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NORCOTT, J., with whom EVELEIGH and HARPER, Js., join, dissenting. I conclude that the Bridgeport jury that was summoned to decide the facts of this case reasonably could have found that the victim, a twenty-five year old woman with numerous disabilities, including cerebral palsy, mental retardation and hydrocephalus, which render her unable to walk and talk and leave her with only very limited means to communicate with others, was in fact " '[p]hysically helpless,' " even under what the majority deems to be the "highly particularized meaning" of General Statutes § 53a-65 (6),[1] as explicated by *State* v. *Hufford*, 205 Conn. 386, 399, 533 A.2d 866 (1987). I therefore respectfully disagree with the majority's conclusion that the Appellate Court properly determined that the convictions of the defendant, Richard Fourtin, of attempt to commit sexual assault in the second degree in violation of General Statutes §§ 53a-49 (a) (2)[2] and 53a-71 (a) (3),[3] and sexual assault in the fourth degree in violation of General Statutes (Rev. to 2005) § 53a-73a (a) (1) (C),[4] were not supported by sufficient evidence. See *State* v. *Fourtin*, 118 Conn. App. 43, 45, 982 A.2d 261 (2009). Because I would reverse the judgment of the Appellate Court, I respectfully dissent.

The majority accurately states the background facts and procedural history, and I will not repeat them extensively here. Because this case presents an issue that is extremely fact sensitive, I do, however, emphasize certain descriptive facts with respect to the victim and her disabilities, as well as the events surrounding the disclosure of her assaults. "The [victim] is a woman with significant disabilities that affect the manner in which she interacts with others. She [suffered a brain hemorrhage after being born three months premature, causing] cerebral palsy, mental retardation and hydrocephalus.[5] She cannot walk and needs assistance in performing the activities of daily living.[6] She is nonverbal but communicates with others by gesturing and vocalizing and through the use of a communication board.[7] To manifest her displeasure, she can kick, bite[8] and scratch. The [victim] can also vocalize her feelings by groaning or screeching.

"In 2006, the [victim] was attending an adult day care program for men and women who are physically, emotionally or mentally disabled. Deacon Raymond Chervenak was a staff member at the day care program with whom the [victim] regularly communicated about her interest in sports. On February 23, 2006, Chervenak observed that the [victim] looked 'aggravated' and 'scared.' In response to Chervenak's inquiry, the [victim], by means of appropriate gestures[9] and the use of a communication board, made him aware that the defendant [who is the boyfriend of her mother, S] had

sexually assaulted her at her home. In similar fashion, the [victim] repeated this accusation to Frances Hernandez, the supervisor of the adult program, by pointing to her own body parts and Chervenak's body parts. A subsequent medical examination disclosed physical symptoms consistent with the [victim's] report that she had been sexually assaulted." Id., 46–47.

"In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . [I]n viewing evidence which could yield contrary inferences, the jury is not barred from drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with innocence. The rule is that the jury's function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Ovechka*, 292 Conn. 533, 540–41, 975 A.2d 1 (2009).

Before turning to a detailed examination of the record in this case, I begin with a review of the legal principle that the jury tasked with deciding the facts of this case was called upon to apply,[10] namely, whether the victim was physically helpless, a term that is statutorily defined as "unconscious *or for any other reason . . . physically unable to communicate* unwillingness to an act." (Emphasis added.) General Statutes § 53a-65 (6). The leading Connecticut case involving the application of this term is *State* v. *Hufford*, supra, 205 Conn. 386, wherein this court concluded that there was insufficient evidence to support the fourth degree sexual assault conviction of the defendant, an emergency medical technician, who had allegedly touched the breasts and vagina of a female patient who was being restrained during transportation to the hospital because she was agitated and apparently suicidal. Id., 389–90. This court first noted that the language of § 53a-65 (6) "contains no terms not commonly used which might not be understood in their ordinary meaning," and stated that, "[s]ince the complainant was not unconscious, we are concerned with whether she was physically able to communicate her unwillingness to the act." Id., 398. Quoting Webster's Third New International Dictionary (1986), the court determined that the word "communicate" was plain and unambiguous, and meant " 'to make known: inform a person of . . . speak, gesticulate . . . to convey information.' "[11] *State* v. *Hufford*, supra, 398–99. Rejecting the state's claim that the complainant, who was unable to resist the alleged assault because she was being restrained, but had "protested verbally," was "physically helpless"; id., 398; the court observed

that, "[b]y her own account, the complainant told the defendant repeatedly to stop touching her, directly conveying her objection to his advances. While this testimony tends to show lack of consent, it contradicts the state's assertion that the complainant was unable to communicate her 'unwillingness to an act.' " Id., 399. Accordingly, this court concluded that "[t]he record contains no evidence tending to show that the complainant was physically helpless."[12] Id.

Consistent with our decision in *State* v. *Hufford*, supra, 205 Conn. 399, case law from other jurisdictions applying statutory language identical to that of § 53a-65 (6) in sufficiency of the evidence analyses makes clear that even the most significant physical disability does not *by itself* render an individual physically helpless. Thus, I agree with the majority that the analytical key remains the disabled victim's physical ability to communicate consent or the lack thereof.[13] Compare *Dabney* v. *State*, 326 Ark. 382, 384, 930 S.W.2d 360 (1996) (A fifty-three year old victim who was blind and unable to speak was physically helpless when, "[a]s to her ability to communicate, the victim could only grunt, raise her hand, and shake her head from side to side. She was unable to write. In addition, witnesses testified that the victim's ability to perceive and comprehend her surroundings was very limited."), and *People* v. *Gonzalez*, 62 App. Div. 3d 1263, 1264–65, 878 N.Y.S.2d 534 (sufficient evidence that victim with "advanced Alzheimer's disease . . . was 'physically unable to communicate unwillingness to an act' "), appeal denied, 12 N.Y.3d 925, 912 N.E.2d 1087, 884 N.Y.S.2d 706 (2009); and *People* v. *Green*, 298 App. Div. 2d 143, 144, 747 N.Y.S.2d 767 (Both victims were the defendant's fellow hospital patients and "were so severely handicapped that they were not capable of communicating an unwillingness to act. While there was evidence that each victim could make reflexive body motions, the evidence did not warrant a conclusion that either victim was capable of making voluntary movements designed to communicate unwillingness . . . ." [Citation omitted.]), appeal denied, 99 N.Y.2d 559, 784 N.E.2d 84, 757 N.Y.S.2d 211 (2002), with *People* v. *Clyburn*, 212 App. Div. 2d 1030, 1031, 623 N.Y.S.2d 448 (victim who suffered from Huntington's chorea, but could speak, not physically helpless), appeal denied, 85 N.Y.2d 971, 653 N.E.2d 627, 629 N.Y.S.2d 731 (1995), and *People* v. *Morales*, 139 Misc. 2d 200, 201–202, 528 N.Y.S.2d 286 (1988) (The victim, who "suffers from muscular dystrophy rendering her paralyzed from the neck down and wheelchair bound," not physically helpless because she had "clearly testified that she verbally communicated her lack of consent and protests to the defendant during the incident. Therefore, although she was indeed physically helpless in the ordinary sense of the term, she was not physically helpless for purposes of the statute."), and *State* v. *Bucknell*, 144 Wn. App. 524, 529–30, 183 P.3d 1078 (2008)

(bedridden victim paralyzed from waist down by amyotrophic lateral sclerosis, commonly known as Lou Gehrig's disease, not physically helpless because she was "able to talk, answer questions, and understand and perceive information").

Finally, in reviewing the evidence in this record, I emphasize that "[w]hether a victim is physically helpless at any given moment is largely a question of fact for the jury to decide." (Internal quotation marks omitted.) *State* v. *Stevens*, 311 Mont. 52, 59, 53 P.3d 356 (2002); see also, e.g., *Dabney* v. *State*, supra, 326 Ark. 384; *Perez* v. *State*, 479 So. 2d 266, 267 (Fla. App. 1985); *State* v. *Tapia*, 751 N.W.2d 405, 407 (Iowa App. 2008); *People* v. *Teicher*, 52 N.Y.2d 638, 649, 422 N.E.2d 506, 439 N.Y.S.2d 846 (1981). The majority recognizes this principle of factual deference, but in my view, fails to pay it sufficient heed.

Thus, unlike the majority, I agree with the state's position that, when the evidence properly is construed in the light most favorable to sustaining the verdict, including reasonably drawing inferences from that evidence in a manner consistent with the jury's verdict; see, e.g., *State* v. *Ovechka*, supra, 292 Conn. 540–41; there is legally sufficient evidence in the record to support the jury's finding that the victim's physical and mental disabilities rendered her "physically unable to communicate unwillingness to an act." General Statutes § 53a-65 (6). With respect to the victim's communicative abilities, although they were not completely nonexistent, they nevertheless were significantly and severely restricted, as shown by her need to use a cumbersome and slow communication board. See footnote 7 of this dissenting opinion. Dee Vetrano, the director of residential support at the Litchfield County Association for Retarded Citizens, who supervises the group home wherein the victim resided at the time of trial, testified that it took a great deal of energy and time for the victim's brain to make her hands move so that she could use the board—testimony that was demonstrated for the jury when the victim's testimony had to be taken in short intervals over *four separate trial days* because of the fatigue caused by the act. Indeed, Vetrano testified further that, when the victim became stressed or agitated—which the jury reasonably could have inferred was a possible, *and indeed quite likely*, reaction to a sexual advance by the defendant, who was her mother's boyfriend—she would involuntarily "fist" her hands, rendering her further unable to communicate using the board, and therefore unable to physically communicate to the defendant that his sexual advances were unwelcome. Moreover, given the context dependent nature of the victim's communication abilities, as shown by the icon based communication board and the testimony of S that, to her knowledge, the victim had never received any kind of sex education—either from S or from any of her schools or care programs—the

jury also reasonably could have inferred that the victim had significant difficulty understanding and responding to questions about sex.[14]

These communicative difficulties are further borne out in the testimony of three physicians to the effect that the victim was unable to communicate with them during the course of gynecological examinations, and that they had to speak with S in order to obtain necessary information. Jose Reyes, an obstetrician and gynecologist who was one of the victim's regular treating physicians, testified that, in October, 2005, the victim came in for treatment of an apparent rash "with [S] and it was [S] who communicated with me since I could not communicate with the [victim]." Reyes testified on cross-examination that, although the victim had a contact dermatitis condition on her genitalia and perineum that would generally be a very painful and itchy condition, she could not communicate that to him. Elenita Espina, Reyes' partner in practice, similarly testified at trial that she was never able to communicate with the victim, both at a June, 2006 examination following the sexual assault at issue in this case, and during numerous past visits. Finally, James Bovienzo, an emergency department physician at St. Vincent's Medical Center in Bridgeport who performed the sexual assault examination on the victim, answered in the negative when asked whether he was "able to discuss matters with [the victim] while [he was] involved in collecting . . . evidence in this case," testifying that she was "noncommunicative" throughout the examination. In assessing the victim's communicative abilities with respect to matters pertaining to her body, the jury reasonably could have credited the physicians' testimony regarding how the victim simply could not communicate with them—particularly given her lack of sexual knowledge and the fact that they were called upon to assess and treat her genital and perineal areas both in the course of ordinary medical care and in conjunction with the sexual assault evaluations occasioned by her allegations in this case. Thus, I conclude that the jury's finding of physical helplessness was supported by sufficient evidence.[15]

In concluding to the contrary, the majority echoes the defendant's contentions and posits that the victim must be in a state akin to unconsciousness in order to qualify as physically helpless under the statute, noting that "it is the rare case that does not involve a victim who was physically helpless due to unconsciousness, sleep or intoxication." The defendant and the majority, quite understandably, then rely heavily on *People* v. *Huurre*, 193 App. Div. 2d 305, 307–308, 603 N.Y.S.2d 179 (1993), aff'd, 84 N.Y.2d 930, 645 N.E.2d 1210, 621 N.Y.S.2d 511 (1994) (per curiam), wherein the New York Appellate Division, in an opinion later adopted by the Court of Appeals, concluded that there was not sufficient evidence to establish the physical helplessness of

"a [thirty-five year old] woman with an IQ of [sixteen] to [twenty], which is the functional equivalent of a three year old and renders her profoundly mentally retarded. In addition, the victim suffers from cerebral palsy and epilepsy, and is nonverbal in the sense that she has no understandable speech, but she does make gutt[u]ral noises and is capable of making and understanding a few signs. Essentially, she is capable of doing and understanding that which a three year old can do and understand, except that she does not have the ability to speak." The court determined that the victim's rudimentary communicative abilities[16] and responses to medical treatment "most vividly [typify] the problem with this case—the victim has the physical ability to communicate her unwillingness to do an act, but she is mentally incapable of determining when she should be willing and when she should be unwilling to do an act." Id., 308.

I disagree with the majority's reliance on *Huurre* in applying § 53a-65 (6). First, as aptly noted by the Arkansas Supreme Court in applying an identical definition, the statute "only requires physical helplessness, *not total incapacity*." (Emphasis added.) *Dabney* v. *State*, supra, 326 Ark. 385. Second, the Appellate Division's decision in *Huurre*, even if it comprehensively reflects the state of the law in New York, nevertheless is both nonbinding[17] and, in my view, a wrongly decided case that simply cannot be reconciled with the state high court's prior admonition in *People* v. *Teicher*, supra, 52 N.Y.2d 649, namely, that physical helplessness is largely a question of fact for the trier. Moreover, *Huurre* is only superficially similar to the present case on the basis of the disabilities suffered by the victim therein as described in the opinion, and is distinguishable because, although it, like the present case, contained some evidence that the victim's "lack of speech does not inhibit her from communicating when she wants or does not want something"; *People* v. *Huurre*, supra, 193 App. Div. 2d 307; the evidence of the victim's responsiveness to medical examinations in *Huurre* was the polar opposite of that considered by the jury in this case through the testimony of Reyes, Bovienzo and Espina. Specifically, the victim in *Huurre* actively communicated her desire to avoid the examination and physically tried to "get off the examining table and jumped back when [the physician] approached her with a tube. The [physician] finally became discouraged and left the room without having completed the examination. The victim did receive a complete gynecological examination later that day at the clinic, but in order to do so she had to be strapped down and her legs held apart by two or three people." Id., 307–308; see also id., 308 (The court noted that "when the victim is given medicine at the institution in which she resides she often backs away and shakes her head, indicating that she does not want to take the medicine. Another exam-

ple of the victim's ability to communicate occurred when she cut her head and was taken to the hospital. She covered her wound with her hand when the doctor tried to look at it."). The victim in *Huurre* is, then, distinguishable from the victim in the present case, who exhibited to her physicians no such ability to communicate or resist gynecological examinations.[18]

Finally, the majority, in apparent agreement with the defendant's characterization of the state's factual arguments as "radical and untenable reconstruction[s] of how juries may consider and apply evidence"; (internal quotation marks omitted) see footnote 13 of the majority opinion; relies on *State* v. *Scruggs*, 279 Conn. 698, 905 A.2d 24 (2006), and declines to consider the state's factual arguments on the ground that they were not raised at trial, and thus constitute the oft-derided appeal by ambuscade. In *Scruggs*, this court concluded that, "in order for any appellate theory to withstand scrutiny . . . it must be shown to be not merely before the jury due to an incidental reference, but as part of a coherent theory of guilt that, upon [review of] the principal stages of trial, can be characterized as having been presented in a focused or otherwise cognizable sense. We adopted this rule as the standard by which to gauge whether evidence introduced at trial, but not relied on by the state in its legal argument, is properly cognizable by an appellate court when evaluating the sufficiency of the evidence." (Internal quotation marks omitted.) Id., 718; see also id., 718–19 (rejecting state's attempt to argue applicability of subjective standard on appeal after record revealed that it had based its case at trial on objective standard, namely, that conditions in defendant's argument would have been injurious to any child under General Statutes § 53-21); *State* v. *Robert H.*, 273 Conn. 56, 83–85, 866 A.2d 1255 (2005) (under "theory of the case doctrine," state could not rely, on appeal, on sexual act by defendant, evinced in record, to support jury's verdict in response to sufficiency challenge when state did not present that particular act at trial as culpable conduct).

I respectfully disagree with the majority's application of *Scruggs* and somewhat restrictive reading of the record in the present case and the manner in which this issue was tried.[19] My reading of the record reveals that the victim's physical helplessness was, although an essential element of the offenses charged, not a significant factual matter tried to the jury. Rather, the defendant pursued this issue primarily as a question of law to be determined by the trial court in his motion for a judgment of acquittal and postjudgment motions, and the state responded accordingly. In my view, the state's factually based arguments in this appeal are consistent with its argument before the trial court in response to the defendant's motions, namely, that the victim's ability to communicate consent at the time of the assault was a credibility based question of fact.

Indeed, after the trial court determined, in denying the defendant's motions, that there was sufficient evidence of physical helplessness to present a jury question, the parties' summations bear out that the primary factual issue argued to the jury was whether the defendant had committed the sexual acts in question, rather than the victim's physical helplessness under the statute—with the victim's physical attributes, such as her bite and startle reflexes, rendering impossible the allegations that the victim had performed oral sex on the defendant.[20] Thus, in my view, the state's arguments in this certified appeal are consistent with how the case was tried, both with respect to legal matters determined by the trial court and factual matters argued to the jury.[21]

In conclusion, I would hold that, given the wide range of evidence admitted in this trial concerning the victim's responses to various stimuli and her communication abilities, the resolution of credibility issues and the drawing of inferences from the wealth of conflicting testimony adduced at trial was grist for the jury's mill, and not for a majority of this court to redraw on appeal by impermissibly sitting as the "thirteenth juror."[22] See, e.g., *State* v. *Morgan*, 274 Conn. 790, 800, 877 A.2d 739 (2005) ("[W]e do not sit as a thirteenth juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record. . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict." [Internal quotation marks omitted.]). Thus, although the majority's explication of the evidence in this case is an accurate recitation of much of the trial record, its approach simply is inconsistent with our well settled review of sufficiency challenges, which are conducted with an eye toward sustaining jury verdicts, even those with which this court may disagree. See, e.g., *State* v. *Ovechka*, supra, 292 Conn. 540–41. Thus, I conclude that the Appellate Court improperly determined that there was insufficient evidence that the victim was physically helpless as that term is defined by § 53a-65 (6), and would reverse its judgment and remand the case to that court with direction to affirm the judgment of conviction.

Accordingly, I respectfully dissent.

[1] General Statutes § 53a-65 (6) provides: " 'Physically helpless' means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act."

[2] See footnote 2 of the majority opinion for the text of § 53a-49 (a) (2).

[3] See footnote 1 of the majority opinion for the text of § 53a-71a (a) (3).

[4] See footnote 3 of the majority opinion for the text of General Statutes (Rev. to 2005) § 53a-73a (a) (1) (c).

[5] Ralph Welsh, a clinical psychologist, described the victim's total functioning as akin to someone between the ages of two and five years old, based on a "total composite" indicating "severe to profound deficit[s]" in the areas of living communication, daily living, socialization and adaptive behavior. She has mathematical and language comprehension skills equivalent to a range from kindergarten to second grade. Welsh, who testified for the defense regarding what he considered to be the victim's suggestibility during interviews and interrogations, compared the victim to a five year old child who has been "isolated" and has "not had contact with anything other than

a certain limited world. . . . She's not like the average five year old child who has . . . much more life experiences."

[6] The victim also lacks trunk control and is able to stand only when secured with multiple straps in a device called a prone stander. While standing in her prone stander, the victim can play an organ or electronic piano. She needs other people to move her in and out of the prone stander, bed and wheelchair, needs assistance with toileting functions, and must be bathed, spoon-fed and have her teeth brushed by her mother, S, or home health aides.

[7] The communication board utilized by the victim contains numerous words, such as emotions, persons' names, "yes" and "no," and icons to which she can point in order to express her needs and desires, such as hunger, thirst and the need to use the toilet. The board also contains the letters of the alphabet for the victim's use in spelling out more complex requests, as she is able to spell at a fifth grade level.

[8] There also, however, was testimony that the victim's biting was, at least in part, the result of an involuntary startle reflex caused by her hydrocephalus, which was so sensitive that she could only be fed gingerly with a plastic spoon. That startle reflex also resulted in the victim kicking her legs up so hard that she would bruise them on her wheelchair or the tray of her prone stander.

[9] The victim "pointed to her mouth and then to Chervenak's crotch, and to her chest area and then to her pubic area." *State* v. *Fourtin*, supra, 118 Conn. App. 46 n.6.

[10] I agree with the majority that this case, in some respects, presents a matter of statutory interpretation that is a question of law subject to plenary review; see also General Statutes § 1-2z; namely, in divining the meaning of the phrase "physically helpless." Nevertheless, I view this legal question as inextricably bound with the pure sufficiency issues herein. Put differently, this is neither a "typical" statutory interpretation case involving the determination of a statute's meaning in juxtaposition with undisputed or previously found facts, nor a sufficiency case involving the review of a factual record in light of undisputed general legal principles. Rather, this case straddles the analytical line between the two, and I treat it accordingly.

[11] This court's conclusion in *State* v. *Hufford*, supra, 205 Conn. 398–99, that the definition of physically helpless is plain and unambiguous, accords with the drafters' view of § 53a-65 (6), which was enacted as part of the comprehensive revision of Connecticut's Penal Code in 1969. See Public Acts 1969, No. 828, § 66 (7). The reports of the commission to revise the criminal statutes (commission) indicate that the commission took the definition verbatim from New York's Penal Law and considered it to be "self explanatory." See Commission to Revise the Criminal Statutes, Commentary on Title 53a: The Penal Code (1969), pp. 2, 39, 45; see also Report of the Commission to Revise the Criminal Statutes (1967) p. 132 (describing definition of physically helpless as "self-explanatory"). Indeed, although the legislature did not adopt the commission's commentary to the Penal Code; see *State* v. *Parmalee*, 197 Conn. 158, 163 n.7, 496 A.2d 186 (1985); the floor debates on the commission's proposed code nevertheless do not contain any discussion about the meaning of or ambiguity in the definition of physically helpless.

[12] Further, this court rejected the state's reliance on *People* v. *Teicher*, 52 N.Y.2d 638, 648–49, 422 N.E.2d 506, 439 N.Y.S.2d 846 (1981), for the proposition that the "complainant was physically helpless by virtue of her inability to move away from the defendant notwithstanding her ability to speak"; *State* v. *Hufford*, supra, 205 Conn. 398; noting that, in "*Teicher*, the defendant, a dentist, was convicted of sexually abusing a police decoy whom he had drugged. The Court of Appeals upheld the conviction over the defendant's contention that the victim was not physically helpless because she was mentally aware although unable to control her body. Significantly, that court pointed out that the jury heard evidence that the victim was lifted to a standing position by the defendant, and that, under the circumstances, 'there may be a decrease in the cerebral blood flow which could result in dizz[i]ness or even unconsciousness,' and that chest compression could compound the result, thereby leaving the question of the state of the victim's helplessness for the jury to decide." Id.

[13] I note that, in other jurisdictions, statutes addressing physically helpless victims have aptly been criticized as "mislabeled" for this reason. See *People* v. *Morales*, 139 Misc. 2d 200, 202, 528 N.Y.S.2d 286 (1988) ("although [a victim paralyzed from the neck down] was indeed physically helpless in the ordinary sense of the term, she was not physically helpless for purposes of

the statute"); see also *People* v. *Orda*, 180 Misc. 2d 450, 454–55, 690 N.Y.S.2d 822 (1999) (finding sufficient evidence of "[f]orcible compulsion" given "great disparity in physical condition between [the] defendant and his quadriplegic charge," and noting that victim "in fact, is physically helpless," although not legally so under "statutory definition which deserves reexamination"). Although the definition of physically helpless utilized in Connecticut and New York is the most common statutory definition of physical incapacity, Professor Wayne R. LaFave has noted "considerable variation" in the language of statutes protecting physically incapacitated victims, observing: "Sometimes the statutory reference is only to a victim who is *unconscious*, and sometimes unconscious is listed with some alternative condition, such as *asleep*, *physically powerless*, or *physically incapable of resisting*. Some statutes refer more generally to where a physical condition has affected the person in some way, such as by making the person unaware that a sex act is being committed, incapable of consent, or substantially limited in the ability to resist." (Emphasis added.) 2 W. LaFave, Substantive Criminal Law (2d Ed. 2003) § 17.4 (b), pp. 643–44. Thus, I note that a perhaps more comprehensive definition is provided by, for example, N.C. Gen. Stat. § 14-27.1 (3) (2009), which "defines 'physically helpless' as '(i) a victim who is unconscious; or (ii) *a victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act*.' " (Emphasis altered.) *State* v. *Atkins*, 193 N.C. App. 200, 205, 666 S.E.2d 809 (2008); see id., 205–206 (concluding that eighty-three year old victim with severe arthritis who could only walk with aid of walker, "needed assistance with her everyday household chores and could only transverse steps or do other daily errands with assistance," was " 'physically helpless' " because she could not escape or "actively oppose or resist" her attacker), review denied, 363 N.C. 130, 673 S.E.2d 364 (2009). As I note in greater detail in footnote 22 of this dissenting opinion, the legislature may well wish to reexamine § 53a-65 (6) in order to determine whether the current definition of physically helpless provides adequate protection from sexually assaultive conduct for persons with physical disabilities, while simultaneously assuring their individual liberties.

[14] Thus, I agree with the amici curiae, office of protection and advocacy for persons with disabilities, Arc of Connecticut, and Developmental Disabilities Council of Connecticut, that the Appellate Court's observation that "[n]o evidence was offered at trial to establish whether the [victim] had access to a communication board at the time of the alleged assault"; *State* v. *Fourtin*, supra, 118 Conn. App. 50 n.10; is inapt, as well as representative of its apparent reweighing of the evidence before the jury. Given the victim's cognitive deficiencies, and their impact on her total disability as described by Ralph Welsh, the psychologist called by the defendant; see footnote 5 of this dissenting opinion; I similarly find puzzling the Appellate Court's reference to Stephen Hawking, "the celebrated author of A Brief History of Time," in support of its conclusion that "someone cannot be described as noncommunicative even though he suffers from a disease that requires him to communicate by the use of a computer system." Id., 51 n.11.

[15] I acknowledge the testimony of S that the victim had to be placed on Depo-Provera at the age of fourteen in order to stop her menstrual periods because the victim became "very difficult to manage" during her periods and, indeed, would kick, scream and otherwise resist when S attempted to place a sanitary pad in her private area. To the extent, however, that this testimony could be interpreted as an inference that runs counter to that taken from the physicians' testimony, namely, that the victim was perfectly capable of resisting or communicating with respect to the unwanted touching of her private parts, the jury was not required to credit this testimony, particularly given S' testimony that she supported the defendant and believed that the charges against him were false.

Similarly, I agree with the state that the jury was not required to credit the testimony of S, and her mother, R, to the effect that the victim's ability to kick, bite, screech and groan was indicative of her ability to communicate a lack of consent but, rather, could have found that these behaviors were manifestations of her disabilities and would not have had any communicative significance to the defendant, given evidence proving his limited degree of contact with her. This is particularly so given testimony that the victim's biting and kicking, acts upon which the majority and the defendant rely to indicate that the victim could communicate her displeasure, rendering her not physically helpless, were at least in part the result of an involuntary startle reflex caused by her hydrocephalus. See footnote 8 of this dis-

senting opinion.

[16] The New York court acknowledged that "there may be situations under which the different factors that cause a victim to become incapable of consent overlap . . . . Indeed, one of the psychologists who testified on behalf of the [state] indicated that while the victim, who is at the high end of the scale which is used to measure profound retardation, has rudimentary communication abilities, there are those on the low end of the scale used to measure profound mental retardation that have none. Such persons may, as a consequence of their mental retardation, or mental defect . . . be physically unable to communicate unwillingness to an act . . . . Here, however, the [state] failed to establish that such an overlap exists." (Citations omitted.) *People* v. *Huurre*, supra, 193 App. Div. 2d 309–10.

[17] Although New York decisions are often informative with respect to the interpretation and application of our substantive criminal laws, which, including § 53a-65, are in large part modeled after New York's Penal Code; see, e.g., *State* v. *Albert*, 252 Conn. 795, 810–11, 750 A.2d 1037 (2000); see also footnote 11 of this dissenting opinion; we need not follow that state's case law when it is unpersuasive or otherwise inapposite. See, e.g., *State* v. *Mastropetre*, 175 Conn. 512, 522, 400 A.2d 276 (1978) ("the similarity of language existing between the New York and Connecticut [P]enal [C]odes does not compel a like construction").

[18] I acknowledge the defendant's argument that the physicians' testimony in the present case was conclusory and did not explain what they meant in describing the victim as noncommunicative. Positing that the prosecutor was "careful . . . not to ask too much" about how the victim responded to the physical examinations, the defendant contends that the victim's submission to the physical examination could have been viewed as "physically indicating willingness. Query then, if she can communicate willingness, why can't she communicate unwillingness?" The defendant himself, however, had ample opportunity to elicit from the physicians' testimony in support of the inference that the victim had the capability to communicate willingness or unwillingness to other people touching her genital area. Indeed, the record reveals that the defendant questioned Bovienzo thoroughly during cross-examination, and Espina during direct examination, but never once asked about their efforts to communicate with the victim or about her responses to their physical examinations, focusing instead on establishing alternative nonsexual causes for the irritation of the victim's genitalia or the damage to her hymen. Further, the defendant touched on this point during his brief cross-examination of Reyes, confirming Reyes' testimony that, although contact dermatitis of the genitalia is an itchy and painful condition, the victim "couldn't communicate [that] to you," and "you couldn't tell from any communication from her whether it was painful or not painful . . . ." In any event, the conclusory nature of the physicians' testimony is a deficiency that, in my view, goes only to the weight of the evidence for the trier, and simply is irrelevant to the sufficiency inquiry performed on appellate review.

[19] Applying *Scruggs* to the facts of the present case, the majority posits that,"[a]t no time during the trial . . . did the state challenge or dispute testimony establishing that the victim communicated displeasure through biting, kicking, scratching, screeching or groaning. Indeed, the state itself elicited much of this testimony, albeit in an attempt to establish for the jury that the victim was credible and perfectly capable of communicating her likes and dislikes. Nor did the state contend or otherwise suggest that these behaviors were simply manifestations of the victim's disabilities rather than volitional communicative acts intended to express displeasure. Likewise, the state did not proceed on the theory that the victim's behaviors merely reflected generalized anger or frustration."

[20] Specifically, in its opening summation, the state cited testimony that the victim has "the capabilities of an infant" in explaining briefly how she was physically helpless before moving on to explain how the other statutory elements were satisfied. In response, although the defendant mentioned briefly in his summation that the victim was not physically helpless because of evidence indicating her ability to bite, kick and screech, this was not a significant portion of his factual argument as a strategic matter. Rather, the defendant emphasized that "we're not saying [the victim's physical helplessness] matters at all" because "*this event, this sexual assault, never happened*"; (emphasis added); with the allegations of oral sexual activity being: (1) the result of the victim having been manipulated into making them; and (2) factually impossible based on the victim's bite and startle reflexes, as well as her positioning in her stander and wheelchair. The state's

rebuttal summation did not address the physically helpless issue but, rather, focused on evidence of the consistency of the victim's accusations and the fact that she lacked the intellectual capacity to lie.

I note that it was, in my view, a sound strategy for the defendant not to distract the lay jury from his claims of factual impossibility and manipulation of the victim by arguing the rather counterintuitive proposition that the state had not proven the victim's physical helplessness—an issue whose complexity is demonstrated by this court's 4 to 3 division in this certified appeal.

[21] A review of *Cola* v. *Reardon*, 787 F.2d 681 (1st Cir.), cert. denied, 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986), on which the majority relies in support of the proposition that the defendant's legal "argument to the trial court outside the presence of the jury is wholly irrelevant to [an inquiry under *State* v. *Scruggs*], which is concerned solely with the theory of guilt that was presented to the jury," demonstrates the overbreadth of the majority's reliance on the *Scruggs* rule in discounting the state's factual arguments in this appeal. As is demonstrated by this court's application of *Cola* in *State* v. *Robert H.*, supra, 273 Conn. 82, this principle articulated in *Cola* and *Scruggs*, first explained in detail by the United States Supreme Court in *Dunn* v. *United States*, 442 U.S. 100, 106, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979), is "rooted in principles of due process of law" and is intended to protect the defendant's right to fair notice of the *specific charged acts* that form the basis for the criminal charges for which he is being tried. See *State* v. *Robert H.*, supra, 83–84 (state could not use evidence that defendant had pushed child's neck down toward defendant's private parts to constitute sufficient evidence of physical touching element of risk of injury charges under § 53-21 [1] when that act did not constitute factual basis of any charge against defendant); see also *United States* v. *Johnson*, 804 F.2d 1078, 1084 (9th Cir. 1986) (describing *Dunn* and *Cola* as "involv[ing] a failure to charge the defendant in the indictment for the specific acts for which he was convicted"); *Commonwealth* v. *Cheromcka*, 66 Mass. App. 771, 775 n.3, 850 N.E.2d 1088 (describing *Dunn* and *Cola* as cases in which "the allegedly criminal conduct relied upon on appeal was different from the acts or theory of guilt that was the focus of the evidence at trial"), review denied, 447 Mass. 1108, 853 N.E.2d 1060 (2006). Thus, I do not see any inconsistencies or variances in the state's theory of the conduct underlying the offenses charged that raise any due process concerns with respect to the sufficiency of the evidence analysis in this appeal. Compare *Chiarella* v. *United States*, 445 U.S. 222, 235–36, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980) (The court declined to consider an alternate ground for affirmance in a securities fraud case, namely, that the "petitioner breached a duty to the acquiring corporation" because "[t]he jury instructions demonstrate that [the] petitioner was convicted merely because of his failure to disclose material, [nonpublic] information to sellers from whom he bought the stock of target corporations. The jury was not instructed on the nature or elements of a duty owed by petitioner to anyone other than the sellers."), and *Dunn* v. *United States*, supra, 106 (concluding that appeals court improperly based affirmance of false declarations conviction on petitioner's October testimony when trial "jury was instructed to rest its decision on [his] September statement"), and *Cola* v. *Reardon*, supra, 693–94 (concluding that state appeals court improperly upheld state employee's criminal conflict-of-interest charges based on employee's conduct at bankruptcy proceeding involving debtor, rather than loan transactions that were focus of charges, arguments and jury instruction at trial), with *United States* v. *Johnson*, 804 F.2d 1078, 1084 (9th Cir. 1986) (rejecting defendant's claim that *Dunn* and *Cola* entitled him to acquittal on appeal on ground that "the theory that he 'was not the bank robber, but was in knowing possession of bank loot is being presented for the first time on appeal' "), and *Fenske* v. *State*, 592 N.W.2d 333, 335–36 (Iowa 1999) (rejecting defendant's reliance on *Dunn* and *Cola* to uphold burglary conviction because "key issue throughout this case has been whether [the defendant] had a 'right, license or privilege' to enter the house" and indictment and jury instructions did not limit jury's consideration of which occupant of house had requisite standing to give or deny consent to entry).

[22] The majority and the Appellate Court; see *State* v. *Fourtin*, supra, 118 Conn. App. 49; suggest that "this appears to be a case in which the state ultimately proceeded against the defendant under the wrong statute." See footnote 20 of the majority opinion. Although I conclude that there was sufficient evidence that the victim in this case was physically helpless as defined by § 53a-65 (6), given the closeness of this legal issue, I nevertheless

agree with the majority that the state would have been far better advised not to abandon its original course of additionally prosecuting the defendant for sexual assault in the second degree in violation of § 53a-71 (a) (2), attempt to commit sexual assault in the second degree in violation of §§ 53a-49 (a) (2) and 53a-71 (a) (2), and sexual assault in the fourth degree in violation of General Statutes (Rev. to 2005) § 53a-73a (a) (1) (B), all of which require a victim that is "mentally defective." See footnote 20 of the majority opinion.

Indeed, the difficulty of proving that a disabled victim is physically helpless under § 53a-65 (6), particularly going forward in light of the majority's opinion in this case, counsels me to acknowledge the comprehensively briefed observation of the amici curiae office of protection and advocacy for persons with disabilities, Arc of Connecticut, and Developmental Disabilities Council of Connecticut, that it is imperative for the criminal justice system to "recognize that individuals with disabilities who are victims of sex crimes will not come forward if their voices are not heard or respected," and that persons with cognitive or physical disabilities face increased risks of sexual victimization. Given the artfully expressed concerns of the amici, I urge the legislature to determine whether the current definition of physically helpless provides adequate protection for persons with physical disabilities from sexually assaultive conduct. See also footnote 13 of this dissenting opinion.