No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Alrick A. Evans — 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, Alrick Evans, and the respondent, The State of Connecticut. Importantly, this matter had a companion case in the Connecticut Supreme Court, *State of Connecticut v. Nemiah Allan*, 329 Conn. 815, 190 A.3d 874 (2018). Mr. Allan has contemporaneously filed a near identical petition for certiorari to this court.

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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's determination pursuant to *Alleyne*?

OPINIONS BELOW

The opinion of the Connecticut Supreme Court is reported at 329 Conn. 770, 189 A.3d 1184 and is reproduced at page A1 of the Appendix attached to this petition. The decision of the trial court is reproduced at pages A26-A40 of the Appendix.

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. A41.

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. Factual 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 charged with one count of sale of narcotics in violation of Connecticut General Statutes § 21a-278(b) and one count of possession of narcotics in violation of Connecticut General Statutes § 21a-279(a). The charges arose out of the sale of crack cocaine in Bristol, Connecticut.

The petitioner pled guilty to the count of sale of narcotics pursuant to General Statute §21a-278(b) on November 16, 2011. He entered his plea pursuant to *North*

Carolina v. Alford, 400 U.S. 25, 37 (1970). The petitioner was sentenced, pursuant to a plea agreement, to five years of incarceration followed by five years of special parole.

The petitioner filed a motion to correct an illegal sentence on November 15, 2015. He did so pursuant to Connecticut Practice Book §43-22. Section 43-22 permits the court to correct a sentence imposed in an illegal manner. The petitioner argued that, in light of *United States v. Alleyne*, 570 U.S. 99 (2013), his sentence was imposed in a manner that violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000) because he was entitled to a jury's determination with respect to the fact of drug dependency. The presence or absence of the fact of drug dependency was the difference between a five year mandatory minimum sentence and a sentence limited to probation.

The trial court dismissed the petitioner's motion for lack of jurisdiction.

B. The Connecticut State Appeal.

The petitioner timely filed an appeal in the Connecticut Appellate Court. The matter was transferred to the Connecticut Supreme Court which heard arguments and decided the case. On 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*, 536 U.S. 545 (2002)—and required a jury's determination of facts that trigger mandatory minimums sentences.

[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.

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.

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 it 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. A41. The court granted that motion in part on October 17, 2018 and modified its opinion but *did not decline jurisdiction* in this matter. 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 states 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 who violates [§21a-287(b)(1)(A)] for a first offense, shall be imprisoned not less than

[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).

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, 124 (2009)("(ACCA) imposes a 15-year mandatory prison term on an individual

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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).

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 that in (A) but enough to satisfy (B) is subject to a mandatory minimum of five years and as much as forty years. Lastly, a person who possesses a quantity of these substances less than that set forth in (B) is subject to a sentence of up to 20 years ((C)) or 5 years ((D))—depending on the identity 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 yea 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 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. Dmaya, _ 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, supra*; *International Harvester, supra*. 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*, supra, 530 U.S. at 485. 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 lesser-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 this 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 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 483. 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, *Scalia, J.*, concurring. 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,

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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 428 (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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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.)

[25] P.A. 17-17 repealed the existing language in *§§ 21a-277 (a)*

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. Saari, 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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CLERK'S OFFICE
SUPERIOR COURT
GA-15
NEW BRITAIN

CR11-0049062-T		SUPERIOR COURT
STATE OF CONNECTICUT	:	JUDICIAL DISTRICT OF NEW BRITAIN
V.	:	AT G.A. 15
ALRICK EVANS	:	FEBRUARY 9, 2016

MEMORANDUM OF DECISION
RE: MOTION TO CORRECT ILLEGAL SENTENCE

The defendant, Alrick Evans, pursuant to Practice Book § 43-22, requests this Court to correct what he claims is an illegal sentence imposed in his case. The defendant asserts that the sentence itself is illegal and that it was imposed in an illegal manner. The defendant received a total effective sentence of five years of incarceration, to be followed by five years of special parole, on the charge of sale of narcotics, pursuant to § 21a-278 (b). This sentence was imposed on November 16, 2011. The defendant was represented by two attorneys at his change of plea and sentencing.

Procedural History

The defendant was arrested on June 15, 2011, and charged with illegal narcotic related crimes.

On November 16, 2011, after plea and disposition discussions with the defendant's counsel, the assistant states attorney and the presiding criminal judge, the defendant pleaded guilty under the *Alford* doctrine on file number CR11-0049062-T, Count One, to the charge of sale of narcotics, in violation of § 21a-278 (b).[1] The defendant, on that date, also admitted to violating his probation in CR09-0042425-T and CR09-0042410-T. Probation in both of these cases was terminated as part of the agreed upon disposition. The Honorable Hillary B. Strackbein partially dismissed and partially denied the defendant's previously filed motion to correct illegal sentence. The Connecticut Appellate Court affirmed that decision in a per curiam decision. *State* v. *Evans*, 150 Conn. App. 905, 93 A.3d 182 (2014).

The defendant filed the present motion to correct illegal sentence on November 5, 2015. This Court heard argument on the motion on November 18, 2015.

In his motion, the defendant argues that his sentence is illegal because: (1) it exceeds the relevant statutory maximum limits pursuant to *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Alleyne* v. *United States*, -U.S. -, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013); (2) it violates the defendant's state and federal rights to substantive due process and equal protection because (i) there is no compelling state interest or rational basis for punishing non-drug-dependent defendants differently from drug-dependent defendants for the

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[1]Transcript, November 16, 2011, pp. 7-8, 14.

same conduct and (ii) the defendant's sentence infringes upon his fundamental right to liberty in a manner that does not further a compelling state interest; (3) it violates article first, § 9 of the Connecticut Constitution by imposing a punishment not clearly warranted by law; and (4) it violates the intent of the legislature and the rule of lenity.

The defendant also argues that his sentence was imposed in an illegal manner because: (1) the court incorrectly believed that it was required to impose a mandatory minimum sentence despite the fact that the prosecution failed to prove the fact, namely, the defendant's non-drug-dependency, that would trigger such a mandatory minimum; (2) the court relied on an inaccurate understanding of the facts; and (3) the court erroneously believed that it was required to impose the mandatory minimum sentence.

Law

Under Connecticut law, "the jurisdiction of the sentencing court terminates once a defendant's sentence has begun, and, therefore, that court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act." *Cobhan* v. *Commission of Correction*, 258 Conn. 30, 37, 779 A.2d 80 (2001).

Practice Book § 43-22 states that "[t]he 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."

"An illegal sentence is essentially one which either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory." (Internal quotation marks omitted.) *State* v. *Parker*, 295 Conn. 825, 839, 992 A.2d 1103 (2010).

"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." (Internal quotation marks omitted.) *State* v. *Delgado*, 116 Conn. App. 434, 438, 975 A.2d 736 (2009).

"Sentences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way which violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promise." (Internal quotation marks omitted.) *State* v. *Parker*, supra, 295 Conn. 839.

"The remedies available for correcting an illegal sentence include reconstructing the sentence to conform to its original intent or to the plea agreement, eliminating a sentence previously imposed for a vacated conviction or resentencing a defendant if it is determined that the original sentence was illegal." (Internal quotation marks omitted.) *State* v. *Barksdale*, 79 Conn. App. 126, 139, 829 A.2d 911 (2003).

Discussion

In the matter before the Court, the defendant pleaded guilty under the *Alford* doctrine[2] to violation of General Statutes § 21a-278 (b). Section 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

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[2]"A criminal defendant who enters a guilty plea under the *Alford* doctrine does not admit guilt but acknowledges that the state has sufficient evidence to convict." *State* v. *Fairchild*, 155 Conn. App. 196, 199 n.2, 108 A.3d 1162, cert. denied, 316 Conn. 902, 111 A.3d 470 (2015); see *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

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 the prosecution."

While not directly challenging his guilty plea, the defendant, in essence, seeks to invalidate the portion of his guilty plea as it relates to a lack of drug dependency by arguing that even though he pleaded guilty to the statute that applied to non-drug-dependent individuals, his *sentence* under the statute is illegal, because he did not specifically admit, nor did the assistant states attorney articulate, nor did the court specifically find, that he was not drug-dependent.

"The entry of a guilty plea under the *Alford* doctrine carries the same consequences as a standard plea of guilty. By entering such a plea, a defendant may be able to avoid formally admitting guilt at the time of sentencing, but he nonetheless consents to being treated as if he were guilty with no assurances to the contrary." *State* v. *Faraday*, 268 Conn. 174, 205, 842 A.2d 567 (2004). Where a defendant has sought to challenge the validity of his *Alford* plea to § 21a-278 (b) due to lack of a specific finding or canvas related to drug dependency, our Supreme Court has held that even when "the trial court did not rely upon the defendant's

representation that he understood the crime with which he was charged, it did not have a duty to canvass the nature of the charge with respect to drug-dependency at the plea hearing because it is not an element of the crime. . . . [T]he defendant's status as a person who is not drug-dependent is not an essential element of the offense charged. It is not a part of the prohibited conduct. . . ." (Internal quotation marks omitted.) *State* v. *Badgett*, 220 Conn. 6, 15, 595 A.2d 851 (1991).

The defendant further asserts that there is a violation of substantive due process and equal protection under the law because of the application of two separate punishment schemes for the same offense under §§ 21a-278 (b) and 21a-277.[3]

This position has already been addressed and rejected by the Connecticut Supreme Court.

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[3]General Statutes § 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.

"Under traditional equal protection principles, a State retains broad discretion to classify [conduct as criminal] as long as its classification has a reasonable basis. . . . [W]here there is some natural and substantial difference germane to the subject and purposes of the legislation, there is no illegal discrimination between those within an established class and others not so included." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Grullon*, 212 Conn. 195, 214, 562 A.2d 481 (1989). "The legislature may rationally have concluded that such enhanced penalties were in tension with its goal of appropriate treatment for those who are drug-dependent. By exempting drug-dependent persons from prosecution under § 21a-278, and from its mandatory minimum sentence, the legislature empowered the court to exercise greater discretion in individual cases to determine the appropriate balance between treatment and punishment. Accordingly, we find no illegal discrimination in the legislature's determination to distinguish in this fashion between those who are drug-dependent and those who are not." Id., 216-17.

In *State* v. *Ray*, 290 Conn. 602, 966 A.2d 148 (2009), our Supreme Court confirmed that lack of drug dependency is not an element of § 21a-278 or a sentencing enhancement. Rather, proof of drug dependency serves as an affirmative defense to § 21a-278 and mitigates the defendant's culpability. Id., 625. Therefore, it was constitutional to place the burden of proof on the defendant to prove drug dependency. Id., 626. The court held that nothing in *Apprendi*

prevented the legislature from creating an affirmative defense that reduced the possible sentence for a defendant. Id., 623-24. The Supreme Court noted that while "under *Apprendi*, any factor (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 . . . 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)." (Citations omitted; internal quotation marks omitted.) Id., 624-25. The court acknowledged that "it may be unusual, or even odd, for a state to create two separate crimes with identical elements, but with different penalties, because one statute provides for an affirmative defense that the other does not. As long as the *substance* of an affirmative defense does not run afoul of the constitutional limits discussed in *Patterson* [v. *New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977)], however, there are no constitutional limitations on the freedom of the states to structure their criminal statutes as they see fit. See *Apprendi* v. *New Jersey*, supra, 530 U.S. 491 n.16 (primary check on state's freedom to restructure criminal code to place burden of proof on defendant is political process, subject to constitutional limitations discussed in *Patterson* v. *New York*, supra, 210)." *State* v. *Ray*, supra, 625-26.

In the present case, the defendant argues that the United States Supreme Court holding in *Alleyne* v. *United States* overrules *Ray*, because it found that any fact that imposes or increases a mandatory minimum sentence is an element of an offense and must be found by the finder of fact and not by the court at sentencing. If non-drug-dependency were an aggravating factor at sentencing which resulted in a mandatory minimum sentence, the defendant's argument would be compelling. The defendant, however, misapplies *Alleyne* when he argues that this case alters Connecticut's statutory scheme to make § 21a-277 (a) the base offense and transforms § 21a-278 (b) into an enhanced penalty. Such a transformation would create a rule whereby any affirmative defense that is codified using a separate statute would be transformed into a base offense and the previous base offense would be transformed into a statutory sentencing enhancement. Nothing in the language of *Alleyne* supports such a sweeping change. Rather, *Alleyne* simply broadened the definition of the elements of an offense to include both those that increase the statutory maximum, previously found in *Apprendi*, and those sentencing factors that increase a mandatory minimum, thus requiring the prosecution to prove these elements to the finder of fact.[4] *Alleyne* v. *United States*, supra, 133 S. Ct. 2163.

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[4]Further, even if our Supreme Court were to eventually rule that *Alleyne* does alter the framework of our statutory scheme as it applies to drug offenses, our Supreme Court has made clear that in our hierarchical judicial system, Supreme Court decisions are binding on the Appellate Court and the Superior Courts; Appellate Court decisions are binding on the Superior Courts. *Stuart* v. *Stuart*, 297 Conn. 26, 45-46, 996 A.2d 259 (2010); *Ferrigno* v. *Cromwell*

Proof of non-drug-dependency in Connecticut, however, as stated previously, has never been classified as a sentencing factor. Rather, it is presumed that an individual is not drug dependent and drug dependency is an affirmative defense to § 21a-278 (b), which must be proven by the defendant to the trier of fact. *State* v. *Ray*, supra, 290 Conn. 616-26. Therefore, since drug dependency is not a sentencing enhancing factor, nothing in *Alleyne* would render the defendant's sentence illegal, because there was no requirement of a specific finding of fact that he was not drug-dependent.[5]

The defendant's final argument that the sentence is illegal is that he received a sentence that exceeded the statutory maximum available. The Court finds this argument without merit for the following reasons. First, as previously stated, the defendant was properly sentenced

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Development Associates, 44 Conn. App. 439, 443, 689 A.2d 1150 (1997) (Appellate Court decisions are "controlling precedent until overruled or qualified" [internal quotation marks omitted.]), aff'd., 244 Conn. 189, 708 A.2d 1371 (1998). At this time, our Supreme Court has not acted to overrule *Ray*.

[5]It is also of note that a typical challenge to a sentence under *Apprendi* or *Alleyne* is where the jury found the defendant guilty of an offense and the court sentenced the defendant based, in part, on a fact not found by the jury. Here, in contrast, the defendant pleaded guilty to § 21a-278 (b) which specifically applies to a non-drug-dependent person under the *Alford* doctrine. So, even if he did not admit to being drug-dependent, he conceded that the state could meet its burden of proof at trial under this statute. The defendant did not argue at his plea canvas, nor does he argue now, that he should have been permitted to plead under § 21a-277 (a), which applies to a drug-dependent person. Instead, he seems to argue that the court should treat §§ 21a-277 and 21a-278 as a single statute with non-drug-dependency as an element that would increase a defendant's sentence.

under § 21a-278 (b), which has a five year mandatory minimum and a twenty year maximum. Second, even if the defendant had been sentenced under § 21a-277 (a) for a first time offense, the maximum term of imprisonment under the statute was fifteen years - far in excess of the five year mandatory minimum and the five years of special parole that the defendant was sentenced to by the court.

The defendant's sentence was clearly warranted by law. There is no statutory ambiguity which would trigger the rule of lenity.

The Court, therefore, finds that the defendant's sentence is not an illegal sentence.

In his motion, the defendant also argues that his sentence was imposed in an illegal manner and puts forth reasons for his position.

The defendant asserts that the trial court relied on inaccurate understanding of the facts. This assertion is not supported by the facts presented.

Under *Ray* and prior cases, there is a presumption that a defendant is not drug-dependent, and that can be overcome by the defendant as an affirmative defense. The defendant, in pleading guilty to § 21a-278 (b), did not do anything to challenge such a presumption. The defendant points to a statement made by the prosecution that cocaine was the defendant's drug of choice to show that the issue of the defendant's drug dependency was raised to the trial court at the time of his plea and sentencing. Within the context of the statement, however, it is

unclear whether it refers to the drug of choice for the defendant's personal use or for his sale. Neither the defendant nor either defense counsel raised the defendant's drug use at the time of sentencing. Therefore, the trial court did not rely on inaccurate facts during sentencing.

The defendant also argues that the imposition of the sentence was illegal because the trial court was under a mistaken belief as to the mandatory minimum sentence that the Court must impose under § 21a-278 (b). The trial court did not erroneously believe that it was required to impose the mandatory minimum sentence. The defendant pleaded guilty to § 21a-278 (b), which contains the mandatory minimum sentence. The defendant also agreed to the imposed sentence of five years to serve followed by five years of special parole. The defendant does not argue that he would have been eligible for a suspension of the mandatory minimum sentence under § 21a-278 (b). Rather, he argues that the court should have known that it could sentence him under § 21a-277 (a), despite the fact that he pleaded guilty to a violation of § 21a-278 (b). In essence, the defendant argues that the court erred in sentencing the defendant under a statute that he elected to plead guilty to, because it somehow should have understood that his conduct really fell under another statute. While the court does have discretion, pursuant to General Statutes § 21a-283a,[6] to deviate from the mandatory minimum sentence of § 21a-278

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[6]Section 21a-283a provides: "Notwithstanding any provisions of the general statutes, when sentencing a person convicted of a violation of any provision of this chapter, except a violation of subsection (a) or (c) of section 21a-278a, for which there is a mandatory minimum

(b) upon a showing of good cause by the defendant, the statute does not give the court unlimited discretion to deviate from the mandatory minimum statute. Additionally, the state was under no additional burden to prove the defendant's drug dependency under the statutory scheme. In the present case, the transcript does not indicate that the defendant or either of his counsel, at the time of his plea and sentencing, attempted to assert a good cause reason to deviate from the mandatory minimum sentence under § 21a-278 (b). Rather, the defendant stated that he was electing to plead to § 21a-278 (b) and receive the sentence that was subsequently imposed, despite being made an alternative offer for twelve years, execution suspended after six years, with three years of probation. The defendant raised concerns at the dispositional and sentencing hearing concerning whether he would receive credit for any time served during the pendency of his cases. He did not raise concerns over whether he was being sentenced under the appropriate statute, merely whether he was being sentenced under the correct docket number, as he had

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sentence, which 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 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, as those terms are defined in section 53a-3, 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."

multiple pending cases at the time of his plea. Upon being canvassed by the Court, the defendant acknowledged that he had spoken with both of his counsel and he understood the charges against him, the possible sentence, and the sentence being imposed as a result of his plea. The Court, therefore, finds that the trial court did not err in sentencing the defendant to the mandatory minimum sentence.

Finally, the defendant requests specific relief. The Court declines to proceed on the specific relief requested in light of this Court's decision on the motion. The Court also declines to modify the mittimus to reflect a sentence not provided by statute.

Conclusion

For all of the reasons stated, and after review and consideration, the Court finds that the sentence imposed was legal and it was imposed in a legal manner.

The defendant's motion to correct an illegal sentence is hereby:

DENIED

So Ordered.

BY THE COURT

D'Addabbo, J.

SUPREME COURT

STATE OF CONNECTICUT

SC 19881

STATE OF CONNECTICUT

v.

ALRICK EVANS

OCTOBER 17, 2018

O R D E R

THE MOTION OF THE STATE-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. THE UPDATED OPINION 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/
RENE L. ROBERTSON
ASSISTANT CLERK-APPELLATE

NOTICE SENT: October 18, 2018
HON. FRANK M. D'ADDABBO
COUNSEL OF RECORD
CLERK, SUPERIOR COURT, H15N CR11-0049062-T

180084

DOCKET NUMBERS: : SUPERIOR COURT

H15N-CR090042410-T H15N-CR110049061-S : G.A. #15
H15N-CR090042425-T H15N-CR110049062-T : AT NEW BRITAIN, CT
H15N-CR110047914-T H15N-CR110049063-T
H15N-CR110258885-S H15N-CR110049313-T : NOVEMBER 16, 2011

STATE OF CONNECTICUT

V.

ALRICK A. EVANS

AT TIME OF PLEA AND SENTENCING

BEFORE THE HONORABLE HILLARY B. STRACKBEIN, JUDGE

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

Representing the State of Connecticut:

ATTORNEY JEFFREY LEE -- Ordering Party
Assistant State's Attorney
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Representing the Defendant:

ATTORNEY GERALD KLEIN
21 Oak Street #308
Hartford, Connecticut 06106

ATTORNEY DEBON DAMIAN FREEMAN
One Linden Place
Hartford, Connecticut 06106

Recorded By:
Patricia Muñiz

Transcribed By:
Patricia Muñiz
Court Recording Monitor
20 Franklin Square
New Britain, Connecticut 06051

THE COURT: Okay. Now, this is the matter of Alrick Evans. We had given the time based on Mr. Evans' hesitation last time and his certain allegations he was making, but the Court left the offer open until today, the offer being five years followed by five years of special parole. Is that right?

ATTY. LEE: Wasn't there an alternative split sentence offer.

ATTY. KLEIN: Yes, there was an alternative, Your Honor.

THE COURT: What was that?

ATTY. KLEIN: Six years on the bottom with a three year period of probation.

ATTY. LEE: Was it twelve after six?

ATTY. KLEIN: Something after -

ATTY. FREEMANN: Yeah, it was six, twelve, six. I'm not certain on the probationary period.

THE COURT: So it would be like twelve, six, three?

ATTY. FREEMAN: Right.

THE COURT: All right. Which is it that you wanted?

THE DEFENDANT: (No response.)

THE COURT: It was five years plus five special parole or twelve years suspended after six years with three years of probation.

ATTY. KLEIN: Just so the record can reflect, Attorney Freeman and I, I note from talking to the lawyer had both seen him at Walker facility, separate from each other --

THE COURT: Right.

ATTY. KLEIN: -- for extensive meetings.

THE COURT: Yes.

ATTY. KLEIN: -- since the last court date. We did not speak to him today because, at the least the way I left it and I think Attorney Freeman did also, it's just a matter -- he said he doesn't want a trial. It's just a matter of him deciding which of the two.

THE COURT: Well, we left it open for today.

ATTY. KLEIN: Yes, that's why we didn't talk to him this morning.

THE COURT: Well, if you both talked to him that day at the facility numerous times then he'll admit that. Is that what happened, the lawyers spoke to you?

THE DEFENDANT: Yes.

THE COURT: Okay. And which of these two choices did you want, Mr. Evans?

ATTY. KLEIN: He's asking the exact counts, Mr. Lee?

ATTY. LEE: I'm sorry?

ATTY. KLEIN: Mr. Evans is asking the exact

counts that he's going to be put to plea on.

THE COURT: What counts are you proceeding on?

ATTY. LEE: I'm filing in 0-6-2, a single count of sale, 21a-278(b); and another count of 21a-278(b), what I'll call a "throw down case" in New Britain.

THE COURT: So it's a sale of narcotics and possession with intent to sell.

ATTY. KLEIN: Both under 278(b).

THE COURT: But you're dropping the rest of this, all the rest of it?

ATTY. LEE: Admit and terminate the VOP's and nolle on the domestic related.

ATTY. KLEIN: So no time on the domestic at all.

ATTY. LEE: Yeah, only two out of the five counts. All set?

THE CLERK: Can I have the docket numbers?

ATTY. LEE: File ending in 0-6-2.

THE CLERK: Yes.

ATTY. LEE: And a file ending 8-8-5.

ATTY. KLEIN: Now there's a question as to whether he's being held on the docket numbers he's going to plead to.

ATTY. LEE: I have no idea.

THE CLERK: I don't either.

ATTY. FREEMAN: Would Your Honor order credit back to his date of incarceration?

THE COURT: I will order -- D.O.C. will calculate

his credit and that's as far as I'm willing to go. He got arrested. There were bonds. He made some bonds and he got brought back in. I'm not going to sit here and do that. D.O.C will do it for the time he was arrested on these dockets numbers.

ATTY. FREEMAN: All right, Judge, but he doesn't have credit on one of these.

ATTY. KLEIN: Can we ask madam clerk whether we ever asked them to be increased or not?

THE COURT: Are there bonds on everything?

THE CLERK: He's posted on some.

THE COURT: Right. You never raised them when he came back in?

ATTY. KLEIN: But if the choice, as I think it's going to be, is six years would the Court consider imposing the six year sentence on the newer file, the one that he's held on, and perhaps a five year concurrent sentence on what Mr. Lee is calling the throw down case which I know he bonded out on.

THE COURT: You want 12/6/3, and then you want five years to serve concurrent --

ATTY. KLEIN: Yes.

THE COURT: -- on the possession with intent? Fine. Is he going to make it through a canvass, because why are we wasting our time here? He didn't make it through the last canvass, you know, we got halfway through the canvass last time. I need to

know if we're going to make it through the canvass. Today, we have other cases to do. He can have trial.

ATTY. KLEIN: I was under the impression he's going to accept the six so that's my error. I just want to state for the record if the Court is just going to leave it at whatever credit he gets that correction gives him --

THE COURT: Yeah.

ATTY. KLEIN: -- and if it runs concurrent --

THE COURT: Yes.

ATTY. KLEIN: -- the sentence starts today with zero credit.

THE COURT: No. No. D.O.C. will calculate his -

ATTY. KLEIN: He's not being held on a file that the Court is going impose five years on as I understand it. If you do it by docket number, because that will clarify it. But he has a promise to appear on this so-called "throw down case." He's going to plead to that today.

THE COURT: Do you want to put him to plea on a different of the drug cases?

ATTY. LEE: I actually don't. I have a reason for that.

THE COURT: Oh, okay.

ATTY. LEE: It's not credit, it's money.

THE COURT: Okay. Well, there's not going to be

any claim to the money on any of these cases.

ATTY. KLEIN: Well, of course, there is. There's a collateral asset forfeiture matter, Your Honor.

THE COURT: You could argue that with asset forfeiture.

ATTY. KLEIN: Right. No, I understand that.

THE COURT: The instrumentality of drug dealing isn't going to be returned to the defendant. I don't know what you want from me today. Either we're going forward or we're not. It's very simple. I got judges who want to try cases. You don't want to do this deal I don't care. I just don't. I've already done this, Mr. Evans, last time. And I asked you.

THE DEFENDANT: It was just confusing. I mean I'm not --

THE COURT: What's confusing?

THE DEFENDANT: Five cases plus and they gave me --

THE COURT: There are only two cases.

THE DEFENDANT: No, now it's two docket numbers that I'm pleading guilty to, but last time it was all five they were trying to make me to plead. I didn't know. You know? It's confusing.

THE COURT: Do you want to plead to all five?

THE DEFENDANT: No.

THE COURT: Oh, then I don't see what the

confusion is.

THE DEFENDANT: No, I'll take the two but what I'm trying to say is what docket number because D.O.C. would not give me back the credit. You know? I was held before for seven days then they gave me a PTA and then I came back to jail July 6th. I've been held since July 6th until present.

THE COURT: 7/6, you'll get credit -- he'll get credit from 7/6, wouldn't he? Right, you got picked back up on this?

ATTY. KLEIN: The Court will note credit from --

THE COURT: 7/6. Is that what you want?

THE DEFENDANT: Yes, yes.

THE COURT: Credit from 7/6.

ATTY. KLEIN: All right. So, therefore, you want the five and five and credit from the day you went in jail.

THE COURT: He wants five plus five special. Is that what you just said?

ATTY. FREEMAN: Yes, Your Honor.

THE COURT: So you just changed it from the six to the five plus five? You want five plus five?

ATTY. FREEMAN: Five plus five, yes.

THE COURT: Okay then, put him to plea.

ATTY. LEE: Docket number CR11-49062, first count of the information, sale of narcotics, 21a-278(b). Guilty or not guilty?

THE DEFENDANT: Guilty.

ATTY. LEE: Judge, can I do the facts as we go through these?

THE COURT: Okay.

ATTY. LEE: Or would you rather I do them all together?

THE COURT: You could do it however you want to do it.

ATTY. LEE: On or about 5/19/2011, Bristol police in working with the statewide narcotics knew that Mr. Evans was moving some weights of cocaine, illegal drug, narcotics, if you will. They got a CI to do some buys under their supervision.

Mr. Evans did trade for a quantity of United States currency on or about 5/19/11, those narcotics, for U.S. currency. There were a couple of other of those sales occurred on 5/19 and 6/8, just to established beyond any reasonable doubt in our minds that he was an ongoing drug dealer. We're not going to make him to 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, Brittney Farms Road, 55 Brittney Farms Road, Apartment 104, 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 31.4 more than one ounce of, I believe his drug of choice here is, crack cocaine, that is correct. So that's the facts as to those two 21a-278(b) files.

As to the violations of probation: I believe -- In docket CR09-42425: You're charged with violation of probation, sir, 53a-32. Do you admit or deny violating your probation?

THE DEFENDANT: I admit.

ATTY. LEE: Judge, that probation was imposed by Judge Brunetti. The underlying sentence from a trespass in the first degree, one year execution suspended, one year probation consecutive to the next probation that we will talk about. The total effective sentence - after we go through the facts of the consecutive - were two years execution suspended and one year probation.

That second probation I referred to in docket CR09-42410: Sir you're also charged with violating that probation, 53a-32. Do you admit or deny violating your probation?

THE DEFENDANT: I admit.

ATTY. LEE: So that was second imposed one year execution suspended sentence, making up the two years

executed suspended on or about 12/8/2009. After going on that probation, the allegation is that he was arrested on or about 2/10/2011, which is the breach of peace and harassment that we didn't pursue sufficient, though, for a violation. The total effective sentence is whatever it was he chose.

THE COURT: The exposure, fifteen on each of those?

ATTY. LEE: No, twenty on each, five year minimum mandatory.

THE COURT: Okay. Is there a waiver of a presentence investigation?

ATTY. KLEIN: Yes, Your Honor.

THE COURT: A waiver of a presentence investigation?

ATTY. LEE: Yes. Thank you.

THE COURT: A DNA sample is taken in all felony convictions.

Are you under the influence of any alcohol or drugs or medicine that would stop you from understanding what's happening in court?

THE DEFENDANT: (No response.)

THE COURT: Out loud.

THE DEFENDANT: No.

THE COURT: And did you have enough time to talk to your lawyers about these cases and your decision to plead guilty and admit the violations of

probation?

THE DEFENDANT: I didn't. It's being terminated. The violation of probation --

THE COURT: Okay. Mr. Evans, listen to the questions and answer them.

THE DEFENDANT: Okay.

THE COURT: Did you have enough time to talk to your lawyers about these cases and your decision to plead guilty and to admit the violations of probation? Did you have enough time to talk to them or not?

THE DEFENDANT: Yeah, that on the probation was going to be terminated, I guess.

THE COURT: Okay. I didn't say that. I said did you have enough time to discuss the cases with your lawyers?

THE DEFENDANT: (No response.)

THE COURT: Yes or no?

THE DEFENDANT: Just the drugs aspect. Yes, yes.

THE COURT: You know that your probations are going to be terminated and you're going to be on special parole after this.

THE DEFENDANT: Yes.

THE COURT: You understand that for the two charges of drug selling that you just pled to you could have gotten twenty years on each of those. Did your lawyers go over this with you?

THE DEFENDANT: Yes. Yes, Your Honor.

THE COURT: And you're satisfied with this plea bargain?

THE DEFENDANT: Yes. Yes, Your Honor.

THE COURT: You understand that by pleading guilty and admitting the violations you're giving up certain rights. You're giving up your right to a trial to a judge or jury on the criminal charges. The state would have had to prove those against you beyond a reasonable doubt. You could have testified if you wanted to, you never have to testify, but you could. You could put on your own witnesses and you confront and cross-examine the witnesses against you with the help of your lawyers. There won't be a trial because of your pleas. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: On the violations of probation, you could have had a hearing to a judge not a jury and the state only has to prove a violation of probation by a lower standard of proof, that's called "preponderance of the evidence" that you violated your probation. That means it's more likely than not that you violated your probation, getting arrested while on probation is pretty much an automatic violation. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: At a hearing to a judge not a jury,

once again, you could have testified, you could have put on witnesses and you could have confronted witnesses against you. There won't be any hearing and there won't be any trial because of your pleas. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any charges anywhere else?

THE DEFENDANT: No, Your Honor.

THE COURT: And if you were not a United States citizen, there could be consequences to your pleas of deportation, exclusion from the United States or a denial of naturalization. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Anyone threatening you or forcing you or promising you anything to get you to plead guilty today?

THE DEFENDANT: No.

THE COURT: So your pleas are voluntary?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You heard what the prosecutor said. Is that what happened on those days?

THE DEFENDANT: About, um, what he said --

THE COURT: About selling the drugs?

THE DEFENDANT: (No response.)

THE COURT: These were straight pleas, right? These weren't Alford pleas, right?

THE DEFENDANT: Substantially.

THE COURT: Substantially.

THE DEFENDANT: Yeah.

THE COURT: Do you want this to be under the Alford doctrine?

THE DEFENDANT: Yes.

ATTY. KLEIN: Yes, please.

THE COURT: We need to get this clear. The Alford doctrine suggests that you might disagree with some of the facts the prosecutor said about what happened, but if it went to trial there's a good chance you would be convicted and get a much worse sentence than what you're getting here today. Is that your understanding of the Alford doctrine?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand that once I accept your pleas today you can't change your mind later, we're done today, and you'll have this plea bargain. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: State or Defense, any reason I shouldn't accept the pleas?

ATTY. LEE: No, ma'am.

ATTY. FREEMAN: No, Your Honor.

ATTY. KLEIN: No, Your Honor.

THE COURT: I'll make a finding your pleas are knowingly and voluntarily made with the assistance of

competent counsel. There is a factual basis for the pleas. They're accepted and findings of guilty may enter. Anything further, Attorney Lee? Anything further?

ATTY. LEE: No.

THE COURT: Anything further, counsel? What would you like to say?

ATTY. FREEMAN: Just briefly, Your Honor. Mr. Evans just wanted some assurances that his accomplishments to date known to the State or Mr. Lee that this wraps them all up that there is no outstanding warrants that Mr. Lee has or knows of that will pop-up later on.

THE COURT: I assume that this is everything. Is that right?

ATTY. LEE: I don't know of anything else. He would know how much criminal behavior he engaged in over and above that which has already been charged. I can't answer that. I know of nothing that's coming, if he does, he does.

THE COURT: I'm going to infer that the state is saying there are no further charges pending. Okay?

ATTY. FREEMAN: Okay.

THE COURT: Anything else?

ATTY. KLEIN: Just, Your Honor, very briefly that my records indicate that July 6th is indeed the date when he was ordered incarcerated by Judge

Brunetti in Bristol.

THE COURT: Okay.

ATTY.KLEIN: So if the Court would be good enough when it sentencing him concurrently on both files to just give him credit or order that he had credit from those dates.

THE COURT: All right. Anything you wanted to say? Mr. Evans.

THE DEFENDANT: Yes.

THE COURT: Anything you wanted to say about this?

THE DEFENDANT: Yes, Your Honor. On one of the dockets that I pled guilty to, under the charges, I was locked up from June 15th, the one in New Britain, from June 15th to June 23rd when I post bond. I was incarcerated for those days.

THE COURT: All right. D.O.C will give you credit for any days that you were in.

THE DEFENDANT: The counselor told me I have to bring that to you attention.

THE COURT: Okay. Well you brought it to my attention. Anything else you wanted to say? Okay. You really shouldn't be asking me about credit, what you should be doing is deciding that you're not going to sell drugs anymore because all you're going to do is spend your life in and out of jail. And with special parole, the minute you picked up you go right

back. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I don't know how to get you to change what you do, your way of thinking, but if you think selling poison to people is the way to make a living it isn't, and I'm hoping that maybe you'll learn that. Okay?

It is the sentence of the Court that you be committed to the custody of the Commissioner of Corrections for five years followed by five years of special parole on both concurrent. Credit from July 6th. Nolles on open charges. Your old probations are violated and terminated. Special parole will put conditions on you:

No associating with drug dealers, any substance abuse treatment they think is necessary and no domestic violence against the alleged victim in the case that was dropped. They'll have to look into that. Domestic violence is not acceptable. Any fees and costs are waived.

ATTY. KLEIN: Thank you, Your Honor.

THE COURT: Good luck, Mr. Evans.

DOCKET NUMBERS: : SUPERIOR COURT

H15N-CR090042410-T H15N-CR110049061-S : G.A. #15
H15N-CR090042425-T H15N-CR110049062-T : AT NEW BRITAIN, CT
H15N-CR110047914-T H15N-CR110049063-T
H15N-CR110258885-S H15N-CR110049313-T : NOVEMBER 16, 2011

STATE OF CONNECTICUT

V.

ALRICK A. EVANS

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. # 15, New Britain, Connecticut, before the Honorable Hillary B. Strackbein, Judge, on the 16th day of November, 2011.

Dated this 5th of January, 2012 in New Britain, Connecticut.

Patricia Muñiz
Court Recording Monitor

NO: CR-11-0049062

STATE OF CONNECTICUT	:	SUPERIOR COURT
v.	:	NEW BRITAIN J.D.
ALRICK EVANS	:	NOVEMBER 5, 2015

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. 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 when 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,

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SUPERIOR COURT
CR-11-0049062
NEW BRITAIN

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 the Memorandum and that will be presented at oral argument on this motion the defendant submits that the Court should correct the defendant's sentence, eliminating the mandatory minimum, so that a legal sentence may be imposed in a lawful manner by: 1. leaving the statute under which he pled undisturbed, 2. imposing a non-mandatory sentence that does not exceed a total of seven years combined incarceration plus special parole, and 3. Revising the mittimus to state "non-mandatory", or by such other remedy as the court may deem appropriate.

Respectfully submitted,
ALRICK EVANS
The Defendant

By: _____

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ORDER

The foregoing having been considered, it is hereby ORDERED:

GRANTED / DENIED.

2/1/16 (O'Neill)
Def. to memorialize
at Dec.
Lodge

BY THE COURT

_____
Judge/Clerk

CERTIFICATE OF SERVICE

I hereby certify that the on November 4, 2015, foregoing was sent via first class mail as well as sent via facsimile to all counsel of record:

Attorney Jeffrey Lee
State's Attorney's Office
131 North Main Street
Bristol, CT 06010

And sent via first class mail to:

Mr. Alrick Evans #299269
Osborn Correctional Institution
335 Bilton Road
Somers, CT 06071.

April E. Brodeur
JN 421863

NO: CR-11-0049062

STATE OF CONNECTICUT : SUPERIOR COURT

v. : NEW BRITAIN J.D.

ALRICK EVANS : NOVEMBER 5, 2015

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SUPERIOR COURT
GA-15
NEW BRITAIN

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 correcting the sentence. 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;

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

Under the common law a trial court's jurisdiction terminates when a defendant is taken in execution of his sentence. 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, 578, 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 ultimately pled in the New Britain Judicial District on docket number CR11-0049062 on the charge of Sale of Narcotics violating C.G.S. §21a-278(b).[1]

On the day of his plea and sentencing the atmosphere was one of confusion for all parties. After confusion as to what files Mr. Evans would plead under, what charges he would be pleading to, and what the agreed upon sentence was, the still confused Mr. Evans pled guilty under the Alford doctrine on docket number CR11-0049062 to the charge of Sale of Narcotics violating C.G.S. §21a-278(b).[2] See Transcript 11/16/11, pp. 3-4, 6-7; A4-8. There was no evidence concerning the defendant's status as non-drug-dependent.

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[1] This was the defendant's first conviction for a drug offense.

[2] Mr. Evans pled guilty on another docket number but filed a motion a motion to correct an illegal sentence in 2013, which was successful and resulted in a dismissal of that docket number due to the failure to put him to plea on that docket number. That motion to correct raised no claims under Apprendi or Alleyne.

Sentencing Transcript Nov. 16, 2011. During sentencing the prosecutor did note that Mr. Evans' drug of choice was crack cocaine, implying Mr. Evans' extensive use of the drug. Id. at 9. The court imposed a total effective sentence of 5 years of incarceration, followed by 5 years of special parole.[3]

Mr. Evans appealed his convictions to the Appellate Court. That Court affirmed the judgment in a per curiam decision. State v. Evans, 150 Conn. App. 905 (per curiam) (2014).

III. *Argument*

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

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 States 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?"

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[3] The court failed to canvas the defendant on the mandatory minimum on the offense to which he was pleading.

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, or admitted during a plea, and found beyond a reasonable doubt.[4] It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury, or admitted during a plea. The Alleyne Court so held.

Before Apprendi the United States 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).[5] "[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).[6] In Harris the Court "declined to apply Apprendi to

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[4] 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.

[5] 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 "realloc[ate] 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.

[6] 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 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

facts that increased the mandatory minimum sentence but not the maximum sentence[,]" concluding that "judicial fact finding 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, elicited, or found, 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. Correction of the sentence 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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sentence beyond the statutory maximum,' [536 U.S.], at 566, 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, or admitted, elicited, or found during a plea . 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) The Legislative History of Connecticut's Two Statutes Prohibiting and Punishing the Sale of Narcotics

When someone in Connecticut sells narcotics,[7] he potentially violates two separate, and virtually identical, statutory provisions: §21a-277(a) ("Penalty for illegal manufacture, distribution, sale, prescription, dispensing") and §21a-278(b) ("Penalty for illegal manufacture, distribution, sale, prescription or administration by non-drug-dependent person"). "The[se] statutes are virtually identical except that §21a-278[(b)] applies exclusively to persons who are not drug-dependent," (emp. added) State v. Jenkins, 41 Conn. App. 604, 607 (1996), while "§21a-277(a)... does not consider [or even mention] drug dependency". (emp. added) Id. This near identity arises from the history of these statutes, which shows that §21a-278(b) was enacted four years after §21a- 277(a) and was clearly intended to define an aggravated form of the earlier crime with harsher punishments, with the aggravating factor being the non-drug-dependent status of the seller.

The predecessor of current §21a-277(a) was enacted first, in 1967, as §36 of a larger, comprehensive law dealing with the regulation of legal and illegal drugs which was in part modeled after the Uniform Controlled Substances Act and replaced our older version of the Uniform Narcotic Drug Act. See 1967 Public Acts No.555. It was originally codified as §19-480 and was later transferred in 1983 to its current location at §21a-277(a). The predecessor of current §21a-278(b) was first enacted 4 years later, in 1971, see 1971 Public Acts No.812, §1, and was then expanded in 1974, see 1974 Public Acts No.332 §1. It was originally codified as §19-480a and was later transferred in 1983 to §21a-278(b).

The legislative history of the initial 1971 enactment of the predecessor of current §21a-278(b) clearly shows that its purpose was to create a new separate statutory crime

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[7] These statutes also apply to one "who manufactures, distributes,... 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 [narcotics]... except as authorized [by law]"(emp. added.) See §21a-277(a) & §21a-278(b) (same language in both).

that was an aggravated form of §21a-277(a), with harsher punishments, and that the aggravating factor was the drug seller's status of being non-drug-dependent.[8] Representative Carrozzella, co-chairman of the Judiciary Committee, introduced the bill that would become §21a-278(b) on the floor of the House and explained that "the problem with §19-480 [now §21a-277(a)] is the fact that in many instances, the seller who is not a drug addict is given a suspended sentence.... What this bill says is that insofar as the person who is not a drug addict, if he sells, he shall go to jail for not less than ten [later changed to five] years for the first offense...." (emp. added) 14 H.R. Proc., Pt.10, 1971 Sess., p.4613. Representative Avcollie, the sponsor of the bill, stated that the "intent of the bill is to give the state's attorney and the prosecuting attorney an opportunity to charge an additional crime 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." (emp. added) 14 H.R. Proc., Pt.10, 1971 Sess., pp.4616-4617. What the bill does, according to Representative Avcollie, is to make it "mandatory that the non-addicted pusher be given a jail sentence." (emp. added) Id.4614. "This bill does not go towards the addicted drug pusher. It goes to the individual who is making a living on selling drugs, strictly for profit, not to support a habit, not to continue an addiction or a sickness..." Id. 4615. Rep. Bingham, a supporter of the bill, stated: "The non-addict drug pusher... is a menace to society, he preys upon the weak, he preys upon the poor, and this bill certainly is a step forward in our war against non-addict drug pushers..." (emp. added) Id.4617. Similar comments were made on the floor when the law was expanded in 1974.[9]

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[8] Our Supreme Court has noted the standard method for creating an aggravated form of a crime in Connecticut is for our legislature to do what they did here, i.e., to enact separate new statutory provision which includes the aggravating factor(s) in the definition of the crime and punishment and specifies the harsher penalties intended. See State v. Kirk R., 271 Conn. at 515-516 (citing as example "the statutes concerning an assault on an elderly person... [which] create separate aggravated offenses when the victim is at least sixty years of age, and the state is required to prove the age of the victim as an element of that separate aggravated offense").

[9] For example, Rep. Avcollie noted that the 1974 bill was an expansion of the 1971 legislation he had introduced "which first put the concept of penalizing the non-addicted

The enactment of §21a-278(b) therefore was intended to create an aggravated form of §21a- 277(a), with a harsher punishment for those non-addicted predators who sold drugs for profit. "The design and effect of §21a-278(b) is to punish persons who are not drug-dependent and sell narcotics more severely than drug-dependent persons who sell narcotics." (emp. added.) State v. Jenkins, 41 Conn. App. at 607; see also State v. Walker, 90 Conn. App. 737, 742-743, cert. denied, 275 Conn. 930 (2005) (same); State v. Marrero, 66 Conn. App. 709, 714-715 (2001) (same). This harsher punishment takes 3 forms. First, §21a-278(b) creates a greater stigma for those convicted of it, because it is intended by the legislature to treat more harshly those non- drug addicted persons who sell drugs for a profit, and this stigma is reflected in its very title ("Penalty for illegal manufacture, distribution, sale, prescription or administration by non-drug-dependent person"), which is how the crime is listed on the records of those who are convicted of it. Second, §21a-278(b) currently imposes a 5 year mandatory minimum sentence, which is not required for those convicted of §21a-277(a).[10] Jenkins, 41 Conn. App. at 607 (so noting). Third, and

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seller on our books". (emp. added) 17 H.R. Proc., Pt.6, 1974 Sess., p.3172. He also noted that the mandatory sentencing applied to the seller "who was non-addicted... [t]he seller who's out making a profit". Id. 3183-3184 ("that person doesn't need any understanding. He needs to go to jail..."). Rep. Bingham noted that "the type[s] of person that we are attempting to attack" by the 1974 bill are "those on-drug-dependent offenders... who traffic in heroin, LSD, and cocaine". (emp. added) Id.3166. Rep. Kennelly noted that the bill "is rigorous in its approach to the very vicious element in our society... the non-addict trafficker in drugs". (emp. added) Id.p.3169. Rep. Freedman stated that the tough sentences were intended for "non-addict, professional pushers". (emp. added) Id.

[10] Putting aside for the moment the greater stigma intended by our legislature for a separate conviction for sale of narcotics by a non-drug dependent person, there is at least a question as to whether the rule of Apprendi would apply if the only difference between §21a-277(a) and §21a- 278(b) were that the latter has a mandatory minimum sentence of five years and the former does not. (Of course, this interesting question does not have to be addressed here because §21a- 278(b) also exposes defendant to a greater maximum sentence than §21a-277(a) and thus clearly comes within Apprendi for that reason.) The reason the interesting question arises is because, after the Apprendi decision was issued but before the decisions in Blakely, Booker, and Cunningham, the U.S. Supreme Court issued the decision in Harris v. U.S., 536 U.S. 545 (2002) which held that Apprendi did not apply to a sentencing fact that set a mandatory minimum so long as it did not increase the maximum sentence to which the accused was exposed. Id. 567; see, e.g., State v. Kirk R.,

most important, §21a-278(b) creates the lengthier maximum sentence for first time offender (as charged in this case) of 20 years, while §21a-277(a) has a maximum sentence of only 15 years for the first time offender. Jenkins, 41 Conn. App. at 607 (noting that §21a-278(b) provides punishment for "'a first time offender'" of "'not less than five years nor more than twenty years'" and that §21a-277(a) provides punishment for "'a first offense'" of "'not more than fifteen years'"); see also State v. Hart, 221 Conn. at 619 (Berdon, J., dissenting) ("the establishment of [a violation of] §21a-278 sets the mandatory maximum sentence for a conviction of possession with intent to sell by a person who is not drug-dependent at twenty years for a first offense, while a similar conviction pursuant to §21a-277 carries a mandatory maximum sentence of fifteen years for a first offense").[11]

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271 Conn. at 505 (discussing Harris). But there are courts which have questioned whether Harris can remain good law after the decisions in Blakely, Booker, and Cunningham, because they applied Apprendi to sentencing guideline systems which start with a presumptive midline sentence and then aggravate or mitigate the actual sentence based on sentencing factors such as used in mandatory minimum statutes as well. See, e.g., U.S. v. Malouf, 377 F.Supp.2d 315, 320-327 (D.Mass. 2005) (so questioning), rev'd, 466 F.3d 21 (1st Cir. 2006), cert. denied, 127 S.Ct. 1892 (2007). The point, of course, is that the accused who receives the 5 year mandatory minimum sentence under §21a-278(b) receives this harsher sentence based entirely on fact finding not done in accord with federal jury-trial right.

[11] Defendant notes that there is a somewhat anomalous situation with regard to the penalty provisions of §21a-277(a) and §21a-278(b) concerning second offenders, although this is not directly relevant here since defendant in this case was not charged with being a second offender. See Practice Book §36-14 (providing procedures for charging accused as second offender in part B of information). (Incidentally, it should be recalled that the history of our procedures for charging a prior offense in a part B information date back to State v. Ferrone, 96 Conn. 160, 171- 175 (1921), which was long before the federal jury trial right was expanded to reach the states in the 1960s and so is based on either on the state constitution or state common law, not the federal constitution.) The anomaly is: for a second offense §21a-278(b) increases the sentencing range to "not less than ten years nor more than twenty-five years" while §21a-277(a) increases the sentence range from still no mandatory minimum "to not more than thirty years". Although the mandatory minimum of 10 years for a second violation of §21a-278(b) is certainly a harsher sentence, the maximum of 25 years is less than the 30 years maximum for a second violation of §21-277(a). Since the legislature clearly believes that the selling of narcotics by a non-drug- dependent person is the more aggravated crime, it simply does not make sense to provide for a maximum sentence for the second violation of the more aggravated crime which is less than the maximum sentence for the second violation of the less aggravated crime. This

Thus, "[o]ur laws increase the punishment for the sale of narcotics by a person who is not drug-dependent because the legislature has chosen to punish those who sell drugs for profit more [severely] than those who sell to sustain their own habits..." Jenkins, 41 Conn. App. at 612 & n.2 (citing legislative history). In enacting §21a-278(b), therefore, "[o]ur legislature has defined a different more heinous type of narcotic sale" and it has done this "by providing that §21a-278(b) applies exclusively to persons who are not drug-dependent." (emp. added.) Jenkins, 41 Conn. App. at 618; see State v. Marrero, 66 Conn. App. at 714-715 (by its terms §21a-278(b) "appl[ies] exclusively to one who is not 'at the time of such action [i.e., sale] a drug-dependent person'").

c) 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).[12] 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

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would appear to be the type of legislature error that was found in State v. Jenkins, 198 Conn. 671, 673-677 (1986) (where legislature mistakenly imposed one year mandatory minimum on more aggravated crime of kidnapping with a firearm, where regular kidnapping had a ten year mandatory minimum; one year minimum held to apply to all kidnapping until legislature could fix error).

[12] 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[.]

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. 167, 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).
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> Ray, 290 Conn. at 614.

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 decided 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 (or admitted, elicited or found during a plea. 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 proof of non-drug dependency was not obtained through admission, elicitation, or finding during his plea. 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 penalty specified in C.G.S. §21a-278(b), i.e., mandatory minimum is illegal if it is not imposed with a finding or admission of non-drug dependency. 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 admitted to by the defendant or found by the jury. See Addington v. Texas, 441 U.S. 418, 427 (1979) ("The individual should not be asked to share equally with society the risk of error when the possible injury to the individual [from an erroneous decision] is significantly greater than any possible harm to the state").

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 five years, followed by five years of special parole. That sentence is illegal because no admission or finding of non-drug dependency was made.

Apprendi and its progeny require any fact that increases punishment — here, the both the maximum available sentence and minimum available sentence— to be found by the jury, or admitted. 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, or admitted by the defendant.

Here the prosecution presented no evidence that the defendant was not drug-dependent. Rather the prosecution noted that crack cocaine was the defendant's, "drug of choice," indicating that the defendant was a user of that drug. Sentencing Transcript, p. 9. The defendant did not admit that he was not drug dependent. Absent an admission or a finding 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 proof of the non-drug dependence element. Those elements exposed him only to the range of sentences specified in §21a-277. Because there was no admission or finding of non-drug dependence, the imposition of the mandatory minimum sentence set forth in C.G.S. §21a-278(b) was impermissible. The higher maximum sentence of twenty years is also impermissible. The defendant's sentence totaled five years of imprisonment and 5 years of special parole. Here the Court failed to seek an admission by the defendant regarding non-drug dependence and did not make any such finding, and imposed a sentence under a statute section that has a mandatory minimum. Although the judge said nothing about a mandatory minimum, and the mittimus does not note a mandatory minimum, the defendant is serving a mandatory minimum because the mittimus does not denote that the sentence is "non-mandatory". Therefore the defendant was sentenced to a mandatory minimum. Due Process requires a re-sentencing.

The court 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) without disturbing the statute section of C.G.S. §21a-278(b)[13] and marking the mittimus "non-mandatory". "[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 a[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. In correcting the sentence the Court will be able to impose a sentence that is not a mandatory minimum sentence as a mandatory minimum sentence is not a lawful sentence, and that the defendant's maximum sentence as a first offender is a total of seven years.

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[14]

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

[13] Under C.G.S. §21a-283a, a court may impose a non-mandatory sentence under C.G.S. Section 21a-278.

[14] 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[.]"

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

i. 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) 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[15] 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.[16]

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 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

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[15] "[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).

[16] 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.

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.[17] There is no compelling state interest in punishing the same behavior, based on 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

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[17] 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 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." Dutkiewicz, 289 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 . . . ." Caldor's, Inc. v. Bedding Barn, Inc., 177 Conn. 304, 315 (1979).

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. 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).[18] 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

[18] 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.[16] However, the Court's decisions concerning article first, section 9 have largely accomplished the Geisler analysis. E.g., Rizzo, 303 Conn. at 212-220.

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 557, 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. Cinque 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.[19] In Rizzo, 303 Conn. at 137, the Court held "the phrase 'clearly warranted by law' 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 but 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

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

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 which 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 imposing a lawful sentence based on the penalty range for C.G.S. §21a-277 (a). In other words, the court should make the defendant's conviction under §21a-278(b) a non-mandatory sentence and mark a revised mittimus "non-mandatory".

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. 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, 279 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; McNellis, 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.

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.

Under these circumstances the fundamentals of due process required that the defendant make an admission during the plea canvas that he was not drug dependent. That did not occur. 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 finding or admission that the defendant was not drug dependent the mandatory minimum sentence was imposed in an illegal manner. The defendant's sentence must be corrected.

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

b. 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, 127-129 (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. There was no proof that the defendant was not drug dependent. No admission was made by the defendant that he was not drug dependent. No attempt was made by the court to elicit that information during the canvas. No statements were made by the prosecutor that he believed the petitioner was not drug

dependent. In fact, the prosecutor's comment about crack cocaine being the defendant's "drug of choice" indicates that the petitioner was drug dependent. See Sentencing Transcript Nov. 16, 2011 at 9. In State v. Hart, 221 Conn. 595 (1992), our Supreme Court made clear that the accused charged with violating §21a-278(b) has presented sufficient evidence to raise the issue of drug-dependence when "'there is any foundation in the evidence, no matter how weak or incredible'" that the accused was drug-dependent at the time of the sale. 221 Conn. at 613, quoting, State v. Fuller, 199 Conn. 273, 278 (1986). In making such a determination, the evidence is to be viewed in the light most favorable to the defense. 199 Conn. at 279. See also State v. McNeil, 21 Conn. App. 519, 522, cert. denied, 216 Conn. 807 (1990) (accused meets initial burden of production with evidence which, if credited, would raise a reasonable doubt about his non-drug-dependence). 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 "confounds reason and a just result." Huey, 199 Conn. at 128.

Here the court imposed a mandatory minimum sentenced 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. 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, or an admission by the defendant that he was not drug-dependent. That failure of proof limits the range of legal sentences the court could impose. As set forth above, a corrected sentence 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. 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, which it did. 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 no mandatory minimum. The Court should correct the sentence imposed in an illegal manner by correcting the mittimus and imposing a new sentence knowing it has that option.

d. The Defendant's Sentence was Imposed in an Illegal Manner Because he Received a Sentence Exceeding the Maximum Available Sentence.

In this case the sentence exceeded the maximum sentence allowed under C.G.S. Section 21a-277. The conviction in docket number CR11-0049062 was the defendant's first conviction for a drug offense. His total sentence of 5 years to serve followed by 5 years of special parole is illegal. Apprendi and Alleyne provide that the only legal sentence is the base sentence of C.G.S. Section 21a-277, unless non-drug dependence is proven or admitted. The maximum sentence for a first offender under the base offense of 21a-277 is seven (7) years. See A 22. The enhanced sentence (which is the only differentiation between two statutes with same elements) can only be imposed after proof of the non-drug

dependent element. That element was neither proven nor admitted by the defendant. It will be recalled that for purposes of applying the Apprendi rule, it does not matter what label the State may attach to a fact which increases the range of punishment to which the accused is exposed, the Apprendi rule states that such a fact is an element of the offense for Sixth Amendment purposes and both must be proven to a jury (or the court as ultimate fact finder where the jury is waived) and must be proven by the State beyond a reasonable doubt. Saffarzahn, 537 U.S. at 111. Therefore the defendant cannot receive the enhanced maximum penalty of C.G.S. Section 21a-278(b). The sentencing judge knew that this was the defendant's first offense because she applied the sentencing range for a first offender under C.G.S. Section 21a-278(b). However, the only constitutional sentence for a first offender where non-drug dependence has not been proven or admitted is that provided in C.G.S. Section 21a-277, seven (7) years.

Connecticut General Statutes Section 54-125e provides that the combined period of incarceration plus the period of special parole cannot exceed the maximum allowable sentence. The constitutionally permissible statutory maximum total sentence is that found in C.G.S. Section 21a-277 which, for a first offense, shall not exceed seven (7) years. The defendant's total sentence exceeds that amount by three (3) years. The court should correct the sentence by modifying it to conform to the maximum constitutionally permissible sentence for a first offense when there is no proof or admission of non-drug dependence, which per C.G.S. Section 21a-277, is a total of seven years between both the time to serve and the special parole. The corrected sentence with a maximum of seven years cannot increase the incarceration period due to the plea agreement. The court, however, could correct the sentence to make is constitutional in at least two ways. For example, five years to serve plus two years of special parole, or four years to serve plus three years of special parole.

Conclusion and Relief Requested

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 by: 1. leaving the statute under which he pled undisturbed, 2. imposing a non-mandatory sentence that does not exceed a total of seven years combined incarceration plus special parole, and 3. Revising the mittimus to state "non-mandatory", or by such other remedy as the court may find appropriate.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that the on November 4, 2015, foregoing was sent via first class mail as well as sent via facsimile to all counsel of record:

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