# STATE OF CONNECTICUT *v.* DARRELL TINSLEY (SC 20479)

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

*Syllabus*

The defendant, who had been convicted of manslaughter in the first degree and risk of injury to a child, appealed to the Appellate Court from the trial court's denial of his motion to correct an illegal sentence. The defendant's conviction stemmed from an incident that occurred while he was watching the victim, a fifteen month old, when the victim's mother was at work. The defendant had alerted the victim's mother that something was wrong with the victim and picked her up from her place of employment. While the three of them were driving to the hospital, they were involved in a motor vehicle accident. The victim died at the hospital, and an autopsy revealed bruises on his cheek, one of his legs, and his chest, which occurred shortly before his death, and internal abdominal injuries, including a broken rib and a lacerated liver, the latter of which was determined to be the cause of the victim's death. Although the defendant ultimately was convicted of the lesser included offense of manslaughter in the first degree, the operative information had charged him with capital felony, alleging in relevant part that the defendant, "with the intent to cause the death of [the victim], caused the death of [the victim] . . . by blunt trauma to the abdomen." As to the risk of injury charge, the information alleged in relevant part that the defendant "did an act likely to impair the health of [the victim] . . . by inflicting multiple trauma to his face, head, chest, and abdomen and thereby causing: laceration of the liver, internal bleeding in the abdomen, fracture of the tenth right rib, and multiple contusions of the face, head, chest, and abdomen." In his motion to correct, the defendant claimed that his sentence imposed for manslaughter in the first degree and risk of injury to a child violated the constitutional prohibition against double jeopardy. The Appellate Court reversed the trial court's denial of the defendant's motion to correct. The Appellate Court determined that, when a defendant claims that his conviction includes a lesser included offense, the court does not merely compare the elements of each offense under *Blockburger* v. *United States* (284 U.S. 299) but, instead, asks whether it is possible to commit the greater offense, "in the manner described in the information," without having first committed the lesser offense. Accordingly, the Appellate Court concluded that, even though risk of injury was not a lesser included offense of manslaughter in the first degree under *Blockburger*, insofar as each offense required poof of an element that the other did not, it was a lesser included offense as charged by the state in the information because it was not possible

for the defendant to have committed manslaughter in the first degree by inflicting blunt trauma to the victim's abdomen without also impairing the health of the victim by inflicting trauma to his abdomen. On the granting of certification, the state appealed to this court. *Held* that the Appellate Court incorrectly determined that the defendant's convictions of risk of injury to a child and manslaughter in the first degree were the same offense for double jeopardy purposes, as that court improperly considered the facts alleged in the information rather than confining its analysis to the statutory elements of the offenses, and, accordingly, this court reversed the judgment of the Appellate Court and remanded the case with direction to affirm the trial court's denial of the defendant's motion to correct: the Appellate Court improperly conflated the cognate pleadings approach, by which courts determine whether a defendant has received constitutionally adequate notice of the charges against him when a lesser included offense instruction has been requested, with the *Blockburger* test, which protects against cumulative punishments and under which two distinct statutory provisions constitute the same offense only if each provision requires proof of a fact that the other does not; moreover, although the language of the charging documents is relevant to whether the statutory elements of each offense are the same under *Blockburger*, federal and state precedent, including this court's own case law, confirmed that the statutory elements, rather than the factual allegations in the charging documents, drive the *Blockburger* inquiry, notwithstanding a substantial overlap in the proof offered to establish the crimes; furthermore, to the extent that this court has suggested that a court undertaking a double jeopardy analysis should consider the facts alleged by the state "in the manner described in the information," that directive was relevant in determining whether one crime is a lesser included offense of another only insofar as the reviewing court is consulting the information in order to determine whether it alleges distinct elements for each offense, rather than in determining the particular factual predicate of the case; in the present case, manslaughter in the first degree, which requires proof that the defendant, with intent to cause serious physical injury, caused the victim's death, and risk of injury to a child, which requires proof of the defendant's impairment to the health of a child less than sixteen years of age, each contained an element that the other did not, and it was therefore possible to commit either offense without committing the other.

Argued April 1, 2021—officially released August 27, 2021*

*Procedural History*

Substitute information charging the defendant with the crimes of capital felony and risk of injury to a child,

* August 27, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Barry*, *J.*; verdict and judgment of guilty of the lesser included offense of manslaughter in the first degree and of risk of injury to a child, from which the defendant appealed to the Appellate Court, *Lavery*, *C. J.*, and *Schaller* and *Zarella*, *Js.*, which affirmed the trial court's judgment; thereafter, the court, *Schuman*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Bright* and *Devlin*, *Js.*, which reversed the trial court's judgment, and the state, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

*Melissa L. Streeto*, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Hodge*, state's attorney, *Gail P. Hardy*, former state's attorney, and *John Fahey*, supervisory assistant state's attorney, for the appellant (state).

*Naomi T. Fetterman*, for the appellee (defendant).

*Opinion*

ROBINSON, C. J. The sole issue in this certified appeal is the extent to which a court should consider the facts alleged by the state in the charging documents when determining whether a crime is a lesser included offense of another, rather than confining its analysis to the elements of the statutes at issue, under *Blockburger* v. *United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). The state appeals, upon our grant of its petition for certification,[1] from the judgment of the

[1] We granted the state's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that, notwithstanding the fact that manslaughter in the first degree, under General Statutes § 53a-55 (a) (1), and risk of injury to a child, under General Statutes (Rev. to 1995) § 53-21, as amended by Public Acts 1995, No. 95-142, § 1, are not the same offense under *Blockburger* v. *United States*, [supra, 284 U.S. 299], the defendant's conviction of those crimes nonetheless violated the double jeopardy clause of the United States constitution because, as charged in the information, those crimes stood in relation of greater and lesser included offenses?" *State* v. *Tinsley*, 335 Conn. 927, 234 A.3d 979 (2020).

Appellate Court reversing the judgment of the trial court, which denied the motion to correct an illegal sentence filed by the defendant, Darrell Tinsley, on the basis of its conclusion that the defendant's convictions of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1)[2] and risk of injury to a child in violation of General Statutes (Rev. to 1995) § 53-21, as amended by Public Acts 1995, No. 95-142, § 1,[3] violate the constitutional prohibition against double jeopardy. See *State* v. *Tinsley*, 197 Conn. App. 302, 304, 326, 232 A.3d 86 (2020). On appeal, the state claims that the Appellate Court improperly considered the factual allegations in the information in concluding that risk of injury to a child, as charged therein, was a lesser included offense of manslaughter in the first degree, rendering the defendant's conviction of both offenses a violation of his right to be free from double jeopardy. We conclude that the Appellate Court improperly considered the facts alleged in the state's information, rather than confining its analysis to the statutory elements under the *Blockburger* test, insofar as risk of injury to a child is not a lesser included offense of manslaughter in the first degree because each offense requires the state to prove an element the other does not. Accordingly, we reverse the judgment of the Appellate Court.

[2] General Statutes § 53a-55 (a) provides in relevant part: "A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person . . . ."

[3] General Statutes (Rev. to 1995) § 53-21, as amended by No. 95-142, § 1, of the 1995 Public Acts, provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of a class C felony." All references to § 53-21 in this opinion are to the 1995 revision of the statute, as amended by No. 95-142, § 1, of the 1995 Public Acts.

The record reveals the following relevant facts and procedural history, aptly set forth by the Appellate Court in its opinion. "[Despite having] an unstable relationship, [the defendant and the victim's mother] cohabited in a one bedroom apartment along with the [fifteen month old] victim . . . . During the course of the adults' relationship, individuals who knew the victim noticed a marked change in his behavior when he was in the presence of the defendant. At such times, the victim was timid, withdrawn and afraid of the defendant. The defendant's attitude toward the victim ranged from indifference to dislike. When [the victim's mother] was no longer able to avail herself of professional child care, the defendant sometimes took care of the victim while [the victim's mother] worked.

"Prior to his death, the victim was in good health. On December 8, 1996, between 8 and 8:30 a.m., the defendant drove [the victim's mother] to her place of employment. According to [the victim's mother], there was nothing wrong with the victim when she went to work. During the morning, [the victim's mother] and the defendant spoke by telephone several times concerning the victim. At approximately 11:15 a.m., the defendant telephoned [the victim's mother], stating that there was something wrong with the victim and that he did not know what was the matter. The defendant then drove the victim to [the victim's mother's] place of employment, and, from there, all three proceeded to the Connecticut Children's Medical Center (medical center) in Hartford. They were involved in a motor vehicle accident en route.

"When he arrived at the medical center, the victim was in critical condition because he was not breathing and had little heart activity. The victim died when resuscitation efforts failed. An autopsy revealed bruises on the victim's right cheek, left leg and chest, which an associate medical examiner from the [O]ffice of the

[C]hief [M]edical [E]xaminer determined occurred shortly before the victim's death. The injuries were inconsistent with an automobile accident, a twelve inch fall into a bathtub, cardiopulmonary resuscitation or bumping into a fire door, which were explanations offered by the defendant. The victim also suffered significant internal injuries, namely, multiple fresh cranial hemorrhages, a broken rib and a lacerated liver that caused three quarters of his blood to enter his abdominal cavity. According to the associate medical examiner, the victim's liver was lacerated by blunt trauma that occurred within [one] hour of death and was the cause of death." (Internal quotation marks omitted.) Id., 304–306.

"The state charged the defendant with capital felony in violation of General Statutes (Rev. to 1995) § 53a-54b (9), as amended by [§ 3 of] No. 95-16 of the 1995 Public Acts, and risk of injury to a child in violation of § 53-21. The jury found the defendant guilty of the lesser included offense of manslaughter in the first degree in violation of § 53a-55 (a) (1) and risk of injury to a child. On February 6, 1998, the court sentenced the defendant to twenty years of incarceration on the manslaughter count and ten years of incarceration on the risk of injury count with the sentences to run consecutively. . . . On March 8, 2018, the defendant . . . filed a . . . motion to correct an illegal sentence and an accompanying memorandum of law, [claiming that his sentence violated his federal and state constitutional rights to be free from] double jeopardy . . . . On May 15, 2018, the court issued its memorandum of decision denying the defendant's motion to correct an illegal sentence." (Footnotes omitted.) Id., 306–307.

Specifically, the court stated: " 'It . . . seems to me entirely possible that the fatal blows to the ribs, liver, and abdomen could have occurred from a separate blow that was interrupted perhaps by a minute or so before or after trauma was inflicted to the child's face and

head, which is also alleged in the information. And in that situation it would not clearly be one continuous uninterrupted assault. I acknowledge the defense argument that there's no way to actually parse through all this at this time twenty years later, but ultimately it's the defendant's burden, and if we can't do that then the defendant has not met his burden.' " Id., 309.

The defendant appealed from the judgment of the trial court to the Appellate Court, claiming that "his conviction and punishment for manslaughter in the first degree and risk of injury arose from the same transaction and that risk of injury is a lesser included offense of manslaughter in the first degree, as charged in this matter, in violation of his right to be free from double jeopardy." Id. The Appellate Court agreed with the defendant. Specifically, the court concluded that, despite risk of injury not being a lesser included offense of manslaughter in the first degree under the *Blockburger* test, it was nevertheless a lesser included offense as charged in the information in this case. Id., 325. Accordingly, the Appellate Court reversed the judgment of the trial court and remanded the case for further proceedings. Id., 326. This certified appeal followed.

Before turning to the parties' claims, we set forth the applicable standard of review and background principles governing the analysis of double jeopardy claims. "A defendant's double jeopardy claim presents a question of law, over which our review is plenary. . . . The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. The double jeopardy clause [applies] to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial." (Internal quotation marks omit-

ted.) *State* v. *Porter*, 328 Conn. 648, 654–55, 182 A.3d 625 (2018).

"Double jeopardy analysis in the context of a single trial is a [two step] process, and, to succeed, the defendant must satisfy both steps. . . . First, the charges must arise out of the same act or transaction [step one]. Second, it must be determined whether the charged crimes are the same offense [step two]. Multiple punishments are forbidden only if both conditions are met. . . . At step two, we [t]raditionally . . . have applied the *Blockburger* test to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 655; see also *State* v. *Goldson*, 178 Conn. 422, 424, 423 A.2d 114 (1979). At the outset, we note that the Appellate Court's conclusion that the defendant's convictions of manslaughter in the first degree and risk of injury arose from the same act or transaction perpetuated on the same victim is undisputed. See *State* v. *Tinsley*, supra, 197 Conn. App. 319. Accordingly, pursuant to the second step of *Blockburger*, we now turn to whether risk of injury to a child is a lesser included offense of manslaughter in the first degree, rendering them the same offense for double jeopardy purposes.

"Our case law has been consistent and unequivocal" that the second step of *Blockburger* "is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial." (Internal quotation marks omitted.) *State* v. *Porter*, supra, 328 Conn. 656; accord *State* v. *Bernacki*, 307 Conn. 1, 9, 52 A.3d 605 (2012), cert.

denied, 569 U.S. 918, 133 S. Ct. 1804, 185 L. Ed. 2d 811 (2013). When conducting this analysis, "we are concerned with theoretical possibilities, and do not focus on the evidence presented." (Internal quotation marks omitted.) *State* v. *Mezrioui*, 26 Conn. App. 395, 403–404, 602 A.2d 29, cert. denied, 224 Conn. 909, 617 A.2d 169 (1992).

Although it is well settled that, under *Blockburger*, a court may look to the charging documents to determine whether one crime is a lesser included offense of another, at issue in this appeal is the extent to which the particular facts alleged within the charging documents are relevant to that analysis. The state challenges the Appellate Court's conclusion that, "[when] the defendant claims that his or her conviction includes a lesser included offense, we employ a different analysis than the traditional *Blockburger* comparison of the elements of each offense. . . . 'The test for determining whether one violation is a lesser included offense in another violation is whether it is possible to commit the greater offense, *in the manner described in the information or bill of particulars*, without having first committed the lesser.' " (Citations omitted; emphasis added.) *State* v. *Tinsley*, supra, 197 Conn. App. 313. The Appellate Court cited to a series of cases from both this court and the Appellate Court that have included the language, "in the manner described in the information," when considering whether one crime is a lesser included offense of another, namely, *State* v. *Miranda*, 260 Conn. 93, 125, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002), *State* v. *Greco*, 216 Conn. 282, 292, 579 A.2d 84 (1990); *State* v. *Goldson*, supra, 178 Conn. 426, *State* v. *Bumgarner-Ramos*, 187 Conn. App. 725, 749, 203 A.3d 619, cert. denied, 331 Conn. 910, 203 A.3d 570 (2019), and *State* v. *Flynn*, 14 Conn. App. 10, 17–18, 539 A.2d 1005, cert. denied, 488 U.S. 891, 109 S. Ct. 226, 102 L. Ed. 2d 217

(1988). See *State* v. *Tinsley*, supra, 313. For the reasons discussed in this opinion, we conclude that, under *Blockburger*, these cases do not require the case specific, fact sensitive inquiry in which the Appellate Court engaged.

The parties dispute whether the Appellate Court correctly determined that the facts alleged by the state in the information are determinative of the double jeopardy inquiry under *Blockburger*. The state claims that the court should consider only the statutory elements of each offense and that two crimes do not become greater or lesser included offenses by virtue of the specific facts alleged by the state in the information. In response, the defendant argues that the Appellate Court correctly determined that the two offenses, *as described in the information*, are the same offense, regardless of their differing statutory elements. We agree with the state and conclude that, under the *Blockburger* test, manslaughter in the first degree and risk of injury to a child are not greater and lesser included offenses because each has a statutory element the other does not, regardless of the facts alleged in the information. Accordingly, the defendant's conviction of both offenses did not violate the prohibition against double jeopardy.

At the center of the parties' dispute and the Appellate Court's conclusion is the language "in the manner described in the information." The issue before us is whether this language alters the *Blockburger* test and requires a court to consider the elements of the offense within the specific factual scenario alleged in the charging documents. At the outset, we recognize that "in the manner described in the information" is language that has appeared, in the double jeopardy context, under two common instances in which a court must determine whether one crime is a lesser included offense of another. A comparison of those two instances highlights how they have been conflated, and we take this opportu-

nity to clarify the appropriate double jeopardy analysis under *Blockburger*.

The first instance in which a court must determine whether one crime is a lesser included offense of another, in the context of double jeopardy, is the "cognate pleadings approach." *State* v. *Tomlin*, 266 Conn. 608, 618, 835 A.2d 12 (2003). The cognate pleadings approach is used to determine whether a defendant has received constitutionally adequate notice of the charges against him when a lesser included offense instruction has been requested. See id., 617–18. "A defendant is entitled to an instruction on a lesser [included] offense if, and only if . . . [among other conditions] it is not possible to commit the greater offense, *in the manner described in the information or bill of particulars*, without having first committed the lesser . . . ."[4] (Emphasis added.) *State* v. *Whistnant*, 179 Conn. 576, 588, 427 A.2d 414 (1980); see also *State* v. *Brown*, 163 Conn. 52, 62, 301 A.2d 547 (1972) ("to require an instruction on a lesser included offense, the lesser offense must not require any element which is not needed to commit the greater offense in the manner alleged in the information or the bill of particulars").

Although the cognate pleadings approach bears some relation to the double jeopardy analysis, it is, by definition, distinct from the *Blockburger* test that a court

[4] By way of background, we note that "[a] defendant is entitled to an instruction on a lesser offense if, and only if, the following conditions are met: (1) an appropriate instruction is requested by either the state or the defendant; (2) it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without having first committed the lesser; (3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense; and (4) the proof on the element or elements which differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant innocent of the greater offense but guilty of the lesser." *State* v. *Whistnant*, 179 Conn. 576, 588, 427 A.2d 414 (1980).

engages in to decide if being put to jeopardy on a lesser offense bars a later prosecution on the greater offense or if the conviction of two offenses in a single trial essentially punishes a defendant for a single crime. See *State* v. *Greco*, supra, 216 Conn. 292 (*Blockburger* test is distinct analysis from test evaluating jury instructions). In contrast to the cognate pleadings approach, when the court seeks to determine whether a defendant's conviction of multiple crimes violates his right against double jeopardy under *Blockburger*, it is well settled that "the test . . . is whether each provision requires proof of a fact which the other does not." (Internal quotation marks omitted.) Id., 291; accord *State* v. *John*, 210 Conn. 652, 695, 557 A.2d 93 (1989), cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989), and cert. denied sub nom. *Seebeck* v. *Connecticut*, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989); *State* v. *Wright*, 197 Conn. 588, 593, 500 A.2d 547 (1985).

Subsequent federal and sister state precedent, along with the United States Supreme Court's own "decisions applying [*Blockburger*'s] principle reveal . . . [that] the [c]ourt's application of the [*Blockburger*] test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, *notwithstanding a substantial overlap in the proof offered to establish the crimes*." (Citations omitted; emphasis added.) *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975); see *Gore* v. *United States*, 357 U.S. 386, 389, 78 S. Ct. 1280, 2 L. Ed. 2d 1405 (1958); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 788–89, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946); see also *United States* v. *Dixon*, 509 U.S. 688, 696, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993) ("[i]n both the multiple punishment and multiple prosecution contexts, this [c]ourt has concluded that [when] the two offenses for which the defendant is punished or tried cannot survive

the 'same-elements' test, the double jeopardy bar applies"); *United States* v. *DeCarlo*, 434 F.3d 447, 455–56 (6th Cir. 2006) ("[t]he [d]ouble [j]eopardy [c]lause is not violated merely because the same evidence is used to establish more than one statutory violation if discrete elements must be proved in order to make out a violation of each statute"). The purposes of the two tests highlight a key distinction between the analyses. The *Blockburger* test protects "against cumulative punishments [and] is . . . designed to ensure [only] that the sentencing discretion of the courts is confined to the limits established by the legislature." (Internal quotation marks omitted.) *State* v. *Greco*, supra, 216 Conn. 293. The cognate pleadings approach, on the other hand, is "grounded on the premise that whe[n] one or more offenses are lesser than and included within the crime charged, notice of the crime charged includes notice of all lesser included offenses. . . . This notice permits each party to prepare a case properly, each cognizant of its burden of proof."[5] (Internal quotation marks omitted.) *State* v. *Tomlin*, supra, 266 Conn. 617.

[5] Although we do not consider the cognate pleadings approach in great detail here because this case does not concern a lesser included offense instruction, we note that "[c]ourts face a [two part] analysis when considering lesser included offense issues: first, does the offense meet the definition of a lesser included offense; and second, if it is a lesser included offense, should an instruction be given to the jury?" J. Minerly, "The Interplay of Double Jeopardy, the Doctrine of Lesser Included Offenses, and the Substantive Crimes of Forcible Rape and Statutory Rape," 82 Temp. L. Rev. 1103, 1107 (2009). *Blockburger* addresses the first inquiry as to whether a defendant may be punished for multiple crimes. See id., 1110–11. States have varying approaches to answer the second inquiry regarding jury instructions; Connecticut uses the cognate pleadings approach. See, e.g., *State* v. *Tomlin*, supra, 266 Conn. 618.

"The [cognate pleadings] approach uses the pleadings, rather than the statutory elements, to determine whether a [lesser included] offense charge is acceptable. States using this approach compare the elements, as modified by the defendant's charging instrument, to the elements of the proposed [lesser included] offense. If the lesser offense is described by the pleadings, then the charge is permissible. This method allows the court to consider the specific facts as stated in the pleadings, rather than being tied to the letter of the elements of the charged offense. In sum, it is a more customized

We acknowledge that, under both the cognate pleadings approach and the *Blockburger* test, the language of the statutes under which the defendant is charged, as well as the charging documents, are relevant. See *State* v. *Greco*, supra, 216 Conn. 292. The Appellate Court, however, did more than examine the charging documents to determine the statutory elements of each offense, as is required under *Blockburger*. Instead, the court relied on the specific factual manner in which the defendant's offenses were described in the information: "Focusing our analysis on the theoretical possibilities, rather than the evidence, we cannot discern a scenario in which the defendant could have caused the death of the fifteen month old victim by blunt trauma to the abdomen without also impairing the health of the victim by inflicting trauma to his abdomen. Stated differently, it was not possible for the defendant to commit the homicide offense, *in the manner described in the information*, without first having committed risk of injury to a child." (Emphasis added.) *State* v. *Tinsley*, supra, 197 Conn. App. 324. Therefore, the Appellate Court improperly conflated the cognate pleadings approach with the *Blockburger* analysis because the cognate pleadings approach, unlike the *Blockburger* test, "does not insist that the elements of the lesser offense be a subset of the higher offense. It is sufficient that the lesser offense have certain elements in common with the higher offense . . . . [In addition], the relationship between the offenses is determined not by a comparison of statutory elements in the abstract, but by reference to the pleadings in the case." (Internal quotation marks omitted.) *State* v. *Tomlin*, supra, 266 Conn. 618. Essentially, by its definition, the cognate pleadings approach is inconsistent with the well established *Blockburger*

approach than the statutory-elements method of analysis." (Footnotes omitted.) A. Peters, "Thirty-One Years in the Making: Why the Texas Court of Criminal Appeals' New Single-Method Approach to Lesser-Included Offense Analysis Is a Step in the Right Direction," 60 Baylor L. Rev. 231, 240 (2008).

test, which, by its own terms, is limited to considering only the elements of the statutes and the charging documents.[6]

The defendant argues that, in *State* v. *Tomlin*, supra, 266 Conn. 608, this court rejected the *Blockburger* analysis when determining whether one offense is a lesser included offense of another in favor of the cognate pleadings approach. We disagree. In *Tomlin*, this court considered whether, under the circumstances of that case, the trial court had properly instructed the jury that manslaughter was a lesser included offense of murder. Id., 627–28. As we discussed previously in this opinion, whether a lesser included offense instruction is appropriate in a particular case is governed by an analysis distinct from the *Blockburger* test. Indeed, the court in *Tomlin* appropriately did not reference *Blockburger* at all in the entirety of its opinion in that case. Thus, the defendant's reliance on *Tomlin* is misplaced.

The defendant also points to this court's statement in *State* v. *Bletsch*, 281 Conn. 5, 28, 912 A.2d 992 (2007), that "[t]he *Blockburger* test . . . requires that we look to charging instruments for the facts the state has alleged to satisfy the statutory elements." We disagree with the defendant's characterization of *Bletsch* because this court's reference to the facts alleged in the information in that case was to better ascertain under which portion of the statutes the defendant was charged. The defendant in *Bletsch* alleged that "one cannot engage in sexual intercourse with a child under sixteen . . .

[6] We note that the defendant, throughout his brief, describes the cognate pleading approach as part and parcel of the *Blockburger* analysis. For example, the defendant argues that, because the cognate pleadings approach references the factual allegations contained in the state's information to determine whether one crime is the lesser included offense of another for purposes of jury instructions, the same approach should be applied to a *Blockburger* analysis. The defendant, however, does not direct us to any authority to support the proposition that the two approaches are interchangeable.

without either having contact with her intimate parts or without subjecting the victim to contact with that person's intimate parts . . . and that sexual intercourse with a child under sixteen necessarily will impair the child's morals." Id. This court considered the facts alleged in the information, not to position the elements within the facts of the charged offense, as the Appellate Court did in the present case, but to consider all *hypothetical* scenarios that would prove one offense and not the other under the statutory elements. This court concluded that "it is possible to have contact with the victim's intimate parts, such as her breasts, without engaging in sexual intercourse. Consequently, it was possible to prove each offense in the manner charged in the substitute information without necessarily proving the other offense." Id., 29. Therein lies the distinction. In *Bletsch*, this court referenced the information to ascertain all possible scenarios in which one crime could be committed without the other. In contrast, the defendant in the present case asks us to limit all hypothetical scenarios only to the one that is described in the information, namely, that manslaughter of a minor child cannot occur without risk of injury to that child. Such analysis would alter the emphasis *Blockburger* places on the statutory elements, and we decline to do so.

We recognize that both this court and the Appellate Court have used the phrase in "the manner described in the information" within various *Blockburger* inquiries. Such references appear to have led to significant confusion regarding, and ultimately conflation of, the cognate pleadings approach and the *Blockburger* test. Illustrating this confusion, the Appellate Court concluded that, "[when] the defendant claims that his or her conviction includes a lesser included offense, we employ a different analysis than the traditional *Blockburger* comparison of the elements of each offense." *State* v. *Tinsley*,

supra, 197 Conn. App. 313. To support this conclusion, the court relied on three Connecticut cases, namely, *State* v. *Greco*, supra, 216 Conn. 292, *State* v. *Carlos P.*, 171 Conn. App. 530, 537–39, 157 A.3d 723, cert. denied, 325 Conn. 912, 158 A.3d 321 (2017), and *State* v. *Raymond*, 30 Conn. App. 606, 610–11, 621 A.2d 755 (1993). These cases, however, do not stand for the proposition that an analysis other than the *Blockburger* test should be used to determine whether a defendant's conviction under two statutes violates the prohibition against double jeopardy. In each of these three cases, this court or the Appellate Court undertook a traditional *Blockburger* analysis and examined the statutory elements of the offenses.

The inclusion of "in the manner described in the information" has not, and cannot, alter the application of the *Blockburger* test. To illustrate this point, we briefly review a series of cases that contain the phrase "in the manner described in the information" or similar language, including those cases referenced by the Appellate Court.

In *State* v. *Miranda*, supra, 260 Conn. 93, this court concluded that assault in the first degree and risk of injury to a child "both require proof of elements that the other does not. Consequently, it is *possible* to prove one offense in the manner charged in the information without necessarily proving the other offense." (Emphasis in original.) Id., 126. This court referenced *only the statutory elements* required to prove each offense. See id. The information was relevant in identifying the charges against the defendant and the elements the state had to prove. See id. Similarly, in *Greco*, this court concluded that, because "there are no elements of first degree robbery and first degree burglary [that] are not also elements of felony murder when the felony murder count alleges 'robbery and burglary' as the predicate offenses, these offenses constitute the 'same offense'

as the felony murder charge under the *Blockburger* test." *State* v. *Greco*, supra, 216 Conn. 292. Therefore, the information was relevant to the court's analysis insofar as it identified the predicate offenses for felony murder. See id.; see also *State* v. *Goldson*, supra, 178 Conn. 426–27 (concluding that it is impossible to transport narcotics without possessing narcotics); *State* v. *Bumgarner-Ramos*, supra, 187 Conn. App. 751 ("[c]onsidering the theoretical possibilities . . . and not the evidence, as [a court is] required to do in the second step of the *Blockburger* analysis, [the court is] aware of no conceivable circumstance in which the defendant could have caused [the victim's] death without also having caused her serious physical injury"); *State* v. *Raymond*, supra, 30 Conn. App. 611–12 (considering language of information and concluding "that the information alleges two different intents"); *State* v. *Flynn*, 14 Conn. App. 10, 17–18, 539 A.2d 1005 (considering elements of charges and whether each provision requires proof of additional fact that other does not), cert. denied, 488 U.S. 891, 109 S. Ct. 226, 102 L. Ed. 2d 217 (1988). Thus, the "manner described in the information" is relevant in determining whether one crime is a lesser included offense of another only to the extent the reviewing court is consulting the information in order to determine whether it alleges distinct elements for each offense, rather than to determine the particular factual predicate of the case. Indeed, this court does not always consult the information when it is evident that each offense contains an element the other does not. See, e.g. *State* v. *McCall*, 187 Conn. 73, 91, 444 A.2d 896 (1982) (concluding that risk of injury to child is not lesser included offense of sexual assault in second degree because "[e]ach requires proof of an element not required by the other").

The United States Supreme Court's decision in *Illinois* v. *Vitale*, 447 U.S. 410, 100 S. Ct. 2260, 65 L. Ed. 2d

228 (1980), further confirms that the statutory elements, rather than the factual allegations, drive the *Blockburger* inquiry. In *Vitale*, the defendant argued that, under Illinois law, it was impossible to convict him of manslaughter without also proving his reckless failure to slow his vehicle because the state alleged that the victim's death was caused by his failure to brake. See id., 418. The court disagreed and concluded that "[t]he point is that if manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the 'same' under the *Blockburger* test. The mere possibility that the [s]tate will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution."[7] Id., 419. Therefore, because the well established *Blockburger* test focuses on the elements of each offense rather than the facts alleged in the information, we now consider the elements that the state must prove for manslaughter in the first degree and risk of injury to a child.

In the present case, the defendant, although initially charged with capital felony, was convicted of the lesser included offense of manslaughter in the first degree in violation of § 53a-55 (a) (1), which requires the state to prove that (1) "the defendant intended to cause serious

[7] The United States Supreme Court in *Vitale* did not ultimately resolve the issue of whether manslaughter and failure to reduce speed were greater and lesser included offenses. The court observed that the "Illinois Supreme Court did not expressly address the contentions that manslaughter by automobile could be proved without also proving a careless failure to reduce speed, and [the court is] reluctant to accept its rather cryptic remarks about the relationship between the two offenses involved here as an authoritative holding that under Illinois law proof of manslaughter by automobile would always involve a careless failure to reduce speed to avoid a collision." *Illinois* v. *Vitale*, supra, 447 U.S. 419. The United States Supreme Court remanded the case to the Illinois Supreme Court to determine whether, under Illinois statutes, as construed by the state's highest court, manslaughter always would require proof of failure to slow because, if it did not, the two offenses were not the same for *Blockburger* purposes. See id., 421.

physical injury to the victim," and (2) "he caused [the victim's] death." (Internal quotation marks omitted.) *State* v. *Greene*, 186 Conn. App. 534, 550, 200 A.3d 213 (2018). The information alleged that the defendant, "with the intent to cause the death of [the victim], caused the death of [the victim], who was then [fifteen] months of age, by blunt trauma to the abdomen."[8]

The defendant was also convicted of risk of injury to a child in violation of the act prong of § 53-21.[9] See footnote 9 of this opinion. The state had to prove that the defendant, "with the general intent to do so, committed (1) an act (2) likely to impair the morals or health (3) of a child under the age of sixteen." (Internal quotation marks omitted.) *State* v. *Owens*, 100 Conn. App. 619, 636, 918 A.2d 1041, cert. denied, 282 Conn. 927, 926 A.2d 668 (2007). The information alleged that the defendant "did an act likely to impair the health of [the victim], a child who was then [fifteen] months of age, by inflicting multiple trauma to his face, head, chest, and abdomen and thereby causing: laceration of the liver, internal bleeding in the abdomen, fracture of the

[8] Although the information charges the defendant with capital felony, the statutory elements are the same for manslaughter in the first degree with the exception of the applicable mental state. Because the defendant references the description contained within the information, we address it here only to demonstrate the ultimate importance to the double jeopardy inquiry of the statutory elements of each offense.

[9] This court has identified two distinct prongs under § 53-21, namely, the situation prong and the act prong. See *State* v. *Padua*, 273 Conn. 138, 147–48, 869 A.2d 192 (2005). "The 'situation prong' refers to the language in [the statute that] provides that '[a]ny person who . . . wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired . . . shall be guilty of a class C felony . . . .'

"The 'act prong' refers to the language . . . that provides: 'or does any act likely to impair the health or morals of any such child . . . shall be guilty of a class C felony . . . .' " (Emphasis omitted.) *State* v. *Owens*, 100 Conn. App. 619, 635–36 n.12, 918 A.2d 1041, cert. denied, 282 Conn. 927, 926 A.2d 668 (2007).

tenth right rib, and multiple contusions of the face, head, chest, and abdomen."

The statutory elements of manslaughter in the first degree and risk of injury to a child indicate that each offense contains an element that the other does not. Manslaughter in the first degree under § 53a-55 (a) (1) requires the state to prove that the defendant, with intent to cause serious physical injury, caused the victim's death, whereas risk of injury to a child in violation of § 53-21 requires proof of impairment to the health of a child less than sixteen years of age. Thus, it is conceivable to commit the crime of manslaughter in the first degree without committing risk of injury to a child under sixteen. Similarly, it is entirely possible to commit the crime of risk of injury to a child without committing manslaughter in the first degree because an impairment to the health of a child does not necessarily involve causing the death of a child by intentionally causing serious physical injury. The Appellate Court's additional consideration of the facts alleged in the information, specifically with respect to the victim's abdominal injury, was misplaced because that analysis does not shed light on whether the two offenses each contain an element of proof the other does not. The existence of an abdominal injury is not an element of either offense. Because the United States Supreme Court has declined to consider facts alleged in the information when conducting a *Blockburger* analysis, we decline to import that consideration into the double jeopardy analysis.

Finally, the defendant argues that we should treat his convictions of manslaughter in the first degree in violation of § 53a-55 (a) (1) and risk of injury to a child in violation of § 53-21 as the same offense for double jeopardy purposes, even if they constitute separate offenses under the *Blockburger* test. "The *Blockburger* test is a rule of statutory construction, and because it serves as a means of discerning congressional purpose

the rule should not be controlling [when], for example, there is a clear indication of contrary legislative intent." (Internal quotation marks omitted.) *State* v. *Miranda*, supra, 260 Conn. 127; accord *State* v. *Greco*, supra, 216 Conn. 293. Given our conclusion that, under *Blockburger*, the defendant's convictions of manslaughter in the first degree and risk of injury to a child "do not constitute the same offense, the burden remains on the defendant to demonstrate a clear legislative intent to the contrary." (Internal quotation marks omitted.) *State* v. *Schovanec*, 326 Conn. 310, 326, 163 A.3d 581 (2017). The defendant, however, has provided no authority for his claim that the legislature intended to treat §§ 53a-55 (a) (1) and 53-21 as the same offense for double jeopardy purposes. Accordingly, we conclude that §§ 53a-55 (a) (1) and 53-21 are not the same offense for double jeopardy purposes. See, e.g., *State* v. *Miranda*, supra, 127.[10] The Appellate Court, therefore, incorrectly determined that the defendant's convictions of risk of injury to a child in violation of § 53-21 and manslaughter in the first degree in violation of § 53a-55 (a) (1) violated the defendant's right to be free from double jeopardy.

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

In this opinion the other justices concurred.

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[10] We note that, because the state did not provide the Appellate Court "with any authority that our legislature authorized separate penalties for the defendant's criminal offenses . . . [that court] defer[red] to the *Blockburger* presumption and conclude[d] that . . . the defendant's punishment cannot withstand constitutional scrutiny." *State* v. *Tinsley*, supra, 197 Conn. App. 325–26. On appeal, the state challenges the Appellate Court's allocation of the burden. Because we conclude that the two offenses are distinct under the *Blockburger* test, it is the defendant's burden to demonstrate contrary legislative intent.

# STATE OF CONNECTICUT *v.* ELIZABETH K. TURNER
## (SC 20360)

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

*Syllabus*

Convicted of robbery in the first degree and felony murder, among other crimes, the defendant appealed. The defendant's convictions stemmed from her involvement in the murders of the victims, B and B's son, P. Prior to the murders, the defendant and her husband, C, lived in B's home. The defendant devised a scheme in order to steal from B, pursuant to which the defendant instructed C to tell B that the defendant had been arrested and that he needed money to bail the defendant out of jail. B acquiesced and gave C the money, which C and the defendant used to buy drugs. Subsequently, the defendant and C returned to B's home, where the defendant heard an altercation and subsequently witnessed C stabbing P. The defendant did not intercede, and, according to a statement the defendant later made to the police, it was apparent to her at that point that B may have already been dead. After the killings, the defendant went through B's purse and removed money and personal items, and the defendant and C jointly sold B's and P's personal property for cash. In her appeal before the Appellate Court, the defendant claimed that the trial court's instructions violated her due process rights on the ground that the court, in referring to a larceny by false pretenses in its instructions on the first degree robbery and felony murder charges, improperly presented the jury with a legally invalid but factually supported basis for finding her guilty with respect to those charges. In support of this claim, the defendant argued that a larceny by false pretenses could not, as a matter of law, serve as the predicate felony for robbery and felony murder. The Appellate Court concluded that the trial court's references to larceny by false pretenses presented the jury with a legally valid basis for conviction, albeit one that was factually unsupported by the evidence presented at trial, and that the improper inclusion of the factually unsupported theory was harmless because the post murder larcenies also presented the jury with a legally valid and factually supported alternative basis for finding the defendant guilty of robbery and felony murder. The Appellate Court affirmed the judgment of conviction, and the defendant, on the granting of certification, appealed to this court. *Held* that the jury having been instructed on an alternative theory of conviction that was legally valid and factually supported by the evidence, the Appellate Court properly upheld the defendant's conviction of first degree robbery and felony murder: a larceny by false pretenses that precedes the use of force can satisfy the

larceny element of robbery if the force is used in order to retain the property immediately after the taking, and, therefore, the trial court's references to larceny by false pretenses in its instructions presented the jury with a legally valid theory for finding the defendant guilty of robbery and felony murder; nevertheless, because the evidence established that the defendant and C completed their scheme to take money from B under the pretense that it was to bail the defendant out of jail before B and P were murdered, that scheme could not serve as a factual basis for finding the defendant guilty of robbery or felony murder, and, accordingly, the trial court's references to larceny by false pretenses in its instructions in connection with that scheme was improper; however, the submission of this factually unsupported theory of guilt to the jury did not violate the defendant's due process rights because the jury was provided with a legally valid and factually supported alternative basis for conviction insofar as the jury was instructed that it could find the defendant guilty of first degree robbery and felony murder on the basis of her participation in the larcenies that occurred after the murders were committed, and this alternative theory of criminal liability was amply supported by the evidence.

Argued March 24—officially released August 31, 2021*

*Procedural History*

Substitute information, in the first case, charging the defendant with the crimes of conspiracy to commit larceny in the third degree and accessory to larceny in the third degree, substitute information, in the second case, charging the defendant with three counts of the crime of robbery in the first degree, two counts of the crime of felony murder, and with one count each of the crimes of criminal attempt to possess narcotics, larceny in the third degree, burglary in the third degree, hindering prosecution in the second degree, forgery in the second degree, conspiracy to commit robbery in the first degree, and tampering with evidence, and substitute information, in the third case, charging the defendant with the crimes of larceny in the second degree, using a motor vehicle without the owner's permission, and forgery in the second degree, brought to the Superior Court in the judicial district of Waterbury, where

* August 31, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

the cases were consolidated; thereafter, the case was tried to the jury before *Cremins*, *J.*; verdicts and judgments of guilty, from which the defendant appealed; subsequently, the Appellate Court, *Lavine*, *Prescott*, *and Bright*, *Js.*, which affirmed the judgments of the trial court, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

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

*Ronald G. Weller*, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Terence D. Mariani* and *Cynthia S. Serafini*, senior assistant state's attorneys, for the appellee (state).

*Opinion*

KAHN, J. This certified appeal requires us to consider whether the defendant's convictions of robbery in the first degree in violation of General Statutes § 53a-134 (a) (1) and felony murder in violation of General Statutes § 53a-54c should be reversed due to the trial court's references to larceny by false pretenses in its instructions to the jury on both offenses. The defendant, Elizabeth K. Turner, appeals from the judgment of the Appellate Court affirming her conviction on sixteen counts,[1] including three counts of robbery in the first

[1] The defendant was convicted of two counts of felony murder in violation of General Statutes (Rev. to 2011) § 53a-54c, one count of attempt to possess narcotics, in violation of General Statutes § 53a-49 and General Statutes (Rev. to 2011) § 21a-279 (a), one count of larceny in the third degree, in violation of General Statutes § 53a-124 (a), one count of burglary in the third degree, in violation of General Statutes § 53a-103 (a), one count of hindering prosecution in the second degree, in violation of General Statutes § 53a-166 (a), one count of forgery in the second degree, in violation of General Statutes § 53a-139 (a) (1), two counts of robbery in the first degree in violation of General Statutes § 53a-134 (a) (1), one count of robbery in the first degree in violation of § 53a-134 (a) (3), one count of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a), one count of tampering with physical evidence in violation of General Statutes (Rev. to 2011) § 53a-155 (a) (1), one count of

degree and two counts of felony murder, for her involvement in the murder of Donna Bouffard and her son, Michael Perkins (Perkins).[2] The defendant contends that the trial court, by referring to larceny by false pretenses in its instructions, improperly presented the jury with a legally invalid but factually supported basis for finding her guilty of both robbery and felony murder. The Appellate Court rejected that claim, concluding that the trial court's instructions, although improper, provided the jury with a legally valid but factually unsupported basis for finding the defendant guilty and, as a result, did not impact her due process right to a fair trial. See *State* v. *Turner*, 190 Conn. App. 693, 709–15, 212 A.3d 715 (2019). The Appellate Court further held that the trial court's instructional error was harmless because the jury had a legally valid and factually supported alternative basis for finding the defendant guilty of robbery and felony murder. Id., 711–15. We affirm the judgment of the Appellate Court.

The jury reasonably could have found the following relevant facts based on the evidence presented at trial. In February, 2012, Bouffard invited the defendant and her husband, Claude Turner, both of whom were homeless at the time, to live with her in her Watertown home. Bouffard's generosity was an extension of a kindness first offered by her daughter, Christine Perkins, who, after seeing the Turners at a Waterbury mall and recognizing Claude Turner from a Salvation Army food line,

conspiracy to commit larceny in the third degree in violation of §§ 53a-48 (a) and 53a-124 (a), one count of accessory to larceny in the third degree in violation of General Statutes §§ 53a-8 (a) and 53a-124 (a), one count of larceny in the second degree in violation of General Statutes § 53a-123 (a) (1), and one count of using a motor vehicle without the owner's permission in violation of General Statutes § 53a-119b (a) (1).

[2] The defendant was convicted of two counts of robbery in the first degree in violation of § 53a-134 (a) (1) for the robberies of Bouffard and Perkins. The defendant was also convicted of one count of robbery in the first degree in violation of § 53a-134 (a) (3) for robbery using a dangerous instrument.

invited the Turners to stay with her and her mother. Bouffard provided the Turners with their own room on the second floor.

At the beginning of April, 2012, Bouffard received a disability settlement in the amount of $13,000. After using a portion of the settlement to pay various bills, Bouffard put the remaining $7000 in an envelope and hid it under her bed. When she noticed that some of the money was missing, she took the remaining cash and placed it in a safe in her living room. Bouffard accused the defendant and Claude Turner of the theft, but allowed them to remain in her home.

On April 19, 2012, Bouffard traveled to Vermont for a brief vacation with a friend. Prior to her departure, Bouffard served eviction papers on her daughter and her daughter's husband, David Ortiz, so that her son, Perkins, could move back into her home after having moved out following a dispute with Ortiz. While Bouffard was away, the defendant directed her husband to break into the safe with a crowbar in order to access the remainder of the money obtained from the disability settlement. Claude Turner complied, and the couple stole approximately $6000, all of which they used to purchase drugs. When Bouffard returned from Vermont and discovered the open, empty safe, she reported the larceny to the police. In early May, 2012, Bouffard asked the Turners to move out of her home. The couple refused to leave.

The relationship between the Turners and Bouffard deteriorated rapidly following the theft. In the ensuing months, the defendant expressed to her husband and their close friend, Anthony Acosta, that she wanted to put rat poison in Bouffard's and Perkins' food. After her arrest, the defendant told the police that Bouffard frequently complained about being unhappy and that she found such complaints to be condescending. She

also admitted that she and Bouffard argued frequently during this period.

On June 28, 2012, the defendant devised a new scheme to steal from Bouffard. She instructed her husband to go to Bouffard and tell her that the defendant had been arrested and that he needed $50 to bail her out of jail. Bouffard acquiesced and gave Claude Turner the money, which he and the defendant used to buy drugs. Later that same day, again at the direction of the defendant, Claude Turner returned to Bouffard and told her the bond was actually $100. Bouffard again gave Claude Turner $50, and the couple used the money to purchase more drugs.

Just after midnight on June 29, 2012, the Turners returned to Bouffard's home, where Perkins was asleep on a couch and Bouffard was awake in her room. According to the defendant's statement to the police following her arrest, Bouffard began "running her mouth" soon after they arrived. Hoping to avoid a confrontation, the defendant went upstairs and turned on a television in the room that she shared with her husband. Interested in what was going on downstairs, the defendant lowered the sound on the television so that she could listen in.

Soon thereafter, the defendant heard "banging" and "wrestling" noises. The defendant also heard Perkins yell, "[j]ust stop" and "[p]lease stop, I love you." (Internal quotation marks omitted.) The defendant then started to walk down the stairs but stopped when she saw Claude Turner stabbing Perkins in the stomach. The defendant did not intercede, and, according to her statement to the police, it was at that moment that she realized that Bouffard was likely dead because the room to her door was closed despite Perkins' pleas for help. After seeing the defendant, Claude Turner told her to return upstairs, which she promptly did.

Immediately after the killings, Claude Turner walked upstairs and handed Bouffard's purse to the defendant. The defendant went through the purse and removed $200, multiple gift cards, and the keys to Bouffard's car. The defendant then walked down the stairs, past the mutilated bodies of Perkins and Bouffard, and searched for the paperwork for Bouffard's car. The defendant and her husband then drove Bouffard's car to Waterbury, where they picked up Acosta and purchased marijuana and cocaine. The three then returned to Bouffard's home and used the drugs. At trial, the jury heard former testimony from Acosta that, while they were sitting in the Turners' room, the defendant said that she regretted telling her husband to kill Bouffard and Perkins. When the defendant discovered an eviction notice while searching through Bouffard's belongings, she remarked to Acosta, "good for them. They deserved it."

Over the next several days, the defendant, Claude Turner, and Acosta sold a variety of items they stole from the house, including Bouffard's camper, phone, and jewelry, and Perkins' scooter, guitar, and a video game console. The defendant later admitted to the police that she and her husband had jointly decided to sell the various items for cash. The defendant also attempted to withdraw money from Bouffard's bank account using a forged check but was turned away by a skeptical bank teller. On Friday, July 6, 2012, one week after the murders, the defendant and her husband sold Bouffard's car for $400.

The defendant and her husband were ultimately arrested in Baltimore, Maryland, and the defendant waived extradition to Connecticut.[3] The defendant was charged with sixteen offenses. Relevant to the present

[3] While in prison awaiting trial, the defendant wrote a letter to a friend in which she stated that she had "made a huge mistake" that resulted in "lives [being] lost." (Internal quotation marks omitted.)

appeal, the defendant was charged, in the second case, with felony murder as to Bouffard and Perkins in counts one and two, respectively, and robbery in the first degree as to Bouffard and Perkins in counts nine and ten, respectively. At trial, the prosecutor argued that the defendant had engaged in a continuous sequence of larcenous conduct, beginning with the bail scheme and culminating in the theft of the victims' property after the murders. At the conclusion of the state's case-in-chief, defense counsel moved for a judgment of acquittal on the ground that the defendant did not plan or participate in the murder and, as a result, could not be guilty of felony murder or robbery. The prosecutor, in response to the motion, argued that the timing of the murders elevated both the bail scheme larceny and the larcenies committed after the murders to robberies. The trial court denied the motion.

At an on-the-record charging conference held the following day, defense counsel argued that the state's "continuing course of conduct" theory was inappropriate for closing argument on the felony murder counts because the bail scheme had ended prior to the use of force. The trial court disagreed, concluding that whether the bail scheme, as part of a continuous course of conduct, could serve as the predicate felony for felony murder was a question of fact for the jury. The trial court reasoned: "The cases in the brief that was filed by the state in the hearing [on] probable cause do stand for the proposition, in my view, that there can be a continuing course of conduct from a point prior to the murders . . . that can be argued as a continued course of conduct, which would encompass the underlying predicate robbery for the felony murder. . . . My conclusion, further, is that whether or not it is a continuing course of conduct is a fact[ual] issue that has to be decided by the jury."

In its instructions to the jury on the counts of robbery and felony murder, the trial court defined the crime of larceny by false pretenses when it described the larceny element of robbery. The trial court instructed the jury in relevant part: "Larceny simply means theft or stealing. Larceny also includes obtaining property by false pretenses. 'False pretense' means a false representation of fact." The trial court referred to larceny by false pretenses a total of three times in its instructions on robbery and felony murder.

Aside from the various references to larceny by false pretenses, the trial court's instructions hewed closely to the model instructions for robbery and felony murder. See Connecticut Criminal Instructions 5.4-1 and 6.4-1, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited August 20, 2021). When it instructed the jury on the felony murder charges in counts one and two of the second case, the trial court explained that, in order to find the defendant guilty, it had to find that the killings occurred "in the course of, and in furtherance of the commission or attempted commission of the crime of robbery . . . ." The trial court further noted that " '[i]n the course of the commission' of the robbery or attempted robbery means during any part of the defendant's participation in the robbery or attempted robbery." The trial court also instructed the jury that the killing must "in some way be causally connected to, or as a result of, the robbery . . . ." The jury subsequently returned verdicts finding the defendant guilty on all counts. See *State* v. *Turner*, supra, 190 Conn. App. 695–96. Thereafter, the trial court rendered judgments of conviction in accordance with the verdicts and sentenced the defendant to sixty years of incarceration. Id., 700.

On appeal to the Appellate Court, the defendant claimed, inter alia,[4] that the trial court's instructions on

[4] In her appeal before the Appellate Court, the defendant also claimed that insufficient evidence was presented at trial to support her conviction

the charges of robbery and felony murder violated her due process right to a fair trial because the court's various references to larceny by false pretenses permitted the jury to base its guilty verdict on a legally invalid but factually supported theory of guilt. See *State* v. *Turner*, supra, 190 Conn. App. 704–705. In support of this claim, the defendant argued that a larceny by false pretenses cannot, as a matter of law, serve as the predicate felony for robbery and felony murder. Id., 709. According to the defendant, the trial court's reference to larceny by false pretenses created the impression that the jury could find her guilty of robbery and felony murder based on the larceny by false pretenses at issue in this case, namely, the bail scheme. Id., 700–702. The defendant argued that, because the instructions contained a legally invalid theory, the jury's general verdicts must be reversed under *Stromberg* v. *California*, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931). *State* v. *Turner*, supra, 704–705.

The Appellate Court rejected the defendant's claim and held that, although the trial court's references to larceny by false pretenses were improper, the instructional error presented the jury with a legally *valid* theory that was factually unsupported by the evidence presented at trial. Id., 709–10. Relying on our decision in *State* v. *Chapman*, 229 Conn. 529, 643 A.2d 1213 (1994), the Appellate Court held that the inclusion of the factually unsupported theory was harmless because the post murder larcenies also presented the jury with a legally valid and factually supported alternative basis for finding the defendant guilty. See *State* v. *Turner*, supra, 190 Conn. App. 715. This certified appeal followed.[5]

of attempted possession of narcotics. See *State* v. *Turner*, supra, 190 Conn. App. 696. This claim is not at issue in the present certified appeal.

[5] The defendant appealed from her conviction to this court, and we transferred the appeal to the Appellate Court. See General Statutes § 51-199 (c); Practice Book § 65-1. We subsequently granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate

Before turning to the defendant's specific claim on appeal, we begin by reviewing the legal principles relevant to our consideration of claims of instructional error involving multiple theories of guilt on a single count. We have previously recognized the important distinction between instructional errors that present the jury with a legally valid but factually unsupported theory of liability and those that provide the jury with a legally *invalid* basis for convicting the defendant. In *Chapman*, we noted that "the United States Supreme Court has held that a factual insufficiency regarding one statutory basis, which is accompanied by a general verdict of guilty that also covers another, factually supported basis, is not a federal due process violation." *State* v. *Chapman*, supra, 229 Conn. 539; see also, e.g., *State* v. *Burton*, 258 Conn. 153, 162–65, 778 A.2d 955 (2001). In such cases, the inclusion of a legally valid but factually unsupported theory of liability in the instructions does not implicate the due process rights of the defendant because a jury is well equipped to differentiate between factually supported and factually unsupported theories of guilt. See *State* v. *Chapman*, supra, 539; see also *Griffin* v. *United States*, 502 U.S. 46, 56–59, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991).

A jury is not, however, "equipped to determine whether a particular theory of conviction submitted to [it] is contrary to law . . . ." (Internal quotation marks omitted.) *State* v. *Chapman*, supra, 229 Conn. 539. As a result, if a jury is provided with a legally invalid alternative basis for finding the defendant guilty and the jury returns a general verdict of guilty, the defendant's due process rights are violated, and the conviction must be reversed unless the state can show that "the jury *necessarily* found facts to support the conviction on a

Court properly uphold the defendant's conviction of robbery and felony murder based on a legally invalid but factually supported theory for the conviction?" *State* v. *Turner*, 333 Conn. 915, 216 A.3d 650 (2019).

valid theory." (Emphasis added.) *State* v. *Cody M.*, 337 Conn. 92, 116, 259 A.3d 576 (2020); see also *Hedgpeth* v. *Pulido*, 555 U.S. 57, 58, 129 S. Ct. 530, 172 L. Ed. 2d 388 (2008).

In the present appeal, the defendant contends that the Appellate Court incorrectly concluded that the trial court's instructions presented the jury with a legally valid but factually unsupported basis for finding her guilty of robbery and felony murder. Specifically, the defendant argues that the Appellate Court incorrectly determined that a person who obtains property through false pretenses and later uses force to retain that property can, as a matter of law, be convicted of robbery or felony murder. According to the defendant, a larceny by false pretenses can never serve as a legally valid predicate for robbery and felony murder, and, as a result, the trial court's instructions violated her due process rights by providing the jury with a legally invalid basis for finding her guilty. Citing this court's recent decision in *State* v. *Cody M.*, supra, 337 Conn. 92, the defendant argues that her conviction on the charges of robbery and felony murder must be reversed because the state cannot establish that the jury made the factual findings necessary to support her conviction on a legally valid alternative theory. We disagree.

We begin our analysis of the defendant's claim by examining the Appellate Court's conclusion that, under certain circumstances, a larceny by false pretenses can serve as the predicate felony for robbery and felony murder. In support of its conclusion, the Appellate Court offered the following hypothetical: "Suppose that, during the course of the bail scheme, [Perkins] glanced out [of] the window and saw the defendant in the car. If he exclaimed, after Bouffard has handed over the money, that the defendant was not in jail but was outside, and Turner immediately used physical force in order to retain possession of the money, then the lar-

ceny by false pretenses could have been a proper predicate for a robbery." *State* v. *Turner*, supra, 190 Conn. App. 709. We agree with the Appellate Court's reasoning and conclude that a larceny by false pretenses that precedes the use of force can satisfy the larceny element of robbery under General Statutes § 53a-133 if the force is used in order to retain the property immediately after the taking.[6] See General Statutes § 53a-133 ("[a] person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of . . . the retention [of the property] *immediately after the taking* [of the property]" (emphasis added)). As we have consistently recognized, a larceny that occurs either "immediately before or after" the use of force can serve as the predicate larceny for robbery under § 53a-133. *State* v. *Ghere*, 201 Conn. 289, 297, 513 A.2d 1226 (1986). We, therefore, conclude that the trial court's references to larceny by false pretenses in its charge presented the jury with a legally *valid* theory for finding the defendant guilty of robbery and felony

[6] The case law that the defendant cites in support of the opposite conclusion is unavailing. The defendant relies heavily on the California Supreme Court's decision in *People* v. *Williams*, 57 Cal. 4th, 776, 786–89, 305 P.3d 1241, 161 Cal. Rptr. 3d 81 (2013). Although the majority in that decision held that a larceny by false pretenses that precedes a use of force cannot serve as a predicate larceny for robbery under California law; see id., 788–89; the holding in that case turned on the language of California's robbery statute, which differs significantly from the language contained in § 53a-133. Unlike the relevant California statute, § 53a-133 covers the "use of physical force . . . for the purpose of . . . the retention [of the property] immediately after the taking . . . ." The defendant also mistakenly relies on *People* v. *Quinn*, 186 App. Div. 2d 691, 588 N.Y.S.2d 646 (1992), which makes clear that, under New York state law, a larceny by false pretenses can serve as the predicate felony for robbery if force is used "to overcome . . . resistance to the retention of the [property] 'immediately after the taking.' " Id., 692; see also, e.g., *People* v. *Saia*, 112 App. Div. 2d 804, 805, 492 N.Y.S.2d 306 (recognizing that robbery can be committed by threatening physical force for purpose of retaining property acquired by false pretenses), appeal denied, 66 N.Y.2d 617, 485 N.E.2d 244, 494 N.Y.S.2d 1040 (1985).

murder.[7] See *Griffin* v. *United States*, supra, 502 U.S. 59 (noting that theory of conviction is legally invalid if charged conduct "is protected by the [c]onstitution, is time barred, or fails to come within the statutory definition of the crime"); see also, e.g., *United States* v. *Desnoyers*, 637 F.3d 105, 109 (2d Cir. 2011).

We now must consider whether this legally valid theory was supported by evidence presented at trial. According to the Appellate Court, the evidence established that the bail scheme "was complete[d] before the victims were murdered," and, as a result, it could not serve as the factual basis for finding the defendant guilty of robbery and felony murder. *State* v. *Turner*, supra, 190 Conn. App. 709–10. On the basis of our review of the record, we agree with the Appellate Court. During trial, testimony established that, on the evening of June 28, 2012, Claude Turner and the defendant fraudulently acquired $100 from Bouffard and promptly used that money to purchase drugs. After midnight on June 29, 2012, the defendant and Claude Turner returned to Bouffard's home, and, following an argument with Bouffard, Claude Turner killed both Bouffard and Perkins. By the time the victims were murdered, the proceeds of the bail scheme had been spent. Additionally, no evidence was presented at trial that Claude Turner's use of force was connected to the bail scheme or that he attacked Bouffard for the purpose of "[p]reventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking . . . ." General Statutes § 53a-133. Due to the absence of any evidence connecting the killings to the completed bail scheme, we conclude that this theory of criminal liability was factually unsupported, and, as a result, the

[7] The defendant implicitly concedes as much in her brief when she argues that "the bail larceny may have had a connection to the murder. But it did not have the legally required connection because the Turners had spent the stolen money."

trial court's inclusion of larceny by false pretenses in its instructions on robbery and felony murder was improper. See, e.g., *State* v. *Reid*, 193 Conn. 646, 667 n.22, 480 A.2d 463 (1984) (noting that "[i]t is error for a court to submit to a jury as a basis for a conviction any statutory alternative ground unsupported by the evidence").

Having determined that the instructions improperly presented the jury with a legally valid but factually unsupported theory of conviction, "we must determine whether: (1) the error is constitutional or nonconstitutional in nature; and (2) whether it was harmful." *State* v. *Chapman*, supra, 229 Conn. 537. As we have previously noted, the submission of a factually unsupported theory of guilt does not violate the constitutional rights of a defendant, as long as the trial court's instructions also provided the jury with a legally valid *and* factually supported basis for conviction. Id., 539–44; see also, e.g., *State* v. *Berger*, 249 Conn. 218, 238–39, 733 A.2d 156 (1999).

In her brief, the defendant concedes that her participation in the larcenies that occurred after Bouffard and Perkins were killed provided the jury with a legally valid basis for finding her guilty of both robbery and felony murder.[8] The trial court specifically instructed the jury that, in order to find the defendant guilty of felony murder, it had to find that a "death occurred during . . . any part of the defendant's *participation* in the robbery or attempted robbery." (Emphasis added.) The trial court also instructed the jury that it needed to find that the death was "in some way . . . causally connected to, or as a result of, the robbery . . . ." As the defendant concedes, these instructions

[8] Specifically, the defendant states: "Here, the theft of money and gift cards from Bouffard's purse immediately after her death could support a [conviction of] robbery and felony murder . . . if the defendant knew ahead of time that [Claude] Turner was going to kill the victim to steal from her."

presented the jury with a legally valid basis for finding the defendant guilty of robbery and felony murder based on the larcenies committed after the murders.[9]

We also agree with the Appellate Court's assessment that this alternative theory of liability was amply supported by evidence contained in the record. As the Appellate Court noted, the evidence established, among other things, that (1) the defendant told the police that Claude Turner would do anything for her in order to keep her happy; (2) she twice directed Claude Turner to steal Bouffard's money, first when it was under Bouffard's bed and then again when it was in the safe; (3) she did not intervene when she saw Claude Turner stabbing Perkins; (4) she searched through Bouffard's purse and stole money, gift cards, and car keys immediately after the murders; (5) she walked past the bodies of Bouffard and Perkins when searching for the paperwork for Bouffard's car; (6) she and Claude Turner used the money from Bouffard's purse to purchase drugs; (7) they, along with Acosta, used the drugs in Bouffard's home shortly after the murders; (8) she told Acosta that she regretted telling Claude Turner to kill Bouffard and Perkins; and (9) she stated in a letter that she wrote from prison that she had "made a huge mistake" that resulted in "lives [being] lost."[10] (Internal quotation marks omitted.) *State* v. *Turner*, supra, 190 Conn. App. 700, 712. As the Appellate Court aptly noted, "[t]hese facts, and others, provided a basis for the jury to have concluded beyond a reasonable doubt that at least the killing of Bouffard was planned in advance and was

[9] The defendant's claim of instructional error is limited to the trial court's references to larceny by false pretenses in its robbery and felony murder instructions. The defendant does not allege that any other portion of the instructions was improper.

[10] We also note that, during the prosecutor's closing argument, he argued that, due to the defendant's direct involvement in the crimes leading up to the killings, "common sense" dictated that she was aware of Claude Turner's plan to kill the victims before it happened.

designed to gain possession of her money and property, and that . . . Perkins was killed because he was a witness and/or attempted to intervene." Id., 712–13.

Our conclusion that the jury was instructed on an alternative theory of conviction that was both legally valid and factually supported is sufficient to reject any nonconstitutional claim of instructional error. See, e.g., *State* v. *Chapman*, supra, 229 Conn. 542 ("we have consistently held that submission of an instruction for which there was no basis in the evidence is subject to harmless error analysis"). In the present case, the defendant cannot establish that the trial court's error more probably than not affected the jury's verdict because the trial court's instructions provided the jury with a legally valid and factually supported alternative basis for finding her guilty of robbery and felony murder. When a jury is presented with multiple legally valid theories of conviction, only one of which is unsupported by the evidence presented at trial, "we assume that the jury found the defendant guilty under the supported allegation, rather than the unsupported allegation." Id., 543–44.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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## STATE OF CONNECTICUT *v.* JODI D.*
## (SC 20370)

McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

*Syllabus*

Pursuant to the statute (§ 53a-60b (a) (1)) delineating the crime of assault of a disabled person in the second degree, a person is guilty of that crime when he or she commits the crime of assault in the second degree and the victim is "physically disabled," as defined by statute (§ 1-1f).

* In accordance with our policy of protecting the privacy interests of the victims of family violence, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

Pursuant to § 1-1f (b), "[a]n individual is physically disabled if he has any chronic physical handicap, infirmity or impairment . . . ."

Convicted, after a jury trial, of the crime of assault of a disabled person in the second degree, the defendant appealed to the Appellate Court, claiming, inter alia, that § 53a-60b (a) (1), the statute under which she had been convicted, was unconstitutionally vague as applied to her conduct to the extent that it relied on the definition of physical disability set forth in § 1-1f (b). The defendant and her sister, S, had engaged in a physical altercation during which the defendant struck S with a wooden billy club. At the time of the altercation, S suffered from fibromyalgia, a condition for which she had been receiving ongoing medical treatment and taking prescription medication. As a result of that condition, S experienced chronic pain issues and physical limitations that made sitting, standing and walking difficult. The Appellate Court affirmed the judgment of conviction, concluding, inter alia, that § 53a-60b (a) (1) was not unconstitutionally vague as applied to the defendant's conduct because the term "physical disability," as defined in § 1-1f (b), had a readily ascertainable meaning, and the defendant's conduct clearly came within the unmistakable core of conduct prohibited by § 53a-60b (a) (1). The Appellate Court also concluded that there was sufficient evidence to support the jury's finding that the victim suffered from a physical disability. On the granting of certification, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on her claim that §§ 53a-60b (a) (1) and 1-1f (b) were unconstitutionally vague as applied to her conduct: this court consulted the dictionary definitions of "handicap," "infirmity," and "impairment," as used in § 1-1f (b), and concluded that those words, as well as the term "physically disabled" in § 53a-60b (a) (1), are not so inherently vague that a person of ordinary intelligence would not know what conduct is prohibited under § 53a-60b (a) (1), at least as applied to the defendant's conduct toward S; moreover, the courts of other jurisdictions have previously rejected claims that the terms "handicap" and "impaired" are unconstitutionally vague, and there was no merit to the defendant's claim that the statutes were unconstitutionally vague insofar as they conferred unfettered discretion on police officers and prosecutors, among others, to determine which victims are physically disabled enough to warrant prosecution of their aggressors under § 53a-60b (a) (1), as a statute, such as § 53a-60b (a) (1), that is sufficiently clear to give a person of common intelligence notice of what is prohibited necessarily is sufficiently clear to cabin the discretion of police officers and prosecutors within constitutional limits.

2. This court concluded that § 53a-60b (a) (1) was unconstitutionally overinclusive insofar as the statute could be applied to assaults on persons whose physical disabilities neither diminish their ability to defend themselves from assault nor make them particularly vulnerable to injury, which would have no reasonable and substantial relation to the statute's

purpose, and, although § 53a-60b (a) (1) still constitutionally can be applied to conduct that comes within the statute's rational core, because the jury in the present case was not instructed that it was required to find that S had a diminished ability to defend herself or that she was particularly vulnerable to injury at the time of the assault in order to find the defendant guilty under § 53a-60b (a) (1), the case was remanded for a new trial at which the jury could be instructed in accordance with the foregoing standard.

(*Two justices concurring in part and dissenting in part in one opinion*)

Argued December 7, 2020—officially released August 31, 2021**

*Procedural History*

Substitute information charging the defendant with the crimes of assault of a disabled person in the second degree, assault in the third degree and reckless endangerment in the second degree, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, and tried to the jury before *Cremins*, *J.*; verdict of guilty of assault of a disabled person in the second degree and reckless endangerment in the second degree; thereafter, the court vacated the verdict as to the charge of reckless endangerment in the second degree; judgment of guilty of assault of a disabled person in the second degree, from which the defendant appealed to the Appellate Court, *Sheldon*, *Keller* and *Flynn*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Reversed*; *new trial.*

*Megan L. Wade*, assigned counsel, with whom was *James P. Sexton*, assigned counsel, for the appellant (defendant).

*Brett R. Aiello*, deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Karen Diebolt*, former assistant state's attorney, for the appellee (state).

** August 31, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Naomi T. Fetterman* filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

*Opinion*

McDONALD, J. The issues before us in this appeal are (1) whether the term "physically disabled," as used in General Statutes § 53a-60b (a) (1) and defined by General Statutes § 1-1f (b), is unconstitutionally vague as applied to the conduct of the defendant, Jodi D., who was convicted of assault on a victim who suffered from fibromyalgia and other physical ailments, (2) if the statutes are not unconstitutionally vague, whether they are unconstitutionally overinclusive, and (3) whether there was insufficient evidence to establish that the victim suffered from a physical disability within the meaning of § 53a-60b (a) (1).

The defendant was charged with assault of a disabled person in the second degree in violation of § 53a-60b (a) (1), assault in the third degree in violation of General Statutes § 53a-61 (a) (1) and reckless endangerment in the second degree in violation of General Statutes § 53a-64 (a) after an altercation with the victim, the defendant's sister, during which the defendant struck the victim with a wooden billy club. The jury found the defendant guilty of assault of a disabled person in the second degree and reckless endangerment in the second degree and not guilty of assault in the third degree, and the trial court rendered judgment of conviction. Thereafter, the defendant appealed to the Appellate Court, claiming, among other things, that "§ 53a-60b (a) (1) is unconstitutionally vague as applied to her conduct" and that "the evidence did not support a finding that the victim was physically disabled . . . ." (Footnote omitted.) *State* v. *Dojnia*, 190 Conn. App. 353, 355–56, 210 A.3d 586 (2019). The Appellate Court rejected these claims and affirmed the judgment of conviction. Id., 386. We then granted the defendant's peti-

tion for certification to appeal to this court, limited to the following issues: (1) "Did the Appellate Court correctly conclude that . . . §§ 1-1f (b) and 53a-60b (a) (1) were not unconstitutionally vague as applied to the defendant?" And (2) "[d]id the Appellate Court correctly conclude that the evidence the state presented at trial was sufficient to prove beyond a reasonable doubt that the victim was 'physically disabled' under the governing statutes?" *State* v. *Dojnia*, 333 Conn. 914, 215 A.3d 1211 (2019). The defendant also claims on appeal that, even if the statutes are not unconstitutionally vague, § 53a-60b (a) (1) is unconstitutional because there is no rational nexus between the broad scope of the statute and the legislature's narrow purpose in enacting it.[1] Although we reject the defendant's claim that the statutes are unconstitutionally vague, we conclude that they are unconstitutionally overinclusive and lack any rational basis as applied to assaults on persons whose physical disabilities neither diminish their ability to defend themselves from assault nor make them particularly vulnerable to injury. Accordingly, we reverse the judgment of the Appellate Court and remand the case for a new trial.

The opinion of the Appellate Court sets forth the following facts that the jury reasonably could have found. "In October, 2015, the defendant and the victim, who are sisters, resided in separate units of a duplex style home in Naugatuck that was owned by their mother. For years prior to the events at issue, the victim suffered from chronic pain and was physically limited

[1] We recognize that this issue may be outside the scope of the certified questions because overinclusiveness and vagueness are distinct concepts. Nevertheless, we address the issue because the defendant raised it before the Appellate Court and it is closely intertwined with the certified questions. See, e.g., *Montoya* v. *Montoya*, 280 Conn. 605, 617 n.11, 909 A.2d 947 (2006) (this court has discretion to review issue that is outside scope of certified questions); see also footnote 6 of this opinion.

in performing everyday tasks, such as standing, walking, and climbing stairs.

"For several years prior to the events at issue, the defendant and the victim did not have a good relationship. The relationship between the defendant and the victim worsened in January, 2015, when the defendant's son, who resided with the defendant, was involved in an altercation with the victim at her residence. According to the victim, during this prior incident, the defendant's son broke down her back door and attacked her, which led to his arrest. Tensions escalated further because the defendant was unhappy with the fact that the victim's dog entered her portion of their shared backyard, and that the victim failed to clean up after her dog. Shortly before the incident underlying this appeal, the defendant erected a small plastic fence to separate her backyard from that of the victim in an attempt to keep the victim's dog away. The fence ran across the backyard and between the two rear doors of the residence. The victim was unhappy about the fence. The victim's mother had asked the victim to look for another place to live, and, by October, 2015, the victim was actively planning to move out of her residence.

"Late in the evening on October 10, 2015, the victim walked out of the front door of her residence. From one of the windows of the defendant's residence, the defendant made a negative comment to the victim, who was talking on her cell phone, but the victim declined to engage the defendant in conversation. At approximately 1:30 a.m., on October 11, 2015, the victim left her residence to walk her dog by means of her back door, which was adjacent to the back door leading into the defendant's residence. By this point in time, the victim had consumed multiple alcoholic beverages. The victim walked her dog in the vicinity of her nearby driveway.

"While the victim was reentering her residence with her dog, she noticed that a light had been turned on

inside of the defendant's residence. The victim then stepped back outside, at which time the defendant, who was lurking near the victim's back door, grabbed the victim by the upper part of her body and pulled her over the small plastic fence that was separating their backyards, causing the victim to topple to the ground. A physical struggle between the defendant and the victim ensued, during which the defendant struck the victim repeatedly with a wooden billy club. The victim, while lying on the ground, tried to prevent the defendant from continuing to strike her. The victim grabbed the defendant's hand and pulled her by her hair, causing [the defendant] to fall on top of [the victim]. The victim repeatedly told the defendant to '[l]et go' of the billy club, and the defendant told the victim that she was tired of her, that she hated her, and that she wanted her 'out of here.'

"Ultimately, the victim restrained the defendant, and the victim asked her what their father, who had died, would say to them if he saw them fighting. The defendant promised not to strike the victim again, at which time the victim released her grasp on the defendant's hair and the defendant stepped away from the victim.

"The defendant picked up the victim's cell phone, which had fallen out of the victim's hands during the altercation, and gave it back to her. The victim tossed aside one of the defendant's garbage pails before making her way back inside. The victim was bleeding from her nose and choking on blood. The victim sustained multiple bruises and lacerations on her face, back, left arm, left shoulder, left leg, and torso. The victim's right eye swelled, and she experienced a great deal of pain, particularly pain that emanated from her jaw. The victim's clothing was stained with blood and dirt, and she was unable immediately to locate either her eyeglasses or a pendant that she had been wearing prior to the altercation.

"After the victim went back inside of her residence, she called the police. Soon thereafter, Naugatuck Police Officer Robert Byrne arrived on the scene. He encountered the defendant and the victim arguing in front of the residence. After he separated the sisters, he met privately with the defendant. The defendant admitted that she had struck the victim with the wooden billy club, which was on her kitchen table but stated that she had acted in self-defense. The defendant also stated that she had begun arguing with the victim after she caught the victim 'snooping around in the backyard . . . .' She stated that the small plastic fence that she had erected to prevent the victim's dog from entering her portion of the backyard was a cause of consternation between her and the victim. The defendant sustained injuries during the incident and claimed to have been 'strangled' by the victim, but her injuries were not serious enough to warrant medical treatment. Byrne arrested the defendant on the assault charge, took her into custody, and transported her to police headquarters to complete the booking process.

"Naugatuck Police Officer Shane Andrew Pucci arrived on the scene to provide Byrne with backup assistance. He spoke with the victim privately in her residence and accompanied her to a hospital after emergency medical services arrived on the scene. At the hospital, medical personnel took X-ray images of the victim and treated her injuries. While at the hospital, the victim provided Byrne with an oral statement concerning the incident and her injuries. By 6 a.m. on October 11, 2015, the victim was discharged from the hospital and transported home. Pucci gave the victim a misdemeanor summons for disorderly conduct." *State* v. *Dojnia*, supra, 190 Conn. App. 356–59.

The defendant was charged with assault of a disabled person in the second degree, assault in the third degree and reckless endangerment in the second degree. "At

trial, the victim testified about her extensive medical history. She testified that she had experienced back problems since 2000 and had undergone two surgical procedures on her back. She testified that she had undergone multiple 'foot surgeries' in 1990, 'five or six ear surgeries' in 2000, and 'one breast surgery.' Also, the victim testified that she had suffered from a nerve condition called fibromyalgia, for which she receives ongoing medical treatment. She testified that, at the time that the assault occurred, she was using a variety of medications that had been prescribed for her. Specifically, she was using a medication called Savella to treat her fibromyalgia, three times per day. She was using a medication called Vicodin to treat her pain, usually once per day. She explained: 'Depending on the day, if . . . I know I'm not going to be doing much that day, I'll probably just take one [Vicodin] in the morning or when I wake up.' She also testified that she used Ambien, which helped her to sleep, as needed. The victim testified that she had experienced physical limitations for many years: 'I can't sit too long. I can't stand too long. Walking a far distance is difficult for me. Stairs are very difficult for me to do if I'm carrying something. Just grocery shopping, doing laundry, it's a task for me to do those things.'

"The victim testified that she had received treatment from her primary care physician as well as from Matthew Letko, whom she described as being an employee of '[the] arthritis center.' The victim testified that she had received Social Security disability payments since 2004, and that, in the ten years prior to her testimony in 2017, she had not been engaged in any employment to supplement her disability income.

"The state presented testimony from Letko, who explained that he was a physician's assistant employed

by the Arthritis Center of Connecticut, in Waterbury.[2] Letko testified that the victim had been a patient of the center since February, 2008, and that he had been treating her since 2009 for 'chronic pain issues, chronic low back pain and fibromyalgia syndrome.' He testified that fibromyalgia is 'a widespread pain syndrome primarily affecting muscles, upper back, mid-back, low back, hips, shoulders. It presents with a lot of tenderness, sensitivity to touch. There can also be other symptoms associated, like fatigue, poor sleep.' Letko testified that the treatment that he provided to the victim included prescribing 'Savella, which is a medication specifically approved for fibromyalgia syndrome, muscle relaxants, anti-inflammatory medications; other treatments also include injections, physical therapy, [and] aquatic therapy.' He testified that, in October, 2015, the victim was prescribed Savella, Ambien and Vicodin. Letko testified that he evaluated the victim on a monthly basis. He stated that the physical limitations related to her chronic back pain and fibromyalgia included difficulty in prolonged sitting, hearing, bending, lifting, and using stairs. Letko testified that, although her pain symptoms may fluctuate from day to day, her condition was not going to improve. He testified that the goal of his treatment plan for the victim 'would be to manage the pain effectively enough where she can have a quality of life where she can function around the home, in the community . . . take care of herself, get out of bed every morning, perform basic tasks around the house.' " (Footnote in original.) Id., 365–67.

The defendant testified on her own behalf at trial. On cross-examination, the defendant testified that she knew that the victim was "disabled" and that she was

[2] "The court recognized Letko, who testified that he had received training and licensure as a physician's assistant and had practiced under the supervision of a medical doctor, to be 'an expert in the area of a physician's assistant.' " *State* v. *Dojnia*, supra, 190 Conn. App. 366 n.4.

aware of some of the victim's surgeries and physical ailments. On redirect, the defendant testified that the victim exaggerated and lied about her medical conditions. She also testified that, contrary to the victim's testimony, the victim had worked as a dog walker and house cleaner.[3]

The jury found the defendant guilty of assault of a disabled person in the second degree and reckless endangerment in the second degree. At sentencing, pursuant to the state's request, the sentencing court vacated the conviction of reckless endangerment in the second degree on double jeopardy grounds pursuant to *State* v. *Polanco*, 308 Conn. 242, 245, 61 A.3d 1084 (2013). The court sentenced the defendant to five years of imprisonment, suspended after two years, and three years of probation.

The defendant appealed from the judgment of conviction to the Appellate Court, claiming, for the first time, that "§ 53a-60b (a) (1) is unconstitutionally vague as applied to her conduct." *State* v. *Dojnia*, supra, 190 Conn. App. 359. Specifically, the defendant claimed that, by incorporating the definition of "physical disability" set forth in § 1-1f (b) into § 53a-60b (a) (1), the legislature "impermissibly delegated basic policy matters to the courts for resolution of whether a diagnosis of fibromyalgia falls within the definition of physically disabled for resolution on an ad hoc basis. In so doing, the enforcement of these statutes in the defendant's case [was] arbitrary." (Internal quotation marks omitted.) Id., 361. The Appellate Court concluded that "the term 'physical disability,' as used in § 1-1f (b), has a

[3] The victim testified during the state's case that she had not done any "side jobs" to supplement her Social Security disability income. When the prosecutor asked the victim whether she had ever cleaned houses, she said "[n]ever." When the prosecutor asked the victim whether she had walked dogs, the victim replied that she had walked her own dog and her friends' dogs. The victim did not indicate that she had done this on a regular basis as a source of income.

readily ascertainable meaning. It refers to *any* recurring bodily condition that detrimentally affects one's ability to carry out life's activities, regardless of whether it is congenital, [or] the result of bodily injury, organic processes, or . . . illness. The language used in the statute, particularly the phrase, 'not limited to,' reflects that the legislature did not intend to set forth an exhaustive list of each and every bodily condition that could result in a physical disability, and the fact that the legislature did not do so does not necessitate a conclusion that the statute lacks sufficient guidance with respect to its meaning." (Emphasis in original.) Id., 369. The court concluded that the defendant's conduct "clearly came within the unmistakable core of conduct prohibited by § 53a-60b (a) (1)"; id.; and, accordingly, rejected the defendant's claim that the statute is unconstitutionally vague as applied to her conduct. Id., 359.

The Appellate Court also rejected the defendant's claim that the state had failed to prove that the victim suffered from fibromyalgia, concluding that there was sufficient evidence that the victim suffered from "various chronic pain issues, chronic low back pain, and fibromyalgia," and that, in any event, the state did not have the burden of proving that "the victim's physical disability was caused by any particular illness or injury." (Internal quotation marks omitted.) Id., 375. For similar reasons, the court rejected the defendant's claim that fibromyalgia is not a physical disability under § 53a-60b (a) (1) as a matter of law. Id., 376–78. Accordingly, the court concluded that there was sufficient evidence to support the jury's finding that the victim suffered from a physical disability. Id., 377–78. Having rejected the defendant's claims on appeal,[4] the court affirmed the judgment of conviction. Id., 386.

[4] The Appellate Court also rejected the defendant's claim that the prosecutor engaged in prosecutorial impropriety during closing argument. *State* v. *Dojnia*, supra, 190 Conn. App. 378. The defendant does not challenge that ruling on appeal to this court.

This certified appeal followed.[5] The defendant claims on appeal that the Appellate Court incorrectly determined that §§ 53a-60b (a) (1) and 1-1f (b) are not unconstitutionally vague as applied to her conduct. Specifically, she contends that, as applied in the criminal context, § 53a-60b (a) (1) is "ambiguous" because § 1-1f (b) is a remedial statute and, therefore, must be liberally construed, whereas § 53a-60b (a) (1) is a criminal statute that must be strictly construed. The defendant further contends that § 53a-60b (a) (1) is unconstitutional because its broad scope lacks any rational nexus to the intent of the legislature in enacting the statute, namely, to protect persons who have a diminished ability to defend themselves from assault or who are particularly vulnerable to injury.[6] Finally, the defendant contends

[5] After this appeal was filed, we granted permission to the Connecticut Criminal Defense Lawyers Association to file an amicus curiae brief in support of the defendant's position.

[6] The state contends that the only claim that the defendant raised before the Appellate Court and that is reviewable by this court is that §§ 53a-60b (a) (1) and 1-1f (b) are unconstitutionally "vague as applied to her because fibromyalgia purportedly does not rise to the level of a physical disability." We disagree. Although the defendant's brief to the Appellate Court was not a model of clarity, the defendant expressly claimed that the statutes are "so unclear that ordinary people cannot understand what specifically constitutes 'physically disabled' . . . ." The defendant also claimed that, although "the legislature intended to enhance penalties [only] for crimes against the most vulnerable, including those with clearly diagnosable and severe disabilities," the statutes "arguably . . . could apply to nearly all victims." Although the defendant did not expressly characterize the latter claim as implicating the overinclusiveness doctrine, her failure to label her argument using the correct technical rubric does not render the claim unreviewable.

The concurrence and dissent disagrees with this conclusion and contends that the defendant's arguments do not "constitute a separate claim under the overinclusiveness doctrine." As we explain subsequently in this opinion, a statute is unconstitutionally overinclusive if it creates a classification and its application to some members of the class is not rationally related to a legitimate government purpose. The defendant in the present case has claimed that it would be arbitrary to apply § 53a-60b (a) (1) to assaults on victims who, although they suffer from a "physical disability," as that term is broadly defined, do not have a diminished ability to defend themselves or a heightened vulnerability to injury. In other words, the defendant contends that the class of persons to which the statute applies is larger than

that the evidence was insufficient to establish that the victim was physically disabled for purposes of § 53a-60b (a) (1). We conclude that §§ 53a-60b (a) (1) and 1-1f (b) are not unconstitutionally vague. We agree with the defendant, however, that § 53a-60b (a) (1) is unconstitutionally overinclusive as applied to assaults on persons whose physical disabilities neither diminish their ability to defend themselves from assault nor make them particularly vulnerable to injury. Because the jury was not instructed on the proper standard for determining whether the victim had a physical disability within the meaning of § 53a-60b (a) (1), we further conclude that the case must be remanded for a new trial.

We first address the defendant's claim that §§ 53a-60b (a) (1) and 1-1f (b) are unconstitutionally vague as applied to her conduct. This issue presents a legal question subject to de novo review. See, e.g., *State* v. *Kirby*, 137 Conn. App. 29, 39, 46 A.3d 1056, cert. denied, 307 Conn. 908, 53 A.3d 222 (2012). "A statute . . . [that] forbids or requires conduct in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process. . . . Laws must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that [she] may act accordingly. . . . A statute is not void for vagueness unless it clearly and unequivocally is unconstitutional, making every presumption in favor of its validity. . . . To demonstrate that [a statute] is unconstitutionally vague as applied to [her], the [defendant] therefore must . . . demonstrate beyond a reasonable doubt that [she] had inadequate notice of what was prohibited or that

the class of persons for whom application of the statute would be rationally related to a legitimate government purpose, which is a classic overinclusiveness claim. The concurrence and dissent cites no authority for the proposition that a claim that has been distinctly raised is unreviewable because the party making the claim did not attach the correct doctrinal label to it.

[she was] the victim of arbitrary and discriminatory enforcement. . . . [T]he void for vagueness doctrine embodies two central precepts: the right to fair warning of the effect of a governing statute . . . and the guarantee against standardless law enforcement. . . . If the meaning of a statute can be fairly ascertained a statute will not be void for vagueness [because] [m]any statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties. . . . References to judicial [decisions] involving the statute, the common law, legal dictionaries, or treatises may be necessary to ascertain a statute's meaning to determine if it gives fair warning." (Citation omitted; internal quotation marks omitted.) *State* v. *Scruggs*, 279 Conn. 698, 709–10, 905 A.2d 24 (2006).

The United States Supreme Court has previously held that "the more important aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement. . . . [When] the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." (Citation omitted; internal quotation marks omitted.) *Kolender* v. *Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983); see, e.g., *Grayned* v. *Rockford*, 408 U.S. 104, 108–109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) ("[a] vague law impermissibly delegates basic policy matters to [police officers], judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application").

With these principles in mind, we turn to the defendant's claim that §§ 53a-60b (a) (1) and 1-1f (b) are unconstitutionally vague. Section 53a-60b (a) provides in relevant part: "A person is guilty of assault of [a] . . . disabled

. . . person . . . in the second degree when such person commits assault in the second degree under section 53a-60 . . . and (1) the victim of such assault . . . is . . . physically disabled, as defined in section 1-1f . . . ." Section 1-1f (b) provides that "[a]n individual is physically disabled if he has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device."

The defendant concedes that "[t]here is nothing inherently ambiguous about [the] terms" used in §§ 53a-60b (a) (1) and 1-1f (b), and that the legislature plainly intended that the definition of "physically disabled" set forth in § 1-1f (b) would, in the civil context, "encompass as many individuals as possible . . . ."[7] The defendant contends, however, as applied in the criminal context, § 53a-60b (a) (1) is "ambiguous" because § 1-1f (b) is a remedial statute and, therefore, must be liberally construed, whereas § 53a-60b (a) (1) is a criminal statute that must be strictly construed. Compare *Vollemans* v. *Wallingford*, 103 Conn. App. 188, 197, 928 A.2d 586 (2007) (Connecticut Fair Employment Practices Act, General Statutes § 46a-51 et seq., is remedial legislation that must "be construed liberally to effectuate [its] beneficent purposes" (internal quotation marks omitted)), aff'd, 289 Conn. 57, 956 A.2d 579 (2008), with

[7] Somewhat inconsistently, the defendant also contends that "a person of ordinary intelligence could not determine with a reasonable degree of certainty that a person who allegedly suffered from fibromyalgia and other chronic pain issues would be considered 'physically disabled' and that, consequently, [the person] would be subject to enhanced criminal liability." In the very next sentence, however, she contends that this is so because § 53a-60b (a) (1) is a criminal statute. As we subsequently explain in the body of this opinion, a statute that is clear and unambiguous in the civil context does not become vague merely because it is applied in the criminal context.

*State* v. *Skakel*, 276 Conn. 633, 674, 888 A.2d 985 ("criminal statutes are governed by the fundamental principle that such statutes are strictly construed against the state" (internal quotation marks omitted)), cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006).

As a preliminary matter, we agree with the defendant that, as used in § 53a-60b (a) (1), the term "physically disabled" and, as used in § 1-1f (b), the words "handicap," "infirmity" and "impairment" are not so inherently vague that a person of ordinary intelligence would not know what conduct is prohibited, at least as applied to the defendant's conduct toward the victim. The term "handicap" is defined in part as "a disadvantage that makes achievement unusually difficult; [especially] . . . a physical disability that limits the capacity to work." Webster's Third New International Dictionary (2002) p. 1027. "Infirmity" is defined in part as "the quality or state of being infirm" and "an unsound, unhealthy, or debilitated state . . . ." Id., 1159. "Infirm" is defined in part as "not strong or sound physically" or "of poor or deteriorated vitality [especially] as a result of age . . . ." Id. "Impairment" is defined in part as "the act of impairing or the state of being impaired: INJURY <physical and mental diseases and [impairments] of man—*Current* [*Biography*]>: DETERIORATION <any [impairment] of his bodily vigor through sickness or age—J.G. Frazer.>" Id., 1131. "Impair" is defined in part as "to make worse," "diminish in quantity, value, excellence, or strength," or "do harm to . . . ." Id. We conclude on the basis of these definitions that "physically disabled," as used in § 53a-60b (a) (1), clearly means having a physical condition that diminishes the ability of a person, or a part or organ of the person, to function properly, thereby limiting the person's ability to perform life's activities, such as working.[8]

[8] The defendant contends that the Appellate Court improperly engrafted language into §§ 53a-60b (a) (1) and 1-1f (b) when it concluded that a

We further note that our sister courts have previously rejected claims that the terms "handicap" and "impaired" are unconstitutionally vague. In *State* v. *Allen*, 334 N.J. Super. 133, 756 A.2d 1087 (Law Div. 2000), overruled in part by *State* v. *Dixon*, 396 N.J. Super. 329, 933 A.2d 978 (App. Div. 2007), the Law Division of the Superior Court of New Jersey considered the constitutionality of a state statute that imposed an enhanced penalty on a defendant who, in committing a crime, "acted with the purpose to intimidate" a person "because of . . . [a] handicap . . . ." (Internal quotation marks omitted.) Id., 136. The court rejected a claim that the statute was unconstitutionally vague because "handicapped" had been defined by dictionary as "having a physical or mental disability that substantially limits activity." (Internal quotation marks omitted.) Id., 139. In addition, "disability" had been defined as "incapacitated by illness, injury or wound."[9] (Internal quotation marks omitted.) Id.

"physical disability" is a condition that "detrimentally affects one's ability to carry out life's activities . . . ." *State* v. *Dojnia*, supra, 190 Conn. App. 369. We disagree. It is implicit in the notion of "physical disability" that a person has a physical condition that detrimentally affects the person's ability to function in some manner, and that functional impairment normally is experienced and measured by the extent to which the condition detrimentally affects the person's ability to carry out life's activities.

We express no opinion as to the defendant's contention that an assault on a person who wears eyeglasses comes within the "physically disabled" prong of § 53a-60b (a) (1). Although, as the defendant points out, poor eyesight undoubtedly reflects a functional impairment of a person's vision and can detrimentally affect a person's ability to carry out life's activities, we note that the legislature has limited the class of victims with vision related impairments under the statute to blind persons. See General Statutes § 53a-60b (a) ("assault of an elderly, blind, disabled or pregnant person or a person with intellectual disability"). In light of this specificity, it would appear that the defendant's hypothetical is inapt. See, e.g., *Brennan* v. *Brennan Associates*, 316 Conn. 677, 696, 113 A.3d 957 (2015) ("specific terms covering the given subject matter will prevail over general language of the same . . . statute which might otherwise prove controlling" (internal quotation marks omitted)).

[9] The court in *State* v. *Allen*, supra, 334 N.J. Super. 133, stated that the criminal statute required the state to prove that "a reasonable person in the

In *People* v. *Percz*, 100 Misc. 2d 1018, 420 N.Y.S.2d 477 (1979), the defendant contended that a New York statute that prohibited, among other things, "driving while impaired by the use of a drug" was unconstitutionally vague. Id., 1018. In support of this claim, he relied on a case holding that two subdivisions of that same statute that prohibited driving while intoxicated—a misdemeanor—or while impaired—a "violation"—were unconstitutionally vague because the statute provided no standards for determining whether a defendant was " 'impaired' " or " 'intoxicated,' " and because "there was no evidence that the defendant was sufficiently drunk to make such standard unnecessary . . . ." Id., 1019. The court in *Percz* held that, because the subdivision of the statute that the defendant was charged with violating only prohibited operation of a vehicle while " 'impaired' " and required "no differentiation between degrees of drug influence," that provision was not unconstitutionally vague. Id. Thus, the court implicitly held that any degree of impairment clearly came within

position of the defendants would be on fair notice that [the victim was] handicapped." Id., 139. This is because the use of the term "because of" in the statute "connotes a causal link between the infliction of injury and bias motivation . . . ." (Internal quotation marks omitted.) Id., 140. In other words, the defendant must know at the time of the assault that the victim is handicapped. In the present case, defense counsel conceded at oral argument before this court that proof of such knowledge is not required under § 53a-60b (a) (1), thereby abandoning any such claim. Accordingly, we express no opinion on that issue here. We note, however, that, even if such knowledge is required, the defendant admitted at trial that she knew that the victim was disabled. We further note that proof of such knowledge would not be constitutionally required. Cf. *State* v. *Higgins*, 265 Conn. 35, 48, 826 A.2d 1126 (2003) (The statute making murder of a person under the age of sixteen a capital felony without requiring the state to prove that the defendant knew the victim's age "poses no risk of unfairness to [the defendant]. It is no snare for the unsuspecting. Although the [defendant] . . . may be surprised to find that his intended victim [is under the age of sixteen], he nonetheless knows from the very outset that his planned course of conduct is wrongful. The situation is not one [in which] legitimate conduct becomes unlawful solely because of the identity of the [victim]. In a case of this kind the offender takes his victim as he finds him." (Internal quotation marks omitted.)).

the statutory prohibition. Accordingly, we conclude—as, indeed, the defendant does not dispute—that the victim in the present case was clearly physically disabled within the meaning of §§ 53a-60b (a) (1) and 1-1f (b) because she had a physical condition that diminished her ability to function, thereby limiting her ability to perform life's activities.

The defendant contends, however, that, because § 53a-60b (a) is a criminal statute that must be strictly construed, and § 1-1f (b) is a remedial statute that must be liberally construed, this somehow renders these otherwise clear statutes vague. We are not persuaded. The rule that criminal statutes must be strictly construed is a rule of statutory construction that applies to inherently ambiguous criminal statutes, not a rule of substantive law barring the legislature from enacting broad criminal statutes. See, e.g., *Albernaz* v. *United States*, 450 U.S. 333, 342, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981) ("Lenity . . . serves only as an aid for resolving an ambiguity; it is not to be used to beget one. The rule comes into operation at the end of the process of construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." (Internal quotation marks omitted.)). Nor does the rule render a broad but clear and unambiguous criminal statute ambiguous. See, e.g., id., 342–43.

The defendant also claims that, even if §§ 53a-60b (a) (1) and 1-1f (b) are sufficiently clear to give notice to a person of ordinary intelligence of what conduct is prohibited, they are unconstitutionally vague because they confer "unfettered discretion [on police officers], prosecutors, judges and juries to determine which victims [are] physically disabled 'enough' to warrant enhanced criminal liability . . . ." See, e.g., *Kolender* v. *Lawson*, supra, 461 U.S. 358 ("[T]he more important aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the

requirement that a legislature establish minimal guidelines to govern law enforcement. . . . [When] the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." (Citation omitted; internal quotation marks omitted.)); see also, e.g., *United States* v. *Davis*, U.S. , 139 S. Ct. 2319, 2325, 204 L. Ed. 2d 757 (2019) ("[v]ague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police [officers], prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide"); 16B Am. Jur. 2d 488–89 n.8, Constitutional Law § 962 (2020) ("[a]n unconstitutionally vague law invites arbitrary enforcement . . . if it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case"). A careful review of these authorities, however, makes it clear that the notice prong and the arbitrary enforcement prong of the vagueness doctrine are inextricably intertwined; that is, an unconstitutionally vague statute allows for arbitrary enforcement *because* a person of common intelligence, whether the person is a defendant, a police officer, a prosecutor, a judge or a juror, must guess at its meaning. Conversely, a statute that is sufficiently clear to give a person of common intelligence notice of what is prohibited necessarily is sufficiently clear to cabin the discretion of police officers and prosecutors within constitutional limits. Because we have concluded that the statutes are sufficiently clear to give notice to a person of ordinary intelligence that the victim was physically disabled for purposes of § 53a-60b (a) (1), we reject this claim.[10]

[10] To the extent that the defendant contends that § 53a-60b (a) (1) is unconstitutionally vague because it confers unfettered discretion on prosecutors whether to prosecute conduct that clearly falls within its scope, we disagree. The United States Supreme Court has previously held that, "[w]ithin the limits set by the legislature's constitutionally valid definition

Finally, the defendant claims that § 53a-60b (a) (1) is unconstitutional because there is no rational nexus between the exceedingly broad scope of the "physically disabled" prong and the legislature's relatively narrow intent in enacting the statute. The defendant points out that the legislative history of § 53a-60b (a) (1) indicates that the legislation was intended to prevent crimes against persons who are particularly vulnerable to assault and injury as a result of being physically disabled, and she claims that, unless a limiting gloss is applied, it can be applied to persons who do not fall within that class. See 20 S. Proc., Pt. 7, 1977 Sess., p. 2822, remarks of Senator Salvatore C. DePiano (proposed legislation "is directed at trying to stop . . . assaults [on] people who are blind and elderly and disabled who cannot defend themselves"); 20 H.R. Proc., Pt. 7, 1977 Sess., p. 2896, remarks of Representative Robert G. Gilligan (expressing concerns about "vulnerability to crime," "diminished physical strength and stamina" and diminished ability of persons covered by statute "to defend themselves or to [escape] from threat-ening situations"); 20 H.R. Proc., supra, p. 2896 (noting that elderly persons are more easily injured and slower to recover from injury); Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 1977 Sess., pp. 479–82 (testimony of seventy-seven year old woman regarding multiple assaults and robberies that she had suffered and vulnerabilities of elderly people).

As we indicated, although the defendant frames this claim as implicating the vagueness doctrine, it more properly is characterized as a claim that § 53a-60b (a) (1) is unconstitutionally *overinclusive*. See footnote 6

of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was [not] deliberately based [on] an unjustifiable standard such as race, religion, or other arbitrary classification." (Internal quotation marks omitted.) *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

of this opinion; see also footnote 1 of this opinion and accompanying text. In other words, the defendant effectively contends that the statute violates substantive due process principles because many of its clear applications are not rationally related to a legitimate government purpose. See, e.g., *State* v. *Higgins*, 265 Conn. 35, 68–69, 826 A.2d 1126 (2003) (recognizing in dictum that statute may be so overinclusive or underinclusive that it does not rationally advance legislative purpose); see also, e.g., *United States* v. *Thornton*, 901 F.2d 738, 739–40 (9th Cir. 1990) (when defendant claimed that statute was overinclusive, and statute did not impinge on constitutionally protected conduct or implicate suspect class, court considered whether classification created by statute was irrational or unreasonable); *Bynes* v. *State*, 854 So. 2d 289, 291 (Fla. App. 2003) (when defendant claimed that statute was overinclusive, court applied principle that "[t]he rational basis test requires the legislature to have a legitimate purpose for enacting the statute and to select means which have a reasonable and substantial relation to its purpose which are not unreasonable, arbitrary, or capricious"), review denied, 892 So. 2d 1011 (Fla. 2004); *State* v. *Mitchell*, 757 N.W.2d 431, 439 (Iowa 2008) ("[e]ven under the rational basis test, a statute may be unconstitutional if it is so overinclusive and underinclusive as to be irrational").[11]

[11] The concurrence and dissent points out that *State* v. *Higgins*, supra, 265 Conn. 69, and *United States* v. *Thornton*, supra, 901 F.2d 739–40, involved equal protection claims, not substantive due process claims, and it questions whether the overinclusiveness doctrine is applicable outside of the context of an equal protection claim. We agree that the defendant's claim in the present case could have been framed as an equal protection claim. See, e.g., id.; *State* v. *Higgins*, supra, 69; *State* v. *Mitchell*, supra, 757 N.W.2d 439. Specifically, she could have claimed that it is irrational to treat a ninety pound woman with no physical disability who assaults a heavyweight boxer with periodic migraines more harshly than a heavyweight boxer with periodic migraines who assaults a ninety pound woman with no physical disability. We disagree, however, that overinclusiveness claims can never implicate substantive due process principles. It is well established that a statute that is not rationally related to a legitimate government purpose violates the right to substantive due process; see, e.g., *Dutkiewicz* v. *Dutkiewicz*, 289

Conn. 362, 381, 957 A.2d 821 (2008); and the defendant's claim in the present case is that there is no rational nexus between the intent of the legislature, in enacting the statute, to protect those who have a diminished capacity to defend themselves or a heightened vulnerability to injury and the application of the statute to an assault on a person who has neither of those characteristics. See, e.g., *State* v. *Old South Amusements, Inc.*, 275 Ga. 274, 275, 277–78, 564 S.E.2d 710 (2002) (applying "substantive due process rational basis test" to claim that statute criminalizing use and possession of video poker amusement machines was overinclusive); *People* v. *Avila-Briones*, 49 N.E.3d 428, 433, 450 (Ill. App. 2015) (applying rational basis review to claim that sex offender statutory scheme violated substantive due process because it was overinclusive), appeal denied, 48 N.E.3d 1093 (Ill. 2016).

The concurrence and dissent also relies on authority holding that imperfect statutory classifications that are somewhat overinclusive or underinclusive can pass constitutional muster. See, e.g., *State Troopers Non-Commissioned Officers Assn. of New Jersey* v. *New Jersey*, 643 F. Supp. 2d 615, 624 (D.N.J. 2009) ("[C]ourts are compelled under [a rational basis] review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational basis review because it is not made with mathematical nicety or because in practice it results in some inequality. . . . Thus, the fact that a statute is overinclusive or [underinclusive], standing alone, does not render the statute constitutionally invalid." (Citation omitted; internal quotation marks omitted.)), aff'd, 399 Fed. Appx. 752 (3d Cir. 2010). We conclude that there is a distinction between the present case and the cases that have applied this principle to uphold the constitutionality of a statute that creates an imperfect classification, such as *State* v. *Higgins*, supra, 265 Conn. 61–62, in which the defendant challenged a statute imposing the death penalty for the murder of a victim under the age of sixteen, and *United States* v. *Thornton*, supra, 901 F.2d 739 and n.1, in which the defendant challenged a federal statute making it unlawful to distribute a controlled substance within 1000 feet of any school, college, or university. In *Higgins* and *Thornton*, our legislature and Congress, respectively, were faced with a choice of drawing lines that would inevitably be somewhat arbitrary—in the sense that the lines could be moved in one direction or the other without significantly undermining the purpose of the legislation—or drawing no line at all. In such cases, courts will defer to the legislature's choice out of necessity. See, e.g., *State* v. *Higgins*, supra, 69 ("[t]o invalidate the legislature's choice, we would either have to hold that the [l]egislature cannot draw an age line—which would eviscerate any attempt to include [child murders] within the ambit of the capital murder statute—or we would have to hold that the line should be drawn elsewhere—in which case, we would merely be legislating from the bench" (internal quotation marks omitted)).

In the present case, the legislature was not faced with the choice of drawing an arbitrary line or drawing no line. Indeed, the legislature easily could have created a classification that was rationally and closely related to the statute's purpose, namely, the class of persons who assault persons with a physical disability that diminishes their ability to defend themselves

We agree with the defendant that § 53a-60b (a) (1) is unconstitutionally overinclusive. For example, on its face, the statute clearly would apply to an assault on an Olympic boxer who suffered from chronic but episodic migraine headaches that completely incapacitated him while they were occurring even if, at the time of the assault, he was not experiencing one.[12] Such an application of the statute would have no reasonable and substantial relation to the statute's purpose of protecting those who have a diminished capacity to defend themselves or who are particularly vulnerable to injury.

At least one court has recognized that, if a statute is unconstitutionally overinclusive, the statute still may constitutionally be applied to conduct that is within the statute's rational core. In *People* v. *Rodriguez*, 66 Cal. App. 4th 157, 77 Cal. Rptr. 2d 676 (1998), the defendant challenged the constitutionality of a California statute that provided that "[t]he penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if," as was applicable to that case, "[t]he murder was intentional and perpetrated by means

or renders them particularly vulnerable to injury. Instead, the statute, as written, creates a different and much larger class—persons who assault persons with *any* physical disability—and the application of the statute to any member of that class who is not included in the smaller class bears no rational relation to a legitimate government purpose. We further note that the gloss that we place on the statute will place no greater burden on the fact finder than the statute, as written, does. Cf. *State Troopers Non-Commissioned Officers Assn. of New Jersey* v. *New Jersey*, supra, 643 F. Supp. 2d 632 (rule barring state troopers from practicing law was constitutional even though it was both overinclusive and underinclusive because defendant state department "could have determined that the practice of law [by state employees] presented difficult ethical questions better not decided on a case-by-case basis").

[12] Other examples abound. As written, the statute would apply to assaults on persons suffering from chronic ulcers, eczema, lactose intolerance, tinnitus, insomnia, allergies, taste or smelling disorders or growth disorders, even if these physical disabilities had no effect on the victim's ability to defend himself or his vulnerability to injury.

of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death." (Internal quotation marks omitted.) Id., 164. Specifically, the defendant in *Rodriguez* contended that the statute was "invalid because it [was] unconstitutionally overinclusive on its face." (Internal quotation marks omitted.) Id., 172. The California Court of Appeal observed that "[s]tating that a statute is merely overinclusive . . . presupposes that parts of the statutory coverage have been properly included. Here, [the] defendant recognizes that [the statute] could be constitutionally applied to drive-by shootings, stating that [he] is not asking this [c]ourt to second-guess the wisdom of creating a drive-by special circumstance. The [l]egislative materials, and common knowledge, amply support a judgment that drive-by murders have become a widespread threat to public safety, and a statutory provision directed at deterring such conduct is fully within the power of the [l]egislature and the voters to adopt. [The defendant's] concern is the manner in which the language of the provision will inevitably be applied to reach conduct beyond the evil sought to be remedied . . . . [The] [d]efendant's forthright recognition that [the statute] can be constitutionally applied in at least some circumstances—at least in cases of drive-by shootings—necessarily refutes [his] claim of facial invalidity unless an exception to the general rule applies. . . . [N]o such exception applies. This is not a [f]irst [a]mendment case, the statute is not vague for due process purposes, [the] defendant was not involved in exercising any constitutional right, there is no danger of chilling the exercise of constitutional rights by increasing the penalty for murder by shooting out of a vehicle, etc. Hence [the statute] is not unconstitutional on its face." (Internal quotation marks omitted.) Id.; see, e.g., id., 176 (statute constitutionally applied to defendant because, even if it was overinclusive, he

had not established that his conduct did not come within its rational core).

We find this reasoning persuasive. Accordingly, we conclude that § 53a-60b (a) (1) constitutionally may be applied to conduct that comes within its rational core, namely, an assault on a person with a physical disability that (1) diminishes the ability of the person, or a part or organ of the person, to function properly, thereby limiting the person's ability to perform life's activities, *and* (2) diminishes the person's ability to defend himself from assault or renders him particularly vulnerable to injury. See, e.g., *Boisvert* v. *Gavis*, 332 Conn. 115, 144, 210 A.3d 1 (2019) (court may "add interpretative gloss to a challenged statute in order to render it constitutional" (internal quotation marks omitted)). In making the determination as to whether the victim had a diminished ability to defend himself or was particularly vulnerable to injury, the jury must consider the condition of the victim at the time of the assault.

In the present case, the jury was not instructed that it must find that the victim had a diminished ability to defend herself or that she was particularly vulnerable to injury at the time of the assault in order to find the defendant guilty of assault of a disabled person in the second degree under § 53a-60b (a) (1). We conclude, therefore, that the case must be remanded to the trial court for a new trial at which the jury can be instructed on the proper standard.[13] See, e.g., *State* v. *Salamon*, 287 Conn. 509, 516–17, 550, 949 A.2d 1092 (2008) (defendant was entitled to new trial when jury was not properly instructed with respect to element of offense).

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

[13] If the state chooses not to retry the defendant, then the trial court must vacate the defendant's conviction under § 53a-60b (a) (1) and reinstate the conviction for reckless endangerment in the second degree. See, e.g., *State* v. *Polanco*, supra, 308 Conn. 263.

reverse the judgment of the trial court and to remand the case to that court for a new trial.

In this opinion D'AURIA and ECKER, Js., concurred.

MULLINS, J., with whom KAHN, J., joins, concurring in part and dissenting in part. I agree with the majority that General Statutes §§ 53a-60b (a) (1) and 1-1f (b) are not unconstitutionally vague as applied to the conduct of the defendant, Jodi D. I disagree with the majority that the issue of whether § 53a-60b (a) (1) is unconstitutionally overinclusive is properly before us. Unlike the majority, I conclude that it is not.

Specifically, I do not believe that the defendant has raised the distinct claim that § 53a-60b (a) (1) is unconstitutional under the overinclusiveness doctrine. In fact, overinclusiveness typically is part of the rational basis test applied to an equal protection challenge. See, e.g., *State* v. *Higgins*, 265 Conn. 35, 68–69, 826 A.2d 1126 (2003) (discussing, as part of equal protection claim analysis, whether defendant raised claim that statute is underinclusive or overinclusive). In the present case, the defendant challenged the statute only as void for vagueness as applied to her conduct. Thus, she had to demonstrate, under the facts of this case, either "(1) [that] the statute does not provide fair warning that it applies to the conduct at issue, or (2) that [s]he was the victim of arbitrary enforcement practices." (Internal quotation marks omitted.) *Rocque* v. *Farricielli*, 269 Conn. 187, 206, 848 A.2d 1206 (2004).

The question before us, then, is whether the defendant's conduct—assaulting a person with fibromyalgia and chronic pain—falls within the statute's core of prohibited conduct. The majority concludes, and I agree, that the defendant's conduct clearly does. In my view, it is not proper to then search for and posit other scenarios in which the statute might possibly be unconstitu-

tional. Consequently, the majority's hypotheticals, including its Olympic boxer with migraines hypothetical, are inapposite in the context of the defendant's claim that the statute is unconstitutionally vague as applied to her conduct. See footnote 12 of the majority opinion and accompanying text. The defendant did not raise a separate claim under the overinclusiveness doctrine before the Appellate Court, in her petition for certification to appeal to this court, or in her brief to this court. Therefore, I disagree with the majority's reframing of the defendant's vagueness claim to include a distinctly separate overinclusiveness challenge.[1]

Accordingly, I would not address whether § 53a-60b (a) (1) is unconstitutionally overinclusive. Instead, I would conclude that § 53a-60b (a) (1) is not unconstitutionally vague as applied to the defendant's conduct. As a result, I would reach the second certified issue and agree with the Appellate Court that the evidence was sufficient to establish that the victim suffered from a physical disability within the meaning of § 53a-60b (a) (1).[2] See *State* v. *Dojnia*, 190 Conn. App. 353, 378, 210 A.3d 586 (2019). Therefore, I would affirm the judgment of the Appellate Court.

In the present case, the defendant claims that the statute violates her due process rights because it is unconstitu-

[1] The majority points out that I cite to "no authority for the proposition that a claim that has been distinctly raised is unreviewable because the party making the claim did not attach the correct doctrinal label . . . ." Footnote 6 of the majority opinion. That is true but also irrelevant. Because I do not believe that the defendant raised a separate overinclusiveness claim in the first instance, either before the Appellate Court or in the petition for certification, I see no reason to supply support for a proposition I am not making.

[2] Because I conclude that the defendant's sufficiency claim was resolved properly in the Appellate Court's well reasoned opinion, and that opinion fully addresses that claim; see *State* v. *Dojnia*, 190 Conn. App. 353, 371–78, 210 A.3d 586 (2019); it would serve no useful purpose for me to repeat the discussion contained therein.

tionally vague as applied to her conduct. The majority engages in a thorough and well reasoned analysis of that claim and correctly concludes, with respect to notice, "that [§§ 53a-60b (a) (1) and 1-1f (b)] are sufficiently clear to give notice to a person of ordinary intelligence that the victim was physically disabled for purposes of § 53a-60b (a) (1) . . . ."

As to arbitrary enforcement, the majority also rejects the defendant's claim that § 53a-60b (a) (1) is unconstitutional because it confers unfettered discretion on police officers and prosecutors to determine what conduct falls within its scope. Indeed, the majority concludes that "a statute that is sufficiently clear to give a person of common intelligence notice of what is prohibited necessarily is sufficiently clear to cabin the discretion of police officers and prosecutors within constitutional limits."

Notwithstanding these conclusions, the majority culls from different portions of the defendant's brief a claim under the overinclusiveness doctrine. For instance, the majority relies on the defendant's argument that "the statute fails to provide a sufficient nexus between fibromyalgia and/or other chronic pain issues and protecting people with those conditions from opportunistic criminals seeking to attack people [who are] less likely to be able to ward off such attacks." The majority also uses the defendant's reliance on the legislative history of § 53a-60b (a) (1) and her argument that the statute improperly incorporated "wholesale the intentionally broad, remedial definition of 'physically disabled' in the criminal context" to support its conclusion that the defendant raised a separate claim under the overinclusiveness doctrine.

These arguments do not reveal a separate overinclusiveness claim. Rather, these are the defendant's arguments in support of her vagueness as applied claim. The

defendant's able counsel described it as a vagueness challenge. Specifically, the defendant asserted that the lack of clarity as to what constituted physical disability under § 53a-60b (a) (1) leads to (1) lack of notice, and (2) arbitrary enforcement. The majority's conclusion that the statute was clear and that there was no arbitrary enforcement fully addresses and resolves the claim raised by the defendant and should end the analysis.

Instead, the majority reframes the defendant's arguments into a separate overinclusiveness claim. The majority explains that, "although the defendant frames this claim as implicating the vagueness doctrine, it more properly is characterized as a claim that § 53a-60b (a) (1) is unconstitutionally overinclusive. . . . In other words, the defendant effectively contends that the statute violates substantive due process principles because many of its clear applications are not rationally related to a legitimate government purpose." (Citations omitted; emphasis omitted.) I disagree with the majority's decision to reframe the arguments that the defendant made within her vagueness challenge and to treat them as a properly raised claim under the overinclusiveness doctrine.

The majority states that the defendant merely failed to "label her argument using the correct technical rubric . . . ." Footnote 6 of the majority opinion. This is just simply not the case. The defendant raised and briefed only a vagueness as applied challenge. Indeed, this court has previously explained that "[t]he void for vagueness doctrine is a procedural due process concept that originally was derived from the guarantees of due process contained in the fifth and fourteenth amendments to the United States constitution." *Packer* v. *Board of Education*, 246 Conn. 89, 98, 717 A.2d 117 (1998). Thus, the overinclusiveness doctrine is part of a separate legal claim that was not raised by the defendant.

This court has consistently concluded that it "will not review a claim unless it was distinctly raised at trial. . . . We may, however, review legal arguments that differ from those raised before the trial court if they are subsumed within or intertwined with arguments related to the legal claim raised at trial." (Citations omitted.) *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 203, 982 A.2d 620 (2009). The majority's reframing of the defendant's arguments into a separate overinclusiveness claim under different constitutional protections breaches this well established principle.

I can find no reference to overinclusiveness in the defendant's brief to the Appellate Court or this court, and the Appellate Court did not address the claim of overinclusiveness whatsoever. The majority points to language in the defendant's Appellate Court brief that was used in the context of her claim that § 53a-60b (a) (1) is unconstitutionally vague. In particular, the defendant argued "that ordinary people cannot understand what specifically constitutes 'physically disabled' . . . ." This is a claim directly tied to the notice prong of the vagueness challenge, not an overinclusiveness challenge. The majority also relies on the defendant's claim that, although "the legislature intended to enhance penalties [only] for crimes against the most vulnerable, including those with clearly diagnosable and severe disabilities," §§ 53a-60b (a) (1) and 1-1f (b) "arguably . . . could apply to nearly all victims." This is an argument directed at a claim of arbitrary enforcement. I disagree that either of these arguments in the defendant's Appellate Court brief constitutes a separate claim under the overinclusiveness doctrine.

Indeed, in her brief to this court, the defendant did not cite to any cases that involved claims under the overinclusiveness doctrine. Instead, she relied on *Packer* v. *Board of Education*, supra, 246 Conn. 109–10, in support of her argument that the application of § 53a-

60b (a) (1) to fibromyalgia did not have a sufficient nexus to the legislative purpose of the statute. *Packer* did not involve a claim of overinclusiveness. Instead, *Packer* involved, among other things, a vagueness as applied challenge. See id., 106–113. In *Packer*, this court considered whether there was a nexus between the legislative purpose behind a statute and the conduct prosecuted under the statute for purposes of determining whether there was adequate notice under a vagueness as applied analysis. See id., 109–10 ("[w]e further conclude . . . that a person of ordinary intelligence, apprised only of the language of [General Statutes (Rev. to 1997)] § 10-233d (a) (1) and our prior interpretation . . . of similar language, could not be reasonably certain whether possession of marijuana in the trunk of a car, off the school grounds [and] after school hours, is, by itself and without some tangible nexus to school operation, seriously disruptive of the educational process as required by [that statute] in order to subject a student to expulsion" (emphasis omitted; internal quotation marks omitted)). The defendant's reliance on *Packer* further confirms that she raised only a vagueness challenge here.

Of course, we did not certify any overinclusiveness claim. The majority recognizes this as an issue. However, notwithstanding that substantial stumbling block, the majority explains that "[w]e recognize that this issue may be outside the scope of the certified questions because overinclusiveness and vagueness are distinct concepts. Nevertheless, we address the issue because the defendant raised it before the Appellate Court and it is closely intertwined with the certified questions." Footnote 1 of the majority opinion. I disagree.

To be clear, the only questions we certified were limited to the following: (1) "Did the Appellate Court correctly conclude that . . . §§ 1-1f (b) and 53a-60b (a) (1) were not unconstitutionally vague as applied to the

defendant?" And (2) "[d]id the Appellate Court correctly conclude that the evidence the state presented at trial was sufficient to prove beyond a reasonable doubt that the victim was 'physically disabled' under the governing statutes?" *State* v. *Dojnia*, 333 Conn. 914, 215 A.3d 1211 (2019). As I previously mentioned, I do not believe that overinclusiveness was raised before the Appellate Court, but, even if the defendant had raised it before the Appellate Court, that court did not address it, and we did not certify such a claim.

Furthermore, I disagree with the majority that the question of whether § 53a-60b (a) (1) is unconstitutionally overinclusive is closely intertwined with the certified questions in the present appeal such that the issue is properly before us. The question of whether a statute is overinclusive is not part of the analysis used to determine whether a statute is unconstitutionally vague as applied to a particular defendant's conduct in a particular case. Instead, the question of whether a statute is overinclusive is typically part of the analysis used when applying the rational basis test to an equal protection claim. See, e.g., *Vance* v. *Bradley*, 440 U.S. 93, 108–109, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979) (considering whether statute violates equal protection clause because it is underinclusive or overinclusive); *Big Tyme Investments, LLC* v. *Edwards*, 985 F.3d 456, 470 (5th Cir. 2021) (concluding that "[i]mperfect classifications that are underinclusive or overinclusive pass constitutional muster" under equal protection clause).

Indeed, most of the cases cited by the majority considered whether a statute is overinclusive as part of an equal protection claim analysis. See, e.g., *State* v. *Higgins*, supra, 265 Conn. 69; see also, e.g., *United States* v. *Thornton*, 901 F.2d 738, 739–40 (9th Cir. 1990) (addressing defendants' claim that statute violated equal protection clause because it was both overinclusive and underinclusive). In one of the cases relied on

by the majority, *People* v. *Rodriguez*, 66 Cal. App. 4th 157, 77 Cal. Rptr. 2d 676 (1998), the court explicitly detailed that "[the] [d]efendant's reliance [on a claim of overinclusiveness] appears misplaced, inasmuch as Justice Kline's comments [in a prior decision] about overinclusiveness and underinclusiveness appear directed more toward questions of equal protection than substantive due process." Id., 179, citing *People* v. *Bostick*, 46 Cal. App. 4th 287, 292, 53 Cal. Rptr. 2d 760 (1996) (Kline, P. J., concurring). In the present case, the defendant does not assert any claim under the equal protection clause.

To be sure, "[t]he general rule is that the constitutionality of a statutory provision being attacked as void for vagueness is determined by the statute's applicability to the particular facts at issue. . . . To do otherwise, [in the absence of] the appearance that the statute in question intrudes [on] fundamental guarantees, particularly first amendment freedoms, would be to put courts in the undesirable position of considering every conceivable situation which might possibly arise in the application of [the statute]. . . . Thus, outside the context of the first amendment, in order to challenge successfully the facial validity of a statute, a party is required to demonstrate as a threshold matter that the statute may not be applied constitutionally to the facts of [the] case." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Packer* v. *Board of Education*, supra, 246 Conn. 105–106.

In the present case, the defendant's claim does not implicate her first amendment rights, and, therefore, in order to be successful in her challenge to the validity of § 53a-60b (a) (1), she must demonstrate that the statute may not be applied constitutionally to the facts of this case. Here, she is accused of assault on a person with fibromyalgia and chronic pain. The statute is not vague as applied to that conduct. There is no need to

look beyond her conduct to the hypotheticals posed by the majority. Because I agree with the majority that the defendant has not established that the statute is unconstitutional as applied to the facts of the present case, I would not attempt to "[consider] every conceivable situation which might possibly arise in the application of [the statute]." (Internal quotation marks omitted.) Id., 106.

In addition, even if I were to agree with the majority that the defendant raised a separate claim that § 53a-60b (a) (1) is unconstitutionally overinclusive as part of a substantive due process claim, I would disagree with the majority's analysis of that claim. Although the majority cites to a few cases in which courts have considered a claim of overinclusiveness as part of a substantive due process claim, I find these cases unpersuasive. As one of those cases pointed out, "a statute is not fatally infirm merely because it may be somewhat underinclusive or overinclusive." (Internal quotation marks omitted.) *People* v. *Avila-Briones*, 49 N.E.3d 428, 450 (Ill. App. 2015), appeal denied, 48 N.E.3d 1093 (Ill. 2016). Those cases support the conclusion that, even if the statute is overinclusive—that is, it may impose a burden on one who harms someone with a latent physical disability—it still has a rational relationship to protecting those with physical disabilities. Therefore, when a statute serves a legitimate government purpose—here, protecting those with physical disabilities—any fine-tuning of the statutory scheme to narrow its reach is a task for the legislature.

Moreover, because we are not dealing with a fundamental right, the rational basis test would apply in the present case. Id., 447 ("[i]f the statute does not impact a fundamental right, then we apply the [rational basis] test to the statute"). "[W]hen conducting rational basis review we will not overturn such [government action] unless the varying treatment of different groups or per-

sons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational." (Internal quotation marks omitted.) *Kimel* v. *Florida Board of Regents*, 528 U.S. 62, 84, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000). "On rational basis review, those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it. . . . Ordinarily, that burden is insurmountable. [C]ourts are compelled under [a rational basis] review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational basis review because it is not made with mathematical nicety or because in practice it results in some inequality. . . . Thus, the fact that a statute is overinclusive or [underinclusive], standing alone, does not render the statute constitutionally invalid." (Citations omitted; internal quotation marks omitted.) *State Troopers Non-Commissioned Officers Assn. of New Jersey* v. *New Jersey*, 643 F. Supp. 2d 615, 624 (D.N.J. 2009), aff'd, 399 Fed. Appx. 752 (3d Cir. 2010).

Despite these aforementioned principles, the majority does little more than point to hypotheticals in which § 53a-60b (a) (1) could be considered overinclusive. It posits a hypothetical about an Olympic boxer with migraines and concludes that the statute is unconstitutionally overinclusive because "such an application of the statute would have no reasonable and substantial relation to the statute's purpose of protecting those who have a diminished capacity to defend themselves or who are particularly vulnerable to injury." This is not how we assess the constitutionality of a statute under rational basis review. Rather, it is well established that, "if a statute can be upheld under any plausible justification offered by the state, or even hypothesized by the court, it survives [rational basis] scrutiny." *Amer-*

*ican Express Travel Related Services Co.* v. *Kentucky*, 641 F.3d 685, 690 (6th Cir. 2011).

Thus, on the basis of the record before us, I cannot conclude that the legislature acted irrationally in providing for a heightened punishment of an individual who assaults someone with a physical disability. Even if § 53a-60b (a) (1) lacks mathematical nicety in its application, the statute still has a rational relationship to a legitimate government purpose—namely, protecting people with physical disabilities that diminish their ability to function. Because there are plausible justifications for upholding the constitutionality of this statute—we need look no further than the case at hand, in which a person with fibromyalgia and chronic pain is assaulted—there is a rational relationship to the legislative purpose of protecting physically disabled people. The majority's view turns rational basis review on its head because, instead of negating every conceivable basis that might support the statute, the majority looks to find conceivable examples of how the statute may be overinclusive. Examples of overinclusiveness, however, do not render statutes unconstitutional.

Accordingly, in the absence of the defendant's raising and analyzing a distinct legal claim of overinclusiveness, I would not read a separate equal protection or substantive due process overinclusiveness claim into the defendant's vagueness challenge. Rather, I conclude that the majority's analysis of overinclusiveness is misplaced. Moreover, even if I were to agree with the majority that the defendant raised a claim under the overinclusiveness doctrine, I disagree that the statute fails rational basis review.

I am mindful that "legislative enactments carry with them a strong presumption of constitutionality, and that a party challenging the constitutionality of a validly enacted statute bears the heavy burden of proving the

statute unconstitutional beyond a reasonable doubt . . . .'' (Citations omitted; internal quotation marks omitted.) *Packer* v. *Board of Education*, supra, 246 Conn. 101–102. I cannot conclude that the defendant has met her heavy burden in the present case.

Accordingly, I would affirm the judgment of the Appellate Court.

For the reasons I previously explained, I respectfully dissent in part.

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## RAINBOW HOUSING CORPORATION ET AL. *v.* TOWN OF CROMWELL (SC 20506)

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

*Syllabus*

Pursuant to statute (§ 12-81 (7) (A)), ''the real property of . . . a corporation organized exclusively for . . . charitable purposes . . . and used exclusively for carrying out . . . such purposes'' is exempt from taxation.

Pursuant further to statute (§ 12-81 (7) (B)), ''housing subsidized, in whole or in part, by federal, state or local government . . . shall not constitute a charitable purpose . . . . '[H]ousing' shall not include real property used for temporary housing . . . the primary use of which property is . . . housing for . . . persons with a mental health disorder . . . .''

The plaintiffs, R Co. and G Co., tax-exempt charitable organizations, appealed to the trial court from the decision of the Board of Assessment Appeals of the defendant town. The board had denied the plaintiffs' appeal from the town assessor's allegedly improper denial of their application for a charitable property tax exemption under § 12-81 (7) (A), in connection with residential property that R Co. owns and leases to G Co. G Co. operates a ''supervised apartment program'' on the property. Through the program, G Co. provides housing to as many as five men at a time, all of whom are individuals with severe mental illness who are not able to function in a traditional group home setting. G Co. provides the residents with on-site supervision, as well as various psychiatric, rehabilitative, and skill building services. Residents do not stay at the property for a fixed duration but, rather, remain only until their treatment has progressed to a point that they no longer need G Co.'s

services. The Department of Mental Health and Addiction Services provides G Co. with approximately 75 percent of its funding for the program. The parties stipulated to the relevant facts and filed separate motions for summary judgment. The town claimed that the assessor properly found that, under § 12-81 (7) (B), the property was not tax-exempt because the housing is subsidized in part by the department and is not temporary insofar as residency is not limited to any finite length of time. The plaintiffs claimed that the property was tax-exempt because they are organized exclusively for charitable purposes, the property is used exclusively for furthering those purposes, the housing provided thereon is not government subsidized housing, and the housing is temporary. The trial court agreed with the plaintiffs that the property qualified for tax exemption under § 12-81 (7) (A). Accordingly, the court granted the plaintiffs' motion for summary judgment and rendered judgment thereon, from which the town appealed. *Held*:

1. The town could not prevail on its claim that the plaintiffs were not aggrieved by the denial of their application for tax-exempt status insofar as the plaintiffs failed to provide the assessor with sufficient information to demonstrate that the property qualified for an exemption under § 12-81 (7) and, therefore, that the trial court lacked subject matter jurisdiction; because the town stipulated in the trial court to certain facts that allowed for a finding of aggrievement, namely, that the plaintiffs had filed with the assessor a complete application that contained all of the information necessary for the assessor to ascertain whether the property qualified for an exemption under § 12-81 (7), the town could not challenge that fact for the first time on appeal.

2. Contrary to the town's claim, the subject property was exempt from taxation because, regardless of whether the plaintiffs provide "housing subsidized, in whole or in part, by federal, state or local government" within the meaning of § 12-81 (7) (B), the housing the plaintiffs provided was temporary, and the property therefore qualified for the exemption on that basis: upon review of the statutory scheme governing charitable property tax exemptions and dictionary definitions of the word "temporary," this court concluded that the term "temporary housing" in § 12-81 (7) (B) was ambiguous insofar as it refers to housing that is impermanent and limited in duration without specifying the length of the durational limitation imposed; moreover, to resolve this ambiguity, this court considered the legislative history pertaining to the charitable tax exemption for real property used for temporary housing, especially legislative hearing testimony from representatives of various charitable organizations, which supported the conclusions that the term "temporary" does not entail a fixed durational limitation but, instead, varies depending on the particular purpose of the charitable organization and the needs of the residents being served, and that housing is "temporary" within the meaning of the statute, so long as the resident's stay is impermanent, transitional, and in furtherance of one of the charitable purposes enumer-

ated in § 12-81 (7) (B); furthermore, the plaintiffs satisfied their burden of establishing that the housing provided by the program was "temporary" within the meaning of § 12-81 (7) (B), as the evidence demonstrated that a resident's stay was transitional insofar as its length depended entirely on the resident's treatment progress, the plaintiffs both had charitable purposes pertaining to "housing for . . . persons with a mental health disorder," the supervised apartment program operated in furtherance of those purposes, and the town failed to produce any evidence to rebut the evidence demonstrating that the program's housing was temporary.

(*One justice concurring separately*)

Argued December 11, 2020—officially released September 1, 2021*

*Procedural History*

Appeal from the decision of the defendant's Board of Assessment Appeals upholding the denial of the plaintiffs' claim for a certain real property tax exemption, and for other relief, brought to the Superior Court in the judicial district of Middlesex and transferred to the judicial district of New Britain, where the court, *Hon. Arnold W. Aronson*, judge trial referee, who, exercising the powers of the Superior Court, granted the plaintiffs' motion for summary judgment and rendered judgment thereon, from which the defendant appealed. *Affirmed.*

*Proloy K. Das*, with whom were *Kari L. Olson* and, on the brief, *Joseph D. Szerejko* and *Chelsea R. Sousa*, for the appellant (defendant).

*Pascal F. Naples*, with whom, on the brief, were *Timothy S. Hollister* and *Lilia N. Hrekul*, for the appellees (plaintiffs).

*Elliott B. Pollack*, *Michael J. Marafito* and *Johanna S. Katz* filed a brief for Connecticut Community Non-Profit Alliance, Inc., as amicus curiae.

* September 1, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Cody N. Guarnieri* filed a brief for MARC Community Resources, Inc., as amicus curiae.

*Lloyd L. Langhammer* filed a brief for the town of Colchester et al. as amici curiae.

*Cody N. Guarnieri* filed a brief for Adelbrook Community Services, Inc., as amicus curiae.

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

*Kathleen M. Flaherty* filed a brief for Connecticut Legal Rights Project, Inc., et al. as amici curiae.

*Brian C. Courtney* filed a brief for the Corporation for Independent Living as amicus curiae.

*John F. Sullivan*, assistant town attorney, filed a brief for the town of Manchester as amicus curiae.

*Opinion*

ECKER, J. General Statutes § 12-81 (7)[1] generally exempts from taxation real property owned by a tax-

[1] General Statutes § 12-81 provides in relevant part: "The following-described property shall be exempt from taxation . . . (7) (A) Subject to the provisions of sections 12-87 and 12-88, the real property of, or held in trust for, a corporation organized exclusively for scientific, educational, literary, historical or charitable purposes or for two or more such purposes and used exclusively for carrying out one or more of such purposes or for the purpose of preserving open space land, as defined in section 12-107b, for any of the uses specified in said section, that is owned by any such corporation, and the personal property of, or held in trust for, any such corporation, provided (i) any officer, member or employee thereof does not receive or at any future time shall not receive any pecuniary profit from the operations thereof, except reasonable compensation for services in effecting one or more of such purposes or as proper beneficiary of its strictly charitable purposes, and (ii) in 1965, and quadrennially thereafter, a statement shall be filed on or before the first day of November with the assessor or board of assessors of any town, consolidated town and city or consolidated town and borough, in which any of its property claimed to be exempt is situated. Such statement shall be filed on a form provided by such assessor or board of assessors. The real property shall be eligible for the exemption regardless of whether it is used by another corporation organized exclusively for scientific, educational, literary, historical or charitable purposes or for two or more such purposes;

exempt charitable organization and used exclusively for charitable purposes; see General Statutes § 12-81 (7) (A); but excludes from that exemption "housing subsidized, in whole or in part, by federal, state or local government . . . ." General Statutes § 12-81 (7) (B). The subsidized housing exclusion contains an exception for "temporary housing" used primarily for certain enumerated charitable purposes, including "housing for . . . persons with a mental health disorder . . . ." General Statutes § 12-81 (7) (B) (iii). This appeal requires us to determine whether the trial court correctly determined that property used for a residential mental health treatment program was tax exempt under § 12-81 (7) on the grounds that it does not provide housing subsidized by the government and that any housing provided is temporary. We affirm the judgment of the trial court.

The following facts, as stipulated by the parties, are undisputed. The plaintiffs, Rainbow Housing Corporation (Rainbow Housing) and Gilead Community Services, Inc. (Gilead), are both tax-exempt charitable organizations for federal tax purposes and subsidiaries of Connecticut Institute for the Blind, Inc., doing business as Oak Hill, an entity organized to provide support

"(B) On and after July 1, 1967, housing subsidized, in whole or in part, by federal, state or local government and housing for persons or families of low and moderate income shall not constitute a charitable purpose under this section. As used in this subdivision, 'housing' shall not include real property used for temporary housing belonging to, or held in trust for, any corporation organized exclusively for charitable purposes and exempt from taxation for federal income tax purposes, the primary use of which property is one or more of the following: (i) An orphanage; (ii) a drug or alcohol treatment or rehabilitation facility; (iii) housing for persons who are homeless, persons with a mental health disorder, persons with intellectual or physical disability or victims of domestic violence; (iv) housing for ex-offenders or for individuals participating in a program sponsored by the state Department of Correction or Judicial Branch; and (v) short-term housing operated by a charitable organization where the average length of stay is less than six months. The operation of such housing, including the receipt of any rental payments, by such charitable organization shall be deemed to be an exclusively charitable purpose . . . ."

to people with disabilities. Rainbow Housing owns a residential property at 461 Main Street in Cromwell known as Valor Home, which it leases to Gilead for the purpose of providing "a broad range of high quality health care and recovery support services to individuals with the goal of supporting the individual's independent living in the community." Gilead pursues this goal at Valor Home through its "[s]upervised [a]partment [program]," which is an "intensive, community-based [program] designed to serve a specific cohort of clients ([eighteen] years of age and older) with severe mental illness, with or without co-occurring disorders, needing a supportive supervised living environment, [who] are not able to function in the milieu of a traditional group home setting."

Valor Home houses up to five men at a time, all of whom pay a monthly rental fee. The Department of Mental Health and Addiction Services (department) helps fund Valor Home's supervised apartment program. Pursuant to Gilead's contract with the department, Valor Home provides, among other services, "psychiatric clinical services" and "community-based skill building instruction and other rehabilitative activities," including, but not limited to, "[t]eaching, coaching and assisting with daily living activities," "[a]ssistance with location and access of safe, affordable housing of [the resident's] choice, [and] providing education and support regarding tenant rights and responsibilities . . . ." Overall, Gilead receives approximately 75 percent of its funding from the department and "relies [on] donations from the public to make up the difference."

Prior to 2017, the defendant, the town of Cromwell, granted Valor Home a property tax exemption under § 12-81 (7). In 2017, the plaintiffs filed a timely and complete quadrennial renewal form, otherwise known as an M-3 application. See General Statutes § 12-81 (7) (A) (ii). In the M-3 application, the plaintiffs represented

that Valor Home was exempt from taxation on the October 1, 2017 grand list because "[t]he primary use of [the] property is not housing" but, instead, to "[p]rovide support services for . . . clients with mental illness." Shawna Baron, the assessor for the defendant, denied the plaintiffs' application for a property tax exemption.[2]

The plaintiffs timely filed an appeal with the defendant's Board of Assessment Appeals (board) pursuant to General Statutes §§ 12-89 and 12-111 (a). The board denied the plaintiffs' appeal, and the plaintiffs filed the present action in the Superior Court pursuant to General Statutes §§ 12-89, 12-117a and 12-119, claiming that the defendant improperly denied their application for a property tax exemption. Both the plaintiffs and the defendant moved for summary judgment and stipulated to the relevant facts and related exhibits.

The plaintiffs claimed that Valor Home was exempt from taxation under § 12-81 (7) because the plaintiffs are organized exclusively for charitable purposes, Valor Home is used exclusively for the plaintiffs' charitable purpose of serving individuals with severe mental illness, Valor Home does not provide government subsidized housing or low and moderate income housing, and the housing provided is temporary, transitional, and impermanent. In support of their motion for summary judgment, the plaintiffs submitted the affidavit of Dan Osborne, the chief executive officer of Gilead, who averred that "[o]ccupancy at [Valor Home] is temporary and transitional insofar as the individuals who live at [Valor Home] . . . live there [only] until they no longer need the services provided by Gilead. There is no specific term by which an individual must leave [Valor Home]; the term is entirely dependent [on] the individual's treatment progress. Once the individuals are capa-

[2] Rainbow Housing paid more than $3100 in property taxes under protest in July of 2018, pending the outcome of its appeal from the assessor's denial.

ble of living more independently through the services and supports [provided] by Gilead, they move out of [Valor Home]."

In its motion for summary judgment, the defendant argued that Valor Home was not tax-exempt under § 12-81 (7) because it provides housing that is subsidized in part by the department and because the housing is not limited to a finite length of time and, therefore, is not temporary. In support, the defendant relied on the stipulated fact that Valor Home is funded by the department and an affidavit from Baron explaining that she had "determined that [Valor Home] does not qualify for a charitable tax exemption pursuant to . . . § 12-81 (7) because [the] plaintiff[s] failed to establish that [Valor Home] is used for eligible temporary housing."

The trial court held a hearing on the motions for summary judgment, at which counsel for both parties assured the court that there were no disputed factual issues and that the sole question was whether Valor Home was exempt from taxation under § 12-81 (7) as a matter of law. Following the hearing, the court granted the plaintiffs' motion for summary judgment and denied the defendant's motion. This appeal followed.[3]

On appeal, the defendant renews the claims raised below, namely, that Valor Home is not tax-exempt under § 12-81 (7) because it provides subsidized housing that is not limited to a finite length of time and, thus, is not temporary. After amici curiae filed their briefs,[4] the

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

[4] On October 28, 2020, we invited amici curiae to file briefs that address the following question: "Did the trial court [correctly] conclude that the plaintiffs, [which] operate a supervised apartment program that includes services rendered by contract with the [department] for men who suffer from severe mental illness, were entitled to a municipal property tax exemption under . . . § 12-81 (7) because the subject property was not 'housing subsidized, in whole or in part, by . . . state . . . government' and qualified as 'temporary housing' under the statute?" In response, the following entities

defendant filed a supplemental brief in which it adopted a new claim, raised for the first time by the amicus curiae town of Manchester. Specifically, the defendant claims that the plaintiffs were not aggrieved by the denial of their M-3 application because they failed to provide the assessor with sufficient information to demonstrate that Valor Home was exempt from taxation under § 12-81 (7).

I

We first address the defendant's claim that the plaintiffs were not aggrieved by the denial of their M-3 application because they failed to provide sufficient information to demonstrate that Valor Home qualified for a property tax exemption under § 12-81 (7). The defendant points out that, "[i]n response to the application questions regarding the average stay of residents at the property, rents, amount of income received from rent, and whether the rent was subsidized by the government, the plaintiffs answered 'N/A,' " and "[n]one of the supporting documentation required in conjunction with the application was supplied . . . ." The defendant contends that, in light of the plaintiffs' failure to provide the assessor with this information, the plaintiffs were not aggrieved by the denial of their application pursuant to our holding in *J.C. Penney Corp., Inc.* v. *Manchester*, 291 Conn. 838, 970 A.2d 704 (2009).[5] We disagree.

filed briefs as amici curiae: Connecticut Community Non-Profit Alliance, Inc., Connecticut Legal Rights Project, Inc., Connecticut Fair Housing Center, Adelbrook Community Services, Inc., MARC Community Resources, Inc., the Corporation for Independent Living, the towns of Colchester and Manchester, and the state of Connecticut.

[5] In *J.C. Penney Corp., Inc.* v. *Manchester*, supra, 291 Conn. 838, we held that, when an appeal under § 12-117a "call[s] in question the valuation placed by assessors [on] . . . property . . . the trial court performs a two step function. The burden, in the first instance, is [on] the plaintiff to show that he has, in fact, been aggrieved by the action of the board in that his property has been overassessed." (Emphasis omitted; internal quotation marks omitted.) Id., 844. If the taxpayer fails "to file with the assessors a list of his taxable property and furnish the facts upon which valuations may be based," then the taxpayer is not "aggrieved by an assessment based" on the informa-

Aggrievement is a component of standing, which is essential to invoke the subject matter jurisdiction of the trial court. See, e.g., *Andross* v. *West Hartford*, 285 Conn. 309, 321, 939 A.2d 1146 (2008). Statutory aggrievement under §§ 12-89, 12-117a and 12-119 "exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) Id., 322. Although the defendant failed to preserve its aggrievement claim in the trial court, we will review it because it implicates the trial court's subject matter jurisdiction. See *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 506, 43 A.3d 69 (2012).

Contrary to its claim on appeal, the defendant stipulated below that the plaintiffs filed a "timely" and "complete M-3 application" and that "Rainbow [Housing] is aggrieved by the decision of the assessor to deny their request for a tax exemption of the subject property and by the decision of the board affirming the denial of the tax exemption." The parties cannot confer subject matter jurisdiction by agreement, and, therefore, the conclusory portion of the stipulation stating that the plaintiffs are "aggrieved" is of no consequence to the

tion available to the assessors. (Emphasis omitted; internal quotation marks omitted.) Id., 845. "Only after the court determines that the taxpayer has met his burden of proving that the assessor's valuation was excessive and that the refusal of the board of [assessment appeals] to alter the assessment was improper . . . may the court then proceed to the second step in a § 12-117a appeal and exercise its equitable power to grant such relief as to justice and equity appertains . . . ." (Internal quotation marks omitted.) Id., 844–45.

The plaintiffs in the present case do not call into question the valuation of their property; instead, they claim that Valor Home is completely exempt from taxation and seek relief under §§ 12-89 and 12-119, in addition to § 12-117a. We need not decide whether our holding in *J.C. Penney Corp., Inc.*, applies outside of the valuation context because we resolve the aggrievement issue on other grounds.

present appeal, but the "parties can stipulate to facts to allow [the] finding of aggrievement . . . ." *Fox* v. *Zoning Board of Appeals*, 84 Conn. App. 628, 637, 854 A.2d 806 (2004); see also *Jones* v. *Redding*, 296 Conn. 352, 364, 995 A.2d 51 (2010) (parties stipulated to facts on which "the legal conclusion of aggrievement" was based). That is what occurred here when the parties stipulated to the fact that the plaintiffs' M-3 application was "complete," meaning that it contained all of the information necessary for the assessor to ascertain whether Valor Home was entitled to a property tax exemption under § 12-81 (7). Having so stipulated, the defendant cannot now challenge that fact for the first time on appeal. We therefore reject the defendant's claim that the trial court lacked subject matter jurisdiction.

II

On the merits, the defendant contends that the trial court improperly rendered summary judgment in favor of the plaintiffs because Valor Home provides government subsidized housing that is not temporary in nature and, thus, does not qualify for tax-exempt status under § 12-81 (7). We need not decide whether Valor Home provides "housing subsidized, in whole or in part, by federal, state or local government" within the meaning of § 12-81 (7) (B) because we conclude that Valor Home's housing is "temporary" and therefore qualifies for the exemption on that basis.

The scope of the charitable exemption in § 12-81 (7) is a question of statutory construction, over which we exercise plenary review. See, e.g., *Tannone* v. *Amica Mutual Ins. Co.*, 329 Conn. 665, 671, 189 A.3d 99 (2018). In addition to the usual rules of statutory construction that apply generally; see General Statutes § 1-2z; our analysis of § 12-81 (7) also is governed by the rule of strict construction applicable to statutory provisions

granting tax exemptions. See *St. Joseph's Living Center, Inc.* v. *Windham*, 290 Conn. 695, 707, 966 A.2d 188 (2009). "It is . . . well established that in taxation cases . . . provisions granting a tax exemption are to be construed strictly against the party claiming the exemption, who bears the burden of proving entitlement to it. . . . Exemptions, no matter how meritorious, are of grace . . . . [Therefore] [t]hey embrace only what is strictly within their terms. . . . We strictly construe such statutory exemptions because [e]xemption from taxation is the equivalent of an appropriation of public funds, because the burden of the tax is lifted from the back of the potential taxpayer who is exempted and shifted to the backs of others. . . . [I]t is also true, however, that such strict construction neither requires nor permits the contravention of the true intent and purpose of the statute as expressed in the language used."[6] (Citations omitted; internal quotation marks

[6] As we observed in *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 290 Conn. 695, the rule of strict construction of tax exemption statutes has not always been applied in cases involving "educational, scientific or charitable organizations." Id., 708 n.22. To the contrary, the property of such organizations historically "was treated rather uniformly as being subject to 'a rule of nontaxability.' " Id., quoting *Arnold College for Hygiene & Physical Education* v. *Milford*, 144 Conn. 206, 210, 128 A.2d 537 (1957). The reasoning of this line of cases relied on the "view that such exemptions were 'not merely an act of grace on the part of the [s]tate . . . [but stood] squarely on [s]tate interest. To subject all such property to taxation would tend rather to diminish than increase the amount of taxable property. Other conditions being equal, the happiness, prosperity and wealth of a community may well be measured by the amount of property wisely devoted to the common good . . . .' *Yale University* v. *New Haven*, 71 Conn. 316, 332, 42 A. 87 (1899). Our approach to such statutes reflected this understanding: 'Consequently, [General Statutes (1949 Rev.) § 1761 (7), a functionally identical predecessor of § 12-81 (7)] does not come within the rule that tax exemption statutes must be construed strictly against the taxpayer.' *Arnold College for Hygiene & Physical Education* v. *Milford*, supra, 210; see also *Loomis Institute* v. *Windsor*, 234 Conn. 169, 176, 661 A.2d 1001 (1995) (articulating and following more liberal rule of construction applied to educational institutions)." *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 708 n.22. It is unclear "precisely why this approach has seemingly become extinct, nor is it particularly clear whether it is applicable beyond the educational context."

omitted.) Id. Despite this rule of construction, we define "a charitable use or purpose . . . rather broad[ly] and liberal[ly]." Id., 715. The definition of a charitable use or purpose is not "restricted to mere relief of the destitute or the giving of alms but comprehends activities, not in themselves self-supporting, which are intended to improve the physical, mental and moral condition of the recipients and make it less likely that they will become burdens on society and more likely that they will become useful citizens." (Internal quotation marks omitted.) Id., 715–16. Thus, "[c]harity embraces anything that tends to promote the well-doing and the well-being of social man." (Internal quotation marks omitted.) Id., 716.

We begin our analysis with the statutory scheme governing charitable property tax exemptions. Section 12-81 (7) (A) provides that property used for "scientific, educational, literary, historical or charitable purposes" is "exempt from taxation." Subdivision (B) of § 12-81 (7) creates an exclusion to this tax exemption for "housing subsidized, in whole or in part, by federal, state or local government and housing for persons or families of low and moderate income [which] shall not constitute a charitable purpose under this section." The same provision carves out an exception to this exclusion for five specified categories of temporary housing. Specifically, subdivision (B) provides that, "[a]s used in this subdivision, 'housing' shall not include real property used for temporary housing belonging to, or held in trust for, any corporation organized exclusively for charitable purposes and exempt from taxation for federal income tax purposes, the primary use of which property is one or more of the following: (i) An orphanage; (ii) a drug

Id. Because the parties have not asked us to clarify the rule of construction applicable to § 12-81 (7), we do not resolve the conflict between the modern trend of strict construction and the historical trend of liberal construction in this regard.

or alcohol treatment or rehabilitation facility; (iii) housing for persons who are homeless, persons with a mental health disorder, persons with intellectual or physical disability or victims of domestic violence; (iv) housing for ex-offenders or for individuals participating in a program sponsored by the state Department of Correction or Judicial Branch; and (v) short-term housing operated by a charitable organization where the average length of stay is less than six months. The operation of such housing, including the receipt of any rental payments, by such charitable organization shall be deemed to be an exclusively charitable purpose . . . .'' General Statutes § 12-81 (7) (B). Thus, subsidized housing or low and moderate income housing falls within the scope of the charitable exemption only if it is ''temporary'' and primarily used for one of the five enumerated charitable purposes.

It is undisputed that Valor Home provides treatment and services for ''persons with a mental health disorder . . . .'' General Statutes § 12-81 (7) (B) (iii). The parties dispute whether Valor Home provides ''housing subsidized, in whole or in part, by . . . state . . . government'' and, if so, whether the housing is ''temporary'' within the meaning of § 12-81 (7) (B) (iii). For purposes of this appeal, we will assume, without deciding, that Valor Home provides housing subsidized in part by the department. We nonetheless conclude that the housing is ''temporary'' and, therefore, exempt from taxation under § 12-81 (7) (B) (iii).

The word ''temporary'' is not defined in the statutory scheme, so we look to the ''commonly approved usage of the language . . . .'' General Statutes § 1-1 (a). The word ''temporary'' means ''lasting for a time only: existing or continuing for a limited time: impermanent, transitory . . . .'' Webster's Third New International Dictionary (2002) p. 2353; see also Oxford American Dictionary and Language Guide (1999) p. 1038 (defining

"temporary" as "lasting or meant to last only for a limited time"). Subsidized housing is "temporary" if it is limited in duration, impermanent, or transitory.

We conclude that the term "temporary housing" in § 12-81 (7) (B) is ambiguous because it refers to housing that is "limited in duration" and "impermanent" but does not specify the *length* of the durational limitation imposed. Indeed, only one of the five exceptions in § 12-81 (7) (B) contains an explicit durational limitation, namely, the fifth, catchall provision for "short-term housing operated by a charitable organization where the average length of stay is less than six months." General Statutes § 12-81 (7) (B) (v). There is no defined time limitation for temporary subsidized housing provided (1) by orphanages, (2) by drug or alcohol treatment or rehabilitation facilities, (3) for the homeless, mentally ill, disabled, or victims of domestic violence, and (4) by programs for ex-offenders. The use of a finite durational limitation for "short-term housing," but the omission of such a limitation for "temporary housing," indicates that the legislature intended the terms "short-term" and "temporary" to have different meanings.[7] See,

[7] The defendant contends that the term "temporary" is "appropriately confined to a specified, limited period of time" and relies on certain statutes that variously define the term as ranging in duration from seventy-two hours to three years. See, e.g., General Statutes § 5-196 (25) (defining "temporary position" in State Personnel Act, General Statutes § 5-193 et seq., as "a position in the state service which is expected to require the services of an incumbent for a period not in excess of six months"); General Statutes § 8-68i (defining "temporary" for purposes of "emergency housing on a temporary basis" as "the period of time needed to find housing, not exceeding thirty days"); General Statutes § 20-126c (a) (6) (defining "temporary dental clinic" as "a dental clinic that provides dental care services at no cost to uninsured or underinsured persons and operates for not more than seventy-two consecutive hours"); see also 8 C.F.R. § 2.142 (F) (2) (ii) (B) (2020) (defining "temporary services or labor" as "limited to one year or less, but in the case of a one-time event could last up to 3 years"). The wide disparity in the various time periods identified in these statutes reinforces our conclusion that the term "temporary" is ambiguous with respect to the length of the durational limitation imposed.

e.g., *C. R. Klewin Northeast, LLC* v. *State*, 299 Conn. 167, 177, 9 A.3d 326 (2010) ("[t]he use of the different terms . . . within the same statute suggests that the legislature acted with complete awareness of their different meanings . . . and that it intended the terms to have different meanings" (internal quotation marks omitted)). Because the term "temporary," as used in the statute, imposes no fixed durational limitation, its meaning in this context is not plain and unambiguous. We therefore turn to extratextual sources of legislative intent.

The legislature adopted the charitable tax exemption pertaining to "real property used for temporary housing" in 2003. See Public Acts 2003, No. 03-270, § 1 (P.A. 03-270). As explained by Senator Eileen M. Daily, the purpose of P.A. 03-270, § 1, was "to help clarify two conflicting court decisions in terms of property taxes for housing for orphanages, drug or alcohol treatment or rehab, homeless [intellectually challenged] or mentally ill individuals, people participating in correction or [J]udicial [B]ranch recovery programs, and charitable organizations where the length of stay is less than six months."[8] 46 S. Proc., Pt. 13, 2003 Sess., p. 4069. Thus, P.A. 03-270 was intended to clarify that charitable "properties [that] are utilized for transitional housing purposes shall be deemed [nontaxable]." 46 H.R. Proc., Pt. 21, 2003 Sess., pp. 7002–7003, remarks of Representative Andrea L. Stillman.

[8] It is not clear which two conflicting cases Senator Daily had in mind, but the chronology suggests that they are *Fanny J. Crosby Memorial, Inc.* v. *Bridgeport*, 262 Conn. 213, 811 A.2d 1277 (2002), overruled by *St. Joseph's Living Center, Inc.* v. *Windham*, 290 Conn. 695, 707, 966 A.2d 188 (2009), and *Isaiah 61:1, Inc.* v. *Bridgeport*, 270 Conn. 69, 851 A.2d 277 (2004), the latter of which was pending on appeal in this court at the time of Senator Daily's statements. In neither of these cases did we address the meaning of the term temporary housing in subdivision (B) of § 12-81 (7), and, therefore, our holdings in these cases are not pertinent to the issue on appeal.

During the legislative hearings on P.A. 03-270, the legislature heard testimony from representatives of various charitable organizations regarding the deleterious effects that property taxation has had, or would have, on "transitional shelters and treatment programs" that receive federal, state, or local funding. Conn. Joint Standing Committee Hearings, Finance, Revenue and Bonding, Pt. 1, 2003 Sess., p. 22. The testimony during these hearings emphasized the transitional and impermanent nature of the housing provided by charitable organizations, as well as the fact that housing was secondary or integral to the charitable purpose. For example, Margaret J. Slez, the attorney for Isaiah 61:1, Inc., a federally and state funded nonprofit community justice agency, testified: "[W]e are in no way an established abode under any definition under the [G]eneral [S]tatutes. We are in fact—our clients are there for a period of time that runs from maybe three to six months, maybe [one] year." Id., p. 24. Attorney Slez urged the legislature to exempt from taxation "transition[al] housing" and "rehabilitative housing . . . ." Id., p. 25.

Similarly Reverend Richard Schuster, executive director of St. Luke's Community Services, Inc., a nonprofit organization that provides shelter for the homeless and persons with acquired immune deficiency syndrome and psychiatric disabilities, testified that his charitable organization provides more than "just . . . a bed and a meal." Id., p. 41. Rather, St. Luke's Community Services, Inc., provides a range of treatment and rehabilitative services to help its clients "reach their full potential. Get back on their feet, get back out in society." Id. The provision of housing and services is "purposely designed to meet the needs of these populations in a way that is both healthier and more productive for the client and at a cost savings to both the state and local government." Id., p. 40, remarks of Reverend Shuster.

The testimony at the legislative hearing revealed that the average length of a resident's temporary stay varied depending on the charitable organization's purpose, the nature of the services provided, the treatment and/or rehabilitative goals, and the resident's progress toward those goals. For example, the Bridgeport Rescue Mission, a nonprofit organization that provides faith based addiction services, operates a residential program that lasts for twelve months. Id., p. 120. At Operation HOPE, Inc., a nonprofit center for the homeless, the average length of residency is one to three years, depending on the ability of the individual resident to live independently. Id., pp. 93, 96. Despite the disparity between these lengths of time, the legislative record reflects an intent to include them within the meaning of the term "temporary," provided that the resident's occupancy falls within the scope of the charitable purpose of the organization. See id., p. 74, remarks of Senator John McKinney ("I define permanent housing as 'housing.' I don't define staying in a drug or rehabilitation center for [sixty] days as 'housing.' ").

In light of the objectives animating P.A. 03-270 and the foregoing legislative history, we conclude that the term "temporary" does not have an inflexible or fixed durational limitation; instead, the durational limitation will vary depending on the particular purpose of the charitable organization and the needs of the residents who fall within the categories enumerated in § 12-81 (7) (B).[9] So long as a resident's stay is impermanent, transitional, and in furtherance of one of the enumerated categories of charitable purposes, it is "temporary" within the meaning of § 12-81 (7) (B). For example, an orphanage with the charitable purpose of serving the

[9] An organization's charitable purpose often can be ascertained "by examining [its] foundational documents," such as its charter, certificate of incorporation or bylaws. *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 290 Conn. 714.

needs of minor children without parental guardians may house children for days, weeks, months, or many years. Nonetheless, if a child's stay is impermanent and transitional (i.e., intended to transition the child to a more stable or permanent living environment, such as foster care or adoption), and in furtherance of the orphanage's charitable purpose, the housing is "temporary" under § 12-81 (7) (B). Once the child attains the age of majority and the charitable purpose of the orphanage no longer is being served, then the durational limitation has been reached, and any further stay cannot be considered "temporary" under the statute. The same principle applies to the other specific categories of housing enumerated in § 12-81 (7) (B) (i) through (v).

The defendant contends that a specific, defined time limitation must be read into the statute by judicial construction in order to avoid absurd and unworkable results.[10] We disagree. As discussed previously, the durational limits attaching to the term "temporary" may vary depending on the purpose of the charitable organization and the needs of the residents being served, and our construction of the statute is consistent with the intent of the legislature to exempt from taxation real property used exclusively for the charitable purposes

[10] The defendant also relies on subsequent legislative history, arguing that failed legislative attempts to remove the word "temporary" from subdivision (B) of § 12-81 (7) demonstrate "that, if the legislature had intended for the statute to provide an exemption for housing subsidized by state government that was not clearly temporary, it knew how to do it." See Substitute Senate Bill No. 928, 2019 Sess.; Senate Bill No. 419, 2016 Sess. We are "reluctant to draw inferences regarding legislative intent from the failure of a legislative committee to report a bill to the floor, because in most cases the reasons for that lack of action remain unexpressed and thus obscured in the mist of committee inactivity." *In re Valerie D.*, 223 Conn. 492, 518 n.19, 613 A.2d 748 (1992); see also *Schneidewind* v. *ANR Pipeline, Co.*, 485 U.S. 293, 306, 108 S. Ct. 1145, 99 L. Ed. 2d 316 (1988) ("[t]his [c]ourt generally is reluctant to draw inferences from Congress' failure to act"). Regardless, the failed legislative attempts to delete the term "temporary" from subdivision (B) of § 12-81 (7) do not help to illuminate the term's meaning.

enumerated in § 12-81 (7) (B) (i) through (v). We see nothing absurd or unworkable resulting from this conclusion.[11] See, e.g., *Tayco Corp.* v. *Planning & Zoning Commission*, 294 Conn. 673, 686, 986 A.2d 290 (2010) ("[W]e construe a statute in a manner that will not thwart its intended purpose or lead to absurd results. . . . We must avoid a construction that fails to attain a rational and sensible result that bears directly on the purpose the legislature sought to achieve." (Internal quotation marks omitted.)). Furthermore, "[w]e are not in the business of writing statutes; that is the province of the legislature. Our role is to interpret statutes as they are written. . . . [We] cannot, by [judicial] construction, read into statutes provisions [that] are not clearly stated." (Internal quotation marks omitted.) *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 412, 999 A.2d 682 (2010); see also *Vaillancourt* v. *New Britain Machine/Litton*, 224 Conn. 382, 396, 618 A.2d 1340 (1993) ("[w]e are not permitted to supply statutory language that the legislature may have chosen to omit"). The term "temporary" does not have a specific, defined time limitation, and "[t]he task of promulgating such a limitation lies with the legislature, not with the court." *State* v. *Obas*, 320 Conn. 426, 436, 130 A.3d 252 (2016). Accordingly, we decline the defendant's invitation to graft a specific durational limitation onto the term "temporary" in § 12-81 (7).

With this statutory framework in mind, we address whether the trial court properly rendered summary judgment in favor of the plaintiffs. We begin by examin-

[11] The defendant argues that municipal assessors will "have no reliable or practical metric to apply if an applicant [for a charitable exemption] is not committed to a fixed and limited period of time of residency." We reject this claim because the charitable purpose of an organization, as reflected in its foundational documents, will provide municipal assessors with a reliable and practical metric by which to determine whether a period of residency is temporary within the meaning of § 12-81 (7) (B). See footnote 9 of this opinion.

ing the charitable purpose of the plaintiffs, as reflected in their foundational documents. See footnote 9 of this opinion. According to Rainbow Housing's amended and restated certificate of incorporation, and its amended and restated bylaws, its charitable purpose is "to identify, prepare and establish residential facilities for persons with mental illness . . . ." Similarly, among Gilead's charitable purposes is to "provid[e] a broad range of high quality health care and recovery support services in the home and community to improve mental health and physical well-being, with the goal of supporting the individual's independent living in the community, all without regard to race, color, creed, national and ethnic origin, disability, sexual preference, or socioeconomic status . . . ."

In furtherance of this purpose, the plaintiffs operate the supervised apartment program at Valor Home "to serve a specific cohort of clients ([eighteen] years of age and older) with severe mental illness, with or without co-occuring disorders, needing a supportive, supervised living environment, [who] are not able to function in the milieu of a traditional group home setting." Valor Home "offers [twenty-four] hour, [seven] days per week, on-site supervision for clients who need intensive supervision and support in order to improve or maintain functioning in the community." Valor Home's "programs effectively blend the provision of [twenty-four] hour staffing with increased privacy and opportunities for education and life skill supports (shopping, money management, cooking, laundry, home cleaning, etc.) with an apartment style arrangement of the facility." "The philosophy of the [s]upervised [a]partment [p]rograms places emphasis on a consumer-driven recovery-oriented treatment approach," with the recognition that "empowerment and the ability to instill a hope of recovery are key treatment concepts, and are essential to [clients'] successful transition into the community."

Valor Home's "primary goals are to provide opportunities for community living to individuals who would otherwise require a long-term hospitalization or other more restrictive settings. Other goals include decreasing the number and duration of hospital stays, developing and maintaining satisfying personal relationships, and empowering individuals to take responsibility for managing their own lives to live an optimum life in the community with the least amount of professional support in the least restrictive setting."

As we discussed previously, the plaintiffs submitted the affidavit of Gilead's chief executive officer, Osborne, in support of their motion for summary judgment. Osborne averred that occupancy at Valor Home "is temporary and transitional insofar as the individuals who live at [Valor Home] . . . live there [only] until they no longer need the services provided by Gilead. There is no specific term by which an individual must leave [Valor Home]; the term is entirely dependent [on] the individual's treatment progress. Once the individuals are capable of living more independently through the services and supports [provided] by Gilead, they move out of [Valor Home]."

This evidence was sufficient to meet the plaintiffs' burden of establishing that the housing provided by Valor Home is "temporary" within the meaning of § 12-81 (7) (B) (iii) because it is impermanent, furthers the plaintiffs' charitable purpose of providing treatment to men with severe mental illness, and is designed to "successful[ly] transition [residents] into the community." Once the residents meet the program's goal and are capable of living more independently, "they move out of [Valor Home]." Because the plaintiffs satisfied their burden of production, the defendant was required to "substantiate its adverse claim by showing that there is a genuine issue of material fact *together with the evidence disclosing the existence of such an issue*."

(Emphasis in original; internal quotation marks omitted.) *Squeo* v. *Norwalk Hospital Assn.*, 316 Conn. 558, 593–94, 113 A.3d 932 (2015); see also *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 320–21, 77 A.3d 726 (2013) ("the rule that the party opposing summary judgment must provide evidentiary support for its opposition applies only when the moving party has first made out a prima facie case for summary judgment"). "It is not enough . . . for the opposing party merely to assert the existence of . . . a disputed issue. . . . Mere assertions of fact, whether contained in a complaint or in a brief, are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court [in support of a motion for summary judgment]. . . . As a general rule, then, [w]hen a motion for summary judgment is filed and supported by affidavits and other documents, an adverse party, by affidavit or as otherwise provided by . . . [the rules of practice], must set forth specific facts showing that there is a genuine issue for trial, and if he does not so respond, summary judgment shall be entered against him." (Citations omitted; internal quotation marks omitted.) *Squeo* v. *Norwalk Hospital Assn.*, supra, 594.

The defendant failed to produce any evidence to contradict or rebut the plaintiffs' evidence demonstrating that the housing provided by Valor Home is temporary.[12]

[12] In its supplemental brief, the defendant claims that the housing provided by Valor Home is not temporary because "[a] review of the state voter records shows that at least two residents at Valor Home have voted from that address for several years dating back to at least 2013." This evidence was not presented to the trial court and cannot be considered for the first time on appeal. See *State* v. *Edwards*, 314 Conn. 465, 478, 102 A.3d 52 (2014) ("we cannot consider evidence not available to the trial court to find adjudicative facts for the first time on appeal"); *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 756, 196 A.3d 328 (2018) (appellate courts "do not consider evidence not presented to the trial court").

The defendant also claims that summary judgment was improper because "[t]he plaintiffs refused to provide the [defendant] with any evidence as to how long residents reside at Valor Home . . . ." Practice Book § 17-47

In the absence of such evidence, no disputed issues of material fact existed. See, e.g., *Farrell* v. *Farrell*, 182 Conn. 34, 39, 438 A.2d 415 (1980) ("[G]eneral averments will not suffice to show a triable issue of fact. . . . Indeed, the whole summary judgment procedure would be defeated if, without any showing of evidence, a case could be forced to trial by a mere assertion that an issue exists."). Accordingly, the trial court properly rendered summary judgment in favor of the plaintiffs.

The judgment is affirmed.

In this opinion McDONALD, D'AURIA, MULLINS and KAHN, Js., concurred.

ROBINSON, C. J., concurring in the judgment. I agree with the majority's decision to affirm the judgment of the trial court, which rendered summary judgment in this tax appeal in favor of the plaintiffs, Rainbow Housing Corporation (Rainbow Housing) and Gilead Community Services, Inc. (Gilead), on the ground that they provide temporary housing within the meaning of Gen-

provides that, "[s]hould it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present facts essential to justify opposition, the judicial authority may deny the motion for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just." As we explained in *Dorazio* v. *M. B. Foster Electric Co.*, 157 Conn. 226, 253 A.2d 22 (1968), "[a] party cannot successfully oppose a motion for summary judgment by merely averring that the [opposing party] has exclusive knowledge about certain facts or that affidavits based on personal knowledge are difficult to obtain. Under § 301 [the predecessor to § 17-47], the opposing party must show by affidavit precisely what facts are within the exclusive knowledge of the moving party and what steps he has taken to attempt to acquire these facts." Id., 230; see also *Bank of America, N.A.* v. *Briarwood Connecticut, LLC*, 135 Conn. App. 670, 676–77, 43 A.3d 215 (2012) (trial court properly rendered summary judgment in favor of plaintiff because defendant's request for continuance was not timely filed and "did not comply with the requirements of Practice Book § 17-47"). The defendant did not seek a continuance or discovery in accordance with the requirements of § 17-47, and, therefore, we reject the defendant's claim.

eral Statutes § 12-81 (7) (B).[1] I agree with the majority's ultimate conclusion that Valor Home, which is a residence for adults with mental illness that Rainbow Housing owns and leases to Gilead to operate, provides temporary housing. I write separately, however, because I respectfully disagree with the majority's analysis insofar as it concludes that § 12-81 (7) (B) is ambiguous under our well established principles of statutory construction.[2] I conclude that the statutory language of § 12-81 (7) (B), and particularly the definition of "temporary," is clear and unambiguous, with whether a facility meets that definition being a highly fact sensitive question for the trier. Because the facts in this tax appeal were stipulated, meaning that the defendant, the town of Cromwell, did not establish the existence of a genuine issue of material fact as to the temporary nature of the housing provided by Valor Home, I join with the majority in affirming the judgment of the trial court.

[1] General Statutes § 12-81 provides in relevant part: "The following-described property shall be exempt from taxation . . . (7) (B) On and after July 1, 1967, housing subsidized, in whole or in part, by federal, state or local government and housing for persons or families of low and moderate income shall not constitute a charitable purpose under this section. As used in this subdivision, 'housing' shall not include real property used for temporary housing belonging to, or held in trust for, any corporation organized exclusively for charitable purposes and exempt from taxation for federal income tax purposes, the primary use of which property is one or more of the following: (i) An orphanage; (ii) a drug or alcohol treatment or rehabilitation facility; (iii) housing for persons who are homeless, persons with a mental health disorder, persons with intellectual or physical disability or victims of domestic violence; (iv) housing for ex-offenders or for individuals participating in a program sponsored by the state Department of Correction or Judicial Branch; and (v) short-term housing operated by a charitable organization where the average length of stay is less than six months. The operation of such housing, including the receipt of any rental payments, by such charitable organization shall be deemed to be an exclusively charitable purpose . . . ."

[2] I also note my agreement with part I of the majority opinion, in which the majority concludes that, because the parties stipulated that the plaintiffs' M-3 application was "complete," the defendant cannot now challenge that fact for the first time on appeal.

As noted by the majority, whether Valor Home's housing is "temporary" within the meaning of § 12-81 (7) (B) presents an issue of statutory construction, which is a question of law over which we exercise plenary review. See, e.g., *Boisvert* v. *Gavis*, 332 Conn. 115, 141, 210 A.3d 1 (2019). It is well settled that we follow the plain meaning rule pursuant to General Statutes § 1-2z in construing statutes "to ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 45, 213 A.3d 1110 (2019); see id., 45–46 (stating plain meaning rule).

We begin with the text of the statute. Section 12-81 (7) (A) provides that, with certain exceptions, property used for "charitable purposes" is exempt from taxation. However, § 12-81 (7) (B) provides in relevant part that "housing subsidized, in whole or in part, by federal, state or local government . . . shall not constitute a charitable purpose under this section. . . ." The statute then provides that the term "housing" does "not include real property used for *temporary housing* belonging to, or held in trust for, any corporation organized exclusively for charitable purposes and exempt from taxation for federal income tax purposes, the primary use of which property is one or more of the following . . . (iii) housing for persons who are homeless, persons with a mental health disorder, persons with intellectual or physical disability or victims of domestic violence . . . and (v) short-term housing operated by a charitable organization where the average length of stay is less than six months. The operation of such housing, including the receipt of any rental payments, by such charitable organization shall be deemed to be an exclusively charitable purpose . . . ." (Emphasis added.) General Statutes § 12-81 (7) (B). Because it is undisputed that Valor Home provides treatment and services for "persons with a mental health disorder," and we

assume, without deciding, that Valor Home is subsidized in part by the Department of Mental Health and Addiction Services, the sole question before us is whether Valor Home provides "temporary" housing so as to qualify for a property tax exemption under § 12-81 (7) (B).

Under § 1-2z, we first must determine whether § 12-81 (7) (B) is ambiguous. "The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 527, 93 A.3d 1142 (2014). In other words, a statute is considered plain and unambiguous when "the meaning . . . is so strongly indicated or suggested by the [statutory] language . . . that . . . it appears to be *the* meaning and appears to preclude any other likely meaning." (Emphasis in original; internal quotation marks omitted.) *Ledyard* v. *WMS Gaming, Inc.*, 338 Conn. 687, 698 n.6, 258 A.3d 1268 (2021). In interpreting statutes, words and phrases are construed according to their "commonly approved usage . . . ." General Statutes § 1-1 (a); see e.g., *State* v. *Panek*, 328 Conn. 219, 227–29, 177 A.3d 1113 (2018). As discussed by the majority, " 'temporary' means 'lasting for a time only: existing or continuing for a limited time: impermanent, transitory . . . .' Webster's Third New International Dictionary (2002) p. 2353; see also Oxford American Dictionary and Language Guide (1999) p. 1038 (defining 'temporary' as 'lasting or meant to last only for a limited time')." Part II of the majority opinion. Neither the parties nor the majority presents an alternative interpretation for the meaning of "temporary" other than its plain meaning. Instead, the majority concludes that, because the statute provides a durational limitation for short-term housing and is silent regarding a durational limitation for temporary housing,

the statute is ambiguous. I respectfully disagree with the majority's conclusion as to the statute's ambiguity.

First, the majority points out that § 12-81 (7) (B), in enumerating the exceptions to the general exclusion of subsidized housing from tax exempt status, provides a time limit only for "short-term housing," which, as defined in the statute, means an average stay of less than six months in duration. See General Statutes § 12-81 (7) (B) (v). The majority suggests that such an inclusion indicates that the legislature intended the phrases "short-term" and "temporary" to have different meanings. I agree that the meaning of "short-term" is distinct from the previously discussed meaning of "temporary" based on the plain wording of the statute. An inclusion of a time limit for "short-term" housing but not for "temporary" housing, however, does not render the word "temporary" ambiguous. Indeed, it demonstrates that, had the legislature intended to provide a durational limitation for "temporary" housing, rather than just "short-term" housing, it could have done so. See, e.g., *DeNunzio* v. *DeNunzio*, 320 Conn. 178, 194, 128 A.3d 901 (2016) (common principle of statutory construction is that, when legislature expresses list of items, exclusion of item is deliberate); *Stafford* v. *Roadway*, 312 Conn. 184, 194, 93 A.3d 1058 (2014) ("[i]t is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so" (citation omitted; internal quotation marks omitted)). It is clear from the plain text of the statute that "temporary" housing encompasses residential mental health programs, drug rehabilitation programs, and orphanages, in contrast to "short-term" housing, which is specifically limited in duration, and addresses a broad, catchall category of temporary housing.

Second, I disagree with the majority's conclusion that the statute's silence as to a durational time limit for

"temporary" housing is evidence of its ambiguity. This court has "made clear that [t]he fact that . . . relevant statutory provisions are silent . . . does not mean that they are ambiguous." (Internal quotation marks omitted.) *State* v. *Orr*, 291 Conn. 642, 653–54, 969 A.2d 750 (2009); see, e.g., id., 654 (statute's silence about whether it permits in-court testimony by social worker "should not be skewed as to indicate ambiguity" because it is not susceptible to more than one plausible interpretation); *Manifold* v. *Ragaglia*, 272 Conn. 410, 419, 862 A.2d 292 (2004) ("[statutory] silence does not . . . necessarily equate to ambiguity"). I recognize that, in limited circumstances, this court has found a statute ambiguous as a result of its silence. However, this case does not present such a circumstance. "[S]ilence may render a statute ambiguous when the missing subject reasonably is necessary to effectuate the provision as written." *State* v. *Ramos*, 306 Conn. 125, 136, 49 A.3d 197 (2012); see also *Stuart* v. *Stuart*, 297 Conn. 26, 37, 996 A.2d 259 (2010) (silence as to standard of proof rendered statute ambiguous because there was "more than one plausible interpretation of its meaning"). In contrast, § 12-81 (7) (B) is not silent as to its subject and therefore does not fall within this first instance of ambiguity created by silence.

I also acknowledge that "the legislature's silence as to the scope of a term may render the statute ambiguous. See *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 400, 999 A.2d 682 (2010) ([W]e note that the lien provision is silent with respect to its scope. Although [statutory] silence does not . . . necessarily equate to ambiguity . . . we conclude that this silence renders the provision ambiguous with respect to its scope because there is more than one plausible interpretation of its meaning. . . .)." (Internal quotation marks omitted.) *State* v. *Ramos*, supra, 306 Conn. 137. In *Thomas*, the statute was silent as to an employer's rights

under the lien provision for future workers' compensation claims. See *Thomas* v. *Dept. of Developmental Services*, supra, 396. No such ambiguity exists here. Instead, the silence of § 12-81 (7) (B) as to a specific duration for temporary housing does not render the text of the statute susceptible to more than one plausible reading. See *State* v. *Ramos*, supra, 138–39 (statutory silence as to effect of untimely filed motion did not render statute ambiguous). Rather, the statutory silence simply requires this court to apply the plain and unambiguous meaning of the word "temporary" to the facts of this case in order to determine whether Valor Home provides temporary housing to its residents.

Because the language of § 12-81 (7) (B) is clear and unambiguous, the only remaining question is whether, as a factual matter, Valor Home's residential program provides temporary housing within the common usage of the term.[3] Under the plain meaning of the statute,

[3] I note that, prior to the enactment of § 1-2z, this court addressed latent ambiguity arising from the application of an otherwise unambiguous statute by referencing the legislative history of the statutory provision. "When application of the statute to a particular situation reveals a latent ambiguity in seemingly unambiguous language . . . we turn for guidance to the purpose of the statute and its legislative history . . . ." *University of Connecticut* v. *Freedom of Information Commission*, 217 Conn. 322, 328, 585 A.2d 690 (1991); see also *State* v. *Courchesne*, 262 Conn. 537, 564–65, 572, 816 A.2d 562 (2003); *Conway* v. *Wilton*, 238 Conn. 653, 665, 680 A.2d 242 (1996).

However, after the passage of § 1-2z, this court has recognized that such an approach is no longer appropriate. "Prior to the enactment of § 1-2z, this court sometimes turned to the legislative history of a statutory provision that, although clear on its face, contained a latent ambiguity when the statute was applied to the facts of the case . . . ." *State* v. *Ramos*, supra, 306 Conn. 144 n.4 (*Palmer*, *J.*, concurring); see also *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, 293 Conn. 382, 391 n.8, 978 A.2d 49 (2009) ("the legislature responded to *Courchesne* by passing § 1-2z . . . and rejected, in toto, this [court's] method of interpretation" (citation omitted)); *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, supra, 392 n.8 ("the statutory construction principles set forth in *Courchesne* . . . have been rejected").

As Justice Palmer reiterated in his concurrence in *Ramos*, "we are directed by § 1-2z not to consider extratextual sources in determining the outcome of the present case because [the statute] is not ambiguous on its face with

whether a charitable program provides temporary housing leads to a fact intensive inquiry. I note that the record in this case consists of stipulated facts, under which there is no genuine issue of material fact. Valor Home provides housing for up to five men at a time, each of whom pays a monthly rental fee. Valor Home provides its residents with a myriad of services, including psychiatric clinical services, skill building instruction, and rehabilitative activities. Gilead's chief executive officer, Dan Osborne, states in his affidavit that "[o]ccupancy at [Valor Home] is temporary and transitional insofar as the individuals who live at [Valor Home] . . . live there [only] until they no longer need the services provided by Gilead. There is no specific term by which an individual must leave [Valor Home]; the term is entirely dependent [on] the individual's treatment progress. Once the individuals are capable of living more independently through the services and supports [provided] by Gilead, they move out of [Valor Home]." I agree with the majority's observation that "[t]he defendant failed to produce any evidence to contradict or rebut the plaintiffs' evidence demonstrating that the housing provided by Valor Home is temporary." Part II of the majority opinion.

I emphasize that a more developed factual record might well have led to a different conclusion in this case. For example, the record does not contain any evidence

respect to the issue presently before the court." *State* v. *Ramos*, supra, 306 Conn. 148 (*Palmer*, *J.*, concurring). I agree with Justice Palmer that § 1-2z has the potential to limit this court's ability to ascertain legislative intent accurately, which presents an impediment that is "troubling" in light of a latent ambiguity as is present in this case. Id. (*Palmer*, *J.*, concurring). Thus, under the interpretation regime of § 1-2z, when an ambiguity arises in application, so too does a fact intensive inquiry for the court. This case is illustrative of this potentially difficult point. Instead of looking to the legislative history for further guidance as to the application of the word "temporary" in this context, it appears that we are bound to apply the seemingly plain meaning of the word temporary to the facts in the record. See id., 140–41.

regarding how long residents generally stay at Valor Home. It also does not contain any evidence concerning whether Valor Home's residents act in a manner consistent with living somewhere on a more than temporary basis, such as using its address to register to vote.[4] Cf. *Hicks* v. *Brophy*, 839 F. Supp. 948, 951 (D. Conn. 1993) ("[F]actors [to determine domicil] include the place where civil and political rights are exercised, taxes paid, real and personal property (such as automobiles) located, driver's and other licenses obtained, bank accounts maintained, and places of business or employment. . . . Other factors are also relevant, such as whether the person owns or rents his place of residence, how permanent the residence appears, and the location of a person's physician, lawyer, accountant, dentist, stockbroker . . . ." (Citations omitted.)); *Litvaitis* v. *Litvaitis*, 162 Conn. 540, 546, 295 A.2d 519 (1972) ("[t]o constitute domicil, the residence at the place chosen for the domicil must be actual, and to the fact of residence there must be added the intention of remaining permanently; and that place is the domicil of the person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with the present intention of making it his home" (internal quotation marks omitted)).

Based on the limited factual record in this case, I conclude that Valor Home provides temporary housing to its clients within the meaning of the plain language of § 12-81 (7) (B). I, therefore, agree with the majority's conclusion that the trial court properly rendered summary judgment in favor of the plaintiffs.

Accordingly, I concur in the judgment of the court affirming the trial court's judgment.

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[4] As the majority notes, the defendant could have sought such evidence pursuant to Practice Book § 17-47. See footnote 13 of the majority opinion.