No. _____

IN THE

Supreme Court of the United States

Alfredo Gonzalez,

Petitioner,

v.

Commissioner of Correction

Respondent

On Petition for a Writ of Certiorari to the
Appellate Court
of the State of Connecticut

PETITION FOR WRIT OF CERTIORARI

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JANUARY 24, 2022

QUESTION PRESENTED

Does Connecticut's statutory scheme of accessory to manslaughter in the first degree with a firearm violate Due Process, in that it allows for an increase of both the minimum and maximum punishment for manslaughter if a firearm is used, without requiring the State to prove to a jury beyond a reasonable doubt the very fact that increases the punishment—the accessory's intent that the principal use a firearm?

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceedings.

RELATED PROCEEDINGS

State v. Gonzalez, CR06-0350635, Judicial District of Waterbury. Judgment entered Aug. 1, 2008.

State v. Gonzalez, SC 18687, Supreme Court of Connecticut. Judgment entered April 5, 2011.

Alfredo Gonzalez v. Commissioner, et al., Case No. 3:11-cv-1012(VLB), United States District Court, District of Connecticut. Judgment entered July 20, 2012

Alfredo Gonzalez v. Warden, TSR-CV11-4004210-S, Judicial District of Tolland at Geographical Area #19. Judgment entered Nov. 6, 2013.

Alfredo Gonzalez v. Commissioner of Correction, AC 36370, Appellate Court of Connecticut. Judgment entered Oct. 13, 2015.

Alfredo Gonzalez v. Warden, TSR-CV15-4007014-S, Judicial District of Tolland at Geographical Area #19. Judgment entered Nov. 22, 2019.

Gonzalez v. Comm'r of Corr., AC 43815, Connecticut Appellate Court. Judgment entered June 29, 2021, certification denied, Oct. 26, 2021.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Commentaries

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a judgment of the Connecticut Appellate Court's decision in *Gonzalez v. Comm'r of Corr.*, 205 Conn. App. 511, 258 A.3d 97 (2021), appeal denied by *Gonzalez v. Comm'r of Corr.*, 339 Conn. 909, 261 A.3d 745 (2021).

OPINIONS BELOW

The Connecticut Supreme Court's denial of certification is reported at *Gonzalez v. Comm'r of Corr.*, 339 Conn. 909, 261 A.3d 745 (2021), Appendix A. The Connecticut Appellate Court's decision is available at in *Gonzalez v. Comm'r of Corr.*, 205 Conn. App. 511, 258 A.3d 97 (2021), Appendix B. The state habeas court's denial of the petition is reported at *Gonzalez v. Warden, State Prison*, No. CV154007014S, 2019 Conn. Super. LEXIS 3137 (Super. Ct. Nov. 22, 2019), Appendix C. The District Court's denial of the federal habeas petition is reported at *Gonzalez v. Commissioner*, No. 3:11cv1012 (VLB), 2012 U.S. Dist. LEXIS 101924 (D. Conn. July 20, 2012), Appendix D. The Connecticut Supreme Court's denial of Petitioner's direct appeal is available at *State v. Gonzalez*, 300 Conn. 490, 15 A.3d 1049 (2011), Appendix E.

JURISDICTION

The Connecticut Appellate Court issued its decision on June 29, 2021. The Connecticut Supreme Court denied Petitioner's Petition for Certification on October 26, 2021. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The 14th Amendment to the United States Constitution provides in relevant part: "no State shall....deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Procedural Background

On May 15, 2008, Alfredo Gonzalez was convicted by a jury of accessory to intentional manslaughter in the first degree with a firearm, in violation of Connecticut General Statutes §§ 53a-8 and 53a-55a; conspiracy to commit assault in the first degree in violation of §§ 53a-48 and 53a-59(a)(5); hindering prosecution in the second degree in violation of § 53a-166; and criminal possession of a firearm in violation of § 53a-217(a)(1).

On August 1, 2008, Alfredo Gonzalez was sentenced to a total effective sentence of thirty-eight years in prison, followed by ten years of special parole, broken down as follows: thirty-five years in prison for manslaughter in the first degree with a firearm; ten years in prison, concurrent, for hindering prosecution; five years in prison, concurrent, for criminal possession of a firearm; and three years in prison, consecutive, followed by ten years of special parole, for conspiracy to commit assault in the first degree.

On direct appeal, Petitioner "claim[ed] that the trial court's jury instructions improperly omitted an essential element of the offense of manslaughter in the first degree with a firearm as an accessory, namely, the defendant's intention that the principal would use, carry or threaten the use of a firearm during the commission of the offense." *State v. Gonzalez*, 300 Conn. 490, 492, 15 A.3d 1049 (2011). Thus, the issue was not constitutional, but rather instructional. Petitioner's conviction was affirmed.

Mr. Gonzalez then filed state and federal habeas petitions. In the state petition, *Gonzalez v. Warden*, TSR-CV-11-4004210-S, Mr. Gonzalez only raised effectiveness of counsel. He claimed trial counsel was ineffective for failing to conform his strategy to the jury instructions. This was denied on its merits and affirmed on appeal. *Gonzalez v. Commissioner of Correction*, 160 Conn. App. 902, 125 A.3d 296 (2015).

In the federal habeas petition, *Alfredo Gonzalez v. Commissioner, et al.*, Case No. 3:11-cv-1012(VLB), he raised the exact issue he raised in the operative state habeas petition below. That is: Connecticut General Statutes §§ 53a-8 and 53a-55a—accessory to commit manslaughter in the first degree with a firearm—combine in a way that violates the Due Process Clause of the 5th and 14th Amend. to the U.S. as well as Article First, § Eight of the Connecticut Constitution in that they do not require the state to prove an essential element of the substantial crime charged: the intent to use a firearm.

The District Court found that the petitioner failed to raise this constitutional issue in state court, and dismissed the petition without prejudice to exhausting state remedies on it, thus precipitating the state habeas upon which this petition is built.

Mr. Gonzalez filed the new and operative state habeas petition below. It was denied on its merits by the habeas court, affirmed on appeal to the Connecticut Appellate Court, and the Connecticut Supreme Court denied certification.

B. Factual Background

The facts as described by the Connecticut Appellate court are:

> The defendant had engaged in an ongoing feud with the victim, Samuel Tirado. On the evening of May 5, 2006, the defendant and three friends, Anthony Furs, Christian Rodriguez and Melvin Laguna, went out for the evening in Rodriguez' red GMC Yukon. They stopped briefly at one bar, and then decided to go to a bar named Bobby Allen's in Waterbury because they knew that the victim went there frequently, and they wanted to start a fight with him. En route to Bobby Allen's, the defendant observed

that there were two guns in the Yukon, in addition to a razor blade that he intended to use in that fight, and remarked that, if he had the money, he would give it to Furs to "clap," or shoot, the victim. Rodriguez, who also disliked the victim, then offered to pay Furs $1000 to shoot the victim, which Furs accepted.

When they arrived at Bobby Allen's, the defendant left the group briefly to urinate behind a nearby funeral home. When he rejoined the group, Furs gave the defendant the keys to the Yukon and told him to go get the truck because the victim was nearby speaking with Rodriguez. The defendant and Furs then drove a short distance toward Bobby Allen's in the Yukon, and Furs, upon spotting the victim and Rodriguez outside the bar, jumped out of the Yukon and shot the victim in the chest with a black handgun, mortally wounding him. Rodriguez and Laguna then fled the scene on foot, while Furs and the defendant drove off in the Yukon to a friend's nearby apartment on South Main Street. Thereafter, with the assistance of friends, Furs and the defendant fled separately from the apartment, and the defendant subsequently disposed of the gun, first by hiding it in a woodpile at his mother's home, and later by throwing it into Pritchard's Pond (pond) in Waterbury.

Thereafter, Waterbury police officers investigating the shooting questioned the defendant after arresting him on an outstanding motor vehicle warrant on May 6, 2006. The defendant initially gave a statement denying any involvement in the incident. Subsequently, on May 15, 2006, the Waterbury police reinterviewed the defendant, at which time he admitted disposing of the gun by throwing it into the pond. The defendant then accompanied the officers to the pond and showed them where he had thrown the gun, which enabled a dive team to recover it several days later. After they returned to the police station, the defendant gave the police a second statement admitting that he had lied in his initial statement and explaining his role in the events leading to and following the shooting.

State v. Gonzalez, 300 Conn. 490, 492-94 (2011).

ARGUMENT

Summary of Argument

This case exposes a fault line in the case law that this Court can repair in a way that enhances constitutional liberty.

In Connecticut, manslaughter in the first degree is punishable by one to twenty years of imprisonment. Manslaughter in the first degree *with a firearm*, however, is

punishable by five to forty years of imprisonment. This is a penalty enhancement based on a particular fact—the use of a firearm.

But in Connecticut, the law does not require proof that an accessory to the manslaughter actually intended the use of a firearm. Connecticut only requires the prosecution to prove three elements: The defendant (1) intended to cause serious physical injury; (2) solicited, requested or intentionally aided the principal, who killed the victim; and (3) the principal used a firearm. See *Gonzalez v. Comm'r of Corr.*, 205 Conn. App. 511, 516, n. 7, 258 A.3d 97 (2021).

In other words, if the principal uses a firearm without the accessory's intent or even knowledge, the accessory is nonetheless exposed to dramatic penalty enhancements.

That is a violation of *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975), *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), and *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151 (2013), which collectively stand for the proposition that any fact that increases a defendant's sentencing exposure is an element of the offense that must be proved by the prosecutor, to a jury, beyond a reasonable doubt.

But *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319 (1977) occludes an otherwise straightforward analysis. Patterson holds that a legislature may pass a law that permits the prosecutor in a homicide case to prove only three elements— (1) the defendant intended to kill, (2) the victim died, and (3) the defendant caused the victim's death—and that requires the defendant affirmatively to prove extreme emotional distress in mitigation of the homicide.

Mullaney, by contrast, *disallowed* a legislature to pass a law that presumes a homicide is a murder, and requires the defendant to prove it was a manslaughter.

Patterson and *Mullaney* cannot exist in the same place at the same time. Their holdings are unworkably opposite.

Of the two, *Mullaney* is more consistent with this Court's jurisprudence. *Patterson* and its state progeny should be overruled. Petitioner's conviction should be vacated. His case should be remanded to the Connecticut trial court with the instruction that the prosecution bears the burden to prove, to a jury, beyond a reasonable doubt, that Petitioner intended the principal to use a firearm.

Argument

The dual constitutional requirement that every element of a crime must be proved beyond a reasonable doubt, and every fact that raises the mandatory minimum or statutory maximum is an element of a crime, is well established.

"Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970).

Following *Winship,* in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348 (2000), this Court held that any fact which increases a statutory maximum sentence is an essential element that must be proved beyond a reasonable doubt to a jury. "A 'crime' includes every fact that is by law a basis for imposing or increasing punishment." *Id.* at 501, 120 S. Ct. 2348 (Thomas, J., concurring).

In *Alleyne*, 570 U.S. 99, 133 S. Ct. 2151, this Court held that any fact which increases the mandatory minimum of a sentence is an essential element that must

be proved beyond a reasonable doubt to a jury. “lf a fact [is] by law essential to the penalty, it [is] an element of the offense." *Id.* at 109, 133 S. Ct. 2151.

The question remains, to what degree may a legislature apportion the burden to prove these facts? This Court has taken two drastically different approaches to this question, resulting in quite incompatible answers; Petitioner asks this Court to approve one and discard the other.

The first (and preferred) approach provides that a legislature cannot allow the prosecution, in a homicide prosecution, to presume that a homicide is a murder, and foist upon the defendant the burden to prove the less culpable mental state of manslaughter. *Mullaney*, 421 U.S. 684, 95 S. Ct. 1881. "Shifting the burden of persuasion to the defendant obviously places an even greater strain upon him since he no longer need only present some evidence with respect to the fact at issue; he must affirmatively establish that fact. Accordingly, the Due Process Clause demands more exacting standards before the State may require a defendant to bear this ultimate burden of persuasion." *Id* at 702, n. 31.

The second (and disfavored) approach provides that a state legislature *can* allow the state in a homicide prosecution to prove solely intent to kill, death and causation, and separately require the defendant to prove extreme emotional disturbance. *Patterson*, 432 U.S. 197, 97 S. Ct. 2319. “The New York law on extreme emotional disturbance ... permit[s] the defendant to show that his actions were caused by a mental infirmity not arising to the level of insanity, and that he is less culpable for having committed them ... [This] does not serve to negative any facts of the crime which the State is required to prove in order to convict of murder. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion." *Id* at 206-07.

These cases are irreconcilable. The dissent in *Patterson* says as much. Justice Powell noted that Maine's manslaughter requirement, heat of passion, refers to the same mental state as New York's extreme emotional disturbance requirement, just with language from different eras. *Id* at 220 (Powell dissenting). He then observed:

> *Mullaney* held invalid Maine's requirement that the defendant prove heat of passion. The court today, without disavowing the unanimous holding of *Mullaney,* approves New York's requirement that the defendant prove extreme emotional disturbance. The Court manages to run a constitutional boundary line through the barely visible space that separates Maine's law from New York's. It does so on the basis of distinctions in language that are formalistic rather than substantive.

ld. at 221.

Indeed, *Mullaney* endorsed of the concept that "the fact at issue here - the presence or absence of the heat of passion on sudden provocation – has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide." *Mullaney*, 421 U.S. at 696, 95 S. Ct. 1881.

By contrast, *Patterson* endorses the concept that the state legislature was "perhaps fearing that proof would be too difficult and that too many persons deserving treatment as murderers would escape that punishment if the evidence need merely raise a reasonable doubt about the defendant's emotional state." *Patterson,* 432 U.S. at 207, 97 S. Ct. 2319.

Petitioner proposes that this court should hold that *Mullaney* and *Patterson,* and their attendant principles of expansive and restrictive proceduralism, are incompatible, and that the *Mullaney* doctrine should prevail as the proper approach under federal constitutional law in Connecticut. The reasons for this are myriad.

First, it is the most obviously protective of liberty. *Patterson* cites fears of wrongful acquittals, but our Anglo-American legal heritage—Blackstone's ratio[1] puts it best—accepts the risk of wrongful acquittals over the tyranny of wrongful convictions.

Second, this Court's precedent in other areas favors the *Mullaney* doctrine. *Apprendi* is a prime example. Dissenting from *Apprendi,* Justice O'Connor observed, "it is difficult to understand why the rule adopted by the Court in today's case ... would not require the overruling of *Patterson." Apprendi,* 530 U.S. at 531, 120 S. Ct. 2348 (O'Connor, J., dissenting).

Leading up to this observation, Justice O'Connor explained:

> The Court then cites our decision in *Mullaney* v. *Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975), to demonstrate the "lesson" that due process and jury protections extend beyond those factual determinations that affect a defendant's guilt or innocence ... The Court explains *Mullaney* as having held that the due process proof-beyond-a-reasonable-doubt requirement applies to those factual determinations that, under a State's criminal law, make a difference in the degree of punishment the defendant receives ... The Court chooses to ignore, however, the decision we issued two years later, *Patterson* v. *New York*, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977), which clearly rejected the Court's broad reading of *Mullaney*.
>
> In *Patterson*, the jury found the defendant guilty of second-degree murder. Under New York law, the fact that a person intentionally killed another while under the influence of extreme emotional disturbance distinguished the reduced offense of first-degree manslaughter from the more serious offense of second-degree murder. Thus, the presence or absence of this one fact was the defining factor separating a greater from a lesser punishment. Under New York law, however, the State did not need to prove the absence of extreme emotional disturbance beyond a reasonable doubt. Rather, state law imposed the burden of proving the presence of extreme emotional disturbance on the defendant, and required that the fact be proved by a preponderance of the evidence. 432 U.S. at 198-200. We rejected Patterson's due process challenge to his conviction: "We thus decline to adopt as a constitutional imperative, operative

[1] "It is better that ten guilty persons escape than that one innocent suffer." Sir William Blackstone, *Commentaries on the Laws of England in Four Books*, Vol. 2, Chapter 27 at *19 (1753).

> countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch." 432 U.S. at 210.

Apprendi, 530 U.S. at 529-30, 120 S. Ct. at 2383-84 (O'Connor, J., dissenting)

Thus, Powell dissenting in *Patterson* and O'Connor dissenting in *Apprendi* both make the same common sense observation (albeit from different perspectives) that the tension between *Mullaney* and *Patterson* is unworkable.

Nonetheless, as of the *Apprendi* opinion, *McMillan v. Pennsylvania,* 477 U.S. 79, 106 S. Ct. 2411 (1986) was still good law. *McMillan* held that Due Process is not violated by a state statute that provides that conviction of certain felonies subjects the defendant to a mandatory minimum sentence of five years' imprisonment if the sentencing judge finds, by a preponderance of the evidence, that he visibly possessed a firearm during the offense.

> We do not overrule *McMillan*. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict - a limitation identified in the *McMillan* opinion itself. Conscious of the likelihood that legislative decisions may have been made in reliance on *McMillan,* we reserve for another day the question whether *stare decisis* considerations preclude reconsideration of its narrower holding.

Apprendi, 530 U.S. at 487, n. 13.

If this Court's inclination was unclear then, *Alleyne* provided clarity. In *Alleyne,* the Supreme Court rejected restrictive proceduralism in favor of expansive proceduralism. A*lleyne* explicitly overruled *Harris v. United States,* 536 U.S. 545, 122 S. Ct. 2406 (2002). *Harris* had held that judicial factfinding that increases the mandatory

minimum sentence for a crime is constitutionally permissible. The *Alleyne* Court explained:

> The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an "element" or "ingredient" of the charged offense ... In *Apprendi,* we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. While *Harris* declined to extend this principle to facts increasing mandatory minimum sentences, *Apprendi's* definition of "elements" necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. .. Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.
>
> *Alleyne,* 570 U.S. at 107-08, 133 S. Ct. at 2158.

Significantly, the majority opinion in *Harris* had relied on *Patterson* and *McMillan. "McMillan* rested on the premise 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. 1 477 U.S. at 85 (quoting *Patterson),"* *Harris,* 536 U.S. at 580, 122 S. Ct. 2406 (Thomas, J., dissenting).

Thus, to the extent that *Patterson* supported cases that have been overruled on grounds relevant to the present issue, *Patterson's* precedential value is so seriously impaired that it should now be explicitly overruled.

Overruling *Patterson* would cause the abrogation of its progeny. The most direct example in Connecticut is *State v. Miller*, 95 Conn. App. 362, 896 A.2d 844 (2006).

Miller held that when charged with a violation of manslaughter in the first degree with a firearm under Conn. Gen. Stat. § 53a-55a(a) as an accessory under Conn. Gen. Stat. § 53a-8, the state need not prove that the defendant intended the use of a firearm. *Id*, 95 Conn. App. At 372. This holding violates Due Process. Here is why: The

Connecticut Supreme court reasoned that “the present case involves a criminal statute in which the aggravating circumstance, the use of a weapon, does not require proof of any particular mental state." *Miller,* 95 Conn. App. At 375. This lack of a requirement to prove a defendant’s mental state is exactly the problem.

Especially since *Alleyne,* but even before *Alleyne,* this Court clearly has committed itself to the higher standard of due process, and Connecticut is not unfamiliar with it. In a 1983 concurrence in *State v. McCalpine,* 190 Conn. 822, 463 A.2d 545 (1983), Judge Shea had cited to LaFave & Scott, Criminal Law § 64, p. 506 for the authority that "[t]he prevailing view is that the accomplice must have the mental state required for the crime of which he is to be convicted on an accomplice theory." McAlpine, 190 Conn. at 833 (Shea, J., concurring) (ellipses omitted). He continued:

> In stating that an accomplice need not endorse every act of his participant in crime or possess the intent to commit the specific degree of the robbery charged or the intent to possess a deadly weapon the majority opinion appears to water down these principles. The fact that no specific intent is made an element of the crimes for which the defendant were convicted ... does not remove the necessity for proof of a general intent to perform the acts which constitute the offense ... Unless it was the conscious objective of each defendant that he or another participant perform all of the acts necessary to constitute the particular crime, he would not be guilty of it. This requirement must extend to those acts which enhance the degree of the crime itself. Otherwise an accomplice might be convicted of an offense although he did not entertain the same mental state required by statute for conviction of the principal.
>
> *Id.* (Shea, J., concurring) (internal quotation marks omitted).

This is exactly what happened with Alfredo Gonzalez. Without any proof of his intent toward the aggravating fact, he was convicted of the aggravating crime and sentenced heavily for it. That is a constitutionally infirm quantum of proof for such a drastic taking of liberty.

People are unpredictable and difficult to control, especially in the chaotic context of a manslaughter. Accessory liability is not a distinct crime—it is an alternative means of committing the same crime—therefore, it cannot "be too cumbersome, too expensive, and too inaccurate," *Patterson*, 432 U.S. at 209, 97 S. Ct. 2319, for the United States Constitution to require prosecutors to prove that the accessory intend the alternative criminal means by which they have charged him.

CONCLUSION

The Petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

ALFREDO GONZALEZ
Petitioner

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APPENDIX

APPENDIX A

SUPREME COURT

STATE OF CONNECTICUT

PSC-210128

ALFREDO GONZALEZ

v.

COMMISSIONER OF CORRECTION

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

The petitioner Alfredo Gonzalez's petition for certification to appeal from the Appellate Court, 205 Conn. App. 511 (AC 43815), is denied.

W. Theodore Koch, III, assigned counsel, in support of the petition.
Rocco A. Chiarenza, in opposition.

Decided October 26, 2021

By the Court,

/s/
Yuri P. Min
Temporary Assistant Clerk – Appellate

Notice Sent: October 26, 2021
Petition Filed: August 9, 2021
Clerk, Superior Court, TSR-CV15-4007014-S
Hon. Tejas Bhatt
Clerk, Appellate Court
Reporter of Judicial Decisions
Staff Attorneys' Office
Counsel of Record

APPENDIX B

ALFREDO GONZALEZ *v.* COMMISSIONER OF CORRECTION
(AC 43815)

Alvord, Prescott and Suarez, Js.

Syllabus

The petitioner, who had been convicted of several crimes in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel rendered ineffective assistance for having followed a strategy that was based on an inaccurate statement of the law. The petitioner specifically asserted that his right to due process was violated because the statutory (§§ 53a-8 and 53a-55a) scheme underlying his conviction of manslaughter in the first degree with a firearm as an accessory does not require the state to prove, as an essential element of accessorial liability, that he intended the principal's use of a firearm. The habeas court concluded that the petitioner failed to show how §§ 53a-8 and 53a-55a violated due process by shifting to the defense the burden of proving an essential element of accessorial liability, and, thus, that the petitioner had failed to prove that his counsel rendered ineffective assistance. The court denied the petitioner's habeas petition, and, on the granting of certification, he appealed to this court. On appeal, the respondent Commissioner of Correction contended that the petitioner's claim was procedurally barred pursuant to *Teague* v. *Lane* (489 U.S. 288), which precludes a court on collateral review from declaring a new constitutional rule after a conviction has become final. *Held* that the habeas court properly denied the petitioner's habeas petition, as state and federal precedent at the time his conviction became final made clear that no constitutional rule existed then that required the state to prove, as an essential element of accessorial liability for manslaughter in the first degree with a firearm, that the accessory intended the principal's use of the firearm; moreover, the rule the petitioner sought to establish was not, as he claimed, an application of existing constitutional principles, as the United States Supreme Court in *Patterson* v. *New York* (432 U.S. 197) had held prior to his conviction that it was constitutionally permissible to require criminal defendants to prove affirmative defenses that relate to culpability, which the legislature has required pursuant to statute (§ 53a-16b); furthermore, the rule the petitioner sought to establish was procedural in nature pursuant to *Teague* because it focused on the manner by which an accessory can be deemed culpable for the use of a firearm by others and, thus, contrary to his assertion, did not place a category of private conduct beyond the power of the state to punish so as to satisfy that exception in *Teague* to the prohibition against establishing new constitutional rules of criminal procedure in collateral proceedings, as the rule the petitioner sought would invalidate the provisions in §§ 53a-16b and 53a-55a that make a criminal defendant's lack of knowledge of the firearm an affirmative defense, rather than an element of the offense.

Argued March 9—officially released June 29, 2021

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Bhatt*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

W. Theodore Koch III, assigned counsel, for the appellant (petitioner).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attor-

ney, and *Marc G. Ramia*, senior assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, Alfredo Gonzalez, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. The habeas court granted his petition for certification to appeal. On appeal, the petitioner claims that the habeas court improperly rejected his claim that his right to due process under the federal and state constitutions was violated because General Statutes §§ 53a-8[1] and 53a-55a[2] do not require the state to prove, as an essential element of accessorial liability for manslaughter in the first degree with a firearm, that he intended the principal's use, carrying or threatened use of a firearm. We affirm the judgment of the habeas court.

Our Supreme Court on direct appeal summarized the underlying facts as reasonably found by the jury.[3] "The [petitioner] had engaged in an ongoing feud with the victim, Samuel Tirado.[4] On the evening of May 5, 2006, the [petitioner] and three friends, Anthony Furs, Christian Rodriguez and Melvin Laguna, went out for the evening in Rodriguez' red GMC Yukon. They stopped briefly at one bar, and then decided to go to a bar named Bobby Allen's in Waterbury because they knew that the victim went there frequently, and they wanted to start a fight with him. En route to Bobby Allen's, the [petitioner] observed that there were two guns in the Yukon, in addition to a razor blade that he intended to use in that fight, and remarked that, if he had the money, he would give it to Furs to 'clap,' or shoot, the victim. Rodriguez, who also disliked the victim, then offered to pay Furs $1000 to shoot the victim, which Furs accepted.

"When they arrived at Bobby Allen's, the [petitioner] left the group briefly to urinate behind a nearby funeral home. When he rejoined the group, Furs gave the [petitioner] the keys to the Yukon and told him to go get the truck because the victim was nearby speaking with Rodriguez. The [petitioner] and Furs then drove a short distance toward Bobby Allen's in the Yukon, and Furs, upon spotting the victim and Rodriguez outside the bar, jumped out of the Yukon and shot the victim in the chest with a black handgun, mortally wounding him. Rodriguez and Laguna then fled the scene on foot, while Furs and the [petitioner] drove off in the Yukon to a friend's nearby apartment on South Main Street. Thereafter, with the assistance of friends, Furs[5] and the [petitioner] fled separately from the apartment, and the [petitioner] subsequently disposed of the gun, first by hiding it in a woodpile at his mother's home, and later by throwing it into Pritchard's Pond (pond) in Waterbury.

"Thereafter, Waterbury police officers investigating the shooting questioned the [petitioner] after arresting him on an outstanding motor vehicle warrant on May 6, 2006. The [petitioner] initially gave a statement deny-

ing any involvement in the incident. Subsequently, on May 15, 2006, the Waterbury police reinterviewed the [petitioner], at which time he admitted disposing of the gun by throwing it into the pond. The [petitioner] then accompanied the officers to the pond and showed them where he had thrown the gun, which enabled a dive team to recover it several days later.[6] After they returned to the police station, the [petitioner] gave the police a second statement admitting that he had lied in his initial statement and explaining his role in the events leading to and following the shooting.

"The state charged the [petitioner] in a six count substitute information with murder as an accessory in violation of § 53a-8 and General Statutes § 53a-54a (a), conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a, manslaughter in the first degree with a firearm as an accessory in violation of §§ 53a-8 and 53a-55a, conspiracy to commit assault in the first degree in violation of § 53a-48 and General Statutes § 53a-59 (a) (5), hindering prosecution in the second degree in violation of General Statutes § 53a-166, and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). The [petitioner] elected a jury trial. After evidence, the trial court denied the [petitioner's] motion for acquittal. The jury returned a verdict finding him not guilty of accessory to murder and conspiracy to commit murder, but guilty on all other counts. The trial court [*Miano*, *J.*] rendered a judgment of conviction in accordance with the jury's verdict and sentenced the [petitioner] to a total effective sentence of thirty-eight years imprisonment, with ten years of special parole." (Footnote in original; footnote omitted.) *State* v. *Gonzalez*, 300 Conn. 490, 492–95, 15 A.3d 1049 (2011).

The petitioner's sole claim on direct appeal to our Supreme Court was that "the trial court improperly instructed the jury regarding the elements of the offense of manslaughter in the first degree with a firearm as an accessory.[7] Specifically, the [petitioner] claim[ed] that accessorial liability under § 53a-8 encompasses both the specific intent to cause a result, in this case, to cause the victim serious physical injury, as well as the general intent to perform the physical acts that constitute the offense of manslaughter in the first degree with a firearm, including the use, carrying or threatened use of a firearm." (Footnote added; internal quotation marks omitted.) Id., 495.

Our Supreme Court rejected the petitioner's claim that the trial court improperly instructed the jury. Specifically, our Supreme Court concluded that the trial court's instruction conformed with *State* v. *Miller*, 95 Conn. App. 362, 896 A.2d 844, cert. denied, 279 Conn. 907, 901 A.2d 1228 (2006), which "properly articulated the elements of accessorial liability under § 53a-8 for manslaughter in the first degree with a firearm in viola-

tion of § 53a-55a," and declined the petitioner's "invitation to overrule that decision." *State* v. *Gonzalez*, supra, 300 Conn. 509–10. Moreover, our Supreme Court adopted the conclusion set forth in *Miller* that, "[w]hen a defendant is charged with a violation of § 53a-55a as an accessory, the state need not prove that the defendant intended the use, carrying or threatened use of the firearm."[8] Id., 510; *State* v. *Miller*, supra, 362. Accordingly, our Supreme Court affirmed the petitioner's conviction. *State* v. *Gonzalez*, supra, 510.

Thereafter, the self-represented petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Connecticut pursuant to 28 U.S.C. § 2254. In his one count habeas petition, the petitioner alleged that "Connecticut's statutory scheme of manslaughter in the [first] [d]egree with a [f]irearm violates the [d]ue [p]rocess [c]lause of the [fifth] and [fourteenth] amend[ments] [t]o [the] [United States constitution]. . . . In the facts supporting this ground, the petitioner contend[ed] that . . . § 53a-55a is violative of the United States [c]onstitution in that it does not require the state to prove an essential element of the substantial crime charged: the intent to use a firearm. . . . The respondents move[d] to dismiss the petition on the ground that the petitioner ha[d] not exhausted his state court remedies as to the sole ground in the petition. The respondents argue[d] that the petitioner did not fairly present the federal constitutional challenge raised in ground one of the . . . petition in his direct appeal to [our] Supreme Court. Thus, [the respondents argued that] the claim has not been exhausted." (Citation omitted; internal quotation marks omitted.) *Gonzalez* v. *Commissioner*, United States District Court, Docket No. 3:11cv1012 (VLB) (D. Conn. July 20, 2012). The federal District Court, Bryant, J., dismissed his petition for a writ of habeas corpus without prejudice for failure to exhaust state court remedies. Id.

The petitioner then filed a petition for a writ of habeas corpus in our Superior Court. In his amended habeas petition, the petitioner alleged that his "trial counsel was ineffective for following a strategy that was based on an inaccurate statement of the law, i.e., that the state was required to prove specific intent that a firearm be used." The habeas court, *Cobb*, *J.*, denied his amended petition for a writ of habeas corpus; *Gonzalez* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-11-4004210-S (March 17, 2014); and this court dismissed his appeal therefrom. *Gonzalez* v. *Commissioner of Correction*, 160 Conn. App. 902, 125 A.3d 296 (2015).

On February 13, 2015, the petitioner filed the present petition for a writ of habeas corpus. In his third amended habeas petition, the petitioner set forth the following four counts, in which he alleged (1) that

"§§ 53a-8 and 53a-55a—accessory to commit manslaughter in the first degree with a firearm—combine in a way that violates the due process clause of the [fifth] and [fourteenth] amend[ments] to the [United States constitution] as well as article first, § [8], of the Connecticut constitution in that they do not require the state to prove an essential element of the substantial crime charged: the intent to use a firearm" (due process claim), (2) ineffective assistance of trial counsel,[9] (3) ineffective assistance of appellate counsel,[10] and (4) ineffective assistance of prior state habeas counsel.[11] In his return, with respect to each of the substantive grounds set forth in the third amended habeas petition, the respondent, the Commissioner of Correction, left the petitioner to his proof.

Following a trial, the habeas court, *Bhatt*, *J.*, first determined that the "resolution of the petitioner's claim in count one [is] dispositive of the claims in the remaining counts . . . ." Thus, the court "focuse[d] its discussion on the question of whether there is a . . . due process violation in our statutory scheme for accessory to manslaughter in the first degree with a firearm." Ultimately, the court concluded that "the petitioner has not shown how our statutory scheme violates the due process clause by impermissibly shifting the burden of an essential element to the defense and has failed in his burden of proving ineffective assistance of counsel." Accordingly, the court rendered judgment denying his amended petition for a writ of habeas corpus. Thereafter, the petitioner filed a petition for certification to appeal from the judgment of the habeas court, which was granted. This appeal followed.[12]

On appeal, the petitioner claims that the habeas court improperly rejected his claim that his right to due process under the federal and state constitutions was violated because §§ 53a-8 and 53a-55a do not require the state to prove, as an essential element of accessorial liability for manslaughter in the first degree with a firearm, that he intended the principal's use, carrying or threatened use of a firearm. Specifically, the petitioner maintains that, "[t]o convict an individual of the offense of accessory to manslaughter in the first degree with a firearm, in violation of . . . §§ 53a-8 [and] 53a-55a, in accord with due process as guaranteed by the state and federal constitutions, the state must prove that (1) with the intent to cause serious physical injury to another person, the principal causes the death of such person, (2) in the commission of such offense, the principal uses a firearm, and (3) *the accessory intends that the principal use a firearm*." (Emphasis added.)

The respondent contends that the principles enunciated in *Teague* v. *Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), preclude this court from establishing the new constitutional rule of criminal procedure proposed by the petitioner in a collateral habeas

action. Specifically, the respondent argues that the petitioner "continues to seek . . . to have a new constitutional right declared that requires, as a matter of due process, the engrafting of a requirement that the state prove that an accessory possess the intent that a firearm be used in order to be convicted of the crime of manslaughter in the first degree with a firearm. While a court may declare new constitutional rules in a direct appeal from a criminal conviction, it lacks such authority to do so once a conviction becomes final." In reply to the respondent's contention, the petitioner maintains that "*Teague* is inapplicable" because "existing precedent dictated the result [he] seeks; therefore, it is not a new rule . . . ." Alternatively, the petitioner argues that the rule he seeks satisfies the first exception to the general prohibition against establishing new constitutional rules of criminal procedure in collateral proceedings as set forth in *Teague* v. *Lane*, supra, 311, because it "places a category of private conduct beyond the power of the state to punish." We agree with the respondent and conclude that the petitioner's due process claim is procedurally barred by *Teague*.[13]

"When considering the potential retroactive application of a new rule of constitutional criminal procedure, we apply the rule of *Teague* v. *Lane*, supra, 489 U.S. 288. . . . In *Teague*, the United States Supreme Court held that new constitutional rules of criminal procedure should not be established in or applied to collateral proceedings, including habeas corpus proceedings. [Id.], 315–16. A rule is considered to be new when it breaks new ground or imposes a new obligation on the [s]tates or the [f]ederal [g]overnment. . . . To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. . . . Id., 301. Further, a holding is not so dictated . . . unless it would have been apparent to all reasonable jurists. . . . On the other hand, *Teague* also made clear that a case does *not* announce a new rule, [when] it [is] merely an application of the principle that governed a prior decision to a different set of facts." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Dyous* v. *Commissioner of Mental Health & Addiction Services*, 324 Conn. 163, 173–74, 151 A.3d 1247 (2016).

"With two exceptions, a new rule will not apply retroactively to cases on collateral review. *Teague* v. *Lane*, supra, 489 U.S. 311–13. First, if the new rule is substantive, that is, if the rule places certain kinds of primary, private conduct beyond the power of the criminal lawmaking authority to proscribe . . . it must apply retroactively. Such rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him. . . .

"Second, if the new rule is procedural, it applies retroactively if it is a watershed [rule] of criminal procedure . . . implicit in the concept of ordered liberty . . . meaning that it implicat[es] the fundamental fairness and accuracy of [a] criminal proceeding. . . . Watershed rules of criminal procedure include those that raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." (Citations omitted; internal quotation marks omitted.) *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 62–63, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, 577 U.S. 1202, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016).

The first step in our *Teague* analysis is to determine whether the habeas court in the present case could have afforded the petitioner relief on the basis of established jurisprudence governing his claim or whether affording such relief would have required the habeas court to establish a new constitutional rule of criminal procedure. See *Dyous* v. *Commissioner of Mental Health & Addiction Services*, supra, 324 Conn. 174–75. An analysis of the precedent existing at the time the petitioner's conviction became final in 2011 makes clear that no constitutional rule existed at that time that required the state to prove, as an essential element of accessorial liability for manslaughter in the first degree with a firearm, that the accessory intended the principal's use of a firearm.

We begin with an analysis of our state precedent existing at the time the petitioner's conviction became final. In the petitioner's direct appeal, our Supreme Court adopted the conclusion initially set forth in *State* v. *Miller*, supra, 95 Conn. App. 362, that "the state need not prove that the [petitioner] intended the [principal's] use, carrying or threatened use of the firearm." (Internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 300 Conn. 510. Our Supreme Court noted the affirmative defense provided by General Statutes § 53a-16b, which provides in relevant part that, "[i]n any prosecution for an offense under § 53a-55a . . . in which the defendant was not the only participant, it shall be an affirmative defense that the defendant: (1) Was not armed with a pistol, revolver, machine gun, shotgun, rifle or other firearm, and (2) had no reasonable ground to believe that any other participant was armed with such a weapon. Section 53a-16b is consistent with other areas wherein the legislature has provided that the state must prove the essential elements of the crime, and has left it to the defendant to mitigate[14] his criminal culpability or sentencing exposure via an affirmative defense, particularly with respect to areas that uniquely are within the defendant's knowledge." Id., 508. This precedent remains binding on this court today.[15] Accordingly, our review of state precedent existing at the time the petitioner's conviction became final reveals that the consti-

tutional rule the petitioner seeks would not have been apparent to all reasonable jurists and, as such, was not dictated by established precedent. See *Dyous* v. *Commissioner of Mental Health & Addiction Services*, supra, 324 Conn. 173–74.

We next consider the landscape of federal precedent existing at the time the petitioner's conviction became final. The petitioner maintains that United States Supreme Court precedent existing at the time his conviction became final dictated the result he seeks. Specifically, he argues that his conviction became final "after *Mullaney* v. *Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, [44 L. Ed. 2d 508] (1975), and *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, [147 L. Ed. 2d 435] (2000), were well established," and that "[t]he rationale of these two cases alone implores the review that reveals the due process violation." We conclude that the petitioner's reliance on these cases is misplaced.

In *Mullaney*, the United States Supreme Court declared a Maine statutory scheme unconstitutional.[16] The Maine Supreme Judicial Court had held that, in prosecuting a charge of murder, "the prosecution could rest on a presumption of implied malice aforethought and require the defendant to prove that he had acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter." *Mullaney* v. *Wilbur*, supra, 421 U.S. 688. The issue before the court was "whether the Maine rule requiring the defendant to prove that he acted in the heat of passion on sudden provocation accords with due process." Id., 692. The United States Supreme Court held that this statutory scheme improperly shifted the burden of persuasion from the prosecutor to the defendant and was therefore a violation of the requirement of due process that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged, as stated in *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). *Mullaney* v. *Wilbur*, supra, 701.

In *Apprendi*, the United States Supreme Court declared a New Jersey statutory scheme unconstitutional.[17] The New Jersey statutory scheme "allows a jury to convict a defendant of a second-degree offense based on its finding beyond a reasonable doubt that he unlawfully possessed a prohibited weapon; after a subsequent and separate proceeding, it then allows a judge to impose punishment identical to that New Jersey provides for crimes of the first degree, N.J. Stat. Ann. § 2C:43-6 (a) (1) (West 1999), based upon the judge's finding, by a preponderance of the evidence, that the defendant's purpose for unlawfully possessing the weapon was to intimidate his victim on the basis of a particular characteristic the victim possessed." (Internal quotation marks omitted.) *Apprendi* v. *New Jersey*, supra, 530 U.S. 491. The issue before the court was "whether the [d]ue [p]rocess [c]lause of the [f]our-

teenth [a]mendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from [ten] to [twenty] years be made by a jury on the basis of proof beyond a reasonable doubt." Id., 469. The United States Supreme Court held that, in accordance with due process, "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." Id., 490. The court reasoned that the New Jersey statutory scheme was unconstitutional because it "runs directly into our warning in *Mullaney* that [*In re*] *Winship* is concerned as much with the category of substantive offense as with the degree of criminal culpability assessed." (Internal quotation marks omitted.) Id., 494–95.

The respondent cites *Patterson* v. *New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) for the proposition that "due process does not mandate that the state prove that an accessory to a crime intend that every aggravating element be committed by the principal." In *Patterson*, the United States Supreme Court declined to declare a New York statute unconstitutional.[18] The New York statute provides that a defendant charged with murder can prove as "an affirmative defense . . . that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation—which, if proved by a preponderance of the evidence, would reduce the crime to manslaughter . . . ." Id., 206. The issue before the court was "the constitutionality under the [f]ourteenth [a]mendment's [d]ue [p]rocess [c]lause of burdening the defendant in a New York [s]tate murder trial with proving the affirmative defense of extreme emotional disturbance as defined by New York law." Id., 198. The United States Supreme Court recognized that "the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant"; id., 211; and "decline[d] to adopt as a constitutional imperative, operative countrywide, that a [s]tate must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." Id., 210. The court reasoned that the New York statute was constitutional because it "does not serve to negat[e] any facts of the crime which the [s]tate is to prove in order to convict [a defendant] of murder. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion." Id., 206–207.

The court in *Patterson* distinguished its holding from *Mullaney*, stating that "[t]here is some language in *Mullaney* that has been understood as perhaps construing the [d]ue [p]rocess [c]lause to require the prosecution to prove beyond a reasonable doubt any fact affecting 'the degree of criminal culpability.' . . . It is said that such a rule would deprive legislatures of any discretion whatsoever in allocating the burden of proof . . . .

The [c]ourt did not intend *Mullaney* to have such far-reaching effect." (Citations omitted.) Id., 214–15 n.15. The court clarified that, under *Mullaney*, "a [s]tate must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. . . . Such shifting of the burden of persuasion with respect to a fact which the [s]tate deems so important that it must be either proved or presumed is impermissible under the [d]ue [p]rocess [c]lause." Id., 215.

Our review of the United States precedent existing at the time the petitioner's conviction became final reveals that the rule the petitioner seeks would not have been apparent to all reasonable jurists and, as such, was not dictated by established precedent. See *Dyous* v. *Commissioner of Mental Health & Addiction Services*, supra, 324 Conn. 173–74. First, the functioning of the statutes at issue in *Mullaney* and *Apprendi* are distinguishable from that of the statutes at issue in the present case. The statutes at issue in the present case function to omit proof of any particular mental state of the principal or accomplice with respect to the use, carrying or threatened use of a firearm. See *State* v. *Miller*, supra, 95 Conn. App. 375 (proof of use, carrying or threatened use of firearm "is not encompassed within the dual intent requirement of § 53a-8, but rather is merely an aggravating circumstance that does not require proof of any particular mental state"). Unlike the statutes at issue in *Mullaney* and *Apprendi*, the statutes at issue here do not provide that "the prosecution could rest on a presumption"; *Mullaney* v. *Wilbur*, supra, 421 U.S. 688; or that "a judge [could] impose [a heightened] punishment . . . based upon the judge's [independent factual] finding . . . ." (Citation omitted.) *Apprendi* v. *New Jersey*, supra, 530 U.S. 491. Second, at the time the petitioner's conviction became final, the United States Supreme Court in *Patterson* had avowed "the long-accepted rule . . . that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant." *Patterson* v. *New York*, supra, 432 U.S. 211. Our legislature did so in enacting § 53a-16b, which allows an accomplice to offer proof of his or her mental state as an affirmative defense with respect to the aggravating circumstance of using, carrying or threatening the use of a firearm. Given the United States Supreme Court's holding in *Patterson* that the state need not "disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused"; id., 210; and for the aforementioned reasons, we cannot conclude that the rule the petitioner seeks is merely an application of established constitutional principles.

In light of our thorough review of the relevant federal and state precedent, we conclude that, in the present case, no grounds for relief for the petitioner's due pro-

cess claim were clearly established at the time his conviction became final in 2011. See *Dyous* v. *Commissioner of Mental Health & Addiction Services*, supra, 324 Conn. 177. Accordingly, we conclude that for the habeas court to afford the petitioner relief on his due process claim, it would have had to establish a new constitutional rule that, to comport with due process, the state must prove, as an essential element of accessorial liability for manslaughter in the first degree with a firearm, that the accessory intended the principal's use of a firearm.

Having concluded that the habeas court would have had to depart from prior constitutional jurisprudence to afford relief to the petitioner, we now address his claim that the new constitutional rule he seeks falls within the first *Teague* exception.[19] The petitioner claims that "the rule places a category of private conduct beyond the power of the state to punish" and, therefore, satisfies the first *Teague* exception. We disagree.

The first *Teague* exception "permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the [s]tate to proscribe . . . or addresses a substantive categorical guarante[e] accorded by the [c]onstitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense." (Citation omitted; internal quotation marks omitted.) *Saffle* v. *Parks*, 494 U.S. 484, 494, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990); *Dyous* v. *Commissioner of Mental Health & Addiction Services*, supra, 324 Conn. 181 n.11.

In *Teague* v. *Lane*, supra, 489 U.S. 288, the United States Supreme Court determined that "[t]he first exception . . . is not relevant . . . [where the new constitutional rule] would not accord constitutional protection to any primary activity . . . ." (Citation omitted.) Id., 311. Rather, "rules that regulate only the manner of determining the defendant's culpability are procedural." (Emphasis omitted.) *Schriro* v. *Summerlin*, 542 U.S. 348, 353, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004); *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 68. "[A] rule that alters the manner of determining culpability merely raise[s] the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. . . . Applying this understanding to new rules governing sentences and punishments, a new procedural rule creates the possibility that the defendant would have received a less severe punishment but does not necessitate such a result. Accordingly, a rule is procedural when it affects how and under what framework a punishment may be imposed but leaves intact the state's fundamental legal authority to seek the imposition of the punishment on a defendant currently subject to the punishment." (Internal quotation marks omitted.)

Casiano v. *Commissioner of Correction*, supra, 68.

The new constitutional rule that the petitioner seeks in the present case would require the state, in accordance with due process, to prove as an essential element of accessorial liability for manslaughter in the first degree with a firearm that the accessory intended the principal's use of a firearm. The petitioner argues that "the proposed rule broadens protections against punishment by the state" by requiring the state to "prove to a jury that an accessory intended a principal's use of a firearm" before the accessory can "be exposed to the severely increased penalties to which [the] principal (who obviously intended the use of a firearm) is exposed." (Footnote omitted.) In effect, this rule would alter the manner of determining an accessory's culpability for manslaughter in the first degree with a firearm by invalidating the provisions set forth in §§ 53a-55a and 53a-16b, which make a defendant's lack of knowledge of the firearm an affirmative defense rather than make his knowledge of the firearm an element of the offense. Because the petitioner's proposed rule focuses on the manner by which an accessory can be deemed culpable for the use, carrying or threatened use of a firearm by others in the commission of manslaughter in the first degree, we conclude that the new constitutional rule the petitioner seeks is procedural in nature. See *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 68.

Accordingly, we conclude that the new constitutional rule of criminal procedure that the petitioner seeks does not satisfy the first *Teague* exception. Thus, we conclude that the habeas court properly denied the petitioner relief with respect to his due process claim.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] General Statutes § 53a-8 provides in relevant part: "(a) A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender. . . ."

[2] General Statutes § 53a-55a provides in relevant part: "(a) A person is guilty of manslaughter in the first degree with a firearm when he commits manslaughter in the first degree as provided in section 53a-55, and in the commission of such offense he uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a pistol, revolver, shotgun, machine gun, rifle or other firearm. No person shall be found guilty of manslaughter in the first degree and manslaughter in the first degree with a firearm upon the same transaction but such person may be charged and prosecuted for both such offenses upon the same information. . . ."

[3] The petitioner appealed from the judgment of the trial court to this court, and the appeal was transferred to our Supreme Court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. *State* v. *Gonzalez*, 300 Conn. 490, 492 n.3, 15 A.3d 1049 (2011).

[4] "The victim was the best friend of Michael Borelli, who was convicted of manslaughter charges after he fatally stabbed Jose Gonzalez, the [petitioner's] brother, during a melee at a Waterbury gas station. At one of the court hearings in that case, the victim chanted, 'free Mike Borelli, fuck Peach,' in reference to the [petitioner], whose nickname is 'Peachy.' Thereafter, the [petitioner] often stated that he blamed the victim for his brother's death

and wanted revenge. The victim further antagonized the [petitioner] one night in April, 2006, at [a bar named] Bobby Allen's [in Waterbury], when the victim snubbed the [petitioner's] offer to shake his hand. The [petitioner] then told the victim that he and his friends were 'going down.' " *State* v. *Gonzalez*, 300 Conn. 490, 492 n.4, 15 A.3d 1049 (2011).

[5] "Prior to trial in this case, Furs pleaded guilty to murder and was sentenced to forty-seven years imprisonment. See *Furs* v. *Superior Court*, 298 Conn. 404, 407, 3 A.3d 912 (2010). As is detailed in the record of the trial in the present case, as well as our [Supreme Court's] opinion in *Furs*, although the state subpoenaed Furs to testify at the [petitioner's] trial, he refused to testify on the ground that to do so would violate his privilege against self-incrimination given a pending habeas corpus proceeding in his case, notwithstanding the state's offer of use immunity. Id., 407–409. The trial court held Furs in summary criminal contempt and sentenced him to six months imprisonment consecutive to his murder sentence as a consequence of his failure to testify, concluding that the prosecutor's offer of use immunity was sufficient to protect Furs' fifth amendment rights. Id., 409–10. [Our Supreme Court] subsequently granted Furs' writ of error from that contempt finding, concluding that he was entitled to full transactional immunity under General Statutes § 54-47a. Id., 406, 411–12." *State* v. *Gonzalez*, 300 Conn. 493 n.5, 15 A.3d 1049 (2011).

[6] "Investigators subsequently determined that this gun had fired the bullet that was recovered from the victim's chest and had ejected a shell casing that was found at the scene." *State* v. *Gonzalez*, 300 Conn. 494 n.6, 15 A.3d 1049 (2011).

[7] "After explaining the principles of accessorial liability generally in the context of the murder charge, the trial court instructed the jury in relevant part that, [u]nder the accessorial theory of liability, as I've defined it, in order for the state to prove the offense of accessory to manslaughter in the first degree with a firearm, the following elements each must be proved beyond a reasonable doubt: Number one, that the [petitioner] . . . had the specific intent to cause serious physical injury to [the victim]. Two: That the [petitioner] solicits, requests or intentionally aids the principal, the shooter, who causes the death of such person, [the victim]. And three: In the commission of such offense the principal, the shooter, uses a firearm. After explaining each of the three elements individually, including that the jury had to find that the [petitioner] had the specific intent to cause serious physical injury to [the victim], and that the state must prove beyond a reasonable doubt . . . that the [petitioner] did solicit, request or intentionally aid another person, the principal, to engage in conduct which constitutes [the] crime of manslaughter in the first degree, the trial court noted that the third element is that the state must prove beyond a reasonable doubt that in the commission of this offense the principal, [Furs], uses a firearm, defined as any pistol, revolver or other weapon, whether loaded or unloaded, from which a shot may be discharged. You must find that the firearm was operable at the time of the offense.

"The [petitioner] subsequently took an exception to this portion of the charge, seeking reinstruction on this point. The trial court denied that request, rejecting the [petitioner's] argument that the accessory must have the intention that a firearm be used, not only the principal have the intent to use a firearm and use a firearm, but that the accessory must have the intention. That court agreed with the state's position that the firearm element was an aggravant and that the only mental state that the state was required to prove under §§ 53a-8 and 53a-55a was intent to cause serious physical injury." (Footnote omitted; internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 300 Conn. 496–99.

[8] Our Supreme Court concluded that, "to establish accessorial liability under § 53a-8 for manslaughter in the first degree with a firearm in violation of § 53a-55a, the state must prove that the defendant, acting with the intent to cause serious physical injury to another person, intentionally aided a principal offender in causing the death of such person or of a third person, and that the principal, in committing the act, used, carried or threatened to use a firearm." *State* v. *Gonzalez*, supra, 300 Conn. 496.

[9] Specifically, the petitioner alleged that the performance of his trial counsel, Attorney Lawrence S. Hopkins, was deficient because "he failed properly to preserve the [due process] claim . . . ."

[10] Specifically, the petitioner alleged that the performance of his appellate counsel, Attorney Raymond L. Durelli, was deficient because "he failed to raise the [due process] issue . . . ."

[11] Specifically, the petitioner alleged that the performance of his prior

state habeas counsel, Attorney Joseph A. Jaumann, was deficient because he failed to raise (1) the due process claim, (2) "the issue of ineffective assistance of trial counsel," and (3) "the issue of ineffective assistance of appellate counsel . . . ."

[12] The petitioner does not challenge on appeal the habeas court's determination with respect to his claims of ineffective assistance of trial, appellate, and habeas counsel.

[13] The petitioner argues that this court "should not undertake the [respondent's] proposed *Teague* analysis now because the [respondent] did not assert it in the habeas court, the habeas court did not employ it, and the petitioner can only respond . . . in [his] limited reply brief." We reject the petitioner's contention that we should not consider this issue because the respondent failed to raise it as a defense before the habeas court. See *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 58 n.5, 115 A.3d 1031 (2015) (exercising discretion to consider issue of retroactivity under *Teague* notwithstanding respondent's failure to raise it as defense before habeas court), cert. denied sub nom. *Semple* v. *Casiano*, 577 U.S. 1202, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016).

"[A] reviewing court has discretion to consider an unpreserved claim if exceptional circumstances exist that would justify review of such an issue if raised by a party . . . the parties are given an opportunity to be heard on the issue, and . . . there is no unfair prejudice to the party against whom the issue is to be decided." (Internal quotation marks omitted.) Id. Exceptional circumstances exist that militate in favor of reviewing unpreserved claims, even over the objection of a party, "when review of the claim would obviate the need to address a constitutional question . . . ." (Citations omitted; footnote omitted.) *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 159, 84 A.3d 840 (2014); see also *Neese* v. *Southern Railway Co.*, 350 U.S. 77, 78, 76 S. Ct. 131, 100 L. Ed. 60 (1955) ("we follow the traditional practice of this [c]ourt of refusing to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised . . . by the parties"). We are also mindful that "[t]his court has a basic judicial duty to avoid deciding a constitutional issue if a nonconstitutional ground exists that will dispose of the case." (Internal quotation marks omitted.) *State* v. *Washington*, 39 Conn. App. 175, 176–77 n.3, 664 A.2d 1153 (1995). Furthermore, the petitioner had the opportunity to address the issue of retroactivity under *Teague* in his reply brief and at oral argument before this court, and did so. See *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 58 n.5.

[14] We note that, in the petitioner's case, in which the state charged him with manslaughter in the first degree with a firearm as an accessory in violation of §§ 53a-8 and 53a-55a but not with the lesser included offense of manslaughter in the first degree as an accessory in violation of General Statutes §§ 53a-8 and 53a-55 (a) (1), his proof of the affirmative defense set forth in § 53a-16b would serve to relieve him of any criminal culpability associated with the charge of manslaughter in the first degree with a firearm as an accessory.

[15] In his principal appellate brief, the petitioner acknowledges *State* v. *Miller*, supra, 95 Conn. App. 362, as binding precedent and argues that *Miller* "should be overruled."

[16] "The Maine murder statute, Me. Rev. Stat. Ann., [t]it. 17, § 2651 (1964), provides: 'Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life.'

"The manslaughter statute, Me. Rev. Stat. Ann., [t]it. 17, § 2551 (1964), in relevant part provides: 'Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years . . . .' " *Mullaney* v. *Wilbur*, supra, 421 U.S. 686 n.3.

[17] The United States Supreme Court articulated the New Jersey statutory scheme as follows: "A New Jersey statute classifies the possession of a firearm for an unlawful purpose as a 'second-degree' offense. N.J. Stat. Ann. § 2C:39-4 (a) (West 1995). Such an offense is punishable by imprisonment for 'between five years and 10 years.' § 2C:43-6 (a) (2). A separate statute, described by [New Jersey's] Supreme Court as a 'hate crime' law, provides for an 'extended term' of imprisonment if the trial judge finds, by a preponderance of the evidence, that '[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'

N.J. Stat. Ann. § 2C:44-3 (e) (West Supp. 1999–2000). The extended term authorized by the hate crime law for second-degree offenses is imprisonment for 'between 10 and 20 years.' § 2C:43-7 (a) (3)." *Apprendi* v. *New Jersey*, supra, 530 U.S. 468–69.

[18] Section 125.25 of New York's Penal Law (McKinney 1975) provides in relevant part: "A person is guilty of murder in the second degree when:

"1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

"(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime." *Patterson* v. *New York*, supra, 432 U.S. 198–99 n.2.

[19] The petitioner does not claim that this rule would fall within the second exception in *Teague*, which is for watershed constitutional rules of criminal procedure. See *Dyous* v. *Commissioner of Mental Health & Addiction Services*, supra, 324 Conn. 181. As such, our analysis is limited to the first *Teague* exception.

APPENDIX C

DOCKET NO. CV15-4007014-S	:	SUPERIOR COURT
ALFREDO GONZALEZ	:	
	:	JUDICIAL DISTRICT
	:	OF TOLLAND
V.	:	
WARDEN, STATE PRISON	:	NOVEMBER 22, 2019

MEMORANDUM OF DECISION

It is axiomatic that a valid criminal conviction requires proof beyond a reasonable doubt. The troublesome question, however, is proof of what? Which facts must be proven by the state beyond a reasonable doubt in order to secure a conviction? Which facts may be delegated to the defense to prove or disprove? What limits does the due process clause place on assigning a fact as an element, for which the burdens of production and persuasion rest with the prosecution, and assigning a fact as a defense, for which the burden of production and/or persuasion rests with the defendant? That is the central question in this case. The petitioner contends that our statutory scheme for manslaughter in the first degree with a firearm violates the due process clause because a defendant in a crime that constitutes manslaughter in the first degree with a firearm who maintains that he did not know or intend that his coparticipant use a firearm to commit the crime, must raise this lack of knowledge as an affirmative defense pursuant to General Statutes § 53a–16b. He argues that the due process clause instead requires that the defendant's intent that the coparticipant use a firearm be proven beyond a reasonable doubt by the prosecution, because it is actually an element of the offense.

Our Supreme Court's decision in the petitioner's direct appeal, in conjunction with our jurisprudence on this subject, compels this court to deny the petition.

I. FACTUAL BACKGROUND

Alfredo Gonzalez was arrested and charged with murder as an accessory in violation of General Statutes §§ 53a–8 and 53a–54a (a), manslaughter in the first degree with a firearm as an accessory in violation of § 53a–8 and General Statutes § 53a–55a, conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a–48 and 53a–59 (a) (5), hindering prosecution in the second degree in violation of General Statutes § 53a–166, and criminal possession of a firearm in violation of General Statutes § 53a–217 (a) (1). He was acquitted of the charges of accessory to murder and conspiracy to commit murder, and convicted of the remainder. The trial court sentenced him to a total effective sentence of thirty-eight years imprisonment, with ten years of special parole. He appealed to our Appellate Court, and our Supreme Court transferred the appeal. His sole issue on appeal was that "the trial court improperly instructed the jury regarding the elements of the offense of manslaughter in the first degree with a firearm as an accessory. Specifically . . . that accessorial liability under § 53a–8 encompasses both the specific intent to cause a result, in this case, to cause the victim serious physical injury, as well as the general intent to perform the physical acts that constitute the offense of manslaughter in the first degree with a firearm, including the use, carrying or threatened use of a firearm." (Internal quotation marks omitted.) State v. Gonzalez, 300 Conn. 490, 495, 15 A.3d 1049 (2011). As discussed below in greater depth, our Supreme Court affirmed his conviction. In its decision, it summarized the salient facts underlying his convictions as follows:

> The defendant had engaged in an ongoing feud with the victim, Samuel Tirado. On the evening of May 5, 2006, the defendant and three friends, Anthony Furs, Christian Rodriguez and Melvin Laguna, went out for the evening in Rodriguez' red GMC Yukon. They stopped briefly at one bar, and then decided to go to a bar named Bobby Allen's in Waterbury because they knew that the victim went there frequently, and they wanted to start a fight with him. En route to Bobby Allen's, the defendant observed that there

were two guns in the Yukon, in addition to a razor blade that he intended to use in that fight, and remarked that, if he had the money, he would give it to Furs to "clap," or shoot, the victim. Rodriguez, who also disliked the victim, then offered to pay Furs $1000 to shoot the victim, which Furs accepted.

When they arrived at Bobby Allen's, the defendant left the group briefly to urinate behind a nearby funeral home. When he rejoined the group, Furs gave the defendant the keys to the Yukon and told him to go get the truck because the victim was nearby speaking with Rodriguez. The defendant and Furs then drove a short distance toward Bobby Allen's in the Yukon, and Furs, upon spotting the victim and Rodriguez outside the bar, jumped out of the Yukon and shot the victim in the chest with a black handgun, mortally wounding him. Rodriguez and Laguna then fled the scene on foot, while Furs and the defendant drove off in the Yukon to a friend's nearby apartment on South Main Street. Thereafter, with the assistance of friends, Furs and the defendant fled separately from the apartment, and the defendant subsequently disposed of the gun, first by hiding it in a woodpile at his mother's home, and later by throwing it into Pritchard's Pond (pond) in Waterbury.

Thereafter, Waterbury police officers investigating the shooting questioned the defendant after arresting him on an outstanding motor vehicle warrant on May 6, 2006. The defendant initially gave a statement denying any involvement in the incident. Subsequently, on May 15, 2006, the Waterbury police reinterviewed the defendant, at which time he admitted disposing of the gun by throwing it into the pond. The defendant then accompanied the officers to the pond and showed them where he had thrown the gun, which enabled a dive team to recover it several days later. After they returned to the police station, the defendant gave the police a second statement admitting that he had lied in his initial statement and explaining his role in the events leading to and following the shooting.

(Footnotes omitted.) Id., 492–94.

On appeal, the petitioner argued "that the trial court's jury instructions improperly omitted an essential element of the offense of manslaughter in the first degree with a firearm as an accessory, namely, the defendant's intention that the principal would use, carry or threaten the use of a firearm during the commission of the offense." Id., 492. Our Supreme Court disagreed with the petitioner, concluding that the jury instructions "were a proper statement of the essential elements of manslaughter in the first degree with a firearm as an accessory." Id. The petitioner then filed a petition for writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254. Gonzalez v. Commissioner, United States District Court, Docket No.

3:11cv1012 (VLB) (D. Conn. July 20, 2012). In that petition, he raised only one claim: that Connecticut's statutory scheme of manslaughter in the first degree with a firearm violates Due Process because it does not require the state to prove every element beyond a reasonable doubt. Specifically, the state is not required to prove intent to use a firearm in the commission of the offense. The state countered that this claim was not properly raised in state court and thus, the federal district court did not have jurisdiction because the petitioner had not exhausted his state court remedies. Judge Bryant agreed and dismissed the petition without prejudice.

The petitioner then filed a petition for writ of habeas corpus in state court, under Docket Number CV-11-4004210-S. Counsel filed an amended petition on his behalf, but the amended petition did not raise the issue identified by Judge Bryant. The sole issue in that petition was that trial counsel was ineffective for following a strategy that was based on an inaccurate statement of the law, i.e., that the state was required to prove specific intent that a firearm be used. The habeas court, *Cobb, J.*, denied the petition, *Gonzalez* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-11-4004210-S (March 17, 2014, *Cobb, J.*), and our Appellate Court, in a memorandum per curiam decision, dismissed the appeal. Gonzalez v. Commissioner of Correction, 160 Conn. App. 902, 125 A.3d 296 (2015). The instant petition followed, in which the petitioner raises four grounds of relief: the substantive due process violation and one count each alleging failure of trial, appellate and habeas counsel to raise the substantive due process violation.

II. FINDINGS OF FACT

The facts underlying the petitioner's conviction are not in dispute and need not be repeated here. At the underlying criminal trial, the petitioner was represented by Attorney

Lawrence Hopkins. On direct appeal, he was represented by Attorney Raymond Durelli. He represented himself in federal court. He was represented by Attorney Joseph Jaumann in his prior state habeas corpus petition.

Attorney Durelli believed he had raised the issue in question on direct appeal, albeit in the form of a challenge to the jury instruction. He testified that very rarely has he challenged the constitutionality of a statute. Attorney Jaumann did not raise the instant issue after the matter was returned to state court based on a finding by Judge Bryant that the issue had not been exhausted in state court. Attorney Jaumann did not believe the issue had any merit and did not find any cases supporting the position that the statute, as interpreted by our appellate courts, violated due process because it impermissibly shifted the burden of proof of an essential element to the defense.

Since resolution of the petitioner's claim in count one will be dispositive of the claims in the remaining counts, the court focuses its discussion on the question of whether there is a substantive due process violation in our statutory scheme for accessory to manslaughter in the first degree with a firearm.

III. LEGAL ANALYSIS

A. REQUIREMENTS OF THE DUE PROCESS CLAUSE

1. In re Winship

It is one of the fundamental tenets of the criminal justice system that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). See also Commonwealth v. Webster, 59 Mass. 295, 296 (1850), abrogated on other grounds by Commonwealth v. Russell, 470 Mass.

464, 23 N.E.3d 867 (2015) ("each fact, necessary to the conclusion sought to be established, must be proved by competent evidence beyond a reasonable doubt . . ."). This requirement is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." In re Winship, supra, 372 (*Harlan, J.*, concurring); State v. Lawrence, 282 Conn. 141, 193–94, 920 A.2d 236 (2007). Thus, "because in criminal cases we impose almost all of the risk of error on the state, we require the fact finder to have a very high degree of subjective certitude: no reasonable doubt about the defendant's guilt." State v. Rizzo, 266 Conn. 171, 211, 833 A.2d 363 (2003). This very high degree of subjective certitude of guilt beyond a reasonable doubt applies to each and every element of the charged offense. See State v. Smith, 194 Conn. 213, 217, 479 A.2d 814 (1984).

Of course, the power of the state to define the elements of offenses as they see fit is the subject of constant and complex litigation and is the critical issue in the instant case.

2. Mullaney, Patterson, elements and allocating the burden of persuasion

At issue in Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), was the Maine statute for murder. According to that statute, murder was defined as the unlawful killing of a human being "with malice aforethought, either express or implied." (Internal quotation marks omitted.) Id., 686 n.3. Manslaughter was a killing "in the heat of passion, on sudden provocation, without express or implied malice aforethought." (Internal quotation marks omitted.) Id. The trial court in Mullaney instructed the jury that "malice aforethought is an essential and indispensable element of the crime of murder . . . without which the homicide would be manslaughter. The jury was further instructed, however, that if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that

he acted in the heat of passion on sudden provocation." (Citation omitted; internal quotation marks omitted.) Id., 686. The Supreme Judicial Court of Maine ruled that in Maine, murder and manslaughter are not distinct crimes but, rather, different degrees of the single generic offense of felonious homicide. State v. Wilbur, 278 A.2d 139, 144 (1971). A conviction for manslaughter significantly lowered the criminal penalties to which a defendant could be subjected. Cf. Mullaney v. Wilbur, supra, 698 ("[t]he fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly"). Thus, the issue before the United States Supreme Court was "whether the Maine rule requiring the defendant to prove that he acted in the heat of passion on sudden provocation accords with due process." Id., 692. Accepting as binding the Maine Supreme Judicial Court's interpretation of the state statutes that murder and manslaughter were not different crimes, id., 690–91, the Court held that Maine's shifting of the burden to the defendant to prove that he acted in the heat of passion in order to reduce murder to manslaughter violated due process. Id., 702–04.

The Court was seemingly faced with the same issue in Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). At issue in that case was the New York statutory scheme for murder and manslaughter. See id., 202 ("whether New York's allocation to the defendant of proving the mitigating circumstances of severe emotional disturbance is consistent with due process . . ."). Under the New York statutes, murder was defined as the intentional killing of another. Id., 198. New York law made it an affirmative defense that the defendant killed another under the influence of extreme emotional disturbance. Id., 200. If the defendant proved this, then he was guilty of manslaughter. Id. This did not run afoul of Winship and Mullaney, according to a majority of the Court, because the defendant did not bear the burden of disproving any of the elements of the offense, viz., the intent to kill another. See id., 205–06,

214–15. This differed from the Maine statute in Mullaney because there, malice aforethought was presumed and had to be rebutted by the defendant. Id., 216. Since New York did not presume any element, the statute did not violate due process. Id., 205–06. The majority held that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." Id., 210. Since the definition of the offense did not include extreme emotional disturbance, requiring the defendant to prove that mitigating circumstance was not unconstitutional. Id., 206–07.

In doing so, the Court reaffirmed the principle that "preventing and dealing with crime is much more the business of the States than it is of the Federal Government . . . [and] it is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (Citation omitted; internal quotation marks omitted.) Id., 201–02. The Court was, nonetheless, mindful that "[t]his view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes." Id., 210. The Court cautioned that "there are obviously constitutional limits beyond which the States may not go in this regard." Id. For instance, "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." McFarland v. American Sugar Refining Co., 241 U.S. 79, 86, 36 S. Ct. 498, 60 L. Ed. 899 (1916). Further, legislatures "cannot validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all

the facts essential to guilt." (Internal quotation marks omitted.) Patterson v. New York, supra, 210. But, and of particular relevance to the present case, the Court in Patterson cautioned that "it would not necessarily follow that a State must prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment." Id., 207.

Justice Powell, joined by Justices Brennan and Marshall, dissented from this decision. Id., 216. According to Justice Powell, the majority decision reached its conclusion based on a "narrowly literal parsing of the holding in Winship." Id., 221. According to him, the majority's conclusion was based on the rationale that "[t]he only facts necessary to constitute a crime are said to be those that appear on the face of the statute as a part of the definition of the crime." (Internal quotation marks omitted.) Id. This test, he warned, "allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime. The sole requirement is that any references to the factor be confined to those sections that provide for an affirmative defense." Id., 223. Rejecting this "simplistic lesson in statutory draftsmanship;" id., 224; Justice Powell, instead, provided a two-part test: "[t]he Due Process Clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the factor at issue makes a substantial difference in punishment and stigma. The requirement of course applies *a fortiori* if the factor makes the difference between guilt and innocence. But a substantial difference in punishment alone is not enough. It also must be shown that in the Anglo-American legal tradition the factor in question historically has held that level of importance. If either branch of the test is not met, then the legislature retains its traditional authority over matters of proof. But to permit a shift in the burden of persuasion

when both branches of this test are satisfied would invite the undermining of the presumption of innocence . . . ." (Footnotes omitted.) Id., 226–27.[1]

"Winship spoke of the constitutional requirement to prove beyond a reasonable doubt every fact necessary to constitute the crime, but did not explain when a fact was necessary in a constitutional sense. The question more accurately stated, therefore, is . . . what facts should the government constitutionally be required to prove beyond a reasonable doubt before the defendant can be found guilty." (Emphasis omitted; footnote omitted; internal quotation marks omitted.) S. Sundby, "The Reasonable Doubt Rule and the Meaning of Innocence," 40 Hastings L.J. 457, 459 (1989). Mullaney and Patterson seem to be at odds with no clear rule that can reconcile the two. S. Saltzburg, "Burdens of Persuasion in Criminal Cases: Harmonizing the Views of the Justices," 20 Am. Crim. L. Rev. 393, 398 (1983); Note, "The Constitutionality of Affirmative Defenses After Patterson v. New York," 78 Colum. L. Rev. 655, 664 (1978) ("contrary to the finding of the Patterson Court, New York and Maine law are indistinguishable for purposes of applying Winship"). The constitutional limits beyond which states may not go in allocating burdens of proof and burdens of persuasion were never clearly explained by the Court and have caused great confusion and debate among lower courts and commentators. This stems from the fact that designating a fact as an element or a defense is essentially arbitrary. Members of the Court themselves recognized this confusion in subsequent cases. See Moran v. Ohio, 469 U.S. 948, 952, 105 S. Ct. 350, 83 L. Ed. 2d 285 (1984) (*Brennan, J.*, dissenting from denial of certiorari) ("Thus, in order to determine whether a State may allocate the

[1] This test has also been met with some substantial criticism, in part for its "excessive reliance on history;" J. Jeffries & P. Stephan, "Defenses, Presumptions, and Burden of Proof in the Criminal Law," 88 Yale L.J. 1325, 1363 (1979); at a time of "the greatest surge of penal law reform that this country has ever known." Id., 1364.

burden of proof on an issue in a criminal prosecution to the defendant, it must first be determined what elements constitute the crime in question; this was the problem in Mullaney and Patterson. Yet the resolution of those cases left the solution to this problem in some doubt and the lower courts in considerable disarray."); Model Penal Code § 1.13 (currently § 1.12), comment 111 (Tentative Draft No. 4, 1955) (there is "no certain principle by which to gauge when a qualification of the scope of a prohibition should be classified as matter of [defense] as distinguished from an aspect of the basic definition of the crime"); D. Dripps, "The Constitutional Status of the Reasonable Doubt Rule," 75 Calif. L. Rev. 1665, 1665–66 (1987) ("judicial doctrine . . . arbitrarily distinguish[es] elements of the charged offense, which the government must establish beyond a reasonable doubt, from affirmative defenses, which the legislature may require the defendant to prove by a preponderance of the evidence"); J. Jeffries & P. Stephan, "Defenses, Presumptions, and Burden of Proof in the Criminal Law," 88 Yale L.J. 1325, 1331–32 (1979) ("The trouble, of course, is that the distinction is essentially arbitrary. . . . Traditionally, the only functional difference between a crime and a defense has been precisely the issue under consideration—allocation of the burden of proof. . . . To make the scope of that doctrine depend on the legislative allocation of the burden of proof is to assume the point in issue and thus to reduce Winship to a circularity." [Footnote omitted; internal quotation marks omitted.]).

Before going further, it is necessary to define the term affirmative defense. "An affirmative defense is one that admits the doing of the act charged, but seeks to justify excuse or mitigate it." (Internal quotation marks omitted.) State v. Heinz, 1 Conn. App. 540, 547, 473 A.2d 1242, cert. denied, 194 Conn. 801, 477 A.2d 1021 (1984); State v. Cohen, 568 So. 2d 49, 51–52 (Fla. 1990) ("An 'affirmative defense' is any defense that assumes the complaint or

charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question. An affirmative defense does not concern itself with the elements of the offense at all; it concedes them. In effect, an affirmative defense says, 'Yes, I did it, but I had a good reason.'").

3. Various Approaches to Determining Constitutionality

Many lower courts and commentators have attempted to provide a workable test for determining whether a fact is required to be proven by the state beyond a reasonable doubt or whether the state may place the burden of persuasion for that fact on the defendant.

These approaches have been sorted into three categories: expansive proceduralism, restrictive proceduralism, and substantivism. S. Sundby, supra, 40 Hastings L.J. 463. The proceduralist approach, covering the first two categories, is generally concerned only with how a legislature has decided to define a crime. Under this approach, "the reasonable doubt rule does not require a court to assess independently the importance of different facts within the crime's definition: if facts *A*, *B*, and *C* are each part of the crime's definition, then all must be proven beyond a reasonable doubt to satisfy due process." Id., 464. The difference between the two categories of proceduralism "centers on how to decide what facts within a legislative scheme are actually part of the crime's definition, or, in Winship's terminology, are necessary to constitute the crime." (Internal quotation marks omitted.) Id. Under "expansive" proceduralism, the reasonable doubt rule would attach to every fact affecting criminal liability. Id., 465. Under this approach, it does not matter whether a particular fact is labeled a defense, a mitigating factor, or an element of the crime. Id. Instead, "the key test would be whether the fact is used by the state to justify a particular criminal sanction." Id. This approach "views the constitutional threshold not as resting on how the state uses the factor—as a defense, a

presumption, or as part of the crime's definition—but on the state's decision to use the factor as a basis for determining criminal guilt and punishment." Id. Those ascribing to this approach have focused on the question of "whether the issue is so critical to culpability that it would offend the deepest notions of what is fair and right and just to obtain a conviction where a reasonable doubt remains as to that issue. . . . Clearly, the state must prove a fact necessary to constitute the crime, but inquiry cannot end with the statutory definition of the offense." (Footnotes omitted; internal quotation marks omitted.) Note, supra, 78 Colum. L. Rev. 670. According to others, "[i]f the prosecution contends that a defendant committed rape, not simply assault and battery, it must prove rape. It may not create an offense called rape, define it as assault and battery are now defined, and place the burden of persuasion on a defendant to prove that no rape occurred in order to reduce his conviction to assault and battery. Where degrees of offenses are created based on different act and mens rea requirements, and a claim is made that the defendant is responsible for one degree rather than a lesser degree, the prosecution generally must justify the claim with proof beyond a reasonable doubt. Such proof will justify punishment and the stigma produced by a conviction on the higher offense." S. Saltzburg, supra, 20 Am. Crim. L. Rev. 411. "[T]he fact that a statutory scheme seeks to draw certain lines is prima facie evidence that the jurisdiction regards the differences in criminal activity as significant. Traditional notions of act and mens rea are very useful in identifying the significance of various elements." Id; see also D. Dripps, supra, 75 Calif. L. Rev. 1677 ("[T]he legislative classification of exculpatory facts as elemental or defensive corresponds with one substantive factor, and that is legislative deliberation itself."). Thus, under the "expansive" proceduralist approach, the prosecution would bear the burden of persuasion on every fact a legislature has chosen to make relevant to guilt and punishment. This approach also protects

against the concerns of the dissenters in Patterson by precluding a legislature "from manipulating a crime's formal definition to avoid the strictures of the reasonable doubt rule." S. Sundby, supra, 40 Hastings L.J., 467. Unsurprisingly, Mullaney comes closest to endorsing this view. See Mullaney v. Wilbur, supra, 421 U.S. 701–02.

The "restrictive" proceduralist approach, embodied by Patterson, restricts the application of the reasonable doubt rule to only those facts that a legislature elected to call elements. Under this approach, "[a]s long as a state is careful to label a fact a defense or mitigating factor and not an element of the crime, it is virtually free to shift the burden of proof." (Internal quotation marks omitted.) S. Sundby, supra, 40 Hastings L.J., 471. This reasoning—based on strong deference to federalism and separation of power concerns—is "subject to criticism as determining whether the reasonable doubt rule applies based on the formalistic and arbitrary criterion of a fact's 'physical location' within the statute." Id., 474. Patterson requires looking only to a "syntactical analysis removed from any articulated constitutional justification." Id.

The third approach is substantivism. Those subscribing to this approach "[believe] that just because a fact is included within a crime's definition or is a possible defense does not mean that the fact is 'necessary' to constitute the crime charged." Id., 475. Instead, "a fact is 'necessary' . . . only if its presence or absence is constitutionally required before the state can impose criminal punishment." Id. In other words, despite choosing to include a fact in the definition of a crime, if the state could constitutionally punish that act without proof of the fact, then the fact is not "necessary" to constitute the crime charged. Cf. R. Allen, "Mullaney v. Wilbur, the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention," 55 Tex. L. Rev. 269, 270–71 (1977) (arguing the need to identify

the constitutional interest at stake); J. Jeffries & P. Stephan, supra, 88 Yale L.J. 1346–47 (must define innocence and guilt to determine reasonable doubt rule's scope). Substantivism's quarrel with proceduralism is that the latter is overinclusive and punishes legislatures for including more facts in the definition of a crime than are constitutionally necessary. See J. Jeffries & P. Stephan, supra, 88 Yale L.J. 1365–66 ("Winship should be read to assert a constitutional requirement of proof beyond a reasonable doubt of a constitutionally adequate basis for imposing the punishment authorized. . . . [T]his interpretation of the scope of Winship would serve the essential purpose of the reasonable-doubt requirement in the only meaningful way possible—that is, by explicit recognition of the interaction between a constitutional rule governing the burden of proof and residual legislative authority over the definition of crimes and prescription of punishments."). Proponents of substantivism have argued that jurisprudential oversight of the discretion of legislatures to define crimes and defenses as they see fit should be limited to "that of a constitutional floor for the substantive criminal law, that is, a notion of prerequisites essential for imposing liability along with a required proportionate relationship between the wrong done and the punishment authorized." Id., 1365. Jeffries and Stephan, attempting to make sense of the implications of Winship in light of Mullaney and Patterson, posit an approach whereby the state's burden under the due process clause is analyzed by interpreting Winship to "require proof beyond a reasonable doubt of a constitutionally adequate basis for the punishment authorized." Id., 1381. According to them, the "issue, in short, is not whether the state has proved with requisite certainty whatever facts it chooses to regard as relevant. The issue, rather, is whether the state has proved beyond a reasonable doubt a just basis for punishment." Id., 1382. The problem with this approach is that the task it assigns to courts is monumental. It would require a court, without any meaningful

framework, to determine what exactly is constitutionally required to prove for any particular crime.

As is evident, none of these approaches has any significant overlap, and there is no agreement about a unified theory of approaching the constitutional question. Even shorn of the labels of proceduralism and substantivism, commentators and courts have attempted to theorize a coherent framework for determining whether a fact must be proven by the prosecution or the defense. One commentator suggests the following approach: "First, assume the truth of the affirmative defense asserted. Second, ask whether the defendant nonetheless committed the crime assuming that the prosecution proved all other elements beyond a reasonable doubt. If so, then the prosecution need not prove the absence of the affirmative defense at all, let alone beyond a reasonable doubt. If not, then the reasonable doubt standard should apply to the affirmative defense." (Footnote omitted.) Note, "A Principled Approach to the Standard of Proof for Affirmative Defenses in Criminal Trials," 40 Am. J. Crim. L. 281, 292 (2013). According to Professor LaFave, "the affirmative defense might then be tested by two inquiries: (1) whether the defense is defined in terms of a fact so central to the nature of the offense that, in effect, the prosecution has been freed of the burden to establish that the defendant engaged in conduct with consequences of some gravity; and (2) whether the need for narrowing the issues, coupled with the relative accessibility of evidence to the defendant, justifies calling upon him to put in evidence concerning his defensive claim." 1 W. LaFave, Substantive Criminal Law (3d Ed. 2018) § 3.4 (e), p. 292.

Courts that have considered whether a fact is an element or a defense have analyzed several factors. See generally Note, supra, 78 Colum. L. Rev. 655. The traditional rationale for properly classifying a fact as a defense is that the information is uniquely within the knowledge

of the defendant. See id., 671 n.118 ("It is often said that where a fact is peculiarly within the knowledge of the accused, the relative burdens—a comparatively insignificant one for the defendant, an onerous one for the prosecution—justify allocating the burden of persuasion to the defendant."). Our courts have relied on this principle to uphold the allocation of the burden of persuasion to defendants in other scenarios. In State v. Januszewski, 182 Conn. 142, 167, 438 A.2d 679 (1980), cert. denied, 453 U.S. 922, 101 S. Ct. 3159, 69 L. Ed. 2d 1005 (1981), overruled in part on other grounds by State v. Hart, 221 Conn. 595, 605 A.2d 1366 (1992), our Supreme Court stated that "[i]t is generally recognized that the state bears no initial burden of proof on matters personal to the defendant and peculiarly within his own knowledge." The court found that "[p]lacing upon the defendant the burden of proving the existence of a physical state of being that removes him from the operation of a penal statute is not unusual in this jurisdiction or in others." Id.;[2] see also State v. Savoie, 67 N.J. 439, 463 n.8, 341 A.2d 598 (1975) (stating this rationale for allocation of the burden of production for a mistake defense); State v. Connor, 142 N.C. 700, 704, 55 S.E. 787 (1906) ("the correct rule upon the subject seems to be that, in cases where the subject of such averment relates to the defendant personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the defendant, as matter of defense; but, on the other hand, if the subject of the averment do not relate personally to the defendant, or be not peculiarly within his knowledge, but either relate personally to the prosecutor, or be peculiarly within his knowledge, or at least be as much within his knowledge as within the knowledge of the defendant, the prosecutor must prove the negative" [internal quotation marks omitted]); People v. Patterson, 39 N.Y.2d 288, 305, 347 N.E.2d 898, 383

[2] See below for further discussion of Januszewski.

N.Y.S.2d 573 (1976), aff'd, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) ("[t]he placing of the burden of proof on the defense, with a lower threshold, however, is fair because of defendant's knowledge or access to the evidence other than his own on the issue" [*Breitel, C.J.*, concurring]). In fact, this rationale was relied upon by our Supreme Court in the petitioner's direct appeal. According to that court, our statutory scheme classifying the question of the defendant's intent or knowledge of the use of a firearm as an affirmative defense "is consistent with other areas wherein the legislature has provided that the state must prove the essential elements of the crime, and has left it to the defendant to mitigate his criminal culpability or sentencing exposure via an affirmative defense, particularly with respect to areas that uniquely are within the defendant's knowledge." State v. Gonzalez, supra, 300 Conn. 508.

It should be noted that there is some criticism of this approach. The Court in Mullaney stated that "although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not, as the Court has long recognized, justify shifting the burden to him." Mullaney v. Wilbur, supra, 421 U.S. 702, citing Tot v. United States, 319 U.S. 463, 469, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943), a case involving mandatory presumptions, and Leary v. United States, 395 U.S. 6, 45, 89 S. Ct. 1532, 23 L.Ed.2d 57 (1969). Nor, the Court stated, "is the requirement of proving a negative unique in our system of criminal jurisprudence." Mullaney v. Wilbur, supra, 421 U.S. 702; see also D. Dripps, supra, 75 Calif. L. Rev. 1695 ("In a criminal case, the unilateral consequences of a conviction therefore undercut the credibility of the defendant's testimony. The credibility problem explains why access to evidence cannot justify shifting the burden of proof to a criminal defendant. Although the privilege against self-incrimination or the risk of impeachment with prejudicial prior convictions also distinguish criminal from civil trials, the credibility problem alone provides sufficient reason to reject the

access-to-evidence analysis in criminal cases. The defendant has access to evidence about intent, for example, but is the jury likely to believe it?"); Note, supra, 40 Am. J. Crim. L. 294 ("[T]he defendant's particular knowledge should not, and does not, justify placing the burden on him and lowering the standard for the prosecution. If particular knowledge determined the burden of proof, then defendants should be required to prove, for example, alibis (they have particular knowledge of where they were) or, especially, states of mind (they have particular knowledge of their own thoughts).").

More compelling is the distinction drawn on whether the fact negates an element of the offense or presents additional information that absolves the defendant of criminal liability. Courts, including our court, have observed that "an affirmative defense does not serve to negate an element of the crime which the state must prove in order to convict, but constitutes a separate issue or circumstance on which the defendant is required to carry the burden of persuasion." (Internal quotation marks omitted.) State v. Smith, 148 Conn. App. 684, 706, 86 A.3d 498 (2014), aff'd, 317 Conn. 338, 118 A.3d 49 (2015); United States v. Johnson, 968 F.2d 208, 213–14 (2d Cir.), cert. denied, 506 U.S. 964, 113 S. Ct. 436, 121 L. Ed. 2d 355 (1992) (observing that "an affirmative defense may not, in operation, negate an element of the crime which the government is required to prove; otherwise, there would be too great a risk that a jury, by placing undue emphasis on the affirmative defense, might presume that the government had already met its burden of proof"); State v. Jaime, 2015 ME 22, ¶ 29, 111 A.3d 1050 (2015) ("[b]y its nature, an affirmative defense is presented where the elements of the crime are not necessarily contested, but the defendant offers additional facts that may legally absolve him of criminal liability"); Commonwealth v. Grafton, 93 Mass. App. Ct. 717, 720, 107 N.E.3d 1241, further appellate review denied, 480 Mass. 1109, 111 N.E.3d 284 (2018) ("An affirmative

defense is defined as a matter which, assuming the charge against the accused to be true, constitutes a defense to it; an affirmative defense does not directly challenge any element of the offense. . . . Such a defense involves a matter of justification particularly within the knowledge of the defendant on which he can fairly be required to adduce supporting evidence." [Citations omitted; internal quotation marks omitted.]).

"Mullaney and Patterson both articulate one variation on the procedural due process requirement that the Winship Court found necessary to protect this particular substantive value: despite a State's characterization of an issue as being an affirmative defense, the State may not place the burden of persuasion on that issue upon the defendant if the truth of the defense would necessarily negate an essential element of the crime charged." (Internal quotation marks omitted.) Holloway v. McElroy, 632 F.2d 605, 624–25 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981), overruled on other grounds by Mason v. Balkcom, 669 F.2d 222 (5th Cir. Unit B 1982).

This theory, too, produces dichotomous results, because under Patterson, the constitutionality of the allocation of burdens of production and persuasion hinge almost entirely on the draftsmanship of legislatures. See Patterson v. New York, supra, 432 U.S. 216 ("[l]egislatures do require broad discretion in the drafting of criminal laws, but the Court surrenders to the legislative branch a significant part of its responsibility to protect the presumption of innocence [*Powell, J.*, dissenting]). For instance, in Dixon v. United States, 548 U.S. 1, 17, 126 S. Ct. 2437, 165 L. Ed. 2d 299 (2006), the United States Supreme Court rejected the argument that duress must be disproven by the prosecution beyond a reasonable doubt. Dixon argued that she could not have formed the necessary *mens rea* for the crimes—knowing and willful—because she did not freely choose to engage in the crimes in question. Id., 6. The

Court was not convinced, because, even assuming that Dixon's "will was overborne by the threats made against her and her daughters, she still knew that she was making false statements and knew that she was breaking the law by buying a firearm." (Emphases omitted.) Id., 6. Thus, "[t]he duress defense, like the defense of necessity . . . may excuse conduct that would otherwise be punishable, but the existence of duress normally does not controvert any of the elements of the offense itself." (Citation omitted.) Id. However, in Connecticut, duress is a defense that must be disproven by the state beyond a reasonable doubt. "Duress . . . [is a] recognized [defense] to [a] criminal [charge] because [it] . . . implicate[s] the volitional aspect of criminality. . . . The state's burden of proof beyond a reasonable doubt encompasses, in an appropriate case, a burden of disproving duress beyond a reasonable doubt." (Citations omitted; internal quotation marks omitted.) State v. Heinemann, 282 Conn. 281, 299, 920 A.2d 278 (2007).

Care must be taken to remember that "[t]he mere overlap between the elements of a crime and the elements of an affirmative defense does not render the law proscribing the criminal conduct unconstitutional." United States v. Corbin, 729 F. Supp. 2d 607, 619 (S.D.N.Y. 2010). "[Although] the elements of the crime and of the affirmative defense overlap, in the sense that evidence to prove the latter will often tend to negate the former . . . this overlap did not shift to [the defendant] the burden of proof on any element of the crime . . . nor did it allow the jury to presume elements of the government's case." (Citations omitted; internal quotation marks omitted.) United States v. Thompson, 76 F.3d 442, 453 (2d Cir. 1996).

Additionally, our court has recognized that it "is the general rule that where exceptions to a prohibition in a criminal statute are situated separately from the enacting clause, the exceptions are to be proven by the defense." State v. Tinsley, 181 Conn. 388, 402, 435 A.2d

1002 (1980), cert. denied, 449 U.S. 1086, 101 S. Ct. 874, 66 L. Ed. 2d 811 (1981), overruled on other grounds by State v. Pinnock, 220 Conn. 765, 601 A.2d 521 (1992). When the "matters which the defendant claims must be proven by the state are not only contained in a separate sentence of the statute, but also form no part of the statute's enacting or prohibiting clause [t]hey are not descriptive negatives defining the corpus delicti but are exceptions, and they do not form any essential elements of the crime charged." Id., 403.

Another consideration is whether the allocation of a fact as an affirmative defense infringes on other rights of the defendant. "It would be an abuse of affirmative defenses, as it would be of presumptions in the criminal law, if the purpose or effect were to unhinge the procedural presumption of innocence which historically and constitutionally shields one charged with crime. Indeed, a by-product of such abuse might well be also to undermine the privilege against self incrimination by in effect forcing a defendant in a criminal action to testify in his own behalf." People v. Patterson, supra, 39 N.Y.2d 305 (*Breitel, C.J.*, concurring); State v. Burrow, 293 Or. 691, 706–07, 653 P.2d 226 (1982) (*Linde, J.*, dissenting).

Finally, "[a]nother factor to be considered in allocating the burden of proof is the importance of the fact at issue to the degree of defendant's culpability. The more critical the fact is to the concept of culpability, the more consistent it is with fundamental notions of fairness to require the State to bear the burden of proof." State v. Flaherty, 55 N.C. App. 14, 21–22, 284 S.E.2d 565 (1981).

The court now discusses what the prosecution in Connecticut must currently prove in order to convict a defendant as an accessory to manslaughter in the first degree with a firearm.

4. Accessorial Liability in Connecticut

The statutory provision governing accessorial liability is § 53a–8 (a), which provides that "[a] person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender." In Connecticut, a conviction under § 53a–8 requires proof of a dual intent, i.e., "that the accessory have the intent to aid the principal and that in so aiding he intend to commit the offense with which he is charged." (Emphases omitted.) State v. Harrison, 178 Conn. 689, 694, 425 A.2d 111 (1979); see also State v. Gonzalez, supra, 300 Conn. 499–500. "Additionally, one must knowingly and wilfully assist the perpetrator in the acts which prepare for, facilitate or consummate it." (Internal quotation marks omitted.) State v. Gonzalez, supra, 500. Thus, under § 53a–8, "accessorial liability is not a distinct crime, but only an alternative means by which a substantive crime may be committed . . . ." (Internal quotation marks omitted.) Id. In the petitioner's direct appeal in the present case, our Supreme Court approved of State v. Miller, 95 Conn. App. 362, 896 A.2d 844, cert. denied, 279 Conn. 907, 901 A.2d 1228 (2006). See State v. Gonzalez, supra, 509–10. In Miller, our Appellate Court had decided that our statutory scheme did not require the state to prove that an accessory intended for the principal to use a firearm in order to secure a conviction for manslaughter in the first degree with a firearm. State v. Miller, supra, 375–77. Reviewing our case law, the court in Miller concluded that the use of a firearm is an "aggravating circumstance that does not require proof of any particular mental state." Id., 375. When a statute, as here, provides for no particular mental state attached to an act, the "element is one of general intent, requiring only that the perpetrator act volitionally in some way to use, possess or threaten to

use a firearm in the commission of the offense." State v. Gonzalez, supra, 502. "That the [perpetrator] intend[s] to perform the physical acts that constitute the crime . . . in the manner proved by the evidence [i]s implicitly a part of the state's burden of proof and, in that sense, an element of the crime." State v. Pierson, 201 Conn. 211, 216–17, 514 A.2d 724 (1986). The trial court is not, however, required to instruct the jury that "a criminal act must be volitional" or that the defendant must have the "general intent to do a criminal act" unless there is evidence at trial that suggests that "the defendant's conduct was involuntary." Id., 217–18.

Our Supreme Court noted an ambiguity in this statutory interpretation, however, when the proof of the *perpetrator's* volitional use of a firearm was to be considered in conjunction with an *accessory's* state of mind. State v. Gonzalez, supra, 300 Conn. 503. Reviewing our case law on accessorial liability, the court concluded that our cases routinely have not required the state to prove that the accessory had specific intent where the perpetrator's use of a firearm required only general intent. Id., 503–08. In State v. McCalpine, 190 Conn. 822, 463 A.2d 545 (1983), our Supreme Court held that "[t]o establish the guilt of an accused as an accessory for aiding and abetting the criminal act of another, the state must prove criminality of intent and community of unlawful purpose," and "[t]he mental state of an aider and abettor incorporated in § 53a–8 does not require that the accused know of or endorse every act of his coparticipant in crime." Id., 832. Thus, there is "no requirement that the accessory possess the intent to commit the specific degree of the robbery charged or the intent to possess a deadly weapon." Id., 833.

Justice Shea concurred in the judgment in McCalpine but disagreed with the majority's formulation of the accessorial intent requirement. Id. According to him, the majority's determination appeared to water down the principles that the accessory must have intended to

aid the principal and in so aiding, intended to commit the offense with which he is charged. "The fact that no specific intent is made an element of the crimes for which the defendants were convicted . . . does not remove the necessity for proof of a general intent to perform the acts which constitute the offense . . . Unless it was the conscious objective of each defendant that he or another participant perform all of the acts necessary to constitute the particular crime, he would not be guilty of it. This requirement must extend to those acts which enhance the degree of the crime as well as to those which constitute the basic crime itself. Otherwise an accomplice might be convicted of an offense although he did not entertain the same mental state required by statute for conviction of the principal." (Citations omitted; internal quotation marks omitted.) Id., 834 (*Shea, J.*, concurring).

It remains good law in Connecticut that the "accessory statute's requirement that the defendant act with the mental state required for commission of an offense drops out of the calculation when the aggravating circumstance does not require proof of any particular mental state." (Internal quotation marks omitted.) State v. Gonzalez, supra, 300 Conn. 505. Despite reaffirming that generalization, however, the court in Gonzalez acknowledged that McCalpine has been criticized for its broad scope, and its impact has been limited in cases where the substantive offense requires proof of a particular mental state. Id., 505 n.18. For instance, in State v. Foster, 202 Conn. 520, 522 A.2d 277 (1987), our Supreme Court revisited the issue of accessorial intent in the context of a sufficiency of evidence challenge. Id., 534–36. In that context, without expressly overruling McCalpine, the court held that "accessorial liability is predicated upon the actor's state of mind at the time of his actions, and whether that state of mind is commensurate to the state of mind required for the commission of the offense." Id., 532. In Foster, the defendant argued that he could not be convicted as an accessory to

criminally negligent homicide, because that crime requires an unintended result. Id., 527. The court disagreed, noting that accessorial liability is not another crime, but merely another way of committing the substantive crime. Id., 528. "Contrary to the defendant's assertions, and unlike attempt or conspiratorial liability, accessorial liability does not require that a defendant act with the conscious objective to cause the result described by a statute." Id., 529. Acknowledging that the court has repeatedly "stated that the defendant, in intentionally aiding another, must have the intent to commit the substantive offense"; id.; the court distinguished those cases because they involved crimes "that require a defendant to act with a specific intent to commit the crime." Id., 529–30. In those cases, because "the substantive crime with which the person was charged. . . required that the accessory specifically intend to act or bring about a result, it is logical to state that the accessory, in aiding another, must have intend[ed] to commit the offense with which he is charged." (Internal quotation marks omitted.) Id., 530.

The court made clear, however, that § 53a–8 is "not limited to cases where the substantive crime requires the specific intent to bring about a result." Id. "This interpretation is consistent with the underlying principles of accessorial liability. Such liability is designed to punish one who intentionally aids another in the commission of a crime and not one whose innocent acts in fact aid one who commits an offense." Id., 531. Thus, accessorial liability "is predicated upon the actor's state of mind at the time of his actions, and whether that state of mind is commensurate to the state of mind required for the commission of the offense. If a person, in intentionally aiding another, acts with the mental culpability required for the commission of a crime—be it intentional or criminally negligent—he is liable for the commission of that crime." (Internal quotation marks omitted.) Id., 532.

Connecticut's approach is the same as that of the Model Penal Code, which provides that "complicity in conduct causing a particular criminal result entails accountability for that result so long as the accomplice is personally culpable with respect to the result to the extent demanded by the definition of the crime. Thus, if the accomplice recklessly endangers life by rendering assistance to another, he can be convicted of manslaughter if a death results, even though the principal actor's liability is at a different level. In effect, therefore, the homicidal act is attributed to both participants, with the liability of each measured by his own degree of culpability toward the result." Model Penal Code § 2.06, comment 7; State v. Foster, supra, 533–34 n.14.

Likewise, in State v. Crosswell, 223 Conn. 243, 612 A.2d 1174 (1992), which was also a challenge to the sufficiency of the evidence, id., 244–45, our Supreme Court characterized the language in McCalpine—that the accessory is not required to know of or endorse every act of his coparticipant—as dicta. Id., 258. Croswell also disapproved of the language in McCalpine that "the accessory was not required to possess the intent to commit the specific degree of the crime charged." (Internal quotation marks omitted.) Id. Croswell noted that these comments were dicta because the elements at issue in McCalpine did not require specific intent. Id.; id., 258 n.11.

The court in Croswell, then, made clear that our accessorial intent jurisprudence requires the state to prove that the accessory had specific intent when the substantive offense requires that the state prove that the principal had specific intent. Id., 260–61. The court in Croswell did not overrule or call into question the holding of McCalpine that when a firearm clause in a statute only requires proof of general intent, the state does not have to prove that the accessory have the specific intent that the firearm be used. "Nothing in [Foster]

. . . however, conflicts with the holding in [McCalpine] . . . that when a defendant is charged with robbery in the first degree on the basis that he or another participant in the crime . . . is armed with a deadly weapon; General Statutes § 53a–134 (a) (2); . . . the defendant need not be proven to have intended to possess a deadly weapon. The concurrence in McCalpine also disagreed with that proposition, but it has not been questioned in any decision by this court." (Citations omitted; internal quotation marks omitted.) Id., 261, n.14.

Finally, in the petitioner's direct appeal in the present case, our Supreme Court also rejected his contention that the state was required to prove his specific intent on the use of the firearm because it was "inconsistent with the affirmative defense provided by § 53a–16b." State v. Gonzalez, supra, 300 Conn. 508. The court concluded that the affirmative defense statute "is consistent with other areas wherein the legislature has provided that the state must prove the essential elements of the crime, and has left it to the defendant to mitigate his criminal culpability or sentencing exposure via an affirmative defense, particularly with respect to areas that uniquely are within the defendant's knowledge." Id.[3]

Also instructive to this analysis are our Supreme Court's decisions in State v. Pond, 315 Conn. 451, 108 A.3d 1083 (2015), and State v. Flemke, 315 Conn. 500, 108 A.3d 1073 (2015). In Pond, our Supreme Court considered whether the state must prove that a coconspirator intended for a firearm to be used. State v. Pond, supra, 453. Engaging in statutory interpretation of our conspiracy statute, the court concluded that the language of that statute required proof beyond a reasonable doubt that the coconspirator intended for the specific act that forms the basis of the charge to be committed. Id., 466–81. This is because conspiracy is a specific intent crime. Id., 467. In order to violate § 53a–48 (a), the state must prove that a person "when, with

[3] See discussion below.

intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy." Section 53a–48 (a). Thus, to establish a violation of § 53a–48 (a), "the state must prove that three essential elements are satisfied: (1) the accused intended that conduct constituting a crime would be performed; (2) the accused formed an agreement with one or more persons to engage in such conduct; and (3) any one of the coconspirators performed some overt act in furtherance of the conspiracy." State v. Pond, supra, 315 Conn. 467. "Conspiracy, then, is a specific intent crime, with the intent divided into two elements: [1] the intent to agree or conspire and [2] the intent to commit the offense which is the object of the conspiracy." (Internal quotation marks omitted.) Id., 467–68.

The court further buttressed its conclusion by comparing the language of the conspiracy statute to that of the accessory statute, noting that the difference between the two must be presumed to be intentional. Id., 469–70. Thus, while the legislature intended for the intent requirement for accessory to mirror that of the object offense, it did not intend for that to be the case for conspiracy. Id. The court reasoned that "the legislature has made a reasonable determination that, if an individual willingly participates in a robbery or attempted robbery, during which one of the perpetrators actually threatens the use of deadly force, that individual should be held criminally liable for the increased risk that injury or death will result, even if he did not specifically intend for the threat to be made. It makes little sense, however, to say that, if an individual plans and agrees to participate in a simple, unarmed robbery, he then may be held criminally liable for planning or agreeing to an armed robbery, or one in which a purported weapon is displayed or its use threatened, when he had no such intention and agreed to no such plan." (Emphases omitted.) Id., 476–77.

In State v. Flemke, supra, 315 Conn. 503, decided the same day as Pond, our Supreme Court was asked to hold that the firearm sentence enhancement statute, General Statutes § 53–202k, does not apply to unarmed accomplices, or, in the alternative, that the applicability of that sentence enhancement provision is limited to those accomplices who intended that a firearm be used in the commission of the underlying offense. In rejecting the defendant's invitation, the court reaffirmed its prior holding in State v. Davis, 255 Conn. 782, 772 A.2d 559 (2001). State v. Flemke, supra, 315 Conn. 506. In Davis, our Supreme Court rejected Davis' argument that the plain language of § 53–202k did not include the accessorial liability language and thus should be limited to applying only to principals. State v. Davis, supra, 787, 789. The court noted that Davis was "attempting to draw a distinction between principal and accessorial liability. Such a differentiation, however, misconstrues the nature of accessorial liability. This court has long since abandoned any practical distinction between the terms 'accessory' and 'principal' for the purpose of determining criminal liability. . . . Instead, '[t]he modern approach is to abandon completely the old common law terminology and simply provide that a person is legally accountable for the conduct of another when he is an accomplice of the other person in the commission of the crime.' . . . The legislature adopted this view and expressed it in . . . § 53a–8 (a). Accordingly, 'accessorial liability is not a distinct crime, but only an alternative means by which a substantive crime may be committed . . . .'" State v. Flemke, supra, 508, quoting State v. Davis, supra, 789–90.

The court in Flemke also rejected the defendant's argument that § 53–202k "requires the state to prove that an unarmed accomplice intended that another participant in the offense would use a firearm in the commission of the offense . . . ." State v. Flemke, supra, 315 Conn. 515–16. This was because the defendant, as an accessory, was legally indistinguishable from the

principal. Id., 516. The court reaffirmed the principle that "the state was required to prove only that the defendant was guilty of being an accessory to the underlying robbery and that a firearm was used in the commission of the robbery; the state was not required to also prove that the defendant intended that a firearm would be used during the robbery." Id.

5. Affirmative Defenses and the Burden of Persuasion

Although our Supreme Court has not considered the constitutionality of § 53a–16b in the context in which it is presented to this court, it has done so in regards to a different statute, while applying the same constitutional principles. In State v. Ray, 290 Conn. 602, 966 A.2d 148 (2009), our Supreme Court considered whether the affirmative defense of drug dependency to a charge pursuant to General Statutes § 21a–278 (b) was constitutional. State v. Ray, supra, 616. Previously in Connecticut, the defendant bore the burden of production as to the defense of drug dependency. State v. Januszewski, supra, 182 Conn. 166. Once this was introduced into the case, the burden to prove lack of drug dependency shifted to 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 of [the] excuse, proviso or exemption claimed by him." (Internal quotation marks omitted.) Id., 169. Subsequently, in State v. Hart, supra, 221 Conn. 595, our Supreme Court altered course and determined that, pursuant to Januszewski, the absence of drug dependency was not an element but an exception to liability, and, thus, the burden rested on the defendant to prove drug dependency by a preponderance of the evidence. Id., 608. The court also rejected the defendant's argument that this construction relieved the state of proving all of the elements of the offense. See id., 611. Relying on McMillan v. Pennsylvania, 477 U.S. 79, 85, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), overruled on other grounds by Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), and

Patterson v. New York, supra, 432 U.S. 210, the court held that "[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." State v. Hart, supra, 611. In Ray, the court was again presented with the same arguments. State v. Ray, supra, 613. Noting that if the court "w[as] writing on a blank slate, [it] might find persuasive the defendant's argument," id., 614, it, nonetheless, concluded that it was bound by stare decisis to affirm Hart, in which the exact arguments had been presented and rejected only sixteen years prior. See id.

The court in Ray then considered the defendant's alternative argument: that the fifth and sixth amendments, as interpreted by the United States Supreme Court in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), rendered our statutory scheme in this regard unconstitutional. See State v. Ray, supra, 290 Conn. 616–17. In Apprendi, the Court held that both the due process clause and the sixth amendment require that any fact "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. The New Jersey scheme, which allowed for an enhanced sentence after a finding by a preponderance of the evidence by a trial judge, was, thus, unconstitutional. Id., 490–92. Ray argued that the same applied to our statutory scheme requiring the defendant to prove drug dependency. State v. Ray, supra, 617. Our Supreme Court disagreed, id., 618, noting that nothing in Apprendi was inconsistent with the holding of Patterson, id., 622, which permitted states to place the burden of persuasion for affirmative defenses on the defendant. Id., 618–19. The court concluded that Apprendi was concerned with increasing punishment beyond the maximum prescribed for the offense. See id., 623, 623 n.15.

It relied on McMillan v. Pennsylvania, supra, 477 U.S. 79; cf. State v. Ray, supra, 622–23; a case in which the United States Supreme Court affirmed the constitutionality of a Pennsylvania statute that provided for a mandatory minimum sentence if the sentencing judge found, by a preponderance of the evidence, that the defendant visibly possessed a firearm. McMillan v. Pennsylvania, supra, 79–80, 93. The Court found no issue with that statutory scheme because it "created no presumption against the defendant and did not relieve the prosecution of its burden of proving that the defendant was guilty of the underlying crime." State v. Ray, supra, 621. In addition, the statute "neither alter[ed] the maximum penalty for the crime committed nor create[d] a separate offense calling for a separate penalty . . . ." McMillan v. Pennsylvania, supra, 87–88. McMillan, of course, has been overruled by Alleyne v. United States, supra, 570 U.S. 99, discussed below.

Thus, our Supreme Court reconciled the various strands of United States Supreme Court jurisprudence as follows:

> Having reviewed these cases, it is apparent to us 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; emphases omitted; footnote omitted; internal quotation marks omitted.) State v. Ray, supra, 290 Conn. 622–23.

The court in Ray reaffirmed our jurisprudence that the lack of drug dependency is not an aggravating factor in our statutory scheme; rather, drug dependency is a mitigating factor that reduces the maximum punishment for the same offense. "In other words, it is not the absence of drug dependency that increases the range of punishment to which the accused is exposed under [General Statutes] § 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)." Id., 625.

Subsequently, the United States Supreme Court overruled McMillan in Alleyne v. United States, supra, 570 U.S. 99. In Alleyne, the Court was confronted with judicial fact finding that increased the mandatory minimum punishment for a crime. See id. 104. The Court held that approval of such a scheme was inconsistent with Apprendi and the sixth amendment, because "[a]ny 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; internal quotation marks omitted.) Id., 103. It continued, holding 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." Id., 115–16.

In State v. Evans, 329 Conn. 770, 189 A.3d 1184 (2018), cert. denied, 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019), our Supreme Court was once again faced with a challenge to our

statutory scheme that classified drug dependency as an affirmative defense, this time in light of Alleyne. Id., 772–73. Rejecting once again the defendant's arguments, our Supreme Court deemed it "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." State v. Evans, supra, 800. The court then went on to reject the defendant's argument that drug dependency should be an element of the statute, as opposed to an affirmative defense. Id., 808.

6. Discussion

The petitioner's claim, simply put, is this: in order to convict an individual of the offense of manslaughter in the first degree with a firearm, in violation of § 53a–55a, the state must prove that (1) with the intent to cause serious physical injury to another person, the individual causes the death of such person or of a third person and (2) in the commission of such offense, the individual uses a firearm. In order to convict an individual as an accessory to someone else committing manslaughter in the first degree with a firearm, the state must prove that the individual intended to cause serious physical injury and intended to aid the principal to do so. The hiccup, according to the petitioner, is that in cases where the manslaughter is committed using a firearm, there is no requirement that the accessory know that the principal was armed with, or intended to use a firearm, and more importantly, there is no requirement to prove that the accessory intended for a firearm to be used or even that the accessory was aware that the principal was armed.

Thus, the simple question is: who is required to prove that a defendant did not know that the principal was armed and did not intend for a firearm to be used in the commission of a manslaughter? The petitioner argues that the due process clause requires the state to prove

beyond a reasonable doubt that he knew of or intended the use of the firearm; the respondent argues that the burden rests with the petitioner.

As discussed above, in order to be found guilty as an accessory, the accessory "must knowingly and wilfully assist the perpetrator in the acts which prepare for, facilitate or consummate it." (Internal quotation marks omitted.) State v. Heinemann, supra, 282 Conn. 313. As far as the mental state, the prosecution is required to prove that the principal "acted volitionally to use, possess or threaten to use a firearm in the commission of the offense, with no obligation to prove any mental state beyond that required by the underlying manslaughter statute." State v. Gonzalez, supra, 300 Conn. 503. The mental state attached to the principal's use of the weapon is one of general intent. Id., 502. The prosecution must prove that the principal, in using the firearm to commit manslaughter, intended to use the firearm to commit manslaughter. See id., 502–03, 502 n.14. This, of course, presents a problem for the accessory. Cf. id., 503 ("Ambiguity emerges, however, as we determine the additional elements of accessorial liability under § 53a–8 for violations of § 53a–55a."). As far as the principal is concerned, the volition of that act is self-evident. If the principal used a firearm in the commission of the offense, naturally he *intended* to do so. The same cannot be said of another participant who does not possess the weapon. Thus, the accessory is responsible for the actions of another, and treated *as if he committed the substantive act himself*, without a showing by the state that the accessory also *intended* that the act be committed. Thus, the argument goes, if there is no such thing as a separate crime of being an accessory and an accessory is merely another way of committing the same crime, then should the state not have to prove that the accessory also had the intent to commit the act that is the use of the firearm? In other words, if being an accessory is truly not an offense and an accessory is just as culpable and liable

as the principal and stands in the principal's stead, then must not the state similarly prove the accessory's intent just as it must prove the general intent of the principal to use the firearm?

It is hard to argue with the petitioner's contention that in light of Winship, Mullaney, Apprendi, Alleyne, and Pond, the state should be required to prove to a jury beyond a reasonable doubt that he intended that a firearm be used in the commission of the offense, in light of the fact that a conviction of manslaughter with a firearm doubles the maximum sentence he could receive. This factor—the intent that a firearm be used—can be said to be one that "makes a substantial difference in punishment and stigma;" Patterson v. New York, supra, 432 U.S. 226 (*Powell, J.*, dissenting); and touches upon the core principle that criminal law "is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability;" Mullaney v. Wilbur, supra, 421 U.S. 697–98; thereby requiring the state to prove it beyond a reasonable doubt. In simpler terms, if the state wishes to expose a defendant to a higher penalty based on the fact that the principal used a firearm to take the life of an individual, then it should have to prove that the accessory also intended that the principal use a firearm. In other words, the state should be prohibited from convicting and sentencing a defendant to a harsher sentence for a greater crime, without first proving beyond a reasonable doubt that the defendant intended for that greater crime to be committed. In a related but different context, our Supreme Court affirmed this rationale in Pond. See State v. Pond, supra, 315 Conn. 478–79. This logic finds support in commentary as well. See discussion, supra. One can argue that the just basis for punishing the petitioner in a harsher manner is that his conduct contemplated the use of a firearm. If he did not so intend, then there is no just basis for punishing him more harshly than one who did not use a firearm. Another consideration is whether the allocation of a fact as an affirmative defense infringes on other rights of the defendant. Requiring the

defendant to prove that he did not intend that a firearm be used would serve to "unhinge the procedural presumption of innocence which historically and constitutionally shields one charged with crime . . . [and] also to undermine the privilege against self incrimination by in effect forcing a defendant in a criminal action to testify in his own behalf." People v. Patterson, supra, 39 N.Y.2d 305 (*Breitel, C.J.*, concurring).

On the other hand, the petitioner has provided no authority for the proposition that a legislature is barred by the due process clause from writing into an offense an element that does not require a specific intent or indeed any intent as to an accomplice. Indeed, the elements of manslaughter with a firearm do require the state to prove beyond a reasonable doubt that a firearm was used in the commission of the offense and that the principal committed a volitional act—general intent—in using or displaying that firearm. As written, the fact of the accessory's lack of intent does not negate the fact that a firearm was used in the commission of the offense, but provides a reason why the accessory should not be treated equally culpably: he simply did not know that the principal was armed and would use a firearm. The intent of an accessory is something that is uniquely within the knowledge of that individual, and no reason has been provided why the constitution mandates that this intent requirement be part of the elements of a crime that has to be proved by the state. As discussed above, our Supreme Court and other courts across the country have upheld statutes allocating the burden of persuasion to the defendant where "the facts referred to in the exception or proviso related to the defendant personally, or were peculiarly within his knowledge." State v. Connor, supra, 142 N.C. 704–05; State v. Gonzalez, supra, 300 Conn. 508; People v. Patterson, supra, 39 N.Y.2d 305 ("[t]he placing of the burden of proof on the defense, with a lower threshold,

however, is fair because of defendant's knowledge or access to the evidence other than his own on the issue." [*Breitel, C.J.*, concurring]).

To be sure, treatment of this intent requirement in regards to accomplice liability is not uniform across other jurisdictions. Some jurisdictions require the state to prove that the perpetrator intended that a firearm be used, while others do not. In Rosemond v. United States, 572 U.S. 65, 134 S. Ct. 1240, 188 L. Ed. 2d 248 (2014), the United States Supreme Court held that for the prosecution to convict an individual of being an accessory to the "double-barreled" crime of using or carrying a firearm "during and in relation to any crime of violence or drug trafficking crime" under 18 U.S.C. § 924 (c), it must prove beyond a reasonable doubt "that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." Id., 67. But see Whitaker v. State, 199 A.3d 1021, 1029 (R.I. 2019) (rejecting the application of Rosemond because it "plows no new constitutional ground and applies only to 18 U.S.C. § 924 (c) and the federal aiding-and-abetting statute [and] has no impact on state law"); Hicks v. State, 295 Ga. 268, 273 n.3, 759 S.E.2d 509 (2014), cert. denied, 574 U.S. 1171, 135 S. Ct. 1436, 191 L. Ed. 2d 393 (2015) (noting, in a case involving Georgia's conspiracy statute, that Rosemond "arose under federal law and thus does not control here"); State v. Ward, 473 S.W.3d 686, 693 (Mo. App. W.D. 2015) (Rosemond's holding does not rest on any constitutional requirement nor does it have any application to state criminal laws on accomplice liability).

Jurisdictions that require proof that the accessory knew that the principal was armed seem to outnumber those that do not so require. See Robinson v. United States, 100 A.3d 95, 106–08 (D.C. 2014), 135 S. Ct. 1882, 191 L. Ed. 2d 752 (2015) ("Actual knowledge of the

weapon is required . . . . We perforce hold that the trial court in the present case erred by instructing the jury, in response to its inquiries, that a defendant could be convicted of second-degree burglary while armed as an aider and abettor if she had reason to know the principal perpetrator of that crime was armed." [Footnotes omitted.]); State v. Henderson, 908 N.W.2d 868, 876 (Iowa 2018) (In the "context of a first-degree robbery prosecution under the dangerous weapon alternative, the State must prove the alleged aider and abettor had knowledge that a dangerous weapon would be or was being used. . . . Otherwise, the aider and abettor may have knowledge or intent to commit a robbery, but not first-degree robbery." [Citation omitted; emphases omitted.]); Hemphill v. State, 242 Ga. App. 751, 751, 753, 531 S.E.2d 150 (2000) (approving a pattern jury instruction requiring "that the defendant had knowledge that the crime of armed robbery was being committed" and noting that the defendant—who was the driver—"knew that his accomplices had guns"); Commonwealth v. Brown, 477 Mass. 805, 812, 81 N.E.3d 1173 (2017), 139 S. Ct. 54, 202 L. Ed. 2d 41 (2018) ("[i]n this case, where the predicate felonies were attempted armed robbery and armed home invasion, the Commonwealth also was required to prove that the defendant knew that one of his accomplices possessed a firearm"); Brooks v. State, 124 Nev. 203, 210, 180 P.3d 657 (2008) ("we conclude that an unarmed offender uses a deadly weapon and therefore is subject to a sentence enhancement when the unarmed offender is liable as a principal for the offense that is sought to be enhanced, another principal to the offense is armed with and uses a deadly weapon in the commission of the offense, and the unarmed offender had knowledge of the use of the deadly weapon" [footnote omitted; internal quotation marks omitted]); State v. Bohannan, 206 N.J. Super. 646, 650, 503 A.2d 396 (1986) ("an accomplice will be guilty of armed robbery, regardless of whether he actually possessed or used a weapon, only where he

had the purpose to promote or facilitate an armed robbery"); Wyatt v. State, 367 S.W.3d 337, 341 (Tex. App.), discretionary review dismissed, Docket No. PD-0885-12, 2012 Tex. Crim. App. LEXIS 1562 (2012) ("[w]e agree with appellant that even if the jury believed that appellant participated in the robbery by serving as [the principal actor]'s getaway driver and sharing in the proceeds of the robbery, the record contains no evidence that appellant ever was aware that the firearm would be, was being, or had been used or exhibited during the offense" [internal quotation marks omitted]).

But see People v. Gomez, 87 App. Div. 2d 829, 829, 449 N.Y.S.2d 10, criminal leave to appeal denied, 56 N.Y.2d 811, 437 N.E.2d 1166, 452 N.Y.S.2d 1031 (1982) (rejecting "defendant's contention that the People must prove beyond a reasonable doubt that a defendant has prior knowledge that his accomplices were armed with deadly weapons as an element of the offense of burglary in the second degree"); People v. Young, 114 Mich. App. 61, 65 318 N.W.2d 606 (1982) (determining it was not necessary that "the defendant knew that [the principal] was armed" but only that "the defendant knowingly aided and abetted in the commission of the robbery and that carrying or using a weapon to commit the robbery was fairly within the scope of the common unlawful enterprise"); State v. Ward, supra, 473 S.W.3d 692 (under Missouri law, a defendant may be convicted under the theory of accomplice liability for first-degree robbery if the use of a firearm could be "reasonably anticipated"); State v. Ivy, 119 Wis. 2d 591, 596, 350 N.W.2d. 622 (1984) ("[D]epending on the facts and circumstances of a given case, an armed robbery can be a natural and probable consequence of a robbery. Therefore, if an armed robbery is found to be a natural and probable consequence of a robbery, the aider and abettor need not have had actual knowledge that the principals would be armed with a dangerous weapon."); Sarausad v. State, 109 Wn. App. 824, 836, 39 P.3d 308

(2001) ("[T]he law of accomplice liability . . . requires the State to prove that an accused who is charged as an accomplice with murder in the first degree, second degree or manslaughter knew generally that he was facilitating a homicide, but need not have known that the principal had the kind of culpability required for any particular degree of murder. Likewise, an accused who is charged with assault in the first or second degree as an accomplice must have known generally that he was facilitating an assault, even if only a simple, misdemeanor-level assault, and need not have known that the principal was going to use deadly force or that the principal was armed.").

If this court "w[as] writing on a blank slate"; State v. Ray, supra, 290 Conn. 614; it might be inclined to agree with the petitioner. This court is not, however, writing on the proverbial blank slate. Patterson remains good law, and our Supreme Court has repeatedly held that the accomplice's intent that a firearm be used in the commission of a substantive offense is not an element of the offense. Indeed, our Supreme Court has done so in the petitioner's own case. Our Supreme Court has further repeatedly reaffirmed the principle that making a mitigating factor an affirmative defense does not run afoul of United States Supreme Court case law. Understanding that the precise issue raised by the petitioner appears not to have been explicitly decided by our Supreme Court, this court concludes that, in effect, that court has determined the issue adversely to the petitioner. This court cannot hold otherwise. Potvin v. Lincoln Service & Equipment Co., 298 Conn. 620, 650, 6 A.3d 60 (2010).

CONCLUSION

Thus, the court concludes that the petitioner has not shown how our statutory scheme violates the due process clause by impermissibly shifting the burden of an essential element to the defense and has failed in his burden of proving ineffective assistance of counsel. Judgment shall enter denying the petition for a writ of habeas corpus.

Bhatt, J.

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APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ALFREDO GONZALEZ

PRISONER

v. **Case No. 3:11cv1012 (VLB)**

COMMISSIONER, ET AL. **July 20, 2012**

RULING ON RESPONDENTS' MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, Alfredo Gonzalez, currently confined at the MacDougall Correctional Institution in Suffield, Connecticut, commenced this action for writ of habeas corpus *pro se* pursuant to 28 U.S.C. § 2254. He challenges his 2008 state court convictions for accessory to commit manslaughter, conspiracy to commit assault, hindering prosecution and criminal possession of a firearm. The respondents move to dismiss on the ground that the petitioner has failed to exhaust his state court remedies as to the claim in the petition. For the reasons that follow, the respondents' motion to dismiss will be granted.

I. Standard of Review

A prerequisite to habeas corpus relief under 28 U.S.C. § 2254 is the exhaustion of available state remedies. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement seeks to promote considerations of comity between the federal and state judicial systems. *See Cotto v. Hebert*, 331 F.3d 217, 237 (2d Cir.1982).

To satisfy the exhaustion requirement, a petitioner must present the

essential factual and legal bases of his federal claim to each appropriate state court, including the highest state court capable of reviewing it, in order to give state courts a full and fair "opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam) (internal quotation marks and citation omitted). A federal claim has been "fairly present[ed] in each appropriate state court, including a state supreme court with powers of discretionary review," if it "alert[s] that court to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (internal parentheses and quotation marks omitted). A petitioner "does not fairly present a claim to a state court if that court must read beyond a petition or a brief . . . that does not alert it to the presence of a federal claim in order to find material . . . that does so." *Id.* at 32.

Failure to exhaust may be excused only where "there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient to render futile any effort to obtain relief." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (per curiam). A petitioner cannot, however, simply wait until appellate remedies no longer are available and argue that the claim is exhausted. *See Galdamez v. Keane*, 394 F.3d 68, 73-74 (2d Cir.), *cert. denied*, 544 U.S. 1025 (2005).

II. Procedural Background

After the petitioner's arrest in May 2006, an Assistant State's Attorney in the Connecticut Superior Court for the Judicial District of Waterbury, filed an Information charging the petitioner with one count of conspiracy to commit

murder in violation of Conn. Gen. Stat. §§ 53a-48 and 53a-54a(a), one count of accessory to murder in violation of Conn. Gen. Stat. §§ 53a-8 and 53a-54a(a) and one count of hindering prosecution in the second degree in violation of Conn. Gen. Stat. § 53a-166. *See* Pet. Writ Habeas Corpus at 10. On April 8, 2008, the Assistant State's Attorney filed a Substitute Long Form Information charging the petitioner with one count of conspiracy to commit murder in violation of Conn. Gen. Stat. §§ 53a-48 and 53a-54a(a), one count of accessory to murder in violation of Conn. Gen. Stat. §§ 53a-8 and 53a-54a(a), one count of accessory to intentional manslaughter in the first degree with a firearm in violation of Conn. Gen. Stat. §§ 53a-8 and 53a-55a, one count of conspiracy to commit assault in the first degree in violation of Conn. Gen. Stat. §§ 53a-48 and 53a-59(a)(5), one count of hindering prosecution in the second degree in violation of Conn. Gen. Stat. § 53a-166 and one count of criminal possession of a firearm in violation of Conn. Gen. Stat. § 53a-217(a)(1). *See id* at 5-9.

On May 15, 2008, a jury found the petitioner not guilty of accessory to murder and conspiracy to commit murder, but guilty of accessory to intentional manslaughter, conspiracy to commit assault, hindering prosecution and possession of a firearm. *See State v. Gonzalez*, 300 Conn. 490, 495, 15 A.3d 1049, 1052 (2011). On August 1, 2008, a judge imposed a total effective sentence of thirty-eight years of imprisonment followed by ten years of special parole. *See id.* at 514-15, 930 A.2d at 759.

On appeal, the petitioner raised one claim. He argued that the trial judge

omitted an essential element of the charge of manslaughter as an accessory in his instructions to the jury. Specifically, the judge failed to instruct the jury as to the element of the general intent of the accessory that a firearm be used in the commission of the offense of manslaughter. *See id.* at 492, 15 A.3d at 1050. On April 5, 2011, the Connecticut Supreme Court affirmed the judgement of conviction. *See id.* at 510, 15 A.3d at 1062.

III. Discussion

The petitioner includes only one ground in the present petition. He claims that "[t]he State of Connecticut's statutory scheme of manslaughter in the 1st Degree with a Firearm violates the Due Process Clause of the 5th and 14th Amend. To U.S. Const." Pet. Writ Habeas Corpus at 28. In the facts supporting this ground, the petitioner contends that Conn. Gen. Stat. § 53a-55a "is violative of the United States Constitution in that it does not require the state to prove an essential element of the substantial crime charged: the intent to use a firearm." *Id.* The respondents move to dismiss the petition on the ground that the petitioner has not exhausted his state court remedies as to the sole ground in the petition. The respondents argue that the petitioner did not fairly present the federal constitutional challenge raised in ground one of the present petition in his direct appeal to the Connecticut Supreme Court. Thus, the claim has not been exhausted.

In the petitioner's direct appeal of his conviction to the Connecticut Supreme Court, the petitioner challenged his conviction on the ground that the

trial judge's jury instructions were deficient in that judge had failed to include an essential element of the offense of manslaughter in the first degree with a firearm as an accessory. *See* Pet. Writ Habeas Corpus at 13, 33-46. The petitioner described the essential element as the general intent that a firearm be used in the commission of the offense.

In determining whether the trial judge had correctly instructed the jury as to the manslaughter charge, the Connecticut Supreme Court reviewed the Connecticut Appellate Court's statutory interpretation of the elements of the crime of manslaughter in the first degree with a firearm as an accessory in violation of Conn. Gen. Stat. §§ 53a-55a and 53a-8 in *State v. Miller*, 95 Conn. App. 362, 896 A.2d 844 (2006), cert. denied, . In *Miller*, the Connecticut Appellate Court examined past Connecticut precedent and concluded that "there is a dual intent required for commission of the crime of manslaughter in the first degree with a firearm as an accessory, namely, that the defendant intended to inflict serious physical injury and that he intended to aid the principal in doing so." *Id.* at 377, 896 A.2d at 855. Furthermore, neither the principal nor the accessory is required to prove that the principal "intended the use, carrying or threatened use of [a] firearm" because proof of that element is satisfied if the principal in fact used a firearm in committing the offense of manslaughter in the first degree. *Id.*

The Connecticut Supreme Court concluded that the Connecticut Appellate Court had correctly decided *Miller* and that the state must prove the following elements to establish accessory liability under Conn. Gen. Stat. § 53a-8 for

manslaughter in the first degree with a firearm in violation of Conn. Gen. Stat. § 53a-55a: (1) the defendant acting with intent to cause serious physical injury to another person; (2) intentionally aided a principal offender in causing the death of such person or of a third person; and (3) that the principal, in committing the act, used, carried or threatened to use a firearm. Because the jury instructions on the manslaughter count given by the judge at the end of the petitioner's trial conformed to the decision by the Appellate Court in *Miller* and were "a proper statement of the essential elements of manslaughter in the first degree with a firearm as an accessory," the Connecticut Supreme Court held that the trial judge had correctly instructed the jury on the manslaughter count. *Gonzalez*, 300 Conn. at 495, 15 A.3d at 1052.

Although petitioner's counsel on direct appeal made reference to the Due Process Clause of the Fourteenth Amendment in his brief, that reference was made in the context of his challenge to the court's jury instruction. *See* Pet. Writ Habeas Corpus at 454. In the petition before this court, the challenge is to the manslaughter statute itself. The petitioner claims that the statutory scheme violates the Due Process Clause of the Fifth and Fourteenth Amendment because it does not require the State to prove every element of the offense. In the petitioner's brief in support of this claim, it is evident that the petitioner is attempting to raise a claim that the statute governing manslaughter in the first degree with a firearm is unconstitutional under the Supreme Court's decision in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and not that the charge given by the

Connecticut Superior Court was deficient.[1] (*See* Mem. Support Pet. Writ Habeas Corpus, Doc. No. 1-2.) This claim was not raised on appeal to the Connecticut Supreme Court. Nor did the petitioner's brief in support of his appeal put the Connecticut Supreme Court on notice of this claim. Thus, the claim presenter to this court has not been fairly presented to the highest state court and is not exhausted.

The Second Circuit has held that if a petitioner fails to exhaust a claim on direct appeal and "it is clear that the unexhausted claim is [now] procedurally barred by state law," then the district court "theoretically has the power to deem the claim exhausted." *Aparicio v. Artuz*, 269 F.3d 78, 90 (2d Cir. 2001). The respondents argue that although the petitioner has not exhausted his federal constitutional by raising it on direct appeal, he is not procedurally barred from raising this claim in state court. The petitioner is required to use all available means to secure appellate review of his claims. *See Galdamez*, 394 F.3d at 73-74.

The respondents contend that the petitioner could file a state habeas petition arguing that appellate counsel was ineffective for failing to raise the

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[1] **In *Mullaney*, the Supreme Court declared Maine's homicide statutes unconstitutional. The statutes provided that a person accused of murder could rebut the statutory presumption that he committed the offense with "malice aforethought" by proving "by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce the murder to manslaughter." *Id.* at 703. The Court held that this scheme improperly shifted the burden of persuasion from the prosecutor to the defendant and was therefore a violation of the requirement of due process that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged as defined in *In re Winship*, 397 U.S. 358, 364 (1970). *Id.* at 703-04.**

federal claim on direct appeal. *See Small v. Commissioner of Correction*, 286 conn. 707, 721-24, 946 A.2d 1203, 1213-15, *cert. denied sub nom., Small v. Lantz*, 555 U.S. 975 (2008). In deciding the claim of ineffective assistance of appellate counsel, the state habeas judge would necessarily address the underlying federal constitutional claim relating to the constitutionality of the manslaughter statute. Thus, the petitioner has an available state remedy with regard to the claim in ground one of the petition. Accordingly, the petitioner's claim is not procedurally barred and will not be deemed exhausted. The motion to dismiss is granted on the ground that the claim in the first ground is unexhausted.

IV. Conclusion

The Motion to Dismiss on the ground that sole ground for relief has not been exhausted [doc. # 7] is GRANTED. The Petition for Writ of Habeas Corpus [doc. # 1] is DISMISSED without prejudice for failure to exhaust state court remedies.[2]

The court concludes that jurists of reason would not find it debatable that petitioner failed to exhaust his state court remedies. Thus, a certificate of appealability will not issue. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (holding that, when the district court denies a habeas petition on procedural

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[2] **As this is not a mixed petition containing unexhausted and exhausted claims, a stay of this action pursuant to *Zarvela v. Artuz*, 254 F.3d 374, 380-83 (2d Cir. 2001) would be inappropriate. *See id.* (When a petition contains both exhausted and unexhausted claims, the Court of Appeals for the Second Circuit recommends that the district court stay the exhausted claims and dismiss the unexhausted claims with a direction to the petitioner to timely complete the exhaustion process and return to federal court).**

grounds, a certificate of appealability should issue if jurists of reason would find debatable the correctness of the district court's ruling). The Clerk is directed to enter judgment and close this case.

SO ORDERED this 20th day of July 2012, at Hartford, Connecticut.

/s/
VANESSA L. BRYANT
UNITED STATES DISTRICT JUDGE

APPENDIX E

State v. Gonzalez

Supreme Court of Connecticut

January 7, 2011, Argued; April 5, 2011, Officially Released

SC 18687

Reporter
300 Conn. 490 *; 15 A.3d 1049 **; 2011 Conn. LEXIS 104 ***

STATE OF CONNECTICUT v. ALFREDO GONZALEZ

Subsequent History: Writ of habeas corpus denied *Gonzalez v. Warden, 2013 Conn. Super. LEXIS 3035 (Conn. Super. Ct., Nov. 6, 2013)*

Writ of habeas corpus denied *Gonzalez v. Comm'r of Corr., 2021 Conn. App. LEXIS 213 (Conn. App. Ct., June 1, 2021)*

Prior History: **[***1]** Substitute information charging the defendant with the crimes of murder as an accessory, conspiracy to commit murder, manslaughter in the first degree with a firearm as an accessory, conspiracy to commit assault in the first degree, hindering prosecution in the second degree and criminal possession of a firearm, brought to the Superior Court in the judicial district of Waterbury and tried to a jury before Miano, J.; verdict and judgment of guilty of manslaughter in the first degree with a firearm as an accessory, conspiracy to commit assault in the first degree, hindering prosecution in the second degree and criminal possession of a firearm, from which the defendant appealed.

Anthony Furs v. Superior Court, 298 Conn. 404, 3 A.3d 912, 2010 Conn. LEXIS 306 (Sept. 21, 2010)

Disposition: Affirmed.

Core Terms

accessory, firearm, first degree, manslaughter, use of a firearm, trial court, mental state, armed, gun, commission of the offense, serious physical injury, affirmative defense, essential element, aggravating circumstances, possesses, quotation, revolver, sentence, robbery, commit, murder, pistol, weapon, marks

Case Summary

Procedural Posture

Defendant was convicted in the Superior Court in the judicial district of Waterbury (Connecticut) of manslaughter in the first degree with a firearm as an accessory, conspiracy to commit assault in the first degree, hindering prosecution in the second degree, and criminal possession of a firearm. He appealed.

Overview

Defendant said it was error to instruct the jury he could be convicted of manslaughter in the first degree with a firearm as an accessory, under *Conn. Gen. Stat. § 53a-8* and *53a-55a*, without finding he intended a principal would use a gun while committing the crime. The supreme court held the instruction was proper because,

(1) to show accessorial liability under *Conn. Gen. Stat. § 53a-8* for manslaughter in the first degree with a firearm, under *Conn. Gen. Stat. § 53a-55a*, the State had to prove he, with intent to seriously injure another, intentionally helped the principal cause another's death, and that the principal, in committing the act, used a firearm, as a firearm's use was an aggravating circumstance that did not require proof of a particular mental state, so it only had to be proved that the principal acted with a general intent to perform a proscribed act, (2) defendant's claim was inconsistent with the affirmative defense in *Conn. Gen. Stat. § 53a-16b* on not being armed or having reason to think another participant in the crime was armed, as it would render this defense surplusage, and (3) proof of the intent element was satisfied if the principal used a firearm.

Outcome

Defendant's convictions were affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Accessories > Aiding & Abetting

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

HN1[] **Accessories, Aiding & Abetting**

See *Conn. Gen. Stat. § 53a-8(a)*.

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Voluntary Manslaughter > Elements

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Voluntary Manslaughter > Penalties

HN2[] **Voluntary Manslaughter, Elements**

See *Conn. Gen. Stat. § 53a-55a*.

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Voluntary Manslaughter > Elements

Criminal Law & Procedure > ... > Use of Weapons > Commission of Another Crime > Elements

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

HN3[] **Accessories, Aiding & Abetting**

To establish accessorial liability under *Conn. Gen. Stat. § 53a-8* for manslaughter in the first degree with a firearm in violation of *Conn. Gen. Stat. § 53a-55a*, the State must prove that the defendant, acting with the intent to cause serious physical injury to another person, intentionally aided a principal offender in causing the death of such person or of a third person, and that the principal, in committing the act, used, carried or threatened to use a firearm.

Criminal Law & Procedure > Defenses > Ignorance & Mistake of Fact

HN4[] **Defenses, Ignorance & Mistake of Fact**

See *Conn. Gen. Stat. § 53a-16b*.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Elements of Offense

HN5[] **Particular Instructions, Elements of Offense**

Jury instructions are reviewed to determine whether, read in their entirety, they omitted an essential element of a crime charged, thus creating a reasonable possibility that the jury was misled in reaching its verdict.

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Knowledge

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

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Willfulness

HN6[] **Accessories, Aiding & Abetting**

A criminal conviction under *Conn. Gen. Stat. § 53a-8* requires the State to prove the defendant's dual intent: first, that an accessory have the intent to aid a principal and, second, that in so aiding he intend to commit the offense with which he is charged. Additionally, one must knowingly and wilfully assist the perpetrator in the acts which prepare for, facilitate or consummate it. Under *Conn. Gen. Stat. § 53a-8*, accessorial liability is not a distinct crime, but only an alternative means by which a substantive crime may be committed.

Criminal Law & Procedure > ... > Use of Weapons > Commission of Another Crime > Elements

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Voluntary Manslaughter > Elements

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

HN7[] **Commission of Another Crime, Elements**

The statutory language of *Conn. Gen. Stat. § 53a-55a*, on manslaughter in the first degree with a firearm, does not attach a particular mental state to the element requiring that, in the commission of such offense, the perpetrator uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses, a pistol, revolver, shotgun, machine gun, rifle or other firearm. Lacking a specifically enumerated mental state, the statutory language of *Conn. Gen. Stat. § 53a-55a* clearly indicates, then, that the firearm element is one of general intent, requiring only that the perpetrator act volitionally in some way to use, possess or threaten to use a firearm in the commission of the offense. Put differently, *Conn. Gen. Stat. § 53a-55a*, like any other crime of affirmative action, requires something in the way of a mental element—at least an intention to make the bodily movement which constitutes the act which the crime requires. Such an intent, to perform certain acts proscribed by a statute, is referred to as the general intent ordinarily required for crimes of commission rather than omission.

Criminal Law & Procedure > ... > Use of Weapons > Commission of Another Crime > Elements

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Voluntary

Manslaughter > Elements

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

HN8[] **Commission of Another Crime, Elements**

In a prosecution for manslaughter in the first degree with a firearm under Conn. Gen. Stat. § 53a-55a, the State must prove only that the perpetrator acted volitionally to use, possess or threaten to use a firearm in the commission of the offense, with no obligation to prove any mental state beyond that required by the underlying manslaughter statute.

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Voluntary Manslaughter > Elements

HN9[] **Voluntary Manslaughter, Elements**

See Conn. Gen. Stat. § 53a-55(a).

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Elements of Offense

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

HN10[] **Particular Instructions, Elements of Offense**

A trial court is not required to instruct a jury about the principle that a criminal act must be volitional or that a defendant must have the general intent to do a criminal act, unless there is evidence at trial that suggests that the defendant's conduct was involuntary.

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN11[] **Accessories, Aiding & Abetting**

To establish the guilt of an accused as an accessory for aiding and abetting the criminal act of another, the State must prove criminality of intent and community of unlawful purpose, and the mental state of an aider and abettor incorporated in Conn. Gen. Stat. § 53a-8 does not require that the accused know of or endorse every act of his coparticipant in crime.

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

HN12[] **Accessories, Aiding & Abetting**

The accessory statute's requirement that a defendant act with the mental state required for commission of an offense drops out of the calculation when an aggravating circumstance does not require proof of any particular mental state.

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > Accessories > General Overview

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

HN13[] **Accessories, Aiding & Abetting**

Accessorial liability is predicated upon the actor's state

of mind at the time of his actions, and whether that state of mind is commensurate to the state of mind required for the commission of the offense. Accessorial liability is not a distinct crime, but only an alternative means by which a substantive crime may be committed, so a person may be held liable as an accessory if he has the requisite culpable mental state for the commission of the substantive offense.

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

Criminal Law & Procedure > Accessories > General Overview

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

HN14[] **Mens Rea, General Intent**

Connecticut case law permits the imposition of accessorial liability pursuant to *Conn. Gen. Stat. § 53a-8* without requiring that a defendant intend to satisfy a criminal statute's aggravating circumstance in cases wherein that aggravating circumstance does not have a specific mental state and requires only that the principal act with the general intent to perform the proscribed act.

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN15[] **Accessories, Aiding & Abetting**

The accomplice liability statute permits an accessory to be prosecuted and punished as if he were the principal offender.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Elements of Offense

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

HN16[] **Particular Instructions, Elements of Offense**

An acknowledgement of the fundamental principle that a criminal act must be volitional does not mean that a charge to a jury that omits reference to this principle is constitutionally defective where the evidence at trial contains no suggestion that the defendant's conduct was involuntary.

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Voluntary Manslaughter > Elements

Criminal Law & Procedure > Accessories > General Overview

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

HN17[] **Voluntary Manslaughter, Elements**

There is a dual intent required for commission of the crime of manslaughter in the first degree with a firearm as an accessory, namely, that the defendant intended to inflict serious physical injury and that he intended to aid the principal in doing so. When a defendant is charged with a violation of *Conn. Gen. Stat. § 53a-55a* as an accessory, the State need not prove that the defendant intended the use, carrying or threatened use of the firearm. Proof of the intent element is satisfied if the principal in fact used the firearm.

Counsel: Raymond L. Durelli, special public defender, for the appellant (defendant).

Bruce R. Lockwood, senior assistant state's attorney, with whom, on the brief, were John A. Connelly, state's attorney, and Terence D. Mariani and Cynthia S. Serafini, senior assistant state's attorneys, for the appellee (state).

Judges: Rogers, C. J., and Norcott, Palmer, McLachlan, Eveleigh and Vertefeuille, Js. NORCOTT, J. In this opinion the other justices concurred.

Opinion by: NORCOTT

Opinion

[1050]** **[*491]** NORCOTT, J. The sole issue in this appeal is whether the Appellate **[***2]** Court's decision in *State v. Miller, 95 Conn. App. 362, 896 A.2d 844*, cert. denied, *279 Conn. 907, 901 A.2d 1228 (2006)*, sets forth a correct statement of the essential elements of the offense of manslaughter in the first degree with a firearm as an accessory in violation of *General Statutes §§ 53a-8* [1] and *53a-55a*. [2] The **[*492]** defendant, Alfredo Gonzalez, appeals [3] from the judgment of the trial court, rendered after a jury trial, convicting him of, inter alia, manslaughter in the first degree with a firearm as an accessory in violation of *§§ 53a-8* and *53a-55a*. On appeal, the defendant claims that the trial court's jury instructions improperly omitted an essential element of the offense of manslaughter in the first degree with a firearm as an accessory, namely, the defendant's intention that the principal would use, carry or threaten the use of a firearm during the commission of the offense. We **[**1051]** conclude that the trial court's jury instructions, which conformed to the Appellate Court's decision in *Miller*, were a proper statement of the essential elements of manslaughter in the first degree with a firearm as an accessory. Accordingly, we affirm the judgment of the trial court.

The record reveals the following relevant facts, which the jury reasonably could have found, and procedural history. The defendant had engaged in an ongoing feud with the victim, Samuel Tirado. [4] On the evening of May

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[1] *General Statutes § 53a-8* **[***3]** provides in relevant part: *HN1*[] "(a) A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender. . . ."

[2] *General Statutes § 53a-55a* provides: *HN2*[] "(a) A person is guilty of manslaughter in the first degree with a firearm when he commits manslaughter in the first degree as provided in *section 53a-55*, and in the commission of such offense he uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a pistol, revolver, shotgun, machine gun, rifle or other firearm. No person shall be found guilty of manslaughter in the first degree and manslaughter in the first degree with a firearm upon the same transaction but such person may be charged and prosecuted for both such offenses upon the same information.

"(b) Manslaughter in the first degree with a firearm is a class B felony and any person found guilty under this section shall be sentenced to a term of imprisonment in accordance **[***4]** with subdivision (5) of section 53a-35a of which five years of the sentence imposed may not be suspended or reduced by the court."

[3] The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to *General Statutes § 51-199 (c)* and ***Practice Book § 65-1***.

[4] The victim was the best friend of Michael Borelli, who was convicted of manslaughter charges after he fatally stabbed

5, 2006, the defendant and three friends, Anthony Furs, Christian Rodriguez and Melvin Laguna, went out for the evening in Rodriguez' red GMC Yukon. They stopped briefly at one bar, and then decided to go to **[*493]** a bar named Bobby Allen's in Waterbury because they knew that the victim went there frequently, and they wanted to start a fight with him. En route to Bobby Allen's, the defendant observed that there were two guns in the Yukon, in addition to a razor blade that he intended to use in that fight, and remarked that, if he had the money, he would give it to Furs to "clap," or shoot, the victim. Rodriguez, who also disliked the victim, then offered **[***5]** to pay Furs $1000 to shoot the victim, which Furs accepted.

When they arrived at Bobby Allen's, the defendant left the group briefly to urinate behind a nearby funeral home. When he rejoined the group, Furs gave the defendant the keys to the Yukon and told him to go get the truck because the victim was nearby speaking with Rodriguez. The defendant and Furs then drove a short distance toward Bobby Allen's in the Yukon, and Furs, upon spotting the victim and Rodriguez outside the bar, jumped out of the **[***6]** Yukon and shot the victim in the chest with a black handgun, mortally wounding him. Rodriguez and Laguna then fled the scene on foot, while Furs and the defendant drove off in the Yukon to a friend's nearby apartment on South Main Street. Thereafter, with the assistance of friends, Furs [5] and the defendant fled separately from the apartment, and the **[*494]** defendant subsequently disposed of the gun, first by hiding it in a woodpile at his mother's home, and later by throwing it into Pritchard's Pond (pond) in Waterbury.

Thereafter, Waterbury police officers investigating the shooting questioned the defendant **[**1052]** after arresting him on an outstanding motor vehicle warrant on May 6, 2006. The defendant initially gave a statement denying any involvement in the incident. Subsequently, on May 15, 2006, the Waterbury police reinterviewed the defendant, at which time he admitted disposing of the gun by throwing it into the pond. The defendant then accompanied the officers to the pond and showed them where he had thrown the gun, which enabled a dive team to recover it several days later. [6]

Jose Gonzalez, the defendant's brother, during a melee at a Waterbury gas station. At one of the court hearings in that case, the victim chanted, "free Mike Borelli, fuck Peach," in reference to the defendant, whose nickname is "Peachy." Thereafter, the defendant often stated that he blamed the victim for his brother's death and wanted revenge. The victim further antagonized the defendant one night in April, 2006, at Bobby Allen's, when the victim snubbed the defendant's offer to shake his hand. The defendant then told the victim that he and his friends were "going down."

[5] Prior to trial in this case, Furs pleaded guilty to murder and was sentenced to forty-seven years imprisonment. See *Furs v. Superior Court, 298 Conn. 404, 407, 3 A.3d 912 (2010)*. As is detailed in the record of the trial in the present case, as well as our opinion in Furs, although the state subpoenaed Furs to testify at the defendant's trial, he refused to testify on the ground that to do so would violate his privilege against self-incrimination given a pending habeas corpus proceeding in his case, notwithstanding the state's offer of use immunity. *Id., 407-409*. The trial court held Furs in summary criminal contempt and sentenced him to six months imprisonment consecutive **[***7]** to his murder sentence as a consequence of his failure to testify, concluding that the prosecutor's offer of use immunity was sufficient to protect Furs' fifth amendment rights. *Id., 409-10*. We subsequently granted Furs' writ of error from that contempt finding, concluding that he was entitled to full transactional immunity under *General Statutes § 54-47a*. *Id., 406, 411-12*.

[6] Investigators subsequently determined **[***8]** that this gun had fired the bullet that was recovered from the victim's chest and had ejected a shell casing that was found at the scene.

After they returned to the police station, the defendant gave the police a second statement admitting that he had lied in his initial statement and explaining his role in the events leading to and following the shooting.

The state charged the defendant in a six count substitute information with murder as an accessory in violation of *§ 53a-8* and *General Statutes § 53a-54a (a)*, manslaughter in the first degree with a firearm as an accessory in violation of *§§ 53a-8* and *53a-55a*, conspiracy to commit assault in the first degree in violation of *General Statutes §§ 53a-48* and *53a-59 (a) (5)*, hindering prosecution in the second degree in violation of *General Statutes § 53a-166*, and criminal possession of a firearm in violation of *General Statutes § 53a-217 (a) (1)*. The defendant elected a jury trial. [7] After evidence, the trial **[*495]** court denied the defendant's motion for acquittal. The jury returned a verdict finding him not guilty of accessory to murder and conspiracy to commit murder, but guilty on all other counts. The trial court rendered a judgment of conviction in accordance with the jury's verdict and sentenced the defendant to a total effective sentence of thirty-eight years imprisonment, with ten years of special parole. This appeal followed.

On appeal, the defendant claims that the trial court improperly instructed the jury regarding the elements of the offense of manslaughter in the first degree with a firearm as an accessory. Specifically, the defendant claims that accessorial liability under *§ 53a-8* encompasses both the specific intent to cause a result, in this case, to cause the victim "serious physical injury," as well as the general intent to perform the physical acts that constitute the offense of manslaughter in the first degree with a firearm, including the use, carrying or threatened use of a firearm. The defendant contends that accessorial liability cannot attach unless both the accessory and the principal commit each and every element of the offense, and that relieving the state of the burden of proving that **[***10]** the accessory intended the use of a firearm blurs the distinction between liability as a coconspirator under the *Pinkerton* theory of vicarious liability, [8] and accessorial liability under *§ 53a-8*. Thus, the defendant argues that we should overrule *State v. Miller, supra, 95 Conn. App. 362*, which concluded that the state need not prove that the defendant intended the principal's use, carrying or threatened use of a firearm as an essential element of accessorial **[**1053]** liability for manslaughter in the first degree with a firearm.

In response, the state contends that the firearm requirement of *§ 53a-55a* is an "aggravating circumstance" **[*496]** that does not require proof of any particular mental state for either the principal or the accessory. The state notes that the harshness of the strict liability aspect of this aggravating circumstance is mitigated by *General Statutes § 53a-16b*, [9] which is an

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[7] Prior to trial in this **[***9]** case, the defendant moved to suppress both statements on the ground that they had been obtained in violation of his rights under *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*. After an evidentiary hearing, the trial court denied the defendant's motion to suppress. We note that the defendant does not challenge the trial court's ruling on the motion to suppress in this appeal.

[8] See *United States v. Pinkerton, 328 U.S. 640, 647-48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946)*; see also *State v. Walton, 227 Conn. 32, 45-46, 630 A.2d 990 (1993)* (seminal case adopting Pinkerton doctrine as matter of state law).

[9] *General Statutes § 53a-16b* provides: *HN4*[↑] "In any prosecution for an offense under *section 53a-55a*, *53a-56a*, *53a-60a*, *53a-92a*, *53a-94a*, *53a-102a* or *53a-103a* in which the defendant was not the only participant, it shall be an affirmative defense **[***12]** that the defendant: (1) Was not armed with a pistol, revolver, machine gun, shotgun, rifle or

affirmative defense, whereby the defendant may prove that he was not armed with **[***11]** a firearm and had no reasonable ground to believe that any other participant in the crime was so armed. The state further emphasizes that this affirmative defense does not relieve it from first having to prove all of the elements of the offense, which also means that the distinction between accessorial and coconspirator liability remains intact. Accordingly, the state contends that *State v. Miller, supra, 95 Conn. App. 362*, was properly decided and remains controlling precedent. [10] We agree with the state and conclude that, *HN3*[↑] to establish accessorial liability under *§ 53a-8* for manslaughter in the first degree with a firearm in violation of *§ 53a-55a*, the state must prove that the defendant, acting with the intent to cause serious physical injury to another person, intentionally aided a principal offender in causing the death of such person or of a third person, and that the principal, in committing the act, used, carried or threatened to use a firearm.

The record reveals the following additional relevant facts and procedural history. After explaining the principles of accessorial liability generally in the context of **[*497]** the murder charge, the trial court instructed the jury in relevant part that, "[u]nder the accessorial theory of liability, as I've defined it, in order for the state to prove the offense of accessory to manslaughter in the first degree with a firearm, the following elements each must be proved beyond a reasonable doubt: Number one, that the defendant . . . had the specific intent to cause serious physical injury to [the victim]. Two: That the defendant solicits, requests **[***13]** or intentionally aids the principal, the shooter, who causes the death of such person, [the victim]. And three: In the commission of such offense the principal, the shooter, uses a firearm." After explaining each of the three elements individually, including that the jury had to find that the defendant "had the specific intent to cause serious physical injury to [the victim]," and that "the state must prove beyond a reasonable doubt . . . that the defendant did solicit, request or intentionally aid another person, the principal, to engage in conduct which constitutes [the] crime of manslaughter in the first degree," the trial court noted that the "third element is that the state must prove beyond a reasonable doubt that in the commission of this offense the principal, [Furs], uses a firearm," defined as "any pistol, revolver or other weapon, whether loaded or unloaded, from which a shot may be discharged. You **[**1054]** must find that the firearm was operable at the time of the offense." [11]

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other firearm, and (2) had no reasonable ground to believe that any other participant was armed with such a weapon."

[10] The state also contends that any impropriety in the jury instructions was harmless error under the facts of this case because there was "overwhelming evidence" that the defendant intended a firearm be used in the attack on the victim. As a result of our conclusion on the statutory issue, we need not address the parties' harmless error claims.

[11] The trial court's complete instructions for the charge of manslaughter in the first degree with a firearm as an accessory provides as follows: "Count three is now also an accessory. The charge is accessory **[***14]** to manslaughter in the first degree. Although in this count we are again dealing with the claim of the defendant's liability relevant to accessorial liability, I am first going to define for you the substantive crime of manslaughter in the first degree with a firearm.

"In order to find a defendant guilty of the substantive crime, not accessory, of the substantive crime of manslaughter in the first degree with a firearm, the state must prove the following elements beyond a reasonable doubt: That the defendant, one, with intent to cause serious physical injury to another person, did cause the death of such person, and in the commission—two, did cause the death of such person, and three, in the commission of such offense he uses a firearm. That's the substantive elements of the crime of manslaughter in the first degree with a firearm.

"As I have indicated, the defendant here in this third count is charged with accessory. Please refer to the definition—to the instruction on accessory that I gave you under count one, it applies here equally.

"Under the accessorial theory of liability, as I've defined it, in order for the state to prove the offense of accessory to manslaughter in the first [***15] degree with a firearm, the following elements each must be proved beyond a reasonable doubt: Number one, that the defendant . . . had the specific intent to cause serious physical injury to [the victim]. Two: That the defendant solicits, requests or intentionally aids the principal, the shooter, who causes the death of such person, [the victim]. And three: In the commission of such offense the principal, the shooter, uses a firearm.

"For you to find the defendant guilty of this charge under accessorial liability the state must prove the following elements beyond a reasonable doubt: First, the state must prove beyond a reasonable doubt that the defendant had the specific intent to cause serious physical injury to [the victim]. The term 'serious physical injury' means a physical injury that creates a substantial risk of death or that causes serious disfigurement, serious impairment of health or serious loss [or] impairment of the function of any bodily organ.

"You will note that the basis of the charge under this statute is not that the defendant had the intent to cause the death or kill [the victim], but that he intended to inflict serious physical injury.

"You are instructed to use the [***16] definition of intent and specific intent the court provided earlier in these instructions.

"The second element that the state must prove beyond a reasonable doubt is that the defendant did solicit, request or intentionally aid another person, the principal, to engage in conduct which constitutes [the] crime of manslaughter in the first degree as I've defined that.

"The third element is that the state must prove beyond a reasonable doubt that in the commission of this offense the principal, [Furs], uses a firearm.

"The term 'firearm' includes any pistol, revolver or other weapon, whether loaded or unloaded, from which a shot may be discharged. You must find that the firearm was operable at the time of the offense.

"In summary, the essential elements of the crime of accessory to manslaughter in the first degree with a firearm, each must be proven by the state beyond a reasonable doubt are, one, that the defendant had the specific intent to cause serious physical injury to another person, namely [the victim], that the defendant did solicit, request or intentionally aid the principal to engage in the conduct that constituted the elements of the offense, and three, that in the commission of [***17] this offense the principal did use a firearm.

"If you find that the state has proven beyond a reasonable doubt each of the elements of the crime of accessory to manslaughter in the first degree with a firearm, then you should find the defendant guilty. On the other hand, if you find that the state has failed to prove beyond a reasonable doubt any one of the elements, you shall then find him not guilty."

[*498] The defendant subsequently took an exception to this portion of the charge, seeking reinstruction on this point. The trial court denied that request, rejecting the defendant's argument that "the accessory must have [*499] the intention that a firearm be used, not only the principal have the intent to use a firearm and use a firearm, but that the accessory must have the intention." That court agreed with the [**1055] state's position that the firearm element was an "aggravant" and that the only mental state that the state was required to prove under §§ 53a-8 and 53a-55a was "intent to cause serious physical injury."

We begin by noting that the defendant, by taking an exception, properly preserved this issue for appellate review. See, e.g., State v. Osimanti, 299 Conn. 1, 26, 6 A.3d 790 (2010). Additionally, [***18] HN5[↑] we review jury instructions to determine whether, read in their entirety, they omitted an essential element of the crime charged, thus creating a "reasonable possibility that the jury was misled in reaching its verdict." (Internal quotation marks omitted.) State v. Griggs, 288 Conn.

116, 125, 951 A.2d 531 (2008). Finally, the defendant's claim, which requires us to determine whether a particular mental state is an essential element of manslaughter in the first degree with a firearm as an accessory, raises a question of statutory interpretation, over which we exercise plenary review in applying General Statutes § 1-2z. See, e.g., State v. Fernando A., 294 Conn. 1, 13-14, 981 A.2d 427 (2009).

"The statutory provision governing accessorial liability is . . . § 53a-8 (a), which provides: A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender. This court previously has stated that HN6[] a conviction under § 53a-8 requires [the [***19] state to prove the defendant's] dual intent . . . [first] that the accessory have the intent to aid the principal and [second] that in so aiding he intend to [*500] commit the offense with which he is charged. . . . Additionally, one must knowingly and wilfully assist the perpetrator in the acts which prepare for, facilitate or consummate it." (Citation omitted; internal quotation marks omitted.) State v. Heinemann, 282 Conn. 281, 313, 920 A.2d 278 (2007). Under § 53a-8, "accessorial liability is not a distinct crime, but only an alternative means by which a substantive crime may be committed . . . ." (Internal quotation marks omitted.) State v. Peeler, 271 Conn. 338, 439, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005).

We now turn to State v. Miller, supra, 95 Conn. App. 362, the otherwise controlling decision that the defendant asks us to overrule. In *Miller*, the defendant had claimed that the evidence was insufficient to prove that he had violated § 53a-55a under a theory of accessorial liability because "the evidence was insufficient to establish that he intended the use of a firearm." Id., 371. Relying primarily on our decisions in State v. Avila, 223 Conn. 595, 613 A.2d 731 (1992), [***20] State v. Crosswell, 223 Conn. 243, 612 A.2d 1174 (1992), and State v. McCalpine, 190 Conn. 822, 463 A.2d 545 (1983), the Appellate Court rejected the defendant's claim that the state was required to prove that he had intended the use of a firearm in the commission of the crime, concluding that the use of a firearm was an "aggravating circumstance [that] does not require proof of any particular mental state." State v. Miller, supra, 375. Articulating the elements of § 53a-55a as an accessory, the court further concluded that, "there is a dual intent required for commission of the crime of manslaughter in the first degree with a firearm as an accessory, namely, that the defendant intended to inflict serious physical injury and that he intended to aid the principal in doing so." Id., 377. The court then provided an explanation with respect to the intent element of manslaughter in the first degree [*501] with a firearm: "When a defendant is charged with a violation of § 53a-55a (a) [**1056] on the ground that 'he uses, or is armed with and threatens the use of or displays or [*502] represents by his words or conduct that he possesses a pistol, revolver, shotgun, machine gun, rifle or other firearm' . . . the [***21] state need not prove that the defendant intended the use, carrying or threatened use of the firearm." (Citation omitted.) Id.

To determine the correctness of *Miller*, we start with a review of the elements of the underlying substantive crime, namely, manslaughter in the first degree with a firearm in violation of § 53a-55a, which provides in relevant part: "(a) A person is guilty of manslaughter in the first degree with a firearm when he commits manslaughter in the first degree as provided in section 53a-55, [12] and in the commission of such offense he

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[12] General Statutes § 53a-55 provides in relevant part: HN9[] "(a) A person is guilty of manslaughter in the first

uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a pistol, revolver, shotgun, machine gun, rifle or other firearm. . . ." See also footnote 2 of this opinion. *HN7*[↑] The statutory language of *§ 53a-55a* does not attach a particular mental state to the element requiring that, "in the commission of such offense [the perpetrator] uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a pistol, revolver, shotgun, machine gun, rifle or other firearm." Lacking a specifically enumerated mental state, the statutory language of **[***22]** *§ 53a-55a* clearly indicates, then, that the firearm element is one of general intent, requiring only that the perpetrator act volitionally in some way to use, possess or threaten to use a firearm in the commission of the offense. [13] Put differently, *§ 53a-55a*, like any other crime of "affirmative action . . . require[s] something in the way of a mental element—at least an intention to make the bodily movement which constitutes the act which the crime requires. . . . Such an intent, to perform certain acts proscribed by a statute, we have referred to as the general intent ordinarily required for crimes of commission rather than omission." [14] (Citations omitted; internal quotation marks omitted.) **[**1057]** *State v. Pierson, 201 Conn. 211, 216, 514 A.2d 724 (1986)*, on appeal after remand, **[*503]** *208 Conn. 683, 546 A.2d 268 (1988)*, cert. denied, *489 U.S. 1016, 109 S. Ct. 1131, 103 L. Ed. 2d 193 (1989)*. Thus, *HN8*[↑] in a prosecution for manslaughter in the first degree with a firearm under *§ 53a-55a*, the state must prove only that the perpetrator

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degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or (2) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he committed the proscribed act or acts under the influence of extreme emotional disturbance, as provided in *subsection (a) of section 53a-54a*, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection; or (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person. . . ."

[13] We therefore disagree with the state's characterization of the firearm element as one of strict liability. See, e.g., **[***24]** *State v. Sorabella, 277 Conn. 155, 170-71, 891 A.2d 897* ("[T]he offense of sexual assault in the second degree is not a strict liability crime; rather, it is a general intent crime. . . . The fact that the state is not required to establish that the accused knew that his victim was under sixteen years of age does not transform the offense into a strict liability offense because the state still must establish that the accused had the general intent to have sexual intercourse with the victim." [Citations omitted.]), cert. denied, ***549 U.S. 821, 127 S. Ct. 131, 166 L. Ed. 2d 36 (2006)***.

[14] "That the [perpetrator] intend[s] to perform the physical acts that constitute the crime . . . in the manner proved by the evidence [is] implicitly a part of the state's burden of proof and, in that sense, an element of the crime." *State v. Pierson, 201 Conn. 211, 216-17, 514 A.2d 724 (1986)*, on appeal after remand, *208 Conn. 683, 546 A.2d 268 (1988)*, cert. denied, ***489 U.S. 1016, 109 S. Ct. 1131, 103 L. Ed. 2d 193 (1989)***; see also, e.g., *State v. Washington, 15 Conn. App. 704, 710-11, 546 A.2d 911 (1988)* (assault in first degree in violation of *General Statutes § 53a-59 [a] [1]* requires only intent to cause **[***25]** serious injury, not intent to cause that injury by means of deadly weapon or dangerous instrument). *HN10*[↑] A trial court is not, however, required to instruct a jury about the principle that "a criminal act must be volitional" or that the defendant must have the "general intent to do a criminal act" unless there is evidence at trial that suggests that "the defendant's conduct was involuntary . . . ." *State v. Pierson, supra, 217-18*.

acted volitionally to use, possess or threaten to use a firearm in the commission of the offense, with no obligation to prove any mental state beyond that required by **[***23]** the underlying manslaughter statute.

Ambiguity emerges, however, as we determine the additional elements of accessorial liability under *§ 53a-8* for violations of *§ 53a-55a*. [15] Thus, we turn to the seminal case in this area, *State v. McCalpine, supra, 190 Conn. 831*, wherein this court rejected the defendants' claim that the trial court had improperly failed to instruct the jury that, to hold them liable as accessories **[*504]** to first degree robbery pursuant to *§§ 53a-8* and *General Statutes § 53a-134 (a) (2)*, [16] the defendants "had to possess the requisite intent for robbery, the intent to aid a robbery and **[**1058]** the intent that a deadly weapon be possessed." *Id., 831*. The court noted that, *HN11*[] "[t]o establish the guilt of an accused as an accessory for aiding and abetting the criminal act of another, the state must **[***26]** prove criminality of intent and community of unlawful purpose," and "[t]he mental state of an aider and abettor incorporated in *§ 53a-8* does not require that the accused know of or endorse every act of his coparticipant in crime." *Id., 832*. Thus, the court concluded that there is "no requirement that the accessory possess the intent to commit the specific degree of the robbery charged or the intent to possess a deadly weapon." [17] **[*505]** *Id., 833*. Indeed, *McCalpine*

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[15] We note that the legislative history establishes that, in enacting *§ 53a-55a*, the legislature did not intend to change the underlying crime of first degree manslaughter beyond adding a simple requirement that a firearm be used, carried **[***27]** or threatened in the commission of the offense. The legislature enacted *§ 53a-55a* as part of Public Acts 1975, No. 75-380 (P.A. 75-380), nominally as a "new crime," but essentially as a sentence enhancement. See *State v. Jenkins, 198 Conn. 671, 676, 504 A.2d 1053 (1986)*; see also *id., 678-79* ("Although the legislature might have enacted a penalty-enhancing statute, the language of [*General Statutes] § 53a-92a* unequivocally demonstrates that it did not do so. In . . . *§ 53a-92a (a)*, the statute expressly speaks of kidnapping in the first degree and kidnapping in the first degree with a firearm as separate offenses."). The legislature enacted P.A. 75-380 as a response to a rise in violent crimes against individuals involving deadly weapons; it originally provided for a one year mandatory minimum sentence. See 18 S. Proc., Pt. 5, 1975 Sess., pp. 2293-97, remarks of Senators Stanley H. Page, Howard T. Owens, Jr., and George L. Gunther; 18 H.R. Proc., Pt. 10, 1975 Sess., pp. 4858-59, remarks of Representative Paul C. DeMennato. Speaking in support of the bill, Senator David M. Barry stated that "each one of these new crimes which add the words with a firearm to it has to be tied into the **[***28]** existing criminal statutes that are similar except do not involve a firearm. . . . [W]hat the purpose of this [b]ill is to require a mandatory sentence that may not be suspended or reduced by the [c]ourt." 18 S. Proc., supra, p. 2292; see also id., p. 2294 (noting that it was unnecessary to address violent crimes already subject to mandatory sentences, including assault in first degree or robbery in first or second degree).

[16] *General Statutes § 53a-134 (a)* provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in *section 53a-133* or of immediate flight therefrom, he or another participant in the crime: (1) Causes serious physical injury to any person who is not a participant in the crime; (2) is armed with a deadly weapon; or (3) uses or threatens the use of a dangerous instrument; or (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm, except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was **[***29]** not a weapon from which a shot could be discharged. . . ."

[17] Concurring in the result in *McCalpine*, Justice Shea disagreed with the majority's accessorial liability analysis; he concluded that its determination that "an accomplice need not endorse every act of his coparticipant in crime or possess the intent to commit the specific degree of the robbery charged or

remains good law with respect to the proposition that HN12[↑] the "accessory statute's requirement that the defendant act 'with the mental state required for commission of an offense' drops out of the calculation when the aggravating circumstance does not require proof of any particular mental state." [18] **[*506]** State v. **[**1059]** Crosswell, supra, 223 Conn. 258 n.11; see id.,

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the intent to possess a deadly weapon . . . appears to water down [the] principles" of accessory liability requiring the accessory to "have the intent to aid the principal and that in so aiding he intends to commit the offense with which he is charged." (Internal quotation marks omitted.) State v. McCalpine, supra, 190 Conn. 833-34 (*Shea, J.*, concurring). Justice Shea stated that "[t]he fact that no specific intent is made an element of the crimes for which the defendants were convicted, robbery in the first degree in violation of . . . § 53a-134 (a) (2) and kidnapping in the second degree in violation of General Statutes § 53a-94, does not remove the necessity for proof of a general intent to perform the acts which constitute the offense. . . . Unless it was the 'conscious objective' of each defendant that he or another participant **[***30]** perform all of the acts necessary to constitute the particular crime, he would not be guilty of it. This requirement must extend to those acts which enhance the degree of the crime as well as to those which constitute the basic crime itself. Otherwise an accomplice might be convicted of an offense although he did not entertain the same mental state required by statute for conviction of the principal." (Citations omitted.) Id., 834.

[18] We note, however, that subsequent decisions have limited McCalpine in cases wherein the underlying statutory circumstances require proof of a particular mental state. Specifically, in *Crosswell*, the defendant was convicted as an accessory to burglary in the first degree in violation of General Statutes § 53a-101 (a), the elements of which are that "the state was required to prove that the defendant 'enter[ed] or remain[ed] unlawfully in a building with intent to commit a crime therein and . . . (2) in the course of committing the offense . . . intentionally, knowingly or recklessly inflict[ed] or attempt[ed] to inflict bodily injury on anyone.' " State v. Crosswell, supra, 223 Conn. 257. The defendant claimed, inter alia, "that his conviction for accessory **[***31]** to burglary in the first degree also required proof of at least recklessness on his part with respect to [the principal's] infliction of bodily injury on the occupants of the apartment," and that there was no evidence of his awareness of "any risk, much less a substantial one, that [the gun] would be used to hit [the victim]." (Internal quotation marks omitted.) Id. Noting that the "gist of the defendant's argument is that the charge of being an accessory to burglary in the first degree requires proof of the same mental state as is required to prove a charge of burglary in the first degree"; id., 258; the court criticized the statements in State v. McCalpine, supra, 190 Conn. 832, that § 53a-8 permits "an accomplice to be found guilty even though he did not 'know of or endorse every act of his co-participant[s] in crime' " and that "the accessory was not required to 'possess the intent to commit the specific degree' of the crime charged." State v. Crosswell, supra, 258. The court considered these statements in *McCalpine* to be dicta because "[i]ntent was not an element of the aggravating circumstance provided by the criminal statute at issue in" that case, namely, being armed with a **[***32]** deadly weapon. Id., 258 and n.11. Moreover, the court concluded that the dictum in McCalpine to the effect that "an accessory need not be proved to possess the intent to commit the specific degree of the crime charged"; id., 259; was not supported directly by the cited authority, State v. Parham, 174 Conn. 500, 506-509, 391 A.2d 148 (1978), and, indeed, was inconsistent with the court's subsequent decision in State v. Foster, 202 Conn. 520, 522 A.2d 277 (1987). See State v. Crosswell, supra, 258-60.

In *Crosswell*, the court also observed that, in State v. Foster, supra, 202 Conn. 532-33, "without expressly overruling our statements in *McCalpine* or *Parham*, we held that HN13[↑] accessorial liability is predicated upon the actor's state of mind at the time of his actions, and whether that state of mind is commensurate to the state of mind required for the commission of the offense. . . . Emphasizing that accessorial liability is not a distinct crime, but only an alternative means by which a substantive crime may be committed . . . we concluded that a person may be held liable as an accessory . . . if he has the requisite culpable mental state for the commission of the substantive offense . . . **[***33]** ." (Citations omitted; internal quotation marks omitted.) State v. Crosswell, supra, 223 Conn. 260. The court further posited that, in Foster,

256 (accessory to first degree burglary); see also id., 261 n.14 (noting that this point "has not been questioned in any decision by this court").

HN14[↑] Connecticut case law remains consistent with McCalpine in permitting the imposition of accessorial liability pursuant to § 53a-8, without requiring that the defendant intend to satisfy a criminal statute's aggravating circumstance in cases wherein that [***34] aggravating circumstance does not have a specific mental state and requires only that the principal act with the general intent to perform the proscribed act. [19] Most significant [*507] is State v. Davis, 255 Conn. 782, 787, 772 A.2d 559 (2001), wherein we concluded that an unarmed accomplice may be subjected to the five year [**1060] sentence enhancement pursuant to General Statutes § 53-202k, which applies to "[a]ny person who commits any class A, B or C felony and in the commission of such felony uses, or is armed with and threatens the use of, or displays, or represents by his words or conduct that he possesses any firearm . . . ." We concluded that "[t]he fact that § 53-202k is a sentence enhancement provision rather than a separate and distinct offense . . . is of no consequence to our analysis. HN15[↑] The accomplice liability statute permits an accessory to be 'prosecuted and punished as if he were the principal offender.' . . . Thus, once convicted of armed robbery and armed burglary, even if as an accessory, the defendant is legally indistinguishable from the principal actor. Accordingly, the defendant is subject to the enhancement penalty that the principal also would have received had he been [***35] caught and convicted. For purposes of legal analysis, it is irrelevant that the defendant did not actually possess the gun." (Citations omitted.) State v. Davis, supra, 792; see also State v. Higgins, 265 Conn. 35, 47-48, 826 A.2d 1126 (2003) (under capital felony

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"in effect we agreed with the position taken by Justice Shea, in his concurring opinion in State v. McCalpine, supra, [190 Conn. 833-34]." State v. Crosswell, supra, 261; see also footnote 17 of this opinion. Given the factual posture of Crosswell, as well as the fact that the trial court's instructions in that case did not adopt the suspect language from McCalpine, this court ultimately did not, however, seek to reconcile the ostensibly conflicting language from *McCalpine* and *Foster*. See State v. Crosswell, supra, 223 Conn. 261-62; see also D. Borden & L. Orland, 10 Connecticut Practice Series: Connecticut Criminal Law (2d Ed. 2007) § 53a-8, p. 20 (whether § 53a-8 "requires that the accessory have the mental state to commit the specific degree of the crime charged" remains "unanswered question").

[19] For purposes of distinguishing *McCalpine*, the defendant argues, however, that accessorial liability for a violation of § 53a-55a is distinct from that for a violation of § 53a-134 (a) (2), and thus requires a proof of the accessory's intent that a firearm be used, because the robbery statute specifically [***36] encompasses the circumstance that a participant in the robbery be "armed with a deadly weapon"; General Statutes § 53a-134 (a) (2); while the manslaughter statute requires affirmative action, namely, that the perpetrator "in the commission of such offense . . . uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a pistol, revolver, shotgun, machine gun, rifle or other firearm." General Statutes § 53a-55a (a). We disagree. For purposes of the general intent attendant to the firearm element, this distinction is one without a difference because both statutes require a physical act by the perpetrator— in the case of the robbery statute, arming himself with a deadly weapon— without an attendant mental state. Put differently, as between the armed robbery and manslaughter statutes, the perpetrator or principal's volitional conduct with respect to the possession or use of a firearm or deadly weapon is a difference in degree, rather than kind. See State v. Lester, 123 Ohio St. 3d 396, 401, 2009 Ohio 4225, 916 N.E.2d 1038 (2009) ("[t]he statute's amendment . . . to add language requiring a defendant to brandish or display a deadly weapon in addition [***37] to the strict-liability requirement of possession and control of the deadly weapon does not establish that the General Assembly intended to require a specific mental element").

statute, General Statutes § 53a-54b [8], accessory need not be aware of victim's age while acting with intent requisite for **[*508]** murder); State v. Tucker, 9 Conn. App. 161, 168, 517 A.2d 640 (1986) (accessory to assault in second degree under General Statutes § 53a-60 [a] [2] need intend only to aid in causing physical injury, not that such injury be caused by dangerous instrument or deadly weapon); cf. State v. Peeler, supra, 271 Conn. 437-38 (aggravating factors under General Statutes § 53a-46a [i] arising from manner in which capital felony was committed by principal may be imputed to defendant as accomplice pursuant to § 53a-8).

Moreover, as the state aptly observes, the defendant's claim is inconsistent with the affirmative defense provided by § 53a-16b, which provides in relevant part that "[i]n any prosecution for an offense under section 53a-55a . . . in which the defendant was not the only participant, it shall be an affirmative defense that the defendant: (1) Was not armed with a pistol, revolver, machine gun, shotgun, rifle or other firearm, and (2) had no reasonable ground to believe that any other participant was armed with such a weapon." Section 53a-16b is consistent with other areas wherein the legislature has provided that the state must prove the essential elements of the crime, and has left it to the defendant to mitigate his criminal culpability or sentencing exposure via an affirmative defense, particularly with respect to areas that uniquely are within the defendant's knowledge. See State v. Ray, 290 Conn. 602, 623-24, 966 A.2d 148 (2009) (General Statutes § 21a-278 [b] constitutionally may require defendant to prove **[***38]** drug dependency as affirmative defense to sale of narcotics); State v. Andresen, 256 Conn. 313, 333-34, 773 A.2d 328 (2001) (under General Statutes § 36b-16, state need only prove that defendant sold unregistered securities because exemption from registration requirements is affirmative defense that defendant must prove). Indeed, requiring the state to prove, in a prosecution seeking to hold a **[*509]** defendant accessorily liable for a violation of § 53a-55a, that the defendant intended the use of a firearm by the principal, would render § 53a-16b surplusage, "which would violate the basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions." (Internal quotation marks omitted.) Felician Sisters of St. Francis of Connecticut, Inc. v. Historic District Commission, 284 Conn. 838, 849, 937 A.2d 39 (2008). Thus, we conclude that the trial court properly declined to instruct the jury that, to convict the defendant of manslaughter in the first degree with a firearm as an accessory in violation **[**1061]** of §§ 53a-8 and 53a-55a, the defendant was required to intend that Furs would use, carry or threaten to use a firearm in the commission of the act. [20]

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[20] We **[***39]** also disagree with the defendant's contention that permitting accessories to be held liable for manslaughter in the first degree with a firearm under § 53a-55a in the absence of a showing of intent to engage in the physical acts constituting the offense, namely, the perpetrator's use, carrying or threat to use a firearm, is inconsistent with State v. Pierson, supra, 201 Conn. 216, wherein this court concluded that "[t]o some extent . . . all crimes of affirmative action require something in the way of a mental element— at least an intention to make the bodily movement which constitutes the act which the crime requires. . . . Such an intent, to perform certain acts proscribed by a statute, we have referred to as the general intent ordinarily required for crimes of commission rather than omission." (Citation omitted; internal quotation marks omitted.) The defendant's argument, requiring that the state prove in essence an extra element of general intent, namely, that the accessory intended that the principal use, carry or threaten to use a firearm in the commission of the offense, is, however, undercut by our statement in *Pierson* that HN16[↑] "[o]ur acknowledgement of the fundamental principle **[***40]** that a criminal act must be volitional does not mean that a charge to a jury that omits reference to this

Thus, we conclude that, in *State v. Miller, supra, 95 Conn. App. 362*, the Appellate Court properly articulated the elements of accessorial liability under *§ 53a-8* for manslaughter in the first degree with a firearm **[*510]** in violation of *§ 53a-55a*, and decline the defendant's invitation to overrule that decision. [21] Accordingly, we adopt the conclusion in *Miller* that *HN17*[↑] "there is a dual intent required for commission of the crime of manslaughter in the first degree with a firearm as an accessory, namely, that the defendant intended to inflict serious physical injury and that he intended to aid the principal in doing so." *Id., 377*. When a defendant is charged with a violation of *§ 53a-55a* as an accessory, "the state need not prove that the defendant intended the use, carrying or threatened use of the firearm." Id. Proof of **[***41]** the intent element is satisfied if the principal in fact used the firearm. The trial court, **[**1062]** therefore, properly instructed the jury in this case.

The judgment is affirmed.

In this opinion the other justices concurred.

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principle is constitutionally defective where the evidence at trial contains no suggestion that the defendant's conduct was involuntary . . . ." *Id., 217*; see also *id., 218* ("[t]he defense of the absence of a general intent to do a criminal act may be treated similarly").

[21] We further disagree with the defendant's claim that not requiring the state to prove that the defendant, as an accessory, intended the use, carrying or threat of a firearm in the commission of the offense, blurs the distinction between accessorial liability under *§ 53a-8* and coconspirator liability under the *Pinkerton* doctrine. "[A]ccessorial liability is not a distinct crime, but only an alternative means by which a substantive crime may be committed . . . . Consequently, to establish a person's culpability as an accessory to a particular offense, the state must prove that the accessory, like the principal, had committed each and every element of the offense. . . . By contrast, under the *Pinkerton* doctrine, a conspirator may be found guilty of a crime that he or she did not commit if the state can establish that a coconspirator did commit the crime and that the crime was within the scope of the conspiracy, in furtherance of the conspiracy, and a reasonably foreseeable consequence of the conspiracy." (Citations omitted; internal quotation **[***42]** marks omitted.) *State v. Patterson, 276 Conn. 452, 483, 886 A.2d 777 (2005)*; see id. (rejecting state's reliance on *State v. Davis, supra, 255 Conn. 795-96*, in support of claim that firearms sentence enhancement under *§ 53-202k* should be applied to unarmed coconspirators under *Pinkerton* doctrine). Our conclusion does not blur the distinction between these two forms of criminal liability. The state still must prove that the defendant committed or helped to commit all elements of the underlying substantive crime for liability to attach under *§ 53a-8*; in contrast, under the *Pinkerton* doctrine, the state is relieved of that burden, but instead must prove the existence and scope of a criminal conspiracy in order for liability to attach.

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