STATE OF CONNECTICUT *v.* JOHN TABONE
(SC 18119)

Norcott, Katz, Vertefeuille, Zarella and Schaller, Js.

Argued October 21, 2008—officially released July 7, 2009

Andrew S. Liskov, special public defender, for the appellant (defendant).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *John A. Connelly*, state's attorney, and *Cara Eschuck*, supervisory assistant state's attorney, for the appellee (state).

Opinion

KATZ, J. This case returns to us for a second time to address the sentence of the defendant, John Tabone, following our decision in *State* v. *Tabone*, 279 Conn. 527, 544, 902 A.2d 1058 (2006), in which we remanded the case for resentencing after concluding that the defendant's original sentence of ten years incarceration followed by ten years of special parole was illegal. The defendant appeals[1] from the judgment of the trial court sentencing him on remand to a total effective sentence of twenty years incarceration, execution suspended after ten years, followed by ten years of probation for his conviction of sexual assault in the second degree in violation of General Statutes (Rev. to 1999) § 53a-71 (a) (4),[2] sexual assault in the third degree in violation of General Statutes (Rev. to 1999) § 53a-72a (a) (1) (A)[3] and risk of injury to a child in violation of General Statutes (Rev. to 1999) § 53-21 (2).[4] On appeal, the defendant claims that his total effective sentence after remand is illegal because: (1) the substitution of a ten year term of probation for the ten year period of special parole that originally was imposed unconstitutionally enlarged the sentence in violation of his due process rights under the federal and state constitutions; (2) the sentence was predicated on a personal agreement between the trial court and the state's attorney in violation of General Statutes (Rev. to 1999) § 53a-32 (b) (4)[5] and the separation of powers doctrine; and (3) the sentence violates the double jeopardy clause of the fifth amendment to the United States constitution and the Connecticut constitution.[6] We reverse the judgment of the trial court and remand the case for further proceedings.

The record reflects the following procedural history that is relevant to this appeal, most of which was set forth by this court in *State* v. *Tabone*, supra, 279 Conn. 530–32. "On November 2, 2000, pursuant to a plea agreement, the defendant pleaded guilty under the *Alford* doctrine[7] to sexual assault in the second degree . . . sexual assault in the third degree . . . and risk of injury to a child[8] . . . . The trial court sentenced the defendant as follows: (1) for the charge of sexual assault in the second degree, ten years of imprisonment followed by ten years of special parole; (2) for the charge of sexual assault in the third degree, five years of imprisonment followed by five years of special parole; and (3) for the charge of risk of injury to a child, five years of imprisonment followed by five years of special parole. [The court also imposed certain conditions on the defendant, including enrollment in an outpatient sex offender treatment program.][9] The trial court ordered all of the sentences to run concurrently, resulting in a total effective sentence of ten years of imprisonment followed by ten years of special parole.[10]

"In June, 2004, the defendant filed a motion to correct

his sentence for sexual assault in the second degree pursuant to Practice Book § 43-22.[11] Thereafter, the trial court held a hearing on the defendant's motion. At the hearing, the defendant pointed out that [General Statutes (Rev. to 1999)] § 53a-35a (6)[12] limits the maximum sentence of imprisonment for sexual assault in the second degree to ten years. . . . Because the defendant was sentenced to ten years of imprisonment and ten years of special parole, [he] maintained that his sentence exceed[ed] the maximum statutory limit and, therefore, [was] illegal. Moreover, [he] claimed that [General Statutes] § 54-128 (c)[13] explicitly prohibited the imposition of such an illegal sentence. See General Statutes § 54-128 (c) ('[t]he total length of the term of incarceration and term of special parole combined shall not exceed the maximum sentence of incarceration authorized for the offense for which the person was convicted'). The defendant conceded, however, that General Statutes (Rev. to 1999) § 54-125e (c)[14] required the trial court to sentence the defendant to a period of special parole of 'not less than ten years . . . .' [He] maintained, nonetheless, that to the extent that §§ 54-125e (c) and 54-128 (c) conflict, 'the benefit should go to the defendant.' The trial court disagreed and concluded that the defendant's sentence was not illegal because § 53a-35a (6) plainly authorized a sentence of ten years of imprisonment, and § 54-125e (c) plainly authorized a sentence of ten years of special parole for the offense of sexual assault in the second degree. Further, the trial court concluded that §§ 54-125e (c) and 54-128 (c) do not conflict because § 54-125e (c) unambiguously 'carves out an exception [to the maximum statutory limit] for sex offenses.' " (Citation omitted.) *State* v. *Tabone*, supra, 279 Conn. 530–32. Thereafter, the trial court denied the defendant's motion to correct the sentence, and the defendant's first appeal followed. Id., 532.

In the first appeal, the defendant renewed the claims he had raised before the trial court and also claimed that "his sentence violate[d] the double jeopardy clause of the fifth amendment to the United States constitution because it 'constitutes cumulative multiple punishments exceeding what the legislature intended' for the offense of sexual assault in the second degree." Id. This court concluded that "the defendant's sentence violates § 54-128 (c) because the total length of the term of imprisonment and term of special parole combined exceed[ed] the maximum term of imprisonment authorized for sexual assault in the second degree." Id., 533. The court recognized that "an irreconcilable conflict exists between the sentencing requirements of §§ 54-125e (c) and 54-128 (c)"; id., 543; concluding that, "when the sentencing provisions of §§ 54-125e (c) and 54-128 (c) conflict, the legislature intended the maximum statutory limit in § 54-128 (c) to control." Id., 544. Accordingly, this court remanded the case for resentencing "in accordance with *State* v. *Raucci*, 21 Conn. App. 557,

575 A.2d 234, cert. denied, 215 Conn. 817, 576 A.2d 546 (1990), and *State* v. *Miranda*, 260 Conn. 93, 127–30, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002)."[15] *State* v. *Tabone*, supra, 544.

On remand, the trial court first recognized that *State* v. *Raucci*, supra, 21 Conn. App. 557, and *State* v. *Miranda*, supra, 260 Conn. 93, were applicable to the defendant's sentence, and therefore, this court had authorized it to impose a sentence closely approximating the defendant's original sentence, which had included a period of supervised release by way of special parole, provided that it did not exceed the parameters imposed by the original sentence. The trial court concluded, however, that it could not impose special parole because the minimum ten year special parole period had been determined to be illegal by this court. The trial court discussed probation as an alternate form of supervised release but expressed the concern that a violation of probation could expose the defendant to incarceration for the full term of his suspended sentence, even on the last day of probation, thereby enlarging his sentence, whereas a violation of special parole would have exposed him to incarceration only for the remainder of the special parole period. To address this concern, State's Attorney John A. Connelly submitted a written agreement to the court under which he committed that, if the court were to sentence the defendant to a term of probation instead of special parole and the defendant thereafter violated his probation, the state would seek incarceration only for the remainder of the probationary period, rather than the full term of the suspended sentence.[16] In reliance on this agreement, the trial court imposed a total effective sentence of twenty years incarceration, execution suspended after ten years, with ten years of probation. Specifically, the defendant was sentenced as follows: (1) for sexual assault in the second degree, ten years incarceration; (2) for sexual assault in the third degree, five years incarceration, execution suspended, with ten years of probation, to run consecutively to count one; (3) for risk of injury to a child, five years incarceration, execution suspended, with ten years of probation, to run consecutively to counts one and two. The court also imposed the same conditions on the defendant that had been imposed in his previous sentence, including enrollment in an outpatient sex offender treatment program. See footnote 9 of this opinion. This appeal followed.

I

The defendant first claims that his new sentence is illegal because the ten year period of probation unconstitutionally enlarged his original sentence in violation of his due process rights under the federal and state constitutions. In support of this claim, he contends, inter alia, that, because the terms of incarceration following violations of probation and special parole are

calculated differently, he could be exposed to a significantly longer period of incarceration from a probation violation than from a violation of special parole, thereby exceeding the confines of his original sentence.[17] The state claims that its agreement to seek incarceration only for the time remaining in the probationary period prevents the defendant from being exposed to additional incarceration if he violates his probation, and thus his new sentence is within the parameters of the original one. We agree with the defendant.

A

We begin our analysis by setting forth the legal principles that govern the resolution of the defendant's claim and the appropriate standard for our review. Our rules of practice permit "[t]he judicial authority [to] at any time correct an illegal sentence . . . ." Practice Book § 43-22. "An illegal sentence is essentially one which either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory"; (internal quotation marks omitted) *State* v. *Tabone*, supra, 279 Conn. 534; and, following a successful challenge to the legality of a sentence, the case may be remanded for resentencing. Id.

This court has held that, when a case involving multiple convictions is remanded for resentencing, the trial court is limited by the confines of the original sentence in accordance with the aggregate package theory set forth in *State* v. *Raucci*, supra, 21 Conn. App. 563, and later adopted by this court in *State* v. *Miranda*, supra, 260 Conn. 129–30. In *Miranda*, this court recognized that " 'the defendant, in appealing his conviction and punishment, has voluntarily called into play the validity of the entire sentencing package, and, thus, the proper remedy is to vacate it in its entirety. More significantly, the original sentencing court is viewed as having imposed individual sentences merely as component parts or building blocks of a larger total punishment for the aggregate convictions and, thus, to invalidate any part of that package without allowing the court thereafter to review and revise the remaining valid convictions would frustrate the court's sentencing intent.' " *State* v. *Miranda*, supra, 129, quoting *State* v. *Raucci*, supra, 562. Accordingly, "the [resentencing] court's power under these circumstances is limited by its original sentencing intent as expressed by the original total effective sentence . . . . It may, therefore, simply eliminate the sentence previously imposed for the vacated conviction, and leave the other sentences intact; or it may reconstruct the sentencing package so as to reach a total effective sentence that is less than the original sentence but more than that effected by the simple elimination of the sentence for the vacated conviction. The guiding principle is that the court may resentence the defendant to achieve a rational, coherent

[sentence] in light of the remaining convictions, as long as the revised total effective sentence does not exceed the original." (Internal quotation marks omitted.) *State* v. *Miranda*, supra, 129–30, quoting *State* v. *Raucci*, supra, 563. The determination of whether the defendant's new sentence exceeds his original sentence is a question of law over which our review is plenary. Cf. *State* v. *Mungroo*, 104 Conn. App. 668, 684, 935 A.2d 229 (2007) ("[when] . . . the issue is whether the sentence exceeds relevant statutory maximum limits, the issue is one of law, and we afford it plenary review"), cert. denied, 285 Conn. 908, 942 A.2d 415 (2008).

With these principles in mind, we turn to the question of whether the trial court's substitution of a period of probation for the period of special parole originally imposed exceeds the original sentence. Pursuant to § 54-128 (c), when a defendant violates special parole, he is subject to incarceration only for "a period equal to the unexpired portion of the period of special parole." Thus, for a violation that occurs on the final day of the defendant's special parole term, the defendant would be exposed to one day of incarceration. Special parole, therefore, exposes a defendant to a decreasing period of incarceration as the term of special parole is served. On the other hand, when a defendant violates his probation, the court may revoke his probation, and if revoked, "the court shall require the defendant to serve the sentence imposed or impose any lesser sentence." General Statutes (Rev. to 1999) § 53a-32 (b) (4). Accordingly, if the defendant in the present case were to violate his probation on the final day of his ten year term, he would be exposed to the full suspended sentence of ten years incarceration.[18] Thus, in contrast to a term of special parole, the defendant is exposed to incarceration for the full length of the suspended sentence, with no decrease in exposure as the probationary period is served, for the entirety of the probationary period.[19] We conclude, therefore, that the substitution of probation for special parole effectively has enlarged the defendant's sentence by exposing him to incarceration for an additional ten year period in violation of his due process rights.[20]

The state claims that it has rectified this defect, however, by agreeing to limit its recommendation for incarceration, in the event of a violation of probation, to the remaining probationary period and points to the doctrine of law of the case to shield the defendant from an enlargement of his sentence. This contention is unavailing. The principal flaw in the state's argument is that, while the agreement may bind the state, it does not bind a future trial court, a fact that the state concedes in its brief. It is well established that sentencing is within the discretion of the trial court, and a trial court cannot be bound by an agreement that removes that discretion. *State* v. *DeJesus*, 10 Conn. App. 591, 603, 524 A.2d 1156 (1987) ("public policy considerations

bear against the specific performance of any promise regarding sentencing made by a judge"); see also *United States* v. *Greatwalker*, 285 F.3d 727, 730 (8th Cir. 2002) ("[e]ven when a defendant, prosecutor and court agree on a sentence, the court cannot give the sentence effect if it is not authorized by law"). The fact that the trial court explicitly relied on the state's agreement does not remedy this flaw, as the trial court also has no authority to bind a future trial court. A future trial court would remain free to disregard the state's recommendation and impose the full ten year period of the defendant's suspended sentence pursuant to § 53a-32 (b) (4). Consequently, the defendant's sentence has been enlarged in violation of his due process rights and, therefore, is illegal.

B

Because we conclude that the defendant's sentence is illegal, we once again remand the case for resentencing in accordance with the aggregate package theory under *State* v. *Raucci*, supra, 21 Conn. App. 557, and *State* v. *Miranda*, supra, 260 Conn. 93. We are mindful, however, that at the resentencing hearing, the trial court stated that, due to the fact that this court's previous determination that the defendant's term of special parole was illegal and the fact that probation could expose the defendant to additional incarceration, it would be difficult for the trial court to construct a sentence that would closely approximate the defendant's original sentence. Indeed, the state offered its agreement in order to address these difficulties. Because of the apparent confusion in *State* v. *Tabone*, supra, 279 Conn. 527, a problem likely to arise on remand, and to provide some guidance on this matter, we next address the appropriate means to resentence the defendant. See *State* v. *Arroyo*, 284 Conn. 597, 601 n.3, 935 A.2d 975 (2007) (addressing issues likely to arise on remand); *State* v. *Randolph*, 284 Conn. 328, 331 n.2, 931 A.2d 939 (2007) (same).

We note that the resolution of this question requires an analysis of the relevant sentencing statutes, to which we apply familiar principles of statutory construction. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is

not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *State* v. *Tabone*, supra, 279 Conn. 534–35. The construction of a statute presents a question of law, over which we exercise plenary review. Id., 534.

Three statutes govern the sentence at issue in the present appeal. Because the defendant was convicted of risk of injury to a child and sexual assault in the second degree, both of which are class C felonies, and of sexual assault in the third degree, a class D felony, his sentences are controlled by § 53a-35a, which sets forth the sentencing parameters for those classes of felonies. See footnotes 2, 3 and 4 of this opinion. Under § 53a-35a, class C felonies are subject to a minimum prison sentence of one year and a maximum prison sentence of ten years, and class D felonies are subject to a minimum prison sentence of one year and a maximum prison sentence of five years. See footnote 12 of this opinion. Additionally, § 54-128 (c) requires that, when both special parole and a prison sentence are imposed, the combination of those two sentences cannot exceed the statutory maximum prison sentence set forth in § 53a-35a. See footnote 13 of this opinion. Finally, § 54-125e (c) requires that, for certain convictions including the three offenses committed by the defendant, special parole, if imposed, must be for a minimum term of ten years to a maximum of thirty-five years. See footnote 14 of this opinion.

As this court recognized in *State* v. *Tabone*, supra, 279 Conn. 543, the interaction of these three statutes results in the following conflict: "[T]he trial court was required to sentence the defendant to a minimum of one year of imprisonment under § 53a-35a (6), and to a minimum of ten years of special parole under § 54-125e (c). The total length of the minimum term of imprisonment and the minimum period of special parole combined amounts to eleven years. As such, the trial court was required to impose a combined term of imprisonment and period of special parole that exceeds the maximum sentence of imprisonment for sexual assault in the second degree. At the same time, pursuant to § 54-128 (c), the trial court was prohibited from imposing a combined term of imprisonment and period of special parole that exceeds the maximum sentence of imprisonment for sexual assault in the second degree. Accordingly, under the circumstances of the present case, an irreconcilable conflict exists between the sentencing requirements of §§ 54-125e (c) and 54-128 (c)." This court concluded, however, in reliance on the legislative history surrounding the enactment of these statutes, that, when §§ 54-125e (c) and 54-128 (c) conflict,

the legislature intended the statutory mandatory maximum sentence under § 54-128 (c) to control. Id., 544.

Although we did not state this point expressly in *State* v. *Tabone*, supra, 279 Conn. 544, a necessary corollary to this conclusion is that § 54-125e (c) can be given effect only to the extent that it does not conflict with § 54-128 (c). It is axiomatic that the legislature is presumed not to have intended to enact conflicting legislation, and that, in the absence of a construction that harmonizes the two, both statutes can be given effect only when they do not conflict. See *Perille* v. *Raybestos-Manhattan-Europe, Inc.*, 196 Conn. 529, 541–43, 494 A.2d 555 (1985) ("We are entitled to presume that, in passing a statute, the legislature not only did so with knowledge of the existing statutes but also that it did not intend to enact a conflicting statute. . . . [W]e recognize, however, that we cannot assume that a legislative enactment is devoid of purpose. . . . [Therefore, the conflicting statute] still enjoys vitality where appropriate." [Citations omitted; internal quotation marks omitted.]). Consequently, one of the statutes cannot be given effect under the circumstances of the present case. Because we have resolved the conflict in favor of § 54-128 (c); *State* v. *Tabone*, supra, 544; it necessarily follows that § 54-125e (c) must give way.

That is not to say, however, that § 54-125e (c) in its entirety must fall. It is well established that, because we presume that the legislature does not intend to draft meaningless provisions, we are bound to harmonize otherwise conflicting statutes to the maximum extent possible without thwarting their intended purpose. *State* v. *West*, 192 Conn. 488, 494, 472 A.2d 775 (1984); see also *State* v. *Scott*, 256 Conn. 517, 538–39, 779 A.2d 702 (2001) ("[c]onstruction should not exclude common sense so that absurdity results and the evident design of the legislature is frustrated" [internal quotation marks omitted]); *Rivera* v. *Commissioner of Correction*, 254 Conn. 214, 242, 756 A.2d 1264 (2000) (noting court's duty to reconcile and give concurrent effect to conflicting statutes where possible). Consequently, we must seek a construction that gives effect to the apparent legislative intent while minimizing the damage to the conflicting statute.

As we noted in *State* v. *Tabone*, supra, 279 Conn. 540, the legislature intended to permit the imposition of special parole as "a sentencing option which ensures intense supervision of convicted felons after [they are] released to the community and allows the imposition of parole stipulations on the released inmate." At the same time, the legislature intended to "prevent the trial court from sentencing a defendant to a term of imprisonment and to a period of special parole, the total combined length of which exceeds the maximum sentence of imprisonment for the offense for which the defendant was convicted." Id., 541–42. It is clear, there-

fore, that the legislature intended that special parole, as a form of supervised release, should be available to trial courts, provided that its imposition, in combination with a term of incarceration, does not exceed the maximum statutory period of incarceration permitted by law. To effectuate the intent of the legislature and to resolve the conflict, therefore, and following the reasoning of this court in *Tabone*, the provision specifying a minimum period of ten years special parole must be rendered permissive, thereby allowing trial courts to impose a period of supervised release in combination with a term of incarceration.[21]

Furthermore, we note that the legislature, in apparent recognition of the confusion it had created upon enacting § 54-125e (c), amended that statute shortly after its enactment to remove the mandatory minimum period of special parole. The mandatory minimum of ten years special parole for certain sexual assault convictions had been enacted by the legislature with the passage of No. 98-234, § 3, of the 1998 Public Acts, effective October 1, 1998. The following year, during a special session of the legislature in June, 1999, the legislature removed that mandatory minimum and replaced it with language that gave courts discretion to impose sentences of special parole in excess of ten years for those sexual assault convictions. See Public Acts, Spec. Sess., June, 1999, No. 99-2, § 52 (amending § 54-125e [c] to provide in relevant part that "[t]he period of special parole shall be not less than one year nor more than ten years except that such period may be for more than ten years for a person convicted of a violation of subdivision [2] of section 53-21, section 53a-70, as amended by this act, 53a-70a, as amended by this act, 53a-70b, 53a-71, 53a-72a or 53a-72b, as amended by this act").[22]

In sum, we conclude that the ten year mandatory minimum for special parole under § 54-125e (c) does not apply to resentencing in the present case, and the trial court may apply §§ 53a-35a and 54-128 (c) in a manner such that the new total effective sentence does not exceed the defendant's original total effective sentence of ten years of incarceration, followed by ten years of special parole.[23] Accordingly, the defendant may be sentenced to a period of special parole unfettered by a mandatory minimum period, provided that the combination of the defendant's term of incarceration and term of special parole does not exceed the statutory maximum set forth by § 54-128 (c). By way of example, the defendant could be sentenced to a total effective sentence of ten years incarceration followed by nine years of special parole as follows: (1) for sexual assault in the second degree, eight years incarceration; (2) for sexual assault in the third degree, one year incarceration, to be served consecutively to the sentence for sexual assault in the second degree; (3) for risk of injury to a child, one year incarceration followed by nine years

of special parole, to be served consecutively to the sentences for sexual assault in the second and third degrees. This would result in a total effective sentence of ten years incarceration, followed by nine years of special parole. We do not, however, direct the trial court to impose any particular sentence, but leave to that court, in its discretion, to fashion an appropriate sentence in accordance with *State* v. *Miranda*, supra, 260 Conn. 93.

II

Although our conclusion that the defendant's sentence was enlarged unconstitutionally when probation was substituted for special parole is dispositive, we nonetheless address the defendant's claim that the resentencing on his conviction for sexual assault in the third degree and risk of injury to a child violated the guarantee against double jeopardy under the United States and Connecticut constitutions because that issue is likely to arise on remand. *State* v. *Arroyo*, supra, 284 Conn. 601 n.3. Specifically, the defendant contends that the trial court originally had sentenced him on the crimes of sexual assault in the third degree and risk of injury to a child to serve five years incarceration, execution suspended, and five years of special parole, with each sentence to be served concurrently with each other and with the sentence of ten years incarceration on his conviction for sexual assault in the second degree. He claims that, because he began serving his sentence on November 17, 1999, his sentences on his conviction for sexual assault in the third degree and risk of injury to a child had been served prior to resentencing. Because his new sentence includes components related to the conviction of those crimes, he asserts that his double jeopardy rights against multiple punishments have been violated.

In response, the state contends that, because the defendant's successful challenge to his original sentence vacated all of the sentences against him, he has not suffered multiple punishments for the same offense. The state also asserts that, because the sentences on the conviction of sexual assault in the third degree and risk of injury to a child were part of a total sentencing package, the court on remand could reconstruct the entire sentencing package without violating double jeopardy. We agree with the state.

As a threshold matter, claims of double jeopardy involving multiple punishments present a question of law to which we afford plenary review. *State* v. *Burnell*, 290 Conn. 634, 642, 966 A.2d 168 (2009); *State* v. *Culver*, 97 Conn. App. 332, 336, 904 A.2d 283 (2006), cert. denied, 280 Conn. 935, 909 A.2d 961 (2006). "The fifth amendment to the United States constitution provides in relevant part: No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . . The double jeopardy clause of the fifth amendment is

made applicable to the states through the due process clause of the fourteenth amendment. . . .

"We have recognized that the [d]ouble [j]eopardy [c]lause consists of several protections: It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (Citation omitted; internal quotation marks omitted.) *State* v. *Bletsch*, 281 Conn. 5, 27, 912 A.2d 992 (2007); see also, e.g., *North Carolina* v. *Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds by *Alabama* v. *Smith*, 490 U.S. 794, 798–99, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). It is the third protection that is implicated in this appeal.

It is well established that resentencing a defendant does not trigger double jeopardy concerns when the original sentence was illegal or erroneous. *State* v. *Langley*, 156 Conn. 598, 601–602, 244 A.2d 366 (1968), cert. denied, 393 U.S. 1069, 89 S. Ct. 726, 21 L. Ed. 2d 712 (1969). Jeopardy does not attach until the avenues for challenging the validity of a sentence have been exhausted, and, therefore, "resentencing has repeatedly been held not to involve double jeopardy when the first sentence was, for some reason, erroneous or inconclusive. *Mathes* v. *United States*, 254 F.2d 938, 939 (9th Cir. [1958]); *Robinson* v. *United States*, 144 F.2d 392, 397 (6th Cir. [1944]), [aff'd, 324 U.S. 282, 65 S. Ct. 666, 89 L. Ed. 944 (1945)]; *McCleary* v. *Hudspeth*, 124 F.2d 445, 447 (10th Cir. [1942]), cert. denied, 316 U.S. 670, 62 S. Ct. 1043, 86 L. Ed. 1745 [1942]; 21 Am. Jur. 2d 232, Criminal Law, § 167 [1965]; see note, 97 A.L.R. 160, 162 [1935]. 'Sentencing should not be a game in which a wrong move by the judge means immunity for the prisoner.' *King* v. *United States*, 98 F.2d 291, 296 (D.C. Cir. [1938])." *State* v. *Langley*, supra, 602.

In the specific context of a remand for resentencing when a defendant successfully challenges one portion of a sentencing "package," the United States Supreme Court has held that a trial court may resentence a defendant on his conviction of the other crimes without offending the double jeopardy clause of the United States constitution. *Pennsylvania* v. *Goldhammer*, 474 U.S. 28, 29–30, 106 S. Ct. 353, 88 L. Ed. 2d 183 (1985). Indeed, the resentencing court is free to restructure the defendant's entire sentencing package, even for those components assigned to convictions that have been fully served, as long as the overall term has not expired, without offending double jeopardy. *United States* v. *Triestman*, 178 F.3d 624, 631 (2d Cir. 1999); see, e.g., *United States* v. *Alton*, 120 F.3d 114, 116 (8th Cir. 1997), cert. denied, 522 U.S. 976, 118 S. Ct. 433, 139 L. Ed. 2d 332 (1997) (same); *United States* v. *Benbrook*, 119 F.3d 338, 340–41 (5th Cir. 1997) (holding that defendant that challenges one conviction has no legitimate expectation

of finality in other portions of original sentencing package, even if he already has served term of incarceration associated with other parts); *United States* v. *Smith*, 115 F.3d 241, 247–48 (4th Cir.) (holding that court can resentence defendant on one part of sentencing package after original term has been served so long as defendant has not yet finished serving entire sentence on all parts of sentencing package), cert. denied, 522 U.S. 922, 118 S. Ct. 315, 139 L. Ed. 2d 244 (1997); *United States* v. *Rico*, 902 F.2d 1065, 1068–69 (2d Cir.) (holding that district court may correct sentence to conform to plea agreement without violating double jeopardy, even though defendant already had been released from prison, because defendant was still serving five year term of supervised release), cert. denied, 498 U.S. 943, 111 S. Ct. 352, 112 L. Ed. 2d 316 (1990).

In light of these principles, we conclude that the defendant's resentencing for the crimes of sexual assault in the third degree and risk of injury to a child did not violate double jeopardy. The defendant has challenged only the legality of his sentences, not the validity of his conviction. Consequently, the trial court was free to refashion the entire sentence for each of the crimes within the confines of the original package without violating double jeopardy, as long as the entire sentence had not been fully served. The fact that certain component parts of the total sentence had "expired" is irrelevant. Moreover, the defendant's sentences all had been vacated as a result of his successful challenges to them. *State* v. *Miranda*, supra, 260 Conn. 129 ("the defendant, in appealing his conviction and punishment, has voluntarily called into play the validity of the entire sentencing package and, thus, the proper remedy is to vacate it in its entirety" [internal quotation marks omitted]). Resentencing, therefore, did nothing more than place the defendant in the same position he originally had occupied when he entered his guilty plea. *United States* v. *Triestman*, supra, 178 F.3d 631. We therefore reject the defendant's double jeopardy claim.

The judgment is reversed and the case is remanded for resentencing according to law.

In this opinion NORCOTT and ZARELLA, Js., concurred.

[1] The defendant appealed from the judgment of the trial court to the Appellate Court, and, upon the state's motion, we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

[2] General Statutes (Rev. to 1999) § 53a-71 provides in relevant part: "(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and . . . (4) such other person is less than eighteen years old and the actor is such person's guardian or otherwise responsible for the general supervision of such person's welfare . . . .

"(b) Sexual assault in the second degree is a class C felony for which nine months of the sentence imposed may not be suspended or reduced by the court."

[3] General Statutes (Rev. to 1999) § 53a-72a provides in relevant part: "(a) A person is guilty of sexual assault in the third degree when such person (1) compels another person to submit to sexual contact (A) by the use of

force against such other person or a third person . . . .

"(b) Sexual assault in the third degree is a class D felony."

[4] General Statutes (Rev. to 1999) § 53-21 (2) provides in relevant part: "Any person who . . . has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of a class C felony."

[5] General Statutes (Rev. to 1999) § 53a-32 (b) provides: "If such violation [of probation] is established, the court may: (1) Continue the sentence of probation or conditional discharge; (2) modify or enlarge the conditions of probation or conditional discharge; (3) extend the period of probation or conditional discharge, provided the original period with any extensions shall not exceed the periods authorized by section 53a-29; or (4) revoke the sentence of probation or conditional discharge. If such sentence is revoked, the court shall require the defendant to serve the sentence imposed or impose any lesser sentence. Any such lesser sentence may include a term of imprisonment, all or a portion of which may be suspended entirely or after a period set by the court, followed by a period of probation with such conditions as the court may establish. No such revocation shall be ordered, except upon consideration of the whole record and unless such violation is established by the introduction of reliable and probative evidence and by a preponderance of the evidence."

[6] The fifth amendment to the United States constitution provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a [g]rand [j]ury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

"Although the Connecticut constitution has no specific double jeopardy provision, we have held that the due process guarantees of article first, § 9, include protection against double jeopardy." (Internal quotation marks omitted.) *State* v. *Miranda*, 260 Conn. 93, 119, 794 A.2d 506 (2002).

Article first, § 9, of the Connecticut constitution provides: "No person shall be arrested, detained or punished, except in cases clearly warranted by law."

[7] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless." (Internal quotation marks omitted.) *State* v. *Fowlkes*, 283 Conn. 735, 736 n.1, 930 A.2d 644 (2007).

[8] The defendant was charged, in a substitute long form information, with engaging in multiple acts of sexual intercourse and indecent sexual contact on dates between January 1, 1999, and May 31, 1999, with a person under the age of thirteen years.

[9] Specifically, the trial court required the defendant to: enroll in an outpatient sex offender treatment program; submit to polygraph examinations as deemed appropriate; be prohibited from contact with the victim or the victim's family; be prohibited from living with or having any contact with minors under the age of sixteen years; and be prohibited from working or volunteering in any activity involving contact with any children under the age of sixteen years.

[10] As this court noted in *State* v. *Tabone*, supra, 279 Conn. 532 n.10, both the defendant and the state had agreed during plea negotiations to a total effective sentence of ten years incarceration followed by ten years of special parole.

[11] Practice Book § 43-22 provides that "[t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

[12] General Statutes (Rev. to 1999) § 53a-35a provides in relevant part: "For any felony committed on or after July 1, 1981, the sentence of imprisonment shall be a definite sentence and the term shall be fixed by the court as follows . . . (6) for a class C felony, a term not less than one year nor more than ten years . . . (7) for a class D felony, a term not less than one year nor more than five years . . . ."

Pursuant to § 53a-71 (b), sexual assault in the second degree is a class C felony.

[13] General Statutes § 54-128 (c) provides: "Any person who, during the service of a period of special parole imposed in accordance with subdivision (9) of subsection (b) of section 53a-28, has been returned to any institution of the Department of Correction for violation of such person's parole, may be retained in a correctional institution for a period equal to the unexpired portion of the period of special parole. The total length of the term of incarceration and term of special parole combined shall not exceed the maximum sentence of imprisonment authorized for the offense for which the person was convicted."

[14] General Statutes (Rev. to 1999) § 54-125e (c) provides in relevant part: "The period of special parole shall be not less than one year nor more than ten years except that such period shall be not less than ten years nor more than thirty-five years for a person convicted of a violation of subdivision (2) of section 53-21, section 53a-70, 53a-70a, 53a-70b, 53a-71, 53a-72a or 53a-72b . . . ."

[15] Subsequent to our decision in *State* v. *Tabone*, supra, 279 Conn. 527, but prior to resentencing, the defendant filed a motion to correct an illegal sentence with respect to the conviction of risk of injury to a child on the ground that the five year period of special parole violated the requirement of § 54-125e, which set forth a minimum period of ten years special parole for that particular crime. The defendant requested that the court resentence the defendant to five years of incarceration to run concurrently with his other sentences. Argument on the motion to correct was continued to the time of the defendant's resentencing proceeding, at which he was resentenced on the conviction of risk of injury to a child, as well as on his other two crimes.

[16] The agreement provides as follows: "As [s]tate's [a]ttorney for the [j]udicial [d]istrict of Waterbury, I hereby agree that:

"(1) If [the defendant] is resentenced on this matter to a term or terms which include ten years of incarceration followed by ten years execution suspended and ten years of probation, in lieu of the ten years of incarceration and ten years of special parole found illegal by the court in *State* v. *Tabone*, [supra, 279 Conn. 527]; and

"(2) If [the defendant] is found guilty of a violation of such probation; then the state's attorney's office will seek a maximum sentence on the violation of probation which will not exceed the number of days that [the defendant] has remaining on his probation at the date of the violation rather than the full period of the suspended sentence.

"The object of this agreement is to fulfill the intentions of all involved in the original sentence agreement in a legal manner and it is my intent that current and future members of this [s]tate's [a]ttorney's office abide by this agreement."

We note that the agreement is signed only by State's Attorney Connelly, and not the defendant. In fact, the agreement does not designate a space for the defendant to sign.

[17] The defendant also claims that his sentence was unconstitutionally enlarged because, pursuant to General Statutes § 53a-32a, a failure to admit guilt during any sex offender treatment program automatically would result in a violation of probation, which in turn would expose him to the full suspended term of incarceration. In response, the state contends that § 53a-32a does not result in an automatic revocation of probation and that there is no practical difference between probation and special parole for defendants who are ordered to attend an outpatient sex offender treatment program because failure to admit guilt likely would result in a violation, albeit discretionary, of special parole. Because we conclude that the substitution of probation for special parole illegally enlarged the defendant's sentence, we express no opinion on this issue.

[18] The state contends that the defendant's claim is not ripe for review because he has not violated probation, and may never do so, and thus has not experienced any negative consequences as a result of this new sentence. We reject this claim because, as we previously have noted, "[t]he judicial authority may at any time correct an illegal sentence . . . ." Practice Book § 43-22; *State* v. *Tabone*, supra, 279 Conn. 544 n.17.

[19] We note that the trial court and the parties were fully aware of this possibility. Indeed, at the sentencing proceeding, the trial court noted: "Now, I understand that if [the defendant] violates on the last day of his probation, there could be ten years coming into play, which is not the bargain that we had way back . . . . Okay, the only way this can work is if the state's attorney agreed that while [the defendant] was on probation, if in fact he

violated probation—the maximum penalty the state could look at would be the remaining time that he has on probation."

[20] Because we conclude that the substitution of probation for special parole enlarges the defendant's sentence beyond that specified under *State* v. *Miranda*, supra, 260 Conn. 129–30, we do not address the defendant's claim that the sentence violates his due process rights because the failure to admit guilt during sex offender treatment automatically results in a violation of probation. We also express no opinion on the defendant's second claim, that the agreement violates the separation of powers clause of the Connecticut constitution.

[21] The dissent notes that in *State* v. *Tabone*, supra, 279 Conn. 537, we acknowledged that the plain language of § 54-125e (c) required a sentence of ten years of special parole and suggests that this statement indicates that we did not intend for the trial court to be free to sentence the defendant to fewer than ten years of special parole. Seven pages later in the same opinion, however, we determined that the sentencing provisions of § 54-128 (c) control over those of § 54-125e (c). Id., 544. In accordance with this holding, therefore, § 54-125e (c) cannot be interpreted in accordance with its plain meaning but must be construed to give effect to the intent of the legislature. See *State* v. *Ayala*, 222 Conn. 331, 345, 610 A.2d 1162 (1992) ("[s]tatutory language is to be given its plain and ordinary meaning *unless such meaning is clearly at odds with the legislative intent*" [emphasis added; internal quotation marks omitted]).

[22] To be clear, we note that in the present case, we do not rely on subsequent legislative history to support our construction of the statutes. Were we to do so, we would note that this court has recognized that in the criminal context, the use of subsequent legislative history to discern legislative intent at the time of enactment must be viewed with skepticism because of fair notice concerns. *State* v. *Cote*, 286 Conn. 603, 624 n.14, 945 A.2d 412 (2008) ("[w]e also note that, although we have on occasion looked to the subsequent history of a statute to determine legislative intent . . . such a practice would be inappropriate when construing a penal statute wherein the construction proposed by the state raises concerns of fair notice" [citation omitted]). In the present case, however, these concerns are not implicated; because the trial court is still bound by the original sentence, there is no issue of fair notice to the defendant, as he may not be sentenced beyond the sentence to which he originally had agreed. Cf. *State* v. *Kozlowski*, 199 Conn. 667, 682, 509 A.2d 20 (1986) (rejecting defendant's fair notice claim for conflicting statutes, despite fact that defendant was sentenced to stiffer penalty, because penalties had been spelled out clearly in both relevant public acts).

[23] The dissent contends that the trial court is limited, upon resentencing, to the original ten year period of incarceration because the special parole period originally imposed was part of a sentence that this court found illegal in *State* v. *Tabone*, supra, 279 Conn. 544, in light of the conflict between §§ 54-125e (c) and 54-128 (c). Respectfully, we disagree.

The aggregate package theory, adopted in *State* v. *Miranda*, supra, 260 Conn. 129–30, expressly authorizes the trial court to resentence the defendant on each of his convictions, provided that the new sentence does not exceed the original illegal sentence previously imposed. Under this theory, "the original sentencing court is viewed as having imposed individual sentences merely as component parts or building blocks of a larger total punishment for the aggregate convictions, and, thus, to invalidate any part of that package without allowing the court thereafter to review and revise the remaining valid convictions would frustrate the court's sentencing intent. . . . Accordingly . . . the [resentencing] court's power under these circumstances is limited by its original sentencing intent as expressed by the original total effective sentence, and, furthermore, that this power is permissive, not mandatory. Although the court may reconstruct the sentencing package to conform to its original intent, it is not required to do so. It may, therefore, simply eliminate the sentence previously imposed for the vacated conviction, and leave the other sentences intact; or it may reconstruct the sentencing package so as to reach a total effective sentence that is less than the original sentence but more than that effected by the simple elimination of the sentence for the vacated conviction. *The guiding principle is that the court may resentence the defendant to achieve a rational, coherent* [*sentence*] *in light of the remaining convictions, as long as the revised total effective sentence does not exceed the original.* [*State* v. *Raucci*, supra, 21 Conn. App.] 563, quoting *United States* v. *Bentley*, 850 F.2d 327, 328 (7th Cir.), cert. denied, 488 U.S. 970, 109 S. Ct. 501, 102 L. Ed. 2d 537 (1988)." (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v.

Miranda, supra, 260 Conn. 129–30.

We further explained in *Miranda* that "[i]t is axiomatic that a trial court has wide discretion to tailor a just sentence in order to fit a particular defendant and his crimes, as long as the final sentence falls within the statutory limits. . . . This same wide sentencing discretion equally applies to a trial court's restructuring of a sentencing plan for a defendant who has been convicted in a multiple count case and who faces a permissible range of punishment based on the individual counts. [W]hen a defendant is found guilty on a multicount indictment, there is a strong likelihood that the . . . court will craft a disposition in which the sentences on the various counts form part of an overall plan. When the conviction on one or more of the component counts is vacated, common sense dictates that the judge should be free to review the efficacy of what remains in light of the original plan, and to reconstruct the sentencing architecture . . . within applicable constitutional and statutory limits, if that appears necessary in order to ensure that the punishment still fits both crime and criminal." (Internal quotation marks omitted.) Id., 130, quoting *State* v. *Raucci*, supra, 21 Conn. App. 563–64.

In light of these principles, it is clear that, on resentencing, the trial court must fashion a sentence that does not exceed the original sentence of ten years incarceration followed by ten years of special parole. The fact that a portion of the sentence was found to be illegal is irrelevant. So long as the new sentence does not exceed the original, the trial court is free to sentence the defendant at its discretion.