SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

JOSEPH MOORE *v.* COMMISSIONER OF CORRECTION, SC 20252
Judicial District of Tolland

Habeas; Whether Trial Counsel Rendered Ineffective Assistance in Advising Petitioner Regarding Pretrial Plea Offers. The petitioner was convicted following a jury trial on charges of robbery in the first degree and commission of a class B felony with a firearm. He filed this habeas action, claiming that his trial counsel rendered ineffective assistance in failing to adequately advise him concerning the state's pretrial plea offers. The petitioner argued that, although his attorney advised him on the maximum sentence that he faced on the robbery charge, the attorney failed to advise him that the maximum sentence he faced even if he was successful in proving a theory of defense that he wished to present at trial—which amounted to conceding that he was guilty only of the lesser included offense of robbery in the third degree—would be as severe as, or exceed, the sentences recommended in the plea offers made to him. The habeas court denied the petition, and the petitioner appealed. The Appellate Court (186 Conn. App. 254) affirmed the judgment, holding that the petitioner failed to demonstrate that his attorney provided ineffective assistance. The Appellate Court found that the petitioner's attorney adequately advised him on the best course of action given the facts of the underlying case, which included overwhelming evidence against the petitioner, and informed him of the potential total sentence to which he was exposed. The Appellate Court noted that the attorney had many discussions with the petitioner throughout the course of his representation, advised the petitioner to accept each of the plea deals offered to him, properly explained the state's evidence and provided adequate information for the petitioner to make an informed decision as to whether to accept the plea offers. Finally, the Appellate Court found that the attorney had not performed deficiently in failing to inform the petitioner of the potential total sentence he faced in the unlikely event that he was convicted only of the lesser offense or in failing to persuade the petitioner to accept one of the plea offers. The petitioner was granted certification to appeal, and the Supreme Court will consider whether the Appellate Court properly concluded that the petitioner's trial counsel did not render ineffective assistance in advising the petitioner regarding the state's plea offers.

STATE *v.* HAJI JHMALAH BISCHOFF, SC 20302
Judicial District of Fairfield

Criminal; Whether Appellate Court Properly Held that Public Act Reducing Punishment for Possession of Narcotics in Violation of General Statutes § 21a-279 Does not Apply Retroactively; Whether Supreme Court Should Apply Amelioration Doctrine. The defendant was convicted of possession of narcotics in violation of General Statutes § 21a-279 in connection with a crime he committed in 2014, and sentenced to seven years of incarceration, execution suspended after five years, followed by three years of probation. In 2015, the legislature enacted No. 15-2 of the 2015 Public Acts, which reclassified the violation of § 21a-279 for first time offenders as a class A misdemeanor carrying a maximum sentence of one year of incarceration. The defendant brought this action by a motion to correct an illegal sentence, claiming that the public act applies retroactively and accordingly that his sentence of seven years incarceration is illegal because it exceeds the maximum sentence now allowed by the law. The trial court dismissed the motion to correct, finding that it lacked jurisdiction to consider it, and the defendant appealed. He acknowledged that his case was seemingly controlled by *State* v. *Moore*, 180 Conn. App. 116 (2018), and *State* v. *Kalil*, 314 Conn. 529 (2014), but asked that that precedent be overruled. In *Moore*, the Appellate Court held that, because the public act contained no language indicating that it should apply retroactively, only prospective application would be consistent with both appellate precedent and with the savings statutes, General Statutes §§ 54-194 and 1-1 (t). The savings statutes provide that, when a crime is committed and the statute violated is later amended or repealed, a defendant remains liable under the version of the statute that existed at the time of the commission of the crime. In *Kalil*, the Supreme Court refused a defendant's request that the court adopt the amelioration doctrine, which provides that amendments to statutes that lessen the statutes' penalties apply retroactively, finding that application of the doctrine would be in contravention of the provisions of the savings statutes. The Appellate Court (189 Conn. App. 119) declined the invitation to overrule or disturb the precedent established by *Moore* and *Kalil* and remanded the case to the trial court with direction to deny the motion to correct. The Appellate Court noted that, as Connecticut's intermediate appellate court, it was bound by the Supreme Court's decision in *Kalil* and that, as to *Moore*, it would not overrule another panel of the Appellate Court absent en banc reconsideration. The defendant was granted certification to appeal, and the Supreme Court will consider (1) whether the Appellate Court properly determined in *Moore* that No. 15-2 of the 2015 Public

Acts does not have retroactive effect; and (2) whether the Supreme Court should overrule *Kalil* and apply the amelioration doctrine to give retroactive effect to the public act here.

STATE *v.* JOSE DIEGO GONZALEZ, SC 20317
Judicial District of New Haven

Criminal; Whether Defendant's Right to Due Process Violated by Prosecutorial Impropriety During Closing Arguments. The defendant was convicted of home invasion, sexual assault in the first degree and risk of injury to a child. He appealed, claiming that he was entitled to a new trial because prosecutorial impropriety during closing argument deprived him of his constitutional rights to due process and a fair trial. The defendant argued that the prosecutor improperly presented a substantive discussion of the evidence during the rebuttal portion of her closing argument, which prevented his attorney from knowing how the state intended to marshal the evidence and from being able to effectively rebut the state's position during his closing argument. The defendant also argued that, during rebuttal argument, the prosecutor mischaracterized DNA and fingerprint evidence and improperly introduced new claims. The Appellate Court (188 Conn. App. 304) affirmed the judgment of conviction, noting that the defendant did not object to the prosecutor's closing argument at trial or seek to correct any of the prosecutor's claimed misstatements. The Appellate Court also noted that the defendant failed to present any authority suggesting that a closing argument must be made in a particular order or that the state's initial argument should contain the majority of its argument. The court observed that the closing arguments of the prosecutor and defense counsel demonstrated that each was aware of the evidence and the opposing party's theory of the case, that the defendant addressed the evidentiary issues raised by the prosecutor in closing argument, and that defense counsel vigorously argued the weaknesses of the state's case. The Appellate Court further found that the prosecutor's DNA argument was predicated on the evidence, that the prosecutor's statement concerning fingerprint evidence had a basis in the record and that, in any case, the defendant could not have been prejudiced by the statement because there was no fingerprint evidence that connected him to the crimes. The defendant was granted certification to appeal, and the Supreme Court will consider whether the Appellate Court correctly concluded that the defendant's rights to due process and a fair trial were not violated by prosecutorial impropriety during closing arguments.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

CITY OF MERIDEN et al. *v.* FREEDOM OF INFORMATION COMMISSION et al., SC 20378

Judicial District of New Britain

Freedom of Information; Whether Appellate Court Properly Held that a Gathering of Less than a Quorum of Meriden City Council Members did not Constitute a "Meeting" Subject to FOIA's Open Meeting Requirements. On January 3, 2016, four political leaders of the Meriden City Council—the majority and minority leaders and their deputies (the leadership group)—met with the mayor and the retiring city manager to discuss the search for a new city manager. Following the gathering, a resolution was drafted detailing the names of people to be appointed to the search committee and the duties of the search committee and recommending suitable candidates for the city manager position to the city council. The resolution was subsequently adopted without discussion at a city council meeting. The Meriden Record Journal filed a complaint with the defendant Freedom of Information Commission (commission), alleging that the city had violated the Freedom of Information Act (act) in that the January 3, 2016 "leadership gathering" had not been conducted in compliance with the open meeting requirements of General Statutes § 1-225. The commission issued a decision finding that the gathering was a "proceeding" within the meaning of § 1-200 (2), that the proceeding constituted a "meeting" under that statute, and that the city had violated the open meeting requirement by failing to give public notice of the leadership group gathering. The city appealed from the commission's final decision to the Superior Court, and the trial court dismissed the appeal on concluding that the commission's findings were supported by substantial evidence. The city appealed, and the Appellate Court (191 Conn. App. 684) reversed the judgment and remanded the matter to the trial court with direction to render judgment sustaining the city's appeal from the commission. The Appellate Court held that the gathering of less than a quorum of the city council's members did not constitute a "meeting" under § 1-200 (2) that triggered the open meeting requirements. The Appellate Court held that the terms "hearing" and "proceeding" in the statute refer only to adjudicatory functions or activities and that, because the leadership group gathering did not involve in adjudication, it was not a hearing or other proceeding as contemplated by § 1-200 (2) and therefore not subject to the open

meeting requirements. The court held that the gathering instead constituted a "convening or assembly" for purposes of the statute and noted that, in a 1998 decision, the Appellate Court held that a gathering akin to a convening or assembly that constitutes less than a quorum of members of a public agency generally does not constitute a meeting as contemplated by § 1-200 (2). The Supreme Court granted the commission certification to appeal, and the Supreme Court will consider whether the Appellate Court properly construed the term "proceeding" in § 1-200 (2) to exclude a gathering of four political leaders of the city council at which they discussed the search for a new city manager.

DANIEL KLEIN *v.* QUINNIPIAC UNIVERSITY, SC 20405
Judicial District of New Haven

Negligence; Premises Liability; Whether Jury Should Have Been Instructed Concerning a Landowner's Duty of Care to a Licensee; Whether Appellate Court Correctly Concluded that, Even Assuming that Defendant Owed Plaintiff a Duty, Defendant did not Breach Duty. The plaintiff was injured when he fell off of his bicycle while riding over a speed bump at the campus owned by the defendant Quinnipiac University. He brought this premises liability action seeking monetary damages, claiming that the speed bump was dangerous and defective and that his injuries were caused by the defendant's negligence. The defendant denied the allegations and asserted as a special defense that the plaintiff was contributorily negligent. The case proceeded to a jury trial, and, while the trial court instructed the jury as to the duty of care owed by a landowner to a trespasser, the court refused to instruct the jury as to the duty of care owed to a licensee; that is, a person who is privileged to enter or remain upon the property because the owner consents to their presence. The trial court rendered judgment on the jury's verdict for the defendant, and the plaintiff appealed, claiming that the trial court erred in refusing to charge the jury as to the duty of care that a property owner owes a licensee. He argued that, as the defendant had not posted "no trespassing" signs or installed gates on the campus, the jury reasonably could have found that the defendant had either explicitly or implicitly consented to his presence there. The Appellate Court (193 Conn. App. 469) disagreed and affirmed the judgment, concluding that the absence of "no trespassing" signs or a gate at every entrance to the campus, absent additional evidence demonstrating the defendant's consent, was insufficient to support submission of the question of whether the plaintiff was a licensee to the jury. The Appellate Court also ruled that, even assuming without deciding that the defendant owed the

plaintiff the duty owed a licensee, no jury reasonably could have concluded that the defendant breached that duty in failing to warn him about the speed bump. The court reasoned that the yellow speed bump was visible on a clear and sunny day such that it could not be considered a hidden, dangerous condition. The plaintiff was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court properly determined that the trial court was correct in refusing to instruct the jury on the heightened duty of care owed to a licensee and whether the Appellate Court properly found that the trial court's refusal to instruct as to that duty of care amounted to something in the nature of harmless error.

NANCY BURTON *v.* COMMISSIONER OF ENVIRONMENTAL PROTECTION et al.;
NANCY BURTON *v.* DEPARTMENT OF ENVIRONMENTAL PROTECTION et al., SC 20466
Judicial District of Hartford

Environmental Protection; Nuclear Power; Whether Administrative Proceeding Concerning Renewal of Millstone's Wastewater Discharge Permit was Conducted in Violation of Connecticut Environmental Protection Act and Clean Water Act. In 2007, the plaintiff brought an action against the Connecticut Department of Energy and Environmental Protection (DEEP) and Dominion Nuclear Connecticut, Inc., the owner and operator of Millstone Nuclear Power Station in Waterford. She alleged that Millstone's "once-through" cooling system, which draws large volumes of seawater from Niantic Bay and discharges it into Long Island Sound, is causing "unreasonable pollution" of the waters of the state in violation of General Statutes § 22a-16 of the Connecticut Environmental Protection Act (CEPA). The plaintiff sought, among other things, an order that Millstone be converted to a "closed cooling" system to reduce the alleged environmental damage and a determination, pursuant § 22a-20 of the CEPA, that a pending administrative proceeding concerning renewal of the wastewater discharge permit was inadequate to protect her rights as an intervenor under CEPA. The plaintiff alleged that the permit renewal proceeding had not been conducted fairly and impartially by the hearing officer and the DEEP. In 2010, the permit renewal proceeding terminated when the DEEP issued a renewed wastewater discharge permit for Millstone, and the plaintiff brought an administrative appeal to challenge that decision. After a consolidated trial on both the CEPA action and the administrative appeal, the trial court rendered judgment in favor of the defendants in both cases. The plaintiff appeals. She

claims that the DEEP violated the federal Clean Water Act by failing to make a legally valid determination that Millstone's cooling water intake structures reflect the "best technology available" for minimizing adverse environmental impact, as required by § 316 (b) of the Clean Water Act. The plaintiff also contends that DEEP violated the Clean Water Act in refusing to consider "closed cooling" as the "best technology available" for Millstone's cooling water intake structures. Among the plaintiff's other claims are that (1) she established "unreasonable pollution" under § 22a-16 by showing that Millstone's continuing use of the once-through cooling system will result in pollution and overheating of trillions of gallons of seawater, (2) she proved that there were procedural irregularities in the administrative permit renewal proceeding and that the proceeding was biased against her, and (3) that the trial court erred in failing to conduct the proceeding in her CEPA action in accordance with the Connecticut Supreme Court's remand order.

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.

John DeMeo
Chief Staff Attorney