No. 22-____

IN THE

Supreme Court of the United States

HIRAL M. PATEL,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

On Petition for a Writ of Certiorari to the Connecticut Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a statement against penal interest—

- made by an inmate/declarant who was moved into the cell of an inmate/informant, who was then outfitted by correctional officials with a hidden recording device and was directed by state police to question the inmate/declarant about a past criminal incident;
- and which interrogation resulted in a "dual inculpatory" statement in which the inmate/declarant inculpated himself and the petitioner in that past criminal incident;
- and which statement was admitted in evidence at petitioner's trial, with no opportunity for petitioner to confront the inmate/declarant—

can ever qualify as a "testimonial" statement under *Crawford v. Washington*, 541 U.S. 36 (2004) and its progeny—notwithstanding *Dutton v. Evans*, 400 U.S. 74 (1970) and *Bourjaily v. United States*, 483 U.S. 171 (1987).

And if so, whether petitioner's confrontation rights were violated when the Connecticut Supreme Court, relying on *Dutton* and *Bourjaily*, ruled that such a statement was "nontestimonial," without giving sufficient consideration to *Michigan v. Bryant*, 562 U.S. 344 (2011), which holds that the "primary purpose" test of *Davis v. Washington*, 547 U.S. 813 (2006) "requires a combined inquiry that accounts for both the declarant and the interrogator," i.e., an inquiry that "look[s] to all of the relevant circumstances," and that "examin[es] the statements and actions of all participants" to the interrogation, including "'[t]he identity of [the] interrogator, and the content and tenor of his questions.'"

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Hiral M. Patel, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court, rendered on March 22, 2022.

OPINION BELOW

The opinion of the Connecticut Supreme Court is officially reported at 342 Conn. 445, and is unofficially reported at 270 A.3d 627. The opinion is reproduced in the Appendix (App.) at App. 126a. The opinion of the intermediate Connecticut Appellate Court, which preceded the opinion of the Connecticut Supreme Court, is officially reported at 194 Conn. App. 245, and is unofficially reported at 221 A.3d 45. That opinion is reproduced at App. 51a.

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on March 22, 2022. The petitioner timely filed a motion for reconsideration, which was denied by the Connecticut Supreme Court; notice of the denial was issued on May 24, 2022. See App. 179a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a), on the grounds that the State of Connecticut has violated the petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **Sixth Amendment to the Constitution of the United States** provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

The **Fourteenth Amendment to the Constitution of the United States** provides in pertinent part: ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . . ."

Connecticut General Statutes § 53a-8(a) provides in pertinent part: "A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

Connecticut General Statutes § 53a-48(a) provides: "A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

Connecticut General Statutes § 53a-54a(a) provides in pertinent part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person. . . ."

Connecticut General Statutes § 53a-100aa(a)(1) provides in pertinent part: "A person is guilty of home invasion when such person enters or remains unlawfully in a dwelling, while a person other than a participant in the crime is actually present in such dwelling, with intent to commit a crime therein, and, in the course of committing the offense: (1) Acting either alone or with one or more persons, such person or another participant in the crime commits or attempts to commit a felony against the person of

another person other than a participant in the crime who is actually present in such dwelling. . . ."

Connecticut General Statutes § 53a-101(a)(1) provides in pertinent part: "A person is guilty of burglary in the first degree when (1) such person enters or remains unlawfully in a building with intent to commit a crime therein and is armed with explosives or a deadly weapon or dangerous instrument. . . ."

Connecticut General Statutes § 53a-134(a)(2) provides in pertinent part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime: . . . (2) is armed with a deadly weapon. . . ."

Connecticut General Statutes § 53a-155(a)(1) provides: "A person is guilty of tampering with or fabricating physical evidence if, believing that an official proceeding is pending, or about to be instituted, he: (1) Alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding. . . ."

Connecticut Code of Evidence § 8-6: "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (4) **Statement against Penal Interest.** A trustworthy statement against penal interest that, at the time of its making, so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In determining the trustworthiness of a statement against penal interest, the court shall consider (A) the time the statement was made and the person to whom

the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest."

Federal Rule of Evidence § 801(d)(2)(E) provides in relevant part: "A statement that meets the following conditions is not hearsay: . . . (2) The statement is offered against an opposing party and: . . . (E) was made by the party's coconspirator during and in furtherance of the conspiracy."

Federal Rule of Evidence § 804(b)(3) provides in relevant part: "The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: . . . (3) Statement Against Interest. A statement that: . . . (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability."

INTRODUCTION

The central thesis of this petition is that state and federal courts have often misconstrued or misapprehended this Court's references—in *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 547 U.S. 813 (2006)—to *Dutton v. Evans*, 400 U.S. 74 (1970) and *Bourjaily v. United States*, 483 U.S. 171 (1987). To illustrate that misapprehension, it is necessary to first present a brief synopsis of *Dutton* and *Bourjaily*, and then explain how the Court referenced them in *Crawford* and *Davis*.

In *Dutton v. Evans*, supra, the Court upheld the admission of a brief remark made by a defendant's co-conspirator to a fellow inmate, in which the co-conspirator referred to the defendant, Alex Evans: "'If it hadn't been for that dirty son-of-a-bitch Alex

Evans, we wouldn't be in this now.'" *Id.*, 77. The co-conspirator who uttered that statement did not testify, but the inmate who heard the statement did testify at Evans's trial. The statement was admitted in evidence pursuant to a Georgia evidentiary rule that permits admission of a co-conspirator's "out-of-court statement even though made during the concealment phase of the conspiracy." *Id.*, 81. In finding that petitioner Evans's Sixth Amendment confrontation rights were not violated, the Court noted that the challenged statement was a brief and "spontaneous" remark "of peripheral significance at most"; that it had been "admitted in evidence under a coconspirator exception to the hearsay rule long established under state statutory law"; and that "the statement contained *no express assertion about past fact*[.]" (Emphasis added.) *Id.*, 87-89.

In *Bourjaily v. United States*, supra, this Court upheld the admission of tape-recorded statements made by a defendant's co-conspirator to an informant working for the Federal Bureau of Investigation (FBI). *Id.*, 173-74. At petitioner's trial, the co-conspirator was unavailable as a witness, but his recorded statements were admitted in evidence pursuant to Fed. R. Evid. § 801(d)(2)(E), the co-conspirator exception. *Id.*, 174-75. In finding no violation of petitioner's confrontation rights, the Court stated that "the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under this Court's holding in [*Ohio v. Roberts*, 448 U.S. 56 (1980)], a court need not independently inquire into the reliability of such statements." *Id.*, 183. The Court also emphasized that "co-conspirators' statements, when made in the course and in furtherance of the conspiracy, have a long tradition of being *outside the compass of the general hearsay exclusion*." (Emphasis added.) *Id*.

In *Crawford*, decided in 2004, the Court discarded the "reliability" test of *Ohio v. Roberts*, supra, and replaced it with a test that focuses on whether an out-of-court statement is "testimonial" in nature. The *Crawford* opinion cited *Dutton* as an example of a case in which "the hearsay statement at issue was not testimonial." *Crawford*, 57. And the *Crawford* decision also cited *Bourjaily*, describing it as a case that "admitted statements made unwittingly to an FBI informant after applying a more general test that did *not* make prior cross-examination an indispensable requirement." (Emphasis in original.) *Crawford*, 58.

Two years later, in *Davis v. Washington*, supra, the Court adopted the "primary purpose" test for determining the testimonial character of a statement. *Id.*, 822. In discussing past Confrontation Clause cases, the Court made the following statement that referred to both *Dutton* and *Bourjaily*:

> Where our cases did dispense with those requirements [of unavailability and prior cross-examination]—even under the *Roberts* approach—*the statements at issue were clearly nontestimonial*. See, e.g., *Bourjaily* . . . (*statements made unwittingly to a Government informant*); *Dutton v. Evans*, . . . (plurality opinion) (*statements from one prisoner to another*).

(Emphasis added.) *Davis*, 825.

The citations to *Dutton* and *Bourjaily*, in *Crawford* and *Davis*, are the raison d'etre for this petition, which invites answers to lingering questions under *Crawford* and its progeny. For example, when the *Crawford* and *Davis* opinions cited *Dutton* and *Bourjaily*—cases involving the co-conspirator exception to the hearsay

rule—did the Court intend to declare that *all* inmate-to-inmate or inmate-to-informant statements are henceforth automatically or necessarily "nontestimonial," *regardless of the circumstances of the interrogation or encounter in which the statement was made?* And in evaluating the "primary purpose" of an interrogation between an inmate and a wired police informant, which is what occurred in this case, isn't a court required to examine both the circumstances of the interrogation and the statements and actions of all participants thereto, as *Michigan v. Bryant*, 562 U.S. 344 (2011), directs? And how should a court resolve the "glaringly obvious problem"; *id.*, 383 (Scalia, J., dissenting); of ascertaining the "primary purpose" of an interrogation if the declarant and the interrogator have conflicting motives and purposes? See *State v. Ta'afulisia*, 2022 Wash. App. Lexis 991, *2; 2022 WL 1447613 (Wash. Ct. App. 2022) ("Less clear—because the high court has never allowed itself to be confronted by the thorny question—is what analytical process a court should employ to objectively discern the primary purpose of a conversation in which the participants (speaker and interrogator) have competing purposes (primary or otherwise)." As explained infra, the correct resolution of the present case depends upon the answers to those questions.

* * *

Petitioner Hiral M. Patel was convicted of serious crimes—including home invasion and *Pinkerton*[1] murder—based primarily on an audio recording of a jailhouse conversation between petitioner's codefendant and the codefendant's cellmate, who was acting as a state-embedded police informant. The cellmate/

[1] *Pinkerton v. United States*, 328 U.S. 640 (1946).

informant was wearing a hidden recording device and had been directed by state police to obtain as many details as possible about the home invasion incident that occurred more than a year earlier. In a two-hour recorded conversation, the codefendant/declarant inculpated himself as the murderer, and also inculpated the petitioner and others.

At petitioner's trial, the codefendant/declarant, who had not yet been brought to trial, invoked his privilege against self-incrimination, rendering him "unavailable" as a witness. That enabled the prosecution to introduce the codefendant's recorded statement into evidence as a "dual inculpatory statement" against penal interest, which is "a statement that inculpates both the declarant and a third party, in this case the [petitioner]." *State v. Schiappa*, 248 Conn. 132, 145 n. 15, cert. denied, 528 U.S. 862 (1999). When the recorded statement was played for the jury at petitioner's trial, he was powerless to confront his primary accuser—because you cannot confront or cross-examine a digital audio recording.

STATEMENT OF THE CASE

A home invasion and murder occurred in August 2012 in the Town of Sharon, Connecticut. Thirteen months later, four individuals were arrested in connection with the incident. Two of them, Niraj P. Patel and petitioner Hiral M. Patel, were convicted at separate jury trials in 2016 and 2017. At each of those trials the centerpiece of the prosecution's case was a jailhouse audio recording of a dual inculpatory statement made by a third codefendant, Michael Calabrese, to a cellmate/informant. Because Calabrese had not yet been tried, he invoked his privilege against self-incrimination at both trials, and was thus una-

vailable as a witness. The audio recording, in which Calabrese inculpated himself and his codefendants, was admitted at both trials pursuant to a state evidentiary hearsay rule that permits the introduction of a "statement against penal interest" if the declarant is unavailable and the statement is sufficiently trustworthy. See Conn. Code Evid., § 8-6. The same judge presided at both trials, and at each one he ruled that the recorded statement was admissible pursuant to the evidentiary rule, and was not a "testimonial" statement under *Crawford v. Washington*, supra, and its progeny. Connecticut's appellate tribunals agreed.

I. The Home Invasion and Homicide

In June 2012 the petitioner's cousin, Niraj P. Patel (hereafter Niraj), was arrested on drug charges, and needed money to hire an attorney. Unable to borrow the funds, he devised a plan to rob a drug dealer named Luke Vitalis. Niraj enlisted the assistance of his brother (Shyam Patel), his cousin (petitioner Hiral Patel), and a friend (Michael Calabrese).

In the early evening of August 6, 2012, two men—allegedly Calabrese and the petitioner—with their faces covered by bandanas or masks, entered the Vitalis home. They immediately encountered Luke Vitalis's mother, Ms. Rita Vitalis, and they bound her wrists with zip ties. The petitioner remained with her on the first floor while Calabrese, armed with a handgun, went to the second floor, where he confronted twenty-three-year-old Luke Vitalis. During an ensuing struggle, Calabrese fatally shot Vitalis and stole a small amount of cash and marijuana. The petitioner fled from the house immediately upon hearing the gunshots, enabling Rita Vitalis to call 911. Calabrese fled from the house soon after.

II. The Jailhouse "Dual Inculpatory Statement"[2]

A year passed without any arrests, although the Connecticut State Police suspected Calabrese of involvement. On August 29, 2013, Calabrese was arrested "on drug charges *unrelated* to the August 6, 2012 Sharon home invasion." (Emphasis added.) *State v. Hiral M. Patel,* 342 Conn. 445, 452 (2022) (hereafter *Hiral Patel*). What happened thereafter is essentially "undisputed." *Id*.

As of September 3, 2013, Calabrese was being held on the drug charges at the New Haven Correctional Center in New Haven, Connecticut. When the state police learned of Calabrese's detention, they sought help from officials in the Connecticut Department of Correction (DOC) in finding an inmate who would be willing to converse with Calabrese while wearing a recording device. DOC officials knew of such an inmate, named Wayne Early, who was at that time "being held [in the same facility] following his convictions of attempted burglary in the first degree with a deadly weapon and criminal possession of a firearm." *Id.*, 452-53.

"On September 3, 2013, Early was summoned to the [correctional] facility's intelligence office. Department of Correction officials there informed Early that Calabrese, whom Early did not know, was going to be

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[2] Connecticut courts "evaluate dual inculpatory statements using the same criteria that [the courts] use for statements against penal interest." *State v. Camacho*, 282 Conn. 328, 359, 924 A.2d 99, 121, cert. denied, 552 U.S. 956 (2007). See *Williamson v. United States*, 512 U.S. 594 (1994) ("clarify[ing] the scope of the hearsay exception for statements against penal interest").

moved into Early's cell and asked Early whether he would be willing to wear a recording device. *Early previously had made confidential recordings of other cellmates*. Early said that he would be willing to record Calabrese, if Calabrese seemed inclined to talk." (Emphasis added.) *Id*., 453.

Calabrese was moved into Early's cell that night, and they first met when Early returned to the cell after "rec." At that time, "[t]he two men shared information about the charges for which they were in custody. Early disclosed that he had originally been charged with home invasion, but that charge later was reduced to burglary. Calabrese responded that the police were 'looking' at him for the same type of incident and began to talk about the Sharon home invasion. Early changed the subject because he was not yet wearing the recording device." *Id*. As Early explained in his testimony at petitioner's trial, he stopped the conversation at that point because he "already knew [he] was going to wear" a recording device the next day and "didn't want to have the conversation now and then try to have it again tomorrow." Tr. Jan. 6, 2017, p. 39.

"The following day, Early was brought back to the corrections intelligence office. Early confirmed that he was willing to record Calabrese. A corrections official then placed a call to a *state police official, who spoke with Early* to establish that he had no knowledge about the incident of interest [the Sharon home invasion] *and directed Early to get details* about it if he could." (Footnote omitted, emphasis added.) *Id.*, 453. As Early put it, the state police officer asked him "if [he] could get details, as much details as possible"; he "told me to try to get details." Tr. Jan. 6, 2017 (AM), pp. 40, 48. The intelligence official placed a wireless recording

device, about the size of a computer chip, in Early's T-shirt pocket, and Early placed another shirt over it.

Early was then sent out of the intelligence office, and he went to his cellblock recreation area. Then he waited for the institutional "lockdown" (also known as a "recall") that officials had *planned to call*, in order to require all inmates to return to their cells. As Early described it, he was "sitting there [in the rec area] just waiting for us to go back to the cell. They call a lockdown, we go - - I go back to the cell and start - - start a conversation with Michael Calabrese."[3] Tr. Jan. 6, 2017, p. 41.

A lengthy conversation ensued, during which Calabrese gave many details about the home invasion and homicide, implicating himself as the shooter, and also implicating Niraj Patel and the petitioner. Although Calabrese volunteered some details, "Early repeatedly asked questions to obtain further details or clarification about the incident." *Id.*, 342 Conn. at 453-54. The Appellate Court's opinion noted that the petitioner claimed that Early asked Calabrese "'at least 200 questions.'" *State v. Hiral M. Patel*, supra, 194 Conn. App. 266 n. 12, at App. 79a. Moreover, Early made it a point to tell Calabrese when he should *slow*

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[3] Early's testimony confirmed that the plan was to call a lockdown so that he and Calabrese would be alone in their cell so Early could talk to him. Tr. Jan. 6, 2017 (AM), pp. 41, 49-50. Early had previously testified about the lockdown at Niraj Patel's 2016 trial. When the prosecutor asked him, "And why was it that you [and Calabrese] were sent back to your cell?," Early replied, "They locked the prison down." Tr. Jan. 12, 2016 (A.M.), p. 30. The Connecticut Supreme Court opinion does not mention the lockdown, but it is mentioned in the Connecticut Appellate Court's opinion, *State v. Hiral M. Patel*, 194 Conn. App. 245, 261 (2019), at App. 73a.

down in his responses; see Appendix (Part Two) to Brief of the Defendant-Appellant in the Connecticut Supreme Court, at A605 ("so hold on, hold on. You talkin too fast"); *id*., at A607 ("but you told the story way too fast. Way too fast"); and when he should *speak up*. *id*., at A600 ("yeah, you talk too low, I don't wanna try to hear you over this TV. You talk low"); *id*., at A621 ("I can't hear you . . . I can't hear you").

When the conversation ended two hours later, Early yelled out to a correctional officer for his mail, a prearranged signal that the recording was finished. Early was brought to the intelligence office, and the recording device was removed. Calabrese was moved out of Early's cell the next morning.

One week later, on September 11, 2013, the police arrested all four codefendants (Niraj Patel, Shyam Patel, Hiral Patel, and Michael Calabrese) in connection with the home invasion and murder.

III. Niraj Patel's Trial

The four codefendants' cases were handled separately, and Niraj Patel, the alleged mastermind of the incident, was the first to be tried. At Niraj's 2016 jury trial, Calabrese, whose own case was still pending, invoked his Fifth Amendment privilege against self-incrimination and was thus unavailable to testify. Niraj moved in limine to exclude Calabrese's recorded statement from evidence, and that motion was denied without prejudice, but when the prosecutor later offered the recording (and a transcript) into evidence, Niraj did not object. The recording and transcript were thereupon admitted as full exhibits at Niraj's trial. He was convicted of felony murder and other charges, resulting in a sentence of sixty years, execution suspended after forty years.

IV. Niraj Patel's Appeal in the Connecticut Appellate Court

On appeal to the Connecticut Appellate Court, Niraj asserted that Calabrese's recorded statement was "testimonial" under *Crawford*, and that its admission in evidence violated his confrontation rights. See *State v. Niraj Prabhakar Patel* (hereafter *Niraj Patel*), 186 Conn. App. 814, 830, 834-42, 201 A.3d 459, cert. denied, 331 Conn. 906, 203 A.3d 569 (2019), reproduced at App. 1a.

The Appellate Court recognized that it was dealing with an issue of first impression: "It does not appear as though our Supreme Court has addressed the specific issue of whether a recording initiated by a prisoner, who is acting as a confidential informant, of a fellow prisoner unwittingly making dual inculpatory statements about himself and a coconspirator or codefendant are testimonial in nature." *Id*., 837, at App. 27a.

The Appellate Court ultimately rejected the confrontation claim based on *Crawford*, *Davis*, and several federal decisions, primarily *United States v. Saget*, 377 F.3d 223 (2nd Cir. 2004), cert. denied, 543 U.S. 1079 (2005). See *Niraj Patel*, supra, 834-42, at App. 24a-32a. The Appellate Court agreed with the proposition, expressed in *Saget* and other cases, that the "testimonial" inquiry should focus on the "reasonable expectation of the declarant." *Niraj Patel*, supra, 838-39, at App. 28a-29a. Using that approach, the Appellate Court concluded that Calabrese's statement was not "testimonial." *Id*., 834-42, at 24a-32a. En route to its conclusion, the Appellate Court noted that in *Davis v. Washington*, supra, 825, this Court had cited *Dutton v. Evans*, supra, and *Bourjaily*

v. United States, supra, as cases involving nontestimonial statements.

V. The Petitioner's Trial

The petitioner's jury trial was held in early 2017. At that point, the state still had not brought Calabrese to trial, and when called as a witness he again invoked his privilege against self-incrimination. The trial court (the same judge who had presided at Niraj's trial) rejected petitioner's *Crawford* challenge to the admission of Calabrese's recorded statement. The audio recording was then played for the jurors, who also were provided with a transcript of the recording. Although the prosecution presented additional evidence to establish that petitioner was involved in the home invasion (including cellular site location information and oral statements Calabrese made to his girlfriend), Calabrese's recorded statement was the only affirmative evidence that placed petitioner inside the residence as an active participant in the home invasion.

The petitioner's theory of defense was alibi and third-party culpability, i.e., that petitioner was at his sister's home in Boston at the time of the crime, and that it was Shyam Patel, not petitioner, who entered the house with Calabrese.

The jury rejected those defenses, and on February 1, 2017, the petitioner was convicted of all charges.[4] On

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[4] Petitioner was convicted of: intentional murder (under *Pinkerton*) in violation of Conn. Gen. Stat. § 53a-54a; home invasion in violation of Conn. Gen. Stat. § 53a-100aa (a) (1); burglary in the first degree as an accessory in violation of Conn. Gen. Stat. §§ 53a-101 (a) (1) and 53a-8 (a); robbery in the first degree as an accessory in violation of Conn. Gen. Stat. §§ 53a-134 (a) (2) and 53a-8 (a); conspiracy to commit burglary in the first

April 28, 2017, he was sentenced to a term of forty-five years, execution suspended after thirty-five years and one day, and five years probation.

VI. The Petitioner's Initial Appeal in the Connecticut Appellate Court

In petitioner's first appeal, the Connecticut Appellate Court concluded that petitioner's confrontation claim was "controlled by" the Appellate Court's earlier decision in Niraj Patel's appeal. *Hiral Patel*, supra, 194 Conn. App. 262-63, 266, at App. 75a-79a. At oral argument in this case, petitioner's appellate counsel tried to distinguish Niraj's case from petitioner's case by virtue of "differences in the evidence presented as to the circumstances preceding Early's agreement to record Calabrese." (Emphasis added.) *Id*., 266. However, the Appellate Court took the position that "whether it was Early or law enforcement officials who initiated the cooperation" did not make a difference for purposes of the confrontation claim. *Id.*, 268. The Appellate Court also indicated that even after *Michigan v. Bryant*, supra, a "declarant focused analysis" is the appropriate methodology for determining if a statement is "testimonial." *Hiral Patel*, 194 Conn. App. at 269. Thus, the Appellate Court concluded that Calabrese's statement was nontestimonial and that its admission in evidence did not violate petitioner's confrontation rights. *Id*., 268-69.

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degree in violation of Conn. Gen. Stat. § 53a-101 (a) (1) and § 53a-48; and tampering with physical evidence in violation of Conn. Gen. Stat. (Rev. to 2011) § 53a-155 (a) (1). "The [petitioner] also was convicted of felony murder in violation of [Connecticut] General Statutes § 53a-54c and conspiracy to commit robbery in the first degree in violation of §§ 53a-134 (a) (2) and 53a-48. The trial court vacated his convictions on those charges to avoid double jeopardy concerns." *Hiral Patel*, 342 Conn. at 445 n. 1.

VII. The Petitioner's Appeal in the Connecticut Supreme Court

After his unsuccessful appeal in the Connecticut Appellate Court, the petitioner filed a petition for certification to appeal in the Connecticut Supreme Court. On February 5, 2020, that court granted the petition for certification, limited to certain issues, one of which was: "Did the Appellate Court correctly conclude that the introduction into evidence of a codefendant's 'dual inculpatory statement' did not violate the defendant's confrontation rights under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)?" *State v. Patel*, 334 Conn. 921-22, 223 A.3d 60 (2020), at App.124a.

The certified appeal was argued remotely on February 22, 2021, and on March 22, 2022, the court issued an opinion affirming the Appellate Court's judgment. *State v. Hiral M. Patel*, supra, at App.126a.

As stated in the Connecticut Supreme Court's opinion, the petitioner "argue[d] that he prevails under the current [Confrontation Clause] framework because Early, acting as an agent of law enforcement, effectively interrogated Calabrese for the primary purpose of obtaining testimony to be used in a criminal prosecution." *Id.*, 455.

The Connecticut Supreme Court observed that the United States Supreme Court's "confrontation clause jurisprudence has vexed courts as applied to particular circumstances. . . ." *Id.*, 455-56. See *id.*, 472-73 n. 18 ("[C]ourts are increasingly confronting circumstances in which they are unsure how to assess whether a statement is testimonial.") Nevertheless, the Connecticut Supreme Court stated that it had "confidence as to how *th[is] [C]ourt* would resolve

the issue presented, namely, in favor of the state." (Emphasis added.) *Id.*, 456.

In reaching that conclusion, the Connecticut Supreme Court relied on several factors:

1. In *Crawford* and *Davis*, this Court cited *Dutton v. Evans*, supra, and *Bourjaily v. United States*, supra, as dicta, thereby "indicat[ing] that statements of a coconspirator to a fellow inmate and to an undercover agent inculpating the defendant were clearly nontestimonial." *Hiral Patel*, 457.

2. "Post-*Crawford*, federal courts and state courts have consistently rejected claims that the admission of inmate to inmate or inmate to informant statements inculpating a defendant, whether recorded or not, violated his or her confrontation rights." *Id.*, 458.

3. "Courts also have routinely held that statements made unwittingly to a government agent or an undercover officer, outside of the prison context, are nontestimonial." *Id.*, 458-59.

4. The Connecticut Supreme Court recognized that *Michigan v. Bryant*, supra, and *Ohio v. Clark*, 576 U.S. 237 (2015) require an objective assessment of the circumstances relating to an encounter, and of the statements and actions of the parties involved, i.e., both the declarant and the interrogator. See *State v. Patel*, 460-64. Nevertheless, the court concluded:

> The [United States Supreme] [C]ourt's reasoning in *Bryant* and *Clark* thus confirms the [C]ourt's dicta characterizing the statements in *Dutton* and *Bourjaily* made to persons who harbored secret intentions to obtain evidence to be used at trial as clearly nontestimonial. Like the statements in *Dutton* and *Bourjaily*,

> Calabrese's statement was elicited in circumstances under which the objectively manifested purpose of the encounter was not to secure testimony for trial. Calabrese made his statements in an informal setting, his prison cell, to his cellmate, who undoubtedly actively questioned Calabrese but did so in an evidently sufficiently casual manner to avoid alerting Calabrese that his statement was going to be relayed to law enforcement.

Id., 464-65.

One additional fact should be noted. On August 16, 2018, Michael Calabrese—whose unavailability as a witness enabled the prosecution to use his recorded dual inculpatory statement as the key piece of evidence at separate trials in 2016 and 2017—pleaded guilty to murder, home invasion, and conspiracy to commit robbery. On November 27, 2018, Calabrese was sentenced to a term of imprisonment of fifty-five years.

REASONS FOR GRANTING THE WRIT

The petitioner recognizes that federal and state courts have routinely refused to accord "testimonial" status to inmate-to-inmate or inmate-to-informant conversations.[5] Yet the Court has not had occasion, in

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[5] See, e.g., *United States v. Veloz*, 948 F.3d 418, 430-31 (1st Cir.), cert. denied, __ U.S. __, 141 S. Ct. 438 (2020); *United States v. Pelletier*, 666 F.3d 1, 9-10 (1st Cir. 2011), cert. denied, 566 U.S. 1023 (2012); *United States v. Saget*, supra, 229; *United States v. Pike*, 292 Fed. Appx. 108, 112 (2nd Cir. 2008), cert. denied, 555 U.S. 1122 (2009); *United States v. Farhane*, 634 F.3d 127, 162-63 (2nd Cir.), cert. denied, 565 U.S. 1088 (2011); *United States v. Dargan*, 738 F.3d 643, 650-51 (4th Cir. 2013); *Brown v. Epps*, 686 F.3d 281, 287-89 (5th Cir. 2012); *United States v. Johnson*, 581

the eighteen years since *Crawford* was decided, to directly or expressly address the question of whether such statements *can ever qualify* as testimonial under *Crawford*. As explained infra, courts often have overstated or misconstrued the effect of this Court's references, in *Crawford* and *Davis*, to *Dutton v. Evans* and *Bourjaily v. United States*. In addition, when evaluating the primary purpose of an interrogation involving an inmate/declarant and an inmate/informant, many courts have seemingly ignored this Court's directives, in *Michigan v. Bryant* and *Ohio v. Clark*, to use a "combined inquiry" that examines the purposes and motives of all participants to the encounter, and have instead continued to use a "declarant-focused" approach. Insofar as the Connecticut Supreme Court placed heavy reliance on *Dutton* and *Bourjaily* in evaluating the primary purpose of the interrogation, and failed to give adequate considera-

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F.3d 320, 325 (6th Cir. 2009), cert. denied, 560 U.S. 966 (2010); *United States v. Watson*, 525 F.3d 583, 589 (7th Cir.), cert. denied, 555 U.S. 1037 (2008); *United States v. Smalls*, 605 F.3d 765, 778-80 (10th Cir. 2010); *United States v. Underwood*, 446 F.3d 1340, 1347 (11th Cir.), cert. denied, 549 U.S. 903 (2006). See also *Williams v. Sallivan*, 2018 U.S. Dist. Lexis 66164 *23 (C.D. Cal.) ("this Court is not aware of any Supreme Court case that squarely holds that a statement by an inmate to a confidential informant, whom the inmate does not know or suspect is an informant, is testimonial because the informant is a 'police agent' looking to gather incriminating evidence"), approved, 2018 U.S. Dist. Lexis 66160 (C.D. Cal. 2018). State court decisions include *State v. Nieves*, 897 N.W.2d 363, 373-76 (Wis. 2017); *State v. Newsome*, 2012 Ohio App. Lexis 5286, *12-16 (Ohio Ct. App. 2012), rev. denied, 135 Ohio St. 3d 1433 (Ohio 2013); *People v. Arauz*, 210 Cal. App.4th 1394, 1402 (Cal. Ct. App. 2012), rev. denied, 2013 Cal. Lexis 1778 (Cal. 2013); *People v. Almeda*, 19 Cal. App. 5th 346, 362-63 (Cal. Ct. App.), rev. denied, 2018 Cal. Lexis 2745 (Cal. 2018); *State v. Reyes*, 2015 Tex. App. Lexis 6418 *7-9 (Tex. App. 2015).

tion to the motivations and purposes of the inmate/informant—as *Michigan v. Bryant* seems to require[6] —a serious question remains about the validity of the Connecticut Supreme Court's federal confrontation ruling in this case.

I. *Dutton* and *Bourjaily* Do Not and Should Not Control the "Testimonial" Status of All Inmate-to-Inmate or Inmate-to-Informant Statements

In evaluating the admissibility of Calabrese's dual inculpatory statement, the Connecticut Supreme Court relied to a significant degree on this Court's citations, in *Crawford* and *Davis*, to *Dutton* and *Bourjaily*. Like a number of other courts have done, the Connecticut Supreme Court described the references to *Dutton* and *Bourjaily* as "dicta."[7] Assuming that is an accurate description, it is well to remember that "[d]icta on legal points . . . can do harm, because though they are not binding they can mislead." *Ohio v.*

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[6] See Sup. Ct. R. 10(c) (noting, as one reason for a grant of certiorari, the situation where a state court "has decided an important federal question in a way that conflicts with relevant decisions of this Court.")

[7] See *Hiral Patel*, 457; *United States v. Pelletier*, supra, 9 (noting that *Davis* cited *Dutton* "in dicta"); *United States v. Vasquez*, 766 F.3d 373, 378 (5th Cir. 2014) (same), cert. denied, 574 U.S. 1177 (2015); *Brown v. Epps*, supra, 287 and n. 33 ("In *Davis*, the Supreme Court observed in dicta that statements made unwittingly to a government informant were 'clearly nontestimonial.'"); *State v. Reyes*, supra, *8 (the *Davis* court "observed in dicta that statements made unwittingly to a government informant were 'clearly non-testimonial'"); *People v. Gallardo*, 18 Cal. App. 5th 51, 67 (Cal. Ct. App. 2017) (noting that an earlier California case had "cited dicta" from *Davis*), rev. den., 2018 Cal. Lexis 1850 (Cal. 2018).

Clark, supra, 253 (Scalia, J., concurring). See also *id.*, 254 ("dicta, even calculated dicta, are nothing but dicta").

Many post-*Crawford* decisions have relied on the references to *Dutton* and *Bourjaily* when determining whether a challenged statement violated a criminal defendant's confrontation rights. Some of those decisions involved statements admitted into evidence under the same hearsay exception (the co-conspirator exception) that was at issue in *Dutton* and *Bourjaily*. See, e.g., *United States v. Underwood*, supra, 1347 ("The co-conspirator statement in *Bourjaily* is indistinguishable from the challenged evidence in the instant case."), cert. denied, 549 U.S. 903 (2006); *State v. Brist*, 812 N.W.2d 51, 52 (Minn.) ("we are bound by *Bourjaily* . . . which is identical to this case in all material respects"), cert. denied, 567 U.S. 939 (2012).

In other cases, however, courts have relied upon or cited the *Dutton* or *Bourjaily* references in cases involving the statement-against-penal-interest exception to the hearsay rule. See, e.g., *United States v. Saget*, supra, 229-30 (statements admitted under penal interest exception, but also described as "co-conspirator statements"; the court referred to *Crawford*'s citation of *Bourjaily* as authority for the proposition "that the specific type of statements at issue here are nontestimonial in nature"); *United States v. Smalls*, supra, 778 (interlocutory appeal; citing *Dutton* and *Bourjaily*); *United States v. Pelletier*, supra, 9 (noting that *Davis* cited *Dutton*"); *United States v. Veloz*, supra, 431 (noting *Davis*'s citation of *Bourjaily*); *United States v. Dargan*, supra, 650-51 (citing *Davis*'s quotation of *Dutton*'s parenthetical reference that "statements from one prisoner to another" are not testimonial); *United States v. Udeozor*, 515 F.3d 260, 270 (4th Cir. 2008) (noting that in both *Crawford* and

Davis, the Court cited *Bourjaily* "for the proposition that 'statements made unwittingly to a Government informant' are 'clearly nontestimonial' within the meaning of the Confrontation Clause."); *Fisher v. Commonwealth*, 620 S.W. 3d 1, 10 n. 51 (Ky. 2021) (referring to *Davis*'s citation of *Dutton* for the proposition that "statements from one prisoner to another" are not testimonial);

Since *Dutton* and *Bourjaily* have been conscripted for use in cases involving different hearsay exceptions, it is necessary to ask if the Confrontation Clause should demand more than a "one size fits all" approach.

In the present case, Calabrese's statement was admitted as a dual inculpatory statement against penal interest. Even though *Crawford* abandoned the reliability-based approach of *Ohio v. Roberts*, 448 U.S. 56 (1980), the distinction between hearsay exceptions *still has relevance* under *Crawford*. In fact, the Court has stated that "[i]n making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Michigan v. Bryant*, supra, 358-59; *Ohio v. Clark*, supra, 245 (quoting same); *Bullcoming v. New Mexico*, 564 U.S. 647, 669 (2011) (Sotomayor, J., concurring) (quoting portion of same).

The distinction between the co-conspirator exception and the statement-against-penal-interest exception is relevant here, because of the fundamental difference between those exceptions. A co-conspirator statement is defined as a statement that "is offered against an opposing party and: . . . was made by the party's coconspirator during and in furtherance of the conspiracy." Fed. R. Evid. § 801(d)(2)(E). Such statements are generally "made while the conspiracy is in progress"; *United States v. Inadi*, 475 U.S. 387, 395 (1986), and

traditionally such statements were viewed as part of the *res gestae*. See *Bourjaily*, supra, 183 (citing *United States v. Gooding*, 25 U.S. 460, 470 (1827)). Furthermore, there is no "unavailability" requirement as a prerequisite to the admission of a co-conspirator's statement. *United States v. Inadi*, supra, 392-400. See *id*., 395 ("Because [co-conspirator statements] are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court.") In short, "the coconspirator exception to the hearsay rule is steeped in our jurisprudence," and such statements "have a long tradition of being outside the compass of the general hearsay exclusion." *Bourjaily*, 183. Accordingly, a statement that qualifies as a coconspirator statement "is not [even] hearsay." Fed. R. Evid. § 801(d).

Furthermore, the reason that the co-conspirator's statement in *Bourjaily* did not violate the Confrontation Clause was *not* because it fell "'within a firmly rooted hearsay exception'" under *Ohio v. Roberts*, supra. "In fact it did not violate the Confrontation Clause for the quite different reason that it was not (*as an incriminating statement in furtherance of the conspiracy would probably never be*) testimonial. The co-conspirator hearsay rule *does not pertain to a constitutional right* and is in fact quite unusual." (Emphasis added.) *Giles v. California*, 554 U.S. 353, 374 n. 6 (2008) (plurality opinion). See *United States v. Smalls*, supra, 788 (Kelly, J., dissenting) (quoting portion of same). Clearly, a co-conspirator's statement would never have a "primary purpose" of "establish[ing] or prov[ing] *past events* potentially relevant to later criminal prosecution." (Emphasis added.) *Davis*, supra, 822. And that, presumably, is why *Crawford* described co-conspirator statements as "statements that *by their nature were*

not testimonial." (Emphasis added.) *Crawford*, supra, 56.

Those attributes and characteristics simply do not apply to dual inculpatory statements against penal interest. This Court's decision in *Lilly v. Virginia*, 527 U.S. 116 (1999), makes that clear.

In *Lilly*, this Court identified three categories of statements against penal interest, one of which included the type of (dual inculpatory) statement involved in this case, i.e., a statement "offered by the prosecution to establish the guilt of an alleged accomplice of the declarant." *Id*., 127. The Court noted that "[t]his category also typically includes statements that, when offered in the absence of the declarant, function similarly to those used in the ancient *ex parte* affidavit system." *Id*., 130-31. In addition, the *Lilly* court observed that "[m]ost important, this third category of hearsay encompasses statements that are *inherently unreliable*." (Emphasis added.) *Id*., 131. See *id*., 139 ("such statements [against penal interest] are suspect insofar as they inculpate other persons"). "The decisive fact, which we make explicit today, is that accomplices' confessions that inculpate a criminal defendant *are not within a firmly rooted exception to the hearsay rule* as that concept has been defined in our Confrontation Clause jurisprudence." (Emphasis added.) *Id*., 134. See *Crawford*, supra, 56 (quoting portion of same).

Lilly recognized, of course, that evidence that did not satisfy *Roberts'* "firmly rooted exception" prong, could still be admissible under *Roberts* "particularized guarantees of trustworthiness" prong. See *Lilly*, supra, 135-38. Yet the court noted the "unlikelihood" that an accomplice's statement that "spread[s] blame" would satisfy that standard. See *id*., 137.

And the *Lilly* court concluded that the accomplice statement in that case, made under custodial police questioning, was not sufficiently reliable to satisfy the Confrontation Clause. *Id*., 137-39.

Crawford described *Lilly* as a case that "*excluded testimonial statements* that the defendant had had no opportunity to test by cross-examination." (Emphasis added.) More importantly, *Crawford* did not say or intimate that *all accomplice statements that implicate a codefendant* should be deemed nontestimonial. In fact, the *Crawford* plurality expressed *surprise, not approval*, that despite the *Lilly* decision, "accomplice confessions implicating the accused" had managed to "survive *Roberts*," and that such statements were being "routinely" admitted by lower courts. *Crawford*, supra, 63-64.

To be sure, the instant case is not *Lilly*, since Calabrese's interrogation was conducted by trickery and subterfuge, i.e., by a wired police "surrogate" in a prison cell, rather than by a police officer in a station house. But neither is this case *Dutton* or *Bourjaily*. This Court's endorsement of those two cases has led too many courts—including the Connecticut Supreme Court—to erroneously indulge in a "foregone conclusion" that *any* statement against penal interest, made unwittingly by an inmate to another inmate or government informant, is automatically or necessarily "nontestimonial" under *Crawford* and *Davis*.

II. A "Combined Inquiry" or a "Declarant-Focused" Inquiry?

In *Michigan v. Bryant*, supra, the Court emphasized that "*Davis* requires *a combined inquiry that accounts for both the declarant and the interrogator*. In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the *contents of both the questions and the answers*." (Emphasis added). *Id.*, 367-68. See *id.*, 370 ("Objectively ascertaining the primary purpose of the interrogation by examining the statements and actions of all participants is also the approach most consistent with our past holdings."); and *id.*, 369 ("In determining whether a declarant's statements are testimonial, courts should look to all of the relevant circumstances. Even Justice Scalia concedes that the interrogator is relevant to this evaluation . . . and we agree that '[t]he identity of an interrogator, and the content and tenor of his questions,' . . . can illuminate the 'primary purpose of the interrogation.'") "The inquiry, we emphasized [in *Michigan v. Bryant*], must consider 'all of the relevant circumstances.'" *Ohio v. Clark*, supra, 244. "Courts must evaluate challenged statements in context, and part of that context is the questioner's identity." *Id.*, 249. See also, *State v. Spencer*, 497 P.3d 1125, 1132-33 (Idaho 2021) (under the "primary purpose" paradigm, the "inquiry mandates a review of *the total picture*, including 'all the relevant circumstances'") (quoting *Michigan v. Bryant*, supra, 369). (Emphasis added.)

Despite *Bryant*'s requirement of a "combined inquiry," federal and state courts often have continued to utilize a "declarant-focused" or "declarant-centric" approach that relies exclusively or predominantly on the motivation, purpose, or awareness of the declarant—sometimes without even acknowledging the *Bryant*

standard. See, e.g., *United States v. Taylor*, 802 Fed. Appx. 604, 608 (2nd Cir. 2020) (summary order) (holding that codefendant's statements that inculpated defendant were "not testimonial because [the code-fendant] was not aware that he was speaking to a confidential informant or that his statements could be used at a trial"; no citation of *Michigan v. Bryant* or *Ohio v. Clark*); *United States v. Veloz*, supra, 431 (citing *Davis* and *Bourjaily* for the proposition that "'statements made unwittingly to a Government informant' are 'clearly nontestimonial'"; no citation of *Michigan v. Bryant* or *Ohio v. Clark*), cert. denied, __ U.S. __, 141 S. Ct. 438 (2020).

A recent state court example is *Fisher v. Commonwealth*, supra, where the Supreme Court of Kentucky considered the admissibility of an inmate's dual inculpatory statement to another inmate. In analyzing the defendant's federal Confrontation Clause challenge, the court made the following statements: (1) "It has since [*Crawford*] become clear that whether a statement is testimonial is *a declarant-centric inquiry*." (Emphasis added.) *Id*., 6; (2) "What constitutes a testimonial statement is an objective circumstantial inquiry viewed from *the declarant's perspective*, a decidedly *declarant-centric inquiry*." (Emphasis added.) *Id*., 9; (3) "Whether a statement is testimonial depends *solely on the circumstances of the declarant himself* at the time he made the statement, not whether a person who heard the statement eventually repeats under solemn oath what she allegedly heard the declarant say." (Emphasis added.) *Id*., 10. Although the *Fisher* opinion cites *Michigan v. Bryant*; see *id.*, at 7, n. 24; there is no mention of *Bryant*'s "combined inquiry" requirement. And in the codefendant's case, which involved a "mirror image" of the same claim, the Supreme Court of Kentucky repeated the statements

quoted above; see *Harvey v. Commonwealth*, 2021 Ky. Unpub. Lexis 34, *8-*10, 2021 WL 1680264 (Ky. 2021), but *did not even cite Michigan v. Bryant*.

A second aspect of *Bryant* that is relevant to this case is its renewed emphasis on the objective nature of *Davis*'s primary purpose inquiry: "the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather *the purpose that reasonable participants would have had*, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." (Emphasis added.) *Michigan v. Bryant,* supra*,* 360.

The phrase "reasonable participants" reveals how *Bryant*'s objective inquiry should be implemented. The objective inquiry asks what purpose a reasonable person would have if that reasonable person had been in the same situation, facing the same circumstances that the actual declarant and actual interrogator experienced. Any doubt about this was resolved in the *Bryant* opinion, when the Court discussed the question of whether a declarant's physical injuries could be considered as part of the "combined inquiry." The Court answered that question in the affirmative:

> Taking into account a victim's injuries does not transform this objective inquiry into a subjective one. The inquiry is still objective because it focuses on the understanding and purpose *of a reasonable victim in the circumstances of the actual victim*—circumstances that prominently include the victim's physical state.

(Emphasis added.) *Id*., 369.

Bryant's description of the "reasonable victim" means that Calabrese's purpose and motive must be assessed from the vantage point of a "reasonable inmate" in the same circumstances that Calabrese was in. And Wayne Early's purpose and motive must be assessed from the vantage point of a "reasonable inmate acting as an undercover police informant" in the same circumstances that Early was in.

Opinions may differ on the purposes and motives of "reasonable inmates." A reasonable inmate would know that statements made to *any* fellow inmate could be used against them prosecutorially. In fact, Wayne Early's testimony confirmed what most people (at least those familiar with the criminal justice system) know, i.e., that "everybody talks about their crimes," and that all inmates are aware of the distinct possibility of someone "snitching them out" and becoming a witness against them. Tr. of Jan. 6, 2017 (P.M.), pp. 24-25.[8]

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[8] The following occurred during defense counsel's cross-examination of Wayne Early:

> "Q: Do you have any idea why [Calabrese's] talking to you about this thing? Does it make sense?
>
> A: It makes absolute sense. I've been in prison for a long time, and everybody talks about their crimes.
>
> Q: Okay. And so everybody in prison knows that there's a possibility of someone snitching them out, right?
>
> A: Yes.
>
> Q: Calling [them] to be a witness for the State, right?
>
> A: Yes.
>
> Q: And this guy who's in jail for a day all of a sudden is telling you about a home invasion he is not even arrested for, right?
>
> A: Yes."

But putting aside for the moment Calabrese's purpose or motive, what about the interrogator, the "reasonable inmate acting as an undercover police informant." Viewed objectively, such an interrogator could only have one purpose—to obtain information that would enable police and prosecutors "to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, supra, 822. (And of course, viewed objectively, such an interrogator's motive is not altruistic. The interrogator seeks information that will, in the first instance, assist police and prosecutors, and then later help the interrogator to obtain a reduction of his own criminal sentence, as happened in this case.)

If the motives and purposes of a declarant and interrogator are conflicting, how should the primary purpose of the interrogation be determined? If conflicting motives are objectively established, equally clear, and equivalent in strength, which one prevails? Should a court employ "the old baseball axiom that 'the tie goes to the runner.'"? *Key v. State*, 296 So. 3d 469, 471 (Fla. Dist. Ct. App. 2020).[9] If so, who is the runner?

* * *

"Involvement of government officers in the *production of testimony with an eye toward trial* presents unique potential for prosecutorial abuse - - a fact borne out time and again throughout a history with which the Framers were keenly familiar." *Crawford*, 56 n. 7.

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[9] "Although there is no such rule in the [Major League] baseball rulebook, this axiom is frequently used by umpires to resolve close disputes as to whether a runner has been thrown out at first base." *Key v. State*, supra, 471.

Indeed, the Connecticut Supreme Court recognized the "potential for abuse" that may arise from a scenario like the one in this case: "Recruiting an inmate to elicit inculpatory evidence regarding uncharged criminal activity from another inmate suspected of committing such activity, when law enforcement officials would be unable, or were in fact unable, to obtain a confession directly, clearly raises the potential for abuse." (Footnotes omitted.) *Hiral Patel*, supra, 474.

That potential for abuse is enhanced when codefendants' cases are handled separately. Although "[t]he order in which cases are called for trial is within the sound discretion of the court and may be set by the court as the ends of justice and the business before it require"; *State v. Zeko*, 176 Conn. 421, 423 (1979); it is also true that "the state, in the exercise of its prosecutorial function, has considerable latitude as to how and in what manner it shall proceed against an accused." *Id*., 423; *State v. Littlejohn*, 199 Conn. 631, 642 (1986) (quoting same). Just as "the sequence of trials can effectively preclude a defendant from calling a codefendant to testify on his behalf"; *Taylor v. Singletary*, 122 F.3d 1390, 1393 (11th Cir. 1997); the trial sequence can potentially deprive a defendant of the opportunity to cross-examine a codefendant who has given an out-of-court statement incriminating the defendant.[10]

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[10] In his appeal, the petitioner raised the specter of prosecutorial manipulation of the trial docket, in the sense that *although Calabrese was the first codefendant to confess, and the only one of the four codefendants who was never able to post pretrial bail, he was the last codefendant to be prosecuted*. Because no claim of prosecutorial impropriety had been made in the trial court, there was *no evidence in the record* as to whether the sequence of the trials was simply happenstance, or an intentional maneuver by

This is a case in which a state-choreographed interrogation session resulted in the creation of evidence for use in criminal prosecutions. "[E]ven if the interrogation itself is not formal, the production of evidence by the prosecution at trial would resemble the abuses targeted by the Confrontation Clause if the prosecution attempted to use out-of-court statements as a means of circumventing the literal right of confrontation[.]" *Davis v. Washington*, supra, 838 (Thomas, J., concurring in the judgment in part and dissenting in part). "These constitutional concerns are present whether or not the declarant knows that the government is tricking him into admitting his involvement and at the same time manufacturing 'testimony' against another." *United States v. Smalls*, supra, 788 (Kelly, J., dissenting).

"An accused's right to confront and cross-examine the witnesses against him ought not be subverted by subterfuge and trickery." *Id*., 787 (Kelly, J., dissenting). This case demonstrates how government-initiated and orchestrated efforts to obtain evidence for prosecutorial use, can inflict heavy and unfair damage on the right of a criminal defendant to confront an accuser. Insofar as the facts and circumstances relating to the interrogation are *undisputed*, this case presents the Court with an ideal opportunity to consider the significant issues involved. And as for the "facts" and "circumstances" of an interrogation, what

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prosecutors to deprive Niraj and Hiral Patel of their confrontation rights. However, the Connecticut Supreme Court offered a cautionary note: "If a rare case arose in which there was *evidence that the state intentionally delayed the declarant's trial so as to ensure the declarant's unavailability for cross-examination*, the defendant may have a viable due process claim or argument for the adoption of an equitable rule. . . ." (Emphasis added.) *Hiral Patel*, supra, 471-72 n. 17.

could be more consequential than the fact that officials of a state agency locked down an entire correctional facility in order to *expedite and facilitate an interrogation between a wired police informant and his cellmate*—quite possibly a notable moment in the history of Confrontation Clause jurisprudence.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Connecticut Supreme Court.

Respectfully submitted,

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August 16, 2022

APPENDIX

APPENDIX A

STATE OF CONNECTICUT
APPELLATE COURT

(AC 40605)

STATE OF CONNECTICUT

v.

NIRAJ PRABHAKAR PATEL

Sheldon, Keller and Bright, Js.

Syllabus

Convicted of the crimes of felony murder, home invasion as an accessory, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit burglary in the first degree and hindering prosecution in the second degree in connection with the shooting death of the victim, the defendant appealed. *Held:*

1. The trial court did not abuse its discretion in denying the defendant's motion for a continuance, which was made due to the fact that the defendant was experiencing, among other things, laryngitis and coughing, when he was scheduled to testify on his own behalf; the facts in the record, which were known to the trial court at the time of the defendant's request, demonstrated that the defendant had requested multiple continuances, that the defendant's physician testified that the defendant was medically able to testify via microphone, that the court was aware that the defendant had been working at his family's business and speaking with customers in the interim, and that

the court had made adjustments to its amplification system in the courtroom to assist the jury in better hearing the defendant and others.

2. The trial court did not abuse its discretion in denying the defendant's motions for a mistrial, which the defendant made during and immediately after his testimony because the jury had informed the court that it could not hear him; although the jury initially may have had trouble hearing the defendant due, in part, to problems with the court's amplification system, the jury properly notified the court, which took immediate corrective action, including having the previous testimony read back to the jury in its entirety, permitting counsel to offer corrections to the testimony that was read back, and correcting the problem with the amplification system, it was clear from the record that the jury heard the defendant's testimony through the court's correction of its amplification system or when the testimony was read back, and was able to observe the defendant's demeanor while testifying, and defense counsel made a strategic choice not to ask the defendant to reanswer questions the jury originally had difficulty hearing.

3. The defendant could not prevail on his claim that the trial court improperly admitted into evidence as statements against penal interest a jailhouse recording of a confidential informant and one of his coconspirators, C, who was the informant's cellmate, which was based on his claim that the statements made in the recording were testimonial in nature and were not trustworthy or reliable: C's statements to the informant, which implicated the defendant, bore none of the characteristics of testimonial hearsay, as C made the statements to his prison cellmate in an informal setting, he implicated himself and two

others, and there was no indication that he anticipated that his statements would be used in a criminal investigation or prosecution, and, therefore, the trial court did not violate the defendant's right to confrontation by admitting the recording into evidence; moreover, the defendant's claim that the statements were not trustworthy or reliable was not reviewable, as the trial court denied the defendant's motion in limine to exclude the recording without prejudice and specifically told defense counsel that its ruling was not final and that defense counsel could question the cellmate outside the presence of the jury, through which defense counsel could have developed the record further and attempted to establish that the recording was untrustworthy or unreliable, but defense counsel did not do so, nor did defense counsel object at the time the recording was offered into evidence, and, therefore, the claim was not preserved for appellate review.

4. The trial court did not abuse its discretion in preventing the defendant from asking certain questions to potential jurors during voir dire regarding the death penalty as a means of exploring potential racial biases in jurors and whether jurors could keep an open mind through the end of the trial, including the questioning of the final witness, whom the defendant claimed in many cases is the most important witness: the questions regarding the death penalty could have been misleading and confusing to a potential juror, the record revealed that defense counsel was given wide latitude in questioning potential jurors regarding their ability to be fair and impartial and to follow the law, the trial court never imposed any prohibition on defense counsel's ability to explore potential racial bias or prejudices, and defense counsel chose not to engage in such exploration; moreover, the defendant's proffered question regarding the final witness pre-

sented had the potential to plant prejudicial matter in the minds of the jurors and might have caused the potential jurors to assume that the final witness was special or more important than other witnesses.

5. The defendant's claim that the trial court erred in giving a certain limiting instruction to the jury regarding nonhearsay testimony and that such instruction impacted his right to testify in his own defense by affecting his credibility was not reviewable; the defendant specifically having voiced agreement with the trial court's statement that it would give a limiting instruction and, thereafter, having failed to object to the precise instruction given by the court, the claim of instructional error was unpreserved, and because the claim was evidentiary in nature, it was not reviewable pursuant to *State v. Golding* (213 Conn. 233).

Argued September 21, 2018—
officially released January 8, 2019

Procedural History

Substitute information charging the defendant with the crimes of felony murder, murder, home invasion as an accessory, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit burglary in the first degree, conspiracy to commit robbery in the first degree, and hindering prosecution in the second degree, brought to the Superior Court in the judicial district of Litchfield and tried to the jury before *Danaher*; *J*.; verdict and judgment of guilty; thereafter, the court vacated the defendant's conviction of murder and conspiracy to commit robbery in the first degree, and the defendant appealed. *Affirmed*.

Hubert J. Santos, with whom was *Trent A. LaLima*, for the appellant (defendant).

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *David S. Shepack*, state's attorney, and *Dawn Gallo*, supervisory assistant state's attorney, for the appellee (state).

OPINION

BRIGHT, J. The defendant, Niraj Prabhakar Patel, appeals from the judgment of conviction of felony murder in violation of General Statutes (Rev. to 2011) § 53a-54c, home invasion as an accessory in violation of General Statutes §§ 53a-100aa (a) (1) and 53a-8 (a) and (b), home invasion as an accessory in violation of §§ 53a-100aa (a) (2) and 53a-8 (b), burglary in the first degree as an accessory in violation of General Statutes §§ 53a-101 (a) (1) and 53a-8 (a) and (b), robbery in the first degree as an accessory in violation of General Statutes §§ 53a-134 (a) (2) and 53a-8 (a) and (b), conspiracy to commit burglary in the first degree in violation of General Statutes §§ 53a-101 (a) (1) and 53a-48, and hindering prosecution in the second degree in violation of General Statutes § 53a-166.[1] On appeal, the defendant claims that the trial court erred in (1) denying his motion for a continuance, (2) denying his motions for a mistrial, (3) admitting into evidence the jailhouse recording between a confidential informant and Michael Calabrese, one of the defendant's coconspirators, (4) preventing him from

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[1] The defendant was also convicted of murder and conspiracy to commit robbery in the first degree. The trial court vacated his conviction of those charges to avoid double jeopardy concerns, and imposed a total effective sentence of sixty years incarceration, execution suspended after forty years, thirty years mandatory minimum, with five years probation.

asking certain questions to potential jurors during voir dire, and (5) giving an improper limiting instruction to the jury regarding nonhearsay testimony. We affirm the judgment of the trial court.

The following facts reasonably could have been found by the jury. On June 12, 2012, the defendant was arrested by the Torrington police following a traffic stop. In his vehicle, the police discovered a black duffle bag containing, among other things, marijuana and $12,375 in cash. The defendant, thereafter, needed money to retain a lawyer and to pay the person to whom he owed the $12,375 that the police had confiscated. The defendant searched for legal loans, fast cash loans, and cash advances, to no avail. He also, unsuccessfully, attempted to borrow money from family members. When these efforts failed, the defendant enlisted the help of his cousin, Hiral Patel (Patel), and his friend, Calabrese. The defendant concocted a plan to rob another friend, Luke Vitalis, who was a marijuana dealer. Calabrese agreed to help the defendant because the defendant led him to believe that Vitalis owed money to the defendant, and that the robbery was a way to obtain the money that Vitalis owed. The defendant also led Calabrese to believe that he and the defendant would split the proceeds from the robbery.

The defendant learned that Vitalis was going to sell $29,000 worth of marijuana to a client and that the sale was to occur on the evening of August 5, 2012, at Vitalis' home, located in Sharon. The defendant then set up his own purchase from Vitalis for the following evening, with the intention of robbing him of those proceeds. On August 6, 2012, the defendant drove Patel and Calabrese to the vicinity of Vitalis' home. Calabrese was armed with a loaded .40 caliber Ruger handgun, which the defendant had given to him.

Patel and Calabrese watched the home for a while, and, then, at approximately 6 p.m., they covered their faces with masks and put on black hats and gloves, before entering the home and declaring that it was a home invasion. Vitalis' mother was in the home, and Patel and Calabrese tied her hands, as she begged them not to hurt or kill her son. Calabrese then went upstairs, struck Vitalis with the Ruger, and shot him three times, killing him and leaving "chunks of . . . brain . . . all over the wall." Calabrese could hear Vitalis' mother screaming. Calabrese, soaked in blood, then searched for Vitalis' money, but was able to find only $70 and approximately one-half ounce of marijuana, both of which he took. Patel and Calabrese then fled the scene, leaving a bloody footprint behind. As they left the house, one of them was on a cell phone, and Vitalis' mother heard him saying "hurry up, hurry the fuck up."

Vitalis' mother was able to free herself, and she called 911. After the police arrived, they went upstairs and found Vitalis' body. The police searched the ransacked room and discovered an empty Pioneer speaker box. In total, the police found $32,150 in the bedroom, and they discovered .40 caliber shell casings. They also found a large quantity of marijuana in the home. After the police had arrived at Vitalis' home, the defendant, in an effort to mislead the police, sent a text message to Vitalis' cell phone saying that he was on his way and would be at Vitalis' home in approximately forty-five minutes.

Eventually Patel and Calabrese met up with the defendant. Calabrese thereafter burned his clothing and his sneakers, which police later discovered, enabling them to match the print of the sneaker to that of the bloody footprint left at the scene of the murder.

Calabrese also disposed of the Ruger, which never was found. Later, the defendant attempted to dispose of a bulletproof vest, a Ruger pistol box, a magazine, and a shotgun, leaving the items with relatives in New York City and repeatedly requesting that his cousin dispose of the items in different locations.[2]

On September 11, 2013, the state police arrested the defendant. Following a trial, the jury, on February 4, 2016, returned a verdict of guilty on all counts. Specifically, the jury found the defendant guilty of felony murder, murder under the *Pinkerton* doctrine,[3] two counts of home invasion as an accessory, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit burglary in the first degree, conspiracy to commit robbery in the

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[2] Although the defendant agreed with much of the state's evidence, he testified that he previously had sold the Ruger to Calabrese in December, 2011, for $600. He also testified that he had asked Calabrese and Patel to purchase $20,000 worth of marijuana from Vitalis for him, and that he would drop them off and pick them up. Approximately fifteen minutes after dropping off the pair at Vitalis' home, he received a frantic call from Patel telling him to hurry up. Upon driving near the home, the defendant testified, he saw the police and assumed a drug raid had occurred, and, in an effort to mislead police, he sent a text message to Vitalis. He alleged that he had no knowledge of the killing at that time.

[3] "[U]nder the *Pinkerton* doctrine, [see *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946)], a conspirator may be found guilty of a crime that he or she did not commit if the state can establish that a coconspirator did commit the crime and that the crime was within the scope of the conspiracy, in furtherance of the conspiracy, and a reasonably foreseeable consequence of the conspiracy." (Emphasis omitted; internal quotation marks omitted.) *State v. Taylor*, 177 Conn. App. 18, 20 n.1, 171 A.3d 1061 (2017), cert. denied, 327 Conn. 998, 176 A.3d 666 (2018).

first degree, and hindering prosecution in the second degree. The court, thereafter, rendered judgment in accordance with the jury's verdict. See footnote 1 of this opinion. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant claims that the court abused its discretion in denying his motion for a continuance, which was made because the defendant was experiencing, among other things, laryngitis and coughing, when he was scheduled to testify on his own behalf. The defendant argues that his request was reasonable, supported by his affidavit and the note and testimony of his physician, and would have involved only a one day delay in the presentation of evidence in a case that was well ahead of schedule. He contends that this alleged error was harmful because it placed him in a bad light before the jury, which was not able to get an accurate impression of him in order to assess his credibility. The state argues that the court acted well within its discretion in denying another continuance in this matter, especially in light of the fact that the defendant had gone to work at his family's business and there was no guarantee that his laryngitis would have been better with this delay. We conclude that the court acted well within its discretion.

The following additional facts inform our review of this claim. The prosecution rested its case on Wednesday, January 20, 2016. The defendant then requested a continuance to Tuesday, January 26, 2016. The court granted the request. Over the weekend, however, the defendant became ill, and was coughing, vomiting, and experiencing trouble speaking. Defense counsel notified the court, presented a note from the defendant's physician, and requested a continuance to Friday,

January 29, 2016. The court considered the request, granted a further continuance to Wednesday, January 27, 2016, and told defense counsel that he could present witnesses other than the defendant on that day, thereby giving the defendant another day to recuperate before testifying.

On January 28, 2016, the defendant still was experiencing laryngitis and coughing, with the ability to speak only in a low voice. His attorney requested a continuance until Tuesday, February 2, 2016. The prosecution argued that the defendant had been seen working at his family's business in the preceding days and that the continuance should not be granted. Defense counsel conceded that the defendant had been at the family's business but argued that this was quite different from testifying in court while experiencing fits of coughing and having laryngitis. Counsel also argued that to make the defendant testify while his health and voice were compromised would violate his rights under both the state and federal constitutions.

Later that day, the state presented the testimony of the defendant's physician, who opined that the defendant was ill. The physician also stated that he had given the defendant a prescription on Monday, January 25, 2016. He further indicated that with this medication, the defendant should be able to testify approximately seventy-two hours after beginning the medication. He specifically confirmed that if the defendant had started his prescription on Tuesday, he would be ready to testify on Friday, January 29. He further testified that the defendant had not called his office for a follow-up visit and had not indicated to him that the defendant's condition had worsened. On cross-examination, the physician testified that when he told the defendant on Monday to take seventy-two

hours off, that meant that the defendant was not supposed to work. When asked if he would recommend that the defendant take more time off, he answered "[n]o."

Defense counsel also had the defendant speak his name and address so the physician could hear the quality of the defendant's voice. After listening to the defendant, the physician further opined that the defendant was medically able to testify with a microphone. The court denied the requested continuance, noting that it would use the microphone amplification system and "turn it up as high as we need to," when the defendant testified on Friday, January 29, 2016. Defense counsel then requested permission to make a record and argued that the court's ruling interfered with the defendant's right to testify under both the state and federal constitutions. In response, the state noted that it already had its rebuttal witnesses make accommodations and that they were on standby. The court then restated its ruling that the defendant would testify the next day, noting that (1) the defendant had contributed to his own problem by not following medical advice when he returned to work earlier in the week, (2) the defendant's physician had testified that the defendant could testify, and (3) the court had an amplification system to project the defendant's voice.

The defendant argues that the court abused its discretion when it denied his request for a continuance. Although he suggests that the court's ruling under these circumstances implicates his right to testify under the federal and state constitutions, he has not made a freestanding constitutional claim. Instead he has briefed the claim under only the abuse of discretion standard using the *Hamilton* factors. See *State v. Hamilton*, 228 Conn. 234, 240-41, 636 A.2d

760 (1994). Applying those factors, we conclude that the court did not abuse its discretion.

"[T]rial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances . . . ." (Internal quotation marks omitted.) *State v. Bush*, 325 Conn. 272, 316, 157 A.3d 586 (2017).

"A reviewing court is bound by the principle that [e]very reasonable presumption in favor of the proper exercise of the trial court's discretion will be made. . . . To prove an abuse of discretion, an appellant must show that the trial court's denial of a request for a continuance was arbitrary. . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. . . .

"In appellate review of matters of continuances, federal and state courts have identified multiple factors that appropriately may enter into the trial court's exercise of its discretion. Although the applicable factors cannot be exhaustively catalogued, they generally fall into two categories. One set of factors focuses on the facts of record before the trial court at the time when it rendered its decision. From this perspective, courts have considered matters such as: the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the

past; the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support of the request; the defendant's personal responsibility for the timing of the request; the likelihood that the denial would substantially impair the defendant's ability to defend himself; the availability of other, adequately equipped and prepared counsel to try the case; and the adequacy of the representation already being afforded to the defendant. . . . Another set of factors has included, as part of the inquiry into a possible abuse of discretion, a consideration of the prejudice that the defendant actually suffered by reason of the denial of the motion for continuance." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State v. Hamilton*, supra, 228 Conn. 240-41; see *State v. Bush*, supra, 325 Conn. 316-17.

In this matter, the facts of record before the trial court at the time it rendered its decision were the following. The request for an additional continuance came during the evidentiary portion of the trial. The prosecution rested on January 20, 2016, after having presented more than thirty witnesses over a two week period, and the court granted the defendant a continuance to January 26, 2016. On January 26, the defendant requested another continuance, this time due to his illness, to Friday, January 29, 2016. The court granted another continuance but only until Wednesday, January 27, 2016, and it told the defendant that he could present witnesses other than himself on that date, thereby giving him the additional day to recover that he had requested.

On January 28, the defendant, still coughing and asserting that he was having trouble speaking, requested another continuance to Tuesday, February

2, 2016, with no guarantees that he would recover by that date or that his voice would be back to normal; defense counsel stated that he "hope[d]" the defendant's voice would be better by then. Moreover, the defendant's physician testified that the defendant was medically able to testify with a microphone, despite his illness. Additionally, the court was aware that the defendant had been working at his family's business and speaking with customers, although the defendant was arguing that he was not fit to testify because of illness, and his attorney had believed that he was home resting during that time. To assist the jury in better hearing the defendant and others, the court also instructed that the amplification system be turned up as loud as needed. On the basis of these facts, which were known to the trial court at the time of the defendant's request for a continuance, we conclude that the trial court did not abuse its discretion in denying the defendant's request.[4]

II

The defendant claims that the court erred in denying his motions for a mistrial, made during and immediately after his testimony, because the jury had informed the court that it could not clearly hear the defendant. The defendant argues: "When the jury informed the court [that] it could not hear [the defendant], he had already testified about all of the conduct that may encompass all of the crimes except hindering prosecution. The court was also aware that the credibility of [the defendant's] testimony was

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[4] Because we have concluded that the court did not act unreasonably in denying the defendant's additional request for a continuance, we need not engage in harmless error analysis. See *State v. Hamilton*, supra, 228 Conn. 242.

the crucial question, and a jury that credit[s] [the defendant's testimony] must acquit on all charges except, possibly, hindering prosecution. . . . [Although] the court was in a difficult position after the jury's note, this position had no possible remedies to restore [the defendant's right to a] fair trial." We are not persuaded.

The following additional facts are necessary to our consideration of this claim. The day after the court had denied the defendant's motion for another continuance, he was called to testify. The defendant explained to the jury that he had bronchitis and laryngitis, and that this was affecting his voice. Several times during his testimony, the defendant was asked to repeat his answers and move closer to the microphone. The defendant testified about the events that had occurred before the crimes of which he was accused, ending at the point where he had dropped off Patel and Calabrese at Vitalis' home. See footnote 2 of this opinion. The jury then was excused for its morning break, and it sent a note to the court stating that it was having trouble hearing the defendant. The defendant requested that the court poll the jury to see how many of them did not hear his testimony, and to ascertain what they did not hear, and he requested that the court declare a mistrial. The state objected to the defendant's request, noting that at other points during the trial, jurors had raised their hands and asked for testimony to be repeated when they did not hear it, and that this had not occurred during the defendant's testimony. The state also noted that defense counsel could take the defendant through his testimony again if counsel thought it was appropriate to do so.

The court denied both the request to poll the jury and the defendant's motion for a mistrial. At the request of the jury, the defendant's previous testimony thereafter was read to the jury. The court also repositioned the defendant's microphone, placed the speaker directly in front of the jury, and instructed the jurors that if any one of them had any further difficulty hearing testimony, she or he should immediately notify the court by raising her or his hand. The defendant's live testimony then continued. Almost immediately, one or more jurors raised his or her hand, and the amplification system again was adjusted. No subsequent problems were recorded. Following the defendant's testimony, he again moved for a mistrial, which the court denied. The defendant claims the court committed error by denying his motions for a mistrial. We disagree.

"[T]he principles that govern our review of a trial court's ruling on a motion for a mistrial are well established. Appellate review of a trial court's decision granting or denying a motion for a [mistrial] must take into account the trial judge's superior opportunity to assess the proceedings over which he or she has personally presided. . . . Thus, [a] motion for a [mistrial] is addressed to the sound discretion of the trial court and is not to be granted except on substantial grounds. . . . In our review of the denial of a motion for [a] mistrial, we have recognized the broad discretion that is vested in the trial court to decide whether an occurrence at trial has so prejudiced a party that he or she can no longer receive a fair trial. The decision of the trial court is therefore reversible on appeal only if there has been an abuse of discretion. . . .

"In reviewing a claim of abuse of discretion, we have stated that [d]iscretion means a legal discretion, to be

exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . . Therefore, [i]n those cases in which an abuse of discretion is manifest or where injustice appears to have been done, reversal is required." (Internal quotation marks omitted.) *State v. Holley*, 327 Conn. 576, 628, 175 A.3d 514 (2018).

Although the defendant's voice may have been low and the jury initially may have had trouble hearing him due, at least in part, to problems with the court's amplification system,[5] the jury properly notified the court, which took immediate corrective action. The court had the previous testimony read to the jury in its entirety, and counsel was permitted to offer corrections to the read back. The court also adjusted the defendant's microphone, the speakers, and the amplification system. The court told the jury to notify it immediately if there was any further difficulty hearing testimony, and, almost immediately, such notification was given to the court, which took further corrective action, and the jury, again, was instructed to notify the court if any further problems were encountered. The defendant then resumed his testimony, with no further problems.

We readily acknowledge the defendant's concern that the jury was required to assess his credibility

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[5] The court also voiced concern that the defendant may have been exaggerating his symptoms, and it pointed to several specific instances where it had to direct the defendant to speak into the microphone.

and that its ability to do so could be compromised if it was unable to hear him. The shortcoming of the defendant's argument, however, is that the court corrected the problem with the amplification system, had the testimony read to the jury, and gave counsel an opportunity to offer any corrections to the testimony that was read back, and the defendant resumed his live testimony. Had defense counsel thought it crucial that the jury hear the missed testimony live, directly from the defendant, rather than read back, he could have reinquired of the defendant or asked the court to strike the prior testimony that the jury did not hear and allow him to begin anew.[6] He chose not to do so. It is clear from the record that the jury heard the defendant's testimony, either live or by virtue of its being read, and was able to observe the defendant's demeanor while testifying,[7] and that defense counsel made a strategic choice not to ask the defendant to reanswer the questions that the jury originally had difficulty hearing. On this basis, we conclude that the court did not abuse its discretion in denying the defendant's motions for a mistrial.[8]

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[6] Of course, it would have been up to the court to rule on a request to strike the prior testimony, but, in any event, the record reveals that the defendant did not undertake such a request.

[7] The defendant claims that certain symptoms of his illness, including his coughing and illness related pauses in his speech, could have been viewed as "tics" that the jury interpreted as indications that the defendant was anxious or lying. The defendant's argument ignores the fact that the jury was told at the outset of the defendant's testimony that he was not feeling well and had laryngitis and bronchitis.

[8] The defendant also requested that we review a video recording of the defendant's testimony made by a news organization. The defendant claims that the recording would allow us to see for ourselves whether the defendant adequately could be heard when

III

The defendant next claims that the trial court erred in admitting into evidence, as statements against penal interest under § 8-6 (4) of the Connecticut Code of Evidence, (1) the jailhouse recording of a confidential informant and Calabrese, the informant's cellmate, and (2) the testimony of Calabrese's former girlfriend, Britney Colwell, who testified to statements made by Calabrese that implicated the defendant. The defendant first argues that by admitting the jailhouse recording into evidence, the court violated his right to confrontation.[9] He contends that Calabrese's

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he testified. We decline the defendant's invitation for several reasons. First, the recording was not marked as an exhibit in the trial court and, therefore, is not part of the record before us. Second, we have no way of knowing whether the recording accurately depicts the vantage point of the jury. Third, the state does not dispute that at least some jurors had difficulty hearing the defendant before the morning recess. Finally, the court took steps to address the issue raised by the jury. The defendant does not claim that the jury was unable to hear him after those steps were taken. Nor does he claim that any inaccuracies in the read back of his prior testimony were not immediately corrected or that the court in any way restricted defense counsel's ability to reask questions, the answers to which counsel was concerned the jury might not have heard the first time.

[9] 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 . . . ." Although the defendant does not clarify whether his claim is brought pursuant to the sixth amendment to the federal constitution or article first, § 8, of our state constitution, the defendant makes no claim that our state constitution provides greater protections, and we, in fact, previously have held that the confrontation clause in our state constitution does not provide greater rights than those guaranteed by the federal constitution. See *State v. Jones*, 140 Conn. App. 455, 466, 59 A.3d 320 (2013) ("there exists no legal basis that suggests that our

statements were testimonial in nature, and, even if they were not testimonial, they failed to meet the requirements of the Connecticut Code of Evidence because they were not trustworthy or reliable. The defendant argues that Calabrese's statements to Colwell were unreliable and not against Calabrese's penal interest. The state argues that Calabrese's statements in the jailhouse recording were not testimonial in nature and that their admission into evidence, therefore, did not violate the defendant's right to confrontation. Additionally, the state argues that, as an evidentiary matter, the defendant's claim is not reviewable, but, to the extent that we deem it reviewable, the statements in the jailhouse recording were both trustworthy and reliable as dual inculpatory statements and that their admission, therefore, did not violate the Connecticut Code of Evidence. We agree with the state.[10]

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state constitution provides the defendant any broader protection to confront a witness against him"), aff'd, 314 Conn. 410, 102 A.3d 694 (2014).

[10] In its brief, the state does not address the admission of Colwell's testimony. This is not entirely surprising given the manner in which the defendant, in his principal brief, sets forth his argument regarding Calabrese's out-of-court statements. The defendant repeatedly uses the term "statements" to refer to the various statements made by Calabrese in the jailhouse recording. He then makes only passing reference to Colwell's testimony in his brief when discussing the reliability of Calabrese's "statements." The defendant also fails to include any harm analysis directed specifically to Colwell's testimony. Similarly, the defendant, in his reply brief, focuses on "[t]he out-of-court statement made by [Calabrese] to [his cellmate informant] . . . ." In fact, Colwell is not mentioned a single time in the reply brief. Finally, to the extent Calabrese's statements were addressed at oral argument before this court, the defendant discussed only the statements made in the jailhouse recording. Nevertheless, for the same reason that we hold in part 13 of this section that any

The following additional facts inform our review. After Calabrese was arrested, he and his cellmate were talking about the charges that were pending against them. Thereafter, the cellmate approached a security officer and offered to record Calabrese. The cellmate was set up with a recording device, and he recorded his conversation with Calabrese, who was unaware that he was being recorded. Calabrese told his cellmate about the events surrounding Vitalis' killing, implicating himself, Patel, and the defendant.

The defendant filed a motion in limine seeking to exclude the jailhouse recording of Calabrese and his cellmate, alleging that the admission of this recording would be in violation of the fourth, fifth, sixth, and fourteenth amendments to the United States Constitution, Article I, §§ 8, 9, and 10 of the Connecticut constitution, and § 42-15 of the Practice Book. The court denied the motion *without prejudice*, explaining that it did not consider the issue to be final and that it also would permit the defendant, out of the presence of the jury, to question the cellmate about the recording before the cellmate testified to the jury. The defendant has not pointed us to anything in the record that indicates that the defendant opted to pursue such questioning.

On the morning that the cellmate was scheduled to testify, the prosecutor notified the court and defense counsel that it had received a letter from Calabrese's

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evidentiary objection to the admission of the jailhouse recording was not preserved properly by the defendant, we also hold that any claim that the trial court erred by admitting Colwell's testimony as to the statements made to her by Calabrese has been abandoned by the defendant's failure to raise any objection to such testimony at trial after the court denied, *without prejudice*, his motion in limine.

attorney stating that Calabrese would invoke his fifth amendment privilege against self-incrimination if called to testify at the defendant's criminal trial and that his attorney would instruct him to remain silent. The following colloquy then occurred:

"[The Prosecutor]: I had discussions with Your Honor and defense counsel on a date prior to today in anticipation of [the cellmate's] testimony, and I believe that we had agreed in chambers that a representation made by way of letter from [Calabrese's attorney] on behalf of his client would suffice insofar as the foundation necessary for the dual inculpatory statement's admission.

"The Court: All right. Is . . . the record you just made sufficient for your purposes or do you want to mark the letter as an exhibit?

"[The Prosecutor]: I would like to mark it, please, for ID, Your Honor.

"The Court: All right, marked for ID only. That will be state's exhibit—

"The Clerk: Thirty-seven.

"The Court: Anything from the defense?

"[Defense Counsel]: No, Your Honor."

When the cellmate was called to testify at the defendant's trial, he admitted that he had a cooperation agreement with the state that provided that if he testified honestly and truthfully that the state, in the future, would notify the court of his cooperation. The prosecutor then questioned him about his offer to record Calabrese, and moved to admit the recording as a full exhibit. Defense counsel specifically stated that he had "[n]o objection." The prosecutor then moved to admit into evidence transcripts of the recording.

When the court asked defense counsel if he had any objection, defense counsel responded: "No." The court instructed the jury that the transcripts were to assist them, but that they should rely on their understanding of the recording, and that if they believed something in the transcript differed from what they heard in the recording, the recording would control. The prosecutor then played the recording for the jury. Shortly thereafter, defense counsel began his cross-examination. Redirect by the prosecutor and recross by defense counsel followed. After the cellmate was excused from the courtroom, the court asked the parties if there was anything further before they took a recess, and both the prosecutor and defense counsel said no.

The defendant now claims that the court violated his right to confrontation by admitting this recording into evidence because the statements made in the recording were testimonial in nature,[11] and, even if they were not testimonial in nature, they failed to meet the requirements of the Connecticut Code of Evidence because they were not trustworthy or reliable. We consider each argument in turn.

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[11] Insofar as the defendant failed to renew his objection after the court denied his motion to exclude *without prejudice*, we consider this claim under *State v. Golding*, 213 Conn. 233, 239-40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015) (defendant can prevail on claim of constitutional error not preserved at trial only if following conditions are met: [1] record is adequate to review alleged claim; [2] claim is of constitutional magnitude alleging violation of fundamental right; [3] alleged constitutional violation exists and deprived defendant of fair trial; and [4] if subject to harmless error analysis, state failed to demonstrate harmlessness beyond reasonable doubt). We conclude, however, that the statements made in the recording were not testimonial in nature, and that this claim, therefore, is not of constitutional magnitude, thus failing *Golding's* second prong.

A

Whether the Statements were Testimonial

"Under *Crawford v. Washington*, [541 U.S. 36, 68-69, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)], the hearsay statements of an unavailable witness that are testimonial in nature may be admitted under the sixth amendment's confrontation clause only if the defendant has had a prior opportunity to cross-examine the declarant. Hearsay statements that are nontestimonial in nature are not governed by the confrontation clause, and their admissibility is governed solely by the rules of evidence. . . . Thus, the threshold inquiry for purposes of the admissibility of such statements under the confrontation clause is whether they are testimonial in nature." (Internal quotation marks omitted.) *State v. Maguire*, 310 Conn. 535, 564 n.14, 78 A.3d 828 (2013). "Because this determination is a question of law, our review is plenary." *State v. Madigosky*, 291 Conn. 28, 44, 966 A.2d 730 (2009).

"In *Crawford*, the Supreme Court declined to spell out a comprehensive definition of testimonial . . . . Instead, the court defined a testimonial statement in general terms: A solemn declaration or affirmation made for the purpose of establishing or proving some fact. . . . The court did note, however, three formulations of th[e] core class of testimonial statements . . . [1] ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . [2] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testi-

mony, or confessions . . . [and 3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . ." (Internal quotation marks omitted.) Id., 44-45.

"Subsequently, in *Davis v. Washington*, [547 U.S. 813, 822,126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)], the United States Supreme Court elaborated on the third category and applied a 'primary purpose' test to distinguish testimonial from nontestimonial statements given to police officials, holding: 'Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.' In *Davis*, the court held that statements given to a 911 operator while an emergency was unfolding were nontestimonial and could be admitted because they were given for the primary purpose of responding to the emergency. . . . In contrast, statements given in an affidavit following a 911 telephone call to a police officer were testimonial and therefore inadmissible because they were provided to the officer after the emergency had passed for the primary purpose of developing evidence against an accused. . . .

"In *State v. Slater*, [285 Conn. 162, 172 n.8, 939 A.2d 1105, cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008)], we reconciled *Crawford* and *Davis*, noting: 'We view the primary purpose gloss articulated in *Davis* as entirely consistent with

Crawford's focus on the reasonable expectation of the declarant. . . . [I]n focusing on the primary purpose of the communication, *Davis* provides a practical way to resolve what *Crawford* had identified as the crucial issue in determining whether out-of-court statements are testimonial, namely, whether the circumstances would lead an objective witness reasonably to believe that the statements would later be used in a prosecution.' . . . We further emphasized that `this expectation must be reasonable under the circumstances and not some subjective or far-fetched, hypothetical expectation that takes the reasoning in *Crawford* and *Davis* to its logical extreme.'" (Citations omitted.) *State v. Smith*, 289 Conn. 598, 623-24, 960 A.2d 993 (2008).

The defendant contends that "there was no ongoing emergency [and] the entire purpose behind correction officers having [the cellmate] make the recording of Calabrese was to obtain evidence against him and others for later prosecution. . . . An objective witness in Calabrese's position, as an incarcerated person, should have reasonably expected that anything he said about his crimes to another inmate . . . could be later relayed and used at a trial. An objective person would not reasonably trust a person he just met with the details of a murder without suspecting his words may later haunt him." (Citations omitted; footnote omitted.) He further contends that "[t]he relevant inquiry is not based upon Calabrese's subjective beliefs but, rather, that of an objective, reasonable witness under similar circumstances."

The state responds that an objective witness would not expect his statements to his cellmate to be recorded and used against him or his coconspirator. Additionally, the state argues, "[m]oreover, post-

Crawford, the majority of federal courts have held that dual inculpatory or coconspirator statements made by one prisoner to another, even when one of the prisoners is a confidential informant for law enforcement, are nontestimonial and these courts have done so after analyzing the question from the perspective of the declarant.[12]" We agree with the state.

It does not appear as though our Supreme Court has addressed the specific issue of whether a recording initiated by a prisoner, who is acting as a confidential informant, of a fellow prisoner unwittingly making dual inculpatory statements about himself and a coconspirator or codefendant are testimonial in nature. After reviewing relevant case law, we conclude that Calabrese's statements at issue in the present case are non-testimonial in nature.

In *Davis*, the Supreme Court indicated that statements made unwittingly to a government informant, or statements made from one prisoner to another, "were clearly nontestimonial." *Davis v. Washington*, supra, 547 U.S. 825 ("Where our cases . . . dispense[d]

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[12] "See *United States v. Pelletier*, 666 F.3d 1, 9-10 (1st Cir. 2011) (dual inculpatory statement of one inmate to another nontestimonial) (collecting cases from Fourth, Sixth, Eighth, Tenth, and Eleventh Circuit Courts of Appeals), cert. denied, 666 U.S. 1023, 132 S. Ct. 2683, 183 L. Ed. 2d 48 (2012); *United Slates v. Pike*, 292 Fed. Appx. 108, 112 (2d Cir. 2008) . . . (dual inculpatory statement from one inmate to another who was confidential informant nontestimonial where informant's status unknown to declarant), cert. denied, 555 U.S. 1122, 129 S. Ct. 959, 173 L. Ed. 2d 150 (2009), [and cert. denied sub nom. *Pattison v. United States*, 555 U.S. 1122, 129 S. Ct. 957, 173 L. Ed. 2d 150 (2009)]; *United States v. Underwood*, 446 F.3d 1340, 1346-48 (11th Cir. 2006) (dual inculpatory statements of one inmate to another nontestimonial), cert. denied, 549 U.S. 903, 127 S. Ct. 226, 166 L. Ed. 2d 179 (2006)."

with [the confrontation clause requirements of unavailability and prior cross-examination in cases that involved testimonial hearsay]—even under the [pre-*Crawford*] approach—the statements at issue were clearly nontestimonial. See, e.g., *Bourjaily v. United States*, 483 U.S. 171, 181-184[,] [107 S. Ct. 2775, 97 L. Ed. 2d 144] [1987] [statements made unwittingly to a Government informant]; *Dutton v. Evans*, 400 U.S. 74, 87-89[,] [91 S. Ct. 210, 27 L. Ed. 2d 213] [1970] [plurality opinion] [statements from one prisoner to another].").

In *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004), cert. denied, 543 U.S. 1079, 125 S. Ct. 938, 160 L. Ed. 2d 821 (2005),[13] then Judge Sotomayor explained in a unanimous decision that "[a]lthough [the Supreme Court in *Crawford*] declined to spell out a comprehensive definition of testimonial . . . it provided examples of those statements at the core of the definition, including prior testimony at a preliminary hearing, previous trial, or grand jury proceeding, as well as responses made during police interrogations. . . . With respect to the last example, the Court observed that [a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. . . . Thus, the types of statements cited by the Court as testimonial share

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[13] "Decisions of the Second Circuit Court of Appeals, although not binding on us, are particularly persuasive. *Turner v. Frowein*, 253 Conn. 312, 341, 752 A.2d 955 (2000); see also *State v. Spencer*, 268 Conn. 575, 610, 848 A.2d 1183 (opinions of Second Circuit entitled to significant deference), cert. denied, 543 U.S. 967, 125 S. Ct. 409, 160 L. Ed. 2d 320 (2004)." (Internal quotation marks omitted.) *State v. Miller*, 96 Conn. App. 362, 382 n.13, 896 A.2d 844, cert. denied, 279 Conn. 907, 901 A.2d 1228 (2006).

certain characteristics; all involve a declarant's knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings." (Citations omitted; internal quotation marks omitted.)

The court further opined, "*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the *declarant's awareness or expectation* that his or her statements may later be used at a trial. [*Crawford*] lists several formulations of the types of statements that are included in the core class of testimonial statements, such as 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' . . . All of these definitions provide that the statement must be such that the *declarant reasonably expects* that the statement might be used in future judicial proceedings. . . . Although the Court [in *Crawford*] did not adopt any one of these formulations, its statement that '[t]hese formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it' suggests that the Court would use the reasonable expectation *of the declarant* as the anchor of a more concrete definition of testimony." (Citations omitted; emphasis added; footnote omitted.) Id., 228-29; see also *State v. Miller*, 95 Conn. App. 362, 382, 896 A.2d 844 (discussing *Saget*), cert. denied, 279 Conn. 907, 901 A.2d 1228 (2006).

In *Saget*, it was undisputed that the coconspirator of the defendant had no knowledge that he was speaking with a confidential informant. *United States v.*

Saget, supra, 377 F.3d 229. The court stated that, in light of this, it would not "attempt to articulate a complete definition of testimonial statements in order to hold that [the coconspirator's] statements did not constitute testimony . . . because *Crawford* indicates that the specific type of statements at issue here are nontestimonial in nature." Id.

The court in *Saget* went on to discuss the Supreme Court's decision in *Bourjaily v. United States*, supra, 483 U.S. 171, which it found relevant. *United States v. Saget*, supra, 377 F.3d 229. It explained, *Bourjaily* "involved a co-defendant's unwitting statements to an FBI informant, as an example of a case in which nontestimonial statements were correctly admitted against the defendant without a prior opportunity for cross-examination. . . . In *Bourjaily*, the declarant's conversation with a confidential informant, in which he implicated the defendant, was recorded without the declarant's knowledge. . . . The Court held that even though the defendant had no opportunity to cross-examine the declarant at the time that he made the statements and the declarant was unavailable to testify at trial, the admission of the declarant's statements against the defendant did not violate the Confrontation Clause. . . . *Crawford* approved of this holding, citing it as an example of an earlier case that was consistent with the principle that the Clause permits the admission of nontestimonial statements in the absence of a prior opportunity for cross-examination." (Citations omitted; internal quotation marks omitted.) Id.

In reliance on *Crawford* and *Bourjaily*, the court in *Saget* firmly held that "a declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within

the meaning of *Crawford*." Id.; accord *United States v. Dargan*, 738 F.3d 643, 650-51 (4th Cir. 2013) (statements made by coconspirator of defendant to cellmate in informal setting were "plainly nontestimonial" under *Davis* and *Crawford*); *United States v. Pelletier*, 666 F.3d 1, 9 (1st Cir. 2011) ("Although we have not previously had occasion to apply *Davis* to the situation presented here—statements made by one inmate to another—we have little difficulty holding that such statements are not testimonial. . . . [The declarant's] jailhouse statements to [his fellow inmate] bear none of the characteristics of testimonial hearsay. They were made not under formal circumstances, but rather to a fellow inmate with a shared history, under circumstances that did not portend their use at trial against [the defendant]." [Citations omitted.]), cert. denied, 566 U.S. 1023, 132 S. Ct. 2683, 183 L. Ed. 2d 48 (2012); *United States v. Smalls*, 605 F.3d 765, 778, 780 (10th Cir. 2010) (accomplice declarant's recorded statement to confidential informant cellmate "unquestionably nontestimonial" because declarant "in no sense intended to bear testimony against [defendant]; [declarant] in no manner sought to establish facts for use in a criminal investigation or prosecution . . . [declarant] boasted of the *details* of a cold-blooded murder in response to 'casual questioning' by a fellow inmate and apparent friend" [citation omitted; emphasis in original]); *United States v. Johnson*, 581 F.3d 320, 325 (6th Cir. 2009) (declarant's dual inculpatory statements implicating himself and codefendants, unwittingly made to confidential jailhouse informant wearing wire, were nontestimonial), cert. denied, 560 U.S. 966, 130 S. Ct. 3409, 177 L. Ed. 2d 326 (2010); *United States v. Watson*, 525 F.3d 583, 589 (7th Cir. 2008) ("statement unwittingly made to a confidential informant and recorded by the government is not

'testimonial' for Confrontation Clause purposes"), cert. denied sub nom. *Redmond v. United States*, 555 U.S. 1037, 129 S. Ct. 610, 172 L. Ed. 2d 466 (2008), and cert. denied, 555 U.S. 1104, 129 S. Ct. 972, 173 L. Ed. 2d 117 (2009); *United States v. Udeozor*, 515 F.3d 260, 270 (4th Cir. 2008) (because defendant plainly did not think he was giving any sort of testimony when making statements to victim during recorded telephone calls, admission of taped conversations into evidence did not violate defendant's rights under confrontation clause).

In the present case, Calabrese's statements to his prison cellmate bear none of the characteristics of testimonial hearsay. Calabrese made these statements to his prison cellmate in an informal setting. He implicated himself, Patel, and the defendant, and there is no indication that he anticipated that his statements would be used in a criminal investigation or prosecution. Accordingly, we conclude that the trial court did not violate the defendant's right to confrontation by admitting into evidence the recording of Calabrese's statements."[14]

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[14] To the extent that the defendant also argues that even if the statements were nontestimonial, their admission still violated his right of confrontation, we reject this claim as inconsistent with our law. See *State v. Smith*, supra, 289 Conn. 618 ("[n]ontestimonial statements . . . are not subject to the confrontation clause"); *State v. Anwar S.*, 141 Conn. App. 355, 361, 61 A.3d 1129 ("[h]earsay statements that are nontestimonial in nature are not governed by the confrontation clause, and their admissibility is governed solely by the rules of evidence" [internal quotation marks omitted]), cert. denied, 308 Conn. 936, 66 A.3d 499 (2013).

B

Whether Calabrese's Statements were Trustworthy or Reliable

The defendant contends that the court improperly admitted Calabrese's statements under § 8-6 (4) of the Connecticut Code of Evidence as statements against penal interest when they were not trustworthy or reliable. The state argues that, as an evidentiary matter, the defendant's claim is not reviewable because he failed to preserve his objection properly by reasserting it after his motion in limine was denied *without prejudice*. In the alternative, it argues that the statements were both trustworthy and reliable. We conclude that this claim is not reviewable because the defendant failed to preserve his objection.

As set forth in our statement of additional facts, in ruling on the defendant's motion in limine to exclude Calabrese's statements, the court denied the motion *without prejudice* and specifically told defense counsel that its ruling was not final, and that defense counsel could question the cellmate outside of the presence of the jury, before he testified and before the recording was introduced into evidence. Defense counsel has not asserted on appeal that he took the opportunity to question the cellmate outside of the jury's presence. Additionally, the record clearly demonstrates that defense counsel did not object when the recording of the statements was offered into evidence. The record also reveals that defense counsel specifically agreed that the prosecutor had laid the necessary foundation for admission of the recording by his submission of a letter from Calabrese's attorney stating that Calabrese would invoke his fifth amendment privilege if called to testify.

Practice Book § 60-5 provides in relevant part: "In jury trials, where there is a motion, argument, or offer of proof or evidence in the absence of the jury, whether during trial or before, pertaining to an issue that later arises in the presence of the jury, and *counsel has fully complied with the requirements for preserving any objection or exception to the judge's adverse ruling* thereon in the absence of the jury, the matter shall be deemed to be distinctly raised at the trial for purposes of this rule without a further objection or exception provided that the grounds for such objection or exception, and the ruling thereon as previously articulated, remain the same. . . ." (Emphasis added.)

"A trial court may entertain a motion in limine made by either party regarding the admission or exclusion of anticipated evidence. . . . The judicial authority may grant the relief sought in the motion or such other relief as it may deem appropriate, may deny the motion with or *without prejudice to its later renewal*, or may reserve decision thereon until a later time in the proceeding. Practice Book § 42-15. This court has said that [t]he motion in limine . . . has generally been used in Connecticut courts to invoke a trial judge's inherent discretionary powers to control proceedings, exclude evidence, and prevent occurrences that might unnecessarily prejudice the right of any party to a fair trial." (Emphasis added; internal quotation marks omitted.) *State v. Holmes*, 64 Conn. App. 80, 85, 778 A.2d 253, cert. denied, 258 Conn. 911, 782 A.2d 1249 (2001).

Our Supreme Court has stated: "[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling

for review, trial counsel must object properly." (Internal quotation marks omitted.) *State* v. *Cabral*, 275 Conn. 514, 530-31, 881 A.2d 247, cert. denied, 546 U.S. 1048, 126 S. Ct. 773, 163 L. Ed. 2d 600 (2005). In particular, where the court's evidentiary ruling is preliminary and not final, it is "incumbent on the defendant to seek a definitive ruling [when the evidence is offered at trial] in order fully to comply with the requirements of our court rules of practice for preserving his claim of error . . . ." *State* v. *Johnson*, 214 Conn. 161, 170, 571 A.2d 79 (1990).

We conclude that the defendant's claim is not reviewable. The court denied the defendant's motion in limine *without prejudice*, and specifically stated that its ruling *was not final*, in order to permit defense counsel the opportunity to question the cellmate out of the presence of the jury; defense counsel, through such questioning, would have had the opportunity to attempt to establish that the recording containing Calabrese's statement was untrustworthy or unreliable. The defendant specifically was permitted to make such a showing and to raise additional objections when the recording was introduced into evidence. This would have allowed the trial court to make a final ruling after the record was further developed by defense counsel and the court was in a better position to evaluate the circumstances surrounding the recording. Having not taken advantage of the court's offer and having not objected at the time the evidence was offered, the defendant has not preserved this evidentiary issue for appellate review.[15]

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[15] The defendant argues in his reply brief that his evidentiary claim is preserved properly because he did not need to again raise his objection at trial because "no additional information arose."

IV

The defendant also claims that the trial court erred in preventing him from asking certain questions to potential jurors during voir dire. Specifically, the defendant claims that the court abused its discretion in preventing him from questioning potential jurors regarding (1) their opinions on the death penalty and (2) whether they would keep an open mind throughout the trial, including when the final witness was questioned because "many times the most important witness is the last witness." The state contends that the court properly prohibited these questions on the ground that they raised irrelevant and improper matters. After setting forth our standard of review and the principles that guide us, we will consider each voir dire question in turn.

"Voir dire plays a critical function in assuring the criminal defendant that his [or her] [s]ixth [a]mendment right to an impartial jury will be honored. . . . Part of the guarantee of a defendant's right to an

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This assertion is not correct. At the time the court rendered its preliminary ruling, neither it nor the parties had the benefit of the informant's testimony. The situation at trial was different when the state offered the recording after the defendant had stipulated that a foundation for its admission had been laid and the informant provided additional foundational testimony before the state offered it into evidence. See generally this part of the opinion. The defendant chose not to conduct any examination of the informant before the statement was admitted into evidence. To the contrary, defense counsel stated that he had "[n]o objection" to the introduction of the statement. The defendant thus made no attempt to seek a definitive ruling from the court on the basis of either the record at trial or the additional testimony he could have procured from the informant. Consequently, not only did the defendant fail to preserve the claim he now raises on appeal, he abandoned the claim at trial.

impartial jury is an adequate voir dire to identify unqualified jurors. . . . Our constitutional and statutory law permit each party, typically through his or her attorney, to question each prospective juror individually, outside the presence of other prospective jurors, to determine [his or her] fitness to serve on the jury. Conn. Const., art. I, § 19; General Statutes § 54-821; Practice Book [§ 42-12]. . . . Because the purpose of voir dire is to discover if there is any likelihood that some prejudice is in the [prospective] juror's mind [that] will even subconsciously affect his [or her] decision of the case, the party who may be adversely affected should be permitted [to ask] questions designed to uncover that prejudice. This is particularly true with reference to the defendant in a criminal case. . . . The purpose of voir dire is to facilitate [the] intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause." (Internal quotation marks omitted.) *State v. Edwards*, 314 Conn. 465, 483, 102 A.3d 52 (2014).

"[I]f there is any likelihood that some prejudice is in the juror's mind which will even subconsciously affect his decision of the case, the party who may be adversely affected should be permitted questions designed to uncover that prejudice. . . . The latitude . . . afforded the parties in order that they may accomplish the purposes of the voir dire [however] is tempered by the rule that [q]uestions addressed to prospective jurors involving assumptions or hypotheses concerning the evidence which may be offered at the trial . . . should be discouraged . . . . [A]ll too frequently such inquiries represent a calculated effort on the part of counsel to ascertain before the trial starts what the reaction of the venire[person] will be to certain issues of fact or law or, at least, to implant in his mind a prejudice or

prejudgment on those issues. Such an effort transcends the proper limits of the voir dire and represents an abuse of the statutory right of examination. . . .

"Thus, we afford trial courts wide discretion in their supervision of voir dire proceedings to strike a proper balance between [the] competing considerations . . . but at the same time recognize that, as a practical matter, [v]oir dire that touches on the facts of the case should be discouraged." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *State v. Ebron*, 292 Conn. 656, 666-67, 975 A.2d 17 (2009), overruled on other grounds by *State v. Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011). "[T]he permissible content of the voir dire questions cannot be reduced to simplistic rules, but must be left fluid in order to accommodate the particular circumstances under which the trial is being conducted. Thus, a particular question may be appropriate under some circumstances but not under other circumstances. . . . The trial court has broad discretion to determine the latitude and the nature of the questioning that is reasonably necessary to search out potential prejudices of the jurors." (Citation omitted; internal quotation marks omitted.) *State v. Skipper*, 228 Conn. 610, 626-27, 637 A.2d 1101 (1994).

A

On October 26, 2015, the defendant filed a motion for permission to question prospective jurors about their views on the death penalty on the grounds that he wanted to evaluate whether jurors were defense or prosecution oriented, and he wanted to "gauge [their] knowledge and awareness of current issues."[16] He

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[16] The death penalty prospectively was repealed by the legislature in 2012. See Public Acts 2012, No. 12-5. Our Supreme

asserted that he would inform the jury that this was not a death penalty case. The prosecutor objected, arguing, in part, that, since the death penalty is nonexistent in Connecticut, these types of questions would mislead and confuse the jury, which has no say in the defendant's punishment in any case. The prosecutor contended that there were many other ways that defense counsel could explore juror bias without injecting irrelevant and inappropriate matters into the case. The court denied the defendant's motion on the basis that the questions sought to inquire into whether prospective jurors were aware that the death penalty had been abolished, and an inquiry into a juror's knowledge of existing law was impermissible under *Duffy v. Carroll*, 137 Conn. 51, 56-57, 75 A.2d 33 (1950) ("Neither is a juror's knowledge or ignorance concerning questions of law a proper subject of inquiry. These are concerned with matters which the juror is bound to take from the court. A juror cannot be a law to himself, but is bound to follow the instructions of the court in that respect, and hence his knowledge or ignorance concerning questions of law is not a proper subject of inquiry upon the trial of the challenge for cause." [Internal quotation marks omitted.]). The court also stated that sentencing was not a matter for potential jurors to consider.

The defendant argues that the court's prohibition on his questions regarding the death penalty was an abuse of discretion because studies have indicated that "pro-death penalty jurors would be more likely to harbor racial biases against [the defendant, and it] is proper for defense counsel to inquire regarding the

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Court, thereafter, on August 25, 2016, in *State v. Santiago*, 318 Conn. 1, 122 A.3d 1 (2015), declared the death penalty unconstitutional for previous convictions as well.

death penalty as a means of exploring potential racial biases in jurors as well as jurors' favorable views of the prosecution." We are not persuaded.

In the defendant's motion, he specifically stated in part that he wanted to gauge the knowledge of prospective jurors concerning current issues, namely the death penalty. We agree with the state and the trial court that such questioning could be misleading and confusing to a potential juror. "[A] juror's knowledge or ignorance with respect to questions of law is not a proper subject of inquiry on voir dire. . . . [All] too frequently such inquiries represent a calculated effort on the part of counsel to ascertain before the trial starts what the reaction of the venireman will be to certain issues of fact or law or, at least, to implant in his mind a prejudice or prejudgment on those issues. Such an effort transcends the proper limits of the voir dire and represents an abuse of the statutory right of examination." (Citations omitted; internal quotation marks omitted.) *Lamb v. Burns*, 202 Conn. 158, 164, 520 A.2d 190 (1987). "[I]t is important that the trial [court], in the exercise of [its] discretion, be punctilious in restricting counsel's inquiries to questions which are pertinent and proper for testing the capacity and competency of the juror . . . and which are neither designed nor likely to plant prejudicial matter in his mind." (Citation omitted; internal quotation marks omitted.) *State v. Anthony*, 172 Conn. 172, 176, 374 A.2d 156 (1976).

Here, the record reveals that defense counsel was given wide latitude in questioning potential jurors regarding their ability to be fair and impartial and to follow the law. Specifically, he inquired about, inter alia, their feelings about the criminal justice system, about their ability to remain fair and impartial despite

the defendant's arrest and the facts of the crimes alleged, about potential sympathy for the victim's mother, and about the presumption of innocence and reasonable doubt. Furthermore, the court never imposed any prohibition on defense counsel's ability to explore potential racial bias or prejudices; rather, it appears that defense counsel chose not to engage in such exploration. On the basis of the foregoing, we conclude that the court did not abuse its discretion in preventing the defendant from questioning potential jurors about the death penalty.

B

On November 5, 2015, the defendant questioned potential jurors about whether they could keep an open mind through the end of trial because "many times, the most important witness is the last witness." After jury selection ended for the morning session, the court noted these questions and told defense counsel that they were problematic because they focused on the final witness, regardless of who that witness might be, and they could lead a juror to conclude that the last witness was more important than other witnesses. The court suggested that counsel could ask the potential jurors whether they would keep an open mind throughout the entire trial.

The defendant argues that his proposed question "did not instruct the juror to place extra weight on the testimony of the last witness; instead, to ensure the juror waits until all the evidence is presented, it asks the juror to be open to the possibility that the last witness is most important. The situation proposed by the statement is true; sometimes the last witness truly *is* the most important." (Emphasis in original.) We conclude that the court did not abuse its discretion in disallowing this question.

As stated in part A of this section: "[I]t is important that the trial [court], in the exercise of [its] discretion, be punctilious in restricting counsel's inquiries to questions which are pertinent and proper for testing the capacity and competency of the juror . . . and which are neither designed nor likely to plant prejudicial matter in his mind." (Citation omitted; internal quotation marks omitted.) *State v. Anthony*, supra, 172 Conn. 176. In this case, the court was concerned that defense counsel's focus on "the last witness" might cause the potential jurors to assume that the last witness was special or more important than other witnesses. With this concern in mind, the court told defense counsel that he could ask whether the juror would remain open minded throughout the entire trial, from start to finish, but he could not ask specifically about "the last witness." We conclude that this question has the potential to plant prejudicial matter in the minds of the jurors. See id. Accordingly, we conclude that the trial court did not abuse its discretion in prohibiting it.

V

The defendant claims that the court erred in giving a certain limiting instruction to the jury regarding non-hearsay testimony. He also contends that the court's limiting instruction affected his right to testify in his own defense by affecting his credibility, and, therefore, that this claim is of constitutional magnitude appropriate for *Golding* review.[17] The state argues, in relevant part, that this is nothing more than

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[17] See *State v. Golding*, 213 Conn. 233, 239-40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015).

an alleged evidentiary error, which the defendant failed to preserve. We agree with the state.

The following additional facts inform our consideration of this claim. On January 29, 2016, during a break in the defendant's direct testimony, defense counsel filed a motion requesting to introduce certain out-of-court statements, particularly a statement allegedly made by Calabrese to the defendant on the ground that such statement was being "offered not for its truth but to show its effect on the hearer, [and], therefore, [it] is not hearsay." The court heard argument on the motion, which included the following colloquy:

"The Court: My first question . . . is exactly what statements [are we] talking about. You indicated before the break that you wanted to offer, through your client, a statement that Michael Calabrese said the day after the shooting that, '[i]f I'm going down, you're going down.' Are there other statements that are not identified in this motion that are going to come up?

"[Defense Counsel]: Correct. That statement was made—something to that effect, I don't know the exact language, and I believe—I believe that's all we have, yes.

"The Court: All right.

"[Defense Counsel]: And then that statement affected a number of things after, but that's the one statement essentially. . . .

"The Court: My understanding of your argument, at least one you articulated, is that this is offered not for the truth, but to explain why the defendant took the steps he did and that the state argues constitute

consciousness of guilt. Is that correct, that's the argument?

"[Defense Counsel]: Correct, Your Honor. I believe it's relevant. The state has made consciousness of guilt a large portion of [its] case, particularly things that happened after the homicide, therefore this statement to my client and my client heard on the morning after the homicide colored all of his actions afterwards, and would be, I think, crucial and necessary explanation for why he took some of the steps he did, which would otherwise could raise suspicion with the jury as to consciousness of guilt charge.

* * *

"The Court: So you do want the statement in for the truth, you want the jury to hear those words.

"[Defense Counsel]: We believe the words are important to understand why they would have that impact on the defendant. And I fail to see the prejudice here. I mean, I suppose the jury could be prejudiced against Mr. Calabrese for making a threatening statement, but they already heard numerous statements by Mr. Calabrese here in court that I think would sufficiently prejudice them against him and would already lead them to believe that he could be violent and that he could be threatening, and I don't see . . . prejudice here, that was all on the tape. And the probative value here, the consciousness of guilt evidence, he acts like this because Calabrese says I will essentially—that I will take action to make sure you are guilty.

"The Court: How can you say the jury must hear those particular words and at the same time argue that you're not offering those words for the truth, you don't want the jury to credit those words?

"[Defense Counsel]: They don't need to credit them, they need to understand why the statement was so alarming to my client. Did you know that you could be legally liable for this, that would be different, but if 'I go down, you go down,' he knows that Mr. Calabrese will go down based on what Mr. Calabrese did, that statement is much more alarming than just a general idea of Calabrese saying you could be legally liable.

"The Court: Isn't that the point. I mean, didn't he learn that day or sooner that Michael Calabrese shot Luke Vitalis, and that's in evidence, that Luke Vitalis was dead, that his testimony is that he believed Luke Vitalis was only going to make a drug purchase, that he knew, and you established this, that he gave a gun to Michael Calabrese, he knew he drove Michael Calabrese to Luke Vitalis' house, he knew that he drove Michael Calabrese from Luke Vitalis' house, and this is all of his testimony, all of that is admissible, it's not hearsay, and all of those things would certainly go to why he did the investigation that he did. I don't—again, it seems that you're telling me you don't want the jury to believe the words, but you want them to hear the words, all—and, quite frankly, are less incriminating, the fact that Michael Calabrese said that, than all the facts I just outlined that are in evidence.

"[Defense Counsel]: I believe that fact that there's a threat would explain the panic on the part of the defendant. And it doesn't matter whether or not it's a credible threat, it matters the language of it and what he hears. I don't think we need to judge whether or not it's a credible threat by Mr. Calabrese, whether or not the language is such it would cause someone in the defendant's position to panic and to take rash actions to try and potentially remove himself from—

"The Court: Did that alarm him more than knowing he now is involved in a murder?

"[Defense Counsel]: I—people—I don't know what his legal knowledge was before this, but it would be reason for him to say I didn't plan this, I didn't have no involvement, I can't get in trouble for it, and then the next morning what Calabrese says, oh, my God, I could be going to jail for that. That's a reasonable thought someone could have being told that threat, and I think the full language of the threat is necessary to communicate why he would panic, why he would take certain actions.

"The Court: Turning to your alternative argument, that this statement by Michael Calabrese is against his penal interest. How is he exposed to prosecution by saying the words, 'If I go down, you go down?'

"[Defense Counsel]: First, it's an admission by Mr. Calabrese that he could be going down. Second, it's tampering with a witness by threatening [the defendant] not to go forward with any information, because he's saying if you take any action to make sure I'm punished, I will make sure you come down with me.

"The Court: [Prosecutor]?

"[The Prosecutor]: There's no—well, I mean, an admission—Mr. Calabrese is not on trial, so the defendant can't offer Mr. Calabrese's statement as an admission. 'If I'm going down, you're going down,' in no way implicates Mr. Calabrese, because it's conditional. I mean . . . it's a conditional situation. He's not saying, 'Yo, man, I did this, you drove me, and if you tell the cops that I did this, I'm telling 'em you drove me.' It's not factual. It's conditional. . . . [H]ow can a conditional statement be a statement against penal interest? It's alleging something in the future.

"[Defense Counsel]: Your Honor, first, if [the defendant] had testified at Mr. Calabrese's trial, this statement would come in as an admission against penal interest. I have no doubt about that. Additionally, we would ask that the state articulate the potential proof of prejudice is so great it would outweigh its probative value. I don't think we've heard any prejudice articulated, but that's a prejudice articulated at this time.

"The Court: What is the prejudice to the state if it's not offered for the truth?

"[The Prosecutor]: Your Honor, the defendant's whole case is going to be to attempt to discount the credibility of Mr. Calabrese's taped statement, and so they're—inevitably they're going to have to argue that somehow Mr. Calabrese's intent was to frame [the defendant]. . . . And this statement goes directly to that.

"The Court: I understand. Am I correct in my understanding and expectation that if the [court] were to admit it, that there would be no argument in closing argument or at any other time that—no reference to the statement as supporting the defendant's claim that Calabrese's tape recording is not accurate?

"[Defense Counsel]: That's correct. And the idea that we're attacking credibility of Mr. Calabrese, is further evidence we're not producing it for the truth, Mr. Calabrese is lying on the tape, he's lying here.

"The Court: I don't know if it's be[ing] introduced for the truth, but I think I am going to—I'm not confident that this is the only way to get this evidence before the jury and that it's necessary. I will allow it, but there will be a corrective instruction immediately that it's not being offered for the truth, that the jury will not

consider it to be the truth, or draw any conclusions or make any findings based upon whether the statement is truthful or not, it's simply offered to explain why the defendant took certain subsequent actions. Is that fair?

"[Defense Counsel]: Very good.

"The Court: All right. Please call the jury."

After the defendant resumed the witness stand, he testified that Calabrese told him: " 'Don't say anything. If I go down, you're going down with me.' " The court immediately provided a limiting instruction to the jury: "All right, at this point, ladies and gentlemen, that is a statement that is offered for a specific purpose, and that is a limited purpose, and so when you engage in your deliberations, you can only consider it for that limited purpose, and it is as follows: That statement, as I understand it, is going to be offered to explain why the defendant took certain subsequent actions. It is not offered for the truth. *It is not offered with the expectation or the understanding that you believe that those were the words that were spoken*. All right. Go ahead." (Emphasis added.) It is the emphasized portion of the court's limiting instruction that the defendant now contends violated his right to testify in his own defense. He alleges that the court effectively undermined his credibility by giving this instruction.

First, we conclude that this claim is an evidentiary matter. Our Supreme Court repeatedly has opined that "because an instructional error relating to general principles of witness credibility is not constitutional in nature; *State v. Patterson*, [276 Conn. 452, 469-71, 886 A.2d 777 (2005)]; the defendant would not be entitled to review of any such claim under

State v. Golding, 213 Conn. 233, 239-40, 567 A.2d 823 (1989) . . . ." (Internal quotation marks omitted.) *State v. Diaz*, 302 Conn. 93, 114, 25 A.3d 594 (2011). Accordingly, we will not afford *Golding* review to this evidentiary matter.

Moreover, in the present case, the defendant specifically voiced agreement with the court's statement that it would give a limiting instruction, and the defendant, thereafter, failed to object to the precise instruction given by the court. His claim, therefore, is unreviewable. See *State v. William C.*, 103 Conn. App. 508, 520 n.6, 930 A.2d 753 ("[t]he defendant did not object at trial, however, to the court's instructions, and, therefore, the unpreserved claim of instructional error is not reviewable"), cert. denied, 284 Conn. 928, 934 A.2d 244 (2007).[18]

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[18] During oral argument before this court, the defendant argued that he properly preserved this claim by raising an objection to a similar limiting instruction given in the court's final instruction to the jury. We disagree. In its final instruction the court stated, "there was testimony by the defendant that Michael Calabrese made a statement to him about, if I go down, you're going down with me, or words to that effect. That was offered for a limited purpose. That was to show the effect of such a statement on the defendant; it is not to be considered by you for the truth of those statements or for you to conclude that those statements were made in those words." After the defendant objected on the ground that the jury was charged incorrectly that it could not "conclude that those statements were made," the court offered the defendant an opportunity to submit a corrective charge to the court. After the luncheon recess, defense counsel confirmed to the court that he no longer was seeking that the jury be recharged on this issue. Thus, any claim that the defendant might have had that the jury was charged incorrectly explicitly was waived by counsel when he declined the opportunity to have the jury recharged.

The judgment is affirmed.

In this opinion the other judges concurred.

APPENDIX B

STATE OF CONNECTICUT
APPELLATE COURT

(AC 41821)

STATE OF CONNECTICUT

v.

HIRAL M. PATEL

Alvord, Bright and Bear, Js.

Syllabus

Convicted of the crimes of murder, home invasion, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit burglary in the first degree and tampering with physical evidence in connection with the shooting death of the victim, the defendant appealed, claiming, inter alia, that the trial court improperly admitted into evidence certain statements by his coconspirator, C, that inculpated the defendant, and precluded him from introducing into evidence a statement by S, a cousin of the defendant, that was against S's penal interest. N, a cousin of the defendant who had been charged with narcotics offenses, enlisted the defendant and C in N's plan to rob the victim, with whom N previously had engaged in drug transactions. N drove the defendant and C to an area near the victim's home before driving away. After

the defendant and C entered the victim's home and tied up his mother, C went upstairs, shot the victim and ransacked his bedroom looking for money. The defendant and C then fled into the woods, where the defendant lost his cell phone, and they thereafter met up with N and drove away. N subsequently was convicted of murder in a separate trial, and this court affirmed his conviction on appeal. In the defendant's trial, C, in response to a question by the court and without having been sworn in, informed the court that he would exercise his fifth amendment privilege against self-incrimination and refuse to answer questions if he were called to testify. The court thereafter admitted into evidence a tape recording of a conversation between C and E, a jailhouse informant, that was made after E told correction officials that he would be willing to record his conversations with C without C's knowledge. The court further admitted into evidence testimony from C's girlfriend, B, about statements C had made to her and precluded the defendant's sister, M, from testifying that S had told her that S was with C during the incident. *Held*:

1. The trial court did not abuse its discretion when it admitted C's statements to E and B pursuant to the dual inculpatory statement exception to the hearsay rule under the applicable provision (§ 8-6 [4]) of the Connecticut Code of Evidence:

a. The defendant could not prevail on his unpreserved claim that the trial court improperly found that C was unavailable to testify because C was not under oath when questioned about his fifth amendment privilege; that court's failure to have C

sworn in did not violate the defendant's sixth amendment right to confrontation or constitute plain error, as the defendant made no claim that C's privilege against self-incrimination might not pertain to all of the questions that he would have been asked, and the defendant did not contend that C would have answered some questions or that the court's inquiry of C as to his personal invocation of the privilege was deficient in substance.

b. The trial court did not violate the defendant's sixth amendment right to confrontation when it admitted C's statements to E, this court having determined in N's appeal that C's statements to E bore none of the characteristics of testimonial hearsay; C's statements, which implicated himself, N and the defendant, were made to his cellmate in an informal setting, there was no indication that C anticipated that his statements would be used in a criminal investigation or prosecution, and although the evidence suggested that the recording of C's statements was initiated by the Department of Correction and that the police had spoken to E prior to the recording, which was not clear from the testimony in N's trial, an objective witness would not reasonably believe that C's statements could be used at a trial, as there was no indication under either scenario that C had knowledge that he was speaking with a jailhouse informant, the determination of whether C's statements were testimonial focused on the reasonable expectations of C, and nothing about the circumstances suggested that a person in C's position would intend his statements to be a substitute for trial testimony.

c. This court found unavailing the defendant's unpreserved claim that C's statements to E were testimonial under the due process and confrontation clauses in article first, § 8, of the state constitution, as the defendant did not identify any compelling economic or sociological concern that supported a change in the interpretation of the confrontation clause in article first, § 8, of the state constitution.

d. The trial court did not abuse its discretion when it admitted C's statements to E and B pursuant to § 8-6 (4), as that court's findings adequately supported its conclusion that C's statements presented sufficient indicia of reliability to justify their admission: C made the statements to E, a fellow inmate who was facing serious charges and appeared to be a fellow gang member, the details of the crime were related only by C, and it was within the trial court's discretion to evaluate the consistencies and inconsistencies in C's statements and to conclude, on balance, in favor of a determination that the statements were reliable; moreover, C had a close relationship with B, and his statements to her were made on the day of the crime and were consistent with other evidence, and even if C downplayed his involvement when he admitted to B that he robbed the victim while failing to offer that he also murdered the victim, C directly and explicitly incriminated himself by admitting his participation in the robbery, and, thus, the statement remained against his penal interest.

2. The trial court did not abuse its discretion when it excluded from evidence M's testimony concerning S's statement to her on the ground that it was not trustworthy and, thus, did not satisfy the requirements of § 8-6 (4): although S's statement that he should have been charged with murder instead of the defendant was against his penal interest, the relationship between M and S did not support a finding of trustworthiness, as M acknowledged that, although they had been close while growing up, she did not see S as much as she did before she entered medical school, that she had seen S only twice in the past year and that it had been years since she had more steady contact with him, and there was no evidence that S had ever repeated his statement to M or made inculpatory statements to others; moreover, contrary to the defendant's assertion that S's statement was supported by corroborating circumstances, statements of the victim's mother, in which she described the intruders, were inconsistent, the lack of proof that S was at a location distant from the crime was not necessarily corroborative of his statement, other statements S had made did not corroborate the key portion of his statement to M but suggested merely that he was involved in the crime to some degree, and circumstances surrounding the murder were far more consistent with a finding that the defendant had entered the victim's home, rather than S.

3. The defendant could not prevail on his claim that the trial court abused its discretion when it denied his motion to preclude the state from offering the testimony of an agent with the Federal

Bureau of Investigation about cell phone tower data analysis relative to the movement of cell phones associated with the defendant, N and C on the day of the murder: contrary to the defendant's assertion that the court improperly failed to conduct a hearing pursuant to *State v. Porter* (241 Conn. 57) to determine the reliability of the agent's methods and procedures, the court held the functional equivalent of a *Porter* hearing, as there was ample testimony bearing on the relevant *Porter* factors and sufficient testimony to enable the court to determine whether the agent's methods were reliable, and although the court did not use the words rate of error or peer review in its ruling, it appropriately relied on the experience of other experts who had carried out similar work and noted that the agent's findings were reviewed by other experts in the same field; moreover, the defendant's assertion that the absence of sector analysis in the data rendered the agent's calculations and conclusions less precise and accurate than they would have been with a sector-based analysis was unavailing, as defense counsel did not identify at trial the defendant's alibi that he was out of state at the time of the crime as a factual distinction requiring the court to reconsider its ruling on the issue in N's trial, nor did he explain to this court how sector analysis would be more reliable, when the state, in light of the defendant's alibi, sought only to identify the general area in which his phone was present.

4. The evidence was sufficient to convict the defendant of murder under a theory of liability predicated on *Pinkerton v. United States* (328 U.S.

640); it reasonably was foreseeable that the victim might fight back to thwart the robbery of his proceeds from a drug sale and that C, who was armed with a loaded gun, might, in furtherance of the conspiracy, cause the victim's death with the intent to do so, and the defendant's role in the incident was not too attenuated that it would have been unjust to hold him responsible for the criminal conduct of C, as the defendant had communicated with N about the crime days prior thereto, planned to enter the victim's home to rob him of money he had received from a drug sale and restrained the victim's mother after entering the home.

Argued May 14—
officially released November 12, 2019

Procedural History

Substitute information charging the defendant with the crimes of felony murder, murder, home invasion, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit robbery in the first degree, conspiracy to commit burglary in the first degree and tampering with physical evidence, brought to the Superior Court in the judicial district of Litchfield and tried to the jury before *Danaher*, *J.*; thereafter, the court denied the defendant's motions to preclude certain evidence; verdict of guilty; subsequently, the court denied the defendant's motion for a new trial and granted the defendant's motion to vacate the verdict as to the charge of felony murder; thereafter, the court vacated the verdict as to the charge of conspiracy to commit robbery in the first degree; judgment of guilty of

murder, home invasion, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit burglary in the first degree and tampering with physical evidence, from which the defendant appealed. *Affirmed*.

Richard Emanuel, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *David S. Shepack*, state's attorney, and *Dawn Gallo*, supervisory assistant state's attorney, for the appellee (state).

OPINION

ALVORD, J. The defendant, Hiral M. Patel, appeals from the judgment of conviction of murder in violation of General Statutes § 53a-54a, home invasion in violation of General Statutes § 53a-100aa (a) (1), burglary in the first degree as an accessory in violation of General Statutes §§ 53a-101 (a) (1) and 53a-8 (a), robbery in the first degree as an accessory in violation of General Statutes §§ 53a-134 (a) (2) and 53a-8 (a), conspiracy to commit burglary in the first degree in violation of General Statutes §§ 53a-101 (a) (1) and 53a-48, and tampering with physical evidence in violation of General Statutes § 53a-155 (a) (1).[1] On appeal, the defendant claims that (1) the court erred in admitting into evidence dual inculpatory statements of his coconspirator, Michael Calabrese; (2) the court erred in precluding the defendant from

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[1] The defendant also was convicted of felony murder and conspiracy to commit robbery in the first degree. The trial court vacated his conviction of those charges to avoid double jeopardy concerns. *See* footnote 31 of this opinion.

introducing into evidence a statement of Shyam Patel (Shyam), a cousin of the defendant, that was against his penal interest; (3) the court erred in admitting historical cell site location information without conducting a *Porter*[2] hearing; and (4) there was insufficient evidence adduced at trial to sustain his conviction of murder on a theory of *Pinkerton*[3] liability. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On June 12, 2012, police arrested Niraj Patel (Niraj), the defendant's cousin, after a motor vehicle stop and seized $12,575 from his person and his vehicle. He was charged with criminal attempt to possess more than four ounces of marijuana, interfering with an officer, tampering with evidence, possession of drug paraphernalia, and motor vehicle charges. Following his arrest, Niraj unsuccessfully attempted to borrow money from family members to pay his attorney.

Niraj thereafter formed a plan to rob Luke Vitalis, a marijuana dealer with whom Niraj had conducted drug transactions. Vitalis lived with his mother, Rita G. Vitalis, at 399 Cornwall Bridge Road in Sharon. On August 3, 2012, Niraj sent a text message to the defendant, stating: "I throw you some dough to do this if you have to bring Diva," who was the defendant's family dog. The defendant

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[2] See *State v. Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L Ed. 2d 645 (1998).

[3] See *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L Ed. 1489 (1946).

responded by stating: “You fig a ride out.” Niraj responded: “Yes.” The defendant replied: “Word.” Niraj also offered Calabrese, a friend, money to participate in the robbery.

Niraj knew that Vitalis had sold ten pounds of marijuana from his home on August 5, 2012, and set up a transaction with Vitalis for the following day, with the intention of robbing Vitalis of his proceeds of the previous sale. On August 6, 2012, Niraj drove Calabrese and the defendant to the area of Vitalis’ home and dropped them off down the road. Calabrese and the defendant ran through the woods to Vitalis’ home. They watched the home and saw Vitalis’ mother come home. At approximately 6 p.m., Calabrese and the defendant, wearing masks, bandanas, black hats, and gloves, entered the home, encountered Vitalis’ mother, and restrained her using zip ties. Calabrese, armed with a Ruger handgun that he received from Niraj, went upstairs and encountered Vitalis in his bedroom. He struck Vitalis with the handgun and shot him three times, killing him. Calabrese searched the bedroom but could find only Vitalis’ wallet with $70 and approximately one-half ounce of marijuana, both of which he took. Calabrese and the defendant ran from the property into the woods, where the defendant lost his cell phone. Calabrese and the defendant eventually met up with Niraj, who was driving around looking for

them. Calabrese burned his clothing and sneakers on the side of Wolfe Road in Warren.[4]

After freeing herself, Vitalis' mother called 911. State police troopers arrived at the scene at approximately 6:14 p.m. and found Vitalis deceased. Some of the drawers in the furniture in Vitalis' bedroom were pulled out. The police searched the bedroom and found $32,150. They also found marijuana plants growing in the home and outside, 1.7 pounds of marijuana inside Vitalis' bedroom closet, and evidence of marijuana sales.

The defendant's parents, who were traveling out of state on the day of the crime, owned a package store in Madison. While the defendant's parents were away, the defendant was supposed to assist the store's employee, James Smith, and provide him with a ride home at night. On the afternoon of the day of the crime, Smith called the defendant to ask him to pick up single dollar bills for the store, but could not get in touch with him. The defendant's parents also could not reach him and, eventually, they called a family member, Sachin Patel (Sachin). Sachin left his job at 6:30 p.m. and arrived at the store at about 7 p.m. After Sachin could not reach the defendant on his cell phone, Sachin went to the defendant's house in Branford, let the dog out, and continued to call the defendant from the house phone. Sachin left the defendant's house at about 8:30 p.m. and returned to the store to give Smith a ride home.

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[4] The burnt clothing and sneakers later were discovered, and subsequent forensic testing revealed that footwear imprints from the crime scene probably were made by the right sneaker.

On September 11, 2013, the defendant was arrested. Following a trial, the jury, on February 1, 2017, returned a guilty verdict on all counts. The court, thereafter, rendered judgment in accordance with the jury's verdict. See footnote 1 of this opinion. The court imposed a total effective sentence of forty-five years of imprisonment, execution suspended after thirty-five years and one day, twenty-five years of which were the mandatory minimum, with five years of probation. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court erred in admitting into evidence "dual inculpatory statements" made by Calabrese. First, he contends as a threshold matter that the state failed to prove Calabrese's unavailability because Calabrese was not under oath when he invoked his fifth amendment privilege. Next, he claims that Calabrese's statements made to a jailhouse informant, Wayne Early, were testimonial, and that the introduction into evidence of the recording of those statements violated his federal and state confrontation and due process rights. He further contends that the recording and the testimony of Britney Colwell, Calabrese's girlfriend at the time of the crime, regarding statements Calabrese made to her, also were inadmissible pursuant to § 8-6 (4) of the Connecticut Code of Evidence. We consider each of these claims in turn.

A

As a threshold matter, the defendant contends that "the court erred in finding that Calabrese was 'unavailable' because Calabrese was not under oath when questioned about his fifth amendment privilege." The defendant acknowledges that his claim is unpreserved but nevertheless seeks review pursuant to the bypass doctrine set forth by our Supreme Court in *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), or reversal pursuant to the plain error doctrine.[5] The state argues that the defendant's argument is meritless, emphasizing the defendant's "fail[ure] to cite a single case that holds that a trial court's finding of 'unavailability' must be based on the sworn testimony of the purportedly unavailable witness."[6] We agree with the state that the court

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[5] "The plain error doctrine is based on Practice Book § 60-5, which provides in relevant part: The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial court. . . . The plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . A party cannot prevail under [the] plain error [doctrine] unless [he] has demonstrated that the failure to grant relief will result in manifest injustice." (Internal quotation marks omitted.) *Cator v. Commissioner of Correction*, 181 Conn. App. 167, 177 n.3, 185 A.3d 601, cert. denied, 329 Conn. 902, 184 A.3d 1214 (2018).

[6] The state also responds that the defendant's challenge is "unreviewable because he never asserted in the trial court that Calabrese needed to be sworn in before responding to the

did not err in finding Calabrese to be unavailable and, therefore, the defendant has not shown the existence of a constitutional violation or met the stringent standard for relief pursuant to the plain error doctrine.[7]

The following additional procedural history is relevant. On the morning of January 4, 2017, the court stated that defense counsel wanted a "record to be made as to whether . . . Calabrese would be willing to testify if he were called by either party in this case or if, alternatively, he would seek to invoke his rights under the fifth amendment." Defense counsel represented his understanding "that the state does not intend to call this gentleman based on their understanding that he's going to invoke his fifth amendment privilege. It is my position that, if that's to be done, it should be done by the witness himself . . . on the record in court; his lawyer can't do it for him." Calabrese was present in court with his counsel, Attorney Gerald Giaimo. Responding to the court's inquiry, Calabrese stated that he had the opportunity to talk with Attorney Giaimo about the proceeding. In response to the court's question concerning whether he would answer questions if he were called as a

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trial court's questions." We disagree that the claim is unreviewable. See *State v. Nieves*, 89 Conn. App. 410, 414-15, 873 A.2d 1066 (reviewing, pursuant to *Golding*, unpreserved claim that court failed to hold hearing and require witness personally to invoke privilege against self-incrimination), cert. denied, 275 Conn. 906, 882 A.2d 679 (2005).

[7] The defendant makes only passing reference in his appellate briefs to his right to confrontation as the constitutional right violated.

witness in the defendant's case, he stated that he "would plead the fifth." In response to the court's follow-up questions, Calabrese confirmed that he planned to invoke his rights under the fifth amendment. The court inquired of the parties whether there was "any question in the mind of either party as to whether this is a valid invocation of the fifth amendment privilege," and defense counsel responded that he had "no question about that" but requested "a follow-up question in terms of whether or not he would intend to invoke his fifth amendment rights with respect to every question he might be asked, not just generally." Defense counsel asked to inquire, and the state objected. The court indicated that it did not think it was necessary for defense counsel to inquire. Defense counsel stated that he wanted to know whether Calabrese's invocation of the fifth amendment "applie[d] to every question that is asked of him relevant to this case." The court then asked Calabrese: "[I]f you were to be asked questions about the facts of this case by either party, what position would you take?" Calabrese stated that he would "take the fifth." The court then asked: "Anything further?" Defense counsel responded: "Nothing from me."

The court found that Calabrese had made a valid invocation of his fifth amendment privilege, stating that it believed that if "Calabrese were to answer any questions relative to the facts of this case, they could have a tendency to incriminate him." The court again asked whether there was [a]nything further from either party," to which defense counsel responded, "[n]othing further."

"Under *Golding*, a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; internal quotation marks omitted.) *State v. Walker*, 332 Conn. 678, 688, 212 A.3d 1244 (2019). We conclude that the defendant's claim is reviewable under the first and second prongs of *Golding*. Accordingly, we turn to the third prong of *Golding*—namely, whether the defendant has established a violation of his sixth amendment confrontation rights.

In support of his claim that his sixth amendment right to confrontation was violated, the defendant cites *State v. Cecarelli*, 32 Conn. App. 811, 821, 631 A.2d 862 (1993). In *Cecarelli*, the trial court accepted the representation made by counsel for a witness that the witness would invoke his fifth amendment privilege regardless of the question he was asked. Id., 817. The witness did not appear in court, and the court denied the defendant's request for a hearing to determine whether a valid privilege properly was claimed as to questions concerning the scope and extent of the witness' actions as a police informant. Id., 817-18. On appeal, this court concluded that the trial court's failure to hold a hearing implicated the defendant's constitutional

right to present a defense. Id., 821. Noting that "a question-by-question invocation of the privilege against self-incrimination may not be required under all circumstances," this court concluded that the sustaining of a blanket privilege claim was not appropriate given the circumstances before the trial court, and that a hearing was required. Id., 820.

Cecarelli is distinguishable from the present case in that the defendant in *Cecarelli* challenged the witness' assertion of his constitutional privilege on the ground that it might not pertain to all of the questions the defendant sought to ask regarding his entrapment defense. Specifically, this court reasoned: "We cannot speculate that the defendant's entrapment defense may be inextricably bound up with a scheme of criminality on the part of [the witness] and that all questions asked of [the witness] to corroborate that defense might require answers tending to incriminate him. That determination may be reached only at a hearing for that purpose, which would allow the trial court to explore the basis, if any, of the witness' refusal to testify, if he does, in fact, invoke his privilege." Id., 821. Here, the defendant makes no claim that Calabrese's constitutional privilege might not have pertained to all of the questions that would have been asked of him.

On point with this case is *State v. Nieves*, 89 Conn. App. 410, 417, 873 A.2d 1066, cert. denied, 275 Conn. 906, 882 A.2d 679 (2005). In *Nieves*, this court rejected the defendant's claim "that the [trial] court violated his sixth amendment right to present a defense simply by failing to hold a hearing,

requiring [the witness] to take the stand and personally to invoke his fifth amendment privilege." Id. In *Nieves*, the court permitted the witness' counsel to represent that his client would invoke his fifth amendment privilege against self-incrimination as to all questions. Id., 416-17. The defendant did not request a hearing but moved to compel the witness to testify. Id., 416. On appeal, this court noted that "there is no claim that [the witness] might have answered some relevant questions that would go to the defendant's defense"; id., 418-19; and found the defendant's argument premised solely on the fact that the witness personally did not invoke the privilege at a hearing unavailing. Id., 420-21.

The defendant's sole challenge to the court's unavailability finding is that Calabrese had not been administered an oath prior to his testimony, during a hearing before the court, that he would assert his fifth amendment privilege not to testify. The defendant does not contend that Calabrese would have answered some questions or that the court's inquiry of Calabrese as to his personal invocation of the privilege was deficient in substance. We cannot conclude that the court's failure to have Calabrese sworn in violated the defendant's sixth amendment right to confrontation or constituted plain error. Accordingly, the court did not err in finding Calabrese to be unavailable.

B

Having concluded that the court did not err in finding Calabrese to be unavailable, we now consider the defendant's claim that the court improperly

admitted into evidence Calabrese's statements to Colwell and Early.

The following additional facts and procedural history are relevant. In statements made to Colwell on the day of Vitalis' killing, Calabrese admitted his participation in the robbery. Subsequently, in September, 2013, Calabrese detailed the events surrounding Vitalis' killing, implicating himself, Niraj, and the defendant, in a recorded statement to a confidential inmate informant.

Our analysis of this issue requires discussion of filings in Niraj's trial on charges stemming from the same incident.[8] In Niraj's trial, he filed a motion in limine seeking to preclude the state from introducing into evidence out-of-court statements made by Calabrese in lieu of his live testimony, contending that the admission of his statements would violate the fourth, fifth, sixth and fourteenth amendments to the United States constitution,

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[8] Niraj also was arrested on September 11, 2013. *State v. Patel*, 186 Conn. App. 814, 820, 201 A.3d 459, cert. denied, 331 Conn. 906, 203 A.3d 569 (2019). The trial court, *Danaher, J.*, presided over Niraj's jury trial, which was held in January and February, 2016. Niraj was convicted on multiple charges and appealed from the judgment of conviction to this court, which affirmed his conviction. Id., 857.

Judge Danaher also presided over the defendant's trial. At the request of defense counsel, Judge Danaher took judicial notice of the totality of the filings and the transcripts of Niraj's case. During the defendant's trial, the court also referred to certain rulings issued in Niraj's trial.

Accordingly, this opinion references certain decisions, motions, and testimony from Niraj's trial where necessary to our consideration of the issues presented in this appeal.

article first, §§ 8, 9 and 10 of the Connecticut constitution, and Practice Book § 42-15. See *State v. Patel*, 186 Conn. App. 814, 831, 201 A.3d 459, cert. denied, 331 Conn. 906, 203 A.3d 569 (2019). On December 31, 2015, the court issued a ruling denying Niraj's motion without prejudice.

Addressing Calabrese's statements to Early, the court noted the passage of time, thirteen months, as a factor weighing against the trustworthiness of the statements. The court further considered that Calabrese's statements "were made to a fellow inmate who appeared to the defendant to be a fellow gang member, and one who was facing serious charges." The court found that the statements were "replete with specific details of the crime," and stated that inconsistencies identified by the defendant were not as significant as they appear and "pale[d] in comparison to the myriad details of the crime that could only be known to a participant in the crime." Considering the extent to which the statements were against Calabrese's penal interest, the court noted that Calabrese explicitly stated that he killed Vitalis and "ma[de] clear that any other person involved is less culpable than he is." The court also considered that Calabrese had initiated the discussion about the crime on September 3, 2015, and that Calabrese had made statements to Colwell that were consistent with his statements to Early. Last, the court stated that the state offered cell phone location evidence linking Calabrese to the crime. The court concluded that Calabrese's statements to Early were admissible as statements against penal interest pursuant to § 8-6 (4) of the Connecticut

Code of Evidence. The court further concluded that Calabrese's statements to Early were not testimonial.

Regarding Calabrese's statements to Colwell, the court found that the statements constituted declarations against penal interest pursuant to § 8-6 (4), in that the "statements were made to a confidante; they were made just before, on the day of, and the day after, the homicide. Their trustworthiness lies in not only the foregoing facts, but in their consistency with other physical evidence in the case, including the time of the statements relative to the event; the specific admissions of theft that were consistent with other evidence relative to the theft and the statements regarding clothing that were consistent with the declarant's efforts to destroy clothing that might carry evidence of the crime."

In the trial underlying this appeal, on August 3, 2016, the defendant filed a similar motion in limine seeking to preclude the state from offering into evidence Calabrese's out-of-court statements. In his memorandum of law in support of his motion, the defendant recognized that the issue had been considered and ruled on by the court in connection with Niraj's trial. On November 8, 2016, the court, at the request of defense counsel and without objection from the state, took judicial notice of the totality of the filings and the transcripts in Niraj's trial. Later that day, the court noted that, in Niraj's trial, it had ruled on a motion in limine regarding Calabrese's statements and asked whether "there are any changes in the law since that ruling that require a different result and, alternatively,

whether there are any factual developments that you wish to bring to my attention that might bring about a different result." Defense counsel responded, "[n]o, as to both, Your Honor." The court indicated that "it would appear that the law of the case would control,"[9] and the state agreed. The court asked defense counsel whether he had anything further, and defense counsel replied: "No, I just want to make—I think we agree that in the event that this has to—this case has to go beyond as proceeding subsequent to the verdict, that Your Honor is relying—and [the] defendant will have available the record of the Niraj Patel file—trial . . . with respect to the arguments and the submissions." The state had no objection to that request. The court then stated: "Well, the law of the case is not absolute, but under the circumstances expressed by the defense in the motion and the responses to my questions today, I find that the law of the case controls that the ruling of December 31, 2015, will control this motion as well, and the motion is denied for the reasons set forth in that opinion."

On January 6, 2017, the state called Early as a witness. Early, who remained incarcerated at the time of the defendant's trial, testified that while

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[9] The trial court referred to two rulings in Niraj's trial as the "law of the case" when ruling on similar motions in the defendant's trial. See part III of this opinion. Aside from the defendant's accurate notation in a footnote in his principal brief that the law of the case doctrine is not applicable, neither party on appeal raises a claim of error in the court's presumably inartful reference to its rulings in Niraj's trial as the law of the case in the defendant's trial.

incarcerated at the New Haven Correctional Center, he was called to the intelligence office, informed that Calabrese was going to be moved into Early's cell, and asked whether he would be willing to wear a recording device to record Calabrese.[10] Early, who previously had made confidential recordings of other inmates, indicated he would be willing to do so, and Calabrese was moved into his cell that evening. Later that evening, the two discussed the crimes for which they were incarcerated. Early stopped the conversation, however, because he knew he was going to wear a recording device and did not want to repeat the same conversation the next day. The next day, Early again was called to the intelligence office and asked whether he " 'could do it," and Early responded that he could. The intelligence officer then placed a telephone call to the state police, in which Early was asked what he knew about the case. Early responded that he did not know anything about it, and the state police asked Early to get as many details as possible. The intelligence officer then placed the recording device in Early's shirt pocket.

Early went back to his cellblock recreation area, a lockdown was called, and he went back to his cell with Calabrese. The two engaged in a lengthy conversation, in which Calabrese detailed the

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[10] Early did not know whether Calabrese was moved into his cell for the sole purpose of being recorded. Early testified: "I don't know if he was comin' in just for that reason. I know he got moved out [of] the dorm because of some, some foolishness he did in the dorm. So, when he came to my cellblock, the officer told me, I want you to try to see if you can get him . . . because I done it before."

events surrounding Vitalis' killing, implicating himself, Niraj, and the defendant. Over the defendant's objection, the recording was played for the jury during trial.[11] The defendant renewed his objection to the admission of the recording in his motion for a new trial, which was denied.

On January 18, 2017, the state called Colwell as a witness, who testified that in August, 2012, she lived with her boyfriend at the time, Calabrese, at their condominium in Branford. Colwell stated that one day in the first week of August, 2012, Calabrese was on the telephone with Niraj. He told Colwell that Niraj "wanted him to go up near his parents' house . . . to rob a kid that owed him money" and that Niraj told Calabrese that he "would give him a good amount of money if he did this." Colwell stated that Calabrese was hesitant at first but later decided "he was gonna do it." Within a couple days of the telephone call with Niraj, Calabrese left their condominium, saying that "he was going to pick up [the defendant] to go up near his parents' house to go rob the kid." Colwell begged him not to go. As the evening went on and Colwell did not hear from Calabrese, she began calling him "a hundred times" and calling everyone he knew.

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[11] Defense counsel indicated his objection to the recording's introduction into evidence. The court noted that it had written an opinion on this issue in the trial of Niraj and indicated that it had not written the same opinion for this trial, but that it already had ruled on the issue. Defense counsel agreed that the motion was the same in both trials and indicated his understanding that the "ruling . . . stands," but advised that he planned to formally object in front of the jury to make a record.

When Colwell spoke with Calabrese later that evening, she asked him whether he did what he had to do, and Calabrese responded, "yeah, but we didn't get any money. We just got a little bit of weed." When Calabrese returned to their condominium early the next morning, he was wearing different clothes and was not wearing shoes. He told Colwell he had been playing basketball at Niraj's house and that Niraj had given him a change of clothes.

1

Federal Constitutional Claim

We begin by addressing the defendant's federal constitutional claim that his confrontation rights were violated by the introduction into evidence of the recording of Calabrese's statements to Early. He argues that Calabrese's statements were testimonial. We disagree with the defendant's claim, which is controlled by our recent decision in *State v. Patel*, supra, 186 Conn. App. 814.

"The sixth amendment to the United States constitution, applicable to the states through the fourteenth amendment, provides in relevant part: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . . In *Crawford v. Washington*, [541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)], the [United States] Supreme Court substantially revised its approach to confrontation clause claims. Under *Crawford*, testimonial hearsay is admissible against a criminal defendant at trial only if the defendant had a prior opportunity for cross-examination and the witness is unavailable to

testify at trial. . . . In adopting this categorical approach, the court overturned existing precedent that had applied an open-ended balancing [test] . . . conditioning the admissibility of out-of-court statements on a court's determination of whether the proffered statements bore adequate indicia of reliability. . . . Although *Crawford's* revision of the court's confrontation clause jurisprudence is significant, its rules govern the admissibility only of certain classes of statements, namely, testimonial hearsay. . . . Accordingly, the threshold inquiries in a confrontation clause analysis are whether the statement was hearsay, and if so, whether the statement was testimonial in nature . . . . These are questions of law over which our review is plenary." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State v. Walker*, supra, 332 Conn. 689-90.

"As a general matter, a testimonial statement is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. . . . Although the United States Supreme Court did not provide a comprehensive definition of what constitutes a testimonial statement in *Crawford*, the court did describe three core classes of testimonial statements:

[1] ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . [2] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions,

prior testimony, or confessions [and] . . . [3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . . The present case concerns only this third category form of testimonial statements.

"[I]n *Davis v. Washington*, [547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)], the United States Supreme Court elaborated on the third category and applied a primary purpose test to distinguish testimonial from nontestimonial statements given to police officials, holding: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

"In *State v. Slater*, [285 Conn. 162, 172 n.8, 939 A.2d 1105, cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008)], we reconciled *Crawford* and *Davis*, noting: We view the primary purpose gloss articulated in *Davis* as entirely consistent with *Crawford's* focus on the reasonable expectation of the declarant. . . . [I]n focusing on the primary purpose of the communication, *Davis* provides a practical way to resolve what *Crawford* had identified as the crucial issue in determining whether out-of-court statements are testimonial,

namely, whether the circumstances would lead an objective witness reasonably to believe that the statements would later be used in a prosecution." (Citations omitted; internal quotation marks omitted.) *State v. Walker*, supra, 332 Conn. 700-702.

Although arguing that the United States Supreme Court has yet to make an explicit post-*Crawford* ruling on this issue, the defendant recognizes that the court, in dicta, has expressed the view that "statements made unwittingly to a [g]overnment informant" or "statements from one prisoner to another" are "clearly non-testimonial." *Davis v. Washington*, supra, 547 U.S. 825 (citing *Bourjaily v. United States*, 483 U.S. 171, 181-84, 107 S. Ct. 2775, 97 L. Ed. 2d 144 [1987], and *Dutton v. Evans*, 400 U.S. 74, 87-89, 91 S. Ct. 210, 27 L. Ed. 2d 213 [1970] [plurality]). The defendant further concedes that "to date, federal and state courts have refused to accord 'testimonial' status to statements made to fellow inmates or informants."

This court, in resolving Niraj's appeal, noted that our Supreme Court had not "addressed the specific issue of whether a recording initiated by a prisoner, who is acting as a confidential informant, of a fellow prisoner unwittingly making dual inculpatory statements about himself and a coconspirator or codefendant are testimonial in nature." *State v. Patel*, supra, 186 Conn. App. 837. Considering this question in the context of Calabrese's statements, this court concluded that his statements were nontestimonial in nature. Id. This court relied on *United States v. Saget*, 377 F.3d 223, 229 (2d Cir. 2004), cert. denied, 543 U.S. 1079, 125 S. Ct. 938, 160 L. Ed. 2d 821 (2006), in which the United

States Court of Appeals for the Second Circuit concluded "that a declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*" and decisions from other jurisdictions holding that statements to confidential jailhouse informants were not testimonial. See *State v. Patel*, supra, 840-41 (collecting cases).

We conclude that the resolution of the defendant's federal constitution claim is controlled by our decision in *State v. Patel*, supra, 186 Conn. App. 814, in which we concluded that Calabrese's statements "[bore] none of the characteristics of testimonial hearsay," in that "Calabrese made these statements to his prison cell-mate in an informal setting. He implicated himself, [the defendant] and [Niraj] and there is no indication that he anticipated that his statements would be used in a criminal investigation or prosecution." Id., 841. *State v. Patel*, supra, 814, was released on January 8, 2019, after the briefing was completed in this case.[12] At oral argument before this court, the sole

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[12] In his brief, the defendant relies on several factors, which he contends support a conclusion that Calabrese's statements were testimonial. First, he argues that there was no ongoing emergency and that the primary purpose of the interrogation, conducted thirteen months after the crime, was "to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, supra, 547 U.S. 822. Second, as to the "objective analysis of the circumstances of [the] encounter"; *Michigan v. Bryant*, 562 U.S. 344, 360, 131 S. Ct. 1143, 179 L Ed. 2d 93 (2011); he contends that Calabrese intentionally was moved to a specific cell in order to enable Early to gather evidence for the state to use against Calabrese in a criminal prosecution. Third, emphasizing that

bases advanced by the defendant's appellate counsel for distinguishing *Patel* were differences in the evidence presented as to the circumstances preceding Early's agreement to record Calabrese.

The following additional background is relevant. In Niraj's trial, the court denied his motion in limine to preclude introduction into evidence of the Calabrese recording and noted that "the state claims that the conversations between Calabrese and the cellmate were initiated on September 3, 2013, without the involvement of law enforcement . . . ." Early testified, in that case, that "the intelligence officer asked me if I was—if I was willing to wear a device because I was ready—they don't want him because I'm trying to—I'm trying to dis on my plate, so, I say—I say, absolutely, I will. Know what I mean? He was in my cell. And I went to the officer and he started speaking; the next day, I went to the officer and said, he—he's talking about it; know what I mean? So, he put the device in my pocket—in my pocket and sent me back to the cell." On cross-examination, Early further testified that the night Calabrese was moved into his cell, he and Calabrese talked about

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Early "was not a neutral listening device," the defendant states that Early interrogated Calabrese by asking "at least 200 questions." Fourth, the defendant places weight on the fact that Early had been asked by correctional staff and the state police to serve as a confidential informant, which, he contends, rendered Early an agent of law enforcement. Last, the defendant argues that "any reasonable person objectively would have known that such statements could be used against him. Indeed, Early confirmed that all prisoners are aware of the possibility of someone 'snitching them out' and becom[ing] a state's witness against them."

their charges, and that the following day, Early went to security and said that he knew he could get Calabrese to talk.[13] In the present case, as described previously, Early testified that he first was called to the intelligence office, informed that Calabrese was going to be placed in his cell, and asked whether he would be willing to wear a recording device to record Calabrese. The next day, when Early again was called to the intelligence office, he was put on a telephone call with the state police and was asked to get as many details as possible.

Accordingly, the evidence in the present case suggests that the recording was initiated by the Department of Correction, which fact was not clear from the testimony during Niraj's trial, and that the state police were involved and had spoken to Early, facts that were not in evidence during Niraj's trial. We are not convinced that factual discrepancies in Early's testimony as to whether it was Early or law enforcement officials who initiated the cooperation between the two disturbs our conclusion that Calabrese's statements were non-testimonial. The analysis regarding whether Calabrese's statements were testimonial focuses on

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[13] Accordingly, this court, in *State v. Patel*, supra, 186 Conn. App. 831, recited the circumstances leading to Early's recording as follows: "After Calabrese was arrested, he and his cellmate were talking about the charges that were pending against them. Thereafter, the cellmate approached a security officer and offered to record Calabrese. The cellmate was set up with a recording device, and he recorded his conversation with Calabrese, who was unaware that he was being recorded."

the reasonable expectation of the declarant, Calabrese. Under either factual scenario, there is no indication that Calabrese had knowledge that he was speaking with a confidential jailhouse informant and, thus, an objective witness making statements under those circumstances would not reasonably believe that his statements later may be used at a trial. Accordingly, as this court previously concluded in *State v. Patel*, supra, 186 Conn. App. 841-42, Calabrese's statements to Early were nontestimonial, and the admission into evidence of the recording did not violate the defendant's right to confrontation under the federal constitution.

The defendant raises one additional argument not raised in *State v. Patel*, supra, 186 Conn. App. 814. The defendant claims that the court ran afoul of *Michigan v. Bryant*, 562 U.S. 344, 369-70, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011), in failing to give consideration to *Early's* statements and actions during his conversation with Calabrese. He relies on *Bryant's* direction that, determining whether a declarant's statements are testimonial, courts should look to all of the relevant circumstances," such as "the statements and actions of all participants." Id. The state responds that "[w]hile the circumstances leading to a declarant making his hearsay statements can be relevant to whether they were testimonial, nothing about the circumstances here suggests that a person in Calabrese's 'position would intend his statements to be a substitute for trial testimony,' " quoting *Ohio v. Clark*, __U.S.__, 135 S. Ct. 2173, 2182, 192 L. Ed. 2d 306 (2015). The state directs this court's attention to post-*Bryant* decisions from the United

States Court of Appeals for the Fourth and Fifth Circuits that have continued to engage in a declarant focused analysis. See *United States v. Dargan*, 738 F.3d 643, 650 (4th Cir. 2013) ("[t]he primary determinant of a statement's testimonial quality is whether a reasonable person in the declarant's position would have expected his statements to be used at trial—that is, whether the declarant would have expected or intended to bear witness against another in a later proceeding" [internal quotation marks omitted]). In *Dargan*, the United States Court of Appeals for the Fourth Circuit held that jail-house disclosures to a cellmate were plainly nontestimonial, where the statements were made to a casual acquaintance, his cellmate, in an informal setting, and were not made with an eye toward trial, where the declarant "had no plausible expectation of 'bearing witness' against anyone." Id., 651; see also *Brown v. Epps*, 686 F.3d 281, 287-88 (5th Cir. 2012) (noting, in post-*Bryant* decision, that "several district courts in this Circuit have held that statements unknowingly made to an undercover officer, confidential informant, or cooperating witness are not testimonial in nature because the statements are not made under circumstances which would lead an objective witness to reasonably believe that the statements would be available for later use at trial. Many other Circuits have come to the same conclusion, and none disagree" [footnote omitted; internal quotation marks omitted]). Considering these decisions in factually similar circumstances,

we are not persuaded that the court erred in engaging in a declarant focused analysis.[14]

2

State Constitutional Claim

For the first time, on appeal, the defendant argues that "[a]s an independent ground for relief, this court should conclude that Calabrese's statement was 'testimonial' for purposes of the due process and confrontation clauses in article first, § 8, of the Connecticut constitution." The defendant concedes that this issue is unpreserved, but nevertheless seeks review pursuant to the bypass doctrine set forth by our Supreme Court in *State v. Golding*, supra, 213 Conn. 239-40. We conclude that the record is adequate for review, and the defendant's claim, on its face, is of constitutional magnitude. The claim fails to satisfy the third prong of *Golding*, however, because the defendant has not established that a constitutional violation exists.

"In determining the contours of the protections provided by our state constitution, we employ a multifactor approach that we first adopted in [*State v. Geisler*, 222 Conn. 672, 684-85, 610 A.2d 1225 (1992)]. The factors that we consider are (1) the

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[14] We also do not find persuasive the defendant's citation to a single unreported case from Texas in which the court found testimonial a declarant's statements made to his aunt while she was wearing a wire. *Cazares v. State*, Docket No. 15-00266-CR, 2017 WL 3498483, *11 (Tex. App. August 16, 2017), review refused, Texas Court of Criminal Appeals, Docket No. PD-0204-18 (May 23, 2018), __U.S.__,139 S. Ct. 422, 202 L Ed. 2d 324 (2018).

text of the relevant constitutional provisions; (2) related Connecticut precedents; (3) persuasive federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of [the] constitutional [framers]; and (6) contemporary understandings of applicable economic and sociological norms [otherwise described as public policies]. . . . We have noted, however, that these factors may be inextricably interwoven, and not every [such] factor is relevant in all cases." (Citations omitted; internal quotation marks omitted.) *State v. Skok*, 318 Conn. 699, 708, 122 A.3d 608 (2015).

At the outset, we conclude that five *Geisler* factors—the first through the fifth—do not support the defendant's claim that the admission into evidence of Calabrese's statements violated his rights under article first, § 8, and indeed, the defendant, in his principal brief to this court, concedes as much. Moreover, our Supreme Court has stated that "with respect to the right to confrontation within article first, § 8, of our state constitution, its language is nearly identical to the confrontation clause in the sixth amendment to the United States constitution. The provisions have a shared genesis in the common law. . . . Moreover, we have acknowledged that the principles of interpretation for applying these clauses are identical." (Citations omitted.) *State v. Lockhart*, 298 Conn. 537, 555, 4 A.3d 1176 (2010).

As to the sixth *Geister* factor—contemporary economic and sociological considerations, including relevant public policy—the defendant argues that "[t]he Department of Correction should not serve

as a Department of Interrogation." He argues: "This is a case in which . . . correctional officers . . . acting at the behest of [the] state police . . . purposely relocated a targeted inmate by moving him to a particular cell so that . . . a 'wired' informant could interrogate the targeted inmate and record the interrogation for later use in a criminal prosecution." He maintains that the law enforcement involved in planning the recording knew or should have known that "under existing law" the recording would likely be admissible at trial if the declarant were unavailable as a witness "and would thereby deprive any codefendant who had been implicated by the declarant of his or her right to confront their accuser." Citing prosecutorial discretion in the determination of the order in which cases are brought to trial, the defendant argues that "prosecutors can effectively manipulate the system to deprive defendants of their confrontation rights."

The state responds, inter alia, that "short of precluding the use of any taped recording of inmate to inmate communication, it is unclear how the defendant's proposed constitutional rule would work in practice. Yet, recording of inmate confessions should be encouraged, not forbidden, given the distrust with which our courts historically have viewed jailhouse informant testimony." We conclude that the defendant has not identified any compelling economic or sociological concern supporting a change in the interpretation of our confrontation clause and therefore conclude that the sixth *Geisler* factor does not lend support to the defendant's claim.

In light of the foregoing, we conclude that the admission into evidence of Calabrese's statements did not violate the defendant's rights under article first, § 8, of the Connecticut constitution.

3

Evidentiary Claim

The defendant also claims that the court abused its discretion when it concluded that Calabrese's statements to Early and Colwell were admissible as dual inculpatory statements pursuant to § 8-6 (4) of the Connecticut Code of Evidence. We disagree.

"A dual inculpatory statement is admissible as a statement against penal interest under § 8-6 (4) of the Connecticut Code of Evidence, which carves out an exception to the hearsay rule for an out-of-court statement made by an unavailable declarant if the statement at the time of its making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." (Internal quotation marks omitted.) *State* v. *Pierre*, 277 Conn. 42, 67, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006). "In short, the admissibility of a hearsay statement pursuant to § 8-6 (4) . . . is subject to a binary inquiry: (1) whether [the] statement . . . was against [the declarant's] penal interest and, if so, (2) whether the statement was sufficiently trustworthy." (Internal quotation marks omitted.) *State* v. *Bonds*, 172 Conn. App. 108, 117, 158 A.3d 826, cert. denied, 326 Conn. 907, 163 A.3d 1206 (2017). The defendant concedes that Calabrese's statements to Early and

Colwell were against his penal interest and challenges only the court's finding that the statements were trustworthy.

"In determining the trustworthiness of a statement against penal interest, the court shall consider (A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest. . . . Conn. Code Evid. § 8-6 (4). Additionally, when evaluating a statement against penal interest, the trial court must carefully weigh all of the relevant factors in determining whether the statement bears sufficient indicia of reliability to warrant its admission. . . . [W]hen viewing this issue through an evidentiary lens, we examine whether the trial court properly exercised its discretion." (Citations omitted; internal quotation marks omitted.) *State v. Pierre*, supra, 277 Conn. 68; see also *State v. Bonds*, supra, 172 Conn. App. 123 ("[w]e review for an abuse of discretion the court's determination that the statement was trustworthy and, thus, admissible at trial"). "[N]o single factor for determining trustworthiness . . . is necessarily conclusive. . . . Rather, the trial court is tasked with weighing all of the relevant factors set forth in § 8-6 (4) . . . ." (Citation omitted; internal quotation marks omitted.) *State v. Bonds*, supra, 125.

The defendant argues that Calabrese's statements to Early were not trustworthy. With respect to the first factor, the defendant argues that statements to fellow inmates traditionally have been considered untrustworthy, Calabrese and Early

did not know each other, and most of Calabrese's statements were prompted and induced by Early's questioning.[15] We disagree that this factor weighs against a finding of reliability. The court found relevant that Calabrese made the statements "to a fellow inmate who appeared to . . . be a fellow gang member, and one who was facing serious charges."[16] In *State v. Smith*, 289 Conn. 598, 633, 960 A.2d 993 (2008), our Supreme Court concluded that the trial court's findings adequately supported its conclusion that a witness' statements to his cellmate, in which he implicated himself in an unsolved murder, presented sufficient indicia of reliability to justify their admission, noting "the camaraderie that arises" between those who are incarcerated and facing criminal charges. Id. The court in *Smith* also considered that the witness "did not induce [the declarant] to share the details of the crime." Id. It noted the trial court's finding

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[15] The court found that the passage of thirteen months between the crime and Calabrese's statements weighs against the trustworthiness of the statements.

[16] The defendant argues that "Early would not have appeared to . . . be a fellow gang member," and points to Early's encouraging Calabrese to become a member of the "blood" gang. (Internal quotation marks omitted.) After Early told Calabrese he could "make shit happen" for him, Calabrese responded: "[I]t's basically the same shit anyway. Fuckin all my boys are fuckin bloods every time there's fucking something goin on I get fucking sucked into fuckin going." Even if Early would not have appeared to be "a fellow gang member," the evidence suggested that he was a member of a gang, with which all of Calabrese's friends were affiliated. Thus, the court did not err in considering this relationship in support of a finding of reliability.

that although "at times [the witness] seemed to lead some of the discussion," the declarant was "a willing and active participant . . . who provided nearly all of the substance of the discussion." (Internal quotation marks omitted.) Id., 616-17. In the present case, although Early continually asked Calabrese questions, Early testified that he did not know anything about the crime before talking to Calabrese. Thus, the details of the crime were related only by Calabrese. Accordingly, the person to whom the statements were made weighs in favor of a finding of trustworthiness.

As to the second factor, the defendant recognizes that Calabrese recited "specific details of the crime" but contends that his statements also "contained numerous facts that were contradicted by his other statements or by physical evidence." Specifically, he emphasizes that Calabrese told Early that Vitalis had come at him with a large knife, but there was no evidence of any knife. Rather than setting forth and analyzing the remainder of the alleged inconsistencies, the defendant merely "incorporates . . . the list of contradictory and inconsistent statements listed in the trial memoranda filed by Niraj . . . and the defendant." (Citation omitted.) It was within the trial court's discretion to evaluate the consistencies and inconsistencies to conclude that, on balance, the second factor weighed in favor of a determination that the statements are reliable. Indeed, the trial court noted the inconsistencies identified by the defendant and found that they "pale[d] in comparison to the myriad details of the crime that could only be known to a participant in the crime." Accordingly,

our examination of the relevant factors[17] leads us to conclude that the trial court's findings adequately support its conclusion that Calabrese's statements to Early presented sufficient indicia of reliability to justify their admission. See *State v. Smith*, supra, 289 Conn. 631.

The defendant also argues that Calabrese's statements to Colwell were not trustworthy because he "was seeking to misinform his girlfriend about his involvement in the incident; he downplayed his participation, admitting to the robbery but denying involvement in the death of . . . Vitalis. He even told Early that he had lied to Colwell." The state responds that Calabrese actually had not denied killing Vitalis in his statement hours after the murder, and that "Calabrese's statement about "rob [bing] the kid," made before the incident, was not inconsistent with the state's theory, which allowed for the possibility that the gunman's intent to kill may have been formed moments before the actual murder."

With regard to the first factor, Calabrese made his statements to Colwell on the day of the crime, both when he was leaving their condominium to commit the crime and later that night after having committed the crime. "In general, declarations made soon after the crime suggest more reliability than those made after a lapse of time where a

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[17] As to the third factor, the extent to which the statement was against the declarant's penal interest, the defendant does not challenge the court's finding that Calabrese explicitly stated that he killed Vitalis and "ma[de] clear that any other person involved is less culpable than he is."

declarant has a more ample opportunity for reflection and contrivance." (Internal quotation marks omitted.) *State v. Camacho*, 282 Conn. 328, 361, 924 A.2d 99 (statements made within one week of murders trustworthy), cert. denied, 552 U.S. 956, 128 S. Ct. 388, 169 L. Ed. 2d. 273 (2007); see *State v. Pierre*, supra, 277 Conn. 71 (statements made within "couple of weeks" trustworthy). The statements also were made to Calabrese's girlfriend, a person with whom Calabrese had a close relationship. See *State v. Camacho*, supra, 361-62 (statement made to neighbor, who was also friend, indicative of statement's reliability). As to the second factor, the statements were consistent with other evidence in the case, in that Calabrese told Colwell they "didn't get any money," which was consistent with the police, upon conducting a search, finding $32,150 in Vitalis' bedroom. As to the third factor, even if Calabrese downplayed his involvement by admitting that he robbed Vitalis while failing to offer that he also had murdered Vitalis, the statement remained against his penal interest to a significant extent, in that he "directly and explicitly incriminated himself by admitting his own participation in" the robbery. *State v. Bonds*, supra, 172 Conn. App. 123. Thus, the trial court's findings adequately support its conclusion that Calabrese's statements to Colwell presented sufficient indicia of reliability to justify their admission. See *State v. Smith*, supra, 289 Conn. 631.

In light of the preceding factors, we conclude that the court did not abuse its discretion when it admitted Calabrese's statements to Early and

Colwell pursuant to the dual inculpatory statement exception to the hearsay rule.

II

The defendant's second claim on appeal is that the "court erred in ruling that the defense could not elicit testimony from Salony [Majmudar], the defendant's sister, that Shyam had confessed to her that it was he, not the defendant, who had accompanied Calabrese into the Vitalis home on August 6." He claims that the exclusion of Majmudar's testimony regarding Shyam's statement constituted evidentiary error under § 8-6 (4) of the Connecticut Code of Evidence, and violated his federal and state constitutional rights to present a defense and to due process of law. We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. On January 25, 2017, Majmudar, the defendant's sister, testified that Shyam visited her home unannounced one evening during the last two weeks of September, 2013. When defense counsel sought to elicit the substance of the conversation, the state asked for a proffer outside the presence of the jury. The jury was excused, and Majmudar testified that Shyam asked to borrow $50,000 to help make Niraj's bond. Majmudar testified that she told Shyam that she could not help him because she needed to have money ready for the defendant's bond and attorney's fees. Majmudar testified: "I told him that [the defendant] didn't do this, that [the defendant] was innocent, he was in Boston with me. He didn't look surprised. I asked him if he knew who was with [Calabrese] during the robbery.

He stayed silent, and he avoided making eye contact with me. I asked him again if he knew who was with [Calabrese] during the robbery, and he still stayed silent and looked away. I directly asked him if he was with [Calabrese] during the robbery. That's when he started to break down in tears, and he admitted that he and [Calabrese] tried to rob [Vitalis] that night."[18] Majmudar

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[18] Majmudar testified to the remainder of the conversation as follows: "So, I asked him why they robbed [Vitalis]. He said that they needed money to pay for Niraj's attorney fees. He said that [Calabrese] was supposed to rob Luke alone, that Niraj dropped [Calabrese] off near Luke's house first. When Luke's mom got home, [Calabrese] got cold feet and refused to rob [Vitalis] until Shyam showed up last minute.

"I asked him what happened during the robbery. He said the robbery went bad; [Vitalis] got shot. Shyam said he panicked, ran out of the house back to the car. [Calabrese] was still in the house looking for that money. Shyam didn't want to wait around and get caught, so he drove home as fast as he could to change his clothes.

"I asked him what happened to [Calabrese]. He said that he and Niraj drove around with the Pathfinder and eventually picked up [Calabrese] from the woods, and they burned everything they wore in different locations.

"I asked him if [Calabrese] used [the defendant's] phone during the robbery. He said yes. He said that he and [Calabrese] didn't use their own phones, cars or gun during the robbery. He said that Niraj was stupid to use his own phone to contact [Vitalis] that day. I asked him where they left their phones. He said [Calabrese's] phone was with Niraj. Shyam said he left his phone at home.

"I asked him why my parents' two black [sport utility vehicles] were seized. He said they used the black Saab [sport utility vehicle] from New York during the robbery.

testified that she told only the defendant about Shyam's confession.

The following morning, the court heard argument on the issue of whether Shyam's statements to Majmudar were admissible as statements against penal interest under § 8-6 (4) of the Connecticut Code of Evidence. Analyzing the trustworthiness of the statements, the court considered a number of factors that it determined weighed against admissibility, including that the confession was made thirteen months after the crime; the witness, Majmudar, told no one other than the defendant for more than three and one-half years after the statement was made; the statements were made to only one person, Majmudar; the nature of the relationship between Majmudar and Shyam, in that she had only seen Shyam approximately twice

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"I asked him what happened to the gun. He said that he and Niraj gave the gun to [their cousin] to get rid of.

"I asked him if [the defendant] ever came to Warren earlier that day. He said he never came that day, he came two weeks later.

"I asked him why he was charged with so little, with hindering prosecution and tampering with evidence, why his bond was only fifty thousand when everyone else's was at least one million or more. He said that he threatened [Calabrese], threatened to go after his sister if [Calabrese] ever gave him up.

"I was infuriated. I told Shyam that he needed to come forward and confess. He said that he couldn't do that to his parents, that Niraj may go down for this and his parents couldn't lose him as well.

"I told him that he needed to leave, and I never saw Shyam again."

in the preceding year or so; and Majmudar was highly motivated to assist her brother. The court concluded that there was insufficient evidence corroborating the statement to render it trustworthy and, therefore, the statement did not satisfy the requirements of § 8-6 (4).[19]

As set forth in part I B 3 of this opinion, we review for an abuse of discretion the court's determination of the trustworthiness of a statement against penal interest. See *State v. Pierre*, supra, 277 Conn. 68. "In determining the trustworthiness of a statement against penal interest, the court shall consider (A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest. . . . Conn. Code Evid. § 8-6 (4)." (Citation omitted; internal quotation marks omitted.) *State v. Pierre*, supra, 68.

We begin with the third factor, pursuant to which the defendant argues that "there is no question that Shyam's statement was against penal interest." The court described Shyam's statement as being "to the effect that he should be charged with murder instead of the defendant." We agree

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[19] The court also indicated that it did not "believe there's been a sufficient showing that Shyam Patel is unavailable" but stated that "the decision I am rendering does not at all turn on that fact." Because we conclude that the court did not abuse its discretion in determining that Shyam's statement was not trustworthy, we need not address the court's finding that the defendant had not established that Shyam was unavailable.

with the defendant that the statement was against Shyam's penal interest to a significant extent, such that this factor weighs in favor of a finding of trustworthiness.

As to the first factor, the defendant argues on appeal that Shyam's statement was trustworthy in that it was made to "someone with whom he had a close personal relationship, and with whose family he had resided for two years while in high school." We cannot conclude that the court erred in determining that the relationship between Majmudar and Shyam did not support a finding of trustworthiness.[20] Although Majmudar testified that Shyam had shared confidences with her, that she and Shyam were close growing up, and that the two grew even closer when Shyam stayed with her family for his junior and senior years of high school, she acknowledged that she did not see him as much as she did before medical school and residency. She also testified that she had seen Shyam only twice in the past year or so and that it had "been years" since she had more steady contact with Shyam.[21]

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[20] Likewise, the court did not err in determining that the thirteen month time period between the crime and Shyam's statement weighed against a finding of trustworthiness, notwithstanding that his statement was made within a few weeks of his arrest. See *State v. Lopez*, 264 Conn. 309, 317, 757 A.2d 542 (2000).

[21] The court also noted Majmudar's relationship to the defendant in its consideration of the person to whom Shyam's statement was made. "[A] trial court may not consider the credibility of the testifying witness in determining the trustworthiness of a declaration against penal interest" *State v. Rivera*, 268 Conn. 351, 372, 844 A.2d 191 (2004). Our Supreme Court has considered the witness' relationship to the

Moreover, there was no evidence presented that Shyam ever had repeated the statement or had made inculpatory statements to persons other than Majmudar. See *State v. Rivera*, 221 Conn. 58, 70, 602 A.2d 571 (1992) (considering that there was no evidence declarant repeated statement to anyone else and testified to the contrary at probable cause hearing); *State v. Mayette*, 204 Conn. 571, 578, 529 A.2d 673 (1987) (delay in making statements combined with lack of reiteration of statements weigh against reliability); see also *State v. Lopez*, 254 Conn. 309, 321, 757 A.2d 542 (2000) (considering, under second factor, that there was no evidence declarant had repeated statement or made inculpatory statements to any other person).

As to the second factor, the defendant argues that Shyam's statement was supported by a number of corroborating circumstances. First, he points to Vitalis' mother's indication, at one point, that Shyam was one of the intruders. Although Vitalis' mother did not testify at trial, a joint stipulation signed by the prosecutor, Dawn Gallo, and the defendant, by defense counsel, William F. Dow III, was entered into evidence and read aloud to the jury. The joint stipulation provided, in relevant part, that Vitalis' mother gave multiple statements with different descriptions of the intruders, first stating that both men were white and later stating

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defendant, however, as a factor "'coloring' " the trustworthiness of the proffered statements. *State v. Payne*, 219 Conn. 93, 115, 591 A.2d 1246 (1991) (agreeing with trial court's conclusion that long-standing relationship between defendant and witness would not lead to conclusion of trustworthiness).

that they could have been Hispanic. In January, 2016, Vitalis' mother told an inspector with the state's attorney's office that she believed one of the two men was an Indian male and that she believed this person to be Shyam Patel. At the time of the incident, she knew Niraj and Shyam, but did not know the defendant. In January, 2017, Vitalis' mother told an inspector that she did not know who either of the two intruders were for certain. Because the statements of Vitalis' mother were inconsistent with each other, they are not sufficiently corroborative of Shyam's statement.

Second, the defendant argues that "[t]here was no irrefutable proof that Shyam was at some distant location at the time of the crime, so he clearly had the opportunity to participate in it." In support of this argument, he cites *State v. Gold*, 180 Conn. 619, 636, 431 A.2d 501, cert. denied, 449 U.S. 920, 101 S. Ct. 320, 66 L. Ed. 2d 148 (1980), in which our Supreme Court noted that the declarant had the opportunity to commit the murders, citing, as corroborating circumstances, that two witnesses had testified during the defendant's offer of proof that the declarant was in the state on the day of the murders and was absent from his home at the approximate time of the crimes. No such testimony existed in the present case, and the *lack* of proof that Shyam was at a distant location is not necessarily corroborative of Shyam's statement.

The defendant further argues that Shyam's statement is corroborated by his access to the Pathfinder after the crime, evidence suggesting

that it was he who had the car cleaned,[22] and searches he conducted online for information about criminal penalties.[23] Although this evidence may "reinforce the idea of his active criminal involvement," as the defendant argues, these circumstances do not necessarily corroborate the key portion of Shyam's statement that he entered Vitalis' home with Calabrese but, rather, they suggest merely that he was involved in the crime to some degree.

The defendant further suggests that "the court's admissibility ruling was based in part on an improper consideration. i.e., the court's own opinion as to the credibility of Shyam's statement against penal interest." (Emphasis omitted.) He cites the court's remarks that the evidence pointed "more to Michael Calabrese and this defendant than it does to Shyam Patel having been the person to enter the Vitalis home. The circumstances surrounding the event are far more consistent with

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[22] There was evidence at trial that Shyam sent the following text messages to Niraj at 8:13 p.m. on August 6, 2012: "U want me to come to the station in pathfinder?"; "?"; "Lemme know . . . I got keys." A white Pathfinder, registered at the home Shyam shared with his parents and, occasionally, Niraj, was seized by police. The vehicle smelled clean and seemingly had new floor mats. A receipt dated August 31, 2012, at 10:40 am. from Personal Touch Car Wash in New Milford was found in a bedroom at Shyam's home, and Shyam's cell phone utilized two cell towers in the vicinity of the car wash around the date and time printed on the receipt.

[23] There was evidence at trial that there were Google searches conducted on Shyam's computer for the terms "conspiracy to commit murder in Connecticut" and "conspiracy to kill," along with searches for penalties for those crimes.

this defendant entering the Vitalis' home than Shyam Patel entering that home." (Emphasis omitted.) We are not persuaded that the challenged remarks demonstrate that the court exceeded its gatekeeping function in determining whether Shyam's statements were sufficiently trustworthy to be admitted into evidence. The court referenced defense counsel's point "that it is important to not confuse the issue of credibility with admissibility," and stated that it was "fully cognizant of that" and "kept that in mind . . . in making [its] ruling . . . ."

On the basis of the foregoing, we conclude that the court did not abuse its discretion by excluding from evidence Majmudar's testimony as to Shyam's statement because it was not trustworthy and, therefore, did not satisfy the requirements of § 8-6 (4).[24]

III

The defendant's third claim on appeal is that "[t]he court erred when it denied the defendant's motion to preclude 'cellular telephone tower evidence'—more formally known as 'historical cell[ular] site location information (CSLI)'—and

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[24] The defendant also claims that the court's exclusion of Shyam's statement violated his constitutional rights to present a defense and to due process of law. We disagree. "The defendant's rights to present a defense and to due process do not give him the prerogative to present any testimony or evidence he chooses. In the exercise of his constitutional rights, the accused, as required of the [s]tate, must comply with the established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." (Internal quotation marks omitted.) *State v. Rosado*, 218 Conn. 239, 249-50, 588 A.2d 1066 (1991).

refused to require the state to demonstrate the reliability of such evidence at a hearing held pursuant to *State v. Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998)." (Footnote omitted.) We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. Again, our analysis of this issue requires discussion of filings and testimony in Niraj's trial. See footnote 9 of this opinion. In Niraj's trial, Niraj filed a motion to preclude the state from introducing "cellular telephone tower evidence or, in the alternative, that the state be required to demonstrate the evidence's reliability at a hearing pursuant to *Porter*." The court held a hearing on the motion on December 23, 2015. Noting the many ways in which cell tower technology has been used, the court stated that "it would seem to me that it would make sense to hear from the witness whom the state would offer at trial. I'm not turning this into deposition, I'm not turning this into a *Porter* hearing, but . . . th[e] first question is whether this is an innovative scientific technique. That's the first question. If what is being offered is something that's been used uncritically for ten years that's one thing, if no one has ever used this type of evidence anywhere then we might need a *Porter* hearing." Defense counsel then stated that the innovative scientific technique he sought to challenge was the theory that the cell phone "must hit the closest tower."

The state then presented the testimony of Special Agent James J. Wines of the Federal

Bureau of Investigation (FBI) and a member of its Cellular Analysis Survey Team (CAST), whose responsibilities as a CAST member included "analyz[ing] records obtained by law enforcement agencies related to specific crimes and then using those records [to] conduct an analysis using cell tower information as to the approximate location of a cell phone at a particular time." Wines testified that CAST members have testified in hundreds of federal and state trials. As to Wines' personal experience, he stated that he has used historical call detail records with cell site information since 2003, spent "thousands of hours reviewing call detail records," and has used that information "to locate subjects in [his] investigations, to locate and apprehend fugitives, to assist in the recovery of evidence, to locate victims of child prostitution, a variety of different . . . scenarios." Wines explained that his reports and presentations are subject to internal peer review, usually by a more senior member of CAST, who reviews his analysis for accuracy and completeness. Wines testified that in his experience, "the individual or the phone has always been in the area where the call detail records indicated the phone would be."

Wines testified that cell phone providers use call detail records for a number of purposes, including "for billing records, so that they can accurately bill their customers for the amount of network resources that their customers use, and they also use it to assist in optimizing the network to provide the best possible coverage for their . . . customers." Wines stated that cell phone carriers "are constantly trying to ensure the reliability and the

quality of their networks so that they don't lose customers." Wines testified that he had received training from AT&T, Verizon, Sprint, and T-Mobile, the four major cell phone providers that provide cell phone service in Connecticut, and that he maintains regular contact with their "legal compliance people as well as engineers" regarding "how their call detail records are populated and maintained as well as how their networks are optimized."

In the present case, Wines analyzed the movement of cell phones associated with Niraj, Calabrese, and the defendant on August 6, 2012. He plotted the cell towers each phone utilized, which showed "the movement of two phones [associated with Niraj] coming up from the area of Queens, New York, to the area of Sharon, Connecticut, and . . . two other phones [associated with Calabrese and the defendant] moving up from the area of Branford, Connecticut, down on the shoreline, again, up to the area of Sharon, Connecticut. And while these phones are moving they're often in contact with one another as they proceed north."

With respect to the towers accessed by the cell phone associated with the defendant on August 6, 2012, Wines explained that prior to 6:04 p.m., the phone accessed tower 1025, which is located on the top of Mohawk Mountain, for a series of phone calls. Wines testified that there were no outgoing calls or messages from the cell phone associated with the defendant after 6:04 p.m. on August 6, 2012, which, he observed, indicated "either that the phone was off or that it was . . . in an area where it could not receive any cell signal," or that

"something could have happened to the phone that rendered it unable" to receive a cellular signal.

Wines explained that he had used an AT&T engineering phone[25] and had "detected energy from tower 1025" in the front yard and inside Vitalis' home on a staircase. This meant that were the engineering phone to make a call, "it would have utilized resources from tower 1025." Wines performed this test once. Wines stated that tower 1025 was not the closest tower to the Vitalis residence and explained why a cell phone might use a tower other than the closest tower. Wines stated that a cell phone is "constantly evaluating its network, and it's scanning the area and determining the strength and clarity of the signals it's receiving from the cell towers in the area. And in doing that analysis it is looking for the strongest, cleanest signal, and that's the tower that it's going to select when it requests resources to make or receive a call or make or receive a text message. The factors that can affect the strength and clarity can be terrain features, can be obstructions, can be the way that the antennas are oriented—the down-tilt of particular antennas. In driving in this area in preparing my analysis, what I did note that it is an extremely hilly area, and there are significant terrain features, peaks and valleys that could affect

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[25] Wines testified that an engineering phone is "a phone that's set up to show you the—the signals that it's receiving from the tower. It shows you what's happening on your cell phone in the background that you don't see. It presents it on the screen, so that you can kind of spot check and confirm what a particular phone from a particular carrier—what it sees as the strongest, cleanest signal at a particular time."

the strength of signal coming from towers, which could cause a phone to select a tower that would not necessarily be the closest tower, but would be the strongest, clearest signal." Wines testified that tower 1025 is between seven and eight miles from the crime scene and that the tower likely had a maximum range of eight miles, which would cover approximately 200 square miles.[26]

Wines further testified that "when a cell phone selects a cell tower, it has to be within the RF [radio frequency] footprint of that particular tower in order to request resources from that tower to complete either a call or an SMS [short message service] message" and, therefore, his analysis also can show where a cell phone was not located. Wines acknowledged that cell towers provide 360 degree coverage and that they are often broken down into sectors. Wines stated that because he "was simply trying to show movement over . . . a large area," he did not "break it down into sectors" and that he conducted his analysis "simply using the towers."

Wines testified that the tower a cell phone utilizes is recorded automatically and electronically in the call details records, and that he was

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[26] In situations in which a cell phone connects to a tower that is not the closest tower to the cell phone, Wines stated, he would try to conduct a drive test "if the network was still in the same condition that it was in at the time the crime occurred." In the present case, Wines stated that there had been changes to the AT&T network, so a drive test was not possible. A drive test had been conducted three weeks prior to the homicide, however, and a signal from tower 1026 was present along Route 4, approximately two miles southeast of the crime scene.

not aware of any situation in which a cell tower site noted in a call detail record was incorrect. Although he had never seen a study from outside law enforcement in which the methodology was tested, he stated that "it's tested in a practical, real world sense every day when myself and other members of my unit find fugitives, recover evidence, recover kidnap victims that it's—it works."

Following Wines' testimony, the court heard argument on Niraj's motion in limine. The court then ruled that the evidence offered did not involve an innovative scientific technique and, therefore, a *Porter* hearing was not appropriate. It further stated that "[e]ven if a hearing were warranted and the findings I just made and all the findings I make are based on the evidence presented by this witness, the objection to the technique does not succeed. The evidence offered is scientifically valid; it's rooted in the methods of procedures of science. It is far more than a subjective belief or unsupported speculation; it is therefore sufficiently reliable to be admitted into evidence." The court based its findings "not only on the testimony of the witness in general, but in particular the witness' long experience in this type of analysis, the nature of the evidence that's being offered, the experience of other experts who carry out similar work, the fact that this witness has had significant training and experience in this area, and that his findings are reviewed by other experts in the same field." The court noted Niraj's objection to Wines' methodology but stated that it "did not hear an argument from the defendant as to an alternate methodology that should have been used in this

case, nor is there any evidence, offered by the defendant, by any other expert in this field that some other methodology should have been used." Last, the court found the evidence relevant "in that it purports to show the movement of parties allegedly connected with the homicide . . . on or about the date and time of the homicide . . . ."

In the present case, the defendant filed a motion in limine and memorandum of law in support thereof that virtually was identical to those filed by Niraj. The court heard argument on the motion on November 8, 2016. Defense counsel agreed with the court that his motion paralleled that filed in Niraj's case. Noting that it had ruled on the motion in Niraj's case from the bench on December 23, 2015, and that its ruling was "based upon the testimony provided . . . at a hearing, specifically, testimony by agent Wines," the court inquired of defense counsel whether there were "any changes in the law or factual developments that would cause me to reconsider that ruling." Defense counsel responded: "None that I'm aware of, Your Honor." The court then stated: "[F]or the reasons stated with regard to the Calabrese statement motion, I will deny this motion as well, pursuant to the law of the case.[27] And that's based upon, in part, the representations made by the defense this morning that there are no material factual changes or changes in the law that would warrant a different result. And so the motion in limine to preclude admission of cellular telephone tower evidence is denied." (Footnote added.)

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[27] See footnote 9 of this opinion.

At trial, Wines testified as to the movement of cell phones associated with Niraj, and one cell phone each associated with Shyam, the defendant, and Calabrese over the course of August 6, 2012, and the state introduced into evidence three PowerPoint presentations depicting the movement of those phones to and from the Sharon area, movement in the Sharon area on the afternoon and evening of August 6, 2012, and the activity of cell phones associated with the defendant's family members. Wines testified that from 3:57 p.m. through 6:04 p.m. on August 6, 2012, all activity on the cell phone associated with the defendant utilized tower 1025, which Wines' engineering phone had detected as the "strongest, highest quality signal" at the crime scene and which an AT&T drive test conducted two and one-half weeks prior to the crime "along route 4 approximately two and a quarter to two and a half miles southeast of the crime scene also detect[ed] signal from tower 1025 as being the strongest, highest quality signal in that area."

In his February 6, 2017 motion for a new trial, the defendant claimed that the court, without requiring a sufficient showing of reliability, improperly admitted evidence "purporting to establish instances of mobile telephone communications between the defendant and other accused parties as well as their whereabouts and movements . . . ." The state objected, arguing that the court properly admitted the evidence "after having held a *Porter* hearing in *State v*. [*Patel*, supra, 186 Conn. App. 814], then again hearing argument in [this case], which incorporated by agreement of the parties the

evidence and argument presented in *State v.* [*Patel*, supra, 814].” The court denied the motion on April 28, 2017.

In a supplemental written ruling issued on June 20, 2017, the court addressed our Supreme Court’s decision, released following the jury’s verdict in the present case, in *State v. Edwards*, 325 Conn. 97, 133, 156 A.3d 506 (2017), which held that the trial court improperly admitted testimony and documentary evidence of historic cell site analysis, including cell tower coverage maps, through a detective without qualifying him as an expert and conducting a *Porter* hearing in order to ensure that his testimony was based on reliable scientific methodology. The court in *Edwards* relied on the approach by the United States District Court for the District of Connecticut in *United States v. Mack*, Docket No. 3:13-cr-00054 (MPS), 2014 WL 6474329 (D. Conn. November 19, 2014), in which the court conducted a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and concluded that the FBI agent’s methodology was sufficiently reliable to meet the requirements of *Daubert* and, therefore, the agent could testify regarding his conclusions.

The court in the present case stated that “the state presented an expert witness with qualifications equal to those of the witness who testified in *Mack*, as opposed to the limited qualifications of the state’s witness in *Edwards*.” The court explained that Wines demonstrated in detail the methodology that he used in completing his analysis. The court stated: “More significantly,

even though this court found that a *Porter* hearing was not required relative to the cell tower data analysis, it effectively carried out a *Porter* hearing out of the presence of the jury in the proceeding against Niraj and concluded that, even if a *Porter* hearing was required, the evidence proffered by the state was scientifically valid in that it was rooted in the methods and procedures of science. Thus, this court made the findings that were lacking in *Edwards* and that the District Court did make in *Mack*.[28]

On appeal, the defendant argues that "[t]his court should not countenance the trial court's attempt, in its June 20, 2017 ruling, to retroactively 'reclassify' the offer of proof at Niraj's trial as 'effectively' constituting a *Porter* hearing." The state responds that the court "conducted the functional equivalent of a *Porter* hearing and, most importantly, made the findings required by *Porter*." We agree with the state that the court held the functional equivalent of a *Porter* hearing.

"In *Porter*, we followed the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*, *Inc*., [supra, 509 U.S. 579], and held that testimony based on scientific evidence should be subjected to a flexible test to determine the reliability of methods used to reach a particular conclusion. . . . A *Porter* analysis involves a two part inquiry that assesses the reliability and relevance of the witness' methods. . . . First, the

[28] The defendant does not dispute that he agreed at trial that the court could rely on the evidence presented at the hearing on the motion in limine in Niraj's trial.

party offering the expert testimony must show that the expert's methods for reaching his conclusion are reliable. A nonexhaustive list of factors for the court to consider include: general acceptance in the relevant scientific community; whether the methodology underlying the scientific evidence has been tested and subjected to peer review; the known or potential rate of error; the prestige and background of the expert witness supporting the evidence; the extent to which the technique at issue relies [on] subjective judgments made by the expert rather than on objectively verifiable criteria; whether the expert can present and explain the data and methodology underlying the testimony in a manner that assists the jury in drawing conclusions therefrom; and whether the technique or methodology was developed solely for purposes of litigation. . . . Second, the proposed scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered, and not simply be valid in the abstract. . . . Put another way, the proponent of scientific evidence must establish that the specific scientific testimony at issue is, in fact, derived from and based [on] . . . [scientifically reliable] methodology." (Internal quotation marks omitted.) *State v. Edwards*, supra, 325 Conn. 124.

"[I]t is well established that [t]he trial court has broad discretion in ruling on the admissibility [and relevancy] of evidence. . . . [Accordingly] [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. . . . Because a trial court's ruling under *Porter* involves the admissibility of evidence,

we review that ruling on appeal for an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *State v. Montanez*, 185 Conn. App. 589, 619, 197 A.3d 959 (2018), cert. denied, 332 Conn. 907, 209 A.3d 643 (2019).

We first consider whether the hearing conducted in Niraj's case was, in substance, a *Porter* hearing. Our review of the transcript reveals that there was ample testimony before the court bearing on the relevant *Porter* factors and that there was sufficient testimony to enable the court to determine whether Wines' methods were reliable. Specifically, Wines testified, inter alia, that, although he had not seen a study from outside law enforcement that tested his methodology, "it's tested in a practical, real world sense" when CAST members find fugitives and recover kidnap victims and evidence, his work is subject to an internal peer review process where another CAST member reviews his analysis for accuracy and completeness, his personal experience with the accuracy of the technology was such that "the individual or the phone has always been in the area where the call detail records indicated the phone would be," he has had personal experience using historical call detail records with cell site information since 2003 and has received training from the major cell phone providers; and the technology was developed for a number of purposes, including to assist cell phone carriers in optimizing their networks to provide the best possible coverage for their customers.

The defendant contends, however, that the court "did not make adequate *Porter* findings . . . ."[29] Specifically, he argues that the court's ruling failed to address "the known or potential rate of error" and the "peer review" factor. (Internal quotation marks omitted.) Although the court did not use the words "rate of error" or "peer review," it expressly relied on "the experience of other experts who carry out similar work" and noted that Wines' "findings are reviewed by other experts in the same field," both appropriate considerations under the flexible *Porter* test. See *United States v. Mack*, supra, 2014 WL 6474329, *4 (citing testimony that estimation procedures "are commonly relied upon by law enforcement and the cell phone industry when more precise methods of estimation are unavailable" and noting that CAST member had testified that, "in his experience, it is an unusual case in which the actual coverage area of a cell tower differs greatly from the estimation derived from this method"). Last, we note that each of these factors is "only one of several nonexclusive factors . . . . No single *Porter* factor is dispositive." (Internal quotation marks omitted.) *State v. Montanez*, supra, 185 Conn. App. 620-21.

Moreover, the court in *Mack* found that the CAST member's inability to provide a precise

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[29] In a one sentence footnote in his appellate brief, the defendant argues that "[T]he state did not meet its burden of showing that Wines was qualified as an expert . . . and the court never expressly decided that 'preliminary question.' " (Citation omitted.) This argument is inadequately briefed and, accordingly, we decline to review it. See *Slate v. Prosper*, 160 Conn. App. 61, 74-75, 125 A.3d 219 (2015).

numerical error rate in the context of estimating the coverage area of cell towers did not negate his qualitative testimony, nor did the lack of scientific peer review render his methods unreliable. *United States v. Mack*, supra, 2014 WL 6474329, *4; see also *State v. Montanez*, supra, 185 Conn. App. 621 (noting, in context of determining coverage areas of particular towers through drive test analysis, that certain federal courts have declined to find drive test data unreliable on basis of lack of scientific testing and publications).

Last, the defendant contends that "the most fundamental omission is the court's failure to consider the absence of 'sector' analysis and how that absence affected Wines' ability to provide objective rather than subjective data." Specifically, he emphasizes that "[t]he absence of sector analysis means that Wines' calculations and conclusions were less precise and less accurate than they would have been with a sector-based analysis." As the defendant recognizes, defense counsel in Niraj's trial conceded that Niraj, whose alibi was that he was at his parents' house in Warren, was within the radius of coverage of tower 1025. The defendant in the present case states that he "did not make any such concession." Indeed, the defendant's alibi in the present case was that he was at Majmudar's house in Boston, plainly outside of tower 1025's uncontested coverage area of 200 square miles.[30]

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[30] Majmudar testified that she and the defendant celebrate Raksha Bandhan, an annual religious festival celebrating the bonds between brothers and sisters, and that the 2012 festival was scheduled for August 2. Majmudar testified that because she was out of town on August 2, she and the

When the court in the present case asked whether there were any factual developments that would cause it to reconsider the ruling rendered in Niraj's case, defense counsel did not identify his *out-of-state alibi* as a factual distinction requiring reconsideration. Nor does he explain in his appellate brief how the greater precision of a sector analysis would be more reliable, where the state, in light of the defendant's alibi that he was in Boston, sought only to identify the general area in which his phone was present.

Accordingly, the defendant has not demonstrated that the court abused its discretion in denying his motion to preclude CSLI evidence.

IV

The defendant's final claim on appeal is that there was insufficient evidence to convict him of murder predicated on *Pinkerton* liability. The defendant acknowledges that he "actively participated in the planned burglary and robbery" but

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defendant arranged to meet at her home on August 6. According to Majmudar, after notifying the defendant that she would arrive home late, Majmudar arrived at about 7 p.m. The defendant was parked with his car door open and was looking for something, which she thought was his cell phone. She stated that they then went inside her home and performed the ceremony, which took no longer than five minutes, and that the defendant left within two hours to return home to Branford to let the dog out. Majmudar testified that she learned about the homicide two days after the defendant was arrested on September 11, 2013. According to Majmudar's testimony, she realized that the defendant came to see her on the day of the homicide and then she told her mother that he could not have been involved.

argues that "there is no evidence that he or any [coconspirator] ever contemplated the death of [Vitalis]." He further argues that his "participation in the conspiracy and Calabrese's murder of [Vitalis] was so attenuated or remote . . . that it would be unjust to hold the defendant responsible for the criminal conduct of his coconspirator." (Internal quotation marks omitted.) We disagree.

We first set forth our standard of review. "The standard of review employed in a sufficiency of the evidence claim is well settled. [W]e apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . . In conducting our review, we are mindful that the finding of facts, the gauging of witness credibility and the choosing among competing inferences are functions within the exclusive province of the jury, and, therefore, we must afford those determinations great deference." (Internal quotation marks omitted.) *State v. Leggett*, 94 Conn. App. 392, 398, 892 A.2d 1000, cert. denied, 278 Conn. 911, 899 A.2d 39 (2006).

We next set forth the scope of *Pinkerton* liability. "Under the *Pinkerton* doctrine . . . a conspirator may be held liable for criminal offenses committed by a coconspirator that are within the scope of the conspiracy, are in furtherance of it, and are

reasonably foreseeable as a necessary or natural consequence of the conspiracy. . . . The rationale for the principle is that, when the conspirator [has] played a necessary part in setting in motion a discrete course of criminal conduct, he should be held responsible, within appropriate limits, for the crimes committed as a natural and probable result of that course of conduct. . . . [W]here . . . the defendant was a full partner in the illicit venture and the coconspirator conduct for which the state has sought to hold him responsible was integral to the achievement of the conspiracy's objectives, the defendant cannot reasonably complain that it is unfair to hold him vicariously liable, under the *Pinkerton* doctrine, for such criminal conduct. . . .

"In analyzing vicarious liability under the *Pinkerton* doctrine, we have stated that the *Pinkerton* doctrine constitutionally may be, and, as a matter of state policy, should be, applied in cases in which the defendant did not have the level of intent required by the substantive offense with which he was charged. The rationale for the doctrine is to deter collective criminal agreement and to protect the public from its inherent dangers by holding conspirators responsible for the natural and probable—not just the intended—results of their conspiracy. . . . This court previously has recognized that [c]ombination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise. . . . In other words, one natural and probable result of a crim-

inal conspiracy is the commission of originally unintended crimes. . . . Indeed, we specifically have contrasted *Pinkerton* liability, which is predicated on an agreement to participate in the conspiracy, and requires the substantive offense to be a reasonably foreseeable product of that conspiracy . . . with accessorial liability, which requires the defendant to have the specific mental state required for the commission of the substantive crime. . . .

"Thus, the focus in determining whether a defendant is liable under the *Pinkerton* doctrine is whether the coconspirator's commission of the subsequent crime was *reasonably foreseeable*, and not whether the defendant could or did *intend* for that particular crime to be committed. In other words, the only mental states that are relevant with respect to *Pinkerton* liability are that of the defendant in relation to the conspiracy itself, and that of the coconspirator in relation to the offense charged. If the state can prove that the *coconspirator's* conduct and mental state satisfied each of the elements of the subsequent crime at the time that the crime was committed, then the defendant may be held liable for the commission of that crime under the *Pinkerton* doctrine if it was reasonably foreseeable that the coconspirator would commit that crime within the scope of and in furtherance of the conspiracy." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State v. Coward*, 292 Conn. 296, 307-309, 972 A.2d 691 (2009).

Accordingly, "[u]nder the *Pinkerton* doctrine . . . a defendant may not be convicted of murder *unless one of his criminal associates*, acting foreseeably

and in furtherance of the conspiracy, caused the victim's death with the intent to do so. . . . [U]nder *Pinkerton*, a coconspirator's intent to kill may be imputed to a defendant who does not share that intent, provided, of course, that the nexus between the defendant's role and his coconspirator's conduct was not so attenuated or remote . . . that it would be unjust to hold the defendant responsible . . . ." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State v. Coltherst*, 263 Conn. 478, 494, 820 A.2d 1024 (2003).

Our Supreme Court has acknowledged, however, that "there may be occasions when it would be unreasonable to hold a defendant criminally liable for offenses committed by his coconspirators even though the state has demonstrated technical compliance with the *Pinkerton* rule. . . . For example, a factual scenario may be envisioned in which the nexus between the defendant's role in the conspiracy and the illegal conduct of a coconspirator is so attenuated or remote, notwithstanding the fact that the latter's actions were a natural consequence of the unlawful agreement, that it would be unjust to hold the defendant responsible for the criminal conduct of his coconspirator. In such a case, a *Pinkerton* charge would not be appropriate." (Internal quotation marks omitted.) Id., 493.

The defendant cursorily maintains that Vitalis' murder was not reasonably foreseeable. We disagree. Giving deference, as we must, to the reasonable inferences of the jury, it reasonably was foreseeable that Vitalis, who was home with his mother at the time of the crime, might resist or fight back to thwart the robbery of his proceeds from a large

drug sale, and that the defendant's coconspirator, Calabrese, who was armed with a loaded gun, might, in furtherance of the conspiracy, cause Vitalis' death with the intent to do so. See *State v. Coward*, supra, 292 Conn. 312 (quoting *State v. Rossi*, 132 Conn. 39, 44, 42 A.2d 354 [1945], for proposition that "crimes against the person like robbery . . . are, in common experience, likely to involve danger to life in the event of resistance by the victim or the attempt of the perpetrator to make good his escape and conceal his identity"); *State v. Taylor*, 177 Conn. App. 18, 33, 171 A.3d 1061 (2017) (Sufficient evidence to support the defendant's conviction of murder under the *Pinkerton* doctrine existed where the "court reasonably found, on the basis of the evidence presented and the reasonable inferences drawn therefrom, that the defendant and [his alleged coconspirator] robbed the victim, who fought back, and that they did so in furtherance of an agreement to commit a robbery while at least one of them was armed with a deadly weapon. Because the murder of the victim was committed in furtherance of that conspiracy, and was a reasonably foreseeable consequence thereof, such proof of conspiracy also supported the defendant's conviction for murder under the *Pinkerton* doctrine."), cert. denied, 327 Conn. 998, 176 A.3d 555 (2018); see also *State v. Gonzalez*, 311 Conn. 408, 427, 87 A.3d 1101 (2014) (noting that had the state sought to prove the defendant's liability for manslaughter in the first degree with a firearm under *Pinkerton*, evidence that the defendant possessed a loaded gun when he was together with an individual selling drugs "could well have been probative circumstantial evidence of the existence

of a conspiracy between them to sell drugs at [the housing complex], of which the death of an interfering party could be a foreseeable, natural, and probable consequence").

Moreover, we disagree that the defendant's role was too attenuated, such that it would be unfair to apply *Pinkerton*. Viewing the evidence in the light most favorable to sustaining the verdict, the defendant communicated with Niraj via text message regarding the crime days prior to it. The defendant, presumably aware, as was Calabrese, that Vitalis was a drug dealer who recently received a large amount of cash from a drug sale, planned to enter Vitalis' home to rob him of that money. Moreover, before the defendant and Calabrese entered the home, they saw Vitalis' mother arrive home. Once inside, the defendant restrained her using zip ties. Cf. *State v. Coward*, supra, 292 Conn. 311 (considering, among other evidence, that the "plan called for [the defendant's coconspirator] and the defendant to invade an occupied home and to 'use force' to commit the robbery"). Under these circumstances, we conclude that the extent of the defendant's participation was not so attenuated and remote that it would be unjust to hold him responsible for the criminal conduct of his coconspirator, Calabrese.[31]

[31] We further note that the jury also found the defendant guilty of felony murder. See footnote 1 of this opinion. Upon motion of the defendant, the court vacated the conviction of felony murder to avoid double jeopardy concerns. Consequently, even if there was insufficient evidence to sustain the defendant's conviction of murder predicated on *Pinkerton* liability, the felony murder conviction could be reinstated on

The judgment is affirmed.

In this opinion the other judges concurred.

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remand. See *State v. Miranda*, 317 Conn. 741, 753-54, 120 A.3d 490 (2015) ("[W]e see no substantive obstacle to resurrecting a cumulative conviction that was once vacated on double jeopardy grounds—provided that the reasons for overturning the controlling conviction would not also undermine the vacated conviction. . . . [A] jury necessarily found that all the elements of the cumulative offense were proven beyond a reasonable doubt. Put differently, although the cumulative conviction goes away with vacatur, the jury's verdict does not.").

APPENDIX C

ORDER GRANTING PETITION FOR CERTIFICATION TO APPEAL

STATE OF CONNECTICUT

v.

HIRAL M. PATEL

The defendant's petition for certification to appeal from the Appellate Court, 194 Conn. App. 245 (AC 41821), is granted, limited to the following issues:

1. Did the Appellate Court correctly conclude that the introduction into evidence of a codefendant's 'dual inculpatory statement' did not violate the defendant's confrontation rights under *Crawford v. Washington,* 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)?

"2. Did the Appellate Court correctly conclude that the introduction into evidence of a codefendant's 'dual inculpatory statement' did not violate the defendant's confrontation rights under the Connecticut constitution?

"3. Did the Appellate Court correctly conclude that a codefendant's 'dual inculpatory statement' was properly admissible as a statement against penal interest under § 8-6 (4) of the Connecticut Code of Evidence?

"4. Did the Appellate Court correctly conclude that the trial court properly excluded from evi-

dence, under § 8-6 (4) of the Connecticut Code of Evidence, a codefendant's statement against penal interest that exculpated the defendant?"

Richard Emanuel, in support of the petition.

Matthew A. Weiner, assistant state's attorney, in opposition.

Decided February 5, 2020

APPENDIX D

STATE OF CONNECTICUT
SUPREME COURT

(SC 20446)

STATE OF CONNECTICUT

v.

HIRAL M. PATEL

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

Convicted of various crimes, including murder, in connection with a home invasion, the defendant appealed, claiming, inter alia, that the trial court had improperly admitted into evidence a dual inculpatory statement made by a codefendant, C, to E, a fellow prison inmate. The defendant's cousin, N, had included the defendant and C in N's plan to rob the victim, with whom N had previously engaged in drug transactions. N drove the defendant and C to the area of the victim's home, which the defendant and C eventually entered. After encountering the victim, C shot and killed him. While in custody on an unrelated charge, C recounted the events of the home invasion, including the defendant's role, to E, who surreptitiously recorded the conversation. At trial, the recording of C's conversation with E was admitted as a statement against penal interest under the applicable

provision (§ 8-6 (4)) of the Connecticut Code of Evidence. In addition, defense counsel, in order to advance a theory of third-party culpability, sought to have the defendant's sister, M, testify about a purported confession that P, N's cousin, made to M. The trial court excluded M's testimony regarding P's confession on the ground that it was not sufficiently trustworthy. The Appellate Court affirmed the judgment of conviction, and the defendant, on the granting of certification, appealed to this court. *Held:*

1. The Appellate Court correctly concluded that the trial court had not abused its discretion in admitting into evidence C's dual inculpatory statement to E:

a. The admission of C's statement did not violate the defendant's right to confrontation under the United States constitution: in *Crawford v. United States* (541 U.S. 36), the United States Supreme Court indicated that statements of a defendant's coconspirator to a fellow inmate inculpating the defendant are nontestimonial, and, subsequently, federal and state courts have consistently rejected claims that the admission of statements between inmates or between an inmate and an informant that inculpate a defendant violate the defendant's right to confrontation; moreover, in determining whether the admission of such statements implicates a defendant's right to confrontation, courts have undertaken an objective analysis of the circumstances surrounding the making of the statements and the encounter during which they were made in order to assess the primary purpose and degree of formality of that encounter; in the present case, C's statement to E was elicited under circumstances in which the objectively manifested purpose of the encounter was not to secure testimony for trial, as C made his statement in an informal

setting, namely, his prison cell, to his cellmate, E, who questioned C in a sufficiently casual manner to avoid alerting C that C's statement was going to be relayed to law enforcement.

b. The admission of C's statement did not violate the defendant's confrontation rights under article first, § 8, of the Connecticut constitution: although the defendant urged this court to depart from the federal standard and to hold, under the state constitution, that a statement qualifies as testimonial if the reasonable expectation of either the declarant or the interrogator/listener is to prove past events potentially relevant to a later criminal prosecution, this court was not convinced that the defendant established the necessary predicates for departing from the federal standard, as an analysis under the six factors set forth in *State v. Geisler* (222 Conn. 672) did not support a more protective interpretation under the state constitution; moreover, although this court noted that it might be compelled to reach a different result under a slight variation of the facts, in the present case, the court had a fair assurance that government officials did not influence the content or the making of C's statement, as there was no evidence to suggest any involvement by the state's attorney's office in orchestrating the inquiry or that the police coached E on what questions to ask or what facts they were seeking to learn, and, because the conversation between C and E was recorded, the trial court could ascertain the extent to which, if any, C's answers may have been shaped or coerced by E.

c. The trial court did not abuse its discretion in admitting C's statement under § 8-6 (4) of the Connecticut Code of Evidence as a statement against penal interest: although the fact that the statement

was made thirteen months after the commission of the crimes weighed against its admission, and although E and C, who were fellow inmates for only a short period of time, did not share the type of relationship that would support the statement's trustworthiness, C's account of the home invasion was consistent with the physical evidence in almost all material respects, the statement was clearly against C's penal interest, as he cast himself as the principal actor in the commission of the crimes, and C's statement and the circumstances surrounding the making of that statement had none of the characteristics that historically has caused courts to view dual inculpatory statements as presumptively unreliable when offered to prove the guilt of a declarant's accomplice.

2. The Appellate Court correctly concluded that the trial court had properly excluded P's confession to M, which the defendant attempted to offer through M's testimony as a statement against penal interest under § 8-6 (4): the trial court reasonably concluded that P's purported confession, in which he admitted that it was he, and not the defendant, who accompanied C into the victim's home, was not sufficiently trustworthy to be admitted as a statement against penal interest, as much of the evidence that the defendant characterized as corroborative indicated only that P may have played some role in connection with the home invasion, not that P had been present in the victim's home; moreover, P's confession was made more than one year after the incident, and M claimed to have told no one except the defendant about P's confession for more than three and one-half years after P made the confession, delays that provided M with the opportunity to learn of the details of the prosecution's theory of the case.

Argued February 22, 2021—
officially released March 22, 2022

Procedural History

Substitute information charging the defendant with the crimes of felony murder, murder, home invasion, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit robbery in the first degree, conspiracy to commit burglary in the first degree, and tampering with physical evidence, brought to the Superior Court in the judicial district of Litchfield and tried to the jury before *Danaher, J.;* thereafter, the court denied the defendant's motions to preclude certain evidence; verdict of guilty; subsequently, the court, *Danaher, J.,* granted the defendant's motion to vacate the verdict as to the charge of felony murder and vacated the verdict as to the charge of conspiracy to commit robbery in the first degree; judgment of guilty of murder, home invasion, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit burglary in the first degree, and tampering with physical evidence, from which the defendant appealed to this court; subsequently, the case was transferred to the Appellate Court, *Alvord, Bright* and *Bear, Js.,* which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Richard Emanuel, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, was *Dawn Gallo,* state's attorney, for the appellee (state).

Opinion

KAHN, J. Following a jury trial, the defendant, Hiral M. Patel, was convicted of murder in violation of General Statutes § 53a-54a, home invasion in violation of General Statutes § 53a-100aa (a) (1), burglary in the first degree as an accessory in violation of General Statutes §§ 53a-101 (a) (1) and 53a-8 (a), robbery in the first degree as an accessory in violation of General Statutes §§ 53a-134 (a) (2) and 53a-8 (a), conspiracy to commit burglary in the first degree in violation of § 53a-101 (a) (1) and General Statutes § 53a-48, and tampering with physical evidence in violation of General Statutes (Rev. to 2011) § 53a-155 (a) (1).[1] The Appellate Court affirmed the judgment of conviction; *State v. Patel,* 194 Conn. App. 245, 250, 301, 221 A.3d 45 (2019); and we thereafter granted the defendant's petition for certification to appeal. See *State v. Patel,* 334 Conn. 921, 223 A.3d 60 (2020). The defendant's principal challenge relates to the admission into evidence of a codefendant's recorded dual inculpatory statement[2] to a fellow inmate acting at the behest of the state police. The defendant contends that the Appellate Court incorrectly concluded that the statement was nontestimonial and, therefore, did not implicate the defendant's confrontation rights under

[1] The defendant also was convicted of felony murder in violation of General Statutes § 53a-54c and conspiracy to commit robbery in the first degree in violation of §§ 53a-134 (a) (2) and 53a-48. The trial court vacated his convictions on those charges to avoid double jeopardy concerns.

[2] "A dual inculpatory statement is a statement that inculpates both the declarant and a third party, in this case the defendant." (Internal quotation marks omitted.) *State v. Camacho*, 282 Conn. 328, 359, 924 A.2d 99, cert. denied, 562 US. 956, 128 S. Ct. 388, 169 L Ed. 2d 273 (2007).

either the United States constitution or the Connecticut constitution, and that the trial court properly admitted it under the hearsay exception for statements against penal interest. We disagree with the defendant's claims and affirm the Appellate Court's judgment.

The Appellate Court's decision sets forth the following facts that the jury reasonably could have found. "On June 12, 2012, [the] police arrested Niraj Patel (Niraj), the defendant's cousin, after a motor vehicle stop . . . . [Niraj] was charged with criminal attempt to possess more than four ounces of marijuana, interfering with an officer, tampering with evidence, possession of drug paraphernalia, and motor vehicle charges. Following his arrest, Niraj unsuccessfully attempted to borrow money . . . to pay his attorney.

"Niraj thereafter formed a plan to rob Luke Vitalis, a marijuana dealer with whom Niraj had conducted drug transactions. Vitalis lived with his mother, Rita G. Vitalis . . . in Sharon. [Niraj offered money to Michael Calabrese, a friend, and the defendant to perform the robbery.]

"Niraj knew that Vitalis had sold ten pounds of marijuana from his home on August 5, 2012, and set up a transaction with Vitalis for the following day, with the intention of robbing Vitalis of his proceeds of the previous sale. On August 6, 2012, Niraj drove Calabrese and the defendant to the area of Vitalis' home and dropped them off down the road. Calabrese and the defendant ran through the woods to Vitalis' home. They watched the home and saw Vitalis' mother come home. At approximately 6 p.m., Calabrese and the defendant, wearing masks, bandanas, black hats, and gloves, entered the home, encountered Vitalis' mother, and restrained her using zip ties. Calabrese, armed with a Ruger handgun that he received from

Niraj, went upstairs and encountered Vitalis in his bedroom. He struck Vitalis with the handgun and shot him three times, killing him. Calabrese searched the bedroom but could find only Vitalis' wallet with $70 and approximately one-half ounce of marijuana, both of which he took. Calabrese and the defendant ran from the property into the woods, where the defendant lost his cellphone. Calabrese and the defendant eventually met up with Niraj, who was driving around looking for them. Calabrese burned his clothing and sneakers on the side of Wolfe Road in Warren.

"After freeing herself, Vitalis' mother called 911. State police . . . arrived at the scene at approximately 6:14 p.m. and found Vitalis deceased. Some of the drawers in the furniture in Vitalis' bedroom were pulled out. The police searched the bedroom and found $32,150 . . . 1.7 pounds of marijuana . . . and evidence of marijuana sales." (Footnote omitted.) *State v. Patel,* supra, 194 Conn. App. 250-51.

The record reveals the following additional undisputed facts and procedural history. While the police were investigating the Sharon home invasion, Calabrese was arrested and detained on an unrelated charge. While in custody, Calabrese recounted the events that had occurred during the home invasion, including the defendant's role, to a jailhouse informant who was surreptitiously recording the conversation. At trial, the state established that Calabrese had invoked his fifth amendment privilege not to testify and introduced, over defense counsel's objection, the recording of Calabrese's dual inculpatory statement as a statement against penal interest under § 8-6 (4) of the Connecticut Code of Evidence. The state also introduced cell phone site location

information, testimony from Calabrese's former girlfriend, and other evidence that tended to corroborate the defendant's presence at, and involvement in, the Sharon home invasion, as well as evidence establishing that friends and family of the defendant had been unable to make contact with the defendant immediately before, during, and after the period during which the Sharon home invasion occurred. See id., 251-52, 262, 284-89.

The defense advanced theories of alibi and third-party culpability. The defendant's older sister, Salony Majmudar, testified that the defendant was visiting her in Boston, Massachusetts, to celebrate an important Hindu holiday when the Sharon home invasion occurred.[3] Defense counsel also sought to have Majmudar testify about a purported confession that had been made to her by Niraj's brother, Shyam Patel (Shyam), in which Shyam admitted that it was he, and not the defendant, who had accompanied Calabrese to Vitalis' home. Defense counsel offered Shyam's statement as a statement against penal interest under § 8-6 (4) of the Connecticut Code of Evidence. The trial court sustained the prosecutor's objection to the admission of the statement, ruling that the statement was insufficiently trustworthy to satisfy § 8-6 (4).

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[3] The holiday, Raksha Bhandana, which celebrates the bond between a brother and sister, or other close male/female relationships, fell on August 2, 2012. The director of Hindu life at Yale University confirmed the holiday's significance and that, although the preferred way to celebrate is in each other's presence, there is flexibility in both the manner and timing of the holiday's observance. Cell phone records established that Majmudar and the defendant had a thirty-seven minute phone call on August 2, 2012, and no phone contact on August 6, 2012.

The jury returned a verdict, finding the defendant guilty of murder, home invasion, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit burglary in the first degree, and tampering with physical evidence, among other charges, and the trial court thereafter rendered judgment in accordance with the jury's verdict. See footnote 1 of this opinion. The court imposed a total effective sentence of forty-five years of imprisonment, execution suspended after thirty-five years and one day, and five years of probation.

The defendant appealed from the judgment of conviction, claiming that constitutional and evidentiary errors entitled him to a new trial. See id., 249-50. The Appellate Court affirmed the judgment of conviction. Id., 250, 301. We thereafter granted the defendant's petition for certification to appeal, limited to the following issues: (1) whether the Appellate Court correctly concluded that the admission of Calabrese's dual inculpatory statement (a) did not violate the defendant's confrontation rights under the United States constitution, (b) did not violate the defendant's confrontation rights under the Connecticut constitution, and (c) was proper under our code of evidence as a statement against penal interest; and (2) whether the Appellate Court correctly concluded that the trial court had properly excluded Shyam's confession. See *State v. Patel,* supra, 334 Conn. 921 n.22. The defendant's constitutional claims are subject to plenary review; see, e.g., *State v. Smith,* 289 Conn. 598, 618-19, 960 A.2d 993 (2008); whereas his evidentiary claims, which challenge the application, rather than the interpretation, of our code of evidence, are reviewed for an abuse of discretion. See, e.g., *State v. Pierre,* 277 Conn. 42, 68, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006); see

also *State v. Saucier,* 283 Conn. 207, 218-21, 926 A.2d 633 (2007) (contrasting standards of review).

I

The defendant challenges the admission of Calabrese's dual inculpatory statement on both constitutional and evidentiary grounds. We agree with the Appellate Court that the trial court properly admitted this statement.

The following additional undisputed facts provide context for our resolution of this issue. Calabrese was arrested on August 29, 2013, on drug charges unrelated to the August 6, 2012 Sharon home invasion. He was initially held in custody at the same correctional facility where Wayne Early was being held following his convictions of attempted burglary in the first degree with a deadly weapon and criminal possession of a firearm.

On September 3, 2013, Early was summoned to the facility's intelligence office. Department of Correction officials there informed Early that Calabrese, whom Early did not know, was going to be moved into Early's cell and asked Early whether he would be willing to wear a recording device. Early previously had made confidential recordings of other cellmates. Early said that he would be willing to record Calabrese, if Calabrese seemed inclined to talk. Late that evening, Calabrese was moved into Early's cell. The two men shared information about the charges for which they were in custody. Early disclosed that he had originally been charged with home invasion, but that charge later was reduced to burglary. Calabrese responded that the police were "looking" at him for the same type of incident and began to talk about the Sharon home

invasion.[4] Early changed the subject because he was not yet wearing the recording device.

The following day, Early was brought back to the corrections intelligence office. Early confirmed that he was willing to record Calabrese. A corrections official then placed a call to a state police official, who spoke with Early to establish that he had no knowledge about the incident of interest[5] and directed Early to get details about it if he could. When Early returned to his cell, equipped with a hidden recording device, he gradually turned the conversation to the subject of the home invasion that Calabrese had mentioned the prior night, telling Calabrese that he "want[ed] to hear how that shit went down . . . ." Calabrese volunteered many details, including the fact that the defendant participated, but Early repeatedly asked questions to obtain further details or clarification about the incident.

Calabrese's account ascribed the following actions and intentions to the participants. He and the defendant went to Sharon with the intention of robbing a drug dealer (Vitalis). Calabrese entered Vitalis' home first, because he was the only one with a gun. After they entered and saw Vitalis' mother, Calabrese grabbed her and started to tie her hands. Calabrese

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[4] In the recorded exchange on September 4, 2013, Calabrese told Early that the police had questioned him about the incident after they reviewed cell phone records for Vitalis, which eventually led them to information about Calabrese's cell phone. The trial court credited Early's testimony that, on the evening of September 3, 2013, Calabrese initiated the topic of the Sharon home invasion.

[5] It is unclear from the record whether Early was told where the incident took place, or how the matter of interest was described to Early.

directed the defendant to finish the task and to watch her while Calabrese confronted Vitalis upstairs. Calabrese did not plan to shoot Vitalis but did so after Vitalis threatened him with a knife and tried to grab the gun. The defendant fled when he heard the gunshots, allowing Vitalis' mother to make her way to a phone and to call the police. Calabrese's search yielded only $70 and a small amount of marijuana before he had to flee. Calabrese was able to catch up with the defendant because the defendant had stopped to look for his cell phone, which he had dropped while running through a swampy area in the woods and was unable to recover. Niraj, who had planned the robbery, eventually found them and gave Calabrese a change of clothes. Calabrese set fire to his blood soaked clothes and shoes in a wooded area, because he had left a footprint in a pool of Vitalis' blood at the crime scene.

At trial, the state offered the recording of Calabrese's dual inculpatory statement into evidence for its truth; therefore, it indisputably is hearsay. See Conn. Code Evid. § 8-1 (3). Because Calabrese's invocation of his fifth amendment privilege not to testify deprived the defendant of an opportunity to cross-examine Calabrese about that statement, his statement is admissible only if it avoids the constitutional hurdle imposed by the confrontation clauses of the federal and state constitutions; see U.S. Const., amends. VI and XIV, §1; Conn. Const., art. I, § 8; and the evidentiary hurdle of hearsay rules.[6]

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[6] Although several of this court's decisions address the evidentiary issue first; see, e.g., *State v. Simpson*, 286 Conn. 634, 650-51, 945 A.2d 449 (2008); *State v. Camacho*, supra, 282 Conn. 362-63; *State v. Kirby*, 280 Conn. 361, 373-78, 908 A.2d 506 (2006); those cases appear to rely on the jurisprudential policy of constitutional avoidance, which directs courts to decide a case

A

The parties disagree as to whether the United States Supreme Court has in fact settled the issue of whether the admission of a hearsay statement to a jailhouse informant inculpating the declarant and a codefendant violates the codefendant's rights under the confrontation clause of the sixth amendment to the United States constitution. The defendant contends that the court answered that question in the negative only in dicta, under distinguishing circumstances, and that subsequent decisions that have expanded the framework of this inquiry by recognizing that the identity and actions of the questioner must be considered. The defendant argues that he prevails under the current framework because Early, acting as an agent of law enforcement, effectively interrogated Calabrese for the primary purpose of obtaining testimony to be used in a criminal prosecution.

There can be no doubt that the court's confrontation clause jurisprudence has vexed courts as applied to particular circumstances, a point we elaborate on in

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on a nonconstitutional basis if one is available, rather than unnecessarily deciding a constitutional issue. See, e.g., *State v. Cameron M.*, 307 Conn. 504, 516 n.16, 55 A.3d 272 (2012) (overruled in part on other grounds by *State v. Elson*, 311 Conn. 726, 728 n.14, 764, 91 A.3d 862 (2014)), cert. denied, 569 U.S. 1006, 133 S. Ct. 2744, 186 L. Ed. 2d 194 (2013); *State v. McCahill*, 261 Conn. 492, 501, 811 A.2d 667 (2002). This policy is inapplicable, however, to cases in which a defendant raises the constitutional claim based on his right to confrontation. Resolution of the evidentiary claim would not obviate the need to address the constitutional issue because, even if the statement is inadmissible under the hearsay exception relied on, the state would be free on retrial to seek admission of the same statement on a different evidentiary basis. The constitutional issue, therefore, is the appropriate starting point.

part I B of this opinion. The present case, however, is one in which we have confidence as to how the court would resolve the issue presented, namely, in favor of the state. The federal constitutional issue, therefore, is our starting point. See *State v. Purcell,* 331 Conn. 318, 334 n.11, 203 A.3d 542 (2019) (noting that we address federal constitution first when "we can predict to a reasonable degree of certainty how the United States Supreme Court would resolve the issue"); see also *State v. Taupier,* 330 Conn. 149, 166 n.14, 193 A.3d 1 (2018) (concluding that it was more efficient to address federal claim first because review of federal precedent would be necessary under state constitutional framework in *State v. Geisler,* 222 Conn. 672, 685, 610 A.2d 1225 (1992)), cert. denied, __U.S.__, 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019).

The sixth amendment's confrontation clause, which is binding on the states through the due process clause of the fourteenth amendment; *Pointer v. Texas,* 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const., amend. VI. Although an "essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination"; (emphasis omitted; internal quotation marks omitted) *Davis v. Alaska,* 415 U.S. 308, 315-16, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); this clause has never been interpreted to require the opportunity to cross-examine every hearsay declarant. See, e.g., *Idaho v. Wright,* 497 U.S. 805, 813-14, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990); see also *Crawford v. Washington,* 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

In prior cases, we have chronicled the development of the court's confrontation case law, including its sea change from a focus on whether the hearsay statement bore adequate "indicia of reliability"; (internal quotation marks omitted) *Ohio v. Roberts,* 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); to a focus on whether the statement is "[t]estimonial" in nature under *Crawford v. Washington,* supra, 541 U.S. 59, and its progeny. See generally *State v. Rodriguez,* 337 Conn. 175, 226-27, 252 A.3d 811 (2020) (*Kahn, J.,* concurring).[7] Although the court has "labored to flesh out what it means for a statement to be 'testimonial' "; *Ohio v. Clark,* 576 U.S. 237, 244, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015); it has deemed the term to include not only ex parte in-court testimony and formalized testimonial materials such as affidavits and depositions but also "[p]olice interrogations . . . ." *Crawford v. Washington,* supra, 51-53. The court used that term in its colloquial, rather than its strictly legal, sense to include a "recorded statement, knowingly given in response to structured police questioning . . . ." Id., 53 n.4. Such statements "are testimonial when the circumstances objectively indicate that . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (Internal quotation marks omitted.) *Ohio v. Clark,* supra, 244, quoting *Davis v. Washington,* 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

In dicta in *Crawford* and *Davis,* the court indicated that statements of a coconspirator to a fellow inmate

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[7] See also *State v. Sinclair*, 332 Conn. 204, 218-25, 210 A.3d 509 (2019); *State v. Slater*, 286 Conn. 162, 169-74, 939 A.2d 1105, cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008); *State v. Kirby*, supra, 280 Conn. 378-83.

and to an undercover agent inculpating the defendant were clearly nontestimonial. The court asserted that its newly adopted testimonial rubric would not alter the results reached in its prior cases. See *Davis v. Washington,* supra, 547 U.S. 825-26; *Crawford v. Washington,* supra, 541 U.S. 58. Two of the cases cited by the court as examples were *Dutton v. Evans,* 400 U.S. 74, 77-78, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) (plurality opinion), and *Bourjaily v. United States,* 483 U.S. 171, 174, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987), in which the declarants were unavailable for cross-examination. See *Davis v. Washington,* supra, 825; *Crawford v. Washington,* supra, 57-58. In *Dutton,* the court had held that the admission of a statement of the defendant's coconspirator to a cellmate, implicating the defendant in a triple homicide, did not violate the defendant's confrontation rights. See *Dutton v*. Evans, supra, 87-89. In *Bourjaily,* the court had held that the admission of a recorded telephone conversation between the defendant's coconspirator and an FBI informant, in which the coconspirator implicated the defendant in a drug selling enterprise, did not violate the defendant's confrontation rights. See *Bourjaily v. United States,* supra, 173-74, 183-84.

Post-*Crawford,* federal courts and state courts have consistently rejected claims that the admission of inmate to inmate or inmate to informant statements inculpating a defendant, whether recorded or not, violated his or her confrontation rights. See, e.g., *United States v. Veloz,* 948 F.3d 418, 430-32 (1st Cir.), cert. denied, __U.S.__, 141 S. Ct. 438, 208 L. Ed. 2d 133 (2020); *United States v. Dargan,* 738 F.3d 643, 650-51 (4th Cir. 2013); *United States v. Dale,* 614 F.3d 942, 954-56 (8th Cir. 2010), cert. denied, 563 U.S. 918, 131 S. Ct. 1814, 179 L. Ed. 2d 774 (2011), and cert. denied sub nom. *Johnson v. United States,* 563 U.S.

919, 131 S. Ct. 1814, 179 L. Ed. 2d 775 (2011); *United States v. Smalls,* 605 F.3d 765, 778 (10th Cir. 2010); *People v. Arauz,* 210 Cal. App. 4th 1394, 1402, 149 Cal. Rptr. 3d 211 (2012); *State v. Nieves,* 376 Wis. 2d 300, 326-27, 897 N.W.2d 363 (2017). Courts also have routinely held that statements made unwittingly to a government agent or an undercover officer, outside of the prison context, are nontestimonial.[8] See, e.g.,

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[8] We are aware of only two cases to the contrary. In *Cazares v. State*, Docket No. 08-15.00266-CR, 2017 WL 3498483, *10 (Tex. App. August 16, 2017, review refused), cert. denied, __U.S.__, 139 S. Ct. 422, 202 L. Ed. 2d 324 (2018), the court deemed the informant's purpose, which was unknown to the declarant, to be dispositive. In *People v. Redeaux*, 355 Ill. App. 3d 302, 823 N.E.2d 268, cert. denied, 215 Ill.2d 613, 833 N.E.2d 7 (2005), the court took a narrower approach. It suggested that a coconspirator's statements to an undercover officer could be testimonial if elicited pursuant to an "interrogation," meaning formal, structured questioning. (Internal quotation marks omitted.) Id., 306-307. The court in *Redeaux* ultimately concluded that the conversation at issue did not come close to such questioning, pointing to the facts that its purpose was to facilitate a drug transaction, not "a subterfuge to gain information about this or some other crime," and that the undercover officer never asked the coconspirator, a drug dealer, to name his "source," i.e., the defendant. (Internal quotation marks omitted.) Id., 306.

Before and shortly after *Crawford* was decided, a few commentators had advocated for a de facto interrogation approach but limited that term to circumstances in which there was sustained questioning, leading questions, or suggestions made with a preconceived notion of the evidence that the agent or informant wanted to obtain. See M. Berger, "The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model," 76 Minn. L. Rev. 557, 608-609 (1992); M. Seigel & D. Weisman, "The Admissibility of Co-Conspirator Statements in a Post-*Crawford* World," 34 Fla. St. U. L. Rev. 877, 903-904 (2007). Courts have rejected a "de facto" interrogation theory in the context of jailhouse informants acting as agents for the police on the grounds that this circumstance is not an interrogation and

Brown v. Epps, 686 F.3d 281, 287 and n.35 (5th Cir. 2012) (citing cases reaching this conclusion). Although some of these cases simply relied on the United States Supreme Court's dicta; see, e.g., *United States v. Veloz,* supra, 431-32; *United States v. Saget,* 377 F.3d 223, 229 (2d Cir. 2004), cert. denied, 543 U.S. 1079, 125 S. Ct. 938, 160 L. Ed. 2d 821 (2005); many others reasoned that such statements could not have been given for the purpose of proving past facts relevant to a prosecution because the declarant did not know that he was speaking to an informant or an undercover officer. See, e.g., *United States v. Dargan,* supra, 646, 650-51; *State v. Nieves,* supra, 326-27.

The defendant contends, however, that the court's more recent confrontation clause jurisprudence suggests that the court would now reject this dicta. Our review of this case law confirms, rather than undermines, the vitality of this dicta.

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would not yield a testimonial statement, even if it could be broadly characterized as an interrogation. *See*, e.g., *United States v*. *Smalls*, supra, 605 F.3d 779 ("[C]asual questioning by a fellow inmate does not equate to police interrogation, even though the government coordinated the placement of the fellow inmate and encouraged him to question [the defendant's accomplice]. But whether we properly may label [the confidential informant's] encounter with [the defendant's accomplice] as an interrogation in some remote sense is beside the point because *Davis* establishes that not every statement made in response to an interrogation is testimonial. Rather, only in some instances does interrogation tend to generate testimonial responses." (Emphasis omitted; internal quotation marks omitted.)). But see id., 788 (Kelly, J., dissenting) (arguing that history supports confrontation analysis based on declarant with full knowledge of facts, including true identity and purpose of person eliciting information). We explain subsequently in this opinion why both *Cazares* and *Redeaux* are contrary to the United States Supreme Court's most recent case law.

"*Crawford* and *Davis* did not address whose perspective matters—the declarant's, the interrogator's, or both—when assessing the primary purpose of [an] interrogation." (Internal quotation marks omitted.) *Michigan v. Bryant,* 562 U.S. 344, 381, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011) (Scalia, J., dissenting). More recent cases have interpreted *Davis* to require consideration of "the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs." Id., 370; see also *Ohio v. Clark,* supra, 576 U.S. 246-47 (considering identity of participants as well). A consistent theme echoed in the case law, however, is that this consideration is one based on *objective* facts. See *Davis v. Washington,* supra, 547 U.S. 826 ("[t]he question before us in *Davis* . . . is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements"); *Crawford v. Washington,* supra, 541 U.S. 52 (testimonial statements would include those "that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" (internal quotation marks omitted)).

This point was underscored and elaborated on in *Michigan v. Bryant,* supra, 562 U.S. 344, when the court stated: "The Michigan Supreme Court correctly understood that this inquiry is objective. . . . *Davis* uses the word 'objective' or 'objectively' no fewer than eight times in describing the relevant inquiry. . . . 'Objectively' also appears in the definitions of both testimonial and nontestimonial statements that *Davis* established. . . .

"An objective analysis of the circumstances of an encounter and the statements and actions of the

parties to it provides the most accurate assessment of the 'primary purpose of the interrogation.' The circumstances in which an encounter occurs—e.g., at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards—are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, *the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred."* (Citations omitted; emphasis added; footnote omitted.) Id., 360.

The court's most recent confrontation clause case exemplifies this objective, totality of circumstances approach, as well as the significance of the formality of the encounter in making that determination. See *Ohio v. Clark,* supra, 576 U.S. 237. In *Clark,* the court considered the statements of a three year old child, in response to his teachers' questions, in which he identified his mother's boyfriend as the perpetrator of injuries discovered by the teachers. Id., 240. The teachers were mandated by state law to report suspected abuse to government authorities. Id., 242. These facts required the court to squarely address for the first time the question of whether statements made to individuals who are not law enforcement officers implicate confrontation rights. Id., 246.

The court first summarized its confrontation clause jurisprudence, noting that the primary purpose test has evolved to require consideration of "all of the relevant circumstances." (Internal quotation marks omitted.) Id., 244. One such circumstance it identified

"is the informality of the situation and the interrogation. . . . A formal [station house] interrogation, like the questioning in *Crawford,* is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused." (Citation omitted; internal quotation marks omitted.) Id., 245.

The court in *Clark* recognized that statements to individuals who are not law enforcement officers "could conceivably raise confrontation concerns"; id., 246; but cautioned that "[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." Id., 249. Thus, the fact that the child was speaking to his teachers "remains highly relevant. Courts must evaluate challenged statements in context, and part of that context is the questioner's identity." Id., 249; see also id. ("the relationship between a student and his teacher is very different from that between a citizen and the police").

In concluding that the primary purpose of the encounter was not to gather evidence for the defendant's prosecution but to protect the child, the court in *Clark* pointed to the following facts: "At no point did the teachers inform [the child] that his answers would be used to arrest or punish his abuser. [The child] never hinted that he intended his statements to be used by the police or prosecutors.[9] And

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[9] The court in *Clark* also observed that its decision was bolstered by the age of the child: "Statements by very young children will rarely, if ever, implicate the [c]onfrontation [c]lause. Few preschool students understand the details of our criminal justice system. Rather, [r]esearch on children's understanding of the

the conversation between [the child] and his teachers was informal and spontaneous. The teachers asked [the child] about his injuries immediately upon discovering them, in the informal setting of a preschool lunchroom and classroom, and they did so precisely as any concerned citizen would talk to a child who might be the victim of abuse. This was nothing like the formalized [station house] questioning in *Crawford* or the police interrogation and battery affidavit in *Hammon* [*v. Indiana*, which was decided together with *Davis v. Washington,* supra, 547 U.S. 813]."[10] (Footnote added.) Id., 247.

Consistent with *Bryant,* the court in *Clark* thus relied exclusively on the objectively *manifested* facts—what was said, who said it, how it was said, and where it was said. Nothing indicates that, contrary to *Bryant,* the hidden intentions or identity of the person eliciting the statement would be relevant, let alone dispositive.[11] See *United States v. Volpendesto,* 746 F.3d 273,

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legal system finds that young children have little understanding of prosecution. . . . Thus, *it is extremely unlikely that a* [*three year old*] *child in* [*this child's*] *position would intend his statements to be a substitute for trial testimony*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Ohio v. Clark*, supra, 576 U.S. 247-48.

[10] *Hammon* involved statements given by a domestic violence victim to the police, after being isolated from her abusive husband, which were memorialized in a "battery affidavit." (Internal quotation marks omitted.) *Davis v. Washington*, supra, 574 U.S. 820. The court held that the statements in *Hammon* were testimonial. Id., 830.

[11] The court in *Clark* also rejected the defendant's reliance on the state's mandatory reporting obligation as a basis to equate the child's teachers with the police and their questions with an official interrogation. *See Ohio v. Clark*, supra, 576 U.S. 249. The court observed that "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her

289-90 (7th Cir.) ("*Bryant* mandates that we not evaluate the purpose of [the] recorded conversation from the subjective point of view of [the coconspirator], who knew he was secretly collecting evidence for the government. Instead, we evaluate their conversation objectively. And from an objective perspective, [the recorded] conversation looks like a casual, confidential discussion between [coconspirators]."), cert. denied sub nom. *Sarno v. United States,* 574 U.S. 936, 135 S. Ct. 382, 190 L. Ed. 2d 256 (2014), and cert. denied sub nom. *Potchan v. United States,* 574 U.S. 936, 135 S. Ct. 383, 190 L. Ed. 2d 256 (2014). *Clark* also underscores the significance of the formality surrounding the questioning, which imparts to the declarant a solemnity of purpose akin to other forms of testimonial statements, such as ex parte testimony, affidavits, and grand jury testimony. See *Ohio v. Clark,* supra, 576 U.S. 243 ("[i]n *Crawford* . . . [w]e explained that 'witnesses,' under the [c]onfrontation [c]lause, are those 'who bear testimony,' and we defined 'testimony' as 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact' " (citation omitted)); see also *State v. Sinclair,* 332 Conn. 204, 225, 210 A.3d 509 (2019) ("there is agreement among all of the justices that the formality attendant to the making of the statement must be considered").

The court's reasoning in *Bryant* and *Clark* thus confirms the court's dicta characterizing the statements in *Dutton* and *Bourjaily* made to persons who harbored secret intentions to obtain evidence to be used at trial as clearly nontestimonial.[12] Like the

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student into a law enforcement mission aimed primarily at gathering evidence for a prosecution." Id.

[12] The defendant makes much of the fact that the statements in *Dutton* and *Bourjaily* were admitted under the hearsay excep-

statements in *Dutton* and *Bourjaily,* Calabrese's statement was elicited in circumstances under which the objectively manifested purpose of the encounter was not to secure testimony for trial. Calabrese made his statements in an informal setting, his prison cell, to his cellmate, who undoubtedly actively questioned the defendant but did so in an evidently sufficiently casual manner to avoid alerting Calabrese that his statement was going to be relayed to law enforcement. Cf. *United States v. Dargan,* supra, 738 F.3d 650-51 (statements by defendant's coconspirator to cellmate were clearly nontestimonial because they were made "in an informal setting—a scenario far afield from the type of declarations that represented the focus of *Crawford's* concern" and declarant "had no plausible expectation of 'bearing witness' against anyone"). The admission of Calabrese's dual inculpatory statement,

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tion for statements by a coconspirator—historically viewed as inherently reliable—whereas Calabrese's statement was admitted under the exception for statements against penal interest—historically viewed as presumptively unreliable when used to inculpate a codefendant. Even if we were to accept the defendant's characterization; see *United States v. Inadi*, 475 U.S. 387, 400, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986) (recognizing that *Dutton* involved state coconspirator rule that admitted broader category of statements than did federal coconspirator rule); the distinction he draws is immaterial. *Bryant* would compel us to reach the same result even in the absence of this dictum. Moreover, the distinction between the hearsay exceptions has no relevance under *Crawford's* testimonial analytical framework, which abandoned the traditional evidentiary analytical approach, a reliability focused inquiry. See, e.g., *State v. Rivera*, 268 Conn. 351, 365 n.13, 844 A.2d 191 (2004) ("[b]ecause the United States Supreme Court [in *Crawford*] has characterized [the] statement [in *Dutton*] as nontestimonial . . . it would follow that the statement [against penal interest to a fellow inmate] . . . is also nontestimonial").

therefore, did not violate the defendant's confrontation rights under the federal constitution.

B

We next turn to the defendant's confrontation clause challenge under article first, § 8, of the Connecticut constitution. The defendant asks this court to hold that, under our state constitution, a statement qualifies as "testimonial" if the reasonable expectation of either the declarant *or the interrogator/listener* is to establish or to prove past events potentially relevant to a later criminal prosecution. (Internal quotation marks omitted.) We are not persuaded that the defendant has established the necessary predicates for departing from the federal standard. We do not, however, foreclose the possibility of departing from the federal standard under appropriate circumstances in a future case, and raise a strong cautionary note about the present circumstances.

In *State v. Geisler,* supra, 222 Conn. 684-85, this court identified factors to be considered to encourage a principled development of our state constitutional jurisprudence. Those six factors are (1) persuasive relevant federal precedents, (2) the text of the operative constitutional provisions, (3) historical insights into the intent of our constitutional forebears, (4) related Connecticut precedents, (5) persuasive precedents of other state courts, and (6) contemporary understandings of applicable economic and sociological norms, or as otherwise described, relevant public policies. Id., 685; accord *Feehan v. Marton,* 331 Conn. 436, 449, 204 A.3d 666, cert. denied, __U.S.__, 140 S. Ct. 144, 205 L. Ed. 2d 35 (2019).

The defendant concedes that the first, second, and fifth factors do not support a more protective inter-

pretation under state law. The text of the two clauses are nearly identical. Compare Conn. Const., art. I, § 8 (guaranteeing defendant's right "to be confronted *by* the witnesses against him" (emphasis added)) with U.S. Const., amend. VI (guaranteeing right "to be confronted *with* the witnesses against him" (emphasis added)). The federal and state precedent we have addressed in part I A of this opinion does not support the defendant's proposed standard. To this we would add that we are aware of only one state that has charted an independent course under its state constitution's confrontation clause with regard to this issue.[13] That state did not adopt the defendant's proposed standard; it never adopted *Crawford's* testimonial standard and continued to adhere to the "adequate indicia of reliability" standard recognized in *Ohio v. Roberts,* supra, 448 U.S. 66. See *State v. Copeland,* 353 Or. 816, 820-24, 306 P.3d 610 (2013).

With regard to the third and fourth factors, historical insights and Connecticut precedent, the

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[13] There are examples of courts relying on their respective state constitutions to fill gaps in the United States Supreme Court's testimonial framework, at least until the court does so itself. See, e.g., *State v. Scanlan*, 193 Wn. 2d 753, 766, 445 P.3d 960 (2019) (concluding that Washington case law articulating comprehensive definition of "testimonial" statements and specific test for applying that definition to statements to nongovernmental witnesses under Washington constitution due to gap in federal jurisprudence was superseded by subsequent decision of United States Supreme Court applying its primary purpose test to statements to nongovernmental witnesses), cert. denied, __U.S.__, 140 S. Ct. 834, 205 L. Ed. 2d 483 (2020); see also *State v. Rodriguez*, supra, 337 Conn. 226-27 (*Kahn*, *J.*, concurring) (filling gap regarding admissibility of forensic evidence with its own test under federal constitution); *People v. John*, 27 N.Y.3d 294, 312-15, 52 N.E.3d 1114, 33 N.Y.S.3d 88 (2016) (filling gap regarding admissibility of forensic scientific laboratory reports).

defendant expressly conceded before the Appellate Court that these factors also do not favor his position. This court's first confrontation clause case, in 1921, took the position that "[t]he underlying reasons for the adoption of this right in the [f]ederal [c]onstitution and in [s]tate [c]onstitutions, and the principles of interpretation applying to this provision, are identical." *State v. Gaetano,* 96 Conn. 306, 310, 114 A. 82 (1921). We recently reiterated this position. See *State v. Lockhart,* 298 Conn. 537, 555, 4 A.3d 1176 (2010) (noting that federal and state provisions are subject to same interpretation because they have "shared genesis in the common law").[14]

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[14] Although this court indicated that the federal and state provisions are subject to the same interpretation because of their "shared genesis in the common law"; *State v. Lockhart*, supra, 298 Conn. 555; it is important to acknowledge that we have never undertaken an independent examination of the circumstances surrounding the adoption of the federal confrontation clause. This acknowledgement is important because examinations of those circumstances by courts and scholars have not yielded a consensus as to what historical facts matter and what these facts reveal about the intended meaning and application of the confrontation clause.

This inconsistency is reflected in the court's case law; see, e.g., *Crawford v. Washington*, supra, 541 U.S. 60-64 (determining that court's previous interpretation of confrontation clause in *Roberts* was wholly incompatible with historical basis for adoption of confrontation clause); as well as in scholarship that, in turn, criticizes *Crawford's* own historical account. See, e.g., K. Graham, "Confrontation Stories: Raleigh on the Mayflower," 3 Ohio St. J. Crim. L. 209, 209 (2005) ("Justice Scalia's majority opinion [in *Crawford*] tells a version of the history of the [c]onfrontation [c]lause that would do Hollywood proud"); B. Trachtenberg, "Confronting Coventurers: Coconspirator Hearsay, Sir Walter Raleigh, and the Sixth Amendment Confrontation Clause," 64 Fla. L. Rev. 1669, 1677-78 (2012) (citing sources).

The lack of consensus as to which historical facts motivated the adoption of the confrontation clause and how the clause applies to present circumstances seems to be a product of several factors. No court or scholar has concluded that the confrontation clause is unambiguous and can be interpreted literally. See *State v. Torello*, 103 Conn. 511, 513, 131 A. 429 (1925) ("[interpreted] [l]iterally it would prohibit the introduction of the testimony of any witness who was not produced in court"); M. Larkin, "The Right of Confrontation: What Next?," 1 Tex. Tech L. Rev. 67, 67 (1969) ("[t]he precise source of this use of the word 'confront' is obscure"). Ascertaining original intent in the absence of a plain textual meaning is complicated by the lack of any meaningful debate during the drafting and ratification of the federal confrontation clause. See H. Gutman, "Academic Determinism: The Division of the Bill of Rights," 54 S. Cal. L Rev. 296, 332 n.181 (1981) (debate on confrontation clause lasted live minutes); R. Mosteller, "Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions", 1993 U. Ill. L Rev. 691, 737 ("Enough of the historical materials surrounding the drafting and the ratification debates survives that we can be relatively confident that no precise meaning was ascribed to the [c]onfrontation [c]lause in either process. Indeed, the clause received only limited attention." (Footnote omitted.)). Case law is of marginal help in ascertaining original intent because criminal cases largely were tried in state courts at the time of the framing and the sixth amendment right of confrontation was not extended to the states until 1965. See R. Friedman, "*Crawford*, *Davis and Way Beyond*," 15 J.L & Policy 553, 553 (2007); K. Graham, supra, 3 Ohio St. J. Crim. L 210.

In addition, application of the confrontation clause has been complicated by significant historical developments that could not have been foreseen by the framers. Crimes are investigated and prosecuted differently than at the time of the framing. See M. Mannheimer, "Toward a Unified Theory of Testimonial Evidence Under the Fifth and Sixth Amendments," 80 Temp. L. Rev. 1135, 1164 (2007) ("professional police now replicate the investigatory function of the magistrate"); E. Schaerer, "Proving the Constitution: Burdens of Proof and the Confrontation Clause," 55 U. Rich. L. Rev. 491, 494-95 (2021) (noting that, at time of framing, police generally did not initiate investigations on their own based on suspicion of probable crime, and prosecution typically was

The defendant does not expressly concede the third and fourth *Geisler* factors to this court as he did before the Appellate Court, but he acknowledges this case law in his brief to this court. In lieu of an argument regarding the significance of that case law, the defendant emphasizes the historical fact that third-party statements against penal interest constituted inadmissible hearsay at the time of the framing, as well as for an extended period thereafter. See, e.g., *Bruton v. United States,* 391 U.S. 123, 128 n.3, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968); *State v. Schiappa,* 248 Conn. 132, 147 and n.18, 728 A.2d 466, cert. denied, 528 U.S. 862, 120 S. Ct. 152, 145 L. Ed. 2d 129 (1999). See generally E. Schaerer, "Proving the Constitution: Burdens of Proof and the Confrontation Clause," 55 U. Rich. L. Rev. 491, 494 (2021) ("[a]t the framing, hearsay was more strictly prohibited at trial, and courts recognized few hearsay exceptions"). This

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initiated by crime victims and their families); M. Seigel & D. Weisman, "The Admissibility of Co-Conspirator Statements in a Post-*Crawford* World," 34 Fla. St. U. L. Rev. 877, 906-907 (2007) ("[i]n the [f]ramers' day, there was essentially no such thing as an undercover investigation; indeed, organized, professional police forces did not come onto the scene until around the Civil War" (footnote omitted)). Hearsay exceptions have been expanded significantly; see E. Schaerer, supra, 494-95; and new forms of evidence, e.g., forensic evidence, have developed. See D. Noll, "Constitutional Evasion and the Confrontation Puzzle," 56 B.C. L. Rev. 1899, 1904 (2016).

The defendant advances no argument about the significance of any of these factors, other than the lack of a historical hearsay exception for statements against penal interest, which we address subsequently in this opinion. We acknowledge these factors to make clear that *Gaetano* does not foreclose an argument that the federal courts have misinterpreted the confrontation clause or that the development of our common law may support an independent interpretation in a different context.

fact has no logical connection, however, to the defendant's proposed confrontation standard.[15] The defendant's testimonial standard would not categorically preclude such statements, whether they were dual inculpatory statements or not; it would only preclude such statements when the declarant is unavailable for cross-examination and the reasonable expectation of either the declarant or the listener is to establish or to prove past events potentially relevant to a later criminal prosecution. Reliance on the lack of

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[15] In the section of his brief devoted to historical insights and Connecticut precedent, the defendant cites authority for propositions that he also does not connect to the principal question before us—whether our state has ever been more protective of confrontation rights than the federal system or standard—and that do not lend support to the specific testimonial standard that he advances. These authorities state the following propositions: Connecticut has long recognized the importance of cross-examination; see, e.g., 2 H. Dutton, A Revision of Swift's Digest of the Laws of the State of Connecticut (1862) c. XX, § 411, p. 437; and special sensitivity to confrontation clause concerns is appropriate when the testimony of a witness is critical to the state's case against the defendant and the consequences of a conviction based on the absent witness' testimony are grave. See, e.g., *State v. Lebrick*, 334 Conn. 492, 507, 512, 223 A.3d 333 (2020) (stating these principles in connection with question of whether state made reasonable efforts to locate witness who purportedly was unavailable to testify, to satisfy federal confrontation clause).

The defendant also cites to one scholarly article in which the author asserts that the testimonial nature of the statement should be established from the perspective of either the speaker or the listener. See M. Pardo, "Confrontation After Scalia and Kennedy," 70 Ala. L. Rev. 757, 782 (2019). The author of this article offers no historical analysis to support this standard and acknowledges doctrinal difficulties in applying it. See id., 782 n.180. Many other commentators reject the defendant's view. See, e.g., M. Mannheimer, supra, 80 Temp. L. Rev. 1192; W. Reed, "*Michigan v. Bryant:* Originalism Confronts Pragmatism," 89 Denv. L. Rev. 269, 300-302 (2011).

a recognized exception for these statements at the time of the framing is also in tension with the defendant's representation that he does not seek to overrule *Crawford,* which rejected the *Roberts* framework, which considered whether the statement fell within a "firmly rooted" hearsay exception. See *Ohio v. Roberts,* supra, 448 U.S. 66; see also *State v. Nieves,* supra, 376 Wis. 2d 316-19 (citing sources addressing admission of dual inculpatory statements post-*Crawford* and acknowledging that *Bruton*[16] doctrine regarding confrontation violation arising from admission of such statements as against third party survives only as to testimonial statements).

The defendant's state constitutional claim, thus, effectively rests exclusively on the sixth *Geisler* factor, public policy. He identifies the following considerations. First, the defendant argues that the United States Supreme Court is not infallible. The sea change from *Roberts'* reliability standard to *Crawford's* testimonial standard demonstrates this reality, as does the fact that the court's confrontation clause case law continues to be in flux. Second, the defendant seeks a modified interpretive standard—an additional layer of prophylaxis to prevent a significant risk of deprivation of confrontation rights—not the rejection of the court's testimonial, primary purpose framework. The defendant argues that this interpretation fills a gap in the court's case law, which has yet to clarify if a statement is testimonial when the speaker is unaware that the statement may be used as evidence in a criminal prosecution but the listener seeks to obtain the statement for that purpose. He contends that, by adopting a standard under which the perspective of

[16] *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

either the declarant or the listener can render the statement testimonial, we would place the emphasis where it belongs—on the testimonial *effect* of the statement, i.e., the jury would believe that the statement is equivalent to testimony and would rely on it to assess guilt or innocence. Third, the defendant argues that the adoption of the "either perspective" approach would serve the public interest by enhancing the perception that our criminal trial proceedings are fair.[17] (Internal quotation marks omitted.)

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[17] "The defendant's brief has a fourth policy section, from which we have difficulty gleaning a specific policy argument. The defendant asserts that one or more of the participants in the planning and execution of Calabrese's "interrogation" should have known that the recorded statement would be admissible at trial if Calabrese was unavailable to testify, that the sequence of codefendants' trials can affect their availability for cross-examination, and that sequence is a matter of prosecutorial discretion.

There are several flaws in these assumptions. There is no evidence that the police knew that Calabrese was the shooter when they asked Early to record him. Had Calabrese offered an account identifying someone else as the shooter, it is possible that the state would have attempted to use the statement to extract a plea agreement in exchange for Calabrese's testimony against the shooter. Even if Calabrese had been tried first after admitting to being the shooter, there is a strong possibility that he still would have been unavailable to testify at the defendant's subsequent trial. Calabrese's fifth amendment privilege would continue during any pending appeal; see, e.g., *United States v. Kennedy*, 372 F.3d 686, 691 (4th Cir. 2004), cert. denied, 543 U.S. 1123, 125 S. Ct. 1019, 160 L. Ed. 2d 1073 (2005); as well as during any possible retrial should he prevail on appeal. We also note that circumstances outside of the state's control (e.g., discovery, availability of witnesses, etc.) may dictate the sequence of codefendants' trials. If a rare case arose in which there was evidence that the state intentionally delayed the declarant's trial so as to ensure the declarant's unavailability for cross-examination, the defendant

We are not persuaded that these arguments are sufficient to carry the day under the present circumstances. We previously have relied on policy considerations similar to those mentioned by the defendant but have always cited to other *Geisler* factors that supported the rule we adopted. See, e.g., *State v. Purcell,* supra, 331 Conn. 342-46 (explaining that we were adopting broader prophylactic rule not expanding constitutional right, but also citing other *Geisler* factors that supported rule); *State v. Linares,* 232 Conn. 345, 379-80, 655 A.2d 737 (1995) (concluding that United States Supreme Court's rationale for departing from prior, more protective standard was unsound but also citing other *Geisler* factors that supported our rule). Although the need to fill a "gap" in the court's confrontation jurisprudence to resolve a case may provide a compelling policy argument, even in the absence of other supporting *Geisler* factors, our discussion in part II explains why the gap identified by the defendant does not exist. None of the defendant's other policy arguments rises to a similar level of necessity. Some of his policy arguments, e.g., that the court does not always reach the correct result, could apply in any case. In sum, it is clear that the defendant cannot prevail under a traditional *Geisler* analysis.

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may have a viable due process claim or argument for the adoption of an equitable rule akin to the forfeiture doctrine, which bars a defendant from objecting to the admission of hearsay statements of a witness whose absence has been procured by the defendant. See T. Lininger, "Reconceptualizing Confrontation After *Davis*," 85 Tex. L. Rev. 271, 300-301 and nn.165-68 (2006) (discussing forfeiture doctrine). We have no occasion to consider either possibility in the present case.

His state constitutional claim under the confrontation clause, therefore, fails.[18]

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[18] We underscore that we do not intend for this decision to foreclose the possibility of departing from the federal courts' interpretation of the confrontation clause in another context. We are mindful of two concerns that are not implicated in the present case that may, in the future, weigh in favor of an independent course of action. First, there are indications in opinions of various United States Supreme Court justices that the court may adopt more limiting principles than those articulated in *Crawford* and *Davis*. See, e.g., *Williams v. Illinois*, 567 U.S. 60, 58-59, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012) (plurality opinion); see also *Ohio v. Clark*, supra, 576 US. 254 (Thomas, J. concurring). Second, courts are increasingly confronting circumstances in which they are unsure how to assess whether a statement is testimonial. See K. McMuniga], "*Crawford*, Confrontation, and Mental States," 64 Syracuse L. Rev. 219, 220 (2014) (observing that commentators have described contemporary confrontation clause jurisprudence as " 'incoherent," uncertain," unpredictable," a train wreck,' suffering from 'vagueness' and '[doublespeak],' and, simply put, a 'mess' " (footnotes omitted)). This problem is particularly acute in cases in which forensic evidence is at issue. See, e.g., *State v. Rodriguez*, supra, 337 Conn. 203-204 (*Kahn*, *J*., concurring). Even some of the court's justices have complained about the lack of clear direction from the court. See id., 204 (citing cases from various courts raising this concern). Justice Gorsuch, joined by Justice Sotomayor, stated in a recent dissent from the court's denial of certiorari in a confrontation clause case: "Respectfully, I believe we owe lower courts struggling to abide our holdings more clarity than we have afforded them in this area. *Williams* imposes on courts with crowded dockets the job of trying to distill holdings on two separate and important issues from four competing opinions. The errors here may be manifest, but they are understandable and they affect courts across the country in cases that regularly recur." *Stuart v. Alabama*, __U.S.__, 139 S. Ct. 36, 37, 202 L. Ed. 2d 414 (2018) (Gorsuch, J., dissenting from the denial of certiorari). As applied to the facts of the present case, however, the current standard yields a clear result.

We end this discussion, however, with a strong note of caution. Although the defendant cannot prevail under our state constitution in the present case, we might be compelled to reach a different result under a slight variation of facts. The circumstances under which Calabrese's statement was elicited implicate several concerns identified by the court in *Crawford* and its progeny. *Crawford* recognized that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . . ." *Crawford v. Washington,* supra, 541 U.S. 56 n.7. The court in *Davis* also cautioned that law enforcement officials should not be permitted to circumvent the confrontation clause by intentionally altering the method by which they collect the statement to render the statement nontestimonial. See *Davis v. Washington,* supra, 547 U.S. 826 ("we do not think it conceivable that the protections of the [c]onfrontation [c]lause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition" (emphasis omitted)); see also *Williams v. Illinois,* 567 U.S. 50, 133, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012) (Kagan, J., dissenting) (noting that five justices reject proposition that, "[i]f the [c]onfrontation [c]lause prevents the [s]tate from getting its evidence in through the front door, then the [s]tate could sneak it in through the back"). Recruiting an inmate to elicit inculpatory evidence regarding uncharged criminal activity from another inmate suspected of committing such activity, when law enforcement officials would be unable, or were in fact unable, to obtain a confession

directly,[19] clearly raises the potential for abuse.[20] Although such circumstances do not meet the present

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[19] The police affidavit in support of the defendant's arrest warrant reflects that, many months before Calabrese gave the surreptitiously recorded statement, he had given several statements to the police about the Sharon home invasion. Calabrese was approached by the police because of cell phone records connecting him to Niraj. Calabrese provided a statement to the police at that time and later provided additional statements through his attorney. Calabrese initially claimed to have learned about the home invasion only after the fact but later admitted that he was present when Niraj announced the plan. In all of the statements, however, Calabrese disavowed any participation and claimed that the defendant and an unknown third party were the perpetrators.

[20] The fact that Early was recording Calabrese in their prison cell at the behest of law enforcement would not implicate either Calabrese's *Miranda* rights under the fifth amendment to the United States constitution; see *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); because courts do not consider this situation to be a "custodial interrogation"; (internal quotation marks omitted) *Illinois v. Perkins*, 496 U.S. 292, 296-98, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990); or his right to counsel under the sixth and fourteenth amendments to the United States constitution, because that right is offense specific and is limited to charged offenses or uncharged offenses that are directly connected to the charged offense. See id., 299; *United States v. Basciano*, 634 Fed. Appx. 832, 836 (2d Cir. 2015), cert. denied, __U.S.__, 136 S. Ct. 2529, 195 L. Ed. 2d 859 (2016). But use of this tactic in other factual scenarios may cross a constitutional line. For example, if Calabrese had been charged in connection with the Sharon home invasion and invoked his right to counsel, the police could not have surreptitiously questioned him through an agent or undercover operative. See, e.g., *Massiah v. United States*, 377 U.S. 201, 205-206, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964) ("Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with [a] crime. . . . [I]f

legal definition of an interrogation and, hence, do not implicate the confrontation clause, we can envision facts under which eliciting an inculpatory statement in this setting might rise to the level of a violation of due process or a circumstance under which it might be appropriate for this court to consider the extraordinary measure of reversal under the exercise of its supervisory authority. Cf. *Illinois v. Perkins,* 496 U.S. 292, 302-303, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990) (Brennan, J., concurring) (expressing concern whether due process may be violated when undercover agent and jailhouse informant "lure [the] respondent into incriminating himself when he was in jail on an unrelated charge," noting that, under such circumstances, state "can ensure that a suspect is barraged with questions from an undercover agent until the suspect confesses").

Our concerns are tempered in the present case, however, for a few reasons. There was no evidence presented suggesting any involvement by the Office of the State's Attorney in orchestrating the recording or directing the inquiry. Nor is there evidence that any police official coached Early on what questions to ask or what facts they were seeking to learn. The trial court did not abuse its discretion by crediting Early's testimony that he was not given any information about the crime and that Calabrese first raised the subject

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such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse." (Citations omitted; footnotes omitted; internal quotation marks omitted.)). Although Calabrese clearly was a suspect in the Sharon home invasion when Early recorded Calabrese's statements; see footnote 19 of this opinion; there is no claim that there was probable cause to arrest Calabrese in connection with that incident at that time and that a decision was made to delay arrest to circumvent Calabrese's right to counsel.

of his involvement in the Sharon home invasion.[21] Because the exchange was recorded, the trial court was able to ascertain the extent to which, if any, Calabrese's answers may have been shaped or coerced by Early. See M. Berger, "The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model," 76 Minn. L. Rev. 557, 609 (1992) (noting that recording coconspirators' statements made to government agent or informant will "deter prosecutorial abuse and enhance jury's ability to function"). Recording also eliminates concerns of fabrication by the informant. See id.; cf. *State v. Jones,* 337 Conn. 486, 504, 254 A.3d 239 (2020) (noting that special credibility instruction is required when jail-house informant testifies because such testimony must be reviewed with particular scrutiny in light of witness' powerful motive to falsify his or her testimony). That recording makes clear that Calabrese volunteered most of the inculpatory information with

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[21] The trial court properly raised these concerns at the hearing on the motion in limine in Niraj's trial; its ruling in that case was deemed the law of the case for the defendant's identical motion: "It does, in my mind, create an issue as to whether the recording is testimonial, and that's an issue that really can only be resolved, I believe, with an understanding of what led up to the recording. Who initiated the conversation? My understanding is the topic first came up the day before the recording. What were the circumstances under which, after that conversation, the cooperating individual agreed to record a conversation? What happened on the morning of the conversation before it took place? What interaction did that individual have with law enforcement? Certainly, I believe all that is relevant to a *Crawford* analysis." Neither Niraj nor the defendant called the corrections officials or law enforcement officials who spoke with Early to testify at the hearing on the motion in limine. We note, however, that nothing that Early stated in his conversation with Calabrese suggested any personal knowledge about the facts of the crime.

no prompting. We therefore have a fair assurance that the involvement of government officials did not influence the content or the making of the statement.

C

Because we have concluded that the admission of Calabrese's dual inculpatory statement did not violate the defendant's federal or state confrontation rights, the admissibility of the statement is, therefore, limited only by the rules of evidence. See, e.g., *Ohio v. Clark,* supra, 576 U.S. 245. Calabrese's statement was admitted under the hearsay exception for statements against penal interest. See Conn. Code Evid. § 8-6 (4). "We evaluate dual inculpatory statements using the same criteria that we use for statements against penal interest." *State v. Camacho,* 282 Conn. 328, 359, 924 A.2d 99, cert. denied, 552 U.S. 956, 128 S. Ct. 388, 169 L. Ed. 2d 273 (2007). We conclude that the trial court's admission of Calabrese's statement under § 8-6 (4) was not an abuse of discretion.

Admission of a hearsay statement pursuant to § 8-6 (4) of the Connecticut Code of Evidence "is subject to a binary inquiry: (1) whether [the] statement . . . was against [the declarant's] penal interest and, if so, (2) whether the statement was sufficiently trustworthy." (Internal quotation marks omitted.) *State v. Bonds,* 172 Conn. App. 108, 117, 158 A.3d 826, cert. denied, 326 Conn. 907, 163 A.3d 1206 (2017); see also *State v. Pierre,* supra, 277 Conn. 67. Only the second part of that inquiry is at issue in this appeal.

Our code of evidence directs trial courts to consider the following factors in assessing the trustworthiness of the statement: "(A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in

the case, and (C) the extent to which the statement was against the declarant's penal interest." Conn. Code Evid. § 8-6 (4). "[N]o single factor . . . is necessarily conclusive . . . . Thus, it is not necessary that the trial court find that all of the factors support the trustworthiness of the statement. The trial court should consider all of the factors and determine whether the totality of the circumstances supports the trustworthiness of the statement." (Citations omitted; internal quotation marks omitted.) *State v. Lopez,* 254 Conn. 309, 316, 757 A.2d 542 (2000).

The trial court concluded that the length of the delay between the crimes and the making of the statement, thirteen months, weighed against its trustworthiness but that all of the other factors strongly weighed in favor of admission. The state concedes that the timing of the statement weighs against admission. See, e.g., *State v. Pierre,* supra, 277 Conn. 70 ("[i]n general, declarations made soon after the crime suggest more reliability than those made after a lapse of time [when] a declarant has a more ample opportunity for reflection and contrivance" (internal quotation marks omitted)). We therefore focus on the remaining factors. We disagree with the trial court's treatment of one of the factors but conclude that it ultimately did not abuse its discretion in admitting the statement.

The trial court suggested that the fact that the statement was made "to a fellow inmate who appeared to the defendant [to] be a fellow gang member, and one who was facing serious charges," rendered the statement more trustworthy. The record does not support a factual predicate for this conclusion, and the law does not support its reasoning. Calabrese was not

a fellow gang member.[22] He unambiguously informed Early that he was not a "blood," although "all [his] boys" belonged to the gang, and he did not join because he "really [didn't] give a shit" about belonging to the gang.

The fact that Early and Calabrese were fellow inmates, in and of itself, does not establish that they shared the type of relationship of trust and confidence that demonstrates the trustworthiness of the statement. Cf. *State v. Thompson,* 305 Conn. 412, 435, 45 A.3d 605 (2012) (statement was trustworthy when made to fellow inmate who was known to declarant for several years before incarceration, and with whom declarant had become "reasonably close" in two months of incarceration prior to making of statement (internal quotation marks omitted)), cert. denied, 568 U.S. 1146, 133 S. Ct. 988, 184 L. Ed. 2d 767 (2013); *State v. Camacho,* supra, 282 Conn. 361 (statement made "to people with whom [declarant] had a trusting relationship"); *State v. Pierre,* supra, 277 Conn. 69 (statement made to friend, with whom declarant "routinely socialized"); *State v. Bryan,* 193 Conn. App. 285, 304-306, 219 A.3d 477 (relationship of trust and friendship when declarant had known person to whom he made statement for approximately ten years, had stayed at person's home, and had committed robbery with that person), cert. denied, 334 Conn. 906, 220 A.3d 37 (2019). Our appellate case law indicates that [s]tatements made by a declarant to fellow inmates have been considered untrustworthy. See *State v.*

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[22] It is unclear what the trial court meant when it stated that "Early was facing serious charges." When Calabrese's statement was elicited, Early had already been convicted of attempted burglary in the first degree with a deadly weapon and criminal possession of a firearm.

DeFreitas, 179 Conn. 431, 453, 426 A.2d 799 (1980) (declarations against penal interest are untrustworthy when, inter alia, confessions made to fellow inmate); *Morant v. State,* 68 Conn. App. 137, 172, 802 A.2d 93 (exclusion of [third-party] confession proper when, inter alia, declarant confided not in close friends but in fellow inmate) (overruled in part on other grounds by *Shabazz v. State,* 259 Conn. 811, 830 n.13, 792 A.2d 797 (2002)), cert. denied, 260 Conn. 914, 796 A.2d 558 (2002). The fact that the statements allegedly made by [the declarant] were made to a fellow inmate, *with whom* [*the declarant*] *did not have a close relationship,* weighs against their trustworthiness." (Emphasis added.) *Martin v. Flanagan,* 107 Conn. App. 544, 549-50, 945 A.2d 1024 (2008).

State v. Smith, supra, 289 Conn. 598, on which the state relies, is not to the contrary. In *Smith,* we concluded that the trial court's admission of an inmate's recorded statement, when the court found that it was made in a private manner to a cellmate in whom the declarant would be likely to confide, was not an abuse of discretion. Id., 630, 632-33. It was not our intention in *Smith* to adopt a blanket rule or presumption that a relationship between inmates, or even cellmates, is one of trust and confidence simply because of their shared circumstance. The inmates in *Smith* were both facing drug charges and had been cellmates for perhaps as long as one month when the statements were made. Id., 615.

In the present case, Early and Calabrese were strangers who were cellmates for less than twenty-four hours when the statement was made. Early's purported status as a gang member could have induced Calabrese to embellish his criminal history to send a message that neither Early nor any of his fellow

gang members in the facility should mess with him. There is no basis in the record to conclude that, in this fleeting period, a relationship of trust and confidence developed.

The two remaining factors, however, corroboration and the degree to which the statement was against Calabrese's penal interest, overwhelmingly weigh in favor of trustworthiness. Calabrese's account was consistent with the physical evidence in almost all material respects; the only material inconsistency was his claim that Vitalis had pulled a knife on him when no knife was found at the scene. There are numerous reasons why Calabrese may have intentionally fabricated the existence of the knife.[23] The state also produced independent evidence to corroborate Calabrese's identification of the defendant as his accomplice and Calabrese's presence at the scene—cell phone location information and a statement that Calabrese had made to his girlfriend before the crime, among other evidence. Although the defendant points to certain aspects of Calabrese's account that are inconsistent with the evidence (i.e., time of day, which door was the point of entry, etc.), none of these facts is material. It is unsurprising that such inconsequential details could have been misremembered more than one year after the events occurred.

The extent to which the statement is against Calabrese's own penal interest could not be greater. He cast himself as the principal actor—the only perpe-

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[23] It is immaterial whether Calabrese subjectively, but incorrectly, assumed that he would be less culpable if it was believed that he killed Vitalis in self-defense. "Whether a statement is against a declarant's penal interests is an objective inquiry of law, rather than a subjective analysis of the declarant's personal legal knowledge." *State v. Camacho*, supra, 282 Conn. 369.

trator armed, the person who first restrained Vitalis' mother, the person who shot Vitalis, and the only one who stole property from the scene. He exposed himself to felony murder charges, among other charges. Calabrese's statement and the circumstances of its making have none of the characteristics that had historically caused courts to view dual inculpatory statements as presumptively unreliable when offered to prove the guilt of an accomplice of the declarant. See *Lilly v. Virginia,* 527 U.S. 116, 134, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999) (plurality opinion) (concluding that such statements are not within firmly rooted hearsay exception for confrontation clause purposes); see also id., 136-37 (confirming that such statements may nonetheless be admitted if they possess particularized guarantees of trustworthiness). Calabrese neither shifted blame from himself to the defendant nor attempted to share the blame for the murder with the defendant. See *State v. Schiappa,* supra, 248 Conn. 155 (citing these factors). Calabrese did not know that his statement was being recorded at the behest of state officials, and, thus, he could not have been making the statement to curry favor with the government. See *State v. Rivera,* 268 Conn. 351, 370, 844 A.2d 191 (2004) (*"Lilly's* main concern was with statements in which, as is common in police station confessions, the declarant admits only what the authorities are already capable of proving against him and seeks to shift the principal blame to another (against whom the prosecutor then offers the statement at trial)" (internal quotation marks omitted)); *State v. Gold,* 180 Conn. 619, 635, 431 A.2d 501 (concern with attempt to "curry favor"), cert. denied, 449 U.S. 920, 101 S. Ct. 320, 66 L. Ed. 2d 148 (1980); 2 R. Mosteller, McCormick on Evidence (8th Ed. 2020) § 319, p. 569 ("federal courts have most frequently

admitted [third-party] statements that inculpate a defendant [when] two general conditions are satisfied: (1) the statement does not seek to curry the favor of law enforcement authorities, and (2) it does not shift blame"). Therefore, the trial court clearly did not abuse its discretion by admitting Calabrese's dual inculpatory statement under § 8-6 (4).

II

The defendant's final challenge is to the trial court's exclusion of Shyam's confession to the defendant's sister, Majmudar, which the defendant offered as a statement against penal interest under § 8-6 (4) of the Connecticut Code of Evidence. The defendant contends that the trial court abused its discretion in concluding that Shyam's statement was not trustworthy. We agree with the Appellate Court that the trial court's ruling was not an abuse of discretion.[24]

The principles that we articulated in part I C regarding the hearsay exception for statements against penal interest under § 8-6 (4) of the Connecticut Code of Evideuce apply equally to the admissibility of Shyam's confession. We assess the

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[24] The state contends that the trial court also properly excluded Shyam's purported confession on the ground that the defendant failed to establish Shyam's unavailability, a precondition for the admission of a statement against penal interest. See Conn. Code Evid. § 8-6 (4). Although there were several exchanges between defense counsel and the court on this issue, it is not entirely clear whether the trial court conclusively determined that the defendant had failed to meet this condition. Like the Appellate Court, we conclude that it is unnecessary to address Shyam's availability in light of our conclusion that the trial court did not abuse its discretion in determining that Shyam's statement was not trustworthy. See *State v. Patel*, supra, 194 Conn. App. 279 n.19.

trial court's discretion in applying those principles to the following undisputed facts. During the presentation of the defense's case-in-chief, Majmudar testified that her cousin Shyam had made a surprise visit to her Boston home sometime in the last two weeks of September, 2013. When asked what Shyam had said during that visit, the prosecutor objected. In a proffer outside of the jury's presence, Majmudar provided the following testimony. She and Shyam had a close relationship, becoming especially close when Shyam lived with Majmudar's family in Branford, Connecticut, for two years while Majmudar was in high school. When Shyam visited Majmudar in Boston in September, 2013, he told Majmudar that his family was asking relatives for help posting bond for Niraj, and asked whether he could borrow $50,000 from her. Majmudar replied that she could not lend the money because she needed it to help the defendant post bond and pay attorney's fees. Majmudar told Shyam that she knew the defendant was innocent because he had been with her in Boston when the crimes occurred. When Shyam did not appear surprised by this revelation, Majmudar asked him if he knew who had accompanied Calabrese. After further probing, Shyam broke down in tears and admitted that he and Calabrese were the ones who had tried to rob Vitalis. Shyam then provided her with an account of the incident, in which he stated that he had fled the Vitalis home after Calabrese shot Vitalis and later returned in a vehicle with Niraj to pick up Calabrese. Majmudar asked Shyam whether Calabrese had used the defendant's cell phone during the robbery.[25] Shyam responded affirmatively and

[25] Evidence was presented at trial regarding the movement of cell phones associated with Niraj, Calabrese, and the defendant on August 6, 2012, which placed those phones near the crime scene and often in contact with one another. See *State v. Patel*,

volunteered that he had left his own cell phone at home. Majmudar told Shyam that he needed to come forward and confess, but Shyam said that he could not do that to his parents, as they already faced the risk that Niraj would be taken away from them.

The trial court asked Majmudar who she had told about Shyam's confession. She replied that she had told only the defendant, after he was released on bond.

The court sustained the prosecutor's objection to the admission of the testimony pertaining to Shyam's confession. The court found that, in light of the totality of the circumstances under which the statement was purportedly made, the statement was untrustworthy and particularly lacking in sufficient corroboration. The court cited the following factors. The court pointed out that the alleged confession was made thirteen months after the crime and that Majmudar claimed to have told no one except the defendant about the alleged confession for more than three and one-half years after the statement was made. It reasoned: "Both of these delays provided her with years to learn the details of the prosecution's theory of the case and, if she wished to do so, [to] fabricate the statement. . . . [B]oth the delay in which the statement was suppos-

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supra, 194 Conn. App. 285-86. The cell phone associated with the defendant accessed the cell tower located between seven and eight miles from the crime scene for a series of phone calls prior to 6:04 p.m. See id., 286-87. There were no outgoing calls or messages from the cell phone associated with the defendant after 6:04 p.m. on August 6, 2012, which, the state's expert observed, "indicated 'either that the phone was off or that it was . . . in an area where it could not receive any cell signal,' or that 'something could have happened to the phone that rendered it unable' to receive a [cell] signal." Id., 286. On August 6, 2012, Shyam's phone was used to make several phone calls through a device in his home in Warren.

edly made and the time at which it was revealed, which was yesterday, independently, and, when combined, weigh heavily against the admissibility of the statement. The incriminating statements were, based on the evidence made to date, made to only one person, [Majmudar]; that fact weighs against admissibility. The concept that [Majmudar] allegedly allowed her parents and her sister to agonize over the emotional and financial burden of this prosecution for the past three and [one-half] years, all the while keeping to herself the supposed confession that would have been of incalculable relief to them, is incomprehensible and weighs against admissibility. The nature of the relationship between [Majmudar] and Shyam . . . weighs heavily against admissibility. The witness is highly motivated to assist her brother, and, even though there may be a strong relationship between these two cousins, Shyam and [Majmudar] . . . Shyam . . . had to know that [Majmudar's] primary loyalty would be to her brother. Unless Shyam . . . wanted his confession to be open and known, he would never have made it to one of the four people on this planet who are most highly motivated above and beyond all others to bring it to the attention of the authorities to save their son, their sibling, from what they would have believed to be a wrongful prosecution."

The court further reasoned that "[t]he details of the statement . . . make it untrustworthy and even bizarre." The court questioned why Shyam would volunteer trivial details such as which vehicle he had driven,[26] and found it "[e]specially suspect" that

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[26] According to Majmudar, Shyam said that he and Niraj had driven "the Pathfinder" back to the woods to find Calabrese. Shyam's family owns a white Pathfinder. Majmudar testified that, when she questioned Shyam as to why the police had seized

Majmudar asked Shyam if Calabrese used the defendant's phone during the robbery. See footnote 26 of this opinion. The court noted that there was no evidence explaining how Majmudar would have known that phones played any role in the robbery—"for all she knew, the plan was hatched by coconspirators in a bar, immediately carried out and no phones were used at all." The court found it nonsensical that, if Calabrese and Shyam decided not to use their own phones during the robbery, they would use the phone of someone with whom they are associated or related, instead of untraceable phones.

The court also pointed out that evidence demonstrated that "Vitalis had significant contacts and dealings with Niraj . . . and Shyam . . . which explains . . . at least in part, why Niraj . . . and Shyam . . . did not enter that home, because . . . despite masks, through their voices in the prior context, it would have been readily recognized, and that would explain why Niraj . . . solicited others who [did] not have contact with . . . Vitalis to carry out the robbery. . . . [T]hat evidence alone points more to . . . Calabrese and this

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her parents' two black sport utility vehicles (SUVs), Shyam said that they had used "the black Saab SUV from New York" during the robbery. From the defendant's perspective, these statements identifying the vehicles provide two benefits. The report of the use of the black Saab explains a witness' report of seeing Niraj driving a vehicle fitting the description of the defendant's black Honda CRV about five miles away from Vitalis' home, when no such vehicle was registered to Niraj or to Niraj's family. The report of the use of the Pathfinder, after the murder was commited, in conjunction with evidence that Shyam had access to that vehicle on August 6, 2012, and that the Pathfinder was thoroughly cleaned in the weeks before the police seized it in mid-September, 2013, provides potential physical evidence connecting Shyam to the crime.

defendant than it does to Shyam . . having been the person to enter the Vitalis home. The circumstances surrounding the event are far more consistent with [the] defendant entering the Vitalis' home than Shyam . . . entering that home."

The Appellate Court agreed that Shyam's statement "was against [his] penal interest to a significant extent, such that this factor weighs in favor of a finding of trustworthiness," but concluded that the trial court had not abused its discretion in concluding that the remaining factors clearly weighed against such a finding. *State v. Patel,* supra, 194 Conn. App. 280, 283. We agree that the trial court's exclusion of the statement was not an abuse of discretion.[27]

The defendant's arguments for the admission of the statement are unpersuasive. He suggests that, with

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[27] We observe that several statements made by the trial court in connection with its ruling could be interpreted as comments explaining why Majmudar's testimony lacked credibility. "We previously have concluded . . . that a trial court may not consider the credibility of the testifying witness in determining the trustworthiness of a declaration against penal interest." *State v. Rivera*, supra, 268 Conn. 372; see also 2 R. Mosteller, supra, § 319, p. 575 ("The federal courts have disagreed on whether the corroboration requirement applies to the veracity of the in-court witness testifying that the statement was made in addition to the clearly required showing that the statement itself is trustworthy. As a matter of standard hearsay analysis, the credibility of the in-court witness regarding the fact that the statement was made is not an appropriate inquiry." (Footnote omitted.)). The defendant did not challenge the trial court's ruling on this basis. Even if the trial court had improperly rested its decision in part on Majmudar's credibility, however, the reasons articulated by the trial court illustrate why a jury would have been highly unlikely to credit her testimony, and any potential error in excluding Shyam's purported confession would have been harmless.

regard to the temporal factor, it is more important that Shyam's confession was made shortly after the arrests in connection with the Sharon home invasion than the fact that it was made more than one year after the incident. The defendant cites no case law supporting this proposition, and this proposition is contradicted by the rationale for the temporal factor—that a lapse of time following the crime provides a declarant with opportunity for reflection and contrivance. See *State v. Pierre,* supra, 277 Conn. 70. The defendant's emphasis on the close relationship between the cousins, Majmudar and Shyam, and on the case law recognizing that a blood relationship may be one of trust; see, e.g., *State v. Rivera,* supra, 268 Conn. 369; misses the point. The trial court reasonably pointed to the stronger relationship between the defendant and his sister, and her loyalty to him over Shyam.

Most of the evidence that the defendant characterizes as corroborative indicates only that Shyam may have played some role in connection with the incident, not that Shyam was present in the Vitalis home.[28] We

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[28] "There was evidence at trial that Shyam sent the following text messages to Niraj at 8:13 p.m. on August 6, 2012: 'U want me to come to the station in [P]athfinder?'; '?'; 'Lemme know . . . I got keys.' A white Pathfinder, registered at the home Shyam shared with his parents and, occasionally, Niraj, was seized by [the) police. The vehicle smelled clean and seemingly had new floor mats. A receipt dated August 31, 2012, at 10:40 am. from Personal Touch Car Wash in New Milford was found in a bedroom at Shyam's home, and Shyam's cell phone utilized two cell towers in the vicinity of the car wash around the date and time printed on the receipt." *State v. Patel*, supra, 194 Conn. App. 282 n.22. "There was [also] evidence at trial that there were Google searches conducted on Shyam's computer for the terms 'conspir-

previously have emphasized that "[t]he corroboration requirement for the admission of a [third-party] statement against penal interest is significant and goes beyond minimal corroboration." (Emphasis omitted; internal quotation marks omitted.) *State v. Lopez,* supra, 254 Conn. 319. The only evidence that could corroborate Shyam's presence at the Vitalis home invasion is one of the several statements given by Vitalis' mother to the police about the incident. In January, 2016, more than three years after the incident, Rita Vitalis told the police that she believed that one of the masked intruders was an Indian male and believed that this person was Shyam. She knew Niraj and Shyam but not the defendant. In other statements, however, she reported that she believed that both of the intruders were white, that they could be Hispanic, or that she did not know who either intruder was with certainty. The trial court, therefore, reasonably concluded that Shyam's statement was not sufficiently trustworthy to be admitted as a statement against penal interest.

The judgment of the Appellate Court is affirmed. In this opinion the other justices concurred.

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acy to commit murder in Connecticut' and 'conspiracy to kill,' along with searches for penalties for those crimes." Id., 282 n.23.

APPENDIX E

STATE OF CONNECTICUT
SUPREME COURT

ORDER ON MOTION FOR RECONSIDERATION
SC 210275

Docket Number:	SC20446
Issue Date:	5/24/2022
Sent By:	Supreme/Appellate

Order On Motion for Reconsideration
SC 210275

SC20446 STATE OF CONNECTICUT

v.

HIRAL M PATEL

Notice Issued: 5/24/2022 12:17:09 PM

Notice Content:

Motion Filed: 3/31/2022

Motion Filed By: Hiral M Patel

Order Date: 05/17/2022

Order: Denied

Keller, J, did not participate in the consideration of or decision on this motion.

By the Court
Robertson, Rene L.

Notice sent to Counsel of Record

Hon. John D. Moore

Clerk, Superior Court, LLICR130143598T