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ZARELLA, J., with whom McLACHLAN, J., joins, concurring in part and dissenting in part. I respectfully disagree with the majority's decision to treat the petition of the defendant, Joshua Komisarjevsky, for certification to appeal from the order of the Appellate Court as a petition for review pursuant General Statutes § 52-265a. I instead would directly address the issues presented in the petition for certification and conclude that the order of the trial court from which the defendant appealed should be subject to interlocutory review pursuant to *State v. Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983). I agree with the majority, however, that the trial court's order vacating the sealing of the defendant's witness list should be reversed for the reasons on which it relies in its opinion. Accordingly, I concur only in the result that the majority reaches, namely, its reversal of the trial court's order.

I

I begin with the reasons for my disagreement with the majority's decision to treat the defendant's petition as a petition for review pursuant to § 52-265a. At the outset, I emphasize that I take no position as to whether the defendant's petition for certification to appeal, if treated as a petition for review, should be granted. That decision lies solely within the discretion of the Chief Justice. See General Statutes § 52-265a (b). Whether the defendant's petition for certification to appeal should be treated as a petition for review under § 52-265a is, however, a decision for this court to make. For the reasons that follow, I disagree with the majority's decision to treat the defendant's petition for certification to appeal as a petition for review.

First, this appeal came to this court by way of a petition for certification to appeal from the order of the Appellate Court dismissing the defendant's appeal from the trial court's order for lack of a final judgment, and this court has granted appellate review of the Appellate Court's order as to that issue. The final judgment question in this case was raised and briefed in the Appellate Court, and that court dismissed the appeal on the ground that the defendant's appeal was not from a final judgment or appealable order. Furthermore, the parties have fully briefed and argued this issue before this court in accordance with the first certified question, which specifically addresses whether "the trial court's decision to grant [the intervenors'] motion to unseal a 'witness list' constitute[s] a final judgment permitting interlocutory review?" *State v. Komisarjevsky*, 301 Conn. 920, A.3d (2011). This court should first answer the certified question before moving on to consider other jurisdictional bases.

Second, the defendant specifically chose not to file a petition for review of the trial court's order pursuant to § 52-265a. The record before the trial court demonstrates that the defendant was fully aware of his right to file a petition for review pursuant to § 52-265a, but the defendant nevertheless chose not to do so and, instead, appealed directly to the Appellate Court from the trial court's order.¹ The possibility that this court might review the order pursuant to § 52-265a was not addressed further by any party until this court raised it, sua sponte, at oral argument, in the certified appeal. The defendant, therefore, chose to pursue a direct appeal with the Appellate Court and presented his arguments through a direct appeal in both appellate forums in this state.

Third, the intervenors, the Hartford Courant Company (Courant) and Alaine Griffin, a reporter for the Courant, have contested this court's power to construe the defendant's petition for certification to appeal as a petition for review under § 52-265a,² which permits "appeals only from orders or decisions of the Superior Court." *Hall v. Gilbert & Bennett Mfg. Co.*, 241 Conn. 282, 299, 695 A.2d 1051 (1997). The defendant already appealed from the trial court's order to the Appellate Court and has petitioned this court for certification to appeal from the order of the Appellate Court dismissing the defendant's appeal. In their supplemental brief to this court, the intervenors claim that, because the defendant has asked this court to review the Appellate Court's order, and not that of the trial court, his petition appears to fall outside the scope of § 52-265a. The majority does not, however, resolve or even address this jurisdictional claim by one of the parties, notwithstanding this court's duty to resolve a jurisdictional claim as a threshold matter before reaching the merits of the appeal. See, e.g., *Peters v. Dept. of Social Services*, 273 Conn. 434, 441, 870 A.2d 448 (2005) (court must address subject matter jurisdiction issues before considering merits of appeal).

Fourth, as I will discuss more fully in this opinion, I would conclude that the trial court's order in the present case qualifies as an appealable interlocutory order under *State v. Curcio*, supra, 191 Conn. 31, and that it is therefore unnecessary to construe the defendant's petition for certification to appeal as a petition for review in order to assume jurisdiction over the defendant's case. The defendant has presented a very strong argument that the trial court's order may fall within one or both prongs of the *Curcio* test for the appealability of interlocutory orders, and the facts discussed and the conclusions reached by the majority fully support such a determination. If the trial court's order is appealable pursuant to *Curcio*, then this court can reach the merits of the defendant's appeal without considering whether his petition for certification to appeal should be con-

strued as a petition for review under § 52-265a.

Finally, even if this court were to conclude that the trial court's order does not qualify as a final judgment for purposes of *Curcio*, this court should explain that decision first and then proceed to consider whether the order nevertheless should be reviewed under § 52-265a. In prior instances, in which this court has decided to treat other appeals from interlocutory orders as being brought pursuant to § 52-265a, this court typically decides first whether the party's appeal is from a final judgment and then explains whether it nevertheless may decide the appeal under § 52-265a. See, e.g., *Hall v. Gilbert & Bennett Mfg. Co.*, supra, 241 Conn. 293–301; *State v. Ayala*, 222 Conn. 331, 338–42, 610 A.2d 1162 (1992); cf. *State v. Fielding*, 296 Conn. 26, 33–43 and n.7, 994 A.2d 96 (2010). This mode of analysis makes sense. Our case law is developed through written opinions, which explain the reasoning for a court's decision and have a precedential value that provides guidance and predictability to courts, attorneys and the citizens of this state. I see no reason why this court should depart from its traditional mode of analysis in the present case.

The majority gives two reasons for not addressing the jurisdictional questions. First, the majority contends that “it is abundantly clear that this court has jurisdiction over the matter certified from the Appellate Court.” Footnote 3 of the majority opinion. Second, it contends that bypassing our traditional analysis is “the most expeditious route properly available” *Id.* I disagree and am not persuaded by either justification. First, the fact that this case comes to this court by way of a certified appeal does not distinguish this case from our prior cases in which we have first resolved a final judgment question before considering whether to treat the appeal as a petition for review. In at least two instances in which § 52-265a was considered as a possible ground for jurisdiction, the case came to this court either by way of certified appeal from the Appellate Court or a transfer, which are each sufficient to vest this court with jurisdiction to review whether an interlocutory order or decision is appealable. See *State v. Fielding*, supra, 296 Conn. 33–35 and n.7 (certified appeal); *Hall v. Gilbert & Bennett Mfg. Co.*, supra, 241 Conn. 288–89 (transfer of appeal from Appellate Court, where appeal from decision of compensation review board had been filed). In each of these cases, this court first determined that the order or decision from which the appellant appealed was not a final judgment *before* considering whether to treat the petition for certification as a late petition for review pursuant to § 52-265a. See *State v. Fielding*, supra, 296 Conn. 33–35 and n.7 (concluding, in certified appeal from Appellate Court, that interlocutory order was not final judgment, and Chief Justice denied review pursuant to § 52-265a); *Hall v. Gilbert & Bennett Mfg. Co.*, supra, 294, 298–301 (con-

cluding, in appeal transferred from Appellate Court to this court, that interlocutory decision was not final judgment but that § 52-265a provided alternative basis for appellate jurisdiction). Therefore, the fact that the appeal in the present case comes to this court by way of a petition for certification in no way distinguishes it from our prior cases or justifies a departure from our customary order of analysis. Second, the majority's approach is not any more expeditious in resolving this case than our traditional analysis because, as I will discuss more fully in this opinion, much of the analysis that the majority employs in deciding the merits of this appeal is directly applicable to a *Curcio* analysis. I therefore see no reason why we should avoid the jurisdictional question that this court already has certified and that already has been briefed and argued by the parties.

For the foregoing reasons, I respectfully dissent from the majority opinion insofar as the majority construes the defendant's petition for certification to appeal as a petition for review under § 52-265a.

II

In light of my disagreement with the majority's decision to treat the defendant's petition for certification to appeal as a petition for review, I next must determine whether the Appellate Court properly concluded that the trial court's order in the present case was not an appealable interlocutory order under *Curcio*. For the reasons that follow, I would reverse the order of the Appellate Court dismissing the defendant's appeal and review the defendant's claims on their merits.

I begin my analysis by reviewing the relevant legal principles. "The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law [over which we exercise plenary review]." (Internal quotation marks omitted.) *Palmer v. Friendly Ice Cream Corp.*, 285 Conn. 462, 466, 940 A.2d 742 (2008). "We previously have noted that [t]he right of appeal is purely statutory. It is accorded only if the conditions fixed by statute and the rules of court for taking and prosecuting the appeal are met. . . . Moreover, [t]he statutory right to appeal is limited to appeals by aggrieved parties from final judgments . . . and we have observed that [l]imiting appeals to judgments that are final serves the important public policy of minimizing interference with and delay in the resolution of trial court proceedings. . . . Because our jurisdiction over appeals . . . is prescribed by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim." (Citations omitted; internal quotation marks omitted.) *Hartford Accident & Indemnity Co. v. Ace American Reinsurance Co.*, 279 Conn. 220, 224–25, 901

A.2d 1164 (2006).

“In a criminal proceeding, there is no final judgment until the imposition of a sentence. . . . The general rule is . . . that interlocutory orders in criminal cases are not immediately appealable.” (Citations omitted; internal quotation marks omitted.) *State v. Fielding*, supra, 296 Conn. 36. “In both criminal and civil cases . . . [however] we have determined [that] certain interlocutory orders and rulings of the Superior Court [were] final judgments for purposes of appeal. An otherwise interlocutory order is appealable in two circumstances: (1) [when] the order or action terminates a separate and distinct proceeding, [and] (2) [when] the order or action so concludes the rights of the parties that further proceedings cannot affect them. . . . *State v. Curcio*, supra, 191 Conn. [31]. The first prong of the *Curcio* test . . . requires that the order being appealed from be severable from the central cause of action so that the main action can proceed independent of the ancillary proceeding. . . .

“The second prong of the *Curcio* test focuses on the nature of the right involved. It requires the parties seeking to appeal to establish that the trial court’s order threatens the preservation of a right already secured to them and that that right will be irretrievably lost and the [parties] irreparably harmed unless they may immediately appeal. . . . Thus, a bald assertion that [the appellant] will be irreparably harmed if appellate review is delayed until final adjudication . . . is insufficient to make out an otherwise interlocutory order a final judgment. One must make at least a colorable claim that some recognized statutory or constitutional right is at risk. . . . The [appellant] must show that [the trial court’s] decision threatens to abrogate a right that he or she *then* holds.” (Citations omitted; emphasis in original; internal quotation marks omitted.) *Hartford Accident & Indemnity Co. v. Ace American Reinsurance Co.*, supra, 279 Conn. 225–26. “For a claim to be colorable, the defendant need not convince the trial court that he necessarily will prevail; he must demonstrate simply that he *might* prevail.” (Emphasis in original.) *State v. Tate*, 256 Conn. 262, 276–77, 773 A.2d 308 (2001).

Ordinarily, this court is reluctant to grant interlocutory review to orders of the trial court prior to sentencing, and for good reason. This reluctance serves the important goals of operating a swift and efficient criminal justice system. See, e.g., *State v. Coleman*, 202 Conn. 86, 92, 519 A.2d 1201 (1987); *State v. Parker*, 194 Conn. 650, 655–56, 485 A.2d 139 (1984); *State v. Curcio*, supra, 191 Conn. 30–31. Most issues that arise in connection with interlocutory orders are easily reviewable, and any impropriety is effectively curable upon appellate review after a final judgment. See *State v. Parker*, supra, 658. Furthermore, an acquittal in a criminal case essentially

will render moot interlocutory issues that otherwise would be appealable in the event of a conviction. By reserving appellate review until the completion of the trial court proceedings, our courts avoid the dreaded delay brought about by piecemeal litigation, thereby furthering the defendant's and the public's interest in timely resolutions to criminal proceedings. See *id.*, 656 (“[p]iecemeal appeals are disfavored because the delay resulting therefrom does not serve the public's interest in swift and certain justice”).

Notwithstanding this justified reluctance to review interlocutory orders in criminal proceedings, this court nevertheless must retain flexibility to review orders in those rare situations in which the delay of appellate review will result in a substantial probability of irreparable harm to the rights of the parties and will undermine the effectiveness of our criminal justice system. In these situations, any harm from inefficiencies or delays in the criminal justice process is dwarfed by society's fundamental and overarching interest in ensuring the fairness and integrity of the criminal process. See, e.g., *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (“[n]o right ranks higher than the right of the accused to a fair trial”). To this end, our federal and state constitutions guarantee fundamental protections to the criminal defendant to ensure that he receives a fair opportunity to defend against the deprivation of his liberty by the state. These protections balance our adversarial system and help to maintain confidence in our criminal justice system. It therefore is imperative that interlocutory review be afforded in those unique cases in which a defendant's right to defend himself is threatened with irreparable and immeasurable harm.

Applying the foregoing principles, I would conclude that the unique facts of the present case demonstrate that this court should review the trial court's unsealing order under the second prong of *Curcio* because the defendant has established a colorable claim that delay of appellate review threatens to abrogate his due process right to a fair trial. First, it is undisputed that a criminal defendant has the constitutional right to a fair trial. See, e.g., *id.* As the majority notes, “adverse publicity can endanger the ability of a defendant to receive a fair trial,” and, “[t]o safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity.” (Internal quotation marks omitted.) Furthermore, the defendant's right to a fair trial encompasses a right to prepare a defense. As the majority further notes, this right includes access to potential witnesses to prepare and present a defense. Thus, the defendant's right to access potential witnesses in preparation of his defense is not disputed. Cf. *State v. Longo*, 192 Conn. 85, 91, 469 A.2d 1220 (1984) (“[t]he defendant must show that [the trial court's] decision threatens to abro-

gate a right that he or she *then* holds” [emphasis in original]).

Second, the facts of this case demonstrate that the disclosure of the defendant’s witness list threatens his right to a fair trial. The record in the present case, including the affidavits, media reports and testimony presented by the defendant, establishes that this case has received extraordinary, if not unprecedented, media attention in this state that may hinder the defendant’s ability to prepare and present a defense if the witness list is released to the public. These facts include: (1) the trial court’s own acknowledgment of the “intense public interest” in the present case; (2) surveys indicating unparalleled case recognition of the case by the public; (3) the saturation of coverage in the media; (4) information from a defense expert indicating a “pervasive sense of fear and reprisal” by potential witnesses; (5) the documented extreme hostility directed at the defendant, his counsel, and those connected to him; (6) the experience of at least one defense witness during the trial of Steven Hayes, a participant in the defendant’s alleged crimes; (7) the affidavit of defense counsel establishing that several potential witnesses will not cooperate with the investigation if their connection to the defendant is made known in advance of trial; and (8) the fact that the intervenors have conceded that they will make the information in the list available to the public. The facts in the record, all relied on by the majority in its analysis of the merits of the defendant’s appeal, sufficiently establish a colorable claim that the list of potential witnesses, if revealed to the public, will subject the persons on that list to severe, negative attention that could prejudice the defendant’s ability to seek cooperation from them and to gain information vital to establishing his defense.³

Finally, although the possibility of harm is necessarily speculative in view of the prospective nature of the allegations, the unique facts of this case give rise to a substantial probability that any harm to the defendant’s ability to prepare and present a defense may not be remedied by subsequent appellate review. As the majority aptly explains, “it is difficult to imagine how the court could measure that harm and, if measurable, how such harm could be remedied. The defendant may never know what information he could have obtained from a reluctant source, and a person who refused to cooperate would seem to be no more likely to do so should a new trial be ordered.” The defendant does not have to prove that he necessarily will suffer irreparable harm as a result of the trial court’s order; he must only make a colorable claim that he will suffer such harm. See *State v. Tate*, supra, 256 Conn. 276–77. Because the defendant has a right to a fair trial, and in light of the unique public attention in this case that may give rise to an incurable public backlash against potential witnesses in such a way that will prejudice the defendant’s

right to prepare a defense, I would conclude that this case falls within the category of cases in which the rights of the defendant “can be enjoyed only if vindicated prior to trial.” *State v. Parker*, supra, 194 Conn. 659.

I note that, in reaching this conclusion, I am persuaded largely by the unique and extraordinary negative public attention that this case has received relative to most criminal cases. The defendant has sufficiently established that the negative public attention that has been and will likely be directed at him and those connected to him differs in both kind and degree from that in most other cases. On the basis of the facts in the record, I am led to conclude that the unsealing of the witness list in this case, unlike in most other cases, will likely result in irreparable prejudice to the defendant’s right to a fair trial. For these reasons, I find the present case distinguishable from *State v. Figueroa*, 22 Conn. App. 73, 77–80, 576 A.2d 553 (1990) (concluding that court lacked jurisdiction to review trial court’s order unsealing police report on ground that order did not constitute appealable final judgment), cert. denied, 215 Conn. 814, 576 A.2d 544 (1991).

With respect to the merits of the present case, I agree with the majority’s conclusion that the trial court’s order vacating the sealing of the witness list must be reversed. In agreeing with the majority’s conclusion, I am mindful that the defendant’s trial will be public and that the media and the general public will be free to observe and report on the trial, including the identity and testimony of the witnesses who testify.

For the foregoing reasons, I respectfully dissent from the majority opinion insofar as the majority treats the defendant’s petition for certification to appeal as a petition for review under § 52-265a and concur in that opinion insofar as the majority reverses the order of the trial court.

¹ In his motion for reconsideration of the trial court’s order vacating the sealing order, the defendant explained that a petition for review was not a feasible option for appellate review of the trial court’s order because, “[a]lthough the court’s decision is of great importance to [the defendant], counsel cannot say in good faith and candor that this issue is a matter of *substantial* public interest, a condition precedent to seeking review pursuant to . . . § 52-265a” (Emphasis in original.) Presumably for this reason, the defendant thereafter did not seek appellate review on that basis.

² General Statutes § 52-265a provides in relevant part: “(a) Notwithstanding the provisions of sections 52-264 and 52-265, any party to an action who is aggrieved by an order or decision of the Superior Court in an action which involves a matter of substantial public interest and in which delay may work a substantial injustice, may appeal under this section from the order or decision to the Supreme Court”

³ Moreover, as the majority notes, what is important to our consideration is not just whether potential witnesses actually will experience negative attention if their identity as witnesses is made known but also whether potential witnesses would fear such attention and decline to cooperate on that basis.