SUPREME COURT

OF THE

STATE OF CONNECTICUT

JUDICIAL DISTRICT OF NEW HAVEN

S.C. 20447

STATE OF CONNECTICUT

V.

JAMES GRAHAM

BRIEF OF THE STATE OF CONNECTICUT–APPELLEE
WITH ATTACHED APPENDIX

TO BE ARGUED BY:

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NATURE OF THE PROCEEDINGS

In 2017, the defendant, James Graham, and two accomplices gunned-down and robbed a member of a rival gang on a Hamden bike path. Thereafter, the State charged the defendant with one count each of felony murder; General Statutes § 53a-54c; conspiracy to commit robbery in the first degree; General Statutes §§ 53a-48(a), 53a-134(a)(2); and carrying a pistol without a permit; General Statutes § 29-35(a). Defendant's Appendix (D.App.) at A4-A5. Following a trial, a jury found the defendant guilty as charged. Transcript (T.)10/3/19 at 6-9; D.App. at A48. Thereafter, the trial court, *Vitale, J.*, imposed a total effective sentence of 52 years of incarceration. T.12/12/19 at 30-31; D.App. at A48.

COUNTERSTATEMENT OF THE FACTS

On the afternoon of November 13, 2017, the defendant and two associates, Brennan Coleman and Robert Moye, had walked from the defendant's home on Bassett Street in New Haven to the vicinity of where the Canal Line Trail, a jogging and bike path, intersects with Dudley Street in Hamden. T.9/24/19 at 127-31, 141; T.10/1/19 at 24-26, 44-45, 52; see State's Exhibits (St.Exs.) 3, 4 (surveillance videos); 78 (map). At Dudley Street, at 3:39 p.m., they observed Donovan Lowndes, with whom Coleman and Moye were acquainted, driving by. T.9/25/19 at 28-29. Coleman flagged Lowndes down, and the three men approached his vehicle and engaged him in conversation. Id. at 31-32; St.Exs. 4 (surveillance video), 83, 84 (still images). As they spoke, Coleman pulled out a semiautomatic pistol that he had newly acquired and showed it to Lowndes. T.9/25/19 at 32-33. He handed the gun to Lowndes, who examined it and then handed it back to Coleman. Id. at 33-37; St.Exs. 83, 84. After he had returned the gun to Coleman, Lowndes drove away. T.9/25/19 at 35-37.

The defendant, Coleman, and Moye then observed the victim, Leandre Benton, walking on the trail. T.9/24/19 at 125-27; T.9/25/19 at 140; T.9/26/19 at 54; T.10/1/19 at 26-27; see St.Ex. 3. The defendant, Coleman, and Moye were members of "Read Street" and "Starr Block," allied groups from New Haven. T.10/1/19 at 34-35; T.10/2/19 at 13-14. Benton, however, was affiliated with "SLB," a rival group from Hamden. T.9/25/19 at 141;

T.10/2/19 at 14. When they saw Benton, Coleman said, "[L]et's go stain him," meaning that they should rob him. T.9/26/19 at 54-55; see also T.9/25/19 at 140.

The defendant and Coleman then approached Benton along the bike path. T.9/25/19 at 140. Coleman asked Benton whether he was a member of "SLB." Id. Benton responded by punching Coleman in the face and knocking him to the ground. Id. at 140-41; T.9/26/19 at 55-56. Coleman then pulled out a nine millimeter pistol and tried to shoot Benton, but the gun jammed. T.9/25/19 at 140-43; T.9/26/19 at 56. The defendant then pulled out a .380 caliber pistol of his own and shot Benton in the head and torso. T.9/25/19 at 7-14; 141-42; T.9/26/19 at 55-57. The wounds ultimately proved fatal. T.9/25/19 at 14; St.Exs. 51-55 (autopsy photos), 80 (autopsy report).

After the defendant had shot Benton, he and Coleman removed money and a cellular phone from his body. T.9/26/19 at 58-59. They also stole some of Benton's clothing.[1] Id. The defendant, Coleman, and Moye then fled the scene on foot. T.10/1/19 at 28-29.

Thereafter, Moye used the Facebook Messenger application on his phone to contact an associate, Steven Capers. T.9/25/19 at 68-76, 83, 163-64. He asked Capers whether he could pick him up. Id. at 76. Capers was in West Haven with his girlfriend, Kristen Avery; nevertheless, he agreed to give Moye a ride. Id. at 73-74, 76-77. Moye then asked to be picked up on St. Mary Street in Hamden. Id. at 77.

Thereafter, Capers drove with Avery to St. Mary Street and arrived within 15 to 20 minutes. T.9/25/19 at 78, 80. Moye, Coleman and the defendant then emerged from a back yard near the intersection with Dudley Street and entered Capers' car. Id. at 80-83. They appeared "nervous," "anxious," and out of breath, and they told Capers to drive away while the car doors were still open. Id. at 82-83. Capers sensed that something was amiss

[1]When a passerby found Benton lying in the grass next to the bike path shortly after the shooting, Benton was clutching a gold watch that was no longer fastened to his wrist in his left hand. T.9/24/19 at 35, 37, 43-44, 54; T.10/1/19 at 19-20.

because he could smell the odor of gunpowder and could see police activity in the area. Id. at 83-85. He asked what had happened, and the three men responded that "they had to get it right on cuz."[2] Id. at 85. Capers surmised they had committed a crime, and he did not want to get into trouble. Id. at 84-85. Therefore, he refused to drive and ordered them out of his car, after which they exited and ran southbound. Id. at 84-85, 87-88, 168-69.

Thereafter, between 4:05 and 4:21 p.m., Moye used Facebook Messenger to contact Shyquan Bellamy, a man who accepted money in exchange for rides in his car. Id. at 189-92, 195, 198-99. Moye asked Bellamy to pick him up on Bassett Street in New Haven and drive him to Waterbury. Id. at 192. Bellamy then drove to Bassett Street and arrived within minutes. Id. at 195, 198-99. Once there, Bellamy called Moye, who came outside along with Coleman and the defendant. Id. at 194, 197-98. All three men entered Bellamy's car, and Bellamy then drove them to a location in Waterbury and dropped them off there. Id. at 194-96, 198.

Later that evening, Moye initiated a FaceTime video call with Capers. Id. at 91-92. Coleman and the defendant, who were with Moye, were visible to Capers and told him that they were in Waterbury. Id. at 94. During the call, Moye, Coleman, and the defendant all were "flashing" guns. Id. at 94, 108. Moye had a .38 caliber revolver, Coleman had a nine millimeter pistol, and the defendant had a .380 caliber pistol.[3] Id. at 94-95, 107-09.

At 8:58 p.m. on the evening of the shooting, Moye used the Snapchat application on his phone to record a brief video. T.9/26/19 at 98-100, 107; T.10/1/19 at 63-67. That video depicted Moye and Coleman displaying guns while the defendant looked on with a grin on

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[2]Capers understood that this phrase "could mean stealing. It could mean fighting. It could mean shooting. It could mean robbing." T.9/25/19 at 86-87.

[3]Capers testified that, from prior interactions, he had known Moye to carry a .38 caliber revolver, that Coleman carried a nine millimeter semiautomatic pistol, and that the defendant always carried a chrome .380 caliber semiautomatic pistol. T.9/25/19 at 94-95, 107-08. Capers stated that the guns he observed during the FaceTime call were the same firearms that he had seen the three of them possess on prior occasions. Id. at 108-09.

his face.[4] T.10/1/19 at 63-67; St.Ex. 75 (Snapchat video img_2606.mp4).

About one week later, the defendant was at the home of his friend, Jalen Bacote. T.9/26/19 50-52. Bacote observed a Facebook post about the death of the victim, with whom Bacote was acquainted, and mentioned it to the defendant. Id. at 49-50, 52. The defendant responded that "that was their work." Id. at 53. He then detailed how he had been with Moye and Coleman when they saw Benton; Coleman suggested that they rob him; they then approached Benton; Coleman pulled a gun; and Benton punched Coleman, who fell to the ground. Id. at 54-56. The defendant stated that Coleman then directed him to shoot Benton, after which, the defendant admitted, he shot Benton.[5] Id. at 56-57. He also admitted that he and his cohorts then took money, a phone, and clothing from Benton's body. Id. at 58-59, 74. He said that "they took his clothes. They stripped him." Id. at 59, 74.

Also about one week after the shooting, Capers was at Moye's home. T.9/25/19 at 138. Moye asked Capers to swear that he would not tell anyone what he was about to say. Id. at 139. Moye then detailed the events of Benton's murder. He stated that he, Coleman, and the defendant were near Dudley Street when they saw Benton; they decided to ask if he was "SLB" and then rob him; when they did so, Benton punched Coleman in the face and Coleman fell; Coleman tried to shoot Benton, but his gun jammed; and the defendant then shot Benton with his own .380 caliber pistol. Id. at 140-42. Moye did not say whether he,

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[4]The State also presented a Snapchat video that Moye had recorded two days before Benton's murder. T.9/26/19 at 95-97, 107. In that video, Moye is seen brandishing a revolver before he reverses the camera and records the defendant holding a chrome semiautomatic pistol. St.Ex. 75 (Snapchat video img_2539.mp4); see also St.Ex. 35 (still image of defendant holding pistol). Capers testified that the gun the defendant is holding in the images was the .380 caliber pistol Capers had seen him carrying on many occasions. T.9/26/19 at 112-14.

[5]Bacote knew that the defendant had shot Benton with a silver .380 caliber pistol because that was the only type of gun that he had, and Bacote had seen him carrying it on multiple prior occasions. T.9/26/19 at 57, 65-66. Bacote testified that he had been present when the defendant purchased that gun in September or October, 2017. Id. at 66-67. The defendant allowed him to inspect the gun, and Bacote observed an imprint on the side of the pistol stating that it was .380 caliber. Id. at 68; see also T.10/2/19 at 14-15; St.Ex. 90 (Snapchat video depicting defendant holding pistol recognized by Bacote).

Coleman, and the defendant stole anything from Benton. Id. at 143-44.

The defendant testified in his own defense. He admitted that he, Moye, and Coleman were present at the scene of Benton's murder, but he denied that they were involved. T.10/1/19 at 47, 67-68. Instead, he asserted that he, Moye, and Coleman had walked to Dudley Street because Coleman was supposed to meet someone there. Id. at 26, 44-45. That person, however, did not show up, and the three of them then began walking southbound toward the defendant's home. Id. at 26-27, 46. Along the way, they encountered Benton, whom the defendant denied knowing. Id. at 26, 36, 45. Benton called them over and asked to purchase a certain quantity of marijuana, which Coleman happened to be carrying. Id. at 26, 46-47. The defendant claimed that, as the drug deal proceeded, he looked up and saw an unknown man wearing a black sweat suit and hooded jacket with his face covered approaching from behind them and pointing a gun. Id. at 27-28, 47-49. The defendant then ran away and heard gunshots as he departed. Id. at 28, 49-50.

The defendant claimed that he, Moye, and Coleman then returned to his house and later traveled to Waterbury in Bellamy's car. Id. at 28-30. He asserted that they went there to obtain guns because someone had shot at them. Id. at 31. He denied that any of them had had guns at the time of the shooting and contended that he did not see any of them with guns until after they had obtained them in Waterbury.[6] Id. at 33, 42-43. He acknowledged that the three of them had approached Lowndes' vehicle prior to the shooting, but he denied that Coleman had shown Lowndes a gun at that time. Id. at 43. Instead, the defendant claimed that Coleman had shown Lowndes a cell phone. Id. The defendant also denied that they encountered Capers near the scene or entered his car. Id. at 31.

[6]The defendant conceded that he was known to carry a gun, but he denied that it was a .380 caliber pistol. T.10/1/19 at 39-40. Instead, he asserted that he carried a nine millimeter gun. Id. He acknowledged that a photo in evidence; St.Ex. 35 (which Capers had testified depicted the defendant holding his usual .380 caliber pistol); showed him possessing a gun in the days before the shooting, but he claimed that it was not his normal gun and he did not know the caliber of the gun depicted in that image. T.10/1/19 at 40-41, 43-44.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED TESTIMONY REGARDING A STATEMENT AGAINST PENAL INTEREST BY THE DEFENDANT'S COHORT STATING THAT THE DEFENDANT SHOT THE VICTIM

The defendant claims that the court abused its discretion when it admitted testimony by Capers that Moye had told Capers that the defendant had shot Benton. Defendant's Brief (D.B.) at 6-17. He argues that: (1) Capers' testimony was hearsay that did not constitute a statement against penal interest under Code of Evidence § 8-6(4); and (2) that admission of Capers' testimony violated the defendant's confrontation rights. Id. The claims fail because: (1) the trial court properly found that Moye's statements were against his penal interest; (2) the trial court did not abuse its discretion when it found the statements trustworthy; and (3) the admission of Capers' testimony did not violate the defendant's confrontations rights because Moye's statements were nontestimonial. Alternatively, any error was harmless.

A. Facts Pertinent To This Claim

During direct examination of Capers, the State alerted the trial court that it anticipated that the defendant would object to inquiry regarding a "dual inculpatory statement" given by Moye to Capers. T.9/25/19 at 118. The State conducted a proffer examination of Capers outside of the jury's presence. Id. at 121-25. Therein, Capers detailed admissions Moye had divulged to Capers and Donald Harris, another associate of theirs, in Moye's back yard approximately one week after the murder.[7] Id. Moye made Capers and Harris swear that they would not reveal what he was about to say. Id. at 122-23. He then admitted that he, Coleman, and the defendant had seen Benton on the bike path; that they decided "to stain" him, meaning to rob him; that they approached and asked if Benton was "SLB"; that Benton punched Coleman; that Coleman attempted to shoot Benton, but his gun jammed; and that

[7]By the time of the proffer, Capers already had testified before the jury that he had known Moye for six or seven years prior to the date of the conversation, and that Moye, as well as Harris, Coleman, and the defendant, were part of a group with whom Capers would get high and drive around. T.9/25/19 at 68-73.

the defendant then shot Benton in the head. Id. at 123-25. Moye described how the bullet passed through Benton's head and came out the opposite side. Id. at 124. Moye also said that Coleman had a "baby nine" and the defendant was carrying a .380 caliber pistol. Id. at 123. Moye did not say whether he was carrying a gun himself, and he did not say whether the three of them stole anything. Id. at 123-24. Moye, however, affirmed that, when they approached Benton, they planned to ask if he was "SLB" and then rob him. Id. at 125.

Following this proffer, the defendant objected that Capers' testimony was hearsay. Id. at 130. Further, he contended that it was not admissible as a statement against penal interest under Code of Evidence § 8-6(4) because it was "very self-serving," in that Moye appeared to distance himself from involvement in the crime by not saying that he was involved in shooting Benton, and by not admitting that he was carrying a gun at the time of the shooting. Id. at 130-31. The State, in turn, argued that the testimony regarding Moye's admissions was admissible as a statement against penal interest. Id. at 132-33. It noted that Moye made the statements only one week following the shooting; he made the statements to a friend; and, in making the statements, he placed himself at the scene at the time of the shooting, involved himself in a plan "to stain" Benton, and, thereby, "implicated himself in two felonies, the robbery and the felony murder." Id.

Thereafter, the trial court overruled the objection to Capers' testimony. Id. at 133-35. It found that Moye was unavailable.[8] Id. at 133. It then found that Moye made the statements to Capers only one week after the shooting and that he made the statements to Capers, a friend in whom Moye would be likely to confide. Id. at 134. It also specifically noted that Moye had Capers swear an oath not to disclose his admissions. Id. Further, it observed that surveillance videos already in evidence showed Moye, Coleman, and the defendant together

[8]The State had alerted the court that Moye's attorney had informed it that she would advise him to invoke his Fifth Amendment privilege if called to testify, and that he had invoked that privilege in a prior probable cause hearing. T.9/25/19 at 131. The defendant agreed that Moye was unavailable to testify. Id. at 131-32.

near the scene of the crime, and that Lowndes had testified that at least one of them was armed. Id. The court then rejected the defendant's argument that Moye's statements were not against his penal interest because they were self-serving. Id. at 135. It found that they were not self-serving because Moye implicated himself in a plan to rob Benton. Id. Based upon all of these factors, the court found that Capers' testimony regarding Moye's admissions was admissible as a statement against penal interest. Id.

Capers then testified before the jury regarding Moye's admissions consistently with the above-detailed proffer. Id. at 138-44. In his testimony before the jury, Capers further noted that Moye "just kept saying that they probably was going to get caught." Id. at 144.

B. Standard Of Review And Relevant Legal Principles

The standard applied to a trial court's admission of evidence is well established:

> To the extent that a trial court's admission of evidence is based on an interpretation of the Code of Evidence, [this Court's] standard of review is plenary. [This Court] review[s] the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion….

(Brackets in original omitted; citation omitted; quotation marks omitted.) State v. Ayala, 333 Conn. 225, 243 (2019).

> It is axiomatic that if premised on a correct view of the law, the trial court's ruling on the admissibility of evidence is entitled to great deference…. In this regard, the trial court is vested with wide discretion in determining the admissibility of evidence…. Accordingly, the trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion…. Furthermore, in determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling, and [this Court] will upset that ruling only for a manifest abuse of discretion.

(Brackets in original omitted.) Id. at 243-44.

Pursuant to Connecticut Code of Evidence § 8-2(a), "[h]earsay is inadmissible, except as provided in the Code…." When a declarant is unavailable as a witness, however, Connecticut Code of Evidence § 8-6 excludes from the hearsay rule's coverage, inter alia:

> A trustworthy statement against penal interest that, at the time of its making, so far tended to subject the declarant to criminal liability that a reasonable person

> in the declarant's position would not have made the statement unless the person believed it to be true. In determining the trustworthiness of a statement against penal interest, the court shall consider (A) the time the statement was made, and the person to whom it 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).

> In short, the admissibility of a hearsay statement pursuant to § 8-6(4) of the Connecticut Code of Evidence is subject to a binary inquiry: (1) whether the statement … was against the declarant's penal interest and, if so, (2) whether the statement was sufficiently trustworthy.

(Brackets in original omitted; quotation marks omitted.) State v. Bonds, 172 Conn. App. 108, 117, cert. denied, 326 Conn. 907 (2017). "No single factor for determining trustworthiness … is necessarily conclusive…. Rather, the trial court is tasked with weighing all of the relevant factors set forth in § 8-6(4)…." (Brackets in original omitted.) State v. Patel, 194 Conn. App. 245, 273 (2019), cert. granted, 334 Conn. 921 (2020). The weighing of these factors is reviewed for an abuse of discretion. See State v. Pierre, 277 Conn. 42, 68 (2006).

C. The Defendant Has Failed To Establish That The Trial Court Abused Its Discretion When It Admitted Capers' Testimony Regarding Moye's Admissions As Statements Against Penal Interest

The defendant claims that the trial court abused its discretion when it admitted Capers' testimony about Moye's comments as statements against penal interest because, he argues: (1) Moye's statements were not against his penal interest, in that they were dual inculpatory statements that minimized his role in the criminal conduct while inculpating the defendant and Coleman; and (2) the statements were not trustworthy. Neither argument has merit.

First, the trial court properly found that Moye's statements were against his penal interest, even though Moye did not portray himself as the shooter. His statements revealed himself as complicit in the crimes because, when he, Coleman, and the defendant approached Benton, they already had decided to "stain" him, i.e. rob him. Moye, therefore, had admitted that he participated in the transaction -- an armed robbery that resulted in Benton's death -- and thereby exposed himself to liability for conspiracy, robbery, and/or

felony murder, if not other crimes. See State v. Camacho, 282 Conn. 328, 360 (2007) (statements against penal interest where declarant and defendant implicated equally in crimes); State v. Rivera, 268 Conn. 351, 368-69 (2004) (statements against penal interest where declarant exposed as principal or accessory to same charges as defendant); State v. Azevedo, 178 Conn. App. 671, 685-88 (2017) (statements against penal interest where declarant portrayed as accessory to defendant's crimes), cert. denied, 328 Conn. 908 (2018).

Nevertheless, the defendant argues that the statements were not against Moye's penal interest because he depicted Coleman and the defendant as having attempted to shoot or having shot Benton, respectively, but did not implicate himself in the shooting. He argues that, because Moye did not admit to shooting Benton himself, those portions of his statements implicating the defendant and Coleman were not against Moye's penal interest and, therefore, were not admissible. This Court, however, has rejected an argument that dual inculpatory statements, such as in the present case, are inadmissible as statements against penal interest. See State v. Schiappa, 248 Conn. 132, 147-54 & n.15 (1999). Moreover, this Court has held that selective admissions, including those which tend to inculpate a defendant while limiting a declarant's culpability, are admissible. See State v. Bryant, 202 Conn. 676, 696-97 (1987) ("[o]ur view is that where the disserving parts of a statement are intertwined with self-serving parts, it is more prudential to admit the entire statement and let the trier of fact assess its evidentiary quality in the complete context"). This Court found that a statement implicating a declarant in a broader criminal transaction was against his penal interest, even though he did not implicate himself in all of the acts of his cohort. See id. ("[t]he argument that [declarant's] direct confessions to the burglary and his neutrality as to the sexual assault suggest an improper motive to involve himself just enough to help the defendant but not enough to inculpate himself on the sexual assault … is no bar to admissibility. The claim that the declarations were selective bears on the appropriate weight to be given the evidence and not its admissibility"). In reaching these conclusions, this Court "reject[ed] a narrow and inflexible definition of a statement against penal interest in favor of a definition which includes

not only confessions, but other remarks which would tend to incriminate the declarant were he or she the individual charged with the crime." Id. at 695. This Court provided that, "[t]he 'against [penal] interest' exception is not limited to a defendant's direct confession of guilt." Id. Rather, "[i]t applies as well to statements that 'tend' to subject the speaker to criminal liability." Id.

The Code of Evidence incorporates these principles. Its commentary provides that "statements other than outright confessions of guilt may qualify" as statements against penal interest, and that self-serving aspects only go to the statement's weight. Conn. Code Evid. § 8-6(4), commentary. Neither this Court nor the Code has limited the definition of "against penal interest" in the context of a dual inculpatory statement only to statements that expose a declarant to the same scope of criminal liability as the charged defendant.[9]

Whether a dual inculpatory statement that portrays a declarant in a better light than a defendant is against the declarant's penal interest also may be informed by the party to whom the declarant made the statement. A declarant who inculpates a cohort during police interrogation while minimizing his own role in a crime may be viewed skeptically because, in that circumstance, the declarant may be trying to minimize his own liability by portraying himself as having played a lesser role in the criminal scheme. See State v. Boyd, 214 Conn. 132, 139-40 (1990); see also Williamson v. United States, 512 U.S. 594, 601-02 (1994); id. at 607-08 (Ginsburg, J., concurring) ("[a] person arrested in incriminating circumstances has a strong incentive to shift blame or downplay his own role in comparison with that of others,

[9]Statements against penal interest are not limited to a declarant's admission to engaging in criminal conduct jointly with a defendant. See Conn. Code Evid. § 8-6(4), commentary (providing that statements against penal interest are admissible in civil proceedings). The exception also permits admission of statements describing a declarant's unilateral criminal activity where relevant. See United States v. Dupree, 870 F.3d 62, 80-81 (2d Cir. 2017) (finding deceased victim's statement properly admitted "because it referred to his drug activity" providing motive for murder), cert. denied, 138 S. Ct. 1178 (2018); United States v. Persico, 645 F.3d 85, 102-03 (2d Cir.) (murder victim's statement that he regularly met with defendant properly admitted), cert. denied, 565 U.S. 1042 (2011).

in hopes of receiving a shorter sentence and leniency in exchange for cooperation"). Even that circumstance, however, does not present an absolute bar to admission of a dual inculpatory statement, though its admission may be somewhat more restricted. See id. at 606-07 (Scalia, J., concurring) ("a declarant's statement is not magically transformed from a statement against penal interest into one that is inadmissible merely because the declarant names another person or implicates a possible codefendant. For example, if a lieutenant in an organized crime operation described the inner workings of an extortion and protection racket, naming some of the other actors and thereby inculpating himself on racketeering and/or conspiracy charges, I have no doubt that some of those remarks could be admitted as statements against penal interest. Of course, naming another person, if done, for example, in a context where the declarant is minimizing culpability or criminal exposure, can bear on whether the statement meets the … standard").[10] Where, however, a statement is not made to police in the wake of a declarant's detention or arrest, any minimization of his role does not inform whether the statement is against his penal interest because the circumstances in which the statement is uttered do not present the opportunity for the declarant to ingratiate himself with the authorities or try to lessen his exposure.[11] See People

[10]The defendant repeatedly contends that Moye actively tried to lessen his culpability for the shooting. It is hard to see, however, how Moye's statement could be seen as downplaying his role. Instead, it may have been an accurate reporting of his conduct during the robbery and murder, i.e., that he played a lesser role than Coleman and the defendant, insofar as Moye never pulled his own gun. Absent evidence that Moye minimized his own conduct from what actually occurred, there is no basis for the defendant's argument that Moye's statement was not against his penal interest, as accurate admissions of de minimis conduct can constitute statements against penal interest. See Williamson v. United States, 512 U.S. at 603 (noting statement "'Sam and I went to Joe's house' might be against the declarant's interest if a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy").

[11]In this regard, the Advisory Committee's Notes to the analogous Federal Rule of Evidence 804(b)(3) provide: "Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. … On the other hand,

v. Flinner, 10 Cal.5th 686, 736 (2020); see also United States v. Manfre, 368 F.3d 832, 841-42 (8th Cir. 2004); People v. Myhand, 120 A.D.3d 970, 975-76 (N.Y. App. 2014), lv. denied, 30 N.E.3d 172 (N.Y. 2015); cf. State v. Britt, 881 N.W.2d 818, 826-27, 845-47 (Neb. 2016) (statement identifying defendant as shooter in felony murder inadmissible where evidence defendant and declarant entered home and two shooters opened fire, but declarant's only identified defendant as shooter).[12] Here, Moye made his statements to a friend during a casual encounter; he did not utter his admissions while in custody. Thus, a concern that his statements were purposed to curry favor with authorities and shift blame is not present.

Therefore, it is plain that the trial court properly found Moye's admissions against his penal interest. He admitted that he, Coleman, and the defendant had decided to "stain" Benton, meaning to rob him, and that, during the ensuing robbery, the defendant ultimately shot him. Moye's statement that he was part of a conspiracy to rob Benton was against his penal interest in that it revealed his intimate knowledge of the conspiracy that led to the events culminating in Benton's death. See United States v. Tocco, 200 F.3d 401, 414-15 (6th Cir. 2000) (statements revealing knowledge of conspiracy against penal interest). Such statements so far tended to subject Moye to criminal liability that a reasonable person would not have made them unless he believed them to be true. Indeed, the very fact that Moye

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the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying…." (Emphasis added.) Fed. R. Evid. 804(b)(3), Advisory Committee Notes; see State's Appendix at A-14-A-15.

[12]The State notes that in State v. Britt, 881 N.W.2d at 846, the court found that, though a declarant's "statements were not directly designed to curry favor with the authorities insofar as they were made to acquaintances," the declarant "would believe that if any of these statements shifting blame were reported to the authorities, he would have a greater chance of striking a plea bargain and of receiving a lesser punishment for his crimes." To the extent that Britt suggests that a declarant's abstract hope that a partially self-exculpatory statement will make its way to police can inform a determination as to whether the statement is against his penal interest, that position is a bare outlier among precedents. Moreover, the degree to which the declarant in Britt appears to have attempted to craft a narrative contrary to evidence strongly indicating his greater participation in the charged murders greatly informed the court's determination that the statements were not against his penal interest. Id. Such a sharp conflict with independent evidence is not present in the instant case.

required Capers and Harris to swear oaths of secrecy before he made his statements further establishes that he understood that they were against his penal interest. See State v. Rivera, 268 Conn. at 368-69.

Next, the defendant contends that the trial court abused its discretion in finding Moye's admissions trustworthy. His argument lacks merit. Under the factors set forth in Code of Evidence § 8-6(4) -- the timing of Moye's statements, to whom he uttered them, the independent corroboration of his statements, and the degree to which the statements were against his penal interest -- all militated in favor of finding them trustworthy.

First, the timing of the statements supported a finding of trustworthiness. "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." State v. Camacho, 282 Conn. at 361. Here, Moye made his statements approximately one week following the murder. This narrow timeframe supported the trial court's finding that the statements were trustworthy. See State v. Smith, 289 Conn. 598, 631 (2008) (statements three months after crime trustworthy); State v. Camacho, 282 Conn. at 361 (one week after crime); State v. Pierre, 277 Conn. at 70-72 ("couple of weeks" after crime); State v. Rivera, 268 Conn. at 370 (within five months of crime); State v. Bryan, 193 Conn. App. 285, 304 (two weeks after crime), cert. denied, 334 Conn. 906 (2019); State v. Azevedo, 178 Conn. App. at 689 (three years after crime); cf. State v. Diaz, 109 Conn. App. 519, 547 (one year after crime untrustworthy), cert. denied, 289 Conn. 930 (2008).

Second, Moye made the statements to close associates during a casual encounter in his back yard. Capers detailed how he had known Moye for six or seven years, and how he, Harris, and Moye all were part of a group that regularly hung out together. See State v. Pierre, 277 Conn. at 69-70 (statements trustworthy where made to friend with whom declarant routinely socialized); see also State v. Bonds, 172 Conn. App. at 124-25 (relationship between declarant and witness supports finding of trustworthiness); cf. People v. Greenberger, 58 Cal. App. 4th 298, 335 (1997) ("[c]learly the least reliable circumstance

is one in which the declarant has been arrested and attempts to improve his situation with the police by deflecting criminal responsibility onto others. … However, the most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures"). Moreover, Moye required both Capers and Harris to swear oaths of secrecy. See State v. Smith, 289 Conn. at 631-32 (statement made in hushed tone and intended to be kept private trustworthy); State v. Rivera, 268 Conn. at 370 (statement made in confidence trustworthy).

Third, Moye's statements were partially corroborated. Although the shooting occurred in a blind spot not covered by surveillance cameras, videos captured Moye, Coleman, and the defendant in the vicinity of the crime scene both immediately before and after the shooting. See Walker v. United States, 167 A.3d 1191, 1210-11 (D.C. 2017) (partial corroboration by surveillance videos supported finding statement trustworthy). Further, Lowndes had testified that he observed Coleman in possession of a firearm when Coleman approached his car shortly before the shooting.[13] See People v. Myhand, 120 A.D.3d at 976 (statement trustworthy where some conduct independently observed).

Finally, the extent to which Moye's statements were against his penal interest supported finding them trustworthy. As previously noted, Moye admitted that he, Coleman, and the defendant planned to rob Benton, and that the defendant then killed him during the robbery. Such a statement was plainly against Moye's penal interest because it exposed him

[13]In addition to the factors expressly relied upon by the trial court in finding Moye's statements trustworthy, the State notes that additional independent evidence also corroborated the statements. For example, Moye said that the defendant used a .380 caliber pistol, which was corroborated by the .380 caliber bullet recovered from Benton's body at his autopsy. T.9/25/19 at 12-13; T.9/26/19 at 26-27, 29; St.Ex. 72 (recovered projectile). Moye also accurately recounted the nature of Benton's head wound, in that the bullet that struck Benton's head had entered near the mid-front of his head, passed through his cranium, and exited near his left ear. T.9/25/19 at 9-11; St.Exs. 55 (photo of bullet trajectory); 80 (autopsy report). Moreover, the fact that Benton's watch was found removed from his wrist and clutched in his hand corroborated Moye's statement that he, Coleman, and the defendant had planned to rob Benton.

to liability for multiple crimes, up to and including felony murder. Based on these factors, the trial court did not abuse its discretion when it found Moye's statements trustworthy.

D. The Trial Court Did Not Violate The Defendant's Confrontation Rights

Next, the defendant contends that admission of Moye's statements violated his confrontation rights under the sixth amendment to the United States constitution. D.B. at 6-7, 11, 16. The claim is unpreserved, in that the defendant only objected to Capers' testimony as hearsay and did not claim that his testimony would violate the confrontation clause. T.9/25/19 at 130-31. Nevertheless, he seeks review of his claim under State v. Golding, 213 Conn. 233, 239-40 (1989).[14] D.B. at 11. The claim fails under Golding's third prong because a constitutional violation does not exist, in that admission of Moye's statements did not constitute testimonial hearsay.

As the United States Supreme Court prescribed in Crawford v. Washington, 541 U.S. 36, 60-69 (2004), the sixth amendment's confrontation clause does not permit the admission of testimonial hearsay against a criminal defendant. See State v. Camacho, 282 Conn. at 348-49. The Crawford rule, however, does not prohibit the admission of nontestimonial hearsay, provided it satisfies an exception to the hearsay rule at state evidentiary law. Id. at 349; State v. Rivera, 268 Conn. at 363; see Crawford v. Washington, 541 U.S. at 68 ("[w]here nontestimonial hearsay is at issue, it is wholly consistent with the framers' design to afford the states flexibility in their development of hearsay law -- as does [Ohio v.] Roberts, [448 U.S. 56, 66 (1980),] and as would an approach that exempted such statements from confrontation clause scrutiny altogether." (Brackets in original omitted.)). "Thus, when faced

[14]Under Golding, as modified by In re Yasiel R., 317 Conn. 773, 781 (2015), "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation … exists and … deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) 213 Conn. at 239-40.

with the issue of the contested admission of hearsay statements against the accused in a criminal trial, courts must first determine whether the statement is testimonial." State v. Camacho, 282 Conn. at 349.

Here, Moye's statements were nontestimonial.

> A testimonial statement is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact…. Crawford v. Washington, supra, 541 U.S. at 51…. Although the United States Supreme Court did not provide a comprehensive definition of what constitutes a testimonial statement in Crawford, the court did describe three core classes of constitutional statements: (1) ex parte in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially …[;] (2) extrajudicial statements … contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[;] and (3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial….

(Brackets in original omitted; emphasis in original omitted.) State v. Sinclair, 332 Conn. 204, 219 (2019). It is this third classification that appears to be implicated in the present case.

"In Davis v. Washington, [547 U.S. 813, 822 (2006),] the United States Supreme Court elaborated on the third category, applying a 'primary purpose' test" that looks to the declarant's primary purpose in making a statement in determining whether it is testimonial or nontestimonial. Id.; see State v. Slater, 285 Conn. 162, 172 n.8 (2008) (deeming "primary purpose gloss articulated in Davis as entirely consistent with Crawford's focus on the reasonable expectation of the declarant…. In focusing on the primary purpose of the communication, Davis provides a practical way to resolve what Crawford identified as the crucial issue in determining whether out-of-court statements are testimonial, namely, whether the circumstances would lead an objective witness reasonably to believe that the statements would later be used in a prosecution." (Brackets in original omitted.)). Since Crawford and Davis, this Court has adhered to the rule that, in determining a declarant's primary purpose in making a statement, "the formality attendant to the making of the statement must be

considered." State v. Sinclair, 332 Conn. at 221-25; see also Ohio v. Clark, 576 U.S. 237, 247-49 (2015) (statement nontestimonial where not made in formal setting or to police officer, and where unlikely declarant intended statement as substitute for trial testimony); Michigan v. Bryant, 562 U.S. 344, 366 (2011) (statement nontestimonial where questioning unlike "formal station-house interrogation"); see also State v. Patel, 186 Conn. App. 814, 840-41 (unwitting statements by inmate to confidential informant nontestimonial on basis of informality of communication; collecting cases), cert. denied, 331 Conn. 906 (2019).

Here, Moye's statements were nontestimonial because they were given in an informal setting with no expectation that they would be used in a later prosecution. In State v. Pierre, 277 Conn. at 77-78, this Court found a declarant's statements against penal interest nontestimonial where the declarant made them "on his own initiative, to a friend whom he had known for several years, nearly six months before either he or the defendant were arrested for the crime." Likewise, in State v. Camacho, 282 Conn. at 350-51, this Court found statements against penal interest nontestimonial where the declarant made voluntary statements to personal acquaintances in casual settings. See also State v. Rivera, 268 Conn. at 365 ("[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." (Quotation marks omitted.)). So too here. Moye made his statements to Capers in a casual meeting in Moye's back yard before anyone involved had been charged.[15] Thus, the

[15]The defendant relies significantly on Lilly v. Virginia, 527 U.S. 116, 134-35 (1999) (plurality), to argue 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," and 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." D.B. at 11. The defendant's reliance on Lilly is misplaced, in that Lilly is at best a relic from the pre-Crawford era, and its underpinnings have been supplanted by Crawford's focus on the distinction between testimonial and nontestimonial hearsay in deciding confrontation claims. State v. Greene, 274 Conn. 134, 168-70 (2005); see Walter v. State, 267 S.W.3d 883, 894 n.47 (Tex. Crim. App. 2008) (recognizing Lilly superseded); see also United States v. Smalls, 605 F.3d 765,

statements were nontestimonial and their admission did not violate the defendant's confrontation rights. His claim, therefore, fails under Golding's third prong.

E. Any Error Was Harmless

If the admission of Moye's statements was improper, any error was harmless.

> When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful…. Whether an improper ruling is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case…. Most importantly, [this Court] must examine the impact of the … evidence on the trier of fact and the result of the trial…. The proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error…. Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict.

(Brackets in original omitted.) State v. Bouknight, 323 Conn. 620, 626-27 (2016).

> When an evidentiary impropriety is of constitutional proportions, the state bears the burden of proving that the error was harmless beyond a reasonable doubt…. [This Court] must examine the impact of the evidence on the trier of fact and the result of the trial…. If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless…. That determination must be made in light of the entire record including the strength of the state's case without the evidence admitted in error.

773-76 (10th Cir. 2010) (labeling Lilly "a dead letter" post-Crawford; detailing evolution of confrontation jurisprudence pre- and post-Crawford); People v. Almeda, 19 Cal. App. 5th 346, 361-63 (2018) (deeming Lilly-based challenge to statement against penal interest "not legally valid"). Moreover, even Lilly specifically noted that "[i]t is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice -- that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing." (Emphasis added.) 527 U.S. at 137. Notably, the statement at issue in Lilly was a confession by one of Lilly's accomplices to police after his arrest. Id. at 121; see Walter v. State, 267 S.W.3d at 893-94 & n.47 (noting Lilly's reasoning consistent with Crawford and Davis in that, post-Crawford, accomplice's confession to police inadmissible testimonial hearsay due to formality).

(Brackets in original omitted.) State v. Mangual, 311 Conn. 182, 214 (2014).

Here, regardless of who bears the burden, any error was harmless. The defendant's presence at the scene was amply established by surveillance video which recorded him, Coleman, and Moye near the trail immediately before and after the shooting. St.Exs. 3, 4. Those videos depict Benton entering the blind spot where the shooting occurred and the defendant, Coleman, and Moye entering the same location. The videos then show the defendant, Coleman, and Moye fleeing -- albeit with their hands in their pockets and not displaying any indicia that they were attempting to dodge bullets from an active shooter. The videos do not depict anyone else coming or going from the area at the pertinent time -- including the alleged unidentified shooter that the defendant described in his testimony. Further, Lowndes' and Capers' eyewitness testimony (independent of Capers' account of Moye's statements) also placed the defendant, Coleman, and Moye there. T.9/25/19 at 28-36, 80-85. Avery also testified that they encountered Coleman, Moye, and a third man at that location.[16] T.9/26/19 at 83-89. Further, Lowndes testified that he saw Coleman with a gun. T.9/25/19 at 31-34. Capers likewise testified that, when the defendant, Coleman, and Moye entered his car shortly after the shooting, they appeared anxious and he could smell gunpowder. Id. at 83-85. Moreover, when Capers asked what had happened, one of them said, "they had to get it right on cuz," which Capers understood to mean that they had been involved in fighting, robbing, or shooting someone. Id. at 85-87. Capers also detailed how, in a FaceTime call following the shooting, he saw the defendant, Coleman, and Moye displaying guns, and that the defendant had a .380 caliber pistol. Id. at 94-95, 107-09. Similarly, the State introduced Snapchat videos which depicted the defendant, Coleman, and Moye displaying firearms, both in the days before and after the shooting. St.Exs. 75, 90. Finally, Bacote testified that, one week after Benton's murder, the defendant admitted that

[16]Due to the overwhelming weight of evidence that the defendant was present near the scene, it is not surprising that he admitted in his own testimony to being at the crime scene and interacting with Benton there. T.10/1/19 at 25-28.

the shooting had been "their work"; that he, Coleman, and Moye had planned to rob Benton; and that the defendant shot Benton before taking items from him. T.9/26/19 at 53-59, 74. For these reasons, the State's case was overwhelming, and any error was harmless.

II. THE TRIAL COURT PROPERLY ADMITTED TESTIMONY REGARDING TWO WITNESSES' COOPERATION AGREEMENTS

The defendant claims that the State committed prosecutorial impropriety by eliciting certain components of Capers' and Bacote's cooperation agreements and by presenting closing argument related to those materials. D.B. at 17-30. He contends that the State improperly presented evidence and argument that both men had promised to provide "truthful" testimony, and he argues that, by doing so, the State improperly vouched for their credibility before they had been impeached.

The claim fails because, although he preserved objections to some the evidence below, he has not argued that the court abused its discretion in admitting the evidence on which the State relied in closing argument. His claim, therefore, misguidedly tries to recast routine evidentiary questions as prosecutorial impropriety. If reviewed as evidentiary claims, he has failed to establish that the trial court abused its discretion, and the State properly relied on admitted testimony. Alternatively, if the court erred, any error was harmless.

A. Facts Pertinent To This Claim

1. Steven Capers

Prior to the start of Capers' testimony, outside the presence of the jury, the State had Capers' written agreement marked. T.9/25/19 at 50-51; see St.Ex. 82 for ID (Capers' agreement); D.App. at A84-A86. The defendant then objected to the written agreement itself being admitted into evidence and claimed that it would improperly vouch for Capers' credibility because it stated that he was "required to tell the truth" and would indirectly suggest that the State believed his testimony. T.9/25/19 at 51-54. The defendant conceded, "[T]he fact that there is a cooperation agreement can be explored by the State or by the defense," but objected to the document being admitted without redaction to omit references to

truthfulness. Id. at 52-53; see also id. at 54 ("it ends up appearing to vouch for the credibility of the witness, and we know that that's not appropriate for any attorney to do"). The court indicated uncertainty as to the nature of the objection and sought clarification. Id. at 53-54. When it asked whether the defendant's objection was that the document would be cumulative to testimony that the State could explore, and whether his objection was "to the written document itself, not to the nature of the agreement and the understanding between the State and the defendant [*sic*]," the defendant replied, "That's correct." Id. at 54.

The State responded that the written agreement would not be cumulative, in that it was the best evidence of Capers' agreement with the State. Id. at 54-55. Further, the State noted that a statute that was about to take effect required cooperation agreements to be written in order to promote transparency.[17] Id. at 55. Moreover, it argued, "[I]f we're allowed to question a witness about the agreement, and not offer the agreement, it almost does the opposite. It seems like there's some kind of untoward or some type of hidden agenda that the State has…." Id.

Thereafter, the court sustained the objection to admitting the written agreement as a full exhibit. Id. At the same time, it prescribed, "[t]he State will be allowed to inquire fully as to the contents of the agreement and the understanding of the witness." Id. at 56. It observed that the process of permitting the State to ask leading questions regarding the nature and terms of an agreement had been endorsed in Marquez v. Commissioner of Correction, 330 Conn. 575, 607 (2019). Id.

Thereafter, before the jury, the State examined Capers and established that, at the time of his testimony, he was in jail and had "a number of charges" pending against him. Id. at 58. He then testified that he had entered a written cooperation agreement in February, 2019, and had pleaded guilty to some of the pending charges. Id. at 59-60. The State then

[17]The prosecutor presumably was referring to General Statutes § 54-86*o*, which was enacted via Public Act 19-131, and became effective on October 1, 2019.

alerted the court that it was going to read portions of the agreement and ask Capers if they reflected his understanding of it. Id. The defendant objected without stating a basis for the objection, but the court overruled the objection. Id.

Thereafter, in response to questions incorporating portions of the agreement, Capers affirmed, inter alia, that he had agreed to: (1) "truthfully disclose all information pertaining to [his] criminal activities and the criminal activities of others"; (2) "truthfully testify before … any trial, retrial, or other court proceeding concerning such activity…."; and (3) "give complete and truthful information and testimony at all times." Id. at 61-62. He further affirmed that the agreement provided that "in the event the State … or a judge of the Superior Court reasonably determines that [he had] … given … incomplete, false, or misleading information, [the] agreement becomes null and void…." Id. at 62-63. The defendant then again objected and asserted, "I think what we're doing here is exactly what we just argued outside the presence of the jury." Id. at 63. The court overruled the objection. Id.; see also D.App. at A94-A108 (transcript of proceedings).

On cross-examination, the defendant inquired into the terms of Capers' cooperation agreement and the benefits that he had received. T.9/25/19 at 156-58. Capers affirmed that his original sentence exposure was greater than 30 years of incarceration, but the agreement secured for him a cap of three years. Id. at 158-60. He also acknowledged that he hoped that his cooperation would result in him serving "zero time." Id. at 159.

2. Jalen Bacote

The day following Capers' testimony, the State called Bacote. T.9/26/19 at 37. Outside the presence of the jury, the State alerted the court that Bacote also was testifying pursuant to a cooperation agreement, and it had his agreement pre-marked. Id. at 37-38; see St.Ex. 81 for ID (Bacote's agreement); D.App. at A88-A90. The defendant then noted, "Again, your Honor, I would make the same objection to the actual paperwork." T.9/26/19 at 38. The court sustained the objection to Bacote's written agreement itself by stating, "I assume you have the same objection with the same ruling." Id.

Bacote then testified before the jury that he had charges pending against him at that time and was appearing pursuant to a cooperation agreement. Id. at 42-43. When the State began to inquire into the terms of the agreement, the defendant objected that the State was reading from a document not in evidence. Id. at 44. The court responded, "The objection is overruled for the reasons indicated yesterday." Id.

In response to the State's questions incorporating terms in the agreement, Bacote then affirmed, inter alia, that he had agreed to: (1) "truthfully disclose all information pertaining to [his] criminal activities [and] the criminal activities of others"; (2) "truthfully testify before … any trial, retrial, or any court proceeding concerning the criminal activity…."; and (3) "provide complete and truthful information and testimony…." Id. at 44-46. He further affirmed that the agreement provided that "if a judge or if the State reasonably determines that [he had] given incomplete, false, or misleading information, [the] agreement becomes null and void." Id. at 46; see D.App. at A132-A133, A137-A141 (transcript of proceedings).

Thereafter, in closing argument, the State mentioned Capers' and Bacote's agreements by observing that the defendant was likely to argue that the agreements factored against their credibility because they were trying to obtain deals. T.10/2/19 at 29, 33. The State, however, noted the provisions that would void the agreements if Capers and Bacote testified untruthfully. Id. at 29. It then argued that the jury should credit them because of the independent and cross-corroboration of their testimony presented at trial. Id. at 29-33.

B. Standard Of Review And Relevant Legal Principles

As previously noted, see Section I.B, supra, a trial court's admission of evidence is reviewed for an abuse of discretion. See State v. Ayala, 333 Conn. at 243.

> In analyzing claims of prosecutorial impropriety, [this Court] engage[s] in a two step analytical process…. [This Court] first examine[s] whether prosecutorial impropriety occurred…. Second, if an impropriety exists, [this Court] then examine[s] whether it deprived the defendant of his due process right to a fair trial. The defendant has the burden to show both that the prosecutor's conduct was improper and that it caused prejudice to his defense.

> In determining whether the defendant was deprived of the due process right to a fair trial, [this Court is] guided by the factors enumerated by this [C]ourt in State v. Williams, 204 Conn. 523, 540 … (1987). These factors include [1] the extent to which the impropriety was invited by defense conduct or argument, [2] the severity of the impropriety, [3] the frequency of the impropriety, [4] the centrality of the impropriety to the critical issues in the case, [5] the strength of the curative measures adopted, and [6] the strength of the state's case…. A reviewing court must apply the Williams factors to the entire trial, because there is no way to determine whether the defendant was deprived of his right to a fair trial unless the impropriety is viewed in light of the entire trial…. The question of whether the defendant has been prejudiced by prosecutorial impropriety … depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties.

(Citations omitted; quotation marks omitted; some brackets in original omitted.) State v. Sinclair, 332 Conn. at 236-37.

C. The Defendant Improperly Is Presenting An Evidentiary Claim As A Claim Of Prosecutorial Impropriety

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. Instead, he attempts to bypass the preservation requirement, his incomplete preservation of his claims, the abuse of discretion standard applicable to the evidentiary rulings, and clear precedent on the question and cast the State's mere proffering of the evidence as impropriety. This should not be countenanced.

A challenge to a prosecutor's eliciting of evidence from a witness may constitute "an evidentiary challenge masked as prosecutorial impropriety." State v. Harris, 198 Conn. App. 530, 549-51, cert. denied, 335 Conn. 961 (2020); see State v. Elmer G., 333 Conn. 176, 201 (2019); State v. Rowe, 279 Conn. 139, 151-52 (2006); State v. Santiago, 187 Conn. App. 350, 370-71, cert. denied, 331 Conn. 902 (2019); State v. Lindo, 75 Conn. App. 408, 420-21, cert. denied, 263 Conn. 916 (2003). Such disguised claims are rejected out of hand.

Simply put, it is not impropriety for a prosecutor to ask a question that may elicit testimony that may be objectionable, let alone one that garners an objection that the trial court then decides in the prosecutor's favor. See State v. Rowe, 279 Conn. at 151-52; see

also State v. Angel M., 180 Conn. App. 250, 267-68 (2018) ("the defendant's claim is that the prosecutor committed an impropriety by asking an improper question. Although framed as prosecutorial impropriety, upon further review, we conclude that this claim is purely evidentiary"), aff'd, ___ Conn. ___ (Dec. 31, 2020); State v. Adams, 139 Conn. App. 540, 548 (2012) (rejecting argument that eliciting arguably inadmissible constancy of accusation evidence to which defendant did not object constituted impropriety), cert. denied, 308 Conn. 928 (2013); State v. Serrano, 91 Conn. App. 227, 232 & n.4 ("[a]lthough the defendant also claims that the prosecutor committed misconduct by asking leading questions during direct examination, we decline to treat an evidentiary claim as a distinct category of prosecutorial misconduct"), cert. denied, 276 Conn. 908 (2005); cf. State v. Hafner, 168 Conn. 230, 250-51 (1975). If there is error in such an exchange, it is in the admission of the testimony elicited by the question, not the asking of the question. Cf. State v. Michael T., ___ Conn. ___, 2021 WL 1584623, *5 n.10 (Apr. 22, 2021). Likewise, once evidence has been admitted, properly or improperly, the State does not commit impropriety by presenting argument based on that evidence. Rather, closing argument referencing evidence admitted by the court is derivative of the earlier evidentiary ruling. See State v. Rowe, 279 Conn. at 152; see also State v. Warholic, 278 Conn. 354, 365 (2006) ("the state may argue that its witnesses testified credibly, if such an argument is based on reasonable inferences drawn from the evidence…."); State v. White, 195 Conn. App. 618, 642-43 (state properly referenced agreement to testify truthfully in arguing witness' credibility), cert. denied, 335 Conn. 906 (2020). Here, the defendant has not briefed a challenge to the court's admission of Capers' and Bacote's testimony. Therefore, he has failed to present a proper challenge to the State's presentation of that testimony and its closing argument derived therefrom.

If reviewed at all, the defendant's claims should be reviewed as evidentiary claims under the abuse of discretion standard, not as prosecutorial impropriety claims. Reviewed under that standard, the defendant plainly has failed to establish that the trial court abused

its discretion in admitting testimony regarding the agreements.[18]

Connecticut Code of Evidence § 6-4 provides that "[t]he credibility of a witness may be impeached by any party, including the party calling the witness…." Its commentary establishes that it "applies to all parties in both criminal and civil cases and applies to all methods of impeachment authorized by the Code [of Evidence]." Conn. Code Evid. 6-4, commentary. Section 6-5, in turn, prescribes that "[t]he credibility of a witness may be impeached by evidence showing bias for, prejudice against, or interest in any person or matter that might cause the witness to testify falsely." Section 6-6(b) permits that "[a] witness may be asked, in good faith, about specific instances of conduct of the witness, if probative of the witness' character for untruthfulness." That subsection's commentary provides:

> [i]nquiry into specific instances of conduct bearing on the witness' character for untruthfulness is not limited to cross-examination; such inquiry may be initiated on direct examination, redirect or recross. ... Although inquiry often will occur during cross-examination, subsection (b) contemplates inquiry on direct or redirect examination when, for example, a calling party impeaches its own witness pursuant to [Conn. Code Evid. §] 6-4, or anticipates impeachment by explaining the witness' untruthful conduct or portraying it in a favorable light.

(Emphasis added.) Conn. Code. Evid. § 6-6(b), commentary.

Read together, these sections plainly permitted the trial court to admit the provisions of Capers' and Bacote's agreements during direct examination as probative evidence of their motives or interest to testify truthfully. See State v. McCall, 677 P.2d 920, 931-32 (Ariz. 1983)

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[18]The State acknowledges tension between decisions stating that unpreserved evidentiary claims cannot be reviewed as claims of prosecutorial impropriety and some of this Court's precedents, which occasionally have reviewed such claims under the rubric of prosecutorial impropriety. See State v. Elmer G., 333 Conn. at 198 n.11. The State submits that claims challenging the posing of a question that may violate a rule of evidence generally should not be permitted to form the basis for a claim of prosecutorial impropriety, at least not where the question does not blatantly invade the province of the jury. Cf. id. (listing cases where review permitted of claims that questions or argument allegedly invaded province of jury). In any event, where, as here, the state has proffered evidence, the defendant has objected, and the trial court has overruled the objection, the prosecutor must be permitted to rely on the trial court's discretion in presenting evidence, and the defendant must challenge the trial court's ruling in order to obtain review of the issue. See State v. Gray, 200 Conn. 523, 538 (1986) (noting prosecution entitled to rely upon rulings of court in proving case).

(term requiring witness testify truthfully properly admitted on direct examination as evidence of motive or interest); see also State v. Taft, 306 Conn. 749, 765 (2012) ("exploring [witness'] motivation for lying and her awareness of the ramifications of not telling the truth is exactly the type of information a jury requires to make an appropriate determination regarding a witness' credibility"); State v. Ouellette, 110 Conn. App. 401, 410-11 (2008) (discussing need for full understanding of agreement to be placed before jury), aff'd, 295 Conn. 173 (2010).

Moreover, there is no merit to the defendant's contention that the State was required to wait until after the defense had attacked the witnesses' credibility on cross-examination to admit the term of the agreement requiring them to testify truthfully. In a similar context, while discussing both the concerns underlying a prosecutorial impropriety claim and the evidentiary rule prohibiting questions bolstering a witness' credibility before an attack on that witness' credibility, this Court has observed:

> The evidentiary rule[19] underlying the defendant's claim … exists to promote judicial efficiency: "As of the time of direct examination, it is uncertain whether the cross-examiner will attack the witness's credibility…. If the opposing counsel [does not attack the witness' credibility], all the time devoted to the bolstering evidence on direct examination will have been wasted." 1 C. McCormick, Evidence (7th Ed. 2013) § 33, pp.204-205; see also Fed. R. Evid. 608, advisory committee notes ("enormous needless consumption of time which a contrary practice would entail justifies the limitation"). Because the evidentiary rule against preemptive bolstering of a witness' testimony has its roots in efficiency, rather than fairness, we will not in the present case rely on it as a basis on which to adjudicate a claim of prosecutorial impropriety.

(Some brackets in original.) State v. Elmer G., 333 Conn. at 200-01; see People v. Mendoza, 52 Cal.4th 1056, 1085 (2011) ("a trial court has discretion … to permit the prosecution to introduce evidence supporting a witness's credibility on direct examination, particularly when the prosecution reasonably anticipates a defense attack on the credibility of that witness"); see also United States v. Musacchia, 900 F.2d 493, 497 (2d Cir. 1990) (observing that, where

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[19] Elmer G. cited Connecticut Code of Evidence § 6-6(a), which governs admission of opinion and reputation evidence of character for truthfulness, for the proposition that "evidence bolstering a witness' credibility generally is inadmissible but may become admissible if the witness' credibility first has been attacked." 333 Conn. at 197.

attack on witness' credibility "inevitable," admission of cooperation agreement during direct examination harmless), cert. denied, 501 U.S. 1250 (1991). Indeed, this Court directly stated that a claim that a prosecutor attempted to bolster a witness' testimony before an attack on the witness' credibility is evidentiary, and does not sound in due process. State v. Elmer G., 333 Conn. at 201. The same is true in the instant case. The truthfulness provisions of the agreements were relevant and probative evidence related to the witnesses' credibility, which the State reasonably could anticipate would be attacked. As such, the trial court had the discretion, and properly exercised it, to admit the agreements' terms on direct examination.

The defendant acknowledges that, in State v. Gentile, 75 Conn. App. 839, 845-52, cert. denied, 263 Conn. 926 (2003), the Appellate Court held it was proper for the State to admit a cooperation agreement during direct examination, including portions that required a witness to testify truthfully. D.B. at 22-27. He asks this Court to overrule Gentile and adopt the Second Circuit's reasoning in United States v. Borello, 766 F.2d 46, 57 (2d Cir. 1985), which held it improper for the prosecution to introduce an agreement before a witness' credibility had been attacked because use of such an agreement primarily serves to bolster the witness' credibility. Id. The defendant's request should be rejected. As the Gentile Court observed, the rule it adopted is the position of the "overwhelming majority" of federal circuit courts, whereas the Second Circuit's rule was the minority view. 75 Conn. App. at 851 (collecting cases). The Appellate Court found more persuasive the majority view, which recognizes the "dual nature of cooperation agreements -- both impeaching and bolstering a witness' credibility." Id. It observed:

> [c]ooperation agreements can undermine a witness' credibility by revealing a motive for the witness to tailor his testimony to satisfy the government to receive the benefits of the agreement while at the same time the witness' credibility can be bolstered by the presence of a cooperation agreement that can give the witness' testimony the appearance of having the government's stamp of approval.

Id. Moreover, it noted that, subsequent to Borello, the Second Circuit had expressed regret and indicated that, if it were not bound by its circuit precedent, it would adopt the majority

position. Id. at 852, citing United States v. Cosentino, 844 F.2d 30, 33 n.1 (2d Cir.), cert. denied, 488 U.S. 923 (1988). The defendant's request for this Court to join the lamented minority camp should be rejected. Moreover, his request would not only require this Court to overrule Gentile, it also would have to supersede the Code of Evidence and its commentary, which, as detailed above, permit the introduction on direct examination of potentially impeaching evidence related to motive and interest in testifying. As this Court recently recognized in Elmer G., the requirement that some evidence wait until after a witness's credibility has been attacked is rooted in economy, not fairness. As such, this Court should endorse Gentile and, likewise, find that the trial court did not abuse its discretion and that there is no basis for the claim of prosecutorial impropriety.

D. Any Error Was Harmless

Alternatively, if the trial court abused its discretion, or if the defendant's claim of prosecutorial impropriety has any merit, his convictions nevertheless must be upheld because no harm or prejudice resulted. As detailed above; see Section I.E., supra, the corroboration of Capers' and Bacote's testimony by surveillance videos, physical evidence, and independent testimony rendered any error harmless. Moreover, the agreements' provisions that they testify truthfully was merely cumulative to the oaths they swore when they testified, in that both swore to tell the truth under penalty of perjury -- a charge that the State would have discretion whether or not to pursue.[20] See State v. Pona, 66 A.3d 454, 474-75 (R.I. 2013) (finding agreement promise to testify truthfully same as promise made when testifying under oath). For these reasons, any error or impropriety provides no basis for reversing the defendant's convictions.

[20]For this same reason, the defendant's request that this Court exercise its supervisory authority to require courts to instruct, inter alia, "that the state does not know if the witness told the truth"; D.B. at 29-30; should be rejected. The terms of a cooperation agreement, like the implications of a witness' oath, only suggest State belief in a witness' veracity on the basis of whether the State ultimately pursues a perjury charge -- something that the jury does not learn at trial and necessarily cannot know. Simply put, the malfeasance that the defendant strongly suggests cannot occur.

III. THE STATE DID NOT COMMIT PROSECUTORIAL IMPROPRIETY UNDER THE STATE CONSTITUTION DURING CLOSING ARGUMENT BY PRESENTING A "GENERIC TAILORING" ARGUMENT

The defendant claims that the State presenting a "generic tailoring" argument that violated his confrontation rights under the state constitution. D.B. at 30-40. He contends that, although such arguments are permissible under federal constitutional law, they are improper under allegedly heightened protections in Article first, § 8 of the state constitution. Id. at 34-39. His claim is unpreserved, and, therefore, he seeks review under Golding.

The claim fails because the State did not commit any impropriety. The State's closing argument constituted a specific, rather than a generic, tailoring argument, and, therefore, this Court should have no occasion to consider whether generic tailoring arguments are impermissible under the state constitution. Alternatively, because the State constitution does not provide any heightened protections, the State's argument did not violate the defendant's rights. For these reasons, the claim fails under Golding's third prong.

A. Facts Pertinent To This Claim

During closing argument, the State summarized the defendant's testimony "that it wasn't him. It was a masked man in a track suit who came in from somewhere, not anywhere on camera, not from the north, not from the south, not from the east, not from the west, but from somewhere in the trees and aimed this gun at them and fired." T.10/2/19 at 33. It then noted that the shooting occurred in a blind spot -- after cameras had recorded Benton entering that location from one direction, and the defendant, Coleman, and Moye entering from the opposite direction. Id. Thereafter, the State played video of the three men fleeing the scene and highlighted for the jury that, contrary to the defendant's suggestion that they were running while being shot at, none of them dove for cover or ducked; instead, they were moving away from the scene with their hands in their pockets. Id. at 33-34. The State then returned to the defendant's account of the shooting and argued:

> The defendant sat here throughout the course of the trial. He heard all of the testimony. And 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 [C]anal [L]ine. So he admits it's him. We have GPS records of [*sic*] 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 gave some guys a ride. The defendant can't dispute that, so he concedes it. It says 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. But Mr. Capers and Mr. Bacote know the caliber of that gun, and that was a .380. 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. So the moments [*sic*] of the shooting, he tells you the story that we've been talking about. That just by happenstance, the exact moments where he, Mr. Coleman, and Mr. Moye are walking up to Mr. Benton there is a masked man in a track suit who aims at them, fires at them without provocation, just by coincidence. So I'd ask you, ladies and gentlemen, is it that easy to get away with this crime, to get away with murder, to come in here and take the stand and say it wasn't me, it was the masked man in the bushes? If it's that easy, then find the defendant not guilty.

Id. at 35-36. The defendant did not object to any of the State's argument. Id.

B. Standard Of Review And Relevant Legal Principles

The standard of review and principles of law applied to claims of prosecutorial impropriety is set forth in Section II.B, supra.

> It is well established that federal constitutional and statutory law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher level[s] of protection for such rights…. In determining the contours of the protections afforded by our state constitution, [this Court] employ[s] a multifactor approach that [it] first adopted in State v. Geisler, 222 Conn. 672, 684-86 … (1992). The factors that [it] consider[s] are (1) the text of the relevant constitutional provisions; (2) related Connecticut precedents; (3) persuasive federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of the constitutional framers; and (6) contemporary understandings of applicable economic and sociological norms…. In addition, as [this Court] previously ha[s] noted, these factors may be inextricably interwoven, and not every such factor is relevant in all cases.

(Brackets in original omitted.) State v. Saturno, 322 Conn. 80, 102 (2016).

C. The Trial Prosecutor Did Not Commit Impropriety

The defendant claims that the State committed impropriety by presenting a generic tailoring argument when it observed that the defendant had been present throughout trial and could adapt his testimony to the evidence. He contends that generic tailoring arguments, though permissible at federal law, violate heightened protections under the state constitution. His claim fails because the State did not present a generic tailoring argument. Alternatively, if the State presented a generic tailoring argument, such arguments are permissible under the state constitution because it does not provide heightened protections.

> There are two types of tailoring arguments: generic and specific. The former occurs when the prosecutor argues the inference solely on the basis of the defendant's "presence at trial and his accompanying opportunity to fabricate or tailor his testimony." State v. Alexander, [254 Conn. 290, 300 (2000)]; see also State v. Daniels, [861 A.2d 808, 819 (N.J. 2004)] ("[g]eneric accusations occur when the prosecutor, 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"). A specific tailoring argument, by contrast, occurs when a 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. See State v. Daniels, supra, at [819] ("[a]llegations of tailoring are specific when there is evidence in the record, which the prosecutor can identify, that supports an inference of tailoring").

(Brackets in original omitted.) State v. Weatherspoon, 332 Conn. 531, 543-44 (2019).

The United States Supreme Court has held that tailoring arguments, both generic and specific, do not violate any federal constitutional rights. Id. at 545-46, citing Portuondo v. Agard, 529 U.S. 61, 75-76 (2000). It observed that such an argument appropriately "invites the jury to act on its 'natural and irresistible' inclination to make the permissible inference of tailoring from a defendant's presence throughout all of the prior trial testimony." State v. Weatherspoon, 332 Conn. at 546, quoting Portuondo v. Agard, 529 U.S. at 67-68. The Court "pointed out that generic tailoring arguments pertain to the defendant's 'credibility as a witness and [are] therefore in accord with our [long-standing] rule that when a defendant takes the stand, his credibility may be impeached and his testimony assailed like that of any

other witness." (Brackets in original.) Id., quoting Portuondo v. Agard, 529 U.S. at 69. This Court has not determined whether generic tailoring arguments violate the state constitution. For the reasons set forth, infra, the State did not present a generic tailoring argument, and, in any event, such arguments do not violate the state constitution.

1. The State did not present a generic tailoring argument

The State presented a specific tailoring argument that "was tied to the evidence that supported such an inference." State v. Weatherspoon, 332 Conn. at 550. The State noted that the defendant's testimony could be viewed as designed to fit with the surveillance videos in evidence by noting that his account of an unidentified shooter emerging from the bushes provided the only tenuous explanation for how the unidentified shooter was not captured on video, which otherwise recorded the movements of Benton, the defendant, Coleman, and Moye. The State then asked the jury to decide whether, based on the State's evidence, the defendant's testimony regarding the events of the shooting were credible.

An argument that a defendant's testimony too conveniently fits with the testimony and exhibits already presented is a specific, not a generic tailoring argument.[21] See Martinez v. People, 244 P.3d 135, 141-42 (Colo. 2010) ("the prosecution might reference facts in the record indicating that a defendant has tailored specific elements of his testimony to fit with particular testimony given by other witnesses." (Quotation marks omitted.)); see also State v. Mattson, 226 P.3d 482, 497 (Haw. 2010) (reference to defendant's presence at trial and conflicts in evidence proper argument); cf. Agard v. Portuondo, 159 F.3d 98, 99 (2d Cir. 1998) (argument improper where "not based on the fit between the testimony of the defendant and other witnesses"), rev'd, 529 U.S. 61 (2000); Martinez v. People, 244 P.3d at 142 (argument

[21]The defendant notes that this Court discouraged generic tailoring arguments in State v. Weatherspoon, 332 Conn. at 550-54, and suggested that, if prosecutors continue to present such arguments "without an appropriate evidentiary basis," it will pronounce a rule prohibiting generic tailoring arguments. D.B. at 33. As argued herein, because the State presented a specific tailoring argument rooted in the evidence, this Court's concerns in Weatherspoon are not at play here. This Court did not disapprove of specific tailoring arguments. See State v. Weatherspoon, 332 Conn. at 549-50, 553.

improper where prosecutor failed to connect argument to evidence, though evidence could have permitted specific tailoring argument). The State's argument here mentioning the defendant's presence at trial also referenced evidence at trial, namely the surveillance videos and witness testimony placing the defendant at the scene of the shooting. It then asked the jury to use its common sense to find that the defendant's account of the crime, which awkwardly attempted to fit with the weight of that evidence, was not credible. This was a specific tailoring argument, not a generic one. Therefore, it was proper.

2. The State's argument did not constitute impropriety under allegedly heightened protections of the state constitution

Alternatively, if the State presented a generic tailoring argument, the defendant's claim fails because, after applying the Geisler factors, it is apparent that our state constitution does not provide greater protection than its federal counterpart. Consequently, generic tailoring arguments are permissible as a matter of state law.

First, the text of article first, § 8 of the state constitution is worded virtually identically to the Sixth Amendment to the United States constitution. This uniformity of language alone has led this Court to find that that portion of the state constitution does not provide greater protections than the Sixth Amendment.[22] See State v. Lockhart, 298 Conn. 537, 555 (2010).

Second, prior state case law does not support the defendant's claim. In State v. Alexander, a defendant was afforded the opportunity to file a supplemental brief addressing the state constitutional claim presented here. 254 Conn. at 296 n.9. This Court rejected the claim, albeit without extensive discussion. Id. In any event, the Alexander Court also addressed the substantive concerns at issue by noting:

by exercising his fifth amendment right to testify on his own behalf, it is

[22]The State notes that Article first, § 8, provides, inter alia, that "the accused shall have a right to be heard by himself and by counsel" -- which phrasing does not appear in the Sixth Amendment. This Court has interpreted this provision in terms of a defendant's ability to present closing argument, not to testify. See State v. Hoyt, 47 Conn. 518, 535-37 (1880); see also State v. Higgins, 201 Conn. 462, 476-77 (1986); State v. Plaskonka, 22 Conn. App. 207, 210-11, cert. denied, 216 Conn. 812 (1990).

> axiomatic that a defendant opens the door to comment on his veracity. "It is well established that once an accused takes the stand and testifies his credibility is subject to scrutiny and close examination. State v. Carter, [189 Conn. 631, 640 (1983)]. A defendant cannot both take the stand and be immune from impeachment…. An accused who testifies subjects himself to the same rules and tests which could by law be applied to other witnesses. State v. Palozie, [165 Conn. 288, 298 (1973)]." State v. McClendon, [199 Conn. 5, 12 (1986)]. Finally, the Supreme Court has noted that when a defendant "assumes the role of a witness, the rules that generally apply to other witnesses -- rules that serve the truth-seeking function of the trial -- are generally applicable to him as well." Perry v. Leeke, [488 U.S. 272, 282 (1989)].

(Emphasis added.) 254 Conn. at 297-98; see also id. at 299 ("it is the search for truth that is the primary object of the confrontation clause"). A protection that shifts the axis of concern away from the truth-seeking function would corrupt the very purpose of a trial as a truth-seeking endeavor and the role of a jury as factfinder by depriving it of probative evidence that is logically relevant to a fact in issue -- the credibility of a witness.

Third, as previously noted, and as the defendant concedes, relevant federal precedent is contrary to the defendant's claim. See Portuondo v. Agard, 529 U.S. at 65-73.

Fourth, the weight of sister-state authority undermines the defendant's claim. Though he lists a number of states that have limited the ability of prosecutors to present generic tailoring arguments, he does not indicate whether many of those limitations are founded on state constitutional provisions analogous to our own. D.B. at 36-37. Indeed, he only presents two states -- Hawaii and Washington -- that have found that generic tailoring arguments violate their respective state constitutions. Id. at 37. Neither state provides persuasive authority for reading greater protections into our state constitution. For example, the precedents finding greater protections in the Hawaii constitution do so without any substantive analysis of the text, history, or purpose of the state provision. Instead, the Hawaii Supreme Court merely invokes the circular rationale that, "when the United States Supreme Court's interpretation of a provision present in both the United States and Hawai'i Constitutions does not adequately preserve the rights and interests sought to be protected, we will not hesitate to recognize the appropriate protections as a matter of state constitutional

law." Sate v. Mattson, 226 P.3d at 495-96 (applying Haw. Const., article first, § 14). It then expressed agreement with concerns articulated in Portuondo's dissent and asserted a state rule barring generic tailoring arguments. Id.; see also State v. Walsh, 260 P.3d 350, 360-61 (Haw. 2011). The Hawaii Supreme Court did not engage in anything like a Geisler analysis in interpreting its state constitution. The Washington Supreme Court, in contrast, did engage in a more substantive analysis of its state constitution. See State v. Martin, 252 P.3d 872, 875 (Wn. 2011) (examining Wn. Const., article first, § 22). In finding greater protections in its state constitution, the Court observed "significant textual differences" between its state constitution and the Sixth Amendment, including that the Washington constitution "explicitly recognized the right of defendants to appear, to present a defense, and to testify." Id. at 876. It also read into the historic context of its state constitutional provision indications that it was intended to provide greater confrontation rights than its federal counterpart.[23] Id. at 876-77. Beyond these isolated precedents from Hawaii and Washington, the State's research has found no other sister state precedents that have construed their state constitutions to prohibit generic tailoring arguments. Therefore, the number of states finding greater state constitutional protections on this question is a bare minority of two.

Fifth, the defendant's contention that historical insights into the framer's intent supports finding greater protections in the state constitution is unavailing. He accurately notes that Connecticut originally followed the common law rule that criminal defendants were incompetent to testify at trial, and that a defendant only was permitted to make an unsworn statement in his case. D.B. at 35, citing Z. Swift, A Digest of the Law of Evidence in Civil and Criminal Cases (1810), p.69; State v. Gethers, 197 Conn. 369, 391-92 (1985). He also rightly

[23]Notably, despite finding greater protections in its state constitution, the Washington Supreme Court also found that it did not violate the State constitution for the prosecutor to ask a testifying defendant during cross-examination whether he had tailored his testimony to evidence presented by prior witnesses where the defendant had indicated that prior testimony had informed his recollection. State v. Martin, 171 Wn.2d at 536; cf. State v. Berube, 286 P.3d 402, 409-10 (Wn. App. 2012), rev. denied, 308 P.3d 642 (Wn. 2013).

observes that common law disqualification persisted long after adoption of the 1818 state constitution, in that defendants were not permitted to testify until after a statutory enactment in 1867. See State v. Gethers, 197 Conn. at 392. Due to this historic background, this Court has deemed "doubtful" a suggestion that Article first, § 8 contains a right to testify.[24] State v. Higgins, 201 Conn. 462, 476-77 (1986). As a consequence, it is clear that the rising tide that established the right to testify by the late nineteenth century as a matter of both state and federal statutory law, lifted both Connecticut's practice and the federal rule in tandem, and did not establish a greater right under the state constitution. See Ferguson v. Georgia, 365 U.S. 570, 573-82 (1961) (detailing evolution of criminal defendants' ability to testify); see also Rock v. Arkansas, 483 U.S. 44, 49-53 (1987).

Sixth, and finally, contemporary understandings of applicable economic and sociological norms do not support the defendant's claim. The defendant does not present any applicable concerns and only reiterates the positions of the dissenting justices from Portuondo by arguing, "[e]ven 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." D.B. at 38-39. By conceding that jurors may draw an inference of tailoring based upon their own appraisal of conflicting accounts, the defendant undermines his own argument. The State should not be hamstrung from asking jurors to draw an inference that they properly can make. Moreover, where a defendant's testimony fits just too conveniently with all objective evidence, it makes little sense to prevent the prosecution from arguing that that testimony is incredible when it depends upon an absurd confluence of events. For these reasons, the Geisler factors do not support an interpretation of the state constitution that provides greater protections than its federal counterpart. Absent greater protections, the defendant's claim fails.

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[24]Historic insights into Connecticut's constitution distinguish it from the Washington constitution discussed above. As noted, the Washington Supreme Court found that its state constitution provided greater protections in part based on the text of its constitution, which explicitly provided for a right to testify at trial at a time when such a right had not been recognized at federal law. State v. Martin, 252 P.3d at 876-77.

3. Any impropriety did not deprive the defendant of the due process right to a fair trial

Alternatively, under the Williams factors; see Section II.B, supra; the State's argument did not deprive the defendant of the due process right to a fair trial. See State v. Papantoniou, 185 Conn. App. 93, 103-07, cert. denied, 330 Conn. 948 (2018). First, the State agrees that its argument was not invited by defense conduct. Second, the impropriety was not severe. The defendant did not object to the State's argument or request any curative measures. "Given the defendant's failure to object, only instances of grossly egregious [impropriety] will be severe enough to mandate reversal." State v. Thompson, 266 Conn. 440, 480 (2003). Counsel's failure to object strongly suggests that any impropriety was not severe enough to deprive the defendant of a fair trial. See id. at 479; see also State v. Ciullo, 314 Conn. 28, 59 (2014). Moreover, the State's argument was couched within efforts to juxtapose the defendant's version of events with independent testimony and evidence, which indisputably is a proper use of closing argument. Any impropriety, therefore, was not egregious. Third, any impropriety was infrequent. It was confined to a brief passage in the State's closing argument and was not pervasive throughout the lengthy trial. See State v. Papantoniou, 185 Conn. App. at 113 (brief impropriety during closing argument infrequent); see also State v. Camacho, 282 Conn. at 383. Fourth, the impropriety was not central to the case. While the relative credibility of witnesses was important, it was not dispositive. The State's case, and the credibility of the defendant, depended heavily on videos showing him entering and exiting the crime scene, on witnesses placing him at the scene with armed cohorts, and on Snapchat videos depicting him possessing a gun capable of being used in the crimes. Cf. State v. Crump, 145 Conn. App. 749, 762-63 (witness credibility central where cased depended on sole witness), cert. denied, 310 Conn. 947 (2013). Fifth, consideration of the curative measures favors the State. Because the defendant did not object or request any curative measures, he "bears much of the responsibility for the fact that [any] improprieties went uncured." State v. Weatherspoon, 332 Conn. at 558. In any event, the court instructed the

jury on witness credibility generally, and, in relation to the defendant's testimony in particular, it prescribed that the jurors should evaluate his credibility in the same manner as any other witness. T.10/2/19 at 89; see State v. Weatherspoon, 332 Conn. at 558 & n.16. Finally, the State's case was extremely strong. As noted, surveillance videos and eyewitness testimony placed the defendant entering the location where the crime occurred and depicted him fleeing the scene immediately thereafter. As the State aptly noted in its closing, the videos were inconsistent with the defendant's testimony that he was fleeing from an unidentified active shooter who killed Benton as they spoke to him, in that the defendant, Coleman, and Moye are seen retreating with their hands in their pockets and are not ducking, seeking cover, or moving as though they are dodging gunfire. Moreover, Capers and Bacote testified to admissions that inculpated the defendant and his cohorts, and their accounts were partially corroborated by independent evidence in the case. Further, the Snapchat videos depicted the defendant in the days surrounding the murder in possession of his .380 caliber pistol, a weapon capable of inflicting Benton's fatal wounds. For these reasons, any impropriety did not deprive the defendant of the due process right to a fair trial.

D. Resort To This Court's Supervisory Authority Is Unwarranted

This Court should not resort to its supervisory authority to prohibit generic tailoring arguments. See State v. Reyes, 325 Conn. 815, 822-23 (2017) (discussing supervisory authority). As argued above, the State did not present a generic tailoring argument. Thus, as in State v. Weatherspoon, 332 Conn. at 550-54, there is no need to establish a new rule here. Moreover, no rule is required because, even if the State presented a generic tailoring argument, such amounts to proper argument on a valid consideration for a jury -- whether a defendant's testimony too conveniently fits with the State's proof. Comment on such a matter should not be discouraged, as it would undermine the truth-seeking function of the trial.

CONCLUSION

For all of the foregoing reasons, the State of Connecticut-Appellee asks this Court to affirm the trial court's judgment of conviction.

Respectfully submitted,

STATE OF CONNECTICUT

BY: */s/*

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that

(1) the electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided;

(2) the electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law;

(3) a copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7;

(4) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(5) the brief complies with all provisions of this rule.

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