No. 22-___

IN THE

Supreme Court of the United States

DANIEL GREER,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

On Petition for a Writ of Certiorari to the Connecticut Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

ALAN M. DERSHOWITZ
1575 Massachusetts Avenue
Cambridge, MA 02138

RICHARD EMANUEL
Counsel of Record
LAW OFFICES OF
RICHARD EMANUEL
246 Goose Lane, Suite 106
Guilford, CT 06437
(203) 689-5761
newtrials@comcast.net

DAVID T. GRUDBERG
CARMODY TORRANCE SANDAK
& HENNESSEY LLP
195 Church Street, 18th Floor
P.O. Box 1950
New Haven, CT 06509
(203) 777-5501
dgrudberg@carmodylaw.com

Counsel for Petitioner

March 1, 2023

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Is the Due Process Clause violated when a jury at a sex crimes trial is instructed that evidence of *uncharged* sexual misconduct "is admissible and may be considered to prove that the defendant had *the propensity or a tendency to engage in the type of criminal sexual behavior with which he is charged*," even though the alleged act of *uncharged* sexual misconduct—which provides the sole basis for the "propensity" instruction—does not have to be proved by a preponderance of the evidence.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Daniel Greer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Connecticut Appellate Court, rendered on July 19, 2022.

OPINION BELOW

The opinion of the Connecticut Appellate Court is officially reported at 213 Conn. App. 757, and is unofficially reported at 279 A.3d 268. The opinion is reproduced in the Appendix ("App.") at 1a-35a.

JURISDICTION

The judgment of the Connecticut Appellate Court was entered on July 19, 2022. The petitioner timely filed a motion for reconsideration, which was denied by the Connecticut Appellate Court on August 1, 2022. See App. 36a. The petitioner then filed a petition for certification with the Connecticut Supreme Court, which was denied on November 1, 2022. See App. 37a. Petitioner thereafter filed a motion for reconsideration en banc, which the Connecticut Supreme Court denied on December 6, 2022. See App. 39a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a), on the grounds that the State of Connecticut has violated the petitioner's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **Fifth Amendment to the Constitution of the United States** provides in pertinent part: "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

The **Fourteenth Amendment to the Constitution of the United States** provides in pertinent part: ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . . ."

Connecticut General Statutes § 53-21(a) provides in pertinent part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony for a violation of subdivision (2) of this subsection. . . ."

Connecticut General Statutes § 53a-71 provides in pertinent part: "(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than three years older than such other person. . . . (b) Sexual assault in the second degree is a class C felony or, if the victim of the offense is under sixteen years of age, a class B felony, and any person found guilty under this section shall be sentenced to a term of imprisonment of which nine months of the sentence imposed may not be suspended or reduced by the court."

Connecticut Code of Evidence § 4-5 provides in pertinent part:

"**(a) General Rule.** Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person except as provided in subsection (b).

(b) When Evidence of other Sexual Misconduct is Admissible to Prove Propensity. Evidence of other sexual misconduct is admissible in a criminal case to establish that the defendant had a tendency or propensity to engage in aberrant and compulsive sexual misconduct if: (1) the case involves aberrant and compulsive sexual misconduct; (2) the trial court finds that the evidence is relevant to a charged offense in that the other sexual misconduct is not too remote in time, was allegedly committed upon a person similar to the alleged victim, and was otherwise similar in nature and circumstances to the aberrant and compulsive sexual misconduct at issue in the case; and (3) the trial court finds that the probative value of the evidence outweighs its prejudicial effect."

Fed. R. Evid. 413, entitled Similar Crimes in Sexual-Assault Cases, provides in relevant part: "**(a) Permitted Uses.** In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant."

Fed. R. Evid. 414, entitled Similar Crimes in Child-Molestation Cases, provides in relevant part: "**(a) Permitted Uses.** In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant."

INTRODUCTION

"A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977), cert. denied, 439 U.S. 847 (1978);

United States v. Daniels, 770 F.2d 1111, 1116 (D.C. Cir. 1985) (quoting same). Those ten words—"tried for what he did, not for who he is"—have been described as a precept that is "fundamental to American jurisprudence"; *United States v. Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980); and as a principle that "reflects the underlying premise of the criminal justice system." (Internal quotation marks omitted.) *United States v. Verduzco*, 373 F.3d 1022, 1026 (9th Cir.), cert. denied, 543 U.S. 992 (2004). See also Hon. Eliot D. Prescott, *Tait's Handbook of Connecticut Evidence* (6th Ed. 2019) § 4.7.2, p. 156 ("The old axiom was and is 'Try the case, not the person.'")

These vital principles are easily threatened, if not eviscerated, by a "propensity" instruction—which in this case informed the jurors that they could conclude, based on alleged acts of *uncharged* sexual misconduct, "that the [petitioner] had the propensity or a tendency to engage in the type of criminal sexual behavior *with which he is charged.*" (Emphasis added.) See *State v. Greer*, supra, at App. 26a and 30a.

This Court long ago noted the dangers of "propensity" evidence; see *Michelson v. United States*, 335 U.S. 469, 475-76 (1948); *Old Chief v. United States*, 519 U.S. 172, 181 (1997); but the Court has never expressly ruled on the constitutionality of admitting such evidence. See *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5 (1991) ("Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime.") See *Coningford v. Rhode Island*, 640 F.3d 478, 484-85 (1st Cir.) (noting that the Supreme Court has "expressly declined" to answer that question), cert. denied, 565 U.S. 954 (2011);

Gomes v. Silva, 958 F.3d 12, 25 n. 9 (1st Cir. 2020) (same).

This petition *does not* challenge the *admission* of uncharged misconduct evidence, nor does it challenge *the use* of uncharged misconduct evidence *as* propensity evidence. Instead, this petition presents a related question of whether a criminal jury must be given some minimal and uniform *standard of proof* for use in deciding *whether* a defendant committed an act of uncharged misconduct, *when that uncharged act serves as the sole factual predicate for a propensity instruction*.

In 2009, the Connecticut Supreme Court ruled "that it is *not necessary* that a trial court instruct the jury that it must find, by a preponderance of the evidence, that prior acts of misconduct actually occurred at the hands of the defendant." (Emphasis added.) *State v. Cutler*, 293 Conn. 303, 322 (2009), overruled in part on other grounds by *State v. Elson*, 311 Conn. 726 (2014). The misconduct in *Cutler* was not offered for propensity purposes, and the trial court instructed the jury on a "believe" standard of proof:

> "You may consider such [misconduct] evidence if you believe it, and further find that it logically and rationally supports the issue for which it is being offered by the state, but only as it may bear on the issue of intent. On the other hand, if you don't believe such evidence, or even if you do, if you find that it does not logically and rationally support the issue for which [it] is being offered by the state, namely the defendant's intent, then you may not consider the testimony for any purpose."

Id., at 316.

The obvious danger of a "believe" instruction is that "belief is susceptible of different degrees of strength, or intensity." Jeremy Bentham, *A Treatise on Judicial Evidence* (London, 1825), p. 40, quoted in J. P. McBaine, *Burden of Proof*: *Degrees of Belief*, XXXII Cal. L. Rev. 242 (1944). "'Belief admits of all degrees, from the slightest suspicion to the fullest assurance.'" *Young v. Commonwealth*, 11 Ky. Op. 689, 690 (1882); *Montgomery v. Commonwealth*, 224 S.W. 878 (Ky. Ct. App. 1920) (quoting same); *Maxwell Ice Co. v. Brackett, Shaw & Lunt Co.*, 116 A. 34, 37 (N.H. 1921) (same); *Francken v. State*, 209 N.W. 766, 769 (Wis. 1926) (same).

Although the Connecticut Supreme Court upheld the use of the "believe" instruction in *Cutler*, the court suggested an alternative instruction: "[A] jury may consider prior misconduct evidence for the proper purpose for which it is admitted if there is evidence from which the jury *reasonably could conclude* that the defendant actually committed the misconduct." (Emphasis added.) *Id*., 322. The *Cutler* opinion acknowledged, however, that the "reasonably could conclude" standard represents a *lower* standard of proof than a preponderance of the evidence. See *id*., 321-22 ("we see no reason to impose on trial courts a [preponderance of the evidence] jury instruction that requires jurors to consider the properly admissible prior misconduct evidence *at a higher standard*"). (Emphasis added.) More recently, the Connecticut Supreme Court reaffirmed *Cutler*'s essential holding that a preponderance of the evidence standard is not needed for prior misconduct evidence. See *State v. Ortiz*, 343 Conn. 566, 601-02 (2022).

Cutler was not a sex prosecution. Neither was *Ortiz*. The uncharged misconduct in those cases was never

offered for, or considered as, propensity evidence. *Id*., 322. In the thirteen years since *Cutler* was decided, the Connecticut Supreme Court has never addressed the specific question raised herein—whether a preponderance of the evidence standard *becomes* necessary *when the uncharged misconduct is offered and admitted as propensity evidence*.

As discussed more fully below, federal courts, when dealing with the admission of uncharged misconduct evidence, generally utilize the "preponderance of the evidence" standard that was endorsed by this Court in *Huddleston v. United States*, 485 U.S. 681 (1988). As for state jurisdictions, more than half of the states use either the preponderance standard or the "clear and convincing evidence" standard for deciding if an act of uncharged misconduct has been proved. One state uses the reasonable doubt standard for that purpose.

At petitioner's trial, the jury was *not even* instructed on the "believe" standard or on the "reasonably could conclude" standard. Instead, the jury was simply told that "[i]t is for you *to determine* whether the defendant committed any uncharged sexual misconduct and, if so, the extent, if any, to which that evidence establishes that the defendant had the propensity or a tendency to engage in criminal sexual behavior." (Emphasis added.) *State v. Greer*, supra, at App. 30a.

On direct appeal, petitioner argued that "determine" *is not a standard of proof*, and that petitioner's jury was not provided with *any* standard of proof for deciding if petitioner in fact committed the acts of uncharged misconduct that gave rise to the propensity instruction. The constitutional question presented in this petition is whether the Due Process Clause requires that uncharged misconduct be proved *at least* by a preponderance of the evidence, before such

misconduct may be considered and relied upon by a jury *as propensity evidence*.

STATEMENT OF THE CASE

The petitioner is an 82-year-old Jewish orthodox rabbi who previously ran a religious school known as the Yeshiva of New Haven (hereafter yeshiva). In 2016, a former student named E[1] filed a federal civil suit, claiming that he was sexually abused by the petitioner in 2002 and 2003, when E was a fourteen and fifteen-year-old student at the yeshiva. In the spring of 2017 a federal jury "awarded [E] $15 million in compensatory damages, and thereafter the district court awarded $5 million in punitive damages and interest of $1,749,041.10, for a total award of $21,749,041.10." *Mirlis v. Greer*, 952 F.3d 36, 40 (2nd Cir. 2020), cert. denied, __ U.S. __, 141 S. Ct. 1265 (2021).

In the summer of 2016, while the civil suit was pending, E, who was then twenty-eight years old, first reported the alleged sexual abuse to the police in New Haven. As a result of that complaint, petitioner was arrested by warrant on July 26, 2017, and was charged with four counts of sexual assault in the second degree in violation of Conn. Gen. Stat. § 53a-71(a)(1) and four "companion" counts of risk of injury to a child in violation of Conn. Gen. Stat. § 53-21(a)(2). The charges encompassed four discrete sexual acts: two acts of fellatio and two acts of anal intercourse; each of those acts gave rise to one count of sexual assault and one count of risk of injury. The petitioner pleaded not

[1] The alleged victim was identified only by his initial E in the Connecticut Appellate Court's opinion. See App. 5a, n. 2.

guilty to all charges and was tried by a jury in September of 2019.

At the criminal trial, E testified that when he was fourteen and fifteen years old, he engaged in acts of fellatio and anal intercourse with the petitioner. E further claimed that after he reached the age of sixteen (which for most purposes is the age of consent for sexual intercourse in Connecticut) in the fall of 2003, he continued to have sexual relations with the petitioner until 2006, when E was eighteen years old.

At the conclusion of the evidence, the trial judge acquitted the petitioner of the four sexual assault charges because they were barred by the applicable statute of limitations. On September 25, 2019, the jury convicted petitioner of the four remaining risk of injury charges, and on December 2, 2019, the court sentenced petitioner to a total effective term of 20 years, execution suspended after 12 years, and 20 years probation.

A. The Uncharged Misconduct Evidence at Trial

This petition focuses on the state's presentation of uncharged misconduct evidence from R, another former student who had attended the petitioner's yeshiva in the 2008-2009 academic year, when R was thirteen and fourteen years old. R testified that petitioner tutored him in reading.

The Connecticut Appellate Court summarized the uncharged misconduct evidence as follows:

> R recounted that the [petitioner] frequently would touch R's crotch to get R's attention and that, when R attempted to position himself in such a way to avoid that contact, the [petitioner] would

> touch R's "butt" instead. R also testified regarding one particular incident where, after he told the [petitioner] that he received a good grade, the [petitioner] drove him to a local park to celebrate. When they arrived at the park, they sat on a bench, and the [petitioner] pulled out a bottle of wine, two plastic cups, and a can of nuts. After drinking some of the wine, R began to feel dizzy and decided to eat some of the nuts. R testified that, while he was eating the nuts, the [petitioner] was "trying to, like, French kiss me and I was trying to keep my mouth shut." When R became upset, the [petitioner] "got all embarrassed and said, like, 'oh, I'm out of line, it must be the alcohol.'" The [petitioner] then brought R back to the school.

State v. Greer, at App. 25a-26a.

It must be noted that in 2008, the Connecticut Supreme Court first sanctioned the use of *uncharged sexual misconduct* as "propensity" evidence in sex crime prosecutions. See *State v. DeJesus*, 288 Conn. 418, 463 (2008) ("Accordingly, we conclude that evidence of uncharged misconduct properly may be admitted in sex crime cases under the liberal standard, provided its probative value outweighs its prejudicial effect, *to establish that the defendant had a tendency or a propensity to engage in certain aberrant and compulsive sexual behavior*.") (Emphasis added.).

In 2012, the Connecticut Code of Evidence was amended to specifically permit the introduction of "other sexual misconduct" as propensity evidence; see Conn. Code Evid. § 4-5(b); and the Connecticut Judicial Branch later published a "propensity" jury instruction on its website. Connecticut Criminal Jury Instructions (Rev. 2015) § 2.6-13, at App. 41a. Like all

instructions on the Judicial Branch website, the propensity instruction was "intended as a guide for judges and attorneys in constructing charges and requests to charge"; the "publication [of such instructions] by the Judicial Branch is not a guarantee of their legal sufficiency." *State v. Gomes*, 337 Conn. 826, 853 n. 19 (2021).

Following R's testimony at petitioner's trial, the judge instructed the jury, consistent with *DeJesus* and the Connecticut Code of Evidence, as follows:

> In a criminal case such as this in which the [petitioner] is charged with a crime involving sexual misconduct, evidence of the [petitioner's] commission of other sexual misconduct is admissible and may be considered to prove that the [petitioner] had the propensity or tendency to engage in the type of criminal sexual behavior with which he is charged. . . . *It is for you to determine* whether the [petitioner] committed any uncharged sexual misconduct and, if so, the extent, if any, to which that evidence establishes that the [petitioner] had the . . . propensity or tendency to engage in criminal sexual behavior." (Emphasis added.)

State v. Greer, supra, at App. 26a-27a.

B. The Charge Conference and the Final Jury Instructions

Near the end of petitioner's trial, his defense counsel submitted a written request to charge on uncharged misconduct evidence. In pertinent part the request stated: "It is for you to determine whether the State has proven *by clear and convincing evidence* whether the [petitioner] committed the alleged uncharged sexual misconduct. If you find that the State has met

that standard, then you may determine the extent, if any, to which that evidence establishes that the [petitioner] had a propensity or tendency to engage in criminal sexual behavior. . . . *As to any evidence of uncharged misconduct, the State's burden is to prove that conduct by clear and convincing evidence*. . . ." (Emphasis added.) *State v. Greer*, supra, at App. 27a.

At the charge conference, petitioner's counsel acknowledged that his request to charge on the "clear and convincing" standard was contrary to *State v. Cutler*, supra, where, as noted earlier, the court held that a criminal defendant is *not even* entitled to a "preponderance of the evidence" instruction with respect to uncharged misconduct—although civil litigants in Connecticut *are* so entitled.[2]

In the ensuing discussion at the charge conference, petitioner's counsel stated: "What I asked for earlier was *a standard by which* [the jury] *can determine* whether [the alleged uncharged misconduct] *was proven*, that's a—a flaw in our scheme for these—for addressing these types of cases." *Id*., at App. 29a. The trial judge, who *erroneously* believed that the preponderance standard *was* the governing standard, replied as follows: "No, it's not a flaw, it's that you want a higher standard than the law requires. It's not that there isn't a standard, *the standard is preponderance of the evidence, you gotta prove these [uncharged misconduct] facts by the preponderance of*

---

[2] "There is no rule that a prior act of misconduct must be proven by a preponderance of evidence [in criminal cases]." However, "[t]he standard of proof for uncharged misconduct *if used in civil cases* is the civil burden of *a preponderance of the evidence*." (Emphasis added.) Hon. Eliot D. Prescott, *Tait's Handbook of Connecticut Evidence* (Sixth ed. 2019), § 4.15.3, pp. 172-73.

the evidence—this uncharged misconduct or other misconduct; you have to prove the elements of the crime beyond a reasonable doubt." (Emphasis added.) *Id*., at App. 29a. In reply, petitioner's counsel stated in part, "my position is that the state has to prove these [acts of alleged misconduct] *by some standard [of proof]*." (Emphasis added.) *Id*.

The trial court denied the petitioner's request to charge. In the final charge to the jury regarding uncharged misconduct involving R, the court reiterated the same principles it had conveyed to the jury in its mid-trial instructions involving R's testimony:

> The state has submitted evidence that the [petitioner] engaged in sexual misconduct with [R]. The [petitioner] has not been charged in this case with any offenses related to this alleged conduct. In a criminal case such as this in which the [petitioner] is charged with a crime involving sex - - sexual misconduct, evidence of the [petitioner's] commission of other sexual misconduct is admissible and may be considered to prove that the [petitioner] had the propensity or a tendency to engage in the type of criminal sexual behavior with which he is charged. However, evidence of prior misconduct on its own is not sufficient to prove the defendant guilty of the crimes charged in the information. *It is for you to determine whether the [petitioner] committed any uncharged sexual misconduct* and, if so, the extent, if any, to which that evidence establishes that the [petitioner] had the propensity or a tendency to engage in criminal sexual behavior. . . ." (Emphasis in original.)

State v. Greer, supra, at App. 29a-30a.

The trial judge gave a similar instruction to the jury with respect to another type of uncharged misconduct, to wit, evidence of sexual relations between petitioner and E *after* E reached the age of sixteen years. That evidence was not offered for propensity purposes. Instead, it was "admitted to show or explain the full extent of the sexual relationship be—between the [petitioner] and [E] and to show a common plan or scheme by the [petitioner] to have continuous sexual relations with [E]." *Id.*, at App. 30a. That instruction contained the same "determine" directive utilized in the instructions concerning R: "*It is for you to determine one, whether such acts occurred* and, two, if they occurred, whether they establish what the state seeks to establish." (Emphasis in original.) *Id*., at App. 30a-31a.

C. The Direct Appeal in the Connecticut Appellate Court

Connecticut has a two-tiered appellate system, consisting of the Connecticut Appellate Court, an intermediate tribunal, and the Connecticut Supreme Court. Pursuant to Connecticut statutes and court rules, petitioner was required to file his appeal in the Connecticut Appellate Court.

For purposes of this petition, the significance of the two-tiered system is that the Connecticut Supreme Court "has the final say on matters of Connecticut law and that the Appellate Court and Superior Court are bound by [Connecticut Supreme Court] precedent." *Stuart v. Stuart*, 297 Conn. 26, 45-46 (2010). As the Connecticut Appellate Court has often acknowledged, it cannot "overrule," "reevaluate," "reexamine," "reconsider," "discard," or even "modify" Connecticut Supreme Court precedent. See, e.g., *State v. Luciano*, 204 Conn. App. 388, 413 n. 22, cert. denied, 337 Conn. 903 (2021);

State v. Salazar, 151 Conn. App. 463, 476 (2014), cert. denied, 323 Conn. 914 (2016).

That presented a predicament for petitioner, who wanted to challenge the continuing validity of the Connecticut Supreme Court's *Cutler* decision, but could not do so in the Appellate Court. Consequently, prior to filing his opening brief in the Appellate Court, petitioner filed a motion to transfer[3] his appeal to the Connecticut Supreme Court so that, inter alia, he would be able to challenge the *Cutler* decision. The Connecticut Supreme Court denied the motion to transfer on June 1, 2021. See App. 43a.

Because *Cutler* was binding on the Appellate Court, the petitioner was precluded, in his Appellate Court brief, from claiming that the jury should have been instructed on either a "clear and convincing evidence" standard" (as cited in the written request to charge) or pursuant to a "preponderance of the evidence" standard. The petitioner therefore briefed the claim that the trial court erred in failing to provide the jury with *any standard of proof* for use in deciding if petitioner committed the acts of uncharged misconduct. However, in order to preserve the constitutional claim that he *wanted* to raise in the Connecticut Supreme Court, and that he *now* seeks to raise in this Court, the petitioner described that claim in his initial Appellate Court brief:

> The [petitioner] would nevertheless like to be on record as asserting, at the earliest point in the appellate process, that it is fundamentally unfair,

---

[3] A rule of Connecticut appellate procedure provides that "[a]fter the filing of an appeal in the Appellate Court, . . . any party may move for transfer [of the appeal] to the Supreme Court." Conn. Practice Book § 65-2.

> and a violation of federal and state due process; U.S. const., Amend, V, XIV; Conn. const., art. I, § 8; to allow "other sexual misconduct" *to be used as "propensity" evidence* without requiring the state to prove, *at least by a preponderance of the evidence*, that the [petitioner] committed the uncharged misconduct.

(Footnote omitted; emphasis added.) Def. Br. in *State v. Greer*, AC 43726, p. 27.

The petitioner filed his opening brief in the Connecticut Appellate Court on July 2, 2021, and he filed a reply brief on December 3, 2021. A few days later he filed a second motion to transfer the appeal to the Connecticut Supreme Court, asserting, inter alia: "The [petitioner] seeks to argue that [*State v.*] *Cutler* should be overruled, or at least modified in sex crime cases. Inasmuch as the Appellate Court cannot overrule or even reconsider *Cutler*, this Court is *the only court* that can possibly afford relief on this claim." (Emphasis in original.) Motion to Transfer (Dec. 7, 2021), p. 2. The Connecticut Supreme Court again denied the motion to transfer, on January 26, 2022. See App. 44a.

D. The Appellate Court's Decision

Petitioner's appeal was argued in the Connecticut Appellate Court on February 28, 2022. In his briefs and at oral argument, petitioner claimed that the trial court had failed to provide the jury with any meaningful standard of proof for deciding if petitioner committed the acts of uncharged misconduct.

In an opinion issued on July 19, 2022, the Appellate Court rejected that claim:

> Here, the court instructed that it was for the jury "to determine" whether the [petitioner] engaged in the uncharged misconduct. We discern no meaningful distinction between the "believe" standard endorsed in *Cutler* and the court's use of the word "determine" in the present case. For that reason, we are not persuaded that the court's instructions were deficient. If anything, "determine" is a stronger standard than "believe.". . . Accordingly, we find no error in the court's instructions to the jury that it must determine that something occurred rather than believe that it occurred. Consequently, we conclude that our Supreme Court's decision in *Cutler* controls and, therefore, that the court properly instructed the jury regarding the uncharged misconduct evidence.

State v. Greer, supra, 786, at App. 34a-35a. The Appellate Court affirmed the judgment of conviction.

On July 27, 2022, the petitioner filed a motion for reconsideration in the Connecticut Appellate Court. In that motion he argued, inter alia, that "the word 'determine' simply tells the jurors that they have to decide—that they have to make up their mind—about whether (or not) the defendant committed the alleged act of uncharged misconduct." Motion for Reconsideration (July 27, 2022), p. 7. Petitioner pointed out that "[t]he essential deficiency with the 'determine' instruction is that it does nothing to convey any sense of *how persuaded*, *how convinced*, or *how satisfied* the jurors must be in order to conclude that the defendant in fact committed an act of uncharged misconduct." (Emphasis added.) *Id*., p. 8. The Appellate Court denied the motion for reconsideration on August 1, 2022. See App. 36a.

E. The Petition for Certification in the Connecticut Supreme Court

On September 1, 2022, the petitioner filed a petition for certification, asking the Connecticut Supreme Court to review the Appellate Court's decision. The Connecticut Supreme Court denied the petition for certification on November 1, 2022. See App. 37a.

On November 16, 2022, the petitioner filed a motion for reconsideration en banc of the denial of his petition for certification. On December 6, 2022, the Connecticut Supreme Court denied the motion for reconsideration en banc. See App. 39a.

REASONS FOR GRANTING THE WRIT

A leading commentator has noted that there is a split of authority in this country on the question of who should decide if a defendant committed an act of uncharged misconduct. "The traditional view is that the judge makes the decision. However, the emerging view is that the jurors have the final power to make that determination." 1 E. Imwinkelried, *Uncharged Misconduct Evidence* (2021 ed.) § 2:6, p. 107. Connecticut follows the latter approach—as do the federal courts and many state courts—and a relevant question in those jurisdictions is whether the jury—the agency responsible for deciding if in fact a criminal defendant committed an act of uncharged misconduct—should be required to make that decision according to a specific, uniform, and ascertainable standard of proof.

In *Huddleston v. United States*, 485 U.S. 681 (1988), this Court considered, in the context of other crimes evidence under Fed. R. Evid. 404(b), "whether the district court must itself make a preliminary finding that the Government has proved the 'other act' by a preponderance of the evidence before it submits the

evidence to the jury." *Id*., 682, 685. The court answered that question in the negative. *Id*., 687-90. The Court noted that the admission of other crimes evidence presents a question of "conditional relevancy" under Fed. R. Evid. 104(b), and that the trial court "neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence." *Huddleston*, 690. Instead, the trial court "simply examines all the evidence in the case and decides *whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence*." (Emphasis added.) *Id*.

When the Connecticut Supreme Court rejected the use of the preponderance standard in *State v. Cutler*, it described *Huddleston*'s invocation of the phrase "by a preponderance of the evidence" (at page 690 of the *Huddleston* opinion), as "dicta," and therefore not binding. *Cutler*, supra, 320. Although *Huddleston* was not a constitutional ruling, and was not binding on state courts, petitioner has been unable to locate any other decision embracing the "dicta" view. In fact, at least one state supreme court has indicated, citing *Huddleston*, that "[t]he United States Supreme Court, interpreting the Federal Rules of Evidence, *has adopted the preponderance standard*." (Emphasis added.) *People v. Carpenter*, 15 Cal. 4th 312, 382 (1997). See also *People v. Anderson*, 208 Cal. App. 4th 851, 895 (2012) (noting same), rev. denied, 2012 Cal. Lexis 10018 (2012), cert. denied, 569 U.S. 905 (2013).

The majority opinion in *Estelle v. McGuire*, supra, seems to confirm that the preponderance standard is the minimally-acceptable standard of proof for uncharged misconduct. See *id*., 502 U.S. 73-74 ("To the extent that the jury may have believed McGuire committed the prior acts and used that as a factor in

its deliberation, we observe that there was sufficient evidence to sustain such *a jury finding by a preponderance of the evidence*.") (Emphasis added.). The same can be said of a dissenting opinion in *Dowling v. United States*, 493 U.S. 342 (1990). See *id*., 356 (Brennan, Marshall, and Stevens, Js., dissenting) ("Before a jury can consider facts relating to another criminal offense as proof of an element of the presently charged offense, the jury *must conclude by a preponderance of the evidence* 'that the act occurred and that the defendant was the actor.'") (Emphasis added.); *id*., 361 (with respect to prior misconduct, "the jury is required to conclude that the defendant committed the prior offense *only by a preponderance of the evidence*") (Emphasis added.); *id*., 362 (noting that "the lower [preponderance] standard of proof makes it easier for the jury to conclude that the defendant committed the prior offense"). In fact, most of the federal circuits have expressly held, or presumed, that *Huddleston* requires the preponderance standard.[4]

---

[4] *United States v. DeCicco*, 370 F.3d 206, 211-12 (1st Cir. 2004) (summarizing *Huddleston* as "stating that there must be enough evidence for a jury to reasonably conclude by a preponderance of the evidence that the prior bad act was committed," and finding the evidence sufficient under the preponderance standard); *United States v. Browne*, 834 F.3d 403, 409-10 (3rd Cir. 2016) ("We have determined that to meet the Rule 104(b) standard of sufficiency, the proponent of the evidence must show that 'the jury could reasonably find th[ose] facts . . . by a preponderance of the evidence.'"), cert. denied, 137 S. Ct. 695 (2017); *United States v. McLamb*, 985 F. 2d 1284, 1290 (4th Cir. 1993) ("the role of the district court in these cases is limited to determining from all the evidence whether the jury could reasonably find that the defendant committed the similar acts by a preponderance of the evidence"); *United States v. Smith*, 804 F.3d 724, 735 (5th Cir. 2015) ("proof of an uncharged offense is sufficient if 'the jury could reasonably find' that the offense occurred 'by a preponderance of

As for state jurisdictions, more than half of the states have concluded—based on *Huddleston*, common law, evidence codes, or statutes—that uncharged misconduct must be proved at least by a preponderance of the evidence.

For example, among those states in which *the trial court* determines if the defendant committed the act of misconduct (before admitting the evidence), several require the trial court to make that finding by a

---

the evidence.'"); *United States v. Matthews*, 440 F.3d 818, 828 (6th Cir.) ("According to the [Supreme] Court [in *Huddleston*], this relevancy standard [of Rule 404(b)] requires that other-act evidence be admitted only if, after an examination of all the evidence in the case, the trial court concludes that the jury could reasonably find by a preponderance of the evidence that the act occurred and that the defendant was the actor."), cert. denied, 547 U.S. 1186 (2006); *United States v. Burke*, 425 F.3d 400, 410 (7th Cir. 2005) (construing *Huddleston* as holding that "the preponderance standard is appropriate for determining the admissibility of prior acts evidence"), cert. denied, 547 U.S. 1208 (2006); *United States v. Reyes*, 542 F.3d 588, 592-93 (7th Cir. 2008) (quoting same), cert. denied, 555 U.S. 1148 (2009); *United States v. Masters*, 978 F.2d 281, 286 (7th Cir. 1992) ("the United States Supreme Court has concluded that the preponderance standard is appropriate when deciding whether to use other-crimes evidence at trial"); *United States v. Brumfield*, 686 F.3d 960, 963 (8th Cir.) ("The prosecution must present sufficient evidence from which a jury could find by a preponderance of the evidence that the prior act occurred."), cert. denied, 568 U.S. 1074 (2012); *United States v. Evans*, 728 F.3d 953, 962 (9th Cir. 2013) (the court "'decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence'"); *United States v. Green*, 873 F.3d 846, 858 n. 9 (11th Cir. 2017) (trial court must decide if jury could find the fact at issue "by a preponderance of the evidence"), cert. denied, 138 S. Ct. 2620 (2018); *United States v. Ruffin*, 40 F.3d 1296, 1298 (D.C. Cir. 1994) ("a court may conditionally admit 'other crimes' evidence subject to proof from which the jury reasonably could conclude, by a preponderance of the evidence, that the defendant committed the other crimes").

preponderance of the evidence.[5] In a larger number of states the court must make that finding by "clear and convincing" evidence, or a close variant thereof.[6] Two

---

[5] **Colorado:** *People v. Garner*, 806 P.2d 366, 373 (Colo. 1991) ("Before admitting such evidence, the trial court, on the basis of all the evidence before it, must be satisfied by a preponderance of the evidence that the other crime occurred and that the defendant committed the crime."); *People v. Rath*, 44 P.3d 1033, 1039 (Colo. 2002); **Louisiana:** *State v. Dauzart*, 844 So.2d 159, 165 La. Ct. App. 2003) ("This court has recognized the preponderance of the evidence standard as the burden of proof in a [*State v.*] *Prieur* [277 So.2d 126 (La. 1973)] hearing."); *State v. Davis*, 924 So.2d 1096, 1104 (La. Ct. App. 2006) (same); **Washington:** *State v. Bythrow*, 790 P.2d 154, 157 (Wash. 1990) ("the standard of proof for admission of other crimes is 'preponderance of the evidence'"); *In re Detention of Coe*, 286 P.3d 29, 35 (Wash. 2012) ("a trial court can admit evidence of other crimes or wrongs only if it "'(1) finds by a preponderance of the evidence that the misconduct occurred'"'); *State v. Wilhelm*, No. 70704-3-I, 2015 Wash. App. Lexis 1498 *22-23 (Wash. Ct. App. 2015) (same);**West Virginia:** *State v. McGinnis*, 455 S.E.2d 516, 526-28 (W. Va. 1994) ("After hearing the [misconduct] evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts."); *State v. Sites*, 825 S.E.2d 758, 767 (W. Va. 2019) (quoting same).

[6] **Arizona:** *State v. Terrazas*, 944 P.2d 1194, 1198 (1997) ("Therefore, before admitting evidence of prior bad acts, trial judges must find that there is clear and convincing proof both as to the commission of the other bad act and that the defendant committed the act."); *State v. Aguilar*, 97 P.3d 865, 874 (Ariz. 2004) ("First, the trial court must determine that clear and convincing evidence supports a finding that the defendant committed the other act."); *State v. Hardy*, 283 P.3d 12, 20 (Ariz. 2012) ("Before admitting evidence of other acts, a trial judge must find clear and convincing evidence that the defendant committed the act."), cert. denied, 568 U.S. 1127 (2013); **Delaware:** *Getz v. State*, 538 A.2d 726, 734 (Del. 1988) ("The other crimes must be proved by evidence which is 'plain, clear and conclusive.'"); *Smith v. State*, 669 A.2d 1, 5 (Del. 1995) ("the trial court must find that: . . . the prior bad acts are subject to proof by clear and conclusive

evidence"); *Morse v. State*, 120 A.3d 1, 8 (Del. 2015) ("the acts must be proved by 'plain, clear and conclusive' evidence"); *Ward v. State*, 239 A.3d 389 (Del. 2020) (under *Getz*, "the evidence must be 'plain, clear and conclusive'"); **District of Columbia:** *Groves v. United States*, 564 A.2d 372, 374 (D.C. 1989) ("In the absence of a final adjudication of guilt, the government must show by clear and convincing evidence that the other crime occurred and that the defendant is connected to it."); *Menendez v. United States*, 154 A.3d 1168, 1177 (D.C. 2017); **Florida:** *Bryant v. State*, 787 So.2d 904, 905 (Fla. Dist. Ct. App. 2001) ("'Before evidence of a collateral offense can be admitted . . ., there must be clear and convincing evidence that the former offense was actually committed by the defendant.'"); *Henrion v. State*, 895 So.2d 1213, 1216 (Fla. Dist. Ct. App. 2005) ("The offering party is required to prove the defendant's connection with the similar act by clear and convincing evidence."); **Iowa:** *State v. Sullivan*, 679 N.W.2d 19, 25 (Iowa 2004) (for "bad-acts evidence" to be admissible, "there must be clear proof the individual against whom the evidence is offered committed the bad act or crime"); *State v. Richards*, 879 N.W.2d 140, 145 (Iowa 2016) (same); *State v. Putnam*, 848 N.W.2d 1, 8-9 and n. 2 (Iowa 2014) (reiterating the "clear proof" requirement); **Maryland:** *Harris v. State*, 597 A.2d 956, 960 (Md. 1991) ("the trial judge must determine 'whether the accused's involvement in the other crimes is established by clear and convincing evidence.'"); *Burris v. State*, 78 A.3d 371, 380 (Md. 2013) ("In fact, 'the evidence must be "clear and convincing in establishing the accused's involvement" in the prior bad acts.'"); *Cooper v. State*, 2021 Md. App. Lexis 72 at *13 (Md. Ct. Spec. App. 2021) ("the court must find that the accused's involvement in the other crimes or acts is established by clear and convincing evidence"); **Minnesota:** *State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006) ("there must be clear and convincing evidence that the defendant participated in the prior act"); *State v. Clark*, 755 N.W.2d 241, 260 (Minn. 2008) (same); **Nebraska:** *State v. Faust*, 660 N.W.2d 844, 861-62 (Neb. 2003), disapproved on other grounds, *State v. McCulloch*, 742 N.W.2d 727 (2007) (noting that under Neb. Rev. Stat. § 27-404(3), "evidence of other crimes, wrongs, or acts of the accused may be offered in evidence by the prosecution if the prosecution proves to the court by clear and convincing evidence that the accused committed the crime, wrong, or act. Such proof shall first be made outside the presence

of the jury."); *State v. Oldson*, 884 N.W.2d 10, 40 (Neb. 2016) (citing statutory requirement); **Nevada:** *Petrocelli v. State*, 692 P.2d 503, 508 (Nev. 1985) ("before evidence of a prior bad act can be admitted, the state must show, by plain, clear and convincing evidence that the defendant committed the offense"); *Tinch v. State*, 946 P.2d 1061, 1064 (Nev. 1997) ("To be deemed an admissible bad act, the trial court must determine, outside the presence of the jury, that: . . . the act is proven by clear and convincing evidence"); *Carter v. State*, 121 P.3d 592, 598-99 (Nev. 2005) ("Generally speaking, we require prescreening of such [bad act] evidence under *Petrocelli v. State* to determine . . . whether it is proven by clear and convincing evidence"); **New Hampshire:** *State v. Smalley*, 855 A.2d 401, 405 (N.H. 2004) ("there must be clear proof that the defendant committed the act" of misconduct); *State v. Dow*, 131 A.3d 389, 394 (N.H. 2016) (same); **New Jersey:** *State v. Cofield*, 605 A.2d 230, 235 (N.J. 1992) ("The evidence of the other crime must be clear and convincing"); *State v. Hernandez*, 784 A.2d 1225, 1233 (N.J. 2001) ("The requirement that the State must produce 'clear and convincing evidence' of other-crime conduct before such evidence may be admitted is firmly rooted in New Jersey case law."); *State v. Green*, 197 A.3d 1136, 1142-43 (N.J. 2018) ("the prosecution must establish that the other crime 'actually happened by "clear and convincing" evidence'"); **New York:** *People v. Sanchez*, 618 N.Y.S.2d 770, 771 (N.Y. App. Div. 1994) ("Evidence of uncharged crimes should only be admitted where relevant, based upon clear and convincing proof of the defendant's identity as the perpetrator of those crimes. . . ."); *People v. Workman*, 684 N.Y.S.2d 116, 117 (N.Y.App. Div. 1998) (rejecting defendant's claim "that the People failed to establish by clear and convincing evidence that defendant" had engaged in a prior bad act); **North Dakota:** *State v. Parisien*, 703 N.W.2d 306, 316 (N.D. 2005) ("the evidence of the prior act or acts must be substantially reliable or, clear and convincing"); *Steinbach v. State*, 859 N.W.2d 1, 6 (N.D. 2015) (same); **Oklahoma:** *Bryan v. State*, 935 P.2d 338, 356 (Okla. Crim. App. 1997) ("proof of the evidence [of the other crime] must be clear and convincing"); *Lowery v. State*, 192 P.3d 1264, 1267 (Okla. Crim. App. 2008) (other crimes evidence "'must be established by clear and convincing evidence'"): **South Carolina:** *State v. Smith*, 387 S.E.2d 245, 247 (S.C. 1989) ("To be admissible, proof of prior bad acts must be clear and convinc-

other states appear to utilize a standard of "substantial proof" or "substantial evidence."[7] Among the states in which *the jury* decides if the defendant committed the act of misconduct, some follow *Huddleston* but without requiring an instruction on a specific standard of proof.[8] However, in other jurisdictions that follow

---

ing."); *State v. Wilson*, 545 S.E.2d 827, 829 (S.C. 2001) ("To be admissible, other crimes that are not the subject of conviction must be proved by clear and convincing evidence."); *State v. Holder*, 676 S.E.2d 690, 698 (S.C. 2009) (same); **Tennessee:** *Wrather v. State*, 169 S.W.2d 854, 858 (Tenn. 1943) ("we approve the rule that, to render evidence of an independent crime admissible, the proof of its commission, and of the connection of the accused on trial therewith, must be not 'vague and uncertain,' but clear and convincing"); *State v. Jones*, 450 S.W.3d 866, 892-93 (Tenn. 2014) ("The burden is on the State to establish by clear and convincing evidence that: (1) another crime was committed; and (2) the crime was committed by the defendant"; and noting that state evidence rule provides that "[t]he court must find proof of the other crime, wrong, or act to be clear and convincing").

[7] **Ohio:** *State v. Knight*, 722 N.E.2d 568, 570 (Ohio Ct. App. 1998) ("Evidence of other acts is admissible if there is substantial proof that the other acts were committed by the defendant. . . ."); *State v. Glenn*, 2011 Ohio App. Lexis 737, *12-13 (Ohio Ct. App.), (same), review denied, 948 N.E.2d 451 (Ohio 2011); **Pennsylvania:** *Commonwealth v. Donahue*, 549 A.2d 121, 127 (Pa. 1988) ("for the jury to be entitled to consider [the other crime] there must of course be substantial evidence of these facts"); *Commonwealth v. Odum*, 584 A.2d 953 (Pa. Sup. Ct. 1990) (the burden "is one of substantial evidence").

[8] **Alabama:** *Akin v. State*, 698 So.2d 228, 235 (Ala. Crim. App. 1996), cert. denied, 698 So. 2d 238 (Ala. 1997); **Alaska:** *Ayagarak v. State*, No. A-8066, 2003 Alas. App. Lexis 73, *12-13 (Alaska Ct. App. 2003); **Hawaii:** *State v. Gano*, 988 P.2d 1153, 1163-64 (Haw. 1999); **Idaho:** *State v. Kay*, 927 P.2d 897, 905 (Idaho 1996), but see *Cooke v. State*, 233 P.3d 164, 169 n. 1 (Idaho Ct. App. 2010), rev. denied, 2010 Ida. Lexis 102 (Idaho 2010); **Illinois:** *People v. Thingvold*, 584 N.E.2d 89, 95 (Ill. 1991); *People v. Oaks*, 662 N.E.2d 1328, 1348 (Ill.), cert. denied, 519 U.S. 873 (1996); *People*

Huddleston, the courts have interpreted *Huddleston as requiring* the preponderance standard, or have assumed that it does, or have independently incorporated that standard.[9]

---

v. Johnson, 148 N.E.3d 126, 141 (Ill. App. Ct.), rev. denied, 147 N.E.3d 685 (2020); **Kentucky:** *Parker v. Commonwealth*, 952 S.W.2d 209, 214 (Ky 1997); *Leach v. Commonwealth*, 571 S.W.3d 550, 554 (Ky. 2019); *Kelly v. Commonwealth*, 655 S.W.3d 154, 165 (Ky. 2022); **Michigan:** *People v. Vandervliet*, 508 N.W.2d 114, 123-26 (Mich. 1993); *People v. Hine*, 650 N.W.2d 659, 662 (Mich. 2002); **Mississippi:** *Lester v. State*, 692 So.2d 755, 779 (Miss. 1997), overruled on other grounds, *Weatherspoon v. State*, 732 So. 2d 158, 162 (Miss. 1999); **Missouri:** *State v. Williams*, 548 S.W.3d 275, 288 (Mo. 2018); **Montana:** *State v. Paulson*, 817 P.2d 1137, 1140 (Mont. 1991); **Oregon:** *State v. Carlson*, 808 P.2d 1002, 1007-08 (Or. 1991); *State v. Wright*, 387 P.3d 405, 407 (Or. Ct. App. 2016); **Virginia:** *Pavlick v. Commonwealth*, 497 S.E.2d 920, 924-25 (Va. Ct. App. 1998); *Prieto v. Commonwealth*, 721 S.E.2d 484, 498 (Va.), cert. denied, 568 U.S. 871 (2012).

[9] **California:** *People v. Carpenter*, 935 P.2d 708, 747-48 (Cal. 1997) (asserting that *Huddleston* "adopted the preponderance standard"; "If the jury finds by a preponderance of the evidence that defendant committed the other crimes, the evidence is clearly relevant and may therefore be considered."); *People v. Sanchez*, 63 Cal. 4th 411, 453 (Cal. 2016) ("preponderance of the evidence is the proper standard for uncharged crimes"), cert. denied, 137 S. Ct. 1340 (2017); Judicial Council of California Criminal Jury Instructions (2022 ed.) (CALCRIM) 1191A ("You may consider this [uncharged sexual misconduct] evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense[s]."); **Georgia:** *Jones v. State*, 802 S.E.2d 234, 236 (Ga. 2017) (other crimes evidence is admissible if, inter alia, "there is sufficient proof for a jury to find by a preponderance of the evidence that the defendant committed the prior act"); *Lowe v. State*, 879 S.E.2d 492, 496 (Ga. 2022) (quoting same); **Indiana:** *Clemens v. State*, 610 N.E.2d 236, 242 (Ind. 1993) (following *Huddleston*; "there must be sufficient evidence at trial to support a finding by the jury that the accused committed the similar act for it to be

admissible"), but see *Camm v. State*, 812 N.E.2d 1127, 1140 (Ind. Ct. App. 2004) (citing *Huddleston* for the proposition that "there must be sufficient evidence from which the jury could reasonably find the defendant's misconduct proven by a preponderance of the evidence"); **Maine:** *State v. Dean*, 589 A.2d 929, 933 n. 6 (Me. 1991) (citing *Huddleston*; misconduct evidence "was admitted for a limited purpose and could be considered for that limited purpose if the jury concluded that it was more probable than not "'that the act occurred and that the defendant was the actor'"'); *State v. Weckerly*, 181 A.3d 675, 682 n. 9 (Me. 2018) (*Huddleston* "enunciated" the preponderance standard, and a trial court "need only conclude that 'the jury could reasonably find the conditional fact [i.e., that the defendant did the prior act] by a preponderance of the evidence'"); **Massachusetts:** *Commonwealth v. Rosenthal*, 732 N.E.2d 278, 280-81(Mass. 2000) (citing *Huddleston*; to admit prior bad acts, "'the Commonwealth must satisfy the judge that "the jury [could] reasonably conclude that the act occurred and that the defendant was the actor,"'" and "'[t]he Commonwealth need only show these facts by a preponderance of the evidence.'"); *Commonwealth v. Dorazio*, 37 N.E.3d 566, 571 (Mass. 2015) (quoting same); **New Mexico:** *State v. Martinez*, 160 P.3d 894, 900 (N.M. 2007) (quoting *Huddleston* for the proposition that "'[t]he court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence'"); **North Carolina:** *State v. Haskins*, 411 S.E.2d 376, 380-81 (N.C. Ct. App. 1991) (citing *Huddleston*; "the 'other crimes, wrongs, or acts' evidence is relevant only if the jury can conclude by a preponderance of the evidence that the extrinsic act occurred and that the defendant was the actor"); *State v. Smith*, 808 S.E.2d 621, ___ (N.C. Ct. App.) (quoting same), rev. denied, 813 S.E.2d 237 (N.C.), cert. denied, 139 S. Ct. 250 (2018); **Rhode Island:** *State v. Rodriguez*, 996 A.2d 145, 151-52 (R.I. 2010) ("a trial justice may exclude evidence of a prior act . . . if she concludes that the jury could not reasonably find by a preponderance of the evidence that the prior act occurred"); **South Dakota:** *State v. Wright*, 593 N.W.2d 792, 798-99 (S.D. 1999) (citing *Huddleston*; "Before a jury may consider facts relating to other acts as proof of an issue relevant to the present offense, the jury must conclude the defendant committed the other acts by a preponderance of the evidence"); *State v. Medicine Eagle*, 835 N.W.2d 886, 895 n. 8 (S.D. 2013)

(jury was instructed that "[b]efore determining whether to consider this evidence [of other acts], you must first determine if a preponderance of the evidence established that [the defendant] committed the other acts"); *State v. Phillips*, 906 N.W.2d 411, 417 (S.D. 2018) ("We have said that other acts evidence is 'admissible only if the evidence is sufficient for the trial court to conclude that a jury could find by a preponderance that the other "act[s] occurred and that the defendant was the actor."'"); **Utah:** *State v. Lucero*, 328 P.3d 841, 847, 850, 852-53 (Utah 2014) (citing *Huddleston* but "adopt[ing] the majority rule that a preponderance of the evidence is required to admit evidence of prior bad acts"; construing state evidence rule "to require a judge to admit evidence when it determines that the jury could reasonably find matters of conditional fact by a preponderance of the evidence. . . 'similar act evidence is relevant only if the jury can reasonably conclude [by a preponderance of the evidence] that [1] the act occurred and that [2] the defendant was the actor'") (bracketed text in original), abrogated on other grounds by *State v. Thornton*, 391 P.3d 1016 (Utah 2017); *State v. Corona*, 436 P.3d 174, 180 (Utah Ct. App. 2018) ("'matters of conditional relevance must also meet the preponderance of the evidence standard under rule [allowing evidence of prior bad acts]'"), cert. denied, 437 P.3d 1249 (Utah 2019); **Vermont:** *State v. Robinson*, 611 A.2d 852, __ (Vt. 1992) (construing *Huddleston* as permitting evidence of prior bad acts "if the jury could reasonably find by a preponderance of the evidence that defendant committed the prior bad act," and applying that standard); *State v. Winter*, 648 A.2d 624, 631-32 (Vt. 1994) (same); **Wisconsin:** *State v. Gray*, 590 N.W.2d 918, 929 (1999) (""other acts evidence is relevant if a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act'"); *State v. Kaminski*, 777 N.W.2d 654, 658 (Wis. Ct. App. 2009) (same); *State v. Faustmann*, 915 N.W.2d 456 (Wis. Ct. App. 2018) (same); **Wyoming:** *Heinemann v. State*, 12 P.3d 692, 700 (Wyo. 2000) (noting that Wyoming adopted the *Huddleston* standard but that "[w]e are persuaded by the decisions of federal courts requiring that Rule 404(b) evidence must be established by a preponderance of the evidence"), cert. denied, 532 U.S. 934 (2001); but see *Gleason v. State*, 57 P.3d 332, 342 (Wyo. 2002) (in determining the probative value of prior bad act evidence, the trial court should consider several factors, including "[h]ow clear is it that the defendant committed the prior

Texas deserves its own paragraph. There, the trial court must make its conditional finding under the *reasonable doubt* standard, and then instruct the jury on *that standard*.[10]

The point of the foregoing survey is this: *Huddleston* adopted the preponderance standard for the admission of uncharged misconduct evidence in the federal courts. And almost seventy percent of the states now utilize either the preponderance standard, the "clear and convincing evidence" standard, a "substantial evidence" standard, or the reasonable doubt standard, for the admission of uncharged misconduct evidence. It is also significant that in his classic treatise, Professor Edward J. Imwinkelried provides a sample jury instruction that "specifies the measure of the burden of proof." See 2 E. Imwinkelried, *Uncharged Misconduct Evidence* (2021 ed.) §§ 9:65—9:66, at pp. 434-36. "The [sample] instruction apprises the jury that the standard is 'a preponderance of the evidence.'

---

bad act?. . . ."); *Miller v. State*, 479 P.3d 387, 392 n. 5 (Wyo. 2021) (quoting same).

[10] **Texas:** *Harrell v. State*, 884 S.W.2d 154, 157-61(Tex. Crim. App. 1994) ("in deciding whether to admit extraneous offense evidence in the guilt/innocence phase of trial, the trial court must . . . make an initial determination at the proffer of the evidence, that a jury could reasonably find beyond a reasonable doubt that the defendant committed the extraneous offense"; "This Court has long required that juries be instructed not to consider extraneous offense evidence unless they believed beyond a reasonable doubt that the defendant committed such offense."); *Reed v. State*, 550 S.W.3d 748, 761 (Tex. App. 2018) (quoting portion of same); *Fischer v. State*, 268 S.W.3d 552, 556 (Tex. Crim. App. 2008) (same); *Dounley v. State*, No. 05-19-00036-CR, 2020 Tex. App. Lexis 711 *2 (Tex. App. 2020) ("upon the defendant's request, the trial court must instruct the jury not to consider the admitted extraneous offense evidence unless it believes beyond a reasonable doubt that the defendant committed the extraneous offense").

In other jurisdictions, the standard would be 'clear and convincing proof.' In some jurisdictions, the standard is proof beyond a reasonable doubt." *Id*., pp. 434-36.

In the vast majority of cases where courts have implemented a specific standard of proof for uncharged misconduct, the misconduct evidence *was not* offered for propensity purposes. But when, as here, the uncharged misconduct *is* offered as propensity evidence, the need for a specific standard of proof is elevated because of the enhanced potential for prejudice lurking in every propensity instruction.

Finally, the absence of a jury instruction on a specific and uniform standard of proof, meant that each juror at petitioner's trial was free to apply his or her *own* individual standard. Could a reasonable juror, consistent with the trial court's "determine" instruction, have decided that petitioner *could have* or *might have* committed an act of misconduct—a probability of less than fifty percent—and then relied on the propensity instruction? Yes.

The Due Process Clause requires more. Uncharged misconduct is inherently prejudicial. The preponderance standard should be the minimally-acceptable standard for its admission, especially when such misconduct is offered for propensity purposes.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Connecticut Appellate Court.

Respectfully submitted,

Of Counsel:

ALAN M. DERSHOWITZ
1575 Massachusetts Avenue
Cambridge, MA 02138

RICHARD EMANUEL
Counsel of Record
LAW OFFICES OF
RICHARD EMANUEL
246 Goose Lane, Suite 106
Guilford, CT 06437
(203) 689-5761
newtrials@comcast.net

DAVID T. GRUDBERG
CARMODY TORRANCE SANDAK
& HENNESSEY LLP
195 Church Street, 18th Floor
P.O. Box 1950
New Haven, CT 06509
(203) 777-5501
dgrudberg@carmodylaw.com

Counsel for Petitioner

March 1, 2023

APPENDIX

TABLE OF CONTENTS

APPENDIX A

CONNECTICUT APPELLATE COURT

Docket Number: AC 43726

STATE OF CONNECTICUT

v.

DANIEL GREER

July 19, 2022

Bright, C. J., and Elgo and DiPentium, Js.

Syllabus

Convicted of four counts of risk of injury to a child, the defendant appealed to this court. The defendant, a rabbi, was a teacher at and served as the dean of a private, Orthodox Jewish high school. The victim, E, attended the school for four years, commencing in 2001. E alleged that, during his sophomore year, when he was fourteen and fifteen years old, he and the defendant met at least once a week to engage in various sexual acts. The defendant continued to engage in sexual acts with E after he turned sixteen years old. In 2016, E reported the sexual abuse to the police. The defendant was arrested and charged with four counts each of sexual assault in the second degree and risk of injury to a child. At trial, the state introduced uncharged misconduct evidence pursuant to a provision (§ 4-5) of the Connecticut Code of Evidence regarding a sexual relationship between the defendant and R, a former student at the school, and

the defendant's relationship with E after his sixteenth birthday. Following R's testimony, the court provided a limiting instruction to the jury. After the close of evidence at trial, defense counsel moved for a judgment of acquittal as to the charges of sexual assault in the second degree on the ground that the prosecution was barred by the applicable statute ((Rev. to 2001) § 54-193a, as amended by Public Acts 2002, No. 02-138, § 1) of limitations because E had not notified a police officer or state's attorney within five years of the commission of the offense. The state conceded that the charges were barred, and the trial court granted the motion for a judgment of acquittal. Thereafter, the state filed a new information limited to the four counts of risk of injury to a child. In its final instructions to the jury, the court instructed in relevant part regarding misconduct evidence: "It is for you to determine whether the defendant committed any uncharged sexual misconduct. . . ." The jury found the defendant guilty. The defendant filed postverdict motions for a judgment of acquittal and a new trial, claiming, inter alia, that the limitation period applicable to the charges of sexual assault in the second degree should also apply to the risk of injury charges because the charges were based on the same conduct. The trial court denied the motions, and the defendant appealed to this court. *Held:*

1. The trial court properly denied the defendant's motion for a judgment of acquittal as to the risk of injury charges: our courts previously have concluded that risk of injury to a child and sexual assault are separate and distinct offenses; moreover, contrary to the defendant's assertion, the requirement that a victim notify a police officer or state's attorney of an offense within five years of its commission was limited by the plain and unambiguous language of § 54-193a

to charges of sexual assault in the second degree pursuant to statute (§ 53a-71 (a) (1)); furthermore, if the legislature had intended the additional reporting requirement to also apply to charges of risk of injury under the applicable statute (§ 53-21 (a) (2)), it would have stated so expressly, and, accordingly, for the court to expand the requirement to violations of § 53-21 (a) (2) would be contrary to the presumed intent of the legislature; additionally, applying different statutes of limitations to the two sets of charges would not lead to an absurd or unworkable result, as two criminal statutes can be construed to proscribe the same conduct and a defendant may be prosecuted under either.

2. The trial court properly instructed the jury as to the evidence of uncharged misconduct: the defendant adequately preserved his challenge to the trial court's instructions regarding the uncharged misconduct evidence involving the defendant's continued sexual acts with E after E turned sixteen by stating in his request to charge that, "[a]s to any evidence of uncharged misconduct," the state had the burden to prove such conduct by clear and convincing evidence; moreover, the trial court instructed that it was for the jury "to determine" whether the defendant engaged in the acts of uncharged misconduct and, contrary to the defendant's assertions, there was no meaningful distinction between an instruction that a jury may consider prior misconduct evidence if it "believes" such evidence, which our Supreme Court endorsed in *State v. Cutler* (293 Conn. 303) and which is used in the Connecticut Criminal Jury Instructions, and the trial court's use of the word "determine"; accordingly, the trial court's instructions regarding the uncharged misconduct were not deficient.

Argued February 28—officially released July 19, 2022

Procedural History

Substitute information charging the defendant with four counts each of the crimes of sexual assault in the second degree and risk of injury to a child, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, and tried to the jury before *Alander, J.*; thereafter, the court, *Alander, J.*, granted the defendant's motion for a judgment of acquittal as to the four counts of sexual assault in the second degree; verdict of guilty of four counts of risk of injury to a child; subsequently, the court, *Alander, J.*, denied the defendant's postverdict motions for a judgment of acquittal and a new trial and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Richard Emanuel, with whom was *David T. Grudberg*, for the appellant (defendant).

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, former state's attorney, and *Maxine Wilensky* and *Karen A. Roberg*, senior assistant state's attorneys, for the appellee (state).

Opinion

BRIGHT, C. J. The defendant, Daniel Greer, appeals from the judgment of conviction, rendered after a jury trial, of four counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). On appeal, the defendant claims that the court improperly (1) concluded that the statute of limitations applicable to sexual assault in the second degree under General Statutes (Rev. to 2001) § 54-193a, as amended by Public Acts 2002, No. 02-138, § 1 (effective

May 23, 2002) (P.A. 02-138),[1] did not apply to the risk of injury charges and (2) declined to instruct the jury to apply a standard of proof to determine whether certain prior misconduct occurred. We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The defendant, who is a rabbi, founded Yeshiva of New Haven, Inc. (yeshiva), a private, Orthodox Jewish school, and served as a dean, rabbi, and teacher at the yeshiva. The victim, E,[2] attended the yeshiva for high school, beginning his freshman year in August or September, 2001, when he was thirteen years old. E's birthday is in October, and he turned fourteen years old during his freshman year. Shortly after the school year began, E was expelled from the yeshiva, but he was allowed to return to complete his freshman year after spending a few weeks at home.

In 2002, when he was fourteen years old, E returned to the yeshiva for his sophomore year. At some point during the beginning of the school year, the defendant told E to meet him at an apartment adjacent to the school, and E complied. At the apartment, the defendant offered E a can of nuts and an alcoholic drink, either wine or hard liquor, in a red Solo cup. They proceeded to drink and talk about E's family and his future, and E began to get emotional and his head felt

---

[1] The legislature repealed § 54-193a effective October 1, 2019. Unless otherwise indicated, all references to § 54-193a in this opinion are to the 2001 revision of the statute, as amended by P.A. 02-138.

[2] In accordance with our policy of protecting the privacy interests of the victims of the crime of risk of injury to a child, we decline to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

"fuzzy . . . ." At some point, the defendant touched E's thigh or crotch area and attempted to kiss him on the lips. When E pulled away and asked the defendant what he was doing, the defendant said that "[i]t wasn't a big deal and that this is what he does to his kids." Nothing further transpired, and E returned to his dormitory.

After the initial incident at the apartment, E and the defendant met at least once a week during his sophomore year at various locations—often in New Haven or at a motel in Branford—and engaged in oral or anal sex. During these encounters, the defendant and E often would consume alcohol. E acknowledged that "the encounters meld together" but was "very sure" that he and the defendant engaged in anal and oral sex during his sophomore year, during which time he was fourteen and fifteen years old. He testified that, during that period, he and the defendant frequently performed oral sex on each other, that he performed anal sex on the defendant "many" times, and that, when the defendant attempted to perform anal sex on E, E forced him to stop because it was too painful. After these encounters, E would feel "shame, guilt, [and] confusion." At the yeshiva, the defendant gave E preferential treatment and would not yell at him as he regularly did with other students. When E attempted to end the sexual relationship, the defendant stopped giving him preferential treatment and became "nasty" instead of "nice and charming . . . ." The defendant continued to engage in sexual acts with E after he turned sixteen years old in October, 2003.

After graduating in 2005, E went to an Orthodox yeshiva in Israel to continue his Jewish studies and met S, his future wife, while staying there. In 2006, E told S that the defendant had molested him during

high school, but he did not provide any details about the abuse. In the summer of 2006, E returned to Connecticut and met the defendant at the Branford motel, where they had their last sexual encounter.

In December, 2007, E and S were married, and the defendant was one of the witnesses at the ceremony, which is a position of honor. E explained that he gave the defendant this honor because he respected the defendant and "still felt part of the New Haven community . . . ." For several years following their marriage, E and S would travel to New Haven for Jewish holidays, where they would share meals with members of the yeshiva community, including the defendant. When E and S had a son in June, 2010, E asked the defendant to hold the baby during the circumcision, which is also a position of honor.

In 2013, E and S bought a house in New Jersey, and E found a rabbi in that community. Around that time, E stopped traveling to New Haven and communicating with the defendant. At some point before 2016, E disclosed the abuse to his therapist and two family friends, one of whom was working at the yeshiva. In May, 2016, E filed a civil action in federal court against the defendant seeking money damages stemming from the sexual abuse. In August, 2016, while the civil action was pending, E reported the sexual abuse to the New Haven Police Department.

On July 26, 2017, the defendant was arrested and charged with four counts of sexual assault in the second degree under General Statutes § 53a-71 (a) (1)[3]

---

[3] General Statutes § 53a-71 provides in relevant part: "(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under

and four counts of risk of injury to a child under § 53-21 (a) (2).[4] In the operative long form information, the state alleged that the charged conduct occurred when E was fourteen and fifteen years old, "at the city of

---

sixteen years of age and the actor is more than three years older than such other person . . . .

"(b) Sexual assault in the second degree is a class C felony or, if the victim of the offense is under sixteen years of age, a class B felony, and any person found guilty under this section shall be sentenced to a term of imprisonment of which nine months of the sentence imposed may not be suspended or reduced by the court."

Although § 53a-71 has been the subject of several amendments since the defendant's commission of the crime that formed the basis of his conviction; see, e.g., Public Acts 2004, No. 04-130, § 1 (establishing additional form of sexual assault when actor is twenty years old or older and stands in position of power, authority or supervision); Public Acts 2007, No. 07-143, § 1 (increasing, from two to three years, age difference between teenagers required for older individual to be guilty of sexual assault in second degree); those amendments have no bearing on the merits of this appeal. Accordingly, in the interest of simplicity, we refer to the current revision of the statute.

[4] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony for a violation of subdivision (2) of this subsection . . . ."

Although § 53-21 has been the subject of several amendments since the defendant's commission of the crimes that formed the basis of his conviction; see, e.g., 2007 Public Acts, No. 07-143, § 4 (establishing five year mandatory minimum sentence for violation of § 53-21 (a) (2) when victim is under thirteen years old); 2013 Public Acts, No. 13-297, § 1 (adding additional form of risk of injury); those amendments have no bearing on the merits of this appeal. Accordingly, in the interest of simplicity, we refer to the current revision of the statute.

New Haven on divers dates between 2002 up to October 27, 2003. . . .” As the state acknowledged at oral argument before this court, the sexual assault and risk of injury charges were premised on the same conduct—anal intercourse and fellatio.[5]

The case proceeded to a jury trial, and, at the close of evidence, defense counsel moved for a judgment of acquittal as to the charges of sexual assault in the second degree on the ground that the prosecution was barred by the statute of limitations set forth in § 54-193a because E had not notified a police officer or state's attorney within five years after the commission of the offense. After a brief recess, the state conceded that the sexual assault charges are barred under § 54-193a, and the court granted the motion for a judgment of acquittal as to the four counts of sexual assault in the second degree (counts one, three, five, and seven). Thereafter, the state filed a new information limited to the four counts of risk of injury to a child, and the jury found the defendant guilty of those charges.

The defendant filed postverdict motions for a judgment of acquittal and a new trial. In the memorandum of law in support of the motions, the defendant claimed, inter alia, that the same limitation period

---

[5] Counts one, three, five, and seven alleged that the defendant violated § 53a-71 (a) (1) by engaging in the following conduct: “anal intercourse—Daniel Greer's penis with [E's] anus” (count one); “fellatio—Daniel Greer's penis in [E's] mouth” (count three); “anal intercourse—[E's] penis in Daniel Greer's anus” (count five); and “fellatio—[E's] penis in Daniel Greer's mouth” (count seven). Counts two, four, six, and eight alleged that the defendant violated § 53-21 (a) (2) based on the following contact between the defendant and E: “Daniel Greer's genital area with [E's] anus” (count two); “Daniel Green's genital area with [E's] mouth” (count four); “[E's] genital area with Daniel Greer's anus” (count six); and “[E's] penis in Daniel Greer's mouth” (count eight).

applicable to sexual assault in the second degree should apply to the risk of injury charges because all of the charges were based on the same conduct.[6] After hearing argument, the court rejected the defendant's statute of limitations claim and denied the motions. Thereafter, the court sentenced the defendant to twenty years of incarceration, execution suspended after twelve years, followed by ten years of probation. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the same limitation period that applied to the charges of sexual assault in the second degree also applies to the risk of injury charges, which were based on the same conduct and proved by the same evidence. We are not persuaded.

As a preliminary matter, we set forth our standard of review and the legal principles that guide our analysis. The defendant's statute of limitations claim presents an issue of statutory construction. "Issues of statutory construction present questions of law, over which we exercise plenary review." (Internal quotation marks omitted.) *500 North Avenue, LLC v. Planning Commission*, 199 Conn. App. 115, 121, 235 A.3d 526, cert. denied, 335 Conn. 959, 239 A.3d 320 (2020); see also *State v. George J.*, 280 Conn. 551, 562-63, 910 A.2d 931 (2006) (statute of limitations claims raise

[6] Although the defendant's memorandum stated that it was filed in support of both his motion for a new trial and his motion for a judgment of acquittal, it addressed only the defendant's claim that the risk of injury charges should be dismissed for the same reason that the sexual assault charges were dismissed. Thus, on the basis of the statute of limitations issue raised, the defendant sought a judgment of acquittal and not a new trial.

questions of statutory construction subject to plenary review), cert. denied, 549 U.S. 1326, 127 S. Ct. 1919, 167 L. Ed. 2d 573 (2007).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .

"[I]t is reasonable to presume that, by rejecting the underlying premise [of a prior decision], the legislature also . . . express[es] its disapproval of [the court's prior] conclusion . . . . The legislature can reject the underlying premise of a decision by changing or deleting a provision on which the court relied. This is especially true when that provision exists elsewhere in the statutory scheme. For instance, [when] a statute, with reference to one subject, contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed . . . . This tenet of statutory construction ensures that statutes [are] construed, if possible, such that no clause, sentence or word shall be superfluous. void or insig-

nificant, and that every sentence, phrase and clause is presumed to have a purpose." (Citations omitted; internal quotation marks omitted.) *Gilmore v. Pawn King, Inc.*, 313 Conn. 535, 542-43, 98 A.3d 808 (2014).

"The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. . . . Indeed, it is because of the remedial nature of criminal statutes of limitation[s] that they are to be liberally interpreted in favor of repose." (Citation omitted; internal quotation marks omitted.) *State v. Skakel*, 276 Conn. 633, 677, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006).

In accordance with § 1-2z, we begin with the text of § 54-193a, which provides in relevant part: "Notwithstanding the provisions of section 54-193, no person may be prosecuted for any offense, except a class A felony, involving sexual abuse, sexual exploitation or sexual assault of a minor except within thirty years from the date the victim attains the age of majority or within five years from the date the victim notifies any police officer or state's attorney acting in such police officer's or state's attorney's official capacity of the commission of the offense, whichever is earlier, provided if the prosecution is for a violation of subdivision (1) of subsection (a) of section 53a-71 . . . the

victim notified such police officer or state's attorney not later than five years after the commission of the offense." General Statutes (Rev. to 2001) § 54-193a, as amended by P.A. 02-138.

Thus, for an offense involving sexual abuse, sexual exploitation, or sexual assault of a minor, the statute of limitations is the earlier of (1) thirty years from the date the victim reaches eighteen years old or (2) five years from the date the victim notifies law enforcement or a state's attorney of the offense. See General Statutes (Rev. to 2001) § 54-193a, as amended by P.A. 02-138. The legislature, however, provided a further requirement for a violation of § 53a-71 (a) (1), which involves sexual intercourse between a victim at least age thirteen but under age sixteen and an actor at least three years older, that the victim notify a police officer or prosecutor within five years after the offense is committed. See General Statutes (Rev. to 2001) § 54-193a, as amended by P.A. 02-138. That reporting requirement is at issue in the present case.

It is undisputed that E did not report the defendant's conduct to the police within five years of its occurrence. In fact, it was for this reason that the court granted the judgment of acquittal as to the sexual assault charges. The defendant argues that, because the sexual assault and risk of injury charges were based on the same conduct, "it would be illogical and unreasonable to apply a greater limitation period to that same conduct when it is *simultaneously* prosecuted under the risk of injury statute—a statute that *does not* require proof of sexual intercourse or penetration, and which can be violated simply by proof of over the clothes contact with the intimate parts of the perpetrator or the intimate parts of the child victim. Such a bizarre or irrational result was un-

doubtedly neither intended nor foreseen by the legislature . . . .” (Emphasis in original; footnote omitted; internal quotation marks omitted.) In response, the state asserts that the plain and unambiguous statutory language defeats the defendant’s claim because, “where the legislature expressly has proscribed a shorter statute of limitations for one way of committing a crime . . . a reviewing court cannot presume that it also intended to extend that limitation to other crimes not specifically named.”[7] We agree with the state.

---

[7] The state also contends that the defendant waived this claim by failing to raise it at trial. We disagree.

In *State v. Golodner*, 305 Conn. 330, 355-56, 46 A.3d 71 (2012), the defendant filed postverdict motions for a judgment of acquittal and a new trial, asserting that one count of the substituted information was barred by the applicable statute of limitations. The trial court denied the motion, “stating that the defendant had failed to raise the statute of limitations defense in a timely manner . . . .” Id., 356. On appeal, the state argued “that the defendant waived an affirmative defense based on the statute of limitations by raising it for the first time after the conclusion of trial.” Id. In rejecting the state’s waiver argument, our Supreme Court noted that a waiver of a statute of limitations defense must be voluntary and intelligent and held that “[t]here [was] nothing to suggest a voluntary waiver on the part of the defendant . . . . His motion for acquittal based on the statute of limitations would suggest the contrary.” Id., 359.

In the present case, as in *Golodner*, the defendant raised the statute of limitations defense in postverdict motions and, therefore, he did not voluntarily waive it. Although the state argues that *Golodner* is distinguishable because it involved an amendment to the information and, therefore, the statute of limitations defense was unavailable before trial; see id., 355-56; we are not persuaded that this fact had any bearing on the court’s holding in *Golodner*. In fact, the court agreed with the defendant’s argument in *Golodner* that Practice Book § 41-8’s “use of the phrase ‘if made prior to trial’ suggests that the motion *does not*

As a preliminary matter, we note that "[o]ur courts have addressed the relationship between risk of injury to a child and the various degrees of sexual assault in the context of double jeopardy claims on several occasions, each time concluding that the two crimes do not constitute the same offense. In *State v. Bletsch*, [281 Conn. 5, 28-29, 912 A.2d 992 (2007)], for example, [our Supreme Court] . . . concluded that, under the charging instruments in that case, the crimes of sexual assault in the second degree under . . . § 53a-71 (a), and risk of injury to a child under § 53-21 (a) (2), do not constitute the same offense for double jeopardy purposes because the language of the statutes makes it possible to have 'sexual intercourse' under § 53a-71 (a) without touching the victim's 'intimate parts' under § 53-21 (a) (2), and vice versa." *State v. Alvaro F.*, 291 Conn. 1, 7, 966 A.2d 712, cert. denied, 558 U.S. 882, 130 S. Ct. 200, 175 L. Ed. 2d 140 (2009). Accordingly, although the underlying conduct giving rise to the charges in the present case is the same, sexual assault

---

have to be mode before trial." (Emphasis added.) Id., 356; see also Practice Book § 41-8 (statute of limitations defense "shall, if made prior to trial, be raised by a motion to dismiss the information").

The state also contends that the present case should be controlled by *State v. Pugh*, 176 Conn. App. 518, 535, 170 A.3d 710, cert. denied, 327 Conn. 985, 175 A.3d 43 (2017), in which this court held that, because the defendant failed to assert the statute of limitations defense at trial, "the defendant is deemed to have waived such defense and is, therefore, barred from raising it on appeal." Unlike the present case, however, the defendant in *Pugh* failed to raise the statute of limitations claim before the trial court and sought to raise it for the first time on appeal. See id. Therefore, the claim in *Pugh* was unpreserved. Accordingly, we conclude that *Pugh* is distinguishable and that *Golodner* is controlling.

in the second degree and risk of injury to a child are separate and distinct offenses.

Notwithstanding this fact, the defendant, relying on *State v. George J.*, supra, 280 Conn. 571-76, contends that the same statute of limitations should apply to both offenses. In *George J.*, the defendant claimed that his prosecutions for two counts of risk of injury to a child were time barred under General Statutes (Rev. to 1993) § 54-193, which provided the statute of limitations for nonclass A felony offenses generally. Id., 571. The defendant argued that General Statutes (Rev. to 1993) § 54-193a, as amended by Public Acts 1993, No. 93-340, § 11 (P.A. 93-340), which provided an extended statute of limitations " 'for any offense involving sexual abuse, sexual exploitation or sexual assault of a minor,'" applied "only to offenses for which sexual abuse, sexual exploitation or sexual assault of a minor is an element of the crime, and that risk of injury is not such an offense because conduct other than sexual acts against minors is encompassed within that offense." Id. At the time of the offense, General Statutes (Rev. to 1993) § 53-21 did not include subsection (2), which was added in 1995 to address sexual contact with a minor child. Id., 573-74 and n.15.

In rejecting the defendant's claim, the court noted that "the legislature has created an extended limitations period to allow child sexual abuse victims, who may be unable to come forward at the time the offense has occurred, a reasonable opportunity to report the abuse. It would thwart that purpose and create disharmony to apply the extended statute of limitations to a sexual assault offense, but apply the general limitations period of five years from the date of the offense to a risk of injury charge involving the same conduct. The law prefers rational and prudent

statutory construction, and we seek to avoid interpretations of statutes that produce odd or illogical outcomes." Id., 574-75.

The defendant contends that "the 'odd or illogical outcome' that the *George J.* court sought to avoid, would occur here if the court allowed the risk of injury convictions to stand—convictions based on the same essential conduct underlying the time barred sexual assault charges. . . . Where, as here, the alleged violations of § 53-21 (a) (2) are based on the same conduct forming the basis for the sexual assault charges under § 53a-71 (a) (1), the same five year statute should apply." (Footnote omitted.) We disagree.

In *George J.*, our Supreme Court sought to determine whether the extended statute of limitations for sex offenses against minors applied to the risk of injury statute despite the fact that General Statutes (Rev. to 1993) § 53-21 did not include a sexual element of the offense. *State v. George J.*, supra, 280 Conn. 573. In rejecting the state's contention that General Statutes (Rev. to 1993) § 54-193a "clearly" applied to risk of injury to a child, the court explained that "the meaning of the statute is not plain and unambiguous, because it does not refer expressly either to the crime of risk of injury or to the statute addressing that crime, and there is more than one reasonable construction based solely on the text of the statute. Indeed, because the crime of risk of injury does not *necessarily* involve sexual abuse, we certainly cannot conclude that [General Statutes (Rev. to 1993)] § 54-193a becomes unambiguous by looking to the crime charged in the present case." (Emphasis in original; internal quotation marks omitted.) Id., 563 n.8. Nevertheless, after considering the specific language the legislature chose to use in General Statutes (Rev. to 1993) § 54-193a, the

legislative policy underlying the statute, and the bill analysis prepared by the Office of Legislative Research (OLR), the Supreme Court concluded that the extended statute of limitations applied to risk of injury charges that were based on sexual abuse, sexual assault, or sexual exploitation of a minor. Id., 572-76.

Specifically, the court first noted that, at the time of the defendant's conduct, "[i]t [was] well established that [General Statutes (Rev. to 1993) § 53-21's] proscription on actions that create a risk of 'impair[ing]' the 'health or morals' of a child encompasses a broad range of acts, including sexual acts against minors." Id., 572. The court then defined the question before it as "whether, by creating an extended statute of limitations for 'any offense . . . *involving* sexual abuse, sexual exploitation or sexual assault of a minor' . . . General Statutes (Rev. to 1993) § 54-193a, as amended by P.A. 93-340, § 11; the legislature intended that the statute apply to any such conduct or only to such conduct when it expressly is prescribed as an element of the offense." (Emphasis in original.) *State v. George J.*, supra, 280 Conn. 573. The court answered that question by comparing General Statutes (Rev. to 1993) § 54-193a with other criminal statutes of limitations: "[General Statutes (Rev. to 1993) §] 54-193a is one of three criminal statutes of limitations. Notably, in both of the other statutes of limitations, the legislature specifically has provided the statutory provisions to which the limitations period applies; see General Statutes § 54-193b;[8] or has delineated the statutory

[8] "General Statutes [Rev. to 2005] § 54-193b provides: 'Notwithstanding the provisions of sections 54-193 and 54-193a, a person may be prosecuted for a violation of section 53a-70. 53a-70a, 53a-70b, 53a-71, 53a-72a or 53a-72b not later than twenty years from the date of the commission of the offense, provided (1)

provisions or classes of offenses that are excluded from the limitations period. See General Statutes (Rev. to 1993) § 54-193. By contrast, in § 54-193a, the legislature did not cite specific statutes to which the expanded limitations period applies; rather, it used a broad descriptive phrase, 'any offense[s] involving . . . .' General Statutes (Rev. to 1993) § 54-193a, as amended by P.A. 93-340, § 11. It is difficult to imagine how the legislature could have phrased the statute more expansively and yet still limited its reach to sexual acts against children." (Footnote in original; footnote omitted.) *State v. George J.*, supra, 573-74. The court concluded that its interpretation was consistent with OLR's analysis of the public act, which was codified at § 54-193a. Id., 575.

As noted previously in this opinion, the court also discussed the legislative policy underlying General Statutes (Rev. to 1993) § 54-193a and concluded that applying the extended statute of limitations to a sexual assault offense but not to a risk of injury offense based on the same conduct would thwart the policy behind the statute, create disharmony, and produce odd or illogical outcomes. Id., 574-75. It is this policy statement on which the defendant relies to argue that

---

the victim notified any police officer or state's attorney acting in such police officer's or state's attorney's official capacity of the commission of the offense not later than five years after the commission of the offense, and (2) the identity of the person who allegedly committed the offense has been established through a DNA (deoxyribonucleic acid) profile comparison using evidence collected at the time of the commission of the offense.' Although § 54-193b was enacted in 2000; see Public Acts 2000, No. 00-80, § 1; we nonetheless find it useful in discerning the type of language that the legislature could have used in 1995 had it intended that. § 54-193a have a more limited, specific reach." *State v. George J.*, supra, 280 Conn. 573 n.16.

it would create similar disharmony to apply the reporting requirement in § 54-193a to violations of § 53a-71 (a) (1) but not to risk of injury violations based on the same conduct.

The problem with the defendant's argument is that it ignores the plain and unambiguous language of the statute. The legislature specifically identified § 53a-71 (a) (1) as the sole statute to which the additional reporting requirement applies. General Statutes (Rev. to 2001) § 54-193a, as amended by P.A. 02-138. Given the plain and unambiguous statutory language, we cannot expand § 54-193a's limited exception for a prosecution of sexual assault in the second degree under § 53a-71 (a) (1) and apply it to a risk of injury charge under § 53-21 (a) (2). Indeed, to do so "would contravene the doctrine of expressio unius est exclusio alterius—the expression of one thing is the exclusion of another—[under which] we presume that when the legislature expresses items as part of a group or series, an item that was not included was deliberately excluded. . . . Put differently, it is well settled that [w]e are not permitted to supply statutory language that the legislature may have chosen to omit." (Citation omitted; internal quotation marks omitted.) *Mayer v. Historic District Commission*, 325 Conn. 765, 776, 160 A.3d 333 (2017).

Furthermore, our conclusion is consistent with the reasoning in *George J.*, in which our Supreme Court expressly relied on the fact that the legislature did not limit the expanded statute of limitations in General Statutes (Rev. to 1993) § 54-193a to specific criminal statutes. *State v. George J.*, supra, 280 Conn. 573-74. It further noted that this was in stark contrast to other statutes of limitations that either were limited to specific statutes or excluded specific statutes from their

operation. Id., 573. Relevant to the present case, the legislature did not provide that the additional reporting requirement applied to any *offense* involving sexual intercourse with another person between the ages of thirteen and sixteen when the defendant is more than three years older than such person. Instead, the legislature specifically limited the application of the reporting requirement to only "a violation of subdivision (1) of subsection (a) of section 53a-71 . . . ." General Statutes (Rev. to 2001) § 54-193a, as amended by P.A. 02-138. Consistent with our Supreme Court's conclusion in *George J.*, we conclude that, had the legislature intended a different application of the statute, it readily could have so provided. See *State v. George J.*, supra, 574.

Finally, we are not persuaded that applying a different statute of limitations to the two sets of charges in the present case leads to an absurd or unworkable result. As this court has recognized, "[t]wo criminal statutes can be construed to proscribe the same conduct and a defendant can be prosecuted under either." *Evans v. Commissioner of Correction*, 47 Conn. App. 773, 780-81, 709 A.2d 1136, cert. denied, 244 Conn. 921, 714 A.2d 5 (1998). Although the defendant suggests that the legislature intended for the reporting requirement to apply to the *conduct* giving rise to a prosecution of sexual assault in the second degree, as noted previously in this opinion, such an intent is not reflected in the statutory language.

As our Supreme Court has explained, [o]ur statute of limitations distinguishes between offenses according to their severity, and there is nothing inconsistent in the fact that some prosecutions are barred where others are not. We further believe that confidence in

our judicial system would be severely eroded if serious charges were dismissed by the courts for reasons of judicial policy, when the legislature, through the statute of limitations, has manifested an intent that they be prosecuted." *State v. Ellis*, 197 Conn. 436, 476, 497 A.2d 974 (1985). In the present case, we are persuaded that the legislature, by establishing an extended statute of limitations for *"any offense* . . . involving sexual abuse, sexual exploitation or sexual assault of a minor," has manifested an intent that charges of risk of injury to a child should be prosecuted, so long as the prosecution occurs within the extended statute of limitations. (Emphasis added.) General Statutes (Rev. to 2001) § 54-193a, as amended by P.A. 02-138; see also *State* v. *George J.*, supra, 280 Conn. 574 ("[i]t is difficult to imagine how the legislature could have phrased [General Statutes (Rev. to 1993) § 54-193a] more expansively and yet still limited its reach to sexual acts against children"). The fact that the legislature identified a single statutory exception to that extended statute of limitations for a prosecution of sexual assault in the second degree does not indicate a contrary intent.

In sum, the legislature carved out a single exception to the extended statute of limitations under § 54-193a for the prosecution of a violation of § 53a-71 (a) (1). Had the legislature intended for the same exception to apply to § 53-21 (a) (2), it would have stated so expressly. Consequently, we conclude that § 54-193a is unambiguous and does not yield absurd or unworkable results. Therefore, the court properly denied the

defendant's motion for a judgment of acquittal as to the risk of injury charges.[9]

II

The defendant next claims that the court, in its mid-trial and final instructions to the jury, improperly failed to provide the jury with a standard of proof to apply in determining whether the defendant had committed acts of uncharged misconduct. In response, the state argues that the defendant's challenge to the court's instruction as to the evidence of uncharged misconduct with E is unpreserved and unreviewable and that the court properly instructed the jury regarding the evidence of uncharged sexual misconduct with another student, R. We conclude that the defendant's claim is preserved and that the court properly instructed the jury.

---

[9] The defendant also claims that, "[i]f this court has any reasonable doubt about the proper scope of § 54-193a, relief should be granted as a matter of lenity." "[T]he touchstone of this rule of lenity is statutory ambiguity. . . . [W]e . . [reserve] lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute." (Emphasis in original; internal quotation marks omitted.) *State v. Palmenta*, 168 Conn. App. 37, 47, 144 A.3d 503, cert. dismissed, 323 Conn. 930, 150 A.3d 230 (2016), and cert. denied, 323 Conn. 931, 150 A.3d 231 (2016). Here, because we conclude that the statute is not ambiguous and that it does not lead to absurd or unworkable results, we have no reason to resort to the rule of lenity. See id. ("[b]ecause we conclude that, after full resort to the process of statutory construction, there is no reasonable doubt as to the meaning of the statute, we need not resort to the rule of lenity"); see also General Statutes § 1-2z (when meaning of text of statute "is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered").

The following additional facts and procedural history are relevant to the defendant's claim. Before trial, the state filed a motion to introduce uncharged misconduct evidence pursuant to § 4-5 of the Connecticut Code of Evidence.[10] The state sought to introduce evidence regarding a sexual relationship between the defendant and R, a former student who attended the yeshiva in 2008, and the defendant's sexual relationship with E after E's sixteenth birthday. Following oral argument, the court granted the state's motion, determining that the defendant's uncharged sexual misconduct with R was admissible to establish the defendant's propensity to commit the

---

[10] Section 4-5 of the Connecticut Code of Evidence provides in relevant part: "(a) General Rule. Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person except as provided in subsection (b).

"(b) When evidence of other sexual misconduct is admissible to prove propensity. Evidence of other sexual misconduct is admissible in a criminal case to establish that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual misconduct if: (1) the case involves aberrant and compulsive sexual misconduct; (2) the trial court finds that the evidence is relevant to a charged offense in that the other sexual misconduct is not too remote in time, was allegedly committed upon a person similar to the alleged victim, and was otherwise similar in nature and circumstances to the aberrant and compulsive sexual misconduct at issue in the case; and (3) the trial court finds that the probative value of the evidence outweighs its prejudicial effect.

"(c) When evidence of other crimes, wrongs or acts is admissible. Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony. . . ."

type of sexual misconduct with which he was charged under § 4-5 (b) of the Connecticut Code of Evidence and that the continuation of the defendant's sexual relationship with E was admissible to show the defendant's common plan or scheme to have continuous sexual relations with E under § 4-5 (c).[11]

At trial, the state presented testimony from E regarding incidents that occurred after his sixteenth birthday. Before the state elicited that testimony, the court provided a limiting instruction to the jury.[12] The state also presented testimony from R regarding incidents of uncharged sexual misconduct. R testified that, in 2008, when he was thirteen or fourteen years old, the defendant had tutored him at the yeshiva. R

---

[11] The court explained that, "[t]o the extent that the subsequent sexual activity between the defendant and [E] is not viewed as misconduct, the issue becomes one of relevancy. . . . Evidence that the defendant and [E] had a sexual relationship after the alleged sexual misconduct in this case is probative of the full nature of their relationship and the prior sexual misconduct as well as the reason why [E] did not immediately report the sexual misconduct to the police."

[12] The court stated: "You're now going to be hearing evidence where . . . the witness is going to claim that he had sexual relations with the defendant after he turned sixteen. . . . [The defendant is] not charged with any crimes related to that, but you will be hearing about that.

"It's not being offered to show the bad character of the defendant, it's not being offered to show his propensity to commit crimes. It's being offered to show—it's being offered for a limited purpose; one, to show the complete nature of relationship between this witness and the defendant, and the state's also offering it to show that the defendant had in his mind a common plan to continue to have sexual relations and to have sexual relationships with [E]. I'll give you further instructions on this when I give you my final instructions on the law that applies to this case."

recounted that the defendant frequently would touch R's crotch to get R's attention and that, when R attempted to position himself in such a way to avoid that contact, the defendant would touch R's "butt" instead. R also testified regarding one particular incident where, after he told the defendant that he received a good grade, the defendant drove him to a local park to celebrate. When they arrived at the park, they sat on a bench, and the defendant pulled out a bottle of wine, two plastic cups, and a can of nuts. After drinking some of the wine, R began to feel dizzy and decided to eat some of the nuts. R testified that, while he was eating the nuts, the defendant was "trying to, like, French kiss me and I was trying to keep my mouth shut." When R became upset, the defendant "got all embarrassed and said, like, 'oh, I'm out of line, it must be the alcohol.'" The defendant then brought R back to the school.

Following R's testimony, the court provided the following limiting instruction to the jury: "The state is claiming that the defendant engaged in other sexual . . . misconduct with someone other than [E], particularly with . . . [R]. The defendant has not been charged with any offense related to this alleged conduct. In a criminal case such as this in which the defendant is charged with a crime involving sexual misconduct, evidence of the defendant's commission of other sexual misconduct is admissible and may be considered to prove that the defendant had the propensity or tendency to engage in the type of criminal sexual behavior with which he is charged. However, evidence of prior misconduct on its own is not sufficient to prove that the defendant is guilty of the crimes charged in the information. It is for you to determine whether the defendant committed any uncharged sexual misconduct and, if so, the extent, if any, to which that

evidence establishes that the defendant had the . . . propensity or tendency to engage in criminal sexual behavior. Please bear in mind as you consider this evidence that at all times the state has the burden of proving that the defendant committed each of the elements of the offenses which he is charged in the information, and I remind you that the defendant is not on trial for any act, conduct or offense not charged in the information."

Before the charge conference, the defendant filed a written request to charge regarding uncharged sexual misconduct, which provided in relevant part: "It is for you to determine whether the state has proven by clear and convincing evidence whether the defendant committed the alleged uncharged sexual misconduct. If you find that the state has met that standard, then you may determine the extent, if any, to which that evidence establishes that the defendant had a propensity or tendency to engage in criminal sexual behavior. Bear in mind as you consider this evidence that, at all times, the state has the burden of proving that the defendant committed each of the elements of the offense charged in the information. As to any evidence of uncharged misconduct, the state's burden is to prove that conduct by clear and convincing evidence." (Footnote omitted.)

At the charge conference, the following exchange occurred between the court and defense counsel:

> "The Court: . . . [Y]ou're asking me to tell the jury that any uncharged sexual misconduct has to be proven by clear and convincing evidence.
>
> "[Defense Counsel]: Correct.
>
> "The Court: Do you have any authority for that?

"[Defense Counsel]: It's cited, Your Honor. It's out-of-state authority. . . .

"The Court: And this says 'but see *[State v. Cutler*, on other grounds by *State v. Elson*, 311 Conn. 726, 91 A.3d 862 (2014)],' is that contrary authority?

"[Defense Counsel]: Absolutely. Yes.

"The Court: Okay. So you're asking me to overrule the Connecticut Supreme Court. . . . Your request is duly filed. That's not the law in the state of Connecticut and it's not—

"[Defense Counsel]: A journey of a million miles, Your Honor, begins with but a single step.

"The Court: No, I—I understand you may be pre—preserving for appellate review; I have no quarrel with that."

Shortly thereafter, while discussing the portion of the court's draft charge regarding evidence of the continuing sexual relationship between E and the defendant, which was titled "Evidence of Other Misconduct," defense counsel requested that the court instruct the jury that "[i]t is for you to determine, one, whether the state has proven such acts occurred . . . [and] [t]wo, if proven, whether they established what the state seeks to establish . . . ." Defense counsel explained that "[t]he way this is drafted it assumes that it has been proven; it doesn't really leave to the jury to determine. It essentially says, look, I, the judge, have admitted those, here's how you're supposed to use this, okay." When the prosecutor asked defense counsel to repeat himself, the court explained that "[h]e wants to emphasize that the state has to prove that these acts occurred." An exchange between the court and defense counsel followed:

"The Court: How . . . is it not clear when it says it is for you to determine; one, whether such acts occurred? How . . . does that assume that they've been proven?

"[Defense Counsel]: Because it's—it's the burden of the state to—to prove it. . . . Okay, they have to prove it. . . . What I asked for earlier was a standard by which they can determine whether it was proven, that's a—a flaw in our scheme for these—for addressing these types of cases. The court, having rejected my request and anticipating—

"The Court: No, it's not a flaw, it's that you want a higher standard than the law requires. It's not that there isn't a standard, the standard is preponderance of the evidence, you gotta prove these facts by the preponderance of the evidence this—this uncharged misconduct or other misconduct; you have to prove the elements of the crime beyond a reasonable doubt.

"[Defense Counsel]: And you have to—my position is that the state has to prove these by some standard, okay, and—and the way this is phrased without putting it that way essentially there's an imprimatur from the court that these things are valid and have been proven.

"The Court: Yeah, I don't read it that way . . . ."

The court denied the defendant's requests and subsequently instructed the jury regarding the uncharged misconduct evidence as follows: "The state has submitted evidence that the defendant engaged in sexual misconduct with [R]. The defendant has not been charged in this case with any offenses related to this alleged conduct. In a criminal case such as this in

which the defendant is charged with a crime involving sex—sexual misconduct, evidence of the defendant's commission of other sexual misconduct is admissible and may be considered to prove that the defendant had the propensity or a tendency to engage in the type of criminal sexual behavior with which he is charged. However, evidence of prior misconduct on its own is not sufficient to prove the defendant guilty of the crimes charged in the information. *It is for you to determine whether the defendant committed any uncharged sexual misconduct* and, if so, the extent, if any, to which that evidence establishes that the defendant had the propensity or a tendency to engage in criminal sexual behavior. Bear in mind as you consider this evidence that, at all times, the state has the burden of proving that the defendant committed each of the elements of the offenses charged in the information. I remind you that the defendant is not on trial for any act, conduct or offense not charged in the information.

"The state has also presented that the defendant continued to have sexual relations with [E] after [E] reached the age of sixteen . . . . This evidence has not been admitted to prove the bad character of the defendant or the defendant's tendency to commit criminal acts and it cannot be used by you for such purposes. Such evidence has been admitted for a limited purpose only. This evidence was admitted to show or explain the full extent of the sexual relationship be—between the defendant and [E] and to show a common plan or scheme by the defendant to have continuous sexual relations with [E]. The evidence may be used by you only for those purposes. *It is for you to determine, one, whether such acts occurred* and, two, if they occurred, whether they

establish what the state seeks to establish." (Emphasis added.)

A

We first address whether the defendant preserved his claim of instructional error regarding the evidence of uncharged misconduct with E. The state claims that, in his written request to charge, "the defendant only asked the court to instruct that the state had to prove by clear and convincing evidence 'alleged uncharged sexual misconduct' admitted to prove that the defendant had a propensity or tendency to engage in criminal sexual behavior.'" Significantly, however, the second to last sentence of the request to charge provided: *"As to any evidence of uncharged misconduct*, the state's burden is to prove that conduct by clear and convincing evidence." (Emphasis added.) Moreover, the court understood the scope of the defendant's request to charge because the court explained: "It's not that there isn't a standard, the standard is preponderance of the evidence, you gotta prove these facts by the preponderance of the evidence this—this *uncharged misconduct or other misconduct* . . . ." (Emphasis added.) Consequently, we conclude that the defendant adequately preserved his challenge to the court's instructions as to the uncharged misconduct evidence involving E. See *State v. Ramon A. G.*, 336 Conn. 386, 395, 246 A.3d 481 (2020) ("[b]ecause the sine qua non of preservation is fair notice . . . the determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity *to place the trial court on reasonable notice* of that very same claim" (emphasis added; internal quotation marks omitted)).

B

Having determined that the defendant preserved his claim that the court improperly failed to provide the jury with a standard by which to determine whether the acts of uncharged misconduct occurred, we now consider its merits.

We begin our analysis with the standard of review. "When reviewing the challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *State v. Arroyo*, 292 Conn. 558, 566, 973 A.2d 1254 (2009), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010).

In *State v. Cutler*, supra, 293 Conn. 303, our Supreme Court addressed a claim similar to the defendant's claim in the present case. In *Cutler*, the defendant claimed that the trial court improperly failed to instruct the jury to apply a preponderance of the evidence standard in considering uncharged misconduct evidence. Id., 315. The challenged instructions provided: "You may consider such evidence if you believe it, and further find that it logically and rationally supports the issue for which it is being offered by the state, but only as it may bear on the issue of intent. On the other hand, if you don't believe

such evidence, or even if you do, if you find that it does not logically and rationally support the issue for which [it] is being offered by the state, namely the defendant's intent, then you may not consider the testimony for any purpose." (Internal quotation marks omitted.) Id., 316.

Our Supreme Court disagreed with the defendant and concluded "that it is not necessary that a trial court instruct the jury that it must find, by a preponderance of the evidence, that prior acts of misconduct actually occurred at the hands of the defendant. Instead, a jury may consider prior misconduct evidence for the proper purpose for which it is admitted if there is evidence from which the jury reasonably could conclude that the defendant actually committed the misconduct." (Footnote omitted.) Id., 322. The court explained that the trial court's "use of the word 'believe' comports with the requirement that a jury may consider prior misconduct evidence if there is evidence from which it reasonably could conclude that the defendant committed the acts. . . . [I]t is clear that the trial court's use of the word 'believe' is not only correct in law, but also sufficiently guides the jury as to its consideration of the prior misconduct evidence. If the jury believes the prior misconduct evidence, it follows logically that there is evidence from which the jury reasonably could conclude that the defendant committed the prior acts of misconduct." Id., 322-23.[13]

---

[13] In *State v. Ortiz*, 343 Conn. 566, 601-602, __ A.3d __ (2022), which was decided after the present appeal had been argued, our Supreme Court reaffirmed its holding in *Cutler*. The court explained that, in *Cutler*, it had expressly rejected a claim that the trial court was required to instruct the jury that it must find prior misconduct evidence to be proven by a heightened standard and emphasized that "it saw *no reason to impose on trial courts a jury*

In the present case, the defendant notes that the "believe" instruction endorsed in *Cutler* is used in the Connecticut Criminal Jury Instructions[14] and by Connecticut judges when instructing on uncharged misconduct. He argues that, in the present case, he "*did not even* get the benefit of the (lower than a preponderance) 'believe' standard, which has its own deficiencies. Instead, the jury was allowed to make its decisions (on whether the defendant committed any misconduct) unfettered by any uniform standard. . . . The court's instructional omission was patently erroneous." (Emphasis in original; footnote omitted.) We disagree.

Here, the court instructed that it was for the jury "to determine" whether the defendant engaged in the uncharged misconduct. We discern no meaningful distinction between the "believe" standard endorsed in *Cutler* and the court's use of the word "determine" in the present case. For that reason, we are not persuaded that the court's instructions were deficient. If anything, "determine" is a stronger standard than "believe." When used as a transitive verb, "believe" means "to consider to be true or honest" or "to accept the word or evidence of or "to hold as an opinion . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed.

---

instruction that requires jurors to consider the properly admissible prior misconduct evidence, at a higher standard." (Emphasis in original; internal quotation marks omitted.) Id., 602 n.13.

[14] With respect to evidence of uncharged misconduct, the model jury instructions provide in relevant part: "You may consider such evidence if you believe it and further find that it logically, rationally and conclusively supports the issue[s] for which it is being offered by the state, but only as it may bear on the issue[s] [for which it was admitted]." Connecticut Criminal Jury Instructions 2.6-5, available at https://wvvw.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited July 11, 2022).

2003) p. 112. In the same context, "determine" means "to settle or decide by choice of alternatives or possibilities" or "to find out or come to a decision about by investigation, reasoning, or calculation . . . ." Id., p. 340. Thus, "believe" connotes, at least to some extent, subjective and emotional reasoning, whereas "determine" connotes more objective and logical reasoning. Accordingly, we find no error in the court's instructions to the jury that it must determine that something occurred rather than believe that it occurred. Consequently, we conclude that our Supreme Court's decision in *Cutler* controls and, therefore, that the court properly instructed the jury regarding the uncharged misconduct evidence.

The judgment is affirmed.

In this opinion the other judges concurred.

APPENDIX B

CONNECTICUT APPELLATE COURT

Docket Number: AC 43726

STATE OF CONNECTICUT

v.

DANIEL GREER

Notice Issued: 8/1/2022 10:37:56 AM

ORDER ON MOTION FOR RECONSIDERATION
AC 222164

Notice Content:

Motion Filed: 7/27/2022

Motion Filed By: Daniel Greer

Order Date: 08/01/2022

Order: Denied

By the Court

Matyi, Luke P.

Notice sent to Counsel of Record

Hon. Jon M. Alander

Clerk, Superior Court, NNHCR170177934T

APPENDIX C

SUPREME COURT
STATE OF CONNECTICUT

PSC 220157

STATE OF CONNECTICUT

v.

DANIEL GREER

ORDER ON PETITION FOR
CERTIFICATION TO APPEAL

The defendant's petition for certification to appeal from the Appellate Court, 213 Conn. App. 757 (AC 43726), is denied.

KAHN, J., did not participate in the consideration of or decision on this petition.

Richard Emanuel and *David T. Grudberg*, in support of the petition.

Timothy F. Costello, senior assistant state's attorney, in opposition.

Decided November 1, 2022

By the Court,

/s/
Luke Matyi
Assistant Clerk-Appellate

Notice Sent: November 1, 2022

Petition Filed: September 1, 2022

Clerk, Superior Court, NNH CR17 0177934 T

Hon. Jon M. Alander

Clerk, Appellate Court

Reporter of Judicial Decisions

Staff Attorneys' Office

Counsel of Record

APPENDIX D

SUPREME COURT
STATE OF CONNECTICUT

Docket No. NNHCR170177934T

STATE OF CONNECTICUT

v.

DANIEL GREER

ORDER ON PRE APPEAL MOTION FOR
RECONSIDERATION EN BANC
SC220118

Notice Issued: 12/6/2022 2:08:41 PM

Court Address:

Office of the Appellate Clerk
231 Capitol Avenue
Hartford, CT 06106

Notice Content:

Motion Filed: 11/16/2022

Motion Filed By: Daniel Greer

Order Date: 12/6/2022

Order: Denied

KAHN, J., did not participate in the consideration of or the decision on this motion.

By the Court

Matyi, Luke P.

Notice sent to Counsel of Record

Hon. Jon M. Alander

Clerk, Superior Court, NNHCR170177934T

APPENDIX E

Connecticut Judicial Branch
Criminal Jury Instructions

§ 2.6-13 Other Misconduct – Criminal Sexual Behavior

(Revised to November 17, 2015)

When the defendant is charged with criminal sexual behavior, evidence of the defendant's commission of another offense or offenses is admissible and may be considered if it is relevant to prove that the defendant had the propensity or a tendency to engage in the type of criminal sexual behavior with which (he/she) is charged. However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crimes charged in the information. Bear in mind as you consider this evidence that at all times, the state has the burden of proving that the defendant committed each of the elements of the offense charged in the information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the information.

Commentary

This approach replaces the former practice of admitting this type of evidence as common scheme or plan. *State v. DeJesus*, 288 Conn. 418, 470-71 (2008); *State v. Antonaras*, 137 Conn. App. 703 (2012) (court improperly instructed jury on the common scheme or plan exception). See Code of Evidence § 4-5 (b).

Evidence of prior sexual misconduct may be admitted under this exception if it is relevant to prove that the defendant had the propensity or a tendency to engage in the type of criminal sexual behavior with which he or she is charged, its probative value

outweighs its prejudicial effect, and the jury is given a limiting instruction on its use. *State v. DeJesus*, supra, 288 Conn. 473-74. The trial court should adapting [sic] this instruction to the specific purpose for which the evidence was offered.

Defendant does not have to be charged with a sexual crime for evidence of prior criminal sexual behavior to be relevant. *State v. Johnson*, 289 Conn. 437, 455-56 (2008); *State v. Snelgrove*, 288 Conn. 742 (2008).

See also Other Misconduct of Defendant, Instruction 2.6-5.

APPENDIX F

SUPREME COURT
STATE OF CONNECTICUT

AC 43726

STATE OF CONNECTICUT

v.

DANIEL GREER

June 1, 2021

ORDER

THE MOTION OF THE DEFENDANT-APPELLANT, FILED MARCH 25, 2021, FOR TRANSFER OF APPEAL FROM APPELLATE COURT TO SUPREME COURT, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT,

/s/
LUKE P. MATYI
ASSISTANT CLERK-APPELLATE

NOTICE SENT: June 1, 2021

COUNSEL OF RECORD

CLERK, SUPERIOR COURT, NNHCR170177934T

HON. JON M. ALANDER

APPENDIX G

SUPREME COURT
STATE OF CONNECTICUT

AC 43726

STATE OF CONNECTICUT

v.

DANIEL GREER

January 26, 2022

ORDER

The motion of the defendant-appellant, filed December 7, 2021, for transfer of appeal from Appellate Court to Supreme Court, having been presented to the Court, it is hereby ORDERED denied.

By the Court,

/s/
Luke P. Matyi
Assistant Clerk-Appellate

Notice Sent: January 26, 2022

Counsel of Record

Hon. Jon M. Alander

Clerk, Superior Court, NNHCR170177934T

210158