STATE OF CONNECTICUT *v.* FERNANDO A.*
(SC 18045)
(SC 18103)

Rogers, C. J., and Norcott, Palmer, Vertefeuille, Zarella, Schaller and McLachlan, Js.[1]

Argued March 12, 2008—officially released November 3, 2009

Steven D. Ecker, with whom was *Alinor C. Sterling*, for the appellant (defendant).

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *David I. Cohen*, state's attorney, *Kevin J. Dunn*, assistant state's attorney, and *David R. Applegate*, deputy assistant state's attorney, for the appellee (state).

Richard Blumenthal, attorney general, and *Jane R. Rosenberg* and *Susan Quinn Cobb*, assistant attorneys general, filed a brief for the department of children and families as amicus curiae.

Hakima Bey-Coon filed a brief for the office of the victim advocate as amicus curiae.

Daniel J. Foster filed a brief for the American Civil Liberties Union Foundation of Connecticut as amicus curiae.

Anne C. Dranginis and *Proloy K. Das* filed a brief for the Connecticut Coalition Against Domestic Violence as amicus curiae.

Opinion

NORCOTT, J. In this public interest appeal, we consider the nature of the hearing that a defendant must receive prior to the issuance of a criminal protective order in a family violence case (criminal protective order) pursuant to General Statutes § 54-63c (b).[2] The defendant, Fernando A., appeals, upon the grant of his application filed pursuant to General Statutes § 52-265a,[3] from the trial court's denial of his request for an evidentiary hearing prior to the issuance of a criminal protective order. We conclude that § 54-63c (b), and the cross-referenced General Statutes § 46b-38c,[4] permit the trial court to issue a criminal protective order at the defendant's arraignment after consideration of oral argument and the family violence intervention unit's report (family services report). We also conclude that the trial court is required to hold, at the defendant's request made at the initial hearing, a subsequent hearing within a reasonable period of time at which the state will be required to prove the continued necessity of that order by a fair preponderance of the evidence, which may include reliable hearsay. Because the defendant did not receive this subsequent hearing as requested, we reverse the decision of the trial court.

The record reveals the following undisputed facts and procedural history. The defendant and his wife are involved in divorce proceedings. On October 14, 2007, the defendant was arrested on numerous family violence criminal charges arising from an incident wherein he allegedly had assaulted his wife.[5] Pursuant to § 54-63c (b), the police released the defendant that day on the conditions that he not enter the family home and that he avoid contact with his wife pending his first court appearance. At that appearance on October 15, 2007, the trial court, *Pavia*, *J.*, reviewed the family services report, and issued a criminal protective order as a condition of his pretrial release. Judge Pavia denied the defendant's request for an evidentiary hearing at that time, reasoning that "immediate judicial review of this matter is necessary to protect the safety and well-being of the victim and the family," and that "the need for expeditious assumption of judicial control following a defendant's arrest outweighs the need to minimize risk of error through adversary procedures." Judge Pavia then continued the case to October 18, 2007, so that the defendant could request a hearing on that date.

Subsequently, on October 18, 2007, the defendant appeared before the trial court, *Bingham*, *J.*, to request an evidentiary hearing to contest the continuation of the criminal protective order. The defendant argued that he was entitled to a full evidentiary hearing under both § 54-63c and the due process clause of the fourteenth amendment to the United States constitution[6] because the criminal protective order interfered with his "fundamental constitutional liberties to family integ-

rity: his right to be in his home, and not to be subject to a restraining order issued by a court and law enforcement authorities without judicial imprimatur." Judge Bingham denied the defendant's request for an evidentiary hearing, reasoning that the procedure for issuing a domestic violence protective order in criminal cases "is similar to a bail hearing, and you're not entitled to a full trial on a bail hearing."[7] See also footnote 26 of this opinion. This certified and expedited appeal followed.[8] See footnote 3 of this opinion.

On appeal, the defendant contends, inter alia, that the trial court improperly failed to conduct an evidentiary hearing prior to issuing a criminal protective order because § 54-63c (b) "expressly require[d]" the trial court to hold such a hearing when he first appeared in court. The defendant argues that the word "hearing," as used in § 54-63c (b), means an adversarial and formal adjudicative proceeding at which issues of fact and law are tried, evidence is taken, and witnesses and parties are heard. The defendant further contends that the cross-reference in § 54-63c (b) to § 46b-38c, the family violence criminal procedure statute that authorizes courts to impose criminal protective orders at the defendant's first court appearance; see footnote 4 of this opinion; requires that the criminal statute be applied consistently with the similarly worded General Statutes § 46b-15,[9] which, he argues, contemplates a full evidentiary hearing within fourteen days of the ex parte issuance of a civil domestic violence temporary restraining order. Finally, the defendant cites the legislative history of the statutes, and also relies on the rule of lenity, under which ambiguous criminal statutes are construed against the state.

In response, the state contends that criminal protective orders arise from bail or pretrial release proceedings that do not by themselves require an evidentiary hearing. The state also argues that, when the legislature enacted No. 07-123, § 1, of the 2007 Public Acts (P.A. 07-123), which amended § 54-63c (b), it presumptively was aware of *State* v. *Doe*, 46 Conn. Sup. 598, 610, 765 A.2d 518 (2000), which held that an evidentiary hearing is not constitutionally required prior to the issuance of a criminal protective order under § 46b-38c. Thus, had the legislature intended to require a full evidentiary hearing, it would have drafted § 54-63c (b) using language similar to that contained in the witness protective order statute, General Statutes § 54-82r.[10] Finally, the state argues that the rule of lenity is inapplicable because it applies only when the statutory language, legislative history and underlying policies fail to resolve the ambiguity. Although we agree with the state that §§ 54-63c (b) and 46b-38c (d) permit the trial court to issue a criminal protective order at arraignment after consideration of oral argument and the family services report, we also conclude that those statutes require the trial court to hold, at the defendant's request made

at the initial hearing, a subsequent hearing within a reasonable period of time wherein the state will be required to prove the continued necessity of that order by a fair preponderance of the evidence, which may include reliable hearsay.[11]

"Issues of statutory construction raise questions of law, over which we exercise plenary review. . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . .

"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. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Citation omitted; internal quotation marks omitted.) *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic District Commission*, 284 Conn. 838, 847, 937 A.2d 39 (2008).

We begin with the text of § 54-63c (b), which authorizes police officers in "family violence crime" cases, after making "reasonable," but unsuccessful, attempts to reach a bail commissioner, to "order the release of such person upon the execution of a written promise to appear or the posting of such bond as may be set by the police officer and may impose nonfinancial conditions of release which may require that the arrested person do one or more of the following: (1) Avoid all contact with the alleged victim of the crime, (2) comply with specified restrictions on the person's travel, association or place of abode that are directly related to the protection of the alleged victim of the crime, or (3) not use or possess a dangerous weapon, intoxicant or controlled substance. . . ."[12] Section 54-63c (b) then provides that: "Any nonfinancial conditions of release imposed pursuant to this subsection shall remain in effect until the arrested person is presented before the Superior Court pursuant to subsection (a) of section 54-1g.[13] *On such date, the court shall conduct a hearing pursuant to section 46b-38c at which the defendant is entitled to be heard with respect to the issuance of a protective order*." (Emphasis added.)

The text of § 54-63c (b) does not specify the nature

of the hearing other than describing it as one held "pursuant to section 46b-38c," upon being presented to the trial court pursuant to General Statutes § 54-1g (a). Thus, § 54-63c (b) must be read in conjunction with § 46b-38c (a), which establishes "family violence response and intervention units in the Connecticut judicial system to respond to cases involving family violence . . . [which] shall be coordinated and governed by formal agreement between the Chief State's Attorney and the Judicial Department." Each geographical area of the Superior Court has a "local family violence intervention unit"; General Statutes § 46b-38c (b); that is required to: "(1) [a]ccept referrals of family violence cases from a judge or prosecutor, (2) prepare written or oral reports on each case for the court by the next court date to be presented at any time during the court session on that date, (3) provide or arrange for services to victims and offenders, (4) administer contracts to carry out such services, and (5) establish centralized reporting procedures. . . ." General Statutes § 46b-38c (c); see also footnote 4 of this opinion.

Subsection (d) of § 46b-38c prescribes only certain limited aspects of the hearing process and provides: "In all cases of family violence, a written or oral report and recommendation of the local family violence intervention unit shall be available to a judge at the first court date appearance to be presented at any time during the court session on that date. . . ." With the family services report available to it, the trial court then is authorized to "consider and impose the following conditions to protect the parties, including, but not limited to: (1) Issuance of a protective order pursuant to subsection (e) of this section; (2) prohibition against subjecting the victim to further violence; (3) referral to a family violence education program for batterers; and (4) immediate referral for more extensive case assessment. . . ." General Statutes § 46b-38c (d); see also footnote 4 of this opinion.

Similar to § 54-63c (b), the text of § 46b-38c (d) does not specify the precise nature of how the hearing shall be conducted, or what the defendant's rights are therein. Because the term "hearing" is "not defined in the statute, General Statutes § 1-1 (a) requires that we construe the term in accordance with the commonly approved usage of the language. . . . If a statute or regulation does not sufficiently define a term, it is appropriate to look to the common understanding of the term as expressed in a dictionary." (Citation omitted; internal quotation marks omitted.) *Jim's Auto Body* v. *Commissioner of Motor Vehicles*, 285 Conn. 794, 808, 942 A.2d 305 (2008). The word "hearing" is defined alternatively as an "opportunity to be heard, to present one's side of a case, or to be generally known or appreciated," "a listening to arguments" or "a preliminary examination in criminal procedure . . . ." Merriam-Webster's Collegiate Dictionary (10th Ed. 1993). Simi-

larly, Black's Law Dictionary (7th Ed. 1999) defines "hearing" as a "judicial session, usu[ally] open to the public, held for the purpose of deciding issues of fact or of law, *sometimes with witnesses testifying* . . . ." (Emphasis added.) Resorting to these dictionary definitions does not answer conclusively the question of whether a hearing under § 54-63c (b) must be evidentiary in nature. The statute is, therefore, ambiguous, and we may consult extratextual sources in resolving this issue. See General Statutes § 1-2z.

The legislative history of both §§ 46b-38c and 54-63c (b) similarly does not disclose clearly the nature of the hearing required. The history of P.A. 07-123, codified in part at § 54-63c (b), indicates only that the statute was enacted to authorize police officers, in the event that "reasonable efforts" to locate a bail commissioner failed, to impose nonfinancial conditions of release pending the defendant's first appearance before the trial court. See 50 S. Proc., Pt. 11, 2007 Sess., p. 3390, remarks of Senator Andrew McDonald (noting "problem in our domestic violence laws and domestic family relations laws with the setting of bail conditions when an individual is arrested, most normally, over the weekend"); see also 50 H.R. Proc., Pt. 12, 2007 Sess., pp. 3875–76, remarks of Representative Michael Lawlor (authority of police to impose nonfinancial conditions is limited to "between the time the person is actually arrested and released, and the time the courts actually open, which would typically be the next day, or in the case of a Friday night or Saturday arrest, on Monday morning"). In enacting P.A. 07-123, the legislature recognized that giving police officers this authority to impose release conditions would avoid the unnecessary detention of defendants, while providing additional and formal protection for complainants pending the defendant's first court appearance. See 50 H.R. Proc., supra, pp. 3886–88; see also id., p. 3895, remarks of Representative Kevin Witkos ("[o]ftentimes prior to this, the party was taken out of the home, brought down to the police station and the victim remained at home unknowing whether that person would return home to cause greater harm").

The legislative history of the cross-referenced § 46b-38c similarly fails to illuminate the nature of the required hearing. That statute was enacted in 1986 in response to the domestic abuse of Tracey Thurman, a woman whose local police department had failed to aid her after repeated beatings by her former husband. See 29 H.R. Proc., Pt. 14, 1986 Sess., pp. 5258–59, remarks of Representative Pauline Kezer. The legislature created family violence response and intervention units to accept referrals of family violence cases from judges or prosecutors, and prepare family services reports and recommendations for the court based on interviews of the complainant and the defendant. See General Statutes § 46b-38c (c) and (d). The legislative history of

§ 46b-38c does not, however, explain further the nature of the hearing that should be held before the trial court on the defendant's first court date.

Other factors, however, lead us to conclude that the legislature did not intend for a hearing held pursuant to §§ 54-63c (b) and 46b-38c (d) to be a full evidentiary proceeding akin to a minitrial. In particular, we note that "[t]he legislature is presumed to know the judicial interpretation placed upon a statute"; *Charles* v. *Charles*, 243 Conn. 255, 262, 701 A.2d 650 (1997), cert. denied, 523 U.S. 1136, 118 S. Ct. 1838, 140 L. Ed. 2d 1089 (1998); and that the legislature "is presumed . . . to be cognizant of judicial decisions relevant to the subject matter of a statute . . . and to know the state of existing relevant law when it enacts a statute." (Citations omitted; internal quotation marks omitted.) *State* v. *Dabkowski*, 199 Conn. 193, 201, 506 A.2d 118 (1986).

Thus, it is significant that the language of § 54-63c (b) contemplates that the criminal protective order hearing held pursuant to § 46b-38c will be held in conjunction with an arraignment pursuant to § 54-1g (a). This is because the Superior Court, in the 2000 decision in *State* v. *Doe*, supra, 46 Conn. Sup. 598, relied on *Gerstein* v. *Pugh*, 420 U.S. 103, 119, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975), and concluded that a hearing held pursuant to § 46b-38c, at which the defendant did not have the opportunity to cross-examine the complainant prior to the issuance of a criminal protective order in a family violence case, did not violate the defendant's due process rights because it was a bail related hearing that required "the need for expeditious assumption of judicial control . . . ." (Internal quotation marks omitted.) *State* v. *Doe*, supra, 609. The court reasoned that "the defendant may at any time have the conditions of his release modified pursuant to General Statutes § 54-69.[14] At that time, the defendant is entitled to have a full hearing." Id., 610. Thus, when the legislature amended § 54-63c (b) by enacting P.A. 07-123, it presumably was aware of a published decision concluding that a full adversarial hearing was not constitutionally required for the initial issuance at arraignment of a criminal protective order pursuant to § 46b-38c. Accordingly, we find it significant that the legislature failed to amend the statute by imposing specific hearing requirements when it enacted P.A. 07-123.[15] See, e.g., *Mahon* v. *B.V. Unitron Mfg., Inc.*, 284 Conn. 645, 665, 935 A.2d 1004 (2007) ("[a]lthough we are aware that legislative inaction is not necessarily legislative affirmation . . . we also presume that the legislature is aware of [the court's] interpretation of a statute, and that its subsequent nonaction may be understood as a validation of that interpretation" [internal quotation marks omitted]).

We also are "guided by the principle that the legislature is always presumed to have created a harmonious

and consistent body of law . . . . [T]his tenet of statutory construction . . . requires us to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction. . . . Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed. . . . That tenet of statutory construction is well grounded because [t]he General Assembly is always presumed to know all the existing statutes and the effect that its action or non-action will have upon any one of them." (Citations omitted; internal quotation marks omitted.) *Hatt* v. *Burlington Coat Factory*, 263 Conn. 279, 310, 819 A.2d 260 (2003).

A review of other criminal procedure statutes demonstrates that, when the legislature has desired to impose specific requirements on the conduct of a pretrial hearing, it has said so explicitly. For example, § 54-82r, which authorizes courts to impose protective orders prohibiting the harassment of witnesses in criminal cases; see footnote 10 of this opinion; is drafted similarly to § 54-63c. Unlike the family violence statute, however, the legislature specifically required in § 54-82r (a) that a judge considering the entry of a protective order for the benefit of a witness hold a "hearing at which hearsay evidence shall be admissible" and "[find] by a preponderance of the evidence that harassment of an identified witness in a criminal case exists or that such order is necessary to prevent and restrain the commission of a violation of section 53a-151 or 53a-151a. *Any adverse party named in the complaint has the right to present evidence and cross-examine witnesses at such hearing.* . . ." (Emphasis added.) Similarly, General Statutes § 54-64f,[16] which authorizes trial courts to impose different conditions or to revoke the bail of defendants who have violated the "reasonable conditions" of their releases, similarly requires an "evidentiary hearing at which hearsay or secondary evidence shall be admissible," along with a finding of the violation "by clear and convincing evidence . . . ." General Statutes § 54-64f (b) and (c). Thus, the text of related criminal procedure statutes indicates that, had the legislature intended the initial criminal protective order hearing to be evidentiary in nature in every case, it easily could have so required.[17] See *In re Ralph M.*, 211 Conn. 289, 307, 559 A.2d 179 (1989) ("the absence of any language in [General Statutes] § 46b-127 confining the court to the rules of evidence in a hearing to determine probable cause at the transfer stage of [the juvenile court] proceedings is a compelling indication that strict evidentiary standards were not intended to apply in such a proceeding"). Indeed, this lack of proce-

dural requirements, beyond the mandated availability of the family relations report, leads us to conclude that the legislature intended for trial courts to have some discretion to determine the scope of the hearing necessary prior to the initial issuance of a criminal protective order in a family violence case.

Moreover, our construction of § 46b-38c (d) necessarily is informed by the various exigencies faced by a trial court considering whether to grant a criminal protective order in a family violence case. Thus, we emphasize that the legislature did not intend for §§ 54-63c (b) and 46b-38c to entitle a defendant to an evidentiary hearing beyond consideration of the parties' arguments and the family services report prior to the *initial* issuance of a criminal protective order at arraignment, which may well occur within hours of the alleged incident of family violence. See General Statutes § 54-63c (b) (stating only that "defendant is entitled to be heard" at § 46b-38c hearing held at arraignment); see also *State* v. *Doe*, supra, 46 Conn. Sup. 609–10 (procedural due process does not require that defendant receive evidentiary hearing prior to *initial* issuance of criminal protective order or similar condition of release at arraignment). This reflects the potential need for immediate judicial intervention to restore order and safety in the home, as embodied in the legislature's enactment of P.A. 07-123, which allows police officers to impose temporary criminal protective orders as a release condition even prior to the defendant's arraignment. In our view, this limitation also reflects legislative recognition of the heavy flow of judicial business in the busy geographical area courts during arraignment sessions, the press of which is well described by Justice Schaller in his concurring and dissenting opinion. See *People* v. *Forman*, 145 Misc. 2d 115, 128, 546 N.Y.S.2d 755 (1989) ("the emergency nature of the decision, as well as the practical difficulties inherent in convening an immediate evidentiary hearing, mitigate against the imposition of such hearings as constitutionally required before a [temporary order of protection] may first be issued at arraignment").

We agree, however, with the defendant's claims that the extended effects of that initial emergency order may well cause a defendant significant pretrial deprivations of family relations and/or property.[18] This concern, and the legislature's desire to satisfy the defendant's due process rights under the fourteenth amendment to the United States constitution, is reflected in the comments of the sponsor of the bill enacted as P.A. 07-123, who viewed it as an attempt to "strike a very delicate balance here between the legitimate interests of law enforcement, and the important constitutional and civil liberty concerns that we would have [as] citizens . . . ." 50 H.R. Proc., supra, p. 3904, remarks of Representative Lawlor. Accommodation of this legislative desire to comply with the dictates of due process, and

the statutes' silence as to the precise nature of the hearing required; see *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 407, 944 A.2d 925 (2008) (" '[w]hen . . . a statutory provision is silent with respect to [the issue at hand], our analysis is not limited by . . . § 1-2z' "); leads us to conclude also that, after a criminal protective order has been issued at arraignment, a defendant is entitled, upon his request made at that time, to a more extensive hearing to be held within a reasonable period of time about the continued necessity of that order. At that second hearing, the state bears the burden of proving,[19] by a fair preponderance of the evidence, the continued necessity of the criminal protective order in effect since the defendant's arraignment.[20] Cf. *Frizado* v. *Frizado*, 420 Mass. 592, 597, 651 N.E.2d 1206 (1995) (although not expressly provided for by statute, party seeking civil domestic violence protective order must make case for relief by preponderance of evidence); *In re Morrill*, 147 N.H. 116, 117–18, 784 A.2d 690 (2001) (same); *Steckler* v. *Steckler*, 492 N.W.2d 76, 80 (N.D. 1992) (same); *Felton* v. *Felton*, 79 Ohio St. 3d 34, 42, 679 N.E.2d 672 (1997) (same); accord General Statutes § 54-82r (a) (preponderance of evidence standard applies at hearing to determine whether protective order is necessary for witness); *State* v. *Doe*, supra, 46 Conn. Sup. 610 (applying preponderance of evidence standard in criminal protective order case).

With respect to the type of proof required at this subsequent hearing, we further conclude that, inasmuch as the legislature has not required the introduction of evidence that conforms strictly with the rules of evidence; see *In re Ralph M.*, supra, 211 Conn. 307; the state may, consistent with the defendant's federal due process rights, proceed by proffer, supported by reliable hearsay evidence, and the trial court retains the discretion to determine whether testimony from the complainant or other witnesses is necessary for the order to continue.[21] Cf. *United States* v. *LaFontaine*, 210 F.3d 125, 130–32 (2d Cir. 2000) (government may proceed by proffer, and defendant's right to call government witness at hearing to revoke bail based on witness intimidation lies within discretion of trial court); *United States* v. *Smith*, 79 F.3d 1208, 1210 (D.C. Cir. 1996) (defendant's sixth amendment confrontation rights were not violated when government proceeded by proffer at preventive detention hearing, and defendant's due process rights were protected by right to counsel, to testify in his own behalf and to proffer testimony of others); see also *State* v. *Doe*, supra, 46 Conn. Sup. 610 (concluding that summons for disorderly conduct and police officer's report constituted sufficient evidence to meet preponderance of evidence standard in criminal protective order case).

Indeed, requiring the evidence admitted at this subsequent hearing to comply with the rigors of the rules of evidence would be inconsistent with other relevant

legislation governing pretrial hearings in criminal cases, including § 54-64f (b), which permits the admission of hearsay or secondary evidence at a hearing to determine whether the defendant has violated the conditions of his release, and § 54-82r (a), which permits the admission of hearsay evidence at a hearing to consider entry of a protective order for benefit of a witness. See footnotes 16 and 10 of this opinion. The defendant may, however, upon the trial court's acceptance of his proffer of relevant evidence regarding the continued necessity of the protective order, testify or present witnesses on his own behalf, and may cross-examine any witnesses whom the state might elect to present against him.[22] This defense evidence, along with the comprehensive initial proffer and the submission of evidence by the state, further will ensure that there will be a record adequate to review, on an expedited basis under General Statutes § 54-63g,[23] the trial court's ruling with respect to the continued necessity of the criminal protective order.

Accordingly, we conclude that §§ 54-63c (b) and 46b-38c permit the trial court to issue a criminal protective order at the defendant's arraignment after consideration of oral argument and the family services report.[24] We also conclude that the trial court is required to hold, at the defendant's request made at arraignment, a subsequent hearing within a reasonable period of time wherein the state will be required to prove the continued necessity of that order by a fair preponderance of the evidence, which may include reliable hearsay, and the defendant will have the opportunity to proffer relevant evidence to counter the state's case in support of the criminal protective order through his own testimony or that of other witnesses.[25] On the record of the present consolidated appeal, Judge Pavia did not need to conduct an immediate evidentiary hearing when she issued the initial criminal protective order at the defendant's arraignment. Rather, Judge Pavia properly set the matter down for a hearing three days later. At that time, however, Judge Bingham improperly concluded, as a matter of law, and, we acknowledge, without benefit of this opinion, that the defendant was not entitled to any kind of hearing beyond that which he already had received before either himself or Judge Pavia.[26] Accordingly, on remand, the defendant is entitled to the opportunity to request, and to receive, an evidentiary hearing as described in the preceding paragraph about the continued necessity of the criminal protective order.

The order in Docket No. SC 18103 is affirmed. The order in Docket No. SC 18045 is reversed and the case is remanded for further proceedings in accordance with the preceding paragraph.

In this opinion ROGERS, C. J., and VERTEFEUILLE, ZARELLA and McLACHLAN, Js., concurred.

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline

to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

[1] This case originally was argued before a panel of this court consisting of Justices Norcott, Palmer, Vertefeuille, Zarella and Schaller. Thereafter, the court, pursuant to Practice Book § 70-7 (b), sua sponte, ordered that the case be considered en banc. Accordingly, Chief Justice Rogers and Justice McLachlan were added to the panel, and they have read the record, briefs and transcript of oral argument.

The listing of justices reflects their seniority status as of the date of oral argument.

[2] General Statutes § 54-63c (b) provides: "If the person is charged with the commission of a family violence crime, as defined in section 46b-38a, and the police officer does not intend to impose nonfinancial conditions of release pursuant to this subsection, the police officer shall, pursuant to the procedure set forth in subsection (a) of this section, promptly order the release of such person upon the execution of a written promise to appear or the posting of such bond as may be set by the police officer. If such person is not so released, the police officer shall make reasonable efforts to immediately contact a bail commissioner to set the conditions of such person's release pursuant to section 54-63d. If, after making such reasonable efforts, the police officer is unable to contact a bail commissioner or contacts a bail commissioner but such bail commissioner is unavailable to promptly perform such bail commissioner's duties pursuant to section 54-63d, the police officer shall, pursuant to the procedure set forth in subsection (a) of this section, order the release of such person upon the execution of a written promise to appear or the posting of such bond as may be set by the police officer and may impose nonfinancial conditions of release which may require that the arrested person do one or more of the following: (1) Avoid all contact with the alleged victim of the crime, (2) comply with specified restrictions on the person's travel, association or place of abode that are directly related to the protection of the alleged victim of the crime, or (3) not use or possess a dangerous weapon, intoxicant or controlled substance. Any such nonfinancial conditions of release shall be indicated on a form prescribed by the Judicial Branch and sworn to by the police officer. Such form shall articulate (A) the efforts that were made to contact a bail commissioner, (B) the specific factual basis relied upon by the police officer to impose the nonfinancial conditions of release, and (C) if the arrested person was non-English-speaking, that the services of a translation service or interpreter were used. A copy of that portion of the form that indicates the nonfinancial conditions of release shall immediately be provided to the arrested person. A copy of the entire form shall be provided to counsel for the arrested person at arraignment. Any nonfinancial conditions of release imposed pursuant to this subsection shall remain in effect until the arrested person is presented before the Superior Court pursuant to subsection (a) of section 54-1g. On such date, the court shall conduct a hearing pursuant to section 46b-38c at which the defendant is entitled to be heard with respect to the issuance of a protective order."

Section 54-63c was substantially amended by No. 07-123, § 1, of the 2007 Public Acts, which was effective at the time of the defendant's arrest. Hereafter, unless otherwise indicated, references to this statute in this opinion are to the current revision, which includes the changes effected by that amendment.

[3] This appeal is the consolidation of two separate proceedings, Docket Nos. SC 18045 and SC 18103. Docket No. SC 18045 is an appeal from the October 18, 2007 order of the trial court, *Bingham*, *J.*, filed pursuant to General Statutes § 52-265a, which 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 within two weeks from the date of the issuance of the order or decision. The appeal shall state the question of law on which it is based.

"(b) The Chief Justice shall, within one week of receipt of the appeal, rule whether the issue involves a substantial public interest and whether delay may work a substantial injustice. . . ."

Because Chief Justice Rogers was unavailable, Justice Norcott, as the senior available associate justice, considered and granted the defendant's application in SC 18045 pursuant to Practice Book § 83-4. In addition, we note that this interlocutory appeal properly is before this court because "the 'order or decision' referred to in § 52-265a from which an appeal may be taken need not be a final judgment." *Laurel Park, Inc.* v. *Pac*, 194 Conn. 677, 678 n.1, 485 A.2d 1272 (1984).

Docket No. SC 18103 is an appeal from the October 15, 2007 order of the trial court, *Pavia*, *J.*, to the Appellate Court, and raises an issue identical

to that of the certified appeal in SC 18045. Ordinarily, this appeal would not properly be before this court because a defendant's exclusive nondiscretionary remedy from an order concerning conditions of release is a petition to the Appellate Court pursuant to General Statutes § 54-63g. See *State* v. *Ayala*, 222 Conn. 331, 338–39, 610 A.2d 1162 (1992). Nevertheless, we will exercise our discretion and treat the defendant's appeal in SC 18103 as a properly filed bail review petition in the Appellate Court. Cf. id., 341–42 (dismissing defendant's petition for certification to appeal pursuant to General Statutes § 51-197f from Appellate Court's determination on bail review motion, but treating that petition as properly filed § 52-265a petition). Inasmuch as SC 18103 is related to SC 18045, which is properly before this court pursuant to § 52-265a, we have transferred SC 18103 from the Appellate Court to this court, and consolidated it with SC 18045 pursuant to Practice Book § 61-7 and Practice Book § 65-3, which permits the transfer of release review petitions from the Appellate Court to this court "*in any case on appeal to the supreme court* . . . ." (Emphasis added.)

[4] General Statutes § 46b-38c provides in relevant part: "(a) There shall be family violence response and intervention units in the Connecticut judicial system to respond to cases involving family violence. The units shall be coordinated and governed by formal agreement between the Chief State's Attorney and the Judicial Department.

"(b) The Court Support Services Division, in accordance with the agreement between the Chief State's Attorney and the Judicial Department, shall establish within each geographical area of the Superior Court a local family violence intervention unit to implement sections 46b-1, 46b-15, 46b-38a to 46b-38f, inclusive, and 54-1g. The Court Support Services Division shall oversee direct operations of the local units.

"(c) Each such local family violence intervention unit shall: (1) Accept referrals of family violence cases from a judge or prosecutor, (2) prepare written or oral reports on each case for the court by the next court date to be presented at any time during the court session on that date, (3) provide or arrange for services to victims and offenders, (4) administer contracts to carry out such services, and (5) establish centralized reporting procedures. All information provided to a family relations officer in a local family violence intervention unit shall be solely for the purposes of preparation of the report and the protective order forms for each case and recommendation of services and shall otherwise be confidential and retained in the files of such unit and not be subject to subpoena or other court process for use in any other proceeding or for any other purpose, except that if the victim has indicated that the defendant holds a permit to carry a pistol or revolver or possesses one or more firearms, the family relations officer shall disclose such information to the court and the prosecuting authority for appropriate action.

"(d) In all cases of family violence, a written or oral report and recommendation of the local family violence intervention unit shall be available to a judge at the first court date appearance to be presented at any time during the court session on that date. A judge of the Superior Court may consider and impose the following conditions to protect the parties, including, but not limited to: (1) Issuance of a protective order pursuant to subsection (e) of this section; (2) prohibition against subjecting the victim to further violence; (3) referral to a family violence education program for batterers; and (4) immediate referral for more extensive case assessment. Such protective order shall be an order of the court, and the clerk of the court shall cause (A) a certified copy of such order to be sent to the victim, and (B) a copy of such order, or the information contained in such order, to be sent by facsimile or other means within forty-eight hours of its issuance to the law enforcement agency for the town in which the victim resides and, if the defendant resides in a town different from the town in which the victim resides, to the law enforcement agency for the town in which the defendant resides. If the victim is employed in a town different from the town in which the victim resides, the clerk of the court shall, upon the request of the victim, send, by facsimile or other means, a copy of such order, or the information contained in such order, to the law enforcement agency for the town in which the victim is employed within forty-eight hours of the issuance of such order.

"(e) A protective order issued under this section may include provisions necessary to protect the victim from threats, harassment, injury or intimidation by the defendant, including, but not limited to, an order enjoining the defendant from (1) imposing any restraint upon the person or liberty of the victim, (2) threatening, harassing, assaulting, molesting or sexually assaulting the victim, or (3) entering the family dwelling or the dwelling of the victim. A protective order issued under this section may include provisions necessary to protect any animal owned or kept by the victim including, but not limited to, an order enjoining the defendant from injuring or threatening to injure such animal. Such order shall be made a condition of the bail or release of the defendant and shall contain the following language: 'In accordance with section 53a-223 of the Connecticut general statutes, any violation of this order constitutes criminal violation of a protective order which is punishable by a term of imprisonment of not more than five years,

a fine of not more than five thousand dollars, or both. Additionally, in accordance with section 53a-107 of the Connecticut general statutes, entering or remaining in a building or any other premises in violation of this order constitutes criminal trespass in the first degree which is punishable by a term of imprisonment of not more than one year, a fine of not more than two thousand dollars, or both. Violation of this order also violates a condition of your bail or release, and may result in raising the amount of bail or revoking release.' Every order of the court made in accordance with this section after notice and hearing shall also contain the following language: 'This court had jurisdiction over the parties and the subject matter when it issued this protection order. Respondent was afforded both notice and opportunity to be heard in the hearing that gave rise to this order. Pursuant to the Violence Against Women Act of 1994, 18 USC 2265, this order is valid and enforceable in all fifty states, any territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico and tribal lands.' The information contained in and concerning the issuance of any protective order issued under this section shall be entered in the registry of protective orders pursuant to section 51-5c. . . ."

[5] The defendant was charged with one count each of the crimes of assault in the third degree in violation of General Statutes § 53a-61, disorderly conduct in violation of General Statutes § 53a-182, and reckless endangerment in the second degree in violation of General Statutes § 53a-64, and two counts of the crime of risk of injury to a child in violation of General Statutes (Rev. to 2007) § 53-21 (a) (1).

[6] The fourteenth amendment to the United States constitution, § 1, provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

[7] Specifically, Judge Bingham concluded that giving the defendant a full evidentiary hearing with the right to examine and subpoena witnesses, including the complainant, would place an "undue burden" on the complainant, who had indicated her fear of the defendant. Judge Bingham also rejected the defendant's statutory argument, concluding that the language of the statute did not expressly mandate a "full evidentiary hearing," and required only notice and the opportunity to be heard. For a more complete discussion of Judge Bingham's ruling, see footnote 26 of this opinion.

[8] We note that Judge Bingham subsequently modified the criminal protective order to permit the defendant some visitation with his children.

[9] General Statutes § 46b-15 provides in relevant part: "(a) Any family or household member as defined in section 46b-38a who has been subjected to a continuous threat of present physical pain or physical injury by another family or household member or person in, or has recently been in, a dating relationship who has been subjected to a continuous threat of present physical pain or physical injury by the other person in such relationship may make an application to the Superior Court for relief under this section.

"(b) The application form shall allow the applicant, at the applicant's option, to indicate whether the respondent holds a permit to carry a pistol or revolver or possesses one or more firearms. The application shall be accompanied by an affidavit made under oath which includes a brief statement of the conditions from which relief is sought. Upon receipt of the application the court shall order that a hearing on the application be held not later than fourteen days from the date of the order. The court, in its discretion, may make such orders as it deems appropriate for the protection of the applicant and such dependent children or other persons as the court sees fit. Such order may include temporary child custody or visitation rights and such relief may include but is not limited to an order enjoining the respondent from (1) imposing any restraint upon the person or liberty of the applicant; (2) threatening, harassing, assaulting, molesting, sexually assaulting or attacking the applicant; or (3) entering the family dwelling or the dwelling of the applicant. The court, in its discretion, may make such orders as it deems appropriate for the protection of any animal owned or kept by the applicant including, but not limited to, an order enjoining the respondent from injuring or threatening to injure such animal. If an applicant alleges an immediate and present physical danger to the applicant, the court may issue an ex parte order granting such relief as it deems appropriate. If a postponement of a hearing on the application is requested by either party and granted, the order shall not be continued except upon agreement of the parties or by order of the court for good cause shown.

"(c) Every order of the court made in accordance with this section shall contain the following language: 'This order may be extended by the court beyond six months. In accordance with section 53a-107, entering or remaining in a building or any other premises in violation of this order constitutes criminal trespass in the first degree. This is a criminal offense

punishable by a term of imprisonment of not more than one year, a fine of not more than two thousand dollars or both.'

"(d) No order of the court shall exceed six months, except that an order may be extended by the court upon motion of the applicant for such additional time as the court deems necessary. If the respondent has not appeared upon the initial application, service of a motion to extend an order may be made by first-class mail directed to the respondent at his or her last known address.

"(e) The applicant shall cause notice of the hearing pursuant to subsection (b) of this section and a copy of the application and the applicant's affidavit and of any ex parte order issued pursuant to subsection (b) of this section to be served on the respondent not less than five days before the hearing. The cost of such service shall be paid for by the Judicial Branch. Upon the granting of an ex parte order, the clerk of the court shall provide two certified copies of the order to the applicant. Upon the granting of an order after notice and hearing, the clerk of the court shall provide two certified copies of the order to the applicant and a copy to the respondent. Every order of the court made in accordance with this section after notice and hearing shall contain the following language: 'This court had jurisdiction over the parties and the subject matter when it issued this protection order. Respondent was afforded both notice and opportunity to be heard in the hearing that gave rise to this order. Pursuant to the Violence Against Women Act of 1994, 18 USC 2265, this order is valid and enforceable in all fifty states, any territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico and tribal lands.' Immediately after making service on the respondent, the proper officer shall send or cause to be sent, by facsimile or other means, a copy of the application, or the information contained in such application, stating the date and time the respondent was served, to the law enforcement agency or agencies for the town in which the applicant resides, the town in which the applicant is employed and the town in which the respondent resides. The clerk of the court shall send, by facsimile or other means, a copy of any ex parte order and of any order after notice and hearing, or the information contained in any such order, to the law enforcement agency or agencies for the town in which the applicant resides, the town in which the applicant is employed and the town in which the respondent resides, within forty-eight hours of the issuance of such order. . . ."

[10] General Statutes § 54-82r provides in relevant part: "(a) Upon application of a prosecutorial official, a court may issue a protective order prohibiting the harassment of a witness in a criminal case if the court, after a hearing at which hearsay evidence shall be admissible, finds by a preponderance of the evidence that harassment of an identified witness in a criminal case exists or that such order is necessary to prevent and restrain the commission of a violation of section 53a-151 or 53a-151a. Any adverse party named in the complaint has the right to present evidence and cross-examine witnesses at such hearing. Such order shall be an order of the court, and the clerk of the court shall cause a certified copy of such order to be sent to the witness, and a copy of such order, or the information contained in such order, to be sent by facsimile or other means within forty-eight hours of its issuance to the appropriate law enforcement agency.

"(b) A protective order shall set forth the reasons for the issuance of such order, be specific in terms and describe in reasonable detail, and not by reference to the complaint or other document, the act or acts being restrained. A protective order issued under this section may include provisions necessary to protect the witness from threats, harassment, injury or intimidation by the adverse party including, but not limited to, enjoining the adverse party from (1) imposing any restraint upon the person or liberty of the witness, (2) threatening, harassing, assaulting, molesting or sexually assaulting the witness, or (3) entering the dwelling of the witness. Such order shall contain the following language: 'In accordance with section 53a-223 of the Connecticut general statutes, any violation of this order constitutes criminal violation of a protective order which is punishable by a term of imprisonment of not more than five years, a fine of not more than five thousand dollars, or both. Additionally, in accordance with section 53a-107 of the Connecticut general statutes, entering or remaining in a building or any other premises in violation of this order constitutes criminal trespass in the first degree which is punishable by a term of imprisonment of not more than one year, a fine of not more than two thousand dollars, or both.' If the adverse party is the defendant in the criminal case, such order shall be made a condition of the bail or release of the defendant and shall also

contain the following language: 'Violation of this order also violates a condition of your bail or release and may result in raising the amount of bail or revoking release.' . . ."

[11] On appeal, the defendant also renews his claim that the due process clauses of the United States and Connecticut constitutions; see U.S. Const., amend. XIV, § 1; Conn. Const., art. I, § 8; entitle him to an evidentiary hearing prior to the issuance of a criminal protective order. Because of our conclusion with respect to the defendant's statutory claims, and the fact that he notes that a civil protective order hearing under § 46b-15 (b) may be delayed for up to fourteen days, and concedes that "a short delay in the hearing date likely would not violate due process requirements," we do not reach these constitutional issues, except as necessary to delineate the contours of the hearing required by §§ 54-63c (b) and 46b-38c (d). See, e.g., *Kelo* v. *New London*, 268 Conn. 1, 12 n.10, 843 A.2d 500 (2004), aff'd, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005); see also footnote 21 of this opinion.

[12] The procedure for the release of an arrestee is set forth by General Statutes § 54-63c (a), which provides: "Except in cases of arrest pursuant to a bench warrant of arrest in which the court or a judge thereof has indicated that bail should be denied or ordered that the officer or indifferent person making such arrest shall, without undue delay, bring such person before the clerk or assistant clerk of the superior court for the geographical area under section 54-2a, when any person is arrested for a bailable offense, the chief of police, or the chief's authorized designee, of the police department having custody of the arrested person shall promptly advise such person of the person's rights under section 54-1b, and of the person's right to be interviewed concerning the terms and conditions of release. Unless the arrested person waives or refuses such interview, the police officer shall promptly interview the arrested person to obtain information relevant to the terms and conditions of the person's release from custody, and shall seek independent verification of such information where necessary. At the request of the arrested person, the person's counsel may be present during the interview. No statement made by the arrested person in response to any question during the interview related to the terms and conditions of release shall be admissible as evidence against the arrested person in any proceeding arising from the incident for which the conditions of release were set. After such a waiver, refusal or interview, the police officer shall promptly order release of the arrested person upon the execution of a written promise to appear or the posting of such bond as may be set by the police officer, except that no condition of release set by the court or a judge thereof may be modified by such officer and no person shall be released upon the execution of a written promise to appear or the posting of a bond without surety if the person is charged with the commission of a family violence crime, as defined in section 46b-38a, and in the commission of such crime the person used or threatened the use of a firearm."

[13] General Statutes § 54-1g (a) provides: "Any arrested person who is not released sooner or who is charged with a family violence crime as defined in section 46b-38a or a violation of section 53a-181c, 53a-181d or 53a-181e shall be promptly presented before the superior court sitting next regularly for the geographical area where the offense is alleged to have been committed. If an arrested person is hospitalized, or has escaped or is otherwise incapacitated, the person shall be presented, if practicable, to the first regular sitting after return to police custody."

[14] General Statutes § 54-69 provides in relevant part: "(a) Whenever in any criminal prosecution the state's attorney for any judicial district or the assistant state's attorney is of the opinion that the bond without or with surety given by any accused person is excessive or insufficient in amount or security, or that the written promise of such person to appear is inadequate, or whenever any accused person alleges that the amount or security of the bond given by such accused person is excessive, such state's attorney or assistant state's attorney *or the accused person* may bring an application to the court in which the prosecution is pending or to any judge thereof, alleging such excess, insufficiency, or inadequacy, and, after notice as hereinafter provided and hearing, such judge shall in bailable offenses *continue, modify or set conditions of release* upon the first of the following conditions of release found sufficient to provide reasonable assurance of the appearance of the accused in court: (1) Upon such person's execution of a written promise to appear, (2) upon such person's execution of a bond without surety in no greater amount than necessary, (3) upon such person's execution of a bond with surety in no greater amount than necessary. . . ." (Empha-

sis added.)

[15] Although *State* v. *Doe*, supra, 46 Conn. Sup. 598, is a Superior Court decision, rather than an opinion of this court or the Appellate Court, we may rely on the doctrine of legislative acquiescence because, as an officially published decision, it is part of a limited group of trial court opinions that are "useful as precedents or [whose publication] will serve the public interest . . . ." General Statutes § 51-215a (a). Thus, we disagree with Justice Palmer's criticism in his dissent of our reliance on *Doe* as "stretch[ing] the doctrine of legislative acquiescence beyond its breaking point." Although we acknowledge, and presume that the legislature is aware of, the decisional hierarchy in the court system, the fact that *Doe* is a Superior Court decision not binding statewide does not detract from its status at that time as the only published authority construing § 46b-38c.

[16] General Statutes § 54-64f provides in relevant part: "(a) Upon application by the prosecuting authority alleging that a defendant has violated the conditions of the defendant's release, the court may, if probable cause is found, order that the defendant appear in court for an evidentiary hearing upon such allegations. An order to appear shall be served upon the defendant by any law enforcement officer delivering a copy to the defendant personally, or by leaving it at the defendant's usual place of abode with a person of suitable age and discretion then residing therein, or mailing it by registered or certified mail to the last-known address of the defendant.

"(b) If the court, *after an evidentiary hearing at which hearsay or secondary evidence shall be admissible*, finds by clear and convincing evidence that the defendant has violated reasonable conditions imposed on the defendant's release it may impose different or additional conditions upon the defendant's release. If the defendant is on release with respect to an offense for which a term of imprisonment of ten or more years may be imposed and the court, after an evidentiary hearing at which hearsay or secondary evidence shall be admissible, finds by clear and convincing evidence that the defendant has violated reasonable conditions of the defendant's release and that the safety of any other person is endangered while the defendant is on release, it may revoke such release.

"(c) If the defendant is on release with respect to an offense for which a term of imprisonment of ten or more years may be imposed and the court, *after an evidentiary hearing at which hearsay or secondary evidence shall be admissible*, finds by clear and convincing evidence that the safety of any other person is endangered while the defendant is on release and that there is probable cause to believe that the defendant has committed a federal, state or local crime while on release, there shall be a rebuttable presumption that the defendant's release should be revoked. . . ." (Emphasis added.)

[17] Other statutes similarly are illustrative of the legislature's prerogative to require that the courts conduct a certain type of adversarial or evidentiary hearing. See, e.g., General Statutes § 17a-498 (c) (At a Probate Court hearing on an application for a civil commitment of a mentally ill person to a psychiatric facility, the respondent or "his or her counsel shall have the right to present evidence and cross-examine witnesses who testify at any hearing on the application. If such respondent notifies the court not less than three days before the hearing that he or she wishes to cross-examine the examining physicians, the court shall order such physicians to appear."); General Statutes § 19a-343a (e) (action commenced by state to abate public nuisance shall have initial "show cause hearing" for court to "determine whether there is probable cause to believe that a public nuisance exists, and that the circumstances demand the temporary relief requested be ordered," followed by "evidentiary hearing within ninety days from the show cause hearing").

[18] It is undisputed that criminal protective orders may have a significant impact on a defendant's fundamental constitutional rights. See *Williams* v. *State*, 151 P.3d 460, 465 (Alaska App. 2006) (defendant subject to criminal protective order "has a liberty interest in choosing his family living arrangements"); *People* v. *Forman*, supra, 145 Misc. 2d 121 ("Each of the temporary orders of protection restrict [the] defendant's liberty to go where he pleases—he may not go to the home, place of business or place of employment of his wife, as well as his associational liberty in relation to his wife. . . . The orders also exclude him from real property in which [the] defendant otherwise shares ownership and a right to possession." [Citations omitted.]); *Moore* v. *Moore*, 376 S.C. 467, 474–75, 657 S.E.2d 743 (2008) (subject of civil protective order faces, inter alia, "immediate loss of his children . . . and possession of the marital residence," as well as "future ramifications" with "long-term impact" on marital litigation). Moreover, by imposing what some commentators have referred to as "de facto divorce," albeit without the benefit of property division and procedures attendant to the dissolution

context, the protective order further compounds the financial difficulties attendant to being tried on criminal charges. See J. Suk, "Criminal Law Comes Home," 116 Yale L.J. 2, 42, 50 (2006) (criminal protective order "amounts in practice to state-imposed de facto divorce" and because it raises "the prospect of punishment for the proxy conduct of being present at home," it "shifts the very goal of pursuing criminal charges away from punishment to control over the intimate relationship in the home"); see also C. Frank, comment, "Criminal Protection Orders in Domestic Violence Cases: Getting Rid of Rats With Snakes," 50 U. Miami L. Rev. 919, 942–43 (1996) ("courts should take seriously the deprivation of the guaranteed right to enjoy property that will result from the issuance of a criminal protection order").

[19] On June 27, 2008, after this case had been argued before the original panel of this court, we ordered the parties to file supplemental briefs addressing the following question: "If this court concludes that an evidentiary hearing is required for the imposition of a domestic violence protective order in a criminal case, should the state be required to prove the necessity of that order by a preponderance of the evidence or by clear and convincing evidence?" Thereafter, both the state and the defendant filed comprehensive supplemental briefs in support of the position that, consistent with the procedures followed in civil domestic violence cases in both Connecticut and in other states, the state should be required to prove the necessity of a domestic violence protective order in a criminal case by a preponderance of the evidence.

[20] We emphasize that this subsequent hearing should not be a minitrial on the underlying criminal charges, or, put differently, the state is not required to prove the elements of those crimes charged by a preponderance of the evidence. Indeed, only those defendants charged with crimes punishable by death or life imprisonment have a right to a probable cause hearing in Connecticut. See, e.g., *State* v. *Mitchell*, 200 Conn. 323, 324–26, 512 A.2d 140 (1986) (discussing article first, § 8, of constitution of Connecticut, as amended by article seventeen of amendments); see also *Gerstein* v. *Pugh*, supra, 420 U.S. 119–20 (federal constitution does not require adversary procedures at probable cause proceeding). Thus, once probable cause has been established for the defendant's arrest; see Practice Book § 37-12 (a) (defendant is entitled to probable cause determination within forty-eight hours of warrantless arrest which "shall be made in a nonadversary proceeding, which may be ex parte based on affidavits"); the state's burden is limited to proving by a preponderance of the evidence the necessity of the criminal protective order as a regulatory means for protecting the complainant and other members of the defendant's household. The defendant remains free, however, to adduce his own evidence tending to negate the necessity for the criminal protective order or portions thereof, evidence that may well pertain to the merits of the underlying criminal charges.

[21] We note that the defendant does not argue that the confrontation clause of the sixth amendment to the United States constitution requires that he be given the absolute right to examine the complainant at this early stage in the proceedings, particularly if she does not appear to testify on the state's behalf. See *State* v. *Randolph*, 284 Conn. 328, 378–79 n.15, 933 A.2d 1158 (2007) (declining to decide issue, but noting that "majority of states, however, have concluded that the sixth amendment right to confrontation 'is basically a trial right' . . . that does not apply to preliminary hearings" [citation omitted]). To the extent, however, that the defendant claims that his due process rights entitle him to procedural protections beyond those delineated in our interpretation of §§ 54-63c (b) and 46b-38c, namely, a full minitrial, with the right to compel the testimony of and examine the complainant, we disagree. Specifically, we note that several federal courts of appeal have held, following *United States* v. *Salerno*, 481 U.S. 739, 742, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987), which upheld the constitutionality of the federal Bail Reform Act, 18 U.S.C. § 3141 et seq., that a defendant facing the even greater liberty restriction of preventive *detention* on the basis of predicted dangerousness is not entitled to those rights as matter of due process. See, e.g., *United States* v. *LaFontaine*, 210 F.3d 125, 130–32 (2d Cir. 2000); *United States* v. *Smith*, 79 F.3d 1208, 1210 (D.C. Cir. 1996); see also *Harnish* v. *State*, 531 A.2d 1264, 1268 n.8 (Me. 1987) (For pretrial detention of those charged with "capital" offenses, court followed *Gerstein* v. *Pugh*, supra, 420 U.S. 120, and concluded that "[t]he pretrial bail proceeding in which the [s]tate makes the required probable cause showing is not to be a mini-trial. The [s]tate may make that showing on affidavits and reliable hearsay as in other pretrial proceedings to determine probable cause."). Indeed, other courts have, consistent with these decisions, concluded that a defendant is not constitutionally entitled to an evidentiary

hearing with the right to confront and to cross-examine the complainant prior to the issuance of a criminal protective order in a domestic violence case. See *Mendez* v. *Robertson*, 202 Ariz. 128, 130, 42 P.3d 14 (App. 2002) (rejecting defendant's claim that "he was entitled to an evidentiary hearing on his motion for reexamination of his release conditions, that the respondent judge erred in accepting avowals by the prosecutor, and that [he] should have been permitted to call the victim as a witness so he could cross-examine her"); *People* v. *Koertge*, 182 Misc. 2d 183, 189, 701 N.Y.S.2d 588 (1998) (defendant facing criminal protective order does not have "statutory or constitutional right to confront his accuser prior to trial" and due process protection is limited to right to present evidence at bail hearing, at which trial court has discretion to order further evidentiary hearing); *Ex parte Flores*, 130 S.W.3d 100, 107 (Tex. App. 2003) (evidentiary hearing not required for issuance of emergency protective order despite lack of procedure for modification because "the availability of the writ of habeas corpus procedure affords one the opportunity to obtain an adversarial hearing to contest the emergency protective order"), review denied, 2004 Tex. Crim. App. LEXIS 809 (Tex. Crim. App. April 28, 2004); see also *State* v. *Thompson*, 349 N.C. 483, 494, 508 S.E.2d 277 (1998) (discussing *Gerstein* and *Salerno* and stating that Supreme Court "has not required such [adversary hearing] procedures to defeat such a [procedural due process] challenge" in case rejecting facial challenge to statute allowing domestic violence arrestee to be detained for forty-eight hours prior to release conditions hearing before judge); but see *People* v. *Forman*, supra, 145 Misc. 2d 129 ("The requirements of due process do entitle [the] defendant to a prompt evidentiary hearing after the temporary order of protection excluding [the] defendant from the home has been issued. . . . The importance of [the] defendant's interest in his home, the severity of the deprivation imposed through exclusion from the home, and, typically, the need to resolve conflicting issues of fact and credibility as to the underlying family conflict, require that a trial type hearing be provided. Presentation of witnesses and cross-examination are the most suitable means for assessment of veracity and credibility." [Citations omitted.]). Thus, we conclude that the federal due process clause does not entitle the defendant to any procedural protections beyond those articulated in our interpretation of the relevant statutes.

[22] Should the trial court, in the exercise of its sound discretion, deem it necessary for the complainant or children to testify, we note that such testimony may be taken and the witness cross-examined in a manner intended to address concerns, expressed herein by the state and the amici curiae, Connecticut Coalition Against Domestic Violence, office of the victim advocate and department of children and families, as well as both Justices Palmer and Schaller in their dissents, about the potential intimidation of testifying complainants and children. Cf. Public Acts 2008, No. 08-67, § 1, codified at General Statutes § 46b-15c (authorizing court to order sworn testimony in family relations matter by party or child who is subject of protective order, when other party is subject of protective order, to be taken via videoconference technology with witness either outside courtroom or in remote location).

[23] General Statutes § 54-63g provides: "Any accused person or the state, aggrieved by an order of the Superior Court concerning release, may petition the Appellate Court for review of such order. Any such petition shall have precedence over any other matter before said Appellate Court and any hearing shall be heard expeditiously with reasonable notice."

[24] Justice Schaller expresses concern about the uncertainties that might develop during the implementation of this procedure, namely, the definition of terms such as "reasonable time," and whether the arraignment court must inform the defendant of his right to the subsequent hearing. We acknowledge the impracticability of addressing in dicta every possible dispute that might arise during the implementation of this, or any other, judicial decision, and note that many such concerns are best addressed either through the rule-making process or the development of future case law.

[25] Justice Schaller argues in his dissent that our conclusion is "unwise policy" because, given the "unique kind of vulnerability" of family violence victims, the likelihood of examination and cross-examination at an early stage in the proceedings will deter them from pursuing criminal complaints against their abusers. We acknowledge Justice Schaller's observations about the unique concerns of those involved in family violence cases, and emphasize that the state is not required to call a family violence complainant to testify at the subsequent hearing, and the trial court retains considerable discretion about whether to grant such a request by the defendant. To the extent that a defendant does "proffer [a] highly damaging [challenge]" to a complainant's account, "virtually compelling the state to call victims in order to prove the necessity of continuing the order," that concern is dependent

solely on the trial court's assessment of the credibility of the defense. Moreover, should the trial court in its discretion deem the complainant's testimony necessary prior to the issuance of a criminal protective order, statutory mechanisms exist to facilitate that testimony in a manner that will mitigate intimidation concerns. See footnote 22 of this opinion.

[26] In his dissent, Justice Palmer argues that we should affirm the judgment of the trial court because the defendant failed to argue before the trial court in support of the particular conclusion of law that we adopt herein, and argued only that he was entitled to a full, trial-like, evidentiary hearing. We agree, however, with Justice Schaller that Justice Palmer's position represents a hypertechnical and unduly restrictive application of the rules of preservation, which we acknowledge "generally limit this court's review to issues that are distinctly raised at trial." (Internal quotation marks omitted.) *Rowe* v. *Superior Court*, 289 Conn. 649, 660, 960 A.2d 256 (2008). On this point, like Justice Schaller, we find persuasive the analysis from our recent decision in *Rowe*, wherein we concluded that trial counsel had preserved for appellate review via writ of error his claim that a second finding of criminal contempt, based on a witness' refusal to answer subsequent and rephrased questions on the same topic, violated the common law. Id., 662–63. We noted in *Rowe* that we were "mindful that [although] the plaintiff did not raise [before the trial court] all of the theories that he raises in his writ as to why his conduct should be deemed a single act of contempt, those theories are related to a single legal claim," and that there is "substantial overlap between these theories under the case law." Id., 663. Accordingly, we concluded that "we [could not] conclude that the plaintiff has ambushed the trial court by seeking reversal of an issue that he had failed to raise at trial." Id., 662–63; see also id., 661 n.6 (declining to construe ambiguity in record against plaintiff-in-error because of "summary nature of the proceedings and the fact that this issue is one of first impression"). Indeed, we also noted in *Rowe* that the concerns of judicial economy implicated by appeals by ambuscade, namely, that new trials would be required, were not implicated because "success on the writ would not require a new trial." Id., 661 n.6.

A review of the applicable transcript reveals that a reversal in this interlocutory public interest appeal does not operate as a judicial ambush of Judge Bingham, as, after he denied the defendant a full, trial-like hearing, defense counsel questioned him about the nature of the hearing to which the defendant was entitled. Defense counsel also pointed out that the state had not shown him any supporting affidavits, notwithstanding the fact that the defendant himself did not make a proffer in support of his request to call witnesses. Finally, a reversal here would not frustrate judicial economy, as the case has not been tried, and no evidence has been admitted in this pretrial hearing; this appeal, therefore, concerns solely a proposition of law that requires the defendant to receive what likely will be a brief hearing.

Indeed, for a more complete understanding of what took place before Judge Bingham, we note in detail that, during argument, the following exchange occurred between Judge Bingham and defense counsel.

"The Court: Well . . . you're not entitled to a full hearing, with the right to subpoena witnesses and the right to call the wife. This puts an undue burden on the wife because she has—and the affidavits, evidently, indicate that the wife is afraid of the husband and that she requested a full protective order. And you're not entitled to a full trial here in this court. . . .

"[Defense Counsel]: *If I may then, Your Honor, if we're doing it today, I would point out to the court that we've been shown no affidavits.*" (Emphasis added.)

After further argument on the legislature's intent, the following exchange occurred between the prosecutor, the court and defense counsel.

"[The Prosecutor]: . . . [W]e don't do this arbitrarily and cavalierly. We have pictures; this is a documented case. This is not something that we're just saying it's a credibility issue, here. There's plenty of facts that substantiate probable cause that the police found to make an arrest, and certainly the issuance of a protective order. That's all I have to say, Your Honor. And, counsel, if the Appellate Court agrees with you, then the state will, in the future—will comply with any evidentiary hearing the court deems fit.

"The Court: Well—

"[The Prosecutor]: I'm going to ask for a continuance, Your Honor. We can put it on the regular docket. I think counsel's been heard in our argument. I think it's essentially a legal argument, Your Honor. The court would certainly be leaving—we issue, literally, hundreds and hundreds of these a week, Your Honor. And I'm not saying court efficiency or court economy is the determinant fact here, but the court understands the type of argument counsel is making. He's saying that, essentially, we have a little minitrial before we have another trial, to determine whether this happened. The court makes decisions like this all the time, and not just only domestic violence cases. The fact that she's a woman, believe me, plays no determination in this whatsoever for the state's opinion on this case. It has nothing to do with it.

"[Defense Counsel]: I can only act on the basis of what I've heard in this

courtroom, counsel.

"The Court: Well, my ruling is that you are not entitled to a full trial, with the ability to subpoena witnesses and have a full trial.

"[Defense Counsel]: *May I know, then, Your Honor's interpretation of the nature of the hearing that we are, then, permitted under § 46b-38c, as referenced in Public Act 07-123*?

"The Court: *We gave you a right to be heard today.*

"[Defense Counsel]: *How, Your Honor, when I have heard no evidence against my client except statements which are not under oath? There* [*are*] *no facts before the court* when, in fact, the Public Act itself states that the . . . protective order—issued by the police remains only in effect until the presentment under § 54-1g, the arraignment statute, which was Monday, at which time there has to be a hearing. Well, if the hearing is simply the state saying, 'we want a restraining order,' and they submit to the court the report of the family—or the domestic violence response unit, what hearing is that?

"[The Prosecutor]: That's the hearing you're entitled to, counsel.

"[Defense Counsel]: Oh.

"[The Prosecutor]: *And if counsel has to—wants to put in a hearing right now, say that he has reason to believe the credibility and the statements of the victim, or the Gerstein of the credibility of the police officers that responded, I'd like to hear that, myself, because the state's interest here is to do justice. If this was a situation where there was—you know, things that were manufactured—*

"[Defense Counsel]: *Well, that's—*

"[The Prosecutor]: I'd like to hear it.

"[Defense Counsel]: *—that's—*

"[The Prosecutor]: I'm certainly—my own eyes, I met with the victim today, Your Honor, and I see bruises all over her body; so based on the statements that the police officers gave me when they made the arrest, I have reason to believe that an assault took place, here. And that's what we do here on a daily basis, counsel. And I guess you're going to have to meet with your local legislat[ors] to maybe, you know, change the law. . . .

"The Court: Well, *the argument of counsel for the defendant I don't accept*, and I am adopting the procedure which has been—this is similar to a bail hearing, and you're not entitled to a full trial on a bail hearing. So, you may have an appeal . . . .

"[Defense Counsel]: We filed the appeal already, Your Honor." (Emphasis added.)

Although we acknowledge the importance of preservation requirements to an orderly system of appellate review, it appears that Justice Palmer would conclude that a reviewing court may consider only those specific *arguments* made before the trial court on the given *issue*, namely, what type of hearing is required under § 46b-38c, or subject of a dispute, and also is required to accept an appellant's arguments in their entirety before granting any relief at all. Put differently, adopting Justice Palmer's restrictive application of those requirements would frustrate a reviewing court's ability to address claims on appeal appropriately and effectively because that court would be precluded from granting partial relief unless the appellant has elected to proceed in the alternative before the trial court and ask specifically for that partial relief before that court, prior to repeating those arguments verbatim on appeal. Thus, we disagree with Justice Palmer's view that we apply preservation principles in this case in an "expansive" manner "never before . . . adopted." Expressed in the symbolic language that Justice Palmer uses to illustrate his misunderstanding of this opinion, we simply state that, if a defendant asks for relief at the trial court that encompasses elements A, B, C and D, that request is adequate to permit relief on appeal that only grants elements A and B, but not C and D. Under Justice Palmer's view, a defendant would need to argue explicitly that, "if I'm not entitled to A, I am still entitled to B, C and D," and "if I'm not entitled to A and B, then I am still entitled to C and D," and so on, in order to render that relief available on appeal. That strikes us as an unduly onerous burden on litigants. Moreover, we disagree with Justice Palmer's reliance on case law concluding that evidentiary claims were not properly preserved. See *State* v. *Cabral*, 275 Conn. 514, 530–31, 881 A.2d 247, cert. denied, 546 U.S. 1048, 126 S. Ct. 773, 163 L. Ed. 2d 600 (2005); *State* v. *Meehan*, 260 Conn. 372, 388–89, 796 A.2d 1191 (2002). Evidentiary rulings are subject to a preservation and briefing standard under Practice Book §§ 5-5 and 67-4 (d) (3) that reflects the discretionary nature of those decisions, as compared to questions of law such as that present in this case, which are subject to plenary review. See *State* v. *Cabral*, supra, 530–31 ("[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted." [Internal quotation marks omitted.]); *State* v. *Meehan*, supra, 388 (noting discretionary nature of evidentiary ruling).

In our view, a more functional approach to preservation acknowledges the tension that exists between decision making by busy trial courts, which, as Justice Schaller acknowledges, frequently must occur at a rapid pace, and decision making by appellate courts, which often have available to them the luxury of a more comprehensive briefing process, as well as ample time to engage in a more thorough argument, research and writing process prior to issuing an opinion.