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Vol. 333

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* WILLIAM MCCLEESE (SC 20081)

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

Syllabus

Pursuant to *Miller* v. *Alabama* (567 U.S. 460) and *State* v. *Riley* (315 Conn. 637), the prohibition against cruel and usual punishments in the federal constitution precludes a court from sentencing a juvenile offender to life imprisonment, or its functional equivalent, without the possibility of parole, unless the juvenile offender's age and the hallmarks of adolescence have been considered as mitigating factors in the sentencing determination.

Pursuant further to recent legislation (P.A. 15-84, § 1), a person convicted of a crime or crimes committed while such person was under eighteen years of age who received a total effective sentence of more than ten years prior to or after the effective date of the act becomes eligible for parole after serving 60 percent of his or her sentence, or in the case of sentences of more than fifty years imprisonment, after serving thirty years.

The defendant, who had been convicted of the crimes of murder, conspiracy to commit murder, and assault in the first degree, appealed from the trial court's dismissal of his motion to correct an illegal sentence. The defendant was seventeen years old when he committed the crimes and was sentenced to eighty-five years imprisonment without eligibility for parole. The sentencing court made no express reference to the defendant's youth and the hallmarks of adolescence as mitigating factors when it sentenced him. After the defendant was sentenced, *Miller* and *Riley* were decided, and P.A. 15-84 was enacted. The defendant claimed before the court deciding his motion to correct that, under the federal and state constitutions, his sentence was imposed in an illegal manner because the sentencing court made no express reference to his youth and the hallmarks of adolescence as mitigating factors. The defendant also claimed that the retroactive parole eligibility that he was afforded by P.A. 15-84 did not constitute a remedy for a *Miller* violation under the Connecticut constitution, and, thus, he was entitled to be resentenced in accordance with the dictates of *Miller* and *Riley*. The court ultimately dismissed the defendant's motion to correct as moot after the United States Supreme Court determined in *Montgomery* v. *Louisiana* (136 S. Ct. 718) that *Miller* applied retroactively but that, under the federal constitution, a *Miller* violation could be remedied by extending eligibility for parole to a juvenile offender, which remedy had already been afforded to the defendant by virtue of the passage of P.A. 15-84. On appeal, the defendant claimed that the parole eligibility afforded by P.A. 15-84 did not remedy the *Miller* violation under the Connecticut

constitution, P.A. 15-84 is unconstitutional under the separation of powers doctrine embodied in article two of the state constitution and under the due process clause of the fourteenth amendment to the federal constitution, and P.A. 15-84 violates the defendant's right to equal protection under the federal constitution. *Held*:

1. The trial court properly dismissed the defendant's motion to correct an illegal sentence for lack of subject matter jurisdiction on the basis of mootness, as the parole eligibility afforded to the defendant under P.A. 15-84 was an adequate remedy for a *Miller* violation, and, accordingly, the defendant could not prevail on his claim that he was entitled to be resentenced under the state constitution: upon review of the factors set forth in *State* v. *Geisler* (222 Conn. 672) for construing the scope and parameters of the Connecticut constitution, this court declined to conclude that those factors compelled a state constitutional rule beyond what the legislature required in P.A. 15-84, because, although federal precedent requires special treatment of juveniles who are subject to harsh punishments, that precedent hinged on the severity of those punishments, and this court could not dismiss the mitigating effect that the parole eligibility afforded to juvenile offenders under P.A. 15-84 has in this context, and the relevant text of the state constitutional provisions at issue (art. I, §§ 8 and 9), the constitutional history, Connecticut and sister state precedent, and public policy did not support any enhanced protection under the state constitution; moreover, this court determined, after considering, inter alia, the historical development of the punishment of juvenile offenders in Connecticut, recent legislative enactments, and the laws and practices of other jurisdictions, that the remedy of parole eligibility for a *Miller* violation does not categorically offend contemporary standards of decency, and this court, in the exercise of its independent judgment, concluded that such a remedy comported with the state constitution.
2. The defendant's claims that P.A. 15-84 is unconstitutional under the separation of powers doctrine embodied in article two of the Connecticut constitution and the due process clause of the fourteenth amendment to the United States constitution were unavailing: the legislature did not exceed its authority by affording the defendant parole eligibility pursuant to P.A. 15-84, as the power of sentencing is shared by all three branches of state government, the power to impose or modify a judgment of conviction is not synonymous with the power of sentencing, and P.A. 15-84 did not alter the defendant's judgment of conviction but, rather, retroactively modified the state's sentencing scheme, which falls within the legislature's power to prescribe and limit punishments for crimes and does not encroach on the judiciary's power to impose or modify a sentence; moreover, P.A. 15-84 does not violate the separation of powers doctrine by impermissibly delegating sentencing power to the Board of Pardons and Paroles, as the board's power at the parole stage is distinct from the judiciary's sentencing power; furthermore, although this court determined that the defendant had inadequately briefed his claim that

P.A. 15-84 violates the due process clause of the fourteenth amendment, it nevertheless concluded, on the basis of P.A. 15-84 as enacted, that any *Miller* violation had been negated by virtue of the fact that the defendant was afforded parole eligibility under that act.

3. The defendant could not prevail on his claim that P.A. 15-84 violates his right to equal protection under the United States constitution on the ground that juveniles convicted of capital felony are entitled to resentencing under P.A. 15-84 whereas juveniles, such as the defendant, who are convicted of murder, are not: even if this court assumed that each group of juveniles that the defendant identifies are similarly situated, the legislature had a rational basis for treating them differently, as the manner in which mandatory sentences for capital felony and discretionary sentences for murder are imposed is distinct and, thus, might have warranted distinct remedies; moreover, the legislature reasonably could have determined that, because only 4 juveniles were serving mandatory life sentences for capital felony or arson murder, whereas approximately 270 juveniles were serving sentences of longer than ten years for other crimes, resentencing was simply a more feasible task for a smaller group in light of the judicial resources needed to conduct such proceedings, and the legislature potentially could have distinguished between actual life sentences for capital felony and those that are for the functional equivalent of life, including for murder, and determined that the latter, which offer the possibility of geriatric release, was worth granting to even the most culpable offenders, particularly at an advanced age when they would likely pose a much lesser threat to society but would cost the state much more to care for.

(*One justice concurring separately; one justice dissenting*)

Argued October 15, 2018—officially released August 23, 2019*

Procedural History

Substitute information charging the defendant with the crimes of murder, conspiracy to commit murder, assault in the first degree and conspiracy to commit assault in the first degree, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Harper*, *J.*; verdict and judgment of guilty of murder, conspiracy to commit murder and assault in the first degree, from which the defendant appealed to the Appellate Court, *Bishop*, *McLachlan* and *Dupont*, *Js.*, which affirmed the trial court's judgment; thereafter, the court, *Clifford*, *J.*, dismissed the defendant's

* August 23, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

motion to correct an illegal sentence, and the defendant appealed. *Affirmed.*

Adele V. Patterson, senior assistant public defender, with whom was *Beth A. Merkin*, public defender, for the appellant (defendant).

Melissa Patterson, deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Matthew A. Weiner* and *Lisa M. D'Angelo*, assistant state's attorneys, for the appellee (state).

Kim E. Rinehart filed a brief for the Connecticut Psychiatric Society as amicus curiae.

Opinion

D'AURIA, J. Under the federal constitution's prohibition of cruel and unusual punishments, a juvenile offender cannot serve a sentence of imprisonment for life, or its functional equivalent, without the possibility of parole, unless his age and the hallmarks of adolescence have been considered as mitigating factors. *Miller* v. *Alabama*, 567 U.S. 460, 476–77, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 60–61, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, U.S. , 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016); *State* v. *Riley*, 315 Conn. 637, 641, 110 A.3d 1205 (2015), cert. denied, U.S. , 136 S. Ct. 1361, 194 L. Ed. 2d 376 (2016). The defendant, William McCleese, a juvenile offender, was originally serving a sentence of imprisonment for the functional equivalent of his life without the possibility of parole, in violation of this constitutional mandate. Because of subsequent legislation, however, he will be eligible for parole in or about 2033. This appeal requires us to decide whether the legislature may remedy the constitutional violation with parole eligibility. We conclude that it may and has done so.

The following undisputed facts and procedural history, as contained in the record and the Appellate

Court's decision in the defendant's direct appeal, are relevant to this appeal. The defendant was seventeen years old when he and a partner shot and killed one victim and injured another. *State* v. *McCleese*, 94 Conn. App. 510, 512, 892 A.2d 343, cert. denied, 278 Conn. 908, 899 A.2d 36 (2006). In 2003, a jury found the defendant guilty of murder in violation of General Statutes § 53a-54a (a), conspiracy to commit murder in violation of § 53a-54a (a) and General Statutes § 53a-48 (a), and assault in the first degree in violation of General Statutes § 53a-59 (a) (5). Id., 511.

The defendant received a total effective sentence of eighty-five years of imprisonment without eligibility for parole, including sixty years on the conviction of murder. Although the sentencing court, *Harper*, *J.*, considered other mitigating evidence and mentioned the defendant's youth several times, there is no express reference in the record that it specifically considered youth as a mitigating factor, which, at the time, was not a constitutional requirement. See *Miller* v. *Alabama*, supra, 567 U.S. 460. The Appellate Court affirmed his conviction on direct appeal; *State* v. *McCleese*, supra, 94 Conn. App. 521; and this court denied his petition for certification to appeal from the Appellate Court's judgment. *State* v. *McCleese*, 278 Conn. 908, 899 A.2d 36 (2006).

Subsequently, decisions by the United States Supreme Court, decisions by this court, and enactments by our legislature resulted in changes to the sentencing scheme for juvenile offenders. Those changes will be set forth more fully in this opinion, but a brief summary helps to understand the procedural posture of this case. Specifically, the United States Supreme Court in *Miller* held that the eighth amendment's prohibition on cruel and unusual punishments is violated when a juvenile offender serves a mandatory sentence of life imprisonment without the possibility of parole because it renders "youth (and all that accompanies it) irrelevant to impo-

sition of that harshest prison sentence" and "poses too great a risk of disproportionate punishment." *Miller* v. *Alabama*, supra, 567 U.S. 479. Thus, an offender's age and the hallmarks of adolescence must be considered as mitigating factors before a juvenile can serve this particular sentence.[1] This court has interpreted *Miller* to apply not only to mandatory sentences for the literal life of the offender, but also to discretionary sentences and sentences that result in imprisonment for the "functional equivalent" of an offender's life. *State* v. *Riley*, supra, 315 Conn. 642, 654; see also *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 72. We also have ruled that *Miller* applies not only prospectively, but retroactively, and also to challenges to sentences on collateral review. *Casiano* v. *Commissioner of Correction*, supra, 71.

To comport with federal constitutional requirements, the legislature passed No. 15-84 of the 2015 Public Acts (P.A. 15-84).[2] In relevant part, the act retroactively provided parole eligibility to juvenile offenders sentenced to more than ten years in prison. See P.A. 15-84, § 1. As a result, the defendant is no longer serving a sentence without the possibility of parole—he will be parole eligible after serving thirty years, when he is about fifty years old.

[1] We refer to the offender's age and the hallmarks of adolescence as the *Miller* factors throughout this opinion. Specifically, a court must consider "immaturity, impetuosity, and failure to appreciate risks and consequences"; the offender's "family and home environment" and the offender's inability to extricate himself from that environment; "the circumstances of the homicide offense, including the extent of [the offender's] participation in the conduct and the way familial and peer pressures may have affected him"; the offender's "inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and "the possibility of rehabilitation . . . ." (Internal quotation marks omitted.) *State* v. *Riley*, supra, 315 Conn. 658, quoting *Miller* v. *Alabama*, supra, 567 U.S. 477–78.

[2] Section 1 of No. 15-84 of the 2015 Public Acts, codified at General Statutes (Supp. 2016) § 54-125a, provides in relevant part: "(f) (1) . . . [A] person convicted of one or more crimes committed while such person was under eighteen years of age, who is incarcerated on or after October 1, 2015, and who received a definite sentence or total effective sentence of more than

ten years for such crime or crimes prior to, on or after October 1, 2015, may be allowed to go at large on parole in the discretion of the panel of the Board of Pardons and Paroles for the institution in which such person is confined, provided (A) if such person is serving a sentence of fifty years or less, such person shall be eligible for parole after serving sixty per cent of the sentence or twelve years, whichever is greater, or (B) if such person is serving a sentence of more than fifty years, such person shall be eligible for parole after serving thirty years. . . .

"(2) The board shall apply the parole eligibility rules of this subsection only with respect to the sentence for a crime or crimes committed while a person was under eighteen years of age. . . .

"(3) Whenever a person becomes eligible for parole release pursuant to this subsection, the board shall hold a hearing to determine such person's suitability for parole release. . . .

"(4) After such hearing, the board may allow such person to go at large on parole . . . if it appears . . . (C) such person has demonstrated substantial rehabilitation since the date such crime or crimes were committed considering such person's character, background and history, as demonstrated by factors, including, but not limited to, such person's correctional record, the age and circumstances of such person as of the date of the commission of the crime or crimes, whether such person has demonstrated remorse and increased maturity since the date of the commission of the crime or crimes, such person's contributions to the welfare of other persons through service, such person's efforts to overcome substance abuse, addiction, trauma, lack of education or obstacles that such person may have faced as a child or youth in the adult correctional system, the opportunities for rehabilitation in the adult correctional system and the overall degree of such person's rehabilitation considering the nature and circumstances of the crime or crimes.

"(5) After such hearing, the board shall articulate for the record its decision and the reasons for its decision. If the board determines that continued confinement is necessary, the board may reassess such person's suitability for a new parole hearing at a later date to be determined at the discretion of the board, but not earlier than two years after the date of its decision. . . ."

Section 2 of No. 15-84 of the 2015 Public Acts, codified at General Statutes (Supp. 2016) § 54-91g, provides in relevant part: "(a) If the case of a child . . . is transferred to the regular criminal docket of the Superior Court . . . and the child is convicted of a class A or B felony pursuant to such transfer, at the time of sentencing, the court shall:

"(1) Consider, in addition to any other information relevant to sentencing, the defendant's age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development; and

"(2) Consider, if the court proposes to sentence the child to a lengthy sentence under which it is likely that the child will die while incarcerated, how the scientific and psychological evidence described in subdivision (1) of this subsection counsels against such a sentence.

"(b) Notwithstanding the provisions of section 54-91a of the general statutes, no presentence investigation or report may be waived with respect to a child convicted of a class A or B felony. . . .

"(d) The Court Support Services Division of the Judicial Branch shall compile reference materials relating to adolescent psychological and brain development to assist courts in sentencing children pursuant to this section."

Following these developments, the defendant filed a motion to correct an illegal sentence. He asserted a *Miller* claim under the federal constitution and a similar claim under the state constitution.[3] Initially, the trial court, *Clifford, J.*, ruled in the defendant's favor on his federal constitutional claim but reserved ruling on a remedy for the federal violation and on the merits of the state constitutional claim.

Three days after the trial court's initial ruling on the motion to correct an illegal sentence, the United States Supreme Court held that *Miller* applied retroactively. *Montgomery* v. *Louisiana*, U.S. , 136 S. Ct. 718, 732, 193 L. Ed. 2d 599 (2016). In other words, a *Miller* violation existed if a juvenile offender was serving life without parole without the trial court's having considered the *Miller* factors, even if the sentencing took place before *Miller* had been decided. Although this court in *Casiano* had already established that *Miller* applied retroactively, critically, *Montgomery* also made clear that "[*Miller*'s] retroactive effect . . . does not require [s]tates to relitigate sentences, let alone convictions, in every case [in which] a juvenile offender received mandatory life without parole. A [s]tate may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." Id., 736.

Relying on *Montgomery*, the state filed a motion to reconsider the trial court's ruling granting the defen-

[3] "A *Miller* claim or *Miller* violation refers to the sentencing court's obligation to consider a juvenile's age and circumstances related to age at an individualized sentencing hearing as mitigating factors before imposing a sentence of life imprisonment [or its equivalent] without parole." *State* v. *Delgado*, 323 Conn. 801, 806 n.5, 151 A.3d 345 (2016). The United States Supreme Court relied on similar reasoning to decide *Graham* v. *Florida*, 560 U.S. 48, 75, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). "A *Graham* claim or *Graham* violation refers to the sentencing court's obligation to provide a meaningful opportunity for parole to a juvenile [nonhomicide offender] who is sentenced to life imprisonment [or its equivalent, regardless of parole eligibility]." *State* v. *Delgado*, supra, 806 n.5.

dant's motion to correct an illegal sentence. After briefing and argument, the court granted the motion to reconsider, concluded that the defendant's *Miller* claim was now moot under both the federal and state constitutions, and dismissed the motion to correct an illegal sentence. The defendant appealed from that decision to the Appellate Court. The defendant's appeal was then transferred to this court. See Practice Book § 65-2.

In this appeal, we must decide whether the trial court had subject matter jurisdiction over the defendant's motion to correct an illegal sentence. Subject matter jurisdiction "involves the authority of the court to adjudicate the type of controversy presented by the action before it." (Internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 533, 911 A.2d 712 (2006). The existence of jurisdiction is a question of law, and our review is plenary. Id., 532. A trial court generally has no authority to modify a sentence but retains limited subject matter jurisdiction to correct an illegal sentence or a sentence imposed in an illegal manner. *State* v. *Delgado*, 323 Conn. 801, 809, 151 A.3d 345 (2016). Practice Book § 43-22[4] codifies this common-law rule. Id. Therefore, we must decide "whether the defendant has raised a colorable claim within the scope of Practice Book § 43-22 . . . . In the absence of a colorable claim requiring correction, the trial court has no jurisdiction . . . ." (Citation omitted.) Id., 810.

In the present case, whether the defendant has made out a colorable claim depends on (1) whether the parole eligibility afforded by P.A. 15-84 adequately remedies an unconstitutional sentence under the state constitution, (2) whether, consistent with separation of powers

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

principles embodied in the Connecticut constitution,[5] the legislature may remedy an unconstitutional sentence that was imposed by the judiciary, and (3) whether P.A. 15-84 violates the defendant's right to equal protection. We hold that the defendant has not made out a colorable claim and that the trial court lacked jurisdiction over his motion.

I

The defendant first claims that the parole eligibility afforded by P.A. 15-84, § 1, does not remedy a *Miller* violation under the Connecticut constitution. Specifically, he argues that a juvenile sentenced to fifty years or more without consideration of the *Miller* factors must be resentenced in accordance with *Miller*, regardless of whether he is eligible for parole. We disagree and conclude that parole eligibility under P.A. 15-84, § 1, is an adequate remedy for a *Miller* violation under our state constitution just as it is under the federal constitution.

This court has not yet addressed this issue. In *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992), "we identified six nonexclusive tools of analysis to be considered, to the extent applicable, whenever we are called on as a matter of first impression to define the scope and parameters of the state constitution: (1) persuasive relevant federal precedents; (2) historical insights into the intent of our constitutional forebears; (3) the operative constitutional text; (4) related Connecticut precedents; (5) persuasive precedents of other states; and (6) contemporary understandings of applicable economic and sociological norms, or, as otherwise described, relevant public policies. . . . These factors,

[5] Article second of the constitution of Connecticut, as amended by article eighteen of the amendments, provides in relevant part: "The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another. . . ."

[commonly referred to as the *Geisler* factors and] which we consider in turn, inform our application of the established state constitutional standards—standards that . . . derive from United States Supreme Court precedent concerning the eighth amendment—to the defendant's claims in the present case." (Citations omitted.) *State* v. *Santiago*, 318 Conn. 1, 17–18, 122 A.3d 1 (2015).

A

1

Federal Precedent

It is not critical to a proper *Geisler* analysis that we discuss the various factors in any particular order or even that we address each factor. See *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 408, 119 A.3d 462 (2015). Because the point of departure that the defendant advocates for requires an understanding of the federal jurisprudence on the sentencing of juveniles, we begin with a survey of those precedents.

Federal precedent requires special treatment of juveniles when especially harsh punishments are imposed. The cases justify this treatment, in part, by acknowledging that juveniles are less deserving of criminal punishment and are more capable of change than their adult counterparts. But federal case law also relies on the severity of the punishments at issue in these cases: death and life imprisonment without parole. Precisely because these punishments are irrevocable, they are "disproportionate for the vast majority of juvenile offenders . . . ." *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 736. This rationale does not support similar special treatment of juveniles who are parole eligible, notwithstanding the length of the sentence imposed, because they are afforded the opportunity to "demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." Id.

The eighth amendment to the United States constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. The cruel and unusual punishments clause has been understood to bar "(1) inherently barbaric punishments; (2) excessive and disproportionate punishments; and (3) arbitrary or discriminatory punishments." *State* v. *Santiago*, supra, 318 Conn. 19. "For the most part, however, the [United States Supreme] Court's precedents consider punishments challenged . . . as disproportionate to the crime. The concept of proportionality is central to the [e]ighth [a]mendment." *Graham* v. *Florida*, 560 U.S. 48, 59, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). There are two types of proportionality challenges: (1) "challenges to the length of term-of-years sentences given all the circumstances in a particular case," and (2) categorical challenges balancing "the nature of the offense . . . [or] the characteristics of the offender" against a particular type of sentence. Id., 60.

The United States Supreme Court's juvenile sentencing cases have involved categorical proportionality challenges, as does the defendant's claim in this appeal. Therefore, in this context, the court has weighed the characteristics of juvenile offenders against the severity of sentences of death or life imprisonment without parole.

On one hand, the court has considered "the unique aspects of adolescence . . . ." *State* v. *Riley*, supra, 315 Conn. 644–45. It repeatedly has recognized that "children are constitutionally different from adults for purposes of sentencing." *Miller* v. *Alabama*, supra, 567 U.S. 471. Juvenile offenders have "diminished culpability and greater prospects for reform" than their adult counterparts because they are less mature, more vulnerable to external influences like peers, and have character traits that are not yet fully ingrained. Id. These observations "[rest] not only on common sense—on

what 'any parent knows'—but on science and social science . . . ." Id. And, none of them is crime specific. Id., 473.

On the other hand, the court has considered the severity of the punishments imposed: death or life imprisonment without parole. Sentence severity is critical to a categorical proportionality analysis. Prior to *Graham*, categorical challenges had been applied only to the death penalty. *Graham* v. *Florida*, supra, 560 U.S. 59; see also *Kennedy* v. *Louisiana*, 554 U.S. 407, 438, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008) (nonhomicide offenders); *Roper* v. *Simmons*, 543 U.S. 551, 568, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (juvenile offenders); *Atkins* v. *Virginia*, 536 U.S. 304, 318, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (offenders with limited intellectual functioning). For juvenile offenders, however, the court extended categorical challenges to apply to sentences of life imprisonment without parole in certain contexts. *Graham* v. *Florida*, supra, 61. It first banned all sentences of life without parole for juvenile nonhomicide offenders; id., 82; and then the mandatory imposition of sentences of life without parole for juvenile homicide offenders. *Miller* v. *Alabama*, supra, 567 U.S. 465.

Miller, in particular, justified the extension of the categorical approach for two reasons, both of which relate to the irrevocability of a life-without-parole punishment. First, the court stated that traditional penological justifications could not warrant a mandatory, irrevocable punishment for a juvenile. Id., 472. Most relevant here, if a sentencing court determines that an offender is incapable of change, then incapacitation and the impossibility of rehabilitation justify his permanent imprisonment. See id., 472–73. But, the court noted, this determination is fundamentally "at odds with a child's capacity for change," so it presents a contradiction when applied to juvenile offenders. Id., 473; see also id., 472–73 ("[d]eciding that a juvenile offender

forever will be a danger to society would require mak-[ing] a judgment that [he] is incorrigible—but incorrigibility is inconsistent with youth" [internal quotation marks omitted]).

Second, the court "liken[ed] life-without-parole sentences imposed on juveniles to the death penalty itself." Id., 474. The two "share some characteristics . . . that are shared by no other sentences," such as irrevocability by "[i]mprisoning an offender until he dies . . . ." (Internal quotation marks omitted.) Id., 474–75. The comparison is even more apt in the juvenile context: a life-without-parole sentence is "especially harsh" for juveniles "because [a juvenile offender] will almost inevitably serve more years and a greater percentage of his life in prison than an adult offender." (Internal quotation marks omitted.) Id., 475. Moreover, life imprisonment without parole is the "harshest possible penalty" available for a juvenile, after *Roper* barred capital punishment for juveniles. Id., 479. Therefore, the court "treated [life imprisonment without parole] similarly to that most severe punishment" by adopting "a distinctive set of legal rules" that had been applied only in death penalty cases. Id., 475. These rules required individualized sentencing, thereby ensuring that the most severe punishments were not inevitable but were "reserved only for the most culpable [juvenile] defendants committing the most serious offenses." Id., 476.

But when a juvenile is eligible for parole, the punishment is no longer irrevocable, and, therefore, these rationales no longer apply (or, at least, not nearly with as much force). The first reason collapses if state law permits a juvenile to become parole eligible because the punishment expressly acknowledges that the offender might one day change and reenter society. Similarly, the justification for individualized sentencing—the harshness of a life sentence without parole, which will often

mean a much longer period of incarceration than an adult will have with the same sentence—weakens considerably when state law provides an offender the chance for early release. A punishment with the possibility of parole is surely less harsh than one without it.

Not only was *Miller*'s reasoning limited to sentences that do not include parole eligibility, but its holding was as well. Id., 479 ("[w]e therefore hold that the [e]ighth [a]mendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders"). In *Montgomery*, the court took the opportunity to reiterate that life-with-parole sentences were constitutional, as it expressly permitted states to remedy *Miller* violations with parole eligibility. "Allowing those offenders [sentenced in violation of *Miller*] to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence . . . . The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 736.

In sum, the United States Supreme Court's juvenile sentencing cases rest as much on the diminished moral culpability and enhanced capacity for rehabilitation of a juvenile offender as on the irrevocability of a punishment of death or life imprisonment without parole. To dismiss the effect of parole eligibility—which makes a punishment less severe by affording the opportunity to demonstrate change—would undercut their reasoning entirely.

2

Connecticut Constitutional Text and History

Textually, article first, §§ 8 and 9, of the state constitution establish principles of due process and serve as the basis for Connecticut's prohibition against cruel

and unusual punishments but provide no insight into *Miller*. See *State* v. *Santiago*, supra, 318 Conn. 16 ("the constitution of Connecticut prohibits cruel and unusual punishments under the auspices of the dual due process provisions contained in article first, §§ 8 and 9"). The defendant does not contend, and we have not held, that the text of these provisions of Connecticut's constitution itself, compared with the text of the federal constitution, suggests any enhanced protection under the state constitution. Moreover, although neither due process provision expressly differentiates between juveniles and adults, we draw no conclusion from the fact that "the framers of the 1818 constitution decided to embed these traditional [freedoms from cruel and unusual punishments] in our dual due process clauses . . . rather than in an express punishments clause." (Citation omitted.) Id., 39.

Neither does Connecticut's constitutional history support the defendant's argument. In the early 1800s, Connecticut accounted for the differences between juvenile and adult offenders, but in ways plainly distinguishable from *Miller*.

One seminal distinction was the availability of the infancy defense: an offender less than seven years of age was conclusively presumed incapable of committing a crime, whereas an offender between the ages of seven and fourteen was presumed incapable, but the presumption was rebuttable. Offenders older than fourteen were treated as adults. *In re Tyvonne M.*, 211 Conn. 151, 156, 558 A.2d 661 (1989). Other distinctions were less formal. Legislative pardons for juveniles were inconsistent but not uncommon; N. Steenburg, Children and the Criminal Law in Connecticut, 1635–1855: Changing Perceptions of Childhood (2005) p. 189 (from 1810 to 1830, General Assembly granted nine of twenty petitions for clemency by juvenile offenders, which was a higher

percentage than granted to adult offenders); see also A. Kean, "The History of the Criminal Liability of Children," 53 Law. Q. Rev. 364, 364–66 (1937) (discussing common-law recognition in England as early as thirteenth century of lesser moral culpability of child offenders and development of tendency to pardon them); and juries even may have hesitated to find juveniles guilty during this era. See N. Steenburg, supra, p. 31 ("[t]he General Assembly heard reports that underage criminals were aware that juries did not want to send them to the state prison"). Eventually, juveniles began to receive special treatment in criminal proceedings beyond the infancy defense, such as the appointment of guardians. Id., pp. 23–24, 186–87. By 1843, the legislature had enacted a discretionary sentencing scheme allowing courts to send offenders under age seventeen to less harsh county facilities instead of the state run prisons mandated for adult offenders. Id., p. 200; see Public Acts 1843, c. 21. And, in 1851, it established a separate reform school to house offenders under age sixteen. N. Steenburg, supra, pp. 204–205; see Public Acts 1851, c. 46.

But these protections did not always apply. The laws in place to protect juveniles at the time of ratification were inconsistently followed in practice. See, e.g., N. Steenburg, supra, p. 192 ("the use of . . . guardians was inconsistent and often ineffective"). And the most significant reforms—discretionary sentencing and a reform school—occurred well after the state constitution had been adopted. Even then, although the location where an offender would serve his sentence could be modified, the duration could not: "Because state sentencing guidelines did not specifically allow consideration of mitigating circumstances, many children served what appeared to be excessively harsh sentences . . . for crimes of youthful disobedience or heedlessness. Judges often had no choice in assigning jail or prison sentences because the General Assembly mandated specific sentences for many crimes." Id., pp. 31–32.

This meant juveniles often received the same criminal punishments as adults, including life imprisonment at the state's most notorious prison, Newgate, and even death. See W. Bailey, Children Before the Courts in Connecticut (1918) p. 19 ("it was legally possible for a boy barely over [seven] years of age to be committed to Newgate for life"); 2 Z. Swift, A System of the Laws of the State of Connecticut (1796) p. 368 ("[a] boy of eight years of age, has been executed for burning two barns"); V. Streib & L. Sametz, "Executing Female Juveniles," 22 Conn. L. Rev. 3, 13–15 (1989) (describing execution of twelve year old girl in 1786).

Thus, although Connecticut historically acknowledged that juvenile offenders are different from their adult counterparts and developed measures to allow courts to account for the disparity, the measures Connecticut has used are distinguishable from the one required by *Miller*. In the early 1800s, juvenile status appeared to end at an offender's fourteenth birthday. When protections were technically available, they were discretionary, inconsistently applied, or both. And when protections were actually invoked, most addressed criminal liability (e.g., the infancy defense) or criminal procedure (e.g., the appointment of guardians), but not criminal punishment. Even the state's later sentence mitigation reforms were merely permissive and only allowed a court to change the location where a defendant would serve a sentence. Mandatory consideration of age and the hallmarks of adolescence prior to imposing certain punishments on juvenile offenders is a much more recent development. Therefore, Connecticut constitutional history does not support the defendant's argument that only resentencing, and not parole eligibility, can remedy a *Miller* violation.

3

Connecticut Precedent

This court has not yet addressed *Miller* as a matter of substantive state law. Our prior decisions on the

subject have been limited to procedural state law and federal law. We, therefore, consider these cases as persuasive precedent but conclude that they do not support a rule that requires resentencing for punishments that include parole eligibility.

Casiano is the only case in which we have addressed cruel and unusual punishment as it relates specifically to juveniles under state law, as opposed to federal law. In that case, we concluded that *Miller* was a watershed rule of criminal procedure, and, therefore, it applied retroactively to cases arising on collateral review. *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 69, 71. As the defendant notes, we stated broadly that consideration of the *Miller* factors in sentencing was "implicit in the concept of ordered liberty" and "central to an accurate determination that the sentence imposed is a proportionate one." (Internal quotation marks omitted.) Id., 69. But our interpretation of *Miller* was clearly more limited. We recognized that *Miller* "set forth a presumption that a juvenile offender would not receive a life sentence without parole"; id., 70; and repeatedly recognized that the rule was limited to that "particular punishment." Id., 71.

As a matter of federal law, this court expressly and recently has held that parole eligibility is an adequate remedy for a *Miller* violation. In *State* v. *Delgado*, supra, 323 Conn. 810, the defendant originally had been sentenced without consideration of the *Miller* factors to the functional equivalent of life imprisonment without parole. With the enactment of P.A. 15-84, § 1, however, he became parole eligible. Id. We held that this remedied the constitutional violation: "[U]nder *Miller*, a sentencing court's obligation to consider youth related mitigating factors is limited to cases in which the court imposes a sentence of life, or its equivalent, without parole. . . . As a result [of P.A. 15-84, § 1], the defendant's sentence no longer falls within the purview of *Miller*, *Riley* and *Casiano*, which require consideration of youth related

mitigating factors only if the sentencing court imposes a sentence of life *without* parole. . . . *Miller* simply does not apply when a juvenile's sentence provides an opportunity for parole . . . ." (Citations omitted; emphasis altered.) Id., 811; see also part II of this opinion.

This court also has stated more broadly that *Miller* does not apply to sentences that "lack the severity of the sentences at issue in *Roper*, *Graham* and *Miller*." *State* v. *Taylor G.*, 315 Conn. 734, 744–45, 110 A.3d 338 (2015). In *Taylor G.*, we concluded that a juvenile offender's mandatory total effective sentence of ten years of incarceration followed by three years of special parole did not violate *Miller*. The court emphasized that the punishment was "far less severe" than those at issue in the United States Supreme Court's juvenile punishment cases because it was not "final and irrevocable . . . ." Id. We stated: "Although the deprivation of [a juvenile's] liberty for any amount of time, including a single year, is not insignificant, *Roper*, *Graham* and *Miller* cannot be read to mean that all mandatory deprivations of liberty are of potentially constitutional magnitude." Id., 745.[6]

The defendant notes that this court has twice—in *Riley* and *Casiano*—interpreted *Miller* to apply to punishments that it does not expressly include. Although these cases reflect this court's determination that the phrase "life imprisonment without parole" should be construed beyond its literal meaning, we have applied

[6] Our Appellate Court also has declined to apply *Miller* (or a state constitutional analogue) to sentences of less than imprisonment for life, or its functional equivalent, without parole. See *State* v. *Rivera*, 177 Conn. App. 242, 275, 172 A.3d 260 (2017) (mandatory minimum sentence of twenty-five years incarceration did not violate state constitution); *Dumas* v. *Commissioner of Correction*, 168 Conn. App. 130, 140–41, 145 A.3d 355 (sentence of thirty years incarceration did not violate federal constitution), cert. denied, 324 Conn. 901, 151 A.3d 1288 (2016); *State* v. *Logan*, 160 Conn. App. 282, 293, 125 A.3d 581 (2015) (sentence of thirty-one years incarceration did not violate federal constitution), cert. denied, 321 Conn. 906, 135 A.3d 279 (2016).

Miller only to punishments that have a substantially similar practical effect. Thus, the punishments at issue in *Riley* and *Casiano* are distinguishable from punishments that include parole eligibility under P.A. 15-84, § 1.

In the first case, *State* v. *Riley*, supra, 315 Conn. 637, in which we reasoned that *Miller* "logically reaches beyond its core holding," we concluded that it applied to discretionary sentences and to sentences for terms of years that were the "functional equivalent" of a sentence of life without parole. Id., 642, 654. But many of the reasons we cited for why *Miller* should apply to these types of punishments do not apply when the juvenile is parole eligible. For example, we relied on the fact that the defendant's sentence of 100 years imprisonment with the possibility of parole after ninety-four years left him "no possibility of parole before his natural life expires" and ensured that he "would undoubtedly die in prison . . . ." Id., 640, 643 n.2, 660. Parole eligibility after thirty years under P.A. 15-84, § 1, however, contemplates release when most juvenile offenders will be in their late forties, thereby offering a realistic opportunity for a life outside of prison.

Similarly, in *Casiano*, apart from the retroactivity holding described previously, we held that *Miller* applied to a sentence of fifty years imprisonment without the possibility of parole. *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 79. Although we stated that "the concept of 'life' in *Miller* and *Graham* [was] more [broad] than biological survival"; id., 78; we were ultimately concerned with "the sense of hopelessness" that accompanies a life-without-parole sentence, which "means that good behavior and character improvement are immaterial . . . ." (Internal quotation marks omitted.) Id., 78–79, quoting *Graham* v. *Florida*, supra, 560 U.S. 70. Conversely, parole eligibility offers hope and makes an offender's future conduct relevant.[7]

[7] Although we ordered resentencing in *Riley* and *Casiano*, those decisions predated the enactment of P.A. 15-84. Therefore, courts lacked a mechanism

Thus, Connecticut precedent indicates only that this court has been willing to interpret *Miller* beyond its literal meaning, but not so far as to require resentencing for punishments that include parole eligibility under P.A. 15-84, § 1.

4

Sibling State Precedent

The defendant argues that sibling state comparisons are not helpful in our analysis because certain aspects of Connecticut's juvenile punishment scheme—most notably, a parole system in which eligibility is based in part on the length of the sentence—are unique to this state. Although Connecticut's parole system appears to be distinct in this respect, we note that our essential holding in *Delgado* that *Miller* does not require resentencing for a punishment that includes parole eligibility is consistent with other jurisdictions. See *State* v. *Delgado*, supra, 323 Conn. 811–12 n.7 (citing jurisdictions); see also, e.g., *Talbert* v. *State*, No. 64486, 2016 WL 562778, *1 (Nev. February 10, 2016) (parole eligibility "within [offender's] lifetime"); *State* v. *Charles*, 892 N.W.2d 915, 920–21 (S.D.) (parole eligibility at age sixty), cert. denied, U.S. , 138 S. Ct. 407, 199 L. Ed. 2d 299 (2017). Similarly, other jurisdictions have held that their state constitutions do not require a court to consider the *Miller* factors before imposing a punishment that includes parole eligibility. E.g., *State* v. *Propps*, 897 N.W.2d 91, 102 (Iowa 2017) (punishment including "realistic and meaningful" parole eligibility); *Diatchenko* v. *District Attorney*, 466 Mass. 655, 673, 1 N.E.3d 270 (2013) (life imprisonment with possibility of parole after thirty-one years); *State* v. *Vang*, 847 N.W.2d 248, 262–63 (Minn. 2014) (life imprisonment with possibility of early release after thirty years).

to grant parole eligibility for those defendants at the time. See *State* v. *Delgado*, supra, 323 Conn. 815–16.

5

Public Policy

Nor does Connecticut's public policy compel a conclusion that resentencing is the sole remedy for a *Miller* violation. "[O]ur legislature . . . has the primary responsibility for formulating the public policy of our state." *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 317 Conn. 435. In both *Riley* and *Casiano*, this court declined to address issues related to the recent constitutional developments in juvenile punishment in deference to the legislature. See *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 79 ("we have every reason to expect that our decisions in *Riley* and in the present case will prompt our legislature to renew earlier efforts to address the implications of . . . *Graham* and *Miller*"); *State* v. *Riley*, supra, 315 Conn. 662 ("there is every reason to believe that the legislature will take definitive action regarding these issues").

In response, the legislature passed P.A. 15-84. See Proposed Senate Bill No. 796, 2015 Sess. ("Statement of Purpose: [t]o comply with the decisions of the Supreme Court of the United States in *Miller* v. *Alabama* [supra, 567 U.S. 460] and *Graham* v. *Florida* [supra, 560 U.S. 48]"). Section 2 of P.A. 15-84, in relevant part, requires a court to consider the *Miller* factors when imposing certain sentences upon juvenile offenders. The legislature determined, however, that this requirement would not be retroactive. See *State* v. *Delgado*, supra, 323 Conn. 814 and n.9. Therefore, it does not apply to the defendant. Section 1 of P.A. 15-84, however, does apply to him and does provide a remedy. As set forth previously, the legislature provided retroactive parole eligibility to juvenile offenders sentenced to more than ten years in prison.

The defendant and amici cite abundant evidence of the differences between juveniles and adults, which they contend weighs in favor of requiring consideration

of the *Miller* factors at sentencing, even retrospectively and in addition to parole eligibility.[8] We are not persuaded. First, our legislature considered this perspective alongside other evidence that weighed against a broader application of P.A. 15-84, § 2, such as public safety,[9] the impact on victims,[10] and feasibility.[11] Second,

[8] See Brief of Amici Curiae American Psychological Association et al., *Miller* v. *Alabama*, (U.S. 2012) (Nos. 10-9646 and 10-9647), 2012 WL 174239, *8 ("[a]dolescents are less able to control their impulses; they weigh the risks and rewards of possible conduct differently; and they are less able to envision the future and apprehend the consequences of their actions"); Brief of Amicus Curiae American Bar Association, *Montgomery* v. *Louisiana*, (U.S. 2016) (No. 14-280) p. 24 ("[t]he states' interest in finality, which underpins the general rule of [nonretroactivity], is particularly weak here"); Brief of Amicus Curiae Former Juvenile Court Judges, *Montgomery* v. *Louisiana*, (U.S. 2016) (No. 14-280) pp. 5–6 ("the criminal justice system is equipped to revisit the sentences of juvenile offenders pursuant to this [c]ourt's decision in *Miller*, even when those offenders' cases are no longer on direct review and even when a substantial amount of time has passed since the offense was committed").

[9] See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 2015 Sess., p. 966, remarks of Senator John A. Kissel ("I appreciate all your efforts in working with the leadership of this committee to help move this issue forward for the betterment of the people of the [s]tate of Connecticut but also making sure that public safety is of paramount and continues to remain as paramount importance for the citizens that we represent").

[10] See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 2015 Sess., pp. 955–56, remarks of Attorney Robert Farr ("[O]ne of my personal issues here was the treatment of the victim's and the victim's families. And I didn't want to see them revictimized by having this great uncertainty. You can think in the [*Riley*] case where an individual was murdered and a sentence was imposed of 100 years. Nine years later they're now back into court again at a resentencing. . . . And so what we tried to do is—as has been pointed out is give some certainty so that in the [*Riley*] case instead of having to worry about resentencing what would have happened is in [thirty] years, [twenty-one] years from now there will be a parole hearing . . . .").

[11] See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 2015 Sess., p. 963, remarks of Professor Sarah Russell of Quinnipiac University School of Law ("So different states—California and Delaware have decided people should go through a court system [t]o petition essentially the court for a resentencing rather than do it through a parole board . . . . So it really I think depends on the individual state [and] what structures they have in place. Some states don't even have functioning parole boards and so are relying on their court systems for a second look.").

more broadly, we have recognized that certain policy based aspects of criminal punishment are best left to the legislature. See, e.g., *State* v. *Bell*, 303 Conn. 246, 267, 33 A.3d 167 (2011) ("to the extent that the economic costs of incarceration are a factor in determining an appropriate sentence, they are to be considered not by the sentencing authority but by the legislature when it is enacting sentencing provisions"); see also part II B of this opinion. Third, legislatures from other jurisdictions also have chosen to remedy *Miller* violations with parole eligibility. E.g., Cal. Penal Code § 3051 (b) (4) (Deering Supp. 2018); Nev. Rev. Stat. §§ 176.025 and 213.12135 (2017); Tex. Penal Code Ann. § 12.31 (a) (West 2013); Wyo. Stat. Ann. § 6-10-301 (c) (2013).

Fourth, and finally, both a belated resentencing hearing and a parole hearing can provide a meaningful remedy to this newly declared constitutional violation, although neither is ideal. "Under *Miller*, bear in mind, the inquiry is whether the inmate was seen to be incorrigible when he was sentenced—not whether he has proven corrigible and so can safely be paroled today." *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 744 (Scalia, J., dissenting). As with any factual issue, the passage of time often makes this finding difficult. "For example, [if the defendant waived a presentence investigation report at his original sentencing], a resentencing court would be called on to determine, without the benefit of a presentence investigation conducted at the time of the defendant's conviction, what the defendant's character was . . . years ago when he was sentenced. Without such information, the court would likely need to principally rely upon the defendant's subsequent rehabilitation or lack thereof since his sentencing. . . . Resentencing in such cases would be cumbersome and would in reality be more akin to a parole hearing." *State* v. *Williams-Bey*, 167 Conn. App. 744, 778–79, 144 A.3d 467 (2016), modified in part on other grounds, 173 Conn. App. 64, 164 A.3d 31 (2017), aff'd, 333 Conn. 468,

A.3d (2019). The same situation arises in the present case because the parties cannot locate the presentence investigation report authored for the defendant's original sentencing in 2003. Although it is "not impossible"; *Songster* v. *Beard*, 201 F. Supp. 3d 639, 641 (E.D. Pa. 2016); even in cases in which only a few years have passed, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." (Internal quotation marks omitted.) *Graham* v. *Florida*, supra, 560 U.S. 68. Asking sentencing judges to make this determination years after the fact might, in these cases, be asking too much.

The parole board, under P.A. 15-84, § 1, on the other hand, bases its decisions on more recent evidence and more ascertainable outcomes. Although parole and resentencing hearings share many of the same characteristics—e.g., the right to counsel, the offender's right to make a statement and present evidence, each victim's right to make a statement, the availability of expert testimony—the parole board relies more on evidence of actual rehabilitation and focuses more on the offender's ability to succeed outside of prison at the most relevant moment, just before he will, potentially, be released. For example, it considers the probability that he will "remain at liberty without violating the law," the continuing "benefits to [the offender] and society that would result from [the offender's] release," and the offender's "substantial rehabilitation . . . ." P.A. 15-84, § 1, codified at General Statutes (Supp. 2016) § 54-125a (f) (4). It does not overlook the value of the *Miller* factors, though. Alongside these forward-looking factors described previously, the board also considers a juvenile offender's "age and circumstances . . . as of the date of the commission of the crime," "remorse and increased maturity since the date of the commission of the crime," and "efforts to overcome . . . obstacles

that such person may have faced as a child . . . .'' General Statutes (Supp. 2016) § 54-125a (f) (4).[12] It considers not whether a juvenile is capable of change in the distant future but, rather, from the best possible vantage point, whether he has actually changed.

These considerations highlight a truth about the retroactive application of *Miller* that appears to animate the dissent and its frustration with our decisions in this case and in *Delgado*—that no remedy will put the defendant in the same position he would have been in if his youth had been considered when he was sentenced. In the present case, the defendant was effectively sentenced to life imprisonment, and state law did not provide an opportunity for parole for such crimes. See footnote 17 of this opinion. A sentence of life without parole improperly denies the juvenile offender of ''a chance to demonstrate growth and maturity''

[12] See footnote 23 of this opinion (comparing *Miller* factors and parole eligibility factors). The dissent incorrectly states that parole eligibility under P.A. 15-84 does not require the board to give any special weight to the *Miller* factors and the diminished culpability of juvenile offenders but, rather, only permits the board to consider the *Miller* factors in determining rehabilitation. Public Act 15-84, § 1, requires the board to consider whether an inmate has demonstrated substantial rehabilitation, considering factors such as ''the age and circumstances of such person *as of the date of the commission of the crime* . . . .'' (Emphasis added.) The fact that the defendant's age at the time of the crime is a factor in determining whether he has demonstrated substantial rehabilitation shows that this factor is not only '' 'future focused,' '' as the dissent contends, but also considers whether he had diminished capacity because of his age at the time of the crime. Just because his age at the time of the crime may be considered for rehabilitative purposes does not mean it cannot also be considered for culpability purposes. If there is any doubt about this, let us clear it up: the board should, *for culpability purposes*, consider the defendant's age and circumstances as of the date of the commission of the crime. This is in line with the parole board's stated policy of giving ''great weight to the diminished culpabilities of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and maturity that has been displayed when considering an offender for suitability.'' State of Connecticut Board of Pardons and Paroles, Annual Report 2016–2017 (2017), available at https://portal.ct.gov/-/media/BOPP/Legacy-Files/BoPPAnnualReport20162017forDASDigestpdf.pdf (last visited August 23, 2019).

because the court's judgment that he is "incorrigible" "was made at the outset," before he had the opportunity to show any capacity for change. (Internal quotation marks omitted.) *State* v. *Riley*, supra, 315 Conn. 648, quoting *Graham* v. *Florida*, supra, 560 U.S. 73. Without the possibility of parole, the defendant was denied hope; *Graham* v. *Florida*, supra, 70; and had no incentive to "demonstrate growth and maturity" that he might use in support of a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (Internal quotation marks omitted.) *State* v. *Riley*, supra, 648.

Neither the remedy this state provides (parole eligibility), which *Montgomery* has held to be constitutionally sufficient, nor the dissent's proposed remedy of resentencing can reinstate to the defendant the opportunities for demonstrated growth that he lost during those years. That is not to say that resentencing is not a meaningful, practical, and constitutionally sufficient remedy. All we are saying is that parole eligibility also is a meaningful, practical, and constitutionally sufficient remedy in light of the fact that no remedy can travel back in time and provide the defendant with a *Miller* compliant sentencing hearing at the time of his original sentencing. No one has lost their courage, shrugged their shoulders, or not tried to remedy the constitutional violation at issue. Rather, the legislature, this court in *Delgado*, and the United States Supreme Court in *Montgomery* recognized that remedying this violation is not as simple as recalculating a sentence on the basis of retroactive changes to sentencing guidelines or vacating a sentence enhancement that has been deemed unconstitutionally vague, analogies that the dissent finds apt. Unlike those circumstances, the remedy of resentencing in this case is an incomplete remedy. The legislature chose to rectify this problem by providing juvenile defendants with the possibility of parole, a meaningful remedy consistent with *Miller* that "ensures that juve-

niles whose crime reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence." *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 736.

We acknowledge that a defendant's parole eligibility date under P.A. 15-84, § 1, is determined by the length of his original sentence, which, in some cases, was imposed without consideration of the *Miller* factors. See P.A. 15-84, § 1, codified at General Statutes (Supp. 2016) § 54-125a (f) (1) (juvenile offender parole eligible [A] "if such person is serving a sentence of [between ten and fifty years] . . . after serving sixty per cent of the sentence or twelve years, whichever is greater, or [B] if such person is serving a sentence of more than fifty years . . . after serving thirty years"). But this alone does not completely nullify the significance of parole eligibility under P.A. 15-84, § 1. See *Graham* v. *Florida*, supra, 560 U.S. 75 ("[a] [s]tate is not required to guarantee eventual freedom to a juvenile offender"). It still offers a meaningful opportunity to "demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 736.

Ultimately, we do not believe that we are better situated than the legislature to strike an appropriate balance among these competing policies, particularly in an area that is traditionally within the purview of the legislature and when we have called the legislature's attention to these specific issues. Therefore, we do not conclude that the considerations identified by the defendant and the amici compel a particular constitutional rule beyond what the legislature requires.

B

The preceding *Geisler* analysis informs our application of the substantive legal test under our state constitution. See *State* v. *Santiago*, supra, 318 Conn. 18–19 n.14. ("our consideration of the relevant *Geisler* factors

is interwoven into our application of the legal framework that properly governs such challenges"). "[T]he constitution of Connecticut prohibits cruel and unusual punishments under the auspices of the dual due process provisions contained in article first, §§ 8 and 9." Id., 16. In evaluating challenges under this prohibition, we apply the two part federal framework that we adopted in *State* v. *Ross*, 230 Conn. 183, 252, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995). *State* v. *Santiago*, supra, 19, 21. First, we consider "whether the punishment at issue comports with contemporary standards of decency." Id., 21. Second, we also must exercise our independent judgment to determine whether the punishment is constitutional. Id., 22.

In the first part—evolving standards of decency—we look for consensus based on five objective criteria: "(1) the historical development of the punishment at issue; (2) legislative enactments; (3) the current practice of prosecutors and sentencing juries; (4) the laws and practices of other jurisdictions; and (5) the opinions and recommendations of professional associations." Id., 52.

We conclude that it does not categorically offend contemporary standards of decency to remedy a *Miller* violation with parole eligibility. Historically, although Connecticut enacted some measures to permit courts to mitigate punishment of juvenile offenders, the specific protections used were distinguishable from the sentencing practice at issue, limited, and inconsistently applied. See part I A 2 of this opinion. Currently, the prospective-only sentencing provisions in P.A. 15-84, § 2, reflect the reasoned judgment of the legislature, which is a reliable indicator of our public policy. This approach to *Miller* violations is also in accord with that of other jurisdictions. Finally, although a consensus of professional associations[13] agrees that the *Miller* factors are relevant in determining a juvenile offender's culpability and

[13] See footnote 8 of this opinion.

capacity for rehabilitation, we note that P.A. 15-84, § 2, instructs a parole board to consider similar factors, as well as any additional evidence put forth by the offender, in determining whether the offender is entitled to early release.

In the second part of the federal framework—the exercise of independent judgment—we consider judicial precedents and "our own understanding of the rights secured by the constitution," which encompasses "whether the penalty at issue promotes any of the penal goals that courts and commentators have recognized as legitimate: deterrence, retribution, incapacitation, and rehabilitation." *State* v. *Santiago*, supra, 318 Conn. 22. Although "this court cannot abdicate its nondelegable responsibility for the adjudication of constitutional rights" by giving unwarranted deference to the legislature, "we should exercise our authority with great restraint . . . ." (Internal quotation marks omitted.) Id., 42, quoting *State* v. *Ross*, supra, 230 Conn. 249.

Our independent judgment does not compel a conclusion that a *Miller* violation may not be remedied by parole eligibility under P.A. 15-84, § 1. Like the federal constitution, our state constitution secures the right to proportionality in the punishment of juveniles. In analyzing proportionality, the characteristics of the offender must be balanced against the severity of the punishment. Thus, in juvenile sentencing cases, courts have emphasized the severity of the sentences at issue —death and life without parole—as much as the diminished culpability and greater capacity for reform of juvenile offenders. Moreover, as distinguished from sentences of death and life without parole, sentences contemplating early release do not necessarily negate all penological justification. Incapacitation and rehabilitation may continue to justify sentences with parole eligibility because they account for the fact that juveniles can change.

For the previously stated reasons, we conclude that parole eligibility afforded by P.A. 15-84, § 1, is an adequate remedy for a *Miller* violation under the Connecticut constitution.

II

In *State* v. *Delgado*, supra, 323 Conn. 801, we held that in light of P.A. 15-84, which provided juvenile offenders with the possibility of parole, *Miller* no longer applied because it did not apply to juvenile offenders who are serving a sentence of life imprisonment, or its equivalent, as long as those offenders have the possibility of parole. Id., 811; see also *State* v. *Boyd*, 323 Conn. 816, 151 A.3d 355 (2016) (companion case to *Delgado* decided on same grounds). The defendant claims that this court should overrule *Delgado* because it renders P.A. 15-84, § 1, unconstitutional under the separation of powers doctrine embodied in the state constitution and under the due process clause of the federal constitution. See footnote 15 of this opinion. Addressing these arguments now, we are not persuaded by them.

A

In *Delgado*, the defendant originally was serving a sentence of sixty-five years in prison, "which is equivalent to life imprisonment," and was not eligible for parole. *State* v. *Delgado*, supra, 323 Conn. 810. Because the sentencing court had not considered the *Miller* factors, the defendant filed a motion to correct an illegal sentence, asserting a *Miller* claim under the federal constitution. Id., 803–805. In that motion, he claimed he was entitled to resentencing, despite the subsequent passage of P.A. 15-84, § 1, which afforded him the possibility of parole. Id., 803–804.

This court disagreed. It reasoned that because of P.A. 15-84, § 1, the defendant "can no longer claim that he is serving a sentence of life imprisonment, or its equiva-

lent, without parole. The eighth amendment, as interpreted by *Miller*, does not prohibit a court from imposing a sentence of life imprisonment with the opportunity for parole for a juvenile homicide offender, nor does it require the court to consider the mitigating factors of youth before imposing such a sentence. . . . Rather, under *Miller*, a sentencing court's obligation to consider youth related mitigating factors is limited to cases in which the court imposes a sentence of life, or its equivalent, without parole. . . . As a result, the defendant's sentence *no longer falls within the purview of Miller*, *Riley* and *Casiano*, which require consideration of youth related mitigating factors only if the sentencing court imposes a sentence of life without parole. . . . *Miller simply does not apply* when a juvenile's sentence provides an opportunity for parole . . . ." (Citations omitted; emphasis altered.) Id., 810–11.

We noted in *Delgado* that our reasoning was consistent with the analysis in *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 736, which indicated that states "may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. . . . Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the [e]ighth [a]mendment." (Citation omitted.) Id.

The dissent takes issue with our reliance on *Delgado*, which it contends improperly interpreted *Montgomery* by holding that *Miller* no longer applied once the defendant was granted parole eligibility. The dissent argues that this sidesteps the issue of whether parole eligibility is a sufficient cure for a federal *Miller* violation in light of this court's holding in *Casiano* that the rule in *Miller* is a watershed rule of criminal procedure. The dissent essentially would have us overrule *Delgado* on this

ground.[14] The dissent argues further that *Delgado* is distinguishable on the ground that it "neither addresses nor answers the different question raised by defendant here, which is whether the availability of parole under P.A. 15-84 cures a constitutional violation that this court [in *Casiano*] has deemed to be a 'watershed' rule—that is, a rule essential to the fundamental fairness of the judicial proceeding, central to an accurate determination of a proportionate sentence, and implicit in the very idea of ordered liberty—as a matter of state postconviction, remedial law." (Emphasis omitted.)

The defendant never has advanced any of the dissent's arguments, however.[15] Moreover, the arguments

[14] The dissent, itself, never uses the words "overrule" or "wrongly decided" in relation to *Delgado*. Instead, it contends that "the majority's reliance" on *Delgado* is erroneous. Nevertheless, overruling *Delgado* must be the dissent's argument, although that can be divined only from what the dissent goes on to say is "mistake[n]" about *Delgado*.

[15] To be clear, the defendant never has argued that *Delgado* should be overruled or distinguished because either (1) *Delgado* misinterprets *Montgomery* by holding that parole eligibility negates any *Miller* violation rather than cures an existing violation, or (2) parole eligibility under P.A. 15-84 fails to cure a *Miller* violation under the federal constitution as a matter of state postconviction remedial law in light of *Casiano*.

The defendant filed his initial brief prior to this court's decision in *Delgado*. In it, he argued that parole eligibility under P.A. 15-84 did not remedy a *Miller* violation because the requirements of *Miller* could be satisfied only by resentencing. As to *Montgomery*, the defendant argued that it did not overrule this court's holding in *Casiano* that *Miller* was a watershed rule of criminal procedure, and, as such, any violation could be corrected only by resentencing. The defendant asserted separation of powers and due process claims. After this court's decision in *Delgado* was released, however, the defendant sought and received permission to file a supplemental brief, in which he conceded that *Delgado* precluded his federal *Miller* claim, although he maintained his separation of powers and due process claims, and asserted a new equal protection claim. Subsequently, in his reply brief, for the first time, the defendant argued that this court should reconsider and overrule *Delgado*, relying not on the reasoning used by the dissent but, rather, by arguing that *Delgado* violates the separation of powers doctrine embodied in article two of the state constitution, as amended by article eighteen of the amendments. In light of the fact that *Delgado* was released after the defendant filed his initial brief, we have addressed all of the claims that the defendant has raised not only in his supplemental brief but also in

the dissent raises not only implicate whether *Delgado* should be overruled, but also call into question the continued vitality of *Casiano* and the proper application of the framework set forth in *Teague* v. *Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), after the United States Supreme Court subsequently held in *Montgomery* that the rule in *Miller* was a matter of "substantive" law.[16] *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 736. Because the parties do not address these issues, and in light of the unique nature of *Casiano*—the only case to hold that *Miller* is a watershed rule of criminal procedure, a unique designation in of itself, and a linchpin of the dissent's analysis—this court has been provided with little guidance on how to address these issues. It is precisely for this reason that we do not decide cases based on issues not raised by the parties. See, e.g., *State* v. *Connor*, 321 Conn. 350, 362, 138 A.3d 265 (2016).

Additionally, when no party has asked us to overrule precedent, we are particularly reluctant to address—

his reply brief, including his claim that *Delgado* should be overruled on the ground that it violates the separation of powers doctrine. We, however, do not address the dissent's contention that *Delgado* should be overruled because it misinterprets *Montgomery* and misapplies *Casiano*. The claim raised by the defendant involves the separation of powers doctrine, whereas the dissent's contention involves cruel and unusual punishment. Although both seek to overturn *Delgado*, we disagree with the dissent that these legal issues are intertwined or subsumed with the issues raised.

[16] The retroactivity outcome is the same regardless of whether it is a substantive or watershed procedural rule. As the dissent correctly points out, the framework set forth in *Teague* for determining whether a federal constitutional rule applies retroactively may be applied in a "more expansive" manner by a state than by the United States Supreme Court "where a particular state interest is better served by a broader retroactivity ruling." (Internal quotation marks omitted.) *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 64. This court in *Casiano*, however, did not necessarily apply the *Teague* framework more liberally than the court in *Montgomery* did. Both courts determined that the rule in *Miller* was retroactive but on different grounds. Surely, the United States Supreme Court's interpretation of its own precedent—as a substantive or procedural watershed—would be helpful even to a state's application of the *Teague* framework.

much less disturb—a unanimous precedent of recent vintage; see, e.g., *New England Estates, LLC* v. *Branford*, 294 Conn. 817, 836 n.20, 988 A.2d 229 (2010) (declining to overrule precedent when not argued by parties); when the legislative response to *Miller* at issue was invited by this court; see *State* v. *Casiano*, supra, 317 Conn. 79 ("we have every reason to expect that our decisions in *Riley* and in the present case will prompt our legislature to renew earlier efforts to address the implications of the Supreme Court's decisions in *Graham* and *Miller*"); and the precedent is consistent with the United States Supreme Court's holding that parole eligibility is a sufficient remedy for a *Miller* violation. See *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 736. We would reexamine such a precedent only when there is a "special justification . . . ." *Sepega* v. *DeLaura*, 326 Conn. 788, 799 n.5, 167 A.3d 916 (2017). The dissent's views do not present such a justification.

B

With respect to the claims actually raised by the defendant, he requests that we overrule our holding in *Delgado* because, otherwise, in his view, it effectively renders P.A. 15-84, § 1, unconstitutional by violating the separation of powers doctrine embodied in article second of the Connecticut constitution, as amended by article eighteen of the amendments. See footnote 5 of this opinion. According to the defendant, *Delgado* holds that his unconstitutional punishment is cured by P.A. 15-84, § 1, because it provides him with a future parole hearing, at which a panel of the Board of Pardons and Paroles will consider the *Miller* factors. He argues that the legislature overstepped and encroached upon the power of the judiciary by changing the defendant's sentence to include the possibility of parole and by delegating resentencing power to the board because sentencing is solely within the power of the judiciary.

Our holding in *Delgado*, however, was not that P.A. 15-84, § 1, *cures* a *Miller* violation. Rather, more accurately, parole eligibility under P.A. 15-84, § 1, *negates* a *Miller* violation because the sentence no longer falls within the purview of *Miller*. Resentencing would undoubtedly cure a *Miller* violation. See *State* v. *Delgado*, supra, 323 Conn. 810–11. But, although a particular defendant's sentence is not actually changed per court order, P.A. 15-84, § 1, has the legal effect of altering the defendant's punishment so that he no longer will serve life, or its equivalent, in prison without the possibility of parole. And, as we said in *Delgado*, if a defendant has the possibility of parole, there is no *Miller* violation. Id. Thus, resentencing is not required. Id. A punishment that includes parole eligibility "no longer falls within the purview of *Miller* . . . . *Miller* simply does not apply when a juvenile's sentence provides an opportunity for parole . . . ." (Citations omitted.) Id., 811. As we have more recently stated, "we understand *Delgado* to be, in essence, a mootness decision . . . ." *State* v. *Evans*, 329 Conn. 770, 788 n.16, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019). It is with this understanding that we address the defendant's separation of powers argument, which does not persuade us.

"[B]ecause a validly enacted statute carries with it a strong presumption of constitutionality, those who challenge its constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt. . . . [W]hen a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear." (Internal quotation marks omitted.) Id., 809.

Article second of the constitution of Connecticut, as amended by article eighteen of the amendments, provides in relevant part: "The powers of government shall be divided into three distinct departments, and

each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another. . . .'' Conn. Const., amend XVIII. ''[T]he primary purpose of [the separation of powers] doctrine is to prevent commingling of different powers of government in the same hands. . . . The constitution achieves this purpose by prescribing limitations and duties for each branch that are essential to each branch's independence and performance of assigned powers.'' (Internal quotation marks omitted.) *State* v. *Evans*, supra, 329 Conn. 810. Nevertheless, ''[t]he rule of separation of governmental powers cannot always be rigidly applied.'' (Internal quotation marks omitted.) *Adams* v. *Rubinow*, 157 Conn. 150, 155, 251 A.2d 49 (1968). Our state government is not ''divided in any such way that all acts of the nature of the functions of one department can never be exercised by another department; such a division is impracticable, and if carried out would result in the paralysis of government.'' *In re Application of Clark*, 65 Conn. 17, 38, 31 A. 522 (1894).

In challenges to a statute's constitutionality on the ground that it impermissibly infringes on the judicial authority in violation of separation of powers principles, ''[a] statute will be held unconstitutional on [separation of powers] grounds [only] if: (1) it governs subject matter that not only falls within the judicial power, but also lies exclusively within judicial control; or (2) it significantly interferes with the orderly functioning of the Superior Court's judicial role.'' (Internal quotation marks omitted.) *State* v. *Evans*, supra, 329 Conn. 810.

1

The defendant first argues that the legislature impermissibly modified his sentence by providing him with parole eligibility. He argues that, insofar as the judiciary

has the exclusive power to modify a judgment, it also has the exclusive power to modify a sentence because a sentence is "the pronouncement of judgment in criminal cases . . . ." This argument is unpersuasive for two reasons.

First, under our state's law, the power of sentencing is a shared power. Although the judiciary exclusively has the power to render, open, vacate, or modify a judgment, we repeatedly have held that the power to sentence is shared by all three branches of government. See, e.g., *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 828, 950 A.2d 1220 (2008) ("[a]lthough the judiciary unquestionably has power over criminal sentencing . . . the judiciary *does not have exclusive authority in that area*" [emphasis in original; internal quotation marks omitted]); id. (legislature decides appropriate penalties, judiciary adjudicates and determines sentence, and executive manages parole system); *State* v. *Campbell*, 224 Conn. 168, 178, 617 A.2d 889 (1992) ("sentencing is not within the exclusive control of the judiciary and . . . there is no constitutional requirement that courts be given discretion in imposing sentences"), cert. denied, 508 U.S. 919, 113 S. Ct. 2365, 124 L. Ed. 2d 271 (1993). The judiciary may impose a specific sentence, but the legislature has the power to define crimes, prescribe punishments for crimes, impose mandatory minimum terms of imprisonment for certain crimes, preclude the probation or suspension of a sentence, and even pardon offenders. See *State* v. *Darden*, 171 Conn. 677, 679–80, 372 A.2d 99 (1976) ("the constitution assigns to the legislature the power to enact laws defining crimes and fixing the degree and method of punishment and to the judiciary the power to try offenses under these laws and impose punishment within the limits and according to the methods therein provided"); *State* v. *Morrison*, 39 Conn. App. 632, 634, 665 A.2d 1372 ("Prescribing punishments for crimes . . . is . . . a function of the legislature. . . . The

judiciary's power to impose specific types of sentences is therefore defined by the legislature." [Citations omitted; internal quotation marks omitted.]), cert. denied, 235 Conn. 939, 668 A.2d 376 (1995); see also *McLaughlin* v. *Bronson*, 206 Conn. 267, 271, 537 A.2d 1004 (1988) ("Ordinarily, the pardoning power resides in the executive. . . . In Connecticut, the pardoning power is vested in the legislature . . . ." [Citations omitted.]). It is the legislature that defines the parameters of a sentencing scheme, including whether it permits parole eligibility.[17] See *Mead* v. *Commissioner of Correction*, 282 Conn. 317, 324, 920 A.2d 301 (2007) ("eligibility for parole [is] a part of the state's sentencing scheme"). That is what the legislature did in enacting P.A. 15-84, § 1.[18]

Second, the power to impose or modify a judgment of conviction is not synonymous with the power of sen-

[17] As a matter of fact, the reason that the defendant's original sentence violated *Miller* was because General Statutes § 54-125a (b) (1) denied the defendant the possibility of parole. See General Statutes (Rev. to 2001) § 54-125a (b) (1) ("[n]o person convicted of any of the following offenses, which was committed on or after July 1, 1981, shall be eligible for parole: . . . murder, as provided in section 53a-54a").

Although the trial court had discretion to determine the length of the defendant's sentence, it did not have discretion to grant the defendant the possibility of parole. Thus, by providing the possibility of parole through the enactment of P.A. 15-84, the legislature did not usurp the trial court's exercise of discretion to determine whether the defendant was parole eligible but, rather, modified the sentencing scheme responsible for the defendant's unconstitutional sentence.

[18] The legislature did not change the length of the defendant's sentence but, rather, provided him with the possibility of parole. The defendant conceded at oral argument—and thus we assume without deciding—that if, post-*Miller*, all defendants must be resentenced, it is possible that a particular defendant could be sentenced to a longer period of incarceration than he originally received. P.A. 15-84, § 1, on the other hand, ensures that juvenile defendants with a sentence of more than ten years of incarceration, who did not have the benefit of *Miller* at the time of sentencing, would have their sentences mitigated, and potentially spend less time incarcerated, by providing the possibility of parole. See *State* v. *Campbell*, supra, 224 Conn. 178 ("it [is] proper to construe broadly a remedial statute designed to curb the ill effects stemming from wide judicial discretion in sentencing prisoners for similar offenses" [internal quotation marks omitted]).

tencing. A judgment of conviction is defined as "[t]he written record of a criminal judgment, consisting of the plea, the verdict or findings, the adjudication, and the sentence." Black's Law Dictionary (10th Ed. 2014) p. 972. "Sentencing," however, is defined as "[t]he judicial determination of the penalty for a crime." Id., p. 1570; see id., p. 1569 (defining "sentence" as "the punishment imposed on a criminal wrongdoer"). Public Act 15-84, § 1, does not alter the defendant's judgment of conviction. He remains convicted of murder, conspiracy to commit murder, and assault in the first degree. In enacting P.A. 15-84, § 1, the legislature retroactively modified the sentencing scheme (although not any particular sentence), which is included in its power to prescribe and limit punishments for crimes.[19]

The defendant counters that, although the legislature has the power to create the scheme of punishment, it cannot do so retroactively without violating the separation of powers doctrine because the change effectively modifies his sentence. But the fact that the legislature, in exercising its power to create and modify the state's sentencing scheme, has affected a particular defendant's sentence does not mean that it has impermissibly encroached upon the judiciary's powers to impose or modify a sentence. It is well established that judicial and legislative powers necessarily overlap in many areas,

[19] Our analysis accords with other jurisdictions that have held that the legislature does not intrude on the realm of the judiciary by retroactively changing a sentencing scheme to create more lenient penalty provisions. See *State ex rel. Esteen* v. *State*, 239 So. 3d 233, 237 (La. 2018) ("[T]he legislature exercised its exclusive authority to determine the length of punishment for crimes classified as felonies, and further declared those more lenient penalties shall be applied retroactively to those already sentenced. Nothing in the constitution prohibits the legislature from enacting more lenient penalty provisions and declaring they be applied retroactively in the interest of fairness in sentencing."); see also *State* v. *Vera*, 235 Ariz. 571, 576–77, 334 P.3d 754 (App. 2014) (legislature did not violate separation of powers by providing defendant with possibility of parole after sentencing), review denied, Arizona Supreme Court (March 17, 2015), cert. denied, U.S. , 136 S. Ct. 121, 193 L. Ed. 2d 95 (2015).

including sentencing. See, e.g., *State* v. *Campbell*, supra, 224 Conn. 178 ("[a]lthough the judiciary unquestionably has power over criminal sentencing . . . the judiciary does not have exclusive authority in that area").

The fact that certain governmental powers overlap is not only necessary to ensure the smooth and effective operation of government; see *In re Application of Clark*, supra, 65 Conn. 38 (rigid application of separation of powers doctrine would "result in the paralysis of government"); but also is a product of the historical evolution of Connecticut's governmental system, which established a "tradition of harmony" among the separate branches of government that the separate branches of the federal governmental system did not have. R. Kay, "The Rule-Making Authority and Separation of Powers in Connecticut," 8 Conn. L. Rev. 1, 7 (1975). As it relates to the Judicial Branch, this tradition might be explained in part by the fact that, before the constitution of 1818, Connecticut did not have a separate judicial system. Rather, the executive and legislative branches shared judicial power, with the governor sitting on the five judge panel of the Superior Court and the General Assembly having the power of final review over decisions. W. Horton, The History of the Connecticut Supreme Court (West 2008) pp. 9–12.

Nor was a strict separation of powers enshrined in the state constitution. Although delegates adopted the provision currently contained in article second, they rejected another provision that would have barred one branch of government from exercising the powers of another:[20] "[T]he [1818 state constitutional] convention [did] not seem to have been interested either in a partic-

[20] The rejected provision provides: "No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances herein after expressly directed or permitted." Journal of the Proceedings of the Convention of Delegates Convened at Hartford, August 26, 1818 (1901) p. 78; see *Norwalk Street Railway Co.'s Appeal*, 69 Conn. 576, 604, 37 A. 1080 (1897) (*Baldwin*, *J.*, dissenting).

ularly stringent version of separation of powers or in a careful restriction of the powers of the legislature. The convention struck the provision that would have expressly prohibited the officers of each department from exercising powers properly classified as belonging to another. Such explicit provisions were common in constitutions of other states being written at this time. . . . Given [the] tradition of harmony between executive and legislative departments, it may be that the convention did not feel the necessity for a strict expression of separation of powers. . . . The 1818 Constitution thus established a government with a flexible separation of powers and a distinctly dominant legislative branch." R. Kay, supra, 8 Conn. L. Rev. 7.

"The Connecticut history with regard to separation of powers stands in marked contrast, therefore, to that of the federal [c]onstitution." E. Peters, "Getting Away from the Federal Paradigm: Separation of Powers in State Courts," 81 Minn. L. Rev. 1543, 1552 (1997). "Diverse [state] histories[21] demonstrate that even though state constitutional provisions may textually resemble those found in the federal [c]onstitution, they may reflect distinct state identities that will result in differences in how courts apply and construe such texts. Far from being arbitrary departures from a superior federal model, these interpretations have the legitimacy of

[21] For example, unlike Connecticut, "Massachusetts had a . . . colonial heritage, colored by numerous perceived injustices at the hands of various royal mandates. Not surprisingly, revolutionary political leaders drafting the Massachusetts Constitution of 1780 provided expressly for the separation of powers. Other states, including Maryland, New Hampshire, North Carolina, and Virginia, did likewise." (Footnotes omitted.) E. Peters, supra, 81 Minn. L. Rev. 1552–53; see also, e.g., Mass. Const., pt. 1, art. XXX ("[i]n the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them").

differences rooted in the past and adaptable for the future." (Footnote added.) Id., 1553.

This is not to say that one branch cannot unconstitutionally intrude upon the authority of another branch, or has not done so. This court is appropriately vigilant in guarding against such intrusions. See, e.g., *State* v. *McCahill*, 261 Conn. 492, 512, 811 A.2d 667 (2002) (legislative intrusion on judiciary); *Savage* v. *Aronson*, 214 Conn. 256, 269, 571 A.2d 696 (1990) (executive intrusion on judiciary); *Stolberg* v. *Caldwell*, 175 Conn. 586, 604, 402 A.2d 763 (1978) (executive intrusion on legislature), appeal dismissed sub nom. *Stolberg* v. *Davidson*, 454 U.S. 958, 102 S. Ct. 496, 70 L. Ed. 2d 374 (1981); see also *Spiotti* v. *Wolcott*, 326 Conn. 190, 201–202, 163 A.3d 46 (2017) ("[w]hen we construe a statute . . . our only responsibility is to determine what the legislature, within constitutional limits, intended to do" [internal quotation marks omitted]).

In the present circumstances, however, the original constitutional intrusion was not upon another branch, but upon the rights of individuals not to have cruel and unusual punishments imposed upon them. Those punishments, although judicially levied, were legislatively authorized or even, in some cases, mandated. It is hardly incongruous—or unconstitutional—then, for the legislature to be a part of the solution to the intrusion on individual liberty it caused. This seems particularly true when the United States Supreme Court has suggested this very remedy; see *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 736; and when we have invited the legislature to take such action. See *State* v. *Riley*, supra, 315 Conn. 662; see also *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 79.

Accordingly, we conclude that P.A. 15-84, § 1, is not unconstitutional because the legislature did not improp-

erly exceed its authority by providing the defendant with the possibility of parole.[22]

2

The defendant also argues that, in its quest to cure a *Miller* violation via the parole board's future consideration of the *Miller* factors, P.A. 15-84, § 1, violates the separation of powers doctrine by impermissibly delegating sentencing authority to the board. This argument is premised on a misreading of *Delgado* and the act.

To reiterate, in *Delgado*, we held that after passage of P.A. 15-84, § 1, if a sentence includes parole eligibility, it "no longer falls within the purview of *Miller* . . . . *Miller* simply does not apply . . . ." (Citations omitted.) *State* v. *Delgado*, 323 Conn. 811. Thus, as men-

[22] Rather than implicating separation of powers issues, by retroactively modifying the sentencing scheme, P.A. 15-84, § 1, presents the possibility of an ex post facto issue. However, because P.A. 15-84, § 1, does not increase the length of time that the defendant will be incarcerated but, rather, provides for the possibility that he will be released on parole sooner than the expiration of his sentence, P.A. 15-84, § 1, does not present any ex post facto concerns. See *Johnson* v. *Commissioner of Correction*, 258 Conn. 804, 818, 786 A.2d 1091 (2002) ("[T]he primary focus of an ex post facto claim is the probability of increased punishment. . . . [T]he new law [must] [create] a genuine risk that [an individual] will be incarcerated longer under that new law than under the old law."); see also *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 377, 163 A.3d 597 (2017) (amendments to parole eligibility statute did not give rise to ex post facto issue because "the challenged parole hearing provision does not increase the petitioner's overall sentence, alter his initial parole eligibility date, or change the standard used by the [B]oard [of Pardons and Paroles] to determine parole suitability").

We note, however, that should the legislature amend or repeal P.A. 15-84, § 1, possible ex post facto issues might arise. See *Petaway* v. *Commissioner of Correction*, 160 Conn. App. 727, 733, 125 A.3d 1053 (2015) (if there is change in law affecting parole eligibility, such change violates ex post facto clause if change "extend[s] the length of [a defendant's] incarceration or delay[s] the date of his first eligibility for parole consideration beyond the time periods in existence at the time of his criminal conduct"), cert. dismissed, 324 Conn. 912, 153 A.3d 1288 (2017). Under those circumstances, criminal defendants possibly could file a motion to correct an illegal sentence or a petition for a writ of habeas corpus.

tioned before, we did not hold in *Delgado* that P.A. 15-84, § 1, cures a *Miller* violation. Rather, more accurately, parole eligibility under P.A. 15-84, § 1, negates a *Miller* violation. As a result, because the defendant is parole eligible under the act, he is not entitled to have the *Miller* factors considered, and, thus, there is no need for resentencing. Therefore, the board's power at the parole stage is distinct from the judiciary's sentencing power.

Instead, the board has the power to determine whether a parole eligible offender is entitled to parole. This is to ensure that defendants have "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham* v. *Florida*, supra, 560 U.S. 75. In furtherance of this goal, the act requires the board to consider certain factors, including the offender's age and circumstances at the time of the offense. But, although these factors echo the *Miller* factors, they are not identical.[23] Even if they were, just because the constitution requires the *Miller* factors to be considered at sentencing going forward does not mean that the legislature may not also require that the board consider those factors at other times.

[23] Compare footnote 1 of this opinion (reciting *Miller* factors), with P.A. 15-84, § 1, codified at General Statutes (Supp. 2016) § 54-125a (f) (4) ("the board may allow such person to go at large on parole . . . if it appears . . . [C] such person has demonstrated substantial rehabilitation since the date such crime or crimes were committed considering such person's character, background and history, as demonstrated by factors, including, but not limited to, such person's correctional record, the age and circumstances of such person as of the date of the commission of the crime or crimes, whether such person has demonstrated remorse and increased maturity since the date of the commission of the crime or crimes, such person's contributions to the welfare of other persons through service, such person's efforts to overcome substance abuse, addiction, trauma, lack of education or obstacles that such person may have faced as a child or youth in the adult correctional system, the opportunities for rehabilitation in the adult correctional system and the overall degree of such person's rehabilitation considering the nature and circumstances of the crime or crimes").

Therefore, we conclude that P.A. 15-84, § 1, does not violate the separation of powers doctrine by improperly delegating sentencing power to the board.

C

In his reply brief, the defendant also claims that we should overrule *Delgado* because it renders P.A. 15-84, § 1, unconstitutional by violating federal due process requirements. Specifically, he argues that, because the legislature has the power to change or repeal P.A. 15-84, § 1, in the future, he is deprived of due process in light of the rule that " '[s]entences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them.' *United States* v. *Daugherty*, 269 U.S. 360, 363, 46 S. Ct. 156, 70 L. Ed. 309 (1926)." He argues that his sentence is not fairly certain if the legislature has the power to continually change it.

The defendant's analysis of this claim consists of one short paragraph in his reply brief. He does not provide any case law or analysis beyond his single citation to *Daugherty*. Nor does he specify whether he is making a procedural or substantive due process claim. There is no reference to the interest balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 334–35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), as required under a procedural due process claim that implicates a liberty interest; see *State* v. *Anderson*, 319 Conn. 288, 314–15, 127 A.3d 100 (2015); or to the rational basis test applied to a substantive due process claim that does not involve a fundamental right. See *State* v. *Moran*, 264 Conn. 593, 615, 825 A.2d 111 (2003).

Because the defendant has not briefed the analytic complexities of his due process claim, we deem it inadequately briefed. See, e.g., *State* v. *Buhl*, 321 Conn. 688, 726–29, 138 A.3d 868 (2016) (upholding determination that due process claim was inadequately briefed). Nevertheless, we emphasize that our holdings in *Delgado*

and the present case are premised on P.A. 15-84, § 1, as enacted. It is on the basis of this legislation that we hold that any *Miller* violation has been negated and that there are no separation of powers violations. See also footnote 22 of this opinion.

III

Finally, the defendant claims that P.A. 15-84, § 1, violates his right to equal protection under the federal constitution.[24] He argues that, as a juvenile convicted of murder, he is entitled to resentencing because, pursuant to P.A. 15-84, § 6, a juvenile convicted of capital felony, in violation of General Statutes § 53a-54b,[25] is entitled to resentencing. See footnote 26 of this opinion. We are not persuaded.

The defendant's argument proceeds in three parts. First, he contends that, as a juvenile convicted of murder with a discretionary sixty year sentence, he is similarly situated to another type of juvenile offender—one who has been convicted of capital felony with a mandatory life sentence, but without an underlying sentence for murder (which is a lesser included offense of capital felony). See *State* v. *Reynolds*, 264 Conn. 1, 24 n.13, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). Second, he argues that these groups are treated differently under

[24] The defendant's constitutional claim was not raised before the trial court. To the extent that the record supports it, we nonetheless review it under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). The defendant also cites the Connecticut constitution as a basis for his equal protection claim but provides no separate discussion. Therefore, we limit our analysis to the federal constitution. See, e.g., *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 382 and n.10, 163 A.3d 597 (2017).

[25] Section 53a-54b was amended by No. 12-5, § 1, of the 2012 Public Acts to substitute "murder with special circumstances" for "capital felony." *State* v. *Medina*, 170 Conn. App. 609, 610 n.1, 155 A.3d 285, cert. denied, 325 Conn. 914, 159 A.3d 231 (2017). We refer to § 53a-54 as "capital felony" for convenience and because that is the nomenclature employed by the parties and the trial court.

P.A. 15-84. Under § 1 of the act, a juvenile murderer is parole eligible, but under § 6,[26] he contends, a juvenile capital felony offender's conviction may be vacated. Therefore, because the capital felony offender then lacks a conviction (and sentence), his conviction for murder is revived, he receives a new sentencing proceeding for murder, and he becomes parole eligible as a result of § 1. In other words, the murderer receives only a parole hearing, whereas the capital felony offender receives both a second sentencing *and* a parole hearing. Third, he argues that this scheme is irrational because, regardless of the length of the resulting sentence, permitting a second sentencing proceeding and parole eligibility constitutes a less severe punishment than parole eligibility alone. Because capital felony is a crime that is more severe than murder, the defendant contends, no rational basis can support denying a juvenile convicted of murder the second sentencing proceeding that is provided to a juvenile convicted of capital felony. See *State* v. *Moran*, supra, 264 Conn. 614 ("it [is] impossible to conceive of a rational basis to support treating the less serious crime more severely than the more serious crime"). We disagree that the statutory scheme is irrational.

[26] Section 6 of P.A. 15-84 applies only to sentencing—not convictions—and, therefore, does not appear to support the defendant's argument. Public Act No. 15-84, § 6, codified at General Statutes (Supp. 2016) § 53a-46a (a), provides in relevant part: "A person shall be subjected to the penalty of death for a capital felony committed prior to April 25, 2012, under the provisions of section 53a-54b, as amended by this act, in effect prior to April 25, 2012, only if (1) a hearing is held in accordance with the provisions of this section, and (2) such person was eighteen years of age or older at the time the offense was committed."

Rather, the defendant's argument appears to be based on P.A. 15-84, § 7, codified at General Statutes (Supp. 2016) § 53a-54b, which provides in relevant part: "A person is guilty of [capital felony] who is convicted of any of the following *and was eighteen years of age or older at the time of the offense* . . . ." (Emphasis in language added by P.A. 15-84, § 7.) The legislature specified that the amendment was retroactively "applicable to any person convicted prior to, on or after" October 1, 2015, the effective date of P.A. 15-84, § 7. We note that, shortly after the legislature's approval of P.A. 15-84, the court abolished the death penalty in *State* v. *Santiago*, supra, 318 Conn. 140.

Even if we assume that the juvenile offenders the defendant identifies are similarly situated,[27] the legislature had a rational basis for treating them differently. "If the statute does not touch upon either a fundamental right or a suspect class, its classification need only be rationally related to some legitimate government purpose in order to withstand an equal protection challenge." (Internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 383, 163 A.3d 597 (2017). Under rational basis review, "[i]t is irrelevant whether the conceivable basis for the challenged distinction actually motivated the legislature. . . . [The law] must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (Citation omitted; internal quotation marks omitted.) *Keane* v. *Fischetti*, 300 Conn. 395, 406, 13 A.3d 1089 (2011). "[T]he [statutory scheme] is presumed constitutional . . . and [t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it . . . ." (Internal quotation marks omitted.) *State* v. *Moran*, supra, 264 Conn. 606.[28]

[27] The defendant argues that the classes of juvenile offenders he identifies are similarly situated because murder is a lesser included offense of capital felony. The state points out, however, that they are distinguishable because one sentence is discretionary and the other is mandatory. Although perhaps a sufficient distinction, we nonetheless assume, without deciding, that the offenders are similarly situated for equal protection purposes.

We note one further issue with regard to the defendant's argument that a capital felony offender will be "resentence[d] . . . ." A capital felony offender is not "resentenced" in the same way that the defendant claims he is entitled to be. Rather, a conviction and sentence for one crime (capital felony) are vacated and a sentence for a separate conviction (murder) is imposed. Conversely, the defendant wants to have a second sentencing for the same conviction (murder).

[28] The defendant argues that intermediate scrutiny applies to his claim because it involves "a significant interference with liberty . . . ." (Internal quotation marks omitted.) *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 161, 957 A.2d 407 (2008). We have rejected similar arguments before and have applied rational basis scrutiny to claims involving interference with liberty as a result of criminal punishment. E.g., *State* v. *Higgins*, 265 Conn. 35, 66, 826 A.2d 1126 (2003); *State* v. *Wright*, 246 Conn. 132, 140–41, 716 A.2d 870 (1998).

The manner in which mandatory sentences for capital felony and discretionary sentences for murder were imposed is distinct and, thus, they conceivably might have warranted distinct remedies. Specifically, a juvenile convicted of murder already had received an opportunity to make his case for leniency to a judge, whereas a juvenile convicted of capital felony had not. In this sense, offering resentencing only to the latter group would result in equal, not harsher, punishment, at least in a numerical sense—each group gets one chance to convince a judge to exercise discretion in its favor. Moreover, practical considerations potentially might have made drawing this distinction between the groups rational. Only 4 juveniles were serving mandatory life sentences for capital felony or arson murder, as compared to approximately 270 juveniles serving sentences of longer than ten years for other crimes.[29] See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 2015 Sess., p. 1062, remarks of Sarah Eagan, Office of the Child Advocate (stating number of juveniles sentenced). Because of the judicial resources needed to conduct the proceedings, the legislature reasonably could have determined that resentencing was simply a more feasible task for a smaller group. We also note that the legislature potentially could have distinguished between actual life sentences (for capital felony) and those that are for the functional equivalent of life (for murder). Because the latter still offer the possibility of geriatric release, the legislature could have determined that this possibility was worth granting to even the most culpable offenders, particularly at an advanced age

[29] Although his assertion is not in the record, the defendant claims that forty juvenile offenders were serving sentences of more than fifty years as of November, 2014. Testimony before the Judiciary Committee regarding juvenile sentencing shows that, as of March 4, 2015, "[a]pproximately [fifty] people [were] serving [a] sentence of [fifty] years or more for crimes committed under [the] age [of eighteen], most without the chance of parole." (Emphasis omitted.) Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 2015 Sess., p. 1062, remarks of Sarah Eagan, Office of the Child Advocate.

when they would likely pose a much lesser threat to society but would cost the state much more to care for. Any of these reasons suffice to pass constitutional muster.

For the previously discussed reasons, the defendant is not entitled to relief in connection with his equal protection claim.

The judgment is affirmed.

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

PALMER, J., concurring. I agree with and therefore join the majority opinion. I write separately only to note that, as I read the opinion of the dissenting justice, that opinion seems to be predicated on principles of fundamental fairness. These principles are violated, the dissenting justice suggests, when a juvenile is sentenced to life in prison or its functional equivalent—even if the juvenile is later afforded the opportunity for parole in satisfaction of the requirements of the eighth amendment—if the sentencing judge did not expressly consider the mitigating factors of youth. Those principles, however, are not so much rooted in the eighth amendment but, rather, in the due process clauses of the federal and state constitutions. Because the defendant, William McCleese, has not raised any such due process claim, we must await another day to address it.

ECKER, J., dissenting. Only four years ago, this court decided—as a matter of state law—that the constitutional requirement of an individualized sentencing proceeding for juvenile offenders facing life sentences established a "watershed" rule of criminal procedure. *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 69–70, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, U.S. , 136 S. Ct. 1364, 194

L. Ed. 2d 376 (2016). Our holding in *Casiano* was expressed in these emphatic terms: "If failing to consider youth and its attendant characteristics creates a risk of disproportionate punishment in violation of the eighth amendment, then the rule in *Miller* [v. *Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)], assuredly implicates the fundamental fairness of a juvenile sentencing proceeding because it is a 'basic precept of justice' that punishment must be proportionate 'to both the offender and the offense.' (Internal quotation marks omitted.) Id., 469. The court in *Miller* also 'alter[ed] our understanding of the bedrock procedural elements essential to the fairness of a [juvenile sentencing] proceeding'; (emphasis omitted; internal quotation marks omitted) *Sawyer* v. *Smith*, [497 U.S. 227, 242, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990)]; because the court required that certain factors be considered in an individualized sentencing proceeding before a certain class of offenders may receive a particular punishment. In other words, our understanding of the bedrock procedural element of individualized sentencing was altered when the court intertwined two strands of its eighth amendment jurisprudence to require consideration of new factors for a class of offenders to create a presumption against a particular punishment. As one court aptly noted, albeit in dicta: '[I]f ever there was a legal rule that should—as a matter of law and morality—be given retroactive effect, it is the rule announced in *Miller*. To hold otherwise would allow the state to impose unconstitutional punishment on some persons but not others, an intolerable miscarriage of justice.' (Emphasis omitted.) *Hill* v. *Snyder*, Docket No. 10-14568, 2013 WL 364198, *2 (E.D. Mich. January 30, 2013)." *Casiano* v. *Commissioner of Correction*, supra, 70–71.

These are very strong words, and I have quoted them accurately. In *Casiano*, we determined, "as a matter of law and morality," as a "basic precept of justice," and

as a "bedrock procedural [element] essential to the fairness of a [juvenile sentencing] proceeding," that *before* a trial court exercises its discretion to sentence a juvenile offender to a lifetime in prison, the court must consider the mitigating effects of youth and its attendant circumstances. (Internal quotation marks omitted.) Id., 71. Indeed, we deemed this legal and moral principle so fundamental to our jurisprudence in Connecticut—so deeply " 'implicit in the concept of ordered liberty' "; id., 69, quoting *Teague* v. *Lane*, 489 U.S. 288, 311, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)—that we chose to characterize it as a "watershed" rule, a designation of such singular status that the United States Supreme Court itself has yet to affix to any of its own decisions.[1] When *Casiano* was issued, moreover, we were acutely aware that such a designation would require retroactive application of the underlying procedural rule, i.e., the *Miller* requirement of an individualized sentencing hearing at which the sentencing judge would consider the hallmarks of youth before passing judgment on a juvenile offender facing the possibility of receiving the harshest of sentences. "To hold otherwise," this court stated, "would allow the state to impose unconstitutional punishment on some persons but not others, an intolerable miscarriage of justice." (Internal quotation marks omitted.) *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 71.

Today, four short years later, we accept just such a miscarriage of justice visited on the defendant, William McCleese, and the majority justifies the result as if *Casiano*, and another case decided a few months earlier, *State* v. *Riley*, 315 Conn. 637, 110 A.3d 1205 (2015), cert. denied, U.S. , 136 S. Ct. 1361, 194 L. Ed.

[1] The watershed label, which triggers retroactive application of the new rule, describes an "extremely narrow" class of cases arising so rarely that the United States Supreme Court itself "has never held that any rule falls within the exception." (Internal quotation marks omitted.) *Lester* v. *United States*, 921 F.3d 1306, 1308 (11th Cir. 2019).

2d 376 (2016), did not mean what they said. I am unable to understand how this court can overlook *Casiano* and *Riley* without any apparent sign of cognitive dissonance, or why it would choose to do so. I respectfully dissent.

For the reasons set forth in this dissenting opinion, I disagree that the parole eligibility conferred by No. 15-84 of the 2015 Public Acts (P.A. 15-84)[2] provides an

[2] Section 1 of No. 15-84 of the 2015 Public Acts, codified at General Statutes § 54-125a, provides in relevant part: "(f) (1) Notwithstanding the provisions of subsections (a) to (e), inclusive, of this section, a person convicted of one or more crimes committed while such person was under eighteen years of age, who is incarcerated on or after October 1, 2015, and who received a definite sentence or total effective sentence of more than ten years for such crime or crimes prior to, on or after October 1, 2015, may be allowed to go at large on parole in the discretion of the panel of the Board of Pardons and Paroles for the institution in which such person is confined, provided (A) if such person is serving a sentence of fifty years or less, such person shall be eligible for parole after serving sixty per cent of the sentence or twelve years, whichever is greater, or (B) if such person is serving a sentence of more than fifty years, such person shall be eligible for parole after serving thirty years. Nothing in this subsection shall limit a person's eligibility for parole release under the provisions of subsections (a) to (e), inclusive, of this section if such person would be eligible for parole release at an earlier date under any of such provisions.

"(2) The board shall apply the parole eligibility rules of this subsection only with respect to the sentence for a crime or crimes committed while a person was under eighteen years of age. . . .

"(3) Whenever a person becomes eligible for parole release pursuant to this subsection, the board shall hold a hearing to determine such person's suitability for parole release. . . .

"(4) After such hearing, the board may allow such person to go at large on parole with respect to any portion of a sentence that was based on a crime or crimes committed while such person was under eighteen years of age if the board finds that such parole release would be consistent with the factors set forth in subdivisions (1) to (4), inclusive, of subsection (c) of section 54-300 and if it appears, from all available information, including, but not limited to, any reports from the Commissioner of Correction, that (A) there is a reasonable probability that such person will live and remain at liberty without violating the law, (B) the benefits to such person and society that would result from such person's release to community supervision substantially outweigh the benefits to such person and society that would result from such person's continued incarceration, and (C) such person has demonstrated substantial rehabilitation since the date such crime

adequate remedy for the constitutional violation that occurred at the time of the defendant's sentencing. The trial court failed to conduct an individualized sentencing hearing at which it properly considered the hallmarks of youth—and, in particular, the diminished moral culpability of the juvenile defendant, which *must* be taken into account before imposing an eighty-five year sentence pursuant to *Miller*. The defendant continues to serve the eighty-five year sentence unconstitutionally imposed on him by that judicial authority. This means not only that the judiciary previously failed to meet our constitutional obligation in connection with the performance of our core function, which is to provide individualized justice, but that we persist in doing so.

I

A

It is today undeniable that "children are constitutionally different from adults for purposes of sentencing."

or crimes were committed considering such person's character, background and history, as demonstrated by factors, including, but not limited to, such person's correctional record, the age and circumstances of such person as of the date of the commission of the crime or crimes, whether such person has demonstrated remorse and increased maturity since the date of the commission of the crime or crimes, such person's contributions to the welfare of other persons through service, such person's efforts to overcome substance abuse, addiction, trauma, lack of education or obstacles that such person may have faced as a child or youth in the adult correctional system, the opportunities for rehabilitation in the adult correctional system and the overall degree of such person's rehabilitation considering the nature and circumstances of the crime or crimes.

"(5) After such hearing, the board shall articulate for the record its decision and the reasons for its decision. If the board determines that continued confinement is necessary, the board may reassess such person's suitability for a new parole hearing at a later date to be determined at the discretion of the board, but not earlier than two years after the date of its decision.

"(6) The decision of the board under this subsection shall not be subject to appeal. . . ."

Miller v. *Alabama*, supra, 567 U.S. 471; see id. (stating that this principle was "establish[ed]" by *Roper* v. *Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 [2005], and *Graham* v. *Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 [2010]). The driving force behind this extraordinary[3] pronouncement, and the reason for the broad consensus around it, is the ever growing body of scientific evidence demonstrating that children have biological and psychological differences that make them substantially less able than adults to control their impulses, exercise self-control, resist peer pressure, consider alternative courses of conduct, and appreciate the long-term consequences of their actions. See *Miller*

[3] Extraordinary only in America, I should add. It is no point of pride that we are one of only one or two countries in the world that permits a juvenile offender to be sentenced to life without parole. See C. de la Vega & M. Leighton, "Sentencing Our Children to Die in Prison: Global Law and Practice," 42 U.S.F. L. Rev. 983, 985 (2008) (engaging in comparative analysis of juvenile justice and rehabilitation models). "These issues have become so [well understood] at the international level," explain the authors of this article, "that a state's execution of [the life without parole] sentence raises the possibility that it not only violates juvenile justice standards but also contravenes international norms established by the United Nations Convention Against Torture. Globally, the consensus against imposing [life without parole] sentences on children is virtually universal. Based on the authors' research, there is only one country in the world today [as of 2008] that continues to sentence child offenders to [life without parole] terms: the United States." (Footnote omitted.) Id., 985. A different source indicates that one other country shares this dubious distinction, at least as of 2005. That country is Somalia. See Amnesty International, Human Rights Watch, "The Rest of Their Lives: Life Without Parole for Child Offenders in the United States," (2005), p. 5, available at http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf (last visited August 22, 2019) ("all countries except the United States and Somalia have ratified the Convention on the Rights of the Child, which explicitly forbids 'life imprisonment without possibility of release' for 'offenses committed by persons below eighteen years of age' "). It appears that our system of justice, in some ways a model envied and emulated around the globe, lags behind the vast majority of other countries with respect to our treatment of juvenile offenders. And if Nelson Mandela spoke the truth when he said that "[t]here can be no keener revelation of a society's soul than the way in which it treats its children," then our failure to keep pace with practices elsewhere in this regard should be viewed as profoundly disturbing.

v. *Alabama*, supra, 472 n.5.[4] These findings are understood to have inescapable and meaningful *moral* significance, because they mean that children are less morally blameworthy—less culpable, we say—for their actions, "even when they commit terrible crimes." Id., 472. For this reason, the findings hold powerful implications for the law of juvenile sentencing.

The time is fast approaching, in my opinion, when we must acknowledge that the constitutional implications of this idea—that children are constitutionally different for the purposes of criminal sentencing—extend beyond the minimalist holding settled on by the majority, which appears to derive from it nothing more than a formalistic rule prohibiting the imposition of a sentence of death or life without parole on juvenile defendants. I believe that the rationale expressed in the

[4] In *Roper*, *Graham*, and *Miller*, the United States Supreme Court relied on this growing body of scientific and social science evidence to establish the constitutionally significant differences between adults and juveniles. See *Miller* v. *Alabama*, supra, 567 U.S. 472 n.5 ("[t]he evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger"). Children are different, the court explained, in significant part because their brains are not yet fully developed or fully functioning. See *Graham* v. *Florida*, supra, 560 U.S. 68 (noting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"). The various anatomical structures and neurochemical systems that govern decision making and impulse control not only remain undeveloped in adolescents, but develop at different rates within the brain, and this developmental mismatch is responsible for some of the most significant impairments, such as impulsivity and lack of judgment and self-control, so often observed in juveniles. See *Miller* v. *Alabama*, supra, 472 n.5. The American Psychiatric Association (APA) submitted an amicus curiae brief in *Miller* providing an extensive review of the science and social science demonstrating these points. Id. (quoting APA's amicus brief for proposition that " '[i]t is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance' "). In the present case, a similar brief was filed by amicus curiae Connecticut Psychiatric Society, which focused on the post-*Miller* literature further establishing the scientific basis for treating children differently from adults for the purposes of criminal sentencing.

relevant cases, and especially this court's own decisions in *Riley* and *Casiano*, obligates us to find significantly greater meaning in the underlying principles than that found by the majority.

B

It is important to provide the relevant backdrop to this appeal because these facts illustrate in living color the nature and extent of the constitutional violation that occurred when the defendant was sentenced to an eighty-five year term of imprisonment in June, 2003. The particular details of the sentencing proceedings explain why I refuse to accept the view that the defendant's sentence does not remain stained by the constitutional violation under review.

The defendant was sentenced to an eighty-five year term of imprisonment for crimes he committed at the age of seventeen.[5] The state has conceded that the sentencing proceeding was not compliant with *Miller*,[6] and

[5] The defendant was convicted in 2003 of murder in violation of General Statutes § 53a-54a (a), conspiracy to commit murder in violation of General Statutes §§ 53a-54a (a) and 53a-48 (a), and assault in the first degree in violation of General Statutes § 53a-59 (a) (5), after he and his younger half brother shot and killed the victim and injured another individual in 2001. *State* v. *McCleese*, 94 Conn. App. 510, 511–12, 892 A.2d 343, cert. denied, 278 Conn. 908, 899 A.2d 36 (2006). The defendant "conspired to murder [the victim] . . . because the defendant believed that [the victim] was 'messing with' [his younger brother]." Id., 512. The trial court imposed a sixty year sentence on the murder count, a consecutive twenty year sentence on the conspiracy count, and a consecutive five year sentence on the assault count, resulting in a total effective sentence of eighty-five years.

[6] At the hearing on the defendant's motion to correct an illegal sentence, the trial court asked the state if it was disputed that the sentencing judge "[did not] follow the mandates of *Miller* v. *Alabama* in what should be considered by a judge when sentencing [a juvenile offender] . . . [i]n other words . . . the [sentencing] court did not factor in all the things that *Miller* v. *Alabama* now requires?" The state answered: "Correct. . . . [T]hose factors were not taken into consideration." This clarifying colloquy followed:

"The Court: I mean, I'm not saying that the [judge] did not mention at some point, you know, which normally they do in sentencing, the youth of somebody, but . . . the sentencing [judge] didn't address in the detail and form in which *Miller* v. *Alabama* requires is what—

"[The Prosecutor]: That is correct, Your Honor. . . . Age may have been mentioned, but not in any detail as required under those cases."

the trial court presiding over the defendant's motion to correct an illegal sentence found that the sentencing court "clearly did not consider the [defendant's] age, youthful attributes and capacity for reform and rehabilitation as delineated in *Miller* . . . ." Indeed, without the benefit of the *Roper*, *Graham*, and *Miller* trilogy, the sentencing court considered the defendant's age, not as a mitigating factor lessening his culpability, but as an aggravating factor *confirming* the court's view of the defendant's incorrigibility.[7] After mentioning the defendant's use of marijuana since the age of fourteen, his daily use of the drug "illy" for one year, his negligible employment history, and that he dropped out of high school in the ninth grade, the court stated that it did not "view these factors . . . as acceptable excuses or mitigation for [his] serious criminal conduct." To the contrary, the court stated: "*If anything*, *these factors heighten the court's concern for you and your future*." (Emphasis added.) Consistent with this theme, the court continued: "Furthermore, this court is not unmindful that, arguably, you do not possess an extensive criminal record. However, this fact gives the court little comfort in view of the nature and extent of your criminal activities and felony conviction, *especially when those factors are considered in light of your young age*." (Emphasis added.)

The trial court sentenced the defendant to a lifetime behind bars in language that depicts the defendant as the fully mature, fully culpable author of his own fate, whose deadly actions were the product of his own unimpaired free choice: "You know, Mr. McCleese, a major part of life is the making of choices. You had the opportunity to freely choose the road you wished to travel.

[7] No fault is attributable to the sentencing court here. As I previously noted, the sentencing proceeding took place in 2003, nine years before *Miller* and twelve years before this court decided *Riley*. There is no evidence in the record that the defendant at sentencing submitted or referenced any of the scientific studies or raised any legal claim on the basis of those studies.

You had the opportunity to plan your life's journey and you made your choice. You chose to travel a path that resulted in the wounding of one man, the death of another, and the destruction of your own life. Consequently, your journey as a free man, as a free, young man living in a free society, has come to an end. You have forfeited your societal rights to go and come as you [choose] by making terrible choices. You have written your final chapter as a free man." The defendant must be resentenced if we are to remove the constitutional cloud hanging over this case.

C

For present purposes, the most important feature of the *Roper*, *Graham*, and *Miller* trilogy, and their enhanced state counterparts, *Riley* and *Casiano*, is that these cases identify and elaborate on two *different* implications of the "children are different" doctrine for the constitutional law of juvenile sentencing. One of those implications—the only one that the majority considers meaningful for eighth amendment purposes—is the forward-looking rehabilitative component, which requires the state to provide juvenile offenders "some meaningful opportunity to obtain release [i.e., parole] based on demonstrated maturity and rehabilitation."[8] *Graham* v. *Florida*, supra, 560 U.S. 75. This doctrinal strand emanates from the insight that the very hallmarks of youth that make children different also make them capable of change, because the "transitory" nature of those characteristics; *Miller* v. *Alabama*, supra, 567 U.S. 473; "enhance[s] the prospect that, as the years go by and neurological development occurs, [the juvenile

[8] Although the rehabilitative strand is found in *Roper*, *Graham*, and *Miller*, the doctrinal expression of the rule is most closely associated with *Graham*, and a sentence that satisfies the requirement of parole eligibility is often referred to as "*Graham* compliant." See, e.g., *Willbanks* v. *Dept. of Corrections*, 522 S.W.3d 238, 256 (Mo.) (discussing *Riley* and its requirement of "a *Graham*-compliant sentence"), cert. denied, U.S. , 138 S. Ct. 304, 199 L. Ed. 2d 125 (2017).

offender's] deficiencies will be reformed." (Internal quotation marks omitted.) Id., 472, quoting *Graham* v. *Florida*, supra, 68, and *Roper* v. *Simmons*, supra, 543 U.S. 570. In the context of a case in which a juvenile offender faces a life sentence, the rehabilitative strand requires parole eligibility.

But there is a second and equally important component to the *Roper*, *Graham*, and *Miller* trilogy, which the majority ignores. This second doctrinal strand focuses on the concept of culpability or moral blameworthiness—a foundational principle in the law of crime and punishment.[9] The culpability strand, central to *Riley* and *Casiano*,[10] is based on the fundamental recognition that the age of the juvenile offender and the associated hallmarks of youth necessarily impact the assessment of moral blameworthiness at the heart of the sentencing process.[11] See *Miller* v. *Alabama*, supra, 567 U.S. 472 (explaining that "[w]e reasoned [in *Graham*] that those [scientific] findings . . . of transient rashness, proclivity for risk, and inability to assess consequences . . . lessened a child's 'moral culpability' "); *Graham* v. *Florida*, supra, 560 U.S. 71 (noting

[9] Our focus here is on punishment, but the concept of moral culpability also is fundamental to the determination of criminal liability. "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. *It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.*" (Emphasis added.) *Morissette* v. *United States*, 342 U.S. 246, 250, 72 S. Ct. 240, 96 L. Ed. 288 (1952); see also R. Pound, Introduction to F. Sayre, A Selection of Cases on Criminal Law (1927), pp. xxxvi–xxxvii ("Historically, our substantive criminal law is based [on] a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.").

[10] See *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 60, 68–70; *State* v. *Riley*, supra, 315 Conn. 646–51.

[11] The cases sometimes attribute the importance of assessing culpability to generic penological goals such as retribution; see, e.g., *Miller* v. *Alabama*, supra, 567 U.S. 472; and at other times to the eighth amendment "proportionality" requirement. See, e.g., id., 469–71, 473.

that "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender" [internal quotation marks omitted]); *Roper* v. *Simmons*, supra, 543 U.S. 571 (recognizing "the diminished culpability of juveniles").

In the same way that the rehabilitative strand relates directly to parole eligibility, the culpability strand bears directly on the *length* of the sentence imposed on a juvenile offender. Under the sentencing scheme that applied to the defendant in the present case, as in *Riley* and *Casiano*, the exact length of the sentence is determined by the judicial authority exercising its discretion, within the broad range fixed by the legislature, in the context of an adjudicatory sentencing proceeding. Many judges believe that this particular task is the single most difficult and important job that they perform in a line of work that requires them to make decisions of great consequence every day. See, e.g., *United States* v. *Brown*, 843 F.3d 74, 84 (2d Cir. 2016) (Sack, J., concurring) ("[s]entencing is perhaps the most important responsibility of a trial judge, and surely the most difficult" [internal quotation marks omitted]), cert. denied, U.S. , 138 S. Ct. 708, 199 L. Ed. 2d 579 (2018). At the core of the sentencing function is the exercise of judicial discretion to determine the appropriate sentence proportionate to the offense and the offender—a decision based in significant part on an individualized assessment of the particular defendant's culpability.

The culpability strand, for this reason, contains a crucial *procedural* component, which recognizes that the required assessment of blameworthiness only can be conducted by the sentencing court in the context of an individualized hearing. This is the procedure that was the central focus of our decision in *Casiano*. In *Casiano*, we noted that we were not bound by the federal courts' characterization of the *Miller* rule; *Casi-*

ano v. *Commissioner of Correction*, supra, 317 Conn. 63–64; and held, as a matter of state law, that *Miller* announced "a watershed rule of criminal procedure" that was retroactively applicable to cases on collateral review. Id., 62; see id., 63–64 (noting that "although this court . . . will apply the *Teague* framework, we d[o] so with the caveat that, while federal decisions applying *Teague* may be instructive, this court will not be bound by those decisions in any particular case, but will conduct an independent analysis and application of *Teague*" [internal quotation marks omitted]); see also *Danforth* v. *Minnesota*, 552 U.S. 264, 280–81, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008) (noting that *Teague* "was intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own [s]tate's convictions"). As I noted previously, we explained that this procedural component could not be ignored, because "the individualized sentencing prescribed by *Miller* is central to an accurate determination . . . that the sentence imposed is a proportionate one" and "implicates . . . fundamental fairness." (Citation omitted; internal quotation marks omitted.) *Casiano* v. *Commissioner of Correction*, supra, 70.

II

Against this background, the majority concludes that there is no *Miller* violation to remedy in the present case at all, because the defendant now is eligible for parole under P.A. 15-84. It does so despite three elemental points that cannot be disputed: (1) the defendant's constitutional rights were violated in 2003 when he was sentenced to eighty-five years of imprisonment without the individualized hearing required under *Miller*, as extended by *Riley*; (2) the defendant never has been resentenced since that time, which is to say that he never has been afforded a sentencing proceeding that

complies with the "watershed" rule deemed by this court in *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 71, to be a " 'bedrock procedural [element] essential to the fairness of a [juvenile sentencing] proceeding' " for all defendants, past and present, who remain imprisoned pursuant to a sentence imposed in violation of *Miller*; and (3) pursuant to the sentence imposed in 2003, which remains in effect, the defendant will remain in the custody of the Commissioner of Correction for a period of eighty-five years—for the remainder of his life, unless he lives past the age of 105. See P.A. 15-84, § 1, codified at General Statutes § 54-125a (g).

The majority's reasoning is flawed. Its logic begins with the false premise that the *Miller* violation evaporated as of October 1, 2015, the effective date of § 1 of P.A. 15-84, which made the defendant parole eligible. This idea is critical to the majority opinion because it serves to dispense with the need for a *Miller*-compliant resentencing; if the constitutional violation at issue is "negated" by retroactive parole eligibility, then no constitutional violation remains and there is nothing to remedy. The majority claims that its logic follows from the holding of the United States Supreme Court in *Montgomery* v. *Louisiana*, U.S. , 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), as adopted by this court in *State* v. *Delgado*, 323 Conn. 801, 151 A.3d 345 (2016). I find this reasoning fundamentally flawed.

To begin with, neither *Montgomery* nor any other precedent of the United States Supreme Court holds or suggests that the retroactive availability of parole eligibility in any way "negates" a constitutional violation, as the majority holds today. To the contrary, *Montgomery* unequivocally held that "[a] conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, *void*. . . . [A] court has no authority to leave in place a conviction or sentence that violates a substantive

rule, regardless of whether the conviction or sentence became final before the rule was announced." (Citation omitted; emphasis added.) *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 731. The *Montgomery* court then proclaimed: "The [c]ourt now holds that *Miller* announced a substantive rule of constitutional law." Id., 736. Accordingly, the sentence imposed on the defendant in the present case became *void* under *Montgomery*. This is the very opposite of the constitutional violation being "negated," as the majority would have it.

After concluding that *Miller* decided a substantive rule of constitutional law, *Montgomery* took up the remedial question necessarily triggered by the requirement of retroactive application.[12] When it opines that "[a] [s]tate may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them"; id., 736; the statement must be read in the context of the mandatory sentencing scheme governing that case. *Montgomery* does *not* hold that the retroactive availability of parole eligibility in all cases and all circumstances will remedy a *Miller* violation; nor could it sensibly say so without eviscerating the "substantive rule of constitutional law" it just took pains to recognize. Id. Any suggestion to the contrary seriously misconstrues the precedent in two respects.

First, the remedial holding of *Montgomery* must be determined by reference to the facts of that case. The petitioner, Henry Montgomery, was seventeen years old at the time he committed the homicide for which he

[12] It is important to understand at the outset that the court in *Montgomery* could not, as a matter of federal law, establish limitations on Connecticut's ability to provide a remedy for a *Miller* violation that is more generous than that provided by federal courts. See *Danforth* v. *Minnesota*, supra, 552 U.S. 288 (holding that "the remedy a state court chooses to provide its citizens for violations of the [f]ederal [c]onstitution is primarily a question of state law"). This point is discussed shortly.

was sentenced by a state court in Louisiana to a mandatory sentence of life imprisonment without the possibility of parole. Id., 725–26. Under Louisiana law, "[t]he sentence was automatic upon the jury's verdict, so [the petitioner] had no opportunity to present mitigation evidence to justify a less severe sentence." Id., 726. Ordering resentencing in *Montgomery*, in other words, would have been an exercise in futility because the only available sentencing option under Louisiana law was life *with* parole. See La. Code Crim. P. Ann. art. 878.1 (Supp. 2019). Given the lack of discretion in a mandatory sentencing scheme, as well as concerns of federalism and comity, the court held that, "where a juvenile offender receive[s] *mandatory* life without parole," states need not "relitigate sentences, let alone convictions, in every case . . . ." (Emphasis added.) *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 736. *Montgomery* is silent on the appropriate remedy for an eighth amendment violation when the juvenile offender was sentenced under a *discretionary* sentencing scheme, such as Connecticut's, in which the defendant could receive a sentence of as little as twenty-five years of imprisonment upon resentencing. See General Statutes § 53a-35a (2) (authorizing "a term not less than twenty-five years nor more than life").

The second reason that *Montgomery* exerts no controlling force here is more fundamental. It is a well established principle of federal law that "the *remedy* a state court chooses to provide its citizens for violations of the [f]ederal [c]onstitution is primarily a question of *state* law." (Emphasis added.) *Danforth* v. *Minnesota*, supra, 552 U.S. 288. This is so because federal law is "fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings. It was intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of

new rules of constitutional law when reviewing its own [s]tate's convictions." Id., 280–81. For this reason, states are free—as this court did in *Casiano*—to develop "*state* law to govern retroactivity in state postconviction proceedings"; (emphasis in original) id., 289; and those remedies may be more expansive than the remedy provided under federal law. See id., 287 ("[s]tate law may provide relief beyond the demands of federal due process, but under no circumstances may it confine petitioners to a lesser remedy" [internal quotation marks omitted]); see also *Thiersaint* v. *Commissioner of Correction*, 316 Conn. 89, 107, 113, 111 A.3d 829 (2015) (recognizing that, "under *Danforth*, state courts may give broader effect to new constitutional rules of criminal procedure than *Teague* allows in federal habeas review" and, therefore, "while federal decisions applying *Teague* may be instructive, this court will not be bound by those decisions in any particular case, but will conduct an independent analysis"). *Danforth* also makes it clear that a state law granting its citizens broader remedies for federal constitutional violations need not be premised on "legislation or . . . judicial interpretation of [the state] [c]onstitution"; *Danforth* v. *Minnesota*, supra, 288; rather, it may be grounded instead on the unique development of the state's law. Id., 289.

We return to the majority's determination that parole eligibility "*negates* a *Miller* violation,"[13] such that "there is no *Miller* violation" at all. (Emphasis in original.) It

[13] For the sake of simplicity, I adopt the majority's use of the shorthand phrases "*Graham* violation" and "*Miller* violation." See footnote 3 of the majority opinion. A *Graham* violation refers to a sentencing court's failure to account for the likelihood of rehabilitation by providing a juvenile offender with parole eligibility; a *Miller* violation refers to a sentencing court's failure to take into account the "hallmarks of youth" in determining the most appropriate term of incarceration proportional to the trial court's assessment of the offender's moral culpability and related penological objectives. *State* v. *Delgado*, supra, 323 Conn. 806 n.5.

is undisputed that a *Miller* violation occurred at the time the defendant's sentence was imposed in 2003 because the trial court failed to consider the mitigating factors of youth before sentencing the defendant to the harshest penalty permitted for a juvenile offender. See *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 736 (holding that *Miller* "announced a substantive rule of constitutional law" because "the sentence of life without parole is disproportionate for the vast majority of juvenile offenders"); *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 79 (requiring resentencing of juvenile offender because "the procedures set forth in *Miller* must be followed when considering whether to sentence a juvenile offender to fifty years imprisonment without parole"). Although the defendant now is eligible for parole after serving thirty years of his eighty-five year sentence pursuant to § 1 of P.A. 15-84, the *Miller violation* does not magically cease to exist. The majority's contrary conclusion—that parole eligibility "negates" the constitutional violation—confuses the analysis of a constitutional *violation* with the very different exercise of fashioning a *remedy* to a constitutional violation.

To support its conclusion that the *Miller* violation has been negated in this case, the majority relies on *State* v. *Delgado*, supra, 323 Conn. 811, in which this court held that a juvenile defendant who was sentenced to life imprisonment without the possibility of parole or its functional equivalent "no longer falls within the purview of *Miller*, *Riley*, and *Casiano*" after the passage of P.A. 15-84. The fundamental logic driving *Delgado* is straightforward: "*Miller* simply does not apply when a juvenile's sentence provides an opportunity for parole . . . ." Id. Three errors result from the majority's reliance on *Delgado*. First, in relying on *Delgado*, the majority incorporates and repeats that decision's failure to distinguish between the constitutional *violation* that

unquestionably occurred at sentencing and the constitutional *remedy* for that violation. *Delgado*, like the majority here, mistakes the question for the answer when it concludes that the constitutional violation disappeared at the moment parole eligibility became available. The question in *Delgado*, as in *Montgomery*, was whether the *Miller* violation, which had been determined to exist as a matter of substantive constitutional law, was *remedied* by the availability of parole. That question cannot be answered by wordplay—"What *Miller* violation?" Defining the violation out of existence begs the question, which remains this: Does the retroactive availability of parole eligibility remedy the constitutional violation that occurred when the trial court failed to take into account the hallmarks of youth at a compulsory individualized sentencing hearing[14] held *before imposing sentence*? This question can be answered yes or no, but it cannot be answered, as *Delgado* and the majority do, by declaring that there is no longer a constitutional violation to remedy.

Second, *Delgado* relies substantially on the remedial holding of *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 736; see *State* v. *Delgado*, 323 Conn. 807–808, 812; and, to that extent, it offers no assistance in answering the specific issue confronted here, because *Delgado* neither considered nor decided the more precise state law remedial question that emerges under *Danforth*. The defendant in *Delgado* never even cited to *Danforth*, and never invoked its precedential force to argue that "the remedy a state court chooses to provide its citizens for violations of the [f]ederal [c]onstitution is primarily a question of state law." *Danforth* v. *Minnesota*, supra,

[14] This individualized sentencing hearing is the proceeding that we have deemed to be essential to the fundamental fairness of the judicial proceeding, central to an accurate determination of a proportionate sentence, and implicit in the very idea of ordered liberty. *Casiano* v. *Commissioner of Correction*, supra, 716 Conn. 70–71.

552 U.S. 288. The closest the defendant came to making that argument in *Delgado* was the off-point contention that resentencing was contemplated by the Connecticut legislature based on its decision "to require both a *Miller* compliant sentencing hearing *and* an opportunity for parole [in P.A. 15-84] . . . ." (Emphasis in original; internal quotation marks omitted.) *State* v. *Delgado*, supra, 815. *Delgado* therefore neither addresses nor answers the different question raised by the defendant here, which is whether the availability of parole under P.A. 15-84 cures a constitutional violation that this court has deemed to be a "watershed" rule—that is, a rule essential to the fundamental fairness of the judicial proceeding, central to an accurate determination of a proportionate sentence, and implicit in the very idea of ordered liberty—*as a matter of state postconviction, remedial law*. Consideration of this question is essential to resolving the defendant's claim on appeal and, therefore, I address it in part II of this dissenting opinion.

Third, and relatedly, *Delgado* completely fails to acknowledge that this court went significantly further in *Riley* and *Casiano* than did the United States Supreme Court in the respective federal counterpart cases, *Miller* and *Montgomery*. *Delgado* for the most part lumps its treatment of the federal and state cases together; see *State* v. *Delgado*, supra, 323 Conn. 811–12; and it steadfastly ignores the fact that not only the holdings, but also the reasoning, of the Connecticut cases extends more broadly than that found in the federal cases in important ways. After all, *Riley* did not merely follow *Miller*, but it expressly *rejected* a "narrow" reading of the case; *State* v. *Riley*, supra, 315 Conn. 653; and expanded upon the *Miller* principles by applying them to "(1) discretionary sentencing schemes and (2) sentences that are the functional equivalent of life in addition to sentences of life without parole." *State* v. *Belcher*, Docket No. CR-94-100508, 2016 WL 2935462, *2

(Conn. Super. April 29, 2016) (*Devlin, J.*).[15] And *Casiano* took the *Miller* rule one step further, deeming it to be a watershed rule of criminal procedure.[16] *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 69–70.

The cursory treatment *Delgado* gives this court's own cases, decided only one year earlier, is especially notable when we look more closely at the distinguishing features of *Riley* and *Casiano*. *Riley* extended the application of *Miller* beyond mandatory sentences in significant part because the court acknowledged the critical importance of *Miller*'s demand for a hearing at which the sentencing judge is "*require*[*d*] . . . to take into account how children are different" in a discretionary sentencing scheme. (Emphasis added; internal quotation marks omitted.) *State* v. *Riley*, supra, 315 Conn. 654; see id., 658 ("*Miller* does not stand solely for the proposition that the eighth amendment demands that the sentencer have discretion to impose a lesser punishment than life without parole on a juvenile homicide offender. Rather, *Miller* logically indicates that, if a sentencing scheme permits the imposition of that punishment on a juvenile homicide offender, the trial court *must* consider the offender's 'chronological age and its hallmark features' as mitigating against such a severe sentence." [Emphasis in original.]), quoting *Miller* v. *Alabama*, supra, 567 U.S. 477. Simply put, *Riley* recognizes what *Delgado* and the majority opinion here ignore: a court cannot exercise sentencing discretion without first considering those factors deemed essential to the proper exercise of that discretion.

[15] See also Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 2015 Sess., p. 943, remarks of Chief State's Attorney Kevin Kane (stating that "the Connecticut Supreme Court went a little farther [in *Riley*] than I ever thought the U.S. Supreme Court intended to go in *Graham* and *Miller*"); id., p. 959, remarks of former Representative Robert Farr (agreeing that *Riley* "went beyond the U.S. Supreme Court decision" in *Miller*).

[16] *Montgomery* did not reach the issue.

Perhaps even more troubling is that *Delgado* does not so much as mention the predominant fact that *Casiano* declares *Miller* to have established a "watershed" rule, which itself is a ruling of enormous significance. The defendant in *Delgado* once again facilitated this oversight because he offered nothing more than a conclusory argument "that '*Montgomery* does not . . . supersede the final and controlling precedent [of this court] in *Riley* and *Casiano*, which provide a new sentencing hearing as the remedy for sentences that are illegal or were imposed in an illegal manner . . . .' " *State* v. *Delgado*, supra, 323 Conn. 815. I find myself unable to stand by silently and allow *Riley* and *Casiano* to be forgotten.

II

Having determined that there was a *Miller* violation in this case, I next address whether the retroactive parole eligibility conferred by P.A. 15-84 is sufficient to cure the violation as a matter of state law.[17] In *Riley*

[17] The majority opinion criticizes the scope of my analysis on the ground that "[t]he defendant never has advanced any of the dissent's arguments," and states that the court should decline to decide this case "based on issues not raised by the parties." I disagree that the ground I cover is outside the scope of the claims raised by the defendant. The defendant argued in his initial brief that the remedial component of *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 718, is not binding on this court pursuant to *Danforth* v. *Minnesota*, supra, 552 U.S. 280–81; that resentencing is required as a matter of state law under *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 70–71, which designated *Miller* a watershed rule of criminal procedure; that the sentencing judge, not the Board of Pardons and Parole, has the constitutional obligation to sentence the defendant on the basis of an individualized assessment of the *Miller* factors; and that concerns about practicality cannot outweigh the fundamental rights at stake. After the defendant filed his initial brief, this court issued its decision in *State* v. *Delgado*, supra, 323 Conn. 801. The defendant thereafter filed a reply brief in which he argued that "[t]his court should reconsider and overrule" *Delgado* because "*Delgado* was decided when the law was in flux, without full briefing of the issues, and the decision is 'incorrect and unjust.' " To the extent that this dissenting opinion may expand on certain arguments made by the defendant, or draw out additional significance or different implications on the basis of arguments that come within the scope of the defendant's claims, I see nothing

and *Casiano*, this court adopted and expanded on the principle that "children are different" for the purposes of criminal sentencing. (Internal quotation marks omitted.) *Casiano* v. *Commissioner*, supra, 317 Conn. 60; *State* v. *Riley*, supra, 315 Conn. 654. The assessment of culpability conducted as part of a criminal sentencing is a central aspect of the "children are different" jurisprudence elucidated in *Riley* and *Casiano*. These cases understand that young people who commit crimes, even horrible crimes, cannot reflexively be written off as bad and immoral people of defective character. Their conduct may be despicable, and even unforgiveable, and the harm they cause may be irrevocable, but, in the context of juvenile offenders, our case law requires the sentencing authority to resist the reflexive assignment of unmitigated moral blameworthiness that may be directed at adults who commit the same crimes. Our

improper or unusual about doing so. Cf. *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 635 n.7, 126 A.3d 558 (2015) (distinguishing between "claim[s]" and "argument[s]" and noting that appellate courts may review "legal arguments that . . . are subsumed within or intertwined with arguments related to the legal claim" [internal quotation marks omitted]).

Finally, because I would conclude that the parole eligibility conferred by P.A. 15-84 was not intended to remedy the violation of juvenile offenders' constitutional rights at sentencing pursuant to *Miller*, I do not address the question of whether the legislature can, without violating the separation of powers enshrined in article second of the state constitution, modify a defendant's sentence to remedy a *Miller* violation. It is an open question whether the legislature would transgress constitutional limitations were P.A. 15-84 construed to either (1) delegate to the Board of Pardons and Paroles, an agency wholly outside of the Judicial Branch, the authority to exercise an act of sentencing discretion already conferred to the Judicial Branch, or (2) preempt the judiciary from requiring resentencing to remedy a constitutional violation committed by a judicial officer exercising his judicial discretion in a judicial proceeding. See Conn. Const., art. II ("[t]he powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another"). I do not read the majority's separation of powers discussion to address these particular points, because its view, following *Delgado*, is that parole eligibility *negates* the *Miller* violation, thus making resentencing unnecessary.

growing knowledge about adolescent development no longer permits us to say that the juvenile offender is exercising his free will to the same extent as an adult offender.[18] See generally S. Erickson, "Blaming the Brain," 11 Minn. J.L. Sci. & Tech. 27, 28–29 (2010) ("Much of the recent legal scholarship concerned with criminal responsibility as of late has invested heavily in the notion that the findings of biological sciences promise a fundamental shift away from orthodox notions of criminal liability. . . . All share the belief that the impact of neuroscience on the law in the coming years will be inevitable, dramatic, and will fundamentally alter the way the law does business. And nowhere is this promise endorsed with more gusto than in discussions of responsibility and criminal liability." [Footnotes omitted.]).

Riley, applying the logic of *Miller* and the science underlying its holding, identifies with precision the hallmark features of youth that must be considered by a judge in mitigation at any sentencing proceeding at which the judge may sentence a juvenile offender to life without parole. Those features include "immaturity, impetuosity, and failure to appreciate risks and consequences; the offender's family and home environment and the offender's inability to extricate himself from that environment; the circumstances of the homicide offense, including the extent of [the offender's] participation in the conduct and the way familial and peer pressures may have affected him; the offender's inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys; and the possibility of rehabilitation . . . ." (Internal quotation marks omitted.) *State* v. *Riley*,

[18] Teenage children unquestionably are capable of making moral choices and conform their conduct accordingly. We are speaking about matters of degree. The physiological and psychological impediments at issue, moreover, are not distributed in equal shares to all juveniles.

supra, 315 Conn. 658. *Casiano*, decided very shortly thereafter, instructs that the adjudicative process by which the judicial authority gives individualized consideration to these factors as part of the discretionary act of sentencing is fundamental to our system of justice. *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. at 69–71.

As acknowledged in *Miller* and repeated in *Casiano*, "upon proper consideration of 'children's diminished culpability' . . . it would be 'uncommon' for a sentencing authority to impose the harsh penalty of a life sentence without parole." Id., 70, quoting *Miller* v. *Alabama*, supra, 567 U.S. 479. These cases, "in effect, set forth a presumption that a juvenile offender would not receive a life sentence without parole upon due consideration of the mitigating factors of youth . . . ." *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 70. Thus, "the individualized sentencing prescribed by *Miller*" necessarily "impact[s] the sentence imposed in most cases." Id.

In the present case, the defendant's eighty-five year sentence of imprisonment is presumptively disproportionate to his moral culpability because, if the trial court had considered the mitigating factors of the defendant's youth at the time of his commission of the offenses, as *Miller* requires, a lesser sentence likely would have been imposed. We do not know what that sentence would have been, of course, because the constitutional violation that occurred at the time deprives us of that knowledge. The majority opinion necessarily assumes that, if the constitutional requirements had been followed, the sentence would have been eighty-five years *with* the possibility of parole. Or, at least, it finds the use of such an assumption sufficient for remedial purposes, so that the retroactive availability of parole eliminates the need for a resentencing that complies with

the requirements set forth in *Miller*, *Riley*, and *Casiano*. My disagreement with this approach exists on many levels, but it will be useful to express my disagreement in two parts. The first, addressed in part II A of this dissenting opinion, focuses on the particular ways that the parole eligibility conferred by § 1 of P.A. 15-84 is insufficient to remedy the disproportionate length of the defendant's sentence, and the second, addressed in part II B of this dissenting opinion, focuses on what I consider to be the fundamental conceptual flaws in the majority's position.

A

Providing parole eligibility is insufficient to remedy the disproportionate length of the defendant's sentence for four reasons. First, parole eligibility is dependent on the length of the sentence imposed, and, here, the defendant's lengthy sentence means that he is not eligible for parole until after he has served a minimum of thirty years of imprisonment. See P.A. 15-84, § 1, codified at General Statutes § 54-125a (f) (1) (B) (providing that "person . . . serving a sentence of more than fifty years" is not eligible for parole until "after serving thirty years"). If the defendant had been sentenced to a term of anything less than fifty years, he would be eligible for parole sooner—"after serving sixty per cent of the sentence or twelve years, whichever is greater." P.A. 15-84, § 1, codified at General Statutes § 54-125a (f) (1) (A). Second, once a defendant becomes eligible for parole, release is by no means guaranteed, because "the decision to grant parole is entirely within the discretion of the [Board of Pardons and Paroles]." (Internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 371, 163 A.3d 597 (2017). This leads to my third point, which is that the length of a defendant's sentence affects the likelihood that parole

will be granted.[19] As the defendant points out, "an inmate serving an eighty-five year sentence will fare significantly worse [at a parole hearing] than other inmates who, for example, are serving fifty year sentences for committing similar, serious (homicide) offenses. Common sense would tell us that the greater the reduction requested, the less likely it would be that an inmate would receive relief at a parole hearing." Finally, once a person is released on parole, he or she nonetheless "remain[s] in the custody of the Commissioner of Correction and [is] subject to supervision by personnel of the Department of Correction during such person's period of parole." P.A. 15-84, § 1, codified at General Statutes § 54-125a (g). Thus, neither parole eligibility nor release on parole cures the violation of the defendant's eighth amendment right to be free from cruel and unusual punishment.

Although other states have enacted statutes or regulations to remedy *Miller* violations by providing for retroactive parole eligibility, many of these states expressly require the decision-making authority to consider a juvenile offender's diminished culpability at the time of the commission of the offense in deciding whether to grant parole. See Ark. Code Ann. § 16-93-621 (b) (2) (Supp. 2017) (requiring parole board to take into consideration, inter alia, "[t]he diminished culpability of minors as compared to that of adults," "[t]he hallmark features of youth," "[a]ge of the person at the time of the offense," and "[i]mmaturity of the person at the time of the offense"); Cal. Penal Code § 3051 (f) (1) (Deering Supp. 2018) (requiring parole board to "take

[19] The length of a defendant's sentence also affects an inmate's classification, which is used to "determine the inmate's appropriate confinement location, treatment, programs and employment assignment whether in a facility or the community." (Internal quotation marks omitted.) *Anthony A.* v. *Commissioner of Correction*, 326 Conn. 668, 671–72 and n.3, 166 A.3d 614 (2017), quoting Department of Correction, Administrative Directive 9.2 (3) (a) (effective July 1, 2006).

into consideration the diminished culpability of youth as compared to that of adults" and "the hallmark features of youth"); W. Va. Code Ann. § 62-12-13b (b) (LexisNexis Supp. 2018) (requiring parole board to consider "[a]ge at the time of the offense," "[i]mmaturity at the time of the offense," and "[h]ome and community environment at the time of the offense"); Md. Code Regs. § 12.08.01.18 (3) (2016) (requiring parole commission to consider "[a]ge at the time the crime was committed," "[t]he individual's level of maturity and sense of responsibility at the time . . . the crime was committed," "[w]hether influence or pressure from other individuals contributed to the commission of the crime," "[t]he home environment and family relationships at the time the crime was committed," "[t]he individual's educational background and achievement at the time the crime was committed," and "[o]ther factors or circumstances unique to prisoners who committed crimes at the time the individual was a juvenile that the Commissioner determines to be relevant"). For example, in *People* v. *Franklin*, 63 Cal. 4th 261, 370 P.3d 1053, 202 Cal. Rptr. 3d 496 (2016), the Supreme Court of California found parole eligibility under Cal. Penal Code § 3051 (f) (1) to be an adequate remedy for a *Miller* violation because, amongst other things, the statute directed "the [b]oard to give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner . . . [and] contemplate[d] that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the [b]oard's consideration." (Citation omitted; internal quotation marks omitted.) Id., 283.

In contrast, P.A. 15-84 neither requires the Board of Pardons and Paroles (board) to give any special weight to the *Miller* factors and the diminished culpability of

juvenile offenders, nor contemplates that such information will be available at a youth offender parole hearing to facilitate the board's decision.[20] Although the board may grant a juvenile offender parole if it finds that "such person has demonstrated substantial rehabilitation since the date such crimes or crimes were committed considering such person's character, background and history, as demonstrated by . . . the age and circumstances of such person as of the date of the commission of the crime or crimes, whether such person has demonstrated remorse and increased maturity since the date of the commission of the crime . . . [and] such person's efforts to overcome . . . obstacles that such person may have faced as a child"; P.A. 15-84, § 1, codified at General Statutes § 54-125a (f) (4) (C); this provision plainly is focused on a juvenile offender's rehabilitation, rather than a juvenile offender's diminished culpability. Parole eligibility under P.A. 15-84, in other words, is "future focused" and does not consider whether a juvenile offender "was less blameworthy due to their youth at the time of the offense." *State* v. *Link*, 297 Or. App. 126, 151, 441 P.3d 664 (2019); see id., 149–52 (holding that murder review hearing under Or. Rev. Stat. § 163.105 [2015] after thirty years of imprisonment did not "[provide] an opportunity for the consideration of the qualities of youth sufficient to comply with *Miller*" because [1] "*Graham* and *Miller* are replete with language holding that the proper actor to consider the qualities of youth is the *sentencer*," [2] "any consideration of the qualities of youth would come—at a

[20] The majority opinion points out that the board has explained in an annual report that it gives " 'great weight to the diminished culpabilities of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and maturity that has been displayed when considering an offender for suitability.' " See footnote 12 of the majority opinion. This statement carries no legal force, of course, because the directive is not contained in any administrative regulation or in P.A. 15-84. In any event, parole eligibility is not an adequate substitute for a *Miller*-compliant resentencing by a judge.

minimum—[thirty] years after the imposition of the sentence" and "delay would undercut the essence of *Miller*," and [3] parole board is required to consider neither "immaturity at the time of the offense, nor how such immaturity lessened the culpability or blameworthiness of the defendant" [emphasis in original]). Because nothing in P.A. 15-84 requires the board to consider the *Miller* factors when deciding whether a juvenile offender will spend the rest of his natural life in prison, I believe that parole eligibility under the statute is inadequate to remedy the violation of a juvenile offender's eighth amendment rights. See *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 70 ("the individualized sentencing prescribed by *Miller* is central to an accurate determination . . . that the sentence imposed is a proportionate one" [citation omitted; internal quotation marks omitted]); *State* v. *Riley*, supra, 315 Conn. 653 (holding that, under *Miller*, "the sentencer must consider age related evidence as mitigation when deciding whether to irrevocably sentence juvenile offenders to a lifetime in prison").

The inadequacy and unfairness of the retroactive aspect of P.A. 15-84, as applied to the defendant and any similarly situated juvenile offenders, is exacerbated by the disparate impact that *Miller* violations have on minority juvenile offenders. In written testimony submitted to the Joint Standing Committee on the Judiciary, the Center for Children's Advocacy explained that, "[e]ven though [b]lack and Latino youth comprise only 16% of Connecticut's total population, they represent 88% [of] all juvenile offenders serving sentences of more than [ten] years and 92% of youth sentenced to more than [fifty] years. Additionally, [b]lack and Latino youth serve longer sentences than when convicted of the same crime as their white counterparts." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 2015 Sess., p. 1048. Moreover, prior to the enactment of P.A.

15-84, "100% of juveniles serving a life sentence without parole [were] African Americans . . . ." Id., p. 1097, remarks of Subira Gordon, legislative analyst for the African American Affairs Commission. Thus, in Connecticut, it is minority youth who primarily are affected by the disproportionately long sentences meted out in violation of the requirements of *Miller*, and it is minority youth who continue to suffer the unconstitutional effects of these disproportionately long sentences.

The defendant in the present case was seventeen years old at the time of the commission of his crimes, and, under federal and Connecticut precedent, he has an eighth amendment right to have the mitigating factors of his youth, and his consequent diminished moral culpability, considered in determining whether he should spend the rest of his natural life imprisoned. Despite this constitutional right, the defendant has not had—and, under P.A. 15-84, never will have—an adjudicatory proceeding in which his diminished moral culpability is considered in relation to the length of his sentence. Because the parole eligibility conferred by P.A. 15-84 does not ensure "an accurate determination that the sentence imposed is a proportionate one"; *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 69; it fails to remedy the violation of the defendant's fundamental constitutional rights.[21]

B

I have five broader points to make in response to the suggestion that the constitutional violation that

[21] The violation that I would find occurred in this case likely would carry implications for a relatively small number of similarly situated juvenile offenders. As of March, 2015, there were "approximately 200 people [in Connecticut] serving sentences of more than [twelve] years for crimes committed under the age of [eighteen]. About [fifty] are serving [fifty] years or more." Conn. Joint Standing Committee Hearings, supra, p. 953, remarks of Professor Sarah F. Russell. The record does not disclose how many of these individuals are serving sentences imposed after sentencing hearings that did not comply with *Miller*.

occurred at the defendant's sentencing in June, 2003, is erased or cured by the legislature's provision of parole eligibility in 2015.

First, to repeat in the most basic terms what already has been said, it seems patently obvious that curing the *Graham* violation that occurred here does not address or cure the *Miller* violation that also occurred, because *Graham* and *Miller* concern two different aspects of the defendant's punishment. As I previously discussed, parole eligibility addresses the offender's potential for change and rehabilitation based on the scientific fact that the hallmarks of youth usually are transitory and will disappear over time. The individualized sentencing hearing mandated by *Miller* is necessary to take into account the hallmarks of youth as they relate to the offender's culpability, not his prospects for future rehabilitation, for purposes of deciding whether the defendant should be sentenced to thirty years, fifty years, or some other term of imprisonment. To suggest that parole eligibility erases or cures the *Miller* violation in a discretionary sentencing scheme strikes me as irrational when there is a distinct violation—one of watershed dimensions—that has independent consequences on the *length* of the sentence.

Second, unless it is willing to heighten the irrationality still more, the majority cannot brush aside the *Miller* violation inflicted on the defendant in 2003 on the theory that the violation disappears as a definitional matter because *Miller*, *Riley*, and *Casiano* apply only to sentences of life *without* parole, and the defendant is now serving a sentence of life *with* parole. To begin with, as a legal matter, the defendant is serving the very *same* sentence of eighty-five years of imprisonment that was imposed in 2003. Parole eligibility is not part of a defendant's sentence and, therefore, cannot cure a constitutional infirmity in the sentence. Parole eligibility, like other terms and conditions affecting how an inmate's

sentence is implemented by the Department of Correction, is not within the jurisdiction of the sentencing judge or the Judicial Branch. See, e.g., *State* v. *McCoy*, 331 Conn. 561, 586–87, 206 A.3d 725 (2019) (clarifying and reiterating that "a trial court loses jurisdiction once the defendant's sentence is executed, unless there is a constitutional or legislative grant of authority"); *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 371 (noting that "the decision to grant parole is entirely within the discretion of the board" and, therefore, "parole eligibility under [General Statutes] § 54-125a does not constitute a cognizable liberty interest sufficient to invoke habeas jurisdiction" [internal quotation marks omitted]). If the sentence itself was illegal, it remains illegal, because it has not changed. That point is technical, although we often rely on technical points to reach our holdings in the field of criminal sentencing.

More fundamentally, it is remarkable to me that the majority is willing, with no apparent hesitation, to conclude that the entire corpus of juvenile sentencing law developed over the past fifteen years based on the revolutionary, paradigm-shifting insight that " 'children are different' " for sentencing purposes; *Casiano* v. *Commissioner*, supra, 317 Conn. 60; *State* v. *Riley*, supra, 315 Conn. 654; can be reduced to nothing more than the anemic requirement of parole eligibility.[22] It is not impossible to read the cases so narrowly, I suppose, but to arrive at that conclusion fights fiercely against the logic of those cases and the spirit animating them, especially as seen in *Riley* and *Casiano*. In my view, it is impossible to read our precedent to suggest that the foundational, animating, and essential principle of those cases is inapplicable to any sentence other than death or life without the possibility of parole. The pro-

[22] I say "anemic" because such a narrow reading leaves us virtually alone, among all countries in the world, in the severity of our juvenile sentencing jurisprudence. See footnote 3 of this dissenting opinion.

foundly significant principle that " 'children are constitutionally different from adults for sentencing purposes,' " embraced enthusiastically by this court in 2015; *Casiano* v. *Commissioner of Correction*, supra, 56; has been reduced to this disheartening reformulation: "Children are constitutionally the same as adults for sentencing purposes, even for the most severe sentences, short of death and its functional equivalent." The result is unfortunate and unnecessary. It also signals a major retreat from where our court positioned itself on the issue only four years ago, which brings us back to *Casiano*.

Third, the majority, in my view, vastly overstates the significance of the unremarkable fact that the legislature made the sentencing provisions contained in § 2 of P.A. 15-84 prospective, while giving the parole provisions in § 1 of P.A. 15-84 retroactive application. It is wholly unnecessary to read a preemptive remedial intention into that arrangement, and the fact that the legislature did not make § 2 retroactive across the board does not mean that it intended to strip judges of the authority to order resentencing on a case-by-case basis in the event that the juvenile offender was sentenced in violation of *Miller*. It would have made no sense to require resentencing in every case for the simple reason that some significant number of juvenile offenders within the retroactive scope of P.A. 15-84 would have been sentenced by trial judges who had taken into account the hallmarks of youth prior to 2015. The scientific basis for mandating—indeed, constitutionalizing—that procedure may not yet have been widely known before *Miller*, but many judges with sentencing responsibility undoubtedly were aware that children often lack adult-like judgment and impulse control, and these considerations were treated as a mitigating factor by some judges long prior to 2015. See *Roper* v. *Simmons*, supra, 543 U.S. 569 (noting that lack of maturity and underde-

veloped sense of responsibility found in youth is something "any parent knows"). Requiring resentencing in every case would not have been sensible, and it is hardly surprising that the legislature did not include a generic retroactivity provision in § 2 of P.A. 15-84.[23]

Fourth, the majority's claim that the passage of time makes resentencing not "practical" only serves to reinforce the impression that we have lost the courage of the convictions that we expressed in *Casiano*, in which we deemed the constitutional violation that occurred at the defendant's sentencing in 2003 a transgression of the most fundamental principles of individualized justice. *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 69–70. It strikes me as very odd that we so easily can shrug our shoulders now and say that "no remedy will put the defendant in the same position he would have been in if his youth had been considered when he was sentenced," and so we need not even try. Given the passage of time since the defendant's commission of the crimes in 2001, it is possible that some practical difficulties may arise during the resentencing process, but I cannot agree that this possibility relieves us of our obligation to provide a meaningful remedy for the constitutional violation that occurred

[23] Based on the chronology of events, it appears exceedingly unlikely that the legislature was aware of this court's decision in *Casiano* and its designation of *Miller* as a watershed rule of criminal procedure at the time P.A. 15-84 was enacted. The *Casiano* decision officially was released on May 26, 2015, the very same day that the House of Representatives passed the final version of the bill that became P.A. 15-84. See 58 H.R. Proc., Pt. 15, 2015 Sess., p. 4917. The Senate had passed the bill over a month earlier, on April 22, 2015. See 58 S. Proc., Pt. 3, 2015 Sess., p. 734. It was required to vote again, on May 29, 2015, because the House had adopted a minor amendment to the bill immaterial to the present appeal. See 58 S. Proc., Pt. 8, 2015, p. 2646; see also 58 H.R. Proc., supra, p. 4910 (summarizing Senate Amendment Schedule "A"). The transcript of the proceedings demonstrates that the May 29 Senate vote was little more than a formality—there was no further discussion of the merits of the bill and certainly no mention of the newly released *Casiano* decision.

at sentencing. "Constitutional violations implicating the courts must be susceptible of a judicial remedy." *Pamela B.* v. *Ment*, 244 Conn. 296, 313, 709 A.2d 1089 (1998). "Once a constitutional violation is found," a court is required to fashion a "remedy to fit the nature and extent of the constitutional violation." (Internal quotation marks omitted.) *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420, 97 S. Ct. 2766, 53 L. Ed. 2d 851 (1977).

The reality is that the resentencing of convicted offenders is neither a rare nor impractical remedy in numerous judicial contexts. At the federal level, tens of thousands of resentencing proceedings have been required over the past few years in the wake of various retroactive judicial rulings and sentencing reforms.[24]

[24] For example, in 2014, the United States Sentencing Commission promulgated Amendment 782, commonly known as the "drugs-minus-two" amendment, which was retroactively applicable to criminal defendants convicted of certain drug offenses and resulted in "approximately 40,000 federal prisoners eligible to seek shorter sentences." J. Haile, "Farewell, Fair Cruelty: An Argument For Retroactive Relief in Federal Sentencing," 47 U. Tol. L. Rev. 635, 640 (2016). As a result of Amendment 782, "approximately 30,000 individuals had their sentences reduced, with an average decrease of [twenty-five] months." C. Devins, "Lessons Learned From Retroactive Resentencing After *Johnson* and Amendment 782," 10 Fed. Cts. L. Rev. 39, 45 (2018). More recently, in *United States* v. *Johnson*, U.S. , 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), the United States Supreme Court held that the residual clause definition of a "violent felony" in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924 (e) (2) (B), was unconstitutionally vague, resulting in a 334 percent increase in the filing of motions to vacate, set aside or correct sentences under 28 U.S.C. § 2255, and a 312 percent increase in the filing of "second or successive collateral challenges under 28 U.S.C. § 2244" in the federal courts. C. Devins, supra, 10 Fed. Cts. L. Rev. 54–55. Pursuant to *Johnson* and *Welch* v. *United States*, U.S. , 136 S. Ct. 1257, 1265, 194 L. Ed. 2d 387 (2016) (holding that *Johnson* was "a substantive decision and so has retroactive effect . . . in cases on collateral review"), criminal defendants "eligible for relief [are] entitled to resentencing without the ACCA's residual clause." C. Devins, supra, 10 Fed. Cts. L. Rev. 87. "Although the Sentencing Commission estimates that *Johnson* resulted in sentence reductions for [only] about 1,200 inmates nationwide, these cases are likely underreported and . . . the actual number could be much higher." (Footnote omitted.) Id., 80.

This remedial practice is by no means new; there have been watershed-like events in criminal procedure over the years requiring resentencing of offenders on a far more extensive scale than implicated here. See, e.g., W. Kelly, "Sentencing, Due Process, and Invalid Prior Convictions: The Aftermath of *United States* v. *Tucker*," 77 Colum. L. Rev. 1099 (1977) (discussing federal resentencings required in wake of *United States* v. *Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 [1972], which held that sentences cannot be enhanced by convictions obtained in violation of right to counsel under *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 [1963]). In Connecticut, resentencing is necessary in various contexts as well, including in habeas cases involving a successful claim of ineffective assistance of counsel, in which resentencing is required to "place the habeas petitioner, as nearly as possible, in the position that he would have been in if there had been no violation of his right to counsel." (Internal quotation marks omitted.) *H. P. T.* v. *Commissioner of Correction*, 310 Conn. 606, 615, 79 A.3d 54 (2013). It makes no sense to me that we find ourselves working so hard to make this remedy unavailable in the present context involving the constitutional rights of children.

Fashioning remedies for constitutional violations sometimes presents courts with a "difficult task," but a meaningful remedy "is what the [c]onstitution and our cases call for, and that is what must be done in this case." *Dayton Board of Education* v. *Brinkman*, supra, 433 U.S. 420; see also *State* v. *Lyle*, 854 N.W.2d 378, 403 (Iowa 2014) (recognizing that resentencing juvenile offenders "will likely impose administrative and other burdens," but holding that those are "burdens our legal system is required to assume [because] [i]ndividual rights are not just recognized when convenient"). The Supreme Court of Iowa relied on this sound reasoning in a similar case and, in my view, its analysis should

apply to a rule that we have deemed to constitute a "watershed rule" under Connecticut law: "Even if the resentencing does not alter the sentence for most juveniles, or any juvenile, the action taken by our [trial court] judges in each case will honor the decency and humanity embedded within [the state constitution] and, in turn, within every [citizen of the state]. The youth of this state will be better served when judges have been permitted to carefully consider all of the circumstances of each case to craft an appropriate sentence and give each juvenile the individual sentencing attention they deserve . . . . The [s]tate will be better served as well." *State* v. *Lyle*, supra, 403.

Fifth, and finally, if the majority means what it says here, then it should acknowledge that we really did not mean what we said in *Casiano* when we deemed *Miller* to establish a watershed rule of constitutional dimension. The language we employed in *Casiano* qualifies as more than a begrudging acceptance, more than a mild endorsement, more even than a firm embrace; it elevates the principle to the most revered constitutional status available. Indeed, the *Casiano* watershed designation confers constitutional status with meaning beyond the eighth amendment, because it triggers due process protection. The reason that a procedural rule of watershed significance requires retroactive application is that the right is deemed to be "implicit in the concept of ordered liberty," which is the touchstone used to identify rights entitled to protection as a matter of constitutional due process. (Internal quotation marks omitted.) *Albright* v. *Oliver*, 510 U.S. 266, 301, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) (Stevens, J., dissenting); see id. (explaining that court initially held that "the right to be free from unreasonable official searches was 'implicit in "the concept of ordered liberty,"' and therefore protected by the [d]ue [p]rocess [c]lause of the [f]ourteenth [a]mendment," and that court later

" 'extend[ed] [those] *substantive* protections of due process to all constitutionally unreasonable searches—state or federal' " [emphasis in original]); *Herrera* v. *Collins*, 506 U.S. 390, 435–36, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) ("This [c]ourt has held that the [d]ue [p]rocess [c]lause protects individuals against two types of government action. So-called substantive due process prevents the government from engaging in conduct that shocks the conscience . . . or interferes with rights implicit in the concept of ordered liberty . . . . When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. . . . This requirement has traditionally been referred to as procedural due process." [Citations omitted; internal quotation marks omitted.]); *Palko* v. *Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937) (equating rights that are "the very essence of a scheme of ordered liberty" with " 'principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' ").[25]

The *Casiano* watershed designation and its constitutional entailments cannot be ignored; nor can it be suggested with a straight face that the procedural right to an individualized hearing before the sentencing court is owed the most robust constitutional protection available when a juvenile offender is sentenced to life in prison without parole, but suddenly warrants no constitutional protection at all if the offender receives an identical sentence with the possibility of parole.

I therefore dissent.

[25] See T. Darden, "Constitutionally Different: A Child's Right to Substantive Due Process," 50 Loy. U. Chi. L.J. 211, 267–68 (2018) ("[a] permeating substantive due process right based on age status and its attendant disadvantages in achieving fundamental fairness at certain stages of the justice process seems aligned with fully interpreting the juvenile sentencing cases").

STATE OF CONNECTICUT *v.* TAUREN WILLIAMS-BEY
(SC 19954)

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

Syllabus

The defendant, who had been convicted, on a plea of guilty, of murder as an accessory, appealed to the Appellate Court from the judgment of the trial court dismissing his motion to correct an illegal sentence for lack of subject matter jurisdiction. The defendant, who had committed the crime of which he was convicted when he was sixteen years old, was sentenced to thirty-five years imprisonment without the possibility of parole. In his motion to correct, the defendant claimed, inter alia, that he was entitled to be resentenced because his original sentence had been imposed in violation of the Connecticut constitution insofar as the sentencing court did not consider his age and the hallmarks of adolescence as mitigating factors in imposing his sentence, and insofar as the subsequent enactment of legislation (P.A. 15-84, § 1), which retroactively afforded certain juvenile offenders, including the defendant, parole eligibility, did not remedy that violation. The Appellate Court rejected the defendant's claim and upheld his sentence, concluding that, although the trial court had jurisdiction over his claim, any potential violation was cured by his eligibility for parole under P.A. 15-84. Thereafter, while the defendant's petition for certification to appeal from the Appellate Court's judgment was pending, this court determined in *State* v. *Delgado* (323 Conn. 801) that, under the federal constitution, resentencing was not required if a juvenile offender became eligible for parole under P.A. 15-84 and, therefore, that a court lacks jurisdiction to decide a juvenile offender's motion to correct an illegal sentence that is based on lack of parole eligibility. In light of *Delgado*, this court declined to rule on the petition for certification to appeal and remanded the case to the Appellate Court. The Appellate Court thereafter upheld the dismissal of the defendant's motion to correct an illegal sentence, and the defendant, on the granting of certification, appealed to this court, claiming that, under the Connecticut constitution, he was entitled to resentencing even after he became eligible for parole under P.A. 15-84. *Held* that the resolution of the defendant's appeal was controlled by this court's decision in *State* v. *McCleese* (333 Conn. 378), in which the court concluded that the parole eligibility afforded to juvenile offenders by P.A. 15-84 is an adequate remedy for a sentence of life imprisonment, or its functional equivalent, without the possibility of parole imposed on a juvenile without consideration of the juvenile offender's age and the hallmarks of adolescence, and, because the defendant became eligible for parole upon the enactment of P.A. 15-84, the state constitution

did not require resentencing; accordingly, the Appellate Court's judgment was affirmed.

(*One justice dissenting*)

Argued October 15, 2018—officially released August 23, 2019*

Procedural History

Information charging the defendant with the crimes of murder as an accessory and conspiracy to commit murder, brought to the Superior Court in the judicial district of Hartford, where the defendant was presented to the court, *Clifford*, *J.*, on plea of guilty to the charge of murder as an accessory; thereafter, the state entered a nolle prosequi as to the charge of conspiracy to commit murder; judgment of guilty in accordance with the plea; subsequently, the court, *Alexander*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to the Appellate Court, *Lavine*, *Beach* and *Alvord*, *Js.*, which reversed the judgment only as to its form and remanded the case with direction to render judgment denying the motion to correct; thereafter, this court, sua sponte, ordered the Appellate Court to reconsider its decision that the trial court had jurisdiction over the motion to correct; subsequently, the Appellate Court, *Lavine*, *Alvord* and *Beach*, *Js.*, affirmed the trial court's dismissal of the defendant's motion to correct an illegal sentence, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Heather Clark, assigned counsel, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Vicki Melchiorre*, supervisory assistant state's attorney, for the appellee (state).

* August 23, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

George Jepsen, former attorney general, *Steven R. Strom*, assistant attorney general, and *Leland J. Moore* filed a brief for the Connecticut Board of Pardons and Paroles as amicus curiae.

S. Max Simmons and *Marsha L. Levick* filed a brief for the Juvenile Law Center as amicus curiae.

Michael S. Taylor and *James P. Sexton* filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

Opinion

D'AURIA, J. Under the federal constitution's prohibition on cruel and unusual punishments, a juvenile offender cannot serve a sentence of imprisonment for life, or its functional equivalent, without the possibility of parole, unless his age and the hallmarks of adolescence have been considered as mitigating factors. *Miller* v. *Alabama*, 567 U.S. 460, 476–77, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 60–61, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, U.S. , 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016); *State* v. *Riley*, 315 Conn. 637, 641, 110 A.3d 1205 (2015), cert. denied, U.S. , 136 S. Ct. 1361, 194 L. Ed. 2d 376 (2016). The defendant, Tauren Williams-Bey, is presently serving a sentence of thirty-five years imprisonment, and, pursuant to No. 15-84 of the 2015 Public Acts (P.A. 15-84), codified at General Statutes § 54-125a, has the possibility of parole after twenty-one years in prison. His original sentence of thirty-five years without parole was imposed without consideration of his age or the hallmarks of adolescence. The defendant does not claim that this sentence violates the federal constitution. Rather, he claims that it violates the Connecticut constitution and that he must be resentenced, even after P.A. 15-84 later made him parole eligible. On the basis of our decision in *State* v. *McCleese*, 333 Conn. 378, A.3d (2019), which we also release today, we conclude that the defendant is not entitled to resentencing.

The following facts and procedural history are relevant to the present appeal. The defendant is currently imprisoned for murder. He was sixteen years old when he and two friends shot and killed the victim. The defendant pleaded guilty to murder as an accessory, in violation of General Statutes (Rev. to 1997) § 53a-54a and General Statutes § 53a-8. The parties waived the presentence investigation report, and the record does not reveal that the court otherwise considered the defendant's age and the hallmarks of adolescence as mitigating factors at sentencing. In accordance with the plea agreement, the court imposed a sentence of thirty-five years imprisonment. At the time of sentencing, the crime of which the defendant was convicted made him ineligible for parole. See General Statutes (Rev. to 1997) § 54-125a (b) (1). If he serves the full term of imprisonment, the defendant will be fifty-two years old when he is released.

"Subsequently, decisions by the United States Supreme Court, decisions by this court, and enactments by our legislature resulted in changes to the sentencing scheme for juvenile offenders. . . . Specifically, the United States Supreme Court . . . held that the eighth amendment's prohibition on cruel and unusual punishments is violated when a juvenile offender serves a mandatory sentence of life imprisonment without the possibility of parole because it renders 'youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence' and 'poses too great a risk of disproportionate punishment.' *Miller* v. *Alabama*, supra, 567 U.S. 479. Thus, an offender's age and the hallmarks of adolescence must be considered as mitigating factors before a juvenile can serve this particular sentence.[1] This court has interpreted *Miller* to apply

[1] We refer to the offender's age and the hallmarks of adolescence as the *Miller* factors throughout this opinion. Specifically, a court must consider " 'immaturity, impetuosity, and failure to appreciate risks and consequences'; the offender's 'family and home environment' and the offender's inability to extricate himself from that environment; 'the circumstances of the homicide

not only to mandatory sentences for the literal life of the offender, but also to discretionary sentences and sentences that result in imprisonment for the 'functional equivalent' of an offender's life. *State* v. *Riley*, supra, 315 Conn. 642, 654; see also *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 72. We also have ruled that *Miller* applies not only prospectively, but retroactively, and also to challenges to sentences on collateral review. *Casiano* v. *Commissioner of Correction*, supra, 71.

"To comport with federal constitutional requirements, the legislature passed [P.A. 15-84].[2] In relevant part, the act retroactively provided parole eligibility to juvenile offenders sentenced to more than ten years in

offense, including the extent of [the offender's] participation in the conduct and the way familial and peer pressures may have affected him'; the offender's 'inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys'; and 'the possibility of rehabilitation . . . .' " *State* v. *Riley*, supra, 315 Conn. 658, quoting *Miller* v. *Alabama*, supra, 567 U.S. 477–78.

[2] Section 1 of P.A. 15-84 provides in relevant part: "(f) (1) . . . [A] person convicted of one or more crimes committed while such person was under eighteen years of age, who is incarcerated on or after October 1, 2015, and who received a definite sentence or total effective sentence of more than ten years for such crime or crimes prior to, on or after October 1, 2015, may be allowed to go at large on parole in the discretion of the panel of the Board of Pardons and Paroles for the institution in which such person is confined, provided (A) if such person is serving a sentence of fifty years or less, such person shall be eligible for parole after serving sixty per cent of the sentence or twelve years, whichever is greater, or (B) if such person is serving a sentence of more than fifty years, such person shall be eligible for parole after serving thirty years. . . .

"(2) The board shall apply the parole eligibility rules of this subsection only with respect to the sentence for a crime or crimes committed while a person was under eighteen years of age. . . .

"(3) Whenever a person becomes eligible for parole release pursuant to this subsection, the board shall hold a hearing to determine such person's suitability for parole release. . . .

"(5) After such hearing, the board shall articulate for the record its decision and the reasons for its decision. If the board determines that continued confinement is necessary, the board may reassess such person's suitability for a new parole hearing at a later date to be determined at the discretion of the board, but not earlier than two years after the date of its decision. . . ."

prison. See P.A. 15-84, § 1." (Footnotes in original.) *State* v. *McCleese*, supra, 333 Conn. 382–83. As a result, the defendant is no longer serving a sentence without parole—he will be parole eligible after serving twenty-one years, or when he will be thirty-eight years old.

Following these developments, the defendant filed a motion to correct an illegal sentence, asserting, among other claims, a *Miller* violation.[3] The trial court dismissed the motion for lack of jurisdiction, and the defendant appealed from that decision to the Appellate Court.

The Appellate Court rejected the defendant's claim and upheld his sentence. *State* v. *Williams-Bey*, 167

Section 2 of P.A. 15-84, codified as amended at General Statutes § 54-91g, provides in relevant part: "(a) If the case of a child . . . is transferred to the regular criminal docket of the Superior Court . . . and the child is convicted of a class A or B felony pursuant to such transfer, at the time of sentencing, the court shall:

"(1) Consider, in addition to any other information relevant to sentencing, the defendant's age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development; and

"(2) Consider, if the court proposes to sentence the child to a lengthy sentence under which it is likely that the child will die while incarcerated, how the scientific and psychological evidence described in subdivision (1) of this subsection counsels against such a sentence.

"(b) Notwithstanding the provisions of section 54-91a of the general statutes, no presentence investigation or report may be waived with respect to a child convicted of a class A or B felony. . . .

"(d) The Court Support Services Division of the Judicial Branch shall compile reference materials relating to adolescent psychological and brain development to assist courts in sentencing children pursuant to this section."

[3] "A *Miller* claim or *Miller* violation refers to the sentencing court's obligation to consider a juvenile's age and circumstances related to age at an individualized sentencing hearing as mitigating factors before imposing a sentence of life imprisonment [or its equivalent] without parole. See *Miller* v. *Alabama*, supra, 567 U.S. 478–79. A [claim or violation under *Graham* v. *Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)] refers to the sentencing court's obligation to provide a meaningful opportunity for parole to a juvenile who is sentenced to life imprisonment [or its equivalent, regardless of parole eligibility]." *State* v. *Delgado*, 323 Conn. 801, 806 n.5, 151 A.3d 345 (2016).

Conn. App. 744, 749, 144 A.3d 467 (2016) (*Williams-Bey I*). It held that the trial court had jurisdiction over the defendant's *Miller* claim but that his parole eligibility under P.A. 15-84, § 1, cured any potential violation. Id., 759, 767–69. The defendant thereafter petitioned this court for certification to appeal.

While the petition was pending, this court held that, under the federal constitution, resentencing was not required to cure a *Miller* violation if the offender became eligible for parole under P.A. 15-84, § 1; parole eligibility negated the violation. *State* v. *Delgado*, 323 Conn. 801, 810–12, 151 A.3d 345 (2016); see id., 811 ("As a result [of P.A. 15-84, § 1], the defendant's sentence no longer falls within the purview of *Miller*, *Riley* and *Casiano*, which require consideration of youth related mitigating factors only if the sentencing court imposes a sentence of life without parole. . . . *Miller* simply does not apply when a juvenile's sentence provides an opportunity for parole." [Citations omitted.]). Therefore, if a juvenile offender is parole eligible, a court lacks jurisdiction to hear a motion to correct an illegal sentence on the basis of an alleged violation of *Miller*. Id., 812.

In accordance with *Delgado*, this court declined to rule on the defendant's petition for certification to appeal at that time and remanded his case to the Appellate Court. The Appellate Court summarily affirmed the dismissal of the defendant's motion to correct an illegal sentence on the alternative ground decided in *Delgado*. *State* v. *Williams-Bey*, 173 Conn. App. 64, 164 A.3d 31 (2017) (*Williams-Bey II*). The defendant then filed a second petition for certification to appeal, this time from the Appellate Court's decision in *Williams-Bey II*.

We granted both of the defendant's petitions at that time, limited to the following state constitutional issues: "1. Under the Connecticut constitution, article first, §§ 8 and 9, are all juveniles entitled to a sentencing proceed-

ing at which the court expressly considers the youth related factors required by the United States constitution for cases involving juveniles who have been sentenced to life imprisonment without the possibility of release? See *Miller* v. *Alabama*, [supra, 567 U.S. 460]. 2. If the answer to the first question is in the affirmative and a sentencing court does not comply with the sentencing requirements under the Connecticut constitution, does parole eligibility under . . . § 54-125a (f) adequately remedy any state constitutional violation?" *State* v. *Williams-Bey*, 326 Conn. 920, 921, 169 A.3d 793 (2017).

Even if we assume, without deciding, that our answer to the first certified question in the defendant's appeal is in the affirmative,[4] and that the defendant was entitled

[4] The dissent also does not address the first certified question but, rather, argues that the defendant's sentence was unconstitutional because a mandatory minimum sentence conflicts with *Miller*'s requirement that juvenile defendants be provided with "individualized, fully discretionary sentencing." *State* v. *Taylor G.*, 315 Conn. 734, 776, 110 A.3d 338 (2015) (*Eveleigh*, *J.*, dissenting). In support of the dissent's argument, the dissent relies on Justice Eveleigh's dissenting opinion in *Taylor G.* In *Taylor G.*, the majority held that the defendant's fifteen year mandatory minimum sentence did not violate *Miller* because not only was the defendant's sentence less than life, or its equivalent, but also "the mandatory minimum requirements, while limiting the trial court's discretion to some degree, still left the court with broad discretion to fashion an appropriate sentence that accounted for the defendant's youth and immaturity when he committed the crimes." Id., 744. In his dissent, Justice Eveleigh disagreed and concluded that all mandatory minimum sentences imposed on any juvenile defendant violate *Miller* because they inhibit a sentencing judge's discretion and ability to consider youth as a mitigating factor. Id., 786–88 (*Eveleigh*, *J.*, dissenting). As a necessary prerequisite to this conclusion, Justice Eveleigh determined that *Miller* should extend to all juvenile defendants regardless of the sentence imposed. Id., 776 (*Eveleigh*, *J.*, dissenting).

It is unclear whether the dissent in this case is arguing that a mandatory minimum sentence violates the federal or state constitution. Either way, this issue is not before this court. The defendant has argued only that, under the state constitution, the rule in *Miller* should extend to all juvenile defendants, regardless of the sentence imposed. The defendant cited Justice Eveleigh's dissent in *Taylor G.* in support of his argument under *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992), that state precedent supports a broader interpretation of *Miller*, but he never has argued that

to have a court consider the *Miller* factors, our reasoning in *McCleese* compels us to answer the second question in the affirmative.[5] In *McCleese*, we decided, among other issues, "whether the parole eligibility afforded by P.A. 15-84 adequately remedies an unconstitutional sentence under the state constitution . . . ." *State* v. *McCleese*, supra, 333 Conn. 386. After analyzing the relevant factors enumerated in *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992), that are to be considered in construing the state constitution and applying the two part framework for adjudicating claims of cruel

his sentence violated *Miller*, under either the federal or state constitution, because it was the product of a mandatory minimum sentencing scheme. Just because the defendant relied on Justice Eveleigh's analysis in *Taylor G.* to support his argument that Connecticut precedent is more liberal than federal precedent concerning the sentencing of juvenile defendants does not mean that the defendant raised the claim that was at issue in *Taylor G.*

Additionally, whether the rule in *Miller* applies to all juvenile defendants is an issue separate and distinct from whether mandatory minimum sentencing violates *Miller*. Although concluding that *Miller* applies to all juvenile defendants is a prerequisite to concluding that all mandatory minimum sentences imposed on any juvenile defendant violate *Miller*, the first conclusion does not necessarily require the second conclusion. Thus, we disagree with the dissent that the constitutionality of mandatory minimum sentences is intertwined with the legal arguments raised by the defendant. The dissent is of course free to address any issue it would like to address. That does not mean that the parties have addressed it, the trial court or Appellate Court have decided it, or this court has certified it. Accordingly, we do not address or opine on this unraised issue relied on by the dissent, especially as doing so would require this court to reexamine recent precedent that the defendant has not challenged and the state has not had the opportunity to defend, thereby depriving this court of any guidance on this issue. E.g., *State* v. *Connor*, 321 Conn. 350, 362, 138 A.3d 265 (2016) ("appellate courts generally do not consider issues that were not raised by the parties"); see also *New England Estates, LLC* v. *Branford*, 294 Conn. 817, 836 n.20, 988 A.2d 229 (2010) (declining to overrule precedent when not argued by parties); *Sepega* v. *DeLaura*, 326 Conn. 788, 799 n.5, 167 A.3d 916 (2017) (requiring "special justification" to depart from stare decisis).

[5] For the same reasons that the majority in *McCleese* rejected the dissent's argument that parole eligibility under P.A. 15-84 is not a sufficient remedy for a *Miller* violation, we likewise reject the dissent's argument in the present case that resentencing is the only appropriate remedy for a *Miller* violation. See *State* v. *McCleese*, supra, 333 Conn. 432–33 (*Ecker*, *J.*, dissenting).

and unusual punishment, we stated that neither contemporary standards of decency nor our independent judgment compelled us to adopt a rule under the state constitution that would require resentencing to remedy a *Miller* violation. *State* v. *McCleese*, supra, 407–408. Instead, consistent with *Delgado* and the federal constitution, we concluded that "parole eligibility afforded by P.A. 15-84, § 1, is an adequate remedy for a *Miller* violation under the Connecticut constitution." Id., 409.

Because the defendant is now eligible for parole under P.A. 15-84, § 1, the state constitution does not require a resentencing.

The judgment of the Appellate Court is affirmed.

In this opinion PALMER, McDONALD, MULLINS and KAHN, Js., concurred.

ECKER, J., dissenting. I respectfully dissent. I would hold that the mandatory minimum sentence imposed on the defendant, Tauren Williams-Bey, in accordance with General Statutes § 53a-54a is unconstitutional as applied to a juvenile offender.[1] My reasons are substantially the same as those set forth at length in Justice Eveleigh's dissenting opinion in *State* v. *Taylor G.*, 315 Conn. 734, 796–97, 110 A.3d 338 (2015)[2] (expressing

[1] The defendant was sixteen years old when he committed the crimes that serve as the basis for his conviction.

[2] I disagree with the majority opinion that the applicability of the *Miller* rule to mandatory minimum sentences was not briefed by the defendant in a manner sufficient to allow us to reach the issue. In his principal brief, the defendant claimed that his sentence "violated the prohibition on cruel and unusual punishment" because the *Miller* rule applies to all juvenile offenders, regardless of the length of the sentence imposed. In support of his argument, the defendant quotes Justice Eveleigh's dissenting opinion at length, devoting two pages to a thorough discussion of the dissent and Justice Eveleigh's conclusion that "neither the crime nor its mandatory minimum punishment should be a factor in a sentencing court's ability to comply with the eighth amendment . . . and, therefore, a sentencing court possesses discretion to fashion a constitutionally permissible sentence, even if that sentence departs downward from a mandatory minimum sentence." *State* v. *Taylor G.*, supra, 315 Conn. 776. The constitutionality under federal law of mandatory mini-

view that mandatory minimum sentences cannot be applied to juvenile offenders under reasoning of *Miller* v. *Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 [2012]), and the decision of the Iowa Supreme Court in *State* v. *Lyle*, 854 N.W.2d 378, 380 (Iowa 2014) (relying on state constitution to hold that mandatory minimum sentences cannot be applied to juvenile offenders).[3] Therefore, I would reverse the defendant's conviction and remand this case to the Appellate Court.[4]

No useful purpose is served by restating at length what already has been said in Justice Eveleigh's dissenting opinion in *Taylor G.* In light of the fundamental principles animating *Miller* and our own decisions in *State* v. *Riley*, 315 Conn. 637, 110 A.3d 1205 (2015), cert. denied, U.S. , 136 S. Ct. 1361, 194 L. Ed. 2d 376 (2016), and *Casiano* v. *Commissioner of Correction*,

mum sentences as applied to juvenile offenders is intertwined with the legal arguments at issue in the present appeal and, in my view, is appropriate for appellate review. Cf. *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 635 n.7, 126 A.3d 558 (2015) (distinguishing between "claim[s]" and "argument[s]" and noting that appellate courts may review "legal arguments that . . . are subsumed within or intertwined with arguments related to the legal claim" [internal quotation marks omitted]).

[3] I recognize that the cited cases all involve direct appeals from judgments of conviction, whereas the present appeal is taken from the trial court's denial of a motion to correct an illegal sentence. I rely on the reasoning contained in these cases relating to the merits of the constitutional claim, i.e., whether the constitution is violated by the application of mandatory minimum sentences without any ability for the sentencing court to consider the hallmarks of youth in mitigation under *Miller*. That substantive analysis applies in the context of a postconviction appeal, in my view, for the reasons explained in my dissenting opinion in *State* v. *McCleese*, 333 Conn. 378, 429, A.3d (2019).

[4] I would remand this case to the Appellate Court with instruction to address the state's remaining claim that the defendant waived his right to the relief being sought because his sentence was imposed pursuant to a plea agreement. See, e.g., *State* v. *Coleman*, 241 Conn. 784, 792, 699 A.2d 91 (1997) (reversing judgment of Appellate Court and remanding for consideration of remaining claims). The waiver issue was fully briefed in the Appellate Court but was not decided due to that court's disposition of the appeal in favor of the state on the merits.

317 Conn. 52, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, U.S. , 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016), I am of the view that mandatory minimum sentences designed for adult offenders cannot constitutionally be applied to juvenile offenders tried as adults without providing an individualized sentencing proceeding in which the sentencing judge *must* consider the mitigating effects of youth and its associated features. "[C]hildren are constitutionally different from adults for sentencing purposes," and these biological and psychological differences strike at "[t]he heart" of the rationale underlying the "penological justifications" for sentencing. (Internal quotation marks omitted.) *Miller* v. *Alabama*, supra, 567 U.S. 471–72. These differences do not change depending on the length of the sentence imposed, and, accordingly, the attendant constitutional safeguards should not change either. We have deemed the "individualized sentencing prescribed by *Miller*" to be "central to an accurate determination that the sentence imposed is a proportionate one" and "implicit in the concept of ordered liberty . . . ." (Internal quotation marks omitted.) *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 69–70. Rightfully so.

For the reasons explained in my dissenting opinion in *State* v. *McCleese*, 333 Conn. 378, 429, A.3d (2019), I also believe that the availability of parole eligibility under § 1 of No. 15-84 of the 2015 Public Acts, codified at General Statutes § 54-125a, is not a substitute for a *Miller*-compliant sentencing hearing and that the defendant is entitled to retroactive relief in the form of a *Miller*-compliant resentencing hearing under these circumstances.

I therefore dissent.

TIMOTHY GRIFFIN *v.* COMMISSIONER OF CORRECTION (SC 20179)

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

Syllabus

The petitioner sought a writ of habeas corpus, claiming that the transfer of his criminal case, which involved crimes that he committed when he was fourteen years old, to the regular criminal docket from the docket for juvenile matters, and his subsequent sentence of forty years imprisonment with no eligibility for parole, violated the prohibition against cruel and unusual punishment as set forth in the due process provisions of the Connecticut constitution (article first, §§ 8 and 9). The petitioner, who had been convicted of felony murder and conspiracy to commit robbery in the first degree, claimed that contemporary standards of decency regarding acceptable punishments for children who engage in criminal conduct have evolved for purposes of his constitutional claim, relying on two recent modifications to the juvenile justice laws (P.A. 15-183 and P.A. 15-84) as evidence of this evolution. Public Act 15-183 raised the minimum age of a child whose case is subject to transfer from the docket for juvenile matters to the regular criminal docket from fourteen to fifteen years and further limited the types of felonies that are subject to such a transfer. After the passage of P.A. 15-84, all persons who are serving a sentence of more than ten years of imprisonment for a crime or crimes that were committed as a juvenile, including the petitioner, may be eligible for parole. In support of his habeas petition, the petitioner claimed that P.A. 15-183 applied retroactively to all persons currently serving an adult length sentence for a crime committed at fourteen years of age. The habeas court granted the respondent's motion for summary judgment and rendered judgment thereon, from which the petitioner, on the granting of certification, appealed, seeking to have this court extend to this case the rationale in *State* v. *Santiago* (318 Conn. 1), in which the court held that the legislature's prospective repeal of the death penalty demonstrated that contemporary standards of decency had evolved such that the imposition of the death penalty on inmates convicted of capital felonies committed prior to that prospective repeal violated the state constitution's prohibition against excessive and disproportionate punishment, and that the prospective repeal of the death penalty applied retroactively to all death sentences. *Held*:

1. The passage of P.A. 15-183 did not signal a change in society's evolving standards of decency, and, accordingly, the transfer of the petitioner's case from the docket for juvenile matters to the regular criminal docket for crimes he committed when he was fourteen years old comported

with such standards and did not violate the state constitution's prohibition against cruel and unusual punishment: this court declined to extend the rationale of *Santiago* to the present case in light of the different circumstances presented in those cases, differences in the historical development of public policies concerning the imposition of the death penalty and the transfer of juvenile cases, and the fact that the legislature's prospective repeal of the death penalty applied under all circumstances whereas P.A. 15-183 did continue to allow for the transfer of a fourteen year old's criminal case to the regular criminal docket under very narrow circumstances; moreover, this court declined the petitioner's invitation, in furtherance of his constitutional claim, to apply P.A. 15-183 retroactively to all persons currently serving an adult length sentence for a crime committed at fourteen years of age.

2. The petitioner could not prevail on his claim that his sentence violated the state constitution's prohibition against cruel and unusual punishment even after the provisions of P.A. 15-84 entitled him to eligibility for parole after serving 60 percent, or twenty-four years, of his original forty year sentence, this court having recently rejected similar claims challenging the length of a sentence imposed after the transfer of a juvenile's criminal case to the regular criminal docket in *State* v. *McCleese* (333 Conn. 378) and *State* v. *Williams-Bey* (333 Conn. 468), and, accordingly, the Connecticut constitution did not entitle the petitioner to be resentenced for his conviction: unlike inmates serving life sentences and functional life sentences with no possibility of parole, the petitioner now will be eligible for parole after serving twenty-four years, one year less than the mandatory minimum sentence for adults convicted of felony murder, providing him with a chance for reconciliation with society and hope for his future; moreover, it was not practicable to grant the petitioner's request to reverse his judgment of conviction, to vacate his sentence imposed twenty years ago and to order a new trial, as the petitioner, who is now approximately thirty-five years old, is unable to have access to the juvenile justice system and its associated rehabilitation programs because of his age, and the parole board would be the better venue for relief when the petitioner becomes eligible for parole, at which time the board will consider various factors, including his age and circumstances when he committed the crimes.

(*One justice concurring in part and dissenting in part*)

Argued January 17—officially released August 23, 2019*

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Sferrazza*, *J.*, denied the

* August 23, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

petitioner's motion for summary judgment, granted the respondent's motion for summary judgment and rendered judgment denying the petition, from which the petitioner, on the granting of certification, appealed. *Affirmed.*

John C. Drapp III, assigned counsel, for the appellant (petitioner).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Emily D. Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

KAHN, J. The issue presented in this appeal[1] is whether the transfer of a fourteen year old defendant's case to the regular criminal docket and his subsequent sentence of forty years imprisonment violate the prohibition against cruel and unusual punishment enshrined in the dual due process provisions of the constitution of Connecticut, article first, §§ 8 and 9. The petitioner, Timothy Griffin, appeals from the judgment of the habeas court rendered in favor of the respondent, the Commissioner of Correction. The petitioner argues that Connecticut's "standards of decency" regarding acceptable punishments for children who engage in criminal conduct have evolved. That evolution, the petitioner contends, has rendered both the transfer of a fourteen year old defendant's case to the regular criminal docket and the resultant sentencing as an adult unconstitutional, in violation of the state prohibition against cruel and unusual punishment.[2] The respondent claims that, because recent statutory modifications to the juvenile

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

[2] The petitioner asserts three claims that we deem to be inadequately briefed and, therefore, do not consider: an as-applied challenge, a substantive due process challenge, and a procedural due process challenge.

justice system do not reflect changes in contemporary standards of decency, the habeas court properly granted the respondent's motion for summary judgment. The respondent specifically cites to No. 15-183 of the 2015 Public Acts (P.A. 15-183), which, inter alia, raised to fifteen years the age of a child whose case is subject to transfer to the regular criminal docket from the docket for juvenile matters, and to No. 15-84 of the 2015 Public Acts (P.A. 15-84), which makes certain individuals eligible for parole. We agree that recent statutory changes to the juvenile justice system—which significantly limit, but do not entirely prohibit, the transfer of a fourteen year old defendant's case to the regular criminal docket—do not evidence a change in contemporary standards of decency for purposes of the constitutional claim raised by the petitioner in the present case. We also conclude that, because the petitioner is eligible for parole pursuant to P.A. 15-84, his forty year sentence complies with established constitutional safeguards. Therefore, we affirm the judgment of the habeas court.

The record reveals the following relevant facts and procedural history. In December, 1997, the then fourteen year old petitioner was arrested in connection with the murder of a grocery store owner during an armed robbery. The petitioner and an accomplice donned masks and entered the grocery store, where the petitioner shot and killed the store owner. The perpetrators then emptied the cash register and fled. Afterward, the petitioner "bragg[ed] about shooting the owner of the store . . . ." At the time of the crime, the petitioner had been removed from the normal school curriculum, placed on juvenile probation, and required to wear an electronic bracelet to monitor his location because, allegedly, he had assaulted a teacher. The petitioner's case was automatically transferred to the regular criminal docket pursuant to General Statutes (Rev. to 1997) § 46b-127 (a). In 1999, he entered open guilty pleas to

felony murder in violation of General Statutes (Rev. to 1997) § 53a-54c and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2). He received a total effective sentence of forty years imprisonment. At that time, the petitioner was not granted the possibility of eligibility for parole.

In the petitioner's first habeas action in 2007, the habeas court found that the petitioner failed to prove that his pleas had not been entered knowingly, intelligently and voluntarily but rendered judgment in his favor on his claim of ineffective assistance of counsel and restored his right to file for sentence review. In a per curiam decision, this court affirmed the judgment of the habeas court. *Griffin* v. *Commissioner of Correction*, 292 Conn. 591, 597, 973 A.2d 1271 (2009). Subsequently, upon the petitioner's application for review, the Sentence Review Division of the Superior Court found that the sentence imposed was "neither inappropriate [nor] disproportionate." *State* v. *Griffin*, Docket No. CR-97-135279, 2010 WL 1794692, *2 (Conn. Super. February 23, 2010).

After filing and then withdrawing a second habeas petition, the petitioner filed the petition for a writ of habeas corpus that is the subject of this appeal.[3] The

[3] The petitioner filed in the trial court a motion to correct an illegal sentence pursuant to Practice Book § 43-22 on the basis of the same claim that he has raised in the habeas petition at issue in this appeal. We have explained that, "before seeking to correct an illegal sentence in the habeas court, a defendant either must raise the issue on direct appeal or file a motion pursuant to § 43-22 with the trial court." *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 38, 779 A.2d 80 (2001). A petitioner's failure to raise the issue on direct appeal or in a motion to correct an illegal sentence could risk procedural default. See id., 39–40. The respondent, however, during a hearing on the petitioner's motion to correct an illegal sentence on May 24, 2017, advised the trial court that the habeas court should be the proper forum for the petitioner's claim. Consistent with this position, the respondent concedes that he "did not pursue a procedural default claim in [his] motion for summary judgment or when arguing against the petitioner's motion for summary judgment." Because the respondent expressly waived the special defense of procedural default, the ordinary rule requiring the petitioner first to seek relief through a motion to correct an illegal sentence does not apply in the present habeas action.

parties filed cross motions for summary judgment, and the habeas court granted the respondent's motion.[4] The habeas court then granted the petitioner's petition for certification to appeal in September, 2017. See General Statutes § 52-470 (g). This appeal followed.

This appeal presents issues of constitutional interpretation and statutory construction, which are matters of law subject to our plenary review. See, e.g., General Statutes § 1-2z; *Tannone* v. *Amica Mutual Ins. Co.*, 329 Conn. 665, 671, 189 A.3d 99 (2018); *Honulik* v. *Greenwich*, 293 Conn. 698, 710, 980 A.2d 880 (2009). Summary judgment shall be granted if, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Practice Book § 17-49; see also *Rodriguez* v. *Testa*, 296 Conn. 1, 6–7, 993 A.2d 955 (2010). The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact. See, e.g., *Rodriguez* v. *Testa*, supra, 6–7.

I

We first consider whether the passage of P.A. 15-183 establishes that contemporary standards of decency have evolved, such that it is unconstitutional to transfer the case of a fourteen year old defendant from the docket for juvenile matters to the regular criminal docket under any set of circumstances. In advancing this claim, the petitioner effectively asks this court to apply P.A. 15-183 retroactively to all persons currently serving an adult length sentence for a crime committed at fourteen years of age. We decline to do so.

In 2015, the legislature passed P.A. 15-183, which, among other things, as a general rule, raised the age of

[4] The petitioner acknowledges that his appeal from the habeas court's denial of his motion for summary judgment was not a final judgment for the purposes of appeal. The petitioner, therefore, concedes that the single issue in the present case is whether it was error for the habeas court to grant the respondent's motion for summary judgment.

a child whose case can be transferred from the docket for juvenile matters to the regular criminal docket from fourteen years to fifteen years. See General Statutes § 46b-127 (a). Shortly thereafter, this court concluded that P.A. 15-183 applied retroactively to pending cases. See *State* v. *Nathaniel S.*, 323 Conn. 290, 292–93, 146 A.3d 988 (2016). We explicitly stated, however, that P.A. 15-183 did not apply to cases that had reached final judgment, concluding that "we perceive no absurdity in the fact that retroactive application of the act will affect pending cases but not those that already have reached a final judgment, as this will be true of most retroactive amendments to procedural rules." Id., 300. That conclusion, of course, would apply in the context of a habeas petition, which collaterally attacks a final judgment.

At about the same time as the enactment of P.A. 15-183 and our conclusion in *Nathaniel S.*, we held, in a death penalty case, that a statute could apply retroactively—even to cases that had reached final judgment—if society's standards of decency had evolved so that a previously constitutionally valid criminal punishment now violated the state constitution's prohibition on cruel and unusual punishment. See *State* v. *Santiago*, 318 Conn. 1, 118–19, 139–40, 122 A.3d 1 (2015). In *Santiago*, the defendant was found guilty of capital felony for a murder committed in December, 2000, and was sentenced to death. Id., 10–11. During the appeals process, our legislature passed No. 12-5 of the 2012 Public Acts (P.A. 12-5), which prospectively banned the death penalty in all cases. See General Statutes §§ 53a-35a, 53a-45, 53a-46a, 53a-46b and 53a-54a; *State* v. *Santiago*, supra, 11–12. The defendant sought review of whether, "although his crimes were committed prior to the effective date of [P.A. 12-5], that legislation nevertheless represent[ed] a fundamental change in the contemporary standard[s] of decency in Connecticut . . . ren-

dering the death penalty now cruel and unusual punishment . . . .'' (Internal quotation marks omitted.) *State* v. *Santiago*, supra, 12. In light of the passage of P.A. 12-5, this court reexamined the constitutionality of the death penalty pursuant to the state constitution, focusing on the principle that, ''in determining whether a particular punishment is cruel and unusual in violation of [state] constitutional standards, we must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society.'' (Internal quotation marks omitted.) *State* v. *Santiago*, supra, 43, quoting *State* v. *Rizzo*, 303 Conn. 71, 187–88, 31 A.3d 1094 (2011).

We explained in *Santiago* that, to determine whether standards of decency are evolving, we rely on five objective criteria: (1) historical development of the punishment at issue; (2) legislative enactments; (3) the current practice of prosecutors and sentencing judges or juries; (4) the laws and practices of other jurisdictions; and (5) the opinions and recommendations of professional associations.[5] See *State* v. *Santiago*, supra, 318 Conn. 52; see also *State* v. *McCleese*, 333 Conn. 378, 407, A.3d (2019). On the basis of these criteria, this court concluded that the prospective repeal of the death penalty, coupled with the fact that only one person had been executed in this state since 1960, demonstrated that contemporary standards of decency had evolved such that the imposition of the death penalty on inmates convicted under the repealed death penalty statutory scheme violated the state constitution's prohibition

[5] We do not consider the current practice of prosecutors and sentencing judges as they are bound by the applicable statutes and do not have the discretion to deviate. Therefore, in the present case, they are not an indication of contemporary understandings of applicable sociological norms. In addition, the petitioner did not reference opinions and recommendations of professional associations that relate to the transfer of a fourteen year old child's case to the regular criminal docket; nor did our research discover any that addressed this specific issue.

against excessive and disproportionate punishment. See *State* v. *Santiago*, supra, 139–40. Therefore, we concluded, P.A. 12-5 applied retroactively, and all sentences of death are now reduced to life imprisonment with no possibility of release, even in those cases that had long since gone to final judgment.[6] Id.

The petitioner asks us to extend the rationale of *Santiago* to the circumstances of the present case, specifically, that we conclude that P.A. 15-183 indicates that standards of decency have evolved and that P.A. 15-183 applies retroactively to all persons currently serving an adult length sentence for a crime committed at fourteen years of age. We disagree that the rationale of *Santiago* extends to the petitioner's claims and emphasize that the circumstances presented in *Santiago* were extraordinary. First, as both this court and the United States Supreme Court separately have recognized, "[d]eath is different." *State* v. *Rizzo*, 266 Conn. 171, 226, 833 A.2d 363 (2003); see also *California* v. *Ramos*, 463 U.S. 992, 998, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983) (recognizing "the qualitative difference of death from all other punishments"). Second, in *Santiago*, this court was confronted with legislation that simultaneously banned *all* executions prospectively, yet preserved the sentences of death for those whose offenses had been committed prior to a particular date. By contrast, P.A. 15-183, codified as amended at General Statutes § 46b-127, merely establishes, *as a general rule*,

[6] We utilize the framework that this court applied in *Santiago* as the analysis of the evolving standards of decency, as it is the linchpin in the arguments of both the petitioner and the respondent. See *State* v. *Santiago*, supra, 318 Conn. 18 n.14. We observe that the parties also employed the factors we set forth in *State* v. *Geisler*, 222 Conn. 672, 610 A.2d 1225 (1992). If we assume that the *Geisler* framework is applicable to the ultimate issue of whether transferring the case of a fourteen year old defendant to the regular criminal docket and his subsequent sentencing to forty years imprisonment now constitute a violation of the Connecticut constitutional prohibition on cruel and unusual punishment, the *Geisler* factors are interwoven into the evolving standards of decency analysis. See *State* v. *Santiago*, supra, 18 n.14.

that transfers of cases involving fourteen year old defendants to the regular criminal docket are barred. Under other provisions of the current statutory scheme, however, there are circumstances, albeit rare, in which the case of a fourteen year old defendant may be transferred to the regular criminal docket. For the reasons set forth more fully herein, we conclude that transferring the case of a fourteen year old defendant to the regular criminal docket comports with our evolving standards of decency and, therefore, does not violate the constitution of Connecticut.

Our application of the five criteria set forth in *Santiago* to the petitioner's claim confirms our conclusion. Historically, public policies guiding the treatment of fourteen year old defendants have varied over time, particularly as they pertain to children who commit serious offenses like felony murder. Unlike the steady 400 year decline in the acceptability of imposing the death penalty, the treatment of criminal defendants who are children has fluctuated between policies favoring the transfer of the cases of such defendants to the regular criminal docket and those favoring retention in the juvenile justice system. See *State* v. *Santiago*, supra, 318 Conn. 53–54. See generally E. Cauffman et al., "How Developmental Science Influences Juvenile Justice Reform," 8 U.C. Irvine L. Rev. 21, 33–34 (2018) ("[R]ising juvenile crime in the latter half of the twentieth century . . . [gave] rise to the 'get tough' policy agendas across the country. . . . [A]s the fear of adolescent crime subsided in many states, the pendulum swung back in favor of judicial discretion. . . . Presently, juvenile transfer policies vary from state to state." [Footnotes omitted.]). Therefore, the current shift toward the retention of more fourteen year olds in the juvenile system as evidenced by P.A. 15-183, although relevant to the question of whether standards of decency have evolved, carries

less weight than did P.A. 12-5.[7] As the habeas court in the present case observed, "[t]he legislature is free to meander as long as its path stays with[in] constitutional bounds."

"[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (Internal quotation marks omitted.) *Atkins* v. *Virginia*, 536 U.S. 304, 312, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002); see also *State* v. *McCleese*, supra, 333 Conn. 407; *State* v. *Santiago*, supra, 318 Conn. 59–60. Our detailed review of P.A. 15-183 reveals that, although the changes effected by the act certainly reflect our law's ongoing movement toward a juvenile justice system that is adapted to the unique needs and vulnerabilities of children, it *allows* some transfers, albeit under very narrow circumstances, of the cases of fourteen year olds to the regular criminal docket. Accordingly, contrary to the petitioner's argument, P.A. 15-183 stops short of evidencing a societal rejection of *all* such transfers.

In enacting P.A. 15-183, which, in relevant part, amended General Statutes (Rev. to 2015) § 46b-127, the legislature changed the process by which a child's case may be transferred from the docket for juvenile matters to the regular criminal docket. Prior to the enactment of P.A. 15-183, the case of a child aged fourteen and older was automatically transferred to the regular criminal docket when the child was charged with a capital felony, a class A or B felony, or felony arson. See General Statutes (Rev. to 2015) § 46b-127 (a) (1). Following such transfer, at the state's attorney's request, the case of a child charged with a class B felony could be transferred back to the docket for juvenile matters, but there

[7] We consider it significant that, in *Santiago*, we observed that this state had executed only one person since 1960, and only after that person had "waived his right to further appeals and habeas remedies." *State* v. *Santiago*, supra, 318 Conn. 57, 58. By contrast, there is no indication that the transfer of children's cases to the regular criminal docket has ceased.

was no similar mechanism for those charged with a capital felony or class A felony. See General Statutes (Rev. to 2015) § 46b-127 (a) (2). A child at least fourteen years of age charged with class C, D, or E felonies could have his case transferred to the regular criminal docket following a hearing to consider probable cause and the best interests of the child and the public. See General Statutes (Rev. to 2015) § 46b-127 (b) (1). Children who were ages thirteen and under could not have their cases transferred to the regular criminal docket under any circumstances. See General Statutes (Rev. to 2015) § 46b-127.

The landscape for transfers changed with the passage of P.A. 15-183. The act now allowed the automatic transfer of cases to the regular criminal docket only for those cases in which the offense had been committed by a child who had attained fifteen years of age. See General Statutes § 46b-127 (a) (1). Children fifteen years old and older continue to have their cases automatically transferred to the regular criminal docket when they have been charged with a capital felony, a class A felony, or arson murder, but the legislature limited which class B felonies subject a child's case to automatic transfer. See General Statutes § 46b-127 (a) (1) and (3). For many class B felonies, children charged with those offenses are now afforded the same hearing process as those charged with class C, D, or E felonies: a child at least fifteen years of age charged with these offenses may have his case transferred to the regular criminal docket following a hearing to consider probable cause and the best interests of the child and the public. See General Statutes § 46b-127 (a) (3) and (b) (1). The effect is that, now, children aged fourteen years old and younger cannot have their cases transferred to the regular criminal docket *under § 46b-127*. See General Statutes § 46b-127.

Nevertheless, the legislature left in place another procedural mechanism by which a fourteen year old's case can be transferred to the regular criminal docket. Specifically, pursuant to General Statutes § 46b-133c, when a child who has been designated a serious juvenile repeat offender[8] is charged with a felony committed when he was at least fourteen years old and the child does not waive his right to a trial by jury, then the court must transfer the child's case to the regular criminal docket. General Statutes § 46b-133c (a), (b) and (f). The prosecutor initiates this procedure by requesting that the proceeding be designated a serious juvenile repeat offender prosecution and must show by clear and convincing evidence that such designation will serve the public safety. General Statutes § 46b-133c (b). After such designation, a serious juvenile repeat offender prosecution shall be transferred to the regular criminal docket only if the child does not waive his right to a trial by jury. General Statutes § 46b-133c (f). If the child does waive his right to trial by jury, then the proceeding is held before the court. General Statutes § 46b-133c (c). Significantly, the legislature amended General Statutes (Rev. to 2015) § 46b-133c in 2015; see P.A. 15-84; the same year that it amended General Statutes (Rev. to 2015) § 46b-127. See P.A. 15-183. The fact that the legis-

[8] A serious juvenile repeat offender is "any child charged with the commission of any felony if such child has previously been adjudicated as delinquent or otherwise adjudicated at any age for two violations of any provision of title 21a, 29, 53, or 53a that is designated as a felony." General Statutes § 46b-120 (10). A child may be adjudicated as delinquent if he has, while under sixteen years of age, "(i) violated any federal or state law, except section 53a-172, 53a-173, 53a-222, 53a-222a, 53a-223 or 53a-223a, or violated a municipal or local ordinance, except an ordinance regulating behavior of a child in a family with service needs, (ii) wilfully failed to appear in response to a summons under section 46b-133 or at any other court hearing in a delinquency proceeding of which the child had notice, (iii) violated any order of the Superior Court in a delinquency proceeding, except as provided in section 46b-148, or (iv) violated conditions of probation supervision or probation supervision with residential placement in a delinquency proceeding as ordered by the court." General Statutes § 46b-120 (2) (A).

lature looked at both provisions in the same year and did *not* raise the minimum age for transfer under § 46b-133c provides a strong indication that the legislature intended to preserve this narrow exception to the general rule that the case of a fourteen year old cannot be transferred to the general criminal docket.

It is clear that the legislature's views on the appropriate punishment and procedural protections for children in the criminal context are changing and that it now prohibits the transfer of most cases of fourteen year olds charged with felonies to the regular criminal docket, but the legislature stopped short of enacting a complete ban under any circumstances. That is, although a fourteen year old's case will be transferred only under very narrow circumstances and only when the statutory procedural safeguards have been satisfied, P.A. 15-183 *does allow*, within those limited circumstances, a fourteen year old's case to be transferred to the regular criminal docket. Because it left the procedure in place for a fourteen year old's case to be transferred to the regular criminal docket if he is adjudicated a serious juvenile repeat offender, P.A. 15-183 does not signal a change in society's evolving standards of decency rendering unconstitutional the transfer of a fourteen year old's case to the regular criminal docket under any circumstances.

Public Act 15-183 plainly is distinguished in this respect from P.A. 12-5, which prospectively repealed the death penalty under *any* circumstances, even for the most heinous crimes and for the most violent repeat offenders. See *State* v. *Santiago*, supra, 318 Conn. 60–61 ("For the first time in our state's history, the governor and a majority of both legislative chambers have now rejected state sanctioned killing and agreed that life imprisonment without the possibility of release is a just and adequate punishment for even the most horrific crimes. For any future crimes, the death penalty has been removed from the list of acceptable punishment

that may be imposed in accordance with the law."). Public Act 12-5 did not leave in place procedural mechanisms by which even a few defendants could be sentenced to death going forward. The *complete* prospective abolition of the death penalty signaled to this court that related standards of decency had quite clearly evolved, rendering the death penalty a violation of the prohibition on cruel and unusual punishment in the constitution of Connecticut in all cases, regardless of when the crime was committed. See id., 62. In contrast, P.A. 15-183 did not eliminate the transfer of all cases of fourteen year olds to the regular criminal docket.

Finally, "[a]lthough trends within Connecticut are the most direct and relevant indicators of contemporary standards of decency with respect to the state constitution, we also look to developments in our sister states . . . for additional input." Id., 77–78; see also *State* v. *McCleese*, supra, 333 Conn. 399; *State* v. *Rizzo*, supra, 303 Conn. 190–91. When we do so, it becomes apparent that transferring a fourteen year old defendant's case to the regular criminal docket is routinely done, especially in the instance of serious offenses. In fact, the petitioner cites to only one state, New Jersey, which has set fifteen years old as the minimum age at which a child may have his case transferred to the regular criminal docket, prohibiting the cases of fourteen year olds from ever being transferred to the regular criminal docket, even for crimes of murder. See N.J. Stat. Ann. § 2A:4A-26.1 (c) (West Cum. Supp. 2018). One additional state, New Mexico, has a minimum transfer age of fifteen, but fourteen year old defendants charged with murder and tried on the docket for juvenile matters, can receive adult length sentences. See N.M. Stat. Ann. §§ 32A-2-3 (J) (3) and 32A-2-20 (2010). The parties do not dispute that the remaining forty-eight states—including Connecticut—allow for a fourteen year old's case to be tried on the regular criminal docket in at

least some circumstances. Accordingly, Connecticut is in accord with the vast majority of states. By contrast, as we noted in *Santiago*, although the United States remains "an anomaly, the last remaining holdout in a historical period that has seen the Western nations embrace abolitionism as a human rights issue and a mark of civilization," nationally, "the number of states eschewing the death penalty continues to rise." (Internal quotation marks omitted.) *State* v. *Santiago*, supra, 318 Conn. 78.

II

Having concluded that the transfer of the petitioner's criminal case to the regular criminal docket for a crime he committed when he was fourteen years old does not violate the Connecticut constitution, the remaining issue we address is whether the petitioner's forty year sentence violates the prohibition against cruel and unusual punishment even after the provisions of P.A. 15-84 made the petitioner eligible for parole after serving 60 percent, i.e., twenty-four years, of his original sentence, which was imposed when he was fifteen years old. We have recently rejected similar claims challenging the length of a sentence imposed after a child was tried and convicted on the regular criminal docket. See generally *State* v. *McCleese*, supra, 333 Conn. 382, 409 (granting of parole eligibility pursuant to P.A. 15-84 was adequate remedy for seventeen year old sentenced to eighty-five years for murder and related offenses); *State* v. *Williams-Bey*, 333 Conn. 468, 471, 477, A.3d (2019) (granting of parole eligibility pursuant to P.A. 15-84 was adequate remedy for sixteen year old sentenced to thirty-five years imprisonment for murder as accessory); *State* v. *Delgado*, 323 Conn. 801, 802, 815, 151 A.3d 345 (2016) (defendant's entitlement to parole consideration pursuant to P.A. 15-84 was adequate remedy for sixteen year old sentenced to sixty-five years imprisonment). Because the petitioner is now eligible

for parole pursuant to the provisions of P.A. 15-84, the state constitution does not require a resentencing. See General Statutes § 54-125a (f) (1).

We acknowledge that a forty year sentence is a significant amount of time. Felony murder, however, is one of the most serious offenses that a person can commit in our society. When the petitioner was initially sentenced to forty years with no possibility of parole, the petitioner's scheduled release would have been in 2037, when he would have been in his mid-fifties. With the enactment of P.A. 15-84, the petitioner will now be eligible for parole in 2023, after serving twenty-four years, sixteen years earlier than originally anticipated and one year less than the mandatory minimum sentence for adults convicted of felony murder. See General Statutes §§ 53a-35a (2) and 53a-54c. At that time, the petitioner will be in his late thirties. Unlike defendants serving life sentences and functional life sentences with no possibility of parole, the petitioner has a "chance for fulfillment outside prison walls," a "chance for reconciliation with society," and hope for his future after serving his sentence. *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 79, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, U.S. , 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016); cf. id. (life sentence can include sentence that is functional equivalent of life by leaving juvenile defendant "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope" [internal quotation marks omitted]).

Finally, we observe that the petitioner requests that his judgment of conviction be reversed, that his sentence that was imposed twenty years ago be vacated, and that a new trial be ordered in compliance with § 46b-127. This requested relief is not practicable. The petitioner seeks to have access to the juvenile justice system and its associated rehabilitation programs, but the petitioner, who is now approximately thirty-five years old, is unable to participate in these programs

because of his age. As we recently observed in *McCleese*, the inquiry of whether a child was incorrigible at the time of sentencing is difficult to assess after the passage of time. "[E]ven in cases in which only a few years have passed, [i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." (Internal quotation marks omitted.) *State* v. *McCleese*, supra, 333 Conn. 403; see also *Graham* v. *Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). "The parole board, under P.A. 15-84, § 1 (f), on the other hand, bases its decisions on more recent evidence and more ascertainable outcomes . . . [and] relies more on evidence of actual rehabilitation and focuses more on the offender's ability to succeed outside of prison at the most relevant moment—just before he will, potentially, be released." *State* v. *McCleese*, supra, 403. At this point, once the petitioner becomes eligible for parole, the parole board is the better venue for relief. At the appropriate time, the parole board will evaluate the petitioner for parole release by taking into account various statutory factors, including "the age and circumstances of [the petitioner] as of the date of the commission of the crime or crimes, whether [the petitioner] has demonstrated remorse and increased maturity since the date of the commission of the crime or crimes . . . lack of education or obstacles that [the petitioner] may have faced as a child or youth in the adult correctional system, the opportunities for rehabilitation in the adult correctional system and the overall degree of [the petitioner's] rehabilitation considering the nature and circumstances of the crime or crimes."[9] General Statutes § 54-125a (f) (4) (C).

[9] As we observed in *McCleese*, the parole board "does not overlook the value of" the offender's age and hallmarks of adolescence in determining "whether he has demonstrated substantial rehabilitation," and "should, *for culpability purposes*, consider [his] age and circumstances as of the date of the commission of the crime." (Emphasis in original.) *State* v. *McCleese*, supra, 333 Conn. 403 and 404 n.12.

For the reasons we have stated, the transfer of the petitioner's case to the regular criminal docket and his subsequent sentencing do not violate the prohibition against cruel and unusual punishment enshrined in the Connecticut constitution.

The judgment is affirmed.

In this opinion ROBINSON, C. J., and PALMER, McDONALD, D'AURIA and MULLINS, Js., concurred.

ECKER, J., concurring in part and dissenting in part. In 1999, the petitioner, Timothy Griffin, was sentenced to a total effective term of forty years of imprisonment, without the possibility of parole, for crimes he committed as a fourteen year old child. I agree with the majority that the petitioner's transfer from the juvenile court to the regular criminal docket does not violate article first, §§ 8 and 9, of the Connecticut constitution and, therefore, concur in the result reached in part I of the majority opinion. For the reasons explained in my dissenting opinions in *State* v. *McCleese*, 333 Conn. 378, 429, A.3d (2019) (*Ecker*, *J.*, dissenting), and *State* v. *Williams-Bey*, 333 Conn. 468, 477, A.3d (2019) (*Ecker*, *J.*, dissenting), however, I disagree with the majority that the indisputable violation of the petitioner's constitutional right to have the mitigating, hallmark features of youth considered at the time of his sentencing is cured by the parole eligibility conferred by § 1 of No. 15-84 of the 2015 Public Acts (P.A. 15-84), codified at General Statutes § 54-125a. Accordingly, I respectfully dissent from part II of the majority opinion.

In *Miller* v. *Alabama*, 567 U.S. 460, 471, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the United States Supreme Court held that "children are constitutionally different from adults for purposes of sentencing." This conclusion "rested not only on common sense—on what 'any parent knows'—but on science and social science" studies confirming that children are substan-

tially less able than adults to control their impulses, exercise self-control, resist peer pressure, consider alternative courses of conduct, and appreciate the long-term consequences of their actions. Id., 471; see id., 472 and n.5. These "transient" characteristics "both [lessen] a child's moral culpability and [enhance] the prospect that, as the years go by and neurological development occurs, [the juvenile offender's] deficiencies will be reformed." (Internal quotation marks omitted.) Id., 472. As a result, "the penological justifications for imposing the harshest sentences on juvenile offenders" is diminished even when those offenders "commit terrible crimes." Id. The court in *Miller* therefore held that the sentencer must "consider the mitigating qualities of youth"; (internal quotation marks omitted) id., 476; regardless of the severity of the crime. See id., 473 (clarifying that "none of what [the court] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific").

The constitutional requirement of a *Miller*-compliant sentencing hearing is both substantive; see *Montgomery* v. *Louisiana*, U.S. , 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016); and procedural. See *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 69–71, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, U.S. , 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016). Indeed, in *Casiano*, this court held, as a matter of state law, that *Miller* established a "watershed [rule] of criminal procedure . . . implicit in the concept of ordered liberty . . . meaning that it implicat[es] the fundamental fairness and accuracy of [a] criminal proceeding." (Citation omitted; internal quotation marks omitted.) Id., 63. We explained that the new sentencing procedure established in *Miller* "is central to an accurate determination that the sentence imposed [on a juvenile offender] is a proportionate one." Id., 69.

The record in the present case reflects that, when the trial court imposed a forty year sentence on the

petitioner in 1999, it entirely failed to consider the mitigating factors of the petitioner's youth, "and all that accompanies it," as required by *Miller* v. *Alabama*, supra, 567 U.S. 479. Therefore, the petitioner's sentence was imposed in violation of his right to be free from cruel and unusual punishment under the eighth amendment to the United States constitution.[1]

For the reasons explained in detail in my dissenting opinion in *State* v. *McCleese*, supra, 333 Conn. 429 (*Ecker, J.*, dissenting), I believe that the parole eligibility conferred by § 1 of P.A. 15-84 is both too little and too late to remedy the violation of the petitioner's constitutional rights. In my view, the petitioner is entitled to a new sentencing proceeding at which the mitigating, hallmark features of youth existing at the time of his commission of the offenses properly are considered in fashioning a proportionate sentence, i.e., a sentence that is "graduated and proportioned to both the offender and the offense[s]." (Internal quotation marks omitted.) *Miller* v. *Alabama*, supra, 567 U.S. 469.

The majority refers to the practical difficulty in assessing the mitigating factors of youth and resentencing the petitioner due to the passage of time. No doubt these difficulties may arise at resentencing, to a greater or lesser degree, depending on the circumstances. I cannot agree, however, that this possibility relieves us of the obligation to provide a meaningful remedy for the constitutional violation that occurred at sentencing.

[1] The majority concludes that the petitioner's substantive due process argument is inadequately briefed. See footnote 2 of the majority opinion. I reluctantly agree, although the petitioner's reference in his appellate brief to substantive due process rights that are "implicit in the concept of ordered liberty" is highly suggestive of our conclusion in *Casiano* that *Miller* establishes a watershed rule of criminal procedure—meaning precisely that the right is "implicit in the concept of ordered liberty . . . ." (Internal quotation marks omitted.) *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 63; see also *State* v. *McCleese*, supra, 333 Conn. 466–67 (*Ecker, J.*, dissenting) (pointing out due process implications of watershed designation).

"Constitutional violations implicating the courts must be susceptible of a judicial remedy." *Pamela B.* v. *Ment*, 244 Conn. 296, 313, 709 A.2d 1089 (1998). "Once a constitutional violation is found," a court is required to fashion a "remedy to fit the nature and extent of the constitutional violation." (Internal quotation marks omitted.) *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420, 97 S. Ct. 2766, 53 L. Ed. 2d 851 (1977). Even if resentencing the petitioner on remand presents a "difficult task," it "is what the [c]onstitution and our cases call for, and that is what must be done in this case." Id.; see also *State* v. *Lyle*, 854 N.W.2d 378, 403 (Iowa 2014) (Resentencing juvenile offenders "will likely impose administrative and other burdens," but those are "burdens our legal system is required to assume. Individual rights are not just recognized when convenient."). The Supreme Court of Iowa made the point well: "Even if the resentencing does not alter the sentence for most juveniles, or any juvenile, the action taken by our [trial court] judges in each case will honor the decency and humanity embedded within [the state constitution] and, in turn, within every [citizen of the state]. The youth of this state will be better served when judges have been permitted to carefully consider all of the circumstances of each case to craft an appropriate sentence and give each juvenile the individual sentencing attention they deserve . . . . The [s]tate will be better served as well." *State* v. *Lyle*, supra, 403.

I therefore concur in the result reached in part I of the majority opinion and dissent from part II of the majority opinion.

ORDERS

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WACHOVIA MORTGAGE, FSB *v.* PAWEL TOCZEK ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 189 Conn. App. 812 (AC 42225), is denied.

David M. Bizar, in support of the petition.

Decided October 2, 2019

STATE OF CONNECTICUT *v.* MATTHEW M. PUGH

The defendant's petition for certification to appeal from the Appellate Court, 190 Conn. App. 794 (AC 40402), is denied.

James B. Streeto, senior assistant public defender, and *Shanna P. Hugle*, in support of the petition.

Sarah Hanna, assistant state's attorney, in opposition.

Decided October 2, 2019

RICHARD M. PATROWICZ ET AL. *v.* BARRY PELOQUIN

The defendant's petition for certification to appeal from the Appellate Court 190 Conn. App. 124 (AC 40662), is denied.

ROBINSON, C. J., did not participate in the consideration of or decision on this petition.

Barry Peloquin, self-represented, in support of the petition.

Ernest J. Cotnoir, in opposition.

Decided October 2, 2019

STATE OF CONNECTICUT *v.* ELIZABETH K. TURNER

The defendant's petition for certification to appeal from the Appellate Court, 190 Conn. App. 693 (AC 41179), is granted, limited to the following issue:

"Did the Appellate Court properly uphold the defendant's conviction of robbery and felony murder based on a legally invalid but factually supported theory for the conviction?"

Mark Rademacher, assistant public defender, in support of the petition.

Ronald G. Weller, senior assistant state's attorney, in opposition.

Decided October 2, 2019

VICTOR DEMARIA *v.* CITY OF BRIDGEPORT

The plaintiff's petition for certification to appeal from the Appellate Court, 190 Conn. App. 449 (AC 41234), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the plaintiff's Veterans Administration hospital records improperly were admitted into evidence pursuant to General Statutes § 52-174 (b)?"

Brenden P. Leydon, in support of the petition.

Eroll V. Skyers, in opposition.

Decided October 2, 2019

U.S. BANK, NATIONAL ASSOCIATION, TRUSTEE *v.* CHRISTOPHER M. FITZPATRICK ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 190 Conn. App. 773 (AC 41513), is denied.

Ryan P. Driscoll, in support of the petition.

Jeffrey M. Knickerbocker, in opposition.

Decided October 2, 2019

JOHN S. KAMINSKI *v.* DAVID POIROT

The plaintiff's petition for certification to appeal from the Appellate Court, 190 Conn. App. 214 (AC 41586), is denied.

John S. Kaminski, self-represented, in support of the petition.

Decided October 2, 2019

FARMINGTON-GIRARD, LLC *v.* PLANNING AND ZONING COMMISSION OF THE CITY OF HARTFORD

THE PAMELA CORPORATION ET AL. *v.* PLANNING AND ZONING COMMISSION OF THE CITY OF HARTFORD

The petition by the plaintiff Farmington-Girard, LLC, for certification to appeal from the Appellate Court, 190 Conn. App. 743 (AC 41601), is granted, limited to the following issue:

"Did the Appellate Court properly hold that the plaintiff failed to exhaust its administrative remedies when it did not appeal an unfavorable 'requirement or decision' of the zoning administrator to the Zoning Board of Appeals concerning the plaintiff's application for a special permit?"

PALMER and ECKER, Js., did not participate in the consideration of or decision on this petition.

David F. Sherwood, in support of the petition.

Daniel J. Krisch and *Matthew J. Willis*, in opposition.

Decided October 2, 2019

STATE OF CONNECTICUT *v.* EMMIT SCOTT

The defendant's petition for certification to appeal from the Appellate Court, 191 Conn. App. 315 (AC 38035), is denied.

MULLINS, J., did not participate in the consideration of or decision on this petition.

Pamela S. Nagy, assistant public defender, in support of the petition.

Laurie N. Feldman, special deputy assistant state's attorney, in opposition.

Decided October 2, 2019

STATE OF CONNECTICUT *v.* PATRICIA DANIELS

The state's petition for certification to appeal from the Appellate Court, 191 Conn. App. 33 (AC 40321), is granted, limited to the following issue:

"Did the Appellate Court improperly order a new trial rather than reinstate the defendant's conviction of intentional manslaughter in the first degree, which was vacated for sentencing purposes under *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013)?"

Denise B. Smoker, senior assistant state's attorney, in support of the petition.

Laila M. G. Haswell, senior assistant public defender, in opposition.

Decided October 2, 2019

STATE OF CONNECTICUT *v.* PATRICIA DANIELS

The defendant's petition for certification to appeal from the Appellate Court, 191 Conn. App. 33 (AC 40321), is dismissed.

Laila M. G. Haswell, senior assistant public defender, in support of the petition.

Denise B. Smoker, senior assistant state's attorney, in opposition.

Decided October 2, 2019

JEAN-PIERRE BOLAT *v.* YUMI S. BOLAT

The plaintiff's petition for certification to appeal from the Appellate Court, 191 Conn. App. 293 (AC 40767), is denied.

MULLINS, J., did not participate in the consideration of or decision on this petition.

Steven R. Dembo and *Caitlin E. Kozloski*, in support of the petition.

Decided October 2, 2019

TROY HARRIS *v.* COMMISSIONER OF CORRECTION

The petitioner Troy Harris' petition for certification to appeal from the Appellate Court, 191 Conn. App. 238 (AC 41036), is denied.

McDONALD, J., did not participate in the consideration of or decision on this petition.

Deren Manasevit, assigned counsel, in support of the petition.

Laurie N. Feldman, special deputy assistant state's attorney, in opposition.

Decided October 2, 2019

ROBERT CLASBY ET AL. *v.* EDWARD ZIMMERMAN ET AL.

The petition by the defendant Bradford Estates, LLC, for certification to appeal from the Appellate Court, 191 Conn. App. 143 (AC 41463), is denied.

Lawrence F. Reilly and *James Alissi*, in support of the petition.

Thomas B. Noonan, in opposition.

Decided October 2, 2019

SCARLETT LEWIS, ADMINISTRATRIX (ESTATE OF JESSE LEWIS), ET AL. *v.* TOWN OF NEWTOWN ET AL.

The named plaintiff's petition for certification to appeal from the Appellate Court, 191 Conn. App. 213 (AC 41697), is denied.

McDONALD, J., did not participate in the consideration of or decision on this petition.

Devin W. Janosov, in support of the petition.

Charles A. Deluca and *John W. Cannavino*, in opposition.

Decided October 2, 2019

THOMAS MCGINTY *v.* STAMFORD POLICE DEPARTMENT ET AL.

The defendants' petition for certification to appeal from the Appellate Court, 191 Conn. App. 163 (AC 41943), is denied.

ROBINSON, C. J., did not participate in the consideration of or decision on this petition.

Scott Wilson Williams, in support of the petition.

Decided October 2, 2019

NONHUMAN RIGHTS PROJECT, INC. *v.* R.W. COMMERFORD AND SONS, INC., ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 192 Conn. App. 36 (AC 41464), is denied.

Barbara M. Schellenberg and *Steven M. Wise*, pro hac vice, in support of the petition.

Decided October 2, 2019

FEDERAL NATIONAL MORTGAGE ASSOCIATION *v.* RICHARD FARINA ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 42627) is denied.

Richard Farina, self-represented, in support of the petition.

Adam L. Avallone, in opposition.

Decided October 2, 2019

CHRISTIANA TRUST *v.* HEATHER BLISS ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 42628) is denied.

John R. Hall, in support of the petition.

Jeffrey M. Knickerbocker, in opposition.

Decided October 2, 2019

PETER RICCARDO ET AL. *v.* NICOLE COULOUTE ET AL.

The petition by the defendant April Couloute for certification to appeal from the Appellate Court (AC 42664) is denied.

April Couloute, self-represented, in support of the petition.

Robert J. Schluger, in opposition.

Decided October 2, 2019

JOSEPH HALLADAY *v.* COMMISSIONER OF CORRECTION

The petitioner Joseph Halladay's petition for certification to appeal from the Appellate Court (AC 42702) is granted, limited to the following issues:

"1. Did the Appellate Court properly dismiss the petitioner's appeal for lack of a final judgment?

"2. If the answer to the first question is 'no,' did the trial court properly reject the petitioner's claim of privilege in his attorney's case file?"

Vishal K. Garg, assigned counsel, in support of the petition.

Bruce R. Lockwood, supervisory assistant state's attorney, in opposition.

Decided October 2, 2019

BANK OF AMERICA, N.A. v. ALBERT CUSEO III ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 42930) is denied.

ECKER, J., did not participate in the consideration of or decision on this petition.

Albert Cuseo III, self-represented, in support of the petition.

Jeffrey M. Knickerbocker, in opposition.

Decided October 2, 2019

ANNICK LOWRY *v.* JACQUELINE MAYERS

The defendant's petition for certification to appeal from the Appellate Court (AC 43083) is denied.

Jacqueline Mayers, self-represented, in support of the petition.

Annick Lowry, self-represented, in opposition.

Decided October 2, 2019

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CONNECTICUT APPELLATE REPORTS

Vol. 193

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

DORRANCE T. KELLY *v.* MARSHALL D. KURTZ ET AL.

(AC 41366)
(AC 41365)

Keller, Moll and Devlin, Js.

Syllabus

The plaintiff sought to recover damages from the defendants for, inter alia, breach of contract relating to the buyout of the plaintiff's oral surgery practice by the defendant K. In connection therewith, the parties executed three documents, including a purchase and sale agreement, an operating agreement and a supplementary agreement. Pursuant to those agreements, K paid the plaintiff two installments and subsequently became the manager of the practice. Pursuant to the supplementary agreement, the plaintiff could work a part-time schedule of his choosing and retire at the time of his choosing, provided that he retired by the age of eighty. The relationship between the plaintiff and K became strained, and K hired a new associate without the consent of the plaintiff and told the plaintiff he wanted him to retire in six weeks. Approximately one month after K paid the final installment due under the purchase and sale agreement, he had the locks on the doors of the practice changed. The plaintiff, believing he had been terminated, began seeing patients in other towns. The defendants ordered a street sign for the practice that included the plaintiff's name and kept the plaintiff's name on the practice's website and referral cards for approximately six months after the plaintiff left the practice. The plaintiff filed a nineteen count revised complaint in which he alleged claims for, inter alia, breach of contract pertaining to all three agreements, breach of the implied covenant of good faith and fair dealing relating to all three agreements,

invasion of privacy, tortious interference with business expectancies, violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.), and unjust enrichment. The defendants filed an eleven count counterclaim, alleging, inter alia, that the plaintiff had breached the operating agreement and the lease agreement between the plaintiff and the practice. After the jury returned a verdict in favor of the plaintiff on nine of his ten claims against the defendants and found in favor of the defendants on the remaining counts of the counterclaim, the defendants filed a motion to set aside the verdict and to dismiss the plaintiff's claims of breach of the operating agreement and breach of the implied covenant of good faith and fair dealing in that agreement. The trial court denied in part and granted in part the defendants' motion to set aside, granted their motion to dismiss and rendered judgment in favor of the plaintiff. On the separate appeals to this court by the plaintiff and the defendants, *held:*

1. The trial court did not abuse its discretion in denying the defendants' motion to set aside the jury's verdict on the counts alleging breach of the supplementary agreement and breach of the implied covenant of good faith and fair dealing:

   a. The defendants' claim that the evidence was insufficient to support the jury's finding of a breach of the supplementary agreement because the evidence was insufficient to prove that the plaintiff was terminated or that he was prevented from working a schedule of his choosing was unavailing: the trial court, in rejecting the defendants' claim, determined that the jury reasonably could have found on the basis of the evidence presented that the defendants terminated the plaintiff or prevented him from working a schedule of his choosing, and that notwithstanding the lack of a formal, express statement of termination, the jury reasonably could have found that certain of the defendants' conduct constituted a breach of their obligations to continue to employ the plaintiff and prevented him from receiving the benefits he was entitled to under the agreement; moreover, the court properly declined the defendants' invitation to revisit the evidence at trial and to substitute its judgment for that of the jury, and there was ample evidence introduced at trial on which the jury could have based a finding that the plaintiff was denied the right to work a schedule of his choosing.

   b. The defendants could not prevail on their claim that the verdict was inconsistent because the jury awarded $2,000,000 for breach of the supplementary agreement and $150,000 for breach of the implied covenant of good faith and fair dealing in that agreement, when both claims were based on identical evidence; the trial court found that even though the plaintiff based both causes of action on similar factual allegations, the plaintiff pleaded two separate causes of action and could recover two different jury awards, and, thus, that the jury could have found, as a matter of law, that the plaintiff suffered two separate legal harms from the same facts, as the jury's finding of breach of contract did not require a finding of any improper motive by the defendants and did not

necessarily include damages arising from ill intent, and, therefore, the court properly fulfilled its duty to harmonize the jury's verdict.

2. The trial court did not abuse its discretion in setting aside the jury's verdict on the plaintiff's claim that the defendants invaded his privacy by misappropriating his name after he was terminated; even if the defendants' use of the plaintiff's name was wrongful, the plaintiff failed to prove that he suffered any damages as a result of the defendants' use of his name, and the plaintiff presented no evidence of the commercial benefit to the defendants from the use of his name.
3. The trial court did not abuse its discretion in setting aside the jury's verdict and award of damages on the plaintiff's claim of tortious interference with his business expectancies; the plaintiff failed to prove that he suffered an actual loss as a result of the defendants' alleged interference with his business expectancies, and because the plaintiff already had recovered for losses he sustained as a result of his wrongful termination, the trial court properly ensured that he did not recover twice for the same loss.
4. The trial court did not abuse its discretion in setting aside the jury's verdict on the plaintiff's CUTPA claim, the plaintiff having failed to prove that he suffered any ascertainable loss as a result of the alleged CUTPA violations.
5. The trial court properly set aside the jury's verdict on the plaintiff's claim of unjust enrichment; the plaintiff had already recovered for wrongful termination under his claim that the defendants breached the supplementary agreement and, therefore, could not recover again under an unjust enrichment theory.
6. The trial court properly dismissed the plaintiff's claims of breach of the operating agreement and breach of the implied covenant of good faith and fair dealing in that agreement, as the plaintiff lacked standing to bring those claims; the loss that the plaintiff alleged was derivate of a loss to the medical practice, and he failed to prove that he was specifically and injuriously affected by K's failure to secure his approval of the hiring of the new associate.

Argued May 23—officially released October 15, 2019

Procedural History

Action for, inter alia, breach of contract relating to the sale of the plaintiff's oral surgery practice to the named defendant, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the defendants filed a counterclaim; subsequently, the plaintiff withdrew four counts of the complaint and the defendants withdrew counts one through seven of their counterclaim; thereafter, the matter was tried to the jury before *Truglia*, *J.*; verdict in part for the plaintiff

on the complaint and for the defendants on their counterclaim; subsequently, the trial court granted the defendants' motion to dismiss the plaintiff's claims of breach of the operating agreement and breach of the implied covenant of good faith and fair dealing in the operating agreement, and granted in part the defendants' motion to set aside the verdict for the plaintiff and rendered judgment on the complaint thereon, from which the plaintiff and the defendants filed separate appeals with this court, which consolidated the appeals. *Affirmed.*

Dana M. Hrelic, with whom were *Wesley W. Horton* and, on the brief, *Robert Flynn*, for the appellants-appellees (defendants).

Kara A. Lynch, pro hac vice, with whom were *Nathan J. Buchock* and, on the brief, *Brian E. Spears*, for the appellee-appellant (plaintiff).

Opinion

DEVLIN, J. In this case arising from the buyout of an oral surgery practice, the plaintiff, Dorrance T. Kelly, DDS, and the defendants, Marshall D. Kurtz, DMD, Marshall D. Kurtz, DMD, PC, and Danbury Oral and Maxillofacial Surgery Associates, LLC (DOMSA), appeal from the judgment of the trial court rendered, following a jury trial, in favor of the plaintiff, in the amount of $2,150,000. To establish the terms of the buyout, the parties executed three documents: a purchase and sale agreement, an operating agreement, and a supplementary agreement.[1] On appeal, the defendants claim, in AC 41366, that the trial court erred in denying their motion to set aside the jury's verdict on the plaintiff's claims of breach of the supplementary agreement and breach of the implied covenant of good faith and fair dealing in the supplementary agreement on the grounds

[1] The complete titles and the terms of these documents will be set forth herein.

that (1) the evidence presented at trial was insufficient to sustain the jury's finding of breach of the supplementary agreement, and (2) the jury's awards of damages on the plaintiff's claims of breach of the supplementary agreement and breach of the implied covenant of good faith and fair dealing in the supplementary agreement were inconsistent. The plaintiff claims, in AC 41365, that the trial court erred in (1) granting the defendants' motion to set aside the jury's verdict on his claims of invasion of privacy by misappropriation of his name, tortious interference with his business expectancies, violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statues § 42-110a et seq., and unjust enrichment; and (2) dismissing his claim of breach of the operating agreement and breach of the implied covenant of good faith and fair dealing in the operating agreement on the ground that he lacked standing to bring those claims. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our disposition of these appeals. The plaintiff and Kurtz are oral surgeons, who began practicing together in 2004. From May, 2004 to July, 2008, Kurtz worked as a salaried employee for the plaintiff, who had been practicing since the early 1970s and had built a successful practice. On or about July 1, 2006, Kurtz entered into a "Purchase and Sale Agreement of Personal Goodwill of Dorrance T. Kelly, DDS and Assets of Dorrance T. Kelly, DDS, Oral Surgery, P.C." The purchase and sale agreement provided that the plaintiff would sell his practice to Kurtz for $1,600,000, to be paid to the plaintiff in two equal installments; the first installment to be paid on July 17, 2006, and the second on June 30, 2009. The agreement further provided that the existing practice would continue to operate through a newly formed limited liability company known as DOMSA.

Also on July 1, 2006, the parties entered into an "Amended and Restated Operating Agreement of Danbury Oral & Maxillofacial Surgery Associates, LLC" (operating agreement). The operating agreement, which was signed by Dorrance T. Kelly, DDS, Oral Surgery, P.C. and Marshall D. Kurtz, DMD, P.C., provided that each member professional corporation would hold a 50 percent ownership interest in DOMSA, with the plaintiff initially acting as the manager with full authority for day-to-day management and control of the practice. After Kurtz paid the second installment of the purchase price, Kurtz would become the manager of DOMSA and assume full authority for its management, control and direction. The operating agreement further provided: "In instances where a [m]ember is a [p]rofessional [c]orporation, a limited liability company, a [l]imited liability [m]embership or other entity, the term '[m]ember' shall include for all purposes all stockholders, members, [m]embers or other owners thereof, of whatever nature." It required that the hiring of additional staff, including associates, be made by an affirmative vote of all members. The operating agreement also provided that the plaintiff would retire on June 30, 2009, upon his receipt from Kurtz of the second installment of the purchase price of the practice, and that upon retirement, he "shall have the right to . . . continue [working] as an associate of [DOMSA] until the age of [eighty] at a rate of compensation of fifty [percent] (50%) of his net collections upon such other terms and conditions as the parties hereto shall agree." The operating agreement provided that "[t]he [m]anager shall direct, manage and control the business of [DOMSA] to the best of [his] ability. Except for situations in which the approval of the members is expressly required by this Operating Agreement or by nonwaivable provisions of applicable law, the [m]anager shall have the full and complete authority, power and discretion to manage and control

the business, affairs and properties of [DOMSA], to make all decisions regarding those matters and to perform any and all other acts or activities customary or incident to the management of [DOMSA's] business."

On June 30, 2009, the parties, individually, and as members of their respective professional corporations, entered into a "Supplementary Agreement," which modified certain provisions of the purchase and sale agreement and the operating agreement. The supplementary agreement modified the plaintiff's obligations with respect to working days and on call responsibilities, and provided that he would work a reduced part-time schedule of his choosing. It further modified the requirement that the plaintiff retire on June 30, 2009, and provided that he could retire at a time of his choosing, but maintained that he would retire and "discontinue the practice of dentistry" when he reached the age of eighty, and that the plaintiff would continue to own a one percent interest in DOMSA until Kurtz paid the full purchase price.

Over time, the plaintiff and Kurtz's relationship became strained. At some point in the latter part of 2009, the plaintiff threatened to leave DOMSA if Kurtz did not pay him 65 percent of his net collections. Kurtz acquiesced and agreed to pay the plaintiff the 65 percent that he demanded, but reverted to paying him 50 percent in December, 2012, in accordance with the operating agreement.

In late 2012, and continuing into early 2013, the Department of Social Services conducted an audit of DOMSA's Medicaid billing records and determined that DOMSA had received overpayments of approximately $212,000 for Medicaid patients who had been treated between 2008 and 2010. To reimburse the Department of Social Services for the overpayment received by DOMSA, Kurtz agreed, without informing the plaintiff,

to continue to treat Medicaid patients without compensation until the full amount of the overpayment was satisfied. This agreement, however, did not affect the plaintiff, who continued to treat Medicaid patients and received 50 percent of the amount that he billed for his patients.

At some point prior to the summer of 2013, the plaintiff and Kurtz discussed hiring an associate. To that end, Kurtz, as the manager of DOMSA, placed an advertisement for that position and began speaking with applicants. Although the operating agreement expressly provided that "an affirmative vote of all [m]embers" was required for the "[h]iring of additional staff inclusive of [a]ssociates," Kurtz and the plaintiff did not discuss the hiring process as it progressed.

On August 1, 2013, the plaintiff and Kurtz had a meeting, which Kurtz secretly recorded, in the plaintiff's office. At that meeting, Kurtz told the plaintiff that he had hired a new associate, Daniel Traub, who would begin working at DOMSA on October 1, 2013. The plaintiff expressed his displeasure of Kurtz' hiring of Traub without the plaintiff's consent. Kurtz told the plaintiff that, by the time Traub started working in October, he would own 100 percent of DOMSA, and could manage it "as he saw fit." He told the plaintiff that he would have "the right to change anything that I want in the contracts . . . I can amend anything" and the right to "make the hours be whatever I want . . . make the staff do whatever I want, and the office space be whatever I want, and the office open and close." Kurtz told the plaintiff that he wanted him to retire before Traub commenced his employment at DOMSA, and suggested September 15, 2013, as his retirement date. The plaintiff told Kurtz that he did not want to retire and that he had the right to work at DOMSA for as long as he wished until he reached the age of eighty. Later that day, in an

unrecorded conversation, Kurtz told the plaintiff that his last day would be September 17, 2013.

The plaintiff took a medical leave from DOMSA from August 2 to August 20, 2013. On August 15, 2013, Kurtz paid the final installment due under the purchase and sale agreement. When the plaintiff returned from medical leave on August 21, 2013, he instructed the staff not to schedule any new patients for him beyond September 12, 2013. On August 22, 2013, Kurtz's attorney, Steven Smart, informed the plaintiff's attorney, Kara Lynch, that the plaintiff had not been terminated or forced to retire, and that he could continue to work at DOMSA as an associate.

When the plaintiff arrived at the office on September 17, 2013, he was told that he had no patients on his schedule and that Kurtz would direct patients to him as he saw fit. The plaintiff left the office without seeing any patients that day.

The plaintiff arrived at the office the next day to find that the locks on the doors of the practice had been changed. He confronted Kurtz in the office parking lot, where they argued about the breakdown of their professional and personal relationship. Believing that he had been terminated by Kurtz, the plaintiff did not return to work at DOMSA after this argument.

On September 21, 2013, Lynch sent an e-mail to Smart indicating that the plaintiff had been terminated by Kurtz. Smart responded that the plaintiff had not been terminated or forced to retire, and that the plaintiff could continue to work at DOMSA and receive his previously agreed upon 50 percent of fees that he generated.

Believing that he had been terminated by Kurtz, the plaintiff began seeing patients in Norwalk and West Hartford. Despite the plaintiff's absence from DOMSA, Kurtz ordered a new street sign for DOMSA that

included the plaintiff's name. Kurtz also did not remove the plaintiff's name from DOMSA's website or patient referral cards for approximately six months after he left the practice.

The plaintiff thereafter commenced this action, and by way of a nineteen count revised complaint, alleged the following: four counts of breach of contract (purchase and sale agreement, operating agreement and supplementary agreement); three counts of breach of the implied covenant of good faith and fair dealing; one count of successor liability; one count of violation of the Connecticut Fair Employment Practices Act (CFEPA), General Statutes § 46a-51 et seq.; one count of breach of fiduciary duty; one count of failure to pay wages to an employee in violation of General Statutes § 31-71b; one count of invasion of privacy by misappropriation of name; one count of tortious interference with business expectancies; one count of violation of CUTPA; one count of unjust enrichment; one count of slander; one count of intentional infliction of emotional distress; one count of negligent infliction of emotional distress; and one count seeking a declaratory judgment that the plaintiff is no longer bound by the restrictive covenant contained in the operating agreement.

The defendants filed an answer, one special defense, and an eleven count counterclaim alleging, inter alia, that the plaintiff had breached the operating agreement and the lease agreement between the plaintiff, as the owner of the building in which the Danbury office of DOMSA is located, and DOMSA.

Following several days of trial, the court submitted to the jury interrogatories on ten distinct claims by the plaintiff against the defendants: breach of the operating agreement and breach of the implied covenant of good faith and fair dealing in that agreement; breach of the supplementary agreement and breach of the implied covenant of good faith and fair dealing in that agreement; violation of CFEPA; breach of fiduciary duty;

invasion of privacy by appropriation of name; tortious interference with business expectancies; violation of CUTPA; and unjust enrichment.[2] The court also submitted to the jury interrogatories on the defendants' claims for damages related to the plaintiff's alleged violation of the lease agreement: unjust enrichment; breach of the implied covenant of good faith and fair dealing in the lease agreement; and violation of CUTPA.[3] The jury returned a verdict in favor of the plaintiff on nine of his ten claims against the defendants, awarding him damages on seven of those ten claims, for a total award of $3,150,000 in compensatory damages.[4] The jury also found that the plaintiff was entitled to punitive damages on five of those seven claims. The jury found in favor of the defendants on the remaining counts of their counterclaim, awarding damages in the amount of $175,000.

The defendants thereafter filed a motion to set aside the jury's verdict on the complaint and a motion to dismiss the plaintiff's claims of breach of the operating agreement and breach of the implied covenant of good faith and fair dealing in that agreement. The trial court denied in part and granted in part the defendants' motion to set aside, and granted their motion to dismiss. The court rendered judgment in favor of the plaintiff in the amount of $2,150,000, and these appeals followed. Additional facts will be set forth as necessary.

[2] Prior to trial, the plaintiff withdrew his claims of slander, and intentional and negligent infliction of emotional distress; and the defendants withdrew the counts of their counterclaim alleging breach of the operating agreement. After the plaintiff rested his case, the court directed a verdict in favor of the defendants on the plaintiff's claim of breach of the purchase and sale agreement. The plaintiff abandoned his claim seeking a declaratory judgment that he is no longer bound by the restrictive covenant contained in the operating agreement.

[3] The defendants withdrew their claims related to the operating agreement prior to trial.

[4] The jury also found that the defendants breached the operating agreement, violated CFEPA, and breached their fiduciary duty to the plaintiff, but awarded the plaintiff no damages under those counts.

Because the bulk of the claims raised in these appeals arises from the trial court's rulings on the defendants' motion to set aside the jury's verdict, we begin by setting forth the well settled standard of review governing the court's judgment on those claims. "The trial court possesses inherent power to set aside a jury verdict which, in the court's opinion, is against the law or the evidence . . . . [The trial court] should not set aside a verdict where it is apparent that there was some evidence upon which the jury might reasonably reach [its] conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles . . . . Ultimately, [t]he decision to set aside a verdict entails the exercise of a broad legal discretion . . . that, in the absence of clear abuse, we shall not disturb." (Internal quotation marks omitted.) *Kumah* v. *Brown*, 160 Conn. App. 798, 803, 126 A.3d 598, cert. denied, 320 Conn. 908, 128 A.3d 953 (2015). With these principles in mind, we address the parties' claims in turn.

I

AC 41366

We begin with the defendants' appeal challenging the jury's verdict in favor of the plaintiff and the trial court's denial of their motion to set aside the verdict. In response to the interrogatories submitted, the jury found that the defendants breached the supplementary agreement and breached the implied covenant of good faith and fair dealing in the supplementary agreement, by wrongfully terminating the plaintiff before he reached the age of eighty and by failing to allow the plaintiff to work a schedule of his choosing. The jury awarded the plaintiff $2,000,000 in compensatory damages for breach of the supplementary agreement, and $150,000 in compensatory damages for breach of the implied covenant of good faith and fair dealing in the

supplementary agreement.[5] The trial court denied the defendants' motion to set aside these portions of the jury's verdict.

A

The defendants first argue that the evidence was insufficient to support the jury's finding of breach of the supplementary agreement because the plaintiff was not terminated from his employment at DOMSA or prevented from working a schedule of his choosing. We are not persuaded.[6]

"[I]t is not the function of this court to sit as the seventh juror when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict . . . . In making this determination, [t]he evidence must be given the most favorable construction in support of the verdict of which it is reasonably capable. . . . In other words, [i]f the jury could reasonably have reached its conclusion, the verdict must stand, even if this court disagrees with it. . . .

"We apply this familiar and deferential scope of review, however, in light of the equally familiar principle that the plaintiff must produce sufficient evidence to remove the jury's function of examining inferences and finding facts from the realm of speculation. . . . A motion to set aside the verdict should be granted if the

[5] The jury also found that the plaintiff was entitled to punitive damages for breach of the supplementary agreement and breach of the implied covenant of good faith and fair dealing in the supplementary agreement. The trial court set aside that determination, and the plaintiff has not challenged that ruling on appeal.

[6] Because we conclude that the evidence was sufficient to prove that the plaintiff was terminated, we do not reach the defendants' additional claim that the evidence was insufficient to support the jury's award of damages if the only breach of the supplementary agreement was the prevention of the plaintiff from working a schedule of his choosing.

jury reasonably and legally could not have reached the determination that they did in fact reach." (Citations omitted; internal quotation marks omitted.) *Carrol* v. *Allstate Ins. Co.*, 262 Conn. 433, 442, 815 A.2d 119 (2003).

In the context of our "review of a motion to set aside the verdict . . . given the deference our standard of review requires to the trial court's decision, it is especially important to know what evidence before the jury justified the verdict in the court's mind." *Levine* v. *418 Meadow Street Associates, LLC*, 163 Conn. App. 701, 715, 137 A.3d 88 (2016). "[T]he trial court is uniquely situated to entertain a motion to set aside a verdict as against the weight of the evidence because, unlike an appellate court, the trial [court] has had the same opportunity as the jury to view the witnesses, to assess their credibility and to determine the weight that should be given to their evidence. . . . Indeed, we have observed that, [i]n passing upon a motion to set aside a verdict, the trial judge must do just what every juror ought to do in arriving at a verdict. . . . [T]he trial judge can gauge the tenor of the trial, as we, on the written record cannot, and can detect those factors, if any, that could improperly have influenced the jury." (Internal quotation marks omitted.) *State* v. *O'Donnell*, 174 Conn. App. 675, 696–97, 166 A.3d 646, cert. denied, 327 Conn. 956, 172 A.3d 205 (2017). "The concurrence of the judgments of the [trial] judge and the jury . . . is a powerful argument for upholding the verdict." (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 371, 119 A.3d 462 (2015).

In their motion to set aside the verdict, the defendants raised the same arguments to the trial court that they advance now—that the evidence was insufficient to prove that the plaintiff was terminated or that he was prevented from working a schedule of his own choosing. Following a thorough and well reasoned analysis of the evidence presented to the jury, and the law pertaining to its examination of the sufficiency of that

evidence, the court rejected the defendants' arguments. Specifically, the court explained that "[t]he jury reasonably could have found that the defendants terminated [the plaintiff] and/or prevented him from working a schedule of his choosing based on the following evidence: (1) the August 1, 2013 recorded conversation, including Kurtz' request that [the plaintiff] leave by September 17, 2013, so that there could be some 'separation' between [the plaintiff's] departure and Traub's first day on October 1, 2013; (2) Kurtz' statements during the August 1, 2013 conversation that he could change the office hours and other working conditions to be 'whatever I want'; (3) locking [the plaintiff] out of the office on September 18, 2013; (4) Traub's testimony that Kurtz told him that he had asked [the plaintiff] to retire and that [the plaintiff] did not take it well; (5) testimony of office staff that Kurtz told them, shortly after September 17, 2013, that [the plaintiff] would not be returning to the office; and (6) evidence that at least some of the office staff believed that [the plaintiff] would not be returning to practice with DOMSA." The court determined that "notwithstanding the lack of a formal, express statement of termination and the defendants' later offer of continued employment, the jur[y] could reasonably have found that the result of the defendants' conduct between August 1, 2013 and September 18, 2013, was a breach of the defendants' obligations to continue to employ [the plaintiff] and prevented him from receiving benefits he was entitled to under the agreement."

The court explained that the defendants' claim of insufficiency was not based on disputed facts, but, instead, that the defendants urged an alternative interpretation of the evidence presented to the jury. We agree. The defendants asked the trial court in their motion to set aside the jury's verdict, and ask this court now, to examine the evidence introduced at trial in a light favorable to them, or to emphasize or give more

weight to evidence that supports their position. It was not the role of the trial court, nor is it the role of this court, to do so. The court properly declined the defendants' invitation to revisit the evidence at trial and substitute its judgment for that of the jury.

As to their argument that the evidence at trial was insufficient to prove that the defendants denied the plaintiff the ability to work a schedule of his own choosing,[7] the defendants again reiterate claims of insufficiency that they raised before the trial court in their motion to set aside the verdict, namely, that the provision of the supplementary agreement affording the plaintiff the right to work a schedule of his own choosing applied only when he was a member of DOMSA, not when he became an employee of DOMSA, and that the plaintiff failed to prove that he was denied that right. The court rejected that notion, explaining that it could not "say as a matter of law that (1) this provision of the supplementary agreement is unambiguous and that (2) the jury, therefore, could not possibly have found that the language allowing [the plaintiff] to work a schedule of his choosing applied only to him as a member of DOMSA." The court concluded: "If the jurors did believe it applied to him as an employee, there was sufficient evidence to find that the defendants failed to allow him to work a schedule of his own choosing. The jury reasonably could have found, for example, that Kurtz' reservation of the right to assign patients to [the plaintiff] and other conditions placed on the offer to return to work at DOMSA did not comply with the defendants' contractual obligations to allow [the plaintiff] to continue to work until eighty years of age or to work a schedule of his own choosing." Moreover, evidence was presented that Kurtz told the plaintiff

[7] We note that because the jury's award of damages was not apportioned between the two claimed breaches of the supplementary agreement, the jury's verdict may be sustained on the basis of the evidentiary sufficiency of his first allegation under the general verdict rule.

that he would direct patients to him as "he saw fit," the plaintiff was locked out of the computerized scheduling system of DOMSA, and the plaintiff was not given a key to the office after the locks were changed. We thus agree that there was ample evidence introduced at trial on which the jury could have based a finding that the plaintiff was denied the right to work a schedule of his own choosing.

B

The defendants also argue that the jury's verdict was inconsistent because the jury awarded $2,000,000 for breach of the supplementary agreement and $150,000 for breach of the implied covenant of good faith and fair dealing in that agreement, and the damages awarded on those claims should have been the same because they were based upon identical evidence. We disagree.

"The role of an appellate court where an appellant seeks a judgment contrary to a general verdict on the basis of the jury's allegedly inconsistent answers to . . . interrogatories is extremely limited. . . . To justify the entry of a judgment contrary to a general verdict upon the basis of answers to interrogatories, those answers must be such in themselves as conclusively to show that as [a] matter of law judgment could only be rendered for the party against whom the general verdict was found; they must negative every reasonable hypothesis as to the situation provable under the issues made by the pleadings; and in determining that, the court may consider only the issues framed by the pleadings, the general verdict and the interrogatories, with the answers made to them, without resort to the evidence offered at the trial. . . . When a claim is made that the jury's answers to interrogatories in returning a verdict are inconsistent, the court has the duty to attempt to harmonize the answers." (Emphasis omitted; internal quotation marks omitted.) *Kumah* v. *Brown*, supra, 160 Conn. App. 803–804.

In addressing this claim in the defendants' motion to set aside the verdict, the trial court held: "Breach of contract and breach of the covenant of good faith and fair dealing are separate causes of action and the jury could, as a matter of law, find that [the plaintiff] suffered two separate legal harms from the same facts. . . . The jury could have found on the facts presented at trial that the defendants breached the supplementary agreement in the ways alleged, and did so with dishonest or malicious intent. . . . The jur[y] could have found that [the plaintiff], on the same facts presented, suffered two distinct legal harms and voted to compensate him separately for each harm."

The court acknowledged the validity of the defendants' argument that "the same facts, arising from the same breach of contract, should not give rise to two different awards," but noted that "the counts . . . are not identical because [the plaintiff] has alleged two separate causes of action which require two separate sets of elements to be proven."[8] The court explained: "While some of the factual allegations overlap between both counts, [the plaintiff's] allegations regarding the breach of the covenant of good faith and fair dealing in the supplementary agreement, read broadly and realistically . . . also allege that Kurtz' alleged breaches of contract were done in bad faith. Moreover, the court advised the jury on the difference between both causes of action, including that the breach of the implied covenant of good faith and fair dealing in the supplementary

[8] The trial court explained: "In count three, [the plaintiff] alleged that Kurtz, in his professional capacity, violated the supplementary agreement by 'wrongfully terminating . . . [the plaintiff] . . . prior to his eightieth birthday . . . [failed] to allow . . . [the plaintiff] to work a schedule of his choosing . . . and . . . [failed] to compensate . . . [the plaintiff] for fifty [percent] . . . of [his] net collections . . . .' Count seven, regarding the breach of the implied covenant of good faith and fair dealing in the supplementary agreement, alleged that the defendants were obligated to not 'take any improper action which would deprive . . . [the plaintiff] of the benefit of his bargain . . . [Kurtz'] aforesaid acts and omissions [alleged in count three] . . . were breaches . . . of the aforesaid covenant of good faith and fair dealing.' "

agreement require that the jury make a finding of bad faith, in addition to finding a breach of contract, to find in favor of [the plaintiff]. . . . Thus, even though [the plaintiff] based both causes of action on similar factual allegations, [the plaintiff] pleaded two different causes of action and could therefore recover two different jury awards—one for the breaches of contract themselves, and one for engaging in bad faith—which would not be inconsistent with each other."

The court further explained: "[T]here is sufficient evidence upon which the jury reasonably could have found that the defendants breached the contract and did so with improper intentions. Evidence upon which the jur[y] could have based each of these findings included: the content of the two August 1, 2013 office meetings; hiring the new associate without [the plaintiff's] consent; the lock out with instructions to staff not to give [the plaintiff] a key; the goodbye card sent by the office staff to [the plaintiff] on September 17, 2013; the argument in the parking lot on September 18, 2013, and the direction to [the plaintiff] that he remove all of his personal belongings from his personal office the following weekend or they would be left 'in the parking lot'; and Kurtz' statement to the staff and others that [the plaintiff] was not coming back to practice at DOMSA. The court assumes that the jur[y] listened to the evidence, listened carefully to the charge, and correctly applied the law to the facts as they found them. The court assumes that the jur[y] rendered two separate awards for two separate legal harms—$2,000,000 for the breach of contract and $150,000 for the separate and distinct legal harm of breaching the contract with evil intent."

It is well settled that, "[a]lthough the covenant of good faith and fair dealing is implied in every contract, a plaintiff cannot state a claim for breach of the implied covenant simply by alleging a breach of the contract, in and of itself. . . . Instead, to state a legally sufficient

claim for breach of the implied covenant sounding in contract, the plaintiff must allege that the defendant acted in bad faith." (Citation omitted.) *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 132 Conn. App. 85, 99, 30 A.3d 38 (2011), aff'd, 311 Conn. 123, 84 A.3d 840 (2014).

Here, as the trial court aptly noted, the factual allegations of the two claims associated with the supplementary agreement certainly overlapped, but they were not identical. The jury's finding of breach of contract did not require a finding of any improper motive by the defendants and thus did not necessarily include damages arising from ill intent.[9] Because the trial court properly fulfilled its duty to harmonize the jury's verdict, we cannot conclude that it abused its discretion in denying the defendants' motion to set aside the jury's verdict on the counts alleging breach of the supplementary agreement and breach of the implied covenant of good faith and fair dealing in that agreement.

II

AC 41365

We now turn to the plaintiff's challenges to the trial court's judgment setting aside the jury's verdict on his claims of invasion of privacy, tortious interference with business expectancies, violation of CUTPA, and unjust enrichment.[10] Because the court set aside certain portions of the jury's verdict on the ground that the plaintiff

[9] To the extent that the defendants argue that the awards of damages for breach of contract and breach of the implied covenant of good faith and fair dealing are impermissibly duplicative, that issue cannot be determined based upon the jury's responses to the interrogatories. Although the jury found that the defendants breached the contract and the implied covenant of good faith and fair dealing by terminating the contract and denying the plaintiff the right to work the schedule of his choosing, it is possible one award of damages was for wrongful termination, while the other for usurping the plaintiff's schedule.

[10] The plaintiff claims that if this court restores the jury's verdict on any of these claims, he is entitled to attorney's fees and punitive damages. Because we affirm the court's judgment setting aside these portions of the jury's verdict, we do not reach this argument.

failed to prove damages, we begin by setting forth the following pertinent general principles.

"It is axiomatic that the burden of proving damages is on the party claiming them. . . . When damages are claimed they are an essential element of the plaintiff's proof and must be proved with reasonable certainty. . . . Damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty. . . . [Although] there are circumstances in which proof of damages may be difficult and . . . such difficulty is, in itself, an insufficient reason for refusing an award once the right to damages has been established . . . the court must have evidence by which it can calculate the damages, which is not merely subjective or speculative . . . but which allows for some objective ascertainment of the amount. . . . This certainly does not mean that mathematical exactitude is a precondition to an award of damages, but we do require that the evidence, with such certainty as the nature of the particular case may permit, lay a foundation [that] will enable the trier to make a fair and reasonable estimate." (Citation omitted; internal quotation marks omitted.) *American Diamond Exchange, Inc.* v. *Alpert*, 302 Conn. 494, 510–11, 28 A.3d 976 (2011).

"Evidence is considered speculative when there is no documentation or detail in support of it and when the party relies on subjective opinion." (Internal quotation marks omitted.) Id., 511. "At a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits may be ascertained. . . . While the modern tendency is toward greater liberality in the requirements . . . [for proving lost profits] *it is the unvarying rule that evidence of such certainty as the nature of the case permits should be produced.*" (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 512.

With the foregoing in mind, and guided by the aforementioned principle that "[t]he decision to set aside a verdict entails the exercise of a broad legal discretion . . . that, in the absence of clear abuse, we shall not disturb"; (internal quotation marks omitted) *Kumah* v. *Brown*, supra, 160 Conn. App. 803; we address each of the plaintiff's claims in turn.

A

The plaintiff first claims that the trial court erred in setting aside the jury's verdict and award of damages in the amount of $300,000 on his claim that the defendants invaded his privacy by misappropriating his name after he was terminated from DOMSA. The plaintiff claims that the trial court erred in finding that the sale of his "personal good will" to the defendants included the right to use his name, and that even if the defendants did not have the right to use the plaintiff's name, the plaintiff failed to prove that he suffered any damages as a result of said use. We need not address the issue of whether "personal good will" included the right to use the plaintiff's name because, even if the defendants' use of the plaintiff's name was wrongful, we agree with the trial court that the plaintiff failed to prove that he suffered any damages as a result of the defendants' use of his name.[11]

On this claim, the court instructed the jury as follows: "To recover for this cause of action, the plaintiff must prove that his name was used by the defendants without his consent for the purpose of appropriating to their benefit the commercial value of the plaintiff's name. The damages for such misappropriation are measured by the commercial benefit obtained by the defendants or by the harm to the plaintiff." The plaintiff claims that the trial court disregarded evidence that he presented

[11] The issue of whether "personal good will" includes the use of one's name has not been decided in Connecticut.

in support of his claim that the defendants commercially benefitted from the use of his name, such as the facts that several dentists confirmed that they used the referral cards after the plaintiff left DOMSA to refer patients to him, and that DOMSA's employees testified that they received these cards and calls requesting appointments with the plaintiff, but that they were scheduled with Kurtz.

Contrary to the plaintiff's argument, the trial court did, in fact, consider the evidence introduced by the plaintiff. In setting aside the jury's verdict on this claim, the trial court noted that the plaintiff presented evidence that after he left DOMSA, the defendants ordered a new sign for the Danbury office that listed his name and that that sign was displayed for several months. The defendants did not remove the plaintiff's name from DOMSA's website or stop using patient referral cards listing the plaintiff until several months after the plaintiff left the practice. In the spring of 2014, the defendants purchased an advertisement that included the plaintiff's name in a high school flyer.

The court nevertheless set aside the jury's verdict on the plaintiff's claim of invasion of privacy by misappropriation of his name because "[the plaintiff] presented no evidence at trial of a single patient who came to DOMSA after [the plaintiff]'s departure as a result of the street sign, patient referral cards, website, or high school promotional calendar." The court noted that it had instructed the jury that "damages for this claim are measured by the commercial benefit obtained by the defendants or by the harm to [the plaintiff]," and reasoned that "[s]ince [the plaintiff] presented no proof of a commercial benefit obtained by the defendants through the use of [the plaintiff]'s name after he was no longer a member of DOMSA, the jury could not have found that the defendants misappropriated [the plaintiff]'s name." The trial court further opined that

"an award under this claim of damages would also be a duplication of lost earnings, which the jury awarded to [the plaintiff] through its verdict on the claims of violations of the supplementary agreement."

Despite the plaintiff's assertion that the defendants commercially benefitted from the use of his name, he presented no evidence of the commercial value of that benefit. The plaintiff presented no evidence of which patients or how many patients the defendants gained, or how the defendants benefitted commercially, as a result of their use of his name. Because there was no evidentiary basis for the jury's award of $300,000 for the defendants' allegedly wrongful use of the plaintiff's name, the court did not abuse its discretion in setting aside the jury's verdict on the plaintiff's invasion of privacy claim.

B

The plaintiff next claims that the court abused its discretion in setting aside the jury's verdict and award of damages in the amount of $300,000 on his claim of tortious interference with his business expectancies. The trial court set aside the jury's verdict on this claim on the grounds that the plaintiff failed to prove that the defendants tortiously interfered with his actual or expected contractual relationships with his former patients and with referring dentists, and that he suffered an actual loss as a result of any such alleged interference. Because we agree with the trial court's finding that the plaintiff failed to prove that he suffered an actual loss as a result of the defendants' alleged interference with his business expectancies, we conclude that the court did not abuse its discretion in setting aside the jury's verdict and award of damages on this claim.

"It is well established that the elements of a claim for tortious interference with business expectancies are: (1) a business relationship between the plaintiff

and another party; (2) the defendant's intentional interference with the business relationship while knowing of the relationship; and (3) as a result of the interference, the plaintiff suffers actual loss. . . . It is not essential to such a cause of action that the tort have resulted in an actual breach of contract, since even unenforceable promises, which the parties might voluntarily have performed, are entitled to be sheltered from wrongful interference. . . . It does not follow from this, however, that a plaintiff may recover for an interference with a mere possibility of his making a profit. On the contrary, wherever such a cause of action as this is recognized, it is held that the tort is not complete unless there has been actual damage suffered. . . . To put the same thing another way, it is essential to a cause of action for unlawful interference with business that it appear that, except for the tortious interference of the defendant, there was a reasonable probability that the plaintiff would have entered into a contract or made a profit." (Citations omitted; internal quotation marks omitted.) *Villages, LLC* v. *Longhi*, 187 Conn. App. 132, 146–47, 201 A.3d 1098 (2019).

"[T]he proper measure of damages in an action for tortious interference with . . . business expectancies is not the profit to the defendant but rather the pecuniary loss to the plaintiff of the benefits of the prospective business relation." *American Diamond Exchange, Inc.* v. *Alpert*, 101 Conn. App. 83, 103, 920 A.2d 357, cert. denied, 284 Conn. 901, 931 A.2d 261 (2007). "Unlike other torts in which liability gives rise to nominal damages even in the absence of proof of actual loss . . . it is an essential element of the tort of unlawful interference with business relations that the plaintiff suffered actual loss." (Citation omitted; internal quotation marks omitted.) *American Diamond Exchange, Inc.* v. *Alpert*, supra, 302 Conn. 510.

Here, the court reasoned: "[T]he court agrees [with the defendants] that [the plaintiff] did not prove by a preponderance of the evidence an ascertainable actual loss as a result of the defendants' wrongful actions. Assuming, as the court must, that the jur[y] believed that the defendants acted wrongfully in the manner in which they advised [the plaintiff's] former patients after his termination from DOMSA, there was still no evidence to support the jury's award of $300,000 in lost revenue [to the plaintiff]. . . . [E]ven if the jury reasonably believed that the defendants diverted [the plaintiff's] former patients in the weeks and months following his termination from DOMSA, and did so with an improper motive, it is clear to the court that the jury could not have awarded [the plaintiff] an additional $300,000 over and above the amount awarded for violation of the supplementary agreement. The court agrees with the defendants that the evidence at trial showed that the revenue that the jury found was impermissibly diverted would have been the same revenue that [the plaintiff] would have received had he stayed with DOMSA and continued to treat those patients as an associate surgeon. In the court's view, the jury could not have reached its verdict as to tortious interference unless [it] found that the defendants had no right to treat [the plaintiff's] former patients, and found that [the plaintiff] would have earned $300,000 in revenue over and above what he would have earned at DOMSA but for the wrongful termination. The evidence at trial, however, does not support either of these underlying findings." In other words, the court explained: "[T]here is nothing to distinguish the evidence of lost earnings awarded for breach of the supplementary agreement from lost earnings by diversion of former clients. . . . [T]he court agrees with the defendants that the only fair, logical, and reasonable inference to be drawn from the jury's findings and award for tortious interference with business expectancies is that it duplicates the award for breach of the supplementary agreement."

We agree with the trial court's conclusion that the plaintiff failed to prove any actual loss resulting from the defendants' alleged interference with his business expectancies. Similar to the plaintiff's claim of misappropriation of his name, the plaintiff failed to provide the jury with even an estimate of how many or which patients he lost as a result of the defendants' conduct. Without such an evidentiary basis, there is no way to calculate or objectively ascertain the amount of damages sustained by the plaintiff with even a minimal degree of certainty.

Moreover, "[t]he rule precluding double recovery is a simple and time-honored maxim that [a] plaintiff may be compensated only once for his just damages for the same injury . . . . Connecticut courts consistently have upheld and endorsed the principle that a litigant may recover just damages for the same loss only once. The social policy behind this concept is that it is a waste of society's economic resources to do more than compensate an injured party for a loss and, therefore, that the judicial machinery should not be engaged in shifting a loss in order to create such an economic waste. . . . [D]uplicated recoveries must count as overcompensation by any standard. In general, two different measures should not be used to compensate for the same underlying loss . . . . Duplicated recoveries, furthermore, must not be awarded for the same underlying loss under different legal theories. . . . Although a plaintiff is entitled to allege respective theories of liability in separate claims, he or she is not entitled to recover twice for harm growing out of the same transaction, occurrence or event." (Citations omitted; internal quotation marks omitted.) *Rowe* v. *Goulet*, 89 Conn. App. 836, 849, 875 A.2d 564 (2005).

The plaintiff has already recovered for losses that he sustained as a result of his wrongful termination, and that recovery contemplated his lost earnings, which is the same measure of damages for which he sought to be

compensated under his claim of tortious interference. Such a duplicated recovery is impermissible. In fact, the court instructed the jury as follows: "You must consider the issue of damages separately for each cause of action for which you find liability—whether it's the plaintiff's or defendants'—without regard for any damages that you may have awarded in any other cause of action. The court will ensure that either party does not recover more than once for the same loss, even if that party prevails on two or more causes of action." In setting aside the jury's verdict on the plaintiff's claim of tortious interference, the trial court properly ensured that the plaintiff did not recover twice for the same loss.

C

The plaintiff also claims that the trial court erred in setting aside the jury's verdict and award of damages in the amount of $100,000 for violations of CUTPA. The jury found that the defendants violated CUTPA by failing to obtain the plaintiff's vote prior to hiring Traub; failing to disclose business transactions made on behalf of DOMSA, including settlement of the Medicaid audit; wrongfully terminating the plaintiff before he reached eighty years old; failing to allow the plaintiff to work a schedule of his choosing; intentionally interfering with the plaintiff's business relations and economic expectancies; and misappropriating the plaintiff's name. In setting aside the jury's CUTPA verdict, the trial court explained that it should not have instructed the jury on the plaintiff's CUTPA claims because they arose from intracorporate employment disputes that are not subject to CUTPA. The court also found that the plaintiff failed to prove that he sustained any ascertainable loss as a result of the defendants' alleged CUTPA violations. The plaintiff's challenge to the trial court's finding that the defendants' conduct was intracorporate is focused

on the defendants' post-termination conduct of allegedly diverting the plaintiff's patients from him and misappropriating his name. Even if those claims were viable under CUTPA, we agree that the plaintiff failed to prove that he sustained any ascertainable loss as a result of the defendants' alleged CUTPA violations.[12]

"[Section] 42-110b (a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." (Internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *CALCO Construction & Development Co.*, 318 Conn. 847, 880, 124 A.3d 847 (2015).

"To give effect to its provisions, § 42-110g (a) of the act establishes a private cause of action, available to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b . . . .

"The ascertainable loss requirement [of § 42-110g] is a threshold barrier which limits the class of persons who may bring a CUTPA action seeking either actual damages or equitable relief. . . . Thus, to be entitled to any relief under CUTPA, a plaintiff must first prove that he has suffered an ascertainable loss due to a CUTPA violation. . . . CUTPA, however, is not limited to providing redress only for consumers who can put a precise dollars and cents figure on their loss . . . as the ascertainable loss provision do[es] not require a plaintiff to prove a specific amount of actual damages in order to make out a prima facie case. . . . Rather

[12] Because we conclude that the trial court correctly concluded that the plaintiff failed to establish any ascertainable loss, we need not address the plaintiff's claim that the court erred in finding that the defendants' conduct arose from intracorporate employment disputes that are not subject to CUTPA.

. . . [d]amage . . . is only a species of loss . . . hence [t]he term loss necessarily encompasses a broader meaning than the term damage. . . . Accordingly . . . for purposes of § 42-110g, an ascertainable loss is a deprivation, detriment [or] injury that is capable of being discovered, observed or established. . . . [A] loss is ascertainable if it is measurable even though the precise amount of the loss is not known. . . . Under CUTPA, there is no need to allege or prove the *amount* of the actual loss. . . .

"Of course, a plaintiff still must marshal *some* evidence of ascertainable loss in support of her CUTPA allegations, and a failure to do so is indeed fatal to a CUTPA claim . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Marinos* v. *Poirot*, 308 Conn. 706, 713–14, 66 A.3d 860 (2013).

"A plaintiff also must prove that the ascertainable loss was caused by, or a result of, the prohibited act. General Statutes § 42-110g (a) . . . . When plaintiffs seek money damages, the language as a result of in § 42-110g (a) requires a showing that the prohibited act was the proximate cause of a harm to the plaintiff. . . . [P]roximate cause is [a]n actual cause that is a substantial factor in the resulting harm . . . . The question to be asked in ascertaining whether proximate cause exists is whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendant's act." (Internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *CALCO Construction & Development Co.*, supra, 318 Conn. 882–83.

On appeal, the plaintiff argues: "Deceit permeated the defendants' actions from the time Kurtz took over as manager of the practice in 2009 until the defendants successfully drove [the plaintiff] out of the practice and essentially destroyed his career. Kurtz lied to get [the plaintiff]'s patients and referral sources to continue to provide the business after [the plaintiff] left."

Although the record supports the plaintiff's allegations that some of the plaintiff's patients called DOMSA after he left and were not referred to him, the plaintiff failed to marshal any evidence of an ascertainable loss as a result of that conduct. The plaintiff did not introduce any evidence of even an estimate of the number of patients that he lost, or financial loss that was attributable to the loss of those patients. In his brief to this court, the plaintiff argues simply that "his W-2s and [the] defendants' earning records" established an ascertainable loss. Although those documents demonstrate a reduction in the plaintiff's earnings following his termination from DOMSA, the plaintiff failed to establish that the defendants' alleged conduct of diverting patients from him and using his name proximately caused any loss that can be gleaned from an examination of those documents. We thus conclude that the trial court did not abuse its discretion in setting aside the jury's verdict on the plaintiff's CUTPA claim.

D

The plaintiff also challenges the trial court's judgment setting aside the jury's verdict and award of damages in the amount of $150,000 on his claim of unjust enrichment. It is well-settled that a plaintiff may recover for unjust enrichment when a contract remedy is unavailable, to the extent that the defendant has unjustly profited at the plaintiff's expense. *Horner* v. *Bagnell*, 324 Conn. 695, 707–708, 154 A.3d 975 (2017). In other words, breach of contract and unjust enrichment are mutually exclusive theories of recovery. *Russell* v. *Russell*, 91 Conn. App. 619, 638, 882 A.2d 98, cert. denied, 276 Conn. 924, 925, 888 A.2d 92 (2005).

Here, the plaintiff alleged that the defendants were unjustly enriched "as a result of their squeeze out and wrongful termination of . . . [him] and their scheme to divert patients from . . . [him]." Because the plaintiff had already recovered for wrongful termination

under his claim that the defendants breached the supplementary agreement, the trial court found, and we agree, that he could not again recover under an unjust enrichment theory. We therefore conclude that the trial court properly set aside the jury's verdict on the plaintiff's claim of unjust enrichment.

E

The plaintiff also claims that the trial court erred in dismissing his claims for breach of the operating agreement and breach of the implied covenant of good faith and fair dealing in the operating agreement on the ground that the court lacked subject matter jurisdiction because he lacked standing to bring those claims. We disagree.

The jury found that the defendants breached the operating agreement and the implied covenant of good faith and fair dealing in the operating agreement by failing to disclose to the plaintiff business transactions made on behalf of DOMSA, specifically, the settlement of the Medicaid audit, and by failing to obtain the plaintiff's vote prior to hiring Traub. The jury did not award any compensatory damages to the plaintiff on his claim of breach of the operating agreement, but did indicate that the plaintiff was entitled to punitive damages. It awarded him damages in the amount of $150,000 for breach of the implied covenant of good faith and fair dealing in that agreement.

On February 17, 2017, the defendants filed a motion to dismiss the plaintiff's claims for breach of the operating agreement and breach of the implied covenant of good faith and fair dealing in the operating agreement for lack of subject matter jurisdiction. The defendants claimed, inter alia, that the plaintiff lacked standing to bring those claims because the alleged violations of the plaintiff's rights to be advised of DOMSA's finances and to vote on the hiring of Traub did not cause the plaintiff

any harm, and he therefore was not aggrieved.[13] The defendants further argued that even if those violations did cause harm, any harm sustained by the plaintiff was derivative of, and indistinguishable from, the harm sustained by DOMSA.

On January 26, 2018, the trial court granted the defendants' motion to dismiss, by way of a written memorandum of decision, on the ground that the plaintiff did not suffer any injury as a result of the two claims related to the operating agreement that was separate and distinct from injury suffered by DOMSA, and thus that the claims of breach of the operating agreement should have been brought as derivative actions. The trial court thus concluded that it lacked subject matter jurisdiction over the plaintiff's claims of breach of the operating agreement and breach of the implied covenant of good faith and fair dealing in the operating agreement because the plaintiff did not have standing to bring them.

"If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . [A] claim that a court lacks subject matter jurisdiction may be raised at any time during the proceedings . . . . A determination regarding a trial court's subject matter jurisdiction is a question of law. . . .

"[S]tanding is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy." (Citations omitted; internal quotation marks omitted.) *Wiederman*

[13] The defendants also claimed that the plaintiff's claims regarding the operating agreement were moot. Because we agree with the trial court's determination that the plaintiff lacked standing to bring these claims, we need not address the defendants' mootness argument.

v. *Halpert*, 178 Conn. App. 783, 793–94, 176 A.3d 1242 (2017), cert. granted on other grounds, 328 Conn. 906, 177 A.3d 1161 (2018).

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]." (Internal quotation marks omitted.) Id., 794–95.

"[A]s a general rule, a plaintiff lacks standing unless the harm alleged is direct rather than derivative or indirect. . . . [I]f the injuries claimed by the plaintiff are remote, indirect or derivative with respect to the defendant's conduct, the plaintiff is not the proper party to assert them and lacks standing to do so. Where, for example, the harms asserted to have been suffered directly by a plaintiff are in reality derivative of injuries to a third party, the injuries are not direct but are indirect, and the plaintiff has no standing to assert them." (Citation omitted; internal quotation marks omitted.) Id., 795.

"A limited liability company is a distinct legal entity whose existence is separate from its members. . . . [It] has the power to sue or to be sued in its own name; see General Statutes §§ 34-124 (b) and 34-186; or may be a party to an action brought in its name by a member or manager. . . . A member or manager, however, may not sue in an individual capacity to recover for an injury based on a wrong to the limited liability company."

(Internal quotation marks omitted.) *Padawer* v. *Yur*, 142 Conn. App. 812, 817, 66 A.3d 931, cert. denied, 310 Conn. 927, 78 A.3d 145 (2013).

On appeal, the plaintiff challenges the trial court's determination that he lacked standing to bring his claims related to the operating agreement. In his opposition to the defendants' motion to dismiss, and in his "Omnibus Statement of Facts in Support of [His] Opposition to [the] Defendants' Post-Trial Motions," the plaintiff argued that he suffered loss as a result of Kurtz' failure to inform him of the Medicaid reimbursement by virtue of the fact that, at that time, he retained a one percent interest in DOMSA, and because he continued to treat Medicaid patients "without knowing that Medicaid was not reimbursing [DOMSA] for his work," the loss of Medicaid revenue to DOMSA caused him to suffer financial loss. It cannot reasonably be disputed that such a loss was derivative of a loss to DOMSA. To the extent that the plaintiff now argues that his loss was not derivative "because the defendants did not compensate him for his treatment of Medicaid patients over a two-year period and then in 2013," the trial court properly found that "[t]he only evidence at trial was that [the plaintiff] continued to receive his 50 percent share of the net collections for his services at DOMSA." The trial court concluded that "there was no evidence brought forth at trial that [the plaintiff] was harmed in any way by the results of the Medicaid audit." Consequently, the plaintiff has failed to prove that he was aggrieved by Kurtz' failure to inform him of the Medicaid audit.

Also in his opposition to the defendants' motion to dismiss, the plaintiff alleged that "[t]he hiring of Traub proved . . . costly to [the plaintiff]—since it directly led to his termination from DOMSA" and thereby caused him to lose "millions of dollars in income." This claim is belied by the record. Although the plaintiff should have been afforded the opportunity to vote on the decision to hire Traub pursuant to the terms of the operating

agreement, he has not claimed, nor does the evidence presented at trial reflect, that he opposed that hiring decision. Indeed, the evidence presented at trial indicated that the plaintiff and Kurtz agreed to advertise for a new associate. Moreover, we agree with the trial court's finding that the plaintiff "introduced no evidence of a direct connection between the hiring of Traub and [the plaintiff]'s termination at trial or evidence that Kurtz employed Traub as a first step in forcing [the plaintiff] out of DOMSA." The plaintiff failed to prove that he was specially and injuriously affected by Kurtz' failure to secure his approval of Traub's hiring, and he, therefore, lacked standing to claim that the defendants breached the operating agreement or the implied covenant of good faith and fair dealing in that agreement. We therefore conclude that the trial court properly dismissed these claims.

The judgment is affirmed.

In this opinion the other judges concurred.

WESTON STREET HARTFORD, LLC *v.* ZEBRA REALTY, LLC (AC 40415)

DiPentima, C.J., and Sheldon and Moll, Js.*

Syllabus

The plaintiff sought a temporary and permanent injunction prohibiting the defendant from, inter alia, maintaining a parking lot within an easement granting the plaintiff a right-of-way over certain property owned by the defendant. The defendant filed a counterclaim, seeking, inter alia, a judgment declaring that it had the right to relocate the right-of-way at its own expense provided that it would be similar in size to the existing right-of-way and that it would not impose any additional burden on the plaintiff, as well as a permanent injunction directing the plaintiff to release the right-of-way upon its relocation by the defendant. The trial court rendered judgment for the defendant on the plaintiff's complaint,

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

concluding that the plaintiff was not entitled to injunctive relief because it had failed to establish that the defendant's actions were interfering with the plaintiff's use of the right-of-way. The court also rejected the defendant's counterclaim insofar as the defendant sought a right to relocate the existing right-of-way and an order directing the plaintiff to release the right-of-way upon its relocation. Thereafter, the defendant appealed, and the plaintiff filed a cross appeal with this court. *Held*:

1. The trial court properly rendered judgment for the plaintiff on the counts of the defendant's counterclaim relating to the defendant's request to relocate the right-of-way and for an order directing the plaintiff to release the right-of-way; notwithstanding the defendant's claim to the contrary, there was no meaningful difference between the unilateral modification of an easement that this court in *Alligood* v. *LaSaracina* (122 Conn. App. 473) found to be improper and the unilateral relocation of an easement that the defendant sought in the present case, as either change is improper without the mutual consent of the landowner and the easement owner, and this court rejected the defendant's claim that *Alligood* was inconsistent with Supreme Court precedent and declined to overrule *Alligood*.
2. The plaintiff could not prevail on its claim that the trial court improperly rendered judgment in the defendant's favor on the plaintiff's complaint and denied the plaintiff's request for injunctive relief: in concluding that the plaintiff had failed to demonstrate that its inability to use the right-of-way would necessarily result but for the issuance of the requested injunction, and, thus, was not entitled to its requested injunctive relief, the trial court applied the correct standard of law set forth in *Karls* v. *Alexandra Realty Corp*. (179 Conn. 390), which requires a party seeking injunctive relief to show that there a substantial probability that but for the issuance of the injunction, the party seeking it will suffer irreparable harm; moreover, the court did not abuse its discretion in denying the plaintiff's request for injunctive relief under the circumstances of the case and in light of the extraordinary nature of injunctive relief, as the court fully acknowledged that parking in the right-of-way would interfere with the plaintiff's access to the right-of-way but that this harm was not likely to befall the plaintiff but for the issuance of the requested injunction.

Argued January 22—officially released October 15, 2019

Procedural History

Action for, inter alia, a temporary and permanent injunction prohibiting the defendant from maintaining a parking lot within a right-of-way, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the matter was transferred to the judicial district of Tolland; thereafter, the defendant

filed a counterclaim; subsequently, the matter was tried to the court, *Bright*, *J.*; judgment for the defendant on the complaint and in part for the plaintiff on the counterclaim, from which the defendant appealed and the plaintiff cross appealed to this court. *Affirmed.*

Steven Lapp, with whom, on the brief, was *Daniel J. Klau*, for the appellant-cross appellee (defendant).

Mario R. Borelli, with whom, on the brief, was *Frank A. Leone*, for the appellee-cross appellant (plaintiff).

Opinion

MOLL, J. The present case arises from a dispute between the plaintiff, Weston Street Hartford, LLC, and the defendant, Zebra Realty, LLC, concerning a right-of-way easement held by the plaintiff that runs over property owned by the defendant. The defendant has appealed and the plaintiff has cross appealed from the judgment rendered, after a court trial, on the plaintiff's complaint and the defendant's counterclaim. On appeal, the defendant claims that the trial court, in rendering judgment in favor of the plaintiff on counts one and two of the counterclaim, incorrectly determined that *Alligood* v. *LaSaracina*, 122 Conn. App. 473, 999 A.2d 836 (2010), applies to the present case and prohibits any landowner from relocating an easement without the consent of the easement holder. In the alternative, the defendant contends that the Restatement (Third), Property, Servitudes § 4.8 (3) (c), is a more logical extension of Connecticut easement law than the rule adopted by this court in *Alligood*.[1] On cross appeal, the

[1] On the appeal form filed by the defendant, the defendant indicated that, in addition to the trial court's judgment with respect to its counterclaim, it is appealing from the trial court's determination that the plaintiff's intended use of the easement at issue does not overburden the easement or the defendant's property. In its principal appellate brief, the defendant recognizes that it raised the matter of overburdening as a special defense to the plaintiff's complaint and that it was not aggrieved by the trial court's judgment on the plaintiff's complaint, which was rendered in its favor. The defendant nonetheless explains that it "intends to brief its claims of error arising from the trial court's analysis and decision on the issue of overburden-

plaintiff claims that, upon finding that the defendant's use of the servient estate interfered with the plaintiff's intended use of the easement, the court should have rendered judgment in its favor on its complaint and granted its request for an injunction prohibiting interference by the defendant. We disagree with both parties' claims and, accordingly, affirm the judgment of the trial court.

The following procedural history and facts, as found by the trial court, are relevant to the parties' claims. The plaintiff is the owner of real property located at 170 Weston Street in Hartford, and the defendant is the owner of adjacent real property located at 145 West Service Road in Hartford. The properties are located in an area zoned for commercial or industrial use. When facing Weston Street, the back right corner of the plaintiff's property abuts the rear of the defendant's property. The portion of the plaintiff's property that abuts the defendant's property was formerly known as Lot 13.

In 1979, Gennaro Russo transferred his ownership of 145 West Service Road to Dalchard Warehouse, Inc. (Dalchard Warehouse), by deed, which provided in relevant part that 145 West Service Road was subject to a right-of-way in favor of what was then Lot 13 (right-of-way).[2] At the time of this transfer, Russo still owned

ing, as alternative grounds for affirmance" of the court's judgment on the plaintiff's complaint. In its appellate brief on the cross appeal, the defendant briefs, inter alia, these claims of error. Because we affirm the judgment of the trial court with respect to the plaintiff's complaint, we need not reach the defendant's alternative grounds for affirmance.

[2] Specifically, the 1979 deed provided that 145 West Service Road was "[s]ubject to a Right-of-Way in favor of that piece of real property designated Lot No. 13 on said map, said Right-of-Way being more particularly bounded and described as follows:

"NORTHERLY:	By Lot No. 14B, as shown on said map, 341.63 feet, more or less;
"EASTERLY:	By West Service Road, 25 feet;
"SOUTHERLY:	By the non-burdened portion of Lot No. 14A, 345 feet, more or less; and
"WESTERLY:	By Lot No. 13, as shown on said map, 25 feet, more or less.

the lots that would become 170 Weston Street as it exists today, namely, Lots 6 through 13 of an area known as the Fox Press Subdivision. In 1980, Russo's ownership of Lots 6 through 12 was transferred to Charter Oak Bank & Trust Company (Charter Oak) by way of foreclosure by sale, and, thereafter, Russo transferred his ownership of Lot 13 to Charter Oak by quitclaim deed. The combined transferred parcels eventually became known as 170 Weston Street. Consequently, Lot 13 no longer exists as a separate lot.

In April, 1998, Dalchard Warehouse quitclaimed its interest in 145 West Service Road to Bechard, LLC. In November, 2006, Belchard, LLC, transferred the property to the defendant by warranty deed, which provided in relevant part that 145 West Service Road was encumbered by "[a] Right-of-Way, 25 feet in width, as reserved in a deed dated August 29, 1979 and recorded in Volume 1723 at Page 277 of the Hartford Land Records."

In June, 2011, the plaintiff acquired 170 Weston Street. The deed transferring ownership of 170 Weston Street to the plaintiff specifically references the right-of-way, describing it as follows: "[T]he right to use a 25 foot right-of-way for the benefit of that portion of these premises previously known as Lot No. 13, for ingress and egress to West Service Road as reserved in a deed from Gennaro A. Russo, Debtor in Possession to Dalchard Warehouse, Inc. Dated August 29, 1979 and recorded in Volume 1723, Page 277 of the Hartford Land Records."

In August, 2011, the plaintiff entered into a three year lease agreement with Capitol Transportation, LLC (Capitol Transportation), pursuant to which Capitol

"Said Right-of-Way is for the purpose of providing ingress and egress for all purposes, to said Lot No. 13 and shall run with the land benefited and the land burdened regardless whether there is other access to Lot No. 13. Said Right-of-Way to be maintained by the owner or owners of said Lot No. 13."

Transportation was to use a portion of the plaintiff's property at 170 Weston Street as a school bus terminal and storage and transportation facility. Thereafter, approximately 135 school buses and/or vans, which were used to transport students enrolled in the Hartford public and magnet schools, were regularly parked on the plaintiff's property in an area that includes, but is not limited to, former Lot 13. At this time, the defendant operated and continued to operate an adult entertainment establishment and night club, known as the Mynx Cabaret, on its property at 145 West Service Road. The parking lot surrounding the Mynx Cabaret contained eighty-five parking spaces, including twenty-five to thirty of which were located in the right-of-way.

In September, 2011, the plaintiff commenced an action against the defendant, seeking a temporary and permanent injunction prohibiting and restraining the defendant from maintaining a parking lot on the right-of-way or from obstructing the plaintiff's right to pass over the right-of-way. See *Weston Street Hartford, LLC* v. *Zebra Realty, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-11-6025475-S (first action). The defendant filed a counterclaim, seeking, inter alia, a permanent injunction enjoining the plaintiff from asserting any right to use the right-of-way and a declaratory judgment with respect to the parties' rights to the right-of-way. See id.

On March 11, 2013, in the first action, the trial court rendered judgment, after a court trial, in favor of the defendant on the plaintiff's complaint and in favor of the plaintiff on the defendant's counterclaim. In its memorandum of decision, the court concluded that the plaintiff had established the existence of the right-of-way but had failed to prove that the defendant's actions or inactions were materially interfering with the plaintiff's use of the right-of-way because one particular utility pole, which was located in the public right-of-way, was obstructing the right-of way, and the plaintiff had

not established that the utility pole could be relocated. The court also concluded that the plaintiff's intended use would overburden the right-of-way because some of the buses that would be utilizing it would do so to travel to and from property not intended to be benefitted by the right-of-way, i.e., property other than former Lot 13, and, therefore, such use was not permitted. Additionally, the court rendered a declaratory judgment that the plaintiff was still the owner of the right-of-way and specified as follows: "The right-of-way shall run with the land benefitted, that being former Lot 13, and the land burdened, that being 145 West Service Road, whether there is other access to former Lot 13. The right-of-way to be maintained by the owner or owners of former Lot 13. The right-of-way may not be used to benefit any other property into which former Lot 13 was merged."[3]

Following the conclusion of the first action, the plaintiff began considering alternative uses for former Lot 13 involving the right-of-way. Between July and November, 2014, the plaintiff arranged for and paid over $60,000 to move three utility poles outside of the right-of-way, including the utility pole that was in the city of Hartford's (city) control. In March or April, 2015, the plaintiff notified the defendant that it was developing a new plan for former Lot 13.

In August, 2015, the plaintiff commenced the present action against the defendant. In its complaint, the plaintiff alleged, inter alia, that it was the owner of the right-of-way, that the defendant materially interfered and continues to materially interfere with the plaintiff's use of the right-of-way by maintaining a parking lot in the right-of-way and by failing to sign an application or a letter of authorization enabling the plaintiff to obtain a curb cut permit from the city, and that such interference has caused and will continue to cause irreparable

[3] The plaintiff did not appeal from the court's judgment in the first action.

injury to the plaintiff. The plaintiff sought the following relief: (1) a temporary and permanent injunction prohibiting and restraining the defendant from maintaining a parking lot within the right-of-way or from obstructing the plaintiff's right to use the right-of-way; (2) an order requiring the defendant to sign documentation that may be required to enable the plaintiff to obtain a curb cut; and (3) costs.

On November 20, 2015, the defendant filed an answer, special defenses, and a five count counterclaim. As part of its first special defense, the defendant alleged that the plaintiff's intended use will overburden and constitutes an impermissible misuse of the right-of-way. In its counterclaim, the defendant alleged, inter alia, that: it has a right to relocate the right-of-way (count one); it would be equitable to deny the plaintiff's request for injunctive relief and to enter injunctive relief in favor of the defendant, compelling the plaintiff to release the right-of-way upon its relocation by the defendant (count two); the defendant was not materially interfering with the plaintiff's use of the right-of-way (count three); the defendant has no duty to sign curb cut permit applications or otherwise authorize the plaintiff to make unnecessary alterations and/or modifications to the defendant's property to make use of the right-of-way (count four); and a permanent injunction should enter prohibiting the plaintiff from making unnecessary alterations and/or modifications to the defendant's property to access the right-of-way (count five). The defendant sought a variety of relief, most relevantly: (1) a declaratory judgment that it has the right to relocate the right-of-way on its property, at its own cost and expense, such that the relocated right-of-way is substantially equal in dimension, utility, and convenience to the plaintiff as the current right-of-way and that the relocated right-of-way would not impose any additional burden on the plaintiff; and (2) a permanent injunction ordering the

plaintiff to release the right-of-way upon its relocation by the defendant in the manner described previously.[4]

Meanwhile, in October, 2015, the plaintiff submitted a curb cut application to the city, which the city deemed unacceptable.[5] A curb cut was not necessary for the plaintiff to gain access to the right-of-way.[6] In November, 2015, with the assistance of a surveyor, the plaintiff began preparing a site plan for former Lot 13 upon which the plaintiff intended to construct a parking lot that would be accessed using the right-of-way.

In January, 2016, the defendant prepared two concept plans to relocate the right-of-way on its property. The defendant intended to reconfigure its parking area to maintain approximately the same number of parking spaces utilized by patrons while also providing the plaintiff with access across its property to former Lot 13. The plaintiff had no interest in either alternative, however, and would not consider any alternative to the right-of-way. The defendant did not establish that the city would approve these alternative concept plans.

[4] The defendant requested the following additional relief: a declaratory judgment that it has the right to use its property in any manner that does not unreasonably interfere with the plaintiff's use of the right-of-way, including using the area for parking subject to certain conditions; a declaratory judgment that the plaintiff has no right to make unnecessary alterations and/or modifications to the defendant's property to access the right-of-way, the plaintiff's intended alterations and/or modifications are unnecessary, and the defendant has no duty to sign curb cut permit applications or otherwise authorize the plaintiff to make unnecessary alterations and/or modifications to its property to access the right-of-way; a permanent injunction prohibiting the plaintiff from making unnecessary alterations and/or modifications to the defendant's property to access the right-of-way; costs; and such other relief deemed fair, just, and equitable by the court.

[5] The city returned the plaintiff's curb cut application and noted that it required the submittal of full A-2 surveys for the plaintiff's and the defendant's lots. The plaintiff submitted an A-2 survey, but the defendant did not. Thus, the city never reconsidered the plaintiff's curb cut application.

[6] A curb does not obstruct access from West Service Road to the right-of-way, and, according to the trial court, the area at issue in the curb cut application appears to be traversable.

On March 15, 2016, the plaintiff submitted a planning and zoning application to the city for approval of its site plan. According to the site plan, former Lot 13 would serve as a parking lot, containing seventy-nine parking spaces, and would be fenced off from the remainder of 170 Weston Street such that the only means of access to the parking lot would be by way of the right-of-way. The plaintiff's current tenants, Specialty Corporation, Inc. (Specialty),[7] and Hertz Corporation (Hertz), which operate a school bus depot and sell out of service rental cars, respectively, would use the parking lot as an accessory to their principal uses of 170 Weston Street. On June 20, 2016, the plaintiff submitted a revised site plan. Per the revised site plan, the plaintiff intended for the parking lot to be used for passenger vehicle parking for tenants, employees, and invitees of Specialty and Hertz, and as passenger vehicle parking for concert and sporting event attendees. On July 12, 2016, the city approved the revised site plan. The plaintiff did not establish that it obtained from the city a permit or license to utilize former Lot 13 as a parking lot for public use, however.

On April 18, 2017, following a court trial held on July 12 and 13, 2016, and the submission of posttrial briefs from both parties, the court issued a memorandum of decision. With respect to the plaintiff's complaint, the court rendered judgment in favor of the defendant, concluding, inter alia, that the plaintiff was not entitled to injunctive relief because it had failed to establish that the defendant's actions were causing imminent harm or currently interfering with the plaintiff's use of the

[7] Under the August 12, 2014 lease executed by the plaintiff and Specialty, Specialty had the full right to use and occupy former Lot 13. The trial court found that, pursuant to the terms of a February 29, 2016 amendment to that lease, however, "the plaintiff can require Specialty to remove its buses and vans from former lot 13 in exchange for Specialty having the right to utilize, for employee parking, a maximum of fifty of the [seventy-nine planned] parking spaces to be constructed."

right-of-way. With respect to the defendant's counterclaim, the court rendered judgment in favor of the plaintiff on counts one, two, and five, dismissed the third count, and, with respect to the fourth count, issued a declaratory judgment that, on the basis of the facts as they existed before the court, the defendant had no duty or obligation to assist the plaintiff in obtaining a curb cut permit.

On May 5, 2017, the defendant appealed from the court's judgment on the first and second counts of its counterclaim.[8] On May 11, 2017, the plaintiff filed a cross appeal from the court's judgment on its complaint. Additional facts and procedural history will be provided as necessary.

I

We first address the defendant's claim on appeal. The defendant argues that, in rendering judgment in favor of the plaintiff on the defendant's counterclaim, the trial court erred in concluding that *Alligood* v. *LaSaracina*, supra, 122 Conn. App. 473, was controlling precedent. Specifically, the defendant contends that *Alligood* should be limited to its facts and should not be broadly applied so as to preclude the relocation, as opposed to the modification, of any right-of-way by the owner of servient land without the consent of the owner of the dominant estate. In the alternative, the defendant contends that *Alligood* is inconsistent with controlling Connecticut Supreme Court precedent, which has relied on the Restatement (Third) of Property in Connecticut easement cases, and that § 4.8 (3) (c) of the Restatement (Third) of Property is more consistent with general principles of Connecticut easement law and public policy. We disagree.

Central to the defendant's claim is the question of whether a servient landowner must obtain consent from the owner of the dominant estate to relocate an easement on the servient estate. As this is a question of law,

[8] See footnote 1 of this opinion.

our review is plenary. See *Abrams* v. *PH Architects, LLC*, 183 Conn. App. 777, 788, 193 A.3d 1230, cert. denied, 330 Conn. 925, 194 A.3d 290 (2018) ("[i]t is axiomatic that matters of law are entitled to plenary review on appeal").

To answer this question, we first turn to *Alligood*. In *Alligood*, the defendants unilaterally altered a section of the plaintiffs' right-of-way across the defendants' property by eliminating the circular turnaround at the end of the right-of-way. *Alligood* v. *LaSaracina*, supra, 122 Conn. App. 475. On appeal, and in agreement with the plaintiffs, this court determined that the trial court applied the incorrect standard of law to the plaintiffs' request for injunctive relief and that the defendants' unilateral alteration of the location and dimensions of the right-of-way was improper. Id., 476. In so holding, we adopted and applied the general rule adhered to by a majority of jurisdictions, namely, that "once the location of an easement has been selected or fixed, it cannot be changed by either the landowner or the easement owner without the other's consent." (Internal quotation marks omitted.) Id.

Our adoption of the majority approach was not dependent upon any distinction between the relocation or modification of an easement. See id., 476–77 (collecting cases applying majority rule to easement modification and relocation). Rather, we adopted the majority approach, over that set forth in § 4.8 (3) (c) of the Restatement (Third) of Property, which provides: "Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not . . . (c) frustrate the purpose for which the easement was created." We reasoned: "[W]e believe that the attributes of the majority rule, namely, uniformity, stability, predictability and judicial economy, outweigh

any increased flexibility offered by the Restatement approach." *Alligood* v. *LaSaracina*, supra, 122 Conn. App. 478. Applying the majority rule to the factual circumstances of the case, we determined that the defendants' alteration of the plaintiffs' right-of-way was improper because "[t]he defendants did so *without the plaintiffs' consent*." (Emphasis added.) Id., 478–79. Accordingly, per our legal precedent, no meaningful difference exists between the unilateral modification of an easement, as in *Alligood*, and the unilateral relocation of an easement, as sought by the defendant in the present case; under the majority rule, either change is improper without consent from both the landowner and easement owner.[9]

Moreover, although the defendant contends that we should distinguish *Alligood* from the present case on the basis that *Alligood* involved the modification, rather than a relocation, of an easement—and, therefore, apply § 4.8 (3) (c) of the Restatement (Third) of Property instead of the majority rule—§ 4.8 (3) (c) does not support such distinction. As recited previously, § 4.8 (3) (c) of the Restatement (Third) of Property provides in relevant part: "Unless expressly denied by the terms of an easement . . . the owner of the servient estate is entitled to make reasonable changes in the *location or dimensions of an easement*, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not . . . (c) frustrate the purpose for which the easement was created." (Emphasis added.) As demonstrated by its express terms, § 4.8 (3) (c) does not distinguish

[9] The defendant argues that *Alligood* does not, and should not, prevent a servient landowner from *prospectively* obtaining court relief to compel the relocation of an easement over the unreasonable opposition of the easement holder. We disagree. If granted, such relief would be contradictory to the majority rule, which provides that the location of an easement cannot be changed without consent from both the landowner and the easement holder *once the location of an easement has been selected or fixed.*

between the relocation and modification of an easement.[10]

Likewise, the defendant's contention that *Alligood* is inconsistent with our Supreme Court precedent is unsupported, as the defendant points to no case in which our Supreme Court has adopted § 4.8 of the Restatement (Third) of Property or suggested that § 4.8 is a necessary corollary to sections upon which our Supreme Court *has* relied, namely, §§ 4.9,[11] 4.10,[12] and 8.3[13] of the Restatement (Third) of Property, which concern the use and enforcement of servitudes. Moreover, in *Alligood*, we expressly acknowledged the intended purpose of § 4.8 of the Restatement (Third) of Property,

[10] Furthermore, the defendant cites no authority, and we are aware of none, supporting the application of § 4.8 (3) (c) of the Restatement (Third) of Property in this manner.

[11] Section 4.9 of the Restatement (Third) of Property provides: "Except as limited by the terms of the servitude determined under § 4.1, the holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude."

[12] Section 4.10 of the Restatement (Third) of Property provides: "Except as limited by the terms of the servitude determined under § 4.1, the holder of an easement or profit as defined in § 1.2 is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. The manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude. Unless authorized by the terms of the servitude, the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment."

[13] Section 8.3 of the Restatement (Third) of Property provides: "(1) A servitude may be enforced by any appropriate remedy or combination of remedies, which may include declaratory judgment, compensatory damages, punitive damages, nominal damages, injunctions, restitution, and imposition of liens. Factors that may be considered in determining the availability and appropriate choice of remedy include the nature and purpose of the servitude, the conduct of the parties, the fairness of the servitude and the transaction that created it, and the costs and benefits of enforcement to the parties, to third parties, and to the public.

"(2) Except when failure to enforce servitudes in common-interest communities or general-plan developments provides the basis for modification or termination due to changed conditions under § 7.10, property owners or an association of property owners may enforce the servitudes against subsequent similar violations by the same or different parties unless, under the circumstances then prevailing, enforcement would be unreasonable or inequitable."

namely, "to permit development of the servient estate to the extent it can be accomplished without unduly interfering with the legitimate interests of the easement holder," while rejecting it in favor of the majority rule. (Internal quotation marks omitted.) *Alligood* v. *LaSaracina*, supra, 122 Conn. App. 477.

By arguing further that *Alligood* is inconsistent with the general principles of Connecticut easement law and public policy, the defendant essentially asks that we overrule *Alligood*. "[I]t is axiomatic that one panel of this court cannot overrule the precedent established by a previous panel's holding. . . . As we often have stated, this court's policy dictates that one panel should not, on its own, [overrule] the ruling of a previous panel. The [overruling] may be accomplished only if the appeal is heard en banc." (Internal quotation marks omitted.) *LM Ins. Corp.* v. *Connecticut Dismanteling, LLC*, 172 Conn. App. 622, 632–33, 161 A.3d 562 (2017); see also *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 417, 195 A.3d 664 (2018) ("[t]he doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it" [internal quotation marks omitted]).

In the present case, relying on the majority rule adopted in *Alligood*, the trial court rejected the first and second counts of the defendant's counterclaim, in which the defendant sought both a declaratory judgment that it has the right to relocate the right-of-way unilaterally and an injunction requiring the plaintiff to release its rights in the existing right-of-way if the relocated right-of-way were substantially equal in dimension, utility, and convenience. In accordance with our adoption of the majority approach in *Alligood*, and in light of our foregoing discussion, we decline to limit *Alligood* in the manner requested by the defendant, and we conclude that the trial court properly rendered judgment in favor of the plaintiff on counts one and two of the defendant's counterclaim.

II

We turn now to the plaintiff's cross appeal. The plaintiff claims that, upon finding that the defendant's use of the servient estate interfered with the plaintiff's intended use of the easement, the trial court should have rendered judgment in the plaintiff's favor on its complaint and granted its request for an injunction prohibiting additional interference by the defendant. In support of its claim, the plaintiff argues that the court erred by holding the plaintiff to an incorrect and more burdensome standard with respect to whether it would suffer irreparable harm to its easement rights. The plaintiff argues in the alternative that the court abused its discretion when it denied its request for injunctive relief. We disagree.

We are mindful of the following standard of review. "A prayer for injunctive relief is addressed to the sound discretion of the court and the court's ruling can be reviewed only for the purpose of determining whether the decision was based on an erroneous statement of law or an abuse of discretion. . . . Therefore, unless the trial court has abused its discretion . . . the trial court's decision must stand. . . . How a court balances the equities is discretionary but if, in balancing those equities, a trial court draws conclusions of law, our review is plenary." (Citation omitted; internal quotation marks omitted.) *Commissioner of Correction* v. *Coleman*, 303 Conn. 800, 810, 38 A.3d 84 (2012), cert. denied sub nom. *Coleman* v. *Arnone*, 568 U.S. 1235, 133 S. Ct. 1593, 185 L. Ed. 2d 589 (2013).

A

First, we address the plaintiff's argument that the court applied the incorrect legal standard when determining whether the plaintiff was entitled to injunctive relief. Specifically, the plaintiff argues that the court erroneously relied upon *Karls* v. *Alexandra Realty Corp.*, 179 Conn. 390, 426 A.2d 784 (1980), to require that it demonstrate an "actual disturbance" of its easement

right in order to establish irreparable harm, even though Connecticut law requires only that the holder of an easement right demonstrate the existence of a substantial probability of interference with such right. Therefore, according to the plaintiff, it demonstrated irreparable harm by virtue of the court's finding that parking in the right-of-way by the defendant's employees and customers will interfere with the plaintiff's intended use of the right-of-way.

The following legal principles and precedent are relevant to the plaintiff's argument. It is well established that "[a] party seeking injunctive relief must demonstrate that: (1) it has no adequate remedy at law; (2) it will suffer irreparable harm absent an injunction; (3) it will likely prevail on the merits; and (4) the balance of equities tips in its favor." (Internal quotation marks omitted.) *Wellswood Columbia, LLC* v. *Hebron*, 327 Conn. 53, 59 n.5, 171 A.3d 409 (2017). "[T]he owner of [an] easement is entitled to [injunctive] relief only if he can show that he will be disturbed or obstructed in the exercise of his right to use it." (Internal quotation marks omitted.) *Welles* v. *Lichaj*, 136 Conn. App. 347, 354, 46 A.3d 246, cert. denied, 306 Conn. 904, 52 A.3d 730 (2012).

In *Karls*, the trial court issued an injunction restraining the defendant[14] from using a fourteen foot wide right-of-way, which provided access to the plaintiffs' and defendant's properties, after concluding, inter alia, that the construction of the defendant's house violated certain zoning ordinances. *Karls* v. *Alexandra Realty Corp.*, supra, 179 Conn. 393–94. "The plaintiffs' central complaint [was] that the right-of-way [was] inadequate for use by six families and that such an excessive use would result in irreparable injury to them." Id., 395. On appeal, our Supreme Court considered, inter alia, whether the injunction issued by the trial court was improper in light of the facts found. Id., 399.

[14] The plaintiffs filed suit against multiple defendants in *Karls*, but we refer only to the defendant homeowner for ease of discussion.

In making its determination, our Supreme Court was guided by several key legal principles governing the issuance of injunctions: "The issuance of an injunction is the exercise of an extraordinary power which rests within the sound discretion of the court, and the justiciable interest which entitles one to seek redress in an action for injunctive relief is at least one founded on the imminence of substantial and irreparable injury." (Internal quotation marks omitted.) Id., 401. In other words, "[t]he extraordinary nature of injunctive relief requires that the harm complained of is occurring or will occur if the injunction is not granted. Although an absolute certainty is not required, it must appear that there is a substantial probability that but for the issuance of the injunction, the party seeking it will suffer irreparable harm." Id., 402. "The plaintiff seeking injunctive relief bears the burden of proving facts which will establish irreparable harm as a result of that violation." Id., 401.

In consideration of the foregoing legal principles and the facts found by the trial court, our Supreme Court in *Karls* concluded that it could not agree with the court's conclusion that the plaintiffs had satisfied their burden of proving the substantial likelihood that irreparable harm would result from the defendant's violation. Id., 401–402. Our Supreme Court reasoned: "[A]lthough the plaintiffs have shown that they may *possibly* suffer irreparable harm, i.e., emergency vehicles blocked by a car stuck in the right-of-way, they have failed to demonstrate that such harm is *imminent* or that it *will necessarily be caused by* the defendant's violation of the zoning regulations. In the absence of such a showing, an injunction cannot be issued." (Emphasis added.) Id. According to our Supreme Court, the harm complained of was not imminent in light of the trial court's finding that the alleged harm was only a possibility and the

fact that the injunction would not become effective until one year after it was issued. Id., 403.

In the present case, the trial court concluded, inter alia, that "parking in the right-of-way by the defendant's employees and customers will interfere with the plaintiff's reasonably intended use of the right-of-way, at least during Specialty's hours of operation," but determined that the plaintiff did not establish irreparable harm. The court explained: "In this case, it is undisputed that the plaintiff's rights have not yet been disturbed. Specialty's buses are still parked on former Lot 13. The plaintiff has not constructed its planned parking lot. Nor is there any evidence that Specialty will take advantage of the fifty parking spaces [that] the plaintiff has committed to provide under the lease amendment. The position of the plaintiff here is similar to that of the plaintiffs in *Karls*. While it is entirely *possible* that its access to the right-of-way may be impaired, such impairment is *not imminent*. In fact, it is contingent on a number of events that have yet to occur. In addition, the court has no way of knowing if the defendant will still be operating in the manner it has been if and when the planned parking lot is built and is being used by Specialty's employees. For these reasons, the plaintiff is not entitled to the injunctive relief it has requested."[15] (Emphasis added.)

[15] In the preceding paragraph of its memorandum of decision, the trial court stated: "The court agrees with the defendant that a claim of interference with an easement or right-of-way, as opposed to breach of a restrictive covenant, requires proof of irreparable harm, or, at the very least, that the holder of the easement's rights have been actually obstructed or disturbed. In fact, even in the cases relied upon by the plaintiff, the court held that injunctive relief was warranted because the defendant had in fact disturbed the plaintiff's rights." In light of this particular language, the plaintiff argues in part that the court incorrectly concluded that, in order to establish irreparable harm, the plaintiff must prove that "the holder of the easement's rights have been actually obstructed or disturbed." (Internal quotation marks omitted.) We disagree. Despite the court's inclusion of the clause "at the very least," which suggests in isolation that the court believed that the plaintiff must meet a higher legal standard than our precedent requires, the

The foregoing explanation demonstrates that the court correctly applied *Karls* to the factual circumstances of the present case. Essentially, relying on *Karls*, the trial court concluded that the plaintiff had failed to demonstrate that the alleged harm (i.e., the plaintiff's inability to use of the right-of-way because of the defendant's use of its parking lot within the right-of-way) would necessarily result but for the issuance of the requested injunction; not only was the parking lot not yet constructed on former Lot 13, it was unclear to the court whether Specialty would ever use any of the parking spaces afforded to it under the amended lease; see footnote 7 of this opinion; or whether the defendant would be operating its business in the same manner once the parking lot was actually constructed. Accordingly, we conclude that the trial court applied the correct standard of law when determining whether the plaintiff was entitled to injunctive relief.[16]

court goes on to correctly apply *Karls* to the factual circumstances of the present case.

[16] In light of *Karls*, the plaintiff argues that interference with an easement in and of itself is sufficient to demonstrate the existence of a substantial probability of harm to an easement holder's rights, and it cites multiple cases in support, namely, *Leabo* v. *Leninski*, 182 Conn. 611, 438 A.2d 1153 (1981), *Gerald Park Improvement Assn.* v. *Bini*, 138 Conn. 232, 83 A.2d 195 (1951), *New London* v. *Perkins*, 87 Conn. 229, 87 A. 724 (1913), *Dewire* v. *Hanley*, 79 Conn. 454, 65 A. 573 (1907), *Schwartz* v. *Murphy*, 74 Conn. App. 286, 812 A.2d 87 (2002), cert. denied, 263 Conn. 908, 819 A.2d 841 (2003), cert. denied, 546 U.S. 820, 26 S. Ct. 352, 163 L. Ed. 2d 61 (2005), and *Simonds* v. *Shaw*, 44 Conn. App. 683, 691 A.2d 1102 (1997). We disagree. In each of these cases, there was no real question as to whether the plaintiffs would ever actually use the easements or whether the easements were or would be obstructed by the defendants; rather, the plaintiffs had already been using or attempting to use the easements in the manner intended and were prevented from doing so, or it was highly likely that they would be prevented from doing so, by the defendants' interference. By contrast, in the present case, the trial court was not convinced of the substantial probability that *but for the injunction* the plaintiff would be prevented from using the right-of-way in the manner intended because, although the court found that the parking in the right-of-way by the defendant's employees and customers *will interfere* with the plaintiff's reasonably intended use of the right-of-way, such harm was *not imminent* as the plaintiff had not yet

B

We next address the plaintiff's alternative argument that the trial court abused its discretion when it denied the plaintiff's request for injunctive relief. The plaintiff argues that a fair balancing of the equities supports the conclusion that an injunction should have been issued by the court in the present case.

The following legal principles are relevant to the plaintiff's argument. "The granting of an injunction rests within the sound discretion of the trial court and [i]n exercising its discretion, the court . . . may consider and balance the injury complained of with that which will result from interference by injunction. . . . The relief granted must be compatible with the equities of the case. . . . The action of the trial court will not be disturbed unless it constitutes an abuse of discretion." (Internal quotation marks omitted.) *Waterbury* v. *Phoenix Soil, LLC*, 128 Conn. App. 619, 627–28, 20 A.3d 1 (2011); see also *Baruno* v. *Slane*, 151 Conn. App. 386, 397 n.9, 94 A.3d 1230 ("[T]he granting of injunctive relief, which must be compatible with the equities of the case, rests within the trial court's sound discretion. . . . Those equities should take into account the gravity and wilfulness of the violation, as well as the potential harm to the defendants." [Emphasis omitted; internal quotation marks omitted.]), cert. denied, 314 Conn. 920, 100 A.3d 851 (2014). "In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done." (Internal quotation marks

constructed the planned parking lot on former Lot 13, there was no evidence before the court to suggest that Specialty would use the parking spaces in said parking lot, and the court "ha[d] no way of knowing if the defendant [would] still be operating in the manner it [had] been if and when the planned parking lot [was] built and [was] being used by Specialty's employees."

omitted.) *Wethersfield* v. *PR Arrow, LLC*, 187 Conn. App. 604, 645, 203 A.3d 645, cert. denied, 331 Conn. 907, 202 A.3d 1022 (2019).

In the present case, as described previously, the court initially determined that "parking in the right-of-way by the defendant's employees and customers will interfere with the plaintiff's reasonably intended use of the right-of-way, at least during Specialty's hours of operation." In making this determination, the court acknowledged, inter alia, that "the plaintiff's intended use of former Lot 13 as a parking lot [was] far from theoretical"—due to the plaintiff's removal of the three utility poles obstructing the right-of-way, the plaintiff's submission of detailed site plans to the city, the city's approval of the revised site plan, and the creation of the amended lease with Specialty—and, "[t]hus, it [was] reasonably expected that the plaintiff *may someday* make use of the former Lot 13 as a parking lot for Specialty's employees and will use the right-of-way for access to that lot." (Emphasis added.) Thereafter, the court found that it was possible that the plaintiff's access to the right-of-way may be impaired but concluded that such impairment was not imminent because "it [was] contingent on a number of events that [had] yet to occur," such as Specialty's use of fifty new parking spaces that it was provided under the amended lease agreement.

The foregoing discussion by the trial court demonstrates that it fully acknowledged that parking in the right-of-way would interfere with the plaintiff's access to the right-of-way but also recognized that this harm was not likely to befall the plaintiff but for the issuance of the requested injunction. Under these circumstances, and in light of the extraordinary nature of injunctive relief, we cannot say that the court abused its discretion when it denied the plaintiff's request for an injunction.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JEFFREY ORLANDO CREWE
(AC 40882)

Keller, Moll and Beach, Js.

Syllabus

Convicted, after a jury trial, of the crime of possession of a narcotic substance, the defendant appealed to this court, claiming that the evidence was insufficient to support his conviction. The defendant's conviction stemmed from an incident in which two police officers, C and R, while patrolling an area known for drug use, located the defendant and two other individuals, Y and M, inside of a van that was parked behind bushes. After C observed two bundles of heroin on the center console next to the defendant's left leg, the police conducted a search of the van, which revealed the presence of heroin. Heroin was also found on the person of M. In prosecuting the case, the state pursued the theory that although the defendant did not physically possess narcotic substances on his person at the time of the arrest, he constructively possessed at least some of the narcotics found in the van. *Held* that there was sufficient evidence for the jury to draw a reasonable inference that the defendant constructively possessed at least some of the narcotics to support the defendant's conviction, as the jury reasonably could have inferred, on the basis of the totality of the circumstances, that the defendant knew of the presence of the narcotics in the van and exercised dominion and control over the narcotics: C testified that the van was parked in the rear of an otherwise vacant parking lot in broad daylight and was concealed by a cluster of bushes so that it was not visible from the street, the area was known for traffic in narcotics, the location of the van raised C's suspicions, the defendant quickly reached behind the driver's seat as C approached the van, and a subsequent search of the vehicle revealed that a large bag containing small rubber bands and a white powder that later tested positive for heroin was present where the defendant had reached, which supported the inference that the defendant hastily attempted to conceal the substance he knew was illegal and exercised dominion and control over it; moreover, other evidence found at the scene, as well as the wealth of evidence seized by the officers at the time of the arrest and the testimony of the witnesses, further provided a sufficient basis for the jury reasonably to find that the defendant knew that heroin was in the van and that he exercised dominion and control over at least a portion of it.

Argued March 7—officially released October 15, 2019

Procedural History

Substitute information charging the defendant with the crimes of possession of a narcotic substance, possession of a narcotic substance with intent to sell, and

conspiracy to possess a narcotic substance with the intent to sell, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Klatt*, *J.*; verdict of guilty of possession of a narcotic substance; thereafter, the court denied the motion filed by the defendant for a judgment of acquittal; judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Timothy H. Everett, assigned counsel, with whom were *Adam Antar*, certified legal intern, and, on the brief, *Karen Mitchell*, certified legal intern, *Julie Moscato*, certified legal intern, and *Uriel Lloyd*, certified legal intern, for the appellant (defendant).

Lisa A. Riggione, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Robert F. Mullins*, assistant state's attorney, for the appellee (state).

Opinion

BEACH, J. The defendant, Jeffrey Orlando Crewe, appeals from the judgment of conviction, rendered after a jury trial, of possession of a narcotic substance in violation of General Statutes § 21a-279 (a). The defendant's sole claim on appeal is that the evidence presented at trial was insufficient to support his conviction. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On August 18, 2014, Hamden Police Officers Greg Curran and Enrique Rivera were patrolling by bicycle in the area of Dixwell Avenue and the Farmington Canal Trail (trail). The officers were assigned to this specific area in response to reports of bicycle thefts and drug use by teens and young adults. At approximately 6:12 p.m., Curran and Rivera observed a young man walk across the trail in a westerly direction toward Dixwell Avenue and cut through a hole in a six-foot fence that

separated the trail from the adjacent property. Rivera, who was familiar with the cut in the fence, pointed it out to Curran because he thought knowledge of the hole might be useful in a future pursuit situation.

The officers proceeded through the hole in the fence and entered an adjacent parking lot situated behind several businesses. Upon approaching the parking lot, Curran noticed a van parked behind bushes that concealed the van's presence from passersby on Dixwell Avenue. Curran testified that "[i]t was odd for them to be sitting there so [he] went over to check on them." As Curran approached the van he could see that there were two people in the front seats.[1] As Curran approached the van, the front seat passenger, later identified as the defendant, quickly reached down behind the driver's seat. Curran, for safety concerns, asked the defendant what he was reaching for. In response, the defendant held up a used car magazine.

As Curran was talking to the defendant, he noticed a third individual, later identified as JonMichael Young, in the back seat. At that point, Young reached down toward his seat, but Curran asked him to place his hands on the headrest in front of him. He complied. Curran questioned the driver, later identified as Lachee McGee, as to why they were parked in that area. She said that they were looking for frogs in a nearby puddle. As Curran was talking to the occupants, he observed two bundles of heroin on the center console next to the defendant's left leg.[2] At this point, Rivera approached the van on bicycle and Curran said "104" to him, which was a police signal indicating that drugs were present.

[1] Curran testified that the weather was bright.

[2] Curran had received special training on how narcotics are packaged and how to identify narcotics. Curran testified that the bundles of heroin he observed on the center console of the van were packed in pink glassine bags.

Curran asked the defendant to exit the vehicle and stand near Rivera, and he complied. As the defendant exited the vehicle, Curran stood at the driver's window. He testified that McGee looked down at the center console and, seeing the bundles of heroin, picked up the used car magazine that the defendant had displayed and placed it on top of the bundles of heroin.[3] At this point, Curran asked McGee to turn over the keys to the vehicle. Curran then was able to take possession of the drugs that he had seen on the center console.[4] The remaining occupants of the van were removed from the vehicle and were detained by other officers who had arrived on the scene.[5] The police searched the defendant and found nothing of note on his person.

When McGee exited the van and was patted down, police observed a small pink glassine bag sticking out of the front of her pants. The bag resembled the bags found on the center console. When McGee was asked if she had any other drugs in her possession, she answered positively and said that she had shoved drugs down the front of her pants. A female officer who had been called to the scene retrieved the drugs from the front of McGee's pants. The officers seized nine bags of narcotics from the person of McGee. Curran continued to search the vehicle and discovered several other bags of heroin on top of the center console, as well as a bottle of a substance known as Super Mannitol.[6] In total, twenty-five pink glassine bags were retrieved from the center console. A search of the back seat revealed

[3] Curran further testified that McGee appeared very nervous when Curran asked the defendant to exit the van.

[4] While Curran was taking possession of the drugs on the center console, his finger hit one of the bundles and knocked it to the passenger side floor. He was able to retrieve this bundle upon a subsequent search of the car.

[5] Because they were on bicycles and did not have any way to secure the detained individuals, Curran and Rivera requested backup.

[6] Curran testified that Super Mannitol is commonly used as a mixing agent that is added to increase the volume of heroin.

a white dinner plate, two metal strainers, sixty pink glassine bags each filled with a substance that later field-tested positive as heroin, and a Ziploc type of bag with a large amount of the same substance. Rivera also found bags stuffed between the seats in the rear passenger area of the van where Young had been sitting. On the basis of his training and experience, Curran believed that he had interrupted the occupants while they were mixing the heroin with the Super Mannitol in order to package the narcotics for sale.

The police seized ninety-four small bags and one larger bag, all containing heroin. At trial, the seized evidence was introduced as five exhibits as follows: (1) twenty-five pink glassine bags containing powder that tested positive for heroin and Super Mannitol and weighed 1.09 grams; (2) sixty pink glassine bags that tested positive for heroin and weighed 2.415 grams and contained Super Mannitol; (3) a Ziploc bag containing powder that tested positive for heroin and weighed 1.892 grams; (4) a white bottle containing Super Mannitol, a mixing agent, which contained no controlled substance; and (5) nine pink glassine bags containing powder that tested positive for heroin and weighed .399 grams.

The defendant was charged with possession of a narcotic substance in violation of § 21a-279 (a), possession of a narcotic substance with the intent to sell in violation of General Statutes § 21a-277 (a), and conspiracy to possess a narcotic substance with the intent to sell in violation of General Statutes §§ 53a-48 and 21a-277 (a). A jury convicted the defendant of possession of a narcotic substance and acquitted him of the remaining two counts. The court imposed a sentence of seven years of incarceration, execution suspended, and three years of probation.

On appeal, the defendant claims that the evidence at trial was insufficient to sustain his conviction of possession of a narcotic substance on the theory of

nonexclusive constructive possession. The state argues that there was ample evidence that the defendant knew the character of the narcotic substances and exercised dominion and control over at least some of the narcotics in the vehicle. We agree with the state.

"The standard of review employed in a sufficiency of the evidence claim is well settled. [W]e apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . This court cannot substitute its own judgment for that of the [finder of fact] if there is sufficient evidence to support the [finder of fact's] verdict." (Internal quotation marks omitted.) *State* v. *Andriulaitis*, 169 Conn. App. 286, 292, 150 A.3d 720 (2016).

Section 21a-279 (a) (1) provides: "Any person who possesses or has under such person's control any quantity of any controlled substance, except less than one-half ounce of a cannabis-type substance and except as authorized in this chapter, shall be guilty of a class A misdemeanor."

"[T]he jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all evidence proves the defendant guilty of all elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact . . . but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [jury] is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [jury] may draw whatever inferences from the evidence or facts established by the evidence [that] it deems to be reasonable and logical. . . .

"Finally, on appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Citation omitted; internal quotation marks omitted.) *State* v. *Leniart*, 166 Conn. App. 142, 170, 140 A.3d 1026 (2016), rev'd on other grounds, 333 Conn. 88, A.3d (2019).

In the prosecution of the present case, the state pursued the theory that, although the defendant did not physically possess narcotics on his person at the time of the arrest, he constructively possessed at least some of the narcotics in the van. "[T]o prove illegal possession of a narcotic substance, it is necessary to establish that the defendant knew the character of the substance, knew of its presence and exercised dominion and control over it. . . . Where . . . the contraband is not found on the defendant's person, the state must proceed on the alternate theory of constructive possession, that is, possession without direct physical contact. . . . Where the defendant is not in exclusive possession of the [place] where the narcotics are found, it may not be inferred that [the defendant] knew of the presence of the narcotics and had control over them, unless there are other incriminating statements or circumstances tending to buttress such an inference. . . . [T]he state

had to prove that the defendant, and not some other person, possessed a substance that was of narcotic character with knowledge both of its narcotic character and the fact that he possessed it." (Citation omitted; internal quotation omitted.) *State* v. *Walcott*, 184 Conn. App. 863, 873, 196 A.3d 379 (2018).

"[I]t is a function of the jury to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . Because [t]he only kind of an inference recognized by the law is a reasonable one . . . any such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and founded upon the evidence. . . . However, [t]he line between permissible inference and impermissible speculation is not always easy to discern. When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation. When that point is reached is, frankly, a matter of judgment. . . .

"[P]roof of a material fact by inference from the circumstantial evidence need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . Thus, in determining whether the evidence supports a particular inference, we ask whether the inference is so unreasonable as to be unjustifiable. . . .

In other words, the inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference. Equally well established is our holding that a jury may draw factual inferences on the basis of already inferred facts. . . . Moreover, [i]n viewing evidence which could yield contrary inferences, the jury is not barred from drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with innocence." (Internal quotation marks omitted.) *State* v. *Niemeyer*, 258 Conn. 510, 518–19, 782 A.2d 658 (2001).

Additionally, "[w]e do not sit as the 'seventh juror' when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict of guilt beyond a reasonable doubt. Moreover, [i]n reviewing the jury verdict, it is well to remember that [j]urors are not expected to lay aside matters of common knowledge or their own observation and experience of the affairs of life, but, on the contrary, to apply them to the evidence or facts in hand, to the end that their action may be intelligent and their conclusions correct." (Citation omitted; internal quotation marks omitted.) *State* v. *Ford*, 230 Conn. 686, 693, 646 A.2d 147 (1994).

In the present case, there was sufficient evidence to support the inference that the defendant constructively possessed narcotics. Curran testified that the van was parked in the rear of an otherwise vacant parking lot in broad daylight and was concealed by a cluster of bushes so that it was not visible from the street. The area was known for traffic in narcotics. The location of the van raised Curran's suspicions, as he thought it was unusual for a vehicle to be parked in such a manner. The secluded and screened location could have been selected to avoid detection. Additionally, as Curran

approached the vehicle, the defendant quickly reached behind the driver's seat. A subsequent search of the vehicle revealed that a large Ziploc bag containing small rubber bands and a white powder that later tested positive for heroin was present where the defendant had reached.[7] The evidence seized from behind the driver's seat further supported the inference that the defendant hastily attempted to conceal the substance he knew was illegal and exercised dominion and control over it.

Other evidence found at the scene further supported an inference that the defendant exercised dominion and control over at least some of the narcotics. Located directly next to the defendant near the center console of the vehicle were two bundles of heroin, several individual bags of heroin, and a bottle of Super Mannitol. Additionally, a subsequent search of the back seat of the vehicle yielded a white dinner plate, two metal strainers, sixty pink glassine bags filled with heroin, and a larger Ziploc type of bag that also contained heroin. These items customarily were used in the packaging of heroin. In total, ninety-four individual small glassine bags were found, along with the larger Ziploc type of bag. Curran testified that he believed that he had interrupted the occupants of the van while they were using the sifters in the process of mixing the heroin with the Super Mannitol to package the narcotics for sale.

We conclude that there was sufficient evidence for the jury to draw a reasonable inference that the defendant constructively possessed at least some of the narcotics found in the van. As noted, this court gives deference to inferences made by a jury, so long as those inferences are not so unreasonable as to be unjustifiable. The wealth of evidence seized by the officers at the time of arrest and the testimony of the witnesses

[7] Rivera found a white dinner plate and two metal sifters behind the driver's seat.

provided a sufficient basis for the jury reasonably to find that the defendant knew that heroin was in the van and that he exercised control over at least a portion of it. Although some factors, viewed in a vacuum, might militate against a finding of constructive possession, the jury reasonably could have inferred on the basis of the totality of the circumstances that the defendant knew of the presence of the narcotics in the van and that he exercised dominion and control over narcotics.[8]

The defendant relies primarily on *State* v. *Fermaint*, 91 Conn. App. 650, 881 A.2d 539, cert. denied, 276 Conn. 922, 888 A.2d 90 (2005), to support his contention that the evidence presented at trial was insufficient to establish that he was in constructive possession of the heroin found in the van at the time of his arrest. In *Fermaint*, the police received a tip from a confidential informant that the owner of a vehicle possessed crack cocaine and that she was accompanied by two males, one of whom the informant identified as "Hector." Id., 652. After locating and stopping the vehicle, officers observed the occupants of the vehicle engaging in furtive movements, including the defendant's bending from the back seat toward the front seat passenger. Id. As one officer approached, the front seat passenger was observed putting something in her pants. Id. An officer observed several crumbs of a rock like substance, which later tested positive for cocaine, on the back seat next to the defendant. Id., 652–53. The officer testified that it was possible that the defendant could have sat in the back seat without noticing the crumbs. Id., 653 n.3. A green leafy substance, later found to be marijuana, was found in the front carpet area. Id., 653. A plastic bag containing a large rock like substance,

[8] We also note that the other two occupants of the van likewise attempted hastily to conceal narcotics from the officers. As stated in *United States* v. *Batista-Polanco*, 927 F.2d 14, 18 (1st Cir. 1991), "the factfinder may fairly infer . . . that it runs counter to human experience to suppose that criminal conspirators would welcome innocent nonparticipants as witnesses to their crimes."

which tested positive for cocaine, and $120 were found on the person of the front passenger. Id. An address book and $2 were found on the person of the defendant, but no drugs. Id., 653. This court reversed the trial court's judgment revoking the defendant's probation. Id., 650. It held that the minimal nexus between the defendant and the drugs, along with the perhaps ambiguous movements observed by the officers, was insufficient to establish constructive possession of a narcotic substance. Id., 662–63.

Review of a claim of insufficient evidence is necessarily fact specific and, as stated previously, the evaluation of the strength of inferences involves an exercise of judgment. The facts of the present case are different from those of *Fermaint*. We previously noted that "[w]here the defendant is not in exclusive possession of the [place] where the narcotics are found, it may not be inferred that [the defendant] knew of the presence of the narcotics and had control over them, unless there are other incriminating statements or circumstances tending to buttress such an inference." (Internal quotation marks omitted.) *State* v. *Walcott*, supra, 184 Conn. App. 873. Sufficient incriminating circumstances exist in the present case. As in *Fermaint*, the defendant here moved furtively upon being approached by police, but there was considerably more evidence that he was aware of the presence of heroin. Unlike in *Fermaint*, the defendant was found in a vehicle that was parked in an unusual location in an area known for drug traffic and was concealed from the street by bushes. Further, the amount of narcotics located next to the defendant in *Fermaint* appeared to have been trace amounts that easily could have been overlooked; here, two bundles of heroin, each containing ten individual baggies, were found immediately next to the defendant's leg. A bottle of Super Mannitol was located next to the defendant. Other items commonly used in the packaging of heroin were found in the van.

Viewing the evidence in its totality and in the light most favorable to sustaining the jury's verdict, we conclude that there was sufficient evidence for the jury reasonably to have drawn the inference that the defendant constructively possessed heroin.

The judgment is affirmed.

In this opinion the other judges concurred.

LAWRENCE S. JEZOUIT *v.* DANNEL P. MALLOY ET AL.
(AC 40839)

DiPentima, C. J., and Moll and Beach, Js.

Syllabus

The plaintiff brought this action against the defendant state officials, officers and employees, claiming that telephone calls he had made to them were unlawfully recorded because they failed to obtain his consent or to provide him with notice in violation of statute (§ 52-570d [a]) before recording the calls. The plaintiff sought, inter alia, to permanently enjoin the defendants and all state officials and employees from unlawfully recording telephonic communications in the conduct of state business. The trial court granted the defendants' motion to dismiss and rendered judgment thereon, concluding that § 52-570d did not waive sovereign immunity by force of necessary implication, and that the plaintiff's claim for injunctive relief failed because he did not make substantial allegations of wrongful conduct on the part of the defendants to promote an illegal purpose in excess of their statutory authority. On the plaintiff's appeal to this court, *held*:

1. The trial court properly granted the defendants' motion to dismiss the plaintiff's complaint on the ground that the defendants were immune from suit pursuant to the doctrine of sovereign immunity:

   a. The plaintiff could not prevail on his claim that because § 52-570d authorizes an aggrieved person to bring an action in the Superior Court, as does similar language in the statute (§ 17a-550) that provides remedies for violations of the patients' bill of rights, the only possible interpretation of § 52-570d is that it impliedly waives sovereign immunity: unlike § 17a-550, which makes no distinction between patients of private and public mental health facilities, § 52-570d does not implicate a compelling public policy reason to provide those who have their telephonic communications recorded in an illegal fashion by the government the same civil remedy as those who are recorded illegally by private parties and, thus, no language in § 52-570d required an interpretation that it impliedly

waives sovereign immunity; moreover, related statutes that evidenced the remedial nature of § 17a-550 illuminated the breadth of the legislative concern for the fair treatment of mental patients, and a statute's instruction as to what an aggrieved person must file and where to file it did not compel the conclusion that such a statute waives sovereign immunity. b. There was no merit to the plaintiff's assertion that because § 52-570d (b) exempts from liability certain state officials, it waives sovereign immunity from suit by necessary implication for those state officials not so designated, such as the defendants: the implicit waiver of sovereign immunity from liability in § 52-570d (a) and (b) did not implicitly waive sovereign immunity from suit, and the exemption of certain state officials in § 52-570d (b) from the provisions of § 52-570d (a) did not require the conclusion that the legislature intended to waive sovereign immunity from suit with respect to those claims, as a statute logically can be interpreted as waiving sovereign immunity from liability with respect to certain state officials but not waiving sovereign immunity from suit with respect to claims against those officials; moreover, where the state waives sovereign immunity from liability but not its immunity from suit, an aggrieved person in such circumstances is not without recourse and may seek recovery against the state by filing a claim with the Claims Commissioner pursuant to statute (§ 4-141 et seq.).

2. The plaintiff could not prevail on his claim that because he sought declaratory and injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of an officer's statutory authority, the trial court improperly dismissed his complaint by failing to apply the exception to sovereign immunity for claims of declaratory and injunctive relief, as the plaintiff failed to alleged a cognizable claim under that exception to sovereign immunity; the trial court properly determined that the complaint did not set forth substantial allegations of wrongful conduct by the defendants to promote an illegal purpose in excess of their statutory authority, as the plaintiff's interpretation of § 52-570d would impose civil liability on state officials for conduct as innocuous as having an answering system that records voice mails, and the plaintiff failed to allege that the defendants recorded his telephonic communications to promote an illegal purpose and did not allege any purpose behind the recording of his telephonic communications in a manner proscribed by § 52-570d (a).

Argued May 22—officially released October 15, 2019

Procedural History

Action, inter alia, to enjoin the defendants from recording certain telephonic communications in the course of their official business, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Elgo*, *J.*, granted the defendants' motion to dismiss; thereafter, the court granted

the plaintiff's motion for reargument and vacated in part its order granting of the defendants' motion to dismiss; subsequently, the court granted the defendants' motion for reconsideration and rendered judgment dismissing the action, from which the plaintiff appealed to this court. *Affirmed.*

David V. DeRosa, with whom, on the brief, was *Lawrence S. Jezouit*, for the appellant (plaintiff).

Maura Murphy Osborne, assistant attorney general, with whom, on the brief was *George Jepsen*, former attorney general, for the appellees (defendants).

Opinion

DiPENTIMA, C. J. The plaintiff, Lawrence S. Jezouit, appeals from the judgment of the trial court dismissing his complaint on the basis of sovereign immunity. The plaintiff argues that the court improperly dismissed his complaint because (1) he brought his claim pursuant to General Statutes § 52-570d, which he contends waives sovereign immunity by force of necessary implication, and (2) he seeks declaratory and injunctive relief in accordance with a recognized exception to sovereign immunity. We disagree and, thus, affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. In his complaint, the plaintiff alleged that, on May 26, 2010, he sought to record a telephone conversation that he had with an agent of the Internal Revenue Service (IRS). When the plaintiff disclosed to the IRS agent that he was recording their conversation, the agent informed him "that she would cease further discussion and would not continue so long as the call was being recorded." The plaintiff alleged that he believed that it was "unfair" that he could not record the conversation in light of the fact that it was the "reciprocal practice" of the IRS, as well as many other government agencies and business entities, to record such conversations for their own purposes.

After researching the law, the plaintiff concluded that the state's routine practice of recording telephone communications was illegal because state officials failed to obtain consent, or to provide notification to the recorded party, in accordance with the provisions of § 52-570d (a).[1] The plaintiff alleged that he initially had lobbied the state legislature to amend § 52-570d in order to address the fact that the statute had been "outpaced" by certain technological developments and the ubiquitous use of modern telephone answering systems. When his lobbying efforts failed, the plaintiff claimed that he "reluctantly" commenced this action in his own interest and in the interest of the public.

As to the gravamen of his complaint, the plaintiff alleged that he was recorded illegally when, on various dates in March, 2015, he called the defendants (with one exception) and left messages on their respective automated answering systems.[2] The plaintiff alleged

[1] General Statutes § 52-570d (a) provides: "No person shall use any instrument, device or equipment to record an oral private telephonic communication unless the use of such instrument, device or equipment (1) is preceded by consent of all parties to the communication and such prior consent either is obtained in writing or is part of, and obtained at the start of, the recording, or (2) is preceded by verbal notification which is recorded at the beginning and is part of the communication by the recording party, or (3) is accompanied by an automatic tone warning device which automatically produces a distinct signal that is repeated at intervals of approximately fifteen seconds during the communication while such instrument, device or equipment is in use."

[2] The defendants, all of whom are named in their official capacities with the state of Connecticut, are: Governor Dannel P. Malloy, who was replaced as a defendant, upon a motion granted by this court, by his successor, Governor Edward M. Lamont, Jr.; Colleen M. Murphy, general counsel for the Freedom of Information Commission; Martin M. Looney, President Pro Tempore, Joint Committee on Legislative Management; Adam Joseph, press aide to Senator Martin M. Looney; Joe Aresimowicz, Speaker of the House of Representatives; Andrea Furlow, legislative assistant; Leonard A. Fasano, Senate Minority Leader, Joint Committee on Legislative Management; Themis Klarides, Minority Leader of the House of Representatives, Joint Committee on Legislative Management; Edwin Vargas, state representative; Francesco P. Sandillo, legislative assistant to Representative Edwin Vargas; John A. Mockler, technology manager, Office of Information Technology Services, Office of Legislative Management; William F. O'Shea, attorney, Legislative Commissioner's Office; Judge Patrick L. Carroll III, Chief Court

that these recordings were obtained illegally because the defendants failed to obtain consent or to provide notice in a manner required by § 52-570d (a). In his prayer for relief, the plaintiff sought "[f]indings that [his] legal rights were invaded by the unlawful recording of his . . . telephonic communications, which caused legal injuries," nominal damages, costs and reasonable attorney's fees pursuant to § 52-570d (c), and "injunctive relief, preliminary and permanent, enjoining the defendants and the state of Connecticut, its officials, officers, agencies, departments and employees from illegally recording telephonic communications whenever performing any duties or conducting any business on behalf of the state, and in particular from utilizing any device, instruments or equipment, personal or otherwise, to record telephonic communications in violation of . . . § 52-570d and in particular § 52-570d (a) (2)."

On June 18, 2015, the defendants filed a motion to dismiss the plaintiff's complaint in its entirety. In their motion, the defendants argued that the plaintiff's claims were barred by the doctrine of sovereign immunity. In a memorandum of decision, dated August 6, 2015, the trial court granted the defendants' motion on the grounds that § 52-570d did not waive sovereign immunity and that the plaintiff's claim for injunctive relief did not satisfy either of the two exceptions for seeking such relief against the state. On August 27, 2015, the

Administrator; Sharon Wilson, executive secretary, Office of the Chief Court Administrator; Martin R. Libbin, director, Legal Services; Leann R. Power, public records administrator; and Sara E. Cheeseman, public records archivist.

The plaintiff did not allege that he called Governor Malloy; rather, he alleged that Governor Malloy "is the supreme executive authority of the state of Connecticut pursuant to the powers vested in him by section five of article fourth of the constitution of the state of Connecticut. Section twelve of the same article requires that, as such, he 'shall take care that the laws be faithfully executed.' Governor Malloy has failed to take care that his agents comply with General Statutes § 52-570d."

plaintiff filed a motion to reargue, which was granted by the court on September 16, 2015. Following reargument, the court, in an order dated July 5, 2017, vacated its judgment of dismissal, concluding that § 52-570d (c), when read in conjunction with § 52-570d (b), waives sovereign immunity by force of necessary implication.[3] In particular, the court noted that because § 52-570d (b) delineates specific state actors who are not subject to liability under § 52-570d (a), the law implies that "other state and private actors who are not so specified are therefore subject to liability under the statute." On July 24, 2017, the defendants filed a motion for reconsideration of the court's July 5, 2017 order. On September

[3] General Statutes § 52-570d (b) provides: "The provisions of subsection (a) of this section shall not apply to:

"(1) Any federal, state or local criminal law enforcement official who in the lawful performance of his duties records telephonic communications;

"(2) Any officer, employee or agent of a public or private safety agency, as defined in section 28-25, who in the lawful performance of his duties records telephonic communications of an emergency nature;

"(3) Any person who, as the recipient of a telephonic communication which conveys threats of extortion, bodily harm or other unlawful requests or demands, records such telephonic communication;

"(4) Any person who, as the recipient of a telephonic communication which occurs repeatedly or at an extremely inconvenient hour, records such telephonic communication;

"(5) Any officer, employee or agent of any communication common carrier who in the lawful performance of his duties records telephonic communications or provides facilities to an investigative officer or criminal law enforcement official authorized pursuant to chapter 959a to intercept a wire communication;

"(6) Any officer, employee or agent of a Federal Communications Commission licensed broadcast station who records a telephonic communication solely for broadcast over the air;

"(7) Any officer, employee or agent of the United States Secret Service who records telephonic communications which concern the safety and security of the President of the United States, members of his immediate family or the White House and its grounds; and

"(8) Any officer, employee or agent of a Federal Communications Commission broadcast licensee who records a telephonic communication as part of a broadcast network or cooperative programming effort solely for broadcast over the air by a licensed broadcast station."

General Statutes § 52-570d (c) provides: "Any person aggrieved by a violation of subsection (a) of this section may bring a civil action in the Superior Court to recover damages, together with costs and a reasonable attorney's fee."

7, 2017, the court granted the defendants' motion for reconsideration and issued a memorandum of decision, vacating its July 5, 2017 order and dismissing the plaintiff's action on the basis of sovereign immunity.

In its September 7, 2017 memorandum of decision, the court noted that, in accordance with our Supreme Court's holding in *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, 293 Conn. 382, 978 A.2d 49 (2009) (*Envirotest*), in order for a statute to waive the state's sovereign immunity from suit by force of necessary implication, the waiver must be the "*only possible interpretation* of the [statutory] language." (Emphasis in original.) Id., 390. Applying this holding to § 52-570d, the court concluded that the statute was susceptible to more than one interpretation as to whether it constituted a waiver of sovereign immunity, and, thus, did not operate to waive sovereign immunity by force of necessary implication.[4] From this decision, the plaintiff appeals.[5]

I

The plaintiff contends that the court improperly dismissed his complaint because § 52-570d waives sovereign immunity by force of necessary implication. We

[4] In its third decision, from which the plaintiff appeals, the court stated that its July 5, 2017 order, which vacated the August 6, 2015 decision dismissing the plaintiff's complaint, was limited to the issue of whether the statute waives sovereign immunity by force of necessary implication. Accordingly, the court stated that it would not revisit the issue of whether the plaintiff had sought declaratory and injunctive relief in accordance with one of the exceptions to sovereign immunity, as that portion of the August 6, 2015 decision was not subject to reconsideration.

[5] The defendants argue that we can affirm the decision of the trial court on the alternative basis that the plaintiff lacks standing to bring this action. Because we agree with the trial court that the action is barred by the doctrine of sovereign immunity, we need not address the standing issue in this appeal. See *Mendillo* v. *Tinley, Renehan & Dost, LLP*, 329 Conn. 515, 517, 187 A.3d 1154 (2018) (affirming judgment of trial court and declining to reach alternative jurisdictional basis for dismissal).

consider this claim to be twofold.[6] First, the plaintiff argues that § 52-570d (c), which authorizes any person aggrieved by a violation of § 52-570d (a) to bring a civil action for damages, is effectively the same as General Statutes § 17a-550, which our Supreme Court has interpreted as waiving sovereign immunity by force of necessary implication. Second, he contends that because § 52-570d (b) provides that the provisions of § 52-570d (a) do not apply to specific state actors who record telephonic communications in the lawful performance of their official duties, or when such communications are of an emergency nature, the legislature intended the state to be subject to suit to the same extent as private persons for any unlawful recordings that are not exempted by the provisions of the statute. We do not agree.

We begin our analysis by setting forth the legal principles that guide our review. "[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . A determination regarding a trial court's subject matter

[6] We note that the plaintiff also argues that the court failed to correctly apply General Statutes § 1-2z when it concluded that § 52-570d did not waive sovereign immunity by force of necessary implication as to the facts presented in this case. Specifically, he contends that the court improperly concluded that, on the basis of the allegations of the complaint, the plaintiff implicitly consented to being recorded and, irrespective of whether the statute waived sovereign immunity by force of necessary implication in other contexts, it did not waive sovereign immunity under this particular set of facts. The plaintiff argues that such a conclusion is contrary to our process of statutory interpretation and the plain and unambiguous language of § 52-570d (a), which he contends sets forth the exclusive means of obtaining consent or providing notice with respect to the recording of a telephonic communication. Given that our review of a trial court's interpretation of a statute is plenary; see *Aurora Loan Services, LLC* v. *Condron*, 181 Conn. App. 248, 277, 186 A.3d 708 (2018); and our conclusion that the statute does not waive sovereign immunity in any factual context is dispositive with respect to the plaintiff's first claim on appeal; see part I B of this opinion; we see no reason to address the issue of whether the court correctly applied § 1-2z when it concluded that the statute did not waive sovereign immunity under this particular set of facts.

jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Macellaio* v. *Newington Police Dept.*, 142 Conn. App. 177, 179–80, 64 A.3d 348 (2013).

"The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law. . . . [T]he practical and logical basis of the doctrine [of sovereign immunity] is today recognized to rest . . . on the hazard that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds, and property. . . . Not only have we recognized the state's immunity as an entity, but [w]e have also recognized that because the state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state. . . . Exceptions to this doctrine are few and narrowly construed under our jurisprudence." (Citations omitted; internal quotation marks omitted.) *Markley* v. *Dept. of Public Utility Control*, 301 Conn. 56, 65, 23 A.3d 668 (2011).

"The doctrine of sovereign immunity is a rule of common law that operates as a strong presumption in favor of the state's immunity from liability or suit. See *C. R. Klewin* [*Northeast, LLC*] v. *Fleming*, [284 Conn. 250, 258, 932 A.2d 1053 (2007)] (The principle that the state cannot be sued without its consent . . . is well established under our case law. . . . It has deep roots in this state and our legal system in general, finding its origin in ancient common law. . . . [T]his court has recognized the well established principle that statutes in derogation of sovereign immunity should be strictly

construed. . . . [When] there is any doubt about their meaning or intent they are given the effect which makes the least rather than the most change in sovereign immunity. . . . In an action against the state in which damages are sought, a plaintiff seeking to circumvent the doctrine of sovereign immunity must show that . . . the legislature, either expressly or by force of a necessary implication, statutorily waived the state's sovereign immunity . . . ." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, supra, 293 Conn. 387–88. The parties agree that § 52-570d does not expressly waive sovereign immunity; therefore, the only issue as to this claim is whether the statute does so by necessary implication.

In *Envirotest*, our Supreme Court explained that in order for a statute to waive sovereign immunity by force of necessary implication, "it is not sufficient that the claimed waiver reasonably may be implied from the statutory language. It must, by logical necessity, be the *only possible interpretation* of the language." (Emphasis altered.) Id., 389–90. Further, because ambiguous language in a statute is by definition "susceptible to more than one reasonable interpretation"; see *Carmel Hollow Associates Ltd.* v. *Bethlehem*, 269 Conn. 120, 134 n.19, 848 A.2d 451 (2004); any ambiguity as to whether the statute waives sovereign immunity by force of necessary implication "is not an ambiguity but, rather, an answer." *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, supra, 293 Conn. 390. Simply stated, a statute cannot waive the state's sovereign immunity from suit by force of necessary implication when its language is ambiguous because, logically, such ambiguity forecloses the prospect that an implied waiver of sovereign immunity is "the *only possible interpretation* of the [statutory] language." (Emphasis

in original.) Id. Thus, unlike our typical process of statutory interpretation pursuant to General Statutes § 1-2z,[7] when the meaning of the statute cannot be ascertained from its plain and unambiguous language, we do not consult extratextual evidence to determine whether the legislature intended to waive sovereign immunity by force of necessary implication. See *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 439, 54 A.3d 1005 (2012). Instead, the existence of an ambiguity "ends the inquiry," and we must conclude that the state's immunity from suit has not been implicitly waived by the statute's language. *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, supra, 391.

A

The plaintiff first argues that the court improperly concluded that § 52-570d did not waive sovereign immunity by force of necessary implication because such a determination is inconsistent with *Mahoney* v. *Lensink*, 213 Conn. 548, 562, 569 A.2d 518 (1990), in which our Supreme Court held that similar language found in the statutory predecessor to § 17a-550[8] waived sovereign immunity by force of necessary implication.[9] Additionally, the plaintiff contends that when a statute provides

[7] General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

[8] General Statutes § 17a-550 provides: "Any person aggrieved by a violation of sections 17a-540 to 17a-549, inclusive, may petition the superior court within whose jurisdiction the person is or resides for appropriate relief, including temporary and permanent injunctions, or may bring a civil action for damages."

[9] As a threshold matter, we note that *Mahoney* was decided before *Envirotest* and the enactment of § 1-2z. Nonetheless, our Supreme Court in *Envirotest* interpreted *Mahoney* as establishing, and correctly applying, the rule that an implied waiver of sovereign immunity must be the "*only possible interpretation* of the [statutory] language," without consultation of extratextual sources. (Emphasis in original.) See *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, supra, 293 Conn. 390; but see id., 401–402 (*Katz*,

"what to file" and "where to file it," the statute waives sovereign immunity by force of necessary implication. We disagree.

In *Mahoney*, our Supreme Court addressed, inter alia, whether General Statutes § 17-206k (now § 17a-550) waives sovereign immunity by force of necessary implication. The statute in particular provides a "remedy for those persons aggrieved by violations of any specific provisions of the patients' bill of rights, [General Statutes §§ 17a-540 to 17a-549]," by permitting such persons to petition the Superior Court for appropriate relief or to bring a civil action for damages. *Mahoney* v. *Lensink*, supra, 213 Conn. 555; General Statutes § 17a-550. Because the statute contains no express waiver of sovereign immunity, the court looked to the various statutory provisions that comprise the patients' bill of rights in order to determine whether the legislature intended to waive sovereign immunity implicitly. In so doing, the court found that several of the statutes made no distinction between private and public facilities and that, in order for "the purposes sought to be served by the enactment of the patients' bill of rights," it was necessarily implied "that the legislature intended to provide a direct cause of action against the state and thus to waive its sovereign immunity." *Mahoney* v. *Lensink*, supra, 558.

J., concurring) (In *Mahoney*, "the issue was whether [General Statutes] § 17-206k [now § 17a-550], in providing a statutory remedy for those persons aggrieved by violations of any specific provisions of the patients' bill of rights . . . constitutes an abrogation of sovereign immunity so as to authorize a voluntary patient in a state mental facility to sue the state or its commissioners. Acknowledging that this question required a strict construction of the statute, the court concluded that a waiver was compelled by necessary implication. . . . Although the court concluded that the necessary implication arose from the text of related provisions, which included references to any public . . . facility . . . the court extensively examined the legislative history to confirm this construction. . . . Indeed, the fact that the lion's share of the court's analysis focused on this history indicates that it was integral to the court's conclusion and not mere dicta." [Citations omitted; internal quotation marks omitted.]).

We conclude that the plaintiff's argument ignores several distinguishing factors between the statute at issue in *Mahoney* and § 52-570d. In particular, *Mahoney* acknowledged that § 17a-550, part of the patients' bill of rights, was a remedial statute and "its provisions should be liberally construed in favor of the class sought to be benefited." Id., 556. The remedial nature of the statute was evidenced by several related statutes that illuminated "the breadth of the legislative concern for the fair treatment of mental patients." Id. Because the patients' bill of rights act made no distinction between patients of private and public mental health facilities, the *Mahoney* court concluded that it was "a necessary implication of *the purposes sought to be served by the enactment of the patients' bill of rights*" that the legislature had waived sovereign immunity as to any claim pursuant to § 17a-550. (Emphasis added; footnote omitted.) Id., 557. Thus, it was a fundamental aspect of the entire legislative act that counseled our Supreme Court to conclude that sovereign immunity had been waived by force of necessary implication. Here, there is no language from which we can conclude that in order for the purposes of § 52-570d to be served, we must interpret the statute as an implied waiver of sovereign immunity. Specifically, unlike the statute in *Mahoney*, the text of this statute does not implicate a compelling public policy reason for providing persons who have their telephonic communications recorded in an illegal fashion by the government the same civil remedy as those persons who are recorded illegally by private parties. Thus, we are unpersuaded that simply because the language in § 52-570d (c) is similar to § 17a-550, we should conclude that the statute waives sovereign immunity by force of necessary implication.

The plaintiff further contends that, following our Supreme Court's decision in *Mahoney*, the language of § 17a-550 became the "paradigm" for an implied waiver of sovereign immunity. Specifically, he submits that

when a statute "instructs an 'aggrieved person' what to file . . . and where to file," our courts have held such language to be an implied waiver of the state's sovereign immunity from suit.[10] In support of this proposition, the plaintiff asks us to compare our Supreme Court's holding in *Martinez* v. *Dept. of Public Safety*, 263 Conn. 74, 83, 818 A.2d 758 (2003), with the legislature's response to that case in its enactment of No. 03-97 of the 2003 Public Acts.

In *Martinez*, the plaintiff, a former state police trooper, brought suit against the state pursuant to General Statutes § 53-39a, "seeking reimbursement for expenses and costs he had incurred in defending himself against criminal charges that arose out of his alleged conduct during the course of duty." Id., 75. After examining the language of the statute, our Supreme Court concluded that the plaintiff's claims were barred by the doctrine of sovereign immunity because § 53-39a did not include an express or implied waiver of the state's immunity from suit. Id., 88. Shortly after the court's decision was published, the legislature amended the statute to include language that authorized aggrieved persons to enforce the provisions of § 53-39a by way of a private cause of action filed in the Superior Court. See General Statutes (Rev. to 2003) § 53-39a, as amended by Public Acts 2003, No. 03-97, § 2 (P.A. 03-97, § 2).[11] Our Supreme Court has recognized that the

[10] The plaintiff argues that § 52-570d (c) satisfies the requirements for an implied waiver of sovereign immunity because it instructs "any person aggrieved" to file "a civil action" with "the Superior Court."

[11] General Statutes (Rev. to 2003) § 53-39a, as amended by P.A. 03-97, § 2, provides: "Whenever, in any prosecution of an officer of the Division of State Police within the Department of Public Safety, or a member of the Office of State Capitol Police or any person appointed under section 29-18 as a special policeman for the State Capitol building and grounds, the Legislative Office Building and parking garage and related structures and facilities, and other areas under the supervision and control of the Joint Committee on Legislative Management, or a local police department for a crime allegedly committed by such officer in the course of his duty as such, the charge is dismissed or the officer found not guilty, such officer shall be indemnified by his employing governmental unit for economic loss sus-

2003 amendment to § 53-39a superseded its decision in *Martinez*. See *Vejseli* v. *Pasha*, 282 Conn. 561, 570 n.8, 923 A.2d 688 (2007).

Although the plaintiff is correct that the legislature amended § 53-39a by adding a provision that authorizes an aggrieved person to bring an action in the Superior Court, we disagree that the interplay between *Martinez* and the 2003 amendment to § 53-39a compels the conclusion that whenever a statute instructs an aggrieved person "what to file" and "where to file," it constitutes a waiver of sovereign immunity. For one, we note that, unlike § 52-570d (c), the provision in § 53-39a specifies that an action to enforce the statute can be brought against the government. See General Statutes (Rev. to 2003) § 53-39a, as amended by P.A. 03-97, § 2. Moreover, "[t]he general purpose of [§ 53-39a] is to permit police officers to recoup [from their employing governmental unit] the necessary expenses that they have incurred in defending themselves against unwarranted criminal charges arising out of their conduct in the course of their employment." *Cislo* v. *Shelton*, 240 Conn. 590, 598, 692 A.2d 1255 (1997). Thus, it is only municipalities and the state that are subject to suit under this particular indemnity statute, and a provision authorizing suit against the employing governmental unit would by logical necessity constitute an implied waiver of sovereign immunity from suit. Such is not the case with § 52-570d (a), which applies generally to any person who uses "any instrument, device or equipment to record an oral private telephonic communication." See *State* v. *Lombardo Bros. Mason Contractors, Inc.*, supra, 307 Conn. 439–40 ("statutory language generally purporting to affect rights and liabilities of all persons *will not be*

tained by him as a result of such prosecution, including the payment of any legal fees necessarily incurred. Such officer may bring an action in the Superior Court against such employing governmental unit to enforce the provisions of this section."

deemed to apply to the state in the absence of an express statutory reference to the state" [emphasis in original]). Accordingly, we do not agree with the plaintiff that simply because § 52-570d authorizes an aggrieved person to bring an action in the Superior Court, the only possible interpretation of the statute is an implied waiver of sovereign immunity.

B

The plaintiff next argues that § 52-570d waives sovereign immunity from suit by force of necessary implication because subsection (b) of the statute exempts certain state officials who record telephonic communications in the lawful performance of their duties, or in cases of emergency, from the provisions of subsection (a). The plaintiff argues that if we were to conclude that the statute does not waive sovereign immunity from suit, the exemptions provided in subsection (b) vis-à-vis state officials would be rendered superfluous. Put another way, because the statute exempts from liability certain state officials, by necessary implication, the statute waives sovereign immunity from suit for those state officials not so designated, such as the defendants in this action. We conclude that this argument is without merit.

In claiming that the statute implicitly waives sovereign immunity from suit because it exempts certain state actors from the provisions of subsection (a), the plaintiff conflates a waiver of the state's sovereign immunity from liability with a waiver of its sovereign immunity from suit. See *Rivers* v. *New Britain*, 288 Conn. 1, 11, 950 A.2d 1247 (2008) ("[s]overeign immunity is comprised of two concepts, immunity from liability and immunity from suit" [internal quotation marks omitted]). There is a "conceptual distinction between sovereign immunity from suit and sovereign immunity

from liability. Legislative waiver of a state's suit immunity merely establishes a remedy by which a claimant may enforce a valid claim against the state and subjects the state to the jurisdiction of the court. By waiving its immunity from liability, however, the state concedes responsibility for wrongs attributable to it and accepts liability in favor of a claimant." (Internal quotation marks omitted.) *Vejseli* v. *Pasha*, supra, 282 Conn. 570 n.8. In such circumstances where the state waives sovereign immunity from liability but not its immunity from suit, an aggrieved person is not without recourse, as he "may seek recovery against the state by filing a claim with the claims commissioner in accordance with General Statutes § 4-141 et seq." *Rivers* v. *New Britain*, supra, 12. Accordingly, we can logically interpret a statute as waiving sovereign immunity from liability with respect to certain state officials but not waiving sovereign immunity from suit with respect to claims against those officials.

Applying this principle to § 52-570d, we read § 52-570d (a) and (b) as an implicit waiver of the state's sovereign immunity from liability but not as an implicit waiver of the state's sovereign immunity from suit. Simply stated, the fact that the statute exempts certain state officials from the provisions of § 52-570d (a) does not require us to conclude that the legislature intended to waive sovereign immunity from suit with respect to those claims. Our conclusion is bolstered by our review of similar statutes, which reveals that when the legislature seeks to waive the state's sovereign immunity from suit in the context of a statutory cause of action, it normally does so by express waiver. See General Statutes § 52-570b (g) ("[a] civil action may be brought under this section against the state or any political subdivision thereof and the defense of governmental immunity shall not be available in any such action"); General Statutes § 52-556 ("[a]ny person injured in person or property through the negligence of any state

official or employee when operating a motor vehicle owned and insured by the state against personal injuries or property damage shall have a right of action against the state to recover damages for such injury"). "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed. . . . That tenet of statutory construction is well grounded because [t]he General Assembly is always presumed to know all the existing statutes and the effect that its action or non-action will have upon any one of them." (Internal quotation marks omitted.) *Hatt* v. *Burlington Coat Factory*, 263 Conn. 279, 310, 819 A.2d 260 (2003).

In light of the foregoing, we do not agree with the plaintiff that the only possible interpretation of § 52-570d is a waiver of sovereign immunity by force of necessary implication. Thus, we conclude that the statute does not waive the state's sovereign immunity from suit, and the trial court properly dismissed the plaintiff's complaint on this basis.

II

In his second claim on appeal, the plaintiff argues that the court improperly dismissed his complaint by failing to apply the recognized exception to sovereign immunity for claims of declaratory and injunctive relief. Specifically, the plaintiff argues that he has sought declaratory and injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of an officer's statutory authority.[12] We disagree and, thus, conclude that the plaintiff has not alleged a cognizable claim under this exception.

[12] With respect to this claim, the plaintiff also argues that he should not be required to plead a "substantial" allegation of wrongful conduct because he asserts this court improperly added this requirement in conflict with existing precedent at the time. In particular, the plaintiff contends that the exception, as it was announced in *Miller* v. *Egan*, 265 Conn. 301, 828 A.2d 549 (2003), did not include such a requirement; rather, it was added by this court two years later in *Tuchman* v. *State*, 89 Conn. App. 745, 878 A.2d 384,

As stated previously in this opinion, "[t]he sovereign immunity enjoyed by the state is not absolute. There are

cert. denied, 275 Conn. 920, 883 A.2d 1252 (2005). The plaintiff acknowledges, however, that our Supreme Court has reiterated the exception as it was explained in *Tuchman*, including the requirement that the allegation of wrongful conduct be substantial, in cases subsequent to *Miller*. See, e.g., *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 349, 977 A.2d 636 (2009). "[I]t is well established that this court, as an intermediate appellate tribunal, is not at liberty to discard, modify, reconsider, reevaluate or overrule the precedent of our Supreme Court. . . . Furthermore, it is axiomatic that one panel of [the Appellate Court] cannot overrule the precedent established by a previous panel's holding." (Citation omitted; internal quotation marks omitted.) *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, 176 Conn. App. 570, 595, 170 A.3d 73 (2017). Accordingly, in light of the fact that our Supreme Court has clearly endorsed such a requirement subsequent to its decision in *Miller*, we find no merit in the plaintiff's position that his allegations of wrongful conduct against the defendants need not be substantial.

Further, our reading of our Supreme Court's holding in *Miller* reveals that the plaintiff's contention is misplaced insofar as he argues that this court imparted the requirement that an allegation of wrongful conduct against the state be "substantial" in conflict with *Miller*'s holding. Prior to *Miller*, our Supreme Court held in *Antinerella* v. *Rioux*, 229 Conn. 479, 497, 642 A.2d 699 (1994), overruled in part by *Miller* v. *Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003), that sovereign immunity did not bar a claim against the state based on a substantial allegation of wrongful conduct to promote an illegal purpose in excess of an officer's statutory authority. *Miller* overruled *Antinerella* only to the extent that such case held that sovereign immunity did not bar "monetary damages actions against state officials acting in excess of their statutory authority." *Miller* v. *Egan*, supra, 265 Conn. 325. *Miller* did not address, nor overrule, the requirement that a claim brought pursuant to this exception be predicated on a "substantial allegation" of wrongful conduct. See *Columbia Air Services, Inc.* v. *Dept. of Transportation*, supra, 293 Conn. 349 (citing *Antinerella* v. *Rioux*, supra, 497). Indeed, to conclude otherwise would require us to read *Miller* as implicitly overruling decades of precedent with respect to the requirements for seeking injunctive relief on the basis of wrongful conduct. See *Bendell* v. *Johnson*, 153 Conn. 48, 51, 212 A.2d 199 (1965) ("[O]nly those whose justiciable interests were injured . . . would, in a proper case, be entitled to seek redress in an action for injunctive relief. . . . [A] justiciable interest is at least one founded on the imminence of substantial and irreparable injury. . . . An injunction is not a matter of right. Rather, its issuance rests within the sound discretion of the court. . . . The principle that an injunction will not issue for a trifling, inconsequential or technical injury to a plaintiff's rights has been consistently followed." [Citations omitted; internal quotation marks omitted.]); see also *Scoville* v. *Ronalter*, 162 Conn. 67, 74, 291 A.2d 222 (1971) ("[t]he plaintiffs must allege facts which, if proven, would establish irreparable injury and assume the burden of proving facts which will establish substantial and

[three] exceptions . . . .'' (Citations omitted; internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 349, 977 A.2d 636 (2009). The first exception, as discussed in part I of this opinion, occurs ''when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity''; the second exception occurs ''when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights''; and the third exception occurs ''when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority.'' (Internal quotation marks omitted.) Id. ''For a claim under the third exception [to the doctrine of sovereign immunity], the plaintiffs must do more than allege that the defendants' conduct was in excess of their statutory authority; they also must allege or otherwise establish facts that reasonably support those allegations.'' (Internal quotation marks omitted.) *Markley* v. *Dept. of Public Utility Control*, supra, 301 Conn. 72; see also *Antinerella* v. *Rioux*, 229 Conn. 479, 486, 642 A.2d 699 (1994) (allegation that defendant terminated plaintiff's employment ''to further his own financial gain through [an illegal] fee splitting agreement with various deputy sheriffs'' sufficient for purposes of exception to sovereign immunity), overruled in part on other grounds by *Miller* v. *Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003).

In its August 6, 2015 memorandum of decision, the trial court concluded that ''[t]o the extent that the plaintiff seeks declaratory or injunctive relief, he has failed to assert claims that amount to a substantial allegation of wrongful conduct to promote an illegal purpose in

irreparable damage if they are to prevail in their request for injunctive relief'').

excess of the officer's statutory authority. Quite simply, the defendants have voice mail systems which the plaintiff knowingly utilized to leave voice mail messages. Such conduct could not be more benign."[13] (Internal quotation marks omitted) We agree.

As we noted previously in this opinion, the plaintiff alleged that all but one of the defendants illegally recorded him in violation of § 52-570d (a), when he called them and left messages on their respective automated answering systems. See footnote 2 of this opinion. The plaintiff maintains that because those recordings were created without the defendants' obtaining consent from all parties, or providing proper notification, they constituted illegal recordings under § 52-570d (a). Here, the plaintiff's interpretation would impose civil liability on state officials for conduct as innocuous as having an answering system that records voice mails. We agree with the trial court that the plaintiff's complaint does not set forth "substantial allegations" of wrongful conduct to promote an illegal purpose in excess of the state officers' statutory authority.

The plaintiff alleged that the defendants violated § 52-570d (a) in recording his telephonic communications. Specifically, the plaintiff's complaint asserts that he initiated telephone communication with the various defendants, with the exception of Governor Malloy, and that, as a result, "a ringtone was activated and operated until the state's instrument, device or equipment, in sequence, activated a verbal notification, also known as a greeting, a tone, and then made a recording of the [p]laintiff's communication through to [p]laintiff's termination of the communication." Accordingly, we conclude that these allegations are not "substantial" allegations of wrongful conduct sufficient to satisfy the third exception to the doctrine of sovereign immunity.

[13] This portion of the trial court's August 6, 2015 memorandum of decision was not vacated by the July 5, 2017 order. See footnote 4 of this opinion.

See *Braham* v. *Newbould*, 160 Conn. App. 294, 313, 124 A.3d 977 (2015) (inmate's claim that he was charged twice for his eyeglass prescription in violation of § 18-85a-3 of Regulations of Connecticut State Agencies was not substantial allegation of wrongful conduct).

The third exception to sovereign immunity also requires an allegation that the state officer's wrongful conduct promoted an illegal purpose in excess of the officer's statutory authority. See *Columbia Air Services, Inc.* v. *Dept. of Transportation*, supra, 293 Conn. 349. In the present case, the plaintiff also has failed to allege that the defendants recorded his telephonic communications to promote an illegal purpose. Indeed, the plaintiff has not alleged *any* purpose behind the defendants' recording of his telephonic communications in a manner proscribed by § 52-570d (a). Because a plaintiff seeking to bring a claim pursuant to this exception must allege facts that, if proven, would show that a state official acted in excess of his or her authority to promote an illegal purpose, the trial court properly granted the defendants' motion to dismiss on the basis of sovereign immunity. See *Carter* v. *Watson*, 181 Conn. App. 637, 642, 187 A.3d 478 (2018) ("[i]n the absence of a proper factual basis in the complaint to support the applicability of these exceptions, the granting of a motion to dismiss on sovereign immunity grounds is proper" [internal quotation marks omitted]). For these reasons, we conclude that the plaintiff failed to allege a cognizable claim under the third exception to sovereign immunity and, therefore, this claim must fail.

The judgment is affirmed.

In this opinion the other judges concurred.

MERIBEAR PRODUCTIONS, INC. *v.* JOAN E. FRANK ET AL.

(AC 42602)

Alvord, Keller and Prescott, Js.

Syllabus

The plaintiff, M. Co., which had obtained a default judgment in California against the defendants, J and G, brought this action seeking to enforce that judgment in Connecticut, alleging claims for breach of contract and quantum meruit. Following a trial, the trial court rendered judgment in favor of M Co., from which the defendants jointly appealed to this court, which affirmed the decision of the trial court. Thereafter, the defendants, on the granting of certification, appealed to our Supreme Court, which reversed this court's judgment, concluding that it did not have jurisdiction over the appeal due to a lack of a final judgment as to G, and remanded the case to this court with direction to dismiss the appeal. M Co. subsequently filed in the trial court a withdrawal of the action as to the breach of contract and quantum meruit counts against G, and the defendants jointly filed the present appeal to this court. M Co. filed a motion to dismiss the appeal, arguing that it was untimely and, thus, subject to dismissal. The defendants subsequently filed a motion for permission to file a late appeal, which this court granted nunc pro tunc. *Held* that M Co.'s motion to dismiss the appeal was denied; contrary to M Co.'s claim that this court should dismiss the appeal because its untimeliness constituted a jurisdictional defect, the twenty day time limit for filing an appeal pursuant to the applicable rule of practice (§ 63-1) is not subject matter jurisdictional and this court may, in its discretion, allow a party to file an untimely appeal, and although the general rule against hearing untimely appeals is necessary, in the present case good cause existed for allowing the defendants' appeal to proceed, as the policy considerations that ordinarily weigh against granting untimely appeals either were not present or were overborne by competing considerations, the defendants did not strategically employ delay tactics for their own benefit, and allowing the defendants to file a late appeal would not prejudice M Co., whereas, if this court were to decline to allow the appeal to go forward, the defendants would be unduly deprived of their appellate rights.

Considered June 26—officially released October 15, 2019

Procedural History

Action to, inter alia, enforce a foreign judgment rendered against the defendants in California, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Tyma, J.*; judgment for the plaintiff, from which the defendants

appealed to this court, which affirmed the trial court's judgment; thereafter, the defendants, on the granting of certification, appealed to our Supreme Court, which reversed the judgment of this court and remanded the case to this court with direction to dismiss the defendants' appeal; subsequently, the plaintiff filed a withdrawal of action as to two counts of its complaint, and the defendants appealed to this court; thereafter, the plaintiff filed a motion to dismiss the appeal; subsequently, the defendant filed a motion for permission to file a late appeal. *Motion to dismiss denied; motion for permission to file late appeal granted.*

Anthony J. LaBella, in support of the motion to dismiss and in opposition to the motion for permission to file late appeal.

Michael S. Taylor, in opposition to the motion to dismiss and in support of the motion for permission to file late appeal.

Opinion

PRESCOTT, J. The plaintiff, Meribear Productions, Inc., filed a motion to dismiss the appeal of the defendants, Joan Frank and George Frank. The plaintiff argued that the defendants' joint appeal was untimely and, thus, subject to dismissal. See Practice Book §§ 63-1 and 66-8. In response, the defendants filed a motion for permission to file a late appeal. The defendants argued that permission to file a late appeal was warranted because they would suffer a loss of their appellate rights if the appeal was not allowed. We agreed with the defendants and, therefore, granted nunc pro tunc the defendants' motion to file a late appeal, and denied the plaintiff's motion to dismiss the appeal as untimely, indicating in our order that an opinion would follow. We write to explain our reasons for permitting this late appeal.

The following procedural history is relevant to our discussion of the parties' motions. In 2011, the defendants, who were selling their home in Westport, hired

the plaintiff to provide home staging services. See *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, 711–12, 183 A.3d 1164 (2018). The defendants ultimately defaulted on their payment obligations to the plaintiff and, in 2012, the plaintiff, a California corporation, filed an action against the defendants in California Superior Court. The California court entered a default judgment against the defendants in the amount of $259,746.10.

Thereafter, in 2013, "the plaintiff commenced the present action in Connecticut seeking to hold the defendants jointly and severally liable under the foreign default judgment and to recover additional attorney's fees, costs, and postjudgment interest. In response to the defendants' assertion of a special defense that the judgment was void because the California court lacked personal jurisdiction over them, the plaintiff amended its complaint to add two counts seeking recovery against both defendants under theories of breach of contract and quantum meruit. Prior to trial, a prejudgment attachment in the amount of $259,746.10, together with 10 percent postjudgment interest, pursuant to provisions of the California Code of Civil Procedure, was entered against the Westport real property owned by Joan Frank.

"In a trial to the court, the plaintiff litigated all three [counts of the complaint]. In its posttrial brief, the plaintiff requested that the court give full faith and credit to the California judgment, plus postjudgment interest; '[i]n the alternative,' find that the defendants had breached the contract and award damages in the same amount awarded in the California judgment, plus interest, fees and costs; and, '[f]inally, in the event [that] neither request is . . . granted,' render judgment in the plaintiff's favor on the quantum meruit count in the same amount.

"The court issued a memorandum of decision finding in favor of the plaintiff on count one against George

Frank and on count two against Joan Frank. The court acknowledged at the outset that the three count complaint was for 'common-law enforcement of a foreign default judgment, and alternatively, for breach of contract and quantum meruit.' Turning first to count one, the trial court determined that, as a result of the manner in which process was served, the California court lacked personal jurisdiction over Joan Frank but had jurisdiction over George Frank. In rejecting George Frank's argument that the exercise of jurisdiction did not comply with the dictates of due process, the court cited his admission 'that he signed a guarantee of the staging agreement . . . that provides that Los Angeles is the appropriate forum.' Consequently, the court stated that it would render judgment on count one for Joan Frank and against George Frank.

"In resolving the remaining counts, the court made no further reference to George Frank. As to count two, the court concluded that Joan Frank had breached the contract, that she could not prevail on her special defenses to enforcement of the contract, and that judgment would be rendered for the plaintiff and against Joan Frank. As to count three, the court cited case law explaining that parties routinely plead alternative counts of breach of contract and quantum meruit, but that they are only entitled to a single measure of damages. The court concluded: 'The plaintiff has proven that Joan Frank breached the contract. Therefore, the court need not consider the alternative claim for quantum meruit.'

"The court awarded damages against George Frank on count one and against Joan Frank on count two. Although both awards covered inventory loss and lost rents, the California judgment included prejudgment interest and attorney's fees, whereas the breach of contract award included late fees related to the rental loss. The judgment file provided: 'The court, having heard

the parties, finds the issues for the plaintiff. Whereupon it is adjudged that the plaintiff recover of the defendant Joan E. Frank $283,106.45 damages and that the plaintiff recover of the defendant George A. Frank $259,746.10.' The court indicated that a hearing would be scheduled on attorney's fees, but did not address the subject of postjudgment interest." *Meribear Productions, Inc.* v. *Frank*, supra, 328 Conn. 712–14.

On December 18, 2014, the defendants jointly appealed from the judgment, and this court affirmed the decision of the trial court. *Meribear Productions Inc.* v. *Frank*, 165 Conn. App. 305, 140 A.3d 993, rev'd, 328 Conn. 709, 183 A.3d 1164 (2016). The defendants' certified appeal to our Supreme Court followed.

During the course of oral argument before our Supreme Court, the court inquired as to whether George Frank's appeal had been taken from a final judgment because the trial court's ruling had not disposed of all of the counts in the operative complaint brought against him. *Meribear Productions Inc.* v. *Frank*, supra, 328 Conn. 715. Thereafter, the parties submitted supplemental briefs addressing whether there was a final judgment as to George Frank. Id. All parties posited that a final judgment existed as to George Frank. Id., 715–16.

Our Supreme Court concluded to the contrary, however, indicating that "the trial court's failure to dispose of either the contract count or the quantum meruit count as to George Frank resulted in the lack of a final judgment." Id., 716. On the basis of the lack of a final judgment as to George Frank, our Supreme Court apparently concluded that it did not have jurisdiction over the entire appeal, including with respect to Joan Frank, and, therefore, it remanded the case to this court with direction to dismiss the appeal. Id.

In a footnote, our Supreme Court explained its conclusion that it was proper to dismiss the entire appeal, even though it had concluded "that the judgment as to

Joan Frank was final" and, therefore, a final judgment was lacking only as to one of the two defendants. Id., 716–17 n.4, 724. Specifically, the court stated: "In the defendants' supplemental brief on this issue, there was no request for this court to consider Joan Frank's appeal separately should we conclude that the judgment is not final as to George Frank. Nor did they contend that the issues as to each defendant overlapped to such an extent that we should consider both. This court has recognized that, [i]n some circumstances, the factual and legal issues raised by a legal argument, the appealability of which is doubtful, may be so inextricably intertwined with another argument, the appealability of which is established, that we should assume jurisdiction over both. . . . However, that circumstance is not applicable in the present case. We have previously relied on this exception when there is a final judgment as to all of the parties before the reviewing court, and the question is whether we can also consider an interlocutory ruling affecting those parties properly before us. . . . In the present case, the judgment is final as to Joan Frank only. In addition, we have invoked this exception when resolution of the interlocutory ruling would control or bear on the resolution of the final judgment or the case generally. . . . In the present case, our resolution of George Frank's jurisdictional challenge to the California judgment could have no bearing on Joan Frank's challenge to the judgment against her for breach of contract or on any potential liability under quantum meruit. Nor would it be dispositive of the challenge to the damages awarded." (Citations omitted; internal quotation marks omitted.) Id., 716–17 n.4.[1]

[1] On October 2, 2018, the plaintiff filed a motion for attorney's fees and a motion for postjudgment interest with the trial court. Following argument on the motions, the parties stipulated, and the trial court confirmed, that an award of attorney's fees in the amount of $66,410 would enter. The court further granted the plaintiff an award of postjudgment interest at the rate of 5 percent per annum. The trial court's actions on these motions did not affect the finality of the judgment at issue here.

Following our directed dismissal of the appeal on remand, the plaintiff filed in the trial court a withdrawal of the contract count and the quantum meruit count against George Frank, thereby rendering a final judgment as to him. On February 15, 2019, the defendants filed the present joint appeal.

On February 22, 2019, the plaintiff filed a motion to dismiss the appeal as to both defendants claiming that the appeal was untimely. The plaintiff argued that "this court lacks the jurisdiction to entertain the appeal by virtue of the fact that this is a joint appeal . . . wherein the final judgment from which Joan Frank appeals was rendered on October 14, 2014." On March 4, 2019, the defendants filed a memorandum in opposition to the plaintiff's February 22, 2019 motion to dismiss, arguing that the appeal was timely. The defendants further argued that even if the appeal was untimely, this court has the power to allow it to continue.

Thereafter, on March 8, 2019, the defendants filed a motion to file a late appeal. In this motion, the defendants argued that they should be permitted to file a late appeal because the "[p]laintiff could not be prejudiced by permitting a late appeal and [the] defendants will suffer a loss of their appellate rights if the appeal is not allowed." On March 13, 2019, the plaintiff filed an objection to the defendants' March 8, 2019 motion for permission to file a late appeal. On June 26, 2019, this court granted nunc pro tunc the defendants' March 8, 2019 motion to file a late appeal, and denied the plaintiff's February 22, 2019 motion to dismiss the appeal, indicating that this opinion would follow.

At the outset, we note that, contrary to the plaintiff's argument that this court should dismiss the defendants' appeal because its untimeliness constituted a jurisdictional defect, the twenty day time limit for filing an

appeal as articulated in Practice Book § 63-1 (a)[2] is not subject matter jurisdictional. *Alliance Partners, Inc.* v. *Volatarc Technologies, Inc.*, 263 Conn. 204, 209, 820 A.3d 224 (2003). Thus, this court may, in its discretion, allow a party to file an untimely appeal. *Parlato* v. *Parlato*, 134 Conn. App. 848, 850 n.1, 41 A.3d 327 (2012). This principle is articulated in Practice Book § 60-2, which provides in relevant part: "[The court] may . . . on its own motion or upon motion of any party . . . order that a party for good cause shown may file a late appeal . . . ." The burden to establish "good cause" for failing to file a timely appeal falls on the party seeking permission to file a late appeal. *Alliance Partners, Inc.* v. *Volatarc Technologies, Inc.*, supra, 263 Conn. 211.

"[If] a motion to dismiss that raises untimeliness is, itself, timely filed pursuant to Practice Book § 4056 [now § 66-8], it is ordinarily our practice to dismiss the appeal if it is in fact late, and if no reason readily appears on the record to warrant an exception to our general rule. This practice is based in part on the fact that if the untimely appeal is entertained, a delinquent appellant would obtain the benefit of the appellate process after contributing to its delay, to the detriment of others with appeals pending who have complied with the rules and have a right to have their appeals determined expeditiously. Appellees are given the right under our rules to object to the filing of a late appeal and should be given the benefit of that rule, barring unusual circumstances or unless they waive the benefit of that rule. . . . We ordinarily dismiss late appeals that are the subject of timely motions to dismiss, knowing also that our discretion can be tempered by Practice Book § 4183 (6) [now § 60-2 (6)], which provides for the filing of late appeals for good cause shown. . . .

[2] Practice Book § 63-1 (a) provides in relevant part: "Unless a different time period is provided by statute, an appeal must be filed within twenty days of the date notice of the judgment or decision is given . . . ."

"We acknowledge that we eschew a mechanistic interpretation of our appellate rules in recognition of the fact that an unyielding policy requiring strict adherence to an appellate time limitation—no matter how severe or unfair the consequences—does not serve the interests of justice." (Citations omitted; internal quotation marks omitted.) *Alliance Partners, Inc.* v. *Volatarc Technologies, Inc.*, supra, 263 Conn. 213–14.

Although we are cognizant that the general rule against hearing untimely appeals is necessary for the reasons explained in *Alliance Partners, Inc.*, we conclude that, in the present case, good cause exists that warrants allowing the defendants' late appeal to proceed. The policy considerations that ordinarily weigh against granting untimely appeals either are not present here, or are overborne by competing considerations. For example, the defendants do not ask us to allow them to obtain the benefit of appellate review after contributing to its delay. To the contrary, on December 18, 2014, the defendants diligently filed their first appeal, which they and the plaintiff believed was taken from a final judgment as to both of them. Thus, the defendants did not strategically employ delay tactics for their own benefit. Moreover, allowing the defendants to file a late appeal will not prejudice the plaintiff, which argued that the prior judgment was final as to both defendants when the first appeal was before our Supreme Court and which was ready to litigate the merits of the appeal at that time. The plaintiff has not proffered any reason why circumstances have changed in the intervening period that would render unfair the adjudication of the defendants' appellate claims now. Finally, if we were to decline to allow the appeal to go forward, the defendants would be prejudiced in that they would be unduly deprived of their appellate rights.

In considering the defendants' motion for permission to file a late appeal, we also acknowledge that the timing

of the filing of the present appeal had far less to do with the defendants' diligence in litigating their claims than with the natural consequence of our Supreme Court's dismissal of the defendants' first appeal in its entirety. If our Supreme Court had elected to dismiss the prior joint appeal only as to George Frank and allowed the appeal to proceed with respect to Joan Frank, whom they concluded had appealed from a final judgment, the current claim regarding the timeliness of the present appeal would not have arisen.[3]

Although a final judgment has now entered as to all parties, the plaintiff is now asserting that, because the present appeal is untimely as to Joan Frank, the joint appeal must be treated as a whole and dismissed, just as the previous appeal was dismissed by our Supreme Court. That is, in our view, simply an unreasonable result, and it is primarily for that reason that we conclude that there is good cause to permit the present appeal to proceed.

The defendants' motion to file a late appeal is granted nunc pro tunc, and the plaintiff's motion to dismiss the appeal as untimely is denied.

In this opinion the other judges concurred.

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[3] Practice Book § 61-3 provides in relevant part: "A judgment disposing of only a part of a complaint . . . is a final judgment if that judgment disposes of all causes of action in that complaint . . . brought by or against a particular party or parties. . . .

"The appeal from such judgment *may* be deferred . . . until the final judgment that disposes of the case for all purposes and as to all parties is rendered . . . ." (Emphasis added.) This provision, in providing that appeals may be taken separately, appears to support the principle that the finality of judgments generally is to be assessed with regard to each individual party. Our Supreme Court did not discuss Practice Book § 61-3 or explain why it was inapplicable relative to the procedural facts before it.

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Habeas Corpus; claim that habeas court improperly denied petition for writ of habeas corpus; whether petitioner met burden to demonstrate prejudice resulting from trial counsel's allegedly deficient performance in failing to advise petitioner properly regarding immigration consequences of guilty plea.

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Contracts; attorney's fees; claim that trial court abused its discretion in calculating award of attorney's fees; whether trial court abused its discretion by not discounting award of attorney's fees on account of small sum awarded to plaintiffs for breach of contract claims; claim that proper analysis of factors listed in rule 1.5 (a) of Rules of Professional Conduct would compel a significant downward departure from plaintiffs' initial lodestar calculation because damages awarded were insignificant in relation to court's award of attorney's fees; whether plaintiffs had legitimate claim for attorney's fees pursuant to contract; whether trial

court abused its discretion in awarding attorney's fees with respect to private nuisance claim on which plaintiffs did not prevail; whether party may recover attorney's fees for unsuccessful claims that are inextricably intertwined and involve common basis in fact or legal theory with successful claims; whether private nuisance and breach of contract claims were factually and legally distinct and were inextricably intertwined or based on common legal theory.

Goldstein *v.* Hu (Memorandum Decision) 903

Jezouit *v.* Malloy 576

Sovereign immunity; action concerning alleged illegal recording of telephonic communications by state officials; whether trial court properly granted motion to dismiss complaint on ground of sovereign immunity; claim that only possible interpretation of statute (§ 52-570d) pertaining to recording of telephonic communications was that it impliedly waived sovereign immunity because it authorized an aggrieved person to bring action in Superior Court; claim that because § 52-570d (b) exempted from liability certain state officials, by necessary implication, it waived sovereign immunity from suit for state officials not so designated, such as defendants; claim that dismissal of complaint was improper because trial court failed to apply exception to sovereign immunity for claims of declaratory and injunctive relief.

Kelly *v.* Kurtz 507

Contracts; whether trial court abused its discretion in denying motion to set aside jury's verdict on counts alleging breach of supplementary agreement and breach of implied covenant of good faith and fair dealing; claim that evidence was insufficient to prove that plaintiff was terminated or prevented from working scheduling of his own choosing; claim that verdict was inconsistent; whether trial court abused its discretion in setting aside jury's verdict on claims that defendants invaded plaintiff's privacy by misappropriating his name after he was terminated, of tortious interference with business expectancies, of alleged violations of Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.), and of unjust enrichment; whether plaintiff failed to prove that he suffered any damages as result of defendants' use of his name; whether plaintiff failed to prove that he suffered actual loss as result of defendants' alleged interference with his business expectancies or that he suffered any ascertainable loss as result of alleged CUTPA violations; whether plaintiff could recover under theory of unjust enrichment where he recovered under theory of breach of contract; whether plaintiff lacked standing to bring claims relating to breach of operating agreement.

King *v.* Commissioner of Correction 61

Habeas corpus; claim that habeas court improperly concluded that petitioner failed to establish that he had received ineffective assistance from his trial counsel; whether trial counsel provided ineffective assistance by not objecting to trial court's jury instructions or requesting additional jury instruction regarding difference between intent elements of assault charges against petitioner; whether trial counsel provided ineffective assistance by declining to object to admission of police detective's written summary of petitioner's oral account of incident; whether trial counsel's strategic decision to allow written summary into evidence was reasonable; whether there was not reasonable probability that outcome of trial would have been different if written summary had been excluded; whether habeas court reasonably concluded that petitioner failed to prove that he was prejudiced by trial counsel's failure to request trial court to place its rejection of his plea agreement on record; whether there was reasonable probability that outcome of criminal proceedings would have been different if trial counsel had requested trial court to place its rejection of plea on record; claim that habeas court improperly dismissed claim that trial court violated petitioner's right to due process by not stating on record its reasons for rejecting plea agreement; whether petitioner was harmed by absence of record of rejection of plea agreement.

Kirby *v.* Commissioner of Correction 902

Klein *v.* Quinnipiac University 469

Negligence; premise liability action; claim that trial court erred by declining to instruct jury on definition of, and duty owed to, licensee; whether evidence sufficient to support conclusion that plaintiff was licensee; whether defendant private university explicitly or implicitly expressed desire that plaintiff enter its campus or willingness that he do so; claim that defendant impliedly gave plaintiff consent to ride his bicycle on campus because there was lack of no trespassing signs and no gate at each entrance to campus; whether lack of no

trespassing signs or gate, without some additional evidence demonstrating implied consent, was insufficient to send question of whether plaintiff was licensee to jury; whether evidence supported finding that defendant breached duty to plaintiff as licensee; whether defendant was required to warn plaintiff of obvious dangers of his actions; whether general verdict rule precluded review of plaintiff's remaining evidentiary claim, which related only to special defense of contributory negligence.

Meribear Productions, Inc. *v.* Frank 598

Foreign judgment; breach of contract; quantum meruit; final judgment; motion to dismiss appeal as untimely; motion for permission to file late appeal; whether twenty day time limit for filing appeal pursuant to applicable rule of practice (§ 63-1) is subject matter jurisdictional; whether good cause existed to allow defendants' appeal to proceed.

Peek *v.* Manchester Memorial Hospital 337

Negligence; motion for summary judgment; claim that trial court improperly granted motion for summary judgment and determined that action was barred by applicable statute of limitations (§ 52-584); whether statute of limitations was tolled by continuous course of treatment doctrine; whether evidence before trial court demonstrated genuine issue of material fact as to when plaintiff discovered injury as contemplated by § 52-584.

Putnam Park Apartments, Inc. *v.* Planning & Zoning Commission 42

Zoning; whether trial court improperly determined that zoning regulations permitted building to be located less than 100 feet from property line; whether trial court improperly determined that building proposal was consistent with zoning regulations; whether certain zoning regulation applied to special permit application.

R & P Realty Co. *v.* Peerless Indemnity Ins. Co. 374

Contracts; reviewability of claim that trial court erroneously concluded that defendant did not breach insurance policy by declining to cover increased demolition costs resulting from presence of asbestos and lead in building; reviewability of claim that trial court improperly found that increased demolition costs constituted replacement costs, rather than being component of actual cash value of plaintiffs' loss, and that plaintiffs failed to provide reasonable notice to defendant of claim seeking recovery for increased demolition costs; failure of plaintiffs to provide adequate record for review.

Simms *v.* Commissioner of Correction 901

Soto *v.* Christians Alliance, Inc. 901

State *v.* Bryan 285

Murder; conspiracy to commit murder; whether trial court abused its discretion by admitting into evidence as dual inculpatory statements under applicable rule of evidence (§ 8-6 [4]), statements that defendant's accomplice made to friend of accomplice about victim's murder; claim that accomplice's statements to friend of accomplice were inadmissible as dual inculpatory statements because they sought to shift blame for victim's murder to defendant; claim that accomplice's statements to friend of accomplice were not against accomplice's penal interest; whether trial court correctly concluded that accomplice's statements to friend of accomplice were trustworthy; unpreserved claim that state failed to disclose to defendant, in violation of Brady *v.* Maryland *(373 U.S. 83), certain police internal affairs records that concerned allegations of prior misconduct by detective who investigated murder; whether police internal affairs records were material to outcome of defendant's trial.*

State *v.* Cane 95

Criminal possession of firearm; criminal possession of ammunition; possession of controlled substance with intent to sell; whether trial court erroneously denied motion to suppress evidence police seized from defendant's home and car; claim that trial court improperly found that warrantless search of defendant's home by police after he was arrested and in police custody constituted justifiable, protective sweep of defendant's home; reviewability of unpreserved claims that defendant was constructively seized by police and that they lacked probable cause to search his car; whether information in affidavit of police officer in support of warrant application provided basis for determination that probable cause existed to search defendant's vehicle; unpreserved claim that trial court committed plain error when it granted state's motion for joinder, where defendant, personally and through counsel, expressly stated that he had no objection to joinder; unpreserved claim of judicial bias; whether reversal of judgment was warranted under plain error doctrine where defendant claimed that trial court, in pretrial memo-

randum of decision on motion to suppress, had found him guilty of kidnapping and assault charges as to certain individuals it referred to as victims and then considered those charges in sentencing him.

State *v.* Crewe 564

Possession of narcotic substance; claim that there was insufficient evidence to support conviction; whether jury reasonably could have inferred from evidence that defendant knew of presence of narcotics in van, exercised dominion and control over at least some of narcotics and, thus, constructively possessed narcotics.

State *v.* Gomes 79

Assault in second degree; whether trial court deprived defendant of right to present defense of investigative inadequacy when it omitted from its jury instructions certain language in defendant's written request to charge that pertained to alleged inadequacy of police investigation as it might relate to weaknesses in state's case.

State *v.* Palumbo 457

Sexual assault in first degree; sexual assault in fourth degree; risk of injury to child; claim that questions referring to trial as being first time that defendant mentioned that other people were in same area during hike where he alleged sexually abused minor victim violated his constitutional right to remain silent pursuant to Doyle *v.* Ohio *(426 U.S. 610), by introducing evidence of his post-*Miranda *silence; claim that questions that sought to elicit evidence of defendant's post-*Miranda *silence amounted to prosecutorial impropriety that violated his due process right to fair trial; whether defendant's unpreserved* Doyle *claim failed under third prong of* State *v.* Golding *(213 Conn. 233).*

State *v.* Shin 348

Interfering with officer; disorderly conduct; reviewability of claim that defendant's arrest and seizure by police was illegal, where claim was raised for first time in reply brief, defendant never moved to suppress evidence, and trial court did not make any factual findings or legal conclusions regarding whether any evidence was illegally seized; claim that evidence was insufficient to support conviction because police officers' testimony was fabricated; reviewability of claim that trial court improperly admitted testimony from police officers about statements defendant made in Internet video he had posted; whether defendant failed to secure finalized, specific ruling as to testimony of officers; whether trial court abused its discretion when it denied defendant's request to excuse prospective juror for cause during voir dire; unpreserved claim that trial court violated defendant's state constitutional right to compulsory process when it denied request to issue subpoena to rabbi from out of state; reviewability of claim that trial court improperly found defendant incompetent to stand trial before it later determined that he was competent to stand trial; whether claim that trial court violated defendant's constitutional right to travel when it imposed as term of conditional discharge special condition that he stay out of Connecticut for two years was moot; whether claim that trial court violated defendant's constitutional right to travel was not moot because it fell within collateral consequences exception to mootness doctrine.

Stiggle *v.* Commissioner of Correction (Memorandum Decision) 902

Water Pollution Control Authority *v.* McKinley 901

Weston Street Hartford, LLC *v.* Zebra Realty, LLC 542

Easements; temporary and permanent injunction; counterclaim; whether trial court properly rendered judgment for plaintiff on counts of defendant's counterclaim relating to its request to relocate plaintiff's right-of-way easement over defendant's property; difference between unilateral modification of easement and unilateral relocation of easement, discussed; claim that trial court improperly rendered judgment in defendant's favor on plaintiff's complaint and denied plaintiff's request for injunctive relief; whether trial court applied correct standard of law in determining whether plaintiff was entitled to injunctive relief; whether court abused its discretion in denying plaintiff's request for injunctive relief.

SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

BRASS CITY LOCAL, CACP *v.* CITY OF WATERBURY, SC 20337
Judicial District of Waterbury

Arbitration; Whether Trial Court Properly Determined that it Lacked Jurisdiction Over Application to Confirm Interest Arbitration Award. The plaintiff, Brass City Local, CACP (the union) represents all investigatory and uniformed members of the Waterbury Police Department. The union filed an application to confirm an interest arbitration award, which was issued pursuant to General Statutes § 7-473c of the Municipal Employees Relations Act (MERA) and established the terms of a successor collective bargaining agreement with the defendant, the city of Waterbury. Interest arbitration is a process during which the terms and conditions of an employment contract are established by a final and binding decision of an arbitration panel. MERA imposes compulsory interest arbitration on a municipality and the representative of its employees whenever the parties have reached an impasse in their collective bargaining. The city moved to dismiss the application for lack of subject matter jurisdiction, claiming that the trial court has no statutory authority to confirm an interest arbitration award. The trial court granted the motion to dismiss. The trial court held that chapter 909 of the General Statutes, comprising §§ 52-408 through 52-424 and relating to arbitration proceedings, does not authorize judicial review of an interest arbitration award via an application to confirm absent a written agreement by the parties to arbitrate. The trial court further held that, while MERA authorizes judicial review of an interest arbitration award pursuant to an application to vacate or modify, it does not authorize judicial review of an application to confirm. The union appeals, claiming that the trial court improperly held that judicial confirmation of its interest arbitration award is not available. The union argues that the trial court erred in finding that (1) MERA is in derogation of the common law and, thus, must be strictly construed; (2) judicial review of arbitration that is authorized by statute is limited to the provisions of chapter 909 that are explicitly mentioned in the authorizing statutes; (3) because MERA states that an interest arbitration award is "final and binding," it cannot be the subject of an application to confirm; and (4) interest arbitration awards are less susceptible to judicial oversight than grievance arbitration awards. The city argues that the trial court's judgment can be affirmed on the alternative ground that the trial court lacked subject matter

jurisdiction because the union failed to exhaust the grievance and arbitration procedures in the collective bargaining agreement.

NORTH SAILS GROUP, LLC v. BOARDS AND MORE GMBH et al., SC 20338
Judicial District of Hartford

Contracts; Personal Jurisdiction; Long-Arm Statute; Due Process; Whether Trial Court Properly Dismissed Breach of Contract Action Against Foreign Defendants for Lack of Personal Jurisdiction on Ground that Conduct Complained of Did not Occur in Connecticut. The plaintiff, North Sails Group, LLC, is a limited liability company that designs, engineers and manufactures boat sails in Milford. The plaintiff licenses its trademark to other companies for purposes of manufacturing clothing and associated sailing products branded with the plaintiff's trademark. In October, 2000, the plaintiff entered into a licensing agreement with Boards and More GmbH (Boards and More), a limited liability company with a principal place of business in Austria. In the licensing agreement, Boards and More agreed to pay royalties to the plaintiff and make a good faith effort to maximize its production of the licensed goods. In November, 2017, after being acquired by a German investment firm, Boards and More represented to the plaintiff that it was going to launch its own trademark and use it to replace the plaintiff's trademark on the goods that Boards and More produced. In response, the plaintiff brought this action in Connecticut Superior Court, alleging that the defendants, Boards and More and the German investment firm, had breached the licensing agreement by failing to maximize production of the goods bearing the plaintiff's trademark. The defendants moved to dismiss the action for lack of personal jurisdiction. They claimed that the plaintiff failed to allege that the defendants had conducted any activity in Connecticut that would satisfy the requirements of the state long-arm statute, General Statutes § 52-59b. The defendants also argued that the court's exercise of jurisdiction would violate their due process rights because the defendants lacked minimum contacts with Connecticut, such that asserting jurisdiction over them would not comport with traditional notions of fair play and substantial justice. The trial court, relying on the United States Supreme Court's decision in *Bristol-Myers Squibb, Co.* v. *Superior Court of California*, 137 S. Ct. 1773 (2017), granted the defendants' motion to dismiss. The court reasoned that, while it likely had jurisdiction under the long-arm statute insofar as Boards and More had conducted business in Connecticut,

a Connecticut court's exercise of personal jurisdiction here did not satisfy constitutional due process guarantees. The court reasoned that, in order to exercise specific personal jurisdiction over the foreign defendants, the conduct that the plaintiff complained of must have occurred in this state. The court noted that the conduct complained of here—the defendants' branding of the products and their decision to rebrand—occurred in Europe, not Connecticut. The plaintiff appeals, claiming that the exercise of jurisdiction over Boards and More would be consistent with due process because the plaintiff's breach of contract claim arises out of Boards and More's minimum contacts with Connecticut. The plaintiff claims that the trial court misinterpreted *Bristol-Meyers Squibb* as articulating a new standard that would drastically narrow specific jurisdiction in breach of contract actions.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

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Chief Staff Attorney