SUPREME COURT

OF THE

STATE OF CONNECTICUT

JUDICIAL DISTRICT OF NEW HAVEN

S.C. 20447

STATE OF CONNECTICUT

v.

JAMES GRAHAM

REPLY BRIEF

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The defendant relies upon the nature of proceedings and statement of facts section in his original brief.

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

The state in its brief argues that the trial court properly admitted Moye's statement to Capers under the hearsay exception regarding statements against penal interest. S/B 9(S/B refers to state's brief). The state in its brief agrees that Moye did not admit to being the shooter or admit that he had been armed. The state contends that the statement was admissible as a statement against penal interest merely because Moye told him that when they saw the victim they decided to rob him. Capers testified that Moye never told him whether they did in fact rob the victim. Whether a statement is against a person's penal interest is a question of law. *State v. Savage*, 34 Conn. App. 166, 177 (1994).

The state relies on *State v. Bryant*, 202 Conn. 676, 696 (1987) for its assertion that a statement against penal interest is broadly interpreted to include "not only confessions, but other remarks which would tend to incriminate the declarant were he or she the individual charged with the crime." S/B 11, citing to *Bryant*, supra at 695. The state additionally asserts that "the Code of Evidence incorporates these principles". S/B 11. The problem with the state's argument is that *State v. Bryant*, was decided before *Williamson v. United States*, 512 U.S. 594, 600 (1994) which does not permit as a statement against penal interest, "non-self-inculpatory statements, even if they are made within a broader narrative that that is generally self-inculpatory". This Court recognized that in the wake of *Williamson, supra,* a person's self-inculpatory statements are severable from his self-serving statements. *Skakel*

v. State, 295 Conn. 447, 523-24 (2010), *Zarella, J.,* concurrence. The Court also noted that Code of Evidence § 8-6(4) is patterned after the Federal rule. Id. It is highly unlikely that *Bryant's* broad interpretation that permits the entire narrative, both disserving and self-serving statements into evidence, is good law today.

Additionally, even *Bryant,* supra at 696 recognized that the statements admissibility is founded on "not the fact that the declaration is against interest but the awareness of that fact by the declarant which gives the statement significance." Here, a reasonable person in Moye's shoes at the time he was making the statements to an acquaintance would believe that he was lessening his culpability concerning the entire crime by placing the blame of the killing on others." See, *Williamson v. United States,* 512 U.S. at 604. Moye's version of events described at best that he was in agreement to possibly rob the victim, but never did he claim they were looking to kill or wound the victim. His narrative set forth events that included that the victim unexpectedly punched Coleman to the ground causing Coleman to pull out his gun that jammed. Moye's statement included that this caused the defendant to take out a gun and shoot the victim. Moye never admitted that he had a gun or that the shooting of Benton was part of any plan. Moye was clearly attempting to place the blame of the killing away from himself and onto the co-defendants.

Nothing in Moye's statements clearly inculpated himself in the killing and nothing in his narrative revealed that he was aware that he could be criminally liable for all of the crimes. Moye did not in any way indicate to Capers that he was concerned about getting arrested for the killing or that he realized his exposure was the same, making this situation distinguishable from that in *State v. Camacho*, 282 Conn. 328, 360 (2007) and *State v. Azevedo*, 178 Conn. App. 671, 685 (2017), cert. denied, 328 Conn. 908 (2018) that the state

cites in its brief. See, S/B 10. The additional case that the state cites, *State v. Rivera*, 268 Conn. 351, 368 (2004) for supporting that Moye's entire narrative was admissible is misplaced. In *Rivera*, the defendant brought a claim that his constitutional rights to confrontation were violated when a witness testified concerning what another witness told him. The Court permitted the testimony finding that it was admissible under the statement against penal interest hearsay exception. The *Rivera* Court recognized that under the Federal Rule and *Williamson*, supra, non-self-inculpatory statements that are included in the narrative are not permissible under the exception, but determined that all of the statements were self-inculpatory. *Williamson,* supra at 371 n. 18. [1] Here, Moye's statements did not fully and equally implicate himself in all of the crimes and thus were not permissible.

The state additionally attempts to support its assertion that the entire narrative was admissible as a statement against penal interest by pointing out that the statement was not made to law enforcement but rather to his acquaintance. See, S/B 11-13. Under the circumstances of this case, one that involves rival gangs, Moye could have been more concerned about reparations from rival gang members a very real concern. By placing the blame of the shooting on the co-defendants, Moye may have been attempting to get word on the street that the others shot the victim, not him. Although Moye did not make the statement to the police, he resolved his case by pleading to lesser charges of conspiracy to

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[1] From the state's perspective, Moye's statements that placed the blame for the shooting on the co-defendants was not an attempt by Moye to lessen his culpability. Moye is not an attorney and a reasonable person in his shoes would have believed that his explanation as to how the shooting occurred would have lessened his culpability. See, *Williamson v. United States*, supra at 604. Moye did not admit to planning or attempting or agreeing to shoot the victim. By placing the blame on the more serious actions on the co-defendants, Moye in the very least was attempting to limit his exposure and to portray himself as the least culpable.

commit robbery and receiving a much more lenient sentence. Moye's statements lacked trustworthiness and the trial court erred in admitting the entire narrative in under the penal interest hearsay exception. See, S/B 13.

The state contends that Moye's statements were trustworthy because of the timing, "to whom he uttered them, the independent corroboration of his statements, and the degree to which the statements were against his penal interest." S/B 14. "In general, declarations made soon after the crime suggest more reliability than those made after a lapse of time where a declarant has a more ample opportunity for reflection and contrivance." (Internal quotation marks omitted.) *State v. Lopez,* 254 Conn. 309, 317, 757 A.2d 542 (2000). Although the state cites to authorities that have determined one week or so after the crime supports that the statement was trustworthy, it still was enough time for deliberation and to concoct a narrative that places the blame away from himself.

The state asserts the statements were trustworthy because they were made to a close associate in the defendant's backyard. S/B 14. The state ignores that Capers admitted that they all were using marijuana that day and were "high" at the time of the conversation. Additionally, the state ignores that Capers did not take this information to the police, rather he waited until he was under arrest and needed to curry favor with the authorities.

The state in its brief admits that Moye's statements were only "partially corroborated." S/B 15. What is missing is any corroboration that the defendant had a firearm and shot the victim. Although the state presented evidence that the defendant carried a .380 gun, such gun was never located. The evidence also did not corroborate that the group intended to rob the victim. The victim was found with money in his pocket, two cell phones and a bag

of narcotics. Emergency responders found the victim lying in the grass, he was wearing a zipped up jacket and he was fully clothed. 09/24/19TR at 41,54; 09/24/19TR at 179-192. The police retrieved two cell phones from the victim, money in his pants and a bag of powder like substance. Id. at 193-196. This is contrary to the state's assertion that the assailant removed the victim's clothing, took his cell phone and money. See, S/B 2. The state's cooperating witness Bacote testified that the defendant removed money, clothing and a cell phone from the victim, but that is discredited by the evidence found at the scene. Nothing corroborated Bacote's statement that items were taken from the victim.

Williamson v. United States, 512 U.S. 594, 604, 114 S.Ct. 2431 (1994) (a statement that does not implicate oneself, but rather suggests that one is a "small fish in a big conspiracy," is less likely to be trustworthy). The factors do not support that the statement in its entirety was trustworthy and thus was not admissible under the statement against penal interest hearsay rule.

Lastly, the state asserts that any error was harmless. S/B 19-20. Hearing statements by a co-defendant that the defendant took out his gun and shot the victim cannot be considered harmless. There were no eyewitnesses to the actual shooting that testified. The state's case relied heavily on the testimony of two cooperating witnesses to prove that the defendant was the shooter. The defendant testified in his own defense, admitting he was at the scene but asserted that the victim approached them to buy some marijuana. The defendant claimed that an unknown masked shooter came from behind the bushes and started shooting and they all ran. Hearing that a co-defendant claimed that the defendant was the shooter certainly would have weakened the defendant's defense. The error was not harmless.

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

The state first asserts that the defendant's claim "fails, first because he has not challenged the trial court's evidentiary rulings admitting the testimony regarding Capers' and Bacote's cooperation agreements." The state incorrectly views the claim as one of a mere evidentiary claim, that wasn't completely preserved and that the state's use of the evidence was not improper.

First, the defendant contends that his claim was fully preserved in regard to whether it is viewed as an evidentiary issue or a prosecutorial impropriety claim. It is clear from trial counsel's objections that defendant was objecting to the entire written agreements being entered into evidence by the state including the truth telling provisions. 9/25/19TR 2,51-53. The defendant argued that the "truth telling" provisions are self-serving and that the jury could understand that the state was vouching for its witnesses. The court in overruling the defendant's objections understood the law to permit the state to elicit and ask leading questions concerning the cooperation agreement, including all of the provisions. Id. at 56. The defendant contends that all aspects of his claim are preserved and reviewable. The claim is one that involves an evidentiary ruling and the state's improper use of that evidence. The defendant in its brief specifically requests that the Court overrule *State v. Gentile*, 75 Conn. App. 839, 845-852, cert.denied 263 Conn.926 (2003). By requesting that the Court overrule *Gentile*, the defendant is in essence arguing that the trial court abused its discretion in entering the evidence. Contrary to the state's assertion the defendant has challenged the

trial court's admission of Caper's and Bacote's testimony in regards to the improper direct examination by the prosecutor. See, S/B 26.

The prosecutor drew up the cooperation agreement, including all of the provisions that mention the obligations of the witness to testify truthfully and that the agreement would be void if the court determined he had not been truthful. The prosecutor read the truth telling provisions to the witness and asked him if he understood them and agreed to them. See, Def. Org. Brief pp. 18-19. The direct examination of the defendant in this manner was not only self-serving, improper bolstering it also was an impermissible vouching by the state of its witness. The state argues that the defendant's claim is an evidentiary claim "masked as prosecutorial impropriety". S/B 25. None of the cases that the state cites to support its assertion, involve claims of improper vouching with truth telling provisions and are misplaced. See, S/B 25; *State v.Harris* , 198 Conn. App. 530, 549-51, cert. denied, 335 Conn. 961 (2020)(admission of evidence regarding defendant's gang affiliation was not a violation of due process, no impropriety);*State v. Rowe*, 279 Conn. 139, 151(2006)(prosecutor's arguments regarding defendant's flight, were not improper); *State v. Santiago*, 187 Conn. App. 350, 370, cert. denied, 331 Conn. 902 (2019)(failure of prosecutor to redact certain portions of a statement was an impropriety or a constitutional claim);*State v. Lindo*, 75 Conn. App. 408, 420, cert.denied, 263 Conn. 916 (2003)(questioning the defendant about his citizenship was evidentiary, not a constitutional impropriety).

Under *State v. Gentile*, supra, the trial court had authority to enter the entire agreement into evidence during the state's direct examination, that is why the defendant is seeking this Court to reconsider that opinion. What the *Gentile*, decision and the state fail to recognize is that "truth telling" provisions can unfairly bolster the witnesses' credibility and

promotes and encourages a prosecutor to improperly vouch for its own witness, which is always improper.

The claim in this case is analogous to that in *State v. Singh*, 259 Conn. 693,709-711 (2002). In *Singh*, the Court determined that it was improper for the state to elicit during the cross-examination of the defendant whether he believed other witnesses had been lying. Here, similar to *Singh*, the prosecutor's elicitation of the truth telling aspects of the agreement was calculated. Not only did the prosecutor devise the provisions, he used them to improperly vouch and enhance the witness credibility, there was no legitimate reason for the state to elicit the provisions on direct examination. The questions the state asked the witness were designed to endorse the witness' credibility. The jury in order to disbelieve the witness would have to believe that the witness was not testifying as he was obligated to by the agreement and that the prosecutor or judge would void the favorable cooperation agreement. It has long been held that prosecutors should not vouch for its witnesses and permitting this type of examination only encourages and promotes improper vouching. Additionally, the jury could have understood that if it acquitted the defendant the witness would be prosecuted for perjury.

The prosecutor's argument essentially is that because the trial court ruled that the entire agreement could be entered into evidence any use of it was not improper. First, as argued above, the defendant challenges *Gentile*, supra and submits that such truth telling provisions of an agreement should not be admissible. Secondly, the prosecutor in its brief does not address how the prosecutor's reading of the provisions and the state's elicitation of answers by the witness did not amount to an improper vouching for its witness. See, *United States v. Roberts,* 618 F.2d 530, 536 (9th Cir. 1980)(truth telling provisions send

message that prosecutor knows the truth and will assure it will be spoken); *State v. Ish*, 170 Wn. 2d 189, 198 (2010) (truth telling provisions especially in direct examination likely to result in improper vouching).

"Evidence that bolsters a witness' credibility before it has come under attack is prohibited." Conn.Code Evid. § 6–11(a); C. Tait & E. Prescott, Connecticut Evidence (4th Ed. 2008) § 6.27.2(a), p. 342 (discussing prohibition of '[e]vidence accrediting or supporting a witness's honesty or integrity [before] the witness's credibility has first been attacked')." *State v. Juan V.,* 109 Conn.App. 431, 439, 951 A.2d 651, cert. denied, 289 Conn. 931, 958 A.2d 161 (2008). "A witness may be asked on direct examination questions necessary to lay a foundation for the later admission of other evidence, even if such foundation questions might appear to accredit the witness. Such use does not violate the general rule that accreditation before impeachment is improper. [Id., at 431]; *State v. Albino,* 130 Conn. App. 745, 773–74, 24 A.3d 602, 621 (2011). Contrary to the state's interpretation, the Code of Evidence does not permit a party to bolster a witness' credibility before it is impeached. See, S/B 27-28.

The state's reliance on *State v. Elmer G.*,333 Conn. 176, 200-201 (2019) is misplaced. Even the *Elmer G.,* Court recognized that pursuant to Conn. Code of Evid. § 6-6 (a) "evidence bolstering a witness' credibility generally is inadmissible but may become admissible if the witness' credibility first has been attacked". Id. at 197. In *Elmer G.*, the defendant sought to have reviewed as unpreserved prosecutorial misconduct claims, arguments that the state improperly bolstered the credibility of two of its witnesses during questioning. In *Elmer G.,* the prosecutor asked the victim on direct examination "are you

making this stuff up" and "has anybody put you up to testifying the way that you have here"? [2]

In distinguishing the situation from *Singh*, the *Elmer G.,* Court noted that "information about the victim's and Lopez's own motivation for lying....is exactly the type of information a jury requires to assess their credibility." (citation and quot. marks omitted) Id. at 199. Here, the state didn't elicit information about any motivations that were reflected in the evidence that the witness may have had for lying, rather the state unfairly bolstered the witness' credibility by reading the truth telling provisions and eliciting from the witness whether he agreed and or understood the obligation to tell the truth. Intertwined in the wording of the truth telling provisions is the danger the jury would understand that the prosecutor and the trial judge would be the decision makers that assessed and knew if the witness was telling the truth. This goes beyond the questioning deemed appropriate in *Elmer G.* Here, the reading of the truth telling provisions would confuse the issues for the jury. Because of the nature of the defendant's claim of bolstering, the reading and eliciting of the truth telling provisions it is not purely a claim of violating the evidentiary rule. Rather it is also a claim that the truth telling provisions permitted the prosecutor to unfairly vouch for its witness, which is a violation of due process. The claim here would be a due process violation no matter if it took place on direct or during cross-examination. The state does not address the improper vouching aspect of the claim and simply casts the claim as a proper bolstering of the witness claim. Here, the prosecutor didn't merely point out that the witness had a cooperation agreement and that pursuant to that agreement the witness had an

2. More questioning along the lines of whether the witness was telling the truth occurred during the redirect examination. Id. at 197.

obligation to testify truthfully, rather the prosecutor read out loud all of the truth telling provisions which crossed the line. See, *United States v. Ramos*, 314 Fed. Appx 344, 347 (2nd Cir. 2008)(asking a single question concerning a witness' obligation to tell the truth pursuant to an agreement maybe permissible). Here, it is a violation of due process and an improper vouching when the state uses the cooperation agreement to put before the jury the idea or suggestion that the state and judge have some special knowledge to determine if the witness is testifying truthfully, that the deal would be void and that the witness could face perjury charges. See, *People v. Enos*, 168 Mich. App. 490, 494-495 (1988).

The introduction of this evidence was harmful. See, S/B 30. The provisions of the agreement went beyond a promise to testify truthfully. Id. The provisions that inform that the witness is obligated per the agreement and that the state can void the agreement if it is reasonably determined that the witness did not tell the truth unfairly vouch for the witness' testimony and informs the jury that the prosecutor and judge can determine whether the witness is telling the truth. The jury is never instructed that the promise in the agreement does not add to the obligation that is imposed by the oath, that the prosecutor doesn't necessarily know if a witness is being truthful and that an acquittal doesn't mean that the state would seek a prosecution for perjury.

Both Capers and Bacote were extremely important witnesses for the state because no eyewitness to the actual shooting testified. Bacote and Capers' essentially proved the state's case that the defendant had been the person that shot the victim. Both Capers and Bacote had a huge incentive to testify falsely in order to benefit from the agreement. The court did not give any type of cautionary instructions regarding the provisions especially one

that the state does not know whether a witness is testifying truthfully. This Court should find harmful error and reverse the defendant's convictions.

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

The state argues that the prosecutor's arguments that directly highlighted to the jury that the defendant sat throughout the trial and had the opportunity to hear all the testimony and then "decide which pieces of evidence he wanted to disagree with and which pieces of evidence he was going to concede" and argument that because the shooting was not on camera "he tells you the story that we've been talking about", are specific and therefore proper. S/B 33. The prosecutor's argument pointed to evidence that the defendant agreed with because in the state's view such evidence could not be disputed; the defendant's mother identified him in the video, the time he left his home and that his photo was on the cell phone. The prosecutor 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 moment of the shooting...he tells you the story that we've been talking about". Just because the shooting was not captured on camera does not mean that the defendant made up a "story" as to what happened. The prosecutor has not tied the evidence to support a claim of tailoring. The prosecutor has not pointed to evidence that would permit an inference that the defendant had fabricated his account. Here, the prosecutor's overall argument constituted an improper generic one; he specifically pointed out to the jury that the defendant sat through the trial and was thus able to testify according to the testimony that he heard. In *State v. Weatherspoon*, 332 conn. 531, 553 (2019) our Supreme Court noted that specific tailoring arguments that are warranted by the evidence may be permissible but

arguments of tailoring that are not supported by the evidence are not permissible. The fact that no cameras captured the shooting is not evidence that supported that the defendant tailored his testimony. It was improper for the state to urge the jury to draw an inference that the defendant had the opportunity to make up his testimony because no cameras captured the shooting. The *Weatherspoon* Court additionally noted that many states prohibit general tailoring arguments as a matter of "sound trial practice or state law". Id. at 554.

The state additionally asserts that if the argument can be considered a generic tailoring argument, it nonetheless was proper because it did not violate our state constitution. S/B 35. The defendant relies on his argument contained in his original brief pages 34-39 that tailoring arguments violate our state constitution.

The state additionally argues that if the prosecutor's argument is improper it did not deprive the defendant of his due process right to a fair trial. S/B 39. The state asserts that the state's argument "was couched within efforts to juxtapose the defendant's version of events with independent testimony and evidence" and therefore the state argues it was not egregious. S/B 39. The state argued that the defendant's testimony concerning what happened during the shooting was not on camera, the state did not argue specific evidence that would support an inference that the defendant's version of events was fabricated. No eyewitnesses to the shooting testified. The state's argument was egregious because it went to the heart of the defendant's defense, his version of the events. The state didn't just point to conflicting evidence in the record, the state explicitly brought to the jurors' attention that the defendant sat throughout the trial and had the "opportunity to decide which pieces of evidence he wanted to disagree with and which pieces of evidence he was going to concede". Contrary to the state's assertion, the credibility of the witnesses, including the

defendant's testimony, was crucial in this case. It is true that the state's case depended heavily on the video evidence showing the defendant entering and leaving the scene, and the Snapchat video showing the defendant in possession of a gun, however the defendant's testimony was the only testimony from someone at the scene when the shooting occurred. Here, since there was no direct evidence that contradicted the defendant's version of events, the state's argument unfairly undermined his theory of defense. Such arguments impinge on the defendant's constitutional right to testify and places the defendant in a difficult situation in considering whether he should take the stand. The state's case was not that strong relying on Capers' and Bacotes' testimony, whom were not at the scene and had favorable cooperation agreements with the state.

The defendant asserts that the error is not only a due process violation but also one that implicates and infringes on the defendant's specific Fifth Amendment rights. See, *State v. Payne,* 303 Conn. 538, 563 (2012). As such the state has the burden to prove the error was harmless beyond a reasonable doubt, which they cannot do. The prosecutor's generic tailoring argument was harmful and this Court should reverse the defendant's convictions and remand for a new trial.

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CERTIFICATION

Pursuant to Conn. Prac. Bk. § § 62-7 and 67-2 the undersigned certifies that the attached Reply Brief are true copies of the electronically submitted Brief, and that true copies were mailed first class postage prepaid this 21nd day of July, 2021 to Timothy Costello, Juris No. 427474, 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; timothy.costello@ct.gov

It is also certified that a copy was mailed first class postage prepaid to my client, James Graham #414529, Garner Correctional, 50 Nunnawauk Road, POB 5500, Newtown, CT 06470.

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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