No.

# In the Supreme Court of the United States

ANTHONY COLLYMORE, PETITIONER

*v.*

THE STATE OF CONNECTICUT, RESPONDENT

*ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT*

**PETITION FOR A WRIT OF CERTIORARI**
**APPENDIX**

SUSAN M. HANKINS
*Counsel of Record for Petitioner*
265 Golden Hill Street
Bridgeport, CT 06604
T: 203-870-9944
SMHankins@gulashlaw.com

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# APPENDIX A

**334 Conn. 431, 223 A.3d 1**
**Supreme Court of Connecticut**

# STATE of Connecticut
**v.**

# Anthony COLLYMORE
**(SC 19868)**
**Argued November 7, 2018**
**Officially released January 21, 2020**

## Synopsis

**Background:** Defendant was convicted in the Superior Court, Judicial District of Waterbury, Cremins, J., of felony murder, attempt to commit robbery, conspiracy to commit robbery, and criminal possession of a firearm. Defendant appealed. The Appellate Court, 168 Conn.App. 847, 148 A.3d 1059, affirmed. Defendant petitioned for certification to appeal, which the Supreme Court granted.

**Holdings:** The Supreme Court, D'Auria, J., held that:

1 State's failure to extend immunity that it had granted to witnesses for testimony given during State's case-in-chief to testimony given during defendant's case-in-chief did not violate defendant's due process and compulsory process rights under the prosecutorial misconduct theory of immunity;

2 State's revocation of immunity, coupled with trial court's warnings to witnesses, did not violate defendant's rights to due process and to present a defense;

3 identity of shooter was not at issue as to charges of felony murder, attempted robbery, and conspiracy to commit robbery, and thus, trial court's admission of

purported first time in-court identification testimony did not implicate defendant's due process rights;

4 identity of shooter was at issue as to charge of criminal possession of a firearm, and thus, trial court's admission of purported first time in-court identification testimony implicated defendant's due process rights; but

5 any error in trial court's admission of first time in-court identification testimony was harmless.

Affirmed.

**Attorneys and Law Firms**

****5** Susan M. Hankins, assigned counsel, for the appellant (defendant).

Robert J. Scheinblum, senior assistant state's attorney, with whom were Cynthia S. Serafini, senior assistant state's attorney, and, on the brief, Maureen Platt, state's attorney, for the appellee (state).

Palmer, McDonald, D'Auria, Kahn, Ecker and Vertefeuille Js.

***Opinion***

D'AURIA, J.

***435** The primary question in this appeal is whether the defendant, Anthony Collymore, was harmed when the state, after granting immunity to three witnesses under General Statutes § 54-47a for testimony given during the state's case-in-chief, revoked that immunity when the same witnesses later testified in the defense case-in-chief. The defendant appeals from the judgment of the Appellate Court affirming the judgment of conviction, rendered after a jury trial, of felony murder in violation of General Statutes § 53a-54c, attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-

49 (a) (2) and 53a-134 (a) (2), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a), and criminal possession of a firearm in violation of **6 General Statutes § 53a-217 (a) (1).1 He claims that his rights to due process and a fair trial under the fourteenth amendment to the United States constitution, and his rights to compulsory process and to present a defense under the sixth amendment to the United States constitution were violated when the trial court improperly permitted the state to revoke the immunity of the three witnesses, causing them to invoke their fifth amendment right against self-incrimination. Additionally, the defendant claims that the Appellate Court improperly denied his motion to reconsider in light of this court's holding in *State* v. *Dickson*, 322 Conn. 410, 141 A.3d 810 (2016), cert. denied, —— U.S. ——, 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017), on the ground that two witnesses made improper, first time in-court identifications. Because we conclude that the revocation of immunity did not violate the defendant's *436 constitutional rights and that any improprieties regarding the first time in-court identifications were harmless, we affirm the judgment of the Appellate Court.

The following facts, reasonably found by the jury and recited by the Appellate Court in *State* v. *Collymore*, 168 Conn. App. 847, 850–52, 148 A.3d 1059 (2016), and procedural history are relevant to our review of these claims: "On January 18, 2010, the defendant and two of his friends, Rayshaun Bugg and Vance Wilson (Vance), were driving around Waterbury in a white ... four door, rental Hyundai that the defendant's aunt and uncle had lent to him, looking to rob someone. Eventually the three men drove into the Diamond Court apartment complex,

which comprises eight apartment buildings. Halfway down the main road of the complex, the men saw an expensive looking, black Acura sport utility vehicle (SUV) and decided to rob its driver.

"They drove down a small road behind the apartments, where the defendant and Vance pulled out their guns and exited the Hyundai, saying that they were going to rob the driver of the SUV. The defendant had a .38 revolver, and Vance had a .357 revolver. Bugg drove to the end of the small road and waited. The defendant and Vance reached the SUV, saw two young children running toward its driver, and decided to call off the robbery. The SUV drove away.

"The defendant and Vance then saw seventeen year old John Frazier (victim) and decided to rob him. As they were trying to rob him, he slapped away one of their guns and ran toward his apartment, at the entrance to the complex. The defendant and Vance both fired shots at the victim.

"Bugg drove up, the defendant and Vance ran over to the Hyundai and got in, and they sped off to the apartment of Jabari Oliphant, a close friend who lived in Waterbury. There, the defendant and Vance explained ***437** to Bugg and Oliphant what had just transpired at Diamond Court, namely, that they had intended to rob the man in the SUV but decided not to when they saw his young children; instead, they tried to rob the victim and shot him when he resisted. They then asked Oliphant if he had something to clean their guns.

"Police arrived at Diamond Court within minutes of the shooting and found the fatally wounded victim in front of his family's apartment. An autopsy revealed that a single .38 class bullet through the victim's **7 heart had killed him.2 The defendant was arrested and tried.

"At trial, the state's case included more than thirty witnesses, who testified over the course of fifteen days. A jury found the defendant guilty, and the court imposed a sentence of eighty-three years in prison." (Footnote in original.) Id. The defendant appealed to the Appellate Court, claiming, in relevant part, that the trial court had violated his constitutional rights to due process and compulsory process by failing to compel Bugg, Vance, and Oliphant to testify during the defense case-in-chief when they invoked their fifth amendment right against self-incrimination after the state improperly revoked the immunity that it had granted these witnesses during the state's case-in-chief. Id., at 852, 148 A.3d 1059.

The Appellate Court rejected the defendant's constitutional claim and affirmed the judgment of conviction, reasoning that, although the state could not revoke immunity it already had granted, his constitutional rights were not violated because the state did not revoke the existing immunity of these witnesses but, rather, refused to grant additional immunity for any transaction, matter, or thing not testified to and immunized during the state's case-in-chief. Id., at 865, 867, 148 A.3d 1059. The defendant, *438 according to the Appellate Court, was not constitutionally entitled to have the three witnesses granted additional immunity because he had failed to establish that the additional testimony

would have been essential to his defense or would not have been cumulative. Id., at 870–71, 148 A.3d 1059. Moreover, the Appellate Court determined that the trial court properly allowed the witnesses to invoke their fifth amendment privilege regarding questions not covered by the existing immunity because responsive answers had a tendency to incriminate the witnesses and, thus, their invocation of their fifth amendment right prevailed over the defendant's right to compulsory process. Id., at 873–74, 874 n.14, 148 A.3d 1059. The Appellate Court, however, also determined that the trial court abused its discretion by allowing the witnesses to invoke their fifth amendment privilege regarding questions covered by the existing immunity because their answers would not have incriminated them but that this error was harmless because the witnesses already had testified at length and been subject to cross-examination on those subject matters. Id., at 874–75, 148 A.3d 1059.

Subsequently, the defendant filed a timely motion for reconsideration and reargument en banc, in light of this court's holding in *State* v. *Dickson*, supra, 322 Conn. at 410, 141 A.3d 810. The Appellate Court summarily denied the defendant's motion.

The defendant petitioned for certification to appeal, which we granted, limited to the following issues: (1) "[Did] the Appellate Court properly [hold] that a prosecutor's grant of immunity to a witness for his testimony during the state's case-in-chief does not extend to the same witness' testimony when later called by the defendant as a witness?" (2) "If the answer to the first question is no, was the error nonetheless harmless?" And (3) "[Did] in-court identification testimony made by the victim's mother and

brother, contrary to their pretrial statements, [violate] the defendant's due process rights ***439** pursuant to *State* v. *Dickson*, [supra, 322 Conn. at 410, 141 A.3d 810]?

" ****8** *State* v. *Collymore*, 324 Conn. 913, 153 A.3d 1288 (2017). Additional facts will be set forth as required.

**I**

The defendant first claims that his rights to present a defense and to due process were violated as a result of the state's revocation of the immunity it previously had granted to former prosecution witnesses under § 54-47a when they later were called as defense witnesses. Specifically, the defendant argues that the Appellate Court improperly characterized the prosecutor's actions as declining to grant additional immunity rather than as revoking existing immunity, which should have extended to his case-in-chief. This mischaracterization, the defendant contends, led the Appellate Court to improperly address his arguments in support of his constitutional claim, namely, that the state acted improperly by intentionally revoking immunity to deprive him of exculpatory testimony from those witnesses and that the state's actions, coupled with the trial court's warnings to the witnesses, improperly drove the witnesses from the witness stand.

Moreover, the defendant argues that he was harmed by the improper revocation of immunity, which caused the witnesses' subsequent, invalid invocations of their fifth amendment rights, because (1) the witnesses' testimony would have addressed exculpatory, material, and noncollateral subject matter, (2) the witnesses' testimony

would have rehabilitated their credibility, and (3) the state's actions interfered with his right to control his defense strategy by forcing him to elicit testimony during the state's case-in-chief rather than during the defense case-in-chief.

The state responds that the Appellate Court properly characterized the prosecutor's actions as a refusal to grant additional immunity, not as a revocation of ***440** existing immunity. The state argues that the defendant was not constitutionally entitled to have Vance, Bugg, and Oliphant granted additional immunity because he failed to establish either prosecutorial misconduct or that the additional testimony was material, exculpatory, or essential to his defense. Further, the state contends that, to the extent that the trial court improperly allowed the witnesses to invoke their fifth amendment right against self-incrimination, this error was harmless because their testimony would have been cumulative. Even if we assume, without deciding, that the state violated § 54-47a when it revoked the immunity it previously granted to Vance, Bugg, and Oliphant, we agree with the state that this action did not violate the defendant's constitutional rights.

**A**

The following additional facts and procedural history are relevant to this claim. Prior to trial, Bugg, Vance, and Oliphant each had given statements to the police that incriminated the defendant. Bugg had inculpated the defendant twice—in his statement to the police and during his testimony at the defendant's hearing in probable cause. Vance also inculpated the defendant twice—in his statement to the police and when he pleaded guilty to charges related to the incident at issue. Oliphant

likewise incriminated the defendant in the statement he gave to the police.

When these witnesses were called as prosecution witnesses at trial, all three invoked their fifth amendment right against self-incrimination and refused to testify. The state granted immunity to these witnesses pursuant to § 54-47a in exchange for their testimony. Specifically, the state granted Bugg "use immunity for any drug activity he was engaged in on **9 January 18, *441 2010."3 The state did not specifically grant Bugg *immunity* from prosecution for any false statement made at the defendant's hearing in probable cause, which Bugg was concerned about, but it did concede that it would not prosecute him for any perjury that he may have committed at the hearing in probable cause.4 The state granted Vance immunity from prosecution for making a false statement in his prior statements.5 The state granted Oliphant immunity from prosecution for both filing a false statement and hindering prosecution on the basis of his statement to the police.6

Despite the witnesses' prior statements that incriminated the defendant, the witnesses repudiated those statements on direct examination in the state's case and testified so as to exonerate him. All three witnesses testified that they did not provide the police with the information contained in the statements and had signed the statements only because they had been coerced by the police. In light of this testimony, the state interrupted the testimony of each witness to call Lieutenant *442 Michael Slavin of the Waterbury Police Department, who testified that he was present when the witnesses made

and signed their statements and that the witnesses had not been coerced. Through Slavin, the state then had the statements of Bugg, Vance, and Oliphant read into the record and admitted into evidence for substantive purposes pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).

After the statements were admitted under *Whelan*, the state recalled the witnesses and continued with direct examination.7 The state questioned the witnesses in detail about their prior statements to the police, reading the statements sentence by sentence and asking the witnesses if the information contained in each sentence was correct. Although the state had not yet offered into evidence Bugg's prior testimony ****10** from the probable cause hearing or Vance's prior testimony from his plea proceedings for substantive purposes under *Whelan*, it questioned Bugg and Vance about these other prior statements in a fashion similar to its questioning about their prior statements to the police. The witnesses each testified that, to the extent their prior statements and testimony were inconsistent with their trial testimony, the information contained in the prior statements and testimony was incorrect.

Subsequently, on cross-examination, defense counsel questioned the witnesses extensively about all of their prior statements that incriminated the defendant and, ***443** especially, about their reasons for making these prior statements.8 Although at this point in the trial, Bugg's prior testimony from the hearing in probable cause and Vance's prior testimony from his plea

proceedings had not been admitted into evidence for substantive purposes under *Whelan*, because the state had questioned Bugg and Vance extensively about their prior testimony and gone through it with them line by line, defense counsel was able to extensively cross-examine them about their prior testimony. Defense counsel also questioned the witnesses about their new exculpatory testimony and the events that occurred on the night of the incident at issue.

At the end of the state's case, after the testimony of these witnesses concluded, the court permitted the state to read into the record Bugg's prior testimony at the hearing in probable cause and Vance's prior testimony at his plea proceedings for substantive purposes pursuant to *Whelan*.

The defense subsequently called these witnesses as defense witnesses in its case-in-chief. Prior to taking the witness stand, the witnesses were informed that the state was not extending its prior grant of immunity to their testimony in the defense case-in-chief and was ***444** not willing to grant any additional immunity for matters not covered by the prior grant of immunity. Specifically, the state clarified that it was "not giving [the witnesses] immunity for any testimony as a witness in the defense case." The state argued that the witnesses' testimony had concluded after the state's case ended and that, because they no longer were being called as prosecution witnesses, they did not "have immunity from the state for anything that [they]—that [they testify] to at this point on." The court, however, noted that it was unclear as to whether the immunity that the witnesses already had been granted by the state extended to their testimony as defense witnesses and that this was an issue the

Appellate Court would have to decide.9 **11 The court then cautioned the witnesses that this was an unresolved issue, that they may or may not have immunity, and that they should be guided by the advice of their counsel. Subsequently, while testifying during the defense case-in-chief, the witnesses each invoked their fifth amendment rights and refused to answer some or all of the questions asked. We discuss each witness' prior statements and trial testimony in turn.

**1**

As explained, prior to trial, Bugg had inculpated the defendant twice—in a statement to the police and during his testimony at the defendant's probable cause hearing. In his statement to the police, Bugg informed the police that, on the date of the murder, he, the defendant, and Vance had been driving around looking for *445 women and ended up at Diamond Court. While in the parking lot area, the defendant saw an SUV driving toward them. The defendant and Vance discussed how the man in the SUV probably had money, pulled out their guns, and said they were going to rob him. Bugg saw Vance with a .357 and the defendant with a .38 revolver. The defendant then drove past the SUV and parked in a driveway. The defendant and Vance exited the vehicle and told Bugg to drive. Bugg remained in the vehicle for approximately five minutes and then heard five or six gunshots. He then drove the vehicle toward the SUV. The defendant ran to the vehicle, got into the backseat and said, “this nigga's hot.” Vance then ran to the vehicle and also got into the backseat. Bugg drove away and asked if they “got” anything, to which Vance said no and that the boy they tried to rob “tried some wild shit.” Bugg asked the defendant if he shot the boy. The defendant did not respond but appeared to be mad at Vance. Bugg drove

them to Oliphant's house, where the defendant told Bugg that they did not rob the guy in the SUV but that "we got some young nigga walk[ing] by, holding his pockets, and he wouldn't give it up. [The defendant] said that, because the young nigga wouldn't give it up, [Vance] yapped that nigga. I know that yap means to shoot somebody. They said the guy in the [SUV] had a baby in it, so they felt bad [and] instead took the young nigga. [The defendant] said [Vance] ha[d] his gun to the boy's chest, and the boy tried to grab it and they started to tussle over the gun [and] that is why he shot him." Vance then asked for some ammonia to clean his gun. Vance kept telling everyone to keep their mouths shut. Bugg then left Oliphant's house and went to a strip club with his brother. He later told his cousin, Marquise Foote, about the incident.

After he gave his statement to the police, Bugg testified at the defendant's probable cause hearing. His testimony ***446** was similar to, but not entirely consistent with, the content of his statement to the police. Specifically, Bugg testified that, although he saw Vance with a .357 pistol, he only saw something in the defendant's pocket that he assumed to be a gun.

At trial, on direct examination in the state's case-in-chief, Bugg's testimony differed significantly from his prior statements. He testified that, on the date of the incident, he, the defendant and Vance had been driving around, looking to purchase marijuana. They drove to the area near Diamond Square because Bugg knew of a ****12**narcotics dealer there. In the past, when Bugg wanted to purchase marijuana, he would call the dealer, and they would meet at Diamond Court. Although Bugg

had not called the dealer prior to the current excursion, he saw the dealer's truck, a dark colored SUV, parked in the parking lot and informed the defendant and Vance that the dealer was in the truck. The defendant then parked down a side street. The defendant and Vance exited the vehicle. Bugg testified that he did not see either of them with a weapon. As Bugg was waiting in the vehicle, he testified, he thought he heard gunshots but was uncertain because music was playing in the vehicle. Bugg then drove toward the SUV and saw the defendant coming toward him, with Vance a couple of feet behind the defendant. The defendant and Vance got into the backseat of the vehicle, and Bugg drove to the defendant's house, where the three men smoked marijuana.10

***447** On direct examination during the defense case-in-chief, after the state informed Bugg that the prior grant of immunity did not extend to his testimony during the defense case, defense counsel questioned Bugg at length about recorded phone conversations he had had with his sister and mother while he was incarcerated. See footnote 10 of this opinion. Defense counsel asked Bugg to clarify what his statement to his sister about "kitty" meant. He explained that "kitty" meant money but that he had lied to his sister and only said that to calm her down. He testified that the conversation was about Vance's needing to tell the truth because Vance had lied in his statement. Defense counsel then asked Bugg about the nature of his relationship with Foote in January, 2010, to which Bugg responded that "[w]e wasn't cool" because "he stole from me." Defense counsel then inquired about what Foote had stolen from Bugg, in response to which Bugg invoked his fifth amendment right against self-incrimination. Bugg also invoked his fifth amendment right in response to the

following questions by defense counsel: (1) where he had driven the vehicle after the defendant and Vance exited to purchase marijuana, (2) where precisely the vehicle he was driving was located at the time the shooting occurred, and (3) if he had told the truth about the vehicle's location during the probable cause hearing.11

**2**

Vance also inculpated the defendant twice prior to the defendant's trial—in the ****13** statement Vance gave to***448** the police and when Vance pleaded guilty to charges related to the incident at issue. In his statement to the police, Vance stated that, on the day of the incident, he was with the defendant and Bugg when the defendant stated that he wanted to commit a robbery to get money to buy his son a birthday present. Vance agreed to help the defendant commit the robbery. He testified that the defendant drove them to an apartment complex where they saw a black SUV. The defendant parked behind one of the apartment buildings. Then, the defendant and Vance took out their guns and got ready to rob the driver of the SUV. Vance stated that he had a .357 revolver and that the defendant had a .38 revolver. The defendant and Vance exited the vehicle while Bugg remained in the vehicle. According to Vance, he and the defendant decided not to commit the robbery when they saw two children run toward the SUV. Vance and the defendant then saw the victim walking in the street and decided to rob him instead. Vance stated that he ran up behind the victim as the defendant put a gun to the victim's chest. The victim, however, slapped the gun away and ran toward the entrance of the apartment building. The defendant and Vance chased after him, and the defendant started shooting at the victim, firing two or three gunshots. Vance testified that, when he saw a woman and a man open the

front door of the apartment the victim was running toward, he fired two or three gunshots at the door to scare them. Bugg then drove toward the defendant and Vance, who got into the backseat, and Bugg drove to Oliphant's house. The defendant commanded Vance to give him his gun so that the defendant could get rid of the guns, and Vance complied. Vance stated that he was not certain whether he or the defendant had shot the victim.

Subsequently, Vance again inculpated the defendant during his testimony in the proceedings in which Vance pleaded guilty to charges stemming from his participation ***449** in the incident at issue.12 During the plea proceedings, Vance's prior statement to the police was read into the record, and Vance swore to its veracity. Additionally, in response to questions by the prosecutor, Vance's reiteration of the events of the incident at issue was mostly consistent with his statement to the police, with a few minor deviations.

Then, at the defendant's trial, on direct examination during the state's case, Vance testified that, approximately one month prior to the incident at issue, he had given the defendant ten blocks of heroin that the defendant was supposed to, but never did, pay for. On the day of the incident, the defendant called Vance, stating that, if Vance went with him to collect money from a man, he would give Vance the money. Vance agreed. Subsequently, the defendant, Vance, and Bugg drove to Diamond Court. Once at Diamond Court, the defendant saw the man who owed him money coming out of one of the apartment buildings with two children. Vance and the defendant exited the vehicle, and Bugg drove away. The man and the children quickly got into a vehicle and drove

away. Vance argued with the defendant over the defendant's failure to ask the man for the money. Vance then punched the defendant, in response to which the defendant appeared to reach inside his clothing for a gun. Believing that the defendant had a gun, Vance grabbed the Taurus Magnum .357 gun at his hip and fired seven gunshots in the defendant's direction. The defendant **14 ran toward where Bugg had parked their vehicle and was not struck by any of the bullets. Vance did not think he shot anyone. The defendant and Vance got into the backseat of the vehicle, and Bugg drove to the defendant's house. Vance testified that he expected his statement to the police to *450 contain a recitation of these facts, including an admission that he might have killed the victim accidentally with a stray bullet when he shot at the defendant. Defense counsel then extensively cross-examined Vance about the events at issue and his prior statements.

During the defense case-in-chief, because Vance had stated that he would not respond to any questions, the trial court, outside the presence of the jury, ordered defense counsel to make an offer of proof. Vance refused to answer any questions. Specifically, he invoked his fifth amendment privilege against self-incrimination in response to the following questions: (1) what promises did the police officers make to him at the time he signed his statement to the police, (2) did he shoot the victim, (3) what did the detectives tell him about signing his statement, and (4) did he make a telephone call to Karen Atkins in June, 2012. Defense counsel did not ask Vance any further questions, despite the trial court's advising him to make a record of any questions he wanted to ask. Because Vance invoked his fifth amendment privilege in

response to every question asked, the trial court ruled that Vance could not be called to testify merely to invoke his fifth amendment privilege against self-incrimination.

**3**

In his prior statement to the police, Oliphant stated that Vance and the defendant had come to his house on the night of the murder. Vance informed Oliphant that he had killed the victim and that the defendant had been with him when the murder occurred. Vance and the defendant told Oliphant that they had gone out looking to rob someone but that, when they tried to rob the victim, he fought back and ran away, after which Vance chased him and shot him in the back. Oliphant stated that he previously had seen Vance with a .357 gun and that Vance had told him he had used that gun ***451** to shoot the victim. Oliphant also stated that he knew that the defendant had a .38 revolver.

At the defendant's trial, on direct examination in the state's case-in-chief, Oliphant testified that, on the night of the murder, the defendant, Vance, and Bugg came to his house. While Vance and Oliphant were alone in the bathroom, Vance told Oliphant that he had killed the victim and wanted to kill the defendant and Bugg to eliminate all witnesses. Soon after the conversation in the bathroom, Vance, Bugg, and the defendant left the house together. At a later date, Vance told Oliphant more details, including that he had shot at the victim approximately five times. Oliphant testified that, a couple of days after the murder, he also questioned the defendant about the murder but that the defendant did not want to talk. Oliphant testified that, subsequently, while he and Bugg were riding in a vehicle, Bugg told him that, on the night of the murder, they had been riding

around, drinking and smoking marijuana when Vance got out of the vehicle and tried to rob the victim. The victim attempted to fight off Vance, who then shot the victim and got back into the vehicle. Oliphant further testified that he previously had seen Vance with a .357 gun but never had seen the defendant with a gun.

After the state's case-in-chief, Oliphant was called as a defense witness. Prior to the start of Oliphant's testimony, his counsel informed the trial court that Oliphant would not testify, "[b]ased on the representation **15 that immunity will not be extended to [his] being called as a defense witness." The court then ordered that defense counsel make an offer of proof outside the presence of the jury.

On direct examination during the offer of proof, Oliphant answered two questions, stating (1) that he had been arrested for drug possession in 2011, and (2) that he did not know anyone named Jamel Waver but *452 that he previously had been arrested with a man named Jamel, whose surname he did not know. Oliphant, however, invoked his fifth amendment privilege against self-incrimination in response to two other questions: (1) whether he was beaten while in police custody, and (2) whether he previously testified during the state's case-in-chief that he felt guilty about Vance. Defense counsel did not ask any other questions, despite the trial court's warning that there needed to be a complete record.

On cross-examination, the state asked three questions regarding Oliphant's relationship with Jamel, including whether Oliphant possessed narcotics when they were

arrested together in 2011, but Oliphant invoked his fifth amendment right in response to all three questions.13 The state argued that, because Oliphant had invoked his fifth amendment right in response to all questions posed by the state on cross-examination, his testimony on direct examination would have to be stricken, and, thus, he could not be called to testify before the jury. The court agreed, citing *State* v. *Person*, 215 Conn. 653, 577 A.2d 1036 (1990).

**B**

We now turn to the defendant's claim. He contends that his rights to due process and compulsory process were violated when the state improperly revoked the immunity it had granted to Bugg, Vance, and Oliphant under § 54-47a. "[A] defendant has a right under the compulsory process and due process clauses to present [his] version of the facts as well as the prosecution's to the jury so [that] it may decide where the truth lies.... The compulsory process clause of the sixth amendment generally affords an accused the right to call witnesses whose testimony is material and favorable to his defense ...." (Citations omitted; internal ***453** quotation marks omitted.) *State* v. *Holmes*, 257 Conn. 248, 253, 777 A.2d 627 (2001), cert. denied, 535 U.S. 939, 122 S. Ct. 1321, 152 L. Ed. 2d 229 (2002). "The issue of whether a defendant's rights to due process and compulsory process require that a defense witness be granted immunity is a question of law and, thus, is subject to de novo review." Id., at 252, 777 A.2d 627; see also *State* v. *Kirby*, 280 Conn. 361, 403, 908 A.2d 506 (2006) (same). The defendant's claim is premised on an alleged violation of § 54-47a.14 He argues ****16** that, once the state granted the three witnesses immunity under § 54-47a, the statute provided them with immunity during both the state's

case-in-chief and the defense case-in-chief.15 Even if we assume, without deciding, that, once the state granted these witnesses immunity under § 54-47a,16 this immunity extended throughout the entire trial and could not ***454** be revoked during the defense case-in-chief, and that the state's failure to extend the immunity violated § 54-47a,17 we determine ****17** that this violation was not constitutional in nature.

The defendant argues that this alleged error is of constitutional magnitude and that, by mischaracterizing ***455** the state's actions as declining to grant additional immunity rather than as revoking or failing to extend immunity, the Appellate Court did not properly address his constitutional claim. Specifically, the defendant argues that, by mischaracterizing the actions of the state, the Appellate Court never addressed (1) his allegation that the state acted with the intent to deprive him of the witnesses' testimony by revoking immunity in violation of § 54-47a, and (2) the impact that the revocation, coupled with the trial court's warnings, had on the witnesses and their decisions to invoke their fifth amendment rights against self-incrimination.

**1**

First, the defendant contends that the Appellate Court did not address his argument that due process and compulsory process under the federal constitution required that immunity be extended to the defense case-in-chief because the state intentionally prevented the witnesses from testifying in the defense case-in-chief. Even if we assume that the state's actions violated § 54-47a, this court has explained that only under "certain compelling circumstances" have some federal courts

determined that "the rights to due process and compulsory process under the federal constitution require the granting of immunity to a defense witness." *State* v. *Holmes*, supra, 257 Conn. at 254, 777 A.2d 627; accord *State* v. *Kirby*, supra, 280 Conn. at 403–404, 908 A.2d 506. Specifically, "[t]he federal [c]ircuit [c]ourts ... have developed two theories pursuant to which the due process and compulsory process clauses entitle defense witnesses to a grant of immunity. They are the effective defense theory, and the prosecutorial misconduct theory.... Because such circumstances [have not been present in prior cases before this court], however, we [have not had to] decide whether either theory is a correct application of the due process or compulsory process clause." (Internal quotation marks omitted.) ***456** *State* v. *Kirby*, supra, at 404, 908 A.2d 506; see *State* v. *Giraud*, 258 Conn. 631, 636–37, 783 A.2d 1019 (2001)(applying this framework when state granted prosecution witness immunity during hearing in probable cause but refused to extend immunity to defendant's case-in-chief when same witness was called as defense witness during trial).

The defendant in this case argues that only the prosecutorial misconduct theory applies.18 "The prosecutorial misconduct ****18** theory of immunity is based on the notion that the due process clause [constrains] the prosecutor to a certain extent in [the] decision to grant or not to grant immunity.... Under this theory, however, the constraint imposed by the due process clause is operative only when the prosecution engages in certain types of misconduct, which include forcing the witness to invoke the fifth amendment or engaging in discriminatory grants of immunity to gain a

tactical advantage, and the testimony must be material, exculpatory ***457** and not cumulative, and the defendant must have no other source to get the evidence." (Internal quotation marks omitted.) *State* v. *Kirby*, supra, 280 Conn. at 404, 908 A.2d 506. As in *Kirby*, we need not decide whether the prosecutorial misconduct theory is valid, because, even if we did, the defendant has failed to establish that he has satisfied the requirements of this theory in this case.

We have described the requirements of this theory as "a very difficult burden for a defendant to meet." *State* v. *Giraud*, supra, 258 Conn. at 637, 783 A.2d 1019. Specifically, the defendant has the burden of establishing that (1) the prosecution engaged in misconduct, (2) the testimony was material, exculpatory, and not cumulative, and (3) there was no other source for securing the evidence. In the present case, the defendant did not request that the trial court make a finding regarding (a) whether the state engaged in misconduct, or (b) the state's intent in revoking immunity. From the record, it appears that the state's actions were based on its interpretation of the statute, not an intent to deprive the defendant of witness testimony. Nevertheless, there is at least the appearance of unfairness in the state's actions, especially in light of the fact that a defendant has the right to recall prosecution witnesses in his or her own case-in-chief to inquire into matters beyond the scope of the state's direct examination. See *State* v. *Caracoglia*, 134 Conn. App. 175, 192, 38 A.3d 226 (2012)("[T]he scope of the state's direct examination inherently limits the scope of the defendant's cross-examination. It occasionally may be necessary for the defendant to go beyond the scope of direct examination to present information material to

his defense. To do so he may need to recall a witness."). Specifically, to the extent that the defendant intended to ask these witnesses questions that involved subjects covered by the existing immunity but that went beyond the scope of the state's direct examination, it would appear unfair for the defendant ***458** to be denied the opportunity to ask these questions because the state revoked immunity. We caution the state against engaging in what would appear to be an unfair and discriminatory grant of immunity. Even if we assume, however, that the state's actions were unfair and constituted misconduct by engaging in a discriminatory grant of immunity to gain a tactical advantage, the defendant has failed to establish that the testimony he was prevented from offering was not cumulative.

The defendant argues that the state's improper revocation of immunity, which caused the witnesses to improperly invoke their fifth amendment right against self-incrimination, ****19** deprived him of exculpatory, material, and noncumulative testimony. Specifically, he argues that the testimony of Bugg, Vance, and Oliphant during the defense case would have provided additional details about the defendant's and the witnesses' roles in the attempted robbery and murder, and would have rehabilitated the witnesses' and the defendant's credibility. We disagree.

**a**

The defendant's argument is premised on his subsidiary argument that, if immunity had not been revoked, the witnesses would not have been able to validly invoke their fifth amendment rights against self-incrimination. Thus, to determine whether the testimony at issue was

exculpatory, material, and noncumulative, we first must determine whether the witnesses could have validly invoked their fifth amendment rights, even if immunity had not been revoked. We are guided by the following legal principles: "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.... In appraising a ***459** fifth amendment claim by a witness, a judge must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." (Citations omitted; internal quotation marks omitted.) *Martin* v. *Flanagan*, 259 Conn. 487, 495–96, 789 A.2d 979 (2002).

When a witness' invocation of the fifth amendment privilege against self-incrimination conflicts with a defendant's right to present a defense, the defendant's right must "bow to accommodate other legitimate interests in the criminal trial process." (Internal quotation marks omitted.) *Rock* v. *Arkansas*, 483 U.S. 44, 55, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor* v. *Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). However, a witness' testimony is not privileged under the fifth amendment right against self-incrimination if the testimony is protected by a grant of immunity. See *State* v. *Roma*, 199 Conn. 110, 115, 505 A.2d 717 (1986); id., at 115–16, 505 A.2d 717 (holding that witness validly invoked fifth amendment right when questioned

about subject matter that was outside scope of immunity and outside scope of prior testimony). Additionally, once a witness voluntarily has testified about a subject, he may not later invoke the privilege against self-incrimination when questioned about additional details involving that subject matter. See id., at 115, 505 A.2d 717 ("[w]here the witness ... has already testified, on direct examination, to the incriminating matters sought to be explored on cross, he may be found to have waived his right not to disclose further the relevant details necessary to test the truth or accuracy of what he has already revealed").

With regard to the testimony of Bugg, Vance, and Oliphant, even if we assume that the state violated § 54-47aby revoking immunity and that immunity should ***460** have extended to the defense case-in-chief, the three witnesses validly invoked their fifth amendment rights in response to some, though not all, of the questions posed on direct examination during the defendant's case. Bugg answered many of the questions asked by defense counsel on direct examination during the defense case-in-chief. After testifying that he did not have a good relationship with Foote at the time of the murder because Foote had stolen from him, Bugg invoked his fifth ****20** amendment right in response to a question about what Foote had stolen from him. Bugg also invoked his fifth amendment right in response to questions about precisely where the getaway vehicle he was driving was located at the time the shooting occurred.19

As to the question about what Foote stole from Bugg, Bugg and his counsel believed that whatever Foote stole could possibly subject Bugg to criminal charges. Even if we assume that what was stolen involved some form of

contraband, Bugg's preexisting immunity, which covered only drug activity on the day of the murder,20would ***461** not have extended to his response to this question, even if the immunity had not been revoked. Thus, Bugg validly invoked his fifth amendment privilege in response to this question, regardless of the revocation of immunity.

As to the questions regarding the location of the getaway vehicle, to the extent that the location of the vehicle might implicate Bugg in drug activity on the day of the murder—as Bugg was the getaway driver in what he claimed began as a narcotics deal—under the broad standard that applies, the grant of immunity covered these questions. See *Martin* v. *Flanagan*, supra, 259 Conn. at 495, 789 A.2d 979 (invocation of fifth amendment right is valid if there *might* be danger of injurious disclosure). Therefore, if immunity had not been revoked, Bugg's invocation of his fifth amendment privilege in response to these questions would have been invalid.

Vance, who was granted immunity from prosecution only for making a false statement to the police and during his plea proceedings, invoked his fifth amendment right against self-incrimination during the defense case-in-chief as to the following questions: (1) did he shoot the victim, (2) what promises did the police officers make to him at the time he signed his statement, (3) what did the detectives tell him about signing the statement, and (4) did he make a telephone call to Atkins in June, 2012? The grant of immunity would have covered Vance's response to the first question if his response established that he lied in his statement to the police or during the

plea proceedings about shooting the victim. Thus, his invocation of his fifth amendment privilege in response to that question would have been invalid if immunity had not been revoked.

Additionally, the grant of immunity would have covered Vance's responses to the second and third questions ***462** if they had established that he was coerced into ****21** signing his statement to the police and that the information it contained was false, and, thus, that he had made a false statement. Therefore, his invocation of his fifth amendment privilege in response to those questions would have been invalid if immunity had not been revoked.

Vance's response to the fourth question would have been outside the scope of the immunity he was granted because it did not involve his prior statements, which did not mention Atkins, and, thus, the revocation of immunity had no effect on his invocation of his fifth amendment privilege as to this question. Additionally, Vance never testified about a telephone call to Atkins during the state's case and, thus, did not waive his fifth amendment right as to that question. Moreover, the record is void of information regarding Atkins, for example, who she is and the importance of this telephone call, and, thus, it is unclear how Vance's response to this question would have tended to incriminate him. Because it is the defendant's burden to establish harm; see, e.g., *State* v. *Bouknight*, 323 Conn. 620, 626–27, 149 A.3d 975 (2016); we cannot conclude that Vance would have invalidly invoked his fifth amendment right if immunity had not been revoked.

Oliphant, who was granted immunity from prosecution for filing a false statement and hindering prosecution on the basis of his statement to the police, invoked his fifth amendment right when he was examined21 by the defendant in his case-in-chief in response to questions about (1) whether he had been beaten while in police custody and (2) whether he previously had testified ***463** in the state's case that he felt guilty about Vance.22The grant of immunity would have covered Oliphant's response to the first question if it established that he was coerced into making and signing a false statement to the police and, thus, had made a false statement. Therefore, the invocation of his fifth amendment privilege in response to that question would have been invalid if immunity had not been revoked. Similarly, the grant of immunity would have covered Oliphant's response to the second question if it established that he felt guilty because he lied about what occurred on the night of the murder and, thus, had made a false statement in his statement to the police. Therefore, his invocation of his fifth amendment privilege in response to that question would have been invalid if immunity had not been revoked.

**b**

To the extent that these witnesses validly invoked their fifth amendment privilege, even if immunity had not been revoked, the defendant has failed to establish that the revocation of immunity violated his constitutional rights under the prosecutorial misconduct theory because the witnesses ****22** would not have answered these questions anyway, and, thus, their testimony would not have been exculpatory. To the extent the witnesses could have invalidly invoked their fifth amendment right if the immunity had not been revoked, however, we must

determine whether the invalid invocations ***464** deprived the defendant of material, exculpatory, and noncumulative testimony. We determine that they did not because the defendant has failed to establish that the testimony would not have been cumulative.

To summarize, Bugg invalidly invoked his fifth amendment right in regard to questions about the location of the getaway vehicle that he operated at the time of the shooting. Vance invalidly invoked his fifth amendment right in regard to questions about whether he shot the victim, what promises the detectives made to him when he signed his statement to the police, and what the detectives told him about signing the statement. Oliphant invalidly invoked his fifth amendment right in regard to questions about whether he was beaten while in police custody and whether he previously testified in the state's case about feeling guilty about Vance. The defendant argues that the proposed inquiries addressed noncumulative, exculpatory, and material information about the events at issue and would have rehabilitated his credibility and that of the witnesses.23 Specifically, he argues that where Bugg moved and parked the getaway vehicle would have helped establish both what Bugg witnessed and whether any of the other witnesses, such as, for example, the ***465** victim's mother and brother,24 were able to see the getaway vehicle. Additionally, the defendant argues that the location of the getaway vehicle would cast doubt on the credibility of Foote's testimony that Bugg had told him that he witnessed the shooting.25

Although we agree that this information would be material, we disagree that the defendant has established that it was not cumulative. During the state's case, both the defendant and the state questioned Bugg about the location of the getaway **23 vehicle before, during, and after the shooting. Although Bugg's prior testimony, which mentioned the location and movements of the getaway vehicle, was not read into the record for substantive purposes until after Bugg testified in the state's case, the state questioned Bugg about his prior testimony, going through it sentence by sentence. Then, on cross-examination, defense counsel both had the opportunity to, and did, in fact question Bugg about his prior testimony, including the location of the getaway vehicle and his motives for providing the prior testimony. The defendant has failed to identify any testimony Bugg would have provided on this subject that he did not already provide in the state's case26 and therefore has *466 provided us with no reason to believe that any further testimony by Bugg on this subject would not have been cumulative.

The defendant also argues that Vance would have provided material testimony because identifying who shot the victim and from where the gunshots originated were central issues at trial. Additionally, he argues that asking Vance about what the detectives said to him and promised him in regard to his statement to the police was crucial to rehabilitating his credibility by establishing that he had been coerced into signing the statement. Again, we agree that this information was material, but we also determine that the defendant has failed to establish that it was not cumulative. During the state's case, both parties questioned Vance at length about his

role in the murder. In all of his different statements and varying testimony, Vance admitted that he fired his weapon on the night of the murder at the scene of the crime and may have (accidentally or otherwise) shot the victim. The defendant, who has the burden of establishing that he has satisfied all three prongs of the prosecutorial misconduct theory, has provided no record to establish that, had Vance once again been questioned ***467** about who shot the victim, his testimony would have provided any new information.

Similarly, both parties questioned Vance at length about his allegations of police coercion. Defense counsel spent significant time on cross-examination in the state's case attempting to rehabilitate Vance's credibility by establishing that the detectives coerced him into signing the statement that he gave to them. Although it is true that Vance's prior testimony at his plea proceedings was not read into the record for substantive purposes until after his testimony in the state's case concluded, ****24** Vance had been questioned by both parties about his prior testimony during the state's case, and, thus, defense counsel already had attempted to rehabilitate Vance's credibility in regard to his prior testimony. Moreover, the defendant has failed to identify any new and nonprivileged testimony that Vance would have provided on these subjects that he had not already provided in the state's case. As a result, the defendant has failed to establish that any further testimony by Vance on these subject matters would not have been cumulative.27 The defendant similarly argues that Oliphant's testimony would have been material and exculpatory because whether Oliphant was beaten while in police custody and whether he felt guilty about Vance were matters that

pertained to Oliphant's credibility. The record establishes, however, that Oliphant testified about these subject matters in the state's case. See foot-notes ***468** 7 and 22 of this opinion. Defense counsel spent considerable time on cross-examination attempting to rehabilitate Oliphant's credibility by establishing that he had signed the statement he made to the police after they had beaten and coerced him and that he felt guilty for having lied about the defendant's role in the murder. The defendant has not identified any new testimony that Oliphant would have provided on these subjects. Thus, the defendant has failed to establish that Oliphant's testimony would not have been cumulative.

The defendant further argues, generally, that, because other witnesses testified on behalf of the state after these witnesses and because Vance's prior testimony in his plea proceedings and Bugg's prior testimony at the hearing in probable cause were read into the record after their testimony had concluded, he should have had an opportunity to confront these witnesses about these subsequent pieces of evidence, which would not have been cumulative. The defendant argues that by not having this opportunity, he was restricted to remain within the parameters of the state's case and denied the right to compose his defense strategy as he thought best. He argues that he had compelling tactical reasons to wait to ask certain questions until the defense case, after all of the state's witnesses had testified.

We agree that, in general, a defendant is not limited to the scope of the state's case and may recall a state's witness as a defense witness to inquire into areas not previously discussed in the state's case.28 See

*State* v. *Caracoglia*, supra, 134 Conn. App. at 192–93, 38 A.3d 226. However, with the exception of the question about what Foote stole from Bugg, to which Bugg had a valid claim of ***469** privilege, the defendant has failed to provide a record of what other evidence he wanted to confront the witnesses about that he did not already ask about in the state's case. Although Bugg's prior testimony from the hearing in probable cause and Vance's prior testimony from his plea ****25** proceedings were admitted for substantive purposes after those witnesses testified in the state's case, both parties questioned Bugg and Vance extensively during the state's case about the substance of that testimony and their motives for providing that testimony. Despite inquiries by the trial court, the Appellate Court, and this court, the defendant has been unable to articulate either what questions he would have asked that would have led to new and not privileged information or a strategic reason for delaying asking certain questions. Thus, the defendant has failed to establish either that his defense strategy was improperly curtailed or that he was prevented from inquiring into subject areas outside the scope of the state's case that would have led to new and not cumulative testimony.

Accordingly, because the defendant has failed to provide this court with a record establishing what new information these witnesses would have provided if the state had not revoked their immunity, he has failed to establish that the state's violation of § 54-47a, assuming that a violation did occur, violated his constitutional rights to due process and compulsory process under the prosecutorial misconduct theory of immunity.

With regard to the defendant's second argument in support of his constitutional claim, the defendant contends that, by failing to categorize the state's actions as revoking immunity, the Appellate Court improperly failed to consider whether the revocation of immunity, coupled with the trial court's warnings to the witnesses, ***470** substantially interfered with his right to present a defense by intimidating the witnesses and driving them from the witness stand. Although we agree with the defendant that the Appellate Court did not address the impact the revocation of immunity, coupled with the trial court's warnings,29 had on the witnesses and their decisions to invoke their fifth amendment rights, we do not agree that the impact was such that the defendant's rights to due process and to present a defense were violated.

Neither the trial court nor the prosecutor may intimidate a witness and drive him from the witness stand. See, e.g., *Webb* v. *Texas*, 409 U.S. 95, 98, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972) ("judge's threatening remarks ... effectively drove that witness off the stand, and thus deprived the petitioner of due process"); *United States* v. *Williams*, 205 F.3d 23, 29 (2d Cir.) ("judicial or prosecutorial intimidation that dissuades a potential defense witness from testifying for the defense can, under certain circumstances, violate the defendant's right to present a defense"), cert. denied, 531 U.S. 885, 121 S. Ct. 203, 148 L. Ed. 2d 142 (2000). Nevertheless, "[t]he function of the court in a criminal trial is to conduct a fair and impartial proceeding.... When the rights of those other than the parties are implicated, [t]he trial judge has the responsibility for safeguarding both the rights of the ****26** accused and the interests of the public in the

administration of criminal justice.... ***471** Accordingly, it is within the court's discretion to warn a witness about the possibility of incriminating himself.... The court, however, abuses its discretion if it actively interferes in the defendant's presentation of his defense, and thereby pressures a witness into remaining silent.... The dispositive question in each case is whether the government actor's interference with a [witness'] decision to testify was substantial." (Citations omitted; internal quotation marks omitted.) *State* v. *Tilus*, 157 Conn. App. 453, 475–76, 117 A.3d 920 (2015), appeal dismissed, 323 Conn. 784, 151 A.3d 382 (2016).

The present case is distinguishable from the cases cited by the defendant in which warnings issued by courts or prosecutors have been held to be coercive. In those cases, the government actor gratuitously and threateningly warned the witness about committing perjury, threatened to revoke a plea agreement, or made the witnesses physically unavailable. See, e.g., *Webb* v. *Texas*, supra, 409 U.S. at 97, 93 S.Ct. 351, 34 L.Ed.2d 330 ("The trial judge gratuitously singled out this one witness for a lengthy admonition on the dangers of perjury.... [And] the judge implied that he expected [the witness] to lie, and went on to assure him that if he lied, he would be prosecuted and probably convicted for perjury ...."); *United States* v. *Vavages*, 151 F.3d 1185, 1190–91 (9th Cir. 1998) (prosecutor substantially interfered with witness' decision whether to testify when warnings about committing perjury were intimidating and intended to stifle witness' testimony where prosecutor made "an unambiguous statement of his belief that [witness] would be lying if she testified in support of [defendant's] alibi" and threatened to withdraw witness' plea agreement in

unrelated case if she testified in support of defendant's alibi [emphasis omitted] ); *United States* v. *Morrison*, 535 F.2d 223, 225–26, 227 (3d Cir. 1976) (during meeting in his office on day before witness testified, prosecutor repeatedly warned witness about committing perjury, "which culminated in a highly intimidating personal ***472** interview"); *United States* v. *Bell*, 506 F.2d 207, 222 (D.C. Cir. 1974) ("[g]overnment conditioned its acceptance of [witnesses' guilty] pleas upon their commitment to refrain from testifying [in defendant's] behalf"); *United States* v. *Tsutagawa*, 500 F.2d 420, 422, 423 (9th Cir. 1974) ("the government placed witnesses, who may have been favorable to the appellees, outside the power of our courts to require attendance" when it precluded appellees from interviewing them by releasing them and sending them back to Mexico because they were illegal aliens who were not subjects of grand jury investigation); see also *State* v. *Tilus*, supra, 157 Conn. App. at 476, 117 A.3d 920 (courts have found interference when government actor either stepped into role of witness' advocate or specifically threatened witness).

In the present case, neither the trial court nor the prosecutor threatened the witnesses. The witnesses were not bombarded with multiple warnings, were not warned that testifying in favor of the defendant would lead to perjury charges, were not threatened with having their plea deals revoked, and were not made physically unavailable. Although "the court may not threaten a witness into remaining silent or effectively [drive] that witness off the stand"; (internal quotation marks omitted) *State* v. *Fred C.*, 167 Conn. App. 600, 613, 142 A.3d 1258, cert. denied, 323 Conn. 921, 150 A.3d 1150 (2016); a court may advise a witness who has testified

inconsistently of the consequences of committing perjury, as long as the court does not suggest which version of the witness' **27 testimony is correct. Id., at 613–14, 142 A.3d 1258. Here, the court cautioned the witnesses that the law was unsettled as to whether they had immunity30 and that *473 they should follow the advice of counsel as to whether they should testify. The court did not threaten the witnesses in any way. Although the state did inform the witnesses that it was revoking immunity and that none of their testimony during the defense case would be covered by any immunity, the record does not reflect that it did so in a threatening manner. Rather, it informed the court and witnesses of how it interpreted the immunity statute. The state never threatened the witnesses that, in light of this revocation of immunity, it would prosecute the witnesses if they testified or if they testified in a manner unfavorable to the state's case. The state's actions might have been a factor in the witnesses' decisions to invoke their fifth amendment rights, but "[a] defendant's constitutional rights are implicated only where the prosecutor or trial judge employs *coercive or intimidating* language or tactics that *substantially interfere* with a defense witness' decision whether to testify." (Emphasis added.) *United States* v. *Vavages*, supra, 151 F.3d at 1189. The state's informing the witnesses of what it believed to be the scope of the immunity statute was not so coercive or intimidating as to substantially interfere with the witnesses' decisions. Moreover, Bugg, Vance, and Oliphant all were represented by counsel and had an opportunity to speak with their counsel regarding their decisions to invoke their fifth amendment rights. See *United States* v. *Serrano*, 406 F.3d 1208, 1216 (10th Cir.) ("potential for unconstitutional coercion by a

government actor significantly diminishes ... if a defendant's witness elects not to testify after consulting an independent attorney" [emphasis omitted] ), cert. denied, 546 U.S. 913, 126 S. Ct. 277, 163 L. Ed. 2d 247 (2005); *State* v. *Tilus*, supra, 157 Conn. App. at 477, 117 A.3d 920 (same).

Thus, the revocation of immunity, coupled with the trial court's warnings to the witnesses, did not drive these witnesses from the witness stand and, thus, did ***474** not violate the defendant's rights to due process and to present a defense. Accordingly, even if we assume that the state violated § 54-47a by revoking the immunity it previously granted to Bugg, Vance, and Oliphant, this error was not constitutional in nature. Thus, the defendant has failed to establish that, by revoking this immunity, the state violated his constitutional rights.

**II**

The defendant next claims that, pursuant to this court's recent decision in *State* v. *Dickson*, supra, 322 Conn. at 410, 141 A.3d 810, his right to due process was violated by the first time in-court identification31 testimony of the victim's mother, Nelly Robinson, and brother, George C. Frazier. As to Robinson, the defendant argues that, because she did not previously inform anyone that she had witnessed the shooting or that she could describe the shooters, her description of the shooters ****28** constituted a first time in-court identification subject to *Dickson*. As to George Frazier, the defendant argues that, because he did not previously identify the defendant in an out-of-court, nonsuggestive identification procedure, his in-court identification violated *Dickson*. The defendant further

argues that both identifications were not harmless beyond a reasonable doubt.

The state responds that *Dickson* does not apply because identity was not at issue in the present case. Additionally, the state contends that, as to Robinson, *Dickson* does not apply because her description of the shooters did not constitute an identification. As to George Frazier, the state argues that *Dickson* does not apply because his in-court identification of the defendant was unsolicited and unanticipated, and *Dickson* applies only in cases in which "the state intends to present a first time in-court identification ...." ***475** Id., at 445, 141 A.3d 810. Finally, the state argues that, to the extent that *Dickson* applies, the admission of the testimony was harmless because of the state's strong case, which the defendant's own testimony largely corroborated.

We agree with the state that, even if we assume that Robinson and George Frazier made in-court identifications, identity was not at issue as to the charges of attempted robbery, conspiracy to commit robbery, and felony murder, and, thus, the admission of the first time in-court identifications did not implicate the defendant's right to due process. However, we disagree that identity was not at issue in relation to the charge of criminal possession of a firearm. Nevertheless, we determine that any error was harmless beyond a reasonable doubt.

**A**

The following additional facts are necessary to our review of this claim. At trial, Robinson, the victim's mother, testified that, at the time of the incident, she was in her apartment on the second floor ironing clothing when she

heard the victim yell and looked out the window to see him running and ducking as two men shot at him. She described the two shooters: "One was taller than the other, and one was stockier and shorter than the other one." She testified that the "short, stocky one" fired two gunshots at the victim and that "the other one" then fired two gunshots.32 Robinson further testified that she ran downstairs to the front door, ***476** where her two other children were standing, with the door open. The victim was outside the door reaching toward her. She grabbed him and laid him on the ground. She looked around and saw the two shooters get into a white car that sped away. She testified that she told all of this to the police at the scene of the crime but admitted that, in her written statement to them, there is no reference to ****29** her having witnessed the shooting or having seen the shooters.33

Following Robinson's testimony, George Frazier—her son and the victim's brother—testified that, at the time of the incident, he was inside his family's apartment and heard yelling. He went to look out the downstairs window and saw the victim running and yelling for their mother. George Frazier testified that he went to open the front door and heard approximately five gunshots. He testified that, when he opened the front door, he saw the victim on the floor outside their apartment. He further testified that he heard gunshots coming from the direction of mailboxes on the premises and saw two shooters and a white, four door vehicle parked with three men inside. He testified that he did not previously inform the police that he saw two shooters and never identified the defendant as one of the shooters but recalled that the defendant was one of the two shooters "[b]ecause the man that stands in front

of me, I recognize his face." He specified that he "saw [the defendant] with a gun" but "never told anybody ***477** that until now." He testified that the defendant was with a "short, light-skinned" person.

George Frazier was subject to extensive cross-examination, during which he testified that he had suffered from a brain tumor a few months after the victim's murder and had difficulty recalling information. On cross-examination, he testified inconsistently about what he recalled, when and where he heard the gunshots, and what he had told the prosecutor. After his testimony concluded, the prosecutor went on the record, outside the presence of the jury, to state that George Frazier had testified falsely as to when he had met with her and that his testimony was unanticipated, specifically, his testimony about witnessing the shooting and his identification of the defendant as one of the shooters. Defense counsel said nothing on the matter.

**B**

"[W]hether [a party] was deprived of his due process rights is a question of law, to which we grant plenary review ...." (Internal quotation marks omitted.) *State* v. *Dickson*, supra, 322 Conn. at 423, 141 A.3d 810. Whether the admission of eyewitness identification testimony violated due process is premised on whether the identification procedure was unnecessarily suggestive: "In the absence of unduly suggestive procedures conducted by state actors, the potential unreliability of eyewitness identification testimony ordinarily goes to the weight of the evidence, not its admissibility, and is a question for the jury.... Principles of due process require exclusion of unreliable identification evidence that is not the result of an

unnecessarily suggestive procedure [o]nly when [the] evidence is so extremely unfair that its admission violates fundamental conceptions of justice .... A different standard applies when the defendant contends that an in-court identification followed an unduly suggestive pretrial identification procedure that was conducted by a state actor. In such cases, both ***478** the initial identification and the in-court identification may be excluded if the improper procedure created a substantial likelihood of misidentification." (Citations omitted; internal quotation ****30** marks omitted.) Id., at 419–20, 141 A.3d 810.

"In determining whether identification procedures violate a defendant's due process rights, the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the totality of the circumstances." (Internal quotation marks omitted.) Id., at 420–21, 141 A.3d 810.

In *Dickson*, this court was faced with applying these principles to a first time in-court identification. We recognized the suggestive nature of first time in-court identifications: "[W]e are hard-pressed to imagine how there could be a more suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person whom the state has accused of committing [a] crime, and then asking the witness if he can identify the person who committed the crime.... If this procedure is not suggestive, then no

procedure is suggestive." (Emphasis omitted; footnote omitted.) Id., at 423–24, 141 A.3d 810.

To avoid this kind of suggestive procedure, we announced the following procedural rule: "[I]n cases in which identity is an issue, in-court identifications that are not preceded by a successful identification in a nonsuggestive identification procedure implicate due process principles and, therefore, must be prescreened by the trial court." (Footnote omitted.) Id., at 415, 141 A.3d 810. We then established the following prescreening procedure: "In cases in which there has been no pretrial identification ... and the state intends to present a first time in-court identification, the state must first request permission ***479** to do so from the trial court.... The trial court may grant such permission only if it determines that there is no factual dispute as to the identity of the perpetrator, or the ability of the particular eyewitness to identify the defendant is not at issue." (Citation omitted.) Id., at 445–46, 141 A.3d 810. Permission is proper in these kinds of cases because, "when identity is not an issue," a defendant's due process rights are not implicated. Id., at 433, 141 A.3d 810.

We held that this procedural rule applied retroactively to all cases pending on review. Id., at 450–51, 141 A.3d 810. Because, however, it was too late to prescreen first time in-court identifications that already had occurred in pending cases, we provided a road map for how pending appeals should be handled: "[I]n pending appeals involving this issue, the suggestive in-court identification has already occurred. Accordingly, if the reviewing court concludes that the admission of the identification was harmful, the only remedy that can be provided is a

remand to the trial court for the purpose of evaluating the reliability and the admissibility of the in-court identification under the totality of the circumstances.... If the trial court concludes that the identification was sufficiently reliable, the trial court may reinstate the conviction, and no new trial would be required." (Citations omitted; emphasis omitted.) Id., at 452, 141 A.3d 810. "Of course, if the record is adequate for review of the reliability and admissibility of the in-court identification, the reviewing court may make this determination." Id., at 452 n.35, 141 A.3d 810.

Since *Dickson*, this court has not been faced with the retroactive application of *Dickson* to a claim involving a first time in-court identification that already has occurred. The Appellate Court, however, has addressed this issue. Specifically, in ****31** *State* v. *Swilling*, 180 Conn. App. 624, 646, 184 A.3d 773, cert. denied, 328 Conn. 937, 184 A.3d 268 (2018), the defendant, who had a romantic history with the victim, was convicted of kidnapping, home invasion, and assault prior to this court's decision ***480** in *Dickson*. Id., at 627–28, 648, 184 A.3d 773. The victim, who did not make an out-of-court nonsuggestive identification, identified the defendant for the first time at trial as her assailant. Id., at 647–48, 184 A.3d 773. On appeal to the Appellate Court, the defendant in *Swilling* claimed that, pursuant to *Dickson*, the victim's first time in-court identification violated his right to due process because the victim did not first make an out-of-court nonsuggestive identification and because the trial court did not prescreen the victim's in-court identification. Id., at 648–49, 184 A.3d 773. The Appellate Court disagreed. Following this court's road map in *Dickson* for addressing this issue in pending cases, the

Appellate Court determined that, because "there was no factual dispute with respect to whether the victim had the ability to identify the defendant"; id., at 648, 184 A.3d 773; and, thus, identity was not at issue, there was no constitutional violation, and, therefore, the trial court's failure to prescreen the first time in-court identification was not harmful. Id., at 649–50, 184 A.3d 773. Because the Appellate Court found the lack of prescreening harmless, it properly did not go on to determine whether the identification was reliable under the totality of the circumstances.

We agree with the Appellate Court's application of *Dickson* in *Swilling*. Because prescreening was not required in pending cases in which the first time in-court identification already occurred, a reviewing court must determine whether the admission was harmful, which necessarily includes determining whether identity was at issue. See *State* v. *Dickson*, supra, 322 Conn. at 452, 141 A.3d 810. Thus, for cases pending at the time the decision in *Dickson* was released, if identity was not at issue, the admission of a first time in-court identification does not implicate due process concerns and, thus, was not harmful.34

***481** In the present case, the state argues that, under *Dickson*, the admission of the first time in-court identifications did not violate the defendant's rights to due process for three reasons: (1) Robinson did not make a first time in-court identification, (2) *Dickson* applies only when "the state intends to present a first time in-court identification," and (3) identity was not at issue. We address each in turn.

As an initial matter, we must determine whether Robinson and George Frazier made first time in-court identifications. It is clear that George Frazier identified the defendant, for the first time at trial, as one of the shooters. He testified that he never previously informed anyone that he witnessed the shooting or that the defendant was one of the shooters. It is less clear whether Robinson's testimony constitutes a first time in-court identification.

Robinson never testified at trial that the defendant was one of the two shooters. ****32** Nor did she testify that one of the victim's assailants looked like the defendant. Robinson did not mention the defendant in any way. She did, however, testify that she saw two shooters—one was tall and thin, the other was short and stocky. Although the defendant argues that this description matches the physical characteristics of the defendant and Vance, Robinson never testified to such a correlation. As such, it is not clear from the record that Robinson explicitly identified the defendant as one of the shooters. Rather, she provided a description of the suspects.

***482** This court in *Dickson* emphasized that the new rule we announced therein did not apply to observations of the perpetrator, such as height, weight, sex, race, and age, so long as the prosecutor does not question the witness about whether the defendant resembles the perpetrator. *State* v. *Dickson*, supra, 322 Conn. at 436–37, 447, 141 A.3d 810; cf. *State* v. *Bethea*, 187 Conn. App. 263, 278, 202 A.3d 429, cert. denied, 332 Conn. 904, 208 A.3d 1239 (2019); *State* v. *Torres*, 175 Conn. App. 138, 150, 167

A.3d 365, cert. denied, 327 Conn. 958, 172 A.3d 204 (2017).

Nevertheless, we noted in *Dickson* that a defendant's due process rights may be implicated by the admission of a witness' testimony as to their observations about a perpetrator if the witness "was unable to provide any of these details before the court proceeding ...." *State* v. *Dickson*, supra, 322 Conn. at 437 n.19, 141 A.3d 810. However, because we were not presented with that problem in that case, we did not address it. See id.

The description that Robinson gave of the perpetrators was minimal and generic—a short, stocky man and a tall, thin man. Robinson did not testify as to race, age, clothing or facial descriptions. This court has not previously addressed whether the level of detail in a witness' description of a perpetrator plays a factor in whether the description constitutes an identification or implicates a defendant's due process rights. We, however, need not decide this issue because, even if we assume that the rule in *Dickson* applies to Robinson's observations about the perpetrators, the defendant suffered no harm. See part II C of this opinion.

**2**

Next we address the state's argument that *Dickson* does not apply in the present case because *Dickson*applies only when "the state intends to present a first time in-court identification ...." *State* v. *Dickson*, supra, 322 Conn. at 445, 141 A.3d 810. It is true that the procedure we ***483** set forth in *Dickson* did not contemplate cases in which the first time in-court identification was a surprise to both the state and the defendant. Although we

recognize that the prosecutor in the present case committed no misconduct because the identifications were unsolicited and unanticipated and because this court had yet to announce the new rule created in *Dickson*, the fact that these identifications were unsolicited and unanticipated does not affect whether they violate the defendant's right to due process. All first time in-court identifications are subject to the rule in *Dickson*; see footnote 34 of this opinion; regardless of the prosecutor's intent.

**3**

Finally, the state argues that *Dickson* does not apply, or that there was no due process violation; see id.; because identity was not at issue. Specifically, the state argues that, because the defendant testified that he was present at the scene of the crime and because he did not have to be the shooter to be convicted of felony murder, the shooter's identity was not at issue. The defendant responds that identity was ****33** at issue because the identity of the shooter and whether there was more than one shooter were actively disputed at trial. In light of the defendant's testimony that he was present at the scene of the crime, we agree with the state that identity was not at issue as to most of the charges, which did not require the defendant to be the shooter in order to be found guilty but disagree that identity was not at issue with regard to the charge of criminal possession of a firearm.

The defendant was charged with and found guilty of felony murder, two counts of attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree, and criminal possession of a firearm. See footnote 1 of this opinion. Although the

state's ***484** general theory of the case was that the defendant and Vance attempted to rob the victim and then fired their guns at the victim, the state argued in summation to the jury that the defendant could be found guilty of attempted robbery even if he did not have or use a gun. The prosecutor stated that "it doesn't have to be that they both had guns; it has to be that either [the defendant] or [Vance] must have been armed." Similarly, in regard to the charge of felony murder, the prosecutor argued that the state "does not have to prove who shot and killed [the victim], just that either [Vance's or the defendant's] actions caused [the victim's] death."

Likewise, when instructing the jury as to the charge of felony murder, the trial court explained that, to find the defendant guilty, it had to find that "the defendant, acting alone or with one or more persons ... committed or attempted to commit a robbery" and that "the defendant or another participant in the attempted robbery caused the death of [the victim] ...." As to the charge of attempted robbery under §§ 53a-49 (a) (2) and 53a-134 (a) (2), the trial court instructed the jury that, to find the defendant guilty, it had to find that "the defendant or another participant in the crime [was] armed with a deadly weapon." As to the charge of attempted robbery under §§ 53a-49 (a) (2) and 53a-134 (a) (4), the trial court instructed the jury that, to find the defendant guilty, it had to find that "the defendant or another participant in the crime [displayed] or [threatened] the use of what he [represented] by word or conduct to be a pistol, revolver, rifle, shotgun, machine gun, or other firearm." As to the charge of conspiracy to commit robbery, the trial court did not mention possession of a firearm in its instruction. The only charge on which the court instructed the jury that it

had to find that the defendant possessed a firearm before it could find him guilty was the charge of criminal possession of a firearm in violation of § 53a-217 (a) (1). ***485** The trial court's instructions were consistent with the law of this state. See *State* v. *Davis*, 255 Conn. 782, 791, 772 A.2d 559 (2001) ("treating accessories and principals alike" for purposes of § 53a-134 so that defendant does not have to possess, use, or threaten use of deadly weapon to be found guilty of robbery, as long as another participant in robbery possessed, used, or threatened use of deadly weapon).

As the state's argument and jury instructions make clear, identity was not at issue as to the charges of felony murder, both counts of attempted robbery, and conspiracy to commit robbery. As to those charges, although the identity of the shooter was disputed, the defendant did not need to possess or use a firearm to be found guilty. It was sufficient for the state to establish that the defendant participated in the attempted robbery and the conspiracy to commit robbery while another participant—Vance—possessed, used, or threatened the use of a firearm. The defendant ****34** placed himself at the crime scene at the time the crime occurred. He admitted at trial that he was standing near Vance when Vance fired his gun at the victim. In light of the defendant's testimony, the issues that remained as to these four charges concerned whether the defendant participated in the attempted robbery and the conspiracy to commit robbery. The identity of the shooter was not at issue. Thus, as to these four charges, because identity was not at issue, the admission of the identification testimony of Robinson and George Frazier did not implicate the defendant's due process rights and, therefore, was not harmful.

Identity was at issue, however, in relation to the charge of criminal possession of a firearm. For the jury to find the defendant guilty of this charge, the state was required to prove that he possessed a firearm. See General Statutes § 53a-217 (a) (1). Although the trial court noted in its jury instructions that possession could ***486** be actual or constructive, the state in closing argument argued to the jury only that the defendant actually possessed a firearm. Cf. *State* v. *King*, 321 Conn. 135, 149, 136 A.3d 1210 (2016) ("[p]rinciples of due process do not allow the state, on appeal, to rely on a theory of the case that was never presented at trial"). Although the state was not required to establish that the defendant either was the shooter or possessed a firearm in order for the jury to find him guilty of felony murder, attempted robbery, and conspiracy to commit robbery, the state was required to establish that he actually possessed a firearm in order for the jury to find him guilty of criminal possession of a firearm. Thus, the identity of the shooter was at issue for purposes of that charge—if the state established that the defendant was the shooter, then it likewise established that he possessed a firearm. Accordingly, the identification testimony of Robinson and George Frazier did implicate the defendant's due process rights in relation to the charge of criminal possession of a firearm.

**C**

Because we have determined that the admission of the identification testimony of Robinson and George Frazier implicated the defendant's due process rights in relation to the charge of criminal possession of a firearm, we must determine whether the testimony was harmless beyond a reasonable doubt. See *State* v. *Dickson*, supra, 322 Conn. at 453, 141 A.3d 810. "A constitutional error is harmless

when it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict without the impermissible [evidence] .... That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]." (Citation omitted; internal quotation marks omitted.) Id. We conclude that any error was harmless beyond a reasonable doubt.

***487** Whether an error is harmless in a particular case depends on several factors, including the importance of the witness' testimony to the state's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the witness' testimony on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. *State* v. *Shaw*, 312 Conn. 85, 102, 90 A.3d 936 (2014). "Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial.... If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless." (Internal quotation marks omitted.) Id.

****35** The following additional facts, some of which we already have discussed, are relevant to our analysis. Joseph Rainone, a firearms examiner for the Waterbury Police Department, testified that, on the basis of bullet fragments found at the scene of the crime, it was inconclusive whether all of the bullets had been fired from the same gun, and it was possible that either one or more firearms had been used. However, he testified that all of the bullets fired were .38 class bullets, which could be

fired from either a .38 revolver or a .357 revolver. Additionally, he testified that at least five, but as many as seven, gunshots were fired. Thus, it was possible that all of the bullets could have been fired from Vance's .357 revolver or from both Vance's .357 revolver and another firearm (either a .357 or a .38 revolver).

There was conflicting testimony at trial concerning whether the defendant possessed and/or used a firearm during the incident. As detailed in part I A of this opinion, in the prior statements of Bugg and Vance that were admitted for substantive purposes under *Whelan*, both stated that the defendant had a .38 revolver in his possession at the time of the incident, although they ***488** later recanted on the witness stand and testified that he did not have a gun. Additionally, in his statement to the police, which also was admitted for substantive purposes under *Whelan*, Oliphant stated that he knew that the defendant possessed a .38 revolver because he previously had seen the defendant with it, although not necessarily during the incident at issue. Oliphant disputed this knowledge during his testimony at trial.

In addition to the testimony previously discussed, the state also presented the testimony of Foote. Foote testified that, after the shooting, Bugg told him that both the defendant and Vance had attempted to rob the victim and shot at him. The state also offered the testimony of Sade Stevens, who had been at Oliphant's apartment in his bedroom when the defendant, Bugg, and Vance arrived after the shooting. She testified that she heard the defendant say that they had tried to rob the victim and that she heard Vance say that he shot the victim.

However, she testified that she did not hear the defendant confess to shooting the victim. The state then had Stevens' prior statement to the police read into the record for substantive purposes under *Whelan*. In her statement, Stevens stated that she had heard both the defendant and Vance admit to shooting the victim. Further, the state offered the testimony of Omar Wilson (Omar), the defendant's uncle. Omar testified that, in May, 2010, approximately four months after the incident at issue, he saw the defendant with a gun.

Although it is true that Bugg and Vance recanted their prior statements that were admitted under *Whelan*, the jury was entitled to credit and rely on the *Whelan* statements. See, e.g., *State* v. *Dupigney*, 78 Conn. App. 111, 120–22, 826 A.2d 241 (admission of evidence identifying defendant as shooter, even if improper, was nevertheless harmless beyond reasonable doubt because, inter alia, three other witnesses also identified defendant as shooter, including witness whose identification was ***489** admitted under *Whelan* because he recanted on witness stand at trial), cert. denied, 266 Conn. 919, 837 A.2d 801 (2003). This is especially so in light of the fact that, despite the recantations by Bugg and Vance, the testimony and statements that Foote and Stevens gave to the police corroborated the prior statements of Bugg and Vance that the defendant was armed with a firearm during the incident. Thus, even without the identification testimony of Robinson and George Frazier, the jury heard testimony from four other witnesses that the defendant possessed a firearm at the time of the shooting and testimony ****36** from one witness, Omar, that the defendant possessed a firearm after the shooting. That testimony establishes beyond a reasonable doubt that the

jury would have returned a guilty verdict, even without the impermissible identification testimony. See, e.g., *State* v. *Artis*, 314 Conn. 131, 159–60, 101 A.3d 915 (2014) (even if identification testimony was improper, it was harmless beyond reasonable doubt because of other identification testimony by witness who personally knew defendant); *State* v. *Dupigney*, supra, at 120–22, 826 A.2d 241 (admission of evidence identifying defendant as shooter, even if improper, was nevertheless harmless beyond reasonable doubt because three other witnesses also identified defendant as shooter).

Moreover, defense counsel had the opportunity to, and did, extensively cross-examine George Frazier about his identification testimony. See *State* v. *Artis*, supra, 314 Conn. at 160–61, 101 A.3d 915 (considering fact that defense counsel extensively cross-examined witness in determining whether improper identification testimony was harmless). Defense counsel heavily attacked George Frazier's credibility. George Frazier continuously contradicted himself, and his response to most questions was that he had no recollection, although he already had answered most of the questions on direct examination. He also testified that he had had surgery a ***490** few months after the victim's murder to remove a brain tumor. Not only did defense counsel attack George Frazier's credibility, but the state similarly questioned him about his identification of the defendant, pointing out that he never previously had identified the defendant and never told the police or the prosecutor that he had witnessed the shooting. The state even went so far as to question George Frazier about whether he "actually saw [the defendant] with a gun, or are you just saying that because you

wanted to help out your brother's memory?" The state's skepticism is clear in the record.

Furthermore, in arguing to the jury that the defendant possessed a firearm during the incident, the state primarily relied on the *Whelan* statements and the testimony of Bugg and Vance, with minimal reliance on the identification testimony of Robinson and George Frazier. With regard to the charge of attempted murder, the state argued in summation to the jury: "And in this particular count, count two, it has to be that they were armed with a deadly weapon. Well, again, it doesn't have to be that they both had guns; it has to be that either [the defendant] or [Vance] must have been armed. And the testimony is, however, though, that they both had guns. [Bugg] said they did in his statement. [Vance] said they did in his statement. [Bugg] said it at the testimony he gave at the probable cause hearing, and [Vance] said it when he plead[ed] guilty to the crimes." Although the state did refer to Robinson's testimony that she saw two shooters in relation to the felony murder charge in regard to the charge of criminal possession of a firearm, the state did not rely on Robinson's testimony, arguing only: "So, the next question is, did he possess a firearm on January 18, 2010. Bugg said he had one. [Vance] said he had one." In addition to relying on the *Whelan* statements of Bugg and Vance, the state also relied on Omar's testimony that he ***491** saw the defendant with a gun a few months after the victim's murder, "which means the defendant had an instrumentality of the crime."

The state's overall reliance on the identification testimony at issue was minimal. The state referred to George Frazier only three times during closing argument—to

argue the direction in which the gunshots were fired (but not who was shooting), to argue that the victim was heard calling out **37 for his mother, and to argue that the jury should take into consideration the fact that he had had a brain tumor when considering his testimony. The state did not rely on or reference George Frazier's identification of the defendant in any way. The state, on four occasions, referenced Robinson's testimony that she saw two shooters and argued that the jury should take into consideration the fact that she was emotionally distraught when she spoke to the police when considering her testimony and statement to the police. These references, however, were overshadowed by the state's repeated references to testimony from other witnesses that the defendant possessed a firearm—specifically, nine references to the testimony of Bugg or Vance, two references to the testimony of Stevens, and three references to the testimony of Omar.

Accordingly, we conclude that, to the extent that the identification testimony of Robinson and George Frazier was improper, it was harmless beyond a reasonable doubt because it was cumulative of other identification testimony, it was subject to extensive cross-examination, it was minimally relied on by the state in closing argument, and, even without their testimony, there was sufficient evidence for the jury to find the defendant guilty beyond a reasonable doubt.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

**Footnotes**

1

The defendant also was found guilty of a second count of attempted robbery in the first degree in violation of §§ 53a-49 (a) (2) and 53a-134

(a) (4), but the trial court vacated that finding at sentencing, pursuant to *State* v. *Polanco*, 308 Conn. 242, 245, 61 A.3d 1084 (2013).

2

"The state's ballistics expert noted that a .38 class bullet could be fired from a nine millimeter pistol, a .38 Special revolver, or a .357 Magnum revolver." *State* v. ***Collymore***, supra, 168 Conn. App. at 851 n.2, 148 A.3d 1059.

3

Although the state indicated it was granting Bugg only use immunity, because it granted him immunity pursuant to § 54-47a, it necessarily granted him both use immunity and transactional immunity. See *Furs* v. *Superior Court*, 298 Conn. 404, 410–11, 3 A.3d 912 (2010) (§ 54-47a [b] necessarily provides witness with both use and transactional immunity, and state cannot restrict its offer of immunity to only use or only transactional immunity).

4

The state then requested that the court inform the jury that Bugg had been granted immunity and was compelled to testify. Over defense counsel's objections, the trial court informed the jury prior to the start of Bugg's testimony that he had been compelled to testify under § 54-47a, although the court did not specifically say that he had been granted immunity.

5

The state argues that the defendant's claim, as it relates to Vance, fails because the record is inadequate to establish that the state ever granted him immunity. Although it is true that the state did not explicitly grant Vance immunity on the record prior to the start of his testimony, the state did later clarify on the record that it had granted Vance immunity from prosecution for the crime of making a false statement. In light of this clarification, the state's argument fails.

6

The trial court informed Oliphant that "you have been given transactional immunity by the state." See footnote 3 of this opinion.

7

For some of the witnesses, there was a delay between the admission of the *Whelan* statements and the recommencement of direct examination. Bugg was not recalled by the state until approximately nine days later, after ten other witnesses had testified on behalf of

the state. Vance was not recalled by the state until approximately eight days later (although due to weather, evidence was presented during only two of those eight days), after six other witnesses had testified on behalf of the state. Direct examination of Oliphant recommenced immediately after his prior statement to the police was read into the record.

8

Bugg testified that he signed his statement to the police and testified at the hearing in probable cause because he was promised a plea deal that limited his period of incarceration to five years. He also alleged that he had been slapped and hit by the officers prior to agreeing to sign the statement.

Vance testified that he signed his statement to the police only so that he would not receive the death penalty and testified at the plea proceedings consistently with the statement only so that he would receive a lesser sentence. Vance testified that not only did he not make a statement to the police but that the language in the statement was inconsistent with how he spoke.

Oliphant testified that he was bullied, beaten, and forced by the police into making a false statement against the defendant. According to Oliphant, he does not speak in the manner used in the statement and never would have used the phrases contained in the statement. He further testified that he was offered a plea deal if he perjured himself and testified in a manner that was consistent with his statement to the police.

9

The defendant never requested that the trial court determine whether immunity under § 54-47a extended to testimony given during the defense case but, rather, agreed with the trial court that whether a witness is granted immunity is solely in the hands of the state and that the court could not require that immunity be granted. When the trial court inquired as to what defense counsel was seeking from the court, counsel responded that he did not believe that the court could do anything but nevertheless requested that the jury be advised that the prior immunity had been revoked. The court declined to give the jury this instruction.

10

The state also questioned Bugg about phone conversations he had had with his sister and mother while he was incarcerated. Bugg testified that he did not recall the substance of the conversations but that he might have told his sister that Vance was willing to help him. He said that he did not recall telling his sister that, if he gave Vance "some kitty," everything would be fine. He did recall telling his mother or sister to tell Foote that they needed to talk so that Foote would tell the truth.

After Bugg's testimony in the state's case concluded, the state played audio recordings of these telephone conversations. In one recording, Bugg told his sister that, if he could "get that nigga' some kitty, and everything's gonna be good." He also informed his sister that "I'm trying to help the other nigga' out."

11

On cross-examination by the state, Bugg invoked his fifth amendment privilege as to four other questions: (1) whether he had testified inconsistently at the hearing in probable cause about whether the purpose of going to Diamond Court was to purchase marijuana, (2) whether he had testified inconsistently during the state's case-in-chief about remembering the telephone conversation with his sister about "kitty," (3) whether he had ever threatened Foote, and (4) whether he failed to inform the police that the reason he, the defendant and Vance had gone to Diamond Court was to purchase marijuana. The defendant, however, does not argue that he was harmed by Bugg's refusal to respond to these questions.

12

Although Vance had pleaded guilty pursuant to a plea deal at the time of the defendant's trial, he had not yet been sentenced because his sentence was contingent on whether he testified truthfully at the defendant's trial.

13

The defendant does not argue that he was harmed by Oliphant's invocation of his fifth amendment right in response to questions by the state on cross-examination during the defense case-in-chief.

14

Section 54-47a (a) permits a prosecutor to apply to the court for an order directing a witness, who has invoked his fifth amendment privilege against self-incrimination, to testify if the prosecutor determines that the testimony of the witness "in any criminal

proceeding involving ... felonious crimes of violence ... or any other class A, B or C felony ... [is necessary to obtain] sufficient information as to whether a crime has been committed or the identity of the person or persons who may have committed a crime ... [and] is necessary to the public interest ...."

Section 54-47a (b), however, prohibits the witness from being "prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify or produce evidence, and no testimony or evidence so compelled, and no evidence discovered as a result of or otherwise derived from testimony or evidence so compelled, may be used as evidence against him in any proceeding, except that no witness shall be immune from prosecution for perjury or contempt committed while giving such testimony or producing such evidence."

15

Contrary to the state's argument, the defendant does not contend that the witnesses were entitled to additional immunity for subject matter not covered by the preexisting immunity. For this reason, we do not need to determine whether the defendant had a constitutional or statutory right to have these witnesses granted *additional* immunity.

16

Even if we assume that immunity extends throughout the entire trial, this in no way means that the statute permits an immunized witness to testify falsely; the statute specifically prohibits the state from granting immunity for perjury a witness commits while giving testimony under a grant of immunity. See General Statutes § 54-47a (b); see also *State* v. *Giraud*, 258 Conn. 631, 634, 783 A.2d 1019 (2001) (immunity is not "a license to lie" [internal quotation marks omitted] ). The defendant does not argue otherwise.

17

We note that, although the defendant argues before this court that the trial court failed to rule on the issue of whether the statute provided the witnesses with immunity throughout the entirety of the trial, the defendant never requested that the trial court decide this issue. Although the defendant argued at trial that the state's actions violated his rights to present a defense and to due process because the state was unfairly depriving him of witness testimony by scaring the witnesses from the witness stand, he did not argue that the state

violated the statute. Defense counsel even admitted that whether immunity was granted was solely in the hands of the state and not within the power of the court. Defense counsel did not take issue with the state's argument that, under the statute, immunity extended only to the witnesses' testimony during the state's case. When the trial court inquired what defense counsel was seeking from the court on this issue, defense counsel responded that he did not think the court could do anything about whether the witnesses' immunity extended to the defense case-in-chief but requested that the jury be instructed that the state had revoked immunity, which the trial court denied. Although the trial court stated that it was unclear whether immunity extended to the defense case-in-chief, it did not fail to decide this issue because the defendant never sought a ruling on this issue.

Because the defendant did not raise a statutory claim at trial that the state improperly applied § 54-47a by revoking immunity, to the extent that the defendant's claim is not constitutional in nature, we do not review his statutory claim for harmless error, even if we assume that the state's actions violated § 54-47a.
See *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 203, 982 A.2d 620 (2009) ("we will not review a claim unless it was distinctly raised at trial"); *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 597, 188 A.3d 702 (2018) (same).

Despite the defendant's failure to raise this statutory claim at trial, to the extent that his constitutional claim relies on a violation of § 54-47a, we do not find it unpreserved. At trial, the defendant claimed that the state's actions regarding immunity violated his constitutional rights. The fact that the defendant now argues that the state's actions likewise violated § 54-47a does not make his constitutional claim unpreserved, nor does the state so argue. The defendant's argument on appeal—that the state's actions violated his constitutional rights to due process and to present a defense because the state employed tactical gamesmanship to scare the witnesses from the witness stand and, thus, unfairly deprived him of their testimony—is the same as his argument before the trial court, regardless of the reference to § 54-47a. See,
e.g., *Crawford* v. *Commissioner of Correction*, supra, 294 Conn. at 203, 982 A.2d 620 ("[w]e may ... review legal arguments that differ from those raised before the trial court if they are subsumed within or

intertwined with arguments related to the legal claim raised at trial").

18

This framework has been used predominantly for evaluating whether the state's refusal to grant immunity to a defense witness, who never has been granted immunity, violated the defendant's constitutional rights. See *State* v. *Kirby*, supra, 280 Conn. at 402–404, 908 A.2d 506. It also has been applied by this court to determine whether the state violated a defendant's constitutional rights when it granted a witness immunity at one stage of the proceedings (the hearing in probable cause) but declined to extend that immunity to the same witness when called as a defense witness during trial. *State* v. *Giraud*, supra, 258 Conn. at 635–37, 783 A.2d 1019. The parties do not dispute that this framework applies under the procedural posture and facts of this case; in fact, the defendant relies on it in support of his constitutional claim. Although we have been unable to identify any federal cases in which this framework has been applied when immunity has been revoked, rather than when the state has declined to grant immunity, this framework appears to be equally applicable to the constitutional analysis in the present case because it considers whether the state engaged in a discriminatory grant of immunity, which is how the defendant in the present case categorizes the state's actions—discriminatorily granting immunity for the state's case but revoking that immunity during the defendant's case to gain a tactical advantage.

Additionally, we note that, although the nomenclature of the prosecutorial misconduct theory is similar to a claim for prosecutorial impropriety, these are two separate and distinct claims, and the defendant in the present case does not raise a prosecutorial impropriety claim.

19

The defendant also argues that Bugg refused to respond to questions about a telephone conversation with his sister involving "kitty." Our review of the record, however, shows that Bugg did respond to defense counsel's inquiries about that subject during direct examination in the defense case. See also footnote 10 of this opinion. The defendant has not identified any questions that he was unable to ask or any new information that he was unable to obtain regarding this subject matter.

20

The immunity that the state had granted to Bugg was limited to drug activity that he was engaged in on the day of the murder. See part I A of this opinion. Although the state indicated that it did not intend to prosecute Bugg for making a false statement at the hearing in probable cause, no immunity was officially granted. See id.; see also *State* v. *Williams*, 200 Conn. 310, 319, 511 A.2d 1000 (1986) ("the right to one's privilege against prosecution that could result from the testimony sought does not depend upon the likelihood of prosecution but upon the possibility of prosecution"); *Murphy* v. *Nykaza*, Superior Court, judicial district of Fairfield, Docket No. 320696 (May 17, 1995) (14 Conn. L. Rptr. 289, 290, 1995 WL 316967) ("a prosecuting attorney's indication in a particular case that he will not prosecute ... [is] not sufficient to defeat a claim of privilege" [internal quotation marks omitted] ).

21

The defendant does not argue that he was harmed by Oliphant's invocation of his fifth amendment right in response to questions by the state during cross-examination in the defense case about a man named Jamel, with whom the defendant was arrested and who testified about hearing him being beaten by detectives while in police custody.

22

Our review of the record does not show that Oliphant testified that he felt guilty about Vance. Oliphant testified that, when Vance had been living in North Carolina, he called Oliphant and said he was staying in an abandoned house, and so Oliphant "felt bad" for him and invited Vance to stay with him in Connecticut. Oliphant, however, did testify on direct examination in the state's case-in-chief that he felt "a lot of guilt" about this case. On cross-examination, defense counsel inquired into this subject, in response to which Oliphant testified that he felt guilty for lying and incriminating the defendant, his best friend, by signing a false statement, which he signed only because the detectives beat and coerced him.

23

The defendant argues that the harm caused by the exclusion of this testimony was compounded by the state's reliance on the unavailable testimony in its summation to the jury. See *State* v. *Carter*, 228 Conn. 412, 428–29, 636 A.2d 821 (1994), cert.
denied, *Connecticut* v. *D'Ambrosia*, 493 U.S. 1063, 110 S. Ct. 880, 107

L. Ed. 2d 963 (1990); id., at 428, 636 A.2d 821("the harm to the defendant's claim of self-defense resulting from the exclusion of the victim's criminal record was compounded when the assistant state's attorney, in his rebuttal to the defendant's closing argument, commented" that there was no evidence that victim was bad person).

Although we agree that a defendant may be harmed by the improper exclusion of evidence if the prosecutor, in summation to the jury, relies on the significance of the missing evidence, this is not such a case. After having thoroughly reviewed the record, we determine that the state did not rely on the absence of the improperly excluded testimony during its summation.

24

Both the victim's mother, Nelly Robinson, and brother, George C. Frazier, testified at the criminal trial that they saw a white getaway vehicle from the front door of their apartment, which conflicted with Bugg's testimony about parking the vehicle behind and between two of the apartment buildings. See part II A of this opinion.

25

Foote testified at trial that Bugg informed him that he had witnessed the shooting. The defendant argues that, because Foote testified after Bugg, he should have been permitted to question Bugg about whether he witnessed the shooting. The defendant, however, never asked Bugg during direct examination in the defense case-in-chief whether he witnessed the shooting, and, thus, Bugg never invoked his fifth amendment privilege in response to this question. In the absence of such a record, we cannot say that the defendant was harmed.

26

The defendant argues that the Appellate Court speculated that the witnesses' testimony during the defense case would have been cumulative but that there is no way to know or for him to have created a sufficient record because the state prevented him from obtaining answers to these questions. The case cited by the defendant, however, is distinguishable because it involved an error of constitutional magnitude, thereby requiring the state to prove that the error was harmless beyond a reasonable doubt, which it could not do in the absence of a sufficient record. See *State* v. *D'Ambrosio*, 212 Conn. 50, 61, 561 A.2d 422 (1989) ("[o]n the present record, we cannot conclude that the court's error, which implicates the defendant's constitutional right to impeach and discredit state witnesses, was

harmless beyond a reasonable doubt"), overruled in part on other grounds by *State* v. *Bruno*, 236 Conn. 514, 523–24 n.11, 673 A.2d 1117 (1996).

In the present case, under the prosecutorial misconduct theory, the burden is on the defendant to provide a sufficient record and to establish that the testimony would not have been cumulative. The trial court advised defense counsel to ask any questions he had and to create an adequate record. In light of the fact that the witnesses invalidly invoked their fifth amendment rights in response to questions that they already had answered in the state's case, there is no reason in the record to suspect that any additional testimony would have been any different from their prior testimony.

27

Because we have determined that, even if the state improperly revoked immunity, and the witnesses subsequently invalidly invoked their fifth amendment rights, the defendant has failed to establish that this error was constitutional under the prosecutorial misconduct theory on the ground that he has failed to establish that the testimony would not have been cumulative, we need not address the state's alternative argument that any error in the revocation of immunity as to Vance was harmless because the statute of limitations for the crime of making a false statement had expired. See *State* v. *Giraud*, supra, 258 Conn. at 638, 783 A.2d 1019.

28

Both the trial court and the state correctly stated that the defendant had the right to recall the state's witnesses during the defense case-in-chief and question them on new topic areas not raised during the state's case.

29

We note that the defendant did not object to the court's admonitions to the witnesses. However, because the record is adequate for review and the defendant's claim is of constitutional magnitude, we review it pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third condition of *Golding*); see *State* v. *Fred C.*, 167 Conn. App. 600, 609, 142 A.3d 1258 (reviewing under *Golding*unpreserved claim that trial court's perjury admonition to witness violated defendant's due process rights), cert. denied, 323 Conn. 921, 150 A.3d 1150 (2016); see also *State* v. *Elson*, 311 Conn.

726, 754–55, 91 A.3d 862 (2014) (defendant was not required to affirmatively request review under *Golding*).

30

The defendant further argues that his rights to due process and to present a defense were violated by the trial court's failure to decide whether § 54-47a required the state to extend immunity throughout the trial proceedings. The defendant, however, never requested that the trial court determine whether the statute provided the witnesses immunity throughout the entire trial and not merely during the state's case-in-chief. See footnote 17 of this opinion.

31

For purposes of this opinion, "first time in-court identification" refers to in-court identifications in cases in which the witness has not successfully identified the defendant in a prior out-of-court identification procedure.

32

On cross-examination, defense counsel, using a photograph of Diamond Court, asked Robinson to use a pointer to show where on the photograph the victim and the shooters were located when she looked out her window and saw the shooting. In describing the events, Robinson testified that the shooters chased after the victim but then stopped running and started shooting. In describing where the shooters stopped, she testified: "This guy right here—the short, fat one—went up, shot him twice, pushed back. The other tall, skinny one went up, shot him twice ...."

The defendant does not argue on appeal that Robinson's use of the phrase, "[t]his guy right here," meant that she was specifically pointing to and identifying the defendant. Although the record is unclear, it is equally possible that Robinson's statement referred to where on the photograph she was pointing, as in, "this guy, the guy standing right here where I am pointing." The record does not reflect that she identified the defendant, and neither party has argued that she did.

33

Officer Michael Modeen, who responded to the scene of the crime, testified that Robinson did not inform him that she had witnessed the shooting or seen the shooters but, rather, that she heard several loud bangs and then opened the front door to find the victim fall to his back and see a white car speed away with two or three males inside.

Modeen, however, did testify that Robinson was overcome with emotion and that she had difficulty conveying this information.

34

The state argues that, when identity is not at issue, *Dickson* does not apply. We have classified the impact of the rule in *Dickson* a bit differently, however, but with the same result in this case. We have held that the procedural rule in *Dickson*applies to all first time in-court identifications. Under *Dickson*, prospectively, all first time in-court identifications must be prescreened, with the trial court having discretion to permit the admission of these identifications in cases in which identity is not at issue. Similarly, in cases pending at the time of this court's decision in *Dickson*, the lack of prescreening is harmful only if identity was at issue. Thus, *Dickson* makes clear that first time in-court identifications implicate due process only if identity is at issue.

# APPENDIX B

**324 Conn. 913, 153 A.3d 1288**

**Supreme Court of Connecticut**

# STATE of Connecticut

**v.**

# Anthony COLLYMORE

**Decided January 25, 2017**

## Opinion

The defendant's petition for certification for appeal from the Appellate Court, 168 Conn.App. 847, 148 A.3d 1059 (2016), is granted, limited to the following issues:

"1. Whether the Appellate Court properly held that a prosecutor's grant of immunity to a witness for his testimony during the state's case-in-chief does not extend to the same witness' testimony when later called by the defendant as a witness?

***1289** "2. If the answer to the first question is no, was the error nonetheless harmless?

"3. Whether in-court identification testimony made by the victim's mother and brother, contrary to their pretrial statements, violated the defendant's due process rights pursuant to State v. Dickson, 322 Conn. 410, 141 A.3d 810 (2016)?"

EVELEIGH, J., did not participate in the consideration of or decision on this petition.

# APPENDIX C

**168 Conn.App. 847, 143 A.3d 1059**
**Appellate Court of Connecticut**

## STATE of Connecticut
**v.**

## Anthony COLLYMORE
**(AC 37703)**
**Argued January 14, 2016**
**Officially released October 11, 2016**

# Synopsis

**Background:** Defendant was convicted in the Superior Court, Judicial District of Waterbury, Cremins, J., of felony murder, attempt to commit robbery, conspiracy to commit robbery, and criminal possession of a firearm. Defendant appealed.

**Holdings:** The Appellate Court, Gruendel, J., held that:

1 witnesses were not constitutionally entitled to additional immunity under effective defense theory when called as defense witnesses;

2 witnesses were not constitutionally entitled to additional immunity under prosecutorial misconduct theory when called as defense witnesses;

3 trial court acted within its discretion in sustaining witnesses' rights against self-incrimination as to certain questions;

4 witnesses were not entitled to invoke privilege against self-incrimination as to questions they had already answered in State's case-in-chief;

5 trial court's error in allowing witnesses to invoke privilege against self-incrimination as to questions already asked when they initially testified in State's case-in-chief was harmless;

6 any error in admitting uncharged misconduct evidence was harmless;

7 witness's prior inconsistent statements were admissible for limited purpose of impeaching witness's credibility; and

8 trial court's comments during sentencing were proper commentary and did not demonstrate improper lengthening of sentence for defendant's exercise of right to jury trial.

Affirmed.

**1065 Appeal from Superior Court, judicial district of Waterbury, Cremins, J.

## Attorneys and Law Firms

Susan M. Hankins, assigned counsel, for the appellant (defendant).

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were Maureen Platt, state's attorney, and Cynthia S. Serafini, senior assistant state's attorney, for the appellee (state).

Gruendel, Lavine and Mullins, Js.*

# Opinion

GRUENDEL, J.

***849** It is well established that the state may immunize from prosecution a witness called in its ***850** case-in-chief. See generally General Statutes § 54–47a. The primary question in this appeal is whether the state, after immunizing such a witness for testimony given during the state's case-in-chief, may decline to extend that immunity to the same witness in connection with his testimony during the defense case-in-chief. Here, we conclude that the state was not required to grant three prosecution witnesses ****1066** additional immunity for their testimony during the defense case-in-chief, and that the court's refusal during the defense case-in-chief to compel those witnesses to testify when they invoked their fifth amendment right to remain silent was proper as to some testimony and harmless as to the rest. Accordingly, because we conclude that the remainder of the defendant's claims—three evidentiary claims and a claim that the court improperly penalized the defendant at sentencing for electing to go to trial—also lack merit, we affirm the judgment of conviction.

The defendant, **Anthony Collymore**, appeals from that judgment, rendered after a jury trial, of (1) felony murder in violation of General Statutes § 53a–54c; (2) attempt to commit robbery in the first degree in violation of General Statutes §§ 53a–49 (a) (2) and 53a–134 (a) (2); (3) conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a–48 (a) and 53a–134 (a); and (4) criminal possession of a firearm in violation of General Statutes § 53a–217 (a) (1).1

At trial, the jury reasonably could have found the following facts. On January 18, 2010, the defendant and two of his friends, Rayshaun Bugg and Vance Wilson (Vance), were driving around Waterbury in a white, four door, rental Hyundai that the defendant's aunt and uncle had lent to him, looking to rob someone. Eventually ***851** the three men drove into the Diamond Court apartment complex, which comprises eight apartment buildings. Halfway down the main road of the complex, the men saw an expensive-looking, black Acura sport utility vehicle (SUV) and decided to rob its driver.

They drove down a small road behind the apartments, where the defendant and Vance pulled out their guns and exited the Hyundai, saying that they were going to rob the driver of the SUV. The defendant had a .38 revolver and Vance had a .357 revolver. Bugg drove to the end of the small road and waited. The defendant and Vance reached the SUV, saw two young children running toward its driver, and decided to call off the robbery. The SUV drove away.

The defendant and Vance then saw seventeen year old John Frazier (victim) and decided to rob him. As they were trying to rob him, he slapped away one of their guns and ran toward his apartment, at the entrance to the complex. The defendant and Vance both fired shots at the victim.

Bugg drove up, the defendant and Vance ran over to the Hyundai and got in, and they sped off to the apartment of Jabari Oliphant, a close friend who lived in Waterbury. There, the defendant and Vance explained to Bugg and

Oliphant what had just transpired at Diamond Court, namely, that they had intended to rob the man in the SUV but decided not to when they saw his young children; instead, they tried to rob the victim and shot him when he resisted. They then asked Oliphant if he had something to clean their guns.

Police arrived at Diamond Court within minutes of the shooting and found the fatally wounded victim in front of his family's apartment. An autopsy revealed that a single .38 class bullet through the victim's heart had killed him.2 The defendant was arrested and tried.

***852** ****1067** At trial, the state's case included more than thirty witnesses, who testified over the course of fifteen days. A jury found the defendant guilty, and the court imposed a sentence of eighty-three years in prison. The defendant now appeals from that conviction.

**I**

The defendant's first claim is that the court improperly failed to compel three defense witnesses to testify. Specifically, the defendant argues that the court improperly allowed the state to revoke the immunity of three prosecution witnesses when they were called as defense witnesses, then improperly allowed those witnesses to invoke their fifth amendment right and refuse to testify, and that these two errors combined to unconstitutionally deny the defendant these witnesses' exculpatory testimony.

**A**

The following additional facts and procedural history are relevant to this claim. At the defendant's trial, the state granted immunity to three witnesses—Bugg, Vance, and

Oliphant—in exchange for their testimony during the state's case-in-chief. Although they were called as prosecution witnesses, once they began to testify, these witnesses repudiated prior statements inculpating the defendant and testified so as to exonerate him, reiterating their exculpatory testimony when the defense cross-examined them. The defendant sought to examine those witnesses again during his case-in-chief but, this time, each witness invoked his fifth amendment right and refused to answer many or all questions asked.

The inculpatory evidence from these three witnesses came from recorded statements they gave before trial to various authorities, which the court admitted for substantive purposes.3 The statements differed markedly ***853** from the trial testimony, and each of the three witnesses repudiated his statements at length during the state's direct examination and the defendant's cross-examination. We discuss each witness in turn.4

**1**

Bugg was the first of the three witnesses granted immunity. When the state called him to testify in its case-in-chief, he communicated through his attorney that he would be invoking his fifth amendment right against self-incrimination, fearing that the state might bring drug charges against him for his activities on the night of the shooting and perjury charges if he contradicted the testimony he had given at the defendant's probable cause hearing. The state told the court: "Your Honor, based on our review of the statute, the state intends to give [Bugg] use immunity for any drug activity he was engaged in on January 18, 2010.... [In addition] the state does not intend to prosecute [Bugg] for any perjury that he may have committed at the probable cause hearing." The court

informed Bugg that as a result, "your [immunity under the statute] doesn't exist, because the state has removed [the possibility of prosecution that] would otherwise allow you to [claim the immunity]." ****1068** Bugg indicated that he understood. The court instructed the jury that "under [§] 54-47a, [Bugg] has been compelled to testify ...."

**a**

**Bugg's Testimony during State's Case-in-Chief**

When the state examined Bugg during its case-in-chief, he testified that on January 18, 2010, he, the ***854** defendant and Vance drove to Diamond Court to buy drugs from "the weed man," and then drove to Oliphant's apartment. Bugg acknowledged under questioning that this story differed from the police statement he gave on February 10, 2011, and from his testimony at the defendant's probable cause hearing on August 30, 2011. In repudiating his earlier statements, he claimed, however, that the police had forced him to sign the statement after writing it themselves and that he had testified falsely at the probable cause hearing in exchange for a plea deal.

On cross-examination, Bugg reiterated that, on January 18, 2010, there was never any plan to rob someone, they were "going to get some weed, that was the whole thing," and he did not see the defendant or Vance with a gun that night. Bugg testified that he signed the police statement in exchange for a plea deal and because the police beat him, and that his testimony at the probable cause hearing was part of the same plea deal.

**b**

**Bugg's Prior Inconsistent Statements**

The state submitted the two statements made by Bugg prior to his testimony at trial, both of which were admitted into evidence for substantive purposes under *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S.Ct. 597, 93 L.Ed.2d 598 (1986).

First, the state introduced Bugg's police statement, made on February 10, 2011, through Lieutenant Michael Slavin, one of the detectives who had taken it. Slavin testified that Bugg had agreed with the statement he had given to the police and that the police did not beat or threaten Bugg. The court admitted the statement as a full exhibit.

Bugg stated to the police that on January 18, 2010, he, the defendant and Vance were driving around when ***855** the defendant and Vance saw a black Acura SUV at Diamond Court, pulled out their guns, told Bugg that they were going to rob its driver, and got out of the car. Bugg saw the defendant with a .38 revolver and Vance with a .357. Soon, Bugg heard five or six gunshots and saw the defendant and Vance running up. They got into the Hyundai and told Bugg to drive, and he sped away. When they arrived at Oliphant's apartment, Vance and the defendant explained to Bugg that "the guy in the Acura had a baby in it, so they felt bad; instead [they] took the young nigga." The defendant told Bugg that Vance "ha[d] his gun to the [victim's] chest" while they were trying to rob him, "and the [victim] tried to grab it and they started to tussle over the gun, [and] that is why

he shot him." While the defendant was talking, Vance asked for some ammonia so that he could clean off his gun.

Second, Bugg's probable cause hearing statement, made on August 30, 2011, was admitted into evidence through the testimony of the court reporter who had recorded and transcribed it. At the probable cause hearing, Bugg had testified that the defendant and Vance decided to rob the man in the Acura SUV, that they went to do so, that he heard gunshots, that the defendant and Vance came running to the Hyundai, that they got in and he drove off, and that at Oliphant's apartment they had ****1069** stated that they robbed someone else instead.

**c**

**Bugg's Testimony during Defense Case-in-Chief**

When the defense told the court that it would be calling Bugg as a witness, the state told the court that "the state's granting of immunity to the—the prosecution witnesses does not extend to them as defense witnesses ...." The court told Bugg that there was "an issue as to whether or not the immunity that the state gave [him] when [he was] here before applie[d] to [his] ***856** testimony now, because now [he was] being called by the defendant ... and that issue, whether or not the immunity attache[d] [was] unclear," so "what [he] should do is be guided by what [his] attorney," who would be sitting next to him during his testimony, "advise[d] [him] as to answering any of the questions." When the state added that, "notwithstanding the court's position, it is the state's that [Bugg] is not being given ... immunity for his testimony at this point in time," the court clarified, "I want to be sure this is clear for the record. I believe

what I said to [Bugg] is that the law is unclear as to whether or not the immunity he was given by the state relates to his testimony as a defense witness."

In response to questions about the night of January 18, 2010, Bugg testified that he was driving the Hyundai that night, that he "thought they was going to get some weed," and that he did not know where the shooting occurred because he "was in a car." Bugg asserted his fifth amendment rights when asked where he drove after the defendant and Vance exited the car, and where he was when he heard gunshots. Bugg also answered defense counsel's questions about various phone calls he had made from prison and asserted his fifth amendment rights for only one such question—after testifying that his cousin, Marquise Foote, had stolen from him, he asserted his fifth amendment rights when asked what was stolen.

As to his testimony at the probable cause hearing, Bugg agreed with the defense counsel that he had testified at that hearing "for the purpose of getting a deal," but asserted his fifth amendment rights when asked if his testimony at that hearing was true.

**2**

Vance was the second of the three witnesses granted immunity. When the state called him to testify, he ***857** waived his fifth amendment right against self-incrimination. The state later clarified that it had granted Vance immunity "for a claim of false statement ...."

**a**

**Vance's Testimony during State's Case-in-Chief**

During the state's case-in-chief, Vance testified that on January 18, 2010, he and Bugg accompanied the

defendant to Diamond Court to collect $3000 from someone so that the defendant could repay Vance for heroin Vance had given the defendant. Vance believed that they were "going to ask [the man] where the money is. That's all." When they arrived, that man drove off, Vance punched the defendant in the jaw and, believing that the defendant was "reaching for something," Vance shot at the defendant with a .357 Taurus Magnum revolver as he ran away. Vance testified that he had never seen the defendant with a gun but had seen him with a knife. Soon, the defendant got back into the car with Vance and Bugg, and they drove off.

The state asked Vance about his two prior accounts of the shooting—his statement to police on February 22, 2011, and ****1070** his guilty plea on February 21, 2012—both of which differed from his trial testimony. Vance claimed that he signed the police statement only because he had been threatened with the death penalty and that he entered his guilty plea in exchange for a sentence of only thirty to fifty years' incarceration. When questioned about his police statement and guilty plea, Vance repudiated both and persisted in his story about driving to Diamond Court to collect money owed him for heroin.

On cross-examination, Vance essentially reiterated his testimony given on direct examination.

***858 b**

**Vance's Prior Inconsistent Statements**

The state submitted the two statements made by Vance prior to his testimony at trial, both of which were admitted into evidence for substantive purposes

under *State* v. *Whelan*, supra, 200 Conn. at 753, 513 A.2d 86.

First, the state introduced Vance's police statement, made on February 22, 2011, through Slavin, who testified that Vance had signed at the bottom of each page and that no one threatened or forced him to do so. In Vance's statement, he said that on January 18, 2010, he, the defendant and Bugg drove to Diamond Court where they saw a black Acura SUV and decided to rob its driver. Vance took out a .357 revolver, the defendant took out a .38 revolver, and they exited the car and ran up to the SUV, but they then saw two young children, causing them "to let it go." The SUV drove off. Vance and the defendant then saw the victim walking by and decided to rob him. The defendant stuck his gun in the victim's chest, saying, "you know what it is," but the victim slapped the gun away and took off running. The defendant and Vance each fired two or three shots in the victim's direction before getting into their car and driving to Oliphant's apartment. There, the defendant asked for Vance's gun so he could dispose of it and his gun.

Second, Vance's guilty plea statement was admitted into evidence through the testimony of the court monitor who recorded and transcribed it. At the guilty plea hearing, Vance had admitted that the defendant asked him to commit a robbery; that he, the defendant, and Bugg decided to rob the man in the SUV; that both he and the defendant had guns; that the defendant's gun was a .38; that they decided against robbing the SUV when they saw its driver had young children; that they tried to rob the victim instead; that the defendant ran ***859** up to the victim first and put a gun to his chest; that Vance fired

two or three shots when the victim ran; that the defendant fired shots as well; and that back at Oliphant's apartment on Walnut Street, Vance gave his gun to the defendant when asked.

**c**

**Vance's Testimony during Defense Case-in-Chief**

When the defense called Vance as a witness, the state asserted that "it is the state's position that any testimony that he gives at this portion of the proceeding is not covered by ... immunity." The court repeated to Vance the same advisement it had given Bugg concerning immunity and told him to "be guided by the advice of your attorney and that's—that's the way we should proceed."

The court asked for an offer of proof outside the presence of the jury, during which defense counsel asked what the police said when they took Vance's statement, whether Vance shot the victim, and whether Vance called a person named Karen Atkins in June, 2012. Vance replied: "Based on the advice of my counsel, I'm going to invoke my fifth amendment right."

****1071** Although the defendant argued that Vance had no valid fifth amendment right to assert, the state and Vance's attorney argued that Vance had yet to be sentenced on a guilty plea to various charges arising from the January 18, 2010 shooting; that the plea deal allowed a sentence in the range of thirty to fifty years; and that until Vance was sentenced his fifth amendment right against self-incrimination continued to apply to the events of January 18, 2010. The court held that Vance's fifth amendment right continued to apply until after sentencing and that, because the state "sa[id] on the

record that [Vance] is not being immunized with respect to his testimony as a defense witness," therefore he ***860** "properly, in my view, invoked his fifth amendment privilege." Because it would be improper to call a witness for the sole purpose of having him invoke the fifth amendment in front of the jury; see *State* v. *Person*, 215 Conn. 653, 660–61, 577 A.2d 1036 (1990), cert. denied, 498 U.S. 1048, 111 S.Ct. 756, 112 L.Ed.2d 776 (1991); the court excused Vance without having him testify as a defense witness.

**3**

Oliphant was the third of the three witnesses granted immunity in connection with the defendant's trial. When the state called him to testify, he communicated through his attorney that he would be invoking his fifth amendment right against self-incrimination. Oliphant's attorney discussed with the court Oliphant's fear that the state might bring false statement charges against him if he contradicted his statement to police, and hindering prosecution charges for his interactions with the defendant, Vance, and Bugg after the shooting. After a colloquy with the prosecutor, the court told Oliphant, "you don't have a fifth amendment privilege because ... you have been given transactional immunity by the state." Oliphant said that he understood.

**a**

**Oliphant's Testimony during State's Case-in-Chief**

During questioning in the state's case-in-chief, Oliphant testified that on the night of January 18, 2010, he was at the apartment on Walnut Street when the defendant, Vance, and Bugg came over. Privately, Vance told Oliphant that he had just killed someone, and wanted to kill Bugg and the defendant "because he didn't want to leave no witnesses." A couple of days later, Bugg told

Oliphant that the defendant, Vance, and he had been driving around drinking and smoking that night, when Vance "saw somebody walking down the ***861** street, hopped out [of] the car, [and] tried to rob him. The [victim] fought [Vance] off and [Vance] shot [the victim]. [Vance] jumped back in the car and they sped off." Oliphant further testified that the defendant never talked about the shooting with him, and that Oliphant had never seen the defendant with a gun, but that he had seen Vance with a .357 caliber gun before the January 18, 2010 shooting.

Oliphant acknowledged that this story differed from the statement he had given to the police on February 2, 2011. He claimed, however, that the police made him sign that statement after beating him for hours, while he was high on PCP and alcohol. When the state questioned Oliphant line by line, he again repudiated his statement and persisted in his story that he was told that Vance got out of the car alone and robbed a passerby.

On cross-examination, defense counsel examined Oliphant extensively about his statement, which Oliphant repudiated and said he signed only because police beat him and a prosecutor "was offering [him] deals to perjure [him]self ...."

****1072** **b**

**Oliphant's Prior Inconsistent Statement**

The state submitted Oliphant's police statement into evidence and the court admitted it for substantive purposes under *State* v. *Whelan*, supra, 200 Conn. at 753, 513 A.2d 86. The state again called Slavin as a witness, who testified that he had taken Oliphant's police

statement in the same manner he had taken Bugg's and Vance's statements, and that no one forced or threatened Oliphant to sign.

In the statement, Oliphant said that on the night of January 18, 2010, at the apartment on Walnut Street, Vance and the defendant both told Oliphant that they had been driving around with Bugg looking to rob someone when they saw the victim in the Diamond Court ***862** apartment complex. They told Oliphant that they tried to rob the victim, but when he fought back and ran toward his apartment, Vance shot him in the back. At some point, Bugg also spoke with Oliphant and told him that the defendant, Vance, and he were driving around in the white car on January 18, 2010, looking for someone to rob, that they saw the victim in the Diamond Court apartment complex, and that Vance shot the victim as he ran away. Oliphant previously had seen Vance with a .357 caliber gun and the defendant with a .38 caliber revolver.

**c**

**Oliphant's Testimony during Defense Case-in-Chief**

When the defense tried to call Oliphant as a witness, the state told the court that "it's the state's position that the immunity that was given to Mr. Oliphant when he testified as a prosecution witness in the state's casein-chief ... ended ... and he has no immunity for anything that goes on today." The court advised Oliphant concerning immunity as it had Bugg and Vance and told him to "be guided ... by [his] attorney's advice ...." Oliphant's attorney said that Oliphant would not answer any questions "[b]ased on the representation that

immunity will not be extended to him being called as a defense witness."

During an offer of proof outside the presence of the jury, defense counsel asked several questions about Oliphant's February 2, 2011 statement to the police. Oliphant invoked the fifth amendment when asked if he was beaten on that date and what he had meant by part of his trial testimony as a prosecution witness,5 ***863** but he did testify that, on February 2, 2011, he was arrested with a man named Jamel, whom he had not known for long. The state asked three questions on cross-examination—how, and for how long, had Oliphant known Jamel before their arrest; and did they have narcotics when arrested. Oliphant asserted his fifth amendment rights in response to each question.

The state argued that Oliphant could not selectively assert his fifth amendment rights, testifying about a subject for the defense but refusing to answer the state's questions about the same subject. Defense counsel agreed that if Oliphant did so, then he would be unavailable for cross-examination and so the court would have to strike his testimony. See *State* v. *Marsala*, 44 Conn.App. 84, 92–93, 688 A.2d 336 (court properly struck defendant's entire testimony where he refused to answer questions ****1073** on cross-examination), cert. denied, 240 Conn. 912, 690 A.2d 400 (1997). The court held that, because Oliphant "indicated he is not going to respond to any of the questions asked on cross-examination by the state," it would be futile to call him as a witness only to have his testimony stricken. Accordingly, the court released

Oliphant from the subpoena with which he had been served, and he did not testify as a defense witness.

**B**

With that factual history in mind, we now turn to the defendant's first claim on appeal, which is that the court improperly (1) allowed the state to revoke the immunity of Bugg, Vance, and Oliphant, three prosecution witnesses, when they were called as defense witnesses; and (2) failed to compel those three witnesses to testify when they asserted their fifth amendment rights as defense witnesses, thus denying the defendant crucial, exculpatory testimony. We address each argument in turn.

***864 1**

The defendant argues that the court improperly allowed the state to "revoke" its grant of immunity to Bugg, Vance, and Oliphant when they were called as defense witnesses and, that the revocations violated the defendant's rights to due process and a fair trial under the fourteenth amendment to the United States constitution, as well as his rights to compulsory process and to present a defense under the sixth amendment6to the United States constitution.7 As we have noted, the state initially had granted each witness immunity during the prosecution's case-in-chief, pursuant to § 54–47a.8 When the defendant called those same witnesses for his case-in-chief, the state told each of them that they no longer had immunity.

The defendant characterizes this as a "revocation" of immunity and argues that such a revocation violated his constitutional rights because it effectively prevented the witnesses from testifying. By contrast, the

state ***865** argues that it "did not *revoke* grants of immunity to any of its witnesses" and that the real question is whether the court properly held that the state need not grant *additional* immunity to those witnesses. (Emphasis added.) We agree with the state that, because it did not revoke the witnesses' immunity and the court properly held that the state was under no obligation to grant them additional immunity, the defendant's constitutional rights were not violated.

****1074** First, to the extent that the defendant claims that the court violated his constitutional rights by misapplying § 54–47a to permit the state to *revoke* immunity previously granted under § 54–47a, we must interpret that statute. "To the extent that the [defendant's] claim requires us to interpret the requirements of [a statute], our review is plenary." *In re Nevaeh W.*, 317 Conn. 723, 729, 120 A.3d 1177 (2015). We begin with the statute's text and relationship to other statutes, and consider other evidence of its meaning only if the text itself is either ambiguous or yields absurd results. Id., 729–30, 120 A.3d 1177.

Section 54–47a has two parts. Section 54–47a (a) provides in relevant part: "Whenever in the judgment of ... a state's attorney ... the testimony of any witness ... in any criminal proceeding involving ... felonious crimes of violence ... or any other class A, B or C felony ... [is necessary to obtain] sufficient information as to whether a crime has been committed or the identity of the person or persons who may have committed a crime ... [and] is necessary to the public interest ... the state's attorney ... may, with notice to the witness, after the witness has claimed his privilege against self-incrimination, make

application to the court for an order directing the witness to testify ...."

Section 54–47a (b) provides in relevant part: "Upon the issuance of the order such witness shall not be ***866** excused from testifying ... on the ground that the testimony ... may tend to incriminate him or subject him to a penalty or forfeiture. No such witness may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify ... and no testimony ... so compelled, and no evidence discovered as a result of or otherwise derived from testimony ... so compelled, may be used as evidence against him in any proceeding, except that no witness shall be immune from prosecution for perjury or contempt committed while giving such testimony ...."9

The plain language of § 54–47a (b) thus provides that, if a witness is compelled to testify about a "transaction, matter or thing," then the witness cannot be "prosecuted or subjected to any penalty or forfeiture for or on account of" that transaction, matter, or thing. Nothing in the statute suggests that a prosecutor may later revoke that immunity, before or after the witness testifies, and decide to prosecute the witness after all. Indeed, if the state had such power, then the immunity promised under § 54–47a would be an empty gesture. We conclude that, in the absence of special circumstances, once the state grants a witness immunity under § 54–47a, it plainly lacks the power to revoke that immunity. Accordingly, to the extent that Bugg, Vance, or Oliphant was compelled under § 54–47a to testify about a transaction, matter, or thing during the state's case-in-chief, then, from that point on, the

state could no longer prosecute them for or on account of it.10

***867** ****1075** The state argues, and we agree, that it "did not *revoke* grants of immunity to any of its witnesses." (Emphasis added.) Given the constraints imposed by § 54–47a, the state's comments to the three witnesses are best understood not as a "revocation" of the immunity that they already had, but rather as a refusal to grant those witnesses *additional* immunity.11 To wit, the state did not wish to grant them both transactional immunity from prosecution for any transactions discussed for the first time during the defense case-in-chief, and use or derivative use immunity that would bar the state from using their defense testimony—or evidence derived from it—in any potential prosecutions against them that the state could still legally pursue.

The question is not one of revocation. Rather, the question is whether any of the constitutional provisions cited by the defendant required the state to grant that additional immunity to those witnesses.

We therefore turn to whether the state was required to grant the three witnesses additional immunity for their testimony as defense witnesses. "As a threshold matter, we must first determine the applicable standard of review that governs our examination of the defendant's claims. The issue of whether a defendant's rights to due process and compulsory process require that a defense witness be granted immunity is a question of law and, thus, is subject to de novo review. ...

"[A] defendant has a right under the compulsory process and due process clauses to present [his] version ***868** of the facts as well as the prosecution's to the jury so [that] it may decide where the truth lies. ... The compulsory process clause of the sixth amendment generally affords an accused the right to call witnesses whose testimony is material and favorable to his defense ....

"We begin our analysis with the statutory provision concerning prosecutorial immunity for witnesses. [Section] 54–47a authorizes the prosecution to grant immunity to state witnesses under certain circumstances. We explicitly have held that § 54–47a confers no such authority upon the courts with regard to defense witnesses. ... Indeed, this court has held repeatedly that there is no authority, statutory or otherwise, enabling a trial court to grant immunity to defense witnesses. ... We have no occasion to revisit those holdings today.

"We recognize that other courts have held that under certain compelling circumstances the rights to due process and compulsory process under the federal constitution require the granting of immunity to a defense witness. The federal Circuit Courts of Appeals have developed two theories pursuant to which the due process and compulsory process clauses entitle defense witnesses to a grant of immunity. They are the effective defense theory, and the prosecutorial misconduct theory ....

"Under the effective defense theory ... the trial court has the authority to grant immunity to a defense witness when it is found that a potential defense witness can offer testimony which is clearly exculpatory and *essential to the*

*defense case* and when the government has no strong **1076 interest in withholding ... immunity .... The Third Circuit [Court of Appeals] has held explicitly that under the effective defense theory [i]mmunity will be denied if the proffered testimony is *869 found to be ambiguous [or] not clearly exculpatory ....

"The prosecutorial misconduct theory of immunity is based on the notion that the due process clause [constrains] the prosecutor to a certain extent in [its] decision to grant or not to grant immunity. ... Under this theory, however, the constraint imposed by the due process clause is operative only when the prosecution engages in certain types of misconduct, which include forcing the witness to invoke the fifth amendment or engaging in discriminatory grants of immunity to gain a tactical advantage, and the testimony must be material, exculpatory and *not cumulative*, and the defendant must have *no other source to get the evidence.*" (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Kirby*, 280 Conn. 361, 403–404, 908 A.2d 506 (2006).

Our Supreme Court previously has declined to decide whether either of these theories is correct, in the absence of circumstances that would then warrant reversal of a judgment on that basis. Id., 405. The present case again provides no occasion to reach the correctness of either theory.

To succeed under the effective defense theory, a defendant must show that the testimony at issue was " 'essential' " to the defense. Id.; see, e.g., *United States* v. *MacCloskey*,

682 F.2d 468, 475, 479 (4th Cir.1982)(reversing judgment of conviction where "primary defense witness" refused to answer some questions before jury as to certain directly relevant details of alleged conspiracy, although "testimony she gave in ... voir dire was detailed and contradicted, or offered innocent explanations to, [the] damaging testimony" of state's primary witness). Here, by contrast, there is no reason to believe that the three witnesses' testimony ***870** during the defense case-in-chief would have been anything other than a rehash of their prosecution testimony, which, if believed, already tended to exonerate the defendant from each of the crimes charged. Each testified at length, favorably to the defendant, both when the state examined them during its case-in-chief and when the defendant cross-examined them. Although it is possible that the witnesses would have provided additional exculpatory details when called as defense witnesses, nothing in the record indicates what those details would have been.12 See ****1077** *United States* v. *Triumph Capital Group, Inc.*, 237 Fed.Appx. 625, 630 (2d Cir.2007)("[N]o one knows what [the witnesses] would have testified to since they refused to comment on the matter. [The defendant's] speculation that [they] would have testified in [his] favor is not sufficient to prove that their testimony would have been exculpatory."). The defendant has failed to show that any additional testimony the three witnesses may have provided as defense witnesses was essential to his defense.

***871** Likewise, under the prosecutorial misconduct theory, a defendant must show that the testimony at issue was "not cumulative" and that he had "no other source to get the evidence." *State* v. *Kirby*, supra, 280

Conn. at 404, 908 A.2d 506. The defendant has provided no indication of what new exculpatory testimony he would have elicited from these three witnesses during his case-in-chief. At oral argument before this court, the defendant's counsel was specifically asked what additional details the defendant was prevented from eliciting from these three witnesses, and she provided none. Accordingly, the defendant has failed to show that the witnesses' excluded testimony would not have been cumulative and that he had no other source to get the evidence.

We thus conclude that the state was not constitutionally required to grant additional immunity to Bugg, Vance, and Oliphant when they testified as defense witnesses.

**2**

The defendant also argues that the court improperly failed to compel Bugg, Vance, and Oliphant to testify when they asserted their fifth amendment rights as defense witnesses, because at that point, as a result of the immunity that the state had granted them during its case-in-chief, they were no longer exposed to prosecution and thus had no valid fifth amendment right to assert.13 We conclude that the court properly refused to compel these witnesses to answer some questions, that the court improperly refused to compel them to ***872** answer other questions, and that any error was harmless because all of the testimony improperly excluded was cumulative.

We begin with our standard of review. "A ruling on the validity of a witness' fifth amendment privilege is an evidentiary determination that this court will review

under the abuse of discretion standard. ... It is well settled that the trial court's evidentiary rulings are entitled to great deference. ... The trial court is given broad latitude in ruling on the admissibility of evidence, and we will not disturb such a ruling unless it is shown that the ruling amounted to an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Luther*, 152 Conn.App. 682, 699, 99 A.3d 1242, cert. denied, 314 Conn. 940, 108 A.3d 1123 (2014).

"[W]hen an improper evidentiary ruling is not constitutional in nature, the defendant [also] bears the burden of demonstrating that the error was harmful .... [W]hether [the improper exclusion of a witness' testimony] is harmless in a particular case depends upon a number of factors, such as ... whether the testimony was cumulative ... [and] the extent of cross-examination otherwise permitted .... Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 558–59, 34 A.3d 370 (2012).

****1078** "The standard for determining whether to permit invocation of the privilege against self-incrimination is well established. To reject the invocation it must be *perfectly clear,* from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have [a] tendency to incriminate the witness. ... The right to the ***873** privilege does not depend upon the likelihood of prosecution but upon the possibility of prosecution." (Citations omitted; emphasis in original; internal

quotation marks omitted.) *State* v. *Giraud*, 258 Conn. 631, 640, 783 A.2d 1019 (2001).

Here, all but three of the questions as to which Bugg, Vance, and Oliphant asserted their fifth amendment rights during the defendant's case-in-chief were questions that they had already answered during the state's case-in-chief. The three new questions were: (1) to Bugg, what his cousin stole from him; (2) to Vance, whether he called a person named Karen Atkins in June, 2012; and (3) to Oliphant, what he meant when he testified during the state's case-in-chief that he felt guilty about Vance.

As to the three new questions, we are unable to conclude that the court abused its discretion in sustaining the witnesses' invocation of their fifth amendment rights. We note that "[i]n appraising a fifth amendment claim by a witness, a judge must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." (Internal quotation marks omitted.) *Martin* v.*Flanagan*, 259 Conn. 487, 495–96, 789 A.2d 979 (2002). "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." (Internal quotation marks omitted.) Id., 495. As to the first question, the nature of what Bugg's cousin stole from him could have incriminated Bugg if the item was contraband. As to the second and third questions, the record sheds little light on their significance. Accordingly, on this record, we cannot second-guess the determination of the trial court. We conclude that the court did not abuse its discretion in

sustaining the witnesses' invocation of ***874** their fifth amendment rights when they were asked about these three transactions, as to which they lacked immunity.14

By contrast, as to those questions that the witnesses had already answered during the state's case-in-chief, § 54–47a foreclosed any possibility of prosecution for the transactions, matters, and things at issue. Accordingly, further questions about those same issues did not implicate the witnesses' fifth amendment right against self-incrimination.15 The court abused its discretion in sustaining the witnesses' invocations of their fifth amendment rights as to those issues.16

****1079** We conclude, however, that this error was harmless.17 Here, each witness already had testified and been cross-examined at length, on the same issues, during the ***875** state's case-in-chief. We thus conclude that the defendant has failed to meet his burden of proving that the improper exclusion of these witnesses' testimony to the same effect during his case-in-chief was harmful.

Because the court did not permit the state to revoke these witnesses' immunity and properly held that the state need not grant them additional immunity when they were called as defense witnesses, and because the court's failure to compel these three witnesses to reiterate testimony as defense witnesses was harmless, the defendant's first claim fails.

**II**

The defendant's second group of claims entails three alleged evidentiary errors: (1) that the court improperly admitted uncharged misconduct evidence

suggesting that the defendant had a gun one week before the shooting and four months after the shooting; (2) that the court improperly admitted a prior inconsistent statement by Bugg to impeach his trial testimony that he had never discussed the shooting with his cousin; and (3) that the court improperly permitted the state's lead detective, Slavin, to testify, in the course of describing how the ***876** investigation proceeded, about various witnesses' statements to the police.

We begin by setting forth the standard of review. "We review the trial court's decision to admit evidence, if premised on a correct view of the law ... for an abuse of discretion." *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007); see also *State* v. *Douglas F.*, 145 Conn.App. 238, 246, 73 A.3d 915 (because "[t]he trial court has broad discretion in ruling on the admissibility ... of evidence ... [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion" [internal quotation marks omitted] ), cert. denied, 310 Conn. 955, 81 A.3d 1181 (2013). "In determining whether there has been an abuse of discretion, every reasonable ****1080** presumption should be given in favor of the trial court's rulings on evidentiary matters." (Internal quotation marks omitted.) *State* v. *Gauthier*, 140 Conn.App. 69, 79–80, 57 A.3d 849, cert. denied, 308 Conn. 907, 61 A.3d 1097 (2013).

"[W]hen an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. ... [W]hether [the improper admission of a witness' testimony] is harmless in a particular case depends upon a number of

factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. ... Most importantly, we must examine the impact of the [improperly admitted] evidence on the trier of fact and the result of the trial. ... [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was ***877** substantially swayed by the error. ... Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Payne*, supra, 303 Conn. at 558–59, 34 A.3d 370.

We address each of the defendant's three evidentiary claims in turn.

**A**

The defendant first challenges the court's admission of testimony from two witnesses about whether he possessed a gun on two occasions other than the night of the shooting, arguing that such evidence of uncharged misconduct was more prejudicial than probative. Even if the court improperly admitted this testimony, which we do not conclude, nevertheless, it was harmless.

In this regard, the defendant first challenges the court's admission of a portion of Oliphant's testimony during which the prosecutor asked if Oliphant had told the police about an incident on January 9, 2010, when the defendant allegedly shot someone in the groin at a bar

fight. Initially, the state sought to admit this testimony for substantive purposes, to prove that the defendant possessed a gun nine days before the Diamond Court robbery and thus had the means to commit the Diamond Court robbery. The defense objected that it was more prejudicial than probative. The court ruled that the state could ask Oliphant only whether the defendant had a gun on January 9 because gun possession then was relevant to "an element of the fifth count of the information,"18 and "[t]hat is an exception where [the evidence is relevant to] an element of the crime, ***878** [and that] is one of the reasons why uncharged misconduct can be allowed." See Conn. Code Evid. (2009) § 4–5 (b) ("[e]vidence of other crimes, wrongs or acts of a person is admissible ... to prove ... an element of the crime").

The state, however, sought to ask about the details of the January 9, 2010 incident as well, to the extent that Oliphant had described them in his statement to the police but repudiated that statement at trial. The prosecutor made an offer of proof outside the presence of the jury, during which she examined Oliphant line by line on his police statement about the ****1081** January 9 incident. Oliphant categorically denied that he ever gave such a statement and added that he had "never seen [the defendant] with a gun." After the proffer, the defense renewed its objection to the testimony. The court ruled that it would allow the questions "only for purposes of [the] impeachment and credibility of Mr. Oliphant," and, when the jury returned to the courtroom, the court instructed it accordingly. The state then examined Oliphant line by line on the statement he had given to police about the defendant shooting another person in the groin one week before the Diamond Court shooting.

Oliphant categorically denied giving such a statement to the police and added that he had "never seen [the defendant] with a gun ever."

The second piece of uncharged misconduct evidence that the defendant claims the court improperly admitted is the portion of his uncle Omar's testimony in which Omar said that he saw the defendant with a gun on May 8, 2010. Initially, the state sought to admit the testimony to prove that the defendant possessed a gun four months after the Diamond Court shooting; the defense objected that such testimony was more prejudicial than probative; and the court ruled that the testimony was admissible under § 4-5 (b) of the (2009) Connecticut Code of Evidence as relevant to an element ***879** of the fifth count of the information.19 After an extensive offer of proof by the state, the defense also objected that the testimony was not relevant to the gun possession charge in count five because the May 8, 2010 gun was not the gun that the defendant allegedly possessed on January 18, 2010. The state argued that the defendant's possession of a different gun four months later was still relevant to whether the defendant possessed a gun on the night of the Diamond Court shooting. The court ruled that Omar's testimony that the defendant possessed a different gun four months after the Diamond Court shooting was not relevant to establish an element of the fifth count of the information but was admissible together with the testimony about gun possession on January 9, 2010, and January 18, 2010, as evidence of "a system of criminal activity" of gun possession engaged in by the defendant, offered to prove the defendant's intent to rob the victim at Diamond Court.20 See Conn. Code Evid. (2009) § 4–5 (b) ("[e]vidence of other crimes, wrongs or acts of a person

is admissible ... to prove ... a system of criminal activity"). Omar then testified that he saw the defendant with a handgun on May 8, 2010. In its jury charge, the court instructed the jury that the testimony about gun possession on May 8, 2010, was admitted "solely to show or establish a system of criminal activity being engaged in by the defendant."

Even if the court had improperly admitted both of these portions of testimony, which we do not conclude, we hold that the defendant has nevertheless failed to carry his burden of proving that the jury's verdict was substantially swayed by its admission. See, e.g., ***880** *State* v. *Sanseverino*, 287 Conn. 608, 637, 949 A.2d 1156 (2008) ("[e]ven if we were to assume, without deciding, that the trial court improperly admitted the evidence ... we conclude that the defendant failed to meet his burden of providing that such impropriety was harmful"), overruled in part on other grounds by *State* v. *DeJesus,* 288 Conn. 418, 437, 953 A.2d 45 (2008), and superseded in part after reconsideration by ****1082** *State* v. *Sanseverino*, 291 Conn. 574, 579, 969 A.2d 710 (2009), overruled in part on other grounds by *State* v. *Payne*, 303 Conn. 538, 548, 34 A.3d 370 (2012).

The defendant acknowledges that his claim is evidentiary, not constitutional, in nature. "[W]hen an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. ... [W]hether [the improper admission of a witness' testimony] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case,

whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. ... Most importantly, we must examine the impact of the [improperly admitted] evidence on the trier of fact and the result of the trial. ... [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. ... Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Payne*, supra, 303 Conn. at 558–59, 34 A.3d 370.

First, this testimony was not particularly important to the prosecution's case. Whether the defendant had ***881** a gun on January 9, 2010,21 or on May 8, 2010, was ancillary to the central issue of the case, namely, whether the defendant participated in the robbery and shooting of the victim on January 18, 2010. The state presented ample evidence of the robbery, as discussed subsequently in connection with the strength of the prosecution's case.

Second, evidence that the defendant possessed a gun weeks before or months after the shooting was largely superfluous because there was also evidence that he possessed a gun on the night of the shooting.

Third, as to corroborating or contradictory evidence, multiple witnesses either testified or admitted in

statements to the police, which the state previously had submitted into evidence, that they saw the defendant with a gun on the night of the shooting or on other nights, while several witnesses—most notably Bugg and Vance, in direct contradiction to their police statements—testified that they had never seen the defendant with a gun. Neither Oliphant's nor Omar's testimony was unique or pivotal in this regard.

***882** ****1083** Fourth, the defendant was able adequately to cross-examine both Oliphant and Omar. Oliphant testified favorably to the defense during both direct and cross-examination.

Fifth and finally, the prosecution's case was strong. The state's case comprised more than thirty witnesses and more than 200 exhibits over the course of fifteen days of testimony.

The victim's mother testified that, from the family apartment, she saw two people with physiques similar to the defendant and Vance both shoot at the victim at approximately 9:40 p.m. on January 18, 2010. The victim's brother testified that, from the family apartment, he saw the defendant and a second man both shoot at the victim a little after 9:30 p.m. on January 18, 2010.

The state submitted the prior statements and testimony of the defendant's two accomplices, Bugg and Vance, both of whom initially confessed to the armed robbery in those statements and testimony. Although they recanted their confessions once they received plea deals and testified favorably to the defense at trial, the state impeached

them with phone call recordings in which Bugg seemingly asked various relatives to help him coordinate his testimony with Vance, saying at one point that Vance had agreed to "take the whole charge" in exchange for some money.

Oliphant and his then girlfriend, Sade Stevens, both gave statements to police that they had heard the defendant and Vance confess to robbing and shooting the victim when they came to Oliphant's apartment on the night of January 18, 2010, although they, too, partially recanted those statements at trial and claimed instead that Vance alone confessed that he robbed and shot the victim.

The state's crime scene technicians and its ballistics expert determined that the four bullet cores recovered ***883** from the crime scene plus the intact bullet recovered from the victim's body were .38 class bullets, fired from a .38 Special revolver, a .357 Magnum revolver, or a nine millimeter pistol. Because pistols eject bullet casings when fired, however, the state's ballistics expert testified that the lack of casings found at the crime scene was consistent with the shots being fired from a revolver. Multiple witnesses either testified or gave statements to police that were admitted into evidence to the effect that the defendant had a .38 revolver and that Vance had a .357 revolver, which they had with them on the night of the shooting.

Phone records showed that, at approximately the time of the shooting, the defendant's cell phone reflected several calls from the area of Diamond Court. Various neighbors saw a four door white car driving through Diamond Court

just before the shooting and speeding out of Diamond Court just after the shooting. The defendant's aunt testified that, on the night of the shooting, she had lent the defendant her rental car—a four door, white Hyundai—and that they returned the car to the rental company the next day.

The defendant himself testified that, on the night of the shooting, he and Vance dressed all in black and drove to Diamond Court with Bugg in the defendant's white rental car; that they parked behind the apartments; that the defendant and Vance exited the car and walked first toward the man in the SUV, then toward the victim after they realized the man in the SUV had children; that Vance fired shots in the victim's direction; that Bugg pulled up in the car; that the defendant and Vance got in; and that Bugg drove off. The defendant claimed, however, that they never agreed or tried to rob anyone; Vance had gotten into an unrelated altercation with the victim, on his own, and shot him for that reason. The state introduced into evidence phone call recordings in which the defendant ****1084** repeatedly told his ***884** mother to convince one of the prosecution witnesses to invoke her fifth amendment rights if called to testify.

As a result, we conclude that the defendant has failed to carry his burden of proving that the jury's verdict was substantially swayed by the admission of evidence that he had a gun one week before or several months after the shooting.

**B**

As to Bugg's prior inconsistent statement, the defendant challenges the court's admission of the testimony of

Bugg's cousin, Foote, about Bugg's confession to him during a car ride several weeks after the shooting. We conclude that the court properly admitted that testimony for the limited purpose of impeaching Bugg's credibility.

The following additional facts and procedural history are relevant to this claim. Initially, the state sought to admit the challenged testimony for substantive purposes, arguing that, although it was hearsay, it fell under the coconspirator exception to the prohibition on hearsay,22 but the state later conceded that the coconspirator exception did not apply. Instead, the state sought to admit the testimony solely for impeachment purposes, as extrinsic evidence of a prior inconsistent statement by Bugg. The state argued that, under the Connecticut Code of Evidence, "it's within the judicial discretion of the trial court whether to admit the impeaching statements where no foundation has been laid." See Conn. Code Evid. § 6–10 (c) ("[i]f a prior inconsistent statement made by a witness is not ... disclosed to the witness at the time the witness testifies, and if the ***885** witness admits to making the statement, extrinsic evidence of the statement is inadmissible, *except in the discretion of the court*" [emphasis added] ). The defense objected to the testimony as hearsay and argued that, if the state wished to use it as an inconsistent statement, then it should have disclosed it to Bugg when he testified.

After reviewing the transcript of Bugg's earlier trial testimony, the court noted that Bugg twice had denied confessing to Foote, once when asked directly if "there came a point in time where [he] told [Foote] what had happened on Diamond Court"—Bugg replied, "[n]o"—and,

second, when Bugg was asked if his statement to police that "[t]he only one [he] told about this [was his] cousin Marquis[e] Foote" was true—Bugg replied, "[n]o." The court ruled that Foote could testify to Bugg's prior inconsistent statement, but that such testimony would be admissible only for the limited purpose of impeaching Bugg.

Accordingly, before Foote testified to his conversation with Bugg, the court instructed the jury as follows: "Ladies and gentlemen, I talked to you when we first began the trial about evidence admitted for a limited purpose. Any comments that Mr. Bugg made to Mr. Foote, they can be used by you only for purposes of evaluating the credibility of Mr. Bugg; you can't use them for any other purpose. So, to the extent that you find them [relevant] you can use them, but only insofar as they relate to the credibility of Mr. Bugg; they are not to be used by you ... these statements are not to be used by you for substantive purposes. So, this is a limit[ed] inquiry, credibility only, not for substantive purposes."

Foote testified that three or four weeks after the shooting, he and Bugg were driving ****1085** around smoking pot when Bugg confided in him what had happened on ***886** the night of the shooting. Foote recalled that Bugg had said that he, Vance, and the defendant were out looking to rob someone that night. They saw the victim and decided to rob him. The defendant and Vance got out of the car and put a gun in the victim's face, which he pushed away. The victim then ran away and the defendant and Vance shot him. The state asked if Bugg had ever told Foote that, on the night of the shooting, he,

the defendant, and Vance were there to buy marijuana, or to settle a debt. Foote testified that Bugg had not told him such a story.

At the end of the trial, the court again instructed the jury: "The testimony of Marquise Foote was admitted only for impeachment purposes as to Rayshaun Bugg. Any other use of that testimony would be improper."

We begin by setting forth the applicable law. Section 6–10 (a) of the Connecticut Code of Evidence provides: "The credibility of a witness may be impeached by evidence of a prior inconsistent statement made by the witness." Our Supreme Court has held that "[i]mpeachment of a witness by the use of a prior inconsistent statement is proper only if the two statements are in fact inconsistent. ... Moreover, the inconsistency must be substantial and relate to a material matter." (Citations omitted; emphasis omitted.) *State* v. *Richardson*, 214 Conn. 752, 763, 574 A.2d 182 (1990).

Section 6–10 (c) of the Connecticut Code of Evidence provides in relevant part that "[i]f a prior inconsistent statement made by a witness is not ... disclosed to the witness at the time the witness testifies, *extrinsic evidence* of the statement is inadmissible, *except in the discretion of the court.*" (Emphasis added.) This court has held that "[w]e have no inflexible rule regarding the necessity of calling the attention of a witness on cross-examination to his alleged prior inconsistent statements before either questioning him on the subject ***887** or introducing extrinsic evidence tending to impeach him." (Internal quotation marks

omitted.) *State* v. *Gauthier*, supra, 140 Conn.App. at 79, 57 A.3d 849. Rather, trial "[c]ourts have wide discretion whether to admit prior inconsistent statements that have not satisfied the typical foundational requirements in § 6–10 (c) of the Connecticut Code of Evidence ...." (Internal quotation marks omitted.) Id., 80.

Here, the defendant argues that the court abused its discretion in admitting Foote's testimony under § 6–10 (c) of the Connecticut Code of Evidence, as extrinsic evidence of a prior inconsistent statement by Bugg. In view of all the circumstances, we conclude that the court reasonably decided (1) that Bugg's confession to Foote was substantially inconsistent with both his denial of having made such a confession and with his testimony at trial about driving to Diamond Court only to buy marijuana from the "weed man" on the night of the shooting; and (2) that the issue of whether the jury should believe Bugg's statement to police that the defendant and Vance committed the crimes charged, or Bugg's testimony at trial that they merely attempted to buy marijuana, was material to the defendant's guilt or innocence. Accordingly, the court did not abuse its discretion in admitting the challenged testimony for the limited purpose of impeaching Bugg.23

***888 **1086 C**

The defendant dresses his third and final evidentiary claim in constitutional garb, arguing that "the trial court erred in permitting lead detective ... Slavin to testify about and comment on hearsay information police received from the state's witnesses, [that the admission of this testimony] violated the defendant's rights to confrontation and cross-examination, [that the admission of this testimony] invaded the province of the jury as to

both witness credibility and critical disputed facts, and [that the admission of this testimony] was contrary to the rules of evidence." (Internal quotation marks omitted.) The defendant argues that the court permitted Slavin to testify as a "super-witness" who filtered the testimony of other witnesses for the jury. We conclude that the court properly admitted Slavin's testimony for the limited purpose of explaining how the police investigation proceeded.

The following additional facts and procedural history are relevant to this claim. Near the end of the state's case-in-chief, the state recalled Slavin as a witness so that he could testify about how the police investigation of the January 18, 2010 shooting proceeded. As part of this testimony, the state planned to ask Slavin about the statements that various witnesses had given to police. The defense objected that such testimony would be both improper hearsay and improper commentary on the testimony of other witnesses. The court ruled that such testimony was admissible, but only "with respect to individuals that have already testified," and "only for the purpose of [showing] how that affected the [police] investigation ... [not] for any other purpose." The court added that it would be giving the jury a limiting instruction and, accordingly, instructed the jury as follows:

"You're also going to hear testimony about what some of the witnesses said to the police—witnesses that have ***889** already testified here in front of you. That—those comments by Lieutenant Slavin about what a witness said, *that is not intended in any way to affect your individual determination of the credibility of that witness*

*as they—as they sat here on the* [*witness*] *stand and testified. The whole purpose of this testimony by Lieutenant Slavin is to give you, in context, how the police investigation proceeded.* So, there are going to be some comments about other things you've heard here from other witnesses. *That's not to be used for any purpose other than how the police reacted to those responses.* So, you've got—we talked about compartments. You've got a compartment for the witness and what the witness testified to. Then you've got a compartment, comments that Lieutenant Slavin may make about what those witnesses said. *Again, only to give you the context of the police investigation.*

"You've got to separate that so the fact that I'm going to allow him to make comments on what somebody else said *doesn't mean in any way, shape, or form that you should treat that testimony any differently than I instructed you to treat all the testimony, which is to take everybody individually and treat them by the same standard.*" (Emphasis added.) The court clarified, "[and] if I said, what they said, I didn't mean in any [way] to support anything that anybody said. I'm just trying to ****1087** apply the rules as best I can. You've got to determine the credibility. That's your job, not my job."

Slavin testified as follows about the investigation and the role that various witnesses' police statements played in it. Ten days after the shooting, the police received a tip. On the basis of that tip, he entered two nicknames into a police database and came up with the names of the defendant and Oliphant. He searched the Judicial Branch website for those names and found that the defendant received a ticket a few days before the shooting. From the

police report of that incident, he ***890** obtained the defendant's phone number and a description of the car he drove, which matched the car seen on the night of the shooting. He also learned of a third individual, Vance, who was with the defendant when he was ticketed.

One year later, on January 5, 2011, Foote was arrested on unrelated charges and told police that he had information about the January 18, 2010 shooting. Foote confirmed that the defendant, Oliphant, and Vance were involved and added a fourth name—Bugg. Foote told police that those individuals tried to rob the victim on the night of the shooting, that the victim "disrespected" the attempted robbery, that they shot him for that reason, and that Bugg was the getaway driver. Foote did not give the police a written statement at that time.

The police next interviewed Oliphant and his then girlfriend, Stevens, who both gave written statements on February 2, 2011, denying that Oliphant was involved and asserting that the defendant, Vance, and Bugg were the culprits. On February 10, 2011, the police interviewed Bugg, who gave a written statement confessing that he, the defendant, and Vance, but not Oliphant, attempted the robbery on the night of January 18, 2010. Bugg's statement that the defendant and Vance initially planned to rob a man in an Acura SUV, but changed plans when they saw he had two children caused one of the detectives to remember a phone call he received shortly after the shooting from a friend who was at Diamond Court picking up his children on the night of the shooting. On February 16, 2011, police interviewed him and took a written statement. On February 18, 2011, the police interviewed Vance's then girlfriend, Vondella Riddick, who gave a

written statement. Finally, police traveled to North Carolina where they interviewed Vance, who gave a written statement on February 22, 2011, confessing that he, the defendant, and Bugg attempted to rob the victim and ended up shooting him.

***891** At that point, the police arrested the defendant, Vance, and Bugg. Prior to trial, the police conducted additional interviews, including a second interview with Stevens and an interview with the defendant's aunt, both of whom gave written statements.

After the state finished questioning Slavin, the defense cross-examined him. The defense previously had cross-examined each of the witnesses whose police statements Slavin discussed in his testimony.

The court's final charge to the jury at the end of the trial reiterated that the jurors were "the sole judges of the facts," and that they "must determine the credibility of police personnel in the same way and by the same standards as [they] would evaluate the testimony of any other witness." The charge did not specifically reference Slavin's testimony, but instructed the jury generally that, "[y]ou will recall that I have ruled that some testimony and evidence has been allowed for a limited purpose. Any testimony or evidence which I identified as being limited to a purpose you will consider only as it relates to the limits for which it was allowed, and you shall not consider such testimony or evidence ****1088** in finding any other facts as to any other issue."

Although the defendant frames his objection to this testimony in constitutional terms, invoking the sixth amendment's confrontation clause24 and the fair trial component of the fourteenth amendment's due process clause,25 his claim is in reality evidentiary in nature. See ***892** *State* v. *Smith*, 110 Conn.App. 70, 86, 954 A.2d 202 ("[r]obing garden variety claims [of an evidentiary nature] in the majestic garb of constitutional claims does not make such claims constitutional in nature" [internal quotation marks omitted] ), cert. denied, 289 Conn. 954, 961 A.2d 422 (2008).

As to the defendant's confrontation clause claim, the United States Supreme Court has stated that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford* v. *Washington*, 541 U.S. 36, 60 n. 9, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Here, the court "allow[ed] comments [only] with respect to individuals that ha[d] already testified" at trial, on statements that "ha[d] already been presented to the jury ...." The defendant had an opportunity to cross-examine those witnesses about their statements and so the confrontation clause was not implicated.26

***893** ****1089** As to the defendant's fair trial claim, because we conclude that the court properly admitted the challenged testimony and properly instructed the jury as to its use, the defendant's right to a fair trial was not implicated.

Proceeding then to the defendant's evidentiary claims, the defendant objects to the testimony on two grounds: (1) as improper commentary on the testimony of other witnesses, and (2) as improper hearsay. Neither objection has merit.

First, the defendant argues that "Slavin's testimony in this case ... placed an improper gloss on the testimony of other witnesses." (Internal quotation marks omitted.) Our Supreme Court has held that "it is improper to ask a witness to comment on another witness' veracity." ***894** *State* v. *Singh*, 259 Conn. 693, 706, 793 A.2d 226 (2002). "[I]t is never permissible ... to ask a witness to characterize the testimony or statement of another witness ...." (Internal quotation marks omitted.) Id.; see also id. ("improper to ask question designed to cause one witness to characterize another's testimony as lying"); id. ("question to defendant of whether victim lied in testimony improper because it sought information beyond defendant's competence").

Here, however, Slavin did not comment on the testimony of other witnesses. Although Slavin did testify about the same underlying facts as other witnesses, such as the statements that various witnesses gave to the police, the defendant has cited to no rule that bars two witnesses from testifying about the same underlying facts. Nor are we aware of any.

Moreover, the defendant's argument that Slavin improperly colored the jury's perception of other witnesses' testimony ignores that Slavin's testimony *was not admitted for substantive or credibility purposes.* The

court admitted Slavin's testimony for the limited purpose of explaining how the police investigation proceeded, instructed the jurors that his testimony was "not to be used for any [other] purpose," and specifically instructed the jurors that Slavin's testimony should not "in any way ... affect your individual determination of the credibility of [other] witness[es] as they ... sat here on the [witness] stand and testified." See *State* v. *L.W.*, 122 Conn.App. 324, 335 n. 7, 999 A.2d 5 (court's cautionary instructions relevant to analysis of whether evidence properly admitted), cert. denied, 298 Conn. 919, 4 A.3d 1230 (2010). "We presume that the jury followed the instructions as given." *State* v. *Webster*, 308 Conn. 43, 58 n. 11, 60 A.3d 259 (2013). "[I]t is well established that, [i]n the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them." (Internal quotation ***895** marks omitted.) *Hurley* v. *Heart Physicians*, *P.C.*, 298 Conn. 371, 402, 3 A.3d 892 (2010). Accordingly, we conclude that Slavin's testimony was not improper commentary on the testimony of other witnesses.

****1090** Second, the defendant argues that "Slavin's testimony about what codefendants and other witnesses told police consisted of first level, double, triple and quadruple hearsay." On the contrary, the court did *not* admit Slavin's testimony for its truth, but only to explain "how the police investigation proceeded." "An out-of-court statement *offered to prove the truth of the matter asserted* is hearsay and is generally inadmissible unless an exception to the general rule applies." (Emphasis added; internal quotation marks omitted.) *State* v. *Rosario*, 99 Conn.App. 92, 108, 912 A.2d 1064, cert. denied, 281 Conn. 925, 918 A.2d 276 (2007).

Evidence offered for another purpose, however, "is admissible not as an exception to the hearsay rule, but because it is not within the rule." *State* v. *Sharpe*, 195 Conn. 651, 661, 491 A.2d 345 (1985). For instance, "the state may ... present evidence to show the investigative efforts made by the police and the sequence of events as they unfolded, even if that evidence would be inadmissible if offered for a different reason." *State* v. *Vidro*, 71 Conn.App. 89, 95, 800 A.2d 661, cert. denied, 261 Conn. 935, 806 A.2d 1070 (2002). Here, the state did exactly that. Accordingly, the challenged testimony was not improper hearsay.

The court properly admitted Slavin's testimony for the limited purpose of explaining how the police investigation proceeded.

**III**

The defendant's fifth and final claim is that the court improperly penalized him with a longer sentence for electing to go to trial, as revealed by the court's remarks at sentencing.

***896** The following additional facts and procedural history are relevant to this claim. Before being sentenced, the defendant addressed the court to explain that although "I do accept responsibility for my actions [insofar as] ... I feel that if I was living a better life in 2010, I wouldn't be sitting right here. [Nevertheless] I did not shoot [the victim]. I didn't do it. What I did was see what happened and didn't say anything, when the police questioned me ... [a]nd I guess that's the reason why I'm sitting here today because ... I was the first person they questioned in this case, [and] if I [had] told the truth

[about] what happened [then] the prosecutor wouldn't be over there saying [I] deserve the maximum, she would have been offering me a deal like she was offering Bugg to lie ... [at] my probable cause hearing. And I would be free in—in another five years, maybe. ... But since I didn't say anything this is what I have to—this is what I have to live with. ... Once again, I'm sorry, for y'all loss, but the facts ... of the matter, Your Honor, [are that] on these five counts ... I'm innocent."

After briefly addressing the victim's family, the court addressed the defendant: "Anthony Collymore, your actions on the night of January 18th, 2010, were completely random, totally senseless and just vicious in nature. You shattered [the victim's] family, left them with a loss that will linger with them forever. Your actions clearly demonstrate total indifference to the laws of our society and a complete disregard for others.

"*Furthermore, you are still unwilling to accept full responsibility for your actions.* I cannot get inside your mind to determine your motives that night to commit such a senseless act. You should have known that the decisions that you took that night were going to lead to a tragic end, and they did." (Emphasis added.) The court concluded by noting the defendant's lengthy, violent criminal record.

***897** ****1091** At the outset, we note that this unpreserved claim by the defendant "is reviewable under the first two prongs of *State* v. *Golding*, [213 Conn. 233, 239, 567 A.2d 823 (1989)] because: (1) the record is adequate for review as the trial court's remarks during

sentencing are set forth in the transcripts in their entirety; and (2) the claim is of constitutional magnitude, as demonstrated by the defendant's discussion of relevant authority in his main brief." (Footnote omitted.) *State* v. *Elson*, 311 Conn. 726, 756, 91 A.3d 862 (2014). We thus turn to the third prong of *Golding*, to determine whether "the alleged constitutional violation ... exists and ... deprived the [defendant] of a fair trial." (Internal quotation marks omitted.) *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

As to whether a constitutional violation exists, it is "clearly improper" to increase a defendant's sentence "based on [his or her] decision to stand on [his or her] right to put the [g]overnment to its proof rather than plead guilty ...." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Elson*, supra, 311 Conn. at 758, 91 A.3d 862. Nevertheless, a defendant's " 'general lack of remorse' "; id., 761–62, 91 A.3d 862; and " 'refusal to accept responsibility' "; id.; for crimes of which he was convicted are " 'legitimate sentencing considerations' ...." Id., 761. "[R]eview of claims that a trial court lengthened a defendant's sentence as a punishment for exercising his or her constitutional right to a jury trial should be based on the totality of the circumstances. ... [T]he burden of proof in such cases rests with the defendant." (Internal quotation marks omitted.) Id., 759.

Here, the defendant argues that the court's comment at sentencing that he was "still unwilling to accept full responsibility for [his] actions" proves that the court improperly lengthened his sentence as punishment for electing to go to trial. We disagree. In context, that language was a comment on the defendant's

remarks ***898** at sentencing, in which the defendant continued to blame his predicament in large part on his quality of life and on the prosecutor, rather than accept full responsibility for his own actions. In context, the court's remark was proper commentary on the defendant's " 'general lack of remorse' "; *State* v. *Elson*, supra, 311 Conn. at 761–62, 91 A.3d 862; and " 'refusal to accept responsibility' ...."27 Id.; see also ****1092** *State* v. *West*, 167 Conn.App. 406, 419, 142 A.3d 1250 (2016) (rejecting similar claim).

The judgment is affirmed.

In this opinion the other judges concurred.

## Footnotes

The listing of judges reflects their seniority status on this court as of the date of oral argument.

1

The defendant was also found guilty of a second count of attempted robbery in the first degree in violation of §§ 53a–49 (a) (2) and 53a–134 (a) (4), but the court vacated that finding at sentencing, pursuant to *State* v. *Polanco*, 308 Conn. 242, 245, 61 A.3d 1084 (2013).

2

The state's ballistics expert noted that a .38 class bullet could be fired from a nine millimeter pistol, a .38 Special revolver, or a .357 Magnum revolver.

3

See *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86 ("[w]e, therefore, adopt today a rule allowing the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at

trial and is subject to cross examination"), cert. denied, 479 U.S. 994, 107 S.Ct. 597, 93 L.Ed.2d 598 (1986).

4

The multiple, overlapping nature of these witnesses' testimony requires a more detailed presentation of the facts than is ordinarily necessary.

5

The following colloquy occurred during defense counsel's questioning of Oliphant:

"[Defense Counsel]: Now, you testified at the trial that you felt guilty, that—you felt guilty about Vance Wilson. Can you explain that?

"[The Witness]: I plead the fifth. ...

"[Defense Counsel]: You indicated during your direct testimony that you felt guilty. What was that reference?

"[Oliphant's Counsel]: He took the fifth amendment to that question."

6

The sixth amendment rights to compulsory process and to present a defense are made applicable to the states through the fourteenth amendment's due process clause. *State* v. *Andrews*, 313 Conn. 266, 272 n. 3, 96 A.3d 1199 (2014).

7

Although the defendant argues in his brief that the state's conduct violated both the federal and state constitutions, he has provided no independent analysis under the state constitution, as required by *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), and so we limit our review to the federal constitutional claim. See *State* v. *Allen*, 289 Conn. 550, 580 n. 19, 958 A.2d 1214 (2008).

8

At trial, the state never specified by what authority it immunized the three witnesses. The state asserts on appeal, however, that it relied on § 54–47a for Bugg and Oliphant. As to Vance, the state argues that the record of his immunity is inadequate to review, but argues in the alternative that its grant of immunity to Vance was proper, citing a § 54–47a case, *State* v. *Giraud*, 258 Conn. 631, 635 n. 3, 638, 783 A.2d 1019 (2001). At no point before the trial court or this court has the state asserted any other source for its authority to immunize

witnesses. Accordingly, we confine our review to § 54–47a. See *Furs* v. *Superior Court*, 298 Conn. 404, 411–13, 3 A.3d 912 (2010) (declining to review claim that state has "inherent authority" to immunize witnesses, because it was not raised before trial court).

9

Here, the state proceeded in the opposite order, first telling the court that it was granting the witnesses immunity and then having the court instruct the witnesses that they could no longer refuse to testify on the basis of their fifth amendment right against self-incrimination.

10

Because a grant of immunity pursuant to § 54–47a necessarily includes transactional immunity, all three witnesses received such immunity when the state immunized them during its case-in-chief. See *Furs* v. *Superior Court*, 298 Conn. 404, 411, 3 A.3d 912 (2010) ("the General Assembly intended to provide both transactional and derivative use immunity to witnesses compelled under the statute to testify"). Section 54–47a also confers use and derivative use immunity, meaning that, in addition, the state cannot use testimony compelled under § 54-47a—or evidence found as a result of that testimony—to prosecute the witness for another offense about which the witness did not testify. See id.; but see *Cruz* v. *Superior Court*, 163 Conn.App. 483, 490 n. 5, 136 A.3d 272 (2016) (treating use and derivative use immunity as wholly contained subset of transactional immunity).

11

For its part, the trial court never explicitly stated whether it viewed the issue as one of revoking existing immunity or granting additional immunity, but its comments suggest that it took the latter view.

12

At oral argument before this court, the defendant did argue that trial counsel was barred during cross-examination in the state's case-in-chief from asking certain questions, as they were beyond the scope of the state's direct examination, then barred from asking those same questions during the defense case-in-chief because the witnesses asserted their fifth amendment rights, and that this sufficed to show that the defense was denied essential testimony. We disagree, for two reasons.

First, as a legal matter it is not potentially exculpatory questions but actually exculpatory answers that the defendant must show to sustain his burden under the effective defense theory. See *United States* v. *Triumph Capital Group, Inc.*, 237 Fed.Appx. 625, 629–30 (2d Cir.2007) (questions alone not sufficient); see also *United States* v. *MacCloskey*, supra, 682 F.2d 475–77, 479 (reversing conviction where witness *had* previously answered questions during voir dire outside jury's presence and answers were detailed and exculpatory). Here, we cannot speculate as to what the answers to the defendant's questions might have been. See *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 502, 510, 970 A.2d 578 (2009) ("speculation and conjecture ... have no place in appellate review" [internal quotation marks omitted] ).

Second, as a factual matter, even if we could speculate as to the answers to the questions that were asked, we would conclude that such testimony was cumulative or otherwise obtainable because, here, the witnesses did answer the vast majority of questions at some point during the trial, and the only questions that remained unanswered were highly tangential to the actual issues at hand. See part I B 2 of this opinion.

13

We note that the state, in its brief, did not address the defendant's argument that the court improperly sustained these witnesses' invocation of their fifth amendment rights.

14

As to the three new questions, the court's failure to compel Bugg, Vance, and Oliphant to testify did not violate the defendant's constitutional rights because the witnesses asserted a valid fifth amendment right. See *State* v. *Simms*, 170 Conn. 206, 209–10, 365 A.2d 821 (in conflict between witness' fifth amendment right against self-incrimination and defendant's right to compulsory process, fifth amendment right prevails), cert. denied, 425 U.S. 954, 96 S.Ct. 1732, 48 L.Ed.2d 199 (1976).

15

The defendant also claims, as a procedural matter, that the court erred by not individually assessing whether each question implicated the witness' fifth amendment right to remain silent, and instead permitting a "blanket" assertion of that right. We do not address this

claim because we conclude that, even if the procedure was improper, these questions did not implicate the fifth amendment.

16

As to these questions, the court's failure to compel Bugg, Vance, and Oliphant to testify did not violate the defendant's constitutional rights because the same testimony already had been presented during the state's case-in-chief, and the defendant has identified no compelling tactical reason why that testimony needed to be repeated in the defense case-in-chief. See *State* v. *West*, 274 Conn. 605, 624–25, 877 A.2d 787 ("[t]he federal constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense ... [which is] in plain terms the right to ... present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies" [internal quotation marks omitted] ), cert. denied, 546 U.S. 1049, 126 S.Ct. 775, 163 L.Ed.2d 601 (2005).

17

The defendant argues that this error was structural and thus not subject to harmlessness analysis. We disagree. "[W]e forgo harmless error analysis only in rare instances involving a structural defect of *constitutional magnitude*.... Structural defect cases defy analysis by harmless error standards because *the entire conduct of the trial, from beginning to end, is obviously affected* ...." (Emphasis altered; internal quotation marks omitted.) *State* v. *Artis*, 314 Conn. 131, 150, 101 A.3d 915 (2014). "[S]tructural defect cases contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. ... Such errors infect the entire trial process ... and necessarily render a trial fundamentally unfair .... Examples of such structural errors include, among others, racial discrimination in the selection of a grand jury or petit jury and the denial of a defendant's right to counsel, right to a public trial, or right to self-representation." (Citations omitted; internal quotation marks omitted.) Id., 151. Here, the court's various *evidentiary rulings* improperly excluding testimony that the jury had already heard neither were an error of *constitutional* magnitude nor "infect[ed] the entire trial process ... necessarily render[ing] [the] trial fundamentally unfair ...." (Internal quotation marks omitted.) Id.

18

The fifth count of the information, which charged the defendant with criminal possession of a firearm in violation of § 53a–217 (a) (1), alleged that "on or about January 18, 2010, at approximately 9:42 p.m., at or near [Diamond Court, the defendant] possessed a firearm and had been convicted of a felony."

19

See footnote 18 of this opinion.

20

The defendant was charged with two counts of attempted robbery in the first degree in violation of §§ 53a–49 and 53a–134, one count of conspiracy to commit robbery in the first degree in violation of §§ 53a–48 and 53a–134, and one count of felony murder with a predicate felony of robbery.

21

The court instructed the jury that it could use the testimony about January 9, 2010, only to assess Oliphant's credibility, not for substantive purposes. The defendant argues that the jury would have ignored this clear instruction and instead used the evidence substantively. "[I]t is well established that, [i]n the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them." (Internal quotation marks omitted.) *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 402, 3 A.3d 892 (2010). Nevertheless, in determining whether evidence is more prejudicial than probative, a court must assess the risk that a jury will ignore such instructions and use evidence for an improper purpose. See *State* v. *Busque*, 31 Conn.App. 120, 124–25, 129–32, 623 A.2d 532 (1993) (reversing conviction where evidence was such that jury likely used it for improper purpose, despite court's clear instruction), appeal dismissed, 229 Conn. 839, 643 A.2d 1281 (1994). Because the defendant here does not challenge the admission of the January 9 gun possession testimony to the extent that the jury properly used it to assess Oliphant's credibility, in our analysis of harmlessness we consider the risk that the jury improperly used that testimony for substantive purposes.

22

See Conn. Code Evid. § 8–3 ("[t]he following are not excluded by the hearsay rule ... [1] ... [a] statement that is being offered against a

party and is ... [D] a statement by a coconspirator of a party while the conspiracy is ongoing and in furtherance of the conspiracy").

23

The defendant also argues that Foote's testimony was improper hearsay. We disagree. "An out-of-court statement *offered to prove the truth of the matter asserted* is hearsay and is generally inadmissible unless an exception to the general rule applies." (Emphasis added; internal quotation marks omitted.) *State* v. *Rosario*, 99 Conn.App. 92, 108, 912 A.2d 1064, cert. denied, 281 Conn. 925, 918 A.2d 276 (2007). Evidence offered for another purpose, however, "is admissible not as an exception to the hearsay rule, but because it is not within the rule." *State* v. *Sharpe*, 195 Conn. 651, 661, 491 A.2d 345 (1985). Here, the court twice instructed the jury that the evidence was admitted solely for impeachment. "It is a fundamental principle that jurors are presumed to follow the instructions given by the judge." (Internal quotation marks omitted.) *State* v. *Williams*, 258 Conn. 1, 15 n. 14, 778 A.2d 186 (2001).

24

The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...."

The sixth amendment right to confrontation is made applicable to the states through the due process clause of the fourteenth amendment. See, e.g., *Pointer* v. *Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

25

The defendant argues that this testimony violated his "right to have his jury determine issues of credibility and fact" and that this "state[s] [a claim] of constitutional magnitude." Although he does not specify under what provision of the constitution he asserts this right, we gather from the cases he cites that it is essentially a "fair trial" claim under the due process clause of the fourteenth amendment to the United States constitution, which provides in relevant part: "nor shall any State deprive any person of life, liberty or property, without due process of law ...."

26

Although Slavin did testify, in one instance, to the out-of-court statement of a nonwitness, we conclude that the defendant waived

any challenge to that testimony. At trial, the state asked Slavin how the police first learned who was involved in the shooting. Slavin began to say that they had received a tip but defense counsel interrupted, objecting "as to what the tip might have been" on the ground that it was hearsay. The state claimed it for its effect on the listener, the court overruled the objection, and Slavin testified that the police "received a tip from a young lady who overheard some people talking on a bus that a party named Rex and Stacks or ... Dreads were ... the ones responsible for killing [the victim]." The court then excused the jury and held a sidebar, at which defense counsel asked the court to strike the testimony about "the tip information" but expressly agreed that the state could "ask the question, you heard something, you got a tip, and then as a result of that tip, what did you do. It doesn't have to have what the tip is." The court adopted that position, ruling that Slavin could testify that "the authorities [got] a tip and act[ed] on that" but could not testify that "the tip said (a), (b), or (c)." When the court reiterated that the state could ask about "[t]he fact ... [that police] got a tip," the state asked, "[b]ut that's where the objection would l[ie] for [defense counsel]," and the court replied: "That's not what I heard. What I heard was, the issue was with respect to the *content* of the conversation from someone outside of the authorities. Am I correct in that?" (Emphasis added.) Defense counsel replied, "Yes." The court then brought the jury back into the courtroom, instructing the jurors that it was striking the testimony they had heard about the tip and that although Slavin would be testifying about what others had said, such testimony was "not to be used for any purpose other than how the police reacted to those responses ... to give [jurors] the context of the police investigation." The state then elicited the following testimony from Slavin:

"Q. Okay. And now you indicated that at some point in time a tip came into the Waterbury police?"

"A. Yes.

"Q. And when was that?

"A. It was on, I believe, January 28th, 2010.

"Q. Okay. And based on that tip, what did you do?

"A. Based on that tip, the—the names that I had to work with, the nicknames—we have a database of nicknames, street names, that we've been compiling—particularly another sergeant and I—since—

for almost ten years now. We had those nicknames in this list, and the nicknames came out to be Stacks, which would be [the defendant], and Rex or Dreads, which turned out, we believed, to be Mr. Oliphant—Jabari Oliphant."

Defense counsel did not object to this testimony. Against this background, "[w]e deem this claim waived, and, therefore, we decline to review it." *State* v. *Phillips*, 160 Conn.App. 358, 369, 125 A.3d 280, cert. denied, 320 Conn. 903, 127 A.3d 186 (2015).

27

On several of his claims, the defendant also asks this court to invoke its supervisory powers to reverse the judgment of the trial court and remand the case for a new trial. We decline to do so. "The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Emphasis omitted; internal quotation marks omitted.) *State* v.*Lockhart*, 298 Conn. 537, 576, 4 A.3d 1176 (2010). This is not such a case.

Finally, the defendant asks this court "to review the sealed exhibit [submitted to the court at trial, containing the personnel files of several detectives who testified] and [to] grant appropriate relief." (Citation omitted.) The state does not dispute the propriety of such review, but argues that "unless the sealed exhibit contains information ... so compelling that it could have impacted the outcome at trial," the court did not abuse its discretion in denying the defendant's request for those files. At trial, the court agreed to review the files to determine whether any information in them should be disclosed to the defendant. It appears that no such information was disclosed. We have reviewed the sealed files ourselves and conclude that the court did not abuse its discretion in denying the defendant's request.

# APPENDIX D

# SUPREME COURT
# STATE OF CONNECTICUT

SC 19868
STATE OF CONNECTICUT
v.
ANTHONY COLLYMORE

MARCH 4, 2020

**ORDER**

THE MOTION FOR THE DEFENDANT-APPELLANT, FILED FEBRUARY 20, 2020, FOR RECONSIDERATION AND/OR REARGUMENT, HAVING BEEN PRESENTED TO THE COURT IT IS HEREBY ORDERED THAT RECONSIDERATION IS GRANTED, BUT THE RELIEF REQUESTED THEREIN IS DENIED.

MULLINS, J., DID NOT PARTICIPATE IN THE CONSIDERATION OF OR DECISION ON THIS MOTION.

BY THE COURT,
_____/s/_____
SUSAN REEVE
DEPUTY CHIEF CLERK

NOTICE SENT: MARCH 4, 2020
COUNSEL OF RECORD
HON. WILLIAM T. CREMINS
CLERK, SUPERIOR COURT, UWY CR11 0397596 T 190240

# APPENDIX E

## UNITED STATES CONSTITUTIONAL PROVISIONS

**U.S. Const. Amend. 5. Criminal actions--Provisions concerning--Due process of law and just compensation clauses.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**U.S. Const. Amend. 6. Rights of the accused.**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## U.S. Const. Amend. 14. Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

## STATUTORY PROVISIONS

### 18 U.S. Code §6602 § 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to--

**(1)** a court or grand jury of the United States,

**(2)** an agency of the United States, or

**(3)** either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a

prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

**18 U.S. Code § 6003. Court and grand jury proceedings**

**(a)** In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

**(b)** A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment--

**(1)** the testimony or other information from such individual may be necessary to the public interest; and

**(2)** such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

**Connecticut General Statutes § 54-47a. Compelling testimony of witness. Immunity from prosecution**

(a) Whenever in the judgment of the Chief State's Attorney, a state's attorney or the deputy chief state's attorney, the testimony of any witness or the production of books, papers or other evidence of any witness (1) in any criminal proceeding involving narcotics, arson, bribery, gambling, election law violations, felonious crimes of violence, any violation which is an offense under the provisions of title 22a, corruption in the executive, legislative or judicial branch of state government or in the government of any political subdivision of the state, fraud by a vendor of goods or services in the medical assistance program under Title XIX of the Social Security Act amendments of 1965, as amended,1 any violation of chapter 949c,2 or any other class A, B or C felony or unclassified felony punishable by a term of imprisonment in excess of five years for which the Chief State's Attorney or state's attorney demonstrates that he has no other means of obtaining sufficient information as to whether a crime has been committed or the identity of the person or persons who may have committed a crime, before a court or grand jury of this state or (2) in any investigation conducted by an investigatory grand jury as provided in sections 54-47b to 54-47g, inclusive, is necessary to the public interest, the Chief State's Attorney, the state's attorney, or the deputy chief state's attorney, may, with notice to the witness, after the witness has claimed his privilege against self-incrimination, make application to the court for an order directing the witness to testify or produce evidence subject to the provisions of this section.

(b) Upon the issuance of the order such witness shall not be excused from testifying or from producing books, papers or other evidence in such case or proceeding on the

ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify or produce evidence, and no testimony or evidence so compelled, and no evidence discovered as a result of or otherwise derived from testimony or evidence so compelled, may be used as evidence against him in any proceeding, except that no witness shall be immune from prosecution for perjury or contempt committed while giving such testimony or producing such evidence. Whenever evidence is objected to as inadmissible because it was discovered as a result of or otherwise derived from compelled testimony or evidence, the burden shall be upon the person offering the challenged evidence to establish a source independent of the compelled testimony or evidence.

# APPENDIX F

NO: UWY CR11-0397596-T : SUPERIOR COURT

STATE OF CONNECTICUT : JUDICIAL DISTRICT
OF WATERBURY

: AT WATERBURY,
CONNECTICUT

ANTHONY COLLYMORE : 2013

BEFORE THE HONORABLE WILLIAM T. CREMINS,
JUDGE

A P P E A R A N C E S :

Representing the State of Connecticut:

ATTORNEY CYNTHIA SERAFINI, SASA
ATTORNEY DON THERKILDSEN, ASA
Office of the State's Attorney
400 Grand Street
Waterbury, Connecticut 06702

Representing the Defendant:

ATTORNEY DON O'BRIEN, SPD
P.O. Box 218
Simsbury, Connecticut 06070
(Ordering Party – Atty. Martin Zeldis)

## TRANSCRIPT NOTATION

The cited transcript is denoted by volume followed by page, e.g., Volume: Page. The individual volumes are consecutively numbered:

| | | |
|---|---|---|
| 1 PT: | February 28, 2011 | Arraignment Proceedings |
| 2 PT: | May 19, 2011 | Preliminary Proceedings |
| 3 PT: | July 14, 2011 | Preliminary Proceedings |
| 4 PT: | July 22, 2011 | Preliminary Proceedings |
| 5 PT: | July 22, 2011 | Preliminary Proceedings |
| 6 HPC: | August 10, 2011 | Probable Cause Hearing |
| 7 HPC: | August 30, 2011 | Probable Cause Hearing |
| 8 HPC: | September 7, 2011 | Decision/Probable Cause, Preliminary Proceedings |
| 9 PT: | October 4, 2011 | Preliminary Proceedings |
| 10 PT: | February 22, 2012 | Preliminary Proceedings |
| 11 PT: | June 20, 2012 | Preliminary Proceedings |
| 12-21 VDT: | January 17-30, 2013 | Voir Dire |
| 21-23 T: | February 4, 2013, A.M. | Trial Proceedings |
| 24-25T: | February 5, 2013, A.M. | Trial Proceedings |
| 26 T: | February 6, 2013, P.M. | Trial Proceedings |
| 27-28 T: | February 7, 2013, A.M. | Trial Proceedings |
| 29-30 T: | February 13, 2013, A.M. | Trial Proceedings |
| 31-32 T: | February 14, 2013, A.M. | Trial Proceedings |
| 33-34 T: | February 15, 2013, A.M. | Trial Proceedings |
| 35-36 T: | February 19, 2013, A.M. | Trial Proceedings |
| 37-38 T: | February 20, 2013, A.M. | Trial Proceedings |
| 39-40 T: | February 21, 2013, A.M. | Trial Proceedings |
| 41-43 T: | February 22, 2013, A.M. | Trial Proceedings |
| 44-45T: | February 28, 2013, A.M. | Trial Proceedings |
| 46 T: | March 1, 2013, A.M. | Trial Proceedings |
| 47 T: | March 1, 2013, P.M. | Trial Proceedings |

| | | |
|---|---|---|
| 48-49 T: | March 4, 2013, A.M. | Trial Proceedings |
| 50-51 T: | March 5, 2013, A.M. | Trial Proceedings |
| 52-53 T: | March 6, 2013, A.M. | Trial Proceedings |
| 54-55 T: | March 7, 2013, A.M. | Trial Proceedings |
| 56-57 T: | March 11, 2013, A.M. | Trial Proceedings |
| 58-59T: | March 12, 2013, A.M. | Trial Proceedings |
| 60-61 T: | March 13, 2013 | Jury Deliberations |
| 61 T: | March 14, 2013, P.M. | Verdict |
| 62 HPC: | April 15, 2013 | HPC Waiver |
| 63 ST: | May 16, 2013 | Sentencing |

**FEBRUARY 14, 2013 AM SESSION 31 T:**
**STATE'S CASE [Excerpt]**

**[State's direct of state's witness co-defendant Rayshaun Bugg regarding location of car, map, Attorney Serafini]**

[16] Q It's the build -- It's the driveway between buildings 4 and 5?

[17] A Yes.

Q And he pulled down there and where did he park?

A Right behind my aunt house.

Q So right behind building 4?

A Um hmm.

Q And then what happened?

A They got out the car, him and Wilson.

Q Who got out of the car?

A Him and Wil -- Collymore and Wilson.

Q Did you have a phone on you that night?

A Did I have a phone? Yes.

Q And what kind of a phone was that?

A Probably a Nextel.

Q A Nextel?

A Probably.

Q The kind that you can chirp somebody on?

A Yes.

Q Okay. And did you get a chirp from Mr. Collymore?

A No.

Q So when -- Mr. Collymore and Mr. Wilson both got out of the vehicle?

A Yes.

Q And it's at that point in time where you saw

Anthony Collymore with a gun, right?

[18] A No, I didn't see one. No.

Q You saw Anthony Collymore with a gun on January 18th, 2010, didn't you?

A No, I didn't.

Q And didn't you describe the type of gun that Anthony Collymore had that night as a .38?

A No, I didn't.

Q Did you ever -- Didn't you tell that to the police?

A No, I didn't.

Q And you know what a .38 looks like, right?

A I assume a gun, yes.

Q You know what a .38 looks like is my question.

A A gun. I -- I don't know exactly what type of gun, but I know it's a gun.

Q Think you know the difference between a revolver and a semi-automatic?

A Yes, I know that.

Q Okay. And do you know what a .357 looks like?

A No.

Q You saw Mr. Wilson or -- You saw Mr. Wilson with a gun in his hand at that time, didn't you?

A No, I didn't.

Q And you saw that it was a .357, correct?

A No, I didn't.

Q And [19] you had seen Mr. Wilson in the possession of a gun prior to January 18th, 2010, correct?

A No.

Q Now, when Wilson and Collymore got out of the car, it was your understanding at that point in time they were going to rob the man in that SUV, correct?

A No.

Q And you indicated in your testimony you got into the driver's seat?

A Yes.

Q And that's because you were told to get into the driver's seat, correct?

A No.

Q Well, you indicated that at some point in time you got into the driver's seat and then you moved the car, correct?

A Yes.

Q And that's because you were told to move the car, right?

A No.

Q So you just drove off leaving behind Stacks and Mann?

A No, I got in the driver's seat 'cause I -- I wasn't told. I just felt like getting in the driver's seat 'cause they was taking too long.

Q It was taking too long. So -- But then you drove off, right?

A Yeah. I went to go turn the car around and meet him on the other side.

Q Well, when you say you went to turn the car around, you didn't go back up --

A Well --

Q -- and come out buildings 4 and 5, did you?

A No.

Q You went -- continued on that driveway and came up [20] between buildings 1 and 2, correct?

A Yes.

Q And it's your testimony today and your testimony

last Tuesday that you didn't tell them that you were going to drive the car and no one told you, correct?

A Yes.

Q And no one told you to get in the driver's seat. That's what you're telling us today, right?

A Yes.

Q But you nonetheless got in the driver's seat and drove off not telling Mr. Collymore or Mr. Wilson where you were going?

A I was going to meet them. I was going back around to meet them.

Q But you didn't tell them that, right?

A No.

Q And they didn't tell you that, you know, meet us down at the end of the street, did they?

A No.

Q So somehow they managed to figure out that you were down at the end of the street even though you never told them that, right?

A Yes.

Q They didn't tell you to go there, right?

A Yes.

Q That's quite a coincidence, isn't it? So you testified that at some point in time you heard -- you heard a noise?

[21] A I thought I did.

Q And that caused you to turn down the radio, right?

A Yes.

Q And you've heard gunshots before that night, correct?

A Have I heard gun -- I thought I heard gunshots before.

Q No. My question to you is: You had heard gunshots. You knew what a gunshot sounded like before that night, correct?

A Yes.

Q And you thought that what you heard was a gunshot, correct?

A Yes.

Q Okay. And how many gunshots did you think you -- you heard?

A I wasn't sure. That's why I turned down the music.

Q So you don't know? Is that what you're saying?

A Yes.

Q Okay. And then you said at some point in time Mr. Collymore came down -- came to the car, correct?

A When I pulled all the way down by building 1 and 2.

Q Okay. And where did you pull the car to?

A Right behind building 2, like right where the curb is at.

Q Okay. Right behind -- Can you show us with this pointer where you pulled the car?

A Right here.

**[22]** Q So right behind building 2?

A Um hmm.

Q Right as the building starts to come -- There's a little hill there, right?

A Yes.

Q And that's right before you come up -- before you even get up to the corner of Manhan -- of building 1, correct?

A Yes.

Q Okay. So there's no way that Mr. Collymore or Mr.

Wilson would have been able to see the car if they were on Manhan Street, correct?

A Yes.

Q Okay. And so -- But nonetheless they happened to run down in that direction?

A No, I pulled the car up.

Q You just said you pulled the car up to the end of the -- bottom of the --

A Yes, but that's not when they got in the car.

Q Well, isn't that where you said they had got in the car?

A No, it's not.

Q Didn't you --

A I said I pulled up right there.

Q -- look at a map --

THE COURT: You have to have the question responded to before the next question is asked, please.

[23] Q Didn't you look at a map when you gave your statement to the Waterbury Police Department?

A They showed me a map.

Q And didn't you mark on that map where you picked them up?

A Yes.

Q And didn't you write on that map this is where I picked them up?

A Yes.

Q And then you signed it, correct?

A Yes.

Q And that would be down below building 2, correct?

A Yes.

Q Showing you what has been marked State's Exhibit

26. That's the map that you signed.
THE COURT: I'm sorry. Attorney O'Brien can't --
ATTY. SERAFINI: He can get up, Your Honor.
THE COURT: Why don't you do it on the other side so everybody can see it.

Q This is the map that you signed, correct?

A Yes.

Q Showing the -- Showing the Waterbury Police Department where it was you picked up Anthony Collymore and Vance Wilson, correct?

[24] A Yes.

Q And that's exactly where you just showed us on this map, correct?

A Yes.

Q Okay. And again --
ATTY. O'BRIEN: Could I see that map? Your Honor, could I see that map?
THE COURT: She's examining. Not at this --

Q And again, that is well below the street -- Manhan Street, correct?

A Yes.

Q And you indicated that Mr. Collymore came to the car and he was just walking?

A Yes.

Q And how far behind him was Mr. Wilson?

A Like 20 feet, 30 feet.

Q 200 feet?

A No. 20 feet, 30 feet.

Q 20 feet?

A Yes.

Q So how far am I from you?

A Probably about 30 feet.

Q So he was much closer?

A Yeah. In the --

Q You think this is 20 feet?

A I said 20 to 30 feet, yes.

Q But I mean, you think that from where you are --

A (Indiscernible).

Q -- to where I am is 20 feet?

A No. It's a little less than that.

[25] Q Maybe like ten feet?

A A little more probably.

Q Okay. So if he's 20 feet, he's maybe back to where the door is?

A Probably by the desk.

Q So maybe about 15 feet? And it's your testimony that he's just walking, sashaying behind him?

A I said he was walking, yes.

Q He's walking behind him? And no one's in any kind of a hurry, right?

A No.

Q They're just walking along, happen to come over to where you're parked, right?

A Yes.

Q Okay. And they both got into the backseat, right?

* * *

**MARCH 5, 2013 AM SESSION 50: T**
**DEFENSE CASE [excerpts]**

[5] THE COURT: And what about the other witnesses who are here, do they have counsel? The witnesses who are here –

ATTY. O'BRIEN: We –

THE COURT: - that are incarcerated?

ATTY. O'BRIEN: Mr. Bugg does, Rayshaun Bugg, his attorney is here but I understand there's a wrinkle with it because the Court – the state's attorney has indicated that she's not going to extend the immunity that she granted for him to testify on [6] her case to his testimony on the defense's case.

THE COURT: Well, as counsel is aware, I can't do anything with respect to immunity that's the State. So how do you want – how do you want the Court to address that? It's the State's determination whether or not they are going to grant it, the Court has no jurisdiction in that area. I can't require them to do anything.

ATTY. O'BRIEN: I understand that, Your Honor but if it turns out that Mr. Bugg does not testify, I want this jury to know that the State is preventing him from testifying because she's not extending the immunity that she granted for his testimony.

ATTY. SERAFINI: No, Your Honor. He has a 5th Amendment privilege that he can invoke at any time. The State is not going to – and the case law is – is clear. State versus Giraud, G-i-r-a-u-d, and that's at *2 58 Connecticut 6 31* it's a 2001 case and only the State can grant immunity.

THE COURT: Okay.

ATTY. O'BRIEN: There's no question that only the State can grant immunity, Your Honor. This is in a unique sit – circumstance, as it has been throughout.

Yesterday we heard the Cecil B. DeMille production, film going on the wall, audio, with respect to what Mr. Bugg said during the probable [7] cause hearing, as well as the introduction of these recordings. These recordings were in existence at the time that he was testifying, had

they been played for him – which I believe and I – I've indicated this before that is the proper way to do cross examination, you call the person's attention to it and they get a chance to either accept it or reject it and then I have an opportunity to do a cross examination.

That was not done in this case, this was essentially Bugg 2, he was called in to testify again without having cross examination, regarding the issues that he testified to. So –

THE COURT: Well –

ATTY. O'BRIEN: - I –

THE COURT: - let me ask you a question, counsel? ¶He – you seem to be equating inconsistent statements with Whalen statements, is that correct?

ATTY. O'BRIEN: Either way, Your Honor.

THE COURT: Okay. All right. So then, let me give you a hypothetical because I have concern about the issue that you're raising. If a witness gets on the stand and says, A, and that witness is – then gets on – the witness in the statement said A, the witness on the stand says B, party wishes to [8] offer the statement that A made on a – as a Whalen statement.

ATTY. O'BRIEN: This is the same witness, you're –

THE COURT: Same witness.

ATTY. O'BRIEN: - talking about.

THE COURT: If your argument is correct that witness could admit that he made the statement and then the statement couldn't come in because it would then be extrinsic evidence. Correct?

ATTY. O'BRIEN: Right.

THE COURT: But that's not what Whalen requires, is it?

ATTY. O'BRIEN: If he's admitting the statement then

there's no – there's no conflict in – in his testimony –
THE COURT: But that –
ATTY. O'BRIEN: - there's no –
THE COURT: - under that –
ATTY. O'BRIEN: - there's no issue of Whalen.
THE COURT: - under that scenario the witness could prohibit the Whalen statement from coming in by just saying that's what I said. Right?
ATTY. O'BRIEN: Right.
THE COURT: You could never get a Whalen statement in.
ATTY. O'BRIEN: Right. And you shouldn't be able to if - if the witness is admitting what he said [9] in the state – if the State had introduced – asked him about his statement, yes, I said that. Yes, I said that.
THE COURT: All right. So what – what are you asking the Court to – I'm not sure I understand what you're asking the Court to do?
ATTY. O'BRIEN: Well, I'm saying this – this is a situation where Bugg has testified twice and I haven't had an opportunity to test – to cross-examine him the second time.
THE COURT: How does that relate to his 5th Amendment [10] privilege?
ATTY. O'BRIEN: Well, it relates to it because if it had been done properly with the way I submit that it should have been done, which is when he's testifying didn't you say at the probable cause hearing all of the things that were – were brought out yesterday for him – impeachment purposes. So then at that point he has either a chance to explain it or admit to it and then I have an opportunity to cross-examine him. Now, I'm being

precluded from cross-examining him on things that were – were played for the jury and put on the movie screen yesterday.

ATTY. SERAFINI: And those –

THE COURT: How –

One second, please.

How does that relate to his 5th Amendment privilege?

ATTY. O'BRIEN: Because at the time if he's – if she's doing it – if the State is doing it correctly she's granting him immunity for his testimony and at that time he has immunity –

THE COURT: Well –

ATTY. O'BRIEN: - it doesn't extend just to direct testimony –

THE COURT: Counsel –

ATTY. O'BRIEN: - it extends to cross examination.

ATTY. SERAFINI: Just for the wreck –

THE COURT: I'm – well – one – one second.

I still don't understand what you're asking this Court to do with respect to Mr. Bugg's –

ATTY. O'BRIEN: I understand –

THE COURT: - amendment.

ATTY. O'BRIEN: - the - I understand Court's situation –

THE COURT: Okay.

ATTY. O'BRIEN: - but what I'm saying is because of the way this examination of Mr. Bugg has been conducted over the course of essentially two days because yesterday was Bugg, he – you heard his voice, you saw his –

THE COURT: I – I understand, counsel, but let – let me get to the point, what are you asking me to [11] do? I'm trying to narrow this down, what – what – if the State determines that they're not going to give him immunity

and Attorney Hutchinson believes that, that is a problem, what are you asking me to do?

ATTY. O'BRIEN: I don't know that the Court can do anything, that's up to the state's attorney and the state's attorney has chosen to do it this way, but the Court has allowed this – this examination to be done in that fashion, which is my objection from the beginning –

THE COURT: Okay.

ATTY. O'BRIEN: - which is the proper way to do cross examination –

THE COURT: That's been –

ATTY. O'BRIEN: - is you call –

THE COURT: - that's –

ATTY. O'BRIEN: - attention to the –

THE COURT: - that's been –

ATTY. O'BRIEN: - person –

THE COURT: - that's been preserved for the record. All right. So –

ATTY. O'BRIEN: And – and –

THE COURT: - I mean -

ATTY. O'BRIEN: - in – in effect, his confrontation right, my client's confrontation right has been extinguished because of that because I can't [12] ask Bugg the questions that were relevant for yesterday's testimony, which was testimony in effect.

THE COURT: Okay. Attorney Hutchinson, what's – what's your – what - what's your position with respect to Mr. Bugg and his testimony today?

ATTY. HUTCHINSON: Your Honor, I haven't spoken to Mr. Bugg yet because I'm not sure if he's in yet. And my understanding is that anything he says today, if it contradicts prior testimony in this proceeding, prior

testimony in a HPC, or possibly his written statement that's been admitted, if – if anything he says today is contrary to that the State is free to charge him with perjury and that's – that's my concern.

And I have spoken to Mr. Collymore's attorney, he has indicated the nature of the questions. My other concern is questions and answers don't always go as you anticipate and – and a lay defendant or a lay witness testifying doesn't understand the parameters in answering the question and all he has to do is –

THE COURT: Well –

ATTY. HUTCHINSON: - say the wrong thing –

THE COURT: - well, let me –

ATTY. HUTCHINSON: - and that opens –

THE COURT: - let me –

ATTY. HUTCHINSON: - it up –

[13] THE COURT: - let me –

ATTY. HUTCHINSON: - for the State. .

THE COURT: - ask you this question. My understanding of the rule with respect to the 5th Amendment privilege for a witness is that it's taken question by question, would you agree with that?

ATTY. HUTCHINSON: My understanding was –

THE COURT: In other words somebody can't – a defendant can invoke period, but a witness it's question by question. I think that's the rule, would you agree with that?

ATTY. HUTCHINSON: I would agree with that.

THE COURT: Let me just –

ATTY. HUTCHINSON: I didn't take a look at it.

THE COURT: This is Taricani, T-a-r-i-c-a-n-i versus Nationwide Mutual Insurance Company, *77 Conn. App. 1*

*39* at page 1 36, which states witnesses invoking the 5th Amendment do not have a blanket right to refuse to testify, but are obligated to answer those questions that can be answered and to make a specific claim of privilege as to the rest.

And – so that's Connecticut case law, appellate court.

ATTY. HUTCHINSON: And my understanding is that – I understand that, I agree with that the problem is that when the State gets up to cross-examine that there may have been areas that the [14] door was opened and the state's attorney will want to cross-examine further in that area and he can –

THE COURT: But if he's got a privilege, then you can as his attorney advise him to invoke it. Correct?

ATTY. HUTCHINSON: As long as I can do that on cross.

THE COURT: Well, this is how we're going to proceed. Again, based on the rule, we'll have to take Mr. Bugg's testimony question by question and Attorney Hutchinson I'm going to allow you to sit right next to him.

ATTY. HUTCHINSON: Thank you.

THE COURT: All right. And I will explain to the jury that there may be times when Mr. Bugg may invoke his privilege, he will then have a right to consult with you and if you think the question implicates that –

ATTY. HUTCHINSON: Then I will according – will advise him accordingly.

THE COURT: And that's the way we'll do it.

ATTY. HUTCHINSON: Thank you.

THE COURT: No, let's – does anybody disagree with that?

ATTY. SERAFINI: May I have a moment, please?

THE COURT: Sure.

ATTY. SERAFINI: Because it's my understanding [15] that if the witness is going to invoke their 5th Amendment privilege that cannot be done in front of the jury, Judge.
THE COURT: Well, counsel, based on –
ATTY. SERAFINI: I'm just –
THE COURT: - I – in this circumstance, unless you can show me a specific prohibition on –
ATTY. SERAFINI: The –
THE COURT: - witnesses, not on the defendant –
ATTY. SERAFINI: Yup.
ATTY. O'BRIEN: Mm-hmm.
THE COURT: - a case that says that a witness cannot invoke his 5th – shouldn't be allowed to invoke it in front of a jury, where some questions can be answered and some can't.
ATTY. THERKILDSEN: Before the Court rules on that may I get that case? I can provide a case for the Court for that, I just need to be excused momentarily.
THE COURT: What's the case because I have most of them here?
ATTY. THERKILDSEN: It's a – it's a criminal case, I have to go look it up in my office,
Your Honor.
THE COURT: All right.
ATTY. O'BRIEN: Your Honor, may I – I be heard on that?
[16] THE COURT: Sure.
ATTY. O'BRIEN: If that – if that's the way the Court's gonna proceed I think that – I think that hurts the defense because if I ask a question he –
THE COURT: Well, counsel –

ATTY. O'BRIEN: - asserts his –
THE COURT: - what – what –
ATTY. O'BRIEN: - 5th Amendment -
THE COURT: - what would you suggest as an alternative?
ATTY. O'BRIEN: Well, that's up to the State to extend the immunity.
THE COURT: No. Take that – that's their issue, not mine. With respect to what I can do, give me an alternative to what I'm suggesting and I'll consider it.
ATTY. O'BRIEN: The Court is more learned than I am certainly –
THE COURT: Counsel, if you have an alternative, I'll consider it. I just thought about this because I thought this issue would come up and I can't come up with anything else.
ATTY. O'BRIEN: I understand, Your Honor.
THE COURT: Okay. You said you need to talk to Mr. Bugg.
ATTY. O'BRIEN: Yes, I'd like to if it's –
THE COURT: Attorney –
[17] ATTY. SERAFINI: Could I just –
THE COURT: - Hutchinson –
ATTY. SERAFINI: - can I just put on the record?
THE COURT: Sure.
ATTY. SERAFINI: When counsel claims they've had – not had the opportunity to cross-examine these witnesses for the record Mr. O'Brien had a copy of the testimony from Mr. Bugg at the HPC, the State went through all of the questions that I thought were inconsistent, asked him that and counsel had the opportunity to cross-examine him on what he actually

said. So to – to now say he didn't have the opportunity, Judge, in the State's opinion that is not true.

THE COURT: Well, again, that's for the appellate court to determine. Okay. So you said you want to talk to Mr. Bugg.

ATTY. O'BRIEN: Yes, Your Honor.

THE COURT: Attorney Hutchinson, I assume you want to be there when Mr. O'Brien talks to Mr. Bugg.

ATTY. HUTCHINSON: Yes.

THE COURT: How much time do you need so I can give the jury some indication of when we could start.

ATTY. O'BRIEN: Probably a half-hour, Your Honor.

THE COURT: All right. What about Mr. Slavin, is he here?

[18] ATTY. SERAFINI: He's here. Yes.

THE COURT: All right. The question is how long do you think you're going to have him on the stand? ¶ There's nothing in here that relates to Mr. Slavin, so that issue –

ATTY. O'BRIEN: Not – not that long if that's the case.

ATTY. SERAFINI: We'll have to deal with that, the motion in limine the state filed.

THE COURT: All right. Let's do it this way. We'll – we're going to start at 5 minutes of – you say you need a half-an-hour?

ATTY. O'BRIEN: Yes.

THE COURT: All right. We're going to start at 5 minutes of 11, we'll take Mr. Bugg first, if counsel has a case bring it to Attorney Maeder and then bring it to me and I'll consider it, but I can't come up with another alternative based on the unique circumstances of this case.¶ Five of.

(The court recessed and reconvened.)

THE COURT: Okay. Let's bring Mr. Collymore out, please.

(The defendant entered the courtroom.)

THE COURT: Okay. Everybody is back. Before I continue we had several chamber's conferences just prior to opening court again. I want to be – I – I [19] heard something that I was a little bit concerned about, did I hear the State saying that there may be an argument that the Court is suborning perjury in this matter, did –

ATTY. SERAFINI: No, I –

THE COURT: - I hear that right?

ATTY. SERAFINI: - didn't say that.

THE COURT: Okay. All right. Thank you. I thought that's what I heard.

All right. This is how we're going to proceed. We're going to have Mr. Bugg come out, he's already been sworn in this matter. I'm going to indicate to Mr. Bugg that there is a legal issue as to whether or not the immunity that he was granted by the State in his testimony in the State's case-in-chief, whether or not that applies to his testimony as a defense witness. It's an – in my opinion it's an unclear issue and that he should be guided by the advice of his attorney, Attorney Hutchinson, who will be sitting next to him during the examination.

Any comments for the record on that procedure?

ATTY. SERAFINI: I'm sorry, I – is he going to be questioned outside the presence of the jury or in – in the presence of the jury because –

THE COURT: In the –

ATTY. SERAFINI: - counsel –

THE COURT: - presence.

[20] ATTY. SERAFINI: - has indicated that she expects

that he will be invoking his 5th Amendment.
THE COURT: For every question?
ATTY. HUTCHINSON: Not for every question –
THE COURT: Okay. Then –
ATTY. HUTCHINSON: - Your Honor.
THE COURT: - he's going to do it in front of the jury.
ATTY. HUTCHINSON: As we had previously discussed the rules are different for a witness –
THE COURT: The rules are different –
ATTY. HUTCHINSON: - than –
THE COURT: - for a witness than from a defendant.
ATTY. HUTCHINSON: Thank you.
THE COURT: Okay. Any other comments?
ATTY. SERAFINI: We need to address that motion in limine that the State filed, Your Honor.
THE COURT: Motion in limine related to?
ATTY. SERAFINI: Self-serving hearsay.
THE COURT: Why would any self-serving statements made – made by Mr. Collymore be admissible, under what exception to the hearsay rule?

Attorney O'Brien?

ATTY. O'BRIEN: I guess the question is, is it self-serving just to essentially admit that you were there but that you didn't do anything?
[21] THE COURT: Well, that's a denial –
ATTY. O'BRIEN: That you –
THE COURT: - isn't it?
ATTY. O'BRIEN: - that you can guarantee that – his – his statement is that he can guarantee that he didn't shoot that boy.
THE COURT: No, that's self-serving. Unless you can

point out an exception under Section 8 of the *Code*, which is the hearsay section, it's – it's a statement by a party not being offered against the party for the truth of its content, therefore it's hearsay under Article 8. Unless you can point out to me an exception that would apply it would not be admissible under our rules.

ATTY. O'BRIEN: Your Honor, I think in the context of the interview – this is being done by, I believe, Slavin and Tirado –

THE COURT: Counsel –

ATTY. SERAFINI: He's looking –

THE COURT: - I'm asking, please if there are going to be what would be defined as self-serving statements – let's take this one step at a time, so we have the record. Would you – are there – will they be – being offered for the truth of their content?

ATTY. O'BRIEN: Yes. Yes.

THE COURT: Okay. Therefore, would you agree that **[22]** they are hearsay?

ATTY. O'BRIEN: Well, it's – it's a defendant, so it's an admission in a sense.

THE COURT: Is it being offered against the party?

ATTY. O'BRIEN: Yes.

THE COURT: How?

ATTY. O'BRIEN: Against the State?

THE COURT: No.

ATTY. O'BRIEN: Oh.

THE COURT: Against Mister –

ATTY. O'BRIEN: - well it – it's - it's nothing offered against, it's part of his defense –

THE COURT: But what's –

ATTY. O'BRIEN: - that he – he –

THE COURT: - the exception to the hearsay rule, if it's offered for the truth, it's hearsay, it would then have to fall under an exception to the hearsay rules, the rules, so unless you can point out to me an exception, it's inadmissible hearsay.

ATTY. O'BRIEN: I can't.

THE COURT: Okay.

ATTY. O'BRIEN: I can't give you one.

THE COURT: Then it's – then if it's offered for the truth it's under our rules, hearsay, if there's no exception, it's not admissible. Okay.

[23] ATTY. O'BRIEN: One – one second, Your Honor, my client has something.

ATTY. SERAFINI: So that – is the motion in limine granted, Your Honor?

THE COURT: I need to hear the questions. Basically, if it's offered it's – unless there's an exception it's hearsay, it's not admissible. So I would –

ATTY. SERAFINI: So – well, so –

THE COURT: - assume Attorney O'Brien would follow that –

ATTY. SERAFINI: - what I –

THE COURT: - guideline.

ATTY. SERAFINI: - what I'm seeking is to have – to prevent counsel from asking the questions that would be eliciting that information, that's –

THE COURT: Well, I –

ATTY. SERAFINI: - what I'm asking in -

THE COURT: - I think under the -

ATTY. SERAFINI: - the motion in limine.

THE COURT: - protocols of this court, which counsel has had it is not proper for an attorney to offer evidence that

they know is inadmissible. I forget what number that is but that's in there. Okay.

ATTY. SERAFINI: So is the Court deferring the motion in limine or –

[24] THE COURT: Well, I'm assuming, Attorney O'Brien, you're not gonna ask questions that might elicit responses that would not be admissible testimony under our rules. Is that a fair comment?

ATTY. O'BRIEN: Yes, it is. Your Honor, in terms of my questioning of Slavin and/or Tirado it will have to do with the interview of my client and what position –

THE COURT: Counsel, I don't mean to interrupt, right now let's take care of Mr. Bugg.

ATTY. O'BRIEN: Okay.

THE COURT: Let's do that first. Okay. Let's bring Mr. Bugg up, bring him out. Can we get a chair set up for –

Counsel, where do you want to be – do you want to be in there, right there?

ATTY. HUTCHINSON: Yes.

THE COURT: All right. Can you get a chair in there, please? Okay.

ATTY. O'BRIEN: Your Honor, I have a request that Mr. Bugg be allowed to hear the phone conversations that were played yesterday, prior to having the jury come in, so that when I ask him about those conversations he'll have a frame of reference.

THE COURT: Well, it's – those phone conversations are in evidence – do – is there a way to play – can they – as you ask the questions, you can [25] play it because it's evidence, it can be made known to the witness. Do we have it set up to – to play?

ATTY. THERKILDSEN: The - I believe the computer

sound bar is set up, as long as counsel intended on doing this himself, I'm not going to do it for him.

It is – it is set up.

THE COURT: All right. Do we have a connection to the computer – to a computer?

ATTY. THERKILDSEN: This computer, he can use the State's computer.

THE COURT: All right. Is the disk – disk would be plaintiff's – State's, I'm sorry – 1 94, I believe. Does that sound right?

Linda, is that the disk with the calls from Mr. Bugg?

(The Court conferred with the clerk.)

THE COURT: Yes, bring him out.

(The Court conferred with the clerk.)

THE COURT: Mr. Bugg, would you come up here, please?

Thank you. All right. Can we remove the hand restraints first?

Okay. Mr. Bugg, you're still under oath, you were sworn in before.

[26] THE WITNESS: Yeah.

THE COURT: There is an issue as to whether or not the immunity that the State gave you when you were here before applies to your testimony now, because now you're being called by the defendant, okay, so what you should do – and – and that issue, whether or not the immunity attaches it's unclear, the – the law doesn't clearly set that out - so what you should do is be guided by what your attorney advises you as to answering any of the questions. Okay. Is that – is that clear?

THE WITNESS: Yes.

THE COURT: Attorney Hutchinson, is that –

ATTY. HUTCHINSON: Yes, Your Honor.

THE COURT: Okay. Let's bring –

ATTY. SERAFINI: I - before –

THE COURT: Yes. Please.

ATTY. SERAFINI: - that starts, Judge, I would just like to advise Mr. Bugg that the State is not giving him immunity for any testimony as a witness in the defense case and notwithstanding the Court's position it is the State's that he is not being given test – he is not being given immunity for his testimony at this point in time.

So –

THE COURT: All right. Well –

ATTY. SERAFINI: - I just want –

[27] THE COURT: - I want to be sure –

ATTY. SERAFINI: - that to be clear to the

THE COURT: - I want to be sure this is clear for the record. I believe what I said to Mr. Bugg is that the law is unclear as to whether or not the immunity he was given by the State relates to his testimony as a defense witness. That's what I told him. I want to be sure that, that's clear for –

ATTY. SERAFINI: Well, as I –

THE COURT: - the record.

ATTY. SERAFINI: - indicated, Judge, it's the State's position that when you look at State versus Reese and State versus Girard and read those in conjunction with the statute that the immunity can only be given by the State, the Court has no authority to – to give any immunity to a witness –

THE COURT: I don't –

ATTY. SERAFINI: - and his –

THE COURT: - believe that – okay, I want – I -

ATTY. SERAFINI: - his testimony – May I –

THE COURT: Go ahead.
ATTY. SERAFINI: - continue?
THE COURT: No.
ATTY. SERAFINI: His testimony concluded when he was called as a defense witness, he was cross-examined, and if the state had attempted to [28] withdraw the immunity before he was cross-examined I would agree with the Court that, that would be improper but because his testimony concluded and he was no longer – he is no longer being called as a prosecution witness, he doesn't have immunity from the State for anything that he – that he testifies to at this point on.
THE COURT: All right. So again, Mr. Bugg, you should be guided by what your attorney tells you. Okay.
THE WITNESS: Yup.
THE COURT: All right. Let's bring the panel out.
ATTY. O'BRIEN: Your Honor, I would – I would want the jury -
THE COURT: Hold on one second.
ATTY. O'BRIEN: - I would want the jury to know that he's not being given immunity by the State –
THE COURT: Under what –
ATTY. O'BRIEN: - for his testimony -
THE COURT: - under what –
ATTY. O'BRIEN: - that's why we have Vicki Hutchinson-
THE COURT: - under –
ATTY. O'BRIEN: - sitting in the –
THE COURT: All –
ATTY. O'BRIEN: - box.
[29] THE COURT: - I'm going to tell the jury that Mr. Bugg is sitting next to his attorney and that any questions that the attorney feels should not be answered

by Mr. Bugg the attorney will so advise. That's all I'm going to say. I'm not going to say anything more than that. Okay.

ATTY. SERAFINI: Judge, before you get the jury I just wanted to indicate to the Court that – and I had asked in chambers for an offer of proof because I'm now gonna cite to – to State versus Iverson which is at *48 Conn. App. 1 68*, it's a 1998 case. And in that case the Court said that it is widely held that it is improper to permit a witness to claim a testimonial privilege in front of the jury where the witness' intention not to testify is known beforehand. And then there's a long list of cases cited starting with United States versus Chapman, which is a 11 Circuit case from 1989.

THE COURT: Well, counsel that may be true but I don't know what questions, if any, Mr. Bugg is going to be advised to claim his 5th Amendment to.

ATTY. SERAFINI: And that's – that's why I asked for an offer of proof. Because counsel - his counsel has indicated that she is advising him to do that, so that's why if that is his intention that should be done beforehand.

THE COURT: Bring the panel out.

[30] (The jury panel entered the courtroom.)

THE COURT: Okay. I ask counsel please stipulate to the presence of all the jurors?

ATTY. SERAFINI: Yes, Your Honor.

ATTY. O'BRIEN: Yes, Your Honor.

THE COURT: Ladies and gentlemen, the next witness for the defense is a Mr. Bugg, Sean Bugg, he testified previously in this case, so he's already been sworn in. He is accompanied today by his attorney, Attorney Hutchinson and she will advise Mr. Bugg as to questions that he may not choose to answer based on his 5th

Amendment privileges.

Attorney O'Brien. Let's go.

ATTY. O'BRIEN: Thank you, Your Honor.

[31] **R A Y S H A U N B U G G, [In presence of jury]**

Waterbury, Connecticut having been previously sworn, resumed the stand, was examined and testified as follows:

ATTY. O'BRIEN: I'd like to play those recordings from the jail, if I could get some assistance.

ATTY. THERKILDSEN: No, I've already – I've already discussed this before the jury came out that I'm not gonna assist in the defense, it's not my role as a prosecutor.

ATTY. O'BRIEN: I'm not asking for assist in the defense, I'm asking – he has the recordings on his computer. I have – I don't have the capacity to play those, since I don't have a computer.

ATTY. THERKILDSEN: If I play the wrong one, hit the wrong button, it looks like it's intentional. I don't want to be in that situation, Your Honor. He's had these tapes for months, for weeks.

ATTY. O'BRIEN: I got the recording the –

THE COURT: Right.

ATTY. O'BRIEN: - other day, Your Honor.

THE COURT: We need to – State's 195. Do we have that, Linda?

All right. Attorney O'Brien, State's 1 95 is right there.¶ One 94. I'm sorry, my apologies, it's 1 94. [32] Let's load it up and play it.¶Attorney Therkildsen, what I'm going to ask you to do is just start the disk.

ATTY. THERKILDSEN: It takes a minute to come up, I just explained that to Attorney O'Brien.

THE COURT: Just start it.

ATTY. THERKILDSEN: I have no problem getting him going, Your Honor, I'm just –

THE COURT: Fine. Then let's start it and see what happens. See where we go from there.

(The recording played as follows:)

This is Global Tel Link this call originates from a Connecticut Department of Corrections

Facility – this is Global Tel Link this call originates at the Connecticut Department of Corrections Facility and may be recorded or monitored.

I have a collect call from, Bugg, an inmate at MacDougall Correctional Institution.

MR. BUGG: The nigga', right, he say some spray he'll take it, you heard?

MR. BUGG'S SISTER: Say what?

MR. BUGG: Some – some - some kitty, he'll take it, you heard.

MR. BUGG'S SISTER: Some kitty, he'll take it?

MR. BUGG: Yeah. I'm taking to what's her name, he said some kitty, he'll take that shit.

[33] Know what I'm talking about?

MR. BUGG'S SISTER: Oh, he'll take the charge, the whole charge?

MR. BUGG: Yeah, shut-up, dummie.

MR. BUGG'S SISTER: Oh.

MR. BUGG: Yeah.

MR. BUGG'S SISTER: What the fuck he want?

MR. BUGG: I don't know, Monie (phonetic spelling), I'm trying to talk to him that's why – find out – find out –

MR. BUGG'S SISTER: Well, I tell – if I find his info I could write to him –

MR. BUGG: Yeah, but don't – don't put it in your name –

MR. BUGG'S SISTER: Mm-hmm.

MR. BUGG: - and don't say no wild shit, just ask him, like, saying what's good and - and all that shit, he says get everything - 'cause I'm like, yo, (indiscernible) he's like, no, I'm fucked up, like, so he ain't gonna have a – you know, what I'm saying, like, you know I need to – I need out of this shit, you follow me?

MR. BUGG'S SISTER: Un-huh.

MR. BUGG: He like, yeah, I know, he like – he's like, you should of never said that, you should have never told them they could drop off this shit. I'm like, yo, but – my back against the wall type shit, [34] like, I'll try to help your boy, I'm trying to help the other nigga' out, so he's like fuck it – you should have looked out for yourself. I'm like, you know, I'm saying to you man – I told him I'm gonna get out of this shit. And he's like, just get out of it, let them do it to everybody, see what I'm saying. So I put everything out and if I give him some bread he's gonna look out for me and he said yeah. So –

MR. BUGG'S SISTER: Yeah, I'll tell (indiscernible) when he calls.

MR. BUGG: But we not – we not gonna get that shit to him right away, we gotta wait, wait 'til –

MR. BUGG'S SISTER: Yeah. Yeah, we gonna see what's gonna happen and then whatever happens he gonna get one for –

MR. BUGG: When I start trial, I go – I go for the hearing – oh, yeah, you – you see the old girl with the red hair? Don't say her name but you know who I'm talking about?

MR. BUGG'S SISTER: I don't know who the fuck you talking about.

MR. BUGG: What a – with the nasty dreds, her –

MR. BUGG'S SISTER: Oh, no, I haven't seen that bitch,

why?
MR. BUGG: 'Cause I need – I need her to – come through too, come through in a clutch.
MR. BUGG'S SISTER: Like what you need, like –
[35] MR. BUGG: The – the – the – to help me out, she needs to get up on the stand.
(The recording stopped here.)
ATTY. SERAFINI: Could we just have on the record, which call that was?
ATTY. O'BRIEN: That was the first one on this disk, Your Honor.
THE COURT: For the record I believe that is the call dated 12-2-11, call time 20 hours 35 minutes. The recorded portion is 2 minutes and 14 seconds into that call, through 4 minutes and 26 seconds for that call.
ATTY. O'BRIEN: That's correct, Your Honor.
THE COURT: All right. Go ahead.
DIRECT EXAMIANTION BY ATTY. O'BRIEN:

Q Now, Mr. Bugg, you were speaking on that phone call. Correct?

A Yes.

Q Could you explain what you were – you were saying?

A To my – I was telling my sister pretty much that – how I put this – 'cause she was worried that I was gonna get like, 60 or 70 years, so I was just telling her, like, yo, everything gonna be all right and I might have blew it out of proportion a little.

Q So when you said, kitty, what were you referring to?

A I was talking about money but I wasn't gonna – I was just saying that so she didn't worry as much as she

was worrying.

[36] Q Okay. And when you're saying – you – you – referred to Vance Wilson?

A Yes.

Q And him - him taking the charge?

A Well, telling the truth.

Q Telling the truth.

A Yes.

Q That he did the shooting.

A That –

ATTY. SERAFINI: I'm gonna object to the leading questions, this is direct –

THE COURT: They're leading.

ATTY. SERAFINI: - exam –

BY ATTY. O'BRIEN:

Q Well, what – what do you mean by –

A Telling the –

Q - taking the charge?

A - truth on what happened, period. I wasn't, like, he just – I felt like he didn't tell the truth, so I just wanted him to tell the truth.

THE COURT: Is this the second call, Attorney O'Brien?

ATTY. O'BRIEN: Yes, Your Honor.

This is call 12 2 11 at 20:35, which would be 8:35 in the evening, 7 06 through 9 10 in

THE COURT: Okay.

[37] ATTY. O'BRIEN: - the length.

(The recording plays as follows:)

MR. BUGG'S SISTER: What kind of jail was what's his name in?

MR. BUGG: Who?

MR. BUGG'S SISTER: Vance.

MR. BUGG: Vance.

MR. BUGG'S SISTER: Huh?

MR. BUGG: He's – the other nigga?

MR. BUGG'S SISTER: Yeah, what kind of jail he in where they get to wear regular clothes?

MR. BUGG: Oh, no, he just came from down south.

MR. BUGG'S SISTER: Nigga' he was in jail down there.

MR. BUGG: Yeah, but they – they just gave him some clothes just to transfer him, like, they don't – they don't give – I guess the clothes that he got nabbed in probably. They took his – they took his dreds off, everything.

MR. BUGG'S SISTER: Oh, wow, they –

MR. BUGG: Yo, that – that nigga' was laughing, yo (indiscernible) that nigga' was wild in - I'm like – I'm like, you – how much time they trying to give you? I'm like 30. How much they trying to give Stacks? I'm like 40. He said, dam, they gonna try to hang me. He started laughing. I'm looking at this nigga' like, oh, you don't give a fuck. [38] This nigga' crazy.

MR. BUGG'S SISTER: Is that nigga' retarded, he – he probably – he probably didn't got it all and he can take some fucking – they can have him doing some type of psycho shit, like –

MR. BUGG: That nigga' weird as fuck, that nigga' was laughing and he shook. I'm –

MR. BUGG'S SISTER: I don't think so –

MR. BUGG: I mean –

MR. BUGG'S SISTER: - the nigga' was built for that – they think they can go down south doing shit like that, get away with it, come up here and do that shit, you don't do that. You don't do that.

MR. BUGG: I told that nigga', I'm – I told that nigga', I'm gonna take care of him – hold him down like – yo, just be easy, keep your head up, I'm not gonna hold you down but-

MR. BUGG'S SISTER: Exactly you got to tell him that until you got the info, that's jive, that's dumb shit, but if he willing to help you out, boy, you got to do what you got to do, he willing to take everything, you got to do what you got to do.

MR. BUGG: That's what I said talk to your brother.

MR. BUGG'S SISTER: And he - and he help you out you, nigga', you gotta help him out –

MR. BUGG: He ain't even helping, he's telling [39] the truth, nigga'.

MR. BUGG'S SISTER: Well, yeah, but actually he's taking – he could be a grimy-ass nigga' and lie, like –

MR. BUGG: Yeah, you right.

MR. BUGG'S SISTER: You feel me?

MR. BUGG: Hell, yeah.

MR. BUGG'S SISTER: So you got help him out, too, like.

MR. BUGG: That's what I said, he got to talk to –

MR. BUGG'S SISTER: Yeah.

MR. BUGG: - you know what I'm saying, make sure he's on the same page, you know what I mean?

(The recording stopped here.)

BY ATTY. O'BRIEN:

Q You were referring to Vance Wilson?

A Yes.

Q Can you explain what was said during that conversation?

A It's pretty much the same thing, like, I didn't – at the time I didn't read – I didn't have his statement, so I

didn't – I had it, but I didn't read it, so I – I wasn't sure what he was saying. And I was saying that he should just tell the truth instead of just – just trying to cover his own self, like saying – tell what really happened.

Q Okay. You say you had this statement, so you knew [40] what he was gonna say –

A Yeah, but I wasn't –

Q - it was in his statement.

A - I wasn't sure if he was gonna get a deal or what – how he was gonna go about his case.

Q So what you're saying is that you had his statement, you read his –

ATTY. SERAFINI: Objection to the leading questions.

THE COURT: It's leading, counsel.

ATTY. O'BRIEN: Okay.

THE COURT: Sustained.

BY ATTY. O'BRIEN:

Q You – you said you had his statement.

A Yes.

Q Did you read it, so you – you knew what he was gonna say.

A Yes.

Q So were you telling – what were you telling him to do?

A To tell the truth.

Q And that's not what's in his statement. Correct?

A No.

Q And you said something about hold him down, what – what does that mean?

A About the same thing with the – the money thing. It was – I was just saying that so my sister didn't

worry as [41] much about the time that I was getting.

Q But you wanted him to tell the truth.

A Yes.

Q And – and with respect to the other phone call, you mentioned somebody with a red – red dregs I believe it was, who was that?

A Sade.

Q And you indicated that you wanted her to tell the truth?

A Yes.

ATTY. O'BRIEN: This is the third one, Your Honor, it's 12 2 at 21:07 through – and it's approximately 20 – 20 seconds long.

(The recording played as follows:)

This is Global Tel Link, this call originates from a Connecticut Department of Corrections facility and may be recorded or monitored. I have a collect call from, Bugg, an inmate at MacDougall Correctional Institution.

MR. BUGG: Yeah, well, and I seen this nigga'.

A VOICE: Who?

MR. BUGG'S SISTER: The other nigga'.

MR. BUGG: Yeah, know what I mean. He told me that Vance get that nigga' some kitty and everything's gonna be good. You feel me?

(The recording stopped here.)

[42] BY ATTY. O'BRIEN:

Q Mr. Bugg –

A Yes.

Q - interpret that conversation.

A It's the same thing as the other two about some money or whatever. And I was just saying that so my

sister didn't worry as much.

Q So you're telling your sister that you get some kitty –

ATTY. SERAFINI: Objection to the leading –

THE COURT: It's leading, counsel.

ATTY. O'BRIEN: All right.

THE COURT: Sustained.

BY ATTY. O'BRIEN:

Q Can you explain it any further, in terms of how that's gonna help – help your sister?

A Well, to tell her that it's kind of – well, it's not hard to explain, but I don't see what you're trying to tell me to do. But the only thing I could explain is that I was just telling her that we was gonna – well, yeah, I was gonna give him some money but I really wasn't, I was just saying that, so she didn't worry as much and she didn't think that I was gonna be in jail, like, for 60 years or whatever.

ATTY. O'BRIEN: This is the fourth one, Your Honor, it's 2 1 12 at 19 28 and it's approximately - 12 seconds, maybe?

(The recording plays as follows:)

[43] This is Global Tel – this call originates from a Connecticut Department of Corrections facility and may be recorded or monitored. I have a collect call from, Bugg, an inmate at MacDougall Correctional Institution.

MR. BUGG: If this nigga' comes to court and testify then everything should be straight. I got to try to get in touch with that dumb-ass bitch Sade, too, because she gotta get up and testify too and tell the fucking truth instead of always fucking lying all the time.

(The recording stopped here.)

BY ATTY. O'BRIEN:

Q Mr. Bugg, interpret that conversation, tell us about that conversation.

A I was just pretty much trying to tell Sade to come to court, to get in touch with her, so she could come and tell the truth about what happened.

ATTY. O'BRIEN: This is the fifth call, Your Honor, it's 2 14 12 at 14:05, which would be 2:05 in the afternoon. It's approximately – I think it's – this is, like, a half – half a minute, 30 seconds.

(The recording plays as follows:)

This is Global Tel Link, this call originates from a Connecticut Department of Corrections facility and may be recorded or monitored. I have a collect [44] call from – an inmate at Garner Correctional Institution.

A VOICE: I don't even see him around, nigga', I seen Foote around yesterday looking all weird and shit.

MR. BUGG: You was with Foote, bro, what's the fuck are you doing with that nigga', bro?

A VOICE: I didn't say I was with him, I said I seen him, nigga'.

MR. BUGG: Oh, I thought you said you was with him.

A VOICE: Hell, no, nigga' he fucking (indiscernible).

MR. BUGG: Yo, I'm about – I'm about to get a copy of the statements too and send them shit home.

A VOICE: All right. All right. Yeah.

MR. BUGG: Nigga's gotta post some shit up on the lamp – the street lamps – I mean, the street light.

(The recording stopped here.)

BY ATTY. O'BRIEN:

Q Mr. Bugg, can you explain that call?

A I was saying that just to get him - instead of lying to show him that if you gonna lie, you might as well tell the truth, point blank, period, just tell the truth.

Q Now, what was your relationship with Mr. Foote, Marquise Foote, back –

[45] A He's my –

Q - in January of 2010?

A We wasn't cool.

Q Well, explain that, why –

A Well –

Q - weren't you cool?

A - 'cause he stole from me.

Q He stole from you?

A Yes.

Q He stole what?

A I can't –

I plead the fifth on that.

Q Did he steal money?

ATTY. SERAFINI: Object. No -

THE COURT: Counsel –

ATTY. SERAFINI: Objection.

THE COURT: Counsel, he's invoked his privilege, no further questioning in that area is permissible.

ATTY. O'BRIEN: All right.

BY ATTY. O'BRIEN:

Q Did he – other than that time, was there another time that he stole?

A Yes.

Q And what – what did he steal?

A I can't answer that. Plead the fifth on that.

ATTY. SERAFINI: I'm gonna object. Can we have a sidebar?

[46] (A sidebar occurred here.)

THE COURT: Let's continue.

BY ATTY. O'BRIEN:

Q Now, Mr. Bugg, did you have a car that was – was crashed?

A Yes.

Q And did Mr. Foote do –

ATTY. SERAFINI: Objection –

ATTY. O'BRIEN: - anything to that car?

ATTY. SERAFINI: - to the leading questions.

THE COURT: Sustained.

BY ATTY. O'BRIEN:

Q What – what happened with that car?

ATTY. SERAFINI: Objection. What's the relevance?

THE COURT: What is the relevance, counsel?

ATTY. O'BRIEN: The relevance is to what Mr. Foote did with the car.

ATTY. SERAFINI: What –

THE COURT: The objection is sustained. It's not relevant to this proceeding. Sustained.

ATTY. O'BRIEN: Your Honor, I submit that it is because I –

THE COURT: Counsel, I've ruled. Please move on to the next question.

ATTY. O'BRIEN: Did –

THE COURT: I don't want further argument. [47] Please continue.

BY ATTY. O'BRIEN:

Q Did he steal anything?

ATTY. SERAFINI: Objection.

THE COURT: All right. Ladies and gentlemen, step out for just a second, please. ¶ Just in the hallway, Linda.

(The jury exited the courtroom.)

THE COURT: Attorney O'Brien, the next question I hear that I determine to be totally inappropriate, I will proceed accordingly. Do you understand?

ATTY. O'BRIEN: Yes, I do, Your Honor. However, I had – I think I should –

THE COURT: Counsel, that is the end of the discussion. Bring the panel back in. Don't go there.

ATTY. O'BRIEN: Your Honor, just if –

THE COURT: Go ahead.

ATTY. O'BRIEN: - if I might be heard on this on the record? This does not implicate his 5th Amendment right. I think –

THE COURT: Counsel –

ATTY. O'BRIEN: - I don't know if his lawyer knows that.

THE COURT: - let me – let me – let me interrupt. Extrinsic evidence, with respect to [48] another witness, is not admissible under our *Code of Evidence*. These questions, in my opinion, relate to extrinsic evidence about another party, it's not admissible, therefore I don't want the questions asked, do you understand?

ATTY. O'BRIEN: Yes, I understand, but I want to lay the record. This witness had – is supposedly the witness that told Marquise Foote all of the information about what occurred on January 18th, 2010 –

THE COURT: Then call –

ATTY. O'BRIEN: - while – while they're driving around smoking a joint.

THE COURT: You can ask Mr. Foote those questions.

This is extrinsic evidence, it's not permissible under the rules. Am I clear?

ATTY. O'BRIEN: Yes.

THE COURT: Bring the panel back in.

(The jury panel reentered the courtroom.)

THE COURT: Okay. Everybody's back, let's continue with the questioning.¶Is this Number 6 now, counsel, please?

ATTY. O'BRIEN: Yes.

THE COURT: Thank you.

ATTY. O'BRIEN: I'm sorry.

(The recording played as follows:)

MR. BUGG: Hey, yo, bro, I'm talking – I seen this nigga' the other day, like, [49] this nigga says some old rinky (indiscernible) shit, bro.

A VOICE: Who.

MR. BUGG: My mother fucking – the nigga' that's with Marquise (phonetic spelling) and shit.

A VOICE: Who?

MR. BUGG: The nigga' – the nigga' – yeah, he says some wild stupid down south type shit – like, what.

A VOICE: What he say?

MR. BUGG: You know he says shit like he ain't going down alone. What.

A VOICE: The one - the one with the dreds?

MR. BUGG: Yeah, but I'm like, nigga', you on your own, nigga' you not taking all of us down, nigga', I don't give a fuck what you talking about buddy, you's done.

A VOICE: You only got a minute left you better hurry up.

MR. BUGG: Yeah.

A VOICE: Yo, you a funny guy -

MR. BUGG: I'm on a call – call right back -
A VOICE: My shit – my shit gonna die, I'll call later.
MR. BUGG: Yeah, but fuck it, though. I'm like – I'm like, what you meant by that, he like, I'm not going down. I said, my nigga', you – you told on [50] yourself, my nigga', like Floatey (phonetic spelling).

(The recording stopped here.)

BY ATTY. O'BRIEN:

Q Mr. Bugg, can you tell us about that conversation?

A Well, Vance pretty much was trying to bring everybody down with him and I was – well, when I had seen him I was, like, yo, you might as well just tell the truth instead of trying to bring everybody else down, because you – did some dumb shit. Excuse me.

Q And your understanding of the truth was what?

A Well, from what I know of - I didn't see it but he – I guess did it and I felt that he was trying to bring everybody else down and say that something else totally different happened, just to save his self.

Q All right.

ATTY. O'BRIEN: We're on 7 Your Honor. It's 2 14 12, starting at 7:59, it's approximately 24 seconds.

(The recording played as follows:)

This is Global – Tel Link. This call originates from a Connecticut Department of Corrections Facility and may be recorded or monitored. I have a collect call from – an inmate at Garner Correctional Institution.

MR. BUGG: I mean, because I can't pinpoint – I can't – I can't – and my statement don't say that, [51] that I said who did what, who did this, all I said was somebody told me this and somebody told me that, that's not – that's not

enough to convict somebody or – the only thing that, that really matters that they can - Vince he said everything like the (indiscernible) –

A VOICE: Yeah.

MR. BUGG: I think he done told on his dam self he's dumbest fuck.

(The recording stopped here.)

BY ATTY. O'BRIEN:

Q Mr. Bugg, can you interpret that conversation, what were you – what were you meaning to say in that conversation?

A Well, I was talking to my mom and I was saying that, like, he told on his self, but in a way he tried to bring everybody with him, like, I guess he felt that he wasn't making not – or making it out of it, so he felt like it was only right to just bring everybody down with him.

Q Now, your – you received a 25-year sentence. Correct?

A Yes.

Q Now, are you testifying the way you've testified because you want to –

ATTY. SERAFINI: Objection –

ATTY. O'BRIEN: - get back at the State?

ATTY. SERAFINI: - to the leading.

[52] THE COURT: It's lead – counsel, it's leading. Sustained.

BY ATTY. O'BRIEN:

Q Do you have any prejudice against the State?

A No.

Q So you don't hold the State responsible for your – your getting a 25-year sentence?

A I hold myself responsible.

Q For – for what – why is that?

A Because I was – I copped out to the time, they didn't give – well, they gave it to me but I took the time.

Q And why did you cop out?

A Because I was in a hole, I put myself in a hole and I didn't feel like going to trial because I wasn't sure how everything was gonna work out.

Q And what do you mean how everything was gonna work out -

A I didn't –

Q - going to trial?

A - I felt that I was gonna get more time, so I just took the 25 'cause I felt that it was . . .

Q And your role that night – well, you were just driving the car. Correct?

A Yes.

Q Did you know that – that –

ATTY. O'BRIEN: Well, withdrawn.

BY ATTY. O'BRIEN:

Q What was your understanding as to what was gonna happen when they got out of the car?

A Say that again.

[53] Q What was your understanding as to what was gonna happen when they got out of the car?

A I thought they was going to get some weed.

ATTY. O'BRIEN: May I have a moment, Your Honor?

THE COURT: Please.

BY ATTY. O'BRIEN:

Q Now, you were in the car at the time that you heard shots. Correct?

ATTY. SERAFINI: Objection to the leading questions.

THE COURT: Counsel, it's leading. You can't lead the witness, it's your witness, you can't lead him.
ATTY. O'BRIEN: Well –
BY ATTY. O'BRIEN:
Q After you dropped him off where did you go, after they got out of the car to buy weed, where –
A I –
Q - where did you go?
ATTY. HUTCHINSON: May I just have a moment?
THE COURT: Please.
(Counsel and the witness conferred here.)
THE WITNESS: I plead the fifth on that.
ATTY. O'BRIEN: I'm sorry?
[54] THE WITNESS: I plead the fifth on that.
BY ATTY. O'BRIEN:
Q Do you know where the shooting took place?
A No.
Q You don't. And why is that?
A 'Cause I was in a car.
Q And where was the car at that point?
A Plead the fifth on that.
(Counsel conferred with the clerk.)
BY ATTY. O'BRIEN:
Q Mr. Bugg, do you remember being asked by the State about a photograph of the area?
ATTY. SERAFINI: Can we have a when –
THE COURT: We need –
ATTY. SERAFINI: - was this at the trial, at the HPC, we need a date.
ATTY. O'BRIEN: Well, let me – I'll withdraw the question.

BY ATTY. O'BRIEN:

Q Did you put a mark on a photograph between Building 1 and Building 2?

A Yes.

Q Do you remember that? Is that –

A Yes.

Q - a yes?

A Yes.

Q Now, where – were you there when the shots were [55] fired, or were you there - is that where you drove to?

A Plead the fifth.

Q Now, Mr. Bugg, at the probable cause hearing, were you testifying in – for the purpose of getting a deal?

A Yes.

Q So at the probable cause hearing that wasn't the truth. Correct?

ATTY. SERAFINI: Objection to the –

THE COURT: Again –

ATTY. SERAFINI: - leading questions.

THE COURT: - the jury should – it's a leading question, counsel –

ATTY. O'BRIEN: All right.

THE COURT: Sustained.

BY ATTY. O'BRIEN:

Q Was that the truth?

A I plead the fifth.

ATTY. O'BRIEN: Nothing further, Your Honor.

THE COURT: Counsel, do you wish to inquire?

ATTY. SERAFINI: Yes.

CROSS EXAMIANTION BY ATTY. SERAFINI:

Q Mr. Bugg, you didn't get the deal that you had agreed to prior to the probable cause hearing, did you?

A No.

Q And when you just testified that it was your understanding when they got out of – out of the car that they were getting out to get weed that's not what you [56] testified to at the probable cause hearing on August 30th, 2011, is it?

A Plead the fifth.

Q The first conversation that you – that was played for you in which you're talking about giving that nigga' some kitty, he'll take it, you're talking about Vance Wilson. Right?

A Yes.

Q And that conversation you're speaking to your sister. Right?

A Yes.

Q And you indicated in that, that the person that you refer to as old girl with red hair is Sade Stevens or is that Shanika Key?

A Sade.

Q And Shanika Key's your cousin. Right?

A I said Sade.

Q I know, but you testified previously that Shanika Key is your cousin. Right?

ATTY. O'BRIEN: Objection, Your Honor, it's –

THE COURT: Basis?

ATTY. O'BRIEN: - it's outside –

THE COURT: It's outside –

ATTY. O'BRIEN: - the scope.

THE COURT: - the scope. Sustained.

BY ATTY. SERAFINI:

Q And in your statement to your sister you told her [57] – or in your conversation with your sister you told her that you were gonna give the money to Vance Wilson after everything was over, correct, yes –

A Yes.

Q - or no?

A Yes.

Q And in the second call, when you talk about holding that nigga' down you're again referring to Vance Wilson. Correct?

A Yes.

Q And who were you talking to in that second call?

A I believe it was my sister.

Q Your sister?

A Yes.

Q You only have one sister. Right?

A Yes.

Q And in the third call, when you talked about giving that nigga' some kitty and everything will be good, again you're talking about Vance Wilson?

A Yes.

Q Do you recall testifying at this proceeding on February 14th, 2013. You were asked the question about whether or not if I give that nigga' some kitty everything will be good. Do you recall telling that to your sister? This is me asking you the question. Answer: I don't remember. Question: You don't remember? Kitty would be money. Right? Answer: I don't know.

[58] So are you saying that your testimony today, now you know that kitty is money?

A I plead the fifth.

Q And in your fourth phone conversation on

February 1st, 2012 you're talking about getting in touch with Sade and that is Sade Stevens. Correct?

A Yes.

Q And you just testified that you – you would try and get her to come to court, you have a lawyer to – that could do that for you. Correct?

ATTY. O'BRIEN: Objection, Your Honor.

THE COURT: Basis?

ATTY. O'BRIEN: As – as to what the lawyer can do for him.

ATTY. SERAFINI: In getting in touch with a witness that's the question.

THE COURT: No. Overruled. Answer the question if you can.

The question is do you have a –

BY ATTY. SERAFINI:

Q You have a lawyer that could get in touch with a witness for you. Right?

A Yes.

Q You didn't need to get in touch with the witness. Right?

A Yes.

Q In the fifth phone conversation you said you were [59] trying to get copies of the statements and you ended up getting copies of all those statements, didn't you?

A Alford David.

Q I – I don't hear you.

A Alford David.

Q I'm sorry.

THE COURT: Affidavits.

BY ATTY. SERAFINI:

Q You got the affidavits?

A Yeah.

Q Okay. And you got those from your attorney. Right?

A Yes.

Q And you had those with you in jail. Right?

A Yes.

Q And you showed those to other people in jail, didn't you?

A No.

ATTY. O'BRIEN: Objection.

THE COURT: Basis?

ATTY. O'BRIEN: Relevancy.

THE COURT: Sustained. It's outside the scope, it's not relevant. Sustained.

BY ATTY. SERAFINI:

Q In the sixth phone call you're talking about old boy, that's Vance Wilson, isn't it?

A Yes.

Q And in that sixth call and in the seventh call, when [60] you were talking about Mr. Wilson you said something to the effect that he was – told on himself, he was trying to bring everyone down. Correct?

A Yes.

Q But your statement was given – this – the written statement given to the Waterbury Police, was given before Mr. Wilson's statement. Correct?

A Yes.

Q And you told on yourself in that statement. Correct?

A Yes.

Q Now, you testified at the probable cause hearing on August 30th, 2011. Correct?

A Yes.

Q And all of those phone conversations that we heard took place after you testified in the probable cause hearing. Correct?

A I don't remember the actual date.

Q Well, the first three calls that you heard took place on February 2nd – excuse me, on December 2nd, 2011, so that
would be after August of 2011. Correct?

A Yes.

Q And then the next four all took place in February of 2012. So those were all after you had already testified at the probable cause hearing. Correct?

A Yes.

Q And during that time period when those phone [62] conversations were being recorded, you were incarcerated with Mr. Wilson. Correct?

A What you mean by with him?

Q You were incarcerated in the same facility as Mr. Wilson.

A Not all of them.

Q Some of them.

A Yes.

Q I mean, at some point in time you were incarcerated with Vance Wilson in the same correctional facility. Correct?

A Yes.

ATTY. SERAFINI: Could I just have a moment?

BY ATTY. SERAFINI:

Q I show Mr. Bugg what has been marked State's Exhibit 22 and you recognize that as your statement. Correct?

A Yes.

Q And you read that statement back on February 10th, 20 and –

ATTY. O'BRIEN: Your Honor, I'm gonna object.

ATTY. SERAFINI: - 11. Correct?

THE COURT: Basis?

ATTY. O'BRIEN: I don't – I don't see that this being in the scope of –

THE COURT: It's outside the scope. Sustained.

BY ATTY. SERAFINI:

[62] QWell, in the fifth call that you talk about you're referring to Mr. Foote and you talk about the statements of Mr. Foote. Right?

A Yes.

Q You had copies of those. Correct?

A Yes.

Q And you wanted to get those out to your friends so that they would know what Mr. Foote said in his statement.

ATTY. O'BRIEN: Yeah, I'm –

ATTY. SERAFINI: Correct?

ATTY. O'BRIEN: - gonna object. This –

THE COURT: Basis?

ATTY. O'BRIEN: - has already been asked and answered

ATTY. SERAFINI: No, it hasn't.

ATTY. O'BRIEN: - if you referred to that he had the affidavit -

THE COURT: Sustain the objection –
ATTY. O'BRIEN: - which we contained.
THE COURT: - to that question. He said he had an affidavit, he answered that question.
BY ATTY. SERAFINI:

Q Okay. You had an affidavit of Marquise Foote?

A Yes.

Q And when you talk about that, is it like what you have in front of you?

A Yes.

Q Okay. And that's what you wanted to get out to your [63] friends, right, so they would know that Marquise – what he'd given in his statement.

A Yes.

Q That's what you were talking about. Correct?

A Yes.

Q The affidavit for Marquise Foote. Right?

A Yes.

ATTY. SERAFINI: Could I just have a moment?
THE COURT: Please.
BY ATTY. SERAFINI:

Q When you say – when you talk about putting them up on street lights, you mean putting them up on a light post so everybody in the neighborhood could read what Mr. Foote said to the police. Right?

A I was playing.

Q Say what?

A I was playing.

Q I can't hear you.

A Playing.

Q You were playing?

A Yeah.

Q Didn't you want Mr. Foote to come in and say he was coerced into giving that statement?

A I wanted him to tell the truth.

Q Didn't you tell – didn't you at one point in time say you wanted him to come in and say he was coerced, yes or no?

A I just told you I wanted him to tell the truth.

[64] Q Didn't you have a phone conversation on February 14th, 2012 in which you called your mother's number and – this was at 7:59 p.m. phone call and you told her that you needed to talk to Foote –

ATTY. O'BRIEN: Objection, Your Honor, this is way outside the –

THE COURT: It's outside –

ATTY. O'BRIEN: - scope.

THE COURT: - the scope. Sustained.

BY ATTY. SERAFINI:

Q Do you recall –

ATTY. SERAFINI: Well, may I – may we approach, Your Honor?

THE COURT: Counsel, I've ruled. Not –

ATTY. SERAFINI: But –

THE COURT: - on this issue.

ATTY. SERAFINI: May – may we approach?

THE COURT: Okay.

(Sidebar occurred here.)

BY ATTY. SERAFINI:

Q Mr. Bugg, did you ever at any point in time threaten Mr. Foote?

ATTY. O'BRIEN: Objection.

THE COURT: Basis?
ATTY. O'BRIEN: I think that's outside the scope.
ATTY. SERAFINI: It's cross examination -
[65] THE COURT: I'll allow –
ATTY. SERAFINI: - and –
THE COURT: - this question.
THE WITNESS: Plead the fifth.
BY ATTY. SERAFINI:

Q Plead the fifth?

A Yes.

Q And did you ever discuss your testimony with any other person besides your attorney –
ATTY. O'BRIEN: This is –
ATTY. SERAFINI: - in this –
THE COURT: Sustained. It's outside the scope of the direct examination. Sustained.
ATTY. SERAFINI: Well, it goes to bias, Judge, and it goes to –
THE COURT: It's outside the scope. I've ruled. Please continue.
ATTY. SERAFINI: Thank you.
BY ATTY. SERAFINI:

Q You testified that you have no prejudice against the State because you thought you were going to get more time –you didn't feel like going to trial because you thought you were gonna get more time because you were the driver, is that your testimony?

A Yes.

Q And you – and it's your testimony that you have no – you – you feel no prejudice against the State, you weren't [66] upset about the fact that you weren't getting

the deal that you had originally agreed to with the State?

A No.

Q You were happy you were getting 25 years, is that your testimony?

A I'm not gonna go to trial and get more time.

Q But you could have had the opportunity to get less time than the 25. Correct?

A Yes.

Q And that map that you signed for the Waterbury Police

that was on the day you gave your statement. Correct?

A Yes.

ATTY. O'BRIEN: Your Honor, I'm gonna object to – to that –

THE COURT: Counsel, you –

ATTY. O'BRIEN: - sentiment, he –

THE COURT: - you asked about this map.

ATTY. O'BRIEN: No, but in terms he gave a statement, I think that mischaracterizes. He said he signed the statement.

THE COURT: Okay. I think the statement was signed, use that term.

BY ATTY. SERAFINI:

Q I'm showing you State's Exhibit 26, this is the map that you signed – bless you – on February 10th, 2011. Correct?

A Yes.

[67] Q And that was right after – or excuse me, that was before you signed State's Exhibit 22. Correct? You – you signed this first. Right?

A Signed what first, this one here?

Q The map.

A I believe I signed –

ATTY. O'BRIEN: Your Honor –

THE WITNESS: - this one.

ATTY. O'BRIEN: - I'm going to object. I - I think when I asked these questions it – he was pleading the fifth, so, I mean, I think there's – there's a balance – there's a balance here.

ATTY. SERAFINI: I don't think so, Judge.

THE COURT: No, counsel, I disagree. Answer the question if you can.

BY ATTY. SERAFINI:

Q Would it refresh your recollection to look at the – the statement to see whether or not you signed the map first or the statement?

A It's not gonna make a difference. I believe I signed the statement.

Q You think you signed the statement first and then the map?

A Yes.

ATTY. O'BRIEN: Your Honor, I'm going to object because –

ATTY. SERAFINI: Okay.

[68] ATTY. O'BRIEN: - the relevance of the statement doesn't have anything to do with – with what I went into on my direct examination.

THE COURT: There was no discussion of relationship between the statement and the map. Sustained.

BY ATTY. SERAFINI:

Q Okay. So now today you testified you were up there on Manhan Street on January 18th, 2010 to buy weed, but that is not what you told the police on February

10th, 2011. Correct?
ATTY. O'BRIEN: Your Honor, I'm going to object to that.
THE COURT: Basis?
ATTY. O'BRIEN: It's outside the scope.
ATTY. SERAFINI: No, it's –
THE COURT: No, that's not outside the scope.
THE WITNESS: Plead the fifth.
THE COURT: You can answer – All right. It's not outside the scope. The witness has responded.
ATTY. SERAFINI: I've no further questions, Your Honor.
THE COURT: Anything further?
ATTY. O'BRIEN: Yes, Your Honor.
REDIRECT EXAMINATION BY ATTY. O'BRIEN:

Q Now, you were asked a question about you telling on [69] yourself?

A Yes.

Q Why did you tell on yourself?

A Say that again.

Q Why did you supposedly tell on yourself?

A To get a deal. Well –

Q Okay.

A - I didn't really tell on myself, I just agreed to what was written down and I was gonna get a deal in return.

Q Okay. And you signed it.

A Yes.

Q And you expected to have a deal?

ATTY. SERAFINI: Objection, to the leading –
THE COURT: Again –
ATTY. SERAFINI: - questions.
THE COURT: - counsel, you're leading the witness.

Sustained. You can't do that, it's your witness.
BY ATTY. O'BRIEN:

Q Now, after you testified at the HPC, your hearing in probable cause, did you have a deal at that point?

A I still did, yes.

Q Okay. And what point did the deal go off?
ATTY. SERAFINI: Objection. I think this is outside the scope.
THE COURT: Where was the – where was that discussed in the cross exam –
[70] ATTY. O'BRIEN: Well, there was reference to the hearing in probable cause, Your Honor.
THE COURT: No. Sustained. It's outside the scope of the cross examination, the details, you're going into details, that's outside the scope. Sustained.
BY ATTY. O'BRIEN:

Q Now, at the – at the hearing in probable cause –
ATTY. O'BRIEN: I'll withdraw that.
BY ATTY. O'BRIEN:

Q When you say that you took the 25 years because you thought you might get more time –

A Yes.

Q - could you explain that?

A It was – well, that is self-explanatory it – I just didn't want to get more time.

Q Why did you think you were get – getting more time?

A Because that was the offer on the table, it was either that or go to trial.

Q Okay. And you didn't want to go to trial?

A No.

Q Why?

A Because I didn't want to get more time and I already buried myself for agreeing to what was going on and I feel like I put myself in a hole, so I didn't want to go to trial.

[71] Q Okay. But – but that was – you – you signed a statement. Correct?

A Yes.

Q And that would – you signed that statement expecting to get a deal.

A Yes.

Q And that never came through.

A No.

ATTY. O'BRIEN: Nothing further.

RECROSS EXAMINATION BY ATTY. SERAFINI:

Q You signed that statement before there was any deal on the table. Correct?

A No, I was told before I signed the statement that I was gonna get a deal.

Q And who – who told you that?

A I was told by –

ATTY. O'BRIEN: Objection, Your Honor –

THE WITNESS: - Griffin was -

ATTY. O'BRIEN: - that's outside the scope.

ATTY. SERAFINI: Well -

THE COURT: No, counsel, you opened this door. Overruled.

THE WITNESS: I was told by Griffin and Tirado that I was gonna get 5 years.

BY ATTY. SERAFINI:

Q And when was that?

A The day that I signed the statement.

Q So before – was that before you signed the statement [72] or after you signed the statement?

A Before I signed the statement.

Q So before you signed the statement, before the State knows any information at all about who's really involved –

ATTY. O'BRIEN: Objection, Your Honor, I –

ATTY. SERAFINI: - in this case, the –

ATTY. O'BRIEN: - this is – this is –

ATTY. SERAFINI: - State is offering –

ATTY. O'BRIEN: - some –

THE COURT: Well, what –

ATTY. SERAFINI: - you a deal?

ATTY. O'BRIEN: - this is a summation, Your Honor, this is not a question.

ATTY. SERAFINI: No, it is a question.

THE COURT: Sustained. Rephrase the question, please.

BY ATTY. SERAFINI:

Q Before you signed that statement, before the State even knows who's involved in the – in the case –

ATTY. O'BRIEN: Objection.

ATTY. SERAFINI: - whose role –

THE COURT: Counsel –

ATTY. O'BRIEN: All right.

THE COURT: - it's a compound question. Singular questions –

ATTY. SERAFINI: Sure.

THE COURT: - please.

[73] BY ATTY. SERAFINI:

Q You signed that –

THE COURT: Sustained.

BY ATTY. SERAFINI:

Q - statement on February 10th, 2010. Correct?

A Yes.

Q And at that point in time the State did know, as far as –

ATTY. SERAFINI: Withdrawn.

BY ATTY. SERAFINI:

Q At that point in time, you were the first person to give any information regarding what had happened on Manhan Street.

ATTY. O'BRIEN: Objection, Your Honor.

ATTY. SERAFINI: Correct?

THE COURT: Basis?

ATTY. O'BRIEN: He would not know if he's the first person to give a statement.

THE COURT: Sustained.

BY ATTY. SERAFINI:

Q At that point in time the police had no other statements –

ATTY. SERAFINI: Withdrawn.

BY ATTY. SERAFINI:

Q You were not shown any other statements by the police on February 10th, 2010. Correct?

A Yes, I was.

[74] Q Okay. Whose statement were you shown?

A I was showed (sic) Oliphant's statement, Sade's - Stevens statement, I was showed Marquise's statement. A couple of other people, but nobody that I really knew of.

Q And Marquise Foote wasn't up on Manhan Street on January 18th –
ATTY. O'BRIEN: Objection, as to –
ATTY. SERAFINI: - 2010 –
ATTY. O'BRIEN: - whether Marquise –
THE COURT: Sustained.
ATTY. O'BRIEN: - Foote –
THE COURT: That's beyond the scope.
ATTY. SERAFINI: Well, it goes to –
THE COURT: Counsel, I've ruled.
ATTY. SERAFINI: Okay.
THE COURT: Sustained.
BY ATTY. SERAFINI:
Q None of those people were with you on January 18th, 2010, were they?
ATTY. O'BRIEN: Objection, this is –
THE COURT: Basis?
ATTY. O'BRIEN: - outside the scope.
ATTY. SERAFINI: No, it's not –
THE COURT: Now –
ATTY. SERAFINI: - Judge

* * *

**MARCH 5, 2013 PM SESSION 52: T**
**DEFENSE CASE [Excerpts]**

**[Colloquy between Court and Attorney for Co-Defendant Vance Wilson, outside presence of jury]**

[1] The following is an excerpt of the proceedings:)
THE MARSHAL: Court is back in session.
You may be seated.
Good afternoon, Judge.

THE COURT: Good afternoon.

(The defendant entered the courtroom.)

ATTY. CRETELLA: Excuse me, Your Honor?

THE COURT: Yes?

ATTY. CRETELLA: Thank you. It's Don Cretella.

THE COURT: Yes.

ATTY. CRETELLA: I'm here. I represent one of the witnesses, Vance Wilson. I was contacted by defense counsel yesterday to be here at two because Mr. Wilson may be taking the stand. Mr. Wilson, it's anticipated that he will invoke his Fifth Amendment right.

THE COURT: Okay.

ATTY. CRETELLA: All right. And I just didn't know what -- when we were going to get to that point.

THE COURT: Well, let me -- Let me ask a couple of questions. Would he intend to invoke with respect to every question?

ATTY. CRETELLA: Yes.

THE COURT: Even though they may not result in any prosecution, like his name and his birth date and --

ATTY. CRETELLA: I imagine he would answer those [2] questions.

THE COURT: Okay.

ATTY. CRETELLA: I don't think he would answer any quest -- He would invoke his Fifth Amendment right regarding any question involving any criminal activity.

[1] THE COURT: Okay. We may be taking him next because I have -- Hopefully we can take him next --

ATTY. CRETELLA: Okay.

* * *

[3] ATTY. SERAFINI: But essentially what it says, Judge, is that not permitting cross-examination when it

goes directly to the crime charged is a violation [4] of the confrontation and that goes for both the -- the State and the defendant.

So when the defense tries to ask question of a witness and then because the witness is going to invoke their Fifth Amendment privilege the State is no longer able to elicit cross-examination of that -- what they testified to, that -- that testimony should be stricken.

THE COURT: Okay. I guess I'm confused. If the witness is asked a question, was the light green, and the response is that I'm not going to answer under my privileges under the Fifth Amendment, are you saying that the State then should have a right to continue questioning in that area?

ATTY. SERAFINI: If it has to do with -- with -- it's not a collateral issue, then the point being that the State is not being allowed to confront the witness and test the veracity of what they are testifying to --

[3] THE COURT: But if there's no testimony --

ATTY. SERAFINI: -- because they're -- because they're invoking their privilege.

So what I'm saying is if the questions that they're invoking their priv -- privilege on have to do with a matter at issue here, then their testimony should be stricken because the State is not being allowed to confront them because they are invoking [5] their Fifth Amendment privilege. So in other words, the defense can't ask the -- the witness to testify X, Y, and Z. You know, didn't you go up to Manhan Street and this happened and that happened and then when the State wants to -- to confront them and test the truthfulness of that testimony and they invoke their Fifth, we can no longer --

THE COURT: Oh, no. No. I'm sorry. Now, I

understand.

ATTY. SERAFINI: Okay.

THE COURT: Attorney O'Brien?

ATTY. O'BRIEN: Your Honor, I -- I'm baffled by this because the -- I assume she's referring to Mr. Bugg's testimony where he invoked the Fifth.

THE COURT: Mr. Bugg's testimony is done. It's on the record. I'm not going back to that.

ATTY. O'BRIEN: Right. But Mr. Bugg -- I would make the argument that -- and I have made the argument that we were not able to confront him fully --

THE COURT: Counsel --

ATTY. O'BRIEN: -- because of the --

[4] THE COURT: -- let me -- let me --

ATTY. O'BRIEN: -- failure of the State --

THE COURT: I'm going to -- I'm going to -- I'm going to interrupt. Mr. Bugg has testified on direct and has testified on cross and has testified in the defendant's case. As far as I'm concerned, for these [6] proceedings, he's done unless he's called on rebuttal by the State. So I'm not going to go back and revisit Mr. Bugg's testimony. That's done.

ATTY. O'BRIEN: Your Honor, I believe the defendant was prejudiced by the fact that Mr. Bugg invoked his Fifth Amendment in front of the jury which leads to speculation on the part of the jury and the jury's not understanding why when he was testifying before he was fully answering the questions. Now, when he's testifying for the defendant he's not answering these questions, so we haven't had the confrontation opportunity with respect to Mr. Bugg.

THE COURT: Okay. It's noted. I'm not going to bring Mr. Bugg back.

ATTY. SERAFINI: But that is why I would ask with any future --

THE COURT: I agree.

ATTY. SERAFINI: Thank you.

* * *

[13] THE COURT: Linda, would you tell the jury that we're going to be delayed, please?

(The witness, Vance Wilson, entered the courtroom and resumed the witness stand. His attorney, Donald Cretella, was with him in the witness box.)

THE COURT: Mr. Wilson, would you -- would you come up here, sir, please? We're going to take -- take the hand -- hand restraints off.

(The witness conferred with his attorney off the record.)

ATTY. CRETELLA: We're all set.

THE COURT: Okay. Mr. Wilson, the jury's not in [14] here. Let me tell you what we're going to do. The defendant -- The defense counsel is going to ask you some questions. Any question that you don't want to answer based on the advice of your attorney, then just say so. We're not going to have you do that in front of the jury. Any questions that you want to answer, again, based on your attorney's advice and then we'll see whether or not we're going to have the jury come out at all.

THE WITNESS: All right.

THE COURT: All right. Let's proceed.

ATTY. SERAFINI: Before we do that, Judge -- Judge --

THE COURT: Yeah?

ATTY. SERAFINI: -- the State wants to put on the record [12] for Mr. Wilson's benefit that the grant of immunity -- immunity that was given to him -- I don't think either counsel or Mr. Wilson's paying attention at this point, so

I'll just wait until they're done.
THE COURT: Let's wait.
(The witness and Attorney Cretella confer off the record.)
THE COURT: Okay.
ATTY. SERAFINI: The grant of immunity that was given to Mr. Wilson extended only for his testimony in the State's case in chief and it is the State's position that any testimony that he gives at this [15] portion of the proceeding is not covered by that grant of immunity.
THE COURT: Okay. Mr. Wilson, let me just say one more thing. The law is unclear on this point as to whether or not the fact that you got immunity when you were here as a witness for the State, whether that in any way attaches for the entire case. The law is very unclear on that. There are no cases on it, so what I'm going to advise you, just like I did the last witness who was out here, is you should be guided by the advice of your attorney and that's -- that's the way we should proceed.
Attorney O'Brien?
ATTY. O'BRIEN: Just so that I'm clear in terms of what the grant of immunity was when he testified for the State. Was it for perjury for any test -- testimony that he gave?
THE COURT: I don't have --
ATTY. O'BRIEN: I don't -- I don't recall.
[13] ATTY. SERAFINI: No, because -- It wasn't for perjury because, as I've indicated with every witness, the State cannot grant immunity for perjury that has been committed --
THE COURT: That's under the statute.
ATTY. SERAFINI: -- or that is going to be committed.
THE COURT: That's under the statute.
[16] ATTY. SERAFINI: That's in the statute. Right.

THE COURT: Right. That's under the statute.

ATTY. O'BRIEN: Well, what immunity did she grant? He's already pled guilty. He's going to get a 50 year sentence.

ATTY. SERAFINI: Well, it was for a claim of false statement, I believe. I thought that's what the defend -- the witness claimed.

THE COURT: Counsel, ask the questions, please. Attorney Cretella and Mr. Wilson will determine whether or not he's going to respond to the question, so we need to go one question at a time. Go ahead.

ATTY. O'BRIEN: Might I have a moment, Your Honor?

OFFER OF PROOF EXAMINATION OF VANCE WILSON

[17] BY ATTY. O'BRIEN:

Q Mr. Wilson, you testified that the statement that you gave in North Carolina, that was given under duress; is that correct?

ATTY. SERAFINI: I'm going to object, Your Honor. Again, this is direct examination and --

THE COURT: Okay. Well --

ATTY. SERAFINI: -- we don't have a time frame as to – because he's testified at --

THE COURT: All right. Counsel -- Again, Attorney O'Brien, please, time frames, no leading questions. This is your witness.

BY ATTY. O'BRIEN:

Q The statement that you gave on February 22nd, 2011 at two o'clock in the afternoon in Piedmont Correctional Facility, what, if any, promises were made to you at that time?

A Based on the advice of my counsel, I'm going to

invoke my Fifth Amendment right.

Q Isn't it true that you shot that boy?

ATTY. SERAFINI: Objection to the leading questions.

THE COURT: It's leading. Sustained.

BY ATTY. O'BRIEN:

Q Did you or did you not shoot that boy that night?

A Based on the advice of my counsel, I'm going to invoke my Fifth Amendment right.

ATTY. O'BRIEN: Your Honor, I think it's clear he's not going to answer any questions regarding this incident.

THE COURT: Do you have anymore questions of the witness? If that's --

ATTY. O'BRIEN: Well, I could --

THE COURT: If that's the -- If that's the extent of the examination, then I would --

ATTY. O'BRIEN: No, it isn't the extent of the examination.

THE COURT: -- I would not bring the jury out because [18] that would be simply to invoke his Fifth Amendment privilege without any other responses.

BY ATTY. O'BRIEN:

Q Were --

THE COURT: Go ahead.

Q Were you -- Mr. Wilson, were you told by the detective anything with respect to the statement in terms of whether you sign it or not sign it?

A Based on the advice of my counsel, I'm gonna invoke my Fifth Amendment right.

Q Do you remember making a phone call back in June of 2012 to a Karen Atkins?

A Based on the advice of my counsel, I'm going to invoke my Fifth Amendment right.

Q Is it your intention, Mr. Wilson, of not answering any questions regarding this incident?

A Based on the advice of my counsel, I'm going to invoke my Fifth Amendment right.

ATTY. O'BRIEN: Your Honor, he's -- He's giving a Fifth Amendment right regarding not answering questions. I don't see where there's any implication, any jeopardy. He's just telling me what his intentions are.

THE COURT: Attorney Cretella?

ATTY. CRETELLA: No -- No position, Your Honor.

THE COURT: Let me hear the question again.

BY ATTY. O'BRIEN:

[19] Q Is it your intention to not ask -- answer any questions that I pose to you regarding this incident?

THE COURT: I think that can be answered.

A No, I ain't answering no questions.

Q You're not going to answer any questions?

ATTY. O'BRIEN: Your Honor, I think he's clear that he's not answering any question --

Q You're not answering any questions with respect to what occurred on January 18th, 2010 at Diamond Court?

A That's correct.

THE COURT: Attorney Serafini, do you have any questions at all?

ATTY. SERAFINI: No. I --

THE COURT: Okay.

ATTY. O'BRIEN: Your Honor, I would submit that I don't know if he has it -- a Fifth Amendment because his jeopardy -- he's already pled guilty. He's got a deal. His deal is 30 to -- 30 to 50 and I believe that if the State would -- would be forthcoming in this matter, I think they would say that he's going to -- they're going to recommend

50 years. So he's already pled guilty, tried to withdraw his plea, but his -- his fate is sealed.

ATTY. SERAFINI: And the State's position is it's not sealed because there's a -- it's a range. Any perjury that he were to give will affect the sentence he -- he gets on that guilty plea and --

ATTY. CRETELLA: If I -- If I might, Your Honor?

[20] THE COURT: Attorney Cretella?

ATTY. CRETELLA: The -- Mr. Wilson's Fifth Amendment rights are attached until judgment is entered at sentencing. The Supreme Court is pretty clear on that.

THE COURT: Okay. Two things: First of all, under State versus Person, a witness may not be called to the stand in the presence of the jury merely for the purpose of invoking his privilege against self-incrimination.

In State versus -- I'm sorry. This is Martin versus Flanagan, 259 Connecticut 487, pages 497 -- 497, the way authority permits a witness whose conviction has not been finalized on direct appeal to invoke the privilege against self-incrimination and to refuse to testify about the subject matter which formed the basis of his conviction.

At this point, the Court finds that Mr. Wilson's case has not been finalized and that he has not yet been sentenced in this matter. Therefore, he has a right to invoke his Fifth Amendment privilege. Since it's not proper to do that only in front of the jury, I think Mr. Wilson is done.

ATTY. CRETELLA: Thank you, Your Honor.

THE COURT: Thank you.

ATTY. SERAFINI: Judge, can I just have the cites for both -- the two cases that you've cited? I'm [21] sorry. I didn't get it on Martin --

THE COURT: State versus Person, 215 Connecticut 653.

ATTY. O'BRIEN: Your Honor, may I be heard?
THE COURT: Well, let me -- One second. All right. Let me do this for one -- Martin versus Flanagan, 259 Connecticut 487. The discussion is at page 490 --
ATTY. SERAFINI: Seven. I got that.
THE COURT: I'm sorry. 487 -- 497, footnote 4.
ATTY. SERAFINI: Thank you.
ATTY. O'BRIEN: Your Honor, so that I understand this, the State brings the witness in. He testifies fully about the incident, the statement, and then when I call him in he doesn't testify. I'm a little concerned. Is it the grant of immunity of the misdemeanor -- the one year misdemeanor when he's got 50 years hanging over his head that he decided to testify? And if so, was there any deal made with this witness to testify?
THE COURT: Counsel, the only -- the only way I can respond to that question is -- Well, on this peculiar set of circumstances I can find no Connecticut case law as to whether or not immunity granted in a proceeding remains in that proceeding. The only thing that I can find is that the Court cannot immunize anybody for anything and that the [22] State's Attorney is the only authority that can grant immunity.

So the position of the State is that the immunity was limited to Mr. Wilson's testimony as a State's witness and is saying on the record that he is not being immunized with respect to his testimony as a defense witness, so based on the law as it currently is constituted, he has properly, in my view, invoked his Fifth Amendment privilege. I [19] don't know what else I can say. That's --
ATTY. O'BRIEN: Well --
THE COURT: That's the law.
ATTY. O'BRIEN: So that I understand this. The State

brought him on and I would submit -- submit this purposely so that she could introduce his prior statement under Whelan. In terms of a fairness aspect, I should be able to question him about that statement on our case and --

ATTY. SERAFINI: He -- He was allowed to during cross-examination, Judge.

THE COURT: Again, you had a right to cross-examine. There is no case on point that I can find and anyone else who I asked to look can find on this particular issue. The closest thing is the question of testimony at a hearing in probable cause and then testimony at a subsequent trial.

This issue -- I have not been able to find [23] anything. I have checked with several of my colleagues. They've never run into it before.

So as far as I can find it, there's no law, so I'm going with the law as it currently is constituted and the Appellate Court will make any further determination in that matter.

ATTY. O'BRIEN: So the --

THE COURT: I've done what I think is appropriate.

ATTY. O'BRIEN: So the State is -- is saying that they granted immunity for a false statement, which is a one year misdemeanor, when the true purpose was to grant the immunity so that they could get his statement that he allegedly gave in North Carolina in as a Whelan statement.

THE COURT: Counsel, it's not my province to go behind what the State intended or didn't intend to do in their case.

ATTY. O'BRIEN: No, I think it's clear that that's what their intent was.

THE COURT: Well, then I -- I'm not going to comment on

that. I'm just saying that this is the law as I read it. This is an issue that needs, at some point, to be decided by our Appellate Court. Right now there's no law. I'm going with the pieces I have. That's all I can do.

Okay. Anything else of Mr. Wilson?

[24] Okay. Thank you, sir.

(The witness, Vance Wilson, exited the courtroom.)

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**MARCH 6, 2013 AM SESSION 53: T**
**DEFENSE CASE [Excerpt, outside presence of jury]**

[17] THE COURT: I see Attorney Jaumann is here.

Have you had a chance, Attorney Jaumann, to speak with Mr. Oliphant?

ATTY JAUMANN: Yes, Your Honor, I have. Good morning, Your Honor.

THE COURT: Good morning. Can you give us an idea as to whether or not he's going to respond to any of the questions that are asked of him by either the defense or the state?

ATTY JAUMANN: On my advice he is not. Based on the representation that immunity will not be extended to him being called as a defense witness.

THE COURT: Okay, I think we need to make a record here.

I'm sorry, will Mr. Oliphant be your next witness, counsel?

MR. O'BRIEN: Yes, Your Honor.

THE COURT: Okay. Let's bring Mr. Oliphant up.

Linda, again, please tell the jury that we're going to be a little bit longer.

Mr. Oliphant, could you come up here and take the stand,

sir, please.

If we could remove the hand restraints, please.

Mr. Oliphant, first of all, you're still under oath.

Attorney Serafini, does the state have, for the record, any comment?

[18] ATTY SERAFINI: Yes. For the record, Your Honor, it's the state's position that the immunity that was given to Mr. Oliphant when he testified as a prosecution witness in the state's case in chief that ended with his testimony and he has no immunity for anything that goes on today.

THE COURT: Mr. Oliphant, let me –- I'll tell you the same thing. The law is unclear as to whether or not the immunity that you were granted continued during the entire trial. The law is unclear. Therefore, you should be guided. Any responses you make today are by your attorney's advice, so you should follow his advice. The law is unclear in this area.

Based on that, Attorney O'Brien.

DIRECT EXAMINATION BY ATTORNEY O'BRIEN:

Q Mr. Oliphant, you were arrested for drug possession back in 2010, correct?

A Yes, sir.

Q And was a Jamal Waver with you when you were arrested?

ATTY SERAFINI: I'm going to object unless we have a specific date.

ATTY O'BRIEN: This is February 2, 2011.

ATTY SERAFINI: So it wasn't –- he testified that he was arrested for drug possession in 2010.

THE COURT: Is there a legal objection for the record?

ATTY SERAFINI: Yes.

[19] THE COURT: What is it, please?
ATTY SERAFIN: I would like the specificity as to the date.
THE COURT: Sustained. Let's have the exact date, please.
ATTY O'BRIEN: Yes, I'm mistaken about that date, Your Honor.
THE COURT: Okay. Let's have the question again, please.

Q February 2, 2011 you were in custody for a drug possession charge, correct?

A I can't really remember the correct date but it might have been.

Q And do you recall a Jamal Waver being arrested with you?

ATTY SERAFINI: Your Honor, I am going to object to the leading questions. This is direct.
THE COURT: They're leading questions, sustained.

Q Do you know a Jamal Waver?

A I don't know any Jamals.

Q You don't know Jamal Waver?

A Jamel?

Q Jamel Waver.

A I don't know Jamel Waver, no.

Q But you were in custody and you've testified that you were being beaten, correct?

ATTY SERAFINI: Could we have a date? Objection.

[20] Q On February 2, 2011.

A Sir, my lawyer told me to take the Fifth.

Q Is that what you want to do?

A Yes.

Q Now you testified at the trial that you felt guilty that –- you felt guilty about Vance Wilson. Can you explain that?

A I plead the Fifth.

ATTY O'BRIEN: I don't have any further questions, Your Honor.

THE COURT: Any questions?

ATTY SERAFINI: No, Your Honor.

THE COURT: Do you wish to have Mr. Oliphant answer the two questions he did answer in front of the jury?

ATTY O'BRIEN: Taking the Fifth, Your Honor?

THE COURT: Well, no. He answered two questions. The questions that you asked he answered, were you arrested for a drug charge on 2-2-11; he answered that, right?

ATTY JAUMANN: He answered if he was arrested for a drug charge. I don't believe the first question there was a date.

THE COURT: Okay, arrested for a drug charge.

ATTY JAUMANN: The second was if he knew Jamal Waver. The answer was no.

ATTY O'BRIEN: If I might ask one other question?

THE COURT: Sure.

Q Who were you arrested with on February 2, 2011?

ATTY SERAFINI: Objection, relevance.

[21] THE COURT: Overruled.

A Could you ask the question again, please, sir.

Q Who were you arrested with on February 2, 2011?

A I was arrested with a couple of people. I was arrested with a guy named Jamel. I was arrested with a guy named Devante. I was arrested –- it was like six or

seven of us.

Q Is Jamal Waver –-

MR. COLLYMORE: Jamel.

ATTY SERAFINI: Objection to the leading questions once again.

THE COURT: Counsel, it's leading. Sustained.

Q Do you know his last name?

ATTY SERAFINI: Objection. That was asked and answered. He said he didn't.

THE COURT: Overruled.

A No.

THE COURT: All right, doesn't know the last name.

Q How long had you known Jamel?

A I met him through a mutual –-

ATTY SERAFINI: Objection again to the relevance, Judge.

ATTY O'BRIEN: Your Honor, so that the Court knows, I have Jamel Waver downstairs. He's going to testify who was present in the –-

ATTY SERAFINI: I'm going to object that this is done in front of another witness, Judge. That's inappropriate. So he can signal to him what he [22] wants him to say? That's inappropriate.

ATTY O'BRIEN: No, I'm not signaling anything. I just want to establish that he was there at the same time.

THE COURT: What relevance is how long Mr. Oliphant might have known Jamel? What's the relevance of that?

ATTY O'BRIEN: Well that they know each other.

THE COURT: But the answer was –- you can ask him that question, does he know him, but the relevance of how long - -

ATTY O'BRIEN: Okay.

THE COURT: It's not relevant.

Q You know Jamel Waver?

ATTY SERAFINI: Objection. That has been asked and answered.

THE COURT: The testimony that I heard was that Mr. Oliphant knew somebody named Jamel. He didn't say anything about knowing the surname. So let me hear the question in terms of what the testimony has been.

Q How well did you know him?

ATTY JAUMANN: Could we get some clarification as to who?

ATTY O'BRIEN: Jamel - - he knows him as Jamel.

A Actually I've known him as Mel.

Q Mel.

A How long have I known him? I've known him not that long.

[23] ATTY O'BRIEN: No other questions, Your Honor.

CROSS-EXAMINATION BY ATTORNEY SERAFINI:

Q Did you know Mel from drug dealing?

A I take the Fifth.

Q And do you have any time frame that you had known Mel?

A I take the Fifth.

Q And you and Mel had possession of narcotics that night on February 2, 2011?

A I take the Fifth.

THE COURT: Counsel, this is outside the scope.

Attorney O'Brien, same question, do you wish to have the jury brought out and hear Mr. Oliphant's responses? Not where he took the Fifth Amendment, his responses to the few questions that he –-

ATTY SERAFINI: Judge, he cannot selectively invoke the Fifth Amendment. So if the state's questions that I just posed he's going to invoke the Fifth, then it's inappropriate to have him –-

THE COURT: Let me do this one at a time so I can create the record.

ATTY SERAFINI: Okay.

ATTY O'BRIEN: Yes, Your Honor.

THE COURT: What's the state's position as far as follow-up?

ATTY SERAFINI: The state's position is that it's inappropriate to have him come out –- the state cannot cross-examine him because he plans to invoke the Fifth [24] on the questions that the state intends to ask him.

THE COURT: Attorney O'Brien, how do you respond to that, where the witness has indicated he's not going to respond to any of the questions asked on cross-examination by the state based on the case we talked about yesterday, State vs. Pierson, which says the witness may not be called to the stand in the presence of the jury for the purpose of invoking his privilege against self-incrimination. So if done on the direct, he's going to do it on the cross-examination. So why should it be presented to the jury?

ATTY O'BRIEN: Well I want to ask him whether he knows Mel.

THE COURT: All right, if you have additional questions let me hear the additional questions. We've got to make the full record here. Go ahead.

RE-DIRECT EXAMINATION BY ATTORNEY O'BRIEN:

Q You indicated during your direct testimony that you felt guilty. What was that reference?

ATTY JAUMANN: He took the Fifth Amendment to that

question.
THE COURT: On that question, Mr. Oliphant invoked his Fifth Amendment privilege. So a follow-up question would not be appropriate.

Q You were arrested on February 2, 2011, correct?

A Yes.

Q And one of the people you were arrested with was [25] somebody you know as Mel?

ATTY SERAFINI: Objection to the leading questions, and these have already been asked. I don't understand –-
THE COURT: Counsel, again, they're leading questions.
ATTY O'BRIEN: All right, I understand.
ATTY JAUMANN: Your Honor, if I'm not mistaken, I believe these questions were all posed and he answered.
THE COURT: That's correct, so the objection is sustained. They've been asked and answered already.
ATTY O'BRIEN: So we're ready to go.
THE COURT: Counsel, I need a response to my inquiry. Mr. Oliphant has indicated that he is going to invoke his Fifth Amendment privilege with respect to any cross-examination. What, then, under our case law would allow him to testify at all in front of this jury?
ATTY O'BRIEN: Your Honor, it goes to the state's position regarding revoking his immunity for his testimony. Selectively revoking his immunity.
THE COURT: Counsel, that's an issue that we resolved yesterday. Again, I have advised the witnesses that the law is unclear, that they should follow the advice of their counsel because I feel the law is unclear. He has done that. I need to know –- please answer my question. Under our case law which says that you shouldn't have somebody in front of a jury just for [26] the purpose of

invoking their Fifth Amendment, which he has indicated he's going to do with respect to all the cross-examination questions. What's the argument? What case law –- what support is there to have Mr. Oliphant testify at all in front of this jury? That's what I'm trying to find out.

ATTY O'BRIEN: Your Honor, the questions that I posed were was he arrested on February 2, 2011. The jury knows that. Was he arrested with –- who was he arrested with, Jamel?

ATTY SERAFINI: Can I ask that the witness be removed while this argument is being made?

THE COURT: Okay, keep Mr. Oliphant in the holding area, please.

MR. OLIPHANT: Can I talk to my lawyer, please?

THE COURT: Yes. There's room there, sir, where he can talk to you.

Don't take him downstairs. This shouldn't be too long.

Attorney O'Brien, the issue –- maybe I'm not phrasing or structuring the question properly. Mr. Oliphant has indicated he's not going to answer any of the state's questions on cross-examination. So what's the argument to bring him out here so that you can ask him some questions as to when he was arrested and does he know this person –-

ATTY O'BRIEN: Your Honor, I understood that. Maybe [27] I didn't hear him say that but the question is he's answering my questions regarding when he is arrested. The scope of that question, you know, he was arrested. Well, what's she going to be able to ask about that? How's that going to get –-

THE COURT: Attorney Serafini?

ATTY O'BRIEN: Yes, the attorney, the state's attorney.

THE COURT: Okay.

ATTY O'BRIEN: And does he know Jamel –-
THE COURT: Let me back up further. What is the relevance of the date that Mr. Oliphant was arrested?
ATTY O'BRIEN: It's relevant because Jamel Waver was also arrested with him –
THE COURT: I understand that, but how is this witness testifying that he was arrested, which the jury already knows from prior testimony. What additional purpose would you argue –- the jury knows based on prior testimony that Mr. Oliphant was arrested on February 2, 2011. That's been established. To ask him that question again, and if that's the only question you're going to ask, what's the relevance?
ATTY O'BRIEN: No, the second question is who were you arrested with, one of the people being Jamel Waver.
THE COURT: Is there going to be a third question?
ATTY O'BRIEN: I think he - -
THE COURT: Let's assume hypothetically he says he was [28] arrested with Mel.
ATTY O'BRIEN: And that will be the questions.
THE COURT: Two questions?
ATTY O'BRIEN: Two questions, and the third one being does he know Mel.
THE COURT: Okay. Now based on those questions, why can't the state then inquire as to what the arrest was about? And he's going to refuse to answer.
ATTY O'BRIEN: No, I understand the Court's position.
THE COURT: Okay.
ATTY SERAFINI: And then the state would be in the position of asking the Court to strike the testimony which the jury would have heard. That's why it doesn't come in.
THE COURT: If in fact –- let me see if I can set the record

out for this. If my understanding of the rule is if a witness is not available for cross-examination, i.e. he won't answer any questions, then the Court is required to strike any direct testimony. Would you agree with that?

ATTY O'BRIEN: Yes, I do.

THE COURT: Okay. So if he's not going to answer any questions, what's the purpose in bringing him out, asking two questions, having him invoke his Fifth Amendment, then telling the jury they are to disregard his testimony because I would have to strike it if he's [29] not going to answer questions on cross-examination, would you agree that that would be the procedure the Court would have to follow?

ATTY O'BRIEN: Yes, I do, Your Honor, but this is a situation created by the state.

ATTY SERAFINI: The state is bound by the rules of evidence.

THE COURT: I don't need to hear any further argument. All right, let's bring Mr. Oliphant and Mr. Jaumann back out. I will explain my ruling on the record.

Could we take the hand restraints off, please.

This is what we're going to do. Mr. Oliphant did respond to a few questions under direct examination. He has indicated that he is not going to respond to any questions asked by the state on cross-examination, which he has been advised by Attorney Jaumann not to respond to. Therefore, if the jury came out and allowed Mr. O'Brien to ask the questions and then the state was unable to cross-examine, I would be forced under our rules in the presence of the jury to strike Mr. Oliphant's testimony. Therefore, I find the only purpose of having Mr. Oliphant testify in front of the jury would result in the Court having to strike his testimony, that it's –- that State vs.

Pierson, 215 Connecticut 653 Conn applies and a witness may not be called to the stand in the presence of the jury merely [30] for the purpose of invoking his privilege. So I'm not going to just get him out here to strike his testimony.

Anything further for the record before I ask –-

ATTY O'BRIEN: No, Your Honor.

ATTY SERAFINI: No, Your Honor.

THE COURT: Okay, thank you. Thank you, Mr. Oliphant.

ATTY JAUMANN: That means he's released from the subpoena?

THE COURT: He's done, he's done.

ATTY JAUMANN: Thank you.

* * * *

**MARCH 12, 2013 AM [Excerpts] 58 T: CHARGING CONFERENCE, MOTION**

[3] THE COURT: Okay. With regard to the state's motion in limine, in particular item six. I am going to allow the defendant to argue the issue of third party culpability because I find that there is evidence with regard to the first four counts, not the fifth count, the first four counts.

But taken together, the evidence when taken together, considered in light most favorable for the defendant.

If the jury chooses to believe the testimony, particularly the testimony of Mr. Collymore, then his testimony would indicate that he was not - did not have the intent to commit the underlying charge, which is robbery in the first degree. He further testified that Mr. Wilson was the principle.

So I'm going to allow - if this jury believes that then that establishes third party culpability with respect to those first four charges. If they believe that. So that can be argued to the jury.

Okay, with respect to the testimony at the HPC of Mr. Bugg and the plea hearing with regard to Mr. Wilson. Again, I have reviewed the testimony in this case including the cross examination of Mr. Bugg and Mr. Wilson.

Make a finding that there was - that the evidence submitted one, qualifies under Whalen, the [4] evidence being the testimony at the HBC of Mr. Bugg and the plea hearing of Mr. Wilson in so far as it is inconsistent with their testimony here at the trial.

Those inconsistencies were reviewed in my opinion by - in both the direct examination and the cross examination. Therefore, there was a right of confrontation. Motion to strike is denied.

All right, anything else before the panel comes out for the final argument?

ATTY. O'BRIEN: Yes, Your Honor. The Court - I would ask for a limiting instruction regarding the - the revocation of the immunity issue. The jury doesn't know that.

The immunity was lifted for the same defense witnesses that were put on by the state's case.

THE COURT: Other than Mr. Bugg, the jury never heard that revocation. Did it?

ATTY. O'BRIEN: The jury didn't hear anything about immunity. So when the defendant put on his - those same witnesses they were -

THE COURT: But those witnesses - the only - the witnesses that were called by the defendant, in particular

Mr. Oliphant and Mr. Wilson and I believe both Mr. Wilsons. The jury never saw them invocate their fifth amendment right not to testify. Is that correct? Am I correct in that?

ATTY. O'BRIEN: That's correct.

[5] THE COURT: All right, so what am I going to tell the jury?

ATTY. O'BRIEN: Tell the jury that when the defendant called the same witnesses to testify freely and openly, theoretically, when they were called they had lawyers sitting in the box and they exercised their fifth amendment -

THE COURT: What's the authority for that? If you can give me some authority, Counsel, I'll consider it.

ATTY. O'BRIEN: I don't have authority, Your Honor. This - this

THE COURT: And I couldn't find it.

ATTY. O'BRIEN: - may be the case for authority.

ATTY. SERAFINI: No, the case is *State versus Iverson*. That's the case that says you can't do that. And that would fly in the face of the holding in *State versus Iverson*, which is that a jury can not know.

THE COURT: Do you have any cases, Counsel? I need them before I charge the jury in this matter. I can not find any cases that support your argument. If you got something let me see it, otherwise I can not find anything that supports that argument.

And with respect to Mr. Bugg, there is an invocation charge in here.

So at this point I'll reserve decision. If you give me something I'll consider it. But right now [6] it's not to be - I mean you're asking me - now it relates to the final argument. Correct? Would you be arguing this in your

final argument to the jury?
ATTY. O'BRIEN: It depends on what the Court - Your Honor, I don't have any cases on it. I've looked for cases on it.
THE COURT: Okay.
[6] ATTY. O'BRIEN: But I'm saying in the element of fairness -
THE COURT: All right, what is the - I didn't bring it out with me.
ATTY. SERAFINI: Can I have just a minute, Judge?
THE COURT: Linda, tell the jury we're going to be a few minutes. I'm going to have to read the case again before I rule on this. Give me the citation, Counsel. I'm going to take a brief recess.
ATTY. SERAFINI: It's *48 Conn. App. 168*, Your Honor, that *State versus Bruce Iverson*.
THE COURT: All right. As soon as I read the case I'm coming back out so we'll take a brief recess.
(A recess was taken, after which the following occurred.)
THE COURT: Okay, bring Mr. Collymore out, please. Okay, I've reviewed *State versus Iverson*, which again is *48 Conn. App. 168.* I shapardize the case, [7] it is still the law in Connecticut. At page 174 in Iverson the Court states as follows: A witness may not be called to the stand in the presence of the jury merely for the purpose of invoking his privilege against self incrimination.

Neither the state nor the defendant has the right to benefit from any inference the jury may draw simply from the witness' assertion of the privilege.

If the jury - if the witness can't invoke the privilege in front of the jury, to me it's a logical conclusion that it shouldn't be a part of the charge to tell the jury that that's

what happened.

So that's the law so I am not going to give the instruction. Again, that's the law, that's what it says.

ATTY. O'BRIEN: Your Honor, I'd like to make a further argument. I think that if the Court recalls I asked Mr. Bugg about his relationship with Mr. Foote and I asked the question about him stealing from him. And at that point I didn't know he was going to invoke the fifth. His lawyer, Ms. Hutchinson, told him to assert his fifth amendment.

So that I think interfered with my ability to get into the issues of why Mr. Bugg did not like Mr. Foote, particularly at the time with Mr. Foote is supposedly relating a conversation that he had with Mr. Bugg.

[8] So his assertion of the fifth amendment stopped me from getting into that.

THE COURT: Attorney Serafini?

ATTY. SERAFINI: I think that Counsel wants a Mulligan, Your Honor. He had the opportunity to cross examine both Mr. Bugg and Mr. Foote when they were on the stand. He could have asked those questions when either one of them was on the stand and he didn't.

So the bottom line is he had the opportunity and that's what the case law says, you have to be afforded the opportunity for cross examination.

THE COURT: Why wasn't the issue pursued on cross examination?

ATTY. O'BRIEN: I'd have to retrace my notes. I don't recall, Your Honor.

THE COURT: Again, Crawford is the issue with respect to these issues in my opinion. And Mr. Bugg was on the stand, he had been immunized when he was called by the state.

It was adequate ability to cross examine at that point and it was not done so I'm not going to - except for the charge that talks about Mr. Bugg's invocation of a portion of his testimony in front of the jury, I'm not going to give any further instructions.

Anything else?