JOHN DOE *v.* TOWN OF WEST HARTFORD ET AL. (SC 19828)

Palmer, McDonald, Robinson, D'Auria and Vertefeuille, Js.

Syllabus

Pursuant to statute (§ 52-593 [a]), a cause of action shall not be lost if the process to be served is delivered to a marshal before the expiration of the applicable statute of limitations and the process is served within thirty days of such delivery; pursuant further to statute (§ 52-593 [b]), the officer making such service shall endorse on the return the date that process was delivered to him or her.

The plaintiff brought this action against the defendants, a town, multiple law enforcement personnel and certain health-care providers and institutions, in connection with his involuntary hospitalization for psychiatric observation and the events preceding it. The allegedly wrongful acts occurred between May 22 and June 8, 2007, and a three year statute of limitations applied to the plaintiff's claims. A state marshal, G, served a summons and complaint on the defendants on June 9, 2010, a date that was one or more days beyond the expiration of the applicable limitation period. The defendants filed motions for summary judgment, claiming, inter alia, that the plaintiff's claims were time barred. The defendants attached as an exhibit G's return of service, which indicated that service had occurred on June 9, 2010. The plaintiff opposed these motions, claiming that the summons and complaint, prepared by his former attorney, S, had been delivered to G on May 20, 2010, and thus satisfied the requirements of § 52-593a (a). Because G's return of service did not include an endorsement of delivery as required by § 52-593a (b), the plaintiff filed an affidavit executed by G in which G attested that

the summons and complaint had been delivered to him on May 20, 2010. The defendants thereafter deposed G, which revealed that he had no independent memory or record of the date on which he had received the summons and complaint from S. The trial court denied the defendants' motions to strike G's affidavit but allowed the plaintiff to submit an affidavit from S in lieu of G's affidavit. In his affidavit, S attested that G had retrieved the summons and complaint from his law office on May 20, 2010. The defendants, after deposing S, filed motions to strike his affidavit, supplemental memoranda in support of their motions for summary judgment, and a transcript of S's deposition. The trial court concluded that S's statement as to the date G retrieved the summons and complaint was based on hearsay rather than personal knowledge, as S did not personally deliver the process to G or witness G retrieve the process, and disregarded that statement in ruling on the summary judgment motions. The trial court then determined that the plaintiff's claims were time barred because he had failed to meet his burden of producing admissible evidence sufficient to create a genuine issue of material fact as to whether the summons and complaint had been delivered to G prior to the expiration of the statute of limitations, such that the thirty days for service permitted by § 52-593a would apply to save the action. The trial court granted the defendants' motions for summary judgment, and the plaintiff appealed to the Appellate Court. The Appellate Court reversed the trial court's judgment, concluding that the nonhearsay portions of S's deposition testimony sufficiently had raised a genuine issue of material fact as to whether the summons and complaint had been delivered to G on May 20, 2010, and rejected the defendants' claim that G's failure to certify on the return of service the date on which the documents were delivered to him was an alternative ground for affirming the trial court's judgment because such certification was a prerequisite to invoking the remedial protection of § 52-593a. On the granting of certification, the defendants appealed to this court. *Held*:

1. The Appellate Court properly determined that the endorsement requirement of § 52-593 (b) was directory rather than mandatory, and, accordingly, there was no merit to the defendants' claim that G's failure to endorse the date that the return was delivered to him warranted summary judgment in their favor; the legislature's use of the word "shall" in § 52-593 (b), considered in conjunction with the plain meaning rule, was not dispositive of the issue of whether that provision was mandatory or directory, as the requirement is stated in affirmative terms, unaccompanied by negative language, and does not expressly render unavailable the extension of time allowed by subsection (a) in the event of noncompliance, the legislature's placement of § 52-593a in the applicable legislative scheme among other provisions that extend or toll statutes of limitations under various circumstances underscored its remedial purpose and counseled that it should not be given an overly restrictive construction that would defeat its curative goal, and permitting a plaintiff

to prove service of process to a marshal by means other than the statutorily directed endorsement would not result in an unjust windfall but, rather, would enable a plaintiff who establishes timeliness through other evidence to receive the protection that the legislature sought to provide to him, at no expense to the opposing party.

2. Contrary to the defendants' claim, the admissible evidence before the trial court was sufficient to create a genuine issue of material fact regarding the timeliness of the delivery of process to G, and, accordingly, the Appellate Court correctly concluded that the trial court improperly had granted the defendants' motions for summary judgment; S's statements, as set forth in the transcript of his deposition, which was properly part of the record considered by the Appellate Court in reviewing the trial court's rulings on the summary judgment motions, indicated that, although S was unable to recall certain details with precision, he remembered the broader outline of the events in question due to certain memorable aspects of the case and consistently recalled that the events had occurred "a day or so" before the statutory deadline, and S's statements were suggestive of an inference that G, who regularly served papers for S's law office, was summoned by the office manager as usual and, thereafter, arrived to pick up the documents as requested.

Argued October 11, 2017—officially released February 27, 2018

Procedural History

Action to recover damages for, inter alia, the alleged violation of the plaintiff's federal constitutional rights, and for other relief, brought to the Superior Court in the judicial district of Hartford, Complex Litigation Docket, where the court, *Sheridan*, *J.*, granted in part the motions to strike the affidavit of A. Paul Spinella filed by the named defendant et al.; thereafter, the action was withdrawn as against the defendant Jeffrey Rose et al.; subsequently, the court, *Sheridan*, *J.*, granted the motions for summary judgment filed by the named defendant et al. and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court, *Beach*, *Mullins* and *Mihalakos*, *Js.*, which reversed in part the trial court's judgment and remanded the case for further proceedings, and the named defendant et al., on the granting of certification, appealed to this court. *Affirmed.*

Scott M. Karsten, with whom were *Michael R. McPherson*, and, on the brief, *Laura Pascale Zaino* and *Patrick D. Allen*, for the appellants (named defendant et al.).

Josephine Smalls Miller, for the appellee (plaintiff).

Opinion

McDONALD, J. This certified appeal requires us to construe General Statutes § 52-593a,[1] a remedial savings statute that operates to render an action timely commenced as long as process is delivered to a marshal prior to the expiration of the applicable statute of limitations and served within thirty days. The defendants, three groups of individuals and entities involved in the 2007 involuntary psychiatric hospitalization of the plaintiff, John Doe,[2] appeal from the judgment of the Appellate Court, which reversed the trial court's rendering of summary judgment in their favor. They claim that the Appellate Court improperly concluded that (1) the requirement in § 52-593a (b) that a marshal shall endorse under oath on the return of service the date on which process was delivered to him or her, is directory, rather than mandatory, and (2) there existed a genuine issue of material fact concerning whether the plaintiff had delivered the process to a marshal within the applicable limitation period. We conclude that § 52-593a (b)

[1] General Statutes § 52-593a provides: "(a) Except in the case of an appeal from an administrative agency governed by section 4-183, a cause or right of action shall not be lost because of the passage of the time limited by law within which the action may be brought, if the process to be served is personally delivered to a state marshal, constable or other proper officer within such time and the process is served, as provided by law, within thirty days of the delivery.

"(b) In any such case, the officer making service shall endorse under oath on such officer's return the date of delivery of the process to such officer for service in accordance with this section."

[2] "The plaintiff was granted permission to proceed under a pseudonym due to the nature of the allegations in the complaint." *Doe* v. *West Hartford*, 168 Conn. App. 354, 357 n.1, 147 A.3d 1083 (2016).

does not preclude a plaintiff from proving timely delivery of process to the marshal by means other than the statutorily prescribed method. We further conclude that there existed a genuine issue of material fact as to whether timely delivery was made. Accordingly, we affirm the judgment of the Appellate Court.

The following facts and procedural history are relevant to this appeal. The plaintiff was hospitalized involuntarily for psychiatric observation in May and June, 2007. Subsequent to his release, he brought this action against multiple individuals and entities, alleging various wrongful conduct in connection with the hospitalization and the events preceding it. The defendants named in the complaint include (1) a therapist who previously had treated the plaintiff and the therapist's employer (medical defendants), (2) the town of West Hartford, its chief of police and certain members of its police department in their official and individual capacities (town defendants), and (3) Hartford Hospital, the Institute of Living and various psychiatric professionals who were involved in the plaintiff's commitment and treatment (hospital defendants).[3] It is undisputed that the allegedly wrongful acts at issue occurred between May 22 and June 8, 2007, and that, for purposes of this appeal, a three year statute of limitations applied to the plaintiff's claims.

The plaintiff's former counsel, A. Paul Spinella, finalized a complaint and executed a summons on May 19, 2010. The defendants were served with these documents by State Marshal John R. Griffin on June 9, 2010, a date that was one or more days beyond the expiration

[3] The medical defendants are Dale J. Wallington and Resilience Health Care, L.L.C. The town defendants are the town of West Hartford, Chief of Police James Strillacci, and Gino Giansanti, Kimberly Sullivan, Sean Walmsley, John Silano, Michael Camillieri and Donald Melanson, members of the town's police department. The hospital defendants are Hartford Hospital, the Institute of Living, Radhika Mehendru, Carl Washburn and Theodore Mucha.

of the relevant limitation period, depending on the particular wrongful act alleged.[4] More than three years later, the hospital defendants filed a motion for summary judgment, claiming, inter alia, that the plaintiff's claims against them were time barred. They attached as an exhibit Griffin's return of service indicating that service had occurred on June 9, 2010. The town defendants filed a similar motion as to certain claims, also appending Griffin's return of service. The plaintiff opposed these motions, arguing, inter alia, that the claims at issue were not time barred because the summons and complaint had been delivered to Griffin on May 20, 2010, thereby satisfying the requirements of § 52-593a. See footnote 1 of this opinion. Because Griffin's return of service did not include an endorsement of the date of delivery as required by § 52-593a (b), the plaintiff instead included an affidavit executed by Griffin wherein Griffin attested that the summons and complaint had been delivered to him on May 20, 2010.

Thereafter, the defendants deposed Griffin, which revealed that he had no independent memory or record of the date on which he had received the summons and complaint from Spinella. Rather, upon request, he simply had executed an affidavit prepared by Spinella, assuming that the delivery date identified therein was correct. Subsequent to the deposition, the hospital defendants and the town defendants filed motions to strike the paragraph of Griffin's affidavit in which he averred that the summons and complaint had been delivered to him on May 20, 2010. Therein, they argued that Griffin's averment was not based on his personal knowledge but, rather, on inadmissible hearsay. The

[4] Typically, an action is "commenced," for purposes of determining compliance with a statute of limitations, when the defendant is served with a summons and complaint. *Chestnut Point Realty, LLC*, v. *East Windsor*, 324 Conn. 528, 540, 153 A.3d 636 (2017).

trial court denied the motions to strike,[5] but indicated, nevertheless, that it would disregard Griffin's affidavit when ruling on the summary judgment motions. The court further allowed that the plaintiff could submit an affidavit from Spinella in lieu of Griffin's affidavit, and that the defendants would be permitted sixty days in which to depose Spinella in regard to the facts and circumstances underlying his averments in that affidavit.

Contemporaneous with the trial court's ruling, Spinella signed an affidavit in which he attested that, at the time he represented the plaintiff in this matter, he had been "acutely aware of the statute of limitations," he had executed the summons with the complaint attached on May 19, 2010, and Griffin had retrieved those documents from Spinella's law office on May 20, 2010. After deposing Spinella, the hospital defendants and the town defendants filed motions to strike his affidavit and supplemental memoranda in support of their earlier motions for summary judgment, providing to the court a transcript of the deposition.[6] They contended that Spinella's affidavit should be stricken because his deposition testimony had revealed that it was based on inadmissible hearsay and speculation, was "self-serving" and lacked credibility. The plaintiff filed a response, claiming that Spinella's deposition testimony demonstrated that he had a clear and detailed personal recollection of the relevant events. In a memorandum of decision, the trial court, after reviewing the

[5] In the trial court's view, the affidavit was not so " 'palpably false' " as to warrant its striking. See *Perri* v. *Cioffi*, 141 Conn. 675, 680, 109 A.2d 355 (1954); *Zbras* v. *St. Vincent's Medical Center*, 91 Conn. App. 289, 293, 880 A.2d 999, cert. denied, 276 Conn. 910, 886 A.2d 424 (2005).

[6] Each group of defendants filed a single document that was captioned as both a motion to strike Spinella's affidavit and a supplemental memorandum in support of summary judgment. The hospital defendants appended the deposition transcript, and the town defendants, in their filing, adopted the arguments presented by the hospital defendants.

deposition testimony, concluded that Spinella's statement that the summons and complaint were retrieved by Griffin on May 20, 2010, was based on hearsay rather than personal knowledge and, therefore, would be disregarded for purposes of deciding the summary judgment motions. Specifically, it reasoned, Spinella did not personally deliver the process to Griffin or see Griffin retrieve it; rather, he merely had received oral confirmation from third parties that the process had been picked up. In light of that ruling, the medical defendants sought and received permission to move for summary judgment on the basis that the claims against them, too, were time barred.

The trial court granted all of the defendants' motions for summary judgment, in three separate memoranda of decision, concluding in each that the claims at issue were time barred. Specifically, it reasoned, the plaintiff had not met his burden of producing admissible evidence sufficient to create a genuine issue of material fact as to whether the summons and complaint had been delivered to Griffin prior to the expiration of the statute of limitations, such that § 52-593a would apply to save the causes of action. The plaintiff's appeal to the Appellate Court followed.

The trial court, in a subsequent articulation, reiterated that portions of Spinella's deposition testimony constituted hearsay evidence that would be inadmissible at trial and that Spinella had not personally witnessed Griffin retrieving the process. Otherwise, the court reasoned, Spinella had no actual recollection of the events in question occurring on the specific date of May 20, 2010, the day he had identified as the date of delivery in his affidavit. Moreover, according to the court, in light of various surrounding circumstances, the more reasonable inference was that delivery was untimely. In the court's view, Spinella's deposition testimony was "loose and equivocal" and, therefore, lacked

probative value. "In sum," the court concluded, "none of the proffered evidence was sufficient to satisfy the plaintiff's burden of demonstrating that the requirements of . . . § 52-593a had been satisfied."

The Appellate Court reversed the judgment of the trial court, holding that Spinella's deposition testimony, even without taking into account the portions identified as hearsay, sufficiently had raised a genuine issue of material fact as to whether the summons and complaint were delivered to Griffin on May 20, 2010. *Doe* v. *West Hartford*, 168 Conn. App. 354, 375–76, 147 A.3d 1083 (2016). The Appellate Court further rejected the defendants' claim, raised as an alternative ground for affirmance, that Griffin's failure to certify, on the return of service, the date on which the documents were delivered to him was fatal to the plaintiff's appeal because such certification is a mandatory prerequisite to invoking the remedial protection of § 52-593a.[7] Id., 377–79. This certified appeal followed.[8]

The defendants claim that the Appellate Court improperly reversed the trial court's judgment in their favor because the requirement of § 52-593a (b) that a

[7] The defendants had raised this statutory interpretation claim before the trial court, but that court ultimately found it unnecessary to resolve.

[8] We granted the defendants' petition for certification to appeal, limited to the following questions:

"1. Did the Appellate Court properly reverse the trial court's grant of the defendants' motion for summary judgment on the basis of its determination that a genuine issue of material fact existed with respect to the availability of the savings statute . . . § 52-593a?

"2. Did the Appellate Court properly conclude that § 52-593a is available to save a cause of action despite the failure of the serving officer to endorse on the officer's return the date of delivery of the process to such officer pursuant to § 52-593a (b)?" *Doe* v. *West Hartford*, 323 Conn. 936, 936–37, 151 A.3d 384 (2016).

In this opinion, we have reversed the ordering of the defendants' claims because it seems more logical to address first the question of what method of proof is required before turning to the question of whether the evidence established that service was timely effectuated.

marshal endorse, on the return of service, the date on which process was delivered to him or her, is a mandatory prerequisite in order to invoke the protection of the statute, and Griffin failed to fulfill that requirement. They claim further, in the alternative, that the admissible evidence before the trial court was insufficient to create a genuine issue of material fact as to whether the summons and complaint were delivered to Griffin prior to the expiration of the statute of limitations. We will address these claims in turn.

I

The defendants claim that the trial court's judgment in their favor should be affirmed because Griffin failed to comply with the endorsement requirement of § 52-593a (b). According to the defendants, that requirement is a mandatory prerequisite for the plaintiff to invoke the remedial extension of the statute of limitations afforded by subsection (a) of the statute. We are not persuaded.

The defendants' claim presents an issue of statutory construction. When we are called upon to construe a statute that is implicated by a summary judgment motion, our review is plenary. See *Sokaitis* v. *Bakaysa*, 293 Conn. 17, 22, 975 A.2d 51 (2009). "In determining the meaning of a statute, we look first to the text of the statute and its relationship to other statutes. General Statutes § 1-2z.[9] If the text of the statute is not plain and

[9] Contrary to the defendants' contention, the legislature's passage of § 1-2z does not preclude a reviewing court from considering prior judicial interpretations of a statute that are not based on the plain meaning rule, when the case law predates the enactment of § 1-2z. See *New England Road, Inc.* v. *Planning & Zoning Commission*, 308 Conn. 180, 186, 61 A.3d 505 (2013); *Hummel* v. *Marten Transport, Ltd.*, 282 Conn. 477, 501, 923 A.2d 657 (2007). Accordingly, the Appellate Court committed no impropriety when it relied on its own directly applicable precedent to construe § 52-593a (b). See *Doe* v. *West Hartford*, supra, 168 Conn. App. 378–79 (discussing Appellate Court case relying on long established precedent).

unambiguous, we may consider extratextual sources of information such as the statute's legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . . Our fundamental objective is to ascertain the legislature's intent." (Citation omitted; footnote added; internal quotation marks omitted.) *Chestnut Point Realty, LLC* v. *East Windsor*, 324 Conn. 528, 533, 153 A.3d 636 (2017).

When interpreting § 52-593a, we further bear in mind that it "is a remedial provision that allows the salvage of an [action] that otherwise may be lost due to the passage of time." (Internal quotation marks omitted.) *Dorry* v. *Garden*, 313 Conn. 516, 533, 98 A.3d 55 (2014). It is established that "remedial statutes must be afforded a liberal construction in favor of those whom the legislature intended to benefit." (Internal quotation marks omitted.) Id.; see also *Isaac* v. *Mount Sinai Hospital*, 210 Conn. 721, 733, 557 A.2d 116 (1989) (observing that "broad and liberal purpose [of a savings statute] is not to be frittered away by any narrow construction" [internal quotation marks omitted]). In short, a remedial statute "should be so construed as to advance the remedy rather than to retard it." (Internal quotation marks omitted.) *Johnson* v. *Wheeler*, 108 Conn. 484, 486, 143 A. 898 (1928). Finally, "Connecticut law repeatedly has expressed a policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his or her day in court. . . . [Thus] [o]ur practice does not favor the termination of proceedings without a determination of the merits of the controversy [when] that can be brought about with due regard to necessary rules of procedure." (Citations omitted; internal quotation marks omitted.) *Fedus* v. *Planning &*

Zoning Commission, 278 Conn. 751, 769–70, 900 A.2d 1 (2006).

Subsection (a) of § 52-593a provides in relevant part that "a cause or right of action shall not be lost because of the passage of the time limited by law within which the action may be brought, if the process to be served is personally delivered to a state marshal, constable or other proper officer within such time and the process is served, as provided by law, within thirty days of the delivery." Pursuant to subsection (b) of § 52-593a, "[i]n any such case, the officer making service shall endorse under oath on such officer's return the date of delivery of the process to such officer for service in accordance with this section."

As this court previously has explained, § 52-593a "was intended to address the problem that arises when a marshal receives a writ from counsel close to the expiration of the statute of limitations . . . ." *Tayco Corp.* v. *Planning & Zoning Commission*, 294 Conn. 673, 682, 986 A.2d 290 (2010). The statute's purpose is "to prevent a party from losing the right to a cause of action because of untimely service on the part of the *marshal* by giving the marshal additional time in which to effect proper service on the party in question." (Emphasis in original.) Id. To invoke the protection of the statute, a party "must deliver the writ to the marshal within the applicable statute of limitations." Id. In enacting § 52-593a, "the legislature recognized the injustice that might result if a [marshal], through inattention, oversight or lack of time, failed to serve papers in time." (Internal quotation marks omitted.) Id., 683. "By allowing the *marshal* additional time in which to locate and serve a party, § 52-593a provides a method for ensuring correct service of process without infringing on a litigant's ability to timely file even when he or she uses the entire amount of time allotted to bring an action pursuant to the applicable statute of limitations." (Emphasis in original.) Id., 685.

The defendants argue that, to invoke the protections of § 52-593a (a), strict compliance with the certification requirement of § 52-593 (b) is necessary. In the defendants' view, the legislature's use of the word "shall," in delineating this requirement, is unequivocal evidence of its intent that the requirement is mandatory, rather than directory. Moreover, the defendants contend, the Appellate Court's conclusion to the contrary ignored subsection (b) of the statute and rendered it "meaningless." According to the defendants, the "evidentiary morass with which [the trial court] was confronted four years after the fact" was exactly the type of situation that the legislature, in enacting subsection (b), must have intended to avoid. The plaintiff responds that, despite the legislature's use of the word "shall," the Appellate Court properly interpreted subsection (b), consistent with the approach employed in numerous decisions of this court, to be directory rather than mandatory. We agree with the plaintiff.

Contrary to the defendants' assertions, the legislature's use of the word "shall," considered in conjunction with the plain meaning rule, is not dispositive of the question of whether a statutory requirement is mandatory or directory. "Although we generally will not look for interpretative guidance beyond the language of the statute when the words of that statute are plain and unambiguous . . . our past decisions have indicated that the use of the word shall, though significant, does not invariably create a mandatory duty. . . . Indeed, we frequently have found statutory duties to be directory, notwithstanding the legislature's use of facially obligatory language such as shall or must. . . . We therefore look to other relevant considerations, beyond the legislature's use of the term shall, to ascertain the meaning of the statute." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Electrical*

Contractors, Inc. v. *Ins. Co. of the State of Pennsylvania*, 314 Conn. 749, 757–58, 104 A.3d 713 (2014).

"Our prior cases have looked to a number of factors in determining whether such requirements are mandatory or directory. These include: (1) whether the statute expressly invalidates actions that fail to comply with its requirements or, in the alternative, whether the statute by its terms imposes a different penalty; (2) whether the requirement is stated in affirmative terms, unaccompanied by negative language; (3) whether the requirement at issue relates to a matter of substance or one of convenience; (4) whether the legislative history, the circumstances surrounding the statute's enactment and amendment, and the full legislative scheme evince an intent to impose a mandatory requirement; (5) whether holding the requirement to be mandatory would result in an unjust windfall for the party seeking to enforce the duty or, in the alternative, whether holding it to be directory would deprive that party of any legal recourse; and (6) whether compliance is reasonably within the control of the party that bears the obligation, or whether the opposing party can stymie such compliance." Id., 758–59.

We conclude that the foregoing factors, to the extent they are applicable, weigh decisively in favor of a conclusion that the endorsement requirement of § 52-593a (b) is directory rather than mandatory. First, the requirement is stated in affirmative terms, unaccompanied by negative language, and does not expressly render unavailable the extension of time allowed by subsection (a) in the event of noncompliance. See *United Illuminating Co.* v. *New Haven*, 240 Conn. 422, 465–66, 692 A.2d 742 (1997) ("if there is no language that expressly invalidates any action taken after noncompliance with the statutory provisions, the statute should be construed as directory" [internal quotation marks omitted]); but cf. *Butts* v. *Bysiewicz*, 298 Conn.

665, 678–79, 5 A.3d 932 (2010) (construing statute providing that, if certificate of endorsement is not received by prescribed deadline, the "certificate shall be invalid," as creating mandatory deadline [internal quotation marks omitted]). Next, we agree with the Appellate Court; see *Doe* v. *West Hartford*, supra, 168 Conn. App. 378–79; that subsection (a) embodies the substance of § 52-593a, i.e., the allowance of up to thirty additional days for service if process is delivered to a marshal close to, but not beyond, the expiration of the applicable statute of limitations, and that subsection (b) is a matter of convenience, specifically, the provision of a straightforward method by which the timeliness of delivery may be ascertained. See *Teresa T.* v. *Ragaglia*, 272 Conn. 734, 746, 865 A.2d 428 (2005) (if "provision is designed to secure order, system and dispatch in the proceedings, it is generally held to be directory" [internal quotation marks omitted]).

As to the legislative history of § 52-593a, our research reveals that it consists of only a few stray comments by lawmakers that do not concern subsection (b) and, therefore, is unhelpful. Regarding the applicable legislative scheme, the placement of § 52-593a among a number of provisions that extend or toll statutes of limitations under various circumstances; see General Statutes §§ 52-590 through 52-595; underscores its remedial purpose and counsels that it should not be given an overly restrictive construction that would defeat its curative goal. Additionally, permitting a plaintiff to prove timely delivery of process to a marshal by means other than the statutorily directed endorsement would not result in an unjust windfall but, rather, assuming that timeliness could be shown by other evidence, simply would enable the plaintiff to take advantage of a protection that the legislature sought to provide to him, at no expense to the opposing party. Finally, although we agree with the defendants that ensuring that a mar-

shal fulfills the statutory endorsement requirement is, to some degree, within the control of a plaintiff, we nevertheless disagree that this circumstance is enough to overcome the other considerations weighing in favor of a conclusion that the endorsement requirement is directive.

Insofar as the defendants contend that a conclusion that § 52-593a (b) is directory rather than mandatory will render that provision "meaningless," we disagree. To the contrary, we expect that the vast majority of parties seeking the extension of time for service afforded by § 52-593a (a) will continue to comply with the endorsement requirement to avoid the expense and uncertainty attendant to proving compliance by alternative means. We further disagree that the difficulties of proof presented by this case, without more, are evidence that the legislature intended to make endorsement of the delivery date by the marshal mandatory. Those difficulties are as readily attributable to the defendants' choice to wait more than three years to challenge the timeliness of this action, during which time one witness died and the memories of others faded, as they are to the absence of an endorsement by the marshal.

For the foregoing reasons, we conclude that the Appellate Court properly determined that the endorsement requirement of § 52-593a (b) is directory rather than mandatory. Consequently, the defendants' claim that the absence of an endorsement on the return required summary judgment in their favor is without merit.

II

The defendants claim next that the Appellate Court improperly reversed the trial court's rendering of summary judgment in their favor because the plaintiff failed to submit admissible evidence that was adequate to

establish a genuine issue of material fact concerning the applicability of § 52-593a. Specifically, they claim, the evidence was insufficient to create a factual question as to whether process was delivered to Griffin within the three year limitation period. We disagree.

The following additional procedural history is relevant. As previously indicated, Spinella executed an affidavit averring that the summons and complaint were delivered to Griffin on May 20, 2010, and, thereafter, the defendants deposed Spinella to learn the facts and circumstances surrounding that delivery and the source of Spinella's knowledge.[10] The deposition, if credited, revealed the following salient points: (1) although the events in question had occurred more than four years prior, Spinella had a distinct recollection of them because the plaintiff had been an "enormously demanding" and memorable client, and Spinella considered the overall circumstances to be "extraordinary"; (2) Spinella's law office used Griffin exclusively for serving process in 2010, and there was a set routine whereby Griffin would be telephoned and the papers would be left on a particular counter for him to retrieve; (3) at the time Spinella prepared and executed the summons and complaint, which had required some last minute revisions, he was acutely aware that the statute of limitations for the plaintiff's claims was due to expire within a day or so, creating "a lot of concern" and urgency to get the papers to Griffin; (4) Spinella's office manager, whose work area was located near the counter on which documents were left for pickup, typically was responsible for telephoning Griffin to retrieve those documents when a matter was urgent, and Spinella had asked her to do so in this instance; (5) the

[10] The relevant portions of Spinella's deposition are reproduced verbatim in the Appellate Court's opinion. See *Doe* v. *West Hartford*, supra, 168 Conn. App. 368–75. In this opinion, for purposes of brevity, we will describe the content of those excerpts more generally.

documents were placed on the counter for pickup by Griffin; (6) although Spinella was not present when Griffin picked up the summons and complaint, he requested, and later received, oral confirmation from his office staff, likely the office manager, that the documents had been retrieved; (7) thereafter, Spinella checked back and personally observed that the documents no longer were present on the counter; (8) Spinella subsequently spoke to Griffin, who also confirmed that the pickup had occurred; and (9) the office manager had died, making her unavailable to confirm Spinella's recollections of the events in question. Moreover, Griffin, at his deposition, had not testified about confirming with Spinella, after the fact, that he had retrieved the process from the counter on May 20, 2010.

The Appellate Court, after reviewing Spinella's deposition testimony, concluded that it sufficiently had raised a genuine issue of material fact as to whether process had been delivered to Griffin on May 20, 2010, as Spinella had attested.[11] *Doe* v. *West Hartford*, supra, 168 Conn. App. 375. The court discussed most of the foregoing circumstances in its opinion, but also indicated that, even absent consideration of the pickup confirmations that Spinella claimed he had received from third parties, the deposition evidence was sufficient to support a reasonable inference of a May 20, 2010 delivery. Id., 375–76.

The defendants claim that the Appellate Court improperly concluded that the admissible portions of Spinella's deposition testimony gave rise to a genuine issue of material fact as to the timeliness of this action. They argue first that the court should not have considered that testimony when ruling on their summary judg-

[11] The Appellate Court assumed, without deciding, that the trial court properly had stricken Spinella's affidavit, and relied solely on his deposition testimony to determine whether summary judgment was appropriate. *Doe* v. *West Hartford*, supra, 168 Conn. App. 375.

ment motions, because it was submitted solely for the purpose of supporting the motions to strike Spinella's affidavit as lacking in personal knowledge. Alternatively, the defendants contend that Spinella's testimony had no probative value because the trial court found it to be loose and equivocal, and, further, it was speculative and conjectural in that Spinella neither witnessed Griffin's retrieval of the process nor had a true recollection of that retrieval occurring on the specific date of May 20, 2010. Additionally, in the defendants' view, the evidence does not support an inference that delivery to Griffin was timely but, rather, supports the opposite inference, as the trial court reasoned. Finally, the defendants claim, to the extent that there were factual disputes over the applicability of the statute of limitations, it was for the trial court to resolve them.[12] The plaintiff,

[12] The defendants also claim that the Appellate Court, in concluding that summary judgment was not warranted, improperly relied on portions of Spinella's deposition testimony that constituted inadmissible hearsay evidence, namely, the confirmations of delivery that Spinella purportedly had received from third parties. They contend that, by considering those confirmations, the Appellate Court, in effect, improperly revisited and reversed the evidentiary rulings made by the trial court in the course of deciding the motions to strike and for summary judgment. In connection with this claim, the parties contend that exceptions to the general rule that hearsay evidence is inadmissible either do, or do not, apply.

It is well established under our law that the evidence submitted in support of, or in opposition to, summary judgment must be admissible evidence, and that hearsay testimony generally is incompetent for this purpose. See *Great Country Bank* v. *Pastore*, 241 Conn. 423, 436–37, 696 A.2d 1254 (1997); *Dowling* v. *Kielak*, 160 Conn. 14, 18, 273 A.2d 716 (1970); *Nash* v. *Stevens*, 144 Conn. App. 1, 15–16, 71 A.3d 635, cert. denied, 310 Conn. 915, 76 A.3d 628 (2013); see also Practice Book § 17-46. The Appellate Court acknowledged, in a footnote, that the third-party confirmations in this matter "may be considered inadmissible hearsay (barring any exception)" but reasoned that "it was the defendants who submitted Spinella's deposition and no objection was made on hearsay grounds." *Doe* v. *West Hartford*, supra, 168 Conn. App. 376 n.15.

We agree with the defendants that, regardless of the considerations cited by the Appellate Court, the trial court did affirmatively rule that the third-party confirmations were inadmissible hearsay, and the plaintiff did not challenge those evidentiary rulings on appeal. Accordingly, the Appellate Court should not have considered those portions of Spinella's deposition

in response, contends that the Appellate Court properly considered Spinella's deposition when reviewing the summary judgment ruling, and that the contents of that deposition were adequate to create a genuine issue of material fact as to the timeliness of this action. We agree with the plaintiff.[13]

Our review of the trial court's summary judgment rulings is plenary; see *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 313, 77 A.3d 726 (2013); and the general principles governing those rulings are well established. "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the

testimony when determining whether summary judgment was proper. We conclude, nevertheless, that, to the extent that the Appellate Court did so, that impropriety essentially was harmless. Specifically, as we explain hereinafter, we agree with that court that, even absent consideration of the portions of Spinella's deposition that the trial court held were inadmissible hearsay, there was enough evidence in the remaining portions of the deposition to create a genuine issue of material fact regarding whether process had been delivered to Griffin on May 20, 2010. Although the defendants suggest, throughout their brief, that the trial court determined that the entirety of Spinella's deposition testimony, for various reasons, was inadmissible, our review of the court's decisions discloses that that ruling was limited to the portions of the deposition that constituted hearsay.

[13] Consequently, we need not reach the plaintiff's claims that certain additional evidence also contributed to create a genuine issue of material fact. That evidence was not considered by the Appellate Court, and the plaintiff did not submit it to the trial court until he filed a motion for reconsideration of the summary judgment ruling, a motion that the trial court denied. The plaintiff challenged that ruling on appeal, but the Appellate Court did not consider that challenge. *Doe* v. *West Hartford*, supra, 168 Conn. App. 359 n.5.

result of the case." (Internal quotation marks omitted.) Id., 312–13.

A summary judgment motion is an appropriate vehicle by which to challenge the timeliness of an action. See, e.g., id., 313; see also *Grey* v. *Stamford Health System, Inc.*, 282 Conn. 745, 750, 924 A.2d 831 (2007). Typically, "in the context of a motion for summary judgment based on a statute of limitations special defense, a defendant . . . meets its initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period." *Romprey* v. *Safeco Ins. Co. of America*, supra, 310 Conn. 321. Then, if the plaintiff claims the benefit of a provision that operates to extend the limitation period, "the burden . . . shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute." Id. In these circumstances, it is "incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact [as to the timeliness of the action] exists." (Internal quotation marks omitted.) *Iacurci* v. *Sax*, 313 Conn. 786, 799, 99 A.3d 1145 (2014). Consistent with this framework, once the defendants established that they had been served beyond the three year limitation period applicable to the claims against them, the burden shifted to the plaintiff to produce evidence sufficient to raise the factual issue of whether the summons and complaint had been delivered to Griffin by May 22, 2010, the last day before the statute of limitations expired, so as to make available the extra thirty days for service permitted by § 52-593a that would render the action timely. We conclude that the plaintiff satisfied that burden.

To begin, we reject the defendants' claim that Spinella's deposition was not part of the record that the Appellate Court should have considered when

reviewing the trial court's rulings on their summary judgment motions because the defendants submitted that deposition only in support of their motion to strike Spinella's affidavit in opposition to summary judgment. As a factual matter, the defendants' claim is incorrect. Specifically, the document to which the transcript of Spinella's deposition was appended was *both* a motion to strike and a memorandum in support of summary judgment. See footnote 6 of this opinion. Nowhere in that document did the defendants purport to limit the use of the transcript, and, in any event, it is not clear that they would be warranted in doing so. See Practice Book § 13-31 (a) (providing that "any [admissible] part or all of a deposition" submitted in court proceedings "may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof"). Additionally, it is clear from the trial court's articulation of its rulings on the summary judgment motions, wherein the court extensively references and evaluates the deposition testimony, that that court did in fact consider it, although it ultimately found it not compelling. Because the deposition transcript clearly was before the trial court when it ruled on the summary judgment motions, and it informed that court's rulings, the defendants' contention that it should not have been considered in connection with the review of those rulings is meritless.

Next, we agree with the plaintiff that the trial court, in granting the defendants' summary judgment motions, was inordinately focused on whether he could show that process had been delivered to Griffin on the specific date of May 20, 2010. Although that was a proper inquiry for purposes of deciding the motion to strike, in which Spinella had attested to that particular day as the date of delivery, the question implicated by the motions for summary judgment was more general, namely, whether there was evidence that process had

been delivered to Griffin *at any time prior* to the expiration of the earliest possible statute of limitations on May 22, 2010. Regardless of whether Spinella, four years after the events in question, had a recollection of the specific date on which the events had occurred, he claimed vehemently that he recalled the date to be "a day or so" prior to the impending expiration of the statute of limitations, a circumstance of which, at the time, he was acutely aware, and that that awareness had led to a sense of urgency in his office to get the process to Griffin. This testimony, if credited, would lend support to a finding that delivery had occurred in a timely fashion, regardless of whether Spinella definitively could identify the specific date of delivery. Accordingly, we reject the defendants' contention that the testimony was too speculative to defeat summary judgment.

Additionally, we disagree with the defendants and the trial court that Spinella's deposition testimony was insufficient to create a genuine issue of material fact as to the timely delivery of process because Spinella did not personally call Griffin or witness him retrieving the documents from the counter on which, Spinella testified, they had been left for pickup "a day or so" before the statute of limitations was set to expire. When deposed, Spinella explained the routine that his office typically followed when it urgently needed Griffin to pick up documents for service, and he indicated, by citing facts within his personal knowledge, that routine had been set in motion. Specifically, he knew that the summons and complaint, which were dated May 19, 2010, had been placed on the counter from which pickup by Griffin typically occurred, and that he had instructed his office manager to call Griffin to retrieve them.

Spinella's statements, if believed by a fact finder, are suggestive of an inference that Griffin, who regularly

served papers for Spinella's office, was summoned by the officer manager as usual and, thereafter, arrived to pick up the documents as requested. "Testimony as to the habit or practice of doing a certain thing in a certain way is evidence of what actually occurred under similar circumstances or conditions. . . . Evidence of a *regular practice* permits an inference that the practice was followed on a given occasion." (Emphasis in original; internal quotation marks omitted.) *Birkhamshaw* v. *Socha*, 156 Conn. App. 453, 472, 115 A.3d 1, cert. denied, 317 Conn. 913, 116 A.3d 812 (2015); see also Conn. Code Evid. § 4-6 ("[e]vidence of . . . the routine practice of an organization is admissible to prove that the conduct of . . . the organization on a particular occasion was in conformity with the . . . routine practice"). Moreover, Spinella's testimony that he later returned to the counter and saw that the documents no longer were there is additional, albeit circumstantial, evidence that Griffin had come to Spinella's office and retrieved them.[14]

Relatedly, we disagree that Spinella's deposition testimony lacks probative value and, therefore, cannot defeat summary judgment, because that testimony is, at times, "loose and equivocal." "The probative value of evidence is its tendency to establish the proposition that it is offered to prove." *State* v. *Jeffrey*, 220 Conn 698, 709, 601 A.2d 993 (1991), cert. denied, 505 U.S. 1224, 112 S. Ct. 3041, 120 L. Ed. 2d 909 (1992). Evidence

[14] We note in this regard that "[t]he inferences drawn from circumstantial evidence are distinct from conjecture and surmise. Circumstantial evidence requires that the trier [find] that the facts from which the trier is asked to draw the inference are proven and that the inference is not only logical and reasonable but strong enough so that it can be found that it is more probable than otherwise that the fact to be inferred is true. . . . In contrast, impermissible conjecture and surmise would require a jury to infer a new set of facts from unproven or nonexistent facts." (Citation omitted; internal quotation marks omitted.) *Rawls* v. *Progressive Northern Ins. Co.*, 310 Conn. 768, 777 n.5, 83 A.3d 576 (2014).

is probative if it has "any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Conn. Code Evid. § 4-1; see also *State* v. *Prioleau*, 235 Conn. 274, 305, 664 A.2d 743 (1995) (to be probative, "[a]ll that is required is that the evidence *tend* to support a relevant fact even to a slight degree" [emphasis in original; internal quotation marks omitted]).

We have no trouble concluding that Spinella's deposition testimony satisfies this standard. As previously indicated, Spinella was asked to testify about matters that had occurred more than four years earlier and, while unable to recall certain details with precision, he claimed to remember the broader outline of the events in question due to certain memorable aspects of the case. Although he had no real memory of specific dates, he consistently recalled that the pertinent events had occurred "a day or so" before the statutory deadline. Regardless of the generality of this averment, if it is believed, it does tend, to some degree, to support a finding of timely delivery. Moreover, to the extent Spinella expressed himself in uncertain fashion over the course of his deposition, that circumstance would go to the weight of his testimony, but does not deprive it of all probative value.

By dismissing the testimony out of hand, the trial court, in essence, made an improper credibility determination when ruling on a summary judgment motion. It is fundamental that, when ruling on such a motion, a trial court is limited to determining whether a material factual issue exists; it may not then proceed to try that issue on the summary judgment record, if the issue does exist. *Batick* v. *Seymour*, 186 Conn. 632, 647, 443 A.2d 471 (1982); *Dowling* v. *Kielak*, 160 Conn. 14, 16–17, 273 A.2d 716 (1970); *Best Friends Pet Care, Inc.* v. *Design Learned, Inc.*, 77 Conn. App. 167, 176, 823 A.2d

329 (2003). When deciding a summary judgment motion, a trial court may not resolve credibility questions raised by affidavits or deposition testimony submitted by the parties. *Suarez* v. *Dickmont Plastics Corp.*, 229 Conn. 99, 107, 639 A.2d 507 (1994); *Town Bank & Trust Co.* v. *Benson*, 176 Conn. 304, 308–309, 407 A.2d 971 (1978); *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, 167 Conn. App. 691, 710, 145 A.3d 292, cert. denied, 323 Conn. 930, 150 A.3d 231 (2016). "It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given to their testimony can be appraised." (Internal quotation marks omitted.) *Town Bank & Trust Co.* v. *Benson*, supra, 309.

Finally, we are not persuaded by the trial court's reasoning that the evidence before it did not support an inference that delivery to Griffin was timely but, rather, supported the opposite inference. Regarding this claim, the trial court, in its articulation, observed that Griffin did not serve the seventeen defendants until June 9, 2010, twenty days after Griffin purportedly had retrieved the process from Spinella's office. In the court's view, this delay was inconsistent with Spinella's testimony that there was an urgent need to comply with the statute of limitations that he was aware was soon to expire. According to the court, service on this date was "not indicative . . . of an overwhelming concern" with an impending expiration date, but, rather, "highly unusual, and unexplained." The court concluded that the cited circumstance "directly undercuts the inference" of a May 20, 2010 delivery date.

Suffice it to say, any number of competing inferences may be drawn from the fact that Griffin served the defendants on June 9, 2010, a day that, if § 52-593a applies, as the plaintiff contends, still was ten days shy of the expiration of the extended limitation period. When the evidence in a summary judgment record rea-

sonably is susceptible to competing inferences, it is improper for a trial court, in ruling on the summary judgment motion, to choose among those inferences. *Suarez* v. *Dickmont Plastics Corp.*, supra, 229 Conn. 111; *Dacey* v. *Connecticut Bar Assn.*, 170 Conn. 520, 540, 368 A.2d 125 (1976); *United Oil Co.* v. *Urban Redevelopment Commission*, 158 Conn. 364, 379, 260 A.2d 596 (1969). Here, the court should have recognized as much and deferred to the ultimate fact finder the decision as to which inference was the most plausible one after a full evidentiary hearing could be held.[15]

For all of the foregoing reasons, we disagree with the defendants that the admissible evidence properly before the trial court was insufficient to create a genuine issue of material fact regarding the timeliness of service. Accordingly, the Appellate Court's conclusion that the trial court improperly rendered summary judgment in the defendants' favor was correct.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

JEAN ST. JUSTE *v.* COMMISSIONER OF CORRECTION (SC 19460)

Rogers, C. J., and Palmer, McDonald, Robinson and D'Auria, Js.

Syllabus

Pursuant to statute ([Rev. to 2005] § 53a-62 [a]), "[a] person is guilty of threatening in the second degree when . . . (1) [b]y physical threat,

[15] We reject the defendants' assertion that, to the extent there were factual disputes over the applicability of the statute of limitations, they were for the trial court, and not a jury, to resolve. Even if we assume, without deciding, that this assertion is true, the trial court most assuredly is not empowered to resolve factual disputes *when ruling on a summary judgment motion*. Rather, if material factual disputes are identified, they should be addressed more fully in a nonsummary proceeding.

such person intentionally places or attempts to place another person in fear of imminent serious physical injury, (2) such person threatens to commit any crime of violence with the intent to terrorize another person, or (3) such person threatens to commit such crime of violence in reckless disregard of the risk of causing such terror."

The petitioner, who had been convicted, on a guilty plea, of, among other crimes, assault in the second degree, sought a writ of habeas corpus, alleging that his trial counsel had provided ineffective assistance by failing to inform him that his conviction would result in certain immigration consequences, including deportation. The habeas court rendered judgment denying the petition, from which the petitioner, on the granting of certification, appealed to the Appellate Court. The Appellate Court concluded that a prior, unchallenged conviction of threatening in the second degree under § 53a-62 (a) constituted a crime of moral turpitude under federal immigration law (8 U.S.C. § 1101 [a] [13] [C] [v]) and would, therefore, remain as an impediment to the petitioner's reentry into the country following his deportation regardless of any relief provided in connection with the petitioner's assault conviction. The Appellate Court, thus, rendered judgment dismissing the petitioner's appeal as moot, from which the petitioner, on the granting of certification, appealed to this court. *Held* that the Appellate Court improperly dismissed the petitioner's habeas appeal as moot, this court having concluded that, because the petitioner's previous conviction of threatening in the second degree did not, as a matter of law, constitute a crime of moral turpitude, his assault conviction gave rise to a reasonable possibility of prejudicial collateral consequences: because subdivisions (1) and (2) of § 53a-62 (a) proscribe intentional conduct, which falls within the federal definition of moral turpitude, whereas subdivision (3) proscribes reckless conduct without aggravating factors, which does not, § 53a-62 (a) constitutes a divisible statute that is amenable to analysis under a modified categorical approach under federal case law, which requires an examination of the underlying record to determine the subdivision of § 53a-62 (a) that gave rise to the petitioner's conviction; moreover, because the record in the present case did not establish the subdivision of § 53a-62 (a) under which the petitioner was convicted, this court could not conclude, as a matter of law, that the petitioner's previous conviction of threatening in the second degree constituted a crime of moral turpitude that would bar his reentry into this country; accordingly, the case was remanded to the Appellate court with direction to consider the merits of the petitioner's habeas appeal.

Argued October 13, 2017—officially released January 30, 2018*

*January 30, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *T. Santos*, *J.*; judgment denying the petition; thereafter, the petitioner, on the granting of certification, appealed to the Appellate Court, *Alvord*, *Keller* and *Schaller*, *Js.*, which dismissed the appeal, and the petitioner, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Justine F. Miller, assigned counsel, for the appellant (petitioner).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, *Adam E. Mattei*, assistant state's attorney, and *Gerard P. Eisenman*, former senior assistant state's attorney, for the appellee (respondent).

Opinion

ROBINSON, J. This certified appeal presents a question of first impression to this court, namely, whether we should apply the federal courts' modified categorical analysis to determine whether a Connecticut criminal statute, which lists potential offense elements in the alternative, carries the adverse immigration consequences attendant to a crime of moral turpitude as defined in 8 U.S.C. § 1101 (a) (13) (C) (v) of the Immigration and Nationality Act (immigration act), 8 U.S.C. § 1101 et seq.[1] The petitioner, Jean St. Juste, appeals,

[1] Section 1101 (a) (13) (C) of title 8 of the 2012 edition of the United States Code provides in relevant part: "An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien . . .

"(v) has committed an offense identified in section 1182 (a) (2) of this title, unless since such offense the alien has been granted relief under section 1182 (h) or 1229b (a) of this title . . . ."

Section 1182 (a) of title 8 of the 2012 edition of the United States Code provides in relevant part: "Classes of aliens ineligible for visas or admission—

upon our grant of his petition for certification,[2] from the judgment of the Appellate Court dismissing, as moot, his appeal from the judgment of the habeas court, which had denied his amended petition for a writ of habeas corpus challenging a conviction of assault in the second degree in violation of General Statutes § 53a-60 (a) (2). *St. Juste* v. *Commissioner of Correction*, 155 Conn. App. 164, 165–66, 109 A.3d 523 (2015). In its decision, the Appellate Court agreed with the respondent, the Commissioner of Correction (commissioner), and concluded that the habeas appeal was rendered moot by the petitioner's subsequent deportation to Haiti because any relief that could be provided in relation to the petitioner's assault conviction would have no effect on his ability to lawfully reenter this country or to become a citizen. Id., 181. Specifically, the Appellate Court concluded that a prior unchallenged conviction of threatening in the second degree in violation of General Statutes (Rev. to 2005) § 53a-62 (a),[3] which the Appellate Court

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States . . .

"(2) Criminal and related grounds

"(A) Conviction of certain crimes

"(i) In general—Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

"(I) *a crime involving moral turpitude* (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . ." (Emphasis added.)

[2] We originally granted the petitioner's petition for certification to appeal, limited to the following issue: "Whether the Appellate Court properly determined that threatening in the second degree in violation of General Statutes [Rev. to 2005] § 53a-62 categorically constitutes a crime of moral turpitude under 8 U.S.C. § 1101 (a) (13) (C) (v) of the [immigration act]?" *St. Juste* v. *Commissioner of Correction*, 316 Conn. 901, 901–902, 111 A.3d 470 (2015). We note that, following an unopposed motion, this court subsequently reformulated the certified issue: "Did the Appellate Court properly determine that the petitioner's appeal was moot?"

[3] General Statutes (Rev. to 2005) § 53a-62 (a) provides: "A person is guilty of threatening in the second degree when: (1) By physical threat, such person intentionally places or attempts to place another person in fear of

concluded constituted a crime of moral turpitude under the immigration act, would remain as an impediment to the petitioner's reentry. Id. Following case law from the United States Court of Appeals for the Second Circuit, we conclude that § 53a-62 (a) is a divisible statute because it lists potential offense elements in the alternative, not all of which constitute crimes of moral turpitude as a matter of federal law. Applying a modified categorical approach to this divisible statute, because the record does not establish the subdivision of § 53a-62 (a) under which the petitioner was convicted, we further conclude that the Appellate Court improperly determined that the petitioner's threatening conviction constituted a crime of moral turpitude that rendered moot his habeas appeal challenging his assault conviction. Accordingly, we reverse the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the relevant facts and procedural history. "On July 26, 2010, the petitioner filed an amended petition for a writ of habeas corpus in which he alleged that, on December 17, 2007, he pleaded guilty to assault in the second degree in violation of . . . § 53a-60 (a) (2), and guilty under the *Alford* doctrine[4] to possession of a sawed-off shotgun in violation of General Statutes § 53a-211. He was represented by Attorney Howard Ignal. On Janu-

imminent serious physical injury, (2) such person threatens to commit any crime of violence with the intent to terrorize another person, or (3) such person threatens to commit such crime of violence in reckless disregard of the risk of causing such terror."

We note that the legislature has made significant amendments to § 53a-62 since the events underlying the present appeal. See Public Acts 2017, No. 17-111, § 4; Public Acts 2016, No. 16-67, § 7. Hereinafter, all references to § 53a-62 in this opinion are to the 2005 revision of the statute.

[4] Under *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."

ary 28, 2008, he was sentenced pursuant to a plea agreement to a total effective sentence of five years incarceration, execution suspended after eighteen months, followed by five years of probation. On July 27, 2009, the petitioner, represented by Attorney Anthony Collins, filed a motion to withdraw his guilty pleas on the ground that at the time he entered them, he did not understand their immigration consequences. On November 17, 2009, the [trial] court denied the motion.

"In his two count amended petition, the petitioner alleged that Ignal rendered ineffective assistance of counsel because, among other deficiencies, he (1) failed to educate himself about the immigration consequences of the pleas, (2) misadvised the petitioner with respect to the immigration consequences of the pleas, and (3) failed to meaningfully discuss with the petitioner what immigration consequences could . . . flow from the pleas. The petitioner alleged that Ignal's representation was below that displayed by attorneys with ordinary training and skill in . . . criminal law, and that but for such representation, he would not have pleaded guilty and he would have resolved the case in a way that would not result in 'deportation consequences.' In the second count of his petition, the petitioner alleged that his pleas were not knowingly, voluntarily, and intelligently made because he made them under the mistaken belief that his conviction would not subject him to deportation. The petitioner alleged that '[a]s a result of his conviction, [he] has been ordered removed from this country by an immigration judge, and the judge's order has been affirmed by the Board of Immigration Appeals.' Additionally, the petitioner alleged that '[t]he basis for the removal order was the conviction [of] assault in the second degree and possession of a sawed-off shotgun.'[5]

[5] "[T]he record suggests that the petitioner was deported solely because of his conviction of assault in the second degree." *St. Juste* v. *Commissioner of Correction*, supra, 155 Conn. App. 167 n.2.

"Following an evidentiary hearing, the habeas court orally rendered its decision denying the petition.[6] In relevant part, the court stated that it accepted as true the testimony of the petitioner's trial attorney, Ignal. The court stated: '[Ignal] clearly saw all of the problems with this case, and they all spelled the word "immigration." From day one, I think, he was alerted to this and did everything he could, from what I can see, to try to avert the ultimate result.' The court found that Ignal was well aware of the adverse consequences of the pleas insofar as they involved deportation, and that he had thoroughly discussed that issue with the petitioner. The court rejected the claim of ineffective assistance of counsel. Later, the court granted the petitioner's petition for certification to appeal." (Footnotes added and omitted.) Id., 166–67. Following the habeas court's decision, in accordance with the September 2, 2009 decision of the United States Immigration Court (immigration court), the petitioner was deported to Haiti on April 15, 2011.[7] Id., 169.

The petitioner appealed to the Appellate Court on May 4, 2011, claiming that the judgment of the habeas court "should be overturned because, pursuant to *Padilla* v. *Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), [Ignal's performance] was deficient

[6] "Subsequently, the court filed a signed transcript of its decision in accordance with Practice Book § 64-1 (a)." *St. Juste* v. *Commissioner of Correction*, supra, 155 Conn. App. 167 n.3.

[7] As the Appellate Court noted, on September 2, 2009, the immigration court denied the petitioner's motion "to defer his deportation to Haiti, and order[ed] his deportation. It appears that the [immigration] court relied solely on the petitioner's conviction of assault in the second degree, finding that he was subject to removal based on the clear and convincing evidence that he committed that offense, which it described as 'an aggravated felony crime of violence.' [See 8 U.S.C. § 1227 (a) (2) (A) (iii) (2012).] Also, the [immigration] court found that the petitioner had not met his burden of proving that it was more likely than not that he would be subject to torture upon his return to Haiti." (Footnote omitted.) *St. Juste* v. *Commissioner of Correction*, supra, 155 Conn. App. 173.

in that he failed to advise him, prior to entering the plea agreement, 'that his [assault] conviction would make him subject to automatic deportation.' " *St. Juste* v. *Commissioner of Correction*, supra, 155 Conn. App. 167–68. The Appellate Court did not, however, reach the merits of the petitioner's ineffective assistance of counsel claim because it concluded that the appeal should be dismissed as moot. Id., 181. The Appellate Court cited *State* v. *Aquino*, 279 Conn. 293, 901 A.2d 1194 (2006), and *Quiroga* v. *Commissioner of Correction*, 149 Conn. App. 168, 87 A.3d 1171, cert. denied, 311 Conn. 950, 91 A.3d 462 (2014), for the proposition that a court cannot grant practical relief unless there is evidence that the challenged decision is the exclusive basis for the deportation. *St. Juste* v. *Commissioner of Correction*, supra, 172. These circumstances led the Appellate Court "to a consideration of whether, in accordance with the analysis in *Aquino* and *Quiroga*, there is any evidence in the record to suggest that, in the absence of the guilty plea to the assault charge, the petitioner would be allowed to reenter this country or become a citizen." Id., 174.

The Appellate Court observed that the "record reflects, and the petitioner does not dispute, that at the time that he was alleged to have committed the offenses for which he pleaded guilty—assault in the second degree and possession of a sawed-off shotgun—he was serving a period of probation resulting from an earlier conviction [of] threatening in the second degree in violation of . . . § 53a-62. Neither the record nor the parties have shed light on the subdivision of the statute under which the petitioner was convicted. As a result of the threatening conviction, the petitioner was sentenced to a suspended term of imprisonment of eleven months, with two years of probation. The record does not divulge facts concerning the threatening conviction. The parties, however, are in agreement that the petition-

er's conviction resulted from a guilty plea, and that the incident underlying the offense occurred in 2006, when the petitioner was eighteen years of age." Id.

The Appellate Court then agreed with the commissioner's argument that the defendant's conviction of threatening in the second degree constituted a crime of moral turpitude under provisions of the immigration act "that bar aliens from lawful readmission to the United States following their conviction of a crime involving moral turpitude. See 8 U.S.C. § 1182 (a) (2) (A) (i) (I) [2012] (unless statutory exception applies, aliens seeking readmission into United States are ineligible for visas or admission if they have been convicted of crimes involving moral turpitude); 8 U.S.C. § 1101 (a) (13) (C) (v) [2012] (aliens who have committed crimes of moral turpitude and attempt to reenter United States are deemed aliens seeking readmission)."[8] (Footnote omitted.) *St. Juste* v. *Commissioner of Correction*, supra, 155 Conn. App. 174–75. Applying a categorical analysis employed by the Second Circuit in *Dalton* v. *Ashcroft*, 257 F.3d 200, 204 (2d Cir. 2001),[9] the Appellate Court explained that all three applicable subdivisions of the threatening in the second degree statute necessarily

[8] The Appellate Court determined that the petitioner's threatening conviction, although a class A misdemeanor punished by a sentence of imprisonment of less than one year, was nevertheless not subject to any of the exceptions set forth in 8 U.S.C. § 1182 (a) (2) (A) (ii). See *St. Juste* v. *Commissioner of Correction*, supra, 155 Conn. App. 176 and nn. 6 and 7.

[9] In *Dalton* v. *Ashcroft*, supra, 257 F.3d 204, the Second Circuit held: "In this Circuit, we have long endorsed categorical analyses of criminal statutes in the context of deportation orders for crimes of moral turpitude. . . . Our decisions in this area stand for the proposition that the offense, judged from an abstracted perspective, must inherently involve moral turpitude; in other words, any conduct falling within the purview of the statute must by its nature entail moral turpitude. . . . More recently, we have reaffirmed this approach . . . [stating] that [a]s a general rule, if a statute encompasses both acts that do and do not involve moral turpitude, the [Board of Immigration Appeals] cannot sustain a deportability finding [predicated on moral turpitude, based] on that statute." (Citations omitted; internal quotation marks omitted.)

involve "the type of conduct and mental state that is characteristic of crimes involving moral turpitude." *St. Juste* v. *Commissioner of Correction*, supra, 181. Specifically, the Appellate Court relied on the definition of the term "threat" in our decision in *State* v. *Cook*, 287 Conn. 237, 257 n.14, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008), and federal case law from the United States Courts of Appeals for the First, Fifth, Eighth, and Ninth Circuits holding that intent and recklessness are mental states that would support a conclusion that a crime is one of moral turpitude. *St. Juste* v. *Commissioner of Correction*, supra, 179–80. The Appellate Court concluded, therefore, that the guilty plea underlying the petitioner's conviction of assault in the second degree was not the only impediment to his reentry into the United States. Id., 181. Accordingly, the Appellate Court rendered judgment dismissing the petitioner's appeal as moot "because any relief we could afford him in connection with the assault conviction underlying his petition for a writ of habeas corpus would not have any effect on his ability lawfully to reenter this country or to become a citizen." Id. This certified appeal followed. See footnote 2 of this opinion.

On appeal to this court, the petitioner claims that the Appellate Court improperly concluded that threatening in the second degree constitutes a crime of moral turpitude. Specifically, the petitioner contends that, because the statute underlying that offense is divisible, the Appellate Court should have applied the modified categorical approach to determine the particular subdivision of § 53a-62 (a) under which the petitioner pleaded guilty. Applying the modified categorical approach, the petitioner argues that the record demonstrates that he pleaded guilty to threatening in the second degree under § 53a-62 (a) (3), which is not a crime of moral turpitude because it requires proof of recklessness, and not § 53a-62 (a) (1), which requires proof of intent.

In response, the commissioner argues that the Appellate Court properly applied the categorical approach to determine that threatening in the second degree in violation of § 53a-62 (a) constitutes a crime of moral turpitude under any of the statute's three subdivisions. Alternatively, the commissioner argues that, even under the modified categorical approach, the petitioner's threatening conviction constituted a crime of moral turpitude because that approach, properly applied, identifies § 53a-62 (a) (1), which requires an intentional mental state, as the subdivision underlying the petitioner's conviction. We, however, agree with the petitioner and conclude that § 53a-62 (a) is divisible, with offenses requiring recklessness under subdivision (3) not presenting crimes of moral turpitude under Second Circuit case law. Applying the modified categorical approach to the record before us, we are unable to ascertain which subdivision of § 53a-62 (a) formed the basis of the petitioner's conviction. Because we cannot determine from the record whether the petitioner's conviction under that statute constitutes a crime of moral turpitude, we conclude that the Appellate Court improperly dismissed the habeas appeal as moot insofar as the petitioner's challenged assault conviction gives rise to a reasonable possibility of prejudicial collateral consequences.

It is well settled that "[a] case is considered moot if [the] court cannot grant the [litigant] any practical relief through its disposition of the merits . . . . Under such circumstances, the court would merely be rendering an advisory opinion, instead of adjudicating an actual, justiciable controversy. . . . Because mootness implicates the court's subject matter jurisdiction, it raises a question of law subject to plenary review." (Citations omitted; internal quotation marks omitted.) *State* v. *Jerzy G.*, 326 Conn. 206, 213, 162 A.3d 692 (2017).

The collateral consequences doctrine is an exception to the traditional direct injury requirement of mootness. Specifically, "[w]e have determined that a controversy continues to exist . . . if the actual injury suffered by the litigant potentially gives rise to a collateral injury from which the court can grant relief." *State* v. *McElveen*, 261 Conn. 198, 205, 802 A.2d 74 (2002); see also *State* v. *Jerzy G.*, supra, 326 Conn. 213–14. "[F]or a litigant to invoke successfully the collateral consequences doctrine, the litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur." *State* v. *McElveen*, supra, 208.

We recently considered the application of the collateral consequences doctrine in the context of immigration in *State* v. *Jerzy G.*, supra, 326 Conn. 223, which held that a conviction that was not the sole reason for a petitioner's deportation nevertheless could have given rise to prejudicial collateral consequences that negatively affected the petitioner's ability to lawfully reenter the country or to become a citizen.[10] Explaining *State* v. *Aquino*, supra, 279 Conn. 293, this court observed that "courts have held that when a conviction, other than the one being challenged, results in a deportee's *permanent* ban from reentering this country, the deportee cannot establish collateral injury even if the challenged conviction also is an impediment to reentry." (Emphasis in original.) *State* v. *Jerzy G.*, supra, 221; see also id., 222–23 (rejecting cases, such as *Quiroga* v. *Commissioner of Correction*, supra, 149 Conn. App. 168, that read *Aquino* as standing for proposition that court cannot grant practical relief unless there is evidence that challenged decision is *exclusive* basis for

[10] We released our decision in *State* v. *Jerzy G.*, supra, 326 Conn. 206, after the parties filed their briefs in the present appeal but prior to oral argument. The parties have filed supplemental briefs addressing the effect, if any, of our decision in *Jerzy G.* on the present appeal, in response to our order issued on July 24, 2017.

deportation). Therefore, in the present appeal, we must determine whether the petitioner's unchallenged conviction of threatening in the second degree is a crime of moral turpitude that would permanently bar his reentry into the United States or impede his ability to become a citizen.

At the outset, we note that the question of whether the petitioner's conviction of threatening in the second degree constitutes a crime of moral turpitude under the immigration act presents an issue of first impression for Connecticut's courts. In considering this question, which is determinative of the question of mootness in the present appeal, "we note that it is well settled that decisions of the Second Circuit, while not binding upon this court, nevertheless carry particularly persuasive weight in the resolution of issues of federal law . . . ." (Internal quotation marks omitted.) *Dayner* v. *Archdiocese of Hartford*, 301 Conn. 759, 783, 23 A.3d 1192 (2011); see also *Martinez* v. *Empire Fire & Marine Ins. Co.*, 322 Conn. 47, 62, 139 A.3d 611 (2016) ("principles of comity and consistency" constrain us "to follow the Second Circuit" in addressing questions of federal law).

The Board of Immigration Appeals has defined a crime of moral turpitude as "conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Rodriguez* v. *Gonzales*, 451 F.3d 60, 63 (2d Cir. 2006). The Second Circuit has explained that, "[i]n determining whether a crime is a crime involving moral turpitude, we apply either a categorical or a modified categorical approach. Under the categorical approach, we look only to the minimum criminal conduct necessary to satisfy the essential elements of the crime, not the particular circumstances of the defendant's conduct. . . . When the criminal statute at issue encompasses some classes of criminal acts that fall within the

federal definition of [moral turpitude] and some classes that do not fall within the definition, the statute is considered divisible. . . . If a statute is divisible a court, proceeding under the modified categorical approach, may refer to the record of conviction to determine whether a petitioner's conviction was under the branch of the statute that proscribes removable offenses." (Citations omitted; internal quotation marks omitted.) *Mendez* v. *Mukasey*, 547 F.3d 345, 348 (2d Cir. 2008); see also *Akinsade* v. *Holder*, 678 F.3d 138, 144 (2d Cir. 2012) ("where a statute is divisible, such that some categories of proscribed conduct render an alien removable and some do not, application of a modified categorical approach is appropriate" [internal quotation marks omitted]); *Wala* v. *Mukasey*, 511 F.3d 102, 107 (2d Cir. 2007) (applying modified categorical approach to divisible statute). In *Descamps* v. *United States*, 570 U.S. 254, 260, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013), the United States Supreme Court further explained the modified categorical approach, noting that it "serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in [the relevant] conviction." Additionally, the Supreme Court explained that the modified categorical approach helps identify the subdivision at issue by allowing a court to review extra statutory material to "discover which statutory phrase, contained within a statute listing several different crimes, covered a prior conviction." (Internal quotation marks omitted.) Id., 263.

Threatening in the second degree in violation of § 53a-62 (a) is a class A misdemeanor; see General Statutes (Rev. to 2005) § 53a-62 (b); that is punishable by a sentence of imprisonment of "a term not to exceed one year . . . ." General Statutes § 53a-36. We begin by noting that § 53a-62 (a) appears to be a divisible statute

amenable to analysis under the modified categorical approach.[11] Each subdivision of § 53a-62 (a) requires proof of a different act or particular mental state. Under § 53a-62 (a) (1) and (2), the legislature requires proof of an intentional mental state. Specifically, subdivision (1) requires proof that an accused intentionally placed another person in fear of imminent serious physical injury, while subdivision (2) requires proof that an accused intentionally terrorized another person. Section 53a-62 (a) (3), however, requires proof that an accused recklessly disregarded the risk of causing terror in another person. See *Guevara* v. *Holder*, 533 Fed. Appx. 23, 26 (2d Cir. 2013) (New York assault statute was "likely a divisible statute, inasmuch as subsections [2] and [3] do not require a specific intent" and "[s]ubsection [1] involves an intent to injure"). These different mental states require us to determine whether all of the classes of criminal conduct encompassed in the statute "[shock] the public conscience . . . ." *Rodriguez* v. *Gonzales*, supra, 451 F.3d 63.

In making this determination, we recognize that the Second Circuit has explained that, "[b]ecause [i]t is in the intent that moral turpitude inheres, the focus of the analysis is generally on the mental state reflected in the statute." (Internal quotation marks omitted.) *Efstathiadis* v. *Holder*, 752 F.3d 591, 595 (2d Cir. 2014). "Whether a crime is one involving moral turpitude depends on the offender's evil intent or corruption of the mind." (Internal quotation marks omitted.) *Mendez*

[11] We note that it appears that, even under the categorical approach, we would still be left to determine whether threatening in the second degree with a reckless mental state in violation of § 53a-62 (a) (3) constitutes a crime of moral turpitude. Cases from the Second Circuit applying the categorical approach have held that, "[a]s a general rule, if a statute encompasses both acts that do and do not involve moral turpitude, the [Board of Immigration Appeals] cannot sustain a deportability finding [predicated on moral turpitude based] on that statute." (Internal quotation marks omitted.) *Dalton* v. *Ashcroft*, supra, 257 F.3d 204.

v. *Mukasey*, supra, 547 F.3d 347; see also *Michel* v. *Immigration & Naturalization Service*, 206 F.3d 253, 263 (2d Cir. 2000) ("corrupt scienter is the touchstone of moral turpitude"). It is undisputed that a threatening offense committed under subdivisions (1) and (2) of § 53a-62 (a), which require an intentional mental state, constitutes a crime of moral turpitude.[12] Thus, the focus of our inquiry is on whether a threatening offense committed with reckless disregard under § 53a-62 (a) (3) constitutes a crime of moral turpitude.

In the Second Circuit, "crimes committed recklessly (where recklessness is defined as a *conscious* disregard of substantial and unjustifiable risk) have, *in certain aggravated circumstances*, been found to express a sufficiently corrupt mental state to constitute a [crime of moral turpitude]." (Emphasis added.) *Gill* v. *Immigration & Naturalization Service*, 420 F.3d 82, 89 (2d Cir. 2005). The Second Circuit recently reaffirmed this proposition in *Gayle* v. *Sessions*, Docket No. 16-3953-ag, 2018 WL 341736 (2d Cir. 2018), in which the court

[12] Looking beyond the Second Circuit, we observe that the other Circuit Courts of Appeals have held that the crime of threatening, when committed with an intentional mental state, constitutes a crime of moral turpitude. See *Javier* v. *Attorney General*, 826 F.3d 127, 132 (3d Cir. 2016) ("a threat communicated with a specific intent to terrorize is an act accompanied by a vicious motive or a corrupt mind so as to be categorically morally turpitudinous" [internal quotation marks omitted]); *Latter-Singh* v. *Holder*, 668 F.3d 1156, 1163 (9th Cir. 2012) ("Because [the California threatening statute] criminalizes only the [wilful] threatening of a crime that itself constitutes a crime of moral turpitude with the intent and result of instilling sustained and imminent grave fear in another . . . it is categorically a crime involving moral turpitude"); *Solomon* v. *Attorney General*, 308 Fed. Appx. 644, 646 (3d Cir. 2009) (threatening is crime of moral turpitude when crime is threat "to commit any crime likely to result in death or in serious injury to person or property," which state court has interpreted to require both threat and "the intent to threaten or intimidate" [internal quotation marks omitted]); *Chanmouny* v. *Ashcroft*, 376 F.3d 810, 814 (8th Cir. 2004) ("[w]e believe that the crime at issue in this case—threatening a crime of violence against another person with the purpose of causing extreme fear—likewise falls within the category of offenses requiring a vicious motive or evil intent").

concluded that "recklessness is 'a culpable mental state for moral turpitude purposes' when combined with aggravating circumstances." Importantly, the Second Circuit explained that "[c]rimes that are the equivalent of a simple assault do not present the aggravating circumstance necessary for a [crime of moral turpitude], but crimes involving more serious physical harm do." Id. As such, the Second Circuit has held that reckless assault was a crime of moral turpitude when the statute required proof of a deadly instrument and serious bodily harm. *Gill* v. *Immigration & Naturalization Service*, supra, 89. Similarly, the Second Circuit recently concluded that reckless endangerment was a crime of moral turpitude because the statutory element of "danger of death or serious and protracted bodily injury" constituted the requisite aggravating circumstance. *Gayle* v. *Sessions*, supra, 2018 WL 341736, *2; accord *Idy* v. *Holder*, 674 F.3d 111, 118 (1st Cir. 2012) (New Hampshire reckless conduct statute was crime of moral turpitude because of aggravating factor of placing "another in danger of serious bodily injury" [internal quotation marks omitted]).

In the present case, § 53a-62 (a) (3) meets the Second Circuit's reckless mental state requirement for purposes of moral turpitude because, under Connecticut's penal statutes, a person acts recklessly "when he is aware of and *consciously disregards a substantial and unjustifiable risk* that such result will occur or that such circumstance exists." (Emphasis added.) General Statutes § 53a-3 (13). Under the Second Circuit's analysis, § 53a-62 (a) (3) is not, however, a crime of moral turpitude because it lacks the requisite aggravating factor. The statutory language requires that the accused threaten to commit a crime of violence in "reckless disregard of the risk of causing such terror"; General Statutes (Rev. to 2005) § 53a-62 (a) (3); which, "[i]n common parlance . . . means to scare or to cause intense fear

or apprehension." *State* v. *Crudup*, 81 Conn. App. 248, 261, 838 A.2d 1053, cert. denied, 268 Conn. 913, 845 A.2d 415 (2004); see also *State* v. *Kantorowski*, 144 Conn. App. 477, 488, 72 A.3d 1228, cert. denied, 310 Conn. 924, 77 A.3d 141 (2013). In the absence of intent, therefore, it appears that the act of causing terror cannot qualify as an aggravating factor under the Second Circuit's formulation of the moral turpitude requirement, given that it has concluded that a physical act, namely, simple assault, does not. See *Gayle* v. *Sessions*, supra, 2018 WL 341736, *2. As Judge Kelly of the Eighth Circuit has explained in concluding that Minnesota's reckless threatening statute, which is worded similarly to § 53a-62 (a) (3), is not a crime of moral turpitude, it is possible to violate that statute by a "joke or a flippant remark," a remark made in "transitory anger," or "even if no one actually experienced terror."[13] (Internal quota-

[13] Judge Kelly's contextual explanation of the use of the term "threat" leads us to disagree with the Appellate Court's reliance on that term, as defined by *State* v. *Cook*, supra, 287 Conn. 257 n.14, in support of its determination that even reckless threatening is a crime of moral turpitude. See *St. Juste* v. *Commissioner of Correction*, supra, 155 Conn. App. 180 (noting that "threat" is "an indication of something impending and [usually] undesirable or unpleasant [as] *an expression of an intention to inflict evil, injury, or damage on another* [usually] as retribution or punishment for something done or left undone" [emphasis in original; internal quotation marks omitted]).

We note that the majority in *Avendano* v. *Holder*, supra, 770 F.3d 733, concluded that Minnesota's reckless threatening statute constituted a crime of moral turpitude. Given that our federal analysis hews to the law of the Second Circuit, the Eighth Circuit's decision in *Avendano* is distinguishable, and ultimately unpersuasive in the context of this case, because it specifically rejects the Second Circuit's approach of requiring both a reckless mens rea *and* an aggravating act. See id., 736. Particularly because our moral turpitude analysis, which determines whether the petitioner's habeas appeal is moot, is inherently predictive of how the Second Circuit would decide the petitioner's immigration case, we deem ourselves even more constrained by Second Circuit case law than we would be in resolving an ordinary question of federal law. See, e.g., *Dayner* v. *Archdiocese of Hartford*, supra, 301 Conn. 783; cf. *Martinez* v. *Empire Fire & Marine Ins. Co.*, supra, 322 Conn. 62 ("[i]t would be strange indeed for federal statutes and regulations to apply differently, and potentially change the outcome of a case, based solely on which courthouse in Connecticut, state or federal, the plaintiff chooses for filling the action").

tion marks omitted.) *Avendano* v. *Holder*, 770 F.3d 731, 739–40 (8th Cir. 2014) (Kelly, J., concurring in part and dissenting in part). With this perspective, a reckless threat is a far cry from a reckless assault with a deadly instrument that results in serious bodily harm; see *Gill* v. *Immigration & Naturalization Service*, supra, 420 F.3d 89; or reckless endangerment with the risk of death or serious protracted bodily injury; see *Gayle* v. *Sessions*, supra, 2018 WL 341736, *2. Accordingly, we cannot conclude, for purposes of the present mootness inquiry, that a violation of § 53a-62 (a) (3) constitutes a crime of moral turpitude as a matter of law that would serve as a bar to the petitioner's reentry into the United States. Thus, the focus of our modified categorical analysis must turn to a determination of the subdivision of § 53a-62 (a) that forms the basis for the petitioner's conviction.

We now apply the modified categorical approach to determine the subdivision of § 53a-62 (a) under which the petitioner was convicted because it is a divisible statute; it proscribes both conduct that constitutes a crime of moral turpitude—crimes committed under the first two subdivisions—and some conduct that does not—crimes committed under the third subdivision. Accordingly, we now look to the record of conviction for the limited purpose of determining the subdivision of § 53a-62 (a) under which the petitioner was convicted. "The record of conviction includes, inter alia, the charging document, a plea agreement, a verdict or judgment of conviction, a record of the sentence, or a plea colloquy transcript." *Mendez* v. *Mukasey*, supra, 547 F.3d 348. "With respect to guilty pleas, under the modified categorical approach as applied to immigration proceedings, the [Board of Immigration Appeals] may rely only upon facts to which a defendant necessarily pleaded in order to determine the type of conduct that represented the basis of an alien's conviction. . . .

[T]he necessarily pleaded language refers not just to whether a petitioner [pleaded] guilty to elements of the underlying . . . offense, but also to whether by pleading guilty, he [pleaded] those facts necessary to establish that he violated a divisible statute in a manner that satisfies the grounds for removal." (Citations omitted; internal quotation marks omitted.) *Akinsade* v. *Holder*, supra, 678 F.3d 144. Once the modified approach identifies the statutory subdivision at issue, the focus of the moral turpitude inquiry then returns to the elements of the offense without regard to the petitioner's individual conduct. See *Flores* v. *Holder*, 779 F.3d 159, 165 (2d Cir. 2015) ("[o]nce the correct alternative is identified, the focus must return to the elements, rather than the facts, of [the] crime" [internal quotation marks omitted]).

As the parties and the Appellate Court acknowledge, the record in the present case provides little to no insight into which subdivision of § 53a-62 (a) to which the petitioner pleaded guilty. The only evidence contained in the record of conviction is the plea colloquy transcript and the information, neither of which indicate a charge of, or plea to, violating a specific subdivision of § 53a-62 (a). Specifically, count two of the information lists the offense committed as "threatening second degree." During the plea colloquy, the prosecutor asked the petitioner: "[Y]ou're charged in count two of the information with *threatening second*. How do you plead, guilty or not guilty?" (Emphasis added.) The petitioner responded, simply, "[g]uilty."

The commissioner claims, however, that the prosecutor's subsequent statement during the plea colloquy that the petitioner "made threats of potential bodily harm" to a victim, is sufficient to demonstrate that the petitioner pleaded guilty to violating subdivision (1) of § 53a-62 (a) because that is the only subdivision of the statute with a physical threat element. We disagree. The prose-

cutor's statement is, by itself, insufficient to demonstrate that the petitioner pleaded guilty under subdivision (1) of § 53a-62 (a) because that subdivision requires that the accused intentionally placed another person in fear of "imminent serious physical injury . . . ." We have no evidence that the purported "threats of potential bodily harm," that the prosecutor referenced, were sufficient to place the victim in fear of imminent physical injury or that such physical injury was serious. Accordingly, given the lack of evidence in the record, we are unable to ascertain which subdivision of § 53a-62 (a) to which the petitioner pleaded guilty; put differently, he could have pleaded guilty to threatening in the second degree with an intentional or a reckless mental state. Given our conclusion that, in accordance with Second Circuit precedent, reckless threatening under § 53a-62 (a) (3) does not constitute a crime of moral turpitude as a matter of law, we cannot conclude that the petitioner was convicted of a crime of moral turpitude that is a "permanent ban from reentering this country . . . ." *State* v. *Jerzy G.*, supra, 326 Conn. 221; see also *Conboy* v. *State*, 292 Conn. 642, 650, 974 A.2d 669 (2009) ("in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged" [internal quotation marks omitted]).

Accordingly, in the absence of evidence of a crime of moral turpitude that would serve as a permanent ban from reentering this country, we conclude that the petitioner's assault conviction, which he challenges in the present habeas action, gives rise to a reasonable possibility of prejudicial collateral consequences—namely, his deportation and a barrier to reentry. See *State* v. *Jerzy G.*, supra, 326 Conn. 221–23. The Appellate Court, therefore, improperly declined to reach the merits of the petitioner's appeal when it rendered judgment dismissing the petitioner's appeal as moot.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to consider the merits of the petitioner's appeal.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JOHN PANEK (SC 19772)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Robinson, D'Auria and Espinosa, Js.*

Syllabus

Pursuant to statute ([Rev. to 2009] § 53a-189a [a] [1]) a person is guilty of voyeurism when he video records another person, without such other person's knowledge or consent, while the other person is "not in plain view," and under circumstances in which the other person has a reasonable expectation of privacy.

The defendant was charged with three counts of voyeurism arising out of separate incidents in which he allegedly made video recordings of consensual sexual encounters between himself and three women without their knowledge or consent. The defendant moved to dismiss the charges, claiming that the state could not prove the element of § 53a-189a (a) (1) that the women being recorded were not in plain view. Specifically, he argued that the women were in his plain view at the time they were recorded, and, therefore, he could not be found guilty of voyeurism. The trial court granted the motion, rendered judgments dismissing the charges, and the state, on the granting of permission, appealed to the Appellate Court. On appeal to that court, the state claimed that § 53a-189a (a) (1) was ambiguous and, in light of its legislative history, should be interpreted as referring to a victim who was not in plain view of the public generally and that this element was satisfied because the women at issue were not in plain view of the public when they were allegedly recorded. The Appellate Court affirmed the trial court's judgment, concluding that the statutory language unambiguously referred to the plain view of the defendant. The state, on the granting of certification, appealed to this court. *Held*:

1. An examination of the statutory language of § 53a-189a (a) (1) and extratextual sources, especially the statute's legislative history, led this court to conclude that the Appellate Court incorrectly construed the not in plain view element of § 53a-189a (a) (1), and, because the state could establish the not in plain view element on the basis of the facts of this

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

case, the Appellate Court improperly upheld the trial court's dismissal of the charges: this court concluded, upon review of the technical meaning of plain view in the context of the plain view exception to the warrant requirement under fourth amendment to the federal constitution, dictionary definitions of "plain" and "view," and the use of the phrase "not in plain view" in other statutory provisions, that the not in plain view element was susceptible to more than one reasonable interpretation, and, contrary to the Appellate Court's conclusion that the statutory language plainly and unambiguously referred to the plain view of the defendant, that language was ambiguous and plausibly could refer to either the plain view of the defendant or the general public; moreover, the legislative history of § 53a-189a (a) (1) supported the conclusion that the legislature intended the not in plain view element to refer to the plain view of the public generally, and, thus, for the victim to be not in plain view for purposes of § 53a-189a (a) (1), he or she must not be in a position where any member of the public, lawfully situated, could plainly view him or her; furthermore, there was no merit to the defendant's claim that the ambiguity in § 53a-189a (a) (1) should be resolved in his favor under the rule of lenity, as that rule applies only if other tools of statutory construction fail to confirm the meaning of ambiguous language, and, in the present case, there was no reasonable doubt about the intended scope of § 53a-189a (a) (1).

2. There was no merit to the defendant's claim, as an alternative ground for affirming the Appellate Court's judgment, that § 53a-189a (a) (1) was unconstitutionally vague on its face and as applied to his conduct; § 53a-189a (a) (1) put the defendant on notice that recording the victim under the circumstances of this case was conduct the legislature sought to proscribe, the defendant did not cite any legal authority to support his claim that the crime of voyeurism should encompass only scenarios in which the victims believe they are alone, and the legislative history manifested a concern about the nonconsensual recording of another person regardless of whether that person believes they are alone.

Argued September 19, 2017—officially released January 31, 2018**

Procedural History

Three informations charging the defendant, in each case, with the crime of voyeurism, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, where the court, *Wenzel*, *J.*, granted the defendant's motion to dismiss and rendered judgments thereon, from which the state,

** January 31, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

on the granting of permission, appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Sheldon* and *Prescott*, *Js.*, which affirmed the judgments of the trial court, and the state, on the granting of certification, appealed to this court. *Reversed; further proceedings.*

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *Nichol Peco*, assistant state's attorney, for the appellant (state).

William B. Westcott, for the appellee (defendant).

Opinion

D'AURIA, J. The defendant, John Panek, was accused of engaging in sexual activity with a woman in his home and, while doing so, making a video recording of the encounter without the woman's knowledge or consent. He was accused of doing the same thing on at least two other occasions with two other women. In three separate informations, the state charged the defendant with violating General Statutes (Rev. to 2009) § 53a-189a (a) (1).[1] This section generally prohibits a person from, knowingly and with malice, video recording another person "(A) without the knowledge and consent of such other person, (B) while such other person is not in plain view, and (C) under circumstances where such other person has a reasonable expectation of privacy . . . ." General Statutes (Rev. to 2009) § 53a-189a (a) (1). The present appeal concerns the meaning of the element requiring that the victim be "not in plain view" when she is recorded. General Statutes (Rev. to 2009) § 53a-189a (a) (1) (B). More specifically, we are asked to determine to whose plain view the statute refers.

[1] General Statutes § 53a-189a was the subject of certain amendments since the events underlying this appeal. See Public Acts 2015, No. 15-213, § 1. All references to § 53a-189a are to the 2009 revision of the statute unless otherwise indicated.

The defendant moved to dismiss the informations on the ground that the "not in plain view" element refers to the plain view *of the defendant*. He asserted he could not be charged or convicted under this statute for his conduct because each of the women he was with was within his plain view at the time he recorded them. The state responded that the "not in plain view" element of § 53a-189a (a) (1) referred instead to the perspective *of the general public* and that, because the defendant and the victim were inside his home at the time, they were "not in plain view" of the public when the alleged offenses occurred.[2] The trial court concluded that the statute plainly and unambiguously referred to the plain view of the defendant and dismissed the informations. The Appellate Court affirmed the judgments of dismissal. *State* v. *Panek*, 166 Conn. App. 613, 635, 145 A.3d 924 (2016).

Contrary to the trial court and Appellate Court, we conclude that the text of § 53a-189a (a) (1) plausibly could refer to either the plain view of the defendant or the general public, rendering the statute ambiguous. Consulting extratextual sources, we are persuaded that the "not in plain view" element refers to the general public. We also reject the defendant's alternative ground for affirming the judgment of the Appellate Court, namely, that the "not in plain view" element is unconstitutionally vague or overbroad. We therefore reverse the Appellate Court's judgment.

For the purposes of this appeal, the parties have stipulated to the following facts, taken from the affidavit supporting the warrants issued for the defendant's arrest. The defendant and his girlfriend (victim) were engaged in consensual sexual relations in the bedroom

[2] The state also claimed that the "not in plain view" element of § 53a-189a (a) (1) referred to the perspective of the recording device and that, because the victim had no knowledge of the recording device, she was "not in plain view." The state does not pursue this argument on appeal to this court.

of her apartment when she discovered he was secretly recording their encounter using his phone. She had not previously known about or consented to the recording and objected to it immediately. The defendant deleted the recording and claimed it was the first time he had recorded their sexual encounters.

Suspicious that the defendant had stored other surreptitiously recorded videos on his home computer, the victim later traveled to the defendant's home to confront him and end the relationship. The defendant admitted to possessing other secret video recordings of their sexual relations on his computer, and, when the victim demanded he retrieve and delete all the video files, he quickly selected a folder on his computer labeled with her initials and deleted it without showing her its contents. The defendant told her that he could not show her where the recordings were stored on his computer because private images of other women were stored in the same vicinity. The defendant claimed the videos he possessed of other women were consensually recorded.

After the victim reported the incident, the police executed a search warrant at the defendant's home, including his computer equipment and electronic file storage devices. Although he initially told officers he did not possess any other nonconsensually recorded videos, the defendant later admitted he had photographed two other women without their knowledge or consent while they were undressed in his immediate physical presence.

The defendant was arrested and charged with voyeurism in violation of § 53a-189a in three separate informations, each one relating to one of the three women he recorded. The defendant moved to dismiss all charges on the ground that recording his own consensual sexual activity with another person cannot establish the sec-

ond element of the statute, namely, that the recording took place when the victim was "not in plain view." General Statutes (Rev. to 2009) § 53a-189a (a) (1) (B). Interpreting "not in plain view" to unambiguously mean not in plain view of the *defendant*, the trial court concluded on the basis of the stipulated facts that the state's evidence could not establish this element because each woman was in the defendant's immediate physical presence during the recordings and, thus, in his plain view. The court therefore dismissed all three informations.

The state appealed from the judgments of the trial court to the Appellate Court pursuant to General Statutes § 54-96, arguing that the phrase "not in plain view" in § 53a-189a (a) (1) (B) is ambiguous and must therefore be construed in light of its legislative history, which establishes that the statute refers to the plain view of the *public*. Because the women at issue were not in plain view of the public when the defendant recorded them, the state further argued that the second element of the statute would be satisfied in the present case. The Appellate Court disagreed and affirmed the trial court's dismissal of the case, concluding that the statutory language unambiguously referred to the plain view of the person making the recording, not the public. *State* v. *Panek*, supra, 166 Conn. App. 635.

We granted the state's petition for certification to appeal to address the following question: "Did the Appellate Court properly construe the 'not in plain view' element of . . . § 53a-189a, the video voyeurism statute, in affirming the dismissal of the charges against the defendant?" *State* v. *Panek*, 323 Conn. 911, 149 A.3d 980 (2016). In addition to the certified question, the defendant claims that the Appellate Court's judgment may be affirmed on the alternative ground that the "not in plain view" element of § 53a-189a (a) (1) is unconstitutionally vague and overbroad on its face and as applied to his conduct.

I

We turn first to the certified question concerning the meaning of the "not in plain view" element of § 53a-189a (a) (1). Applying plenary review to this question of law; see, e.g., *State* v. *Fowlkes*, 283 Conn. 735, 738, 930 A.2d 644 (2007); we disagree with the Appellate Court's interpretation and instead conclude that "not in plain view" refers to the plain view of the general public, not the defendant. Specifically, although the Appellate Court determined that the statute plainly and unambiguously referred to the plain view of the defendant, we conclude that the statutory language—which is hardly a model of clarity—is ambiguous about whether it refers to the plain view of the defendant, the general public, or anyone else, and, therefore, we must look beyond the language of the statute. Upon consulting extratextual sources, especially the statute's legislative history, we are persuaded that the legislature intended for the "not in plain view" element of § 53a-189a (a) (1) to be viewed from the perspective of the public generally.

Before turning to our analysis, we set forth the essential principles that guide our interpretation of statutes. "[O]ur fundamental objective [in statutory construction] is to ascertain and give effect to the apparent intent of the legislature . . . ." (Internal quotation marks omitted.) *Board of Education* v. *State Board of Education*, 278 Conn. 326, 331, 898 A.2d 170 (2006). When we construe a statute, General Statutes § 1-2z directs us to ascertain its meaning "from the text of the statute itself and its relationship to other statutes." "If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpre-

tive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .'' (Internal quotation marks omitted.) *Rivers* v. *New Britain*, 288 Conn. 1, 11, 950 A.2d 1247 (2008). ''[O]ur case law is clear that ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation.'' (Internal quotation marks omitted.) *Lackman* v. *McAnulty*, 324 Conn. 277, 286, 151 A.3d 1271 (2016).

A

Textual Analysis

Applying these principles, we conclude, contrary to the Appellate Court and the trial court, that an examination of the text of the statute and our consideration of related statutory provisions do not yield a single, unambiguous meaning of the ''not in plain view'' element in § 53a-189a (a) (1).

1

We begin our search for the legislature's intended meaning by examining the statute itself. Section 53a-189a (a) provides in relevant part: ''A person is guilty of voyeurism when, (1) with malice, such person knowingly photographs, films, videotapes or otherwise records the image of another person (A) without the knowledge and consent of such other person, (B) *while such other person is not in plain view*, and (C) under circumstances where such other person has a reasonable expectation of privacy . . . .'' (Emphasis added.) General Statutes (Rev. to 2009) § 53a-189a (a). The statute thus generally criminalizes the malicious and nonconsensual recording of another person while ''such other person is not in plain view,'' and under circum-

stances where such person has a reasonable expectation of privacy. General Statutes (Rev. to 2009) § 53a-189a (a) (1).

The "not in plain view" element presupposes that "such other person" is being viewed from a particular vantage point, but does not explicitly dictate *whose* vantage point must be considered. General Statutes (Rev. to 2009) § 53a-189a (a) (1). The statute itself refers to two individuals—the person recording and the person being recorded. It is doubtful that the statute refers to the plain view of the person being recorded because that would be absurd—the recorded person would always be in plain view of himself or herself—and neither party is advocating for this interpretation. The statutory language, on its face, could be interpreted to refer to the plain view of the person making the recording, as the defendant asserts. But the statute could also be read to refer to the view of the public generally, as the state argues. Also, the statute could refer to the plain view of *any* other person, meaning that the person being recorded must not be in the plain view of *anyone else* at the time of the recording to establish this element of the offense. Nothing in the statutory language expressly points to or excludes any of these latter three interpretations.

A closer look at the meaning of "plain view" does not resolve the ambiguity either. There is no statutory definition of "plain view" for us to consult. When we construe undefined statutory terms, General Statutes § 1-1 (a) directs us to use the "commonly approved usage" of the words at issue, or, if they are technical words that have "acquired a peculiar and appropriate meaning in the law," then they should be construed according to that technical meaning.

The term "plain view" has certainly obtained a technical meaning within jurisprudence concerning the fourth

amendment to the federal constitution and the law governing searches and seizures by government agents. An exception to the fourth amendment's warrant requirement permits police to seize, even in the absence of a warrant, any evidence or contraband in the "plain view" of a police officer. *State* v. *Jones*, 320 Conn. 22, 65–66, 128 A.3d 431 (2015). In the context of the fourth amendment, "plain view" connotes something readily observable and identifiable by the officer, without the aid of technological equipment not publicly available. See, e.g., *Kyllo* v. *United States*, 533 U.S. 27, 40, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) (use of nonpublic thermal imaging equipment constitutes search). It also suggests that the officer must perceive the contraband from a place he has a lawful right to be without a warrant and through an activity he has a lawful right to conduct without a warrant—something is not in plain view if an officer has trespassed to perceive it. See, e.g., *Florida* v. *Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013) (officer with police dog approaching and lingering at front door of residence was search). The limitations on the plain view doctrine protect those who have otherwise generally shielded themselves or their effects from public view from nevertheless being observed or intruded upon by the government using equipment not otherwise available to the public or through an unlawful search or seizure. In short, it helps ensure that police do not skirt the warrant requirement by performing searches with technologies or techniques that the public generally cannot employ.

Considerations at play in the fourth amendment context might help inform the meaning of plain view as used in § 52a-189a (a) (1). For example, a person might be "not in plain view" for the purposes of § 53a-189a (a) (1) if they are observable only through trespass, peeking over or under a privacy barrier, or the use of uncommon technological equipment.

Nevertheless, irrespective of whether and how the fourth amendment plain view doctrine might apply to § 53a-189a, we do not believe that it resolves the ambiguity we contend with about *whose view* must be considered when applying the statute. Although both the fourth amendment and § 53a-189a may be said to address privacy concerns, the fourth amendment plain view doctrine generally governs intrusions by government officers, whereas § 53a-189a relates to the conduct of individuals generally, not government agents. The fourth amendment plain view doctrine is necessarily applied from the perspective of a police officer, lawfully present on the scene, but neither party contends that the "not in plain view" element of § 53a-189a (a) (1) was intended to refer to the plain view of a police officer—an interpretation that would make little sense. The central considerations relating to the fourth amendment plain view doctrine—that something must be observed from a lawful location during lawful activity and without technology unavailable to the general public—could still be applied to § 53a-189a (a) (1) regardless of whether the relevant viewpoint is that of the person doing the recording, a member of the public generally, or anyone else.[3]

Because this technical fourth amendment meaning of "plain view," even if applied to § 53a-189a (a) (1), does not resolve the ambiguity before us, we also consider the common meaning of that phrase, as expressed in the dictionary. See, e.g., *Middlebury* v. *Connecticut Siting Council*, 326 Conn. 40, 49, 161 A.3d 537 (2017).

The dictionary definition provides some support for the state's position that the "not in plain view" element

[3] By this observation, we do not mean to hold that these considerations from the fourth amendment plain view doctrine apply to this statute; that question is not directly before us. We observe only that, even if § 53a-189a (a) (1) were interpreted through the lens of this doctrine, such an interpretation would not resolve the question facing us.

of § 53a-189a (a) (1) refers to the view of the public, but does not entirely resolve the dispute. Webster's Third New International Dictionary (1961) defines "plain," in relevant context, as "free of obstacles" and "free of impediments to view: unobstructed," and it defines "view," in relevant context, as "the act of seeing or beholding . . . ." Other dictionaries provide similar definitions, supporting the conclusion that "in plain view" means something like clearly visible. See, e.g., Webster's II New College Dictionary (2001) (defining "plain" as "clearly evident," and "open and without pretense"); Webster's Eleventh New Collegiate Dictionary (2011) (defining plain as "free from duplicity or subtlety"). These definitions suggest that "plain," as an adjective modifying "view," describes *how* the viewing must occur, but does not tell us *who* must be doing the viewing. Put another way, these dictionary definitions suggest that the person being recorded must not be in "plain view" or not clearly visible, but they do not tell us to whom the victim must not be visible. Notably, however, at least one dictionary equates the meaning of "plain" with "public" in the context of viewing something. The Oxford English Dictionary (2d Ed. 1991) defines "plain" as, inter alia, "open to the elements or to *general* view; *public*." (Emphasis added.) It stands to reason, based on this definition, that "not in plain view" might reasonably be interpreted to mean "not in *public* view." Ultimately, we do not believe, however, that resort to dictionaries alone resolves the question of how to interpret the phrase "not in plain view" in § 53a-189a (a) (1).

2

Apart from the specific statutory provision at issue, we also must consider the meaning of "not in plain view" as used in other statutory provisions, but such a review similarly does not resolve the question of statutory interpretation before us. The defendant in the pre-

sent case is charged with violating subdivision (1) of § 53a-189a (a). But § 53a-189a (a) contains three other subdivisions providing alternative versions of the crime of voyeurism, each of which uses the phrase "not in plain view." General Statutes (Rev. to 2017) § 53a-189a (a) (2) through (4).[4] Like the subdivision at issue in the present case, none of the other subdivisions specifies whose view is at issue.

Applying the defendant's interpretation to at least one of the other subdivisions arguably could render it meaningless, or at least severely limit its scope. Specifically, General Statutes (Rev. to 2017) § 53a-189a (a) (3) provides that a person may be found guilty of voyeurism when, "with the intent to arouse or satisfy the sexual desire of such person, [he] *commits simple trespass*, as provided in section 53a-110a, and *observes*, in other than a casual or cursory manner, another person (A) without the knowledge or consent of such other person, (B) while such other person is inside a dwelling . . . *and not in plain view*, and (C) under circumstances where such other person has a reasonable expectation of privacy . . . ." (Emphasis added.) General Statutes (Rev. to 2017) § 53a-189a (a) (3) thus not only requires that the defendant "observe" the victim, but that he do so while committing "simple trespass" and while the victim is "not in plain view."

Problems might arise if we were to apply the defendant's construction of "not in plain view" to General Statutes (Rev. to 2017) § 53a-189a (a) (3). If "not in

[4] We note that, although subdivisions (3) and (4) were added to § 53a-189a (a) in 2015 after the events at issue in this appeal; see Public Acts 2015, No. 15-213, § 1; they are relevant to our analysis because "not in plain view" is used in each subdivision. See *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 404, 999 A.2d 682 (2010) ("[w]e are . . . guided . . . by the presumption that the legislature, in amending or enacting statutes, always [is] presumed to have created a harmonious and consistent body of law" [internal quotation marks omitted]).

plain view" means not in plain view of the defendant, General Statutes (Rev. to 2017) § 53a-189a (a) (3) might require that the defendant "observe" the victim, but do so while she is "not in [his] plain view," a difficult feat. Of course, one might avoid this problem by overlaying fourth amendment principles on the meaning of "plain view," but that creates a different problem. General Statutes (Rev. to 2017) § 53a-189a (a) (3) not only requires that the defendant "observe" the victim, but that he do so while committing "simple trespass." Applying the fourth amendment meaning of "plain view" to this provision would require the defendant—like a law enforcement officer—to view the victim from a position he has no lawful right to occupy. *State* v. *Brown*, 279 Conn. 493, 520, 903 A.2d 169 (2006). This construction of the "not in plain view" element would render meaningless the separate requirement that the defendant must commit a simple trespass as defined by General Statutes § 53a-110a before his viewing of another may be considered criminal.[5] General Statutes (Rev. to 2017) § 53a-189a (a) (3). If we construed the terms used in this subdivision to avoid these problems, that might, in our view, unduly narrow the statute's scope in a way the legislature might not have intended.

Lastly, usage of the term "plain view" in other statutes sheds little additional light on the meaning of the "not in plain view" element of § 53a-189a (a) (1). The term "plain view" appears in nearly twenty other statutes,[6] in contexts ranging from election protocols and highway regulations to liquor permitting and human trafficking. See, e.g., General Statutes §§ 9-257, 12-476b, 30-54 and 54-234a. Examining those specific statutes does not,

[5] The same difficulties arise when the Appellate Court's construction is applied to General Statutes § 53a-182 (a) (7), otherwise known as the "Peeping Tom" statute, which contains elements similar to those of General Statutes (Rev. to 2017) § 53a-189a (a) (3).

[6] General Statutes §§ 7-313a, 8-44b, 9-257, 9-308, 12-476b, 19a-905, 22-139, 22-140, 23-18, 25-44, 26-206, 29-19, 29-21, 30-54, 46b-38b, 53a-182 and 54-234a.

however, entirely illuminate from whose perspective the "not in plain view" element must be considered, although some statutes indicate that the legislature has, at times, roughly equated the meaning of "plain view" with "public view."

For example, § 12-476b requires that vehicles transporting fuel must have the name of the "true owner or the lessee thereof printed *in plain view* on both sides of the vehicle in prominent and legible letters . . . ." (Emphasis added.) In this context, the usage implies that "in plain view" means in *public* view because it mandates displaying information for general observation by unspecified onlookers.

Other statutes suggest a similar meaning of "plain view" in the context of providing a notice to others. For instance, a permit for the sale of alcohol must be "framed and hung in plain view in a conspicuous place . . . ." General Statutes § 30-54. Operators of highway service plazas, hotels, motels, or inns must post notices offering services to victims of human trafficking "in plain view in a conspicuous location . . . ." General Statutes § 54-234a (a). Specialized policemen shall, when on duty, "wear in plain view a shield" bearing certain words indicating the type of policemen they are, such as state park police or railroad police. See, e.g., General Statutes §§ 8-44b (b), 23-18, 25-44, 29-19 (b) and 29-21; see also General Statutes § 7-313a (fire police officers, when performing their duties, "shall wear the badge of office in plain view of any observer"); General Statutes § 19a-905 (b) (any health-care provider "who provides direct patient care shall wear in plain view during . . . working hours a photographic identification badge"); General Statutes §§ 22-139 (b) and 22-140 (b) (each licensed milk regulation board tester "shall post his license in plain view in the testing room in which he is employed," and each milk tester "shall carry upon his person or post his license in plain view in the

plant in which he is employed"); General Statutes § 26-206 (shellfish policemen, when on duty, "shall wear in plain view a badge bearing conspicuously the words 'Shellfish Policeman' "). The context in which these statutes use the term "plain view" indicates that they refer to the display of something (permit, notice, shield, badge, or license) in public view generally and not in the view of any one person in particular.

These statutes at least suggest that when the legislature uses the term "plain view," without specifying whose view, that term likely refers to a more general vantage point—the plain view of the public or of any potential observer—unless it explicitly states otherwise. That would lead us toward concluding that the legislature intended a more general viewpoint for the "not in plain view" element of § 53a-189a (a) (1), supporting the state's interpretation.

In other instances, however, the legislature has been more precise about whether it intends the relevant vantage point to be that of the public or of someone specific. For example, in title 9 of the General Statutes, governing elections, General Statutes § 9-308 provides that a canvass of returns "shall be made in plain view *of the public.*" (Emphasis added.) On the other hand, General Statutes § 9-257 provides that "[e]very part of the polling place shall be in plain view *of the election officials.*" (Emphasis added.)

Given the lack of consistency with which the legislature has specified the proper vantage point for judgment of whether something is in "plain view," we draw no controlling principle from these statutes that may be applied to resolve the ambiguity in the "not in plain view" element of § 53a-189a (a) (1).

The results of these textual tools of analysis, considered together, leave us convinced that, at the very least, the "not in plain view" element "is susceptible to more

than one plausible interpretation." (Internal quotation marks omitted.) *Lackman* v. *McAnulty*, supra, 324 Conn. 286. That is, we cannot conclude that "not in plain view" in § 53a-189a (a) (1) unambiguously refers to the plain view of the defendant, as opposed to the plain view of the public, or anyone else.

The Appellate Court reached a contrary conclusion, determining that the "not in plain view" element clearly and unambiguously referred only to the plain view of the defendant. It reached this conclusion after considering, among other things, the dictionary definition of "plain view," the fourth amendment meaning of "plain view," and the use of "plain view" in the statute at issue and in a related statute. *State* v. *Panek*, supra, 166 Conn. App. 627, 631–32, 634. It concluded that each of these sources pointed to the defendant's interpretation.

But, upon our de novo examination of these same sources, we are persuaded that they at least support more than one reasonable interpretation, and some arguably provide greater support for the state's interpretation. We emphasize that our first purpose in reviewing these sources is not to select the best interpretation, but to determine whether, after examining the statute's text and related provisions, only one reasonable interpretation remains. See General Statutes § 1-2z. We therefore disagree with the Appellate Court's conclusion that these sources lead to one and only one meaning of the "not in plain view" element of § 53a-189a (a) (1).

Apart from the sources we have already considered, the defendant relies on other sources of statutory interpretation to advance a number of other arguments in support of his position that "not in plain view" must refer to the defendant's plain view.

First, the defendant claims that interpreting "not in plain view" to refer to the plain view of the public

would render superfluous the separate element of a "reasonable expectation of privacy" under § 53a-189a (a) (1) (C). Specifically, he reasons that requiring that a victim not be in "public view" is no different from requiring that the victim have a "reasonable expectation of privacy." If true, he contends, this interpretation would run afoul of our presumption that "the legislature did not intend to enact meaningless provisions" and that "[s]tatutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant . . . ." (Internal quotation marks omitted.) *State* v. *Drupals*, 306 Conn. 149, 159–60, 49 A.3d 962 (2012).

We disagree that the state's interpretation of the "not in plain view" element renders the "reasonable expectation of privacy" element entirely redundant. General Statutes (Rev. to 2009) § 53a-189a (a) (1). We need not decide, in this case, the meaning of the "reasonable expectation of privacy" element. Rather, it suffices to acknowledge that, although whether a person is in public view may affect whether that person has a reasonable expectation of privacy, the two concepts are not coterminous. For example, it may be true that a person in public view generally will not have an expectation of privacy. But, depending on the circumstances, it does not follow that a person out of public view necessarily must hold a reasonable expectation of privacy. Thus, it is possible that, under the state's interpretation, the state could prove that the victim was out of the public view when recorded, but, nevertheless, fail to establish that the victim had a reasonable expectation of privacy at the time.[7]

[7] Any potential overlap between the two elements therefore does not negatively affect the defendant. If the person being recorded is in plain view of the public, then the defendant cannot be convicted under the state's interpretation. Even if the state proves that the person recorded was out of public view, the defendant would still have the opportunity to argue that the victim nevertheless lacked a reasonable expectation of privacy under the circumstances.

Second, the defendant also argues, and the trial court and the Appellate Court agreed, that the "not in plain view" element must be interpreted consistently with the ordinary meaning of the term "voyeurism," the name of the offense with which the defendant was charged. See *State* v. *Panek*, supra, 166 Conn. App. 632–34. According to the defendant, "voyeurism" refers to the secretive or surreptitious viewing of another person, which suggests that the voyeur must be spying on someone who is not in his plain view.

For several reasons, we are not persuaded that the dictionary definition of "voyeurism" controls our interpretation of "not in plain view" as used in § 53a-189a (a) (1). First, we hesitate to rely on the dictionary definition of "voyeurism" to establish the meaning of the elements of that offense. The legislature, by enumerating the elements of an offense named "[v]oyeurism," has provided its own definition for the purpose of our criminal law. As used in this context, we find the dictionary definition of voyeurism less helpful in any attempt to define the contours of that offense. To be sure, "[i]t is well established that, when determining the meaning of a word, it is appropriate to look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *State* v. *Spillane*, 255 Conn. 746, 755, 770 A.2d 898 (2001). "This precept, however, pertains primarily to the situation where no statutory definition is available." Id. The legislature is free to diverge from the dictionary definition when defining a term for its purposes. See, e.g., *State* v. *Webster*, 308 Conn. 43, 54, 60 A.3d 259 (2013) (noting that statutory definition of "sale," as used in statute prohibiting narcotics sales, "is substantially broader in scope than the common dictionary definition" [internal quotation marks omitted]). Indeed, even if we assume that voyeurism historically may have referred to the act of viewing certain private activities, the legislature has

nevertheless expanded on that meaning in this statute to address modern technological developments by criminalizing the recording, not just the observation, of certain private activities. See General Statutes (Rev. to 2009) § 53a-189a (a) (person who "photographs, films, videotapes or otherwise records the image of another person" within purview of statute). Thus, even if the ordinary meaning of "voyeurism" is limited to secretly viewing someone, that meaning does not control our interpretation of how the legislature has defined that word in § 53a-189a.

Second, even if the dictionary definition controlled, the definition of "voyeurism" does not refer solely to secretive viewing. For instance, Webster's Third New International Dictionary (1961) defines "voyeurism" as "the tendencies, act, or looking of a voyeur," and voyeur is defined as "one whose sexual desire is concentrated upon seeing sex organs and sexual acts," or "an unduly prying observer [usually] in search of sordid or scandalous sights." The first definition does not limit voyeurism to secretive viewing. Also, even if the second definition implies that the voyeur is viewing something in secret, neither definition requires that the voyeur must be viewing something not in his own plain sight; rather, the second definition more broadly implies that the voyeur is peering into something private from others generally—an understanding that could support the state's interpretation.

B

Extratextual Sources

Because we conclude that our consideration of the text of § 53a-189a and other statutory provisions does not yield a single, unambiguous interpretation of the "not in plain view" element in § 53a-189a (a) (1), we turn next to extratextual sources of the legislature's intent. This includes looking to the "legislative history

and circumstances surrounding [the statute's] enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *Rivers* v. *New Britain*, supra, 288 Conn. 11.

We find the legislative history most illuminating. During the Senate debate, the proponent of the bill, Senator Donald Williams, summarized the elements of the crime in his own words, clarifying the meaning of "not in plain view." As to that element, Senator Williams stated that, in order for a defendant to violate the statute, the victim must be "not in *public* view . . . ." (Emphasis added.) 42 S. Proc., Pt. 6, 1999 Sess., p. 2151. He further reinforced this meaning by referring to "an area" not in plain view, and "a place" not in public view, indicating that the focus of the statute is on whether the victim is exposed to the public's general view—not a specific person's view, such as the defendant's. Id., pp. 2149, 2151, remarks of Senator Donald Williams.

Similarly, during debate in the House of Representatives, the proponent of the bill, Representative Michael Lawlor, summarized the "not in plain view" element of the statute as meaning "inside a building or another structure . . . ." 42 H.R. Proc., Pt. 10, 1999 Sess., p. 3493. This suggests that the legislature intended "not in plain view" to mean not in public view because being inside a structure implies that a victim is generally shielded from the public's view. It is far less likely that Representative Lawlor intended "inside a building" to mean out of the defendant's plain view, who could potentially also be inside the same building. 42 H.R. Proc., supra, p. 3493.

Another exchange during the debate in the House of Representatives also demonstrates that the legislature did not intend "not in plain view" to mean not in plain

view of the defendant. Representative Hector Diaz asked Representative Lawlor whether a consensually recorded video of sexual relations would violate the statute. Id., p. 3504. Representative Lawlor clarified that it would not because the "statute would require that the original . . . recording would have been recorded without the person's consent and where they had a reasonable expectation of privacy" pursuant to §§ 53a-189a (a) (1) (A) and (C). Id., p. 3505. He continued by saying that "if a couple, for example, videotapes their own sexual relations . . . they *wouldn't be violating this* [*statute*] *because the initial taping*, *I'm assuming*, *was consensual*, and it seems like the requirement is that [the video recording] would have had to have been without the consent of the party." (Emphasis added.) Id., p. 3509, remarks of Representative Michael Lawlor. In other words, Representative Lawlor clarified that there would be no violation under the hypothetical posed only because the "initial taping . . . was consensual"—not because the sexual relations were consensual.[8] Id.

This excerpt of the legislative history undercuts any suggestion that the legislature intended "not in plain view" in § 53a-189a (a) (1) to refer to the view of the defendant. If Representative Lawlor contemplated that the statute would be violated in the hypothetical example where the video recording was nonconsensual, then a statutory requirement that the victim be "not in plain view" of the defendant would be nonsensical. It would be difficult, or well-nigh impossible, for two people to engage in sexual contact with each other without both

[8] The defendant focuses on only one part of this excerpt of the legislative debate, which could be read to suggest that the statute would not be violated if the victim was a coparticipant in the sexual relations. In context, however, the proponent of the bill was clear that it is mutual participation and consent to the creation of the *images* that bars application of the statute—not consent to the *sexual relations*. 42 H.R. Proc., supra, pp. 3505–3509, remarks of Representative Michael Lawlor.

of them being in plain view of one another. Therefore, if Representative Lawlor, the proponent of the bill, recognized that this statute can be violated through the nonconsensual recording of sexual relations, "not in plain view" cannot refer to the plain view of the defendant. Rather, we agree with the state that the legislative history of § 53a-189a supports a conclusion that the legislature intended "not in plain view" to refer to the plain view of the public generally, meaning that a person must not be in a position where any member of the public, lawfully situated, could plainly view the person being recorded.

The defendant claims, however, that because he and the state offer "competing interpretations" of the statute, the issue should ultimately be resolved in his favor under the rule of lenity. He correctly states that, as a general rule, "[c]riminal statutes are not to be read more broadly than their language plainly requires and ambiguities are ordinarily to be resolved in favor of the defendant." (Internal quotation marks omitted.) *State* v. *Kirk R.*, 271 Conn. 499, 510, 857 A.2d 908 (2004).

We acknowledge that the statute is not perhaps the paradigm of drafting precision. As we have recognized in the past, however, "perfect precision is neither possible nor required" in valid statutory creation. (Internal quotation marks omitted.) *Sweetman* v. *State Elections Enforcement Commission*, 249 Conn. 296, 322, 732 A.2d 144 (1999). We further note that, in many instances, seemingly imprecise draftsmanship is "attributable to a desire not to nullify the purpose of the legislation by the use of specific terms which would afford loopholes through which many could escape." (Internal quotation marks omitted.) Id. When interpreting a statute, our goal remains to divine the legislature's intent. Any lack of perfection in the drawing of the statute does not persuade us that the defendant's preferred interpretation of "not in plain view" necessarily accords with

the legislature's intent. See id. (stating that imprecise language does not invalidate statute or render it vague in favor of defendant); see also *Foley* v. *State Elections Enforcement Commission*, 297 Conn. 764, 782–83, 2 A.3d 823 (2010) (court recognized that statute is not model of clarity, but arrived at most reasonable interpretation of language); *In re William D.*, 284 Conn. 305, 312, 933 A.2d 1147 (2007) (noting that statutory defects, such as internal inconsistencies, are not dispositive in favor of respondent—especially if consequences would clearly contravene broader purposes of statutory scheme).

In addition, the defendant's lenity argument fails to recognize that the rule of lenity applies only if other tools of statutory construction fail to confirm the meaning of ambiguous language. "It is well established that courts do not apply the rule of lenity unless a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute." (Internal quotation marks omitted.) *State* v. *Victor O.*, 320 Conn. 239, 258–59 n.22, 128 A.3d 940 (2016).

Here, for reasons we have explained, after an examination of the statutory language, its structure, and its legislative history, we do not conclude that a reasonable doubt persists about the intended scope of § 53a-189a (a) (1). Consequently, "[a]lthough we recognize the fundamental principle that criminal statutes are to be construed strictly, it is equally fundamental that the rule of strict construction does not require an interpretation which frustrates an evident legislative intent." (Internal quotation marks omitted.) *In re William D.*, supra, 284 Conn. 320–21.

II

As an alternative ground for affirmance, the defendant makes the claim, related to his lenity argument,

that the voyeurism statute is unconstitutionally vague, both on its face and as applied to his conduct.[9] He claims that, if the statute does not unambiguously refer to the plain view of the defendant, his right to fair notice will be violated because the statute has "no clear meaning." We disagree.

"A party attacking the constitutionality of a validly enacted statute bears the heavy burden of proving its unconstitutionality beyond a reasonable doubt." *State* v. *Floyd*, 217 Conn. 73, 79, 584 A.2d 1157 (1991). Moreover, we are obligated to "indulge in every presumption in favor of the statute's constitutionality . . . ." (Internal quotation marks omitted.) *State* v. *DeFrancesco*, 235 Conn. 426, 442, 668 A.2d 348 (1995).

"Under the requirements of due process of law mandated by our federal and state constitutions, a penal statute must be sufficiently definite to enable a person to know what conduct he must avoid." (Internal quotation marks omitted.) Id., 443. One of the touchstones of vagueness is that people "of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." (Internal quotation marks omitted.) *State* v. *Fields*, 302 Conn. 236, 260, 24 A.3d 1243 (2011).Our cases do not hold, however, that a statute is unconstitutionally vague merely because two parties have proffered plausible, but opposing, interpretations of a statute. *State* v. *Mattioli*, 210 Conn. 573, 579, 556 A.2d 584 (1989) ("[h]onest disagreement about the interpretation of a statutory provision does not, however, make the statute ambiguous or vague").

[9] The defendant also makes a passing argument that the voyeurism statute is unconstitutionally overbroad. Aside from his use of the term in a heading and quoting of the constitutional standards, the defendant fails to assert any substantive argument about why or how the statute is overbroad. We deem the argument abandoned. See, e.g., *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016).

If this were true, any statute a court concludes is ambiguous would be rendered unconstitutional. See generally *State* v. *Courchesne*, 296 Conn. 622, 726, 998 A.2d 1 (2010) ("a statute is not unconstitutional merely because it is ambiguous or requires further investigation"). Rather, our case law makes clear that "the statute at issue need only give fair warning to those who are potentially subject to it." *State* v. *DeFrancesco*, supra, 235 Conn. 444. To that end, "[t]he proscription of the activity . . . need not be definite as to all aspects of its scope. A statute is not unconstitutional merely because a person must inquire further as to the precise reach of its prohibitions." Id., 443. We are satisfied that § 53a-189a (a) (1) put the defendant on notice that recording the victim under these circumstances was conduct the legislature sought to proscribe.

The defendant's claim that § 53a-189a (a) (1) is vague as applied to his conduct warrants little comment. The defendant asserts, in agreement with the trial court and the Appellate Court, that the crime of voyeurism, as used in common parlance, only reaches scenarios in which victims believe they are alone. *State* v. *Panek*, supra, 166 Conn. App. 624, 632–33. The defendant cites no legal authority for this contention, and we find no support for it in the statute's text or legislative history. In fact, the legislative history of the voyeurism statute manifests a concern about the nonconsensual *recording* of another person, which the statute prohibits regardless of whether the victim believes she is alone. See 42 H.R. Proc., supra, p. 3509, remarks of Representative Michael Lawlor. Moreover, as we have previously discussed, common parlance does not dictate our definition of voyeurism; rather, the General Assembly's requirements as enacted in § 53a-189a determines our definition of voyeurism. That definition includes nonconsensual recordings of an unknowing

victim, even if the defendant makes them while in her immediate physical presence.

Because we conclude that the state may establish the "not in plain view" element of § 53a-189a (a) (1) based on the facts before us, the defendant's motion to dismiss should have been denied. The trial court therefore improperly dismissed the charges against the defendant on the basis raised in his motion to dismiss, and the Appellate Court improperly upheld that dismissal.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgments of the trial court and to remand the case to that court with direction to deny the defendant's motion to dismiss and for further proceedings.

In this opinion the other justices concurred.

A BETTER WAY WHOLESALE AUTOS, INC. *v.* COMMISSIONER OF MOTOR VEHICLES
(SC 19815)

Palmer, McDonald, Robinson, Mullins and Kahn, Js.*

Argued November 13, 2017—officially released February 27, 2018

Procedural History

Appeal from the decision of the defendant ordering the plaintiff to pay a civil penalty and to relocate a portion of its business, brought to the Superior Court in the judicial district of Waterbury and transferred to the judicial district of New Britain; thereafter, the mat-

* This case originally was scheduled to be argued before a panel of this court consisting of Justices Palmer, McDonald, Robinson, Mullins and Kahn. Although Justices Robinson and Kahn were not present when the case was argued before the court, they have read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

ter was tried to the court, *Schuman*, *J.*; judgment sustaining in part and dismissing in part the appeal, from which the plaintiff appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Alvord* and *Agati*, *Js.*, which reversed the trial court's judgment and remanded the case to that court with direction to sustain the plaintiff's appeal, and the defendant, on the granting of certification, appealed to this court. *Appeal dismissed.*

Drew S. Graham, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellant (defendant).

Kenneth A. Votre, with whom was *Marissa Florio*, for the appellee (plaintiff).

Opinion

PER CURIAM. The plaintiff, A Better Way Wholesale Autos, Inc., holds licenses from the Department of Motor Vehicles to deal in motor vehicles at two locations, but sought no such license for a third location at which it displays several hundred vehicles that may be purchased at one of the licensed locations. The defendant, the Commissioner of Motor Vehicles, determined that the plaintiff had violated General Statutes §§ 14-52 and 14-54,[1] respectively, by failing to obtain a license for that location and by failing to obtain a certificate of approval from local authorities for that location and to verify such approval with the defendant. The defendant imposed civil penalties in the amount of $5000 and ordered the plaintiff to cease such activity at that location unless and until it obtained the requisite license and certificate. In the plaintiff's administrative appeal, the trial court affirmed the defendant's decision with respect to the finding of a violation of the certifi-

[1] We note that § 14-54 has been amended by the legislature since the events underlying the present case; see Public Acts 2016, No. 16-55, § 4; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

cate requirement under § 14-54, but sustained the plaintiff's appeal with respect to the defendant's finding of a violation of the license requirement under § 14-52. The plaintiff appealed from the trial court's judgment. The defendant did not cross appeal. The Appellate Court reversed the trial court's judgment with respect to its finding of a violation of § 14-54 and remanded the case to that court with direction to sustain the plaintiff's appeal. *A Better Way Wholesale Autos, Inc.* v. *Commissioner of Motor Vehicles*, 167 Conn. App. 207, 219, 142 A.3d 1209 (2016).

Thereafter, we granted the defendant's request for certification to appeal, limited to the following questions: "Did the Appellate Court correctly conclude that a car dealer's license is not conditioned upon local approval for each proposed location pursuant to . . . [§ 14-54]?"; and "Did the Appellate Court correctly conclude that there was a lack of substantial evidence in the record to support the Department of Motor Vehicles hearing officer's finding that the plaintiff violated [§ 14-54]?"[2] *A Better Way Wholesale Autos, Inc.* v. *Commissioner of Motor Vehicles*, 323 Conn. 925, 150 A.3d 229 (2016).

After examining the entire record on appeal and considering the briefs and oral arguments of the parties, we have determined that the appeal in this case should be dismissed on the ground that certification was improvidently granted.

The appeal is dismissed.

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[2] We note that the first certified question imprecisely characterizes the Appellate Court's decision, as we construe that court to have concluded that § 14-54 does not prescribe a *licensing* requirement for each location, as that matter is addressed in other provisions. See *A Better Way Wholesale Autos, Inc.* v. *Commissioner of Motor Vehicles*, supra, 167 Conn. App. 218–19 and n.8.