MAY CONTAIN REDACTIONS

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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A.C. 40384

_____

STATE OF CONNECTICUT

v.

LORI A. THANER

_____

BRIEF OF DEFENDANT-APPELLANT WITH SEPARATE APPENDIX

_____

TO BE ARGUED BY:

JAMES P. SEXTON

OR

MEGAN L. WADE

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FILED: AUGUST 24, 2018

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STATEMENT OF ISSUES

1. Whether General Statutes §53a-98 (a)(3) is unconstitutionally vague in its application to the defendant; and
2. Whether the evidence was insufficient to support a conviction of custodial interference, where the state introduced no evidence to prove that the defendant to any specific action to “hold, keep, or otherwise refuse to return” her children to their father.

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INTRODUCTION

The gravamen of this direct criminal appeal is whether the defendant, Ms. Lori Thaner, "held, kept, or otherwise refused to return" her four children to their father when she did nothing to prevent them from leaving her home and they refused to return to their father in light of his chronic alcoholism and his prior physical assault of the oldest child. That inquiry encompasses two related questions. First, whether General Statutes § 53a-98 (a)(3), which triggers criminal liability for custodial interference in the second degree by "holding, keeping or otherwise refusing to return a child who is less than 16 years old to the lawful custodian," is unconstitutionally vague as applied to the defendant under the facts of this case. Second, to the extent one is able to divine the scope of conduct that falls within the statute's ambit, whether there was sufficient evidence of that conduct to ground the convictions in this case.

This case stems from an acrimonious divorce between the defendant and Mr. Robert Thaner. It is undisputed that the four children, who were then between the ages of nine and thirteen, had been lawfully visiting with their mother over Memorial Day weekend when it came time for Mr. Thaner to pick them up. Having decided among themselves the night before not to return to their father, the children refused to go home with him when he came to pick them up the next day. The defendant did nothing to prevent them from leaving her home and going to get into their father's car. A Glastonbury police officer confirmed that the children were well and not being restrained in any way by their mother; they simply did not wish to return to their father. That officer recommended seeking family court assistance, which the defendant explained she was doing. According to that officer, the Glastonbury police department generally does not arrest people under § 53a-98 (a)(3). Undeterred, Mr. Thaner called the school resource officer for the children's school in Norwalk, who obtained a warrant for the defendant's arrest. Subsequently, that Norwalk police officer, aided by local Glastonbury police officers and a social worker from the department of children and families, responded to the scene at the defendant's Glastonbury home. The children remained resolute and steadfast in their refusal to return to their father's care. They were eventually

removed by force to DCF's Manchester office, after which a ninety-six-hour hold was placed on them. They were then placed with their aunt and ultimately returned to the care of their parents.

Throughout these proceedings, the state was never able to articulate what conduct the defendant engaged in to hold, keep or otherwise refuse to return her children to their father. The court acknowledged on the record that it was not sure what conduct would ground such a claim, to which the state conceded that even its legal research did not reveal any useful legislative history or judicial gloss to shed light on that question. Neither the model jury instructions nor the court's jury instruction in this case elucidate what conduct was proscribed by the statute. The arresting officer admitted that § 53a-98 (a)(3) was essentially a civil statute and that he was not familiar with the family court process or even all relevant court orders in this case. In short, this was a case where children between the ages of nine and thirteen refused to return to their father's home. There is not a scintilla of evidence that the defendant did anything to restrain the children from leaving her house; they had to be forcibly removed by the police, and even DCF would not return them to their father's care for months. Despite the prosecutor, the court, and the defendant all being at a loss as to what conduct by the defendant constituted the charged offense and despite its arbitrary enforcement by the police departments (Norwalk officers enforce § 53a-98 (a)(3); Glastonbury officers generally do not), the defendant was convicted. Consequently, because the defendant did not have notice as to what conduct was proscribed under the circumstances presented and the statute is being arbitrarily enforced by law enforcement and the courts, § 53a-98 (a)(3) is unconstitutionally vague.

In the alternative, even if the conduct proscribed by § 53a-98 (a)(3) in these circumstances could be discerned, there is insufficient evidence that the defendant engaged in any such conduct. Too be sure, there is conduct that would obviously be proscribed by the statute. A person could not, by way of example, lock children in a room or use the threat of force to deter them from leaving. Likewise, where infants and toddlers are concerned, the

statute may even be broad enough to include a requirement that a person pick up the children and physically facilitate their return to the custodial parent. Where, however, the children are adolescent or preadolescent (i.e., ages nine through seventeen) and refuse to return to the custodial parent, it can hardly be said that the non-custodial parent is required to use force on their children to facilitate their return. Indeed, the statute only states what the person cannot do (i.e., hold, keep, or refuse); it is silent as to any affirmative actions that the person must take in the context of recalcitrant refusal by older children to facilitate their return. Here, the defendant did nothing to hold, keep, or refuse the children's return to their father. She did not lock them in a room; she did not threaten them with negative consequences for returning to their father; she did not refuse to comply with the police or DCF when they came to her house. In short, there is no evidence whatsoever of any conduct by the defendant that equated to holding, keeping, or refusing to return the children to their father. It is true that she did not use physical force or otherwise try to force or coerce her children (which would have included the oldest of the four children, who was 6'1" at the time of the incident) to leave against their will. But, the statute simply cannot be read to require such action on her part. Accordingly, to the extent that the application of § 53a-98 (a)(3) to the facts presented here can even be divined, there was insufficient evidence for the defendant to be convicted.

As a result, the judgment should be reversed, and the case should be remanded with orders to render judgments of acquittal on all three counts.

FACTS AND PROCEDURAL HISTORY

I. Facts Related To The Memorial Day Incident

The defendant and Mr. Thaner were married in 1999. The defendant had a son from a previous marriage (C1) and the couple then had a son of their own (C2), twin daughters (C3 and C4), and another son (C5). T. 1/17/17 at 126-27. When the couple divorced in 2007, the defendant initially was awarded custody of the children. Id. Mr. Thaner took the children every other weekend and on Wednesday evenings for dinner. Id. At the time, the defendant lived in Glastonbury, CT, and Mr. Thaner lived in Norwalk, CT. Id. at 127.

In 2008, C1 was involved in a juvenile matter concerning C3 and C4. T. 1/18/17 at 130. The four younger children began living with Mr. Thaner thereafter, and the custody order officially changed in 2010. T. 1/17/17 at 128-30. According to the 2010 custody order, the defendant was allowed visitation with the children on Tuesday evenings, every other Thursday, every other weekend, and shared holidays. T. 1/17/17 at 132.

This arrangement continued until January, 2015, when Mr. Thaner and C2 were involved in a physical altercation that ended with Mr. Thaner throwing the boy against his car. T. 1/171/7 at 145. The argument began when Mr. Thaner attempted to discipline C2 by taking away his tablet, but C2 refused. Id. at 154. According to Mr. Thaner, C2 punched and kicked him. Id. "So I got out of the car and jacked him up against my car." Id. The three younger children remained inside the car, crying. Id. At that point, C2 was 13, the twins were 11, and C5 was 9. Mr. Thaner called the police, and the officers decided that C2 should live with his mother in Glastonbury. Id. at 145. The officers returned to Mr. Thaner's house five days later, and Mr. Thaner asked them to arrest his 13 year old son. Id. at 154-55.

Thereafter, C2 lived in Glastonbury with his mother, who was expected to drive him to and from school in Norwalk every day. T. 1/17/17 at 148-49. The defendant did so for four months. Id. at 146, 149. She testified, "And after four months of that, I couldn't continue and. . . I had financial obligations. I had two children living with me. I was financially supporting the other three in Norwalk. And . . . you can do a couple weeks of four hour days. But eventually, you have to do your job or you're not going to have a job." T. 1/18/17 at 135. The defendant tried several times to enroll C2 in school in Glastonbury but was denied admission because Mr. Thaner contacted the Board of Education and told them she had no legal right to register the boy in school. T. 1/17/17 at 150.

Mr. Thaner repeatedly complained about C2 missing school to the administrators at West Rocks Middle School in Norwalk during the month of May, 2015. Id. at 134. Mr. Thaner testified that he contacted the assistant principal, the principal, the social worker, and the school resource officer, Officer Nash. Id. at 135-36. The West Rocks social worker testified

that the children frequently were absent in May and June, 2015, and an attendance team met to discuss their concerns. Id. at 166-67.

The department of children and families ("department") received a report alleging educational neglect in May, 2015 and opened its investigation on May 19, 2015, just prior to Memorial Day weekend. Id. at 174, 185. A department social worker met with the children on May 27, 2015, shortly after the Memorial Day incident, and discussed with them their concerns about living with their father. T. 1/18/17 at 88. The children reported "not feeling comfortable returning to the dad's home. They felt that father was not attentive." Id. In particular, "[t]he children reported that father would become unattentive [sic] at night times when he was drinking." Id. at 96. In short, the children alleged that Mr. Thaner abused alcohol in the children's presence, that he slurred his speech, and that they had to put themselves to bed because their father was unable to do so. T. 1/17/17 at 179-80. Accordingly, what began as an investigation into educational neglect became an investigation into physical neglect. T. 1/18/17 at 95. The department issued its report on July 2, 2015, substantiating the allegations of physical neglect against Mr. Thaner. T. 1/17/17 at 184-85. Although Mr. Thaner later successfully appealed the department's conclusion, the children testified during the criminal trial below that they did not want to return to their father because he "drinks a lot," "passes out and talks weird," gets "mean," and becomes "angry easily and can yell a lot." T. 1/18/17 at 107-08.

Mr. Thaner testified at trial that one of his daughters emailed him over Memorial Day weekend prior to his arrival and told him that she did not want to go home with him. T. 1/17/17 at 142. Mr. Thaner emailed back, "I'm coming to pick you up. Be ready." Id. C3, one of the twin girls, testified that she spoke to her father on the phone and told him that she and the other children "didn't want to go with him, and like not to come." T. 1/18/17 at 110. C3 and her siblings all discussed not going home with their father and made that decision together before he arrived in Glastonbury. Id. at 108-09. "We've been wanting to not go for a while so eventually we just decided not to go with him." Id. at 111.

The defendant likewise testified that when Mr. Thaner arrived at her home, the children flatly refused to go with their father. T. 1/18/17 at 136.

> And as a mom, you have a certain amount of power to convince your children to do things. And I was like, you know, come on, they just kept giving me reasons why they didn't want to go. And it just [came] to the point where I felt that I had an obligation to let their voices be heard, to let them talk to some people. I didn't refuse to let them go. They refused to go. If Mr. Thaner had called . . . I was perfectly willing to let him try to talk to them, resolve what was going on. But one of the things with Mr. Thaner is he shuts down. He doesn't want to talk. He just . . . doesn't communicate at all to resolve a problem.

T. 1/18/17 at 136. The defendant further testified that she did not prevent the children from going with their father:

> I did not stop them from going. The door was open. There's . . . three doors out of my house on the first level. If these children wanted to go to their father, there was no stopping them. He was . . . in the front yard. The children knew he was in the front yard. There was no preventing the children from going. It was actually the opposite. They were convincing me of the reasons why they didn't want to go.

T. 1/18/17 at 137-38.

The defendant did not believe that physically forcing the children into their father's car was an option. She testified, "[T]here's four kids. And you saw a couple of them today. [C2] at the time was 13 years old. He's 6'1. There were the two girls . . . who you met. And again, they were slightly smaller two years ago. And then they have a younger brother . . . So they weren't babies. They weren't kids that I could pick up and buckle into their car seat and make them go." T. 1/18/17 at 140. The defendant was also concerned because of the recent physical altercation between Mr. Thaner and C2: "I didn't want to get physical with the children. DCF was already involved in our family. If one of them [was] bruised or hurt, I didn't want to have to explain a physical altercation with the children." T. 1/181/7 at 140.

The defendant's description of her children and their demeanor was supported by the responding police officers. According to Officer Barao of the Glastonbury Police Department, Mr. Thaner reported to the Glastonbury Police Department on Memorial Day that he "was not able to or not allowed to" pick up his children, and he requested a welfare check. T. 1/17/17

at 99. Officer Barao conducted the check and determined that the children were fine. Id. According to Officer Barao, the Glastonbury Police do not normally arrest people for custodial interference: "We recommended[ed] that she seek counsel through family court and pursue that, which she said she was already attempting to do. So had her go through that route." Id. at 100; 103-04 ("At that time, it was generally the policy of the department to have both parties seek additional assistance from family court. That wouldn't be for every case, but it was generally how it was handled.").

Mr. Thaner also contacted Officer Nash, the school resource officer, on Memorial Day. T. 1/17/17 at 25-26. Nash verified that C2 had been out of school for a month. Id. at 26. Officer Nash called the defendant, inquired about the children, and the defendant told him that they had not wanted to come out of the house when Mr. Thaner arrived to pick them up. Id. at 27, 30. Officer Nash testified that he told the defendant that she was the adult and asked why she had not sent them out. Id. According to Officer Nash, the defendant replied that she would not "make the children come out to [Mr. Thaner]." Id. Officer Nash then informed her that she could be criminally liable if she did not return the children to their father. Id. at 32.

> My main concern was getting the children into school. And I discussed with her that it would be in her best interest to have the kids return to school. And I told her that she could be in trouble. The charge that she was eventually charged with this [and] also, a state fine per day that a parent could be . . . fined per day that a kid misses school. And I didn't charge her with that. I thought that was too rough. I just wanted the kids to be returned back to school.

Id. at 32. Officer Nash told the defendant that he would delay executing the arrest warrant if she would bring the children back to school, to which the defendant agreed. Id. at 33. Officer Nash waited a week, and when the children did not return to school, he executed the arrest warrant on June 2, 2015, for custodial interference in the second degree, with the help of the Glastonbury police department. Id. at 33-34. When he arrived at the defendant's house, the Glastonbury police department was already there, as was the children's aunt, Mr. Thaner, and a department social worker. Id. at 35-36, 110. Officer Hoover testified that when

he entered the defendant's home, he found the children in the living room, playing with electronics. He stated that, "[t]hey would not get up. They would not get up to go with their dad. They refused to leave." Id. at 112. Officer Hoover was asked if he knew of any option other than talking to the children to facilitate their return, and he testified that they could "get other people involved, perhaps they could help the situation." Id. at 120.

According to C3, Officer Nash used threats to convince the children to return with their father and that "[h]e like tried to drive us to go back to our father by like somewhat threatening us by telling us if we didn't go back to our father, he would like – like pick us up and forcibly take us outside." T. 1/18/17 at 111. C4, the other twin girl, testified that Officer Nash yelled at them "the whole time" and was "kind of harsh." Id. at 114. Despite the presence of the Glastonbury police, their aunt, their father, and a department social worker, however, and despite Officer Nash's threats, the children again refused to leave with their father. The Glastonbury police then arranged a meeting at the Manchester office of the department of children and families and transported the children there. T. 1/17/17 at 111.

The department issued a 96-hour hold on the children and held a removal meeting, during which they discussed options to avoid removing the children from their home. T. 1/17/17 at 187. At that meeting, the children again refused to go with Mr. Thaner and finally agreed to go with their maternal aunt. Id. The children later were placed with their maternal grandmother and remained with her through the summer. Id. at 187. During the four months that the children spent with their grandmother, Mr. Thaner had no contact with them because "he didn't want to see the children if they didn't want to see him." Id. at 190. Mr. Thaner attempted to pick up the children sometime in September or October, 2015, but the children again refused to go with him. Id. at 190. The children reported to the department that they wanted to live with the defendant and go to school in Glastonbury. Id. at 196.

The children finally returned to Mr. Thaner's house in October, 2015, and Mr. Thaner once again contacted school authorities because the children refused to attend school. T. 1/17/17 at 167, 192. The assistant principal from West Rocks Middle, the principal from

Cranbury Elementary, and Officer Nash all went to Mr. Thaner's home to collect the children and physically bring them to school. Id. Officer Nash testified that they "had to kind of corral the kids to go to school. Mr. Thaner, at one point, had to carry . . . one of the children out, the youngest, out to the car where he was accompanied by the principal of Cranbury on getting back to school and then the other kids kind of say that the resistance wasn't working. So they go up and got dressed and they were driven back to school by the principal of West Rocks and the guidance counselor as well." Id. at 38-39.

Thereafter, C2 ran away from his father's house in the middle of the night, and C3 also ran away under similar circumstances in January, 2016. T. 1/17/17 at 139. Both children wanted to live with their mother, but only C2 was allowed to stay with her. Id. at 139-40, 193. C2 was then registered to attend school in Glastonbury after Mr. Thaner finally gave permission for C2's school records to be transferred. Id.

II. Procedural History

The state charged the defendant with three counts of custodial interference in the second degree in violation of General Statutes § 53a-98 (a)(3). Specifically, the state charged that, "at the city of Glastonbury on or about May 25, 2015 at approximately 7:30 P.M. In the area of Chase Hollow Lane, the said [defendant] did, hold and keep for a protracted period and otherwise refuse to return a child, to wit: [name of child] who was less than sixteen years old, to such child's lawful custodian, to wit: Robert Thaner of Norwalk, after a request by such custodian, knowing that she had no legal right to do so, in violation of Connecticut General Statutes § 53a-98 (a)(3)." Long Form Information (A17)

Due to her purported ineligibility, the defendant was denied a public defender and proceeded to trial pro se. Following the defendant's jury trial in the Superior Court at Norwalk, G.A. 20, *Hernandez, J.*, the defendant was convicted of three counts of custodial interference in the second degree in violation of §53a-98 (a)(3). On March 16, 2017, she was sentenced to a total effective sentence of three years of incarceration suspended after 90 days plus three years of probation. The defendant spent fifty-eight days incarcerated. She was also

ordered to pay $1500 in fines; however, that fine was automatically stayed pending this appeal.

ARGUMENT

I. THE CUSTODIAL INTERFERENCE STATUTE IS UNCONSITUTIONALLY VAGUE AS APPLIED TO THE FACTS OF THIS CASE.

The defendant's convictions of custodial interference in the second degree must be set aside and an order of acquittal entered because, as a matter of law, General Statutes § 53a-98 (a)(3) is unconstitutionally vague. That statute provides, in relevant part, "(a) [a] person is guilty of custodial interference in the second degree when . . . (3) knowing that [she] has no legal right to do so, [she] holds, keeps or otherwise refuses to return a child who is less than sixteen years old to such child's lawful custodian after a request by such custodian for the return of such child." What it means to hold, keep or otherwise refuse to return a child is not defined in the statute, case law or model jury instructions, and some police departments, such as the Glastonbury Police Department, do not enforce it precisely because they do not know what it means. Indeed, its application to this case encouraged the very type of arbitrary and discriminatory enforcement that is prohibited by the fifth and fourteenth amendments to the United States constitution.[1]

A. Additional Relevant Facts

Each of the three counts[2] in the information accuses the defendant "of Custodial Interference in the Second Degree and charges that at the city of Glastonbury on or about

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[1]The fifth amendment to the United States constitution provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

The fourteenth amendment to the United States constitution provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[2]The defendant was originally charged with four counts of custodial interference in the second degree, including a count related to C2. Original Information (A10-11). The count related to C2, however, was nolled by the state prior to the beginning of trial. T. 1/10/17 at 1-2; see also Amended Long Form Information (A17-19).

May 25, 2015 at approximately 7:30 P.M. In the area of Chase Hollow Lane, the said [defendant] did, hold and keep for a protracted period and otherwise refuse to return a child, to wit: [name of child] who was less than sixteen years old, to such child's lawful custodian, to wit: Robert Thaner of Norwalk, after a request by such custodian, knowing that she had no legal right to do so, in violation of Connecticut General Statutes § 53a-98 (a)(3)." The information did not specify what conduct by the defendant held, kept or amounted to a refusal to return her children, between the ages of nine and thirteen, from returning to their father.

Additionally, prior to trial, the court explained to the defendant that "[u]nder 53a-98, custodial interference in the second degree, class A misdemeanor. . . [the] liability is triggered by holding, keeping or otherwise refusing to return a child who is less than 16 years old to the lawful custodian." Tr. 1/10/17 at 215. The defendant responded:

> Well, my . . . interpretation, you know, I'm not a lawyer, but those are, to me, actions. So I'm holding them. I'm keeping them from going. I'm refusing to let them go. The door was open. They could have walked out. I wasn't holding or keeping them.
>
> The thing is, is that for them to be returned to their father would require action on my part. I would have to force them to go.
>
> And when DCF and police were called, once I was gone, they couldn't force them to go. This was not just, you know, come on, go with your dad. This was adamant, we're afraid of him. This was a very bad scene.

T. 1/10/17 at 215-16. The court then remarked: "So I guess it's a question of causation, Attorney Moore. Doesn't that become a question of causation at this point? What is the proximate cause of the children not going with the lawful guardian? I suppose it would help, Attorney Moore, if I had . . . sort of an overview, an outline of what you expect the State's case to show, with respect to holding, keeping or otherwise refusing to return a child." T. 1/10/17 at 216. The state's attorney responded:

> Your Honor, I will say that I actually had the fun time of running through Westlaw with this statute. There's not a lot out there. . . . There really isn't. And it's generally in the context of civil. And there's a few cases where the Courts, you know, kind of talk about what happens in criminal. But as far as actual opinions, I haven't – I didn't run across this issue, and I was hoping to, obviously. . . . So

> I haven't completed all of that. And I spent a number of hours doing what I've done so far.
>
> But I was hoping that it could be addressed before the next jury selection. And that Mr. Thaner could be here and that I could be a little more equipped to respond to that.

T. 1/10/17 at 216-17. The state's attorney never did return to this subject or otherwise address what the state intended to show in order to prove the "hold, keep or otherwise refuse to return a child" element of the custodial interference statute. The state also never produced a bill of particulars, despite the defendant's request.[3]

As to this element of custodial interference, during closing arguments, the state argued to the jury that "the defendant kept her children from their lawful custodian" because when Mr. Thaner drove to Glastonbury to get his children, "the kids were not sent out to him. And doesn't really appear that there's too much dispute here . . . . he came to get them, but they refused to go. And [the defendant] wasn't going to make them." T. 1/19/17 at 22.

When charging the jury on custodial interference in second degree, the court read to the jury the state's long form information and read the text of § 53a-98 (a)(3) into the record. As to the "holding, keeping, or otherwise refusing to return" element, the court did not provide any additional guidance to the jury but said as to, "Element 1, kept child from lawful custodian. The first element is that the defendant held, kept, or refused to return a child to the child's lawful custodian." T. 1/19/17 at 53-54.[4] The court then continued on to the remaining

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[3]Later, after the court asked the defendant to clarify her theory of defense, the defendant sought similar clarification regarding the state's case:

> I feel like I have no idea where the State's case is going. And therefore how do I prepare a defense, and not be able to add witnesses after.
> So I'm having a hard time learning the rules and playing by them. . . . SO that's sort of – I'm having a hard time too, in that what's she presenting? What do I need to defend myself against? What timeline are we looking at?

T. 1/13/17 at 82. No further clarification regarding the state's case was provided by the state's attorney.

[4]The trial court's jury instruction mirrored that of the model jury instruction for Custodial Interference in the Second Degree. See Criminal Jury Instructions, 6.6-4 (A35)

elements.

B. Reviewability

The defendant acknowledges that this claim was not raised before the trial court. This claim nevertheless is reviewable pursuant to *State v. Golding*, 213 Conn. 233, 239-240 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781 (2015). "Under *Golding,* 'a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state had failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt.' (Emphasis in original.) *State v. Golding,* 213 Conn. at 239–40. The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the defendant may prevail." (Citation omitted; internal quotation marks omitted.) *State v. LaFontaine*, 128 Conn. App. 546, 550 (2011).

Both the first and second prongs of *Golding* are satisfied here. Under the first prong of *Golding*, "[f]or a claim that the statute is unconstitutional as applied to the defendant's conduct, the record must reflect the conduct that formed the basis of his conviction." *State v. LaFontaine*, 128 Conn. App. at 550. This first prong of *Golding* is satisfied because the record shows that the defendant was convicted pursuant to General Statutes § 53a-98 (a)(3). See Amended Information (A17-A19) The second prong of *Golding* is satisfied because the defendant's claim that § 53a-98 (a)(3) is unconstitutionally vague implicates her due process rights. See *State v. Schriver,* 207 Conn. 456, 459 (1988), *superseded by statute* as stated in *State v. James G.*, 268 Conn. 382 (2004) (reviewing unpreserved void for vagueness claim); *State v. Rocco*, 58 Conn. App. 585, 589 (2000). Accordingly, because this claim is reviewable, this Court may turn to the third and fourth prongs of *Golding* to determine the merits of the defendant's claim, namely, whether § 53a-98 (a)(3) is void for vagueness as

applied to her case and whether the state can prove harmlessness beyond a reasonable doubt.

C. Standard of Review and Relevant Legal Standards

De novo. “The de novo standard of review is applicable when an appellate court is deciding whether a statutory provision is unconstitutionally vague.” (Internal quotation marks omitted.) *State v. Kirby*, 137 Conn. App. 29, 39 (2012).

Where, as here, a defendant challenges a statute “as void for vagueness, and no first amendment rights are implicated, the constitutionality of the statute is determined by its applicability to the particular facts at issue.” *State v. Rocco*, 58 Conn. App. at 588. “To demonstrate that the statute is unconstitutionally vague as applied to him, the defendant must . . . demonstrate beyond a reasonable doubt that [he] had inadequate notice of what was prohibited or that [he was] the [victim] of arbitrary and discriminatory enforcement. (Internal quotation marks omitted.) Id. at 589.

The void-for-vagueness doctrine embodies two central but distinct aspects: the right to fair warning and the guarantee against standardless law enforcement. *Smith v. Goguen,* 415 U.S. 566, 572-73 (1974); *Mitchell v. King*, 169 Conn. 140, 142-43 (1975). The Supreme Court of the United States has emphasized that "the more important aspect of the vagueness doctrine is not the actual notice, but. . . the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolander v. Lawson,* 461 U.S. 352, 357-58 (1983). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. Rockford,* 408 U.S. 104, 108-09 (1912). Thus, in order to surmount a vagueness challenge, a statute must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he may act accordingly" and the law "must provide explicit standards for those who apply them." Id. at 110; *State v. McMahon*, 257 Conn. 544, 551-52 (2001).

D. General Statutes § 53a-98 (a)(3) Is Unconstitutionally Vague As Applied To The Defendant Because It Fails To Provide Adequate

Notice That The Defendant Can Be Held Criminally Liable For Inaction

The custodial interference statute is unconstitutionally vague as applied to the defendant's case because it fails to provide adequate notice that the defendant's inability to achieve what police officers, school resource officers, and department social workers could not achieve, namely, the immediate return of the children to their father, is sufficient to satisfy this criminal statute. A statute that fails to manifest minimal guidelines to objectively and foreseeably distinguish innocent acts from criminal acts is impermissibly vague. See *State v. Schriver*, 207 Conn. 456, 461 (1988) (noting that challenged statute was impermissibly vague because it "fail[ed] to manifest minimal guidelines by which innocent acts can be objectively and foreseeably distinguished from conduct that violates the statute"); *Smith v. Goguen*, 415 U.S. 566, 578 1974) (The "absence of any ascertainable standard for inclusion and exclusion is precisely that offends the Due Process Clause.").

In order to surmount a vagueness challenge, a statute must “give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so [she] may act accordingly . . . .” *Grayned v. Rockford*, 408 U.S. 104, 108-09 (1912); *State v. McMahon*, 257 Conn. 544, 551-52 (2001); see also *Parker v. Board Of Education*, 246 Conn. 89, 100 (1998) (“A law forbidding or requiring conduct in terms so vague that men of common intelligence necessarily must guess at its meaning and differ as to its application violates due process of law.”)

In *Parker*, a student was expelled from school after being arrested for possession of marijuana off school grounds after school hours. *Parker v. Board of Education*, 246 Conn. 89. On appeal, the student argued that General Statutes § 10-233d(a)(1) could not constitutionally be applied to his case because the phrase “seriously disruptive of the educational process” did not provide any meaningful indication that having marijuana in the trunk of a car off school grounds and after school hours would subject a student to expulsion. The Court and noted that “[o]ur fundamental inquiry is whether, upon being apprised of the language of § 10–233d (a)(1) and those prior interpretations, a person of ordinary intelligence

could determine, with a reasonable degree of certainty, whether the plaintiff's conduct, i.e., having marijuana in the trunk of a car in the town of Morris after school hours, would subject him to expulsion. Put another way, our task is to ascertain whether such persons necessarily would differ as to whether that conduct was 'seriously disruptive of the educational process' at Thomaston High School." Id. at 108. The Court held "that a person of ordinary intelligence, upon being apprised of the language of § 10–233d (a)(1) and our prior interpretation . . . of similar language, would know, with a reasonable degree of certainty, that conduct off school grounds that markedly interrupts or severely impedes the operation of a school is 'seriously disruptive of the educational process' and therefore subjects a student to expulsion. We further conclude, however, that a person of ordinary intelligence, apprised only of the language of § 10–233d (a)(1) and our prior interpretation . . . of similar language, could not be reasonably certain whether possession of marijuana in the trunk of a car, off the school grounds after school hours, is, *by itself and without some tangible nexus to school operation,* 'seriously disruptive of the educational process' as required by § 10–233d (a)(1) in order to subject a student to expulsion." Id. at 109-10. Here, upon being apprised of the language of §53a-98 (a)(3) and without the aid of prior interpretative decisions, a person of ordinary intelligence could not determine, with a reasonable degree of certainty, that the defendant's conduct, i.e., not physically forcing her children to return to their father upon request but taking no action to prevent them from leaving, would subject her to criminal liability.

To convict a defendant of custodial interference in the second degree pursuant to General Statutes § 53a-98 (a)(3), the state must prove beyond a reasonable doubt that: (1) that she had held, kept or otherwise refused to return a child, (2) who was less than sixteen years old, (3) to such child's lawful custodian after a request by such custodian for the return of such child, (4) with knowledge that she has no right to do so. A review of the statute demonstrates that the defendant was not on notice that her inaction in physically forcing her children to return to their father was criminal in nature.

"Pursuant to General Statutes § 1–2z, the meaning of a statute, shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If . . . 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. A statute is ambiguous if, when read in context, [it] is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *State v. Josephs*, 328 Conn. 21, 26 (2018).

Neither § 53a-98 nor the Connecticut Penal Code defines the terms "hold," "keep," or "refuse to return." See General Statutes § 53a-98 (a)(3). Accordingly, this court looks to the ordinary meaning of these words to divine their meaning. *DuBaldo v. Dept. of Consumer Protection,* 209 Conn. 719 (1989); see also, General Statutes § 1-1(a).[5] The following definitions provided by Merriam-Webster Dictionary illustrate the vague nature of the language of § 53a-3, especially as applied to the defendant's case. First, "hold" is defined as "to keep under restraint," or "to prevent from leaving or getting away." Second, "keep" is defined as "to restrain from departure or removal." "Refuse" is defined as "to show or express unwillingness to do or comply with," and "return" is defined as "to pass back to an earlier possessor." Each of these words implies action. An individual presented with words of this nature would have no means of anticipating that the statute also sweeps inaction within the statute's meaning.

Similar to *Parker*, here, the statute as applied to the defendant's case gave her no notice that her conduct was criminal. In *Parker*, the Court determined that a reasonable person could not determine that the having marijuana in the truck of a car in the town, off school property and after school hours would constitute conduct that was "seriously disruptive of the educational process" so as to expose the defendant to expulsion under §

[5]General Statutes § 1-1(a) provides: "In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly.

10–233d (a)(1). Here, a plain reading of the §53a-98 (a)(3) did not indicate to the defendant that her inaction could subject her to criminal liability. For example, as the defendant expressed during trial, “I’m not a lawyer, but those, are, to me, actions. So I’m holding them. I’m keeping them going, I’m refusing to let them go. The door was open. They could have walked out. I wasn’t holding or keeping them.” T. 1/10/17 at 215-16. There was no reason for the defendant to anticipate that by not physically forcing her children to return to Mr. Thaner, she could be held criminally liable. Nor is there any indication that physical force is what the statute requires or seeks to encourage.[6]

Moreover, to "fairly ascertain" a statutory meaning that avoids a vagueness challenge, the court may look to "[r]eferences to judicial opinions involving the statute, the common law, legal dictionaries, or treatises." *State v. Payne*, 240 Conn. 766, 778 (1997). The result must satisfy not only the dual concerns of the vagueness doctrine, but also "'[t]he touchstone of due process [which] is protection of the individual against arbitrary action of government'" *State v. Floyd*, 217 Conn. 73, 87 (1991), citing *Wolff v. McDonnell,* 418 U.S. 539, 558 (1974).

Here, there are only ten reported cases in this state that reference § 53a-98, and none deals with subsection three of the statute. Of those ten, only two are criminal cases. See *State v. Vakilzaden*, 272 Conn. 762 (2005); *State v. Vakilzaden,* 251 Conn. 656 (1999). Even the state's attorney admitted that she was unsure about what conduct qualified under the statute, admitting that there were few reported cases of criminal custodial interference in this state. Tr. 1/10/17 at 216-17 ("There's not a lot out there. . . . There really isn't. And it's generally in the context of civil. And there's a few cases where the Courts, you know, kind of talk about what happens in criminal. But as far as actual opinions, I haven't – I didn't run across this issue, and I was hoping to, obviously.") Without the aid of prior decisions to lend an authoritative judicial gloss to the potentially limitless language of the statute, there was nothing to provide the defendant with fair warning that her failure to act or the failure to overcome the will of a 13

[6]A review of the statute’s scant legislative history is unhelpful in discerning the meaning of the “hold, keep, or otherwise prevent” element of the statute.

year old boy, two 11 year old girls, and a 9 year old boy also came within the proscription of the statute. It is worth noting that intervention by Glastonbury police officers, DCF workers, Officer Nash, Mr. Thaner, and the children's grandmother also failed to accomplish what the defendant could not on her own.

Ultimately, to read into § 53a-98 (a)(3) the criminalization of the inaction of a parent to physically force their children to go with their legal guardian belies the typical strict construction of criminal statutes. “Special rules govern our review of penal statutes. We have long held that [c]riminal statutes are not to be read more broadly than their language plainly requires. . . . Thus, we begin with the proposition that [c]ourts must avoid imposing criminal liability where the legislature has not expressly so intended . . . and ambiguities are ordinarily to be resolved in favor of the defendant. . . . In other words, penal statutes are to be construed strictly and not extended by implication to create liability which no language of the act purports to create.” See *State v. Lutters*, 270 Conn. 198, 206 (2004) (Citations omitted; emphasis in original; internal quotation marks omitted.) Neither a review of the statutory language, legislative history, or case law surrounding § 53a-98 (a)(3) suggests such an interpretation; nor does any relevant judicial gloss from case precedent demonstrate an expectation that the defendant’s conduct in the present case would be prohibited by the statute. Accordingly, § 53a-98 (a)(3) is unconstitutionally vague in its application to this defendant.

E. The Language of General Statutes § 53a-98 (a)(3) Encouraged The Arbitrary and Discriminatory Enforcement As Applied To The Defendant Because It Leaves To The Discretion Of Others The Determination Of Whether Inaction May Constituted Holding, Keeping or Otherwise Refusing to Return” Element Of The Crime

Section 53a-98 (a)(3) is impermissibly vague for the purposes of the fifth and fourteenth amendments to the United States constitutions because the vague wording of the statute led to the arbitrary and discriminatory enforcement of the statute as applied to the defendant. Specifically, it allowed for three convictions of custodial interference in the second degree where the state introduced no evidence that the defendant took any action to prevent

her children from returning to their father upon his request. Such discriminatory application in this case is apparent – the decision of whether the defendant's inaction in physically forcing her children to return to their father, an action which neither DCF nor police officers were able to achieve, was permitted to constitute "holding, keeping or otherwise refusing to return" the children, on the basis of a vague statute that has rarely been utilized in the criminal context. Put another way, the statute was arbitrarily enforced because it is so unclear that ordinary people cannot understand what specifically constitutes "holding, keeping or otherwise refusing to return," thereby allowing the state to rely on it inconsistently and on an ad hoc basis.

"[The doctrine] embodies two central precepts: the right to fair warning of the effect of a governing statute or regulation and the guarantee against standardless law enforcement." *State v. Schriver,* 207 Conn. at 459-60. Importantly, the United States Supreme Court has emphasized that "the more important aspect of the vagueness doctrine is not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern law enforcement." (Internal quotation marks omitted.) *Kolender v. Lawson,* 461 U.S. at 357-58; *State v. Schriver,* 207 Conn. at 460. Thus, "[i]n order to surmount a vagueness challenge, a statute must not "impermissibly [delegate] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *State v. Schriver,* 207 Conn. at 460. "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. . . . Therefore, a legislature [must] establish minimal guidelines to govern law enforcement." (Citation omitted; internal quotation marks omitted.) *State v. Kirby*, 137 Conn. App. at 40–41 (2012).

Here, § 53a-98 (a)(3) is unconstitutionally vague in its application to the defendant because the vagueness of the language impermissibly delegates basic policy matters to

police departments for resolution of whether to charge parents who already are involved with family court proceedings with custodial interference for failing to return their children to their legal guardian. Put another way, if the custodial interference statute encompasses both action and inaction to satisfy the “holds, keeps or otherwise refuses to return a child” element, it confers on police a virtually unrestrained power to arrest and charge persons with a violation of this statute and on prosecutors unconstitutional discretion in enforcement and prosecution. See *State v. Schriver*, 207 Conn. 456, 461-62 (1988) (determining that statute at issue was unconstitutionally vague as applied to the facts of that case in part because it provided "no guidance to potential violators, police officers or juries. . . [and] would seem to authorize police officers and jurors to determine culpability subjectively, on an ad hoc basis"). This statute not only delegated the decision of whether to bring criminal charges against parents involved in family court matters, at all, but it also delegates to police departments the task of determining what specific factual situations rise to the level of custodial interference, including as was the case here, situations in which a parent is inactive in forcing the return of her children to their legal guardian. Such delegation is inappropriate and unconstitutional.

A defendant may successfully challenge the vagueness of the statute as applied to the facts of her case by demonstrating that she was the victim of arbitrary enforcement practices. *See State v. Indrisano,* 228 Conn. 795, 813; see also id., at 826-27 (1994) *(Berdan, J.,* dissenting) (noting that the statutory language at issue was not only "inadequate to provide notice of the type of conduct prohibited by the statute, but it is precisely the type of language that allows police officer, judges and juries to rely on their own subjective judgment to define conduct that they find inconvenient, annoying and alarming.").

The arbitrary application of the custodial interference statute was demonstrated on at least four occasions throughout this event. First, there was testimony that, although Norwalk Police Department does charge parents under this criminal statute, Glastonbury Police Department declines to do so and instead, refers parents to family court. T. 1/17/17 at 98-100. Second, Officer Nash arbitrarily exercised his discretion in charging the defendant with

custodial interference. Officer Nash acknowledged that his main concern was getting the children back to school. T. 1/17/17 at 32 ("My main concern was getting the children into school.") Despite his knowledge that the children had missed school, he testified that he agreed not to press charges against the defendant if the children returned to school. It was only after the children missed additional school days that Officer Nash issued a warrant for the defendant's arrest on the basis of her "holding, keeping or otherwise refusing to return" the children to Mr. Thaner on June 2, 2015, more than a week prior to her arrest. These actions demonstrate the police department's arbitrary enforcement of § 53a-98 (a)(3) against this particular defendant. Third, despite the fact that all four Thaner children were present on the date of the incident and that Mr. Thaner had legal custody of all four children, the state amended its information to charge the defendant only with three counts of custodial interference in the second degree with respect to C3, C4, and C5. Compare Original Information (A10-11) with Amended Long Form Information (A17-19). Prior to the start of trial, however, the state arbitrarily nolled the charge involving C2, the oldest of the four Thaner children and the one who had been living with the defendant since January, 2015, despite the fact that Mr. Thaner retained custody of all four children. T. 1/10/17 at 1-2; T. 1/17/17 at 45-49. Fourth, at trial, even the court and state's attorney were confused as to what conduct constitutes "holding, keeping or otherwise refusing to return" the children to their legal guardian. T. 1/10/17 at 215-17. No clarification of the state's theory of the case occurred which ultimately left the task of defining the element to the jury, as neither the state nor the judge provided such clarification. Significantly, the state could not point to any specific action taken by the defendant that would satisfy the "hold, keep, or otherwise refuse to return" element of the custodial interference statute. Rather, during closing arguments, the state argued to the jury that "the defendant kept her children from their lawful custodian" because when Mr. Thaner drove to Glastonbury to get his children, "the kids were not sent out to him. And doesn't really appear that there's too much dispute here . . . . he came to get them, but they refused to go. And [the defendant] wasn't going to make them." T. 1/19/17 at 22. Thus,

the legislature impermissibly delegated to the police, prosecutor, judge, and jury the task of enforcing and interpreting § 53a-98 (a)(3).[7] And here, the application of such a vague definition was done so arbitrarily to criminalize the inaction of mother of physically forcing her children to return to their father. Accordingly, § 53a-98 (a)(3) is unconstitutionally vague and encouraged the arbitrary and discriminatory application to the defendant in this case, where the state provided no evidence that the defendant actively "held, kept or otherwise refused to return" her children to their legal guardian.

Neither the statutory language of the custodial interference statute nor any relevant judicial gloss from case precedent demonstrates an expectation that the defendant's conduct in the present case would be prohibited by the statute, nor does the statute provide the guidance needed to curb the attendant dangers of arbitrary and discriminatory application. Due process thus requires that the defendant's conviction be reversed and an acquittal entered.

F. Harmless Error

Turning to the fourth prong of *Golding*, which requires the state to prove harmlessness beyond a reasonable doubt, had §53a-98(a)(3) not been unconstitutionally vague, the state could not meet its burden of proof on the "hold, keep or otherwise refuse to return" element of the custodial interference statute, as it presented no evidence to show that the defendant actively prevented the children from returning to Mr. Thaner. Accordingly, the state would not have been able to sustain convictions of custodial interference against the defendant. Because § 53a-98 (a)(3) is unconstitutionally vague as applied to the defendant, and such unconstitutional vagueness harmed the defendant, reversal is required.

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[7]"[A]n unconstitutionally vague law invites arbitrary enforcement in this sense if it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case, or permits them to prescribe the sentences or sentencing range available." 16B Am. Jur. 2d Constitutional Law § 972 (citing to *Beckles v. U.S.*, 137 S. Ct. 886 (2017)). Additionally, "[t]he requirement of standards for enforcement of a criminal statute is intended to prevent police officers, prosecutors, judges, and juries from resolving criminal cases on an ad hoc and subjective basis, pursuing their personal predilections." 21 Am. Jur. 2d Criminal Law § 15.

II. THE EVIDENCE WAS INSUFFICIENT TO CONVICT THE DEFENDANT OF CUSTODIAL INTERFERENCE.

The defendant challenges her convictions of three counts of custodial interference in the second degree on the basis that there was insufficient evidence to prove beyond a reasonable doubt that she "held, kept, or otherwise refused to return" her children to Mr. Thaner, the custodial parent. To support a conviction of custodial interference in the second degree, the state must prove beyond a reasonable doubt, pursuant to General Statutes § 53a-98, that Lori (1) that she had held, kept or otherwise refused to return a child, (2) who was less than sixteen years old, (3) to such child's lawful custodian after a request by such custodian for the return of such child, (4) with knowledge that she has no right to do so. General Statutes § 53a-98(a)(3). Because the elements provided in the statute suggest that to commit custodial interference in the second degree, the defendant must take a specific action to prevent the return of the children to the custodial parent, the state failed to prove beyond a reasonable doubt that the defendant held, kept, or otherwise refused to return the children to their father. Such insufficient evidence violates the due process clause of the fifth amendment to the United States Constitution. Accordingly, the defendant's convictions should be reversed and a judgment of acquittal ordered.

A. Preservation & Standard of Review

This claim is preserved by the defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict, Memorandum in Support, and argument. Should this court find otherwise, the claim is reviewable on appeal nonetheless because one found guilty based on insufficient evidence has been deprived of a constitutional right and necessarily meets the prongs required for review under *State v. Golding.* 213 Conn. at 239-40. *State v. Lewis*, 303 Conn. 760, 767 (2012). The claim is also reviewable pursuant to P.B. § 60-5.

The standard of review for claims of insufficient evidence is well-established. See *State v. Josephs*, 328 Conn. at 35-36. "In evaluating a claim of evidentiary insufficiency, we review the evidence and construe it as favorably as possible with a view toward sustaining the conviction, and then . . . determine whether, in light of the evidence, the trier of fact could

reasonably have reached the conclusion it did reach. . . . A trier of fact is permitted to make reasonable conclusions by draw[ing] whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . [These inferences, however] cannot be based on possibilities, surmise or conjecture." (Internal quotation marks omitted.)" Id. at 35. In addition, "the [trier of fact] must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence." (Citation omitted; internal quotation marks omitted.) Id. at 35-36.

B. The State Presented Insufficient Evidence To Prove That The Defendant To Any Affirmative Action To Hold, Keep, Or Otherwise Refuse To Return The Children To Their Father, A Required Element Of Custodial Interference

Even construing the evidence in light most favorable to sustaining the verdict, the state failed to meet its burden because it presented no evidence that the defendant took affirmative action to prevent her children from returning to their father. In this case, the only evidence presented was that the defendant failed to physically force her children to return to Mr. Thaner. Such dearth of evidence cannot, as a matter of law, be sufficient to sustain three convictions of custodial interference. The state has thus failed to satisfy an essential element of the custodial interference statute.

As an initial matter, it is still unclear what the state's theory of its case was as to the "holding, keeping, or otherwise refusing to return" the children element and what exactly is required to sustain a conviction under this statute. For example, during closing arguments, the state could argue to the jury that the defendant took any specific action to "hold, keep, or otherwise refuse to return" the children to Mr. Thaner. Instead, the state argued that "the

defendant kept her children from their lawful custodian" because when Mr. Thaner drove to Glastonbury to get his children, "the kids were not sent out to him. And doesn't really appear that there's too much dispute here . . . . he came to get them, but they refused to go. And [the defendant] wasn't going to make them." T. 1/19/17 at 22.

Although there is a dearth of case law on the custodial interference statute in the criminal context, a plain reading of the language of the statute suggests that specific action on the part of the defendant to satisfy this element. The Restatement (Second) of Torts within "Division Eight. Interference in Domestic Relations," is Section 700, "Causing Minor Child to Leave or not to Return Home" provides some insight on a civil cause of action similar to the custodial interference statute. Restatement (Second) of Torts § 700 provides that "One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent." In the commentary to such section, however, "[n]o action can be maintained, however, against one who merely gives shelter and sustenance to a child known by the actor to have left home without the parent's permission, if the child is not induced by other means to remain away from its home." Restatement (Second) of Torts § 700, comment a (1977). This interpretation finds further support in at least one case from a neighboring state. See, e.g. *People v. Page*, 77 Misc. 2d 277, 277-78 (1974) (sustaining motion to dismiss information charging defendants with custodial interference in second degree by holding that charging information deficient for failing to specify how defendant "allegedly enticed the child.") (A33-34) In *Page*, the court reasoned that because the word "entice" was not defined in the custodial interference statute, the state was required to demonstrate in evidentiary form the specific "manner of 'enticement' and must set forth some evidentiary statement manifesting the intent of the Defendant to hold the child either permanently or at least for some protracted period." Id. at 278-79.

Reading the custodial interference to require that the state prove beyond a reasonable doubt that the defendant took specific action to "hold, keep, or otherwise prevent" the children

from Mr. Thaner, the evidence is insufficient to support her convictions. As the defendant argued in her motion for judgment of acquittal, the record is devoid of any testimony or evidence that would lead a reasonable fact finder to conclude that the defendant had engaged in some overt act whereby she "refused" to return the children to Mr. Thaner, despite his request for their return. T. 1/18/17 at 37-43.

First, there is not a scintilla of evidence to suggest that the defendant in any way restricted her children's access to their father, prevented their return to him, or actively refused to allow Mr. Thaner to assert his custody over their children.[8] Officer Hoover testified that as the arresting officer with the Glastonbury police department, he was attempting to tell the children to go with their father but that the children themselves refused to get up and leave with Mr. Thaner. T. 1/17/17 at 108-114. To that end, Mr. Thaner's testimony did not suggest that the defendant restricted his access to the children; to the contrary, his testimony supported the fact that the children refused to go with him. See, e.g., T. 1/17/17 at 134-136 (testimony that when he went to pick up his children, defendant came outside and said children did not want to go with him and she was going to do what they wanted to do); id. at 157-60 (testimony that upon arrival to defendant's home on May 25 to pick up children, parked in front of home but did not make any attempts to contact or otherwise access children). Importantly, nowhere in his testimony did Mr. Thaner state that the defendant took any specific action to prevent him from entering the home, calling the children and requesting that they come outside to talk with him, or otherwise prevent the children from leaving with him that day. The evidence adduced at trial also suggests that the defendant did not take steps to conceal the location of the children; in fact, the defendant cooperated with the Glastonbury police on the date of the incident and successfully completed a welfare check.

[8]The exhibits at trial also are not relevant to the "holding, keeping, or otherwise refusing to return" element of the custodial interference statute. Nor do the exhibits presented at trial support the state's case that the defendant took some action to hold, keep, or otherwise refuse to return the children to Mr. Thaner. Rather, the exhibits entered in full showed that the children missed school in Norwalk and established the custody order in place at the time of the Memorial Day incident. See Exhibit List (A37-38).

Tr. 1/17/17 at 98-99.

Second, the evidence overwhelmingly leads to the conclusion that the children arranged among themselves to refuse to go with their father, and one of the twins even communicated this refusal prior to Mr. Thaner's arrival to the defendant's home in Glastonbury. Tr. 1/17/17 at 137. (Mr. Thaner testified: "Actually, my daughter had emailed me once or twice telling me that she wanted to stay there and that she didn't want to come back to Norwalk."). The West Rocks Middle School social worker testified that Mr. Thaner called her and "informed us that he was not able to get his children to come back home." Tr. 1/17/17 at 167. Jennifer Auger, one of the DCF workers, testified: "[I]t was my understanding that the children went to visit and when it was time for them to go back to Dad's house at the end of their visitation time with mom, they refused to go." Tr. 1/17/17 at 175.

Indeed, the evidence presented in this case reveals that it was the children who refused to leave their mother's home. Officer Nash, the arresting officer, testified that the defendant reported to him that "the kids didn't want to come out to Mr. Thaner." T. 1/17/17 at 27. Mr. Thaner testified that when he arrived on Memorial day, the defendant "came out of her house and told me that she wasn't sending the children out. The children didn't want to come out and she was going to do what the children wanted." T. 1/17/17 at 136. The state asked, "Did you do anything as a result of that? Did you take the children? Did you go into the house and grab them? What did you do after that?" to which Mr. Thaner responded that he went to the Glastonbury Police Department to discuss the situation with them. T. 1/17/17 at 136-37. At that point, the Glastonbury Police Department told Mr. Thaner that the situation was a civil matter and to take it up with the family court. T. 1/17/17 at 136-37.

The children's testimony accords with this view of the events. C3 testified that she, C4, and C5 decided together that they wanted to stay with their mother and would not return with Mr. Thaner at the end of Memorial Day weekend. Tr. 1/18/17 at 107-11. C3 communicated this decision to her father by phone. Tr. 1/18/17 at 109-10. C4 testified similarly, noting that she too did not want to go with her father when he came to pick them

up. Tr. 1/18/17 at 115-16.

The children's refusal to return to their father is further corroborated by the fact that no other adult could force or coerce the children to return to Mr. Thaner after the defendant was arrested. Officer Hoover of the Glastonbury Police Department testified that neither he nor Officer Nash could convince them to return to their father. He testified that, "the children would not leave the home," "they would not get up to go with their father," and they "refused to leave." T. 1/17/17 at 111-12. According to Officer Hoover, the children's great aunt and therapist, Judy Smith, were also present. Smith's role was to persuade the children to leave with their father, but she, too, was unsuccessful. T. 1/17/17 at 117. DCF ultimately was forced to take custody by placing a 96-hour hold. DCF worker Auger testified that the hold was issued at the beginning of June and that "[t]he children had refused to go with father and mother was unable to take them. I believe she was arrested at the time." T. 1/17/17 at 178.

The children then lived with their grandmother for months and refused to see Mr. Thaner during that time. T. 1/17/17 at 189-90. According to Auger, the custody order reverted back to Mr. Thaner after the DCF charges against him were dismissed. T. 1/17/17 at 189-90. Mr. Thaner "made attempts to pick up the children," but "they refused to go with him." T. 1/17/17 at 191; see also, id. at 90-91 (DCF worker Carmen DeLossantos testified that "[t]he children refused to return to the father's home.").

The record is devoid of evidence that, even if construed in the light most favorable to the verdict would prove beyond a reasonable doubt that the defendant held, kept, or otherwise refused to return the children to Mr. Thaner. The evidence therefore is insufficient to sustain the convictions of the defendant on three counts of custodial interference. Accordingly, the convictions must be reversed and a judgment of acquittal ordered.

CONCLUSION

For the foregoing reasons, this Court should reverse the three convictions of custodial interference in the second degree and remand to the trial court with instruction to enter judgments of acquittal on all counts.

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CERTIFICATION

Pursuant to Practice Book § 67-2, I hereby certify the following:

1. This brief and appendix comply with all provisions of this rule;

2. This brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law;

3. This brief and appendix are true copies of the brief and appendix that were submitted electronically pursuant to subsection (g) of this section;

4. A true electronic copy of this brief and appendix were delivered via e-mail to the counsel of record listed below on August 24, 2018, and said electronic copies redacted any personal identifying information where necessary to comply with the provisions of this rule;

5. In accord with Practice Book § 62-7, a copy of this brief and appendix was sent to each counsel of record, those trial judges who rendered a decision that is the subject of this appeal, and my client, on August 24, 2018, as further detailed below.

In accord with Practice Book § 62-7, a copy of this brief and appendix was sent to each counsel of record, those trial judges who rendered a decision that is the subject of this appeal, and my client, on August 24, 2018, as further detailed below.

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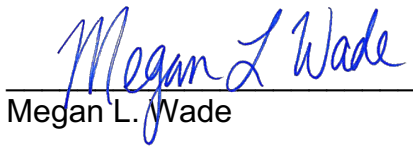

Megan L. Wade