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VERTEFEUILLE, J., dissenting. Although I agree with parts I, II A and III of the majority opinion, I disagree with the majority's conclusion in part II B of its opinion that the trial court properly enhanced the sentence of the defendant, Damon Fagan, under General Statutes § 53a-40b, despite the fact that it failed to canvass the defendant to ascertain whether his guilty plea to part B of the information was made knowingly and voluntarily. Specifically, I disagree with the majority's underlying conclusion that no plea canvass was required constitutionally because the defendant was not entitled to have a jury find whether his sentence could be enhanced under § 53a-40b. Instead, I conclude that in accordance with the United States Supreme Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), a jury must find the operative fact that underlies the defendant's sentence enhancement under § 53a-40b, namely, whether he was released on bond at the time he committed the present offenses with which he is charged. Because I believe that the defendant would be entitled to a jury finding, I conclude that the trial court's failure adequately to canvass him prior to accepting his guilty plea violated his due process rights under the federal constitution. Thus, I would reverse the judgment of the trial court with respect only to the defendant's one year sentence enhancement under § 53a-40b, and would remand the case to the trial court with direction to permit the defendant to withdraw his guilty plea to part B of the information.

I agree with the majority that the issue of whether the defendant's due process right to a plea canvass was violated turns on whether the defendant was, by pleading guilty, waiving his right to a jury trial on the factual issues that triggered the enhancement of his sentence under part B of the information. I further agree that this inquiry is controlled by the United States Supreme Court's decision in *Apprendi* and its progeny. I depart, however, from the reasoning of the majority opinion in its interpretation and application of the rule laid down in that case.

In *Apprendi*, the Supreme Court set forth the rule regarding when a defendant is entitled to a jury finding of facts that would increase his or her criminal penalty beyond the statutorily prescribed maximum. Id., 490. In that case, the defendant entered a guilty plea to two counts of second degree possession of a firearm for an unlawful purpose and one count of third degree unlawful possession of an antipersonnel bomb. Id., 469–70. The trial court subsequently held a hearing regarding the applicability of New Jersey's hate crime statute, which provides for an extended term of imprisonment if the trial judge finds by a preponderance of the evi-

dence that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." (Internal quotation marks omitted.) Id., 468–69. The trial judge made the requisite finding under the hate crime statute and enhanced the defendant's sentence accordingly. Id., 471.

On appeal, the Supreme Court concluded that the New Jersey hate crime statute was unconstitutional because the due process clause of the fifth and fourteenth amendments to the United States constitution and the sixth amendment's right to a jury trial make it "unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." (Internal quotation marks omitted.) Id., 490. Accordingly, the court established the following rule: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[1] Id.; accord *Blakely* v. *Washington*, 542 U.S. 296, 301–304, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (invalidating defendant's sentence under rule set forth in *Apprendi* because sentence was enhanced beyond statutorily prescribed maximum on basis of trial court's determination that defendant acted with deliberate cruelty).

The *Apprendi* court excepted the fact of a prior conviction from the general rule on the basis of the Supreme Court's prior decision in *Almendarez-Torres* v. *United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). In that case, the court concluded that the defendant could be subject to a longer prison sentence based on the fact that he had been previously convicted for "aggravated felonies," despite the fact that such prior convictions were not charged in the defendant's indictment.[2] Id., 226–27. In reaching this conclusion, the court rejected the defendant's argument that the federal constitution requires that the fact of his prior convictions also be proved to a jury beyond a reasonable doubt. Id., 239.

The court in *Apprendi* described *Almendarez-Torres* as "at best an exceptional departure from the historic practice"; *Apprendi* v. *New Jersey*, supra, 530 U.S. 487; of charging in an indictment all facts needed to inform the defendant of the crime charged and the subsequent penalty if found guilty, of trying such facts to a jury, and proving such facts to a jury beyond a reasonable doubt. Id., 476. The court also intimated that *Almendarez-Torres* was decided wrongly and if the fact of prior conviction had been contested it would need to be proved to a jury beyond a reasonable doubt, but it

declined to revisit the case because the defendant did not challenge its validity. Id., 489–90. Instead, the court treated *Almendarez-Torres* as a narrow exception to the general rule requiring the jury to find any facts beyond a reasonable doubt that would increase the penalty beyond the statutorily prescribed maximum.[3] Id., 490.

The court reasoned that its decision in *Almendarez-Torres* could be excepted from the general rule that it was announcing because that decision "turned heavily upon the fact that the additional sentence to which the defendant was subject was the prior commission of a serious crime. . . . Both the certainty that procedural safeguards attached to any fact of prior conviction, and the reality that [the defendant in *Almendarez-Torres*] did not challenge the accuracy of that fact in his case, mitigated the due process and [s]ixth [a]mendment concerns otherwise implicated in allowing a judge to determine a fact increasing punishment beyond the maximum of the statutory range." (Citations omitted; internal quotation marks omitted.) Id., 488; see also *Jones* v. *United States*, 526 U.S. 227, 249, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999) (noting that due process and sixth amendment concerns in *Almendarez-Torres* were mitigated because "unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees"). Indeed, the court noted that "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." *Apprendi* v. *New Jersey*, supra, 530 U.S. 496.

Applying the plain language of the rule set forth in *Apprendi*, it is apparent that the fact of whether the defendant was released on bond from an arrest is not a fact of prior conviction and is therefore a fact that the due process clause and the sixth amendment require to be proved to a jury beyond a reasonable doubt. The Arizona Court of Appeals, in *State* v. *Gross*, 201 Ariz. 41, 44, 31 P.3d 815 (App. 2001), reached this same conclusion based on a sentence enhancement statute that is nearly identical to § 53a-40b. In that case, the defendant was convicted after a jury trial of two counts of forgery. Id. Prior to sentencing, the trial court took judicial notice of a Superior Court record and found that the defendant had committed the present offense while released on bond for another felony offense. Id., 43. Accordingly, the trial court enhanced the defendant's sentence by two years on each count pursuant to Arizona Revised Statutes Annotated § 13-604 (R) (West 2001), which provides in relevant part that "[a] person

who is convicted of committing any felony offense, which felony offense is committed while the person is released on bail or on the defendant's own recognizance on a separate felony offense . . . shall be sentenced to a term of imprisonment two years longer than would otherwise be imposed for the felony offense committed while released on bond or on the defendant's own recognizance . . . ."

On appeal, the Court of Appeals concluded that the enhancement of the defendant's sentence based on the trial court's finding that the defendant committed the present offenses while on release awaiting trial on a separate felony charge violated *Apprendi*. *State* v. *Gross*, supra, 201 Ariz. 44. The court reasoned that, because the fact that the defendant was on release status resulted in a sentence beyond the statutorily prescribed maximum, the plain language of *Apprendi* required that the defendant's release status be submitted to the jury and proved beyond a reasonable doubt. Id. The court did acknowledge that it would be rather easy for the court to take judicial notice of a court record to determine the release date, but it concluded that "[u]nder *Apprendi*, it is a defendant's exposure to additional punishment, not the ease or accuracy with which that fact can be determined by a trial court, that is pivotal in triggering a defendant's right to have a jury decide." Id., 45.

Despite the narrow wording of the prior conviction exception to the general rule set forth in *Apprendi*, the majority correctly notes that some courts have concluded that other facts, such as the defendant's status as being on probation or parole and the defendant's release date from prison, also fall within that exception because they arise from and are essentially analogous to a prior conviction. See, e.g., *People* v. *Montoya*, Court of Appeals, Docket No. 03CA0696, 2006 Colo. App. LEXIS 220, *6 (Colo. App. February 23, 2006) (concluding that "fact that [the] defendant was on parole or probation is inextricably linked to his prior conviction and thus falls within the prior conviction exception"); *State* v. *Calloway*, 914 So. 2d 12, 14 (Fla. App. 2005) (concluding that date defendant was released from prison falls within prior conviction exception because "it is directly derivative of a prior conviction"), cert. denied, U.S. , 126 S. Ct. 1794, 164 L. Ed. 2d 534 (2006); *State* v. *Allen*, 706 N.W.2d 40, 48 (Minn. 2005) (concluding that fact defendant was on probation "arises from, and is so essentially analogous to, the fact of a prior conviction, that constitutional considerations do not require it to be determined by a jury"), cert. denied, U.S. , 126 S. Ct. 1884, 164 L. Ed. 2d 583 (2006). These courts reason that, because these facts are bound up in the prior conviction to which constitutionally required procedural safeguards attached, the sixth amendment concerns expressed in *Apprendi* are not implicated. See *People* v. *Montoya*, supra, *6–7;

State v. *Calloway*, supra, 14; *State* v. *Allen*, supra, 47–48.

Even if I were to assume that the prior conviction exception should be extended to facts that arise from and are so essentially analogous to a prior conviction, the exception nonetheless would be inapplicable in the present case. Here, the defendant's sentence was enhanced based on the fact that he was released on bond after an arrest at the time when the present offenses were committed. This fact plainly did not arise from a prior conviction. Further, this fact cannot be said to be essentially analogous to a prior conviction because the substantial procedural safeguards that attach to the factual finding of a prior conviction, namely, the rights to a jury trial and to have the state prove the relevant facts beyond a reasonable doubt, do not attach to a factual finding of a defendant's release status after an arrest. Cf. *United States* v. *Tighe*, 266 F.3d 1187, 1194 (9th Cir. 2001) (concluding that " 'prior conviction' exception to *Apprendi*'s general rule *must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt*" [emphasis added]); *State* v. *Brown*, 879 So. 2d 1276, 1290 (La. 2004) (concluding that juvenile adjudication does not fall within prior conviction exception because it "is not established through a procedure guaranteeing a jury trial"); but cf. *United States* v. *Jones*, 332 F.3d 688, 696 (3d Cir. 2003) (juvenile adjudication may fall within prior conviction exception if defendant was accorded "all the procedural safeguards that he [was] constitutionally due"); *United States* v. *Smalley*, 294 F.3d 1030, 1032–33 (8th Cir. 2002) (same). Accordingly, I conclude that the due process and sixth amendment concerns at issue in *Apprendi* would be implicated by a trial court's factual finding of the defendant's release status after an arrest.

The majority opinion also relies on *Ryle* v. *State*, 842 N.E.2d 320, 325 (Ind. 2005), in which the Indiana Supreme Court advanced an alternative reasoning for determining that the trial court could find that the defendant was on probation at the time his subsequent offense was committed. The court in *Ryle* noted that the United States Supreme Court in *Shepard* v. *United States*, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005), reaffirmed the use of certain documents by the trial court to determine the character of a prior conviction for the purpose of determining whether a sentence enhancement applies. *Ryle* v. *State*, supra, 324–25. The court in *Ryle* concluded that the trial court properly had found that the defendant was on parole based on references in a presentence investigation report to case files from courts in which the defendant was convicted because these type of judicial records bear the same hallmark of conclusive significance as those enumerated in *Shepard*. Id., 325.

I am not persuaded that the *Shepard* decision provides a basis on which a trial court constitutionally can find the fact of the defendant's release status after an arrest under § 53a-40b. In *Shepard* v. *United States*, supra, 544 U.S. 16, the defendant entered a plea of guilty to possessing a firearm as a felon in violation of 18 U.S.C. § 922 (g) (1). Because the defendant had four prior convictions under a Massachusetts state burglary statute, the government sought to apply the Armed Career Criminal Act (act), 18 U.S.C. § 924 (e), which requires a minimum fifteen year sentence for anyone possessing a firearm after three prior convictions for violent felonies, and the act makes burglary a violent felony if it was committed in a building or enclosed space. Id., 15–16. Because the Massachusetts burglary statute was more expansive than the definition of burglary under the act, the government urged the District Court judge to consider police reports that were submitted with complaint applications in order to show that the burglaries were committed in a building or enclosed space. Id., 17.

The court in *Shepard* reaffirmed its decision in *Taylor* v. *United States*, 495 U.S. 575, 602, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), in which it had allowed District Courts, in order to determine whether the prior convictions necessarily fell within the act's definition of burglary, to refer to the charging documents filed in the court of conviction and recorded judicial acts, such as the jury instructions, that could have limited the conviction to the type of burglary defined in the act. *Shepard* v. *United States*, supra, 544 U.S. 20. In order to encompass the scenario wherein the prior convictions arose from either a bench trial or a guilty plea, the *Shepard* court expanded the documents to which the District Court can refer to include: the judge's rulings of law and finding of facts; the transcript of the plea colloquy or the written plea agreement; and any finding of facts adopted by the defendant upon entering his or her plea. Id. The court did, however, reject the government's use of police reports because they go "beyond conclusive records made or used in adjudicating guilt . . . ." Id., 21. Instead, the court noted that the inquiry must be confined to reference to judicial records "of the convicting court approaching the certainty of the record of conviction in a [state that defines burglary in the same manner as the act]." Id., 23. Finally, Justice Souter, writing for four members of the court, noted that the court's recent decision in *Apprendi* also required that the District Court's inquiry be limited to judicial records that contain facts that *necessarily* had to be found by the convicting court. Id., 24–26. Justice Thomas, who concurred in the judgment of the court, took the position that any factual inquiry by the District Court into the judicial records of the defendant's prior convictions was unconstitutional under *Apprendi*. Id., 26–28.

Turning to the present case, I cannot conclude that *Shepard* provides any support for a trial judge to find, on the basis of a record contained in a court file, the fact that a defendant was released on bond from an arrest on a specific date. Unlike the types of judicial records discussed in *Shepard*, such a judicial record was not "made or used in adjudicating guilt"; id., 21; and the facts contained in such a record were not necessarily found by a convicting court. Accordingly, such a fact does not approach the certainty of a prior conviction.[4]

Other courts, as the majority also correctly notes, have refused to extend the prior conviction exception to apply to facts such as the defendant's parole or probation status. See, e.g., *State* v. *Wissink*, 172 N.C. App. 829, 837, 617 S.E.2d 319 (2005) (concluding that, although probationary status is not far removed from prior conviction, rule set forth in *Apprendi* requires this fact to be found by jury and noting that fact of probationary status "did not have the procedural safeguards of a jury trial and proof beyond a reasonable doubt recognized in *Apprendi* as providing the necessary protection for defendants at sentencing"); *State* v. *Perez*, 196 Or. App. 364, 371–73, 102 P.3d 705 (2004) (concluding that fact defendant was on parole or probation was related to prior conviction, but procedural safeguards discussed in *Apprendi* did not apply to this fact, and, therefore, fact must be proved to jury beyond reasonable doubt), rev'd on other grounds, 340 Or. 310, 131 P.3d 168 (2006); *State* v. *Jones*, 126 Wash. App. 136, 142–46, 107 P.3d 755 (2005) (concluding that whether defendant was in community placement at time offense committed does not fall within prior conviction exception because procedural safeguards of fact of prior conviction are not applicable and rejecting view that prior conviction exception should be viewed to encompass facts related to past conviction because *Apprendi* plainly stated that exception was narrow).

Although the majority generally characterizes these decisions refusing to expand the prior conviction exception as formalistic, I believe that these courts properly limited this exception to the fact of prior conviction because the *Apprendi* court firmly stated that it was carving out only a narrow exception from its general rule requiring a jury finding of the sentence enhancing facts. Not only did the court refer to *Almendarez-Torres*, the decision on which the exception is based, as "at best an *exceptional* departure from the historic practice" regarding criminal proceedings; (emphasis added) *Apprendi* v. *New Jersey*, supra, 530 U.S. 487; it also stated its doubts regarding the correctness of this decision. Id., 489–90 and n.15; see also *Shepard* v. *United States*, supra, 544 U.S. 27–28 (Thomas, J., concurring) (noting that *Almendarez-Torres* has been eroded by court's sixth amendment jurisprudence and majority of

court now believes it was decided wrongly). On the basis of these reservations, the court explicitly stated that the exception it was creating to accommodate the *Almendarez-Torres* decision was a "*narrow exception* . . . ." (Emphasis added.) *Apprendi* v. *New Jersey*, supra, 490; see also *United States* v. *Tighe*, supra, 266 F.3d 1194 (noting that "*Apprendi* [c]ourt's serious reservations about the reasoning of *Almendarez-Torres* counsel against any extension" of prior conviction exception).

The majority opinion does, however, construe some of these decisions as adopting what it describes as a "context driven approach," wherein a jury trial would be required only if the relevant inquiry was of the type of "complicated and intensively factual inquiry that clearly would fall within the jury's traditional province."[5] Employing this context driven approach, the majority concludes that the fact of whether the defendant was released on bond after an arrest at the time of the subsequent offenses need not be tried to a jury because it can be proven easily by reference to a court file. The majority noted that "once the defendant was convicted under part A of the information, demonstrating that he had committed the crimes charged on the date specified, the only issue left open—whether he was on release from an arrest at the time—properly could have been the subject of judicial notice." I agree that evidence found in a court file likely would be able to answer the factual question of the defendant's status and such evidence is amenable to judicial notice. See *McCarthy* v. *Warden*, 213 Conn. 289, 293, 567 A.2d 1187 (1989) ("[w]e may . . . take judicial notice of the court files in another suit between the parties, especially when the relevance of that litigation was expressly made an issue at this trial"), cert. denied, 496 U.S. 939, 110 S. Ct. 3220, 110 L. Ed. 2d 667 (1990); *State* v. *Sanko*, 62 Conn. App. 34, 42, 771 A.2d 149 (noting that court may take judicial notice from judicial record of defendant's status vis-a-vis criminal justice system under § 53a-40b), cert. denied, 256 Conn. 905, 772 A.2d 599 (2001). Nevertheless, the ease of proof does not mean that no factual inquiry is necessary where the parties contest that fact. See *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 301, 57 S. Ct. 724, 81 L. Ed. 1093 (1937) ("[judicial] notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence"); see also *Jacobs* v. *Healey Ford-Subaru, Inc.*, 231 Conn. 707, 730 n.24, 652 A.2d 496 (1995) ("doctrine of judicial notice excuses the party having the burden of establishing a fact from introducing formal proof of the fact" [internal quotation marks omitted]).

Further, the majority's reasoning, which hinges the right to a jury trial on the ease by which the underlying fact may be proven, finds no support in *Apprendi*. As we have noted previously herein, the court in *Apprendi*

did not except the fact of prior convictions from the general rule requiring jury fact-finding because the fact of prior conviction was easily proven by reference to a court file; rather, the court incorporated this exception because of the procedural safeguards that attached to the fact of conviction and the reality that the defendant in *Almendarez-Torres* did not contest the fact of his prior conviction. *Apprendi* v. *New Jersey*, supra, 530 U.S. 488. Indeed, the *Apprendi* court's dictum intimating that a jury finding would be required, under its reasoning, if the fact of prior conviction had been contested in *Almendarez-Torres*[6] undermines the majority opinion's reasoning because the fact of prior conviction could also have been proven easily by reference to the court file. As the Arizona Court of Appeals stated, "[u]nder *Apprendi*, it is a defendant's exposure to additional punishment, not the ease or accuracy with which that fact can be determined by a trial court, that is pivotal in triggering a defendant's right to have a jury decide." *State* v. *Gross*, supra, 201 Ariz. 45.

Finally, I do not believe that it would be appropriate to limit the defendant's right to a jury trial on the basis of the majority opinion's context driven approach because it would require this court to engage in a subjective analysis of how complicated or easy a given fact would be to prove and it is this type of subjective inquiry regarding the outer contours of the sixth amendment's right to a jury trial that the United States Supreme Court disapproved of in *Blakely* v. *Washington*, supra, 542 U.S. 296. In *Blakely*, the court expressly rejected the view that legislatures should be allowed to, *within certain limits*, establish that certain factors are to be considered sentencing factors found by the trial court. Id., 307. The court noted that this view would mean, in operation, "that the law must not go too far—it must not exceed the judicial estimation of the proper role of the judge." Id. The court rejected the notion that the sixth amendment contains this subjective standard, as opposed to the bright line rule of *Apprendi*. Id., 308. The court stated that the right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." Id., 305–306. Accordingly, the court expressed its doubt "that the [f]ramers would have left [the] definition of the scope of jury power up to judges' intuitive sense of how far is *too far*."[7] (Emphasis in original.) Id., 308. In the context of the majority's opinion, I must conclude that the framers also would not have wanted to limit the right to a jury trial based on a judge's intuitive sense of how easy or complicated a given fact would be to prove.

I therefore conclude that, in the present case, if the defendant had not entered a guilty plea, he would have been entitled to a jury finding regarding whether he

was released on bond from an arrest at the time he committed the crimes charged in part A of the information. Accordingly, by pleading guilty to the sentence enhancement under § 53a-40b, the defendant waived the same rights that were discussed in *Boykin* v. *Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), namely, his fifth amendment privilege against self-incrimination and his sixth amendment rights to a jury trial and to confront his accusers. To waive such fundamental constitutional rights validly under the due process clause, the waiver must be "an intentional relinquishment or abandonment of a known right or privilege." (Internal quotation marks omitted.) *McCarthy* v. *United States*, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969). I therefore conclude that, if a trial court fails to canvass adequately the defendant to ensure that the defendant knowingly and voluntarily entered a guilty plea to part B of an information charging the defendant with a sentence enhancement under § 53a-40b, such a guilty plea is obtained in violation of due process and is therefore voidable.

An examination of the record in the present case reveals that the trial court made no effort to ascertain whether the defendant's guilty plea was made knowingly and voluntarily. The complete exchange between the court and the defendant consisted of the court directing the clerk to put the defendant to plea on part B of the information, the clerk informing the defendant that he was charged under part B of the information with violating § 53a-40b and asking the defendant how he wished to plead, and the defendant responding that he pleaded guilty. Thus, the record in the present case does not reveal any facts from which a reasonable conclusion could be drawn that the plea was made knowingly and voluntarily. Accordingly, I conclude that there was a clear violation of the defendant's constitutional rights because his guilty plea to part B of the information did not comply with constitutional standards.[8] See *Boykin* v. *Alabama*, supra, 395 U.S. 242 ("[i]t was error, plain on the face of the record, for the trial judge to accept [the] petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary"); *State* v. *Bugbee*, 161 Conn. 531, 535–36, 290 A.2d 332 (1971) (concluding that, because trial court record was completely silent as to whether defendant's guilty plea was knowing and voluntary, plea was not in compliance with constitutional standards). The defendant should therefore be given the opportunity to withdraw his plea.

I therefore respectfully dissent.

[1] The United States Supreme Court in *Blakely* v. *Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), defined the maximum sentence to be "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Accordingly, the current rule, as set forth in *United States* v. *Booker*, 543 U.S. 220, 244, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), is that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a

jury beyond a reasonable doubt."

[2] The factual background of the *Almendarez-Torres* decision is described in detail in footnote 20 of the majority opinion.

[3] Specifically, the court in *Apprendi* stated: "Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, [the defendant] does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence." *Apprendi* v. *New Jersey*, supra, 530 U.S. 489–90.

[4] The majority opinion also relies on *State* v. *Sanko*, 62 Conn. App. 34, 42, 771 A.2d 149, cert. denied, 256 Conn. 905, 772 A.2d 599 (2001), in which the Appellate Court concluded that the defendant was not deprived unconstitutionally of a jury trial on whether his sentence could be enhanced under § 53a-40b. The basis for the Appellate Court's decision was twofold. First, the court concluded that no jury trial was required because there was no issue of fact. Id., 43. Specifically, the court noted that the defendant's counsel conceded at the sentencing hearing that the defendant was released on a written promise to appear following a conviction for a prior crime when he committed the subsequent offense. Id. Second, the court also determined that the due process and sixth amendment concerns were mitigated because of the defendant's concession regarding his prior conviction. Id., 44–45.

The present case is distinguishable from *Sanko* because the defendant has not conceded that he was released on bond from an arrest at the time he committed the offenses with which he is charged. In his brief in this court, the defendant claims never to have stipulated as to his status at the time of the present offenses. Further, my review of the record in the present case reveals that, although the defendant, during his sentencing hearing, made numerous allusions to his prior arrest for disorderly conduct, he did not admit explicitly that he was, in fact, released on bond on the date of the subsequent offenses.

[5] The majority identifies *State* v. *Jones*, supra, 126 Wash. App. 136, and *Markwood* v. *Renard*, 203 Or. App. 145, 125 P.3d 39 (2005), as employing a context driven approach to determine whether a jury finding was necessary based on the complexity and intensively factual nature of the inquiry. I cannot agree that these courts employed such an analysis. In *Jones*, the court concluded that the fact that the defendant was in community placement does not fall within the prior conviction exception because the facts necessary to make this finding were contained in department of correction records and not within the judgment or sentence of the prior conviction. *State* v. *Jones*, supra, 143–44. Thus, the *Jones* court concluded that the facts contained within these records do not fall within the prior conviction exception because they "do not bear the same procedural protections as facts necessarily determined by the jury's verdict." Id., 145. Accordingly, I cannot agree that the *Jones* court's decision was based on the "complicated and intensively factual inquiry" into the defendant's status as being in community placement at the time of the offenses. Rather, the fact of the defendant's status as being in community placement did not fall within the prior conviction exception because the procedural protections that apply to the fact of conviction do not apply to department of correction records.

In *Markwood* v. *Renard*, supra, 203 Or. App. 150, the court concluded that the defendant was entitled to a jury finding regarding an increased sentence based on his probationary status at the time he committed the offenses with which he was charged even though the defendant admitted that he was on probation at that time. The court reasoned that, under Oregon law, "an upward departure sentence based on a defendant's supervisory status requires further inferences about the malevolent quality of the offender and the failure of his [supervisory] status to serve as an effective deterrent . . . ." (Internal quotation marks omitted.) Id. Because the defendant did not admit to those further facts, the court concluded that the defendant was entitled under *Apprendi* to a jury finding of those additional facts. Id. The court did not consider whether a jury would have been required to find the fact that the defendant was on probation if he had not admitted to that fact. The court did, however, cite to its prior decision in *State* v. *Perez*, supra, 196 Or. App. 371–72, in which it had concluded that the fact that the defendant was on parole or probation does not fall within the prior conviction exception because this fact "has not been proved to a jury beyond a reasonable doubt, so the same 'procedural safeguards' had not attached

to that 'fact' . . . ." Accordingly, I cannot conclude that the Oregon Court of Appeals has adopted such a context driven approach to determining when a jury finding is required under *Apprendi*.

[6] See footnote 3 of this opinion.

[7] Indeed, the framers had expressed the fear that "the jury right could be lost not only by gross denial, but by erosion." (Internal quotation marks omitted.) *Apprendi* v. *New Jersey*, supra, 530 U.S. 483. As the United States Supreme Court noted in *Jones* v. *United States*, supra, 526 U.S. 248, "[o]ne contributor to the ratification debates . . . commenting on the jury trial guarantee in [article three, § 2, of the United States constitution] . . . warn[ed] of the need 'to guard with the most jealous circumspection against the introduction of new, and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time, imperceptibly undermine this best preservative of LIBERTY.' " Accordingly, even though the present case presents a question that admittedly challenges the sixth amendment right to jury trial on the margins, I believe that this court should nonetheless view any expansion of the prior conviction exception with the most jealous circumspection.

[8] Because the defendant's claim was unpreserved, he can prevail on this claim only if he satisfies the four-pronged test set forth in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). Under *Golding*, the defendant can prevail on this claim only if the following conditions are met: "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." Id. I agree with the majority opinion that the first two prongs were satisfied. Because I conclude that the trial court's failure to canvass adequately the defendant was a clear constitutional violation, I conclude that the third prong of *Golding* was satisfied. Under the fourth prong of the *Golding* analysis, the state bears the burden of proving that the constitutional error was harmless beyond a reasonable doubt. See *State* v. *Estrella*, 277 Conn. 458, 477, 893 A.2d 348 (2006); *State* v. *Faust*, 237 Conn. 454, 470, 678 A.2d 910 (1996). In the present case, the state has failed to meet its burden because it did not to argue, in its brief in this court, that the constitutionally inadequate canvass was harmless beyond a reasonable doubt.