STATE OF CONNECTICUT *v.* HAJI JHMALAH BISCHOFF (SC 20302)

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

Syllabus

Pursuant to statute (§ 54-194), "[t]he repeal of any statute defining or prescribing the punishment for any crime shall not affect any pending prosecutions or any existing liability to prosecution and punishment therefor, unless expressly provided in the repealing statute that such repeal shall have that effect."

Pursuant further to statute (§ 1-1 (t)), "[t]he repeal of an act shall not affect the punishment, penalty or forfeiture incurred before the repeal takes effect . . . ."

The defendant was convicted of and sentenced to an effective term of incarceration of five years for possession of narcotics, among other crimes, in connection with events that occurred in 2014. After the defendant's arrest but prior to his conviction in 2016, the legislature amended the statute (§ 21a-279) under which the defendant was convicted, effective October 1, 2015, by changing possession of narcotics from a class D felony with a maximum sentence of seven years of imprisonment to a class A misdemeanor with a maximum sentence of one year of imprisonment. After the defendant unsuccessfully appealed from the judgment of conviction, he filed a motion to correct an illegal sentence, arguing, inter alia, that the legislature had intended its 2015 amendment to § 21a-279 to apply retroactively. The trial court dismissed the motion to correct, and the defendant appealed to the Appellate Court, which directed the trial court to deny rather than to dismiss the defendant's motion, concluding, inter alia, that the 2015 amendment did not apply retroactively. On the granting of certification, the defendant appealed to this court. *Held*:

1. The Appellate Court correctly determined that the defendant was properly sentenced in accordance with the version of § 21a-279 that was in effect when he committed the crimes of which he was convicted: this court has interpreted §§ 54-194 and 1-1 (t) to embody a presumption that changes to criminal statutes prescribing or defining punishment apply prospectively only, unless the statute expressly states otherwise, the plain language of the 2015 amendment did not indicate that it was to apply retroactively, and, contrary to the defendant's claim, the legislature did not intend to exclude ameliorative changes to sentencing schemes from the presumption against retroactivity derived from §§ 54-194 and 1-1 (t); moreover, because the legislature was aware that this court has interpreted §§ 54-194 and 1-1 (t) as requiring an explicit expression of

intent regarding retroactivity to overcome this presumption, the legislature's silence regarding retroactivity in the 2015 amendment was evidence of an intent that it have prospective application only; furthermore, the defendant could not prevail on his claim that prospective only application of the 2015 amendment would lead to an absurd and unworkable result on the basis that the 2015 amendment was meant to implement a 2015 budget bill that the legislature anticipated would result in fiscal savings for the Department of Correction, as nothing in the language of the budget bill or its legislative history referenced the 2015 amendment or the fiscal savings that would be realized from the 2015 amendment.

2. This court declined the defendant's invitation to adopt the amelioration doctrine, which provides that amendments to statutes that lessen their penalties are applied retroactively, and to overrule *State* v. *Kalil* (314 Conn. 529), which recently rejected the applicability of that doctrine: *Kalil* thoroughly considered whether to adopt the amelioration doctrine only six years ago and was based on approximately 100 years of precedent during which time the legislature took no action to suggest any disagreement with this court's interpretation and application of §§ 54-194 and 1-1 (t); moreover, this court's analysis in *Kalil* was consistent with this court's analysis of the defendant's claim regarding the retroactivity of the 2015 amendment to § 21a-279, demonstrating that there were no conflicts or difficulties in applying the holding of *Kalil*.

(*One justice concurring separately*)

Argued September 11, 2020—officially released January 15, 2021*

Procedural History

Substitute information charging the defendant with two counts each of the crimes of possession of narcotics with intent to sell by a person who is not drug-dependent, possession of narcotics with intent to sell and possession of narcotics, and with one count of the crime of possession of less than four ounces of a cannabis-type substance, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Dennis*, *J.*; verdict and judgment of guilty of one count of possession of less than four ounces of a cannabis-type substance and of two counts of possession of narcotics, from which the defendant appealed to the Appellate Court, *Sheldon*, *Elgo* and *Bright*, *Js.*, which affirmed the judgment; thereafter, this court denied the defendant's petition for

* January 15, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

certification to appeal; subsequently the court, *Doyle*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Lavine* and *Harper*, *Js.*, which reversed the trial court's denial of the motion to correct an illegal sentence and remanded the case with direction to deny the motion, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Emily H. Wagner, assistant public defender, with whom, on the brief, was *Judith L. Borman*, senior assistant public defender, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, *Craig P. Nowak*, senior assistant state's attorney, and *Jennifer F. Miller*, assistant state's attorney, for the appellee (state).

Opinion

D'AURIA, J. In 2015, our legislature amended General Statutes (Rev. to 2015) § 21a-279 (a) to reclassify a first offense for possession of narcotics from a class D felony subject to a maximum sentence of imprisonment of seven years to a class A misdemeanor subject to a maximum sentence of one year of incarceration. Public Acts, Spec. Sess., June, 2015, No. 15-2, § 1 (Spec. Sess. P.A. 15-2).[1] This legislative action reflected a change in

[1] In 2014, when the defendant committed the offense of which he was convicted, General Statutes (Rev. to 2013) § 21a-279 (a) provided: "Any person who possesses or has under his control any quantity of any narcotic substance, except as authorized in this chapter, for a first offense, may be imprisoned not more than seven years or be fined not more than fifty thousand dollars, or be both fined and imprisoned; and for a second offense, may be imprisoned not more than fifteen years or be fined not more than one hundred thousand dollars, or be both fined and imprisoned; and for any subsequent offense, may be imprisoned not more than twenty-five years or be fined not more than two hundred fifty thousand dollars, or be both fined and imprisoned."

At the time of the defendant's sentencing, General Statutes (Supp. 2016) § 21a-279 (a) provided: "(1) Any person who possesses or has under such

public policy that emphasized treatment and rehabilitation over incarceration for those convicted of possessing controlled substances. In this certified appeal, we are asked to determine whether the legislature's action applies retroactively to criminal cases pending at the time the amendment became effective.

The defendant, Haji Jhmalah Bischoff, was arrested and charged with, among other crimes, possession of narcotics in violation of § 21a-279 (a) prior to the enactment of Spec. Sess. P.A. 15-2, § 1. He was not convicted and sentenced, however, until *after* the amendment's enactment. The defendant claims that both the trial court and the Appellate Court incorrectly determined that Spec. Sess. P.A. 15-2, § 1, does not apply retroactively, and, thus, he claims that the sentence imposed on him was illegal, as it exceeded the maximum sentence allowed under § 21a-279 (a) as amended. Specifically, he claims that (1) although the plain language of Spec. Sess. P.A. 15-2, § 1, does not mention retroactivity, a prospective-only application of the amendment would lead to an absurd or unworkable result when viewed in the context of Public Acts 2015, No. 15-244 (P.A. 15-244), the state budget bill that Spec. Sess. P.A. 15-2, § 1, was meant to implement, and (2) alternatively, this court should overrule *State* v. *Kalil*, 314 Conn. 529, 107 A.3d 343 (2014), and adopt the amelioration doctrine, which presumes that amendments to statutes that mitigate punishment apply retroactively. We disagree with

person's control any quantity of any controlled substance, except less than one-half ounce of a cannabis-type substance and except as authorized in this chapter, shall be guilty of a class A misdemeanor.

"(2) For a second offense of subdivision (1) of this subsection, the court shall evaluate such person and, if the court determines such person is a drug-dependent person, the court may suspend prosecution of such person and order such person to undergo a substance abuse treatment program.

"(3) For any subsequent offense of subdivision (1) of this subsection, the court may find such person to be a persistent offender for possession of a controlled substance in accordance with section 53a-40."

Unless otherwise indicated, all references to § 21a-279 (a) in this opinion are to the 2013 revision of the statute.

the defendant on both accounts and affirm the Appellate Court's judgment.

The following facts and procedural history are supported by the record and relevant to our review of the defendant's claims. On the basis of conduct that occurred in 2014, a jury in 2016 found the defendant guilty of possession of heroin in violation of § 21a-279 (a), possession of cocaine in violation of § 21a-279 (a), and possession of less than four ounces of marijuana in violation of § 21a-279 (c). See *State* v. *Bischoff*, 182 Conn. App. 563, 568–69, 190 A.3d 137, cert. denied, 330 Conn. 912, 193 A.3d 48 (2018). After the defendant's arrest but prior to his conviction and sentencing, the legislature amended § 21a-279 (a), with an effective date of October 1, 2015, reclassifying a first violation of § 21a-279 (a) as a misdemeanor punishable by not more than one year of incarceration. At the defendant's 2016 sentencing, his counsel requested that the trial court sentence him in accordance with the amended version of § 21a-279 (a). He argued that the policy underlying the amendment—providing assistance, not punishment, to nonviolent drug users—should apply retroactively to him. The trial court declined this request, merged the defendant's convictions of possession of heroin and possession of cocaine into a single conviction of possession of narcotics, and sentenced him to seven years of incarceration, suspended after five years, and three years of probation. As to his conviction of possession of less than four ounces of marijuana, the trial court sentenced him to a concurrent term of one year of incarceration.

The defendant appealed from the judgment of conviction to the Appellate Court and, among other things, renewed his argument that he was entitled to be sentenced on the conviction of possession of narcotics pursuant to Spec. Sess. P.A. 15-2, § 1, which, he claimed, applied retroactively to his case. Id., 579. The Appellate Court rejected the defendant's claim, relying on *State*

v. *Moore*, 180 Conn. App. 116, 124, 182 A.3d 696, cert. denied, 329 Conn. 905, 185 A.3d 595 (2018), which held that Spec. Sess. P.A. 15-2, § 1, did not apply retroactively. Id. The defendant petitioned for certification to appeal, which this court denied. See *State* v. *Bischoff*, 330 Conn. 912, 193 A.3d 48 (2018).

The defendant then filed a motion to correct an illegal sentence, the subject of the present appeal, again arguing that the legislature intended Spec. Sess. P.A. 15-2, § 1, to apply retroactively, or, alternatively, that the amelioration doctrine should apply. The trial court dismissed the motion, and the defendant appealed to the Appellate Court, which, in a per curiam opinion, again held that Spec. Sess. P.A. 15-2, § 1, does not apply retroactively, and, like the trial court, rejected application of the amelioration doctrine, ruling that it was bound by this court's holding in *State* v. *Kalil*, supra, 314 Conn. 529.[2] *State* v. *Bischoff*, 189 Conn. App. 119, 121–22, 206 A.3d 253 (2019). The defendant petitioned this court for certification to appeal, which we granted, limited to the following issues: (1) "Did the Appellate Court properly determine, in *State* v. *Moore*, [supra, 180 Conn. App. 116] that [Spec. Sess. P.A. 15-2, § 1], does not have retroactive effect?" And (2) "[i]f the answer to the first certified question is '[yes],' should this court overrule the retroactivity analysis contained in *State* v. *Kalil*, [supra, 314 Conn. 552] and apply the amelioration doctrine to give retroactive effect to Spec. Sess. P.A. 15-2, § 1?"[3] *State* v. *Bischoff*, 331 Conn. 926, 926–27, 207 A.3d 28 (2019).

[2] The Appellate Court ruled that the form of the trial court's judgment was improper and that the trial court should have denied, not dismissed, the defendant's motion. See *State* v. *Bischoff*, 189 Conn. App. 119, 120, 124, 207 A.3d 28 (2019).

[3] Due to a scrivener's error, which we correct in brackets, the second certified question initially stated: "If the answer to the first certified question is 'no,' should this court overrule the retroactivity analysis contained in *State* v. *Kalil*, [supra, 314 Conn. 552] and apply the amelioration doctrine to give retroactive effect to Spec. Sess. P.A. 15-2, § 1?" *State* v. *Bischoff*, 331 Conn. 926, 927, 207 A.3d 28 (2019).

Although "[a] claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is [typically] reviewed pursuant to the abuse of discretion standard"; (internal quotation marks omitted) *State* v. *Brown*, 310 Conn. 693, 701–702, 80 A.3d 878 (2013); in the present case, the defendant's motion to correct an illegal sentence raises two questions of law, over which our review is plenary: (1) whether the trial court properly construed Spec. Sess. P.A. 15-2, § 1, not to apply retroactively; see *Walsh* v. *Jodoin*, 283 Conn. 187, 195, 925 A.2d 1086 (2007); and (2) whether this court should overrule *Kalil* and recognize the amelioration doctrine. See, e.g., *State* v. *Ashby*, 336 Conn. 452, 492, 247 A.3d 521 (2020).

I

The defendant first claims that we must interpret Spec. Sess. P.A. 15-2, § 1, to apply retroactively. The defendant concedes that the plain language of Spec. Sess. P.A. 15-2, § 1, does not mention retroactivity. He asserts that the legislature enacted P.A. 15-244, a budget bill, under the impression that Spec. Sess. P.A. 15-2, § 1, a budget implementing bill, would reduce the prison population and save the Department of Correction (department) millions of dollars. The defendant argues that, if Spec. Sess. P.A. 15-2, § 1, is not applied retroactively, the department would not attain those savings, an absurd and unworkable result that would violate the legislature's constitutional duty to pass a balanced budget. See Conn. Const., amend. XXVIII (codified at Conn. Const., art. III, § 18 (a)). As a result, he contends, this court must examine relevant extratextual sources, including a fiscal note authored by the Office of Fiscal Analysis showing that the legislature intended Spec. Sess. P.A. 15-2, § 1, to apply retroactively. See Office of Fiscal Analysis, Connecticut General Assembly, Fiscal Note, House Bill No. 7104, An Act Implementing Provisions of the State Budget for the Biennium Ending June

30, 2017 Concerning General Government Provisions Relating to Criminal Justice.

In response, the state contends that the Appellate Court—in *Moore*, in the defendant's direct appeal, and in the present case—correctly determined that, in the absence of explicit language regarding retroactivity, Spec. Sess. P.A. 15-2, § 1, is presumed to apply only prospectively, i.e., only to cases brought after its effective date. The state argues that a prospective application would not lead to an absurd or unworkable result when Spec. Sess. P.A. 15-2, § 1, is viewed in the context of the relevant savings statutes, General Statutes §§ 1-1 (t) and 54-194. We agree with the state.

A criminal "statute is said to have retroactive application if it applies to crimes allegedly committed prior to its date of enactment. . . . The question is one of legislative intent and is governed by well established rules of statutory construction." (Citations omitted.) *State* v. *Nathaniel S.*, 323 Conn. 290, 294, 146 A.3d 988 (2016). Specifically, "to ascertain and give effect to the apparent intent of the legislature . . . General Statutes § 1-2z directs this court to first consider the text of the statute and its relationship to other statutes to determine its meaning. If, after such consideration, the meaning is plain and unambiguous and does not yield absurd or unworkable results, we shall not consider extratextual evidence of the meaning of the statute. . . . Only if we determine that the statute is not plain and unambiguous or yields absurd or unworkable results may we consider extratextual evidence of its meaning such as the legislative history and circumstances surrounding its enactment . . . [and] the legislative policy it was designed to implement . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Citations omitted; footnote omitted; internal

quotation marks omitted.) *Marchesi* v. *Board of Selectmen*, 309 Conn. 608, 614–15, 72 A.3d 394 (2013).

We therefore begin our analysis with the language of Spec. Sess. P.A. 15-2, § 1, the first clause of which provides: "Section 21a-279 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2015*) . . . ." (Emphasis in original.) Spec. Sess. P.A. 15-2, was passed on June 20, 2015, and § 1 is silent on whether it applies retroactively. The effective date of Spec. Sess. P.A. 15-2, § 1, October 1, 2015, is therefore the only textual reference to the date of applicability found in Spec. Sess. P.A. 15-2, § 1, and indicates that the change in punishment for violating § 21a-279 would take effect months after its enactment, not retroactively.

The defendant counters that this court may not treat the effective date as dispositive of the legislature's intent regarding retroactivity.[4] We agree and do not rely

[4] The defendant argues that courts recently have placed too much significance on the effective date in determining retroactivity, treating it as dispositive. See *State* v. *Kalil*, supra, 314 Conn. 558 ("[T[he effective date of [Public Acts 2009, No. 09-138, § 2 (P.A. 09-138)], was October 1, 2009. This fact, and the absence of any express language in the provision referring to its retroactive application, indicates that the legislature intended P.A. 09-138, § 2, to be applied prospectively only."); *State* v. *Moore*, supra, 180 Conn. App. 123 ("The effective date of the 2015 amendment is October 1, 2015. . . . The amendment contains no express statement that it applies retroactively. . . . [T[he absence of any language stating that the amendment applies retroactively indicates that the legislature intended the amendment to apply prospectively only." (Citation omitted.)). He points out that, in *State* v. *Nathaniel S.*, supra, 323 Conn. 301, this court held that the effective date had no " 'particular significance' " in determining retroactivity.

There is a critical difference between Spec. Sess. P.A. 15-2, § 1, and the amendatory act we construed in *State* v. *Nathaniel S.*, supra, 323 Conn. 294–96. *Nathaniel S.* involved an amendment to the juvenile transfer statute that increased the age of a child whose case was subject to an automatic transfer to the adult docket by one year to fifteen years old. Id., 292; see Public Acts 2015, No. 15-183, § 1 (P.A. 15-183), codified at General Statutes (Supp. 2016) § 46b-127 (a) (1). The issue in *Nathaniel S.* was whether the presumption against retroactivity under General Statutes § 55-3, which applies only to substantive changes in the law, applied to the juvenile transfer amendment. We concluded that the amendment to the automatic transfer

on the act's effective date as the only relevant textual evidence of the legislature's intent regarding retroactivity. The courts in *Kalil* and *Moore* did not, either. Rather, we consider the effective date in light of the applicable savings statutes and the legislature's lack of any reference to retroactivity.

Section 1-2z directs that "[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself *and its relationship to other statutes*." (Emphasis added.) Because Spec. Sess. P.A. 15-2, § 1, repealed and replaced[5] the penalty structure for

provisions was procedural in nature, which, under our case law, unlike a substantive amendment, is presumed to apply retroactively to all pending cases. *State* v. *Nathaniel S.*, supra, 301. It was in light of that presumption that the court stated that the effective date of P.A. 15-183 was of no " 'particular significance' ": i.e., the effective date of the repealing statute did not overcome the presumption of retroactivity. Id.

By contrast, the amendment at issue in the present case changes the punishment structure for the crime of possession of narcotics, thereby implicating §§ 54-194 and 1-1 (t), which apply to changes to criminal statutes prescribing punishment and create a presumption against retroactivity. The defendant does not contend that we are tasked with deciding whether Spec. Sess. P.A. 15-2, § 1, is substantive or procedural under § 55-3. Thus, unlike in *Nathaniel S.*, in which the defendant sought to use an effective date to *rebut* an applicable presumption, the effective date of Spec. Sess. P.A. 15-2, § 1, *buttresses* the presumption of prospective application only.

[5] In enacting amendments—ameliorative or otherwise—our legislature explicitly repeals the prior version of the amended statute. Connecticut may be unique in this respect. Thus, this court consistently has held, and the defendant does not contest, that amendments and substitutions to statutes are the equivalent of repeals, and, thus, the savings statutes apply to any change—amendment, substitution, or repeal—to a criminal statute prescribing or defining punishment. See *Simborski* v. *Wheeler*, 121 Conn. 195, 200, 183 A. 688 (1936) (amendment or substitution "constitutes just as complete and effective a repeal of the provisions in the place of which the substitution is made as though they had been in terms repealed"); see also *State* v. *Kalil*, supra, 314 Conn. 553 n.9 (difference between repeal and amendment "is a distinction without a difference, because the legislature typically repeals an existing statute before enacting its replacement containing the amended language"). Thus, there is no dispute in the present case that the legislature "repealed" the existing possession of narcotics statute in its entirety before replacing it with the new sentencing scheme. See Spec. Sess. P.A. 15-2, § 1 ("[s]ection 21a-279 of the general statutes is repealed and the following is substituted in lieu thereof (Effective October 1, 2015)" (emphasis omitted)).

the crime of possession of narcotics, the state argues that §§ 54-194 and 1-1 (t), two of our savings statutes, are related statutes for statutory construction purposes, and, thus, our interpretation of Spec. Sess. P.A. 15-2, § 1, is controlled by their presumption against retroactivity. We agree.

The plain language of § 54-194 provides that "[t]he repeal of any statute defining or prescribing the punishment for any crime shall not affect any pending prosecution or any existing liability to prosecution and punishment therefor, unless expressly provided in the repealing statute that such repeal shall have that effect." Section 1-1 (t) provides that "[t]he repeal of an act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, or prosecution, or proceeding pending at the time of the repeal, for an offense committed, or for the recovery of a penalty or forfeiture incurred under the act repealed."

This court has interpreted these statutes to mean that there is a presumption that changes to criminal statutes prescribing or defining punishment apply prospectively only, unless the statute expressly states otherwise. See *State* v. *Kalil*, supra, 314 Conn. 552 (presumption that criminal statutes apply prospectively is derived from §§ 54-194 and 1-1 (t)). This presumption "can be overcome only by a clear and unequivocal expression of legislative intent that the statute shall apply retrospectively . . . [which may be determined by examining the language of the statute and] the relationship of [the statute] to related statutes . . . ." (Citation omitted.) *Mead* v. *Commissioner of Correction*, 282 Conn. 317, 325, 920 A.2d 301 (2007); see also *State* v. *Nowell*, 262 Conn. 686, 701–702, 817 A.2d 76 (2003).[6]

[6] An example of the legislature's expressly providing for retroactive applicability is No. 11-51 of the 2011 Public Acts, § 22, codified at General Statutes § 18-98e (a), which provides in relevant part that "any person sentenced to a term of imprisonment for a crime committed on or after October 1, 1994, and committed to the custody of the Commissioner of Correction on or

As noted, the defendant does not contend that the plain language of Spec. Sess. P.A. 15-2, § 1, clearly overcomes this presumption. Rather, he argues that this presumption does not apply in the present case because the legislature did not intend for these savings statutes to apply to ameliorative changes to sentencing schemes, and, thus, these statutes are not in fact related statutes for statutory construction purposes in determining the meaning of Spec. Sess. P.A. 15-2, § 1.[7] Specifically, the defendant argues that §§ 54-194 and 1-1 (t) do not apply to Spec. Sess. P.A. 15-2, § 1, because, historically, these savings statutes were adopted to prevent common-law abatement, not to prevent a defendant from receiving the benefit of an ameliorative statute.

It is true that these savings statutes were enacted "to counter the effect of the common-law abatement doctrine." *State* v. *Kalil*, supra, 314 Conn. 556. The history of the statutes, however, does not support an argument that the legislature intended to exclude ameliorative amendments from the presumption against retroactivity derived from §§ 54-194 and 1-1 (t)).

We refer to these statutes as "savings statutes" because they "preserve all prior offenses and liability therefor so that when a crime is committed and the statute violated is later amended or repealed, defendants remain liable under the revision of the statute existing at the time of the commission of the crime. . . . [S]avings statutes were enacted to prevent defendants

after said date . . . may be eligible to earn risk reduction credit toward a reduction of such person's sentence, in an amount not to exceed five days per month, at the discretion of the Commissioner of Correction for conduct as provided in subsection (b) of this section occurring on or after April 1, 2006." This amendment specifically provided that it retroactively applied to inmates who committed crimes on or after October 1, 1994.

[7] The defendant makes this argument in his initial brief in relation to his second claim, regarding the amelioration doctrine, and in his reply brief in relation to his first claim in response to the state's argument regarding the proper construction of Spec. Sess. P.A. 15-2, § 1. For efficiency, we address this argument here.

from escaping punishment by allowing the state to pursue them under prior versions of a statute, regardless of whether the newer revision imposed a greater or lesser penalty." (Citations omitted.) *State* v. *Graham*, 56 Conn. App. 507, 511, 743 A.2d 1158 (2000). "At common law, the repeal of a criminal statute abated all prosecutions which had not reached final disposition in the highest court authorized to review them. . . . Abatement by repeal included a statute's repeal and [reenactment] with different penalties. . . . And the rule applied even when the penalty was reduced. . . . To avoid such results, legislatures frequently indicated an intention not to abate pending prosecutions by including in the repealing statute a specific clause stating that prosecutions of offenses under the repealed statute were not to be abated." (Citations omitted.) *Bradley* v. *United States*, 410 U.S. 605, 607–608, 93 S. Ct. 1151, 35 L. Ed. 2d 528 (1973). "As a way of preventing abatements of criminal prosecutions and other liabilities when legislatures failed to provide special savings clauses in the repealing legislation, state legislatures began in the [nineteenth] century to adopt general savings statutes applicable thereafter to all repeals, amendments, and reenactments of criminal and civil liabilities. For criminal prosecutions, therefore, these statutes shifted the legislative presumption from one of abatement unless otherwise specified to one of [nonabatement] in the absence of contrary legislative direction." (Footnote omitted; internal quotation marks omitted.) *Holiday* v. *United States*, 683 A.2d 61, 66 (D.C. 1996), cert. denied sub nom. *Palmer* v. *United States*, 520 U.S. 1162, 117 S. Ct. 1349, 137 L. Ed. 2d 506 (1997).

To the extent that the history of the savings statutes leaves any ambiguity as to their applicability, this court's interpretation of these statutes lays to rest any doubt. Since at least 1936, this court has held that changes to criminal sentencing schemes, even those that provide a benefit to defendants, are subject to these

savings statutes. See *Simborski* v. *Wheeler*, 121 Conn. 195, 183 A. 688 (1936) (applying statutory predecessor to § 54-194 when amendments to method of carrying out death penalty would have benefited defendant).[8] This is due to the language of § 54-194, which provides in relevant part that it applies to "[t]he repeal of *any* statute defining or prescribing the punishment for any crime. . . ." (Emphasis added.) On the basis of this language, courts in this state have concluded that "[i]t is obvious from the clear, unambiguous, plain language of the savings statutes that the legislature intended that the defendant be prosecuted and sentenced in accordance with and pursuant to the statutes in effect at the time of the commission of the crime . . . regardless of whether the newer revision imposed a greater or lesser penalty." (Citations omitted.) *State* v. *Graham*, supra, 56 Conn. App. 511, citing *Simborski* v. *Wheeler*, supra, 198–200.

[8] The concurring justice disagrees that "our earlier case law suggests that the outcome in *Kalil* was foreordained by 'extensive case law' . . . ." Footnote 2 of the concurring opinion. Specifically, it does not view our prior case law as ever having decided "the question of whether the amelioration doctrine could or should be adopted as part of our laws . . . ." Id. Although this court may not have used the word "amelioration," our prior case law clearly has addressed whether changes to criminal statutes defining or prescribing punishment that provide a benefit to defendants apply retroactively under §§ 54-194 and 1-1 (t), which is the same issue in different verbiage. It is also true that, in *Castonguay* v. *Commissioner of Correction*, 300 Conn. 649, 16 A.3d 676 (2011), we stated that "[t]his court has not previously held that ameliorative changes to criminal statutes apply retroactively and we express no opinion on that question here." Id. 663 n.14. But that statement related to General Statutes § 55-3, which is the savings statute governing substantive changes to laws in general, not §§ 54-194 and 1-1 (t), which apply specifically to changes in laws that define or prescribe punishment. See *Harlow* v. *Planning & Zoning Commission*, 194 Conn. 187, 194, 479 A.2d 808 (1984) (§ 55-3 embodies general presumption that legislation is intended to operate prospectively). Moreover, the *Castonguay* footnote is consistent with our prior law, as this court *never* has "held that ameliorative changes to criminal statutes *apply* retroactively . . . ." (Emphasis added.) *Castonguay* v. *Commissioner of Correction*, supra, 663 n.14. On the other hand, we specifically *have* held that changes to criminal statutes that benefit defendants *do not apply* retroactively in the absence of a clear intent from the legislature.

In light of this plain language and history, this court consistently has held that these savings statutes embody a legislative intent of only prospective application of changes to criminal statutes defining or prescribing punishment, unless otherwise specified explicitly, regardless of whether the change benefits defendants. See *State* v. *Kalil*, supra, 314 Conn. 552 (holding that §§ 54-194 and 1-1 (t) apply to changes to sentencing schemes of criminal statutes, even those that benefit defendant); *State* v. *Harris*, 198 Conn. 158, 168, 502 A.2d 880 (1985) (rejecting defendant's argument that he should not be prosecuted under statute in effect at time of crime but under amended statute, and stating that, "[i]n order to accept the defendant's argument . . . [the court] would have to ignore the savings clause embodied in . . . § 54-194"); *State* v. *Carbone*, 172 Conn. 242, 256, 374 A.2d 215 (repeal of statute was not retroactive "[s]ince the defendants were liable to prosecution at the date of the repeal, [and, thus] § 54-194 preserves that liability"), cert. denied, 431 U.S. 967, 97 S. Ct. 2925, 53 L. Ed. 2d 1063 (1977), and cert. denied, 431 U.S. 967, 97 S. Ct. 2925, 53 L. Ed. 2d 1063 (1977); *State* v. *DeMartin*, 171 Conn. 524, 528–29, 370 A.2d 1038 (1976) (in determining whether amended statute applies, "§ 54-194 is dispositive" that "a crime committed prior to the effective date of the repealing act remains punishable under the terms of the prior statute" unless amended statute expressly provides otherwise (internal quotation marks omitted)); *State* v. *Pastet*, 169 Conn. 13, 22, 363 A.2d 41 (§ 1-1 (t) applied to repeal of sentencing statute, and, thus, repeal was not retroactive), cert. denied, 423 U.S. 967, 96 S. Ct. 297, 46 L. Ed. 2d 270 (1975); *State* v. *Pastet*, 152 Conn. 81, 85, 203 A.2d 287 (1964) ("[i]n the absence of any expressed legislative intent that [the public act] should apply retroactively, we dismiss this attempt by the defendant [to persuade the court otherwise] without further comment"), citing General Statutes §§ 1-1 (t) and 54-194;

Dortch v. *State*, 142 Conn. 18, 29, 110 A.2d 471 (1954) (savings statutes applied to change to criminal sentencing scheme and prevented retroactive application when "[t]he legislature expressed no intent that [the amended statute] should operate retrospectively"); *Simborski* v. *Wheeler*, supra, 121 Conn. 197–98, 199 (The court applied the statutory predecessor to § 54-194 when amendments that changed the method of carrying out the death penalty would have benefited the defendant because "[t]he situation before [the court was] clearly within the intent of . . . provisions [the legislature previously had enacted pertaining to the repeal of statutes]. In effect they attach to every act repealing a statute within their purview a saving clause . . . under which the repealed statute still remains in full effect as regards any matter covered by it.").[9]

On the basis of this extensive case law, dating back to the 1930s, we must assume that the legislature is aware of how we have interpreted and applied §§ 54-194 and 1-1 (t).[10] The legislature has not amended these savings

[9] Despite our lengthy history of applying these savings statutes to all changes to criminal statutes prescribing punishment, the defendant relies on a footnote from *State* v. *Nathaniel S.*, supra, 323 Conn. 290, for his contention that there remains an open question regarding whether the savings statutes would bar retroactive application of a change to a criminal statute that benefits a defendant. We said in that case: "Because we conclude that [the amendment at issue] is procedural rather than substantive, we need not determine whether [General Statutes] § 55-3 would bar retroactive application of a statute that, while substantive in nature, affords only benefits to a criminal defendant and imposes no new obligations on either the defendant or other persons." (Emphasis omitted.) Id., 295 n.1. Not only is the footnote in *Nathaniel S.* nonbinding dictum, as already discussed, it involves a different savings statute than either of the statutes at issue in this case. See footnote 4 of this opinion. As also already discussed, this court has a long history of applying §§ 54-194 and 1-1 (t) to any amendment that involves the defining or prescribing of punishment, regardless of whether the amendment increases or decreases punishment.

[10] The defendant argues that this court should interpret its savings statutes in a manner similar to how courts in other jurisdictions have interpreted their savings statutes as not applying to ameliorative changes to sentencing schemes. But as this court previously has stated, "[b]ecause of the differences in the statutory language, governing statutory regimes, and controlling

statutes, manifesting its acceptance of our interpretation of them. See *State* v. *Kalil*, supra, 314 Conn. 556 (legislature has not amended §§ 54-194 and 1-1 (t) for more than 130 years); see also *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 440, 54 A.3d 1005 (2012) ("[o]nce an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative acquiescence places a significant jurisprudential limitation on our own authority to reconsider the merits of our earlier decision" (internal quotation marks omitted)).[11] Thus, §§ 54-194 and 1-1 (t) apply to any change to a

legal precedents, those decisions are of limited use in construing the intent of the Connecticut legislature . . . ." *State* v. *Nathaniel S.*, supra, 323 Conn. 301.

[11] The defendant responds that, pursuant to *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), we cannot presume legislative acquiescence unless the legislature has amended these statutes to adopt explicitly this court's interpretation of them. See id., 521–22 ("We also have recognized that legislative inaction [following our interpretation of a statute] is not necessarily legislative affirmation . . . . [T]he legislature's failure to amend a statute in response to our interpretation of that provision is not dispositive of the issue because legislative inaction is not always the best of guides to legislative intent." (Citations omitted; internal quotation marks omitted.); id., 525 (legislative acquiescence is strongest when legislature has amended statute at issue in response to judicial interpretation but did not amend portion at issue, despite judicial interpretation).

The defendant misapplies our holding in *Salamon*. In *Salamon*, this court did not hold that legislative inaction cannot be considered in determining legislative intent but, rather, held that legislative inaction did not *establish* the legislature's intention regarding this state's kidnapping statute, as "the issue presented by the defendant's claim is not one that is likely to have reached the top of the legislative agenda because the issue directly implicates only a relatively narrow category of criminal cases"; id., 523; and because the statutory section at issue had not been subject to any amendment since 1969. Id., 525–56.

The present case is distinguishable from *Salamon* because the issue of whether §§ 54-194 and 1-1 (t) apply to all changes to criminal statutes prescribing punishment *is* an issue "likely to have reached the top of the legislative agenda"; id., 523; for the following reasons: this court's interpretation of §§ 54-194 and 1-1 (t) dates back to at least the 1930s; this court has addressed this issue previously on numerous occasions; and our prior interpretation of these statutes has had broad impact, implicating any criminal case involving a sentencing scheme that the legislature has amended.

criminal statute prescribing or defining punishment and are related statutes for purposes of interpreting Spec. Sess. P.A. 15-2, § 1.

Additionally, because we must assume that the legislature is aware that we have interpreted §§ 54-194 and 1-1 (t) as requiring an explicit expression of intent regarding retroactivity to overcome this presumption, we likewise must assume that the legislature's silence regarding retroactivity in Spec. Sess. P.A. 15-2, § 1, is evidence of an intent for prospective application only. Specifically, in light of our well established interpretation of §§ 54-194 and 1-1 (t), the fact that Spec. Sess. P.A. 15-2, § 1, is silent regarding retroactivity does not create ambiguity. See *State* v. *Orr*, 291 Conn. 642, 653–54, 969 A.2d 750 (2009) ("[t]he fact that . . . relevant statutory provisions are silent . . . does not mean that they are ambiguous" (internal quotation marks omitted)). Rather, this silence "indicates that the legislature intended [the amendment] to be applied prospectively only." *State* v. *Kalil*, supra, 314 Conn. 558; see also *State* v. *Harris*, supra, 198 Conn. 168 (because we must presume that legislature was aware of savings statute, and related case law, we also must presume that it did not intend for amendment at issue to apply retroactively when amendment made no mention of retroactive application). Accordingly, Spec. Sess. P.A. 15-2, § 1, is subject to only one reasonable interpretation—that it applies only prospectively.

Moreover, the straightforward rule created by these savings statutes—that changes to the sentencing scheme of a criminal statute are not retroactive unless explicitly stated—is supported by the legislature's directive in § 1-2z that we ascertain the meaning of a statute "in the first instance . . . from the text of the statute itself and its relationship to other statutes." This rule also makes for sound policy because, by requiring the legislature to be explicit regarding retroactivity,

these savings statutes help eliminate the possibility of ambiguity regarding an amendment's applicability, an issue inherent in any amendment altering criminal penalties that could be resolved by legislative clarity rather than judicial interpretation.

Nevertheless, the defendant asserts that we must consider Spec. Sess. P.A. 15-2, § 1, in the context of not only the savings statutes, but also in light of P.A. 15-244, the budget bill he claims it was meant to implement. He argues that, even if it is assumed that the text of the amendment and its relationship to the savings statutes yield a plain and unambiguous meaning requiring prospective application only, this reading leads to an "absurd and unworkable result." The crux of the defendant's argument is that P.A. 15-244 anticipated a certain amount of fiscal savings for the department, which was supposed to be accomplished by Spec. Sess. P.A. 15-2, § 1, and, without retroactive application, Spec. Sess. P.A. 15-2, § 1, cannot accomplish its purpose, thereby creating an unbalanced budget in violation of the legislature's constitutional duty to pass a balanced budget. See Conn. Const., amend. XXVIII. As a result, the defendant contends, this court may examine extratextual sources to determine the legislature's intent, including a fiscal note authored by the Office of Fiscal Analysis regarding Spec. Sess. P.A. 15-2, § 1. See Office of Fiscal Analysis, Fiscal Note, House Bill No. 7104, supra. The defendant maintains that the fiscal note shows that the legislature intended the amendment to apply retroactively because the legislature anticipated that it would lead to a certain amount of savings for the department, which would have been possible only if the amendment were to be applied retroactively to those defendants with pending cases at the time the amendment became effective.

The defendant correctly notes that, even if the language of Spec. Sess. P.A. 15-2, § 1, is plain and unambiguous, extratextual sources may be consulted if "the

meaning of a provision cannot be gleaned from examining the text of the statute and other related statutes without yielding an absurd or unworkable result . . . ." *Carmel Hollow Associates Ltd. Partnership* v. *Bethlehem*, 269 Conn. 120, 129 n.16, 848 A.2d 451 (2004); see also *State* v. *Salamon*, 287 Conn. 509, 524–25, 949 A.2d 1092 (2008). "[T]his court will not interpret statutes in such a way that would reach a bizarre or absurd result." (Internal quotation marks omitted.) *State* v. *Boyd*, 272 Conn. 72, 79, 861 A.2d 1155 (2004). The plain language of P.A. 15-244, however, does not support the defendant's argument. Nothing in P.A. 15-244 or its legislative history references Spec. Sess. P.A. 15-2, § 1, let alone a specific amount of fiscal savings anticipated by Spec. Sess. P.A. 15-2, § 1. This is not surprising because P.A. 15-244 was passed by the legislature before Spec. Sess. P.A 15-2.

Rather, to establish that the legislature intended Spec. Sess. P.A. 15-2, § 1, to create a certain amount of fiscal savings that would be possible through retroactive application only, the defendant makes a circular argument, relying on extratextual sources to show that a prospective only application would lead to the absurd result of *not* achieving those savings, thereby justifying the use of the same extratextual sources in interpreting Spec. Sess. P.A. 15-2, § 1.[12] The defendant argues that we may examine these extratextual sources to determine whether there is an absurd or unworkable result insofar as budget bills and associated implementing bills "are

[12] Specifically, the defendant relies on the fiscal note authored by the Office of Fiscal Analysis attached to Spec. Sess. P.A. 15-2, § 1, which provides in relevant part: "The bill [Spec. Sess. P.A. 15-2, § 1] makes various changes to statutes regarding drug possession that implement P.A. 15-244. The changes result in an estimated savings to the [d]epartment . . . of $6.6 million in [fiscal year 2016] and at least $12.4 million in [fiscal year 2017] through reduction in prison population and corresponding facility closures. However, P.A. 15-244 includes a higher savings target of $ 12.5 million in [fiscal year 2016] and $18.9 million in [fiscal year 2017] in the [d]epartment . . . ."

unique forms of legislation because they cannot be fully understood on their own. Unlike the plain language contained within other statutes, budget bills are comprised of fiscal amounts and budget line items—numbers—that are not self-explanatory. Indeed, these bills can only be fully understood and acted upon by reference to documents prepared by the legislature's nonpartisan office, the Office of Fiscal Analysis . . . [including fiscal notes] and any implementing legislation the legislature chooses to pass to effectuate the revenue and expenditure levels contained in the budget." Thus, the defendant contends that we must consider Spec. Sess. P.A. 15-2, § 1, not just in light of P.A. 15-244 but also in light of any related analyses authored by the Office of Fiscal Analysis.

The defendant cites no case law, and we have found none, holding that budget bills are inherently ambiguous under § 1-2z and that extratextual sources must be considered to determine their meaning. Additionally, the defendant's argument conflicts directly with our rules of statutory construction, which prohibit this court from considering extratextual sources unless the plain language of the statute is ambiguous or leads to an absurd or unworkable result. See General Statutes 1-2z. In determining whether the plain language of P.A. Spec. Sess. 15-2, § 1, leads to an absurd or unworkable result, we are limited to considering its plain language and its relationship to other statutes. The defendant has not identified any language in Spec. Sess. P.A. 15-2, § 1, or P.A. 15-244 that supports his argument. The only arguable support for his argument exists in extratextual sources, such as the fiscal note attached to Spec. Sess. P.A. 15-2, § 1, which we cannot consider.[13] See

[13] The only reference in the legislative history of P.A. 15-244 to fiscal savings for the department is a single statement that the budget bill requires the department to save $5.3 million. See 58 H.R. Proc., Pt. 23, 2015 Sess., p. 7858, remarks of Representative Toni E. Walker ("We also had some savings in our budget. . . . We ended up at approximately 20 million [dollars] . . . . And the way we have it broken down now is 5 million [dollars]

State v. *Ramos*, 306 Conn. 125, 140–41, 49 A.3d 197 (2012) ("[a]lthough the defendant contends that our conclusion would mean that legislators whose comments during debate on [a] 1997 amendment indicated that they interpreted the statute differently and did not understand the plain meaning of the bill that they either sponsored or voted in favor of, this argument too depends on our resort to the legislative history that § 1-2z bars us from considering [in the absence of ambiguity or an absurd result]").

We note, however, that, even if the Office of Fiscal Analysis made a mistake regarding the retroactive application of Spec. Sess. P.A. 15-2, § 1, or a miscalculation about its anticipated fiscal savings, this alone would not necessarily lead to an absurd or unworkable result requiring retroactive application when the legislature has not expressed any manifest intent for retroactive application. Not only does neither P.A. 15-244 nor Spec. Sess. P.A. 15-2, § 1, mention retroactivity, but the legislative histories of both are void of any discussion regarding retroactivity. See *Mead* v. *Commissioner of Correction*, supra, 282 Conn. 326 (rejecting retroactive application of statute when "review of the legislative history . . . reveals that it is void of any clear and unequivocal expression by the legislature for [the statute] to apply retroactively"). We acknowledge that fiscal notes authored by the Office of Fiscal Analysis "may bear on the legislature's knowledge of interpretive problems that could arise from a bill." *Butts* v. *Bysiewicz*, 298 Conn. 665, 688 n.22, 5 A.3d 932 (2010). But they "are not, in and of themselves, evidence of legislative

for the Department of Developmental Services, 5.3 million [dollars] for the . . . Department [of Correction], and then we have given the responsibility to the Secretary of [the] Office of [Policy and Management] to achieve another . . . 10 million [dollars] from the other collective agencies."). There is no mention in the legislative history of how these savings will occur, and it differs from the savings anticipated in the fiscal note relied on by the defendant.

intent . . . .” Id. The fiscal note at issue, by itself, is insufficient. Sections 54-194 and 1-1 (t) require an explicit expression of intent regarding retroactivity to overcome the presumption of prospective applicability only. Accordingly, viewing the plain language of Spec. Sess. P.A. 15-2, § 1, in the context of P.A. 15-244 does not lead to an absurd or unworkable result, and, thus, extratextual sources may not be considered.

Nevertheless, the defendant responds that it is illogical for the legislature to change the sentencing scheme on the basis of a change in moral policy and a recognition that the prior punishment was ineffective but not to apply that change retroactively. This argument, however, relies on legislative history, which we may not examine in light of our conclusion that the plain language of Spec. Sess. P.A. 15-2, § 1, is clear and unambiguous, and does not lead to an absurd or unworkable result. See *State* v. *Ramos*, supra, 306 Conn. 140. More fundamentally though, this court has stated that there is “nothing irrational in a legislative conclusion that individuals should be punished in accordance with the sanctions in effect at the time the offense was committed, a viewpoint encompassed by the savings statutes themselves.” (Internal quotation marks omitted.) *State* v. *Kalil*, supra, 314 Conn. 555, quoting *Holiday* v. *United States*, supra, 683 A.2d 79. It also is perfectly rational for the legislature to conclude that the better policy is to offer statutory grace and apply the change retroactively to pending cases, or even to already sentenced defendants. According to its own words, along with our case law, however, the legislature must do so explicitly.

Accordingly, we conclude that the plain language of Spec. Sess. P.A. 15-2, § 1, clearly and unambiguously prohibits retroactive application, and this interpretation does not lead to an absurd or unworkable result, especially when viewed in context of the related savings statutes, §§ 54-194 and 1-1 (t). Therefore, we conclude

that the Appellate Court correctly determined that the defendant was properly sentenced in accordance with the version of § 21a-279 (a) in effect on the date of the conduct at issue.

II

Alternatively, the defendant asks us to declare that Spec. Sess. P.A. 15-2, § 1, applies retroactively under the amelioration doctrine, which "provides that amendments to statutes that lessen their penalties are applied retroactively . . . ." (Internal quotation marks omitted.) *State* v. *Kalil*, supra, 314 Conn. 552. The defendant acknowledges that this court only recently rejected the applicability of this doctrine in *Kalil*. Nonetheless, he argues that we should overrule *Kalil* because it is at odds with this court's long-standing retroactivity precedent.[14] The state responds that this court's holding in *Kalil* is supported by both the applicable savings statutes and § 1-2z, and that no grounds exist for overruling *Kalil*. We agree with the state.

Our determination of whether we should overrule a prior decision is guided by the doctrine of stare decisis, which "counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. . . . [I]n evaluating the force of stare decisis, our case law dictates that we should be especially wary of overturning a decision that involves the construction of a statute. . . . When we construe a statute, we act not as plenary lawgivers but as surrogates for another policy maker, [that is] the

[14] The defendant also argues that *Kalil*'s prohibition against applying the amelioration doctrine does not apply to the present case because Spec. Sess. P.A. 15-2, § 1, is distinguishable from the statute at issue in *Kalil* in that Spec. Sess. P.A. 15-2, § 1, directly interacts with the budget bill that it was meant to implement, and, thus, not applying this doctrine would lead to an absurd and unworkable result. As explained in part I of this opinion, prospective only application of Spec. Sess. P.A. 15-2, § 1, does not lead to an absurd or unworkable result in light of P.A. 15-244, and, thus, we reject this argument.

legislature. In our role as surrogates, our only responsibility is to determine what the legislature, within constitutional limits, intended to do. . . . Once [we have construed a statute and] an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative acquiescence places a significant jurisprudential limitation on our own authority to reconsider the merits of our earlier decision. . . . Factors that may justify overruling a prior decision interpreting a statutory provision include intervening developments in the law, the potential for unconscionable results, the potential for irreconcilable conflicts and difficulty in applying the interpretation." (Internal quotation marks omitted.) *State* v. *Evans*, 329 Conn. 770, 804–805, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019).

In *Kalil*, the defendant argued that Public Acts 2009, No. 09-138, § 2 (P.A. 09-138), which increased the minimum value element of the second degree larceny statute from $5000 to $10,000, and which would have resulted in a downgrade of the defendant's second degree larceny charge to third degree larceny and a reduction in his sentence, applied retroactively under the amelioration doctrine. *State* v. *Kalil*, supra, 314 Conn. 550. P.A. 09-138, § 2, was enacted after the criminal conduct at issue but while the defendant's case was pending. Id., 551. In declining to adopt the amelioration doctrine, this court noted that, in determining whether a change in a criminal statute prescribing punishment applies retroactively, it is bound by the presumption against retroactivity contained in §§ 54-194 and 1-1 (t). Id., 552–53. Nevertheless, the defendant in *Kalil* argued that the amelioration doctrine should apply despite these savings statutes because the legislature did not intend for §§ 54-194 and 1-1 (t) to apply to ameliorative changes in law. Id., 556. This court disagreed. Id. First, as

explained in detail in part I of this opinion, this court set forth its extensive history of holding that these savings statutes apply to all changes to criminal statutes defining or prescribing punishment, even if the change benefits defendants, unless the legislature explicitly provides otherwise. Id., 553–54. Because "the legislature has not seen fit to amend the statutes in any material respects for more than 130 years," despite this case law, this court held that these savings statutes applied and weighed against adopting the amelioration doctrine. Id., 556.

Second, we held that this court was required to interpret changes to criminal sentencing schemes in light of these savings statutes for separation of powers reasons: "[W]hatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility . . . these are peculiarly questions of legislative policy. . . . Thus, although the rule of separation of governmental powers cannot always be rigidly applied . . . it must be remembered that the constitution assigns to the legislature the power to enact laws defining crimes and fixing the degree and method of punishment and to the judiciary the power to try offenses under these laws and [to] impose punishment within the limits and according to the methods . . . provided." (Citations omitted; internal quotation marks omitted.) Id., 554–55.

Third, this court determined that adopting the amelioration doctrine "could result in the unequal treatment of defendants who commit the [same] crime . . . on the same day but whose trials proceed at a different pace, thus resulting in some defendants being convicted under the law in effect at the time the crime was committed and others under the law enacted following commission of the crime." Id., 555. We concluded that it is "unlikely that the legislature would have intended for two similarly situated offenders to receive . . . dispa-

rate treatment solely on the fortuity of when their cases came to trial." (Internal quotation marks omitted.) Id., 555–56.

Fourth, in response to the defendant's argument that it would be illogical for the legislature to intend for an ameliorative statute to apply prospectively only, this court explained that there was "nothing irrational in a legislative conclusion that individuals should be punished in accordance with the sanctions in effect at the time the offense was committed, a viewpoint encompassed by the savings statutes themselves." (Internal quotation marks omitted.) Id., 555. Finally, this court rejected the defendant's reliance on case law from other jurisdictions that have adopted the amelioration doctrine, explaining that those jurisdictions relied on "their own unique state constitutional and jurisdictional constraints." Id., 556.

We see no reason why this court should overrule *Kalil*, which thoroughly considered this issue more than six years ago. Although relatively recent, the holding in *Kalil* is premised on approximately 100 years of precedent, during which time the legislature took no action that would suggest any disagreement with our interpretation and application of §§ 54-194 and 1-1 (t). See *State* v. *Evans*, supra, 329 Conn. 806–807. Moreover, the analysis in *Kalil* is consistent with our analysis in part I of this opinion, showing that there are no conflicts or difficulty in applying the holding of *Kalil*. Accordingly, we are not persuaded that any " 'cogent reasons' " or " 'inescapable logic' " supports a departure from our decision in *Kalil*. Id., 805.

The defendant argues that *Kalil* nevertheless should be overruled because it is at odds with this court's prior precedent regarding retroactivity. Specifically, he argues that, prior to *Kalil*, this court routinely examined extratextual sources to determine the legislature's

intent regarding retroactivity regardless of the amendment's plain language, and, thus, *Kalil*'s strict application of § 1-2z is contrary to prior case law.[15] The defendant contends that the holding in *Kalil* means that the savings statutes will always trump legislative intent. He contends that, instead, the savings statutes must yield to legislative intent, which is established in this case by extratextual sources. This argument relies on retroactivity cases decided before the enactment of § 1-2z in which this court considered both the plain language of the amendments and legislative history to determine the legislature's intent. See, e.g., *State* v. *Parra*, 251 Conn. 617, 622–23, 741 A.2d 902 (1999); *In re Daniel H.*, 237 Conn. 364, 376, 678 A.2d 462 (1996).

This court has held that the enactment of § 1-2z did not suggest that the legislature intended to overrule prior cases in which our courts employed methods of statutory interpretation that were inconsistent with § 1-2z. See *Hummel* v. *Marten Transport, Ltd.*, 282 Conn. 477, 501, 923 A.2d 657 (2007). This would include prior retroactivity cases. We never have held, however, that all future retroactivity cases also can ignore the dictates of § 1-2z and the principles contained therein. Although the holdings in the cases the defendant cites remain good law, the principles of statutory construction that were used to reach those holdings have been replaced by § 1-2z,[16] which directs us not to examine extratextual

[15] The defendant also argues that *Kalil*'s strict application of § 1-2z was contrary to prior case law because it treated the effective date of legislation as dispositive of the legislature's intent regarding retroactivity. We reject this argument for the same reasons we rejected it in part I of this opinion.

[16] In two sentences in his reply brief, the defendant argues that, to the extent that § 1-2z prevents him from relying on extratextual sources to establish legislative intent regarding retroactivity, that statute violates the separation of powers doctrine because "the interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function." We decline to review this claim, which the defendant raised, for the first time, in his reply brief. See, e.g., *State* v. *Devalda*, 306 Conn. 494, 519 n.26, 50 A.3d 882 (2012).

sources unless the statute's plain language is ambiguous or creates an absurd or unworkable result. This does not mean that the savings statutes trump the legislature's intent. To the contrary, they require the legislature to be explicit in its intent regarding retroactivity. As explained, this court has interpreted §§ 54-194 and 1-1 (t) in this fashion for decades, and the legislature never has amended them, acquiescing to our interpretation of the legislature's own rules of construction. See *State* v. *Graham*, supra, 56 Conn. App. 511 ("[t]he defendant's request that this court adopt an 'amelioration doctrine,' whereby amendments to statutes that lessen their penalties are applied retroactively is, in essence, asking this court to intervene in the legislative process to nullify by judicial fiat the legislature's savings statutes"). Contrary to the defendant's argument that a strict adherence to § 1-2z conflicts with our retroactivity jurisprudence, § 1-2z is consistent with our prior interpretations of §§ 54-194 and 1-1 (t), which require that the legislature use explicit—i.e., "plain"—language to express its intent to apply such a statute retroactively. This rule of construction is not of "our own making," as the concurring justice asserts, but of the legislature's making. (Emphasis omitted.) Section 1-2z is further evidence of the legislature's intent that its statutes be taken at face value, and not only supports but requires our conclusion that, unless explicitly stated otherwise, acts governed by §§ 54-194 and 1-1 (t) must be presumed to apply only prospectively.[17]

[17] If we were to conclude, as the concurring justice does, that our construction would "defeat and frustrate the will of the legislature," we would of course reach a different conclusion or overrule *Kalil*. Statutory construction, after all, is not a means unto itself but, rather, a process of divining the legislature's will. Although applying Spec. Sess. P.A. 15-2, § 1, retroactively or adopting and applying the amelioration doctrine to it might be *consistent* with the purpose of the amendment—to reverse policies that led to mass incarceration for mere drug possession and to provide a second chance, including treatment resources, to drug users—that does not mean such an application is *required*. Rather, this bipartisan legislation, described by several legislators as a first step that might require future legislation; see

Finally, the defendant argues that the holding in *Kalil* is hostile to the clear legislative purpose of ameliorative amendments because these amendments manifest a shift in society's moral approach to punishment. In support of his position, the defendant relies on case law from other jurisdictions that have adopted the amelioration doctrine for this very reason. This argument is unpersuasive, however, because, as we already have explained in *Kalil*, we are bound by § 1-2z and by our savings statutes, which we consistently have interpreted as applying to ameliorative changes in criminal sentencing schemes. Accordingly, we decline the invitation to overrule *Kalil* and to adopt the amelioration doctrine.

The judgment of the Appellate Court is affirmed.

In this opinion ROBINSON, C. J., and McDONALD, KAHN and KELLER, Js., concurred.

58 S. Proc., Pt. 12, June, 2015 Spec. Sess., pp. 3547–48, remarks of Senator John A. Kissel (describing amendment as "trying a new path, a new methodology," that might require the legislature "to go back and tweak it and change it"); id., p. 3550, remarks of Senator Gary A. Winfield (although voting in favor of the amendment, "there's more that we need to do"); id., p. 3551, remarks of Senator Catherine C. Osten (this amendment was "a beginning of [our] finally dealing with our ever burgeoning . . . prison population"); id., p. 3552, remarks of Senator Leonard A. Fasano (this amendment was "the tip of the iceberg"); id., p. 3554, remarks of Senator Martin M. Looney ("we'll continue to work on these issues"); could have been the result of a compromise, including with legislators who believed that "individuals should be punished in accordance with the sanctions in effect at the time the offense was committed." (Internal quotation marks omitted.) *State* v. *Kalil*, supra, 314 Conn. 555. Ultimately, though, we do not examine this legislative history for the same reason the majority in *Kalil* did not address legislative history: because the plain language of Spec. Sess. P.A. 15-2, § 1, clearly and unambiguously prohibits retroactive application in light of the presumption of prospective only intent arising not from our holding in *Kalil* but from our savings statutes. Thus, the issue is not whether the amelioration doctrine would be consistent with Spec. Sess. P.A. 15-2, § 1, but whether the amelioration doctrine is consistent with our savings statutes. If we were to adopt the amelioration doctrine, as the defendant requests, it would apply to any amendment to criminal statutes that benefits criminal defendants. The legislative history underlying a single amendment alone does not justify adopting such a broadly applicable doctrine.

ECKER, J., concurring in the judgment. In *State* v. *Kalil*, 314 Conn. 529, 107 A.3d 343 (2014), this court held that the principles animating the common-law amelioration doctrine were "in direct contravention" of the applicable Connecticut savings statutes governing the retroactive application of repealed statutes[1] and, therefore, did not permit a sentencing court to confer the benefits of ameliorative legislation on a defendant whose crime predated the ameliorative legislation's effective date, even when the sentencing itself took place after that date. Id., 553; see id., 553–59. Due regard for the policy of stare decisis compels me to concur in the result reached by the majority on the basis of the holding in *Kalil*. I do so reluctantly, however, because I am convinced that *Kalil* was wrongly decided, and I am not enthusiastic about reaffirming its holding.[2] Jus-

[1] See General Statutes § 1-1 (t) ("[t]he repeal of an act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, or prosecution, or proceeding pending at the time of the repeal, for an offense committed, or for the recovery of a penalty or forfeiture incurred under the act repealed"); General Statutes § 54-194 ("[t]he repeal of any statute defining or prescribing the punishment for any crime shall not affect any pending prosecution or any existing liability to prosecution and punishment therefor, unless expressly provided in the repealing statute that such repeal shall have that effect").

[2] I disagree with the majority to the extent that its review of our earlier case law suggests that the outcome in *Kalil* was foreordained by "extensive case law" dating back to *Simborski* v. *Wheeler*, 121 Conn. 195, 183 A. 688 (1936). Part I of the majority opinion; id. (opining that prior case law "lays to rest any doubt" regarding applicability of savings statutes). I see no evidence that this court, prior to *Kalil*, ever considered or adjudicated the question of whether the amelioration doctrine could or should be adopted as part of our laws governing the retroactive application of criminal statutes. As of 2011, in fact, we expressly declined to rule on the question when it was directly raised by a petitioner, leaving the issue unresolved. See *Castonguay* v. *Commissioner of Correction*, 300 Conn. 649, 663 n.14, 16 A.3d 676 (2011) ("[t]his court has not previously held that ameliorative changes to criminal statutes apply retroactively and we express no opinion on that question here"). The Appellate Court rejected the doctrine in *State* v. *Graham*, 56 Conn. App. 507, 511, 743 A.2d 1158 (2000), but provided no analysis of the issue beyond declaring that adoption of the doctrine would

tice Eveleigh cogently marshals the arguments why *Kalil* was wrongly decided in his concurring and dissenting opinion in that case, with strong supplemental support provided by case law from other jurisdictions that have persuasively construed their own savings statutes—statutory schemes no different from ours in substance, and motivated by precisely the same policy concerns—to accommodate the amelioration doctrine.[3] See id., 559–70 (*Eveleigh, J.*, concurring and dissenting); see also E. Morrison, "Resurrecting the Amelioration Doctrine: A Call to Action for Courts and Legislatures," 95 B.U. L. Rev. 335, 339 (2015) (arguing that courts and legislatures should adopt amelioration doctrine and follow example set by high courts in New York, California, Minnesota and Michigan, in particular). No purpose is served by repeating or elaborating those arguments here.

If we were writing on a clean slate—that is, if *Kalil* had never been decided—the present case would pro-

improperly "intervene in the legislative process to nullify by judicial fiat the legislature's savings statutes."

[3] See, e.g., *In re Estrada*, 63 Cal. 2d 740, 745, 747–48, 408 P.2d 948, 48 Cal. Rptr. 172 (1965) (noting that general savings statute simply reflected legislature's "intent that an offender of a law that has been repealed or amended should be punished" but did "not directly or indirectly indicate whether [the offender] should be punished under the old law or the new one," and holding that "the [l]egislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply"); *People* v. *Schultz*, 435 Mich. 517, 529, 460 N.W.2d 505 (1990) (general savings statute was intended "to prevent technical abatements from barring actions to enforce criminal liability and thereby excusing offenders from punishment" but was not intended "to save the terms of punishment in effect on the date of offense when an ameliorative amendment was subsequently enacted and the case had not yet reached final disposition before [the state's Supreme] Court"); *People* v. *Oliver*, 1 N.Y.2d 152, 159–60, 134 N.E.2d 197, 151 N.Y.S.2d 367 (1956) (general savings statute, which was intended "to preserve the [s]tate's right to prosecute offenses previously committed under the repealed statute," did not preclude application of "an ameliorative statute [that] takes the form of a reduction of punishment for a particular crime").

vide a particularly strong occassion for adoption of the amelioration doctrine in that the legislation at issue was intended to implement precisely the kind of public policy that the amelioration doctrine is designed to promote. The idea underlying the amelioration doctrine is that "[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law." *People* v. *Oliver*, 1 N.Y.2d 152, 160, 134 N.E.2d 197, 151 N.Y.S.2d 367 (1956). With respect to Public Acts, Spec. Sess., June, 2015, No. 15-2 (Spec. Sess. P.A. 15-2), the argument for application of the doctrine is especially compelling because the statutory amendment reflected the legislature's belief that the preexisting, stricter punishment regime supplanted by the ameliorative legislation was not merely *unnecessary* to meet the legitimate ends of the criminal law but was affirmatively *destructive* of those ends. Indeed, as the following discussion illustrates, the fundamental public policy driving the passage of Spec. Sess. P.A. 15-2 was the legislature's determination that the preexisting sentencing regime governing the criminal offenses committed by the defendant, Haji Jhmalah Bischoff, caused ruinous penological results and, by the legislature's own determination, must be torn out by the roots and replaced with a fundamentally different and less punitive model animated by a radically contrasting conception of crime and punishment in the particular context of drug possession. I recount this legislative background to highlight the irony inhering in our decision today, which requires a trial court, in the name of deference to the legislative will, to impose sentence on the defendant under a statutory regime that the legislature itself considers discredited and outmoded, rather than under the new, more enlightened regime enacted by the legislature prior to the defendant's sentencing.[4]

[4] The majority states that, because "the plain language of Spec. Sess. P.A. 15-2, § 1, clearly and unambiguously prohibits retroactive application," we

Section 1 of Spec. Sess. P.A. 15-2 was passed as part of a large-scale criminal justice reform effort known as the Second Chance Society initiative, which aimed to reverse policies that had led to mass incarceration and sought to treat rather than to punish drug users.[5] Representative William Tong, who introduced the legislation in the House during the regular legislative session, explained that incarcerating individuals for mere drug possession had not "accomplished our goal of eradicating drug abuse and drug addiction." 58 H.R. Proc., Pt. 24, 2015 Sess., p. 8100. Instead, "we have sent generations of young men, predominantly from our cities, to jail." Id. Representative Tong explained that the bill constituted a landmark shift in public policy that "fundamentally remakes our criminal justice system and our drug policy . . . ." Id., p. 8097. He also denounced the state's former strategy of mass incarceration of nonviolent drug possessors: "[W]e want to be smarter on crime, and we know that creating a generation of felons and a strategy of mass incarceration of people for simple possession just isn't working." 58 H.R. Proc., Pt. 25, June, 2015 Sess., pp. 8488–89. Representative

have no need even to examine this legislative history. Part I of the majority opinion. As the majority acknowledges elsewhere in its opinion, Spec. Sess. P.A. 15-2 is silent on the question of retroactivity, and the meaning of that silence only becomes "unambiguous" in light of the presumption of a prospective only intent arising from our holding in *Kalil*. I agree that our holding in *Kalil* is clear and unambiguous. I further agree that, in light of *Kalil*, we must interpret Spec. Sess. P.A. 15-2 to apply only prospectively under the operative savings statutes as construed in *Kalil*. My point is that the legislative history of Spec. Sess. P.A. 15-2, which the majority feels compelled to ignore under *Kalil*, should cause us to doubt the wisdom of the holding in *Kalil*.

[5] Senate Bill No. 952, as amended by Senate Amendment A, was introduced during the regular legislative session. See Substitute Senate Bill No. 952, Senate Amendment, Schedule A, LCO No. 9318, 2015 Sess. It passed the Senate but then was passed only temporarily by the House. The same legislation was taken up during the June Special Session, where it passed both chambers in the form of Spec. Sess. P.A. 15-2, § 1. The legislative background I discuss refers to statements made during both the regular and the special sessions.

Tong characterized the Public Act as "a second chance to get this right. We have a second chance to continue to be tough on crime but to be smarter on crime. Today we have a chance to take a major step in building a smart and smarter drug policy and to get this right." 58 H.R. Proc., Pt. 24, 2015 Sess., p. 8102.

Senator Eric D. Coleman introduced the bipartisan bill to the Senate during the regular session, explaining that Spec. Sess. P.A. 15-2, § 1, "puts a greater emphasis on alternatives to incarceration and . . . treatment—perhaps hopefully a more rational treatment of nonviolent offenders." 58 S. Proc., Pt. 10, 2015 Sess., p. 3110. According to Senator Coleman, "the bill . . . encourages we as policymakers and we who are concerned about the administration of criminal justice in our state to treat mere drug possession as something that requires medical treatment rather than criminal sanctions." 58 S. Proc., Pt. 12, June, 2015 Spec. Sess., p. 3542. The legislative history also makes clear that the bill was intended to help drug-dependent individuals reintegrate into society. Senator John A. Kissel noted: "What I think this bill is about is redemption and our belief that most folks in our society may make a mistake, may make two, may make more, but fundamentally we believe people can turn their lives around." Id., p. 3545. In response to a question from Representative Charles J. Ferraro regarding how the bill would reduce crime, Representative Tong explained: "I think the most accessible and most obvious [way] is that sentencing young people or any person, frankly, for simple possession for a mandatory minimum and a felony, has [the] potential and likelihood to ruin their life. . . . I think this is about recidivism, giving people a shot after they've made a mistake to get a job, [to] get on with their lives and to do good." 58 H.R. Proc., Pt. 24, 2015 Sess., p. 8160. Representative Richard A. Smith noted the change from a punitive to a rehabilitative model: "I agree 1000

percent that I would rather see someone who has a drug issue get treatment as opposed to [go] to jail. Jail does not serve that person. Jail does not serve society. It doesn't bring him or her back in and make that person a better person and a productive person." Id., p. 8137. Senator Martin M. Looney, the president pro tempore of the Senate, remarked on the change in policy, noting that "unfortunately in our society we have too many people serving life prison sentences on the installment plan; in, out, in, out, back again, never really establishing themselves in society. And the difficulty is that those who have their prospects in life blighted by an early criminal conviction often, for a very minor drug offense, wind up being haunted by that and having prospects foreclosed for the rest of their lives." 58 S. Proc., Pt. 10, 2015 Sess., p. 3126. Senator Catherine A. Osten, who explained that she had worked in the Department of Correction for twenty-one years, made similar remarks and also noted the fiscal impact of over incarceration in this state: "I think that this bill will finally take control of a population that does not deserve to be inside our correctional [system] and could actually be productive citizens, which is something that would be wonderful to see." Id., p. 3114. She added: "In addition to that, I think that this finally starts realizing the second event that will happen as a result of this, and that is fiscal control . . . over a burgeoning correctional budget." Id.

These same sentiments were echoed by Governor Dannel P. Malloy, who made clear when signing Spec. Sess. P.A. 15-2 into law that the state was implementing "systematic change" and making a dramatic shift in its approach to nonviolent drug possessors: "The cycle our system currently encourages—one of permanent punishment—hurts too many families and communities. When we should have been focusing on permanent reform, we focused on permanent punishment. For too

long, we built modern jails instead of modern schools. Because this bill passed, Connecticut has taken a giant step into the future." (Internal quotation marks omitted.) D. Malloy, Press Release, Gov. Malloy Signs "Second Chance Society" Bill To Further Reduce Crime and Successfully Re-Integrate Nonviolent Offenders into Society (July 9, 2015), available at https://portal.ct.gov/Malloy-Archive/Press-Room/Press-Releases/2015/07-2015/Gov-Malloy-Signs-Second-Chance-Society-Bill-to-Further-Reduce-Crime-and-Successfully-ReIntegrate-Non (last visited January 14, 2020). "[M]ost of all," Governor Malloy said, "these initiatives are focused on turning nonviolent offenders into productive members of our society [who] can contribute to our economy, rather than drain it." (Internal quotation marks omitted.) Id.

Although there is no legislative history directly addressing the retroactive application of Spec. Sess. P.A. 15-2, there is strong circumstantial evidence that the legislature intended the ameliorative provisions contained therein to apply to individuals, like the defendant, who had not yet been sentenced as of the amendment's effective date. In his remarks, Representative Tong specifically included inmates like the defendant whose cases were then pending among the individuals who should not be incarcerated and who are part of a generation whose lives have been "ruined" by the state's former policy: "By way of example, right now we have 500 [people] locked up in our state. . . . [T]he controlling offense, meaning the most serious offense is drug possession. Two hundred of them are there because of a sentence, *300 are in pretrial.* There are estimated [to be] about 1150 inmates, which includes parolees, for whom the controlling offense was drug possession. Over a generation, that's thousands of people. Thousands of people whose lives have been changed, and you might say ruined, because they made a mistake and because they were given a felony, and a mandatory

minimum. They went away for two years or longer, and they've not been able to get their lives in the right direction since." (Emphasis added.) 58 H.R. Proc., Pt. 24, 2015 Sess., pp. 8100–8101. Likewise, there is evidence that the fiscal savings expected by the legislature and calculated by the Office of Fiscal Analysis were based on the retroactive application of Spec. Sess. P.A. 15-2 to persons whose cases were pending on the statute's effective date. See Office of Fiscal Analysis, Connecticut General Assembly, Fiscal Note, House Bill No. 7104, An Act Implementing Provisions of the State Budget for the Biennium Ending June 30, 2017 Concerning General Government Provisions Relating to Criminal Justice.

The foregoing legislative history vividly reveals the ironic dissonance inhering in this court's decision to reject the amelioration doctrine. Most immediately, I find it ironic that we are required, in the name of deference to the will of the legislature, to defeat and frustrate the will of the legislature as it relates to the sentencing reform initiatives embodied in Spec. Sess. P.A. 15-2.[6] I agree with the majority that it is not necessarily "absurd" to believe that the legislature might have

[6] To be clear, I am not suggesting that our holding today directly contravenes a deliberate, conscious, and articulated legislative intention to apply Spec. Sess. P.A. 15-2 retroactively. Although it seems clear from the legislative record that one of the main sponsors of the legislation, Representative Tong, almost certainly intended retroactive application to unsentenced violators, there is no evidence that the legislature as a whole gave the precise question any thought. I agree with the majority that, as a result of this legislative silence, our rules of construction since *Kalil* require us to *presume* an intention of a prospective only application. My point is that the presumptions we make regarding a prospective only legislative intention have caused the Judicial Branch in this case to impose and uphold a sentence that fundamentally conflicts with the explicit policies, purposes and principles animating the sentencing legislation that had been enacted at the time of the defendant's sentencing. Because that result is deeply counterintuitive, I would prefer, if writing on a clean (pre-*Kalil*) slate, to apply a rule of construction that employs the opposite presumption, namely, that the legislature intends ameliorative criminal statutes to apply retroactively.

deemed the prior sentencing scheme ruinous and destructive but chose, at the same time, to apply its reform measures prospectively only. But such a legislative choice, even if not outright absurd, strikes me at the very least as exceedingly odd and counterintuitive and, therefore, unlikely; were it not for the precedential mandate of *Kalil*, I certainly would not presume from the legislature's silence in Spec. Sess. P.A. 15-2 regarding retroactive application that it intended for any future sentencing, occurring after the effective date of the amendment, to implement the very sentencing regime it had just denounced as inimical to good public policy.

The irony runs deeper still because, in my view, the legislative will that *Kalil* claimed to be upholding is based on a contested statutory construction *of our own making*. This point follows from my view, shared by scholarly commentators and a number of respected high courts, that general savings statutes do not compel the result reached in *Kalil*; instead, those statutes were intended to avoid the untoward and unintended consequences arising from strict application of the common-law abatement doctrine (as it interacts with the constitutional ex post facto doctrine) and were never actually intended by the legislature to preclude retroactive application of ameliorative amendments such as Spec. Sess. P.A. 15-2. See *State* v. *Kalil*, supra, 314 Conn. 563–64 (*Eveleigh*, *J.*, concurring and dissenting); see also E. Morrison, supra, 95 B.U. L. Rev. 341–42 ("General saving statutes were meant to address the limited problem of pardons resulting from the interplay between the doctrine of abatement and the constitutional prohibition against ex post facto laws. . . . General saving statutes were not intended to eliminate the amelioration doctrine, which merely offered a defendant the benefit of a reduction in penalty after a legislature amended

the charging statute." (Footnotes omitted.)); footnote 3 of this opinion (citing cases). The expansion of the savings statutes to encompass ameliorative amendments within the scope of their presumption of prospective only application, in other words, is not the ineluctable and unavoidable outcome of legislative design and intention. Rather, it is the result of a series of decisions of this court imposing our gloss on the relevant statutes.[7] The irony arises from the fact that we purport to

[7] The majority declines to accept responsibility for this court's active role in producing the operative rule—the rule that ameliorative changes to the sentencing scheme of a criminal statute are not retroactive unless explicitly stated in the amending legislation—by pointing to the mandatory regime of statutory construction imposed by General Statutes § 1-2z, the so-called plain meaning statute. Again, I agree that *Kalil* settled that question when it held that the text of the savings statutes creates a plain and unambiguous rule. See *State* v. *Kalil*, supra, 314 Conn. 553 (declining to adopt the amelioration doctrine "because the doctrine is in direct contravention of Connecticut's savings statutes"). I do not agree, however, that *Kalil* settled the question correctly. At a purely textual level, the controversial question is what the savings statutes mean by the word "repeal." Did those statutes, when enacted, intend to include within their scope statutory amendments that happen to be effectuated as a technical matter by the mechanism of a repeal? See id., 563–64 (*Eveleigh*, *J.*, concurring and dissenting) ("[i]n my view, these savings statutes do not apply because we are not dealing with the repeal of a statute, as required by the savings statutes, rather, we are dealing with an amendment to a statute"). The answer may be yes or it may be no, but the text standing alone does not resolve the question. In other words, although the savings statutes are perfectly clear that repealing statutes will not be construed to be retroactive unless they provide for retroactive application in express terms, the *scope* of those savings statutes—that is, whether they apply to ameliorative amendments such as Spec. Sess. P.A. 15-2—is not at all obvious without major interpretive work supplied by the judiciary. Indeed, this is the whole point of the cases and commentators opining that such savings statutes were never meant to preclude adoption of the amelioration doctrine. See, e.g., E. Morrison, supra, 95 B.U. L. Rev. 341 (explaining historical origin of savings statutes and reason why those statutes do not preclude adoption of amelioration doctrine). The point is particularly salient in Connecticut because we know for a fact that the legislature enacted our savings statutes in the late nineteenth century specifically "to counter the effect of the common-law abatement doctrine" in direct response to this court's decision in *State* v. *Daley*, 29 Conn. 272 (1860); *State* v. *Kalil*, supra, 556; and not with any apparent intention to preclude adoption of the amelioration doctrine. See id., 565–66 (*Eveleigh*, *J.*, concurring and dissenting). I refuse to believe that fidelity to the statutory text

undertake and execute our role in the construction of the savings statutes, and Spec. Sess. P.A. 15-2, under what I take to be the self-concealing and ill-fitting cloak of judicial restraint, as if the contested meaning, scope and application of these statutes arise out of the unmediated exercise of legislative will embodied in the "plain" meaning of the laws under review. The reality is that this court has played an active and important role formulating the rule of statutory construction governing the present case. Our holding in the present case enforces the rule that we articulated in *Kalil*.

This final point returns me to the reason that I concur in the judgment. The operative rule of statutory construction—accurately stated by the majority as holding "that changes [including ameliorative changes] to the sentencing scheme of a criminal statute are not retroactive unless explicitly stated [in the amending legislation]"; part I of the majority opinion—was made crystal clear by this court in *Kalil*, a decision issued in 2014 and therefore available to the legislature when Spec. Sess. P.A. 15-2 was debated and adopted. Under these circumstances, my disagreement with *Kalil* is not a sufficient reason to vote to reverse that precedent or its construction of the relevant savings statutes. "The doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. . . . Stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency. . . . It is the most important application of a theory of decisionmaking consistency in our legal culture and . . . is an obvious manifestation of the notion that decisionmaking consistency itself has normative value."

requires us to blind ourselves to the particular historical context producing that text.

(Internal quotation marks omitted.) *State* v. *Salamon*, 287 Conn. 509, 519, 949 A.2d 1092 (2008). The principles underlying the doctrine of stare decisis are at their zenith when we are asked to overturn "a decision that involves the construction of a statute." (Internal quotation marks omitted.) Id., 520.

The arguments for and against the adoption of the amelioration doctrine were analyzed and resolved in *Kalil*. The defendant has not raised any new arguments—he "has simply repeated the arguments that the parties made and that this court rejected in [*Kalil*], which does not justify a departure from principles of stare decisis." *Spiotti* v. *Wolcott*, 326 Conn. 190, 204, 163 A.3d 46 (2017). If the legislature wishes to reverse the presumption established in *Kalil* for ameliorative statutes, it may enact legislation to that effect, as has been done in at least nine states.[8] Accordingly, I reluc-

[8] See 5 Ill. Comp. Stat. 70/4 (West 2013) ("[i]f any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect"); Ky. Rev. Stat. Ann. § 446.110 (LexisNexis 2010) ("[i]f any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect"); N.H. Rev. Stat. Ann. § 624:5 (2001) ("[n]o offense committed and no penalty or forfeiture incurred, under any of the acts repealed by house bill no. 75 of the 1955 session of the general court, and before the time when such repeal shall take effect, shall be affected by the repeal, except that when any punishment, penalty, or forfeiture shall be mitigated by the provisions of the Revised Statutes Annotated, such provisions may be extended and applied to any judgment to be pronounced after such repeal"); Ohio Rev. Code Ann. § 1.58 (B) (West 2004) ("[i]f the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended"); Tex. Government Code Ann. § 311.031 (b) (West 2013) ("[i]f the penalty, forfeiture, or punishment for any offense is reduced by a reenactment, revision, or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended"); Vt. Stat. Ann. tit. 1, § 214 (c) (2015) ("[i]f the penalty or punishment for any offense is reduced by the amendment of an act or statutory provision, the same shall be imposed in accordance with the act or provision as amended

tantly agree with the majority that we are bound by *Kalil* to hold that Spec. Sess. P.A. 15-2 does not apply retroactively to the defendant. I therefore concur in the judgment.

NANCY BURTON *v.* DEPARTMENT OF ENVIRONMENTAL PROTECTION ET AL.

NANCY BURTON *v.* COMMISSIONER OF ENVIRONMENTAL PROTECTION ET AL.

(SC 20466)

Robinson, C. J., and McDonald, Mullins, Kahn and Keller, Js.

Syllabus

The plaintiff brought an action under the Connecticut Environmental Protection Act of 1971 (CEPA) (§ 22a-14 et seq.) against the Commissioner of Environmental Protection and D Co., the owner and operator of a nuclear power plant in Waterford, seeking, inter alia, an injunction requiring the power plant to convert to a closed-cycle cooling system. The plaintiff previously had intervened in a proceeding before the Department of Environmental Protection to challenge the department's tentative determination to renew a permit authorizing D Co. to withdraw water from Niantic Bay, cycle it through the power plant, and then discharge it into the Long Island Sound. In her CEPA action, the plaintiff claimed, inter alia, that the permit renewal proceeding was inadequate to protect the rights recognized by CEPA and that the current operation of the power plant would result in unreasonable pollution. The trial court rendered judgment dismissing the plaintiff's CEPA action for lack of standing. The plaintiff appealed, and this court reversed the trial court's judgment,

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unless imposed prior to the date of the amendment"); Va. Code Ann. § 1-239 (2017) ("if any penalty, forfeiture, or punishment be mitigated by any provision of the new act of the General Assembly, such provision may, with the consent of the party affected, be applied to any judgment pronounced after the new act of the General Assembly takes effect"); W. Va. Code Ann. § 2-2-8 (LexisNexis 2018) ("if any penalty or punishment be mitigated by the new law, such new law may, with the consent of the party affected thereby, be applied to any judgment pronounced after it has taken effect").

concluding that the plaintiff did have standing. Thereafter, the permit renewal proceeding continued, and, in 2010, after the department conducted an evidentiary hearing, the hearing officer issued a proposed final decision, in which the hearing officer recommended that the department issue a permit. The department subsequently issued the permit, and the plaintiff filed an administrative appeal against the department and D Co., claiming, inter alia, that the department failed to make a legally valid best technology available determination. The administrative appeal was then consolidated with the plaintiff's CEPA action. Thereafter, the commissioner and D Co. filed motions to dismiss the CEPA action on the ground that it was moot, which the trial court granted. The plaintiff appealed from the judgment of dismissal, and this court reversed that judgment. On remand, the trial court conducted a hearing on the merits of the consolidated actions and rendered judgments in favor of the commissioner, the department and D Co. The plaintiff appealed, claiming, inter alia, that the trial court incorrectly concluded that she had failed to prove that the administrative proceeding was inadequate and that the operation of the power plant would result in unreasonable pollution. *Held*:

1. The plaintiff's claim that the administrative proceeding was inadequate to protect the rights recognized by CEPA was unavailing:

a. The plaintiff could not prevail on her claim that the administrative proceeding was inadequate insofar as the hearing officer precluded certain claims on which the plaintiff sought to intervene: the hearing officer did not abuse her discretion by precluding the plaintiff's claim challenging the permit renewal application on the ground that it failed to implement the best technology available, as that claim was duplicative of several other claims, and the hearing officer fully considered the plaintiff's arguments on this issue; moreover, the hearing officer did not abuse her discretion by precluding three additional claims of the plaintiff on the ground that they raised issues that were outside the department's jurisdiction, as these claims involved matters that were regulated exclusively by the federal government, and two of those claims, which raised issues concerning federal criminal law and employment practices, were not related to environmental issues.

b. The plaintiff's claim that the administrative proceeding was inadequate because the hearing officer had excluded a 2007 document containing a draft best technology available determination was unavailing: contrary to the plaintiff's claim, the department was previously directed by this court in *Fish Unlimited* v. *Northeast Utilities Service Co.* (254 Conn. 1) to review all of its prior determinations regarding the cooling system, and the plaintiff mischaracterized this court's language in *Fish Unlimited*, which was not an order but, rather, an explanation of what the department would be required to do to renew the permit pursuant to the applicable statutory scheme; moreover, the hearing officer's decision to exclude this document was not improper because there was nothing

in the document or testimony to support its credibility, unlike other drafts of the permit, which were formally circulated by the department, authenticated, signed by their drafters, and admitted at the hearing.

c. The plaintiff could not prevail on her claim challenging the neutrality of the administrative proceeding on the ground that the hearing officer was biased, colluded with D Co. to issue the permit without any consideration of the closed-cycle cooling system, and prejudged the plaintiff's challenge to the permit's best technology available determination; the plaintiff's claim was inadequately briefed, as her allegations regarding bias were speculative and lacked citations to the administrative record, and the plaintiff's arguments concerning the allegations contained no relevant legal authority and were cursorily scattered across different headings and sections of her brief.

2. This court declined to review the plaintiff's claim that she established that unreasonable pollution would result from the power plant's operation as permitted and claim that the permit's best technology available determination violated the Clean Water Act, as they were inadequately briefed: the plaintiff provided only minimal citation to the trial or administrative record in support of these claims, and she provided no citation to any legal authority to define "unreasonable pollution" under CEPA, to define "best technology available" under the Clean Water Act, or to support either claim; moreover, this court declined to address the plaintiff's claim that the trial court failed to follow this court's prior remand order when it conducted a single hearing because the claim was inadequately briefed, as the plaintiff's briefing of this claim was inconsistent and nearly incomprehensible.

Argued September 10, 2020—officially released January 21, 2021*

Procedural History

Action, in the second case, for a temporary injunction in connection with the intake and discharge of water from the Long Island Sound and nearby bodies of water by the defendant Dominion Nuclear Connecticut, Inc., the owner and operator of Millstone Nuclear Power Station, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Tanzer*, *J.*, granted the defendants' motions to dismiss and rendered judgment thereon in their favor, from which the plaintiff appealed; thereafter, this court reversed the trial court's judgment in the second case

* January 21, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

and remanded that case for further proceedings; administrative appeal, in the first case, from the decision of the named defendant approving the application of the defendant Dominion Nuclear Connecticut, Inc., to renew its water discharge permit, brought to the Superior Court in the judicial district of Danbury, where the case was transferred to the judicial district of Hartford; subsequently, the cases were consolidated; thereafter, the court, *Sheridan*, *J.*, granted the defendants' motions to dismiss the action in the second case and rendered judgment thereon in their favor, from which the plaintiff appealed; subsequently, this court reversed the trial court's judgment in the second case and remanded that case for further proceedings; on remand, the cases were tried to the court, *Moukawsher*, *J.*; judgments for the defendants, from which the plaintiff appealed. *Affirmed.*

Nancy Burton, self-represented, the appellant (plaintiff).

Matthew I. Levine, assistant attorney general, with whom were *Daniel M. Salton*, assistant attorney general, and, on the brief, *William Tong*, attorney general, and *Claire E. Kindall*, solicitor general, for the appellees (named defendants in the first and second cases).

Elizabeth C. Barton, with whom were *Harold M. Blinderman* and, on the brief, *Taylor C. Amato*, for the appellee (defendant Dominion Nuclear Connecticut, Inc.).

Opinion

McDONALD, J. This case comes to us for the third time following lengthy and highly contested litigation. The plaintiff, Nancy Burton, brought an action under the Connecticut Environmental Protection Act of 1971 (CEPA), General Statutes § 22a-14 et seq., against the defendants, the Commissioner of Environmental Pro-

tection[1] and Dominion Nuclear Connecticut, Inc., and an administrative appeal under General Statutes § 4-183 (a) against the defendants, the Department of Environmental Protection[2] and Dominion. The actions, now consolidated, claim, in part, that the operation of the Millstone Nuclear Power Station (plant), which is owned and operated by Dominion, is causing unreasonable pollution of the waters of the state in violation of CEPA. Specifically, the plaintiff challenged the department's decision to issue a National Pollutant Discharge Elimination System permit to Dominion to authorize the intake and discharge of water by the plant, claiming that the permit renewal proceeding was inadequate to protect the rights recognized by CEPA. The trial court previously dismissed the plaintiff's CEPA action for lack of standing, which this court reversed in *Burton* v. *Commissioner of Environmental Protection*, 291 Conn. 789, 970 A.2d 640 (2009) (*Burton I*). Thereafter, the trial court again dismissed the plaintiff's CEPA action, this time concluding that the action was moot because the permit renewal proceeding had terminated. This court reversed that decision in *Burton* v. *Commissioner of Environmental Protection*, 323 Conn. 668, 150 A.3d 666 (2016) (*Burton II*). On remand from *Burton II*, the trial court conducted a hearing on the merits of the plaintiff's CEPA claim and administrative appeal and rendered judgments in favor of the defendants. The plaintiff now appeals from those judgments, claiming, among other things, that the trial court incorrectly concluded that she failed to prove that the administrative

[1] The Commissioner of Environmental Protection is now called the Commissioner of Energy and Environmental Protection. See footnote 2 of this opinion.

[2] In 2011, the Department of Energy and Environmental Protection was established as the successor department to the Department of Environmental Protection and the Department of Public Utility Control, and the Commissioner of Energy and Environmental Protection became the head of the successor department. See Public Acts 2011, No. 11-80, § 1, codified at General Statutes (Supp. 2012) § 22a-2d.

proceeding was inadequate and the operation of the plant would result in unreasonable pollution.

Our decisions in *Burton I* and *Burton II*, as supplemented by the record, set forth the following relevant facts and procedural history. The plant is a nuclear power facility located in Waterford. The plant has a once-through cooling system in which it draws water from Niantic Bay, cycles it once through the plant, then discharges the hot water into the Long Island Sound. The plaintiff alleges that this process draws approximately two billion gallons of water per day. These activities are authorized by a permit that the department issued to the owner of the plant—currently, Dominion—pursuant to the federal Clean Water Act, 33 U.S.C. § 1251 et seq.[3]

In 1992, the department issued a five year permit authorizing the plant's water intakes and discharges. After it expired, the plant continued to operate under that permit's terms while the department processed Dominion's timely permit renewal application pursuant to General Statutes § 4-182 (b). In 2006, the department issued a notice of tentative determination to renew the permit, which triggered the public aspect of the permit renewal proceeding. The plaintiff filed a timely notice of intervention in the permit renewal proceeding pursuant to General Statutes (Rev. to 2005) § 22a-19, as amended by No. 06-196, § 256, of the 2006 Public Acts.[4]

[3] The department originally issued the permit in 1992 to Dominion's predecessor, Northeast Nuclear Energy Company. When Dominion purchased the plant from Northeast in 2001, the department approved the transfer of Northeast's permit to Dominion and the substitution of Dominion for Northeast in the permit renewal application.

[4] General Statutes (Rev. to 2005) § 22a-19, as amended by No. 06-196, § 256, of the 2006 Public Acts (P.A. 06-196), provides in relevant part: "(a) In any administrative, licensing or other proceeding . . . any person . . . may intervene as a party on the filing of a verified pleading asserting that the proceeding . . . involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state. . . ."

Hereinafter, all references to § 22a-19 in this opinion are to the 2005 revision of the statute, as amended by P.A. 06-196, § 256.

She claimed, among other things, that the plant's operation, as permitted, would result in unreasonable pollution because it would "entrain and impinge [marine life], a natural resource of vital import[ance] to the state"; (internal quotation marks omitted) *Burton* v. *Commissioner of Environmental Protection*, supra, 291 Conn. 794; and "continuously release vast quantities of hot water [in]to the Long Island Sound . . . ." (Internal quotation marks omitted.) Id., 794–95. She claimed that these activities would "continue the process by which indigenous fish stocks have been devastated"; (internal quotation marks omitted) id., 794; and that converting the plant's current cooling system to a closed-cycle cooling system "would virtually eliminate waterborne adverse impacts to the marine environment . . . ." (Internal quotation marks omitted.) Id., 795. The hearing officer allowed the plaintiff to intervene on certain claims but precluded numerous other claims that the plaintiff raised concerning Dominion's and the department's alleged collusion and illegal activities, as well as the plant's alleged radioactive pollution. At every stage of the proceedings, the plaintiff has argued that the plant should convert to a closed-cycle cooling system. This cooling system would recirculate the water used to cool the plant and result in significantly less water intake and discharge. See, e.g., *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 214 n.2, 129 S. Ct. 1498, 173 L. Ed. 2d 369 (2009).

In 2007, while the permit renewal proceeding was ongoing, the plaintiff brought the first action against the commissioner under CEPA, General Statutes § 22a-16.[5] She claimed, among other things, that (1) the permit

[5] General Statutes § 22a-16 provides in relevant part: "[A]ny person . . . may maintain an action in the superior court . . . for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof . . . for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction . . . ."

renewal proceeding was inadequate to protect the rights recognized by CEPA, and (2) the current operation of the plant would result in unreasonable pollution. She sought, among other remedies, an injunction requiring the plant to convert to a closed-cycle cooling system. The trial court dismissed this action, holding that the plaintiff lacked standing under § 22a-16 because her claim arose from a permitting proceeding. The plaintiff appealed, and this court reversed. We concluded that the plaintiff had standing for her claim under § 22a-16 because her complaint "sets forth facts to support an inference that unreasonable pollution, impairment or destruction of a natural resource will probably result from [the plant's] operation." *Burton* v. *Commissioner of Environmental Protection*, supra, 291 Conn. 804. We also reasoned that the ongoing permit renewal proceeding did not preclude the plaintiff's action when, as here, the plaintiff claimed "that the permit renewal proceeding is inadequate to protect the rights recognized by [CEPA] . . . ." Id., 812. We remanded the case, directing the trial court to afford the plaintiff an opportunity to establish that the permit renewal proceeding was inadequate to protect the rights recognized by CEPA and, if appropriate, to stay that administrative proceeding. Id., 813.

Meanwhile, the permit renewal proceeding continued. In 2008, the department introduced a revised draft permit, which was the product of negotiations between Dominion and various environmental organizations that had also intervened in the administrative proceeding. The department conducted an evidentiary hearing on the permit renewal over the course of eighteen days in January and February, 2009. During the hearing, the plaintiff offered the testimony of two fact witnesses, including herself. She also extensively cross-examined all of Dominion's and the department's witnesses. Additionally, the plaintiff offered approximately sixty-one

exhibits, one of which was initially admitted as a full exhibit but was subsequently excluded.

In 2010, the hearing officer issued her proposed final decision[6] pursuant to General Statutes (Rev. to 2009) § 4-179 (c), in which she recommended that the department issue the revised draft permit. The plaintiff filed exceptions to the proposed final decision. The department's deputy commissioner, who was charged with rendering a final decision on the contested permit renewal, rejected the plaintiff's arguments. Thereafter, the deputy commissioner issued the permit.[7]

The 2010 permit is the center of this dispute. The Clean Water Act required the department to determine, in its best professional judgment, that the plant's cooling system, as permitted, reflects "the best technology available [BTA] for minimizing adverse environmental impact." 33 U.S.C. § 1326 (b) (2018); see *Natural Resources Defense Council, Inc.* v. *United States Environmental Protection Agency*, 822 F.2d 104, 111 (D.C. Cir. 1987) ("[i]f no national standards have been promulgated . . . the permit writer is authorized to use, on a case-by-case basis, [the permit writer's] 'best professional judgment' to impose" applicable effluent limitations that comply with Clean Water Act). The 2010 permit evaluated the operation of the plant's cooling

[6] Under General Statutes (Rev. to 2009) § 4-179 (b), a hearing officer makes a proposed final decision in a contested case, which "shall be in writing and contain a statement of the reasons for the decision and a finding of facts and conclusion of law on each issue of fact or law necessary to the decision." Following the hearing officer's proposed final decision, the department's deputy commissioner issued her final decision under General Statutes (Rev. to 2009) § 4-180, which affirmed the hearing officer's proposed final decision, with minor modifications, and conducted an independent evaluation as to whether the permit complied with, among other statutes and regulations, CEPA and the Clean Water Act.

[7] This five year permit expired in 2015. Dominion filed a timely application for renewal, and the plant continues to operate under this permit pursuant to § 4-182 (b).

system and concluded that it did not reflect the BTA. The permit recognized that requiring the plant to convert to a closed-cycle cooling system, as sought by the plaintiff, would reflect the BTA, but the permit declined to require the plant to convert to that cooling system because the department could not evaluate the feasibility of such a requirement. Instead, the permit imposed a series of other technological requirements to mitigate the current cooling system's environmental impact. The permit also required specific studies to ascertain the feasibility of converting the plant to a closed-cycle cooling system, the results of which may trigger a "subsequent BTA determination by the commissioner . . . ."

In evaluating the permit's compliance with CEPA and the Clean Water Act, the hearing officer and the deputy commissioner each concluded that the plant's current cooling system and the additional studies and technology requirements *together* reflected the BTA. The deputy commissioner noted that "the BTA in the present case is not a single technology but, rather, a combination of various technologies, studies, and commitments."

Following the department's issuance of the 2010 permit, the plaintiff timely filed the second action, an administrative appeal from the department's permit renewal under § 4-183 (a).[8] The plaintiff claimed, among other things, that the final decision and permit failed to make a legally valid BTA determination. This action was consolidated with the plaintiff's earlier CEPA action.

Thereafter, the defendants moved to dismiss the CEPA action, arguing that it was moot because the

[8] General Statutes § 4-183 (a) provides in relevant part: "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. . . ."

permit renewal proceeding had terminated. The trial court granted the defendants' motions to dismiss, reasoning that, with the conclusion of the administrative proceeding, the court lacked authority to grant equitable relief consistent with this court's remand in *Burton I*. The plaintiff appealed, and this court reversed, concluding that "the present action is not moot because a controversy continues to exist between the parties"; *Burton* v. *Commissioner of Environmental Protection*, supra, 323 Conn. 677; and "[t]he issuance of the renewal permit did not resolve or terminate these controversies, and they continue to exist." Id., 678. We also recognized that, if the plaintiff prevailed, the trial court's authority to issue an appropriate remedy would not be limited to staying the administrative proceeding; rather, the court would have the authority to adjudicate the impact of the plant's operation and issue appropriate equitable relief. See id. Accordingly, we remanded the case; id., 684; directing the trial court to determine "whether the permit renewal proceeding was inadequate because the department misinterpreted or misapplied the applicable environmental law and, if the hearing is determined to have been inadequate, [to] . . . order . . . appropriate declaratory or equitable relief." Id., 679 n.7. We further emphasized that "we express[ed] no opinion . . . regarding" the appropriate procedures for litigating the CEPA action and administrative appeal, as consolidated. Id.

In 2018, following our remand in *Burton II*, the trial court held a single, four day hearing on the merits of the two consolidated actions. The trial court rendered judgments for the defendants in both actions. It concluded that the plaintiff did not establish that the plant's operation, as permitted, resulted in unreasonable pollution. It also concluded that the plaintiff failed to establish that the administrative proceeding contained procedural irregularities or was otherwise inadequate

to protect the rights recognized by CEPA. The trial court also disagreed with the plaintiff's challenge to the permit's BTA determination, reasoning that the deputy commissioner, in her final decision, "conclude[d] that the technology proposed for [the plant] meets the Clean Water Act requirement of [BTA]."

The plaintiff filed a motion for mistrial, claiming, among other things, that the remand in *Burton II* required the trial court to hold a hearing first on the adequacy of the administrative proceeding and then a distinct hearing on the issue of unreasonable pollution. The trial court denied the plaintiff's motion. The plaintiff appealed from the judgments of the trial court to the Appellate Court, and the appeal was transferred to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. Additional relevant facts will be set forth as necessary.

Although the plaintiff's brief appears to assert six arguments, they are not clearly articulated, and they are more properly distilled into four claims. First, the plaintiff argues that the trial court incorrectly concluded that she failed to establish that the administrative proceeding was inadequate to protect the rights recognized by CEPA. Second, the plaintiff argues that the trial court improperly held that she failed to establish that unreasonable pollution would result from the plant's operation. Third, the plaintiff argues that the trial court incorrectly concluded that the department's BTA determination did not violate the Clean Water Act. Finally, the plaintiff argues that the trial court violated this court's remand order in *Burton II* by failing to follow the prescribed two step proceeding. The defendants argue that the plaintiff has inadequately briefed all of her claims. They also argue, in the alternative, that the trial court's procedures and substantive holdings were proper. We agree with the defendants that the majority of the plaintiff's claims are inadequately briefed, and

we conclude that those claims that are adequately briefed lack merit.[9]

I

We begin with the plaintiff's claim that the administrative proceeding was inadequate to protect the rights recognized by CEPA.[10] Although not clearly explained in her brief, the plaintiff appears to raise three arguments in support of her claim: the plaintiff challenges (1) the hearing officer's decision to preclude certain claims on which the plaintiff sought to intervene, (2) the hearing officer's decision to exclude certain evidence that the plaintiff sought to admit, and (3) the neutrality of the proceeding. We address each argument in turn.

A

The plaintiff first argues that the administrative proceeding was inadequate because the hearing officer precluded certain claims on which she sought to intervene. Specifically, the plaintiff asserts that paragraphs 5B, 5F, 5J and 5K of her notice of intervention were

[9] We note that the plaintiff raises numerous arguments throughout her brief via superficial and conclusory statements that do not appear to fit into any of her four main claims. To the extent they assert claims for relief, we conclude that they are inadequately briefed. These arguments include: the legality of the department's emergency authorizations regarding the plant's 1992 permit; the question of whether the department applied cost-benefit analysis in renewing the permit; the propriety of the other intervenors' negotiations and stipulation; the propriety of the trial court's reviewing evidence that was excluded from the administrative proceeding; and the veracity of the trial court's statements about the context of the Clean Water Act.

[10] We note that the plaintiff mischaracterizes the trial court's decision on this issue. She asserts that "[t]he trial court never ruled on the specific question of whether [the administrative] proceedings were inadequate pursuant to [General Statutes] § 22a-20 . . . ." This is not true. Under a heading dedicated to the inadequacy of the proceeding, the trial court concluded that the administrative proceeding "suffered from no fundamental procedural unfairness."

improperly precluded. Because the plaintiff does not reference the hearing officer's preclusion of any of her other claims, we confine our analysis to those claims enumerated in the plaintiff's brief.

Paragraph 5B alleged that granting the permit renewal application would result in the release of toxic and radioactive substances into the Long Island Sound. Paragraph 5F alleged that "[t]he application violates the federal Clean Water Act in that it fails to implement the [BTA] to avoid unnecessary adverse impacts and in other respects." Paragraph 5J baldly alleged that Dominion had pleaded "guilty to committing federal felonies" due to falsifying environmental monitoring reports, releasing carcinogens, and violating permit conditions. Paragraph 5K alleged, also with little context, that Dominion had a "track record of firing whistleblowers in retaliation for their truth telling and exposure" of information about the plant's operation. The hearing officer precluded these four claims, among others, because they contained "allegations that are either not relevant to this proceeding, redundant, or have been previously resolved," and because they raised issues that were "beyond the scope of the application before [the hearing officer] or are otherwise not within the jurisdiction of [the department]." For its part, the trial court noted that the "hearing officer heard, in one fashion or another, all of the substantive issues [the plaintiff] complains about, including the issue of the closed-cycle [cooling] system." The plaintiff argues that preclusion of these claims contributed to the inadequacy of the administrative proceeding because she was unable to raise issues relevant to the contested permit renewal decision. The defendants argue that the hearing officer correctly concluded that the department lacked jurisdiction over the precluded claims.

We begin with the applicable legal principles governing a party's intervention in an administrative proceed-

ing. Section 22a-19 (a) provides in relevant part: "In any administrative . . . proceeding . . . any person . . . may intervene as a party on the filing of a verified pleading asserting that the proceeding . . . involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state." In addition, the department's rules of practice provide that the hearing officer in a contested case has discretion to "restrict the participation in the proceeding of [an intervenor], although only to the extent necessary to promote justice and the orderly conduct of the proceeding." Regs., Conn. State Agencies § 22a-3a-6 (k) (7). We therefore consider whether the hearing officer abused her discretion by precluding the plaintiff's claims. See, e.g., *Board of Selectmen* v. *Freedom of Information Commission*, 294 Conn. 438, 446, 984 A.2d 748 (2010) ("[o]ur ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted . . . in abuse of its discretion" (internal quotation marks omitted)).

We conclude that the hearing officer did not abuse her discretion by precluding these four claims. First, paragraph 5F, which challenged the permit renewal application because it failed to implement the BTA, was duplicative of several of the claims on which the hearing officer permitted the plaintiff to intervene. In particular, the hearing officer considered the plaintiff's challenge regarding the proper implementation of the BTA under paragraph 6, which asserted the diminished environmental impact of a closed-cycle cooling system. The hearing officer then issued a detailed ruling that the plaintiff had failed to establish a prima facie showing of unreasonable pollution. Because paragraph 5F was duplicative of several other claims and the hearing officer fully considered the plaintiff's arguments on this

point, the hearing officer did not abuse her discretion by precluding it.

In addition, we conclude that it was not an abuse of discretion for the hearing officer to preclude paragraphs 5B, 5J and 5K on the ground that they raised issues that were outside the department's jurisdiction. We have repeatedly explained that "[CEPA] grants standing to intervenors to raise only those environmental concerns that are within the jurisdiction of the particular administrative agency conducting the proceeding [in] which the party seeks to intervene." *Nizzardo* v. *State Traffic Commission*, 259 Conn. 131, 148, 788 A.2d 1158 (2002). In 2006, when the plaintiff filed her notice of intervention, the department had jurisdiction over "all matters relating to the preservation and protection of the air, water and other natural resources of the state." General Statutes (Rev. to 2005) § 22a-2 (a).[11] Because radiological discharge by nuclear power plants is regulated exclusively by the federal government, the hearing officer's decision to preclude paragraph 5B for lack of jurisdiction was not an abuse of discretion. See *Burton* v. *Dominion Nuclear Connecticut, Inc.*, 300 Conn. 542, 552, 23 A.3d 1176 (2011) (holding, in distinct action brought by plaintiff against Dominion, that federal law preempted regulation of radiological safety at nuclear power plants); see also *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 212, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983) ("the [f]ederal [g]overnment maintains complete control of the safety and 'nuclear' aspects of energy generation"). Regarding paragraphs 5J and 5K, federal criminal law and employment practices are likewise outside the department's jurisdiction.

Moreover, under CEPA, intervention in administrative proceedings is limited to claims asserting certain

[11] The department's jurisdiction was modified in 2011 by No. 11-80, §§ 1 and 55, of the 2011 Public Acts. See footnote 2 of this opinion.

environmental issues. See *Pond View, LLC* v. *Planning & Zoning Commission*, 288 Conn. 143, 159, 953 A.2d 1 (2008) ("it is axiomatic that [§ 22a-19] encompasses substantive environmental issues only"). The plaintiff does not connect her allegations in paragraphs 5J and 5K to any such environmental issue. Accordingly, it was not an abuse of discretion for the hearing officer to preclude these claims.

B

The plaintiff next argues that the administrative proceeding was inadequate because the hearing officer excluded certain evidence that the plaintiff sought to introduce. Specifically, the plaintiff identifies a document that she alleges is a draft BTA determination prepared by department staff, dated September 10, 2007.[12] This document asserts that the closed-cycle cooling system satisfies the BTA requirement in the Clean Water Act.

The following additional facts are relevant to our analysis. At the administrative hearing, the plaintiff sought to introduce the September 10, 2007 document during her cross-examination of a Dominion witness, but the hearing officer declined to enter it as a full

[12] The plaintiff also asserts that "the hearing officer precluded the plaintiff from introducing into evidence the most recently expired 1992 permit . . . ." (Footnote omitted.) To the extent that the plaintiff argues that this exclusion contributed to the inadequacy of the proceeding, this argument is inadequately briefed because the plaintiff provides no analysis regarding why exclusion of this evidence was improper. "We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Knapp* v. *Knapp*, 270 Conn. 815, 823 n.8, 856 A.2d 358 (2004).

Likewise, at oral argument, the plaintiff referenced testimony from litigation in another case by an expert, Mark Gibson, which was not admitted as evidence in the present case. Because this report was not raised prior to oral argument, we decline to consider this newly raised argument. "[I]t is well settled that a claim cannot be raised for the first time at oral argument." *Hornung* v. *Hornung*, 323 Conn. 144, 160 n.20, 146 A.3d 912 (2016).

exhibit. The hearing officer noted that it was not authenticated, and, therefore, it was not credible. She observed that it was not typed on department letterhead; nor was it signed to otherwise indicate its source. The plaintiff asserted that the unidentified person who gave her the document told her that it was prepared by department staff. The hearing officer noted that, without testimony by the person who gave the plaintiff the document, her assertion was hearsay. Finally, the hearing officer concluded that there was no foundation to introduce the document as an exhibit because there was nothing to link the document to the witness the plaintiff was cross-examining.[13]

On appeal, the plaintiff appears to argue that the exclusion of this document rendered the administrative proceeding inadequate for two reasons. First, the plaintiff challenges the hearing officer's evidentiary ruling that the document lacked credibility. Second, the plaintiff argues that the exclusion of this document rendered the administrative proceeding inadequate because the department was previously ordered by this court to "review all of [the department's] prior determinations that [the plant's] cooling system is consistent with the provisions of the . . . Clean Water Act, which requires that the cooling water intake structure represent [the BTA] for minimizing environmental impacts." (Internal quotation marks omitted.) *Fish Unlimited* v. *Northeast Utilities Service Co.*, 254 Conn. 1, 14, 756 A.2d 262 (2000), overruled in part on other grounds by *Waterbury* v. *Washington*, 260 Conn. 506, 800 A.2d 1102 (2002). In *Fish Unlimited*, which was decided before the permit renewal proceeding began, several environmental organizations sought an injunction against the prior owners and operators of the plant requiring it to convert to a closed-cycle cooling system. See id., 3 and nn.1 and 2;

[13] The trial court did not specifically address the issue of whether exclusion of this document was proper.

see also id., 9. In upholding the trial court's dismissal of the complaint, this court reasoned that the environmental organizations were first required to exhaust the administrative remedies available through the permit renewal proceeding. Id., 19–21. Although the holding in *Fish Unlimited* regarding the applicability of the exhaustion doctrine has since been overturned; see *Waterbury* v. *Washington*, supra, 545; the plaintiff argues that this court ordered the department to review prior BTA determinations in the permit renewal proceeding, which it failed to do by excluding the September 10, 2007 draft BTA determination.

The defendants contend that exclusion of this document was not an abuse of discretion in light of the hearing officer's role to evaluate the reliability of evidence. Dominion also argues that the plaintiff has not shown how the hearing officer's evidentiary ruling affected the outcome of the permit renewal proceeding in light of the expansive administrative record. For their part, the department and the commissioner argue that the passages the plaintiff cites from *Fish Unlimited* "were not intended to instruct the department on the substantive requirements of a hearing."

Resolution of this claim is controlled by well settled principles. Under the department's rule governing contested cases, a hearing officer in a contested case has the discretionary power to "[a]dmit or exclude evidence and rule on objections to evidence . . . ." Regs., Conn. State Agencies § 22a-3a-6 (d) (2) (E). In addition, "[t]he hearing officer *shall not admit any evidence which is* irrelevant, immaterial, unduly repetitious, *untrustworthy, or unreliable.*"[14] (Emphasis added.) Id., § 22a-3a-6 (s) (1). Moreover, "administrative tribunals are not

[14] This subdivision of the regulation supplements General Statutes § 4-178, under which "the agency shall, as a matter of policy, provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence . . . ."

strictly bound by the rules of evidence and . . . they may consider evidence which would normally be incompetent in a judicial proceeding, as long as the evidence is reliable and probative." *Tomlin* v. *Personnel Appeal Board*, 177 Conn. 344, 348, 416 A.2d 1205 (1979); see also, e.g., *Connecticut Fund for the Environment, Inc.* v. *Stamford*, 192 Conn. 247, 249, 470 A.2d 1214 (1984) ("Although proceedings before administrative agencies . . . are informal and are conducted without regard to the strict rules of evidence, the hearings must be conducted so as not to violate the fundamental rules of natural justice. . . . Due process of law requires not only that there be due notice of the hearing but that at the hearing the parties involved have a right to produce relevant evidence, and an opportunity to know the facts on which the agency is asked to act, to cross-examine witnesses and to offer rebuttal evidence." (Citation omitted.)). "It is within the province of the hearing officer to determine the credibility of evidence. . . . The plaintiff bears the burden of demonstrating that a hearing officer's evidentiary ruling is arbitrary, illegal or an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *Roy* v. *Commissioner of Motor Vehicles*, 67 Conn. App. 394, 397, 786 A.2d 1279 (2001).

We disagree with both of the plaintiff's arguments regarding the September 10, 2007 document. First, the plaintiff mischaracterizes this court's language from *Fish Unlimited.* Our statement that "the department must review all of its prior determinations [regarding the cooling system]"; *Fish Unlimited* v. *Northeast Utilities Service Co.*, supra, 254 Conn. 14; was not an order; rather, it was an explanation of what the department would be required to do to renew the permit pursuant to the applicable statutory scheme. We described this process to explain that, contrary to the arguments raised by the plaintiff environmental organizations, the

permit renewal proceeding would not be futile, and the department would have the authority to grant the requested relief. See id., 14–15. Contrary to the plaintiff's argument, excluding this document did not "def[y]" any "order" from this court.

Second, the hearing officer's decision to exclude this document was not improper because there was nothing in the document or testimony to support its credibility. This contrasts with the other drafts of the permit, which were formally circulated by the department, authenticated, signed by their drafters, and admitted at the hearing. The department's regulations require a hearing officer to exclude evidence that is "untrustworthy, or unreliable"; Regs., Conn. State Agencies § 22a-3a-6 (s) (1); and the plaintiff has not explained how the hearing officer's evidentiary ruling regarding the document's credibility was improper, particularly in light of the document's low probative value.

C

Finally, with respect to the adequacy of the proceeding, the plaintiff challenges the neutrality of the administrative proceeding. Specifically, she argues that the hearing officer was biased, colluded with Dominion to issue the permit without any consideration of the closed-cycle cooling system, and prejudged the plaintiff's challenge to the permit's BTA determination. The defendants argue that the plaintiff's claim is inadequately briefed because it is conclusory, speculative, and without citations to the administrative record. They also argue, in the alternative, that the hearing officer's conduct was proper and that, even if there were any procedural irregularities, the plaintiff failed to show how she was harmed by them.

We agree with the defendants that this claim is inadequately briefed. The plaintiff's allegations of the hearing officer's bias are speculative and contain no citations

to the record.[15] See, e.g., *Connecticut Coalition Against Millstone* v. *Connecticut Siting Council*, 286 Conn. 57, 87, 942 A.2d 345 (2008) ("mere conclusory assertions regarding a claim, with no mention of relevant authority and minimal or no citations from the record, [are inadequately briefed]"). Additionally, the plaintiff's argument contains no legal authority discussing the circumstances under which an agency's action may be invalidated for bias, collusion, or prejudgment. Finally, the plaintiff's argument on this claim is cursorily scattered across different headings and sections of her brief, making it short and difficult to comprehend. As such, we conclude that it is inadequately briefed.

II

The plaintiff raises three additional claims on appeal. First, she claims that she established that unreasonable pollution would result from the plant's operation as

[15] The only specific evidence that the plaintiff supplies to support her allegations of collusion between the department and Dominion is testimony by a Dominion witness regarding the stipulation negotiations between the department, Dominion, and the other environmental intervenors. In the administrative proceeding, the witness testified that a "ground rule" of the stipulation negotiations was that the parties would not discuss the issue of converting the plant to a closed-cycle cooling system. In objecting to the plaintiff's subsequent line of questioning, Dominion's attorney restated the witness' testimony as indicating that "it was clear that all parties were in agreement that [the closed-cycle cooling system] was not on the table." In this appeal, the plaintiff asserts that the witness' testimony that the closed-cycle cooling system was "off the table" supports her allegations of bias, collusion, and prejudgment by the hearing officer. With no analysis or other evidence to support them, these allegations are speculative and the claims on which they are based are inadequately briefed. See, e.g., *Knapp* v. *Knapp*, 270 Conn. 815, 823 n.8, 856 A.2d 358 (2004) ("[when] the parties cite no law and provide no analysis of their claims, we do not review such claims" (internal quotation marks omitted)). Moreover, the witness' testimony referenced the stipulation negotiations, not the hearing. The hearing officer and the deputy commissioner were required to evaluate the stipulated revised draft permit to ensure that it complied with applicable state and federal law, which they did in their proposed final decision and final decision, respectively. The plaintiff presents no evidence that these decisions were prejudged as a result of the stipulation negotiations.

permitted. Second, she claims that the permit's BTA determination violates the Clean Water Act. Specifically, the plaintiff argues that the permit functionally makes no valid BTA determination at all because it determines that the current cooling system does *not* meet the BTA requirement, yet it declines to require the plant to convert to the superior cooling system. Third, the plaintiff claims that the trial court failed to follow this court's remand order in *Burton II* when it conducted a single hearing on the merits of her actions. The defendants contend that each of these claims is inadequately briefed. We agree with the defendants.

"We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 120, 830 A.2d 1121 (2003). For a reviewing court to "judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016). In addition, briefing is inadequate when it is "not only short, but confusing, repetitive, and disorganized." Id., 726.

We are mindful that "[i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party. . . . Nonetheless, [a]lthough we allow [self-represented] liti-

gants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Citation omitted; internal quotation marks omitted.) *New Haven* v. *Bonner*, 272 Conn. 489, 497–98, 863 A.2d 680 (2005). Moreover, "[a]n appellant cannot . . . rely on the appellee to decipher the issues and explain them to the [reviewing court]." *State* v. *Buhl*, supra, 321 Conn. 728–29; see, e.g., *Traylor* v. *State*, 332 Conn. 789, 806–807, 213 A.3d 467 (2019) ("[w]e acknowledge that the plaintiff is a self-represented party and that it is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants . . . [but] a litigant on appeal [is not] relieved of the obligation to sufficiently articulate a claim so that it is recognizable to a reviewing court" (citations omitted; internal quotation marks omitted)).

We conclude that the plaintiff's claims that she established that unreasonable pollution would result from the plant's operation and that the permit's BTA determination violates the Clean Water Act are inadequately briefed. The plaintiff provides only minimal citation to the trial court record or administrative record in support of those claims.[16] She provides no citation to any

[16] For the first time, in her reply brief, the plaintiff quotes, without any analysis, a memorandum prepared by an individual who did not testify in the trial court and whose credibility as an expert witness could not be judged. The short memorandum, circulated internally within the department, summarizes a report evaluating the impact of the plant's operation on fish population and entrainment during the year 1996. It is well settled that "new arguments are not to be raised in a reply brief because [the opposing party is] preclude[d] . . . from responding." *State* v. *Williams*, 146 Conn. App. 114, 137 n.25, 75 A.3d 668 (2013), aff'd, 317 Conn. 691, 119 A.3d 1194 (2015); see, e.g., *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 91 n.9, 881 A.2d 139 (2005) ("[i]t is a well established principle that arguments cannot be raised for the first time in a reply brief" (internal quotation marks omitted)). The plaintiff's reply brief cursorily states that this memorandum is "particularly damning" but does not analyze its relevance to her proposition that a closed-cycle cooling system would reduce the plant's environmental impact. Accordingly, we decline to consider the memorandum or any related argument that the plaintiff raises.

legal authority to define "unreasonable pollution" under CEPA, define "best technology available" under the Clean Water Act, or support either claim. She also provides no meaningful analysis for either claim. See, e.g., *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 748, 183 A.3d 611 (2018) ("[a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly" (internal quotation marks omitted)). Accordingly, we decline to review these claims.

In addition, we conclude that the plaintiff's claim that the trial court failed to follow this court's remand order in *Burton II* when it conducted a single hearing is inadequately briefed. As an initial matter, the plaintiff's briefing is inconsistent: she asserts that the trial court should have conducted a two step proceeding, but she differs in what she argues the two steps should be. At one point in her brief, the plaintiff argues that the two steps should have been (1) a hearing on the merits of her claims, and then (2) a hearing on the appropriate relief. Later in her brief, the plaintiff argues that the two steps should have been (1) a hearing on the merits on the inadequacy of the administrative proceeding issue, and then (2) a hearing on the merits on the unreasonable pollution issue. Given this inconsistency, the plaintiff's argument on this claim is nearly incomprehensible. See, e.g., *State* v. *Buhl*, supra, 321 Conn. 726 (declining to review claim that was "not only short, but confusing, repetitive, and disorganized"); see also, e.g., *Birch* v. *Polaris Industries, Inc.*, 812 F.3d 1238, 1249 (10th Cir. 2015) (declining to review claim that was "vague, confusing, [and] conclusory"). Additionally, the plaintiff devotes less than one page of her main brief to this argument. "Although the number of pages devoted to an argument in a brief is not necessarily determinative, relative sparsity weighs in favor of concluding that the argument has been inadequately briefed." *State* v. *Buhl*,

supra, 726. Accordingly, we consider this claim to be inadequately briefed and decline to address it.[17]

The judgments are affirmed.

In this opinion the other justices concurred.

ONE ELMCROFT STAMFORD, LLC *v.* ZONING BOARD OF APPEALS OF THE CITY OF STAMFORD ET AL.
(SC 20393)

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

Syllabus

Pursuant to statute ((Rev. to 2003) § 14-55), no certificate of approval for a license to deal in or to repair motor vehicles "shall be issued until the application has been approved and such location has been found suitable for the business intended . . . ."

Pursuant further to statute (§ 2-30b (a)), when two or more legislative acts passed during the same legilsative session "amend the same section of the general statutes . . . and reference to the earlier adopted act is not made in the act passed later, each amendment shall be effective except in the case of irreconcilable conflict, in which case the act which was passed last . . . shall be deemed to have repealed the irreconcilable provision contained in the earlier act . . . ."

The defendants P Co. and A filed an application with the Department of Motor Vehicles seeking a license to operate a used car dealership in the city of Stamford, and A filed an application with the defendant zoning board of appeals seeking a certificate of approval for the proposed location of the dealership. The board held a public hearing and approved the application subject to various conditions. The plaintiff filed an administrative appeal from the board's decision, claiming that the board improperly failed to conduct the suitability analysis mandated by § 14-55. The trial court rendered judgment denying the administrative appeal, concluding that the board was required to and did consider the suitability of the propsed location in accordance with § 14-55. The plaintiff appealed to the Appellate Court, claiming, inter alia, that the board failed to conduct the suitability analysis mandated by § 14-55 and that the trial court had improperly searched beyond the board's stated findings to cure

[17] We also note that the trial court repeatedly clarified the procedures it would employ in conducting the hearing, and the plaintiff indicated her understanding of and assent to those procedures.

that deficiency. The Appellate Court reversed the trial court's judgment, concluding that, pursuant to § 2-30b (a), two 2003 amendments to § 14-55, Nos. 03-184 and 03-265 of the 2003 Public Acts, the former of which expressly repealed § 14-55 without providing a replacment, the latter of which purported to amend § 14-55 by adding two new sentences, and neither of which referenced each other, constituted irreconcilable amendments and that P.A. 03-265 should be given effect because it was passed by the General Assembly two days after P.A. 03-184 was passed. On the granting of certification, P Co. and A appealed to this court, claiming that the Appellate Court incorrectly concluded that § 14-55 was not repealed in 2003. *Held* that the Appellate Court incorrectly concluded that § 14-55 had not been repealed: the biennial codifications compiled by the Legislative Commissioners' Office, and thereafter ratified by the General Assembly, constituted an authoritative source for the statutory law of this state at the time those codifications went into effect, it was undisputed that the General Assembly adopted, ratified, confirmed and enacted the 2005 revision of the General Statutes and that § 14-55 was listed therein as having been repealed by P.A. 03-184, this same language was presented to the General Assembly and was ratified in seven successive statutory revisions, and, accordingly, this court was unable to conclude that the plaintiff satisfied its burden of proving that these entries were the result of a mere editorial error and should simply be ignored; moreover, other jurisdictions and secondary authorities provide support for the position that an attempt to amend a previously repealed statute is generally ineffective, and the Appellate Court improperly applied § 2-30b (a) to resolve the conflict between the two amendments, as that statute applies only when two or more acts amend the same statute, and P.A. 03-184 did not amend § 14-55, as that term is ordinarily defined, but, rather, eliminated it in its entirey.

Argued October 21, 2020—officially released January 25, 2021*

Procedural History

Appeal from the decision of the named defendant granting the application of the defendant Pasquale Pisano for approval of the location of a used car dealership on certain real property, brought to the Superior Court in the judicial district of New Britain and transferred to the judicial district of Stamford-Norwalk, where the case was tried to the court, *Hon. Taggart D. Adams*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment denying

* January 25, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

the plaintiff's appeal, from which the plaintiff appealed to the Appellate Court, *Sheldon*, *Elgo* and *Lavery*, *Js.*, which reversed the judgment of the trial court and remanded the case to that court with direction to remand the case to the named defendant for further proceedings, and the defendant Pasquale Pisano et al., on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Gerald M. Fox III, for the appellants (defendant Pasquale Pisano et al.).

Jeffrey P. Nichols, with whom were *Amy E. Souchuns* and, on the brief, *John W. Knuff*, for the appellee (plaintiff).

William Tong, attorney general, *Clare E. Kindall*, solicitor general, and *Jane R. Rosenberg*, assistant attorney general, filed a brief for the state of Connecticut as amicus curiae.

Opinion

KAHN, J. The dispositive issue in this appeal is whether the suitability analysis mandated by General Statutes (Rev. to 2003) § 14-55[1] is still required in order to obtain a certificate of approval of the location for a used car dealership, notwithstanding the fact that subsequent revisions of the General Statutes list that provision as having been repealed. The plaintiff, One Elmcroft Stamford, LLC, filed an administrative appeal challenging the decision of the defendant Zoning Board of Appeals of the City of Stamford to grant a certificate of approval of the location for a used car dealership run by the defendants Pasquale Pisano and Pisano Brothers Automotive, Inc.[2] After the trial court rendered judg-

[1] All references to § 14-55 in this opinion are to the 2003 revision of the General Statutes.

[2] For the sake of simplicity, we refer to Pasquale Pisano and Pisano Brothers Automotive, Inc., collectively as the defendants and to them individually by name. We refer to the Zoning Board of Appeals of the City of Stamford as the board.

ment denying the administrative appeal, the plaintiff appealed to the Appellate Court, which reversed the trial court's judgment. See *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, 192 Conn. App. 275, 277–78, 217 A.3d 1015 (2019). The defendants, following our grant of certification, now appeal to this court. On appeal, the defendants claim that the Appellate Court incorrectly concluded that § 14-55 continues to carry the force of law. In response, the plaintiff contends that the Appellate Court correctly concluded that § 14-55 was not repealed by a sequence of contradictory public acts relating to that statute that were passed by the legislature in 2003. For the reasons that follow, we conclude that § 14-55 has been repealed and, accordingly, reverse the judgment of the Appellate Court.

We begin with a brief review of the various statutes and public acts passed by our legislature that are relevant to our consideration of this appeal. General Statutes (Rev. to 2003) § 14-54 provides in relevant part: "Any person who desires to obtain a license for dealing in or repairing motor vehicles shall first obtain . . . a certificate of approval of the location for which such license is desired from the selectmen or town manager of the town, the mayor of the city or the warden of the borough, wherein the business is located or is proposed to be located, except in any city or town having a zoning commission and a board of appeals, in which case such certificate shall be obtained from the board of appeals. . . ."

Standards related to the issuance of such certificates were originally outlined by the legislature in § 14-55. General Statutes (Rev. to 2003) § 14-55 provides in relevant part: "In any town, city or borough the local authorities referred to in section 14-54 shall, upon receipt of an application for a certificate of approval referred to in said section, assign the same for hearing within sixty-five days of the receipt of such application. . . . *No*

such certificate shall be issued until the application has been approved and such location has been found suitable for the business intended, with due consideration to its location in reference to schools, churches, theaters, traffic conditions, width of highway and effect on public travel." (Emphasis added.)

Two public acts passed by the General Assembly during the 2003 legislative session relating to § 14-55 are at issue. First, No. 03-184, § 10, of the 2003 Public Acts (P.A. 03-184), which passed the second house of the legislature on June 2, 2003, expressly repealed § 14-55 without providing a replacement.[3] Second, No. 03-265, § 9, of the 2003 Public Acts (P.A. 03-265), which passed the second house of the legislature only two days later, purported to amend § 14-55 by appending two new sentences to the previously existing language.[4]

[3] P.A. 03-184, § 10, provides, in its entirety: "(*Effective October 1, 2003*) Sections 14-55, 14-67k and 14-322 of the general statutes are repealed." (Emphasis in original.)

[4] P.A. 03-265, § 9, provides as follows: "Section 14-55 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2003*):

"In any town, city or borough the local authorities referred to in section 14-54 shall, upon receipt of an application for a certificate of approval referred to in said section, assign the same for hearing within sixty-five days of the receipt of such application. Notice of the time and place of such hearing shall be published in a newspaper having a general circulation in such town, city or borough at least twice, at intervals of not less than two days, the first not more than fifteen, nor less than ten days, and the last not less than two days before the date of such hearing and sent by certified mail to the applicant not less than fifteen days before the date of such hearing. All decisions on such certificate of approval shall be rendered within sixty-five days of such hearing. The applicant may consent to one or more extensions of any period specified in this section, provided the total extension of any such period shall not be for longer than the original period as specified in this section. The reasons for granting or denying such application shall be stated by the board or official. Notice of the decision shall be published in a newspaper having a general circulation in such town, city or borough and sent by certified mail to the applicant within fifteen days after such decision has been rendered. Such applicant shall pay a fee of ten dollars, together with the costs of publication and expenses of such hearing, to the treasurer of such town, city or borough. No such certificate

Neither P.A. 03-184 nor P.A. 03-265 referred to the other, and both were assigned an effective date of October 1, 2003.[5] The legislature passed no further public acts with respect to § 14-55 after 2003.[6]

In 2005, the Legislative Commissioners' Office, pursuant to the legislative directive set forth in General Statutes § 2-56 (g), completed a biennial revision of our state's laws that cited the public acts previously described in this opinion and expressly listed § 14-55 as repealed. This revision was ultimately ratified by the legislature. See General Statutes (Rev. to 2005) § 14-55; see also Public Acts 2005, No. 05-12, § 1 (P.A. 05-12) ("Volumes 1 to 13, inclusive, of the general statutes of Connecticut, revised to 1958, consolidated, codified, arranged and revised to January 1, 2005, by the legislative commissioners under the provisions of subsection

shall be issued until the application has been approved and such location has been found suitable for the business intended, with due consideration to its location in reference to schools, churches, theaters, traffic conditions, width of highway and effect on public travel. In any case in which such approval has been previously granted for any location, the local authority may waive the requirement of a hearing on a subsequent application. In addition, the local authority may waive the requirement of a hearing on an application wherein the previously approved location of a place of business is to be enlarged to include adjoining or adjacent property." (Emphasis in original.)

[5] Number 03-278, § 40, of the 2003 Public Acts (P.A. 03-278), which became effective on the date of its passage, July 9, 2003, made technical changes to § 14-55. Because those changes can either be harmonized with the amendments made in P.A. 03-265; see General Statutes § 2-30b (b); see also *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 192 Conn. App. 288; or, in the alternative, can be read simply as operative up to the point of the repeal effected by P.A. 03-184, the passage of P.A. 03-278 is not dispositive of the issues presented in this appeal.

[6] The legislature has, however, since chosen to amend the statutory provision that requires certificates of approval of the location, § 14-54, on several occasions. These amendments include not only an act passed in a special session later that same year; see Public Acts, Spec. Sess., June, 2003, No. 03-6, § 70; but also various other acts passed over the years that followed. See Public Acts 2016, No. 16-55, § 4; Public Acts 2006, No. 06-133, § 23; Public Acts 2005, No. 05-218, § 22.

(g) of section 2-56 of the general statutes and published under the title 'The General Statutes of Connecticut, Revision of 1958, Revised to January 1, 2005', including the consolidation, codification, arrangement and revision of the public acts of the state from 1959 through 2004, inclusive, *are adopted*, *ratified*, *confirmed and enacted*." (Emphasis added.)).[7]

Against this legislative backdrop, we turn to the following relevant facts and procedural history relating to this particular case. On June 1, 2016, the defendants filed an application with the Department of Motor Vehicles seeking a license to operate a used car dealership at 86 Elmcroft Road in the city of Stamford. On July 14, 2016, Pisano also filed an application with the board seeking a certificate of approval of the location for the dealership as required by statute. See General Statutes (Rev. to 2015) § 14-54, as amended by Public Acts 2016, No. 16-55, § 4. The board held a public hearing on September 14, 2016. Although two neighboring residents appeared at the hearing to voice their opposition to the request, the plaintiff, a commercial entity that owns an adjacent parcel, did not appear before the board to oppose the application. After that hearing, the board voted unanimously to approve that application with various conditions.[8]

[7] Seven subsequent revisions, each of which indicates that § 14-55 was repealed, were ratified in the same manner. See Public Acts 2019, No. 19-39, § 1; Public Acts 2017, No. 17-16, § 1; Public Acts 2015, No. 15-9, § 1; Public Acts 2013, No. 13-16, § 1; Public Acts 2011, No. 11-14, § 1; Public Acts 2009, No. 09-57, § 1; Public Acts 2007, No. 07-12, § 1.

[8] Both the trial court and the Appellate Court observed that the certificate of approval ultimately issued by the board " 'looks and reads like a variance.' " *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 192 Conn. App. 291. We are constrained to agree but pause to observe that the dispute between the parties before us relates only to a claim that the board improperly issued a certificate of approval of location. Indeed, in the pleadings initiating this proceeding, the plaintiff specifically appealed "from the granting of a certificate of approval of location . . . ."

The plaintiff subsequently commenced this administrative appeal pursuant to General Statutes § 14-57 and pursuant to General Statutes § 4-183 of the Uniform Administrative Procedure Act, claiming, inter alia, that the board improperly failed to conduct the suitability analysis mandated by § 14-55 in granting a certificate for the approval of the location. After briefing and oral argument from the parties, the trial court issued a memorandum of decision, denying the plaintiff's appeal. Although the trial court agreed with the plaintiff that the board was required to consider the suitability factors set forth in § 14-55, it concluded, after its own examination of the record, that the board had given due consideration to the suitability of the defendants' proposed use. The plaintiff subsequently appealed from the trial court's judgment to the Appellate Court, claiming, inter alia, that the board had failed to conduct the suitability analysis mandated by § 14-55 and that the trial court had improperly searched beyond the board's stated findings to cure that deficiency. *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 192 Conn. App. 278.

The Appellate Court first looked to General Statutes § 2-30b (a) to resolve the conflict between P.A. 03-184 and P.A. 03-265. Id., 285–87. Section 2-30b (a) provides in relevant part: "When two or more acts passed at the same session of the General Assembly amend the same section of the general statutes, or the same section of a public or special act, and reference to the earlier adopted act is not made in the act passed later, each amendment shall be effective except in the case of irreconcilable conflict, in which case the act which was passed last in the second house of the General Assembly shall be deemed to have repealed the irreconcilable provision contained in the earlier act . . . ." Citing *State* v. *Kozlowski*, 199 Conn. 667, 676, 509 A.2d 20 (1986), the Appellate Court concluded that § 2-30b "applies to all acts which expressly change existing

legislation . . . .'' (Internal quotation marks omitted.) *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 192 Conn. App. 287. The Appellate Court concluded that, pursuant to § 2-30b, P.A. 03-184 and P.A. 03-265 were irreconcilable amendments to the same statute and that P.A. 03-265 should be given effect because it was passed by the second house of the General Assembly two days after P.A. 03-184. Id.

After reaching this conclusion, the Appellate Court turned to the question of whether the board had given ''due consideration to [the proposed] location in reference to schools, churches, theaters, traffic conditions, width of highway and effect on public travel'' as required by § 14-55. (Internal quotation marks omitted.) Id., 292. The Appellate Court answered that question in the negative, concluding that, ''[a]lthough the board heard evidence that, to some extent, could pertain to suitability, and also issued several conditions of approval that accommodate[d] potential concerns within the neighborhood, the board issued no findings as to the suitability factors enumerated under § 14-55.''[9] Id., 293. As a result, the Appellate Court reversed the trial court's judgment and remanded the case with direction to sustain the plaintiff's appeal. Id., 293, 296. We thereafter granted the defendants' petition for certification to appeal, limited to the following issue: ''Did the Appellate Court correctly conclude that . . . § 14-55 was not repealed in 2003?'' *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, 333 Conn. 936, 218 A.3d 594 (2019).[10]

[9] The Appellate Court also agreed with the plaintiff's contention that the trial court had improperly reached beyond the board's explicit findings, which employed language typical of a variance; see footnote 8 of this opinion; to find compliance with the requirements of § 14-55. *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 192 Conn. App. 293–95. The Appellate Court concluded that the board itself was required to make those findings. Id., 295–96.

[10] The plaintiff raises three distinct procedural arguments that warrant brief attention. First, the plaintiff asserts that our review of this certified

In the present appeal, the defendants claim that the Appellate Court erred in deciding that § 14-55 was not repealed in 2003. Specifically, the defendants argue that the biennial revision of the General Statutes compiled by the Legislative Commissioners' Office and ratified by the General Assembly should be viewed as an authoritative source of the statutory law of this state. The defendants also argue that the decision to list § 14-55 as repealed was, on its merits, correct because nothing was left for P.A. 03-265 to amend following the express repeal of § 14-55 in P.A. 03-184. Finally, the defendants posit that § 2-30b cannot be applied to this case because P.A. 03-184 repealed, rather than amended, § 14-55.

In response, the plaintiff asserts that the decision to list § 14-55 as repealed in the 2005 revision of the General Statutes was an "editorial error" by the Legislative Commissioners' Office. Specifically, the plaintiff argues that, because P.A. 03-184 and P.A. 03-265 are in irreconcilable conflict, § 2-30b requires that the latter be given effect and that, even if § 2-30b did not apply, common-

question is barred because the defendants did not challenge the continued validity of § 14-55 before the trial court. Our own review of the record indicates that, notwithstanding its general adoption of the board's brief, the defendants did, in fact, expressly rely in part on the legislature's repeal of § 14-55 during oral argument before the trial court. The question of that statute's continuing validity was then squarely addressed in both the trial court's memorandum of decision and by the Appellate Court on appeal. Second, the plaintiff argues that we should decline to address several new legal arguments advanced by the defendants relating to the application of § 2-30b and the legislative ratification embodied in P.A. 05-12. We reject this claim as well. See, e.g., *Jobe* v. *Commissioner of Correction*, 334 Conn. 636, 644 n.2, 224 A.3d 147 (2020) ("[o]ur rules of preservation apply to claims, but they do not apply to legal arguments, and, therefore, [w]e may . . . review legal arguments that differ from those raised below if they are subsumed within or intertwined with arguments related to the legal claim before the court" (internal quotation marks omitted)). Finally, the plaintiff's claim that the defendants have caused it prejudice by attempting to interject new evidence relating to the internal procedures of the Legislative Commissioners' Office lacks merit because the defendants' argument simply relies on references to various pieces of legislation passed by the General Assembly.

law rules of statutory construction require the same result. The plaintiff contends that decisions made by the Legislative Commissioners' Office do not carry the force of law because their actions are not those of the legislators. Finally, the plaintiff argues that the legislature's ratification of the biennial revision prepared by the Legislative Commissioners' Office should have no bearing on the validity of § 14-55 because ratification is pro forma and was not undertaken by the legislature with the conflict between P.A. 03-184 and P.A. 03-265 in mind.

We begin by noting the applicable standard of review. The parties agree that the discrete issue now before this court—the continued vitality of § 14-55—presents a question of law over which our review is plenary. See, e.g., *Redding* v. *Georgetown Land Development Co., LLC*, 337 Conn. 75, 82, 251 A.3d 980 (2020) ("[q]uestions of statutory construction are matters of law subject to plenary review"); *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 594, 181 A.3d 550 (2018) ("[t]he interpretation and application of a statute . . . involves a question of law over which our review is plenary" (internal quotation marks omitted)). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.)

Sena v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 45–46, 213 A.3d 1110 (2019).

Over one century of case law demonstrates that this court has consistently afforded deference to the formal publication of statutes by the legislature. The subject was first addressed by this court in *Eld* v. *Gorham*, 20 Conn. 7 (1849). In that case, we examined a statutory provision relating to the competency of witnesses that, according to a subsequent revision of the General Statutes, took effect on June 27, 1848. Id., 14. The underlying public act, by contrast, specified that the statutory provision would take effect on June 28, 1848. Id. The defendant, who sought application of the statute and argued in favor of the earlier date, claimed that the revision constituted authoritative evidence of the existence and validity of the laws contained therein. Id. The plaintiff responded by urging this court to look into the proceedings of the entity then charged with the task of codification, the committee of revision, and to determine whether it had exceeded the powers conferred on it by the legislature. Id.

This court observed that, by ratifying the revised statutes, the legislature had indicated an intent to treat the materials contained within that revision as "the only public statute laws of this [s]tate . . . ." Id., 15. *Eld* held, in no uncertain terms, that "[w]hen . . . the legislature constituted such certified copy an authentic record of the statute laws of the state, it has the same force and effect as if it were in truth a portion of the original records of the proceedings of that body. As such, it imports absolute verity; is, in itself, conclusive evidence of what it states; and is therefore entitled to implicit credit." Id., 16. Thus, the court concluded, "we are bound to consider the copy of the published statutes . . . as containing the veritable and only statute laws of the state, when the present action was tried; and that therefore, it is not competent for us, in this suit and

in this mode, to permit any enquiry as to the propriety of the course taken by the committee of revision, or the secretary of state, respecting the publication or authentication of those statutes." Id., 16–17.

Subsequent cases, although allowing limited inquiries into the validity and scope of various statutory enactments, provide additional support for the deference to be afforded to published statutes. See *State* v. *South Norwalk*, 77 Conn. 257, 264–65, 58 A. 759 (1904) (noting that presence of statute in bound publication of public acts "is in ordinary cases conclusive"); *State* v. *Savings Bank of New London*, 79 Conn. 141, 147, 64 A. 5 (1906) ("The record of the Public Acts of the General Assembly made and kept by the [s]ecretary is evidence, and ordinarily the conclusive evidence, of the existence or nonexistence of an [a]ct of the General Assembly . . . . Although in certain proceedings the existence of an [a]ct which does not appear in that record may be established by other evidence." (Citation omitted.)); *State* v. *McGuire*, 84 Conn. 470, 478, 80 A. 761 (1911) (reaffirming general principle that statutory revision "is to be held to contain the entire statute law of the [s]tate in force when it went into effect"); *Leete* v. *Griswold Post No. 79, American Legion*, 114 Conn. 400, 406, 158 A. 919 (1932) (noting that "presumption against repeal by implication . . . [is] augmented when . . . both [statutory] provisions have been retained in a general revision of the statutes, and by the [reenactment] of such revision established as parts of the entire statute law of the [s]tate").

Although these decisions are not of recent vintage, neither the Appellate Court nor the parties to the present case have cited any authority that would cause us to reconsider the general proposition that, when our legislature has chosen to adopt formal procedures for aggregating and publishing its own work, the resulting

product is entitled to significant weight.[11] We therefore conclude, consistent with this precedent, that the biennial codifications compiled by the Legislative Commissioners' Office pursuant to § 2-56 (g) and thereafter ratified by the legislature continue to constitute an authoritative source for the statutory law of this state at the time they went into effect. The contents of such revisions are presumptively correct, and a party seeking to overcome that presumption bears the burden of proving its infirmity. See 82 C.J.S. 401–402, Statutes § 323 (2009) ("[i]t is incumbent on those who assert that the codifiers went beyond their commissions to prove it"); cf. 1 U.S.C. § 204 (a) (2018) ("[t]he matter set forth in the edition of the Code of Laws of the United States current at any time shall . . . establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the com-

[11] In dismissing the importance of statutory revisions, the Appellate Court relied on its previous decision in *Figueroa* v. *Commissioner of Correction*, 123 Conn. App. 862, 870, 3 A.3d 202 (2010), cert. denied, 299 Conn. 926, 12 A.3d 570 (2011), for the proposition that "compilations of public acts prepared by the Legislative Commissioners' Office do not constitute the actual law of this state . . . ." *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 192 Conn. App. 285 n.5. We disagree with that reliance for two distinct reasons.

First, the publications at issue in *Figueroa* were compilations of the public acts required by General Statutes § 2-58, and not legislatively ratified revisions of the General Statutes produced pursuant to § 2-56 (g). See *Figueroa* v. *Commissioner of Correction*, supra, 123 Conn. App. 867–69. Although some of *Eld*'s progeny support a level of deference to the former; see *State* v. *Savings Bank of New London*, supra, 79 Conn. 147; *State* v. *South Norwalk*, supra, 77 Conn. 264–65; the present case involves only the latter. The formal ratification process attendant to the legislature's review of biennial revisions detailed previously in this opinion renders this distinction a meaningful one.

Second, the issue raised in *Figueroa* was fundamentally different. In that case, the Appellate Court addressed a claim that, when amending certain criminal statutes, the legislature had failed to comply with the enactment clause set forth in article third, § 1, of the Connecticut constitution. See *Figueroa* v. *Commissioner of Correction*, supra, 123 Conn. App. 870 (noting that "it is not the publication of these acts in the Public Acts compilations that makes them effective against members of the public, but their lawful passage by the General Assembly").

mencement of the session following the last session the legislation of which is included").

It is undisputed that the legislature "adopted, ratified, confirmed and enacted" the 2005 revision of the General Statutes; Public Acts 2005, No. 05-12, § 1; and that § 14-55 is listed therein as having been repealed by P.A. 03-184 on October 1, 2003. This same language has been presented to the legislature and has been ratified in seven successive statutory revisions. See footnote 7 of this opinion. For the reasons that follow, we are unable to conclude that the plaintiff has satisfied its burden of proving that these entries were the result of a mere "editorial error" and should simply be ignored.

Other jurisdictions that have addressed the issue provide ample persuasive authority to support the position that an attempt to amend a previously repealed statute is generally ineffective.[12] See *Oldham* v. *Rooks*, 361 So. 2d 140, 143 (Fla. 1978) ("[a]s a general rule of statutory construction, an act amending a section of an act repealed, even by implication, is void"); *Lampkin* v. *Pike*, 115 Ga. 827, 829, 42 S.E. 213 (1902) ("[t]he legislature has general power to amend statutes, but an amendatory act, to be valid as such, must relate to an existing statute, and not to one which is nonexistent, or has been repealed" (internal quotation marks omitted)); *Taylor* v. *Board of Commissioners*, 147 Idaho 424, 436, 210 P.3d 532 (2009) ("Generally, courts hold that a repealed act cannot be amended since an amendatory act alters, modifies, or adds to a prior statute. . . . Without an act in place, there is nothing to amend." (Citation omitted;

[12] We acknowledge that some jurisdictions may give effect to subsequent amendments to a repealed statute, provided the new statutory provision can stand independently without reliance on the previously repealed statute. See 1A N. Singer & J. Singer, Sutherland Statutes & Statutory Construction (7th Ed. 2009), § 22:3, pp. 253–54. That is not the circumstance presented by the present case, in which the amendment that passed after the repeal could not stand on its own without reliance on the repealed provision.

footnote omitted.)); *Griffin Telephone Corp.* v. *Public Service Commission*, 236 Ind. 29, 34, 138 N.E.2d 150 (1956) ("an act which attempts to amend a [nonexistent] law or section, is itself void and of no legal effect"); *Dept. of Revenue* v. *Burlington Northern, Inc.*, 169 Mont. 202, 209, 545 P.2d 1083 (1976) (state statute providing that "[a]n act amending a section of an act repealed is void" (internal quotation marks omitted)); *State* v. *Brennan*, 89 Mont. 479, 486, 300 P. 273 (1931) ("[i]t was not possible for the [l]egislature to put life into a dead statute by amendment of it"); *State* v. *Blackwell*, 246 N.C. 642, 643, 99 S.E.2d 867 (1957) ("It thus appears that the amendatory act . . . on which the [s]tate relies . . . purportedly amends a statute which had been repealed. Thus the amendatory act . . . is a nullity. This is so for the reason that where . . . an entire independent section of a statute is wiped out of existence by repeal, there is nothing to amend."); see also *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514, 19 L. Ed. 264 (1868) ("the general rule, supported by the best elementary writers, is, that when an act of the legislature is repealed, it must be considered . . . as if it never existed" (footote omitted; internal quotation marks omitted)).

Authoritative secondary sources provide further support for this rule. See 1A N. Singer & J. Singer, Sutherland Statutes & Statutory Construction (7th Ed. 2009) § 22:3, p. 253 ("When an act has been repealed by a general repealing clause or by implication, the fact of its repeal is sometimes overlooked and a new act purports to amend it. This raises the issue of whether a repealed statute can be amended. Since an amendatory act alters, modifies, or adds to a prior statute, all courts hold that a repealed act cannot be amended. No court will give the attempted amendment effect to revive a repealed act."); see also 82 C.J.S., supra, § 296, p. 371 ("It has been held that a statute which has been repealed

in its totality cannot be amended. The supposition of the legislature that the statute is still in force as evidenced by the attempted amendment can make no difference." (Footnote omitted.)).[13]

We also disagree with the Appellate Court's conclusion that the conflict between P.A. 03-184 and P.A. 03-265 can be resolved by application of § 2-30b (a). As previously stated in this opinion, that statute only applies "[w]hen two or more acts passed at the same session of the General Assembly *amend* the same section of the general statutes . . . ." (Emphasis added.) General Statutes § 2-30b (a). Because no specific definition of the verb "amend" is supplied, we ascertain its meaning by looking to the ordinary use of that word at the time the legislature chose to employ it and, more broadly, by examining the relationship of § 2-30b to other statutes. See General Statutes § 1-2z. At the time the language set forth in § 2-30b (a) was first enacted, the word "amend" was defined in the following manner: "To improve. To change for the better by removing defects or faults. . . . To change, correct, revise." (Citation omitted.) Black's Law Dictionary (4th Ed. 1968) p. 106. This concept stood in explicit contrast to the word "repeal," the entry for which contains the following notation: " 'Repeal' of a law means its complete abrogation by the enactment of a subsequent statute, whereas the 'amendment' of a statute means an

[13] The plaintiff argues that the result reached in the present case should be different because P.A. 03-265 was passed by the legislature before the effective date for P.A. 03-184. We disagree. As stated previously in this opinion, P.A. 03-265 amended § 14-55 without mention of P.A. 03-184, and both of those acts were assigned an effective date of October 1, 2003. If P.A. 03-265 became effective first, then § 14-55, in its newly amended form, would have been repealed by the subsequent effect of P.A. 03-184. Conversely, if the express repeal embodied by P.A. 03-184 became effective first, then the general rule that a repealed statute cannot be revived by a later amendatory act applies with full force. Either way, the result is the same: the legislature's express repeal governs.

alteration in the law already existing, leaving some part of the original still standing." Id., p. 1463. In this case, P.A. 03-184 did not change, correct, revise or alter § 14-55; rather, it eliminated the statutory provision in its entirety. The meaning of the word "amend" in § 2-30b (a) must also be construed in a manner consistent with General Statutes § 2-18, which provides in relevant part: "Each bill for a public act amending any statute . . . shall set forth in full the act . . . or the section or subsection thereof, to be amended. Matter to be omitted or repealed shall be surrounded by brackets and new matter shall be indicated by underscoring . . . ." There is no dispute that P.A. 03-184 does not conform to this requirement. See footnote 3 of this opinion.

Reading the plain language of § 2-30b in this light, we are simply not at liberty to accept the plaintiff's argument that the express repeal contained within P.A. 03-184 was intended to "amend" § 14-55, as that term has been employed by the legislature. As a result, we conclude that the Appellate Court improperly applied § 2-30b (a) to the present case. We view this reading as entirely consistent with our previous construction of § 2-30b in *State* v. *Kozlowski*, supra, 199 Conn. 676, on which we may continue to rely. See, e.g., *Kasica* v. *Columbia*, 309 Conn. 85, 94, 70 A.3d 1 (2013) (noting that § 1-2z does not require this court to overrule prior judicial interpretations of statutes). In *Kozlowski*, we concluded that a public act employing the prefatory phrase "[s]ection 14-227a of the general statutes is repealed and the following is substituted in lieu thereof," but which otherwise followed "the format prescribed by . . . § 2-18," was amendatory in nature and, therefore, subject to the rule set forth in § 2-30b. (Internal quotation marks omitted.) *State* v. *Kozlowski*, supra, 671–72, 676. Then, as now, the focus of our inquiry was whether the legislature intended to amend an existing statute. Id., 676. If we are to limit the word "amend"

to its plain meaning, an outright repeal would not qualify as an amendment so as to justify the application of § 2-30b.

Finally, we note that the Legislative Commissioners' Office did not apply § 2-30b when faced with a similar scenario in 2011. During the legislative session that year, the General Assembly passed two separate public acts relating to General Statutes (Rev. to 2011) § 32-717,[14] which had called on, among others, the Commissioner of Economic and Community Development, to prepare recommendations for an implementation plan and budget for the establishment of an "Innovation Network" to facilitate job growth. That statute was expressly repealed by a budget implementation bill; see Public Acts 2011, No. 11-48, § 303 (P.A. 11-48); that passed the second house of the legislature on June 1, 2011, and was signed by the governor on July 1, 2011. Notwithstanding that repeal, the legislature sought to make substantive amendments to § 32-717 later that same session. Specifically, No. 11-140, § 11, of the 2011 Public Acts (P.A. 11-140), which passed the second house of the legislature on June 7, 2011, and was signed by the governor on July 8, 2011, sought to give the Commissioner of Economic and Community Development the authority to actually establish such an "Innovation Network" and added, inter alia, a significant, new provision detailing the scope of that entity's activities. As in the present case, the subsequent revision of the General Statutes listed § 32-717 as repealed. See General Statutes (Rev. to 2013) § 32-717.[15] That entry has now remained unchanged for nearly one decade.

The plaintiff argues that this example is inapposite because the Legislative Commissioners' Office appeared to have "simply made a mistake" in reconciling P.A. 11-

[14] All references to § 32-717 in this opinion are to the 2011 revision of the General Statutes.

[15] We note that the state of Connecticut sought and received permission from this court to appear in the present case as amicus curiae, and that

48 and P.A. 11-140. This argument fails to account for the fact that the legislature's express ratification of the 2013 revision, without subsequent corrective legislative action, demonstrates that the decision to list § 32-717 as repealed in the 2013 revision was not the result of inadvertence or neglect but, rather, the consistent and studious application of established rules of statutory construction. This provides good reason to believe that the Legislative Commissioners' Office conducted a similar, thorough review of the contradictory public acts at issue in the present case and applied the same principles of statutory construction in compiling the subsequent revision.

It has now been fifteen years since the 2005 revision of the General Statutes was promulgated and, despite having passed multiple amendments to the statutory scheme governing certificates of approval of the location; see footnote 6 of this opinion; the legislature has not yet seen fit to reenact the provisions previously set forth in § 14-55. Our role in the present appeal is simply to determine and follow the will of the legislature. See, e.g., *Ashmore* v. *Hartford Hospital*, 331 Conn. 777, 787, 208 A.3d 256 (2019) ("When we construe a statute, we act not as plenary lawgivers but as surrogates for another policy maker, [that is] the legislature. In our role as surrogates, our only responsibility is to determine what the legislature, within constitutional limits, intended to do." ((Internal quotation marks omitted.)). Mindful of that singular duty, we conclude that § 14-55 has been repealed.[16]

this example was drawn to our attention by its thoughtful and comprehensive brief.

[16] As a result of its conclusion that § 14-55 was not repealed, the Appellate Court declined to address certain other claims raised by the plaintiff. See *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 192 Conn. App. 293 n.10. Because those issues fall outside of the scope of the certified appeal before us; see *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 333 Conn. 936; we decline to address them in the present appeal.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to consider the plaintiff's remaining claims.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* WAGNER GOMES (SC 20407)

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

Syllabus

Convicted of the crime of assault in the second degree, the defendant appealed to the Appellate Court, claiming that the trial court had deprived him of his right to present a defense of investigative inadequacy by omitting from its jury instructions certain language in his written request to charge stating that the jury could consider evidence of the police investigation as it might relate to any weaknesses in the state's case. At trial, the defendant contended that the victim had either mistakenly or intentionally misidentified him as the person who assaulted her and that, if the police had conducted even a minimally adequate investigation of the incident, they would have discovered this to be the case. In support of his contention, the defendant adduced testimony from a number of witness regarding the inadequacy of the police investigation. The Appellate Court affirmed the trial court's judgment, concluding that the investigative inadequacy instruction that the trial court had given did not mislead the jury or otherwise deprive the defendant of his right to present an investigative inadequacy defense. In reaching its conclusion, the Appellate Court noted that the trial court's instruction was identical to the model jury instruction provided on the Judicial Branch website and consistent with investigative inadequacy instructions approved by this court in *State* v. *Collins* (299 Conn. 567) and *State* v. *Williams* (169 Conn. 322). The Appellate Court also rejected the defendant's contention that, in light of recent developments in the law, as indicated in this court's recent decision in *State* v. *Wright* (322 Conn. 270), the model instruction no longer reflected the correct statement of the law. On the granting of certification, the defendant appealed to this court, renewing his claim in the Appellate Court challenging the propriety of the trial court's investigative inadequacy instruction. While this appeal was pending, the defendant was deported, and the record did not disclose the basis for his deportation. *Held*:

1. The defendant's appeal was not rendered moot because of his deportation, as this court's mootness doctrine recognizes reputational damage as a

cognizable, collateral consequence of a criminal conviction, and, if the defendant should prevail on the merits, it will remove the stain of the underlying conviction from his record.

2. The Appellate Court incorrectly determined that the trial court's investigative inadequacy instruction did not mislead the jury or otherwise deprive the defendant of his right to present an investigative inadequacy defense, there having been a reasonable possibility that the jury was misled by the trial court's instruction: in light of *Williams*, *Collins* and *Wright*, this court concluded that the model jury instruction utilized by the trial court failed to inform the jury of a defendant's right to rely on relevant deficiencies or lapses in the police investigation to raise the specter of a reasonable doubt and the jury's concomitant right to consider any such deficiencies in evaluating whether the state has proven its case beyond a reasonable doubt, and the language that the defendant requested to be added to the model instruction would have properly apprised the jury of the defendant's right to present an investigative inadequacy defense and its right to consider it in evaluating the strength of the state's case; moreover, there was a significant risk that the instruction given by the trial court improperly led the jury to believe that it could not consider the defendant's arguments concerning the adequacy of the police investigation, because, instead of apprising the jury that reasonable doubt could be found to exist if it concluded that the investigation was careless, incomplete or so focused on the defendant that it ignored leads that may have suggested other culprits, there was a reasonable possibility that the instruction had the opposite effect and caused the jury to believe that it was precluded from considering any such evidence; furthermore, given the weakness of the state's case, the instructional error was harmful, as the state's case against the defendant rested almost entirely on the believabilty of the victim's testimony identifying the defendant as the perpetrator, which the defendant sought to refute by directing the jury's attention to the alleged inadequacies in the police investigation.

State v. *Aquino* (279 Conn. 293), to the extent that it held that a defendant's deportation during the pendency of his or her appeal renders the appeal moot when the record does not disclose whether the defendant's guilty plea was the sole reason for his deportation, overruled.

Argued September 15, 2020—officially released January 26, 2021*

Procedural History

Substitute information charging the defendant with the crime of assault in the second degree, brought to the Superior Court in the judicial district of Fairfield,

* January 26, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

geographical area number two, and tried to the jury before *Doyle*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Alvord*, *Moll* and *Bear*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Reversed*; *new trial.*

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Cornelius Kelly*, acting state's attorney, and *Margaret E. Kelley*, state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Wagner Gomes, appeals[1] from the judgment of the Appellate Court affirming his conviction, rendered following a jury trial, of assault in the second degree in violation of General Statutes § 53a-60 (a) (2). The defendant claims that the Appellate Court incorrectly determined that the trial court's investigative inadequacy jury instruction did not mislead the jury or otherwise deprive him of his right to present an investigative inadequacy defense. We agree and, accordingly, reverse the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following relevant facts and procedural history. "In the

[1] This court granted the defendant's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court correctly conclude that the trial court's 'investigative inadequacy' jury instruction did not mislead the jury or otherwise prejudice the defendant?" And (2) "[s]hould this court overrule or limit its decisions in *State* v. *Williams*, 169 Conn. 322, 363 A.2d 72 (1975), and *State* v. *Collins*, 299 Conn. 567, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011), as they relate to the 'investigative inadequacy' jury instruction, and invoke its supervisory authority to prescribe an investigative inadequacy instruction as proposed by the defendant?" *State* v. *Gomes*, 334 Conn. 902, 219 A.3d 798 (2019).

early morning hours of September 12, 2015, the victim, Edilene Brandao, along with several other persons, including Raphael Morais, attended a birthday party at the Brazilian Sports Club (club), located at 29 Federal Street in Bridgeport. Shortly after arriving, the victim had one drink, and Morais went to the bar to get a drink for himself. Morais confronted the defendant's girlfriend, who was at the bar, pushed her, and made offensive remarks to her. A fight then broke out inside the club between the defendant and Morais. Security guards intervened and separated them. The defendant was taken outside, and Morais was taken to the [club's] patio.

"The victim went to the patio with Morais. There was a fence at the back of the patio, and the victim had her back to that fence. The victim proceeded to ask Morais why he was fighting, and Morais responded, 'it's him.' The victim then turned to face the fence and saw the defendant standing approximately two feet away from her, on the outside of the fence, with a bottle in his hand. The defendant then struck the victim on the forehead with the bottle.

"The club's owner, Demetrio Ayala, Jr., knew the defendant because he visited the club several times per month. Ayala observed the [earlier] fight between the defendant and another person known to him as 'Rafael.'[2] [Ayala ordered the club's security guards to separate the defendant and Morais, and to take the defendant outside and Morais to the patio. Soon thereafter] Ayala, after hearing shouting on the patio, went to investigate and discovered that the victim was bleeding. Ayala then

[2] "It is not clear from the record whether the individual that Ayala knew as 'Rafael' was Raphael Morais. Ayala did not know the last name of the individual whom he referred to as Rafael, and the spelling of the name, Raphael or Rafael, is inconsistent throughout the trial transcripts. Nevertheless, both parties concede in their briefs that the defendant and Morais were engaged in some form of altercation." *State* v. *Gomes*, 193 Conn. App. 79, 82 n.5, 218 A.3d 1063 (2019).

went out the front door of the club in order to try to find the defendant, [who had just been taken outside of the club by a security guard, to see if he was near enough to the outside of the fence surrounding the patio to be involved in the victim's injuries. Ayala observed the defendant] in the parking lot running away from the club. Ayala subsequently called the police.

"Before the police arrived, the victim was transported to St. Vincent's Medical Center in Bridgeport by private car in the company of several persons who were in the club that night. She arrived at the hospital at about 12:30 a.m., where she was seen by a triage nurse and received treatment for the bleeding and pain. Several hours later, the victim was also treated by a plastic surgeon and then released.[3]

"John Topolski and Matthew Goncalves, officers with the Bridgeport Police Department, were among the first police officers to arrive at the club shortly after 1:30 a.m. Upon their arrival, they observed that '[the scene] was a mess' and that 'there [were] maybe [100] people scattered amongst the streets.' Officer Topolski briefly spoke with Morais, who had, he observed, a swollen face, one eye that was swollen shut, profuse facial bleeding, clothes covered in blood, and an apparently dislocated shoulder.[4] Once the scene was secure, the

[3] "The plastic surgeon who treated the victim testified regarding her injuries. Reading from an emergency department attending physician's note that was in evidence, the plastic surgeon stated: 'The patient sustained a deep laceration in the left eyebrow, and she was struck with a bottle on the face during the fight in the bar. . . . There is a five centimeter in length laceration that's deep with irregular borders and a small stellar portion [over] the left brow . . . .' The plastic surgeon also testified that the 'stellar portion' referred to 'where the skin . . . bursts open from contact where it stellates, so it just looks like a star. . . . It's not a clean laceration, like you get from a kitchen knife.' " *State* v. *Gomes*, 193 Conn. App. 79, 82–83 n.6, 218 A.3d 1063 (2019).

[4] "There was evidence that, after the defendant struck the victim with the bottle, several other patrons of the club attacked Morais." *State* v. *Gomes*, 193 Conn. App. 79, 83 n.7, 218 A.3d 1063 (2019).

officers departed for the hospital, intending to question Morais, who also had been taken to the hospital before the police completed their initial on-site investigation. While the officers were en route to the hospital, they received a radio dispatch informing them that a woman, who also had been injured at the club, was already at the hospital.

"When the officers arrived at the hospital, Officer Topolski went in search of the injured woman, and Officer Goncalves went in search of Morais. Although Officer Goncalves located Morais, he was unable to speak with Morais because his wounds were being treated, and he was being prepared for surgery. Officer Topolski located the victim in the waiting area of the hospital's emergency department and identified her as the woman who had been injured at the club. The victim was in the company of approximately five other individuals. Officer Topolski observed that the victim was crying and visibly shaken. She had blood covering her face and was holding gauze to her head. Despite her physical and emotional condition, the victim was coherent enough to provide information to Officer Topolski. In her verbal statement to Officer Topolski, the victim denied that Morais may have been the aggressor in some type of altercation with her. Officer Topolski, while he was at the hospital, also obtained the name of the defendant, but it was not clear from whom he received that information.[5]

"On October 2, 2015, the victim went to the Bridgeport police station with her attorney, where she was interviewed by Detective Paul Ortiz in the presence of Sergeant Gilbert Valentine about the events that occurred on September 12, 2015. Detective Ortiz reviewed Officer

[5] "The victim testified that she did not give the defendant's name to the police because she did not know the defendant prior to the night she was attacked." *State* v. *Gomes*, 193 Conn. App. 79, 84 n.8, 218 A.3d 1063 (2019).

Topolski's report of the events. Through this report, Detective Ortiz learned that the defendant might be a suspect. Detective Ortiz prepared a photographic array that included a photograph of the defendant, which he showed to the victim. When the victim viewed the photograph of the defendant, she became emotional and started to cry. She examined the entire array and then selected the defendant's photograph, on which she wrote that she was '100 percent' confident that he was the person who had attacked her. The defendant was subsequently arrested.

"At trial, the defendant sought to persuade the jury that reasonable doubt existed regarding the victim's identification of the defendant as the person who assaulted her. The main defense advanced by the defendant was that the police had conducted an inadequate investigation of the incident.

"During closing arguments, defense counsel argued that 'this case screams reasonable doubt. . . . [T]he police completely failed in this case, and they completely failed [the victim]. They didn't go back to that scene that night. They didn't identify the crime scene. They didn't take any photos so that you, ladies and gentlemen, could see how the scene looked that night. How the lighting looked. They never tried to get any surveillance video. . . . They didn't confirm what happened.' Defense counsel also argued that the police 'spent ninety minutes on this investigation,' and that the case 'boil[ed] down to one witness and what she saw in a split second, and she may very well believe that [the defendant] did this to her. But the police did nothing to confirm as to what Officer Goncalves said they needed to do.'[6]

[6] Officer Goncalves testified that, in his experience responding to incidents at bars, because of the consumption of alcohol, bystanders tend to volunteer information to the police about their observations, which are often in "blurry" detail. He further testified that the police view this information with skepticism until it can be "confirm[ed]." During closing argument,

"In connection with his defense of inadequate police investigation, the defendant had filed a written request to charge the jury, which provided in relevant part: '[1] You have heard some arguments that the police investigation was inadequate and biased. [2] The issue for you to decide is not the thoroughness of the investigation or the competence of the police. [3] However, you may consider evidence of the police investigation as it might relate to any weaknesses in the state's case. [4] Again, the only issue you have to determine is whether the state, in light of all the evidence before you, has proved beyond a reasonable doubt that the defendant is guilty of the counts with which he is charged.'

"On October 27, 2018, the court held a charge conference. In discussing the final charge, the court told defense counsel that it would be charging on the adequacy of the police investigation, in a form that was somewhat similar to the defendant's requested instruction, but that '[its instruction] may be a little bit different.'

"The court instructed the jury in relevant part: 'You have heard some arguments that the police investigation was inadequate and that the police involved in the case were incompetent or biased. The issue for you to decide is not the thoroughness of the investigation or the competence of the police. The only issue you have to determine is whether the state, in light of all the evidence before you has proved beyond a reasonable doubt that the defendant is guilty of the counts with which he was charged.' Defense counsel objected to

defense counsel directed the jury's attention to this testimony: "You know what else Officer Goncalves said . . . when he testified about that night? It was interesting. I don't know if you caught it. He said so typically when . . . officers do respond to bar fights, alcohol is involved so people tend to be more vocal and facts tend to be a little blurry. . . . [The police] want to confirm some of the information coming in. Confirm, ladies and gentlemen. The police never confirmed what [the victim] had to say. They never confirmed her story."

the court's omission of point three of his requested instruction.

"The jury subsequently found the defendant guilty of assault in the second degree . . . . The court rendered judgment in accordance with the jury's verdict and imposed a total effective sentence of five years of imprisonment, execution suspended after two years, followed by three years of probation." (Footnote added; footnotes in original; footnotes omitted.) *State* v. *Gomes*, 193 Conn. App. 79, 81–86, 218 A.3d 1063 (2019). The defendant appealed to the Appellate Court, claiming that "the jury instructions, as given, deprived him of his right to present a defense of investigative inadequacy. Specifically, the defendant argue[d] that the [trial] court erred in failing to include point three of his requested jury charge, which [provides]: 'However, you may consider evidence of the police investigation as it might relate to any weaknesses in the state's case.' The defendant argue[d] that without the inclusion of this requested sentence, the jury would not 'have understood how to use the evidence [defense counsel] was able to elicit about the inadequacies of [the police investigation].' " Id., 86.

The Appellate Court rejected the defendant's claim, noting that the instruction given by the trial court was (1) identical to the model criminal jury instruction on investigative inadequacy provided on the Judicial Branch website,[7] and (2) consistent with investigative

[7] Instruction 2.6-14, titled "Adequacy of Police Investigation," was approved by the Judicial Branch's Criminal Jury Instruction Committee on November 6, 2014. It provides: "You have heard some arguments that the police investigation was inadequate and that the police involved in this case were incompetent. The issue for you to decide is not the thoroughness of the investigation or the competence of the police. The only issue you have to determine is whether the state, in light of all the evidence before you, has proved beyond a reasonable doubt the defendant is guilty of the count[s] with which (he/she) is charged." Connecticut Criminal Jury Instructions 2.6-14, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited January 21, 2021).

The commentary to instruction 2.6-14 provides: " 'A defendant may . . . rely upon relevant deficiencies or lapses in the police investigation to raise

inadequacy instructions approved by this court in *State* v. *Collins*, 299 Conn. 567, 598, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011),[8] and *State* v. *Williams*, 169 Conn. 322, 335 n.3, 363 A.2d 72 (1975),[9] and by the Appellate Court in *State* v. *Nieves*,

the specter of reasonable doubt, and the trial court violates his right to a fair trial by precluding the jury from considering evidence to that effect.' *State* v. *Collins*, 299 Conn. 567, 599–600 [10 A.3d 1005] (finding that such an instruction as this does not preclude the jury from considering the evidence of the police investigation as it might relate to any weaknesses in the state's case) [cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011)]. '*Collins* does not require a court to instruct the jury on the quality of police investigation, but merely holds that a court may not preclude such evidence and argument from being presented to the jury for its consideration.' *State* v. *Wright*, 149 Conn. App. 758, 773–74, [89 A.3d 458] cert. denied, 312 Conn. 917 [94 A.3d 641] (2014)." Connecticut Criminal Jury Instructions, supra, 2.6-14, commentary.

[8] In *Collins*, the trial court instructed the jury in relevant part: "Now, you have heard in the course of arguments by counsel discussion as to whether the police conducted a thorough investigation. You have also heard some discussion about the competency of the police in this arrest. Ladies and gentlemen, this question might be a matter of opinion, but the state has put its evidence before you and the defendant was entitled to make an investigation and put his evidence before you also. And, of course, not only the state but also the defense has put on evidence on behalf of the defendant. I say to you, ladies and gentlemen, that the ultimate issue before you is not the thoroughness of the investigation or the competence of the police. The ultimate issue you have to . . . determine is whether the state in light of all the evidence before you has proved beyond a reasonable doubt that the defendant is guilty on one or more of the counts for which he is charged." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Collins*, supra, 299 Conn. 595.

[9] In *Williams*, the trial court instructed the jury in relevant part: "Now, you have heard in the course of arguments discussion as to whether the police conducted a thorough search. You have also heard some discussion about the competency of the police in this arrest. Now, ladies and gentlemen, this question might be a matter of opinion, but the [s]tate has put its evidence before you, and the defense was entitled to make an investigation and put its evidence before you also, and, of course, not only the [s]tate but also the defense has put on evidence on behalf of the defendant. I say to you, ladies and gentlemen, that the issue before you is not the thoroughness of the investigation or the competence of the police. This issue you have to determine is whether the [s]tate in the light of all the evidence before you has proved beyond a reasonable doubt that the defendant is guilty on one or both counts with which he is charged." (Internal quotation marks omitted.) *State* v. *Williams*, supra, 169 Conn. 335 n.3.

106 Conn. App. 40, 57–58, 941 A.2d 358, cert. denied, 286 Conn. 922, 949 A.2d 482 (2008),[10] and *State* v. *Tate*, 59 Conn. App. 282, 284–85, 755 A.2d 984, cert. denied, 254 Conn. 935, 761 A.2d 757 (2000).[11] See *State* v. *Gomes*, supra, 193 Conn. App. 87–89. The Appellate Court also rejected the defendant's contention that this court's recent decision in *State* v. *Wright*, 322 Conn. 270, 140 A.3d 939 (2016), signaled a marked development in our jurisprudence on the investigative inadequacy defense, thus calling into question the continued adequacy of the instructions approved in earlier cases. *State* v. *Gomes*, supra, 92. The Appellate Court determined that the defendant's reliance on *Wright* was misplaced because that case "did not consider the adequacy of a jury instruction on an investigative inadequacy defense" and because, to the extent this court expressed any views on the substance of that defense, they were fully consistent with the views expressed in *Collins*. Id., 92–93.

Finally, the Appellate Court observed that, in its instructions regarding reasonable doubt, the trial court

[10] In *Nieves*, the trial court instructed the jury in relevant part: "During the course of the case, you've heard some discussion or questioning as to whether the police conducted a thorough investigation and the competency of the police in this case. The issue before you in this case is not the thoroughness of the investigation or the competence of the police. The issue you have to determine is whether the state, in light of the evidence before you, has proven beyond a reasonable doubt [that] the defendant is guilty of the crimes charged." (Internal quotation marks omitted.) *State* v. *Nieves*, supra, 106 Conn. App. 57.

[11] In *Tate*, the trial court instructed the jury in relevant part: "You've heard questioning regarding the thoroughness of the police investigation in this case. This question might be a matter of opinion, but the state has put its evidence before you, and the defense is entitled to make an investigation and put its evidence before you also. And, of course, not only the state but also the defense has put on evidence in behalf of the defendant. I tell you that the issue before you is not the thoroughness of the investigation of the responding police officer; the issue you have to determine is whether the state, in light of all the evidence before you, has proved the defendant's guilt beyond a reasonable doubt as I have recited that to you. That is the sole issue." (Internal quotation marks omitted.) *State* v. *Tate*, supra, 59 Conn. App. 284.

had advised the jury that "[a] reasonable doubt may arise from the evidence itself *or from a lack of evidence*." (Emphasis in original; internal quotation marks omitted.) Id., 95. On the basis of this instruction, and the trial court's investigative inadequacy instruction, which "repeated to the jury its responsibility to determine whether the state, in light of all of the evidence, had proved beyond a reasonable doubt that the defendant was guilty of the count with which he was charged," the Appellate Court concluded that "the jury was not misled by the instructions given . . . ." Id. This certified appeal followed.

I

Following submission of the parties' briefs to this court, the defendant was deported to Cape Verde. Because the record on appeal did not disclose the basis for the defendant's deportation,[12] we directed the parties to submit

[12] Although the basis for the defendant's deportation is unknown, we take judicial notice of the fact that, in 2011, the defendant pleaded guilty in the Superior Court, judicial district of Fairfield, to possession of narcotics in violation of General Statutes § 21a-279 (a), specifically, for possession of cocaine. See *Bouchard* v. *State Employees Retirement Commission*, 328 Conn. 345, 371 n.13, 178 A.3d 1023 (2018) ("[this] court may take judicial notice of files in other cases"). The defendant's conviction of possession of cocaine, which is not challenged in this appeal, renders him permanently inadmissible to the United States because it is a "controlled substance" violation. See 8 U.S.C. § 1182 (a) (2) (A) (i) (2018) ("any alien convicted of . . . (II) a violation of . . . any law or regulation of a State . . . relating to a controlled substance (as defined in section 802 of Title 21), is inadmissible"); 21 U.S.C. § 802 (6) (2018) ("[t]he term 'controlled substance' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter"); 21 U.S.C. § 812, schedule II (a) (4) (2018) ("coca leaves . . . cocaine . . . or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this paragraph"); cf. 8 U.S.C. § 1182 (h) (2018) ("[t]he Attorney General may, in his discretion, waive the application of . . . subparagraph (A) (i) (II) of such subsection insofar as it relates to single offense of simple possession of 30 grams or less of marijuana"). For the reasons provided herein, the defendant's permanent inadmissibility to the United States does not alter our conclusion that we may provide him with practical relief by ruling in his favor on the merits of the appeal.

supplemental briefs addressing whether the defendant's removal from the United States had rendered the appeal moot[13] under *State* v. *Aquino*, 279 Conn. 293, 901 A.2d 1194 (2006), and *State* v. *Jerzy G.*, 326 Conn. 206, 162 A.3d 692 (2017). We did so because, in *Aquino*, this court held that a defendant's deportation during the pendency of his appeal had rendered his appeal moot insofar as the record did not disclose whether his guilty plea was the sole reason for his deportation, and, as a result, it was not clear whether we could afford him any practical relief. *State* v. *Aquino*, supra, 298. In *Jerzy G.*, however, we questioned whether *Aquino* was correctly decided, noting that the decision "[o]n its face . . . appear[ed] to be inconsistent with our collateral consequences jurisprudence"; *State* v. *Jerzy G.*, supra, 220; particularly the well established "presumption of collateral consequences," which attaches automatically to criminal convictions. Id., 223 n.6. Because, however, we could resolve *Jerzy G.* without deciding that question, we left it for another day. Id., 223 and n.6. That day has come. For the reasons set forth hereinafter, we conclude that *Aquino* was wrongly decided and must be overruled. We further conclude that the defendant's appeal is not moot because a favorable decision on the merits can provide the defendant with a measure of practical relief.

It is well settled that "[a] case is considered moot if [the] court cannot grant the [litigant] any practical relief through its disposition of the merits . . . . Under such circumstances, the court would merely be rendering an advisory opinion, instead of adjudicating an actual, justiciable controversy." (Citation omitted; internal quotation marks omitted.) Id., 213. The general princi-

[13] "[M]ootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve." (Internal quotation marks omitted.) *State* v. *McElveen*, 261 Conn. 198, 204, 802 A.2d 74 (2002), quoting *Ayala* v. *Smith*, 236 Conn. 89, 93, 671 A.2d 345 (1996).

ples guiding our mootness analysis are well established. "The doctrine of mootness is rooted in the same policy interests as the doctrine of standing, namely, to assure the vigorous presentation of arguments concerning the matter at issue. See H. Monaghan, 'Constitutional Adjudication: The Who and When,' 82 Yale L.J. 1363, 1384 (1973) (describing mootness as the doctrine of standing set in a time frame: [t]he requisite personal interest that must exist at the commencement of the litigation [standing] must continue throughout its existence [mootness]). . . . [T]he standing doctrine is designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . . Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . .

"The first factor relevant to a determination of justiciability—the requirement of an actual controversy—is premised upon the notion that courts are called upon to determine existing controversies, and thus may not be used as a vehicle to obtain advisory judicial opinions on points of law. . . . Moreover, [a]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . .

"This court has recognized, however, that a case does not necessarily become moot by virtue of the fact that

. . . due to a change in circumstances, relief from the actual injury is unavailable. We have determined that a controversy continues to exist, affording the court jurisdiction, if the actual injury suffered by the litigant potentially gives rise to a collateral injury from which the court can grant relief." (Citations omitted; internal quotation marks omitted.) *State* v. *McElveen*, 261 Conn. 198, 204–205, 802 A.2d 74 (2002). "[F]or a litigant to invoke successfully the collateral consequences doctrine, the litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur. . . . This standard provides the necessary limitations on justiciability underlying the mootness doctrine itself. Where there is no direct practical relief available from the reversal of the judgment . . . the collateral consequences doctrine acts as a surrogate, calling for a determination whether a decision in the case can afford the litigant some practical relief in the future. The reviewing court therefore determines, based upon the particular situation, whether, the prejudicial collateral consequences are reasonably possible." Id., 208.

In applying these principles, we have long held that a conclusive presumption of prejudicial collateral consequences attaches to criminal convictions not only because of the undesirable legal disabilities they impose, but also because of the damage they cause to a defendant's reputation. See, e.g., *State* v. *Jordan*, 305 Conn. 1, 10 n.9, 44 A.3d 794 (2012) ("since collateral legal disabilities are imposed as a matter of law because of a criminal conviction, a case will not be declared moot even [when] the sentence has been fully served" (internal quotation marks omitted)); *Putman* v. *Kennedy*, 279 Conn. 162, 176 n.14, 900 A.2d 1256 (2006) ("the collateral consequences doctrine applies when the collateral consequences of the contested court action, such as the continuing stigma of a criminal conviction,

constitute a continuing injury to the specific litigant, justifying the court's retention of jurisdiction over the dispute, despite the lack of any consequences flowing from the adjudication directly at issue in the appeal" (internal quotation marks omitted)); *Putman* v. *Kennedy*, supra, 172 ("inasmuch as we previously have recognized the importance of reputation damage as a collateral consequence in other contexts, we see no reason not to do so here, for being the subject of a court order intended to prevent or stop domestic violence may well cause harm to the reputation . . . of the defendant"); see also *Williams* v. *Ragaglia*, 261 Conn. 219, 231, 802 A.3d 778 (2002) (appeal was not moot because "revocation of a foster care license for cause stigmatizes the plaintiff as having been found to be an unfit caregiver"); *State* v. *McElveen*, supra, 261 Conn. 215 (defendant's appeal from probation revocation was not moot because revocation may "affect his standing in the community in its connotation of wrongdoing" (internal quotation marks omitted)); *Statewide Grievance Committee* v. *Whitney*, 227 Conn. 829, 838 n.13, 633 A.2d 296 (1993) ("collateral consequences for an attorney's reputation and professional standing make it clear that the defendant's appeal from his suspension is not moot"); *State* v. *Collic*, 55 Conn. App. 196, 201, 738 A.2d 1133 (1999) (removal of probation violation from defendant's record would delete "mark that would otherwise . . . affect his reputation in the community").

In *Aquino*, however, without any discussion of the foregoing principles, this court dismissed the appeal of the defendant, Mario Aquino, as moot, stating that, "[w]hile this appeal was pending, [Aquino] was deported. There is no evidence in the record as to the reason for his deportation. If it was not the result of his guilty plea alone, then this court can grant no practical relief and any decision rendered by this court would

be purely advisory." (Footnote omitted.) *State* v. *Aquino*, supra, 279 Conn. 298. As we later explained in *State* v. *Jerzy G.*, supra, 326 Conn. 220–21, although the court in *Aquino* cited no authority for the proposition that we could not afford Aquino practical relief unless he could establish that his guilty plea was the sole basis for his deportation, it appears that the court, in reaching that decision, followed federal case law addressing this issue, specifically *Perez* v. *Greiner*, 296 F.3d 123 (2d Cir. 2002), which held that, "when a conviction, other than the one being challenged, results in a deportee's permanent ban from reentering this country, the deportee cannot establish collateral injury even if the challenged conviction also is an impediment to reentry. See [id., 126] ('because [the petitioner] is permanently inadmissible to this country due to his prior drug conviction, collateral consequences cannot arise from the challenged robbery conviction, and the petition is moot')." (Emphasis omitted.) *State* v. *Jerzy G.*, supra, 221.

It is apparent, however, that the court's reliance in *Aquino* on *Perez* was mistaken because this court is not bound by federal mootness principles, which are "based on the justiciability requirements applicable to the federal courts under article three of the United States constitution. . . . In deciding issues of mootness, this court is not constrained by article three, § 2, or the allocation of power between the state and federal governments.[14] Our state constitution [provides that]

[14] We do not find *Perez* particularly persuasive in any event because, in concluding that no collateral consequences could arise from the robbery conviction of the petitioner, Santos Perez, due to his permanent inadmissibility stemming from an unrelated drug conviction, the Second Circuit Court of Appeals failed to consider Perez' eligibility for a temporary admission waiver under 8 U.S.C. § 1182 (d) (3). See *United States* v. *Hamdi*, 432 F.3d 115, 120–21 (2d Cir. 2005) (concluding that defendant's appeal from sentence enhancement imposed following his guilty plea was not moot, despite his removal and inadmissibility due to unchallenged conviction, because enhanced sentence could impact his ability to obtain discretionary waiver under 8 U.S.C. § 1182 (d) (3)). A waiver under 8 U.S.C. § 1182 (d) (3) "waives

. . . the jurisdiction of [the] courts shall be defined by law. Conn. Const., art. V, § 1. . . . Our mootness jurisprudence, therefore, has evolved under our common law." (Citations omitted; footnote added; internal

nearly every ground of inadmissibility set forth in [8 U.S.C. § 1182 (a)] for nonimmigrant applicants," except "security related grounds such as espionage, sabotage, persecution, genocide, or torture . . . ." D. Beach, "Waivers of Inadmissibility: Off the Beaten Path," 11-01 Immigr. Briefings 1 (January, 2011). Perez was inadmissible because of a prior controlled substance conviction; *Perez* v. *Greiner*, supra, 296 F.3d 126; but that would not have rendered him ineligible for a waiver under 8 U.S.C. § 1182 (d) (3).

According to the United States Department of State's Foreign Affairs Manual, "[t]he law does not require that such waiver action be limited to exceptional, humanitarian or national interest cases. Thus, while the exercise of discretion and good judgment is essential, generally, consular officers may recommend waivers for any legitimate purpose such as family visits, medical treatment (whether or not available abroad), business conferences, tourism, etc." (Internal quotation marks omitted.) D. Beach, supra, 11-01 Immigr. Briefings 1. Similarly, the Board of Immigration Appeals has stated that there is "no requirement that the applicant's reasons for wishing to enter the United States be 'compelling.' " *In re Hranka*, 16 I. & N. Dec. 491, 492 (B.I.A. 1978). In determining whether to grant a waiver, three factors must be weighed: "The first is the risk of harm to society if the applicant is admitted. *The second is the seriousness of the applicant's prior immigration law, or criminal law, violations, if any.* The third factor is the nature of the applicant's reasons for wishing to enter the United States." (Emphasis added.) Id. Additional considerations include the "*recentness and seriousness of the crime or offense*, type of disability, reasons for proposed travel to the United States, and the probable consequences of the public interest of the [United States]." (Emphasis added.) D. Beach, supra, 11-01 Immigr. Briefings 1.

Accordingly, in *Perez*, Perez' unchallenged controlled substance conviction did not necessarily render him ineligible for a discretionary waiver under 8 U.S.C. § 1182 (d) (3). If the robbery conviction he challenged in his appeal was upheld, however, that conviction may have weighed against his receiving such a waiver. See *United States* v. *Hamdi*, supra, 432 F.3d 120–21. Because "a habeas petition challenging a criminal conviction is rendered moot by a release from imprisonment only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction"; (internal quotation marks omitted) *Perez* v. *Greiner*, supra, 296 F.3d 125; the potential that Perez' challenged robbery conviction might have adversely impacted his eligibility for a discretionary waiver under 8 U.S.C. § 1182 (d) (3) provided a sufficient basis to avoid the dismissal of his appeal as moot. Because the court in *Perez* failed to consider the relevance of a discretionary waiver under 8 U.S.C. § 1182 (d) (3), for which the defendant in this appeal might be eligible, we do not find its analysis persuasive.

quotation marks omitted.) *State* v. *McElveen*, supra, 261 Conn. 211–12; see also *Andross* v. *West Hartford*, 285 Conn. 309, 329, 939 A.2d 1146 (2008) (noting that, for purposes of standing, this court is "not required to apply federal precedent in determining the issue of aggrievement" (internal quotation marks omitted)).

One significant difference between our mootness doctrine and that of the federal courts, which is ultimately dispositive of the jurisdictional question presented in this appeal and should have been dispositive in *Aquino*, is that federal law does not recognize reputational damage as a cognizable collateral consequence of a criminal conviction, only concrete legal disabilities.[15] See, e.g., *Spencer* v. *Kemna*, 523 U.S. 1, 16 n.8, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998) (damage to reputation was insufficient collateral consequence of criminal conviction to avoid dismissal on mootness grounds); *Foretich* v. *United States*, 351 F.3d 1198, 1212 (D.C. Cir. 2003) ("[o]ur case law makes clear that [when] reputational injury is the lingering effect of an otherwise moot aspect of a lawsuit, no meaningful relief is possible"); *United States* v. *Probber*, 170 F.3d 345, 349 (2d Cir.

[15] It appears, however, that, in the civil law context, reputational injury is considered by some federal courts to be a sufficiently prejudicial collateral consequence to prevent dismissal on mootness grounds. See, e.g., *Furline* v. *Blakey*, 246 Fed. Appx. 813, 815 (3d Cir. 2007) (appeal of airman whose airman's certificate was suspended for 180 days, then reinstated, was not moot because of possible collateral consequence of "continuing stigma"); *In re Surrick*, 338 F.3d 224, 230 (3d Cir. 2003) (attorney's suspension from practice of law was not moot because continuing stigma associated with suspension constituted possible collateral consequence), cert. denied, 540 U.S. 1219, 124 S. Ct. 1509, 158 L. Ed. 2d 154 (2004); *Dailey* v. *Vought Aircraft Co.*, 141 F.3d 224, 228 (5th Cir.1998) (appeal of attorney who was disbarred and then reinstated was not moot because even temporary disbarment is harmful to lawyer's reputation, and "the mere possibility of adverse collateral consequences is sufficient to preclude a finding of mootness" (internal quotation marks omitted)); *Connell* v. *Shoemaker*, 555 F.2d, 483, 486–87 (5th Cir. 1977) (appeal by apartment owners seeking relief from military official's order prohibiting military personnel from renting owners' properties for 180 days was not moot after 180 day period because of harm to owners' reputations).

1999) (noting that, in criminal cases, federal courts "[reject] the notion that the possibility of vindicating a reputational interest of the sort asserted here [is] sufficient to avoid mootness"); *Wickstrom* v. *Schardt*, 798 F.2d 268, 270 (7th Cir. 1986) (holding that collateral consequences must be serious legal consequences, not mere injury to reputation).

As we have explained, our mootness doctrine does recognize the collateral consequence of reputational damage. See, e.g., *State* v. *Jerzy G.*, supra, 326 Conn. 225 ("if the defendant's appeal is deemed to be moot, he will have been deprived of the only avenue to remove [the] stain [to his reputation]" caused by underlying guilty plea); *Putman* v. *Kennedy*, supra, 279 Conn. 172, 175 (recognizing importance of reputation damage as collateral consequence in determining that defendant's appeals were not moot). Indeed, "the citizens of this state have placed such value on one's interests in his or her reputation as to afford it constitutional protection. See Conn. Const., art. I, § 10 ('[a]ll courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay')." *Williams* v. *Ragaglia*, supra, 261 Conn. 232–33; see id. (rejecting mootness challenge to court's jurisdiction). Accordingly, we conclude that *Aquino* was wrongly decided and must be overruled. We further conclude that the defendant's appeal is not moot because, should he prevail on the merits, it will remove the stain of the underlying conviction from his record. We turn, therefore, to the merits of the appeal.

II

The defendant claims that the Appellate Court incorrectly determined that the trial court's investigative inadequacy instruction did not mislead the jury or other-

wise prejudice his constitutional right to present a defense of investigative inadequacy. As previously indicated, the Appellate Court rejected the defendant's claim of instructional error, concluding that the challenged instruction was an accurate statement of the law and sufficient to guide the jury in reaching a verdict because the instruction was (1) identical to the model jury instruction on investigative inadequacy on the Judicial Branch website, and (2) "[n]early identical" to instructions this court and the Appellate Court have upheld in prior cases. *State* v. *Gomes*, supra, 193 Conn. App. 88–89. The Appellate Court also rejected the defendant's contention that, even if the model instruction was once considered a correct statement of the law, it was no longer correct in light of recent developments in the law. Id., 91–93.

On appeal to this court, the defendant renews his claim before the Appellate Court, including his assertion that the model jury instruction, though similar in some respects to the instructions approved in *Williams* and *Collins*, is missing critical language that saved the instructions in those cases from constitutional infirmity, namely, "the defense was entitled to make an investigation and put on evidence before you." The defendant argues that, although the omitted language is not as clear a statement of the right to present an investigative inadequacy defense as the statement in *Collins* that "[a] defendant may . . . rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt"; *State* v. *Collins*, supra, 299 Conn. 599–600; it nevertheless conveys "that the defendant's investigative evidence and arguments are legitimate grist for the jury's mill." According to the defendant, by omitting this pivotal language from the model jury instruction—language that was included in the instructions approved in *Williams* and *Collins*—and by then instructing the jury that, although it had

"heard some arguments that the police investigation was inadequate and that the police involved in the case were incompetent," the issue it must decide was "not the thoroughness of the investigation or the competence of the police," the trial court effectively instructed the jury *not* to consider the defendant's arguments regarding the inadequacy of the investigation in assessing reasonable doubt.

The state argues, in response, that the trial court's instruction was not improper because it highlighted the defendant's investigative inadequacy arguments, reminded the jury that its core responsibility was not to evaluate the adequacy of the investigation in the abstract, but to determine whether the defendant was guilty of the charged offenses beyond a reasonable doubt, and accords with existing Connecticut law on investigative inadequacy instructions. We agree with the defendant that there is a reasonable possibility that the jury was misled by the trial court's investigative inadequacy instruction, and, therefore, the defendant is entitled to a new trial.

The following additional facts are relevant to our resolution of the defendant's claim. As previously indicated, the defendant requested that the trial court instruct the jury that it could "consider evidence of the police investigation as it might relate to any weaknesses in the state's case" in light of his contention at trial that the victim had misidentified him as her assailant, either mistakenly or intentionally to protect Morais, the actual assailant, and that, if the police had conducted even a minimally adequate investigation, they would have realized this to be the case. In support of this contention, the defendant adduced the testimony of his then girlfriend, Juliele Silver Ferreira, who testified that she was at the club with the defendant on the night in question and that they had left after his altercation with Morais but before the victim was assaulted. The defendant

further adduced the testimony of Ayala, the club owner, and his wife, Debroa Moncio, that Morais was beaten up by a group of club patrons immediately after the victim sustained her injuries. The defendant also elicited testimony from Officers Topolski and Goncalves, the first two officers to arrive on the scene, that, when they were dispatched to the club, they were informed by the dispatcher that Morais was a suspect in the assault but that neither officer ever investigated Morais as a suspect. Detective Ortiz testified that, when he interviewed Morais, he viewed him as a witness or a victim but not as a suspect.[16]

Officers Topolski and Goncalves further testified that, upon arriving at the club, they were approached by several club patrons claiming to have information about the assault, but they did not ask for the names or contact information for any of these witnesses or ever attempt to interview them regarding what they had seen. Officers Topolski and Goncalves further acknowledged never interviewing Ayala or any of the club's staff who were working there that evening to determine whether they had heard or seen anything that might aid the investigation. Finally, the victim testified that she had never met or seen the defendant prior to the night in question and that she had only a "split second" to observe her attacker.

In light of this and other testimony, defense counsel argued to the jury that, although the state's case relied entirely on the victim's identification of the defendant, the police "did nothing" to confirm the accuracy of that identification. In particular, defense counsel argued that the police never investigated reports they had received on the night in question that Morais, who was beaten by

[16] Morais did not testify at trial. According to testimony from Richard Lindberg, an inspector at the Office of the State's Attorney, the state attempted to serve a subpoena on Morais but was unsuccessful in locating him.

club patrons immediately after the victim was assaulted, was the actual perpetrator. As a consequence, defense counsel argued that the state had not proven its case beyond a reasonable doubt.

The following well established legal principles guide our analysis of the defendant's claim. "[A] fundamental element of due process of law is the right of a defendant charged with a crime to establish a defense. . . . Where . . . the challenged jury instructions involve a constitutional right, the applicable standard of review is whether there is a reasonable possibility that the jury was misled in reaching its verdict. . . . In evaluating the particular charges at issue, we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is . . . whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law." (Internal quotation marks omitted.) *State* v. *Collins*, supra, 299 Conn. 598–99. "If a requested charge is in substance given, the court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . Additionally, we have noted that [a]n error in instructions in a criminal case is reversible error when it is shown that it is reasonably possible for errors of constitutional dimension or reasonably probable for nonconstitutional errors that the jury [was] misled." (Citations omitted; internal quotation marks omitted.) *State* v. *Aviles*, 277 Conn. 281, 309–10, 891 A.2d 935, cert. denied, 549 U.S. 840, 127 S. Ct. 108, 166 L. Ed. 2d 69 (2006). "A challenge to the validity of jury instructions presents a question of law over which [we

have] plenary review." (Internal quotation marks omitted.) *State* v. *Collins*, supra, 599.

In *Williams*, this court considered for the first time a claim of instructional error relating to "a statement in the [jury] charge relative to the competence of the police investigation." *State* v. *Williams*, supra, 169 Conn. 334–35. The instruction provided: "Now, you have heard in the course of arguments discussion as to whether the police conducted a thorough search. You have also heard some discussion about the competency of the police in this arrest. Now, ladies and gentlemen, this question might be a matter of opinion, but the [s]tate has put its evidence before you, and the defense was entitled to make an investigation and put its evidence before you also, and, of course, not only the [s]tate but also the defense has put on evidence on behalf of the defendant. I say to you, ladies and gentlemen, that the issue before you is not the thoroughness of the investigation or the competence of the police. This issue you have to determine is whether the [s]tate in the light of all the evidence before you has proved beyond a reasonable doubt that the defendant is guilty on one or both counts with which he is charged." (Internal quotation marks omitted,) Id., 335 n.3; see also footnote 9 of this opinion. Without discussing the particulars of the claim or the legal basis for it, the court concluded that the challenged instruction "gave the jury a clear understanding of the issues involved and a proper guidance in determining those issues." Id., 336.

In *Collins*, however, this court took a closer look at the right to present a defense based on the inadequacy of a police investigation, explaining in relevant part: "In the abstract, whether the government conducted a thorough, professional investigation is not relevant to what the jury must decide: Did the defendant commit the alleged offense? Juries are not instructed to acquit

the defendant if the government's investigation was superficial. Conducting a thorough, professional investigation is not an element of the government's case. . . . *A defendant may, however, rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt, and the trial court violates his right to a fair trial by precluding the jury from considering evidence to that effect.* See *Commonwealth* v. *Bowden*, 379 Mass. 472, 485–86, 399 N.E.2d 482 (1980) (trial court improperly instructed jury not to consider evidence of investigators' failure to perform certain scientific tests when defendant's presentation at trial focused on raising inference that police had contrived much of the case against him and he emphasized that failure in order to call into question the integrity of the police investigation); see also *Commonwealth* v. *Avila*, 454 Mass. 744, 767, 912 N.E.2d 1014 (2009) (a judge may not remove the issue of a biased or faulty police investigation from the jury); *People* v. *Rodriguez*, [141 App. Div. 2d 382, 385, 529 N.Y.S.2d 318 (1988)] (trial court denied defendant fair trial by eliminat[ing] from the jury's consideration an essential element of the defense, namely, police testing that did not yield fingerprints on gun at issue)." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *State* v. *Collins*, supra, 299 Conn. 599–600.

On appeal, the defendant in *Collins*, Ricardo Collins, claimed that the last two sentences of the instruction, which substantively was identical to the one given in *Williams*; see footnote 8 of this opinion; "destroyed [his] defense by precluding consideration of it and also by conveying the judge's impression that his defense was not worthy of consideration." (Internal quotation marks omitted.) *State* v. *Collins*, supra, 299 Conn. 598. We disagreed, concluding that "[the] instruction did not mislead the jury or violate [Collins'] right to present a

defense because it did not direct the jury *not* to consider the adequacy of the investigation as it related to the strength of the state's case, or *not* to consider specific aspects of [Collins'] theory of the case. Rather, the instruction highlighted the portions of the parties' arguments that addressed the adequacy of the police investigation, and properly reminded the jury that its core task was to determine whether [Collins] was guilty of the charged offenses in light of all the evidence admitted at trial, rather than to evaluate the adequacy of the police investigation in the abstract. . . . Moreover, notwithstanding [Collins'] arguments to the contrary, the . . . instruction was phrased in neutral language and did not improperly disparage [his] claims, or improperly highlight or endorse the state's arguments and evidence." (Citations omitted; emphasis added; footnotes omitted.) Id., 600–602.[17]

In *State* v. *Wright*, supra, 322 Conn. 281, this court revisited the defense of investigative inadequacy, albeit in the context of a claim that the trial court improperly precluded the defendant, Billy Ray Wright, from asking questions during cross-examination about the adequacy of the police investigation in that case.[18] In addressing this claim, we reaffirmed recognition of a defendant's entitlement to present an investigative inadequacy defense, stating in relevant part: "[T]he inference that may be drawn from an inadequate police investigation is that the evidence at trial may be inadequate or unrelia-

[17] Following *Collins*, the model criminal jury instruction titled "Adequacy of Police Investigations" was approved by the Judicial Branch's Criminal Jury Instruction Committee. See footnote 7 of this opinion.

[18] In *Wright*, this court did not consider the propriety of an investigative inadequacy instruction because the trial court had prevented Wright from presenting evidence of investigative inadequacy that would warrant such an instruction. Rather, this court determined what evidentiary thresholds a defendant must satisfy before pursuing an investigative inadequacy defense. *State* v. *Wright*, supra, 322 Conn. 284–85 (defendant must establish relevance of testimony offered, and trial court must determine whether probative value of evidence exceeds risk of unfair prejudice to state).

ble because the police failed to conduct the scientific tests or to pursue leads that a reasonable police investigation would have conducted or investigated, and these tests or investigation reasonably may have led to significant evidence of the defendant's guilt or innocence. A jury may find a reasonable doubt if [it] conclude[s] that the investigation was careless, incomplete, or so focused on the defendant that it ignored leads that may have suggested other culprits." (Internal quotation marks omitted.) Id., 283, citing *Commonwealth* v. *Silva-Santiago*, 453 Mass. 782, 801, 906 N.E.2d 299 (2009).

In light of *Williams*, *Collins* and *Wright*, we agree with the defendant that the model jury instruction utilized by the trial court in the present case failed to inform the jury not only of a defendant's right to "rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt"; *State* v. *Collins*, supra, 299 Conn. 599–600; but also the jury's concomitant right to consider any such deficiencies in evaluating whether the state has proved its case beyond a reasonable doubt.[19] Although the model instruction is similar to the instructions this court approved in *Williams* and *Collins* because it informs the jury not to consider investigative inadequacy "in the abstract"; (internal quotation marks omitted) id., 599; the model instruction, unlike the instructions in *Williams* and *Col-*

[19] "The language used in the model jury instructions, although instructive in considering the adequacy of a jury instruction . . . is not binding on this court." (Citation omitted; internal quotation marks omitted.) *Snell* v. *Norwalk Yellow Cab, Inc.*, 332 Conn. 720, 762, 212 A.3d 646 (2019). "[W]e previously have cautioned that the . . . jury instructions found on the Judicial Branch website are intended as a guide only, and that their publication is no guarantee of their adequacy. See, e.g., *State* v. *Reyes*, 325 Conn. 815, 821–22 n.3, 160 A.3d 323 (2017) (The Judicial Branch website expressly cautions that the jury instructions contained therein [are] intended as a guide for judges and attorneys in constructing charges and requests to charge. The use of these instructions is entirely discretionary and their publication by the Judicial Branch is not a guarantee of their legal sufficiency. . . .)." (Internal quotation marks omitted.) *Snell* v. *Norwalk Yellow Cab, Inc.*, supra, 762–63.

lins, improperly fails to inform the jury that a defendant may present evidence of investigative inadequacy in his or her *particular* case. Indeed, as the defendant argues, the model instruction omits the very language that the court in *Collins* determined rendered the instruction in that case acceptable because it (1) apprised the jury that "the defendant was entitled to make an investigation and put his evidence before [it]," and (2) directed the jury to determine, based on "*all the evidence* before [it]," including evidence presented by the defendant, whether the state had proved the defendant's guilt beyond a reasonable doubt. (Emphasis added; internal quotation marks omitted.) Id., 595. The language that the defendant requested be added to the model jury instruction—i.e., that the jury "may consider evidence of the police investigation as it might relate to any weaknesses in the state's case"—would have similarly apprised the jury of the defendant's right to present an investigative inadequacy defense and the jury's right to consider it in evaluating the strength of the state's case.

We further conclude that there is a significant risk that the instruction given by the trial court misled the jury to believe that it could *not* consider the defendant's arguments concerning the adequacy of the police investigation. Although the first sentence of the instruction acknowledged that the defendant made arguments that the police had failed to investigate adequately the crime in question, in the very next sentence, the jury was instructed that the adequacy of the police investigation was *not* for it to decide. This admonishment was reinforced by the third and final sentence that the "*only*" issue for the jury to decide was whether the state had proven the defendant's guilt beyond a reasonable doubt. (Emphasis added; internal quotation marks omitted.) Thus, rather than apprising the jury that reasonable doubt could be found to exist if the jury "conclude[d] that the investigation was careless, incomplete, or so

focused on the defendant that it ignored leads that may have suggested other culprits''; (internal quotation marks omitted) *State* v. *Wright*, supra, 322 Conn. 283; there is a reasonable possibility that the instruction had the opposite effect and caused the jury to believe that it was *prohibited* from considering any such evidence. Cf. *State* v. *Collins*, supra, 299 Conn. 600–601 (instruction ''did not direct the jury *not* to consider the adequacy of the investigation as it related to the strength of the state's case, or *not* to consider specific aspects of the defendant's theory of the case'' (emphasis added)); see also *Stabb* v. *State*, 423 Md. 454, 472, 31 A.3d 922 (2011) (instruction impermissibly invaded province of jury by effectively directing it not to consider lack of sexual assault forensics examination or corroborating physical evidence); *Atkins* v. *State*, 421 Md. 434, 452–53, 26 A.3d 979 (2011) (concluding that instruction violated defendant's constitutional rights to due process and fair trial because it directed jury to ignore arguments by defendant that state had not presented scientific evidence connecting knife to alleged crime).

Given the relative weakness of the state's case, it also is apparent that the instructional error was harmful to the defendant. As previously indicated, the state's case against the defendant turned almost entirely on the believability of the victim's testimony that, although she had never seen the defendant before the night in question and could not describe him to Officer Topolski when they spoke at the hospital following the assault, and although the attack occurred in ''a split second'' from behind a six foot fence, she was able to identify the defendant as her assailant from a photographic array conducted more than two weeks later. Defense counsel sought to exploit and amplify the weaknesses in the state's evidence by directing the jury's attention to inadequacies and omissions in the investigation, in particular Officers Topolski's and Goncalves' failure to consider

Morais as a potential suspect, even though he was identified as such by the police dispatcher, as well as their failure to interview any of the witnesses who approached them on the night in question outside the club, claiming to have information about the assault. Defense counsel asked the jury to find the defendant not guilty on the basis of these investigative lapses because they raised a reasonable doubt as to the trustworthiness of the victim's identification of him as the person who attacked her. We cannot conclude that a properly instructed jury would not have done so.[20]

[20] We agree with the defendant that the investigative inadequacy instruction upheld in *Williams* and *Collins* should be improved on to better convey, as this court recently explained in *Wright*, that "[t]he inference that may be drawn from an inadequate police investigation is that the evidence at trial may be inadequate or unreliable because the police failed to conduct the scientific tests or to pursue leads that a reasonable police investigation would have conducted or investigated, and these tests or investigation reasonably may have led to significant evidence of the defendant's guilt or innocence. A jury may find a reasonable doubt if [it] conclude[s] that the investigation was careless, incomplete, or so focused on the defendant that it ignored leads that may have suggested other culprits." (Internal quotation marks omitted.) *State* v. *Wright*, supra, 322 Conn. 283. Toward that end, we encourage our trial courts going forward to utilize the following investigative inadequacy instruction, which bears resemblance to the one utilized by the Massachusetts courts: You have heard some testimony of witnesses and arguments by counsel that the state did not (mention alleged investigative failure: e.g., conduct certain scientific tests, follow standard procedure, perform a thorough and impartial police investigation, etc.) in this case. This is a factor that you may consider in deciding whether the state has met its burden of proof in this case because the defendant may rely on relevant deficiencies or lapses in the police investigation to raise reasonable doubt. Specifically, you may consider whether (relevant police investigative action) would normally be taken under the circumstances, whether, if (that/those) action(s) (was/were) taken, (it/they) could reasonably have been expected to lead to significant evidence of the defendant's guilt or innocence, and whether there are reasonable explanations for the omission of (that/those) action(s). If you find that any omissions in the investigation were significant and not reasonably explained, you may consider whether the omissions tend to affect the quality, reliability, or credibility of the evidence presented by the state to prove beyond a reasonable doubt that the defendant is guilty of the count(s) with which (he/she) is charged. The ultimate issue for you to decide, however, is whether the state, in light of all of the evidence before you, has proved beyond a reasonable doubt that the defendant is guilty of the count(s) with which (he/she) is charged. See, e.g., Criminal Model Jury

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to that court for a new trial.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* ROBERT LEE GRAHAM (SC 20153)

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

Argued September 16, 2020—officially released February 4, 2021*

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford, where the court, *Gold*, *J.*, denied in part the defendant's motions to suppress certain evidence; thereafter, the case was tried to the jury before *Gold*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Appeal dismissed.*

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

Nancy L. Walker, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, former state's attorney, and *Vicki Melchiorre* and *Richard Rubin*, senior assistant state's attorneys, for the appellee (state).

Instructions for Use in the District Court, Instruction 3.740, available at https://www.mass.gov/doc/3740-omissions-in-police-investigations/download (last visited January 21, 2021).

* February 4, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

PER CURIAM. After this case was argued, defense counsel notified this court that the defendant and appellant, Robert Lee Graham, died while in the custody of the Commissioner of Correction on January 8, 2021. Defense counsel did not request any specific disposition of this appeal as a result of the defendant's death. Consistent with the past practice of this court, therefore, we dismiss the appeal as moot. E.g., *State* v. *Bostwick*, 251 Conn. 117, 118–19, 740 A.2d 381 (1999); *State* v. *Trantolo*, 209 Conn. 169, 170, 549 A.2d 1074 (1988); *State* v. *Granata*, 162 Conn. 653, 653, 289 A.2d 385 (1972); *State* v. *Raffone*, 161 Conn. 117, 120, 285 A.2d 323 (1971); see also *Dove* v. *United States*, 423 U.S. 325, 325, 96 S. Ct. 579, 46 L. Ed. 2d 531 (1976) (dismissing petition for writ of certiorari as moot). We leave for another day the question of whether the better course of action in such cases, followed by the majority of our sister courts, would be to vacate the judgment of conviction and to remand with instructions to dismiss the indictment ab initio. See, e.g., *United States* v. *Mollica*, 849 F.2d 723, 725–26 (2d Cir. 1988) (vacating judgment of conviction and dismissing indictment as to deceased appellant); *State* v. *Trantolo*, supra, 174 (*Healey*, *J.*, dissenting) ("the great majority of courts that have considered the problem have ruled that death pending appellate review of a criminal conviction abates not only the appeal but also the proceedings had in the prosecution ab initio"); J. Derrick, "Abatement Effects of Accused's Death Before Appellate Review of Federal Criminal Conviction," 80 A.L.R. Fed. 446, 448, § 2 (1986) (stating majority rule).

The appeal is dismissed.