

## SUPREME COURT PENDING CASES

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

STATE *v.* RODERICK ROGERS, SC 20469

*Judicial District of Fairfield*

**Criminal; Reviewability; Whether Supreme Court’s Decision Reversing Codefendant’s Conviction Requires Reversal of Defendant’s Conviction; Whether Defendant’s Unpreserved Claim That Trial Court Improperly Failed to Hold *Porter* Hearing Regarding Cell Site Location Information Is Reviewable.** The defendant was charged with murder, conspiracy to commit murder, and assault in the first degree in connection with a shooting in Bridgeport. On the day of the shooting, the defendant called his cousin, David Anderson, for a ride from the defendant’s home. Because Anderson was on probation, he wore a global positioning system (GPS) device that tracked his movements. On their way through Bridgeport, the defendant and Anderson picked up one of the defendant’s friends, Raashon Jackson. The three then proceeded to a housing complex where the shooting subsequently occurred. Thereafter, the defendant and Jackson were arrested in connection with the shooting and charged with the same offenses. Over his objection, the trial court consolidated the defendant’s case with Jackson’s. During jury selection seven days before the trial, the state disclosed to the defense that Sergeant Andrew Weaver of the Hartford Police Department had been retained as an expert witness to analyze GPS and cell site location information pertaining to the defendant, Jackson, and Anderson. On the eve of trial, Jackson moved to preclude Weaver’s evidence or, in the alternative, for a continuance in order that a defense expert could be obtained. The court denied Jackson’s motions. The defendant did not join in these motions or otherwise object to Weaver’s evidence. Nor did the defendant request a hearing pursuant to *State v. Porter*, 241 Conn. 57 (1997), to determine whether Weaver’s evidence was based on reliable scientific principles. The defendant and Jackson were subsequently convicted on all counts. On appeal to the Appellate Court, the defendant claimed, *inter alia*, that the trial court improperly declined to hold a *Porter* hearing with respect to Weaver’s evidence. The defendant relied on the then newly released decision in *State v. Edwards*, 325 Conn. 97 (2017), which held that a trial court must hold a *Porter* hearing before admitting evidence regarding cell phone location data. The Appellate Court (183 Conn. App. 669) rejected this claim and affirmed the defendant’s conviction. The Appellate Court determined

that the defendant had failed to preserve the claim for appeal and that the retroactive applicability of *Edwards* did not render the unpreserved claim reviewable. The court alternatively concluded that the claimed error was harmless. Thereafter, the defendant filed a petition for certification to appeal to the Supreme Court. While the petition was pending, the Supreme Court issued a decision, *State v. Jackson*, 334 Conn. 793 (2020), reversing the conviction of the defendant's codefendant. The court held that it was an abuse of discretion for the trial court to allow the state's late disclosed witness to testify without first granting Jackson a reasonable continuance to obtain his own expert and that such error was harmful. The court subsequently granted the defendant's petition for certification to appeal and will now decide (1) whether its decision reversing the conviction of the defendant's codefendant requires that the court also reverse the defendant's conviction; (2) whether the Appellate Court properly determined that the defendant's unpreserved claim regarding the trial court's failure to hold a *Porter* hearing was not reviewable; and (3) whether the Appellate Court properly determined that the trial court's failure to hold a *Porter* hearing was harmless.

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DANIEL DIAZ *v.* COMMISSIONER OF CORRECTION, SC 20536  
*Judicial District of Fairfield*

**Habeas; Whether Appellate Court Properly Rejected Petitioner's Claim That Habeas Court Abused Its Discretion by Denying His Petition for Certification to Appeal With Respect to His Claim That Defense Counsel Rendered Ineffective Assistance by Failing to Disclose His Role As An Active Police Officer.** The petitioner, Daniel Diaz, was convicted of several offenses, including possession of narcotics with intent to sell and criminal possession of a firearm. The Supreme Court, however, reversed the petitioner's convictions and remanded for a new trial. During his second trial, Attorney Frank Canace, who was employed as a police officer by the city of New Haven, represented the petitioner. The petitioner was not aware that Canace was employed as a police officer, and Canace did not inform him of that fact. After his second trial, the petitioner was again convicted of various drug and weapons charges. Thereafter, the petitioner brought this habeas action claiming that Canace had rendered ineffective assistance of counsel. The petitioner alleged that Canace had a conflict of interest as a result of his employment as a police officer while representing the petitioner. He further alleged that Canace's conflict of interest manifested itself when he failed, inter

alia, to adequately cross-examine police officers regarding their prior inconsistent statements. In addition, the petitioner alleged particular instances in which Canace provided deficient performance at his criminal trial. Following a trial, the habeas court rejected the petitioner's claim and denied the petition. Subsequently, the court also denied the petition for certification to appeal. The petitioner appealed, claiming that the habeas court abused its discretion in denying his petition for certification to appeal with respect to his ineffective assistance counsel claim. Specifically, he claimed that Canace maintained a conflict of interest and performed deficiently during his second criminal trial. The Appellate Court (200 Conn. App. 524) concluded that the petitioner could not prevail on his ineffective assistance of counsel claim because he failed to present any law that held that Canace's simultaneous representation of the petitioner and his employment as a police officer established a conflict of interest. Moreover, the court noted that the petitioner had failed to point to any specific instances that suggested that his interests were impaired or compromised for the benefit of a third party or any errors by Canace that were so serious that he did not function as the counsel guaranteed by the sixth amendment. The court also rejected the petitioner's argument that Canace had a conflict of interest because he was required by General Statutes § 54-1f (b) to arrest the petitioner if he had reasonable grounds to suspect that the petitioner had committed a felony crime, noting that the petitioner had failed to cite any specific instance in which § 51-1f (b) or any other legal obligation Canace had as a police officer impaired his ability to provide the petitioner with adequate and uncompromised defense representation. The court dismissed the appeal, concluding that the habeas court did not abuse its discretion in denying the petition for certification to appeal. The petitioner was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court properly rejected the petitioner's claim that the habeas court had abused its discretion by denying his petition for certification to appeal with respect to the claim that defense counsel at his second criminal trial rendered ineffective assistance by failing to disclose his role as an active police officer in the state of Connecticut.

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STATE *v.* RAMON LOPEZ, SC 20601

*Judicial District of New Britain*

**Criminal; Violation of Probation; Whether Airsoft Pellet Gun is “Firearm” under General Statutes § 53a-3 (19); Whether General Statutes § 53a-217, Which Proscribes Possession of Firearm**

**by Felon, is Unconstitutionally Vague.** The defendant pleaded guilty to two counts of risk of injury to a minor, and the court imposed a sentence that included a period of probation. The defendant was subsequently released on probation, and he informed his probation officer that he would be living on the first floor of a three-story house in New Britain. After receiving information that the defendant had brought a gun to his workplace, the police executed a search warrant for the defendant's residence, where they found a silver BB gun and a KWC Airsoft pellet gun. The defendant was arrested and charged with two counts of criminal possession of a firearm in violation of General Statutes § 53a-217 (a), which provides that "[a] person is guilty of criminal possession of a firearm . . . when such person possesses a firearm . . . and (1) has been convicted of a felony . . . ." The term "firearm" is defined in General Statutes § 53a-3 (19) as "any sawed-off shotgun, machine gun, rifle, shotgun, pistol, revolver or other weapon, whether loaded or unloaded from which a shot may be discharged." A probation violation warrant was subsequently issued as a result of the defendant's arrest. After a hearing, the trial court found, by a preponderance of the evidence, that the defendant had violated two conditions of his probation, namely, that he not possess any firearms and that he not violate any criminal laws of this state, by possessing the Airsoft pellet gun, which the court determined was a "firearm" under § 53a-3 (19). The court, however, found that the silver BB gun was not a "firearm" under the statute because it "was not capable of firing a shot." The court thereafter revoked the defendant's probation. The defendant appealed to the Appellate Court, and the Supreme Court transferred the appeal to itself. The defendant claims on appeal that the trial court improperly found him in violation of his probation because an Airsoft pellet gun is not a "firearm" within the meaning of §§ 53a-217 and 53a-3 (19). He acknowledges that the Supreme Court in *State v. Hardy*, 278 Conn. 113 (2006), held that a BB gun – designed to shoot lead pellets propelled with carbon dioxide cylinders – was a "deadly weapon" under General Statutes § 53a-3 (6) for purposes of a first degree robbery charge. He, however, argues that *Hardy* is distinguishable because, unlike the BB gun in that case, an Airsoft pellet gun is "a toy" that shoots plastic pellets and there is no evidence that it was designed for violence or to cause serious injury. He thus maintains that an Airsoft pellet gun is not "a dangerous instrument or deadly weapon, let alone a 'firearm.'" Further, the defendant claims that there was insufficient evidence to establish that he "possessed" the Airsoft pellet gun. Specifically, he claims that the evidence was insufficient to support the inference that he knew of or

exercised dominion and control over the Airsoft pellet gun found inside a twelve-room, six-bedroom house that he shared with several relatives. In addition, he claims that the trial court erred in concluding that he violated his probation on a basis not alleged in the criminal information, which, according to the defendant, limited its probation violation allegation to the possession of the inoperable silver BB gun that he had allegedly brought to his workplace. He also claims that § 53a-217 is unconstitutionally vague because no reasonable person would be on notice that “a toy pellet gun that discharges plastic pellets constitutes a “firearm” under the statute.

IN RE IVORY W. et al., SC 20624

*Superior Court for Juvenile Matters at Middletown*

**Child Protection; Whether Denial of Motion for Continuance of Termination of Parental Rights Trial Violated Respondent’s Procedural Due Process Rights; Whether Trial Court Abused Its Discretion in Denying Motion for Continuance; Whether Supreme Court Should Exercise Supervisory Authority and Require Parental Termination Proceedings Be Continued When Related Criminal Charges Are Pending.** In October, 2017, the Department of Children and Families (department) received a referral from the Hartford Police Department stating that a man had reported receiving sexually explicit pictures of one of the respondent mother’s two minor children. In the course of the department’s investigation, the respondent admitted to sending explicit pictures of her daughter to multiple people. She also admitted to having explicit pictures of her son but denied sending those to anyone. The department subsequently filed termination of parental rights petitions with respect to both children, which the respondent contested. On the basis of the same set of underlying facts, the respondent was charged in federal court with distributing child pornography. The trial court initially set an August, 2019 trial date for the termination proceedings. The respondent subsequently filed multiple continuance requests seeking to delay the termination trial until after her criminal trial so as to preserve her fifth amendment right against self-incrimination. The termination trial was eventually scheduled for January, 2021. In December, 2020, the respondent filed her fourth motion for continuance on the same basis as the previous requests. The trial court denied this continuance request and, after a contested trial, rendered judgments terminating the respondent’s parental rights. The respondent then filed this appeal in the Appellate Court, which was transferred on party motion to the Supreme Court. On appeal, the respondent claims that the trial court

violated her federal and state constitutional rights to procedural due process by denying her motion for continuance and proceeding with the termination trial when it knew that she would be asserting her fifth amendment right against self-incrimination in light of the pending criminal charges. In conjunction with this claim, she takes the position that the Supreme Court should overrule the Appellate Court's decision in *In re Clark K.*, 70 Conn. App. 665, 674 cert. denied, 261 Conn. 925 (2002), wherein the court held that the respondent mother could not complain on appeal that she did not have a full and fair hearing when she chose to exercise her fifth amendment privilege against self-incrimination and remained silent at the termination proceeding in light of related criminal charges which were pending. The respondent also claims that the denial of her motion for continuance constitutes an abuse of discretion by the trial court and that the Supreme Court should exercise its supervisory authority and require termination proceedings be continued when there are related criminal charges pending.

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

*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.*

*Jessie Opinion  
Chief Staff Attorney*

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