago*, however, [she], Justice Espinosa and I explained at great length why we believed that the majority decision was incorrect . . . and we were unable to persuade the majority." (Citations omitted.) Id. Isn't this a curious notion? Apparently, when determining whether a previous decision of this court was manifestly incorrect, we consider whether the

in the present appeal becomes: "What would Justice Norcott do?" And the current court is required to divine an answer. Surely, the reader does not need me to call his or her attention to the theoretical flaw in this idea. Under such a test, our decisions will turn on pure speculation regarding how a former justice, or justices, would decide a current case if they were still on the court. In addition, justices who have reached the constitutionally required retirement age, and in some cases, who have passed away, will continue to rule supreme in this institution, not because of the decisions they wrote, and the reasoning therein, but simply because they happened to vote with the majority in a case that is subsequently under reconsideration.

Normally, I accept what my colleagues have written and do not attempt to uncover a delitescent meaning

dissenting justices in the prior case successfully persuaded the majority justices that they, the majority, had reached a manifestly incorrect decision. If the dissenting justices had prevailed in the prior decision, would the outcome not have been different? Obviously, it would have been, so Chief Justice Rogers must mean something else. Perhaps, what she is trying to suggest is that she, Justice Espinosa, and I must now come up with a *new* reason that *Santiago* is incorrect. Why, if *Santiago* was incorrect when decided for the reasons that we then stated, would it not still be incorrect for the same reasons today? After all, as Chief Justice Rogers has observed, it has been less than one year since we decided *Santiago*. Moreover, I am again back to that vexing question, what does Justice Robinson think? That seems like a particularly important question under the current circumstances when three of the current members of the court think *Santiago* is correct and three others have explained why it is demonstrably wrong. If Justice Robinson could offer a different explanation for why *Santiago* is erroneous, would that get us past Chief Justice Rogers' unique test?

Finally, Chief Justice Rogers notes that those justices who were in the majority in *Santiago*, and join in the per curiam opinion in the present case, continue to believe that *Santiago* is correct, almost as to suggest that, if only one of them had changed his mind, perhaps we would then be permitted to overrule *Santiago*. Again, she leaves the reader to create his or her own explanation. Unfortunately, I can be of no help. I cannot think of any constitutional, statutory, or common-law rule that bestows greater authority on a justice who was in the majority of a prior decision when that decision is being reconsidered.

or ulterior motive, and I will not do so in the present case. I have trouble accepting, however, that it is the institutional integrity of this court that truly concerns Chief Justice Rogers. First, she largely agrees with the stare decisis analysis I have presented in this opinion. See footnote 2 of Chief Justice Rogers' concurring opinion. Second, she does not refute my argument that this court's legitimacy comes from a fidelity to the rule of law; overruling prior cases is, in many instances, consistent with the rule of law, and any appearance that we are driven by the rule of individuals can be placated by the application of an objective stare decisis test. Third, in the recent past, neither this court nor Chief Justice Rogers has expressed concern about overruling a prior decision after a change in court membership.[30]

[30] During Chief Justice Rogers' tenure on this court, we have overruled prior precedent in twenty-five cases. See *State* v. *Wright*, 320 Conn. 781, 810, 135 A.3d 1 (2016); *Arras* v. *Regional School District No. 14*, 319 Conn. 245, 268–69 n.24, 125 A.3d 172 (2015); *Campos* v. *Coleman*, supra, 319 Conn. 38, 57; *State* v. *Moreno-Hernandez*, 317 Conn. 292, 308, 118 A.3d 26 (2015); *Haynes* v. *Middletown*, 314 Conn. 303, 316, 323, 101 A.3d 249 (2014); *State* v. *Artis*, 314 Conn. 131, 156, 101 A.3d 915 (2014); *State* v. *Elson*, 311 Conn. 726, 754, 91 A.3d 862 (2014); *Ulbrich* v. *Groth*, 310 Conn. 375, 409, 78 A.3d 76 (2013); *State* v. *Moulton*, 310 Conn. 337, 362–63 and n.23, 78 A.3d 55 (2013); *State* v. *Polanco*, 308 Conn. 242, 260–61, 61 A.3d 1084 (2013); *State* v. *Sanchez*, 308 Conn. 64, 80, 60 A.3d 271 (2013); *State* v. *Guilbert*, 306 Conn. 218, 253, 49 A.3d 705 (2012); *State* v. *Paige*, 304 Conn. 426, 446, 40 A.3d 279 (2012); *Gross* v. *Rell*, 304 Conn. 234, 270–71, 40 A.3d 240 (2012); *Arrowood Indemnity Co.* v. *King*, 304 Conn. 179, 201, 39 A.3d 712 (2012); *State* v. *Payne*, 303 Conn. 538, 541–42, 34 A.3d 370 (2012); *State* v. *Kitchens*, 299 Conn. 447, 472–73, 10 A.3d 942 (2011); *Bysiewicz* v. *DiNardo*, 298 Conn. 748, 778–79 n.26, 6 A.3d 726 (2010); *State* v. *Connor*, 292 Conn. 483, 528 n.29, 973 A.2d 627 (2009); *St. Joseph's Living Center, Inc.* v. *Windham*, 290 Conn. 695, 729 n.37, 966 A.2d 188 (2009); *State* v. *DeJesus*, supra, 288 Conn. 437; *State* v. *Salamon*, supra, 287 Conn. 514; *Jaiguay* v. *Vasquez*, 287 Conn. 323, 348, 948 A.2d 955 (2008); *State* v. *Grant*, 286 Conn. 499, 535, 944 A.2d 947, cert. denied, 555 U.S. 916, 129 S. Ct. 271, 172 L. Ed. 2d 200 (2008); *Gibbons* v. *Historic District Commission*, 285 Conn. 755, 771, 941 A.2d 917 (2008). In all twenty-five cases, the subsequent overruling panel was different from the panel that decided the cases being overruled. Moreover, Chief Justice Rogers either authored or joined the majority in nineteen of these cases. See *State* v. *Wright*, supra, 830; *Campos* v. *Coleman*, supra, 64; *State* v. *Moreno-Hernandez*, supra, 292, 312; *Haynes* v. *Middletown*, supra, 305;

Chief Justice Rogers also expresses concern that overruling *Santiago* would send the message that a challenge to any four to three decision may be mounted when a member of the original majority leaves the court. My response is concise and simple: So what. This has been, and will always be, the case, unless we make stare decisis an inexorable command. A challenge may, at any time, be mounted against any of our previous decisions, whether they are four to three, five to two, six to one, or unanimous. That is part of our constitutional system. For a period of more than thirty years, criminal defendants repeatedly and consistently attacked this court's interpretation of the state's kidnapping statutes. See, e.g., *State* v. *Luurtsema*, 262 Conn. 179, 200, 202, 811 A.2d 223 (2002); *State* v. *Amarillo*, 198 Conn. 285, 304–306, 503 A.2d 146 (1986); *State* v. *Chetcuti*, supra, 173 Conn. 170–71. In *State* v. *Salamon*, supra, 287 Conn. 513–14, this court decided to adopt the interpretation the criminal defendants had been advocating for years. Moreover, the majority in *Salamon* did not seem troubled at all by the fact that various earlier compositions of this court had repeatedly rejected such an interpreta-

State v. *Artis*, supra, 131, 161; *State* v. *Elson*, supra, 726, 785; *Ulbrich* v. *Groth*, supra, 470; *State* v. *Moulton*, supra, 337, 370; *State* v. *Polanco*, supra, 242, 263; *State* v. *Sanchez*, supra, 64, 87; *State* v. *Guilbert*, supra, 274; *Gross* v. *Rell*, supra, 237; *Arrowood Indemnity Co.* v. *King*, supra, 179, 204; *State* v. *Payne*, supra, 541; *State* v. *Kitchens*, supra, 500; *State* v. *Connor*, supra, 483, 533; *State* v. *DeJesus*, supra, 420; *State* v. *Grant*, supra, 502 ; *Gibbons* v. *Historic District Commission*, supra, 755, 778. Chief Justice Rogers dismisses my point by stating that there is no inconsistency in her position in the foregoing cases and the position she takes in the present appeal. See footnote 1 of Chief Justice Rogers' concurring opinion. *Anyone who reads the cases Justice Espinosa and I cite, however, will discover that not once, in any of these twenty-five cases, has this court, or Chief Justice Rogers, ever raised a concern over a change in panel membership or queried how a departed justice who was in the majority would have ruled if he or she had still been a member of the court.* In fact, in seventeen cases—*Wright*, *Arras*, *Moreno-Hernandez*, *Haynes*, *Ulbrich*, *Sanchez*, *Paige*, *Gross*, *King*, *Payne*, *Kitchens*, *Bysiewicz*, *Connor*, *St. Joseph's Living Center, Inc.*, *DeJesus*, *Grant*, and *Gibbons*—the words "stare decisis" cannot be found in the majority opinions at all.

tion. This court need not stand blindly by an earlier decision simply because it was reached on the narrowest of votes.[31] Instead, what is important is that the court objectively apply the legal rules that govern each case and decide, on the basis of a neutral application of a principled stare decisis doctrine, whether the dictates of stare decisis require us to continue to adhere to an earlier, erroneous decision.

In sum, the argument that the integrity and legitimacy of this court would be undermined by overruling *Santiago* is faulty. First, the rule of law does not bind us to erroneous precedent. Instead, it requires us to neutrally apply an objective stare decisis framework and to decide whether the benefit of affording *Santiago* stare decisis effect is outweighed by the costs. Second, if the entire court were to reexamine our holding in *Santiago*, and, after such examination, a majority of the justices were to conclude that *Santiago* is wrong, it would *not*

[31] At oral arguments in the present appeal, counsel was asked whether our ruling in *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 141, 147–48, 957 A.2d 407 (2008), also a controversial four to three decision, which held that a statute purporting to prohibit same-sex marriage was unconstitutional, could be attacked and overruled. I again note that a decision should not receive special stare decisis consideration because it was decided by one vote rather than two or three. In addition, and more important, I doubt that this court, notwithstanding the United States Supreme Court's recent decision in *Obergefell* v. *Hodges*, U.S. , 135 S. Ct. 2584, 2604–2605, 192 L. Ed. 2d 609 (2015), could overrule *Kerrigan* in light of the tremendous reliance interests that decision has engendered. First, the day after we decided *Kerrigan*, marriage licenses were being issued to same-sex couples. Second, there has been a reordering in employee benefits and health insurance in light of *Kerrigan*. Third, it is likely that the principles represented by *Kerrigan* have become part of the consciousness of the citizens of this state. Undoubtedly, there has been even more reliance on *Kerrigan* than that which I just outlined.

In his concurring opinion, Justice Robinson suggests that the reliance in the present case is different only in kind and not in degree from the reliance interests that would be at stake if *Kerrigan* were reconsidered. See footnote 6 of Justice Robinson's concurring opinion. In light of my analysis in part I B of this opinion, I cannot fathom the logic behind such a claim.

be because there has been a change in the court's membership.

III

CONCLUSION

In closing, I want to note an astute observation once made by Chief Justice Charles Evan Hughes, when he was an Associate Justice of the United States Supreme Court. In response to the argument that dissent weakens the court's institutional prestige, Justice Hughes wrote: "When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity [that] is merely formal, [that] is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect [on] public opinion at the time. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice." C. Hughes, The Supreme Court of the United States: Its Foundation, Methods and Achievements—An Interpreation (1928) pp. 67–68. The observation of Justice Hughes is equally applicable in the present case. What will ultimately sustain this court's legitimacy is a prudent and independent exercise of the judgment of each individual justice, guided, of course, by our constitution and our laws. Just as it may be regrettable when the justices do not all agree, it may also be regrettable that our public appearance may temporarily be tarnished when we overrule a previous decision in short order. Far greater, and more important, than such regret, however, is our oath to uphold the constitution and our

duty to objectively interpret that law. I am troubled by the suggestion that we must adhere to a decision, despite our belief that such a decision is unconstitutional, for no reason other than the appearance that we have changed our mind due to a change in court personnel. I cannot, in good conscience, join the court in such action. I believe the oath we take requires more of us.

ESPINOSA, J., dissenting. " 'Twill be recorded for a precedent, And many an error by the same example Will rush into the state." W. Shakespeare, The Merchant of Venice, act IV, sc. i.

I write this dissenting opinion not to address the concurring opinion of Justice Palmer, who continues to believe that *State* v. *Santiago*, 318 Conn. 1, 122 A.3d 1 (2015), was rightly decided.[1] I have already addressed the merits of *Santiago*, or rather, the lack thereof, in my dissenting opinion in that case. Id., 388. Of course, my dissenting opinion in *Santiago* pales in comparison to the dissent issued by Chief Justice Rogers, who wrote that "[e]very step" of the majority's analysis in that decision was "fundamentally flawed"; id., 231; and then, over the course of 110 blistering pages, painstakingly and methodically exposed those flaws one by one, ripping the majority's all too vulnerable analysis to shreds, revealing it to be both a violation of the principle of stare decisis; id., 238; and so lacking in foundation that it was built upon "a house of cards, falling under the slightest breath of scrutiny." Id., 233. Accordingly, I refer any readers who retain doubts as to whether *Santiago* was clearly wrong to the dissenting opinion of the Chief Justice. Id., 231–341.

[1] Given that my dissenting opinion does not address his concurring opinion, it is puzzling that Justice Palmer feels the need to respond to my dissent.

I also need not address the barely two paragraph disdainful majority opinion in the present case. I do note, however, that it is hardly surprising that the majority has decided to issue its opinion as a terse and dismissive per curiam, suggesting that the state's arguments in favor of overruling *Santiago* do not merit serious consideration. This is particularly troubling considering the importance of the issue presented in this appeal. It is this court's duty to give full consideration to the claims of the parties who come before it. In many cases less significant than the present one, the court as a matter of courtesy and respect answers all the claims raised by the parties, even when the court may believe that such claims lack merit. Dismissing the state's arguments in the present case in a *per curiam* opinion creates the appearance that the outcome was predisposed, and that oral argument was allowed merely to avoid the perception that the state was being treated unfairly. Indeed, Mark Rademacher, the assistant public defender who argued this appeal, stated that the purpose of granting the state's motion for oral argument was " '[to make] the state feel good about losing.' " J. Charlton, "Connecticut High Court Revisits Death Penalty," Fox 61, January 7, 2016, available at http://fox61.com/2016/01/07/Connecticut-high-court-to-revisit-death-penalty/ (last visited May 16, 2016).

I write to address the concurring opinion of the Chief Justice who frames the issue presented in this appeal in this manner: May the court overrule a recently established precedent solely because there has been a panel change since the now challenged decision? Taking that as her starting point, the Chief Justice voices the concern that overruling *Santiago* would call into question the integrity of this court because doing so: (1) would create the appearance that the court is governed by the whims of individual justices rather than the rule of law; (2) would create the public perception that the result

of a case depends on the composition of the panel; and (3) would undermine the stability and predictability of the law, on which litigants rely. The short answer to those concerns is that they are unjustified and irrelevant when the prior precedent at issue is clearly wrong. As I explain in this dissenting opinion, this is particularly true when the clearly wrong, recently decided case has violated the doctrine of stare decisis—under those circumstances, that doctrine *requires* that the prior precedent be overruled. *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 233–34, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). The position of the Chief Justice in the present case, therefore, is irreconcilable with her position in her dissenting opinion in *Santiago*, that the decision was clearly wrong. See *State* v. *Santiago*, supra, 318 Conn. 231. A panel change cannot insulate a clearly wrong decision from being overruled.[2]

Because of the importance of the issue presented in this appeal, a longer response is necessary. This court's appearance as an impartial decision-making body, governed by the rule of law rather than the proclivities of individual panel members, is vital. No one disputes that, nor does anyone question the integral role that stability and predictability play in our legal system. But the protestations of the Chief Justice are predicated on a straw man that employs post hoc reasoning and finds no support in our stare decisis jurisprudence. In this dissent, I consider these two flaws in the analysis of the Chief Justice, and thereby illustrate the central flaw in her opinion—it overlooks the overarching stare decisis principle of which even playwrights are aware—a clearly wrong decision is dangerous, because it will be relied on as precedent. As this court frequently has noted, "[i]t is more important that the court should be

[2] I observe that unlike Chief Justice Rogers, Justice Robinson does not embrace the notion that there are any circumstances when stare decisis requires the court to adhere to a clearly wrong decision.

right upon later and more elaborate consideration of the cases than consistent with previous declarations." (Internal quotation marks omitted.) *Conway* v. *Wilton*, 238 Conn. 653, 660, 680 A.2d 242 (1996). And when a decision is so clearly wrong that the Chief Justice felt compelled to write in her dissent that the "fundamentally flawed" analysis suffers from a "complete absence of any historical support," relies on "irrelevant" factors; *State* v. *Santiago*, supra, 318 Conn. 231; is so "riddled with non sequiturs . . . [that] to enumerate all of them would greatly and unnecessarily increase the length of this [110 page] dissenting opinion," engages in "speculation" and relies on propositions that are "devoid of any substantive content"; id., 242–43; "misstates both the eighth amendment jurisprudence of the United States Supreme Court and the state constitutional jurisprudence of this court"; id., 249; is "untenable"; id., 254; "illogical"; id., 256; "troubling"; id., 257; and "deliberately vague"; id., 261; is predicated on a legislative history that was created by "cherry pick[ing] extra-record sources that provide slanted and untested explanations for the history of the death penalty in this state"; id., 264 n.30; and constitutes a "judicial invalidation, without constitutional basis, of the political will of the people"; id., 278; that decision, which itself violated the doctrine of stare decisis, does not merit the application of that doctrine.

I

POST HOC STRAW MEN ARE UNPERSUASIVE

The Chief Justice misstates the issue presented in this appeal, framing it as whether this court should overrule a recently decided case *because* the panel has subsequently changed. By formulating the issue in that manner, she erects a straw man. Obviously, if this court were to overrule a decision merely *because* the panel had changed, the court would do damage to the rule

of law. That causal connection exists, however, only in the opinion of the Chief Justice, who certainly finds herself more than capable of knocking down the proposition she has put forward. But the mere fact that a decision overruling *Santiago* would have occurred after the panel changed does not necessitate the conclusion that the panel change would have *caused* the court to overrule *Santiago*, and is nothing more than a logical fallacy, an example of "post hoc, ergo propter hoc"[3] reasoning.

On another level, what the Chief Justice appears to suggest is that, because the panel in *Santiago* would have been unwilling to overrule that decision, the current panel is prevented from doing so. She even goes so far as to tally the unchanged votes of the remaining three members of the majority panel from *Santiago* that are on the panel for this appeal, counting that as support for her decision to accord stare decisis effect to *Santiago*. She appears to suggest, therefore, that if one of the members of the majority in *Santiago* had come to the realization that *Santiago* was clearly wrong, a majority of the panel in the present case would be justified in overruling *Santiago*. First, if that notion does not create the appearance that the personally held beliefs of individual justices govern the outcome of the present appeal, I do not know what would. Second, the Chief Justice does not give her own vote, or the votes of the other two original dissenting justices, sufficient weight. By my tally, those votes also totaled three. Finally, if the notion advanced by the Chief Justice—that an opinion should not be overruled because the original majority continued to believe the case was rightly decided—held any weight, *Plessy* v. *Ferguson*,

[3] See Black's Law Dictionary (9th Ed. 2009) (noting Latin phrase post hoc, ergo propter hoc is translated as " 'after this, therefore because of this,' " and defining phrase as "relating to the fallacy of assuming causality from temporal sequence; confusing sequence with consequence").

163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), overruled by *Brown* v. *Board of Education*, 347 U.S. 483, 494–95, 74 S. Ct. 686, 98 L. Ed. 873 (1954), would still be good law.

II

STARE DECISIS PRINCIPLES APPLIED TO A DECISION THAT FLOUTED STARE DECISIS

This court has stated that "[one] well recognized exception to stare decisis under which a court will examine and overrule a prior decision . . . [is when that prior decision] is clearly wrong." (Internal quotation marks omitted.) *Conway* v. *Wilton*, supra, 238 Conn. 660. The exception to the doctrine of stare decisis for decisions that are "clearly wrong" is perhaps the oldest and most well established, dating back to William Blackstone, who explained: "[I]t is an established rule to abide by former precedents, where the same points come again in litigation . . . . Yet this rule admits of exception, where the former determination is *most evidently contrary to reason*; much more if it be contrary to the divine law. . . . The doctrine of the law then is this: that precedents and rules must be followed, *unless flatly absurd* or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration." (Emphasis added.) 1 W. Blackstone, Commentaries on the Laws of England (1775) pp. 69–70.

Contrary to the position of the Chief Justice, the United States Supreme Court has held that when a recently decided case has ignored and contravened existing precedent, the doctrine of stare decisis *requires* that the decision be overruled. As explained by D. Arthur Kelsey, now a justice of the Supreme Court of Virginia, when "a court overrules a more recent case that, itself, violated stare decisis and thus represented a divergence from settled precedent . . . the court

does not flout stare decisis by overruling the anomalous case. Rather, it 'restore[s]' the prior 'fabric of [the] law' that the anomalous case departed from. *Adarand Constructors, Inc.* v. *Pena*, [supra, 515 U.S. 234]. Thus, in *Adarand Constructors, Inc.*, the [c]ourt overruled its recent opinion in [*Metro Broadcasting, Inc.* v. *Federal Communications Commission*, 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990)], stating: '*Metro Broadcasting* [*Inc.*] itself departed from our prior cases—and did so quite recently. By refusing to follow *Metro Broadcasting* [*Inc.*], then, we do not depart from the fabric of the law; we restore it.' " D. Kelsey, "The Architecture of Judicial Power: Appellate Review and Stare Decisis," 45 Judges' J., p. 13 n.29 (Spring 2006).

I observe that there were significant panel changes in the five years that passed between *Metro Broadcasting, Inc.*, and *Adarand Constructors, Inc.* The majority in *Metro Broadcasting, Inc.*, was comprised of Justices Brennan, White, Marshall, Blackmun and Stevens. *Metro Broadcasting, Inc.* v. *Federal Communications Commission*, supra, 497 U.S. 550. The dissenters were Chief Justice Rehnquist, and Justices O'Connor, Scalia and Kennedy. Id. When the court overruled *Metro Broadcasting, Inc.*, in *Adarand Constructors, Inc.*, none of the original panel members changed their positions, but only Justice Stevens remained of the original majority. *Adarand Constructors, Inc.* v. *Pena*, supra, 515 U.S. 202–203. Writing for the majority in *Adarand Constructors, Inc.*, Justice O'Connor distinguished this context—when the court considers overruling a recent decision that contravened well established precedent—from the context presented in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 844, 864, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), in which the court considered whether to overrule *Roe* v. *Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). *Adarand Constructors, Inc.* v. *Pena*, supra, 233. When

Casey was decided, *Roe* had become "integrated into the fabric of law." Id., 234. By contrast, *Metro Broadcasting, Inc.*, created a tear in that fabric by violating the principle of stare decisis; the doctrine therefore required that the damage be controlled by overruling the anomalous decision as soon as possible. Id., 233–34.

The United States Supreme Court relied on the very same principle in *United States* v. *Dixon*, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993), in which it overruled its decision in *Grady* v. *Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), following a panel change. The court in *Dixon* explained that "*Grady* contradicted an unbroken line of decisions, contained less than accurate historical analysis, and has produced confusion . . . ." (Internal quotation marks omitted.) *United States* v. *Dixon*, supra, 711. Letting that decision stand, therefore, would "mock stare decisis." Id., 712; see D. Kelsey, supra, 45 Judges' J., p. 13 n.29.

That is precisely the context in the present case. The Chief Justice detailed the manner in which the majority in *Santiago* cast aside a vast body of existing precedent, simply because the majority of the panel in that case held a contrary view, in complete contravention to applicable precedent and with flagrant disrespect for the principle of stare decisis. *State* v. *Santiago*, supra, 318 Conn. 238–39 (*Rogers, C. J.*, dissenting). She observed that essential to the majority's analysis was its position that "this court's previous holdings that the due process provisions of the state constitution do not bar the imposition of the death penalty for the most heinous murders are now questionable . . . ." Id., 238 (*Rogers, C. J.*, dissenting). She then criticized the majority, not only for its lack of respect for precedent, but also for its lack of intellectual honesty. She pointed out that the majority—unwilling to openly acknowledge the fact that it was overruling dozens of decisions, which repeatedly had upheld the constitutionality of the death

penalty, solely because the majority would have held a different view—"carefully avoid[ed] suggesting . . . [that those decisions] were wrongly decided." (Citation omitted.) Id., 238 n.5.

In fact, the Chief Justice's dissenting opinion in *Santiago* makes clear that the majority decision in that case was driven by naked judicial activism, in contravention to the existing law of this state. She explained: "[B]ecause there is no legitimate legal basis for finding the death penalty unconstitutional under either the federal or the state constitution, I can only conclude that the majority has improperly decided that the death penalty must be struck down because it offends the majority's subjective sense of morality." Id., 276–77. It was a classic example of a court giving no effect or even consideration to the principle of stare decisis, and represented a drastic departure from our death penalty jurisprudence. Inevitably, such decisions are, as the Chief Justice expressed eloquently, "based on a house of cards, falling under the slightest breath of scrutiny." Id., 233. In other words, such decisions inevitably are clearly wrong and destroy the fabric of the law. Stare decisis requires that such decisions be overruled.

In the present case, accordingly, the question is not whether the court should overrule *Santiago because of* a panel change. The question that the Chief Justice should be asking is whether stare decisis principles support the conclusion that a panel change *prevents* this court from being able to overrule a clearly wrong, recently decided case that constitutes an abrupt departure from well established precedent. And the clear answer to that question is no; stare decisis requires that the fabric of the law be restored by overruling the anomalous decision.

The Chief Justice cannot point to a single case to support the proposition that a panel change prevents

the court from overruling clearly wrong precedent, because none exists. My research has revealed that all of this court's decisions overruling prior precedent have happened *following* a panel change. During her tenure, for instance, my research also has revealed that this court has overruled its prior precedent on at least *twenty-five occasions*. In every single one of those cases, the panel that overruled the prior precedent differed from the panel that had decided the original case. See *State* v. *Wright*, 320 Conn. 781, 810, 135 A.3d 1 (2016) (overruling in part *State* v. *DeJesus*, 270 Conn. 826, 856 A.2d 345 [2004]); *Arras* v. *Regional School District No. 14*, 319 Conn. 245, 268–69 n.24, 125 A.3d 172 (2015) (overruling *Pollard* v. *Norwalk*, 108 Conn. 145, 142 A. 807 [1928], "to the extent that *Pollard* supports the dissent's position" in *Arras*, on basis that if dissent's reading of *Pollard* were correct, *Pollard* would be inconsistent with *Bortner* v. *Woodbridge*, 250 Conn. 241, 736 A.2d 104 [1999], and *Sadlowski* v. *Manchester*, 206 Conn. 579, 538 A.2d 1052 [1988]); *Campos* v. *Coleman*, 319 Conn. 36, 57, 123 A.3d 854 (2015) (overruling *Mendillo* v. *Board of Education*, 246 Conn. 456, 717 A.2d 1177 [1998]); *State* v. *Moreno-Hernandez*, 317 Conn. 292, 308, 118 A.3d 26 (2015) (overruling in part *State* v. *Gonzalez*, 222 Conn. 718, 609 A.2d 1003 [1992]); *Haynes* v. *Middletown*, 314 Conn. 303, 323, 101 A.3d 249 (2014) (overruling in part both *Purzycki* v. *Fairfield*, 244 Conn. 101, 708 A.2d 937 [1998], and *Burns* v. *Board of Education*, 228 Conn. 640, 638 A.2d 1 [1994]); *State* v. *Artis*, 314 Conn. 131, 156, 101 A.3d 915 (2014) (overruling *State* v. *Gordon*, 185 Conn. 402, 441 A.2d 119 [1981], cert. denied, 455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 [1982]); *State* v. *Elson*, 311 Conn. 726, 746–48, 748 n.14, 754, 91 A.3d 862 (2014) (overruling in part *In re Jan Carlos D.*, 297 Conn. 16, 997 A.2d 471 [2010], *State* v. *Cutler*, 293 Conn. 303, 977 A.2d 209 [2009], *In re Melody L.*, 290 Conn. 131, 962 A.2d 81

[2009], *Johnson* v. *Commissioner of Correction*, 288 Conn. 53, 951 A.2d 520 [2008], *State* v. *McKenzie-Adams*, 281 Conn. 486, 915 A.2d 822, cert. denied, 552 U.S. 888, 128 S. Ct. 248, 169 L. Ed. 2d 148 [2007], *State* v. *Commins*, 276 Conn. 503, 886 A.2d 824 [2005], *Lebron* v. *Commissioner of Correction*, 274 Conn. 507, 876 A.2d 1178 [2005], and *State* v. *Ramos*, 261 Conn. 156, 801 A.2d 788 [2002]); *Ulbrich* v. *Groth*, 310 Conn. 375, 409, 78 A.3d 76 (2013) (overruling in part *Flagg Energy Development Corp.* v. *General Motors Corp.*, 244 Conn. 126, 709 A.2d 1075 [1998]); *State* v. *Moulton*, 310 Conn. 337, 362 n.23, 363, 78 A.3d 55 (2013) (overruling "prior precedent to the contrary" of court's conclusion that "[General Statutes] § 53a-183 [a] proscribes harassing and alarming speech as well as conduct"); *State* v. *Polanco*, 308 Conn. 242, 245, 261, 61 A.3d 1084 (2013) (overruling in part *State* v. *Chicano*, 216 Conn. 699, 584 A.2d 425 [1990], cert. denied, 501 U.S. 1254, 111 S. Ct. 2899, 115 L. Ed. 2d 1062 [1991]); *State* v. *Sanchez*, 308 Conn. 64, 80, 60 A.3d 271 (2013) (overruling in part *Finley* v. *Aetna Life & Casualty Co.*, 202 Conn. 190, 520 A.2d 208 [1987], overruled in part on other grounds by *Curry* v. *Burns*, 225 Conn. 782, 786, 626 A.2d 719 [1993]); *State* v. *Guilbert*, 306 Conn. 218, 253, 49 A.3d 705 (2012) (overruling in part *State* v. *McClendon*, 248 Conn. 572, 730 A.2d 1107 [1999], and *State* v. *Kemp*, 199 Conn. 473, 507 A.2d 1387 [1986]); *State* v. *Paige*, 304 Conn. 426, 446, 40 A.3d 279 (2012) (overruling in part *State* v. *Greenberg*, 92 Conn. 657, 103 A. 897 [1918]); *Gross* v. *Rell*, 304 Conn. 234, 270–71, 40 A.3d 240 (2012) (overruling in part *Lesnewski* v. *Redvers*, 276 Conn. 526, 886 A.2d 1207 [2005]); *Arrowood Indemnity Co.* v. *King*, 304 Conn. 179, 201, 39 A.3d 712 (2012) (overruling in part *Aetna Casualty & Surety Co.* v. *Murphy*, 206 Conn. 409, 538 A.2d 219 [1988]); *State* v. *Payne*, 303 Conn. 538, 541–42, 564, 34 A.3d 370 (2012) (overruling *State* v. *King*, 187 Conn. 292, 445 A.2d 901 [1982], "and

its progeny," and overruling in part *State* v. *Tomas D.*, 296 Conn. 476, 995 A.2d 583 [2010]); *State* v. *Kitchens*, 299 Conn. 447, 472–73, 10 A.3d 942 (2011) (overruling in part *State* v. *Ebron*, 292 Conn. 656, 975 A.2d 17 [2009]); *Bysiewicz* v. *DiNardo*, 298 Conn. 748, 778–79 n.26, 6 A.3d 726 (2010) (overruling *In re Application of Slade*, 169 Conn. 677, 363 A.2d 1099 [1975]); *State* v. *Connor*, 292 Conn. 483, 528 n.29, 973 A.2d 627 (2009) (overruling in part *State* v. *Day*, 233 Conn. 813, 661 A.2d 539 [1995]); *St. Joseph's Living Center, Inc.* v. *Windham*, 290 Conn. 695, 729 n.37, 966 A.2d 188 (2009) (overruling *Fanny J. Crosby Memorial, Inc.* v. *Bridgeport*, 262 Conn. 213, 811 A.2d 1277 [2002], and *United Church of Christ* v. *West Hartford*, 206 Conn. 711, 539 A.2d 573 [1988], to extent that those cases were inconsistent); *State* v. *DeJesus*, 288 Conn. 418, 437, 953 A.2d 45 (2008)[4] (overruling in part *State* v. *Sanseverino*, 287 Conn. 608, 949 A.2d 1156 [2008] [*Sanseverino I*], superseded in part by *State* v. *Sanseverino*, 291 Conn. 574, 969 A.2d 710 [2009] [*Sanseverino II*]); *State* v. *Salamon*, 287 Conn. 509, 513, 542, 949 A.2d 1092 (2008) (overruling entire line of cases interpreting kidnapping statutes as allowing conviction for kidnapping even when restraint involved was merely incidental to commission of another offense, most recently stated in *State* v. *Luurtsema*, 262 Conn. 179, 811 A.2d 223 [2002]); *Jaiguay* v. *Vasquez*, 287 Conn. 323, 348, 948 A.2d 955 (2008) (overruling in part *Johnson* v. *Atkinson*, 283 Conn. 243, 926 A.2d 656 [2007]); *State* v. *Grant*, 286 Conn. 499, 535, 944 A.2d 947 (overruling in part *State* v. *Whipper*, 258 Conn. 229, 780 A.2d 53 [2001]), cert. denied, 555 U.S. 916, 129 S. Ct. 271, 172 L. Ed. 2d 200 (2008); *Gibbons* v. *Historic District Commission*, 285 Conn. 755, 771, 941 A.2d 917 (2008) (overruling in part

[4] The similarity in case names between *State* v. *DeJesus*, supra, 270 Conn. 826, and *State v. DeJesus*, supra, 288 Conn. 418, is purely coincidental. Hereinafter, all references in this dissenting opinion to *DeJesus* are to *State* v. *DeJesus*, supra, 288 Conn. 418.

Stankiewicz v. *Zoning Board of Appeals*, 211 Conn. 76, 556 A.2d 1024 [1989]).

The Chief Justice presided over many of the appeals in which this court overruled prior precedent. Accordingly, this court's existing practices in adhering—or not adhering—to the stare decisis principles that the Chief Justice currently invokes are relevant in evaluating the persuasiveness of her claim that the doctrine prevents this court from overruling *Santiago*. I note that many of this court's recent decisions overruling prior precedent include no discussion whatsoever of the doctrine of stare decisis. See, e.g., *Haynes* v. *Middletown*, supra, 314 Conn. 323 (overruling in part both *Purzycki* v. *Fairfield*, supra, 244 Conn. 101, and *Burns* v. *Board of Education*, supra, 228 Conn. 640, with no mention of stare decisis or underlying principles); *State* v. *Sanchez*, supra, 308 Conn. 78 (overruling in part *Finley* v. *Aetna Life & Casualty Co.*, supra, 202 Conn. 190, with no mention of stare decisis or underlying principles); *State* v. *Paige*, supra, 304 Conn. 446 (overruling in part *State* v. *Greenberg*, supra, 92 Conn. 657, with no mention of stare decisis or underlying principles). The Chief Justice's stated concern in her concurring opinion in this case, that overruling *Santiago* would raise questions "about the court's integrity and the rule of law in the state of Connecticut," cannot be reconciled with the number of times this court has overturned its prior decisions without even considering whether doing so would be consistent with the doctrine.

These recent decisions also call into question the assertion of the Chief Justice that stare decisis must be adhered to in the present case because "neither the factual underpinnings of the prior decision nor the law has changed . . . ." She contends that one of these changes is necessary before a court may overrule a decision. Presumably, because she recognizes no exception for clearly wrong decisions despite its well

established roots in our law, and because she obviously believes that *Santiago* was clearly wrong; see *State* v. *Santiago*, supra, 318 Conn. 231–341 (*Rogers*, *C. J.*, dissenting); she takes the position that even when a decision is clearly wrong, it must be accorded stare decisis effect unless one of these two conditions is present. She claims that in the absence of one or both of those two conditions, the decision to overrule prior precedent is based merely on "a present doctrinal disposition to come out differently from [the prior decision]." *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, supra, 505 U.S. 864.

In a case that was decided mere months ago, however, the Chief Justice joined the majority in overruling prior precedent, despite the absence of either of these two conditions. And in doing so, the court recognized a new cause of action, hardly a small change in the law. In *Campos* v. *Coleman*, supra, 319 Conn. 57, this court overruled *Mendillo* v. *Board of Education*, supra, 246 Conn. 456, 461, 477–96, in which the court had declined, based on an exhaustive analysis of the relevant policy principles and applicable precedent, to recognize a derivative cause of action for loss of consortium by a minor child. The justification provided by the court in *Campos* for overruling *Mendillo*, which had been decided by an en banc panel before the court adopted that practice for all cases, is illuminating: "Upon reconsideration of the relevant considerations, including the five factors that this court found determinative in *Mendillo*, we now agree with the concurring and dissenting opinion in *Mendillo* that the public policy factors favoring recognition of a cause of action for loss of parental consortium outweigh those factors disfavoring recognition." *Campos* v. *Coleman*, supra, 43. The opinion then proceeded to consider each of those factors and explain why the present panel now "disagree[d]"; id., 45; with the evaluation conducted by the panel in *Mendillo* of

each of those factors. Id., 44–57. In other words, the panel in *Campos* simply disagreed with the conclusion arrived at by the panel in *Mendillo*, so *Mendillo* was overruled. Nothing in the factual underpinnings or the law had changed in the more than seventeen years since *Mendillo* was decided. The court in *Campos* relied on many of the identical authorities on which the court in *Mendillo* had relied, but the court in *Campos* arrived at a different conclusion.

One would expect, considering the Chief Justice's claim that the court is bound by the doctrine of stare decisis in the present case, that she would have expressed similar concerns regarding the risk that the court might appear to be deciding cases on the basis of the personal moral beliefs of individual justices, and that *Campos* would include an extensive and considered discussion of why stare decisis should not apply to *Mendillo*. Not so. Not only did *Campos* restrict its passing reference to the doctrine of stare decisis to a brief footnote, but it also misstated one of the basic principles underlying the doctrine. Id., 57 n.16. Specifically, as I have explained in this dissenting opinion, the exception to the doctrine of stare decisis for clearly wrong decisions is well established. That exception, however, is quite narrow, and does not apply to a decision when a current panel concludes merely that, although the original decision was "wrong," reasonable jurists could disagree. We have therefore limited the application of the "clearly wrong" exception to stare decisis to those instances when overruling prior precedent is compelled by "the *most cogent* reasons and *inescapable* logic . . . ." (Emphasis added; internal quotation marks omitted.) *Conway* v. *Wilton*, supra, 238 Conn. 660–61. The court in *Campos*, however, merely made the conclusory statement that its decision to overrule *Mendillo* was justified because "logic dictate[d] such a result." *Campos* v. *Coleman*, supra, 319

Conn. 57 n.16. This statement significantly lowers the bar. If all that were required in order for this court to overrule prior precedent was the present panel's conclusion that "logic dictated" that result, our definition of the word "precedent" would have to change radically.

Outside observers reading the *Campos* decision might be concerned that the *sole reason* for its conclusion was the *composition of the panel*. The Chief Justice, however, joined the majority, a position that is inconsistent with her concern in the present case to avoid the appearance of being driven by a mere doctrinal disagreement with the *previous panel*.

The Chief Justice's decision in *State* v. *DeJesus*, supra, 288 Conn. 418, is particularly problematic for her, because in that case, without any hesitation, she authored an opinion that accomplished precisely what she asserts today would so threaten the rule of law and the integrity of this court. In *Sanseverino I*, supra, 287 Conn. 612–13, decided less than two months before *DeJesus*, this court applied *State* v. *Salamon*, supra, 287 Conn. 509, to reverse the defendant's conviction for kidnapping. In *Salamon*, this court overruled a long line of cases that had held that a conviction for kidnapping would lie even when "the restraint involved . . . [was] merely incidental to the commission of another offense perpetrated against the victim by the accused." Id., 513. The defendant in *Sanseverino I* had been convicted of both kidnapping and sexual assault. *Sanseverino I*, supra, 611–12. The majority in *Sanseverino I*, supra, 624, concluded that, under the new rule, which required that the state prove that the restraint involved was more than merely incidental to and necessary for the commission of the sexual assault, "no reasonable jury could have found the defendant guilty of kidnapping in the first degree on the basis of the evidence that the state proffered at trial." Accordingly, the proper

remedy, the court concluded, was not a retrial on the kidnapping charge, but an outright acquittal. Id., 626. Justice Zarella dissented, arguing that the majority decision improperly had evaluated the sufficiency of the state's evidence presented at trial on the basis of the new rule. Id., 654. Justice Zarella observed: "The majority may be correct that, on the basis of the facts presented at the defendant's trial, the state did not demonstrate that the defendant perpetrated a restraint of the victim that has legal significance independent of the sexual assault. The state, however, had no knowledge when presenting its case to the jury that it was necessary to make such a showing." Id. (*Zarella*, *J.*, dissenting).

The Chief Justice, who had joined the majority in *Sanseverino I*, authored *State* v. *DeJesus*, supra, 288 Conn. 437, which, with the *addition of two new panel members*, overruled *Sanseverino I*. In *DeJesus*, the Chief Justice relied on the very same principles—in fact, the very same case law—that she and the other members of the majority in *Sanseverino I* had found unpersuasive less than two months earlier. Compare *Sanseverino I*, supra, 287 Conn. 648–64 (*Zarella*, *J.*, dissenting), with *State* v. *DeJesus*, supra, 288 Conn. 434–39. And she did so notwithstanding the objections of the dissent, which argued that the decision in *DeJesus* evinced a "lack of respect for the principle of stare decisis . . . ." *State* v. *DeJesus*, supra, 288 Conn. 529 (*Katz*, *J.*, dissenting). Specifically, the dissent in *DeJesus* levied an uncannily familiar accusation against the majority, stating that "[t]he majority's decision to overrule such *recent* precedent strikes at the very heart of [stare decisis]." (Emphasis added.) Id., 530 (*Katz*, *J.*, dissenting).

Writing for the majority in *DeJesus*, the Chief Justice quickly dismissed the dissenting opinion's arguments, voicing no concerns whatsoever that either the *subse-*

quent panel change or the quick nature of the about face presented any impediment to overruling *Sanseverino I*. *State* v. *DeJesus*, supra, 288 Conn. 437–38 n.14. This is particularly noteworthy for several reasons. First, as I have observed, the dissent expressly pointed out the fact that *DeJesus* was released at a whiplash-inducing speed after *Sanseverino I*, which was controlling precedent as to the appropriate remedy for less than two months before the court changed its mind. Id., 529 (*Katz*, *J.*, dissenting). Second, the sole justification on which the majority in *DeJesus* relied for its decision to overrule *Sanseverino I* was that the rule announced was *clearly* "*wrongly decided*." (Emphasis added.) Id., 437 n.14. The opposite conclusion, the majority explained, was compelled by the most "inescapable logic . . . ." Id. This basis, that *Sanseverino I* was not merely wrong, but indisputably so, is the very same basis that the Chief Justice now asserts is somehow insufficient to overrule *Santiago*, despite her very public and very obvious belief that *Santiago* is clearly wrong. Lastly, I observe that because so little time passed between the publication of *Sanseverino I* and *DeJesus*, absolutely nothing had changed between the two decisions. This is particularly ironic, given the Chief Justice's insistence in the present case that in order for this court to overrule prior precedent, there must have been some subsequent change in the facts or the law, and that the conclusion that a decision was clearly wrong, on its own, is insufficient to justify a departure from stare decisis. One wonders what the Chief Justice might have responded in *DeJesus*, had the dissent pointed out, quite accurately, that "the only change that has occurred [since *Sanseverino I* was decided] is a change in the makeup of this court . . . ."

Do not misunderstand me to suggest that *State* v. *DeJesus*, supra, 288 Conn. 418, was wrongly decided. To the contrary, *DeJesus* is perfectly consistent with

the doctrine of stare decisis, because *Sanseverino I*, supra, 287 Conn. 608, had ignored prior precedent. The panel in *DeJesus*, therefore, was required by the doctrine of stare decisis to overrule the portion of *Sanseverino I* that contravened well established precedent, regardless of how recently *Sanseverino I* had been decided, and regardless of whether there was a panel change. *DeJesus* repaired the fabric of the law. And *DeJesus* did so as quickly as possible, before the errant decision could do damage. That is precisely what we are asked to do in the present case.

The position of the Chief Justice, that when there has been a panel change, stare decisis precludes the court from overturning a recent, clearly wrong decision that flouted established precedent, conflicts with a fundamental principle underlying the doctrine of stare decisis, namely, that the doctrine, although grounded in stability and consistency, *cannot* be rigid. Otherwise, consistency and stability would require the court to follow precedent regardless of how wrong it may be. See *Conway* v. *Wilton*, supra, 238 Conn. 660 ("Stare decisis is not an inexorable command. . . . [A]lthough [s]tare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, [it] is not an absolute impediment to change. . . . [S]tability should not be confused with perpetuity. If law is to have a current relevance, courts must have and exert the capacity to change a rule of law when reason so requires." [Citations omitted; internal quotation marks omitted.]). As this court has stated on many occasions, it is more important to be right than to be consistent. Id.

The two "rules" that the Chief Justice focuses on in her concurring opinion in the present case are: (1) this court cannot overrule a decision following a panel change; and (2) this court cannot overrule a recently decided case. As to the first supposed rule, she points

to no instance in which this court overruled prior precedent, where there had not been an *intervening panel change*. She also fails to cite to a single decision by this court declining to overrule a prior precedent on the basis that it was too recently decided. Assuming, however, for purposes of discussion, that these two rules bar the court from overruling prior precedent, her rigid application of these principles, if carried out in the manner that they suggest is appropriate, would guarantee that a clearly wrong decision would stand uncorrected.

An excellent illustration of this principle is this court's decision in *Tileston* v. *Ullman*, 129 Conn. 84, 86, 26 A.2d 582 (1942), appeal dismissed, 318 U.S. 44, 46, 63 S. Ct. 493, 87 L. Ed. 603 (1943), which declined to overrule *State* v. *Nelson*, 126 Conn. 412, 11 A.2d 856 (1940), based in part on the principle that "a change in personnel of the court affords no ground for reopening a question which has been authoritatively settled." Just as in the present case, there had been a panel change between the two decisions; the panels differed by one member because Justice Hinman, who had been on the panel in *Nelson*, had retired. In *Nelson*, the court had rejected a challenge to General Statutes (1930 Rev.) §§ 6246 and 6562, which together, as construed by the court, made it a criminal offense for a physician to prescribe contraceptives to a married woman, even when "the general health and well-being of the patient require[d] it." *Tileston* v. *Ullman*, supra, 85. The court in *Nelson* expressly left open the question of whether an exception should be read into the statutes when a physician has concluded that pregnancy would jeopardize the life of the woman, which the court acknowledged was a commonly recognized exception in abortion statutes at the time. *State* v. *Nelson*, supra, 418; *Tileston* v. *Ullman*, supra, 85.

The plaintiff in *Tileston* was a licensed physician who sought a declaratory judgment that General Statutes (1930 Rev.) §§ 6246 and 6562 allowed for an exception when a physician had concluded that pregnancy would place a woman's life in danger. Although this was precisely the issue that had been left unresolved by *Nelson*; *State* v. *Nelson*, supra, 126 Conn. 418; the court in *Tileston* characterized the claim as one that would require it to overrule *Nelson*, and declined to do so, in part because the panel had changed. *Tileston* v. *Ullman*, supra, 129 Conn. 86.

In *Tileston*, the court's reliance on the panel change obviated any need to reexamine the problematic public policy principles on which *Nelson* had rested. Specifically, in *Nelson*, the court had explained that the statutes' "plain purpose" was "to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus engender . . . a virile and virtuous race of men and women." (Internal quotation marks omitted.) *State* v. *Nelson*, supra, 126 Conn. 425. The court's choice of the word " 'virile' " is revealing, in light of its additional observation that "not all married [women] are immune from temptation or inclination to extra-marital indulgence, as to which risk of illegitimate pregnancy is a recognized deterrent deemed desirable in the interests of morality." Id., 424. Because the women at issue in the appeal were all married, any child born as a result of a so-called "illegitimate pregnancy" would not actually be "illegitimate"; putative father laws would prevent that. The purpose of the statutes, accordingly, was to protect the "virility" of husbands by preventing them from being made into cuckolds! It is easy to see why the panel in *Nelson* would deem such a public "purpose" to outweigh any concerns over women's general health.

Similarly, the panel in *Tileston* had no difficulty balancing that noble public "purpose" against the consider-

ably greater risk presented to the female patients at issue in that case—death. Indeed, for those women, the court had a perfectly legal, alternative solution: "absolute abstention." *Tileston* v. *Ullman*, supra, 129 Conn. 92. Writing for the majority, Justice Ells, the only new panel member, even offered a helpful observation: "Certainly [absolute abstention] is a sure remedy." Id.

The decision in *Tileston* illustrates the dangers of the rigid application of stare decisis. The court in *Tileston* was able to rely in part on a panel change to justify its refusal to allow for a statutory exception that had not been dictated by prior precedent, despite the fact that the exception was commonly allowed in the much more extreme case of abortion. Id., 85–86. Similarly, the Chief Justice is able to rely on the panel change in the present case to justify her refusal to overrule a decision that blatantly violated the doctrine of stare decisis. *Tileston* also starkly demonstrates the fallacy of concluding that this court risks the appearance that its decision is driven by the doctrinal disposition of the panel only when a new panel overrules prior precedent. Most importantly, *Tileston* highlights the principle that some decisions are so wrong that duty requires that the court overrule them. If a slightly different panel than the one in the present case had decided yesterday that physicians could be prosecuted for providing contraception to female patients, I have no doubt that the Chief Justice would voice no concerns that the rule of law or integrity of this court would be imperiled by overruling that clearly wrong decision.

Of course, the best evidence that the Chief Justice improperly relies on the doctrine of stare decisis to justify her conclusion that *Santiago* should not be overruled is *Santiago* itself. That is, the overwhelming irony is that the Chief Justice relies on the doctrine of stare decisis in declining to overrule a decision that she herself recognized tramped merrily over this court's entire

body of death penalty jurisprudence, in complete disregard of that doctrine.[5] The decision in *Santiago* rewrote

[5] I also note the irony that *Santiago* itself involved multiple panel changes. Justices opted in and out of the panel while it was being considered by this court, yet no one seemed to be concerned that those panel changes would give rise to the public perception that the result of an appeal before this court depended on the composition of the panel. A summary of the panel changes in that case reveals that they were quite numerous.

I begin with the panel that decided *State* v. *Santiago*, 305 Conn. 101, 49 A.3d 566 (2012), which was argued on April 27, 2011, and was the same appeal that gave rise to the decision in *State* v. *Santiago*, supra, 318 Conn. 1. That panel was comprised of Chief Justice Rogers, and Justices Norcott, Zarella, McLachlan, Eveleigh, Harper and Vertefeuille. Over the course of the years during which the decision in *State* v. *Santiago*, supra, 305 Conn. 1, was pending before this court, the orders on the motions in that case reveal that Justice Palmer had recused himself from the case.

On May 9, 2012, more than one year after oral argument in *State* v. *Santiago*, supra, 305 Conn. 1, the defendant in that case filed a motion seeking permission to file a supplemental brief addressing the effect of No. 12-5 of the 2012 Public Acts on his appeal. The order denying that motion was issued by the same panel that heard oral argument in *State* v. *Santiago*, supra, 305 Conn. 101. The motion was denied "because, under the circumstances of this case, these constitutional issues would be more appropriately addressed in the context of postjudgment motions." Id., 308 n.167. The decision in *State* v. *Santiago*, supra, 305 Conn. 101, was released one month later.

On September 12, 2012, the original panel in *State* v. *Santiago*, supra, 305 Conn. 101, granted the defendant's renewed motion requesting permission to file a supplemental brief and his motion seeking permission to file a late motion for reconsideration. On September 14, 2012, the Chief Clerk of the Supreme Court notified the parties in a letter that Justice McLachlan, who was scheduled to leave the Judicial Branch at the end of that month, had withdrawn from the panel, and that Justice Palmer, "who is not recused on the legal issues implicated in the reconsideration, has been added to the panel." At that point in time, therefore, the panel in what was to become *State* v. *Santiago*, supra, 318 Conn. 1, now consisted of Chief Justice Rogers, and Justices Norcott, Palmer, Zarella, Eveleigh, Harper and Vertefeuille.

In November, 2012, Justice Harper reached the age of seventy. Although his continued participation in the case was authorized by this court's decision in *Honulik* v. *Greenwich*, 293 Conn. 641, 644, 658, 980 A.2d 845 (2009), and General Statutes § 51-198 (c), he withdrew from the panel. Similarly, although her status had not changed, and her continued participation in the case as a senior justice was authorized by § 51-198 (b), Justice Vertefeuille also withdrew from the panel. Justice McDonald and I were added to the panel after we joined the court, thus allowing the defendant's motion for reconsideration to be decided by all of the court's then current members. At that time, the panel in what was to become *State* v. *Santiago*, supra, 318

history, contorted both this court's legal precedent and the legislative history of No. 12-5 of the 2012 Public Acts (P.A. 12-5), and blatantly substituted its own moral judgment for that of the people of this state. Good jurisprudence, not the present doctrinal disposition of a slightly different panel, would justify overruling such an abuse of judicial power. As the Chief Justice notes in her concurring opinion, the court's decision in *Santiago* "raise[d] legitimate concerns by the people we serve about the court's integrity and the rule of law in the state of Connecticut." We now have the opportunity to restore the faith of the people of this state in this court's respect for the rule of law. The doctrine of stare decisis requires that we take that opportunity.

Overturning *Santiago* would not require justices to decide the present case according to their personal moral beliefs. The Chief Justice explained in her dis-

Conn. 1, now consisted of Chief Justice Rogers, and Justices Norcott, Palmer, Zarella, Eveleigh, McDonald and myself.

Oral argument was heard on the defendant's motion for reconsideration on April 23, 2013. Justice Robinson joined the court in December, 2013. Justice Norcott, at that time a judge trial referee, did not withdraw from the panel, and Justice Robinson was not added to it.

In the meantime, the present case was marked ready on May 13, 2014. At that time, the decision on the defendant's motion for reconsideration was more than one year away from being published. See *State* v. *Santiago*, supra, 318 Conn. 1. Although the same issue presented in the motion for reconsideration in that case had been raised and briefed in the present case, and although the panel in the present case was comprised of the Chief Justice and sitting Associate Justices of this court, while the panel in *State* v. *Santiago*, supra, 318 Conn.1, was not, the court did not determine to address the issue in the present case.

The Chief Justice observes in her concurring opinion that in *State* v. *Santiago*, supra, 318 Conn. 1, "this court followed its standard procedures in determining which justices would sit on all phases of that case." I am not suggesting that the court did not follow its standard procedures; I merely observe that while the panel changes in that case were many and ongoing, in the end, those changes yielded the result that in one of the most important decisions this court has decided in recent history, the panel that decided the case was not comprised of all of the sitting justices of this court, contrary to this court's established policy in important cases. This could have been avoided if this court had resolved this issue in the present case.

senting opinion in that case that *Santiago* was decided and governed by "the majority's subjective sense of morality"; *State* v. *Santiago*, supra, 318 Conn. 277; and was completely contrary to what was dictated by existing precedent and the legislative history of P.A. 12-5. Id., 270–76. I agree with her. Even a jurist who is deeply, morally opposed to capital punishment, however, has a duty to follow the law. I agree with the Chief Justice that the majority in *Santiago* ignored that duty, and resolved the appeal on the basis of their personal, moral opposition to the death penalty. Id., 277. Overruling that decision now, not after the decision has been "on the books" long enough to be relied on as precedent, is the best way to adhere to the principle of stare decisis and repair the damage that has been done to the rule of law. The United States Supreme Court has made clear that when a court is called upon to overrule a recent decision that has violated stare decisis, the doctrine of stare decisis requires that the prior decision be overruled. See *Adarand Constructors, Inc.* v. *Pena*, supra, 515 U.S. 233–34. By focusing on the panel change, rather than the damage that *Santiago* inflicted on the rule of law, the Chief Justice loses sight of what needs to be done in the present case—the fabric of the law must be repaired. And the only way to do that would have been to overrule *Santiago*.

I respectfully dissent.

IN RE OREOLUWA O.*
(SC 19501)

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson, Js.

Syllabus

The respondent father, who resides in Nigeria and has been unable to travel to the United States, appealed to the Appellate Court from the judgment

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this

of the trial court terminating his parental rights with respect to his minor child. The child, who was born in the United States and was diagnosed with several complex heart conditions requiring a series of cardiac procedures, was adjudicated neglected and placed in the custody of the petitioner, the Commissioner of Children and Families, after medical personnel observed the respondent mother behaving erratically and having difficulty administering medications to the child. Thereafter, the Department of Children and Families located and maintained communication with the respondent father. The department contacted placement resources identified by the respondent father, attempted to provide electronic visitation with the child through an Internet based video conference system, and provided the respondent father with contact information for the Nigerian consulate in order to facilitate travel. The petitioner submitted evidence indicating that, although the child had successfully undergone multiple cardiac procedures, he was currently unable to travel to Nigeria due to his medical condition and that his ability to travel in the future was unclear. The petitioner presented no evidence that the department had taken additional steps to obtain more specific information about the child's ability to travel in the future, or that the department had attempted to investigate what type of medical care was available to the child in Nigeria. The trial court had determined that the respondent father's absence had limited the type and number of services that the department was able to provide and that, under the circumstances, the department had made reasonable efforts to reunify the respondent father and the child. On appeal to the Appellate Court, the respondent father claimed, inter alia, that the trial court had improperly determined that the department had made reasonable reunification efforts as required by statute (§ 17a-112 [j] [1]). The Appellate Court concluded that, in view of the respondent father's absence, the trial court's finding that the department had made reasonable reunification efforts was not clearly erroneous. The Appellate Court therefore affirmed the judgment of the trial court, and the respondent father, on the granting of certification, appealed to this court. *Held* that the Appellate Court improperly determined that there was adequate evidentiary support for the trial court's finding that the department had made reasonable efforts to reunify the respondent father with his child: the petitioner was unable to prove, by clear and convincing evidence, that the department had made every reasonable reunification effort without providing updated medical information about the child's ability to travel in the future, this court's review of the record having indicated that all of the department's efforts were based on presumptions that the respondent father would have to be present in this country to engage in any reunifica-

appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

tion efforts and that the child could not travel to Nigeria, and, therefore, under the facts of this case, it was not improper for the trial court to consider events subsequent to the filing of the petition to terminate the respondent father's parental rights; moreover, even if the department had legitimate concerns about the medical care available to the child in Nigeria, those concerns did not relieve the department of its burden of making reasonable efforts to achieve reunification by engaging the respondent father and making services available to him aimed at installing healthy parenting skills; accordingly, the judgment terminating the respondent father's parental rights was reversed and the case was remanded for further proceedings.

(*One justice dissenting*)

Argued November 5, 2015—officially released May 31, 2016**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, and tried to the court, *Mosley, J.*; judgment terminating the respondents' parental rights, from which the respondent father appealed to the Appellate Court, *Gruendel*, *Alvord* and *Norcott*, *Js.*, which affirmed the trial court's judgment, and the respondent father, on the granting of certification, appealed to this court. *Reversed; further proceedings.*

Michael S. Taylor, assigned counsel, with whom were *James P. Sexton*, assigned counsel, and, on the brief, *Matthew C. Eagan*, assigned counsel, for the appellant (respondent father).

Michael Besso, assistant attorney general, with whom were *Jessica B. Gauvin*, assistant attorney general, and, on the brief, *George Jepsen*, attorney general, *Gregory T. D'Auria*, solicitor general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Owen Murphy, for the minor child.

** May 31, 2016, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

EVELEIGH, J. In this certified appeal,[1] we must decide whether the Appellate Court properly affirmed the judgment of the trial court terminating the parental rights of the respondent father, Olusegun O., as to his minor son, Oreoluwa O.[2] See *In re Oreoluwa O.*, 157 Conn. App. 490, 116 A.3d 400 (2015). On appeal, the respondent asserts, inter alia, that the Appellate Court improperly affirmed the judgment of the trial court concluding that the Department of Children and Families (department) had made reasonable efforts to reunify Oreoluwa with the respondent in accordance with General Statutes (Supp. 2016) § 17a-112 (j) (1).[3] We agree

[1] We granted the petition of the respondent father, Olusegun O., for certification to appeal, limited to the following issues: (1) "Did the Appellate Court properly affirm the trial court's determination that the [Department of Children and Families] made reasonable efforts to reunify the [minor] child [Oreoluwa O.] with the respondent [father]?"; (2) "Did the Appellate Court properly affirm the trial court's determination that [Oreoluwa] had been abandoned?"; (3) "Did the Appellate Court properly determine that the respondent [father] lacked standing to assert a claim that [Oreoluwa's] fundamental right to family integrity was violated by the use of a judicial process to terminate [the respondent] father's parental rights that deprived [the] respondent [father] of meaningful notice and an opportunity to be heard?"; and (4) "If the answer to question number three is in the negative, was [Oreoluwa's] fundamental right . . . to family integrity violated because [the respondent] father was denied a meaningful notice and opportunity to be heard?" (Internal quotation marks omitted.) *In re Oreoluwa O.*, 317 Conn. 914, 116 A.3d 813 (2015). In view of our decision regarding the first certified question, it is unnecessary for us to reach the remaining three questions, although we have serious concerns regarding both the sufficiency of the grounds for termination, and the procedure used during the termination proceeding.

[2] We note that the trial court also terminated the parental rights of the respondent mother, Adebola O., who is not a party to the present appeal. See *In re Oreoluwa O.*, 157 Conn. App. 490, 492 n.1, 116 A.3d 400 (2015). In the interest of simplicity, we refer to Olusegun O. as the respondent in this opinion. We also note that counsel for the minor child has adopted the appellate briefs submitted by the petitioner, the Commissioner of Children and Families, before both the Appellate Court and this court. See id.

[3] We note that § 17a-112 has been amended by our legislature since the events underlying the present appeal. See, e.g., Public Acts 2015, No. 15-159, § 1. These amendments are not, however, relevant to the present appeal.

with the respondent and, accordingly, reverse the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following relevant facts and procedural history. "The respondent, together with his wife, Oreoluwa's mother,[4] live in Nigeria. Oreoluwa's mother traveled to the United States while pregnant [and gave birth to him in the United States]. Prior to his birth, it was determined that he suffered significant congenital heart defects, and he was diagnosed with several complex heart conditions after he was born. Initially, he was released from the hospital to his mother's care, and the two lived with a family in Milford for a short time after his birth before moving into a hotel. In mid-April, 2013, when he was approximately three months old, Oreoluwa was readmitted to the hospital, where medical personnel observed his mother behaving erratically and having difficulty administering his medications.

"On May 3, 2013, the petitioner, the Commissioner of Children and Families (commissioner), sought from the court an order of temporary custody and filed a neglect petition as to Oreoluwa. The commissioner alleged that Oreoluwa was neglected in that he was being denied proper care and was being permitted to live under conditions injurious to his [well-being], and that he was uncared for in that his home could not provide the specialized care that he required. Oreoluwa was adjudicated neglected and committed to the custody of the commissioner. The court approved specific steps for the respondent to take so he could be reunited with Oreoluwa. On December 23, 2013, the commissioner filed a petition for the termination of the respondent's parental rights regarding Oreoluwa on the

For the sake of simplicity, all references to § 17a-112 within this opinion are to the version appearing in the 2016 supplement to the General Statutes.

[4] See footnote 2 of this opinion.

grounds that (1) Oreoluwa had been abandoned by the respondent in the sense that he failed to maintain a reasonable degree of interest, concern, or responsibility as to [Oreoluwa's welfare], and (2) there was no ongoing parent-child relationship with the respondent 'that ordinarily develops as a result of a parent having met on a day-to-day basis the physical, emotional, moral, and educational needs of [Oreoluwa] . . . and [that] to allow further time for the establishment or reestablishment of the parent-child . . . relationship would be detrimental to [Oreoluwa's] best interests . . . .' On February 27, 2014, the court entered a default as to the respondent because of his failure to appear at the plea hearing. . . .

"The hearing on the termination of parental rights petition was held on March 12, 2014. On March 20, 2014, the court rendered an oral decision terminating the parental rights of the respondent. The respondent subsequently filed a motion for reargument and reconsideration, which was denied. On June 14, 2014, the respondent [appealed]. The respondent also filed a motion for articulation of the decision to terminate parental rights, which was denied. The respondent filed a motion for review with [the Appellate Court], which granted the motion. On October 10, 2014, the trial court issued its articulation.

"The court found by clear and convincing evidence pursuant to . . . § 17a-112 (j) (1) that the department made reasonable efforts to reunify Oreoluwa with the respondent given the circumstances. The court noted that 'the [respondent's] absence from the state, and indeed from this country, has limited the type and number of services that the department has been able to provide to him. When a parent is not available to participate in services, the reasonableness of the department's efforts must be judged in that context.' The court explained that although the department was not able

to provide [the respondent with] services, it had provided him with contact information for the Nigerian consulate in New York, maintained communication with him, investigated a possible placement resource for Oreoluwa suggested by the respondent, and attempted, although unsuccessfully, to set up visitation via [an Internet based videoconference system known as] Skype. . . .

"After finding that the allegations of the petition were proven by clear and convincing evidence, the court then determined whether termination was in the best interest of Oreoluwa. The court considered the seven statutory factors and [in its articulation] made written findings as to each factor pursuant to § 17a-112 (k). The court ultimately concluded that there was clear and convincing evidence that it was in Oreoluwa's best interest to terminate the respondent's parental rights." (Footnotes altered.) *In re Oreoluwa O.*, supra, 157 Conn. App. 493–96.

The respondent appealed from the judgment of the trial court to the Appellate Court. On appeal, the respondent claimed that the trial court improperly determined that "(1) the [department] made reasonable efforts to reunify him with Oreoluwa, (2) the respondent abandoned Oreoluwa, and (3) the respondent had no ongoing parent-child relationship with Oreoluwa. He also claim[ed], on behalf of Oreoluwa, that the guarantee of due process under the fourteenth amendment to the United States constitution required the trial court to provide the respondent with notice of alternative means of participation in the termination trial and required the court to undertake reasonable efforts to use those alternative means." Id., 492–93.

The Appellate Court affirmed the judgment of the trial court. In regard to the reunification efforts, the Appellate Court recognized as follows: "The depart-

ment maintained communication with the respondent via e-mail and telephone calls, and, when the respondent indicated a possible placement resource for Oreoluwa with an attorney in Philadelphia, the department contacted the potential resource. The department was later informed by the [respondent], however, that he no longer wished for the potential placement resource to be involved. Although the respondent argues that these efforts by the department did not actually relate to reunification, we conclude that under the circumstances of the present case, the actions taken by the department were reasonable and related to reunification." Id., 501.

The Appellate Court further concluded that the trial court's findings as to reasonable efforts had adequate evidentiary support. Id. In regard to the trial court's finding "that the respondent's absence from the country prevented the department from being able to provide him with any services," the Appellate Court agreed that "the reasonableness of the department's efforts must be assessed in light of this key finding." Id. In view of the foregoing, the Appellate Court concluded that "the trial court's finding that the department made reasonable efforts to reunify Oreoluwa with the respondent was not clearly erroneous." Id., 502. This appeal followed.

Although the respondent has raised several issues on appeal to this court,[5] we need address only one, because our resolution of that claim is dispositive of the appeal. The respondent claims that the Appellate Court improperly affirmed the judgment of the trial court because the department failed to undertake the reasonable efforts required by § 17a-112 (j) (1) to reunite him with Oreoluwa before it filed the petition to terminate his parental rights. We conclude that the department failed to under-

[5] See footnote 1 of this opinion.

take such efforts and, accordingly, we reverse the judgment of the Appellate Court on that basis.

Pursuant to § 17a-112 (j),[6] the trial court must make certain required findings after a hearing before it may terminate a party's parental rights. It is well established that, "[u]nder § 17a-112, a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termina-

[6] General Statutes (Supp. 2016) § 17a-112 (j) provides in relevant part that a trial court may grant a petition for termination of parental rights "if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent . . . unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) (A) the child has been abandoned by the parent in the sense that the parent has failed to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child; (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding, or (ii) is found to be neglected, abused or uncared for and has been in the custody of the commissioner for at least fifteen months and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . (D) there is no ongoing parent-child relationship, which means the relationship that ordinarily develops as a result of a parent having met on a day-to-day basis the physical, emotional, moral and educational needs of the child and to allow further time for the establishment or reestablishment of such parent-child relationship would be detrimental to the best interest of the child; [or] (E) the parent of a child under the age of seven years who is neglected, abused or uncared for, has failed, is unable or is unwilling to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child and such parent's parental rights of another child were previously terminated pursuant to a petition filed by the Commissioner of Children and Families . . . ."

tion of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. . . . In contrast to custody proceedings, in which the best interests of the child are always the paramount consideration and in fact usually dictate the outcome, in termination proceedings the statutory criteria must be met before termination can be accomplished and adoption proceedings begun. . . . Section [17a-112 (j) (3)] carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the termination of parental rights in the absence of consent." (Citation omitted; footnote omitted; internal quotation marks omitted.) *In re Eden F.*, 250 Conn. 674, 688–89, 741 A.2d 873 (1999). "If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child." Id., 689.

Also as part of the adjudicatory phase, "the department is required to prove, by clear and convincing evidence, that it has made reasonable efforts . . . to reunify the child with the parent, unless the court finds . . . that the parent is unable or unwilling to benefit from reunification . . . . Turning to the statutory scheme encompassing the termination of the parental rights of a child committed to the [custody of the commissioner], [§ 17a-112] imposes on the department the duty, inter alia, to make reasonable efforts to reunite the child or children with the parents. The word reasonable is the linchpin on which the department's efforts in a particular set of circumstances are to be adjudged, using the clear and convincing standard of proof. Neither the word reasonable nor the word efforts is, however, defined by our legislature or by the federal act from which the requirement was drawn. . . . [R]easonable efforts means doing everything reasonable, not

everything possible." (Citation omitted; internal quotation marks omitted.) *In re Samantha C.*, 268 Conn. 614, 632, 847 A.2d 883 (2004).

Subsequent to the Appellate Court's decision in the present case, this court clarified the applicable standard of review of an appeal from a judgment of the trial court pursuant to § 17a-112 (j). See *In re Shane M.*, 318 Conn. 568, 587, 122 A.3d 1247 (2015); see also *In re Gabriella A.*, 319 Conn. 775, 789–90, 127 A.3d 948 (2015). In those cases, this court clarified that "[w]e review the trial court's subordinate factual findings for clear error. . . . We review the trial court's ultimate determination that a parent has failed to achieve sufficient rehabilitation [or that a parent is unable to benefit from reunification services] for evidentiary sufficiency . . . ." *In re Gabriella A.*, supra, 789–90. We conclude that it is appropriate to apply the same standard of review of a trial court's decision with respect to whether the department made reasonable efforts at reunification. See id.; see also *In re Jorden R.*, 293 Conn. 539, 558–59, 979 A.2d 469 (2009). Accordingly, we conclude that we must review the trial court's decision in the present case with respect to whether the department made reasonable efforts at reunification for evidentiary sufficiency.

In the present case, the trial court determined that "the department has made reasonable efforts to locate and reunify Oreoluwa with the [respondent] given the circumstances." In making this finding, the trial court first recognized that the respondent's presence in Nigeria limited the type and number of services that the department could provide to him. The trial court further relied on the fact that the department maintained communication with the respondent, contacted the resource named by him who resided in the United States, attempted unsuccessfully to provide electronic visitation and communication with Oreoluwa through

Skype, and provided the respondent with contact information for the Nigerian consulate in New York. The Appellate Court affirmed the decision of the trial court, concluding that, under the circumstances of this case, "the trial court's finding that the department made reasonable efforts to reunify Oreoluwa with the respondent was not clearly erroneous." *In re Oreoluwa O.*, supra, 157 Conn. App. 502.

In the present case, the department filed the petition for termination of the respondent's parental rights on December 23, 2013. At that time, Oreoluwa was approximately eleven months old.

At the time that the commissioner filed the petition for termination of the respondent's parental rights, the respondent had taken significant steps to remain involved in Oreoluwa's life. The respondent paid for the hotel where Oreoluwa and his mother initially had resided. The respondent also repeatedly attempted to contact the cardiologists who were caring for Oreoluwa, but did not receive any communication from them. The respondent also was in "constant contact" with the department, calling once a week and e-mailing more frequently to receive updates regarding Oreoluwa. The respondent also identified possible placement resources for Oreoluwa in the United States, which were ultimately unsuccessful.

Furthermore, the respondent repeatedly requested that he be allowed to communicate with Oreoluwa through Skype. Although the department's employees repeatedly requested that the department obtain the necessary equipment to enable this videoconference—namely, a tablet—the department never approved the request and the respondent was never allowed to videoconference with Oreoluwa.

Prior to the commissioner filing the petition for termination of the respondent's parental rights, the respon-

dent filed two applications for visas to travel to the United States. Both of the respondent's applications for visas were denied.

At the time that the commissioner filed the petition for termination of the respondent's parental rights, Oreoluwa had undergone multiple cardiac procedures, which had been successful. Nevertheless, a December, 2013 social study prepared by the department indicated that Oreoluwa would "require several cardiac procedures and surgeries throughout his life according to his cardiologist . . . ." It further indicated that Oreoluwa "is not able to travel to Nigeria due to his medical status and it is unclear at this time when he would be cleared to travel."

The medical information presented at the trial in this matter in March, 2014, contained no further information about Oreoluwa's medical condition either at the time the commissioner filed the petition for termination of parental rights or up to the time of trial. Indeed, the medical information in the form of affidavits from Oreoluwa's physicians dated back to April, 2013.[7] Further-

[7] The dissent asserts the following: "[T]he majority's conclusion suggests that the only evidence in the record relevant to whether it could be determined as of the date of the trial when Oreoluwa would be medically cleared to travel was the April 29, 2013 affidavit by Oreoluwa's treating cardiologists. In fact, the majority incorrectly states that 'the only evidence presented at trial that related to when Oreoluwa would be cleared to travel indicated that, before he was born, physicians expected that he would be unable to travel for at least one year from his birth.' That statement ignores evidence that supports the judgment of the trial court. Specifically, the petition for termination of parental rights, which was admitted into evidence at the trial, relies on much more recent reports offered by Oreoluwa's physicians, reports that provide ample support for the trial court's finding, particularly given the highly deferential standard of review accorded to the trial court's subordinate factual findings. It is helpful to review the evidence in detail." We disagree. We conclude that the trial court's finding that the department had established by clear and convincing evidence that it had made reasonable efforts to reunify Oreoluwa with the respondent was not supported by sufficient evidence.

Specifically, at trial, the department had the burden of producing evidence to establish that it had made reasonable efforts in reuniting Oreoluwa with

more, the only evidence presented at trial that related

the respondent. We conclude that a critical aspect of determining whether the department had made reasonable efforts at reunification was to determine when, if ever, Oreoluwa would be cleared to travel to Nigeria because the evidence indicated that the respondent had been unsuccessful in coming to the United States to date.

In support of its position that the department had made reasonable efforts at reunification, the commissioner introduced the following: an affidavit from Oreoluwa's physicians, social studies prepared by the department, and testimony from the department's social worker. Contrary to the dissent's representations, this evidence did not provide sufficient evidence to support the trial court's finding that the department had made reasonable efforts at reunification. Instead, the affidavits from the physicians were approximately eleven months old at the time of trial and did not include information about Oreoluwa's ability to travel. The social studies prepared by the department only contained the same conclusory information repeated from study to study: "[Oreoluwa] will require several cardiac procedures and surgeries throughout his life according to [his cardiologist]. Oreoluwa is not able to travel to Nigeria due to his medical status and it is unclear at this time when he would be cleared to travel. There is also uncertainty regarding the medical care he would be able to receive in Nigeria and if his ongoing medical needs would be able to be met."

Furthermore, the testimony from the department's social worker, Cynthia Pfeifer, was equally insufficient. Specifically, Pfeifer testified as follows during cross-examination by counsel for the minor child:

"Q. Okay. Now, speaking of [Oreoluwa] being medically cleared to travel [to] Nigeria, was that ever considered by the department?

"A. Meaning what?

"Q. [Oreoluwa] traveling to Nigeria since his parents could not come to the United States?

"A. He medically is not able to travel to Nigeria.

"Q. Okay. And what are the reasons?

"A. He has a unique heart condition.

"Q. Okay.

"A. In layman's terms, the medical team . . . has not sanctioned him to travel. He requires a sequence of surgeries and catheterizations to build the valves in his heart, as [I understand] it.

"Q. Okay.

"A. When [Oreoluwa's mother] learned of the medical issues while she was pregnant, the [medical] team . . . gave her a choice; you can either deliver here in the United States and he will not be able to travel for minimally [one] year, or you can go back to Nigeria and deliver and he would not have been expected to live for, I believe it was, more than a few months. . . .

"Q. Okay. So, now you mentioned [Oreoluwa] would be able to travel minimally in [one] year. Has . . . [one] year gone by since [he was] born?

"A. Yes.

to when Oreoluwa would be cleared to travel indicated that, before he was born, physicians expected that he would be unable to travel for at least one year from his birth.

At the time of the trial, the department entered into evidence a study in support of a permanency plan dated January 14, 2014. In that study, the department reported that Oreoluwa had undergone another cardiac catheterization on December 3, 2013, which "went well." The report also indicated that Oreoluwa had an appointment with his pediatric cardiologist on January 6, 2014, and that he is "doing well and can start on whole milk and more solid foods." The study further stated that another appointment with his pediatric cardiologist would be scheduled in two months and that "[t]he cardiac and surgical teams will meet prior to this appointment to discuss how they are going to proceed." This study repeated the same lines from the December, 2013 social study as follows: "[Oreoluwa] will require several cardiac procedures and surgeries throughout his life according to [his cardiologist]. Oreoluwa is not able to travel to Nigeria due to his medical status and it is unclear at this time when he would be cleared to travel. There is also uncertainty regarding the medical care he would be able to receive in Nigeria and if his ongoing medical needs would be able to be met."

The trial court found that, "[a]s of December, 2013, [Oreoluwa] was not able to travel to Nigeria due to his medical status, and it was not clear when he could do so." The trial court cited to the department's study of the permanency plan as the source for the foregoing

"Q. Okay. And he's still not cleared to travel?

"A. Correct."

The foregoing evidence was wholly insufficient for the trial court to make a determination as to whether the department had made reasonable efforts at reunifying Oreoluwa with the respondent because it did not indicate when, if ever, Oreoluwa would be able to travel to Nigeria.

statement. The trial court further found that Oreoluwa "was still not cleared to travel as of the date of the trial." The trial court did not cite to any authority for the foregoing statement about Oreoluwa's medical status at the time of trial. The trial court made no findings as to when Oreoluwa would be cleared to travel or when his medical team was meeting to discuss his future medical plan, despite the fact that the department's own exhibit revealed that Oreoluwa's cardiac and surgical team would be meeting prior to his appointment in March, 2014, to develop a plan for his future medical care. Indeed, there was no information presented at trial indicating whether Oreoluwa had any surgeries or cardiac procedures scheduled at that time.[8]

[8] The dissent asserts as follows: "[A]t oral argument before this court, the respondent conceded that Oreoluwa's original prognosis was that he would be medically unable to travel for at least one year. . . . Subsequently, however, Oreoluwa's physicians provided an updated, less definite estimate of when he would be able to travel. . . . This estimate, provided when Oreoluwa was eleven months old, differs from the one that was provided at the time of Oreoluwa's birth, which established a possible end date of one year. By contrast, the more recent estimate provided no potential end date. That is, as compared to the initial estimate that Oreoluwa might be able to travel by his first birthday, the most recent report from his physicians, reflected in the social study that was filed when Oreoluwa was eleven months old, did not provide any estimate of the earliest date on which Oreoluwa could travel. I draw the reasonable inference from those two pieces of evidence, viewed together, in the light most favorable to sustaining the judgment of the trial court, that it remained unclear, at the time of the trial, when Oreoluwa would be medically cleared to travel. It would indeed be reasonable to infer that, if anything, it had become less certain when Oreoluwa would be medically cleared to travel." (Emphasis omitted.) Contrary to the dissent's representation, nothing in the December, 2013 study or the more recent January, 2014 study indicated that "it had become less certain when Oreoluwa would be medically cleared to travel." (Emphasis omitted.) Instead, these studies, which were prepared and written in the department's own language, reflect the department's neglect in failing to provide the trial court with any information about the medical prognosis of when Oreoluwa would be cleared to travel. These studies were not accompanied by any medical reports or documentation supporting the dissent's theory that the physicians declined to provide an estimate of the soonest date on which Oreoluwa could travel or that it had become more unclear when he would be cleared to travel. Indeed, these studies indicated that all procedures done

The trial court then concluded that "the clear and convincing evidence establishes that the department has made reasonable efforts to locate and reunify Oreoluwa with the [respondent] given the circumstances. . . . [The respondent's] absence from the state, and indeed from this country, has limited the type and number of services that the department has been able to provide to him."

In considering whether, in the present case, the Appellate Court properly upheld the trial court's finding that the department had made reasonable efforts to reunify the respondent with Oreoluwa, we are mindful that "the requirement that the department make reasonable efforts to reunite parent and child affects the substantive rights of the parties to a termination proceeding. The requirement of reunification efforts provides additional substantive protection for any parent who contests a termination action, and places a concomitant burden on the state to take appropriate measures designed to secure reunification of parent and child." *In re Eden F.*, supra, 250 Conn. 696. Furthermore, we are mindful that the burden is on the commissioner to demonstrate that the department has made

to date had gone well and that he was not suffering developmental delays from his medical condition. Moreover, the trial court never made any factual finding that Oreoluwa's medical status had changed and that it had become more unclear when he would be able to travel and the dissent's reliance on this "fact" constitutes improper fact-finding.

Furthermore, the dissent asserts that "[t]he majority also relies on the fact that Oreoluwa was scheduled to have appointments with his pediatric cardiologist in January and March, 2014, as a basis for its conclusion that the trial court's finding that the department made reasonable efforts was not supported by sufficient evidence." We disagree. The relevance of the January and March, 2014 medical appointments is that more updated medical information was available to the department, but was not presented to the trial court. Instead, we conclude that without the most up to date and complete medical information available, the trial court was not able to make an adequate determination as to whether the department had made reasonable efforts to reunify Oreoluwa with the respondent.

reasonable efforts to locate the parent and to reunify the child with the parent. See, e.g., *In re Gabriella A.*, supra, 319 Conn. 777 n.4 ("[t]he [commissioner] must prove either that [the department] has made reasonable efforts to reunify or, alternatively, that the parent is unwilling or unable to benefit from reunification efforts" [internal quotation marks omitted]). "[R]easonable efforts means doing *everything reasonable* . . . ." (Emphasis added.) *In re Samantha C.*, supra, 268 Conn. 632.[9]

[9] The dissent asserts that "[t]he revised, more conservative estimate that cardiologists provided as to when Oreoluwa would be medically able to travel, taken together with [the testimony of Cynthia Pfeifer, the department's social worker], which the court found to be credible, and the trial court's specific findings in the articulation, when construed in the light most favorable to sustaining the judgment, provide sufficient evidentiary support for the conclusion that as of the date of the trial on the petition for termination, it remained unclear when Oreoluwa would be cleared to travel. The majority construes the evidence in a different light—declining to infer that the difference between the initial estimate given to the department by Oreoluwa's cardiologists, as testified to by Pfeifer, and the later estimate that the cardiologists provided to the department, as noted both in the social study in support of the termination petition and the social study in support of the permanency plan, had any meaning. Certainly, it is possible to construe the evidence in the manner that the majority does. I do not dispute that, nor is it necessary to do so. The mere fact that the majority's construction of the evidence is one possible manner of viewing it, however, is not sufficient given the standard of review, which requires us to construe the evidence in the light most favorable to sustaining the judgment. The majority's rationale would be supported only if it could demonstrate that the construction of the evidence that I suggest is not a reasonable one. And that, the majority cannot do." (Emphasis omitted.) We disagree. As we have explained previously in this opinion, it is well established that the burden is on the commissioner to demonstrate by clear and convincing evidence that the department has made reasonable efforts to locate the parent and to reunify the child with the parent. Contrary to the dissent, we cannot conclude that the record in the present case provides sufficient evidence to support the trial court's conclusion that the department met its burden in the present case.

Furthermore, in support of the conclusion that the trial court's determination that the department had made reasonable efforts at reunification was supported by sufficient evidence, the dissent repeatedly relies on facts not found by the trial court. As we have repeatedly recognized, "[i]t is elementary that neither this court nor the Appellate Court can find facts in the first instance. . . . [A]n appellate court cannot find facts or draw conclusions

In examining the reasonableness of the department's efforts in the present case, we are guided by the Appellate Court's decision in *In re Shaiesha O.*, 93 Conn. App. 42, 887 A.2d 415 (2006). In *In re Shaiesha O.*, the commissioner filed a petition to terminate the parental rights of the child's mother and father, prior to learning the results of a pending paternity test. Id., 46. Once the results of the paternity test were known, the department notified the father and he objected to the petition to terminate his parental rights. Id.

In reversing the termination of the parental rights of the father, the Appellate Court relied on the following facts: "Despite learning on December 10, 2002, that the [father] might be [the child's] father, the department did not make any attempt to contact him until March 17, 2003, when [a department social worker] left him a message regarding the taking of a paternity test. For the approximately ten week period from the first contact the department had with the [father] until the filing of the petition, [the department social worker] had two brief telephone conversations with the [father] regarding his paternity test. [The department social worker] testified that the first time that she had a discussion with him regarding a possible placement plan for [the child] was during June, 2003, after the filing of the petition to terminate the [father's] parental rights. She stated that as of June, 2003, the department had not facilitated any visitation between the [father] and [the child]. Significantly, she stated that if the [father] had requested visitation, she would have told him that he [could not] see [the child] until his paternity was confirmed." (Emphasis omitted.) Id., 49.

from primary facts found, but may only *review* such findings to see whether they might be legally, logically and reasonably found . . . ." (Emphasis in original; internal quotation marks omitted.) *Parisi* v. *Parisi*, 315 Conn. 370, 385, 107 A.3d 920 (2015).

On the basis of the foregoing facts, the Appellate Court in *In re Shaiesha O.*, 93 Conn. App. 50–51, reasoned as follows: "[I]t is plain that prior to the filing of the petition to terminate the [father's] parental rights, the department made no efforts to foster a relationship between [the child] and the [father] because his paternity had not been established. However understandable that posture might be from a dispositional perspective, the department's disinclination to encourage a relationship between the [father] and [the child] can hardly be taken as evidence of an effort to reunify the two." Id., 49–50. The Appellate Court continued: "Given that evidentiary underlayment, we are not, as a reviewing court, able to find any support in the record for a finding that the department made any efforts, let alone reasonable ones, to reunify [the child] with the [father] before the commissioner sought to terminate his parental rights. . . . Additionally, since the record reflects that the department had not discussed with the [father] a placement plan for [the child] until after the commissioner had moved to terminate his parental rights, the record is devoid of any support for its contention that he was unable or unwilling to benefit from reunification efforts as of the date the petition was filed. Accordingly, we conclude that there is inadequate evidentiary support in the record for a finding that the department made the statutorily required efforts to reunify [the child] with the [father] or that he was unwilling or unable to benefit from such efforts."

In the present case, a review of the department's efforts to reunify the respondent with Oreoluwa demonstrates that all of those efforts were based on the department's presumption that the respondent would have to be present in this country to engage in reunification efforts and that Oreoluwa could not travel to Nigeria. Despite knowing that Oreoluwa had successfully undergone repeated cardiac procedures and that his medical

team was meeting to discuss future medical plans, the department took no steps to inquire into this medical information or to present it to the trial court.

Although the department's two studies indicated that "it is unclear at this time when [Oreoluwa] would be cleared to travel," the commissioner presented no evidence regarding any additional steps taken to obtain more specific information about when Oreoluwa may be cleared to travel or at least when the medical authorities would have some clarity regarding his future ability to travel. Because the respondent was having difficulty traveling to this country to be with Oreoluwa, the department's utter failure to determine when Oreoluwa would be able to travel to Nigeria can hardly be taken as evidence of an effort to reunify the two.

"In the adjudicatory phase, the judicial authority is limited to evidence of events preceding the filing of the petition or the latest amendment, except where the judicial authority must consider subsequent events as part of its determination as to the existence of a ground for termination of parental rights." Practice Book § 35a-7 (a). Our rules of practice and the relevant statutory provisions do not, however, address whether the trial court should consider evidence of events following the filing of the petition for termination of parental rights when determining whether the department has made reasonable efforts. In the present case, the trial court did examine the efforts made by the department "as of the adjudicatory date." Neither party asserts that it was improper for the trial court to consider events subsequent to the filing of the petition for termination of parental rights in the present case. Under the facts of the present case, however, we conclude that it was not improper for the trial court to consider events subsequent to the filing of the petition for termination of parental rights. At the time of filing the petition for termination of parental rights in the present case, there

was uncertainty as to when Oreoluwa would be cleared to travel and his medical status was in a state of flux. Furthermore, the efforts that the department was able to undertake depended on Oreoluwa's changing medical status. Therefore, we conclude that it was necessary for the trial court to consider events subsequent to the filing of the petition for termination of parental rights in this case. Indeed, we conclude that the commissioner was unable to meet the burden of demonstrating that the department had made reasonable efforts to reunify Oreoluwa with the respondent without providing updated medical information about Oreoluwa at the time of the trial.

Furthermore, the trial court relied on summary statements in the department's studies that "[t]here is also uncertainty regarding the medical care [Oreoluwa] would be able to receive in Nigeria and if his ongoing medical needs would be able to be met." The commissioner presented no evidence that the department had attempted to investigate what type of medical care Oreoluwa would receive in Nigeria. The department's failure to investigate the type of medical care available to Oreoluwa in Nigeria and its willingness to rely on "uncertainty" about that care is also not evidence of an effort to reunify the respondent with Oreoluwa. Indeed, even if the department had legitimate concerns about the medical care available to Oreoluwa in Nigeria, those concerns do not relieve the department of its burden of making reasonable efforts to achieve reunification by engaging the respondent and making available services aimed at instilling in him healthy parental skills. See *In re Vincent B.*, 73 Conn. App. 637, 646–47, 809 A.2d 1119 (2002) (concerns regarding father's perceived plans after reunification did not relieve department from making reasonable efforts to achieve reunification), cert. denied, 262 Conn. 934, 815 A.2d 136 (2003).[10]

[10] Indeed, if the medical information indicated that Oreoluwa would have been able to travel to Nigeria at some point in the not so distant future, it

would likely have been reasonable for the department to conduct a home study of the respondent in Nigeria. The dissent implies that, under Connecticut law, it would not be reasonable to require such a study. The dissent's position is, however, controverted by the position of the department at oral argument in this court. The department's attorney conceded at oral argument that, if, for example, the evidence in the record indicated that Oreoluwa would have been able to travel six months after his cardiac procedure in December, 2013, it would have been reasonable for the department to conduct a home study in Nigeria. Furthermore, contrary to the dissent's position, many courts in other jurisdictions have recognized that home studies from foreign countries may be reasonable. See, e.g., *In re E.N.C.*, 384 S.W.3d 796, 808 (Tex. 2012) ("there is no indication from the record that the [d]epartment considered the possibility of the children living with [the father] in Mexico; [the father] was never offered a service plan . . . [and] because the [d]epartment never assessed [the father's] situation in Mexico, there is a lack of evidence establishing the instability of [the father's] home in Mexico"); *In re Doe*, 153 Idaho 258, 263, 281 P.3d 95 (2012) (reversing judgment of trial court terminating father's parental rights and requiring that child be reunified with father in Mexico where home study from child protection service "stated that [the father] was financially, emotionally, physically, and mentally able to provide for [his daughter], that his home would be a suitable placement for [his daughter], and that [the Mexican child protection service] would provide services to [the father] if [his daughter] were placed with him"). Furthermore, contrary to the dissent's position, it is not unheard of for child protective services in the United States to work with intercountry case management services. Indeed, "[b]etween January 2011 and January, 2013, International Social Service-USA Branch . . . Intercountry Case Management Division provided 696 separate intercountry case-management services to 915 children in the American foster-care system. These services were provided in seventy-three different countries and involved forty different . . . states. The services provided ranged from simple relative notification of a child in care to complex home studies, background checks, and in-depth assessments on family members for potential placement of a child." (Footnote omitted.) F. Northcott & W. Jeffries, "Forgotten Families: International Family Connections for Children in the American Public Child-Welfare System," 47 Fam. L.Q. 273 (2013).

The dissent criticizes our reliance on these authorities, noting that "those authorities do not speak to the uncontroverted fact that in this state an undertaking of this sort has never been done, there is an absence of any applicable statutes, regulations or procedures that would serve to effectuate it, and there is a conceded lack of any liaison in Nigeria." We disagree. The dissent is improperly finding facts. The trial court did not find, and there is no evidence in this record to support, the fact that "in this state, [a home study in a foreign country] has never been done . . . ." Although the social worker in the present case was not aware of other instances of a home study being performed in another country and the respondent's counsel could not find such information, there is nothing to support the factual leap that the dissent is making. Indeed, it is not surprising that research performed by the respondent's counsel did not reveal that such a study had been

In the present case the trial court's finding that the department made reasonable efforts was based on the following facts: (1) the department maintained communication with the respondent; (2) the department contacted the resource named by the respondent who resided in the United States; and (3) the department attempted unsuccessfully to provide electronic visitation and communication with Oreoluwa through Skype. Without updated medical information regarding Oreoluwa's ability to travel and medical needs, however, we conclude that the commissioner did not meet the burden of demonstrating that the department did "everything reasonable" under the circumstances to reunite the respondent with Oreoluwa. See *In re Samantha C.*, supra, 268 Conn. 632. Therefore, we conclude that the Appellate Court improperly determined that there was adequate evidentiary support for the trial court's finding that the department made reasonable efforts to reunify the respondent with Oreoluwa.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court only with respect to the termination of the respondent's parental rights and to remand the case to the trial court for further proceedings consistent with this opinion.

In this opinion ROGERS, C. J., and PALMER, ZARELLA, McDONALD and ROBINSON, Js., concurred.

ESPINOSA, J., dissenting. I agree with the majority that the trial court's subordinate factual findings were not clearly erroneous, specifically, that as of December, 2013, it was unclear when the minor child in the present case, Oreoluwa O., would be medically able to travel,

performed because of the confidential nature of the department's records. Accordingly, we do not find the dissent's criticism of these authorities persuasive.

and, that as of the date of the trial on the petition for termination of the parental rights of the respondent father, Olusegun O., filed by the petitioner, the Commissioner of Children and Families, Oreoluwa was still not medically cleared to travel. Those subordinate factual findings, construed together with additional evidence in the record, including evidence that the respondent failed to travel to the United States in order to receive reunification services from the Department of Children and Families (department), provide sufficient evidentiary support for the trial court's ultimate factual finding pursuant to General Statutes (Supp. 2016) § 17a-112 (j) (1),[1] that, given the circumstances, the department made reasonable efforts toward reunification.[2] I therefore disagree with the majority that the Appellate Court improperly affirmed the judgment of the trial court terminating the parental rights of the respondent with respect to Oreoluwa. See *In re Oreoluwa O.*, 157 Conn. App. 490, 116 A.3d 400 (2015). The majority's conclusion to the contrary fails to accord proper deference to the trial court's factual findings. That is, rather than properly viewing the evidence in the light most favorable to sustaining the judgment of the trial court and considering all of the evidence along with the reasonable inferences drawn therefrom to determine whether the record provides sufficient support for the trial court's judgment, the majority draws every inference possible to reverse that judgment. To be clear, whenever inferences may be drawn from the evidence in the record or the findings of the trial court, the majority and I

[1] See footnote 3 of the majority opinion.

[2] As the majority opinion explains, after the release of the Appellate Court opinion, which applied clear error review to all of the trial court's factual findings, we clarified the applicable standard of review. See *In re Gabriella A.*, 319 Conn. 775, 789–90, 127 A.3d 948 (2015); *In re Shane M.*, 318 Conn. 569, 587–88, 122 A.3d 1247 (2015). Consistent with those decisions, I review the trial court's subordinate factual findings for clear error and the ultimate findings for evidentiary sufficiency.

draw opposite inferences—I draw the inference that supports the judgment of the trial court, while the majority draws the inference least likely to support that judgment. In addition, rather than considering the totality of the evidence, the majority reviews the record selectively, considering only the evidence that does not support the judgment of the trial court, and ignoring or discounting the evidence that does provide support. Finally, the majority turns the sufficiency of the evidence analysis on its head by grounding its conclusion that the evidence was insufficient not on a consideration of the evidence that was presented, along with reasonable inferences drawn therefrom, but on information that was *not in the record*. In other words, the majority examines the record to determine what was absent, and concludes that the information that was missing renders the record insufficient to support the judgment of the trial court. The majority does not cite to any authority to justify this approach to a sufficiency of the evidence inquiry.

Because I conclude that, viewing the evidence in the light most favorable to sustaining the judgment of the trial court, the Appellate Court properly affirmed the trial court's finding as to reasonable efforts; id., 502; I address the remainder of the respondent's claims on appeal, and conclude that the Appellate Court properly affirmed the trial court's finding that the respondent abandoned Oreoluwa and properly concluded that the respondent lacked standing to assert a due process challenge on behalf of Oreoluwa for alleged harms suffered by the respondent.[3] Id., 506, 509. Accordingly, I respectfully dissent.

[3] Because the judgment of the Appellate Court may be affirmed on the basis of only one ground for termination and because I conclude that there was sufficient evidence to support the finding that the respondent abandoned Oreoluwa, I need not address the respondent's claim that the trial court improperly found that the petitioner met her burden to prove that there was no ongoing parent-child relationship. See *In re Luis C.*, 210 Conn. 157, 170, 554 A.2d 722 (1989).

I

I begin with the issue of whether the department expended reasonable efforts toward reunification. In order to grant a petition to terminate parental rights, the trial court is required to find by clear and convincing evidence that the department "has made reasonable efforts . . . to reunify the child with the parent . . . unless the court finds . . . that the parent is unable or unwilling to benefit from reunification efforts . . . ." General Statutes (Supp. 2016) § 17a-112 (j) (1). "The word reasonable is the linchpin on which the department's efforts in a particular set of circumstances are to be adjudged . . . . Neither the word reasonable nor the word efforts is, however, defined by our legislature or by the federal act from which the requirement was drawn. . . . [R]easonable efforts means doing everything reasonable, not everything possible." (Internal quotation marks omitted.) *In re Samantha C.*, 268 Conn. 614, 632, 847 A.2d 883 (2004).

Because the question of whether the department made reasonable efforts depends on the particular circumstances of the case, I begin with the facts as evidenced in the record and found by the trial court. Pursuant to the applicable standard; see *In re Shane M.*, 318 Conn. 569, 587–88, 122 A.3d 1247 (2015); I review the trial court's subordinate factual findings for clear error and its ultimate determinations, including the determination that the department engaged in reasonable efforts, for evidentiary sufficiency. That is, I "consider whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]." (Internal quotation marks omitted.) *In re Gabriella A.*, 319 Conn. 775, 789, 127 A.3d 948 (2015). Because the majority does not abide by the applicable standard of review, I empha-

size that "[i]t is not the function of this court to sit as the [fact finder] when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, supports the [judgment of the trial court] . . . . In making this determination, [t]he evidence must be given the most favorable construction in support of the [judgment] of which it is reasonably capable. . . . In other words, [i]f the [trial court] could reasonably have reached its conclusion, the [judgment] must stand, even if this court disagrees with it." (Internal quotation marks omitted.) *Carrol* v. *Allstate Ins. Co.*, 262 Conn. 433, 442, 815 A.2d 119 (2003). It is notable, as I will demonstrate later in this opinion, that the majority repeatedly and consistently construes the evidence in the manner *least* favorable to sustaining the judgment of the trial court.

The record reveals that the respondent's actions created a situation in which the petitioner was compelled to intervene in order to save Oreoluwa. Because of his choices and his actions, the respondent and his wife, Oreoluwa's mother, found themselves separated from their son by an ocean and the department was charged with the Herculean task of attempting to provide them with reunification services across that ocean. The trial court found that shortly before Oreoluwa's birth, his mother was among a group of pregnant Nigerian women who traveled to the United States for the purpose of giving birth in this country so that their babies would have dual citizenship in Nigeria and the United States. Although his wife suffered from mental illness, and had a history of postpartum depression, the respondent did not accompany her to the United States.

Although this account was the original explanation that the respondent and his wife offered for her trip to a foreign country so shortly before her due date, they later provided a different reason. They claimed that she

had traveled here to shop for items for Oreoluwa prior to his birth, and decided to remain and deliver him here only after an ultrasound revealed that Oreoluwa had congenital heart defects. This revised account is consistent with the picture painted by the respondent of himself and his wife as hapless victims.

By contrast, the version of the story credited by the trial court reveals that the respondent took a calculated risk—gambling with the welfare of his mentally ill wife and his unborn child against the value of United States citizenship—that backfired on him, and then disavowed responsibility for the consequences of his actions and accused the petitioner of "wrench[ing]" his child from him. Any doubts as to the respondent's goals are quelled by his own words, in which he contrasted his chosen course of action with the choices of "other [A]fricans [who] are rushing to [E]urope." The ultimate goal was immigration—and there is nothing wrong with that—but it is completely disingenuous for the respondent to claim that he did not make choices that created a risk for both his unstable wife and his unborn child.

Accordingly, as a result of the respondent's own choices, when Oreoluwa was born in January, 2013, at Yale-New Haven Hospital (hospital), the respondent was in Nigeria. At the time of his birth, Oreoluwa was diagnosed with complex congenital heart disease. Specifically, he was diagnosed with "[p]ulmonary [a]tresia, [v]entricular [s]eptal [d]efect, with [m]ajor [a]ortopulmonary [c]ollateral [a]rteries including a collateral from his coronary circulation." Oreoluwa's condition required the administration of medication precisely as prescribed or he was at risk of sudden death. When he was born, his mother was informed that if Oreoluwa traveled to Nigeria, he was likely to live for only approximately one month. On the basis of that information, she chose to remain in the United States with him so that he could receive the medical treatment he needed.

Within weeks after Oreoluwa's birth, it became apparent that the mother was having difficulty caring for him. In February, Oreoluwa's pediatrician noted the mother's failure to adhere to Oreoluwa's feeding schedule, which was crucial because he needed to gain weight before he could have the first of several required surgeries. In March, 2013, following Oreoluwa's first major surgery, his cardiologist was troubled when he learned that the mother was incorrectly administering Oreoluwa's medication, that she had moved from her sponsor family's home to a Super 8 motel, and that she had no suitable bed for Oreoluwa. The cardiologist also noted that the mother displayed a flat affect, giggled inappropriately and avoided making eye contact. On the basis of these observations, Oreoluwa was admitted to the hospital to allow hospital staff to monitor and assess the mother's ability to care for him. He was subsequently released to her care, but within a few days she brought him to the emergency department because she was unable to feed him properly. Oreoluwa was readmitted due to increased concerns about the mother's mental health and her ability to care for him.

In the latter half of April, 2013, during this second social admission, hospital staff attempted repeatedly to teach the mother how to properly feed and medicate Oreoluwa. Their efforts to teach her these basic tasks were unavailing. Staff also reported that during the hospital stay the mother displayed troubling and erratic behavior—refusing to care for and feed Oreoluwa, laughing inappropriately, screaming at staff, walking away while people were trying to speak to her, and locking herself in the bathroom. On the basis of all of these factors, hospital staff advised the petitioner that an order of temporary custody was necessary in order to ensure Oreoluwa's safety. Ultimately, the petitioner was compelled by these circumstances to remove Oreoluwa from his mother's custody. The mother was subse-

quently diagnosed with psychosis NOS (not otherwise specified), and was hospitalized.[4]

At the time that the petitioner removed Oreoluwa from his mother's custody, the respondent was still in Nigeria. A few weeks later, following her release from the hospital, the mother first visited her cousin in New York, then returned to Nigeria without informing the petitioner that she was doing so and without attempting to visit Oreoluwa. The petitioner learned of her departure only after she had left the country. Both parents were now in Nigeria. Their son, Oreoluwa, was in Connecticut in the care of the petitioner.

On May 3, 2013, the petitioner filed a petition for neglect, alleging that Oreoluwa was being denied proper care and attention, that he was being permitted to live under conditions injurious to his well-being, and that his home could not provide the specialized care that he required. The court held a hearing on the petition in July, 2013. Neither the respondent nor his wife was present for the hearing—both were in Nigeria. During the hearing, the social worker assigned to the case attempted several times to place a telephone call to the respondent in Nigeria, in order to allow him to participate in the proceedings by way of speaker phone. Although it was confirmed that the respondent had been served with notice of the hearing, when an operator put the telephone call through, there was a busy signal on the other end of the line. At the hearing, the court heard evidence that the respondent had applied for a visa and had been denied. The court found that both the respondent and the mother had defaulted for failure to appear. The court also found that Oreoluwa was

[4] The mother previously had been diagnosed with schizophrenia and had been prescribed medication in Nigeria. She also had suffered from postpartum depression following the birth of at least one of her other children. She was not diagnosed with postpartum depression following the birth of Oreoluwa.

neglected and ordered him committed to the custody of the petitioner.

The court approved the preliminary specific steps that had been issued in May, 2013, and made some modifications to the orders with respect to the respondent. That is, pursuant to General Statutes § 46b-129 (j), in order for "the respondent to safely . . . regain custody" of Oreoluwa, he was ordered to take all possible steps to legally come to the United States to establish a relationship with Oreoluwa, and to visit him as often as the department permitted. The court did not order the department to provide the respondent with an immigration attorney or to directly aid the respondent with immigration services.[5] Instead, the specific steps direct the department to "[r]efer the respondent to appropriate services . . . ." At that point, the department already had referred the respondent to the appropriate services: the Nigerian consulate in New York. The remainder of the services that the department would be required to provide to the respondent were designated as "to be determined if [the respondent] comes to the [United States]." From the outset, therefore, pursuant to the trial court's order, the majority of the services that the department was obligated to provide to the respondent were conditioned on his presence in the United States.

Oreoluwa's mother returned to Connecticut with her father on July 31, 2013. The respondent remained in Nigeria. She stayed in Connecticut for approximately two weeks, during which time the department helped her to find a hotel in the area and provided her with

[5] Although the respondent was not provided with court-appointed immigration counsel at the hearing on the neglect petition, as he subsequently claimed was his right, the court appointed counsel to represent the respondent in the present case. Ultimately, the respondent's court-appointed counsel referred him to an immigration attorney, whose services the respondent retained.

information regarding available apartments. The department scheduled an administrative case review meeting while the mother was here so that she could participate and provided her transportation to the meeting. During the case review meeting, it was explained to the mother that in order for reunification to take place, she needed to be present in the United States. While the mother was here, the department provided her with supervised visitation with Oreoluwa, and provided her with transportation to visits. The department included the mother in a medical appointment for Oreoluwa, during which she was able to speak to and ask questions of his physicians. The department also facilitated a meeting between the mother and Oreoluwa's foster parents, during which she was able to ask questions about his daily schedule, current care and overall strengths and needs. She returned to Nigeria on August 13, 2013, stating that she needed to return to her normal routine to maintain her mental health stability.

By December, 2013, when Oreoluwa was eleven months old, the respondent had never met him. Following the birth of Oreoluwa, the respondent had filed applications for a visa to come to the United States on two occasions, but had been denied each time. His second visa application was denied in October, 2013, and the respondent had informed the department of the denial at that time. There was no indication that the respondent would be able to comply with the most basic and essential specific step ordered by the trial court: travel legally to the United States in order to establish a relationship with Oreoluwa. Indeed, because the *only* available evidence was that the respondent twice had been denied a visa, there was clear and convincing evidence that he would be unsuccessful in fulfilling this key specific step.

As for the mother, although she had Oreoluwa in her care for the first three months of his life, she had not

seen him since her brief visit in August, 2013. Additionally, it was the mother's mental illness that compelled the petitioner to remove Oreoluwa and that prevented her from staying in the country to receive reunification services. As a result, she had had contact with Oreoluwa for only three and one-half months during his first eleven months, and she had not seen him at all for the past four months. Following her return to Nigeria and the expiration of her visa, the mother had informed the department that she did not intend to apply for another visa. When the petition for termination of parental rights was filed, the mother continued to require treatment in Nigeria for her mental illness. There was no reason, therefore, to believe that the mother would be able to comply with her court-ordered specific steps.

On December 23, 2013, on the basis of all these facts, the petitioner filed the petition to terminate the respondent's parental rights. The petitioner asserted that the department had made reasonable efforts to reunify the respondent with Oreoluwa or the respondent was unable or unwilling to benefit from reunification efforts. As grounds for termination of the respondent's parental rights, the petitioner alleged that (1) the respondent had abandoned Oreoluwa, and (2) there was no ongoing parent-child relationship.[6]

Shortly before the trial on the petition to terminate parental rights, the court approved the department's permanency plan, which recommended termination of the parental rights of both the respondent and his wife, and the adoption of Oreoluwa by his foster parents. The

[6] As to the mother, the petitioner cited three grounds supporting termination of her parental rights: (1) abandonment; (2) no ongoing parent-child relationship; and (3) a prior adjudication of neglect as to Oreoluwa, and the failure of the mother to "achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and needs of the child or youth, [she] could assume a responsible position in the life of the child . . . ."

permanency plan relied on many of the same factors on which the petition for termination of parental rights relied, including that the absence of the parents from this country prevented the department from being able to offer them reunification services, and that they had thus far failed to comply with most of the court-ordered specific steps. Specifically, the only steps that the parents had complied with were the ones requiring them to maintain communication with the department and to obtain and maintain adequate housing. Additionally, because it was unlikely that the parents would obtain visas, it was improbable that they would be able to achieve significant compliance with the specific steps. Finally, Oreoluwa had bonded with his foster family, who wished to adopt him, and with whom he had lived since he was five months old. The foster family had been present for all of his medical procedures and major surgeries since he came into their care, and he was receiving routine regular and specialty medical care in the foster home. The department concluded that Oreoluwa's adoption by his foster family was in his best interest.

At the trial on the petition for the termination of parental rights, it was clear that the extraordinary nature of the particular circumstances in the present case played a major role in the court's finding that the department made reasonable efforts to reunify the respondent with Oreoluwa. By the time of the trial, Oreoluwa was approximately fourteen months old, and the respondent had yet to secure a visa to come to this country. As the court later explained in an articulation of its decision, the respondent's absence from this country "limited the type and number of services that the department has been able to provide to him." For instance, because the respondent was in Nigeria, the mere act of maintaining communication with him presented the department

with significant challenges. Testimony established that when social workers assigned to the case attempted to place telephone calls to the respondent, the telephone calls routinely did not go through, or, if they did, the connection was not good, and the calls frequently were cut off. The social workers had to rely on e-mails to communicate with the respondent. Sometimes, the respondent responded to the e-mails directly; at other times, he attempted to place a telephone call in response.

Viewed in light of the circumstances, the testimony and exhibits offered at the trial provided sufficient evidence to support the trial court's finding that the department made reasonable efforts to provide the respondent with reunification services. Specifically, despite the aforementioned difficulties with communication, the department maintained telephone and e-mail communication with the respondent to keep him updated on Oreoluwa's well-being and developments in his case. Additionally, the department consulted with its immigration specialist, William Rivera, and referred the respondent to the Nigerian consulate in New York. The department also explored possible placement options with family and friends of the respondent. When the respondent identified an alternative placement for Oreoluwa with a Pennsylvania family known to Oreoluwa's maternal grandfather, the department contacted the head of that family, Attorney Ayo Turton, but the respondent subsequently informed the department that he no longer wished it to consider placing Oreoluwa with Turton.[7] The department also contacted a maternal cousin, but that individual was not able to serve as a placement resource. Because the respondent had

[7] The social study also reports that Turton contacted the department to report that he no longer wished to serve as a resource for Oreoluwa because he believed that the respondent's motives were not in the best interest of Oreoluwa. According to Turton, the respondent was "just trying to use [Oreoluwa's] medical condition in order to secure a visa to this country."

requested to be able to view Oreoluwa via Skype, an Internet based computer software application that permits videoconferencing, the department attempted, albeit unsuccessfully, to obtain a computer device, such as an iPad, for the department's offices that would support Skype. The department also approached Oreoluwa's foster parents to determine whether they would allow the respondent to view Oreoluwa through Skype using their home computers, but the foster parents were uncomfortable with this suggestion.

At the trial on the petition, the respondent argued that there were reasonable efforts that the department could have made on the respondent's behalf, but did not. In addition to the services already provided, the respondent argued that the department should have given him more time to obtain a visa and also should have obtained an iPad to allow him to communicate with Oreoluwa via Skype. With respect to the provision of Skype technology, although the department attempted to comply with the respondent's request, the department contested the efficacy of using videoconferencing technology to build a relationship between an infant and a complete stranger. Accordingly, the department argued, providing such a means of "communication" between the respondent and Oreoluwa did not constitute a "reasonable" effort. As for the respondent's argument that he should have been allowed more time to obtain a visa, the department responded that further delay would be detrimental to Oreoluwa, and, as of the day of the trial, the respondent had provided no evidence that either he or his wife had taken any steps toward applying for a visa. The couple had merely offered the department the vague assertion that they were "working on it," without providing any details such as whether they had an appointment with the consulate.

In an oral decision, the court found by clear and convincing evidence that the department had made reasonable efforts to reunify the respondent with Oreoluwa. The court indicated that it was the respondent's failure to comply with the court-ordered specific step that he travel to the United States that prevented the department from being able to facilitate visitation with Oreoluwa, as the provision of that essential service depended on his presence in this country.[8] Because the trial court found that the department had made reasonable efforts to provide reunification services, it was not required to reach the question of whether the respondent was able to benefit from such services, which would have served as an alternative ground for terminating the respondent's parental rights. See *In re Jorden R.*, 293 Conn. 539, 552–53, 979 A.2d 469 (2009) ("[T]he department must prove either that it has made reasonable efforts to reunify or, alternatively, that the parent is unwilling or unable to benefit from reunification efforts. [General Statutes (Rev. to 2005) §] 17a-112 [j] clearly provides that the department is not required to prove both circumstances. Rather, either showing is sufficient to satisfy this statutory element." [Emphasis omitted.]). The court also found that the petitioner had proven by clear and convincing evidence both grounds relied on to support termination of the respondent's parental rights, and further found that termination was in the best interest of the child.

In its subsequent articulation of its decision, the trial court made more detailed factual findings, emphasizing that the respondent's absence from this country greatly limited the ability of the department to provide him with reunification services. Under those circumstances, the

[8] The court's finding that it was the respondent's failure to travel to this country that prevented the department from being able to provide him with services is supported by the extensive services that were provided to the mother during her initial mental health hospitalizations following Oreoluwa's birth and during her brief visit to the United States in August, 2013.

court found that the department maintained communication with the respondent, explored alternative placement options, attempted to set up its computers for Skype communication, and referred the respondent to the Nigerian consulate, providing him with the relevant contact information. The court also made the express factual finding that Oreoluwa was not medically cleared to travel as of the date of the trial. Significantly, the court stated that it had relied on trial testimony in arriving at its findings and emphasized the principle that the trial court is the sole arbiter of the credibility of witnesses. Clearly, the trial court found the testimony of the petitioner's witness, Cynthia Pfeifer, a social work supervisor with the department, who was the only witness to testify at the trial, to be credible.

Subsequent to the trial on the termination petition, the respondent moved for reargument and reconsideration, and sought a stay of the order granting the petition for termination of the respondent's parental rights. During the initial hearing on the motions, the respondent, who had retained immigration counsel, both in Connecticut and in Nigeria, argued that "[t]he single biggest obstacle for reunification was the visa application . . . ." The respondent contended that the provision of court-appointed counsel to represent him in the termination proceedings themselves was not sufficient—he claimed he was also entitled to immigration services, including appointed immigration counsel. He argued that the failure of the department to provide such counsel and services necessitated the finding that the department had failed to make reasonable efforts to reunify the respondent with Oreoluwa. Counsel for the respondent summarized his view of the present case in his request for supplemental briefing on the following issue: "What . . . is [the] department's obligation to help a parent obtain a visa?"

As to this claim, I agree with the Appellate Court, which properly concluded that the department was not required to provide the respondent with immigration counsel in order to satisfy the "reasonable efforts requirement." *In re Oreoluwa O.*, supra, 157 Conn. App. 498. The respondent cites to no statute or regulation that contemplates that the department should provide immigration services to noncitizen parents living in a foreign country. The department's immigration practice guide in its policy manual does not address this factual scenario. The manual contemplates the provision of *some* immigration assistance to adult clients who are in this country, stating that its social workers "shall assist undocumented adult clients with issues related to their immigration status." Dept. of Children & Families, Policy Manual § 31-8-13. Even that assistance is somewhat limited, however. The manual defines "[a]ssist" to mean, "for example, to help fill out forms and provide a referral to an immigration attorney. [The department] shall *not* pay for legal services or otherwise take responsibility for an adult client's immigration status." (Emphasis in original.) Id. Moreover, the respondent's claim that the department has a duty to provide immigration services to noncitizen parents who are living abroad and whose child has been committed to the care of the petitioner, implicates significant public policy concerns that are properly resolved by the legislature, not the courts.[9]

[9] I observe that the present case is the second appeal in the past two years that has raised the question of whether the department should be required to provide immigration services to a noncitizen parent whose child, a citizen of the United States, has been committed to the custody of the petitioner. See *In re Gabriella A.*, 154 Conn. App. 177, 182, 104 A.3d 805 (2014), aff'd, 319 Conn. 775, 127 A.3d 948 (2015). Although the respondent mother in *In re Gabriella A.* did not pursue at this court her claim regarding immigration services, she argued at the Appellate Court that the department had failed to make reasonable efforts to reunify her with the child because the department, inter alia, "terminated the only assistance . . . that [the respondent] was receiving with regard to her immigration status." Id. Such claims are likely to increase in the coming years, suggesting the prudence

As I have explained, there was sufficient evidence in the record to support the trial court's ultimate factual finding that under the facts of the present case, there was clear and convincing evidence that the department made reasonable efforts toward reunification. The majority, however, focuses its analysis on Oreoluwa's ability to travel, specifically on the question of whether, as of the time of the trial, it was possible to determine when he would be able to travel. This issue is a red herring. As I will explain herein, this issue was not raised at the trial court. The parents barely raised the issue of whether he was medically cleared to travel as of the date of the trial, but the trial court made a finding as to that issue, stating that Oreoluwa could not travel as of the date of the trial. The parents, however, did not raise the question of whether it was still not possible to determine, as of the date of the trial, when Oreoluwa might be able to travel. Moreover, I question how this issue is relevant to the determination of whether the department made reasonable efforts toward reunification. The specific steps ordered by the trial court all contemplated that reunification efforts by the department were contingent on the respondent being present in this country. The majority, by contrast, implicitly suggests that the department should have attempted to provide reunification services to the respondent by sending Oreoluwa to Nigeria.

For example, the majority states that if the record had established that Oreoluwa would have been medically cleared to travel "at some point in the not so distant future, it would likely have been reasonable for the department to conduct a home study of the respondent in Nigeria." See footnote 10 of the majority opinion. The requirement to conduct a home study is predicated

of a legislative determination of whether and to what extent the department's duty to provide reasonable efforts to reunify a parent with his or her child includes the provision of immigration services to the parent.

on the premise that it would be reasonable to require the department to provide reunification services to the respondent in Nigeria, after sending Oreoluwa to that country. This assumption is highly questionable in light of the concession at the termination trial that there is nothing akin to the Interstate Compact on the Placement of Children; see General Statutes § 17a-175; that would govern relations between Connecticut and Nigeria in this context, and there is no department liaison in Nigeria.

Evidence adduced at the trial on the termination petition supports the conclusion that there are simply no statutes, regulations or procedures in place to dictate whether and how the department should send a child born in the United States to a foreign country to live with his or her parents. Specifically, after Pfeifer testified that Oreoluwa was not medically cleared to travel, the respondent's counsel engaged her in the following colloquy:

"Q. Now, in your direct testimony, you stated that you've been in the department's . . . employment for about sixteen years, roughly fifteen years?

"A. Yes.

"Q. In your experience, have you had situations where children were born in the United States and were then sent to their country of origin of their parents?

"A. Directly under my supervision?

"Q. Yeah.

"A. No."

In Pfeifer's experience of fifteen or sixteen years with the department, the department had never sent a child born in the United States to a foreign country to live with his or her parents. Never. During a hearing on the respondent's motion for reargument, reconsideration

and a stay of judgment, the respondent's counsel confirmed that his "exhaustive" research confirmed that Pfeifer's personal experience was not isolated. He was unable to uncover a single instance in which the department had done or had been held required to do what the respondent now insists it is statutorily required to undertake as part of its reasonable efforts to reunify him with Oreoluwa—sending the child to a foreign country to live with parents who are completely unknown to him.

The majority relies on authority from other jurisdictions to support its dicta that a home study would be reasonable if it were determined that Oreoluwa would be medically cleared to travel at some point in the future. I observe that those authorities do not speak to the uncontroverted fact that in this state an undertaking of this sort has never been done, there is an absence of any applicable statutes, regulations or procedures that would serve to effectuate it, and there is a conceded lack of any liaison in Nigeria.

I further observe that the authorities relied on by the majority do not provide support for the conclusion that it would be reasonable under Connecticut law to require the department to conduct a home study in Nigeria. The majority relies on two decisions. The first, *In re E.N.C.*, 384 S.W.3d 796, 798 (2012), involved a father who had been deported to Mexico after living with his wife and children in Texas for eight or nine years. There was testimony at trial that the father "was a good father who provided support for the children." Id., 799. Even after he had been deported, the father continued to visit with the children, who traveled to Mexico for that purpose. Id. Testimony at trial established that after visits, the children "did not want to come home and . . . wanted to stay with their father in Mexico." Id. More importantly, nothing in the decision discusses the relevant Texas statutes and regulations providing for

home studies in Mexico, so that case sheds no light on whether it would be reasonable to impose the same requirements on the department in the present case. The second case relied on by the majority, *In re Doe*, 153 Idaho 258, 281 P.3d 95 (2012), is even less on point. That decision says nothing about whether it would be reasonable for Idaho child protection authorities to conduct a home study in Mexico, where the father lived. The decision merely notes that Mexican authorities conducted a home study, and reports the results of that study. Id., 263.

I also observe that the majority relies on an article that details the case management services provided by the International Social Service-USA Branch Intercountry Case Management Division. F. Northcott & W. Jeffries, "Forgotten Families: International Family Connections for Children in the American Public Child-Welfare System," 47 Fam. L.Q. 273 (2013). Despite the fact that services were provided in forty different states, the article makes no mention whatsoever of such services being provided in Connecticut. Id.

The majority also claims that by looking to Pfeifer's testimony and the respondent's concession that the department has never sent a child born in the United States to a foreign country to live with his or her parents, I engage in fact-finding. To the contrary, I apply the proper standard of review, which the majority fails to do. That is, I construe the evidence in the light most favorable to sustaining the judgment of the trial court.

Finally, I observe that there are significant problems with the majority's suggestion that it would be reasonable to require the department to send Oreoluwa to Nigeria for the provision of reunification services in that country. For instance, even assuming that there were sufficient mechanisms in place to allow the department to facilitate reunification services in Nigeria,

where would Oreoluwa stay while these services were being provided? With the complete strangers who made the choices that resulted in the petitioner being required to take custody of him? The respondent had never met Oreoluwa. The respondent's wife was psychotic, and unable to take care of Oreoluwa. If Oreoluwa could not reside with them, then where should he stay? Is there an agency in Nigeria where he could be placed? Once the child is in Nigeria, outside the jurisdiction of Connecticut, how would the department be able to guarantee that reunification services would be performed at all? Because I conclude that it would not have been reasonable to require the department to send Oreoluwa to Nigeria in order to provide reunification services there, I would end the sufficiency inquiry without delving into the issue of Oreoluwa's ability to travel.

Even assuming that the majority is correct that it would have been reasonable to require the department to send Oreoluwa to Nigeria and to provide reunification services in that country, however, I would conclude that there was sufficient evidence to support the trial court's ultimate finding that the department made reasonable efforts toward reunification. Before I discuss the arguments, evidence and findings of the trial court on this issue, I offer the following clarification of the majority's analysis. Although the majority does not directly state so, it appears to suggest that the question of whether Oreoluwa was medically cleared to travel is broken down into two distinct factual questions that are relevant to whether the department satisfied its burden to establish reasonable efforts toward reunification. The majority concedes that the trial court made an express finding as to the first factual question, namely, whether Oreoluwa was medically cleared to travel as of the date of the trial on the termination petition. As to that question, the trial court found that Oreoluwa ''was still not cleared to travel as of the date of the

trial." The majority admits that the court's finding was not clearly erroneous. The second factual question is whether, as of the date of the trial, it had become possible to determine when Oreoluwa would be able to travel, and, if the answer to that question was yes, when the child would be medically cleared to travel. The majority relies on the failure of the trial court to make these very specific, *express* factual findings to reverse the judgment of the Appellate Court affirming the trial court's judgment terminating the respondent's parental rights. That is, I understand the majority to be claiming that, in the absence of a finding by the trial court that at the time of the trial on the petition, it was still not possible to determine when Oreoluwa would be able to travel, there was insufficient evidence in the record to support the trial court's ultimate factual finding that the department made reasonable efforts toward reunification. I disagree.

The majority is only able to arrive at its conclusion by ignoring the applicable standard of review, which requires this court to consider all of the evidence in the record, along with reasonable inferences drawn therefrom, and construe the record in the light most favorable to sustaining the judgment of the trial court. In arriving at its conclusion, the majority applies precisely the opposite presumption, viewing the evidence in the light least favorable to sustaining the judgment, and drawing inferences least likely to support the judgment. By doing so, the majority is able to discount evidence that would support the conclusion that even in the absence of an express finding by the trial court, there was sufficient evidence in the record to support a finding that as of the date of the trial, it remained unclear when Oreoluwa would be cleared to travel.

A careful reading of the trial court's articulation is the best starting point. The court did not merely find that Oreoluwa was not cleared to travel as of the date

of the trial. It stated: "As of December, 2013, [Oreoluwa] was not able to travel to Nigeria due to his medical status, *and it was not clear when he could do so*. . . . He was *still* not cleared to travel as of the date of the trial." (Emphasis added.) The trial court failed expressly to include, after the word "still," that as of the date of the trial, it remained unclear when Oreoluwa would be able to travel. That failure creates an ambiguity as to whether the trial court found that as of the date of the trial it remained unclear when Oreoluwa would be cleared to travel. It is not, however, unreasonable to read the trial court's articulation to implicitly make that finding. The standard of review requires that we resolve such ambiguities consistent with the judgment of the trial court. The majority, however, does not feel bound by the standard of review and resolves the ambiguity in the manner most consistent with its view of how the case should be resolved. In contrast to the majority, I read the articulation pursuant to the standard of review and resolve the ambiguity consistent with the trial court's judgment. That is, I read the articulation to implicitly find that, as of the date of the trial, it still could not be determined when Oreoluwa would be able to travel. Given that implicit finding, this court could reverse the Appellate Court's judgment only if the trial court's finding was clearly erroneous, and it was not.

Even in the absence of that implicit finding, I would conclude that there was sufficient evidence in the record to support the ultimate finding of the trial court as to reasonable efforts. The question of whether, as of the date of the trial, it remained unclear when Oreoluwa would be medically able to travel to Nigeria, was not the primary focus at the trial on the petition to terminate parental rights. At the trial on the petition, both parents touched very briefly on the issue of whether Oreoluwa was medically cleared to travel as of the date of the trial, and simply speculated that Oreoluwa *might* be

medically able to travel. The parents suggested that the department could not reasonably rely on the reports of Oreoluwa's cardiologists, provided as recently as January 14, 2014, stating that Oreoluwa was not medically cleared to travel and that it was at that time unclear when he would be.

Similarly, the majority's conclusion suggests that the only evidence in the record relevant to whether it could be determined as of the date of the trial when Oreoluwa would be medically cleared to travel was the April 29, 2013 affidavit by Oreoluwa's treating cardiologists. In fact, the majority incorrectly states that "the only evidence presented at trial that related to when Oreoluwa would be cleared to travel indicated that, before he was born, physicians expected that he would be unable to travel for at least one year from his birth." That statement ignores evidence that supports the judgment of the trial court. Specifically, the petition for termination of parental rights, which was admitted into evidence at the trial, relies on much more recent reports offered by Oreoluwa's physicians, reports that provide ample support for the trial court's finding, particularly given the highly deferential standard of review accorded to the trial court's subordinate factual findings. It is helpful to review the evidence in detail.

As I have noted, the trial court expressly found that Oreoluwa was not medically cleared to travel as of the date of the trial. The issue first was raised during the respondent's cross-examination of Pfeifer, who was asked whether, as of the day of the trial, Oreoluwa had been medically cleared to travel. She responded without qualification that he was not. Specifically, she testified that when Oreoluwa was born, his physicians informed his mother that he would be unable to travel for *at least* one year, and further testified that, as of the date of the trial, at which time Oreoluwa was more than one year old, he was still not cleared to travel. That testi-

mony regarding the original estimate of when Oreoluwa would be able to travel was corroborated by an April 29, 2013 affidavit by Oreoluwa's treating cardiologists, which stated that they anticipated that Oreoluwa would have the second of "several" required surgeries sometime around his first birthday. Neither the respondent nor his wife challenged Pfeifer's testimony as to this matter and they did not offer any evidence to controvert it. Moreover, at oral argument before this court, the respondent conceded that Oreoluwa's original prognosis was that he would be medically unable to travel for at least one year. That original prognosis, therefore, suggested that Oreoluwa's travel status might change after his first year.

Subsequently, however, Oreoluwa's physicians provided an updated, less definite estimate of when he would be able to travel. That more updated estimate is set forth in the social studies in support of the petition for termination and the permanency plan, both of which were introduced into evidence. Each social study includes a section detailing the most recent reports that the department had received from Oreoluwa's numerous physicians. Specifically, when the petition for termination of parental rights was filed, Oreoluwa's physicians reported to the department that his most recent surgery had taken place on October 10, 2013, during which cardiologists replaced a shunt, which led from his innominate artery to the right pulmonary artery, with a conduit. Although that procedure had gone well, as had a cardiac catheterization procedure, the physicians' most recent estimate provided to the department and recorded in the social study was that "Oreoluwa is not able to travel to Nigeria due to his medical status and it is unclear at this time when he would be cleared to travel."

This estimate, provided when Oreoluwa was eleven months old, differs from the one that was provided

at the time of Oreoluwa's birth, which established a possible end date of one year. By contrast, the more recent estimate provided no potential end date. That is, as compared to the initial estimate that Oreoluwa might be able to travel by his first birthday, the most recent report from his physicians, reflected in the social study that was filed when Oreoluwa was eleven months old, did not provide *any* estimate of the earliest date on which Oreoluwa could travel. I draw the reasonable inference from those two pieces of evidence, viewed together, in the light most favorable to sustaining the judgment of the trial court, that it remained unclear, at the time of the trial, when Oreoluwa would be medically cleared to travel. It would indeed be reasonable to infer that, if anything, it had become *less* certain when Oreoluwa would be medically cleared to travel.

The study in support of the permanency plan, prepared on January 14, 2014, more than one month after the study in support of the petition for termination, includes additional, updated information relayed to the department from Oreoluwa's treating physicians. The study reports that Oreoluwa's December 3, 2013 cardiac catheterization went well. One of his physicians reported that he had closed one of Oreoluwa's arteries during the procedure, and that there was another artery that he could close off. The success of that procedure, however, did not prevent both the treating cardiologist and Oreoluwa's pediatric cardiologist, Bevin Weeks, from emphasizing that Oreoluwa continued to need additional cardiac surgeries and procedures. The study further reflects that at the time of its preparation, Oreoluwa's travel status had not changed—he was still not medically able to travel, and it was still not able to be determined when he would be cleared to travel. This piece of evidence provides further support for the determination that, as of the date of the trial, Oreoluwa was

not medically able to travel and it was still not possible to determine when he would be cleared to travel.

Although the majority initially ignores the evidence in the social studies entirely, it later attempts to discount that evidence in response to this dissent, suggesting that because the studies were "prepared and written in the department's own language," the information contained therein somehow does not accurately reflect the most recent information received from Oreoluwa's physicians, despite the fact that the notations in the social studies indicate that the information recorded was received from those physicians. See footnote 8 of the majority opinion. The majority thus draws an inference based on the evidence that is inconsistent with the judgment of the trial court. The majority also complains that the studies were "not accompanied by any medical reports or documentation," again calling into question the accuracy of the information contained in the social studies. Id. It was the trial court's duty, not the majority's, to weigh the evidence and determine whether to credit it. By contrast, the majority has no difficulty relying on those same social studies as reliable and accurate when the information provided therein supports the majority's conclusion. For instance, the majority does not question the accuracy or the source of the information in the social studies to the extent that they reflect that Oreoluwa was not suffering developmental delays from his medical condition. Thus, the majority selectively relies only on the evidence that supports its conclusion and undercuts the conclusion of the trial court. This is not consistent with the applicable standard of review.

Moreover, the majority questions the estimated date of Oreoluwa's ability to travel set forth in the social studies because the language in the social study in support of the permanency plan regarding Oreoluwa's ability to travel was the same as that in the study in support

of the petition for termination. Rather than inferring that the lack of change in the language in the social studies reflected a lack of change in Oreoluwa's status, the majority dismisses that lack of change in his status because the social study in support of the permanency plan "repeated the same lines" that were used in the social study in support of the petition for termination. The majority suggests, therefore, that the department personnel who prepared the January, 2014 social study in support of the permanency plan, just cut and pasted the same sentence into the report, and those statements did not reflect that Oreoluwa's travel status had not changed since the filing of the petition. Although the majority's inference is certainly one that the trial court could have drawn, the trial court's judgment is consistent with the opposite inference, namely, that the department's statement in the social study in support of the permanency plan reflects updated information on Oreoluwa's travel status. That inference is a reasonable one because the social study clearly reflects that the department was in frequent communication with and received ongoing updates from the cardiologists, stating repeatedly that various physicians "reported" the relevant information that was recorded by date in the social study. The majority's inference to the contrary is not consistent with the role of a reviewing court.

Finally, the majority claims that, by noting the difference in the two estimates, and construing that *evidence* in the manner most favorable to sustaining the judgment of the trial court, I engage in "fact-finding." See footnote 8 of the majority opinion. The majority appears to forget that when this court engages in a sufficiency of the evidence inquiry, we examine the facts as found by the trial court, and the totality of the evidence, including reasonable inferences drawn therefrom, construed in the light most favorable to sustaining the judgment of the trial court. Consistent with that standard, I do what

the majority should have done, and review the record to determine what evidence was presented that would support the judgment of the trial court. When evidence lends itself to a reasonable inference that supports the judgment of the trial court, and, therefore, on which the trial court reasonably could have relied, I draw that inference. Only after reviewing the entire record in this manner is it appropriate to inquire whether there is sufficient evidence to support the trial court's ultimate factual finding that the department made reasonable efforts toward reunification. *In re Gabriella A.*, supra, 319 Conn. 790. Observing that the original estimate of when Oreoluwa would be able to travel was more definitive because it provided a possible end date, as compared with later estimates, which provided no end date, is a reasonable inference drawn when those two facts are considered together. The majority draws no such inferences that would support the judgment of the trial court, notwithstanding the clear requirement under the standard of review that this court, as a reviewing court, must do so in determining whether the evidence is sufficient.

The revised, more conservative estimate that cardiologists provided as to when Oreoluwa would be medically able to travel, taken together with Pfeifer's testimony, which the court found to be credible, and the trial court's specific findings in the articulation, when construed in the light most favorable to sustaining the judgment, provide sufficient evidentiary support for the conclusion that as of the date of the trial on the petition for termination, it remained unclear when Oreoluwa would be cleared to travel. The majority construes the evidence in a different light—declining to infer that the difference between the initial estimate given to the department by Oreoluwa's cardiologists, as testified to by Pfeifer, and the later estimate that the cardiologists provided to the department, as noted both

in the social study in support of the termination petition and the social study in support of the permanency plan, had any meaning. Certainly, it is *possible* to construe the evidence in the manner that the majority does. I do not dispute that, nor is it necessary to do so. The mere fact that the majority's construction of the evidence is one possible manner of viewing it, however, is not sufficient given the standard of review, which requires us to construe the evidence in the light most favorable to sustaining the judgment. The majority's rationale would be supported only if it could demonstrate that the construction of the evidence that I suggest is not a reasonable one. And that, the majority cannot do.

Another illustration of the majority's lack of deference to the trial court's findings is its selective summary of the facts. For example, the majority cites to the report by Oreoluwa's physician that Oreoluwa was "doing well and [could] start on whole milk and more solid foods." That report is only part of the story. The majority completely ignores the fact that at the time that the termination petition was filed, Oreoluwa continued to require regular monitoring of his oxygen levels and in-home nursing services twice a week. If the majority had applied the proper standard of review, it would have considered the facts in the record that actually support the trial court's ultimate factual finding. Instead, the majority ignores those facts entirely, and highlights only the evidence that supports reversal.

The majority also relies on the fact that Oreoluwa was scheduled to have appointments with his pediatric cardiologist in January and March, 2014, as a basis for its conclusion that the trial court's finding that the department made reasonable efforts was not supported by sufficient evidence. This reading of the record turns the applicable standard of review on its head. First, the majority's inquiry does not properly focus on the evidence that was presented, and whether that evi-

dence, considered cumulatively with all appropriate inferences drawn therefrom, was sufficient, but instead focuses on what was *not* admitted into evidence. That is contrary to the very nature of a sufficiency of the evidence inquiry, in which the reviewing court examines what is actually *in* the record and asks whether it is sufficient. Second, the majority continues to draw inferences least favorable to sustaining the judgment of the trial court. It should come as no shock that a child with Oreoluwa's serious condition had regular, ongoing medical appointments with specialists. Reading this evidence in the light most favorable to sustaining the judgment of the trial court, the majority *should* reason that those scheduled appointments further demonstrated that although Oreoluwa's treatment was progressing well, he was still a child who needed significant, highly skilled care and frequent monitoring by specialists. Rather than relying on this additional information in the record as further evidence that the evidence was sufficient to demonstrate that it remained unclear when Oreoluwa would be cleared to travel, however, the majority infers, without directly stating so, that there could have been information to the contrary presented at the meeting of Oreoluwa's physicians. The majority offers no explanation as to how such an inquiry is part of the inquiry as to whether the evidence that was presented was sufficient—and the only evidence in the record is that Oreoluwa's team of cardiologists had recently declined to provide *any* estimate as to when he would be medically cleared to travel.

On the basis of the foregoing, and applying the proper standard of review, I conclude that the trial court's subordinate finding that Oreoluwa was not medically able to travel was not clearly erroneous, and, therefore, that the trial court's ultimate factual finding that the department made reasonable efforts was supported by sufficient evidence. I would accordingly affirm the judg-

ment of the Appellate Court, concluding that the department made reasonable efforts toward reunification of the respondent and Oreoluwa.

II

I next address the respondent's claim that the Appellate Court improperly concluded that the trial court's finding that he abandoned Oreoluwa was not clearly erroneous. Because I conclude that there is sufficient evidence in the record to support the trial court's finding that the respondent abandoned Oreoluwa, I would affirm the judgment of the Appellate Court.

"For purposes of termination proceedings, abandonment has been defined as a parent's fail[ure] to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child . . . . General Statutes [Rev. to 2015] § 17a-112 (j) (3) (A). Maintain [as used in that statute] implies a continuing, reasonable degree of interest, concern, or responsibility and not merely a sporadic showing thereof." (Internal quotation marks omitted.) *In re Santiago G.*, 318 Conn. 449, 472, 121 A.3d 708 (2015). "Abandonment focuses on the parent's conduct." *In re Juvenile Appeal (Docket No. 9489)*, 183 Conn. 11, 14, 438 A.2d 801 (1981). "The commonly understood general obligations of parenthood entail these minimum attributes: (1) express love and affection for the child; (2) express personal concern over the health, education and general well-being of the child; (3) the duty to supply the necessary food, clothing, and medical care; (4) the duty to provide an adequate domicile; and (5) the duty to furnish social and religious guidance." (Internal quotation marks omitted.) Id., 15.

The following additional facts are relevant to the resolution of this claim. The trial court found that the respondent "demonstrated some degree of interest in and concern for the welfare of Oreoluwa." The trial

court specifically noted that the respondent had maintained communication with the department, calling approximately four times per month to check on Oreoluwa, and also had inquired as to how he could provide financial support for him. The department responded to the respondent and requested that he provide verification of his income in the form of pay stubs or tax information, to enable the department to establish a rate for the respondent to pay child support. The respondent did not send the information and never responded to the request. The court also found that although the department provided the respondent with information so that he could send correspondence, cards or gifts to Oreoluwa, he had not done so.[10]

Although the Appellate Court agreed with the trial court that the record revealed that the respondent had demonstrated " 'some degree' " of interest in Oreoluwa's welfare, it also concurred with the trial court's observation that the statutory standard required more than that. *In re Oreoluwa O.*, supra, 157 Conn. App. 504. I agree that the record supports the conclusion that the respondent demonstrated only " 'some degree of interest' " in Oreoluwa. Id. The respondent must demonstrate that he maintained a "reasonable degree of interest, concern or responsibility as to the welfare of the child . . . ." General Statutes (Supp. 2016) § 17a-112 (j) (3) (A). On the basis of the court's subordinate factual findings, which were not clearly erroneous, there was more than sufficient evidence to support the ultimate finding of the trial court that the respondent abandoned Oreoluwa.

The respondent's primary claim on appeal is that the trial court's finding that he abandoned Oreoluwa was

[10] I agree with the Appellate Court that it would be improper to consider the extra-record evidence now offered by the respondent to challenge this finding. *In re Oreoluwa O.*, supra, 157 Conn. App. 505 n.10.

improper because abandonment requires that the parent be "at fault." That is, the respondent argues that in order for a court to find that a parent abandoned his child, the record must support a finding that the parent engaged in conduct that rendered the relationship impossible, or that created the separation or lack of parental involvement. It is unnecessary for me to determine whether the respondent's legal theory is correct, because the trial court did make such a finding, and that finding has ample support in the record. As I already have set forth in my initial review of the facts in the present case, the trial court made the factual finding that the respondent and his wife determined that she would travel to the United States alone, when she was seven months pregnant, with the purpose of giving birth to her child here. As I also detail in this dissenting opinion, the record reveals that the mother suffered from mental illness and had a history of postpartum depression. In light of these facts, the respondent's claim that he is without fault is ironic. He chose to risk his unborn child's welfare by remaining home and sending his wife to deliver their child in a foreign country, despite her mental health history. The trial court's findings and the record provide more than sufficient support for the conclusion that the respondent created the separation. His claims to the contrary find no support in the record.

III

Finally, I address the respondent's claim, which he asserted on behalf of Oreoluwa, that "the guarantee of due process under the fourteenth amendment [to the United States constitution] required the trial court to (1) advise him that he could participate in the termination trial via telephone, [videoconference] or through the use of reasonable continuances to permit [the] respondent time to review the trial exhibits and transcripts prior to presenting his defense, and (2) take

reasonable efforts to use those alternat[ives]." (Internal quotation marks omitted.) *In re Oreoluwa O.*, supra, 157 Conn. App. 507. I agree with the Appellate Court that the respondent lacked standing to raise this claim. Id., 507–508.

"If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The objection of want of jurisdiction may be made at any time . . . [a]nd the court or tribunal may act on its own motion, and should do so when the lack of jurisdiction is called to its attention. . . . The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings. . . .

"Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . . Two broad yet distinct categories of aggrievement exist, classical and statutory. . . . Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the decision, as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the . . . decision has specially and injuriously affected that specific personal or legal interest. . . . Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory

aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Citation omitted; internal quotation marks omitted.) *In re Christina M.*, 280 Conn. 474, 480–81, 908 A.2d 1073 (2006).

The respondent argues that our case law supports the conclusion that he has standing to assert a constitutional claim on his child's behalf for a harm that *he* allegedly suffered. The cases cited by the respondent, however, are distinguishable, and provide support only for the conclusion that a parent has standing "to raise concerns *about his or her child's representation*"; (emphasis added) id., 481; or that a child has standing to raise concerns about the fairness of the proceedings terminating a respondent parent's rights. *In re Melody L.*, 290 Conn. 131, 157, 962 A.2d 81 (2009) (children had standing to challenge judgment terminating parental rights of respondent mother), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 746–47, 91 A.3d 863 (2014). In each of those circumstances, the party who was conferred standing would have been unable to assert the subject claims on his or her own behalf. The respondent does not claim that he would lack standing to assert the due process claim at issue in the present case, because he clearly would have standing to do so. The respondent cites to no authority that supports the proposition that a party who undeniably would have standing to assert a constitutional claim on his own behalf nonetheless has standing to assert the same claim on behalf of another. Such a proposition would constitute an unwarranted expansion of our current case law.

For the foregoing reasons, I respectfully dissent.

STATE OF CONNECTICUT *v.* MICHAEL BRAWLEY (SC 19441)

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson, Js.

Syllabus

Convicted of the crimes of burglary in the first degree, conspiracy to commit burglary in the first degree, assault in the second degree, kidnapping in the first degree, conspiracy to commit kidnapping in the first degree, carrying a pistol without a permit, and criminal possession of a firearm, the defendant appealed to the Appellate Court, which affirmed the trial court's judgment. On the granting of certification, the defendant appealed to this court, claiming that the Appellate Court incorrectly concluded that he was not entitled to a new trial even though the record provided no support for the trial court's ruling requiring him to remain shackled during his criminal trial. *Held* that, although the trial court improperly ordered the defendant to remain shackled throughout his criminal trial because there was nothing to suggest that restraining him was reasonably necessary under the circumstances and such a need was not reflected in the record of the trial court proceedings, the defendant, having failed to demonstrate that the jury actually saw or otherwise was aware of his restraints, did not establish that he was deprived of his right to a fair trial as a result of the trial court's impropriety; accordingly, this court affirmed the Appellate Court's judgment.

Argued December 15, 2015—officially released June 14, 2016

Procedural History

Substitute information charging the defendant with three counts of burglary in the first degree, two counts of conspiracy to commit burglary in the first degree, and one count each of assault in the second degree, kidnapping in the first degree, conspiracy to commit kidnapping in the first degree, carrying a pistol without a permit, and criminal possession of a firearm, brought to the Superior Court in the judicial district of Waterbury, where all of the counts except for the count of criminal possession of a firearm were tried to the jury before *Schuman*, *J.*; verdict of guilty; thereafter, the count of criminal possession of a firearm was tried to the court, *Schuman*, *J.*; finding of guilty; subsequently,

the court rendered judgment in accordance with the jury's verdict and the court's finding, from which the defendant appealed to the Appellate Court, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Christopher N. Parlato, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Jason Germain*, senior assistant state's attorney, for the appellee (state).

Opinion

PALMER, J. The sole issue raised by this certified appeal is whether the Appellate Court properly concluded that the defendant, Michael Brawley, is not entitled to a new trial even though the record provides no support for the ruling of the trial court requiring that the defendant remain shackled during his criminal trial. Although we agree with the defendant that he should not have been shackled throughout the trial, he has failed to establish that he was harmed by the shackling because, so far as the record reveals, the jury never saw the restraints. Accordingly, we affirm the judgment of the Appellate Court.

For purposes of this appeal, only a brief summary of the relevant facts and procedural history is necessary. In July, 2008, the defendant was apprehended for his alleged role in a series of burglaries in the town of Naugatuck, the purpose of which was to obtain money and an M-4 machine gun. Thereafter, the defendant was charged with multiple counts of burglary in the first degree and conspiracy to commit burglary in the first degree, and one count each of kidnapping in the first degree, conspiracy to commit kidnapping in the first degree, assault in the second degree, carrying a pistol without a permit, and criminal possession of a firearm.

On September 24, 2009, the defendant entered a plea of not guilty as to all counts and elected to be tried by a jury except on the charge of criminal possession of a firearm, for which he elected a court trial. At the start of the first day of the evidentiary portion of the trial, defense counsel moved to have the defendant's shackles "removed predicated on good behavior." The trial court denied the motion, stating that "the standard procedure is to leave shackles on during trial." The trial court further explained that its standard procedure is to remove the shackles "only during . . . jury selection when a juror is in the back row . . . ." The trial court made no additional statements or findings regarding the shackling, and the issue did not arise again at any point during the defendant's trial. Following a six day trial, the jury found the defendant guilty on all of the counts that had been tried to the jury, and the trial court found the defendant guilty of criminal possession of a firearm. The trial court rendered judgment in accordance with the jury's verdict and the court's finding, and sentenced the defendant to a total effective term of thirty years imprisonment.

The defendant appealed from the judgment of the trial court to the Appellate Court, which affirmed the trial court's judgment in a memorandum decision. *State* v. *Brawley*, 153 Conn. App. 903, 100 A.3d 62 (2014). Thereafter, we granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly affirm the trial court's determination that the defendant would be required to remain shackled throughout the guilt phase of the trial?" *State* v. *Brawley*, 315 Conn. 917, 107 A.3d 412 (2015).

Following oral argument before this court, and in accordance with Practice Book § 60-2,[1] we directed the

[1] Practice Book § 60-2 provides that a reviewing court may, on its own motion, "(1) order a [trial] judge to take any action necessary to complete the trial court record for the proper presentation of appeal . . . ."

trial court to "inform this court whether the jury . . . was able to observe, or otherwise was aware, that the defendant was wearing shackles during trial." We further directed the trial court to "state (1) the basis of its knowledge in that regard, and (2) the kind or type of shackles at issue, that is, leg irons, belly chain or the like." In its response to our order, the trial court first explained that, because "the trial in question took place [more than] six years ago," it could not "state with certainty from its recollection what type of shackles the defendant wore or whether the shackles worn by the defendant were visible to the jury." The court also stated, however, that "it [was] the court's strong belief that the defendant wore leg shackles only and that they were not visible to the jury." In support of this belief, the court observed that, "over its eighteen years of experience, it [could not] . . . recall presiding over any jury trial in which a party has worn a belly chain or the like." With regard to whether the jury witnessed the defendant in shackles, the trial court further explained that, as a general matter, "it believes firmly in taking every measure to prevent the jury from doing so," and, to that end, the court's standard procedure is to ensure that a defendant's shackles are concealed by having a curtain placed around the defense table so that the jury cannot see the defendant's legs, and by having the defendant seated at the table whenever the jury enters or exits the courtroom. Finally, the trial court stated that its review of the jury charge revealed "that the court made no mention of shackles, which the court would normally have mentioned if the jury had seen the defendant's shackles, either inadvertently or as a result of the court's orders." Accordingly, the trial court concluded that there was "every reason to believe that the court prevented the jury from seeing the defendant in shackles and no evidence to support the contrary belief."

On appeal to this court, the defendant claims, contrary to the conclusion of the Appellate Court, that, because the trial court failed to find that the use of restraints on the defendant during trial was reasonably necessary, its decision compelling him to remain shackled violated his constitutional right to a fair trial. Although conceding that the trial court did not provide any legitimate reason for the shackling, the state argues that the impropriety was harmless because the record is devoid of any evidence that the jury saw or otherwise knew that the defendant was shackled. We agree with the state.

We begin our review of the defendant's claim by setting forth the legal principles that govern our analysis. It is well established that, "[a]s a general proposition, a criminal defendant has the right to appear in court free from physical restraints. . . . Grounded in the common law, this right evolved in order to preserve the presumption favoring a criminal defendant's innocence, while eliminating any detrimental effects to the defendant that could result if he were physically restrained in the courtroom. . . . The presumption of innocence, although not articulated in the [c]onstitution, is a basic component of a fair trial under our system of criminal justice. . . . Nonetheless, a defendant's right to appear before the jury unfettered is not absolute. . . . A trial court may employ a reasonable means of restraint [on] a defendant if, exercising its broad discretion in such matters, the court finds that restraints are reasonably necessary under the circumstances." (Citation omitted; internal quotation marks omitted.) *State* v. *Webb*, 238 Conn. 389, 454–55, 680 A.2d 147 (1996). Despite the breadth of that discretion, however, "[t]he law has long forbidden routine use of visible shackles during the guilt phase; it permits a [s]tate to shackle a criminal defendant only in the presence of a special need." *Deck* v. *Missouri*, 544 U.S. 622,

626, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005); see also *United States* v. *Haynes*, 729 F.3d 178, 188 (2d Cir. 2013) ("a defendant may not be tried in shackles unless the trial judge finds on the record that it is necessary to use such a restraint as a last resort to satisfy a compelling interest").

"In order for a criminal defendant to enjoy the maximum benefit of the presumption of innocence, our courts should make every reasonable effort to present the defendant before the jury in a manner that does not suggest, expressly or impliedly, that he or she is a dangerous character whose guilt is a foregone conclusion. . . . The negative connotations of restraints, nevertheless, are without significance unless the fact of the restraints comes to the attention of the jury." (Internal quotation marks omitted.) *State* v. *Webb*, supra, 238 Conn. 455. "The defendant bears the burden of showing that he has suffered prejudice by establishing a factual record demonstrating that the members of the jury knew of the restraints." Id.; see also *State* v. *Tweedy*, 219 Conn. 489, 507 n.14, 594 A.2d 906 (1991) ("[a]lthough defense counsel claimed at trial that the defendant's restraints were visible from the jury box, he did not create a record to substantiate that claim by making an appropriate offer of proof"); *State* v. *Woolcock*, 201 Conn. 605, 616–17, 518 A.2d 1377 (1986) (because record contained no evidence that jury was aware of defendant's shackles, "[t]he [defendant] has not carried his burden of providing an appellate record [that] supports his claim of error"); *State* v. *Williams*, 195 Conn. 1, 10, 485 A.2d 570 (1985) ("the record does not indicate . . . [and] the defendant [does not] claim that any offer of proof was made as to whether the jurors could or did view the restraints when on the defendant").

When, however, "a court, without adequate justification, orders [a] defendant to wear shackles that *will be seen* by the jury, the defendant need not demonstrate

actual prejudice to make out a due process violation. The [s]tate must prove beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained." (Emphasis added; internal quotation marks omitted.) *Deck* v. *Missouri*, supra, 544 U.S. 635.

Finally, "[i]n reviewing a shackling claim, our task is to determine whether the court's decision to employ restraints constituted a clear abuse of discretion. . . . While appellate review is greatly aided when a court develops the record by conducting an evidentiary hearing concerning the necessity for restraints, such a hearing is not mandatory. . . . A record in some fashion disclosing the justification for using restraints, however, is essential to meaningful appellate review of a shackling claim. . . . This is particularly so because of the potential for prejudice in the use of shackles. . . . Accordingly, a trial court must ensure that its reasons for ordering the use of restraints are detailed in the record."[2] (Citations omitted; internal quotation marks omitted.) *State* v. *Tweedy*, supra, 219 Conn. 506.

[2] We note that the aforementioned principles have long been reflected in our rules of practice. Specifically, Practice Book § 42-46 provides: "(a) Reasonable means of restraint may be employed if the judicial authority finds such restraint reasonably necessary to maintain order. If restraints appear potentially necessary and the circumstances permit, the judicial authority may conduct an evidentiary hearing outside the presence of the jury before ordering such restraints. The judicial authority may rely on information other than that formally admitted into evidence. Such information shall be placed on the record outside the presence of the jury and the defendant given an opportunity to respond to it.

"(b) In ordering the use of restraints or denying a request to remove them, the judicial authority shall detail its reasons on the record outside the presence of the jury. The nature and duration of the restraints employed shall be those reasonably necessary under the circumstances. All reasonable efforts shall be employed to conceal such restraints from the view of the jurors. Upon request, the judicial authority shall instruct the jurors that restraint is not to be considered in assessing the evidence or in the determination of the case."

Turning to the present case, we note that the record indicates that the trial court ordered the defendant to remain shackled during trial in accordance with its "standard procedure . . . ." To the extent that the trial court's "standard procedure" represents a general policy of the court favoring the use of leg restraints at trial, even in the absence of a showing that such restraints are necessary, that policy violates the principle that restraints may be used only when there is particularized need to do so, and only when that need is reflected in the record.

Nor is there anything in the record of the present case to suggest that restraining the defendant was reasonably necessary under the circumstances. Although the defendant had been charged with serious crimes of violence, there is nothing in the record to establish that he was a flight risk, that he had exhibited serious behavioral issues or that he otherwise posed a danger to the security of the people in the courtroom. But cf. *Sekou* v. *Warden*, 216 Conn. 678, 692–93, 583 A.2d 1277 (1990) (concluding that, notwithstanding trial court's failure to articulate its reasons for restraining petitioner at his criminal trial, record "amply demonstrate[d]" that nature and duration of restraints employed were reasonably necessary due to petitioner's "history of insubordination and violence in penal institutions, which included an attack on a prison guard with a knife, [his] participation in a prison rebellion," and his destruction of prison property). In the absence of a showing that the defendant posed a flight or safety risk, there simply was no reason to have him shackled.

Nevertheless, to establish that he was deprived of his right to a fair trial, the defendant, in addition to showing that he was restrained without sufficient cause, also must provide evidence demonstrating that the jury actually saw or otherwise was aware of his

restraints.[3] See, e.g., *State* v. *Webb*, supra, 238 Conn.

[3] The defendant contends that, when a trial court makes an erroneous decision to restrain a defendant, and the record in the case is silent as to whether the restraints were visible to the jury, the state, rather than the defendant, has the burden of establishing beyond a reasonable doubt that the defendant's restraints were not seen by the jury. In support of his contention, the defendant relies on *United States* v. *Banegas*, 600 F.3d 342 (5th Cir. 2010), in which the United States Court of Appeals for the Fifth Circuit concluded that requiring the defendant to prove that his restraints were visible to the jury in cases in which the record is silent on the matter "would create the unjust result that, when the record is sparse as to the facts of shackling, the defendant would have to depend on that same sparse record to prove the negative fact of shackle visibility before the government would have to take up its burden of proving the absence of prejudice." Id., 347. For the following reasons, we are not persuaded by the defendant's argument.

In reaching its conclusion, the court in *Banegas* noted that placing the burden on a defendant "would significantly alter the burden of proof articulated [by the United States Supreme Court] in *Deck* [v. *Missouri*, supra, 544 U.S. 635]." *United States* v. *Banegas*, supra, 600 F.3d 347. A review of the United States Supreme Court's decision in *Deck*, however, convinces us that the court in *Banegas* misinterpreted the holding in *Deck*.

In *Deck*, the petitioner, Carman Deck, was convicted of murdering and robbing an elderly couple. *Deck* v. *Missouri*, supra, 544 U.S. 624–25. On appeal, his death sentence was set aside, and the Missouri Supreme Court ordered a new sentencing proceeding. Id., 625. During that new sentencing proceeding, Deck was shackled with leg irons, handcuffs, and a belly chain. Id. Despite counsel's objection to the restraints, the trial court declined to have them removed, explaining that Deck "[had] been convicted and [would] remain in [leg irons] and a belly chain." (Internal quotation marks omitted.) Id. The penalty phase proceeded with Deck in restraints, and he again was sentenced to death. Id. Deck appealed his death sentence, arguing that his shackling violated both Missouri law and the United States constitution. Id. The Missouri Supreme Court rejected that argument and upheld Deck's death sentence. Id., 625–26.

On appeal to the United States Supreme Court, the state of Missouri claimed that the Missouri Supreme Court properly had found that (1) the record lacked evidence that the jury saw the restraints, (2) the trial court acted within its discretion, and (3) the defendant did not demonstrate that he had suffered prejudice. Id., 634. The United States Supreme Court rejected these arguments. Id., 634–35. With respect to the first contention, the court determined that, contrary to Missouri's assertion, the record in the case "[made] clear that the jury was aware of the shackles." Id., 634. With regard to the second argument, the court concluded that the record "contain[ed] no formal or informal findings" explaining the trial court's reasons for imposing the requirement of shackles beside "the fact that Deck already

455. There is no dispute that the defense did not make any offer of proof at trial with respect to whether the jury could or did see the restraints. In fact, defense counsel never renewed or amplified his initial objection after the trial court denied his motion to have the shackles removed. Furthermore, our review of the record reveals no evidence to suggest that the jury actually saw or otherwise knew of the defendant's shackles. In addition, according to the trial court's rectification of the record, the defendant always was seated at the defense table before the jury entered, and he remained

[had] been convicted." (Internal quotation marks omitted.) Id. On the basis of its rejection of the two foregoing arguments, the court rejected Missouri's final argument, concluding that, when "a court, without adequate justification, orders [a] defendant to wear shackles that *will be seen* by the jury, the defendant need not demonstrate prejudice to make out a due process violation. The [s]tate must prove beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained." (Emphasis added; internal quotation marks omitted.) Id., 635.

Thus, *Deck* makes clear that a heightened burden falls on the state when the unwarranted restraints *are visible* to the jury, and not when, as in *Banegas*, the record is silent on the matter. Accordingly, we disagree with the conclusion that the court reached in *Banegas*. We further note that our understanding of the United States Supreme Court's holding in *Deck* is consistent with that of other federal and state courts that have examined the issue. See, e.g., *Mendoza* v. *Berghuis*, 544 F.3d 650, 654 (6th Cir. 2008) ("*Deck*'s facts and holding . . . concerned only visible restraints at trial. The [United States] Supreme Court was careful to repeat this limitation throughout its opinion." [Emphasis omitted.]), cert. denied, 556 U.S. 1188, 129 S. Ct. 1996, 173 L. Ed. 2d 1096 (2009); see also *Ochoa* v. *Workman*, 669 F.3d 1130, 1145 (10th Cir.) ("it is the potential impact on the jury of visible restraints that implicates the fundamental fairness of a jury trial proceeding"), cert. denied, 568 U.S. 904, 133 S. Ct. 321, 184 L. Ed. 2d 190 (2012); *People* v. *Letner*, 50 Cal. 4th 99, 155, 235 P.3d 62, 112 Cal. Rptr. 3d 746 (2010) (*Deck* did not support contention that prosecution was required to disprove visibility when there was no evidence in record that jury observed defendant wearing shackles), cert. denied, 563 U.S. 939, 131 S. Ct. 2143, 179 L. Ed. 2d 897 (2011), and cert. denied sub nom. *Tobin* v. *California*, 563 U.S. 939, 131 S. Ct. 2097, 179 L. Ed. 2d 897 (2011); *Hoang* v. *People*, 323 P.3d 780, 785–86 (Colo.) (when restraints are visible to jurors, prosecution bears burden to prove harmless error, but when it is not apparent from record that jury had observed shackles, defendant must demonstrate visibility), cert. denied, 574 U.S. 894, 135 S. Ct. 233, 190 L. Ed. 2d 175 (2014).

there until after the jury left the courtroom. Finally, the fact that the trial court could not recall presiding over a single case in which a jury had been able to observe a defendant in restraints strongly supports the conclusion that the jury in the present case did not see the defendant's shackles. On the present record, therefore, the defendant has failed to establish that the trial court's impropriety in having him shackled during his trial abridged his presumption of innocence.[4]

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

LISA J. CEFARATTI *v.* JONATHAN S. ARANOW ET AL. (SC 19443)

Rogers, C. J., and Palmer, Zarella, McDonald, Espinosa, Robinson and Vertefeuille, Js.

Syllabus

The plaintiff sought to recover damages from, inter alios, the defendant physician, A, and the defendant hospital for medical malpractice, claiming that A negligently had left a surgical sponge in the plaintiff's abdominal cavity during gastric bypass surgery. The plaintiff claimed that the hospital was directly liable for its own negligence during the surgery, and vicariously liable for A's negligence because it had held A out to the public as an agent or employee of the hospital. Prior to deciding to have the surgery, the plaintiff was aware that A had performed the same surgical procedure on an acquaintance and, after researching the matter, she determined that A was considered the best surgeon for the procedure in the state. The plaintiff subsequently attended a seminar and follow-up informational sessions conducted by A and his staff at the hospital, and was also provided with pamphlets prepared by the hospital describing the role of the health care team that would be caring for the plaintiff. The plaintiff assumed that A was an employee of the hospital because he had privileges there, and she relied on that belief when she chose to undergo the surgery at the hospital. The hospital filed a motion for summary judgment claiming, inter alia, that the plaintiff did not have a

[4] Of course, the defendant may seek to establish that the jury did, in fact, observe him in shackles in connection with a petition for a writ of habeas corpus.

viable claim of vicarious liability against it because A was not its actual agent or employee and because the doctrine of apparent agency is not recognized as a basis for tort liability in this state as a matter of law. The plaintiff objected to the motion, claiming that the doctrine of apparent agency has been recognized in this state, and contending that there was a genuine issue of material fact as to whether the hospital had held A out as its agent or employee and whether she had acted in reliance on her belief that A was the hospital's agent or employee. The trial court, concluding that the doctrine of apparent agency had not been recognized in this state in tort actions, and, therefore, that the plaintiff's claim of vicarious liability against the hospital was barred, rendered summary judgment for the hospital on that claim. The plaintiff then appealed from that judgment to the Appellate Court, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Held* that this court concluded that both the doctrine of apparent authority, which expands the authority of an actual agent, and the doctrine of apparent agency, which creates an agency relationship that would not otherwise exist, may be applied in tort actions: this court previously determined in *Fireman's Fund Indemnity Co.* v. *Longshore Beach & Country Club* (127 Conn. 493) that the doctrine of apparent authority applied to tort cases, and because the terms apparent authority and apparent agency have been used interchangeably in this state, this court concluded that the distinction between the two doctrines did not justify recognizing one, but not the other; furthermore, this court concluded that although, under certain circumstances, proof of detrimental reliance is not required to establish an apparent agency in tort actions, when, as here, the plaintiff selected the specific person who provided the services and caused the injury on the basis of the plaintiff's knowledge of the person's skills and reputation, the plaintiff must demonstrate an actual and reasonable belief in the principal's representations that the person was its agent or employee, and also detrimental reliance on those representations to establish apparent agency; accordingly, because this court adopted the detrimental reliance standard for establishing an apparent agency in tort actions for the first time, the case was remanded to the trial court to provide the plaintiff with an opportunity to present evidence that she detrimentally relied on her belief that A was the hospital's agent or employee, such that she would not have allowed A to perform the surgery if she had known that A was not the hospital's agent or employee.

L & V Contractors, LLC v. *Heritage Warranty Ins. Risk Retention Group, Inc.* (136 Conn. App. 662), *Mullen* v. *Horton* (46 Conn. App. 759), and *Davies* v. *General Tours, Inc.* (63 Conn. App. 17), to the extent they suggested that the doctrines of apparent authority and apparent agency had been rejected as a matter of law in tort actions, overruled.

(*Three justices dissenting in one opinion*)

Argued January 21—officially released June 14, 2016

Procedural History

Action to recover damages for the defendants' alleged medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Aurigemma, J.*, granted the motions for summary judgment filed by the defendants and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court, *Beach, Sheldon* and *Bear, Js.*, which affirmed in part the judgment of the trial court, from which the plaintiff, on the granting of certification, appealed to this court. *Reversed; further proceedings.*

Kelly E. Reardon, with whom, on the brief, was *Robert I. Reardon, Jr.*, for the appellant (plaintiff).

S. Peter Sachner, with whom, on the brief, was *Amy F. Goodusky*, for the appellee (defendant Middlesex Hospital).

Jennifer L. Cox and *Jennifer A. Osowiecki* filed a brief for the Connecticut Hospital Association as amicus curiae.

Alinor C. Sterling, *Cynthia C. Bott* and *Kathryn Calibey* filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

Opinion

ROGERS, C. J. The primary issue that we must resolve in this certified appeal is whether this court should recognize the doctrine of apparent agency in tort actions, under which a principal may be held vicariously liable for the negligence of a person whom the principal has held out as its agent or employee. The plaintiff, Lisa J. Cefaratti, brought a medical malpractice action against the defendants, Jonathan S. Aranow, Shoreline Surgical Associates, P.C. (Shoreline),[1] and Middlesex Hospi-

[1] The plaintiff alleged that Shoreline was Aranow's employer and that Shoreline was directly liable to her for its own negligence. Shoreline has admitted that Aranow is its employee, and the claim against Shoreline is not at issue in this appeal.

tal (Middlesex), alleging that Aranow had left a surgical sponge in the plaintiff's abdominal cavity during gastric bypass surgery. She further alleged that Middlesex was both directly liable for its own negligence during the surgery and vicariously liable for Aranow's negligence, because Middlesex had held Aranow out to the public as its agent or employee. Thereafter, Middlesex filed a motion for summary judgment claiming, among other things, that the plaintiff did not have a viable claim of vicarious liability against it because Aranow was not its actual agent or employee and the doctrine of apparent agency is not recognized in tort actions in this state.[2] The trial court agreed with Middlesex and granted its motion for summary judgment on the vicarious liability claim. The plaintiff appealed to the Appellate Court, which affirmed the judgment of the trial court. *Cefaratti* v. *Aranow*, 154 Conn. App. 1, 45, 105 A.3d 265 (2014). We then granted the plaintiff's petiption for certification to appeal on the following issue: "Did the Appellate Court properly conclude that the doctrine of apparent authority does not apply to

[2] Middlesex also claimed in its motion for summary judgment that both the direct and the derivative claims against it were barred by the statute of limitations. Aranow and Shoreline subsequently filed a joint motion for summary judgment raising the same claim. The trial court concluded that the direct claims against Aranow and Middlesex were barred by the statute of limitations and, therefore, the derivative claims against Middlesex and Shoreline were also barred. The plaintiff appealed from the trial court's ruling with respect to her claims against Aranow and Shoreline and the claim of vicarious liability against Middlesex to the Appellate Court, which reversed the judgment of the trial court on the ground that there was a genuine issue of material fact as to whether the statute of limitations had been tolled by the continuing course of treatment doctrine. *Cefaratti* v. *Aranow*, 154 Conn. App. 1, 22, 105 A.3d 265 (2014). We then granted Aranow and Shoreline's petition for certification to appeal from that ruling, limited to the following issue: "Did the Appellate Court properly apply the 'continuing course of treatment' doctrine in determining what constitutes an 'identifiable medical condition' under that doctrine?" *Cefaratti* v. *Aranow*, 315 Conn. 919, 919–20, 107 A.3d 960 (2015). In the companion case of *Cefaratti* v. *Aranow*, 321 Conn. 637, 138 A.3d 837 (2016), released on the same date as this opinion, we answer that question in the affirmative.

actions sounding in tort?" *Cefaratti* v. *Aranow*, 315 Conn. 919, 107 A.3d 960 (2015). We answer that question in the negative. We also conclude that, because we are adopting a new standard for establishing an apparent agency in tort actions, the case must be remanded to the trial court to provide the plaintiff with an opportunity to establish that there is a genuine issue of material fact as to each element of the doctrine.

The record, which we view in the light most favorable to the plaintiff for purposes of reviewing the trial court's rendering of summary judgment, reveals the following facts and procedural history. At some point prior to December, 2003, the plaintiff decided that she wanted to undergo gastric bypass surgery. The plaintiff knew that Aranow performed this type of surgery because he had performed the procedure on her partner's mother, with very good results. The plaintiff researched the matter and determined that Aranow was considered to be the best gastric bypass surgeon in the state.[3]

[3] The following exchange took place between Aranow's attorney and the plaintiff at the plaintiff's deposition:

"Q. Okay, so can you tell me how it came about that you made a decision that you wanted to have gastric bypass surgery? Did some doctor recommend that to you?

"A. It was around the time that [the plaintiff's treating physician] said that I was borderline diabetic and I started taking stock of my health very seriously. My partner's mother had had bariatric surgery and she had a really good result and that's when I decided that that's what I wanted to do.

"Q. And do you know who did your partner's mother's surgery?

"A. Dr. Aranow.

"Q. So is that where you got his name from?

"A. That's where I got his name and then I did my own research and I found that he was the best in the state at that time.

"Q. And so at that point you made a decision, I think I want to do this procedure?

"A. Yes.

"Q. And when you did your research, were you just researching doctors who did the procedure or were you actually researching the procedure itself?

"A. Both."

Before Aranow would accept the plaintiff as a patient and perform the surgery, the plaintiff was required to attend a seminar that Aranow conducted at Middlesex. In addition, she attended a number of informational sessions at Middlesex that were conducted by Aranow's staff. The plaintiff received a pamphlet at one of the informational sessions that had been prepared by Middlesex and that stated that "the health care team who will be caring for you has developed an education program that is full of important information." In addition, the pamphlet stated that "[t]he team will go over every aspect of your stay with us. We will discuss what you should do at home before your operation, what to bring with you, and events on the day of surgery."[4] The plaintiff assumed that Aranow was an employee of Middlesex because he had privileges there, and she relied on this belief when she chose to undergo surgery at Middlesex.

On December 8, 2003, Aranow performed gastric bypass surgery on the plaintiff at Middlesex. On August 6, 2009, after being diagnosed with breast cancer by another physician, the plaintiff underwent a computerized tomography (CT) scan of her chest, abdomen and pelvis. The CT scan revealed the presence of foreign material in the plaintiff's abdominal cavity. On September 9, 2009, the plaintiff met with Aranow, who informed her that the object in her abdominal cavity was a surgical sponge.

Thereafter, the plaintiff brought a medical malpractice action alleging, among other things, that Aranow

[4] In support of her opposition to Middlesex' motion for summary judgment, the plaintiff provided the trial court with the affidavit of Sarah A. McNeely, an associate at the law firm that represented the plaintiff, in which McNeely stated that she had visited Middlesex' website and found information that would support a reasonable belief that Aranow was employed by Middlesex. McNeely printed out the materials and attached them to her affidavit. The plaintiff has pointed to no evidence in the record, however, that would support a finding that the plaintiff saw these materials before undergoing the surgery.

had negligently failed to remove the surgical sponge from her abdominal cavity during the gastric bypass surgery and that Middlesex was vicariously liable for Aranow's negligence because it had held Aranow out as its agent or employee. Middlesex then filed a motion for summary judgment in which it contended that the plaintiff's claim of vicarious liability was barred because Middlesex was not Aranow's employer and the doctrine of apparent authority is not recognized as a basis for tort liability in this state as a matter of law. The plaintiff objected to Middlesex' motion for summary judgment claiming that, contrary to its contention, the doctrine of apparent agency has been recognized in this state. The plaintiff also contended that there was a genuine issue of material fact as to whether Middlesex had held out Aranow as its agent or employee and whether the plaintiff had acted in reliance on her belief that that was the case. Relying on the Appellate Court's decision in *L & V Contractors, LLC* v. *Heritage Warranty Ins. Risk Retention Group, Inc.*, 136 Conn. App. 662, 47 A.3d 887 (2012), the trial court concluded that the doctrine of apparent agency has not been recognized in this state. See id., 670 ("this court has held that the doctrine of apparent authority cannot be used to hold a principal liable for the tortious actions of its alleged agent"). Accordingly, the trial court concluded that the plaintiff's claim of vicarious liability against Middlesex was barred as a matter of law and it rendered summary judgment for Middlesex on that claim. The plaintiff appealed to the Appellate Court, which affirmed the judgment of the trial court. *Cefaratti* v. *Aranow*, supra, 154 Conn. App. 45. This certified appeal followed.[5]

[5] After we granted the plaintiff's petition for certification to appeal, we granted permission to the Connecticut Trial Lawyers Association to file an amicus curiae brief in support of the plaintiff's position and to the Connecticut Hospital Association to file an amicus curiae brief in support of Middlesex' position.

The plaintiff claims on appeal that the Appellate Court improperly concluded that the doctrine of apparent agency has not been recognized in the state as a basis for vicarious liability in actions sounding in tort. Middlesex contends that, to the contrary, the plaintiff has confused the doctrine of apparent authority, which expands the authority of an actual agent, with the doctrine of apparent agency, which creates an agency relationship that would not otherwise exist, and the Appellate Court properly held that the doctrine of apparent agency has been expressly rejected as a basis for tort liability in this state. Middlesex further contends that, even if the doctrine of apparent agency is generally applicable in tort actions, hospitals may not be held vicariously liable for the medical malpractice of their agents or apparent agents. Finally, Middlesex contends that, even if hospitals may be held vicariously liable for medical malpractice, the plaintiff has failed to establish the elements of the doctrine in the present case.

"The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in

the facts set out in the memorandum of decision of the trial court." (Citation omitted; internal quotation marks omitted.) *Gold* v. *Greenwich Hospital Assn.*, 262 Conn. 248, 253, 811 A.2d 1266 (2002).

We begin our analysis with a review of our cases involving the doctrines of apparent agency and apparent authority.[6] The first case to come before this court involving the application of the doctrine of apparent authority in a tort action was *Fireman's Fund Indemnity Co.* v. *Longshore Beach & Country Club, Inc.*, 127 Conn. 493, 18 A.2d 347 (1941). In that case, the named defendant, Longshore Beach and Country Club, Inc. (country club), employed certain persons to park club members' cars upon their arrival and to retrieve the cars when the members departed. Id., 494. The country club also employed James Plant as a watchman. Id., 495. The parking attendants wore green uniforms, while

[6] The doctrine of apparent authority expands the authority of an actual agent, while the doctrine of apparent agency creates an agency relationship that would not otherwise exist. See *Miller* v. *McDonald's Corp.*, 150 Ore. App. 274, 282 n.4, 945 P.2d 1107 (1997) ("Apparent agency is a distinct concept from apparent authority. Apparent agency creates an agency relationship that does not otherwise exist, while apparent authority expands the authority of an actual agent."); see also *Crinkley* v. *Holiday Inns, Inc.*, 844 F.2d 156, 166 (4th Cir. 1988) ("apparent authority presupposes actual agency, and only operates to extend the scope of an actual agent's authority," while, under doctrine of apparent agency, "no actual agency exists, [but] a party may be held to be the agent of another on the basis that he has been held out by the other to be so in a way that reasonably induces reliance on the appearances"); but see *Fletcher* v. *South Peninsula Hospital*, 71 P.3d 833, 840–41 (Alaska 2003) (concluding that apparent agency is based on § 429 of Restatement [Second] of Torts, while apparent authority is based on § 8 of Restatement [Second] of Agency, and, "[e]xcept for apparent authority's more explicit focus on the principal's conduct, apparent authority and apparent agency are not markedly different theories of liability; in fact, other courts often use them interchangeably"); *Daly* v. *Aspen Center for Women's Health, Inc.*, 134 P.3d 450, 454 (Colo. App. 2005) (when plaintiff "seeks to establish vicarious liability for a physical tort, she is asserting apparent agency, not apparent authority"). It is an understatement to say that courts have been inconsistent in their use of the terminology relating to the doctrines of apparent agency and apparent authority.

Plant wore a blue one. Id. A club member, Fred Giorchino, was about to leave the club and asked Plant if he could drive. When Plant replied that he could, Giorchino offered Plant a tip to retrieve his car for him. Id. Plant agreed but never returned with the car. Ultimately, the car was found submerged in nearby waters, with Plant in the driver's seat, drowned. Id. The plaintiff, which had insured Giorchino's car, brought a subrogation action against the country club and its operators contending that they were liable for Plant's negligence because he was "acting either within the scope of [the country club's] implied or [its] apparent authority." Id., 496. The trial court concluded that, to the contrary, Plant was acting as Giorchino's agent and, accordingly, it rendered judgment for the defendants. Id.

On appeal, this court stated that "[a]pparent and ostensible authority is such authority as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe that the agent possesses. This authority to act as agent may be conferred if the principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to act on an apparent agency. It is essential to the application of the above general rule that two important facts be clearly established: (1) that the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority; and (2) that the person dealing with the agent knew of the facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority. The apparent power of an agent is to be determined by the acts of the principal and not by the acts of the agent; a principal is responsible for the acts of an agent within his apparent authority only where the principal himself by his acts or conduct has clothed the agent

with the appearance of authority, and not where the agent's own conduct has created the apparent authority. The liability of the principal is determined in any particular case, however, not merely by what was the apparent authority of the agent, but by what authority the third person, exercising reasonable care and prudence, was justified in believing that the principal had by his acts under the circumstances conferred upon his agent."[7] (Internal quotation marks omitted.) Id., 496–97.

After setting forth these legal principles, this court concluded that, under the specific facts of the case, "Plant was not acting . . . even in the apparent or ostensible scope of his authority. The plaintiff failed to establish that the defendants held Plant out to the [country club] members as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority; or that Giorchino acting in good faith had reason to believe and did believe that Plant possessed the necessary authority. The defendants' liability is determined by what authority Giorchino, exercising reasonable care and prudence, was justified in believing that the defendants had by their acts under the circumstances conferred upon Plant. Giorchino's question whether Plant could drive a car, and his bargain with him are among the significant facts." Id., 497–98. Accordingly, this court concluded that the defendants were not liable for Plant's negligence. Id., 498.

Despite the clear language of *Fireman's Fund Indemnity Co.*, in which this court recognized the doctrine of apparent authority but rejected the plaintiff's claim because it had failed to establish the factual ele-

[7] The court in *Fireman's Fund Indemnity Co.* derived these principles from two contract cases involving the doctrine of apparent authority. *Fireman's Fund Indemnity Co.* v. *Longshore Beach & Country Club, Inc.*, supra, 127 Conn. 497, citing *Zazzaro* v. *Universal Motors, Inc.*, 124 Conn. 105, 111, 197 A. 884 (1938), and *Quint* v. *O'Connell*, 89 Conn. 353, 357, 94 A. 288 (1915).

ments of that claim, the Appellate Court has subsequently suggested in a series of cases that that doctrine and the related doctrine of apparent agency have been rejected in this state *as a matter of law*.[8] It was not until its decision in the present case that the Appellate Court finally recognized that this conflict exists.[9] We agree that *L & V Contractors, LLC* v. *Heritage Warranty Ins. Risk Retention Group, Inc.*, supra, 136 Conn. App. 662, *Davies* v. *General Tours, Inc.*, 63 Conn. App. 17,

[8] See *L & V Contractors, LLC* v. *Heritage Warranty Ins. Risk Retention Group, Inc.*, supra, 136 Conn. App. 670 ("the doctrine of apparent authority cannot be used to hold a principal liable for the tortious actions of its alleged agent"); *Davies* v. *General Tours, Inc.*, 63 Conn. App. 17, 31, 774 A.2d 1063 ("the doctrine of agency by estoppel, or apparent authority . . . is not a viable ground on which to premise liability against a defendant sued for the torts of an alleged agent" [internal quotation marks omitted]), cert. granted, 256 Conn. 926, 776 A.2d 1143 (2001) (appeal withdrawn October 18, 2001); *Mullen* v. *Horton*, 46 Conn. App. 759, 771–72, 700 A.2d 1377 (1987) (trial court properly had held that defendants in tort action were entitled to judgment as matter of law on claim pursuant to doctrine of apparent authority because doctrine had never been "used in such a manner" in this state).

[9] Specifically, the Appellate Court concluded in the present case that *Mullen* v. *Horton*, 46 Conn. App. 759, 771, 700 A.2d 1377 (1987), and *Davies* v. *General Tours, Inc.*, 63 Conn. App. 17, 31, 774 A.2d 1063, cert. granted, 256 Conn. 926, 776 A.2d 1143 (2001) (appeal withdrawn October 18, 2001), must be interpreted as having "held that *the facts of those cases* did not justify the imposition of vicarious liability" under the doctrine of apparent authority, thereby implying that this court has recognized the doctrine. (Emphasis added.) *Cefaratti* v. *Aranow*, supra, 154 Conn. App. 40–41; see also id., 45 (affirming *L & V Contractors, LLC*, on sole ground that panel of Appellate Court cannot overrule precedent established by previous panel).

Numerous Superior Court decisions have applied *Fireman's Fund Indemnity Co.* in tort actions. See *Beamon* v. *Petersen*, Superior Court, judicial district of New Haven, Docket No. CV-10-6010085-S (April 9, 2014) (57 Conn. L. Rptr. 920, 923) ("it is illogical to conclude that *Fireman's Fund* [*Indemnity Co.*] cannot be invoked for the proposition that the doctrine of apparent authority applies to tort liability" [internal quotation marks omitted]); id., 923 (citing Superior Court cases that have concluded that *L & V Contractors, LLC*, is not binding because it conflicts with *Fireman's Fund Indemnity Co.*); but see *Weiss* v. *Surgical Associates, P.C.*, Superior Court, judicial district of Fairfield, Docket No. CV-11-6022546-S (April 30, 2015) (following *L & V Contractors, LLC*, and citing other Superior Court cases that have done so).

774 A.2d 1063, cert. granted, 256 Conn. 926, 776 A.2d 1143 (2001) (appeal withdrawn October 18, 2001), and *Mullen* v. *Horton*, 46 Conn. App. 759, 700 A.2d 1377 (1987), cannot be reconciled with *Fireman's Fund Indemnity Co.*, and must, therefore, be overruled. Although this court in *Fireman's Fund Indemnity Co.* did not expressly analyze the issue of whether the doctrine of apparent authority should apply, it clearly believed that the doctrine did apply in tort cases. Nothing in the language of this court's decision suggests that this court had merely assumed, without deciding, that the defendants could be held vicariously liable for the tortfeasor's negligence. Moreover, this court has characterized its decision in *Fireman's Fund Indemnity Co.* as "*applying*" the doctrine of apparent authority in a tort case. (Emphasis added.) *Hanson* v. *Transportation General, Inc.*, 245 Conn. 613, 617 n.5, 716 A.2d 857 (1998).

Indeed, in the present case, Middlesex does not dispute that *Fireman's Fund Indemnity Co.* stands for the proposition that the doctrine of apparent *authority* may be applied in tort cases in this state. Rather, it contends that there is a distinction between the doctrine of apparent authority and the doctrine of apparent agency, and that *Fireman's Fund Indemnity Co.* recognized only the former. We agree with Middlesex that *Fireman's Fund Indemnity Co.* involved the doctrine of apparent authority, not the doctrine of apparent agency, and that there is a useful semantic distinction between the two doctrines. Specifically, the doctrine of apparent authority expands the authority of an actual agent, while the doctrine of apparent agency creates an agency relationship that would not otherwise exist. See footnote 6 of this opinion. We do not agree, however, that this distinction between the two doctrines justifies recognizing one but not the other. As in many

other jurisdictions,[10] it has been the rule in this state for courts to use the terms apparent agency and apparent authority interchangeably. For example, in *Fireman's Fund Indemnity Co.* v. *Longshore Beach & Country Club, Inc.*, supra, 127 Conn. 496–97, a case in which an actual employment relationship existed between the defendants and the tortfeasor, this court first referred to the law governing "apparent authority" and then immediately noted that apparent authority may be found when the principal "causes or allows third persons to act on an apparent *agency*." (Emphasis added.) In *Davies* v. *General Tours, Inc.*, supra, 63 Conn. App. 31, a case in which no actual agency relationship was established between the defendant and the tortfeasor, the Appellate Court referred to the "doctrine of agency by estoppel, or apparent *authority* . . . ." (Emphasis added; internal quotation marks omitted.) Similarly, in *L & V Contractors, LLC* v. *Heritage Warranty Ins. Risk Retention Group, Inc.*, supra, 136 Conn. App. 669, the Appellate Court concluded that there was no actual agency relationship but then referred to the plaintiff's claim under the doctrine of "apparent *authority*." (Emphasis added.) See also *City Bank of New Haven* v. *Throp*, 78 Conn. 211, 217, 61 A. 428 (1905) (in contract case, "[w]hether the subject is treated as an *agency* by estoppel or as one of apparent or ostensible *authority*, the principle is the same, and the law is well settled" [emphasis added]).[11] Thus, the cases assume that the same policy considerations underlie both doctrines.

[10] See *Baptist Memorial Hospital System* v. *Sampson*, 969 S.W.2d 945, 947 n.2 (Tex. 1998) ("Many courts use the terms ostensible agency, apparent agency, apparent authority, and agency by estoppel interchangeably. As a practical matter, there is no distinction among them. . . . Regardless of the term used, the purpose of the doctrine is to prevent injustice and protect those who have been misled." [Citations omitted.]); id. (citing cases).

[11] We further note that, in *Mullen* v. *Horton*, 46 Conn. App. 759, 771, 700 A.2d 1377 (1987), the plaintiff sought to hold the defendants liable for the acts of an *employee* under the doctrine of "apparent authority," thus using the correct terminology. As we have indicated, the Appellate Court concluded that "the doctrine of apparent authority has never been used in such

Moreover, the Restatement (Third) of Agency now sets forth a single doctrine that expressly applies both to actual agents and to apparent agents. 1 Restatement (Third), Agency § 2.03 (2006). That Restatement (Third) provides: "Apparent authority is the power held by an agent *or other actor* to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." (Emphasis added.) Id.; see also id., comment (a), p. 113 ("[t]he definition in this section does not presuppose the present or prior existence of an agency relationship"); id., comment (b), p. 114 ("The doctrine stated in this section applies to agents *and other actors* who purport to act as agents on a principal's behalf. The doctrine also applies to the 'apparent authority' of actors who are agents but whose actions exceed their actual authority. Many judicial opinions use the terms 'apparent agency' and 'apparent authority' interchangeably." [Emphasis added.]); 2 Restatement (Third), Agency § 7.08 (2006) (providing that principal is vicariously liable for tort committed by person with apparent authority as defined by § 2.03).

Indeed, Middlesex has not identified a single case from any other jurisdiction in which the court has recognized the applicability of the doctrine of apparent authority in tort actions, but has refused to recognize the doctrine of apparent agency, and we decline to follow such a course here. As this court stated more than 100 years ago in the context of a contract case, regardless of whether there is an actual agency relationship between the defendant and the direct tortfeasor

a manner." Id., 772. This conclusion could not have been based on the distinction between apparent authority and apparent agency, however, because, under *Fireman's Fund Indemnity Co.*, the doctrine of apparent authority may be applied to hold the tortfeasor's employer vicariously liable.

or only an apparent agency, if the defendant "has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for [the defendant] to say that no authority had been given, or that it did not reach so far, and that the third party had acted upon a mistaken conclusion. . . . If a loss is to be borne, the author of the error must bear it." (Internal quotation marks omitted.) *City Bank of New Haven* v. *Throp*, supra, 78 Conn. 217; see also *Alvarez* v. *New Haven Register, Inc.*, 249 Conn. 709, 720, 735 A.2d 306 (1999) ("The rules of vicarious liability . . . respond to a specific need in the law of torts: how to fully compensate an injury caused by the act of a single tortfeasor. Upon a showing of agency, vicarious liability increases the likelihood that an injury will be compensated, by providing two funds from which a plaintiff may recover. If the ultimately responsible agent is unavailable or lacks the ability to pay, the innocent victim has recourse against the principal." [Emphasis omitted; internal quotation marks omitted.]); *Mendillo* v. *Board of Education*, 246 Conn. 456, 482, 717 A.2d 1177 (1998) ("the fundamental policy purposes of the tort compensation system [are] compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct"), overruled on other grounds by *Campos* v. *Coleman*, 319 Conn. 36, 57, 123 A.3d 854 (2015). "Whether the subject is treated as an agency by estoppel or as one of apparent or ostensible authority, the principle is the same, and the law is well settled." *City Bank of New Haven* v. *Throp*, supra, 217; see also *Baptist Memorial Hospital System* v. *Sampson*, 969 S.W.2d 945, 948 n.2 (Tex. 1998) ("[r]egardless of the term used, the purpose of the [various doctrines under which a principal who has held out a person as an agent may be held vicariously liable for the person's negligence] is to prevent injustice and protect those

who have been misled"). Accordingly, we conclude that both the doctrine of apparent authority and the doctrine of apparent agency may be applied in tort actions.

Middlesex claims, however, that a principal should not be held liable for the negligence of a person who was not an actual agent under the doctrine of apparent agency because "[a] necessary element of demonstrating that there is a principal and agent relationship is to show that the principal is in control." *L & V Contractors, LLC* v. *Heritage Warranty Ins. Risk Retention Group, Inc.*, supra, 136 Conn. App. 668; see also *Tianti* v. *William Raveis Real Estate, Inc.*, 231 Conn. 690, 696–97, 651 A.2d 1286 (1995) ("[i]t has long been established that [t]he fundamental distinction between an employee and an independent contractor depends upon the existence or nonexistence of the right to control the means and methods of work" [internal quotation marks omitted]). Middlesex contends that it would be unfair to hold an entity responsible for conduct that it had no ability to prevent. Middlesex does not dispute, however, that a principal may be held liable under the doctrine of apparent authority for the acts of an *actual agent who is acting beyond his or her authority*, i.e., who is not acting under the control of the principal, when the principal's conduct has led the plaintiff reasonably to believe that the agent was acting within his or her authority and the plaintiff has detrimentally relied on that belief. We see no reason why a different rule should apply when the principal lacks control over an apparent agent. See D. Janulis & A. Hornstein, "Damned If You Do, Damned If You Don't: Hospitals' Liability For Physicians' Malpractice," 64 Neb. L. Rev. 689, 702 (1985) (requiring plaintiff to prove that principal controlled apparent agent in order to establish apparent agency blurs theories of respondeat superior and apparent agency).

Middlesex also contends that, even if the doctrine of apparent agency may be applied in tort actions, "[a] hospital cannot practice medicine and therefore cannot be held directly liable for any acts or omissions that constitute medical functions." *Reed* v. *Granbury Hospital Corp.*, 117 S.W.3d 404, 415 (Tex. App. 2003); id. (when decision that resulted in plaintiff's injury "was one that only a physician could have made," hospital employer could not be held liable for it); see also *Browning* v. *Burt*, 66 Ohio St. 3d 544, 556, 613 N.E.2d 993 (1993) ("[a] hospital does not practice medicine and is incapable of committing malpractice"). We again disagree. First, it appears that, to the extent that *Reed* stands for the proposition that a hospital cannot be held liable for the medical malpractice of its agents and employees, that case is inconsistent with the decision of the Texas Supreme Court in *Baptist Memorial Hospital System* v. *Sampson*, supra, 969 S.W.2d 948; see id. ("[h]ospitals are subject to the principles of agency law which apply to others . . . [therefore] a hospital may be vicariously liable for the medical malpractice of independent contractor physicians when plaintiffs can establish the elements of ostensible agency" [citations omitted; internal quotation marks omitted]); and *Browning* held only that hospitals cannot commit medical malpractice directly, not that they cannot be held vicariously liable for the medical malpractice of their agents, employees and apparent agents. See *Comer* v. *Risko*, 106 Ohio St. 3d 185, 187, 833 N.E.2d 712 (2005) (hospital may be held liable for torts of employees under doctrine of respondeat superior and for torts of apparent agents under doctrine of agency by estoppel).

Second, regardless of the rule in Texas and Ohio, it has never been the rule in this state that hospitals cannot be held vicariously liable for the medical malprac-

tice of their agents and employees.[12] To the contrary, this court, the Appellate Court and the Superior Court have consistently assumed that the doctrine of respondeat superior may be applied to hold hospitals vicariously liable for the medical malpractice of their agents and employees.[13] Because a hospital may be held vicariously liable for the medical malpractice of its agents and employees under the doctrine of respondeat superior, it may also be held vicariously liable under the doctrine of apparent agency.[14]

[12] Although hospitals were once exempt from claims of vicarious liability for the medical malpractice of their agents and employees under the doctrine of charitable immunity; see *McDermott* v. *St. Mary's Hospital Corp.*, 144 Conn. 417, 422, 133 A.2d 608 (1957); that doctrine has been legislatively abolished. See General Statutes § 52-557d.

[13] See *Sherwood* v. *Danbury Hospital*, 278 Conn. 163, 184 n.19, 896 A.2d 777 (2006) (hospital may be held vicariously liable when employee physician fails to fulfill duty of care to patient); *Mather* v. *Griffin Hospital*, 207 Conn. 125, 136, 540 A.2d 666 (1988) ("any negligence the jury ascribed to [a nurse employed by the defendant hospital] would have been attributable to the hospital under the doctrine of respondeat superior"); see also *Wilkins* v. *Connecticut Childbirth & Women's Center*, 314 Conn. 709, 104 A.3d 671 (2014) ("the plaintiff filed this medical malpractice action [against the corporate defendants] based on alleged negligence on the part of employees or agents of the defendants during the . . . delivery of [the plaintiff's] child"); *Morgan* v. *Hartford Hospital*, 301 Conn. 388, 392, 21 A.3d 451 (2011) (corporate defendant was sued pursuant to doctrine of respondeat superior); *Rivera* v. *St. Francis Hospital & Medical Center*, 55 Conn. App. 460, 464, 738 A.2d 1151 (1999) (hospital was sued pursuant to doctrine of respondeat superior); *Shenefield* v. *Greenwich Hospital Assn.*, 10 Conn. App. 239, 249, 522 A.2d 829 (1987) ("[t]he failure of the doctor, while acting as an agent of the hospital, to fulfill his duty supported the jury's finding of negligence on the part of both the doctor and the hospital"); footnote 9 of this opinion (citing Superior Court cases that have held hospitals vicariously liable for medical practice).

[14] The amicus Connecticut Hospital Association contends that holding hospitals vicariously liable for medical malpractice under the doctrine of apparent agency would "transmute hospitals into excess insurers of those physicians who are neither employees nor actual agents of the hospital." To the extent that the amicus is claiming that it is simply unfair to hold an entity vicariously liable for the negligence of a nonagent, we reject this argument for the reasons set forth in this opinion. Moreover, although the issue is not before us, we note that a principal that is held vicariously liable for another's negligence under the doctrine of apparent agency may be able

We next address Middlesex' claim that, even if hospitals may be held liable for the negligence of their agents and employees under the doctrine of apparent agency, the plaintiff in the present case cannot prevail on her claim because she has not established a genuine issue of material fact as to each element of the doctrine. Specifically, Middlesex contends that the plaintiff is required to, and cannot, prove that she detrimentally relied on Middlesex' representations that Aranow was its agent or employee. Cf. *Menzie* v. *Windham Community Memorial Hospital*, 774 F. Supp. 91, 97 (D. Conn. 1991) (observing that application of doctrine of apparent authority to tort action is "rife with speculation, suggesting the need for a more definitive reading of Connecticut laws," but concluding that plaintiff failed to demonstrate genuine issue of material fact as to whether doctrine applied because he presented no evidence of reliance), vacated on other grounds, United States Court of Appeals, Docket No. 92-7350 (2d Cir. February 8, 1993). The plaintiff contends that, to the contrary, our cases have consistently held that all that

to seek indemnification from the tortfeasor, an option that is not available to an insurer. See *Kyrtatas* v. *Stop & Shop, Inc.*, 205 Conn. 694, 698, 535 A.2d 357 (1988) ("[a] plaintiff in an action for indemnification not based on statute or express contract . . . can recover indemnity from [the active tortfeasor] . . . by establishing four separate elements: [1] that the . . . tortfeasor was negligent; [2] that his negligence, rather than [the negligence of the party seeking indemnification], was the direct, immediate cause of the accident and injuries; [3] that [the tortfeasor] was in control of the situation to the exclusion of the [party seeking indemnification]; and [4] that the [party seeking indemnification] did not know of such negligence, had no reason to anticipate it, and could reasonably rely on the . . . tortfeasor not to be negligent"). The amicus further contends that liability insurers will be unable "to rate, review, and collect premiums" for this risk. The amicus has not explained, however, why liability insurers will lack this ability. Insurance companies regularly insure large and immensely complex enterprises. Indeed, the doctrine of apparent authority has been widely adopted; see footnote 26 of this opinion; and the amicus has pointed to no evidence of an insurance crisis in the states where it is recognized.

is required to establish apparent agency[15] is proof: "(1) that the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority; and (2) that the person dealing with the agent knew of the facts and acting in good faith had reason to believe, and did believe, that the agent possessed the necessary authority." (Internal quotation marks omitted.) *Fireman's Fund Indemnity Co.* v. *Longshore Beach & Country Club, Inc.*, supra, 127 Conn. 497; see also *Beckenstein* v. *Potter & Carrier, Inc.*, 191 Conn. 120, 140–41, 464 A.2d 6 (1983) ("Apparent authority . . . must be determined by the acts of the principal rather than by the acts of the agent. . . . Furthermore, the party seeking to impose liability upon the principal must demonstrate that it acted in good faith based upon the actions or inadvertences of the principal." [Citations omitted; internal quotation marks omitted.]).[16] At oral argument before this court, the

[15] Many of these cases use the phrases "apparent authority" and "apparent agency" interchangeably. Because, as we have explained, the underlying rationale for both doctrines is the same, and because the present case involves a claim of apparent agency, we use that term.

[16] See also *Cohen* v. *Holloways', Inc.*, 158 Conn. 395, 407, 260 A.2d 573 (1969) ("the acts of the principal must be such that [1] the principal held the agent out as possessing sufficient authority to embrace the act in question, or knowingly permitted him to act as having such authority, and [2] in consequence thereof the person dealing with the agent, acting in good faith, reasonably believed, under all the circumstances, that the agent had the necessary authority" [internal quotation marks omitted]); *Nowak* v. *Capitol Motors, Inc.*, 158 Conn. 65, 69, 255 A.2d 845 (1969) (same); *Lewis* v. *Michigan Millers Mutual Ins. Co.*, 154 Conn. 660, 665–66, 228 A.2d 803 (1967) ("To fix the principal's liability for the agent's act, it must be shown either that the principal, by his own acts, causes the mistaken belief that the agent had the requisite authority or that the principal knowingly permitted the agent to engender that belief. . . . Also, of course, the third party must have acted in good faith on the false appearance created by the principal." [Citation omitted.]); *Zazzaro* v. *Universal Motors, Inc.*, 124 Conn. 105, 110–11, 197 A. 884 (1938) ("This claim apparently overlooks the elements essential to apparent authority . . . . One is that the principal must have held the agent out to the public as possessing the requisite authority, and the other that the one dealing with the agent and knowing of the facts, must

plaintiff further contended that there is a difference between the doctrine of apparent agency, on which she relies, and the doctrine of agency by estoppel, and that only agency by estoppel requires proof of detrimental reliance.[17] Thus, the plaintiff contends, all that she is required to prove to establish apparent agency is that Middlesex held out Aranow as its employee or agent and that she actually, reasonably, and in good faith believed that to be the case.

Although we agree with the plaintiff that our cases involving the doctrine of apparent agency have not required a showing of detrimental reliance, we note that all of the cases except *Fireman's Fund Indemnity Co.* involved contract actions, and *Fireman's Fund Indemnity Co.* adopted its standard from cases involving contract actions. It may be that proof of detrimental reliance has not been required to establish apparent agency in contract actions because such reliance is generally implicit in the conduct at issue.[18] No such presumption of reliance arises in tort actions pursuant to the doctrine of apparent agency. See *Fernander* v. *Thigpen*, 278 S.C. 140, 148, 293 S.E.2d 424 (1982) ("[i]n the ordinary personal injury case the injured person does not rely upon authority of any kind in getting hurt");

have believed in good faith and upon reasonable grounds that the agent had the necessary authority.").

[17] See 1 Restatement (Third), supra, § 2.03, comment (b), p. 114 (" '[o]stensible authority,' as the term is defined in some jurisdictions, is not identical in meaning to 'apparent authority' when it requires elements requisite to estoppel"); id., § 2.05, p. 145 ("[a] person who has not made a manifestation that an actor has authority as an agent . . . is subject to liability to a third party who justifiably is induced to make a detrimental change in position"); see also D. Janulis & A. Hornstein, supra, 64 Neb. L. Rev. 701 ("confusion abounds . . . in the areas of apparent agency versus estoppel to deny agency").

[18] For example, if A agrees to pay B $1000 for a car, and A gives the $1000 to C, reasonably believing B's representations that C was his agent, it reasonably may be presumed that A would not have given the money to C but for B's representations.

D. Janulis & A. Hornstein, supra, 64 Neb. L. Rev. 697 ("the required change of position suggests that the estoppel doctrine will generally be inapplicable in the typical personal injury case"), citing *Stewart* v. *Midani*, 525 F. Supp. 843, 851 (N.D. Ga. 1981); see also *Stewart* v. *Midani*, supra, 851 ("it cannot reasonably be contended that a motorist would be more likely to wish to collide with a truck bearing the insignia of [Texaco] than with one bearing any other insignia").[19] Accordingly, we believe that it is appropriate for us to consider as a matter of first impression whether the *Fireman's Fund Indemnity Co.* standard, which derives from contract actions, should apply in tort actions or, instead, proof of detrimental reliance is a required element of the doctrine of apparent agency in such cases.

Unfortunately, as our inconsistent use of terminology in these contract cases suggests, this area of the law is rife with confusion. As commentators have observed, "[a]lthough the doctrine of apparent agency [as applied in tort actions] is steeped in principles of estoppel, apparent agency and estoppel to deny agency are not theoretically identical. In practice, however, commentators and courts often use these terms as if they were interchangeable, causing confusion and possible misapplication of the law." (Footnotes omitted; internal quo-

[19] We also note that some of the language in the cases on which the plaintiff relies is equivocal. For example, in *Beckenstein* v. *Potter & Carrier, Inc.*, supra, 191 Conn. 120, this court stated that the party seeking to impose liability must prove that "it *acted in good faith* based upon the actions . . . of the principal"; (emphasis added) id., 140–41; not simply that the party must have *believed* the principal's manifestations of agency in good faith. See also *Lewis* v. *Michigan Millers Mutual Ins. Co.*, 154 Conn. 660, 666, 228 A.2d 803 (1967) ("the third party must have *acted in good faith* on the false appearance created by the principal" [emphasis added]). In addition, although this court in *Nowak* v. *Capitol Motors, Inc.*, 158 Conn. 65, 69, 255 A.2d 845 (1969), set forth the test for apparent agency that this court adopted in *Fireman's Fund Indemnity Co.*, this court also stated that "the plaintiff is bound by [the apparent agent's] statements . . . if they were *justifiably relied upon* by the defendants." (Emphasis added.) Id., 70.

tation marks omitted.) D. Janulis & A. Hornstein, supra, 64 Neb. L. Rev. 696. Indeed, having reviewed the relevant case law; see footnote 26 of this opinion; we are compelled to agree with these commentators that "it is difficult at times to discern whether a court is basing its finding of liability on estoppel, apparent agency, or on respondeat superior. It may be nigh impossible to decide which theory of agency a court is using to impose liability even when it discusses its rationale at length." D. Janulis & A. Hornstein, supra, 697.

The relevant portions of the various Restatements do not clarify the issue. See 1 Restatement (Second), Agency § 8 (1958);[20] id., § 8B;[21] id., § 267;[22] 1 Restatement (Third), supra, § 2.03;[23] 2 Restatement (Third), supra,

[20] Section 8 of the Restatement (Second), supra, provides: "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons."

[21] Section 8 B of the Restatement (Second), supra, provides in relevant part: "(1) A person who is not otherwise liable as a party to a transaction purported to be done on his account, is nevertheless subject to liability to persons who have changed their positions because of their belief that the transaction was entered into by or for him, if

"(a) he intentionally or carelessly caused such belief, or

"(b) knowing of such belief and that others might change their positions because of it, he did not take reasonable steps to notify them of the facts. . . .

"(3) Change of position, as the phrase is used in the restatement of this subject, indicates payment of money, expenditure of labor, suffering a loss or subjection to legal liability."

[22] Section 267 of the Restatement (Second), supra, provides: "One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such."

[23] Section 2.03 of the Restatement (Third), supra, provides: "Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."

§ 7.08;[24] 2 Restatement (Second), Torts § 429 (1965).[25] Indeed, the conflicting terminology and standards set forth in these authorities, and the lack of clarity as to whether the provisions that are not tort specific were intended to or logically may be applied in tort actions, appear to be the source of much of the confusion in the cases applying the doctrine of apparent agency in that context. See footnote 26 of this opinion.

Nevertheless, although their doctrinal underpinnings are not entirely clear, we ultimately are persuaded by the cases that have concluded that, under certain circumstances, proof of detrimental reliance is not required to establish an apparent agency in tort actions. Specifically, many courts, especially in cases seeking to hold a hospital vicariously liable for a physician's malpractice, have concluded that an apparent agency is established when the plaintiff proves that he or she looked to the principal to provide services and the principal, not the plaintiff, selected the specific person who actually provided the services and caused the plaintiff's injury.[26] These courts have not required the plaintiff to

[24] Section 7.08 of the Restatement (Third), supra, provides: "A principal is subject to vicarious liability for a tort committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission."

[25] Section 429 of the Restatement (Second) of Torts, supra, provides: "One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants."

[26] See *Fletcher* v. *South Peninsula Hospital*, 71 P.3d 833, 840 (Alaska 2003) (apparent agency may be found when "the patient looks to the institution, rather than the individual physician, for care"), legislatively overruled in part as stated in *Evans ex rel. Kutch* v. *State*, 56 P.3d 1046, 1067 (Alaska 2002) (under state statute, hospital is not liable for negligence of physicians who are independent contractors if hospital provides notice that physicians are not agents or employees and physicians have required levels of malpractice insurance); *York* v. *Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 194, 854 N.E.2d 635 (2006) ("the reliance element of a plaintiff's

apparent agency claim is satisfied if the plaintiff reasonably relies upon a hospital to provide medical care, rather than upon a specific physician"); *Paintsville Hospital Co.* v. *Rose*, 683 S.W.2d 255, 257 (Ky. 1985) (apparent agency applies when physician is "supplied through the hospital rather than being selected by the patient"); *Grewe* v. *Mt. Clemens General Hospital*, 404 Mich. 240, 251, 273 N.W.2d 429 (1978) ("the critical question is whether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as the situs where his physician would treat him for this problems"); *Hardy* v. *Brantley*, 471 So. 2d 358, 371 (Miss. 1985) ("[w]here a hospital holds itself out to the public as providing a given service . . . and where the hospital enters into a contractual arrangement with [independent contractor] physicians to direct and provide the service, and where the patient engages the services of the hospital without regard to the identity of a particular physician and where as a matter of fact the patient is relying upon the hospital to deliver the desired health care and treatment, the doctrine of respondeat superior applies and the hospital is vicariously liable for damages proximately resulting from the neglect, if any, of such physicians"), legislatively overruled in part as stated in *Brown* v. *Delta Regional Medical Center*, 997 So. 2d 195, 197 (Miss. 2008) (*Hardy* was overruled in part by state statute barring claims against state for acts of independent contractors); *Butler* v. *Domin*, 302 Mont. 452, 462–63, 15 P.3d 1189 (2000) ("a hospital may be liable if the hospital holds itself out as a provider of medical services and, in the absence of notice or knowledge to the contrary, the patient looks to the hospital, as opposed to the independent practitioner, to provide competent medical care"); *Renown Health* v. *Vanderford*, 126 Nev. 221, 227, 235 P.3d 614 (2010) (doctrine of ostensible agency applies "when a patient goes to the hospital and the hospital selects the doctor to treat the patient, such that it is reasonable for the patient to assume the doctor is an agent of the hospital"); *Hill* v. *St. Clare's Hospital*, 67 N.Y.2d 72, 80–81, 490 N.E.2d 823, 499 N.Y.S.2d 904 (1986) (doctrine of apparent agency applies "to hold a hospital or clinic responsible to a patient who sought medical care at the hospital or clinic rather than from any particular physician"); *Peter* v. *Vullo*, 758 S.E.2d 431, 439 (N.C. App. 2014) (apparent agency could be found when plaintiff sought services from hospital and hospital chose anesthesiologist); *Comer* v. *Risko*, supra, 106 Ohio St. 3d 188 (doctrine of agency by estoppel applies when "the hospital holds itself out to the public as a provider of medical services and . . . the patient looks to the hospital, not a particular doctor, for medical care" [internal quotation marks omitted]); *Roth* v. *Mercy Health Center, Inc.*, 246 P.3d 1079, 1090 (Okla. 2011) (doctrine of ostensible agency applies when "the patient, at the time of admittance, looks to the hospital solely for treatment of his or her physical ailments, with no belief that the physicians were acting on their own behalf rather than as agents of the hospital"); *Eads* v. *Borman*, 351 Ore. 729, 744, 277 P.3d 503 (2012) ("[t]he fact that the patient relies on the reputation of the hospital itself as a care provider, and does not make an independent selection as to which physicians the patient will obtain care from, provides the factual basis for the reliance needed for the apparent authority analysis" [internal quotation

establish detrimental reliance on the principal's repre-

marks omitted]); *Capan* v. *Divine Providence Hospital*, 287 Pa. Super. 364, 368, 430 A.2d 647 (1980) (hospital may be held liable under doctrine of ostensible agency because "the changing role of the hospital in society creates a likelihood that patients will look to the institution rather than the individual physician for care"), abrogated by 40 Pa. Stat. Ann. § 1303.516 (2014) (hospital may be held liable under principles of ostensible agency when reasonably prudent person would be justified in belief that care in question was being rendered by hospital or its agents or care in question was advertised or represented to patient as care being rendered by hospital or its agents); *Simmons* v. *Tuomey Regional Medical Center*, 341 S.C. 32, 52, 533 S.E.2d 312 (2000) (doctrine of ostensible agency "is limited . . . to those situations in which a patient seeks services at the hospital as an institution, and is treated by a physician who reasonably appears to be a hospital employee"); *Boren ex rel. Boren* v. *Weeks*, 251 S.W.3d 426, 436 (Tenn. 2008) (doctrine of apparent agency applies when "[1] the hospital held itself out to the public as providing medical services; [2] the plaintiff looked to the hospital rather than to the individual physician to perform those services; and [3] the patient accepted those services in the reasonable belief that the services were provided by the hospital or a hospital employee"); *Burless* v. *West Virginia University Hospitals, Inc.*, 215 W. Va. 765, 777, 601 S.E.2d 85 (2004) ("[r]eliance . . . is established when the plaintiff looks to the hospital for services, rather than to an individual physician" [internal quotation marks omitted]); *Pamperin* v. *Trinity Memorial Hospital*, 144 Wis. 2d 188, 211, 423 N.W.2d 848 (1988) ("the critical question is whether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as the situs where his physician would treat him for his problems" [internal quotation marks omitted]); *Sharsmith* v. *Hill*, 764 P.2d 667, 672 (Wyo. 1988) (doctrine of apparent agency applies "where the patient engages the services of the hospital without regard to the identity of a particular physician and where as a matter of fact the patient is relying upon the hospital to deliver the desired health care and treatment"), overruled in part by *Campbell County Memorial Hospital* v. *Pfeifle*, 317 P.3d 573, 581 (Wyo. 2014) (public hospitals cannot be held liable under doctrine of apparent agency).

Other courts have applied different standards in determining whether a hospital may be found liable for the negligence of a physician under the doctrine of apparent agency. See *Bynum* v. *Magno*, 125 F. Supp. 2d 1249, 1266 (D. Haw. 2000) (under Hawaii law, plaintiff must show justifiable reliance), rev'd on other grounds, 55 Fed. Appx. 811 (9th Cir. 2003); *Ermoian* v. *Desert Hospital*, 152 Cal. App. 4th 475, 503, 61 Cal. Rptr. 3d 754 (adopting reasonable belief standard), appeal denied, 2007 Cal. LEXIS 10631 (Cal. 2007); *Vanaman* v. *Milford Memorial Hospital, Inc.*, 272 A.2d 718, 722 (Del. 1970) (adopting justifiable reliance standard of § 267 of Restatement [Second] of Agency, supra); *Stone* v. *Palms West Hospital*, 941 So. 2d 514, 519–21 (Fla. App. 2006) (recognizing doctrine of apparent agency applies

sentations that the tortfeasor was the principal's agent or employee, i.e., that the plaintiff would not have accepted the tortfeasor's services if the plaintiff had known that the tortfeasor was not the principal's agent. Indeed, many cases have held that the plaintiff is not even required to present affirmative evidence that he or she actually and reasonably believed that the tortfeasor was the principal's agent or employee. Rather, the cases appear to hold that such belief may be presumed from the fact that the plaintiff chose the principal and the principal chose the specific person who provided the services,[27] and the fact the principal was the actual

to hold hospital liable for negligence of physician who is not agent, but standard is unclear); *Richmond County Hospital Authority* v. *Brown*, 257 Ga. 507, 508–509, 361 S.E.2d 164 (1987) (adopting justifiable reliance standard of § 267 of Restatement [Second] of Agency, supra); *Jones* v. *Health-South Treasure Valley Hospital*, 147 Idaho 109, 117, 206 P.3d 473 (2009) (adopting reasonable belief standard of § 2.03 of Restatement [Third] of Agency, supra); *Sword* v. *NKC Hospitals, Inc.*, 714 N.E.2d 142, 152 (Ind. 1999) (adopting reasonable belief standard of § 429 of Restatement [Second] of Torts, supra); *Bradford* v. *Jai Medical Systems Managed Care Organization, Inc.*, 439 Md. 2, 18–19, 23, 93 A.3d 697 (2014) (plaintiffs must have justifiable or reasonable belief in agency relationship); *Hefner* v. *Dausmann*, 996 S.W.2d 660, 667 (Mo. App. 1999) (adopting detrimental reliance standard); *Dent* v. *Exeter Hospital, Inc.*, 155 N.H. 787, 792, 931 A.2d 1203 (2007) (applying reasonable belief standard); *Basil* v. *Wolf*, 193 N.J. 38, 67, 935 A.2d 1154 (2007) (stating in dictum that standard is reasonable belief); *Estate of Cordero ex rel. Cordero* v. *Christ Hospital*, 403 N.J. Super. 306, 314–18, 958 A.2d 101 (2008) (applying reasonable belief standard of § 2.03 of Restatement [Third] of Agency, supra, and § 429 of Restatement [Second] of Torts, supra); *Zamora* v. *St. Vincent Hospital*, 335 P.3d 1243, 1248 (N.M. 2014) (applying justifiable reliance standard); *Benedict* v. *St. Luke's Hospitals*, 365 N.W.2d 499, 504 (N.D. 1985) (doctrine of ostensible agency applies when plaintiff seeks services in emergency room); *Rodrigues* v. *Miriam Hospital*, 623 A.2d 456, 462 (R.I. 1993) (applying detrimental reliance standard); *Baptist Memorial Hospital System* v. *Sampson*, supra, 969 S.W.2d 948–49 (adopting justifiable reliance standard of § 267 of Restatement [Second] of Agency, supra); *Mohr* v. *Grantham*, 172 Wn. 2d 844, 860, 262 P.3d 490 (2011) (to establish apparent agency, belief of agency must be objectively reasonable).

[27] Courts in a number of cases involving claims against hospitals under the doctrine of apparent authority have held that a hospital can rebut this presumption by posting signs indicating that medical providers are not the agents or employees of the hospital or by requiring patients to sign disclaimers to that effect. See, e.g., *Sword* v. *NKC Hospitals, Inc.*, 714 N.E.2d 142, 152 (Ind. 1999) (citing cases and stating "[a] hospital generally will be able

cause of the relationship between the plaintiff and the tortfeasor that resulted in injury is sufficient justification to apply the doctrine. See, e.g., *Sword* v. *NKC Hospitals, Inc.*, 714 N.E.2d 142, 152 (Ind. 1999) ("if the hospital has failed to give meaningful notice [that the provider of care was an independent contractor], if the patient has no special knowledge regarding the arrangement the hospital has made with its physicians, and if there is no reason that the patient should have known of these employment relationships, then reliance is presumed").

We find these cases persuasive for a number of reasons. First, cases in which the plaintiff accepted a principal's offer of services and the principal then chose the specific person who would provide the services have contractual overtones, and detrimental reliance is implicit in a contractual relationship. See 1 Restatement (Second), Torts, supra, § 8, comment (d), p. 33 ("it is not irrational to hold that merely entering into a contract is a change of position which would enable the third person to bring an action against the principal" for negligence of independent contractor employed by principal). Second, when an entity has held itself out as providing certain services to the public—and, indeed, may have made great efforts to persuade members of the public to avail themselves of those services, and

to avoid liability by providing meaningful written notice to the patient, acknowledged at the time of admission"). Some courts have also held, however, that such signs and disclaimers may not always be effective methods of avoiding liability in a hospital setting. Id. ("[u]nder some circumstances, such as in the case of a medical emergency . . . written notice may not suffice if the patient had an inadequate opportunity to make an informed choice"); compare *Menzie* v. *Windham Community Memorial Hospital*, supra, 774 F. Supp. 97 ("reliance" element of apparent agency claim was not satisfied when plaintiff was brought to hospital under emergency circumstances and did not choose particular hospital). This issue is not before us in the present case, however, and, therefore, we need not resolve it here.

benefited from doing so[28]—and has selected the specific individual who will provide those services to particular members of the public, we do not believe that it is unfair to hold that entity liable for the individual's negligence. Third, and relatedly, holding principals liable under these circumstances is consistent with the fundamental purposes of the tort compensation system of deterring wrongful conduct and shifting the blame to the party who is in the best position to prevent the injury.[29] See

[28] Numerous cases that have adopted this standard have relied on the fact that modern hospitals typically engage in extensive publicity campaigns to attract patients. See, e.g., *Kashishian* v. *Port*, 167 Wis. 2d 24, 38, 481 N.W.2d 277 (1992) ("Modern hospitals have spent billions of dollars marketing themselves, nurturing the image with the consuming public that they are full-care modern health facilities. All of these expenditures have but one purpose: to persuade those in need of medical services to obtain those services at a specific hospital. In essence, hospitals have become big business, competing with each other for health care dollars. As the role of the modern hospital has evolved, and as the image of the modern hospital has evolved [much of it self-induced], so too has the law with respect to the hospital's responsibility and liability towards those it successfully beckons." [Footnote omitted.]).

[29] Middlesex claims that, even if the plaintiff is not required to prove detrimental reliance on the principal's representations that the tortfeasor was its agent or employee when the principal selected the tortfeasor, we should limit the application of that doctrine to cases in which the plaintiff sought treatment in a hospital's emergency room. We disagree. Although a number of courts have held that "[t]he fact of seeking medical treatment in a hospital emergency room and receiving treatment from a physician working there is sufficient to satisfy [the elements of an apparent agency claim]"; (internal quotation marks omitted) *Stone* v. *Palms West Hospital*, 941 So. 2d 514, 520–21 (Fla. App. 2006); see also, e.g., *Bynum* v. *Magno*, 125 F. Supp. 2d 1249, 1266 (D. Haw. 2000) (applying Hawaii law and concluding that, "[w]here the patient was admitted to the [e]mergency [r]oom . . . the elements for apparent agency are more likely to be met, whatever test is used"); *Richmond County Hospital Authority* v. *Brown*, 257 Ga. 507, 509, 361 S.E.2d 164 (1987) ("[i]n particular [the doctrine] has been applied to emergency room settings"); we see no reason why the doctrine should be *limited* to that situation. Rather, we conclude that the doctrine should apply whenever its elements have been established. See *Kashishian* v. *Port*, 167 Wis. 24, 44, 481 N.W.2d 277 (1992) (although three criteria for establishing apparent agency can be satisfied in emergency room setting, "[w]e can discern no reason to conclude, as a matter of law, that the doctrine of apparent authority should not exist in other contexts concerning hospitals

Mendillo v. *Board of Education*, supra, 246 Conn. 482; see also *Kashishian* v. *Port*, 167 Wis. 2d 24, 45, 481 N.W.2d 277 (1992) (The court determined that holding a hospital liable under these circumstances "provides a stronger incentive to the hospital to monitor and control physicians. This will result in higher quality medical care since the hospital is in the best position to enforce strict adherence to policies regarding patient safety . . . .").

We further conclude, however, that, when the *plaintiff* selected the specific person who provided the services and caused the injury on the basis of the plaintiff's knowledge of the person's skills and reputation, the plaintiff must demonstrate an actual and reasonable belief in the principal's representations that the person was its agent, and also detrimental reliance on those representations to establish apparent agency. See *Orlando Executive Park, Inc.* v. *Robbins*, 433 So. 2d 491, 494 (Fla. 1983) (elements of apparent agency in tort action are: "[1] a representation by the principal; [2] reliance on that representation by a third person; and [3] a change of position by the third person in reliance upon such representation to his detriment" [internal quotation marks omitted]); *Deal* v. *North Carolina State University*, 114 N.C. App. 643, 647, 442 S.E.2d 360 (1994) ("[t]he common thread in the [tort] cases upholding the assertion of apparent agency is the plaintiff's desire to deal with the estopped party for some particular reason and the plaintiff acting because he believed he was dealing with the estopped party's agent" [internal quotation marks omitted]); *Watkins* v. *Mobil Oil Corp.*, 291 S.C. 62, 67, 352 S.E.2d 284 (App.

and independent physicians when all the elements are present"). Other settings in which the elements might be established might include a hospital operating room, when the hospital chose the anesthetist or nurses, or in a hospital clinic, when the plaintiff chose the clinic and the clinic selected the specific provider of services.

1986) (To prove apparent agency in a tort action, "it is not enough simply to prove that the purported principal by either affirmative conduct or conscious and voluntary inaction has represented another to be his agent or servant. A party must also prove reliance upon the representation and a change of position to his detriment in reliance on the representation."); 1 Restatement (Second), Agency, supra, § 267 ("[o]ne who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such"). It would make little sense to hold a principal vicariously liable for the negligence of a person who was not an agent or an employee of the principal when the plaintiff would have dealt with the apparent agent regardless of the principal's representations.

Accordingly, we adopt the following alternative standards for establishing apparent agency in tort cases. First, the plaintiff may establish apparent agency by proving that: (1) the principal held itself out as providing certain services; (2) the plaintiff selected the principal on the basis of its representations; and (3) the plaintiff relied on the principal to select the specific person who performed the services that resulted in the harm complained of by the plaintiff. Second, the plaintiff may establish apparent agency in a tort action by proving the traditional elements of the doctrine of apparent agency, as set forth in our cases involving contract claims, plus detrimental reliance. Specifically, the plaintiff may prevail by establishing that: (1) the principal held the apparent agent or employee out to the public as possessing the authority to engage in the conduct at issue, or knowingly permitted the apparent agent or employee to act as having such authority; (2) the plain-

tiff knew of these acts by the principal, and actually and reasonably believed that the agent or employee or apparent agent or employee possessed the necessary authority; see *Fireman's Fund Indemnity Co.* v. *Longshore Beach & Country Club, Inc.*, supra, 127 Conn. 496–97; and (3) the plaintiff detrimentally relied on the principal's acts, i.e., the plaintiff would not have dealt with the tortfeasor if the plaintiff had known that the tortfeasor was not the principal's agent or employee. We emphasize that this standard is narrow, and we anticipate that it will be only in the rare tort action that the plaintiff will be able to establish the elements of apparent agency by proving detrimental reliance. See *Fernander* v. *Thigpen*, supra, 278 S.C. 148 ("[i]n the ordinary personal injury case the injured person does not rely upon authority of any kind in getting hurt"); D. Janulis & A. Hornstein, supra, 64 Neb. L. Rev. 697 ("the required change of position suggests that the estoppel doctrine will generally be inapplicable in the typical personal injury case"), citing *Stewart* v. *Midani*, supra, 525 F. Supp. 851; see also *Stewart* v. *Midani*, supra, 851 ("it cannot reasonably be contended that a motorist would be more likely to wish to collide with a truck bearing the insignia of [Texaco] than with one bearing any other insignia").

There is no real dispute that the plaintiff in the present case cannot meet the first standard, and Middlesex claims that the plaintiff has not established detrimental reliance on its representations. Because we have adopted the detrimental reliance standard for the first time in this opinion, however, we believe that fairness requires us to remand the case to the trial court so that the plaintiff may have an opportunity to present evidence that she detrimentally relied on her belief that Aranow was Middlesex' agent or employee. We emphasize that, to meet this burden, the plaintiff must set forth facts and evidence capable of raising a reasonable

inference that she would not have allowed Aranow to perform the surgery if she had known that he was not Middlesex' agent or employee.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to remand the case to the trial court for further proceedings in accordance with this opinion.

In this opinion PALMER, McDONALD and VERTEFEUILLE, Js., concurred.

ZARELLA, J., with whom ESPINOSA and ROBINSON, Js., join, dissenting. In elementary school history, we are all taught that the legislature makes the law, the judiciary interprets the law, and the executive enforces the law. Those who are learned in the law, however, understand that this is an oversimplification of our constitutional order. Since before the founding, judges in England, from whom the judiciary takes many of its traditions, and this country, acting as stewards of the common law, have engaged in lawmaking. As such, judges, not legislators, at least in the early years of our republic, tended to the development of the law in such areas as property, contract, and tort. Thus, a disconnect exists between our elementary understanding of the separation and delegation of the powers and duties of government, on the one hand, and the actual allocation of work among the branches, on the other. In addition, there is a small area over which both the judiciary and the legislature have the authority to enact policy. In the beginning, such dual authority was relatively unproblematic. Legislatures largely dealt with public law, and the courts tended to private law. See, e.g., D. Farber & P. Frickey, "In the Shadow of the Legislature: The Common Law in the Age of the New Public Law," 89 Mich. L. Rev. 875, 876 (1991). In the age of the regulatory state and statutory proliferation, however, the legislature has

become increasingly involved with private law; see, e.g., General Statutes § 30-102 (abrogating common-law negligence cause of action against purveyors of alcohol for injuries caused by intoxicated persons); General Statutes § 52-557d (abolishing common-law defense of charitable immunity); General Statutes § 52-572h (b), (c) and (*l*) (eliminating, in certain cases, doctrine of contributory negligence, providing for proportionate, rather than joint and several, liability in cases involving multiple tortfeasors, and abolishing doctrines of last clear chance and assumption of risk); raising this pragmatic question: What is the role of the common-law judge in the era of the ever engaged legislature? The present case brings this question to the forefront.

Before I reach that question, however, I must attend to a preliminary matter. The plaintiff in the present case, Lisa J. Cefaratti, claims that the Appellate Court incorrectly concluded that the doctrine of apparent agency does not extend to tort actions, thereby preventing her from holding the defendant Middlesex Hospital (hospital) vicariously liable for the alleged negligence of the named defendant, Jonathan S. Aranow, a surgeon who is not an employee of the hospital but who has privileges to and does perform surgeries at the hospital. The plaintiff argues that such conclusion is contrary to our holdings in *Fireman's Fund Indemnity Co.* v. *Longshore Beach & Country Club, Inc.*, 127 Conn. 493, 496–97, 18 A.2d 347 (1941), which, she contends, recognized that the apparent agency doctrine is applicable to tort actions, and *Hanson* v. *Transportation General, Inc.*, 245 Conn. 613, 617 n.5, 716 A.2d 857 (1998), which, she argues, implicitly affirmed the doctrine's availability in tort cases. In response to the hospital's argument that this court has extended apparent *authority* to tort actions but has not, and should not, extend apparent *agency* to such cases, the plaintiff

contends that this court's jurisprudence does not distinguish between the two doctrines.

I need not decide whether our case law recognizes a difference between apparent agency and apparent authority or, if it does, whether such distinction provides a principled reason for applying one doctrine to tort actions but not the other. Instead, I conclude that this court has never decided whether either doctrine should be available to plaintiffs seeking to hold individuals or entities vicariously liable for the tortious conduct of another. I must, therefore, consider that question as a matter of first impression.

In *Fireman's Fund Indemnity Co.*, the plaintiff insurer brought a subrogation action against the defendant country club (club), among others, to recover for amounts the insurer had paid to its insured for damages caused to the insured's vehicle by an employee of the club. *Fireman's Fund Indemnity Co.* v. *Longshore Beach & Country Club, Inc.*, supra, 127 Conn. 493–94. The insurer claimed, among other things, that the club's employee was acting within his implied or apparent authority and, therefore, that the club could be held liable for the employee's negligence. See id., 496. In addressing the insurer's argument, this court did not decide, or even discuss, whether the club could be held vicariously liable for the negligence of the employee under a theory of apparent authority. Instead, relying on two contract cases, namely, *Quint* v. *O'Connell*, 89 Conn. 353, 94 A. 288 (1915), and *Zazzaro* v. *Universal Motors, Inc.*, 124 Conn. 105, 197 A. 884 (1938), the court in *Fireman's Fund Indemnity Co.* merely concluded that the insurer had not established that the employee was, in fact, acting within his apparent authority. *Fireman's Fund Indemnity Co.* v. *Longshore Beach & Country Club, Inc.*, supra, 496–97. The plaintiff claims that implicit in this holding is that the doctrines of apparent authority and apparent agency do apply to

tort actions because, in the plaintiff's view, we would not have decided whether the employee had acted within his apparent authority if the doctrine did not apply.

In a similar vein, and despite its acknowledgment that the court in *Fireman's Fund Indemnity Co*. "did not expressly analyze the issue," the majority in the present case concludes that *Fireman's Fund Indemnity Co*. applied the doctrine of apparent authority to tort actions. The majority reasons that the there is no language in *Fireman's Fund Indemnity Co*. to suggest that the court was simply assuming, without deciding, that the club could be held vicariously liable for the employee's negligence under that doctrine. In addition, the court in *Hanson*, the majority and the plaintiff argue, recognized *Fireman's Fund Indemnity Co*. as applying apparent authority in tort actions. Finally, the majority cites the hospital's acknowledgment that *Fireman's Fund Indemnity Co*. extended the doctrine of apparent authority to tort actions.

I respectfully disagree with the plaintiff's and the majority's reading of *Fireman's Fund Indemnity Co*., and their rationales for such a reading. First, I doubt that this court adopted a liability expanding doctrine without some consideration and discussion. Generally, this court weighs the relevant policy considerations when deciding whether to expand or limit tort liability by adopting new doctrines or creating new causes of action. See, e.g., *Campos* v. *Coleman*, 319 Conn. 36, 57, 123 A.3d 854 (2015) (recognizing new cause of action for loss of parental consortium after evaluating relevant public policy factors and concluding that factors weigh in favor of recognizing such claim); *Sic* v. *Nunan*, 307 Conn. 399, 401, 412, 54 A.3d 553 (2012) (declining to recognize duty of driver to position wheels of vehicle straight while waiting to make left turn, noting that there were no "public policy concerns that would justify

the imposition of new liability"); *Craig* v. *Driscoll*, 262 Conn. 312, 328–29, 813 A.2d 1003 (2003) (recognizing "a common-law negligence action for injuries caused by an intoxicated adult patron against purveyors of alcoholic liquor" because such action would supplement and further state's public policy goals as expressed through enactment of Dram Shop Act); *Hamon* v. *Digliani*, 148 Conn. 710, 716–18, 174 A.2d 294 (1961) (abolishing privity of contract requirement in breach of warranty cases, thereby laying foundation for strict product liability, noting that other jurisdictions have done so "on [the basis of] the public policy of protecting an innocent buyer from harm," and observing change in how products are delivered from manufacture to end consumer). In the absence of any indication that the court in *Fireman's Fund Indemnity Co.* gave any thought to the policy considerations implicated by a decision to extend liability to purported principals by adopting the doctrine of apparent authority in tort actions, I will not so readily assume that it did. Second, neither the plaintiff insurer nor the defendant club in *Fireman's Fund Indemnity Co.* briefed the issue of whether apparent authority should apply in tort actions;[1] see generally *Fireman's Fund Indemnity Co.* v. *Longshore Beach & Country Club, Inc.*, Conn. Supreme Court Records & Briefs, December Term, 1940, Pt. 1, Plaintiff's and Defendants' Briefs; and it is the policy of this court to refrain from addressing issues not raised by the parties. See, e.g., *Blumberg Associates*

[1] It does not appear that the trial court in *Fireman's Fund Indemnity Co.* considered the applicability of the doctrine of apparent authority to tort actions either. See *Fireman's Fund Indemnity Co.* v. *Longshore Beach & Country Club*, 5 Conn. Supp. 165, 166–68 (1937), aff'd, 127 Conn. 493, 18 A.2d 347 (1941). Indeed, it framed the issue of the club's liability as follows: "The first question is whether or not the employee . . . was [the defendant club's] agent and servant and this, in turn, depends [on] whether, at the time, he was either acting within the scope of his employment in respect of a duty, *express or implied*, imposed [on] him by [the club]." (Emphasis added.) Id., 166–67.

Worldwide, Inc. v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 142, 84 A.3d 840 (2014) ("It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial. . . . [O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court." [Citations omitted; internal quotation marks omitted.]); see also id., 128 (holding, "with respect to the propriety of a reviewing court raising and deciding an issue that the parties themselves have not raised, that the reviewing court [1] must do so when that issue implicates the court's subject matter jurisdiction, and [2] has the discretion to do so if [a] exceptional circumstances exist that would justify review of such an issue if raised by a party, [b] the parties are given an opportunity to be heard on the issue, and [c] there is no unfair prejudice to the party against whom the issue is to be decided"). Third, it is not uncommon for this court to avoid answering legal questions that do not affect the outcome of a case. See, e.g., *State* v. *Bacon Construction Co.*, 300 Conn. 476, 480, 482, 15 A.3d 147 (2011) (assuming without deciding that *Convalescent Center of Bloomfield, Inc.* v. *Dept. of Income Maintenance*, 208 Conn. 187, 194–95, 544 A.2d 604 [1988], which allows immediate appeal from denial of collateral estoppel defense in context of administrative proceedings, should not be overruled because that case did not extend to prejudgment remedy proceeding). Thus, the plaintiff assumes too much in her assertion that the court in *Fireman's Fund Indemnity Co.* must have decided that the doctrine of apparent authority applies in tort cases because it decided that the plaintiff insurer had not established that the employee was acting within his apparent authority. Fourth, this court's cursory statement in *Hanson*, in a parenthetical in a footnote, that *Fireman's*

Fund Indemnity Co. "appl[ied] similar [actual, implied, or apparent] agency principles in [a] tort action"; *Hanson* v. *Transportation General, Inc.*, supra, 245 Conn. 617 n.5; does not transform *Fireman's Fund Indemnity Co*. into something it is not. As I have already explained, the court in *Fireman's Fund Indemnity Co*. merely decided that the plaintiff insurer had not established, as a factual matter, that the club employee was acting within his apparent authority. *Fireman's Fund Indemnity Co*. v. *Longshore Beach & Country Club, Inc.*, supra, 127 Conn. 496–97. It *did not* decide to apply that doctrine in a tort action. See id. Finally, we are not confined by the parties' mistaken readings of our case law, and, therefore, I find it irrelevant that the hospital in the present case also reads *Fireman's Fund Indemnity Co*. to hold that the doctrine of apparent authority applies in tort actions.

Because *Fireman's Fund Indemnity Co*. does not apply the doctrine of apparent authority or apparent agency to tort actions, this court must decide in the present case, as a matter of first impression, whether such doctrine should be available to tort plaintiffs. Thus, I return to the question that I previously raised: What is the role of a common-law judge in the era of the ever engaged legislature? In this particular case, which involves the allocation of liability among the different functionaries in a complex and highly regulated industry, I believe it is wise to defer to the legislature to address this issue in the first instance. Of course, I do not dispute that this court has the authority to decide the issue presented, as I have framed it. Instead, I simply suggest that we should refrain from doing so, as a matter of prudence.

This court has long espoused the principle that the legislature, and not this institution, shall set the policy of the state. See, e.g., *Sic* v. *Nunan*, supra, 307 Conn. 410 (declining to recognize duty of "drivers to keep their

wheels pointed in a particular direction when stopped at an intersection waiting to turn," in part because "it is undisputed that the legislature, which has the primary responsibility for formulating public policy . . . has not seen fit to enact any statutes requiring [such conduct]" [citation omitted; internal quotation marks omitted]); see also *General Motors Corp.* v. *Mulquin*, 134 Conn. 118, 132, 55 A.2d 732 (1947) ("it is for the legislature, which is the arbiter of public policy, to determine what [public policy] shall be"); *New Haven Metal & Heating Supply Co.* v. *Danaher*, 128 Conn. 213, 222, 21 A.2d 383 (1941) ("the legislature determines the public policy of the state"); *State* v. *Gilletto*, 98 Conn. 702, 714, 120 A. 567 (1923) ("[t]he legislature is the arbiter of public policy"). I acknowledge, as I must, that many of these cases involved statutory law rather than the common law and, therefore, are different from the present case, which falls within the common-law sphere of torts. Nevertheless, we have also recognized, in a slightly different context, that "[i]t is not the role of this court to strike precise balances among the fluctuating interests of competing private groups"; *Cologne* v. *Westfarms Associates*, 192 Conn. 48, 65, 469 A.2d 1201 (1984); such as, on the one hand, people who are similarly situated to the plaintiff in the present case and, on the other hand, hospitals and other health-care institutions. "That function has traditionally been performed by the legislature, which has far greater competence and flexibility to deal with the myriad complications [that] may arise from" the assignment of liability. Id.

Striking a balance between competing private interests and public policy considerations undoubtedly has been a function of the Legislative Branch due to its institutional aptitude to address such issues. There are a variety of questions that arise in the context of considering whether to expand liability and, relatedly, who should bear the burden for such liability. For example,

in the present case, in determining whether hospitals should be vicariously liable for the malpractice of nonemployee physicians and surgeons, a policy maker might desire a comprehensive understanding of general staffing arrangements at area hospitals, gather data regarding the number and outcomes of malpractice actions, and query the current remedies available to malpractice victims and the inadequacy, if any, of such remedies. Prior to making a determination, the decision maker might also consider General Statutes § 20-11b (a), which requires certain medical providers to maintain minimum liability insurance, and collect cases, if any exist, in which such minimum coverage was insufficient to adequately compensate patients who had been victims of medical malpractice.[2] Additional factors ripe for consideration are (1) the impact such expansion of liability has had in other jurisdictions, on both hospital financing and medical malpractice actions, and (2) the myriad regulations that currently govern the health-care industry and health-care providers. Through public hearings, the legislature can collect data and receive testimony in regard to such matters from industry leaders and affected members of society, including the plaintiff's bar. The legislature may also consult outside experts and elicit input from state regulators. Moreover, the legislature can enact comprehensive reform, establishing the boundaries of liability and providing predictability to health-care institutions and their insurers. Finally, determining who should bear the burden for harm caused by medical malpractice is a value judgment, and the legislature, as an elected body, may be

[2] It is certainly arguable that the enactment of such a requirement reflects the legislature's judgment that individual health-care providers, and not hospitals, should be liable for their own negligence, and that, if the liability insurance required by such statute is inadequate to provide relief to the plaintiff in the present case and those individuals similarly situated, their recourse is to ask the legislature to increase the minimum amount of coverage required.

held accountable if the allocation it makes is not in line with societal values.

In contrast, the Judicial Branch is ill equipped to methodically address questions of liability expansion with potentially far-reaching societal consequences. In answering such a question, courts are limited to the record created and the evidence introduced by the parties. See, e.g., *West Farms Mall, LLC* v. *West Hartford*, 279 Conn. 1, 27, 901 A.2d 649 (2006) (observing that appellate "review is limited to matters in the record"). Moreover, courts, unlike the legislature, are not free to consult outside sources and to collect their own data. Instead, they are confined by rules of judicial notice. See, e.g., *Moore* v. *Moore*, 173 Conn. 120, 121–22, 376 A.2d 1085 (1977) ("[o]ur own cases have attempted to draw a line between matters susceptible of explanation or contradiction, of which notice should not be taken without giving the affected party an opportunity to be heard . . . and matters of established fact, the accuracy of which cannot be questioned . . . which may be judicially noticed without affording a hearing" [citations omitted]). In addition, courts are limited to deciding the cases and questions before them. Consequently, they develop policy on an ad hoc basis and on the basis of the facts presented in each case, which creates uncertainty. The present case provides an example. Despite holding that hospitals, in some cases, may be vicariously liable for the negligence of nonemployee physicians and surgeons, the majority does not decide whether an exception for such liability should exist when the hospital informs patients that certain physicians or surgeons are not employed by the hospital. See footnote 27 of the majority opinion. Instead, the majority simply states that that question is not before the court in this case, and, therefore, it must be left for another day. Id. Finally, members of this court, unlike

the elected bodies of government, cannot be held accountable for the value judgments they reach.

Additionally, deference to the legislature seems to be a particularly prudent course of action in the present case because hospitals are highly regulated institutions within a highly regulated industry. Hospitals are subject to certificate of need requirements, limiting their ability, for example, to purchase certain equipment or to add and discontinue certain services without first receiving approval from the Department of Public Health. See General Statutes § 19a-638 (a). In addition, hospitals are licensed by the Department of Public Health and must comply with regulations regarding, among other things, physical plant, medical staffing, medical records, and emergency planning. See, e.g., Regs., Conn. State Agencies §§ 19-13-D3, 19-13-D4a and 19-13-D5. As a payor of health-care services, the state also has a large impact on hospital financing. See, e.g., General Statutes § 17b-239 (a) (2) ("Medicaid rates paid to acute care and children's hospitals shall be based on diagnosis-related groups established and periodically rebased by the Commissioner of Social Services"). Due to the complex regulatory scheme governing health-care facilities, it is my view that this court should not disturb the careful balance that the legislature has achieved by exposing hospitals to vicarious liability for injuries caused by nonemployees. Instead, I would defer to the judgment of the legislature.

In sum, the arrival of any new era is necessarily accompanied by the end of another. Thus, the modern age of growing complexity and rapid change, in my view, brings to an end the period in which this court should make sweeping, common-law jurisprudential changes.[3] Instead, the legislature, which has become

[3] There is a difference, of course, in correcting the common law, on the one hand, and expanding or changing the course of the common law, on the other. In the case of the former, this court should continue to exercise its common-law authority to harmonize common-law rules with "[t]he felt necessities of the time . . . ." O. Holmes, The Common Law (1881) p. 1.

ever engaged in the common-law sphere, is institutionally better equipped to continue the development of the common law. Moreover, the legislature, an elected body with public processes, is designed to reflect the morality and experience of our time. Law giving by the legislature is more democratic, and it also is less likely to do serious harm. Accordingly, I conclude that this court should refrain from recognizing the doctrine of apparent agency in tort actions and, instead, defer to the judgment of the legislature regarding whether hospitals should be subject to vicarious liability for the malpractice of nonemployee health-care providers. Therefore, I respectfully dissent.

LISA J. CEFARATTI *v.* JONATHAN S. ARANOW ET AL. (SC 19444)

Rogers, C. J., and Palmer, Zarella, McDonald, Espinosa, Robinson and Vertefeuille, Js.

Syllabus

The plaintiff sought to recover damages from the defendant physician, A, the defendant surgical group, S Co., and the defendant hospital for medical malpractice, alleging that A negligently had left a surgical sponge in the plaintiff's abdominal cavity during a gastric bypass surgical procedure. The plaintiff claimed, inter alia, that the hospital was directly liable for its own negligence and that the hospital and S Co. were vicariously liable for A's negligence. After having diagnosed the plaintiff as being morbidly obese, A performed the surgery on the plaintiff in December, 2003, at the hospital. The plaintiff thereafter had approximately seven follow-up appointments with A between January, 2004, and March, 2009. Approximately one year after the surgery, the plaintiff began experiencing abdominal discomfort and described the sensations to A. Subsequently, following an unrelated medical examination, the surgical sponge was discovered in the plaintiff's abdomen. The plaintiff thereafter filed her action against the defendants in August, 2000. The defendants moved for summary judgment, contending that the plaintiff's claims were barred by the three year statute of limitations (§ 52-584) applicable to medical malpractice claims. The plaintiff opposed the motions, claiming, inter alia, that the statute of limitations was tolled by the continuing course of treatment doctrine. The trial court concluded that the identified medical condition at issue was the sponge in the plaintiff's abdomen and, because

the plaintiff did not know about that condition, she could not have sought treatment for it, and, therefore, the continuing course of treatment doctrine did not apply and the action was barred by the statute of limitations. Accordingly, the trial court rendered summary judgment for the defendants, and the plaintiff appealed to the Appellate Court. The Appellate Court concluded that the plaintiff's morbid obesity was an identified medical condition for purposes of the continuing course of treatment doctrine, and that there was a genuine issue of material fact as to whether A had provided ongoing treatment to the plaintiff for that condition. Accordingly, that court determined that there was a genuine issue of material fact as to whether the continuing course of treatment doctrine tolled the statute of limitations. The Appellate Court reversed the trial court's judgment in part with respect to A's liability and the vicarious liability claims against S Co. and the hospital. From that judgment, A and S Co., on the granting of certification, appealed to this court, claiming, inter alia, that the Appellate Court incorrectly concluded that the plaintiff's morbid obesity was an identified medical condition for purposes of the continuing course of treatment doctrine. *Held* that the Appellate Court properly determined that there were genuine issues of material fact as to whether the continuing course of treatment doctrine tolled the statute of limitations, there having been genuine issues of material fact as to whether the plaintiff's abdominal discomfort was caused by the presence of the surgical sponge and therefore was an identified medical condition for purposes of the continuing course of treatment doctrine, and as to whether the plaintiff sought continuing treatment for that medical condition; in order to establish that there were genuine issues of material fact as to whether the continuing course of treatment doctrine tolled the statute of limitations, the plaintiff was required only to present evidence that her abdominal discomfort was caused by the sponge left in her abdomen during the surgery by A and that she sought continuing treatment for her discomfort from A, not that she knew about the sponge and sought treatment for the presence of it in her abdomen.

Argued January 21—officially released June 14, 2016

Procedural History

Action to recover damages for the defendants' alleged medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Aurigemma*, *J.*, granted the motions for summary judgment filed by the defendants and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court, *Beach*, *Sheldon* and *Bear*, *Js.*, which reversed in part the judgment of the

trial court and remanded the case for further proceedings, from which the named defendant et al., on the granting of certification, appealed to this court. *Affirmed.*

Ellen M. Costello, for the appellants (named defendant et al.).

Kelly E. Reardon, with whom, on the brief, was *Robert I. Reardon, Jr.*, for the appellee (plaintiff).

Opinion

ROGERS, C. J. The issue that we must resolve in this certified appeal is whether the plaintiff's medical malpractice action is barred by the statute of limitations or, instead, the statute of limitations was tolled under the continuing course of treatment doctrine. The plaintiff, Lisa J. Cefaratti, brought this action against the defendants, Jonathan S. Aranow, Shoreline Surgical Associates, P.C. (Shoreline), and Middlesex Hospital (Middlesex), alleging that Aranow had left a surgical sponge in the plaintiff's abdominal cavity during gastric bypass surgery. She further alleged that Middlesex was both directly liable for its own negligence and vicariously liable for Aranow's negligence, and Shoreline was vicariously liable for Aranow's negligence.[1] Thereafter, Middlesex filed a motion for summary judgment claiming, among other things, that the claims against it were barred by the applicable statute of limitations, General

[1] The relevant complaint has four counts. The first count is against "Jonathan S. Aranow, M.D. of . . . Shoreline . . . ." The second count is against Middlesex. The third count is against "Middlesex . . . and Aranow . . . [respondeat] [s]uperior." The fourth count is against Shoreline. Both the first and the fourth count allege that Aranow is Shoreline's employee but, unlike the third count, they do not expressly allege that Shoreline is vicariously liable for Aranow's negligence under the doctrine of respondeat superior. Because the trial court apparently assumed that that was the case, and the defendants do not contend otherwise, we also make that assumption.

Statutes § 52-584.[2] Aranow and Shoreline subsequently filed a joint motion for summary judgment raising the same claim. The trial court concluded that the direct claims against Aranow and Middlesex were barred by the statute of limitations and, therefore, the derivative claims against Middlesex and Shoreline were also barred. Accordingly, the trial court rendered judgment for the defendants, and the plaintiff appealed to the Appellate Court, which reversed the judgment of the trial court on the ground that there was a genuine issue of material fact as to whether the statute of limitations had been tolled by the continuing course of treatment doctrine.[3] *Cefaratti* v. *Aranow*, 154 Conn. App. 1, 22, 105 A.3d 265 (2014). We then granted Aranow and Shoreline's petition for certification to appeal from that ruling, limited to the following issue: "Did the Appellate

[2] Middlesex also claimed that the plaintiff did not have a viable claim of vicarious liability against it because Aranow was not its actual agent or employee and the doctrine of apparent agency is not recognized in tort actions in this state. The trial court agreed with Middlesex and granted its motion for summary judgment on the vicarious liability claim. The plaintiff appealed to the Appellate Court, which affirmed the judgment of the trial court. *Cefaratti* v. *Aranow*, 154 Conn. App. 1, 45, 105 A.3d 265 (2014). We then granted the plaintiff's petition for certification to appeal on the following issue: "Did the Appellate Court properly conclude that the doctrine of apparent authority does not apply to actions sounding in tort?" *Cefaratti* v. *Aranow*, 315 Conn. 919, 107 A.3d 960 (2015). In the companion case of *Cefaratti* v. *Aranow*, 321 Conn. 593, 141 A.3d 752 (2016), issued on the same date as this opinion, we answer that question in the negative and conclude that the case must be remanded so that the plaintiff may have an opportunity to present evidence sufficient to create a genuine issue of material fact under our newly adopted standard for establishing apparent agency in a tort action.

[3] The plaintiff has not claimed on appeal to the Appellate Court or to this court that the continuing course of treatment doctrine tolls the statute of limitations with respect to her claim that Middlesex is directly liable for its own negligence. Accordingly, the trial court's summary judgment rendered in favor of Middlesex on that count still stands. See *Cefaratti* v. *Aranow*, supra, 154 Conn. App. 6 n.3 ("Count two of the complaint is not at issue in this appeal. . . . Any possible negligence on the part of [Middlesex] is not at issue on appeal."). To the extent that the plaintiff claims that Shoreline is directly liable for its own negligence before and during the surgery, any such claim is also barred for the same reason.

Court properly apply the 'continuing course of treatment' doctrine in determining what constitutes an 'identifiable medical condition' under that doctrine?"[4] *Cefaratti* v. *Aranow*, 315 Conn. 919, 919–20, 107 A.3d 960 (2015). We answer that question in the affirmative and, therefore, affirm the judgment of the Appellate Court.

The record, which we view in the light most favorable to the plaintiff for purposes of reviewing the trial court's rendering of summary judgment, reveals the following facts and procedural history. On December 8, 2003, after having diagnosed the plaintiff as being morbidly obese, Aranow performed gastric bypass surgery on the plaintiff at Middlesex. Thereafter, the plaintiff had follow-up appointments with Aranow on January 14, 2004, May 11, 2004, October 22, 2004, May 10, 2005, November 16, 2005, December 17, 2007, and March 20, 2009. The plaintiff testified at her deposition that, starting approximately one year after her surgery, she began to experience uncomfortable sensations in her abdomen. She described the sensations as follows: "When [the sponge] was in there it was so large that I could barely bend over without it getting caught on my ribs and the pain was very, very intense. I felt like I was carrying a child in my abdomen." She further stated that she felt that "something was pushing out . . . and it felt like somebody was stabbing me . . . . [W]henever I had to have a bowel movement it felt like somebody was twisting something inside of me . . . ." The plaintiff testified that she described these sensations

[4] As we have explained, the only remaining claim against Middlesex is that it is vicariously liable for Aranow's negligence. See footnote 3 of this opinion. Middlesex did not join in the present appeal, presumably because the derivative claim against it would be barred if this court were to agree with Aranow and Shoreline that the claim against Aranow is barred. For convenience, we hereinafter refer to Aranow and Shoreline as the defendants.

exactly to Aranow at every appointment, except perhaps the first two.[5]

On August 6, 2009, after being diagnosed with breast cancer by another physician, the plaintiff underwent a computerized tomography (CT) scan of her chest, abdomen and pelvis. The CT scan revealed the presence of foreign material in the plaintiff's abdominal cavity. On September 9, 2009, the plaintiff met with Aranow, who informed her that the object in her abdominal cavity was a surgical sponge. After the sponge was surgically removed, she no longer had the sensations of having something caught on her ribs and of carrying a child.[6]

On August 18, 2010, the plaintiff brought a medical malpractice action alleging that Aranow had negligently failed to remove the surgical sponge from her abdominal cavity during the gastric bypass surgery, and that Middlesex and Shoreline were both directly liable for their own negligence and vicariously liable for Aranow's negligence. Thereafter, Middlesex filed a motion for summary judgment claiming that, because the plaintiff had not brought the action within the three year statute of repose provided for in § 52-284,[7] the action was

[5] The plaintiff filled out a questionnaire at each of the follow-up appointments that specifically asked whether she was suffering from abdominal pain. She indicated that she had abdominal pain only on the questionnaire for the November 16, 2005 appointment. The plaintiff explained at her deposition that she did not indicate that she had abdominal pain on the other questionnaires because she "didn't consider it at that time to be abdominal pain, and the way I described [it] to [Aranow] was different than what I would describe [as] abdominal pain."

[6] Although it is not absolutely clear, the plaintiff's deposition testimony strongly implies that she underwent surgery to have the surgical sponge removed. Specifically, she stated that, "[w]hen the sponge was in there," she had a specific type of discomfort, and that she had not had that type of discomfort "[s]ince the surgery . . . ." The plaintiff's attorney confirmed at oral argument before this court that the sponge was surgically removed two years after it was discovered.

[7] General Statutes § 52-584 provides: "No action to recover damages for injury to the person, or to real or personal property, caused by negligence,

barred. The defendants filed a separate motion for summary judgment raising the same claim. The plaintiff opposed the motions, claiming, among other things, that the statute of limitations was tolled by the continuing course of treatment doctrine.

The trial court observed in its memorandum of decision that, to establish the elements of the continuing course of treatment doctrine, the plaintiff was required to prove "(1) that . . . she had an identified medical condition that required ongoing treatment or monitoring; (2) that the defendant provided ongoing treatment or monitoring of that medical condition after the allegedly negligent conduct, or that the plaintiff reasonably could have anticipated that the defendant would do so; and (3) that the plaintiff brought the action within the appropriate statutory period after the date that treatment terminated." (Footnotes omitted.) *Grey* v. *Stamford Health System, Inc.*, 282 Conn. 745, 754–55, 924 A.2d 831 (2007). The trial court concluded that the identified medical condition at issue in the present case was the sponge in the plaintiff's abdomen and, because the plaintiff did not know about that condition, she could not have sought treatment for it. Accordingly, it concluded that the doctrine did not apply and the action was, therefore, barred by the statute of limitations, entitling the defendants to summary judgment.

The plaintiff appealed from the judgment to the Appellate Court. The Appellate Court concluded that the plaintiff's morbid obesity was an identified medical

or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, podiatrist, chiropractor, hospital or sanatorium, shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of, except that a counterclaim may be interposed in any such action any time before the pleadings in such action are finally closed."

condition for purposes of the continuing course of treatment doctrine and that there was a genuine issue of material fact as to whether Aranow had provided ongoing treatment for that condition. *Cefaratti* v. *Aranow*, supra, 154 Conn. App. 21–22. Accordingly, it concluded that there was a genuine issue of material fact as to whether the continuing course of treatment doctrine tolled the statute of limitations; id., 22; and reversed in part the judgment of the trial court. Id., 45.

This certified appeal followed. The defendants contend that the Appellate Court incorrectly determined that the plaintiff's morbid obesity was an identified medical condition for purposes of the continuing course of treatment doctrine. Rather, the defendants contend, the plaintiff's identified medical condition was either the retained surgical sponge, for which the plaintiff could not have sought treatment because she was unaware of it, or the plaintiff's morbid obesity, which was not an identified medical condition for purposes of the doctrine because it did not have any connection to the injury of which she complained. The plaintiff contends that she sought treatment *both* for her morbid obesity and for postoperative complications, such as her abdominal discomfort. Accordingly, she contends, her abdominal discomfort was an identified medical condition for purposes of the doctrine. In turn, the defendants respond that this claim fails because the plaintiff was required to and did not establish a connection between the medical condition for which she sought treatment—her abdominal discomfort—and the alleged negligence—leaving the sponge in the plaintiff's abdominal cavity. They further contend that, even if there is evidence that the sponge caused the plaintiff's abdominal discomfort, the plaintiff cannot prevail because she has not alleged or presented evidence that Aranow's continuing failure to diagnose the true cause of her discomfort was negligent.

We conclude that, to establish that there are genuine issues of material fact as to whether the continuing course of treatment doctrine tolled the statute of limitations, the plaintiff was required only to present evidence that her abdominal discomfort was caused by the sponge and that she sought continuing treatment for her discomfort from Aranow. We further conclude that the plaintiff has established that there is a genuine issue of material fact as to whether the doctrine applies.

"The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Citation omitted; internal quotation marks omitted.) *Gold* v. *Greenwich Hospital Assn.*, 262 Conn. 248, 253, 811 A.2d 1266 (2002).

"[I]n the context of a motion for summary judgment based on a statute of limitations special defense, a defendant typically meets its initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period. . . . When the plaintiff

asserts that the [limitation] period has been tolled by an equitable exception to the statute of limitations, the burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute." (Citation omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 321, 77 A.3d 726 (2013). Thus, in the present case, because there is no dispute that the plaintiff filed her complaint after the limitations period set forth in § 52-584 had expired, the burden is on the plaintiff to establish that there is a genuine issue of material fact as to whether the statute of limitations was tolled by the continuing course of treatment doctrine.

We begin our analysis with a review of our case law involving the continuing course of treatment doctrine. "As a general rule, [t]he [s]tatute of [l]imitations begins to run when the breach of duty occurs." (Internal quotation marks omitted.) *Grey* v. *Stamford Health System, Inc.*, supra, 282 Conn. 751. "We have . . . recognized, however, that the statute of limitations, in the proper circumstances, may be tolled under the continuous treatment . . . doctrine, thereby allowing a plaintiff to commence his or her lawsuit at a later date." (Internal quotation marks omitted.) Id. Under that doctrine, "[s]o long as the relation of physician and patient continues as to the particular injury or malady which [the physician] is employed to cure, and the physician continues to attend and examine the patient in relation thereto, and there is something more to be done by the physician in order to effect a cure, it cannot be said that the treatment has ceased." (Internal quotation marks omitted.) Id.

As we have indicated, to establish the elements of the continuing course of treatment doctrine, a plaintiff is required to prove "(1) that he or she had an identified medical condition that required ongoing treatment or monitoring; (2) that the defendant provided ongoing

treatment or monitoring of that medical condition after the allegedly negligent conduct, or that the plaintiff reasonably could have anticipated that the defendant would do so; and (3) that the plaintiff brought the action within the appropriate statutory period after the date that treatment terminated." (Footnotes omitted.) Id., 754–55. To constitute an "identified medical condition" for purposes of the doctrine, the medical condition for which the plaintiff received ongoing treatment must be connected to the injury of which the plaintiff complains. See id., 754 n.6, citing *Watkins* v. *Fromm*, 108 App. Div. 2d 233, 244, 488 N.Y.S.2d 768 (1985) ("continuous treatment doctrine applies only to treatment for the same or related illnesses or injuries, continuing after the alleged acts of malpractice, not mere continuity of a general physician-patient relationship" [internal quotation marks omitted]); *Miccio* v. *Gerdis*, 120 App. Div. 3d 639, 640, 990 N.Y.S.2d 863 (2014) (doctrine applies "where [the physician] treated the patient continuously over the relevant time period for symptoms that are ultimately traced to [the underlying] condition [of which the plaintiff complains]").

With these principles in mind, we turn to the evidence in the present case. The plaintiff testified that, starting approximately one year after the surgery, she developed severe abdominal discomfort. She further testified that she complained to Aranow of this discomfort at each of the subsequent follow-up appointments. Finally, she testified that, after the surgical sponge was removed, a number of symptoms disappeared.[8] On the basis of

[8] Accordingly, we reject the defendants' contention that "[t]here was not one scintilla of evidence in this case that the alleged abdominal pain was ultimately traced to the retained sponge." There is sufficient evidence to create an issue of fact as to whether the sponge caused the discomfort given that some of the discomfort disappeared after the sponge was removed. *Sherman* v. *Bristol Hospital, Inc.*, 79 Conn. App. 78, 89, 828 A.2d 1260 (2003) ("An exception to the general rule with regard to expert medical opinion evidence is when the medical condition is obvious or common in everyday life. . . . Similarly, expert opinion may not be necessary as to

this evidence, we conclude that there are genuine issues of material fact as to (1) whether the plaintiff's abdominal discomfort was caused by the presence of the surgical sponge and, therefore, whether it was an "identified medical condition" for purposes of the continuing course of treatment doctrine; and (2) whether the plaintiff sought continuing treatment for that medical condition. Accordingly, we conclude that the Appellate Court properly determined that there are genuine issues of material fact as to whether the continuing course of treatment doctrine tolled the statute of limitations.

The defendants contend, however, that the doctrine does not apply because the plaintiff has not alleged that Aranow's treatment of her *after* the surgery was negligent.[9] Specifically, they contend that she has not

causation of an injury or illness if the plaintiff's evidence creates a probability so strong that a lay jury can form a reasonable belief." [Citations omitted; internal quotation marks omitted.]).

[9] Although we conclude in this opinion that it is not necessary for a plaintiff to prove that there must be a continuing failure to diagnose in order for the doctrine to apply, in her opposition to the defendants' motion for summary judgment, we note that the plaintiff contended that the defendants "continually breached their duty from 2003 to 2009 by failing to properly examine and follow up with the [p]laintiff to determine that a surgical sponge had been left behind." In other words, the plaintiff contended that the defendants' failure to diagnose the true nature of her condition constituted continuing negligence. The only evidence that the plaintiff cited to support this claim, however, was Aranow's deposition testimony that a sponge had been left in the abdominal cavity of a former patient and that he had discovered the sponge several years after the surgery when he ordered a CT scan. We conclude that this evidence is not sufficient to raise a genuine issue of material fact as to whether Aranow breached the governing standard of care when he failed to diagnose the plaintiff's true condition when she complained of abdominal discomfort after the appeal. Rather, the plaintiff was required to present expert testimony as to whether Aranow breached the standard of care. See *Doe* v. *Yale University*, 252 Conn. 641, 687, 748 A.2d 834 (2000) ("[e]xcept in the unusual case where the want of care or skill is so gross that it presents an almost conclusive inference of want of care . . . the testimony of an expert witness is necessary to establish both the standard of proper professional skill or care on the part of a physician" [citation omitted]); *Sullivan* v. *Yale-New Haven Hospital, Inc.*, 64 Conn. App. 750, 767, 785 A.2d 588 (2001) ("[b]ecause it was evident that the substitute plaintiff did not produce an expert witness who would have

alleged that Aranow negligently failed to discover during the follow-up appointments that a surgical sponge had been left in her abdominal cavity during the surgery. Thus, the defendants implicitly contend that we should adopt the "single act" exception to the continuing course of treatment doctrine, under which the doctrine does not apply when the plaintiff's injury was caused by a single act of negligence rather than by a continuous course of negligent treatment. See *Pastchol* v. *St. Paul Fire & Marine Ins. Co.*, 326 Ark. 140, 146, 929 S.W.2d 713 (1996) ("the continuous treatment doctrine becomes relevant *when the medical negligence consists of a series of negligent acts or, a continuing course of improper treatment*" [emphasis in original; internal quotation marks omitted]); *Langner* v. *Simpson*, 533 N.W.2d 511, 522 (Iowa 1995) ("[t]o prevail under the continuum of negligent treatment doctrine, the plaintiff must show [1] that there was a continuous and unbroken course of negligent treatment, and [2] that the treatment was so related as to constitute one continuing wrong" [internal quotation marks omitted]); *Swang* v. *Hauser*, 288 Minn. 306, 309, 180 N.W.2d 187 (1970) (doctrine does not apply when alleged tort was single act and no continued course of treatment could cure or relieve it).

We disagree. Our cases have consistently stated that the policy underlying the continuous treatment doctrine seeks to "[maintain] the physician/patient relationship in the belief that the most efficacious medical care will be obtained when the attending physician remains on a case from onset to cure." (Internal quotation marks omitted.) *Grey* v. *Stamford Health System, Inc.*, supra, 282 Conn. 752; *Blanchette* v. *Barrett*, 229 Conn. 256, 276, 640 A.2d 74 (1994) (same); *Connell* v. *Colwell*, 214 Conn.

testified that the defendants had breached the standard of care in their treatment of the plaintiff, the court properly found that the defendants were entitled to judgment as a matter of law").

242, 253, 571 A.2d 116 (1990) (same); see also *Grey* v. *Stamford Health System, Inc.*, supra, 752 ("[t]he doctrine rests on the premise that it is in the patient's best interest that an ongoing course of treatment be continued, rather than interrupted by a lawsuit because the doctor not only is in a position to identify and correct his or her malpractice, but is best placed to do so" [internal quotation marks omitted]), quoting *Nykorchuck* v. *Henriques*, 78 N.Y.2d 255, 258, 577 N.E.2d 1026, 573 N.Y.S.2d 434 (1991); *Grey* v. *Stamford Health System, Inc.*, supra, 752 (policy underlying doctrine is to avoid creating "a dilemma for the patient, who must choose between silently accepting continued corrective treatment from the offending physician, with the risk that his claim will be time-barred or promptly instituting an action, with the risk that the physician-patient relationship will be destroyed" [internal quotation marks omitted]), quoting *Rizk* v. *Cohen*, 73 N.Y.2d 98, 104, 535 N.E.2d 282, 538 N.Y.S.2d 229 (1989). In addition, we have repeatedly recognized that, "[s]o long as the relation of physician and patient continues as to the particular injury or malady which [the physician] is employed to cure, and the physician continues to attend and examine the patient in relation thereto, and there is something more to be done by the physician in order to effect a cure, it cannot be said that the treatment has ceased." (Internal quotation marks omitted.) *Grey* v. *Stamford Health System, Inc.*, supra, 751; *Blanchette* v. *Barrett*, supra, 274 (same); see also *Giambozi* v. *Peters*, 127 Conn. 380, 385, 16 A.2d 833 (1940) ("when . . . injurious consequences arise from course of treatment, the statute [of limitations] does not begin to run until the treatment is terminated"), overruled in part on other grounds by *Foran* v. *Carangelo*, 153 Conn. 356, 360, 216 A.2d 638 (1966). Thus, to require that the continuing treatment itself must be negligent before the doctrine can be applied would be fundamentally inconsistent

with one of the primary policies underlying the doctrine, namely, to allow the patient to seek ongoing treatment for a medical condition caused by a single act of negligence.[10] Accordingly, we decline to adopt this exception. See *Nobles* v. *Memorial Hospital of Laramie County*, 301 P.3d 517, 527–29 (Wyo. 2013) (rejecting single act exception to continuing course of treatment doctrine because exception is "at odds with the basic

[10] We recognize that our cases previously have contrasted situations in which the alleged medical malpractice was " 'a single act of a physician or surgeon' " with situations involving a " 'course of treatment.' " *Blanchette* v. *Barrett*, supra, 229 Conn. 274, quoting *Giambozi* v. *Peters*, supra, 127 Conn. 385. These cases also may be interpreted as suggesting that the continuing course of treatment doctrine does not apply when the only malpractice was the initial single act of negligence. *Blanchette* v. *Barrett*, supra, 274 (when malpractice was single act, "[t]he [s]tatute of [l]imitations begins to run when the breach of duty occurs"); *Giambozi* v. *Peters*, supra, 385 (same); *Giambozi* v. *Peters*, supra, 384 ("where the injury was inflicted at the time of the operation and not occasioned by subsequent treatment or neglect, and there has been no fraudulent concealment by the surgeon, the period of limitation for actions of this kind commences from the date of the wrongful act or omission"). In *Giambozi* v. *Peters*, supra, 385, however, there was no treatment at all after the initial act of negligence. *Blanchette* also does not definitively answer the question of whether the doctrine applies in the absence of ongoing negligence because the court in that case found both that the defendant had a continuing duty to the plaintiff after the initial act of negligence and that the defendant provided continually negligent treatment. See *Blanchette* v. *Barrett*, supra, 279. Moreover, since *Giambozi* was decided, this court has recognized that, in *addition* to allowing a plaintiff to use the last date of the defendant's negligent conduct as the date that the negligence occurred, "[t]he policy underlying the continuous treatment doctrine [also] seeks to maintain the physician/patient relationship in the belief that the most efficacious medical care will be obtained when the attending physician remains on a case from onset to cure." (Internal quotation marks omitted.) *Connell* v. *Colwell*, supra, 214 Conn. 253. In light of the strong policy in favor of allowing the plaintiff to seek treatment for the negligently inflicted injury, we conclude that our suggestions in *Giambozi* and *Blanchette* that, when "[t]he term malpractice . . . [is] applied to a single act of a physician or surgeon . . . [t]he [s]tatute of [l]imitation[s] begins to run when the breach of duty occurs"; (internal quotation marks omitted) *Blanchette* v. *Barrett*, supra, 274, quoting *Giambozi* v. *Peters*, supra, 385; were intended to apply to cases in which there has been *no* continuing course of treatment for an identified medical condition, negligent or otherwise.

policies at the heart of the continuous treatment rule").[11]

The defendants also contend that, even if evidence of continuing negligence is not required, the continuing course of treatment doctrine does not apply here because "the plaintiff certainly could not have anticipated [that] the defendant would have treated her for a retained foreign object of which no one was aware." See *Grey* v. *Stamford Health System, Inc.*, supra, 282 Conn. 755–56 ("when the plaintiff had no knowledge of a medical condition and, therefore, had no reason to expect ongoing treatment for it from the defendant, there is no reason to apply the doctrine"). Thus, the defendants contend that a plaintiff should be required to prove that the medical condition for which continuing treatment was sought was "identified" in the sense that the plaintiff knew its true nature and cause. We disagree. Rather, we conclude that the medical condition must be "identified" in the sense that it was the specific condition that either gave rise to or was caused by the defendant's negligence. See *McDermott* v. *Torre*, 56 N.Y.2d 399, 406, 437 N.E.2d 1108, 452 N.Y.S.2d 351 (1982) ("Included within the scope of continuous treatment is a timely return visit instigated by the patient to complain about and seek treatment for a matter related to the initial treatment. Thus, there will be continuing treatment when a patient, instructed that he or she does not need further attention, soon returns to the doctor because of continued pain in that area for which medical attention was first sought." [Internal

[11] See also *Gomez* v. *Katz*, 61 App. Div. 3d 108, 109–17, 874 N.Y.S.2d 161 (2009) (doctrine applied when defendant caused injury during allegedly negligent eye surgery); *Jauregui* v. *Memorial Hospital of Sweetwater County*, 111 P.3d 914, 915, 918–19 (Wyo. 2005) (doctrine applied when defendant left sponge in plaintiff's shoulder during surgery), overruled on other grounds by *Harmon* v. *Star Valley Medical Center*, 331 P.3d 1174 (Wyo. 2014).

quotation marks omitted.]);[12] *Miccio* v. *Gerdis*, supra, 120 App. Div. 3d 640 ("a physician . . . cannot defeat the application of the continuous treatment doctrine merely because of a failure to make a correct diagnosis as to the underlying condition, where [the physician] treated the patient continuously over the relevant time period for symptoms that are ultimately traced to that condition"); D. Peck, "The Continuous Treatment Doctrine: A Toll on the Statute of Limitations for Medical Malpractice in New York," 49 Alb. L. Rev. 64, 77 (1984) ("Although the [defendant] may be aware that its actions caused the injury which necessitated the subsequent treatment, this knowledge is not a necessary element of affirmative treatment. The essential factor is that the subsequent treatment is related to the act or omission which gave rise to the cause of action." [Footnote omitted.]). This conclusion "is compelled by the policy underlying the continuous treatment doctrine, i.e., that a patient should not be required to interrupt corrective medical treatment by a physician and undermine the trust in the physician-patient relationship in order to ensure a timely claim . . . ." (Citation omitted.) *Couch* v. *Suffolk*, 296 App. Div. 2d 194, 197, 746

[12] In *McDermott* v. *Torre*, supra, 56 N.Y.2d 403, the plaintiff consulted the defendant dermatologist and requested that he examine a mole on her ankle. The defendant conducted tests and concluded that the mole did not require any treatment. Id., 404. The plaintiff then received continued treatment for other ailments with the defendant but received no further treatment for the mole. Id. She continued to complain, however, about pain and discoloration in her ankle. It was ultimately determined that the mole was cancerous. Id. The plaintiff brought an action against the defendant after the limitation period had expired, claiming that the continuing course of treatment doctrine applied. Id., 404–405. The Court of Appeals of New York concluded that the fact that the defendant had continually misdiagnosed the plaintiff's condition as benign was irrelevant for purposes of the doctrine. Id., 406. Rather, the court concluded, the dispositive question was whether the "plaintiff's concern about her ankle was one of the purposes for her subsequent visits" to the defendant. Id. Thus, the plaintiff was not required to prove either ongoing negligence or that the plaintiff and the defendant were aware of the true nature of the plaintiff's condition in order to invoke the doctrine.

N.Y.S.2d 187 (2002). "Although it seems incongruous that subsequent treatment can occur without affirmative action by the physician since the term treatment connotes the presence of action, in certain situations treatment can occur by omission. This treatment by omission arises when the patient returns to the treating physician complaining of problems in the mistreated area but the physician disregards the complaints. The significant factor is that even though the physician may not have provided literal treatment to the afflicted area, the patient, by returning to the physician, has provided him with an opportunity to correct his previous error." (Footnote omitted; internal quotation marks omitted.) D. Peck, supra, 79. Thus, in the present case, the plaintiff was required only to show that there is a genuine issue of material fact as to whether her symptoms of abdominal discomfort were connected to the retained surgical sponge and that she sought treatment for those symptoms, not that she knew about and sought treatment for the presence of the sponge.[13]

Accordingly, we conclude this court's statement in *Grey* v. *Stamford Health System, Inc.*, supra, 282 Conn. 755–56, that "when the plaintiff had no knowledge of a medical condition and, therefore, had no reason to expect ongoing treatment for it from the defendant, there is no reason to apply the doctrine" refers either to the situation in which the plaintiff was suffering from an *asymptomatic* medical condition and, therefore, had no reason to seek treatment for it, or to the situation

[13] The defendants contend that "[t]he trial court made a finding of fact that the retained sponge was the identified medical condition," not the plaintiff's abdominal discomfort, and that we must defer to this finding. Trial courts do not make findings of fact, however, in ruling on motions for summary judgment. Rather, viewing the evidence in the light most favorable to the nonmoving party, they determine whether there are genuine issues of material fact, which is a question of law. Because this court is in as good a position as the trial court to make this determination, our review is plenary. *Gold* v. *Greenwich Hospital Assn.*, supra, 262 Conn. 253.

in which the plaintiff sought treatment for certain symptoms, the defendant determined that the symptoms required no further treatment and the plaintiff sought no further treatment. It does not refer to the situation in which a plaintiff continually sought treatment for symptoms related to the act of negligence for which the true cause was unknown.[14]

To the extent that the defendants contend that routine appointments can never constitute a continuing course of treatment for purposes of the doctrine, we again disagree. Rather, we conclude that routine postoperative appointments for the purpose of tracking the progress of the plaintiff's condition and postoperative complications, if any, constitute continuing treatment for any identified medical condition that was caused by the surgery. See *Miller* v. *Rivard*, 180 App. Div. 2d 331, 339, 585 N.Y.S.2d 523 (1992) (routine postoperative procedures are part of same course of treatment as surgery); *Callahan* v. *Rogers*, 89 N.C. App. 250, 255, 365 S.E.2d 717 (1988) (it is irrelevant for purposes of doctrine whether postoperative appointments were initiated by plaintiff or were scheduled office visits). Of course, as with any application of the doctrine, the plaintiff must present evidence in such cases that he or she sought treatment for a specific medical condition

[14] To support its conclusion that the continuing course of treatment doctrine does not apply in the present case, the trial court relied on our statement in *Martinelli* v. *Fusi*, 290 Conn. 347, 364, 963 A.2d 640 (2009), that, although evidence that the defendant was unaware of the true nature of the plaintiff's condition may indicate that the defendant was negligent, "it does not indicate that the defendant was actually aware that the plaintiff's condition required further treatment, such that an ongoing duty to diagnose and treat that condition could be imposed." That principle, however, relates to the continuing course of *conduct* doctrine, which is distinct from the continuing course of treatment doctrine. See id., 357, 365–66 (analyzing doctrines separately); *Grey* v. *Stamford Health System, Inc.*, supra, 282 Conn. 755 ("the primary difference between the doctrines is that the [continuing course of treatment doctrine] focuses on the *plaintiff's* reasonable expectation that the treatment for an existing condition will be ongoing, while the [continuing course of conduct doctrine] focuses on the *defendant's* duty to the plaintiff arising from his knowledge of the plaintiff's condition" [emphasis in original]).

that was related to the injury of which he or she complained. For example, in the present case, if the plaintiff had failed to present any evidence that the presence of the sponge in her abdominal cavity had caused symptoms for which she sought treatment at the follow-up appointments, the mere fact that the defendants provided ongoing monitoring of the condition that the surgery was intended to cure—the plaintiff's morbid obesity—would not have been sufficient.

For the foregoing reasons, we conclude that the Appellate Court properly determined that there are genuine issues of material fact as to whether the continuing course of treatment doctrine tolled the statute of limitations. Accordingly, we affirm the judgment of the Appellate Court reversing the judgment of the trial court that the plaintiff's action was barred by the statute of limitations.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* DEVON D.*
(SC 19379)

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson, Js.**

Syllabus

Convicted, in three cases that were joined for trial, of multiple counts of sexual assault in the first degree and risk of injury to a child in connection with the defendant's sexual abuse of three of his biological children, A,

* In accordance with our policy of protecting the privacy interests of victims of sexual assault and the crime of risk of injury to a child, we decline to use the defendant's full name or to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

** This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Rogers and Justices Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson. Although Chief Justice Rogers was not present when the case was argued before the court, she has read the briefs and appendices, and listened to a recording of oral argument prior to participating in this decision.

B and C, the defendant appealed to the Appellate Court, which reversed the trial court's judgments. Each of the three cases involved charges specific to each child. The Appellate Court concluded, inter alia, that the trial court had abused its discretion in denying the defendant's motion to sever the three cases and in allowing a dog to sit near A during her trial testimony to provide comfort and support. On the granting of certification, the state appealed to this court. *Held*:

1. The Appellate Court incorrectly concluded that the trial court had abused its discretion in permitting the three cases against the defendant to be tried jointly, as the defendant could not demonstrate that he was substantially prejudiced by the denial of his motion for severance because the evidence in all three cases would have been cross admissible to show that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual misconduct; the incidents involving A, B and C were proximate in time, the three victims were similarly situated in that they were all prepubescent children of similar age who were the defendant's biological children, the defendant's conduct with respect to each child was sufficiently similar to demonstrate that he had a propensity toward aberrant sexual behavior, and the fact that the defendant engaged in additional types of misconduct with A did not render that misconduct so much more severe and shocking than his misconduct with B and C that severance was required.

2. The Appellate Court incorrectly concluded that the trial court had abused its discretion in permitting a dog to sit near A during her trial testimony for comfort and support; the trial court had inherent discretionary authority, apart from that conferred by the statute (§ 54-86g) enumerating the procedures that a court may employ when a child testifies in a sexual assault case, to order special procedures or accommodations to assist A in testifying, and, because the record demonstrated that the trial court expressly found that the dog would help A to testify more reliably and completely and that the dog's presence would not violate the defendant's right to a fair trial, and also demonstrated that the trial court took extensive measures to ensure that the jurors never saw the dog, which was out of their view, the trial court properly exercised its discretion in allowing the dog to sit near A while she testified.

Argued January 22—officially released June 14, 2016

Procedural History

Substitute informations charging the defendant, in the first case, with two counts of risk of injury to a child and one count of sexual assault in the first degree, in the second case, with three counts of risk of injury to a child and two counts of sexual assault in the first degree, and, in the third case, with two counts of risk

of injury to a child and one count of sexual assault in the first degree, brought to the Superior Court in the judicial district of Hartford, where the cases were consolidated; thereafter, the court, *Carbonneau*, *J.*, denied the defendant's motion to sever; subsequently, the cases were tried to the jury; verdicts and judgments of guilty, from which the defendant appealed to the Appellate Court, *Bear*, *Keller* and *Pellegrino*, *Js.*, which reversed the judgments of the trial court and remanded the cases for new trials, and the state, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Anne Mahoney*, senior assistant state's attorney, for the appellant (state).

James B. Streeto, senior assistant public defender, for the appellee (defendant).

Opinion

ZARELLA, J. After a jury trial, the defendant, Devon D., was convicted of four counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), three counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1), and four counts of risk of injury to a child in violation of § 53-21 (a) (2). The charges were brought in three separate informations and involved allegations made by three of the defendant's biological children—C1, C2 and C3.[1] From the judgments of conviction, the defendant appealed to the Appellate Court, which concluded that the trial court had abused its discretion in two ways—by permitting the three cases against the defendant to

[1] To be consistent with the Appellate Court's decision in the present case, we refer to the victims as C1, C2 and C3, and refer to the defendant's former girlfriend as GF. See *State* v. *Devon D.*, 150 Conn. App. 514, 516, 90 A.3d 383 (2014).

be tried jointly and by permitting C1 to testify with a dog at her feet for comfort and support. In the present appeal, the state contends that the Appellate Court incorrectly concluded that the trial court had abused its discretion in denying the defendant's motion to sever the three cases and in allowing a dog to be present with C1 during her testimony. We agree with the state.

The jury reasonably could have found the following relevant facts and procedural history. The defendant and his former girlfriend, GF, have several children together, including a girl, C1, and two boys, C2 and C3. After the defendant and GF separated in 2005, the children visited the defendant at his residence or at his mother's home. In October, 2009, seven year old C1 told GF that the defendant had put his "wee-wee" on her stomach and had touched her "private part" with his fingers. Erin Byrne, a clinical child interview specialist for the Children's Advocacy Center at Saint Francis Hospital and Medical Center, interviewed C1 in November, 2009, and in March, 2010. In the first interview, C1 "spoke about being in a bedroom [in her grandmother's house] with her father and that he had poured some lotion on her body, as well as poured the white stuff from his wee-wee on her body, and had contact with her genitals with his fingers." C1 also disclosed that the defendant had inserted his finger into her vagina while bathing her and using a rag, causing her to bleed. He also forced C1 and her siblings to watch a pornographic movie.

In the second interview, C1 told Byrne that the defendant had penetrated her "private part" with his penis, had attempted to penetrate her "butt" with his penis and had ejaculated on her several times. She also told Byrne that the defendant had forced her to perform fellatio on him, causing her to vomit. Additionally, C1 told Byrne that the defendant had told her that she might die from eating meat and that the reason he "does

the nasty stuff" is to get the "meat" she had eaten "out" of her body. C1 told Byrne that the defendant had put vinegar, or a substance that stung, on her vagina and in her ear, and that he had tried to put his penis in her ear, causing it to bleed. C1 stated that these incidents occurred in her grandmother's home on different days, and that the defendant had his clothes off or his pants pulled down each time. The defendant warned C1 not to say anything about these incidents.

Nine year old C2 also came forward with allegations against the defendant in November, 2009. In an interview with Stacy Karpowitz, a child forensic interview specialist with the Children's Advocacy Center, C2 stated that, on several occasions, the defendant had inserted a rag covered finger into his "butt hole" while C2 was bathing. C2 also stated that the defendant had rubbed C2's penis and made it go "up and down." In doing so, the defendant sometimes used a rag and sometimes used his hand. Finally, C2 stated that the defendant had made him watch a pornographic movie with his siblings and had warned him not to say anything.

Also, in November, 2009, Lisa Murphy-Cipolla, a clinical child interview supervisor with the Children's Advocacy Center, interviewed ten year old C3. C3 stated that the defendant had inserted his finger into C3's "butt" on more than one occasion, and that he had been using a rag, but the rag "slipped." The defendant also had squeezed C3's penis and had pulled back the foreskin on C3's penis on multiple occasions. C3 further stated that the defendant sometimes made him shower with C2, but he did not see the defendant do anything to C2. C3, however, had seen the defendant insert his finger into C1's "butt" on at least one occasion. Finally, C3 told Murphy-Cipolla that the defendant had made him watch a pornographic movie with his siblings and had warned him not to tell GF that the defendant was bathing him.

On the basis of these allegations, the defendant was arrested and charged with four counts of sexual assault in the first degree in violation of § 53a-70 (a) (2), three counts of risk of injury to a child in violation of § 53-21 (a) (1), and four counts of risk of injury to a child in violation of § 53-21 (a) (2). During a trial before a jury, the video-recorded interviews with C1, C2 and C3 were admitted into evidence as full exhibits, and all three recordings were played for the jury.

In its final charge to the jury, the trial court instructed: "In a criminal case in which the defendant is charged with a crime exhibiting abhorrent and compulsive sexual criminal behavior, evidence of the defendant's commission of another offense or offenses is admissible and may be considered for its bearing on any matter to which it is relevant. So for these three cases, you may use [C2's] and [C3's] testimony in this fashion in [C1's] case. In [C2's] case, you may use [C1's] and [C3's] testimony for this specific purpose. In [C3's] case, [C1's] and [C2's] testimony.

"However, evidence of another offense on its own is not sufficient to prove the defendant guilty of the crime or crimes charged in the informations. Bear in mind as you consider this evidence that, at all times, the state has the burden of proving beyond a reasonable doubt that the defendant committed each of the elements of the offense or offenses charged in each information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the informations. With regard to propensity evidence, like other evidence, you decide to give it the weight you find reasonable." Defense counsel did not object or take exception to the trial court's instructions to the jury.

After the jury returned verdicts of guilty as to all counts, the trial court rendered judgments in accordance with the verdicts. The defendant then appealed

to the Appellate Court, which reversed the judgments of conviction and remanded the cases for new trials. *State* v. *Devon D.*, 150 Conn. App. 514, 550, 90 A.3d 383 (2014). We granted the state's petition for certification to appeal from the judgment of the Appellate Court.[2] Additional facts will be set forth as necessary.

I

The first question in this certified appeal is whether the Appellate Court incorrectly concluded that the trial court had abused its discretion in denying the defendant's motion to sever the three cases against him. The state contends that the cases properly were joined for trial because the evidence in each case would have been admitted as prior misconduct in the other cases. We agree with the state.

The following procedural history and facts are relevant to our resolution of this claim. On March 29, 2011, the defendant filed a motion to sever the cases against him. During argument before the trial court, defense counsel claimed that the main concern was that the jury would aggregate the evidence against the defendant, so that, even if the evidence on any single charge would not persuade the jury of his guilt, "the sum total of all the charges . . . may persuade the jury that he's guilty of all of them." Counsel further argued that, because the case concerning C1 was more brutal and shocking than the cases concerning C2 and C3, the jurors might find the evidence in the first case so offensive that they would not be able to deliberate objectively with respect to the remaining two cases. Finally, defense counsel

[2] We granted the state's petition for certification to appeal, limited to the following two questions: First, "[d]id the Appellate Court properly conclude that the trial court erred by joinder of the three sexual assault cases against the defendant?" *State* v. *Devon D.*, 314 Conn. 909, 100 A.3d 402 (2014). Second, "[d]id the Appellate Court properly determine that the trial court's decision to allow an eight year old victim to testify accompanied by a comfort canine constituted an abuse of discretion?" Id.

argued that the cases should be tried separately because they were complex, involving multiple charges, children, witnesses, interviewers and police officers, and because curative instructions would not be sufficient to overcome the potential prejudice of trying the cases jointly.

The state responded that the trial would not be lengthy or overly complex because it involved easily separable fact patterns. The state emphasized that many of the witnesses would be called in all three cases and that, under *State* v. *DeJesus*, 288 Conn. 418, 470–74, 953 A.2d 45 (2008), it expected that evidence in the three cases would be cross admissible. Finally, the state noted that each case was "shocking on its own, so one of them is not more shocking than the other." Defense counsel refuted the state's contention that the evidence in each case would be admissible as prior misconduct in the other cases, pointing to the fact that the victims were different ages, that two victims were male and one was female, and that the allegations involved different types of penetration.

After hearing arguments from counsel, the trial court acknowledged that the allegations in all three cases were brutal and shocking and recognized the potential effect on the jurors. The trial court also noted the difficulties involved in satisfying the *Boscarino* test, which requires a showing that the cases are discrete and easily distinguishable, versus the *DeJesus* test, which requires a showing that the cases are similar. After considering these and other factors, including the effect of the trial on the child victims, the applicable case law, the court's ability to permit jurors to take notes and to provide cautionary instructions, and judicial economy, the court denied the motion for severance. The court noted in particular that the cases involved "discrete and easily distinguishable factual features," that the trial would not be lengthy or complex, and that, because the allega-

tions in all three cases were equally brutal and shocking, "[t]he jurors are going to be shocked to some extent in all three of these [cases]."[3]

The standards for reviewing a trial court's ruling on a motion pertaining to joinder are discussed at length in our decisions in *State* v. *LaFleur*, 307 Conn. 115, 159, 51 A.3d 1048 (2012), and *State* v. *Payne*, 303 Conn. 538, 544–50, 34 A.3d 370 (2012). In those cases, we rejected the notion of a blanket presumption in favor of joinder[4] and clarified that, when charges are brought in separate informations, and the state seeks to join those 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 factors set forth in *State* v. *Boscarino*, 204 Conn. 714, 722–24, 529 A.2d

[3] Although the trial court did not rule specifically on whether the evidence would have been cross admissible, it instructed the jury that the evidence in each case was admissible in the other cases to prove the defendant's propensity to commit crimes of an abhorrent and compulsive sexual nature. We conclude that the Appellate Court properly reviewed the issue of whether the evidence was cross admissible to show propensity because "both parties address[ed] this claim in light of the propensity standard for the admission of misconduct evidence in cases concerning crimes of a sexual nature that was adopted in *State* v. *DeJesus*, supra, 288 Conn. 470–74"; *State* v. *Devon D.*, supra, 150 Conn. App. 522 n.5; and because the test for admitting misconduct evidence to show a common scheme or plan also applies to admitting misconduct evidence to show a propensity to commit crimes of an abhorrent and compulsive sexual nature. See *State* v. *DeJesus*, supra, 476–77.

[4] When the trial in the present case took place, there was a presumption in favor of joinder. Although the presumption no longer applies; see *State* v. *Payne*, supra, 303 Conn. 548–49; the trial court's reliance on the presumption is not dispositive because the question before us on appeal remains the same. That question is whether the defendant has satisfied his 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. *LaFleur*, supra, 307 Conn. 159.

1260 (1987).[5] *State* v. *Payne*, supra, [549–50].'' (Footnote added; internal quotation marks omitted.) *State* v. *LaFleur*, supra, 157. Although the state bears the burden of proof in the trial court, ''[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 . . . .'' (Internal quotation marks omitted.) Id., 158. As we emphasized in *LaFleur*, ''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.

We start our analysis by determining whether the evidence in the cases concerning C1, C2 and C3 was cross admissible, such that evidence in each case would have been admissible as prior misconduct in the other cases. In *DeJesus*, we set forth the following standards for determining when evidence of prior sexual misconduct is admissible: ''[E]vidence of uncharged sexual misconduct properly may be admitted in sex crime cases to establish that the defendant had a tendency or a propensity to engage in aberrant and compulsive criminal sexual behavior if: (1) the trial court finds that such evidence is relevant to the charged crime in that it is not too remote in time, is similar to the offense charged and is committed upon persons similar to the

[5] In *Boscarino*, we identified the factors that a trial court should consider in determining whether separate trials might 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. *LaFleur*, supra, 307 Conn. 156.

prosecuting witness; and (2) the trial court concludes that the probative value of such evidence outweighs its prejudicial effect. In assessing the relevancy of such evidence, and in balancing its probative value against its prejudicial effect, the trial court should be guided by this court's prior precedent construing the scope and contours of the liberal standard pursuant to which evidence of uncharged misconduct previously was admitted under the common scheme or plan exception. Lastly, prior to admitting evidence of uncharged sexual misconduct under the propensity exception . . . the trial court must provide the jury with an appropriate cautionary instruction . . . ." *State* v. *DeJesus*, supra, 288 Conn. 476–77; see also Conn. Code Evid. § 4-5 (b) (effective January 1, 2012), in 73 Conn. L.J., No. 1, p. 211PB (July 5, 2011) (codifying propensity exception described in *DeJesus*).

Recognizing the difficulties of balancing the probative value of the evidence against its prejudicial effect, we have held that "the trial court's decision will be reversed only whe[n] abuse of [its] discretion is manifest or whe[n] an injustice appears to have been done. . . . On review by this court, therefore, every reasonable presumption should be given in favor of the trial court's ruling. . . . *State* v. *Merriam*, 264 Conn. 617, 659–61, 835 A.2d 895 (2003)." (Internal quotation marks omitted.) *State* v. *Romero*, 269 Conn. 481, 497, 849 A.2d 760 (2004).

Applying these standards in the present case, we conclude that the trial court properly exercised its discretion in permitting the cases to be tried together because the evidence in all three cases was cross admissible.[6]

[6] Because we conclude that the evidence was cross admissible, we need not consider whether the trial court properly applied the *Boscarino* factors. *State* v. *LaFleur*, supra, 307 Conn. 155 ("[w]here evidence is cross admissible . . . our inquiry ends"); *State* v. *Pollitt*, 205 Conn. 61, 68, 530 A.2d 155 (1987) (when evidence is cross admissible, "the defendant would not ordinarily be substantially prejudiced by joinder of the offenses for a single trial").

Turning first to the question of relevancy, it is undisputed that the incidents alleged by C1, C2 and C3 were proximate in time because all of the alleged misconduct occurred between January 1, 2006, and August 31, 2009. See, e.g., *State* v. *Jacobson*, 283 Conn. 618, 632–33, 930 A.2d 628 (2007) (upholding admission of uncharged misconduct that occurred approximately six and ten years before charged offenses). Second, it cannot reasonably be claimed that C1, C2 and C3 are not sufficiently similar witnesses. All three victims are prepubescent children of similar age who are the defendant's biological children. We are not convinced by the defendant's suggestion that the victims cannot be deemed similar witnesses simply because they do not share the same gender. This singular difference does not outweigh their shared attributes. See *State* v. *Romero*, supra, 269 Conn. 501 (although victims were different genders, both were prepubescent children who were of similar age when abuse began and were under defendant's care when it occurred).

Finally, the defendant's conduct with respect to each victim was sufficiently similar to demonstrate that he had a propensity toward aberrant sexual behavior. See, e.g., *State* v. *DeJesus*, supra, 288 Conn. 474–75. Because of the familial relationship, the defendant had access to and time alone with each victim. All of the sexual abuse occurred during the defendant's unsupervised visitation with the victims, either at his residence or his mother's residence. The defendant forced all of the victims to watch a pornographic movie. Although none of the victims needed help bathing, the defendant used the cover of bathing in each case as a means of touching them inappropriately. In each case, the defendant used a rag to maintain the pretense of washing, but, in each case, the purported washing resulted in digital anal or vaginal penetration. Not only did all three cases involve allegations that the defendant had used the rag to cam-

ouflage the inappropriate digital penetration, but all three victims also alleged that the defendant touched them inappropriately when he was not using the rag. Lastly, the defendant warned each victim not to tell anyone about his conduct. Given the extensive similarities between the conduct in the three cases, and in view of the liberal standard of admissibility governing the use of prior misconduct evidence in sexual assault cases, we cannot conclude that the trial court abused its discretion in denying the motion for severance.

We disagree with the Appellate Court's conclusions that "the only conduct arguably common to all three victims was the defendant's insertion of his finger into their 'butts' while they bathed" and that C1's allegations "reflect[ed] significant qualitative differences from the facts alleged in the cases involving C2 and C3 . . . ." *State* v. *Devon D.*, supra, 150 Conn. App. 529. Specifically, the Appellate Court focused on the following differences: (1) C1 alleged that the defendant was partially or fully undressed and that some of the abuse occurred in the bedroom, whereas C2 and C3 alleged that he remained clothed and that all of the abuse occurred in the bathroom; (2) C1 alleged penile penetration and fellatio, in addition to digital penetration; and (3) the "alleged conduct toward C1 [unlike the conduct toward C2 and C3] in no way could have been mistaken for an aggressive bathing practice." Id., 528.

With respect to the similarity of the charged and uncharged misconduct, this court has repeatedly recognized that it "need not be so unusual and distinctive as to be like a signature . . . ." (Internal quotation marks omitted) *State* v. *Gupta*, 297 Conn. 211, 228–29, 998 A.2d 1085 (2010). Rather, the question is whether the evidence is sufficiently similar to demonstrate a propensity "to engage in the type of aberrant and compulsive criminal sexual behavior with which he . . . [was] charged." (Internal quotation marks omitted.) Id., 224.

As we discussed previously in this opinion, the defendant engaged in multiple types of similar conduct with all three victims. The fact that the defendant was unclothed during his abuse of C1 and engaged in additional types of sexual misconduct with her does not outweigh these numerous similarities or erode the probative value of that evidence.

In addition, the fact that the defendant engaged in additional types of sexual misconduct with C1 does not render his conduct with her so much more severe and shocking than his conduct with C2 and C3 that severance is required. As the trial court noted, the allegations in all three cases were shocking, and the defendant's inappropriate touching and digital penetration of all three victims can only be characterized as severe. The fact that the defendant engaged in additional types of sexual misconduct with C1 does not render the defendant's conduct toward C2 and C3 any less severe. Even if the conduct toward C1 was significantly more egregious than his conduct toward C2 and C3, however, this court previously has upheld the admission of uncharged sexual misconduct when it differed in degree from the charged conduct. See, e.g., *State* v. *Jacobson*, supra, 283 Conn. 637–38; *State* v. *McKenzie-Adams*, 281 Conn. 486, 530–33, 915 A.2d 822, cert. denied, 552 U.S. 888, 128 S. Ct. 248, 169 L. Ed. 2d 148 (2007).

In *Jacobson*, the defendant hockey coach, Scott Jacobson, developed close relationships with two boys, M and B. *State* v. *Jacobson*, supra, 283 Conn. 622–23. He met with them frequently, gave them gifts, became friends with their mothers, invited them to sleep at his home and slept in the same bed with them. Id. M alleged that, during a sleepover, he awoke to find Jacobson performing oral sex on him. Id., 623. B alleged that, during a sleepover, he awoke to find Jacobson touching his penis with his hands and his mouth. Id., 624. B also alleged that, on subsequent occasions, Jacobson forced

B to touch his penis and attempted to have B sodomize him. Id., 625. During trial, the court permitted K, the mother of a boy who had been involved in a close relationship with Jacobson, to testify as evidence of a common scheme or plan. Id., 628–30. On appeal, this court rejected Jacobson's claim that K's allegations were not sufficiently similar to the allegations by M and B. See id., 637. We concluded that, "although [Jacobson] never sexually assaulted K's son, K's description of [Jacobson's] relationship with and actions toward her son—in particular, sleeping in the same bed with him at [Jacobson's] home—was sufficient to permit an inference that [Jacobson] was grooming K's son for the same kind of sexual abuse that [Jacobson] later inflicted on M and B." Id.

In *McKenzie-Adams*, the defendant high school teacher, Van Clifton McKenzie-Adams, was charged with multiple counts of sexual assault in connection with his relationships with two female students, N.R. and P.L. See *State* v. *McKenzie-Adams*, supra, 281 Conn. 490–91. The relationship with both victims began with intimate conversations in the school library, proceeded to embraces in the school hallway and ultimately resulted in sexual relations. See id., 491–95. The state also introduced the testimony of a third student, R.S., who testified that she and P.L. had had a conversation of a sexual nature with McKenzie-Adams in the school library and that he had embraced her in a sexual manner in the school hallways on several occasions. Id., 528. We concluded that the trial court properly exercised its discretion in admitting the testimony of R.S. as evidence of a common scheme or plan because McKenzie-Adams' sexual misconduct with R.S. was similar to his sexual misconduct during the initial stages of his relationships with both N.R. and P.L. See id., 530–31.

In the present case, the sexual misconduct in each case was much closer in degree of severity than in

Jacobson and *McKenzie-Adams*. If anything, the basis for the cross admissibility of the evidence in the present case is stronger than in *Jacobson* or *McKenzie-Adams* given the extensive similarities between the victims and their allegations. Moreover, our holdings in *State* v. *Gupta*, supra, 297 Conn. 229, and *State* v. *Ellis*, 270 Conn. 337, 358, 852 A.2d 676 (2004), are consistent with our conclusion that the evidence was cross admissible. In both of those cases, the charged and uncharged misconduct did not share the significant similarities that are present here. In *Ellis*, two of the victims, Julia S. and Kristin C., played softball for the defendant coach, Robert Ellis, and alleged that he had touched their breasts inappropriately. *State* v. *Ellis*, supra, 344–46. The third victim, Sarah S., did not play softball on Ellis' team but was connected to him through her sister and her father. Id., 346. Ellis' conduct toward her started with explicit telephone conversations and then became physical. See id., 347–48. Ellis' behavior progressed from touching Sarah S. inappropriately, to exposing himself to her and attempting to force her to touch him with her hands and mouth, to digital penetration of her vagina and attempted penile penetration. Id., 347–49. This court emphasized that "there were few similarities" between Ellis' abuse of Sarah S. and the other two victims. Id., 358.

Similarly, in *Gupta*, we specifically recognized that there were few similarities between the victims and the conduct alleged. In that case, the defendant physician, Sushil Gupta, touched two patients' breasts inappropriately during a medical examination. *State* v. *Gupta*, supra, 297 Conn. 215–17. With the third victim, who had been employed by Gupta's medical group for four years, Gupta engaged in far more overtly sexual behavior. See id., 217–19. In *Gupta*, as in *Ellis*, we emphasized the lack of similarity between the charged and the uncharged misconduct, emphasizing that "the only con-

duct common to all three victims" was that Gupta had felt the victims' breasts with his fingertips and grabbed them. Id., 226. In both cases, the uncharged misconduct had limited relevance because it shared virtually no similarities with the charged misconduct. That is not the case here.

Finally, we strongly disagree that, if the cases had been tried separately, the defendant in the present case could have raised a plausible claim that he was merely bathing C2 and C3. Cf. id., 222–33 (Gupta arguably could assert that improper touching of two victims' breasts was part of legitimate medical exam whereas his improper sexual comments and more overtly sexual acts toward third victim clearly did not constitute legitimate medical procedure). Notably, the defendant never claimed that joinder impaired his ability to assert such a theory with respect to C2 and C3, only that it made it likely that the jury would aggregate the evidence. Therefore, the state did not have an opportunity to make a proffer as to why such a claim would not be plausible. Accordingly, in view of the evidence presented by the state, it is clear that the facts simply would not support this assertion. C2, who was nine years old at the time of the abuse, testified that he had been bathing himself since he was five years old, that nothing had happened to make him especially dirty before the defendant bathed him, that the defendant never said anything to indicate that he was showing C2 how to clean himself appropriately, and that the defendant penetrated his anus in such a manner as to cause pain. C2 also testified that, on more than one occasion, the defendant touched C2's penis without the rag and made it go "up and down." C3, who was ten years old at the time of the abuse, offered similar testimony as to all of these circumstances, including that the defendant squeezed C3's penis and manipulated the foreskin of his penis on several occasions and for

sufficient duration to cause pain. Given these allegations, the defendant could not make a credible claim that he was merely vigorously bathing C2 and C3.

Having determined that the misconduct evidence was relevant to prove that the defendant had a propensity to engage in aberrant sexual behavior, we turn to whether the prejudicial value of the evidence outweighed its probative value. The defendant claims that the trial court did not address whether the prejudicial value of the evidence outweighed its probative value. He also claims that the trial court's instructions "exacerbated" the prejudicial effect of the misconduct evidence because "[t]he jury was told that [it was] to consider such evidence only to show that the defendant has a propensity to commit sex offenses." We disagree with both claims.

"We previously have held that the process of balancing probative value and prejudicial effect is critical to the determination of whether other crime[s] evidence is admissible. . . . At the same time, however, we . . . do not . . . requir[e] a trial court to use some talismanic phraseology in order to satisfy this balancing process. Rather . . . in order for this test to be satisfied, a reviewing court must be able to infer from the entire record that the trial court considered the prejudicial effect of the evidence against its probative nature before making a ruling." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *James G.*, 268 Conn. 382, 395, 844 A.2d 810 (2004). In conducting this balancing test, the question before the trial court "is not whether [the evidence] is damaging to the defendant but whether [the evidence] will improperly arouse the emotions of the jur[ors]." (Internal quotation marks omitted.) *State* v. *Smith*, 275 Conn. 205, 218, 881 A.2d 160 (2005).

In the present case, we are satisfied that the trial court weighed the prejudicial effect of the evidence

against its probative value before ruling on the motion to sever. The court acknowledged the shocking nature of the allegations and recognized their potential effect on the jurors. The court also considered the interests of judicial economy, the effect of the trial on the child victims, the applicable case law and the ability to use cautionary instructions to mitigate any prejudice stemming from the shocking nature of the evidence. Only after balancing these numerous factors did the trial court deny the motion for severance.

We also reject the defendant's claim that the trial court's cautionary instructions "exacerbated" any prejudice to the defendant by informing the jurors that they could consider the uncharged misconduct evidence "only" to show that the defendant had a propensity to engage in such conduct. We do not agree that the defendant has properly characterized the trial court's instruction,[7] and, even if we did, there is no merit to this claim because *DeJesus* stands for the proposition that uncharged misconduct evidence in sexual assault cases "may be admitted in sex crime cases to establish that the defendant had a tendency or a propensity to engage in aberrant and compulsive criminal sexual behavior"; *State* v. *DeJesus*, supra, 288 Conn. 476; and requires a cautionary instruction to that effect. Id., 477.

In sum, we conclude that the trial court properly exercised its discretion in permitting the three cases against the defendant to be tried jointly. The defendant cannot demonstrate that he was substantially prejudiced by the denial of his motion for severance because the evidence in all three cases would have been cross admissible to show that the defendant had a tendency

[7] The defendant does not raise a formal challenge to the trial court's instructions and does not cite to any specific language in the charge. In addition, defense counsel did not object or take exception to the trial court's instructions to the jury at trial.

or a propensity to engage in aberrant and compulsive sexual misconduct.

II

The second issue in this certified appeal is whether the Appellate Court correctly concluded that the trial court had abused its discretion in permitting a dog to sit near C1 during her testimony to provide comfort and support. The state challenges the Appellate Court's conclusion, arguing that the trial court properly exercised its discretion by balancing its determination that the dog's presence likely would help C1 to provide complete and reliable testimony against the possibility of prejudice to the defendant. We agree with the state.

The following facts and procedural history are relevant to our resolution of this claim. On July 5, 2011, the state filed a motion to permit a dog "to sit in close proximity to [C1] during [C1's] testimony, provided that such dog and the dog's handler shall not obscure [C1] from the view of the defendant or the jury . . . ." The state filed the motion after C1, who was eight years old at the time of trial, "had indicated to the victim witness advocate that she was concerned about people looking at her in the courtroom . . . ." Recognizing that the state's motion presented an issue of first impression in Connecticut, the court determined that it would conduct a full evidentiary hearing in accordance with *State* v. *Jarzbek*, 204 Conn. 683, 704, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988), and would "apply the more exacting standard of clear and convincing [evidence] . . . ." The court emphasized that its "reading of the case law indicate[d] that [the hearing] might not be necessary, but it appears to be the more prudent course of action . . . ." The state did not object to the hearing but noted that it did not believe a hearing was necessary.

During the hearing, David Meyers, a licensed clinical social worker, testified that approximately 40 percent of his practice during the previous ten years had involved the treatment of child trauma victims, including victims of sexual assault. He testified that the dog that would sit near C1 during her testimony, Summer, had been trained to be a service dog and occasionally provided support to children in his practice who experienced anxiety. At the time of trial, Summer had not yet been certified as a service dog[8] because she had only just reached the testing age of two. Meyers testified that he and Summer met C1 two hours before the hearing began. C1 initially refused to touch Summer but "became more and more comfortable as she began to pet her. She even touched her teeth and . . . sat with her on the floor and . . . appeared to be more connected and less fearful." Meyers explained that, in his practice, Summer "decreases people's level of anxiety, and she increases people's ability to engage and share difficult life situations." Meyers testified that he saw a similar response with C1 and that Summer's presence increased C1's ability to engage, to answer questions and to talk. After spending one hour with Summer, C1 was "more visibly relaxed, she was able to talk to [the prosecutor], she was able to talk to me about anecdotes about Summer and [was] visibly comfortable." According to Meyers, C1 said that having Summer near her would "help her feel more comfortable." When defense counsel asked Meyers whether he had any way of knowing "whether . . . [C1 would] be able to be more truthful, more reliable, have better memory of events that are a couple of years old with the presence of a dog or without a dog," Meyers responded that, in his experi-

[8] As the Appellate Court noted in its decision, there is a difference between service dogs, comfort dogs, therapy dogs, companion dogs and facility dogs, and these and additional terms are often used interchangeably. See *State* v. *Devon D.*, supra, 150 Conn. App. 538 n.10. Hereinafter, we use the term "dog" or refer to Summer by name.

ence, "when kids are anxious, they're less likely to be able to talk about those things, memories and life experiences. [C1] appeared less anxious during our time, so I'm not sure if that's a clear answer to your question, but it would be my opinion, as a dog handler child therapist, that she appeared more comfortable." In response to questioning from the court, Meyers explained that Summer would be able to lay still for five or six hours.

Defense counsel objected to the dog's presence, arguing that General Statutes § 54-86g (b),[9] which enumerates the procedures that a court may employ when a child testifies in a sexual assault case, does not contemplate the use of dogs. In response to questioning from the trial court, defense counsel clarified that he was *not* making a confrontation clause claim.[10] Rather, he claimed that the defendant's due process rights would be prejudiced because Summer's presence would improperly influence the jury by making it appear that C1 is someone with whom the jury should sympathize. Counsel suggested alternative procedures, such as having C1 testify outside the presence of the jury on closed circuit television or letting her hold a teddy bear or

[9] General Statutes § 54-86g (b) provides: "In any criminal prosecution of an offense involving assault, sexual assault or abuse of a child twelve years of age or younger, the court may, upon motion of the attorney for any party, order that the following procedures be used when the testimony of the child is taken: (1) Persons shall be prohibited from entering and leaving the courtroom during the child's testimony; (2) an adult who is known to the child and with whom the child feels comfortable shall be permitted to sit in close proximity to the child during the child's testimony, provided such person shall not obscure the child from the view of the defendant or the trier of fact; (3) the use of anatomically correct dolls by the child shall be permitted; and (4) the attorneys for the defendant and for the state shall question the child while seated at a table positioned in front of the child, shall remain seated while posing objections and shall ask questions and pose objections in a manner which is not intimidating to the child."

[10] We agree with the Appellate Court's conclusion that the defendant waived any right to assert that Summer's presence violated his constitutional right of confrontation. See *State* v. *Devon D.*, supra, 150 Conn. App. 538 n.9.

letting a trusted adult sit by her during her testimony. He also requested a curative instruction in the event that the court permitted Summer to be present. The state emphasized that it had considered counsel's suggestion to permit GF to sit with C1 but opted not to do so because the theory of the defense was that GF had coached her children to make false allegations against the defendant and because the procedure would defeat any sequestration order. The state also emphasized that the court possessed the inherent discretionary authority, "separate and apart from [§ 54-86g]," to permit C1 to testify with Summer nearby. Although the state also had prepared a motion to permit C1 to testify outside of the courtroom, it indicated that it would not pursue that more drastic measure unless it became necessary.

Following the hearing, the court recognized the need to "balance the [defendant's] due process rights . . . against the need to provide an atmosphere in which all witnesses can testify and provide the truth reliably, fully and completely," and emphasized that the defendant was "entitled to the jury's direct observation of all witnesses." The court opined that permitting Summer to be present would prevent "the need for the more drastic and onerous" procedure of video recording C1's testimony.

After taking these considerations into account and applying a standard of clear and convincing evidence, the court concluded that it "should allow all reasonable tools to make the courtroom a place of comfort and reliability for any witness, but especially a child witness, who, it is alleged, has faced child sexual abuse." The court concluded that permitting Summer to be present was within its discretion, that C1's testimony would be assisted, but not directed, by Summer's presence, and that the defendant's rights would not be prejudiced by Summer's presence with proper curative instructions and safeguards. The court directed that Summer would

be "put in place [on the witness stand] . . . in such a way that the dog will not be viewed by the jury in any way, shape or form,"[11] and solicited suggestions from counsel with respect to additional safeguards and curative instructions. Subsequently, counsel stipulated that the instructions would indicate that "[t]he witness is anxious about testifying in front of a group of people. The dog is not present due to any concern the witness has with the defendant's presence. The . . . dog met the witness [the day before] in preparation for court trial." The jury heard these instructions when the trial commenced, just before C1 testified, and as part of the court's final charge. Each time the court offered these instructions, it also admonished the jurors to disregard the presence of the dog, to draw no inference for or against any witness using a dog, that sympathy should play no part in its considerations or ultimate deliberation, and to "[t]hink of the dog like an interpreter, an aid to get the witness' testimony across to you more clearly."

On appeal to the Appellate Court, the defendant claimed that the trial court's ruling constituted an abuse of discretion and violated his confrontation and due process rights. See *State* v. *Devon D.*, supra, 150 Conn. App. 516, 538 and n.9. The Appellate Court concluded that, although the trial court had the inherent discretionary authority, apart from § 54-86g, to permit Summer to sit near C1 while she testified, "the court abused its discretion in granting the state's motion to [use this procedure] . . . because there was no finding [or] . . . a showing . . . that this special procedure was

[11] The record indicates that Summer was, in fact, put into place on the stand, out of view, before the jurors entered the courtroom for C1's testimony. There is nothing in the record to suggest that the jurors ever saw Summer, and the defendant does not claim that the jurors ever viewed the dog.

needed."[12] Id., 549. Although the Appellate Court held that a showing of need was required, it did not discuss what constitutes a showing of need. The defendant argues, on appeal to this court, that, under *State* v. *Jarzbek*, supra, 204 Conn. 704, the state was required to prove a compelling need for Summer's presence. The state argues, to the contrary, that the procedures in *Jarzbek* do not apply under these circumstances and that "the question on appeal is whether the trial court abused its discretion in balancing the likelihood that the accommodation—in this case, the . . . dog—would help [C1] testify truthfully and completely by reducing . . . her stress or trauma against the potential for prejudice to the defendant." We agree with the state. After considering the record and relevant authority, we conclude that the trial court properly exercised its discretion in granting the state's motion for special procedures.

Whether a trial court may permit a dog to sit near a witness during testimony in a criminal trial to provide comfort and support presents a question of first impres-

[12] The Appellate Court concluded that the defendant had waived his claim that the trial court's ruling violated his constitutional right of confrontation; *State* v. *Devon D.*, supra, 150 Conn. App. 538 n.9; see footnote 10 of this opinion; and noted that, because the cases were being remanded for new trials, there was no need to consider whether any possible prejudice to the defendant had been cured by the trial court's instructions. *State* v. *Devon D.*, supra, 550 n.13. Those questions are not before us in this certified appeal, which is limited to whether the Appellate Court properly determined that the trial court had abused its discretion in permitting Summer to sit near C1 while she testified. To the extent that the defendant has referred to these issues in his brief, both claims are unavailing. Not only do we agree with the Appellate Court's conclusion that the defendant waived any confrontation clause claim, but there is nothing in the record to suggest that Summer's presence interfered with the ability of defense counsel to view or cross-examine C1, or interfered with the jury's view of C1. Similarly, although the defendant makes the blanket statement that he was harmed by Summer's presence because it "implied that C1 had been traumatized . . . made her more sympathetic . . . [and] implied she [was] telling the truth," he refers to nothing in the record to substantiate this statement.

sion for this court. With respect to statutory authority for such a procedure, we agree with the Appellate Court's analysis and conclusion that § 54-86g (b) does not specifically authorize the use of a dog. See *State* v. *Devon D.*, supra, 150 Conn. App. 541–42. As the Appellate Court noted, although § 54-86g enumerates various special procedures that the court may use when a child testifies in a case involving sexual assault or abuse, it does not list the use of a dog among the authorized procedures. Id., 542.

We further agree with the Appellate Court's conclusion that, although § 54-86g does not authorize such a procedure, the trial court has inherent discretionary authority, separate and apart from the statute, to order special procedures or accommodations to assist a witness in testifying. See id., 543. As the Appellate Court recognized, it is well established that "[t]he function of the court in a criminal trial is to conduct a fair and impartial proceeding. . . . A trial judge in a criminal case may take all steps reasonably necessary for the orderly progress of the trial. . . . When the rights of those other than the parties are implicated, [t]he trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. . . . Moreover, [t]he [ability] of a witness [to testify reliably] is a matter peculiarly within the discretion of the trial court and its ruling will be disturbed only in a clear case of abuse or of some error in law." (Internal quotation marks omitted.) Id., quoting *State* v. *Torres*, 60 Conn. App. 562, 569–70, 761 A.2d 766 (2000), cert. denied, 255 Conn. 925, 767 A.2d 100 (2001). The trial court may, for example, exercise its discretion to permit a child to bring a special doll or comfort object from home. See *State* v. *Aponte*, 249 Conn. 735, 744–45, 738 A.2d 117 (1999); see also *State* v. *Torres*, supra, 569 (court did not abuse its discretion in permitting witness' fiancé to sit beside her

while she testified); *State* v. *McPhee*, 58 Conn. App. 501, 506–508, 755 A.2d 893 (court did not abuse its discretion in permitting witness to hold stuffed animal while testifying), cert. denied, 254 Conn. 920, 759 A.2d 1026 (2000). We therefore agree with the Appellate Court's conclusion that the trial court possessed the broad discretionary authority to order special procedures to ensure that C1 was able to testify reliably.

We disagree, however, with the Appellate Court's conclusion that the trial court abused its discretion in permitting C1 to testify with Summer at her feet. *State* v. *Devon D.*, supra, 150 Conn. App. 550. Specifically, we disagree with the Appellate Court's conclusion that the trial court was required to make an express finding that "*there was a need for this special procedure* to be implemented for C1, and that use of such special procedure would not deny the defendant a fair trial." (Emphasis in original.) Id. We conclude that the pivotal question is not whether the special procedure is necessary but whether it will aid the witness in testifying truthfully and reliably.[13] We further conclude that the record in the present case demonstrates that the trial court expressly found that Summer would help C1 to testify more reliably and completely and that Summer's presence would not violate the defendant's right to a fair trial. Finally, the record indicates that the trial court took extensive measures to ensure that the jurors never saw Summer. On the basis of the record, we conclude that the trial court properly exercised its discretion.

We start our analysis by clarifying the applicable standard of review. Although we apply an abuse of discretion standard to review the trial court's decision to permit Summer to sit near C1 during her testimony, we

[13] Because truthful and reliable testimony is an essential component of a fair trial, a finding that an accommodation will help a witness to testify more reliably also constitutes a finding that the accommodation is necessary.

engage in plenary review with respect to the standard and procedures that the trial court used in making this determination. See, e.g., *In re Tayler F.*, 296 Conn. 524, 537, 995 A.2d 611 (2010). With respect to those standards and procedures, the defendant argues that the trial court was required to find, by clear and convincing evidence, that the state had shown a compelling need for the use of Summer. See *State* v. *Jarzbek*, supra, 204 Conn. 707. The state contends that the compelling need test set forth in *Jarzbek* is not applicable because the defendant's right of confrontation is not at issue. We agree with the state and conclude that the appropriate standard is whether the trial court has balanced the extent that the special accommodation will aid the reliability of the witness' testimony against any possible prejudice to the defendant's right to a fair trial.

Because this court has not considered the appropriate standards and procedures that apply in this precise context, we turn to other jurisdictions for guidance. In the five cases in which courts have considered challenges to a trial court's decision to permit a dog to sit with a testifying witness to provide comfort and support, all have concluded that the trial court may exercise its discretion to permit such an accommodation. See *People* v. *Chenault*, 227 Cal. App. 4th 1503, 1517, 175 Cal. Rptr. 3d 1 (2014), review denied, California Supreme Court, Docket No. S220741 (October 15, 2014); *People* v. *Spence*, 212 Cal. App. 4th 478, 517, 151 Cal. Rptr. 3d 374 (2012), review denied, California Supreme Court, Docket No. S208415 (April 10, 2013); *People* v. *Tohom*, 109 App. Div. 3d 253, 266–67, 969 N.Y.S.2d 123 (2013), appeal denied, 22 N.Y.3d 1203, 9 N.E.3d 918, 986 N.Y.S.2d 423 (2014); *State* v. *Jacobs*, Docket No. 27545, 2015 WL 6180908, *6 (Ohio App. October 21, 2015), appeal denied, 145 Ohio St. 3d 1406, 46 N.E.2d 701 (2016); *State* v. *Dye*, 178 Wn. 2d 541, 553–55, 309 P.3d 1192 (2013). As the court noted in *Jacobs*, "[t]hese cases

reveal three principles that guide us . . . . First, trial courts are in the best position to determine how to control trial proceedings, especially the mode of interrogating witnesses. Second, in light of the trial courts' position and their discretion, it is not erroneous for them to approve a variety of special allowances for child victims of sexual abuse. And, third, these special allowances may include using a . . . dog during the child victim's testimony under certain circumstances." *State* v. *Jacobs*, supra, *6.

In each of these cases, the appellate court upheld the trial court's exercise of discretion when it was clear from the record that the dog's presence "would likely assist or enable [the witnesses] to testify completely and truthfully without undue harassment or embarrassment"; *People* v. *Chenault*, supra, 227 Cal. App. 4th 1520; would make the witness feel " 'more comfortable' "; *State* v. *Jacobs*, supra, 2015 WL 6180908, *6; would alleviate the witness' anxiety and help her to more easily discuss the conduct at issue; *People* v. *Tohom*, supra, 109 App. Div. 3d 267; or would serve to facilitate the testimony of a witness who was significantly anxious about testifying and who had developmental disabilities. *State* v. *Dye*, supra, 178 Wn. 2d 554, 557.

In *Chenault*, the California Court of Appeal held that, "[i]nstead of requiring a [case specific] finding that an individual witness needs the presence of a . . . dog . . . in exercising its discretion . . . a trial court should consider the particular facts of the case and the circumstances of each individual witness and determine whether the presence of a . . . dog would assist or enable that witness to testify without undue harassment or embarrassment and provide complete and truthful testimony. . . . If the trial court finds that the presence of a . . . dog would likely assist or enable the individual witness to give complete and truthful testimony and

the record supports that finding, the court generally will act within its discretion . . . by granting a request for the presence of the . . . dog when that witness testifies." (Footnote omitted.) *People* v. *Chenault*, supra, 227 Cal. App. 4th 1517. After reviewing the record in *Chenault*, the California Court of Appeal held that the trial court properly exercised its discretion, noting that it "made implicit findings that the presence of [the dog] . . . would assist or enable [the child victims] to testify completely and truthfully without undue harassment or embarrassment." Id., 1520; see also *People* v. *Tohom*, supra, 109 App. Div. 3d 256–58, 267 (upholding decision to allow dog to accompany child witness during her testimony when social worker testified that dog would decrease witness' anxiety, allow her to communicate better, and better express herself). We find the reasoning in *Chenault* and *Tohom* persuasive because it focuses the trial court's attention on the central question of whether a special accommodation will serve to aid a witness in testifying reliably and completely. Such testimony, in turn, helps to ensure a fair and impartial trial.

We also agree with the state that the compelling need standard set in *Jarzbek* does not apply in the present case because the defendant's right of confrontation is not at issue. In *State* v. *Jarzbek*, supra, 204 Conn. 684, this court considered whether a child victim in a case involving alleged sexual abuse could testify through the use of a video recording made outside the defendant's physical presence. Because this procedure necessarily infringed on the defendant's constitutional right of confrontation, this court concluded that "a trial court must determine, at an evidentiary hearing, whether the state has demonstrated a compelling need for excluding the defendant from the witness room during the [video recording] of a [child] victim's testimony." Id., 704. This court also held that the state "bears the burden of prov-

ing such compelling need by clear and convincing evidence." Id., 705.

The rigorous procedures set forth in *Jarzbek* are not appropriate in the present case because the defendant's right of confrontation is not at issue. See, e.g., *State* v. *McPhee*, supra, 58 Conn. App. 507–508 (declining to extend *Jarzbek* standard to case in which defendant claimed special accommodations to witness aroused jurors' sympathies). Defense counsel informed the trial court that the defendant was not claiming that Summer's presence violated his right of confrontation, and the defendant makes no claim on appeal that Summer interfered with counsel's ability to cross-examine C1 or impeded his view or the jury's view of C1. In fact, as the trial court noted, permitting Summer to sit near C1 during her testimony was intended to obviate the need for the more drastic measure of securing C1's testimony by video recording.

We conclude that the trial court may exercise its discretion to permit a dog to provide comfort and support to a testifying witness. Before doing so, the court must balance the extent to which the accommodation will help the witness to testify reliably and completely against any possible prejudice to the defendant's right to a fair trial. The trial court should consider the particular facts and circumstances for the request to have a dog accompany the particular witness, the extent to which the dog's presence will permit the witness to testify truthfully, completely and reliably, and the extent to which the dog's presence will obviate the need for more drastic measures to secure the witness' testimony. The trial court should balance these factors against the potential prejudice to the defendant and the availability of measures to mitigate any prejudice, such as limiting instructions and procedures to limit the jury's view of the dog.

Applying these standards in the present case, we conclude that the trial court properly exercised its discretion in permitting Summer to sit near C1 during her testimony. The court heard testimony that C1 was anxious about testifying, that children who are anxious are less likely to be able to talk about their experiences, and that Summer made C1 feel more comfortable. Meyers testified that Summer helped C1 to be less anxious and more verbal, to engage, to answer questions, and to talk. On the basis of this evidence, the court found that C1's testimony would be "supported and assisted in an appropriate manner by [Summer's] presence . . . ."

The court recognized its duty to "balance the [defendant's] due process rights . . . against the need to provide an atmosphere in which all witnesses can testify and provide the truth reliably, fully and completely." In doing so, the court considered a number of factors, including that the defendant was "entitled to the jury's direct observation of all witnesses," that a dog would not be able to coach C1's testimony, and that permitting Summer to sit near C1 during her testimony would obviate the need for capturing C1's testimony through a video recording. After considering these factors, the court concluded that the defendant's rights would not be prejudiced by Summer's presence. Moreover, the jurors never saw Summer because the court excused the jury prior to C1's testimony so that Summer would be on the witness stand, out of view, before the jury returned. This procedure eliminated the possibility that the jurors might be swayed by the presence of "[a] cute little kid with her cute dog," as the defendant feared.[14]

[14] The jury was instructed that "[t]he witness [C1] is anxious about testifying in front of a group of people. The dog is not present due to any concern the witness has with the defendant's presence." The court also informed the jurors that C1 had only just met Summer, and that they were to disregard Summer's presence and to "[t]hink of the dog like an interpreter, an aid to get the witness' testimony across to you more clearly." To the extent that the defendant now claims that the trial court's instructions actually exacerbated any prejudice to the defendant, we note that defense counsel specifically requested the foregoing instructions.

After examining the record in the present case, we conclude that the trial court properly exercised its discretion in permitting Summer to sit near C1 during her testimony. We therefore reverse the judgment of the Appellate Court.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to render judgment affirming the judgments of the trial court.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* TERI A. BUHL
(SC 19412)
(SC 19413)

Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson, Js.

Syllabus

The defendant, who had been convicted of breach of the peace in the second degree and harassment in the second degree, appealed to the Appellate Court, claiming that there was insufficient evidence to support her convictions and raising various constitutional claims under the first and fourteenth amendments to the United States constitution. The defendant frequently visited the home of her boyfriend, P, where he lived with his seventeen year old daughter, M. During M's high school graduation, posts appeared under a fictitious profile on Facebook, a social networking website, containing derogatory remarks, a photograph of M, and photographs of various diary entries that had been stored in her bedroom nightstand and described, inter alia, a party at which she drank alcohol and engaged in oral sex. M was informed of the Facebook posts by a friend and she subsequently told the police and her father what had happened. The following day, P received an envelope by overnight mail containing an unsigned letter from an alleged "friend" and the photographs of M's diary entries. When P told the defendant about these incidents, she did not initially react, however, she told P two days later that she had sent the envelope and that its contents had been given to her by one of M's friends. P then told the police that the defendant had sent him the envelope and, following an investigation, the defendant was arrested. At trial, M testified to her belief that any member of the public could view the Facebook posts because she was able to access the fictitious profile from her own account. On appeal, the Appellate

Court concluded that there was insufficient evidence to support the defendant's breach of the peace conviction because the state bore the burden of proving that the posts were publicly exhibited and had failed to present testimony from a person with suitable knowledge of privacy settings on Facebook. The Appellate Court further concluded that the defendant's harassment conviction was supported by sufficient evidence and that the defendant's various constitutional claims were inadequately briefed. Thereafter, the state and the defendant, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court improperly determined that there was insufficient evidence to support the defendant's breach of the peace conviction: the trial court reasonably could have found that the posts were publicly exhibited, this court having concluded that the trial court's apparent lack of familiarity with Facebook did not create a need for expert testimony regarding the public nature of the Facebook posts, that M was familiar with its basic functionalities, explained simple concepts regarding privacy settings to the trial court, and testified as to her own individual perceptions of the fictitious profile, and that the elementary Facebook concepts here did not go beyond the field of ordinary knowledge and experience of an objective trier of fact; moreover, the defendant's breach of the peace conviction had to be reinstated, this court having reviewed the defendant's remaining sufficiency claims regarding that charge in the interests of judicial economy and having concluded that there was sufficient circumstantial evidence to establish, beyond a reasonable doubt, that the defendant was the individual who posted the Facebook entries, including evidence that the defendant had access to M's nightstand, admitted to possessing the diary entries the day before P received them by overnight mail, and that she had a tense and uncomfortable relationship with M, and that the defendant intended to inconvenience, annoy, or alarm M given the language of, and circumstances surrounding, the posts.
2. The Appellate Court properly concluded that there was sufficient evidence to support the defendant's harassment conviction, this court having concluded that the trial court reasonably could have found that the circumstances surrounding the anonymous mailing of the envelope, the contents of the envelope, and the defendant's behavior thereafter demonstrated, beyond a reasonable doubt, her intent to harass, annoy, or alarm P or M; although the fact that the mailing was allegedly sent from a "friend" could show concern for M, rather than an attempt to harass, the trial court could have reasonably inferred that the defendant had fabricated the letter to hide her prior misdeeds of copying M's diary entries and posting them on Facebook.
3. The Appellate Court did not abuse its discretion by declining to consider the defendant's constitutional claims on the ground that they were inadequately briefed: although the defendant's brief to the Appellate Court cited the appropriate standard of review and cases in support of each

of her constitutional claims, discussion of those issues was short, confusing, repetitive, and disorganized, and was combined with her sufficiency claims in contravention of the rule of practice (§ 67-4 [d]) requiring arguments in a brief to be divided under appropriate headings and to include separate statements of the applicable standard of review on each point; although the state responded to the defendant's constitutional claims in its brief to the Appellate Court, this court declined to relieve the defendant of her burden to adequately brief her appellate claims based solely on the state's response.

Argued January 19—officially released June 21, 2016

Procedural History

Substitute information charging the defendant with the crimes of harassment in the second degree, breach of the peace in the second degree and interfering with an officer, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, and tried to the court, *Wenzel*, *J.*; thereafter, the court denied the defendant's motions for a judgment of acquittal, to set aside the verdict and for a new trial; judgment of guilty of harassment in the second degree and breach of the peace in the second degree, from which the defendant appealed to the Appellate Court, *Beach*, *Bear* and *Pellegrino*, *Js.*, which reversed in part the trial court's judgment and remanded the case with direction to render judgment of acquittal on the charge of breach of the peace in the second degree, and, on the granting of certification, the state and the defendant filed separate appeals with this court. *Affirmed in part*; *reversed in part*; *judgment directed.*

Jonathan M. Sousa, special deputy assistant state's attorney, with whom, on the brief, were *David I. Cohen*, state's attorney, and *Donna M. Krusinski*, assistant state's attorney, for the appellant in Docket No. SC 19412 and the appellee in Docket No. SC 19413 (state).

Stephan E. Seeger, with whom, on the brief, was *Igor Kuperman*, for the appellee in Docket No. SC 19412 and the appellant in Docket No. SC 19413 (defendant).

ROBINSON, J. These two certified appeals are brought, respectively, by the state and the defendant, Teri A. Buhl, from the judgment of the Appellate Court, which reversed the defendant's conviction for breach of the peace in the second degree and affirmed her conviction for harassment in the second degree. *State* v. *Buhl*, 152 Conn. App. 140, 161, 100 A.3d 6 (2014). In its appeal, the state claims that the Appellate Court improperly concluded that there was insufficient evidence to support the defendant's breach of the peace conviction. In her appeal, the defendant claims that the Appellate Court improperly: (1) concluded that there was sufficient evidence to support her harassment conviction; and (2) declined to consider her constitutional claims on the ground that they were inadequately briefed. We affirm in part and reverse in part the judgment of the Appellate Court. Specifically, we conclude that the Appellate Court: (1) improperly determined that there was insufficient evidence to support the defendant's breach of the peace conviction; (2) properly concluded that there was sufficient evidence to support her harassment conviction; and (3) did not abuse its discretion in determining that her constitutional claims were inadequately briefed.

The record reveals the following facts and procedural history. In June, 2010, the defendant, a journalist, was involved in a romantic relationship with P and working on an investigative story about underage drinking.[1] The defendant had been dating P for two years, and she frequently visited P's home, often several times per week. P was divorced, and M, his seventeen year old daughter from his previous marriage, resided with him

[1] Consistent with the opinion of the Appellate Court, we decline to identify certain individuals in the present case in order to protect the privacy interests of minor children. *State* v. *Buhl*, supra, 152 Conn. App. 142 n.2.

for one half of each week. M testified that her relationship with the defendant was "tense" and "uncomfortable." M kept handwritten diary entries in a drawer of a nightstand in her bedroom at P's home.

On June 23, 2010, the night of M's high school graduation, M received a telephone call from a friend, B, who stated that he had seen a "fake" profile on Facebook, a social networking website, with posts about her.[2] Because B had received and accepted a friend request from the person who had created the fictitious account, M logged into Facebook through B's account to view the posts. M located the profile, which was created under the name "Tasha Moore." The profile contained a post that read: "[M] gets so drunk at parties that boys know she is an easy hook up. In April . . . she gave [O] a blow job [at a party] and then threw up. [O] calls her that deep throat JAP.[3] [M] told her friends she

[2] "Facebook is a social networking website that allows private individuals to upload photographs and enter personal information and commentary on a password protected 'profile.' " *State* v. *Eleck*, 130 Conn. App. 632, 634 n.1, 23 A.3d 818 (2011), aff'd, 314 Conn. 123, 100 A.3d 817 (2014). To create a Facebook profile, a person chooses a name under which the profile will be listed, enters his or her birth date and e-mail address, and selects a password. *Smith* v. *State*, 136 So. 3d 424, 432 (Miss. 2014). Thereafter, the profile may be accessed on any computer or mobile device by logging into Facebook's website using the same e-mail address and password combination. See id.

Users post content to their profiles, which may include "written comments, photographs, digital images, videos, and content from other websites. To create a . . . post, users upload data from their computers or mobile devices directly to the Facebook website." *Ehling* v. *Monmouth-Ocean Hospital Service Corp.*, 961 F. Supp. 2d 659, 662 (D.N.J. 2013). Users also create networks of Facebook "friends" by sending and accepting friend requests. *State* v. *Eleck*, supra, 130 Conn. App. 634 n.1.

"By default, Facebook pages are public. However, Facebook has customizable privacy settings that allow users to restrict access to their Facebook content. Access can be limited to the user's Facebook friends, to particular groups or individuals, or to just the user." *Ehling* v. *Monmouth-Ocean Hospital Service Corp.*, supra, 961 F. Supp. 2d 662. Subject to these privacy settings, a user's "friends" can see certain aspects of the user's profile, including the user's list of friends, and can write comments that appear on the profile. *State* v. *Eleck*, supra, 130 Conn. App. 634 n.1.

[3] "JAP" is a derogatory term meaning "Jewish American Princess." *Bernstein* v. *Sephora*, 182 F. Supp. 2d 1214, 1218 (S.D. Fla. 2002).

thought giving the best [blow job] would help make [O] her boyfriend. You wonder why some [of the] girls [at M's high school] never learn how to behave around boys." (Footnote added.) That post also contained a photograph of M. A second post contained six photographs of diary entries from M's nightstand, which the author of the post called M's "[c]onfession [l]etter." The diary entries described M drinking alcohol at a party and performing oral sex on a boy. Although "Tasha Moore" sent friend requests to seven or eight of M's friends from school, several of whom accepted the requests, she did not send a friend request to M herself. M was too upset to go out that night to celebrate her graduation. She continued to receive telephone calls from "most people" she knew from school that night asking about the posts.

On the morning of June 24, 2010, M sent a message to "Tasha Moore" via Facebook asking her to take down the posts and warning her that, if they were not removed, she would go to the police. When the posts remained on Facebook, M brought copies of them to the police station and explained what had happened to Officer Daniel Gulino. M then told her parents what had happened.

Later that afternoon, P received an anonymous envelope, sent by overnight mail, which contained copies of M's diary entries—the same ones that had been posted on Facebook.[4] A typed, unsigned cover letter read as follows: "[P], I am a casual friend of your daughter [M]. I told my mom about the story you'll read in this letter that [M] shared with us this spring and she said I should share it with you. [O], the guy [M] hooked up with, has been bragging to my boyfriend and other senior guys about what [M] did with him that night.

[4] When M checked her nightstand, she found that the original diary entries remained there.

He's not really a nice guy. She just gets so drunk so fast sometimes I don't know if she even remembers hooking up with guys. I know she wanted [O] to be her boyfriend but he hardly talked to her after that night. She only showed a few of us these letters . . . . Please don't tell her one of her friends wrote you but my [m]om said it is best if you read them." P and M returned to the police station with these materials.

The next night, on June 25, 2010, P had dinner with the defendant and told her about these events. He explained how "shocked" he was that such a "crazy thing" was going on, and stated that a police investigation was pending. P "got no reaction" from the defendant. Two days later, however, the defendant told P that she had sent the anonymous mailing. She explained that a friend of M's had contacted her because she was concerned about M, and the friend had produced copies of M's diary entries. The defendant claimed that she convinced that friend to turn the copies over to her along with a cover letter explaining the circumstances. When P asked for the friend's name, the defendant refused to reveal that information, stating that she had promised to keep it confidential.

P informed Officer Gulino of the identity of the anonymous mailer. At this point, Officer Gulino already had concluded that the person who took M's diary entries was someone P or M knew because the doors to P's home were kept locked and there were no signs of forced entry. When Officer Gulino spoke with the defendant over the telephone, she told him that she was doing an investigative story on underage drinking in the area, but "adamantly denied" posting M's diary entries on Facebook. When asked if she was "Tasha Moore," the defendant responded, "I'm Teri Buhl, not Tasha Moore." Officer Gulino then turned the investigation over to Sergeant Carol Ogrinc.

Sergeant Ogrinc served an ex parte order on Facebook for the disclosure of the Internet Protocol address (IP address) associated with the "Tasha Moore" profile. After receiving this information, Sergeant Ogrinc then served an ex parte order on Cablevision, an Internet service provider, seeking the disclosure of the person associated with the IP address she was investigating. Cablevision reported that person was the defendant. See footnote 19 of this opinion.

The defendant was subsequently arrested and charged, relevant to these appeals, with breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (4), and harassment in the second degree in violation of General Statutes § 53a-183 (a) (2).[5] The state alleged that the defendant committed harassment by posting M's diary entries on Facebook or sending the anonymous mailing to P. The state based the breach of the peace charge on the Facebook posts only. After a court trial, the court convicted the defendant of both offenses and sentenced her to a total effective sentence of nine months incarceration, execution suspended after thirty days, followed by one year of probation.[6]

The defendant appealed from both convictions to the Appellate Court, claiming that there was insufficient evidence to support her breach of the peace conviction because the state had not proven that: (1) the Facebook posts were "publicly exhibit[ed]"; (2) she posted M's diary entries on Facebook; or (3) she intended to "inconvenience, [annoy] or alarm" M by posting the diary entries on Facebook. General Statutes § 53a-181 (a). The defendant further contended that there was

[5] Although § 53a-183 was amended in 2012; see Public Acts 2012, No. 12-114, § 13; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[6] The trial court did not specify on which basis it found the defendant guilty of harassment.

insufficient evidence to support her harassment conviction, based on the anonymous mailing, because the state had not proven that she intended to "harass, annoy or alarm" P or M by sending the mailing.[7] General Statutes § 53a-183 (a) (2). Embedded within these sufficiency arguments, the defendant also asserted several constitutional claims based on the first amendment to the United States constitution and the due process clause set forth in the fourteenth amendment to the United States constitution.

The Appellate Court determined that the defendant had properly set forth sufficiency arguments with respect to both convictions, but had not adequately briefed her constitutional claims. *State* v. *Buhl*, supra, 152 Conn. App. 151. The Appellate Court concluded that there was insufficient evidence to support her breach of the peace conviction because the state had not proven that the Facebook posts were publicly exhibited. Id., 155. The Appellate Court did not address the defendant's arguments with respect to the other elements of the crime. Id., 155 n.7. In reviewing the defendant's harassment conviction, the Appellate Court concluded that sufficient evidence demonstrated her intent to "harass, annoy or alarm" P or M by sending the anonymous mailing. Id., 154. The Appellate Court, therefore, reversed the defendant's breach of the peace conviction and affirmed her harassment conviction. Id.,

[7] The defendant also argued that there was insufficient evidence to support her harassment conviction based on the Facebook posts because, as with her breach of the peace conviction, the state had not proven her identity as the Facebook poster or her intent to "harass, annoy or alarm" M by posting her diary entries on Facebook. General Statutes § 53a-183 (a) (2). The Appellate Court did not address these contentions, instead affirming the defendant's harassment conviction on the basis of the anonymous mailing alone. *State* v. *Buhl*, supra, 152 Conn. App. 152–54. We agree with the Appellate Court that sufficient evidence supports the defendant's harassment conviction based on the anonymous mailing on that ground. We therefore, similarly, do not address whether the state proved its alternative theory of harassment vis-à-vis the Facebook posts.

161. These certified appeals followed. Additional facts and procedural history will be set forth as necessary.

I

The state claims in its appeal that the Appellate Court improperly concluded that there was insufficient evidence to prove that the Facebook posts were publicly exhibited with respect to the defendant's breach of the peace conviction. In response, the defendant argues to the contrary. We agree with the state. We further conclude that the breach of the peace conviction must be reinstated because the trial court reasonably could have found that the state had met its burden of proving the other elements of the crime at trial, namely, that: (1) the defendant was the person who posted M's diary entries on Facebook; and (2) the defendant intended to "inconvenience, [annoy] or alarm" M by posting her diary entries on Facebook. General Statutes § 53a-181 (a). The state preemptively raises these claims in the event that we agree that there was sufficient evidence to prove that the Facebook posts were publicly exhibited.[8]

The parties do not dispute that our well known standard of review for sufficiency of the evidence claims applies to these appeals, both as to the construction to be given the evidence at trial and the inferences that can be drawn from that evidence. See *State* v. *Davis*, 283 Conn. 280, 329–30, 929 A.2d 278 (2007); see also *State* v. *Drupals*, 306 Conn. 149, 157, 49 A.3d 962 (2012).

A

The state first claims that the Appellate Court improperly concluded that there was insufficient evidence

[8] Because we conclude that there was sufficient evidence to support the trial court's finding that the Facebook posts were publicly exhibited, we address these remaining elements in the interests of judicial economy, rather than remanding them to the Appellate Court for initial consideration. See, e.g., *State* v. *James*, 261 Conn. 395, 411, 802 A.2d 820 (2002). The defendant does not appear to dispute the fact that the Facebook posts contain "offensive, indecent or abusive matter . . . ." General Statutes § 53a-181 (a) (4).

demonstrating that the Facebook posts were "publicly" exhibited, as required by § 53a-181 (a) (4).[9] Specifically, the state argues that the Appellate Court improperly determined that expert testimony was required to prove the public nature of the posts and, in doing so, relied too heavily on a comment by the trial court expressing its unfamiliarity with Facebook, and failed to give proper deference to the trial court's factual findings and credibility determinations. The defendant argues in response that the Appellate Court properly determined that expert testimony was required to prove the public nature of the posts, given the trial court's lack of knowledge of Facebook, and properly determined that M's testimony on this point was contradictory. We agree with the state and conclude that there was sufficient evidence of a public exhibition of the Facebook posts at trial.

The record reveals the following additional facts and procedural history. The state's evidence regarding the public nature of the Facebook posts came primarily from M's testimony. Toward the beginning of her testimony, when the issue of Facebook arose, the trial court stated, "I should forewarn counsel, I don't keep a Facebook page, so please feel free to explain the significance of different Facebook issues as we get to them because I will not necessarily appreciate them." (Internal quotation marks omitted.) Id., 158. M subsequently explained how to "friend" someone on Facebook—by sending them a friend "request" or invitation to become friends—and how, if the person accepts the request, the two users become Facebook "friends." M further explained that a user's profile may be accessible to

[9] General Statutes § 53a-181 (a) provides in relevant part: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . (4) publicly exhibits, distributes, posts up or advertises any offensive, indecent or abusive matter concerning any person . . . ."

the public, or only to his or her network of "friends," depending on the user's privacy settings. See footnote 2 of this opinion. Specifically, with respect to the "Tasha Moore" profile, M testified that she initially viewed the profile through the account of B, who had become friends with "Tasha Moore," but later viewed the exact same content through her own profile, even though she had never become friends with "Tasha Moore." Because M could access the posts without becoming friends with "Tasha Moore," M stated her belief that the profile was "unprivate" and, thus, any member of the public could view the profile and the posts about M.

The Appellate Court concluded that this evidence was insufficient to establish that the Facebook posts were publicly exhibited[10] for two primary reasons: (1) expert testimony[11] was required to establish the public nature of the posts, given the trial court's apparent unfamiliarity with Facebook; and (2) M's testimony on this point was contradictory. *State* v. *Buhl*, supra, 152

[10] The Appellate Court reasoned that the Facebook posts had to be exhibited in a "public place," defined in § 53a-181 (a) as an area "used or held out for use by the public," in order to be publicly exhibited. (Emphasis omitted.) *State* v. *Buhl*, supra, 152 Conn. App. 158. Applying this definition, the Appellate Court concluded that to be publicly exhibited, the Facebook posts had to be accessible by the general public, and not only to "Tasha Moore's" friends. See id., 158. Because we conclude that the trial court reasonably could have concluded that the posts *were* accessible to the general public on the facts of the present case, we need not decide whether a Facebook post that is accessible only to a user's network of friends is publicly exhibited for the purposes of § 53a-181 (a). We leave that question for another day.

[11] The Appellate Court determined that the state needed to present testimony "from a person with suitable knowledge, experience or other relevant qualification relating to the operation of Facebook's privacy settings," but noted that "[s]uch testimony need not necessarily be in the form of expert testimony." *State* v. *Buhl*, supra, 152 Conn. App. 160 and n.9. It is unclear what additional knowledge or experience the Appellate Court considered necessary to establish the public nature of the posts, beyond M's testimony as a Facebook user, short of expert testimony. We, therefore, consider whether expert testimony was required to prove the public element of the crime.

Conn. App. 156–61. We find these rationales unavailing for the reasons explained subsequently in this opinion.

1

The Appellate Court first stated that expert testimony was required to demonstrate that the posts were publicly exhibited, in light of the trial court's inexperience with Facebook. Id., 160–61. Expert opinions "concerning scientific, technical or other specialized knowledge" may be necessary to "assist the trier of fact in understanding the evidence or in determining a fact in issue." Conn. Code Evid. § 7-2. "Although expert testimony may be helpful in many instances, it is required only when the question involved goes beyond the field of ordinary knowledge and experience of the trier of fact. . . . The trier of fact need not close its eyes to matters of common knowledge solely because the evidence includes no expert testimony on those matters." (Internal quotation marks omitted.) *State* v. *Smith*, 273 Conn. 204, 211, 869 A.2d 171 (2005). "Whether expert testimony is required in a particular case is determined on a case-by-case basis and its necessity is dependent on whether the issues are of sufficient complexity to warrant the use of the testimony as assistance to the . . . court." *Johnson* v. *Commissioner of Correction*, 34 Conn. App. 153, 158, 640 A.2d 1007, cert. denied, 229 Conn. 919, 644 A.2d 914 (1994).

Regardless of any comments by the trial court, the elementary Facebook concepts in the present case did not go beyond "the field of ordinary knowledge and experience" of an objective trier of fact. *State* v. *Smith*, supra, 273 Conn. 211. The prevalence of Facebook use in American society cannot be reasonably questioned. Indeed, a 2015 survey performed by the Pew Research Center reveals that 72 percent of American adults that use the Internet also use Facebook. Pew Research Center, "The Demographics of Social Media Users," (2015)

available at http://www.pewinternet.org/2015/08/19/the-demographics-of-social-media-users (last visited May 25, 2016); see also *Vincent* v. *Story County*, United States District Court, Docket No. 4:12CV00157 (RAW) (S.D. Iowa January 14, 2014) ("[t]he use of . . . social media like Facebook is an ever increasing way people speak to each other in the twenty-first century"); *State* v. *Craig*, 167 N.H. 361, 369, 112 A.3d 559 (2015) ("Facebook and other social media sites are becoming the dominant mode of communicating directly with others, exceeding e-mail usage in 2009"); *Forman* v. *Henkin*, 134 App. Div. 3d 529, 543, 22 N.Y.S.3d 178 (2015) ("Facebook and other similar social networking sites are so popular that it will soon be uncommon to find a . . . [person] who does not maintain such an on-line presence"). Nor were they "technically complex issue[s]" requiring expert testimony. *River Bend Associates, Inc.* v. *Conservation & Inland Wetlands Commission*, 269 Conn. 57, 78, 848 A.2d 395 (2004); see also *Graziosi* v. *Greenville*, 985 F. Supp. 2d 808, 810 (N.D. Miss. 2013) ("Facebook claims to enable 'fast, easy, and rich communication' "), aff'd, 775 F.3d 731 (5th Cir. 2015); *United States* v. *Amaya*, 949 F. Supp. 2d 895, 912 (N.D. Iowa 2013) ("Facebook offers . . . an affordable, easy, and extremely viable option to seek information"); *Olson* v. *LaBrie*, Docket No. A11-558, 2012 WL 426585, *1 (Minn. App. February 13, 2012) (process for finding users on Facebook is "simple"), review denied (Minn. April 17, 2012); *Smith* v. *State*, 136 So. 3d 424, 432 (Miss. 2014) (creating Facebook account is "easy"). M, as defense counsel acknowledged at trial, uses Facebook and is familiar with its basic functionalities. She could, therefore, explain simple Facebook concepts to the court, such as "friending" someone and the site's general privacy settings.[12] See, e.g., *State* v. *Inkton*, Docket

[12] We do not suggest that *all* matters related to Facebook or other social media are within the realm of the "ordinary knowledge and experience" of the trier of fact or that *all* such concepts are not "sufficiently [complex]" to require further explanation from an expert. *State* v. *Smith*, supra, 273

No. 102706, 2016 WL 762580, *13 (Ohio February 25, 2016) (detective "familiar with Facebook" could testify on "the difference between Facebook accounts that are open to the public and private accounts [and] using privacy settings to restrict the information that is available to the public"); *People* v. *Glover*, 363 P.3d 736, 746 (Colo. App. 2015) (detective's Facebook testimony was not result of "any specialized knowledge," but based on experience and "knowledge common among ordinary people using, or considering the use of, Facebook"), cert. denied, Docket No. 15SC277, 2015 WL 7987958 (Colo. December 7, 2015).

Moreover, M's testimony that she could view the profile of "Tasha Moore" through her own account, even though she was never friends with "Tasha Moore," was based on her individual perceptions of the profile and not on any "specialized knowledge . . . ." Conn. Code Evid. § 7-2. The question of whether the profile was open to the public therefore became a determination based on M's credibility.[13] See *State* v. *Gaps*, Docket No.

Conn. 211; *Johnson* v. *Commissioner of Correction*, supra, 34 Conn. App. 158. We simply hold that expert testimony was not required in the present case, beyond M's testimony as a Facebook user, to establish that the posts were publicly exhibited.

[13] In holding that expert testimony was required on the public nature of the posts, the Appellate Court relied on our "cautionary language" in *State* v. *Altajir*, 303 Conn. 304, 33 A.3d 193 (2012), with regard to Facebook. *State* v. *Buhl*, supra, 152 Conn. App. 160. In *Altajir*, this court stated that Facebook's "general infrastructure, including [its] privacy settings, is highly dynamic and in many cases may be accurately assessed only with reference to a limited time period." *State* v. *Altajir*, supra, 310 n.2. This court also stated that, "[d]ue to the dynamic nature of Facebook and other such social network sites, these details, as well as basic structural features of the social network, are subject to frequent modification. Care should therefore be taken to assess information relating to social network sites on a case-by-case basis, with due attention to the nature of the site at the time relevant to the case." Id., 307 n.1. The Appellate Court reasoned that this language "underscore[d]" the need for expert testimony or other evidence establishing "the operation of Facebook's privacy settings" and the public nature of the posts. *State* v. *Buhl*, supra, 160.

Our concerns in *Altajir*, however, are inapposite to the present case. *Altajir* concerned the admission of Facebook photographs at a probation

109423, 2014 WL 113465, *4 (Kan. App. 2014) (evidence supported defendant's violation of probation condition that his Facebook profile remain open to public when lay witness testified that she could not find his profile as public user), review denied (Kan. January 8, 2015); *Olson* v. *LaBrie*, supra, 2012 WL 426585, *1 (lay witness testified that any member of public could access Facebook profile). The trial court acknowledged as much, stating twice that the issue of the public nature of the posts came down to whether the court believed M's testimony that she was never friends with "Tasha Moore" and could view the posts through her own account.

The trial court's comment at the beginning of the trial expressing its unfamiliarity with Facebook did not otherwise create a need for expert testimony.[14] The trial court made this comment only a few minutes into the testimony of M, who was the state's first witness to discuss Facebook. Thereafter, the trial court gained

revocation hearing as direct evidence of a probationer's behavior after her incarceration. *State* v. *Altajir*, supra, 303 Conn. 306. Thus, the probationer's Facebook activity was relevant only with respect to a particular time period, namely, that of her probation. Id., 308–309. The state, however, "presented no evidence regarding how [the] photographs had been acquired, who could view the [probationer's] Facebook profile or how Facebook's features governing publicity and privacy functioned during the relevant time period." Id., 310; see also id., 320 n.7. Although we concluded that the photographs had the "minimal indicia of reliability" for admission at the hearing, we expressed concerns with admitting Facebook evidence with generalized testimony on the workings of Facebook, without tying such testimony to the relevant time period, due to the "dynamic nature" of Facebook and "frequent modification[s]" to its features and privacy settings. Id., 307 n.1, 322. The present case, by contrast, is not dependent on the reliability of Facebook evidence to establish that an act occurred during any particular time period. M's testimony that she could view the posts without being friends with "Tasha Moore" at any point in time is sufficient to establish the public element of the crime under § 53a-181 (a) (4).

[14] We assume, without deciding, that the Appellate Court could consider the trial court's statement in evaluating the defendant's sufficiency of the evidence claims.

knowledge of the relevant Facebook concepts through the evidence admitted in the case. M explained the concept of "friending" someone, the general workings of Facebook's privacy settings, and how one may determine whether a person's profile is public or private based on whether a user who is not a friend can view the profile. The state reiterated these matters in its closing argument. The trial court, further, ensured its understanding of the relevant Facebook concepts by interjecting at different points throughout the proceedings to ask questions.[15] The Appellate Court concluded that these questions revealed the trial court's lack of knowledge of Facebook. *State* v. *Buhl*, supra, 152 Conn. App. 159–60. We disagree. Rather, they demonstrate that the trial court appropriately learned the concepts relevant to the proceedings throughout the trial.[16]

2

The Appellate Court's second reason for concluding that M's testimony was insufficient to establish the public nature of the Facebook posts was that M's testimony on that point was contradictory. Id., 160. The Appellate Court focused on the following exchange between M and defense counsel on cross-examination:

"Q. So . . . you were never friends with Tasha Moore?

"A. Yes, but her page was unprivate.

"Q. Okay, you never became friends with Tasha Moore?

[15] The trial court confirmed, for example, that an exhibit showed a Facebook profile, asked M about the concept of "tagg[ing]" someone in a photograph on Facebook, and clarified M's testimony with respect to Facebook's privacy settings.

[16] Additionally, the language used by trial court in inquiring as to the relevant Facebook concepts evinced its understanding of those concepts. The trial court eventually used the verb "friend[ing]" freely and engaged in dialogue about Facebook's privacy settings.

"A. You could see it. No, but I have gone on through [my friend's] Facebook and had seen it through his page.

"Q. Thank you. You went on through your friend's Facebook page to see it?

"A. Yes. Then could see everything through mine.

"Q. I understand it. But, you weren't invited in and you didn't see it from anyone else's page but [your friend's]?

"A. Right, everybody else had been invited except me.

"Q. Okay, everybody else, all eight other people or all seven or eight people?

"A. Multiple people had been invited, [but] not everybody accepted.

"Q. All right. So, it's a private invitation. You have to be invited in?

"A. Sure." (Internal quotation marks omitted.) Id., 156.

The Appellate Court determined that this testimony was contradictory. Id. We, however, like the trial court, see no inconsistency in this testimony. In the first half of this exchange, M stated that she viewed "Tasha Moore's" profile through a friend's account *and* through her own account, though she was never friends with "Tasha Moore." She subsequently responded to a compound leading question that contained two assertions, namely that (1) she had not been "invited" to become friends with "Tasha Moore"; and (2) she had not viewed "Tasha Moore's" profile through anyone's Facebook account other than B's. M answered "[r]ight," but clarified that she was only responding to the first assertion by stating that "everybody else had been invited except me." Defense counsel then asked another two part leading question, asserting that (1) Facebook friend requests are "private invitation[s]," which only the invi-

tee can view; and (2) one must be "invited in" to view a user's profile, or, perhaps, the "Tasha Moore" profile specifically. It is unclear to which assertion M directed her answer of "sure." Regardless, our review of the trial transcript makes clear that the trial court subsequently resolved, to its satisfaction, any ambiguity in this portion of M's testimony.[17]

In particular, the trial court evinced its understanding of M's testimony as being that she could view the posts through her own account even though she was never friends with "Tasha Moore." During closing arguments, when defense counsel continued to argue that the posts were "private," the court inquired:

"The Court: Didn't . . . she say that she saw [the profile] initially signing in [through a friend's account]?

"[Defense Counsel]: Yes.

"The Court: And then later she was able to see it . . . signing in as herself, or as a member of the public?

"[Defense Counsel]: She did say . . . .

"The Court: So there I think the issue is credibility.

"[Defense Counsel]: Correct."

[17] For example, the trial court inquired of M as follows:

"The Court: . . . [Y]ou were asked some questions about how Facebook works . . . . And *I want to make sure I understand it.* . . . [Is there] a way to tell what someone's Facebook . . . privacy [settings are]?

"[M]: Yes . . . . It seemed to be public because I could see it from my own [account] and I was not friends with her. . . . And I could see the same content from my friend's [account] who was friends with her." (Emphasis added.)

M testified similarly on cross-examination:

"Q. . . . Earlier, did you say that you went through [a friend's] account to view what was posted?

"A. Originally . . . . And then through my own.

"Q. And that's your testimony. You went originally through his?

"A. I could see the exact same content through his Facebook that I could see through my own, and I was not friends with [Tasha Moore]."

Most tellingly, at the hearing on the defendant's post-verdict motions, prior to her sentencing, the trial court expressly rejected the notion that M's testimony was unclear as to whether the posts were publicly accessible. The court inquired of defense counsel as follows:

"The Court: Wasn't there testimony by [M] that she was not friended? That she viewed this not only . . . using the Facebook page of a friend who had been friended, but that she directly viewed this under her own identity? . . .

"[Defense Counsel]: [T]here was . . . testimony, I think, that was unclear. . . .

"The Court: *How is that unclear*? . . . You cited the first part of her testimony, where she said that she went through her friend's account. I don't believe you cited her subsequent testimony where she said, *I saw it using my own identity*—

"[Defense Counsel]: Oh that, yeah.

"[The Court]:—and [that M] wasn't friended." (Emphasis added.)

By relying upon arguable inconsistencies in M's testimony that the trial court did not, the Appellate Court failed to "construe the evidence in the light most favorable to sustaining the verdict" and to give proper deference to the trial court's factual findings and credibility determinations. (Internal quotation marks omitted.) *State* v. *Davis*, supra, 283 Conn. 329. "This court cannot substitute its own judgment for that of the [finder of fact] . . . ." *State* v. *Revels*, 313 Conn. 762, 778, 99 A.3d 1130 (2014), cert. denied, 574 U.S. 1177, 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015). "Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the

prosecution." (Emphasis omitted.) *Jackson* v. *Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Even if there were inconsistencies in M's testimony, "[i]t is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony." (Internal quotation marks omitted.) *State* v. *Allen*, 289 Conn. 550, 559, 958 A.2d 1214 (2008); see also, e.g., *State* v. *Alfonso*, 195 Conn. 624, 633–34, 490 A.2d 75 (1985) (jury was entitled to believe witness even though testimony was "varied and contradictory"). "It is not our role to reevaluate the credibility of witnesses or to overturn factual findings of a [trial] court unless they are clearly erroneous." *Ramos* v. *Commissioner of Correction*, 67 Conn. App. 654, 659, 789 A.2d 502, cert. denied, 260 Conn. 912, 796 A.2d 558 (2002); see also *State* v. *Krijger*, 313 Conn. 434, 447, 97 A.3d 946 (2014) ("we accept all . . . credibility determinations and findings [of the trial court] that are not clearly erroneous"). "If there is any reasonable way that the [trier of fact] might have reconciled the conflicting testimony before [it], we may not disturb [its] verdict." (Internal quotation marks omitted.) *State* v. *Allen*, supra, 559. In the present case, we see no reason to disturb the trial court's finding that M's testimony was consistent and credible on this point.[18]

B

Given our conclusion that the trial court reasonably could have found that the state had proven the public

[18] Moreover, beyond M's testimony, other evidence in the record demonstrated the public nature of the Facebook posts. The printed copy of the Facebook profile, admitted into evidence, shows an "Add as Friend" button at the top of the profile. This button indicates, circumstantially, that the person viewing the profile is not already friends with "Tasha Moore." Further down on the page, the posts about M are visible. Thus, it appears that someone who is not already friends with "Tasha Moore" could view the profile and the posts about M in their entirety.

element of the crime of breach of the peace, we next consider the state's contentions that the conviction on that charge must be reinstated because sufficient evidence supports the trial court's findings that: (1) it was the defendant who posted M's diary entries on Facebook under the guise of "Tasha Moore"; and (2) the defendant intended to "inconvenience, [annoy] or alarm" M by posting her diary entries on Facebook. Rather than remand these issues to the Appellate Court for consideration in the first instance, we review them in the interests of judicial economy. See footnote 8 of this opinion. We address each in turn.

1

The state first claims that there was sufficient evidence that the defendant was the person who posted M's diary entries on Facebook. The defendant argues in response that the state did not present direct evidence linking her to the "Tasha Moore" Facebook profile and that the circumstantial evidence in the case fell short of establishing this element beyond a reasonable doubt. We agree with the state and conclude that there was sufficient circumstantial evidence proving the defendant's identity as the Facebook poster.

Before reviewing the evidence, we note that a fact finder's "factual inferences that support a guilty verdict need only be reasonable." (Internal quotation marks omitted.) *State* v. *Allen*, supra, 289 Conn. 556. Although "the [finder of fact] must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Stephen J. R.*, 309 Conn. 586, 593, 72 A.3d 379 (2013). "[T]he line between permissible inference and impermissible speculation is not always easy to discern. When we infer, we derive

a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation. When that point is reached is, frankly, a matter of judgment." (Internal quotation marks omitted.) *State* v. *Copas*, 252 Conn. 318, 339, 746 A.2d 761 (2000).

The following evidence and reasonable inferences support the trial court's finding that the defendant was the person behind the "Tasha Moore" profile and the posts about M. The defendant visited P's home frequently, often several times each week, and M kept diary entries in her bedroom in P's home. The police suspected that the person who took the diary entries was someone with access to P's home, because the doors to the home were kept locked and there were no signs of forced entry. Although M's friends had access to P's home, M testified that only her close friends would come over, and that she felt she could share anything with them. Moreover, the diary entries were posted on Facebook during M's graduation ceremony, which most of her friends attended.

The trial court could reasonably infer that the defendant possessed the diary entries when they were posted on Facebook. The defendant admitted to sending the anonymous mailing, and she, therefore, possessed the diary entries at one time. Given the timing of the Facebook posts and mailing, the trial court could further infer that she possessed them when they were posted on Facebook. The diary entries were posted on Face-

book on June 23, 2010, at approximately 6 p.m., and P received the mailing with the diary entries the following day by overnight mail. Thus, the trial court could reasonably infer that the defendant possessed the diary entries on the night of June 23.

The trial court could also reasonably infer that the defendant had a motive to commit the crime. Consistent with her theory of defense, the defendant testified that she was working on an investigative story about underage drinking at the time, and the diary entries concerned a seventeen year old girl drinking at a party. Additionally, M testified that she had a "tense" and "uncomfortable" relationship with the defendant and that she believed that the defendant tried to "make [her] life miserable." P confirmed that M and the defendant never had a close relationship.

The defendant, however, points to the fact that she had a financially beneficial, nontumultuous relationship with P and, thus, no motive to harm P or M. Indeed, P and the defendant had been dating for more than two years by June, 2010, and P helped pay for her apartment and living expenses. P testified that their relationship was "good" with no long periods of animosity, that P trusted her, and that they had an "open line of communication." M testified that P and the defendant "got along fine" and that she did not perceive any tension between them.

This evidence related to the quality of the relationship between P and the defendant, however, does not diminish the reasonableness of the inference that the trial court did make, namely, that the defendant had a motive to commit the crime based on her troubled relationship with M. "In evaluating evidence that could yield contrary inferences, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier [of fact] may

draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [trier of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Drupals*, supra, 306 Conn. 158. Here, considering all the evidence "in the light most favorable to the prosecution"; *Jackson* v. *Virginia*, supra, 443 U.S. 319; the trial court could reasonably infer that the defendant's motive to create the Facebook posts and make M's life "miserable" outweighed her desire to maintain her advantageous relationship with P.

Lastly, the trial court could reasonably infer that the defendant attempted to conceal her role as the Facebook poster by hiding her identity as the anonymous mailer. First, the defendant sent the copies of the diary entries anonymously rather than approaching P directly. Then, when P explained what had happened to the defendant on June 25, he "got no reaction" from her. It was not until two days later that the defendant admitted to sending the mailing. Cf. *State* v. *Oliveras*, 210 Conn. 751, 759, 557 A.2d 534 (1989) ("[e]vidence that an accused has taken some kind of evasive action to avoid detection for a crime, such as flight [or] concealment of evidence . . . is ordinarily the basis for a charge on the inference of consciousness of guilt").

The defendant responds that she concealed her identity as the anonymous mailer in order to protect her source and later revealed her role in the situation to alleviate some of P's concerns. Again, however, we cannot say that the defendant's proposed inference that she concealed her identity as the anonymous mailer in order to protect her source is so much "more closely correlated with the facts"; (internal quotation marks

omitted) *State* v. *Copas*, supra, 252 Conn. 339; that it renders unreasonable the trial court's conclusion that she was, instead, trying to avoid detection as the Facebook poster. "[P]roof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal." (Internal quotation marks omitted.) *State* v. *Davis*, supra, 283 Conn. 330.

The defendant further argues that this circumstantial evidence, and the reasonable inferences that flow therefrom, are insufficient to prove that she posted the diary entries on Facebook beyond a reasonable doubt. She relies heavily on her claim that the state never produced direct evidence affirmatively linking her IP address to the one associated with the "Tasha Moore" profile.[19] The state did not, however, need direct evidence to prove that the defendant posted M's diary entries on Facebook. We have repeatedly acknowledged that "it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which

[19] We note that Sergeant Ogrinc testified to the following facts at trial: (1) that she contacted Facebook seeking "information on . . . the IP address used for Tasha Moore"; (2) that she ascertained an IP address; and (3) that information she subsequently received from Cablevision indicated that the IP address she had been investigating belonged to the defendant. The state then asked Sergeant Ogrinc whether "the IP address used by Tasha Moore [was] the same IP addressed assigned to [the defendant] by Cablevision." The defendant objected, asserting that the question elicited inadmissible hearsay, and the state withdrew the question. In the course of ruling on the defendant's posttrial motions, the court stated that "[t]here was no evidence that directly linked [the defendant to] the initial Facebook page" and that, although "[t]here was some testimony about the investigation and [going] from step one to step two," the court "did not rely on what the state might have been trying to suggest . . . ."

establishes guilt in a case involving substantial circumstantial evidence." (Internal quotation marks omitted.) *State* v. *Davis*, supra, 283 Conn. 330. The circumstantial evidence in this case, discussed previously, is sufficient to prove that the defendant posted M's diary entries on Facebook. Construing the evidence in the light most favorable to sustaining the verdict, we conclude that the trial court reasonably could have found that the cumulative force of this evidence established this element of the crime beyond a reasonable doubt. See *State* v. *Stovall*, 316 Conn. 514, 520, 115 A.3d 1071 (2015).

2

Second, the state claims that there was sufficient evidence that the defendant intended to "inconvenience, [annoy] or alarm" M by posting her diary entries on Facebook. General Statutes § 53a-181 (a). In response, the defendant argues, inter alia, that the Facebook posts do not evince this intent because M, herself, was not invited to view them. We agree with the state and conclude that there was sufficient evidence to demonstrate the defendant's intent to inconvenience, annoy, or alarm M by posting her diary entries on Facebook.

The crime of breach of the peace requires proof that the defendant publicly exhibited offensive, indecent, or abusive matter concerning any person with the intent to cause "inconvenience, annoyance or *alarm* . . . ."[20] (Emphasis added.) General Statutes § 53a-181 (a). More precisely, the defendant must have the "predominant intent . . . to cause what a reasonable person operating under contemporary community standards would consider a disturbance to or impediment of a lawful activity, a deep feeling of vexation or provoca-

[20] " 'Alarm' is defined as 'to strike with fear: fill with anxiety as to threatening danger or harm . . . .' Webster's Third New International Dictionary [1993]." *State* v. *Cummings*, 46 Conn. App. 661, 673, 701 A.2d 663, cert. denied, 243 Conn. 940, 702 A.2d 645 (1997).

tion, or a feeling of anxiety prompted by threatened danger or harm." (Internal quotation marks omitted.) *State* v. *Wolff*, 237 Conn. 633, 670, 678 A.2d 1369 (1996).

"A person acts 'intentionally' with respect to a result . . . when his conscious objective is to cause such result . . . ." General Statutes § 53a-3 (11); see also, e.g., *State* v. *Nash*, 316 Conn. 651, 671–72, 114 A.3d 128 (2015). "[T]he question of intent is purely a question of fact." (Internal quotation marks omitted.) *State* v. *Hedge*, 297 Conn. 621, 658, 1 A.3d 1051 (2010). "[T]he state of mind of one accused of a crime is often the most significant and, at the same time, the most elusive element of the crime charged. . . . Because it is practically impossible to know what someone is thinking or intending at any given moment, absent an outright declaration of intent, a person's state of mind is usually [proven] by circumstantial evidence . . . ." (Internal quotation marks omitted.) *State* v. *Bonilla*, 317 Conn. 758, 766, 120 A.3d 481 (2015).

In the present case, the state proved the mental state element of the crime of breach of the peace by demonstrating that the defendant specifically intended to cause M "a deep feeling of vexation or provocation" by posting her diary entries on Facebook. (Internal quotation marks omitted.) *State* v. *Wolff*, supra, 237 Conn. 670. The language of, and circumstances surrounding, the posts are sufficient to demonstrate beyond a reasonable doubt her intent to achieve this result. The defendant posted M's private diary entries, which she found in M's nightstand in her bedroom, publicly online. These diary entries expressed M's private thoughts, which were not only deeply personal, but of a sexual and embarrassing nature. They describe M drinking heavily at a party, performing oral sex on a boy, and developing a crush on the boy. The posts specifically named M as the author of the diary entries and included a photograph of her. The posts then insulted her, calling her

an "easy hook up," and relayed O's mockery of her as a "deep throat JAP." Seven or eight of M's friends and classmates were invited to view these posts.

The trial court could have reasonably found that posting a person's private diary entries online and insulting him or her in this manner would reasonably "vex" or "provo[ke]" the person. *State* v. *Wolff*, supra, 237 Conn. 670. "[V]ex" is generally defined as "to bring trouble, distress, or agitation . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003). A fact finder reasonably could determine that M would be "vexed" by the fact that someone had been in her bedroom and rifled through her belongings, not to mention the fact that many of her friends and classmates could view her private thoughts about her experiences with sex and alcohol. Moreover, a person might reasonably be "provo[ked]" by this intrusive act and the insults contained in the posts.[21] *State* v. *Wolff*, supra, 670; see also *Gilles* v. *State*, 531 N.E.2d 220, 223 (Ind. App. 1988) (insults insinuating, inter alia, that person had sexually transmitted disease were "inherently likely to provoke a violent reaction" and supported disorderly conduct conviction).[22]

[21] Defense counsel essentially conceded at trial that the Facebook posts could reasonably show an intent to cause inconvenience, annoyance, or alarm M.

[22] Moreover, "it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his [or her] voluntary conduct." (Internal quotation marks omitted.) *State* v. *Anderson*, 74 Conn. App. 633, 638, 813 A.2d 1039, cert. denied, 263 Conn. 901, 819 A.2d 837 (2003). The trial court could have relied on M's testimony that she did, in fact, feel annoyed and alarmed by the Facebook posts. She testified that she was "too upset" to go out that night and celebrate her graduation with her friends. She was "really upset" by the post, "fearful" and "afraid" that more people would see it, and "paranoid" about the fact that someone had gone through her belongings. P testified that, although M was a "strong-willed person," she was "very upset" by the posts and felt "violated and embarrassed in public." Officer Gulino testified that M was "visibly distraught" and "crying intermittently" at the police station and that her hands shook as she used her cell phone.

The defendant argues, however, that this evidence is insufficient to demonstrate an intent to cause M "a deep feeling of vexation or provocation" because M, herself, was not invited to view the posts.[23] This argument is unpersuasive, however, because the posts were unques-

[23] The defendant also argues that the state had to prove beyond a reasonable doubt that the Facebook posts were intended or likely to produce imminent disorder, namely, that it contained "fighting words." See *Cantwell* v. *Connecticut*, 310 U.S. 296, 308, 60 S. Ct. 900, 84 L. Ed. 1213 (1940) ("The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others."); *State* v. *Indrisano*, 228 Conn. 795, 811–12, 640 A.2d 986 (1994) (noting principle announced in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 573, 62 S. Ct. 766, 86 L. Ed. 1031 [1942], that " 'fighting words' limitation" must be applied when conduct consists "purely of speech"). "Fighting words consist of speech that has a direct tendency to cause imminent acts of violence or an immediate breach of the peace. Such speech must be of such a nature that it is likely to provoke the average person to retaliation." (Internal quotation marks omitted.) *State* v. *Gaymon*, 96 Conn. App. 244, 248, 899 A.2d 715, cert. denied, 280 Conn. 906, 907 A.2d 92 (2006).

Connecticut cases holding that the state must prove that the speech constitutes "fighting words" have, however, concerned other subdivisions of § 53a-181 (a) or predated *State* v. *Wolff*, supra, 237 Conn. 670, in which this court clarified the mental state element of the crime. See, e.g., *State* v. *Weber*, 6 Conn. App. 407, 414–15, 505 A.2d 1266 (upholding conviction under § 53a-181 [a] [5] because language was abusive and constituted fighting words), cert. denied, 199 Conn. 810, 508 A.2d 771 (1986); *State* v. *Beckenbach*, 1 Conn. App. 669, 678, 476 A.2d 591 (1984) ("both sides agree, as do we, that the constitutional guarantee of freedom of speech requires that [the provision prohibiting abusive speech set forth in § 53a-181 (a) (5)] be confined to language which, under the circumstances of its utterance, constitutes 'fighting words'—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"), rev'd on other grounds, 198 Conn. 43, 501 A.2d 752 (1985); *State* v. *Hoskins*, 35 Conn. Supp. 587, 589, 594, 401 A.2d 619 (1978) (reversing conviction under § 53a-181 [4] when defendant painted message on wall of church stating that " 'Jews murdered Jesus Christ' " because speech did not constitute fighting words).

After *Wolff*, the state need only prove that the defendant had the "predominant intent . . . to cause what a reasonable person operating under contemporary community standards would consider a disturbance to or impediment of a lawful activity, a deep feeling of vexation or provocation, or a feeling of anxiety prompted by threatened danger or harm" to satisfy the mental state element of breach of the peace. *State* v. *Wolff*, supra, 237 Conn. 670; see, e.g., *State* v. *Labbe*, 61 Conn. App. 490, 491–96, 767 A.2d 124 (upholding

tionably directed at M. The posts: (1) stated her first and last name, where she went to high school, and her graduation year; (2) contained her signed diary entries; and (3) included a photograph of her. The offensive remarks also specifically targeted M and no one else. Although M did not receive a friend request, seven or eight of her friends and classmates did, which inevitably led to her awareness of the postings.[24] For these reasons, we conclude that the trial court reasonably could have concluded that the state had proven the defendant's intent to "inconvenience, [annoy] or alarm" M by posting her diary entries on Facebook beyond a reasonable doubt. General Statutes § 53a-181 (a).

II

We now turn to the defendant's appeal from the Appellate Court's judgment affirming her harassment conviction. The defendant argues that the Appellate Court improperly: (1) concluded that there was sufficient evidence to support her harassment conviction; and (2) declined to consider her constitutional claims with respect to both convictions on the ground that they were inadequately briefed. We address each claim in turn.

motorist's conviction under § 53a-181 [a] [5] when he exposed himself to another motorist in parking lot of rest stop with no discussion of whether act was intended or likely to produce imminent disorder), cert. denied, 256 Conn. 914, 773 A.2d 945 (2001).

[24] According to the defendant, because M was not "invited" to view the Facebook posts through a friend request, the posts are more akin to venting or gossiping in the public domain. The defendant, however, could have "vented" these thoughts in a more private manner. See, e.g., *State* v. *Eleck*, 130 Conn. App. 632, 634 n.1, 23 A.3d 818 (2011), aff'd, 314 Conn. 123, 100 A.3d 817 (2014) (Facebook users can send "a private message to any other Facebook user in a manner similar to [e-mail]"). She instead chose to thrust M's private diary entries, along with her own offensive remarks, into the public sphere, which evinces an intent to annoy or alarm M. See *O'Leary* v. *State*, 109 So. 3d 874, 877 (Fla. App. 2013) ("[g]iven the mission of Facebook, there is no logical reason to post comments other than to communicate them to other Facebook users").

A

The defendant first claims that the Appellate Court improperly concluded that there was sufficient evidence to support her harassment conviction because the state did not prove beyond a reasonable doubt her intent to "harass, annoy or alarm" P or M by sending the anonymous mailing. General Statutes § 53a-183 (a) (2). Specifically, she argues that the mailing shows concern for M rather than an intent to harass P or M. The state responds that, in light of the anonymous nature of the mailing, the contents of the mailing, and the defendant's behavior thereafter, the trial court reasonably could have found that the defendant intended to harass P or M beyond a reasonable doubt. We agree with the state.

The crime of harassment in the second degree is a specific intent crime. *State* v. *Snyder*, 40 Conn. App. 544, 551–52, 672 A.2d 535, cert. denied, 237 Conn. 921, 676 A.2d 1375 (1996). The state must prove that the defendant communicated with the intent to "harass, annoy or alarm" a person "in a manner likely to cause annoyance or alarm . . . ." General Statutes § 53a-183 (a) (2). The defendant need not engage "in a direct communication with the person whom he [or she] intended to harass." *State* v. *Snyder*, supra, 552.

"[I]ntent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom." (Internal quotation marks omitted.) *State* v. *Simmons*, 86 Conn. App. 381, 387, 861 A.2d 537 (2004), cert. denied, 273 Conn. 923, 871 A.2d 1033, cert. denied, 546 U.S. 822, 126 S. Ct. 356, 163 L. Ed. 2d 64 (2005). "Evidence of the language used in an alleged violation of the harassment statute is [also] relevant to show the intent of the accused in making the [communication] as well as the

likelihood of its causing annoyance or alarm." *State* v. *Lewtan*, 5 Conn. App. 79, 83, 497 A.2d 60 (1985).

In the present case, the trial court reasonably could have found that the circumstances surrounding the mailing, the contents of the mailing, and the defendant's behavior thereafter demonstrate beyond a reasonable doubt her intent to harass, annoy, or alarm P or M through the mailing. The defendant could have brought the diary entries to P, her boyfriend of more than two years, directly, but she instead, as she admitted, sent them anonymously. The anonymous nature of the mailing served to increase P's and M's anxieties because they did not know who had intruded into M's bedroom and copied her diary entries, how the mailer had obtained the entries, or who else might have access to them.[25] P, in fact, testified that he felt "violated" that M's diary entries were in "someone else's hands."

Moreover, when the defendant had the opportunity to admit to sending the mailing, she did not do so and instead hid this information for another two days. On June 25, 2010, P explained to the defendant what had happened, including his receipt of the anonymous mailing, stating how "shocked" he was that such a "crazy thing" was going on. He, however, "got no reaction" from the defendant. The defendant did not admit to sending the mailing until two days later, after learning that a police investigation was pending. Her delayed confession prolonged P's and M's anxieties about the mailing, and further revealed her intention to harass them. The trial court reasonably could have declined to credit the defendant's explanation that she was trying to protect her "source"; see part I B 1 of this opinion; as equally unpersuasive in this context.

[25] It is unclear whether M saw the mailing, but the defendant did not need to communicate with M directly to have an intent to annoy or alarm her. See *State* v. *Snyder*, supra, 40 Conn. App. 552.

The contents of the mailing also show an intent to harass, annoy, or alarm P or M. The package contained copies of M's private diary entries, which described her drinking heavily at a party and performing oral sex on a boy. As the trial court noted, any parent receiving such a mailing would reasonably find it "incredibly distressful, disturbing, and abhorrent." P not only learned this information from a purportedly anonymous stranger, but realized that an unknown person had been in his home—specifically, his daughter's bedroom—rifled through her belongings, and made copies of her private diary entries. He was reasonably "shocked," "surprised," and "outraged" by the contents of the mailing and felt "violated" that an unknown person had been in his home. Additionally, with respect to M, mailing such content to a person's parents could reasonably evince the intent to harass, annoy, or alarm that person, especially if the person is a minor. The defendant may also have had a motive to harass M based on their strained relationship. See part I B 1 of this opinion.

We acknowledge the defendant's argument that the cover letter from a "friend," if believed, could show concern for M and her well-being rather than an attempt to harass P or M.[26] Cf. *Crews* v. *State*, 30 A.3d 120, 125 (Del. Fam. 2011) (concern over former husband's inappropriate behavior in front of child was "driving force" behind text message rather than intent to harass). However, given the trial court's reasonable finding that the defendant copied M's diary entries and

[26] The defendant also argues that the mailing does not evince an attempt to harass, annoy or alarm P or M because P and M already knew of the contents of the mailing as a result of the Facebook posts. Just because P and M reasonably felt annoyed or alarmed by the Facebook posts does not, however, mean that they could not reasonably feel annoyed or alarmed by the same content *again* upon receipt of the mailing. It is also not clear whether P, himself, saw the Facebook posts or read M's diary entries before receiving the mailing. P learned of the Facebook posts when M called him after bringing copies to the police station on June 24, 2010.

posted them on Facebook; see part I B 1 of this opinion; the court could reasonably infer that the defendant fabricated the letter to hide her prior misdeeds. Those acts "bear directly on [her] intent" in sending the mailing. *State* v. *Kantorowski*, 144 Conn. App. 477, 488–89, 72 A.3d 1228 (prior domestic violence incidents showed threats were not "mere jokes or pranks" because threatening statements "need[ed] to be understood in [the] context of [the] entire relationship" [internal quotation marks omitted]), cert. denied, 310 Conn. 924, 77 A.3d 141 (2013); see also *State* v. *Adgers*, 101 Conn. App. 123, 126–27, 921 A.2d 122 (previous "underlying history" of assaults showed perpetrator's intent to harass victim when he sent her notes stating that she "misle[d]" him, despite fact that notes were not threatening [internal quotation marks omitted]), cert. denied, 283 Conn. 903, 927 A.2d 915 (2007). The letter also does not change the disturbing contents of the mailing or the fact that someone, even an apparent "friend," had gone through M's nightstand, read her private diary entries, and made copies of them. We, therefore, conclude that the Appellate Court properly concluded that there was sufficient evidence to support the trial court's conclusion that the defendant intended to harass, annoy or alarm P or M by sending the anonymous mailing.

B

The defendant next claims that the Appellate Court improperly declined to consider her constitutional claims with respect to both convictions on the ground that those issues were inadequately briefed. She argues that her constitutional claims were adequately briefed because she stated the appropriate standards of review, cited relevant case law, and examined the relationship between the law and facts. In response, the state contends that the defendant's constitutional claims were very sparse, repetitive, confusing, and not contained in separate headings, as required by Practice Book § 67-

4 (d). We agree with the state and conclude that the Appellate Court did not abuse its discretion by determining that the defendant's constitutional claims were inadequately briefed.

The record reveals the following additional facts and procedural history. The defendant argued in her Appellate Court brief that there was insufficient evidence to support her convictions "without the trier of fact shifting the burden of proof on [her] and/or impermissibly impinging on her constitutional rights." Embedded within her sufficiency arguments, she claimed that: (1) her harassment conviction violated her rights under the first amendment because it was based on the content of her communications and not her conduct;[27] (2) both convictions violated her rights under the due process clause of the fourteenth amendment because the trial court impermissibly shifted the burden of proof to her to prove that she did not post the diary entries on Facebook; and (3) by requiring her to reveal her source to avoid the inference that she posted the diary entries on Facebook, the trial court infringed on her journalistic privilege not to reveal her source.[28] The Appellate Court observed that the defendant's arguments were "somewhat diffuse, with very little legal analysis as to the effect of many of the alleged errors made by the court."

[27] The defendant relied on *State* v. *Murphy*, 254 Conn. 561, 574, 757 A.2d 1125 (2000), and *State* v. *Moulton*, 120 Conn. App. 330, 352, 991 A.2d 728 (2010), which hold that the crime of harassment in the second degree must be predicated on the defendant's conduct, and not the content of his or her communications, in order to comport with the first amendment. This court, however, has since overruled its decision in *Murphy* and reversed the Appellate Court's decision in *Moulton*, concluding that § 53a-183 (a) (2) proscribes harassing and alarming speech as well as conduct. See *State* v. *Moulton*, 310 Conn. 337, 362, 78 A.3d 55 (2013).

[28] The trial court did not credit the defendant's theory, put forth through P's testimony, that her efforts as an investigative journalist led to her involvement in these events. The trial court stated: "I did not find credible the kind of secondhand statements through [P], as to this being somehow involved in investigative reporting."

State v. *Buhl*, supra, 152 Conn. App. 149. The Appellate Court ultimately concluded that the defendant had asserted sufficiency of the evidence claims with respect to both convictions but had inadequately briefed her constitutional claims. Id., 151.

"We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 120, 830 A.2d 1121 (2003). "[F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Internal quotation marks omitted.) *State* v. *Claudio C.*, 125 Conn. App. 588, 600, 11 A.3d 1086 (2010), cert. denied, 300 Conn. 910, 12 A.3d 1005 (2011); see also *Getty Properties Corp.* v. *ATKR, LLC*, 315 Conn. 387, 413, 107 A.3d 931 (2015) (claim was inadequately briefed when appellants undertook "no analysis or application of the law to the facts of [the] case").

This court has not previously determined the appropriate standard for reviewing the Appellate Court's determination that an issue has been inadequately briefed. In *Connecticut Coalition Against Millstone* v. *Connecticut Siting Council*, 286 Conn. 57, 85, 942 A.2d 345 (2008), however, this court applied an abuse of discretion standard in reviewing a trial court's decision not to review a claim because it was inadequately briefed, when the trial court was sitting in an appellate capacity.[29] We, therefore, agree with the state's con-

[29] This court has also stated that deciding whether to review an inadequately briefed claim constitutes an exercise of judicial discretion. See, e.g.,

tention that an abuse of discretion standard is similarly appropriate for reviewing the Appellate Court's determination that a claim has been inadequately briefed.[30] Accord *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, 263 Conn. 204, 210, 820 A.2d 224 (2003) ("[t]he rules of practice vest broad authority in the Appellate Court for the management of its docket" [internal quotation marks omitted]).

This deferential standard of review leads us to conclude that the Appellate Court did not abuse its discretion in determining that the defendant inadequately briefed her constitutional claims. The defendant devoted approximately one and one-half pages of her thirty-four

Commissioner of Environmental Protection v. *Farricielli*, 307 Conn. 787, 816 n.22, 59 A.3d 789 (2013) ("we exercise our discretion to review these [allegedly inadequately briefed] claims"); *Northeast Ct. Economic Alliance, Inc.* v. *ATC Partnership*, 272 Conn. 14, 51 n.23, 861 A.2d 473 (2004) ("we exercise our discretion to decline to review this claim as inadequately briefed"); *Ward* v. *Greene*, 267 Conn. 539, 546, 839 A.2d 1259 (2004) (addressing inadequately briefed claim "[i]n the exercise of our discretion").

[30] Indeed, the defendant conceded at oral argument before this court that an abuse of discretion standard would be appropriate. The defendant claims in her brief, however, that this court has an independent duty to examine the record for first amendment violations, citing *DiMartino* v. *Richens*, 263 Conn. 639, 661–63, 822 A.2d 205 (2003). This court stated in *DiMartino* that, "in cases raising [f]irst [a]mendment issues [the United States Supreme Court has] repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." (Internal quotation marks omitted.) Id., 662; see *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284–86, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); see also *Brown* v. *K.N.D. Corp.*, 205 Conn. 8, 13–14, 529 A.2d 1292 (1987) ("The purpose of independent review is to safeguard the right of free expression. . . . The function of the procedural scheme created by [the United States Supreme Court in a long line of first amendment cases] is obviously to require an independent second opinion when free speech is curtailed. These cases place the ultimate constitutional responsibility on appellate courts to render that second opinion in order to safeguard free expression." [Citations omitted.]). *DiMartino* suggests, however, that, once a claim under the first amendment is *properly raised and briefed*, appellate courts need not defer to the trial court's findings of fact and should examine the record de novo. See *DiMartino* v. *Richens*, supra, 661–63. Here, the issue is whether the claim was adequately briefed, and *DiMartino* has no bearing on that analysis.

page argument to her content versus conduct claim, three pages to her burden shifting due process claim, and one and one-half pages to her journalistic privilege claim.[31] Although the number of pages devoted to an argument in a brief is not necessarily determinative, relative sparsity weighs in favor of concluding that the argument has been inadequately briefed. This is especially so with regard to first amendment and other constitutional claims, which are often analytically complex. See, e.g., *Schleifer* v. *Charlottesville*, 159 F.3d 843, 871–72 (4th Cir. 1998) ("[f]irst [a]mendment jurisprudence is a vast and complicated body of law that grows with each passing day" and involves "complicated and nuanced constitutional concepts"), cert. denied, 526 U.S. 1018, 119 S. Ct. 1252, 143 L. Ed. 2d 349 (1999); *Missouri* v. *National Organization for Women, Inc.*, 620 F.2d 1301, 1326 (8th Cir.) (first amendment issues are "complex"), cert. denied, 449 U.S. 842, 101 S. Ct. 122, 66 L. Ed. 2d 49 (1980); see also *In re Melody L.*, 290 Conn. 131, 154–55, 962 A.2d 81 (2009) (one and one-half page equal protection claim was inadequate), overruled on other grounds by *State* v. *Elson*, 311 Conn. 726, 746–47, 91 A.3d 862 (2014); *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, supra, 266 Conn. 120 (claim under takings clause was inadequately briefed when plaintiff provided "no authority or analysis in support of its specific claim"); *In re Shyliesh H.*, 56 Conn. App. 167, 181, 743 A.2d 165 (1999) (attempt to brief two constitutional claims in two and one-half pages was inadequate).

Moreover, the briefing of the defendant's claims was not only short, but confusing, repetitive, and disorganized. Although she cited the appropriate standard of review and between three and six cases for each claim, she did not state the claims "clearly and succinctly" such that the Appellate Court could fully understand

[31] These are generous estimates, which require piecing together the defendant's various assertions throughout her brief.

them. *Mullen & Mahon, Inc.* v. *Mobilmed Support Services, LLC*, 62 Conn. App. 1, 10 n.6, 773 A.2d 952 (2001); see *State* v. *Hawkins*, 366 P.3d 884, 898 (Utah App. 2016) ("[t]he inadequacy lies not in the quantity or the quality of the cited authority, but in the failure to analyze and apply that authority"). The defendant combined her three constitutional claims with her sufficiency of the evidence claims, several of which have different standards of review, in contravention of Practice Book § 67-4 (d), which requires that the brief's argument be "divided under appropriate headings into as many parts as there are points to be presented" and include "on each point . . . a separate . . . statement of the standard of review . . . ."[32] See also *Vertex, Inc.* v. *Waterbury*, 278 Conn. 557, 563 n.7, 898 A.2d 178 (2006) (noting that appellant "failed to place [the] arguments under appropriate headings and into separate parts of its brief" in declining to review inadequately briefed claim); *Herring* v. *Daniels*, 70 Conn. App. 649, 654–55 n.4, 805 A.2d 718 (2002) ("Rather than raising his claim separately . . . the [appellant] merely appends his argument to the end of his principal claim. . . . Because the [appellant] has failed to comply with [§ 67-4 (d)], we decline to review his claim."). The defendant then confusingly skipped back and forth between all of these claims throughout her brief. See *Birch* v. *Polaris Industries, Inc.*, 812 F.3d 1238, 1249 (10th Cir. 2015)

[32] We acknowledge that some claims may logically be combined under one heading. See, e.g., *Shenkman-Tyler* v. *Central Mutual Ins. Co.*, 126 Conn. App. 733, 740 n.3, 12 A.3d 613 (2011) ("Although the [appellant] does not separate his argument as it applies to each action but, rather, discusses them jointly insofar as the issues overlap, we do not agree with [the appellee's] assertion that the [appellant] has abandoned his claims . . . . [T]he [appellant]'s brief contains five pages of analysis and citation to relevant case law relating to his claim . . . . In light of the fact that the issue . . . presents a question of law, this level of briefing is adequate for review of his claim." [Citation omitted.]). The constitutional and sufficiency of the evidence claims in the present case, however, do not represent such conceptually related claims.

(declining to review "vague, confusing, [and] conclusory" claim); *Ferg* v. *Ferg*, Docket No. 2005AP2841, 2006 WL 3437345, *3 (Wis. November 30, 2007) (declining to review "confusing" claim that was "not clearly presented"); see also *Hixson* v. *Wolfe*, Docket No. B242538, 2013 WL 6859846, *3 (Cal. App. December 31, 2013) (declining to review "disjointed and confusing" claim in brief that "lack[ed] subheadings and any sort of coherent organization"). Further, the defendant repeated these claims under four different headings, but cited the exact same authority and provided no new analysis.[33] See *State* v. *Grinde*, Docket No. A09-380, 2010 WL 154714, *2 (Minn. App. January 19, 2010) (declining to review repetitive claim). The defendant therefore fell well short of "[t]he goal of appellate counsel . . . to create a document that leads the court through the logic of the advocate's position in a persuasive manner." *Mullen & Mahon, Inc.* v. *Mobilmed Support Services, LLC*, supra, 10 n.6.

The defendant argues that the Appellate Court nonetheless should have reviewed the defendant's constitutional claims because the state responded fully to them in its brief. See *State* v. *Howard F.*, 86 Conn. App. 702, 708, 862 A.2d 331 (2004) ("[c]laims of error by an appellant must be raised in his original brief . . . so that the issue as framed by him can be fully responded to by the appellee in its brief" [internal quotation marks omitted]), cert. denied, 273 Conn. 924, 871 A.2d 1032 (2005). Indeed, the state devoted approximately ten pages of its twenty-four page brief to these claims, reframing them for the Appellate Court in a more logical manner. An appellant cannot, however, rely on the appellee to decipher the issues and explain them to the

[33] The defendant's first two headings concern her harassment conviction and her breach of the peace conviction, respectively. Her last two headings claim that the trial court improperly denied her postverdict motions but assert essentially the same claims.

Appellate Court. "Writing a compelling legal argument is a painstaking, time-consuming task. Good legal analysis is premised on knowing the controlling rules of law. An effective appellate advocate must apply the rules of law to the facts at hand by applying or distinguishing existing legal precedent. . . . To write a good brief and to comply with the rules of practice, counsel must state the rules of law, [and] provide citations to legal authority that support the claims made . . . ." *Mullen & Mahon, Inc.* v. *Mobilmed Support Services, LLC*, supra, 62 Conn. App. 10–11 n.6. We decline to relieve the defendant of her burden to brief her claims adequately based solely on the state's response to those claims in the present case. We, therefore, conclude that the Appellate Court did not abuse its discretion in declining to review the defendant's constitutional claims on the ground that they were inadequately briefed.

The judgment of the Appellate Court is reversed only with respect to the charge of breach of the peace in the second degree and the case is remanded to that court with direction to affirm the judgment of the trial court as to that offense; the judgment of the Appellate Court is affirmed in all other respects.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* STEPHEN M. SABATO
(SC 19406)
(SC 19407)

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson, Js.

Syllabus

Convicted of the crimes of attempt to interfere with an officer and intimidating a witness, the defendant appealed to the Appellate Court. The defendant allegedly had sold a stolen cell phone to an acquaintance, M. Subsequently, when M sent a text message to the defendant informing him that he was at the police station, the defendant sent a text message

to M urging him not to make a statement or to tell anything to the police. Approximately one week later, the defendant discovered that M had made a statement to the police and sent a series of threatening messages to M through Facebook, an online social networking service. The charge of attempt to interfere with an officer was based solely on the defendant's text message to M and the charge of intimidating a witness was based solely on the threatening Facebook messages. The Appellate Court reversed the defendant's conviction of attempt to interfere with an officer, concluding that the evidence was insufficient to convict him of that offense because the text message did not constitute a true threat and thus was protected speech that could not be proscribed under the statute (§ 53a-167a) criminalizing the act of interfering with an officer. The Appellate Court, however, rejected the defendant's claim that there was insufficient evidence to convict him of intimidating a witness and affirmed the judgment of conviction as to that offense. On the granting of certification, the state and the defendant filed separate appeals. *Held*:

1. The Appellate Court correctly determined that the evidence was insufficient to convict the defendant of interfering with an officer; § 53a-167a did not proscribe the defendant's statement in his text message to M urging M not to give a statement to the police about the defendant's alleged criminal activity, and, because the state did not pursue the theory at trial that the defendant interfered with the police by threatening M with physical harm if he gave a statement to them, this court could not evaluate the sufficiency of the evidence on the basis of such a theory.
2. The Appellate Court correctly determined that the evidence was sufficient to convict the defendant of intimidating a witness; the content of the defendant's Facebook messages to M amply supported a finding that the defendant believed that an official proceeding would probably occur and that M would probably be summoned to testify at such proceeding, and that the defendant, in threatening M, intended to influence, delay or prevent M's testimony at a criminal trial, and the jury reasonably could have inferred that the defendant, in threatening M because of his prior cooperation with the police, necessarily intended to convey to M that any future cooperation would be treated in the same manner.

Argued December 8, 2015—officially released June 28, 2016

Procedural History

Substitute information charging the defendant with the crimes of larceny in the fifth degree, attempt to interfere with an officer, and intimidating a witness, brought to the Superior Court in the judicial district of Danbury, geographical area number three, and tried to the jury before *Pavia, J.*; verdict of guilty of attempt to interfere with an officer and intimidating a witness;

subsequently, the court declared a mistrial as to the charge of larceny in the fifth degree and rendered judgment of guilty in accordance with the verdict, from which the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Keller* and *West*, *Js.*, which reversed the trial court's judgment with respect to the charge of attempt to interfere with an officer and remanded the case with direction to render a judgment of acquittal on that charge and to resentence the defendant on the remaining count, and the state and the defendant, on the granting of certification, filed separate appeals with this court. *Affirmed.*

Jacob L. McChesney, special deputy assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *Sean P. McGuinness*, assistant state's attorney, for the appellant in Docket No. SC 19406 and the appellee in Docket No. SC 19407 (state).

Glenn W. Falk, assigned counsel, with whom, on the brief, was *Victoria R. Pasculli*, law student intern, for the appellee in Docket No. SC 19406 and the appellant in Docket No. SC 19407 (defendant).

Opinion

PALMER, J. A jury found the defendant, Stephen M. Sabato, guilty of attempt to interfere with an officer in violation of General Statutes §§ 53a-167a (a)[1] and 53a-49 (a) (2),[2] and intimidating a witness in violation of

[1] General Statutes § 53a-167a (a) provides in relevant part: "A person is guilty of interfering with an officer when such person obstructs, resists, hinders or endangers any peace officer . . . in the performance of such peace officer's . . . duties."

[2] General Statutes § 53a-49 (a) provides in relevant part: "A person is guilty of attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

General Statutes § 53a-151a (a) (1).[3] The defendant's conviction of attempt to interfere with an officer was predicated on a text message that the defendant had sent to a friend instructing him not to cooperate with police officers who were investigating the defendant's involvement in the theft of a cell phone; the conviction of intimidating a witness was predicated on a series of threatening messages that the defendant had sent to the same friend through Facebook, an online social networking service, after learning that he had cooperated with the police about the cell phone theft. The Appellate Court affirmed the defendant's conviction of intimidating a witness notwithstanding the defendant's claim that the evidence was insufficient to support his conviction of that offense. *State* v. *Sabato*, 152 Conn. App. 590, 597, 600, 98 A.3d 910 (2014). The Appellate Court reversed the defendant's conviction of attempt to interfere with an officer, however, after concluding that, under *State* v. *Williams*, 205 Conn. 456, 534 A.2d 230 (1987), fighting words[4] are the only form of speech proscribed by § 53a-167a, and the defendant's text message contained no such language. *State* v. *Sabato*, supra, 595–96, 600. We granted the state's petition for certification to appeal on three issues, one of which is whether this court should "modify *State* v. *Williams*, [supra, 456], to proscribe not only fighting words, but also true

[3] General Statutes § 53a-151a (a) provides in relevant part: "A person is guilty of intimidating a witness when, believing that an official proceeding is pending or about to be instituted, such person uses, attempts to use or threatens the use of physical force against a witness or another person with intent to (1) influence, delay or prevent the testimony of the witness in the official proceeding . . . ."

[4] We previously have described fighting words as "speech that has a direct tendency to cause imminent acts of violence or an immediate breach of the peace. Such speech must be of such a nature that it is likely to provoke the average person to retaliation." (Internal quotation marks omitted.) *State* v. *Szymkiewicz*, 237 Conn. 613, 620, 678 A.2d 473 (1996), quoting *Texas* v. *Johnson*, 491 U.S. 397, 409, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

threats[5] and other categories of unprotected speech . . . .'"[6] (Footnote added; internal quotation marks omitted.) *State* v. *Sabato*, 314 Conn. 938, 102 A.3d 1114 (2014). We granted the defendant's petition for certification to appeal, limited to the issue of whether the Appellate Court properly determined that there was sufficient evidence to convict him of intimidating a witness. *State* v. *Sabato*, 314 Conn. 938, 938–39, 102 A.3d 1113 (2014).

We conclude that the state is precluded from arguing that the defendant's text message constituted a true threat because the state never pursued such a theory of guilt at trial. See, e.g., *Cole* v. *Arkansas*, 333 U.S. 196, 200, 68 S. Ct. 514, 92 L. Ed. 644 (1948) ("[t]o sustain a conviction on grounds not charged in the information and which the jury had no opportunity to pass [on], deprives [a defendant] of a fair trial and a trial by jury, and denies [him] that due process of law guaranteed by the [fourteenth] [a]mendment to the United States [c]onstitution" [internal quotation marks omitted]). The state argued, rather, that the defendant committed the crime of attempt to interfere with an officer merely by

[5] "True threats encompass those statements [in which] the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." (Internal quotation marks omitted.) *State* v. *Moulton*, 310 Conn. 337, 349, 78 A.3d 55 (2013).

[6] This court certified the following three issues in the state's appeal: "1. Did the Appellate Court properly determine that there was insufficient evidence to convict the defendant of attempt to interfere with an officer in violation of . . . [§§] 53a-167a [and 53a-49]?

"2. If the answer to the first question is in the affirmative, should this court modify *State* v. *Williams*, [supra, 205 Conn. 456], to proscribe not only fighting words, but also true threats and other categories of unprotected speech?

"3. Under the circumstances of this case, was the lack of a jury instruction on true threats harmless?" (Internal quotation marks omitted.) *State* v. *Sabato*, 314 Conn. 938, 102 A.3d 1114 (2014).

asking his friend not to give a statement to the police, expression that the state acknowledges is constitutionally protected and, therefore, outside the purview of § 53a-167a (a). Indeed, because the state never argued that the defendant's text message was a true threat, the trial court did not instruct the jury on the definition of such a threat, as it would have been constitutionally required to do if the state had made such an argument. See, e.g., *State* v. *Moulton*, 310 Conn. 337, 362–63, 78 A.3d 55 (2013) ("to ensure that a prosecution . . . does not run afoul of the first amendment, the court must instruct the jury on the difference between protected and unprotected speech whenever the state relies on the content of a communication as substantive evidence of a [crime]"). With respect to the defendant's appeal, we conclude that the evidence supported his conviction of intimidating a witness. Accordingly, we affirm the judgment of the Appellate Court.[7]

The opinion of the Appellate Court sets forth the following facts, which the jury reasonably could have found. "On November 4, 2011, Jazmyn Lopez-Gay, accompanied by the defendant and other friends, visited a nightclub in [the city of] Danbury. While at the nightclub, her cell phone was stolen. The following day, she used an application on her computer to track the cell phone's location that indicated that it was near the Danbury [Fair] [M]all [mall]. She then called the Dan-

[7] Because we reject the state's threshold contention that it has not altered its theory of guilt on appeal, we need not reach the other issues presented in its appeal, namely, whether true threats fall within the purview of § 53a-167a (a) and, if they do, whether the state presented sufficient evidence to support a finding that the defendant's November 5, 2011 text message communicated such a threat, and whether the defendant waived his right to an instruction on true threats or, alternatively, whether the trial court's failure to give such an instruction was harmless error. Our determination that the state has changed its theory of guilt on appeal also makes it unnecessary to decide the defendant's claim, which the Appellate Court did not reach, that § 53a-167a (a) does not proscribe the conduct at issue in this case.

bury police, who went to look for the cell phone but were unable to find it.

"That same day, November 5, 2011, the defendant called Ian Mason, an acquaintance, and asked him to pick him up and drive him to the . . . mall. During that trip, the defendant sold Mason the cell phone. Because the cell phone was password protected, Mason was unable to access its functions or its contents. Seeking to gain access, Mason contacted Michael Barbour, a friend who used to perform work servicing cell phones, and brought the cell phone to his home in [the town of] Newtown.

"Meanwhile, occurring parallel to these events, Lopez-Gay again used the tracking application on her computer, which indicated that her cell phone was located at Barbour's home . . . . Lopez-Gay then called the Newtown Police Department, [which] sent . . . [O]fficer Michael McGowan to that location. Once there, McGowan spoke with Mason, who relinquished the cell phone.

"Later that night, Mason went to the Newtown Police Department. He was questioned by a police officer and eventually provided a sworn, written statement recounting how he came to possess the cell phone. Around this time, Mason sent a text message to the defendant telling him that he was at the police station. In response, the defendant sent a text message to Mason telling him not to write a statement and to 'keep [his] mouth shut.' The message scared Mason and caused him to hesitate before making his statement.

"At some point, the defendant discovered that Mason had made a statement to the police. On November 12, 2011, the defendant sent Mason a series of threatening Facebook messages. The messages shared similar content. In one message, the defendant wrote: 'U wrote a statement regardless. Hearsay is nothing they can't

arrest u unless they have a statement and that's what u did u wrote a fucking statement. . . . I thought we were straight and u wouldn't be dumb enough to write a statement after telling u that day what we did to the last snitch. Ur a snitch kid that's what it comes down to and ur gonna get treated like a snitch u wrote that statement u best be ready for the shit u got urself into. U think it's a fuckin game and all this is fine and [we're] gonna be cool cause u got scared when the cops pressed u and u folded like every other snitch when they had NOTHING on either of us. U fucked up I'd watch out if I were u my boys are real pissed at u for this knowing I'm already in enough shit [as] it is. Don't worry about me worry about them period.'

"The defendant was charged with larceny in the fifth degree, attempt to interfere with an officer, and intimidating a witness." (Footnote omitted.) *State* v. *Sabato*, supra, 152 Conn. App. 592–94.

The charge alleging that the defendant had attempted to interfere with an officer was predicated solely on the November 5, 2011 text message that the defendant had sent to Mason instructing him not to give a statement to the police. The charge alleging that the defendant had intimidated a witness was based on the November 12, 2011 Facebook messages that he sent to Mason after he learned that Mason had given a statement to the police. Although the Facebook messages were admitted into evidence, the text message was not. The assistant state's attorney (prosecutor) questioned Mason about the contents of the text message, however, during the following colloquy:

"Q. . . . After you texted the defendant and told him that you were at the police station, what did he respond with?

"A. He asked me not to write a statement.

* * *

"Q. Did he tell you to keep your mouth shut?

"A. Yes."

Thereafter, during closing arguments, the prosecutor, in addressing the charge of attempt to interfere with an officer, argued that, when Mason "[went] down to the police station, [he] . . . indicates to the defendant that he is . . . there and . . . they have some sort of conversation, through text message, and the defendant indicates to him, you know, don't give a statement to [the] police." The prosecutor then explained that, in order to find the defendant guilty of attempt to interfere with an officer, the jury must find that, "when the defendant sent those text messages to . . . Mason, he was attempting to hinder [the] investigation [by telling Mason], 'don't cooperate with the police . . . .' [T]hat's a substantial step; he didn't complete it, but he took that step. He is guilty of attempt to interfere with an officer." The prosecutor further argued that "the defendant is charged with attempted interference; he's not charged with interfering, and this is important because no one in this courtroom, especially me, is going to claim that the defendant was successful in his attempt to interfere with this investigation. In fact, he was unsuccessful, which led to the Facebook messages, which I'll be getting to a little bit later . . . ."

With respect to the charge of intimidating a witness, the prosecutor argued that, to find the defendant guilty of that offense, the jury must find that the defendant believed that an official criminal proceeding was about to be instituted and that he threatened Mason with physical harm in order to prevent him from testifying in that proceeding. The prosecutor argued that the defendant's Facebook messages established both elements of this offense because they demonstrated that the defendant was aware that a criminal proceeding was

pending or about to be instituted and that he threatened Mason with physical harm to prevent him from testifying in that proceeding.

Subsequently, the jury found the defendant guilty of attempt to interfere with an officer and intimidating a witness.[8] The court thereafter rendered judgment in accordance with the jury's verdict and sentenced the defendant to one year incarceration on the interference charge and six years incarceration, execution suspended after three years, followed by five years of probation, on the intimidation charge. The sentences were to be served consecutively for a total effective sentence of seven years incarceration, suspended after four years, and five years of probation. *State* v. *Sabato*, supra, 152 Conn. App. 594.

The defendant appealed from the trial court's judgment to the Appellate Court, claiming, inter alia, "that § 53a-167a does not proscribe physical or verbal conduct directed against a third party, and thus . . . there was insufficient evidence to establish his guilt [under that statute] because his conduct was directed against Mason, and not a specific, identifiable police officer." Id., 595. The defendant further argued that applying § 53a-167a to conduct directed at Mason, which occurred outside the presence of a police officer, would render the statute unconstitutionally void for vagueness. Id. Finally, the defendant argued that there was insufficient evidence to convict him of intimidating a witness because the Facebook messages "did not constitute proof beyond a reasonable doubt that he intended to influence, delay or prevent Mason from testifying in an official proceeding within the meaning of § 53a-151a." Id., 597. Following oral argument in the

[8] The defendant also was charged with larceny in the fifth degree for the alleged theft of the cell phone. The jury could not reach a unanimous verdict on that count, however, and the court declared a mistrial as to that charge, which is not the subject of this appeal.

Appellate Court, that court, sua sponte, ordered the parties to file simultaneous supplemental briefs "addressing the applicability, if any, of the following language in *State* v. *Williams*, [supra, 205 Conn. 473], to the factual circumstances of this case: To avoid the risk of constitutional infirmity, we construe § 53a-167a to proscribe only physical conduct and fighting words that by their very utterance inflict injury or tend to incite an immediate breach of the peace." (Internal quotation marks omitted.)

The Appellate Court thereafter concluded that the evidence was insufficient to convict the defendant of attempt to interfere with an officer because the state's long form information charged the defendant with violating §§ 53a-167a and 53a-49 solely on the basis of the defendant's text message, and it was undisputed that that message contained no language that reasonably could be construed as fighting words. *State* v. *Sabato*, supra, 152 Conn. App. 596. In light of that determination, the Appellate Court did not reach the defendant's claim that there was insufficient evidence to convict him of attempting to interfere with an officer because § 53a-167a does not proscribe conduct directed at someone who is not an officer.

The Appellate Court, however, rejected the defendant's claim that there was insufficient evidence to convict him of intimidating a witness. The court concluded that the November 12, 2011 Facebook messages were more than sufficient to sustain a finding that the defendant believed that the police were preparing to charge him with the theft of the cell phone, that he believed that Mason would be called to testify at the defendant's criminal trial, and that he threatened Mason to prevent him from testifying in that proceeding. See id., 598–99.

On appeal to this court following our granting of certification, the state argues, inter alia, that the Appel-

late Court incorrectly interpreted § 53a-167a as excluding from the statute's purview all forms of unprotected speech except fighting words. In the alternative, the state asks this court to "modify *Williams*' gloss to allow § 53a-167a to proscribe all forms of unprotected verbal conduct, including 'true threats' . . . ." In his appeal, the defendant claims that the Appellate Court incorrectly concluded that the evidence supported his conviction of intimidating a witness because the state failed to present evidence that the defendant believed that an official proceeding was about to be instituted or that he had a specific intent to influence, delay or prevent Mason's testimony at such a proceeding when he sent him the Facebook messages. We address each appeal in turn.

I

We first address the state's contention that the Appellate Court incorrectly concluded that § 53a-167a does not proscribe true threats or, alternatively, that this court should expand *Williams*' gloss to encompass such threats. The state also argues that, if this court concludes that § 53a-167a proscribes true threats, the evidence was sufficient to convict the defendant of attempt to interfere with an officer because the jury reasonably could have found that the defendant's text message, when viewed in light of the defendant's Facebook messages and certain other evidence, constituted a serious expression of an intent to physically harm Mason if he gave a statement to the police. The defendant contends, inter alia, that the state is attempting to salvage a conviction on the basis of a theory of guilt that was not alleged and was never presented to the jury, in violation of the defendant's right to due process of law. Specifically, the defendant argues that, because the state did not proceed under a theory that the defendant interfered with the police by threatening Mason with physical harm if he gave a statement to them, this court cannot

evaluate the sufficiency of the evidence on the basis of such a theory. The state responds that its theory of guilt has always been "that the defendant attempted to interfere with police questioning of Mason by sending Mason a text message that was intended to frighten Mason out of speaking with the police," and, therefore, the defendant's contention that it has changed its theory of guilt on appeal is without merit. We agree with the defendant.

The following principles guide our analysis of the state's claim. Section 53a-167a (a) provides in relevant part that "[a] person is guilty of interfering with an officer when such person obstructs, resists, hinders or endangers any peace officer . . . in the performance of such peace officer's . . . duties." We previously have interpreted "§ 53a-167a to cover some acts of verbal resistance as well as acts of physical resistance. Although the statute does not explicitly define the nature of the acts that fall within its ambit, 'resistance,' as commonly understood, encompasses both verbal and physical conduct. . . . The inclusion of verbal conduct does not, per se, leave the statute so open-ended that it lends itself to arbitrary enforcement. The statute's requirement of intent limits its application to verbal conduct intended to interfere with a police officer and excludes situations in which a defendant merely questions a police officer's authority or protests his or her action." (Citation omitted.) *State* v. *Williams*, supra, 205 Conn. 471–72. Noting, however, that "this court has the power to construe state statutes narrowly to comport with the constitutional right of free speech" and "[t]o avoid the risk of constitutional infirmity"; id., 473; the court in *Williams* "construe[d] § 53a-167a to proscribe only physical conduct and fighting words that by their very utterance inflict injury or tend to incite an immediate breach of the peace." (Internal quotation marks omitted.) Id. Such a construction, we explained,

"preserves the statute's purpose to proscribe 'core criminal conduct' that is not constitutionally protected." Id., 474. "[I]n accordance with the purpose underlying this judicial gloss, a defendant whose alleged threats form the basis of a prosecution under any provision of our Penal Code . . . is entitled to an instruction that he could be convicted as charged only if his statements . . . constituted a true threat, that is, a threat that would be viewed by a reasonable person as one that would be understood by the person against whom it was directed as a serious expression of an intent to harm or assault, and not as mere puffery, bluster, jest or hyperbole." (Internal quotation marks omitted.) *State* v. *Moulton*, supra, 310 Conn. 367–68.

"In reviewing the sufficiency of the evidence to support a criminal conviction, we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We assume that the fact finder is free to consider all of the evidence adduced at trial in evaluating the defendant's culpability, and presumably does so, regardless of whether the evidence is relied on by the attorneys. . . . When the state advances a specific theory of the case at trial, however, sufficiency of the evidence principles cannot be applied in a vacuum. Rather, they must be considered in conjunction with an equally important doctrine, namely, that the state cannot change the theory of the case on appeal. . . .

"The theory of the case doctrine is rooted in principles of due process of law. . . . In *Dunn* [v. *United States*, 442 U.S. 100, 99 S. Ct. 2190, 60 L. Ed. 2d 743

(1979)], the United States Supreme Court explained: To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. . . . [A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial. . . .

"[I]n order for any appellate theory to withstand scrutiny under *Dunn*, it must be shown to be not merely before the jury due to an incidental reference, but as part of a coherent theory of guilt that, upon [review of] the principal stages of trial, can be characterized as having been presented in a focused or otherwise cognizable sense. . . . Thus . . . we must analyze the evidence adduced at trial to determine whether, when considered in light of the state's theory of guilt at trial, the state presented sufficient evidence . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Carter*, 317 Conn. 845, 853–54, 120 A.3d 1229 (2015).

As we previously indicated, the state denies that its theory of guilt on appeal is different from what it was at trial. The state asserts that, although the prosecutor maintained in his closing argument that the defendant committed the crime of attempt to interfere with an officer by instructing Mason, via text message, not to cooperate with the police, "[t]his one statement . . . does not constitute an exclusive theory of guilt disavowing the circumstances surrounding the text messages that demonstrated the true threatening nature of the text message and explained Mason's intense fearful response to it." The state also contends that, because the prosecutor referred to Mason's fear and one of the defendant's threatening Facebook messages while discussing the interference charge, he "[implicitly] pre-

sented [the] theory that the defendant's attempt to interfere was based on his attempt to frighten Mason out of providing a statement to the police." The state's contention is without merit.

A review of the record reveals that, although the prosecutor made reference to Mason's fear and one of the Facebook messages in his closing argument, both references were made in the context of rebutting defense counsel's argument that the state had failed to prove that it was the defendant and not someone else who sent the November 5, 2011 text message to Mason, not to demonstrate that the text message was intended to communicate a serious expression of an intent to harm Mason if he cooperated with the police. Specifically, the prosecutor argued: "[A]s we're thinking about credibility . . . Mason told you that he was receiving these text messages [from the defendant] and that is consistent with what the officers told you, that he was receiving texts and that he was, in fact, frightened . . . . And, also, let's go back to the Facebook messages, as [they relate] to this charge, referring to the Facebook message that this defendant sent . . . on November 12, 2011, [telling Mason] 'never write a statement, ever, I talked with you about that that day' . . . . And, so, [we have] . . . consciousness of guilt. This defendant said, 'I told you that day not to write a statement.' Why is that important? Because . . . Mason told you he was receiving those text messages. Ladies and gentlemen, that is the equivalent of a confession to attempt to interfere with an officer." The prosecutor's explanation as to why the Facebook messages were relevant to the interference charge is consistent with his response, earlier in the trial, when asked by the court whether the Facebook messages were being offered solely in relation to the larceny[9] and intimidation charges. The prosecutor responded that they were also

[9] See footnote 8 of this opinion.

relevant to the interference charge because, in one of the messages, the defendant "basically admits to sending the text and telling [Mason] not to write a statement . . . ."

At no time did the prosecutor suggest that the Facebook messages—or any other evidence for that matter—were relevant to the interference charge because they helped to prove that the defendant's November 5, 2011 text message, although neutral on its face, was intended to communicate a serious expression of an intent to harm Mason if he cooperated with the police. Cf. *State* v. *Robert H.*, 273 Conn. 56, 82–85, 866 A.2d 1255 (2005) (under theory of case doctrine, when state did not present sexual act by defendant as culpable conduct at trial, state could not rely on that act on appeal to support jury's verdict in response to sufficiency challenge). Indeed, the prosecutor never uttered the words "threat" or "threatening" in relation to the text message, even though, as the state acknowledges, under a true threat theory of guilt, the state bore the burden of establishing beyond a reasonable doubt that the text communicated such a threat. See, e.g., *State* v. *Krijger*, 313 Conn. 434, 458, 97 A.3d 946 (2014) ("[When] a communication contains language [that] is equally susceptible of two interpretations, one threatening, and the other nonthreatening, the government carries the burden of presenting evidence serving to remove that ambiguity. [In the absence of] such proof, the trial court must direct a verdict of acquittal." [Internal quotation marks omitted.]). Rather, as we previously indicated, the prosecutor referred to the November 5, 2011 text message exchange between Mason and the defendant as "some sort of conversation" in which "the defendant indicates to [Mason], you know, don't give a statement to [the] police." According to the prosecutor, it was that statement—"don't give a statement to [the] police"—that constituted the actus reus of the offense.

As we have explained, however, and as the state concedes, § 53a-167a does not proscribe such verbal conduct, and, therefore, the defendant's conviction under that statute cannot stand.

Our determination that the state did not pursue a theory of guilt predicated on threatening language is strongly reinforced by the fact that the trial court did not instruct the jury on the true threat doctrine. Of course, the trial court never gave such an instruction because the state never claimed that the defendant's text message constituted a true threat. A true threat instruction is required, however, in any case in which the defendant's threatening speech forms the basis of the prosecution because only a true threat may be prosecuted under the first amendment. E.g., *State* v. *Moulton*, supra, 310 Conn. 367–68 ("a defendant whose alleged threats form the basis of a prosecution under any provision of our Penal Code . . . is entitled [under the first amendment] to an instruction that he could be convicted as charged only if his statements . . . constituted a true threat" [internal quotation marks omitted]). Accordingly, and for the reasons previously set forth in this opinion, the state cannot prevail on its claim that the evidence was sufficient to convict the defendant of attempt to interfere with an officer based on the theory that the defendant's November 5, 2011 text message constituted a true threat.

II

We next address the defendant's appeal, in which he claims that the Appellate Court incorrectly determined that the evidence was sufficient to convict him of intimidating a witness in violation of § 53a-151a (a). The defendant argues that, although the evidence supported a finding that he threatened Mason for "snitch[ing]," it did not support a finding that he believed that an official proceeding was imminent when he did so, or that his

intention was to prevent Mason's testimony in such a proceeding. We disagree.

Section 53a-151a (a) provides in relevant part: "A person is guilty of intimidating a witness when, believing that an official proceeding is pending or about to be instituted, such person uses, attempts to use or threatens the use of physical force against a witness or another person with intent to (1) influence, delay or prevent the testimony of the witness in the official proceeding . . . ." General Statutes § 53a-146 (6) defines "witness" as "any person summoned, or who may be summoned, to give testimony in an official proceeding." In *State* v. *Ortiz*, 312 Conn. 551, 93 A.3d 1128 (2014), this court explained that the phrase "believing that an official proceeding is pending or about to be instituted," as used in General Statutes § 53a-151 (a),[10] the witness tampering statute, is satisfied "as long as the defendant believes that an official proceeding will probably occur, [and] it does not matter whether an official proceeding is actually pending or is about to be instituted." (Emphasis omitted.) *State* v. *Ortiz*, supra, 569. In light of the close relationship between §§ 53a-151 (a) and 53a-151a (a), it is appropriate to give the same phrase in each statute the same meaning. See, e.g., *State* v. *Grant*, 294 Conn. 151, 160, 982 A.2d 169 (2009) ("ordinarily, the same or similar language in the same statutory scheme will be given the same meaning").

[10] General Statutes § 53a-151 (a) provides: "A person is guilty of tampering with a witness if, believing that an official proceeding is pending or about to be instituted, he induces or attempts to induce a witness to testify falsely, withhold testimony, elude legal process summoning him to testify or absent himself from any official proceeding."

We previously have observed that "the purpose of part XI of the Connecticut Penal Code, in which § 53a-151 (a) [and § 53a-151a (a) are] found, [is to] punish those who interfere with the courts and our system of justice." (Internal quotation marks omitted.) *State* v. *Ortiz*, supra, 312 Conn. 562.

Applying the foregoing definitions to the present facts, we agree with the Appellate Court that the defendant's November 12, 2011 Facebook messages amply supported a finding that the defendant believed that an official proceeding would probably occur and that Mason would probably be summoned to testify at that proceeding. As the Appellate Court explained, "[i]n one Facebook message, the defendant acknowledged that the police were 'getting warrants' and 'building a case' against him. In a different message, the defendant wrote, 'I'll eat the charge . . . .' In yet another message, the defendant told Mason that he was 'already in enough shit [as] it is.' From these statements [alone], the jury reasonably could have inferred that the defendant believed that an official proceeding probably would be instituted." *State* v. *Sabato*, supra, 152 Conn. App. 598.

"Similarly, the record establishe[d] that there was sufficient evidence for the jury to conclude that the defendant believed that Mason probably would be summoned to testify. The term witness is broad, as it includes any person summoned, or *who may be summoned*, to give testimony . . . . General Statutes § 53a-146 (6). The Facebook messages show that the defendant knew that Mason had provided a statement implicating him in the cell phone theft. It was therefore reasonable for the jury to infer that the defendant believed that Mason probably would be called to testify in conformity with that statement at a future proceeding." (Emphasis in original; internal quotation marks omitted.) *State* v. *Sabato*, supra, 152 Conn. App. 598–99. Indeed, the defendant stated in one of those messages, "it's YOUR statement that is gonna fuck it up," thereby demonstrating the defendant's clear understanding that Mason's testimony would be critical at such a proceeding.

We also agree with the Appellate Court that the evidence supported the jury's finding that the defendant,

in threatening Mason, intended to influence, delay or prevent Mason's testimony at a criminal trial. As the Appellate Court observed, "in one Facebook message, the defendant wrote, 'Ur gonna learn the hard way that snitches get what's comin to em straight the fuck up.' In a later message, the defendant wrote: 'Bro snitches get fucked up . . . . The term snitches get stitches is because of snitches. . . . U know that this shit isn't gonna just be left alone for what u did. I just hope ur ready and prepared for the repercussions for ur actions cause I sure am. I'll see u very soon.' In yet another message, the defendant wrote, 'just know that this shit isn't gonna go unsettled and u can take it how u want but shit is gonna get handled . . . .' In his final message, the defendant wrote: 'I thought we were straight and u wouldn't be dumb enough to write a statement after telling u that day what we did to the last snitch. . . . [U]r gonna get treated like a snitch . . . . [U] best be ready for the shit u got urself into. . . . I'd watch out if I were u . . . .' " *State* v. *Sabato*, supra, 152 Conn. App. 599. On the basis of this evidence, the Appellate Court concluded, and we agree, that the "jury reasonably could have inferred that the defendant intended the natural consequences of these threats, which would have included the influence, delay or prevention of Mason's testimony at a future proceeding." Id.

Indeed, the present case is virtually identical to *State* v. *Ortiz*, supra, 312 Conn. 551. In that case, the defendant, Akov Ortiz, was convicted of tampering with a witness in violation of § 53a-151 (a) on the basis of the jury's finding that he threatened a witness with physical harm if she gave a statement to the police. Id., 553, 557. On appeal, Ortiz claimed that the evidence was insufficient to convict him because § 53a-151 (a) "does not proscribe attempts to prevent an individual from speaking to the police" but does proscribe "[attempts] to affect a witness' conduct at an official proceeding."

Id., 554. Although we agreed with Ortiz' reading of the statute, we nevertheless concluded that the evidence supported his conviction because the jury reasonably could have inferred that Ortiz "intended the natural consequences of [his] threat—that [the witness] not only withhold information from the police but also withhold testimony or provide false testimony at a future official proceeding." Id., 573. As in *Ortiz*, the jury in the present case reasonably could have inferred that the defendant, in threatening Mason because of his prior cooperation with the authorities, necessarily intended to convey to Mason that any future cooperation would be treated in the same manner.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

RICHARD REYNOLDS *v.* COMMISSIONER OF CORRECTION
(SC 19071)

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson, Js.

Syllabus

The petitioner, who had been convicted of a capital felony and sentenced to death in connection with the shooting death of a municipal police officer, sought a writ of habeas corpus challenging his sentence and claiming, inter alia, that the criminal trial court had lacked subject matter jurisdiction to hear the charges against him, that his criminal trial counsel had rendered constitutionally ineffective assistance during the guilt phase of his trial, and that international law precluded his conviction. At the petitioner's criminal trial, the state presented testimony from C, who was with the petitioner at the time of the alleged offense, stating that the petitioner had shot and killed the police officer. C, who had been charged in a separate action with hindering prosecution and was later acquitted of that offense, further testified that he had not entered into a deal with the state or received any promises in exchange for his testimony. The habeas court ultimately rejected the petitioner's claims and rendered judgment denying the petition. From that judgment, the petitioner, on the granting of certification, appealed. *Held*:

1. This court concluded that, in light of its decisions in *State* v. *Santiago* (318 Conn. 1) and *State* v. *Peeler* (321 Conn. 375), the petitioner's sentencing claims had effectively become moot, and, accordingly, the petitioner's appeal with respect to those claims was dismissed.
2. There was no merit to the petitioner's claim that the trial court was deprived of subject matter jurisdiction over the capital felony charge because the information did not contain an allegation that the police officer was acting within the scope of his duties at the time of his murder: this court concluded that an information need only allege the statutory citation or name of the offense, along with the date and place the alleged offense occurred, in order to invoke the trial court's criminal jurisdiction, and that the information filed against the petitioner contained such allegations; furthermore, in light of this conclusion, this court declined to address the respondent's claim that the petitioner was procedurally barred from attacking the trial court's subject matter jurisdiction in a collateral proceeding.
3. The petitioner could not prevail on his claims that his trial counsel provided constitutionally inadequate representation by failing to effectively use the state's preferential treatment of C to support his defense: the petitioner was unable to show that his trial counsel rendered deficient performance by failing to raise a claim of misconduct against the state, the petitioner having failed to demonstrate a legal basis for such a claim as the state was under no obligation to bring more severe charges against C, or by failing to adequately attack C's credibility by suggesting that a deal had been made with C in exchange for his testimony, as trial counsel reasonably could have decided to avoid raising an unsupported implication of misconduct by the state and presenting evidence of C's acquittal to preserve the petitioner's credibility with the trier of fact; moreover, even if the petitioner had demonstrated that his trial counsel had rendered deficient performance, he failed to provide any argument or authority in his brief that would support a finding of prejudice.
4. This court declined to address the petitioner's claim that the habeas court improperly concluded that international law did not bar his conviction for a capital felony; although the petitioner's brief contained a passing statement that his conviction violated international law, it cited no authority and provided no argument for that proposition, and, therefore, the issue was inadequately briefed.

(*Two justices concurring and dissenting in two separate opinions*)

Argued April 29, 2015—officially released June 28, 2016

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, and tried to the court, *Schuman*, *J.*; judgment denying the petition, from which the petitioner, on the

granting of certification, appealed. *Dismissed in part; affirmed in part.*

John Holdridge, with whom was *Paula Mangini Montonye*, for the appellant (petitioner).

Harry Weller, senior assistant state's attorney, with whom were *Cynthia S. Serafini*, senior assistant state's attorney, and, on the brief, *Maureen Platt*, state's attorney, and *Brenda L. Hans* and *Elizabeth Tanaka*, assistant state's attorneys, for the appellee (respondent).

Opinion

EVELEIGH, J. The petitioner, Richard Reynolds, appeals from the denial of his petition for a writ of habeas corpus challenging his sentence of death under General Statutes (Rev. to 1991) § 53a-46a and his underlying conviction for a capital felony under General Statutes (Rev. to 1991) § 53a-54b (1).[1] The petitioner was convicted by a three judge panel and sentenced to death by a jury for the murder of a municipal police officer, Walter Williams, Jr., in the early morning hours of December 18, 1992. On direct appeal, this court affirmed the petitioner's conviction and sentence. *State* v. *Reynolds*, 264 Conn. 1, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). The facts relating to the petitioner's crime, his conviction, and his sentence are set forth in greater detail in our decision in his direct appeal. Id., 18–24. After we issued our decision in the petitioner's direct appeal, the petitioner filed a petition for a writ of habeas corpus claiming, among other things, his criminal trial and appellate counsel rendered constitutionally ineffective assistance by failing to raise or sufficiently present a plethora of claims during the criminal proceedings. After an evidentiary hearing, the habeas court rejected each of the petitioner's claims and rendered judgment

[1] The petitioner was also convicted of murder in violation of General Statutes (Rev. to 1991) § 53a-54a, but that conviction was merged into the capital felony count.

denying the petition. The habeas court granted certification to appeal from its judgment pursuant to General Statutes § 52-470 (g), and the petitioner appealed to the Appellate Court. The petitioner later filed a motion to transfer the appeal to this court, which we granted. See General Statutes § 51-199 (c); Practice Book § 65-2.

On appeal, the petitioner raises thirteen separate issues with the habeas court's decision. Most of the issues concern his death sentence, but a few relate to his capital felony conviction.[2] We note at the outset that, in light of our decisions in *State* v. *Santiago*, 318 Conn. 1, 112 A.3d 1 (2015), and *State* v. *Peeler*, 321 Conn. 375, 140 A.3d 811 (2016), we dismiss the appeal with respect to the petitioner's sentencing claims and address only those claims pertaining to his underlying capital conviction. Three claims remain regarding the underlying capital felony conviction: (1) that the criminal trial court lacked subject matter jurisdiction to hear the charges; (2) that his criminal trial counsel rendered constitutionally ineffective assistance during the guilt phase of the petitioner's trial; and (3) that international law precludes his conviction for a capital felony. We reject each of these claims and affirm the judgment of the habeas court with respect to the petitioner's underlying conviction.

I

The petitioner first claims that the substitute long form information charging him with a capital felony

[2] After the habeas trial, but before the petitioner completed briefing this appeal, the legislature passed No. 12-5 of the 2012 Public Acts (P.A. 12-5), which abolished the death penalty for crimes occurring after its effective date. After its passage, the petitioner asked permission to address for the first time on appeal issues concerning the impact of P.A. 12-5 on his death sentence. We denied the request without prejudice to the petitioner's right to refile after the release of a decision in *State* v. *Santiago*, 318 Conn. 1, 122 A.3d 1 (2015), which raised identical claims. This court has released its decision in *Santiago*, which concluded that imposing or carrying out a sentence of death violates article first, §§ 8 and 9, of the Connecticut constitution. Id., 15–17. As a result of that decision, the petitioner's habeas claims respecting the legality of his sentence have effectively become moot, and we leave the petitioner to pursue appropriate remedies in the Superior Court pursuant to Practice Book § 43-22.

failed to describe each and every element of the offense charged, thus depriving the trial court of subject matter jurisdiction. The state initially charged the petitioner with a short form information alleging that he committed the offense of capital felony in the city of Waterbury on or about December 18, 1992, in violation of General Statutes (Rev. to 1991) § 53a-54b (1). The petitioner later filed a motion for a bill of particulars asking for more information about the nature of the charge. The state filed a substitute long form information in response. The long form information alleged that the petitioner "did commit the crime of [capital felony] in violation of Connecticut General Statutes [Rev. to 1991] § 53a-54b (1) in that on or about [December 18, 1992], at approximately [4 a.m.], at or near the intersection of Orange and Ward Streets [in] Waterbury . . . the [petitioner] did commit [murder] of a member of a local police department, to wit: [Officer Williams] of the Waterbury . . . Police Department." The parties agree that the long form information did not allege that Officer Williams was acting within the scope of his duties at the time of the offense, one of the elements of a capital felony under (Rev. to 1991) § 53a-54b (1).

According to the petitioner, the state's failure to allege every element of the capital felony offense deprived the trial court of subject matter jurisdiction over that charge, thus rendering his conviction and resulting sentence invalid. In response, the respondent, the Commissioner of Correction, asserts that the petitioner did not preserve this issue for our review because he failed to raise this claim before the habeas court, preventing him from raising it for the first time in this appeal. The respondent also argues that the petitioner's claim, even if raised, cannot overcome the procedural hurdles required to mount a collateral attack on the subject matter jurisdiction of the original trial court.[3] We do

[3] Relying on a decision in a civil case, *In re Shamika F.*, 256 Conn. 383, 407–408, 773 A.2d 347 (2001), the respondent argues that the petitioner

not address the respondent's arguments about whether the petitioner is procedurally barred from presenting this collateral attack because, assuming for the sake of argument that we could properly review his claim, which presents a question of law; *Stepney Pond Estates, Ltd.* v. *Monroe*, 260 Conn. 406, 417, 797 A.2d 494 (2002); its merits are so obviously lacking that we have no trouble rejecting it out of hand.

An information need not allege every element of an offense to invoke the Superior Court's criminal jurisdiction—it need only allege the statutory citation or name of the offense, along with the date and place the alleged offense occurred.[4] See, e.g., *State* v. *Commins*, 276 Conn. 503, 513–14, 886 A.2d 824 (2005) (rejecting subject matter jurisdiction challenge when information failed to allege element of offense because it was "sufficient for the state to set out in the information the statutory name of the crime with which the defendant is charged" [internal quotation marks omitted]), overruled on other grounds by *State* v. *Elson*, 311 Conn. 726, 754, 91 A.3d 862 (2014); *State* v. *Crosswell*, 223 Conn. 243, 265, 612 A.2d 1174 (1992) ("[i]t is settled law that the original information, because it set forth by name and statutory reference the crime with which the defendant was charged, was sufficient to invoke the jurisdiction of the court"); *State* v. *Alston*, 141 Conn. App. 719, 732, 62 A.3d 586 ("an information that states the exact

cannot collaterally attack the trial court's jurisdiction unless he first shows that the jurisdictional defect was entirely obvious, that he was prevented from raising the claim during the original proceeding, or that justice requires permitting him to litigate the issue for the first time in the collateral proceeding. Because we do not address the respondent's procedural objections, we take no position on the application of these hurdles to a collateral attack on the original trial court's subject matter jurisdiction over a criminal proceeding.

[4] This rule is now so well entrenched in our jurisprudence that it is reflected in the requirements for an information set forth in our rules of practice. See Practice Book § 36-13.

section and subsection of the statute under which a defendant is charged, as well as the time and place of the alleged unlawful event, is sufficient to charge a defendant with such offense"), cert. denied, 308 Conn. 943, 66 A.3d 884 (2013); *State* v. *Reed*, 55 Conn. App. 170, 176–77, 740 A.2d 383 ("The long form information . . . provided the defendant with the exact section and subsection of the statute under which he was charged. . . . Because the information was adequate, we conclude that the trial court had jurisdiction over this matter."), cert. denied, 251 Conn. 921, 742 A.2d 361 (1999); *State* v. *Walton*, 34 Conn. App. 223, 227, 641 A.2d 391 ("The original short form information set forth the crimes with which the defendant was charged by name and statutory references. The information was sufficient, therefore, to invoke the jurisdiction of the court."), cert. denied, 230 Conn. 902, 644 A.2d 916 (1994); see also *State* v. *Vlahos*, 138 Conn. App. 379, 385, 51 A.3d 1173 (2012) (information sufficiently charged offense when it "provide[d] the defendant with the statutory section under which he was charged as well as the time and place of the incident"), cert. denied, 308 Conn. 913, 61 A.3d 1101 (2013); *State* v. *Akande*, 111 Conn. App. 596, 603, 960 A.2d 1045 (2008) (same), aff'd, 299 Conn. 551, 11 A.3d 140 (2011).

Once the state files an information with the required allegations, the Superior Court's criminal jurisdiction is invoked and any claim the information lacks enough factual detail to allow the defendant to prepare a defense goes to the sufficiency of the notice given to the defendant. See, e.g., *State* v. *Alston*, supra, 141 Conn. App. 730–31. The petitioner has not claimed in the present case that a lack of factual detail in the informations prevented him from preparing a defense;[5] he claims only that the trial court lacked jurisdiction.

[5] It is unlikely that the petitioner would have succeeded on such a claim. Even though the informations did not specifically allege that Officer Williams was acting within the scope of his duties at the time of the offense, the

It follows from our case law that the trial court in the present case had jurisdiction to hear the capital felony charge against the petitioner. The state filed a short form information charging the petitioner with a capital felony and included the statutory citation for the alleged offense and the date and place the offense allegedly occurred. Nothing more was required to invoke the trial court's jurisdiction. The fact that the substitute long form information contained additional factual allegations relating to some, but not all, of the elements of the crime had no impact on the trial court's jurisdiction. *State* v. *Crosswell*, supra, 223 Conn. 264–66; *State* v. *Walton*, supra, 34 Conn. App. 227–28. The petitioner further contends that, under the common law, failure to allege every element of a crime rendered an information defective, citing to this court's decisions in *State* v. *Tyrrell*, 100 Conn. 101, 122 A. 924 (1923), *State* v. *Keena*, 63 Conn. 329, 28 A. 522 (1893), and *State* v. *Costello*, 62 Conn. 128, 25 A. 477 (1892). These cases do not, however, discuss whether the alleged defects in the information rendered the trial court without subject matter jurisdiction to hear the charges. More importantly, whatever this court may have held in those cases about the sufficiency of an information under the common law, that view is clearly not in accord with our modern jurisprudence. See, e.g., *State* v. *Commins*, supra, 276 Conn. 513–14; *State* v. *Crosswell*, supra, 264–

petitioner contested this very element at his trial. The state specifically alerted the trial court and the petitioner that the operative information did not include factual allegations for this element and acknowledged that it had the burden of proving that fact beyond a reasonable doubt. See *State* v. *Reynolds*, supra, 264 Conn. 28 n.18. The petitioner subsequently moved for a judgment of acquittal on the ground that the state failed to prove that element, which the trial court denied. Id. The three judge panel hearing the case ultimately found that the state had proven this element beyond a reasonable doubt. It thus appears that the petitioner was fully on notice that the state would try to prove this element at trial and that he prepared his defense accordingly.

66. We therefore conclude that the petitioner's jurisdictional claim is meritless.[6]

II

The petitioner also claims that his criminal trial counsel did not provide constitutionally adequate representation during the guilt phase of his criminal trial because his counsel failed to effectively use the state's preferential treatment of Anthony Crawford, who was with the petitioner when Officer Williams was murdered, to support the petitioner's defense. Specifically, the petitioner asserts that his trial counsel should have brought a claim of misconduct against the state because the petitioner believes the state improperly granted leniency to Crawford to induce Crawford to testify against the petitioner. The petitioner also argues that his trial counsel did not adequately use the state's favorable treatment of Crawford to challenge Crawford's credibility at the petitioner's trial.[7]

According to the petitioner, the state could have charged Crawford with more severe offenses, including murder and attempted sale of cocaine. Evidence given at the petitioner's trial shows that shortly before Officer Williams was murdered, the petitioner and Crawford were walking down a street in Waterbury, each carrying about 175 bags of cocaine worth approximately $3500. *State* v. *Reynolds*, supra, 264 Conn. 18–19. Officer Williams, who was on patrol in the area, spotted the peti-

[6] The petitioner has also claimed, for the first time on appeal, that his trial and appellate counsel's failure to raise this subject matter jurisdiction claim during the criminal trial and direct appeal proceedings amounted to ineffective assistance of counsel. Because the petitioner's stand-alone jurisdiction claim is meritless, his related ineffective assistance claim must also fail.

[7] The petitioner also argues that his counsel rendered ineffective assistance with respect to Crawford at the petitioner's sentencing, but we need not address that argument in the present appeal in light of this court's decisions in *State* v. *Santiago*, supra, 318 Conn. 1, and *State* v. *Peeler*, supra, 321 Conn. 375.

tioner and Crawford and ordered them to stop. Id., 19. Crawford continued walking, but the petitioner stopped for the officer. Id. Officer Williams began to pat down the petitioner, an altercation ensued, and the petitioner ultimately shot and killed Officer Williams. Id., 19–21. Both the petitioner and Crawford ran from the scene but were later apprehended. Id., 20–21.

The state charged the petitioner with the murder of Officer Williams and charged Crawford with hindering prosecution based on Crawford's "silence" about the petitioner's involvement in the shooting when police canvassed the neighborhood shortly after the murder. Neither of them was charged with any drug crimes.[8] Crawford was acquitted of the hindering prosecution charge after a bench trial on the basis that his "silence" was, as a matter of law, not an act of concealment under the hindering prosecution statute. Crawford later testified against the petitioner. The petitioner claimed that Crawford had shot Officer Williams, but Crawford named the petitioner as the shooter in his trial testimony. The three judge panel ultimately found that the petitioner shot Officer Williams. Crawford testified that the state had neither made a deal with him nor given any promises in exchange for his testimony.

The petitioner contends that the state could have charged Crawford as an accomplice in Officer Williams' murder and for the attempted sale of cocaine but that the state did not do so because it had an undisclosed deal with Crawford to forgo more serious charges in return for Crawford's testimony against the petitioner. The petitioner further claims that the state, as part of its undisclosed "ruse" to secure Crawford's testimony,

[8] The state did allege, as part the aggravating factors it put forth in support of its case for applying the death penalty, that the petitioner committed the murder during the commission of an attempted sale of cocaine. That allegation related only to enhancement of the petitioner's sentence, not the crimes he was charged with committing.

intentionally bungled its case against Crawford to all but ensure that he would be acquitted on the hindering prosecution charge. The petitioner argues that trial counsel was deficient for failing to argue that the state's charging decisions amounted to misconduct because they "corrupt[ed] the truth seeking function" of the trial. He also argues that trial counsel should have argued the existence of a secret deal between the state and Crawford as a means to attack Crawford's credibility.

The respondent asserts that there was no misconduct for the petitioner's trial counsel to raise, because the state enjoys broad discretion to charge defendants, and was under no obligation to bring more severe charges against Crawford. The respondent also asserts that the petitioner has provided no evidence that a deal existed between the state and Crawford and notes that both the trial prosecutor and Crawford denied that any deal existed. Consequently, the respondent argues that the petitioner's trial counsel cannot be faulted for failing to make an issue of any purported deal with Crawford. We agree with the respondent and reject the petitioner's claims.

Before turning to the petitioner's claims, we observe that the petitioner's burden and our standard of review are explained in detail in *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712–13, 946 A.2d 1203 (2008). We briefly note that to succeed on a claim of ineffective assistance of counsel, the petitioner must prove both that his trial counsel's performance was constitutionally deficient and that his defense suffered prejudice as a result. Id.

As for the misconduct argument, the petitioner has not shown that his counsel's performance was deficient because he has not shown that any misconduct occurred. Both the decision to criminally charge an individual and the choice of which crime should be

charged lie within the discretion of the state and are not ordinarily subject to judicial review. See, e.g., *State* v. *Kinchen*, 243 Conn. 690, 699–700, 707 A.2d 1255 (1998) (explaining in detail reasons for this deference). To be sure, this discretion is not unlimited. See, e.g., *State* v. *Webb*, 238 Conn. 389, 518 n.81, 680 A.2d 147 (1996) (state cannot charge out of vindictiveness nor on impermissible basis such as race, religion or sex); see also *State* v. *Corchado*, 200 Conn. 453, 460, 512 A.2d 183 (1986) (statute permits court to dismiss charges with prejudice if circumstances are compelling). The petitioner has not, however, directed us to any authority, and we are aware of none, that the state commits misconduct if it chooses not to bring the most severe charges possible against a cooperating witness. To the contrary, prosecutors frequently show leniency toward witnesses who cooperate in a prosecution, a practice that has been upheld by courts time and again. See, e.g., *United States* v. *Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) (noting that "[n]o practice is more ingrained in our criminal justice system" than prosecutors giving leniency to testifying witnesses). Furthermore, barring the state from this practice could severely hinder the state's ability to gather evidence from coparticipants, who frequently hold the best evidence available about the crimes charged. See *United States* v. *Dailey*, 759 F.2d 192, 196 (1st Cir. 1985) (noting that coparticipants are frequently present at crime scenes and can be most knowledgeable witnesses available). Without demonstrating any legal basis for a claim of misconduct, the petitioner has not established that his counsel were deficient by failing to raise it.

But even if the petitioner could show some form of misconduct, the petitioner's claim fails nevertheless because he has provided no argument whatsoever in his briefs about how this alleged deficiency prejudiced him. The petitioner has not provided us any authority

to show what remedy the trial court could have provided the petitioner had his counsel raised a charge of misconduct. The petitioner does not suggest—and we are aware of no authority holding—that the state's leniency toward Crawford somehow precluded the state from charging the petitioner with more severe crimes than Crawford or required his acquittal. Nor has the petitioner suggested that leniency by the state rendered Crawford an incompetent witness.[9] Having failed to provide any argument or authority to support a finding of prejudice, the petitioner cannot succeed on his claim based on this alleged misconduct. See *Small* v. *Commissioner of Correction*, supra, 286 Conn. 713 (failure to prove prejudice defeats claim for ineffective assistance of counsel).

As for the petitioner's argument that his trial counsel failed to adequately attack Crawford's credibility at trial, we conclude his counsel's actions were reasonable and, thus, not deficient. According to the petitioner, his counsel should have done more to challenge Crawford's credibility by arguing the existence of a clandestine deal. The petitioner faults his trial counsel for not relying on Crawford's acquittal on what the petitioner calls a "bogus" hindering prosecution charge and the state's failure to charge Crawford with homicide or drug charges to argue that the state had "obviously cut a deal" with Crawford in exchange for his testimony.

It is hardly unreasonable for counsel to choose to preserve credibility with the finder of fact by declining

[9] Indeed, such a claim would likely fail. We have held that the state is free to unilaterally choose to show leniency toward a witness, and doing so does not violate the defendant's due process rights. See *State* v. *Ferrara*, 176 Conn. 508, 513–15, 408 A.2d 265 (1979) (state's unilateral decision not to prosecute cooperating witness did not amount to deal that had to be disclosed to defense). Moreover, the legislature has specifically authorized the state to seek immunity from prosecution as a means to compel a witness' testimony. General Statutes § 54-47a.

to pursue an argument that is supported by nothing more than conjecture. The petitioner has not cited any evidence that a deal existed other than mere speculation based on the state's lenient treatment of Crawford. One of the petitioner's trial attorneys testified that he had no evidence of any, deal and Crawford denied that the state had made any promises in exchange for his testimony.

The petitioner's trial counsel also reasonably could have chosen not to imply the existence of a deal to avoid raising an unsupported implication that the state had acted improperly. Had there been a deal, the state would have been obligated to disclose it. *State* v. *Floyd*, 253 Conn. 700, 736, 756 A.2d 799 (2000). Had the state neglected to disclose the deal initially, it would have been obligated to correct the record when Crawford testified that no deal existed. *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 368–69, 71 A.3d 512 (2013). Thus, to imply that a secret deal was struck is to imply that the state violated its obligations.

Rather than make such accusations without any supporting evidence, the petitioner's trial counsel opted for the eminently reasonable alternative of questioning Crawford about an unrelated charge pending against him as a means to suggest that Crawford was lying or embellishing his testimony because he hoped, even in the absence of a deal, that the state might be more lenient in his other case.[10] Although the petitioner claims that his counsel should have exposed to the three judge panel that Crawford was acquitted of hindering prosecution because the charge was "bogus," his counsel reasonably could have chosen to avoid revealing Crawford's acquittal, lest it make Crawford appear less culpable for Officer Williams' death in the eyes of the

[10] At the time of his trial testimony, Crawford had an unrelated charge of escape pending against him.

fact finder. We therefore conclude that his trial counsel's performance was not deficient, and we do not consider whether any purported deficiency prejudiced the petitioner, an element of his claim that, as we have previously noted, the petitioner did not brief in this court.[11]

III

Lastly, the petitioner asserts that the habeas court improperly concluded that international law did not bar his conviction for a capital felony. We decline to address this argument, however, because the petitioner did not adequately brief it. Although the petitioner makes a passing statement that his conviction violates international law, the petitioner's claim appears aimed at his sentence, which is governed by our decisions in *State* v. *Santiago*, supra, 318 Conn. 1, and *State* v. *Peeler*, supra, 321 Conn. 375. The petitioner spends all of his argument explaining that international law prohibits a sentence of death but cites no authority and provides no argument that international law also prevents a capital felony conviction, which does not necessarily carry a sentence of death. See General Statutes (Rev. to 1991) § 53a-46a. Consequently, we deem the petitioner's claim waived insofar as it challenges his capital felony conviction. *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 444 n.40, 35 A.3d 188 (2012) ("[c]laims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion").

[11] The petitioner raises, in his brief, an independent claim alleging that the habeas court improperly concluded that it could not consider the cumulative effect of counsel's errors when considering whether those errors prejudiced the petitioner's defense. In support of this claim, the petitioner cites, among other cases, *Kyles* v. *Whitley*, 514 U.S. 419, 436, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), and *Strickland* v. *Washington*, 466 U.S. 668, 695–96, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Having concluded that the performance of the petitioner's trial counsel was not deficient, however, we need not address this claim.

The appeal is dismissed with respect to the petitioner's claims regarding the sentence of death; the judgment is affirmed in all other respects.

In this opinion ROGERS, C. J., and PALMER, McDONALD and ROBINSON, Js., concurred.

ZARELLA, J., concurring and dissenting. I agree with and join parts I, II and III of the majority opinion. With respect to the sentencing issues, I respectfully disagree and note that my opinions as expressed in my dissent in *State* v. *Santiago*, 318 Conn. 1, 341, 122 A.3d 1 (2015), and my dissent in *State* v. *Peeler*, 321 Conn. 375, 430, 140 A.3d 811 (2016), remain unchanged.

ESPINOSA, J., concurring and dissenting. I agree with and join parts I, II and III of the majority opinion. With respect to the sentencing issues, I respectfully disagree and note that my opinions as expressed in my dissent in *State* v. *Santiago*, 318 Conn. 1, 388, 122 A.3d 1 (2015), and my dissent in *State* v. *Peeler*, 321 Conn. 375, 499, 140 A.3d 811 (2016), remain unchanged.

MARQUIS JACKSON *v.* COMMISSIONER OF CORRECTION
(SC 19360)

Rogers, C. J., and Palmer, Zarella, McDonald, Espinosa and Robinson, Js.

Argued February 22—officially released June 28, 2016

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Schuman, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to the Appellate

Court, *Bear*, *Keller* and *Harper*, *Js.*, which affirmed the habeas court's judgment, and the petitioner, on the granting of certification, appealed to this court. *Appeal dismissed.*

Peter Tsimbidaros, for the appellant (petitioner).

Rita M. Shair, senior assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, *Eugene R. Calistro, Jr.*, senior assistant state's attorney, and *Erika L. Brookman* and *Timothy J. Sugrue*, assistant state's attorneys, for the appellee (respondent).

Opinion

PER CURIAM. The issue in this appeal is whether the habeas court properly denied the petition for a writ of habeas corpus filed by the petitioner, Marquis Jackson. The petitioner was convicted, after a jury trial, of eight charges arising from a robbery and murder committed in 1999 in New Haven and was sentenced to a total effective sentence of forty-five years imprisonment.[1] The Appellate Court affirmed the judgment of conviction. *State* v. *Jackson*, 73 Conn. App. 338, 341, 808 A.2d 388, cert. denied, 262 Conn. 929, 814 A.2d 381 (2002). The petitioner thereafter filed a petition for a writ of habeas corpus in which he claimed, among other things, that he was deprived of his sixth amendment

[1] The petitioner was convicted of one count of felony murder in violation of General Statutes § 53a-54c, three counts of robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), two counts of attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 and 53a-134 (a) (2), one count of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2), and one count of carrying a pistol without a permit in violation of General Statutes (Rev. to 1999) § 29-35 (a). See *State* v. *Jackson*, 73 Conn. App. 338, 340–41, 808 A.2d 388, cert. denied, 262 Conn. 929, 814 A.2d 381 (2002).

right to effective assistance of counsel during his trial because his counsel had failed to conduct an adequate pretrial investigation and had failed to adequately present a defense at trial.[2] After a trial, the habeas court denied his petition for a writ of habeas corpus. The petitioner then appealed from the judgment of the habeas court to the Appellate Court, which affirmed the judgment. *Jackson* v. *Commissioner of Correction*, 149 Conn. App. 681, 714, 89 A.3d 426 (2014). We then granted the petitioner's petition for certification to appeal to this court, limited to the following issue: "Whether the Appellate Court properly concluded that the habeas court properly determined that criminal trial counsel had rendered effective assistance with regard to cell phone evidence?" *Jackson* v. *Commissioner of Correction*, 313 Conn. 901, 96 A.3d 558 (2014).

After examining the entire record on appeal and considering the briefs and oral arguments of the parties, we have determined that the appeal in this case should be dismissed on the ground that certification was improvidently granted.

The appeal is dismissed.

VERNON HORN *v.* COMMISSIONER OF CORRECTION (SC 19364)

Rogers, C. J., and Palmer, Zarella, McDonald, Espinosa and Robinson, Js.

Syllabus

The petitioner, who had been convicted of various crimes, including murder, in connection with the robbery of a deli with two accomplices, filed a petition for a writ of habeas corpus, claiming that he was deprived of his sixth amendment right to the effective assistance of counsel because his trial counsel had failed to conduct an adequate pretrial investigation and had failed to adequately present a defense at trial. The petitioner further alleged that he was deprived of his constitutional due process

[2] For purposes of this appeal, the relevant pleading is the petitioner's amended petition for a writ of habeas corpus dated October 10, 2009.

right to a fair trial because certain state's witnesses perjured themselves during his trial, and he asserted a claim of actual innocence. During the robbery in New Haven, a cell phone was stolen from one of the victims. In the two days after the robbery, five calls were made from that cell phone to various telephone numbers in Bridgeport and New Haven. At the petitioner's criminal trial, one of the petitioner's accomplices in the robbery, B, testified for the state that he placed the first three calls from the cell phone, making the first of those calls on his way to Bridgeport with the petitioner after the robbery. B testified that he then gave the cell phone to the petitioner in Bridgeport prior to the time that the next two calls were made. Another state's witness, P, testified that the petitioner than gave the cell phone to him shortly thereafter in New Haven, where he placed the fourth call. At the habeas trial, the petitioner presented the testimony of various witnesses who contradicted the state's theory of who had possession of the stolen cell phone at various times. The habeas court concluded, inter alia, that, contrary to the state's theory at the criminal trial that the petitioner possessed the stolen cell phone, the testimony of new witnesses at the habeas trial regarding the stolen cell phone established that the cell phone could not have been in the petitioner's possession the day after the robbery because the cell phone remained in Bridgeport with B, and that P never received the cell phone from the petitioner in order to make the fourth call as P had testified at the criminal trial. The habeas court further concluded that, pursuant to the test enunciated in *Strickland* v. *Washington* (466 U.S. 668), counsel's failure to obtain this information prior to the criminal trial was deficient performance and the deficient performance had prejudiced the petitioner's defense and undermined the court's confidence in the jury verdict. Accordingly, the habeas court rendered judgment granting the petitioner's habeas petition, from which the respondent, the Commissioner of Correction, on the granting of certification, appealed. On appeal, the respondent conceded that the petitioner's criminal counsel provided ineffective assistance of counsel by failing to adequately investigate who was in possession of the stolen cell phone in the days following the robbery but claimed that the habeas court incorrectly determined that counsel's deficient performance was prejudicial to the petitioner. The petitioner disputed the respondent's claim and claimed three alternative grounds for affirmance. *Held*:

1. The habeas court incorrectly determined that criminal counsel's failure to adequately investigate who was in possession of the stolen cell phone in the days following the robbery was prejudicial pursuant to *Strickland*, this court having concluded that, contrary to the habeas court's determinations, the new evidence regarding the location and use of the cell phone did not undermine confidence in the petitioner's guilty verdict, and, accordingly, counsel's failure to investigate the issue prior to trial was not prejudicial; the new evidence did not conclusively establish that P, after having borrowed the cell phone from the petitioner, could

not have made the fourth call, nor did it give rise to a reasonable probability that the verdict would have been different if that evidence had been presented at the criminal trial, such evidence having been extremely weak, confusing, equivocal, and not compelling, and there having been sufficient other evidence presented at the criminal trial connecting the petitioner to the crimes to convict him, including testimony from B that the petitioner was one of his accomplices and from eyewitnesses placing the petitioner at the deli before, during and after the crimes.

2. The petitioner could not prevail on his claim that the judgment of the habeas court could be affirmed on the alternative ground that criminal counsel's failure to investigate and discover evidence that undermined B's testimony concerning the petitioner's whereabouts before, during and after the crimes was prejudicial under *Strickland*; the petitioner failed to establish the reasonable probability that, if the jury had heard the new alibi evidence presented at the habeas trial, its verdict would have been different, the new alibi evidence having been merely cumulative of evidence presented at the criminal trial that already cast doubt on the state's theory based on B's testimony.

3. The petitioner could not prevail on his claim that the judgment of the habeas court could be affirmed on the alternative ground that the state's unknowing use of perjured testimony by B and P at his criminal trial deprived him of his constitutional due process right to a fair trial, this court having concluded the habeas court properly determined that there was no reasonable probability that, but for B's and P's testimony at the criminal trial, the petitioner would not have been convicted; the petitioner failed to establish conclusively that the state's witnesses committed perjury at the criminal trial, and, even without that testimony, there was sufficient evidence presented at the criminal trial to support the jury's verdict.

4. The petitioner could not prevail on his claim that the habeas court's judgment could be affirmed on the alternative ground of actual innocence, this court having concluded that the habeas court properly determined that the petitioner did not establish that he was actually innocent; the petitioner's claim that the new evidence at the habeas trial established that the testimony of B and P was false and that the remaining evidence setting forth the timeline would have made it nearly impossible for the petitioner to have committed the robbery and murder incorrectly assumed that the approximate times given by the various witnesses were precise times, and, even if this court assumed that the petitioner was not required to present affirmative evidence to establish his actual innocence, the petitioner here had not so completely eviscerated the prosecution's case that the state would have had no evidence to go forward with upon retrial.

Argued February 22—officially released June 28, 2016

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Young*, *J.*; judgment granting the petition, from which the respondent, on the granting of certification, appealed. *Reversed*; *judgment directed.*

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, *Eugene R. Calistro, Jr.*, senior assistant state's attorney, and *Erika L. Brookman*, assistant state's attorney, for the appellant (respondent).

Richard A. Reeve, with whom was *Allison M. Near*, for the appellee (petitioner).

Opinion

ESPINOSA, J. The issue that we must resolve in this appeal is whether the habeas court properly granted the petition for a writ of habeas corpus filed by the petitioner, Vernon Horn. After a joint jury trial with his codefendant, Marquis Jackson, the petitioner was convicted of ten offenses[1] in connection with a robbery and murder he committed in 1999 in New Haven. Following the petitioner's direct appeal, the Appellate Court affirmed the judgment of conviction. *State* v. *Jackson*, 73 Conn. App. 338, 341, 808 A.2d 388, cert.

[1] The petitioner was convicted of one count of felony murder in violation of General Statutes § 53a-54c, one count of assault in the first degree in violation of General Statutes § 53a-59, three counts of robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), two counts of attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 and 53a-134 (a) (2), one count of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2), one count of burglary in the first degree in violation of General Statutes (Rev. to 1999) § 53a-101 (a) (2), and one count of carrying a pistol without a permit in violation of General Statutes (Rev. to 1999) § 29-35 (a). *State* v. *Jackson*, 73 Conn. App. 338, 341, 808 A.2d 388, cert. denied, 262 Conn. 929, 930, 814 A.2d 381 (2002).

denied, 262 Conn. 929, 930, 814 A.2d 381 (2002). Thereafter, the petitioner filed a petition for a writ of habeas corpus in which he claimed, among other things, that he was deprived of his sixth amendment right to effective assistance of counsel during his trial because his counsel had failed to conduct an adequate pretrial investigation and had failed to adequately present a defense at trial.[2] After a trial, the habeas court agreed with the petitioner's claim, granted his petition for a writ of habeas corpus and ordered that the petitioner's conviction be set aside. The respondent, the Commissioner of Correction, then filed this appeal from the judgment of the habeas court.[3] We conclude that the habeas court improperly granted the petitioner's petition for a writ of habeas corpus. Accordingly, we reverse the judgment of the habeas court.

The jury in the underlying criminal trial reasonably could have found the following facts, as set forth by the Appellate Court in its opinion addressing the petitioner's direct appeal from the judgment of conviction. "On January 24, 1999, at approximately 3:30 a.m., Jackson and [the petitioner], along with Steven Brown, entered the Dixwell Deli [deli] on Dixwell Avenue in New Haven, wearing masks and carrying handguns. As [the petitioner] entered the deli, he fired five or six shots from a nine millimeter pistol. One bullet struck Caprice Hardy, a customer, and killed him. A second bullet struck Abby Yousif, an owner of the deli, in the shoulder. Brown and Jackson followed [the petitioner] into the deli.

"Jackson then went behind the counter and attempted to open the cash register. [The petitioner]

[2] For purposes of this appeal, the relevant pleading is the petitioner's fifth amended writ of habeas corpus.

[3] After the habeas court granted the respondent's request for permission to appeal from the judgment of the habeas court, the respondent appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

and Brown went to the deli's back room where they found Vernon Butler, an off-duty employee, and Warren Henderson, a homeless man who helped out around the store. Butler was hit on his head with the butt of a gun, searched for money and taken to the front of the store by [the petitioner] to open the cash register. When Butler could not open the register, Jackson took the cash that Yousif had in his pockets. Butler's [cell phone] was also stolen. The [cell phone] was subsequently used the day after the robbery by Marcus Pearson, who had obtained it from [the petitioner].

"During the course of the robbery, two customers, one of whom was [Kendell] Thompson, entered the deli. Upon entering, each individual was forced to the ground at gunpoint and ordered to turn over whatever money they possessed.

"In the back room, Brown [rifled] through Henderson's pockets, looking for any money that he may have had. Finding no money on Henderson's person, Brown searched the cigar boxes in the back room to see if there was any cash hidden there. After searching the back room, Brown returned to the front of the deli, where [the petitioner] was shouting orders by the door and Jackson was still behind the counter near the cash register. Upon hearing the sound of sirens, Jackson, [the petitioner] and Brown fled the scene.

"The police processed the crime scene and found latent fingerprints on a cigar box in the back room. The prints matched Brown's fingerprints on file with the Bridgeport [P]olice [D]epartment. When interviewed by the New Haven police, Brown admitted his participation in the January 24, 1999 robbery and identified Jackson and [the petitioner] as the other individuals involved. Jackson and [the petitioner] were arrested and tried jointly. Jackson was found guilty of eight of the ten counts on which he was charged and sentenced to a

total effective sentence of forty-five years imprisonment. [The petitioner] was found guilty of all ten counts on which he was charged and sentenced to a total effective sentence of seventy years imprisonment." (Footnotes omitted.) *State* v. *Jackson*, supra, 73 Conn. App. 342–43. The petitioner appealed from the judgment of conviction, and the Appellate Court affirmed the judgment. Id., 341.

Thereafter, the petitioner filed a petition for a writ of habeas corpus, in which he claimed, among other things, that his trial counsel, Leo Ahern, had failed to provide effective assistance at trial. Specifically, he raised the following two claims that are relevant to this appeal. First, he claimed that Ahern did not adequately investigate the state's theory that the petitioner was in possession of the cell phone that had been stolen during the course of the robbery and that, if Ahern had investigated, he would have discovered witnesses who would have contradicted the state's theory. Second, he claimed that Ahern did not adequately investigate Brown's testimony that the petitioner had been with him before, during and after the robbery and murder and that, if Ahern had investigated, he would have discovered evidence that contradicted that testimony. In addition to these ineffective assistance of counsel claims, the petitioner claimed that he was deprived of his constitutional due process right to a fair trial because key state's witnesses perjured themselves during trial and that he was actually innocent. The habeas court conducted a trial on the petition for a writ of habeas corpus over the course of eight days.

After trial, the habeas court concluded that Ahern had failed to provide effective counsel to the petitioner when he failed to discover the evidence that undermined Brown's testimony that the petitioner had been with him before, during and after the robbery and murder, but it concluded that that failure was not prejudicial

because the new evidence did not provide a complete alibi to the petitioner. In addition, the habeas court rejected the petitioner's constitutional and actual innocence claims. The habeas court also concluded, however, that, contrary to the state's theory at trial, the testimony of the new witnesses at the habeas trial regarding the stolen cell phone established that the cell phone could not have been in the petitioner's possession the day after the murder.[4] The habeas court further concluded that Ahern's failure to obtain this information before the criminal trial was deficient performance and that the deficient performance had prejudiced the petitioner's defense. Accordingly, the court granted the petitioner's petition for a writ of habeas corpus and ordered that his conviction be set aside.

On appeal, the respondent concedes that Ahern provided ineffective assistance of counsel by failing to adequately investigate who was in possession of the stolen cell phone in the days following the robbery and murder but contends that the habeas court incorrectly determined that Ahern's deficient performance was prejudicial to the petitioner. The petitioner disputes this claim and claims as alternative grounds for affirmance that the habeas court improperly determined that (1) he was not prejudiced by Ahern's failure to investigate and discover the evidence that undermined Brown's testimony concerning the petitioner's whereabouts before, during and after the robbery and murder; (2) the state's use of perjured testimony did not deprive

[4] The habeas court also concluded that Ahern should have sought information from the company that provided telephone services for the stolen cell phone regarding the origination of the calls made from the cell phone after it was stolen. The petitioner does not dispute, however, that he made no such claim in his petition for a writ of habeas corpus and that such information was no longer available when Ahern took on the petitioner as a client. Accordingly, to the extent that the habeas court determined that this constituted deficient performance and prejudiced the petitioner, we conclude that any such determination was improper.

the petitioner of his constitutional due process right to a fair trial; and (3) the petitioner had failed to establish his claim of actual innocence. We agree with the respondent's claim and reject the petitioner's alternative grounds for affirmance.

Before addressing the parties' specific claims, we set forth the standard of review governing ineffective assistance of counsel claims. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . .

"A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings [pursuant to *Strickland* v. *Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . As enunciated in *Strickland* v. *Washington*, supra, 687, this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law." (Citations omitted; internal quotation marks omitted.) *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 509–10, 964 A.2d 1186, cert. denied sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009).

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. . . . To satisfy the second prong of *Strickland*, that his counsel's deficient performance prejudiced his defense, the petitioner must establish that, as a result of his trial counsel's deficient performance, there remains a probability sufficient to undermine confidence in the verdict that resulted in his appeal. . . . The second prong is thus satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different." (Citations omitted; internal quotation marks omitted.) Id., 522. "In making this determination, a court hearing an ineffectiveness claim [based on counsel's failure to investigate] must consider the totality of the evidence before the judge or the jury. . . . Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland* v. *Washington*, supra, 466 U.S. 695–96.

I

We first address the respondent's claim that the habeas court incorrectly determined that Ahern's failure to adequately investigate who was in possession of the stolen cell phone was prejudicial under *Strickland*. We agree.

The following additional facts and procedural history are relevant to this claim.[5] As we have indicated, Butler's

[5] Unfortunately, because the testimony of the various witnesses at the original criminal trial was confusing and contradictory, it is impossible to construct a single narrative from that testimony while doing justice to the petitioner's claim that there is a reasonable possibility that the result of that trial would have been different but for Ahern's defective counsel. Accord-

cell phone was stolen during the robbery. At the petitioner's criminal trial, the state presented records from Omnipoint Communications regarding calls made from the cell phone after it was stolen. Those records showed that the following five calls had been made from the cell phone: (1) a call to a Bridgeport number on January 24, 1999, at 4:14 a.m. (first call); (2) a call to a Bridgeport number on January 24, 1999, at 10:48 p.m. (second call); (3) a call to a Bridgeport number on January 25, 1999, at 10:40 a.m. (third call); (4) a call to a New Haven number on January 25, 1999, at 11:07 a.m. (fourth call); and (5) a call to a Bridgeport number on January 25, 1999, at 2:32 p.m. (fifth call). Brown testified at the criminal trial that he had made the first call to Willie Sadler while he, Jackson and the petitioner were driving back to Bridgeport after the robbery, that he made the second call to a female acquaintance and that he made the third call to a drug dealing associate. Brown further testified that, after making the third call, he gave the cell phone to the petitioner, and he never saw it again. Brown and the petitioner were on Stratford Avenue in Bridgeport at the time. Brown denied that he or Sadler made the fourth call. Brown also denied that he made the fifth call.

Pearson, who was an acquaintance of the petitioner's and who was at the deli shortly before the robbery, testified at the criminal trial that, at approximately 11 a.m. on the morning of January 25, 1999, Shalonda Jenkins, whom Pearson knew only as "Yogi," and the petitioner came to his house in New Haven. During their visit, Pearson borrowed a cell phone from the petitioner and used it to make the fourth call to Crystal Sykes.[6]

ingly, we are required to recite the testimony of each individual witness at some length.

[6] Sykes married William Newkirk after the criminal trial and before the habeas trial, and changed her last name to Newkirk. To distinguish her from Newkirk, we refer to her in this opinion as Sykes.

Pearson's testimony on this point, however, was somewhat equivocal. He did not recall making the fourth call to Sykes when the police first questioned him. At some point, however, Pearson apparently came to believe that the police had cell phone records that showed that the fourth call had been made from his house.[7] It was not until the police told Pearson that Sykes had told them that he called her and showed Pearson the cell phone records indicating that the fourth call had been made to the residence where Sykes worked that Pearson remembered making the call. Pearson also testified that he believed that the police suspected him of being involved in the robbery and murder.

At the habeas trial, the petitioner called Pearson, Sykes, Sadler, William Newkirk, who was Sykes' boyfriend at the time of the robbery and murder, and Leroy Dease, a detective with the New Haven Police Department, as witnesses on this issue. Sykes testified that, in January, 1999, she was working at a residence at 59 Ivy Street in West Haven taking care of an incapacitated couple.[8] Counsel for the petitioner questioned Sykes about a statement that she had made to the New Haven Police Department on February 2, 1999. Sykes agreed that she had stated that she did not recall receiving a telephone call from Pearson while working at the 59 Ivy Street address, but she also stated that there was a "good possibility" that Pearson may have called her at "around eleven o'clock" on January 25, 1999. She initially thought, however, that the call had been made at 11 p.m. Sykes also testified at the habeas trial that she did not know who made the fourth call or if she received the call, and that was what she had tried to

[7] Pearson was apparently confused on this point. As we have indicated, the cell phone records did not reveal the exact locations from which the calls originated. See footnote 4 of this opinion.

[8] There is no explanation in the record as to why the cell phone records indicate that the fourth call was made to a New Haven telephone number, when the telephone number was for the 59 Ivy Street address in West Haven.

tell the police during the investigation. On cross-examination, Sykes testified that Pearson had called her several times at the 59 Ivy Street address. She further testified that she had "always admitted that [she] had gotten the call." It was possible, however, that the call might have been from someone looking for Newkirk. Ultimately, the habeas court interrupted the examination of Sykes, stating that "[y]ou are not going to get any clarity on this particular . . . issue . . . ."

Newkirk testified at the habeas trial that the police told him that Sadler had called him from a cell phone that had been stolen during a robbery and murder.[9] Newkirk contacted Sadler and encouraged him to tell the police who had made the calls from the cell phone. On March 3, 1999, Newkirk called Dease and told him that Sadler was ready to talk about the calls from the cell phone. The next day, Newkirk and Sadler met with Dease at Sadler's residence in Bridgeport. Newkirk testified that he told Sadler to tell Dease "who got that phone from where he called my cell phone from."[10] According to Newkirk, Sadler told Dease that Brown had allowed Sadler to use the cell phone. Newkirk also testified that Sadler had occasionally called him on the telephone at the 59 Ivy Street address in West Haven, because Newkirk's cell phone did not work in that location. On cross-examination, Newkirk testified that he never told Dease that Sadler had made the fourth call

[9] When counsel for the petitioner asked Newkirk, "[b]ut that's what dragged you into this case is you got a call from . . . Sadler on that cell phone that the police told you had been taken in the . . . robbery/murder?" Newkirk answered, "Yes." Newkirk had just testified, however, that "the detectives told me" that Sadler had called Newkirk from the cell phone. We are unaware of any other evidence that would support the conclusion that the police believed that the fourth call was from Sadler to Newkirk. We also note that Newkirk never testified at the habeas trial that he had an independent recollection of receiving the fourth call from Sadler.

[10] There was no call from the stolen cell phone to Newkirk's cell phone. Accordingly, Newkirk either misspoke or he misunderstood the nature of the evidence that the police had obtained regarding the cell phone.

to him. Newkirk also testified that he had received a telephone call from Sadler at the 59 Ivy Street address when Sadler was "trying to find [him]." He did not testify as to the date and time of that call.

Dease testified that, on March 4, 1999, when he went to Sadler's residence in Bridgeport to meet with Sadler and Newkirk, Sadler told Dease at that point that Brown had made the first and fifth calls to Sadler. Dease did not recall asking Newkirk at any time if Sadler made the fourth call to him, and Dease agreed with the statement that Newkirk "was not on his radar screen" as being the recipient of any of the cell phone calls.

Pearson testified at the habeas trial that, contrary to his testimony at the criminal trial, he did not see a cell phone in the petitioner's possession on the morning of January 25, 1999, that he did not borrow a cell phone from the petitioner and that he did not call Sykes. Pearson testified that he lied at the criminal trial because the police told him that, if he had not borrowed the cell phone from the petitioner, he must have stolen it during the robbery. Pearson was afraid that, if he refused to testify that he had borrowed the cell phone from the petitioner, he would go to jail and lose custody of his children for a crime that he did not commit. On cross-examination, Pearson testified that, during the week of January 23 through February 2, 1999, Sykes had called him "almost every day if not every other day" to arrange for marijuana purchases.

Sadler testified at the habeas trial that Brown had made the first and fifth calls to him. Sadler also testified that he knew Newkirk and that he had been to the 59 Ivy Street residence with Newkirk. During his examination of Sadler, counsel for the petitioner requested that Sadler's statement to the New Haven Police Department, given on March 5, 1999, the day after Sadler met with Newkirk and Dease in Bridgeport, be admitted as

a prior inconsistent statement. In that statement, Sadler denied having made the fourth call.

In addition to the testimony of these five witnesses, the petitioner presented in written form testimony that Jenkins had given at Jackson's habeas trial. Jenkins was unavailable to testify at the petitioner's habeas trial because she had died in the interim. Jenkins had testified at Jackson's habeas trial that, on the morning of January 25, 1999, she walked to her grandmother's house on Shelton Avenue in New Haven. The petitioner, who was Jenkins' cousin, was in their grandmother's house and asked Jenkins to take a walk with him. After approximately twenty minutes, Jenkins and the petitioner started walking to Pearson's house at 12 Elizabeth Street in New Haven. Jenkins testified that the time was "between 9 and 10 [a.m.]. Around about that time. Because it was in the morning." The walk took approximately fifteen minutes. They rang the doorbell at Pearson's house, and Pearson's mother answered the door. When Pearson came to the door, he did not leave the house but stood in the doorway. Jenkins did not see the petitioner give a cell phone to Pearson and did not see a cell phone in the petitioner's possession. After leaving Pearson's house, Jenkins and the petitioner returned to their grandmother's house. Although the petitioner was her cousin, Jenkins testified that she never gave this information to the police or to the petitioner's attorney at the time of the criminal trial.[11] Jen-

[11] Ahern testified at the habeas trial that he had intended to call Jenkins as a witness at the petitioner's criminal trial. Jenkins had attended a portion of the trial, but on the day that Ahern intended to call her, she was not present and Ahern was unable to locate her. This testimony is corroborated by the criminal trial transcript. Ahern did not request a continuance and rested his case without calling Jenkins as a witness. Although Ahern testified at the habeas trial that Jenkins had information about the petitioner's interaction with Pearson on January 25, 1999, he did not indicate what that information was or how he obtained it. Ahern represented to the trial court at the criminal trial, however, that Jenkins would testify that she did not see a cell phone while she was at Pearson's house on the morning of January 25, 1999.

kins testified that she was not aware at the time of the petitioner's criminal trial that he had been arrested and charged with the robbery and murder.

The habeas court concluded that this evidence "leads to only one conclusion as to the whereabouts of the cell phone over the two days. The cell phone was taken by Brown to Bridgeport on January 24, 1999, where it remained. The cell phone never came back to New Haven. . . . Therefore . . . Pearson never got the cell phone from the petitioner and never used it to call . . . Sykes as he testified at the criminal trial. Rather . . . Sadler got the phone from Brown and called . . . Newkirk at the residence of . . . Sykes. This evidence was elicited from Newkirk at the habeas trial." In support of this conclusion, the habeas court appears to have relied heavily on the timing of the calls. Specifically, the habeas court found it "implausible" that Brown could have used the cell phone in Bridgeport at 10:40 a.m. on January 25, 1999, then given the cell phone to the petitioner, who, twenty-six minutes later, loaned it to Pearson at his residence in New Haven so that he could call Sykes, and then returned to Bridgeport where he gave the cell phone to Brown so that Brown could make the fifth call to Sadler at 2:32 p.m. As we have indicated, the habeas court concluded that the failure to present the new evidence at the criminal trial constituted ineffective assistance of counsel and undermined the court's confidence in the jury verdict.

We conclude that, contrary to the habeas court's determinations, the new evidence relating to the use of the cell phone in the days after it was stolen neither conclusively established that Pearson, after borrowing the cell phone from the petitioner, could not have made the fourth call nor gave rise to a reasonable probability that the verdict would have been different if that evi-

dence had been presented at the criminal trial.[12] As the habeas court itself recognized, Sykes' testimony on the issue of whether she had received the fourth call from Pearson was hopelessly unclear. With respect to Newkirk's testimony, although the habeas court stated that evidence that Sadler received the cell phone from Brown and made the fourth call to Newkirk "was elicited from Newkirk," Newkirk testified that *the police had told him* that Sadler had used the cell phone to call him. Newkirk also gave hearsay testimony that Sadler had stated at the March 4, 1999 meeting with Dease that he had used the cell phone to call the telephone at the 59 Ivy Street address, but Sadler denied having made the fourth call in his statement to the police on March 5, 1999. Moreover, Dease testified that he did not recall asking Newkirk whether Sadler had made the fourth call to him and that Newkirk "was not on [his] radar screen" as being a possible recipient of the call during the meeting with Newkirk and Sadler. Thus, even if Newkirk believed that he was testifying truthfully, the most reasonable explanation for this conflicting evidence is that Newkirk was simply confused about the evidence regarding the stolen cell phone and

[12] Although we must accord deference to the habeas court's credibility assessments; see *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 268, 112 A.3d 1 (2015) ("we ordinarily accord deference to credibility determinations that are made on the basis of [the] firsthand observation of [a witness'] conduct, demeanor and attitude" [internal quotation marks omitted]); there is no requirement that we defer to the habeas court's legal determination that new evidence is so compelling that a reasonable juror could not fail to credit it. Cf. *Levesque* v. *Bristol Hospital, Inc.*, 286 Conn. 234, 249, 943 A.2d 430 (2008) (issue of fact "becomes a conclusion of law . . . when the mind of a fair and reasonable [person] could reach only one conclusion" [internal quotation marks omitted]). Nor are we required to defer to the trial court's legal determination that there is a reasonable probability that newly discovered evidence would have resulted in a different verdict if credited by the jury, i.e., that it undermines confidence in the verdict. Cf. *Lapointe* v. *Commissioner of Correction*, supra, 297–98 ("the issue of materiality presents a mixed question of law and fact, with the trial court serving as the fact finder").

what had transpired at the March 4, 1999 meeting.[13] Moreover, although Newkirk testified that Sadler had occasionally called him at Sykes' place of work, he did not testify as to the dates or times of those calls.

With respect to Sadler's testimony that Brown had made the first and fifth calls to him and that he knew Newkirk had been to the 59 Ivy Street address, this testimony, although consistent with the petitioner's theory that the cell phone was continuously in Bridgeport and that Sadler had made the fourth call, certainly does not compel such a conclusion.

As to Jenkins' testimony at Jackson's habeas trial that the petitioner had been with her for approximately thirty-five minutes before they arrived at Pearson's house on the morning of January 24, 1999, and that she did not see the petitioner give the cell phone to Pearson, the habeas court in the present case had no opportunity to personally assess Jenkins' credibility because the testimony was in written form. We note, however, that this testimony was given more than twelve years after the incident in question and that her memory of certain details was incorrect. Indeed, the transcript of Jenkins' testimony at Jackson's habeas trial reveals that she testified implausibly that she was not even aware that the petitioner had been arrested and charged with the crimes, in direct contradiction to Ahern's testimony at

[13] Specifically, Newkirk testified at the habeas trial that the police had told him before the March 4, 1999 meeting in Bridgeport that Sadler had called him from the stolen cell phone. With this belief in mind, he may have simply misunderstood when Sadler, who previously had denied knowing who had made the first and fifth calls, admitted to Dease that he had received those *calls* from Brown, and understood Sadler to be admitting that he had received the stolen *cell phone* from Brown. The petitioner points to no evidence other than Newkirk's testimony that would support the conclusion that Sadler told Dease that he received the cell phone from Brown so that he could make the fourth call. Indeed, if there is any such evidence, we can perceive no reason why the petitioner would not have confronted Sadler with that evidence at the habeas trial.

the habeas trial, confirmed by the criminal trial transcript, that Jenkins had been present at the petitioner's criminal trial. See footnote 11 of this opinion. Accordingly, we conclude that the jury would not have been compelled to believe this testimony. Indeed, neither the habeas court nor the petitioner relies on Jenkins' testimony that the petitioner was with her for thirty-five minutes before they arrived at Pearson's house. Rather, they rely solely on Jenkins' testimony that she did not see the petitioner give the stolen cell phone to Pearson. With respect to that testimony, even if credited, it would not compel the conclusion that the event did not happen.

Finally, as to Pearson's recantation of his testimony at the criminal trial, we previously have recognized that "courts universally view recantation evidence with a healthy dose of skepticism." *Gould* v. *Commissioner of Correction*, 301 Conn. 544, 568, 22 A.3d 1196 (2011). The sole basis for the habeas court's determination that Pearson's testimony at the petitioner's criminal trial was false was "the evidence presented by the other witnesses" at the habeas trial. As we have explained, however, although the testimony of the other witnesses may have been consistent with the petitioner's theory that Brown had continuous possession of the stolen cell phone over the course of the five calls, the testimony was far from conclusive on the issue.

We conclude, therefore, that, far from compelling the conclusion that, contrary to Brown's and Pearson's testimony at the criminal trial, the stolen cell phone was continuously in Bridgeport in the days following the robbery and murder and Pearson could not have made the fourth call, the new evidence was extremely weak and confusing. Indeed, even if entirely credited, the testimony of Sykes, Newkirk, Sadler and Dease at the habeas trial merely left open the *possibility* that

Sadler had made the fourth call.[14] Although Jenkins' testimony that the petitioner was with her for thirty-five minutes before they arrived at Pearson's house, if credited, would be very difficult to reconcile with the state's theory that Brown gave the cell phone to the petitioner in Bridgeport shortly after 10:40 a.m. on January 25, 1999, we have concluded that the jury reasonably could have refused to credit that testimony.

Moreover, the jury at the criminal trial was aware that, if Brown's and Pearson's testimony was true, the following events had to have occurred within a twenty-six minute window on the morning of January 25, 1999:[15] Brown gave the cell phone to the petitioner at Stratford Avenue in Bridgeport; the petitioner went to his car; the petitioner drove to Jenkins' location and found her;[16]

[14] The jury could have believed Newkirk's testimony that Sadler had told Dease that he made the fourth call—or at least believed that Newkirk truly believed that Sadler had made that statement—without being compelled to conclude that Sadler actually made the call. There was significant confusion regarding the calls made from the stolen cell phone. The jury also could have believed that Sadler called Newkirk occasionally at the 59 Ivy Street address without believing that Sadler made the fourth call to Newkirk.

[15] Brown testified at the criminal trial that he made the third call at 10:40 a.m. on January 25, 1999, and that he then gave the cell phone to the petitioner on Stratford Avenue in Bridgeport. Pearson testified that the petitioner loaned the cell phone to Pearson at Pearson's house in New Haven that same morning and that he used the cell phone to make the fourth call, which was at 11:07 a.m. The cell phone records reveal that the third call lasted one minute. Thus, these events would have had to occur between 10:41 a.m. and 11:07 a.m.

The parties have cited no evidence in the record regarding the time required to drive from Bridgeport to New Haven. We take judicial notice that the distance between the cities is approximately twenty miles and the average driving time in good traffic conditions is twenty-five to thirty minutes. See Google Maps (2016), available at http://www.google.com/maps/dir/Bridgeport,+CT/New+Haven,+CT (last visited June 14, 2016).

[16] Pearson testified at the criminal trial that the petitioner and Jenkins arrived at his house together. There is no evidence that Jenkins was with the petitioner in Bridgeport or that the petitioner communicated with Jenkins on the morning of January 25, 1999, about meeting and going to Pearson's house. Thus, it is logical to assume that the petitioner would have had to have gone to Jenkins' location, inform her or be informed of the plan, and then go to Pearson's residence.

Jenkins got in the petitioner's car; the petitioner drove from Jenkins' location to Pearson's residence in New Haven; Pearson learned that the petitioner was carrying a cell phone; Pearson asked to borrow the cell phone (even though he testified at the criminal trial that he had a telephone in his house); and Pearson called Sykes. In addition, Pearson's testimony at the criminal trial as to whether he had made the fourth call was equivocal, and the jury was aware that he had a motive to lie. Thus, the only impact of the new evidence presented at the habeas trial would have been to cast additional doubt on what was already, as the habeas court itself stated, an "implausible scenario."[17] "[W]here the [new] evidence merely furnishes an additional basis on which to challenge [previously admitted evidence, the credibility of which] has already been shown to be questionable . . . the [new] evidence may properly be viewed as cumulative, and hence not material, and not worthy of a new trial." *United States* v. *Persico*, 645 F.3d 85, 111 (2d Cir. 2011), cert. denied, 565 U.S. 1242, 132 S. Ct. 1637, 182 L. Ed. 2d 246 (2012); see also *Orsini* v. *Manson*, 5 Conn. App. 277, 281, 498 A.2d 114 (cumulative evidence is not material in constitutional sense), cert. dismissed, 197 Conn. 815, 499 A.2d 804 (1985). Accordingly, we conclude that, if the jury at the criminal trial concluded that the petitioner had possession of the stolen cell phone, there is no reasonable possibility that the new evidence would have affected that conclusion.

[17] The petitioner contends that, "[h]aving utterly failed to develop and present the available evidence to challenge the state's cell phone story . . . Ahern was forced to concede the accuracy of the testimony of Pearson" when Ahern argued to the jury at the criminal trial that Pearson used the stolen cell phone. Ahern did not concede, however, that the petitioner gave the cell phone to Pearson. Rather, Ahern was attempting to imply that Pearson implicated the petitioner because Pearson himself had taken the cell phone from the deli. Although there was little evidence to support that theory, there was also little evidence to support the theory that Sadler used the cell phone to call Newkirk.

We further note that the evidence that the petitioner had possession of the stolen cell phone was not the only evidence presented at the criminal trial that connected him to the crimes. Accordingly, even if we were to assume that there is a reasonable probability that the new evidence could have persuaded the jury at the criminal trial that the petitioner was not in possession of the cell phone, there still would have been sufficient evidence to convict him. Specifically, Brown testified that he, Jackson and the petitioner robbed the deli in the manner previously set forth in this opinion.[18] Shaquan Pallet testified that he had arrived at the deli in a taxi with the murder victim, Hardy. As he and Hardy were entering the deli, he saw the petitioner and Jackson, both of whom he knew, standing outside and smoking a substance that smelled like embalming fluid. A third person was visible but unidentifiable. Inside the deli, Hardy purchased some cigarettes, gave several to Pallet and then Hardy indicated that he intended to remain at the deli. As Pallet left the deli, he saw the petitioner and Jackson just outside with "skellies" on their heads. Fearing that he was going to be robbed, Pallet walked to the taxi and was driven away.[19]

[18] The details of Brown's testimony are set forth in part II of this opinion.

[19] When the police interviewed Pallet after the robbery and murder, they showed him an array of eight photographs that included photographs of Jackson and the petitioner and asked him if he saw anyone who had been outside the deli before the robbery. Pallet pushed the photographs of the petitioner and Jackson aside and said "take it for what it is . . . ." Pallet was later arrested on various charges. When Pallet was brought to the police station, Dease again interviewed him and showed him the photographic array. At that point, Pallet again chose the photographs of Jackson and the petitioner and signed them.

The petitioner points out that Pallet testified that the petitioner was wearing a distinctive jacket when Pallet saw him outside the deli, and that none of the victims of the crime described such a jacket. The fact that none of the victims remembered the jacket does not conclusively establish, however, that the petitioner was not wearing it. The petitioner also contends that Pallet's testimony that the petitioner was wearing a "skellie," which the petitioner contends is a stocking-type covering without openings for the eyes and mouth, was inconsistent with other testimony that the perpetrators

Thompson testified that he was in the deli when he was confronted by a black male wearing a ski mask who pointed a gun at his head, ordered him to the floor and took $1 from him. When the person went to the back of the deli, Thompson ran out of the deli to his car and "took off." Thompson was able to select a photograph of the petitioner as the person who had held a gun to his head. Thompson selected the photograph because the person's yellowish eyes and his mouth resembled those of the person who had robbed him, but he told the police that he was not 100 percent sure of the identification.[20]

Regina Wolfinger testified that she was sitting in a car outside the deli when she saw a black male run out of the deli and get into a car, which took off quickly. Thereafter, two black males, possibly wearing black hats, came out of the store, stood near an ice machine, and then "took off . . . ." Wolfinger subsequently selected a photograph of the petitioner as resembling one of those men. She testified that her level of certainty was about 75 percent. The petitioner makes no claim that any of these eyewitnesses had a motive to falsely

wore masks with such openings. Pallet never saw the head covering that the petitioner was wearing when it was pulled over his face, however, and Brown testified at the criminal trial that the petitioner was wearing a "skellie," which he described as a ski mask.

[20] The petitioner contends that, on cross-examination, Thompson retracted his testimony identifying the petitioner as the person who had held a gun to his head. We disagree. On direct examination at the criminal trial, Thompson stated that the eyes of the person in the photograph that he selected looked "familiar" and he believed that the photograph was of the person who had held a gun to his head, but he could not be 100 percent sure. On cross-examination, when Ahern asked Thompson whether the reason that he chose the photograph of the petitioner was "because of the eyes," Thompson replied, "Yes." Ahern immediately followed up that question by asking Thompson: "You were not picking out that photograph to tell . . . Dease that this is the man who did it, correct?" Thompson again agreed. Accordingly, it is reasonable to conclude that Thompson merely intended to testify on cross-examination that the petitioner's photograph *looked like* the perpetrator, but Thompson could not be entirely sure that he *was* the perpetrator.

identify him as having been involved in the robbery and murder.

Saliem Al-Dubai, who worked at the deli, testified at the criminal trial that the petitioner, whom Al-Dubai knew as a regular customer, was in the deli at approximately 2:45 to 2:55 a.m. on January 24, 1999, and bought a soda and two loose cigarettes. Pearson came into the deli at approximately the same time and ordered some food. At approximately 3:05 to 3:10 a.m., Al-Dubai and Pearson left the deli and got into a vehicle driven by a person identified only as Naji. At that time, Al-Dubai saw the petitioner cross the street and engage in a whispered conversation with Pearson through the open rear door of the vehicle.

Pearson testified at the criminal trial that he arrived at the deli between 2:30 and 2:45 a.m. on January 24, 1999. He ordered two cheeseburgers and, after receiving the food, left the deli with Al-Dubai and Naji. As he entered Naji's vehicle, the petitioner came over and spoke to him. At approximately 3:15 a.m., Naji dropped Pearson off near his residence, which was approximately three blocks from the deli. As Pearson was eating the cheeseburgers, Zanetta Berryman, with whom Pearson was involved, called him. The call was interrupted and, when Berryman called Pearson back, she told him that the petitioner was with her and he had hung up the phone. Berryman asked Pearson to meet her at the deli. It was then approximately 3:30 a.m. When Pearson arrived at the deli approximately twenty minutes later, the corner was blocked off, and he saw ambulances and police vehicles. He also saw Berryman and the petitioner. A policeman told Pearson that there were two dead bodies inside the deli. Eventually, Pearson talked to the petitioner and Berryman for five to ten minutes, and then he and Berryman returned to his house.

None of the new evidence relating to the use of the cell phone directly casts doubt on the testimony of any of these witnesses placing the petitioner at the deli before, during and after the robbery. We therefore conclude that, contrary to the determination of the habeas court, the new evidence regarding the location and use of the stolen cell phone in the days following the robbery and murder does not undermine confidence in the petitioner's guilty verdict, and, therefore, Ahern's failure to investigate the issue before trial was not prejudicial under *Strickland*. See *Bryant* v. *Commissioner of Correction*, supra, 290 Conn. 522 ("[t]o satisfy the second prong of *Strickland*, that his counsel's deficient performance prejudiced his defense, the petitioner must establish that, as a result of his trial counsel's deficient performance, there remains a probability sufficient to undermine confidence in the verdict that resulted in his appeal" [internal quotation marks omitted]).

II

We next address the petitioner's claim that the judgment of the habeas court may be affirmed on the alternative ground that Ahern's failure to investigate and discover the evidence that undermined Brown's testimony concerning the petitioner's whereabouts before, during and after the robbery and murder was prejudicial under the second prong of *Strickland*. We disagree.

The following additional facts and procedural history are relevant to this claim. Brown testified at the criminal trial that he met the petitioner and Jackson in Bridgeport on the night of the robbery and murder.[21] Brown could not remember the specific time that they met, but "it was late in the night." After they met, they smoked some marijuana and then drove to New Haven.

[21] As we have indicated, the robbery and murder took place shortly before 3:32 a.m. on January 24, 1999.

After arriving in New Haven, the three men drove around "for a minute," and then Jackson, who was driving, stopped to talk to a woman. She did not get into their car. Brown, Jackson and the petitioner then drove to the deli and parked around the corner from the deli in the middle of the block. They got out of the car, and Jackson and the petitioner smoked something that looked like a cigar and smelled like a Magic Marker. Brown saw a taxi pull up in front of the deli. Two people got out of the taxi and entered the deli, and one of them then came out. During the period that they were outside the deli, Brown never saw the petitioner speak to a person sitting in a vehicle.

Brown testified that, at that point, Jackson and the petitioner indicated that they were going to rob the deli. One of them handed a scarf to Brown, who tied it around his face. Jackson and the petitioner then covered their faces with their "skellies," which Brown testified were ski masks. See footnote 19 of this opinion. Either the petitioner or Jackson handed a gun to Brown, but he could not remember who. Jackson and the petitioner also had guns. After the three men entered the deli, the petitioner fired a rapid series of gunshots. A person who was standing at the counter of the deli was hit by the gunfire and ran to the back of the deli. The person behind the counter ducked down. After the firing stopped, Jackson jumped over the counter and attempted to open the cash register. Brown and the petitioner went to the back of the deli, where Brown had seen someone run into a room and shut the door. The petitioner opened the door and saw a male lying on the floor and another male sitting in a chair. Brown checked the pockets of the person on the floor and then searched some cigar boxes for money. Meanwhile, the petitioner grabbed the person in the chair and brought him to the front of the deli. When Brown left

the back room, he saw the petitioner in front of the counter and Jackson behind the counter.

The three men then heard a siren and exited the deli. Brown and Jackson got back into their car, and the petitioner left the area, saying that he would return. Brown and Jackson waited in their car for approximately fifteen minutes, at which time the petitioner returned to the car and they left. Brown saw no police and heard no sirens during that time. As they were driving back to Bridgeport, Brown saw the stolen cell phone on an armrest in the car and used it to call Sadler. Jackson and the petitioner dropped Brown off on Warden Avenue in Bridgeport. Brown still had possession of the cell phone at that time. Brown next saw the petitioner on January 25, 1999, on Stratford Avenue in Bridgeport, sometime after he made the third call to a drug dealing associate at 10:40 a.m. He gave the stolen cell phone to the petitioner at that time.

Brown admitted at the criminal trial that he had lied to the police during their investigation of the robbery and murder. He further testified that he had pleaded guilty to conspiracy to commit manslaughter as the result of his involvement in the robbery and murder.[22] He had not yet been sentenced, but the state had agreed to a maximum sentence of twenty-five years imprisonment, suspended after eighteen years, and Brown had the right to argue for a lesser sentence.

Adrienne Debarros, an acquaintance of the petitioner, testified at the criminal trial that she was at the Alley Cat Club (club) in New Haven from approximately 10 or 11 p.m. on January 23, 1999, until it closed at approxi-

[22] We note that conspiracy to commit manslaughter is not a cognizable offense. *State* v. *Greene*, 274 Conn. 134, 164, 874 A.2d 750 (2005) ("conspiracy to commit manslaughter in the first degree with a firearm is not a cognizable crime because it requires a logical impossibility, namely, that the actor . . . [agree and] intend that an unintended death result" [internal quotation marks omitted]), cert. denied, 548 U.S. 926, 126 S. Ct. 2981, 165 L. Ed. 2d 988 (2006).

mately 1:45 to 2 a.m. on January 24, 1999. Debarros saw the petitioner and Jackson outside the club after it closed. Latiesha Smith was also at the club from approximately 10 or 11 p.m. on January 23 to approximately 1:45 to 2 a.m. on January 24. She testified that she saw Jackson in the club shortly after she arrived and conversed with him at closing time, when she told him to meet her at her house. She arrived home at approximately 2:30 a.m., and Jackson arrived shortly thereafter. He spent the rest of the night with her and left late the next morning.

Berryman testified at the criminal trial that she was at a party on South Genesee Street in New Haven from approximately 11 p.m. on January 23 to 2 a.m. January 24, 1999. At some point after 2 a.m., she was outside smoking a cigarette when Jackson and the petitioner drove by. They stopped, and Berryman asked them for a ride to Pearson's house. Berryman asked the petitioner whether the car was stolen or a "base head rental . . . ." She testified that she asked the question "[b]ecause of the type of person that he is." Berryman saw no guns or masks and no one except Jackson and petitioner in the car. The three of them drove to the deli, where the petitioner gave change to Jackson so that he could make a call from a pay telephone. The petitioner went into the deli and came out about five minutes later with some items that he had purchased. Jackson returned to the car, and the petitioner drove the three of them to John Crenshaw's house. Berryman testified that it would take "[a]bout a minute" to run from Crenshaw's house to the deli.

Berryman asked if she could use the bathroom, and she and the petitioner exited the car. They entered the house, where Berryman saw several people playing cards. Berryman entered the bathroom, where she

remained for approximately fifteen minutes.[23] When she came out, she called several times for the petitioner, who did not respond. Someone went to the front door and called for the petitioner, who eventually came into the house and rejoined Berryman. Berryman then asked if she could use a telephone to call Pearson, who had paged her. The petitioner obtained a cordless telephone and gave it to Berryman, who called Pearson. At that point, the petitioner hung up the telephone. Berryman called Pearson again and asked him to meet her at the deli. While Berryman was on the telephone with Pearson, the petitioner told her that he had seen Pearson at the deli earlier. When Berryman asked him why he had not relayed that information, he ignored her.[24]

Berryman and the petitioner then left Crenshaw's house to return to the deli. At that point, the car that Jackson had been driving was gone. As they were about to enter the deli, a policeman came to the door and told Berryman and the petitioner that they could not come in because there were two dead bodies inside.[25] The police officer was the only official at the scene. He asked Berryman and the petitioner to stay there and asked for their names and addresses. The petitioner was initially reluctant to identify himself because he was on parole. Berryman told him not to be stupid, and the petitioner told her that she was "an alibi anyway." Berryman ultimately convinced the petitioner to give his name to the police.

[23] Berryman also stated several times that she was not sure exactly how long she remained in the bathroom but that it was "a while" or "quite a while . . . ."

[24] The evidence presented at the criminal trial reflects that there was some rivalry between Pearson and the petitioner for Berryman's attentions and that Berryman had been annoyed by and resisted the petitioner's advances. This would explain the petitioner's apparent attempts to prevent Berryman from meeting up with Pearson on the night in question.

[25] As we have indicated, Yousif had been shot, but he was not, in fact, dead.

Berryman knew Yousif, and she was very upset when told that he was dead. The petitioner, however, seemed indifferent, responding with such statements as, "F— him, he ain't nobody." While they waited in front of the deli, "many" police officers arrived, the area was taped off, and Yousif and Hardy were removed by ambulance. Pearson showed up across the street, but Berryman could not go to meet him because she was inside the area cordoned off with crime tape and the police were not letting people cross the tape. Eventually, she was allowed to leave, and she went with Pearson to his house.

Crenshaw testified at the criminal trial that he owned a house at 235 West Ivy Street in New Haven and that Jackson rented a room in the house. Crenshaw saw the petitioner at the house at some point on the night of January 23, 1999, or early morning of January 24, but he could not recall the specific time. The petitioner asked Crenshaw for a cigarette and to use the telephone, and Crenshaw agreed.

Officer Mark Francia of the New Haven Police Department testified that he arrived at the deli approximately one to one and one-half minutes after the 3:32 a.m. 911 call. After ascertaining that two persons had been shot, he called the dispatcher to request two ambulances and two emergency units. Numerous police officers arrived at the deli shortly thereafter.

Officer Michael Ferraro of the New Haven Police Department testified at the criminal trial that he arrived at the scene of the robbery and murder approximately twenty to twenty-five minutes after receiving a radio transmission about the shooting, or at 3:52 a.m. at the earliest. At that point, the victims had already been transported to the hospital. Approximately ten to twenty minutes after arriving at the scene, he spoke to the petitioner and Berryman.

The petitioner presented the following testimony at the habeas trial. Kenneth Ransome testified that he was acquainted with the petitioner and Jackson and that he believed that he had seen them inside the club in the early morning hours of January 24, 1999. The club closed sometime between 1:30 and 1:40 a.m., and the crowd remained outside for thirty to forty-five minutes after closing. Ransome saw Jackson and the petitioner in the crowd during that time and recalled speaking to Jackson. Ransome then drove to the Athenian Diner (diner) in New Haven, which was approximately a fifteen minute drive from the club. He saw the petitioner and Jackson sitting in a car in the parking lot of the diner and again had a brief conversation with Jackson. Ransome believed that it was then approximately 2:30 or 2:45 a.m. Shamar Madden, who was acquainted with the petitioner, also testified that he saw the petitioner and Jackson outside the club after it closed sometime between 1:45 and 2 a.m. Madden left the club between 2:20 and 2:30 a.m. and went to the diner, where he saw the petitioner and Jackson.

The petitioner also presented as an exhibit the report of Officer Diane Gonzalez of the New Haven Police Department regarding her involvement in the investigation of the crime scene. Gonzalez reported that she arrived at the deli at 3:39 a.m. on January 24, 1999. She helped cordon off the crime scene with tape and was then directed to make a list of the vehicles in the immediate area and their license plate numbers. The license plate number of the car that the petitioner and Jackson were driving that night was not included in Gonzalez' report, and Gonzalez did not report seeing any African-American males sitting in any of the vehicles in the vicinity of the deli.

The petitioner contended to the habeas court that Ransome's and Madden's testimony established that, contrary to Brown's testimony, the petitioner and Jack-

son could not have been in Bridgeport with Brown in the hours before the robbery and murder. He further contended that Gonzalez' report established that, contrary to Brown's testimony, the car that Jackson and the petitioner were using that night could not have been parked around the corner from the deli for fifteen minutes after the robbery and murder, with Brown and Jackson sitting in it.

The habeas court concluded that Ahern's failure to investigate and present these witnesses at the criminal trial was not prejudicial. To support this conclusion, the court relied on the Appellate Court's decision in Jackson's appeal from the habeas court's denial of his petition for a writ of habeas corpus, in which the Appellate Court concluded that the failure of Jackson's attorney to present this evidence at the criminal trial was not ineffective assistance of counsel because it did not provide the petitioner with an alibi for the precise time that the robbery and murder occurred. *Jackson* v. *Commissioner of Correction*, 149 Conn. App. 681, 701–702, 89 A.3d 426 (2014), appeal dismissed, 321 Conn. 765, 138 A.3d 278 (2016).

The petitioner now claims that the habeas court failed to consider the fact that, even if the new evidence did not establish the petitioner's whereabouts at the precise time of the robbery and murder, it indicated that the petitioner was in New Haven between 2 and 3 a.m. on January 24, 1999, thereby discrediting Brown's testimony that the petitioner and Jackson had driven from Bridgeport to New Haven immediately before they robbed the deli. He further contends that Gonzalez' report discredited Brown's testimony that, after the robbery, Brown and Jackson sat in a car around the corner from the deli for fifteen minutes waiting for the petitioner to rejoin them.

We conclude that there is no reasonable probability that this new evidence would have resulted in a different

verdict because there was testimony presented at the criminal trial that cast doubt on the state's theories. Specifically, even if the state's theory that the petitioner and Jackson would have had time between the time that they were seen by Debarros and Smith at the club at approximately 1:45 to 2:00 a.m. and the time of the robbery and murder at approximately 3:30 a.m., to drive to Bridgeport, meet up with Brown, smoke some marijuana, drive back to New Haven, meet up and converse with the unidentified woman, drive to the deli, smoke some drugs outside the deli and then rob the deli was plausible if considered in isolation, this theory was contradicted by the testimony of several individuals. This testimony included: Berryman's testimony that the petitioner and Jackson were with her continuously from the time that they picked her up at South Genesee Street in New Haven at some point after 2 a.m. until they went to the deli and then to Crenshaw's house between 3 and 3:15 a.m.; Al-Dubai's testimony that the petitioner was inside the deli at approximately 2:45 a.m.; and Pearson's testimony that he spoke to the petitioner outside the deli at approximately 3:15 a.m. In addition, Brown's testimony at the criminal trial, that he and Jackson were sitting in a car around the corner from the deli for approximately fifteen minutes after the robbery and murder, they left the scene when the petitioner rejoined them and that he made the first call at 4:14 a.m. while he was driving with the petitioner and Jackson back to Bridgeport, would have been extremely difficult to reconcile with Berryman's testimony that, after she and the petitioner returned to the deli from Crenshaw's house, numerous police and emergency vehicles converged on the scene, Francia's testimony that he called for two ambulances and two emergency vehicles and that numerous police officers responded to the 911 call, and Ferraro's testimony that he interviewed Berryman and the petitioner at the scene approximately thirty to forty-five minutes after the robbery and murder.

Accordingly, the new alibi evidence presented at the habeas trial was merely cumulative of evidence presented at the criminal trial that cast doubt on the state's theory based on Brown's testimony.[26] We therefore conclude that the habeas court properly determined that Ahern's deficient performance was not prejudicial under the second prong of *Strickland* because the petitioner failed to establish that there is a reasonable probability that, if the jury had heard the new evidence regarding the events preceding and following the robbery and murder, its verdict would have been different. *United States* v. *Persico*, supra, 645 F.3d 111 (evidence that furnishes additional basis to challenge evidence that is already questionable is not material); *Orsini* v. *Manson*, supra, 5 Conn. App. 281 (cumulative evidence is not material in constitutional sense).

III

We next address the petitioner's claim that the judgment of the habeas court may be affirmed on the alternative ground that the state's use of perjured testimony at the criminal trial deprived him of his constitutional due process right to a fair trial under both the state and federal constitutions. We disagree.

This court has not yet addressed the question of whether the state's unknowing use of perjured testimony violates due process principles.[27] See *Gould* v.

[26] If the jury had disbelieved Brown's testimony regarding the events that preceded and followed the robbery and murder, it still could have believed the eyewitnesses who identified the petitioner as a participant in the crimes. See part I of this opinion. In addition, while the record admittedly reveals no reason why Brown would have testified truthfully about his, the petitioner's and Jackson's participation in the crimes, while lying about their actions before and after the crimes, the jury was not required to reject all of Brown's testimony simply because it disbelieved a portion of it. *State* v. *Meehan*, 260 Conn. 372, 381, 796 A.2d 1191 (2002) ("[i]t is axiomatic that evidentiary inconsistencies are for the jury to resolve, and it is within the province of the jury to believe all or only part of a witness' testimony").

[27] The petitioner makes no claim that the state knowingly used perjured testimony at his criminal trial.

Commissioner of Correction, supra, 301 Conn. 570 n.18. Although "[a] majority of the federal circuit courts require a knowing use of perjured testimony by the prosecution to find a violation of due process"; (internal quotation marks omitted) id.; the United States Court of Appeals for the Second Circuit has held that, "when false testimony is provided by a government witness without the prosecution's knowledge, due process is violated . . . if the testimony was material and the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." (Footnote omitted; internal quotation marks omitted.) *Ortega* v. *Duncan*, 333 F.3d 102, 108 (2d Cir. 2003).

In the present case, the petitioner contends that both Pearson and Brown perjured themselves at his criminal trial. He further contends that this court should adopt the *Ortega* standard under both the federal and state constitutions. We need not decide that question, however, because, even if we were to adopt the *Ortega* standard, the petitioner cannot prevail under that standard. First, the petitioner has not established conclusively that Brown and Pearson committed perjury at the criminal trial.[28] Second, we have concluded in parts I and II of this opinion that evidence presented at the criminal trial cast serious doubt on Pearson's and Brown's testimony, and, even without that testimony, there was still sufficient evidence to support the guilty verdict. Accordingly, we conclude that the habeas court properly determined that there is no reasonable probability that, but for Pearson's and Brown's testimony

[28] As we have explained, although the habeas court concluded that Pearson's testimony at the criminal trial was false "based upon the evidence presented by the other witnesses" at the habeas trial, the testimony of those witnesses did not establish conclusively that, contrary to Pearson's testimony, he did not make the fourth call to Sykes. See part I of this opinion. As we have also explained, courts view recantation testimony with great skepticism. *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 568.

at the criminal trial, the petitioner would not have been convicted, and, therefore, the petitioner was not deprived of his constitutional due process right to a fair trial.

IV

Finally, we address the petitioner's claim that the judgment of the habeas court may be affirmed on the alternative ground that he established his claim of actual innocence. We disagree.

To obtain habeas relief on the basis of a freestanding claim of actual innocence, the petitioner must satisfy a two part test. "First, taking into account both the evidence produced in the original criminal trial and the evidence produced in the habeas hearing, the petitioner must persuade the habeas court by clear and convincing evidence, as that standard is properly understood and applied in the context of such a claim, that the petitioner is actually innocent of the crime of which he stands convicted. Second, the petitioner must establish that, after considering all of that evidence and the inference drawn therefrom . . . no reasonable fact finder would find the petitioner guilty." (Internal quotation marks omitted.) *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 557–58.

"Actual innocence is not demonstrated merely by showing that there was insufficient evidence to prove guilt beyond a reasonable doubt." Id., 560–61. "Rather, actual innocence is demonstrated by affirmative proof that the petitioner did not commit the crime." Id., 561. "Affirmative proof of actual innocence is that which might tend to establish that the petitioner *could not* have committed the crime even though it is unknown who committed the crime, that a *third party* committed the crime or that *no* crime actually occurred." (Emphasis in original.) Id., 563.

"Discrediting the evidence on which the conviction rested does not revive the *presumption* of innocence. To disturb a long settled and properly obtained judgment of conviction, and thus put the state to the task of reproving its case many years later, the petitioners must affirmatively demonstrate that they are *in fact* innocent." (Emphasis in original.) Id., 567. Nevertheless, we have recognized that, "[u]nder circumstances where new, irrefutable evidence is produced that so completely eviscerates the prosecution's case such that the state would have no evidence to go forward with upon retrial, perhaps a functional equivalent to actual innocence might credibly be claimed." Id., 568.

In the present case, the petitioner claims that the new evidence presented at the habeas trial shows that Brown's and Pearson's testimony at the criminal trial was false. He further claims that, if the only evidence before the jury had been Berryman's testimony, it would have been "nearly impossible" for the petitioner to commit the robbery and murder within the period that he was not in Berryman's presence while she remained in the bathroom at Crenshaw's house. Specifically, the petitioner claims that he would have had only from 3:22 to 3:32 a.m. to "(1) leave Berryman at [Crenshaw's house]; (2) run to the [d]eli; (3) meet Jackson and Brown; (4) put on a ski mask from some unknown location; (5) change his clothes, or at least his coat; [6] grab a gun (or guns) from some unknown location; [7] enter the [d]eli and remain inside for [five to seven] minutes; [8] leave the [d]eli; and [9] run back to [Crenshaw's house] just in time to respond calmly to Berryman's request to borrow a phone."

This claim assumes, however, that the approximate times given by the various witnesses were precise

times.[29] Specifically, the petitioner points to Pearson's testimony that he spoke to the petitioner outside the deli at 3:15 a.m., Berryman's testimony that the petitioner then went to Crenshaw's house, Berryman's testimony that she was in the bathroom for fifteen minutes,[30] and Pearson's and Berryman's testimony that the petitioner was with her when she called Pearson at 3:30 a.m. All of these times, however, were approximate. Thus, even if we were to agree that it would have been *impossible* for the petitioner to commit the robbery and murder within a ten minute window, which we do not, the jury reasonably could have concluded that the petitioner had from 3:10 to 3:35 a.m., or possibly even longer, to leave Crenshaw's house, commit the crimes, and then return to Crenshaw's house. Moreover, the petitioner points to nothing in the evidence that would establish that he could not have been carrying a ski mask or a gun during the entire period in question.

Thus, we do not agree that it would have been impossible for the petitioner to run from Crenshaw's house to the deli—which Berryman testified would take approximately one minute—rob the deli and run back to Crenshaw's house within the relevant window of time. Accordingly, even if we were to assume that the petitioner was not required to present affirmative evidence to establish his actual innocence, this is not a case in which the petitioner has "so completely eviscerate[d] the prosecution's case . . . that the state would have

[29] We assume for purposes of this portion of the opinion that the jury would have rejected Pearson's and Brown's testimony if the evidence presented at the habeas trial had been presented at the criminal trial because, even if that were the case, the petitioner cannot prevail on his claim that it would have been impossible for him to commit the crimes under Berryman's account of the events on the night in question.

[30] The petitioner does not cite where in the record Berryman stated that she may have been in the bathroom for as little as ten minutes. Our review of the record reveals that she testified that, although she was not certain how long she was in the bathroom, it was approximately fifteen minutes.

no evidence to go forward with upon retrial . . . .'' *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 568. Accordingly, we conclude that the habeas court properly concluded that the petitioner did not establish that he was actually innocent.

The judgment of the habeas court is reversed and the case is remanded to that court with direction to deny the petitioner's petition for a writ of habeas corpus.

In this opinion the other justices concurred.

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC. *v.* FREEDOM OF INFORMATION COMMISSION ET AL.
(SC 19593)
(SC 19594)

Rogers, C. J., and Palmer, Zarella, McDonald and Espinosa, Js.

Syllabus

Pursuant to the public records provision (§ 1-210 [b] [19] and [d]) of the Freedom of Information Act (§ 1-200 et seq.), whenever a public agency receives a freedom of information request for records for which there are reasonable grounds to believe that their disclosure may result in a safety risk to persons or property, the agency shall notify the Commissioner of Administrative Services, and, if the commissioner believes that such records are exempt from disclosure due to such a safety risk, the commissioner may direct the agency to withhold those records.

The plaintiff appealed to the trial court from the determination of the defendant Freedom of Information Commission that the defendant Commissioner of Administrative Services had reasonable grounds to believe that the disclosure of certain information by the defendant University of Connecticut Health Center may create a safety risk to certain persons. The plaintiff had submitted a freedom of information request to the Health Center, seeking certain correspondence between the Health Center and the National Institutes of Health concerning potential noncompliance with federal animal welfare guidelines. The Health Center produced the requested documents but redacted the names of individuals who had violated federal protocols in the course of animal research, as well as certain federal grant identification numbers that could be used to identify those individuals. The plaintiff thereafter filed a complaint with

the commission, alleging that the Health Center had violated the act by withholding the redacted information. The Health Center subsequently requested that the Department of Administrative Services conduct a safety risk assessment pursuant to § 1-210 (b) (19) and (d) to determine whether the disclosure of the redacted information would pose a safety risk to the individuals whose names or grant numbers were reacted. Relying in part on information regarding prior freedom of information requests related to the Health Center's animal research programs, the department concluded that there were reasonable grounds to believe that disclosure of the redacted material could result in a safety risk to persons and directed the Health Center to withhold the redacted information. Thereafter, the commission concluded that the department had reasonable grounds to believe that disclosure may create a safety risk and upheld its determination. In reaching its conclusion, the commission concluded that the department's reasons were not irrational and that it acted in good faith and without pretext. On the plaintiff's appeal to the trial court from the commission's decision, that court sustained the plaintiff's appeal, concluding that the commission applied the wrong standard in reviewing the department's determination that there were reasonable grounds to withhold the redacted information. The trial court thus reversed the commission's decision and ordered the Health Center to disclose the redacted information. Thereafter, the Health Center and the department appealed. *Held* that, contrary to the trial court's conclusion, the commission effectively applied the correct standard of review in upholding the department's determination, and the case was remanded to the trial court for it to determine whether that standard was properly satisfied: there was no merit to the plaintiff's claim that the Health Center and the department waived their claim on appeal that the commission correctly applied the standard of review set forth in *Commissioner of Correction* v. *Freedom of Information Commission* (46 Conn. L. Rptr. 533), which required the commission and the trial court to defer to the department's determination that the disclosure of the redacted information would create a safety risk if the department provided reasons that are bona fide and not pretextual or irrational, the essence of that claim having properly been presented to the trial court; furthermore, in accordance with this court's decision in *Van Norstrand* v. *Freedom of Information Commission* (211 Conn. 339), which set forth a standard of review that is sufficiently similar to the standard set forth in *Commissioner of Correction* in the context of applying a similar provision in the act, the commission and the trial court should defer to the department's safety risk assessment under § 1-210 (b) (19) and (d) unless the party seeking disclosure establishes that the assessment was frivolous, patently unfounded or in bad faith; moreover, although the commission applied the standard set forth in *Commissioner of Correction* rather than the standard set forth in *Van Norstrand*, those standards were sufficiently similar that there was no reasonable possibility that

the commission would have reached a different conclusion if it had applied the standard set forth in *Van Norstrand*.

Argued February 26—officially released June 28, 2016

Procedural History

Appeal from the decision of the named defendant determining, inter alia, that the defendant Commissioner of Administrative Services did not violate the Freedom of Information Act in ordering the redacting of, inter alia, the names of certain persons involved in animal research at the defendant University of Connecticut Health Center from certain correspondence disclosed pursuant to the plaintiff's freedom of information request, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Schuman*, *J.*; judgment sustaining the appeal, from which the defendant University of Connecticut Health Center and the defendant Commissioner of Administrative Services filed separate appeals. *Reversed*; *further proceedings*.

Charles H. Walsh, assistant attorney general, with whom were *Kerry Anne Colson*, assistant attorney general, and, on the brief, *George Jepsen*, attorney general, for the appellants in Docket Nos. SC 19593 and SC 19594 (defendant University of Connecticut Health Center et al.).

Martina Bernstein, pro hac vice, with whom, on the brief, were *Joseph J. Blyskal III* and *Gabriel Z. Walters*, pro hac vice, for the appellee in Docket Nos. SC 19593 and SC 19594 (plaintiff).

Opinion

PALMER, J. In these appeals, we must determine the standard of review that applies to a determination that public records are exempt from the disclosure provisions of the Freedom of Information Act (act), General Statutes § 1-200 et seq., pursuant to General Statutes

§ 1-210 (b) (19),[1] because there are reasonable grounds to believe that their disclosure may result in a safety risk. The plaintiff, People for the Ethical Treatment of Animals, Inc., submitted a freedom of information request to the defendant University of Connecticut Health Center (Health Center), requesting copies of all correspondence between the Health Center and the National Institutes of Health regarding potential noncompliance with federal animal welfare guidelines. The Health Center produced the requested documents but redacted the names of the individuals who had violated federal protocols and grant identification numbers that would make it possible to identify those individuals. The plaintiff then filed a complaint against the Health Center with the named defendant, the Freedom of Information Commission (commission). While the complaint was pending, the Health Center requested a safety risk determination from the defendant Commissioner of the Department of Administrative Services (department)[2] pursuant to § 1-210 (b) (19) and (d).[3] The department

[1] General Statutes § 1-210 (b) provides in relevant part: "Nothing in the Freedom of Information Act shall be construed to require disclosure of:

* * *

"(19) Records when there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, any government-owned or leased institution or facility or any fixture or appurtenance and equipment attached to, or contained in, such institution or facility, except that such records shall be disclosed to a law enforcement agency upon the request of the law enforcement agency. Such reasonable grounds shall be determined (A) (i) by the Commissioner of Administrative Services, after consultation with the chief executive officer of an executive branch state agency, with respect to records concerning such agency . . . ."

[2] Because we refer to the Freedom of Information Commission as the commission, we refer to the Commissioner of the Department of Administrative Services as the department rather than as the commissioner to avoid confusion.

[3] General Statutes § 1-210 (d) provides in relevant part: "Whenever a public agency . . . receives a request from any person for disclosure of any records described in subdivision (19) of subsection (b) of this section under the Freedom of Information Act, the public agency shall promptly notify the Commissioner of Administrative Services . . . of such request . . . before complying with the request . . . . If the commissioner, after consultation

determined that there were "reasonable grounds to believe that [the] disclosure of this [redacted] material may result in a safety risk to persons or property" and directed the Health Center to withhold the redacted information. The commission upheld this determination. The plaintiff appealed from the commission's decision to the trial court, which sustained the appeal and ordered the Health Center to disclose the redacted information. The Health Center and the department then brought separate appeals,[4] claiming that the trial court incorrectly determined that the commission had applied the wrong standard of review when it sustained the plaintiff's appeal. We agree with the Health Center and the department that the commission applied the proper standard of review. Accordingly, we reverse the judgment of the trial court. We further conclude that the case should be remanded to that court so that it may decide whether the commission, upon application of the proper standard of review, properly upheld the determination of the department.

The record reveals the following facts that the commission found or that are undisputed. On October 18, 2012, the plaintiff submitted a freedom of information request to the Health Center for all correspondence between the Health Center and the National Institutes of Health concerning potential noncompliance with federal animal welfare guidelines from January 1, 2009, until October 18, 2012. Thereafter, the Health Center provided sixty-one pages of redacted records. Some of the redactions were the names of employees involved in

with the chief executive officer of the applicable agency . . . believes the requested record is exempt from disclosure pursuant to subdivision (19) of subsection (b) of this section, the commissioner may direct the agency to withhold such record from such person. . . ."

[4] The Health Center and the department filed separate appeals with the Appellate Court, which consolidated the appeals. Thereafter, we transferred the consolidated appeals to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

animal research and some were federal grant numbers, which could be used to identify the researchers working on the grants. By letter dated December 6, 2012, the plaintiff complained to the commission that the Health Center had violated the act by redacting the information.

The Health Center subsequently wrote to the department requesting a safety risk determination pursuant to § 1-210 (b) (19) and (d). The Health Center attached to its letter two letters from the Department of Public Works dated August 1, 2008, and June 16, 2010, regarding previous freedom of information requests related to the Health Center's animal research programs.[5] In both letters, the Department of Public Works determined that disclosure of the identities of persons involved in animal research posed a safety risk and, therefore, that the information was exempt from the disclosure provisions of the act. Partly on the basis of these letters, the department determined in the present case that "there [were] reasonable grounds to believe that disclosure of this material [identifying the researchers who had failed to comply with federal animal welfare guidelines] may result in a safety risk to persons or property."[6] Accordingly, the department directed the

[5] The Department of Public Works was the department's predecessor for purposes of preparing safety risk assessments pursuant to § 1-210 (b) (19) and (d). See Public Acts 2011, No. 11-51, § 44.

[6] The department stated as follows: "The Commissioner of [Public Works] wrote in 2008: 'Both federal and state authorities have recognized the history of threat, harassment and intimidation directed against those involved in animal research, particularly those working at the nation's universities.' In her 2010 letter, she detailed some [thirty] incidents between 2004 and 2009 involving violence or threats of violence against person[s] and property by animal rights extremists.

"The record provides extensive evidence that release of the names of researchers puts those researchers at an elevated risk of harm from those opposed to their work. The nature of this opposition is qualitatively different from mere political opposition and has been manifested in violent acts time and again.

"The record and our consultations persuade me to find that there are reasonable grounds to believe that disclosure of this material may result in a safety risk to persons or property.

Health Center "to withhold, or redact accordingly, the information" that would disclose the identity of the animal researchers who had violated federal animal welfare guidelines.

Thereafter, the commission conducted a hearing on the plaintiff's complaint and concluded that the department had "reasonable grounds to believe that disclosure of the names and grant numbers of researchers reported for failing to comply with animal welfare guidelines may create a safety risk . . . ." In reaching this conclusion, the commission relied on the Superior Court decision in *Commissioner of Correction* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-07-4015438-S (November 3, 2008) (46 Conn. L. Rptr. 533, 535), for the proposition that it was required "to determine whether the [department's] reasons were pretextual and not bona fide, or irrational." (Internal quotation marks omitted.) The commission concluded that the department's "reasons were not irrational and that the [department] acted in good faith and without pretext in believing that disclosure of the redacted information may result in a risk of harm."

The plaintiff appealed from the commission's decision to the trial court. The trial court concluded that, although the standard set forth in *Commissioner of Correction* v. *Freedom of Information Commission*, supra, 46 Conn. L. Rptr. 535, "may be relevant, it is not the standard set" by this court. Rather, the trial court, quoting this court's decision in *Director, Dept. of Information Technology* v. *Freedom of Information Commission*, 274 Conn. 179, 191–92, 874 A.2d 785 (2005), concluded that "[t]he burden of proving the applicability of an exception [to disclosure under the act] rests

"You are directed to withhold, or redact accordingly, the information submitted to us."

[on] the party claiming it. . . . In particular, [t]his burden requires the claimant of the exemption to provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested." (Citation omitted; internal quotation marks omitted.) Applying this standard, the trial court concluded that, although the Health Center had presented evidence that there was a safety risk to the general community of animal researchers, that risk was not the relevant one because the names of those researchers already were in the public domain through the publication of scholarly articles. The court concluded that the relevant risk was the risk to animal researchers who had failed to comply with the relevant research protocols and that the Health Center had presented no evidence of such a risk. Although Raymond Philbrick, the director of security for the department, had testified at the hearing before the commission that the release of the names of the researchers who had violated the research protocols could make them "more of a target" for a "fringe group" or for individuals opposed to animal research, the court concluded that the testimony was mere opinion and conjecture, and did not satisfy the standard set forth in *Director, Dept. of Information Technology*. Accordingly, the trial court sustained the plaintiff's appeal, reversed the commission's decision and ordered the Health Center to disclose the redacted information.

These appeals followed. The Health Center and the department contend that the trial court failed to properly distinguish between the scope of the commission's review of a safety risk assessment made by the department pursuant to § 1-210 (b) (19) and (d), which is set forth in *Commissioner of Correction* v. *Freedom of Information Commission*, supra, 46 Conn. L. Rptr. 535, and the department's burden of proof, which is set

forth in *Director*, *Dept. of Information Technology* v. *Freedom of Information Commission*, supra, 274 Conn. 191–92. The Health Center and the department further contend that, under the standard of review set forth in *Commissioner of Correction*, both the commission and the trial court are required to defer to the department's assessment. The plaintiff contends that the Health Center and the department waived any claim that *Director*, *Dept. of Information Technology* did not set forth the proper standard of review when the department conceded in the trial court that the standard set forth in that case applied to the department's determination.[7] The plaintiff further contends that the trial court properly found that, under *Director*, *Dept. of Information Technology*, the Health Center and the department failed to satisfy their burden of proving that disclosure of information concerning the identities of researchers who violated animal care protocols would pose a safety risk. We conclude that the claim is reviewable, and we agree with the Health Center and the department that the commission applied the correct standard of review in determining that the safety risk exemption applied to the redacted information.[8]

We first address the plaintiff's claim that the Health Center and the department waived their claim that *Commissioner of Correction* v. *Freedom of Information Commission*, supra, 46 Conn. L. Rptr. 535, and not this court's decision in *Director*, *Dept. of Information Technology* v. *Freedom of Information Commission*, supra, 274 Conn. 191–92, supplies the proper standard of review. We disagree. The commission argued to the trial court that, "under [§ 1-210 (b) (19)], [it is] clear

[7] The commission cited the standard set forth in *Director*, *Dept. of Information Technology* in its brief to the trial court, which the department joined.

[8] Although we conclude that the commission applied the proper standard, as we discuss subsequently in this opinion, we express no opinion as to whether the commission properly applied that standard.

that the message to the commission is that [the department is] entitled to deference." It further argued that the Superior Court decision in *Commissioner of Correction* was the only decision involving a statute directing an agency other than the commission to determine whether an exemption applies in the first instance. In addition, the commission questioned "how much value [*Director*, *Dept. of Information Technology*] has . . . because . . . in [that] case, the [plaintiff] did not follow [§ 1-120 (b) (19)]. So when the [court] reviewed the commission's decision, it was . . . doing so outside the framework that had been established by the legislature . . . ."[9] Although the commission did not cite the standard set forth in *Commissioner of Correction* in its brief to the trial court, which the department joined, the commission expressly contended that the commission and the trial court should defer to the department's safety risk assessment. Specifically, the commission contended that, "[when] a statutory provision [such as § 1-210 (b) (19)] is subject to more than one plausible construction, the one favored by the agency charged with enforcing the statute will be given deference," and

[9] We recognize that, as the plaintiff notes, when the trial court asked commission counsel at trial why the commission had not cited *Director*, *Dept. of Information Technology* in its decision, counsel responded that the commission had not done so because it was "obvious" that the case applied, in the sense that the party claiming an exemption always has to present specific evidence in support of its claim. When the trial court then asked commission counsel if the commission had applied the proper standard, however, counsel responded that the commission had because "the only court decision that . . . interprets . . . statutes that have virtually identical language [as § 1-210 (b) (19)] is [*Commissioner of Correction* v. *Freedom of Information Commission*, supra, 46 Conn. L. Rptr. 535, which] sets the threshold very low." Accordingly, while it is arguable that the commission muddied the waters by suggesting that *both Commissioner of Correction* and *Director*, *Dept. of Information Technology* apply to safety risk determinations made pursuant to § 1-210 (b) (19) and (d) without further explaining how that could be the case, we do not agree with the plaintiff that this constituted a waiver of the Health Center's and the department's claim that *Commissioner of Correction* provides the proper standard of review.

noted that the department, which was charged with performing the safety risk assessment in the first instance, had found that disclosure of the redacted information would have created such a risk. This is essentially the same standard as the standard that the Superior Court applied in *Commissioner of Correction*. Moreover, the trial court, in its memorandum of decision, expressly addressed the issue of whether *Commissioner of Correction* provided the proper standard of proof and concluded that it did not. Accordingly, it is clear to us that the essence of the claim that the Health Center and the department raise on appeal was properly before the trial court.

We conclude, therefore, that we may review the claim that, pursuant to § 1-210 (b) (19), the commission and the trial court were required to defer to the department's determination that the disclosure of the redacted information would create a safety risk if the department provided reasons that were bona fide and not pretextual or irrational. See *Commissioner of Correction* v. *Freedom of Information Commission*, supra, 46 Conn. L. Rptr. 535. This is a question of statutory interpretation, over which our review is plenary.[10] See, e.g., *State* v. *Crespo*, 317 Conn. 1, 8, 115 A.3d 447 (2015); see also *Crews* v. *Crews*, 295 Conn. 153, 161, 989 A.2d 1060 (2010) ("[d]etermining the appropriate standard of review is a question of law, and as a result, it is subject to plenary review"). "The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so

[10] The Health Center and the department do not claim that the commission's determination that *Commissioner of Correction* supplied the proper standard of proof is entitled to deference. Cf. *Longley* v. *State Employees Retirement Commission*, 284 Conn. 149, 164, 931 A.2d 890 (2007) ("an agency's interpretation of a statute is accorded deference when the agency's interpretation has been formally articulated and applied for an extended period of time, and that interpretation is reasonable").

apply. . . . In seeking to determine [the] meaning [of a statute], General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes." (Internal quotation marks omitted.) *State* v. *Crespo*, supra, 9.

We begin with the language of § 1-210 (b) (19). That statute exempts records from the disclosure requirements of the act "when there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person . . . . Such reasonable grounds shall be determined . . . by the [department], after consultation with the chief executive officer of an executive branch state agency . . . ." General Statutes § 1-210 (b) (19). Although this court has not previously construed this language in § 1-210 (b) (19) for the purpose of determining the scope of the department's discretion in making the safety risk determination and the scope of the commission's review of that determination,[11] it has construed similar language in a related statute. In *Van Norstrand* v. *Freedom of Information Commission*, 211 Conn. 339, 559 A.2d 200 (1989), this court considered the scope of General Statutes (Rev. to 1989) § 1-19 (b) (1), which is now codified at § 1-210 (b) (1), and which exempts from the disclosure provisions of the act "[p]reliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents

[11] Section 1-210 (b) (19) was at issue in *Director*, *Dept. of Information Technology* v. *Freedom of Information Commission*, supra, 274 Conn. 179. The plaintiff in that case, however, never sought a safety risk assessment from the Department of Public Works, as the statute then provided. See id., 189–90 (plaintiff bore burden of seeking public safety determination and failed to do so). Indeed, it would appear that neither party in *Director*, *Dept. of Information Technology* raised § 1-210 (b) (19) until the commission raised it in its brief to the trial court. Id., 188 n.8 (first mention of § 1-210 [b] [19] was in commission's brief to trial court). Accordingly, there was no occasion for this court to consider the standard of review that would apply to the safety risk assessment.

clearly outweighs the public interest in disclosure . . . .'' We noted in *Van Norstrand* that the public agency referred to in the statute is the agency to which the freedom of information request was directed. See *Van Norstrand* v. *Freedom of Information Commission*, supra, 345. We then stated that, ''[a]lthough the statute places the responsibility for making [the] determination [to withhold the documents] on the public agency involved, the statute's language strongly suggests that the agency may not abuse its discretion in making the decision to withhold disclosure. The agency must, therefore, indicate the reasons for its determination to withhold disclosure and those reasons must not be frivolous or patently unfounded.'' (Internal quotation marks omitted.) Id. We held that, ''[h]aving concluded that there had been a good faith consideration of the effect [on] disclosure [by the agency], and not having found an abuse of discretion, the [commission] had determined all that was required of it by statute to qualify the requested information for the exemption [at] issue . . . .'' Id., 346; see also *Wilson* v. *Freedom of Information Commission*, 181 Conn. 324, 339, 435 A.2d 353 (1980) (agency's determination that records should be withheld pursuant to predecessor to § 1-210 [b] was upheld when reasons provided by agency were not ''frivolous or patently unfounded'').

Thus, we determined in *Van Norstrand* that, when the act provides that an agency other than the commission must determine whether records fall within a particular exemption in the first instance, the agency has broad discretion to make that determination, and the commission must give deference to that determination.[12] See

[12] The plaintiff in the present case does not dispute that, when an agency has invoked § 1-210 (b) (19) in response to a request for information, the department is required to make the safety risk determination in the first instance. See *Pictometry International Corp.* v. *Freedom of Information Commission*, 307 Conn. 648, 666, 59 A.3d 172 (2013) (''[u]nder § 1-210 [b] [19], [the] safety determination is to be made by the [department] in consultation with the head of the relevant state agency, not by the commission'').

Van Norstrand v. *Freedom of Information Commission*, supra, 211 Conn. 345–46. We further note that, under § 1-210 (b) (19), the department is required to determine only that there are "*reasonable grounds to believe* disclosure *may* result in a safety risk . . . ." (Emphasis added.) This language supports the conclusion that the department is authorized to rely on the experience and professional expertise of its employees to make a predictive judgment. The statute imposes no requirement that, in making its assessment, the department may only consider evidence of previous instances in which persons were subjected to threats or violence as the result of similar disclosures. The statute also does not require that there must be a clear safety risk to justify nondisclosure or that the safety risk must outweigh the public interest in disclosure.[13] Cf. *Director, Dept. of Information Technology* v. *Freedom of Information Commission*, supra, 274 Conn. 192 (when text of statutory exemption to act's disclosure requirement does not require balancing between public interest in disclosure and need for confidentiality, "neither the [commission] nor the courts are required to engage in a separate balancing procedure" [internal quotation marks omitted]); *Chairman, Criminal Justice Commission* v. *Freedom of Information Commission*, 217 Conn. 193, 200, 585 A.2d 96 (1991) ("[t]he fact that the legislature specifically declined to include a balancing requirement in [the predecessor to § 1-210 (b) (2)] is strong evidence that a balancing test is inappropriate when applying [the exemption]"). Accordingly, there are even stronger grounds in the present case for concluding that the legislature intended to grant broad discretion to the department than there were in *Van Norstrand*, in which the statute at issue provided that

[13] It is reasonable to conclude, however, that the legislature did not intend that § 1-210 (b) (19) would apply if the risk to safety is purely speculative or de minimis.

documents were exempt from disclosure "provided the public agency has determined that the public interest in withholding such documents *clearly outweighs* the public interest in disclosure . . . ." (Emphasis added.) General Statutes (Rev. to 1989) § 1-19 (b) (1); see *Van Norstrand* v. *Freedom of Information Commission*, supra, 211 Conn. 345. We therefore agree with the Health Center and the department that, under § 1-210 (b) (19) and (d), the safety risk assessment must be performed by the department in the first instance, after consulting with the head of the relevant state agency, and that both the commission and the trial court should defer to the department's assessment unless the party seeking disclosure establishes that the determination was frivolous, patently unfounded or in bad faith.[14] See

[14] We recognize that, by creating this statutory scheme, the legislature effectively eliminated the department's burden of proving to a finder of fact that § 1-210 (b) (19) exempts records from the disclosure provisions of the act. In ordinary usage, the phrase "burden of proof" refers to the burden borne by a party in an adversarial proceeding before an impartial fact-finding tribunal. In contrast, when an agency seeks a safety risk determination from the department pursuant to § 1-210 (b) (19) and (d), the department acts both as a party—that is, it produces evidence and arguments to support its position—and as the finder of fact, and the proceeding is adversarial only to the extent that the agency and the department may disagree as to whether the exemption should apply. To be sure, when making a safety risk determination, the department should rely on "more than conclusory language, generalized allegations or mere arguments . . . . Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested." (Internal quotation marks omitted.) *Director*, *Dept. of Information Technology* v. *Freedom of Information Commission*, supra, 274 Conn. 191–92. If the department's determination results in a complaint to the commission, however, the commission's only role is to determine whether the department's reasons were frivolous, patently unfounded or in bad faith, not whether it would have agreed with the department's determination. In other words, the commission operates in the same manner as an appellate tribunal, not as a finder of fact.

Thus, we do not disagree with the plaintiff's contention that the legislative history of § 1-210 (b) (19) supports the conclusion that the *department* should apply the standard set forth in *Director*, *Dept. of Information Technology* v. *Freedom of Information Commission*, supra, 274 Conn. 191–92, when making its safety risk determination. See 43 H.R. Proc., Pt. 5, 2000 Sess., p. 1588, remarks of Representative Alex Knopp (reasonable grounds

Van Norstrand v. *Freedom of Information Commission*, supra, 345–46.

Having concluded that our decision in *Van Norstrand* provides the standard of review for claims involving § 1-210 (b) (19), we next address the issue of whether the commission applied the proper standard in the present case. As we have indicated, the commission applied the standard set forth in *Commissioner of Correction*, under which "the [commission's] role is to determine whether the [agency's] reasons were pretextual and not bona fide, or irrational." (Internal quotation marks omitted.) *Commissioner of Correction* v. *Freedom of Information Commission*, supra, 46 Conn. L. Rptr. 535. We have concluded in this opinion that the commission must defer to the department's determination unless it is "frivolous or patently unfounded"; (internal quotation marks omitted) *Van Norstrand* v. *Freedom of Information Commission*, supra, 211 Conn. 345; or was not arrived at in "good faith . . . ." Id., 346. Although these standards are not identical, we conclude that they are sufficiently similar that there is no reasonable possibility that the commission would have reached a different conclusion if it had applied the *Van Norstrand* standard. Accordingly, we conclude that the commission effectively applied the proper standard.[15]

to apply exemption "would not include a general concern for disclosure of these records, but rather knowledge of a particular set of circumstances that would lead one to the conclusion that disclosure could result in harm to a person or to state property"). These remarks do not support the conclusion, however, that the commission may substitute its opinion for the determination of the department if the department's reasons are not frivolous or patently unfounded. Moreover, nothing in Representative Knopp's remarks suggests that the legislature believed that the only "particular set of circumstances" that could constitute reasonable grounds for withholding information would be previous threats or acts of violence resulting from disclosure of precisely the same type of information.

[15] We emphasize, however, that, to avoid confusion and proliferation of standards, the commission and the courts should use the specific language of *Van Norstrand* when reviewing an agency's determination as to whether an exception to the disclosure requirement of the act applies. The plaintiff contends, however, that the standard set forth in *Van Norstrand* does not

The fact that the commission, in effect, applied the proper standard does not necessarily mean, however, that it properly determined that the standard was satisfied. Because the trial court concluded that the commission had applied an improper standard, the court had no reason to address that issue. Accordingly, we conclude that the case should be remanded to the trial court so that it may determine whether the commission properly concluded that the department's determination that disclosure of the redacted information would create a safety risk was not frivolous or patently unfounded and was arrived at in good faith.

The judgment is reversed and the case is remanded to the trial court for further proceedings in accordance with this opinion.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* MARK BANKS
(SC 19246)

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald, Espinosa and Vertefeuille, Js.

Syllabus

The defendant, who had been convicted of the crimes of robbery in the first degree, kidnapping in the first degree and criminal possession of a pistol or revolver, was in the custody of the Commissioner of Correction in 2010 when he refused to submit to the taking of a DNA sample by Department of Correction personnel. The state then filed a motion for permission to use reasonable physical force to obtain a DNA sample

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apply in the present case because the statute at issue in *Van Norstrand*, namely, General Statutes (Rev. to 1989) § 1-19 (b) (1), which is now codified at § 1-210 (b) (1), required the public agency to engage in a balancing test, whereas § 1-210 (b) (19) does not. Our conclusion that *Van Norstrand* supplies the proper standard is based, however, on the fact that § 1-210 (b) (19), like § 1-210 (b) (1), provides that an agency other than the commission will make the determination that the exemption applies in the first instance. Thus, the fact that, unlike § 1-210 (b) (19), § 1-210 (b) (1) requires the agency to engage in a balancing test in making its determination is irrelevant.

from the defendant. The defendant objected, claiming that he was not required to submit to the taking of a DNA sample because the statute (§ 54-102g) requiring all incarcerated felons to submit to DNA testing was not in effect at the time of his convictions in 1997. Prior to a 2003 amendment to § 54-102g, the statute applied only to persons convicted of certain sex offenses and criminal offenses against victims who were minors. The purpose of the amendment was to support the legislative goal of creating a comprehensive DNA data bank to aid in criminal investigations. Thereafter, a 2011 amendment to the statute authorized the state to use force to obtain a DNA sample. The defendant argued that requiring him to submit a DNA sample would constitute an additional punishment to his original sentences and would violate the ex post facto clause of the federal constitution. The trial court granted the motion but stayed the enforcement of its decision pending the resolution of the defendant's appeal from that decision. Subsequently, the defendant was charged with refusal to submit to the taking of a blood or biological sample for DNA analysis in violation of § 54-102g. The defendant moved to dismiss the charge, again presenting the argument that application of § 54-102g to him would violate the ex post facto clause. The trial court concluded that the taking of a DNA sample was not a penalty and denied the defendant's motion to dismiss. Following a trial to the court, the defendant was found guilty and sentenced to one year incarceration, to be served consecutive to his existing sentences. The defendant filed a separate appeal to the Appellate Court, which consolidated the appeals, and argued that the trial court lacked subject matter jurisdiction to consider the state's motion, that § 54-102g, as applied to him, violated his due process rights and the ex post facto clause, that the legislative amendment to § 54-102g authorizing the use of reasonable force to obtain a DNA sample was not intended to have retroactive effect, and that prior to the 2011 amendment § 54-102g did not authorize the commissioner or the department to use reasonable force. The Appellate Court concluded that, because § 54-102g was regulatory and not punitive in nature, the trial court had jurisdiction to consider the state's motion, and, accordingly, that application of § 54-102g to the defendant did not violate his due process rights or the ex post facto clause. That court further concluded that the 2011 amendment to § 54-102g was not applied retroactively to the defendant, and that the statute necessarily included the option of enforcing compliance through reasonable force because the fundamental purpose of the statute would be substantially frustrated if incarcerated felons could simply refuse to provide DNA samples. The Appellate Court affirmed the judgment of conviction and the trial court's grant of the state's motion for permission to use reasonable physical force in obtaining a DNA sample from the defendant, and the defendant, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court properly determined that the trial court had subject matter jurisdiction to consider the state's motion seeking permission

to use reasonable physical force to obtain a DNA sample from the defendant: the language of § 54-102g and the legislative history of that statute demonstrated that the collection of DNA samples was to further the nonpunitive, regulatory goal of maintaining a DNA data bank to assist in criminal investigations, and, although an incarcerated felon's refusal to submit to the taking of a DNA sample could result in a criminal prosecution pursuant to § 54-102g, a statutory provision that subjects a person to prosecution for noncompliance does not automatically convert an otherwise regulatory statutory scheme into a penal statute; moreover, the application of § 54-102g to the defendant here did not affect the sentences for his underlying criminal convictions or further punish him for his underlying crimes.

2. The Appellate Court properly affirmed the trial court's decision to grant the state's motion for permission to use reasonable physical force to obtain a DNA sample from the defendant; although prior to 2011, § 54-102g contained no provision explicitly permitting the department to use reasonable force, the use of such force to obtain a DNA sample from an unwilling individual was inherent in the statute, the 2011 amendment of the statute to explicitly permit the use of such force clarified the original statute and demonstrated the legislature's acknowledgment that it would be necessary at times to use reasonable force to further the goals of § 54-102g in creating a DNA data bank to assist in criminal investigations, and those goals would be frustrated if a person subject to the requirements of the statute refused the mandatory obligation of the statute to provide a DNA sample.

(*Two justices concurring separately in one opinion*)

3. The defendant's claim that the Appellate Court incorrectly determined that the application of § 54-102g to him did not violate his due process rights or the ex post facto clause of the federal constitution was unavailing; the statute was not a penal statute and did not operate retroactively to punish the defendant for his original crimes, but was applicable to him because of his new conduct while incarcerated in failing to comply with § 54-102g, even when his convictions for the underlying crimes predated the enactment of the applicable statutory provision.

Argued January 28—officially released July 5, 2016

Procedural History

Motion, in the first case, for permission to use reasonable physical force to obtain a DNA sample from the defendant, who previously had been convicted of four counts each of the crimes of robbery in the first degree and kidnapping in the first degree, and of two counts of the crime of criminal possession of a pistol or revolver, brought to the Superior Court in the judicial district of

Hartford, where the court, *Mullarkey*, *J.*, granted the state's motion and rendered judgment thereon; thereafter, the court, *Mullarkey*, *J.*, granted the defendant's motion to stay; subsequently, substitute information, in the second case, charging the defendant with refusing to submit to the taking of a blood or other biological sample for DNA analysis, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, and tried to the court, *Carbonneau*, *J.*; judgment of guilty; thereafter, the defendant filed separate appeals with the Appellate Court, *Lavine*, *Robinson* and *Bear*, *Js.*, which consolidated the appeals and affirmed the trial court's judgments, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Daniel J. Foster, assigned counsel, for the appellant (defendant).

Michael Gailor, executive assistant state's attorney, with whom, on the brief, was *Gail P. Hardy*, state's attorney, for the appellee (state).

Opinion

ESPINOSA, J. In this certified appeal[1] we consider whether the Appellate Court properly resolved a series of claims that the defendant, Mark Banks, raises in connection with General Statutes (Rev. to 2009) § 54-102g,[2] which authorizes the Commissioner of Correc-

[1] We granted the defendant's petition for certification, limited to the following issues: (1) "Did the Appellate Court correctly determine that the state may obtain a DNA sample from a felon in the custody of the Commissioner of Correction who was convicted of crimes prior to the enactment of General Statutes § 54-102g?"; and (2) "Did the Appellate Court correctly determine that prior to the passage of No. 11-144, § 1, of the 2011 Public Acts, which amended . . . § 54-102g, it was permissible for the trial court to grant the state permission to use reasonable physical force to obtain a DNA sample?" *State* v. *Banks*, 310 Conn. 951, 81 A.3d 1179 (2013).

[2] All references herein to § 54-102g are to the 2009 revision of the statute unless otherwise indicated.

tion to collect DNA samples from currently incarcerated felons in order to maintain a DNA data bank to assist in criminal investigations. The defendant appeals, following our grant of certification, from the judgment of the Appellate Court affirming both the trial court's judgment granting the state permission to use reasonable physical force to obtain a DNA sample from the defendant and the judgment of conviction rendered following the defendant's refusal to submit to the taking of a blood or other biological sample for DNA analysis in violation of § 54-102g (g). *State* v. *Banks*, 143 Conn. App. 485, 487–88, 71 A.3d 582 (2013). The defendant contends that the Appellate Court: (1) improperly concluded that the trial court had authority to grant the state permission to use reasonable physical force in obtaining a DNA sample from him prior to the 2011 amendment to § 54-102g that incorporated a provision authorizing the state to use such force; see Public Acts 2011, No. 11-144, § 1 (P.A. 11-144); and (2) incorrectly determined that § 54-102g, as applied to the defendant, did not violate his due process rights and the ex post facto clause of the federal constitution. See U.S. Const., art. I, § 10. We conclude that the Appellate Court properly resolved both of the defendant's claims and therefore affirm the judgment of the Appellate Court.

The following facts and procedural history are relevant to the resolution of this appeal. In 1997, following a jury trial, the defendant was convicted of four counts of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4), four counts of kidnapping in the first degree in violation of General Statutes § 53a-92, and two counts of criminal possession of a pistol or revolver in violation of General Statutes (Rev. to 1995) § 53a-217c for robberies committed in 1995. See *State* v. *Banks*, 59 Conn. App. 112, 113, 755 A.2d 951, cert. denied, 254 Conn. 950, 762 A.2d 904 (2000). On December 19, 1997, the trial court sentenced the defen-

dant to fifteen years incarceration to run consecutively with a sentence the defendant was already serving from a prior conviction. The defendant has remained incarcerated since his 1997 convictions.

In his brief to this court, the defendant states that on December 8 and 29, 2009, personnel from the Department of Correction (department) instructed him to submit to the taking of a DNA sample pursuant to § 54-102g (a), but that he refused to comply. On March 17, 2010, department personnel again instructed the defendant and nine other inmates to provide DNA samples in accordance with the statute. The defendant remained steadfast in his refusal to submit to the taking of a DNA sample.

On May 19, 2010, the state filed a motion in the trial court seeking permission to use reasonable physical force to collect a DNA sample from the defendant and a fellow inmate, Roosevelt Drakes,[3] who had likewise refused to submit a sample. The state cited § 54-102g as the authority for its motion. The defendant opposed the state's motion, arguing that if he refused to submit a DNA sample for inclusion in the DNA data bank, the only recourse available to the state was to prosecute him pursuant to § 54-102g (g) for refusal to provide a blood or other biological sample for DNA analysis.[4] The defendant further argued that he was not required to submit a DNA sample because, at the time of his convictions in 1997, General Statutes (Rev. to 1997) § 54-102g

[3] Drakes' appeal, also decided today, raises issues similar to those of the defendant in the present case. See *State* v. *Drakes*, 321 Conn. 857, 146 A.3d 21 (2016).

[4] At the time of the state's motion and the defendant's refusal in March, 2010, refusing to submit to the taking of a DNA sample was punishable as a class A misdemeanor. See General Statutes (Rev. to 2009) § 54-102g (g). The legislature subsequently amended the statute to make the refusal to submit to the taking of a DNA sample a class D felony, effective October 1, 2010. Public Acts 2010, No. 10-102, § 2; see General Statutes (Rev. to 2011) § 54-102g (g).

applied only to those persons convicted of certain sex offenses and did not apply to incarcerated felons, such as the defendant, until the legislature amended the statute in 2003. See Public Acts 2003, No. 03-242, § 1 (P.A. 03-242). Accordingly, the defendant claimed that requiring him to provide a DNA sample would constitute an added punishment to his original sentence and run afoul of the ex post facto clause.

On February 8, 2011, the trial court, *Mullarkey*, *J.*, issued a written memorandum of decision rejecting the defendant's claims and granting the state's motion for permission to use reasonable physical force to collect a DNA sample from the defendant. The trial court determined that submitting to the taking of a DNA sample for the purposes of § 54-102g was a nonpunitive, regulatory measure that did not affect the defendant's original 1997 sentence and, therefore, that the trial court had subject matter jurisdiction over the state's motion. Likewise, because the trial court determined that § 54-102g is regulatory in nature, it concluded that the statute did not run awry of the ex post facto clause. Additionally, after examining the text and legislative history of § 54-102g, the court determined that the statute necessarily included the option of enforcing compliance through reasonable force, because allowing incarcerated felons to simply refuse to provide DNA samples would substantially frustrate the legislature's goal of creating a comprehensive DNA data bank to aid in criminal investigations. The defendant appealed to the Appellate Court from the trial court's decision.[5]

Subsequently, the defendant was charged via a substitute information with refusal to submit to the taking of a blood or biological sample for DNA analysis in viola-

[5] The defendant, however, did not submit a sample of his DNA at this time. The trial court issued a stay delaying the enforcement of its decision pending the resolution of the defendant's appeal. See *State* v. *Banks*, supra, 143 Conn. App. 491.

tion of § 54-102g (g) for his March 17, 2010 refusal. The defendant moved to dismiss the charge and, at a hearing before the trial court, *Carbonneau, J.*, presented similar arguments to those he previously presented in opposition to the state's motion to use physical force, namely, that application of the statute would violate the ex post facto clause as applied to him. The trial court adopted the reasoning of Judge Mullarkey in his memorandum of decision, concluded that the taking of a DNA sample was not a penalty and denied the defendant's motion to dismiss. Following a bench trial, the defendant was found guilty and sentenced to one year incarceration, consecutive to his existing sentences. The defendant filed a separate appeal to the Appellate Court from the judgment of conviction.

The Appellate Court considered the defendant's consolidated appeals and ultimately upheld both the defendant's conviction and the trial court's grant of the state's motion for permission to use reasonable physical force in obtaining a DNA sample from the defendant. *State* v. *Banks*, supra, 143 Conn. App. 485, 487–88. The defendant argued that: (1) the trial court lacked subject matter jurisdiction to consider the state's motion; (2) § 54-102g, as applied to him, violated his due process rights and the ex post facto clause; (3) the legislature, although it had amended § 54-102g in 2011 to authorize the use of reasonable force to obtain a DNA sample; P.A. 11-144; did not intend that amendment to have retroactive effect; and (4) prior to 2011, § 54-102g did not authorize the department to use reasonable force. *State* v. *Banks*, supra, 492, 508. The Appellate Court, largely adopting the reasoning of the trial court's memorandum of decision, concluded that § 54-102g is regulatory rather than punitive in nature and, therefore, that the trial court had jurisdiction to consider the state's motion and that application of the statute to the defendant did not violate his due process rights or contravene the ex post

facto clause. Id., 499, 508–10. In analyzing the text and history of § 54-102g, the Appellate Court determined that the statute was not applied retroactively to the defendant and that, as the trial court concluded, the statute authorized the use of reasonable force to obtain a DNA sample from those who refused to willingly submit one. Id., 507. We thereafter granted the defendant's petition for certification to appeal. See footnote 1 of this opinion.

Prior to addressing the defendant's substantive claims, we provide an overview of the history of the statutory scheme which underlies the defendant's claims. The current revision of § 54-102g (b) requires DNA samples to be collected from all persons convicted of a felony, among others. When initially enacted in 1994, however, the statute only required the collection of DNA samples from persons convicted of certain sex offenses. Public Acts 1994, No. 94-246, § 1; see General Statutes (Rev. to 1995) § 54-102g. The statute was further amended in 1999 to extend the DNA collection requirements to individuals who had committed a criminal offense against a victim who was a minor. Public Acts 1999, No. 99-183, § 1. In 2003, the legislature expanded the scope of the statute to require all incarcerated felons to submit a DNA sample for inclusion in the state DNA data bank. See P.A. 03-242, § 1. The 2003 amendment broadening the category of those subject to § 54-102g is the source of the defendant's present appeal.[6]

[6] General Statutes (Rev. to 2009) § 54-102g provides in relevant part: "(a) Any person who has been convicted of a criminal offense against a victim who is a minor, a nonviolent sexual offense or a sexually violent offense . . . or a felony, and has been sentenced on that conviction to the custody of the Commissioner of Correction shall, prior to release from custody and at such time as the commissioner may specify, submit to the taking of a blood or other biological sample for DNA . . . analysis to determine identification characteristics specific to the person. . . ."

I

A

We first address the defendant's claim that the Appellate Court incorrectly concluded that the trial court properly granted the state's motion for permission to use reasonable physical force as a means of obtaining a sample of the defendant's DNA. *State* v. *Banks*, supra, 143 Conn. App. 507. The defendant contends that § 54-102g is penal rather than regulatory in nature and, therefore, that the trial court was without jurisdiction because the defendant was already serving the sentences for his underlying criminal convictions. The state avers that § 54-102g is not punitive in nature and that the trial court properly had jurisdiction to consider the state's motion given that the court's actions would not affect the defendant's original sentences. We agree with the state.

In the most fundamental sense, subject matter jurisdiction "involves the authority of a court to adjudicate the type of controversy presented by the action before it." (Internal quotation marks omitted.) *State* v. *Fowlkes*, 283 Conn. 735, 739, 930 A.2d 644 (2007). It is well settled that, in criminal matters, "[t]he jurisdiction of the sentencing court terminates when the sentence is put into effect, and that court may no longer take any action *affecting the sentence* unless it has been expressly authorized to act." (Emphasis in original; internal quotation marks omitted.) *State* v. *Waterman*, 264 Conn. 484, 491, 825 A.2d 63 (2003). When determining whether a trial court properly had subject matter jurisdiction over an action, we recognize that "every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *State* v. *Fowlkes*, supra, 739. We exercise plenary review over questions of a court's subject matter jurisdiction. Id., 738.

The critical question in determining whether a court may take action affecting a defendant's sentence following its imposition is whether the requested action is punitive in nature. If the requested action "is not punitive in nature, then a defendant's sentence is not affected, and the trial court has jurisdiction to take that action. If it is punitive, then a defendant's sentence *is* affected, and the trial court lacks jurisdiction to take that action." (Emphasis in original.) Id., 740. In *State* v. *Waterman*, supra, 264 Conn. 484, we addressed a similar jurisdictional claim to that raised by the defendant in the present case. In that case, the defendant challenged the jurisdiction of the trial court to make a finding following the defendant's sentencing that he must register as a sex offender pursuant to General Statutes § 54-251, a provision in Connecticut's version of Megan's Law, General Statutes § 54-250 et seq. *State* v. *Waterman*, supra, 488. The defendant argued that registering as a sex offender was a punitive measure and that the court was without jurisdiction to order him to register, as he had already begun serving the sentence for his underlying convictions. Id., 489. We employed a two part test to determine whether the requirements of a statute are punitive in nature: "[U]nder the first part of the test, the court examine[s] whether the legislature ha[s] intended the statute [under consideration] to be criminal or civil, in other words, punitive in law. . . . Under the second part of the test, the . . . court consider[s] whether, even if not punitive in law, the statute [is] nevertheless punitive in fact, that is, whether the statute [is] so punitive in fact that it [cannot] be seen as civil in nature." (Internal quotation marks omitted.) *State* v. *Fowlkes*, supra, 283 Conn. 741; *State* v. *Waterman*, supra, 492–93; see also *State* v. *Kelly*, 256 Conn. 23, 92, 770 A.2d 908 (2001). We determined that the requirements of Megan's Law were ministerial only; *State* v. *Waterman*, supra, 497; and relied

on the conclusions of the United States District Court for the District of Connecticut in a previous challenge to the same law that neither the text of the statute nor the legislative history evinced a punitive purpose. Id., 493–94; see *Doe* v. *Lee*, 132 F. Supp. 2d 57, 67–68 (D. Conn.), aff'd sub nom. *Doe* v. *Dept. of Public Safety ex rel. Lee*, 271 F.3d 38 (2d Cir. 2001), rev'd on other grounds sub nom. *Dept. of Public Safety* v. *Doe*, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003). Furthermore, the statute did not necessitate modifying, opening, or correcting the defendant's original sentence in order to ensure the defendant's compliance with the registration requirements. *State* v. *Waterman*, supra, 497. We therefore concluded that the registration requirements of Megan's Law are regulatory in nature and not punitive. Id., 489. Accordingly, we determined that the trial court had jurisdiction to order the defendant's registration as the requirement did not affect the defendant's original sentence. Id., 498.

Like the similar claim in *Waterman*, the defendant's argument that the trial court did not have jurisdiction to grant the state's motion for permission to use reasonable force because § 54-102g constitutes a penalty must fail. After our review of § 54-102g, we conclude that the Appellate Court properly determined that the requirements in the statute to provide DNA samples are not punitive in nature and, therefore, the trial court properly had subject matter jurisdiction to consider the state's motion.

Under the first part of our analysis, we examine the statutory text and conclude that the legislature did not intend for DNA collection to be punitive in the context of the statutory scheme that encompasses § 54-102g. In determining the legislative purpose of a statute, we employ the familiar rules of statutory construction. See *Lieberman* v. *Aronow*, 319 Conn. 748, 756–57, 127 A.3d 970 (2015); *In re Tyriq T.*, 313 Conn. 99, 104–105, 96

A.3d 494 (2014). Our analysis of § 54-102g is therefore guided by General Statutes § 1-2z and standard principles of statutory construction. As both the trial court and the Appellate Court observed, § 54-102g (f) demonstrates that the purpose of the statute is to further the nonpunitive goal of maintaining a DNA data bank to assist in criminal investigations: "The identification characteristics of the profile resulting from the DNA analysis shall be stored and maintained . . . in a DNA data bank and shall be made available only as provided in section 54-102j." General Statutes (Rev. to 2009) § 54-102g (f). We agree that the overall purpose of the statute is not to punish those convicted of crimes by requiring them to submit a DNA sample but to use DNA as a means of aiding law enforcement investigations. See *Maryland* v. *King*, 569 U.S. 435, 442, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013) ("[L]aw enforcement, the defense bar, and the courts have acknowledged DNA testing's unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices." [Internal quotation marks omitted.]).

Indeed, the other provisions of the statutory scheme demonstrate that the collection of DNA samples is for regulatory rather than punitive purposes. For example, the statutory scheme contains provisions regulating: the manner in which DNA samples are collected; General Statutes § 54-102h; the manner in which the analysis of DNA samples is to be conducted; General Statutes § 54-102i; and the legitimate purposes for which information in the DNA data bank may be used. General Statutes § 54-102j. Likewise, the statutory scheme contains provisions that: outline penalties for misuse of information in the DNA data bank; General Statutes § 54-102k; provide for the destruction of DNA data bank information upon a person's exoneration; General Statutes § 54-102*l*;

and create a DNA Data Bank Oversight Panel charged with safeguarding the information in the DNA data bank and the privacy of individuals registered therein. General Statutes § 54-102m. All of these provisions further the regulatory purpose and ensure that the DNA data bank is used only in accordance with its proper purpose of assisting in criminal investigations. Notably, all fifty states have enacted statutes similar to Connecticut's that require convicted felons to submit a DNA sample in order to aid in criminal investigations. *Maryland* v. *King*, supra, 569 U.S. 444. In challenges to those statutory schemes, our sister courts have regularly held that the collection of DNA in this context is regulatory and not punitive.[7] Accordingly, § 54-102g is not punitive in law.

Although we conclude that § 54-102g is not punitive in law, under the second part of our analysis, we consider whether the statute may be " 'punitive in fact' " if the punitive effect of the statute is so substantial that it swallows the regulatory or civil purpose of the statute. *State* v. *Waterman*, supra, 264 Conn. 492–93. When inquiring whether a statute is actually punitive in fact, we examine the factors first outlined by the United States Supreme Court in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168–69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963); see *State* v. *Alexander*, 269 Conn. 107, 118, 847

[7] See *United States* v. *Coccia*, 598 F.3d 293, 299 (6th Cir. 2010); *United States* v. *Hook*, 471 F.3d 766, 776 (7th Cir. 2006), cert. denied, 549 U.S. 1343, 127 S. Ct. 2081, 167 L. Ed. 2d 771 (2007); *Johnson* v. *Quander*, 440 F.3d 489, 502–503 (D.C. Cir.), cert. denied, 549 U.S. 945, 127 S. Ct. 103, 166 L. Ed. 2d 255 (2006); *Jones* v. *Murray*, 962 F.2d 302, 309 (4th Cir.), cert. denied, 506 U.S. 977, 113 S. Ct. 472, 121 L. Ed. 2d 378 (1992); *Kruger* v. *Erickson*, 875 F. Supp. 583, 589 (D. Minn. 1995), aff'd on other grounds, 77 F.3d 1071 (8th Cir. 1996); *People* v. *Travis*, 139 Cal. App. 4th 1271, 1295, 44 Cal. Rptr. 3d 177 (2006); *State* v. *Raines*, 383 Md. 1, 30, 857 A.2d 19 (2004); *Kellogg* v. *Travis*, 100 N.Y.2d 407, 410, 796 N.E.2d 467, 764 N.Y.S.2d 376 (2003); *Sanders* v. *Dept. of Corrections*, 379 S.C. 411, 422, 665 S.E.2d 411 (2008), cert. denied, 2009 S.C. LEXIS 480 (S.C. February 20, 2009); *State* v. *Bain*, Docket No. 2008-286, 2009 WL 170109, *1 (Vt. January 14, 2009).

A.2d 970 (2004). These factors include whether the challenged action "has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . ." (Footnotes omitted.) *Kennedy* v. *Mendoza-Martinez*, supra, 168–69. We recognize that these factors "are all relevant to the inquiry, and may often point in differing directions." Id., 169. Additionally, "[s]ometimes one factor will be considered nearly dispositive of punitiveness in fact, while sometimes another factor will be crucial to a finding of nonpunitiveness." (Internal quotation marks omitted.) *State* v. *Kelly*, supra, 256 Conn. 93.

In concluding that § 54-102g is not punitive in fact, the Appellate Court rejected the defendant's claim that, because refusal to submit a DNA sample can result in a criminal prosecution pursuant to § 54-102g (g), the statute is necessarily punitive in its effect. *State* v. *Banks*, supra, 143 Conn. App. 498–99. We agree with the Appellate Court's determination that a statutory provision that subjects a person to prosecution for noncompliance does not automatically convert an otherwise regulatory statutory scheme into a penal statute. At the time the defendant in the present case was charged, § 54-102g (g) provided that any person who failed to submit to the taking of a DNA sample was guilty of a class A misdemeanor. See footnote 4 of this opinion. Megan's Law contains several provisions similar to § 54-102g (g) whereby a person who is required to register as a sex offender, yet fails to do so, is guilty of a class D felony. See General Statutes §§ 54-251 (e), 54-252 (d), 54-253 (e) and 54-254 (b). In *State* v. *Kelly*, supra, 256

Conn. 94, we concluded that the registration requirements of Megan's Law, despite the existence of penalty provisions, were regulatory rather than punitive in nature. The penalty for failure to submit a DNA sample is no greater than the penalty for failure to register as a sex offender, and the defendant offers no reason as to why that penalty is any more burdensome in this context. Accordingly, consistent with our decision in *Kelly*, the penalty provision of § 54-102g (g) does not render the entire statutory scheme punitive in fact.

Our examination of the other *Mendoza-Martinez* factors does not lead us to the conclusion that § 54-102g is punitive in fact. We are unaware of any tradition that considers the submission of a DNA sample to be a historically recognized punishment, and the defendant offers no support for such a proposition.[8] Likewise, requiring convicted felons to submit to the taking of a DNA sample in no way furthers the retributive or deterrent goals of punishment for their underlying crimes.

[8] The defendant instead suggests that submitting a DNA sample should be recognized as a punishment because taking the sample would be a search and an intrusion under the fourth amendment to the federal constitution. There is no support, however, for the defendant's recasting of a fourth amendment search as a punishment. To the contrary, courts have held that actions generally are not punitive if they are minor and indirect in their effect. See *Smith* v. *Doe*, 538 U.S. 84, 99–100, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003); *Hatton* v. *Bonner*, 356 F.3d 955, 963 (9th Cir. 2004). The common methods of obtaining a DNA sample—blood samples and buccal swabs—are both widely recognized as not being intrusive or excessively burdensome. See *Winston* v. *Lee*, 470 U.S. 753, 762, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985) ("society's judgment [is] that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity"); *United States* v. *Amerson*, 483 F.3d 73, 84 n.11 (2d Cir.) ("a [buccal] swab can be taken in seconds without any discomfort"), cert. denied, 552 U.S. 1042, 128 S. Ct. 646, 169 L. Ed. 2d 515 (2007).

We observe that the defendant does not raise a separate fourth amendment claim in the present case. Rather, he argues only that the act of submitting a DNA sample should be considered a punishment because it would also constitute a search. At oral argument before this court, counsel for both the defendant and the state acknowledged that the defendant was not raising a fourth amendment claim in his appeal.

The purpose of collecting DNA samples is not to punish felons for their underlying crimes or to deter future criminals, but to bolster the usefulness of the DNA data bank in criminal investigations.[9] The statutory scheme furthers this purpose by only imposing a minimal inconvenience on those who must submit DNA samples and thereafter safeguards the interests of those in the data bank via the DNA Data Bank Oversight Panel and the destruction of DNA records upon exoneration. The goals expressed in the statute and the operative statutory mechanisms by which they are to be carried out are inconsistent with the goals of punishment. We therefore conclude that the Appellate Court correctly determined that § 54-102g is not punitive in fact under the factors set forth in *Mendoza-Martinez*. As the statute is neither punitive in law or in fact and therefore does not affect the defendant's original sentences, the Appellate Court was correct in its conclusion that the trial court properly had subject matter jurisdiction over the state's motion seeking permission to use reasonable physical force to obtain a DNA sample from the defendant.

B

Although the trial court was vested with jurisdiction to consider the state's motion, we must next determine whether the trial court properly granted the state's motion for permission to use reasonable physical force. At the time of the state's motion, § 54-102g contained no provisions explicitly outlining the remedies available

[9] The defendant challenges the Appellate Court's determination that "[g]iven the . . . importance of the objective to maintain a DNA data bank . . . to implement the purpose of the data bank, it must be comprehensive." *State* v. *Banks*, supra, 143 Conn. App. 505. The defendant argues that the requirements of § 54-102g must be punitive because, if the goal of the statute is to create a comprehensive DNA data bank to assist in criminal investigations, then the only option for the legislature to effectuate its goal would have been to enact an Orwellian statutory scheme that required every citizen in Connecticut to submit a DNA sample rather than just those persons listed under the statute. The defendant's argument is meritless.

to the department should an incarcerated felon refuse to willingly submit to the taking of a DNA sample. The legislature subsequently amended the statute to specifically allow department personnel to use reasonable force to obtain samples from those who refuse to do so. See P.A. 11-144. Thus, we must determine whether, prior to the legislature's amendment, it was permissible for the trial court to authorize the state to use reasonable physical force to obtain a sample of the defendant's DNA.

In its memorandum of decision on the state's motion, the trial court initially concluded that the plain meaning of § 54-102g is clear in that the DNA sample requirement is mandatory. The court observed, however, that, at that point in time, the statute did not expressly provide for the use of reasonable force in the event of an individual's refusal to submit a sample. The defendant argued that the statute's silence evinced an inability to implement force as a means of obtaining the sample, whereas the state argued that, if the use of reasonable force were not permissible, then the entire purpose of the statute would be rendered meaningless by the ability of inmates to refuse sampling. Determining that both interpretations were plausible, the trial court concluded that § 54-102g is ambiguous within the meaning of § 1-2z and proceeded to review the relevant legislative history, which provided no clarity on the use of reasonable force in this context. The trial court ultimately determined that the use of reasonable force to obtain a DNA sample was inherent in the statute because: (1) the legislature's silence on the topic could not be construed as evidence of legislative intent to the contrary; (2) it was department policy to seek a court order authorizing reasonable force in the event of an individual's refusal and the legislature had not addressed that question despite making interim revisions to the statute; and (3) the overall purpose of the statute would be substantially

frustrated otherwise. Accordingly, the trial court granted the state's motion.

The Appellate Court affirmed the trial court's decision, holding that the department's ability to use reasonable force to obtain a DNA sample is implicit in the statute as its fundamental purpose would be subverted otherwise. *State* v. *Banks*, supra, 143 Conn. App. 505–507. Furthermore, the Appellate Court observed that the legislature had since amended the statute to permit the use of reasonable force, thereby clarifying the meaning of the original statute. Id., 507–508; see P.A. 11-144, § 1. On appeal before this court, the defendant argues that the Appellate Court erred in its interpretation of the statute, and that, prior to its 2011 amendment, § 54-102g contained no authority, implicit or otherwise, to use reasonable force to obtain a DNA sample. The state argues in response that the Appellate Court properly upheld the trial court's reading of the statute and that to hold otherwise would severely undercut the legislature's goals in enacting § 54-102g. We disagree with the defendant's argument and conclude that the Appellate Court correctly upheld the trial court's interpretation of the statute.

As the defendant's claim presents us with a question of statutory interpretation, we are guided by § 1-2z and the standard precepts of statutory construction. See *Lieberman* v. *Aranow*, supra, 319 Conn. 756–58. General Statutes (Rev. to 2009) § 54-102g (a) provides in relevant part that "[a]ny person who has been convicted of a . . . felony . . . shall, prior to release from custody and at such time as the [C]ommissioner [of Correction] may specify, submit to the taking of a blood or other biological sample for DNA . . . analysis . . . ." Although the statute was, at the time of the state's motion, silent on the question of the department's use of reasonable force to obtain a DNA sample, the state contends that the legislature's use of the word "shall"

in the language of the statute denotes a mandatory duty on the part of an individual to submit to the taking of a DNA sample upon the request of the department. We recognize that "the legislature's use of the word 'shall' suggests a mandatory command," and yet "the word 'shall' is not [necessarily] dispositive on the issue of whether a statute is mandatory." *Southwick at Milford Condominium Assn., Inc.* v. *523 Wheelers Farm Road, Milford, LLC*, 294 Conn. 311, 319–20, 984 A.2d 676 (2009). Thus, the proper question in determining whether a statute is mandatory is "whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates to a matter of substance or a matter of convenience." (Internal quotation marks omitted.) *United Illuminating Co.* v. *New Haven*, 240 Conn. 422, 465, 692 A.2d 742 (1997).

The use of the word "required" along with "shall" in the text of the statute seems to imply that submitting to the taking of a DNA sample is mandatory. More tellingly, the objective at the heart of § 54-102g is the DNA data bank, the creation and efficacy of which would be substantially impeded without the collection of DNA samples from those persons covered by the statute. Thus, the submission of DNA samples by convicted felons is certainly a matter of substance rather than one of mere convenience, as fulfillment of the statute's goals would be utterly hindered by an individual's refusal to submit a DNA sample. Although the plain language of the statute clearly suggests that § 54-102g imposes a mandatory obligation on an individual to submit to the taking of a DNA sample, the mandatory language of the statute does not address the crux of the defendant's claim, namely, whether the statute authorizes the use of reasonable force to obtain a sample from an unwilling individual. Although we observe that "statutory silence does not necessarily equate to

ambiguity"; (internal quotation marks omitted) *Hartford/Windsor Healthcare Properties, LLC* v. *Hartford*, 298 Conn. 191, 198, 3 A.3d 56 (2010); the state and the defendant offer vying interpretations of the statute in this regard. We therefore conclude, as the trial court and Appellate Court did, that the statute is ambiguous and that we must turn to its legislative history to aid in our analysis. See *State* v. *Banks*, supra, 143 Conn. App. 505.

Both the trial court and the Appellate Court, after reviewing the legislative history of § 54-102g, ultimately concluded that the history shed no light on the legislature's intentions as to the use of reasonable force to obtain a DNA sample. Id. After our own review of the relevant legislative history, we must agree with the conclusions of the trial court and the Appellate Court. The legislature never discussed in floor debates the question of using reasonable force as a means of obtaining a DNA sample, and, as a result, the discussions of the legislators on the statute offer no guidance to our present inquiry.

At first blush, the silence of the legislature during its debate on the statute appears to lend some support to the defendant's position that the silence of the statute militates against the use of reasonable force to obtain a DNA sample. It is well established, however, that, when "we are left with silence on [an] issue . . . we do not determine legislative intent" from such silence. *State* v. *Kirsch*, 263 Conn. 390, 420, 820 A.2d 236 (2003). Additionally, the legislature's silence on the question of reasonable force during the 2003 amendment to § 54-102g was not the legislature's first or last word on the issue. See P.A. 03-242. In 2011, the legislature amended § 54-102g to allow the department to use reasonable force to obtain a DNA sample from an individual, such as the defendant, who refuses to willingly submit to the taking of a sample. See P.A. 11-144, § 1. This court

recognizes that "an amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act." (Internal quotation marks omitted.) *Bhinder* v. *Sun Co.*, 263 Conn. 358, 368–69, 819 A.2d 822 (2003); *State* v. *State Employees' Review Board*, 239 Conn. 638, 648–49, 687 A.2d 134 (1997). Thus, the subsequent amendment demonstrates the legislature's acknowledgment that it would be necessary at times to use reasonable force in order to further the goals of the statute.

In the absence of any determinative legislative history on the statute, the Appellate Court focused on the fact that, given the mandatory and substantive import of the DNA submission requirement, to permit individuals to refuse to comply with the statute at will would seriously defeat the statute's goal of creating a DNA data bank to assist in criminal investigations. *State* v. *Banks*, supra, 143 Conn. App. 506–507. We agree with the Appellate Court's determination that, prior to the 2011 amendment, the use of reasonable force to obtain a DNA sample from an unwilling individual was "inherent" in § 54-102g. To conclude otherwise would result in absolute frustration of the legislature's objective in establishing and maintaining a DNA data bank. We are mindful that reviewing courts should not construe statutes "in disregard of their context and in frustration of the obvious legislative intent" or in a manner "that is hostile to an evident legislative purpose . . . or in a way that is contrary to common sense." (Citations omitted; internal quotation marks omitted.) *State* v. *Skakel*, 276 Conn. 633, 678, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006).

If we were to accept the defendant's position, those persons required to submit a DNA sample under the statute would be free to openly refuse and § 54-102g would be reduced to a nullity and its objectives resoundingly defeated. Although, as the defendant observes,

§ 54-102g (g) subjects a person to further criminal prosecution for refusal to submit a DNA sample, such prosecution does not, as the defendant's case itself demonstrates, remedy the fact that the ultimate objective of § 54-102g has been thwarted. For the statute to be effective, it must necessarily allow for the department to use reasonable force in those instances where a person required to submit to the taking of a DNA sample refuses to do so. See *Rendelman* v. *Scott*, 378 Fed. Appx. 309, 313 (4th Cir. 2010) ("[T]he [s]tate's right to obtain [a] DNA sample from designated inmates must necessarily carry with it the right to use a reasonable degree of force that is sufficient to ensure compliance. Otherwise, the [s]tate's right can be rendered meaningless by an inmate who refuses to grant permission . . . .").

Furthermore, at the time of the state's motion, the department had a policy in place that, when an inmate subject to § 54-102g refused to provide a DNA sample, department personnel were to direct the inmate to complete a "DNA Advisement/Refusal Form" (refusal form) that informed the inmate that refusal to submit a sample pursuant to the statute was a prosecutable offense. See Department of Correction, Felony DNA Policy (October 1, 2010), available at http://www.ct.gov/doc/lib/doc/pdf/PolicyDNAFelony.pdf (last visited May 6, 2016). In its memorandum of decision, the trial court observed that the refusal form also advised an inmate that, if the inmate continued to refuse to provide a sample, the department could seek a court order to use reasonable force in order to ensure compliance with the statute. The court noted that, despite the existence of such a policy, the legislature had not taken any action in subsequent amendments to disavow the state's policy of seeking the authorization of reasonable force should an individual refuse to submit to sampling. See generally *Connecticut Light & Power Co.* v. *Public Utilities Control Authority*,

176 Conn. 191, 198, 405 A.2d 638 (1978). Indeed, the legislature's 2011 amendment took the opposite course of action by explicitly amending the statute to permit the department to use reasonable force in those cases in which an individual refuses to comply with the statute.

Accordingly, we agree with the conclusions of the Appellate Court. Given the statute's mandatory nature, its overall goals and objectives, and the legislature's subsequent amendment to the statute, it was proper for the trial court to grant the state's motion seeking permission to use reasonable physical force to obtain a DNA sample from the defendant.

II

We next address the defendant's claim that the Appellate Court incorrectly determined that the application of § 54-102g to the defendant did not run afoul of the ex post facto clause of the federal constitution. The defendant suggests that, because at the time of his underlying robbery related convictions in 1997, the statute applied only to those convicted of certain sex offenses, the requirement imposed by the 2003 amendment to § 54-102g that all convicted felons submit to the taking of a DNA sample violates the ex post facto clause and the defendant's due process rights. The state counters that the defendant's claim must fail due to the fact that providing a DNA sample is not a punitive sanction, and, therefore, it does not contravene the ex post facto clause or the defendant's due process rights. We agree with the state that § 54-102g does not violate the federal constitution's bar on ex post facto laws.

The constitution of the United States, article one, § 10, provides in relevant part that "[n]o State shall . . . pass any . . . ex post facto Law . . . ." A law may be considered to violate the ex post facto clause if it "punishes as a crime an act previously committed, which was innocent when done; which makes more

burdensome the punishment for a crime, after its commission, or which deprives one charged with [a] crime of any defense available according to law at the time when the act was committed . . . .'' (Internal quotation marks omitted.) *Dobbert* v. *Florida*, 432 U.S. 282, 292, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977); see also *State* v. *Faraday*, 268 Conn. 174, 199, 842 A.2d 567 (2004). In order to run awry of the ex post facto clause, a law ''must be retrospective—that is, it must apply to events occurring before its enactment—and it must disadvantage the offender affected by it . . . .'' (Internal quotation marks omitted.) *State* v. *Faraday*, supra, 195. It is well established that the ''constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them.'' *Collins* v. *Youngblood*, 497 U.S. 37, 41, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990). Accordingly, ''regulatory measures do not constitute punishment as proscribed by the ex post facto clause.'' *State* v. *Kelly*, supra, 256 Conn. 91. For the purposes of the ex post facto clause, our inquiry as to whether a statute is penal or not is the same as that set forth in part I A of this opinion and our decisions in *State* v. *Kelly*, supra, 92, and *State* v. *Waterman*, 264 Conn. 492–93.

The defendant first raised his ex post facto claim in a pro se supplemental memorandum at the time the state filed its motion seeking permission to use reasonable force against the defendant. The trial court rejected the defendant's claim on the ground that § 54-102g is not a penal statute and therefore does not fall within the purview of the ex post facto clause. When the defendant was subsequently prosecuted for violating § 54-102g, the defendant moved to dismiss on the basis of the ex post facto clause, and the trial court denied the motion on the basis of the same reasoning it relied on in granting the state's previous motion to use reasonable physical force. On appeal, the Appellate Court concluded

that its determination that the statute was regulatory rather than punitive foreclosed the defendant's ex post facto claim, and it therefore affirmed the trial court's judgments. *State* v. *Banks*, supra, 143 Conn. App. 509–10.

As the defendant notes, prior to the amendment in 2003 to § 54-102g, making all felons subject to the requirements of that statute; P.A. 03-242; § 54-102g applied only to those persons who had been convicted of particular sex offenses or who had committed an offense against a victim who was a minor. See General Statutes (Rev. to 2003) § 54-102g (a). Thus, at the time the defendant was convicted of his underlying offenses in 1997, he was not required to submit to the taking of a DNA sample for inclusion in the DNA data bank. The 2003 amendment, however, broadened the scope of the statute to include all persons convicted of a felony—a group that includes the defendant—to submit a biological sample for the purposes of the statute. See P.A. 03-242, § 1. Although this factual scenario would seemingly implicate the ex post facto clause, as we already extensively discussed in part I A of this opinion, § 54-102g is *not* a penal statute. The statute does not therefore implicate the ex post facto clause.[10] See *Collins* v. *Youngblood*, supra, 497 U.S. 41. Accordingly, the defendant cannot prevail on his ex post facto claim.

We observe that the courts of other jurisdictions that have addressed this issue have all arrived at the same conclusion, namely, that statutes requiring convicts to submit DNA samples do not contravene the ex post facto clause, even when the underlying convictions precede the DNA collection statutes. See *In re DNA Ex*

[10] Given our conclusion that § 54-102g does not fall within the ambit of the ex post facto clause by virtue of its nonpunitive nature, we need not address the defendant's claims regarding the retroactivity of the statute, which are premised on the defendant's theory that the statute is penal in nature.

Post Facto Issues, 561 F.3d 294, 299 (4th Cir. 2009) ("the DNA-sample requirement did not violate the [e]x [p]ost [f]acto clause"); *United States* v. *Hook*, 471 F.3d 766, 776 (7th Cir. 2006) ("the DNA [statute] does not operate retroactively to punish [the defendant] for his original crime, but rather any punishment that would ensue would be the result of new conduct, i.e., [the defendant's] failure to comply with the DNA [statute]"), cert. denied, 549 U.S. 1343, 127 S. Ct. 2081, 167 L. Ed. 2d 771 (2007); *Gilbert* v. *Peters*, 55 F.3d 237, 238–39 (7th Cir. 1995) ("[b]oth federal and state courts have uniformly concluded that statutes which authorize collection of blood specimens to assist in law enforcement are not penal in nature"); *State* v. *Bain*, Docket No. 2008-286, 2009 WL 170109, *1 (Vt. January 14, 2009) ("federal and state courts across the country have uniformly held that statutes requiring prisoners or convicted felons to provide DNA samples do not violate the federal ex post facto clause, even when the convictions of the persons being asked to provide samples occurred before enactment of the statutes"); see also *United States* v. *Coccia*, 598 F.3d 293, 297–98 (6th Cir. 2010); *Johnson* v. *Quander*, 440 F.3d 489, 502–503 (D.C. Cir.), cert. denied, 549 U.S. 945, 127 S. Ct. 103, 166 L. Ed. 2d 255 (2006). This court has also arrived at the same conclusion in the context of other statutory schemes. See *State* v. *Faraday*, supra, 268 Conn. 198–200 (defendant's revocation of probation did not implicate ex post facto clause because revocation was due to acts distinct and separate from defendant's underlying criminal convictions); *State* v. *Kelly*, supra, 256 Conn. 94 (requirement to register as sex offender is regulatory and does not violate ex post facto clause).

As the regulatory nature of § 54-102g does not raise any concerns in regard to the constitutional prohibition on ex post facto laws, the defendant's due process concerns stemming from the application of a supposed ex

post facto law are therefore not an issue in the present case. Accordingly, we conclude that the Appellate Court properly upheld the trial court's determinations that § 54-102g does not violate the ex post facto clause.

The judgment of the Appellate Court is affirmed.

In this opinion PALMER, EVELEIGH, McDONALD and VERTEFEUILLE, Js., concurred.

ROGERS, C. J., with whom ZARELLA, J., joins, concurring. I agree with the majority opinion but write separately because I believe that the time has come to attempt to clarify our jurisprudence regarding the distinction between mandatory and directory statutes, and specifically the use of the term "shall" in statutory language. As I discuss more fully in this opinion, the distinction between mandatory statutes, which must be strictly complied with, and directory statutes, which merely provide direction and are of no obligatory force,[1] despite the use of the term "shall," originated in cases that involved statutes that vested power in a public official. Over time, however, parties have begun to claim that the mandatory/directory distinction applies to stat-

[1] Black's Law Dictionary (4th Ed. 1968) defines a directory requirement as "[a] provision in a statute, rule of procedure, or the like, which is a mere direction or instruction of no obligatory force, and involving no invalidating consequence for its disregard, as opposed to an imperative or mandatory provision, which must be followed. . . . The general rule is that the prescriptions of a statute relating to the performance of a public duty are so far directory that, though neglect of them may be punishable, yet it does not affect the validity of the acts done under them, as in the case of a statute requiring an officer to prepare and deliver a document to another officer on or before a certain day." (Citation omitted.) See also id. ("Under a general classification, statutes are either 'mandatory' or 'directory,' and, if mandatory, they prescribe, in addition to requiring the doing of the things specified, the result that will follow if they are not done, whereas, if directory, their terms are limited to what is required to be done. . . . A statute is mandatory when the provision of the statute is the essence of the thing required to be done; otherwise, when it relates to form and manner, and where an act is incident, or after jurisdiction acquired, it is directory merely." [Citation omitted.]).

utory provisions that impose substantive requirements on private persons. The state in the present case contends that General Statutes (Rev. to 2011) § 54-102g (a), which provides in relevant part that "[a]ny person who has been convicted of a . . . felony . . . shall, prior to release from custody and at such time as the [C]ommissioner [of Correction] may specify, submit to the taking of a blood or other biological sample for DNA . . . analysis," is mandatory, not directory. I agree.

As I have indicated herein, the distinction between mandatory and directory requirements first arose in cases involving statutes vesting power or jurisdiction in a public officer or body. See *Gallup* v. *Smith*, 59 Conn. 354, 357, 22 A. 334 (1890) ("statutes directing the mode of proceeding *by public officers* are directory, and are not regarded as essential to the validity of the proceedings themselves, unless it be so declared in the statute" [emphasis added; internal quotation marks omitted]); id. ("[w]here words are affirmative, and relate to the manner in which power or jurisdiction vested *in a public officer or body* is to be exercised, and not to the limits of the power or jurisdiction itself, they may and often have been construed to be directory" [emphasis added; internal quotation marks omitted]).[2] In determining whether a statutory provision is

[2] See also *People* v. *Gray*, 58 Cal. 4th 901, 909, 319 P.3d 988, 168 Cal. Rptr. 3d 710 (2014) ("provisions defining time and mode in which *public officials* shall discharge their duties and which are obviously designed merely to secure order, uniformity, system and dispatch in the *public bureaucracy* are generally held to be directory" [emphasis added; internal quotation marks omitted]); *In re M.I.*, 989 N.E.2d 173, 181 (Ill.) ("we presume that language issuing a procedural command *to a government official* indicates an intent that the statute is directory" [emphasis added; internal quotation marks omitted]), cert. denied, 571 U.S. 961, 134 S. Ct. 442, 187 L. Ed. 2d 296 (2013); *Ladd* v. *Lamb*, 195 Va. 1031, 1035, 81 S.E.2d 756 (1954) ("[a]s a rule a statute prescribing the time within which *public officers* are required to perform an official act regarding the rights and duties of others, and enacted with a view to the proper, orderly, and prompt conduct of business, is directory unless it denies the exercise of the power after such time, or the phraseology of the statute, or the nature of the act to be performed, and the consequences of doing or failing to do it at such time are such that the

mandatory or directory, "the test most satisfactory and conclusive is, whether the prescribed mode of action is of the essence of the thing to be accomplished, or in other words, whether it relates to matter material or immaterial—to matter of convenience or of substance." Id., 358. When a statutory provision involving the power of a public officer or body is mandatory, strict compliance is required and the failure to strictly comply invalidates all further proceedings. Id., 356 (when statute is mandatory, "the precise mode prescribed must be pursued"); see *Santiago* v. *State*, 261 Conn. 533, 542, 804 A.2d 801 (2002) (noncompliance with mandatory provision will invalidate any future proceedings contemplated by statute).[3] In contrast, noncompliance with a directory statute will invalidate further proceedings only if it has prejudiced the opposing party.[4] *Santiago* v.

designation of the time must be considered a limitation on the power of the officer" [emphasis added; internal quotation marks omitted]); *Muskego-Norway Consolidated Schools Joint School District No. 9* v. *Wisconsin Employment Relations Board*, 32 Wis. 2d 478, 483, 151 N.W.2d 84 (1967) ("[a] statute prescribing the time within which *public officers* are required to perform an official act is merely directory" [emphasis added; internal quotation marks omitted]); Black's Law Dictionary (4th Ed. 1968) (stating, under definition of "directory," that "[t]he general rule is that the prescriptions of a statute relating to the performance of a *public duty* are so far directory that, though neglect of them may be punishable, yet it does not affect the validity of the acts done under them, as in the case of a statute requiring an *officer* to prepare and deliver a document to another officer on or before a certain day" [emphasis added]).

[3] See also *People* v. *Gray*, 58 Cal. 4th 901, 909, 319 P.3d 988, 168 Cal. Rptr. 3d 710 (2014) ("[t]he mandatory or directory designation does not refer to whether a particular statutory requirement is obligatory or permissive, but instead denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates" [internal quotation marks omitted]); *Ladd* v. *Lamb*, 195 Va. 1031, 1035, 81 S.E.2d 756 (1954) ("[a] mandatory provision in a statute is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding" [internal quotation marks omitted]).

[4] See, e.g., *United Illuminating Co.* v. *New Haven*, 240 Conn. 422, 424 n.1, 466, 692 A.2d 742 (1997) (statute providing that "[t]he assessor or board of assessors shall notify [property owner] . . . of any . . . increase in

State, supra, 542 (noncompliance with directory statute "will not invalidate any future proceedings contemplated by the statute unless the noncompliance has prejudiced the opposing party"). Courts have not required strict compliance with statutes that relate to a matter of convenience rather than substance when they are directed at public officials because, unlike private persons, public officials ordinarily are not acting on their own behalf, but for the benefit of the public, and it would be unfair to hold members of the public responsible for acts and omissions over which they had no control. See 3 N. Singer & J. Singer, Sutherland Statutory Construction (7th Ed. 2008) § 57.15, p. 66.[5]

More recently, however, the mandatory/directory distinction has been applied to statutes that impose substantive requirements on private parties.[6] By way of

assessed valuation" was directory because no statutory language expressly invalidated defective notice, language was indicative merely of intent to create "safe harbor" provision, time was not of essence with regard to notice and plaintiff had made no showing of prejudice [internal quotation marks omitted]).

[5] "There is an essential difference between statutory directions to public officers and to private persons. As to the former, the protection of public or private rights often depends upon the proper performance by the designated officer, a person whose dereliction in that respect is beyond the direct and particular control of those whose rights are at stake. Thus, it has been held that omissions or failures by public officials should not prejudice the interests of those who have no direct and immediate control over the public officials. But as to the latter, frequently the individual's own rights depend upon his own compliance with statutory directions, so no one is to blame but himself for the loss of those rights by a failure to comply. Accordingly, a different rule is followed in the latter situation. Where an individual's rights depend upon his compliance with the provisions of a statute, those provisions are generally mandatory, and compliance therewith is a condition precedent to the perfection of such rights." (Footnote omitted.) 3 N. Singer & J. Singer, supra, § 57.15, pp. 66–67.

[6] The mandatory/directory distinction has also arisen in cases involving procedural time limitations on private causes of action, which is not the type of statute at issue here. In *Williams* v. *Commission on Human Rights & Opportunities*, 257 Conn. 258, 267, 777 A.2d 645 (2001), this court suggested that our cases addressing the effect of a failure to comply with these timing requirements have blurred the mandatory/directory distinction with the con-

example, in *Southwick at Milford Condominium*

cept of subject matter jurisdiction. See id. (This court has applied "inconsistent approaches in determining whether a time limitation is jurisdictional. One line of cases has focused on whether the legislature intended the [statutory] time limitation to be subject matter jurisdictional, and a second line of cases has focused on whether the statutory provision is mandatory or directory.").

I would note that, in *Williams*, this court failed to observe that the cases it cited involving the mandatory/directory distinction, as opposed to the jurisdictional/nonjurisdictional distinction, involved statutory provisions directed at public officials. See id., 268, citing *Doe* v. *Statewide Grievance Committee*, 240 Conn. 671, 681, 694 A.2d 1218 (1997) (considering whether statute requiring panel of Statewide Grievance Committee to "render its decision not later than four months from the date of the panel's determination of probable cause or no probable cause was filed with the [Statewide] [G]rievance [C]ommittee" was directory or mandatory [internal quotation marks omitted]), and *Angelsea Productions, Inc.* v. *Commission on Human Rights & Opportunities*, 236 Conn. 681, 689, 674 A.2d 1300 (1996) (considering whether statutes providing that "[t]he investigator shall make a finding of reasonable cause or no reasonable cause in writing and shall list the factual findings on which it is based not later than nine months from the date of filing of the complaint" and that "hearing shall be held not later than ninety days after a finding of reasonable cause" were mandatory or directory [emphasis omitted; internal quotation marks omitted]). I believe that this distinction has continued validity as applied to statutes directed at public officials. Nevertheless, I agree with the *Williams* analysis to the extent that it holds that, when considering the effect of noncompliance with a statutory time limitation imposed on a *private* party, which was the case in *Williams*; see *Williams* v. *Commission on Human Rights & Opportunities*, supra, 257 Conn. 260 n.1, 266 (considering effect of plaintiff's failure to comply with statute providing that "[a]ny complaint [of a discriminatory practice] filed pursuant to this section must be filed within one hundred and eighty days after the alleged act of discrimination" [internal quotation marks omitted]); the proper distinction is not whether the limitation is mandatory or directory, but whether the statute is subject matter jurisdictional or, instead, the mandatory requirement can be abrogated by waiver or consent. See id., 269. I would also conclude that *all* statutes imposing a time limitation or other procedural requirement on private parties are mandatory, in the sense that they must be complied with in the absence of consent or waiver by the opposing party. See id., 284 (even nonjurisdictional time limitation directed at private party "must be complied with, absent such factors as consent, waiver or equitable tolling"); see also *Federal Deposit Ins. Corp.* v. *Hillcrest Associates*, 233 Conn. 153, 173, 659 A.2d 138 (1995) (fact "that . . . time limitation . . . is not subject matter jurisdictional, does not mean . . . that it can be ignored with impunity"); *Federal Deposit Ins. Corp.* v. *Hillcrest Associates*, supra, 173 (nonjurisdictional time

Assn., Inc. v. *523 Wheelers Farm Road, Milford, LLC*, 294 Conn. 311, 984 A.2d 676 (2009), the defendant contended that General Statutes § 47-280 (a), providing in relevant part that "the declarant [in a common interest community] shall complete all improvements depicted on any site plan or other graphic representation, including any surveys or plans prepared pursuant to section 47-288" was directory, not mandatory, because "the word shall is not [necessarily] dispositive on the issue of whether a statute is mandatory." (Internal quotation marks omitted.) *Southwick at Milford Condominium Assn., Inc.* v. *523 Wheelers Farm Road, Milford, LLC*, supra, 320. This court concluded that the completion requirement was a matter of substance and, therefore, was mandatory. Id., 320. In contrast, in *Weems* v. *Citigroup, Inc.*, 289 Conn. 769, 961 A.2d 349 (2008), the defendant contended that, under General Statutes § 31-71e, which provides that "[n]o employer may withhold or divert any portion of an employee's wages unless

limitation "is more properly considered to be mandatory, which means that it must be complied with absent waiver or consent by the parties").

It is clear to me, therefore, that our cases have used the word "mandatory" in two distinct senses. With respect to statutes vesting power in public officials, the term "mandatory" is used to describe provisions with which the public official must strictly comply, as distinguished from "directory" provisions, which have *no* obligatory force. In contrast, with respect to statutes placing time limitations on *private* parties, *all* such statutes are mandatory in the sense that the party must strictly comply with them, but the failure to comply strictly with a nonjurisdictional statute is fatal *only* in the absence of waiver, consent or equitable excuse. A comprehensive review of all of the hundreds, if not thousands, of Connecticut cases involving these distinctions is beyond the scope of this concurring opinion. Suffice it to say, however, that, as this court acknowledged in *Williams*, our jurisprudence in this area has not always been entirely clear or consistent. See, e.g., *Statewide Grievance Committee* v. *Rozbicki*, 211 Conn. 232, 240–43, 558 A.2d 986 (1989) (concluding that limitation on time within which subcommittee of Statewide Grievance Committee, which is public body, must conclude hearings and render proposed decision was *mandatory*, which ordinarily would mean that noncompliance would invalidate any further proceedings, but ultimately concluding that noncompliance did *not* deprive trial court of subject matter jurisdiction over presentment proceeding).

. . . (2) the employer has written authorization from the employee for deductions on a form approved by the [C]ommissioner [of Labor (commissioner)]," the requirement that an employer use a form approved by the commissioner was directory. *Weems* v. *Citigroup, Inc.*, supra, 789–90. This court agreed that the requirement was only directory because, "[i]f the employee has knowingly and voluntarily consented to the deduction at issue, and even benefited from it, then invalidating deductions because of a technical violation does not further the purpose of the wage collection statutes."[7] Id., 794 n.26.

As I previously have explained, the mandatory/directory distinction originally arose in cases involving procedural requirements directed at public officials, for reasons that are specific to that context. Accordingly, I would conclude that any substantive statute that requires a private party to perform or to refrain from some act in order to assert his or her own rights or to protect the substantive rights of other persons is mandatory, at least in the absence of clear legislative intent to the contrary. Indeed, even *procedural* requirements directed at private parties have generally been

[7] I do not agree that the statutory requirement that an employer use a form approved by the commissioner is directory, i.e, that it constitutes "a mere direction or instruction of no obligatory force, and involving no invalidating consequence for its disregard . . . ." Black's Law Dictionary (4th Ed. 1968). First, I would conclude that the mandatory/directory distinction properly applies only to procedural requirements directed at public officials, and § 31-71e (2) is not directed at a public official, but requires the employer to use a form approved by the commissioner. Second, the court's conclusion in *Weems* renders the statutory language entirely superfluous and essentially allows an employer to determine for itself whether a written authorization to withhold wages complies with substantive statutory requirements that are intended to protect employees, a result that the legislature could not have contemplated. Accordingly, I believe that the sole questions that the court should have addressed in *Weems* were whether the requirement that the employer use a form approved by the commissioner was waivable and, if so, whether the plaintiffs had waived it. I express no opinion on those questions here.

considered mandatory, in the sense that they must be complied with in the absence of waiver or consent by the opposing party. See footnote 6 of this concurring opinion. Thus, I do not believe that in the present case we are required to consider whether the requirement of General Statutes (Rev. to 2011) § 54-102g (a) that "[a]ny person who has been convicted of a . . . felony . . . shall, prior to release from custody and at such time as the [C]ommissioner [of Correction] may specify, submit to the taking of a blood or other biological sample for DNA . . . analysis," is, as a matter of legislative intent, mandatory or directory.[8] In my view, the statute is mandatory because it uses the term "shall" and is directed at a private party.[9]

When a party has failed to comply with a mandatory statute, the only questions that the court should address are whether the mandatory requirement is subject to

[8] I note that the plain language of General Statutes (Rev. to 2011) § 54-102g (a) clearly *requires* a defendant to submit a blood or other biological sample for DNA analysis and does not merely authorize or permit him to do so. Compare *C. R. Klewin Northeast, LLC* v. *Fleming*, 284 Conn. 250, 262–64, 932 A.2d 1053 (2007) (statute providing that "[s]uch certificate [of authorization by the governor to settle a disputed claim by or against the state] shall constitute sufficient authority to such officer or department or agency to pay or receive the amount therein specified in full settlement of such claim" did not require officer or department to pay upon receipt of authorization, but merely authorized payment [emphasis omitted; internal quotation marks omitted]). I further note that the question of whether a statute is mandatory, i.e., it *requires* certain conduct, or *permissive*, i.e., it *authorizes* certain conduct, is different than the question of whether a statute is mandatory or *directory*, i.e., of no obligatory force. See *People* v. *Gray*, 58 Cal. 4th 901, 909, 319 P.3d 988, 168 Cal. Rptr. 3d 710 (2014) ("[t]he mandatory or directory designation does not refer to whether a particular statutory requirement is obligatory or permissive, but instead denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates" [internal quotation marks omitted]).

[9] Whether the reasons for applying the mandatory/directory distinction in cases involving statutes directed at public officials continue to be convincing is not at issue in the present case. Accordingly, I leave that question to another day.

waiver and, if so, whether it has been waived. *Williams* v. *Commission on Human Rights & Opportunities*, 257 Conn. 258, 284, 777 A.2d 645 (2001) (mandatory statute "must be complied with, absent such factors as consent, waiver or equitable tolling"); see also *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 57, 970 A.2d 656 ("[a]s a general rule, both statutory and constitutional rights and privileges may be waived"), cert. denied sub nom. *Bridgeport Roman Catholic Diocesan Corp.* v. *New York Times Co.*, 558 U.S. 991, 130 S. Ct. 500, 175 L. Ed. 2d 348 (2009); compare *Santiago* v. *State*, supra, 261 Conn. 543–44 (certification requirement of General Statutes § 54-95 [a] "serves important *public* and *institutional* policy objectives that are independent of, and perhaps even paramount to, the state's interest as a party to the litigation" and, therefore, cannot be waived [emphasis in original]), with *Hensley* v. *Commissioner of Transportation*, 211 Conn. 173, 178, 558 A.2d 971 (1989) (mandatory statutory requirement that trial referee " 'shall view the land' " in reassessment appeal is subject to waiver). I find it extremely doubtful, and the defendant, Mark Banks, makes no claim, that the state could waive the requirement that he submit to the taking of a DNA sample, which serves "important public . . . policy objectives"; (emphasis omitted) *Santiago* v. *State*, supra, 543; or, if so, that the state has waived it. Accordingly, it is clear to me that the defendant was required to comply with § 54-102g (a).

Of course, as the majority points out, this does not answer the separate question of whether the defendant may be compelled by force to submit to the taking of a DNA sample. Because I agree with the majority's analysis of that question, I concur with the majority opinion.

STATE OF CONNECTICUT *v.* ROOSEVELT DRAKES (SC 19247)

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald, Espinosa and Vertefeuille, Js.

Syllabus

The defendant, who had previously been convicted of the crimes of murder and criminal possession of a firearm, was in the custody of the Commissioner of Correction in 2010 when he refused a request by Department of Correction personnel to submit to the taking of a DNA sample. The state then filed a motion in the trial court seeking permission to use reasonable physical force to obtain a DNA sample from the defendant, citing to the applicable statute (§ 54-102g). While the state's motion was pending in the trial court, the defendant was charged pursuant to § 54-102g with failure to submit to the taking of a blood or other biological sample for DNA analysis. The defendant filed a motion to dismiss the charge, claiming that the charge violated his due process rights and the constitutional prohibition against double jeopardy. The trial court denied the defendant's motion to dismiss, stating that § 54-102g was not punitive and that the defendant was not being prosecuted in connection with his underlying crimes for which he was incarcerated, but for his new conduct of failing to comply with the statutory duty to submit to the taking of a DNA sample. The defendant was thereafter tried and convicted of refusing to submit to the taking of a blood or other biological sample for DNA analysis under § 54-102g, and the defendant appealed to the Appellate Court. The trial court thereafter granted the state's motion for permission to use reasonable physical force, concluding that § 54-102g inherently provided the state with the authority to use reasonable force because allowing individuals subject to the statute to refuse sampling would substantially frustrate the legislative goal in establishing a DNA data bank. The defendant then filed a separate appeal to the Appellate Court. The Appellate Court considered the defendant's consolidated appeals and affirmed the trial court's judgment of conviction and upheld the trial court's grant of the state's motion for permission to use reasonable physical force. On the granting of certification, the defendant appealed to this court, claiming, inter alia, that contrary to the conclusion of the Appellate Court, prior to the legislative amendment to § 54-102g in 2011 that expressly authorized the use of reasonable physical force to obtain a DNA sample, the trial court did not have subject matter jurisdiction to consider the state's motion to use reasonable physical force or authority to grant the motion. *Held*:

1. The defendant could not prevail on his claims that the Appellate Court incorrectly determined that the trial court had subject matter jurisdiction to consider the state's motion for permission to use reasonable physical

force, and that the trial court had authority, prior to the 2011 amendments to the statute, to grant the state's motion; this court, having addressed substantially similar jurisdictional and statutory claims in the companion case of *State* v. *Banks* (321 Conn. 821), adopted the reasoning and conclusions of that decision for purposes of the present case.

2. The Appellate Court correctly determined that the defendant could not prevail on his claim that his conviction of failure to submit to the taking of a blood or other biological sample for DNA analysis in violation of § 54-102g infringed upon his due process rights and violated the state and federal constitutional prohibitions against double jeopardy; the defendant's double jeopardy claim failed as § 54-102g is a regulatory statute that did not constitute an additional punishment for the defendant's underlying crimes because the requirement is not itself a punishment, the defendant's prosecution and conviction under that statute was premised on his conduct of refusing to provide a DNA sample, which was completely unrelated to the actions that formed the basis of his underlying crimes of murder and criminal possession of firearm for which he was incarcerated, and his conviction for violating § 54-102g in no way affected his prior sentence.

Argued January 28—officially released July 5, 2016

Procedural History

Motion, in the first case, for permission to use reasonable physical force to obtain a DNA sample from the defendant, who previously had been convicted of the crimes of murder and criminal possession of a firearm, brought to the Superior Court in the judicial district of Hartford, and substitute information, in the second case, charging the defendant with the crime of refusing to submit to the taking of a blood or other biological sample for DNA analysis, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, and tried to the jury before *Dewey*, *J.*; verdict and judgment of guilty; thereafter, the court *Mullarkey*, *J.*, granted the state's motion for permission to use reasonable physical force to obtain a DNA sample from the defendant and rendered judgment thereon, and the defendant filed separate appeals with the Appellate Court, *Lavine*, *Robinson* and *Bear*, *Js.*, which affirmed the trial court's judgments, and the defendant, on the

granting of certification, appealed to this court. *Affirmed.*

Daniel J. Foster, assigned counsel, for the appellant (defendant).

Michael Gailor, executive assistant state's attorney, with whom, on the brief, was *Gail P. Hardy*, state's attorney, for the appellee (state).

Opinion

ESPINOSA, J. This certified appeal requires this court to consider several claims that the defendant, Roosevelt Drakes, raises in regard to General Statutes (Rev. to 2009) § 54-102g,[1] which requires convicted felons in the custody of the Commissioner of Correction to submit to the taking of a DNA sample for inclusion in a state administered DNA data bank used to assist in law enforcement investigations. The defendant appeals, following our grant of certification,[2] from the judgment of the Appellate Court affirming: the trial court's judgment granting the state permission to use reasonable physical force to obtain a DNA sample from the defendant; and

[1] All references herein to § 54-102g are to the 2009 revision of the statute unless otherwise indicated.

[2] We granted the defendant's petition for certification limited to the following issues: (1) whether the Appellate Court properly determined that prior to the passage of No. 11-144 of the 2011 Public Acts, which amended § 54-102g, it was permissible for the trial court to grant the state permission to use reasonable force to obtain a DNA sample; and (2) whether the Appellate Court correctly determined that the prosecution of the defendant for failing to provide a DNA sample under § 54-102g (g) did not violate due process and the prohibition against double jeopardy. We note that our initial grant of certification; see *State* v. *Drakes*, 310 Conn. 951, 81 A.3d 1179 (2013); did not accurately reflect the issues raised in the defendant's present appeal. See *State* v. *Dort*, 315 Conn. 151, 169, 106 A.3d 277 (2014) ("courts must, when necessary, reformulate the certified question to conform to the issue actually presented to and decided in the appeal to the Appellate Court" [internal quotation marks omitted]). At oral argument before this court, defense counsel clarified that the defendant was not asserting an ex post facto or retroactivity claim.

the judgment of conviction, rendered after a jury trial, of one count of violating § 54-102g (g). See *State* v. *Drakes*, 143 Conn. App. 510, 519, 70 A.3d 1104 (2013). On appeal, the defendant contends that the Appellate Court: (1) erred in concluding that, prior to the amendment to § 54-102g in 2011 specifically authorizing the use of reasonable force to obtain a DNA sample; Public Acts 2011, No. 11-144, § 1 (P.A. 11-144); the trial court had the jurisdiction and authority to grant the state permission to use reasonable physical force to obtain a sample of the defendant's DNA; and (2) incorrectly concluded that the prosecution of the defendant pursuant to § 54-102g did not violate the defendant's right to due process; Conn. Const., art. I, §§ 8 and 9; or the double jeopardy clause of the federal constitution. U.S. Const., amend. V. After our review of the defendant's claims, we conclude that the Appellate Court properly resolved both issues and, therefore, affirm the judgment of the Appellate Court.

The following facts and procedural history are relevant to our resolution of the defendant's appeal. On April 18, 2005, the defendant pleaded guilty to one count of murder in violation of General Statutes § 53a-54a and one count of criminal possession of a firearm in violation of General Statutes (Rev. to 2003) § 53a-217. On April 20, 2005, the defendant was sentenced to thirty years incarceration. At the time of sentencing, the defendant was informed that, by virtue of his new status as an incarcerated felon, he would be required to provide a DNA sample to the Department of Correction (department) for inclusion in the state DNA data bank.

On December 3, 2009, department personnel requested that the defendant provide a DNA sample pursuant to § 54-102g (a). The defendant refused to do so. On December 28, 2009, department personnel again asked the defendant to provide a DNA sample. Once again, the defendant informed department personnel that he

would not do so. On March 17, 2010, the department directed the defendant and nine other inmates who had previously refused sampling to provide a DNA sample in accordance with § 54-102g (a). The defendant again refused to submit to the taking of a sample and told department personnel that if they wanted a sample of his DNA, they would have to get a court order.

On May 19, 2010, the state filed a motion in the trial court seeking permission to use reasonable physical force in order to obtain a DNA sample from the defendant and another inmate, Mark Banks,[3] who also had consistently refused to willingly provide a DNA sample. As authority for its motion, the state cited to § 54-102g. The defendant opposed the state's motion, arguing that § 54-102g did not permit the state to use reasonable force to obtain a DNA sample from an unwilling inmate and that the only remedy available to the state was to prosecute him for failure to provide a blood or other biological sample for DNA analysis under § 54-102g (g).[4] On February 8, 2011, the trial court issued a memorandum of decision rejecting the defendant's claims and authorizing the state to implement reasonable physical force to obtain a DNA sample from the defendant. The trial court determined that the statute inherently provided the state with the authority to use reasonable force, because allowing individuals subject to § 54-102g to refuse sampling outright would substantially frustrate the legislative goal in establishing a DNA data bank. See General Statutes (Rev. to 2009) § 54-102g (f)

[3] Banks' appeal, also decided today, raises substantially similar issues to those presented by the defendant in the present case. See *State* v. *Banks*, 321 Conn. 821, 146 A.3d 1 (2016).

[4] At the time of the events underlying this appeal, an individual who refused to submit to the taking of a DNA sample as required by § 54-102g (a) was guilty of a class A misdemeanor. See General Statutes (Rev. to 2009) § 54-102g (g). The legislature subsequently amended the statute to make such refusal a class D felony, effective October 1, 2010. Public Acts 2010, No. 10-102, § 2; see General Statutes (Rev. to 2011) § 54-102g (g).

(sample to be submitted for DNA analysis, and identification characteristics of profile resulting from such analysis shall be stored in DNA data bank). The defendant appealed from the trial court's decision.

On June 9, 2010, while the state's motion was pending before the trial court, the defendant was charged with a violation of § 54-102g (g) for his failure to submit to the taking of a blood or other biological sample for DNA analysis. On December 16, 2010, the defendant moved to dismiss the charge, arguing that it violated his due process rights and the constitutional prohibition against double jeopardy. On January 4, 2011, the trial court held a hearing on the defendant's motion at which the defendant argued that submitting a DNA sample was a punishment and that it thereby violated the double jeopardy clause by subjecting him to additional punishment for his original crimes. In response, the state argued that § 54-102g is not a punitive sanction and that there was no double jeopardy violation present under the test set forth in the United States Supreme Court's decision in *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) ("the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not"). The trial court denied the defendant's motion, noting that § 54-102g is not a punishment and that the defendant was not being prosecuted in connection with his underlying crimes, but for his new act of not complying with the statutory duty to submit to the taking of a DNA sample. The defendant thereafter was tried before a jury and found guilty of one count of refusing to provide a DNA sample. The defendant was sentenced to one year incarceration, to be served consecutively with his existing sentence. The defendant filed a separate appeal from the judgment of conviction.

The Appellate Court considered the defendant's consolidated appeals and upheld both the trial court's grant of the state's motion for permission to use reasonable physical force to acquire a DNA sample from the defendant and the defendant's conviction under § 54-102g (g) for refusing to submit to the taking of a DNA sample. *State* v. *Drakes*, supra, 143 Conn. App. 512. On appeal to the Appellate Court, the defendant argued that the trial court lacked subject matter jurisdiction to entertain the state's motion, and that it improperly determined that § 54-102g authorized the use of reasonable force to obtain a DNA sample from a resistant inmate. Id., 515. The Appellate Court, fully adopting the reasoning of its companion decision in *State* v. *Banks*, 143 Conn. App. 485, 492–508, 71 A.3d 582 (2013),[5] held that the trial court properly had jurisdiction to consider and grant the motion, and that § 54-102g authorized the use of reasonable force. *State* v. *Drakes*, supra, 516. The defendant also argued that his prosecution and conviction under § 54-102g violated the constitutional guarantee of due process and the prohibition against double jeopardy. Id., 518. The Appellate Court rejected the defendant's argument, reasoning that § 54-102g is regulatory, not punitive, in nature, and that the defendant's prosecution was for the new act of refusing to submit to the taking of a DNA sample and was unrelated to the criminal conduct that provided the basis for his original conviction. Id., 519. We subsequently granted the defendant's petition for certification to appeal. See footnote 2 of this opinion.

I

The defendant first argues that the Appellate Court incorrectly determined that the trial court had subject matter jurisdiction to consider and ultimately grant the state's motion for permission to use reasonable physical

[5] See footnote 3 of this opinion.

force as a means of obtaining a DNA sample. Likewise, the defendant contends that prior to the legislature's 2011 amendment to § 54-102g, which expressly authorized the department to use reasonable physical force to obtain DNA samples from unwilling inmates, there was no authority for the trial court's granting of the state's motion to use such force. See P.A. 11-144. In response, the state posits that, because § 54-102g is regulatory, not penal, in nature, the trial court had subject matter jurisdiction to consider its motion. The state further contends that § 54-102g provides inherent authority to the department to use reasonable physical force, as a conclusion to the contrary would substantially frustrate the objectives of the statutory scheme. We agree with the state and conclude that the Appellate Court properly resolved both questions.

We observe at the outset that the jurisdictional and statutory claims that the defendant raises in the present case are essentially identical to those raised and addressed in the companion case to the defendant's appeal that we decided today. See *State* v. *Banks*, 321 Conn. 821, 146 A.3d 1 (2016). Our examination of these same issues in *Banks* thoroughly resolves the claims of the defendant in the present case, and there is nothing in this case that would mandate a different result than that which we reached in *Banks*. Id., 830–844. Accordingly, we adopt the reasoning and conclusions of that opinion herein. See *Minnesota Methane, LLC* v. *Dept. of Public Utility Control*, 283 Conn. 700, 712, 931 A.2d 177 (2007); *Rocque* v. *Mellon*, 275 Conn. 161, 166–67, 881 A.2d 972 (2005), cert. denied, 547 U.S. 1111, 126 S. Ct. 1913, 164 L. Ed. 2d 664 (2006). We therefore affirm the judgment of the Appellate Court in regard to the defendant's claims that the trial court was without subject matter jurisdiction and that § 54-102g did not authorize the use of reasonable physical force to ensure compliance.

II

The defendant also argues that the Appellate Court improperly rejected his claim that his conviction for failure to submit to the taking of a blood or other biological sample for DNA analysis in violation of § 54-102g (g) infringes upon his due process rights and violates the federal and state constitutional prohibitions against double jeopardy. We disagree with the defendant's claim and affirm the judgment of the Appellate Court.

The fifth amendment to the United States constitution provides in relevant part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." Although our state constitution does not contain an explicit prohibition on double jeopardy, it is well settled that "the due process and personal liberty guarantees provided by article first, §§ 8 and 9, of the Connecticut constitution have been held to encompass the protection against double jeopardy." (Internal quotation marks omitted.) *State* v. *Kasprzyk*, 255 Conn. 186, 192, 763 A.2d 655 (2001). The protection that the state constitution provides against double jeopardy is "coextensive with that provided by the constitution of the United States." Id., 191–92. Specifically, the prohibition against double jeopardy ensures that a defendant will not be prosecuted a second time for the same offense following either an acquittal or a conviction, and also ensures that a defendant will not be subjected to multiple punishments for the same offense. *Whalen* v. *United States*, 445 U.S. 684, 688, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980); *State* v. *Alexander*, 269 Conn. 107, 120, 847 A.2d 970 (2004). The test to determine whether a defendant is being subjected to multiple punishments for the same act under two "distinct statutory provisions" is "whether each [statutory] provision requires proof of a fact which the other does not." *Blockburger* v. *United States*, supra, 284 U.S. 304.

As the Appellate Court noted, the defendant's double jeopardy claim is "misguided for more than one reason." *State* v. *Drakes*, supra, 143 Conn. App. 519. First, as the Appellate Court and the trial court concluded, and as we concluded today in our decision in *State* v. *Banks*, supra, 321 Conn. 830–837, under our decision in *State* v. *Waterman*, 264 Conn. 484, 492–93, 825 A.2d 63 (2003), and the factors articulated in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168–69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), § 54-102g is a regulatory statute and does not impose any penalty on those subject to its requirements. Accordingly, requiring the defendant to submit to the taking of a DNA sample for inclusion in the DNA data bank does not constitute an additional punishment for his underlying crimes because the requirement is not itself a punishment.

Second, the defendant's prosecution and conviction of a violation of § 54-102g (g) is completely unrelated to his conviction of the crimes of murder and criminal possession of a firearm in 2005. That is, the defendant's actions that formed the basis for his initial criminal conviction are distinct and separate from the conduct that formed the basis for his conviction of § 54-102g (g). The defendant's conviction at issue in the present case was due to his refusal, following his original criminal conviction and subsequent incarceration, to provide a DNA sample as required by § 54-102g. Thus, the defendant's prosecution and conviction were premised on conduct separate from his initial conviction, and the defendant's conviction for violating § 54-102g (g) in no way affects his prior sentence. Accordingly, we conclude that the defendant cannot prevail on his double jeopardy claim, and we therefore affirm the judgment of conviction.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

Note

Supreme Court Orders begin at page 901. Page numbers 867 to 900 are intentionally omitted.

Reporter of Judicial Decisions

ORDERS

NANCY BURTON *v.* FREEDOM OF INFORMATION COMMISSION ET AL.

The plaintiff's petition for certification for appeal from the Appellate Court, 161 Conn. App. 654 (AC 36821), is denied.

Nancy Burton, self-represented, in support of the petition.

Kirsten S. P. Rigney, assistant attorney general, in opposition.

Decided April 6, 2016

LISA BRUNO *v.* REED WHIPPLE ET AL.

The defendants' petition for certification for appeal from the Appellate Court, 162 Conn. App. 186 (AC 35707), is denied.

ESPINOSA, J., did not participate in the consideration of or decision on this petition.

Laura Pascale Zaino and *Stephen P. Fogerty*, in support of the petition.

Lisa Bruno, self-represented, in opposition.

Decided April 6, 2016

ROBERT BARTON *v.* CITY OF NORWALK

The defendant's petition for certification for appeal from the Appellate Court, 163 Conn. App. 190 (AC 36040/AC 36270), is granted, limited to the following issues:

"1. Did the Appellate Court properly affirm the trial court's judgment awarding monetary damages based upon the theory of inverse condemnation when the

subject property retained significant value, was used for the same purpose as before the condemnation, and continued to generate substantial rental income?

"2. Did the Appellate Court properly hold that the plaintiff's inverse condemnation action was not barred by the doctrine of judicial estoppel, given the inconsistent positions that he had taken on the use of the taken property?"

McDONALD and ESPINOSA, Js., did not participate in the consideration of or decision on this petition.

Carolyn M. Colangelo, assistant corporation counsel, in support of the petition.

Elliot B. Pollack, in opposition.

Decided April 6, 2016

LAURENCE V. PARNOFF *v.* DARCY YUILLE

The plaintiff's petition for certification for appeal from the Appellate Court, 163 Conn. App. 273 (AC 36106), is denied.

ESPINOSA and ROBINSON, Js., did not participate in the consideration of or decision on this petition.

Laurence V. Parnoff, in support of the petition.

Barbara L. Cox, in opposition.

Decided April 6, 2016

M.U.N. CAPITAL, LLC *v.* NATIONAL HALL PROPERTIES, LLC, ET AL.

The petition by the defendant National Hall Capital, LLC, for certification for appeal from the Appellate Court, 163 Conn. App. 372 (AC 36736), is denied.

Jack E. Robinson, in support of the petition.

Jonathan L. Adler, in opposition.

Decided April 6, 2016

EDGEWOOD STREET GARDEN APARTMENTS, LLC
v. CITY OF HARTFORD

The plaintiff's petition for certification for appeal from the Appellate Court, 163 Conn. App. 219 (AC 36946), is denied.

Clifford S. Thier, in support of the petition.

Decided April 6, 2016

TEEJAY JOHNSON *v.* COMMISSIONER
OF CORRECTION

The petitioner Teejay Johnson's petition for certification for appeal from the Appellate Court, 163 Conn. App. 902 (AC 37223), is denied.

Craig A. Sullivan, assigned counsel, in support of the petition.

Denise B. Smoker, senior assistant state's attorney, in opposition.

Decided April 6, 2016

KAREEM HEDGE *v.* COMMISSIONER
OF CORRECTION*

The petitioner Kareem Hedge's petition for certification for appeal from the Appellate Court, 152 Conn. App. 44 (AC 34681), is granted, limited to the following issues:

* On June 8, 2016, the Supreme Court amended the order for certification. See *Hedge* v. *Commissioner of Correction*, 321 Conn. 921, 138 A.3d 282 (2016).

"1. Did the Appellate Court properly conclude that the petitioner's trial counsel did not have an actual conflict of interest that rendered his representation ineffective?

"2. Did the Appellate Court properly dismiss the petitioner's due process claim involving the adequacy of the trial court's canvass regarding a potential conflict of interest?"

William A. Snider, assigned counsel, in support of the petition.

Decided April 13, 2016

KENNETH J. OTTO, SR. *v.* COMMISSIONER OF CORRECTION

The petitioner Kenneth J. Otto, Sr.'s petition for certification for appeal from the Appellate Court, 161 Conn. App. 210 (AC 36376), is denied.

David J. Reich, assigned counsel, in support of the petition.

Decided April 13, 2016

STATE OF CONNECTICUT *v.* ARIK FETSCHER

The defendant's petition for certification for appeal from the Appellate Court, 162 Conn. App. 145 (AC 36615), is denied.

Arik Fetscher, self-represented, in support of the petition.

Ronald G. Weller, senior assistant state's attorney, in opposition.

Decided April 13, 2016

STATE OF CONNECTICUT *v.* ZACKERY C. FRANKLIN

The defendant's petition for certification for appeal from the Appellate Court, 162 Conn. App. 78 (AC 37161), is denied.

G. Douglas Nash, assigned counsel, in support of the petition.

Michele C. Lukban, senior assistant state's attorney, in opposition.

Decided April 13, 2016

STATE OF CONNECTICUT *v.* MICHAEL A. URBANOWSKI

The defendant's petition for certification for appeal from the Appellate Court, 163 Conn. App. 377 (AC 36771), is granted, limited to the following issue:

"Did the Appellate Court properly determine that the trial court erred in the admission of uncharged misconduct but that said error was harmless?"

Arthur L. Ledford, assigned counsel, in support of the petition.

Timothy F. Costello, assistant state's attorney, in opposition.

Decided April 13, 2016

STATE OF CONNECTICUT *v.* JONATHAN MILLER

The defendant's petition for certification for appeal from the Appellate Court, 163 Conn. App. 772 (AC 37130), is denied.

Robert E. Byron, assigned counsel, in support of the petition.

Matthew R. Kalthoff, special deputy assistant state's attorney, in opposition.

Decided April 13, 2016

STATE OF CONNECTICUT *v.* JOSE JUSINO

The defendant's petition for certification for appeal from the Appellate Court, 163 Conn. App. 618 (AC 38029), is denied.

Pamela S. Nagy, assistant public defender, in support of the petition.

Bruce R. Lockwood, senior assistant state's attorney, in opposition.

Decided April 13, 2016

YVES HENRY LORTHE *v.* COMMISSIONER OF CORRECTION

The petitioner Yves Henry Lorthe's petition for certification for appeal from the Appellate Court, 153 Conn. App. 903 (AC 35686), is denied.

Heather Clark, assigned counsel, in support of the petition.

Melissa E. Patterson, assistant state's attorney, in opposition.

Decided April 20, 2016

STATE OF CONNECTICUT *v.* CHARLES LOGAN

The defendant's petition for certification for appeal from the Appellate Court, 160 Conn. App. 282 (AC 36605), is denied.

ESPINOSA, J., did not participate in the consideration of or decision on this petition.

W. Theodore Koch III, assigned counsel, in support of the petition.

Lisa A. Riggione, senior assistant state's attorney, in opposition.

Decided April 20, 2016

KEVIN J. MENARD *v.* WILLIMANTIC WASTE PAPER COMPANY ET AL.

The plaintiff's petition for certification for appeal from the Appellate Court, 163 Conn. App. 362 (AC 37252), is denied.

Howard B. Schiller and *G. Randal Hornaday*, in support of the petition.

David J. Weil, in opposition.

Decided April 20, 2016

CHARLES FULLENWILEY *v.* COMMISSIONER OF CORRECTION

The petitioner Charles Fullenwiley's petition for certification for appeal from the Appellate Court, 163 Conn. App. 761 (AC 37491), is denied.

Robert J. McKay, assigned counsel, in support of the petition.

Sarah Hanna, assistant state's attorney, in opposition.

Decided April 20, 2016

ROBERT ROUSSEAU *v.* STATEWIDE GRIEVANCE COMMITTEE ET AL.

The plaintiff's petition for certification for appeal from the Appellate Court, 163 Conn. App. 765 (AC 37728), is denied.

Robert Rousseau, self-represented, in support of the petition.

Elizabeth M. Rowe, assistant bar counsel, and *Michael K. Skold*, assistant attorney general, in opposition.

Decided April 20, 2016

IN RE DANIEL N. ET AL.

The petition by the respondent mother for certification for appeal from the Appellate Court, 163 Conn. App. 798 (AC 38454), is denied.

David J. Reich, assigned counsel, in support of the petition.

Renee Bevacqua Bollier, assistant attorney general, in opposition.

Decided April 20, 2016

JAY M. TYLER ET AL. *v.* RICHARD TATOIAN

The plaintiffs' petition for certification for appeal from the Appellate Court, 164 Conn. App. 82 (AC 37799), is denied.

Jay M. Tyler, self-represented, and *Bruce D. Tyler*, self-represented, in support of the petition.

Bruce S. Beck, in opposition.

Decided April 20, 2016

JOHN B. CROUSE *v.* TAMARA S. COX

The proposed intervenor's petition for certification for appeal from the Appellate Court (AC 38462) is dismissed.

Jennifer Crouse, self-represented, in support of the petition.

Decided April 20, 2016

STATE OF CONNECTICUT *v.* STEPHANIE ANDERSON

The defendant's petition for certification for appeal from the Appellate Court, 163 Conn. App. 783 (AC 36245), is denied.

Gwendolyn S. Bishop, assigned counsel, in support of the petition.

Lisa A. Riggione, senior assistant state's attorney, in opposition.

Decided April 27, 2016

STATE OF CONNECTICUT *v.* MICHAEL A. D'AMATO

The defendant's petition for certification for appeal from the Appellate Court, 163 Conn. App. 536 (AC 36877), is denied.

Mark Rademacher, assistant public defender, in support of the petition.

Nancy L. Chupak, senior assistant state's attorney, in opposition.

Decided April 27, 2016

CHARLES AROKIUM *v.* COMMISSIONER OF CORRECTION

The petitioner Charles Arokium's petition for certification for appeal from the Appellate Court, 164 Conn. App. 901 (AC 37025), is denied.

Vishal K. Garg, in support of the petition.

Lisa A. Riggione, senior assistant state's attorney, in opposition.

Decided April 27, 2016

LUONGO CONSTRUCTION AND DEVELOPMENT, LLC *v.* JAMES MCFARLANE

The plaintiff's petition for certification for appeal from the Appellate Court (AC 38185) is denied.

Frank P. Cannatelli, in support of the petition.

Vincent T. McManus, Jr., in opposition.

Decided April 27, 2016

RICHARD NOLEN-HOEKSEMA ET AL. *v.* MAQUET CARDIOPULMONARY AG ET AL.

The named defendant's petition for certification for appeal from the Appellate Court (AC 38812) is dismissed.

Charles D. Ray and *Brittany A. Killian*, in support of the petition.

David N. Rosen, in opposition.

Decided April 27, 2016

STATE OF CONNECTICUT *v.* DAVID E. LEE

The defendant's petition for certification for appeal from the Appellate Court, 138 Conn. App. 420 (AC 31817), is granted, limited to the following issue:

"In light of our decision in *State* v. *Wright*, 320 Conn. 781, 135 A.3d 1 (2016), did the Appellate Court correctly determine that the proper remand to the trial court was a merger of the conspiracy counts, instead of a vacatur of one of the two conspiracy counts?"

Annacarina Jacob, senior assistant public defender, in support of the petition.

Sarah Hanna, assistant state's attorney, in opposition.

Decided May 4, 2016

STATE OF CONNECTICUT *v.* JAMES E.*

The defendant's petition for certification for appeal from the Appellate Court, 154 Conn. App. 795 (AC 34715), is denied.

EVELEIGH, J., did not participate in the consideration of or decision on this petition.

Timothy H. Everett, assigned counsel, in support of the petition.

Sarah Hanna, assistant state's attorney, in opposition.

Decided May 4, 2016

GAIL REINKE *v.* WALTER SING

The plaintiff's petition for certification for appeal from the Appellate Court, 162 Conn. App. 674 (AC 36210), is granted, limited to the following issue:

* On June 8, 2016, the Supreme Court amended the order for certification. See *State* v. *James E.*, 321 Conn. 921, 138 A.3d 282 (2016).

"Did the Appellate Court correctly determine that, in the absence of a finding of fraud, the trial court lacked subject matter jurisdiction to open the parties' judgment of dissolution of their marriage?"

Eric M. Higgins, in support of the petition.

Decided May 4, 2016

STATE OF CONNECTICUT *v.* EDWIN NJOKU

The defendant's petition for certification for appeal from the Appellate Court, 163 Conn. App. 134 (AC 36189), is denied.

Richard S. Cramer, in support of the petition.

Marjorie Allen Dauster, senior assistant state's attorney, in opposition.

Decided May 4, 2016

STATE OF CONNECTICUT *v.* LORENZO ADAMS

The petition by the state of Connecticut for certification for appeal from the Appellate Court, 163 Conn. App. 810 (AC 36701), is granted, limited to the following issue:

"Did the Appellate Court majority correctly determine that there was insufficient evidence to support a judgment against the defendant of attempted larceny in the sixth degree?"

Nancy L. Walker, deputy assistant state's attorney, in support of the petition.

Deren Manasevit, assigned counsel, in opposition.

Decided May 4, 2016

STATE OF CONNECTICUT *v.* LORENZO ADAMS

The defendant's petition for certification for appeal from the Appellate Court, 163 Conn. App. 810 (AC 36701), is granted, limited to the following issue:

"Did the Appellate Court correctly determine that there was sufficient evidence to support the defendant's conviction for breach of the peace?"

Deren Manasevit, assigned counsel, in support of the petition.

Nancy L. Walker, deputy assistant state's attorney, in opposition.

Decided May 4, 2016

J.D.C. ENTERPRISES, INC. *v.* SARJAC PARTNERS, LLC

The petition by the third-party plaintiff, Sarjac Partners, LLC, for certification for appeal from the Appellate Court, 164 Conn. App. 508 (AC 37497), is denied.

Gary J. Greene, in support of the petition.

William S. Wilson II, in opposition.

Decided May 4, 2016

KEVIN STANLEY *v.* COMMISSIONER OF CORRECTION

The petitioner Kevin Stanley's petition for certification for appeal from the Appellate Court, 164 Conn. App. 244 (AC 37662), is denied.

Justine F. Miller, assigned counsel, in support of the petition.

Matthew R. Kalthoff, deputy assistant state's attorney, in opposition.

Decided May 4, 2016

RUTH GLADSTEIN *v.* SARANN GOLDFIELD ET AL.

The plaintiff's petition for certification for appeal from the Appellate Court, 163 Conn. App. 579 (AC 36316), is granted, limited to the following issue:

"In view of our recent decision in *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 320 Conn. 535, 133 A.3d 140 (2016), did the Appellate Court correctly affirm the trial court's order denying the plaintiff's motion to substitute and consequent judgment of dismissal on the basis of the plaintiff's lack of standing?"

Daniel J. Klau, in support of the petition.

Louis B. Blumenfeld and *Lawrence J. Merly*, in opposition.

Decided May 11, 2016

STATE OF CONNECTICUT *v.* WANTO POLYNICE

The defendant's petition for certification for appeal from the Appellate Court, 164 Conn. App. 390 (AC 36626), is denied.

Jodi Zils Gagne, in support of the petition.

Leon F. Dalbec, Jr., senior assistant state's attorney, in opposition.

Decided May 11, 2016

STATE OF CONNECTICUT *v.* TYRONE LAWRENCE KELLEY

The defendant's petition for certification for appeal from the Appellate Court, 164 Conn. App. 232 (AC 36992), is granted, limited to the following issue:

"Did the Appellate Court properly determine that the trial court had subject matter jurisdiction over the defendant's violation of probation proceeding?"

Robert E. Byron, assigned counsel, in support of the petition.

Rocco A. Chiarenza, assistant state's attorney, in opposition.

Decided May 11, 2016

STATE OF CONNECTICUT *v.* MICHAEL LABARGE

The defendant's petition for certification for appeal from the Appellate Court, 164 Conn. App. 296 (AC 37581), is denied.

William B. Westcott, assigned counsel, in support of the petition.

Melissa L. Streeto, senior assistant state's attorney, in opposition.

Decided May 11, 2016

JAMES STAUROVSKY *v.* CITY OF MILFORD POLICE DEPARTMENT ET AL.

The plaintiff's petition for certification for appeal from the Appellate Court, 164 Conn. App. 182 (AC 37670), is granted, limited to the following issue:

"Did the Appellate Court correctly determine that the Compensation Review Board decision must be reversed because the plaintiff must prove that he was disabled or die from a condition or impairment of health caused by hypertension while still employed in order to perfect his claim for benefits under General Statutes § 7-433c?"

David J. Morrissey, in support of the petition.

Decided May 11, 2016

ADAM P. MCNIECE *v.* TOWN OF WATERFORD ET AL.

The plaintiff's petition for certification for appeal from the Appellate Court (AC 38751) is denied.

Adam P. McNiece, self-represented, in support of the petition.

Decided May 11, 2016

ADAM P. MCNIECE *v.* TOWN OF WATERFORD ET AL.

The plaintiff's petition for certification for appeal from the Appellate Court (AC 38845) is denied.

Adam P. McNiece, self-represented, in support of the petition.

Decided May 11, 2016

STATE OF CONNECTICUT *v.* RONALDO MORALES

The defendant's petition for certification for appeal from the Appellate Court, 164 Conn. App. 143 (AC 37121), is denied.

John L. Cordani, Jr., assigned counsel, in support of the petition.

Emily D. Trudeau, deputy assistant state's attorney, in opposition.

Decided May 18, 2016

NORA LYNNE VALENTINE *v.* JOEL ROBERT VALENTINE

The plaintiff's petition for certification for appeal from the Appellate Court, 164 Conn. App. 354 (AC 37286), is denied.

John F. Morris, in support of the petition.

Joel Robert Valentine, self-represented, in opposition.

Decided May 18, 2016

IN RE ELIJAH C.

The petition by the respondent mother for certification for appeal from the Appellate Court, 164 Conn. App. 518 (AC 38519), is granted, limited to the following issues:

"1. Did the Appellate Court incorrectly determine that the respondent's appeal should be dismissed as moot due to a lack of adequate briefing of her claim that the trial court incorrectly determined that she was unable to benefit from services?

"2. If the answer to the first question is in the affirmative, did the trial court correctly determine that the petitioner had made reasonable efforts and that the respondent was unable to benefit from reunification efforts?"

ROBINSON, J., did not participate in the consideration of or decision on this petition.

James P. Sexton, assigned counsel, *Michael S. Taylor*, assigned counsel, and *Matthew C. Eagan*, assigned counsel, in support of the petition.

Michael Besso, assistant attorney general, in opposition.

Decided May 18, 2016

WILFREDO TEXIDOR, JR. *v.* CAROL THIBEDEAU ET AL.

The plaintiff's petition for certification for appeal from the Appellate Court, 163 Conn. App. 847 (AC 37349), is denied.

Juri E. Taalman, in support of the petition.

Scott M. Karsten, in opposition.

Decided May 25, 2016

STATE OF CONNECTICUT *v.* AARON BRANTLEY

The defendant's petition for certification for appeal from the Appellate Court, 164 Conn. App. 459 (AC 37123), is denied.

EVELEIGH, J., did not participate in the consideration of or decision on this petition.

Hugh F. Keefe, in support of the petition.

Nancy L. Walker, deputy assistant state's attorney, in opposition.

Decided May 25, 2016

WILLIAM FRANCINI *v.* GOODSPEED AIRPORT, LLC, ET AL.

The named defendant's petition for certification for appeal from the Appellate Court, 164 Conn. App. 279 (AC 37258), is granted, limited to the following issue:

"Did the Appellate Court properly determine that the trial court incorrectly concluded, as a matter of law, that an easement by necessity may be granted to a landlocked parcel only for the purpose of ingress and egress?"

John R. Bashaw and *Mary Mintel Miller*, in support of the petition.

Decided May 25, 2016

IN RE QUAMAINE K., JR., ET AL.

The petition by the respondent mother for certification for appeal from the Appellate Court, 164 Conn. App. 775 (AC 38532), is denied.

Benjamin M. Wattenmaker, in support of the petition.

Stephen G. Vitelli, assistant attorney general, in opposition.

Decided May 25, 2016

STATE OF CONNECTICUT *v.* JASON M. DAY

The defendant's petition for certification for appeal from the Appellate Court, 165 Conn. App. 137 (AC 36383), is denied.

Jason M. Day, self-represented, in support of the petition.

Lisa A. Riggione, senior assistant state's attorney, in opposition.

Decided May 25, 2016

STATE OF CONNECTICUT *v.* CRAIG HINES

The defendant's petition for certification for appeal from the Appellate Court, 165 Conn. App. 1 (AC 38002), is denied.

Katherine C. Essington, assigned counsel, in support of the petition.

Melissa L. Streeto, senior assistant state's attorney, in opposition.

Decided May 25, 2016

U.S. BANK NATIONAL ASSOCIATION *v.* TRACY AUERBACH ET AL.

The petition by the defendant Larry Karanko for certification for appeal from the Appellate Court (AC 38852) is denied.

Larry Karanko, self-represented, in support of the petition.

Peter A. Ventre, in opposition.

Decided May 25, 2016

KAREEM HEDGE *v.* COMMISSIONER OF CORRECTION

On reconsideration of the petitioner Kareem Hedge's petition for certification for appeal from the Appellate Court, 152 Conn. App. 44 (AC 34681), is denied.

William A. Snider, assigned counsel, in support of the petition.

Adam E. Mattei, assistant state's attorney, in opposition.

Decided June 8, 2016

STATE OF CONNECTICUT *v.* JAMES E.

On reconsideration of the defendant's petition for certification for appeal from the Appellate Court, 154 Conn. App. 795 (AC 34715), is granted, limited to the following issue:

"Did the Appellate Court properly determine that evidence was sufficient to prove the state's allegation that the defendant had caused or permitted a child 'to be placed in such a situation that its life or limb was endangered' when the Appellate Court determined that there was sufficient evidence to support an uncharged theory of risk of injury to a child, i.e., that 'the defendant's conduct created a risk of harm to the mental health of the child?' "

EVELEIGH, J., did not participate in the consideration of or decision on this petition.

Timothy H. Everett, assigned counsel, in support of the petition.

Sarah Hanna, assistant state's attorney, in opposition.

Decided June 8, 2016

JAMES J. BAKER *v.* LISA WHITNUM-BAKER

The defendant's petition for certification for appeal from the Appellate Court, 161 Conn. App. 227 (AC 36958/AC 36959), is denied.

Lisa Whitnum-Baker, self-represented, in support of the petition.

Tara C. Dugo, in opposition.

Decided June 8, 2016

LAWRENCE H. BUCK ET AL. *v.* TOWN OF BERLIN ET AL.

The petition by the plaintiffs Lawrence H. Buck and Christopher L. Buck for certification for appeal from the Appellate Court, 163 Conn. App. 282 (AC 37209), is denied.

Lawrence H. Buck, self-represented, and *Christopher L. Buck*, self-represented, in support of the petition.

Melinda A. Powell, in opposition.

Decided June 8, 2016

KEITH CURRAN *v.* ANNA V. ZUBKOVA

The plaintiff's petition for certification for appeal from the Appellate Court, 163 Conn. App. 904 (AC 37506), is denied.

Keith M. Curran, self-represented, in support of the petition.

Decided June 8, 2016

KEITH M. CURRAN ET AL. *v.* COURT OF PROBATE NORTHEAST DISTRICT ET AL.

The petition by the plaintiff Haiying Tao for certification for appeal from the Appellate Court, 163 Conn. App. 904 (AC 37506), is denied.

Mathew Olkin, in support of the petition.

Decided June 8, 2016

RUFUS SPEARMAN *v.* COMMISSIONER OF CORRECTION

The petitioner Rufus Spearman's petition for certification for appeal from the Appellate Court, 164 Conn. App. 530 (AC 35974), is denied.

James B. Streeto, senior assistant public defender, in support of the petition.

Denise B. Smoker, senior assistant state's attorney, in opposition.

Decided June 8, 2016

CITY OF STAMFORD ET AL. *v.* TEN RUGBY STREET, LLC

The defendant's petition for certification for appeal from the Appellate Court, 164 Conn. App. 49 (AC 36803), is denied.

McDONALD and ROBINSON, Js., did not participate in the consideration of or decision on this petition.

Thomas M. Cassone, in support of the petition.

James V. Minor, special corporation counsel, in opposition.

Decided June 8, 2016

THE DOYLE GROUP *v.* ALASKANS FOR CUDDY

The petition by the defendants Alaskans for Cuddy and David Cuddy for certification for appeal from the Appellate Court, 164 Conn. App. 209 (AC 36900), is denied.

James P. Sexton and *Michael S. Taylor*, in support of the petition.

Robert P. Hanahan, in opposition.

Decided June 8, 2016

STATE OF CONNECTICUT *v.* JAVIER R. MONGE

The defendant's petition for certification for appeal from the Appellate Court, 165 Conn. App. 36 (AC 37699), is denied.

Glenn L. Formica, in support of the petition.

Harry Weller, senior assistant state's attorney, in opposition.

Decided June 8, 2016

STATE OF CONNECTICUT *v.* PATRICK JAMES CANNON

The defendant's petition for certification for appeal from the Appellate Court, 165 Conn. App. 324 (AC 38000), is denied.

Deborah G. Stevenson, assigned counsel, in support of the petition.

Laurie N. Feldman, special deputy assistant state's attorney, in opposition.

Decided June 8, 2016

CITIMORTGAGE, INC. *v.* RAYMOND WINSTON MCLAUGHLIN ET AL.

The defendants' petition for certification for appeal from the Appellate Court (AC 38854) is denied.

Raymond Winston McLaughlin, self-represented, and *Nicole J. McLaughlin*, self-represented, in support of the petition.

Peter E. Ventre, in opposition.

Decided June 8, 2016

STATE OF CONNECTICUT *v.* JEFFREY GIBSON

The defendant's petition for certification for appeal from the Appellate Court, 56 Conn. App. 154 (AC 18591), is denied.

ESPINOSA and ROBINSON, Js., did not participate in the consideration of or decision on this petition.

David B. Rozwaski, in support of the petition.

Denise B. Smoker, senior assistant state's attorney, in opposition.

Decided June 15, 2016

CONNECTICUT HOUSING FINANCE AUTHORITY *v.* ASDRUBAL ALFARO ET AL.

The named defendant's petition for certification for appeal from the Appellate Court, 163 Conn. App. 587 (AC 37265), is granted, limited to the following issue:

"Did the Appellate Court properly determine that the trial court correctly denied the defendant's request for attorney's fees pursuant to General Statutes § 42-150bb?"

Jeffrey Gentes, *J.L. Pottenger*, *Jr.*, and *Peter V. Lathouris*, in support of the petition.

Michael G. Tansley and *Mary Barile Pierce*, in opposition.

Decided June 15, 2016

JAMES J. BAKER *v.* LISA WHITNUM-BAKER

The defendant's petition for certification for appeal from the Appellate Court, 163 Conn. App. 903 (AC 37614/AC 37615/AC 37616/AC 37617/AC 37618/AC 37619), is denied.

Lisa Whitnum-Baker, self-represented, in support of the petition.

Tara Dugo, in opposition.

Decided June 15, 2016

STATE OF CONNECTICUT *v.* ROBERT CUSHARD

The defendant's petition for certification for appeal from the Appellate Court, 164 Conn. App. 832 (AC 36680), is granted, limited to the following issue:

"Did the Appellate Court properly determine that the first canvass of the defendant by the trial court was inadequate and therefore the defendant did not waive his right to counsel as a result, but that a second canvass was adequate to waive the defendant's right to counsel?"

EVELEIGH, J., did not participate in the consideration of or decision on this petition.

Daniel J. Krisch, assigned counsel, in support of the petition.

James M. Ralls, assistant state's attorney, in opposition.

Decided June 15, 2016

STATE OF CONNECTICUT *v.* JOHN MARSHALL SPENCE

The defendant's petition for certification for appeal from the Appellate Court, 165 Conn. App. 110 (AC 36471), is denied.

ROBINSON, J., did not participate in the consideration of or decision on this petition.

Jonathan I. Edelstein and *David M. Kelly*, in support of the petition.

Emily D. Trudeau, deputy assistant state's attorney, in opposition.

Decided June 15, 2016

RICARDO MACK *v.* COMMISSIONER OF CORRECTION

The petitioner Ricardo Mack's petition for certification for appeal from the Appellate Court, 165 Conn. App. 901 (AC 37225), is denied.

William B. Wescott, in support of the petition.

James M. Ralls, assistant state's attorney, in opposition.

Decided June 15, 2016

ALBERT LOPEZ *v.* COMMISSIONER
OF CORRECTION

The petitioner Albert Lopez' petition for certification for appeal from the Appellate Court, 165 Conn. App. 901 (AC 37341), is denied.

John C. Drapp III, in support of the petition.

Linda Currie-Zeffiro, assistant state's attorney, in opposition.

Decided June 15, 2016

IN RE NATALIE S.

The petition by the respondent mother for certification for appeal from the Appellate Court, 165 Conn. App. 604 (AC 38655), is granted, limited to the following issue:

"Did the Appellate Court correctly determine that continuing reunification efforts for the respondent mother were not required because temporary guardianship had been placed with the father?"

ROBINSON, J., did not participate in the consideration of or decision on this petition.

Michael S. Taylor and *Marina L. Green*, in support of the petition.

Benjamin Zivyon, assistant attorney general, in opposition.

Decided June 15, 2016

STATE OF CONNECTICUT EX REL. RAYMOND CONNORS, CHIEF ANIMAL CONTROL OFFICER *v.* TWO HORSES ET AL.

The petition by the defendant Lisa-Lotte E. Lind-Larsen for certification for appeal from the Appellate Court (AC 37594) is denied.

Lisa-Lotte E. Lind-Larsen, self-represented, in support of the petition.

Scott N. Koschwitz, assistant attorney general, in opposition.

Decided June 15, 2016