Chapter 1

Arrests and Identifications

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1-1 ARRESTS

1-1:1 State and Federal Constitutional Foundations

1-1:1.1 The Connecticut Constitution

In "[t]he only case decided reasonably contemporaneously with the adoption of the 1818 [Connecticut C]onstitution,"[2] a freed Connecticut slave named James Mars filed a habeas corpus petition in 1837 on behalf of a slave named Nancy Jackson, claiming that article first, §§ 8 and 10 (now §§ 7 and 9)[3] of the Connecticut Constitution precluded Jackson's owner from detaining her.[4] The slave-owner, James Bulloch, had brought Jackson to Hartford in 1835 when he and his family moved there from Georgia.[5] Mars, whose wife was a laundress for the Bulloch family, filed the habeas

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[2] *State v. Lamme*, 216 Conn. 172, 180 (1990).

[3] Both sections were renumbered without substantive change when the Connecticut Constitution was amended in 1965. *State v. Barton*, 219 Conn. 529, 538 n.4 (1991) ("Although its enumeration was changed to article first, § 7, with the passage of the 1965 constitution," the section's "language has not been altered since its original adoption."); *State v. Lamme*, 216 Conn. 172, 178 (1990) ("The precise language of the present section [9] was originally adopted as article first, § 10, of the Connecticut constitution of 1818.").

[4] *Jackson v. Bulloch*, 12 Conn. 38, 43 (1837).

[5] *Jackson v. Bulloch*, 12 Conn. 38, 39-40 (1837).

petition upon learning that Bulloch planned to remove Jackson from Connecticut in order to sell her.[6]

The habeas petition was drafted by William Wolcott Ellsworth,[7] a professor of law at Trinity College in Hartford, former Connecticut Congressman, and future Connecticut governor and state supreme court justice.[8] Ellsworth conceded "that there [was] nothing in the constitution of the United States applicable to [Jackson's] case,"[9] and relied on the provisions now codified in the Connecticut Constitution at article first (Declaration of Rights), §§ 7 and 9:

> The people shall be secure in their persons from unreasonable . . . seizures; and no warrant . . . to seize any person . . . shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.[10]

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6. James Mars, *Life of James Mars, a Slave Born and Sold in Connecticut* 29 (Dodo Press, U.K., 6th ed. 2009) (first published in 1866 by Press of Case, Lockwood & Co., Hartford). Mars' account of the case includes a description of Jackson's escape to a neighbor's house on the eve of the habeas trial after overhearing that her owner planned to "send [her] South" that very night to avoid the habeas proceeding. James Mars, *Life of James Mars, a Slave Born and Sold in Connecticut* 29-30 (Dodo Press, U.K., 6th ed. 2009) (1866). Mars' first-hand narrative of the trial and appellate proceedings concludes with the Connecticut Supreme Court's order freeing Jackson, who later told Mars that when she went to court "on the last day[,] she had two large pills of opium," which she would have swallowed "before she left the court house" "had she been sentenced to go back." James Mars, *Life of James Mars, a Slave Born and Sold in Connecticut* 31 (Dodo Press U.K., 6th ed. 2009) (1866).

7. James Mars, *Life of James Mars, a Slave Born and Sold in Connecticut* 29 (Dodo Press, U.K., 6th ed. 2009) (1866).

8. Biographical Directory of the United States Congress, 1774 – Present, Biography of William Wolcott Ellsworth, *available at* http://bioguide.congress.gov/scripts/biodisplay.pl?index=E000150 (last visited Jan. 11, 2023).

9. *Jackson v. Bulloch*, 12 Conn. 38, 41 (1837). Three years earlier, Ellsworth had lost a claim that African Americans were entitled to Fourth Amendment protection. *Crandall v. State*, 10 Conn. 339 (1834). *Crandall* was Ellsworth's successful appeal on behalf of a Connecticut school-mistress convicted of unauthorized "harbouring and boarding" of "certain coloured persons" who had come to Connecticut from other states to study at Crandall's school. *Crandall v. State*, 10 Conn. 339, 367 (1834). The *Crandall* court demurred on the constitutional claims urged by defense counsel, but nonetheless reversed the conviction on a procedural ground which the court raised itself: the charging document was deficient because it failed to allege that Crandall's school was "unauthorized." *Crandall v. State*, 10 Conn. 339, 340-54 (1834) (describing constitutional arguments); *Crandall v. State*, 10 Conn. 339, 366-67, 372 (1834) (ruling).

Over a century after *Crandall* was decided, Thurgood Marshall's legal team in *Brown v. Board of Education* would quote defense counsel's constitutional arguments at length, and say of them: "The first comprehensive crystallization of antislavery constitutional theory occurred in 1834 in the arguments of W. W. Ellsworth and Calvin Goddard, two of the outstanding lawyers and statesmen of Connecticut." Brief of Appellants in *Brown v. Board of Education*, 1953 WL 48699, at *207 (Oct. Term 1953).

10. Conn. Const., art. I, § 7.

> No person shall be arrested, detained or punished, except in cases clearly warranted by law.[11]

Reasoning that constitutional protections from unreasonable seizures and unlawful detentions did not apply to slaves, the Connecticut Supreme Court unanimously rejected Jackson's constitutional claims.[12] Nonetheless, in a divided ruling, the court "advise[d] that [Jackson] be discharged" because state statutes had "terminate[d] slavery in Connecticut," and her owner had no right to hold her.[13]

After *Jackson v. Bulloch*,[14] cases relying on article first, §§ 7 and 9 to challenge seizures and detentions were few and far between until "the mid-twentieth century,"[15] when defendants began arguing, (as

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[11] Conn. Const., art. I, § 9. This chapter addresses only seizures of persons; searches and seizures of objects and documents are addressed in Chapter 3.

[12] *Jackson v. Bulloch*, 12 Conn. 38, 43-44 (1837).

[13] *Jackson v. Bulloch*, 12 Conn. 38, 54 (1837). The Connecticut Supreme Court based its ruling on a two-part statutory argument. First, the court read a 1774 colonial law banning the importation of slaves into Connecticut "to be disposed of, left or sold within this state" to mean broadly that "no slave shall be brought from any place and suffered to remain in this state." *Jackson v. Bulloch*, 12 Conn. 38, 45, 49 (1837). While an owner might travel through Connecticut with his slave, the court reasoned, he could not move to the state with his slave as that would amount to "leaving" her in Connecticut. *Jackson v. Bulloch*, 12 Conn. 38, 51 (1837). Second, the court relied on state manumission laws passed in 1784 (prohibiting enslavement of any person born in Connecticut beyond age twenty-five), and 1797 (reducing the age of manumission to twenty-one). *Jackson v. Bulloch*, 12 Conn. 38, 54 (1837). By 1837, when Bulloch brought Jackson to Connecticut, these statutes had, "with the exception of here and there a dying limb," "destroy[ed] slavery in the state. *Jackson v. Bulloch*, 12 Conn. 38, 54 (1837). The court reasoned that to construe the anti-slavery statutes to allow a slave-owner from another state to bring a slave to Connecticut and keep her there in bondage would allow slavery "to revive and flourish" in Connecticut. *Jackson v. Bulloch*, 12 Conn. 38, 54 (1837). This construction being contrary to "the intent of the legislature [and] the words of the act," and there being "no law of this state" under which Bulloch could hold Jackson in slavery, the court ordered that Jackson "be discharged." *Jackson v. Bulloch*, 12 Conn. 38, 54 (1837).

While justices Clark Bissell and Samuel Church dissented from the ruling that freed Jackson, they expressed relief at her liberation. Writing for the dissenters, Justice Bissell wrote that he was "constrained to say," based on his reading of the statutes, that Bulloch had the right to bring his slave from Georgia to Connecticut and keep her enslaved during his sojourn in Hartford. *Jackson v. Bulloch*, 12 Conn. 38, 69 (1837). "At the same time," he observed, "it is a source of gratification both to my learned brother who concurs with me, and to myself, to know, that if our views on this subject are erroneous, their effect will not be, unjustly to deprive a fellow-being of her liberty." *Jackson v. Bulloch*, 12 Conn. 38, 69 (1837).

[14] *Jackson v. Bulloch*, 12 Conn. 38 (1837).

[15] *State v. Barton*, 219 Conn. 529, 538 n.4 (1991). The Connecticut Supreme Court identified but one case, a pre-Civil War appeal in which the court had held there was no state constitutional requirement that an affiant seeking a warrant provide the magistrate with facts and circumstances showing probable cause; it sufficed for the affiant to aver that probable cause existed. *State v. Barton*, 219 Conn. 529, 538 n.4 (1991) (citing *Lowrey v. Gridley*, 30 Conn. 450, 457-59 (1862)). *Lowrey* has never been overruled explicitly, but modern law is to the contrary: both the federal and state constitutions require that an

Ellsworth had done), that the state constitution affords greater protections from unreasonable seizures than does the Fourth Amendment.[16] *Jackson v. Bulloch*'s significance is not limited to its being the first case to address claims based on the Connecticut Constitution's Declaration of Rights. As the Connecticut Supreme Court has observed, "since *Jackson*, our case law under article first . . . 'has continued to emphasize the central role of statutory safeguards in implementing the constitutional right of personal liberty.'"[17]

1-1:1.2 The United States Constitution

Thirty years before *Jackson v. Bulloch*,[18] the first recorded Fourth Amendment case was decided when the United States Supreme Court granted a writ of habeas corpus in 1806 to John Atkins Burford, an Alexandria, Virginia shopkeeper.[19] Burford had been arrested on a warrant charging that he was "not of good name or fame, nor of honest conversation, but an evildoer and disturber of the peace of the United States."[20]

Burford's petition to the United States Supreme Court for habeas relief cited the prohibitions in both the Virginia Constitution and United States Constitution against arrests unsupported by a sworn statement of facts.[21] A unanimous Court granted the petition, with Chief Justice John Marshall explaining that Burford's

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affiant "set forth some of the facts" supporting probable cause. *State v. Barton*, 219 Conn. 529, 541 n.9 (1991) (citing *State v. Heinz*, 193 Conn. 612, 617 (1984)).

16. *See, e.g., State v. Miller*, 227 Conn. 363 (1993) (warrantless search of impounded vehicle allowed under federal law, but not under article first, § 7); *State v. Geisler*, 222 Conn. 672, 690 (1992) (contrary to *New York v. Harris*, 495 U.S. 14 (1990), evidence derived from an unlawful warrantless entry into the home must be excluded under article first, § 7 unless the taint of the illegal entry is attenuated by the passage of time or intervening circumstances); *State v. Marsala*, 216 Conn. 150 (1990) (unlike the Fourth Amendment, article first, § 7 does not include a good faith exception); *State v. Dukes*, 209 Conn. 98 (1988) (search incident to arrest exception to warrant requirement is narrower under state constitution than federal constitution).

17. *State v. White*, 229 Conn. 125, 150 (1993) (quoting *State v. Lamme*, 216 Conn. 172, 181 (1990)).

18. *Jackson v. Bulloch*, 12 Conn. 38 (1837).

19. *Ex parte Burford*, 7 U.S. (3 Cr.) 448 (1806).

20. *Ex parte Burford*, 7 U.S. (3 Cr.) 448, 450-51 (1806). Following his arrest, Burford was sent to jail, "there to remain" until he posted a $1,000 bond as "surety and mainprize for his good behavior towards [the] United States." *Ex parte Burford*, 7 U.S. (3 Cr.) 448, 451 (1806).

21. *Ex parte Burford*, 7 U.S. (3 Cr.) 448, 451 (1806).

"commitment was illegal, for want of stating *some good cause certain, supported by oath*."[22]

The foundation for the Court's ruling in *Ex parte Burford*[23] was the Fourth Amendment:

> The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing . . . the persons . . . to be seized.[24]

The Supreme Court did not extend Fourth Amendment protections to the states until 1961, when the Court held in *Mapp v. Ohio*[25] that the amendment applies to state actors through the Due Process Clause of the Fourteenth Amendment.[26] By then, Connecticut state constitutional limitations on searches and seizures had been in place (if rarely relied upon)[27] for well over a century.[28]

1-1:1.3 The State and Federal Constitutions are Similar But Not Identical

As the Connecticut Supreme Court has observed, "federal constitutional and statutory law establishes a *minimum* national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights."[29]

The significance of this precept—that state constitutional and statutory law can provide greater protection of individual rights than does the federal Constitution—is likely to increase nationwide

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22. *Ex parte Burford*, 7 U.S. (3 Cr.) 448, 453 (1806) (emphasis in original).
23. *Ex parte Burford*, 7 U.S. (3 Cr.) 448 (1806).
24. U.S. Const., amend. IV.
25. *Mapp v. Ohio*, 367 U.S. 643 (1961).
26. *Mapp v. Ohio*, 367 U.S. 643 (1961).
27. *State v. Barton*, 219 Conn. 529, 538 n.4 (1991).
28. *See State v. Geisler*, 222 Conn. 672, 688 (1992) ("Before the fourth amendment's search and seizure clause was made applicable to the states, . . . this court recognized the limits imposed on the government by the Connecticut search and seizure clause.").
29. *State v. Barton*, 219 Conn. 529, 546 (1991) (internal quotation marks and citation omitted) (emphasis in original).

as federal due process protections are curtailed.[30] In Connecticut, "'appellate courts have not been hesitant to continue to grant its citizens the same protection as did the 'old' federal decisions, when the United States Supreme Court has retreated from a previously enunciated broad protection reading.'"[31]

Following the success of a number of claims that the state constitution provides greater protection for some individual rights than does the federal constitution,[32] the Connecticut Supreme Court established a test for assessing state constitutional claims. In *State v. Geisler*,[33] the court began by observing that while article first, § 7 "is similar . . . to the fourth amendment," it is "not identical."[34] The court established a six-factor test to "determine whether, in any given instance, our state constitution affords broader protection to our citizens than the federal constitutional minimum" set by the Fourth Amendment.[35] The *Geisler* factors are: "(1) persuasive relevant federal precedents; (2) the text of the operative constitutional provisions; (3) historical insights into the intent of our constitutional forebears; (4) related Connecticut precedents; (5) persuasive precedents of other state courts; and (6) contemporary understandings of applicable economic and sociological norms, or as otherwise described, relevant public policies."[36]

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30. *See*, Scott L. Kafker, *State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval*, 49 Hastings Const. L.Q. 115 (2022) (As the U.S. Supreme Court's new conservative majority "revers[es] or reduc[es] . . . federal constitutional protection," state courts can be expected to react by conducting "more independent state constitutional analysis . . . in order to provide a double protection of constitutional rights.") (discussing, inter alia, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. __ (2022)).

31. *Trusz v. UBS Realty Investors*, 319 Conn. 175, 195 (2015) (quoting *State v. DeFusco,* 27 Conn. App. 248, 256 (1992), *aff'd,* 224 Conn. 627 (1993)). *See* Linda Ross Meyer, *Connecticut's Anti-Originalist Constitutions and its Independent Courts*, 40 Quinnipiac L. Rev. 501, 588 (2022) (citing *Trusz,* Prof. Meyer observes that "[i]n cases in which the U.S. Supreme Court narrows or rejects earlier-established constitutional rights, the Connecticut Supreme Court will often retain the earlier, more rights-friendly interpretation, especially where the earlier rule has already melded with state practice"), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4162021 (last visited Feb. 11, 2023).

32. *See* Section 1-1:1.1 (listing cases).

33. *State v. Geisler*, 222 Conn. 672 (1992).

34. *State v. Geisler*, 222 Conn. 672, 686 (1992); *see Jackson v. Bulloch*, 12 Conn. 38, 43 (1837) (state search and seizure provision "is almost a transcript of the 4th article of the amendments of the constitution of the United States").

35. *State v. Geisler*, 222 Conn. 672, 686 (1992).

36. *State v. Geisler*, 222 Conn. 672, 686 (1992).

These factors are meant to provide an analytical framework, not a rigid test; the factors "may be inextricably interwoven"; and "not every *Geisler* factor is relevant in all cases."[37] That said, counsel who fails "to provide adequate briefing as to any one of [the *Geisler*] factors" risks losing the right to argue the merits of her client's state constitutional claims.[38] The practice point is clear: appeals based on state constitutional rights require thoughtful briefing on every *Geisler* factor.[39]

While the Connecticut Supreme Court has had occasion to rule that article first, §§ 7 and 9 impose stricter limitations in certain situations than does the Fourth Amendment,[40] "in most cases" the court has concluded that government actors' conduct "permitted under the fourth amendment is permissible under" the state constitution.[41]

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37. *State v. Morales*, 232 Conn. 707, 716 n.10 (1995) (citations omitted).

38. Linda Ross Meyer, *Connecticut's Anti-Originalist Constitutions and its Independent Courts*, 40 Quinnipiac L. Rev. 501, 503 n. 11 (2022) ("The Connecticut Supreme Court has held it is not 'bound' to review inadequately briefed state constitutional claims, but neither is it 'precluded' from doing so.") (citing *State v. Elson*, 311 Conn. 726 (2014)).

39. Professor Meyer's discussion of Connecticut's two constitutions, unique legal history, and historically independent courts provides rich material for thoughtful arguments that go beyond accepting existing decisional caselaw based on *Geisler*, particularly caselaw deferring to federal constitutional law when analyzing state constitutional rights. "Rightly understood, the *Geisler* factors [are part of Connecticut courts'] tradition of deciding a case based on principled scrutiny of both foreign and local decisional law, rather than on mere deference to outside authority." Linda Ross Meyer, *Connecticut's Anti-Originalist Constitutions and its Independent Courts*, 40 Quinnipiac L. Rev 501, 532 (2022). Noting that "[s]pecialized knowledge and access are required to make historical arguments" essential to a thoughtful *Geisler* analysis, Professor Meyer includes in her article citations to an array of scholarly works and primary source documents available, often for free, to counsel asserting state constitutional protection for individual rights. Linda Ross Meyer, *Connecticut's Anti-Originalist Constitutions and its Independent Courts*, 40 Quinnipiac L. Rev. 501, 504 (2022).

40. *See* Section 1-1:1.1 (listing cases).

41. *State v. Jenkins*, 298 Conn. 209, 267 (2010). If the U.S. Supreme Court were to curtail search and seizure protections under the federal Constitution, the Connecticut Supreme Court could reconsider the practice of deferring to federal law in most search and seizure cases. *See* Scott L. Kafker, *State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval*, 49 Hastings Const. L.Q. 115, 119 (2022) ("If the new U.S. Supreme Court majority undertakes a dramatic revision and retrenchment of federal constitutional protections in criminal procedure, state courts can be expected to react."). *See also* Linda Ross Meyer, *Connecticut's Anti-Originalist Constitutions and its Independent Courts*, 40 Quinnipiac L. Rev. 501, 550 (2022) (arguing it "does [not] make historical sense to imagine [that framers of Connecticut's 1818 constitution] would sanction state constitution interpretive doctrines that would follow later federal constitutional interpretations 'lock-step' or even as a default rule"). Alternatively, as it has done on occasion, the state supreme court could avoid ruling on state constitutional claims by relying on state evidentiary rules and caselaw to provide additional protection to individual liberties. *See* Section 1-2:4.2 (discussing *State v. Johnson*, 312 Conn. 687 (2014) (Connecticut Supreme Court declined to invoke state constitutional protections to suppress

1-1:1.4 Reasonableness and Warrant Clauses

The Fourth Amendment consists of two clauses: "The first Clause prohibits unreasonable searches and seizures and the second prohibits the issuance of warrants that are not supported by [sworn evidence of] probable cause, or that do not particularly describe the place to be searched and the persons or things to be seized."[42]

Like its federal counterpart, article first, § 7 has two clauses, the first prohibiting unreasonable searches and seizures, and the second requiring that warrants be based on sworn evidence supporting probable cause, and include a particularized description of the things or persons to be seized.[43]

The constitutional interests protected by arrest warrants are distinct from those protected by search warrants, and require different factual showings to establish probable cause.[44] "An arrest warrant is issued by a magistrate upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense and thus the warrant primarily serves to protect an individual from an unreasonable seizure."[45] "A search warrant, in contrast is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police."[46]

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unduly suggestive identification by private party, but nonetheless held such identifications inadmissible under state evidentiary caselaw)) and Sections 1-2:6.2 and 1-2:6.4 (addressing state supreme court cases applying state evidentiary rules to protect against unreliable identification testimony). Of course, the Connecticut General Assembly has the power to avoid deferring to federal law by expanding statutory and rule-based protections for individual liberties. *See* Section 1-1:7 (Conn. Gen. Stat. § 54-33a eliminated "no knock" execution of warrants); Section 1-2.6 (discussing Connecticut statutory and evidentiary protections against unreliable identifications).

42. *United States v. Leon*, 468 U.S. 897, 961 (1984).

43. Conn. Const., art. I, § 7.

44. *Steagald v. United States*, 451 U.S. 204, 213 (1981); *Payton v. New York*, 445 U.S. 573, 602-03 (1980) ("an arrest warrant requirement may afford less protection than a search warrant requirement"; "if there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law"); *State v. Heinz*, 193 Conn. 612, 624 (1984) (probable cause determination in context of arrest warrant "requires inquiries that are less complex constitutionally than those pertaining to search warrants").

45. *Steagald v. United States*, 451 U.S. 204, 213 (1981).

46. *Steagald v. United States*, 451 U.S. 204, 213 (1981). Arrest warrants are addressed in this chapter; search warrants are discussed in Chapter 3.

Read literally, the Fourth Amendment and article first, §§ 7 and 9 do not require that seizures and detentions be based on a warrant, or indeed that any particular procedures attend a constitutionally valid arrest. Rather, "the ultimate measure of the constitutionality of a governmental search [or seizure] is 'reasonableness.'"[47] "A warrant is not required to establish the reasonableness of *all* government searches [and seizures]; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either."[48]

Nevertheless, beginning with its holding in *Ex parte Burford*[49] that a valid arrest must be supported by a sworn statement of "some good cause certain,"[50] the United States Supreme Court has read the Fourth Amendment to mandate certain procedural protections, with which officials may dispense only in limited situations.[51]

1-1:2 The Fourth Amendment Protects People, Not Places

In *Katz v. United States*,[52] the United States Supreme Court explained that "the Fourth Amendment protects people, not places."[53] Put another way, the conduct that "a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[54] On the other hand, "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[55] "Wherever a man may be"—whether in "a home, an office, . . . a hotel room, [or] a telephone booth"—"he is entitled to know that he will remain free from unreasonable searches and seizures."[56]

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47. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995); *see State v. Dukes*, 209 Conn. 98, 121 (1988) ("[T]he fourth amendment to the United States constitution and article first, § 7, of the constitution of Connecticut . . . proscribe only unreasonable searches and seizures.").
48. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (emphasis in original).
49. *Ex parte Burford*, 7 U.S. (3 Cr.) 448 (1806).
50. *Ex parte Burford*, 7 U.S. (3 Cr.) 448, 453 (1806) (emphasis altered).
51. *See* Section 1-1:10 (Warrantless Arrests).
52. *Katz v. United States*, 389 U.S. 347 (1967).
53. *Katz v. United States*, 389 U.S. 347, 352 (1967).
54. *Katz v. United States*, 389 U.S. 347, 352 (1967).
55. *Katz v. United States*, 389 U.S. 347, 352 (1967).
56. *Katz v. United States*, 389 U.S. 347, 358 (1967).

"It is the objective effect of the State's actions on the privacy of the individual that animates the Fourth Amendment."[57] Finding the constitutional balance between privacy and government interests requires an objective assessment of the specific facts surrounding the government intrusion.[58]

1-1:3 Government Action Required

The Fourth Amendment limits the conduct of government actors, not that of private persons or institutions.[59] That said, private persons or entities are subject to constitutional requirements when they act together with, or at the direction of, federal or state government actors.[60] Like their federal counterparts, state constitutional protections against unreasonable seizures govern only state actors or persons acting in concert with state actors.[61]

1-1:4 Conduct Constituting a Seizure

Article first, § 7 provides "greater protection" than does the Fourth Amendment in determining "what constitutes a seizure."[62] Under the Fourth Amendment, a person is "seized" only when a government actor restrains the person's liberty either by physically

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57. *City of Indianapolis v. Edmond*, 531 U.S. 32, 52 (2000).

58. *Brown v. Texas*, 443 U.S. 47, 51 (1979) ("[T]he Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.").

59. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) ("This Court has . . . consistently construed this protection as proscribing only governmental action; it is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.") (internal quotation marks and citations omitted).

60. *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971) (individuals are government actors for Fourth Amendment purposes when, "in light of all the circumstances of the case," they "must be regarded as having acted as an instrument or agent of the state") (internal quotation marks omitted).

61. *State v. Betts*, 286 Conn. 88, 89 (2008) ("wrongful search or seizure conducted by a private party does not violate" the Fourth Amendment or article first, § 7; there is no bright line test for whether private party's conduct "may be considered state action," but courts consider "whether the police have promised the informant a reward for his cooperation or whether he is self-motivated," "whether the police have asked the informant to obtain incriminating evidence and placed him in a position to receive it," and "whether the information is secured as part of a government initiated, preexisting plan") (internal quotation marks and citations omitted).

62. *State v. Oquendo*, 223 Conn. 635, 649-50 (1992).

restraining the person, or by exhibiting a show of authority to which the person submits.[63]

The Connecticut Supreme Court has rejected this definition, which excludes from constitutional protection attempted arrests that do not cause the person's detention.[64] Under Connecticut Constitution article first, §§ 7 and 9, "a person is seized when" a government agent's attempt to restrain the person "by means of physical force or a show of authority" would cause "a reasonable person [to believe] that he was not free to leave."[65] "The inquiry is objective, focusing on a reasonable person's probable reaction to the officer's conduct."[66]

Courts have divided seizures of a person into two categories: arrests and investigatory detentions ("stops").

1-1:4.1 Arrests

Under the Fourth Amendment, an arrest occurs when "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way" by government authorities.[67] Whether or not authorities are armed with a warrant or announce to the person that she is under arrest,[68] "there is no doubt that at

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63. *California v. Hodari D.*, 499 U.S. 621, 625-26 (1991) ("An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority.") (emphasis in original).

Dissenting in *Hodari D.*, Justice Stevens complained: "Whatever else one may think of today's decision, it unquestionably represents a departure from earlier Fourth Amendment case law." *California v. Hodari D.*, 499 U.S. 621, 642 (1991) (Stevens, J. dissenting). "The test for a 'seizure,'" Justice Stevens explained, had been "whether 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *California v. Hodari D.*, 499 U.S. 621, 639 (1991) (Stevens, J. dissenting) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). "The Court's unwillingness [in *Hodari D.*] to adhere to the 'reasonable person' standard . . . marks an unnecessary departure from Fourth Amendment case law." *California v. Hodari D.*, 499 U.S. 621, 638 (1991) (Stevens, J. dissenting).

64. *State v. Oquendo*, 223 Conn. 635, 652 (1992) ("the dichotomy between an attempted arrest and an arrest 'should not take on constitutional dimensions'") (quoting *California v. Hodari D.*, 499 U.S. 621, 631 (1991) (Stevens J., dissenting)).

65. *State v. Oquendo*, 223 Conn. 635, 647 (1992) (internal quotation marks and citations omitted).

66. *State v. Burroughs*, 288 Conn. 836, 846 (2008) (internal quotation marks and citations omitted).

67. *California v. Beheler*, 463 U.S. 1121, 1123 (1983) (defining custodial arrest for purposes of determining necessity of warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966)); *see* Chapter 2 (discussing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

68. *State v. Januszewski*, 182 Conn. 142, 160 (1980) ("The presence or absence of a formal declaration that the suspect is under arrest is not dispositive of the question.") (internal

some point" during a person's interaction with authorities, "police procedures can qualitatively and quantitatively be so intrusive with respect to a suspect's freedom of movement and privacy interests as to [amount to an arrest] trigger[ing] the full protection of the Fourth and Fourteenth Amendments."[69] "It is a question of fact precisely when" an "arrest [takes] place."[70]

"[N]o definitive list of factors" governs whether there has been an arrest; rather, the determination is an objective assessment based on "the circumstances of each case."[71]

1-1:4.2 Investigatory Detentions ("Stops")

Investigatory stops are addressed more fully in Chapter 3; set forth here are brief descriptions of the constitutional standards for detentions short of arrest.

The probable cause requirement for arrests, addressed below, does not apply to limited detentions such as investigatory stops. Detentions supported by *reasonable suspicion* are constitutionally permitted if the intrusion on personal freedom is limited, and justified by an important government interest.[72] The seminal case on investigatory stops is *Terry v. Ohio*,[73] in which the United States Supreme Court upheld the constitutionality of the brief detention and pat down for weapons of a suspect whom police reasonably believed to be armed and engaged in criminal activity.[74] The *Terry* Court explained that reasonable suspicion exists if there are "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the limited intrusion.[75]

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quotation marks and citations omitted), *cert. denied*, 453 U.S. 922 (1982), *and overruled in part on other grounds by State v. Ray*, 290 Conn. 602 (2009).

69. *Hayes v. Florida*, 470 U.S. 811, 815-16 (1985); *see Dunaway v. N.Y.*, 442 U.S. 200, 207 (1979) ("There can be little doubt that petitioner was 'seized' in the Fourth Amendment sense when he was taken involuntarily to the police station.").

70. *Sibron v. New York*, 392 U.S. 40, 67 (1968); *accord State v. Love*, 169 Conn. 596, 600 (1975) ("Precisely when an arrest occurs is a question of fact which depends on an evaluation of all the surrounding circumstances.").

71. *State v. Jackson*, 304 Conn. 383, 416 (2012) (internal quotation marks and citations omitted).

72. *Terry v. Ohio*, 392 U.S. 1 (1968).

73. *Terry v. Ohio*, 392 U.S. 1 (1968).

74. *Terry v. Ohio*, 392 U.S. 1, 22-24 (1968).

75. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

Article first, §§ 7 and 9 similarly permit limited detentions based on less than probable cause.[76] The state constitutional standards for such detentions "mirror those set forth by the United States Supreme Court in *Terry v. Ohio*."[77] Under the Connecticut Constitution, an officer may "detain an individual for investigative purposes even though there is no probable cause to make an arrest" if, "[b]ased upon the whole picture[,] the detaining officers [had] a particularized and objective basis for suspecting the particular person stopped of criminal activity."[78]

Under both the state and federal constitutions, the legitimacy of limited detentions ("*Terry* stops") depends in part on their scope. "A *Terry* stop that is justified at its inception can become constitutionally infirm if it lasts longer or becomes more intrusive than necessary to complete the investigation" or serve the purpose "for which that stop was made."[79] For example, a valid stop for the purpose of investigating a traffic violation cannot properly be extended for the purpose of searching the car for narcotics.[80] "Authority for [a] seizure [based on a traffic violation] . . . ends when tasks tied to the traffic infraction are—or reasonably should have been—completed."[81]

"The investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."[82] However, the question in this context is "not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it."[83] When a *Terry* stop is challenged, "it is

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76. *State v. Oquendo*, 223 Conn. 635, 654 (1992).

77. *State v. Oquendo*, 223 Conn. 635, 654 (1992).

78. *State v. Oquendo*, 223 Conn. 635, 654 (1992) (internal quotation marks and citations omitted).

79. *Florida v. Royer*, 480 U.S. 491 (1982) (upholding lower court's decision that permissible scope of investigative stop was exceeded where suspect fitting "drug courier profile" was stopped on airport concourse and taken to a separate room for further investigation); *see State v. Mitchell*, 204 Conn. 187, 197 (1987) (permitting 39-minute detention to conduct identification procedure) (citing *United States v. Sharpe*, 470 U.S. 675, 684 (1985)).

80. *See Rodriguez v. United States*, 575 United States 348 (2015) (traffic stop that concluded with issuance of warning to motorist could not be extended to conduct "dog sniff" search of car in absence of reasonable suspicion justifying search for narcotics).

81. *Rodriguez v. United States*, 575 U.S. 348, 349 (2015).

82. *Florida v. Royer*, 480 U.S. 491, 500 (1982).

83. *United States v. Sharpe*, 470 U.S. 675, 687 (1985).

the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure."[84]

"There will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment."[85]

1-1:5 Probable Cause Required for Arrest

An arrest without probable cause, whether for a misdemeanor or felony, generally is unlawful.[86]

Under both the federal and state constitutions, probable cause for an arrest exists when, at the time of the arrest, authorities have knowledge of facts and circumstances, based on reasonably reliable information, to justify a prudent person's belief that an offense has been or is being committed by the person to be arrested.[87] Probable cause "must stand upon firmer ground than mere suspicion, though the arresting officer need not have in hand evidence which would suffice to convict."[88]

Probable cause must be said to exist "as of the time" of an arrest "and not simply as of sometime in the past."[89] The Connecticut Supreme Court has held that "no single rule can be applied to determine when information has become too old to be reliable"; whether information is too old to sustain probable cause must be assessed "on a case-by-case basis."[90]

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84. *Florida v. Royer*, 480 U.S. 491, 500 (1982).

85. *Florida v. Royer*, 480 U.S. 491, 506-07 (1982).

86. *See, e.g., Wong Sun v. United States*, 371 U.S. 471, 479 (1963) ("The history of the use, and not infrequent abuse, of the power to arrest cautions [against] relaxation of the fundamental requirements of probable cause.").

87. *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *State v. Johnson*, 286 Conn. 427, 435-36, *cert. denied*, 555 U.S. 883 (2008).

88. *Wong Sun v. United States*, 371 U.S. 471, 479 (1963); *accord State v. Elliott*, 153 Conn. 147, 152 (1965).

89. *United States v. Grubbs*, 547 U.S. 90, 95 n.2 (2006) (addressing stale search warrant) (quoting *United States v. Wagner*, 989 F.2d 69, 75 (2d Cir. 1993)); *State v. Buddhu*, 264 Conn. 449, 465 (probable cause to sustain search "depends in part on the finding of facts so closely related to the time of the issuance of the warrant as to justify a belief in the continued existence of probable cause at that time"), *cert. denied*, 541 U.S. 1030 (2004).

90. *State v. Buddhu*, 264 Conn. 449, 465, *cert. denied*, 541 U.S. 1030 (2004).

The prohibition against arrests without probable cause that the person to be arrested has committed a crime does not apply to material witnesses to a state or federal felony. Such witnesses may be arrested and detained pursuant to federal and state statutes under certain circumstances, without regard to whether the witness is suspected of violating the law.[91]

1-1:5.1 Probable Cause Based on Objective, Reasonable Assessment of the Totality of the Circumstances Surrounding the Arrest

The standards for probable cause determinations are the same under the federal and state constitutions. In the seminal case of *Illinois v. Gates*,[92] the United States Supreme Court explained that probable cause "is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[93] Probable cause is determined by an objective analysis of the totality of the circumstances surrounding the arrest.[94] Further, "[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts . . . ."[95] The issuing judge may consider "only the information that was actually before [her] at the time . . . she signed the warrant, and the reasonable inferences to be drawn therefrom."[96]

"The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit . . ., there is a fair probability" that a crime has been committed and that the person to be arrested committed

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91. 18 U.S.C. § 3144; Conn. Gen. Stat. § 54-82j.

92. *Illinois v. Gates*, 462 U.S. 213 (1983).

93. *Illinois v. Gates*, 462 U.S. 213, 232 (1983); *accord State v. Johnson*, 286 Conn. 427, 435, *cert. denied*, 555 U.S. 883 (2008).

94. *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *accord State v. Johnson*, 286 Conn. 427, 435, *cert. denied*, 555 U.S. 883 (2008).

95. *Illinois v. Gates*, 462 U.S. 213, 243-44 n.13 (1983); *accord State v. Shields*, 308 Conn. 678, 690 (2013), *cert. denied*, 571 U.S. 1176 (2014).

96. *State v. Shields*, 308 Conn. 678, 691(2013) (internal citations and quotation marks omitted), *cert. denied*, 571 U.S. 1176 (2014).

it.[97] "Reasonable minds may disagree as to whether a particular" set of circumstances "establishes probable cause."[98]

The test for probable cause is the same for arrests upon a warrant as for warrantless arrests. Judges make the determination when feasible, and police officers make the determination when exigencies militate against taking the time for judicial review, but this difference only shifts the decision "from one party to another; the nature of the determination itself . . . has not been altered."[99]

The United States Supreme Court has explained that "[t]here is a large difference between" proving guilt and finding probable cause, "as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them."[100] "Probable cause," the Court has written, "does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction."[101]

The United States Supreme Court has held that a determination of probable cause might still be valid even if it turns out that the determination was "based on reasonable mistakes of both fact and law."[102] In *Heien v. North Carolina*,[103] the United States Supreme Court upheld a seizure and subsequent search based on a police

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97. *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *accord State v. Johnson*, 286 Conn. 427, 437, *cert. denied*, 555 U.S. 883 (2008).

98. *State v. Shields*, 308 Conn. 678, 691 (2013) (internal citations and quotation marks omitted), *cert. denied*, 571 U.S. 1176 (2014). *See Pennsylvania v. LaBron*, 518 U.S. 938 (1996) (Fourth Amendment satisfied where probable cause was based on single officer's observations of one suspect putting drugs in car's trunk and second suspect acting in a way consistent with drugs being in trunk); *Texas v. Brown*, 460 U.S. 730 (1983) (plurality opinion) (officer had probable cause to believe suspect possessed drugs based on officer's observation of party balloon, together with his experience and knowledge that party balloons often were used to transport narcotics); *State v. Holmes*,160 Conn.140, 147-28 (1970) (officer relied in part on familiarity with suspect's drug dealer companion, and with methods of injecting heroin, to support probable cause that defendant was using illegal narcotics); *but see State v. DelVecchio*, 149 Conn. 567, 571 (1965) (probable cause not found where officer observed suspect with nondescript paper bag in car).

99. *State v. Johnson*, 286 Conn. 427, 447 (emphasis deleted), *cert. denied*, 555 U.S. 883 (2008). *See Beck v. Ohio*, 379 U.S. 89, 91 (1964) (question for a judge when there is a warrant, and for police when there is not, is "whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense").

100. *Brinegar v. United States*, 338 U.S. 160, 173 (1949).

101. *Adams v. Williams*, 407 U.S. 143, 149 (1972).

102. *Heien v. North Carolina*, 574 U.S. 54, 63 (2014).

103. *Heien v. North Carolina*, 574 U.S. 54 (2014).

officer's mistaken belief that the suspect was violating state law by driving with one non-functioning tail light; in fact, state law would have been violated only if both tail lights were out.[104] As of this writing, the Connecticut Supreme Court has not directly addressed the question of whether a mistake of fact or law undermines probable cause.[105]

There is some disagreement about whether a constitutionally valid arrest requires probable cause as to every element of the suspected crime. While some federal courts have held that "police cannot establish probable cause without at least *some* evidence supporting the elements of a particular offense,"[106] others have held that "officers need not "establish probable cause as to *each and every* element of a crime before they are entitled to make an arrest."[107] Still other courts have held that probable cause requirements differ depending upon the nature of the crime: for general intent crimes, "an officer need not have probable cause for every element of the offense," but "when specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred."[108]

The Connecticut Supreme Court has come down on the side of courts requiring some evidence as to each element, holding that an arrest warrant "affidavit must recite sufficient facts" to show

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104. *Heien v. North Carolina*, 574 U.S. 54, 59 (2014).

105. *But cf. State v. Diaz*, 226 Conn. 514, 567 n.25 (1993) (Berdon, J., dissenting) (while the majority's opinion addressed the appellate standard for reviewing a magistrate's determination of probable cause, and not whether the magistrate had relied upon a mistake of fact or law, Justice Berdon nonetheless complained: the "majority opinion suggests that even if a magistrate's issuance of a warrant is based on a confusion of the facts in an affidavit or other mistake, this is constitutionally irrelevant so long as a reasonable inference could have saved the warrant. I disagree. If the magistrate never draws a necessary inference, but nevertheless issues a warrant based on a mistake of fact, then there can be no probable cause even if drawing the necessary inference would have been reasonable.").

106. *Wesby v. District of Columbia*, 765 F.3d 13, 20 (D.C. Cir. 2014) (emphasis in original); *see Davis v. New York*, 902 F. Supp. 2d 405, 426 (S.D.N.Y. 2012) ("Probable cause must extend to every element of the crime for which a person is arrested.") (quoting *Alhovsky v. Paul*, 406 F. Appx. 535, 536 (2d Cir. 2011)).

107. *Hawkins v. Mitchell*, 756 F.3d 983, 995 (7th Cir. 2014) (internal quotation marks and citation omitted) (emphasis in original).

108. *Blankenhorn v. City of Orange*, 485 F.3d 463, 472 (9th Cir. 2007) (quoting *Gasho v. U.S.*, 39 F.3d 1420, 1428 (9th Cir. 1994), *cert. denied*, 515 U.S. 1144 (1995)).

that "probable cause exists as to each element of every crime charged."[109]

As for the United States Supreme Court, its opinions leave a good deal of room to continue the debate.[110]

1-1:5.2 Bases for Probable Cause

The facts and circumstances supporting probable cause can come from a variety of sources including: law enforcement officers' direct observations; citizen "tipsters" and police informants; and statements made by, or items seized from, a suspect during a valid investigative stop.

1-1:5.2a Officers' Direct Observations

As a matter of state and federal constitutional law, probable cause to arrest can be based on "circumstances observed by [an] officer preceding the arrest, viewed in light of common knowledge and his own training and experience."[111] Officers may draw reasonable inferences of criminal activity from all the surrounding circumstances, including actions that, if viewed in isolation, would not be criminal on their face.[112]

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109. *State v. Heinz*, 193 Conn. 612, 616, 623-24 (1984).

110. The Court's opinions might be read to say that there must be some evidence for each element of the suspected crime, but the quantum of evidence as to each element need not be sufficient to sustain a finding of guilt. *See Adams v. Williams*, 407 U.S. 143, 149 (1972) ("Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction."); *Brinegar v. United States*, 338 U.S. 160, 173 (1949) ("There is a large difference between" proving guilt and finding probable cause, and "a like difference in the quanta and modes of proof required to establish them.").

On the other hand, the same opinions might be read to mean that there must be probable cause to believe the suspect committed the crime, but there need not be specific evidence for each element of the suspected crime.

111. *State v. DelVecchio*, 149 Conn. 567, 575 (1965). *See Texas v. Brown*, 460 U.S. 730, 742-43 (1983) (plurality opinion) (probable cause that suspect with a party balloon was engaged in drug trafficking based in part on officer's knowledge that narcotics traffickers used party balloons to transport drugs); *State v. Holmes*, 160 Conn. 140, 147-48 (1970) (probable cause that defendant was using illegal narcotics based in part on officer's familiarity with suspect's drug dealer companion, and officer's knowledge of methods used to inject heroin).

112. *See Texas v. Brown*, 460 U.S. 730, 742-43 (1983) (plurality opinion) (possession of party balloon was combined with officer's knowledge that party balloons often were used in narcotics trafficking); *State v. Holmes*, 160 Conn. 140, 147-48 (1970) (suspect's movements in car were combined with officer's familiarity with suspect's drug dealer companion, and with methods of injecting heroin).

In *Atwater v. City of Lago Vista*,[113] the United States Supreme Court relied on an officer's direct observations to hold that a warrantless, custodial arrest for a traffic misdemeanor punishable only with a fine, (failure to use seat belts), was constitutional.[114] The Court rejected Atwater's civil rights claim that her arrest for a minor traffic offense was unreasonable and violated the Fourth Amendment: "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."[115]

The Connecticut appellate courts have not directly addressed whether the state constitution would permit a custodial arrest for a minor offense not punishable by jail.[116]

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113. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

114. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

115. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); *contra Atwater v. City of Lago Vista*, 532 U.S. 318, 365-66 (2001) (O'Connor, J. dissenting) ("Giving police officers constitutional carte blanche to effect an arrest whenever there is probable cause to believe a fine-only misdemeanor has been committed is irreconcilable with the Fourth Amendment's command that seizures be reasonable.").

116. In *State v. Jenkins*, the Connecticut Supreme Court acknowledged the prosecution's argument that a suspect's detention and interrogation did not exceed the permissible scope of an investigative traffic stop because the "defendant constitutionally could have been subjected to custodial arrest for the minor traffic offense" for which he was detained. *State v. Jenkins*, 298 Conn. 209, 233 & n.22 (2010) (citing *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001)). The Court sidestepped this claim, reframing the question as one involving not a custodial arrest but an investigatory stop: "Courts considering the constitutionality under the fourth amendment of a police officer's interaction with a motorist during a routine traffic stop apply the principles developed under the line of case law implementing the central holding of *Terry* [*v. Ohio*, 392 U.S. 1 (1968)]." *State v. Jenkins*, 298 Conn. 209, 233 n.22 (2010).

In *State v. Dalzell*, the Connecticut Appellate Court likewise avoided deciding whether *Atwater* would foreclose a state constitutional challenge to a warrantless arrest for a minor traffic offense. *State v. Dalzell*, 96 Conn. App. 515 (2006), *rev'd in part on other grounds*, 282 Conn. 709 (2007). Like *Atwater v. City of Lago Vista, State v. Dalzell* involved a custodial arrest for violating a traffic law requiring the use of seat belts. The *Dalzell* court avoided the constitutional question by declaring *Atwater v. City of Lago Vista* inapposite: "*Atwater* does not control the outcome of the present appeal" because "[t]he state jurisdiction involved in *Atwater* . . . designated seat belt violations as misdemeanors, for which an arrest is allowed," while "Connecticut . . . treats the motor vehicle equipment violation of failure to wear a seat belt as an infraction for which no arrest is authorized." *State v. Dalzell*, 96 Conn. App. 515, 527 & n.11 (2006), *rev'd in part on other grounds,* 282 Conn. 709 (2007). One trial court has boldly gone where the state appellate courts would not. In an unreported civil rights case, the court relied on *Atwater v. City of Lago Vista* to rule that an officer was entitled to qualified immunity because he had probable cause to arrest the plaintiff for talking on the phone and driving while not in possession of her driver's license, both minor traffic violations. *Mazariegos v. City of Stamford*, No. FSTCV 116010359S, 2013 WL 5879660, at *6 (Oct. 11, 2013).

The rule permitting warrantless arrests based on a police officer's direct observations underlies the state statutory provision authorizing "[p]eace officers" to "arrest, without previous complaint or warrant, any person for any offense . . . when the person is taken or apprehended in the act" of committing the offense.[117]

1-1:5.2b Informants and Tipsters

Probable cause can be based upon information from a reliable, known informant or upon independently corroborated information from an independent source.[118] In *Illinois v. Gates*,[119] the United States Supreme Court held that the validity of a probable cause finding based on information from informants turns on "a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information," there is probable cause to support a search or seizure.[120] The same standard applies under the Connecticut Constitution.[121]

Under the *Illinois v. Gates*[122] totality of circumstances test, "an informant's 'veracity,' 'reliability' and 'basis of knowledge' are all highly relevant in determining the value of his report."[123] A tip from a known informant "carrie[s] a greater indicia of reliability than one from an anonymous informant."[124] A tip that includes an informant's admission of her own criminal activity carries its "own indicia of credibility" supporting probable cause.[125] And "corroboration of details of an informant's tip by independent police work" "reduce[s] the chances of a reckless or prevaricating

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117. Conn. Gen. Stat. § 54-1f(a); *see* Section 1-1:10.2 (further addressing this statute).

118. *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *accord State v. Barton*, 219 Conn. 529, 538 (1991).

119. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

120. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

121. *State v. Barton*, 219 Conn. 529, 544-45 (1991).

122. *Illinois v. Gates*, 462 U.S. 213 (1983).

123. *Illinois v. Gates*, 462 U.S. 213, 230 (1983); *accord State v. Barton*, 219 Conn. 529, 552 (1991).

124. *State v. Clark*, 297 Conn. 1, 12 (2010).

125. *State v. Barton*, 219 Conn. 529, 551 (1991) (quoting *United States v. Harris*, 403 U.S. 573, 583 (1971)).

tale," and can provide "a substantial basis for crediting" the informant's tip.[126]

All that said, the "totality-of-the-circumstances approach" abjures "any rigid demand that specific tests be satisfied by every informant's tip."[127] The question of whether an informant's tip and the circumstances surrounding it support probable cause is a "commonsense, practical" inquiry that cannot be reduced to particular rules.[128]

1-1:5.2c Seized Evidence and Admissions

Probable cause can be based on contraband or other incriminating evidence seized during a valid investigative stop based on reasonable suspicion.[129] Similarly, probable cause for an arrest can be based on contraband discovered by officers conducting a valid investigative stop; but the officers must have probable cause to believe that the items are in fact contraband in order to make a valid arrest.[130]

Contraband discovered during a valid consent search likewise can provide probable cause for an arrest.[131] The threshold requirement that the initial stop be supported by reasonable suspicion that a crime has been, or is being, committed does not satisfy the separate requirement that there be valid consent for the search: consent must "not be coerced, by explicit or implicit means, by

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126. *Illinois v. Gates*, 462 U.S. 213, 244-45 (1983) (internal quotation marks and citations omitted); *cf. State v. Barton*, 219 Conn. 529, 551 (1991) (affidavit based on informant's tip would have "unquestionably been stronger if the affiants had bolstered the reliability of the informant by independently corroborating some of the details he reported").

127. *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983); *accord State v. Barton*, 219 Conn. 529, 544-45 (1991).

128. *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983); *accord State v. Barton*, 219 Conn. 529, 545-46 (1991). For further discussion of this issue, *see* Chapter 3, Section 3-2:2.3.

129. *See United States v. Sharpe*, 470 U.S. 675, 683 (1985) (probable cause properly based on narcotics found during valid investigative stop); *State v. Clark*, 255 Conn. 268, 288-91 (2001) (same).

130. *Compare Minnesota v. Dickerson*, 508 U.S. 366, 376 (1993) (arrest for possession of narcotics invalid where officers conducting stop and frisk did not have probable cause to believe that item felt during pat-down was contraband), *with State v. Clark*, 255 Conn. 268, 288-91 (2001) (officer had sufficient knowledge and experience to "recognize, without further manipulation" that "plasticky packaging material" and "rock- or chunk-like substance" he felt during pat down was crack cocaine), *and State v. Arokium*, 143 Conn. App. 419, 433-34 ("contraband that spilled from the defendant's bag" during valid investigatory stop provided probable cause for arrest), *cert. denied*, 310 Conn. 904 (2013).

131. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

implied threat or covert force."[132] The same standards apply under the Connecticut Constitution: "article first, § 7, does not provide greater protection than does the federal constitution with respect to consent searches during routine traffic stops."[133]

Probable cause for an arrest can be based on admissions voluntarily made during an investigative stop.[134] So long as the defendant has not been subjected to a custodial arrest, no warnings about a suspect's Fifth Amendment rights[135] are required before basing a finding of probable cause to arrest on a suspect's voluntary admissions.[136]

1-1:6 Citizen's Arrests Permitted Upon Probable Cause

As early as 1795, Connecticut common law provided that a suspected law-breaker "may be pursued and arrested by a private person without a warrant."[137] The limited authority of citizens to make arrests and the scope of that authority have been codified at Connecticut General Statutes § 53a-22(f):

> A private person acting on his or her own account is justified in using reasonable physical force upon another person when and to the extent that he or she reasonably believes such to be necessary to effect an arrest or to prevent the escape from custody of an arrested person whom he or she reasonably believes to have committed an offense and who in fact has committed such offense.[138]

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132. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227-28 (1973). Consent searches are discussed in greater detail in Chapter 3.

133. *State v. Jenkins*, 298 Conn. 209, 282 (2010).

134. *State v. Januszewski*, 182 Conn. 142, 161-62 (1980), *overruled on other grounds by State v. Erickson*, 297 Conn. 164 (2010).

135. *See Miranda v. Arizona*, 384 U.S. 436 (1966) (establishing Fifth Amendment warning requirement for custodial arrests); Chapter 2 (discussing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

136. *State v. Januszewski*, 182 Conn. 142, 161-62 (1980), *overruled on other grounds by State v. Erickson*, 297 Conn. 164 (2010). *See United States v. Sanchez*, 449 F.2d 204, 209 (5th Cir. 1971) ("Voluntary statements of any kind, not in response to custodial interrogation, are not barred by the Fifth Amendment, nor has their admissibility been affected by the *Miranda* decision or its progeny.") (citing *Miranda v. Arizona*, 384 U.S. 436, 496 (1966)).

137. *Wrexford v. Smith*, 2 Root 171 (1795).

138. Conn. Gen. Stat. § 53a-22(f).

The statute does not require that the arresting citizen actually "witness [ ] the commission of the offense or . . . come upon the scene shortly after its occurrence."[139] But she must have the equivalent of probable cause: "For purposes of this section, a reasonable belief that a person has committed an offense means a reasonable belief in facts or circumstances which if true would in law constitute an offense."[140] The statute explicitly renders invalid any citizen's arrest based on "an erroneous though not unreasonable belief" that the suspect has committed a crime.[141]

A person making a citizen's arrest "is not justified in using deadly physical force in such circumstances" unless the suspect is "using or about to use deadly force" or is "inflicting or about to inflict great bodily harm."[142]

1-1:7 Knock and Announce

"At the time of the framing" of the United States Constitution, "the common law of search and seizure recognized a law enforcement officer's authority to break open the doors of a dwelling, but generally indicated that he first ought to announce his presence and authority."[143] Similarly, "[f]rom early colonial times," Connecticut has "followed the common-law requirement" that, "in the absence of some special exigency, before an officer may break and enter" a home to execute a warrant, he must "signify the cause of his coming, and to make request to open the doors."[144]

It was not until 1994 that, in *Wilson v. Arkansas*,[145] the United States Supreme Court "squarely held that this [knock and announce] principle is an element of the reasonableness inquiry

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139. *State v. Smith*, 63 Conn. App. 228, 238, *cert. denied*, 258 Conn. 901 (2001).

140. Conn. Gen. Stat. § 53a-22(a); *see State v. Jenkins*, 82 Conn. App. 111, 116-17 (2004) ("The phrase 'reasonable grounds to believe' is synonymous with probable cause.") (internal quotation marks and citations omitted).

141. Conn. Gen. Stat. § 53a-22(a). *Compare* Conn. Gen. Stat. § 53a-22(a) (mistake of fact or law renders citizen's arrest invalid), *with Heien v. North Carolina*, 574 U.S. 54, 63 (2014) (valid finding of probable cause can be "based on reasonable mistakes of both fact and law").

142. Conn. Gen. Stat. § 53a-22(f) (adopting definitions from Conn. Gen. Stat. § 53a-19, entitled "Use of physical force in defense of person").

143. *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995).

144. *State v. Mariano*, 152 Conn. 85, 94 (1964) (internal quotation marks and citations omitted), *cert. denied*, 380 U.S. 943 (1965).

145. *Wilson v. Arkansas*, 514 U.S. 927 (1995).

under the Fourth Amendment."[146] The rule applies under both the federal and state constitutions.[147]

"This is not to say . . . that every entry must be preceded by an announcement."[148] As the *Wilson* Court explained: "The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests."[149] The Court did "not attempt a comprehensive catalog" of reasons why officers might dispense with knocking and announcing their purpose before entering a home; rather, the Court "simply [held] that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry."[150]

While Connecticut constitutional caselaw followed federal law in permitting unannounced entries in exigent circumstances,[151] that flexibility was eliminated in 2021 by General Statutes Section 54-33a.[152] This statute bars "no-knock" entries and requires officers to announce their identity, authority, and purpose before entering and executing a warrant.[153]

1-1:8 Use of Force

"In determining the reasonableness of the manner in which a seizure is effected," including the degree of force used, courts "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[154]

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146. *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995).

147. *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995); *State v. Mariano*, 152 Conn. 85, 94 (1964), *cert. denied*, 380 U.S. 943 (1965).

148. *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995).

149. *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995).

150. *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995).

151. See *State v. Mariano*, 152 Conn. 85, 94 (1964), *cert. denied*, 380 U.S. 943 (1965) (officers did not violate defendant's state constitutional rights when officers at front door broke it down after hearing fleeing footsteps, prompting officers in garage to enter house without announcement).

152. Conn. Gen. Stat. § 54-33a, as amended by Public Acts 2021, No. 21-33, § 7.

153. Conn. Gen. Stat. § 54-33a.

154. *United States v. Harris*, 550 U.S. 372, 383 (2007) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)); *see City of San Francisco v. Sheehan*, 575 U.S. 600, 604, 612-13 (2015)

Deciding whether the force used to make an arrest was reasonable "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[155]

"Th[is] inquiry requires an analysis of the totality of the circumstances."[156] "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[157] "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[158]

That said, "[a]s in other Fourth Amendment contexts, . . . the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[159] There is no "easy-to-apply legal test in the Fourth Amendment context" for determining whether the degree of force used to effect a particular arrest is constitutional: courts "must still slosh [their] way through the fact bound morass of 'reasonableness.'"[160]

"Under [Connecticut constitutional law], in effecting a legal arrest, the arresting officer may, with the exception [of deadly force], use such force as he reasonably believes to be necessary, under all

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(police did not use excessive force in effecting arrest for assault and threatening when they shot a mentally unstable group home resident who had threatened three people and, even after being pepper-sprayed, charged officers while armed with a knife).

155. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (internal quotation marks and citations omitted); *accord Plumhoff v. Rickard*, 572 U.S. 765 (2014).

156. *Plumhoff v. Rickard*, 572 U.S. 765 (2014).

157. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

158. *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

159. *Graham v. Connor*, 490 U.S. 386, 397 (1989); *cf. Kingsley v. Hendrickson*, 576 U.S. 389 (2015) (whether law enforcement officer used excessive force against pretrial detainee in violation of detainee's Fourteenth Amendment due process rights must be judged by applying objective reasonableness standard to totality of circumstances; officer's subjective intent not relevant).

160. *United States v. Harris*, 550 U.S. 372, 383 (2007).

the circumstances surrounding its use, to accomplish that purpose, that is, to effect the arrest and prevent an escape."[161] Deadly force is permissible only when the officer reasonably believes the suspect has committed or is committing a felony, and "only if the force used was reasonably believed to be necessary to effect th[e] arrest."[162]

These constitutional rules are codified, with slight modifications (notably to include imminent physical harm to the list of justifications for using force), at Connecticut General Statutes § 53a-22(b) and (c). Connecticut General Statutes § 53a-22(b) provides that a law enforcement officer "is justified in using physical force [upon another person] when and to the extent that he or she reasonably believes such to be necessary to: (1) Effect an arrest or prevent the escape from custody of a person whom he or she reasonably believes to have committed an offense, unless he or she knows that the arrest or custody is unauthorized; or (2) defend himself or herself or a third person from the use or imminent use of physical force while effecting or attempting to effect an arrest or while preventing or attempting to prevent an escape."[163]

Connecticut General Statutes § 53a-22(c) provides that using deadly force is "justified" to achieve the purposes set out in Connecticut General Statutes § 53a-22(b), but only where the arresting officer "reasonably believes" deadly force "to be necessary to: (1) Defend himself or herself or a third person from the use or imminent use of deadly physical force; or (2) effect an arrest or prevent the escape from custody of a person whom he or she reasonably believes has committed or attempted to commit a felony which involved the infliction or threatened infliction of serious physical injury and if, where feasible, he or she has given warning of his or her intent to use deadly physical force."[164]

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161. *Martyn v. Donlin*, 151 Conn. 402, 411 (1964).

162. *Martyn v. Donlin*, 151 Conn. 402, 411 (1964).

163. Conn. Gen. Stat. § 53a-22(b).

164. Conn. Gen. Stat. § 53a-22(c); *see* Steven Salky, Jacob Schuman & Keisha Stanford, *Lawful Use of Deadly Force by the Police: What's Wrong in Ferguson and Elsewhere*, The Champion (National Ass'n of Criminal Defense Lawyers), May 2015, at 20-25 (arguing that "the national debate stimulated by" the shooting of an unarmed black man in 2015 in Ferguson, Missouri "should prioritize achieving a better balance between public and officer safety and individual liberty than any existing state law governing police use of deadly force"; suggesting that Connecticut General Statutes § 53a-22(c) goes further than some state laws, but not far enough, toward achieving this balance; recommending that state laws "governing police use of deadly force" "should authorize only (a) the objectively necessary

1-1:9 Arrest Warrants

1-1:9.1 Warrant Generally, But Not Invariably, Required

Under both the federal and state constitutions, warrants are *preferred* for all felony arrests.[165] Warrants are presumptively *required* for all arrests, whether for misdemeanors or felonies, made inside a person's home: "[i]t is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable."[166]

Entering someone's home without a warrant to effect an arrest is lawful only in limited situations involving exigent circumstances.[167] That said, consistent with the rule that conduct "a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection,"[168] both the United States Supreme Court and the Connecticut Supreme Court have upheld warrantless arrests based on speedy information and made at the threshold of defendants' homes as they stood in their open doorways.[169]

Warrants are not presumptively required for public felony arrests, or for public misdemeanor arrests based on acts committed in an officer's presence or based on the speedy information of others.[170]

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use of deadly force, and (b) only then to apprehend suspected felons who pose a significant ongoing threat to the officer or the public.").

165. *State v. Heinz*, 193 Conn. 612, 618 (1984) (state and federal constitutions have a "strong preference that arrests, like searches, are normally to be conducted pursuant to a warrant") (citing *Massachusetts v. Upton*, 466 U.S. 727 (1984) (other citations omitted)).

166. *Payton v. New York*, 445 U.S. 573, 586 (1980); *State v. Geisler*, 222 Conn. 672, 681-82 (1992) ("federal and state constitutional principles" render "warrantless searches and seizures inside a home . . . presumptively unreasonable") (internal quotation marks and citation omitted).

167. *Payton v. New York*, 445 U.S. 573, 590 (1980) ("Absent exigent circumstances," the "threshold [of a home] may not reasonably be crossed without a warrant."); *State v. Geisler*, 222 Conn. 672, 681-82 (1992) ("[A]bsent consent to entry or exigent circumstances, a judicial determination of probable cause must stand in between the police and the door of a person's home, whether the object of an entry is to search and seize or to arrest.") (internal quotation marks and citation omitted); *see* Section 1-1:10 (warrantless arrests and exigent circumstances).

168. *Katz v. United States*, 389 U.S. 347, 351 (1967).

169. *United States v. Santana*, 427 U.S. 38, 42 (1976); *State v. Santiago*, 224 Conn. 494, 502-03 (1993); *see State v. Mann*, 271 Conn. 300, 309 (2004) (citing *State v. Santiago* as precedent for upholding arrest based on pat down of suspect who voluntarily answered door to police), *cert. denied*, 544 U.S. 949 (2005).

170. *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) ("A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause."); *see*

1-1:9.2 Warrant Requirements: Sworn Evidence and Particularity

As a matter of federal and state constitutional law, arrest warrants must be signed by an impartial judicial officer and supported by sworn evidence establishing probable cause that a crime has been committed and that the person to be arrested committed it.[171] The test for probable cause is the same for arrests upon a warrant as for warrantless arrests.[172]

A valid arrest warrant "require[s] that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant."[173]

The federal and state constitutions explicitly provide that an arrest warrant must describe the person to be arrested sufficiently to identify her as the person who committed the crime charged in the warrant.[174] Connecticut Practice Book § 36-3 requires that an arrest warrant "contain the name of the accused person, or if such name is unknown, any name or description by which the accused can be identified with reasonable certainty."[175]

"Courts universally have held that an arrest warrant that correctly names the person to be arrested" satisfies the particularity requirement "and need not contain any additional identifying information."[176] A so-called "John Doe" warrant that does not name the suspect but contains other identifying information, such as physical appearance, occupation, current location, place of

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Section 1-1:10 (discussing constitutional and state statutory rules governing warrantless arrests).

171. *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975) ("The standard for arrest is probable cause, defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense.") (internal quotation marks and citation omitted); *State v. Johnson*, 286 Conn. 427, 443-44 ("[T]he totality of the circumstances test is the proper test for determining whether probable cause exist[s] to effectuate [an] arrest . . . under our state constitution."), *cert. denied*, 555 U.S. 883 (2008).

172. *See* Section 1-1:5 (discussing probable cause determinations).

173. *Whitely v. Warden*, 401 U.S. 560, 564 (1971); *accord State v. Heinz*, 193 Conn. 612, 616, 623-24 (1984); *see* Section 1-1:5 (discussing probable cause determinations).

174. U.S. Const., amend. IV (requiring that suspect be "particularly describ[ed]"; Conn. Const., article first, § 7 (requiring that suspect be "describ[ed] . . . as nearly as may be").

175. Practice Book § 36-3.

176. *State v. Police*, 343 Conn. 274, 294 (2022) (quotation marks and internal citations omitted).

residence), satisfies the particularity requirement *if* the information identifies the suspect with reasonable certainty.[177]

In its 2022 opinion in *State v. Police,* the Connecticut Supreme Court observed that "[t]he advent of DNA analysis introduced a new layer of consideration" to constitutional and statutory provisions requiring that a suspect be described with reasonable certainty.[178] "[C]ourts that have considered the constitutionality of a John Doe arrest warrant that described the suspect by reference to his unique DNA profile overwhelmingly have held that it satisfies state and federal constitutional particularity requirements."[179]

In the same case, however, the court held that a John Doe warrant based on a vague general description and a DNA analysis of mixed, partial DNA profiles did not particularly identify the defendant and did not support his arrest.[180] Concluding that a later and arguably more reliable DNA analysis did not affect the infirmity in the original affidavit and arrest warrant, the court dismissed the charges as untimely.[181]

Where criminal procedures involve developing science, such as DNA evidence or eyewitness identifications,[182] counsel must focus as much or more on current scientific research and recent legal developments than on past caselaw to develop arguments and preserve issues for appeal. In a 2021 review by the National Institute of Standards and Technology, the authors observe that developments in DNA science, "if not properly considered and communicated [by forensic science practitioners], can lead to

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177. *State v. Police*, 343 Conn. 274, 295-96 (2022) (citing numerous cases from various jurisdictions).

178. *State v. Police*, 343 Conn. 274, 296 (2022) (citing numerous cases from various jurisdictions).

179. *State v. Police*, 343 Conn. 274, 296 (2022) (quotation marks and internal citations omitted).

180. *State v. Police*, 343 Conn. 274, 294 (2022) (quotation marks and internal citations omitted).

181. *State v. Police*, 343 Conn. 274, 308 (2022). The *Police* court emphasized that its ruling did not question the value of DNA evidence in determining guilt or innocence, nor did the ruling mean that the challenged DNA evidence, supported by expert analysis, "would not have been probative of the defendant's guilt" had the case gone to trial. *State v. Police*, 343 Conn. 274, 307 (2022). The holding "simply" meant that the information provided to the judicial officer in the John Doe affidavit was not sufficiently particular to support the arrest warrant. *State v. Police*, 343 Conn. 274, 308 (2022).

182. *See* Part 2-1 *infra*.

misunderstanding regarding the strength and relevance of the DNA evidence in a case.[183]

1-1:9.3 Obtaining and Issuing a Warrant

1-1:9.3a Review by Neutral Magistrate

"Whether applying the fourth amendment or article first, § 7, of [the state] constitution," arrest warrant affidavits must be reviewed for probable cause by a "detached and neutral magistrate who must judge independently the sufficiency of an affidavit" supporting the warrant.[184] A "magistrate issuing a warrant cannot form an independent opinion as to the existence of probable cause unless the affidavit supporting the warrant application sets forth some of the facts upon which the police have relied in concluding" that probable cause exists.[185]

These standards are incorporated in Connecticut General Statutes § 54-2a and Connecticut Practice Book § 36-1.[186] As Connecticut Practice Book § 36-1 puts it: "a judicial authority may issue a warrant for the arrest of an accused person if the judicial authority determines that the affidavit accompanying the application shows there is probable cause to believe that an offense has been committed and that the accused committed it."[187]

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183. John M. Butler, Hari Iyer, Rich Press, Melissa K. Taylor, Peter M. Vallone, Sheila Willis, *DNA Mixture Interpretation* (Nat'l Inst. of Sci. and Tech., June 2021), *available at* https://doi.org/10.6028/NIST.IR.8351-draft (last visited Feb. 11, 2023). This review is one in a series conducted by the National Institute of Science and Technology addressing the question: "What established scientific laws and principles as well as empirical data exist to support the methods that forensic science practitioners use to analyze evidence?" John M. Butler, Hari Iyer, Rich Press, Melissa K. Taylor, Peter M. Vallone, Sheila Willis, *NIST Scientific Foundation Review i, v* (Nat'l Inst. of Sci and Tech., Dec. 2020), *available at* https://doi.org/10.6028/NIST.IR.8351-draft (last visited Feb. 11, 2023).

184. *State v. Barton*, 219 Conn. 529, 540-41 (1991) (internal quotation marks and citations omitted).

185. *State v. Barton*, 219 Conn. 529, 540-41 (1991) (internal quotation marks and citations omitted).

186. Conn. Gen. Stat. § 54-2a(a) ("In all criminal cases the Superior Court, or any judge thereof, or any judge trial referee specifically designated by the Chief Justice to exercise the authority conferred by this section may issue . . . bench warrants of arrest upon application by a prosecutorial official if the court or judge determines that the affidavit accompanying the application shows that there is probable cause to believe that an offense has been committed and that the person complained against committed it."); *accord* Practice Book § 36-1.

187. Practice Book § 36-1.

1-1:9.3b Issuance

Connecticut General Statutes § 54-42a(b) and Connecticut Practice Book § 36-3 specify the procedures for issuing a warrant.[188] As the Practice Book rule states: an arrest warrant shall "be signed by the judicial authority"; include "the conditions of release fixed, if any"; "state the offense charged"; and "direct any officer authorized to execute it to arrest the accused person and to bring him or her before a judicial authority without undue delay."[189]

1-1:9.3c Sealing

All affidavits in support of an arrest warrant must be filed in court together with the warrant return.[190] "At the time the arrest warrant is issued," upon a written request by a prosecutor supported by a showing of "good cause," the judicial authority "may order that the supporting affidavits be sealed from public inspection or that disclosure" be restricted for a limited time, subject to further judicial review.[191] No such limitations shall apply to the accused's legal counsel.[192]

1-1:9.4 Executing a Warrant

Connecticut General Statutes § 54-2a(d) and (e), and Connecticut Practice Book § 36-5 specify the procedures for serving a warrant.[193]

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188. Conn. Gen. Stat. § 54-2a(b) ("The court, judge or judge trial referee issuing a bench warrant for the arrest of the person or persons complained against shall, in cases punishable by death, life imprisonment without the possibility of release or life imprisonment, set the conditions of release or indicate that the person or persons named in the warrant shall not be entitled to bail and may, in all other cases, set the conditions of release. The conditions of release, if included in the warrant, shall fix the first of the following conditions which the court, judge or judge trial referee finds necessary to assure such person's appearance in court: (1) Written promise to appear; (2) execution of a bond without surety in no greater amount than necessary; or (3) execution of a bond with surety in no greater amount than necessary."); *accord* Practice Book § 36-3.

189. Practice Book § 36-3. *See Gerstein v. Pugh*, 420 U.S. 103, 125 (1975) (Fourth Amendment requires that states "provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.").

190. Practice Book § 36-2(a).

191. Practice Book § 36-2(b) and (c).

192. Practice Book § 36-2(b).

193. Conn. Gen. Stat. § 54-2a(d) ("All process issued by said court or any judge thereof, or any judge trial referee shall be served by any proper officer, or an indifferent person when specially directed to do so, and shall be obeyed by any and all persons and officers to whom the same is directed or whom it may concern."); Conn. Gen. Stat. § 54-2a(e) ("Whenever a warrant or other criminal process is issued . . ., the court, judge or judge trial referee may

The Practice Book rule directs an officer "executing an arrest warrant" to "do so anywhere within the state upon apprehension of the accused."[194] "The officer shall take the accused into custody, [and] serve a copy of the warrant upon him or her . . . ."[195] Officers executing an arrest warrant must use "reasonable" force.[196]

Prosecutions based on arrest warrants issued before but not executed until after the applicable limitations period has run[197] are timely "so long as the warrant is executed without unreasonable delay."[198] A "'reasonable period of time is a question of fact based on the circumstances of each case.'"[199] A defendant challenging the timely execution of a warrant is entitled to a hearing at which she bears the initial evidentiary burden of showing she was available for arrest.[200] The burden then shifts to the state to prove it exercised due diligence in executing the warrant.[201] The state's burden of proving due diligence "is not onerous, but neither is it trivial": it must be met with "admissible evidence" and cannot rely on "unsworn factual representations of counsel."[202]

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cause such warrant or process to be entered into a central computer system in accordance with policies and procedures established by the Chief Court Administrator. Existence of the warrant or other criminal process in the computer system shall constitute prima facie evidence of the issuance of the warrant or process. Any person named in the warrant or other criminal process may be arrested based on the existence of the warrant or process in the computer system and shall, upon any such arrest, be given a copy of the warrant or process."); Practice Book § 36-5.

194. Practice Book § 36-5.

195. Practice Book § 36-5.

196. *See* Section 1-1:8 (Use of Force). Procedures following the arrest are covered in Chapter 4.

197. *See* Conn. Gen. Stat. §54-193 (setting limitations for certain crimes and offenses).

198. *State v. Freeman*, 344 Conn. 503, 506 (2022) (citing *State* v. *Swebilius,* 325 Conn. 793, 802 (2017) and *State v. Crawford*, 202 Conn. 443, 451 (1987)).

199. *State v. Freeman*, 344 Conn. 503, 514 (2022) (quoting *State v. Crawford*, 202 Conn. 443, 451 (1987)). A warrant executed even long after the limitations period has run might meet the reasonable time requirement if the facts show the defendant hid from authorities or otherwise was difficult to find. *Cf.*, *State v. A.B.*, 341 Conn. 47 (2021) (that defendant moved to California did not by itself satisfy state's burden of proving reasonable delay; fact-specific inquiry showed defendant lived in same place, was on social media, and did nothing to evade authorities). On the other hand, if the facts show the defendant did nothing to avoid arrest, even a short delay in executing the warrant might be unreasonable. *State v. Freeman*, 344 Conn. 503, 514 (2022) (citing *State v. Crawford*, 202 Conn. 443, 451 (1987)).

200. *State v. Swebilius*, 325 Conn. 793, 804 (2017).

201. *State v. Swebilius*, 325 Conn. 793, 804 (2017).

202. *State v. Freeman*, 344 Conn. 503, 518 (2022).

1-1:9.5 Withdrawing a State Warrant

Connecticut Practice Book § 36-6 permits an unserved warrant to be cancelled by either the prosecution or the court before the arrest is made.[203] In *State v. Pierre*,[204] the Connecticut Supreme Court read this and related provisions to mean that certain rights attendant the initiation of a prosecution, such as the right to counsel, do not attach until an arrest is made.[205] The signing of an arrest warrant "does not necessarily represent a commitment by the state to prosecute the defendant"; rather, the issuing of a warrant (as opposed to serving it and effecting an arrest) "may be more accurately considered a prelude to a criminal prosecution, subject to amendment or cancellation as necessary, rather than the initiation of an adversarial judicial proceeding in its own right."[206]

1-1:10 Warrantless Arrests

1-1:10.1 State and Federal Constitutions

"Under both the federal and the state constitutions, a warrantless search and seizure is *per se* unreasonable, subject to a few well established exceptions."[207] The warrant presumption does not apply to felony arrests made in public or to misdemeanor arrests made in public for criminal acts committed in an officer's presence or based upon the speedy information of others.[208] Even "a warrantless

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[203] Practice Book § 36-5 ("At the request of the prosecuting authority, any unserved arrest warrant shall be returned to a judicial authority for cancellation. A judicial authority also may direct that any unserved arrest warrant be returned for cancellation."). The court lacks jurisdiction to entertain a petition by a citizen to cancel an unserved arrest warrant before there is a pending criminal case. *See In re Siddiqui*, 195 Conn. App. 594, 600-03 (2020).

[204] *State v. Pierre*, 277 Conn. 42, 97, *cert. denied*, 547 U.S. 1197 (2006).

[205] *State v. Pierre*, 277 Conn. 42, 97 (citing Practice Book §§ 36-5, 36-6 and 36-7), *cert. denied*, 547 U.S. 1197 (2006).

[206] *State v. Pierre*, 277 Conn. 42, 97, *cert. denied*, 547 U.S. 1197 (2006); *see* Chapter 10 (discussing initiation of adversarial proceedings and right to counsel).

[207] *State v. Johnson*, 286 Conn. 427, 444, *cert. denied*, 555 U.S. 883 (2008).

[208] *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) ("A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause."); *see Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (warrantless arrest for traffic misdemeanor supported by probable cause and based on officer's direction observations did not violate Fourth Amendment); *United States v. Watson*, 423 U.S. 411 (1976) (warrantless felony arrest made in public and supported by probable cause did not violate Fourth Amendment); *State v. Perry*, 195 Conn. 505, 507 n.2 (1985) (warrantless felony arrest on public street

arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine" is permitted by the Fourth Amendment if the offense is supported by probable cause and based on an officer's direct observations.[209]

The warrant presumption *does* apply to seizures in the home. "Physical entry of the home is the chief evil against which the wording of the fourth amendment is directed."[210] Government agents can enter a person's home without a warrant to effect a seizure where there are "'exigent circumstances,' [which] refers generally to those situations in which law enforcement agents will be unable or unlikely to effectuate an arrest, search or seizure, for which probable cause exists, unless they act swiftly and, without seeking prior judicial authorization."[211]

The United States Supreme Court has "ma[d]e clear that only in 'a few specifically established and well-delineated' situations may a warrantless search of a dwelling withstand constitutional scrutiny, even though the authorities have probable cause to conduct it."[212] These situations are where officers have consent for the intrusion,[213] or are: (1) "responding to an emergency" such as where a person's health or safety is in danger; (2) "in hot pursuit of a fleeing felon"; or (3) seeking to prevent the "destruction" or "remov[al]" of evidence.[214] "The burden rests on the State to show the existence of such an exceptional situation."[215]

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supported by probable cause was constitutional); *see* Section 1-1:10.2 (Conn. Gen. Stat. § 54-1f permits warrantless arrests in certain situations).

209. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (applying federal law); *see* Section 1-1:5.1 (Connecticut appellate courts have not decided whether state constitution would permit warrantless arrest for minor offense not punishable by jail); *see also* Chapter 4, Section 4-3:5 (discussing requirement of judicial finding of probable cause after warrantless arrest).

210. *State v. Guertin*, 190 Conn. 440, 447 (1983) (citing *Warden v. Hayden*, 387 U.S. 294, 301 (1967)).

211. *State v. Guertin*, 190 Conn. 440, 447 (1983) (quoting *United States v. Campbell*, 581 F.2d 22, 25 (2d Cir. 1978)).

212. *Vale v. Louisiana*, 399 U.S. 30, 34 (1970) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

213. *Vale v. Louisiana*, 399 U.S. 30, 35 (1970) (citation omitted).

214. *Vale v. Louisiana*, 399 U.S. 30, 35 (1970) (citing cases); *see City of San Francisco v. Sheehan*, 575 U.S. 600 (2015) (police qualifiedly immune to civil rights liability for alleged Fourth Amendment violations where officers: entered the single room of a group home resident who reportedly was in distress, unstable and had threatened a social worker; forcibly re-entered the woman's room after she threatened one officer with a knife; and reasonably believed the woman might have access to escape route).

215. *Vale v. Louisiana*, 399 U.S. 30, 35 (1970) (citing *Chimel v. California*, 395 U.S. 752, 762 (1969)).

In *State v. Guertin*,[216] the Connecticut Supreme Court acknowledged these categories identified by the United States Supreme Court,[217] but observed that no specific rules govern all situations: "The parameters of exigent circumstances are neither so well defined nor so sharply delineated that the phrase may be regarded as a free port of entry for all purposes."[218] That said, the court delineated a test for justifying an in-home seizure based on a decision by the Supreme Court of Appeals of West Virginia (that state's highest court).[219] The test, described below, is consistent with protections mandated by the federal and state constitutions.[220]

Exigent circumstances exist when "under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest were not made, the accused would be able to destroy evidence, flee or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others."[221] The exigent circumstances exception "is limited to . . . serious crimes"; in-home seizures for misdemeanors do not qualify.[222]

The test is an "objective" one, based on "what a reasonable, well-trained police officer would believe, not what the arresting officer [subjectively] did believe."[223] The exigent circumstances justifying entry must be actual, and not "unnecessary police-created" or otherwise contrived exigencies.[224]

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216. *State v. Guertin*, 190 Conn. 440 (1983).

217. *State v. Guertin*, 190 Conn. 440, 448-49 (1983).

218. *State v. Guertin*, 190 Conn. 440, 447 (1983).

219. *State v. Guertin*, 190 Conn. 440, 453-54 (1983) (discussing *State v. Canby*, 252 S.E.2d 164, 167 (W. Va. 1979)).

220. *State v. Guertin*, 190 Conn. 440, 453-54 (1983).

221. *State v. Guertin*, 190 Conn. 440, 453 (1983) (warrantless entry and arrest of defendant in his room at YMCA valid where police heard a window being raised and knew defendant could gain access to fire escape or another person's room); *see State v. Mills*, 57 Conn. App. 202, 213-19, *cert. denied*, 253 Conn. 914 (2000) (warrantless arrest in apartment valid where police believed defendant might be armed with a knife, could escape through an open attic, and might remove blood from his clothing).

222. *State v. Guertin*, 190 Conn. 440, 453 (1983); *see State v. Santiago*, 224 Conn. 494, 498-99 (1993) ("Even where there is probable cause to arrest a suspect . . . the fourth amendment prohibits the police from making a warrantless . . . entry into a suspect's home in order to make a routine . . . misdemeanor arrest.") (citing *Payton v. New York*, 445 U.S. 573 (1980)) (internal quotation marks and other citations omitted).

223. *State v. Guertin*, 190 Conn. 440, 453 (1983) (emphasis omitted).

224. *State v. Guertin*, 190 Conn. 440, 453 (1983).

Consistent with the rule that the Fourth Amendment protects people and not places, exigent circumstances are not required where a person has no objectively reasonable expectation of privacy, such as in an open doorway at the threshold of her home.[225]

1-1:10.2 Statutes and Practice Book Rules

The "common law authority to arrest without a warrant in misdemeanor cases may be enlarged by statute."[226] "Statutes and municipal charters" authorizing "an officer to arrest for any misdemeanor . . . without a warrant, if committed in the officer's presence" are constitutionally valid.[227]

Connecticut General Statutes § 54-1f dispenses with the warrant requirement when:

a. Law enforcement officers make an arrest in their "respective precincts . . . [of] any person for any offense in their jurisdiction, when the person is taken or apprehended in the act or on the speedy information of others."[228]

b. Law enforcement officers arrest "any person who the officer has reasonable grounds to believe has committed or is committing a felony."[229]

c. Law enforcement officers, "when in immediate pursuit of one who may be arrested" without a warrant under the statute, "are authorized to

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225. *See* Section 1-1:2 (Fourth Amendment protects people, not places).

226. *Atwater v. City of Lago Vista*, 532 U.S. 318, 343-44 (2001).

227. *Atwater v. City of Lago Vista*, 532 U.S. 318, 344 (2001).

228. Conn. Gen. Stat. § 54-1f(a); *see State v. Adinolfi*, 157 Conn. 222, 225 (1968) (suspect lawfully arrested for breach of peace within minutes of bar-room brawl based on speedy information of witnesses); *State v. Schofield*, No. CR 9848691, 1999 WL 1063198, at *3 (Conn. Super. Ct. 1999) ("The Connecticut Supreme Court has held that 'speedy information of others' means information that was received and acted upon promptly after the commission of the offenses charged in the information.") (internal quotation marks omitted) (citing *Champaigne v. Gintiuk*, 871 F. Supp. 1527 (D. Conn. 1994) (defendant's arrest several hours after incident was not based on speedy information)); *State v. Barles*, 25 Conn. Supp. 103 (1964) (defendant's arrest an hour after alleged crime was based on speedy information).

229. Conn. Gen. Stat. § 54-1f(b); *see State v. Johnson*, 286 Conn. 427, 444 ("The phrase 'reasonable grounds to believe'" under the statute "is synonymous with probable cause.") (internal quotation marks and citations omitted), *cert. denied*, 555 U.S. 883 (2008). *Compare* Conn. Gen. Stat. § 54-1f(b) (applies only to felony arrests), *with* § 54-1f(a) (applies to "any offense" including misdemeanors).

pursue the offender outside of their respective precincts into any part of the state in order to effect the arrest."[230]

d. Any person arrested under the statute "shall be presented with reasonable promptness before proper authority."[231]

Connecticut General Statutes § 7-92 authorizes special constables, appointed by the "chief executive officer of any municipality" for the purpose of "preserv[ing] the public peace," to "serve criminal process and make arrests for commission of crime," including warrantless arrests.[232] Special constables' authority to make arrests is expressly granted under Connecticut General Statutes § 7-92 and does not depend on Connecticut General Statutes § 54-1f.[233]

The Connecticut Practice Book includes additional rules under which law enforcement may dispense with arrest warrants. Under Connecticut Practice Book § 36-4, a judicial authority may issue a summons instead of a warrant unless the "judicial authority determines that it is necessary to take the accused into custody for any of the following reasons": (1) the offense is a felony; (2) there are facts showing the suspect is unlikely to appear in court as directed; (3) the suspect is likely to cause substantial harm to herself or others, or serious harm to property; (4) the suspect is likely to continue the criminal activity if not taken into custody; (5) custody is necessary to protect or give medical care or other assistance to the suspect; (6) the suspect fails to identify herself; or (7) the suspect previously has failed to appear in court as directed.[234] If none of the foregoing circumstances permitting use of a summons is found to exist, the remedy for using a summons in the absence of any justifying circumstances is pretrial "release upon a promise to appear," but not dismissal of the charges.[235]

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230. Conn. Gen. Stat. § 54-1f(c); *see State v. Kowal*, 31 Conn. App. 669, 674 ("it suffices if the pursuit is conducted without undue delay and is accomplished at the earliest safe opportunity[; n]o chase is required for 'immediate pursuit'" under Section 54-1f(c)), *cert. denied*, 227 Conn. 923 (1993).

231. Conn. Gen. Stat. § 54-1f(d).

232. Conn. Gen. Stat. § 7-92; *see State v. Buckland*, 313 Conn. 205, 226-27 (2014) (upholding warrantless arrest by special constable), *cert. denied*, 574 U.S. 1078 (2015).

233. *State v. Buckland*, 313 Conn. 205, 226-27 (2014), *cert. denied*, 574 U.S. 1078 (2015).

234. Practice Book §§ 36-4(a) (1) through (7).

235. Practice Book § 36-4(b).

Under Connecticut Practice Book § 36-8, either upon a complaint that a misdemeanor has been committed, or upon instruction from a judicial authority, a prosecutor may issue a summons directing a suspect to appear in court at a designated time and date to answer to misdemeanor charges.[236] A misdemeanor summons must be served in person, or at the suspect's "usual place of abode with a person of suitable age and discretion residing therein," or the summons may be sent by registered or certified mail to the suspect's last known address.[237] If a law enforcement officer fails to return the summons to court within two weeks of the summons' issuance, or if the accused fails to respond to the summons, the prosecutor may apply for an arrest warrant.[238]

1-1:11 Racial Profiling

1-1:11.1 Federal and State Constitutions

The United States Supreme Court has held that the Fourth Amendment does not provide a basis to challenge a seizure as having been motivated by racial profiling.[239] While "the Constitution prohibits selective enforcement of the law based on considerations such as race," "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."[240] "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[241]

As of this writing, the Connecticut Supreme Court has not ruled on whether article first, §§ 7 and 9 of the Connecticut Constitution prohibit racial profiling. In the only Connecticut Supreme Court case addressing a claim that the state constitution was violated by a seizure motivated by racial profiling, the Court declined to

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236. Practice Book § 36-8.

237. Practice Book § 36-9.

238. Practice Book § 36-10.

239. *Whren v. United States*, 517 U.S. 806, 813 (1996) (racial profiling claim must be based on Equal Protection Clause, not the Fourth Amendment); *see United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) (investigative stop and interrogation do not violate the Equal Protection Clause where race is only one of multiple factors, and not the sole factor supporting the stop).

240. *Whren v. United States*, 517 U.S. 806, 813 (1996).

241. *Whren v. United States*, 517 U.S. 806, 813 (1996); *see Ashcroft v. al-Kidd*, 563 U.S. 731, 740 (2011) ("Efficient and evenhanded application of the law demands that we look to whether the arrest is objectively justified, rather than to the motive of the arresting officer.").

address the defendant's claim because the issue was waived and, in any event, the record was "entirely devoid of evidence of racial profiling."[242]

1-1:11.2 State Statutes

Racial profiling is banned in Connecticut pursuant to Connecticut General Statutes §§ 54-1*l* and 54-1*m*.[243] Connecticut General Statutes § 54-1*l* forbids law enforcement personnel from "engag[ing] in racial profiling" and from detaining "an individual based on any noncriminal factor or combination of noncriminal factors [that are] inconsistent with this policy."[244]

Consistent with the United States Supreme Court case law rejecting the Fourth Amendment in favor of the Equal Protection Clause of the Eighth Amendment as the foundation for racial profiling claims,[245] Connecticut General Statutes § 54-1*l* uses equal protection terms to define racial profiling as: "the detention, interdiction or other disparate treatment of an individual solely on the basis of the racial or ethnic status of such individual."[246] And consistent with the United States Supreme Court case law allowing race to be a relevant factor in, but not the sole basis for, detaining a suspect,[247] Connecticut General Statutes § 54-1*l* provides that a person's "race or ethnicity . . . shall not be the sole factor in determining the existence of probable cause" supporting an arrest.[248] Nor can race be the sole factor in deciding whether an officer has "a reasonable and articulable suspicion that an offense has been or is being committed" supporting an investigatory stop.[249]

Connecticut General Statutes § 54-1*m* requires Connecticut police departments and law enforcement agencies to adopt rules,

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242. *State v. Batts*, 281 Conn. 682, 796-97, *cert. denied*, 552 U.S. 1047 (2007).

243. Conn. Gen. Stat. §§ 54-1*l* and 54-1*m*.

244. Conn. Gen. Stat. § 54-1*l*(c).

245. *Whren v. United States*, 517 U.S. 806 (1996).

246. Conn. Gen. Stat. § 54-1*l*(b).

247. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) (arrest based in part, but not solely, on race does not violate the Equal Protection Clause).

248. Conn. Gen. Stat. § 54-1*l*(d).

249. Conn. Gen. Stat. § 54-1*l*(d).

and to collect and report data, in order to ensure that the anti-racial profiling statute is enforced.[250]

1-1:12 Challenges to Arrests; *Franks v. Delaware*[251]

Challenges to arrests are as varied as the constitutional and statutory protections attending the seizure of persons. As the foregoing discussion demonstrates, the federal and state constitutions continue to generate litigation about the lawfulness of arrests.

There are particular hurdles for a defendant who challenges an arrest based on a warrant. In *Franks v. Delaware*,[252] the United States Supreme Court held that while there is "a presumption of validity with respect to [an] affidavit supporting [a] . . . warrant,"[253] a person subject to search and seizure based on a warrant may be entitled to question the law enforcement affiant under certain limited circumstances. To obtain a "*Franks* hearing," a defendant must first make a threshold particularized showing, (supported by evidence if possible), that the affidavit includes "deliberate falsehood[s] or [statements showing a] reckless disregard for the truth."[254] "[T]he federal standard for challenging a warrant affidavit" established in *Franks* also "applie[s] under article first, § 7, of [the Connecticut] constitution."[255]

A statement might be false or misleading because it omits critical information; omissions "are governed by the same rules" as misstatements.[256] That said, "the literal *Franks* approach" of excluding false statements does not seem "adequate because, by their nature, omissions cannot be deleted."[257] "[T]herefore a better

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250. Conn. Gen. Stat. § 54-1*m*; *see* State of Connecticut, Office of Policy and Management, *available at* www.ctrp3.org (last visited Jan. 13, 2023) (explaining and providing information about the anti-racial profiling law).

251. *Franks v. Delaware*, 438 U.S. 154 (1978).

252. *Franks v. Delaware*, 438 U.S. 154 (1978).

253. *Franks v. Delaware*, 438 U.S. 154, 171 (1978).

254. *Franks v. Delaware*, 438 U.S. 154, 171 (1978).

255. *State v. Glenn*, 251 Conn. 567, 577 (1999).

256. *United States v. Rajaratnam*, 719 F.3d 139, 146 (2d. Cir. 2013), *cert. denied*, 573 U.S. 916 (2014).

257. *United States v. Rajaratnam*, 719 F.3d 139, 146 (2d. Cir. 2013) (internal quotation marks, ellipses and citations omitted), *cert. denied*, 573 U.S. 916 (2014).

approach would be to insert the omitted truths" to judge whether the omissions were material to the finding of probable cause.[258]

If the threshold showing is made, the court must decide whether, "when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause."[259] If the affidavit, excluding the false information, still supports a finding of probable cause, then "no hearing is required."[260] If, however, "the remaining content is insufficient" to sustain probable cause, then the Fourth and Fourteenth Amendments entitle the defendant to a hearing.[261]

At a *Franks* hearing, the defendant has the burden of showing "by a preponderance of the evidence that the affidavit contained false statements that were material on the issue of probable cause."[262] "The deliberate falsity or reckless disregard whose impeachment is permitted" at a *Franks* hearing "is only that of the affiant, not of any nongovernmental informant."[263]

1-1:13 Remedies for Invalid Arrest

"An illegal arrest [in violation of the Fourth Amendment], without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction."[264] Thus, even a *Franks* violation in an affidavit supporting an arrest warrant does not entitle a defendant to the dismissal of the charges for which he was arrested.[265] Instead, the remedy for an invalid arrest generally

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258. *United States v. Rajaratnam*, 719 F.3d 139, 146 (2d. Cir. 2013) (internal quotation marks, ellipses and citations omitted), *cert. denied*, 573 U.S. 916 (2014); *see State v. Bergin*, 214 Conn. 657, 670-71 (1990) (omissions in warrant affidavit alleging bribery, such as time of bribe and how parties characterized the transaction, were not material and would not defeat probable cause even if included).

259. *Franks v. Delaware*, 438 U.S. 154, 171 (1978).

260. *Franks v. Delaware*, 438 U.S. 154, 171 (1978).

261. *Franks v. Delaware*, 438 U.S. 154, 171 (1978).

262. *United States v. Ferguson*, 758 F.2d 843, 848 (2d Cir.), *cert. denied*, 474 U.S. 841 (1985) (citing *Franks v. Delaware*, 438 U.S. 154 (1978)); *see State v. Easton*, 152 Conn. App. 300, 314-17, *cert. denied*, 314 Conn. 932 (2014) (relief following *Franks* hearing properly denied where police omitted citation to statute of which court was aware, and omitted defendant's theory that certain fingerprint information was confidential).

263. *Franks v. Delaware*, 438 U.S. 154, 171 (1978); *accord State v. Ruscoe*, 212 Conn. 223, 232 (1989), *cert. denied*, 493 U.S. 1084 (1990).

264. *United States v. Crews*, 445 U.S. 463, 474 (1980).

265. *State v. Patterson*, 213 Conn. 708, 715-16 (1990).

is exclusion of any statements made, or evidence seized, as a direct result of the arrest.[266]

The same rule applies under the state constitution: "Where the fairness of a subsequent prosecution has not been impaired by an illegal arrest, neither the United States Constitution nor the Connecticut Constitution requires dismissal of the charges or a voiding of the resulting conviction."[267] Where there is a "causal relationship between the primary illegality [such as an] illegal arrest, and the evidence allegedly derived from this illegal conduct," the evidence will be suppressed.[268]

1-2 IDENTIFICATIONS

As in other areas of criminal procedure that involve developing science, such as DNA evidence,[269] matters relating to identification procedures demand that effective counsel focus as much on current scientific research and recent legal developments as on past case law. With that in mind, this section begins by discussing studies focusing on the science of eyewitness identifications, and then addresses the constitutional principles governing identifications together with evolving identification case law and procedures.

This section is not organized by type of identification procedure (showups, lineups, photographic arrays), but rather by the constitutional standards and non-constitutional rules governing identifications in general. That is not to say that any identification procedure is left out: showups, lineups, photographic arrays, and reviews of surveillance tapes and photographs are all addressed below.

1-2:1 Risks of Misidentification

In October 2014, the National Research Council of the National Academy of Sciences published a landmark study reviewing

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266. *United States v. Crews*, 445 U.S. 463, 473-74 (1980) (discussing "Fruit of the Poisonous Tree" doctrine established in *Wong Sun v. United States*, 371 U.S. 471 (1963)); *see State v. Patterson*, 213 Conn. 708, 715-16 (1990) ("Fruit of the Poisonous Tree" doctrine applies to *Franks* violations).

267. *State v. Fleming*, 198 Conn. 255, 263, *cert. denied*, 475 U.S. 1143 (1986).

268. *State v. Ostrowski*, 201 Conn. 534, 547 (1981), *cert. denied*, 459 U.S. 878 (1982). Suppression of evidence resulting from unlawful searches or seizures is addressed in Chapter 3.

269. *See* Section 1:9.2 (addressing developments in DNA science).

30 years of basic and applied scientific research on eyewitness identifications.[270] Observing that the rate of mistaken identifications is significant and nationwide,[271] the study's authors concluded that police and courtroom procedures on identifications should be reformed.[272] The authors recommended further that research on identifications continue; that it include input from scientists, law enforcement, and the judiciary; and that it be used by law enforcement and the courts to continue reforming identification procedures.[273]

Forty-seven years before the National Academy of Sciences published its study, the United States Supreme Court wrote: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[274] In 2012, Supreme Court Justice Sonia Sotomayor observed: "A vast body of scientific literature has reinforced every concern our precedents articulated nearly a half-century ago," and "[t]he empirical evidence demonstrates that eyewitness misidentification is the single greatest cause of wrongful convictions in this country."[275]

The Connecticut Supreme Court has agreed: "the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways . . . tracks a near perfect scientific consensus" "as reflected in hundreds of peer reviewed studies and [compendia of such studies] demonstrat[ing] . . . the fallibility of

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270. National Research Council, National Academy of Sciences, Identifying the Culprit: Assessing Eyewitness Identification (National Academies Press, 2014), *available at* https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification (last visited Jan. 11, 2023).

271. National Research Council, National Academy of Sciences, Identifying the Culprit: Assessing Eyewitness Identification 11 (National Academies Press, 2014) (citing studies by, among others, The Innocence Project), *available at* https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification (last visited Jan. 11, 2023).

272. National Research Council, National Academy of Sciences, Identifying the Culprit: Assessing Eyewitness Identification 105-112 (National Academies Press, 2014), *available at* https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification (last visited Jan. 11, 2023).

273. National Research Council, National Academy of Sciences, Identifying the Culprit: Assessing Eyewitness Identification 113-119 (National Academies Press, 2014), *available at* https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification (last visited Jan. 11, 2023).

274. *United States v. Wade*, 388 U.S. 218, 228 (1967).

275. *Perry v. New Hampshire*, 565 U.S. 228, 262-64 & nn.5-6 (2012) (Sotomayor, J., dissenting) (citing studies) (internal quotation marks and citations omitted).

eyewitness identification testimony."[276] These concerns were the focus of Connecticut's own study of eyewitness identification procedures. From September, 2011 through January, 2012, an Eyewitness Identification Task Force appointed by the Connecticut General Assembly read expert reports, heard from police and prosecutors from Connecticut and other jurisdictions, and reviewed legislation from around the country focusing on eyewitness identification issues in general, and certain identification procedures in particular.[277] On February 8, 2012, the Task Force issued a report including, among other findings, the Task Force's observation that "[m]istaken eyewitness identification is the leading cause of wrongful convictions in the United States."[278]

Both the National Academy of Sciences and the Connecticut Eyewitness Identification Task Force recommended certain best practices for conducting identifications and using identification evidence in court.[279] At the same time, both studies cautioned that no particular procedure can eliminate misidentifications, and urged that investigative and courtroom procedures be changed as needed to reflect ongoing research.[280]

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276. *State v. Guilbert*, 306 Conn. 218, 234-35 & nn.8-11 (2012) (citing cases and studies).

277. *See* Eyewitness Identification Task Force, Report to the Judiciary Committee of the General Assembly, Introductory Letter dated February 8, 2012 from Justice David Borden (2012) (Task Force's mandate included focus on sequential and "double-blind" identifications).

278. Eyewitness Identification Task Force, Report to the Judiciary Committee of the General Assembly 4 (2012) (citing statistics), *available at* https://www.cga.ct.gov/jud/tfs/20130901_Eyewitness%20Identification%20Task%20Force/Final%20Report.pdf (last visited Feb. 17, 2023).

279. National Research Council, National Academy of Sciences, Identifying the Culprit: Assessing Eyewitness Identification 105-117 (National Academies Press, 2014), *available at* https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification (last visited Feb. 17, 2023); Eyewitness Identification Task Force, Report to the Judiciary Committee of the General Assembly 2-4 (2012), *available at* https://www.cga.ct.gov/jud/tfs/20130901_Eyewitness%20Identification%20Task%20Force/Final%20Report.pdf (last visited Feb. 11, 2023). The Connecticut task force's recommendations underlie key provisions of Connecticut's eyewitness identification statute. *See* Section 1-2:6.1 (discussing Connecticut General Statutes § 54-1p).

280. National Research Council, National Academy of Sciences, Identifying the Culprit: Assessing Eyewitness Identification 119 (National Academies Press, 2014), *available at* https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification (last visited Feb. 17, 2023); Eyewitness Identification Task Force, Report to the Judiciary Committee of the General Assembly 4 (2012), *available at* https://www.cga.ct.gov/jud/tfs/20130901_Eyewitness%20Identification%20Task%20Force/Final%20Report.pdf (last visited Feb. 12, 2023).

In a 2022 case, *State v. Gore,* the Connecticut Supreme Court observed that "[i]n comparison to the vast amount of scientific research on stranger identifications [by witnesses who did not know the perpetrator], there have been only a small number of studies focused on the accuracy of familiar identifications."[281] The court noted that "field studies in the area . . . demonstrate that, as a general rule, familiarity renders an identification significantly more reliable than stranger identifications."[282] But the court also acknowledged scientific studies showing that familiar identifications "are not immune from detracting factors" such as cross racial identifications and witnesses' expectations that they will be shown a familiar face.[283] These studies support the legal safeguards against unreliable identifications addressed in the following sections.

1-2:2 Federal and State Constitutional Foundations

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."[284] Similarly, article first, § 8 of the Connecticut Constitution states: "No person shall . . . be deprived of liberty or property without due process of law."[285] Notwithstanding the similar wording of the federal and state constitutional guarantees, article first, § 8 of the Connecticut constitution provides greater protection and requires more stringent standards when judging whether identification procedures comport with due process.[286]

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for

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281. *State v. Gore*, 342 Conn. 129, 161 (2022) (citing J. Vallano et al., *Familiar Eyewitness Identifications: The Current State of Affairs*, 25 Psychol. Pub. Policy & Law 128, 128-29 (2019); *see* Section 1-2:6.2 (addressing non-constitutional rules governing identification cases).

282. *State v. Gore*, 342 Conn. 129, 162 (2022).

283. *State v. Gore*, 342 Conn. 129, 163 (2022) (citing J. Vallano et al., *Familiar Eyewitness Identifications: The Current State of Affairs*, 25 Psychol. Pub. Policy & Law 128, 128-29 (2019).

284. U.S. Const., amend. XIV.

285. Conn. Const., art. I, § 8.

286. *State v. Harris*, 330 Conn. 91, 130-35 (2018) (*overruling State v. Ledbetter*, 275 Conn. 534 (2005), *cert. denied*, 547 U.S. 1082 (2006).

his defence."[287] Article first, § 8 of the Connecticut Constitution similarly guarantees: "In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel."[288]

1-2:3 Right to Counsel

1-2:3.1 Right to Counsel Attends "Critical Stage" Proceedings

The Sixth Amendment to the United States Constitution, applicable to the states under the Fourteenth Amendment,[289] guarantees a defendant's right to counsel.[290] This right applies to all 'critical stages' of a criminal case; "[t]he cases have defined critical stages as proceedings between an individual and agents of the State . . . that amount to 'trial-like confrontations,' at which counsel would help the accused 'in coping with legal problems or . . . meeting his adversary.'"[291] The same right is guaranteed by article first, § 8 of the Connecticut Constitution.[292]

1-2:3.2 Critical Stage Identifications

In the seminal Sixth Amendment case on identification proceedings, the United States Supreme Court held in *United States v. Wade*[293] that "[s]ince it appears that there is grave

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287. U.S. Const., amend. VI.

288. Conn. Const., art. I, § 8. Cases analyzing the right to counsel at identification proceedings have not distinguished between the state and federal constitutions.

289. *Pointer v. Texas*, 380 U.S. 400, 406 (1965) ("We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment, and that that guarantee . . . is to be enforced against the States under the Fourteenth Amendment.") (internal quotation marks and citation omitted).

290. U.S. Const., amend. VI.

291. *Rothgery v. Gillespie County*, 554 U.S. 191, 212 & n.16 (2008) (quoting *United States v. Ash*, 413 U.S. 300, 312-13 (1973)) (other citations omitted). *See State v. Ashby*, 336 Conn. 452, 486 (2020) (on question of how to define "state agents," while acknowledging that U.S. Supreme Court has not directly addressed whether agency rules apply to uncounseled interrogations, Connecticut Supreme Court relied on federal caselaw to hold jailhouse informant acted as state agent when he interrogated defendant in absence of counsel); *see also State v. Ashby*, 336, Conn. 452, 486 (2020) (finding that informant was acting as agent of State when informant elicited incriminating statements from defendant, violating defendant's right to counsel).

292. *Ebron v. Comm'r of Corr.*, 307 Conn. 342, 351 (2012) ("A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings . . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8 of the Connecticut constitution.") (internal quotation marks and citations omitted), *cert. denied*, 569 U.S. 913 (2013).

293. *United States v. Wade*, 388 U.S. 218 (1967).

potential for prejudice" at identification proceedings "which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial," a pretrial identification procedure at which the defendant is present, such as a lineup, is a critical stage at which the defendant is "as much entitled" to counsel "as at the trial itself."[294]

Counsel's presence is necessary to ensure that police conducting a confrontational identification procedure do not influence the outcome by, to use the situation in *United States v. Wade*[295] as an example, placing witnesses where they would see the suspect in the custody of law enforcement agents before being asked to identify the perpetrator.[296] Unlike counsel, "neither witnesses nor . . . participants [in the identification procedure] are apt to be alert for conditions prejudicial to the suspect," "[a]nd if they were, it would likely be of scant benefit to the suspect since neither witnesses nor . . . participants are likely to be schooled in the detection of suggestive influences."[297]

The Sixth Amendment right to counsel at critical stage pretrial identifications does not attach to procedures that occur before adversarial judicial proceedings begin,[298] or that do not require the defendant's presence and therefore do not involve any confrontation between her and police or prosecutors. Non-confrontational identifications include photographic arrays, during which defendants typically are not present.[299]

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294. *United States v. Wade*, 388 U.S. 218, 236-37 (1967) (internal quotation marks and citations omitted).

295. *United States v. Wade*, 388 U.S. 218 (1967).

296. *United States v. Wade*, 388 U.S. 218, 234 (1967); *see United States v. Wade*, 388 U.S. 218, 233-34 (1967) (the United States Supreme Court provided additional examples of suggestive procedures: "other participants in a lineup were grossly dissimilar in appearance to the suspect"; "only the suspect was required to wear distinctive clothing which the culprit allegedly wore"; "the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail"; "the suspect is pointed out before or during a lineup"; "the participants in the lineup are asked to try on an article of clothing which fits only the suspect").

297. *United States v. Wade*, 388 U.S. 218, 230 (1967).

298. *Kirby v. Illinois*, 406 U.S. 682, 690 (1972) ("We decline to . . . impos[e] a per se exclusionary rule upon testimony concerning an identification that took place long before the commencement of any prosecution whatever.").

299. *United States v. Ash*, 413 U.S. 300, 317-21 (1973) (Sixth Amendment does not attach to pretrial photo array because "the accused himself is not present at the time of the photographic display, [so] no possibility arises that the accused might be misled by his

While there are decisions extending the rule that counsel need not be present for a photo array to cases involving photographed[300] or videotaped[301] lineups, as of this writing no such extension has been considered by the United States Supreme Court or the Connecticut Supreme Court. At least one scholarly article posits that the *conduct* of a lineup, whether videotaped or not, involves a confrontation with law enforcement with respect to which the Supreme Court should recognize a right to counsel.[302]

1-2:4 Right to Due Process

1-2:4.1 Right to Due Process Applies to Pretrial Identification Proceedings

Identification procedures that do not involve confrontation and the right to counsel are nonetheless subject to constitutional "review . . . under due process standards."[303]

In a case decided the same day as *United States v. Wade*,[304] the United States Supreme Court held in *Stovall v. Denno*[305] that while an uncounseled identification that precedes any prosecution does not violate the Sixth Amendment, the procedure might be "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant is] denied due process of law" in violation of the Fourteenth Amendment.[306] No particular factor will determine whether an identification procedure is so unnecessarily suggestive as to threaten a defendant's due process rights: "a claimed violation of due process of law in the conduct

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lack of familiarity with the law or overpowered by his professional adversary"; a photo array is akin to other pretrial interviews of witnesses to which defense counsel is not privy; and defense counsel does not need to be present at photo array in order to challenge identification at trial).

300. *See*, *e.g., United States v. Barker*, 988 F.2d 77, 78 (9th Cir. 1993).

301. *See, e.g., United States v. Amrine*, 724 F.2d 84, 87 (8th Cir. 1983) (likening videotaped lineups to photo arrays).

302. William Pena Wells & Brian L. Cutler, *The Right to Counsel at Videotaped Lineups: An Emerging Dilemma*, 22 Conn. L. Rev. 373, 387-88 (1990).

303. *United States v. Ash*, 413 U.S. 300, 320 (1973).

304. *United States v. Wade*, 388 U.S. 218 (1967).

305. *Stovall v. Denno*, 388 U.S. 293 (1967).

306. *Stovall v. Denno*, 388 U.S. 293, 302 (1967); *accord State v. Hafner*, 168 Conn. 230, 235, *cert. denied*, 423 U.S. 851 (1975).

of a confrontation depends on the totality of the circumstances surrounding it."[307]

1-2:4.2 Government Conduct

In its 2012 case on due process challenges to identifications, the United States Supreme Court held in *Perry v. New Hampshire*[308] that only identifications that result from "suggestive circumstances . . . arranged by law enforcement officers,"[309] and therefore are "taint[ed by] improper state conduct," can violate due process.[310] Put another way, only if "the police use an unnecessarily suggestive identification procedure" must a trial court "screen such evidence for reliability before allowing the jury to assess its creditworthiness."[311]

The Connecticut Supreme Court relied on the United States Supreme Court's analysis in *Perry v. New Hampshire*[312] to hold that an identification made by a witness without police prompting or assistance did not implicate the defendant's state due process rights.[313]

The *Johnson* court "rejected the defendant's claim that the due process provisions of the state constitution are automatically implicated . . . [whenever] identification evidence has potentially

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307. *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (no due process violation where police conducted one person "showup" of defendant to hospitalized victim who might have died before police station lineup could be conducted); *see Simmons v. United States*, 390 U.S. 377, 384 (1968) (declining to hold that the Constitution prohibits initial identification by photograph, the United States Supreme Court wrote: "each case must be considered on its own facts, and . . . convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on [due process] ground[s] only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."); *see also State v. Hafner*, 168 Conn. 230, 235-36 (observing that the totality of circumstances test asks courts to "assess the merits of a defendant's allegations of a constitutional impropriety in the methods of identification . . . on a purely ad hoc basis," resulting in "a series of judicial opinions notable for their lack of harmony") (citations omitted), *cert. denied*, 423 U.S. 851 (1975).

308. *Perry v. New Hampshire*, 565 U.S. 228 (2012).

309. *Perry v. New Hampshire*, 565 U.S. 228, 230 (2012).

310. *Perry v. New Hampshire*, 565 U.S. 228, 245-46 (2012).

311. *Perry v. New Hampshire*, 565 U.S. 228, 245-46 (2012) (due process rights not implicated when witness just happened to see and identify defendant as perpetrator while witness was being interviewed by police).

312. *Perry v. New Hampshire*, 565 U.S. 228 (2012).

313. *State v. Johnson*, 312 Conn. 687, 692, 705 (2014) (state constitutional rights not implicated where eyewitness searched internet, located photograph of defendant, and provided it to police on his own volition and without law enforcement assistance).

been tainted by unduly suggestive . . . conduct."[314] But the Connecticut Supreme Court stopped short of agreeing with the United States Supreme Court's opinion in *Perry v. New Hampshire* that "the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial funda-mentally unfair,"[315] and that only where a challenged identification procedure is the product of law enforcement conduct should a court "screen the [identification] evidence for reliability."[316]

Instead, the Connecticut Supreme Court reasoned that even "in the absence of improper state action," some identification "evidence is so extremely unreliable that its admission would deprive the defendant of his right to a fair trial."[317] "Thus, while the reliability of an eyewitness identification, or the lack thereof, ordinarily goes to the weight of the evidence, and not its admissibility, unreliable identification evidence that is tainted by unduly suggestive private conduct, like such evidence that is tainted by improper state action, is *inadmissible.*"[318] The reference to a defendant's "right to a fair trial" notwithstanding, the *Johnson* court characterized challenges to the reliability of privately conducted identifications as "evidentiary matter[s]."[319] In the end, the court's reasoning did not help Johnson, who had failed to object to the identification at trial and whose unpreserved claim could only have succeeded on constitutional, not evidentiary grounds.[320]

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314. *State v. Johnson*, 312 Conn. 687, 705 (2014).

315. *Perry v. New Hampshire*, 565 U.S. 228, 245-46 (2012).

316. *Perry v. New Hampshire*, 565 U.S. 228, 245-46 (2012).

317. *State v. Johnson*, 312 Conn. 687, 705 (2014) (citing *State v. Holliman*, 214 Conn. 38 (1990)).

318. *State v. Johnson*, 312 Conn. 687, 700 (2014) (citing *State v. Holliman*, 214 Conn. 38 (1990)) (emphasis in original) (footnote and citations omitted).

319. *State v. Johnson*, 312 Conn. 687, 700 (2014) (citing *State v. Holliman*, 214 Conn. 38 (1990)); *see* Section 1-2:6 (addressing non-constitutional protections). By relying on evidentiary rules rather than on the defendant's unsuccessful state constitutional claim, the court avoided having to rule in lock-step with federal limitations on identification challenges announced in *Perry v. New Hampshire,* 565 U.S. 228, 245-46 (2012). *See* Section 1-2:6 (addressing statutory protections against unreliable identifications).

320. *State v. Johnson*, 312 Conn. 687, 706 and n.12 (2014).

1-2:4.3 In-Court Identification Procedures

In *State v. Smith*,[321] the Connecticut Supreme Court had held that an in-court testimonial identification must be excluded as violative of due process only when it is tainted by an out-of-court identification that is unnecessarily suggestive and conducive to irreparable misidentification. In *State v. Dickson*,[322] the court limited *Smith* to cases in which the in-court identification is preceded by an admissible out-of-court identification.[323]

Noting that the United States Supreme Court has not yet addressed the question of whether first time in-court identifications require due process protection,[324] the *Dickson* court held that first time in-court identifications implicate due process principles and therefore must be prescreened by the trial court.[325] The court wrote that where the defendant's identity is in issue, "the best practice is to conduct a nonsuggestive identification procedure as soon after the crime as possible."[326] Where there has been no nonsuggestive pretrial identification and the question of identity is in issue, the state *must* request the court's permission and follow "specific procedures" before offering "a first time in-court identification."[327]

The *Dickson* court expressed its "hope and expectation" that the strict procedures it set out would encourage "the state to conduct an out-of-court identification procedure before seeking an in-court identification."[328] "All first time in-court identifications are subject to the rule in *Dickson*" including those "unsolicited and unanticipated" by the state.[329]

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321. *State v. Smith*, 200 Conn. 465, 469 (1986).

322. *State v. Dickson*, 322 Conn. 410 (2016), *cert. denied*, 137 S. Ct. 2263 (2017).

323. *State v. Dickson*, 322 Conn. 410, 430 (2016), *cert. denied*, 137 S. Ct. 2263 (2017).

324. *State v. Dickson*, 322 Conn. 410, 422 (2016), *cert. denied*, 137 S. Ct. 2263 (2017).

325. *State v. Dickson*, 322 Conn. 410, 415 (2016), *cert. denied*, 137 S. Ct. 2263 (2017).

326. *State v. Dickson*, 322 Conn. 410, 445 (2016), *cert. denied*, 137 S. Ct. 2263 (2017).

327. *State v. Dickson*, 322 Conn. 410, 445 (2016), *cert. denied*, 137 S. Ct. 2263 (2017).

328. *State v. Dickson*, 322 Conn. 410, 445 (2016), *cert. denied*, 137 S. Ct. 2263 (2017).

329. *State v. Collymore*, 334 Conn. 431, 482-83 (2020). The *Dickson* Court noted that its holding would not apply to cases on collateral review; *see State v. Dickson*, 322 Conn. 410, 451 n.34 (2016), *cert. denied*, 137 S. Ct. 2263 (2017); or to observations of the perpetrator, such as height, weight, sex, race, and age, so long as the prosecutor does not question the witness about whether the defendant resembles the perpetrator. *State v. Dickson*, 322 Conn. 410, 436-37, 447 (2016), *cert. denied*, 137 S. Ct. 2263 (2017).

The following sections address constitutional challenges to the admissibility at trial of pretrial identifications and in-court identifications tainted by improper pretrial procedures.

1-2:5 Constitutional Violations and Remedies

1-2:5.1 Right to Counsel

"Absent an intelligent waiver," a police failure to provide "noti[ce] of [an] impending" critical stage identification and ensure "counsel's presence" at such a procedure requires that the resulting identification evidence "be excluded" from trial.[330] "Only a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at [a] critical" stage identification; in consequence, "[t]he State is . . . not entitled to an opportunity to show that that testimony had an independent source."[331]

The rule that an uncounseled *pretrial* identification is per se inadmissible does not mean that ensuing in-court identification testimony always is precluded. That said, before such in-court identification testimony may be admitted, the prosecution must meet the heavy burden of showing by "clear and convincing" evidence that the in-court identification is free of "the primary taint" of uncounseled pretrial procedure.[332]

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330. *United States v. Wade*, 388 U.S. 218, 237, 240 (1967) (internal quotation marks and citation omitted).

331. *Gilbert v. California*, 388 U.S. 263, 273 (1967).

332. *United States v. Wade*, 388 U.S. 218, 241 (1967) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)) (other internal quotation marks and citations omitted); *accord State v. Lee*, 177 Conn. 335, 339-40 (1979); *see United States v. Wade*, 388 U.S. 218, 241 (1967) ("Application of [the Fruit of the Poisonous Tree] test in the [in court identification] context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.").

"Th[e independent source] doctrine . . . ostensibly applies" only to identifications that "violat[e] . . . the right to counsel," and not to identifications that violate the due process clause. Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 Vand. L. Rev. 451, 483 (2012) (arguing the United States Supreme Court abandoned the per se exclusionary rule and concomitant independent source test used for uncounseled identifications when it ruled "in *Manson* [*v. Brathwaite*] . . . that the standard for [admitting] any identification [challenged on

1-2:5.2 Due Process

In *Neil v. Biggers*,[333] the United States Supreme Court held that when a court considers a due process challenge to an identification, "[i]t is the likelihood of misidentification which violates a defendant's right to due process," so "even though [a] confrontation procedure [is] suggestive," an identification that "[is] *reliable*" "under the totality of the circumstances" is admissible in evidence.[334] "[R]eliability is the linchpin in determining the admissibility of identification testimony."[335]

The Connecticut Supreme Court has described the foregoing test in additional detail. In 2014, the court "review[ed] . . . the existing law governing unduly suggestive identification procedures" in *State v. Johnson*.[336] "Because reliability is the linchpin in determining the admissibility of identification testimony, a two part test has developed to make that determination."[337]

"In determining whether identification procedures violate a defendant's due process rights, the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the totality of the circumstances."[338] If the trial court finds that the procedure was not unnecessarily suggestive, the evidence is admissible and there is no need to rule on the reliability prong.[339]

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due process grounds] is whether it is 'reliable' despite any police suggestion"); *see Manson v. Brathwaite*, 432 U.S. 98, 126-28 (1977) (Marshall, J., dissenting) (opposing reliability test adopted by the majority, Justice Marshall argued the more stringent per se rule, with its independent source test, provided greater constitutional protection, had worked in similar contexts, and was sufficiently flexible to vindicate law enforcement interests).

333. *Neil v. Biggers*, 409 U.S. 188 (1972).

334. *Neil v. Biggers*, 409 U.S. 188, 198-99 (1972) (emphasis added); *see Simmons v. U.S.*, 390 U.S. 377, 384 (1968) (totality of the circumstances test requires that "[e]ach case . . . be considered on its own facts").

335. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *accord State v. Johnson*, 312 Conn. 687, 697 (2014).

336. *State v. Johnson*, 312 Conn. 687, 696 (2014).

337. *State v. Johnson*, 312 Conn. 687, 697 (2014) (citing *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977)).

338. *State v. Johnson*, 312 Conn. 687, 697 (2014) (citations omitted).

339. *State v. Revels*, 313 Conn. 762, 771-72 (2014), *cert. denied*, 574 U.S. 1177 (2015); *State v. Williams*, 203 Conn. 159, 174 (1987). In a 2003 case applying the two-part reliability

The constitutional rules that apply to identifying suspects do not apply to identifying inanimate objects like cars or guns. The state rules of evidence govern the admissibility of identifications of objects.[340]

1-2:5.2a Suggestibility

In *State v. Marquez*,[341] the Connecticut Supreme Court reasoned that the "suggestiveness prong" of the due process test "should be less stringent" than the reliability prong to avoid rendering "the reliability prong of the analysis vestigial."[342] The Court explained that suggestiveness should "focus[ ] on the mechanics of the [identification procedure] itself, [and on] the behavior of the administering officers."[343]

As applied to the photographic array at issue in the case before it, the *Marquez* Court's focus on "mechanics" involved examining whether "the photographs used were selected or displayed in such a manner as to emphasize or highlight the individual whom the police believe is the suspect."[344] The focus on police conduct involved "examin[ing] the actions of law enforcement personnel to determine whether" the effect of the officers' conduct was to direct "the witness' attention . . . to a suspect because of police conduct" without regard to "whether law enforcement officers intended to prejudice the defendant."[345]

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test for admitting evidence arising from an unduly suggestive identification procedure, the Connecticut Supreme Court rejected the State's argument that the standards should be relaxed when a witness observes similarities between a suspect and the defendant but stops short of directly identifying the defendant as the perpetrator. *State v. Cook*, 262 Conn. 825, 831 & n. 5 (2003) (*citing State v. Lago*, 28 Conn. App. 9, 14-21, *cert. denied*, 223 Conn. 919 (1992). Any distinction between "resemblance testimony" and eyewitness identification evidence is without legal significance. The test for both types of evidence is the same: evidence arguably tainted by unduly suggestive procedures is admissible if it meets the reliability test; and untainted evidence is admissible without the reliability inquiry. This likely explains why *State v. Cook* and *State v. Lago, ante,* are the only two Connecticut appellate cases that refer to "resemblance testimony."

340. *State v. Watson*, 50 Conn. App. 591, 598-00, *cert. denied*, 247 Conn. 939 (1998) (The court "decline[d] to elevate the identification of an inanimate object to one of constitutional magnitude because in our view, the ordinary rules governing the admissibility of objects afford the defendant adequate protection.") (internal quotation marks and citations omitted). *See* Chapter 13, Section 13-5:1 (concerning applicable state rules of evidence).

341. *State v. Marquez*, 291 Conn. 122, *cert. denied*, 558 U.S. 895 (2009).

342. *State v. Marquez*, 291 Conn. 122, 144, *cert. denied*, 558 U.S. 895 (2009).

343. *State v. Marquez*, 291 Conn. 122, 145, *cert. denied*, 558 U.S. 895 (2009).

344. *State v. Marquez*, 291 Conn. 122, 143, *cert. denied*, 558 U.S. 895 (2009).

345. *State v. Marquez*, 291 Conn. 122, 143 (internal quotation marks and citations omitted), *cert. denied*, 558 U.S. 895 (2009).

The *Marquez* Court emphasized that while its suggestibility analysis in that case "focuse[d] principally on two key functional aspects of the eyewitness identification process," "it is the *entire* procedure, viewed in light of the factual circumstances of the individual case, that must be examined to determine if a particular identification is tainted by unnecessary suggestiveness."[346] "The individual components of a procedure cannot be examined piecemeal but must be placed in their broader context to ascertain whether the procedure is so suggestive that it requires the court to consider the reliability of the identification itself in order to determine whether it ultimately should be suppressed."[347]

Put another way, "a claim of an unnecessarily suggestive pretrial identification procedure is a mixed question of law and fact" requiring a court to examine the "totality of the circumstances."[348] These basic principles apply whether the identification procedure involves a photo array[349] or another method of identification such as a showup[350] or lineup.[351]

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346. *State v. Marquez*, 291 Conn. 122, 145-46 (emphasis in original), *cert. denied*, 558 U.S. 895 (2009). The "two functional aspects" on which the *Marquez* Court focused in the case were whether the person conducting the photo array (1) showed the pictures simultaneously (as opposed to sequentially); and (2) knew the suspect's identity (as opposed to being unaware of which photograph depicted the suspect). *State v. Marquez*, 291 Conn. 122, 145-46 n.18, *cert. denied*, 558 U.S. 895 (2009). The Court added that: "this continues to be an issue particularly ill suited to generic, bright line rules," and that "d]ue process does not require the suppression of a photographic identification that is not the product of a double-blind, sequential procedure." *State v. Marquez*, 291 Conn. 122, 156 (internal quotation marks omitted), *cert. denied*, 558 U.S. 895 (2009).

347. *State v. Marquez*, 291 Conn. 122, 146, *cert. denied*, 558 U.S. 895 (2009).

348. *State v. Marquez*, 291 Conn. 122, 137, 167 (internal quotation marks and citations omitted), *cert. denied*, 558 U.S. 895 (2009); *accord State v. Grant*, 154 Conn. App. 293, 311-13 (2014) ("In *State v. Marquez* . . . our Supreme Court held that . . . identification procedures must be evaluated for suggestiveness on a case-by-case basis."), *cert. denied*, 315 Conn. 928 (2015).

349. *See, e.g., State v. Marquez*, 291 Conn. 122, 165 (use of a non-double blind photo array was not unduly suggestive "[i]n view of the totality of the circumstances"), *cert. denied*, 558 U.S. 895 (2009); *State v. Grant*, 154 Conn. App. 293, 311-13 (2014) (neither failure to use double blind and sequential procedures, nor inclusion of photo of defendant clad in hooded sweatshirt was "per se unduly suggestive"; "identification procedures must be evaluated for suggestiveness on a case-by-case basis"), *cert. denied*, 315 Conn. 928 (2015); *State v. Collins*, 100 Conn. App. 833, 850-52 (using mug shots in a photo array not unduly suggestive where police concealed distinctive markings and court gave cautionary instruction to jury), *cert. denied*, 284 Conn. 916 (2007).

350. *State v. Ledbetter*, 275 Conn. 534, 549 (2005) (showups are "inherently and significantly suggestive," but not per se inadmissible), *cert. denied*, 547 U.S. 1082 (2006).

351. *See, e.g., State v. Boscarino*, 204 Conn. 714, 730-32 (1987) (abjuring "per se" rule, court applied totality of circumstances test to conclude that lineup was not "impermissibly

Even a suggestive procedure like a "one-to-one confrontation [showup],"[352] or an improperly conducted and suggestive lineup or photographic array might not be "*unnecessarily* suggestive" if exigent circumstances precluded police from taking the time to perform a less suggestive procedure.[353]

In *State v. Ledbetter*,[354] the Connecticut Supreme Court directed courts determining the "question of whether an exigency existed" to consider "such factors as whether the defendant was in custody, the availability of the victim, the practicality of alternate procedures[,] . . . the need of police to determine quickly if they are on the wrong trail, . . . and whether the identification procedure provided the victim with an opportunity to identify his assailant while his memory of the incident was still fresh."[355]

1-2:5.2b Reliability Following an Unnecessarily Suggestive Identification Procedure

The *Ledbetter* Court also addressed the second prong of the constitutional inquiry, which requires a court "[t]o determine whether an identification that resulted from an unnecessarily suggestive procedure is [nonetheless] reliable."[356] "[T]he corruptive effect of the suggestive procedure is weighed against certain factors

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suggestive" even though victim identified defendant's voice and spoke to other victims prior to lineup).

352. *See State v. Ledbetter*, 275 Conn. 534, 549 (2005) (recognizing showups are inherently suggestive because procedure implies person presented for identification is the perpetrator), *cert. denied*, 547 U.S. 1082 (2006).

353. *State v. Ledbetter*, 275 Conn. 534, 549 (2005) (internal quotation marks and citations omitted) (emphasis in original), *cert. denied*, 547 U.S. 1082 (2006); *accord State v. Revels*, 313 Conn. 762, 772-73 (2014), *cert denied*, 574 U.S. 1177 (2015).

354. *State v. Ledbetter*, 275 Conn. 534 (2005), *cert. denied*, 547 U.S. 1082 (2006).

355. *State v. Ledbetter*, 275 Conn. 534, 549 (2005) (internal quotation marks and citations omitted), *cert. denied*, 547 U.S. 1082 (2006); *see, e.g., State v. Revels*, 313 Conn. 762, 773-75 (2014) (showup justified by exigent circumstances where police believed that armed and dangerous man was at large), *cert. denied*, 574 U.S. 1177 (2015); *State v. Kukucka*, 181 Conn. App. 329, 350-55, *cert. denied*, 329 Conn. 905 (2018) (single photograph showup suggestive but justified by exigencies); *State v. Dakers*, 155 Conn. App. 107, 113 (2015) (showup justified where suspect allegedly robbed victim at gunpoint, fled in victim's car, and tried to run police off the road during high speed chase); *State v. Foote*, 122 Conn. App. 258, 262-63 (showup justified by exigent circumstances, including that defendant was armed and at large, victim's memory of assailant's features was fresh, and prompt identification would exclude innocent persons from becoming focus of ongoing investigation), *cert. denied*, 298 Conn. 913 (2010).

356. *State v. Ledbetter*, 275 Conn. 534, 553 (2005) (quoting *State v. Cook*, 262 Conn. 825, 836-37 (2003)) (other internal quotation marks and citations omitted), *cert. denied*, 547 U.S. 1082 (2006).

such as the opportunity of the [victim] to view the criminal at the time of the crime, the [victim's] degree of attention, the accuracy of [the victim's] prior description of the criminal, the level of certainty demonstrated at the [identification] and the time between the crime and the [identification]."[357]

The factors for judging reliability identified by the *Ledbetter* Court track those first set out by the United States Supreme Court in *Neil v. Biggers*.[358] The *Biggers* Court instructed trial courts to determine reliability based on "the totality of the circumstances," "includ[ing]" the factors relied upon by the *Ledbetter* court and listed in the preceding paragraph.[359] The *Biggers* Court's reference to "totality of the circumstances" to describe its reliability test, and the Court's use of the word "include" to introduce the list of reliability factors, suggest the Court's list of factors is not exhaustive.[360] As one commentator has observed, while most courts assessing the reliability of identifications have relied almost exclusively on the factors listed in *Neil v. Biggers*,[361] the developing research about eyewitness

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357. *State v. Ledbetter*, 275 Conn. 534, 549 (2005) (quoting *State v. Cook*, 262 Conn. 825, 836-37 (2003)) (other internal quotation marks and citations omitted), *cert. denied*, 547 U.S. 1082 (2006). *See, e.g., State v. Reid*, 254 Conn. 540, 558 (2000) (victim of sexual assault had ample opportunity to view attacker both during and after attack); *State v. Figueroa*, 235 Conn. 145, 158-59 (1995) (identification not per se unreliable when conducted nine months after alleged crime); *State v. Williams*, 203 Conn. 159, 178 (1987) (partially erroneous description of suspect went to weight, not admissibility, of identification).

358. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) (listing factors).

359. *Neil v. Biggers*, 409 U.S. 188, 199-200-01 (1972) (where "victim . . ., a practical nurse by profession, had an unusual opportunity to observe and identify her assailant," provided detailed description of alleged rapist, and was certain that defendant was her attacker, victim's positive identification was admissible even though it was the result of a one person showup conducted seven months after the attack).

360. *See* Suzannah B. Gambell, *The Need to Revisit the Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identification*, 6 Wyo. L. Rev. 189, 217 (2006), *available at* https://scholarship.law.uwyo.edu/cgi/viewcontent.cgi?article=1126&context=wlr (last visited Feb. 11, 2023) ("While not directly specifying whether the five *Biggers* factors were an exhaustive list, it appears that the Court meant for other factors to be considered when it stated, "the factors to be considered in evaluating the likelihood of misidentification *include* . . . .") (emphasis added). *Accord State v. Artis*, 314 Conn. 131, 141 n.5 (2014) (the United States Supreme Court "has identified [a] nonexclusive list of factors that are relevant to a determination of whether, under the totality of the circumstances, an out-of-court identification resulting from an unnecessarily suggestive police procedure is nevertheless reliable").

361. Suzannah B. Gambell, *The Need to Revisit the Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identification*, 6 Wyo. L. Rev. 189, 217-18 (2006), *available at* https://scholarship.law.uwyo.edu/cgi/viewcontent.cgi?article=1126&context=wlr (last visited Feb. 11, 2023).

identifications[362] should prompt "courts [to] be flexible in using factors that correlate to current scientific research."[363]

Following the more flexible approach, the Connecticut Supreme Court, in *State v. Harris*[364] held that under the state constitution, the factors determining the admissibility of an eyewitness identification following an unnecessarily suggestive identification should not be limited to those specifically listed in *Neil v. Biggers.* Rather, courts should use the factors identified by the state supreme court in *State v. Guilbert,*[365] on which jurors should be instructed when weighing identification evidence. Those factors include the witness's focus on a weapon (if one were involved); the level of stress at the time of observation; the problems of cross-racial identification; post event exposure to information about the subject of the identification; and the potential for unconscious transference.[366]

The *Harris* court also adopted a burden shifting framework in accordance with a New Jersey case[367] that first requires the defendant challenging the admission of an eyewitness identification to offer "some evidence" that factors within the control of the criminal justice system, such as the identification procedure itself, undermined the reliability of the identification. The burden then shifts to the state to offer evidence demonstrating that the identification was nevertheless reliable in light of all of the

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362. *See, e.g.*, National Research Council, National Academy of Sciences, Identifying the Culprit: Assessing Eyewitness Identification (2014), *available at* https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification (last visited Feb. 11, 2023).

363. Suzannah B. Gambell, *The Need to Revisit the Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identification*, 6 Wyo. L. Rev. 189, 218 & 2020 (2006), *available at* https://scholarship.law.uwyo.edu/cgi/viewcontent.cgi?article=1126&context=wlr (last visited Feb. 11, 2023) (arguing that "a large amount of scientific research completed in the past quarter century" has shown several of the *Biggers* factors "to be unreliable": for example, "[c]onfidence by the witness in an eyewitness identification has been shown to be of little significance to accuracy" because "[c]onfidence can be altered after the identification and is considered to be malleable") (citations omitted); *see State v. Ledbetter*, 275 Conn. 534, 566 (2005) ("The uncontradicted scientific literature . . . suggests [that] a weak correlation, at most, exists between the level of certainty demonstrated by the witness at the identification and the accuracy of that identification."), *cert. denied*, 547 U.S. 1082 (2006).

364. *State v. Harris*, 330 Conn. 91 (2018).

365. *State v. Guilbert*, 306 Conn. 218 (2012). *See* Section 1-2:6.3 (addressing jury instructions).

366. *State v. Harris*, 330 Conn. 91, 118-20 (2018).

367. *State v. Henderson*, 208 N.J. 208 (2011).

relevant factors, including those within the control of the criminal justice system, those conditions over which the criminal justice system has no control, and those that generally arise out of the circumstances under which the eyewitness viewed the perpetrator during the commission of the crime. Finally, the new approach requires the defendant to prove a very substantial likelihood of misidentification. If the defendant meets that burden of proof, the court must suppress the identification.[368]

The *Harris* court overruled *State v. Ledbetter*[369] to the extent that *Ledbetter* deferred to more restrictive federal standards when deciding the admissibility of eyewitness identification testimony following an unnecessarily suggestive identification procedure.[370]

1-2:6 Non-Constitutional Protections

1-2:6.1 Connecticut General Statutes § 54-1p

Connecticut General Statutes § 54-1p was enacted in 2012, just months after the Connecticut Eyewitness Identification Task Force submitted its report and recommendations to the Judiciary Committee of the General Assembly.[371]

The general purpose section of Connecticut's "Eyewitness identification procedures" law sets out a timeline for the Department of Emergency Services and Public Protection, and subsequently local police departments, to develop and implement standard identification procedures for lineups and photographic arrays that are "mandatory" and "based on best practices."[372]

The core regulatory section of the law mandates particular procedures. Photographs or individuals must be presented for identification sequentially.[373] An identification procedure must be "double-blind," which means that it "shall be conducted in such a manner that the person conducting the procedure does not know

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368. *State v. Harris*, 330 Conn. 91, 131-32 (2018).

369. *State v. Ledbetter*, 275 Conn. 534 (2005), *cert. denied*, 547 U.S. 1082 (2006).

370. *State v. Harris*, 330 Conn. 91, 113 (2018).

371. *See* Conn. Gen. Stat. § 54-1p (enacted July 2012); Eyewitness Identification Task Force, Report to the Judiciary Committee of the General Assembly 4 (2012) (submitted Feb. 8, 2012), *available at* https://www.cga.ct.gov/jud/tfs/20130901_Eyewitness%20Identification%20Task%20Force/Final%20Report.pdf (last visited Feb. 11, 2023).

372. Conn. Gen. Stat. § 54-1p(b), (c).

373. Conn. Gen. Stat. § 54-1p(c)(1).

which person in the photo lineup or live lineup is suspected as the perpetrator of the offense."[374] Where a double-blind procedure is not possible in a photo array, the photographs must be "shuffle[d]" such that the person administering the test does not know which photograph the eyewitness is viewing at any given time.[375]

The eyewitness must "be instructed prior to any identification procedure" that: the photographs or persons will be presented sequentially; it is as important to exclude the innocent as to identify the guilty; the persons in the lineup might not precisely resemble the perpetrator at the time of the crime because certain features can change; the perpetrator might or might not be in the lineup; the eyewitness "should not feel compelled" to identify anyone; the eyewitness "should take as much time as needed" to decide; and police will continue to investigate regardless of whether the eyewitness identifies anyone.[376] The eyewitness also must be instructed in accordance with any additional identification standards developed by the official bodies delegated to create and promulgate those standards.[377]

The statute also specifies several required characteristics of "fillers."[378] Fillers are "either . . . person[s] or photograph[s] of a person who is not suspected of an offense and is included in an identification procedure."[379] Fillers must resemble the perpetrator;[380] must be different from those used in prior identification lineups for different persons involved in the same offense;[381] and must include at least five for photo lineups and at least four for live lineups.[382] In addition to the specific requirements about the use of fillers, Subsection (c) contains several further requirements about the conduct of the lineup itself.[383] The subsection prohibits making "any writings or information" about any suspect's prior arrest visible to

374. Conn. Gen. Stat. § 54-1p(c)(2).
375. Conn. Gen. Stat. § 54-1p(c)(2).
376. Conn. Gen. Stat. § 54-1p(c)(3).
377. Conn. Gen. Stat. § 54-1p(c)(4).
378. Conn. Gen. Stat. § 54-1p(c)(5)-(7).
379. Conn. Gen. Stat. § 54-1p(a)(5), (c)(5)-(7).
380. Conn. Gen. Stat. § 54-1p(c)(5).
381. Conn. Gen. Stat. § 54-1p(c)(6).
382. Conn. Gen. Stat. § 54-1p(c)(7).
383. Conn. Gen. Stat. § 54-1p(c)(8)-(14).

the eyewitness during the procedure;[384] requires any "identification actions, such as speaking or making gestures or other movements" be performed by everyone in the lineup;[385] and mandates that at the beginning of a live lineup, all participants must be invisible to the eyewitness.[386] Only one suspected perpetrator should be in any given lineup.[387]

Police should do nothing that might flag the suspect's position in a lineup or otherwise influence an eyewitness's identification of a suspect.[388] If an eyewitness identifies someone in the lineup as the perpetrator, no information about that person can be given to the eyewitness until the eyewitness gives her statement about how certain she is of the identification.[389] Finally, police must summarize every identification procedure in writing, detailing the date and time, the name of all persons present, the results, the photos and identification information of everyone in a photo lineup, and the identification information of everyone in a live lineup.[390]

Shortly after Connecticut General Statutes § 54-1p was enacted, the Connecticut Appellate Court observed that the procedures required by the new law "are designed to increase the reliability of out-of-court identifications."[391] The "rules . . . are not constitutionally mandated," and "[t]he statute . . . is silent on whether violations by law enforcement of [the statute's] provisions should affect the admissibility of an eyewitness's identification."[392]

The authors of the leading Connecticut treatise on evidence have opined "that violations of this statute, except those of constitutional magnitude, should not affect the admissibility of the

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384. Conn. Gen. Stat. § 54-1p(c)(8).

385. Conn. Gen. Stat. § 54-1p(c)(9).

386. Conn. Gen. Stat. § 54-1p(c)(10).

387. Conn. Gen. Stat. § 54-1p(c)(11).

388. Conn. Gen. Stat. § 54-1p(c)(12)-(13).

389. Conn. Gen. Stat. § 54-1p(c)(14).

390. Conn. Gen. Stat. § 54-1p(c)(15).

391. *State v. Johnson*, 149 Conn. App. 816, 827 n.9 (quoting C. Tait & E. Prescott, Handbook of Connecticut Evidence § 8.34 (5th ed. 2014)), *cert. denied*, 312 Conn. 915 (2014).

392. *State v. Johnson*, 149 Conn. App. 816, 827 n.9 (quoting C. Tait & E. Prescott, Handbook of Connecticut Evidence § 8.34 (5th ed. 2014)), *cert. denied*, 312 Conn. 915 (2014). *See also State v. Grant*, 154 Conn. App. 293, 312 n.10 (2014), *cert. denied*, 315 Conn. 928 (2015) (statute addresses the "best practices.").

identification but would be relevant to the weight to be accorded the identification or require a cautionary instruction to the jury."[393]

1-2:6.2 Connecticut Code of Evidence Sections 7-1 and 8-5(2); Judicial Amendment of Connecticut Code of Evidence Section 7-3(a)

In a 2022 decision, *State v. Gore*, the Connecticut Supreme Court overruled a line of cases and amended the Connecticut Code of Evidence to eliminate the rule "that lay opinion testimony identifying a defendant . . . is prohibited when the identification embraces the ultimate issue" to be decided by the jury.[394] The court explained that applying the ultimate issue rule (which is based on common law and codified at § 7-3(a) of the Connecticut Code of Evidence), "to identifications of criminal defendants in video surveillance footage" forced courts to struggle with "artificial or illusory distinctions" rather than focusing on whether the proffered evidence would help the jury without unfairly prejudicing the defendant.[395]

The court amended Code of Evidence § 7-3(a) to exclude identification testimony from the "ultimate issue" rule, and held courts should decide admissibility based on Connecticut Code of Evidence §§ 7-1 (evidence is admissible if it is rationally based and helpful to trier of fact) and 8-5(2) (a declarant's pretrial identification of a defendant will not be precluded as hearsay if the identification is reliable and the declarant is available for cross examination at trial).[396]

The *Gore* court held that the "totality of the circumstances" should determine the reliability of identifications based on videotapes or photographs.[397] Circumstances include the witness's

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393. C. Tait & E. Prescott, Handbook of Connecticut Evidence § 8.34 (5th ed. 2014) (quoted in *State v. Johnson*, 149 Conn. App. 816, 827 n.9, *cert. denied*, 312 Conn. 915 (2014)).

394. *State v. Gore*, 342 Conn. 129 (2022).

395. *State v. Gore*, 342 Conn. 129, 138 (2022).

396. In a related case, the Connecticut Supreme Court established that the admissibility of *expert* identification evidence based on videotapes or photographs is governed by §7-2 of the Connecticut Code of Evidence. *State v. Bruny*, 342 Conn. 169 (2022). The court in *Bruny* also addressed proffered lay opinion identification testimony by applying the new rules it established in *State v. Gore*, 342 Conn. 129 (2022). *See* Section 1-2:6.3, addressing expert identification evidence).

397. *State v. Gore*, 342 Conn. 129, 139 (2022).

general familiarity with the defendant's appearance at the time that the surveillance video or photographs were taken; any change in the defendant's appearance between the time the surveillance video or photographs were taken and the time of trial; the subject's use of a disguise in the surveillance footage; the quality of the video of photographs; the extent to which the subject is depicted in the surveillance footage.[398]

As to the "general familiarity" factor, the *Gore* court declined to join the majority of jurisdictions setting "a low bar" that favors admissibility "as long as a witness has a greater degree of familiarity with the defendant than does the jury."[399] Under *Gore*, the proponent of identification testimony based on videotape or photographs must show that the witness possesses "more than a minimal degree of familiarity with the defendant."[400] To determine this factor, trial courts should consider the particular circumstances, including, *inter alia*, "the frequency, number and duration of any individual prior contacts between the witness and the defendant; the duration of the entire course of contacts and the length of time since the contacts; the relevant viewing conditions; and the nature of the relationship between the witness and the defendant, if any."[401]

1-2:6.3 Jury Instructions

While the Connecticut Supreme Court has yet to directly address the issue of cautionary instructions on eyewitness identifications, the court already has provided significant guidance on this question. In *State v. Guilbert*,[402] while addressing a related evidentiary issue, (discussed above in Section 1-2:5.2c), the court "reiterate[d] that a trial court retains the discretion" to provide cautionary instructions "to aid the jury in evaluating [an] eyewitness identification."[403]

The *Guilbert* court "emphasize[d] . . . that any such instructions should reflect the findings and conclusions of the relevant scientific literature pertaining to the particular variable or variables at issue

398. *State v. Gore*, 342 Conn. 129, 150-51 (2022).
399. *State v. Gore*, 342 Conn. 129, 152 (2022).
400. *State v. Gore*, 342 Conn. 129, 159 (2022).
401. *State v. Gore*, 342 Conn. 129, 159 (2022).
402. *State v. Guilbert*, 306 Conn. 218 (2012).
403. *State v. Guilbert*, 306 Conn. 218, 257-58 (2012).

in the case."[404] "Broad, generalized instructions on eyewitness identifications . . . [will] not suffice."[405] "[T]he proper approach . . . is to leave the development of any such jury instructions to the sound discretion of our trial courts on a case-by-case basis, subject to appellate review."[406]

1-2:6.4 Expert Testimony

The issue directly addressed in *State v. Guilbert*[407] was the admissibility of expert testimony on eyewitness identifications. Following an exhaustive discussion[408] that included citations to "numerous scientifically valid studies"[409] on the subject, the Connecticut Supreme Court "conclude[d] that the reliability of eyewitness identifications frequently is not a matter within the knowledge of an average juror and that the admission of expert testimony on the issue does not invade the province of the jury to determine what weight to give the evidence."[410] Citing Connecticut Code of Evidence § 7-2, the *Guilbert* court held the test for admitting expert testimony is "whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue"[411]

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404. *State v. Guilbert*, 306 Conn. 218, 263 (2012).

405. *State v. Guilbert*, 306 Conn. 218, 258 (2012).

406. *State v. Guilbert*, 306 Conn. 218, 247 n.27 (2012) (following the lengthy discussion of the New Jersey Supreme Court's analysis of identification issues, the Connecticut Supreme Court agreed that case by case appellate review "is the proper approach" to deciding adequacy of jury instructions on this issue) (citing *State v. Henderson*, 208 N.J. 208 (2011)); *see State v. Ledbetter*, 275 Conn. 534, 575-80 (2005) (cautionary instructions appropriate where police failed to inform witness that suspect's picture might or might not have been in the challenged photo array; discussed further in Chapter 14, Section 14-1:9.13a), *cert. denied*, 547 U.S. 1082 (2006)). Jury instructions on identifications are addressed in greater detail in Chapter 14, Section 14-1:9.13.

407. *State v. Guilbert*, 306 Conn. 218 (2012).

408. *State v. Guilbert*, 306 Conn. 218, 235-51 (2012).

409. *State v. Guilbert*, 306 Conn. 218, 253 (2012).

410. *State v. Guilbert*, 306 Conn. 218, 251-52 (2012).

411. *State v. Guilbert*, 306 Conn. 218, 251-52 (2012) (citations and internal quotation marks omitted). The holding tracks the language of § 7-2: "A witness qualified as an expert by knowledge, skill, experience, training education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue." Conn. Evid. Code § 7-2.

In a 2022 case, *State v. Bruny*, the state supreme court rejected a challenge to expert identification testimony based on an enhanced videotape on the ground that it invaded the province of the jury in violation of the "ultimate issue" rule.[412] The court reiterated, as it had held in *Guilbert*, that admissibility of expert identification evidence is governed by § 7-2 of the Connecticut Code of Evidence.[413]

Overruling earlier decisions to the contrary,[414] the *Guilbert* court wrote: "Many of the factors affecting the reliability of eyewitness identifications are either unknown to the average juror or contrary to common assumptions, and expert testimony is an effective way to educate jurors about the risks of misidentification."[415]

The *Guilbert* court also "conclude[d] that," in light of the scientific evidence on the subject, "competent expert testimony" about certain factors affecting the reliability of identifications would meet the threshold "test for the admissibility of scientific evidence."[416] These factors are:

> (1) there is at best a weak correlation between a witness' confidence in his or her identification and the identification's accuracy; (2) the reliability of an identification can be diminished by a witness' focus on a weapon; (3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events; (4) cross-racial identifications are considerably less accurate than identifications involving the same race; (5) memory diminishes most rapidly in the hours immediately following an event and less dramatically in the days and weeks thereafter; (6) an identification may be less reliable in the absence of a double-blind, sequential

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412. *State v. Bruny*, 342 Conn. 169 (2022); *see* § 1-2:6.2 (ultimate issue rule no longer applies to either lay or eyewitness identifications).

413. *State v. Bruny*, 342 Conn. 169 (2022).

414. *State v. Guilbert*, 306 Conn. 218, 253 (2012) (overruling *State v. Kemp*, 199 Conn. 473 (1986) and *State v. McClendon*, 248 Conn. 572 (1999)).

415. *State v. Guilbert*, 306 Conn. 218, 252 (2012) (citations omitted).

416. *State v. Guilbert*, 306 Conn. 218, 253 (2012) (citing *State v. Porter*, 241 Conn. 57, 64 (1997), *cert. denied*, 523 U.S. 1058 (1998)) (internal quotation marks omitted).

> identification procedure; (7) witnesses may develop unwarranted confidence in their identifications if they are privy to post-event or post-identification information about the event or the identification; and (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another.[417]

The *Guilbert* court added that a "defendant should [not] be precluded from presenting [expert] testimony" about eyewitness identification unreliability "merely because the state has presented other evidence of guilt that the jury reasonably could credit."[418] "A contrary rule would unfairly restrict the defendant's opportunity to mount a defense."[419]

Nor are other "methods traditionally employed for alerting juries to the fallibility of eyewitness identifications—cross-examination, closing argument and generalized jury instructions" necessarily proper substitutes for expert testimony; these methods "frequently are not adequate to inform [jurors] of the factors affecting the reliability of [eyewitness] identifications."[420]

This is not to say that a trial court must always admit expert testimony on all, or indeed any, of the eight factors identified in *State v. Guilbert*.[421] Any such testimony must meet the requirement established in *State v. Porter*[422] "that such testimony must be based on scientific knowledge rooted in the methods and procedures of science."[423] Moreover, while "[b]roadly speaking," a defendant "should be permitted to adduce relevant expert testimony on the fallibility of [a contested] eyewitness' identification," other protections "such as comprehensive and focused jury instructions" might provide "an adequate substitute for the [expert] testimony."[424]

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417. *State v. Guilbert*, 306 Conn. 218, 253-54 (2012).

418. *State v. Guilbert*, 306 Conn. 218, 263 (2012).

419. *State v. Guilbert*, 306 Conn. 218, 263 (2012).

420. *State v. Guilbert*, 306 Conn. 218, 243 (2012).

421. *See State v. Guilbert*, 306 Conn. 218, 253-54 (2012) (listing factors).

422. *State v. Porter*, 241 Conn. 57 (1997), *cert. denied,* 523 U.S. 1058 (1998).

423. *State v. Guilbert*, 306 Conn. 218, 253-54 (2012) (citing *State v. Porter*, 241 Conn. 57, 64 (1997), *cert. denied,* 523 U.S. 1058 (1998)) (internal quotation marks omitted); *see* Chapter 13 (addressing trial procedures including *Porter* requirements).

424. *State v. Guilbert*, 306 Conn. 218, 263 (2012).

1-2:7 Research and Law on Identifications Continue to Develop

As the Connecticut Supreme Court wrote in *State v. Guilbert*,[425] the rules on eyewitness identification are not "intended to be frozen in time."[426] "[S]cientific research relating to the reliability of eyewitness evidence is dynamic; the field is very different today than it was [three decades ago], and it will likely be quite different thirty years from now."[427] "[T]rial courts [should not be limited] from reviewing evolving, substantial, and generally accepted scientific research."[428] "[T]o the extent . . . [that] courts either consider variables differently or entertain new ones, they must rely on reliable scientific evidence that is generally accepted by experts in the community."[429]

The Connecticut Appellate Court noted the developing nature of identification law in *Roberts v. Commissioner of Correction*,[430] a 2015 decision rejecting a habeas petitioner's ineffective assistance of counsel claim.[431] The petitioner claimed that his lawyer provided ineffective assistance by failing to develop and introduce expert testimony about the reliability of identifications at petitioner's criminal trial.[432] The Connecticut Appellate Court relied in part on expert testimony from the petitioner's habeas trial that:

> [E]ven though, at the time of the criminal trial [in 2006], the debate over the reliability of different eyewitness identification procedures merited 'very

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425. *State v. Guilbert*, 306 Conn. 218 (2012).

426. *State v. Guilbert*, 306 Conn. 218, 258 (2012) (quoting *State v. Henderson*, 208 N.J. 208, 292 (2011)).

427. *State v. Guilbert*, 306 Conn. 218, 258 (2012) (quoting *State v. Henderson*, 208 N.J. 208, 292 (2011)).

428. *State v. Guilbert*, 306 Conn. 218, 258 (2012) (quoting *State v. Henderson*, 208 N.J. 208, 292 (2011)).

429. *State v. Guilbert*, 306 Conn. 218, 258 (2012) (quoting *State v. Henderson*, 208 N.J. 208, 292 (2011)).

430. *Roberts v. Comm'r of Corr.*, 155 Conn. App. 360, *cert. denied*, 316 Conn. 902 (2015).

431. *Roberts v. Comm'r of Corr.*, 155 Conn. App. 360, 367-71, *cert. denied*, 316 Conn. 902 (2015).

432. *Roberts v. Comm'r of Corr.*, 155 Conn. App. 360, 367-71, *cert. denied*, 316 Conn. 902 (2015).

> little debate' within the scientific community, it was still 'being debated in practice.'[433]
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> . . .
>
> [W]hile the failure to advance an established legal theory may result in ineffective assistance of counsel . . ., the failure to advance a novel theory never will.[434]

Given the current "widespread judicial recognition" of "a near perfect scientific consensus" that "eyewitness identifications are potentially unreliable in a variety of ways,"[435] the development and use by counsel of expert testimony in identification cases can no longer be characterized as a novel theory. Counsel must keep apprised of current scientific research and case law in handling any matter involving an eyewitness identification.

With that, Section 1-2 ends where it began, by exhorting counsel handling any case involving an eyewitness identification to attend carefully to the evolving scientific research, police procedures and legal standards affecting eyewitness identifications.

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[433] *Roberts v. Comm'r of Corr.*, 155 Conn. App. 360, 370, *cert. denied*, 316 Conn. 902 (2015).

[434] *Roberts v. Comm'r of Corr.*, 155 Conn. App. 360, 371, *cert. denied*, 316 Conn. 902 (2015).

[435] *State v. Guilbert*, 306 Conn. 218, 234-36 & nn. 8-11 (2012) (citing cases and studies).