STATE OF CONNECTICUT *v.* ALRICK A. EVANS (SC 19881)

Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn, Js.*

Syllabus

Convicted of the crime of sale of narcotics by a person who is not drug dependent following a plea of guilty entered pursuant to *North Carolina* v. *Alford* (400 U.S. 25), the defendant appealed from the trial court's denial of his motion to correct an illegal sentence. In his motion to correct, the defendant claimed, inter alia, that his sentence exceeded the relevant statutory limits because the lack of drug dependency, which resulted in the imposition of a mandatory minimum sentence pursuant to the statute ([Rev. to 2011] § 21a-278 [b]) under which the defendant was convicted, was neither specifically admitted by the defendant nor proven by the state. Specifically, the defendant claimed that the lack of drug dependency increased the maximum penalty available and that, pursuant to *Apprendi* v. *New Jersey* (530 U.S. 466) and *Alleyne* v. *United States* (570 U.S. 99), the state bore the burden of proving that fact beyond a reasonable doubt. The trial court, following the construction of § 21a-278 (b) by this court in *State* v. *Ray* (290 Conn. 602), concluded that proof of drug dependency under that statute constitutes an affirmative defense and, therefore, that the state was not required to prove that the defendant was not drug dependent. Accordingly, the trial court denied the defendant's motion to correct. On appeal, the defendant claimed, inter alia, that this court should overrule its interpretation of § 21a-278 (b) in *Ray*, and that the statutory scheme governing narcotics offenses violates the separation of powers clause in the Connecticut constitution by improperly allocating the judicial power of sentencing to the prosecutor. In addition, the state contended, inter alia, that the trial court lacked subject matter jurisdiction over defendant's motion to correct. *Held* that the trial court properly denied the defendant's motion to correct an illegal sentence:

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

1. The trial court had subject matter jurisdiction over the defendant's motion to correct, as the defendant's claim of an illegal sentence under *Alleyne* and *Apprendi* was colorably directed to the validity of the sentence, rather than the underlying conviction, and was sufficiently plausible to indulge the presumption in favor of jurisdiction; moreover, the defendant's *Alford* plea did not render the claim presented in his motion to correct moot, this court having concluded that, in the absence of a plea pertaining directly to the issue of drug dependency, the defendant did not waive his right to a specific finding with respect to that issue.
2. This court declined to disturb its long-standing interpretation that proof of drug dependency constitutes an affirmative defense to a charge under § 21a-278 (b): the constitutional analysis in *Ray* remains good law notwithstanding the decisions of the United States Supreme Court in *Apprendi*, which requires the state to prove any fact, other than a prior conviction, that increases the maximum statutory penalty for a crime, and *Alleyne*, which extends that rule to mandatory minimum sentences, insofar as neither of those cases precluded states from utilizing affirmative defenses to mitigate or eliminate criminal liability without running afoul of due process; moreover, the language and legislative history of recent amendments to § 21a-278 and a related narcotics statute ([Rev. to 2011] § 21a-277) were strongly indicative of legislative acquiescence in the interpretation of § 21a-278 (b) by this court in *Ray*, and, therefore, the doctrine of stare decisis counseled against overruling that case as a matter of statutory construction.
3. The defendant could not prevail on his claim that the statutory scheme governing narcotics offenses violates the separation of powers clause of the Connecticut constitution by improperly allocating the judicial power of sentencing to the prosecutor; the legislature's classification of § 21a-277, a separate statute governing the crime of sale of narcotics that carries no mandatory minimum sentence, represented a public policy decision consistent with its constitutionally assigned responsibility and merely provided prosecutors with a choice that was fundamentally no different from their discretion to charge lesser offenses in other contexts.

Argued December 18, 2017—officially released August 21, 2018

Procedural History

Information charging the defendant with the crimes of sale of narcotics by a person who is not drug dependent and possession of narcotics, brought to the Superior Court in the judicial district of New Britain, geographical area number seventeen, and transferred to geographical area number fifteen, where the defendant was presented to the court, *Strackbein*, *J.*, on a plea

of guilty to the charge of sale of narcotics by a person who is not drug-dependent; judgment of guilty; thereafter, the state entered a nolle prosequi as to the charge of possession of narcotics; subsequently, the trial court, *D'Addabbo*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed. *Affirmed.*

April E. Brodeur, assigned counsel, with whom was *Owen Firestone*, assigned counsel, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Jeffrey M. Lee*, senior assistant state's attorney, for the appellee (state).

Opinion

ROBINSON, J. The principal issue in this appeal is whether our decision in *State* v. *Ray*, 290 Conn. 602, 966 A.2d 148 (2009), which would require the defendant in the present case, Alrick A. Evans, to prove drug dependency as an affirmative defense to a charge under General Statutes (Rev. to 2011) § 21a-278 (b),[1] remains

[1] General Statutes (Rev. to 2011) § 21a-278 (b) provides: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any narcotic substance, hallucinogenic substance other than marijuana, amphetamine-type substance, or one kilogram or more of a cannabis-type substance, except as authorized in this chapter, and who is not, at the time of such action, a drug-dependent person, for a first offense shall be imprisoned not less than five years or more than twenty years; and for each subsequent offense shall be imprisoned not less than ten years or more than twenty-five years. The execution of the mandatory minimum sentence imposed by the provisions of this subsection shall not be suspended, except the court may suspend the execution of such mandatory minimum sentence if at the time of the commission of the offense (1) such person was under the age of eighteen years, or (2) such person's mental capacity was significantly impaired, but not so impaired as to constitute a defense to prosecution."

We note that the legislature has recently amended § 21a-278. See Public Acts 2017, No. 17-17, § 2; see also part II B and footnote 25 of this opinion. For the sake of convenience, all references to § 21a-278 in this opinion are to the 2011 revision of the statute.

good law in light of (1) the subsequent decision of the United States Supreme Court in *Alleyne* v. *United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), and (2) the legislature's recent amendment of § 21a-278 (b) in No. 17-17, § 2, of the 2017 Public Acts (P.A. 17-17). The defendant appeals[2] from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant claims that (1) we should overrule our interpretation of § 21a-278 (b) in *Ray*, (2) under *Alleyne*, the state was required to prove his lack of drug dependency beyond a reasonable doubt because it is a fact that would result in an increased mandatory minimum sentence, and (3) the narcotics statutory scheme, which gives the prosecutor the sole authority to decide whether to proceed under § 21a-278 (b), rather than the otherwise identical General Statutes (Rev. to 2011) § 21a-277 (a),[3] violates the separation of powers established by article second of the constitution of Connecticut, as amended by article eighteen of the amendments. The state contends to the contrary, and also argues that the trial court lacked

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

[3] General Statutes (Rev. to 2011) § 21a-277 (a) provides: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any controlled substance which is a hallucinogenic substance other than marijuana, or a narcotic substance, except as authorized in this chapter, for a first offense, shall be imprisoned not more than fifteen years and may be fined not more than fifty thousand dollars or be both fined and imprisoned; and for a second offense shall be imprisoned not more than thirty years and may be fined not more than one hundred thousand dollars, or be both fined and imprisoned; and for each subsequent offense, shall be imprisoned not more than thirty years and may be fined not more than two hundred fifty thousand dollars, or be both fined and imprisoned."

We note that the legislature has recently amended § 21a-277. See P.A. 17-17, § 1; see also part II B and footnote 25 of this opinion. For the sake of convenience, all references to § 21a-277 in this opinion, unless otherwise noted, are to the 2011 revision of the statute.

subject matter jurisdiction over the defendant's motion to correct because that motion challenged his underlying conviction, rather than his sentence. Although we conclude that the trial court had subject matter jurisdiction over the defendant's motion to correct, we disagree with the merits of the defendant's claims and reaffirm *Ray*'s holding that drug dependency under § 21a-278 (b) is an affirmative defense that, if proven, reduces a defendant's potential sentence. Accordingly, we affirm the judgment of the trial court.

The record reveals the following undisputed facts and procedural history. On June 16, 2011, the state charged the defendant with one count of the sale of narcotics in violation of § 21a-278 (b), and one count of possession of narcotics in violation of General Statutes (Rev. to 2011) § 21a-279 (a), in connection with the sale of crack cocaine in Bristol. On November 16, 2011, the defendant pleaded guilty, in accordance with the *Alford* doctrine,[4] to the sale of narcotics in violation of § 21a-278 (b); the state nolled the possession charge. Drug dependency was not discussed during the plea hearing.[5]

[4] *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[5] After the defendant pleaded guilty to one count of violating § 21a-278 (b), the prosecutor stated the following as a factual basis for the plea: "On or about [May 19, 2011], Bristol police in working with the statewide narcotics [task force] knew that [the defendant] was moving some weights of cocaine, illegal drug, narcotics, if you will. They got a [confidential informant] to do some buys under their supervision.

"[The defendant] did trade . . . on or about [May 19, 2011], those narcotics for [United States] currency. [A] couple of other . . . sales occurred on [May 19, 2011], and [June 8, 2011], just to [establish] beyond a reasonable doubt in our minds that he was an ongoing drug dealer. We're not going to make him . . . plead to those other two cases.

"Later on, during the course of the investigation, I believe it was when we had effected, if you will, the sale warrants, written and got them signed by a judge, they went to his location in New Britain . . . a place he was known to lay his head from time to time. When they were going to arrest him there on those warrants, he came around the corner, saw them, clearly in front of the police tossed down a knotted clear baggie that ended up containing . . . more than one ounce of, I believe his drug of choice here

The trial court subsequently sentenced the defendant to five years imprisonment with five years special parole.

Pursuant to Practice Book § 43-22,[6] on November 5, 2015, the defendant filed the motion to correct an illegal sentence that underlies the present appeal.[7] In that motion, the defendant claimed that his sentence is illegal because, inter alia, under *Alleyne* v. *United States*, supra, 570 U.S. 99, and *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the sentence "exceeds the relevant statutory limits" and "the fact triggering the mandatory minimum [sentence] was not found by a proper [fact finder] or admitted by the defendant . . . ." On February 9, 2016, the trial court issued a memorandum of decision observing that, in *State* v. *Ray*, supra, 290 Conn. 623–26, this court had concluded that *Apprendi*, which requires that the state charge, and prove to the fact finder beyond a reasonable doubt, any factor, other than a prior conviction, that increases the maximum penalty for a crime; see *Apprendi* v. *New Jersey*, supra, 474–97; did not apply to proof of drug dependency under § 21a-278 (b) because such proof constitutes an affirmative defense under that statute. The trial court then rejected the defendant's argument that *Ray* is no longer good law under *Alleyne*, which extended the rule set forth in *Apprendi* to facts

is, crack cocaine, that is correct. So [those are] the facts as to those two § 21a-278 (b) files."

[6] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

[7] The defendant previously had filed a motion to correct an illegal sentence on June 13, 2012, challenging various aspects of his plea and sentencing, including the adequacy of the canvass and a claim that the sentence was a double jeopardy violation. In a judgment later affirmed by the Appellate Court; see *State* v. *Evans*, 150 Conn. App. 905, 93 A.3d 182 (2014); the trial court, *Strackbein*, *J.*, denied or dismissed the claims raised in that motion through a memorandum of decision issued on February 7, 2013.

that increase a statutory minimum sentence.[8] See *Alleyne* v. *United States*, supra, 103. After rejecting the defendant's other challenges to his sentence,[9] the trial court rendered judgment denying the motion to correct an illegal sentence. This appeal followed. See footnote 2 of this opinion.

In the present appeal from the trial court's denial of his motion to correct, the defendant claims the following: (1) we should overrule *State* v. *Ray*, supra, 290 Conn. 602; and (2) the narcotics statutory scheme violates the separation of powers.[10] The state disagrees with the merits of the defendant's claims and also contends that the trial court should have dismissed the defendant's motion to correct for lack of subject matter jurisdiction. All of these issues present questions of law over which our review is plenary. See, e.g., *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 327 Conn. 650, 694, 176 A.3d 28 (2018) (constitutional issues); *Hull* v. *Newtown*, 327 Conn. 402, 413–14,

[8] The trial court also observed that the defendant's *Alford* plea constituted a concession that the state could prove a violation of § 21a-278 (b), which applies to individuals who are not drug-dependent, and that he never argued that he should have been permitted "to plead under § 21a-277 (a), which applies to . . . drug-dependent person[s]."

[9] The trial court also rejected the defendant's claims that his sentence was illegal because it violated (1) his state and federal constitutional rights to equal protection of the laws, (2) article first, § 9, of the Connecticut constitution, (3) "the intent of the legislature and the rule of lenity," and (4) his state and federal constitutional rights to due process because the court was unaware of the permissible sentencing range and "there is no rational basis for having two statutes punishing the exact same behavior with differing punishments." The defendant does not renew these claims in the present appeal, and we do not address those issues further.

[10] We note that the defendant has briefed separate claims that the trial court imposed his sentence in an illegal manner on the basis of the court's "inaccurate understanding as to the available statutory range of punishments that resulted from the prosecution's failure to prove the fact triggering the mandatory minimum sentence." We do not address these claims separately, because their resolution is subsumed in the defendant's more specific challenges to *State* v. *Ray*, supra, 290 Conn. 602.

174 A.3d 174 (2017) (statutory construction); *State* v. *Delgado*, 323 Conn. 801, 810, 151 A.3d 345 (2016) (subject matter jurisdiction). We address each issue in turn.

I

As a threshold matter; see, e.g., *State* v. *Koslik*, 116 Conn. App. 693, 699, 977 A.2d 275, cert. denied, 293 Conn. 930, 980 A.2d 916 (2009); we begin with the state's challenges to the trial court's subject matter jurisdiction,[11] namely, that (1) the defendant's motion to correct improperly challenged the underlying conviction, rather than the sentence, and (2) this case is moot because the defendant's sentence was the product of a plea bargain.[12]

[11] Although the state did not raise these jurisdictional claims before the trial court, we review them on appeal because "challenges to the trial court's subject matter jurisdiction may be raised at any time by either party or the court." *State* v. *Delgado*, supra, 323 Conn. 813.

[12] We note that the state also argues that the court lacked jurisdiction over the defendant's motion to correct because the federal courts have uniformly determined that *Alleyne* is not retroactively applicable on collateral review to cases that became final prior to the date of its release. See, e.g., *Walker* v. *United States*, 810 F.3d 568, 574–75 (8th Cir.), cert. denied, U.S. , 136 S. Ct. 2042, 195 L. Ed. 2d 240 (2016); *Crayton* v. *United States*, 799 F.3d 623, 624 (7th Cir.), cert. denied, U.S. , 136 S. Ct. 424, 193 L. Ed. 2d 319 (2015). The state posits that a motion to correct an illegal sentence is collateral in nature, insofar as it takes place outside the direct appellate process. In response, the defendant argues in his reply brief that we should not reach this argument because the state waived it by failing to raise it before the trial court, and he also cites *State* v. *Casiano*, 282 Conn. 614, 625 n.15, 922 A.2d 1065 (2007), for the proposition that a motion to correct "is not collateral to or separate from the underlying criminal action because it directly implicates the legality of the sentencing proceeding and is addressed to the sentencing court itself."

We decline to reach the state's arguments with respect to the retroactivity of *Alleyne*. Although jurisdictional issues may be raised at any time, the state's arguments with respect to retroactivity relate to the merits of the motion to correct, rather than the court's jurisdiction over it. See footnote 16 of this opinion. Moreover, the state does not suggest that there are any exceptional circumstances that would allow it to assert an unpreserved issue as an alternative ground on which to reject the defendant's constitutional claim. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 142–43, 84 A.3d 840 (2014); see also id., 159–60 (" 'exceptional circumstances' " required for review of unpreserved

A

Relying on *State* v. *Lawrence*, 281 Conn. 147, 913 A.2d 428 (2007), the state contends that the trial court lacked jurisdiction over the defendant's motion to correct because it did not challenge the sentencing phase of the proceeding but, rather, the underlying conviction. In response, the defendant cites *State* v. *Henderson*, 130 Conn. App. 435, 24 A.3d 35 (2011), appeals dismissed, 308 Conn. 702, 66 A.3d 847 (2013), and argues that issues raised under *Alleyne* and *Apprendi* are properly addressed in a motion to correct an illegal sentence. We agree with the defendant and conclude that his colorable claim of an illegal sentence under *Alleyne* and *Apprendi* gave the trial court subject matter jurisdiction over his motion to correct.

"It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the commissioner of correction and begins serving the sentence. . . . Without a legislative or constitutional grant of continuing jurisdiction, however, the trial court lacks jurisdiction to modify its judgment." (Citations omitted; internal quotation marks omitted.) *State* v. *Lawrence*, supra, 281 Conn. 153–54.

As in *Lawrence*, the defendant in the present case "relies on a common-law exception to this rule, embodied in [Practice Book] § 43-22, allowing the trial court to correct an illegal sentence." Id., 155. "Because the judiciary cannot confer jurisdiction on itself through its own rule-making power, § 43-22 is limited by the common-law rule that a trial court may not modify a sentence if the sentence was valid and its execution

claims). Accordingly, we leave to another day the retroactivity issues raised by the state with respect to *Alleyne*.

has begun. . . . Therefore, for the trial court to have jurisdiction to consider the defendant's claim of an illegal sentence, the claim must fall into one of the categories of claims that, under the common law, the court has jurisdiction to review." (Citation omitted.) Id.

"[A]n illegal sentence is essentially one which . . . exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . In accordance with this summary, Connecticut courts have considered four categories of claims pursuant to [Practice Book] § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions as to which sentencing statute was applicable." (Citations omitted; internal quotation marks omitted.) Id., 156–57. Considering these categories, which were first articulated by the Appellate Court's definition of the term "illegal sentence" in *State* v. *McNellis*, 15 Conn. App. 416, 443–44, 546 A.2d 292, cert. denied, 209 Conn. 809, 548 A.2d 441 (1988), this court held in *Lawrence* that "a challenge to the legality of a sentence focuses not on what transpired during the trial or on the underlying conviction. In order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, *the sentencing proceeding, and not the trial leading to the conviction*, must be the subject of the attack." (Emphasis added.) *State* v. *Lawrence*, supra, 281 Conn. 158.

Lawrence is not, however, the last word from this court in defining the trial courts' jurisdiction over motions to correct. In *State* v. *Parker*, 295 Conn. 825,

837, 992 A.2d 1103 (2010), we observed that "the rules of practice are consistent with the broader common-law meaning of illegality, permitting correction of both illegal sentences and sentences imposed in an illegal manner." We emphasized that the protection against sentencing in an illegal manner "reflects the fundamental proposition that [t]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." (Internal quotation marks omitted.) Id., 839. We then added "one qualification" to the description in *State* v. *McNellis*, supra, 15 Conn. App. 443–44, observing that the "enumerated examples would not encompass rights or procedures subsequently recognized as mandated by federal due process," explicitly including claims under *Apprendi* v. *New Jersey*, supra, 530 U.S. 490, and similarly would not "encompass procedures mandated by state law that are intended to ensure fundamental fairness in sentencing, which, if not followed, could render a sentence invalid." *State* v. *Parker*, supra, 839–40. Accordingly, we emphasized that "the examples cited in *McNellis* are not exhaustive and the parameters of an invalid sentence will evolve." Id., 840.

To be sure, some constitutional protections governing the sentencing process, such as the United States Supreme Court's decision in *Apprendi*, have had the effect of blurring the lines between the sentencing proceeding and the trial, particularly insofar as they have constitutionally mandated the submission of certain factual issues to the jury prior to the court's imposition of the sentence. For example, in *Apprendi* v. *New Jersey*, supra, 530 U.S. 490, the United States Supreme Court concluded that the federal due process clause and sixth amendment to the United States constitution require that, "[o]ther than the fact of a prior conviction,

any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Thus, a claim is cognizable in a motion to correct an illegal sentence if it is a challenge specifically directed to the punishment imposed, even if relief for that illegal punishment requires the court to in some way modify the underlying convictions, such as for double jeopardy challenges. See *State* v. *Cator*, 256 Conn. 785, 804–805, 781 A.2d 285 (2001) (concluding that "trial court had jurisdiction to alter the sentence pursuant to Practice Book § 43-22, because otherwise the constitutional prohibition against double jeopardy would have been violated," even though correction of illegal sentence required merger of underlying convictions). We emphasize, however, that the motion to correct is not another bite at the apple in place of challenges that are more properly brought on direct appeal or in a petition for a writ of habeas corpus.[13] See *State* v. *McGee*, 175 Conn.

[13] As Judge Bishop has recently observed, it is not always clear when a motion to correct an illegal sentence challenges a sentence rather than a conviction. See *State* v. *McGee*, 175 Conn. App. 566, 586, 168 A.3d 495 (*Bishop, J.*, dissenting) ("confusion abounds on the question of the jurisdiction of the trial court to hear a motion to correct an illegal sentence"), cert. denied, 327 Conn. 970, 173 A.3d 953 (2017). Judge Bishop notes that this confusion is particularly acute with respect to the second category of illegal sentences, namely, double jeopardy violations for multiple punishments, which by definition challenge convictions rather than the sentences for those convictions. See id., 592–95 (questioning whether this court's line of cases under *State* v. *Cator*, supra, 256 Conn. 785, was intended "to open wide the door to attacks on convictions through the guise of a Practice Book § 43-22 motion, nominally assailing a sentence," and stating that jurisdictional case law has "create[d] currents and crosscurrents in need of calming by a higher power"). In his thoughtful dissent in *McGee*, Judge Bishop suggested revisions to the case law governing motions to correct, including the imposition of time limitation and limiting vacation of convictions to cases in which "it is obvious from the criminal information and verdict that convictions violate the protection against double jeopardy," and "that such remedial action can only be taken before a defendant has commenced serving his or her sentence." Id., 595–98. Although we leave the specific issues identified by Judge Bishop to another day, we nevertheless acknowledge that the demarcation between conviction and sentence may not always be crystal clear, particularly in cases presenting *Apprendi* issues, and may invoke the presumption in favor of jurisdiction in cases in which the defendant has made a colorable—however doubtful—claim of illegality affecting the *sentence*, rather than the underlying conviction. See, e.g., *State* v. *Fowlkes*, 283 Conn. 735, 739, 930 A.2d 644 (2007); see also *State* v. *Ramos*, 306 Conn. 125, 134–35, 49 A.3d 197 (2012) ("although this court has recog-

App. 566, 574 n.6, 168 A.3d 495 (2017) (The trial court had jurisdiction over a motion to correct an illegal sentence that sought to vacate a robbery conviction as a remedy for a double jeopardy violation because "the defendant has not challenged, in any way, the validity of his convictions for robbery in the second degree or of the guilty verdicts upon which they rest. He has not claimed any infirmity with the state's information; he has not advanced any claims of insufficiency with respect to the state's evidence against him, or of evidentiary error, instructional error, prosecutorial impropriety, or any other type of error upon which the legality of trial proceedings or of the verdicts and judgments they result in are routinely challenged. Rather, he claimed that, at sentencing, the court should have vacated one of his two second degree robbery convictions and sentenced him only on one of those convictions."), cert. denied, 327 Conn. 970, 173 A.3d 953 (2017).

As the "parameters of an illegal sentence [have] evolve[d]"; *State* v. *Parker*, supra, 295 Conn. 840; particularly given the landmark decision of the United States Supreme Court in *Apprendi* v. *New Jersey*, supra, 530 U.S. 466, we find instructive the Appellate Court's decision in *State* v. *Henderson*, supra, 130 Conn. App. 435. In *Henderson*, the defendant claimed that his robbery and assault sentence, which had been enhanced pursuant to the persistent serious felony offender statute, General Statutes (Rev. to 1993) § 53a-40 (g), was illegal under *Apprendi* because, although he had pleaded guilty to a part B information seeking that enhancement, he did not expressly admit "that the public interest would be best served by extended incarceration and lifetime supervision." Id., 438–39. The Appellate Court concluded that jurisdiction existed over the motion to

nized the general principle that there is a strong presumption in favor of jurisdiction . . . in criminal cases, this principle is considered in light of the common-law rule that, once a defendant's sentence has begun [the] court may no longer take any action affecting a defendant's sentence unless it *expressly* has been authorized to act" [citations omitted; emphasis in original; internal quotation marks omitted]).

correct an illegal sentence, even though it challenged the trial court's failure to submit the issue to the jury—an action that by definition occurs prior to sentencing—because of the defendant's "legal theory as to why his sentence was illegal," namely, a violation of *Apprendi*. Id., 441; see also id., 446. Following *State* v. *Koslik*, supra, 116 Conn. App. 700, which held that there was jurisdiction over a defendant's claim that a trial court had failed to make a finding necessary to justify an extended probation period, the court emphasized in *Henderson* that "the defendant's claims go to the actions of the sentencing court. Specifically, he challenges actions taken by the sentencing court that, although proper at the time, were affected by a subsequent change in the law." *State* v. *Henderson*, supra, 445; see also *State* v. *Abraham*, 152 Conn. App. 709, 720–23, 99 A.3d 1258 (2014) (The court, after reviewing case law, noted the state's concession that the court had jurisdiction under *Henderson* over a motion to correct raising an *Apprendi* challenge to the "sentencing court's decision to impose a sentence enhancement, under [General Statutes] § 53-202k, without first obtaining the necessary jury finding. We further conclude that this jurisdiction encompasses a claim that the defendant did not properly waive his right to a jury determination of the violation, resulting in a sentence imposed in an illegal manner that exceeds the statutory limit for the underlying crimes of which he was found guilty by the jury.").

The state's jurisdictional challenge requires us to consider whether "the defendant has raised a colorable claim within the scope of Practice Book § 43-22 that would, if the merits of the claim were reached and decided in the defendant's favor, require correction of a sentence. . . . In the absence of a colorable claim requiring correction, the trial court has no jurisdiction to modify the sentence." (Citation omitted; internal quo-

tation marks omitted.) *State* v. *Delgado*, supra, 323 Conn. 810. "A colorable claim is one that is superficially well founded but that may ultimately be deemed invalid . . . . For a claim to be colorable, the defendant need not convince the trial court that he necessarily will prevail; he must demonstrate simply that he *might* prevail." (Citation omitted; emphasis in original; internal quotation marks omitted.) *In re Santiago G.*, 325 Conn. 221, 231, 157 A.3d 60 (2017). The jurisdictional and merits inquiries are separate; whether the defendant ultimately succeeds on the merits of his claim does not affect the trial court's jurisdiction to hear it. See id. "It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *State* v. *Fowlkes*, 283 Conn. 735, 739, 930 A.2d 644 (2007). We emphasize, however, that this "general principle that there is a strong presumption in favor of jurisdiction . . . in criminal cases . . . is considered in light of the common-law rule that, once a defendant's sentence has begun [the] court may no longer take any action affecting a defendant's sentence unless it *expressly* has been authorized to act." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Ramos*, 306 Conn. 125, 134–35, 49 A.3d 197 (2012); see, e.g., *State* v. *Koslik*, supra, 116 Conn. App. 697 (applying presumption to motion to correct illegal sentence). Thus, the presumption in favor of jurisdiction does not itself broaden the nature of the postsentencing claims over which the court may exercise jurisdiction in criminal cases, but merely serves to emphasize that the jurisdictional inquiry is guided by the "plausibility" that the defendant's claim is a challenge to his sentence, rather than its ultimate legal correctness. *In re Santiago G.*, supra, 232–33; see also footnote 13 of this opinion.

In determining whether it is plausible that the defendant's motion challenged the sentence, rather than the

underlying trial or conviction, we consider the nature of the specific legal claim raised therein. See *State* v. *Henderson*, supra, 130 Conn. App. 441. As we understand the defendant's claims in the present appeal, he does not ask us to disturb his conviction under § 21a-278 (b), or otherwise claim that he was convicted under the wrong statute. Instead, the defendant seeks resentencing, claiming that § 21a-278 (b) merely enhances the penalty available under § 21a-277 (a) when those statutes are read with the judicial gloss rendered necessary by the United States Supreme Court's decisions in *Alleyne* v. *United States*, supra, 570 U.S. 99, and *Apprendi* v. *New Jersey*, supra, 530 U.S. 466.[14]

[14] Specifically, the defendant argues in his brief that §§ 21a-277 (a) and 21a-278 (b) are, in fact, the same offense insofar as they prohibit "identical conduct." He claims that § 21a-277 serves as the "base offense" and that the addition of drug dependency language renders § 21a-278 (b) simply an aggravated form of § 21a-277 (a) for purposes of proof as an element under federal constitutional law. He suggests, therefore, that he should be resentenced under § 21a-277 (a), with a maximum of fifteen years imprisonment and no mandatory minimum, insofar as § 21a-278 (b) only precludes the trial court from suspending, rather than reducing, the mandatory minimum. The defendant notes that the trial court "had the discretion to impose a nonmandatory minimum portion of the sentence by reducing the mandatory minimum sentence to no mandatory minimum," observing that, "although the mandatory minimum [under § 21a-278 (b)] is nonsuspendable, it is not nonreducible." Cf. General Statutes § 53a-59a (d) (providing in relevant part that "[a]ny person found guilty under this section shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court"); General Statutes § 53a-70a (a) (2) ("ten years of the sentence imposed may not be suspended or reduced by the court"). The defendant also emphasizes that, "although § 21a-278 (b) does not provide for . . . a nonmandatory sentence, such a sentence is permissible because §§ 21a-278 (b) and 21a-277 (a) have the same essential elements . . . and § 21a-277 (a) provides for a sentence without a mandatory minimum." (Citation omitted.) See also General Statutes § 21a-283a (in sentencing defendant under certain narcotics statutes, including § 21a-278 [b], when facts of underlying offense "did not involve the use, attempted use or threatened use of physical force against another person or result in the physical injury or serious physical injury of another person, and in the commission of which such person neither was armed with nor threatened the use of or displayed or represented by word or conduct that such person possessed any firearm, deadly weapon or dangerous instrument . . . the court may, upon a showing of good cause by the defendant, depart from the prescribed mandatory minimum sentence, provided the provisions of this section have not previously been invoked on the defendant's behalf and the court, at the time of sentencing, states in open court the reasons for imposing the particular sentence and the specific reason for imposing a sentence that departs from the prescribed mandatory minimum sentence"). Given this interpretation of the statutory scheme, the defendant then argues in his reply brief that "the remedy for an *Apprendi* or *Alleyne* error is to correct the sentence, not vacate the conviction," and that the "court has

Given the otherwise identical statutory language of §§ 21a-277 (a) and 21a-278 (b), and the lack of any case law from this court squarely rejecting the defendant's proffered interpretation of § 21a-278 (b) as merely providing a penalty enhancement in view of the Supreme Court's decision in *Alleyne*, which extended the protections of *Apprendi* to mandatory minimum sentences; see *Alleyne* v. *United States*, supra, 570 U.S. 103; we conclude that the defendant's interpretation of the narcotics statutory scheme is sufficiently plausible to render it colorable for the purpose of jurisdiction over his motion. See *In re Santiago G.*, supra, 325 Conn. 233–34 (dismissing appeal for lack of final judgment from denial of motion to intervene in termination of parental rights action because there was no colorable claim given unchallenged Appellate Court case law rejecting existence of such right). In particular, the fact that the defendant does not ask us to disturb his conviction under § 21a-278 (b), but merely seeks remand for resentencing, renders this case distinguishable from *State* v. *Lawrence*, supra, 281 Conn. 151, 158–59, in which we concluded that the trial court lacked jurisdiction over a motion to correct claiming that court had improperly convicted the defendant of manslaughter in the first degree with a firearm, rather than simply manslaughter in the first degree, following his successful assertion of the affirmative defense of extreme emotional disturbance.[15]

the common-law authority, as codified in [Practice Book] § 43-22, to hear an argument that a sentence is illegal because it exceeds the statutorily authorized sentence, and to order that such sentence be corrected so that it is legal and within the proper sentencing guidelines."

[15] For other illustrative authorities with respect to the limits of a court's jurisdiction over a motion to correct an illegal sentence, compare *State* v. *Delgado*, supra, 323 Conn. 809 n.6 (trial court had jurisdiction over motion to correct claiming that sentence of life without parole for juvenile, without consideration of mitigating factors, violated eighth amendment), *State* v. *Martin M.*, 143 Conn. App. 140, 143–44 and n.1, 70 A.3d 135 (trial court had jurisdiction over motion to correct claiming that sentencing court improperly relied on subsequently reversed kidnapping conviction in determining sentence), cert. denied, 309 Conn. 919, 70 A.3d 41 (2013), and *State* v. *Koslik*, supra, 116 Conn. App. 700–701 (trial court had jurisdiction over motion to correct claiming that sentencing court had failed to make finding regarding repayment to victim that would permit imposition of three years of probation), with *State* v. *Robles*, 169 Conn. App. 127, 135, 150 A.3d 687 (2016)

Indulging the presumption in favor of jurisdiction, we conclude that the trial court had subject matter jurisdiction over the defendant's motion to correct. In this case, the defendant's claims challenge the validity of *State* v. *Ray*, supra, 290 Conn. 602, in which we concluded that the defendant bore the burden of proving drug dependency, through the lens of *Alleyne*, which extended *Apprendi* to mandatory minimum sentences.[16] Because this claim is colorably directed to the

(trial court lacked jurisdiction over motion to correct claiming that sentence was illegal because it resulted from "guilty pleas to the kidnapping charges [that] are invalid as a result of [*State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008)] and its progeny"), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017), *State* v. *Brescia*, 122 Conn. App. 601, 606–607, 999 A.2d 848 (2010) (trial court lacked subject matter jurisdiction over motion to correct claiming that evidence only supported plea to conspiracy to commit forgery in second degree, rather than first degree, because sentence was legally authorized for first degree conviction), and *State* v. *Starks*, 121 Conn. App. 581, 589–90, 997 A.2d 546 (2010) (no jurisdiction over motion to correct, which was impermissible "collateral attack" on conviction, when "gravamen of the claim [was] that, at trial, the state did not present evidence sufficient to demonstrate that the defendant had violated § 21a-278 [b]" with respect to requisite quantity of drugs).

[16] We acknowledge that our recent decision in *State* v. *Delgado*, supra, 323 Conn. 801, appeared to analyze a motion to correct an illegal sentence in jurisdictional terms when subsequent legal developments affected its merits. In 2014, the defendant in *Delgado* filed a motion to correct, claiming that his sentence of sixty-five years imprisonment without parole was illegal under the United States Supreme Court's juvenile sentencing cases, including *Miller* v. *Alabama*, 567 U.S. 460, 465, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). See *State* v. *Delgado*, supra, 803–807. The trial court dismissed the motion for lack of jurisdiction on the basis of its conclusion that *Miller* did not apply to the case. Id., 809 n.6. On appeal, we first agreed with the state's concession that the trial court had improperly dismissed the motion because it raised a "viable claim by alleging that a sentence of life imprisonment without parole had been imposed without consideration of youth related mitigating factors." Id. Considering the effect of subsequently enacted legislation that afforded the defendant an opportunity for parole; see General Statutes § 54-125a; Public Acts 2015, No. 15-84; we then concluded, as an "exception" to the "general principle that jurisdiction once acquired is not lost or divested by subsequent events," that, "the legal landscape concerning juvenile sentencing laws has changed so significantly that the remaining claims, which would have required resentencing when the motion to correct was filed, no longer require resentencing." (Internal quotation marks omit-

validity of the sentence rather than the underlying conviction, we conclude that the trial court properly exercised jurisdiction over the defendant's motion to correct.

B

The state also contends that the defendant's claims are moot because his sentence arises from his guilty plea to violating § 21a-278 (b), which included the acceptance of the specific period of five years imprisonment in exchange for the benefit of relief on other pending charges. The state contends that this plea amounted to a waiver of his right to a jury determination of the fact of drug dependency, and meant that the trial court did not engage in judicial fact-finding forbidden by *Alleyne*, thus rendering no practical relief available in this case. In response, the defendant relies on *State* v. *Reynolds*, 126 Conn. App. 291, 11 A.3d 198 (2011), and *State* v. *Kokkinakos*, 143 Conn. App. 76, 66 A.3d 936 (2013), overruled in part on other grounds by *State* v. *Henderson*, 312 Conn. 585, 94 A.3d 614 (2014), to argue that his claim is not moot because a guilty plea to an offense, without an acknowledgment on the record from the defendant as to the specific facts that would trigger the increased sentence, does not waive

ted.) *State* v. *Delgado*, supra, 813. Concluding that the "defendant ha[d] not raised a colorable claim of invalidity that, if decided in his favor, would require resentencing"; id., 812–13; we determined that "the trial court no longer possesse[d] jurisdiction over the defendant's motion to correct." Id., 813.

We emphasize that *Delgado* does not stand for the proposition that the merits of a motion to correct are a jurisprudential ouroboros that are inextricably intertwined with the court's jurisdiction over the motion. Rather, we understand *Delgado* to be, in essence, a mootness decision, insofar as the subsequent statutory changes afforded the defendant all of the relief to which he was entitled from his pending motion to correct. See also *St. Pierre* v. *Solnit*, 233 Conn. 398, 401, 658 A.2d 977 (1995); *Connecticut State Medical Society* v. *Commission on Hospitals & Health Care*, 223 Conn. 450, 455, 612 A.2d 1217 (1992).

the predicate finding for enhancement. We agree with the defendant and conclude that this claim is not moot.

"Mootness implicates a court's subject matter jurisdiction and, therefore, presents a question of law over which we exercise plenary review. . . . For a case to be justiciable, it is required, among other things, that there be an actual controversy between or among the parties to the dispute . . . . [T]he requirement of an actual controversy . . . is premised upon the notion that courts are called upon to determine existing controversies, and thus may not be used as a vehicle to obtain advisory judicial opinions on points of law. . . . Moreover, [a]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Citations omitted; internal quotation marks omitted.) *State* v. *T.D.*, 286 Conn. 353, 361, 944 A.2d 288 (2008).

Again assuming that the defendant's interpretation of § 21a-278 (b) in light of *Alleyne* is colorable, we conclude that his *Alford* plea did not render this claim moot. Even if we assume, without deciding, that a guilty plea could affect the court's subject matter jurisdiction over a subsequent motion to correct premised on the failure to make a necessary finding,[17] there was no such

[17] The doctrinal correctness of this assumption is highly dubious. Our case law suggests that any waiver would not affect the court's jurisdiction over the motion to correct but, rather, the merits with respect to whether the sentence had in fact been imposed in an illegal manner. See *State* v. *T.D.*, supra, 286 Conn. 360 n.6 (collateral estoppel does not affect court's subject matter jurisdiction); *State* v. *Pecor*, 179 Conn. App. 864, 871–72, 181 A.3d 584 (2018) ("[T]he court could have granted the defendant relief by correcting the alleged illegal sentence that had been imposed . . . . Therefore, the issue was not moot. Furthermore, the court's conclusion that it lacked subject matter jurisdiction because the defendant was collaterally estopped from claiming that his new sentence was illegal was incorrect."); see also footnote 16 of this opinion.

plea in the present case. A guilty plea to an underlying offense does not, in the absence of a specific plea to the specific facts necessary to trigger an enhanced sentence, operate to waive the defendant's right to that specific finding. We find instructive *State* v. *Kokkinakos*, supra, 143 Conn. App. 83–85, in which the Appellate Court held that a defendant's plea to part A of an information alleging theft offenses, and part B of the information alleging persistent felony offender status under General Statutes (Rev. to 2007) § 53a-40 (j), operated to waive a *jury* finding that enhancement of his sentence was in the public interest, but not a *court* finding to that effect. The Appellate Court emphasized that the canvass was generally limited to a jury trial on part B of the information, and that the defendant "never expressly admitted that an enhancement of his sentence would serve the public interest." Id., 85–86. The court further rejected the state's argument that, "by virtue of the defendant's guilty plea on the part B information, he admitted to a finding that an enhanced sentence would be in the public interest." Id., 86; see id., 87 ("[T]here are two ways in which the public interest factor can be satisfied in the context of a guilty plea. The court can make an express finding, or the defendant can expressly agree to the determination."); see also *State* v. *Abraham*, supra, 152 Conn. App. 722–23 (trial court improperly relied on guilty plea to part B of information in dismissing motion to correct challenging firearms enhancement under General Statutes § 53-202k for lack of requisite jury findings); *State* v. *Reynolds*, supra, 126 Conn. App. 312 (concluding that remand was required because, "[a]fter the defendant made his guilty plea to the charge of being a persistent serious felony offender, the trial court did not make such a finding, nor did the defendant stipulate or acknowledge that extended incarceration is in the public interest"). Turning to the record in the present case, we conclude that

there was no waiver insofar as the defendant did not admit to lack of drug dependency, and the prosecutor's recitation of the facts did not contemplate that topic. See footnote 5 of this opinion. Accordingly, we conclude that the defendant's *Alford* plea did not render this claim moot.[18]

II

We now turn to the principal issue in the present appeal, namely, the defendant's request that we overrule *State* v. *Ray*, supra, 290 Conn. 602, in which we held that not requiring the state to plead and prove lack of drug dependency under § 21a-278 (b) does not violate *Apprendi* v. *New Jersey*, supra, 530 U.S. 466, because drug dependency is an affirmative defense that would mitigate a sentence. The defendant contends that we should overrule *Ray* because (1) the Supreme Court's subsequent decision in *Alleyne* v. *United States*, supra, 570 U.S. 99, requires the state to plead and prove beyond a reasonable doubt those facts, such as lack of drug dependency under § 21a-278 (b), which trigger mandatory minimum sentences, and (2) *Ray* was wrongly decided as a matter of statutory interpretation.

Our consideration of these claims is informed by a detailed review of § 21a-278 (b) and our 2009 decision in *Ray*. Section 21a-278 (b) provides in relevant part that "[a]ny person who . . . sells . . . to another person any narcotic substance . . . and who is not, at the time of such action, a drug-dependent person, for a first offense shall be imprisoned not less than five years or

[18] Given relevant and unchallenged Connecticut authority, we decline to follow the unreported decision in *People* v. *Faher*, Docket No. 328285, 2016 WL 6127902, *4 (Mich. App. October 18, 2016), on which the state relies for the proposition that "when a sentencing court imposes a sentence pursuant to the terms of a plea agreement bargained for and accepted by the defendant, the sentence is not affected by the court's perception of the mandatory or advisory nature of the sentencing guidelines; thus the constitutional concerns underpinning . . . *Alleyne* are not implicated."

more than twenty years . . . .'' See also footnote 1 of this opinion. In *Ray*, the defendant contended, inter alia, that ''(1) this court's previous cases construing § 21a-278 (b) and General Statutes § 21a-269[19] to require the defendant to prove by a preponderance of the evidence that he was drug-dependent were wrongly decided; [and] (2) if our interpretation of the statutes in those cases was correct, the requirement that he prove his dependence on drugs under §§ 21a-278 (b) and 21a-269 violates his due process right to have every element of the offense proved beyond a reasonable doubt . . . .'' (Footnote in original.) *State* v. *Ray*, supra, 290 Conn. 605–606.

In *State* v. *Ray*, supra, 290 Conn. 609–13, we first addressed the vitality of this court's cases considering the proof of drug dependency under § 21a-278 (b) in conjunction with § 21a-269, in particular *State* v. *Januszewski*, 182 Conn. 142, 438 A.2d 679 (1980), cert. denied, 453 U.S. 922, 101 S. Ct. 3159, 69 L. Ed. 2d 1005 (1981), and *State* v. *Hart*, 221 Conn. 595, 605 A.2d 1366 (1992). In *Januszewski*, this court held that, under the predecessor statutes to §§ 21a-269 and 21a-278, the burden was on the defendant to produce ''some substantial evidence tending to prove his drug dependency at the time of the offense'' in order to make ''the matter of his drug dependency . . . an issue in the case . . . .'' *State* v. *Januszewski*, supra, 169. Once the defendant placed his drug dependency in issue, the ''burden rest[ed] on the state, as it does in all other essential elements in the case, to prove beyond a reasonable doubt that the accused was not entitled to the benefit

[19] General Statutes § 21a-269 provides: ''In any complaint, information or indictment, and in any action or proceeding brought for the enforcement of any provision of this part, it shall not be necessary to negative any exception, excuse, proviso or exemption contained in said section, and the burden of proof of any such exception, excuse, proviso or exemption shall be upon the defendant.''

of [the] excuse, proviso or exemption claimed by him." (Internal quotation marks omitted.) Id.

Subsequently, in *State* v. *Hart*, supra, 221 Conn. 607, a majority of this court concluded, over a lengthy dissent by Justice Berdon; see footnote 20 of this opinion; that "*Januszewski* had been incorrectly decided and that the defendant should bear the burden of proving by a preponderance of the evidence that he was dependent on drugs under § 21a-278 (b)." *State* v. *Ray*, supra, 290 Conn. 610. "The majority [in *Hart*] determined that, under *Januszewski*, the absence of drug dependency was not an element of § 21a-278 (b), but, rather, drug-dependency was an exception to that statute within the meaning of § 21a-269. . . . The majority then concluded that it would 'overly strain the language [of § 21a-269] that places the "burden of proof" on a defendant to construe it merely to mean . . . that the defendant need only raise some evidence of his or her drug dependency to shift the burden to the state to prove a negative, i.e., lack of drug dependency, beyond a reasonable doubt.' . . . Accordingly, a majority of this court overruled what we characterized as dicta in [*State* v. *Brown*, 163 Conn. 52, 66–67, 301 A.2d 547 (1972)] and *Januszewski* that, once the defendant has produced some evidence that he is dependent on drugs, the burden shifts to the state to prove beyond a reasonable doubt that the defendant is not drug-dependent. . . . Rather, we concluded that '§ 21a-269 assigns to the defendant the burden of persuading the jury by a preponderance of the evidence that he or she is drug-dependent.' . . .

"Finally, the majority [in *Hart*] rejected the defendant's claim that this construction of § 21a-278 (b) was unconstitutional because it relieved the state of its burden of proving all of the elements of the offense. . . . We noted that, under the decisions of the United States Supreme Court in *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), and

Patterson v. *New York*, [432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977)], '[t]he federal due process clause does not bar state legislatures from placing the burden on a defendant to prove an affirmative defense or to prove that he or she falls within an exemption to liability for an offense.' " (Citations omitted; footnote omitted.) *State* v. *Ray*, supra, 290 Conn. 610–11; see *State* v. *Hart*, supra, 221 Conn. 608–11.

Subsequently, in *Ray*, we declined the defendant's invitation to follow the analysis of Justice Berdon's dissent in *Hart*,[20] which interpreted § 21a-278 (b) to be "effectively . . . an aggravated form of § 21a-277" and concluded that, "therefore, the 'not . . . a drug-dependent person' language in § 21a-278 (b) constitutes an

[20] In his dissenting opinion in *State* v. *Hart*, supra, 221 Conn. 615–22, "Justice Berdon contended that the absence of drug dependency is an element of § 21a-278 (b). . . . In support of this contention, he relied on the legislative history of the statute. . . . He noted that the sponsor of the bill, Representative Bernard Avcollie, had stated during debates on the proposed legislation that the intent of the bill is to give the state's attorney and the prosecuting attorney an opportunity to charge [a crime in addition to § 21a-277] which does carry a harder sentence which goes towards imprisoning the person who is not drug-dependent and who is, in fact, selling drugs for a profit. . . . Representative Avcollie also . . . stated that in order to charge under this law, a state's attorney . . . would have to take advantage of [§ 21a-277 (a)] . . . and have the party arrested and examined for drug dependency. In other words, you would first have to prove that he was or was not addicted and then charge him with the crime. . . . Justice Berdon argued that, in light of this legislative history, it was apparent that this court's holding in *Januszewski*, that the absence of drug dependency was not part of the prohibited conduct, was incorrect. . . . Rather, Justice Berdon argued, § 21a-278 (b) was promulgated for the sole purpose of making the charge of possession with intent to sell by a person who is not drug-dependent subject to more severe penalties than already available under existing law. . . .

"Justice Berdon also pointed out that, [i]f an exception is an integral part of the enacting or prohibition clause of a criminal statute, it is deemed an essential element of the crime, and the state must plead and prove that the defendant is not within the exception. . . . Where an exception to a prohibition is situated separately from the enacting clause, the exception is to be proven by the defense." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Ray*, supra, 290 Conn. 612–13.

aggravating factor that must be treated as an element and must be proven by the state." *State* v. *Ray*, supra, 290 Conn. 613. Observing specifically that § 21a-278 (b) lacked language "that typically connotes an exception," we acknowledged that "we might find persuasive" the defendant's interpretation in *Ray* of the statute's legislative history and language "[i]f we were writing on a blank slate." Id., 614. Nevertheless, we relied on the doctrine of stare decisis in declining to disturb *State* v. *Hart*, supra, 221 Conn. 595, emphasizing the apparent legislative acquiescence to that decision. *State* v. *Ray*, supra, 614–15; see id., 615 (finding "significant that the legislature has amended § 21a-278 [b] several times since our decision in *Hart*, and has chosen not to amend the statute to clarify that the absence of drug dependency was intended to be an element of the offense"). We reemphasized that "public policy militates strongly" in favor of the existing construction, given the difficulty for the state of disproving drug dependency in the first instance; id.; as "[a] defendant's drug dependency at the specific point of time in the past at which the offense occurred is certainly a matter . . . within his own knowledge." (Internal quotation marks omitted.) *State* v. *Hart*, supra, 610; see id. (noting that § 21a-269 "appears to be an implicit recognition by the legislature of the difficulty created when any party is given the burden of proving the nonexistence of a certain fact, especially where, as in this case, the fact is the nonexistence of a physical status of the defendant at one, usually distant, point prior in time," and that, unlike mental disease or defect, rules of practice do not provide "method by which to discover whether drug dependency will be an issue at trial" [internal quotation marks omitted]). Accordingly, in *Ray*, we "decline[d] to overrule our holdings in *Januszewski* and *Hart* that § 21a-278 (b) creates an exception for drug-dependent persons, and that the absence of drug dependency is not

an element of the offense. For similar reasons, we decline[d] to overrule our decision in *Hart* that the 'burden of proof' language of § 21a-269 requires the defendant to prove an exception by a preponderance of the evidence." *State* v. *Ray*, supra, 616.

In *Ray*, we next "address[ed] the defendant's claim that the requirement that the defendant prove drug dependency by a preponderance of the evidence under §§ 21a-278 (b) and 21a-269 is unconstitutional under the United States Supreme Court's decision in *Apprendi* v. *New Jersey*, [supra, 530 U.S. 466], and its progeny." *State* v. *Ray*, supra, 290 Conn. 616. In *Apprendi*, the United States Supreme Court held that, "under the [d]ue [p]rocess [c]lause of the [f]ifth [a]mendment, and the notice and jury trial guarantees of the [s]ixth amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (Internal quotation marks omitted.) *Apprendi* v. *New Jersey*, supra, 476.

In addressing the defendant's constitutional claim in *Ray*, we first conducted a survey of the relevant case law from the United States Supreme Court leading to *Apprendi*, namely, *Patterson* v. *New York*, supra, 432 U.S. 197, *McMillan* v. *Pennsylvania*, supra, 477 U.S. 79, and *Mullaney* v. *Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).[21] See *State* v. *Ray*, supra, 290

[21] We determined from this survey that "*Apprendi* did not change the constitutional landscape and that the holdings of *Mullaney*, *Patterson*, *McMillan* and *Apprendi* can be readily reconciled. First, under *Mullaney*, if a state chooses to treat a fact as an element of an offense, the state must prove that fact beyond a reasonable doubt, even if the state constitutionally could have treated the fact as an affirmative defense. . . . Second, under *Patterson*, if a state chooses to recognize a mitigating circumstance as an affirmative defense, it is not required 'to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate.' . . . There are, however, 'constitutional limits beyond which the [s]tates may not go in this regard.' . . . For example, a state constitutionally could not treat the fact that the defendant did not commit any of the conduct of which he is accused as an

Conn. 618–22. Applying the principles of those cases, we concluded in *Ray* "that placing the burden on the defendant to prove by a preponderance of the evidence a fact—drug dependency—that affects the severity of his punishment under § 21a-278 (b)" is not unconstitutional. Id., 623. We emphasized that the "defendant has not cited, and our research has not revealed, any authority for the proposition that drug dependency is the type of fact that constitutionally may not be treated as an affirmative defense under *Patterson* v. *New York*, supra, 432 U.S. 210. . . . Accordingly, the statute falls squarely within the holding of *Patterson* that the states constitutionally may treat mitigating circumstances as affirmative defenses. . . . We conclude, therefore, that placing the burden on the defendant to prove drug dependency under the statute is constitutional."[22] (Cita-

affirmative defense. . . . Third, under *McMillan*, a fact that exposes the defendant to a mandatory minimum sentence *within* the range allowed by the jury's verdict need not be found by the jury beyond a reasonable doubt. . . . Fourth, under *Apprendi*, if a fact allows the sentencing court to impose a punishment *exceeding* the range authorized by the jury's verdict, that fact has the character of an element despite its label as a sentence enhancement." (Citations omitted; emphasis in original; footnote omitted.) *State* v. *Ray*, supra, 290 Conn. 622–23.

[22] In disagreeing with the defendant's reliance in *Ray* on the structure of §§ 21a-277 (a) and 21a-278 (b) as indicating that lack of drug dependency is an aggravating factor under *Apprendi* insofar as the statutes "are identical, but the punishment for a violation of § 21a-278 (b) is more severe," we emphasized that, as "construed by this court in *State* v. *Januszewski*, supra, 182 Conn. 162–69, and *State* v. *Hart*, supra, 221 Conn. 607–11, the absence of drug dependency does not increase the penalty for the conduct prohibited by § 21a-277 (a). Rather, drug dependency is an affirmative defense to charges that the defendant engaged in the conduct prohibited by § 21a-278 (b), which happens to be the same as the conduct that is prohibited by § 21a-277 (a). In other words, it is not the absence of drug dependency that increases the range of punishment to which the accused is exposed under § 21a-277 (a), but rather, it is the presence of drug dependency that decreases the range of punishment to which the accused is exposed under § 21a-278 (b)." *State* v. *Ray*, supra, 290 Conn. 624–25. We acknowledged that "this distinction is formalistic" but emphasized that such "[f]ormal distinctions . . . can be constitutionally significant" under the case law of the United States Supreme Court, which defers to the construction of state law by the state's highest court in determining whether it passes constitutional muster. Id., 625–26.

tion omitted.) *State* v. *Ray*, supra, 624; see also id., 626 ("it is not unconstitutional to require the defendant to prove his drug dependency by a preponderance of the evidence under §§ 21a-278 (b) and 21a-269"). With this review of *Ray* in mind, we now turn to the defendant's claims in the present appeal.

A

We begin with the defendant's claim that the Supreme Court's decision in *Alleyne* v. *United States*, supra, 570 U.S. 99, requires us to overrule *State* v. *Ray*, supra, 290 Conn. 602, in which we held that the state was not constitutionally required to prove lack of drug dependency under § 21a-278 (b) because it is an affirmative defense that would mitigate a sentence. The defendant argues that *Ray*'s analysis of § 21a-278 (b) is improperly formalistic, in contrast to the substantive inquiry required by *Apprendi* and *Alleyne*, which requires consideration of the "effect" of the statutory language. The defendant contends that lack of drug dependency has the effect of increasing punishment "above what is otherwise legally prescribed"; *Alleyne* v. *United States*, supra, 108; by the otherwise identical § 21a-277 (a) and, therefore, is an element of the offense to be proven by the state. Accordingly, the defendant argues that the imposition of a mandatory minimum sentence was improper because the state did not prove, nor did the defendant admit, a lack of drug dependency. In response, the state contends that *Alleyne* does not undermine *Ray* because *Alleyne* is merely an extension of *Apprendi*, and we recognized in *Ray* that *Apprendi* neither affected facts that apply to mitigate a defendant's punishment or liability, nor overruled *Patterson* v. *New York*, supra, 432 U.S. 210, which held that states, consistent with due process, may treat mitigating circumstances as affirmative defenses that the defendant must prove by a preponderance of the evidence. We agree with the state and conclude that the constitutional

analysis in *Ray* remains good law subsequent to the United States Supreme Court's decision in *Alleyne*.

In *Alleyne*, the Supreme Court considered whether to overrule *Harris* v. *United States*, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002), which had "held that judicial [fact-finding] that increases the mandatory minimum sentence for a crime is permissible under the [s]ixth [a]mendment." *Alleyne* v. *United States*, supra, 570 U.S. 103. The Supreme Court noted that "*Harris* drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum," and overruled *Harris* and its earlier decision in *McMillan* v. *Pennsylvania*, supra, 477 U.S. 79, because "this distinction is inconsistent with our decision in *Apprendi* v. *New Jersey*, [supra, 530 U.S. 466], and with the original meaning of the [s]ixth [a]mendment. Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt. . . . Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." (Citation omitted.) *Alleyne* v. *United States*, supra, 103; see also id., 118 (Sotomayor, J., concurring) (recognizing overruling of *McMillan*). The court determined that the "essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime. It must, therefore, be submitted to the jury and found beyond a reasonable doubt."[23] Id., 115–16; see also *United States* v. *Delgado-*

[23] The Supreme Court emphasized, however, that in "holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial [fact-finding], does not violate the [s]ixth [a]mendment." *Alleyne* v. *United States*, supra, 570 U.S. 116. The court stated that "[e]stablishing what punishment is available by law and setting a specific punishment

Marrero, 744 F.3d 167, 191–92 (1st Cir. 2014) (failure to obtain jury findings of drug quantities required reversal of "aggravated crimes" triggering mandatory minimum sentence, but not underlying "core" narcotics and conspiracy offenses that did not have quantity as element, allowing for defendant to be "subject . . . to the default statutory range of penalties . . . regardless of the drug quantity involved"); *State* v. *Estrella J.C.*, 169 Conn. App. 56, 87–89, 148 A.3d 594 (2016) (noting that *Alleyne* required trial court to instruct jury that it had make specific finding that victim was under age of thirteen years at time of commission of crime for purposes of mandatory minimum under General Statutes § 53-21 [a] [2], but concluding that failure to do so was harmless error given lack of dispute over victim's age and fact that she was eleven years old at trial).

In considering whether *Alleyne* requires us to overrule *Ray*, we deem significant that *Alleyne*, like *Apprendi*, on which *Alleyne* is based, accords with *Patterson* v. *New York*, supra, 432 U.S. 197, insofar as it does not preclude states from utilizing affirmative defenses to mitigate or eliminate criminal liability. The decision of the United States Court of Appeals for the Seventh Circuit in *United States* v. *Zuniga*, 767 F.3d 712 (7th Cir. 2014), cert. denied, U.S. , 135 S. Ct. 1018, 190 L. Ed. 2d 886 (2015), is instructive on this point. In *Zuniga*, the Seventh Circuit, following its earlier decision in *United States* v. *Brown*, 276 F.3d 930, 933 (7th Cir.), cert. denied, 537 U.S. 829, 123 S. Ct. 126, 154 L. Ed. 2d 43 (2002), rejected an *Apprendi* challenge to the federal Armed Career Criminal Act, which placed the burden on the defendant to prove that his offense did not qualify as a serious violent felony for purposes

within the bounds that the law has prescribed are two different things. . . . Our decision today is wholly consistent with the broad discretion of judges to select a sentence within the range authorized by law." (Citation omitted; internal quotation marks omitted.) Id., 117.

of relief from the federal "three strikes" law; see 18 U.S.C. § 921 (a) (20) (2012); because, "while the prosecution must prove all elements of the charged offense beyond a reasonable doubt, legislation that creates affirmative defenses can place the burden of proving that affirmative defense on the defendant without violating *Apprendi*."[24] *United States* v. *Zuniga*, supra, 718–19. The Seventh Circuit reasoned that, because "the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum [under *Alleyne*] there is no reason we cannot apply the logic used in *Brown* . . . ." Id., 719. Emphasizing that multiple circuit courts of appeals had previously interpreted the civil rights restoration section of the three strikes law to be an affirmative defense, rather than an element of the offense, the Seventh Circuit concluded that "the [D]istrict [C]ourt properly decided whether [the defendant's] civil rights were restored because the underlying facts that could support that determination constitute an affirmative defense, not an element of the offense, and are not covered by *Alleyne*." Id.; see also, e.g., *United States* v. *Blake*, 858 F.3d 1134, 1137 (8th Cir.) (*Alleyne* did not require fact-finding by jury with respect to robbery safety valve under federal three strikes statute, 18 U.S.C. § 3559 [c] [3] [A], because it is affirmative

[24] Like *Ray* and *Brown*, other federal circuit courts of appeals have held that affirmative defenses eliminating or mitigating criminal liability do not violate *Apprendi*. See, e.g., *United States* v. *Thompson*, 554 F.3d 450, 455 (4th Cir.) (noting that interpretation of 18 U.S.C. § 3553 [f] "safety valve" statute for sentencing guidelines requiring defendant to prove entitlement amounted to affirmative defense that did not violate *Apprendi*), cert. denied, 558 U.S. 870, 130 S. Ct. 191, 175 L. Ed. 2d 120 (2009); *United States* v. *Snype*, 441 F.3d 119, 151–52 (2d Cir.) (no *Apprendi* violation when defendant must prove entitlement to relief from life sentence dictated by three strikes statute by clear and convincing evidence), cert. denied, 549 U.S. 923, 127 S. Ct. 285, 166 L. Ed. 2d 218 (2006); *United States* v. *Tarallo*, 380 F.3d 1174, 1192 (9th Cir. 2004) (requiring defendant to prove lack of knowledge as to existence of certain federal securities laws "does not run afoul of *Apprendi* because it establishes a partial affirmative defense, not an element of the crime"), modified on other grounds, 413 F.3d 928 (9th Cir. 2005).

defense that decreases sentence from mandatory life term), cert. denied, U.S. , 138 S. Ct. 257, 199 L. Ed. 2d 166 (2017); *United States* v. *Lizarraga-Carrizales*, 757 F.3d 995, 999 (9th Cir. 2014) (*Alleyne* did not require fact-finding by jury with respect to criminal history points for purposes of safety valve relief from narcotics mandatory minimum sentences under 18 U.S.C. § 3553 [f] [1] because defendant bears burden of proving entitlement), cert. denied, U.S. , 135 S. Ct. 1191, 191 L. Ed. 2d 145 (2015); *United States* v. *Harakaly*, 734 F.3d 88, 99 (1st Cir. 2013) (Rejecting *Alleyne* challenge to District Court's finding, for purposes of safety valve under 18 U.S.C. § 3553 [f] [4], that defendant had managerial role in narcotics conspiracy because "the jury verdict or guilty plea sets the baseline sentencing range based upon the minimum and maximum sentences, if any, authorized by statute for the offense of conviction. Judicial fact-finding that precludes safety-valve relief is permissible because it does not increase that baseline minimum sentence."), cert. denied, U.S. , 134 S. Ct. 1530, 188 L. Ed. 2d 462 (2014).

We conclude that *State* v. *Ray*, supra, 290 Conn. 602, remains good law in the wake of *Alleyne*. Although *Alleyne* extended *Apprendi* to mandatory minimum sentences, *Alleyne* did *not* disturb those portions of *Apprendi* that reaffirmed *Patterson* v. *New York*, supra, 432 U.S. 208–10, which upheld the states' prerogative to utilize affirmative defenses to mitigate or eliminate criminal liability without running afoul of due process. Moreover, *Alleyne* did nothing to disturb long-standing Supreme Court precedent holding that whether a sentencing factor is, in essence, an element requiring the state to plead and prove it beyond a reasonable doubt, or an affirmative defense, the pleading and proof of which may be allocated to the defendant, is a matter of state law for "authoritative" determination by state

courts interpreting state statutes; *Ring* v. *Arizona*, 536 U.S. 584, 603, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); insofar as "state courts are the ultimate expositors of state law," binding the federal courts "except in extreme circumstances . . . ." *Mullaney* v. *Wilbur*, supra, 421 U.S. 691; see also, e.g., *Riley* v. *Kennedy*, 553 U.S. 406, 425, 128 S. Ct. 1970, 170 L. Ed. 2d 837 (2008); *Bradshaw* v. *Richey*, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005). Accordingly, we now turn to the defendant's request that we reinterpret § 21a-278 (b) to render lack of drug dependency an element of that offense, thus requiring the state to plead and prove a lack of drug dependency to trigger the mandatory minimum sentence, in order for the statute to pass constitutional muster under *Alleyne*.

B

The defendant asks us to overrule *State* v. *Ray*, supra, 290 Conn. 595, as a matter of statutory interpretation, contending that the construction process required by General Statutes § 1-2z demonstrates that lack of drug dependency under § 21a-278 (b) is an element to be proven by the state, rather than an affirmative defense to be pleaded and proven by the defendant. In particular, the defendant compares § 21a-278 (b) to other criminal statutes and emphasizes its lack of language signaling that drug dependency is an affirmative defense, and that other criminal statutes treat the absence of a fact, such as consent, as an element. The defendant also relies on legislative history supporting the proposition that "[t]he enactment of § 21a-278 (b) . . . was intended to create an aggravated form of § 21a-277 (a), with a harsher punishment for nonaddicted predators who sold drugs for profit." In response, the state contends that the doctrine of stare decisis counsels in favor of not overruling *Ray*, emphasizing recent amendments to §§ 21a-277 (a) and 21a-278 (b)

in P.A. 17-17,[25] by which the legislature specifically intended to clarify, but not substantively change, the narcotics statutes. We agree with the state and decline the defendant's invitation to overrule *Ray* as a matter of statutory construction.

The governing principles are well settled. "The doctrine of stare decisis counsels that a court should not

[25] P.A. 17-17 repealed the existing language in §§ 21a-277 (a) and (b), and 21a-278 (a) and (b). With respect to the statutory subsections at issue in the present appeal, P.A. 17-17, § 1, replaced the language previously contained in § 21a-277 (a); see footnote 3 of this opinion; with the following: "(1) No person may manufacture, distribute, sell, prescribe, dispense, compound, transport with the intent to sell or dispense, possess with the intent to sell or dispense, offer, give or administer to another person, except as authorized in this chapter, any controlled substance that is a (A) narcotic substance, or (B) hallucinogenic substance.

"(2) Any person who violates subdivision (1) of this subsection (A) for a first offense, shall be imprisoned not more than fifteen years and may be fined not more than fifty thousand dollars, or be both fined and imprisoned, (B) for a second offense, shall be imprisoned not more than thirty years and may be fined not more than one hundred thousand dollars, or be both fined and imprisoned, and (C) for any subsequent offense, shall be imprisoned not more than thirty years and may be fined not more than two hundred fifty thousand dollars, or be both fined and imprisoned."

P.A. 17-17, § 2, replaced the language previously contained within § 21a-278 (b); see footnote 1 of this opinion; with the following: "(1) No person may manufacture, distribute, sell, prescribe, dispense, compound, transport with the intent to sell or dispense, possess with the intent to sell or dispense, offer, give or administer to another person, except as authorized in this chapter or chapter 420f, (A) a narcotic substance, (B) a hallucinogenic substance, (C) an amphetamine-type substance, or (D) one kilogram or more of a cannabis-type substance. *The provisions of this subdivision shall not apply to a person who is, at the time of the commission of the offense, a drug-dependent person.*

"(2) Any person who violates subdivision (1) of this subsection (A) for a first offense, shall be imprisoned not less than five years or more than twenty years, and (B) for any subsequent offense, shall be imprisoned not less than ten years or more than twenty-five years. The execution of the mandatory minimum sentence imposed by the provisions of this subdivision shall not be suspended, except that the court may suspend the execution of such mandatory minimum sentence if, at the time of the commission of the offense, such person was under the age of eighteen years or such person's mental capacity was significantly impaired, but not so impaired as to constitute a defense to prosecution." (Emphasis added.)

overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. . . . 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 decisionmaking consistency in our legal culture and . . . is an obvious manifestation of the notion that decisionmaking consistency itself has normative value. . . .

"Moreover, [i]n evaluating the force of stare decisis, our case law dictates that we should be especially wary of overturning a decision that involves the construction of a statute. . . . When we construe a statute, we act not as plenary lawgivers but as surrogates for another policy maker, [that is] the legislature. In our role as surrogates, our only responsibility is to determine what the legislature, within constitutional limits, intended to do. Sometimes, when we have made such a determination, the legislature instructs us that we have misconstrued its intentions. We are bound by the instructions so provided. . . . More often, however, the legislature takes no further action to clarify its intentions. Time and again, we have characterized the failure of the legislature to take corrective action as manifesting the legislature's acquiescence in our construction of a statute. . . . Once an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative acquiescence places a significant jurisprudential limitation on our own authority to reconsider the merits of our earlier decision. . . .

"Factors that may justify overruling a prior decision interpreting a statutory provision include intervening developments in the law, the potential for unconscionable results, the potential for irreconcilable conflicts and difficulty in applying the interpretation. . . . In addi-

tion, a departure from precedent may be justified when the rule to be discarded may not be reasonably supposed to have determined the conduct of the litigants . . . .'' (Citations omitted; internal quotation marks omitted.) *Spiotti* v. *Wolcott*, 326 Conn. 190, 201–203, 163 A.3d 46 (2017); see also, e.g., *State* v. *Ray*, supra, 290 Conn. 614–15; *State* v. *Salamon*, 287 Conn. 509, 519–22, 949 A.2d 1092 (2008).

As we observed in *State* v. *Ray*, supra, 290 Conn. 614, ''[i]f we were writing on a blank slate, we might find persuasive'' the defendant's interpretation of § 21a-278 (b), given the language of the statute and the fact that it ''finds some support in the chronology of the statutes and the [statute's] legislative history . . . .'' The doctrine of legislative acquiescence has, however, even more strength now than when we considered the identical issue in *Ray*. As the state points out, the legislature very recently amended our narcotics statutes in P.A. 17-17, ''An Act Implementing the Recommendations of the Connecticut Sentencing Commission Concerning a Technical Reorganization of Statutes Involving the Illegal Sale of Controlled Substances.'' The amendments did not in any way change the language of § 21a-278 (b) that we considered in *Ray*, which is strongly indicative of legislative acquiescence to the interpretation in that case. See P.A. 17-17, § 2; see also footnotes 1 and 25 of this opinion.

Moreover, the legislative history of P.A. 17-17 demonstrates that the amendments, which were recommended by the Connecticut Sentencing Commission after collaboration between the Judicial Branch, the Office of the Chief Public Defender, and the Division of Criminal Justice, were intended to be clarifying and *not* to make substantive changes to the narcotics stat-

utes.[26] See 60 S. Proc., Pt. 2, 2017 Sess., p. 797, remarks of Senator John Kissel (stating that bill "essentially in a nutshell rationalizes this section of the statutes but in no way changes any of the substance of our criminal justice laws affecting drugs and drug law violations"); 60 H.R. Proc., Pt. 9, 2017 Sess., p. 3594, remarks of Representative Steven Stafstrom ("This bill comes to us from our sentencing commission and recommends technical changes to reorganize our drug statutes in order to make them more user and reader friendly. I will emphasize that this bill . . . does not in any way change any of the existing penalties under our drug statutes.").

"[T]he legislature is presumed to be aware of the [courts'] interpretation of a statute and . . . its subsequent nonaction may be understood as a validation of that interpretation, particularly when it affirmatively amended the statute subsequent to [such] interpreta-

[26] The testimony of the various stakeholders before the Judiciary Committee in support of the bill subsequently enacted as P.A. 17-17 further indicates that the legislature did not intend its amendments to the narcotics statutes to effect substantive changes. See, e.g., *In re Elianah T.-T.*, 326 Conn. 614, 625 n.10, 165 A.3d 1236 ("[i]t is now well settled that testimony before legislative committees may be considered in determining the particular problem or issue that the legislature sought to address by the legislation" [internal quotation marks omitted]). For example, a statement issued by the Division of Criminal Justice in support of the bill described the proposed changes as "strictly technical in nature" and "designed to make the statute clearer with *no substantive changes*." (Emphasis added.) Conn. Joint Standing Committee Hearings, Judiciary, Pt. 8, 2017 Sess., p. 4253; see also id., pp. 4251–52, written remarks of Alex Tsarkov, executive director of the Connecticut Sentencing Commission (stating that "[t]his bill recognizes the need to improve the organization and comprehensibility of statutes concerning the illegal sale of controlled substances," and describing bill as "a small and technical fix" that did not classify offenses, change existing penalties, or change statutory placements or designations of offenses); id., p. 4254, written remarks of Judicial Branch (bill was intended to "create a statute that is neutral as to content, but that would read more clearly than existing law"); id., p. 4254A, written remarks of Deborah Del Prete Sullivan, Legal Counsel, Office of the Chief Public Defender ("[t]he proposed language clarifies the narcotic statutes to make them easier to interpret and apply").

tion, but chose not to amend the specific provision of the statute at issue." (Internal quotation marks omitted.) *Dairyland Ins. Co.* v. *Mitchell*, 320 Conn. 205, 215, 128 A.3d 931 (2016); see, e.g., *Spiotti* v. *Wolcott*, supra, 326 Conn. 203 (declining to overrule *Genovese* v. *Gallo Wine Merchants, Inc.*, 226 Conn. 475, 628 A.2d 946 [1993], because legislature had, over twenty-four year period, "taken no action that would suggest that it disagreed with our conclusion that [General Statutes] § 31-51bb was intended to bar the application of the doctrine of collateral estoppel to claims of statutory and constitutional violations brought after a claim involving the same issues had been finally resolved in grievance procedures or arbitration," despite this court's "implicit invitation" to reconsider that statute); *In re Tyriq T.*, 313 Conn. 99, 114, 96 A.3d 494 (2014) ("[b]y choosing not to legislatively overrule *In re Daniel H.*, [237 Conn. 364, 678 A.2d 462 (1996)], the legislature has acquiesced to this court's interpretation that the deletion of the final judgment language from the mandatory transfer provision was the elimination of the right to an immediate appeal"). Given the very recent changes to our narcotics statutes in P.A. 17-17, the language and legislative history of which demonstrate that the legislature did not intend to effect any substantive changes to the law, we similarly decline to disturb our long-standing interpretation of § 21a-278 (b) making drug dependency an affirmative defense, most recently in *State* v. *Ray*, supra, 290 Conn. 602.

III

Relying largely on this court's decision in *State* v. *McCahill*, 261 Conn. 492, 811 A.2d 667 (2002), the defendant also contends that construing drug dependency as an affirmative defense under § 21a-278 (b), whose elements are "otherwise identical" to § 21a-277 (a), violates the separation of powers under article second of the Connecticut constitution, as amended by article

eighteen of the amendments, by improperly allocating the judicial power of sentencing to the prosecutor, an executive branch actor who chooses the charges to file.[27] In response, the state contends that this issue is controlled by this court's decision in *State* v. *Darden*, 171 Conn. 677, 372 A.2d 99 (1976), which rejected a similar separation of powers challenge to a mandatory minimum sentencing scheme in the context of the larceny and robbery statutes. We agree with the state and conclude that the mandatory minimum sentence provision of § 21a-278 (b) does not violate the separation of powers.

"We begin with the well established proposition that [b]ecause a validly enacted statute carries with it a strong presumption of constitutionality, those who challenge its constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt. . . . In construing a statute, moreover, we will search for an effective and constitutional construction that reasonably accords with the legislature's underlying intent. . . . We also note that, [w]hen a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear. . . .

[27] The defendant seeks review of this unpreserved constitutional claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). Citing Appellate Court authority, *State* v. *Brescia*, 122 Conn. App. 601, 604 n.3, 999 A.2d 848 (2010), and *State* v. *Starks*, 121 Conn. App. 581, 592, 997 A.2d 546 (2010), the state argues, however, that *Golding* review of unpreserved constitutional claims is unavailable in an appeal from the denial of a motion to correct an illegal sentence, because the defendant has available the option of filing another motion to correct. Expressing no position on the correctness of the Appellate Court's decisions in *Brescia* and *Starks* with respect to the availability of *Golding* review in the context of motions to correct, we agree with the defendant that we should exercise our discretion to consider this claim, which presents a pure question of law subject to expeditious resolution, as compared to requiring him to file another motion to correct in the trial court.

"[T]he primary purpose of [the separation of powers] doctrine is to prevent commingling of different powers of government in the same hands. . . . The constitution achieves this purpose by prescribing limitations and duties for each branch that are essential to each branch's independence and performance of assigned powers. . . . It is axiomatic that no branch of government organized under a constitution may exercise any power that is not explicitly bestowed by that constitution or that is not essential to the exercise thereof. . . . [Thus] [t]he separation of powers doctrine serves a dual function: it limits the exercise of power within each branch, yet ensures the independent exercise of that power. . . .

"In the context of challenges to statutes whose constitutional infirmity is claimed to flow from impermissible intrusion upon the judicial power, we have refused to find constitutional impropriety in a statute simply because it affects the judicial function . . . . A statute violates the constitutional mandate for a separate judicial magistracy only if it represents an effort by the legislature to exercise a power which lies exclusively under the control of the courts . . . or if it establishes a significant interference with the orderly conduct of the Superior Court's judicial functions. . . . In accordance with these principles, a two part inquiry has emerged to evaluate the constitutionality of a statute that is alleged to violate separation of powers principles by impermissibly infringing on the judicial authority. . . . A statute will be held unconstitutional on those grounds if: (1) it governs subject matter that not only falls within the judicial power, but also lies exclusively within judicial control; or (2) it significantly interferes with the orderly functioning of the Superior Court's judicial role." (Citations omitted; internal quotation marks omitted.) *State* v. *McCahill*, supra, 261 Conn. 504–506; see also, e.g., *Persels & Associates, LLC* v.

Banking Commissioner, 318 Conn. 652, 668–70, 122 A.3d 592 (2015) (collecting cases).

As the state argues, resolution of the defendant's separation of powers claim is squarely controlled by this court's 1976 decision in *State* v. *Darden*, supra, 171 Conn. 677. In *Darden*, the defendant raised a separation of powers challenge to the second degree robbery statute, which imposed a mandatory minimum sentence of five years imprisonment. See id., 678. Applying the well settled test for determining whether a statute violates the separation of powers, the court observed that it "is rudimentary that the three branches of government do not exist in discrete, airtight compartments, and that the rule of separation of governmental powers cannot always be rigidly applied. . . . In this context it must be remembered that the constitution assigns to the legislature the power to enact laws defining crimes and fixing the degree and method of punishment and to the judiciary the power to try offenses under these laws and impose punishment within the limits and according to the methods therein provided. . . .

"In other words, the judiciary's power to impose a particular sentence is defined by the legislature, and there is no constitutional requirement that courts be given discretion in imposing a sentence. . . . In addition, the legislature may impose mandatory minimum terms of imprisonment for certain crimes, and may preclude the probation or suspension of a sentence." (Citations omitted.) Id., 679–80.

Noting that other federal and state courts have upheld mandatory minimum sentences, this court rejected the defendant's claim that the legislature had "unduly impinged upon the powers of the judiciary" by imposing a mandatory minimum sentence in the second degree

robbery statute.[28] Id., 681. Most significantly, the court rejected the argument that "a mandatory sentencing statute unconstitutionally delegates judicial power to the state's attorney because the latter could choose to prosecute for a crime which carries a mandatory sentence instead of for a crime which carries no such penalty."[29] Id., 682. Relying on the New York Court of Appeals' decision in *People* v. *Eboli*, 34 N.Y.2d 281, 313 N.E.2d 746, 357 N.Y.S.2d 435 (1974), this court observed that a "state's attorney has great responsibility and broad discretion with respect to selecting an appropriate charge. That power, however, is limited in the usual and lawful manner by the facts which the prosecutor may be reasonably expected to prove at trial. . . . There is no claim . . . that the state's attorney abused his discretion, and in fact the defendant was found guilty as charged in the information. Nor has the defendant challenged the sufficiency of the evidence to sustain his conviction. Under the circumstances, we cannot find a deprivation of constitutional rights."[30] (Citation

[28] In upholding the constitutionality of the mandatory minimum robbery sentence, the court also concluded that there "is a rational relationship between the protection of public safety and the imposition of a nonsuspendable sentence for the violent crime of second degree robbery, an essential element of which is the threatened use of a deadly weapon or dangerous instrument. . . . A statute establishing a mandatory jail sentence not only punishes perpetrators of violent crimes but it may also have a deterrent effect, which is a valid social purpose properly within the legislature's police power." (Citation omitted.) *State* v. *Darden*, supra, 171 Conn. 680–81.

[29] Thus, we disagree with the defendant's argument that *Darden* is not controlling because it "assert[ed] a legislative, not executive, encroachment upon judicial power."

[30] We note that the defendant does not ask this court to overrule our decision in *Darden*, which remains consistent with contemporary federal and state authority considering separation of powers challenges to mandatory minimum sentencing statutes, including those challenging the charging discretion that they afford to prosecutors. See, e.g., *United States* v. *Nigg*, 667 F.3d 929, 934–35 (7th Cir.), cert. denied, 566 U.S. 1030, 132 S. Ct. 2704, 183 L. Ed. 2d 61 (2012); *United States* v. *MacEwan*, 445 F.3d 237, 250–52 (3d Cir.), cert. denied, 549 U.S. 882, 127 S. Ct. 208, 166 L. Ed. 2d 144 (2006); *State* v. *Saari*, 152 Vt. 510, 517–19, 568 A.2d 344 (1989); see also *Mistretta* v. *United States*, 488 U.S. 361, 364, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989)

omitted.) *State* v. *Darden*, supra, 171 Conn. 682; see id., 682–83 (noting that jury could have found defendant guilty of lesser included offense of third degree robbery, which "carries no mandatory minimum sentence").

We disagree with the defendant's argument that *Darden* is distinguishable because it involved a single statute, in contrast to the present case, which has two "statutes with identical elements yet different sentencing provisions," insofar as in *Darden*, "[t]he prosecutor did not have the choice . . . between ranges of punishment for proof of identical elements." The prosecutor's choice, however, arises from the legislature's decision to classify narcotics offenses in the manner of §§ 21a-277 (a) and 21a-278 (b), which is consistent with its constitutionally assigned responsibility.[31] See *State* v. *Darden*, supra, 171 Conn. 679–80. Given the legislature's public policy decision to render these choices available to the prosecutor, the decision to charge under § 21a-278 (b) rather than § 21a-277 (a) is fundamentally no

(Rejecting separation of powers challenge to federal sentencing guidelines, and noting that "[h]istorically, federal sentencing—the function of determining the scope and extent of punishment—never has been thought to be assigned by the [United States] [c]onstitution to the exclusive jurisdiction of any one of the three [b]ranches of [g]overnment. Congress, of course, has the power to fix the sentence for a federal crime . . . and the scope of judicial discretion with respect to a sentence is subject to congressional control." [Citation omitted.]).

[31] Given that the classification of offenses is a uniquely legislative function, we find distinguishable *State* v. *McCahill*, supra, 261 Conn. 492, upon which the defendant relies. In *McCahill*, we concluded that No. 00-200, § 5, of the 2000 Public Acts, which eliminated the court's discretion to grant postconviction bail in any case "involving the use, attempted use or threatened use of physical force against another person," violated the separation of powers because "it significantly interferes with the orderly functioning of the Superior Court's judicial role." Id., 508–509. In so concluding, we observed that, particularly with respect to relatively minor offenses that implicated only short terms of imprisonment, this statute requiring immediate incarceration had the effect of rendering the right to appellate review "meaningless," depriving judges of the ability to continue cases for sentencing at a later date, or to impose sentences without incarceration. See id., 513–18.

different from the decision to charge robbery rather than a lesser offense of larceny. See *People* v. *Eboli*, supra, 34 N.Y.2d 289–90 (rejecting constitutional challenge to identically phrased first and second degree coercion statutes, which were felony and misdemeanor respectively, because, regardless of applicable statutory language, prosecutors ultimately retain discretion to make charging decisions that can significantly affect potential penalties); cf. *State* v. *O'Neill*, 200 Conn. 268, 278–80, 511 A.2d 321 (1986) (consistent with disjunctive "options" provided by statute, prosecutor has "broad discretion" to charge arson offenses in way that precludes lesser included offense instruction or requires mandatory minimum sentence upon conviction); *State* v. *Vaughn*, 20 Conn. App. 386, 391–92, 567 A.2d 392 (1989) (rejecting claim that prosecutor abused discretion by charging violation of § 21a-278 [b] "just to obtain a harsher sentence, when [the prosecutor] could have charged [the defendant] with a violation of . . . § 21a-277," given prosecutor's "considerable latitude" in charging and fact that defendant had "no constitutional right to elect which of two applicable statutes [would] be the basis of his indictment and prosecution" [internal quotation marks omitted]).

Thus, we emphasize that "it is well settled that a legislature can exercise its right to limit judicial discretion in sentencing by bestowing on prosecutors the right to make decisions that may curtail judicial discretion" because it is the legislative branch "that has the power to define a crime and set its punishment. Notwithstanding that we judges may have imposed a lesser sentence in the case before us, and question the application of draconian mandatory minimum sentences in some cases, our jurisprudential hands are tied. The great [Benjamin N.] Cardozo taught us long ago: The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. [B. Cardozo, The Nature of the

Judicial Process (1921), p. 141]. Although we recognize that a host of inequities inhere in many large mandatory sentences, the relief must come from the legislative arm of government and not from . . . judges . . . .'' (Internal quotation marks omitted.) *United States* v. *MacEwan*, 445 F.3d 237, 252 (3d Cir.), cert. denied, 549 U.S. 882, 127 S. Ct. 208, 166 L. Ed. 2d 144 (2006). We conclude, therefore, that the trial court properly denied the defendant's motion to correct an illegal sentence.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* NEMIAH ALLAN (SC 19880)

Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn, Js.*

Syllabus

The defendant, who was convicted of conspiracy to sell narcotics by a person who is not drug dependent and interfering with an officer, appealed from the trial court's denial of his motion to correct an illegal sentence. In that motion, the defendant claimed that his sentence had been imposed in violation of *Apprendi* v. *New Jersey* (530 U.S. 466) and *Alleyne* v. *United States* (570 U.S. 99), because the fact of drug dependency, which triggered a mandatory minimum sentence pursuant to the statue ([Rev. to 2009] § 21a-278) under which he was convicted, had neither been admitted by the defendant nor found by the jury. The trial court concluded that the defendant's arguments were foreclosed by *State* v. *Ray* (290 Conn. 602). On appeal, the defendant claimed, inter alia, that this court should overrule *Ray* and that the statutory scheme governing narcotics offenses violates the separation of powers clause in the Connecticut constitution. In addition, the state contended that the trial court lacked subject matter jurisdiction over the defendant's motion to correct. *Held* that the trial court properly denied the defendant's motion to correct; this court, having addressed the same jurisdictional and substantive claims in the companion case of *State* v. *Evans* (329 Conn. 770), adopted the reasoning and conclusion of that decision for the purposes of the present case.

Argued December 18, 2017—officially released August 21, 2018

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

Procedural History

Substitute information charging the defendant with the crimes of sale of narcotics by a person who is not drug dependent, sale of narcotics within 1500 feet of a school, possession of narcotics, conspiracy to sell narcotics by a person who is not drug dependent and interfering with an officer, brought to the Superior Court in the judicial district of New Haven, geographical area number seven, and tried to the jury before *B. Fischer*, *J.*; verdict and judgment of guilty of conspiracy to sell narcotics by a person who is not drug dependent and interfering with an officer, from which the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Bear* and *Pellegrino*, *Js.*, which affirmed the trial court's judgment; thereafter, the court, *S. Moore*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed. *Affirmed.*

Temmy Ann Miller, assigned counsel, with whom was *Owen Firestone*, assigned counsel, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *James Dinnan*, senior assistant state's attorney, for the appellee (state).

Opinion

ROBINSON, J. This appeal is the companion case to *State* v. *Evans*, 329 Conn. 770, A.3d (2018), which we also decide today. The defendant, Nemiah Allan,[1] appeals[2] from the judgment of the trial court

[1] We note that the defendant's name has been spelled inconsistently in various court documents in this case, including in the briefs in the present appeal. We use the spelling that is consistent with the operative information and a previous Appellate Court decision concerning the defendant. See *State* v. *Allan*, 131 Conn. App. 433, 27 A.3d 19 (2011), aff'd, 311 Conn. 1. 83 A.3d 326 (2014).

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

denying his motion to correct an illegal sentence. On appeal, the defendant claims that we should overrule *State* v. *Ray*, 290 Conn. 602, 966 A.2d 148 (2009), in which we interpreted General Statutes (Rev. to 2009) § 21a-278 (b)[3] to render drug dependency an affirmative defense to be proven by the defendant because (1) it is no longer good law in light of the subsequent decision of the United States Supreme Court in *Alleyne* v. *United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), and (2) it was wrongly decided as a matter of statutory interpretation. The defendant also argues that the narcotics statutory scheme, which gives the prosecutor the sole authority to decide whether to proceed under § 21a-278 (b), rather than the otherwise identical General Statutes (Rev. to 2009) § 21a-277 (a),[4] violates

[3] General Statutes (Rev. to 2009) § 21a-278 (b) provides: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any narcotic substance, hallucinogenic substance other than marijuana, amphetamine-type substance, or one kilogram or more of a cannabis-type substance, except as authorized in this chapter, and who is not, at the time of such action, a drug-dependent person, for a first offense shall be imprisoned not less than five years or more than twenty years; and for each subsequent offense shall be imprisoned not less than ten years or more than twenty-five years. The execution of the mandatory minimum sentence imposed by the provisions of this subsection shall not be suspended, except the court may suspend the execution of such mandatory minimum sentence if at the time of the commission of the offense (1) such person was under the age of eighteen years, or (2) such person's mental capacity was significantly impaired, but not so impaired as to constitute a defense to prosecution."

We note that the legislature has recently made certain clarifying, nonsubstantive changes to § 21a-278. See Public Acts 2017, No. 17-17, § 2; see also *State* v. *Evans*, supra, 329 Conn. 772. For the sake of convenience, all references to § 21a-278 in this opinion are to the 2009 revision of the statute.

[4] General Statutes (Rev. to 2009) § 21a-277 (a) provides: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any controlled substance which is a hallucinogenic substance other than marijuana, or a narcotic substance, except as authorized in this chapter, for a first offense, shall be imprisoned not more than fifteen years and may be fined not more than fifty thousand dollars or be both fined and imprisoned; and for a second

the separation of powers established by article second of the Connecticut constitution, as amended by article eighteen of the amendments. The state contends to the contrary, and also argues that the trial court lacked subject matter jurisdiction over the defendant's motion to correct because that motion failed to raise a colorable claim challenging his sentence. Although we conclude that the trial court had subject matter jurisdiction over the defendant's motion to correct, we disagree with the merits of the defendant's claims. Accordingly, we affirm the judgment of the trial court denying the defendant's motion to correct an illegal sentence.

The record reveals the following undisputed facts and procedural history. Following a jury trial, the defendant was convicted of conspiracy to sell narcotics in violation of § 21a-278 (b) and General Statutes § 53a-48, and interfering with a police officer in violation of General Statutes § 53a-167a (a).[5] No evidence concerning the defendant's drug dependency was presented at trial by the state or the defendant, and the trial court did not instruct the jury with respect to drug dependency. At sentencing, the court considered the defendant's history of narcotics convictions, and defense counsel argued that the defendant was not a career criminal but, rather, a career addict as a result of a painkiller

offense shall be imprisoned not more than thirty years and may be fined not more than one hundred thousand dollars, or be both fined and imprisoned; and for each subsequent offense, shall be imprisoned not more than thirty years and may be fined not more than two hundred fifty thousand dollars, or be both fined and imprisoned."

We note that the legislature has recently made certain clarifying, nonsubstantive changes to § 21a-277. See Public Acts 2017, No. 17-17, § 1; see also *State* v. *Evans*, supra, 329 Conn. 773.

[5] The state also charged the defendant with sale of narcotics by a person who is not drug-dependent in violation of § 21a-278 (b), sale of narcotics within 1500 feet of a school in violation of General Statutes (Rev. to 2009) § 21a-278a (b), and possession of narcotics in violation of General Statutes (Rev. to 2009) § 21a-279 (a). The jury found the defendant not guilty of these offenses.

addiction following a neck injury suffered in an automobile accident. The trial court, *B. Fischer*, *J.*, sentenced the defendant to a total effective sentence of twelve years imprisonment, followed by five years of special parole, to be served concurrently with a sentence that the defendant was serving for violation of probation. His conviction was subsequently affirmed on appeal. See *State* v. *Allan*, 131 Conn. App. 433, 443, 27 A.3d 19 (2011), aff'd, 311 Conn. 1. 83 A.3d 326 (2014).

Pursuant to Practice Book § 43-22, the defendant filed a motion to correct an illegal sentence, claiming, inter alia, that his sentence had been imposed in violation of *Alleyne* v. *United States*, supra, 570 U.S. 99, and *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), because the fact of drug dependency, which triggered the mandatory minimum sentence under § 21a-278 (b), was not admitted by the defendant or found by the fact-finder. The trial court, *S. Moore*, *J.*, denied the defendant's motion, concluding that *Alleyne* and *Apprendi* did not control because of this court's interpretation of § 21a-278 (b) in, among other cases, *State* v. *Ray*, supra, 290 Conn. 602, which held that drug dependency is an affirmative defense to be proven by the defendant, rather than an element of the offense to be proven by the state. The trial court denied the defendant's subsequent motion for reconsideration and rendered judgment denying the motion to correct an illegal sentence. This appeal followed.

The jurisdictional issues raised by the parties and the merits of the underlying arguments presented in this appeal are identical to those considered in *State* v. *Evans*, supra, 329 Conn. 770, which we also decide today. We conclude that our examination of these same issues in *Evans* thoroughly resolves the claims in the present appeal and that there is nothing in this case that would mandate a different result. Accordingly, we adopt the reasoning and conclusions of that opinion

herein. See, e.g., *State* v. *Drakes*, 321 Conn. 857, 864, 146 A.3d 21, cert. denied, U.S. , 137 S. Ct. 321, 196 L. Ed. 2d 234 (2016). We, therefore, conclude that the trial court properly denied the defendant's motion to correct an illegal sentence.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* EARL C. SIMPSON III (SC 19846)

Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn, Js.*

Syllabus

Convicted, on a plea of guilty of murder under *North Carolina* v. *Alford* (400 U.S. 25), the defendant appealed, claiming that the trial court had abused its discretion in failing to conduct an evidentiary hearing on his motion to withdraw his plea and by not conducting an adequate inquiry into his complaints about defense counsel. Before the trial court accepted the defendant's plea, it conducted a canvass at which it asked him, among other questions, whether he had a sufficient opportunity to discuss the plea with counsel, whether he understood the nature of the plea and the sentence to which he was exposed, and whether anyone was forcing or threatening him to enter the plea. The court also informed the defendant during the canvass that once he accepted the plea, he could not subsequently change his mind unless he had a valid legal reason for doing so. After the court accepted his plea but prior to sentencing, the defendant wrote two letters to the court in which he requested that he be allowed to withdraw his plea because he did not understand the charge against him and felt pressured by defense counsel to enter the plea. He also requested a new attorney and an evidentiary hearing. In addition, defense counsel filed a motion on the defendant's behalf to withdraw the plea. At the defendant's sentencing hearing, the trial court conducted a colloquy concerning the content of his letters and the motion to withdraw, and permitted the defendant to explain further the basis for that motion. The trial court questioned the defendant on his recall of the initial plea canvass and the replies that he had given to the various questions asked of him during that canvass. The trial court determined that, on the basis of the transcript of the initial plea

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

canvass and the defendant's explanation for his motion, the defendant presented no valid reason for withdrawal or for the court to conduct an evidentiary hearing. On appeal, the Appellate Court concluded that the trial court had abused its discretion in failing to conduct an evidentiary hearing on the defendant's motion to withdraw his plea because such a hearing was required by the rule of practice (§ 39-27 [2]) permitting the withdrawal of a plea when the defendant claims that the plea had been entered without his knowledge of the nature of the charge against him and because the record did not conclusively refute that claim. The Appellate Court also concluded that the trial court had abused its discretion in failing to conduct an inquiry into the defendant's complaints about counsel or his request for the appointment of new counsel. The Appellate Court reversed the trial court's judgment, and the state, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court incorrectly concluded that the trial court had abused its discretion in failing to conduct a hearing on his motion to withdraw his plea, the trial court having held such a hearing when it conducted a thorough evaluation of the defendant's rationale for withdrawing his plea, and no further evidentiary hearing was required because the defendant's allegations during the plea withdrawal hearing did not furnish a proper basis for withdrawal under Practice Book § 39-27: the trial court gave the defendant and defense counsel ample opportunity to present a factual basis for the motion through an open-ended inquiry, and built on that inquiry with a series of incisive questions, in response to which the defendant revealed that his reason for seeking to withdraw his plea changed from his belief that his attorney forced him to enter the plea to having remorse and having simply changed his mind, which was not among the grounds for withdrawal enumerated in § 39-27; moreover, it was irrelevant that the trial court did not explicitly label its inquiry into the defendant's motion as a hearing, and it was not improper for the trial court to have conducted the hearing on the motion during the sentencing hearing; furthermore, this court did not view the plea withdrawal hearing in isolation but evaluated it in light of the fact that the trial court had already provided the defendant with the safeguard of a thorough initial plea canvass.

2. The Appellate Court incorrectly concluded that the trial court had improperly failed to conduct a hearing on the defendant's request for new counsel, as the trial court was not required to hold such a hearing because the defendant's complaints about counsel were not substantial such that the court was required to inquire into the reasons underlying the defendant's dissatisfaction: the defendant's complaints about defense counsel were inextricably linked to the motion to withdraw his plea and were contradicted by the defendant's answers to questions during the initial plea canvass, which established that counsel did not coerce him into pleading guilty and that the defendant was satisfied with counsel's performance and advice; moreover, counsel's statement

to the defendant that he had "no chance of winning," which the defendant complained of, constituted advice, rather than a coercive threat to enter a plea, the defendant's complaint that counsel failed to file various motions merely indicated differences in opinion over trial strategy, the defendant's conclusory allegation that his counsel rendered ineffective assistance because he did not explain all of the elements of the crime of murder was belied by the answers the defendant had given during the initial plea canvass, and the defendant admitted at the plea withdrawal hearing that the true reason behind his dissatisfaction with counsel was a change of heart over his decision to enter a plea.

Argued March 27—officially released August 21, 2018

Procedural History

Substitute information charging the defendant with the crimes of felony murder, murder and robbery in the first degree, brought to the Superior Court in the judicial district of New Haven, where the defendant was presented to the court, *Clifford, J.*, on a plea of guilty to the charge of murder; thereafter, the state entered a nolle prosequi as to the charges of felony murder and robbery in the first degree; subsequently, the court denied the defendant's motion to withdraw the plea and rendered judgment in accordance with the plea, from which the defendant appealed to this court; thereafter, the appeal was transferred to the Appellate Court, *Beach*, *Keller* and *Bear*, *Js.*, which reversed the judgment of the trial court and remanded the case for further proceedings, and the state, on the granting of certification, appealed to this court. *Reversed; judgment directed.*

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Michael Dearington*, former state's attorney, and *Patrick J. Griffin*, state's attorney, for the appellant (state).

Deren Manasevit, assigned counsel, for the appellee (defendant).

KAHN, J. This appeal presents us with a common scenario: a trial court accepts a guilty plea after a proper canvass, but the defendant subsequently seeks to withdraw the plea due to a change of heart. The question that often emerges from this familiar context is the extent to which the trial court must inquire into the defendant's request. In this case, the Appellate Court concluded that the trial court abused its discretion by failing to conduct (1) an evidentiary hearing on the defendant's motion to withdraw his plea, and (2) an adequate inquiry into the defendant's request for new counsel. The state appeals[1] from the judgment of the Appellate Court reversing the judgment of conviction of the defendant, Earl C. Simpson III, following his guilty plea entered under the *Alford*[2] doctrine of murder in violation of General Statutes §§ 53a-54a (a) and 53a-8.[3] *State* v. *Simpson*, 169 Conn. App. 168, 171–72, 150 A.3d 699 (2016). The state claims that the Appellate Court improperly concluded that the trial court was required to hold hearings on the defendant's motion to withdraw his guilty plea and his request for new counsel. Alternatively, the state claims that the Appellate Court improperly concluded that the trial court did not conduct such hearings. The defendant counters that hearings on both the motion and the request were required, and that the Appellate Court properly con-

[1] We granted the state's petition for certification to appeal from the judgment of the Appellate Court, limited to the following issues: (1) "Did the Appellate Court properly conclude that the trial court erred in failing to conduct a hearing on the defendant's motion to withdraw his plea?" (2) "Did the Appellate Court properly conclude that the trial court erred in failing to conduct a hearing on the defendant's request for new counsel?" *State* v. *Simpson*, 324 Conn. 904, 151 A.3d 1289 (2016).

[2] *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[3] In addition, under a separate docket number, the defendant admitted that, by his criminal conduct, he had violated the terms of his probation.

cluded that the trial court failed to conduct them. We conclude that the trial court, after conducting a hearing on the defendant's motion to withdraw his guilty plea, properly denied the motion to withdraw, and, therefore, no evidentiary hearing was required. We also conclude that, under the circumstances of this case, no hearing was required on his request for new counsel. Therefore, the judgment of the Appellate Court is reversed.

The Appellate Court set forth the following facts and procedural history. "The defendant, represented by counsel, entered an *Alford* plea[4] in this case on September 19, 2014. The state, by way of a long form information, filed on June 29, 2012, charged the defendant in count one with felony murder under General Statutes §§ 53a-54c and 53a-8, in count two with murder as an accessory under §§ 53a-54a (a) and 53a-8, and in count three with robbery or attempt to commit robbery in the first degree in violation of General Statutes § 53a-134 (a) (1)." (Footnote added and omitted.) *State* v. *Simpson*, supra, 169 Conn. App. 172.

The defendant pleaded guilty under the *Alford* doctrine to murder in violation of § 53a-54a and admitted that he had violated his probation in violation of General Statutes § 53a-32. Then, "[t]he prosecutor addressed the court to set forth the factual basis underlying the plea

[4] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt, but consents to being punished *as if he were guilty* to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless. The entry of a guilty plea under the *Alford* doctrine carries the same consequences as a standard plea of guilty. By entering such a plea, a defendant may be able to avoid formally admitting guilt at the time of sentencing, but he nonetheless consents to being treated as if he were guilty with no assurances to the contrary." (Citation omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *State* v. *Faraday*, 268 Conn. 174, 204–205, 842 A.2d 567 (2004).

with respect to the murder count, as follows: '[W]ith respect to the plea on the second count of murder, the state is prepared to prove the following facts: On July 9, 2011, at about 6 p.m., New Haven police officers responded to the area of Howard Avenue and Putnam Street based upon a report of shots fired. They located the body of John Claude James, age twenty-six. It was evident to them that he had been shot several times. A later autopsy determined that he had been shot five times in the back area. All but one bullet had exited the body. [Those bullets] were never located.

" 'During the investigation, a witness stated she was in her apartment nearby. Moments after hearing the shots, Cody Franklin and the defendant . . . ran into her apartment. Franklin said that he had just shot someone. The witness also said [the defendant] offered her weed to say that he and Franklin had not been in her apartment. [The defendant] then called his sister, Isis Hargrove, asking her to pick them up. Franklin and the defendant . . . were a short time later seen getting into Isis' car and leaving the area. Also, a witness told [the] police he saw Franklin shoot . . . James and [the defendant] was with Franklin at the time.

" 'The crime scene investigation resulted in the location of six shell casings found in the immediate area where witnesses saw the shots being fired. A ballistics examination disclosed that five casings had been ejected from the same gun, while the sixth casing was ejected from a different gun. Such [evidence] is clearly consistent with there being two shooters. Another witness told police that he saw Franklin and [the defendant] together just before the shooting and saw . . . Franklin fire shots, but he did not admit that he had seen [the defendant] fire any shots.

" 'On May 19, 2014, the defendant . . . was being interviewed by a member of the State's Attorney's Office

in Waterbury in connection with another shooting. When asked about the previous shooting of . . . James, the defendant . . . admitted that he was one of the shooters.'[5]

"Thereafter, the court canvassed the defendant with respect to his [murder and probation] pleas. During the canvass, the defendant stated that he was not under the influence of any alcohol, drugs or medication; he had had a sufficient opportunity prior to the plea canvass to discuss his pleas with counsel; he was satisfied with his counsel's advice; he was entering his 'guilty plea' and his 'probation plea' voluntarily; and nobody was forcing or threatening him to enter the pleas. The defendant stated that he understood the rights he was giving up by entering his pleas, including his right against compulsory self-incrimination, his right to a trial by jury, and his right to confront his accusers.

"The following colloquy between the court and the defendant ensued:

* * *

" 'The Court: . . . On the crime of murder, the state would have to prove that with the intent to cause the death of another person, you caused the death of such person or of a third person, and that is punishable by up to sixty years in prison, twenty-five years at the minimum or nonsuspendable portion. Do you understand that?

" '[The Defendant]: Yes.'

"The court proceeded to ask the defendant if he understood the nature of an *Alford* plea and if he under-

[5] In a separate trial involving the James shooting, Franklin was convicted of "one count of murder in violation of . . . § 53a-54a (a), one count of felony murder in violation of . . . § 53a-54c, and one count of robbery or attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a) (1)." *State* v. *Franklin*, 162 Conn. App. 78, 81, 129 A.3d 770 (2015), cert. denied, 321 Conn. 905, 138 A.3d 281 (2016).

stood the sentence to which he was exposed as well as the agreement in place with the state for a sentence of thirty-two and one-half years imprisonment, with a twenty-five year minimum sentence. The defendant stated that he understood these matters and that no additional promises had been made to him with respect to the pleas. The court stated: 'Once I accept these pleas, you can't change your mind later on unless there's some valid legal reason. Do you understand that?' The defendant replied affirmatively. At the conclusion of the canvass, the defendant stated that he had understood the questions directed to him by the court and that there was nothing that he wished to raise to the court or his attorney prior to the court's acceptance of the pleas.

"The court accepted the defendant's pleas, finding that they were 'understandably made with the assistance of competent counsel.' The court found that the defendant was 'guilty' and that he had violated his probation. The court then continued the matter to a later date.

"By handwritten letter dated October 27, 2014, and addressed to the court, the defendant stated that he wanted to withdraw his [murder] plea and that he desired a new attorney. In relevant part, the letter, signed by the defendant, stated: 'I request to withdraw my guilty plea. I have a legitimate claim. I am not guilty of murder. I am claiming ineffective counsel. I was not explained all elements of the crime of murder. There was no testimony at . . . Franklin's trial that I assisted, aided, or conspiracy. There was no intent on my part. The mere fact that I did not assist and help . . . Franklin from the testimony of the state witnesses is enough to have the charges against me dismissed.

" 'Had my attorney investigated and told me all the facts I wouldn't have pled guilty to a charge that I didn't

commit. I felt pressured to take the plea because I was told I had "no chance" of winning [at] trial. Individuals trying to say I confessed to things I did not. I didn't sign anything or state anything on the record. (About this so-called confession.)

" 'I need a new attorney and I need for him to request a "[m]otion to vacate" and a[n] "evidentiary hearing." My counsel also failed to file a "motion to dismiss" the murder charges after . . . Franklin's trial. Please look into this matter.'

"Additionally, the defendant wrote: 'My attorney never told me the difference between accessory after the fact and obstruction of justice, and aiding and abetting. I never and did not encourage, and or facilitate or participate in the crime by the testimony of the state witness. I had "NO" knowledge that anyone was going to kill anyone. I request a new attorney and to withdraw my plea. Also a[n] evidence hearing on this matter. Ineffective counsel and evidence hearing. Please withdraw my plea. I couldn't make an intelligent decision. Please look into this matter.'

"On December 4, 2014, through counsel, the defendant filed a motion to withdraw his guilty plea pursuant to Practice Book §§ 39-26 and 39-27. In relevant part, the motion stated: 'In subsequent written and oral communications between the defendant and undersigned counsel, the defendant has indicated he did not possess knowledge or fully understand the sentence that could be imposed or the consequences thereto at the time he entered the guilty plea.' The state filed a written opposition to the defendant's motion. . . .

"By a second handwritten letter, dated December 8, 2014, and addressed to the court, the defendant renewed his request to withdraw his plea and for new counsel. The letter, signed by the defendant, stated in relevant part: '[T]here are a few things I would like to

bring to your attention. First and foremost, I was in (special aid) in school and didn't have enough time to be fully explained anything about my charges. I just came and it was on the table. (Accept or reject.) My lawyer never explained the full conditions to . . . such charge I was suppose[d] to plea to in which any evidence points to me as an accessory to. I never had a legal visit or anything. I would really like to take this plea back. My lawyer talked me into something I didn't want to do. I was confused. When I came to court I've told him this personally and that I would like a new lawyer. ([In]effective counsel.) He didn't put any motions in to try to get any hearings when I asked for some. When I was explained about my charge after the fact I told him to withdraw my plea. He wants to wait until the last minute going against my wishes. This is my life on the line and I would like to withdraw and go to trial. Because I'm not responsible for this charge that's against me. Please. I would really appreciate it a lot. Also requesting a new lawyer. I told my old lawyer, Thomas Farver, [that] I wanted to request a new one and I don't think he put it in and went around what I said. I have [a] court [appearance on December] 19, 2014 that is suppose[d] to be a sentencing date. I really hope you grant the motion for my plea to be withdrawn.'

"The defendant, represented by counsel, appeared in court on December 19, 2014, for sentencing. At the beginning of the hearing, the court stated: 'I know the defendant had sent some letters to me which seemed to indicate that, possibly, he was interested in withdrawing his plea.' . . . The following colloquy then occurred:

" 'The Court: So, I guess I should . . . ask [the defendant] . . . is he still pursuing a motion to withdraw this plea? . . .

" '[The Defendant]: Mm-hm. Yes.

" 'The Court: All right. And the basis I just read that your lawyer put in [the motion to withdraw the plea], is that . . . you did not possess knowledge or fully understand the sentence or the consequences thereto?

" '[The Defendant]: Yes.

" 'The Court: All right. Do you want . . . to explain it any more than that? Why is it you . . . want to withdraw your plea?

" '[The Defendant]: Why do I want to—because I feel like everything wasn't explained. It was like, as soon as I got to court, boom, it's just like . . . take this right now. You go to trial, you losing. It was like I was forced to take it. I felt like I was forced to take the plea.

" 'The Court: And who forced you to take the plea; the system, you mean, or the court or—

" '[The Defendant]: No, my lawyer.

" 'The Court: Your lawyer, how did he force you?

" '[The Defendant]: It's like, he told me right there, if I don't take it . . . I'm gonna lose; that's what he said.

* * *

" 'The Court: All right. I mean, it is a matter of, just, you're changing your mind now, kind of, like, buyer's remorse, or did you think about it longer and think you just, you know, maybe you didn't make the right decision; is that what it is?

" '[The Defendant]: Yes.'

"The court then referred to the transcript from the plea canvass on September 19, 2014. The court asked the defendant if he remembered the court having asked him a series of questions at that earlier proceeding. The defendant replied, 'Yeah. Yeah, somewhat.' The court asked the defendant if he recalled answering that he

was not under the influence of alcohol, drugs, or medication and that he had had a sufficient opportunity to discuss the plea with his attorney. The defendant replied, 'No.' The court asked the defendant if he recalled answering that he was satisfied with his attorney's advice concerning the pleas, that he was entering the pleas voluntarily, and that nobody was forcing or threatening him to enter the pleas. The defendant replied, 'Yeah, some of it.' Additionally, the court asked the defendant if he recalled answering that no additional promises had been made to him, and that he understood that he would not be permitted to change his mind and withdraw his pleas absent a valid legal reason to do so. The defendant replied, 'Yes.'

"The following colloquy then ensued:

" 'The Court: In other words, so the transcript seems to bear out that a lot of questions I asked you was, did you need more time with your lawyer, are you satisfied with your lawyer's advice, is anybody forcing you to do this. And the transcript reflects, and so does my recollection, that you . . . answered everything appropriately at that time. And as you've just answered me today, it sounds like you just thought . . . longer over it since that day and you really just want to change your mind. Is that right?

" '[The Defendant]: Yes.'

"When asked if he wished to be heard, the defendant's attorney stated: 'I don't have anything to add other than the representations in the motion as reasons that my client gave me that he wish[ed] to withdraw the plea. And I don't see, in the transcript [of the plea canvass], any technical reasons that would be supported by the Practice Book.' When afforded an opportunity to address the court with respect to the motion to withdraw the plea, the prosecutor added, in addition to his

written objection, that the defendant had prior experience in the criminal justice system.

"The court stated: 'The problem I'm having . . . and I know it was a big decision, and I know we're talking, obviously, about a . . . very long prison sentence, I certainly understand that, but, you know, there is no right to have a plea withdrawn after the plea has been entered and [the defendant has been] canvassed by the court. And the burden of proof is certainly on you to show a plausible reason for the withdrawal of that. And the problem is that . . . a lot of the statements that are in the written motion are very conclusory type of statements. There aren't a lot of facts or meat to it, so to speak.

" 'And it certainly sounds like . . . from what you've indicated . . . it's more of the change of heart after thinking about it longer while waiting to be sentenced, by your own admission here today. Because the transcript [of the plea canvass] clearly bears [that] out and, certainly, so does my recollection, that you certainly appeared to understand what was going on. You indicated no force was being used or no threats to you, that your . . . plea was voluntary.

" 'So, certainly, based on what you said here today, based on the transcript of the plea proceedings, I don't think there's . . . a valid reason to withdraw your plea at this time or even to give you . . . any type of an evidentiary hearing. So, I'm going to deny the request.' " (Footnote added and omitted.) Id., 173–82. The court then "vacated the defendant's probation and imposed a sentence of thirty-two and one-half years of imprisonment, twenty-five years of which is nonsuspendable." Id., 183.

The defendant appealed, claiming that the trial court abused its discretion by denying his motion to withdraw his guilty plea, and, alternatively, that the trial court

failed to conduct the requisite evidentiary hearing on that motion. Id., 171. The defendant also alleged that the trial court abused its discretion by not inquiring into his complaints about counsel.[6] Id.

With regard to the defendant's motion to withdraw his guilty plea, the Appellate Court agreed that the trial court "abused its discretion in failing to conduct [an] evidentiary hearing . . . to determine whether the defendant understood the nature of the charge to which he pleaded guilty under the *Alford* doctrine." Id., 194. It reasoned that such a hearing was required, pursuant to Practice Book § 39-27 (2); id., 190–91; which lists as one of the grounds for withdrawing a guilty plea, circumstances in which the "plea was involuntary, or . . . entered without knowledge of the nature of the charge . . . ." Practice Book § 39-27 (2). The Appellate Court held that, by alleging that he did not understand "the nature of the charge," the defendant met the requirements of § 39-27 (2), and an evidentiary hearing on the matter was required because the record did not conclusively refute his claim. *State* v. *Simpson*, supra, 169 Conn. App. 190–91, 200. Specifically, the Appellate Court expressed concern that the record did not refute the defendant's claim that he did not understand the distinction between culpability for murder as a principal and as an accessory, and that the plea was therefore unknowing and involuntary. Id. The Appellate Court also concluded that "the court abused its discretion by failing to inquire into [the defendant's] complaints" about counsel. Id., 200. It observed that the defendant

[6] The defendant further asserted that, by "failing to address the grievances that the defendant raised to the court concerning his attorney," the trial court violated his right to counsel. *State* v. *Simpson*, supra, 169 Conn. App. 171. The Appellate Court did not reach the merits of that claim. Id., 204 n.16. The defendant also claimed that the trial court "abused its discretion by accepting the plea and that its acceptance of the plea violated the defendant's right to due process." Id., 171. The Appellate Court did not reach that issue. Id., 200 n.14.

made "a seemingly substantial complaint concerning a breakdown in the relationship between [him] and his counsel"; id., 202; and that "the court failed to conduct *any* type of inquiry into the defendant's grievances or his request for the appointment of a new attorney." (Emphasis in original.) Id., 204. The Appellate Court therefore reversed the judgment of the trial court. Id. This certified appeal followed.

As a preliminary matter, we observe that we granted certification to determine whether a hearing was required on either the defendant's motion to withdraw his plea or his request for new counsel, not whether an *evidentiary* hearing was required. See *State* v. *Simpson*, 324 Conn. 904, 151 A.3d 1289 (2016); see also footnote 1 of this opinion. By necessity, however, we are modifying the first certified issue to better reflect the Appellate Court's conclusion that an *evidentiary* hearing was required on the defendant's motion to withdraw his guilty plea. Therefore, the first issue presented is whether the Appellate Court properly concluded that the trial court erred in failing to conduct an *evidentiary* hearing on the defendant's motion to withdraw his plea. We need not modify the second issue, however, which is whether the Appellate Court properly concluded that the trial court abused its discretion by failing to conduct a hearing or an adequate inquiry into the defendant's request for new counsel.

The state argues that the trial court was not required to hold a hearing on the motion to withdraw the plea, because, among other reasons, the defendant was represented by counsel who conceded that there were no grounds for withdrawal. Additionally, the state claims that the trial court was not required to hold a hearing on the defendant's request for new counsel because his complaints were insubstantial. Alternatively, the state asserts that the trial court granted hearings on both the

motion to withdraw and the request for new counsel.[7] Therefore, the state claims, the trial court did not abuse its discretion. In response, the defendant argues that his claims, "if true, constituted sufficient grounds to withdraw the plea as not knowing and voluntary, warranting an evidentiary hearing to determine that issue." Thus, the defendant contends, the trial court abused its discretion in failing to hold such a hearing. The defendant also asserts that his statements about counsel indicated a breakdown in communication amounting to a substantial complaint, which required a hearing on the request for new counsel, which the trial court failed to conduct.

We conclude that the trial court conducted a hearing on the defendant's motion to withdraw his guilty plea, after which no further evidentiary hearing was required, because his allegations did not furnish a proper basis for withdrawal under Practice Book § 39-27. We also hold that the trial court was not required to conduct a hearing on the defendant's request for new counsel. We address the reasoning behind each conclusion in turn.

I

The state's first claim is that the Appellate Court improperly concluded that the trial court deprived the defendant of a hearing on his motion to withdraw his guilty plea because the trial court actually conducted such a hearing. Alternatively, the state asserts that the trial court was not required to hold a hearing on the motion. We conclude that the trial court did conduct a hearing on the motion to withdraw and that an evidentiary hearing was not necessary.[8]

[7] At oral argument, the state conceded the weakness of its argument that the trial court conducted a hearing on the request for new counsel.

[8] The defendant argues at length that his plea was not knowing and voluntary, and that the record failed to refute his claim that it was not. We are not persuaded. First, to the extent that the defendant challenges the plea due to his alleged confusion regarding the distinction between culpability for murder as an accessory, as opposed to as a principal, we observe that

"As a preliminary matter, we set forth the applicable standard of review. It is well established that [t]he burden is always on the defendant to show a plausible reason for the withdrawal of a plea of guilty. . . . To warrant consideration, the defendant must allege and provide facts which justify permitting him to withdraw his plea under [Practice Book § 39-27]. . . . Whether such proof is made is a question for the court in its sound discretion, and a denial of permission to withdraw is reversible only if that discretion has been abused. . . . In determining whether the trial court [has] abused its discretion, this court must make every reasonable presumption in favor of [the correctness of] its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did. . . .

"Motions to withdraw guilty pleas are governed by Practice Book §§ 39-26 and 39-27. Practice Book § 39-26 provides in relevant part: A defendant may withdraw his . . . plea of guilty . . . as a matter of right until the

"there is no practical significance in being labeled an accessory or a principal for the purpose of determining criminal responsibility. . . . The accessory statute merely provides alternate means by which a substantive crime may be committed." (Citations omitted; internal quotation marks omitted.) *State* v. *Montanez*, 277 Conn. 735, 755–56, 894 A.2d 928 (2006). Indeed, in the present case, the state set forth a factual basis for the plea that could have established the defendant's criminal responsibility as an accessory *or* as a principal, given that ballistic evidence indicated two shooters and the defendant admitted to being one of them. *State* v. *Simpson*, supra, 169 Conn. App. 173–74. Thus, any confusion by the defendant over whether he was pleading guilty as an accessory or as a principal is irrelevant—the state's factual basis put him on notice of both theories, and there is no practical difference between them. Second, the defendant's argument that the plea was not knowing and voluntary and, therefore, required an evidentiary hearing, is incorrect. As we explain in part I of this opinion, the trial court held a hearing on the defendant's request to withdraw his plea and properly concluded that an evidentiary hearing was not warranted because the defendant's true reason for withdrawal was that he had simply changed his mind.

plea has been accepted. After acceptance, the judicial authority shall allow the defendant to withdraw his . . . plea upon *proof* of one of the grounds in [Practice Book §] 39-27 . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Anthony D.*, 320 Conn. 842, 850, 134 A.3d 219 (2016).

"We further observe that there is no language in Practice Book §§ 39-26 and 39-27 imposing an affirmative duty upon the court to conduct an inquiry into the basis of a defendant's motion to withdraw his guilty plea." Id., 851. "[T]he administrative need for judicial expedition and certainty is such that trial courts cannot be expected to inquire into the factual basis of a defendant's motion to withdraw his guilty plea when the defendant has presented no specific facts in support of the motion. To impose such an obligation would do violence to the reasonable administrative needs of a busy trial court, as this would, in all likelihood, provide defendants strong incentive to make vague assertions of an invalid plea in hopes of delaying their sentencing." Id., 860–61.

When the trial court does grant a hearing on a defendant's motion to withdraw a guilty plea, the requirements and formalities of the hearing are limited. See *State* v. *Watson*, 198 Conn. 598, 609, 504 A.2d 497 (1986) (describing proceeding as plea withdrawal hearing at which defendant was given opportunity to articulate support for motion in court, and state responded). Indeed, a hearing may be as simple as offering the defendant the opportunity to "present his argument" on his motion for withdrawal. Id. As one court observed, an *evidentiary* hearing is rare, and, outside of an evidentiary hearing, "often a limited interrogation by the [c]ourt will suffice [and] [t]he defendant should be afforded [a] reasonable opportunity to present his contentions." (Internal quotation marks omitted.) *Thomas* v. *Senkowski*, 968 F. Supp. 953, 956 (S.D.N.Y. 1997).

Thus, when conducting a plea withdrawal hearing, a trial court may provide the defendant an opportunity "to present a factual basis for the motion" by asking open-ended questions. *State* v. *Anthony D.*, supra, 320 Conn. 856. In *State* v. *Anthony D.*, supra, 856, for example, this court concluded that the trial court had afforded defense counsel an opportunity to support a plea withdrawal motion when it asked, " '[a]s an officer of the court, do you know of any defect in that plea canvass that would allow the court to, in fact, take back the plea at this time?' "

Furthermore, in assessing the adequacy of the trial court's consideration of a motion to withdraw a guilty plea, "we do not examine the dialogue between defense counsel and the trial court . . . in isolation" but, rather, evaluate it in light of other relevant factors, such as the thoroughness of the initial plea canvass. Id., 857–58. We observe that other courts have similarly flexible conceptions of plea withdrawal hearings. See, e.g., *United States* v. *Davis*, Docket No. 99-1246, 2000 WL 1728072, *1 (2d Cir. November 21, 2000) (describing court proceeding as plea withdrawal hearing at which defendant, "defense counsel, and an [a]ssistant United States [a]ttorney appeared," and defendant "reiterated that he wanted to withdraw his plea").

This flexibility is an essential corollary of the trial court's "authority to manage cases before it as is necessary." *Krevis* v. *Bridgeport*, 262 Conn. 813, 819, 817 A.2d 628 (2003). "The case management authority is an inherent power necessarily vested in trial courts to manage their own affairs in order to achieve the expeditious disposition of cases." Id. Therefore, the trial court is not required to formalistically announce that it is conducting a plea withdrawal hearing; nor must it demarcate the hearing from other related court proceedings. It may conduct a plea withdrawal hearing as part of another court proceeding, such as a sentencing

hearing. See *State* v. *Watson*, supra, 198 Conn. 600, 609 and n.6 (finding no error where trial court probed into defendant's motion for plea withdrawal "immediately" before "sentencing proceedings"). When a trial court inquires into a defendant's plea withdrawal motion on the record, it is conducting a plea withdrawal hearing. See id., 609 (describing proceeding as plea withdrawal hearing where defendant presented arguments for withdrawing plea, state responded, and defendant rebutted).

In the present case, the trial court conducted a hearing on the defendant's motion to withdraw his guilty plea. The record reflects that the trial court gave the defendant a "reasonable opportunity to present his contentions." (Internal quotation marks omitted.) *Thomas* v. *Senkowski*, supra, 968 F. Supp. 956.

A review of the trial court's approach illustrates the adequacy of the hearing. The court began by confirming that the defendant was indeed pursuing a motion to withdraw his plea, and that it was because he did not understand "the sentence or the consequences thereto."[9] The trial court then asked if the defendant wanted to "explain [his motion to withdraw the guilty plea] any more than that."[10] Thus, it allowed the defen-

[9] The defendant argues that "the [trial] court did not establish [the] defendant was even aware of defense counsel's motion" and that the defendant might not have understood this question. We are not persuaded by this speculation.

[10] We interpret the trial court's question as referring to both the defendant's letters and his attorney's motion to withdraw the guilty plea. Therefore, we need not consider the defendant's arguments that the trial court should have entertained the letters because we conclude that it did so in the present case. Indeed, the trial court acknowledged receipt and review of the defendant's letters. Thus, we are not persuaded by the defendant's claim that the hearing was inadequate because the court focused on the motion filed by defense counsel, rather than the defendant's letters. By asking an open-ended question, the trial court afforded the defendant an opportunity to present all of his reasons for seeking to withdraw his guilty plea, not only those contained in his attorney's motion. Additionally, as we explain subsequently, the court's questions provided an ample opportunity for the defendant to explain his rationale for the plea withdrawal, including the reasons outlined in the letters.

dant "to present a factual basis for the motion" through an open-ended question. *State* v. *Anthony D.*, supra, 320 Conn. 856.[11]

The trial court built upon that initial open-ended inquiry with a series of incisive questions, in response to which the defendant's core argument changed. At first, the defendant criticized his attorney's advice, and explained that he believed that his attorney forced him to take the plea. When the trial court subsequently asked if the defendant's rationale was that he had simply changed his mind and had "buyer's remorse," the defendant responded affirmatively. Faced with two conflicting justifications for the motion to withdraw, the trial court then took the time to review the transcript of the prior plea canvass with the defendant. Relying on the transcript, the trial court reminded the defendant that he had already informed the court that he was "satisfied with [his] attorney's advice," had a sufficient opportunity to discuss the plea with his attorney, and was entering the plea of his own free will. The defendant also admitted that, during the prior plea canvass, he had agreed that, once the trial court accepted his plea, he would not be able to withdraw it without a valid legal reason. After the review of the plea canvass, the trial court asked the defendant: "[I]t sounds like you just thought . . . longer over [the plea] since that day and

[11] The defendant attempts to distinguish *State* v. *Anthony D.*, supra, 320 Conn. 860, from the present case because, in that case, "neither the defendant nor his attorney requested an evidentiary hearing . . . ." That distinction is not persuasive, however, because it was not the lack of a request for an evidentiary hearing that was determinative in *Anthony D.* but, rather, that the defendant failed to articulate "specific concerns or facts . . . to justify the withdrawal of the defendant's guilty plea at sentencing . . . ." Id., 862. The defendant's failure to request an evidentiary hearing was merely one consideration, among many, that this court considered in concluding that "the defendant was afforded a reasonable opportunity to satisfy his burden of presenting a factual basis in support of his motion to withdraw his guilty plea." Id., 860.

you really just want to change your mind. Is that right?" The defendant replied, "[y]es."

The trial court then gave defense counsel and the state the opportunity to speak on the motion. The trial court then terminated the hearing by denying the plea withdrawal motion and the request for an evidentiary hearing.

Although the exact contours of a hearing on a motion to withdraw a guilty plea may vary in keeping with the trial court's discretion on such matters, we are confident that the trial court's thorough evaluation of the defendant's rationale in the present case was sufficient. It is irrelevant that the court did not explicitly label its inquiry into the defendant's motion as a hearing. Nor does it matter that the trial court addressed the defendant's motion during sentencing. The defendant and his attorney both had ample opportunity to meet their burden of establishing "a plausible reason for the withdrawal of a plea of guilty." (Internal quotation marks omitted.) *State* v. *Anthony D.*, supra, 320 Conn. 850.

Additionally, because we do not view the hearing in isolation but can look to other factors, such as the existence of a thorough plea canvass; id., 857–59; in the present case, we observe that the trial court had already conducted a proper plea canvass before accepting the defendant's plea. The trial court's plea withdrawal hearing was in addition to that safeguard.

The plea withdrawal hearing yielded useful information: the defendant's true reason for seeking to withdraw the guilty plea was because he had changed his mind.[12] That reason is not among the grounds enumer-

[12] The defendant paints the conclusion that he simply changed his mind as an issue of whether he abandoned the claims in his letters, an argument that mirrors the approach of the Appellate Court. *State* v. *Simpson*, supra, 169 Conn. App. 199. We need not hold that there was abandonment because the trial court considered the defendant's claims, including those expressed in his letters, but rejected them as meritless.

ated in Practice Book § 39-27 for the withdrawal of a plea, and the court had no reason to inquire further, such as by way of an evidentiary hearing. See id., 851, 860–61 (explaining that there is no "affirmative duty upon the court to conduct an inquiry into the basis of a defendant's motion to withdraw his guilty plea," and that "trial courts cannot be expected to inquire into the factual basis of a defendant's motion to withdraw his guilty plea when the defendant has presented no specific facts in support of the motion"). Thus, the trial court held a hearing on the defendant's motion and did not abuse its discretion in not conducting a further inquiry or evidentiary hearing. The Appellate Court improperly concluded otherwise.

II

The state's second claim is that the Appellate Court improperly concluded that the trial court failed to conduct a hearing on the defendant's request for new counsel. Alternatively, the state argues that the Appellate Court improperly concluded that the trial court was required to hold a hearing on the request. We conclude that, under the circumstances of this case, the trial court was not required to conduct a hearing on the request for new counsel.[13]

When reviewing the adequacy of a trial court's inquiries into a defendant's request for new counsel, an appellate court may reverse the trial court only for an abuse of discretion. See, e.g., *State* v. *Arroyo*, 284 Conn. 597, 644, 935 A.2d 975 (2007). "[A] trial court has a responsibility to inquire into and to evaluate carefully all substantial complaints concerning court-appointed counsel . . . . The extent of that inquiry, however, lies within the discretion of the trial court." (Citation omitted; internal quotation marks omitted.) Id. When a defen-

[13] It is unnecessary, therefore, for us to determine whether the trial court actually held a hearing on the request for new counsel.

dant's assertions fall "short of a seemingly substantial complaint, we have held that the trial court need not inquire into the reasons underlying the defendant's dissatisfaction with his attorney. . . . Moreover, the defendant's right to be represented by counsel does not grant a defendant an unlimited opportunity to obtain alternate counsel . . . ." (Citations omitted; internal quotation marks omitted). *State* v. *Robinson*, 227 Conn. 711, 725, 631 A.2d 288 (1993).

In the present case, the trial court did not abuse its discretion by failing to inquire into the defendant's complaints about his counsel because those complaints were not substantial. The defendant's numerous complaints about counsel fall into three general categories.

First, the defendant claimed that his attorney coerced him into pleading guilty. For example, the defendant's first letter contends that, "[h]ad my attorney investigated and told me all the facts I wouldn't have pled guilty to a charge that I didn't commit. I felt pressured to take the plea because I was told I had 'no chance' of winning [at] trial." This complaint is insubstantial. To begin with, the plea canvass contradicts it, as the trial court confirmed that the plea was voluntary and uncoerced, and that the defendant had been satisfied with his attorney's advice. Second, statements such as, "I felt pressured to take the plea because I was told [by counsel] I had 'no chance' of winning [at] trial," are not coercive, but rather amount to "an experienced lawyer's analysis of the evidence available to [a defendant] as against the state's evidence . . . ." *LaReau* v. *Warden*, 161 Conn. 303, 309, 288 A.2d 54 (1971). For example, in *LaReau*, we concluded that defense counsel's statements to the defendant that he "had no case" and "should change [his] plea to guilty," was advice, rather than coercive threats. (Internal quotation marks omitted.) Id. The trial court would have been justified in reaching that conclusion here.

The defendant's second group of complaints in his first letter focuses largely on his counsel's trial strategy. For example, the defendant complained: "I need a new attorney and I need for him to request a '[m]otion to vacate' and a[n] 'evidentiary hearing,' " and "[m]y counsel also failed to file a 'motion to dismiss' the murder charges after the [Franklin] trial." Similarly, the defendant claimed in his second letter that his counsel "didn't put any motions in to try to get any hearings when I asked for some" and that his counsel "wants to wait until the last minute going against my wishes." These complaints are also insubstantial. "Differences of opinion over trial strategy are not unknown, and do not necessarily compel the appointment of new counsel." *State* v. *Drakeford*, 202 Conn. 75, 83, 519 A.2d 1194 (1987). That is especially true in the present case where the plea canvass already established that the defendant was satisfied with his attorney's performance.

The defendant's third group of complaints asserts ineffective assistance of counsel. In his first letter, the defendant wrote, "I am claiming ineffective counsel. I was not explained all elements of the crime of murder." In his second letter, the defendant explained that, "[w]hen I came to court I've told him [about my confusion regarding the underlying crime] personally and that I would like a new lawyer," and characterized this complaint as a matter of ineffective assistance. The defendant's conclusory allegations of ineffective assistance of counsel are an insubstantial complaint in the present case because the defendant confirmed during the plea canvass that he was satisfied with his attorney's advice, and he admitted during the plea withdrawal hearing that the true reason behind his dissatisfaction was a change of heart.

Indeed, the defendant's motion to withdraw his guilty plea and his request for new counsel are inextricably linked: both stem from the defendant's changing his

mind about his guilty plea after its acceptance by the trial court. This background further supports the conclusion that the defendant's assertions about counsel fell "short of a seemingly substantial complaint," and, therefore, the "trial court need not [have] inquired into the reasons underlying the defendant's dissatisfaction with his attorney." (Internal quotation marks omitted.) *State* v. *Robinson*, supra, 227 Conn. 725. We are not persuaded, therefore, by the defendant's attempt to portray his critique of counsel as a "substantial complaint concerning a breakdown in the relationship between the defendant and his attorney." The trial court did not abuse its discretion by denying the defendant's request for new counsel without a hearing, and the Appellate Court improperly concluded that such a hearing was required.

III

The trial court held an adequate hearing on the defendant's motion to withdraw his guilty plea, after which no evidentiary hearing was necessary. Furthermore, no hearing was required in response to the defendant's request for new counsel. Accordingly, we disagree with the Appellate Court that the trial court abused its discretion in failing to hold (1) an evidentiary hearing on the defendant's motion to withdraw his guilty plea, and (2) a hearing or adequate inquiry on his request for new counsel.

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

In this opinion the other justices concurred.