SUPREME COURT PENDING CASES

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

HAROLD T. BANKS, JR. *v.* COMMISSIONER OF CORRECTION,
SC 20621
Judicial District of Tolland

Habeas; Whether Appellate Court Correctly Concluded That Review of Challenges to Habeas Court's Handling of Habeas Proceedings is Unavailable Under *State* v. *Golding* and Plain Error Doctrine for Any Issue That Is Not Included in Petition for Certification to Appeal That is Denied. The petitioner, who had been convicted of various crimes in 2012, filed a habeas petition in December, 2017, collaterally attacking his conviction. The habeas court dismissed the petition pursuant to General Statutes § 52-470 (c) and (e), concluding that it was untimely and that the petitioner, having declined to present any evidence of the reason for the delay in filing the petition, failed to rebut the presumption that the delay was without good cause. Thereafter, the petitioner filed a petition for certification to appeal pursuant to General Statutes § 52-470 (g), citing only one ground for appeal, namely, whether the habeas court erred in finding that there was not good cause to allow the petitioner's untimely habeas petition to proceed. The habeas court denied the petition for certification to appeal. The petitioner appealed to the Appellate Court, claiming that the habeas court abused its discretion in denying his petition for certification to appeal because (1) his habeas counsel provided ineffective assistance and (2) he was denied his constitutional right to counsel because the habeas court failed to intervene when counsel did not present any evidence in support of his claim that good cause existed to rebut the presumption of unreasonable delay in the filing of his habeas petition. The petitioner conceded that he failed to preserve the aforementioned claims for review by failing to include them in his petition for certification to appeal, as required by § 52-470 (g). He nevertheless contended that his unpreserved claims were reviewable under *State* v. *Golding*, 213 Conn. 233, 239-40 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773 (2015). The Appellate Court (205 Conn. App. 337) disagreed, explaining that permitting a habeas petitioner to seek *Golding* review of a claim that was not raised in, or incorporated into, the petition for certification to appeal would circumvent the requirements of § 52-470 (g) and undermine the goals that the legislature sought to achieve in enacting § 52-470 (g), namely, to discourage the filing of frivolous habeas appeals. Further, contrary to the petition-

er's contention, the court also concluded that the petitioner's claims were not reviewable under the plain error doctrine, stating a plain error analysis of claims never raised in connection with a petition for certification to appeal expands the scope of review and undermines the purpose of § 52-470 (g). The court accordingly dismissed the appeal. The petitioner was granted certification to appeal, and the Supreme Court will decide (1) whether the Appellate Court correctly interpreted *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514 (2006), *Cookish* v. *Commissioner of Correction*, 337 Conn. 348 (2020), and other decisions of the Supreme Court in concluding that plain error review of challenges to the habeas court's handling of the habeas proceedings is unavailable for any issue that is not included in the petition for certification to appeal and (2) whether the Appellate Court correctly interpreted *Mozell* v. *Commissioner of Correction*, 291 Conn. 62 (2009), *Moye* v. *Commissioner of Correction*, 316 Conn. 779 (2015), and other decisions of the Supreme Court in concluding that review under *Golding* of challenges to the habeas court's handling of the habeas proceedings is unavailable for any issue that is not included in the petition for certification to appeal.

BENJAMIN BOSQUE *v.* COMMISSIONER OF CORRECTION, SC 20622
Judicial District of Tolland

Habeas; Whether Appellate Court Correctly Concluded That Review of Challenges to Habeas Court's Handling of Habeas Proceedings is Unavailable Under *State* v. *Golding* and Plain Error Doctrine for Any Issue That Is Not Included in Petition for Certification to Appeal That is Denied. The petitioner, who was convicted of conspiracy to commit robbery in the first degree, burglary in the first degree, sexual assault in the first degree and robbery in the first degree, filed a third petition for a writ of habeas corpus. The respondent commissioner filed a request for an order to show cause as to why the habeas petition should be permitted to proceed, as it was not filed within the statutory limit of two years from the date on which the judgment in the prior petition became final. Following an evidentiary hearing at which the petitioner, through counsel, declined the opportunity to present evidence, the habeas court dismissed the petition as untimely because the petitioner failed to demonstrate good cause for the late filing. The petitioner sought certification to appeal on the issue of whether the habeas court erred in finding that there was not good cause to allow his untimely petition to proceed. The habeas court denied certification, and the petitioner appealed to the Appellate Court (205 Conn. App. 480). The petitioner

claimed that the habeas court abused its discretion in denying him certification to appeal because (1) his habeas counsel provided ineffective assistance and (2) he was denied his constitutional right to counsel because the habeas court failed to intervene when counsel did not present any evidence to show that good cause existed for the delay in filing the petition. The petitioner acknowledged that he did not raise the claims in his petition for certification to appeal as required by General Statutes § 52-470 (g) but argued that they were nonetheless reviewable under *State* v. *Golding*, 213 Conn. 233 (1989), or for plain error because they challenged the habeas court's handling of the proceedings themselves rather than raised unpreserved substantive issues. The Appellate Court declined to review the claims, holding that the petitioner was not entitled to review under *Golding* or for plain error of claims that he did not raise in his petition for certification to appeal. The Appellate Court noted that affording such extraordinary review in a habeas appeal of claims that were not raised in the denied petition for certification to appeal would circumvent the requirements of, and expand the scope of review authorized by, § 52-470 (g) and undermine the legislative goals in enacting the statute of preventing frivolous habeas appeals and hastening the final conclusion of the criminal justice process. The petitioner sought certification to appeal from the Appellate Court's judgment, which the Supreme Court granted as to whether the Appellate Court correctly interpreted governing precedent in concluding that review under *Golding* or for plain error of challenges to the habeas court's handling of the habeas proceedings is unavailable for any issue that is not included in the petition for certification to appeal.

DIRECT ENERGY SERVICES, LLC, et al. *v.* PUBLIC UTILITIES REGULATORY AUTHORITY, SC 20643
Judicial District of New Britain

Administrative Appeal; Whether Restrictions on Renewable Energy Program Violate Dormant Commerce, Free Speech or Contracts Clauses of Federal Constitution; Whether Plaintiffs Waived Constitutional Claims by Not Raising Them Before Agency. The plaintiff electric supply companies are required to demonstrate that a minimum percentage of their electricity is derived from specific types of renewable energy sources. To show as much, the companies purchase "renewable energy credits" that represent renewable energy produced by third party generators. In 2005, the defendant agency created a program under which the plaintiff companies issued "variable renewal offers" (VROs) to customers that promised that the

plaintiffs would obtain more than the minimum required renewable energy credits. In October, 2020, the defendant issued a final decision promulgating new rules that prohibited VROs from containing renewable energy credits that were sourced outside of particular geographic areas; this geographic restriction was based on the defendant's finding that the state's air quality is significantly and adversely affected by fossil fuel production in the southwest New England watershed. The defendant also promulgated a resource restriction, which required renewable energy credits to be derived from resources that meet the state's definition of a class I facility, as well as a marketing restriction, which prohibited suppliers from marketing products as renewable energy unless the supplier had either an ownership interest in or a power purchase agreement for a renewable energy source. The plaintiffs appealed to the Superior Court, claiming that the restrictions violate the federal constitution's dormant commerce clause, which limits the power of the states to enact laws that affect interstate commerce, as well as the free speech and contracts clauses of the federal constitution. The trial court found as a threshold issue that the restrictions do not clearly discriminate against interstate commerce but merely have an adverse effect thereon. The resulting burden on interstate commerce, the court found, is not excessive in relation to the putative local benefit, namely, the VRO program's goal of developing renewable energy sources in areas that have a more direct impact on the state's environmental goals, and, therefore, the restrictions do not violate the dormant commerce clause. The court also found that the plaintiffs waived their claims regarding the free speech and contracts clauses by failing to raise them during the administrative proceedings. The trial court therefore affirmed the defendant's decision, the plaintiffs appealed to the Appellate Court, and the Supreme Court transferred this appeal to itself pursuant to General Statutes § 51-199 (c). The plaintiffs claim that the geographic and marketing restrictions violate the dormant commerce clause, contending that the trial court erred in failing to conclude that the geographic restriction facially discriminates against interstate commerce and, therefore, deserves strict scrutiny. Moreover, if not facially discriminatory, the plaintiffs argue that the geographic restriction, as well as the marketing restriction, impose a disproportionate burden on interstate commerce that outweighs any benefit. They also claim that the trial court erred in concluding that they waived their first amendment and contracts clause claims and, finally, that the defendant's decision is invalid because it did not satisfy the procedural requirements of the Uniform Administrative Procedure Act.

STATE *v.* JOHN A. MASSARO, SC 20653
Judicial District of Litchfield at Torrington,
Geographical Area No. 18

Criminal; Sale of Narcotics; Discovery Sanctions; Whether Improper Exclusion of Witness' Prior Inconsistent Statement Is Harmless Error; Whether State's Treatment of Defense Witness as Expert Is Harmless Error. On July 13, 2017, a Torrington police officer saw the defendant and Sarah Mikuski engage in what that officer believed to be a "hand to hand" narcotics transaction. The defendant eluded the police, but Mikuski and her boyfriend were detained and found in possession of drug paraphernalia along with a small, clear plastic bag containing crack cocaine. Mikuski told the officer that she had purchased drugs from the defendant in the past and that, on this occasion, she gave him $26 in exchange for crack cocaine. The defendant was arrested and charged with illegal sale of a narcotic substance. On March 5, 2018, the defendant's investigator, Benjamin Pagoni, interviewed Mikuski. She told Pagoni that, on the day of the incident, she had been in possession of narcotics and gave them to the defendant; Pagoni memorialized that interview in a memorandum. The defendant pleaded not guilty, claiming that it was Mikuski who had sold the cocaine to him for the purpose of raising money to buy heroin, which was her drug of choice. Prior to trial, the state requested, pursuant to Practice Book § 40-13, that the defendant disclose his intended witnesses as well as any witness "statements" in his possession. Defense counsel failed to turn over Pagoni's memorandum in response, reasoning that the memorandum was protected attorney work product. At trial, Mikuski, along with her boyfriend, testified that she had texted the defendant on July 13, 2017, and, after calling him, he sold her narcotics. To rebut that testimony with Mikuski's prior inconsistent statement during her interview, the defendant sought to call Pagoni, and the state objected. The state argued that Mikuski's statement during the interview should be excluded as a discovery sanction for the defendant's failure to disclose Pagoni's memorandum as a witness statement, and the court agreed. Consequently, it ordered that evidence of the written statement was inadmissible and that Pagoni's testimony would be limited to impeaching Mikuski's testimony that she had purchased the crack cocaine from the defendant. On cross-examination, the state challenged Pagoni's recollection of events, and, in response, he indirectly referred to his memorandum. The court instructed the jury to ignore that reference, and Pagoni, the defendant's only witness, went on to answer the state's questions as to general characteristics of the illicit drug trade. After the jury returned

a guilty verdict, the trial court denied the defendant's motion for a new trial, and he appealed to the Appellate Court (205 Conn. App. 687), which held that the trial court erred in finding that the Pagoni memorandum was a statement that needed to be disclosed under § 40-13. That court concluded, however, that the error was not of a constitutional nature and that the resulting sanctions were harmless given the "ample evidence" that the defendant sold drugs to Mikuski. That court also rejected as harmless error the defendant's claim that the trial court, in contravention of the parties' pretrial agreement, erred in allowing the state to convert Pagoni into an expert witness by asking him about general characteristics of the illicit drug trade. The Supreme Court, pursuant to General Statutes § 51-197f, granted defendant's petition for certification to appeal, limited to whether the Appellate Court correctly concluded that the discovery sanctions were harmless and that treating Pagoni like an expert witness was harmless error.

HIGH WATCH RECOVERY CENTER, INC. *v.* DEPARTMENT OF PUBLIC HEALTH et al., SC 20666
Judicial District of New Britain

Administrative Appeal; Whether Appellate Court Properly Concluded That a Certificate of Need Hearing Was Not a "Contested Case" Under the Uniform Administrative Procedure Act; Whether Appellate Court Correctly Concluded That Plaintiff's Letter Requesting Intervenor Status Was Not a Legally Sufficient Request for a Public Hearing. The defendant, Birch Hill Recovery Center, LLC (Birch Hill), submitted an application for a certificate of need to the Office of Health Care Access (OHCA) to establish a substance abuse treatment facility. The OHCA issued a notice stating that it would hold a hearing and that the notice was issued pursuant to General Statutes (Rev. to 2017) § 19a-639a (f) (2), which provides that the OHCA "may" hold a public hearing with respect to any certificate of need application. The plaintiff submitted a letter to the OHCA requesting that it be granted intervenor status in the proceeding. The OHCA granted the plaintiff's request and held a hearing on the application. Birch Hill and the defendant Department of Public Health then entered into an agreement in which Birch Hill's application was approved. The plaintiff appealed to the trial court pursuant to General Statutes § 4-183 (a) of the UAPA, which provides that "[a] person" may appeal from an agency's "final decision." General Statutes § 4-166 (5) defines a "final decision" as an "agency determination in a contested case," and § 4-166 (4) in turn defines a "contested case" as "a proceeding . . . in which the legal rights . . . of a party are

required by state statute or regulation to be determined by an agency after an opportunity for hearing or in which a hearing is in fact held." The trial court granted the defendants' motions to dismiss the appeal on the ground that there was no "final decision" in a "contested case." The plaintiff appealed, and the Appellate Court (207 Conn. App. 397) affirmed the judgment. The court determined that the legislature intended for the word "may" in § 19a-639a (f) (2) to confer discretion, and, thus, a hearing was not statutorily required on Birch Hill's application. It then ruled that the mere opportunity for a hearing coupled with the holding of a hearing in the absence of a specific statute or regulation under which the hearing was required to be held was insufficient to constitute a contested case, citing *Middlebury* v. *Dept. of Environmental Protection*, 283 Conn. 156 (2007), and *Summit Hydropower Partnership* v. *Commissioner of Environmental Protection*, 226 Conn. 792 (1993). In addition, the court rejected the plaintiff's claim that its letter requesting intervenor status constituted a request for a public hearing pursuant to § 19a-639a (e), concluding that the letter failed to satisfy § 19a-639a (e) because (1) it did not contain a request that a public hearing be held on the application and (2) there was nothing in the letter from which it could be inferred that the numerical requirements of § 19a-639a (e) were met. The plaintiff was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court properly followed *Middlebury* and *Summit* in concluding that a certificate of need hearing conducted pursuant to § 19a-639a (f) (2) was not a "contested case," as defined by § 4-166 (4). If the answer to the first question is "yes," the court will then decide whether the Appellate Court correctly concluded that the plaintiff's letter requesting intervenor status in a certificate of need hearing that had been scheduled and noticed pursuant to § 19a-639a (f) was not a legally sufficient request for a public hearing pursuant to subsection (e) of that statute.

DAVID MARKATOS et al. *v.* ZONING BOARD OF APPEALS OF THE TOWN OF NEW CANAAN, SC 20682
Judicial District of Hartford

Zoning; Whether Trial Court Properly Found That Abutting Landowners Did Not Establish That They Were Entitled to Intervene As of Right or Permissively in Appeal From Zoning Board Decision. Grace Farms Foundation, Inc. owns a seventy-five acre parcel of land in New Canaan. In 2017, the town's Planning and Zoning Commission issued Grace Farms a special permit with 100 conditions that allowed it to operate as a place to foster community and explore

nature, the arts and faith. Condition six prohibited any material change in the approved use, or intensification of any use, unless specifically authorized. In 2019, the zoning enforcement officer issued a zoning permit authorizing Grace Farms to convert a former dwelling on the property to administrative offices, which would increase the number of employees accommodated from five to twenty-three. The plaintiffs, who are abutting landowners, appealed to the Zoning Board of Appeals. The zoning board upheld the zoning permit, and the plaintiffs appealed to the Superior Court. The proposed intervenors, who are also abutting landowners, filed a motion to intervene but later withdrew it. The trial court, following a hearing, remanded the case to the zoning board to inquire of the commission on the purpose and meaning of the conditions of the special permit and report back to the court for further proceedings. The proposed intervenors filed a new motion to intervene, which the trial court denied. The trial court rejected their reliance on *Bucky* v. *Zoning Board of Appeals*, 33 Conn. Supp. 607 (1976), for the proposition that a property owner who is statutorily aggrieved as an abutting landowner for purposes of appealing from a zoning board decision pursuant to General Statutes § 8-8 can intervene as a matter of right in such an appeal. The trial court found that subsequent cases have not supported such an automatic result and that *Bucky* is distinguishable because the motion to intervene in the present case was untimely and the proposed intervenors failed to satisfy the other requirements for intervention. Following the grant of certification by the Appellate Court, the proposed intervenors filed this appeal, and the Supreme Court transferred the appeal to itself. Grace Farms claims that the Supreme Court lacks jurisdiction because the appeal was not taken from a final judgment and the proposed intervenors cannot make a colorable claim to intervention as of right. The proposed intervenors claim on appeal that the trial court erred in finding that they did not satisfy the requirements for intervention as of right because (1) their motion was timely, as their interests became implicated only after the case was remanded to the zoning board and it became apparent that the scope of the appeal had broadened beyond the narrow question originally presented of whether conversion of the former dwelling violated condition six of the special permit to the scope of the activities allowed by the special permit; (2) *Bucky* recognized that landowners have a direct and substantial interest in a zoning dispute involving abutting property; and (3) they established that disposition of the appeal without their involvement will significantly impair their interests and that their interests differ materially from, and are not adequately represented by, those of the other parties to the appeal. The

proposed intervenors also claim that the trial court abused its discretion by not allowing them to intervene permissively.

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
