SUPREME COURT

OF THE

STATE OF CONNECTICUT

JUDICIAL DISTRICT OF NEW HAVEN

S.C. 20447

STATE OF CONNECTICUT

v.

JAMES GRAHAM

BRIEF OF THE DEFENDANT-APPELLANT
WITH SEPARATELY BOUND APPENDIX
PART 1 AND PART 2

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The defendant was charged by way of an amended long form information with the crimes of felony murder, C.G.S. § 53a-54c; conspiracy to commit robbery in the first degree, C.G.S. §§ 53a-48(a) and 53a-134(a)(2); and carrying a pistol without a permit, C.G.S. §29-35(a). After a jury trial before the Honorable Elpedio Vitale the defendant was found guilty of all counts. The court sentenced the defendant to 52 years of incarceration on the felony murder, 20 years of incarceration on the conspiracy to commit robbery and five years of incarceration on the carrying a pistol without a permit all to be served concurrently for a total effective sentence of 52 years to serve. The defendant appeals from the judgment of conviction.

STATEMENT OF FACTS

On November 13, 2017, Eric Jordan lived in Hamden near the Canal Line/ bike trail. 09/24/19TR at 28-36. Around 3:15-3:30 p.m., he walked along the Canal Line from his home to meet his girlfriend's son at the bus stop on Dudley Street. While he was walking on the trail he noticed a man laying down in a grassy area about ten to fifteen feet from the trail wearing a blue jacket. He and another walker decided to go closer to the male that was lying in the grass and noticed that he was having trouble breathing and couldn't speak. He noticed the male had a gold watch clutched in his hand. The man's jacket was zipped and he was fully clothed. He called 911 and the EMT's arrived in about five minutes.

Police officer Sheppard arrived after Hamden Fire and Rescue. While the EMT's were working on the man, Sheppard activated his body camera and filmed the scene and spoke to Mr. Jordan and Mr. Klein the men who found the victim. At the scene the police seized two cell phones, ten dollars, a bag of narcotic and a gold watch from the victim. 09/24/19TR at 190-96. The name of the male lying in the grass was identified as Leandre Benton. 09/24/19TR at 46-56. Benton was taken to the hospital where he later passed away from a gunshot wound to the head and a gunshot wound to the torso. Id. at 64. A bullet was

recovered from the torso of the victim. 09/25/19TR at 8-13. A firearms examiner testified that the recovered bullet was from a .380 semiautomatic caliber gun. The gun the bullet was fired from was not recovered. 09/26/19TR at 23-29.

Hamden Officer Jomo Crawford, the lead detective on the case, obtained video surveillance footage from sites on the Canal Line as well as from private residences near the trail. They obtained some video footage from 35-45 Dudley Street, a private residence as well as from cameras located on the trail near Dudley Street. None of the video surveillance that they obtained captured the actual shooting. 09/24/19TR at 61-68. They additionally obtained video surveillance footage from Goodrich Street and from a corner store. After viewing all of the footage Crawford identified potential suspects, three young, black males that were in their late teens to early twenties. Id. at 74. Officer Nutcher, based on the state's theory of the case, took video segments from all the surveillance footage and made one video. St. Exb. 3. The timestamp on the Canal Line videos were accurate, however the timestamp on the residential and commercial footage were not time accurate. Nutcher spliced the videos together to show the three suspects movements along the trail. Over the defendant's objection, Officer Nutcher's spliced together video was entered into evidence. Id. at 110. The victim is seen walking on the trail near Dudley Street. Id. at 124-25. On the video footage from Kool's Place corner store Robert Moye, Brennan Coleman and the defendant can be observed walking in the direction of the Canal Line. Id. at 129. From the Dudley Street footage the three are depicted walking and stopping to talk to Mr. Lowndes who was driving a black car. The video depicts the three walking past the trail entrance and then coming back and entering the trail. The footage also shows them running from the area and down the trail in the opposite direction of the shooting. Crawford recognized Moye on the video and spoke with him regarding this incident. Id. at 129-142,150.

Steven Capers, who was incarcerated at the time of his testimony entered into a cooperation agreement with the state and testified for the state. 09/25/19TR at 58. As part

of his cooperation agreement, Capers pled guilty to charges he had pending in the same court as the trial. Capers entered guilty to pleas to charges stemming from a December 2017 arrest in the town of Monroe in which he faced over sixty years of incarceration. Capers faced up to three years of incarceration on the reduced charges when he was sentenced. In order to benefit from the agreement he had to testify truthfully. Id. at 62. He knew Brennan Coleman and Robert Moye and the defendant from the Newhallville neighborhood where he grew up. He was more friendly with Coleman and Moye than the defendant. Id. at 64-70.

Capers recalled that on November 13, 2017 he was with his girlfriend Kristen Avery at the Milford Bob's store. Robert Moye sent him a Facebook message requesting that he come pick him up near Saint Mary's in Hamden. He agreed and he and Avery drove to the area driving up Goodrich Street to Saint Mary's which took him fifteen to twenty minutes from where he was. The defendant, Coleman and Moye came running up to the car and got into the backseat. The three seemed out of breath and nervous and told him to "go". Capers claimed that the defendant and his friends smelled like gunpowder. Capers decided that he wouldn't give them a ride and told them to leave his vehicle, which they did. Id.at 73-88.

Capers testified that later that evening he was driving around with Fat Cat and Robert Moye Facetimed them. 09/25/19TR at 92. Capers could see that the defendant Moye and Coleman were in a house and all were showing their guns. Capers knew that Moye carried a .38 gun and that Coleman carried a baby nine semiautomatic gun with a beam. Id. at 95. Capers observed the defendant carry a .380 semiautomatic chrome colored gun. Id. at 108. In the Facetime call he observed the three show these weapons, the defendant had the .380 semiautomatic gun. Capers identified the defendant holding a .380 handgun in two photographs, St. Exb. 35 and 36 and identified the defendant holding a .380 gun and Moye holding a .38 gun in a video. St. Exb. 75. 09/26/19TR at 112-114.

Capers knew the victim because he had previously worked with him at WalMart. The victim's nickname was Lee Bando. Capers claimed that a week or so after the murder he was with Moye and Fat Cat in Moye's backyard on Lander Street. They were smoking

marijuana and Moye told him what happened to the victim. Capers claimed that Moye told him that he was with the defendant and Coleman when they observed the victim near Dudley Street and the bike trail. They decided that they would "stain" him which meant to rob him. They asked the victim if he was with SLB, a gang. The victim punched Coleman in the face causing Coleman to pull out his gun and try to shoot but the gun jammed. The defendant took out a .380 gun and shot the victim in the head. Moye did not tell him if they took anything from the victim or what they did immediately afterward. 09/25/19TR at 140-143. Capers did not go to the police with this information. Months later Capers told the police about this conversation while at the Monroe Police station after he got arrested. Id. at 160-161.

Shyquan Bellamy testified that in November 2017, he would make extra money working as a "hood Uber". He explained he didn't actually work for Uber instead people would contact him on Facebook who needed a ride. On November 13, 2017, Moye contacted him through Facebook requesting a ride to Waterbury. Bellamy recalls that he was intoxicated but agreed to pick him up and give him a ride. He picked up Moye, Coleman and the defendant around the corner of Shelton and Bassett Streets. He drove them to Waterbury but he didn't recall the exact street. Id. at 187-195.

Jalen Bacote, testified after entering into a cooperation agreement with the state. 09/26/19TR at 37. He knows the defendant because they grew up together in Newhallville. He also knew the victim and would see him on Dudley Street near the bike trail. About a week after the shooting, the defendant and Thomas Maysonet were at his home. They were smoking and hanging out and he mentioned that he saw the victim's photograph on Facebook and that he had passed away. Bacote claimed that the defendant told him that the victim's death was "their work". Id. at 53. He claimed that the defendant told him that he was with Coleman and Moye and that they saw the victim and that "one thing led to another". Id. at 54. Bacote testified that the defendant told him that when they saw the victim, Coleman said "let's rob him" and then it went sour. The defendant told him that Coleman took out his gun and the victim punched him and Coleman fell down and the

defendant said "we shot him". Bacote claimed that the defendant said "I shot him" and "we shot him". Id. at 55-56. The defendant told him that they all had guns. Bacote claimed the defendant told him that the took the victim's money, phone and some of his clothing. The defendant told him they ran from the trail and then got a ride to Waterbury. Id. at 57-59. Bacote knew that the defendant carried a .380 caliber Larkin gun that was silver with a black rubber handle. Id. at 66. Bacote claimed he was with the defendant at the end of September of beginning of October 2017 when the defendant acquired the gun in Waterbury from the defendant's cousin. Id. at 66-69.

Records showed that in November 13, 2017, the defendant was wearing an electronic bracelet that monitored when he left and returned to his home. 09/26/19TR at 6-8. The records showed that the defendant's electronic bracelet left his home at 3:24 p.m. on the day of the incident and returned at 3:46 p.m. and then left at 4:25 p.m. The defendant returned at 11:19 p.m. that evening. Id. at 12-18.

Defendant's Case: The defendant took the stand and denied shooting the victim. The defendant grew up in the Newhallville area of New Haven. He was 17 years old at the time of the shooting and living with his Aunt and Uncle at 99 Bassett Street. The defendant hadn't heard from his father in awhile and his relationship with his mother was "shaky". He described the Newhallville area as a "violent" neighborhood. When he was fifteen he got grazed by a gunshot to his forehead. He carried a gun at times for his own protection because he didn't believe that the police were there for him. 10/01/19TR at 21-24.

The defendant recalled on November 13, 2017, he was with Robert Moye and Brennan Coleman. Around 3:24 p.m., he left his home on Bassett Street and walked with Moye and Coleman to Dudley Street. They walked there because Coleman was going to meet up with someone. Near Dudley Street, the victim called out to them and asked them to come closer. The victim asked them if they had nicks or five dollar bags of marijuana. Coleman had some and asked the victim how many and he replied that he wanted two. As Coleman looked for the marijuana the defendant noticed that someone was aiming a gun at

them and said "somebody is about to bang on us" and they turned and started to run. 10/01/19TR at 25-28. The defendant said that the person had on something like a black sweat suit, a hoodie and something covering his face. Id. at 48. As they ran away they heard gun shots. He did not see the victim getting shot. Id. at 47. They ran back to his house on Bassett Street. They then got a ride from Bellamy to Waterbury, they did not see Capers or get into his vehicle. They went to Waterbury in order to obtain some guns because they had gotten shot at. After the incident he mostly stayed home because he was afraid. Id. at 29-33. The defendant denied knowing the victim. Id. at 36.

On cross-examination, the defendant denied knowing anything about the Read Street group that he hung around with having a beef with the SLB group from Dudley Street. The defendant denied that he had a Snapchat conversation with Samuel Tate saying that he was going "op shopping" which means to look for people from a different group. The defendant additionally denied ever carrying a .380 gun. He explained that the gun he was holding in the photographs were not his. 39-42.

State's Rebuttal: The state recalled Jalen Bacote who testified that he along with the defendant, Moye and Coleman were members of the Starr Block group who were friendly with the Read Street group. 10/02/19TR at 13. In 2017, there was hostility between the Starr Block group and the SLB group. The victim was a member of the SLB group. Bacote back in 2017 at some time took a Snapchat video of him and the defendant that was entered into evidence. St. Exb. 90. Bacote identified the defendant in the video and claimed that the defendant was also holding a .380 Larkin gun. Id. at 15-16.

ARG. I. THE TRIAL COURT ERRED IN ADMITTING A CO-DEFENDANT'S STATEMENT THAT INCULPATED THE DEFENDANT IN VIOLATION OF CONN. CODE OF EVIDENCE § 8-6(4) AND THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION

The trial court erred in admitting statements that co-defendant Moye allegedly made to Capers that inculpated the defendant in the shooting. The unreliable hearsay evidence

did not meet the evidentiary requirements for admission and violated the defendant's constitutional rights to confrontation. U.S. Const. Amend. VI, XIV

A. The State's Elicitation of Moye's Hearsay Statements

During the direct examination of Steven Capers, a witness who testified in exchange for a cooperation agreement, the state informed the court that it was seeking to elicit hearsay statements that co-defendant Robert Moye made to Capers. 09/25/19TR at 118. Outside the presence of the jury, the state elicited from Capers that about a week after the murder he was in co-defendant Moye's backyard with Moye and Fat Cat. They were smoking weed and Capers claimed that Moye asked him to "do a solemn of oath", which meant to him, "swear to God you're not going to say nothing". Id. at 122. Capers claimed that Moye told him details about the murder, including that the defendant was the person who shot the victim. Capers claimed that Moye said:

> That I'd seen Lee [the victim] on the bike trial, and they was going to stain him, and they asked him was he SLB, and he had punched Brennan in the face, and Brennan pulled out a gun and tried to shoot him but it jammed, and then the defendant had shot him.

Id. at 123. Capers claimed that Moye told him that the defendant had a .380 caliber gun and that the defendant used it to shoot the victim. Capers testified that Moye did not say if he had a gun that day and didn't say whether they took any items from the victim. Capers used marijuana every day and they were all high when this conversation took place. Id. 128-29.

Defense counsel objected to the line of questions concerning what Moye told Capers as a self-serving statement in which Moye distanced himself from the murder. Counsel argued that it wasn't against Moye's penal interest because Moye didn't admit to having a gun and he claimed the defendant took out his gun and shot the victim. In effect, Moye told Capers he did not commit the murder. Counsel added that at a hearing on probable cause in the co-defendant's case it was elicited that Moye claimed they didn't plan to murder the victim. Id. at 130. Under the total circumstances the statement was not reliable.

Moye's counsel indicated that he would take the Fifth Amendment if called to testify. Defense counsel accepted that made Moye "unavailable". The state argued that the evidence was admissible under the hearsay exception, a statement against penal interest. The state argued that the statements were made close in time to the murder, Moye was friends with Capers, and that other evidence corroborated that the defendant, Moye and Coleman were on the trail near the time of the crime. The state asserted that Moye claimed he was only interested in robbing the victim but he also implicated himself in felony murder. Id. at 132-33.

The court determined that Moye was unavailable and that Moye admitted to conspiring to commit a robbery. The court took into account that the statement was made close in time to the incident, to a close friend, that took some type of oath and that video evidence showed that Moye was with the defendant on the trail. The court noted that whether the statement was against penal interest is an objective inquiry of law, evaluated under a reasonable person's standard. The court did not find that the statement was "self-serving" because Moye admitted that he conspired to rob the victim. The court permitted the admission of the evidence. Id. at 134-35.

The examination of Capers resumed and the state elicited that Moye told him that the defendant, Coleman and Moye saw the victim and asked him if he was a SLB gang member. Moye told him that the victim punched Coleman in the face causing Coleman to take out his gun and shoot, but the gun jammed. The defendant then shot the victim. Capers claimed that Moye told him the defendant shot the victim with a .380 gun in the head. Capers testified that Moye didn't tell him what the three did after that. Id. at 140-143. Capers claimed that Moye didn't admit to having a gun and didn't say if they took anything from the victim. Capers claimed that he didn't ask Moye any questions when he told him about the murder.

B. Principles of Law

An out-of-court statement offered to establish the truth of the matter asserted is hearsay. E.g., *State v. Dehaney,* 261 Conn. 336, 355, (2002). As a general rule, such

hearsay statements are inadmissible unless they fall within a recognized exception to the hearsay rule." *State v. Merriam,* 264 Conn. 617, 633 (2003).

The "statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Lee v. Illinois,* 476 U.S. 530, 541 (1986), see also *Bruton v. United States*, 391 U.S. 123, 136 (1968). In *Williamson* v. *United States*, 512 U.S. 594 (1994), the Supreme Court found that Rule 804(b)(3) "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." 512 U.S. at 600-01.

Section 8–6(4) of the Connecticut Code of Evidence creates an exception to the hearsay rule for an out-of-court statement made by an unavailable declarant if that statement was "trustworthy" and, "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." Accord *State v. Schiappa,* 248 Conn. 132, 147–49 (1999) (noting that Conn. Code of Evid. Sec. 8-6 (4) adopted the same definition of statement against penal interest as contained in 804[b][3] of Federal Rules of Evidence).

That section further instructs that, "[i]n 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); see also *State v. Pierre,* 277 Conn. 42 (2006), 68, cert. denied, 547 U.S. 1197 (2006); *State v. Rivera,* supra, 268 Conn. 351, 361(2004). "The trial court should consider all of the factors and determine whether the totality of the circumstances supports the trustworthiness of the statement." *State v. Lopez,* 254 Conn. 309, 316 (2000).

"A dual inculpatory statement is a statement that inculpates both the declarant and a third party, in this case the defendant." *Schiappa,* supra, 248 Conn. at 145 n. 15, Dual inculpatory statements are evaluated for admission using the same criteria that is used for statements against penal interest. Id. at 153. 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. Under § 8–6(4), the court evaluates the statements according to a reasonable person standard, not according to an inquiry into the declarant's personal knowledge or state of mind. See *State v. Pierre,* supra, 277 Conn. at 650 (a "fair reading of the ... statement, viewed through the lens of common sense, makes it abundantly clear that the statements attributed to [the coconspirator] subject both [the coconspirator] and the defendant to criminal liability"). Whether a statement is against the declarant's penal interest is a question of law. *State v. Savage,* 34 Conn. App. 166, 177 (1994).

The defendant has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, "to be confronted with the witnesses against him." U.S. Const., Amd. VI; *Pointer v. Texas,* 380 U.S. 400(1965). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig,* 497 U.S. 836, 845 (1990).

> When the government seeks to offer a declarant's out-of-court statements against the accused, and, as in this case, the declarant is unavailable, courts must decide whether the Clause permits the government to deny the accused his usual right to force the declarant "to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth.'

California v. Green, 399 U.S. 149, 158 (footnote and citation omitted); *Lilly v. Virginia,* 527 U.S. 116, 123, (1999). Whether the admission of the statements violated the defendant's constitutional rights to confrontation are reviewed de novo. *United States v. Williams*, 506 F.3d 151, 155 (2nd Cir. 2007).

C. The Defendant's Claim is Reviewable

The parties' voir dire of the witness and the proposed testimony, along with counsel's objection and the court's ruling have adequately preserved this claim for review. Additionally, the claim would be reviewable under *State v. Golding*, 213 Conn. 233, 230-40 (1989). The claim is one of constitutional magnitude alleging a violation of the defendant's sixth amendment right to confrontation. That the error exists and it was harmful are discussed below. [1]

D. The Trial Court Erred In Admitting the Hearsay Statement

A codefendant's hearsay narrative statements are not all admissible under C.C.E.§ 8-6(4), statements against penal interest. In *Williamson v. United States*, 512 U.S. 594 (1994), the Supreme Court found that Rule 804(b)(3) "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." 512 U.S. at 600-01. "In Williamson's wake, we have repeatedly emphasized that each particular hearsay statement offered under Rule 804(b)(3) must be separately parsed and must, itself, be self-inculpatory." *United States v. Jackson*, 335 F. 3d 170, 178- 79 (2d Cir. 2003). A court must not "just assume that a statement is self-inculpatory because it is part of a fuller confession, especially when the statement implicates someone else." *Williamson*, supra at 594. In *Lilly v. Virginia,* 527 U.S. 116 (1999) the Supreme Court noted that the category of statements against penal interest that are offered to establish the guilt of an alleged accomplice of the declarant, are inherently unreliable and especially those that shift or spread the blame and inculpate others. Id. at 134-35. As such, the Court determined that "accomplices confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule..." for purposes of confrontation clause analysis.

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[1] To satisfy the requirements for *Golding* review of unpreserved constitutional claims it is necessary that "(1) the record is adequate to review that alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation ...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".

Id. at 134. Although accomplices' confessions are presumptively unreliable they could be admissible upon showing "particularized guarantees of trustworthiness". Id. at 135-38.

In the present case, Moye's statement to Capers that the defendant took out his gun and shot the victim, is a non self-inculpatory statement contained in an overall broader narrative. The hearsay rule that permits statements against penal interest does "not extend to...non-self-inculpatory parts, -to parts that are actually self-exculpatory". *Williamson v. United States*, supra at 595. Here, Moye's statement to Capers that the defendant shot the victim in his overall narrative was meant to place blame on someone else and to exonerate himself from the actual murder. Moye never admitted that he had a gun, that he knew that his codefendants were carrying guns, or that the plan was to shoot the victim. "While there is no clear motivation to lie about a fact that could expose one to criminal liability, there is clear motivation to lie about something that lessens one's culpability". *State v. Britt,* 293 Neb. 381, 421 (2016). A reasonable person in Moye's position would most likely think that placing blame on another for the shooting would clear him from liability of the murder. [2] In *Britt*, the Court carefully examined all of the codefendant's statement and determined that "a statement that is in part inculpatory by admitting some complicity, but that is exculpatory insofar as it places the major responsibility on others, does not meet the test of trustworthiness and is thus inadmissible." Id. at 422. In *Britt*, similar to the present case, the codefendant attempted to shift blame to the defendant for the murder although he admitted that they had planned to rob the victims. In finding all of the statements not truly self-inculpatory, the *Britt* Court noted that "even if we assume a reasonable person in Davis' position would be familiar with the concept of felony murder, such person would believe that if any of these statements shifting blame were reported to the authorities, he would have a

[2] Indeed, Moye resolved the charges against him by pleading guilty to Conspiracy to commit robbery in the first degree, C.G.S. Sec. 53a-134(a)(2) and received a sentence of 20 years execution suspended after 13 years and 5 years of probation. NNH-CR18-0296766-T.

greater chance of striking a plea bargain and of receiving a lesser punishment for his crimes." Id. at 423.

("[A] statement which shifts a greater share of the blame to another person (self-serving) or which simply adds the name of a partner in crime (neutral) should be excluded even when closely connected to a statement that assigns criminality to the declarant."); *McCormick on Evidence* 533 (7th ed. 2013); see *State v. Barnes*, 421 S.C. 47, 55-56 (2017)(error to admit statement that implicated codefendant; court stringently interpreted rule against penal interest).

In the present case, Moye's statement that they intended to rob the victim, but the defendant took out a gun and shot the victim, clearly and reasonably could be understood as an attempt to shift the blame of the more serious crime onto the defendant. Especially since Moye did not say that he had a gun or that he knew the others were carrying guns or that they intended to harm the victim. The fact that Moye requested that Capers take an "oath" before he told him about the crimes does not mean that Moye understood that he too could be held liable for the killing. Moye could have been just as concerned that he didn't want word to get out on the street that he had shot the victim, a member of a rival gang. Moye's statement that the defendant took out his gun and shot the victim, did not fully and equally implicate Moye in the crime. See, *State v. Schiappa*, 248 Conn. 132, 156 (1999)(statement implicating the co-defendant was squarely against declarant's self-interest and not blame shifitng). Moye's statement to Capers did nothing to implicate himself in the actual killing. In *State v. Pierre,* 277 Conn. 42, 69-70 (2006) the codefendant implicated defendant but he also made statements concerning his actual involvement in the killing which made his statements clearly against his penal interest. This case is no different than *State v. Boyd*, 214 Conn. 132, 138-39 (1990) where the court determined that the co-defendant's statement that inculpated the defendant was not against penal interest. In *Boyd*, the defendant similar to the present case, was charged with felony murder, although in *Boyd*, the underlying crime was burglary. The co-defendant in that case made a statement that the defendant had been

the one that killed the victim. The *Boyd* Court found that the statement clearly inculpated the defendant in the killing and was not trustworthy to be admitted.

At the time he made the statement to Capers, Moye was not under arrest and had not been charged with any crimes. Moye's motive at the time of making the statement was to place the blame of the killing on the defendant. A reasonable person in Moye's position would believe that he would not be facing penal consequences as a result of Moye's story of what had occurred. "It is not the fact that the declaration is against interest but the awareness of that fact by the declarant which gives the statement significance." (Citations omitted; internal quotation marks omitted.) *State v. Bryant,* 202 Conn. 676, 695–961 (1987); *State v. Collins*, 147 Conn. App. 584 (2014).

A too broad view of a statement against penal interest would result in all codefendant's statements concerning accomplices coming into evidence, despite the recognized inherent unreliability especially in statements that are blame shifting. See, e.g., *State v. Camacho*, 282 Conn. 328, 360-61 (2007) (court found statements not blame shifting and were against penal interest)."In *Williamson's* wake, we have repeatedly emphasized that each particular hearsay statement offered under Rule 804(b) (3) must be separately parsed and must, itself, be self-inculpatory." *United States v. Jackson*, 335 F.3d 170, 179 (2d Cir. 2003). In the present case, the trial court erred in finding that Moye's statement that the defendant took out his gun and shot the victim, was squarely against Moye's penal interest.

If this Court determines that the statement was against Moye's penal interest, the evidence was nonetheless not trustworthy enough to be found admissible under the hearsay rule. The circumstances under which Moye's statement was made is not strongly indicative of reliability. First, Capers testified that he and Moye and Fat Cat were all using marijuana that day and all were high at the time of the conversation. There is no doubt that it is recognized that a person's use of marijuana "impair[s] a witnesses' capacity for accurate observations and recall". *State v. Clark*, 260 Conn. 813, 820-21 (2002). Capers did not say

how the conversation turned to murder other than Moye asked him to take an "oath" and then he allegedly relayed the story that Capers repeated in court. Although, this conversation took place about a week after the crime, it was enough time for Moye to think about the circumstances and then place the blame on the defendant. The evidence showed that Moye and Capers were friends and that Moye and Coleman were friends but that they considered themselves not as friendly with the defendant who was from a different neighborhood and was younger. Under these circumstances there is a possibility that they would place the blame on the defendant who was younger whom they did not consider as close friend. Capers never told the police about this conversation until he was in trouble and was looking to curry favor with the state, which he did.

None of the evidence presented specifically corroborated that the defendant shot the victim. The state's two main witnesses against the defendant, Capers and Bacote, had cooperation agreements with the state and benefitted from testifying favorably for the state.

Although the state presented evidence that the defendant carried a .380 gun, the same caliber that killed the victim, it did not present the gun nor did it present evidence that if the defendant had possessed such a gun, it was the gun that shot the victim. The evidence did not corroborate that the defendants intended to rob the victim. The victim was found with money in his pocket, two cell phones and a bag of narcotics. Capers claimed that the defendant's had called him for a ride after the shooting. Capers' girlfriend Kristen Avery's testimony contradicted Capers in regard to where they came from to pick- up the defendants. Avery claimed they drove from Milford and Capers testified they drove from Hamden. The video evidence does not show Capers' car coming down Goodrich Street or anywhere near where he claimed to meet up with the defendants. Bacote claimed that the defendant said he shot the victim but also testified that the defendant said "they" shot the victim. Contrary to the evidence that was found, Bacote also claimed that the defendant told him that they took money from the victim, they took his clothing off and took his cell phone. The video evidence that the state presented to support its theory had been taken from different

cameras and spliced together however the time on the some of the cameras was inaccurate and there is no evidence to show that the state's compilation of footage was accurate. None of the defendant's DNA was found on the victim or his belongings. Since the statement was not sufficiently trustworthy it also violated the defendant's constitutional rights to confrontation.

In sum, the trial court erred in admitting this unreliable evidence. The statement that the defendant shot the victim was not against Moye's penal- interest, the statement was not made under reliable circumstances and the evidence did not corroborate it.

E. The Admission of Moye's Statement Was Harmful

If the Court determines that the error implicated the defendant's constitutional rights to confrontation then it is the state's burden to prove such error was harmless beyond a reasonable doubt. *State v. Hutton*, 188 Conn. App. 481, 520 (2019). A evidentiary or "nonconstitutional error is harmless when "an appellate court has a fair assurance that the error did not substantially affect the verdict". *State v. Sawyer*, 279 Conn. 331, 357 (2006).

The state's case against the defendant cannot be considered strong; it relied heavily on the testimony of two cooperating witnesses to prove that the defendant had been the shooter. DNA collected from the victim, his clothing and the crime scene did not match the defendant. Capers' testimony that he came to pick up the defendants lacked credibility. His claim that he drove with his girlfriend from Hamden contradicted his girlfriend's testimony that they had driven from Milford. Video evidence from the Goodrich Street area does not show Capers' car on the street during that timeframe. The defendant took the stand and denied shooting the victim. Bacote claimed that the defendant told him that he or they shot the victim however Bacotes' testimony also lacked credibility. He testified that the defendant told him they took the victim's cell phone and clothing off when the evidence showed that was not true. Capers' testimony that Moye told him that was it the defendant that shot the victim which would have strengthened Bacote's questionable testimony. Certainly, evidence that it was a codefendant that told Capers about the shooting would be weighed heavily by

the jury. The error was not harmless and thus this Court must reverse the defendant's convictions and remand for a new trial.

ARG. II. THE PROSECUTOR'S IMPROPER EXAMINATION OF TWO OF ITS KEY WITNESSES CONCERNING THEIR COOPERATION ARGREEMENTS AND IMPROPER CLOSING ARGUMENTS DEPRIVED THE DEFENDANT OF A FAIR TRIAL AND DUE PROCESS OF LAW

A. Facts

At the start of the second day of evidence, trial counsel forewarned the court that the defense anticipated that the state would seek to enter into evidence the entire written cooperation agreement that the state had between it and some of its witnesses. The defense objected to permitting the entire written cooperation agreement to be entered into evidence because the terms of the agreement would be viewed by the jury as an endorsement by the state that the witness is testifying truthfully. 09/25/19TR at 2.

Prior to the testimony of Steven Capers, the court heard arguments concerning the admission of Capers' cooperation agreement, St. Exb. 82 for Id. 09/25/19TR at 51. Trial counsel did not object to questions concerning the fact that Capers had a cooperation with the state, but objected to the entire written agreement coming into evidence. The defense objected because the entire document contains language that would permit the jury to draw an inference that the state is vouching for the credibility of the witness. The document informs the jury that the state is only offering to help the witness if he testifies and tells the truth. Trial counsel argued that the state should not offer the testimony if it didn't believe the witnesses was going to testify truthfully and the written agreement would only be seen as an improper endorsement. Id. at 51-53.

The state responded that the agreement speaks for itself and that the agreement is a "clerk's file". The state argued that a new statute requires that the agreement be disclosed. Id. at 54-55. The court sustained the defense objection and ruled that the entire document could not be entered into evidence. Id. at 55. The court added that if the defense opened the door during cross-examination he may change its ruling. The court ruled however, that

the state could "inquire fully as to the contents of the agreement and the understanding of the witness". Id. at 56.

At the start of its direct examination of Steven Capers, the state began to elicit the fact that he was incarcerated and had a number of charges pending for which he entered into a cooperation agreement with the state. Id. at 58. The state asked Capers to read the agreement to himself and then proceeded to ask him questions concerning the agreement. Over the defense objection, the state began to read sections of the agreement to the witness. Id. at 60. The state proceed by reading from the agreement and eliciting the following:

Q: Is it your understanding that you, Mr. Capers, agrees to; **one, truthfully disclose all information pertaining to your criminal activities and the criminal activities of others as those activities relate to matters which the state of Connecticut and any investigating police officer or agency asks you?**

A: Yes.

Q: **Two, truthfully testify before any investigatory Grand Jury and or any trial, retrial, or other court proceeding concerning such activity when requested to do so by the state of Connecticut?**

A: Yes.

Q: **It's further understood that this is not an immunity agreement, and that in providing information pursuant to the agreement you, Mr. Capers, may be subject to prosecution for any applicable state or criminal offense?**

A: Yes.

The state then elicited the charges Capers entered pleas to, a violation of probation, identity theft and larceny in the fourth degree and that the sentence was up to the judge. The state then read:

Q: **It's further understood that Mr. Capers, meaning yourself, is obligated pursuant to the agreement to give complete and truthful information and testimony at all times. Do you understand that?**

A: Yes.

Q: **And in the event the state of Connecticut or a judge of the Superior Court reasonably determines that you have not given—or that—sorry – you have given complete—incomplete, false or misleading information this agreement becomes null and void and of no further effect?**

A: Yes.

Trial counsel again objected and argued that what the state was doing, reading the document, was exactly what he argued against outside the presence of the jury, the court overruled the objection. Id. at 63. After going over a few more provisions of the agreement the state proceeded with the direct examination of Capers.

On cross-examination, the defense elicited that Capers had been arrested by Monroe police for 15 different charges on January 26, 2018 and spoke to the police about this case. As part of the cooperation agreement he entered guilty pleas to some of the charges and faced a cap of three years of incarceration. Id. at 155-158. Capers asserted that he voluntarily spoke to the police about this murder.

On redirect the state elicited that Capers had a medical marijuana card and that he would often smoke with his friends. The state elicited that Capers was hoping to get less than three years after his testimony but that expectation wasn't making him lie. The state elicited that everything he told the jury was the truth and that his testified consistently with his previous story. Id. at 175-179.

The state additionally called Jalen Bacote another witness who had a cooperation agreement with the state, St. Exb. 81 for Id. Trial counsel objected and the court responded that it had "assum[ed]" counsel would object however the ruling remained the same. 09/26/19TR at 37-38. The state as it did with Capers, requested that Bacote read the cooperation agreement to himself. The state then began to read sections of the agreement out loud prompting another objection from defense counsel. Counsel added that the state was reading from the document not in evidence and not posing a question. The court overruled the objection for the same reasons it permitted the state to do so in Capers. Id. at 44. The state read from Bacote' cooperation agreement the same "truth telling" clauses as

those in Capers' agreement and likewise asked Bacote if he understood and agreed to the provisions. See, Def.s App. at p.138 ; 09/26/19TR pp 39-46.

On cross-examination, defense counsel attempted to elicit how many times law enforcement approached him about this case before he gave statements. Id. at 70-72. He eventually entered into a cooperation agreement on December 20, 2018. He also elicited that when the witness signed the cooperation agreement he was released from jail. Id. at 73-74. The state on redirect elicited that he had been held on bond and that the state didn't object to release on a written promise to appear. Id. at 70-75.

During its closing argument the state pointed out to the jury that Capers and Bacote had cooperation agreements with conditions, "one of which was to testify truthfully or the deal is void". 10/02/19TR at 29. During rebuttal closing, the state added "both of those individuals signed cooperation agreements...are they looking for an incentive? Of course they are. Would you expect them to come in here and testify if they didn't look for something? Does that meant that mean that they are lying? Does that mean what they have to tell you is in any way untrue because they are looking for a benefit? Id. at 51.

B. The Defendant's Claim Is Reviewable

Trial counsel's objections and the court's rulings have preserved this claim for review. If this is in any way inadequate the claim would nonetheless be reviewable under *State v. Golding*, 213 Conn. 233, 239-240 (1989). The admission of this evidence is grounded in a prosecutorial impropriety claim that was of constitutional magnitude depriving the defendant of right to a fair trial. See, *State v. Singh,* 259 Conn.693, 699 (2002). Such a claim is reviewable because "a claim of prosecutorial impropriety, even in the absence of an objection, has constitutional implications and requires a due process analysis under *State v. Williams,* 204 Conn. 523, 535-40 (1987).";*State v. Stevenson,* 269 Conn. 563, 573-74 (2004); U.S. Const. Amend. XIV.

C. Principles of Law and Standard of Review

This Court in determining claims of prosecutorial impropriety first "examines whether prosecutorial impropriety occurred" and if so, then "examines whether it deprived the defendant of his due process right to a fair trial". *State v. Fauci*, 282 Conn. 23, 32 (2007).

It is improper for a prosecutor to express his or her own opinion or to vouch directly or indirectly, as to the credibility of the witnesses. *State v. Bermudez*, 274 Conn. 581, 598 (2005); *State v. Thompson,* 266 Conn. 440, 462 (2003); *State v. Singh*, 259 Conn. 693 (2002).

Trial courts have broad discretion in determining the relevancy and admissibility of evidence. *State v. Swinton*, 268 Conn. 781,797-98 (2004).

"Evidence that bolsters a witness' credibility before it has come under attack is prohibited. " Conn.Code Evid. § 6–11(a). *State v. Albino*, 130 Conn. App. 745, 773–74 (2011); See, c.f. *State v. Ward*, 49 Conn. 429, 442 (1881) (witness' reputation for truthfulness is inadmissible on direct examination).

D. The Defendant Was Denied A Fair Trial By the Prosecutor's Unfair Elicitation of Terms of The Cooperation Agreement

1. The Recent Evolvement of the State's Use of Cooperation Agreements

There is no doubt that the prosecution often relies on witnesses that have their own criminal involvement with the justice system. Such witnesses often have pending criminal charges and seek to gain some consideration or leniency in their own cases when testifying for the state. In the past, prosecutors in our state often did not enter into a formal written cooperation agreement with a witness. Instead, the more common practice would be for a prosecutor to suggest, but not promise, to the witness' attorney that if the witness testified favorably for the state he would receive a more lenient sentence. See, *Marquez v. Comm. of Corrections*, 330 Conn. 575, 603-04 (2019). In *Marquez*, the Court recognized that this resulted in a "vague" understanding of whether there was an agreement and made it difficult for defense to impeach the witness for bias and difficult for the jury to assess whether the witness had a reason to favor the state. To ensure the integrity of the process, the Marquez

Court encouraged prosecutors to enter into written cooperation agreements with witnesses. Prior to *Marquez*, in *Greene v. Comm. of Correction*, 330 Conn. 1, 27-28 (2018) the Court urged the state to ask a cooperating witness fact-specific questions that embody any agreement in order to ensure that the jury has accurate information regarding any agreement. See, also, *Gomez v. Comm. of Corrections*, 2020 WL 3525521.

Since *Greene, Marquez* and the enactment of C.G.S. § 54-86o, the state has entered into more formal written cooperation agreements with its witnesses. In addition to the charges that a witness had entered a guilty plea to and the range of penalties, the cooperation agreement often includes provisions that the witness is obligated and agrees to truthfully testify and that the agreement is void if it is determined that the witness did not testify truthfully. In order to prevent the cooperating witness from committing perjury regarding an agreement, the *Marquez* Court suggested that the "better practice is to make a clear record of the nature of the agreement or understanding, including the anticipated charge(s) and the maximum and minimum penalties for those charges." Id. at 607. The state, as it did in the present case, often seeks to enter the entire agreement including preemptively eliciting the "truth telling" clauses of the agreement.

2. This Court Should Follow the Second Circuit Rule and Overrule *State v. Gentile*

The defendant asserts that this Court should overrule *State v. Gentile*, 75 Conn. App. 839, 845-852, cert. denied 263 Conn. 926 (2003) in respect to its ruling that it is proper for a prosecutor to bolster its witness' credibility on direct examination by either entering or reading from the witness' cooperation agreement not only the charges and range of penalties but also the clauses that concern the witness' obligation and agreement to testify truthfully. In *Gentile*, the state entered into a written cooperation agreement with a witness. At trial, the defense did not object to the state's request to enter the agreement into evidence as a full exhibit. The state then read the document to the jury and proceeded with the direct examination. The *Gentile* Court determined that the defendant's claim that the court erred in entering the agreement into evidence was not preserved, not reviewable under *State v.*

Golding, 213 Conn. 233, 239-40 (1989) or plain error and declined to use their supervisory authority. The *Gentile* Court additionally determined that it was not improper for the prosecutor to question the witness about the entire agreement including the "truth telling" provisions prior to being impeached. The Court refused to adopt the Second Circuit's rule that does not permit a cooperation agreement to be entered into evidence in its entirety until after the witness has been impeached. The *Gentile* Court additionally determined that the prosecutor had not improperly vouched for its witness.

The defendant respectfully requests that this Court reconsider whether it should adopt the Second Circuit's rule which prohibits the entire written cooperation agreement to be entered into evidence or read into evidence on direct testimony. See, *United States v. Borello*,766 F. 2d 46,57 (2nd Cir. 1985). The Second Circuit permits the prosecutor on direct examination to elicit the fact that a cooperation agreement was entered into and the name of the charges but does not permit the "truth telling" provisions to be elicited or entered into evidence. The Second Circuit recognizes that eliciting, reading or entering the entire cooperation agreement on direct examination is extremely prejudicial because it unduly bolsters the witnesses' credibility. *United States v. Smith*, 778 F. 2d 925, 928 (2nd Cir. 1985).

Contrary to the *State v. Gentile,* 75 Conn. App. at 851 view, the Second Circuit does recognize the "dual nature of cooperation agreements- both impeaching and bolstering a witness' credibility". That is exactly why the Second Circuit rule permits the state to elicit the fact that there is an agreement but not to unfairly preemptively bolster the witness' credibility before the witness is impeached. This is because the state is constitutionally obligated to disclose a cooperation agreement and will often elicit the fact that the witness has an agreement prior to any impeachment. See, C.G.S. Sec. 54-86*o*. The "use of a cooperation agreement cuts both ways insofar as it suggests not only a promise to testify truthfully, but also a motive to testify as the Government wished (regardless of where the truth may lie), the agreement, when introduced by the Government is used primarily to

bolster the credibility of a witness". *United States v.Barnes*, 604 F. 2d 121, 151 (2nd Cir. 1979).

The Second Circuit rule does not permit the prosecutor to enter the entire agreement on direct because that runs afoul of the evidentiary rule that it is improper to bolster a witness' credibility until it is attacked. See, *United States v. Borello*, 766 F. 2d 46, 57 (2nd Cir. 1985). "Connecticut follows the federal rules of evidence in that the credibility of a witness cannot be supported until after it has been attacked." *State v. Suckley*, 26 Conn. App. 65, 72 (1991); Code of Evid. Sec. 6-11 (a). This Court should follow the Second Circuit rule which permits the state to elicit the fact that there is an agreement so that the jury can assess any bias concerning the witness, but not permit any elicitation of "truthfulness" provisions until after the witnesses' credibility is attacked.

The *Gentile* ruling should be overruled for several reasons. This ruling is directly contrary to rules of evidence that forbid the entering of evidence to bolster a witness' credibility absent an attack on the veracity of the witness. Conn. Code of Evid. Sec. 6-11 (a); State *v. Albino*, 130 Conn. App. 745, 773-774 (2011); State *v. Ward*, 49 Conn. 429,442 (1881); *United States v. Arroyo-Angulo*, 580 F. 2d 1137,1146 (2nd Cir. 1978); *United States v. Borello*, 766 F.2d 46, 56 (2nd Cir. 1985). McCormick on Evid. Sec. 33 (8th Ed.). A rule that permits the entire cooperation agreement including the "truth telling" provisions to be entered on direct encourages and permits the prosecutor to improperly vouch for its witness. It should be noted that the *Gentile* Court, 75 Conn. App. at 847-48 never reached the evidentiary claim finding it had been waived and not preserved.

3. The *Gentile* Rule Encourages and Promotes Prosecutorial Impropriety

In the present case, the state by reading the "truth telling" provisions out loud to the jury during the examination of both Capers and Bacote and then asking the witness if he understood that he is "obligated pursuant to the agreement to give complete and truthful information and testimony" and he is to "truthfully testify ...When requested to do so by the state" indirectly and improperly vouched for the credibility of its own witness. It is always

improper for a prosecutor to convey to the jury directly or indirectly, its opinion as to the credibility of its witnesses. *State v. Bermudez,* 274 Conn. 581, 598 (2005); *State v. Thompson,* 266 Conn. 440, 462 (2003); *State v. Reynolds*, 264 Conn. 1, 163 (2003); *State v. Ferrone*, 96 Conn. 160, 168-69 (1921). The jury was left with the impression that because of the terms of their agreement, the witness was obligated to tell the truth. At least five of the provisions of the agreement that the prosecutor read out loud had to do with "truth telling". The elicitation of these provisions would lead a juror to believe that the prosecutor was guaranteeing that the witness was telling the truth. "The suggestion is that the prosecutor is forcing the truth from his witness and the unspoken message is that the prosecutor knows what the truth and is assuring its revelation". *United States v.Roberts*, 618 F. 2d 530, 536 (9th Cir. 1980). By having such an agreement that is signed by both parties, the prosecution is implicitly suggesting to the jury that the information being given supports the witness' testimony. When the prosecution confirms with the witness that he has agreed to tell the truth by introducing the entire agreement provisions on direct examination this evidence is "generally self-serving, irrelevant, and may amount to vouching, particularly if admitted during the State's case in chief." *State v. Ish,* 170 Wn.2d 189, 198, 241 P.3d 389 (2010).

The state additionally read the provision that "in the event the State of Connecticut or a judge of the Superior Court reasonably determines that you have...given incomplete, false, or misleading information, this agreement becomes null and void and of no affect". 09/25/19TR at 62-63. This provision implicitly indicates that the prosecutor or the judge can monitor or verify the accurateness of the witnesses' testimony. *United States v. Collins,* 401 F. 3d 212, 216 (4th Cir. 2005); *United States v. Brown*, 508 F. 3d 1066, 1074 (D.C. Circuit 2007). This clause is informing the jury that the prosecutor or the judge are arbiters of the truth and can determine if he or she is telling the truth and that the agreement is only good if they believed the witness is telling the truth. This provision is indirectly vouching because it informs the jury the agreement is not good unless the state believes the witness is telling

the truth. *United States v. Bowie*, 892 F.2d 1494,1498 (10th Cir. 1990). One court determined that the prosecutor's entering into evidence of the entire agreement indirectly vouched "for their credibility, [because] the government was testifying *sub silentio* that "*just this once*" these lowlife witnesses should be believed; that "*during this trial*" they are crowned with the governmental halo of "being on the right side" and are therefore credible." *Comm. v. Bricker,* 525 Pa. 362, 379 (1990). The Massachusetts Supreme Court noted that a cooperation agreement "present[s] the possibility that the jury will believe that the witness is telling the truth, thinking that, because of the agreement's truthfulness requirement, the [prosecution] knows or can discover whether the witness is telling the truth". *Commonwealth v. Ciampa*, 406 Mass. 257, 260 (1989). In Massachusetts, the "truthfulness" provisions of an agreement are commonly redacted because such a "self-serving statement not only lacks probative value, but it impermissibly vouches for the credibility of the witness." 42 Mass. Prac., Criminal Defense Motions Sec. 7:51 (4th Ed. 2019).

The majority of the cooperation agreement provisions read to the jury concerned the agreement to provide truthful testimony and the consequences if that wasn't fulfilled. Even in jurisdictions that permit the entire agreement into evidence during direct examination, recognize that the state should refrain from repetitive references to provisions concerning truthfulness. See, *United States v. Mealy*, 851 F. 2d 890, 900 (7th Cir. 1988); *United States v. Collins*, 223 F. 3d 502, 503 (7th Cir. 2000).

The recent case of *State v. White*, 195 Conn. App. 618, 630-644 (2020) is an example of how the Gentile *rule* encourages and supports improper prosecutorial vouching. In *State v. White*, 195 Conn. App. 618, 639 (2020), the defendant raised unpreserved claims of prosecutorial improprieties that he claimed occurred during redirect examination and rebuttal argument that involved questions and comments concerning a cooperation agreement. In not finding the prosecutor's questions improper, the Court noted that the cooperation agreement was admitted into evidence. The Court determined that the cooperation agreement in conjunction with other evidence supported the prosecutor's elicitations and

therefore were not improper. Likewise, the *White* Court found that the prosecutor's rebuttal comments were not improper because they were based on the evidence. The *White* Court permitted the admission of the "truth telling" provisions of the agreement to authorize improper vouching. It is also improper for the prosecutor to violate the rules of evidence and attempt to bolster or rehabilitate its witness before he or she is impeached. *State v. Albino,* 130 Conn. App. 745, 777 (2011). And it is also improper for a prosecutor to read from a document that is not in evidence.

In the present case, in addition to improperly eliciting the "truth telling" provisions that the jury most likely understood as vouching for its witness, the state during its opening closing argument also reminded the jury of the agreement. The state went over the evidence and emphasized Bacote and Capers' testimony. In an attempt to parry the defense arguments, the state told the jury that it anticipated that defense counsel would urge them not to believe Capers and Bacote because they had agreements. 10/02/19TR. at 28-29. The state told the jury that they "heard about" the agreements and that "both of these individuals" were questioned about the conditions of the agreements. "One of which was to testify truthfully or the deal is void". Id. at 29.

4. The Error Was Not Harmless

Applying the factors set-forth in *State v. Williams*, 204 Conn. 523, 540 (1987) establishes that the defendant was deprived of his due process right to a fair trial by the prosecutorial improprieties. First, the improprieties occurred during direct examination and opening argument and were not invited by defense counsel. It is also significant that trial counsel objected to the entire cooperation agreement being entered into evidence before the witnesses were called. Counsel specifically objected to the "truth telling" clauses of the agreement that would permit the jury to infer that the state was vouching for the truthfulness of the witness.

Bolstering Capers' and Bacotes' testimony was clearly important for the state. Without these witnesses the case against the defendant could not be considered strong.

Although the defendant testified that he was near the area when the victim got shot, he denied that he was the shooter. Both Capers' and Bacotes' testimony was crucial to proving the state's theory that the defendant had shot the victim. A witness "who has been promised a benefit by the state in return for his or her testimony has a powerful incentive, fueled by self interest, to implicate falsely the accused". *State v. Patterson*, 276 Conn. 452, 469 (2005). Beside the fact that he was a cooperating witness, Capers' testimony showed other signs of unreliability. First, he admitted that he was good friends with Moye and Coleman and would smoke marijuana with them all of the time. Although he knew who the defendant was and called him "Crazy James" he was not that friendly with him. The defense asserted that Capers made up the fact that he came to the area to pick up the defendant and co-defendants. The timing of when Capers said he came to pick them up didn't add up and his vehicle was not seen on the Goodrich Street on the video. Capers testified that he had been coming from the Bob's store in Milford with his girlfriend and his girlfriend testified that they had been coming from the Bob's store in Hamden.

Bacote testified that he also knew the defendant and co-defendants from the neighborhood. Bacote testified that the defendant confessed to him and told him that they shot the victim during a robbery. Bacote's credibility was in question by his own testimony that contradicted other state's evidence. Bacote claimed the defendant also told him that they took the victim's cell phone, money and took his clothes off. The state's evidence showed that the victim was found with two cell phones, money and his clothing had not been taken off.

They state would not have been able to prove that the defendant was the shooter without Capers' and Bacotes' testimony. Indeed, the state in its closing argument while reviewing a portion of the video with the jury points out that the video shows what happened before and then it shows three men run away. The state argued that "Mr. Bacote and Mr. Capers explain[ed] to [the jury] what happened" on the grassy area. 10/02/19TR at 35.

Both Capers and Bacote were convicted felons who only agreed to testify against the defendant because they had cooperation agreements. Neither one was present at the time of the shooting. Every piece of evidence that bolstered their credibility was crucial for the state. "When the credibility of the witness is crucial, improper vouching is particularly likely to jeopardize the fundamental fairness of the trial." *State v. Maguire,* 310 Conn. 535, 561-562 (2013). The improprieties were severe and central to the case. They were numerous, the state elicited not just one, but several "truth telling" clauses. The court did not give the jury a cautionary instruction either after the witnesses' testimony or during its general instructions. The court's general instructions to the jury did not ameliorate the prejudice caused. An application of the proper considerations reveals that the defendant was denied his constitutional due process rights to a fair trial.

5. There Is Not a Fair Assurance That the Error did Not Substantially Affect the Verdict

The error in admitting this evidence was not only constitutional in nature, violating the defendant's due process rights to a fair trial, it also violated evidentiary rules. "[T]he proper standard for determining whether an erroneous evidentiary ruling is harmless....[is] whether the jury's verdict was substantially swayed by the error...Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Cit. and int. quot. marks omitted.) *State v. Fernando V.,* 331 Conn. 201, 215-17 (2019). For the same reasons argued above there is not a fair assurance that the admission of this evidence did not substantially affect the verdict.

6. At the Very Least The Court Should Give a Cautionary Instruction

In Massachusetts when a cooperating witness testifies the judge must "specifically and forcefully" instruct the jury to evaluate the witness' credibility with "particular care". *Commonwealth v. Ciampa*, 406 Mass. 257, 266 (1989). If the jury is made aware that the witness promised to tell the truth as part of the cooperation agreement due to either trial testimony or submission of the cooperation agreements as exhibits, the judge should additionally "warn the jury that the government does not know whether the witness is telling

the truth." *Commonwealth v. Meuse*, 423 Mass. 831, 832, 673 N.E.2d 546 (1996). This Court should use its supervisory authority and require that the court instruct not only should the jury evaluate a cooperating witness' testimony with caution and care but that also the state does not know if the witness told the truth. [3] For all of the foregoing reasons, this Court should find error and reverse for a new trial.

ARG. III. THE PROSECUTOR'S TAILORING ARGUMENT VIOLATED THE DEFENDANT'S STATE CONSTITUTIONAL RIGHTS TO CONFRONTATION, TO TESTIFY AND HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL

A. Relevant Facts

During the state's closing argument the state told the jury:

The defendant sat here throughout the course of the trial. He heard all the testimony. I'd submit to you, he had an opportunity to decide which pieces of evidence he wanted to disagree with and which pieces of evidence he was going to concede.

He heard his own mother come in here and testify that it was him on the camera on Goodrich Street. His own mother identifies him from a picture at the very head of the canal line. So he admits it's him. We have GPS records of showing him leaving his house at 3:24 and getting back there 22 minutes later. He can't dispute those electronic records so he concedes it. Mr. Bellamy, he didn't have a dog in this fight. He comes in and says, yeah, I have some guys a ride. The defendant can't dispute that, so he concedes it. It says

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[3] "It is well settled that [a]ppellate courts possess an inherent supervisory authority inherent supervisory authority over the administration of justice.... Supervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole.... Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process." (Internal quotation marks omitted.) *State v. Diaz,* 302 Conn. 93, 106 (2011); *State v. Rose,* 305 Conn. 594, 607 (2012). The Court's "supervisory powers are invoked only in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts.... Overall, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers.... Thus, [the court is] more likely to invoke [its] supervisory powers when there is a pervasive and significant problem ... or when the conduct or violation at issue is offensive to the sound administration of justice...." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State v. Edwards,* 314 Conn. 465, 498–99 (2014).

Waterbury on the video in Mr. Moye's phone. There's a picture of him two days prior pulling a weapon. He can't dispute that, so he says I don't know the caliber of that gun.

So the one portion of the evidence where the defendant has an opportunity to give a piece of information it can't easily be challenged because it's not on camera, it's the moments of the shooting. So the moments of the shooting, he tells you the story that we've been talking about.

10/02/19TR at 35-36.

B. The Defendant's Claim is Reviewable

The defendant did not object to the state's argument however his claim is nonetheless reviewable under *State v. Golding*, 213 Conn. 233, 239 (1989).[4] *State v. Weatherspoon,* 332 Conn. 531, 548 (2019).

C. Principles of Law

A prosecutor makes a tailoring argument when he or she impugns the credibility of a testifying defendant by urging the jury to infer that the defendant had the opportunity to fabricate his testimony based on the fact that he was present for all of the testimony. *Portuondo v. Agard,* 529 U.S. 61, 73 (2000); *State v. Weatherspoon,* 332 Conn. 531, 543 (2019).

Our Supreme Court first considered the constitutionality of tailoring arguments in *State v. Cassidy*, 236 Conn. 112, cert. denied 519 U.S. 910 (1996). The *Cassidy* Court determined that such arguments were unconstitutional; "although the prosecutor was entitled to argue his case forcefully, however, he was not free to assert that the defendant's presence at trial had enabled him to tailor his testimony to that of other witnesses. Such argument exceeded the bounds of fair comment because it unfairly penalized the defendant for asserting his constitutionally protected right to confront his accusers at trial." Id. at 128-129.

A few years later, the United States Supreme Court ruled that tailoring arguments do not violate any federal constitutional rights. *Portuondo v. Agard,* 529 U.S. 61 (2000). The

Portuondo majority refused to recognize that the defendant is situated differently than any other witness and therefore it was proper for the prosecutor to make a tailoring argument. Id. at 73. Two justices dissented, noting that the majority's ruling "transforms a defendant's presence at trial from a Sixth Amendment right to an automatic burden on his credibility". Id. at 77. The dissent pointed out that the "defendant's exercise of a constitutional fair trial right is "insolubly ambiguous" as between innocence and guilt, the prosecutor may not urge the jury to construe the bare invocation of the right against the defendant." Id. at 79. The dissent asserted that generic tailoring does little to advance the truth finding at trial and when made in summation prevents the defendant from responding. The dissent found that the majority's ruling permits a "prosecutorial practice that burdens the constitutional rights of defendants, that cannot be justified by reference to the trial's aim of sorting guilty defendants from innocent ones, and that is not supported by our case law." Id. at 88.

Even the *Portuondo* majority recognized that tailoring arguments are not "always desirable as a matter of sound trial practice" and noted that it is "best left to trial courts, and the appellate courts which routinely review their work". Id. at 73 n. 4; *State v. Weatherspoon*, 332 Conn. at 546.

After the *Portuondo* ruling *Cassidy*, supra, was overruled by *State v. Alexander*, 254 Conn. 290, 294-300 (2000). *Alexander* was decided on federal constitutional grounds and determined that generic tailoring arguments were permissible.

Recently, the issue of tailoring arguments was once again considered in *State v. Weatherspoon*, 332 Conn. 531 (2019). The defendant made a claim that the state impermissibly made a generic tailoring argument and that such argument violated the defendant's right to confrontation pursuant to Article first, Sec. 8, of the Connecticut Constitution. For the first time, the *Weatherspoon* Court, specifically noted that "there are two types of tailoring arguments: generic and specific." Id. at 544. Citing to *State v. Daniels*, 182 N.J. 80, 98 (2004), the court defined a specific tailoring argument as "when the prosecutor makes express reference to the evidence, from which the jury might reasonably

infer that the substance of the defendant's testimony was fabricated to conform to the state's case as presented at trial." Id. at 544. Following the *Daniels* decision, *Weatherspoon*, defined generic tailoring as "despite no specific evidentiary basis that [the] defendant has tailored his testimony, nonetheless attacks the defendant's credibility by drawing the jury's attention to the defendant's presence during trial and his concomitant opportunity to tailor his testimony". Id. The *Weatherspoon* Court determined that the prosecutor had made a permissible specific tailoring argument and therefore did not reach the defendant's state constitutional claim. The *Weatherspoon* Court noted that in the future if prosecutors continue to make "tailoring arguments...indiscriminately and without an appropriate evidentiary basis" it will pronounce a formal rule prohibiting generic tailoring". Id. at 554.

D. The Prosecutor's Generic Tailoring Argument Violated the Defendant's Constitutional Rights

The state made a generic tailoring argument when it explicitly told the jury that the defendant was present in court, heard the testimony of witnesses and had an opportunity to tailor his testimony:

> The defendant sat here throughout the course of the trial. He heard all the testimony. I'd submit to you, he had an opportunity to decide which pieces of evidence he wanted to disagree with and which pieces of evidence he was going to concede.

The state's argument continued by pointing to state's evidence in which the defendant did not dispute and which in the state's view he had to concede. Following that the state argued:

> So the one portion of the evidence where the defendant has an opportunity to give a piece of information it can't easily be challenged because it's not on camera, is the moments of the shooting. So the moments of the shooting, he tells you the story that we've been talking about.

10/02/19TR at 35-36. In *State v. Weatherspoon,* 332 Conn. at 544, the court specifically cites to *State v. Daniels*, 182 N.J. 80 (2004) for definitions of "generic" and "specific" tailoring. In *Daniels*, the Court found that the following argument was an improper generic one:

> The defendant sits with counsel, listens to the entire case and listens to each one of the state's witness[es], he knows what facts he can't get past...But he can choose to craft his version to accommodate those facts.

Id. at 101. The *Daniels* Court in analyzing whether an argument is generic or specific, noted that a specific argument can be made but in a "limited fashion", "the arguments must be based on the evidence in the record and the reasonable inferences drawn therefrom." Id. at 99. The state "may not refer explicitly to the fact that the defendant was in courtroom or that he heard the testimony of other witnesses, and was thus able to tailor his testimony". The present case is exactly like *Daniels,* the state explicitly points out the defendant's presence in court and opportunity to pick and choose how he would testify. Just as in *Daniels*, the state here also highlighted evidence that conformed with the state's evidence but also directly called the jury's attention to the fact that he was present.

E. The State's Improper Arguments Violate the State Constitution

In *State v. Weatherspoon,* supra at 554, the Court noted "the fact that generic tailoring arguments do not burden federal constitutional rights does not mean that they pass constitutional muster under our state constitution". In analyzing whether the Connecticut Constitution provides greater individual rights than the Federal constitution the Court looks to (1) the text of the state constitution; (2) historical analysis; (3) precedent of other jurisdictions; (4) federal precedent; (5) related Connecticut precedent; and (6) public policy. *State v. Geisler,*222 Conn. 672, 684 -86 (1992).

1. Text of the State Constitution

The text of the Connecticut Constitution, Article I, § 8, is almost identical to the Sixth Amendment to the United States Constitution. *State v. Lockhart*, 298 Conn. 537, 551 (2010).

"The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that are essential to due process of law in a fair adversary process.... The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony .... The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call witnesses in his favor, ... Logically included ... is a right to testify himself.... The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony....A defendant's right to testify is also protected by his rights to a fair trial, to due process, to present a defense, and to be free from compelled testimony under article XVII of the amendments to the Connecticut constitution and under article first, § 8, of the Connecticut constitution."

(Citations omitted; internal quotation marks omitted.) *State v.* Shinn, 47 Conn.App. 401, 410 (1997), cert. denied, 244 Conn. 913, 914, (1998).

2. Historical Analysis

Thus far, our Courts have declined to find that article first, § 8, of our state constitution, provides any greater protection in regards to a defendant's right to confrontation. *State v. Lockhart,* 298 Conn. 537 (2010); *State v. Castro,* 200 Conn. App. 450, 465 (2020).

"The ancient common law rule was "that a person charged with a criminal offense is incompetent to testify under oath in his own behalf at his trial." *Ferguson v. Georgia,* 365 U.S. 570, 81 S.Ct. 756, (1961); *State v. Gethers*, 197 Conn. 369, 391(1985). "This rule was the law in Connecticut when the state constitution was adopted: "It is a general rule in criminal cases, that a person who is either to be a gainer, or loser in the event of the cause, in which he is called to give evidence, is incompetent, and cannot be examined." Swift, A Digest of the Law of Evidence in Civil and Criminal Cases (1810) p. 69; see generally *Lucas v. State,* 23 Conn. 18 (1854). However, the defendant,... , had the right to make his oral statement, unsworn, in his case. In 1867, the common law disability prohibiting a defendant from testifying under oath was abrogated by statute in Connecticut." Id. at 391-92. See General Statutes § 54-84.

In *Rock v. Arkansas*, 483 U.S. 44 (1987) the U.S. Supreme Court held that there was, indeed, a constitutional "right to testify on one's own behalf at a criminal trial."

In *State v. Cassidy*, 236 Conn. 112, 125-29 (1996), our Courts first addressed whether a prosecutor's tailoring argument violated the defendant's constitutional rights to testify and concluded that such arguments do violate the defendant's state and federal constitutional rights. In *State v. Alexander,* 254 Conn. 290, 294-300 (2000) based on *Portuondo v. Agard,* 529 U.S. 61 (2000) the Court overruled *Cassidy* basing its decision on federal constitutional grounds. The history of the importance and protection of the defendant's constitutional right to testify in the state of Connecticut favors the defendant in terms of prohibiting under our state constitution.

3. Other Jurisdictions

The *Weatherspoon,* supra at 554, Court noted that "a number of our sister states have determined that generic tailoring arguments are impermissible as a matter of sound trial practice or state law". In *State v. Daniels*, 182 N.J. 80, 97 (2004) reasoned that a criminal defendant is not simply the same as other witnesses at his trial. A criminal defendant possesses fundamental rights that are essential to a fair trial. *Pointer v. Texas,* 380 U.S. 400, 403 (1965). These rights include the right to be present at his trial. *Illinois v. Allen*, 397 U.S. 337, 338 (1970), to present witnesses in his own defense, *Washington v. Texas*, 388 U.S. 14, 18 (1967) and to testify in his own behalf. *Rock v. Arkansas,* 483 U.S. 44 (1987). Since prosecutorial comments that suggest the defendant tailored his testimony "inverts" these basic rights and punishes a defendant from exercising these rights, many states prohibit tailoring arguments. *Daniels*, supra at 97-98. The *Daniels Court utilized* its supervisory authority to prohibit generic tailoring. Id. at 98.

The state of Massachusetts has a long history that continued after *Portuondo, supra, to* prohibit tailoring arguments recognizing that they infringe on basic constitutional rights. *Commonwealth v. Person*, 400 Mass. 136, 139 (1987); *Commonwealth v. Alphonse*, 87 Mass. App. Ct. 338 (2015).

The state of Colorado prohibits generic tailoring arguments; analyzing most claims as a prosecutorial misconduct claim. *Martinez v. People*, 244 P.3d 135, 140-42 (2010).

Likewise, the state of Minnesota, under its state law, analyzes claims of tailoring as one of prosecutorial misconduct. *State v. Swanson*, 707 N.W. 2d 646, 657-58 (Minn. 2006). The state of New York also has determined that generic tailoring arguments are improper. *People v. Pagan*, 2 A.D. 3d 879 (2003); *People v. Skinner*, 298 A.D. 2d 625 (2002).

The state of Washington determined that generic tailoring is a violation under their state constitution which they found provided more protection than the sixth amendment. *State v. Martin*, 171 Wash. 2d 521 (2011). The *Martin* Court noted that its state constitution explicitly granted defendant's the right to appear, to present a defense and to testify. Id. at 531. Likewise, Hawai'i under its state constitution prohibits generic tailoring arguments. *State v. Walsh*, 125 Hawai'i 271 (2011). Generic tailoring becomes an automatic burden on the defendant's basic constitutional rights, discouraging a defendant from testifying in his own behalf. *State v. Basham*, 132 Hawai'i 97, 118 (2014).

States forbidding the use of tailoring arguments recognize the great burden such arguments impose on the constitutional rights of a defendant. They recognize that defendants are not the same as all of the other testifying witnesses in his case. All testifying defendants are predisposed to such arguments. They also recognize that generic tailoring arguments do not advance the truth. This factor favors the defendant as many states have not followed the federal law and prohibited generic tailoring.

4. Federal Precedent

In *Portuondo v. Agard,* 529 U.S. 61 (2000) the United States Supreme Court decided that generic tailoring arguments do not violate the federal constitution. However, as our Supreme Court noted, *Portuondo*, is limited to the federal constitution "and did not address whether generic tailoring arguments were "always desirable as a matter of sound trial practice," which the court explained, was an inquiry "best left to trial courts, and to the appellate courts". *Weatherspoon*, 332 Conn. at 547, quoting Id. at 73 n.4. The *Portuondo* concurrence also noted that such arguments should be discouraged and sent a clear signal

that its ruling "does not, of course, deprive [s]tates or trial judges of the power.. to prevent such argument[s]". Id. at 76.

5. Connecticut Precedent

In *State v. Cassidy*, 236 Conn. 112, 120 (1996) our Supreme Court determined that tailoring arguments are constitutionally infirm as they burden the free exercise of a defendant's constitutional right to confrontation. *Cassidy*, decided on federal constitutional grounds, was overruled based on the *Portuondo*, decision in *State v. Alexander*, 254 Conn. 290, 294 (2000). In determining the issue before the court, the state of Washington in deciding that tailoring arguments do violate its state constitution, gave great consideration to the fact that its pre *Portuondo* caselaw forbid such arguments. *State v. Martin*, 171 Wash. 2d 521, 531 (2011). In *State v. Papantoniou*, 185 Conn. App. 93, cert. denied, 330 Conn. 948 (2018), the Appellate Court did not directly address the defendant's state constitutional claim determining that the error was harmless. The more recent *Weatherspoon*, supra at 554, decision signaled that the Court would be open revisiting the issue especially if generic arguments became more prevalent. This factor favors the defendant.

6. Public Policy

There is no doubt that a defendant is situated differently than other witnesses at his trial. Among the core essential rights to a fair trial, is the right to confrontation. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). The right to be present, *Illinois v. Allen*, 397 U.S. 337,338 (1970) and the right to testify. *Rock v. Arkansas,* 483 U.S. 44, 49 (1987). Generic tailoring arguments impinge and undermine a defendant's constitutional guarantees to a fair trial. *Portuondo*, 529 at 76 (Stevens, J., concurrence).

A defendant's testimony is often going to contradict the state's witnesses. But, unless there is direct evidence that he has altered his testimony a generic tailoring argument unfairly undermines his theory of defense. Even if the jury in assessing the evidence draws an inference of tailoring, it is unfair to permit the prosecutor to encourage them to do so. *Portuondo*, Id. at 88 (Ginsburg, J., dissenting). Generic tailoring infringes on the defendant's

constitutional right to be present and discourages the exercise of a defendant's right to testify. Additionally, a tailoring argument that takes place during closing arguments leaves the defendant hamstrung to defend against the accusation. Certainly the state may challenge the defendant's credibility but it should do so during cross-examination. See, *Portuondo*, 529 at 87. (Ginsburg, J. Dissenting).

F. The Error Is Not Harmless

Because the error implicates the defendant's constitutional rights and infringes on specific enumerated rights, the burden is on the state to prove that was not harmless beyond a reasonable doubt. *State v. Payne*, 303 Conn. 538, 563 (2012). The state's case against the defendant cannot be considered strong. There were no eyewitnesses that testified to the actual shooting. The two witnesses, Capers and Bacote, that place the blame on the defendant, did not witness the shooting and had cooperation agreements with the state.

There is no doubt that the defendant, Coleman and Moye were on the trail near the time of the incident. The defendant in his testimony specifically denied being the shooter. The state in its argument told the jury that the defendant because of his presence in the courtroom, was able to tailor his testimony to the pieces of evidence he wanted to concede and to evidence he didn't. The state was able to use the fact that the defendant was present at his trial as a factor that went against his credibility. When the case comes down to which of two people are more credible a prosecutor's improprieties bearing on credibility can often tip the balance in favor of the state. *State v. Sinvil*, 76 Conn. App. 761 (2003).

G. This Court Should Invoke Its Supervisory Authority To Prohibit Generic Tailoring

If this Court determines that our state constitution does not prohibit generic tailoring arguments, then the Court should nonetheless accept the *Portuondo, supra* at 73 n. 4., Court's invitation to prohibit generic tailoring because it is "not desirable as a matter of sound trial practice." The defendant requests that this Court utilize its supervisory authority and pronounce a rule that prohibits such arguments. *State v. Rose,* 305 Conn. 594, 607 (2012); See, Footnote 3 of this brief.

In sum, the prosecutor in this case made a harmful generic tailoring argument denying the defendant his constitutional rights to testify, to confrontation and to a fair trial. This Court should find that such arguments violate our state constitution and or invoke its supervisory authority to prohibit generic tailoring. The only remedy is to reverse the defendant's convictions and remand for a new trial.

CONCLUSION

For all of the foregoing reasons, this Court must reverse the defendant's convictions and remand for a new trial.

Respectfully submitted,
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S.C. 20447	SUPREME COURT
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JAMES GRAHAM	FEBRUARY 17, 2021

CERTIFICATION

Pursuant to Conn. Prac. Bk. § § 62-7 and 67-2 the undersigned certifies that the attached Brief and Appendix are true copies of the electronically submitted Brief and Appendix, and that true copies were mailed first class postage prepaid this 17th day of February, 2021 to Bruce R. Lockwood, Juris No. 401795, Office of the Chief State's Attorney, Appellate Bureau, 300 Corporate Place, Rocky Hill, CT 06067, Tel. (860) 258-5807, Fax (860) 258-5828, dcj.ocsa.appellate@ct.gov

It is also certified that a copy was mailed first class postage prepaid to my client, James Graham #414529, MacDougall-Walker Correctional, 1153 East Street South, Suffield, CT 06080.

It is also certified that the reply brief complies with all the provisions of Conn. Prac. Bk. § 67-2 including electronic delivery to all counsel of record.

The undersigned attorney hereby certifies that this brief and appendix does not contain any Name or other identifying information that is prohibited from disclosure by rule, statute, court order or case law; and that the brief complies with all provisions of this rule pursuant to Conn. Prac. Bk. § 67-2.

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