No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Nemiah Allan — PETITIONER

VS.

State of Connecticut— RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

CONNECTICUT SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a state court may interpret a criminal statute so that a fact that triggers a mandatory minimum is termed an "affirmative defenses" rather than an "element" so as to avoid the Sixth Amendment requirement of a jury's determination pursuant to *United States v. Alleyne*, 570 U.S. 99 (2013)?

LIST OF PARTIES

The case caption contains the name of the petitioner, Nemiah Allen, and the respondent, the State of Connecticut. Importantly, this matter had a companion case in the Connecticut Supreme Court, *State of Connecticut v. Alrick Evans*, 329 Conn. 770, 189 A.3d 1184 (2018). Mr. Evans has contemporaneously filed a near identical petition for certiorari to this court.

TABLE OF CONTENTS

Questions Presented.....i

List of Parties.....ii

Table of Contents.....iii

Table of Authorities.....iv

PETITION FOR WRIT OF CERTIORARI.....1

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....2..

STATEMENT OF THE CASE.....3

A. Factual and Trial Court Background.....3

B. The Connecticut State Appeal.....5

REASONS FOR GRANTING THE PETITION.....7

I. THE CONNNECTICUT SUPREME COURT INCORRECTLY INTERPRETTED DRUG DEPENDENCY TO BE AN AFFIRMATIVE DEFENSE RATHER THAN AN ELEMENT OF THE CRIME.....6

II. THE CONNECTICUT SUPREME OVERSTATED THE DEFERENCE TO WHICH IT IS ENTITLED PURSUANT TO *MULLANEY V. WILBUR*, 421 U.S. 684 (1975) AND UNDERMINES THE SEPARATION OF POWERS.....13

III. THE CONNECTICUT SUPREME COURT'S RELIANCE ON FEDERAL SENTENCING PROCEDURES WERE IMPERFECT ANALOGIES THAT PRODUCED INCORRECT RESULTS; THIS CASE PRESENTS AN OPPORTUNITY TO CONSDIER *APPRENDI* AND *ALLEYNE* IN A CONTEXT OTHER THAN FEDERAL COURT OR A STATE WITH A SIMILAR DETERMINATE SENTENCING STRUCTURE.....17

CONCLUSION.....21

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000).....*passim*

Ball v. United States, 470 U.S. 856 (1985).....10

Blakely v. Washington, 542 U.S. 296 (2004).....9

Blockburger v. United States, 284 U.S. 299, 304 (1932).....9

Bradshaw v. Richey, 546 U.S. 74, 76 (2005).....14

California v. Cunningham, 549 U.S. 270, 276-81 (2007).....14-15

Chambers v. United States, 555 U.S. 122, 124 (2009).....11

Harris v. United States, 536 U.S. 545 (2002).....1, 5, 19

Hester v. United States, 2019 U.S. LEXIS 9, _ U.S. _, _ S.Ct. _ (2019).....8

International Harvester, Co. v. Kentucky, 234 U.S. 216 (1914).....14

Irizarry v. United States, 553 U.S. 708 (2008).....17

Johnson v. United States, _ U.S. _, 135 S.Ct. 2551, 2556-57 (2015).....15

Marbury v. Madison, 5 U.S. 137, 177 (1803).....17

McMillan v. *Pennsylvania*, 477 U.S. 79 (1986).....17

Mistretta v. United States, 488 U.S. 361 (1989).....11

Mullaney v. Wilbur, 421 U.S. 684, 691 (1975).....12-16

North Carolina v. Alford, 400 U.S. 25, 37 (1970).....5

Patterson v. New York, 432 U.S. 197 (1970).....5

Riley v. Kennedy, 553 U.S. 406 (2008).....14

Ring v. Arizona, 536 U.S. 584 (2002).....12

Rutledge v. United States, 517 U.S. 292 (1996).....9-10

Sessions v. Dimaya, _ U.S. _, _ 138 S.Ct. 1204, 1212 (2018)..... .16-17

Southern Union, Co. v. United States, 567 U.S. 343, 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012.....8

United States v. Alleyne, 570 U.S. 99 (2013).....*passim*

United States v. Booker, 543 U.S. 220 (2005).....8, 17

United States v. Hester, 2019 U.S. LEXIS 9, _ U.S. _, _ S.Ct. _ (2019).....7

Walton v. Arizona, 497 U.S. 639 (1990).....14

UNITED STATES COURTS OF APPEAL CASES

United States v. Cabellero, 672 Fed.Appx. 72, 75 n.3 (2d Cir., 2016).....10

United States v. Cassius, 777 F.3d 1093, 1096-98 (10th Cir., 2015).....7, 13

United States v. Harakaly, 734 F.3d 88, 98 (1st Cir., 2013) cert. denied 134 S.Ct. 1530 (2014).....11

United States v. Jeffers, 329 F.3d 94 (2d Cir., 2003).....11

United States v. Juarez-Sanchez, 558 Fed.Appx. 840, 843 (10th Cir., 2014).....11

United States v. King, 773 F.3d 48 (5th Cir., 2014).....11

United States v. Leanos, 827 F.3d 1167, 1169 (8th Cir., 2016).....11

United States v. Lizarrage-Carrizales, 757 F.3d 995 (9th Cir., 2014).....6

United States v. Silva, 566 Fed.Appx. 804, 807-08 (11th Cir., 2014).....10

See United States v. Thompson, 554 F.3d 450, 454 n.2 (4th Circuit, 2009).....17

United States v. Zuniga, 767 F.3d 712 (7th Cir., 2015).....5

Williams v. Jones, 571 F.3d 1086, 1102 n.4 (10th Cir., 2009).....21

STATE CASES

State v. Allan, 329 Conn. 815, 190 A.3d 874 (2009).....*passim*

State v. Damato-Kushel, 327 A.3d 173, 366 (2017).....19

State v. Evans, 329 Conn. 770, 189 A.3d 1184 (2018).....*passim*

State v. Ray, 290 Conn. 602, 966 A.2d 148 (2009).....5

FEDERAL STATUTES

18 U.S.C. § 921(a)(2)(2012).....5-6,

18 U.S.C §3553(e).....11

18 U.S.C. §3553(f)(1).....5-6, 9-10

21 U.S.C. § 841.....7, 11-12

28 U.S.C. § 994(n).....11

28 U.S.C. § 1257(a).....2

STATE STATUTES

Connecticut General Statutes §21-277.....*passim*

Connecticut General Statutes § 21-278(b).....*passim*

Connecticut General Statutes § 21a-279(a).....3

C.G.S. § 53a-13(a).....9

C.G.S. § 53a-16b.....9

C.G.S. § 53a-67(a).....9

C.G.S § 53a-67(b).....9

C.G.S. § 53a-110(3).....9

C.G.S. § 53a-134(a).....9

C.G.S. § 53a-190(b).....9

C.G.S. § 53a-196g.....9

C.G.S. § 53a-104.....9

C.G.S. § 53a-110(1).....9

STATE AND FEDERAL CONSTITUTIONAL PROVISIONS

Sixth Amendment to the United States Constitution.....*passim*

Article II, §1 Constitution of the State of Connecticut.....5

RULES OF STATE AND FEDERAL COURTS

Connecticut Practice Book §43-22.....4

Federal Rule of Criminal Procedure 11(c).....19

Federal Rule of Criminal Procedure 32.....19

U.S.S.G. §5K1.1.....11

PETITION FOR WRIT OF CERTIORARI

This Court held in *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." In *United States v. Alleyne*, 570 U.S. 99, 116 (2013), this Court held that "because there is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum," *Apprendi* applied to facts triggering mandatory minimum sentences as well. It overruled *Harris v. United States*, 536 U.S. 545 (2002) in doing so. The *Apprendi* court noted that the statute in that "case [did] not raise any questions concerning the State's power to manipulate the prosecutor's burden of proof by...placing the affirmative defense label on 'at least some elements of traditional crimes...." 530 U.S. at 475(internal cites omitted).

This case presents that question. It asks the Court to examine a criminal statute that forbids sale of certain narcotics, imposes a mandatory minimum sentence upon violation, but states its "provisions...shall not apply to a person who is, at the time of the commission of the offense, a drug-dependent person." The issue is whether a state appellate court may interpret this mandatory minimum sentence triggering fact to be an affirmative defense in order to avoid the necessity of a jury determination pursuant to *Alleyne*?

OPINIONS BELOW

The opinion of the Connecticut Supreme Court is reported at 329 Conn. 815, 190 A.2d 874 and is reproduced at page A1-A3 of the Appendix attached to this petition. Additionally, the Connecticut Supreme Court recognized that this was a companion

case to *State v. Evans*, 329 Conn. 770, 190 A.2d 874 (2018) and relied on the analysis set forth in *Evans* in denying the petitioner relief. A copy of that opinion is reproduced at pages A4-28 of the Appendix attached to this petition. Additionally, defendant Evans has filed a petition for certiorari to this Court contemporaneous with the petitioner in this matter.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Connecticut Supreme Court issued its opinion on August 21, 2018. The State of Connecticut filed a motion to reconsider the first, jurisdictional, part of the court's opinion on September 10, 2018. The court granted that motion in part on October 17, 2018. That order is reproduced at page A42 of the Appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Connecticut General Statutes §21-277 Penalty for illegal manufacture distribution sale, prescription, dispensing.

> **(1)** No person may manufacture, distribute, sell, prescribe, dispense, compound, transport with the intent to sell or dispense, possess with the intent to sell or dispense, offer, give or administer to another person, except as authorized in this chapter, any controlled substance that is a (A) narcotic substance, or (B) hallucinogenic substance.
>
> **(2)** Any person who violates subdivision (1) of this subsection (A) for a first offense, shall be imprisoned not more than fifteen years and may be fined not more than fifty thousand dollars, or be both fined and imprisoned, (B) for a

second offense, shall be imprisoned not more than thirty years and may be fined not more than one hundred thousand dollars, or be both fined and imprisoned, and (C) for any subsequent offense, shall be imprisoned not more than thirty years and may be fined not more than two hundred fifty thousand dollars, or be both fined and imprisoned.

Connecticut General Statutes § 21-278(b)

(1) No person may manufacture, distribute, sell, prescribe, dispense, compound, transport with the intent to sell or dispense, possess with the intent to sell or dispense, offer, give or administer to another person, except as authorized in this chapter or chapter 420f, (A) a narcotic substance, (B) a hallucinogenic substance, (C) an amphetamine-type substance, or (D) one kilogram or more of a cannabis-type substance. The provisions of this subdivision shall not apply to a person who is, at the time of the commission of the offense, a drug-dependent person.

(2) Any person who violates subdivision (1) of this subsection (A) for a first offense, shall be imprisoned not less than five years or more than twenty years, and (B) for any subsequent offense, shall be imprisoned not less than ten years or more than twenty-five years. The execution of the mandatory minimum sentence imposed by the provisions of this subdivision shall not be suspended, except that the court may suspend the execution of such mandatory minimum sentence if, at the time of the commission of the offense, such person was under the age of eighteen years or such person's mental capacity was significantly impaired, but not so impaired as to constitute a defense to prosecution.

STATEMENT OF THE CASE

A. Facts and Trial Court Background.

The essential factual issue in this case is whether the petitioner was a drug dependent person at the time he committed drug sale offenses. A finding of drug dependency would have relieved the sentencing court from the five-year mandatory minimum that attends the petitioner's offense of conviction. Connecticut General Statute § 21a-278(b) states that "The provisions of this subdivision shall not apply to a person

who is, at the time of the commission of the offense, a drug-dependent person." This proviso is the fulcrum of this litigation.

The petitioner was convicted following a jury trial of conspiracy to sell narcotics in violation of Connecticut General Statutes § §21a-278(b)(substantive offense) and 53a-48(conspiracy statute) as well as interfering with a police officer in violation of Connecticut General Statutes §53a-167(a). He was simultaneously tried and acquitted of sale of narcotics by a person who is not drug dependent in violation of §21a-278(b) and sale of narcotics within 1500 feet of a school in violation of General Statutes §21a-278a(b), and possession of narcotics in violation of General Statutes §21a-279(a). The petitioner's conviction was sustained by the Connecticut Appellate Court and Supreme Courts on direct appeal *State v. Allan*, 131 Conn.App. 433, 27 A.3d 19 (2001) affirmed 311 Conn. 1, 83 A.3d 326 (2014). Those cases fully recite the facts of conviction and the Supreme Court opinion is reproduced at page A100 of the appendix. The petitioner's exposure, as a result of these convictions was five to twenty years of incarceration for the drug offense and as much as one year for the interfering offense.

No evidence concerning the petitioner's status as a drug dependent, or non-drug dependent, person was presented at trial by the petitioner or the state. Nor did the trial court instruct the jury with respect to drug dependency. At sentencing however, the trial court considered the petitioners prior drug convictions and defense counsel argued that the petitioner was a drug addict as a result of a pain killer addiction commenced subsequent to an automobile accident. On February 22, 2010, the trial court sentenced the petitioner to a total effective sentence of twelve-years incarceration followed by five years special parole. A79-99.

The petitioner filed a Motion to Correct an illegal sentence, pursuant to Connecticut Practice Book § 43-22, on December 5, 2014. A43-A78. He did so on the grounds that drug dependency, or its absence, was neither found by the jury nor admitted by the petitioner; this fact triggered a mandatory minimum—and heightened statutory maximum; and, consequently violated his Sixth Amendment rights as held in *Alleyne v. United States*, supra, 570 U.S. 99 and *Apprendi v. New Jersey*, supra, 530 U.S. 466. The trial court denied the motion claiming it lacked subject matter jurisdiction; it said the motion attacked the conviction rather than the sentence. A29-A41. The defendant took an appeal. On appeal, the case was transferred to the Connecticut Supreme Court.

B. The Connecticut State Appeal.

The petitioner asserted two claims with respect to the merits.[1] First, his sentence was illegal because he was entitled to a jury's determination on the factual issue of drug dependency consistent with *Alleyne*, supra, 570 U.S. 99. In support of that, he argued that *Alleyene* implicitly overruled *State v. Ray*, 290 Conn. 602 (2009)—which was predicated on this Court's holding in *Harris v. United States*, supra, 536 U.S. 545—and required on a jury's determination on facts that trigger mandatory minimums sentences. Second, he argued that C.G.S. §21a-278 violated the separation of powers under Article II, §1 of the Connecticut Constitution because it allocated sentencing authority to the executive branch.

[1] The petitioner has not addressed the jurisdictional issue in detail because the Connecticut Supreme Court ultimately found it *had* jurisdiction and state court jurisdiction is not a federal issue.

The Connecticut Supreme Court concluded the petitioner's appeal raised issues identical to those raised in *State v. Evans*, supra, 329 Conn. 815, 189 A.3d 1184 (2018). It decided this case and *Evans* simultaneously and explicitly stated the *Evans* opinion contained the analysis applicable to both cases. 329 Conn. at 820, 190 A.3d at 877. The balance of this statement of the case, therefore, refers to the *Evans* opinion.

The Connecticut Supreme Court decided the merits of the claim but, nonetheless, affirmed the trial court's judgment. Contrary to the trial court's decision, the Connecticut Supreme Court found that is possessed subject matter jurisdiction over the defendant's motion to correct an illegal sentence where the defendant had a "colorable claim of an illegal sentence under *Alleyne* and *Apprendi*." *Evans*, 189 A.3d at 1194. With respect to the merits, however, the Connect Supreme Court first reviewed its own case law and reaffirmed its interpretation of the dependency clause of §21a-278 as an affirmative defense. It then relied on this court's decision in *Patterson v. New York*, 432 U.S. 197 (1970) holding that a state legislature may allocate the burden to the defendant to prove an affirmative defense and not require the state to disprove it beyond a reasonable doubt. It said, "[i]n considering whether *Alleyne* requires us to overrule *Ray*, we deem significant that *Alleyne*, like *Apprendi*, on which *Alleyne* is based, accords with *Patterson v. New York*, supra, 432 U.S. 197, insofar as it does not preclude states from utilizing affirmative defenses to mitigate or eliminate criminal liability." *Evans*, supra, 180 A.3d at 1206. It then went on analogize to two phenomena in federal sentencing: the Armed Career Criminal Act, 18 U.S.C. § 921(a)(2)(2012), and the "safety valve" provision of 18 U.S.C. §3553(f)(1)(relieving sentencing judges from mandatory minimum sentences in narcotics cases). It noted that in *United States v.*

Zuniga, 767 F.3d 712 (7th Cir., 2015), the seventh circuit rejected an *Apprendi* challenge to a the "serious violent felony" provision of the ACCA's three strikes law on the grounds that it was an affirmative defense. Similarly, it noted that all of the federal circuit courts to consider *Apprendi* challenges to the "safety valve" law rejected them. *See e.g. United States v. Lizarrage-Carrizales*, 757 F.3d 995 (9th Cir., 2014).

The court then went on to reconsider its prior holdings that dependency was an affirmative defense pursuant to §21a-278. Relying on stare decisis grounds, it reaffirmed its prior rulings. It said:

> As we observed in *State v. Ray*, supra, 290 Conn. 614, "[i]f we were writing on a blank slate, we might find persuasive" the defendant's interpretation of § 21a-278 (b), given the language of the statute and the fact that it "finds some support in the chronology of the statutes and the [statute's] legislative history . . . ." The doctrine of legislative acquiescence has, however, even more strength now than when we considered the identical issue in *Ray*.

180 A.3d at 1210. Noting recent legislative changes in the statute, it found that—were the legislature inclined to disagree with prior rulings, it would have further altered the statute. It had, therefore, acquiesced to the court's interpretation.

The state moved for reconsideration of the Connecticut Supreme Court's jurisdictional ruling on September 10, 2018. *See* A42. The court granted that in part on October 17, 2018—and modified its opinion but *did not decline jurisdiction* in this matter. A42. This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE CONNNECTICUT SUPREME COURT INCORRECTLY INTERPRETTED DRUG DEPENDENCY TO BE AN AFFIRMATIVE DEFENSE RATHER THAN AN ELEMENT OF THE CRIME.

The absence of drug dependency is an element of Connecticut General Statute §21a-278. The Connecticut Supreme Court's interpretation is incorrect for four reasons:

first, §21-278(b) is an aggravated form of the lesser included §21a-277; second, the Connecticut legislature explicitly state when it creates affirmative defenses; third, the Connecticut Supreme Court relied on imperfect—and consequently incorrect—federal analogies; and, finally, overlooked the analogy provided by 18 U.S.C. §841 and the Tenth Circuit's decision in *United States v. Cassius*, 777 F.3d 1093, 1096-98 (10th Cir., 2015). The petitioner addresses each, *seriatim*.

First, section 21a-278(b) is an aggravated version of Connecticut General Statutes §21a-277. Section 21a-277(a)(1) forbids any "person [from]...sell[ing]...[or] possess[ing] with the intent to sell any controlled substance that is a (A) narcotic substance, or (B) hallucinogenic substance." The next subsection provides: [a]ny person who violates subdivision (1) of this subsection (A) for a first offense, shall be imprisoned not more than fifteen years and may be fined not more than fifty thousand dollars"[2] then provides for a potential thirty year and one-hundred thousand dollar penalty for a second offense, and a potential thirty year penalty and two-hundred fifty thousand dollar penalty for a third offense. Section 21a-278(b)(1)(A) states similarly any person from: "sell[ing],...possess[ing] with the intent to sell...,...except as authorized in this chapter or chapter 420f, (A) a narcotic substance," or other controlled substances. However, §21a-278b concludes with the following proviso: "The provisions of this subdivision shall not apply to a person who is, at the time of the commission of the offense, a drug-dependent person." Subsection (2) of §21a-278 provides: "[a]ny person

[2] Importantly, this Curt has also held that *Apprendi* applies to criminal fines, *Southern Union, Co. v. United States*, 567 U.S. 343, 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012), and members of this Court recently argued it should apply to restitution as well. *Hester v. United States*, 2019 U.S. LEXIS 9, _ U.S. _, _ S.Ct. _ (2019), *Gorsuch, J.*, dissenting (from denial of certiorari).

who violates [§21a-287(b)(1)(A)] for a first offense, shall be imprisoned not less than five years or more than twenty years," and a range of ten to twenty-five years for a second offense.

The distinction between a sentence of zero to fifteen years or a sentence of a mandatory five to twenty years is a single element: drug dependency. The Connecticut Supreme Court looked to its own precedents and legislative history to determine whether dependency was an affirmative defense rather than an element. The appropriate test is far simpler: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provisions requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). While arising from the double jeopardy context, the *Blockburger* test is illustrative and applicable here: §21a-277 is a lesser included offense of §21a-278(b). In each of the *Apprendi* line of cases, one can fairly say that the offense for which the defendant was convicted—by jury or by plea, was a lesser included offense of the offense for which he was sentenced upon judicial factfinding of the aggravating fact: in *Apprendi*, possession of a firearm operate as a lesser-included offense of possession with a discriminatory purpose; in *Blakely v. Washington*, 542 U.S. 296 (2004), kidnapping operates as a lesser included offense to kidnapping with deliberate cruelty; in *United States v. Booker*, 543 U.S. 220 (2005), possession of 100 grams of crack cocaine operates as a lesser included offense to possession of 562 grams of crack cocaine; in *Alleyne*, using or carrying a firearm in a violent crime operates as a lesser included offense to brandishing a firearm in violent crime. *C.f.*

Rutledge v. United States, 517 U.S. 292 (1996)(conspiracy lesser included offense of continuing criminal enterprise); *Ball v. United States*, 470 U.S. 856 (1985)(possession of firearm lesser included offense to illegally receiving a firearm). Here, §21a-277a operates as a lesser included offense to §21a-278(b): the absence of drug dependency is the aggravating fact that distinguishes the two offenses—it is, therefore, and element. Consequently, it is subject to a jury's determination pursuant to *Alleyne* and *Apprendi.*

Second, the Connecticut legislature knows how to create an affirmative defense when it wishes to. It has explicitly done so in numerous instances: each legislatively recognized affirmative defense begins "it shall be an affirmative defense." C.G.S. § 53a-13(a) (lack of capacity); C.G.S. § 53a-16b (coparticipant in firearm offense); C.G.S. § 53a-67(a) (affirmative defense for sexual offenses involving helpless or mentally incapacitated victims); C.G.S § 53a-67(b) (affirmative defense for sexual offenses in cohabitation); C.G.S. § 53a-110(3) (affirmative defense to criminal trespass); C.G.S. § 53a-134(a) (affirmative defense to robbery); C.G.S. § 53a-190(b) (affirmative defense to bigamy); C.G.S. § 53a-196g (affirmative defense to possession of child pornography); C.G.S. § 53a-104 (affirmative defense to burglary); C.G.S. § 53a-110(1) (affirmative defense to criminal trespass). By contradistinction, § 21a-278(b) provides "the provisions of this subdivision shall not apply to a person who is, at the time of the commission of the offense, a drug-dependent person." It is judicial interpretation that results in a dependency as an affirmative defense.

Third, both the ACCA and safety valve provisions of federal statute are structurally dissimilar to §21a-278. Cleary, the dependency provision of that statute is written into the offense—as elements customarily are. That is not so with respect to the

safety valve and ACCA statutes. The safety valve provision is set forth in 18 U.S.S.C §3553(f). It releases a federal sentencing court from certain drug offense mandatory minimums when a defendant: (1) has no more than one criminal history point; (2) did not use violence or a weapon in his offense; (3) did not have a leadership role; (4) did not sell drugs that resulted in a death or serious harm; and (5) truthfully debriefs with the government regarding his offense.[3] *Id.* (1)-(5). Significantly §3553a—entitled "Imposition of Sentence"—is the federal sentencing statute.[4] Were that not enough, subsection (f) specifically contemplates "*if the court finds at sentencing*, after the Government has been afforded the opportunity to make a recommendation." (emphasis added). Notably, defendants have been convicted at jury trials and were then permitted to raise the safety valve at sentencing. *United States v. Jeffers*, 329 F.3d 94 (2d Cir., 2003). The safety valve is *clearly* delineated as a sentencing factor not an affirmative defense.

The ACCA is, similarly, a poor comparator. First, it—like the safety valve—is applied at sentencing rather than trial. *See Chambers v. United States*, 555 U.S. 122,

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[3] The only other set of circumstances in which a federal sentencing court may be released from a mandatory minimum is pursuant to 18 U.S.C §3553(e), 28 U.S.C. § 994(n), and a U.S.S.G. §5K1.1 letter filed by the government. But this specifically requires a defendant to cooperate outside of the trial context and a guilty plea is a near *fait accompli*. Importantly, this Court resolved separation of powers concerns with respect to the guidelines in *Mistretta v. United States*, 488 U.S. 361 (1989) and the §5K process is, clearly, sanctioned by Congress. However, it sheds little to no light on the present circumstances.

[4] The Connecticut Supreme Court is correct when it says that every federal circuit to consider *Apprendi* and the safety valve—indeed all but the Third, Fourth, Sixth, and D.C. circuits—have held it to be an affirmative defense styled sentencing factor. *United States v. Harakaly*, 734 F.3d 88, 98 (1st Cir., 2013) cert. denied 134 S.Ct. 1530 (2014); *United States v. Cabellero*, 672 Fed.Appx. 72, 75 n.3 (2d Cir., 2016); *United States v. King*, 773 F.3d 48 (5th Cir., 2014); *United States v. Leanos*, 827 F.3d 1167, 1169 (8th Cir., 2016); *United States v. Lizarrage-Carrizales*, supra, 757 F.3d 995 (9th Cir., 2014); *United States v. Juarez-Sanchez*, 558 Fed.Appx. 840, 843 (10th Cir., 2014); *United States v. Silva*, 566 Fed.Appx. 804, 807-08 (11th Cir., 2014).

124 (2009)("(ACCA) imposes a 15-year mandatory prison term on an individual convicted of being a felon in possession of a firearm *if* that individual has 'three previous convictions'" for serious felonies or drug crimes"). Perhaps even more importantly, it is plainly exempted from *Apprendi's* holding: it turns exclusively on "the fact of prior conviction." 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). Moreover, whether prior convictions constitute (1) "violent felonies;" (2) "serious drug offenses;" and are (3) committed on various dates, constitutes either a question of law or a question of mixed fact and law. Regardless, both types of questions involve essential functions of judges, not juries. The Connecticut Supreme Court employed imperfect analogies to federal law and erroneously held that dependency was not an element of the crime as a result.

Fourth, the proper federal analogue is 21 U.S.C. § 841(b)(1)(A), (B), (C), and (D). Section 841 makes it a federal felony to possess (individually) a cornucopia of illicit drugs. The distinguishing feature between subsections (A), (B), and (C) is the quantity of the substance possessed and the attendant mandatory minimum and maximum penalties. A person who possesses a quantity of drug sufficient to satisfy subsection (A) is subject to a mandatory minimum of 10 years and as much as life. A person who possesses a quantity of drugs less than less than that in (A) but enough to satisfy (B) is subject to a mandatory minimum of five years and as much as forty years. Last, a person possesses a quantity of these substances less than that set forth in (B) are subject to a sentence of up to 20 years ((C)) or 5 years ((D))—depending on the identify of the drug (which the petitioner omits in the interest of parsimony). Indeed, these are all

subject to *Apprendi* because they have varying top-end sentences. That notwithstanding, quantity is also an element pursuant to *Alleyne* because quantity triggers varying mandatory minimum sentences.[5] Imagine, however, that Congress had simply said: Any person who possesses these substances is subject to a 10 year mandatory minimum sentence; however any person who possesses less than X amount of the substance shall be subject only to a 5 year mandatory minimum; and any person who possesses less than X – Y amount is not subject to a mandatory minimum sentence. Is there any doubt that this would be a change of form and not substance? *C.f. Apprendi*, 530 U.S. at 494 ("the relevant inquiry is one not of form, but of effect -- does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"). That is substantively identical to what the Connecticut legislature has done and warrants review.

Text, substance, structure, and federal analogues indicate that non-dependency is an element of §21a-278(b).

II. THE CONNECTICUT SUPREME OVERSTATED THE DEFERENCE TO WHICH IT IS ENTITLED PURSUANT TO *MULLANEY V. WILBUR*, 421 U.S. 684 (1975) AND UNDERMINES THE SEPARATION OF POWERS.

The Connecticut Supreme Court's decision violates the separation of powers: it exceeds the authority a state court possesses to interpret its own laws as set forth in *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); and leaves a vague interpretation of a criminal statute that will lead to arbitrary enforcement.

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[5] The Tenth Circuit addressed §841 violations in the context of *Alleyne* and compiled other circuits' caselaw in *United States v. Cassius*, 777 F.3d 1093, 1096-98 (10th Cir., 2015)(considering 17 year sentence on §841(c) violation where district court made finding quantities of crack cocaine). While it did not hold that §841 offenses were governed by *Alleyne* and *Apprendi*, it almost unmistakably suggested it.

First, the Connecticut Supreme Court's interpretation was an "obvious subterfuge to evade consideration of a federal issue." *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975) quoting *Radio Station WOW, Inc, Johnson*, 326 U.S. 120, 129 (1945). The *Apprendi* court noted that "because there [was] no ambiguity in New Jersey's statutory scheme, [that] case [did] not raise any question concerning the State's power to manipulate the prosecutor's burden of proof by, for example, relying on a presumption rather than evidence to establish an element of an offense,...or by placing the affirmative defense label on "at least some elements" of traditional crimes..." 530 U.S. at 475. It is true that, [t]his Court...repeatedly has held that state courts are the ultimate expositors of state law, and...that we are bound by their constructions except in extreme circumstances...." *Mullaney*, supra, 421 U.S. at 691(internal cite omitted).[6] But *Ring v. Arizona*, 536 U.S. 584 (2002) suggests this is precisely such an extreme circumstance. In *Ring*, this Court *overruled Walton v. Arizona*, 497 U.S. 639 (1990) in which it had approved of Arizona's capital sentencing scheme that permitted judges to impose death sentences based on aggravating facts *judges* found at trial. The *Ring* court overruled *Walton* on *Apprendi* grounds. Again, in *California v. Cunningham*, 549 U.S. 270, 276-81 (2007), this Court invalidated the State of California's Determinate

[6] The *Evans* court also cited *Riley v. Kennedy*, 553 U.S. 406 (2008) for this proposition. While it is true that this court did cite *Mullaney* in *Riley*, it hardly sheds light on the presence or absence of exceptional circumstances. *Riley* required this court to consider whether an Alabama state voting law change that was invalidated on state law grounds, nonetheless, required pre-clearance from a federal court pursuant to §5 of the Voting Rights act. This court held that the law never went into effect because it was invalidated by the state court: that has little to do with the present case. It also relied on *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005): that was a federal habeas corpus challenge to Ohio interpretation of it transferred intent law on vagueness grounds. This is neither a habeas corpus action nor a generic due process claim.

Sentencing Law (DSL) on *Apprendi* grounds even after California's state courts had construed the DSL as consistent with the Sixth Amendment's demands. Indeed, Justice Alito—in his dissent, even suggested that the Court was bound by the California Supreme Court's construction of the DSL (holding it analogous to the post-*Booker* sentencing guidelines) but the majority, evidently, found that argument unavailing. *See id.* 306 & n.8, *Alito, J.*, dissenting. The majority noted, *inter alia*, that the California Supreme Court "construed this Court's decisions in an endeavor to render them consistent with California law. The [California] court's interpretation of federal constitutional law plainly does not qualify for this Court's deference." *Id.* 293 n.16. The Connecticut Supreme Court committed the same error: it construed this Court's decisions—and the statute—consistent with its own pre-*Alleyne* precedents. It, therefore, exceeded its constitutional authority when it interpreted dependency to be an affirmative defense, rather than an element, in order to avoid the demands of *Apprendi* and *Alleyne*.

Second, the Connecticut Supreme Court's reading beyond the plain language and substantive consequence of the statue creates other constitutional defects this Court would not tolerate. It leaves the state to decide whether a defendant is guilty of a §21a-277 or §21a-278(b) violation and everyone else to guess at culpable conduct.

> "The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.' *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926).[7] These principles apply not only to statutes defining elements

[7] *Notably, Connally* was a case in which this court affirmed a federal district court's judgment that an Oklahoma statute mandating criminal penalties against businesses for labor law violations was impermissibly vague. Even more notably, the *Connally* court cited *International Harvester, Co. v. Kentucky*, 234 U.S. 216 (1914) in which this Court

> of crimes, but also to statutes fixing sentences. *United States* v. *Batchelder*, 442 U.S. 114, 123, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979)."

Johnson v. United States, _ U.S. _, 135 S.Ct. 2551, 2556-57 (2015)(invalidating residual clause of ACCA). Even more recently, this Court has stated that the void for vagueness

> "doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges....In that sense, the doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.

Sessions v. Dimaya, _ U.S. _, _ 138 S.Ct. 1204, 1212 (2018)[8] citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). It further cited *Kolender* in parenthetical saying "if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department.'" *Id.* 1212 quoting 461 U.S. at 358 n.7. The Connecticut Supreme Court's decision establishes precisely these circumstances: the state can now charge a person who possesses a quantity of crack cocaine with a crime carrying a statutory sentencing range of zero to fifteen years *or* five to twenty years at

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held the Kentucky Court of Appeals construction of the state's criminal statutes to be unconstitutionally vague.

[8] The petitioner concedes that *Johnson* and *Dimaya* are both Fifth Amendment, due process cases. However, Justice Gorsuch noted the connection between statutory clarity and the Sixth Amendment in his *Dimaya* concurrence: "What [the] history [of vagueness doctrine] suggests, the structure of the Constitution confirms....[T]ake the Sixth Amendment's mandate that a defendant must be informed of the accusations against him and allowed to bring witnesses in his defense, and consider what use those rights would be if the charged crime was so vague the defendant couldn't tell what he's alleged to have done and what sort of witnesses he might need to rebut that charge." 138 S.Ct. at 1227, *Gorsuch, J.*, concurring; *see also Apprendi*, 530 U.S. at 499-500, *Thomas, J.*, concurring (noting charging requirement of Sixth Amendment and stating "it is critical to know which facts are elements").

its caprice. *C.f. Dimaya*, supra, 138 S.Ct. at 1223, *Gorsuch, J.*, concurring ("Vague laws invite arbitrary power"). *Even if* the defendant proved his dependency as an affirmative defense, he remains subject to the heightened statutory maximum of 20 years. But for dependency—or non-dependency, these crimes are indistinguishable.

Mullaney deference is at its nadir in the context of jury trial rights and vagueness doctrine. *See Apprendi*, 530 U.S. at 498, *Scalia, J.*, concurring ("The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights"); *Ring*, *International Harvester*. The affirmative defense rationale is an obvious subterfuge to avoid a Sixth Amendment defect. It is a subterfuge that inserts vagueness and capriciousness into the statute. Not only is review warranted but the full power of the Court to "say what the law is" is present. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

III. THE CONNECTICUT SUPREME COURT'S RELIANCE ON FEDERAL SENTENCING PROCEDURES WERE IMPERFECT ANALOGIES THAT PRODUCED INCORRECT RESULTS AND THIS CASE PRESENTS AN OPPORTUNITY TO CONSDIER *APPRENDI* AND *ALLEYNE* IN A CONTEXT OTHER THAN FEDERAL COURT OR A STATE WITH A SIMILAR DETERMINATE SENTENCING STRUCTURE.

This case presents two other phenomena that warrant the Court's attention. First, is the increasingly imprecise and confused language of liability and sentencing. Second, are the state's that employ informal plea and sentencing structures dissimilar to those used in the federal courts. These factors conspire to erode the jury trial right. The petitioner addresses each, *seriatim*.

First, the effect of the Connecticut Supreme Court's decision is that it creates a nebulous third category somewhere between culpability and liability. Strictly, speaking trials determine liability—in which guilt or innocence is at issue. Sentencing determines

culpability—in which aggravation and mitigation are at issue. "It was in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), that the Court, for the first time, coined the term 'sentencing factor' to refer to a fact that was not found by a jury but that could affect the sentence imposed by the judge." *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Following *Booker*, and the remedial opinion in particular, federal courts recognize up- and downward departures pursuant to the advisory guidelines as well as up- and downward variances doled out pursuant to the—now discretionary—non-guidelines sentences. *See Irizarry v. United States*, 553 U.S. 708 (2008)(parties not entitled to F.R.C.P. 32(h) notice for variances at sentencing). This much is clear: an upward departure or variance requires the government to prove some aggravating factor at sentencing; a downward departure or variance requires the defendant to prove some mitigating factor at sentencing. Courts now referring to facts that mitigate or aggravate the sentencing range as "affirmative defenses" confuse the issue of liability and culpability. *See United States v. Thompson*, 554 F.3d 450, 454 n.2 (4th Circuit, 2009)(refusing to follow other circuits and term ACCA safety valve an "affirmative defense because it confuses previously established liability with culpability"). A defense, customarily, exculpates from liability. *Id.* Yet, when these "affirmative defenses" are proven, the defendant remains *liable* but potentially less *culpable* for the same crime. To the extent a defendant is no longer liable for the crime charged upon proof or presumption of an "affirmative defense" such as drug dependency, it is an element of the crime: but for that fact, the defendant is liable only for the less-included offense—culpability is accounted for in the lower statutory sentencing range. Simply because it is permissible to place the burden on the defendant to prove a downward

departure, variance, or inapplicability of ACCA enhancement for criminal history does not make it an affirmative defense. The Connecticut Supreme Court is, in reality, calling a drug dependency a sentencing factor. That raise the second part of this argument.

Second, the Connecticut Supreme Court's decision misapprehends material differences between Connecticut state sentencing and federal sentencing.[9] The Connecticut Supreme Court recently noted the procedure by which cases are resolved without trial in the state:

> we recognize that more than 90 percent of criminal cases in this state are resolved through plea bargains in any given year; see, e.g., Judicial Branch, State of Connecticut, Movement of Criminal Docket: Judicial District Criminal, July 1, 2015, to June 30, 2016, available at https://www.jud.ct.gov/statistics/criminal/Crim JD 1016.pdf (last visited November 22, 2017); and that our rules of practice both require and provide structure with respect to disposition conferences. See Practice Book §§ 39-11 through 39-17. Accordingly, we hesitate to characterize such mandated conferences, which are conducted under the active supervision of the court itself, as anything other than "court proceedings." On the other hand, the conferences at issue in the present case are conducted informally and off the record, and, for that reason, we are hesitant to deem them court proceedings in the absence of reasonably clear evidence that we should do so.

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[9] This case, additionally, presents an opportunity to address the role of *Apprendi* in states that rely predominantly on what Justice O'Connor would have called "discretionary sentencing schemes." *Apprendi*, 530 U.S. at 545, *O'Connor, J.*, dissenting ("Accordingly, under the discretionary-sentencing schemes, a factual determination made by a judge on a standard of proof below "beyond a reasonable doubt" often made the difference between a lesser and a greater punishment"). Clearly, *Apprendi* and its progeny have focused largely on federal sentencing and the sentencing guidelines or states that have guidelines systems analogous to the federal system. *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005); *Harris v. United States*, 536 U.S. 545 (2002); *Alleyne*, supra, 570 U.S. 99. In states that lack this structure—and particularly the formality of separating pleas and sentences in its pretrial disposition process—the ambiguity between (1) elements of the offense the state must prove; (2) complete affirmative defenses to liability; and (3) affirmative defenses to culpability at sentencing, is devasting to the jury trial right.

State v. Damato-Kushel, 327 A.3d 173, 366 (2017). The effect of this process is that, in Connecticut—as happened in the *Evans* case—it is both possible and routine for someone to enter a guilty plea and be sentenced in a single day. Sentences are determined in the pre-trial disposition conferences and imposed upon a plea.

This stands in radical contradistinction to the method in which pleas are entered and sentences imposed in federal courts. Pursuant to Federal Rule of Criminal Procedure 11(c)(1)-(5), a defendant may enter a plea pursuant to plea agreement. The Rules specifically contemplate that he will be told of the district court's obligation to consider the applicable guidelines range and 18 U.S.S.C. §3553(a) factors. F.R.C.P. 11(b)(1)(M). Then the sentencing is scheduled pursuant to Rule 32. Rule 32 contemplates the completion of a presentence investigation, advisory guidelines calculation, and opportunity for the defendant to speak and present evidence. F.R.C.P. 32(c), (d), (e), (f), (i). It is at this point the district courts adjudicate both—as applicable—safety valve relief and ACCA enhancements.

The confusion of affirmative defenses with sentencing factors meets the informal state plea bargaining process to create an estuary of Sixth Amendment deprivation. At a minimum, the federal sentencing structure guarantees a defendant he will be permitted the opportunity to raise safety valve relief or challenge ACCA enhancements on the record at sentencing. In Connecticut, this—if resolved at all—is done off-the-record in a judge's chambers. The federal defendant who is wrongfully deprived safety valve relief will be able to seek review of that finding in an appellate court. In Connecticut, relief from the mandatory minimum is lost to the ethos because it is still not clear whether dependency is (1) an affirmative defense to liability; or (2) a sentencing factor mitigating

culpability. Given that defendants who plead guilty in Connecticut frequently do not receive an on the record sentencing consideration, it is not clear when a defendant may assert this right. "It is...beyond question that Americans of the [founding] period perfectly well understood the lesson that the jury right could be lost not only by gross denial, but by erosion." *Jones v. United States*, 526 U.S. 227, 248 (1999); *see also Apprendi*, supra, 530 U.S. at 383. Moreover, "[t]he founders of the American Republic were not prepared to leave [criminal justice] to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free." *Id.*, 498. The lower court's decision both erodes the jury trial right and deprives defendants of consideration of statutory sentencing factors in the name of efficacy.

This promotes neither liberty nor efficacy. Justice Breyer noted, in his *Apprendi* dissent, that judicial factfinding would generate inefficient burdens the system could not withstand. 530 U.S. at 557 *Breyer, J.*, dissenting ("the real world of criminal justice cannot hope to meet any such ideal. It can function only with the help of procedural compromises, particularly in respect to sentencing.") But there are two possible consequences of the lower court's interpretation. First, defendants who know they are guilty will, nonetheless, elect trials because it is their exclusive opportunity to present *mitigating* sentence evidence *to the jury*. Alternatively, prisons will be filled by more people for longer periods of time because the guilty plea process requires them to forgo mitigation entirely. This is clearly not what the Connecticut legislature intended. More importantly, it is not what the Constitution demands.

"[T]he rational plea bargain combines two things the law keeps separate: the risk of conviction at trial and the probable sentence upon conviction." *Williams v. Jones*, 571 F.3d 1086, 1102 n.4 (10th Cir., 2009) *Gorsuch, J.*, dissenting. The lower courts decision, however, combines these things by operation of law. It does so at the expense of the jury trial right and fair sentencing. Respectfully, the Court should grant review for this reason as well.

CONCLUSION

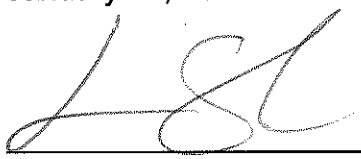
Based upon all of the forgoing reason, the petitioner respectfully requests the Court grant his petition.

Respectfully submitted,

Nemiah Allan
THE PETITIONER

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January 14, 2019

TABLE OF CONTENTS FOR THE APPENDIX TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Decision of the Connecticut Supreme Court in *State of Connecticut v. Nemiah Allan*, 329 Conn. 815, 190 A.3d 874 (2018) A1

Decision of the Connecticut Supreme Court in *State of Connecticut v. Alrick Evans*, 329 Conn. 770, 189 A.3d 1184 (2018) A4

Transcript of the Decision of the Connecticut Superior Court in *State of Connecticut v. Nemiah Allan*, CR09-025166-S.....A29

Order Granting In Part State of Connecticut's Motion For Reconsideration on October 17, 2018.....A42

Motion To Correct Illegal Sentence and Memorandum In Support in *State of Connecticut v. Nemiah Allan*, CR09-025166-S.....A43

Motion To Reconsider Decision of the Connecticut Superior Court in *State of Connecticut v. Nemiah Allan*, CR09-025166-S.....A75

Sentencing Transcript from *State of Connecticut v. Nemiah Allan*, CR09-025166-S.....A79

Decision of the Connecticut Supreme Court from *State v. Allan*, 311 Conn. 1, 83 A.3d 326 (2014).....A100

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State v. Allan

Supreme Court of Connecticut

December 18, 2017, Argued; August 21, 2018, Officially Released

SC 19880

Reporter
329 Conn. 815 *; 190 A.3d 874 **; 2018 Conn. LEXIS 270 ***; 2018 WL 3945758

STATE OF CONNECTICUT v. NEMIAH ALLAN

Prior History: [***1] Substitute information charging the defendant with the crimes of sale of narcotics by a person who is not drug dependent, sale of narcotics within 1500 feet of a school, possession of narcotics, conspiracy to sell narcotics by a person who is not drug dependent and interfering with an officer, brought to the Superior Court in the judicial district of New Haven, geographical area number seven, and tried to the jury before B. Fischer, J.; verdict and judgment of guilty of conspiracy to sell narcotics by a person who is not drug dependent and interfering with an officer, from which the defendant appealed to the Appellate Court, DiPentima, C. J., and Bear and Pellegrino, Js., which affirmed the trial court's judgment; thereafter, the court, S. Moore, J., denied the defendant's motion to correct an illegal sentence, and the defendant appealed.

State v. Allan, 131 Conn. App. 433, 27 A.3d 19, 2011 Conn. App. LEXIS 478 (Sept. 20, 2011)

Disposition: Affirmed.

Core Terms

trial court, imprisoned, sentence, narcotics, dispense, fined, illegal sentence, drug dependency, defense motion

Case Summary

Overview

HOLDINGS: [1]-Defendant's motion to correct an illegal sentence was properly denied because his claim that his sentence violated Apprendi and Alleyne, as he did not admit and a jury did not find drug dependency, triggering a mandatory minimum sentence under *Conn. Gen. Stat. § 21a-278 (2009)*, was foreclosed by another decision on identical claims.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Defenses > Burdens of Proof

HN1[] **Defenses, Burdens of Proof**

Drug dependency, triggering a mandatory minimum sentence under *Conn. Gen. Stat. § 21a-278(b) (2009)*, is an affirmative defense to be proven by a defendant, rather than an element of an offense to be proven by the State.

Syllabus

The defendant, who was convicted of conspiracy to sell narcotics by a person who is not drug dependent and interfering with an officer, appealed from the trial court's denial of his motion to correct an illegal sentence. In that motion, the defendant claimed that his sentence had been imposed in violation of *Apprendi v. New Jersey (530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435)* and *Alleyne v. United States (570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314)*, because the fact of drug [***2] dependency, which triggered a mandatory minimum sentence pursuant to the statue ([Rev. to 2009] *§ 21a-278*) under which he was convicted, had neither been admitted by the defendant nor found by the jury. The trial court concluded that the defendant's arguments were foreclosed by *State v. Ray (290 Conn. 602, 966*

A.2d 148). On appeal, the defendant claimed, inter alia, that this court should overrule *Ray* and that the statutory scheme governing narcotics offenses violates the separation of powers clause in the Connecticut constitution. In addition, the state contended that the trial court lacked subject matter jurisdiction over the defendant's motion to correct. *Held* that the trial court properly denied the defendant's motion to correct; this court, having addressed the same jurisdictional and substantive claims in the companion case of *State v. Evans* (329 Conn.), adopted the reasoning and conclusion of that decision for the purposes of the present case.

Counsel: Temmy Ann Miller, assigned counsel, with whom was Owen Firestone, assigned counsel, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were Patrick J. Griffin, state's attorney, and James Dinnan, senior assistant state's attorney, for **[***3]** the appellee (state).

Judges: Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn, Js.* ROBINSON, J. In this opinion the other justices concurred.

Opinion by: ROBINSON

Opinion

[875]** **[*816]** ROBINSON, J. This appeal is the companion case to *State v. Evans*, 329 Conn. 770, 189 A.3d 1184 (2018), which we also decide today. The defendant, Nemiah Allan,[1] appeals[2] from the judgment of the trial court **[*817]** denying his motion to correct an illegal sentence. On appeal, the defendant claims that we should overrule *State v. Ray*, 290 Conn. 602, 966 A.2d 148 (2009), in which we interpreted *General Statutes (Rev. to 2009) § 21a-278 (b)*[3] to render drug dependency an affirmative defense to be proven by the defendant because (1) it is no longer good law in light of the subsequent decision of the United States Supreme Court in *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), and (2) it was wrongly decided as a matter of statutory interpretation. The defendant also argues that the narcotics statutory scheme, which gives the prosecutor the sole authority to decide whether to proceed under *§ 21a-278 (b)*, rather than the otherwise identical *General Statutes (Rev. to 2009) § 21a-277 (a)*,[4] violates **[*818]** **[**876]** the separation of powers established by article second of

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

[1] We note that the defendant's name has been spelled inconsistently in various court documents in this case, including in the briefs in the present appeal. We use the spelling that is consistent with the operative information and a previous Appellate Court decision concerning the defendant. See *State v. Allan*, 131 Conn. App. 433, 27 A.3d 19 (2011), aff'd, *311 Conn. 1, 83 A.3d 326*, *311 Conn. 1, 83 A.3d 326 (2014)*.

[2] The defendant appealed from the judgment of the trial court to the Appellate Court, and we granted his motion to transfer the appeal to this court pursuant to *General Statutes § 51-199 (c)* and *Practice Book § 65-2*.

[3] *General Statutes (Rev. to 2009) § 21a-278 (b)* provides: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any narcotic substance, hallucinogenic substance other than marijuana, amphetamine-type substance, or one kilogram or more of a cannabis-type substance, except as authorized in this chapter, and who is not, at the time of such action, a drug-dependent person, for a first offense shall be imprisoned not less than five years or more than twenty years; and for each subsequent offense shall be imprisoned not less than ten years or more than twenty-five years. The execution of the mandatory minimum sentence imposed by the provisions of this subsection shall not be suspended, except the court may suspend the execution of such mandatory minimum sentence if at the time of the commission of the offense (1) such person was under the age of eighteen years, or (2) such person's mental capacity was significantly impaired, but not so impaired as to constitute a defense to prosecution."

We note that the legislature has recently made certain clarifying, non-substantive changes to *§ 21a-278*. See Public Acts 2017, No. 17-17, § 2; see also *State v. Evans*, *supra*, *329 Conn. 806*. For the sake of convenience, all references to *§ 21a-278* in this opinion are to the 2009 revision of the statute.

[4] *General Statutes (Rev. to 2009) § 21a-277 (a)* provides: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any controlled substance which is a hallucinogenic substance other than marijuana, or a narcotic substance, except as authorized in this chapter, for a first offense, shall be imprisoned not more than fifteen years and may be fined not more than fifty

the Connecticut constitution, as amended by article eighteen of the amendments. The state contends to the contrary, and also argues that the trial court lacked subject matter jurisdiction over the defendant's motion to correct because that motion failed to raise a colorable claim challenging his [***4] sentence. Although we conclude that the trial court had subject matter jurisdiction over the defendant's motion to correct, we disagree with the merits of the defendant's claims. Accordingly, we affirm the judgment of the trial court denying the defendant's motion to correct an illegal sentence.

The record reveals the following undisputed facts and procedural history. Following a jury trial, the defendant was convicted of conspiracy to sell narcotics in violation of § 21a-278 (b) and General Statutes § 53a-48, and interfering with a police officer in violation of General Statutes § 53a-167a (a).[5] No evidence concerning the defendant's drug dependency was presented at trial by the state or the defendant, and the trial court did not instruct the jury with respect to drug dependency. At sentencing, the court considered the defendant's history of narcotics convictions, and defense counsel argued that the defendant was not a career criminal but, rather, a career addict as a result of a painkiller [*819] addiction following a neck injury suffered in an automobile accident. The trial court, *B. Fischer, J.*, sentenced the defendant to a total effective sentence of twelve years imprisonment, followed by five years of special parole, to be served concurrently with a sentence [***5] that the defendant was serving for violation of probation. His conviction was subsequently affirmed on appeal. See *State v. Allan, 131 Conn. App. 433, 443, 27 A.3d 19 (2011)*, aff'd, *311 Conn. 1, 83 A.3d 326, 311 Conn. 1, 83 A.3d 326 (2014)*.

Pursuant to Practice Book § 43-22, the defendant filed a motion to correct an illegal sentence, claiming, inter alia, that his sentence had been imposed in violation of *Alleyne v. United States, supra, 570 U.S. 99*, and *Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)*, because the fact of drug dependency, which triggered the mandatory minimum sentence under § 21a-278 (b), was not admitted by the defendant or found by the fact-finder. The trial court, *S. Moore, J.*, denied the defendant's motion, concluding that *Alleyne* and *Apprendi* did not control because of this court's interpretation of § 21a-278 (b) in, among other cases, *State v. Ray, supra, 290 Conn. 602*, which held that **HN1**[↑] drug dependency is an affirmative defense to be proven by the defendant, rather than an element of the offense to be proven by the state. The trial court denied the defendant's subsequent motion for reconsideration and rendered judgment denying [**877] the motion to correct an illegal sentence. This appeal followed. The jurisdictional issues raised by the parties and the merits of the underlying arguments presented in this appeal are identical to those considered in *State v. Evans, supra, 329 Conn. 806*, which we also decide today. We conclude that our examination of these same issues in *Evans* thoroughly [***6] resolves the claims in the present appeal and that there is nothing in this case that would mandate a different result. Accordingly, we adopt the reasoning and conclusions of that opinion [*820] herein. See, e.g., *State v. Drakes, 321 Conn. 857, 864, 146 A.3d 21*, cert. denied, ___ *U.S.* ___, *137 S. Ct. 321, 196 L. Ed. 2d 234 (2016)*. We, therefore, conclude that the trial court properly denied the defendant's motion to correct an illegal sentence.

The judgment is affirmed.

In this opinion the other justices concurred.

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thousand dollars or be both fined and imprisoned; and for a second offense shall be imprisoned not more than thirty years and may be fined not more than one hundred thousand dollars, or be both fined and imprisoned; and for each subsequent offense, shall be imprisoned not more than thirty years and may be fined not more than two hundred fifty thousand dollars, or be both fined and imprisoned."

We note that the legislature has recently made certain clarifying, non-substantive changes to § 21a-277. See Public Acts 2017, No. 17-17, § 1; see also *State v. Evans, supra, 329 Conn. 806*.

[5] The state also charged the defendant with sale of narcotics by a person who is not drug-dependent in violation of § 21a-278 (b), sale of narcotics within 1500 feet of a school in violation of *General Statutes (Rev. to 2009) § 21a-278a (b)*, and possession of narcotics in violation of *General Statutes (Rev. to 2009) § 21a-279 (a)*. The jury found the defendant not guilty of these offenses.

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State v. Evans

Supreme Court of Connecticut

December 18, 2017, Argued; August 21, 2018, Officially Released

SC 19881

Reporter
329 Conn. 770 *; 2018 Conn. LEXIS 269 **; 2018 WL 3945953

STATE OF CONNECTICUT v. ALRICK A. EVANS

Prior History: [**1] Information charging the defendant with the crimes of sale of narcotics by a person who is not drug dependent and possession of narcotics, brought to the Superior Court in the judicial district of New Britain, geographical area number seventeen, and transferred to geographical area number fifteen, where the defendant was presented to the court, Strackbein, J., on a plea of guilty to the charge of sale of narcotics by a person who is not drug-dependent; judgment of guilty; there-after, the state entered a nolle prosequi as to the charge of possession of narcotics; subsequently, the trial court, D'Addabbo, J., denied the defendant's motion to correct an illegal sentence, and the defendant appealed.

State v. Evans, 150 Conn. App. 905, 93 A.3d 182, 2014 Conn. App. LEXIS 245 (June 3, 2014)

Disposition: Affirmed.

Core Terms

sentence, trial court, statutes, drug dependency, affirmative defense, mandatory minimum sentence, illegal sentence, imprisoned, narcotics, quotation, marks, overrule, beyond a reasonable doubt, violates, subject matter jurisdiction, cases, guilty plea, drug-dependent, challenges, separation of powers, impose sentence, enhancement, mandatory, contends, dispense, robbery, fined, defense motion, mitigating, merits

Case Summary

Overview

HOLDINGS: [1]-The denial of defendant's motion to correct an illegal sentence was proper because, although the trial court had subject matter jurisdiction over defendant's motion to correct, drug dependency under *Conn. Gen. Stat. § 21a-278(b)* was an affirmative defense that, if proven, reduced a defendant's potential sentence; [2]-The mandatory minimum sentence provision of *§ 21a-278(b)* did not violate the separation of powers; [3]-The court declined to disturb its long-standing interpretation that proof of drug dependency constituted an affirmative defense to a charge under *§ 21a-278(b)*.

Outcome
Trial court's judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Defenses

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale

HN1 **Criminal Law & Procedure, Defenses**

Drug dependency under *Conn. Gen. Stat. § 21a-278 (b)* is an affirmative defense that, if proven, reduces a defendant's potential sentence.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

HN2 **De Novo Review, Conclusions of Law**

Review is plenary for questions of law.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

HN3[] Jurisdiction & Venue, Jurisdiction

It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the commissioner of correction and begins serving the sentence. Without a legislative or constitutional grant of continuing jurisdiction, however, the trial court lacks jurisdiction to modify its judgment.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Illegal Sentences

HN4[] Corrections, Modifications & Reductions, Illegal Sentences

Because the judiciary cannot confer jurisdiction on itself through its own rule-making power, Conn. Gen. Prac. Book, R. Super. Ct. § 43-22 is limited by the common-law rule that a trial court may not modify a sentence if the sentence was valid and its execution has begun. Therefore, for the trial court to have jurisdiction to consider the defendant's claim of an illegal sentence, the claim must fall into one of the categories of claims that, under the common law, the court has jurisdiction to review.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Illegal Sentences

HN5[] Corrections, Modifications & Reductions, Illegal Sentences

An illegal sentence is essentially one which exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. In accordance with this summary, Connecticut courts have considered four categories of claims pursuant to Conn. Gen. Prac. Book, R. Super. Ct. § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. The second category has considered violations of the prohibition against double jeopardy. The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. The fourth category has involved questions as to which sentencing statute was applicable. A challenge to the legality of a sentence focuses not on what transpired during the trial or on the underlying conviction. In order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding, and not the trial leading to the conviction, must be the subject of the attack.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Illegal Sentences

HN6[] Corrections, Modifications & Reductions, Illegal Sentences

The rules of practice are consistent with the broader common-law meaning of illegality, permitting correction of both illegal sentences and sentences imposed in an illegal manner. The protection against sentencing in an illegal manner reflects the fundamental proposition that the defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process. The parameters of an invalid sentence will evolve.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Illegal Sentences

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Statutory Maximums

HN7[] Corrections, Modifications & Reductions, Illegal Sentences

The *federal due process clause* and *Sixth Amendment* require that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. Thus, a claim is cognizable in a motion to correct an illegal sentence if it is a challenge specifically directed to the punishment imposed, even if relief for that illegal

punishment requires the court to in some way modify the underlying convictions, such as for double jeopardy challenges. The motion to correct is not another bite at the apple in place of challenges that are more properly brought on direct appeal or in a petition for a writ of habeas corpus.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

HN8 **Jurisdiction & Venue, Jurisdiction**

A colorable claim is one that is superficially well founded but that may ultimately be deemed invalid. For a claim to be colorable, the defendant need not convince the trial court that he necessarily will prevail; he must demonstrate simply that he might prevail. The jurisdictional and merits inquiries are separate; whether the defendant ultimately succeeds on the merits of his claim does not affect the trial court's jurisdiction to hear it. In determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. Given the presumption in favor of jurisdiction, jurisdictional inquiries are guided by the plausibility of the defendant's claim, rather than its ultimate legal correctness.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

HN9 **De Novo Review, Conclusions of Law**

Mootness implicates a court's subject matter jurisdiction and, therefore, presents a question of law over which plenary review is exercised. For a case to be justiciable, it is required, among other things, that there be an actual controversy between or among the parties to the dispute. The requirement of an actual controversy is premised upon the notion that courts are called upon to determine existing controversies, and thus may not be used as a vehicle to obtain advisory judicial opinions on points of law. Moreover, an actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot.

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Guilty Pleas

HN10 **Entry of Pleas, Guilty Pleas**

A guilty plea to an underlying offense does not, in the absence of a specific plea to the specific facts necessary to trigger an enhanced sentence, operate to waive the defendant's right to that specific finding.

Criminal Law & Procedure > Defenses

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Statutory Maximums

Criminal Law & Procedure > ... > Controlled Substances > Delivery, Distribution & Sale > Penalties

HN11 **Criminal Law & Procedure, Defenses**

Not requiring the state to plead and prove lack of drug dependency under *Conn. Gen. Stat. § 21a-278 (b)* does not violate Apprendi because drug dependency is an affirmative defense that would mitigate a sentence.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Statutory Maximums

HN12 **Imposition of Sentence, Statutory Maximums**

Under the Due Process Clause of the Fifth Amendment, and the notice and jury trial guarantees of the *Sixth amendment*, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

Criminal Law & Procedure > Defenses

Criminal Law & Procedure > ... > Controlled Substances > Delivery, Distribution & Sale > Penalties

HN13 **Burdens of Proof, Defense**

Placing the burden on the defendant to prove drug dependency under Conn. Gen. Stat. § 21a-278(b) is constitutional. It is not unconstitutional to require the defendant to prove his drug dependency by a preponderance of the evidence under Conn. Gen. Stat. §§ 21a-278 (b) and 21a-269.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

HN14 **Imposition of Sentence, Factors**

Whether a sentencing factor is, in essence, an element requiring the state to plead and prove it beyond a reasonable doubt, or an affirmative defense, the pleading and proof of which may be allocated to the defendant, is a matter of state law for authoritative determination by state courts interpreting state statutes, insofar as state courts are the ultimate expositors of state law, binding the federal courts except in extreme circumstances.

Governments > Courts > Judicial Precedent

HN15 **Courts, Judicial Precedent**

The doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. Stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency. It is the most important application of a theory of decisionmaking consistency in our legal culture and is an obvious manifestation of the notion that decisionmaking consistency itself has normative value.

Governments > Legislation > Interpretation

Governments > Courts > Judicial Precedent

HN16 **Legislation, Interpretation**

In evaluating the force of stare decisis, case law dictates that the Supreme Court of Connecticut should be especially wary of overturning a decision that involves the construction of a statute. When the court construes a statute, it acts not as plenary lawgivers but as surrogates for another policy maker, that is the legislature. In its role as surrogates, its only responsibility is to determine what the legislature, within constitutional limits, intended to do. Sometimes, when the supreme court has made such a determination, the legislature instructs the court that it has misconstrued its intentions. The court is bound by the instructions so provided. More often, however, the legislature takes no further action to clarify its intentions. Time and again, the court has characterized the failure of the legislature to take corrective action as manifesting the legislature's acquiescence in the court's construction of a statute. Once an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative acquiescence places a significant jurisprudential limitation on our own authority to reconsider the merits of the court's earlier decision.

Governments > Legislation > Interpretation

Governments > Courts > Judicial Precedent

HN17 **Legislation, Interpretation**

Factors that may justify overruling a prior decision interpreting a statutory provision include intervening developments in the law, the potential for unconscionable results, the potential for irreconcilable conflicts and difficulty in applying the interpretation. In addition, a departure from precedent may be justified when the rule to be discarded may not be reasonably supposed to have determined the conduct of the litigants.

Governments > Legislation > Interpretation

HN18 **Legislation, Interpretation**

The legislature is presumed to be aware of the courts' interpretation of a statute and its subsequent nonaction

may be understood as a validation of that interpretation, particularly when it affirmatively amended the statute subsequent to such interpretation, but chose not to amend the specific provision of the statute at issue.

Constitutional Law > Separation of Powers

Criminal Law & Procedure > ... > Controlled Substances > Delivery, Distribution & Sale > Penalties

HN19 **Constitutional Law, Separation of Powers**

The mandatory minimum sentence provision of Conn. Gen. Stat. § 21a-278(b) does not violate the separation of powers.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

HN20 **Case or Controversy, Constitutionality of Legislation**

Because 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. In construing a statute, moreover, the Supreme Court of Connecticut will search for an effective and constitutional construction that reasonably accords with the legislature's underlying intent. When 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.

Constitutional Law > Separation of Powers

HN21 **Constitutional Law, Separation of Powers**

The 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. It is axiomatic that no branch of government organized under a constitution may exercise any power that is not explicitly bestowed by that constitution or that is not essential to the exercise thereof. Thus the separation of powers doctrine serves a dual function: it limits the exercise of power within each branch, yet ensures the independent exercise of that power.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

HN22 **Case or Controversy, Constitutionality of Legislation**

In the context of challenges to statutes whose constitutional infirmity is claimed to flow from impermissible intrusion upon the judicial power, the Supreme Court of Connecticut has refused to find constitutional impropriety in a statute simply because it affects the judicial function. A statute violates the constitutional mandate for a separate judicial magistracy only if it represents an effort by the legislature to exercise a power which lies exclusively under the control of the courts or if it establishes a significant interference with the orderly conduct of the Superior Court's judicial functions. In accordance with these principles, a two part inquiry has emerged to evaluate the constitutionality of a statute that is alleged to violate separation of powers principles by impermissibly infringing on the judicial authority. A statute will be held unconstitutional on those grounds 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.

Constitutional Law > The Judiciary

Criminal Law & Procedure > Sentencing > Imposition of Sentence

HN23 **Constitutional Law, The Judiciary**

The judiciary's power to impose a particular sentence is defined by the legislature, and there is no constitutional requirement that courts be given discretion in imposing a sentence. In addition, the legislature may impose mandatory minimum terms of imprisonment for certain crimes, and may preclude the probation or suspension of a sentence.

Constitutional Law > The Judiciary

Governments > Courts > Judges

Governments > State & Territorial Governments > Legislatures

HN24[] **Constitutional Law, The Judiciary**

A legislature can exercise its right to limit judicial discretion in sentencing by bestowing on prosecutors the right to make decisions that may curtail judicial discretion because it is the legislative branch that has the power to define a crime and set its punishment. Notwithstanding that judges may have imposed a lesser sentence in the case before them, and question the application of draconian mandatory minimum sentences in some cases, their jurisprudential hands are tied. Although a host of inequities inhere in many large mandatory sentences, the relief must come from the legislative arm of government and not from judges.

Syllabus

Convicted of the crime of sale of narcotics by a person who is not drug dependent following a plea of guilty entered pursuant to *North Carolina v. Alford (400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162)*, the defendant appealed from the trial court's denial of his motion to correct an illegal sentence. In his motion to correct, the defendant claimed, inter alia, that his sentence exceeded the relevant statutory limits because the lack of drug dependency, which resulted in the imposition of a mandatory minimum sentence pursuant to the statute ([Rev. to 2011 **[**2]** *§ 21a-278 (b)*) under which the defendant was convicted, was neither specifically admitted by the defendant nor proven by the state. Specifically, the defendant claimed that the lack of drug dependency increased the maximum penalty available and that, pursuant to *Apprendi v. New Jersey (530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435)* and *Alleyne v. United States (570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314)*, the state bore the burden of proving that fact beyond a reasonable doubt. The trial court, following the construction of *§ 21a-278 (b)* by this court in *State v. Ray (290 Conn. 602, 966 A.2d 148)*, concluded that proof of drug dependency under that statute constitutes an affirmative defense and, therefore, that the state was not required to prove that the defendant was not drug dependent. Accordingly, the trial court denied the defendant's motion to correct. On appeal, the defendant claimed, inter alia, that this court should overrule its interpretation of *§ 21a-278 (b)* in *Ray*, and that the statutory scheme governing narcotics offenses violates the separation of powers clause in the Connecticut constitution by improperly allocating the judicial power of sentencing to the prosecutor. In addition, the state contended, inter alia, that the trial court lacked subject matter jurisdiction over defendant's motion to correct. *Held* that the trial court properly denied the defendant's motion to correct an **[**3]** illegal sentence:

1. The trial court had subject matter jurisdiction over the defendant's motion to correct, as the defendant's claim of an illegal sentence under *Alleyne* and *Apprendi* was colorably directed to the validity of the sentence, rather than the underlying conviction, and was sufficiently plausible to indulge the presumption in favor of jurisdiction; moreover, the defendant's *Alford* plea did not render the claim presented in his motion to correct moot, this court having concluded that, in the absence of a plea pertaining directly to the issue of drug dependency, the defendant did not waive his right to a specific finding with respect to that issue.

2. This court declined to disturb its long-standing interpretation that proof of drug dependency constitutes an affirmative defense to a charge under *§ 21a-278 (b)*; the constitutional analysis in *Ray* remains good law notwithstanding the decisions of the United States Supreme Court in *Apprendi*, which requires the state to prove any fact, other than a prior conviction, that increases the maximum statutory penalty for a crime, and *Alleyne*, which extends that rule to mandatory minimum sentences, insofar as neither of those cases precluded states **[**4]** from utilizing affirmative defenses to mitigate or eliminate criminal liability without running afoul of due process; moreover, the language and legislative history of recent amendments to *§ 21a-278* and a related narcotics statute ([Rev. to 2011] *§ 21a-277*) were strongly indicative of legislative acquiescence in the interpretation of *§ 21a-278 (b)* by this court in *Ray*, and, therefore, the doctrine of stare decisis counseled against overruling that case as a matter of statutory construction.

3. The defendant could not prevail on his claim that the statutory scheme governing narcotics offenses violates the separation of powers clause of the Connecticut constitution by improperly allocating the judicial power of sentencing to the prosecutor; the legislature's classification of *§ 21a-277*, a separate statute governing the crime of sale of narcotics that carries no mandatory minimum sentence, represented a public policy decision consistent with its constitutionally assigned responsibility and merely provided prosecutors with a

choice that was fundamentally no different from their discretion to charge lesser offenses in other contexts.

Counsel: April E. Brodeur, assigned counsel, with whom was Owen Firestone, assigned counsel, for the appellant **[**5]** (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were Brian Preleski, state's attorney, and Jeffrey M. Lee, senior assistant state's attorney, for the appellee (state).

Judges: Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn, Js.* ROBINSON, J. In this opinion the other justices concurred.

Opinion by: ROBINSON

Opinion

[*772] ROBINSON, J. The principal issue in this appeal is whether our decision in *State v. Ray*, 290 Conn. 602, 966 A.2d 148 (2009), which would require the defendant in the present case, Alrick A. Evans, to prove drug dependency as an affirmative defense to a charge under *General Statutes (Rev. to 2011) § 21a-278 (b)*,[1] remains **[*773]** good law in light of (1) the subsequent decision of the United States Supreme Court in *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), and (2) the legislature's recent amendment of *§ 21a-278 (b)* in No. 17-17, § 2, of the 2017 Public Acts (P.A. 17-17). The defendant appeals[2] from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant claims that (1) we should overrule our interpretation of *§ 21a-278 (b)* in *Ray*, (2) under *Alleyne*, the state was required to prove his lack of drug dependency beyond a reasonable doubt because it is a fact that would result in an increased mandatory minimum sentence, and (3) the narcotics statutory scheme, which gives the prosecutor **[**6]** the sole authority to decide whether to proceed under *§ 21a-278 (b)*, rather than the otherwise identical *General Statutes (Rev. to 2011) § 21a-277 (a)*,[3] violates the separation of powers established by article second of the constitution of Connecticut, as amended by article eighteen of the amendments. The state contends to the contrary, and also argues that the trial court lacked **[*774]** subject matter jurisdiction over the defendant's motion to correct

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

[1] *General Statutes (Rev. to 2011) § 21a-278 (b)* provides: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any narcotic substance, hallucinogenic substance other than marijuana, amphetamine-type substance, or one kilogram or more of a cannabis-type substance, except as authorized in this chapter, and who is not, at the time of such action, a drug-dependent person, for a first offense shall be imprisoned not less than five years or more than twenty years; and for each subsequent offense shall be imprisoned not less than ten years or more than twenty-five years. The execution of the mandatory minimum sentence imposed by the provisions of this subsection shall not be suspended, except the court may suspend the execution of such mandatory minimum sentence if at the time of the commission of the offense (1) such person was under the age of eighteen years, or (2) such person's mental capacity was significantly impaired, but not so impaired as to constitute a defense to prosecution."

We note that the legislature has recently amended *§ 21a-278*. See Public Acts 2017, No. 17-17, § 2; see also part II B and footnote 25 of this opinion. For the sake of convenience, all references to *§ 21a-278* in this opinion are to the 2011 revision of the statute.

[2] The defendant appealed from the judgment of the trial court to the Appellate Court, and we granted his motion to transfer his appeal to this court pursuant to *General Statutes § 51-199 (c)* and *Practice Book § 65-2*.

[3] *General Statutes (Rev. to 2011) § 21a-277 (a)* provides: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any controlled substance which is a hallucinogenic substance other than marijuana, or a narcotic substance, except as authorized in this chapter, for a first offense, shall be imprisoned not more than fifteen years and may be fined not more than fifty thousand dollars or be both fined and imprisoned; and for a second offense shall be imprisoned not more than thirty years and may be fined not more than one hundred thousand dollars, or be both fined and imprisoned; and for each subsequent offense, shall be imprisoned not more than thirty years and may be fined not more than two hundred fifty thousand dollars, or be both fined and imprisoned."

We note that the legislature has recently amended *§ 21a-277*. See P.A. 17-17, § 1; see also part II B and footnote 25 of this opinion. For the sake of convenience, all references to *§ 21a-277* in this opinion, unless otherwise noted, are to the 2011 revision of the statute.

because that motion challenged his underlying conviction, rather than his sentence. Although we conclude that the trial court had subject matter jurisdiction over the defendant's motion to correct, we disagree with the merits of the defendant's claims and reaffirm *Ray*'s holding that ***HN1***[☛] drug dependency under § 21a-278 (b) is an affirmative defense that, if proven, reduces a defendant's potential sentence. Accordingly, we affirm the judgment of the trial court.

The record reveals the following undisputed facts and procedural history. On June 16, 2011, the state charged the defendant with one count of the sale of narcotics in violation of § 21a-278 (b), and one count of possession of narcotics in violation of General Statutes (Rev. to 2011) § 21a-279 (a), in connection with the sale of crack cocaine in Bristol. On November 16, 2011, the defendant pleaded guilty, in accordance with the *Alford* doctrine,[4] to the sale of narcotics **[**7]** in violation of § 21a-278 (b); the state nolled the possession charge. Drug dependency was not discussed during the plea hearing.[5] **[*775]** The trial court subsequently sentenced the defendant to five years imprisonment with five years special parole.

Pursuant to Practice Book § 43-22,[6] on November 5, 2015, the defendant filed the motion to correct an illegal sentence that underlies the present appeal.[7] In that motion, the defendant claimed that his sentence is illegal because, inter alia, under *Alleyne v. United States*, supra, 570 U.S. 99, and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the sentence "exceeds the relevant statutory limits" and "the fact triggering the mandatory minimum [sentence] was not found by a proper [fact finder] or admitted by the defendant . . . ." On February 9, 2016, the trial court issued a memorandum of decision observing that, in *State v. Ray*, supra, 290 Conn. 623-26, this court had concluded that *Apprendi*, which requires that the state charge, and prove to the fact finder beyond a reasonable doubt, any factor, other than a prior conviction, that increases the maximum penalty for a crime; see *Apprendi v. New Jersey*, supra, 474-97; did not apply to proof of drug dependency under § 21a-278 (b) because such proof constitutes an affirmative defense under that statute. The trial court then rejected the defendant's argument that *Ray* is no longer good law under *Alleyne*, which **[**8]** extended the rule set forth in *Apprendi* to facts **[*776]** that increase a statutory minimum sentence.[8] See *Alleyne v. United States*, supra, 103. After rejecting the defendant's other challenges to his sentence,[9] the trial

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[4] *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[5] After the defendant pleaded guilty to one count of violating § 21a-278 (b), the prosecutor stated the following as a factual basis for the plea: "On or about [May 19, 2011], Bristol police in working with the statewide narcotics [task force] knew that [the defendant] was moving some weights of cocaine, illegal drug, narcotics, if you will. They got a [confidential informant] to do some buys under their supervision.

"[The defendant] did trade . . . on or about [May 19, 2011], those narcotics for [United States] currency. [A] couple of other . . . sales occurred on [May 19, 2011], and [June 8, 2011], just to [establish] beyond a reasonable doubt in our minds that he was an ongoing drug dealer. We're not going to make him . . . plead to those other two cases.

"Later on, during the course of the investigation, I believe it was when we had effected, if you will, the sale warrants, written and got them signed by a judge, they went to his location in New Britain . . . a place he was known to lay his head from time to time. When they were going to arrest him there on those warrants, he came around the corner, saw them, clearly in front of the police tossed down a knotted clear baggie that ended up containing . . . more than one ounce of, I believe his drug of choice here is, crack cocaine, that is correct. So [those are] the facts as to those two § 21a-278 (b) files."

[6] 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."

[7] The defendant previously had filed a motion to correct an illegal sentence on June 13, 2012, challenging various aspects of his plea and sentencing, including the adequacy of the canvass and a claim that the sentence was a double jeopardy violation. In a judgment later affirmed by the Appellate Court, see ***State v. Evans*, 150 Conn. App. 905, 93 A.3d 182 (2014)**, the trial court, *Strackbein, J.*, denied or dismissed the claims raised in that motion through a memorandum of decision issued on February 7, 2013.

[8] The trial court also observed that the defendant's *Alford* plea constituted a concession that the state could prove a violation of § 21a-278 (b), which applies to individuals who are not drug-dependent, and that he never argued that he should have been permitted "to plead under § 21a-277 (a), which applies to . . . drug-dependent person[s]."

[9] The trial court also rejected the defendant's claims that his sentence was illegal because it violated (1) his state and

court rendered judgment denying the motion to correct an illegal sentence. This appeal followed. See footnote 2 of this opinion.

In the present appeal from the trial court's denial of his motion to correct, the defendant claims the following: (1) we should overrule *State v. Ray*, supra, 290 Conn. 602; and (2) the narcotics statutory scheme violates the separation of powers.[10] The state disagrees with the merits of the defendant's claims and also contends that the trial court should have dismissed the defendant's motion to correct for lack of subject matter jurisdiction. All of these issues present HN2 questions of law over which our review is plenary. See, e.g., *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*, 327 Conn. 650, 694, 176 A.3d 28 (2018) (constitutional issues); *Hull v. Newtown*, 327 Conn. 402, 413-14, [*777] 174 A.3d 174 (2017) (statutory construction); *State v. Delgado*, 323 Conn. 801, 810, 151 A.3d 345 (2016) (subject matter jurisdiction). We address each issue in turn.

I

As a threshold matter; see, e.g., *State v. Koslik*, 116 Conn. App. 693, 699, 977 A.2d 275, cert. denied, 293 Conn. 930, 980 A.2d 916 (2009); we begin with the state's challenges to the trial court's subject matter jurisdiction,[11] namely, that (1) the defendant's motion to correct improperly challenged the underlying conviction, rather than the sentence, [**9] and (2) this case is moot because the defendant's sentence was the product of a plea bargain.[12]

[*778] A

Relying on *State v. Lawrence*, 281 Conn. 147, 913 A.2d 426 (2007), the state contends that the trial court lacked jurisdiction over the defendant's motion to correct because it did not challenge the sentencing phase of the proceeding but, rather, the underlying conviction. In response, the defendant cites *State v. Henderson*, 130 Conn. App. 435, 24 A.3d 35 (2011), appeals dismissed, 308 Conn. 702, 66 A.3d 847 (2013), and argues that issues raised under *Alleyne* and *Apprendi* are properly addressed in a motion to correct an illegal sentence. We agree with the defendant and conclude that his colorable claim of an illegal sentence under *Alleyne* and

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federal constitutional rights to equal protection of the laws, (2) *article first, § 9, of the Connecticut constitution*, (3) "the intent of the legislature and the rule of lenity," and (4) his state and federal constitutional rights to due process because the court was unaware of the permissible sentencing range and "there is no rational basis for having two statutes punishing the exact same behavior with differing punishments." The defendant does not renew these claims in the present appeal, and we do not address those issues further.

[10] We note that the defendant has briefed separate claims that the trial court imposed his sentence in an illegal manner on the basis of the court's "inaccurate understanding as to the available statutory range of punishments that resulted from the prosecution's failure to prove the fact triggering the mandatory minimum sentence." We do not address these claims separately, because their resolution is subsumed in the defendant's more specific challenges to *State v. Ray*, supra, 290 Conn. 602.

[11] Although the state did not raise these jurisdictional claims before the trial court, we review them on appeal because "challenges to the trial court's subject matter jurisdiction may be raised at any time by either party or the court." *State v. Delgado*, supra, 323 Conn. 813.

[12] We note that the state also argues that the court lacked jurisdiction over the defendant's motion to correct because the federal courts have uniformly determined that *Alleyne* is not retroactively applicable on collateral review to cases that became final prior to the date of its release. See, e.g., *Walker v. United States*, 810 F.3d 568, 574-75 (8th Cir.), cert. denied, *U.S. , 136 S. Ct. 2042, 195 L. Ed. 2d 240 (2016)*; *Crayton v. United States*, 799 F.3d 623, 624 (7th Cir.), cert. denied, *U.S. , 136 S. Ct. 424, 193 L. Ed. 2d 319 (2015)*. The state posits that a motion to correct an illegal sentence is collateral in nature, insofar as it takes place outside the direct appellate process. In response, the defendant argues in his reply brief that we should not reach this argument because the state waived it by failing to raise it before the trial court, and he also cites *State v. Casiano*, 282 Conn. 614, 625 n.15, 922 A.2d 1065 (2007), for the proposition that a motion to correct "is not collateral to or separate from the underlying criminal action because it directly implicates the legality of the sentencing proceeding and is addressed to the sentencing court itself."

We decline to reach the state's arguments with respect to the retroactivity of *Alleyne*. Although jurisdictional issues may be raised at any time, the state's arguments with respect to retroactivity relate to the merits of the motion to correct, rather than the court's jurisdiction over it. See footnote 16 of this opinion. Moreover, the state does not suggest that there are any exceptional circumstances that would allow it to assert an unpreserved issue as an alternative ground on which to reject the defendant's constitutional claim. See *Blumberg Associates Worldwide, Inc. v. Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 142-43, 84 A.3d 840 (2014); see also *id.*, 159-60 ("'exceptional circumstances'" required for review of unpreserved claims). Accordingly, we leave to another day the retroactivity issues raised by the state with respect to *Alleyne*.

Apprendi gave the trial court subject matter jurisdiction over his motion to correct.

HN3 "It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the commissioner of correction and begins serving the sentence. . . . Without a legislative or constitutional grant of continuing jurisdiction, however, the trial court lacks jurisdiction to modify its judgment." **[**10]** (Citations omitted; internal quotation marks omitted.) *State v. Lawrence*, supra, 281 Conn. 153-54.

As in *Lawrence*, the defendant in the present case "relies on a common-law exception to this rule, embodied in [*Practice Book*] § 43-22, allowing the trial court to correct an illegal sentence." *Id.*, 155. HN4 "Because the judiciary cannot confer jurisdiction on itself through its own rule-making power, § 43-22 is limited by the common-law rule that a trial court may not modify a sentence if the sentence was valid and its execution **[*779]** has begun. . . . Therefore, for the trial court to have jurisdiction to consider the defendant's claim of an illegal sentence, the claim must fall into one of the categories of claims that, under the common law, the court has jurisdiction to review." (Citation omitted.) Id.

HN5 "[A]n illegal sentence is essentially one which . . . exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . In accordance with this summary, Connecticut courts have considered four categories of claims pursuant to [*Practice Book*] § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations **[**11]** of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions as to which sentencing statute was applicable." (Citations omitted; internal quotation marks omitted.) *Id.*, 156-57. Considering these categories, which were first articulated by the Appellate Court's definition of the term "illegal sentence" in *State v. McNellis*, 15 Conn. App. 416, 443-44, 546 A.2d 292, cert. denied, 209 Conn. 809, 548 A.2d 441 (1988), this court held in *Lawrence* that "a challenge to the legality of a sentence focuses not on what transpired during the trial or on the underlying conviction. In order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, *the sentencing proceeding, and not the trial leading to the conviction*, must be the subject of the attack." (Emphasis added.) *State v. Lawrence*, supra, 281 Conn. 158.

Lawrence is not, however, the last word from this court in defining the trial courts' jurisdiction over motions to correct. In *State v. Parker*, 295 Conn. 825, 837, **[*780]** 992 A.2d 1103 (2010), we observed that HN6 "the rules of practice are consistent with the broader common-law meaning of illegality, permitting correction of both illegal sentences **[**12]** and sentences imposed in an illegal manner." We emphasized that the protection against sentencing in an illegal manner "reflects the fundamental proposition that [t]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." (Internal quotation marks omitted.) *Id.*, 839. We then added "one qualification" to the description in *State v. McNellis*, supra, 15 Conn. App. 443-44, observing that the "enumerated examples would not encompass rights or procedures subsequently recognized as mandated by federal due process," explicitly including claims under *Apprendi v. New Jersey*, supra, 530 U.S. 490, and similarly would not "encompass procedures mandated by state law that are intended to ensure fundamental fairness in sentencing, which, if not followed, could render a sentence invalid." *State v. Parker*, supra, 839-40. Accordingly, we emphasized that "the examples cited in *McNellis* are not exhaustive and the parameters of an invalid sentence will evolve." *Id.*, 840.

To be sure, some constitutional protections governing the sentencing process, such as the United States Supreme Court's decision in *Apprendi*, have had the effect of blurring the lines between the sentencing proceeding and the **[**13]** trial, particularly insofar as they have constitutionally mandated the submission of certain factual issues to the jury prior to the court's imposition of the sentence. For example, in *Apprendi v. New Jersey*, supra, 530 U.S. 490, the United States Supreme Court concluded that HN7 the *federal due process clause* and *sixth amendment to the United States constitution* require that, "[o]ther than the fact of a prior conviction, **[*781]** any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Thus, a claim is

cognizable in a motion to correct an illegal sentence if it is a challenge specifically directed to the punishment imposed, even if relief for that illegal punishment requires the court to in some way modify the underlying convictions, such as for double jeopardy challenges. See *State v. Cator, 256 Conn. 785, 804-805, 781 A.2d 285 (2001)* (concluding that "trial court had jurisdiction to alter the sentence pursuant to *Practice Book § 43-22*, because otherwise the constitutional prohibition against double jeopardy would have been violated," even though correction of illegal sentence required merger of underlying convictions). We emphasize, however, that the motion to correct is not another bite at the apple in place of challenges that are more properly brought on direct appeal or in a petition **[**14]** for a writ of habeas corpus.[13] See *State v. McGee, 175 Conn. App. 566, 574 n.6, [*782] 168 A.3d 495 (2017)* (The trial court had jurisdiction over a motion to correct an illegal sentence that sought to vacate a robbery conviction as a remedy for a double jeopardy violation because "the defendant has not challenged, in any way, the validity of his convictions for robbery in the second degree or of the guilty verdicts upon which they rest. He has not claimed any infirmity with the state's information; he has not advanced any claims of insufficiency with respect to the state's evidence against him, or of evidentiary error, instructional error, prosecutorial impropriety, or any other type of error upon which the legality of trial proceedings or of the verdicts and judgments they result in are routinely challenged. Rather, he claimed that, at sentencing, the court should have vacated one of his two second degree robbery convictions and sentenced him only on one of those convictions."), cert. denied, *327 Conn. 970, 173 A.3d 953 (2017)*.

As the "parameters of an illegal sentence [have] evolve[d]"; *State v. Parker, supra, 295 Conn. 840*; particularly given the landmark decision of the United States Supreme Court in *Apprendi v. New Jersey, supra, 530 U.S. 466*, we find instructive the Appellate Court's decision in *State v. Henderson, supra, 130 Conn. App. 435*. In *Henderson*, the defendant claimed that **[**15]** his robbery and assault sentence, which had been enhanced pursuant to the persistent serious felony offender statute, *General Statutes (Rev. to 1993) § 53a-40 (g)*, was illegal under *Apprendi* because, although he had pleaded guilty to a partB information seeking that enhancement, he did not expressly admit "that the public interest would be best served by extended incarceration and lifetime supervision." *Id., 438-39*. The Appellate Court concluded that jurisdiction existed over the motion to **[*783]** correct an illegal sentence, even though it challenged the trial court's failure to give a jury charge—an action that by definition occurs during trial rather than sentencing—because of the defendant's "legal theory as to why his sentence was illegal," namely, a violation of *Apprendi*. *Id., 441*; see also *id., 446*. Following *State v. Koslik, supra, 116 Conn. App. 700*, which held that there was jurisdiction over a defendant's claim that a trial court had failed to make a finding necessary to justify an extended probation period, the court emphasized in *Henderson* that "the defendant's claims go to the actions of the sentencing court. Specifically, he challenges actions taken by the sentencing court that, although proper at the time, were affected by a subsequent change in the law." *State v. Henderson, supra, 445*; see also *State v. Abraham, 152 Conn. App. 709, 720-23, 99 A.3d 1258 (2014)* (The court, after **[**16]** reviewing case law, noted the state's concession that the court had jurisdiction under *Henderson* over a motion to correct raising an *Apprendi* challenge to the "sentencing court's decision to impose a sentence enhancement, under [*General Statutes*] §

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[13] As Judge Bishop has recently observed, it is not always clear when a motion to correct an illegal sentence challenges a sentence rather than a conviction. See *State v. McGee, 175 Conn. App. 566, 586, 168 A.3d 495* (*Bishop, J.*, dissenting) ("confusion abounds on the question of the jurisdiction of the trial court to hear a motion to correct an illegal sentence"), cert. denied, ***327 Conn. 970, 173 A.3d 953 (2017)***. Judge Bishop notes that this confusion is particularly acute with respect to the second category of illegal sentences, namely, double jeopardy violations for multiple punishments, which by definition challenge convictions rather than the sentences for those convictions. See *id., 592-95* (questioning whether this court's line of cases under *State v. Cator, supra, 256 Conn. 785*, was intended "to open wide the door to attacks on convictions through the guise of a *Practice Book § 43-22* motion, nominally assailing a sentence," and stating that jurisdictional case law has "create[d] currents and crosscurrents in need of calming by a higher power"). In his thoughtful dissent in *McGee*, Judge Bishop suggested revisions to the case law governing motions to correct, including the imposition of time limitation and limiting vacation of convictions to cases in which "it is obvious from the criminal information and verdict that convictions violate the protection against double jeopardy," and "that such remedial action can only be taken before a defendant has commenced serving his or her sentence." *Id., 595-98*. Although we leave the specific issues identified by Judge Bishop to another day, we nevertheless acknowledge that the demarcation between conviction and sentence may not always be crystal clear, particularly in cases presenting *Apprendi* issues, and may invoke the presumption in favor of jurisdiction in doubtful cases. See, e.g., *State v. Fowlkes, 283 Conn. 735, 739, 930 A.2d 644 (2007)*.

53-202k, without first obtaining the necessary jury finding. We further conclude that this jurisdiction encompasses a claim that the defendant did not properly waive his right to a jury determination of the violation, resulting in a sentence imposed in an illegal manner that exceeds the statutory limit for the underlying crimes of which he was found guilty by the jury.").

The state's jurisdictional challenge requires us to consider whether "the defendant has raised a colorable claim within the scope of Practice Book § 43-22 that would, if the merits of the claim were reached and decided in the defendant's favor, require correction of a sentence. . . . In the absence of a colorable claim requiring correction, the trial court has no jurisdiction to modify the sentence." (Citation omitted; internal quotation **[*784]** marks omitted.) State v. Delgado, supra, 323 Conn. 810; HN8[] "A colorable claim is one that is superficially well founded but that may ultimately be deemed invalid . . . . For a claim to be colorable, the defendant need not convince **[**17]** the trial court that he necessarily will prevail; he must demonstrate simply that he *might* prevail." (Citation omitted; emphasis in original; internal quotation marks omitted.) In re Santiago G., 325 Conn. 221, 231, 157 A.3d 60 (2017). The jurisdictional and merits inquiries are separate; whether the defendant ultimately succeeds on the merits of his claim does not affect the trial court's jurisdiction to hear it. See id. "It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) State v. Fowlkes, 283 Conn. 735, 739, 930 A.2d 644 (2007); see, e.g., State v. Koslik, supra, 116 Conn. App. 697 (applying presumption to motion to correct illegal sentence). Given the presumption in favor of jurisdiction, our jurisdictional inquiry is guided by the "plausibility" of the defendant's claim, rather than its ultimate legal correctness. In re Santiago G., supra, 232-33.

In determining whether it is plausible that the defendant's motion challenged the sentence, rather than the underlying trial or conviction, we consider the nature of the specific legal claim raised therein. See State v. Henderson, supra, 130 Conn. App. 441. As we understand the defendant's claims in the present appeal, he does not ask us to disturb his conviction under § 21a-278 (b), or otherwise claim that he was convicted under the wrong **[**18]** statute. Instead, the defendant seeks resentencing, claiming that § 21a-278 (b) merely enhances the penalty available under § 21a-277 (a) when those statutes are read with the judicial gloss rendered necessary by the United States Supreme Court's decisions in **[*785]** Alleyne v. United States, supra, 570 U.S. 99, and Apprendi v. New Jersey, supra, 530 U.S. 466.[14]

Given the otherwise identical statutory language of §§ 21a-277 (a) and 21a-278 (b), and the lack of any case **[*786]** law from this court squarely rejecting the defendant's proffered interpretation of § 21a-278 (b) as merely providing a penalty enhancement in view of the Supreme Court's decision in *Alleyne*, which extended the protections of *Apprendi* to mandatory minimum sentences; see Alleyne v. United States, supra, 570 U.S. 103; we conclude that the defendant's interpretation of the narcotics statutory scheme is sufficiently plausible to render it colorable for the purpose of jurisdiction over his motion. See In re Santiago G., supra, 325 Conn. 233-34 (dismissing appeal for lack of final judgment from denial of motion to

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[14] Specifically, the defendant argues in his brief that §§ 21a-277 (a) and 21a-278 (b) are, in fact, the same offense insofar as they prohibit "identical conduct." He claims that § 21a-277 serves as the "base offense" and that the addition of drug dependency language renders § 21a-278 (b) simply an aggravated form of § 21a-277 (a) for purposes of proof as an element under federal constitutional law. He suggests, therefore, that he should be resentenced under § 21a-277 (a), with a maximum of fifteen years imprisonment and no mandatory minimum, insofar as § 21a-278 (b) only precludes the trial court from suspending, rather than reducing, the mandatory minimum. The defendant notes that the trial court "had the discretion to impose a nonmandatory minimum portion of the sentence by reducing the mandatory minimum sentence to no mandatory minimum," observing that, "although the mandatory minimum [under § 21a-278 (b)] is nonsuspendable, it is not nonreducible." Cf. General Statutes § 53a-59a (d) (providing in relevant part that "[a]ny person found guilty under this section shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court"); General Statutes § 53a-70a (a) (2) ("ten years of the sentence imposed may not be suspended or reduced by the court"). The defendant also emphasizes that, "although § 21a-278 (b) does not provide for . . . a nonmandatory sentence, such a sentence is permissible because §§ 21a-278 (b) and 21a-277 (a) have the same essential elements . . . and § 21a-277 (a) provides for a sentence without a mandatory minimum." (Citation omitted.) See also General Statutes § 21a-283a (in sentencing defendant under certain narcotics statutes, including § 21a-278 (b), when facts of underlying offense "did not involve the use, attempted use or threatened use of physical force against another person or result in the physical injury or serious physical injury of another person, and in the commission of

intervene in termination of parental rights action because there was no colorable claim given unchallenged Appellate Court case law rejecting existence of such right). In particular, the fact that the defendant does not ask us to disturb his conviction under § 21a-278 (b), but merely seeks remand for resentencing, renders this case distinguishable from *State v. Lawrence*, supra, 281 Conn. 151, 158-59, in [**19] which we concluded that the trial court lacked jurisdiction over a motion to correct claiming that court had improperly convicted the defendant of manslaughter in the first degree with a firearm, rather than simply manslaughter in the first degree, following his successful assertion of the affirmative defense of extreme emotional disturbance.[15]

[*787] Indulging the presumption in favor of jurisdiction, we conclude that the trial court had subject matter jurisdiction over the defendant's motion to correct. In this case, the defendant's claims challenge the validity of *State v. Ray*, supra, 290 Conn. 602, in which we concluded that the defendant bore the burden of proving drug dependency, through the lens of *Alleyne*, which extended *Apprendi* to mandatory minimum sentences.[16] Because this claim is colorably

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which such person neither was armed with nor threatened the use of or displayed or represented by word or conduct that such person possessed any firearm, deadly weapon or dangerous instrument . . . the court may, upon a showing of good cause by the defendant, depart from the prescribed mandatory minimum sentence, provided the provisions of this section have not previously been invoked on the defendant's behalf and the court, at the time of sentencing, states in open court the reasons for imposing the particular sentence and the specific reason for imposing a sentence that departs from the prescribed mandatory minimum sentence"). Given this interpretation of the statutory scheme, the defendant then argues in his reply brief that "the remedy for an *Apprendi* or *Alleyne* error is to correct the sentence, not vacate the conviction," and that the "court has the common-law authority, as codified in [*Practice Book*] § 43-22, to hear an argument that a sentence is illegal because it exceeds the statutorily authorized sentence, and to order that such sentence be corrected so that it is legal and within the proper sentencing guidelines."

[15] For other illustrative authorities with respect to the limits of a court's jurisdiction over a motion to correct an illegal sentence, compare *State v. Delgado*, supra, 323 Conn. 809 n.6 (trial court had jurisdiction over motion to correct claiming that sentence of life without parole for juvenile, without consideration of mitigating factors, violated ***eighth amendment***), *State v. Martin M.*, 143 Conn. App. 140, 143-44, 70 A.3d 135 and n.1, 143 Conn. App. 140, 70 A.3d 135 (trial court had jurisdiction over motion to correct claiming that sentencing court improperly relied on subsequently reversed kidnapping conviction in determining sentence), cert. denied, ***309 Conn. 919, 70 A.3d 41 (2013)***, and *State v. Koslik*, supra, 116 Conn. App. 700-701 (trial court had jurisdiction over motion to correct claiming that sentencing court had failed to make finding regarding repayment to victim that would permit imposition of three years of probation), with *State v. Robles*, 169 Conn. App. 127, 135, 150 A.3d 687 (2016) (trial court lacked jurisdiction over motion to correct claiming that sentence was illegal because it resulted from "guilty pleas to the kidnapping charges [that] are invalid as a result of [*State v. Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008)] and its progeny"), cert. denied, ***324 Conn. 906, 152 A.3d 544 (2017)***, *State v. Brescia*, 122 Conn. App. 601, 606-607, 999 A.2d 848 (2010) (trial court lacked subject matter jurisdiction over motion to correct claiming that evidence only supported plea to conspiracy to commit forgery in second degree, rather than first degree, because sentence was legally authorized for first degree conviction), and *State v. Starks*, 121 Conn. App. 581, 589-90, 997 A.2d 546 (2010) (no jurisdiction over motion to correct, which was impermissible "collateral attack" on conviction, when "gravamen of the claim [was] that, at trial, the state did not present evidence sufficient to demonstrate that the defendant had violated § 21a-278 [b]" with respect to requisite quantity of drugs).

[16] We acknowledge that our recent decision in *State v. Delgado*, supra, 323 Conn. 801, appeared to analyze a motion to correct an illegal sentence in jurisdictional terms when subsequent legal developments affected its merits. In 2014, the defendant in *Delgado* filed a motion to correct, claiming that his sentence of sixty-five years imprisonment without parole was illegal under the United States Supreme Court's juvenile sentencing cases, including *Miller v. Alabama*, 567 U.S. 460, 465, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). See *State v. Delgado*, supra, 803-807. The trial court dismissed the motion for lack of jurisdiction on the basis of its conclusion that *Miller* did not apply to the case. *Id.*, 809 n.6. On appeal, we first agreed with the state's concession that the trial court had improperly dismissed the motion because it raised a "viable claim by alleging that a sentence of life imprisonment without parole had been imposed without consideration of youth related mitigating factors." Id. Considering the effect of subsequently enacted legislation that afforded the defendant an opportunity for parole; see ***General Statutes § 54-125a***; Public Acts 2015, No. 15-84; we then concluded, as an "exception" to the "general principle that jurisdiction once acquired is not lost or divested by subsequent events," that, "the legal landscape concerning juvenile sentencing laws has changed so significantly that the remaining claims, which would have required resentencing when the motion to correct

directed to the **[*788]** validity of the sentence rather than the underlying conviction, we conclude that the trial court properly exercised jurisdiction over the defendant's motion to correct.

B

The state also contends that the defendant's claims are moot because his sentence arises from his guilty plea to violating § 21a-278 (b), which included the acceptance of the specific period of five years imprisonment in exchange for **[**20]** the benefit of relief on other pending charges. The state contends that this plea amounted to a waiver of his right to a jury determination of the fact of drug dependency, and meant that the trial court did not engage in judicial fact-finding forbidden by *Alleyne*, thus rendering no practical relief available in this case. In response, the defendant relies on State v. Reynolds, 126 Conn. App. 291, 11 A.3d 198 (2011), and State v. Kokkinakos, 143 Conn. App. 76, 66 A.3d 936 (2013), overruled in part on other grounds by State v. Henderson, 312 Conn. 585, 94 A.3d 614 (2014), to argue that his claim is not moot because a guilty plea to an offense, without an acknowledgment on the record from the defendant as to the specific facts that would trigger the increased sentence, does not waive **[*789]** the predicate finding for enhancement. We agree with the defendant and conclude that this claim is not moot.

HN9[↑] "Mootness implicates a court's subject matter jurisdiction and, therefore, presents a question of law over which we exercise plenary review. . . . For a case to be justiciable, it is required, among other things, that there be an actual controversy between or among the parties to the dispute . . . . [T]he requirement of an actual controversy . . . is premised upon the notion that courts are called upon to determine existing controversies, and thus may not be used **[**21]** as a vehicle to obtain advisory judicial opinions on points of law. . . . Moreover, [a]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Citations omitted; internal quotation marks omitted.) State v. T.D., 286 Conn. 353, 361, 944 A.2d 288 (2008).

Again assuming that the defendant's interpretation of § 21a-278 (b) in light of *Alleyne* is colorable, we conclude that his *Alford* plea did not render this claim moot. Even if we assume, without deciding, that a guilty plea could affect the court's subject matter jurisdiction over a subsequent motion to correct premised on the failure to make a necessary finding,[17] there was no such **[*790]** plea in the present case. HN10[↑] A guilty plea to an underlying offense does not, in the absence of a specific plea to the specific facts necessary to trigger an enhanced sentence, operate to waive the defendant's right to that specific finding. We find instructive State v. Kokkinakos, supra, 143 Conn. App. 83-85, in which the Appellate Court held that a defendant's plea to part A of an information alleging theft offenses, **[**22]** and part B of the information alleging persistent felony offender status under General Statutes (Rev. to 2007) § 53a-40 (j), operated to waive a *jury* finding that enhancement of his sentence was in the public interest, but not a *court* finding to that effect. The Appellate Court emphasized that the canvass was generally limited to a jury trial on part B of the information, and that the defendant "never expressly admitted that an enhancement of his sentence would serve the public interest." Id., 85-86.

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was filed, no longer require resentencing." (Internal quotation marks omitted.) State v. Delgado, supra, 813. Concluding that the "defendant ha[d] not raised a colorable claim of invalidity that, if decided in his favor, would require resentencing"; id., 812-13; we determined that "the trial court no longer possesse[d] jurisdiction over the defendant's motion to correct." Id., 813.

We emphasize that Delgado does not stand for the proposition that the merits of a motion to correct are a jurisprudential ouroboros that are inextricably intertwined with the court's jurisdiction over the motion. Rather, we understand *Delgado* to be, in essence, a mootness decision, insofar as the subsequent statutory changes afforded the defendant all of the relief to which he was entitled from his pending motion to correct. See also St. Pierre v. Solnit, 233 Conn. 398, 401, 658 A.2d 977 (1995); Connecticut State Medical Society v. Commission on Hospitals & Health Care, 223 Conn. 450, 455, 612 A.2d 1217 (1992).

[17] The doctrinal correctness of this assumption is highly dubious. Our case law suggests that any waiver would not affect the court's jurisdiction over the motion to correct but, rather, the merits with respect to whether the sentence had in fact been imposed in an illegal manner. See State v. T.D., supra, 286 Conn. 360 n.6 (collateral estoppel does not affect court's subject matter jurisdiction); State v. Pecor, 179 Conn. App. 864, 871-72, 181 A.3d 584 (2018) ("[T]he court could have granted the defendant relief by correcting the alleged illegal sentence that had been imposed . . . . Therefore, the issue was not moot. Furthermore, the court's conclusion that it lacked subject matter jurisdiction because the defendant was collaterally estopped from claiming that his new sentence was illegal was incorrect."); see also footnote 16 of this opinion.

The court further rejected the state's argument that, "by virtue of the defendant's guilty plea on the part B information, he admitted to a finding that an enhanced sentence would be in the public interest." *Id., 86*; see *id., 87* ("[T]here are two ways in which the public interest factor can be satisfied in the context of a guilty plea. The court can make an express finding, or the defendant can expressly agree to the determination."); see also *State v. Abraham, supra, 152 Conn. App. 722-23* (trial court improperly relied on guilty plea to part B of information in dismissing motion to correct challenging firearms enhancement under *General Statutes § 53-202k* for lack of requisite jury findings); *State v. Reynolds, supra, 126 Conn. App. 312* (concluding that remand was required because, "[a]fter the defendant made his guilty plea to the charge of being a persistent serious **[**23]** felony offender, the trial court did not make such a finding, nor did the defendant stipulate or acknowledge that extended incarceration is in the public interest"). Turning to the record in the present case, we conclude that **[*791]** there was no waiver insofar as the defendant did not admit to lack of drug dependency, and the prosecutor's recitation of the facts did not contemplate that topic. See footnote 5 of this opinion. Accordingly, we conclude that the defendant's *Alford* plea did not render this claim moot.[18]

II

We now turn to the principal issue in the present appeal, namely, the defendant's request that we overrule *State v. Ray, supra, 290 Conn. 602*, in which we held that ***HN11***[↑] not requiring the state to plead and prove lack of drug dependency under *§ 21a-278 (b)* does not violate *Apprendi v. New Jersey, supra, 530 U.S. 466*, because drug dependency is an affirmative defense that would mitigate a sentence. The defendant contends that we should overrule *Ray* because (1) the Supreme Court's subsequent decision in *Alleyne v. United States, supra, 570 U.S. 99*, requires the state to plead and prove beyond a reasonable doubt those facts, such as lack of drug dependency under *§ 21a-278 (b)*, which trigger mandatory minimum sentences, and (2) *Ray* was wrongly decided as a matter of statutory interpretation.

Our consideration of these claims **[**24]** is informed by a detailed review of *§ 21a-278 (b)* and our 2009 decision in *Ray*. *Section 21a-278 (b)* provides in relevant part that "[a]ny person who . . . sells . . . to another person any narcotic substance . . . and who is not, at the time of such action, a drug-dependent person, for a first offense shall be imprisoned not less than five years or **[*792]** more than twenty years . . . ." See also footnote 1 of this opinion. In *Ray*, the defendant contended, inter alia, that "(1) this court's previous cases construing *§ 21a-278 (b)* and *General Statutes § 21a-269*[19] to require the defendant to prove by a preponderance of the evidence that he was drug-dependent were wrongly decided; [and] (2) if our interpretation of the statutes in those cases was correct, the requirement that he prove his dependence on drugs under *§§ 21a-278 (b)* and *21a-269* violates his due process right to have every element of the offense proved beyond a reasonable doubt . . . ." (Footnote in original.) *State v. Ray, supra, 290 Conn. 605-606*.

In *State v. Ray, supra, 290 Conn. 609-13*, we first addressed the vitality of this court's cases considering the proof of drug dependency under *§ 21a-278 (b)* in conjunction with *§ 21a-269*, in particular *State v. Januszewski, 182 Conn. 142, 438 A.2d 679 (1980)*, cert. denied, *453 U.S. 922, 101 S. Ct. 3159, 69 L. Ed. 2d 1005 (1981)*, and *State v. Hart, 221 Conn. 595, 605 A.2d 1366 (1992)*. In *Januszewski*, this court held that, under the predecessor statutes to *§§ 21a-269* and *21a-278*, the burden was on the defendant to produce "some substantial evidence tending **[**25]** to prove his drug dependency at the time of the offense" in order to make "the matter of his drug dependency . . . an issue in the case . . . ." *State v. Januszewski, supra, 169*. Once the defendant placed his drug dependency in issue, the "burden rest[ed] on the state, as it does in all other essential elements in the case, to prove beyond a reasonable doubt that the accused was not entitled to the benefit **[*793]** of [the] excuse, proviso or exemption

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[18] Given relevant and unchallenged Connecticut authority, we decline to follow the unreported decision in *People v. Faher, Docket No. 328285, 2016 Mich. App. LEXIS 1941, 2016 WL 6127902, *4 (Mich. App. October 18, 2016)*, on which the state relies for the proposition that "when a sentencing court imposes a sentence pursuant to the terms of a plea agreement bargained for and accepted by the defendant, the sentence is not affected by the court's perception of the mandatory or advisory nature of the sentencing guidelines; thus the constitutional concerns underpinning . . . *Alleyne* are not implicated."

[19] *General Statutes § 21a-269* provides: "In any complaint, information or indictment, and in any action or proceeding brought for the enforcement of any provision of this part, it shall not be necessary to negative any exception, excuse, proviso or exemption contained in said section, and the burden of proof of any such exception, excuse, proviso or exemption shall be upon the defendant."

claimed by him." (Internal quotation marks omitted.) Id.

Subsequently, in State v. Hart, supra, 221 Conn. 607, a majority of this court concluded, over a lengthy dissent by Justice Berdon; see footnote 20 of this opinion; that "*Januszewski* had been incorrectly decided and that the defendant should bear the burden of proving by a preponderance of the evidence that he was dependent on drugs under § 21a-278 (b)." State v. Ray, supra, 290 Conn. 610. "The majority [in *Hart*] determined that, under *Januszewski*, the absence of drug dependency was not an element of § 21a-278 (b), but, rather, drug-dependency was an exception to that statute within the meaning of § 21a-269. . . . The majority then concluded that it would 'overly strain the language [of § 21a-269] that places the "burden of proof" on a defendant to construe it merely to mean . . . that the defendant need only raise some evidence **[**26]** of his or her drug dependency to shift the burden to the state to prove a negative, i.e., lack of drug dependency, beyond a reasonable doubt.' . . . Accordingly, a majority of this court overruled what we characterized as dicta in [State v. Brown, 163 Conn. 52, 66-67, 301 A.2d 547 (1972)] and *Januszewski* that, once the defendant has produced some evidence that he is dependent on drugs, the burden shifts to the state to prove beyond a reasonable doubt that the defendant is not drug-dependent. . . . Rather, we concluded that '§ 21a-269 assigns to the defendant the burden of persuading the jury by a preponderance of the evidence that he or she is drug-dependent.' . . .

"Finally, the majority [in *Hart*] rejected the defendant's claim that this construction of § 21a-278 (b) was unconstitutional because it relieved the state of its burden of proving all of the elements of the offense. . . . We noted that, under the decisions of the United States Supreme Court in McMillan v. Pennsylvania, 477 U.S. 79, 85, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), and **[*794]** Patterson v. New York, [432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977)], '[t]he *federal due process clause* does not bar state legislatures from placing the burden on a defendant to prove an affirmative defense or to prove that he or she falls within an exemption to liability for an offense.'" (Citations omitted; footnote omitted.) State v. Ray, supra, 290 Conn. 610-11; see State v. Hart, supra, 221 Conn. 608-11.

Subsequently, in *Ray*, we declined the defendant's invitation **[**27]** to follow the analysis of Justice Berdon's dissent in *Hart*,[20] which interpreted § 21a-278 (b) to be "effectively . . . an aggravated form of § 21a-277" and concluded that, "therefore, the 'not . . . a drug-dependent person' language in § 21a-278 (b) constitutes an **[*795]** aggravating factor that must be treated as an element and must be proven by the state." State v. Ray, supra, 290 Conn. 613. Observing specifically that § 21a-278 (b) lacked language "that typically connotes an exception," we acknowledged that "we might find persuasive" the defendant's interpretation in *Ray* of the statute's legislative history and language "[i]f we were writing on a blank slate." Id., 614. Nevertheless, we relied on the doctrine of stare decisis in declining to disturb State v. Hart, supra, 221 Conn. 595, emphasizing the apparent legislative acquiescence to that decision. State v. Ray, supra, 614-15; see id., 615 (finding "significant that the legislature has amended § 21a-278 [b] several times since our decision

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[20] In his dissenting opinion in State v. Hart, supra, 221 Conn. 615-22, "Justice Berdon contended that the absence of drug dependency is an element of § 21a-278 (b) . . . . In support of this contention, he relied on the legislative history of the statute. . . . He noted that the sponsor of the bill, Representative Bernard Avcollie, had stated during debates on the proposed legislation that the intent of the bill is to give the state's attorney and the prosecuting attorney an opportunity to charge [a crime in addition to § 21a-277] which does carry a harder sentence which goes towards imprisoning the person who is not drug-dependent and who is, in fact, selling drugs for a profit. . . . Representative Avcollie also . . . stated that in order to charge under this law, a state's attorney . . . would have to take advantage of [§ 21a-277 (a)] . . . and have the party arrested and examined for drug dependency. In other words, you would first have to prove that he was or was not addicted and then charge him with the crime. . . . Justice Berdon argued that, in light of this legislative history, it was apparent that this court's holding in *Januszewski*, that the absence of drug dependency was not part of the prohibited conduct, was incorrect. . . . Rather, Justice Berdon argued, § 21a-278 (b) was promulgated for the sole purpose of making the charge of possession with intent to sell by a person who is not drug-dependent subject to more severe penalties than already available under existing law. . . .

"Justice Berdon also pointed out that, [i]f an exception is an integral part of the enacting or prohibition clause of a criminal statute, it is deemed an essential element of the crime, and the state must plead and prove that the defendant is not within the exception. . . . Where an exception to a prohibition is situated separately from the enacting clause, the exception is to be proven by the defense." (Citations omitted; footnote omitted; internal quotation marks omitted.) State v. Ray, supra, 290 Conn. 612-13.

in *Hart*, and has chosen not to amend the statute to clarify that the absence of drug dependency was intended to be an element of the offense"). We reemphasized that "public policy militates strongly" in favor of the existing construction, given the difficulty for the state of disproving drug dependency in the first instance; id.; as "[a] defendant's drug dependency at **[**28]** the specific point of time in the past at which the offense occurred is certainly a matter . . . within his own knowledge." (Internal quotation marks omitted.) *State v. Hart*, *supra*, 610; see id. (noting that § 21a-269 "appears to be an implicit recognition by the legislature of the difficulty created when any party is given the burden of proving the nonexistence of a certain fact, especially where, as in this case, the fact is the nonexistence of a physical status of the defendant at one, usually distant, point prior in time," and that, unlike mental disease or defect, rules of practice do not provide "method by which to discover whether drug dependency will be an issue at trial" [internal quotation marks omitted]). Accordingly, in *Ray*, we "decline[d] to overrule our holdings in *Januszewski* and *Hart* that § 21a-278 (b) creates an exception for drug-dependent persons, and that the absence of drug dependency is not **[*796]** an element of the offense. For similar reasons, we decline[d] to overrule our decision in *Hart* that the 'burden of proof' language of § 21a-269 requires the defendant to prove an exception by a preponderance of the evidence." *State v. Ray*, *supra*, 616.

In *Ray*, we next "address[ed] the defendant's claim that the requirement that the defendant prove **[**29]** drug dependency by a preponderance of the evidence under §§ 21a-278 (b) and 21a-269 is unconstitutional under the United States Supreme Court's decision in *Apprendi v. New Jersey*, [*supra*, 530 U.S. 466], and its progeny." *State v. Ray*, *supra*, 290 Conn. 616. In *Apprendi*, the United States Supreme Court held that, ***HN12***[↑] "under the *[d]ue [p]rocess [c]lause of the [f]ifth [a]mendment*, and the notice and jury trial guarantees of the *[s]ixth amendment*, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (Internal quotation marks omitted.) *Apprendi v. New Jersey*, *supra*, 476.

In addressing the defendant's constitutional claim in *Ray*, we first conducted a survey of the relevant case law from the United States Supreme Court leading to *Apprendi*, namely, *Patterson v. New York*, *supra*, 432 U.S. 197, *McMillan v. Pennsylvania*, *supra*, 477 U.S. 79, and *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).[21] See *State v. Ray*, *supra*, 290 **[*797]** Conn. 618-22. Applying the principles of those cases, we concluded in *Ray* "that placing the burden on the defendant to prove by a preponderance of the evidence a fact—drug dependency—that affects the severity of his punishment under § 21a-278 (b)" is not unconstitutional. *Id.*, 623. We emphasized that the "defendant has not cited, and our research has not revealed, any authority for the proposition that drug dependency is the type of fact that constitutionally may not be treated **[**30]** as an affirmative defense under *Patterson v. New York*, *supra*, 432 U.S. 210. . . . Accordingly, the statute falls squarely within the holding of *Patterson* that the states constitutionally may treat mitigating circumstances as affirmative defenses. . . . We conclude, therefore, that ***HN13***[↑] placing the burden on the defendant to prove drug dependency under the statute is constitutional."[22] (Citation **[*798]**

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[21] We determined from this survey that "*Apprendi* did not change the constitutional landscape and that the holdings of *Mullaney*, *Patterson*, *McMillan* and *Apprendi* can be readily reconciled. First, under *Mullaney*, if a state chooses to treat a fact as an element of an offense, the state must prove that fact beyond a reasonable doubt, even if the state constitutionally could have treated the fact as an affirmative defense. . . . Second, under *Patterson*, if a state chooses to recognize a mitigating circumstance as an affirmative defense, it is not required 'to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate.' . . . There are, however, 'constitutional limits beyond which the [s]tates may not go in this regard.' . . . For example, a state constitutionally could not treat the fact that the defendant did not commit any of the conduct of which he is accused as an affirmative defense. . . . Third, under *McMillan*, a fact that exposes the defendant to a mandatory minimum sentence *within* the range allowed by the jury's verdict need not be found by the jury beyond a reasonable doubt. . . . Fourth, under *Apprendi*, if a fact allows the sentencing court to impose a punishment *exceeding* the range authorized by the jury's verdict, that fact has the character of an element despite its label as a sentence enhancement." (Citations omitted; emphasis in original; footnote omitted.) *State v. Ray*, *supra*, 290 Conn. 622-23.

[22] In disagreeing with the defendant's reliance in *Ray* on the structure of §§ 21a-277 (a) and 21a-278 (b) as indicating that lack of drug dependency is an aggravating factor under *Apprendi* insofar as the statutes "are identical, but the punishment for a violation of § 21a-278 (b) is more severe," we emphasized that, as "construed by this court in *State v. Januszewski*, *supra*, 182 Conn. 162-69, and *State v. Hart*,

omitted.) State v. Ray, supra, 624; see also id., 626 ("it is not unconstitutional to require the defendant to prove his drug dependency by a preponderance of the evidence under §§ 21a-278 (b) and 21a-269"). With this review of *Ray* in mind, we now turn to the defendant's claims in the present appeal.

A

We begin with the defendant's claim that the Supreme Court's decision in Alleyne v. United States, supra, 570 U.S. 99, requires us to overrule State v. Ray, supra, 290 Conn. 602, in which we held that the state was not constitutionally required to prove lack of drug dependency under § 21a-278 (b) because it is an affirmative defense that would mitigate a sentence. The defendant argues that *Ray*'s analysis of § 21a-278 (b) is improperly formalistic, in contrast to the substantive inquiry required by *Apprendi* and *Alleyne*, which requires consideration of the "effect" of the statutory language. The defendant **[**31]** contends that lack of drug dependency has the effect of increasing punishment "above what is otherwise legally prescribed"; Alleyne v. United States, supra, 108; by the otherwise identical § 21a-277 (a) and, therefore, is an element of the offense to be proven by the state. Accordingly, the defendant argues that the imposition of a mandatory minimum sentence was improper because the state did not prove, nor did the defendant admit, a lack of drug dependency. In response, the state contends that *Alleyne* does not undermine *Ray* because *Alleyne* is merely an extension of *Apprendi*, and we recognized in *Ray* that *Apprendi* neither affected facts that apply to mitigate a defendant's punishment or liability, nor overruled Patterson v. New York, supra, 432 U.S. 210, which held that states, consistent with due process, may treat mitigating circumstances as affirmative defenses that the defendant must prove by a preponderance of the evidence. We agree with the state and conclude that the constitutional **[*799]** analysis in *Ray* remains good law subsequent to the United States Supreme Court's decision in *Alleyne*.

In *Alleyne*, the Supreme Court considered whether to overrule Harris v. United States, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002), which had "held that judicial [fact-finding] that increases the mandatory minimum sentence for a crime is permissible under **[**32]** the *[s]ixth [a]mendment*." Alleyne v. United States, supra, 570 U.S. 103. The Supreme Court noted that "*Harris* drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum," and overruled *Harris* and its earlier decision in McMillan v. Pennsylvania, supra, 477 U.S. 79, because "this distinction is inconsistent with our decision in Apprendi v. New Jersey, [supra, 530 U.S. 466], and with the original meaning of the *[s]ixth [a]mendment*. Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt. . . . Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." (Citation omitted.) Alleyne v. United States, supra, 103; see also id., 118 (Sotomayor, J., concurring) (recognizing overruling of *McMillan*). The court determined that the "essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime. It must, therefore, be submitted to the jury and found beyond a reasonable doubt."[23] Id., 115-16; see also United States v. Delgado-Marrero, ***[*800]*** 744 F.3d 167, 191-92 (1st Cir. 2014) (failure to obtain jury findings of drug

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supra, 221 Conn. 607-11, the absence of drug dependency does not increase the penalty for the conduct prohibited by § 21a-277 (a). Rather, drug dependency is an affirmative defense to charges that the defendant engaged in the conduct prohibited by § 21a-278 (b), which happens to be the same as the conduct that is prohibited by § 21a-277 (a). In other words, it is not the absence of drug dependency that increases the range of punishment to which the accused is exposed under § 21a-277 (a), but rather, it is the presence of drug dependency that decreases the range of punishment to which the accused is exposed under § 21a-278 (b)." State v. Ray, supra, 290 Conn. 624-25. We acknowledged that "this distinction is formalistic" but emphasized that such "[f]ormal distinctions . . . can be constitutionally significant" under the case law of the United States Supreme Court, which defers to the construction of state law by the state's highest court in determining whether it passes constitutional muster. Id., 625-26.

[23] The Supreme Court emphasized, however, that in "holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial [fact-finding], does not violate the ***[s]ixth [a]mendment***." Alleyne v. United States, supra, 570 U.S. 116. The court stated that "[e]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things. . . . Our decision today is wholly consistent with the broad discretion of judges to select a sentence within the range authorized by law." (Citation omitted; internal quotation marks omitted.) Id., 117.

quantities required reversal of "aggravated crimes" triggering mandatory [**33] minimum sentence, but not underlying "core" narcotics and conspiracy offenses that did not have quantity as element, allowing for defendant to be "subject . . . to the default statutory range of penalties . . . regardless of the drug quantity involved"); State v. Estrella J.C., 169 Conn. App. 56, 87-89, 148 A.3d 594 (2016) (noting that *Alleyne* required trial court to instruct jury that it had make specific finding that victim was under age of thirteen years at time of commission of crime for purposes of mandatory minimum under General Statutes § 53-21 [a] [2], but concluding that failure to do so was harmless error given lack of dispute over victim's age and fact that she was eleven years old at trial).

In considering whether *Alleyne* requires us to overrule *Ray*, we deem significant that *Alleyne*, like *Apprendi*, on which *Alleyne* is based, accords with Patterson v. New York, supra, 432 U.S. 197, insofar as it does not preclude states from utilizing affirmative defenses to mitigate or eliminate criminal liability. The decision of the United States Court of Appeals for the Seventh Circuit in United States v. Zuniga, 767 F.3d 712 (7th Cir. 2014), cert. denied, U.S. , 135 S. Ct. 1018, 190 L. Ed. 2d 886 (2015), is instructive on this point. In *Zuniga*, the Seventh Circuit, following its earlier decision in United States v. Brown, 276 F.3d 930, 933 (7th Cir.), cert. denied, 537 U.S. 829, 123 S. Ct. 126, 154 L. Ed. 2d 43 (2002), rejected an *Apprendi* challenge to the federal *Armed Career Criminal Act*, which placed the burden on the defendant [**34] to prove that his offense did not qualify as a serious violent felony for purposes [*801] of relief from the federal "three strikes" law; see *18 U.S.C. § 921 (a) (20) (2012)*; because, "while the prosecution must prove all elements of the charged offense beyond a reasonable doubt, legislation that creates affirmative defenses can place the burden of proving that affirmative defense on the defendant without violating *Apprendi*."[24] United States v. Zuniga, supra, 718-19. The Seventh Circuit reasoned that, because "the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum [under *Alleyne*] there is no reason we cannot apply the logic used in *Brown* . . . ." Id., 719. Emphasizing that multiple circuit courts of appeals had previously interpreted the civil rights restoration section of the three strikes law to be an affirmative defense, rather than an element of the offense, the Seventh Circuit concluded that "the [D]istrict [C]ourt properly decided whether [the defendant's] civil rights were restored because the underlying facts that could support that determination constitute an affirmative defense, not an element of the offense, and are not covered by *Alleyne*." Id.; see also, e.g., United States v. Blake, 858 F.3d 1134, 1137 (8th Cir.) (*Alleyne* did not require fact-finding [**35] by jury with respect to robbery safety valve under federal three strikes statute, 18 U.S.C. § 3559 [c] [3] [A], because it is affirmative [*802] defense that decreases sentence from mandatory life term), cert. denied, U.S. , 138 S. Ct. 257, 199 L. Ed. 2d 166 (2017); United States v. Lizarraga-Carrizales, 757 F.3d 995, 999 (9th Cir. 2014) (*Alleyne* did not require fact-finding by jury with respect to criminal history points for purposes of safety valve relief from narcotics mandatory minimum sentences under *18 U.S.C. § 3553 [f] [1]* because defendant bears burden of proving entitlement), cert. denied, U.S. , 135 S. Ct. 1191, 191 L. Ed. 2d 145 (2015); United States v. Harakaly, 734 F.3d 88, 99 (1st Cir. 2013) (Rejecting *Alleyne* challenge to District Court's finding, for purposes of safety valve under *18 U.S.C. § 3553 [f] [4]*, that defendant had managerial role in narcotics conspiracy because "the jury verdict or guilty plea sets the baseline sentencing range based upon the minimum and maximum sentences, if any, authorized by statute for the offense of conviction. Judicial fact-finding that precludes safety-valve relief is permissible because it does not increase that baseline minimum sentence."), cert. denied, U.S. , 134 S. Ct. 1530, 188 L. Ed. 2d 462 (2014).

We conclude that State v. Ray, supra, 290 Conn. 602, remains good law in the wake of *Alleyne*. Although *Alleyne* extended *Apprendi* to mandatory minimum sentences, *Alleyne* did *not* disturb those portions of

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[24] Like *Ray* and *Brown*, other federal circuit courts of appeals have held that affirmative defenses eliminating or mitigating criminal liability do not violate *Apprendi*. See, e.g., United States v. Thompson, 554 F.3d 450, 455 (4th Cir.) (noting that interpretation of ***18 U.S.C. § 3553 [f]*** "safety valve" statute for sentencing guidelines requiring defendant to prove entitlement amounted to affirmative defense that did not violate *Apprendi*), cert. denied, ***558 U.S. 870, 130 S. Ct. 191, 175 L. Ed. 2d 120 (2009)***; United States v. Snype, 441 F.3d 119, 151-52 (2d Cir.) (no *Apprendi* violation when defendant must prove entitlement to relief from life sentence dictated by three strikes statute by clear and convincing evidence), cert. denied, ***549 U.S. 923, 127 S. Ct. 285, 166 L. Ed. 2d 218 (2006)***; United States v. Tarallo, 380 F.3d 1174, 1192 (9th Cir. 2004) (requiring defendant to prove lack of knowledge as to existence of certain federal securities laws "does not run afoul of *Apprendi* because it establishes a partial affirmative defense, not an element of the crime"), modified on other grounds, ***413 F.3d 928 (9th Cir. 2005)***.

Apprendi that reaffirmed *Patterson v. New York*, supra, 432 U.S. 208-10, which upheld the states' prerogative to utilize **[**36]** affirmative defenses to mitigate or eliminate criminal liability without running afoul of due process. Moreover, *Alleyne* did nothing to disturb long-standing Supreme Court precedent holding that ***HN14***[☎] whether a sentencing factor is, in essence, an element requiring the state to plead and prove it beyond a reasonable doubt, or an affirmative defense, the pleading and proof of which may be allocated to the defendant, is a matter of state law for "authoritative" determination by state **[*803]** courts interpreting state statutes; *Ring v. Arizona*, 536 U.S. 584, 603, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); insofar as "state courts are the ultimate expositors of state law," binding the federal courts "except in extreme circumstances . . . ." *Mullaney v. Wilbur*, supra, 421 U.S. 691; see also, e.g., *Riley v. Kennedy*, 553 U.S. 406, 425, 128 S. Ct. 1970, 170 L. Ed. 2d 837 (2008); *Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005). Accordingly, we now turn to the defendant's request that we reinterpret § 21a-278 (b) to render lack of drug dependency an element of that offense, thus requiring the state to plead and prove a lack of drug dependency to trigger the mandatory minimum sentence, in order for the statute to pass constitutional muster under *Alleyne*.

B

The defendant asks us to overrule *State v. Ray*, supra, 290 Conn. 624, as a matter of statutory interpretation, contending that the construction process required by *General Statutes* § 1-2z demonstrates that lack of drug dependency under § 21a-278 (b) is an element to be proven **[**37]** by the state, rather than an affirmative defense to be pleaded and proven by the defendant. In particular, the defendant compares § 21a-278 (b) to other criminal statutes and emphasizes its lack of language signaling that drug dependency is an affirmative defense, and that other criminal statutes treat the absence of a fact, such as consent, as an element. The defendant also relies on legislative history supporting the proposition that "[t]he enactment of § 21a-278 (b) . . . was intended to create an aggravated form of § 21a-277 (a), with a harsher punishment for nonaddicted predators who sold drugs for profit." In response, the state contends that the doctrine of stare decisis counsels in favor of not overruling *Ray*, emphasizing recent amendments to §§ 21a-277 (a) and 21a-278 (b) **[*804]** in P.A. 17-17,[25] by which the legislature specifically intended to clarify, but not substantively change, the narcotics statutes. We agree with the state and decline the defendant's invitation to overrule *Ray* as a matter of statutory construction.

The governing principles are well settled. ***HN15***[☎] "The doctrine of stare decisis counsels that **[**38]** a court should not **[*805]** overrule its earlier decisions unless the most cogent reasons and inescapable logic require

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[25] P.A. 17-17 repealed the existing language in §§ 21a-277 (a) and (b), and 21a-278 (a) and (b). With respect to the statutory subsections at issue in the present appeal, P.A. 17-17, § 1, replaced the language previously contained in § 21a-277 (a); see footnote 3 of this opinion; with the following: "(1) No person may manufacture, distribute, sell, prescribe, dispense, compound, transport with the intent to sell or dispense, possess with the intent to sell or dispense, offer, give or administer to another person, except as authorized in this chapter, any controlled substance that is a (A) narcotic substance, or (B) hallucinogenic substance.

"(2) Any person who violates subdivision (1) of this subsection (A) for a first offense, shall be imprisoned not more than fifteen years and may be fined not more than fifty thousand dollars, or be both fined and imprisoned, (B) for a second offense, shall be imprisoned not more than thirty years and may be fined not more than one hundred thousand dollars, or be both fined and imprisoned, and (C) for any subsequent offense, shall be imprisoned not more than thirty years and may be fined not more than two hundred fifty thousand dollars, or be both fined and imprisoned."

P.A. 17-17, § 2, replaced the language previously contained within § 21a-278 (b); see footnote 1 of this opinion; with the following: "(1) No person may manufacture, distribute, sell, prescribe, dispense, compound, transport with the intent to sell or dispense, possess with the intent to sell or dispense, offer, give or administer to another person, except as authorized in this chapter or chapter 420f, (A) a narcotic substance, (B) a hallucinogenic substance, (C) an amphetamine-type substance, or (D) one kilogram or more of a cannabis-type substance. *The provisions of this subdivision shall not apply to a person who is, at the time of the commission of the offense, a drug-dependent person.*

"(2) Any person who violates subdivision (1) of this subsection (A) for a first offense, shall be imprisoned not less than five years or more than twenty years, and (B) for any subsequent offense, shall be imprisoned not less than ten years or more than twenty-five years. The execution of the mandatory minimum sentence imposed by the provisions of this subdivision shall not be suspended, except that the court may suspend the execution of such mandatory minimum sentence if, at the time of the commission of the offense, such person was under the age of eighteen years or such person's mental capacity was significantly impaired, but not so impaired as to constitute a defense to prosecution." (Emphasis added.)

it. . . . Stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency. . . . It is the most important application of a theory of decisionmaking consistency in our legal culture and . . . is an obvious manifestation of the notion that decisionmaking consistency itself has normative value. . . .

HN16[↑] "Moreover, [i]n evaluating the force of stare decisis, our case law dictates that we should be especially wary of overturning a decision that involves the construction of a statute. . . . When we construe a statute, we act not as plenary lawgivers but as surrogates for another policy maker, [that is] the legislature. In our role as surrogates, our only responsibility is to determine what the legislature, within constitutional limits, intended to do. Sometimes, when we have made such a determination, the legislature instructs us that we have misconstrued its intentions. We are bound by the instructions so provided. . . . More **[**39]** often, however, the legislature takes no further action to clarify its intentions. Time and again, we have characterized the failure of the legislature to take corrective action as manifesting the legislature's acquiescence in our construction of a statute. . . . Once an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative acquiescence places a significant jurisprudential limitation on our own authority to reconsider the merits of our earlier decision. . . .

HN17[↑] "Factors that may justify overruling a prior decision interpreting a statutory provision include intervening developments in the law, the potential for unconscionable results, the potential for irreconcilable conflicts and difficulty in applying the interpretation. . . . In addition, **[*806]** a departure from precedent may be justified when the rule to be discarded may not be reasonably supposed to have determined the conduct of the litigants . . . ." (Citations omitted; internal quotation marks omitted.) *Spiotti v. Wolcott*, 326 Conn. 190, 201-203, 163 A.3d 46 (2017); see also, e.g., *State v. Ray*, supra, 290 Conn. 614-15; *State v. Salamon*, 287 Conn. 509, 519-22, 949 A.2d 1092 (2008).

As we observed in *State v. Ray*, supra, 290 Conn. 614, "[i]f we were writing on a blank slate, we might find persuasive" the defendant's interpretation of § 21a-278 (b), given the **[**40]** language of the statute and the fact that it "finds some support in the chronology of the statutes and the [statute's] legislative history . . . ." The doctrine of legislative acquiescence has, however, even more strength now than when we considered the identical issue in *Ray*. As the state points out, the legislature very recently amended our narcotics statutes in P.A. 17-17, "An Act Implementing the Recommendations of the Connecticut Sentencing Commission Concerning a Technical Reorganization of Statutes Involving the Illegal Sale of Controlled Substances." The amendments did not in any way change the language of § 21a-278 (b) that we considered in *Ray*, which is strongly indicative of legislative acquiescence to the interpretation in that case. See P.A. 17-17, § 2; see also footnotes 1 and 25 of this opinion.

Moreover, the legislative history of P.A. 17-17 demonstrates that the amendments, which were recommended by the Connecticut Sentencing Commission after collaboration between the Judicial Branch, the Office of the Chief Public Defender, and the Division of Criminal Justice, were intended to be clarifying and *not* to make substantive changes to the narcotics statutes.[26] **[*807]** See 60 S. Proc., Pt. 2,

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[26] The testimony of the various stakeholders before the Judiciary Committee in support of the bill subsequently enacted as P.A. 17-17 further indicates that the legislature did not intend its amendments to the narcotics statutes to effect substantive changes. See, e.g., *In re Elianah T.-T.*, 326 Conn. 614, 625 n.10, 165 A.3d 1236 ("[i]t is now well settled that testimony before legislative committees may be considered in determining the particular problem or issue that the legislature sought to address by the legislation" [internal quotation marks omitted]). For example, a statement issued by the Division of Criminal Justice in support of the bill described the proposed changes as "strictly technical in nature" and "designed to make the statute clearer with *no substantive changes*." (Emphasis added.) Conn. Joint Standing Committee Hearings, Judiciary, Pt. 8, 2017 Sess., p. 4253; see also id., pp. 4251-52, written remarks of Alex Tsarkov, executive director of the Connecticut Sentencing Commission (stating that "[t]his bill recognizes the need to improve the organization and comprehensibility of statutes concerning the illegal sale of controlled substances," and describing bill as "a small and technical fix" that did not classify offenses, change existing penalties, or change statutory placements or designations of offenses); id., p. 4254, written remarks of Judicial Branch (bill was intended to "create a statute that is neutral as to content, but that would read more clearly than existing law"); id., p. 4254A, written remarks of Deborah Del Prete Sullivan, Legal Counsel, Office of the Chief Public Defender ("[t]he proposed language clarifies the narcotic statutes to make them easier to interpret and apply").

2017 **[**41]** Sess., p. 797, remarks of Senator John Kissel (stating that bill "essentially in a nutshell rationalizes this section of the statutes but in no way changes any of the substance of our criminal justice laws affecting drugs and drug law violations"); 60 H.R. Proc., Pt. 9, 2017 Sess., p. 3594, remarks of Representative Steven Stafstrom ("This bill comes to us from our sentencing commission and recommends technical changes to reorganize our drug statutes in order to make them more user and reader friendly. I will emphasize that this bill . . . does not in any way change any of the existing penalties under our drug statutes.").

HN18[↑] "[T]he legislature is presumed to be aware of the [courts'] interpretation of a statute and . . . its subsequent nonaction may be understood as a validation of that interpretation, particularly when it affirmatively amended the statute subsequent to [such] interpretation, **[*808]** but chose not to amend the specific provision of the statute at issue." (Internal quotation marks omitted.) *Dairyland Ins. Co. v. Mitchell, 320 Conn. 205, 215, 128 A.3d 931 (2016)*; see, e.g., *Spiotti v. Wolcott, supra, 326 Conn. 203* (declining to overrule *Genovese v. Gallo Wine Merchants, Inc., 226 Conn. 475, 628 A.2d 946 [1993]*, because legislature had, over twenty-four year period, "taken no action that would suggest that it disagreed with our conclusion **[**42]** that *[General Statutes] § 31-51bb* was intended to bar the application of the doctrine of collateral estoppel to claims of statutory and constitutional violations brought after a claim involving the same issues had been finally resolved in grievance procedures or arbitration," despite this court's "implicit invitation" to reconsider that statute); *In re Tyriq T., 313 Conn. 99, 114, 96 A.3d 494 (2014)* ("[b]y choosing not to legislatively overrule *In re Daniel H., [237 Conn. 364, 678 A.2d 462 (1996)]*, the legislature has acquiesced to this court's interpretation that the deletion of the final judgment language from the mandatory transfer provision was the elimination of the right to an immediate appeal"). Given the very recent changes to our narcotics statutes in P.A. 17-17, the language and legislative history of which demonstrate that the legislature did not intend to effect any substantive changes to the law, we similarly decline to disturb our long-standing interpretation of *§ 21a-278 (b)* making drug dependency an affirmative defense, most recently in *State v. Ray, supra, 290 Conn. 602*.

III

Relying largely on this court's decision in *State v. McCahill, 261 Conn. 492, 811 A.2d 667 (2002)*, the defendant also contends that construing drug dependency as an affirmative defense under *§ 21a-278 (b)*, whose elements are "otherwise identical" to *§ 21a-277 (a)*, violates the separation of powers under article second of the Connecticut constitution, as amended by article **[*809]** eighteen of the amendments, **[**43]** by improperly allocating the judicial power of sentencing to the prosecutor, an executive branch actor who chooses the charges to file.[27] In response, the state contends that this issue is controlled by this court's decision in *State v. Darden, 171 Conn. 677, 372 A.2d 99 (1976)*, which rejected a similar separation of powers challenge to a mandatory minimum sentencing scheme in the context of the larceny and robbery statutes. We agree with the state and conclude that *HN19*[↑] the mandatory minimum sentence provision of *§ 21a-278 (b)* does not violate the separation of powers.

"We begin with the well established proposition that *HN20*[↑] [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. . . . In construing a statute, moreover, we will search for an effective and constitutional construction that reasonably accords with the legislature's underlying intent. . . . We also note that, [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. . . .

[*810] *HN21*[↑] "[T]he primary **[**44]** 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

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[27] The defendant seeks review of this unpreserved constitutional claim under *State v. Golding, 213 Conn. 233, 239-40, 567 A.2d 823 (1989)*. Citing Appellate Court authority, *State v. Brescia, 122 Conn. App. 601, 604 n.3, 999 A.2d 848 (2010)*, and *State v. Starks, 121 Conn. App. 581, 592, 997 A.2d 546 (2010)*, the state argues, however, that *Golding* review of unpreserved constitutional claims is unavailable in an appeal from the denial of a motion to correct an illegal sentence, because the defendant has available the option of filing another motion to correct. Expressing no position on the correctness of the Appellate Court's decisions in *Brescia* and *Starks* with respect to the availability of *Golding* review in the context of motions to correct, we agree with the defendant that we should exercise our discretion to consider this claim, which presents a pure question of law subject to expeditious resolution, as compared to requiring him to file another motion to correct in the trial court.

by prescribing limitations and duties for each branch that are essential to each branch's independence and performance of assigned powers. . . . It is axiomatic that no branch of government organized under a constitution may exercise any power that is not explicitly bestowed by that constitution or that is not essential to the exercise thereof. . . . [Thus] [t]he separation of powers doctrine serves a dual function: it limits the exercise of power within each branch, yet ensures the independent exercise of that power. . . .

HN22 "In the context of challenges to statutes whose constitutional infirmity is claimed to flow from impermissible intrusion upon the judicial power, we have refused to find constitutional impropriety in a statute simply because it affects the judicial function . . . . A statute violates the constitutional mandate for a separate judicial magistracy only if it represents an effort by the legislature to exercise a power which lies exclusively under the control of the courts . . . or if it establishes [**45] a significant interference with the orderly conduct of the Superior Court's judicial functions. . . . In accordance with these principles, a two part inquiry has emerged to evaluate the constitutionality of a statute that is alleged to violate separation of powers principles by impermissibly infringing on the judicial authority. . . . A statute will be held unconstitutional on those grounds 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." (Citations omitted; internal quotation marks omitted.) *State v. McCahill, supra, 261 Conn. 504-506*; see also, e.g., *Persels & Assocs., LLC v. [*811] Banking Comm'r, 318 Conn. 652, 668-70, 122 A.3d 592 (2015)* (collecting cases).

As the state argues, resolution of the defendant's separation of powers claim is squarely controlled by this court's 1976 decision in *State v. Darden, supra, 171 Conn. 677*. In *Darden*, the defendant raised a separation of powers challenge to the second degree robbery statute, which imposed a mandatory minimum sentence of five years imprisonment. See *id., 678*. Applying the well settled test for determining whether a statute violates the separation of powers, the court observed that it "is rudimentary that the three branches [**46] of government do not exist in discrete, airtight compartments, and that the rule of separation of governmental powers cannot always be rigidly applied. . . . In this context it must be remembered that 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. . . .

"In other words, HN23 the judiciary's power to impose a particular sentence is defined by the legislature, and there is no constitutional requirement that courts be given discretion in imposing a sentence. . . . In addition, the legislature may impose mandatory minimum terms of imprisonment for certain crimes, and may preclude the probation or suspension of a sentence." (Citations omitted.) *Id., 679-80*.

Noting that other federal and state courts have upheld mandatory minimum sentences, this court rejected the defendant's claim that the legislature had "unduly impinged upon the powers of the judiciary" by imposing a mandatory minimum sentence in the second degree [*812] robbery statute.[28] *Id., 681*. Most significantly, the court rejected [**47] the argument that "a mandatory sentencing statute unconstitutionally delegates judicial power to the state's attorney because the latter could choose to prosecute for a crime which carries a mandatory sentence instead of for a crime which carries no such penalty."[29] *Id., 682*. Relying on the New York Court of Appeals' decision in *People v. Eboli, 34 N.Y.2d 281, 313 N.E.2d 746, 357 N.Y.S.2d 435 (1974)*, this court observed that a "state's attorney has great responsibility and broad discretion with respect to selecting an appropriate charge. That power, however, is limited in the usual and lawful manner by the facts which the prosecutor may be reasonably expected to prove at trial. . . . There is no claim . . . that the state's attorney abused his discretion, and in fact the defendant was found guilty as charged in the information. Nor has the defendant challenged the

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[28] In upholding the constitutionality of the mandatory minimum robbery sentence, the court also concluded that there "is a rational relationship between the protection of public safety and the imposition of a nonsuspendable sentence for the violent crime of second degree robbery, an essential element of which is the threatened use of a deadly weapon or dangerous instrument. . . . A statute establishing a mandatory jail sentence not only punishes perpetrators of violent crimes but it may also have a deterrent effect, which is a valid social purpose properly within the legislature's police power." (Citation omitted.) *State v. Darden, supra, 171 Conn. 680-81*.

[29] Thus, we disagree with the defendant's argument that *Darden* is not controlling because it "assert[ed] a legislative, not executive, encroachment upon judicial power."

sufficiency of the evidence to sustain his conviction. Under the circumstances, we cannot find a deprivation of constitutional rights."[30] (Citation **[*813]** omitted.) State v. Darden, supra, 171 Conn. 682; see id., 682-83 (noting that jury could have found defendant guilty of lesser included offense of third degree robbery, which "carries no mandatory minimum sentence").

We disagree with the defendant's argument that Darden is distinguishable because **[**48]** it involved a single statute, in contrast to the present case, which has two "statutes with identical elements yet different sentencing provisions," insofar as in *Darden*, "[t]he prosecutor did not have the choice . . . between ranges of punishment for proof of identical elements." The prosecutor's choice, however, arises from the legislature's decision to classify narcotics offenses in the manner of §§ 21a-277 (a) and 21a-278 (b), which is consistent with its constitutionally assigned responsibility.[31] See State v. Darden, supra, 171 Conn. 679-80. Given the legislature's public policy decision to render these choices available to the prosecutor, the decision to charge under § 21a-278 (b) rather than § 21a-277 (a) is fundamentally no **[*814]** different from the decision to charge robbery rather than a lesser offense of larceny. See People v. Eboli, supra, 34 N.Y.2d 289-90 (rejecting constitutional challenge to identically phrased first and second degree coercion statutes, which were felony and misdemeanor respectively, because, regardless of applicable statutory language, prosecutors ultimately retain discretion to make charging decisions that can significantly affect potential penalties); cf. State v. O'Neill, 200 Conn. 268, 278-80, 511 A.2d 321 (1986) (consistent with disjunctive "options" provided by statute, prosecutor has "broad discretion" to charge arson offenses in way that **[**49]** precludes lesser included offense instruction or requires mandatory minimum sentence upon conviction); State v. Vaughn, 20 Conn. App. 386, 391-92, 567 A.2d 392 (1989) (rejecting claim that prosecutor abused discretion by charging violation of § 21a-278 [b] "just to obtain a harsher sentence, when [the prosecutor] could have charged [the defendant] with a violation of . . . § 21a-277," given prosecutor's "considerable latitude" in charging and fact that defendant had "no constitutional right to elect which of two applicable statutes [would] be the basis of his indictment and prosecution" [internal quotation marks omitted]).

Thus, we emphasize that "it is well settled that HN24[↑] a legislature can exercise its right to limit judicial discretion in sentencing by bestowing on prosecutors the right to make decisions that may curtail judicial discretion" because it is the legislative branch "that has the power to define a crime and set its punishment. Notwithstanding that we judges may have imposed a lesser sentence in the case before us, and question the application of draconian mandatory minimum sentences in some cases, our jurisprudential hands are tied. The great [Benjamin N.] Cardozo taught us long ago: The judge, even when he is free, is still not wholly free. He is **[**50]** not to innovate at pleasure. [B. Cardozo, The Nature of the **[*815]** Judicial Process (1921), p. 141]. Although we recognize that a host of inequities inhere in many large mandatory sentences, the relief must come

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[30] We note that the defendant does not ask this court to overrule our decision in *Darden*, which remains consistent with contemporary federal and state authority considering separation of powers challenges to mandatory minimum sentencing statutes, including those challenging the charging discretion that they afford to prosecutors. See, e.g., United States v. Nigg, 667 F.3d 929, 934-35 (7th Cir.), cert. denied, ***566 U.S. 1030, 132 S. Ct. 2704, 183 L. Ed. 2d 61 (2012)***; United States v. MacEwan, 445 F.3d 237, 250-52 (3d Cir.), cert. denied, ***549 U.S. 882, 127 S. Ct. 208, 166 L. Ed. 2d 144 (2006)***; State v. Saan, 152 Vt. 510, 517-19, 568 A.2d 344 (1989); see also Mistretta v. United States, 488 U.S. 361, 364, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) (Rejecting separation of powers challenge to federal sentencing guidelines, and noting that "[h]istorically, federal sentencing—the function of determining the scope and extent of punishment—never has been thought to be assigned by the [United States] [c]onstitution to the exclusive jurisdiction of any one of the three [b]ranches of [g]overnment. Congress, of course, has the power to fix the sentence for a federal crime . . . and the scope of judicial discretion with respect to a sentence is subject to congressional control." [Citation omitted.]).

[31] Given that the classification of offenses is a uniquely legislative function, we find distinguishable State v. McCahill, supra, 261 Conn. 492, upon which the defendant relies. In *McCahill*, we concluded that No. 00-200, § 5, of the 2000 Public Acts, which eliminated the court's discretion to grant postconviction bail in any case "involving the use, attempted use or threatened use of physical force against another person," violated the separation of powers because "it significantly interferes with the orderly functioning of the Superior Court's judicial role." Id., 508-509. In so concluding, we observed that, particularly with respect to relatively minor offenses that implicated only short terms of imprisonment, this statute requiring immediate incarceration had the effect of rendering the right to appellate review "meaningless," depriving judges of the ability to continue cases for sentencing at a later date, or to impose sentences without incarceration. See id., 513-18.

from the legislative arm of government and not from . . . judges . . . ." (Internal quotation marks omitted.) *United States v. MacEwan*, 445 F.3d 237, 252 (3d Cir.), cert. denied, 549 U.S. 882, 127 S. Ct. 208, 166 L. Ed. 2d 144 (2006). We conclude, therefore, that the trial court properly denied the defendant's motion to correct an illegal sentence.

The judgment is affirmed.

In this opinion the other justices concurred.

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NO: MOTM CR 09 0025166-S : SUPERIOR COURT

STATE OF CONNECTICUT : G.A. #7

v. : AT MERIDEN, CONNECTICUT

NEMIAH ALLAN : September 2, 2015

MOTION TO CORRECT

BEFORE THE HONORABLE SHERIDAN MOORE, JUDGE

A P P E A R A N C E S :

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ATTY. DINNAN: In the matter of Nemiah Allan, James Dinnan, for the State of Connecticut.

ATTY. CARLOW: Your Honor, representing Mr. Allan, Brian Carlow, from the Public Defender's Office.

THE COURT: Okay. This matter was set down today based on the motion to correct illegal sentence that was filed by Mr. Allan, and initially, and then supported by his Counsel. And the Court received, from counsel, uh - that motion, plus - uh - the memorandum of support of the motion. The State also received - the Court also received, from the State, its motion in opposition, as well as its brief and memorandum concerning its opposition.

The Court did have an opportunity to review that material, as well as other material that Mr. Allan's -- Attorney Carlow had presented for the Court's consideration. A decision concerning other individuals, filed similar motions Judicial District of Fairfield, Geographical Area number two. As well as there is a further motion for reconsideration as based on the decision entered in GA Two, by Judge Richards.

So, the Court did review all of those materials as just stated by the Court.

The basis that the Court has been able to determine - of the motion to correct the illegal

sentence was - really, it comes down to an analysis based on two Supreme Court cases. Alleyne versus US, 133 Supreme Court, 2151 and Apprendi versus New Jersey, 530 US 460. Alleyne was decided by the Supreme Court in 2013. And Apprendi was decided by the Court in 2000.

The first part the motion claims that under those two cases, the difference in the Connecticut Statute of - 21a-277 and 21a-278(b), really has to deal with the fact that the second has an event or a factor, that it was not presented in front of the Court, in Mr. Allan's case.

And Alleyne indicates that any sentencing factor or any enhancing of a penalty has to be - or should be - presented to the Court or the jury in making a determination.

While the Court understands the argument presented, the Court is not in agreement that the Alleyne decision controls the Connecticut statutes at this time. The Court does understand where the Supreme Court, in their discussion, concerning sentencings - concerning factors that enhance penalties, I think the Connecticut Courts have clearly delineated after - even after Apprenti - Apparendi - have clearly delineated that the enhance factor of 21a-278(b), in this particular case, is not an element. That the burden for that proof was

solely on the Defendant. And if the Defendant does not introduce the evidence at the time of trial, then Court has no basis to overlook or to somehow change its view of how to approach sentencing.

In this case, Mr. Allan was convicted under 21a-278(b), conspiracy. But there's no statute that says that because it's a conspiracy that the penalty is changed in any way. So, the Court can't find that as a reason for not sentencing under the statute. The claim that the two crimes are similar in nature, and yet, offer different punishments. Again, the Court found - this Court found no support for that. These two statutes have been in co-existence for some 20 plus years. And there has been nothing that has said that these particular statutes punish the same behavior. In fact, they may change based on the fact of a non-drug dependent person or a drug dependent person.

The - the Court still finds that the State Hart, State versus Ray, and State versus Janesaewski (sp), Janazewski (sp), are still a controlling issue here. If, somewhere down the line, the State Supreme Court chooses to revisit its opinion.

And, there was a part of - I believe, in the defense - excuse me - Mr. -- I'll call him the Defendant, at this point, but the moving applicant motion and brief, which pointed out the language of

the hesitancy of the Court in - in State versus Ray, I believe it was. That they talk about the hesitancy about following these cases, but they didn't overturn. They stayed with them. So, I - I - this Court cannot find any reason, at this point, to move away from the State Supreme Court ruling in these cases.

Now, there is also some language in the brief concerning the fact that the Court, at the time of of the trial Court, at that time, being Judge Brian Fischer, didn't give any instruction on the drug dependency or the non-drug dependency - one way or the other - concerning his charge to the jury. Again, it's difficult for this Court to read another Judge's mind. However, the statement - the general rule, I should say - is that unless there has been evidence produced at the time of trial, a Judge is precluded from giving charge if there is no evidence. And everyone admits there was no evidence given concerning drug dependency.

The only evidence that's been - this Court has been able to glean - is that, at some point, there were two witnesses who indicated they knew Mr. Allan. But, knowing and being quote, drug dependent are two different things. They may have known him from Sunday school. They may have known him from - if that's possible knowledge, from a person walking down

the street. Or worse, they could have known him as a drug dealer. But, there was no evidence that said that they knew him necessarily as a drug dependent person.

So, I can't say why the Court did not give that instruction, but it seems - at least from reviewing the record - the instruction wasn't given because there was no evidence that could support - could support that charge.

And I think lastly, the point presented in the brief supporting the motion to correct, had to do with the mandatory minimum. Whether or not the Court could, in fact, or should have, in fact, imposed a mandatory minimum.

Again, I think that's something that really goes to - based on the sentence - clearly, the sentence that the Court imposed was more than the mandatory minimum. And we had probably reached a point where that has become, really, a issue that may be moot.

But, as to whether or not the Court did impose a sentence based upon the mandatory minimum guidelines, that's something that needs to be brought right back to the Judge who did it, I believe. Not a Court sitting reviewing a motion to correct an illegal sentence.

But, I understand that the basis of all those issues - all of the claims of the - whether or not a

mandatory minimum sentence was imposed. Equal protection claim. And the - given the sentence of more than 15 years. All those really fall under an analysis based on the Alleyne versus United States case and the Apprendi - Apprendi versus New Jersey case. And from this Court's look at that, those two cases and from that analysis, the Court does not find any support for the motion, based on the rulings from those cases. The Court does believe that the cases of - the Connecticut cases still control, which indicates that the non-drug dependency is not an element, does not have to be presented to the Court, unless it is presented to the Court by the Defendant, himself.

So, for that reason, the motion to correct the illegal sentence is denied.

ATTY. CARLOW: Just one clarification, and I know that Mr. Allan had indicated to me that he would like to address the Court, if the Court would entertain that. I'm just relaying that to the Court.

But, just in terms of - this - is your Honor's intention to then get a transcript, and sign the transcript of the ruling on this motion?

THE COURT: Yes.

ATTY. CARLOW: Okay. I just wanted to clarify that.

THE COURT: Yes.

ATTY. CARLOW: So, we would be ordering that one, as well.

THE COURT: Right. No, I indicated that I would either do a written decision or do this decision from the Bench and sign the transcript.

ATTY. CARLOW: And either one of those is fine. I just wanted to clarify.

THE COURT: Right. Yeah, I know. You'll need it for the further record.

ATTY. CARLOW: That's fine. Thank you, your Honor. And I - as I indicated, Mr. Allan indicated he wanted to address.

NEMIAH ALLAN: Yes, I would like to address the Court. What was the purpose of them doing a PSI on me, before sentencing, when it came back that I was drug dependent.

THE COURT: Okay.

NEMIAH ALLAN: But, the Judge still didn't sentence me as a non-drug dependent - sentenced me as a non-drug dependent when it came back that I was drug dependent.

THE COURT: And Mr. Allan, that really does address what I - well, the next to the last comments that I made.

Your sentencing Judge, I don't know how he - what factors he used. What information he used based on your sentence. And it was up to him to make those

determinations. So, you really have to address that particular issue - if he allows you to. But you would have to address that particular issue to the sentencing judge, because you're right. There was a pre-sentence investigation. There was certain information that was available and your Attorney Carlow did mention all of the comments that were made, at the sentencing, in his motion to this Court. Which was his basis for supporting that there was information presented to the Court, concerning your drug dependency. But whether or not the Court used those - used that information or didn't use that information, I can't address that.

NEMIAH ALLAN: Well, what was the logic for the PSI?

THE COURT: Again, you are entitled to a PSI.

NEMIAH ALLAN: Yeah. But I'm saying they --

THE COURT: So, if - it doesn't have to be logical.

NEMIAH ALLAN: -- they didn't follow through with it. Isn't that wrong…

THE COURT: The Court can use whatever it finds or doesn't find in that PSI.

NEMIAH ALLAN: Alright. The other question was this, when I went to trial - before I went to trial, I didn't want this attorney to represent me.

THE COURT: Okay. That's a habeas issue.

NEMIAH ALLAN: Yeah, I know that. I put that in the habeas.

THE COURT: Okay.

NEMIAH ALLAN: But, I didn't want him to represent me. It's on the record. That he addressed the Court, stating that I said he was ineffective at my VOP. And then he asked that another Judge be appointment - I mean, another attorney be appointed to me. So, the Judge don't say anything. And then the State's Attorney jumps in and he says sorry to interrupt. But is counsel asking to withdraw his appearance or represent Mr. Allan so he can get into this file and review it.

So, to make a long story short, the Judge said, well, I'm not going to do that today. And the State's Attorney said well, I just to remind the Court that the request - and the Judge continued it to one week later. I come back to court one week later, and I am still stuck with the same attorney.

And so I am thinking that the Judge denied the motion, so I ain't got no choice but to go to trial with this person. But then when I find out that the Judge never denied the motion, I subpoenaed my trial attorney, for my habeas, for which he was on the stand. And he committed perjury on the stand because he said he did all the motion in front of the court and the Judge denied the motion.

THE COURT: Okay.

NEMIAH ALLAN: The Judge never denied the motion.

THE COURT: Well, again, Mr. Allan, I can't go back and recreate the wheel.

NEMIAH ALLAN: I'm not. It's all in the transcript.

THE COURT: Okay, but yeah - this is not what this Court is handling at this time.

NEMIAH ALLAN: I know. I know, but I want to say --

THE COURT: But you are on the record. Okay, it's noted. It's on the record. Okay.

NEMIAH ALLAN: But I am saying though, how is my trial attorney get on that stand and commit perjury? And lying by saying that the Judge denied the motion. The Judge never denied the motion. So, by that, I can get a whole new trial.

THE COURT: I have a little laughter in my voice, Mr. Allan, not because I believe that your questions are not sensible questions. I have a little laughter in my voice because you are asking questions that I can't answer. If I could answer those type of questions, I'd be a very powerful being. And I'm not. I can't tell you why people do things - why people do things for any reason. You know - I can't tell you why - you know - I get up

every morning the way I do.

NEMIAH ALLAN: But he is an attorney. Why is he going to lie on the stand?

THE COURT: Well, there are proceedings against attorneys. There is proceedings - as you know - habeas proceedings. There is - you know - ineffective assistance proceedings.

NEMIAH ALLAN: I already did that.

THE COURT: I can't tell you more than that, sir. Okay. Good luck to you.

NEMIAH ALLAN: Okay.

THE COURT: As soon as I get the transcript, I will sign it and we'll forward it you.

ATTY. CARLOW: Thank you, your Honor.

ATTY. DINNAN: Thank you, your Honor.

THE COURT: Okay.

This matter was concluded: 12:15 PM.

Honorable Sheridan Moore, Judge.

NO: N07M CR 09 0252166-S	:	SUPERIOR COURT
STATE OF CONNECTICUT	:	G.A. #7
v.	:	AT MERIDEN, CONNECTICUT
NEMIAH ALLAN	:	SEPTEMBER 2 2015

C E R T I F I C A T I O N

I hereby certify the foregoing pages are a true and correct transcription of the audio recording of the above-referenced case, heard in Superior Court, G.A. # 7, Meriden, Connecticut, before the Honorable Sheridan Moore, Judge, on the 2nd day of September, 2015.

Dated this 15th day of September, 2015 in Meriden, Connecticut.

Christine A. Elkins May 17 2016
Court Recording Monitor

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SUPREME COURT

STATE OF CONNECTICUT

SC 19880

STATE OF CONNECTICUT

v.

NEMIAH ALLAN

OCTOBER 17, 2018

O R D E R

THE MOTION OF THE STATE OF CONNECTICUT-APPELLEE, FILED AUGUST 31, 2018, FOR RECONSIDERATION/REARGUMENT AND OR RECONSIDERATION EN BANC, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY **O R D E R E D** GRANTED IN PART. SEE THE UPDATED OPINION FOR *STATE OF CONNECTICUT v. ALRICK EVANS*, 329 CONN. 770 (2018), WHICH WILL BE AVAILABLE ON THE JUDICIAL BRANCH WEBSITE AFTER 3:00 P.M. ON OCTOBER 18, 2018, AND THE REPLACEMENT PAGES WILL BE PUBLISHED IN THE LAW JOURNAL OF OCTOBER 23, 2018.

BY THE COURT,

/S/
L. JEANNE DULLEA
ASSISTANT CLERK-APPELLATE

NOTICE SENT: OCTOBER 18, 2018
COUNSEL OF RECORD
HON. SHERIDAN L. MOORE
CLERK, SUPERIOR COURT N07MCR090252166S
NOTICE SENT: OCTOBER 19, 2018
REPORTER OF JUDICIAL DECISIONS

180083

OFFICE OF THE CLERKS
SUPERIOR COURT

2014 DEC 5 AM 9 22

CAT

NO: N07MCR0902521665 STATE OF CONNECTICUT

STATE OF CONNECTICUT : SUPERIOR COURT

: NEW HAVEN J.D. at MERIDEN G.A. # 7

v.

NEMIAH ALLEN : DECEMBER 5, 2014

MOTION TO CORRECT ILLEGAL SENTENCE

Pursuant to C.P.B. §43-22, the defendant seeks correction of the sentence imposed in the above-captioned matter on the grounds that the sentence itself is illegal, and that it was imposed in an illegal manner. As a result, that sentence must be corrected by eliminating the mandatory minimum sentence and resentencing. The defendant contends that his sentence:

1. is illegal under Alleyne v. United States, 133 S. Ct. 2151 (2013) and Apprendi v. New Jersey, 530 U.S. 466 (2000) because it exceeds the relevant statutory maximum limits;
2. is illegal in that it violates the defendant's state and federal rights to equal protection of the laws there is no rational basis for punishing the exact same behavior with differing punishments;
3. is illegal in that it violates the requirement of article first, section 9 of the Connecticut constitution that "[n]o person shall be arrested, detained or punished, except in cases clearly warranted by law," and
4. is illegal in that it violates the intent of the legislature and the rule of lenity; and

5. was imposed in an illegal manner under Alleyne, supra, and Apprendi, supra, because the fact triggering the mandatory minimum sentences was not found by a proper fact-finder or admitted by the defendant;

6. was imposed in an illegal manner, in violation of the defendant's state and federal constitutional rights to procedural due process, because

a) the Court was unaware of the available sentencing range under Alleyne, supra, and Apprendi, supra, and erroneously believed that it was required to impose the mandatory minimum sentence; and/or

b) there is no rational basis for having two statutes punishing the exact same behavior with differing punishments.

The Court's jurisdiction and the defendant's arguments in support of this motion are set forth in the accompanying Memorandum in Support of Motion to Correct Illegal Sentence. Based on the arguments set forth in that Memorandum, and at oral argument on this motion the defendant submits that the Court should correct the defendant's sentence by ordering resentencing so that a legal sentence may be imposed in a lawful manner.

Respectfully submitted,

NEMIAH ALLEN
The Defendant

By: _____
BRIAN S. CARLOW
Deputy Chief Public Defender
Juris # 103052
Office of the Chief Public Defender
30 Trinity Street, 4th floor
Hartford, CT 06106
Tel: 860 509-6400
Fax 860 509-6495

ORDER

The foregoing having been considered, it is hereby ORDERED;

GRANTED / DENIED.

BY THE COURT

_____

Judge/Clerk

CERTIFICATE OF SERVICE

I hereby certify that the on December 5, 2014, foregoing was mailed/hand-delivered to all counsel of record.

BRIAN S. CARLOW
Deputy Chief Public Defender

OFFICE OF THE CLERKS
NO: N07MCR090252166S SUPERIOR COURT

STATE OF CONNECTICUT 2014 DEC 5 AM 9 22 SUPERIOR COURT

v. : NEW HAVEN J.D. at MERIDEN G.A. #7

NEMIAH ALLEN STATE OF CONNECTICUT DECEMBER 5, 2014

MEMORANDUM IN SUPPORT OF MOTION TO CORRECT ILLEGAL SENTENCE

The defendant seeks correction of the sentence imposed in the above-captioned matter on the grounds that the sentence itself is illegal, and that it was imposed in an illegal manner. As a result, that sentence must be corrected by eliminating the mandatory minimum sentence and resentencing. The defendant contends that his sentence:

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3. is illegal in that it violates the requirement of article first, section 9 of the Connecticut constitution that "[n]o person shall be arrested, detained or punished, except in cases clearly warranted by law;" and
4. is illegal in that it violates the intent of the legislature and the rule of lenity; and
5. was imposed in an illegal manner under Alleyne, supra, and Apprendi, supra, because the fact triggering the mandatory minimum sentences was not found by a proper fact-finder or admitted by the defendant;
6. was imposed in an illegal manner, in violation of the defendant's state and federal constitutional rights to procedural due process, because
   a) the Court was unaware of the available sentencing range under Alleyne, supra, and Apprendi, supra, and erroneously believed that it was required to

impose the mandatory minimum sentence; and/or

b) there is no rational basis for having two statutes punishing the exact same behavior with differing punishments.

i. The Court Has Jurisdiction to Hear the Motion to Correct

Under the common law a trial court's jurisdiction terminates when the sentence is executed. State v. Luzietti, 230 Conn. 427, 431-32 (1994). Practice Book § 43-22 embodies a common-law exception to the termination of jurisdiction that permits the trial court, at any time, to correct an illegal sentence or correct a sentence imposed in an illegal manner. State v. Clark, 136 Conn. App. 421, 424-25, cert. denied, 307 Conn. 906 (2012). "The purpose of Practice Book § 43-22 is not to attack the validity of a conviction by setting it aside but, rather to correct an illegal sentence or disposition, or one imposed or made in an illegal manner." State v. Mollo, 63 Conn. App. 487, 491, cert. denied, 257 Conn. 904 (2001). The Court has jurisdiction over a motion to correct an illegal sentence if the sentencing proceeding, and not the conviction itself, is the subject of the attack. State v. Lawrence, 281 Conn. 147, 158 (2007); State v. Osuch, 124 Conn. App. 572, 576, cert. denied, 299 Conn. 918 (2010); State v. Lewis, 108 Conn. App. 486, 488 (2008). The trial court's jurisdiction over a defendant's challenge to his sentence does not extend to a post-sentencing attack on the plea itself. State v. Das, 291 Conn. 356, 362 (2009); Clark, 136 Conn. App. at 426.

Section 44-22 permits the trial court to correct two different types of unlawful sentences. The court may correct a sentence that is itself illegal, and the court may correct a sentence that, although not illegal in and of itself, was imposed in an illegal manner. State v. McNellis, 15 Conn. App. 416, 443-44, cert. denied, 209 Conn. 809 (1988). An illegal sentence includes one that "exceeds the relevant statutory maximum limits" while a sentence imposed in an illegal manner includes those "within the relevant statutory limits but imposed in a way which violates defendant's right ... to be sentenced by a judge relying on accurate information or considerations solely in the record[.]" Id., 444. The defendant's

challenges based on Apprendi, supra, and Alleyne, supra, fall within the confines of §44-22. Both Apprendi and Alleyne address when an enhanced sentence may lawfully be imposed. In Apprendi, supra, the U.S. Supreme Court held that any " 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are elements of the crime, 530 U.S at 490, and thus the Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt, Id., at 484. Absent such a finding an enhanced sentence could not lawfully be imposed. Apprendi's principle applies with equal force to facts increasing the mandatory minimum, for a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed. Alleyne, supra. The remedy for Apprendi or Alleyne error is to correct the sentence, not vacate the conviction. Apprendi, 530 U.S. at 497; Alleyne, 133 S. Ct. at 2164 ("vacat[ing] the Fourth Circuit's judgment with respect to Alleyne's sentence on the §924(c)(1)(A) conviction and remand[ing] the case for resentencing consistent with the jury's verdict.")

II. Factual Background

The defendant was arrested and charged with various drug-related offenses. He proceeded to trial on docket number N07M-CR09-0252166 on the charges of Sale of Narcotics violating C.G.S. §21a-278(b), of Sale of Narcotics within 1500 feet of a school in violation of section C.G.S. §21a-278a (b), Conspiracy to Sell Narcotics in violation of C.G.S. §§53a-48a and 21a-278b, Possession of Narcotics in violation of C.G.S. §21a-279, and Interfering with a Police Officer in violation of C.G.S. §53a-167a (a).

Mr. Allen elected a jury trial, over which the Honorable Brian T. Fischer presided. The prosecution presented evidence in support of the charged offenses. There was no evidence concerning the defendant's status as drug-dependent or non-drug-dependent. Detective John Williams, who had been assigned to the Meriden Police Department narcotics unit and the Connecticut State Police Statewide Narcotics Task Force simultaneously for seven years, testified he was familiar with the defendant prior to the

events giving rise to the charges for which the defendant was on trial. Transcript 12/3/09, pp. 5, 20. Another officer testified that he too was familiar with the defendant prior to the arrest in this case. Transcript of 12/2/09, p. 19 (Officer Michael Fonda).[1]

Mr. Allen waived his right to testify. Transcript 12/3/09, p. 66-70. The defense presented no evidence.

The prosecutor's final argument highlighted the connection between drug addiction and criminal convictions when addressing one of the state's witnesses:

> [H]e took that stand and testified he has a criminal history and you heard it including some larceny's [sic], bank fraud, this arrest and conviction for possession of narcotics. He has a criminal history, again use your common sense and life experience. Unfortunately, he's addicted to narcotics. He buys narcotics on a regular basis and he uses narcotics on a regular basis. Unfortunately, that's a fact of our society and unfortunately, people have to find a means to support that addiction to support that particular affliction that they have. And it isn't always by legal means. And [the witness] is a criminal. He's a convicted criminal no question about that. And he has engaged in crimes that involve I think that [defense counsel] touched on lying. You know when you steal something basically, you're making a lie. But, again you have to put all of this into context. Unfortunately, [the witness] is a drug addicted person. That's what happens to members of our society when drugs are sold to them.
>
> Transcript 12/3/09, pp. 99-100.

The prosecuting attorney also described Mr. Allen as being a street-level dealer with others above him in the chain of drug sales. Transcript 12/3/09, p. 101.

The Court instructed the jury that "the defendant is charged with violating General Statutes 21a-278b, which insofar as it pertains to this case, it reads as follows: Any person who sells to another person any narcotic substance shall be punished." Transcript 12/3/09, p. 122; see also id., p. 124-25, 132. The Court gave no instructions on the issue of drug dependence.

On December 4th, 2009 Mr. Allen was acquitted of Sale of Narcotics, Sale within 1500 feet of a School and Possession of Narcotics, and convicted of Conspiracy to Sell Narcotics and Interfering with a Police Officer.

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[1] The prosecutor commented upon that fact in his summation. Transcript 12/3/09, p. 81.

At sentencing the prosecutor noted that Mr. Allen had a lengthy criminal history, which included convictions for possession and sale of narcotics. Sentencing Transcript (2/22/10), p. 2. The prosecuting attorney also commented on the fact that Mr. Allen had been on probation for a narcotics charge at the time he was arrested in this case, Id. The prosecutor noted that Mr. Allen had been in treatment many times for his drug addiction, but that he had never followed through. The prosecuting attorney referred to Mr. Allen's addition to Percocet as well as other drugs. The prosecutor states, "I don't think that there is any question that over the years the defendant has abused narcotics." Sentencing Transcript, p. 6. The prosecutor predicted, "When he gets out, he will continue to do the same thing that he has done since 1976." Id., p. 7.

Defense counsel urged that the defendant was not "a career criminal" as the prosecutor argued, Sentencing Transcript, p. 2, but that "what we actually have is someone who has a career addiction to drugs[.]" Id., 9. Defense counsel pointed out that the majority of his client's convictions were for possession, and that his most recent conviction for sale was approximately 19 years earlier, in 1991. Id.

Defense counsel reviewed Mr. Allen's history of addiction, as well as his psychiatric diagnoses, and argued that Mr. Allen's criminal history was consistent with that of an addict who had not been able to overcome his addition. Id., pp. 9-11. Mr. Allen explained that he had been in a car accident which seriously injured his neck and for which he had surgery and was prescribed pain killers. Id., p. 14. When he could no longer get prescription medication, he self-medicated using street drugs. He reviewed his progress in the Rushford drug treatment program. He told the Court that when he recently suffered a heart attack and his doctors wanted to prescribe pain medication, he explained his situation and his doctors arranged for him to go to a pain management program rather prescribing pain medication. Id., pp. 14-15.

The Court reviewed the history of the defendant's convictions, including two convictions for possession in 1983 and 1984, a sale of narcotics and a sale of a controlled

substance in 1991, possession convictions in 1997 and 1998, from 1999 through 2005 a series of beach of peace and larceny charges, and possession and failure to appear in 2006, followed by a criminal trespass in 2008. Id., pp. 16-18.

The Court concluded a substantial period of incarceration was warranted and imposed a total effective sentence of twelve years incarceration, followed by five years special parole, to be served concurrently with the two and a half year sentence Mr. Allen was then serving as the result of having been found in violation of his probation based on the criminal charges that went to trial. Id., p. 18.

Mr. Allen appealed his convictions to the Appellate Court. That Court affirmed the judgment in a per curiam decision. State v. Allen, 121 Conn. App. 902 (per curiam), certification denied, 298 Conn. 906 (2010).

III. *Argument*

A. An Enhanced Sentence Cannot Lawfully Be Imposed Unless Non-Drug Dependence, the Element Subjecting the Enhanced Sentence of C.G.S. §21a-278 (b) Is Proven Beyond a Reasonable Doubt

1. Introduction

a) The *Alleyne* and *Apprendi* Decisions

The due process clause of the Fourteenth Amendment mandates that a defendant may only be punished for the crime that has been proven beyond a reasonable doubt at trial or admitted by a plea. Apprendi, 530 U.S. at 469, 475-76. In Apprendi and Alleyne, supra, the United State Supreme Court held that any fact that triggers an enhanced sentence or a mandatory minimum sentence is an element of the offense which must be proven by the prosecution beyond a reasonable doubt, or admitted by the defendant during the plea canvass, before the enhanced or mandatory minimum sentence may be imposed. Apprendi, 530 U.S. at 483, n. 10; Alleyne, 133 S. Ct. at 2158.

Apprendi rejected any distinction based on whether the triggering fact was labeled an element or a sentencing factor. Id., 530 U.S. 478. It is immaterial how the fact that triggers an enhanced sentence or a mandatory minimum sentence is labeled. "[T]he

relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi, 530 U.S. at 494. Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt.[2] It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury. The Alleyne Court so held.

Before Apprendi the United State Supreme Court had approved of a statutory scheme that included sentences enhanced by 'sentencing factors' found by a judge by a preponderance of the evidence. McMillan v. Pennsylvania, 477 U.S. 79 (1986).[3] "[T]he logic of Apprendi prompted questions about the continuing vitality, if not validity, of McMillan's holding that facts found to increase the mandatory minimum sentence are sentencing factors and not elements of the crime." Alleyne, 133 S. Ct. at 2157. Two years after Apprendi, the Supreme Court affirmed McMillan's continued validity in Harris v. United States, 536 U.S. 545 (2002).[4] In Harris the Court "declined to apply Apprendi to

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[2] In Apprendi the Supreme Court rejected the State's argument that there could be no constitutional violation because the sentence imposed was within the permissible range for the unenhanced offenses. Instead, the Apprendi Court held that the constitutional violation arose from the higher range of punishment within which the trial court could exercise its discretion. 530 U.S. at 474; see Alleyne, 133 S. Ct. 2162 (such argument is "beside the point"). The Apprendi Court emphasized that it was the adequacy of the sentencing procedure that was at issue. 530 U.S. at 475.

[3] The McMillan Court reiterated Patterson v. New York[, 432 U.S. 197 (1977)]'s recognition that "there are constitutional limits to the State's power" to "reallocate] or reduc[e] ... burdens of proof in criminal cases[,]" and that "in certain limited circumstances [In re] Winship, [397 U.S. 358 (1970)]'s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged." McMillan, 477 U.S. at 86. Patterson and McMillan relied upon the proposition that "the applicability of the reasonable-doubt standard ... has always been dependent on how a State defines the offense that is charged in any given case." [Patterson, 432 U.S.], at 211, n. 12." McMillan, 477 U.S. at 85. In Alleyne the Court concluded "that Harris was wrongly decided and that it cannot be reconciled with [the] reasoning in Apprendi." Alleyne, 133 S. Ct. at 2158.

[4] The Harris Court reasoned that "the jury's verdict 'authorized the judge to impose the minimum with or without the finding,' the factual basis for increasing the minimum sentence was not "'essential'" to the defendant's punishment, and "merely limited the judge's 'choices

facts that increased the mandatory minimum sentence but not the maximum sentence[,]" concluding that "judicial factfinding that increased the mandatory minimum did not violate the Sixth Amendment." Alleyne, 133 S. Ct. at 2157.

"Alleyne overruled both Harris and McMillan, rejected the earlier Courts' holding that "'facts increasing a mandatory minimum sentence could be decided by a judge at sentencing rather than a jury[,]' Harris, 536 U.S. at 563-65, and held that such facts are instead elements that 'must be submitted to the jury and found beyond a reasonable doubt.' [Alleyne,] 133 S. Ct. at 2158." Boyd v. United States, 2014 U.S. Dist. LEXIS 57343, 3-4 (W.D. Va. Apr. 24, 2014).

Where the triggering fact is not so proven, the enhanced or mandatory minimum sentence may not lawfully be imposed. The failure to prove the triggering fact does not render the underlying conviction illegal. Assuming a legal sentence is imposed, there is no defect in the conviction. A legal sentence in this context means a non-enhanced and non-mandatory minimum sentence. Resentencing is necessary to permit the sentencing judge to have an accurate understanding of the real range of sentences that can be imposed. In some cases it may be necessary to re-sentence under a different statute so as to impose a lawful unenhanced sentence, properly supported by the facts proven to a jury or admitted by a plea. Apprendi, 530 U.S. at 468-469, 495-97.

The Apprendi Court noted that "[p]rosecution subjects the criminal defendant both to "the possibility that he may lose his liberty upon conviction and the certainty that he would be stigmatized by the conviction." 530 U.S. at 478, quoting In re Winship, 397 U.S. 358, 363 (1970). Both these considerations demonstrate the need for the procedural protections associated with proof of elements of an offense beyond a reasonable doubt. Id., 478, 495. "Winship's due process and associated jury protections extend, to some degree, to

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within the authorized range.' [Harris, 536 U.S.] at 567." The Harris Court "drew a distinction between 'facts increasing the defendant's minimum sentence and facts extending the sentence beyond the statutory maximum,' [536 U.S.], at 568, and "limited Apprendi's holding to instances where the factual finding increases the statutory maximum sentence." Alleyne, 133 S. Ct. 2157-58.

determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence. ... This was a primary lesson of Mullaney v. Wilbur, 421 U.S. 684 (1975)." Apprendi, 53 U.S. at 484 (internal quotations marks and citations omitted). In Mullaney the Court rejected the idea "that a State could circumvent the protections of Winship merely by 'redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.'" 421 U.S. at 698. The simple lesson from Alleyne is "[i]f a fact [i]s by law essential to the penalty, it [i]s an element of the offense." Alleyne, 133 S. Ct. at 2158.

In Apprendi the Court "identified a concrete limit on the types of facts that legislatures may designate as sentencing factors." Alleyne, 133 S. Ct. at 2157. Alleyne overruled both Harris and McMillan and held that if such facts increase the sentencing range by triggering a mandatory minimum sentence or an enhanced sentence, they are instead elements that "must be submitted to the jury and found beyond a reasonable doubt." Alleyne, 133 S. Ct. at 2158; Robertson v. United States, 2014 U.S. Dist. LEXIS 49844, 6-7 (W.D. Va. Apr. 9, 2014).

The Apprendi Court concluded there was no principled distinction between a fact that increases the maximum term of imprisonment and the facts constituting "the base offense." 530 U.S. at 476. As a result, the Court "found that Apprendi's sentence had been unconstitutionally enhanced by the judge's finding of racial bias by a preponderance of evidence. Id., at 491-492[.]" Alleyne, 133 S. Ct. at 2157. Apprendi and Alleyne identified the "constitutional limits beyond which the States may not go[.]" McMillan, 477 U.S. at 85.

"Apprendi and its progeny ... mandate that a jury must decide every question of fact that increases the penalty for a crime. Apprendi v. New Jersey, supra, 530 U.S. 490-92." State v. Commins, 276 Conn. 503, 512 (2005). It does not matter how the required finding is labeled. Apprendi and Alleyne require that a defendant's sentencing exposure be governed by the facts found by a jury. Commins, 276 Conn. at 512. Apprendi and Alleyne apply to any fact that triggers a mandatory minimum sentence not otherwise authorized by

the facts found by the jury.

b) Sections 21a-277 and 21a-278 (b)

"The elements of § 21a-278 (b) are identical to the elements of § 21a-277, but §21a-277 does not contain any provision relating to the drug dependency of the offender." State v. Ray, 290 Conn. 602, 613 n.9 (2009).[5] Over twenty years ago the Connecticut Supreme Court held in State v. Hart, 221 Conn. 595 (1992) that non-drug dependence was *not* an element of C.G.S. § 21a-278, and the State was not required to prove it. After Hart C.G.S. §§ 21a-277 and 21a-278 (b) both had the same elements, but §21a-278 (b) carried a mandatory minimum sentence and an increased maximum unless the defendant proved by a preponderance of the evidence that he or she was drug dependent. Ray, 290 Conn. at 634 (affirming Hart post-Apprendi but pre-Alleyne). The Court again examined the burden of proof on non-drug dependence in Ray, 290 Conn. at 623-24. The Court concluded that the constitution did not prohibit requiring a defendant to prove drug dependency as affirmative defense to sale of narcotics under § 21a-278 (b). However the Court expressed doubts about Hart and its predecessors.

> If we were writing on a blank slate, we might find persuasive the defendant's argument that, contrary to our holding in State v. Januszewski, supra, 182 Conn. 187, the "not ... a drug-dependent person" language in § 21a-278 (b) does not create an exception for drug-dependent persons. The phrase is an integral part of § 21a-278 (b) and does not include language, such as the words "unless" or "except," that typically connotes an exception. See State v. Anonymous, supra, 179 Conn. 518-20. We also are compelled to acknowledge that the defendant's position finds some support in the chronology of the statutes and the legislative history of § 21a-278 (b).
>
> Ray, 290 Conn. at 614.

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[5] The General Assembly created two statutes to punish sale or possession of drugs with intent to sell: C.G.S. §§21a-277 and 21a-278 (b). Section 21a-278 (b) provides that "[a]ny person who ... sells [or] possesses with the intent to sell ... any narcotic substance ..., *and who is not, at the time of such action, a drug-dependent person*, for a first offense shall be imprisoned not less than five years or more than twenty years[.]" Section 21a-277 (a) similarly provides: "Any person who ... sells ... [or] possesses with the intent to sell ... any ... narcotic substance ... for a first offense, shall be imprisoned not more than fifteen years[.]

The Ray Court concluded that stare decisis dictated adherence to Hart despite the Court's reservations. 290 Conn. at 614-16. This conclusion was based in part on the Court's rejection of the argument that Apprendi mandated the conclusion that non-drug dependence was an element of 21a-278 (b). The Court relied upon McMillan 477 U.S. at 86, for the proposition that "a fact that exposes the defendant to a mandatory minimum sentence within the range allowed by the jury's verdict need not be found by the jury beyond a reasonable doubt." Ray, 290 Conn. at 623. The Court acknowledged that "under Apprendi, if a fact allows the sentencing court to impose a punishment exceeding the range authorized by the jury's verdict, that fact has the character of an element despite its label as a sentence enhancement." Ray, 290 Conn. at 623. The Court concluded however that the issue of drug dependence operated as an affirmative defense, permissible under Patterson. In reaching this conclusion the Ray Court clung to a "formalistic" view of 21a-277 and 21a-278:

> "[T]he absence of drug dependency does not increase the penalty for the conduct prohibited by § 21a-277 (a). Rather, drug dependency is an affirmative defense to charges that the defendant engaged in the conduct prohibited by § 21a-278 (b), which happens to be the same as the conduct that is prohibited by § 21a-277 (a). In other words, it is not the absence of drug dependency that increases the range of punishment to which the accused is exposed under § 21a-277 (a), but rather, it is the presence of drug dependency that decreases the range of punishment to which the accused is exposed under § 21a-278 (b).
>
> Ray, 290 Conn. at 625.

The Court concluded that the "affirmative defense" of drug dependence did not "run afoul of the constitutional limits discussed in Patterson, ... [as] there are no constitutional limitations on the freedom of the states to structure their criminal statutes as they see fit. Ray, 290 Conn. at 625-626, citing Apprendi, 530 U.S. at 491 n.16.

Both Hart and Ray depended upon McMillan, supra. After the Court's decision in Ray, supra, the United States Supreme Court overruled McMillan in deciding Alleyne, supra. Alleyne held that facts that trigger a mandatory minimum sentence must also be proven by the prosecution beyond a reasonable doubt to a jury. Neither Ray or Hart can

survive Alleyne, supra.

2. The Defendant's Sentence Is Illegal

a. Under Apprendi And Alleyne The Sentence Is Illegal Because It Exceeds The Relevant Statutory Maximum Limits

Here the defendant's sentence is illegal under Apprendi and Alleyne because it exceeds the relevant statutory maximum limits. Sections 21a-277 (a) and 21a-278 (b) are composed of identical elements, "but § 21a-277 does not contain any provision relating to the drug dependency of the offender." Ray, 290 Conn. at 613 n.9 (2009). Therefore, the 'base offense' under Apprendi and Alleyne is §21a-277. As construed by the Connecticut Supreme Court both statutes punish the same conduct and have the same elements. Under Apprendi and Alleyne the duplicity of elements requires that the applicable statutory maximum is the penalty specified in C.G.S. §21a-277, i.e., a maximum of fifteen years, with no mandatory minimum. The sentencing range for § 21a-277 is applicable because the elements proven beyond a reasonable doubt included all the elements of §21a-277, but the question of drug dependence, which under § 21a-278 (b) is necessary to impose a mandatory minimum sentence, and creates a higher maximum sentence, was not submitted to or found by the jury.

The General Assembly has required proof beyond a reasonable doubt for facts that trigger enhanced sentences for violent offenses committed with firearms. In State v. Gonzalez, 300 Conn. 490, 506 n. 15 (2011) the Court noted that the legislature enacted §53a-55a (manslaughter with a firearm) "nominally as a 'new crime,' but essentially as a sentence enhancement." Despite the intent to create a sentence enhancement the legislature required that the triggering fact be proven beyond a reasonable doubt. Id. In order to impose a minimum mandatory sentence under §21a-278 (b) there must be a factual finding (or an admission during the plea canvass) that the defendant is not drug dependent, similar to the findings required in Apprendi v. New Jersey, supra, and Ring v. Arizona, 536 U.S. 584 (2002). United States v. Booker, 543 U.S. 220, 244 (2005) (fact

justifying enhanced sentence "must be admitted by the defendant or proved to a jury beyond a reasonable doubt."); United States v. Yancy, 725 F.3d 596, 601-602 (6th Cir. 2013).

The degree of culpability the legislature associates with factually distinct conduct has significant implications both for a defendant's liberty and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment. Apprendi, supra; see State v. Davis, 190 Conn. 327, 343 (1983) (re "stigmatizing consequences"). The General Assembly has chosen to punish sale or possession with intent to sell with no mandatory minimum and a maximum fifteen year sentence – the penalty provisions of §21a-277 (a). A greater maximum punishment is reserved for non-drug dependent sellers, along with a mandatory minimum. "The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment." Apprendi, 530 U.S. at 495. Here the court sentenced the defendant to a total term of incarceration and special parole of seventeen years. That sentence is illegal because the maximum permissible sentence was fifteen years, not twenty as the sentencing court believed.

Apprendi and its progeny require any fact that increases punishment — here, both the maximum available sentence and minimum available sentence— to be found by the jury. The Sixth and Fourteenth Amendments to the federal constitution require that "any fact (other than prior conviction) that increases the maximum penalty for a crime ... be proven beyond a reasonable doubt." Apprendi, 530 U.S. at 476. In Alleyne, supra, the Supreme Court held that any fact (again, other than the fact of a prior conviction) that triggers or increases a statutory mandatory minimum sentence is an element of the offense which must be found by a jury or admitted by the defendant. Id. at 2155. In reaching this conclusion the Alleyne Court examined the relationship between elements of crimes and

the resulting punishments at common law, and concluded that at common law "[i]f a fact was by law essential to the penalty, it was an element of the offense." Alleyne, 133 S. Ct. at 2158.

Apprendi and Alleyne label facts that increase sentencing exposure elements of the crime. Under C.G.S. §21a-278 (b) a person's status as a non-drug dependent person triggers a five year mandatory minimum sentence and increases the maximum sentence by five years. Under Apprendi and Alleyne non-drug dependence is an element of C.G.S. § 21a-278. But over twenty years ago the Connecticut Supreme Court held in State v. Hart, 221 Conn. 595 (1992) the non-drug dependence was *not* an element of C.G.S. § 21a-278, and the State was not required to prove it. Alleyne changed all that. The Alleyne Court concluded that "the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." Alleyne, 133 S. Ct. at 2161. Post-Alleyne, Hart's reliance on McMillan makes it no longer good law. The imposition of an enhanced sentence, including a mandatory minimum sentence, cannot stand where the triggering fact – non-drug-dependence – has not been proven to a jury beyond a reasonable doubt.

Here the prosecution presented no evidence that the defendant was not drug-dependent. Rather at sentencing the prosecution conceded, "I don't think that there is any question that over the years the defendant has abused narcotics." Sentencing Transcript, p. 6.

The defendant did not testify at trial, and did not admit that he was not drug dependent. In fact the defense argument at sentencing revolved around his drug dependence. Absent a jury finding beyond a reasonable doubt that the defendant was not drug-dependent, the Sixth and Fourteenth Amendments require that his sentence exposure – the range of permissible punishments – was governed by the elements found by the jury. Those elements exposed him only to the range of sentences specified in §21a-277. Because there was no jury finding of non-drug dependence, the imposition of the

mandatory minimum sentence set forth in C.G.S. §21a-278 was impermissible. The higher maximum sentence of twenty years is also impermissible. The defendant's sentence totaled seventeen years of imprisonment and special parole. The maximum permissible sentence in this case was fifteen years. Here the Court was unaware of the true range available for a lawful sentence, and imposed a sentence in excess of the statutory maximum. Due Process requires a re-sentencing.

The jury instructions on the conspiracy charge did not include any issue of drug dependence. The jury found only that the defendant conspired with another to cause the sale of narcotics. The jury never made any finding as to whether or not the defendant was drug-dependent. The facts found permit the court to impose a lawful sentence because C.G.S. §21a-278 (b) and §21a-277 (a) have the same elements. An enhanced sentence under 21a-278 (b) is unlawful, but the Court has the authority to correct the illegal sentence by imposing sentence within the unenhanced, non-mandatory minimum range provided under C.G.S. §21a-277. "[A]lthough th[e] court is without discretionary power to alter a sentence lawfully imposed ... [the court] may order the modification of an erroneous judgment where the evidence is insufficient to support an element of the offense stated in the verdict but where the evidence presented is sufficient to sustain a conviction for s[n] included offense[.]" State v. Grant, 177 Conn. 140, 147 (1979) (citations omitted); Carpenter v. Commissioner, 290 Conn. 107, 120-27 (2009); State v. Barnes, 127 Conn. App. 24, 27 n.1 (2011) (sale of narcotics is a lesser offense included within sale of narcotics by a person who is not drug-dependent); Ray, 290 Conn. at 634 (2009) (same). The Court is authorized to impose a legal sentence in this case. At a resentencing the Court will be aware that a mandatory minimum sentence is not a lawful sentence, and that the defendant's exposure is fifteen years, not twenty.

b. The Defendant's Sentence Is Illegal In That It Violates The Defendant's State And Federal Rights To Substantive Due Process And to Equal

Protection of the Law[6]

Although the state and federal constitutional guarantees of equal protection and of substantive due process protect somewhat different interests, those provisions "have the same meaning and the same limitations." Caldor's, Inc. v. Bedding Barn, Inc., 177 Conn. 304, 314 (1979). The determination of whether a statute violates either or both of the constitutional guarantees of equal protection or substantive due process employs the same analysis. Caldor's, 177 Conn. at 314-15. The first step in either analysis is to determine whether a fundamental constitutional right or liberty is implicated. Where such a right or liberty is implicated the court must examine the statute at issue with strict scrutiny to determine whether the infringement is justified by a compelling state interest. See Benjamin v. Bailey, 234 Conn. 455, 463 (1995).

Where no such fundamental right or liberty is infringed, the court must determine whether the statute bears "a rational relationship to a legitimate state end and [are] based on reasons related to the pursuit of that goal." Caldor's, 177 Conn. at 315, quoting Gentile v. Altermatt, 169 Conn. 267, 295 ..., appeal dismissed, 423 U.S. 1041... (1976). Such a legitimate goal must be pursued only in a "manner that is neither arbitrary nor discriminatory," Caldor's, 177 Conn. at 315, citing Carroll v. Schwartz, 127 Conn. 126, 130 (1940), for Due Process "protect[s] against arbitrary treatment[.]" Adarand Constructors v. Pena, 515 U.S. 200, 213 (1995). Moreover, that statute "may not establish classes that have no reasonable relation to any permissible, public purpose." Caldor's, 177 Conn. at 315; see Washington v. Glucksberg, 521 U.S. 702, 728 (1997). "The court's function . . . is to decide whether the purpose of the legislation is a legitimate one and whether the

[6] The Fourteenth Amendment to the United States Constitution guarantees that no state shall "deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article first, section 20 of the state constitution provides that "no person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin." Article first, section 8 provides, inter alia, "No person shall ... be deprived of life, liberty or property without due process of law[.]"

particular enactment is designed to accomplish that purpose in a fair and reasonable way. Caldor's, 177 Conn. at 315.

f. The Defendant's Sentence Is Illegal Because It Violates The Defendant's State And Federal Rights To Equal Protection Of The Laws Because There Is No Compelling State Interest, Much Less a Rational Basis, For Punishing The Exact Same Behavior With Differing Punishments

The co-existence of sections 21a-277 (a) and 21a-278 (b), and the defendant's prosecution and sentencing for Conspiracy under §21a-278 (b) violate the state and federal constitutional guarantees of equal protection under the law. The statutory scheme is unconstitutional as applied to the defendant as well as on its face. The statutes at issue have the exact same elements, Ray, supra, prohibit the exact same conduct, and yet have sentencing provisions that are unequal. The defendant's fundamental constitutional right to liberty[7] requires that the state justify the inequality of sentences with a compelling state interest, and a demonstration that the statutes are narrowly tailored to advance that interest. This it cannot do. There is no legitimate interest in disparate sentencing ranges for identical conduct.[8]

In State v. Jenkins, 198 Conn. 671, 679-680 (1986) the Court was faced with the conflict between statutes that provided for ten year non-suspendable mandatory minimum for kidnapping, and a ten year mandatory minimum, suspendable after one year, for kidnapping with a firearm. Jenkins, 198 Conn. at 673. The Court recognized that "[s]uch a discrepancy necessarily implicates the equal protection clauses of our federal and state constitutions." Jenkins, 198 Conn. at 677.

This case is the converse of Jenkins. There the behavior to be punished differed, and differed in seriousness, and the more serious sentence was tied to the less serious

[7] "[A]ll protections of the declaration of rights contained in article first of the Connecticut constitution" are "fundamental civil liberties[.]" State v. Rizzo, 266 Conn. 171, 207 (2003).
[8] The defendant does not dispute that the state has a legitimate state interest in deterring and punishing the sale or possession of drugs with intent to sell. That interest is, however, inadequate to justify the disparate sentencing provisions.

conduct. Here the behavior to be punished is the same but the penalties differ and authorize a harsher punishment for conduct that is identical.

The statutes cannot survive even rational basis review. "[W]hen conducting rational basis review,a court "will not overturn ... government action unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the government's actions were irrational." Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 84 (2000). Here the co-existence of two statutes penalizing the exact same behavior but punishing that identical behavior differently is irrational. The punishment authorized by C.G.S. §21a-278 (b) violates the defendant's right to equal protection under the state and federal constitutions. Because penal statutes must be strictly construed, Jenkins, 198 Conn. at 680, the harsher penalty provisions of §21a-278 (b) and cannot be applied to convictions based on the same elements as C.G.S. §21a-277 (a).

Jenkins involved a "legislative error." Jenkins, 198 Conn. at 677. The legislature "mistakenly assign[ed] a lesser penalty to a greater crime." Id. Here the chronology of the enactments, and the legislative history support interpreting the creation of a more serious crime, separate and distinct from §21a-277, intended to punish non-drug dependent dealers more harshly than addicts who may deal to support their own habits. Ray, 290 Conn. at 614.

"To avoid the constitutional quagmire" that it would otherwise have to confront, the Jenkins Court relied upon well-established principles of statutory construction. The Court began with the proposition that "[t]he legislature, cognizant of the constitutional guarantees of equal protection, must be deemed to have sought to attain a rational and sensible result that avoids placing a statute in constitutional jeopardy." Jenkins, 198 Conn. at 679. The Court further relied upon the principle that "a criminal statute is construed strictly against the state and in favor of the accused." Id., 680. The Court thus construed the statutes to require that the lesser penalty was applicable to both kidnapping offenses. Id.

The equal protection problem here can be avoided in the same way that the Supreme Court avoided it in Jenkins, supra, that is, by applying the lesser punishment to violations of both statutes.

ii. The Defendant's Sentence Violates The Defendant's State And Federal Rights To Substantive Due Process Because It Infringes on the Fundamental Right to Liberty In a Manner that is Not Required to Advance a Compelling State Interest, and There Is No Rational Basis For Having Two Statutes Punishing The Exact Same Behavior With Differing Punishments

"The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. ... The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests." Washington v. Glucksberg, 521 U.S. 702, 719-721 (1997) (citations omitted); Dutkiewicz v. Dutkiewicz, 289 Conn. 362, 372 n.9 (2008). The Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" Collins v. Harker Heights, 503 U.S. 115, 125 (1992) quoting Daniels v. Williams, 474 U.S. 327, 331 (1986). "[T]he 'liberty' specially protected by the Due Process Clause" includes but is not limited "to the specific freedoms protected by the Bill of Rights[.]" Glucksberg, 521 U.S. 702, 719-721 (1997). Here the defendant's fundamental constitutional right to liberty is infringed by an irrational sentencing scheme. Thus the statutory scheme is unconstitutional as applied to the defendant as well as on its face.

The Due Process clauses of the state and federal constitutions each identify the fundamental interest in liberty as one protected by Due Process. Strict scrutiny, to determine whether "the infringement is narrowly tailored to serve a compelling state interest," Reno v. Flores, 507 U.S. 292, 301-302 (1993), is required. Glucksberg, 521 U.S. at 728.[9] There is no compelling state interest in punishing the same behavior, based on

[9] Here the legislative scheme infringes the fundamental right to liberty. Even if the asserted right were "not a fundamental liberty interest protected by the Due Process Clause, ... the

proof of the same elements, in some cases with a mandatory minimum sentence and increased maximum sentence, while punishing the same behavior, based on proof of the same elements, in other cases with a non-mandatory minimum sentence and a lower maximum sentence.

The co-existence of §21a-277 (a) and §21a-278 (b), and the infringement of the defendant's liberty through a mandatory minimum sentence and a higher sentencing range, cannot be justified by a compelling state interest. Nor is the statutory scheme narrowly tailored to advance any such interest. The effect of having two statutes with differing penalties penalizing the same conduct is that prosecuting attorneys have the power to charge one individual under 21a-278 (b) and another under 21a-277 for the same conduct. The co-existence of sections 21a-277 and 21a-278 (b) promotes arbitrariness. Although prosecutorial discretion is a well-recognized component of the criminal justice system, that discretion is limited by the fact that "[w]hile the prosecutor may strike hard blows, he is not at liberty to strike foul ones. State v. Andrews, 313 Conn. 266, 294 (2014). Arbitrariness is not a legitimate state interest. Identical elements and differing penalties, as found in sections 21a-277 and 21a-278 (b), do not advance a rational state interest.

c. The Defendant's Sentence Is Illegal In That It Violates The Requirement Of Article First, Section 9 Of The Connecticut Constitution That "[N]o Person Shall Be Arrested, Detained Or Punished, Except In Cases Clearly Warranted By Law"

Article First, section 9 of the Connecticut Constitution guarantees that "no person shall be arrested, detained or punished, except in cases clearly warranted by law." This provision "has no counterpart in the federal constitution[.]" Doe v. Maher, 40 Conn. Supp.

Constitution also requires, however, that governmental interference with the right be rationally related to legitimate government interests." Glucksberg, 521 U.S. at 728. "Rational basis review [searches for] a plausible policy reason for the classification." Dunkiewicz, 269 Conn. at 382. "The court's function . . . is to decide whether the purpose of the legislation is a legitimate one and whether the particular enactment is designed to accomplish that purpose in a fair and reasonable way. If an enactment meets this test, it satisfies the constitutional requirements of due process . . . ." Dalton's, Inc. v. Bedding Barn, Inc., 177 Conn. 304, 315 (1979).

394, 447 (Conn. Super. Ct. 1986) (Berdon, J.). "Recognizing that our state constitution is an instrument of progress is intended to stand for a great length of time and should not be interpreted too narrowly or too literally we have concluded in several cases that the state constitution provides broader protection of individual rights than does the federal constitution." State v. Rizzo, 266 Conn. 171, 207 (2003) (citations omitted). The state constitution "'should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens.' State v. Dukes, 209 Conn. 98, 115 ... (1988)." State v. Lamme, 216 Conn. 172, 183 (1990).[10] Indeed, "article first, § 9, provides greater protection than [the] federal constitution[.]" State v. Santos, 267 Conn. 495, 504 (2004), citing State v. White, 229 Conn. 125, 148-49 (1994). Article § 9 "guarantee[s] the citizens of Connecticut due process of law." State v. Lockhart, 298 Conn. 537, 551 (2010); State v. Mikolinski, 256 Conn. 543, 555 (2001). The Court's "appraisal of the due process contours of article first, § 9, [has looked to] the principles of fundamental fairness that are the hallmark of due process[.]" State v. Mikolinski, 256 Conn. at 567, quoting State v. Lamme, 216 Conn. 172, 185 (1990). Article 1, §9 has required correction of an illegal sentence. State v. Tabone, 292 Conn. 417 (2009).

Under article first, section 9 detention or punishment is illegal where the law does not clearly require it. Cingue v. Boyd, 99 Conn. 70, 94-95 (1923); see White, 229 Conn. at 149-153, 155. The Supreme Court has typically analyzed article first, section 9 as triggering an inquiry into whether the detention or punishment was warranted by an existing statute or other provision of the law. E.g., White, 229 Conn. at 149. "[T]he historical roots of 'except in cases clearly warranted by law' appear to provide protection for personal freedom through a blend of statutory and constitutional rights[.]" Mikolinski, 256 Conn. at 555.[11] In Rizzo, 303 Conn. at 137, the Court held "the phrase 'clearly warranted by law'

[10] Analysis of a state constitutional provision is guided by analysis of six factors identified by the Connecticut Supreme Court in Geisler, 222 Conn. at 684-86.[10] However, the Court's decisions concerning article first, section 9 have largely accomplished the Geisler analysis. E.g., Rizzo, 303 Conn. at 212-220.

[11] However, article first, section 9 is not limited by existing statutes. In Binette v. Sabo, 244

contemplates a requirement that the legal prerequisites for imposing a particular punishment be definitively established before punishment is imposed[.]" "[T]he text indicates that the specific content appropriately to be assigned to the phrase "clearly warranted by law" depends on the particular liberty interest that is at stake. Such a construction is, of course, entirely consonant with the general contours of a constitutional safeguard rooted in flexible principles of due process." State v. Lamme, 216 Conn. 172, 178-179 (1990) (citations omitted).

In this case the defendant's punishment is not clearly warranted by law when his conduct satisfies two statutes which have identical elements, but provide for different sentences, and he is punished under the harsher statute. Because the elements are the same, the imposition of a mandatory minimum sentence under one statutory provision, as opposed to a non-mandatory minimum sentence under the other statutory provision, is not clearly warranted by law. Cf. State v. Jenkins, 198 Conn. 671, 679-680 (1986) (Where legislature provided for lesser sentence for more serious crime the lesser sentence must also apply to convictions sentences for the lesser crime). The creation of two statutes with identical elements and disparate sentences is not "rational and sensible." Jenkins, supra.

There is no basis upon the government can clearly justify the harsher range of penalties in some cases where the conduct to be punished is the same. The Court should correct the defendant's sentence by vacating his existing sentence and imposing a lawful sentence based on the penalty range for C.G.S. §21a-277 (a).

d. The Defendant's Sentence is Illegal in that it violates the intent of the legislature and the rule of lenity

The 'rule of lenity' requires the Court to resolve "doubts in the enforcement of a penal code against the imposition of a harsher punishment." State v. Hinton, 227 Conn.

Conn. 23, 30 n.9 (1998) the Court did not act based upon "an established common-law principle ... or in reliance on a statutory provision." Id. (citation omitted). Rather, [the Court] create[d] a new tort action not heretofore recognized by th[e] court" arising "directly under article first, §§ 7 and 9, of our state constitution[.]" Id.

301, 317, 630 A.2d 593 (1993). The rule was explained in State v. Rawls, 198 Conn. 111, 121-122 (1985):

> It is a fundamental tenet of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. ... The "touchstone" of this rule of lenity is "statutory ambiguity." ... Unless a clear intention to [impose the harsher of two available penalties], the issue should be resolved in favor of lenity[.] Id. (citations omitted).

In Rawls, the legislature had not clearly expressed an intention to punish simultaneous possession of two different drugs as two crimes, and the Court, citing the rule of lenity, held that only one crime had been committed. Similarly, in State v. Hinton, 227 Conn. 301 (1993) the Court invoked the rule of lenity when it declined to adopt an expansive statutory interpretation, even though the interpretation adopted increased the state's burden of proof. 227 Conn. at 317-318; see George M. v. Comm'r of Corr., 101 Conn. App. 52, 60-65 (2007) ("By resort to the rule of lenity, we will resolve the latent ambiguity in the statutory scheme, ... in the petitioner's favor.")

The rule of lenity arises from the principle that "[c]riminal statutes are not to be read more broadly than their language plainly requires and ambiguities are ordinarily to be resolved in favor of the defendant." Hinton, 227 Conn. at 317-18 (citations omitted). Here the rule of lenity is applicable because, under Hart, supra, §21a-277 and §21a-278 (b) have the same elements but differing penalties. "It is axiomatic that the legislature is presumed not to have intended to enact conflicting legislation." State v. Tabone, 278 Conn. 527, 544 (2006). Here lenity comes into play because C.G.S.§ 21a-278 (b) calls for an unconstitutional higher punishment based on proof of the same facts - the same elements – as §21a-277. Because a criminal statute must be construed strictly against the state and in favor of the accused, State v. Dupree, 196 Conn. 655, 660, cert. denied, 474 U.S. 951 (1985), and because the Court must presume that the legislature intended a constitutional result, this Court must conclude that the lesser penalty (without the mandatory minimum) is the applicable penalty. "It is a fundamental tenet of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." Rawls, 198

Conn. at 121.

The Court should correct the defendant's current, illegal sentence by imposing a non-mandatory minimum sentence under §21a-277.

3. The Defendant's Sentence Was Imposed In An Illegal Manner

a. The Defendant's Sentence Is Both Illegal And Imposed In An Illegal Manner Due To The Court's Reliance Upon An Inaccurate Understanding Of As To The Available Statutory Range Of Punishments That Resulted From the Prosecution's Failure to Prove The Fact Triggering The Mandatory Minimum Sentence

The defendant's sentence is both illegal (as explained above) and was imposed in an illegal manner. A sentence is imposed in an illegal manner if the court relies upon inaccurate information, Starks, 121 Conn. App. at 586; McNeills, 15 Conn. App. at 444, because "due process precludes a sentencing court from relying on materially untrue or unreliable information in imposing a sentence." State v. Parker, 295 Conn. 825, 843-844 (2010).

The first requisite to a legal sentence is a proper understanding of the available sentencing range. Only thereafter does the court reach the question of what sentence fits both the offense and the offender. "[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." Apprendi, supra, at 519, quoted in Alleyne, 133 S. Ct. at 2163 (Thomas, J., concurring). The range of permissible sentences "presents a question of law." State v. Tabone, 292 Conn. 417, 432 (2009). What sentence should be imposed in an individual case "is within the discretion of the trial court[.]" Tabone, 292 Conn. at 430. Here the procedure by which the defendant's sentence was imposed was constitutionally invalid because the trial court was under the impression that the mandatory minimum sentence set forth in §21a-278 (b) was the lower limit of the sentencing range.

The mandatory minimum sentence was not an available lawful sentence. Nor was the increased maximum sentence. As discussed above, Apprendi and its progeny require any fact that increases punishment — here, the statutory mandatory minimum — to be

either found by the jury "or admitted by the defendant." Blakely, 542 U.S. at 303. Here the fact that triggers the mandatory minimum sentence under C.G.S. §21a-278 (b) was not found by the jury. Because non-drug dependence was not proven to a jury the true sentencing range was that specified in §21a-277 (a).

The only permissible legal sentence is a non-mandatory sentence, selected by a court aware that no mandatory minimum sentence is either permitted or required. Resentencing is required to permit the Court to impose sentence in a lawful manner. The resentencing must acknowledge that the mandatory minimum mandatory sentence called for under 21a-278 (b) is not an available or lawful available sentences.

The Court must resentence without a mandatory minimum sentence. As discussed above, although 21a-278 (b) does not provide for such a non-mandatory sentence, such a sentence is permissible because 21a-278 (b) and 21a-277 (a) have the same essential elements, Ray, supra, and 21a-277 (a) provides for a sentence without a mandatory minimum.

b. The Defendant's Sentence Was Imposed In An Illegal Manner Because The Court Relied Upon An Inaccurate Understanding of the Facts

Here the sentencing court both relied upon an inaccurate understanding of the available statutory sentencing range, and sentenced the defendant based upon the unproven assumption that he was a non-drug dependent person. The Court, relying on the Supreme Court's analysis in Hart, supra, acted on the understanding that the required mandatory minimum and increased maximum sentence was authorized even though the prosecution did not prove, and the defendant did not admit, that the defendant was non-drug-dependent. See State v. Reynolds, 264 Conn. 1, 30 (2003) (judges are presumed to know the law). The Court misunderstood the range of lawful sentences available to it. In reality a mandatory minimum sentence and the increased maximum sentence of twenty years imprisonment were not available legal sentences. Alleyne, supra.

It may appealing to interpret Apprendi and Alleyne to return the applicability of an

exception such as drug dependence to the pre-Hart interpretation of non-drug dependence. Under the pre-Hart analysis, once the issue of drug dependence is raised (by the defendant's statements, by information in the PSI, or some other way) the prosecution must carry the burden of persuasion and the Court must find beyond a reasonable doubt, that the defendant is, in fact, not drug-dependent. Only after such a finding may the mandatory minimum sentence be imposed. The Court need not decide whether an burden of going forth can be placed on the defendant, or what sort of showing would be adequate if one was permissible. This case does not require the Court to address Apprendi and Alleyne in the context of a case where neither the Court nor the prosecution had any information as to the defendant's drug abuse and potential dependence. Here the Court and the prosecutor were aware of the defendant's drug dependence based upon the PSI. That document recited the defendant's numerous failed attempts at drug rehabilitation. However, no jury finding was made.

Under these circumstances the fundamentals of due process required that the prosecution prove to a jury beyond a reasonable doubt that the defendant was not drug dependent. That did not occur. Instead the defense clearly informed the Court that the defendant was a career drug addict. No fact-finder determined the fact that would render that a mandatory minimum sentence appropriate or inappropriate, available or unavailable for this defendant. Absent a proper jury finding that the defendant was not drug dependent the mandatory minimum sentence and the sentence in excess of fifteen years total were imposed in an illegal manner. The defendant must be resentenced.

Under §21a-278 (b) the court must impose a mandatory minimum sentence. Here that sentence is illegal. However, a non-mandatory minimum sentence is authorized under §21a-277. The Court should correct the illegal sentence by imposing a non-mandatory minimum sentence under that section.

a. The Defendant's Sentence Was Imposed In An Illegal Manner Because The Court Erroneously Believed That It Was Required To Impose The

Mandatory Minimum Sentence

Due Process is offended when a court relies upon materially untrue or unreliable information in fashioning a sentence. Parker, 295 Conn. at 843-844. The defendant's sentence was imposed in an illegal manner because the sentencing court relied upon inaccurate information in sentencing him as a non-drug-dependent person. "Generally, due process does not require that information considered by the trial judge prior to sentencing meet the same high procedural standard as evidence introduced at trial." State v. Huey, 199 Conn. 121, 127-128 (1986). Due process requires that information upon which a sentence is based must be reliable. Id. Whether the information relied upon was sufficiently reliable is a "question [that] must be answered on a case by case basis." Huey, 199 Conn. at 128.

In sentencing the defendant as if he were in fact not drug-dependent, the court sentenced him based on inaccurate information. The sentencing court, relying on Hart, supra, would have relied upon Hart's description of 21a-278 (b) as having an affirmative defense of drug dependence. That affirmative defense cast the burden of proof on the defendant to establish that he was drug dependent. In the absence of such a claim, Hart assured the court that it safely could assume that the defendant was non-drug dependent. Under the circumstances of this case, that assumption was inaccurate and unfounded. It was the type of unreliable sentencing information due process prohibits a court from using in fashioning a sentence.

Correction of a sentence is required "when the sentencing judge relied on information which was truly unreliable, inaccurate or patently wrong." State v. Huey, 199 Conn. at 128. This is just such a situation. Defense counsel's argument at sentencing alerted the Court that the defendant was not a non-drug-dependent person. All the information before the court supported the conclusion that the defendant was drug dependent. While the Court was not necessarily required to credit each piece of information, in order to impose the mandatory minimum sentence under 21a-278 that court would have had to not only "reject a witness' testimony, [but also] conclude from that

rejection that the opposite is true." This the court was not permitted to do. Hart, 221 Conn. 595, 604-06, citing State v. Coleman, 14 Conn. App. 857, 871-76, cert. denied, 208 Conn. 815, 546 A.2d 283 (1988)." State v. Hart, supra, 23 Conn. App. 755-56. Nonetheless, the Court imposed the mandatory minimum sentence that was apparently required by C.G.S. §21a-278. The imposition of the mandatory minimum sentence in light of "such information confounds reason and a just result." Huey, 199 Conn. at 128.

Here the court imposed a mandatory minimum sentence intended for offenders who sold drugs but were not themselves drug dependent. Apprendi and Alleyne do not require that the defendant contest the missing element before he is entitled to have the fact of the presence or absence of drug dependence proven beyond a reasonable doubt. In this case the defendant did raise the issue of drug dependence though the Presentence investigation and the information presented at sentencing. Because the prosecution bore the burden of proving drug dependence the opportunity to establish good cause for a non-mandatory sentence by presenting mitigating evidence was not an adequate substitute for the required proof beyond a reasonable doubt that the defendant was not drug dependent. That failure of proof limits the range of legal sentences the court could impose. As set forth above, a resentencing is required, before a court aware that it could not treat the defendant as a non-drug dependent person.

c. The Defendant's Sentence Was Imposed In An Illegal Manner Because The Court Relied Upon An Inaccurate Understanding Of The Availability of a Non-Mandatory Sentence

Section 21a-278 (b) requires a mandatory minimum sentence and provides only two limited exceptions (not applicable here) to that requirement. Further that statute provides that the mandatory minimum sentence may not be suspended. This statutory language caused the sentencing court to believe that it was bound to impose the mandatory minimum sentence. That sentence was imposed in an illegal manner because the Court acted under the misapprehension that it was required to impose a sentence with a

mandatory minimum. Huey, supra.

Although the mandatory minimum here is non-suspendable, it is not non-reducible. Compare e.g., C. G. S. § 53a-30; §53a-70a ("Any person found guilty under this section shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court"). The court had the discretion to impose a non-mandatory minimum portion of the sentence by reducing the mandatory minimum sentence to nothing. The Court should correct the sentence imposed in an illegal manner by vacating the sentence and imposing a new sentence knowing it has that option.

Conclusion

For all of the foregoing reasons this Court should correct the defendant's illegal sentence and correct the illegal manner in which his sentence was imposed.

Respectfully submitted,

The Defendant

By: 

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CERTIFICATE OF SERVICE

I hereby certify that the on December 5 2014, foregoing was mailed/hand-delivered to all counsel of record.



BRIAN S. CARLOW
Deputy Chief Public Defender

NO: NNNM CR08-0258[illegible] DEC 2 AM 11 51

STATE OF CONNECTICUT CAT : SUPERIOR COURT

STATE OF CONNECTICUT

v. : NEW HAVEN J.D. at MERIDEN G.A. #7

NEMIAH ALLAN : DECEMBER 2, 2015

MOTION FOR RECONSIDERATION

The defendant, Nemiah Allen, hereby moves this honorable Court to reconsider its decision on the Motion to Correct. In support of this motion the defendant relies upon the following:

A. The Two Statutes Punish the Identical Behavior

The Court's decision, embodied in the signed transcript of September 2, 2015, concluded that the United States Supreme Court decisions in Alleyne v. United States, 133 S. Ct. 2151 (2013) and Apprendi v. New Jersey, 530 U.S. 466 (2000) did not control, and that the Connecticut Supreme Court decisions in State v. Januszewski, 192 Conn. 142 (1980), State v. Hart, 221 Conn. 595 (1992), State v. Rey, 280 Conn. 602, (2006) did control. Transcript, 9/2/2015, p. 6. In the course of reaching that decision the Court, referring to C.G.S. §§21a-277 and 21a-278(b) stated:

> The claim that the two crimes are similar in nature, and yet, offer difference punishments. Again, the Court found -- this Court found no support for that. These two statutes have been in co-existence for some 20 plus years. And there has been nothing that said that these particular statutes punish the same behavior. In fact, they may change based on the fact of a non-drug dependent person or a drug dependent person.
>
> Transcript, 9/2/2015, p. 3.

The defendant respectfully submits that the Court has erred in concluding that "there has been nothing that said that these particular statutes punish the same behavior." Id. The Connecticut Supreme Court in Ray, supra, said precisely that. It described 21a-277 and 21a-278(b) as "two separate crimes with identical elements." Ray, 290 Conn. at, 825.

The Court has erred by concluding that the two statutes do not "punish the same behavior." Transcript, 9/2/2015, p. 3. The Court's statement that "they may change based upon the fact of a non-drug dependent person or a drug dependent person[,]" id., seeks to create a distinction that the Supreme Court rejected when it concluded the two statutes have "identical elements." Ray, supra.

B. The *Rule of Lenity* Requires that the Defendant's Sentence Be Administered as a Non-Mandatory Minimum Sentence

The Court, in addressing (in the Court's words) "[w]hether or not the Court could, in fact, or should have, in fact, imposed a mandatory minimum" sentence, the Court concluded that the record was ambiguous as to whether the Court had actually imposed a mandatory minimum sentence. The Court stated,

> But, as to whether or not the Court did impose a sentence based upon the mandatory minimum guidelines, that's something that needs to be brought right back to the Judge who did it, I believe. Not a Court sitting reviewing a motion to correct an illegal sentence.
>
> But, I understand that the basis of all those issues -- all the claims of the -- whether or not a mandatory minimum sentence was imposed [sic].
>
> Transcript, 9/2/2015, pp. 5-6.

The Court here concluded that it was unclear whether the sentencing court did, in fact, impose a mandatory minimum sentence. The ambiguity that the Court found brings

into play the rule of lenity, but in a different context than that presented in the Memorandum in Support of the Motion to Correct.

The 'rule of lenity' is the legal equivalent of the baseball adage 'a tie goes to the runner.' It requires Courts to resolve "doubts in the enforcement of a penal code against the imposition of a harsher punishment." State v. Hinton, 227 Conn. 301, 317, 630 A.2d 593 (1993); see George M. v. Commissioner, 101 Conn. App. 52, 60-65 (2007). The trigger for application of the rule of lenity is ambiguity. State v. Rawls, 198 Conn. 111, 121-122 (1985). Further, "[u]nless a clear intention to [impose the harsher of two available penalties], the issue should be resolved in favor of lenity[.]" Id. To the extent that this Court has found the record ambiguous, the defendant's sentence must be construed to be a non-mandatory sentence. The defendant asks this Court to order a revised mittimus designating the sentence imposed as non-mandatory.

C. To the Extent that the Record is Ambiguous as to Whether the Sentencing Court Imposed a Mandatory or Non-Mandatory Sentence, the Case Should be Referred to the Sentencing Court to Clarify the Record

The Court has stated that the question whether the sentencing "Court did impose a sentence based upon the mandatory minimum guidelines ...[is] something that needs to be brought right back to the Judge who did it[.]" Transcript, September 2, 2015, p. 5. Because this Court indicated it was not in a position to determine at least one of the issues raised in the motion to correct due to this ambiguity, the Court should refer the case for clarification so that the issue can be determined.

Conclusion

For all of the foregoing reasons this Court should reconsider its decision on the defendant's motion to correct illegal sentence.

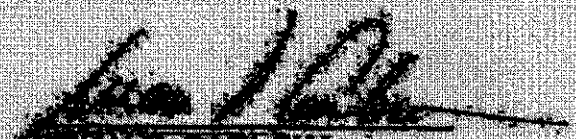
Respectfully submitted,

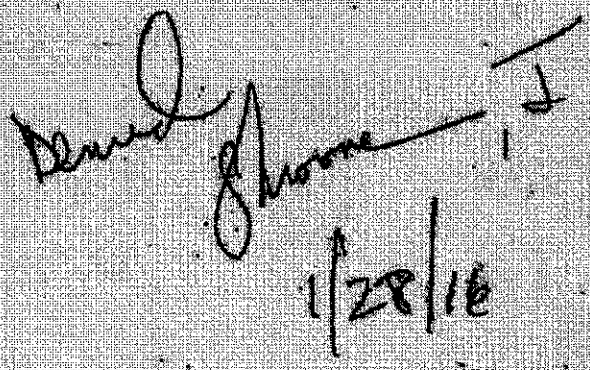
NEMIAH ALLEN
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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2015, foregoing was mailed/hand-delivered to all counsel of record.


BRIAN S. CARLOW
Deputy Chief Public Defender



DOCKET NOS: : SUPERIOR COURT

N07MCR0902521665

STATE OF CONNECTICUT : G.A. # 7

V. : AT MERIDEN, CONNECTICUT

NEMIAH ALLAN : FEBRUARY 22, 2010

SENTENCING TRANSCRIPT

BEFORE THE HONORABLE BRIAN T. FISCHER, JUDGE

A P P E A R A N C E S :

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Representing the Defendant:

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Recorded By:
Michelle Zuk

Transcribed By:
Michelle Zuk
Court Recording Monitor
54 West Main Street
Meriden, Connecticut 06451

ATTORNEY DINNAN: This is the matter for sentencing Nemiah Allan.

THE COURT: Good afternoon. This is the matter of State of Connecticut vs. Nemiah Allan. This is the sentencing hearing. Could I have counsel's name for the record, please?

ATTORNEY DINNAN: Yes, James Dinnan, for the State of Connecticut.

ATTORNEY HARMON: Gerald Harmon for Mr. Nemiah Allan, who is to my left, your Honor.

THE COURT: And this is, Mr. Allan. Okay, thank you. The Court has received and has reviewed the presentence investigation. The State has also received and has reviewed the Appellate Court, State of Connecticut matter of: State of Connecticut vs. Nemiah Allan, which, has been presented to the Court, by Attorney Harmon, on behalf of his client for the Court to review. I have also, reviewed that Appellate matter. And just to review gentlemen, Mr. Allan was tried in front of a jury, and convicted on December 4th, 2009. He was convicted of conspiracy to sell narcotics and interfering and resisting arrest. He was found not guilty for intent to sell narcotics, and possession of narcotics. Is that, correct, gentlemen?

ATTORNEY DINNAN: Yes, your Honor.

ATTORNEY HARMON: That is, correct, your Honor. Yes.

THE COURT: And with that I will hear first from the State of Connecticut followed by defense counsel, and the defendant.

ATTORNEY DINNAN: Thank you, your Honor. The state has reviewed the PSI that was received this morning, from the probation department. I don't take issue with anything in that PSI. As the Court has become aware, now, after viewing the PSI, and becoming a little bit more aware as time goes on, the defendant is a career criminal. He is 51 years old he's been involved in the criminal justice system since 1976, his first conviction. His convictions include the whole gambit of crimes. There is possession of narcotics. There is, multiple convictions for sale of narcotics. There is, violent crimes. There is robbery. There are assaults. There are violations of probation. There are larcenies. There are weapons charges. The defendant has served at different points in time, significant stretches of incarceration. He is currently serving a sentence for a violation probation which is, for narcotics charge. He was on probation when he committed the offenses, for which he was convicted by the jury in this particular case. The defendant is also no stranger to this courthouse. He has been a Meriden resident for approximately, fifteen or twenty years, maybe longer then that. And the defendant, during his entire time here has been a person, who has been a harasser to the community, to his fellow citizens. He has been malicious to his fellow

citizens. He has been disruptive to the police. He has been involved in sale of narcotics. He has been involved in a number of criminal activities here in the City of Meriden. The defendant throughout his adult life does not appear to have had any sustainable employment. He has a number of children. He does not appear to have ever supported any of them. He does not have a relationship apparently, with any of them now. His brother and his father did contribute some comments to the PSI. And it is clear, certainly from his brother's comments, of the frustration that the family has had, with the defendant. And that he has brought this on himself. The defendant's take on it is quite the opposite. The defendant and it jumps out in the PSI, he took five hours during the interview with the probation officer. Five hours of a rant in which, he blamed everybody, for his problems. There is a conspiracy amongst the Meriden Police, the State's Attorneys Office, the Court, his own attorney. That he has been framed. That this didn't occur, but if it occurred, there wasn't enough evidence. He gives explanations that are at times preposterous, but certainly, self-serving and not willing to take responsibility for a single thing.

The defendant in this case, as the jury came back with a conviction for conspiracy to sell narcotics, it's a case as the court is well aware, involved surveillance in a particular area of town, where drug sales were rampant. Police, the Meriden Police actually, had an ongoing

investigation on the stash house that the defendant was using. There was a joint local and federal task force that had arrived on the scene. And then, when the defendant was obviously, involved in the sale of narcotics, he contacted the Meriden Police Department, whose members were part of this task force anyhow, and they came over and set up surveillance. The charge for which he was convicted the lead charge of conspiracy of sale of narcotics involves his conspiracy with Kareem Thomas, who by the defendant's own admission was his supplier of narcotics. He had dialed him up in order to be re-supplied. Mr. Thomas showed up in an automobile, and the Court heard the testimony with regards to that. After that, automobile left, it was followed by police and eventually attempted to be stopped. It took off and then struck a police officer causing life-threatening injuries to that police officer--

NEMIAH ALLAN: That got nothing to do with me. That was--

THE COURT: Hold on.

NEMIAH ALLAN: That had nothing to do with me.

THE COURT: Hold on, Mr. Allan. Go ahead, Attorney Dinnan.

NEMIAH ALLAN: Don't try to make me look like a bad guy.

ATTORNEY DINNAN: This was, the defendant's co-defendant your Honor, someone that he conspired with to sell narcotics in the City of Meriden.

NEMIAH ALLAN: Paint a picture, you paint it, right.

THE COURT: Mr. Allan, it doesn't help your cause. Just be quiet. I am going to give you an opportunity to discuss it with the Court. Go ahead, Attorney Dinnan.

ATTORNEY DINNAN: During the course of the arrest, or the attempted arrest of the co-defendant as indicated, a police officer was seriously injured. The police when they went back to the defendant, the defendant attempted to flee. He had to be physically subdued. He struggled with the police officer for which, he was convicted, on the interfering with a police officer charge. This particular crime is an example of how the defendant has conducted his entire adult life with no concern for other individuals. Being a profiteer, if you will, by selling narcotics, which appears to me, to be the only valid job, that, he has ever had. To take advantage of other people, to blame other people, and to, fight with other people. The Defendant's PSI, outlines his family background. And it goes into some detail although, the defendant, was not very forthcoming, about his medical and mental health history. I think that it is very telling in the PSI where the probation officer reviewing the documentation from Rushford, and other agencies, and they quote, that the defendant is manipulative and a malingerer. The defendant at different times, or many different times, has been encouraged to and set up to be

engaged in treatment. He has never followed through on any of that. I think that some of the commentary in the PSI is after he meets his basic needs, which quite frankly, are the prescription of Percocet's, or other types of drugs, he then, disengages from treatment. Time and time again that's what occurs. The defendant is a malingerer. The defendant is malicious. The defendant is a con-man. The defendant is a gamer whatever adjectives that one can think up, I attribute those to the defendant because he does not take any, or give any respect to the court system. He does not give any respect to his fellow citizens. He is, in it for himself and himself only.

I think the probation officer after interviewing the defendant in her final summation, indicated that the defendant has quote, "an anti-social personality disorder". That's an understatement. The defendant is anti-social. But the defendant, in his examinations over time, at one time there was a diagnosis of bipolar. Apparently, the last evaluation they did not diagnose him as bipolar, they had with a disorder not otherwise specified, a depressive disorder, and then dependence upon substances. I don't think that there is any question that over the years the defendant has abused narcotics. But, there is also no question at least in the state's mind, that over the years the defendant has played the system as best he could. He puts on a great face. He puts on a great show, but it comes right down to it, he is, as the diagnosis from Rushford

says, he is a manipulative malingerer. Probation in their final analysis believes that he is not amenable to the probation efforts and they request that he not be placed on probation. They suggest incarceration followed by a period of special parole. My own feeling is that the defendant has reached a point in his life, and society has reached a point where a heavy incarceration period is the only thing that is going to stop the defendant. When he gets out, he will continue to do the same thing that he has done since 1976. The maximum penalty for this charge, the main charge of conspiracy to sell narcotics is 20 years. And although, I rarely pick a particular number in sentencing arguments, I am picking that number today. I urge the Court to impose the entire 20 year sentence, on the defendant. A year concurrent, on the; interfering with a police officer. There were a number of individuals that testified during the course of the trial that your Honor heard, and that the jury heard. One of those individuals is, Detective David Visconti the officer that was injured. He is present in court obviously, this has been, an interest of concern of his. And the defendant is correct, when he says, he is not the one that ran Detective Visconti over, but, for the actions and the conspiracy—

NEMIAH ALLAN: No, I wasn't in the car—

ATTORNEY DINNAN: Let me finish, my sentence.

THE COURT: Hold on.

ATTORNEY DINNAN: But for, the actions, and the

conspiracy of the defendant, that never would have happened. So, Detective Visconti did request permission to briefly address the court.

THE COURT: Sure.

ATTORNEY DINNAN: Thank you.

THE COURT: You can come forward. Good afternoon, could we just have your name first, please.

DAVE VISCONTI: Detective Dave Visconti.

THE COURT: Go right ahead, Detective.

DAVE VISCONTI: Good afternoon, your Honor. I apologize, for my appearance I was working in undercover capacity. As Attorney Dinnan had said, before, I just wanted to speak to the court about the case. I've dealt with Mr. Allan on several different times in the past dealing with narcotics. I was just assigned to the narcotics detective division three days prior to dealing with Mr. Allan and his conspirator Kareem Thomas. On the day that this all took place, if it wasn't for him selling the drugs or having the drugs in that area, or directly across from the school, where I know that, several of our police officers have kids that go to school. Kareem Thomas, who was his supplier, never would have gone there and the injuries that I sustained, I was out for ten and a half months before I could return fully to work. And I believe that none of this would have ever have happened, if he hadn't done this. Throughout his whole career of dealing with the same people over and over, Detective John Williams,

wished that he could be here, but he could not, because he had a death in the family. He had dealt with Mr. Allan on several different occasions in which, he has not cooperated with police and has constantly been a menace to society in that area where we have a high drug problem.

THE COURT: Thank you, very much. Is there anything else from the State, on this matter?

ATTORNEY DINNAN: No, thank you.

THE COURT: Attorney Harmon.

ATTORNEY HARMON: Thank you, your Honor. In terms of this, in reviewing the PSI, your Honor, I think that in contrast to what the state says in this matter, if you look at it, what we actually have is someone who has a career addiction to drugs your Honor. If you go through that, it indicates in here that Mr. Allan has been on drugs since approximately, 1985 in terms of that. If you review his record, there is, more convictions for possession then anything else, your Honor in terms of that. In fact, we have to go all the way back to 1991 for the last sale charge that Mr. Allan's had in terms of this case. And that is something that it just indicates in the file that it just never worked out for him. He is, staying a drug addict that's correct, your Honor. It goes through here, it just indicates, that he has never been able to kick the habit. He is diagnosed with cocaine and depressive disorder and cocaine dependence from Rushford as recent as May of 2009, your Honor. He is an individual who hasn't been able to

shake that. And that's led to some of the actions that the state talks about in here. Actions where they talk about him being manipulative, he is manipulative to feed a habit. Those things occurred because he is attempting to feed a drug habit that he has, your Honor. In terms of that, the length of period that he has been incarcerated on this case already, on his prior VOP, is probably the longest that he has ever been without narcotics in terms of that, your Honor. So I think that in that sense, this has given him a time period to get dried out and understand what's going on with this case. In terms of being upset, yes, he is upset about this case, your Honor. Yes, he does speak out loudly regarding that, and zealously on his behalf. In terms of that, it is correct, as the Court noted, that regarding the initial charges on this case, he was found not guilty regarding those. In terms of being found guilty on the conspiracy charge, I think that if we look at the case as a whole, your Honor, in terms of the lesser offense that occurred to me, that case was it and we are not belittling or saying anything to make little of the fact that an officer was hurt later on, during that case. We do indicate though, that in our view, and in our opinion it can't be said that Mr. Allan was the cause of that. Mr. Kareem Thomas was the cause of that, he is being charged for that. He has a case pending regarding that. He's the one that should be punished for that action, not Mr. Allan. If it was Mr. Allan who should be punished for that, Mr. Allan

would be charged. He would have a case in Part A in New Haven just like Mr. Thomas does currently, your Honor in terms of that. So, I think that that part we just don't think applies to him in terms of that.

What we have, as previously indicated is a person who has children. He tries to support them the best that he can. But, at the same time he does have he is a drug addict, that, he hasn't gotten over yet, your Honor. In terms of that, he has admitted using cocaine. He admits that he has a drug problem. And I think that's what needs to be addressed here, your Honor. As indicated, in the pre sentence report where it talks about substance abuse evaluation, mental health evaluation and things of that nature that should be applied to him. In the defenses review of this, your Honor, I think a period of five years concurrent to his sentence that he is serving right now would be, appropriate, your Honor.

THE COURT: What is his sentence that he is serving now?

ATTORNEY HARMON: He is serving a two and a half year sentence currently.

THE COURT: Is there anything else, Attorney Harmon?

ATTORNEY HARMON: I know that Mr. Allan wanted to address the court.

THE COURT: Sure. Mr. Allan, you would like to address the court?

NEMIAH ALLAN: Yes. I'm being charged with conspiracy. And they said that I made a confession saying that Fleet was my supplier. So, if I made that confession in my stand point, it is police protocol to get a written statement from the defendant, if he gave a verbal statement or a videotape conversation. That is police protocol which is, failure of due process, which the jury was not -- I think that they was confused about the conspiracy about how they should find me guilty on the conspiracy: All right--

THE COURT: Well, just to be clear, you are not charged with conspiracy to sell narcotics you were convicted by the jury, of conspiracy to sell narcotics.

NEMIAH ALLAN: Sell, correct.

THE COURT: Just so we are clear. Go ahead.

NEMIAH ALLAN: I was convicted on the hearsay which the officers, they have no kind of evidence to back that hearsay. All right, that is number one. Number two, as far as me resisting arrest, why would I resist arrest when this states that I had no drugs found on my possession, so why would I try to run from the police. They had the guns drawn out on me. The person, Fleet ran that officer over, so they wanted to find out who was driving the car so they hit me upside the head with their gun. They had me in the car pistol whipping me, interrogating me. What's his name, who is driving that, I am telling you, what I, know. No, but, they punched me in the stomach. I'm handcuffed hit me upside the head with the pistol. So, I am not no animal,

you know what I am saying, I'm handcuffed. All right, your officer, got hurt, you don't take it out on me. I wasn't even in the car. The probation, you got the report right there. The probation officer lied on the affidavit warrant. He put me in the car that hit that officer. He lied on the affidavit warrant. He violated my probation which, without finding the outcome to my case. He has got it right there in black and white. They didn't get, no drugs, off of me. When they arrested me, all that I had was thirty cents. So, where is the conspiracy coming? There is, no drugs on neither party. There, is no money, on neither party. But, they made this allegation that there is a conspiracy being, where is, the drugs? They said that I did all of these transactions but no money. Thirty cents that's all I had. That is why the jury found me not guilty on sale, possession and in a school zone. Oh, man I don't understand this, but, I don't know. You got me for conspiracy. You are going to sentence me for me having thirty cents on my possession because the jury was not, they didn't know about they wasn't read the instructions properly on what conspiracy or whatever to find me guilty. But, thirty cents, you are going to sentence me on thirty cents when there is, no drugs? The person who had the drugs his testimony was no good in court. So, he is the only one who had the possession and that is the only drug that they had, was a twenty of crack. They have got my fingerprints on nothing.

THE COURT: All right, anything else?

NEMIAH ALLAN: Yes. I was going to Rushford for my drug problem. And then all of a sudden, I was under surveillance. They didn't stop me from going, it is in that report. I was doing everything successfully admitted by the probation officer. Until that day, they said that I was under surveillance. I did this, they had seen me do that. If I did all of these transactions and stuff, why didn't you all arrest me right then. Right then, when I had money or drugs, why didn't you arrest me right then. I understand you, was trying, to build a case. You're messed up, if you were trying to build a case. You didn't get me, with nothing. With nothing, with thirty cents, in my, pocket. No cocaine residue nothing on me. And then I don't have, no dirty urines, so I wasn't -- I didn't violate my probation. I had clean urines. So I was helping my problem. It wasn't just about me being, locked up. No, I was taking care of my problem. I was getting my medication. I was getting my pain medication. You talked about how I never had a job I had a job in '97'. In '96' when I came home from jail, I was working for Saika & Sons. I got into a car accident I had -- removed from my neck. I had surgery to it. I was pending disability. I was on pain medicine and then that ran out. The fusions from my neck deteriorated. So now, the doctors that operated on me, they didn't want to give me no pain medicine. Now, it is hard for me to get pain medicine, so I had to get my pain medicine from the street. And then I ended up getting a heart attack, now,

MidState wants to give me pain medicine. Now, they want to give me Percocets because I told them I've been trying to get pain medicine. Now, they have me going to pain management, which I was starting to go to, until this happened.

THE COURT: All right. Is there, anything, else, Mr. Allan?

NEMIAH ALLAN: No there is, probably other people that you want to hear so.

THE COURT: Attorney Harmon, anything else, from you?

ATTORNEY HARMON: No your Honor. Just to reiterate what he was saying. In terms of the addiction that occurred from the automobile accident. In terms of that, when he had the automobile accident it has continued since that time, your Honor. I think that if the court looks at that, and also, to look at as indicated previously, how he was found not guilty on the more substantive -- what we feel were the more substantive charges within the case, your Honor.

THE COURT: All right.

NEMIAH ALLAN: I have one more thing. And when I was arrested in Meriden, they don't have, no, sale charges on me in Meriden.

THE COURT: I'm sorry?

NEMIAH ALLAN: I've been in Meriden since '96' they said, that they have got all of these drug charges. I

only had, this is my only drug charge, that, I got. I only got possession, possession, possession, no sales. The only sale charge that I have is from 1991 back in Bridgeport, which I did, six straight years.

THE COURT: All right. So no prior sales in Meriden, you're telling me?

NEMIAH ALLAN: I don't, got no prior sales, at all, no sales. I only have possession charges here.

THE COURT: Anything else, Mr. Allan?

NEMIAH ALLAN: That's all that I had on me, was thirty cents, that's all.

THE COURT: Well, I've heard that. All right, Mr. Allan, you know, you use the term what's in black and white. And what is in black and white for this court to consider, in sentence is that you are a 51 year old career criminal with no work history. You clearly, do not support your children. You are convicted of conspiracy to sell narcotics. And your offender's version, I just want to review some other things that are in black and white Mr. Allan. What's in black and white is your offender's version in the PSI, which you indicate, quote, "all of this was over twenty dollars of crack". You also indicate, as follows, as stated, by the probation officer, quote, overall Allan conveyed three primary positions. His first position, being that he was not selling narcotics and the police conspired against him. His, second position, seemed to be, that although, he may have committed an offense the police and

the state did not obtain their information in a lawful manner and/or they did not have enough evidence to convict him beyond a reasonable doubt. And his third position was that he was not represented effectively, and that his attorney conspired with the presiding Judge and the State's Attorney as they often met in chambers alone.

Now, your record it does go back to 1976, as you are well aware Mr. Allan. And you have four convictions of criminal trespass in the 1st degree. You have of that date, in May of 1976 two larceny 4's, a larceny 3. In 1978, you were convicted of, robbery in the 1st degree; followed in August 29 1981, of a gambling conviction; and in October of 1983, you have possession of marijuana; now, in August of 1984, in Bridgeport you have another possession of marijuana; in August of 1989, in Meriden, you have a sale of cocaine. And the pre sentence investigation--

NEMIAH ALLAN: In Meriden? I was locked up.

THE COURT: Hold on. In 1989, the pre sentence investigation indicates the appropriate disposition on those cases, many of which include incarceration, as you know. In 1991, you were convicted of carrying a pistol without a permit, sale of narcotics, sale of a controlled substance; 1997 in Waterbury and 1998 in Waterbury; a breach of peace and possession of narcotics; in 1998, in Waterbury; possession of narcotics. You moved over to Meriden for a conviction in March of 1999, for assault in the 3rd degree. Again in Meriden; August of 2000, it was a breach of peace;

September 2000, larceny in the 6th degree; In Meriden, which apparently now, is your home, in April of '03' it was larceny in the 6th degree; October '04' breach of peace, interfering; January '05' breach of peace. Then we move to May '06' in Meriden, possession of marijuana; Failure to appear in the fall of '06'; In March of '08' criminal trespass in the 1st degree. And then, we get to the pending charges. That is an extensive criminal record, Mr. Allan a horrible criminal record. While you're on probation, you are arrested for the offenses that you tried in front of a Jury. A Jury heard the evidence, and beyond a reasonable doubt found you guilty of conspiracy to sell narcotics and interfering with a police officer. It also notes in your pre sentence investigation, in black and white Mr. Allan, the offender has a disciplinary history with the Department of Corrections to include 48 infractions. Records do not seem to date back any further then 1989. Apparently, you are fortunate for that, so we have 48 infractions since that date. And, it lists all of those infractions. Again, Mr. Allan, in black and white, you do deserve a substantial sentence. You have proven time and time again that after incarceration you come out and you continue to commit serious crimes. Based on, what I've read in the presentence investigation, what I've heard from the state's attorney, what I've heard from the detective, what I've heard from Attorney Harmon. And, Attorney Harmon has done an excellent job, as an advocate for you, Mr. Allan. He has

done an excellent job at that trial and he has done an excellent job at this sentencing hearing. I also, base my sentencing on the remarks that I've heard from you, Mr. Allan.

Your sentence is as follows: you are committed to the Commissioner of Corrections on the conspiracy to commit sale of narcotics for a period of twelve years to serve, five years special parole. On interfering with an officer, you're committed to the Commissioner of Corrections one year to serve, to run concurrent. So, the total effective sentence is: twelve years to serve followed by five years special parole.

Is there anything else, from the State of Connecticut on this matter?

ATTORNEY DINNAN: No, thank you.

THE COURT: Anything else from you, Attorney Harmon?

ATTORNEY HARMON: Is that, concurrent to his sentence that he is serving now, your Honor?

THE COURT: That is concurrent to his sentence that he is doing now. Madam Clerk, do you have some forms? If you could, hand them to Attorney Harmon first please.

THE CLERK: I just want to put it on the record-

ATTORNEY HARMON: I would request back your Honor, just a copy of his paperwork that you reviewed.

THE COURT: Yes, I will.

THE CLERK: I just want to put it on the record,

that I am giving counsel and the defendant; notice of right to appeal judgment conviction, notice of right to have sentence review, application for appeal, and an application for a waiver of fees, costs, and expenses, appointment of counsel on appeal.

THE COURT: Okay, the record will reflect Madam Clerk, that all of the appropriate paperwork has been given to Mr. Allan, reviewed by, Attorney Harmon and apparently, executed by Mr. Allan. Is there anything else, on this matter gentlemen?

ATTORNEY DINNAN: No thank you.

THE COURT: All right. Good luck to you, Mr. Allan, you're all set. Thank you.

ATTORNEY HARMON: Thank you, your Honor.

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As of: January 14, 2019 2:18 PM Z

State v. Allan

Supreme Court of Connecticut

September 24, 2013, Argued; January 28, 2014, Officially Released

SC 18879

Reporter
311 Conn. 1 *; 83 A.3d 326 **; 2014 Conn. LEXIS 5 ***; 2014 WL 223656

STATE OF CONNECTICUT v. NEMIAH ALLAN

Prior History: [***1] Substitute information charging the defendant with the crimes of sale of narcotics by a person who is not drug-dependent, sale of narcotics within 1500 feet of a school, possession of narcotics, conspiracy to sell narcotics by a person who is not drug-dependent and interfering with an officer, brought to the Superior Court in the judicial district of New Haven, geographical area number seven, and tried to the jury before B. Fischer, J.; thereafter, the court denied the defendant's motion for a judgment of acquittal, verdict and judgment of guilty of conspiracy to sell narcotics by a person who is not drug-dependent and interfering with an officer, from which the defendant appealed to the Appellate Court, DiPentima, C. J., and Alvord and Espinosa, Js., which affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. Affirmed.

State v. Allan, 131 Conn. App. 433, 27 A.3d 19, 2011 Conn. App. LEXIS 478 (Sept. 20, 2011)

Core Terms

conspiracy, drugs, buyer-seller, narcotics, buyer, seller, distribute, appellate court, Street, conspiracy conviction, sell narcotics, quotation, marks, parties, crack cocaine, conspirators, vehicles, corner, circumstances, coconspirator, federal court, trial court, distributor, Statutes, inferred, supplier, courts, Sales, sufficiency of evidence, insufficient evidence

Case Summary

Overview

HOLDINGS: [1]-Defendant's conviction for conspiracy to sell narcotics by a person who was not drug-dependent under *Conn. Gen. Stat. §§ 53a-48* and *21a-278* was proper because the evidence supported a finding that defendant agreed with the coconspirator to participate in a drug distribution plan as a seller, rather than merely to purchase narcotics; [2]-The evidence, specifically his statements made to the police, were not sufficient to sustain only a conviction of attempted possession of narcotics. There was ample evidence to support the conclusion that defendant was in the business of selling drugs. Undoubtedly, the most persuasive evidence of that fact came from defendant's own statements, which included admitting to having sold drugs.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN1[] **Conspiracy, Elements**

See *Conn. Gen. Stat. § 53a-48(a)*.

Criminal Law & Procedure > ... > Controlled Substances > Delivery, Distribution & Sale > Penalties

Criminal Law & Procedure > ... > Controlled Substances > Manufacture > Penalties

HN2[] **Delivery, Distribution & Sale, Penalties**

See *Conn. Gen. Stat. § 21a-278(b)*.

Criminal Law & Procedure > ... > Reviewability > Waiver > Exceptions & Validity of Waivers

Evidence > Weight & Sufficiency

Criminal Law & Procedure > Trials > Motions for Acquittal

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

HN3 **Waiver, Exceptions & Validity of Waivers**

A motion for a judgment of acquittal will preserve a sufficiency of the evidence claim. And, although the appellate courts are not bound to consider a claim unless it was distinctly raised at trial under *Conn. Gen. Prac. Book R. App. P. § 60-5*, the appellate courts retain discretion to consider legal theories that differ from those raised before the trial court if they relate to an issue preserved for appeal.

Criminal Law & Procedure > ... > Delivery, Distribution & Sale > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN4 **Conspiracy, Elements**

The so-called buyer-seller exception is not properly viewed as an exception to federal conspiracy law, but, rather, a proper application of fundamental principles of conspiracy jurisprudence that are shared by Connecticut.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN5 **Conspiracy, Elements**

Conspiracy is the unlawful act of agreeing to commit a crime. It is a separate and distinct offense from the commission of the substantive offense that is the object of the agreement. That agreement is a distinct evil, which may exist and be punished whether or not the substantive crime ensues. The gravamen of the crime of conspiracy is the unlawful combination and an act done in pursuance thereof, not the accomplishment of the objective of the conspiracy. As criminals united with a common purpose pose a potentially greater danger to the public than an individual acting in isolation, conspiracy is anticipatory and aimed not at the unlawful object, but at the process of agreeing to pursue that object.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN6 **Conspiracy, Elements**

To establish the crime of conspiracy in Connecticut, the State must prove that there was an agreement between two or more persons to engage in conduct constituting a crime and that the agreement was followed by an overt act in furtherance of the conspiracy, *Conn. Gen. Stat. § 53a-48 (a)*. Conspiracy is a specific intent crime, with the intent divided into two elements: (a) the intent to agree or conspire; and (b) the intent to commit the offense which is the object of the conspiracy. Thus, proof of a conspiracy to commit a specific offense requires proof that the conspirators intended to bring about the elements of the conspired offense.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN7 **Conspiracy, Elements**

When the charged object of the conspiracy is to sell or distribute narcotics, the State is required to prove two distinct elements of intent: (a) that the conspirators intended to agree; and (b) that they intended for narcotics to be sold to another person. The existence of a formal agreement between the parties need not be proved; it is sufficient to show that they are knowingly engaged in a mutual plan to do a forbidden act. Consequently, it is not necessary to establish that the defendant and his coconspirators signed papers, shook hands, or uttered the words we have an agreement. The requisite agreement or confederation may be inferred from proof of the separate acts of the individuals

accused as coconspirators and from the circumstances surrounding the commission of these acts.

Criminal Law & Procedure > ... > Delivery, Distribution & Sale > Conspiracy > Elements

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN8 **Conspiracy, Elements**

With the exception that federal law does not require proof of an overt act in furtherance of a conspiracy to violate its narcotics laws, federal conspiracy law generally reflects the same fundamental requirements as Connecticut law. Under federal conspiracy law generally, the government must prove beyond a reasonable doubt that two or more people agreed to commit a crime covered by the specific conspiracy statute (that a conspiracy existed) and that the defendant knowingly and willfully participated in the agreement (that he was a member of the conspiracy). The existence of a formal agreement to conspire need not be established; circumstantial evidence, reasonable inferences drawn from the relationship of the parties, and the totality of the circumstances are sufficient proof of a conspiracy. Like Connecticut law, under federal law, a drug-distribution conspiracy requires proof that the defendant knowingly agreed-either implicitly or explicitly-with someone else to distribute drugs. Evidence of a mere buyer-seller relationship, without more, does not constitute a conspiracy to distribute drugs.

Criminal Law & Procedure > ... > Delivery, Distribution & Sale > Conspiracy > Elements

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN9 **Conspiracy, Elements**

In a buyer-seller relationship, there is no singularity of purpose and thus no meeting of the minds. Mere proof of a buyer-seller agreement without any prior or contemporaneous understanding does not support a conspiracy conviction because there is no common illegal purpose: In such circumstances, the buyer's purpose is to buy; the seller's purpose is to sell. People in a buyer-seller relationship have not agreed to advance further distribution of drugs; people in conspiracies have. That agreement is the key. Accordingly, a mere buyer-seller relationship lacks an essential element necessary to form a conspiracy.

Criminal Law & Procedure > ... > Delivery, Distribution & Sale > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN10 **Conspiracy, Elements**

Regardless of whether a court characterizes the issue as a proper application of conspiracy law or an exception to a literal application of that law in furtherance of legislative intent, a survey of federal case law indicates that the principle that conspiracy to sell narcotics cannot be found on the mere basis of a buyer-seller relationship universally stems from two tenets of common-law conspiracy. First, mere association with a member of a conspiracy or acquiescence in the object or purpose of a conspiracy is not sufficient to satisfy the intent elements of conspiracy. Second, conspiracy is a separate and distinct offense from the underlying crime that is the object of the agreement. Accordingly, in the context of a drug sale between two alleged coconspirators, the federal courts have held that there must be evidence of an agreement to distribute drugs and that such an agreement must be in addition to the purchase and sale between the two parties. Liability will arise as a coconspirator, therefore, when the buyer and seller shared a conspiratorial purpose to advance other transfers, whether by the seller or by the buyer. By contrast, when the government's proof shows no more than a simple sales transaction between alleged coconspirators, its case for conspiracy will fail.

Criminal Law & Procedure > ... > Delivery, Distribution & Sale > Conspiracy > Elements

Evidence > Weight & Sufficiency

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN11 **Conspiracy, Elements**

The federal courts' approach to analyzing the sufficiency of evidence to support a conviction for conspiracy to distribute drugs is consistent with Connecticut's own conspiracy jurisprudence. Under Connecticut conspiracy law, a mere buyer-seller relationship, without more, would not constitute a conspiracy to distribute drugs. Under the specific intent requirements for a conviction of conspiracy under *Conn. Gen. Stat. § 53a-48*, when a buyer intends only to purchase drugs from a seller, both parties do not unite in the same mental objective because they have different intentions: one has the intention to buy and the other has the intention to sell. Conspirators must specifically intend to agree and intend to sell drugs to another person. Further, as the focus of conspiracy is not on the unlawful object of the conspiracy, but on the process of agreeing to pursue that object, to support a conspiracy charge the state must proffer evidence of an agreement in addition to the purchase and sale agreement between the two parties. The prosecution must show not only that the conspirators intended to agree but also that they intended to commit the elements of the offense. When parties do not unite to form a singularity of purpose, such as agreeing to sell drugs to another person, there is no conspiracy.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Evidence > Weight & Sufficiency

HN12 **Juries & Jurors, Province of Court & Jury**

In reviewing a sufficiency of the evidence claim, a two-part test is applied: First, the evidence is construed in the light most favorable to sustaining the verdict. Second, it is determined whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. The Supreme Court of Connecticut cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. While the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, 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 the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt.

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Evidence > Weight & Sufficiency

HN13 **Appeals, Standards of Review**

On appeal, the Supreme Court of Connecticut does not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. It asks instead whether there is a reasonable view of the evidence that supports the jury's verdict of guilty.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > Types of Evidence > Circumstantial Evidence

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

Evidence > Weight & Sufficiency

HN14 **Conspiracy, Elements**

Due to the clandestine nature of conspiracies, a conviction is usually based on circumstantial evidence. The state of mind of one accused of a crime is often the most significant and, at the same time, the most elusive element of the crime charged. Intention is a mental

process which, of necessity, must be proven either by the statements or the actions of the person whose conduct is being examined.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN15 **Conspiracy, Elements**

One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > Types of Evidence > Circumstantial Evidence

HN16 **Conspiracy, Elements**

An overt act may be committed by either coconspirator. 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.

Criminal Law & Procedure > ... > Indictments > Contents > General Overview

Criminal Law & Procedure > Trials > Verdicts > Inconsistent Verdicts

HN17 **Indictments, Contents**

Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment.

Syllabus

The defendant, who had been convicted, following a jury trial, of, inter alia, conspiracy to sell narcotics by a person who is not drug-dependent, appealed to the Appellate Court, claiming that the trial court improperly denied his motion for a judgment of acquittal because the evidence was insufficient **[***2]** to support that conviction, and that the Appellate Court should apply the "buyer-seller exception" that has been recognized by the federal courts in evaluating the sufficiency of the evidence for a charge of conspiracy to sell narcotics. The defendant had been observed in an area of suspected drug activity engaging in conduct that was consistent with drug dealing by an undercover Meriden police department surveillance team on the night of his arrest, including exchanging money with the operator of a van and meeting with a known drug dealer, T. The Appellate Court affirmed the trial court's judgment, concluding that there was sufficient evidence to support the defendant's conspiracy conviction and declining to apply the buyer-seller exception, and the defendant, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court properly refused to apply the buyer-seller exception to a charge of conspiracy to sell drugs in analyzing the sufficiency of the evidence to support the defendant's conviction of conspiracy to sell narcotics, the federal courts' approach being consistent with our comprehensive conspiracy jurisprudence pursuant to which a mere buyer-seller relationship, **[***3]** without more, does not constitute a conspiracy to distribute drugs, because under the specific intent requirements for a conviction of conspiracy, when a buyer intends only to purchase drugs from a seller, there is no singularity of purpose between the parties, i.e., agreeing to sell drugs to another person; moreover, the state did not prosecute the defendant on the buyer-seller theory but, rather, contended that circumstantial evidence supported the inference that the defendant agreed to participate in a drug distribution plan as a seller, which is an agreement in addition to the agreement made to supply the defendant with drugs for resale.

2. The Appellate Court properly affirmed the defendant's conviction of conspiracy to sell narcotics, this court, construing the evidence in the light most favorable to sustaining the verdict, having found that the evidence was sufficient to support a finding beyond a reasonable doubt that the defendant conspired with T to sell narcotics; in deliberating the conspiracy charge, the jury was allowed to infer the existence of the requisite agreement between the defendant and T from the defendant's statements to the police, the separate actions of the **[***4]** defendant and T, and from the circumstances surrounding the commission of those acts, and there was ample evidence to support the conclusion that the defendant was in the business of selling drugs and that T intended to assist the defendant in that enterprise.

Counsel: Katherine C. Essington, assigned counsel, for the appellant (defendant).

Rita M. Shair, senior assistant state's attorney, with whom, on the brief, were Michael Dearington, state's attorney, and James R. Dinnan, senior assistant state's attorney, for the appellee (state).

Judges: Rogers, C. J., and Norcott, Palmer, Zarella and McDonald, Js.* McDONALD, J. In this opinion the other justices concurred.

Opinion by: McDONALD

Opinion

[328]** **[*3]** McDONALD, J. Today we consider what evidence is necessary to support a conviction for conspiracy to sell narcotics in the context of a buyer-seller relationship between the alleged **[**329]** coconspirators. Following our grant of certification, the defendant, Nemiah Allan, appeals from the judgment of the Appellate Court affirming his judgment of conviction of conspiracy to sell narcotics by a person who is not drug-dependent in violation of *General Statutes §§ 53a-48* **[***5]** and *21a-278 (b)*,[1] and interfering with an officer in violation of *General Statutes § 53a-167a*. On appeal, the defendant claims that the Appellate Court improperly concluded that the evidence was sufficient to support his conspiracy conviction because: (1) the evidence established nothing more than his attempted purchase of narcotics on a single occasion from his alleged coconspirator; and (2) had the Appellate Court adopted the "buyer-seller exception" applied by the federal courts in evaluating the sufficiency of the evidence of conspiracy to sell narcotics, as he had requested, it would have concluded **[*4]** that the trial court improperly denied his motion for a judgment of acquittal on that charge. We conclude that the considerations embodied in this so-called exception are already reflected in our law. We further conclude that the evidence demonstrated more than a mere buyer-seller relationship on a single occasion to support the defendant's conspiracy conviction. Therefore, we affirm the judgment of the Appellate Court, although on different grounds from those articulated by that court.

In reaching its verdict, the jury reasonably could have found the following facts. On the evening of April 15, 2009, officers of the Meriden Police Department conducted surveillance at the corner of West Main Street and Randolph Avenue in Meriden after receiving complaints of drug activity in that area. From their unmarked vehicles, the surveillance team observed the defendant engaging in the following conduct that, in their experience, was consistent with drug dealing. The defendant walked back and forth near the corner of West Main Street and Randolph Avenue while talking **[***7]** on his cell phone. Police officers observed several vehicles periodically stop at this corner, at which point the defendant approached these vehicles, reached inside, and conducted "some sort of transaction" with the vehicles' occupants. Then, while the vehicles idled at this corner, the defendant walked a short distance away to a house located at 20 Maple Branch, just off Maple Street. That house was the subject of a separate police investigation due to neighbors' complaints about drug dealing occurring on its second floor. From the complaints and subsequent surveillance, the police suspected that this residence served as a "stash house," as drug dealers commonly keep their drugs and money at a location near to where they conduct their drug transactions so as to avoid having any evidence of drug activity on their person in the event of a police stop. **[*5]** Shortly after entering the second floor of the house, the defendant exited the house and returned to the particular vehicle waiting at the street corner. Moments later, the driver of the vehicle would drive away, while the defendant remained at the corner.

[330]** During one of these interactions, the officers observed the defendant walk away **[***8]** from a van with money in his hand, which they did not see him possess when he initially approached it. In light of this additional information, once the van departed, the surveillance officers radioed officers in a police cruiser in an effort to stop the van. Upon stopping the van, the driver, Humberto Zarabozo, cooperated with the police

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

[1] *General Statutes § 53a-48 (a)* provides: *HN1*[↑] "A person is guilty of conspiracy when, with intent that **[***6]** conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

General Statutes § 21a-278 (b) provides in relevant part: *HN2*[↑] "Any person who manufactures, distributes, sells . . . any narcotic substance . . . who is not, at the time of such action, a drug-dependent person, for a first offense shall be imprisoned not less than five years or more than twenty years, and for each subsequent offense shall be imprisoned not less than ten years or more than twenty-five years. . . ."

and told them that he had just purchased crack cocaine from the defendant and that he had purchased narcotics from the defendant in the past.[2] The officers recovered crack cocaine from the floor of Zarabozo's van. Subsequently, the officers returned to the surveillance area, where they continued to observe the defendant engaging in similar conduct with approaching vehicles, although the officers did not specifically observe any objects exchanged between the defendant and the occupants of these vehicles.

Soon thereafter, the officers observed the following incident. A tan Acura drove along West Main Street past the corner where the defendant had been meeting vehicles, turned onto Maple Street, and then turned again onto Maple Branch. As the Acura drove toward this location, the defendant crossed West Main Street **[*6]** and walked up Maple Street while talking on his cell phone. The Acura turned around and parked in close proximity to 20 Maple Branch, facing Maple Street. As the defendant approached Maple Branch, the driver of the Acura flashed the car's front lights and then turned off the driving lights while leaving the parking lights on. In response to these signals, the defendant approached the passenger side of the vehicle. He then opened the passenger door and leaned into the vehicle. Moments later, the defendant emerged from the Acura and returned to his corner as the Acura drove away. Following **[***10]** their unsuccessful pursuit of the Acura, the officers returned one to two hours after this incident to arrest the defendant.

The officers took the defendant into custody despite his efforts to resist arrest, gave him *Miranda*[3] warnings, and conducted a search of his person, which yielded no drug related materials. When the officers asked the defendant about the driver of the Acura, he informed them that the driver's name was "Fleet" and that Fleet was a drug supplier from Waterbury. The officers knew the name Fleet as a street level drug supplier, but did not know his real name. The defendant further told them that Fleet had driven to Maple Branch to "resupply" him with crack cocaine. Despite this plan, the defendant told the police that Fleet had not delivered the narcotics when they met earlier that evening. The defendant then opened his cell phone and gave the police Fleet's cell phone number, which was the last outgoing call made from the defendant's cell phone.

When the defendant overheard a police radio transmission indicating that the owner of the Acura was Brandy Clayton, the defendant identified **[***11]** her as Fleet's girlfriend. **[**331]** The officers drove the defendant to a gas **[*7]** station where Clayton was located and from which she reported her vehicle was stolen. The defendant positively identified Clayton as Fleet's girlfriend. Around this time, the police learned that Fleet's actual name is Kareem Thomas. When the police subsequently found Thomas hiding in the house of Clayton's sister, they confirmed that the phone number of the cell phone found on Thomas' person was the number that the defendant had last dialed.

Thereafter, while the defendant was being processed at the police station, he asked the booking officer what had happened to "the big fat white guy." When the booking officer asked the defendant to whom he was referring, the defendant replied "the one that I sold drugs to," presumably referring to Zarabozo, who matched the defendant's description. One or two weeks after the defendant's arrest, the police executed a search warrant for the second floor apartment at 20 Maple Branch, where they seized crack cocaine packaged for street sale and arrested another individual in connection with that seizure.

The state charged the defendant with sale of narcotics by a person who is not drug-dependent **[***12]** in violation of *§ 21a-278 (b)*, sale of narcotics within 1500 feet of a school in violation of *General Statutes § 21a-278a (b)*, possession of narcotics in violation of *General Statutes § 21a-279*, conspiracy to sell narcotics by a person who is not drug-dependent in violation of *§§ 53a-48* and *21a-278 (b)*, and interfering with a police officer in violation of *§ 53a-167a (a)*. At the conclusion of the state's case, the defendant moved for a judgment of acquittal, which the trial court denied. The jury returned a verdict finding the defendant guilty of conspiracy to sell narcotics by a person who is not drug-dependent and interfering with a police officer and finding him not guilty of the other charges. The court rendered judgment

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[2] Zarabozo gave inconsistent accounts in his statements to the police and in his testimony at trial regarding the location at which he had just purchased the drugs from the defendant. The evening of his arrest, Zarabozo told the police that he had purchased the drugs inside a convenience store at the street corner where the defendant interacted with **[***9]** the various drivers, and at trial he testified that he had purchased the drugs from the defendant while inside his van parked at the street corner. It is unclear whether these inconsistencies, or some other factors, influenced the jury in finding the defendant not guilty of sale of narcotics.

[3] *Miranda v. Arizona, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*.

in accordance with the jury's verdict, and sentenced the defendant **[*8]** to a total effective term of twelve years imprisonment followed by five years special parole.

The defendant appealed from the trial court's judgment to the Appellate Court, and claimed that there was insufficient evidence to allow the jury to find him guilty beyond a reasonable doubt of the crime of conspiracy to sell narcotics in violation of his right to due process. *State v. Allan, 131 Conn. App. 433, 435, 437-38, 27 A.3d 19 (2011)*. **[***13]** The Appellate Court rejected the defendant's argument that the state had the burden of proving that the defendant and his coconspirator, Thomas, had entered into an agreement "in the past to distribute narcotics or to distribute narcotics in the future," concluding that the defendant misunderstood the required elements of the crime charged under Connecticut law. *Id., 439-40*. The Appellate Court further declined the defendant's invitation to apply what he called the "buyer-seller exception" applied by the federal courts in evaluating the sufficiency of evidence to support a conviction of conspiracy to sell narcotics, noting that the defendant had not provided the court with a single Connecticut case endorsing such an exception. *Id., 441*. After concluding that the evidence was sufficient to support the conspiracy conviction, the Appellate Court affirmed the judgment of the trial court. *Id., 443*.

Thereafter, we granted the defendant's petition for certification to appeal to this court, limited to the following issue: "Did the Appellate Court correctly refuse to adopt the buyer-seller exception to a charge of conspiracy to sell drugs?" *State v. Allan, 302 Conn. 949, 31 A.3d 383 (2011)*. **[***14]** **[**332]** On appeal, the defendant urges us to adopt the buyer-seller exception that has been uniformly recognized by the federal courts, as well as several state courts, as part of our conspiracy jurisprudence. In doing so, the defendant asserts that, without this exception, every drug sale or attempted **[*9]** drug sale in Connecticut could be prosecuted as a conspiracy. He further argues that such a result would frustrate the legislative intent of our narcotics laws, in which there are more severe sanctions for the sale or distribution of narcotics than for mere possession or attempted possession. The defendant underscores that he is not challenging the jury instructions; in other words, he is not contending that the trial court should have instructed the jury on the buyer-seller exception. Instead, he contends that this court should apply this exception as part of a sufficiency of the evidence inquiry, consistent with the general practice of the federal courts.[4] As such, he contends that his motion for **[*10]** a judgment of acquittal on the ground of insufficient evidence preserved this issue for appeal. Moreover, the defendant claims that application of this exception to the present case would reveal that **[***15]** there is insufficient evidence to find a conspiracy to sell narcotics because the evidence establishes no more than his attempt to purchase narcotics from Thomas on a single occasion.

In response, the state argues that there is no need for this court to adopt the principle that the defendant seeks to engraft onto our law because it already effectively

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[4] Although the defendant is correct that the federal courts analyze this question under a sufficiency of the evidence rubric, we also note that some federal cases suggest that an instruction that a mere buyer-seller relationship does not support a conspiracy conviction properly may be given when requested and supported by the evidence, but that such an instruction may not be required. See *United States v. Mata, 491 F.3d 237, 241-42 (5th Cir. 2007)* (holding adequate instruction on law of conspiracy precludes necessity of giving buyer-seller instruction, even where evidence supports such charge), cert. denied, *552 U.S. 1189, 128 S. Ct. 1219, 170 L. Ed. 2d 75 (2008)*; *United States v. Johnson, 437 F.3d 665, 677 (7th Cir.)* (holding defendant's failure to put forth buyer-

exists.[5] Specifically, [**333] the state argues, the well established contours of Connecticut law for determining whether there is sufficient evidence to support a conspiracy conviction, along with a proper jury instruction on the elements of conspiracy, ensure that a mere buyer of narcotics will not be convicted as a coconspirator. Additionally, because our laws make a distinction between suspects involved in all aspects of the illegal drug trade, reserving the harshest sentences for professional drug dealers, the state contends that it would not charge a mere buyer with distribution related crimes. As such, the state claims that the evidence in this case supports a finding that the defendant agreed with [*11] Thomas to participate in a drug distribution plan as a seller, rather than merely to purchase narcotics. We agree with the state.

I

We begin with the defendant's claim that, in evaluating whether there is sufficient evidence to support a conviction of conspiracy to distribute narcotics, [***19] Connecticut should apply the buyer-seller "exception." In order to address this claim, we first examine the requirements to establish a conspiracy under Connecticut law and then consider the parameters for sufficient evidence for the comparable offense under federal law in the context of a buyer-seller relationship. As this analysis reveals, HN4[↑] the so-called buyer-seller exception on which the defendant relies is not, in our view, properly viewed as an *exception* to federal conspiracy law, but, rather, a proper application of fundamental principles of conspiracy jurisprudence that are shared by this state.

HN5[↑] Conspiracy is the unlawful act of agreeing to commit a crime. See State v. Beccia, 199 Conn. 1, 3, 505 A.2d 683 (1986). It has long been recognized as a separate and distinct offense from the commission of the substantive offense that is the object of the agreement. Id. "That agreement is a distinct evil, which may exist and be punished whether or not the substantive crime ensues." (Internal quotation marks omitted.) United States v. Jimenez Recio, 537 U.S. 270, 274, 123 S. Ct. 819, 154 L. Ed. 2d 744 (2003); see State v. Beccia, supra, 3 ("[t]he gravamen of the crime of conspiracy is [***20] the unlawful combination and an act done in pursuance thereof, not the accomplishment of the objective of the conspiracy" [internal quotation marks omitted]). As criminals united with a common purpose pose a potentially greater danger to the public than an individual acting in isolation, conspiracy is anticipatory and aimed not at the unlawful [*12] object, but at the process of agreeing to pursue that object. See State v. Beccia, supra, 3; State v. Jones, 44 Conn. App. 338, 343, 689 A.2d 517, cert. denied, 240 Conn. 929, 693 A.2d 301 (1997).

HN6[↑] To establish the crime of conspiracy in Connecticut, the state must prove that there was an

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seller theory at trial and strength of state's evidence of conspiracy leads to conclusion that trial court properly declined to give instruction sua sponte), cert. denied, 547 U.S. 1207, 126 S. Ct. 2902, 165 L. Ed. 2d 919 (2006); United States v. Medina, 944 F.2d 60, 65 (2d Cir. 1991) [***16] (finding trial court properly declined to give buyer-seller instruction upon defendant's request when evidence established that there was "advanced planning among the alleged co-conspirators to deal in wholesale quantities of drugs obviously not intended for personal use"), cert. denied sub nom. Mata v. United States, 503 U.S. 949, 112 S. Ct. 1508, 117 L. Ed. 2d 646 (1992). In the present case, because the defendant neither requested such an instruction, nor contended on appeal that the instruction given was inadequate to guide the jury, we need not consider under what circumstances it would be proper for the trial court to provide guidance to the jury on what evidence beyond a buyer-seller relationship is required to support a conspiracy charge. We further note that our research has revealed one case in which the buyer-seller rule or exception has summarily been characterized as an "affirmative [defense] . . . ." United States v. Diaz, 190 F.3d 1247, 1258 (11th Cir. 1999), cert. denied, 534 U.S. 878, 122 S. Ct. 180, 151 L. Ed. 2d 125 (2001). We view this isolated reference as simply reflective of the generally accepted proposition that this theory is advanced by the defendant as part [***17] of his or her defense.

[5] The state also contends that this court should not consider the defendant's claim that we should adopt the buyer-seller "exception" because the defendant failed to bring this [***18] theory to the trial court's attention. We note that we are not bound to consider this claim because of the state's failure to raise this preservation argument before the Appellate Court. See, e.g., Grimm v. Grimm, 276 Conn. 377, 393, 886 A.2d 391 (2005) (defendant's failure to raise issue until oral argument before Appellate Court constituted abandonment of issue before that court and for remainder of proceedings on appeal), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006). Nonetheless, we note that HN3[↑] a motion for a judgment of acquittal will preserve a sufficiency of the evidence claim; see State v. Padua, 273 Conn. 138, 146 n.12, 869 A.2d 192 (2005); and, although the appellate courts are not bound to consider a claim unless it was distinctly raised at trial; see Practice Book § 60-5; the appellate courts retain discretion to consider legal theories that differ from those raised before the trial court if they relate to an issue preserved for appeal. Rowe v. Superior Court, 289 Conn. 649, 663, 960 A.2d 256 (2008).

agreement between two or more persons to engage in conduct constituting a crime and that the agreement was followed by an overt act in furtherance of the conspiracy. General Statutes § 53a-48 (a). "Conspiracy is a **[**334]** specific intent crime, with the intent divided into two elements: (a) the intent to agree or conspire and (b) the intent to commit the offense which is the object of the conspiracy. . . . Thus, [p]roof of a conspiracy to commit a specific offense requires proof that the conspirators intended to bring about the elements of the conspired offense." (Citation **[***21]** omitted; internal quotation marks omitted.) State v. Padua, 273 Conn. 138, 167, 869 A.2d 192 (2005). Accordingly, HN7[] when the charged object of the conspiracy is to sell or distribute narcotics, the state is required to prove two distinct elements of intent: (a) that the conspirators intended to agree and (b) that they intended for narcotics to be sold to another person. State v. Hernandez, 28 Conn. App. 126, 134-35, 612 A.2d 68, cert. denied, 223 Conn. 920, 614 A.2d 828 (1992). "The existence of a formal agreement between the parties need not be proved; it is sufficient to show that they are knowingly engaged in a mutual plan to do a forbidden act. . . . Consequently, it is not necessary to establish that the defendant and his coconspirators signed papers, shook hands, or uttered the words we have an agreement. . . . [T]he requisite agreement or confederation may be inferred from proof of the separate acts of the individuals accused as coconspirators and from the circumstances surrounding the commission of these acts." (Citations omitted; internal quotation **[*13]** marks omitted.) State v. Patterson, 276 Conn. 452, 462, 886 A.2d 777 (2005).

HN8[] With the exception that federal law does not require **[***22]** proof of an overt act in furtherance of a conspiracy to violate its narcotics laws, federal conspiracy law generally reflects the same fundamental requirements as Connecticut law.[6] United States v. Shabani, 513 U.S. 10, 15, 115 S. Ct. 382, 130 L. Ed. 2d 225 (1994). Like Connecticut law, under federal law, "[a] drug-distribution conspiracy . . . requires proof that the defendant knowingly agreed-either implicitly or explicitly-with someone else to distribute drugs." United States v. Johnson, 592 F.3d 749, 754 (7th Cir. 2010); see United States v. Parker, 554 F.3d 230, 234-35 (2d Cir.), cert. denied sub nom. Baker v. United States, 558 U.S. 965, 130 S. Ct. 394, 175 L. Ed. 2d 301 (2009). As a result of the long running "war on drugs" waged by the federal government, however, a problem has perplexed the lower federal courts that our courts have not encountered: under what circumstances may a conspiratorial agreement to distribute drugs arise in a buyer-seller relationship. This issue has arisen primarily in circumstances in which a defendant has been apprehended **[*14]** while purchasing drugs from an existing criminal enterprise and the question is whether the defendant was **[**335]** a member of the seller's **[***23]** conspiracy.[7] See, e.g., United States v. Brown, 726 F.3d 993, 995-96 (7th Cir. 2013); United States v. Deitz, 577 F.3d 672, 678 (6th Cir. 2009), cert. denied, 559 U.S. 984, 130 S. Ct. 1720, 176 L. Ed. 2d 201 (2010); United States v. Hawkins, 547 F.3d 66, 68 (2d Cir. 2008). The Circuit Courts of Appeals uniformly acknowledge that evidence of a mere buyer-seller relationship, without more, does not constitute a conspiracy to distribute drugs. See United States v. Boidi, 568 F.3d 24, 30 (1st Cir. 2009); United States v. Parker, supra, 236; United States v. Gibbs, 190 F.3d 188, 199 (3d Cir. 1999), cert. denied, 528 U.S. 1131, 120 S. Ct. 969, 145 L. Ed. 2d 840 (2000); United States v. Mills, 995 F.2d 480, 485 (4th Cir.), cert. denied, 510 U.S. 904, 114 S. Ct. 283, 126 L. Ed. 2d 233 (1993); United States v. Delgado, 672 F.3d 320, 333 (5th Cir.), cert. denied, __ U.S. __, 133 S. Ct. 525, 184 L. Ed. 2d

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[6] Federal conspiracy law is comprised of dozens of statutes within the United States Code. See, e.g., 18 U.S.C. § 241 (prohibiting conspiracy to violate any person's civil rights); 18 U.S.C. § 371 (prohibiting conspiracy to commit any other federal crime); 21 U.S.C. § 846 (prohibiting conspiracy to violate any statute within Controlled Substances Act). Under federal conspiracy law generally, "the [g]overnment must prove beyond a reasonable doubt that two or more people agreed to commit a crime covered by the specific conspiracy statute (that a conspiracy existed) and that the defendant knowingly and willfully participated in the agreement (that he was a member of the conspiracy)." Smith v. United States, U.S. , 133 S. Ct. 714, 719, 184 L. Ed. 2d 570 (2013). The existence of a formal agreement to conspire **[***25]** need not be established; circumstantial evidence, reasonable inferences drawn from the relationship of the parties, and the totality of the circumstances are sufficient proof of a conspiracy. United States v. Johnson, 592 F.3d 749, 754-55 (7th Cir. 2010); United States v. Redwine, 715 F.2d 315, 320 (7th Cir. 1983), cert. denied sub nom. Strong v. United States, 467 U.S. 1216, 104 S. Ct. 2661, 81 L. Ed. 2d 367 (1984).

[7] The existing conspiracies implicated in these cases generally are of two types: (1) a wheel of which the subordinate members of the conspiracy are spokes and the core seller is the hub; or (2) a chain of sale and distribution in which one sells to another who then sells to a third, etc., and the success of the business depends on the ability of each member to resell the drugs to others. United States v. Parker, supra, 554 F.3d 238.

339 (2012); United States v. Deitz, supra, 676; United States v. Brown, supra, 998; United States v. Donnell, 596 F.3d 913, 924-25 (8th Cir. 2010), cert. denied, __ U.S. __, 131 S. Ct. 994, 178 L. Ed. 2d 831 (2011); United States v. Lennick, 18 F.3d 814, 819 (9th Cir.), cert. denied, 513 U.S. 856, 115 S. Ct. 162, 130 L. Ed. 2d 100 (1994); [***24] United States v. Ivy, 83 F.3d 1266, 1285-86 (10th Cir.), cert. denied sub nom. Hickman v. United States, 519 U.S. 901, 117 S. Ct. 253, 136 L. Ed. 2d 180 (1996); United States v. Bacon, 598 F.3d 772, 776-77 (11th Cir. 2010); United States v. Baugham, 449 F.3d 167, 171, 371 U.S. App. D.C. 213 (D.C. Cir.), cert. denied sub nom. Wells v. United States, 549 U.S. 966, 127 S. Ct. 428, 166 L. Ed. 2d 293 (2006).

[*15] Two lines of reasoning have emerged for this conclusion. One group of federal Circuit Courts of Appeals have reasoned that, HN9[↑] in a buyer-seller relationship, there is no singularity of purpose and thus no meeting of the minds. "Mere proof of a buyer-seller agreement without any prior or contemporaneous understanding does not support a conspiracy [***26] conviction because there is no common illegal purpose; In such circumstances, the buyer's purpose is to buy; the seller's purpose is to sell." (Internal quotation marks omitted.) United States v. Donnell, supra, 596 F.3d 924-25; see United States v. Brown, supra, 726 F.3d 1001 ("People in a buyer-seller relationship have not agreed to advance further distribution of drugs; people in conspiracies have. That agreement is the key."). Accordingly, a mere buyer-seller relationship lacks an essential element necessary to form a conspiracy. See United States v. Brown, supra, 1001 ("[w]e discuss buyer-seller relationships at such length because they do *not* qualify as conspiracies" [emphasis in original]). Another group of federal Circuit Courts of Appeals have reasoned that, under the common-law definition of conspiracy, "when a buyer purchases illegal drugs from a seller, two persons have agreed to a concerted effort to achieve the unlawful transfer of the drugs from the seller to the buyer. . . . [This] *would constitute a conspiracy* with the alleged objective of a transfer of drugs." (Emphasis added.) United States v. Parker, supra, 554 F.3d 234; see United States v. Delgado, supra, 672 F.3d 333 [***27] (indicating that mere buyers would be guilty of conspiracy to distribute under general conspiracy principles in absence of exception). Nonetheless, these courts further reason that Congress [**336] did not intend to subject buyers, particularly addicts, who purchase drugs for personal use, to the severe liabilities intended for distributors. United States v. Parker, supra, 235 ("if an addicted purchaser, who acquired drugs for his own use and without intent [*16] to distribute it to others, were deemed to have joined in a conspiracy with his seller for the illegal transfer of the drugs from the seller to himself . . . [t]he policy to distinguish between transfer of an illegal drug and the acquisition or possession of the drug would be frustrated"); United States v. Delgado, supra, 333 ("[t]he rule shields mere acquirers and street-level users, who would otherwise be guilty of conspiracy to distribute, from the more severe penalties reserved for distribut[o]rs"); see also United States v. Ivy, supra, 83 F.3d 1285-86 ("the purpose of the buyer-seller rule is to separate consumers, who do not plan to redistribute drugs for profit, from street-level, mid-level, and other distributors"). Accordingly, [***28] this latter group has deemed a mere buyer-seller relationship to fall within a "narrow *exception* to the general conspiracy rule for such transactions." (Emphasis added.) United States v. Parker, supra, 234; see also United States v. Delgado, supra, 333.

As we discuss later in this opinion, we view the first group's characterization to be the correct view of the law. Nonetheless, HN10[↑] regardless of whether a court characterizes this issue as a proper application of conspiracy law or an exception to a literal application of that law in furtherance of legislative intent, a survey of federal case law indicates that the principle that conspiracy to sell narcotics cannot be found on the mere basis of a buyer-seller relationship universally stems from two tenets of common-law conspiracy. First, mere association with a member of a conspiracy or acquiescence in the object or purpose of a conspiracy is not sufficient to satisfy the intent elements of conspiracy. United States v. Wardell, 591 F.3d 1279, 1288 (10th Cir. 2009), cert. denied, __ U.S. __, 132 S. Ct. 430, 181 L. Ed. 2d 280 (2011). Second, conspiracy is a separate and distinct offense from the underlying crime that is the object of the [***29] agreement. United States v. Brown, supra, 726 F.3d [*17] 997. Accordingly, in the context of a drug sale between two alleged coconspirators, the federal courts have held that there must be evidence of an agreement to distribute drugs and that such an agreement must be in *addition* to the purchase and sale between the two parties. See id., 998; United States v. Parker, supra, 554 F.3d 235. Liability will arise as a coconspirator, therefore, when "[the buyer and seller] shared a conspiratorial purpose to advance other transfers, whether by the seller or by the buyer." United States v. Parker, supra, 235. By contrast, when the government's proof shows *no more* than a simple sales transaction between alleged coconspirators, its case for conspiracy will fail. Id.;

United States v. Moran, 984 F.2d 1299, 1304 (1st Cir. 1993) ("[a]s for the classic single sale-for personal use, without prearrangement, and with nothing more-the precedent in this circuit as well as others treats it as not involving a conspiracy").

The question then has arisen as to whether the seller's knowledge that the buyer intends to resell the illicit goods is sufficient to establish a conspiracy between the buyer and seller. In **[***30]** resolving this question, many circuits have relied on two decisions that examined under what circumstances a supplier of goods to a known criminal enterprise becomes a party to the existing conspiracy. See Direct Sales Co. v. United States, 319 U.S. 703, 63 S. Ct. 1265, 87 L. Ed. 1674 (1943); United States v. Falcone, 109 F.2d 579 (2d Cir.), aff'd, 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128 **[***337]** (1940). In United States v. Falcone, supra, 580, the defendants were convicted of conspiracy to operate illicit stills because they had supplied distillers with sugar, yeast, and cans. The Second Circuit reversed the convictions, holding that mere knowledge by the defendants that their buyers planned to use the seemingly innocuous supplies in an illegal fashion did not evince their intention to join the conspiracy. Id., 581-82. The court noted: **[*18]** "It is not enough that he does not [forgo] a normally lawful activity, of the fruits of which he knows that others will make unlawful use, he must in some sense promote their venture himself, make it his own, have a stake in its outcome." Id., 581. In affirming the Second Circuit's decision, the Supreme Court held that, if a supplier knows about the unlawful **[***31]** use of his supplies by a buyer, but does not have knowledge of the conspiracy in which the buyer is a member, the supplier cannot be deemed to have joined the conspiracy. United States v. Falcone, 311 U.S. 205, 207, 61 S. Ct. 204, 85 L. Ed. 128 (1940).

Three years later, in Direct Sales Co. v. United States, supra, 319 U.S. 715, the Supreme Court affirmed a drug manufacturer/distributor's conviction of conspiracy to violate federal narcotics laws in connection with sales to a physician of morphine-a drug that was highly regulated but one that the distributor lawfully could distribute and the physician lawfully could dispense. The court noted that the evidence established, inter alia, that the distributor repeatedly had sold excessively large quantities of morphine over a long period of time to the coconspirator physician such that the distributor must have known the physician was dispensing the drugs illegally. Id., 713. The court determined that United States v. Falcone, supra, 311 U.S. 205, was not controlling in this circumstance because morphine is a "restricted commodit[y], incapable of further legal use except by compliance with rigid regulations," whereas the supplies in *Falcone* **[***32]** were "articles of free commerce . . . ." Direct Sales Co. v. United States, supra, 710. The court found the distinction between the character of the goods important to the nature and extent of proof necessary to establish the supplier's knowledge of the buyer's unlawful purpose and to show that by making the sale the supplier intends to further, promote, and accomplish that purpose. Id., 711. The **[*19]** court acknowledged that not every instance of the sale of restricted goods in which the seller knows the buyer intends to use them unlawfully will support a charge of conspiracy. Id., 712. This may be true, the court noted, of "single or casual transactions, not amounting to a course of business, regular, sustained and prolonged, and involving nothing more on the seller's part than indifference to the buyer's illegal purpose and passive acquiescence in his desire to purchase, for whatever end. A considerable degree of carelessness coupled with casual transactions is tolerable outside the boundary of conspiracy." Id., 712 n.8. The court then examined the evidence and concluded that it demonstrated there is "informed and interested cooperation, stimulation, instigation. And there is also a 'stake **[***33]** in the venture' which, even if it may not be essential, is not irrelevant to the question of conspiracy." Id., 713; id. (noting that distributor's stake was in making profits, which would only come from encouraging physician's illegal operations).

From these cases, certain principles emerged. Although the Supreme Court indicated that a seller's "'stake in the venture'" is not essential to sustain a conviction; id.; several Circuit Courts of Appeals **[**338]** have considered this element necessary but subsumed within the foundational principle that, in buyer-seller relationships, the seller must not only have known that the buyer would engage in further distribution, but the seller must have intended and agreed to the shared purpose of further distribution. See United States v. Brown, supra, 726 F.3d 998; United States v. Boidi, supra, 568 F.3d 30; United States v. Parker, supra, 554 F.3d 236; but see United States v. Curley, 55 F.3d 254, 257 (7th Cir.) ("[t]he law does not require the government to prove that a defendant had a stake in a drug distribution venture to gain a conviction for conspiracy"), cert. denied, 516 U.S. 870, 116 S. Ct. 190, 133 L. Ed. 2d **[*20]** 127 (1995). Nonetheless, because "knowledge **[***34]** is the foundation of intent"; Direct Sales Co. v. United States, supra, 319 U.S. 711-12; the courts uniformly treat the seller's knowledge of the buyer's further illegal use of the drugs as a significant

factor in establishing the seller's intention to agree to the further distribution of the drugs. See, e.g., *United States v. Brown, supra, 998*; *United States v. Boidi, supra, 30*; *United States v. Parker, supra, 236*. With respect to what additional evidence will take the step from knowledge to intent to show that both parties intended and agreed to the shared purpose of the distribution of drugs, the courts have not formulated any particular legal standard, but have identified certain factors as relevant to this inquiry. These factors include but are not limited to: sales on credit or consignment; *United States v. Hawkins, supra, 547 F.3d 75*; large quantities of drugs; *United [*21] States v. Yearwood, 518 F.3d 220, 226 (4th Cir.)*, cert. denied, *555 U.S. 861, 129 S. Ct. 137, 172 L. Ed. 2d 104 (2008)*; multiple transactions; *United States v. Becker, 534 F.3d 952, 957-58 (8th Cir. 2008)*; standardized dealings; *United States v. Hawkins, supra, 74*; a level of mutual trust; id.; and the continuity **[***35]** of the relationship between the parties.[8] *United States v. Deitz, supra, 577 F.3d 681*.

As one court noted, however, "the cases otherwise say little about how the various factors are to be weighed." *United States v. Baugham, supra, 449 F.3d 172*. Although the evidence deemed sufficient may include several of these factors; see, e.g., *United States v. Johnson, supra, 592 F.3d 756 n.5* (noting if individual purchases drugs in large quantities on frequent basis on credit, inference of conspiracy properly follows); the existence of a single factor in addition to the buyer-seller relationship may be sufficient. See, e.g., *United States v. Yearwood, supra, 518 F.3d 226* (noting large quantities of drugs alone supports reasonable inference that parties were coconspirators). The recent trend appears to clarify that, while case law had suggested that there is a bright line approach based on enumerated factors to distinguish buyer-seller relationships from conspiracies, a "'totality of the circumstances'" approach is appropriate. See *United States v. Brown, supra, 726 F.3d 1001*; **[***36]** see also *United States v. Hawkins, supra, 547 F.3d 74* ("[n]o single factor is dispositive"). As such, the court must make a "holistic assessment" of the evidence in "deciding whether the jury reasonably discerned an agreement to further trafficking of drugs." *United States v. Brown, supra, 1002*.

A close examination of the cases in which the courts have distinguished mere **[**339]** buyer-seller relationships from conspiracies reveals that the former involves isolated sales "to another without prearrangement and with no idea of or interest in its intended use," i.e., simple purchase and sale transactions with no additional evidence of an agreement. *United States v. Moran, supra, 984 F.2d 1303*; see *United States v. Delgado, supra, 672 F.3d 333* ("[t]he buyer-seller exception prevents a *single buy-sell agreement*, which is necessarily reached in every commercial drug transaction, from automatically becoming a conspiracy to distribute drugs" [emphasis added]); *United States v. Parker, supra, 554 F.3d 236* (referring to drug transfers that occur without profit motivation and without intention that transferee sell or give drugs to anyone else); see also *State v. Gonzalez, 2000 ND 32, 606 N.W.2d 873, 876 (N.D. 2000)* **[***37]** ("The 'something more' required is an understanding between the buyer and seller, often implicit, relating to the subsequent distribution by the buyer. . . . Without more, evidence that a buyer was reselling the substance is insufficient." [Citation omitted.]).[9] Thus, the few cases in which the **[*22]** federal courts have found the evidence against a defendant in a buyer-seller relationship to be insufficient to show the requisite "informed and interested cooperation, stimulation, [and] instigation"; *Direct Sales Co. v. United States, supra, 319 U.S. 713*; are those in which the evidence proved nothing more than a purchase of drugs or mere possession of drugs with intent to distribute. See *United States v. Gore, 154 F.3d 34, 40 (2d Cir. 1998)* (holding evidence insufficient when defendant sold drugs to informant, mentioned that drugs were provided by someone else, but gave no specific indication of exact nature of that transaction or quantity of drugs involved); *United States v. Evans, 970 F.2d 663, 673 (10th Cir. 1992)* (holding evidence insufficient to find defendant joined existing conspiracy when she made single purchase of crack cocaine from existing conspiracy and there was no evidence **[***38]** that she resold drugs), cert. denied, *507 U.S. 922, 113 S. Ct.*

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[8] We note that, in any given case, different circuits may examine all of, some of, or different factors than those we have listed.

[9] See also *United States v. Donnell, supra, 596 F.3d 923-24* ("[w]e have held that '[t]he evidence is sufficient to support a conspiracy where the drugs were purchased for resale'"); *United States v. Deitz, supra, 577 F.3d 678* ("Drug distribution conspiracies are often chain conspiracies such that agreement can be inferred from the interdependence of the enterprise. One can assume that participants understand that they are participating in a joint enterprise because success is dependent on the success of those from whom they buy and to whom they sell." [Internal quotation marks omitted.]).

1288, 122 L. Ed. 2d 680 (1993); United States v. McIntyre, 836 F.2d 467, 471 (10th Cir. 1987) (holding evidence insufficient to find conspiracy from facts that defendant purchased cocaine and shared it with his friends at time of sale); United States v. DeLutis, 722 F.2d 902, 905 (1st Cir. 1983) (holding evidence insufficient to find conspiracy solely from facts that defendant called special agent to inquire about availability of drugs and arrived at drug distributor's house with nearly $5000 in cash on his person).

In light of the aforementioned [***39] case law and considerations articulated therein, we conclude that HN11[☎] the federal courts' approach to analyzing the sufficiency of evidence to support a conviction for conspiracy to distribute [*23] drugs is consistent with our own conspiracy jurisprudence. Under our conspiracy law, a mere buyer-seller relationship, without more, would not constitute a conspiracy to distribute drugs.[10] Under the specific intent [**340] requirements for a conviction of conspiracy under § 53a-48, when a buyer intends only to purchase drugs from a seller, both parties do not unite in the same mental objective because they have different intentions: one has the intention to buy and the other has the intention to sell.[11] See State v. Hernandez, supra, 28 Conn. App. 134-35 (noting conspirators must specifically intend to agree *and* intend to sell drugs to another person). Further, as the focus of conspiracy is not on the unlawful object of the conspiracy, but on the process of agreeing to pursue that object, to support a conspiracy charge the state must proffer evidence of an agreement [*24] in *addition* to the purchase and sale agreement between the two parties.[12] See State v. Beccia, supra, 199 Conn. 4 ("the prosecution must show [***40] not only that the conspirators intended to agree but also that they *intended to commit the elements of the offense*" [emphasis in original; internal quotation marks omitted]). When parties do not unite to form a singularity of purpose, such as agreeing to sell drugs to another person, there is no conspiracy. Indeed, the state did not prosecute the defendant on this theory; rather, it contended that circumstantial evidence supported the inference that the defendant had agreed to participate in a drug distribution plan as a seller, which is an agreement in addition to the agreement made to resupply the defendant with narcotics for resale. Therefore, we fail to see any need to engraft federal conspiracy requirements regarding buyer-seller relationships onto our comprehensive conspiracy jurisprudence.[13]

[**341] II

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[10] We note that, while the defendant argues that every drug sale or attempted drug sale in Connecticut could be prosecuted as a conspiracy, he has not provided this court with any case in which a mere purchase and sale, without more, has been charged as, or been the basis of a conviction of, conspiracy to distribute narcotics in our state.

[11] The defendant argues that other state courts have [***41] "adopted the buyer-seller exception to drug conspiracies prosecuted under state law." An examination of our sister states' case law indicates, however, that the courts have not adopted a formal buyer-seller rule; rather, they similarly have recognized that a mere purchase and sale agreement between parties, without more, does not constitute a conspiracy to sell or distribute narcotics. See, e.g., State v. Pinkerton, 628 N.W.2d 159, 164 (Minn. App. 2001) (holding agreement between defendant seller and informant buyer to sell controlled substances to informant does not constitute conspiracy under Minnesota law); State v. Gonzalez, supra, 606 N.W.2d 876 (holding attempted sale of narcotics between defendant seller and informant buyer is insufficient to prove conspiracy where there was no evidence that informant was going to resell drugs or that defendant believed drugs would be resold); State v. Serr, 1998 ND 66, 575 N.W.2d 896, 899 (N.D. 1998) (holding evidence that alleged coconspirator was overheard stating that he had procured drugs from another for resale does not give rise to reasonable inference that both individuals had agreed to distribute drugs, only that they were in mere buyer-seller [***42] relationship); State v. Gunn, 313 S.C. 124, 134-35, 437 S.E.2d 75 (1993) (holding single purchase of drugs by defendant from large drug conspiracy without any evidence of agreement to sell drugs is insufficient to prove defendant entered existing drug conspiracy).

[12] It is unclear from the Appellate Court's reasoning whether it held that the mere agreement between the defendant and Thomas for Thomas to sell the defendant crack cocaine was sufficient to constitute a conspiracy to sell narcotics. See State v. Allan, supra, 131 Conn. App. 440 ("The defendant's statements show that he had intent to buy narcotics from Thomas and that the defendant made arrangements with Thomas to be resupplied with crack cocaine. That agreement, in concert with an overt act . . . is sufficient under Connecticut law to constitute a conspiracy."). To the extent that the Appellate Court suggested as much, that conclusion was improper.

[13] In light of this conclusion, we need not address the defendant's argument that this court's failure to adopt the buyer-seller "exception" would frustrate the intent of our legislature by punishing a mere buyer or addict procuring drugs for personal consumption.

In light of this [***43] conclusion, we now turn to the question of whether there was sufficient evidence in the present case to support the defendant's conviction of conspiracy to sell narcotics. The defendant argues that the evidence, specifically his statements made to the police, was sufficient to sustain only a conviction of attempted possession of narcotics. We disagree.

[*25] We begin with the well established principles that guide our review. HN12[↑] In reviewing a sufficiency of the evidence claim, we 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 [jury] 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 jury if there is sufficient evidence to support the jury's verdict. . . .

"While the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable [***44] 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 the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

HN13[↑] "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." (Internal quotation marks omitted.) State v. Stephen J. R., 309 Conn. 586, 593-94, 72 A.3d 379 (2013).

In considering this question, we recognize that, HN14[↑] due to the clandestine nature of conspiracies, a conviction is usually based on circumstantial evidence. "The state of mind of one accused of a crime is often the most significant and, at the same time, the most elusive element [*26] of the crime charged. . . . Intention is a mental process which, of necessity, must be proven either by the statements or the actions of the person whose conduct is being examined." [***45] (Citations omitted; internal quotation marks omitted.) State v. Williams, 202 Conn. 349, 356-57, 521 A.2d 150 (1987). In deliberating the conspiracy charge, the jury was allowed to infer the existence of the requisite agreement between the defendant and Thomas not just from the defendant's statements to the police, but also from proof of the separate acts of each of them and from the circumstances surrounding the commission of these acts. State v. Patterson, supra, 276 Conn. 462. We conclude that the totality of this evidence was sufficient to allow the jury to conclude that the defendant and Thomas conspired to sell narcotics.

There was ample evidence to support the conclusion that the defendant was in the business of selling drugs. Undoubtedly, the most persuasive evidence of this fact comes from the defendant's own statements. At the police station, the defendant admitted to having sold drugs to Zarabozo, who had crack cocaine in his possession after the money exchange with the defendant and who admitted to previous drug transactions with the defendant. The defendant further acknowledged seeking [**342] a "resupply" of crack cocaine from Thomas. In addition to his own admissions, the surveillance [***46] police officers observed the defendant engaging in a repeated pattern of conduct with occupants of vehicles that all arrived at the same location, an area where citizens had complained about drug dealing occurring, in which the defendant went between that location and a nearby suspected stash house.[14] See State v. Sanchez, 75 Conn. App. 223, 243, [*27] 815 A.2d 242 ("[e]vidence demonstrating that the defendant was present in a known drug trafficking area further suggests an intent to sell" [internal quotation marks omitted]), cert. denied, 263 Conn. 914, 821 A.2d 769 (2003).

The evidence also supports the conclusion that Thomas, known to the Meriden police as a street level dealer operating under the name Fleet, intended to agree with the defendant to assist him in this enterprise. See Salinas v. United States, 522 U.S. 52, 65, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997). [***47] (HN15[↑]) "[o]ne can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense"). The defendant's characterizations of Thomas as a drug dealer from Waterbury and his statement that Thomas' purpose in meeting with him was to "resupply" him with

[14] Because the search and seizure warrant was executed for the suspected stash house one or two weeks after the defendant's arrest, the jury reasonably could not conclude that the seized drugs belonged to the defendant, but their presence does support the inference that the defendant could have been using the house for similar purposes.

crack cocaine reasonably connotes not only a past relationship but also the procurement of drugs for a purpose and in a quantity consistent with resale versus personal use. Other evidence reflects an established relationship of mutual trust. See *United States v. Hawkins, supra, 547 F.3d 76* (identifying mutual trust as factor establishing conspiracy). The defendant had Thomas' cell phone number. Thomas either knew to park away from the location of the defendant's exchanges with potential customers or was directed to do so by the defendant. When Thomas arrived, he signaled to the defendant with his car lights in a manner that caused the defendant to approach Thomas' car. If, as the defendant claimed to police, Thomas did not deliver the drugs as planned, the fact that Thomas came to inform the defendant in person that he did not have the drugs that evening also allows for the inference that Thomas had an interest **[***48]** in the defendant's venture and that he expected to resupply him in the future. This evidence in its totality takes the relationship between the defendant and **[*28]** Thomas out of a mere buyer-seller relationship and into a conspiratorial relationship, where both parties agreed and intended to sell narcotics, with Thomas taking the role of the distribution supplier and the defendant acting as the reseller to consumers on the street. Moreover, the defendant's cell phone call to Thomas, followed by Thomas' drive to Maple Branch, the flashing of his vehicle's lights, and the defendant's approach to Thomas' vehicle were all acts that the jury could have construed and reasonably inferred therefrom to be overt acts in furtherance of the conspiracy. See *State v. Elijah, 42 Conn. App. 687, 697, 682 A.2d 506* (**HN16**) "[a]n overt act . . . may be committed by either coconspirator"), cert. denied, *239 Conn. 936, 684 A.2d 709 (1996)*; *id., 695* ("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" [internal quotation marks omitted]).

Finally, to the extent that the defendant emphasizes that the jury acquitted him of **[**343]** **[***49]** the charges of sale and possession of narcotics, that fact has no bearing on our examination of the sufficiency of the evidence regarding the conspiracy charge. See *State v. Stevens, 178 Conn. 649, 653, 425 A.2d 104 (1979)* (**HN17**) "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." [Internal quotation marks omitted.]). Construing the evidence in the light most favorable to sustaining the verdict, we hold that the evidence was sufficient to support a finding beyond a reasonable doubt that the defendant had conspired with Thomas to sell narcotics in violation of *§§ 53a-48* and *21a-278 (b)*.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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