JOHN DOE #2 ET AL. *v.* ROBERT RACKLIFFE
(SC 20420)

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

Syllabus

The seven plaintiffs filed six separate actions in 2014 or 2015, seeking to recover damages from the defendant pediatrician for personal injuries they sustained as a result of the defendant's alleged sexual abuse when they were his minor patients in the 1970s and 1980s. The plaintiffs

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

alleged that the defendant's practice of digitally penetrating their anuses during their annual physical examinations constituted both intentional sexual assault and medical negligence, and certain plaintiffs also alleged intentional and negligent infliction of emotional distress. The defendant moved for summary judgment as to the counts of the complaints sounding in negligence on the ground that those claims were barred by the two to three year limitation period contained in the statute (§ 52-584) pertaining to negligence and malpractice actions. The trial court granted the defendant's motions for summary judgment as to the negligence counts, concluding that, because they alleged causes of action arising out of medical conduct, § 52-584 applied rather than the extended statute of limitations (§ 52-577d) applicable to actions for damages to minors caused by sexual assault, abuse or exploitation, which permits such actions to be brought within thirty years from the date the person attains the age of twenty-one. After withdrawing the remaining counts alleging sexual assault and intentional infliction of emotional distress, the plaintiffs appealed. *Held* that the extended limitation period set forth in § 52-577d did not apply to the plaintiffs' claims for injuries arising from medical negligence and negligent infliction of emotional distress, unaccompanied by an originating act of intentional misconduct, and, therefore, the plaintiffs' negligence claims were governed by the limitation period set forth in § 52-584; in light of the language and legislative history of § 52-577d, this court concluded that the limitation period set forth in § 52-577d, which was part of a legislative initiative to address the rights of crime victims, does not apply to negligence claims that do not arise out of harm caused by the intentional sexual abuse, exploitation, or assault of a minor.

Argued February 20—officially released December 15, 2020**

Procedural History

Six actions to recover damages for, inter alia, the defendant's alleged sexual assault of the minor plaintiffs, and for other relief, brought to the Superior Court in the judicial district of Hartford and transferred to the Superior Court in the judicial district of New Britain, where the court, *Young*, *J.*, granted in part the defendant's motion for summary judgment as to the named plaintiff; thereafter, the court, *Young*, *J.*, granted the plaintiffs' motions to substitute William J. Forbes, executor of the estate of Robert Rackliffe, as the defendant;

** December 15, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

subsequently, the court, *Young*, *J.*, granted the substitute defendant's motions for summary judgment as to certain counts of the complaints, and the plaintiffs withdrew the remaining counts of the complaints; thereafter, the court, *Morgan*, *J.*, granted the plaintiffs' motions to consolidate the cases, and the court, *Young*, *J.*, rendered judgments for the substitute defendant, from which the plaintiffs appealed. *Affirmed.*

A. Ryan McGuigan, with whom were *Thomas A. Plotkin* and, on the brief, *Joseph B. Burns* and *Nathan C. Favreau*, for the appellants (plaintiffs).

Logan A. Carducci, with whom were *Laura Pascale Zaino*, *William J. Sweeney*, *Jr.*, and, on the brief, *Richard C. Tynan*, for the appellee (substitute defendant).

Opinion

ECKER, J. The sole issue in this appeal[1] is whether the extended statute of limitations in General Statutes § 52-577d[2] applies to negligence claims for personal injuries brought against the alleged perpetrator of a sexual assault. The seven plaintiffs[3] in these six consolidated cases appeal from the decision of the trial court rendering summary judgment in favor of the defendant, William J. Forbes, as executor of the estate of Robert Rackliffe,[4] on the ground that the plaintiffs' negligence

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

[2] We note that the legislature has recently amended § 52-577d. See Public Acts 2019, P.A. 19-16, § 13 (replacing "minor" with "person under twenty-one years of age" and "age of majority" with "age of twenty-one"). Hereinafter, unless otherwise indicated, all references to § 52-577d are to the 2019 revision of the statute.

[3] The plaintiffs in these six consolidated cases are seven individuals who were pediatric patients of the original defendant, Robert Rackliffe; see footnote 4 of this opinion; when they were minor children.

[4] On November 29, 2016, following Rackliffe's death, the trial court granted the motion to substitute William J. Forbes, the executor of Rackliffe's estate, as the defendant. Prior to the substitution, the trial court had granted partial summary judgment, as to the negligence claims, in favor of Rackliffe in

claims were time barred. The plaintiffs, each of whom were minors at the time of the alleged assaults, contend that the trial court improperly applied the general negligence statute of limitations in General Statutes § 52-584 to their claims alleging medical negligence and negligent infliction of emotional distress instead of the extended limitation period set forth in § 52-577d. We disagree and, accordingly, affirm the judgments of the trial court.

The record reveals the following pertinent facts and procedural history. The plaintiffs were minor patients of Rackliffe, a pediatrician practicing in New Britain, from the early 1970s to the 1980s. The plaintiffs allege that, during their annual physical examinations, Rackliffe digitally penetrated each plaintiff's anus. Several of the male plaintiffs additionally allege that Rackliffe fondled their genitals. Each plaintiff claims that he or she has suffered physical and emotional injuries as a result of Rackliffe's actions.

All seven plaintiffs allege that Rackliffe's conduct constituted both intentional sexual assault and medical negligence. In the medical negligence counts, the plaintiffs each allege that Rackliffe knew or, in the exercise of reasonable care, should have known that his actions violated the standard of care applicable to a pediatrician. Attached to each complaint were a certificate of good faith and an accompanying opinion letter of a similar health care provider pursuant to General Statutes § 52-190a (a). Several plaintiffs also included claims alleging intentional infliction of emotional dis-

John Doe #2 v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-14-5016102-S (December 14, 2015). After the substitution, the court rendered judgments in favor of Forbes in *John Doe #2*, as well as in the remaining five cases. For ease of reference, we refer in this opinion to Rackliffe and Forbes collectively as the defendant.

tress and negligent infliction of emotional distress.[5] In all six actions, the defendant sought summary judgment as to the counts sounding in negligence.[6]

The defendant argued in his motions for summary judgment that the counts sounding in negligence were time barred by § 52-584 because the actions were commenced more than three years after the alleged injurious acts occurred. In three separate memoranda of deci-

[5] The counts contained in each of the complaints are as follows. The two plaintiffs in *James Doe* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-14-5017357-S (September 28, 2018), and the plaintiff in *John Doe #3* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-15-5017333-S (September 28, 2018), each alleged intentional sexual assault and medical negligence. In *John Doe #2* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-14-5016102-S (September 28, 2018), *Jane Doe* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-15-5016759-S (September 28, 2018), *Jane Doe #2* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-15-5017021-S (September 28, 2018), and *Jane Doe #3* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-15-5017022-S (September 28, 2018), the plaintiffs each alleged intentional sexual assault, intentional infliction of emotional distress, medical negligence and negligent infliction of emotional distress.

[6] In *James Doe* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-14-5017357-S (September 28, 2018), the defendant filed a motion for summary judgment as to the second and fourth counts, respectively alleging medical negligence with respect to each of the two plaintiffs. In *John Doe #2* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-14-5016102-S (September 28, 2018), the defendant filed a motion for summary judgment as to the third and fourth counts, respectively alleging negligence and negligent infliction of emotional distress. In *John Doe #3* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-15-5017333-S (September 28, 2018), the defendant incorrectly named counts three and four of the plaintiff's complaint in the motion for summary judgment, but the trial court treated the defendant's motion as seeking summary judgment as to count two, which alleged medical negligence. In *Jane Doe* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-15-5016759-S (September 28, 2018), *Jane Doe #2* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-15-5017021-S (September 28, 2018), and *Jane Doe #3* v. *Rackliffe*, Superior Court, judicial district of New Britain, Docket No. CV-15-5017022-S (September 28, 2018), the defendant sought summary judgment as to counts three and four, which in all three complaints respectively alleged medical negligence and negligent infliction of emotional distress.

sion, the trial court granted summary judgment as to all of the negligence counts.[7] The court reasoned that those counts alleged a cause of action arising out of medical conduct, not sexual assault, abuse or exploitation, as required by § 52-577d. The court rejected the plaintiffs' reliance on this court's decision in *Doe* v. *Boy Scouts of America Corp.*, 323 Conn. 303, 147 A.3d 104 (2016), as well as certain decisions of the Superior Court, holding that § 52-577d applies to claims that third parties negligently failed to take precautions to protect children from sexual abuse, exploitation or assault perpetrated by an intentional wrongdoer. The court distinguished those cases on the ground that, unlike the negligence claims in the present case, the claims of negligence in the third-party negligence cases arose out of injuries caused by acts of intentional sexual misconduct.

After the trial court granted partial summary judgment in all six actions, the plaintiffs withdrew the counts alleging sexual assault and intentional infliction of emotional distress. The trial court subsequently granted the plaintiffs' motions to consolidate the cases for purposes of appeal. This appeal followed.

The question whether § 52-577d applies to claims sounding in negligence brought against an alleged perpetrator of child sexual assault presents a question of statutory interpretation subject to plenary review. See, e.g., *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, 330 Conn. 372, 382, 194 A.3d 759 (2018); *Barrett* v. *Montesano*, 269 Conn. 787, 792, 849 A.2d 839 (2004). In construing the relevant statutes, "[o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks

[7] The court issued the three memoranda of decision over the course of two years. Although there are minor differences in the three decisions, the court's analysis in all three decisions is consistent. For ease of discussion, we set forth a composite summary of the reasoning in those decisions.

omitted.) *Testa* v. *Geressy*, 286 Conn. 291, 308, 943 A.2d 1075 (2008).

We begin, of course, with the text of the statutes in light of the relevant statutory framework. See General Statues § 1-2z. If the text and pertinent statutory context lead to a clear and unambiguous meaning, then our interpretive task is finished. See General Statues § 1-2z ("[i]f, after examining such text and considering [its] relationship [to the broader statutory scheme of which it is a part] 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"). "The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Tarnowsky* v. *Socci*, 271 Conn. 284, 287 n.3, 856 A.2d 408 (2004).

A review of the relevant statutes of limitations, and the way those statutes interrelate, supplies useful background. General Statutes § 52-577, sometimes referred to as our "general tort statute of limitations,"[8] provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of." Section 52-584, which governs negligence claims in particular, provides in relevant part: "No action to recover damages for injury to the person . . . caused by negligence . . . or by malpractice of a physician . . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . ."

These two statutes together establish the basic scheme applicable to the vast majority of tort cases in Connecticut. The three year limitation period in § 52-

[8] *Fichera* v. *Mine Hill Corp.*, 207 Conn. 204, 212, 541 A.2d 472 (1988).

577 applies to all tort actions except (1) negligence claims, which are governed by § 52-584, and (2) tort claims governed by a specialized statute of limitations.[9] See *Doe* v. *Boy Scouts of America Corp.*, supra, 323 Conn. 333 n.20 ("[t]his court previously has held that '[t]he [three year] limitation of § 52-577 is applicable to all actions founded upon a tort which do not fall within those causes of action carved out of § 52-577 and enumerated in § 52-584 or another section' "). Put simply, the general rule in Connecticut is that intentional torts, unless subject to a specialized statute of limitations, are governed by the three year statute of limitations in § 52-577; see, e.g., *Watts* v. *Chittenden*, 301 Conn. 575, 582–83, 22 A.3d 1214 (2011); whereas torts based in negligence generally are subject to the two year statute of limitations in § 52-584.

This brings us to § 52-577d, a specialized statute of limitations that creates an extended limitation period for personal injury claims arising from sexual misconduct involving victims under the age of majority. Cf. footnote 2 of this opinion. Specifically, § 52-577d provides: "Notwithstanding the provisions of section 52-577, no action to recover damages for personal injury to a minor, including emotional distress, caused by sexual abuse, sexual exploitation or sexual assault may be brought by such person later than thirty years from the date such person attains the age of majority." The question in the present case is whether this statutory exception encompasses negligence claims that do not arise out of harm caused by the intentional sexual abuse, sexual exploitation or sexual assault of a minor.

[9] Section 52-577d, the statute at issue in the present case, is an example of such a specialized statute of limitations. Other examples include the statutes governing actions for defamation; see General Statutes § 52-597 ("[n]o action for libel or slander shall be brought but within two years from the date of the act complained of"); and for product liability. See General Statutes § 52-577a (establishing three year statute of limitations and ten year statute of repose for claims within scope of Connecticut Product Liability Act).

Although we have never previously addressed this precise question, we do not write on an altogether clean slate with regard to the application of § 52-577d to claims of negligence. In *Boy Scouts of America Corp.*, we considered whether the extended limitation period in § 52-577d applied to a negligence claim brought in 2012 by a former troop member who alleged that the Boy Scouts organization had failed to take adequate precautions to prevent an adult troop leader from sexually abusing the plaintiff in the 1970s, when the plaintiff was a minor. *Doe* v. *Boy Scouts of America Corp.*, supra, 323 Conn. 308–309, 311. The defendant contended that the negligence claim was time barred because § 52-577d "applies only to *intentional* torts, i.e., to claims against the perpetrator of a sexual assault on a minor, while § 52-584 continues to apply to claims against parties whose negligent conduct is alleged to have caused injury to the plaintiff when he was a minor." (Emphasis in original.) Id., 331. We rejected that claim and concluded that the legislature intended the extended limitation period to encompass negligence claims against parties whose carelessness enables an intentional wrongdoer to perpetrate the sexual abuse, exploitation or assault of a minor. Id., 333–40.

The plaintiffs in the present case argue that our holding in *Boy Scouts of America Corp.* is dispositive of their claims and requires reversal. Their logic is a model of simplicity: their claims are not time barred because they sound in negligence, and *Boy Scouts of America Corp.* held that negligence claims fall within the scope of § 52-577d. The superficial appeal of this argument disappears, however, when we focus on an essential distinction between the cases. The issue in *Boy Scouts of America Corp.* was whether the extended statute of limitations in § 52-577d applied to claims of negligence against third parties *arising out of an underlying act of intentional sexual misconduct*, namely, the troop leader's sexual abuse of the minor plaintiff. Id., 331.

Indeed, the causal nexus connecting the allegations of negligence to injuries resulting from an originating act of intentional misconduct was the pivotal point in our reasoning. We held that the reach of the statute was determined by reference to its purpose in "providing a recovery for a particular type of injury, namely, 'personal injury to a minor, including emotional distress, *caused by sexual abuse, sexual exploitation or sexual assault* . . . .' " (Emphasis altered.) Id., 334. This point highlights what distinguishes the issue decided in *Boy Scouts of America Corp.* from the legal claim made by the plaintiffs in the present case because the plaintiffs in this case have asserted negligence claims involving injuries that do *not* result from intentional sexual misconduct.

The statutory language, although ambiguous,[10] goes a long way toward answering the question presented in this case. As we just noted, the statute applies only to an "action to recover damages for personal injury to a minor, including emotional distress, *caused by sexual abuse, sexual exploitation or sexual assault* . . . ." (Emphasis added.) General Statutes § 52-577d. The sine qua non for application of the statute is the requirement of harm caused by an originating act of sexual abuse, exploitation or assault. The operative terms employed by the legislature to identify the required cause of the injuries—sexual abuse, sexual exploitation and sexual assault—are normally associated with intentional and deliberate wrongdoing; we do not commonly consider sexual abuse, exploitation or assault to be the result of mere accident or carelessness.[11] Indeed, a person engaging in such conduct almost invariably will seek

[10] See *Doe* v. *Boy Scouts of America Corp.*, supra, 323 Conn. 333 ("we conclude that the reference to § 52-577 in § 52-577d does not compel the interpretation urged by the defendant but, instead, merely creates ambiguity as to whether the legislature intended § 52-577d to apply to claims that would otherwise be subject to § 52-584").

[11] We note that the sole issue presented is one of statutory construction, i.e., whether the legislature intended § 52-577d to encompass negligence

to achieve his purposes using force, threats, trickery, coercion, deceit, or other wrongful means bespeaking active malfeasance. Dictionary definitions[12] and legal treatises[13] uniformly define sexual abuse, exploitation and assault to mean intentional, usually criminal, con-

claims for personal injuries that do not result from intentional sexual misconduct. We do not address whether Connecticut recognizes the tort of negligent sexual abuse, exploitation or assault, but only whether the plaintiffs' medical negligence claims are subject to the extended statute of limitations provided in § 52-577d.

[12] For definitions of "sexual assault" and "assault," see, for example, Black's Law Dictionary (11th Ed. 2019) pp. 141–42 (defining "assault" as "[t]he threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact" and "sexual assault" as including "[o]ffensive sexual contact" and "[s]exual intercourse with another person who does not consent"), Merriam-Webster Online Dictionary, available at http://www.merriam-webster.com/dictionary/sexual%20assault (last visited December 11, 2020) (defining "sexual assault" as "illegal sexual contact that usually involves force upon a person without consent or is inflicted upon a person who is incapable of giving consent"), 1 Oxford English Dictionary (2d Ed. 1998) p. 701 (defining "assault" as "[a]n onset or rush upon any one with hostile intent"), Random House Dictionary of the English Language (2d Ed. 1987) p. 124 (defining "assault" as "a sudden, violent attack; onslaught . . . rape"), Webster's Third New International Dictionary (2002) p. 130 (including "rape" as one synonym of "assault"), and American Heritage College Dictionary (4th Ed. 2007) p. 85 (same).

For definitions of "sexual abuse," see, for example, Black's Law Dictionary (11th Ed. 2019) p. 1652 (defining "sexual abuse" as "rape"), and Merriam-Webster Online Dictionary, available at http://www.merriam-webster.com/legal/sexual%20abuse (last visited December 11, 2020) (defining "sexual abuse" as "the infliction of sexual contact upon a person by forcible compulsion").

Black's Law Dictionary defines "sexual exploitation" as "[t]he use of a person, [especially] a child, in prostitution, pornography, or other sexually manipulative activity." Black's Law Dictionary (11th Ed. 2019) p. 1652.

[13] For definitions of assault, see, for example, 6 Am. Jur. 2d 8–9, Assault and Battery § 1 (2008) ("An assault is a demonstration of an unlawful intent by one person to inflict immediate injury or offensive contact on the person of another then present. It is frequently defined as an intentional attempt by a person, by force or violence, to do an injury to the person of another, or as any attempt to commit a battery, or any threatening gesture, showing in itself or by words accompanying it, an immediate intention coupled with a present ability to commit a battery." (Footnote omitted.)), 6 Am. Jur. 2d, supra, § 15, p. 19 ("[e]ven when a statutory definition of assault or assault and battery does not contain the word 'intent' or 'intentional,' the requirement

duct. Case law from Connecticut and elsewhere arising in a wide variety of civil law contexts likewise reflects a strong tendency to treat these acts as wilful and intentional. See, e.g., *Henderson* v. *Woolley*, 230 Conn. 472, 482, 644 A.2d 1303 (1994) (holding that parental immunity doctrine does not bar personal injury claims brought by child against her parent alleging sexual abuse, exploitation and assault because doctrine was not intended to extend to intentional misconduct); *United Services Automobile Assn.* v. *Marburg*, 46 Conn. App. 99, 102, 104, 111, 698 A.2d 914 (1997) (affirming judgment declaring that insurer had no duty to indemnify insured for damages arising from sexual abuse of minor because coverage was excluded for "expected or intended" injuries, and noting that "[m]any cases from other jurisdictions have held, under a doctrine of presumption of intent, that acts of sexual molestation of minors are so heinous that intent to cause harm is presumed as a matter of law" (internal quotation marks omitted)); *Paneson* v. *Zubillaga*, 753 So. 2d 127, 129 (Fla. App.) (addressing doctor's unlawful and unpermitted sexual touching of patient as intentional tort), review denied, 773 So. 2d 59 (Fla. 2000); *Heacock* v. *Cook*, 60 So. 3d 624, 628 (La. App. 2010) (sexual exploitation of patient is intentional tort); *Fearing* v. *Bucher*, 328 Or. 367, 373, 977 P.2d 1163 (1999) (treating sexual assault as intentional tort for purposes of application of doctrine of respondeat superior); *South Carolina Medical Malpractice Liability Ins. Joint Underwriting Assn.* v. *Ferry*, 291 S.C. 460, 464, 354 S.E.2d 378 (1987) (dentist's

of intent to inflict an injury has frequently been established as an essential element of the crime by judicial construction"), and 1 F. Harper et al., Harper, James and Gray on Torts (3d Ed. 2006) § 3.4, p. 320 (defining "assault" as "an act intended to cause a battery upon another person, or to put another person in apprehension of an immediate battery (a bodily contact, either harmful or offensive), and that succeeds in causing an apprehension of such battery in the other or a third person" (footnote omitted)).

For a definition of "sexual abuse," see, e.g., 6 Am. Jur. 2d, supra, § 8, p. 14 ("[a]n act of sexual abuse is a battery").

professional liability coverage did not apply to claim for sexual assault, which is intentional tort); *Graves* v. *North Eastern Services, Inc.*, 345 P.3d 619, 629 (Utah 2015) (treating sexual assault as intentional tort for purposes of determining whether apportionment rules apply); *Horace Mann Ins. Co.* v. *Leeber*, 180 W. Va. 375, 378–81, 376 S.E.2d 581 (1988) (treating claim of "sexual misconduct" as allegation of intentional tort and recognizing split of authority as to duty to defend and to provide coverage to insured for damages allegedly caused by sexual misconduct when policy excludes coverage for "intentional injury"); *J. K.* v. *Peters*, 337 Wis. 2d 504, 513, 808 N.W.2d 141 (App. 2011) (characterizing sexual assault and abuse of child as intentional torts).

A careful review of the legislative history confirms the view that the extended statute of limitations in § 52-577d was intended to require an originating act of intentional sexual abuse, exploitation or assault. Section 52-577d originally was enacted as part of No. 86-401 of the 1986 Public Acts (P.A. 86-401), An Act Concerning Victims Rights. As its title suggests, P.A. 86-401 focused on the rights of crime victims. See 29 S. Proc., Pt. 11, 1986 Sess., p. 3781, remarks of Senator Richard B. Johnston. In addition to extending the statute of limitations for actions seeking damages for injuries caused by sexual abuse, exploitation or assault of a minor;[14] see P.A. 86-401, § 6; the act implemented changes to the Office of Victim Services and gave victims the right to be notified of scheduled plea agreements and to present statements to the court prior to the court's acceptance

[14] As subsequently amended in a technical amendment by No. 86-403, § 104, of the 1986 Public Acts, § 6 of P.A. 86-401 provided: "Notwithstanding the provisions of section 52-577 of the general statutes, no action to recover damages for personal injury to a minor, including emotional distress, caused by sexual abuse, sexual exploitation or sexual assault may be brought by such person no later than two years from the date such person attains the age of majority, except that no such action may be brought more than seven years from the date of the act complained of."

of the pleas resulting from those agreements. See P.A. 86-401, § 2. The act also required the Criminal Injuries Compensation Board to provide victims with a list of their rights, as well as available assistance programs. See P.A. 86-401, § 1. No predicate criminal prosecution or conviction is required to qualify a claim for the extended limitation period provided by § 52-577d,[15] but the overriding purpose of the statute plainly was to enable crime victims additional time to bring civil actions for physical and emotional injuries arising from brutal, predatory sexual crimes perpetrated against them when they were children.

In examining whether § 52-577d was intended to reach injuries caused without any originating act of intentional sexual abuse, exploitation or assault, we consider it significant that the extension of the statute of limitations for civil actions was part of a legislative initiative designed to address the rights of crime victims. The particular references contained in the legislative history to horrific criminal acts indicate that the legislature's focus was on harm resulting from intentional sexual misconduct. Representative Richard D. Tulisano, one of the proponents of the bill, stated that

[15] The legislature was aware that not all sexual misconduct resulted in criminal convictions, and the relevant statutory scheme was amended in 2002 to abolish altogether the statute of limitations for personal injury actions brought by the victim of first degree or aggravated first degree sexual assault. See Public Acts 2002, No. 02-138, § 3 (P.A. 02-138), codified at General Statutes § 52-577e ("[n]otwithstanding the provisions of sections 52-577 and 52-577d, an action to recover damages for personal injury caused by sexual assault may be brought at any time after the date of the act complained of if the party legally at fault for such injury has been convicted of a violation of section 53a-70 or 53a-70a"). This statutory refinement does not, however, support the plaintiffs' argument in the present case. The distinction between §§ 52-577d and 52-577e is that the latter addresses sexual misconduct that results in a criminal conviction, whereas the former concerns all other sexual misconduct. There is no reason to believe that the passage of P.A. 02-138 signaled an intention to include within the scope of § 52-577e the injurious consequences of noncriminal sexual misconduct.

the extended limitation period would apply in civil cases "in which a minor who has been victimized by sexual assault could bring an action against the offender . . . ." 29 H.R. Proc., Pt. 12, 1986 Sess., p. 4388. In response to those who opposed the extension of the statute of limitations, Representative Tulisano reminded those present: "We're talking about young individuals who are raped, who are sexually exploited, who are sexually assaulted." 29 H.R. Proc., Pt. 17, 1986 Sess., p. 6335. The remarks of other legislators reflected a similar understanding. Representative Naomi K. Cohen, who spoke in favor of the extension, recalled one of her constituents "who was raped in her home, as a [sixteen] year old, not by a relative but by someone else. Her parents and her sister were tied up in other rooms and had the opportunity to listen to the act. Without this amendment, the statute of limitations on her rights to file suit would have expired before she and her family, after a number of years of psychological counseling and psychiatric therapy were able to deal with this problem." Id., p. 6341. Representative John J. Woodcock III remarked that the bill would give "people who have been *brutally victimized* . . . a right and a remedy . . . ." (Emphasis added.) Id., p. 6340. We have not found any references to negligent sexual misconduct in the legislative history.

The legislative history contains additional evidence that the legislation was aimed at intentional rather than negligent sexual misconduct. The issue of liability insurance coverage was raised several times, with some legislators expressing concern that the extended limitation period might cause the insurance rates of some businesses, including daycare providers, to rise. See, e.g., id., pp. 6330–31, 6337–38, remarks of Representative William L. Wollenberg. Representative Woodcock addressed those concerns: "I have never seen an insurance policy that covers behavior for sexual abuse, sex-

ual exploitation or sexual assault. These are [wilful], [wanton] and reckless acts. This type of behavior is never defended by the insurance company. It does not fall within the coverage parameters of insurance." Id., p. 6339. Representative Michael D. Rybak also raised the prospect that passage of the bill might cause insurance companies to alter language in insurance policies to preclude coverage for sexual abuse, exploitation or assault. Id., p. 6356. Representative Tulisano responded that the very nature of the conduct at issue ruled out insurance coverage. "[T]his is [wilful] and [wanton]. *It's an intentional act that we're talking about here under this particular proposal.* So the individual would in fact be responsible personally." (Emphasis added.) Id., p. 6357. This aspect of the legislative history reinforces the view that the statute was intended to address causes of action for personal injuries arising from intentional sexual misconduct. The legislature was aware that insurers do not provide coverage for intentional torts, including sexual abuse, exploitation and assault, and discussed extensively the problems that victims would likely encounter in the event that the perpetrator lacked sufficient assets to support a recovery.[16]

[16] Lawmakers were aware that, in some instances, victims relying on the extended limitation period may obtain little or even no monetary relief. See 29 H.R. Proc., Pt. 17, 1986 Sess., pp. 6336–37, 6345–46. Proponents of the legislation emphasized, however, that the benefit afforded to victims goes beyond the ability to recover money damages. An important purpose of the extension of the limitation period is to afford victims the satisfaction of holding the intentional wrongdoer legally responsible, thus enabling victims to move forward with their lives. See id. Accordingly, we disagree with the plaintiffs that our construction of § 52-577d runs contrary to the public policy underlying our tort system of shifting loss from victims to wrongdoers. Compensating victims financially undoubtedly counts among the primary purposes of our tort law. See, e.g., *Doe* v. *Cochran*, 332 Conn. 325, 363, 210 A.3d 469 (2019). And, as the legislators made clear in the floor debate of P.A. 86-401, the overarching purpose of the statute is to make victims whole, a process that will include monetary recovery, if possible. But this logic does not require us to conclude here that the legislature intended the statute to apply to injuries caused by purely negligent sexual misconduct. To the contrary, the legislature recognized that financial compensation may not occur in every case involving the sexual abuse, exploitation or assault of a minor.

The legislative history surrounding the passage of P.A. 86-401 demonstrates that the legislature intended to provide an extended limitation period so that victims could hold wrongdoers accountable and, when possible, recover money damages for personal injuries arising from intentional acts of sexual abuse, exploitation or assault. Although the legislature exhibited an intention to encompass, within the scope of the statute, negligence claims against third-party defendants whose carelessness amounted to a breach of a duty to protect a minor against harm arising from sexual misconduct, there is no indication anywhere in the legislative history that the extended limitation period was intended to apply in the absence of an act of intentional sexual abuse, exploitation or assault. This legislative history supports our conclusion that the extended limitation period set forth in § 52-577d does not apply to the plaintiffs' claims for injuries arising from medical negligence and negligent infliction of emotional distress, unaccompanied by an originating act of intentional misconduct. The negligence claims asserted by the plaintiffs are governed by the limitation period set forth in § 52-584.

The judgments are affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JOSEPH A. STEPHENSON
(SC 20272)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn, Ecker and Keller, Js.

Syllabus

Convicted of burglary in the third degree, attempt to commit tampering with physical evidence, and attempt to commit arson in the second degree in connection with a break-in at a courthouse in Norwalk, the defendant appealed to the Appellate Court. The defendant had entered the office of two assistant state's attorneys located in the courthouse

by breaking a window. One of those attorneys was scheduled to begin jury selection for a criminal trial against the defendant two days after the break-in occurred. Immediately after the break-in, various case files were discovered in a state of disarray in a common area located outside of the attorneys' office, and the police found a bag containing bottles of kerosene nearby. On appeal to the Appellate Court, the defendant claimed, inter alia, that the evidence was insufficient to allow a reasonable inference that the defendant believed that the case files for his criminal case that were found in disarray contained "evidence," as that term was used in the broader definition of "physical evidence," as defined by statute (§ 53a-146 (8)). The Appellate Court reversed the trial court's judgment, albeit on the alternative ground that there was insufficient evidence for the jury to have reasonably concluded that the defendant intended to tamper with any case files or their contents. The Appellate Court expressly recognized that this issue was distinct from the defendant's sufficiency argument relating to the scope of items subject to the prohibition contained in the statute (§ 53a-155) under which the defendant was charged in connection with his alleged attempt to tamper with physical evidence. On the granting of certification, the state appealed to this court. *Held* that the Appellate Court improperly addressed, sua sponte, an issue of evidentiary sufficiency that was distinct from the defendant's claim, without calling for supplemental briefing as required by *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.* (311 Conn. 123): the defendant never raised the particular claim of evidentiary sufficiency the Appellate Court addressed, and, because the sufficiency of the evidence on the question of identity was not challenged, the state had no occasion to brief the issue of whether it had established a connection between the defendant's conduct and the case files found in disarray; moreover, because the sufficiency claim raised by the defendant challenged only whether the jury could have reasonably inferred that his case files contained physical evidence covered by § 53a-155, the state was never called on to apply a sufficiency standard to the distinct issue that the Appellate Court resolved, that is, whether the defendant had intended to alter, remove, conceal or destroy the case files; accordingly, because the Appellate Court failed to afford the parties an opportunity to brief or argue the issue that ultimately proved to be dispositive in that court's analysis, its reversal of the trial court's judgment of conviction was improper.

Argued September 9—officially released December 18, 2020*

Procedural History

Substitute information charging the defendant with the crimes of burglary in the third degree, attempt to

* December 18, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

commit tampering with physical evidence, and attempt to commit arson in the second degree, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, and tried to the jury before *White*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Sheldon*, *Bright* and *Mihalakos*, *Js.*, which reversed the trial court's judgment and remanded the case to that court with direction to render a judgment of acquittal; thereafter, the state, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Sarah Hanna, senior assistant state's attorney, with whom, on the brief, were *Richard Colangelo*, chief state's attorney, *Paul J. Ferencek*, state's attorney, and *Michelle Manning*, senior assistant state's attorney, for the appellant (state).

Vishal K. Garg, for the appellee (defendant).

Opinion

KAHN, J. The state, on the granting of certification, appeals from the judgment of the Appellate Court, which reversed the judgment of the trial court convicting the defendant, Joseph A. Stephenson, of the crimes of burglary in the third degree, attempt to commit tampering with physical evidence, and attempt to commit arson in the second degree in connection with a break-in at the Superior Court for the judicial district of Stamford-Norwalk, geographical area number twenty, which is located in Norwalk. See *State* v. *Stephenson*, 187 Conn. App. 20, 39, 201 A.3d 427 (2019). The state claims, inter alia, that the Appellate Court improperly addressed an issue of evidentiary sufficiency sua sponte without calling for supplemental briefing as required by *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 84 A.3d 840 (2014)

(*Blumberg*). We agree and, accordingly, reverse the judgment of the Appellate Court.

The following facts and procedural history are relevant to our resolution of the present appeal. A silent alarm at the courthouse was triggered at around 11 p.m. on Sunday, March 3, 2013, when the defendant entered the state's attorney's office by breaking a window on the building's eastern side.[1] Although the police were able to respond in about ninety seconds, the defendant successfully evaded capture by running out of a door on the building's southern side. Footage from surveillance cameras introduced by the state at trial show that the defendant was inside of the building for slightly more than three minutes. In the investigation that followed, the police determined that the broken window belonged to an office shared by two assistant state's attorneys. One of those attorneys was scheduled to commence jury selection for a criminal trial against the defendant on certain felony charges only two days after the break-in occurred. No other cases were scheduled to begin jury selection that week. Immediately after the break-in, various case files were discovered in an apparent state of disarray at the northern end of a central, common area located outside of that room. Specifically, several files were found sitting askew on top of a desk with two open drawers; still other files were scattered on the floor below in an area adjacent to a horizontal filing cabinet containing similar files. Photographs admitted as full exhibits clearly show labels on these files reading "TUL" and "SUM." Finally, in a short hallway at the opposite end of that same common area, the police found a black bag containing six bottles of industrial strength kerosene with their UPC labels cut off. The bag and

[1] Although the defendant advanced an alibi defense at trial, he did not challenge the sufficiency of the state's evidence with respect to identity either before the Appellate Court; see *State* v. *Stephenson*, supra, 187 Conn. App. 30, 34; or this court.

its contents were swabbed, and a report subsequently generated by the Connecticut Forensic Science Laboratory included the defendant's genetic profile as a contributor to a mixture of DNA discovered as a result.

Various other components of the state's case against the defendant warrant only a brief summary. The day after the break-in, the defendant called the public defender's office at the Norwalk courthouse to ask whether the courthouse was open and whether he was required to come in that day. The state also submitted evidence showing that the defendant drove a 2002 Land Rover Freelander with an aftermarket push bumper, a roof rack, and a broken taillight, and that surveillance videos from the area showed a similar vehicle driving by the courthouse repeatedly in the hours leading up to the break-in. Finally, the state submitted recordings of various telephone calls the defendant made after he had been taken into custody as a result of his conviction on the criminal charges previously pending against him in Norwalk. During one such telephone call, the defendant asked his brother, Christopher Stephenson, to get rid of "bottles of things" for a heater, speculated about how the police located the vehicle, and attempted to arrange an alibi.

The defendant was tried before a jury on charges of burglary in the third degree in violation of General Statutes § 53a-103, attempt to commit tampering with physical evidence in violation of General Statutes § 53a-49 (a) (2) and General Statutes (Rev. to 2013) § 53a-155 (a) (1), and attempt to commit arson in the second degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-112 (a) (1) (B). The jury returned a verdict finding the defendant guilty of each of these offenses, and the trial court subsequently rendered a judgment in accordance with that verdict.

The defendant appealed from that judgment to the Appellate Court, raising several distinct claims of error.[2] In the final three pages of his principal brief to that court, the defendant raised the following single, relatively narrow claim relating to the sufficiency of the state's proof with respect to the charge that he attempted to tamper with physical evidence: "The state failed to show that any materials in the state's attorney's case file for the defendant's criminal case constituted 'evidence' as defined by [General Statutes] § 53a-146 (8); *the evidence was insufficient to allow a reasonable inference that the defendant believed the file contained evidence*." (Emphasis added.) This claim challenged the judgment of conviction by arguing that, even if the defendant did rummage through the case files that evening, certain evidentiary deficiencies left the jury to "speculate" that he had acted with an intent to tamper with a particular type of document—namely, that within the ambit of § 53a-155 (a) (1).[3] Put differently, the defendant contended that the state had failed to submit adequate proof to allow reasonable inferences about the precise nature of the items contained within his case files. The state responded to this argument by briefing issues of statutory construction relating to the meaning of §§ 53a-146 (8) and 53a-155.

[2] On appeal to the Appellate Court, the bulk of the defendant's principal brief pertained to an unrelated evidentiary claim. The defendant also raised two separate sufficiency claims relating to the charge of attempt to commit arson in the second degree. Although the defendant renews these claims of error in the present appeal as alternative grounds for affirmance, their existence is irrelevant to the question of whether the Appellate Court's decision violated the precepts of *Blumberg*.

[3] General Statutes (Rev. to 2013) § 53a-155 (a) provides: "A person is guilty of tampering with or fabricating physical evidence if, believing that an official proceeding is pending, or about to be instituted, he: (1) Alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding; or (2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such official proceeding."

The Appellate Court ultimately reversed the trial court's judgment on a different ground, based on its conclusion that there was insufficient evidence for the jury to have reasonably concluded that the defendant intended to tamper with any case files or their contents at all. See *State* v. *Stephenson*, supra, 187 Conn. App. 39. Specifically, the Appellate Court framed the dispositive question before it as whether the evidence "was insufficient to prove that [the defendant] . . . acted with the intent to tamper with physical evidence within the courthouse *because the state failed to establish any connection between his proven conduct within the courthouse and any of the files or materials with which he is claimed to have had the intent to tamper*." (Emphasis added.) Id., 34. The Appellate Court answered that question in the affirmative, concluding that the "single fact" that there was "a disorganized pile of files on the floor" was "insufficient for the jury to infer that the defendant ever touched any case files in the state's attorney's office . . . let alone pulled case files out of any file cabinet or off any desk, shelf or table, or that he went through such files for any purpose, much less that he took any steps to alter, remove, conceal or destroy the files or their contents as or after he went through them."[4] Id., 35–36. In reaching its decision, the Appellate Court expressly recognized that the issue was distinct from the defendant's sufficiency argument relating to the scope of items subject to the prohibition contained in § 53a-155. Id., 30 n.4.

In *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 311 Conn. 128, this court concluded, "with respect to the propriety of a reviewing court raising and deciding an issue that the parties themselves have not raised, that the reviewing

[4] In reaching this conclusion, the Appellate Court relied in part on the absence of evidence that would have shown a completed offense. See *State* v. *Stephenson*, supra, 187 Conn. App. 38 ("[n]o evidence was presented that any case file was altered, destroyed, concealed or removed in any way").

court (1) must do so when that issue implicates the court's subject matter jurisdiction, and (2) has the discretion to do so if (a) exceptional circumstances exist that would justify review of such an issue if raised by a party, (b) the parties are given an opportunity to be heard on the issue, and (c) there is no unfair prejudice to the party against whom the issue is to be decided." The state claims that the Appellate Court's decision in the present case violated this mandate by raising a different claim of evidentiary sufficiency sua sponte, without calling for supplemental briefing from the parties. For the reasons that follow, we agree.

We note at the outset that, although this court applies an abuse of discretion standard to the question of whether the Appellate Court properly addressed an issue that was never raised by the parties; see *Diaz* v. *Commissioner of Correction*, 335 Conn. 53, 58, 225 A.3d 953 (2020); we engage in plenary review as to the predicate question of whether a particular claim of error was, in fact, raised during the course of a prior appeal. See, e.g., *State* v. *Connor*, 321 Conn. 350, 363, 138 A.3d 265 (2016).

Our review in the present case indicates that the defendant never raised the particular claim of evidentiary sufficiency addressed by the Appellate Court. First, the defendant's own recitation of the facts in his principal brief to the Appellate Court affirmatively stated the following: "[T]he jury reasonably could have found the following facts concerning a break-in at the Norwalk courthouse. . . . While inside, the perpetrator removed files from a file cabinet, which were found scattered on the floor near the state's attorney's secretary's desk." Because the sufficiency of the evidence on the question of identity was not challenged; see *State* v. *Stephenson*, supra, 187 Conn. App. 30, 34; the state simply had no occasion to brief the question of whether it had established a "connection" between the defendant's "proven conduct" and the case files found scat-

tered on the floor. Second, because the sufficiency claim raised by the defendant challenged only whether the jury could have reasonably inferred that his case files contained physical evidence protected by § 53a-155, the state was never called upon to apply a sufficiency standard to the distinct question, raised by the Appellate Court, of whether the defendant had, in the first instance, intended to "alter, remove, conceal or destroy" the case files at all.

It is, of course, beyond question that the Appellate Court possesses discretion to raise issues pertaining to the sufficiency of evidence sua sponte. See, e.g., *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 311 Conn. 128. It is equally well established, however, that it may do so only after providing the parties with a meaningful opportunity to address the question through supplemental briefing. See, e.g., *State* v. *Dort*, 315 Conn. 151, 161, 106 A.3d 277 (2014) ("[i]f the Appellate Court decides to address an issue not previously raised or briefed, it may do so only after requesting supplemental briefs from the parties or allowing argument regarding that issue" (internal quotation marks omitted)); *Haynes* v. *Middletown*, 306 Conn. 471, 474, 50 A.3d 880 (2012) (same). Because the Appellate Court failed to afford the parties an opportunity to brief or argue the issue that ultimately proved to be dispositive in its analysis, its reversal of the trial court's judgment of conviction was improper.

We find the defendant's arguments to the contrary in the present appeal to be unpersuasive. First, the defendant posits that the Appellate Court was not required to call for supplemental briefing because it merely adopted a separate line of legal reasoning. See *Finkle* v. *Carroll*, 315 Conn. 821, 837 n.14, 110 A.3d 387 (2015) (concluding that supplemental briefing was not required under *Blumberg* for "an amplification and logical extension of the defendants' argument"). The evi-

dentiary deficiency analyzed in the Appellate Court's decision was conceptually distinct from the one pursued by the defendant in his brief to that court. Specifically, the Appellate Court concluded that the state's proof was insufficient for the jury to have reasonably concluded that the defendant's conduct was connected to the files scattered at the northern end of the office or that, even if he did physically disturb those files, he had ultimately intended to tamper with them within the meaning of § 53a-155. See *State* v. *Stephenson*, supra, 187 Conn. App. 39. The defendant, however, only claimed that the evidence admitted at trial was insufficient for the jury to make reasonable inferences about the *contents* of his case files. Although both of these issues relate, at the broadest level, to the question of whether the defendant intended to tamper with physical evidence, the claims address distinct evidentiary deficiencies. Cf. *State* v. *Connor*, supra, 321 Conn. 368.

Second, the defendant argues that the Appellate Court was not required to call for supplemental briefing because the dispositive claim was preserved at trial. Our case law reveals that this argument must fail. See *Sequenzia* v. *Guerrieri Masonry, Inc.*, 298 Conn. 816, 821–22, 9 A.3d 322 (2010) ("[A]lthough the defendant raised the instructional impropriety claim in the trial court . . . it concedes that it did not raise this claim in its brief to the Appellate Court. The defendant contends, however, that the Appellate Court has the discretion to decide a case on any basis, regardless of whether that claim was raised by the parties. We conclude that the defendant misconstrues the limits of the Appellate Court's authority. If the Appellate Court decides to address an issue not previously raised or briefed, it may do so only after requesting supplemental briefs from the parties or allowing argument regarding that issue. . . . Here, it is undisputed that the Appellate Court did not order supplemental briefing or argument on the instructional impropriety claim, which deprived the

plaintiff of the opportunity to be heard on this issue before that court." (Citations omitted; emphasis omitted; internal quotation marks omitted.)), overruled in part on other grounds by *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 84 A.3d 840 (2014); *State* v. *Dalzell*, 282 Conn. 709, 715–17, 924 A.2d 809 (2007) (concluding that Appellate Court improperly addressed preserved claim not raised on appeal without ordering supplemental briefing), overruled in part on other grounds by *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 84 A.3d 840 (2014);[5] cf. *In re Joseph W.*, 301 Conn. 245, 255, 21 A.3d 723 (2011) (ordering supplemental briefing where preserved claim was not raised on appeal).

We emphasize that "[o]ur system [is] an adversarial one in which the burden ordinarily is on the parties to frame the issues, and the presumption is that issues not raised by the parties are deemed waived." *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 311 Conn. 164. When the Appellate Court exercises its discretion to deviate from that general principle, it must afford the parties an opportunity to be heard. See *Bloom* v. *Zoning Board of Appeals*, 233 Conn. 198, 205, 658 A.2d 559 (1995) ("[a] fundamental premise of due process is that a court cannot adjudicate any matter unless the parties have been given a reasonable opportunity to be heard on the issues involved"). Its failure to do so in the present case necessitates remand. See, e.g., *Diaz* v. *Commissioner of Correction*, supra, 335 Conn. 60–61 (concluding that Appellate

[5] In *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 311 Conn. 162 n.34, we overruled *Sequenzia* and *Dalzell* only to the extent that those cases stood for the proposition that supplemental briefing is "the sole condition for [a] reviewing court to raise a new issue sua sponte pursuant to its supervisory power . . . ." Such a conclusion cannot, however, be read to imply that supplemental briefing is not required at all.

Court improperly raised and decided issue without providing parties with opportunity to be heard and remanding case for further proceedings notwithstanding fact that issue had been fully briefed on appeal); *Haynes* v. *Middletown*, supra, 306 Conn. 474–75 (same); see also *State* v. *Connor*, supra, 321 Conn. 368, 374–75 (concluding that Appellate Court improperly raised and decided issue without providing parties with opportunity to be heard and remanding case for consideration of claims actually raised because defendant failed to advance any argument in response to state's colorable claim of prejudice).[6] We, therefore, remand the present case to the Appellate Court in order to address the claims raised by the defendant in his initial appeal. If, during that proceeding, the Appellate Court chooses to exercise its discretion to reach the sufficiency issue raised in its previous decision, it must do so in a manner consistent with this court's decision in *Blumberg*.

The judgment of the Appellate Court is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other justices concurred.

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[6] The defendant claims that his continued incarceration would be unjust and asks us to exercise our supervisory authority to order his release pending the resolution of his appeal. The use of that power is, however, limited to the most extraordinary cases. See, e.g., *State* v. *Edwards*, 314 Conn. 465, 498–99, 102 A.3d 52 (2014). The defendant has provided no reason to distinguish the present case from other criminal appeals in which an uninvited error committed by either the Appellate Court or the trial court necessitates further proceedings.

STATE OF CONNECTICUT *v.* ANGEL M.*
(SC 20106)

Robinson, C. J., and Palmer, McDonald,
D'Auria, Kahn and Ecker, Js.**

Syllabus

The defendant was convicted of sexual assault in the first degree, attempt to commit sexual assault in the first degree, and risk of injury to a child in connection with his alleged sexual abuse of V, the twelve year old victim. The defendant had become romantically involved with M, V's mother, when V was approximately three to four years old. After M and the defendant had a child, A, together, the defendant moved into a house with M, V and A, whom the defendant also allegedly abused sexually at a later point. At trial, the defendant testified that he had never touched V or A in a sexually inappropriate manner and claimed that V and A fabricated their allegations of sexual abuse in retaliation for the defendant's act of hitting M and having withdrawn all financial support for the family after moving out of the house. At his sentencing hearing, the defendant engaged in a colloquy with the court during which he continued to deny his guilt. The court indicated to the defendant during the colloquy that taking responsibility for his misconduct and apologizing would help V and A but that it was the defendant's right to continue to deny his guilt in the event that he appealed his conviction. The court stated further that it would "not punish [him] for" continuing to deny his guilt but that he would "not get any extra credit." After the court sentenced the defendant to a significant period of imprisonment followed by a significant period of probation, he appealed to the Appellate Court, claiming, inter alia, that the trial court had violated his right to due process by improperly augmenting his sentence for his refusal to apologize to V and A after he had been found guilty of the crimes charged in connection with his sexual assault of V. The Appellate Court affirmed the judgment of conviction, concluding, inter alia, that a sentencing court properly may consider a defendant's lack of remorse in fashioning

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018); we decline to identify any person protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

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

an appropriate sentence and also may consider a defendant's denial of culpability in evaluating his or her prospects for rehabilitation. On the granting of certification, the defendant appealed to this court. *Held* that the defendant could not prevail on his claim that the Appellate Court incorrectly concluded that the trial court had not punished him for invoking his right against self-incrimination and for refusing to apologize to V and A: the defendant's claim was belied by the trial court's sentencing remarks, in particular, the court's explicit, on-the-record assurance that it would not increase the defendant's sentence if he chose to exercise his constitutional right against self-incrimination, and nothing the court stated before announcing the defendant's sentence called into question its explicit assurance that the defendant would not be penalized for invoking that right; moreover, this court rejected the defendant's claim that a court should not be permitted to grant leniency to a defendant who accepts responsibility merely because the same leniency would be unavailable to a defendant who does not accept responsibility; furthermore, although the defendant's sentence was severe, he was effectively sentenced to approximately one half of the maximum period of imprisonment to which he was exposed for the three offenses of which he was found guilty, and, therefore, his sentence did not give rise to an inference that the court punished him for refusing to apologize to V and A.

(*Two justices concurring separately in one opinion*)

Argued September 19, 2019—officially released December 31, 2020***

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree, attempt to commit sexual assault in the first degree, and risk of injury to a child, brought to the Superior Court in the judicial district of Hartford, where the court, *Mullarkey*, *J.*, denied the defendant's motion to preclude certain evidence; thereafter, the case was tried to the jury before *Mullarkey*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Keller*, *Mullins* and *Elgo*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

*** December 31, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Pamela S. Nagy, assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, former state's attorney, and *Anne F. Mahoney*, state's attorney, for the appellee (state).

Opinion

PALMER, J. Following a jury trial, the defendant, Angel M., was convicted of sexually assaulting the twelve year old daughter of his romantic partner and sentenced to a total effective prison term of thirty-three years. The defendant appealed to the Appellate Court, claiming, among other things, that the trial court had violated his right to due process at sentencing by penalizing him for refusing to apologize for his criminal misconduct. See *State* v. *Angel M.*, 180 Conn. App. 250, 253, 286, 183 A.3d 636 (2018). According to the defendant, who maintained his innocence both at trial and at the time of sentencing, the trial court's enhancement of his sentence for that reason was fundamentally unfair because it contravened his constitutional right against self-incrimination insofar as any such apology necessarily would have required him to admit guilt. See id., 286–88. The Appellate Court rejected the defendant's claim, concluding that the record did not support his contention that the trial court had increased his sentence because of his unwillingness to issue an apology to the victims; see id., 290–91; and we granted the defendant's petition for certification to appeal. See *State* v. *Angel M.*, 328 Conn. 931, 182 A.3d 1192 (2018). We agree with the Appellate Court and, accordingly, affirm its judgment.

The Appellate Court opinion sets forth the following relevant facts and procedural history. "M is the mother of the victim. M became romantically involved with the defendant when the victim was approximately three or

four years old. M had two children, G and the victim, from a previous relationship. The defendant was a father figure to the victim, and she was considered his stepdaughter.

"Approximately one year after the defendant and M began dating, they had a child together named A. At some point in 2000, the defendant moved in with M. They lived together with the three children, the victim, G, and A, in an apartment in [the city of] Hartford until they purchased a house in 2008.

"In 2006 or 2007, when the victim was approximately twelve years old,[1] she arrived home after school and went into her mother's bedroom to play a game on the family's computer. While she was playing on the computer, the defendant came up behind her and began kissing her neck. The victim froze. Then the defendant picked her up and threw her on the bed. He locked the bedroom door and 'did something near the side of the bed' before lifting up the victim's shirt and licking her breasts. The defendant proceeded to lick the victim's vagina before taking off his pants and attempting to put his penis in her vagina. The victim closed her legs, and the defendant got off of her.[2]

[1] "The victim did not remember exactly how old she was when the sexual abuse occurred, but she testified that she would have been twelve or thirteen because she was in middle school when it happened. She also testified that the abuse took place while the family was living in the apartment in Hartford, during the spring or summer, rather than the house that the defendant and M purchased in 2008." *State* v. *Angel M.*, supra, 180 Conn. App. 254 n.1.

[2] "In addition to the victim's testimony regarding the sexual abuse, the jury heard testimony from three constancy of accusation witnesses. The first was K, the victim's childhood friend. She testified that when they were in fifth or sixth grade, the victim told her that the defendant had molested her. She also testified that the victim provided more details about the molestation when they were freshmen in high school. K's father was the second constancy witness. Although he could not remember an exact date, he recalled the victim telling him that the defendant had molested her. The third witness, G, the victim's brother, testified that the victim had told him via a text message that she had been 'touched.' He testified that he received the text message at some point in 2010 while he was in Europe.

"Several years after that incident, on the evening of December 18, 2011, the defendant and M were involved in an incident outside of a restaurant in Newington. That evening, M had gone to the restaurant without the defendant. She was socializing with a female friend and another man. The defendant, who had been waiting impatiently for her to come home, decided to go to the restaurant to find her. When he arrived, he saw M socializing with a man he did not recognize. He became angry. He confronted M in the parking lot, and an argument ensued. The defendant struck M multiple times. The police arrived shortly thereafter and arrested the defendant. In January, 2012, a protective order was issued as a result of the incident. Thereafter, the defendant stopped providing financial assistance to M, and he moved out of the house and into his own apartment.

"Shortly after the defendant moved out of the house, A ceased all communication with him. The lack of communication between A and the defendant concerned M. As a result, M asked the victim to talk to A in order to figure out why A was ignoring the defendant. On February 7, 2012, the victim started a conversation with A via text messages concerning the change in [A's] relationship with the defendant. In those communications, A told the victim that the defendant had molested her. The victim also revealed that the defendant had molested her, and the victim encouraged A to tell their mother.

"Shortly after this conversation, the victim told M that A had been abused by the defendant. Upon learning

"The victim also testified that the defendant would kiss her neck 'and stuff' every time that she would go on the computer and that on one occasion she woke up and saw the defendant in her bedroom pulling his hands out of his pants. In this case, however, the state only charged the defendant on the basis of the single incident in her mother's bedroom that involved cunnilingus and attempted vaginal penetration." *State* v. *Angel M.*, supra, 180 Conn. App. 254 n.2.

about the abuse, M contacted A's therapist, Mary Mercado, who reported the abuse to the Department of Children and Families (department). The department referred the case to the Hartford Police Department, and Detective Frank Verrengia investigated the case. The victim and A both participated in forensic interviews in March, 2012. The victim disclosed her abuse during [a] forensic interview on March 8, 2012. Following an investigation, the police arrested the defendant on April 18, 2013. The case involving A, however, was administratively closed in May, 2013."[3] (Footnotes in original.) *State* v. *Angel M.*, supra, 180 Conn. App. 253–55.

"The state charged the defendant with one count of sexual assault in the first degree [in violation of General Statutes § 53a-70 (a) (2)], one count of attempt to commit sexual assault in the first degree [in violation of § 53a-70 (a) (2) and General Statutes § 53a-49], and one count of risk of injury to a child [in violation of General Statutes § 53-21 (a) (2)]." Id., 256. At trial, the defendant testified in his own defense that he had never touched

[3] At trial, the state was permitted to introduce A's testimony as prior misconduct evidence. She "testified that the defendant began abusing her [in or around 2011] when she was eleven years old, approximately four or five years after the sexual abuse of the victim. The first incident occurred while the defendant still was living in the family's house in Hartford. A was talking to the defendant in his bedroom when he started to tongue kiss her. The defendant removed her shirt and continued kissing her, but she was able to push him off of her. She put her shirt back on and left the bedroom. The second incident occurred approximately one week later. This time, the defendant attempted to remove A's shirt and touch her breasts at the family home. A was able to get away from him because her sister-in-law arrived at the house and interrupted him. The third incident occurred after the defendant had moved out of the family home to his own apartment. Again, the defendant started by tongue kissing her, and, then, he removed her shirt. The defendant was trying to touch her vagina and breasts, despite A's attempts to push him off of her. During this incident, the defendant attempted to get undressed while he continued touching A, until she suggested that they go to the movies in order to get out of the house." (Footnote omitted.) *State* v. *Angel M.*, supra, 180 Conn. App. 256–57; see id., 257 n.3.

the victim or A in a sexually inappropriate manner. His "theory of defense was that the victim and [A] both fabricated the allegations of sexual abuse. Specifically, he claimed that they made these false allegations in retaliation for his having hit [M] during the restaurant incident, and for withdrawing all financial support from the family after moving out of the house. The jury found the defendant guilty on all counts." Id.

"At the sentencing hearing, the state did not provide a specific recommendation for a sentence. The state simply requested a 'significant sentence' for the defendant, while making clear that there was a mandatory minimum for the charged offenses. The state also noted that the defendant's 'unwillingness to participate in any sex offender treatment programs or to acknowledge any criminal behavior . . . puts him at a much higher risk' to reoffend.

"The defendant was afforded an opportunity to address the court and [to] present additional mitigating evidence. The court heard from several individuals in support of the defendant's good character. One such individual was the defendant's current romantic partner, who has a teenage daughter, with whom the defendant had been residing during the proceedings.

"Before being sentenced, the defendant engaged in the following colloquy with the court:

" '[The Defendant]: The jurors found me guilty. I am innocent of these charges presented against me, and I want to appeal this case.

" 'The Court: Well, I appreciate your position, but, in a case like this, the lifetime effects on the victims can be lessened if the person who committed these acts, particularly in a familial relationship, whether father or stepfather, takes responsibility. I know you wish to appeal, and that does create a dilemma.

" '[The Court Interpreter]: Your Honor, may that be repeated for the interpreter?

" 'The Court: Well, apologizing, admitting what he did, taking responsibility will help the victims enormously; at least that has been my experience over four decades in this business. However, it puts a crimp in your ability to appeal. Do you understand that?

" '[The Defendant]: I did understand. But how would I say sorry for something that I did not do. These are just allegations? I love my daughter; I worked really hard for them. This was hard for me. And I work hard to support this family, two, three jobs to have our home and to lose everything because of these allegations. It's not fair.

" 'The Court: Well, that's your decision, sir. If you wish to continue to deny it, that's your absolute right. *The court will not punish you for that*; however, *you do not get any extra credit.* Do you have anything else you wish to say?

" '[The Defendant]: No. That's it for now.' " (Emphasis in original.) Id., 286–88.

"Thereafter, the court addressed the defendant and explained that 'sentencings have to do with [the] four following considerations: rehabilitation, deterrence, protection of society, and punishment.' The court acknowledged that the defendant had a positive presentence investigation report [(PSI) and outstanding working history] and that several people spoke on his behalf. The court considered the defendant's demeanor during the trial and his successful completion of a family violence education program." Id., 288. The court also recognized "the dilemma of the appeal[s] process" as it related to the defendant's willingness to accept responsibility for his crimes but noted that, "in this type of case, it is most helpful to the victims to have an

admission or an apology." The court also stated that it is "particularly important for them to be restored to [a] calm, collected, healthy mental state."

Notably, the court expressed concern that the defendant was then living with another woman and her teenaged daughter. The court then observed that "the defendant has violated the trust in a household" and was "a predator," and that, "although [the defendant] was not charged with . . . crimes against his [biological] daughter [A], she did testify [as to his sexual abuse of her] under oath . . . and was quite credible." The court then concluded: "These two young ladies have been devastated by your actions, sir. . . . [T]his type of offense, this type of deviancy occurs in men in all strata of society . . . . I have had many . . . of these cases. The fact that one violates the trust of a young girl, who's put her trust in you, is just about the worst crime we have short of murder."

"After noting that it had 'taken all these things into account and . . . tried to balance the seriousness of this offense,' the court sentenced the defendant to a total effective sentence of forty-five years [of] imprisonment, execution suspended after thirty-three years, to be followed by twenty-five years of probation."[4] *State* v. *Angel M.*, supra, 180 Conn. App. 288.

On appeal to the Appellate Court, the defendant claimed that the trial court improperly augmented his sentence because he refused to apologize to the victims[5]

[4] More specifically, the trial court sentenced the defendant to twenty-five years on count one for sexual assault in the first degree, twenty years on count two for attempt to commit sexual assault in the first degree, to run concurrently with count one, and twenty years on count three for risk of injury to a child, execution suspended after eight years, followed by twenty-five years of probation, to run consecutively to count one.

[5] Although the charges against the defendant pertained only to the sexual assault perpetrated on the victim, M's daughter, we refer to the victim and A collectively as the victims.

following his conviction.[6] See id., 286. The Appellate Court rejected this contention, noting, first, that the claim was unpreserved but nonetheless reviewable under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), because the record was adequate for review and the claim was one of constitutional magnitude. *State* v. *Angel M.*, supra, 180 Conn. App. 288. With respect to the legal principles governing the defendant's claim, the Appellate Court recognized that, "[a]lthough a court may deny leniency to an accused who . . . elects to exercise a statutory or constitutional right, a court may not penalize an accused for exercising such a right by increasing his or her sentence solely because of that election." (Internal quotation marks omitted.) Id., 289, quoting *State* v. *Elson*, 311 Conn. 726, 762, 91 A.3d 862 (2014); see also *Mitchell* v. *United States*, 526 U.S. 314, 316–17, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999) (sentencing court, in determining facts that bear on severity of sentence, may not, consistent with fifth amendment privilege against self-incrimination, draw adverse inference from defendant's silence at sentencing). The Appellate Court further stated, however, that a sentencing court properly may consider a defendant's lack of remorse in fashioning an appropriate sentence and that, under *State* v. *Huey*, 199 Conn. 121, 128, 505 A.2d 1242 (1986), a court at sentencing also may consider a defendant's denial of culpability in evaluating his or her prospects for rehabilitation. *State* v. *Angel M.*, supra, 289–90.

[6] In the Appellate Court, the defendant also claimed that (1) the trial court abused its discretion in permitting the state to present uncharged misconduct evidence concerning the defendant's sexual abuse of A, and (2) the senior assistant state's attorney engaged in several improprieties during cross-examination and closing argument that deprived the defendant of his constitutional right to a fair trial. See *State* v. *Angel M.*, supra, 180 Conn. App. 256, 264. These claims, which the Appellate Court rejected; see id., 264, 286; are not the subject of this appeal.

Applying these principles to the present case, the Appellate Court then opined that, although the trial court placed particular emphasis on "the defendant's failure to accept responsibility and his failure to apologize to the victims"; id., 290; all of the sentencing factors considered by the court were proper. See id. As the Appellate Court also noted, the trial court "expressly stated that it would not punish the defendant for exercising his 'absolute right' to not admit guilt and [to] appeal his judgment of conviction, but it would not give him any 'extra credit.' The [trial] court's statements comport with the principle that a court may deny leniency to a defendant for exercising a constitutional right, but it may not punish him or her for exercising such a right. . . . The defendant . . . provided no reason . . . to doubt the trial court's representation that it was not going to punish [him] for exercising his 'absolute right.' " (Citation omitted.) Id., 290–91. Although the Appellate Court's determination that the trial court did not penalize the defendant for invoking his privilege against self-incrimination would have sufficed to resolve the defendant's claim in the state's favor, the court went on to say that, "[b]ecause [it] conclude[d] that [its] decision [was] controlled by [this court's] decision in *State* v. *Huey*, supra, 199 Conn. 121, [it was] not persuaded by the defendant's citation to cases from other jurisdictions for the proposition that a court may not consider a defendant's silence at sentencing as an indication of a lack of remorse."[7] *State* v. *Angel M.*, supra, 180 Conn. App. 290 n.13.

[7] In *Huey*, the defendant, Kent K. Huey, was charged with sexual assault in the first degree and burglary in the first degree after he surreptitiously entered a neighbor's apartment and sexual assaulted her at knifepoint. *State* v. *Huey*, supra, 199 Conn. 123. Following plea negotiations, Huey entered a guilty plea to sexual assault in the third degree. Id. Even though that offense does not require proof of penetration, the state informed the trial court at the time of sentencing that, if there had been a trial, the victim would have testified that Huey had penetrated her sexually. Id., 124. Huey admitted to sexually assaulting the victim but denied that penetration had occurred. Id., 125. Before imposing sentence, the court, crediting the victim's

We thereafter granted the defendant's petition for certification to appeal, limited to the following two issues: (1) "Did the Appellate Court properly conclude that the trial court did not penalize the defendant for maintaining his innocence at sentencing?" And (2) "[s]hould this court overrule *State* v. *Huey*, [supra, 199 Conn. 121], because consideration of a defendant's refusal to admit guilt for any purpose at sentencing is a violation of the defendant's [constitutional] right against self-incrimination?" *State* v. *Angel M.*, supra, 328 Conn. 931.

On appeal to this court, the defendant maintains that the Appellate Court incorrectly concluded that the trial court had not punished him for invoking his right against self-incrimination and refusing to apologize to the victims. In support of this claim, the defendant contends that the Appellate Court failed to consider that the trial court imposed the maximum sentence for each offense, even though the PSI report recommended a "moderate sentence"[8] and estimated the defendant's

version of the assault, expressed the view that Huey's denial of penetration reflected adversely on his prospects for rehabilitation. Id. Thereafter, Huey appealed to the Appellate Court, claiming, inter alia, that "the sentencing judge forced him to admit guilt to a crime with which he was not charged and then punished him for the assertion of his . . . right against self-incrimination when he persisted in his denial of penetration." Id., 128. The Appellate Court rejected Huey's claim; id.; and we granted his petition for certification to appeal, limited to that issue. Id., 122. We agreed with the Appellate Court that Huey could not prevail on his claim, explaining that Huey "did not assert his . . . privilege [against self-incrimination] but rather, while represented by counsel, voluntarily responded to the court's inquiries. . . . [T]he sentencing judge did not attempt to force an admission; he merely gave [Huey] an opportunity to present his version of the incident. Having heard it, he did not have to believe it." (Citations omitted.) Id, 128–29. Thus, Huey was not "punished for persisting in his denial [that] penetration [had occurred]. Rather, the sentencing judge, after observing him, simply factored [Huey's] denial, as an indication of his lack of readiness for rehabilitation, into that complex formula from which he labored to derive a just sentence." Id., 129.

[8] As the defendant asserts, the sentence imposed by the trial court for each of the defendant's three offenses; see footnote 4 of this opinion; was the maximum term of imprisonment allowable for the offense: sexual assault

risk of reoffending as very small, and the defendant had no prior criminal record. Moreover, before imposing sentence, the court repeatedly referred to the defendant's refusal to apologize to the victims. In the defendant's view, these factors demonstrate that the trial court did, in fact, punish the defendant for invoking his constitutional right against self-incrimination, notwithstanding the court's express representation to the contrary. The defendant further contends that, insofar as *State* v. *Huey*, supra, 199 Conn. 121, concludes that a court may consider an accused's silence at sentencing as reflecting a lack of remorse or diminished prospects for rehabilitation, we should disavow that holding as incompatible with the accused's privilege against self-incrimination.

We reject the defendant's claim because it is belied by the trial court's sentencing remarks—in particular, the court's explicit, on-the-record assurance that it would not increase the defendant's sentence for exercising his constitutional right against self-incrimination.[9] In light of this conclusion, we leave for another day the question of whether the federal constitution

in the first degree, a class A felony, carries a maximum sentence of twenty-five years imprisonment; see General Statutes §§ 53a-35a (4) and 53a-70 (a) (2) and (b) (2); attempt to commit sexual assault in the first degree, a class B felony, carries a maximum sentence of twenty years imprisonment; see General Statutes §§ 53a-35a (6), 53a-51 and 53a-70 (a) (2) and (b) (2); and risk of injury to a child, also a class B felony, likewise carries a maximum sentence of twenty years imprisonment. See General Statutes §§ 53a-35a (6) and 53-21 (a). The trial court, however, suspended execution of twelve years of the twenty year sentence imposed for the defendant's conviction of risk of injury to a child. See footnote 4 of this opinion. In addition, the court ordered that the sentence for the conviction of attempt to commit sexual assault in the first degree run concurrently with the sentence for the conviction of sexual assault in the first degree. Thus, the maximum sentence that that defendant could have received was sixty-five years; the defendant received a total effective sentence of thirty-three years.

[9] For the reasons set forth by the Appellate Court, we agree that the defendant's claim, although unpreserved, is reviewable under *State* v. *Golding*, supra, 213 Conn. 239–40, as modified by *In re Yasiel R.*, supra, 317 Conn. 781. See *State* v. *Angel M.*, supra, 180 Conn. App. 288.

bars a sentencing court from considering, for any punitive purpose, a defendant's denial of guilt or refusal to accept responsibility for the crimes of which he has been found guilty.[10] Consequently, we need not address the second certified question.[11]

It is well settled that "a trial court possesses, within statutorily prescribed limits, broad discretion in sentencing matters. On appeal, we will disturb a trial court's sentencing decision only if that discretion clearly has been abused." *State* v. *Kelly*, 256 Conn. 23, 80–81, 770 A.2d 908 (2001). In exercising its discretion, the trial court "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information [it] may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446, 92 S.

[10] Notably, the United States Supreme Court has expressly reserved the question of whether a court may consider a defendant's invocation of the fifth amendment right to remain silent at sentencing as reflecting adversely on the defendant's remorse and acceptance of responsibility. See *Mitchell* v. *United States*, supra, 526 U.S. 330.

[11] Although we do not reach that second question, we again note that the Appellate Court, in rejecting the defendant's contention that the trial court improperly had penalized him for not apologizing to the victims, indicated that that claim was foreclosed by *State* v. *Huey*, supra, 199 Conn. 121; see *State* v. *Angel M.*, supra, 180 Conn. App. 289–90 and n.13; see also footnote 7 of this opinion; which the Appellate Court characterized as holding that a defendant's invocation of the right to remain silent at sentencing may be considered by the court as indicative of a lack of remorse. See *State* v. *Angel M.*, supra, 289. We granted certification on the second question to determine whether that purported holding in *Huey* should be overruled. See *State* v. *Angel M.*, supra, 328 Conn. 931. As we also previously explained, however; see footnote 7 of this opinion; in *Huey*, we reasoned that the defendant in that case had *not* invoked his privilege against self-incrimination and, therefore, that the sentencing judge in that case did not penalize him for doing so. See *State* v. *Huey*, supra, 128–29. We need not express any view as to the soundness of our reasoning in *Huey*, however, in view of our conclusion that the trial court in the present case simply did not penalize the defendant for invoking his right against self-incrimination. Accordingly, we do not rely on our analysis or holding in *Huey* for purposes of resolving the present case; our decision in the present case, rather, is based solely on the fact that the trial court imposed no penalty on the defendant—for lack of remorse or any other reason—for his refusal to issue an apology.

Ct. 589, 30 L. Ed. 2d 592 (1972). A "defendant's demeanor, criminal history, [PSI], prospect for rehabilitation and general lack of remorse for the crimes of which he has been convicted" are all factors that the court may consider in fashioning an appropriate sentence. (Internal quotation marks omitted.) *State* v. *Elson*, supra, 311 Conn. 782.

Notwithstanding this highly deferential standard of review, the trial court's discretion in regard to sentencing is not unfettered. E.g., *State* v. *Huey*, supra, 199 Conn. 127. As the Appellate Court explained, a court generally is not prohibited from denying leniency to a defendant who elects to exercise a statutory or constitutional right. *State* v. *Angel M.*, supra, 180 Conn. App. 289; see also *State* v. *Elson*, supra, 311 Conn. 762; *State* v. *Revelo*, 256 Conn. 494, 513, 775 A.2d 260, cert. denied, 534 U.S. 1052, 122 S. Ct. 639, 151 L. Ed. 2d 558 (2001). Principles of due process, however, forbid a court from retaliating against a defendant by increasing his sentence merely because of the exercise of such a right. E.g., *State* v. *Elson*, supra, 762; *State* v. *Revelo*, supra, 513; see also *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978) ("[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort"); *Mallette* v. *Scully*, 752 F.2d 26, 30 (2d Cir. 1984) ("[T]he sentencing judge, in his discretion, may take into account as a mitigating factor the defendant's voluntary cooperation with the authorities. Nowhere have we suggested that the defendant's refusal to cooperate may be considered in increasing the sentence he would otherwise receive. It is one thing to extend leniency to a defendant who is willing to cooperate with the government; it is quite another thing to administer additional punishment to a defendant who by his silence has committed no additional offense." [Emphasis omitted; internal quotation marks omitted.]).

When a defendant claims that a trial court augmented his sentence because of his decision to exercise a constitutional right, the burden is on the defendant to demonstrate the existence of that constitutional violation based on the totality of the circumstances.[12] See *State* v. *Elson*, supra, 311 Conn. 758–59. This is no easy task. As we have explained, "courts in other jurisdictions generally have required remarks by a trial judge to threaten explicitly a defendant with a lengthier sentence should the defendant opt [to exercise a statutory or constitutional right], or indicate that a defendant's sentence was based on that choice. See, e.g., *United States* v. *Cruz*, 977 F.2d 732, 733 (2d Cir. 1992) (I'm the kind of a judge where you get a fair trial . . . [but] [i]f I find that after the trial . . . you didn't have a defense at all, you're going to get the maximum, because you're playing games with me); *United States* v. *Hutchings*, [757 F.2d 11, 13 (2d Cir.)] ([The] judge stated at sentencing that [the] trial was a total waste of public funds and resources . . . [and that] there was no defense in [the] case. [The defendant] was clearly and unquestionably guilty, and there should have been no trial.) [cert. denied, 472 U.S. 1031, 105 S. Ct. 3511, 87 L. Ed. 2d 640 (1985)]; *People* v. *Mosko*, 190 Mich. App. 204, 210, 475 N.W.2d 866 (1991) (I am very concerned about this case . . . because it was a case that went to trial . . . [a]nd to get up on the stand and [be] sanctimonious and you're self-righteous and you're guilty, that seems to me to be something that is—that

[12] In *State* v. *Kelly*, supra, 256 Conn. 23, this court adopted the majority approach for determining whether a trial court improperly penalizes a defendant for exercising a constitutional right. Id., 82. Under this approach, the defendant must establish, in light of all of the circumstances, "that [he] received a lengthier sentence because he chose to exercise" such a right. Id., 84; see id., 82–83. As we explained in *Kelly*, a minority of jurisdictions have adopted a considerably more lenient standard pursuant to which a reviewing court is obliged to remand for resentencing merely upon a colorable showing by the defendant that the trial court exacted a penalty for the exercise of a constitutional right. Id., 82. We have not been asked in the present case to reconsider the standard we adopted in *Kelly*.

is beyond [decent]) [aff'd, 441 Mich. 496, 495 N.W.2d 534 (1992)].

"[When] a trial court [has] employed more ambiguous language, however, courts generally have rejected claims that the trial court infringed on the defendant's rights. See, e.g., *United States* v. *Tracy*, [12 F.3d 1186, 1202 (2d Cir. 1993)] ([The defendant] not only minimizes his role in this operation, but negates it. In other words, he claims there was really nothing going on here and that he has been unjustly and unfairly and illegally prosecuted by the government . . . .); *State* v. *Brown*, [131 Idaho 61, 73, 951 P.2d 1288 (App. 1998)] (You want to maintain your innocence, that's fine. The evidence shows otherwise. And you have to suffer the consequence. . . . I find that you have abused the justice system and you are paying a consequence because of that.); *State* v. *Tiernan*, [645 A.2d 482, 487 (R.I. 1994)] (defendant required [the victim] to testify by exercising his right to stand trial)." (Internal quotation marks omitted.) *State* v. *Kelly*, supra, 256 Conn. 82–83.

Consistent with the foregoing authority, in *State* v. *Elson*, supra, 311 Conn. 726, this court concluded that the defendant, Zachary Jay Elson, failed to demonstrate that he was penalized for exercising his right to a jury trial. Id., 740, 760–61. Following Elson's convictions of offenses stemming from his physical assault of a female college student; id., 730–31; the trial court conducted a sentencing hearing at which Elson addressed the court and apologized to the victim. Id., 732–33. Before imposing sentence, the court stated: "We've all heard [Elson's] apology. I don't know how sincere it is, but it is certainly unfortunate that it comes so late in the process. *If* [*Elson*] *had been truly apologetic, he wouldn't have put the victim through the trial.* To a large extent, it seems to me that [Elson's] apology represents thinking of himself rather than the victim." (Emphasis altered; internal quotation marks omitted.) Id., 733. On appeal, Elson

pointed to the court's sentencing remarks as convincing evidence that he had been punished for electing to stand trial rather than accepting a plea bargain offered by the state; see id., 736, 756; a contention we rejected for three reasons. See id., 760–62. First, we observed that the length of Elson's sentence belied his claim of vindictiveness because the sentence was significantly less than the maximum exposure he faced and appreciably less than what the state had recommended. See id., 761; see also id. (in determining whether record supported Elson's claim that trial court penalized him for exercising constitutional right, "the length of the sentence that [Elson] received must be evaluated relative to the maximum sentence faced by [Elson] and the sentence recommended by the state"). Second, we reasoned that "the vast majority of the trial court's sentencing remarks reflected a detailed focus on legitimate sentencing considerations"; (internal quotation marks omitted) id.; including the information contained in the PSI, Elson's demeanor, his false trial testimony, his criminal history, his prospects for rehabilitation, the seriousness of the offense, and the fact that he had committed his crime while free on bail awaiting trial on other felony offenses. See id., 735, 761–62. Finally, we deemed it "significant that, when the trial court made the specific comments at issue, it did so in the context of discounting the mitigating factors, including [Elson's] allocution, statements from a family friend and his father, and a letter from his mother, rather than in its separate recitation of factors that would justify lengthening [Elson's] sentence . . . ."[13] Id., 762.

[13] Although we concluded that Elson failed to demonstrate that the trial court had enhanced his sentence to punish him for exercising his right to a trial; *State* v. *Elson*, supra, 311 Conn. 760–61; we nevertheless invoked our supervisory authority to grant him a new sentencing hearing because "[a]n observer hearing the comments at issue . . . could have perceived that the trial court equated [Elson's] exercise of the right to trial with the absence of remorse . . . thereby tainting the public's perception of the sentencing decision . . . ." (Citation omitted; internal quotation marks omitted.) Id., 784. There is no similar risk of public misperception in the

Conversely, in *State* v. *Revelo*, supra, 256 Conn. 494, we concluded that the trial court had increased the sentence of the defendant, Hector Revelo, solely because he elected to exercise his right to challenge the constitutionality of a police search of his home that had resulted in the seizure of a substantial quantity of cocaine. Id., 496–97, 514. After Revelo was charged with certain drug and related offenses stemming from that search, he filed a motion to suppress the cocaine on the ground that the facts alleged in the search warrant on which the seizure of the cocaine was predicated did not support a finding of probable cause. Id., 497. At a pretrial hearing, the trial court announced that, although Revelo had been offered a plea bargain pursuant to which he would be permitted to plead guilty and to receive a sentence of eight years of imprisonment, he elected to have a hearing and a ruling on his motion to suppress. See id. The court further stated that, if Revelo pressed his motion and, after the hearing, it was denied, he could then enter a guilty plea and receive a sentence of nine years instead of eight years. Id., 497–98. Revelo chose the second option, and, in accordance with that election, a hearing was conducted on his motion to suppress, following which the motion was denied.[14] Id., 498. Shortly thereafter, Revelo entered a plea of nolo contendere to the charge of selling illegal drugs, and, as the court previously had promised him, he received a sentence of nine years. Id., 498–99. On appeal, Revelo maintained that the nine year sentence violated his right to due process because he received that sentence, instead of the eight year sentence that he had been offered originally, solely for exercising his

present case due to the trial court's express assurance that the defendant would not be punished for invoking his constitutional right against self-incrimination and maintaining his innocence.

[14] Revelo's motion to suppress was heard and decided by a different judge from the one who participated in the plea discussions with counsel for Revelo. See *State* v. *Revelo*, supra, 256 Conn. 498 n.6.

right to a judicial resolution of his motion to suppress. Id., 499.

We agreed with Revelo, explaining in relevant part: "It has been noted that, in certain circumstances, it may be difficult to draw a meaningful distinction between 'enhancing' the punishment imposed on an accused who exercises a constitutional right and denying him the 'leniency' that he claims he would deserve if he waived that right. . . . Although the distinction between refusing to show leniency to an accused who insists on asserting a constitutional right and punishing an accused for asserting that right may, at times, be a fine one, there is no difficulty in discerning what occurred in [Revelo's] case: the trial court imposed a more severe sentence on [Revelo] solely because he asserted his right to a judicial ruling on his motion to suppress." (Citation omitted.) Id., 513–14.

This case presents a stark contrast to what occurred in *Revelo*. In the present case, after hearing from several character witnesses who spoke in support of the defendant, the trial court asked the defendant if he had anything to say, and he stated that, although the jurors had found him guilty, he was innocent of the charges and intended to appeal. The court responded that it "appreciate[d] [the defendant's] position" and acknowledged that admitting guilt "does create a dilemma" with respect to his desire to appeal. The court further explained, however, that accepting responsibility and apologizing to the victims would likely "help the victims enormously," to which the defendant replied that he could not express remorse for "something that [he] did not do." At that point, the court informed the defendant that he had an "absolute right" to maintain his innocence and assured him that it would "not punish" him for doing so. Although the court also informed the defendant that he would not receive any "extra credit" for refusing to take responsibility for the offenses—in

other words, he would not be granted whatever measure of leniency he otherwise would have been afforded if he had been willing to admit culpability—the court had every right to so advise the defendant. In fact, the court's candor on the issue is commendable, first, because transparency in sentencing is to be encouraged, and, second, because it gave the defendant a final chance to mitigate his sentence, if he chose to do so, by acknowledging his guilt and apologizing to the victims.

Following this colloquy, the court articulated its reasons for the sentence it was about to impose. After noting a number of mitigating factors, the court again observed that, although admitting guilt and apologizing for the offenses would pose a dilemma for the defendant because of his desire to appeal, doing so would be "most helpful" to the victims. Nothing the court stated before announcing its sentence, however, called into question its explicit assurance, made in the plainest of terms, that the defendant would not be penalized for invoking his constitutionally protected right to maintain his innocence.

In this regard, it bears mention that the record in the present case is considerably clearer than the record in *State* v. *Kelly*, supra, 256 Conn. 23, in which we rejected a claim that the trial court violated the right of the defendant, Alex Kelly, to proceed to trial rather than to plead guilty. Id., 79–80. Kelly's contention was predicated on the fact that, at the conclusion of his sentencing hearing, and prior to imposing sentence, the court stated that one of many factors it had considered in reaching a sentencing decision was "whether or not there was a plea or a complete trial," which, the court further stated, "is one of the legal factors to consider in sentencing." (Internal quotation marks omitted.) Id., 80. In disagreeing with the claim, we explained that "the totality of the circumstances surrounding [Kelly's] sentencing gives no indication that the trial court improperly augmented [his] sentence based on his deci-

sion to stand trial." Id., 83. "No fair reading of the record would permit the conclusion that the trial court's comment should be understood to mean that it was lengthening [Kelly's] sentence . . . on [the basis of] his choice to stand trial. Rather, we interpret the trial court's remark as a reminder to [Kelly] of the oft acknowledged truth that many factors favor relative leniency for those who acknowledge their guilt . . . and thus help conserve scarce judicial and prosecutorial resources for those cases that merit the scrutiny afforded by a trial. . . . There is a world of difference between that reminder and a clear showing that [Kelly] received a lengthier sentence because he chose to exercise his right to a jury trial." (Citation omitted; internal quotation marks omitted.) Id., 84. Unlike the comment at issue in *Kelly*—which, unless viewed in the broader context of the court's sentencing remarks, arguably could be construed as suggesting that the court had increased Kelly's sentence because he opted to stand trial—the remarks of the trial court in the present case contained not even the slightest ambiguity: the court in the present case stated clearly and categorically that the defendant would not be punished for invoking his right against self-incrimination. Although, in some cases, a sentencing court's comments may "[cross] that fine line between showing leniency . . . and punishing a defendant for his silence"; (citations omitted) *United States* v. *Stratton*, 820 F.2d 562, 564 (2d Cir. 1987); a distinction that "may be difficult to apply" in a particular case; id.; this is not such a case.[15]

[15] We recognize that a number of courts, including the United States Supreme Court, have questioned the utility of this distinction, at least with respect to its applicability to the granting of leniency for cooperation with the government, while at the same time not repudiating it. See, e.g., *Roberts* v. *United States*, 445 U.S. 552, 557 n.4, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980) ("[w]e doubt that a principled distinction may be drawn between 'enhancing' the punishment imposed [on] the petitioner and denying him the 'leniency' he claims would be appropriate if he had cooperated"); *Mallette* v. *Scully*, supra, 752 F.2d 30 (characterizing distinction as "somewhat illusory" but acknowledging that it alone provides workable framework for

The defendant relies on a few sister state cases—most notably, *State* v. *Burgess*, 156 N.H. 746, 943 A.2d 727 (2008)—to support his claim of a constitutional violation based merely on the trial court's advisement that he could expect a more lenient sentence than he otherwise would receive if he was willing to accept

sentencing purposes). In his dissenting and concurring opinion in *Mallette*, Judge Jon O. Newman explained why, in his view, the distinction between penalizing a defendant for refusing to cooperate and denying leniency for that refusal is conceptually sound. He reasoned: "This [c]ircuit has recognized the distinction between taking into account as a mitigating factor at sentencing a defendant's cooperation with the authorities and administering additional punishment because of a refusal to cooperate. *United States* v. *Bradford*, 645 F.2d 115 (2d Cir. 1981). I do not share the majority's view that this distinction is 'somewhat illusory,' though I acknowledge that doubts about the matter have been significantly expressed. *Roberts* v. *United States*, [supra, 557 n.4]. I acknowledge the basis for such doubts, since it is obvious that [a] defendant who refuses to cooperate often receives a greater sentence than [a] defendant, under otherwise similar circumstances, who cooperates. Of course, that is true of every defendant whose sentence is greater than that of a defendant with mitigating circumstances. But the issue in such cases is not whether one defendant's sentence is higher than another's; it is whether he has been impermissibly punished. That would occur if the sentencing judge started out with a tentative sentence in mind as appropriate for the offense and the offender and then decided to adjust the tentative sentence upward because of some impermissible factor. But the defendant who does not cooperate has no cause for complaint if he receives the judge's tentative sentence, even though the tentative sentence would have been adjusted downward if he had cooperated. Viewing the issue in this way manifestly puts a premium on what was in the judge's mind in formulating the sentence. However, unlike the state of mind of a defendant in a criminal case, it is not necessary that the state of mind of a sentencing judge be ascertained beyond a reasonable doubt. It is sufficient if a reviewing court can have reasonable confidence, giving considerable deference to the articulated explanation of the sentence by the sentencing judge, that the sentence was not adjusted upward because of an impermissible factor." *Mallette* v. *Scully*, supra, 34 (Newman, J., dissenting in part and concurring in part).

In the present case, the trial court left no doubt that the sentence it ultimately imposed was the "tentative" or presumptive sentence that the court had determined to be "appropriate for the offense and the offender"; id.; that is, the sentence that the court was prepared to impose without an acknowledgment of guilt by the defendant. Because the defendant elected to maintain his innocence, the court had no basis to adjust that "tentative" sentence downward as a reward for acceptance of responsibility. Id. This case, therefore, presents a paradigmatic example of the distinction between increasing a defendant's sentence for refusing to admit culpability and granting leniency to a defendant who does so.

responsibility for the offenses. In *Burgess*, the New Hampshire Supreme Court construed its state constitution as eschewing the distinction between granting leniency to a defendant for accepting responsibility and penalizing a defendant for invoking his right against self-incrimination. See id., 760 (concluding that, under New Hampshire constitution, "denying a defendant leniency simply because he fails to speak and express remorse is equivalent to penalizing him for exercising his right to remain silent"); see also *People* v. *Wesley*, 428 Mich. 708, 713, 411 N.W.2d 159 (if defendant maintains his innocence following guilty verdict, sentence will be deemed improper if reviewing court concludes that sentencing court "attempt[ed] to get the defendant to admit guilt" and it appears "that had the defendant affirmatively admitted guilt, his sentence would not have been so severe"), cert. denied, 484 U.S. 967, 108 S. Ct. 459, 98 L. Ed 2d 399 (1987). We are not persuaded by that proposition—which is contrary to the overwhelming weight of authority—because, as we previously explained, there is a meaningful difference between increasing a sentence solely on the basis of the exercise of a constitutional right and denying leniency for invoking that right and declining to accept responsibility. See, e.g., *State* v. *Elson*, supra, 311 Conn. 760–62 (no constitutional violation when trial court stated at sentencing that guilty plea or admission of guilt would have been mitigating factor); *State* v. *Kelly*, supra, 256 Conn. 84 (recognizing critical distinction between granting leniency to defendant who acknowledges guilt, which is perfectly proper, and penalizing defendant for maintaining innocence, which is constitutionally prohibited).

Indeed, we agree with the Second Circuit Court of Appeals that the distinction is a significant one because "it is the only rule that recognizes the reality of the criminal justice system while protecting the integrity

of that system." *Mallette* v. *Scully*, supra, 752 F.2d 30. This is so because the rule advocated by the defendant is unworkable: it effectively would prohibit a sentencing court from granting leniency to a defendant who waives his right to remain silent and accepts responsibility because, in granting such leniency, the court necessarily would be acknowledging the very distinction that the defendant would have us reject. Under that rule, then, it would appear that a court would be barred from granting leniency to a defendant who accepts responsibility merely because that same leniency would be unavailable to a defendant who does not accept responsibility. It is *that* result—one that penalizes a defendant who accepts responsibility by denying the credit that he otherwise would have received for doing so—that is fundamentally unfair.

As the United States Supreme Court has repeatedly recognized, however, "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." *Corbitt* v. *New Jersey*, 439 U.S. 212, 218, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978). Indeed, "[t]he criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the [c]onstitution does not by that token always forbid requiring him to choose." (Internal quotation marks omitted.) *McKune* v. *Lile*, 536 U.S. 24, 41, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002); see also *United States* v. *Maria*, 186 F.3d 65, 68 n.2 (2d Cir. 1999) ("Criminal defendants are regularly forced to confront the choice between forgoing the exercise of legal rights and risking stiffer penalties. . . . That they face such choices does not, alone, offend due process." (Citation omitted.)). Granting leniency to defendants who accept responsibility for their crimes "may well

affect how criminal defendants choose to exercise their constitutional rights. . . . [But] [p]ersons involved in the criminal law process are faced with a variety of choices. Some of the alternatives may lead to unpleasant consequences. For example, to choose to go to trial may result in greater punishment. To take the stand as a witness in one's case opens the door to possible perjury charges as well as possibly strengthening the prosecution's case. [The opportunity to receive credit for accepting responsibility] may add to the dilemmas facing criminal defendants, but no good reason exists to believe that [the reason for affording a defendant that opportunity is] intended to punish anyone for exercising rights. We are unprepared to equate the possibility of leniency with impermissible punishment." (Citation omitted; footnotes omitted.) *United States* v. *Henry*, 883 F.2d 1010, 1011 (11th Cir. 1989). We, therefore, like the vast majority of courts, "reject [the] contention that the availability of a sentence reduction to one who clearly admits personal responsibility for the offense is the equivalent of an increase in sentence for one who does not." *United States* v. *Parker*, 903 F.2d 91, 105 (2d Cir.), cert. denied, 498 U.S. 872, 111 S. Ct. 196, 112 L. Ed. 2d 158 (1990), and cert. denied sub nom. *Moon* v. *United States*, 498 U.S. 874, 111 S. Ct. 201, 112 L. Ed. 2d 162 (1990).

The defendant nonetheless argues that the trial court must have penalized him for maintaining his innocence because the court made repeated references to the defendant's refusal to apologize to the victims, he received the maximum allowable sentence even though he had no prior criminal record, and the PSI placed his risk of reoffending at only 2.1 percent and included a recommendation of a "moderate sentence." We disagree with the defendant's claim. First, it is true, of course, that the court was clear that it would be very beneficial to the victims—and advantageous to the

defendant—if he accepted responsibility for the offenses and issued an apology. As we previously discussed, however, the court was equally clear in acknowledging the "dilemma" that such an admission created for the defendant in light of his desire to appeal, and, most important, the court assured the defendant that he would not be penalized for maintaining his innocence. In view of this assurance, we are not persuaded that what the court said about apologizing to the victims advances the defendant's claim.

With respect to the defendant's contention concerning the severity of his sentence, his maximum exposure for the three offenses was a term of imprisonment of sixty-five years, and he received a total effective prison term of thirty-three years. See footnotes 4 and 8 of this opinion. Although the lengthy period of incarceration imposed on the defendant is no doubt on the high end of the sentencing range, it does not approach the statutory maximum sentence that he potentially could have received. Considering the very broad sentencing discretion vested in the trial court; see, e.g., *State* v. *Baldwin*, 224 Conn. 347, 370–71, 618 A.2d 513 (1993) (claim that sentence is too severe is virtually unreviewable if sentence falls within statutory limits); the prison term imposed on the defendant does not give rise to an inference that the court punished him for refusing to apologize to the victims.

Although the defendant did not have any prior convictions, the court heard sworn testimony from the defendant's daughter, A, that, on several occasions, the defendant also molested her, approximately four or five years after his sexual assault of the victim, when A was eleven years old. At the sentencing hearing, the court observed that A testified "quite credibl[y]" about that uncharged misconduct and that she, like the victim, was "devastated" by the abuse she had suffered at the hands of the defendant. In light of A's convincing testi-

mony that the defendant had molested her as well as the victim, the court was free to discount the fact that the defendant had no prior record.

Nor do we agree with the defendant that the recommendation of a "moderate sentence" in the PSI and its estimate placing the defendant's likelihood of reoffending at 2.1 percent support the conclusion that the trial court increased his sentence for maintaining his innocence, despite the court's assurance that it would do no such thing. Although "our law makes clear that [PSIs] are to play a significant role in reaching a fair sentence"; *State* v. *Thomas*, 296 Conn. 375, 389, 995 A.2d 65 (2010); the trial court's discretion in sentencing is not constrained by any recommendation that may be contained in the report. See *State* v. *Patterson*, 236 Conn. 561, 575, 674 A.2d 416 (1996) ("[c]ourts . . . are afforded equally broad discretion in imposing a sentence when a PSI has been provided").

Finally, it is apparent that the trial court was unpersuaded by the PSI's assessment of the defendant as not posing a serious recidivism risk. As we previously noted, the state sought a " 'significant' " sentence because of the defendant's refusal to acknowledge any wrongdoing or to participate in sex offender treatment, a matter of considerable concern that, the state maintained, put the defendant " 'at a much higher risk' " of reoffending. *State* v. *Angel M.*, supra, 180 Conn. App. 286. The trial court, which referred to the defendant as a "predator," evidently sided with the state. The court also described the defendant's offense as "just about the worst crime we have short of murder," one that "devastate[s]" its victims and "violate[s] the laws of all civilized societies in nature." In light of these remarks, insofar as there is any question as to the trial court's reason for imposing such a substantial sentence, we believe the answer lies in the court's assessment of the gravity of the offenses and their extraordinarily

deleterious effect on the child victim,[16] and not in any desire to punish the defendant for maintaining his innocence.[17]

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

ECKER, J., with whom McDONALD, J., joins, concurring. I agree with the majority that the trial court did not penalize the defendant, Angel M., for the exercise of his constitutional right to maintain his innocence but, instead, denied the defendant a sentencing benefit

[16] We note that, because "a criminal defendant's right to testify does not include the right to commit perjury"; *LaChance* v. *Erickson*, 522 U.S. 262, 266, 118 S. Ct. 753, 139 L. Ed. 2d 695 (1998); the trial court could have enhanced the defendant's sentence on the basis of a finding that his trial testimony was perjurious. See, e.g., *United States* v. *Dunnigan*, 507 U.S. 87, 97, 113 S. Ct. 1111, 122 L. Ed. 2d 445 (1993). Although it is readily apparent from the court's sentencing remarks that it credited the testimony of the victims and disbelieved the testimony of the defendant, there is nothing in those remarks to indicate that the court increased the defendant's sentence on the basis of a finding of perjury.

[17] Of course, if the defendant believes that his sentence is disproportionate to the penalties imposed in similar cases—a matter on which we express no opinion—his recourse is to file an application for review of the sentence with the Sentence Review Division of the Superior Court, which the legislature created "to [provide] a forum in which to equalize the penalties imposed on similar offenders for similar offenses." (Internal quotation marks omitted.) *State* v. *Casiano*, 282 Conn. 614, 626–27 n.16, 922 A.2d 1065 (2007); see also Practice Book § 43-28 ("[t]he review division shall review the sentence imposed and determine whether the sentence should be modified because it is inappropriate or disproportionate in the light of the nature of the offense, the character of the offender, the protection of the public interest, and the deterrent, rehabilitative, isolative, and denunciatory purposes for which the sentence was intended"). To the extent the defendant believes that his sentence is disproportionate to the offenses of which he was convicted, that is an issue to be taken up with the legislature. See, e.g. *State* v. *Darden*, 171 Conn. 677, 679–80, 372 A.2d 99 (1976) ("the [state] constitution assigns to the legislature the power to enact laws defining crimes and fixing the degree and method of punishment and to the judiciary the power to try offenses under these laws and [to] impose punishment within the limits and according to the methods therein provided").

due to his refusal to apologize to his victims. I write separately because the conclusion that the defendant was denied a benefit to which he was not otherwise entitled does not end the constitutional inquiry. Under the "unconstitutional conditions" doctrine, it is well established "that the government may not deny a benefit to a person because he exercises a constitutional right"; (internal quotation marks omitted) *Koontz* v. *St. Johns River Water Management District*, 570 U.S. 595, 604, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013); unless the benefit is conditioned on a "germane" governmental interest that "is sufficiently related to the benefit . . . ." *National Amusements, Inc.* v. *Dedham*, 43 F.3d 731, 747 (1st Cir.), cert. denied, 515 U.S. 1103, 115 S. Ct. 2247, 132 L. Ed. 2d 255 (1995). With respect to the victim of the crimes of conviction, I believe that the condition imposed by the trial court (i.e., an apology to that victim) was both germane and sufficiently related to the legitimate penological goals of sentencing to pass constitutional scrutiny. I question, however, whether the unconstitutional conditions doctrine was satisfied as to the trial court's requirement of an apology to A, the victim of uncharged misconduct, given that the defendant was not charged with, or convicted of, any crimes in connection with A. Although the defendant does not challenge the judgment of conviction on this specific basis, and we therefore need not decide whether the doctrine of unconstitutional conditions was violated in this case, I highlight the issue so that trial judges choosing to venture onto this thin ice in the future will be sensitive to the constitutional concerns.

As the majority acknowledges, the distinction "between showing leniency [at sentencing] . . . and punishing a defendant for his silence" is a "fine line" that "may be difficult to apply in a particular case . . . ." (Internal quotation marks omitted.) Text accompanying footnote 15 of the majority opinion, quoting

United States v. *Stratton*, 820 F.2d 562, 564 (2d Cir. 1987). Indeed, the United States Supreme Court has expressed "doubt that a principled distinction may be drawn between 'enhancing' the punishment imposed [on a defendant] and denying him the 'leniency' he claims would be appropriate if he had cooperated." *Roberts* v. *United States*, 445 U.S. 552, 557 n.4, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980). To the extent that a principled distinction exists, it necessarily depends on the establishment of a "baseline sentence," which is "the normal sentence that would be meted out if constitutional rights were not salient." (Internal quotation marks omitted.) *United States* v. *Whitten*, 610 F.3d 168, 195 (2d Cir. 2010); see also *United States* v. *Oliveras*, 905 F.2d 623, 628 n.8 (2d Cir. 1990) ("in most situations to even make the threshold identification of whether the government is imposing a penalty or denying a benefit requires the location of some baseline from which the action at issue may be measured"). In the federal courts, the United States Sentencing Guidelines prescribe a "base offense level," which may be adjusted upward or downward depending on the defendant's participation in the crime or acceptance of responsibility. See U.S. Sentencing Guidelines Manual cc. 2–3 (2018). Thus, the federal courts typically can ascertain, by reference to the baseline sentence, whether a trial court has denied a defendant leniency or imposed a punishment as a consequence of an assertion of constitutional rights. See, e.g., *United States* v. *Jones*, 997 F.2d 1475, 1478 (D.C. Cir. 1993) ("[h]ere, there can be little doubt that the baseline sentence for [the defendant] was well above the 127 months ultimately imposed"), cert. denied, 510 U.S. 1065, 114 S. Ct. 741, 126 L. Ed. 2d 704 (1994); *United States* v. *Klotz*, 943 F.2d 707, 710 (7th Cir. 1991) ("Distinguishing between rewards and penalties was hard in the pre-guideline world, for sentencing was so individualistic that it was next to impossible to tell

what would have happened had the constitutional right not been pertinent. Now that the guidelines are in place, however, there is a norm: the presumptive range."). In contrast to the federal system, there is no objectively ascertainable baseline sentence in Connecticut because we utilize a highly individualistic sentencing paradigm that confers on the sentencing judge "very broad discretion in imposing any sentence within the statutory limits . . . ." (Internal quotation marks omitted.) *State* v. *Huey*, 199 Conn. 121, 126, 505 A.2d 1242 (1986). Given the breadth of sentencing discretion vested in the trial court, there simply is no baseline sentence in our state system. Thus, it typically will be "next to impossible to tell" what sentence would have been imposed in the absence of a defendant's assertion of his or her constitutional rights. *United States* v. *Klotz*, supra, 710. This fundamental point complicates matters in the context of a doctrine that turns on the fine and elusive distinction between benefit and penalty.

We are saved from this conceptual quagmire in the present case, however, because the record clearly reflects that the trial court was holding out a carrot rather than threatening a stick, that is, offering the defendant the benefit of sentencing leniency instead of threatening him with an enhanced sentence. The trial court explained to the defendant that "apologizing, admitting what he did, taking responsibility will help the victims enormously, at least that has been my experience over four decades in this business. However, it puts a crimp in your ability to appeal, do you understand that?" The defendant responded that he "did understand" but that he could not "say sorry for something that [he] did not do . . . ." The trial court replied that "that's your decision . . . . If you wish to continue to deny it, that's your absolute right. *The court will not punish you for that; however, you do not get any extra credit.*" (Emphasis added.) Because the defendant was

denied a sentencing benefit to which he was not otherwise entitled, I agree with the majority that the trial court did not punish the defendant in violation of the due process clause of the fourteenth amendment to the United States constitution for maintaining his innocence.

I write separately because the particular facts of this case implicate another important constitutional limitation at play when a sentencing judge engages in the type of sentence bargaining that occurred here. The majority properly reaffirms the principle that a criminal defendant cannot, consistent with due process principles, be punished "merely for exercising a statutory or constitutional right." *State* v. *Revelo*, 256 Conn. 494, 513, 775 A.2d 260, cert. denied, 534 U.S. 1052, 122 S. Ct. 639, 151 L. Ed. 2d 558 (2001). But the fact that a court's sentencing offer involves the conferral of a benefit rather than the imposition of a penalty does not give the sentencing judge carte blanche to condition that benefit on the defendant's willingness to say or do anything that the court believes will further the ends of justice. To the contrary, the doctrine of unconstitutional conditions imposes meaningful constitutional limitations on offers of sentencing leniency that are contingent on the defendant's relinquishment of his constitutional rights—even if the defendant can claim no entitlement to leniency in the first place.

Under the unconstitutional conditions doctrine, "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . . For if the government could deny a benefit to a person because of his constitutionally protected [rights], his exercise of those [rights] would in effect be penalized

and inhibited." *Perry* v. *Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); see also *Koontz* v. *St. Johns River Water Management District*, supra, 570 U.S. 608 ("[v]irtually all of our unconstitutional conditions cases involve a gratuitous governmental benefit of some kind"). "The key proposition of the unconstitutional condition[s] doctrine is that the government may not do indirectly what it cannot do directly. The [United States] Supreme Court has articulated this proposition in the context of holding that the government may not grant even a gratuitous benefit on condition that the beneficiary relinquish a constitutional right." *United States* v. *Oliveras*, supra, 905 F.2d 627–28 n.7.

Of course, not all conditions are prohibited under this doctrine. "[I]f a condition is germane—that is, if the condition is sufficiently related to the benefit—then it may validly be imposed. In the final analysis, the legitimacy of a government proposal depends on the degree of relatedness between the condition on a benefit and the reasons why [the] government may withhold the benefit altogether." (Internal quotation marks omitted.) *National Amusements, Inc.* v. *Dedham*, supra, 43 F.3d 747; see also *Koontz* v. *St. Johns River Water Management District*, supra, 570 U.S. 605–606 (government is allowed "to condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal"); *Agency for International Development* v. *Alliance for Open Society International, Inc.*, 570 U.S. 205, 217, 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013) (conditional benefits burdening constitutional rights are permissible if they "define the federal program" but impermissible if they "reach outside it").

In the present case, the trial court conditioned the "extra credit" sentencing benefit on the defendant's

apology to the victims—plural—both the victim whom he was convicted of sexually assaulting and the victim whose testimony at trial was admitted as evidence of uncharged sexual misconduct.[1] See Conn. Code Evid. (2018) § 4-5 (b) (providing that, if certain conditions are met, "[e]vidence of other sexual misconduct is admissible in a criminal case to establish that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual misconduct"). It goes without saying that the government has a legitimate interest in eliciting an apology to the victim of the crime of which the defendant stands convicted. The defendant's acceptance of responsibility, in the form of a sincere apology to the crime victim, manifestly furthers one or more of the legitimate penological goals of sentencing. See *State* v. *Santiago*, 318 Conn. 1, 22, 122 A.3d 1 (2015) (penological objectives of sentencing are "deterrence, retribution, incapacitation, and rehabilitation"). As the United States Supreme Court has observed, "[a]cceptance of responsibility is the beginning of rehabilitation. And a recognition that there are rewards for those who attempt to reform is a vital and necessary step toward completion." *McKune* v. *Lile*, 536 U.S. 24, 47, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002). Furthermore, "[w]hen offenders express genuine remorse in person to those offended, the effects can be profound. . . . Empirical studies and anecdotal evidence from restorative justice programs confirm that face-to-face expressions of remorse and apology matter immensely to offenders and victims." (Footnote omitted.) S. Bibas & R. Bierschbach, "Integrating Remorse

[1] The record reflects that the trial court referenced the uncharged sexual misconduct on multiple occasions in close proximity to its request for an apology to the "victims," at one point stating: "[The defendant is] a predator, the stepdaughter, natural daughter; although he was not charged with the crimes against his natural daughter, she did testify under oath, [was] subject to cross-examination, and was quite credible. These two young ladies have been devastated by your actions, sir."

and Apology into Criminal Procedure," 114 Yale L.J. 85, 115–16 (2004). Providing a criminal defendant the opportunity to admit his or her wrongdoing redounds to the benefit of society as a whole in numerous respects; a defendant's sincere acceptance of responsibility repairs a tear in the social fabric created by his or her transgression and thereby reaffirms and strengthens the underlying moral and legal principles at stake. Furthermore, the penitential act may make us safer because a repentant and rehabilitated defendant presumably is less likely to offend again. See, e.g., *United States* v. *Lopinski*, 240 F.3d 574, 575 (7th Cir. 2001) (sentencing credit for acceptance of responsibility under federal sentencing guidelines reflects, among other things, "the reduced risk of recidivism of a defendant who by facing up to the wrongfulness of his conduct takes the first step to better behavior in the future"); S. Bibas & R. Bierschbach, supra, 126 ("Offenders who come to terms with their crimes and apologize start on the path to reform. They learn valuable lessons and feel better about themselves as persons. They may thus become less likely to recidivate and are prime candidates for mercy to temper criminal justice."). I agree with the majority that the trial court did not violate the defendant's constitutional rights by conditioning a sentencing benefit on the defendant's apology to the victim for the crimes of conviction.[2]

[2] The present case involves an unusual scenario because the trial court solicited an apology from the defendant after a trial in which the defendant had elected to testify and proclaim his innocence. Under these circumstances, I suspect that many trial judges hearing an apology at such a late stage in the proceedings would have rejected any plea for sentencing leniency on the basis of its timing. See, e.g., *United States* v. *Fonner*, 920 F.2d 1330, 1335 (7th Cir. 1990) ("[t]he . . . judge did not abuse his discretion in concluding that [the defendant's] last-minute apology was a deceitful little show"). Regardless, the trial court in the present case certainly was entitled to hold out hope that an apology to the crime victim, however belated, would serve a beneficial and productive penological purpose.

I question, however, whether a trial court constitutionally may condition a sentencing benefit on a defendant's apology to a victim of uncharged misconduct, which is criminal conduct with which the defendant has not been charged or convicted. As Judge Dupont observed in her concurring opinion in *State* v. *Huey*, 1 Conn. App. 724, 738, 476 A.2d 613 (1984), aff'd,199 Conn. 121, 505 A.2d 1242 (1986), "[t]o force the admission of guilt, at a sentencing . . . of a crime with which the defendant is not charged might jeopardize the defendant's rights in the future, either in connection with a retrial or with an independent trial claiming civil rights violations." Indeed, the Second Circuit Court of Appeals has held that it is unconstitutional "[t]o require a defendant to accept responsibility for crimes other than those to which he has [pleaded] guilty or of which he has been found guilty [because it] in effect forces defendants to choose between incriminating themselves as to conduct for which they have not been immunized or forfeiting substantial reductions in their sentences to which they would otherwise be entitled to consideration." *United States* v. *Oliveras*, supra, 905 F.2d 628; see also *United States* v. *Delacruz*, 862 F.3d 163, 177 (2d Cir. 2017) ("[a] denial of [acceptance of responsibility] credit for behavior [that the defendant] has continued to deny and has not been proved against him beyond a reasonable doubt violates the [f]ifth [a]mendment" (emphasis omitted; internal quotation marks omitted)); *United States* v. *Austin*, 17 F.3d 27, 31 (2d Cir. 1994) (defendant's refusal to accept responsibility for "any offense *other* than the offense that is the subject of the plea" cannot be used to deny defendant sentencing benefit (emphasis in original; internal quotation marks omitted)). The First and Third Circuit Courts of Appeals have expressed similar views. See *United States* v. *Frierson*, 945 F.2d 650, 655–60 (3d Cir. 1991) (holding that trial court's denial of sentencing reduction for accep-

tance of responsibility on basis of defendant's refusal to admit guilt with respect to uncharged misconduct violated defendant's constitutional rights), cert. denied, 503 U.S. 952, 112 S. Ct. 1515, 117 L. Ed. 2d 651 (1992); *United States* v. *Perez-Franco*, 873 F.2d 455, 461–64 (1st Cir. 1989) (same).

To be clear, the legal issue is not free from doubt. Although the reasoning of Judge Dupont and the Second Circuit is persuasive to me, I recognize that there is a substantial line of federal authority holding otherwise. Specifically, a majority of the federal Courts of Appeals have held that the denial of a sentencing benefit constitutionally may be conditioned on a defendant's admission of responsibility to the commission of uncharged misconduct, among other reasons, because such a condition is rationally related to the "legitimate governmental practice of encouraging, through leniency in sentencing, both cooperation with law enforcement authorities and contrition on the part of the defendant." *United States* v. *Frazier*, 971 F.2d 1076, 1084 (4th Cir. 1992), cert. denied, 506 U.S. 1071, 113 S. Ct. 1028, 122 L. Ed. 2d 173 (1993); accord *Ebbole* v. *United States*, 8 F.3d 530, 537 (7th Cir. 1993), cert. denied, 510 U.S. 1182, 114 S. Ct. 1229, 127 L. Ed. 2d 573 (1994); see also *United States* v. *Clemons*, 999 F.2d 154, 161 (6th Cir. 1993) (adopting "the rationale of [*Frazier*], a [well balanced] opinion"), cert. denied, 510 U.S. 1050, 114 S. Ct. 704, 126 L. Ed. 2d 671 (1994); *United States* v. *Mourning*, 914 F.2d 699, 707 (5th Cir. 1990) (rejecting defendant's claim that denial of sentencing benefit for refusal to admit responsibility to uncharged misconduct violated defendant's right to silence under fifth amendment because "affording a possibility of a more lenient sentence does not *compel* self-incrimination" (emphasis in original)). As the Fourth Circuit Court of Appeals held in *Frazier*, the denial of a sentencing benefit under such circumstances is not unconstitutional because "[t]he

purpose of conditioning the [sentencing] reduction on full acceptance of responsibility . . . is not to discourage assertion or force waiver [of constitutional rights] or to obtain incriminating information to facilitate future prosecution, but rather, to formalize and further a legitimate governmental practice." *United States* v. *Frazier*, supra, 1085.

The United States Supreme Court has declined to resolve this circuit split; see *Kinder* v. *United States*, 504 U.S. 946, 112 S. Ct. 2290, 119 L. Ed. 2d 214 (1992);[3] so the issue remains unresolved. We need not decide the issue in the present case because the defendant does not claim that the trial court violated his constitutional right to maintain his innocence by conditioning a sentencing benefit on his admission of guilt and apology to a victim of uncharged misconduct. The defendant draws no constitutional distinction between either of the two victims—the one whom he has was convicted of sexually assaulting and the other whom he was not. Although the issue has not been raised or briefed by the parties, I highlight it here so that my agreement with the majority opinion is not misconstrued as an endorsement of a sentencing practice of dubious constitutionality.

For the foregoing reasons, I concur in and join the majority opinion.

[3] Justice Byron White, who dissented from the court's denial of certiorari, described the circuit split and identified the importance of the legal issue. See *Kinder* v. *United States*, supra, 504 U.S. 951 (White, J., dissenting from the denial of certiorari) (although "the First, Second, and Ninth Circuits . . . have determined that conditioning the acceptance of responsibility reduction on confession of uncharged conduct denies the defendant his right against self-incrimination," other circuits, including Fifth Circuit, have held otherwise; "this is not a question of the mere application or simple interpretation of [the acceptance of responsibility guideline], but is instead a recurring issue of constitutional dimension, where the varying conclusions of the [c]ourts of [a]ppeals determine the length of sentence actually imposed").

STATE OF CONNECTICUT *v.* JOSEPH LOUIS IMPERIALE
(SC 20391)

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

Syllabus

The defendant, who had been on probation after his conviction of possession of child pornography in the second degree, appealed from the trial court's judgment revoking his probation. In connection with the defendant's child pornography conviction, the sentencing court had imposed a term of imprisonment followed by a period of probation with conditions, including sex offender treatment. After being released from prison, the defendant entered an inpatient sex offender treatment facility for treatment. Before completing his course of treatment there, however, he was discharged on the basis of his failure to adhere to various conditions established by the facility for continued placement there. The defendant subsequently was charged with violating his probation as a result of his failure to complete sex offender treatment. The defendant filed a motion to dismiss the violation of probation charge, contending, inter alia, that the probationary condition requiring him to successfully complete the sex offender treatment program violated his due process rights. The trial court denied the motion and found the defendant to be in violation of his probation. On appeal from the trial court's judgment revoking the defendant's probation, *held* that the trial court properly denied the defendant's motion to dismiss the violation of probation charge: the defendant's claim that his placement at the treatment facility violated his right to due process on the ground that it was the functional equivalent of incarceration was unavailing, as the restrictions imposed on persons receiving treatment at the facility were appreciably less onerous than those placed on prison inmates, and, thus, residency at the facility was materially different from confinement in a prison; moreover, the defendant's placement at the facility furthered the rehabilitative and public safety purposes of probation, and, because the defendant's probation officer reasonably concluded that the defendant's placement at the facility was the best, most appropriate option under the circumstances, that probationary condition did not offend principles of due process; furthermore, there was no merit to the defendant's claim that subjecting him to the highly restrictive conditions at the facility violated his right to equal protection on the ground that he was placed there due to his status as a homeless person upon his release from prison, as that claim

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

foundered on the trial court's factual finding that he was not referred to the facility because he was homeless, and the defendant's claim that requiring him to attend the sex offender treatment program at the facility as a condition of probation violated his eighth amendment right to be free from cruel and unusual punishment also failed when, as in the present case, the condition of probation was reasonably necessary to accomplish the legitimate goals of probation.

Argued January 23, 2020—officially released January 7, 2021**

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Litchfield, where the court, *Danaher*, *J.*, denied the defendant's motion to dismiss and rendered judgment revoking the defendant's probation, from which the defendant appealed. *Affirmed.*

James B. Streeto, senior assistant public defender, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *David S. Shepack*, former state's attorney, *David R. Shannon*, supervisory assistant state's attorney, and *Gregory L. Borrelli*, assistant state's attorney, for the appellee (state).

Opinion

PALMER, J. The defendant, Joseph Louis Imperiale, appeals from the judgment of the trial court, *Danaher*, *J.*, revoking his probation and sentencing him to an effective term of imprisonment of two years. He claims that the trial court improperly denied his motion to dismiss the violation of probation charge because the condition of probation on which the charge was predicated, namely, that he participate in an inpatient sex offender treatment program, violated his fourteenth amendment rights to due process and equal protection, as well as the constitutional prohibition against the

** January 7, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

imposition of cruel and unusual punishment. We disagree and, accordingly, affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. On January 4, 2013, the defendant pleaded guilty to illegal possession of child pornography in the second degree, in violation of General Statutes § 53a-196e.[1] At the time of the guilty plea, the assistant state's attorney informed the trial court, *Ginocchio*, *J.*, that, following a police investigation into the trafficking of child pornography, the defendant had confessed to the possession of numerous images on his personal computer depicting young children involved in various sex acts. Before accepting the defendant's plea, the court explained to the defendant that he was waiving certain constitutional rights by pleading guilty, and the defendant stated that he understood he was doing so. The court also explained to the defendant that, under the plea agreement, he would be sentenced to a term of imprisonment of ten years, suspended after four years, followed by ten years of probation, the conditions of which would include sex offender registration and "most likely . . . sex offender evaluation and treatment and many other conditions that may involve contact with children and anything [that the Office of Adult Probation] believe[s] is reasonably related to this charge." The court further advised the defendant that if, following the completion of a presentence investigative report, the court determined that the sentence contemplated under the plea agreement was appropriate, the defendant would not be allowed to withdraw his guilty plea without the court's permission. When asked whether he understood, the

[1] General Statutes § 53a-196e provides in relevant part: "(a) A person is guilty of possessing child pornography in the second degree when such person knowingly possesses (1) twenty or more but fewer than fifty visual depictions of child pornography . . . ."

defendant responded that he did. The defendant also indicated that he understood that he would be permitted to withdraw his plea if the court, after reviewing the presentence investigation report, determined that the sentence agreed on by the parties was not appropriate. Following this colloquy, the court accepted the defendant's guilty plea after finding that he had made it knowingly and voluntarily and with the assistance of competent counsel.

The trial court subsequently determined that the sentence negotiated by the parties was appropriate, and, on March 15, 2013, the court sentenced the defendant in accordance with the terms of the plea agreement. At the time of sentencing, the court also recounted the following standard and special conditions of probation, as expressly set forth under the plea agreement: "[S]ex offender registration, sex offender evaluation and treatment through [a Connecticut Association for the Treatment of Sexual Offenders] provider," and compliance "with all recommended sex offender conditions of probation as deemed appropriate by the supervising [probation] officer." Moreover, in imposing sentence, the court emphasized the seriousness of the crime of possession of child pornography insofar as it fuels and perpetuates the "heinous" and "horrendous" sex trade that so grievously exploits and harms young children.

In August, 2015, after completing a short term sex offender treatment program for inmates, the defendant was released on parole to a transitional housing setting in Torrington. His parole was revoked almost immediately, however, after it was discovered that, just two weeks after his release, he was using a public computer to access child pornography. He was returned to prison on September 1, 2015.

On April 5, 2017, the defendant, who was still incarcerated, first met with his probation officer, Nicole

Grella, via video conference. During this intake meeting, the defendant and Grella reviewed his offense, sentence and the conditions of his probation. They also discussed additional details about the defendant's life, including housing, his support network, and his concerns and anticipated needs for his impending probation. At that time, the defendant explained to Grella that he believed that he had reoffended so soon after being paroled in 2015 because of the abrupt transition from prison to community based, independent living without sufficient structure and support. The defendant further told Grella that he needed additional supervision and counseling to overcome his acknowledged addiction to child pornography and to successfully complete his period of probation.

Prior to this video conference, Grella reviewed the defendant's presentence investigation report and records. As a result of this research, Grella learned, among other things, that the defendant had committed a violent sex offense as a juvenile and that he had failed to successfully complete an inpatient sex offender treatment program at that time. Moreover, while participating in that program, the defendant exhibited "pervasive[ly] negative behavior" and admitted that he had devised a plan to be alone with one of the female staff members and to molest her. In addition, the defendant had been deemed a "high risk to sexually reoffend" on the basis of a sex offender evaluation conducted after he was sentenced to serve time in prison in 2013.

In late March, 2017, Grella spoke with the defendant's mother to discuss housing options for the defendant upon his release from prison. The defendant's mother indicated to Grella that she was in the process of moving out of state but would be able to pay for her son's housing while he remained on probation. Grella spoke with the defendant's mother again in early June, 2017, at which time she told Grella that she had secured a bed

for the defendant at the same residence in Torrington where he had resided briefly following his short-lived release on parole.

Grella thereafter told the defendant that she had decided to refer him to the January Center (center), an inpatient sex offender treatment facility in Montville, for placement there upon his discharge from prison. Grella explained that the center offers the most intensive and restrictive sex offender treatment program available through the Judicial Branch's Court Support Services Division and is operated by an entity known as The Connection, Inc., which runs numerous treatment programs throughout the state. The typical length of a stay at the center, where residents live in individual rooms and participate in daily therapy, is three to six months, depending on the resident's progress. The facility is located on the grounds of the Corrigan Correctional Institution and is surrounded by a high, exterior fence topped with razor wire. Although residents of the center may not leave the facility without permission and a staff escort, the building is unlocked, and staff members are instructed not to restrain or touch a probationer seeking to leave without proper authorization. If a resident who is on probation does leave the center without such authorization, however, he or she may be charged with a violation of probation.

The defendant was initially resistant to being placed at the center, in large measure because he believed that his referral to such a restrictive treatment facility was unduly harsh and punitive. He also told Grella that his placement at the center was not warranted because his mother had secured housing for him and he had already lined up a possible employment opportunity. Over the course of several phone calls with the defendant, however, Grella explained in detail why she believed that placement at the center was the most appropriate discharge option for him. On the basis of her expertise, it

was Grella's view that the conditions imposed by the center, including daily therapy sessions, would afford the defendant the best structure and opportunity for his successful reentry into the community. Grella also discussed other benefits of the defendant's placement at the center, including its minimal cost to him and his mother, and the support and assistance it would afford him when he returned to the community upon his departure from the facility, a consideration that the defendant himself had identified as critical to a successful transition. Over time, the defendant grew more agreeable to his placement at the center, and he assured Grella that he would abide by the center's rules. He also told Grella that he understood that, if he refused to comply with those rules or any other aspect of his discharge plan, he would be in violation of his probation.

On June 28, 2017, the defendant signed the conditions of his probation, thereby acknowledging his obligation to abide by them. Among the court-ordered special probationary conditions, probation officials were authorized to require the defendant to participate in a residential sex offender treatment program, and the defendant was required to complete sex offender evaluation and treatment through an approved provider and to comply with all other conditions deemed appropriate by his probation officer in view of his offense. More specifically, the defendant expressly acknowledged the requirement imposed by his probation officer that he reside and receive treatment at the "[c]enter, a secure [twenty-four] hour residential treatment facility/program," and he further agreed to "follow the . . . [c]enter's restrictions, policies and procedures until satisfactory completion of the program." Finally, the defendant acknowledged that leaving the center without permission would constitute a violation of his probation.

Upon his release from prison on July 14, 2017, the defendant commenced his placement at the center. He

thereafter signed sex offender treatment and accountability agreements pursuant to which he was required to abide by the center's policies and rules, including the requirements that he "not engage in any violence, threats or intimidation" or "in any behavior that adversely [a]ffects the treatment or confidentiality of any other client," and that he "abide by all of the rules of [t]he . . . [c]enter in order to [coexist] . . . with other clients, staff members and volunteers." He also agreed to "be respectful to all staff and clients [of the center]," including "allowing [them] personal space, not getting involved in other client's concerns or staff member's undertakings, not swearing, being aware of how [his] behavior or words can make people feel uncomfortable, analyzing situations [that] may trigger anger before reacting, and not causing . . . disturbances within the . . . [c]enter community." In addition, the defendant acknowledged that any violation of these rules would result in his being issued a ticket and in notification to his probation officer. Finally, the defendant was informed that repeated violations could lead to his immediate dismissal from the center.

Although the defendant completed the initial phase of his treatment program, on October 30, 2017, before completing that program, he was discharged from the center because of his failure to adhere to various conditions established by the center for continued placement there. According to a discharge summary prepared by the center, the defendant's treatment was terminated as a result of his "[noncompliance] with program rules and expectations and disorderly conduct" after receiving multiple disciplinary tickets for engaging in a pattern of wilful disobedience and disrespect that adversely affected the therapeutic environment at the center, repeatedly becoming confrontational toward staff, verbally threatening to harm staff, propping open the door to his room when it was supposed to be closed and

locked,[2] and not completing his assigned chores. On one of those occasions, the center staff called the state police to respond to the defendant's behavior. Shortly thereafter, the staff concluded that they had exhausted all efforts to work productively with the defendant and that he had become "a safety concern to himself and the community."

The defendant subsequently was charged with violating his probation for failing to complete sex offender treatment at the center. The defendant moved to dismiss the charge, claiming that the probationary condition requiring him to successfully complete the center treatment program violated his rights under the due process clause of the fourteenth amendment to the United States constitution.[3] In support of this claim, the defendant asserted that the conditions at the center were so severe and restrictive as to constitute the functional equivalent of incarceration and, therefore, were impermissibly onerous as a matter of law. The defendant further claimed that, even if his placement at the center was not tantamount to incarceration, the restrictions imposed on him there nevertheless violated his right to due process because, in light of his background and offense history, those restrictions were not justified as reasonably related to his rehabilitation. Finally, the defendant asserted a third due process violation, namely, that he had been denied adequate notice of his placement at the center when the trial court sentenced him and placed him on probation.

In addition, the defendant maintained that his referral to the center violated his right to equal protection under

[2] The defendant would prop open the door to his room during required therapy sessions, even though the door was supposed to be closed and locked at that time so as to render the room inaccessible to him during such sessions.

[3] The due process clause of the fourteenth amendment to the United States constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ." U.S. Const., amend. XIV, § 1.

the federal constitution[4] because the referral was predicated on his status as a homeless person. Finally, the defendant claimed that his placement at the center violated the constitutional prohibition against cruel and unusual punishment[5] because he was placed at the center, and thereby subjected to its punitive conditions, on account of his homelessness.[6]

Following an evidentiary hearing, the trial court, *Danaher*, *J.*,[7] issued a thorough memorandum of decision in which the court credited the state's witnesses, rejected each of the defendant's claims and, accordingly, denied his motion to dismiss. With respect to the defendant's contention that his placement at the center constituted a due process violation because it was tantamount to incarceration, the trial court stated: "[T]he defendant was not incarcerated at the [c]enter. The evidence presented at the hearing . . . makes clear that a probationer leaving the . . . [c]enter would not be charged with escape. The . . . [c]enter is not staffed by correctional officers. It does not contain cells; it has individual rooms. Residents at the . . . [c]enter leave for religious services and medical appointments. Although the . . . [c]enter is on the grounds of a correctional facility and . . . is surrounded by a fence topped with barbed wire, if a probationer referred to

[4] The equal protection clause of the fourteenth amendment to the United States constitution provides in relevant part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend XIV, § 1.

[5] The eighth amendment to the United States constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII.

The eighth amendment's prohibition against cruel and unusual punishment is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. See, e.g., *Tuilaepa* v. *California*, 512 U.S. 967, 970, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994).

[6] Several other claims that the defendant raised in the trial court are not the subject of this appeal.

[7] Unless otherwise noted, all references hereinafter to the trial court are to Judge Danaher.

the . . . [c]enter elected to leave without permission, that person could walk through the gate or have the gate opened for them. The staff members at the . . . [c]enter are specifically instructed not to touch or try to restrain a probationer seeking to leave the [c]enter without permission. It is true that, in the foregoing event, the probationer would be charged with violation of probation, but the latter fact does not compel the conclusion that referral to the . . . [c]enter is 'essentially' incarceration."

In rejecting the defendant's claim that his placement at the center violated his right to due process because his referral there was unreasonable, the trial court explained: "[T]he Office of Adult Probation engaged in a careful process that led to the conclusion that referral to the . . . [c]enter was appropriate for this defendant. Indeed, the defendant specifically requested additional help in effecting a transition from a correctional institution due to his inability to refrain from obtaining child pornography. He was, after an analysis, designated as a high risk to reoffend, and the . . . [c]enter was a placement designed to respond to such individuals. It offered group treatment and daily individual treatment. It offered help to those seeking employment and assistance obtaining housing and other services. The defendant's placement at the . . . [c]enter was not in any way arbitrary; it was a carefully selected, eminently reasonable placement for a sex offender such as this defendant." The court further explained: "[T]he evidence adduced at the hearing fully supports the court's finding that the defendant's placement at [the] [c]enter was based on empirical evidence, including an understanding of the defendant's offenses and offense history; his rapid reoffense after his initial release in 2015; his own request for additional assistance in effecting a transition; the nature of the . . . [c]enter; and the programs available at [the] [c]enter for high risk offenders.

The defendant's placement at the . . . [c]enter was hardly unreasonable; on the contrary, it was completely appropriate. That placement comports with all requirements that must apply to a condition of probation."

Finally, the trial court rejected the defendant's equal protection and cruel and unusual punishment claims, both of which were predicated on his contention that he was referred to the center on the basis of his homelessness, because the testimony adduced at the hearing on the motion to dismiss established that he had not been placed there for that reason. Rather, the court found that, "although homelessness is a factor in deciding whether to place a [probationer] in the . . . [c]enter, such placement is based primarily on whether the probationer is a high risk sex offender, not on whether the [probationer] is homeless," and, further, in the present case, the defendant "was not placed at the . . . [c]enter because he was homeless; he was placed at the . . . [c]enter because he is a high risk offender."

Thereafter, the trial court found that the defendant had violated his probation by virtue of his improper actions and conduct at the center, and his failure to complete the treatment program there due to that misconduct. The court revoked the defendant's probation and sentenced him to a term of imprisonment of six years, execution suspended after two years, followed by four years of probation. This appeal followed.[8]

In this court, the defendant renews the constitutional claims that he raised in the trial court, which we address in turn. Before doing so, however, we briefly summarize the principles relating to probation that guide our analysis of the defendant's claims. "[P]robation is, first and foremost, a penal alternative to incarceration . . . .

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

[Its] purpose . . . is to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable. . . . [P]robationers . . . do not enjoy the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions. . . . These restrictions are meant to [ensure] that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large." (Internal quotation marks omitted.) *State* v. *Faraday*, 268 Conn. 174, 180, 842 A.2d 567 (2004).

Nevertheless, because probation is itself "a conditional liberty," once granted, it is "a constitutionally protected interest"; (internal quotation marks omitted) *State* v. *Orr*, 199 Conn. App. 427, 434–35, 237 A.3d 15 (2020); and, therefore, "[a]ny restriction . . . [on] a probationer's otherwise inviolable constitutional rights can be justified only to the extent actually required by legitimate demands of the probation process in any given case." *State* v. *Smith*, 207 Conn. 152, 166, 540 A.2d 679 (1988). In other words, principles of due process require that probationary conditions must be reasonably related to the purposes of probation, with appropriate regard for the background and circumstances of the individual probationer, a requirement that is also mandated statutorily under General Statutes § 53a-30.[9]

[9] General Statutes § 53a-30 provides in relevant part: "(a) When imposing sentence of probation or conditional discharge, the court may, as a condition of the sentence, order that the defendant . . . (17) satisfy any other conditions reasonably related to the defendant's rehabilitation. . . .

(b) When a defendant has been sentenced to a period of probation, the Court Support Services Division may require that the defendant comply with any or all conditions which the court could have imposed under subsection (a) of this section which are not inconsistent with any condition actually imposed by the court. . . ."

In view of the nature and goals of probation, however, and because any number of probationary conditions or combinations thereof are likely to be suitable in any particular case, the trial court "has an exceptional degree of flexibility in determining [the] terms [of probation]"; (internal quotation marks omitted) *State* v. *Silas S.*, 301 Conn. 684, 692, 22 A.3d 622 (2011); and we therefore review those terms for abuse of discretion only. See id. Thus, "[i]f it appears that the trial court reasonably was satisfied that the terms of probation had a beneficial purpose consistent with the defendant's reformation and rehabilitation, then the order must stand. . . . In reviewing the issue of discretion, we do so according it every reasonable presumption in favor of the trial court's ruling." (Internal quotation marks omitted.) Id.

"The success of probation as a correctional tool is in large part tied to the flexibility within which it is permitted to operate. . . . In this regard, modifications of probation routinely are left to the [O]ffice of [A]dult [P]robation. When the court imposes probation, a defendant thereby accepts the possibility that the terms of probation may be modified or enlarged in the future pursuant to . . . § 53a-30. . . . To this end, probation officers shall use all suitable methods to aid and encourage [a probationer] and to bring about improvement in his [or her] conduct and condition." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Faraday*, supra, 268 Conn. 180–82. Accordingly, it is well established that, depending on the circumstances of a particular case, the Office of Adult Probation properly may impose conditions of probation that place significant restrictions on a probationer's liberty during the term of his or her probation, if such restrictions are reasonably necessary. See, e.g., *State* v. *Reid*, 204 Conn. 52, 55, 526 A.2d 528 (1987). Of course, a defendant may challenge the probationary condition he

or she is alleged to have violated on the ground that it was unreasonable and, therefore, unlawful. See *State* v. *Smith*, 255 Conn. 830, 840, 769 A.2d 698 (2001); see also Practice Book § 41-8 (8) (defendant may file motion to dismiss charge on ground that "the law defining the offense charged is unconstitutional or otherwise invalid"). Indeed, "[e]ven prior to the violation of probation hearing, if an individual on probation believes that the [O]ffice of [A]dult [P]robation [has] imposed an unreasonable condition, he may request a hearing pursuant to . . . § 53a-30 (c)." *State* v. *Smith*, supra, 255 Conn. 840. If a condition of probation is determined to be invalid, a revocation of probation predicated on a violation of that condition also is unlawful. See, e.g., *State* v. *Cooley*, 3 Conn. App. 410, 415, 488 A.2d 1283 ("[i]f . . . the condition [of probation] serves no rehabilitative purpose and there is undisputed evidence that the condition was unnecessary at its inception, or was without any beneficial purpose as of the date of the hearing, reasonableness of a revocation of the probation is lacking"), cert. denied, 196 Conn. 805, 492 A.2d 1241 (1985).

Finally, "in determining whether a condition of probation impinges unduly [on] a constitutional right [in any particular case], a reviewing court should evaluate the condition" to ensure that it is "reasonably related to the purposes of [probation]." (Internal quotation marks omitted.) *State* v. *Smith*, supra, 207 Conn. 170. "Consideration of three factors is required to determine whether [such] a reasonable relationship exists: (1) the purposes sought to be served by [the] probation[ary] [condition]; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers; and (3) the legitimate needs of law enforcement." (Internal quotation marks omitted.) Id. Upon application of these principles, we conclude that the trial court properly rejected the defendant's claims.

We first address the defendant's contention that, contrary to the determination of the trial court, his placement at the center violated his right to due process because it was the functional equivalent of incarceration.[10] In support of this contention, the defendant focuses on the highly restrictive nature of the conditions at the center, in particular, the facts that center residents may leave the facility only with permission and an escort, that relatively strict security protocols are followed and enforced by center staff, and that the facility is situated on the grounds of a correctional institution with a fence surrounding it.[11] We disagree with the defendant's claim.

It is axiomatic that "[t]he . . . object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration." *Overton* v. *Bazzetta*, 539 U.S. 126, 131, 123 S. Ct. 2162, 156 L. Ed. 2d 162 (2003). Probationers, on the other hand, are afforded a conditional liberty that is dependent on their adherence to certain specified limitations on the freedoms they otherwise would enjoy, without restriction, if they were not subject to a criminal sanction. See, e.g., *Griffin* v. *Wisconsin*, 483 U.S. 868, 873–75, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987). Generally speaking, the infringement on liberty caused by an order of probation is

[10] As the defendant acknowledges, the term "incarceration" is not defined in our statutes, and neither he nor the state has advocated for a particular definition of the term. For present purposes, therefore, we, like the parties, use the term in accordance with its commonly understood meaning, namely, involuntary confinement in a jail or a prison. See *Magee* v. *Commissioner of Correction*, 105 Conn. App. 210, 215, 937 A.2d 72 (imprisonment "commonly and primarily refers to a condition of physical confinement, usually by means of coercion, in a prison"), cert. denied, 286 Conn. 901, 943 A.2d 1102 (2008).

[11] Although situated on the grounds of a correctional institution, it is undisputed that the defendant was not in the custody of the Commissioner of Correction while he resided at the center.

considerably less intrusive than the extreme restrictions attendant to incarceration. See, e.g., *United States* v. *Nachtigal*, 507 U.S. 1, 5, 113 S. Ct. 1072, 122 L. Ed. 2d 374 (1993). Nevertheless, as we previously noted, conditions of probation that are reasonably necessary and appropriate for the rehabilitation of the probationer and the safety of the community are lawful and proper, even though they place significant restrictions on the probationer's liberty during the term of his or her probation. See, e.g., *Blanton* v. *North Las Vegas*, 489 U.S. 538, 542, 109 S. Ct. 1289, 103 L. Ed. 2d 550 (1989) ("probation . . . may engender a significant infringement of personal freedom" (internal quotation marks omitted)). Thus, depending on the circumstances of a particular case, probation may "involve serious restraints on a probationer's [lifestyle], associations, movements and activities." *State* v. *Reid*, supra, 204 Conn. 55. "Indeed, conditions [of probation] may appear to the defendant [to be] more onerous than the sentence of confinement [that] might be imposed." (Internal quotation marks omitted.) Id., 55 n.2.

In the present case, the trial court's factual findings, which are unchallenged, demonstrate that, although the restrictions imposed on persons receiving treatment at the center are by no means insignificant, they are appreciably less onerous than those placed on prison inmates, and, accordingly, those findings support the court's conclusion that residency at the center is materially different from confinement in a prison. As we noted previously, the center contains individual rooms rather than cells, residents are not locked in their rooms, and, in further contrast to prison, the center itself is not locked. Indeed, residents may leave the facility with permission and an escort, and, even if a resident seeks to leave the facility without permission, center staff are directed not to restrain the individual as he or she is leaving, and he or she will not be charged with the

crime of escape. To be sure, the center's treatment program is both restrictive and structured. But residents there retain a number of important rights and privileges that are indisputably unavailable to incarcerated individuals. We therefore agree with the trial court that the defendant's placement at the center for a period of months is not tantamount to a term of imprisonment.[12]

In this regard, we are aware of only one occasion in which this court has held that a person who was not imprisoned in a correctional facility nevertheless was confined under circumstances tantamount to incarceration. In *Connelly* v. *Commissioner of Correction*, 258 Conn. 394, 780 A.2d 903 (2001), the petitioner, William A. Connelly, was acquitted of kidnapping and assault

[12] The defendant also makes brief reference to an additional alleged due process violation, namely, that he did not receive adequate notice at the time of his plea and sentencing that he could be placed at a facility as restrictive as the center. The trial court rejected this claim and, to the extent that the defendant has renewed that claim on appeal, so do we. As we explained, at the plea hearing, the court, *Ginocchio*, *J.*, advised the defendant that his probation officer likely would impose "many other conditions," including sex offender evaluation and treatment, that the officer reasonably believed were appropriate in light of the nature of his offense. Additionally, at the time of sentencing, the court ordered as a special condition of probation that the defendant complete "sex offender evaluation and treatment through [an approved] provider" and that he "[c]omply with all recommended sex offender conditions of probation as deemed appropriate by the supervising [probation] officer." Furthermore, under § 53a-30, a probation officer has broad discretion to impose reasonable probationary conditions and, if warranted, to require that a probationer participate in a sex offender treatment program at a residential facility like the center, which, as the trial court expressly found, "provide[s] community based treatment for the treatment of sex offenders." Finally, the defendant himself recognized that he needed an intensive and structured treatment program if he was to successfully address his addiction to child pornography and to avoid reoffending. As we explain more fully hereinafter, in light of the defendant's addiction and his offense history and likelihood of recidivism, his placement at the center fell squarely within the discretion afforded his probation officer to impose such conditions. Consequently, the defendant's claim that he was not on notice that he could be placed at a residential facility like the center is devoid of merit.

by reason of lack of capacity due to mental disease or defect (insanity) and committed to the custody of the Commissioner of Mental Health for a period of ten years, subject to periodic review by the Psychiatric Security Review Board. Id., 399. For the duration of his commitment, Connelly was confined at Whiting Forensic Institute (Whiting) in Middletown, a maximum security facility for the treatment of violent offenders. Id., 405–406. Several years after his commitment and while still a patient at Whiting, Connelly filed a petition for a writ of habeas corpus, claiming that he was entitled to a new trial because the record did not affirmatively establish that he had been advised of his right to a jury trial. Id., 400. The habeas court agreed with Connelly and awarded him a new trial. Id. After a trial at which Connelly did not raise an insanity defense, a jury found Connelly guilty of the kidnapping and assault charges, and he was sentenced to a total effective prison term of forty years. Id.

Thereafter, Connelly filed another habeas petition seeking credit toward his forty year sentence for the period of time that he had been confined at Whiting pursuant to the commitment order following his insanity acquittal. Id., 401. The habeas court again agreed with Connelly's claim and ordered the Commissioner of Correction to grant Connelly credit toward his sentence for the period of his confinement at Whiting. Id., 402. We affirmed the judgment of the habeas court, explaining that, "[a]lthough the *purpose* of an order of commitment issued as a result of an insanity acquittal is significantly different from that of a prison sentence imposed as a result of a criminal conviction . . . the *effect* of such a commitment on the acquittee is no less a deprivation of liberty than that of a prison sentence. Indeed, the United States Supreme Court has aptly characterized the involuntary confinement for treatment of mental illness as a massive curtailment of liberty. . . .

In fact, [t]he United States Supreme Court has recognized involuntary commitment to a mental institution . . . as involving more than a loss of freedom from confinement . . . due to its stigmatizing consequences, and the potential exposure to invasive, compulsory medical and psychiatric treatment." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 405. We further explained that such a "loss of liberty is all the more profound when the institution to which the patient has been committed is a maximum security facility such as Whiting." Id., 405–406. Finally, we observed that a sentenced prisoner who is transferred from a correctional institution to Whiting for treatment is entitled to full credit toward his sentence for the time spent at Whiting. Id., 406.

The present case is readily distinguishable from *Connelly* because, as we have explained, placement at the center is not akin to imprisonment, let alone is it the equivalent of confinement in a maximum security facility. Thus, our reasoning in *Connelly* and our resolution of that case simply are inapplicable to the present case, which presents an entirely different set of relevant circumstances. Moreover, as the trial court observed, the fact that a probationer placed at the center may be charged with violating probation for leaving the center without permission does not alter the conclusion that placement at the center is not functionally the same as incarceration, as a probationer is always subject to being charged with a probation violation whenever he or she fails to comply with a probationary condition. See, e.g., *State* v. *Reid*, supra, 204 Conn. 56–57.

The defendant also asserts that his placement at the center was not reasonably related to the purposes of probation because the factors that Grella considered in determining the sex offender treatment program most appropriate for the defendant militated against a placement as restrictive as the center. To support his claim

that Grella reasonably could not have concluded that his placement at the most restrictive treatment sex offender treatment facility available was warranted, the defendant cites his positive work and disciplinary history in prison, his completion of a short-term sex offender treatment program while incarcerated, and the fact that his mother had secured housing for him upon his release from prison. We are not persuaded.

As we have explained, the Office of Adult Probation has wide latitude to impose conditions on probationers that serve "to foster the offender's reformation and to preserve the public's safety . . . ." *State* v. *Smith*, supra, 207 Conn. 168. Of course, this includes the authority to require a probationer to undergo sex offender treatment when such treatment is reasonably necessary; see, e.g., *State* v. *Smith*, supra, 255 Conn. 844 (sex offender treatment was "a key component of the [defendant's] rehabilitative process because it was directly connected to one of the underlying crimes to which the defendant had pleaded guilty"); see also *State* v. *Thorp*, 57 Conn. App. 112, 117, 747 A.2d 537 (under § 53a-30, sex offender treatment may be imposed as condition of probation, even when it was not explicitly included in court-ordered terms of probation), cert. denied, 253 Conn. 913, 754 A.2d 162 (2000); as well as to require that a probationer adhere to stringent residential conditions and rules. See, e.g., *State* v. *Agli*, 122 Conn. App. 590, 596, 1 A.3d 133 (probation officer properly required probationer convicted of sex offense to adhere to strict curfew at shelter as condition of probation), cert. denied, 298 Conn. 920, 4 A.3d 1229 (2010).

We agree with the trial court that the defendant's placement at the center furthered the rehabilitative and public safety purposes of probation. Before deciding where to refer the defendant, Grella reviewed the defendant's record and spoke with him on a number of occa-

sions to ascertain his needs and to select an appropriate sex offender treatment program tailored to those needs, with due regard, of course, for community safety. Among other things, Grella learned that the defendant had committed a violent sex offense as a juvenile[13] and that he had failed to complete sex offender treatment deemed necessary in light of the offense. In addition, Grella was aware that the defendant had reoffended within days of his release on parole two years earlier despite his having completed a sex offender treatment program in prison. Furthermore, the defendant himself believed that he had not been afforded adequate supervision and guidance following his release on parole and that he needed additional support in order to overcome his admitted addiction to child pornography and to avoid offending again. Based on her eight years of experience as a probation officer, Grella reasonably concluded that the center's intensive program of individual and group therapy, administered in the structured environment of a residential facility and coupled with the housing and employment assistance offered by the center at the time of the defendant's discharge from the center, was likely to afford the defendant his best opportunity to successfully address his child pornography addiction. It also was reasonable for Grella to conclude that, because the defendant presented a high risk of reoffending, legitimate law enforcement interests

[13] We disagree with the defendant's contention that it was improper for Grella to have considered his violent sex offense as a juvenile in referring the defendant to the center. Although at least one court has held that a probationary condition may not be predicated solely on a juvenile conviction; see *United States* v. *Worley*, 685 F.3d 404, 408–409 (4th Cir. 2012); in the present case, the defendant's juvenile record was only one of a number of considerations that led Grella to conclude that the defendant should be placed at the center. The fact that the defendant had committed a violent sex offense as a juvenile, and then failed to complete sex offender treatment following that offense, was certainly relevant to Grella's determination as to the appropriate conditions of probation, and we see no reason why Grella was prohibited from factoring that information into her decision.

would best be served by placing the defendant at a restrictive facility like the center. Cf. *State* v. *Crouch*, 105 Conn. App. 693, 701–702, 939 A.2d 632 (2008) (rejecting defendant's claim that requiring sex offender treatment as condition of probation violated his right to due process because facts of his underlying conviction of risk of injury to child suggested that sex offender evaluation and treatment were conditions of probation that were "reasonably related to the defendant's reformation" and to "the legitimate purpose of law enforcement in rehabilitating him and in protecting the community").

The defendant asserts that, because a less restrictive sex offender treatment program would have sufficed to accomplish probation's dual goals of rehabilitation and public safety, the Office of Adult Probation was obligated to have selected such a program for him. As a general rule, the beneficial rehabilitative purpose of probation will be best served when the probationer is afforded the opportunity to succeed under conditions that do not limit or restrict his liberty to a greater extent than necessary to accomplish that end. Probationary conditions, however, must also account for the community's legitimate safety concerns. Thus, we will not second-guess the imposition of probationary conditions, as long as they may be justified as reasonably necessary to accomplish the purposes of probation. Cf. *State* v. *Faraday*, supra, 268 Conn. 180–82 (probation officer is responsible for determining conditions that will assist probationer in achieving positive change in behavior). As we previously stated, we must afford the probation officer such flexibility because of the many variables involved in the determination of what set of conditions is best suited to a particular probationer. See *State* v. *Misiorski*, 250 Conn. 280, 287–88, 738 A.2d 595 (1999). Because Grella reasonably concluded that the defendant's placement at the center was the best, most appro-

priate option under the circumstances—not *despite* the restrictive conditions there but *because* of them—that probationary condition did not offend principles of due process.

The defendant next claims that subjecting him to the highly restrictive conditions at the center violated his right to equal protection because he was placed there due to his status as a homeless person. We need not consider the substantive issue raised by the defendant's claim, that is, whether the right to equal protection bars the placement of a probationer at the center on the basis of his or her homelessness, because his claim founders on the trial court's factual finding—fully supported by the record—that he was not referred there for that reason. Moreover, it is difficult to see how the defendant could fairly be characterized as homeless in view of the fact that his mother had secured housing for him upon his release from prison. Because the defendant's equal protection claim is belied by the record, the claim fails.

The defendant finally argues that the condition of probation requiring him to attend sex offender treatment at the center violated his eighth amendment right against cruel and unusual punishment because assigning him to the most restrictive treatment facility in the state was grossly disproportionate given his background and offense history.[14] The defendant cannot prevail on this claim because of our determination, explained in connection with our rejection of his due process claim, that his placement at the center was reasonably related to the purposes of probation: a condition of probation that is reasonably necessary to

[14] The defendant apparently did not raise this argument in the trial court in support of his eighth amendment claim; he maintained, rather, that it constituted cruel and unusual punishment to place him at the center due to his homelessness. We see no reason, however, not to address the merits of the eighth amendment argument he now makes in this court.

accomplish the legitimate goals of probation cannot be unduly harsh. Accordingly, the defendant's eighth amendment claim also lacks merit.[15]

The judgment is affirmed.

In this opinion the other justices concurred.

MAURICE ROSS *v.* COMMISSIONER OF CORRECTION (SC 20281)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

The petitioner, who had been convicted of murder, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel provided ineffective assistance by failing to object to certain improper remarks by the prosecutor during closing argument. Specifically, the prosecutor stated in her closing argument that the state's firearms expert, S, had testified that a purposeful trigger pull was required to fire the petitioner's gun, even though S did not make that statement and was prevented from answering the prosecutor's leading question to that effect when the petitioner's trial counsel successfully objected to it. The habeas court rendered judgment denying the petition, concluding that the petitioner had failed to demonstrate that he suffered prejudice. On the granting of certification, the petitioner appealed to the Appellate Court, which affirmed the habeas court's judgment. The Appellate Court concluded that, although at least one of the prosecutor's remarks during closing argument was improper, the doctrine of collateral estoppel barred the petitioner from litigating the issue of prejudice because, in the petitioner's direct appeal from his conviction, the Appellate Court already had determined, in the context of resolving his claim of prosecutorial impropriety, that the same improper remarks did not prejudice him. Thereafter, the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court incorrectly concluded that the petitioner was collaterally estopped from litigating the issue of whether he was prejudiced by his trial counsel's failure to object to the prosecutor's improper remarks during closing argument, as the issue in the present case was not identical to that presented in the petitioner's direct appeal of his conviction:

[15] In his reply brief, the defendant concedes that, under the circumstances presented, an adverse decision on his due process claim also would require an adverse decision on his eighth amendment claim.

the petitioner's claim of prosecutorial impropriety in his direct appeal required the Appellate Court to apply the factors set forth in *State* v. *Williams* (204 Conn. 540), and, consistent with *Williams* and its progeny, the Appellate Court properly considered trial counsel's failure to object as evidence that the petitioner was not prejudiced, and it was this aspect of the *Williams* analysis that made it impossible to conclude that collateral estoppel barred the petitioner from litigating the issue of prejudice in his habeas action; moreover, the application of the doctrine of collateral estoppel would preclude the petitioner from seeking a remedy for conduct that he claims affected not only his criminal trial but also his likelihood of success on appeal, and, thus, the application of that doctrine would be fundamentally unfair and inconsistent with due process and the principles underlying the writ of habeas corpus.

2. The petitioner failed to demonstrate that he was prejudiced by his trial counsel's failure to object to the prosecutor's improper remarks and, therefore, could not prevail on the merits of his ineffective assistance claim: the failure of trial counsel to object to the remarks did not undermine this court's confidence in the verdict, as the impropriety was confined to the prosecutor's closing argument, and the trial court instructed the jury that the arguments of counsel did not constitute evidence; moreover, although the prosecutor mischaracterized S's testimony, S's actual testimony constituted strong evidence that the gun that the defendant used to commit the murder of which he had been convicted did not fire accidentally, as the petitioner had claimed; furthermore, the petitioner's own statements and actions before and after the shooting provided strong evidence that he acted intentionally, including evidence that the petitioner believed that the victim had arranged for two of her male friends to assault him, that he purchased a gun thereafter for the purpose of killing the men, and that he did not call for help after he shot the victim.

Argued June 1, 2020—officially released January 11, 2021*

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, *Sferrazza*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to the Appellate Court, *Lavine*, *Elgo* and *Bear*, *Js.*, which affirmed the habeas court's judgment, and the petitioner, on the

* January 11, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

granting of certification, appealed to this court. *Affirmed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (petitioner).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *Rebecca Barry*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

KAHN, J. The petitioner, Maurice Ross, appeals[1] from the judgment of the Appellate Court, which affirmed the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner claims that the Appellate Court incorrectly concluded that the doctrine of collateral estoppel barred him from litigating the issue of whether he was prejudiced by his trial counsel's failure to object to the improper comments of the prosecutor during closing argument at his criminal trial. The respondent, the Commissioner of Correction, argues that the Appellate Court correctly held that the doctrine precluded the petitioner from litigating the issue of prejudice. In the alternative, the respondent contends that the judgment of the Appellate

[1] This court granted the petitioner's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court correctly determine that the doctrine of collateral of estoppel precluded the petitioner from litigating the issue of whether [criminal trial] counsel's failure to object to the prosecutor's improper comments during the petitioner's criminal trial prejudiced him as part of an ineffective assistance of counsel claim under *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), because the Appellate Court had previously held in the petitioner's direct appeal from his criminal conviction that those same improper comments did not deprive him of a fair trial?" And (2) "[i]f the doctrine of collateral estoppel does not preclude the petitioner from litigating the issue of prejudice, can the petitioner prevail under *Strickland* v. *Washington*, supra, 466 U.S. 668?" *Ross* v. *Commissioner of Correction*, 331 Conn. 915, 915–16, 204 A.3d 703 (2019).

Court may be affirmed on the basis that the petitioner has failed to demonstrate that he suffered prejudice from his criminal trial counsel's allegedly deficient performance. Although we conclude that the doctrine of collateral estoppel does not apply under the circumstances of the present case, we affirm the judgment of the Appellate Court on the ground that the petitioner has failed to demonstrate prejudice.

The record reveals the following relevant facts and procedural history. Following a jury trial, the petitioner was convicted of murder in violation of General Statutes § 53a-54a (a). See *State* v. *Ross*, 151 Conn. App. 687, 688, 95 A.3d 1208, cert. denied, 314 Conn. 926, 101 A.3d 271 (2014), and cert. denied, 314 Conn. 926, 101 A.3d 272 (2014). On appeal to the Appellate Court, the petitioner claimed that the prosecutor's improper comments during closing argument violated his constitutional right to a fair trial. Id. Although the Appellate Court concluded that at least one of the prosecutor's comments was improper, it affirmed the judgment of conviction on the basis of its conclusion that the petitioner had not been prejudiced by the improper remarks. Id., 688, 706.

The Appellate Court set forth the following relevant facts that the jury reasonably could have found. "In early February, 2009, the [petitioner] and the victim, Sholanda Joyner, were involved in a romantic relationship. The two had known each other since they were children, and had dated intermittently during the preceding eleven years. The victim's relationship with the [petitioner] was, as the victim's sister described it, 'dysfunctional . . . .'

"Several days before February 5, 2009, the [petitioner] went to the victim's apartment on Woolsey Street in New Haven and encountered two of her male acquaintances. A physical altercation between the two men and the [petitioner] ensued, and the [petitioner] was

forcefully ejected from the victim's apartment. Shortly thereafter, the [petitioner] purchased a revolver for the purpose of killing the two men. The [petitioner] returned to the victim's apartment the next morning and encountered the individuals who had assaulted him the previous day. After displaying the revolver, the [petitioner] took their money, cell phones, and some drugs." Id., 688–89.

"On February 5, 2009, the victim appeared, crying . . . at her father's doorstep. Approximately two minutes later, the [petitioner] arrived and demanded that the victim leave with him. Over the protests of the victim's stepmother, the [petitioner] grabbed the victim by the arm and pulled her out the door. Later that evening, at the home of the victim's grandmother, the victim was crying and pleading with the [petitioner] to leave her alone. The [petitioner] again commanded the victim to depart with him, and the two left.

"After leaving the house of the victim's grandmother at approximately 11 p.m., the [petitioner] and the victim walked to the victim's apartment. Along the way, the victim stopped and purchased some ecstasy pills and phencyclidine (PCP). The victim and the [petitioner] smoked the PCP while en route to the victim's apartment. After arriving at the victim's home, the [petitioner] and the victim went into the victim's bedroom, and both of them ingested ecstasy. At some point, the [petitioner] retrieved a revolver and asked the victim if she had 'set [him] up . . . .' The [petitioner] then fired one gunshot into her head, intentionally killing her. After moving the victim's body next to the bed, the [petitioner] left the apartment, locking the door behind him, and [traveled] to Waterbury for several days. While in Waterbury, the [petitioner] socialized at a club named 'Club Paradise.'

"The [petitioner] returned to New Haven on February 8, 2009. Two days later, he encountered Terrence Corni-

gans outside of a mosque in New Haven. Although the two men were not acquainted, the [petitioner] confessed to Cornigans that he had killed his girlfriend by shooting her, and asked for money so that he could leave the state. Cornigans refused to give the [petitioner] any money, but agreed to drive him home. The [petitioner] instead directed Cornigans to drive him by the victim's apartment on Woolsey Street. Shortly thereafter, Cornigans returned the [petitioner] to the mosque. Later that night, Cornigans reported to the police what the [petitioner] had told him about killing his girlfriend. The police went to the victim's apartment and discovered her body. The [petitioner] turned himself in to the police the following day." Id., 689–90.

At his criminal trial, the petitioner admitted that he had shot the victim but claimed that the gun had fired accidentally. Id., 690–91. Because the petitioner admitted to the shooting, the key issue at trial was his intent.

In support of its burden to prove that the petitioner intentionally fired the gun, the state presented the testimony of James Stephenson, a firearms and toolmark examiner with the state of Connecticut. Stephenson testified regarding the operation of the petitioner's gun, a ".32 S&W long caliber Harrington & Richardson revolver . . . ." Stephenson had examined the petitioner's firearm for multiple purposes, including to evaluate the amount of force required to pull the trigger.[2] Stephenson testified that there are two ways to fire the petitioner's revolver, single action and double action. In a single action trigger pull, the hammer is first pulled back, and then the trigger is pulled. In a double action trigger pull, the trigger is pulled back all the way without first cocking the hammer. Stephenson's tests revealed

[2] One of Stephenson's coworkers had performed an initial examination of the firearm and confirmed that it was functioning properly. Stephenson cosigned the report on that examination.

that between three and one-half to five and one-half pounds of pressure are required to fire the weapon in a single action trigger pull. A double action pull requires seven and one-half pounds of pressure. During the state's direct examination of Stephenson, the following exchange occurred:

"[The Prosecutor]: Talking about the single action again . . . with the hammer pulled back, if an individual was holding the gun, and just waving it around, without more, would that cause the gun to fire a bullet?

"[Stephenson]: It requires a force placed upon that trigger to cause it to fire. If the person doesn't have their finger on the trigger, if the gun is—if you were to hold the gun in a fashion where, as explained in single action, if my hand were back here, and I was just waving it around, it's not going to fire. It requires that pressure placed against that trigger to cause it to fire.

"[The Prosecutor]: Is the pressure pulling it backward purposely?

"[Criminal Trial Counsel]: Objection, Your Honor. Again, to the characterization purposely or not, that's a conclusion that I think ultimately is going to go to this jury. That's not appropriate.

"[The Court]: Are you claiming it?

"[The Prosecutor]: No, I'll withdraw it."

The prosecutor continued to question Stephenson, who testified that, with regard to a double action trigger pull, an individual could not, simply by waving the gun around with nothing more, cause the gun to fire. The prosecutor did not repeat the question that had prompted criminal trial counsel's objection.

During closing argument, the prosecutor summarized Stephenson's testimony as follows: "The evidence shows, James Stephenson, the ballistics expert, he indicated

that [he] and other ballistics experts, who check and recheck each other's work, examined this gun, and he stated, based on years of experience, and examining thousands of guns, this gun does not just go off, as the [petitioner] claimed, it requires a *purposeful* trigger pull of between five pounds and seven and a half pounds." (Emphasis added.) During her rebuttal argument, the prosecutor again referred to Stephenson's testimony, stating, "Stephenson, [the] ballistics expert, he told you, ladies and gentlemen of the jury, the gun is safe, don't worry, that this gun does not just go off. It takes a *purposeful* action, a real pull." (Emphasis added.) Also in her rebuttal, the prosecutor stated: "I know a couple of you indicated on voir dire that you shot guns, you are familiar with guns, perhaps many of you are not, however; this is, if you will, the smoking gun. If the injury to her head, the conduct leading up to that night, his conduct after, and all of the information that you have is not enough to prove intent to prove murder, then you will know when he fired this gun because, *as . . . Stephenson eloquently put it*, it takes a *purposeful* pull back, it does not go off. We asked him, if you are shaking the gun around, waving the gun around, even if you have your finger on the trigger, it doesn't go off. No, they tested the gun, there was no malfunction with it. They test fired it at the laboratory. In order for this to discharge a bullet, it takes a *very deliberate*, *purposeful act*." (Emphasis added.)

After his conviction was affirmed on direct appeal, the petitioner instituted the present habeas action, claiming that his criminal trial counsel rendered ineffective assistance by, inter alia, failing to object to the prosecutor's improper remarks during closing argument.[3] The habeas court denied the petition. The court

[3] The petitioner also claimed, before the habeas court, that his criminal trial counsel rendered ineffective assistance by failing to present expert testimony of a toxicologist in support of a planned intoxication defense. The Appellate Court concluded that the habeas court had properly rejected this claim. See *Ross* v. *Commissioner of Correction*, 188 Conn. App. 251,

determined that the petitioner had failed to demonstrate, as required by *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), that he had suffered prejudice by his criminal trial counsel's failure to object.

On appeal, the Appellate Court did not address the question of whether the habeas court correctly concluded that the petitioner had failed to demonstrate prejudice. Instead, the court held that the petitioner was collaterally estopped from litigating the issue of prejudice because, in the direct appeal, the Appellate Court had "already determined that the prosecutor's improper comments did not prejudice the petitioner." *Ross* v. *Commissioner of Correction*, 188 Conn. App. 251, 258, 204 A.3d 792 (2019). The Appellate Court observed that, in the direct appeal, in support of his claim of prosecutorial impropriety, the petitioner had relied on the same improper remarks that now formed the basis of his claim of ineffective assistance of counsel. Id. The court reasoned, therefore, that it already had determined in the direct appeal that those remarks "did not deprive the [petitioner] of a fair trial." (Internal quotation marks omitted.) Id. Accordingly, the Appellate Court affirmed the judgment of the habeas court denying the petition. Id., 259. This certified appeal followed.

I

We first address the petitioner's claim that the Appellate Court incorrectly concluded that he was collaterally estopped from litigating the issue of whether his criminal trial counsel's failure to object to the prosecutor's improper remarks prejudiced him. The respondent contends that the respective prejudice prongs of the tests for prosecutorial impropriety and ineffective assistance

255, 204 A.3d 792 (2019). That determination is not before us in this certified appeal.

of counsel present identical issues. See *State* v. *Williams*, 204 Conn. 523, 539–40, 529 A.2d 653 (1987); see also *Strickland* v. *Washington*, supra, 466 U.S. 694–95. Specifically, the respondent claims that, because the prejudice prongs of both tests require the petitioner to prove that, but for the predicate conduct, it is probable, or likely, that the result of the proceedings would have been different, they are identical for purposes of the doctrine of collateral estoppel. Therefore, the respondent argues, because the Appellate Court already applied *Williams* in the petitioner's direct appeal to conclude that the prosecutor's improper remarks did not prejudice him, he is collaterally estopped from arguing in the habeas action that, pursuant to *Strickland*, he was prejudiced by his criminal trial counsel's failure to object to those remarks.[4] Because we conclude that the issue in the present case is not identical to that presented in the direct appeal, we agree with the petitioner.

"[T]he doctrines of collateral estoppel and res judicata, commonly referred to as issue preclusion and claim preclusion, respectively, have been described as related ideas on a continuum. [C]laim preclusion prevents a litigant from reasserting a claim that has already been decided on the merits. . . . [I]ssue preclusion . . . prevents a party from relitigating an issue that has been determined in a prior suit." (Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, 331 Conn. 524, 532 n.5, 205 A.3d 552 (2019). "For an issue to be subject to collateral estoppel,

[4] The respondent concedes that the *claims* presented in the petitioner's direct appeal and in his habeas action are different. In the direct appeal, the petitioner claimed that the prosecutorial improprieties deprived him of his right to due process, whereas, in this habeas action, he argues that his criminal trial counsel's ineffective assistance violated his right to counsel under the sixth and fourteenth amendments to the United States constitution. Thus, claim preclusion could not apply to the petitioner's claim of ineffective assistance of counsel.

it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Charlotte Hungerford Hospital*, 308 Conn. 140, 146, 60 A.3d 946 (2013).

This court has applied the doctrines of collateral estoppel and res judicata in the habeas context. See, e.g., *In re Application for Writ of Habeas Corpus by Ross ex rel. Ross*, 272 Conn. 653, 662, 866 A.2d 542 (2005) (appeal barred by doctrine of collateral estoppel because plaintiffs in error had "been afforded a full and fair opportunity to litigate the issue of . . . alleged incompetency [of defendant] in prior proceedings"); *McCarthy* v. *Warden*, 213 Conn. 289, 294–96, 567 A.2d 1187 (1989) (doctrine of res judicata precluded relitigation of identical due process claim between identical parties previously adjudicated in federal court), cert. denied, 496 U.S. 939, 110 S. Ct. 3220, 110 L. Ed. 2d 667 (1990). In the criminal context generally, we have observed that "[w]hether two claims . . . are the same for the purposes of res judicata should . . . be considered in a practical frame and viewed with an eye to all the circumstances of the proceedings." (Internal quotation marks omitted.) *McCarthy* v. *Warden*, supra, 295.

In applying the doctrine of res judicata in the habeas context, we have recognized the significance of the unique circumstances raised by collaterally attacking a final judgment. Specifically, we have stated that, "[a]lthough the doctrine of res judicata in its fullest sense bars claims that could have been raised in a prior proceeding, such an application in the habeas corpus context would be unduly harsh. . . . Unique policy considerations must be taken into account in applying the doctrine of res judicata to a constitutional claim raised by a habeas petitioner. . . . Foremost among those considerations is the interest in making certain

that no one is deprived of liberty in violation of his or her constitutional rights. . . . With that in mind, we limit the application of the doctrine of res judicata in circumstances such as these to claims that actually have been raised and litigated in an earlier proceeding." (Internal quotation marks omitted.) *State* v. *Miranda*, 274 Conn. 727, 773, 878 A.2d 1118 (2005) (*Katz*, *J.*, dissenting).[5]

The same policy considerations that we have relied on to circumscribe the application of the doctrine of res judicata to habeas proceedings guide us in applying the doctrine of collateral estoppel in this context.[6] That is, the writ of habeas corpus permits a collateral attack on a final judgment in order to provide "a remedy for a miscarriage of justice or other prejudice. . . . As this court stated in *Bunkley* v. *Commissioner of Correction*,

[5] Outside of the habeas context, res judicata, or claim preclusion, prevents the parties to a prior action, or their privies, from pursuing not only claims that were actually made in the prior action, but also any claims that could have been raised. See, e.g., *Ventres* v. *Goodspeed Airport, LLC*, 301 Conn. 194, 215–16, 21 A.3d 709 (2011) (concluding that res judicata precluded parties to prior action from litigating claim that was not, but could have been, made in prior action).

[6] We are guided by the analysis of the Appellate Court in *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 6 A.3d 213 (2010), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011). In that case, the Appellate Court concluded that the petitioner's claim of ineffective assistance of counsel was not barred by the doctrine of res judicata. Id., 63. In his direct appeal, the petitioner in *Diaz* argued that a comment made by the trial court in its final charge to the jury violated his fourteenth amendment right to due process. Id., 60, 63. The court concluded that the remark, although improper, constituted harmless error. Id., 60. In the petitioner's subsequent habeas action, he claimed that his criminal trial counsel had rendered ineffective assistance by failing to object to the improper remark. Id. The habeas court determined that the doctrine of res judicata barred the petitioner's claim. Id., 61. On appeal, the Appellate Court held that the habeas court had improperly applied the doctrine of res judicata because the two claims—a fourteenth amendment due process claim and an ineffective assistance of counsel claim alleging violations of the sixth and fourteenth amendments to the United States constitution—were not identical. Id., 63. The Appellate Court concluded that the petitioner's ineffective assistance claim was "a separate claim, thus requiring separate legal analysis." Id., 66.

222 Conn. 444, 460–61, 610 A.2d 598 (1992) [overruled in part on other grounds by *Small* v. *Commissioner of Correction*, 286 Conn. 707, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008)], the principal purpose of the writ of habeas corpus is to serve as a bulwark against convictions that violate fundamental fairness." (Internal quotation marks omitted.) *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 561, 153 A.3d 1233 (2017). We must therefore carefully balance the interests of finality that drive the doctrine of collateral estoppel against the constitutional rights secured by the writ. Moreover, we consider the question of whether the issues presented in the habeas action and the direct appeal are identical, "in a practical frame," and view it "with an eye to all the circumstances of the proceedings." (Internal quotation marks omitted.) *McCarthy* v. *Warden*, supra, 213 Conn. 295.

Although, when viewed broadly, the question presented by the prejudice prongs of both *Williams* and *Strickland*—whether the petitioner was deprived of his right to a fair trial—suggests that the issues are identical, there is a key distinction between the operation and focus of the two tests, which answer the ultimate question by employing substantially different means, by evaluating the effect of different conduct undertaken by different actors. See *Strickland* v. *Washington*, supra, 466 U.S. 687; *State* v. *Williams*, supra, 204 Conn. 539. *Williams* evaluates the prejudicial effect of the conduct of the prosecutor; *Strickland*'s focus is on the prejudicial effect of defense counsel's conduct. As a result, the analyses employed by *Williams* and *Strickland* differ. It is undeniable that there is considerable overlap in the evaluation of prejudice for both claims. Understood practically, however, the connection between the issue of prejudice and trial counsel's failure to object differs significantly in the two contexts. In a

habeas action, trial counsel's failure to object forms the basis for a petitioner's claim that counsel's performance was deficient. With respect to the prejudice prong of *Strickland*, the question is whether the *effect* of that failure to object prejudiced the petitioner. By contrast, on direct appeal, the same failure to object operates to support the conclusion that the alleged prosecutorial impropriety did not prejudice a defendant.

The petitioner's claim of prosecutorial impropriety in the direct appeal required the Appellate Court to apply what have come to be known as the *Williams* factors. See *State* v. *Williams*, supra, 204 Conn. 540. Specifically, in *Williams*, we explained that, in determining whether a defendant was deprived of his due process right to a fair trial by prosecutorial impropriety, courts should consider: "[1] the extent to which the [impropriety] was invited by defense conduct or argument . . . [2] the severity of the [impropriety] . . . [3] the frequency of the [impropriety] . . . [4] the centrality of the [impropriety] to the critical issues in the case . . . [5] the strength of the curative measures adopted . . . and [6] the strength of the state's case." (Citations omitted.) Id. In evaluating the severity of the impropriety, we have accorded significant weight to defense counsel's failure to object, explaining that such a failure is "a strong indicator that [defense] counsel did not perceive [the improprieties] as seriously jeopardizing the defendant's fair trial rights." *State* v. *Jones*, 320 Conn. 22, 38, 128 A.3d 431 (2015); see also *State* v. *Angel T.*, 292 Conn. 262, 289, 973 A.2d 1207 (2009) ("[w]hen considering whether prosecutorial [impropriety] was severe, this court consider[s] it highly significant that defense counsel failed to object to any of the improper remarks, [to] request curative instructions, or [to] move for a mistrial" (internal quotation marks omitted)). Accordingly, "the fact that defense counsel did not object to one or more incidents of [impropriety]

must be considered in determining whether and to what extent the [impropriety] contributed to depriving the defendant of a fair trial and whether, therefore, reversal is warranted." *State* v. *Stevenson*, 269 Conn. 563, 576, 849 A.2d 626 (2004).

Consistent with *Williams* and its progeny, in determining whether the petitioner had been prejudiced by the prosecutor's improper remarks during closing argument, the Appellate Court on direct appeal gave significant weight to criminal trial counsel's failure to object to those remarks at trial. Specifically, in concluding that the improper remarks had not deprived the petitioner of his right to a fair trial, the Appellate Court considered it "highly significant that [criminal trial] counsel failed to object to any of the improper remarks, [to] request curative instructions, or [to] move for a mistrial. [Criminal trial] counsel, therefore, presumably [did] not view the alleged impropriety as prejudicial enough to seriously jeopardize the [petitioner's] right to a fair trial. . . . Given the [petitioner's] failure to object, only instances of grossly egregious misconduct will be severe enough to mandate reversal." (Internal quotation marks omitted.) *State* v. *Ross*, supra, 151 Conn. App. 701. On appeal, accordingly, the Appellate Court properly considered criminal trial counsel's failure to object as evidence that the petitioner was not prejudiced by the prosecutor's improper remarks.

In drawing the inference of lack of prejudice on the basis of criminal trial counsel's failure to object, the Appellate Court, consistent with *Williams* and its progeny, presumed that counsel was competent. The heavy reliance placed on criminal trial counsel's failure to object as evidence of a lack of prejudice in a direct appeal could naturally lead to a claim of ineffective assistance in a subsequent habeas action. It is this aspect of the *Williams* analysis—reliance on counsel's failure to object as evidence of a lack of prejudice—

that renders it impossible to conclude that collateral estoppel bars the petitioner from litigating the issue of whether he was prejudiced at trial and on direct appeal by his criminal trial counsel's failure to object to the prosecutor's improper remarks.

As for *Williams*' heavy reliance on trial counsel's failure to object as evidence of a lack of prejudice, in the present case, the application of the doctrine of collateral estoppel would leave the petitioner with no ability to establish how his criminal trial counsel's failure to object affected his trial and his appeal.[7] Put differently, applying the doctrine under these circumstances would effectively preclude him from seeking a remedy for conduct that he claims affected not only his criminal trial but also his likelihood of success on appeal. Applying the doctrine of collateral estoppel to bar the petitioner from litigating whether his criminal trial counsel's failure to object to the improper remarks prejudiced him at trial and on direct appeal would be fundamentally unfair and, therefore, inconsistent with due process and the principles underlying the writ of habeas corpus.

II

We next address the issue of whether the judgment of the Appellate Court may be affirmed on the alternative ground that the petitioner has failed to demonstrate that he suffered prejudice from his criminal trial counsel's failure to object to the improper remarks made by the prosecutor during closing argument. We conclude that the petitioner failed to demonstrate prejudice as required by *Strickland*.

[7] Our ruling is limited to the circumstances presented in this case and does not preclude the application of collateral estoppel in the habeas context. For example, it might be appropriate to apply the doctrine of collateral estoppel to a subsequent habeas claim when the lack of an objection by defense counsel is either not an issue or was not held against a defendant on direct appeal. That question is not before us.

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 466 U.S. 687]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 626–27, 212 A.3d 678 (2019). A reasonable probability is one that is "sufficient to undermine confidence in the verdict that resulted in his appeal." (Internal quotation marks omitted.) *Hickey* v. *Commissioner of Correction*, 329 Conn. 605, 618, 188 A.3d 715 (2018). As we already have noted, a reviewing court may resolve the petitioner's claim on either ground. *Meletrich* v. *Commissioner of Correction*, supra, 627.

"The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of historical facts to questions of law that is necessary to determine whether the petitioner has demonstrated prejudice under *Strickland*, however, is a mixed question of law and fact subject to our plenary review." (Citation omitted; internal quotation marks omitted.) *Michael T.* v. *Commissioner of Correction*, 307 Conn. 84, 90–91, 52 A.3d 655 (2012). In *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 67, 6 A.3d 213 (2010), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011), the Appellate Court reflected on the "interplay" between a petitioner's direct appeal and subsequent habeas action, observing that its conclusion in the direct appeal, that

the trial court's improper comment had constituted harmless error, "while not dispositive, [was] persuasive."

The petitioner in the present case must demonstrate that there is "a reasonable probability that, but for counsel's [alleged] unprofessional errors, the result of the proceeding would have been different." *Strickland* v. *Washington*, supra, 466 U.S. 694. Our review of the record persuades us that the petitioner has failed to demonstrate at the habeas court that he was prejudiced by his criminal trial counsel's failure to object to the improper remarks.

We begin with the Appellate Court's decision in the direct appeal, discounting that decision's reliance on criminal trial counsel's failure to object. The Appellate Court agreed with the petitioner that the prosecutor's mischaracterization of the testimony of the state's firearms expert during closing argument was improper. *State* v. *Ross*, supra, 151 Conn. App. 695. Specifically, the prosecutor stated several times in her closing argument that Stephenson had testified that a purposeful pull was required to fire the petitioner's revolver, despite the fact that Stephenson did not make that statement, and, in fact, was prevented from answering the prosecutor's leading question to that effect when criminal trial counsel successfully objected to it. See id., 698. In rejecting the petitioner's claim that he was prejudiced by the improper remarks, the Appellate Court relied on the trial court's general instructions. Id., 702–703. Those instructions advised the jury that arguments made by counsel are not testimony or evidence, and that it must base its verdict solely on the evidence. See id. The Appellate Court acknowledged that the impropriety went to a central issue in the case—the petitioner's mental state—and was not invited by criminal trial counsel. Id., 705. The state's evidence regarding the petitioner's mental state, however, was

strong. The Appellate Court summarized the evidence on which it relied in arriving at that conclusion: "[T]he state presented evidence that the [petitioner] and the victim were involved in a tumultuous relationship, that the [petitioner] believed the victim had arranged for two of her male acquaintances to assault him, that he purchased a revolver for the purpose of killing these two men, and that immediately before shooting the victim in the head, he asked her, 'are you trying to set me up?' Moreover, the state presented evidence that the [petitioner] did not summon help for the victim after shooting her, but instead left the apartment, locked the door behind him, and fled to Waterbury, where he socialized at a nightclub with another individual." Id., 704.

In its memorandum of decision denying the petition, the habeas court observed that "[t]he petitioner proffered no evidence at the habeas trial regarding prejudice that differs from that evaluated by the Appellate Court on direct appeal." Our review of the record before the habeas court reveals that, on the issue of the prosecutor's improper remarks, the petitioner presented solely the testimony of his criminal trial counsel, which pertained not to prejudice, but to whether his criminal trial counsel's failure to object, to request a curative instruction or to move for a mistrial constituted deficient performance.[8] On the issue of prejudice, habeas counsel argued to the habeas court that the improper remarks went to the key issue in the case—whether the petitioner intended to pull the trigger.

[8] The petitioner's criminal trial counsel testified that it was his practice to object to improper remarks during closing argument only for "egregious" improprieties. For less severe improprieties, he testified, he preferred to avoid "highlighting" any improper remarks. He explained that it was his view that interrupting opposing counsel during closing argument results in "bad vibes" from the jury. He did not offer any strategic reason for failing to object outside of the presence of the jury, to request a curative instruction, or to move for a mistrial.

The failure of the petitioner's criminal trial counsel to object to the improper remarks does not undermine our confidence in the verdict. The impropriety was confined to the prosecutor's closing argument, and the court instructed the jury that the arguments of counsel do not constitute evidence. The improper remarks also must be understood in the context of the strength of the state's case. Although the prosecutor incorrectly stated that Stephenson testified that the petitioner's revolver required a "purposeful" pull to fire, Stephenson's actual testimony constituted strong evidence that the gun did not fire accidentally, as the petitioner had claimed. Specifically, the prosecutor asked Stephenson, "if an individual was holding the gun, and just waving it around, without more, would that cause the gun to fire a bullet?" Stephenson responded: "It requires a force placed upon that trigger to cause it to fire. If the person doesn't have their finger on the trigger, if the gun is—if you were to hold the gun in a fashion where, as explained in single action, if my hand were back here, and I was just waving it around, it's not going to fire. It requires that pressure placed against that trigger to cause it to fire."

As the Appellate Court observed, the evidence presented by the state demonstrated that the petitioner believed that the victim had arranged for two of her male friends to assault him, that the petitioner purchased a gun shortly thereafter for the purpose of killing the men, and that, immediately prior to shooting her, the petitioner accused the victim of setting him up. *State* v. *Ross*, supra, 151 Conn. App. 704. Additional evidence presented by the state, on which the jury properly could have relied to conclude that the petitioner intentionally pulled the trigger, revealed that he did not call for help after he shot the victim. Instead, he left her body in her apartment and went to Waterbury, where he went to a club and stayed for several days. Five days

after shooting the victim, the petitioner approached a stranger outside of a mosque in New Haven, Cornigans, and told him that he had shot the victim. Specifically, the petitioner told Cornigans that he and the victim were in her apartment. He was on the bed when he heard a knock on the door and saw rays of light. He then walked toward the victim, said, are you trying to "set me up" and shot her in the temple. When he spoke to Cornigans, the petitioner did not state that he accidentally shot the victim when he was waving the gun around. He did, however, ask Cornigans to help him move the body and asked for money so he could leave the state.

The state's evidence that the petitioner intentionally shot the victim was compelling. Although Stephenson's testimony countered the petitioner's claim that he shot the victim accidentally, it was the petitioner's own statements and actions before and after the shooting that provided the strongest evidence that he acted intentionally. He purchased the gun for the purpose of killing two men who he believed assaulted him upon the victim's request. He admitted to Cornigans that he said to the victim, you "set me up," and that he then shot her in the temple. All of his actions, including leaving her body in the apartment, going to parties in Waterbury, and asking Cornigans to help him move the body and to give him money so he could leave the state, provided evidence of consciousness of guilt and defied his claim of an accidental shooting. In light of the strength of the state's case, we conclude that the petitioner has failed to demonstrate a "reasonable probability that, but for counsel's [alleged] unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, supra, 332 Conn. 627.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.