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SUPREME COURT

of the

State of Connecticut

Judicial District of New London

S.C. 20781

STATE OF CONNECTICUT

v.

JEAN JACQUES

Brief of the State of Connecticut–Appellee
with attached appendix

To be argued by:

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I. Nature of the proceedings

The defendant, Jean Jacques, appeals the judgment of conviction entered in *State v. Jacques*, Docket #KNL-CR15-1028007. Clerk Appendix (CA) at 95. The state charged the defendant by information with one count of murder in violation of § 53a-54a (a). CA at 26; Transcript (T.) 5/16/22 at 8. A jury (*S. Murphy, J.*, presiding) subsequently found the defendant guilty as charged.[1] T.6/6/22 at 79. The court imposed a sentence of sixty years of imprisonment. T.10/26/22 at 78. This appeal followed.

II. Counterstatement of the facts

The victim, Casey Chadwick, "was only 25 years old when her life was needlessly and violently taken from her at the hands of the defendant[,] … and cut short by devastating injuries, sharp instrument wounds to the head and neck[,] and vascular injuries; a truly grizzly murder." T.10/26/22 at 76-77 (comments of trial court at sentencing).

In mid-June 2015, members of the Norwich Police Department used a confidential informant to contact the defendant, whom they suspected of selling drugs, to arrange a controlled purchase of crack cocaine. T.5/18/22 at 19-22. The defendant told the informant that he did not have any product to sell. Id. at 23. Evidence of the defendant's cell phone communications, later seized pursuant to a warrant, established that, during this same time period, the defendant was

[1] The defendant was first tried in 2016, and that jury found him guilty of murder. *State v. Jacques*, 332 Conn. 271 (2019). This court reversed that judgment of conviction based on the trial court's erroneous denial of a motion to suppress evidence, and remanded the case for a new trial. Id. at 293.

short of both drugs and money and attempting to obtain both. T.5/26/22 at 85-89; exhibits 144-148.

In June, 2015, the victim lived in an apartment at 16 Spaulding Street, in Norwich, occasionally with her boyfriend, Jean Joseph.[2] T.5/17/22 at 17. She and Joseph both used marijuana, and he sold marijuana and other illicit substances, such as crack cocaine. Id. at 18, 63-64. The defendant knew the victim, who occasionally purchased marijuana from him. T.5/17/22 at 41-42. Joseph knew the defendant, and occasionally sold marijuana to him. Id.

On June 14, 2015, the victim and Joseph went to Mystic where the victim purchased four ounces (one-quarter pound) of marijuana from a dealer named Kyle Korzeniewski. T.5/17/22 at 18-21, 63-64; 5/20/22 at 15-18. Upon their return home, Joseph remained with the victim in her apartment until approximately 9 or 10 p.m., at which time he left and went to Baptiste's house, where he spent the night. T.5/17/22 at 20-26. At approximately 11:30 p.m., the victim texted Joseph and told him that the defendant was with her in her apartment. Id. at 42, 81-83; 5/19/22 at 51-52. Joseph testified that it was not unusual for the defendant to occasionally visit the victim's apartment and hang out with her and/or him. T.5/17/22 at 42-43, 83-84. Joseph nevertheless texted the victim to tell the defendant to leave, and he called the defendant and said that he would see him the next day. Id. The last outgoing message from the victim's cell phone was sent at 12:20 a.m. that morning. T.5/19/22 at 52-53.

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[2] Joseph is also referred to as "Buddy" or "Eddy." T.5/17/22 at 17. He had a child with Johane Jean Baptiste and split time between her home in Norwich and the victim's apartment on Spaulding Street. T.5/16/22 at 16-17, 24; 5/17/22 at 24; 5/24/22 at 63; 6/1/22 at 30.

Joseph spent the night of June 14 at Baptiste's house and remained there the next morning to assist Baptiste with their son. T.5/17/22 at 25-27. He departed in Baptiste's car in time to keep a 10 a.m. medical appointment, which lasted for more than two hours.[3] Id. at 27. The victim uncharacteristically failed to respond to Joseph's various communications keeping her apprised of his comings and goings. Id.

After completing his medical appointment, Joseph drove Baptiste's car to the victim's apartment on Spaulding Street. T.5/17/22 at 27-28. The victim's car was parked nearby. Id. at 28. When Joseph entered the apartment, he discovered that it was atypically messy and in disarray, looking as if it had been ransacked. Id. at 28-32. The victim was not present, and the marijuana that she and Joseph had purchased in Mystic the day before was missing, as were some narcotics that had been stashed in the kitchen. Id. at 34-35. Fearing that the apartment had been raided by the police, and the victim arrested, Joseph called the police department and then the courthouse, but learned nothing of the victim's whereabouts. Id. at 32-33; exhibit 20.

Joseph left the victim's apartment and went to the home of his friend, Roussell "P.K." Hypolite, where he called a bail bondsman in a further unsuccessful effort to learn of the victim's whereabouts. T.5/17/22 at 35-36. All the while, Joseph unsuccessfully continued his attempts to contact the victim via cell phone. Id. He and Hypolite then

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[3] Baptiste testified that Joseph arrived at her home at approximately 10 p.m. on June 14, stayed the night, and remained there with her until he left for the doctor's office the next morning. T.6/1/22 at 30-33; see also, 5/18/22 at 52-53 and exhibit 22 (documentary verification of medical appointment).

returned to the victim's apartment, a search of which led to the discovery of the victim's bloodied body inside of a closet. Id. at 37-39. The victim exhibited no signs of life and it was evident to Joseph that she was dead. Id. at 39. Now hysterical, he called 9-1-1 to report what he had found, and police and medical personnel were dispatched in response. T.5/16/22 at 28-30, 46-47, 80-81. When Officer Matthew Goddu entered the apartment, he detected a strong odor of cleaning chemicals and observed a mop and a bucket in the kitchen, which also smelled of cleaning supplies. Id. at 52-53.

Based on an autopsy, it was determined that the victim died as a result of numerous sharp force injuries to her head and neck that caused massive vascular damage and bleeding. T.5/24/22 at 114-15; exhibit 114. She suffered four penetrating stab wounds and eleven lateral incised wounds to the head and neck; incised wounds to the right ring finger, left upper arm and left wrist; and six blunt force trauma injuries to the torso. T.5/24/22 at 120-27. Her vertebral artery was damaged, and her jugular veins and carotid arteries were "cut all the way through, severed." Id. at 121, 127. She would have lost consciousness in approximately thirty seconds and suffered irreversible brain damage and death in minutes. Id. at 128.

State police detectives from the Eastern District Major Crime Squad processed the victim's apartment pursuant to a search warrant. T.5/18/22 at 85-88; exhibit 34 (scene video); exhibit 41 (scene map/diagram). There was no sign of forced entry. Id. at 92. Inside the apartment, police discovered and seized samples of blood-like substances and what appeared to be blood spatter. Id. at 94-98, 103-04, 133, 136. No marijuana or narcotics were located in the apartment, and the victim's cell phone was missing. T.5/19/22 at 15.

The police quickly learned from Joseph that the victim had texted him the night before to report that the defendant was in her

apartment. T.5/18/22 at 19-20; 5/19/22 at 29-31; exhibit 25 (text messages). Having reason to believe that the defendant was an active drug dealer, the police used a confidential informant to contact him on June 15 to arrange a purchase of cocaine. T.5/18/22 at 24-25. The defendant agreed to meet the informant at Broadway and Crossway Street in downtown Norwich later that day. Id. When the transaction was completed, the police arrested the defendant on a drug charge.[4] Id. at 26-28, 73. The defendant's cell phone, currency, and a rent receipt for an apartment on 5 Crossway Street, were seized from the defendant's person incident to his arrest. Id. at 28-29; 5/19/22 at 48. The defendant had what appeared to be recent cuts on both hands. T.5/19/22 at 37. On June 16, 2015, Dr. Maura DeJoseph, an associate medical examiner, examined the defendant's hands pursuant to a search warrant and opined that cuts thereon appeared to be sharp force injuries that may have occurred within a day or two of her examination, and could have been caused by the defendant's hands slipping off the handle of a knife and down over the blade.[5] T.5/19/22 at

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[4] An analysis of the substance that the defendant sold the informant revealed cocaine and Phenacetin, a cutting agent. T.5/18/22 at 77-78; 5/24/22 at 3-7.

[5] Mandi Edwards, a line cook at the Rustic Inn restaurant, testified that the defendant cut his right hand on a broken plate while working at the restaurant on June 14, 2015, as a dishwasher. T.5/20/22 at 5-14. Merzilas Braboy, another restaurant employee who was working at the time, testified that the defendant "had a broken glass and cut his hand open." T.5/31/22 at 16, 28. Dr. DeJoseph acknowledged that the cuts on the defendant's hands could also have been caused by a broken plate. T.5/24/22 at 87-88. Neither witness could attribute cuts on *both* of the defendant's hands to the workplace mishap.

36; 5/24/22 at 86-89. She also observed reddish-brown staining on the defendant's hands. Id. Pursuant to the same warrant, the police obtained a sample of the defendant's DNA. T.5/19/22 at 43. The police also conducted a survey of the defendant's body, took photographs of his hands, and seized his clothing and sneakers. T.5/18/22 at 113-23. The inside tongue of one sneaker had a reddish, blood-like substance on it. Id. at 121-24.

State police detectives also processed the defendant's apartment at 5 Crossway Street pursuant to a search warrant.[6] Id. at 106; 5/19/22 at 48-49; exhibit 46 (scene video). Among other things, they discovered a first aid kit on top of an ironing board, and a white, rock-like substance that appeared to be crack cocaine. T.5/18/22 at 110-13; 5/19/22 at 11.

Lashawanda Hall testified that the defendant arrived at her home at approximately midnight on the night of June 14, 2015. T.5/25/22 at 85-88. When she later awoke at about 2:30 a.m., and got up to use the bathroom, the defendant was no longer there. Id. at 88-89, 92. The next morning, the defendant came by to see Hall's son, who lived with her, and left crack cocaine with him. Id. at 89-90. Hall observed the crack, and "didn't appreciate [her] son having it." Id. at 90, 96. Subsequently, the defendant sent Hall a letter in which "[h]e was trying to get [her] to lie for him and [she] didn't choose to lie about

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[6] Previously, other police officers had searched the defendant's apartment on Crossway Street without a warrant and discovered the victim's cell phone and drugs secreted in a hole in a bathroom wall. *State v. Jacques*, 332 Conn. at 275 & n.3. This evidence was the subject of the motion to suppress, the denial of which ultimately led to the reversal of the first judgment of conviction. Id. No infirmities existed regarding the search of the apartment pursuant to a warrant.

him being in [her] house [for the entirety of] that night."[7] Id. at 91-92, 96; exhibit 136 (letter). Hall gave the letter to the police. Id. at 91.

On June 25, 2015, the police arrested the defendant for the victim's murder. T.5/19/22 at 54. He was advised of, and waived, his rights, and agreed to be interviewed. Id. at 54-57; exhibit 83 (recorded interview with redactions). During the interview, the defendant mentioned to the police that he had received a ride on June 15 from Indira Gomes. T.5/20/22 at 20.

Indira Gomes testified that she was a friend of the defendant, whom she had known for about a year in 2015. T.5/24/22 at 21-22. She picked the defendant up "at the laundromat downtown" early in the morning of June 15, brought him to her home to babysit, and left to run some errands.[8] Id. at 23-24, 34. When Gomes returned home at about eleven that morning, she remained there with the defendant until early afternoon, at which point she drove him to his apartment on Crossway Street, where he went in and came back out, and then she dropped him off near the library. Id. at 23-24, 37-38. The police came to Gomes' home to speak with her and, during a search of her car, they found a black duffle bag in the trunk, which she testified was not hers

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[7] James Streeter, a forensic document examiner, testified that the letter that Hall received and turned over to the police shared common authorship with documents known to have been written by the defendant. T.5/25/22 at 61-77.

[8] The laundromat was located on Broadway, near the Wauregan Hotel, about one-quarter mile from the defendant's apartment at 5 Crossway Street. T.5/20/22 at 92-93. Video surveillance footage for June 15 had been recorded over, and was no longer available, by the time the police interviewed the defendant and learned of its potential significance. Id. at 94-95, 104-06.

and had not been put there by her.[9] Id. at 25. Gomes testified, however, that the defendant was the only person she had been around who would have been able to put the bag inside of her car. Id. at 25-26. The police searched the bag and discovered a number of items of clothing, including a pair of blue jeans that had reddish-brown stains on them. T.5/20/22 at 23-24.

A sample of the blood-like substance that the police took from the living room floor of the victim's apartment tested positive for human blood. T.5/25/22 at 7, 12-14. Further analysis of this sample revealed a single source male DNA profile. Id. at 37. "[E]very genetic marker that was present in th[is] evidentiary … bloodstain was also present in the known sample from [the defendant]. So, … the results are consistent with [the defendant] being the source of th[is] DNA profile…." Id. The expected frequency of persons who could be the source of this profile "is less than one in seven billion in the three most common population groups, and that's African American, Caucasian[, a]nd Hispanic." Id.

A sample of the blood-like substance that the police took from the right sneaker that the defendant was wearing when he was arrested on the drug charge screened positive for blood, but insufficient material existed to do a confirmatory human blood test. T.5/25/22 at 14-16. Further analysis of this sample revealed a single source DNA profile of female origin. Id. at 39. The results of this analysis "are consistent with [the victim] being the source of the DNA profile from [the defendant's right sneaker]." Exhibit 122. The expected frequency of persons who could be the source of this DNA profile "is less than 1 in

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[9] Lt. Anthony Gomes testified that Indira Gomes had "pointed out a bag in her car" and told the police that it had been "left [there] by [the defendant]." T.5/20/22 at 20.

7 billion in the African American, Caucasian, and Hispanic populations." Id.

A sample of the blood-like substance that the police took from the kitchen wall of the victim's apartment tested positive for human blood. T.5/25/22 at 17-20. Further analysis of this sample revealed a DNA mixture. Id. at 41-42. The defendant was "included [in the mixture]. And what that means is that every genetic marker that is present in [the defendant's] DNA profile was also present in the evidence profile…." Id. at 42. The expected frequency of persons who could have contributed this profile "is less than one in seven billion in the African American, the Caucasian, and the Hispanic populations."[10] Id. at 43. The victim could not be eliminated as a contributor to this DNA mixture. "And what that means is [that] most of her genetic markers are present, but some … were not … detected. They could be below the level of detectability of the testing or they simpl[y could] have … dropped out." Id.

A sample of a reddish-brown stain that was located on the left leg of the blue jeans that were found inside the duffle bag in the trunk of Gomes' car screened positive for blood, but insufficient material existed to perform a confirmatory human blood test. T.5/25/22 at 21. Further analysis of this sample revealed a DNA mixture. Id. at 45. The defendant was eliminated as a contributor to this mixture. Id. The victim "is included as a contributor to the DNA profile from [the blue jeans,]" and the expected frequency of a person who could be a contributor to the evidentiary profile is "less than one in seven billion in the African American, Caucasian, and Hispanic populations." Id.

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[10] The defendant either was included in, or could not be eliminated as contributing to, DNA that was located in the bedroom of the victim's apartment. T.5/25/22 at 35-43, 46-51; Exhibit 123.

The State's evidence also included inculpatory statements that were attributed to the defendant by two jailhouse informants, Danny Vazquez and Tywan Jenkins, which evidence will be discussed below in more detail in the Argument section of this brief. See also, T.5/25/22 at 119-24; exhibit 82; 5/26/22 at 34-36.

III. Argument

A. The trial court correctly denied the defendant's request for a new hearing in probable cause

The defendant first claims that the trial court erred when it denied his request for a new hearing in probable cause (HPC). Defendant's Brief (DB) at 13. Some additional facts are necessary to resolve this claim, which is meritless because a second HPC was not required by law.

1. Facts pertaining to this claim

Article seventeen of the amendments to the constitution of Connecticut provides in pertinent part that "[n]o person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law…." The statute implementing this right, § 54-46a (b), provides in pertinent part that "[n]o motion to suppress or for discovery shall be allowed in connection with such hearing."[11] Subsection (c) thereof provides in pertinent part that,

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[11] General Statutes § 54-46a provides in full:

(a) No person charged by the state, who has not been indicted by a grand jury prior to May 26, 1983, shall be put to plea or held to trial for any crime punishable by death, life imprisonment without the possibility of release or life imprisonment unless the court at a preliminary hearing

determines there is probable cause to believe that the offense charged has been committed and that the accused person has committed it. The accused person may knowingly and voluntarily waive such preliminary hearing to determine probable cause.

(b) Unless waived by the accused person or extended by the court for good cause shown, such preliminary hearing shall be conducted within sixty days of the filing of the complaint or information in Superior Court. The court shall be confined to the rules of evidence, except that written reports of expert witnesses shall be admissible in evidence and matters involving chain of custody shall be exempt from such rules. No motion to suppress or for discovery shall be allowed in connection with such hearing. The accused person shall have the right to counsel and may attend and, either individually or by counsel, participate in such hearing, present argument to the court, cross-examine witnesses against him and obtain a transcript of the proceedings at his own expense. At the close of the prosecution's case, if the court finds that, based on the evidence presented by the prosecution, probable cause exists, the accused person may make a specific offer of proof, including the names of witnesses who would testify or produce the evidence offered. The court shall not allow the accused person to present such evidence unless the court determines that such evidence would be sufficient to rebut the finding of probable cause.

(c) If, from the evidence presented pursuant to subsection (b) of this section, it appears to the court that there is probable cause to believe that the accused person has committed the

> [i]f, from the evidence presented pursuant to subsection (b) of this section, it appears to the court that there is probable cause to believe that the accused person has committed the offense charged, the court shall so find and approve the continuance of the accused person's prosecution for that offense.

Prior to the defendant's first trial, the court (*Strackbein, J.*) held a HPC at which the State presented the testimony of (1) Laura Zellner (police dispatcher), (2) Matthew Goddu (responding patrol officer), (3) Paul Rafuse (responding paramedic); (4) Jean Joseph (victim's boyfriend), (5) Tywan Jenkins (jailhouse informant), and (6) Anthony Gomes (lead detective).[12] T.1/12/16 at 11-151. The state also presented various exhibits, including the 911 call, autopsy report, a DNA report, Jenkins' police statement, and photos of the victim's body and the defendant's hands. Id. at 3, 12, 23, 90, 126, 148.

Jenkins testified at the HPC that, while he and the defendant were incarcerated and sharing a cell, the defendant enlisted his assistance to write out several versions of the circumstances

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> offense charged, the court shall so find and approve the continuance of the accused person's prosecution for that offense. A determination by the court that there is not probable cause to require the accused person to be put to trial for the offense charged shall not operate to prevent a subsequent prosecution of such accused person for the same offense.

[12] The State joins the defendant's request that this court take judicial notice of the transcript of the HPC. DB at 14 n.2. To avoid confusion, the State will hereinafter refer to Judge Strackbein by name and to Judge Murphy in the instant case as the "trial court."

surrounding the death of the victim. T.1/12/16 at 68-85. Jenkins testified that the defendant eventually told him that he "snapped" during an argument with the victim, apparently killed her[13], placed her body in a closet, attempted to clean the scene with bleach and a mop, and removed drugs and the victim's cell phone to his apartment on Crossway Street, where he placed them inside a hole in the bathroom wall. Id. at 94-104.

Detective Gomes testified at the HPC that he (1) learned from Joseph that the defendant was with the victim inside of her apartment on the night that she died; (2) spoke to the defendant, who denied being in the apartment at that time and said that he cut his fingers at work, babysat for Indira Gomes, and did laundry downtown the next morning; (3) recovered blood-like substances from inside the victim's apartment, samples of which were forensically analyzed, one of which contained DNA that was consistent with the defendant being the source; and (4) spoke to Jenkins, who told him that, while he and the defendant were cellmates, the defendant told Jenkins that he killed

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[13] Jenkins's HPC testimony was equivocal with respect to whether the defendant admitted killing the victim. T.1/12/16 at 86-109. He "took [some of the defendant's statements] that way[,]" and "assume[d this was] so[,]" but hedged by expressing a lack of recollection, observing that the defendant may have been intermingling statements relating to a prior homicide, and attributing his knowledge of the victim being stabbed in the head to someone other than the defendant. Id. Jenkins further testified at the HPC that, on July 23, 2015, he provided the police with a written statement regarding his interactions with the defendant. Id. at 89-92 (exhibit 15 for identification; reproduced in defendant's appendix (DA) at 109-10).

the victim by stabbing her in the area of the head, cut his own hands in the process, put her body in a closet, attempted to clean up with a mop and bleach, took drugs and victim's cell phone and placed those items inside a hole in the bathroom wall of his Crossway Street apartment. T.1/12/16 at 122-40. Photos depicting evidentiary items in-situ also were presented at the HPC. Exhibits 10-14.

At the conclusion of the HPC, Judge Strackbein found probable cause to believe that the defendant had murdered the victim. T.1/12/16 at 161-62. The finding was expressly based on "the exhibits, the autopsy report, the DNA report, all the photographs, and the totality of the testimony and the evidence submitted during the hearing…." Id. at 161. The court emphasized the importance of the evidence which established, contrary to the defendant's denial, that he had been with the victim in her apartment on the night she died. Id. at 161. The court stated that various items of independent, corroborative evidence lent credibility to Jenkins' testimony regarding the defendant's statements. Id. at 161-62.

Prior to the commencement of the second trial, the defendant orally requested that the trial court conduct a second HPC. T.4/7/22 at 15-16. He acknowledged that a HPC had been held prior to the first trial, which resulted in a finding of probable cause, but reasoned that a second hearing and another such finding were required because this court's reversal of the first judgment of conviction started the case "from scratch" thereby effectively resetting his right to a HPC. Id. at 16. The state argued, to the contrary, that it was only the second trial, not the prosecution itself, that began from scratch, and that no additional finding of probable cause was required for that purpose. Id.

The trial court denied the defendant's request for a second HPC on the grounds that: (1) in reversing the first judgment of conviction, this court ordered a new trial, not a dismissal; and (2) Judge

Strackbein's finding of probable cause remained valid and satisfied the HPC requirement, because the suppression motion that led to the award of a new trial was statutorily disallowed purposes of a HPC. T.4/7/22 at 16-17.

2. The trial court correctly denied the defendant's request for a new HPC

The defendant claims that the trial court erred when it concluded that the probable cause finding made by Judge Strackbein at the first HPC is valid and continues to have legal effect. DB at 13-24. The defendant contends, to the contrary, that the probable cause finding is invalid because, in making it, the court was presented with and "relied on [the drug and cell phone] evidence [that was] seized during the illegal search of [his] apartment, which this Court held should have been suppressed, and was not to be used on retrial." DB at 14. In the defendant's view, this court's reversal of the judgment of conviction that resulted from the first trial "put the case back to square one[,]" meaning that, "before the trial court had jurisdiction over the defendant [for purposes of retrying him], there had to be a probable cause finding *without [the drug and cell phone] evidence*." (Emphasis in original) DB at 20.

This claim is meritless because the law precluded the defendant from challenging the legality of the search of his apartment at the preliminary HPC stage of the proceeding. As previously noted, § 54-46a (b) implements the defendant's state constitutional right to a HPC. An invalid finding of probable cause at a HPC undermines the court's power to hear the case at trial. *State v. Mitchell*, 200 Conn. 323, 331 (1986). Such a finding pertains "not to subject matter jurisdiction, but only to jurisdiction over the person of the defendant." *State v. John*, 210 Conn. 652, 665 n.8, cert. denied, 493 U.S. 824 (1989).

The defendant's claim is meritless because, a HPC was "not designed to be a 'mini trial'" and, "pursuant to § 54-46a, [the defendant] is not entitled to make a motion to suppress" at this stage in the proceeding. *State v. Conn*, 234 Conn. 97, 110 (1995); *State v. Kane*, 218 Conn. 151, 158-59 (1991). In *Kane*, supra, this court concluded that: (1) the substantive rights conveyed by § 54-46a "explicitly exclude a right to a hearing on a motion to suppress at the probable cause stage of a criminal proceeding in which the punishment may be death or life imprisonment"; and (2) evidence which is later suppressed by a court on the ground that it was illegally obtained by the police may properly be admitted at a preliminary HPC.[14]

Generally speaking, constitutional questions relating to the suppression of evidence "are not properly raised in a probable cause hearing because such hearings are not adjudicatory in nature." *In re Ralph M.*, 211 Conn. 289, 313 (1989) (judicial determination of probable cause made at juvenile transfer hearing pursuant to § 46b-127; see also *State v. Middleton*, 20 Conn. 321, 329 (1989) (judicial determination of legality of search not within scope of what preliminary stage of proceeding is intended to accomplish); *State v. McMillan*, 51 Conn. App. 676, 688-89 (same), cert. denied, 248 Conn. 911 (1999). The interest in deterring unlawful police conduct that

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[14] In *Kane*, 218 Conn. at 159, this court expressly agreed with cases holding that (1) as long as the defendant was afforded the opportunity to challenge the admissibility of evidence at trial, the adjudicatory phase of the proceeding, his right to due process was preserved; and (2) evidence, which may later be ruled subject to suppression on the ground that it was illegally obtained by the police, may be admitted at the preliminary HPC stage of the proceeding.

undergirds the exclusionary rule is served by excluding illegally seized evidence from the adjudicatory (trial) stage of the proceeding. Id.

The defendant has obtained all of the relief to which he is entitled as a result of the first trial court's error in denying his motion to suppress the drug and cell phone evidence – an order by this court that "[t]he judgment is reversed, and the case is remanded for a new trial." *State v. Jacques*, 332 Conn. at 294; see *State v. McPhail*, 213 Conn. 161, 169-70 (1989) (refusing to reevaluate probable cause finding in light of State's failure to disclose exculpatory information at HPC pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and limiting inquiry to effect of nondisclosure, if any, on subsequent trial). The defendant makes no claim that the allegedly improper consideration of the drug and cell phone evidence at the HPC tainted the fairness of the instant *retrial*. Because all of the evidence presented at the HPC properly was before Judge Strackbein, the probable cause finding that she made at that preliminary, nonadjudicative stage, of the proceeding remains valid. Moreover, it satisfied the personal jurisdiction requirement of § 54-46a for the purpose of the trial court conducting the retrial. This claim fails.

B. The trial court properly admitted a prior statement pursuant to the *Whelan* doctrine

The defendant next raises several claims based on the trial court's admission of Tywan Jenkins' written statement to the police. Some additional information, common to all of the claims, is helpful in resolving them.

1. The *Whelan* doctrine

Section 8-5 of the Connecticut Code of Evidence provides in relevant part that "[t]he following are not excluded by the hearsay rule, provided the declarant is available for cross-examination at trial:

> (1) … A prior inconsistent statement of a witness, provided (A) the statement is in writing or otherwise recorded by audiotape, videotape or some other equally reliable medium, (B) the writing or recording is duly authenticated as that of the witness, and (C) the witness has personal knowledge of the contents of the statement."

This rule is a codification of *State v. Whelan*, 200 Conn. 743, 753 cert. denied, 479 U.S. 994 (1986), in which this court "adopt[ed] a rule allowing the substantive use of prior written inconsistent statements, [(1)] signed by the declarant, [(2)] who has personal knowledge of the facts stated, [(3)] when the declarant testifies at trial and is subject to cross examination."

2. Facts pertaining to this claim

Detective Gomes testified at the instant trial that, in 2015, he and another detective spoke to Jenkins, whom he described as an inmate and "jailhouse informant," and obtained a written statement which contained information regarding the victim's death that was not available to the general public. T.5/20/22 at 25-28; exhibit 81 for identification (Jenkins' prior statement, which is sworn and dated July 23, 2015). Id.

Jenkins thereafter testified at the instant trial on direct examination at trial as follows. He was present pursuant to a subpoena and did not wish to be in court. T.5/25/22 at 101. He had "heard" that he had been convicted of a crime and he remembered being incarcerated. Id. He suffered from memory loss as the result of a stroke, which he thought occurred about two or three years ago. Id. at 101-02. He did not recall giving a statement to the police in 2015, the name Jean Jacques, or being a cellmate of a Jean Jacques. Id. at 100-02. The State offered Jenkins' prior statement under the *Whelan* rule, and the defendant objected. Id. at 102.

The defendant objected on the ground that, although Jenkins was physically present, his loss of memory deprived the defendant of the ability "to have any sort of cross-examination that's worth anything" and that, therefore, admitting the statement would violate his Sixth Amendment right of confrontation as construed in *Crawford v. Washington*, 541 U.S. 36 (2004).[15] T.5/25/22 at 102-03, 106-08.[16] The State replied that the defendant had been afforded a prior opportunity to cross-examine Jenkins, who was a witness at the HPC, a suppression hearing held incident to the first trial, and the first trial itself. Id. at 103-04. The State further argued that Jenkins' presence on the witness stand, and ability to answer questions, rendered him available for cross-examination for sixth amendment purposes despite his professed loss of memory. Id. at 104-08. Under voir dire questioning by the defendant, Jenkins further testified that an oath meant "[t]o tell the truth" and that he could get into trouble if he did not tell the truth. T.5/25/22 at 111.

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[15] In *Crawford*, 541 U.S. 68, the court held that the admission of testimonial hearsay statements against an accused at a criminal trial comported with the Sixth Amendment right of confrontation only when the declarant was unavailable and the accused had been afforded a prior opportunity for cross-examination. *State v. Rivera*, 268 Conn. 351, 362-63 (2004). Jenkins' police statement indisputably is testimonial in nature.

[16] Counsel argued that Jenkins' "unavailability" as a witness was the result of brain damage or physical injury, "not memory loss." T.5/25/22 at 107. Perhaps more artfully stated, Jenkins' alleged unavailability was the result of memory loss that was apparently caused by a stroke.

The court overruled the defendant's objection finding, in essence, in accordance with *Whelan* and the Sixth Amendment, that Jenkins was available for cross-examination. T.5/25/22 at 109-12. The court admitted Jenkins' prior statement, which was read into the record.[17] Id. at 112-24; exhibit 82; DA at 107 (statement).

Jenkins testified on cross-examination as follows. He had no recollection of his police statement, or the defendant telling him that he killed the victim. T.5/25/22 at 125. For all intents and purposes, he did not know, remember, or recall the various portions of his statement that counsel brought to his attention. Id. at 125-36. He had suffered a stroke, but understood that an oath required him to tell the truth, and he was able to read, walk, speak, and understand counsels' questions. T.5/25/22 at 125-26. He did not recall when he was in jail, but understood that this had occurred a number of times, he appreciated that jail was not a pleasant place, and he did not know whether providing information about crimes was a way to get out of jail. Id. at

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[17] Exhibit 82 is a redacted version of exhibit 81, which remained an exhibit for identification. T.5/25/22 at 114. In it, Jenkins provided the following essential information. Over the course of several days, he and the defendant conversed about the death of the victim while they were cellmates. The first two accounts spared the defendant responsibility for the death, which Jenkins told the defendant he did not believe. Id. at 119-21. Eventually, the defendant confessed that "he snapped[,]" grabbed the victim by her throat and shirt, "stabbed her in the head[,]" killing her, and cut both of his hands in the process. Id. at 121-24. The defendant put the victim's body in a closet, attempted to clean up blood with a mop and bleach, removed the victim's phone and drugs from her apartment, and buried the murder weapon on the side yard of a house at 111 Broad Street. Id. at 123-24.

126-27. Based on information provided to him by his wife, he "was supposed to be released in six days[,] … [and] was only there for 60 days…." Id. at 127-28, 136. He had been married for twenty-two years, and had a wife, not a girlfriend as his police statement said. Id. at 133. He had been told he was a "jailhouse snitch[.]" Id. at 136. He did not know if he was actually out of jail when the victim was killed, and did not recall reading about the crime in the newspaper, whether his daughter knew the victim, or if he knew the defendant prior to being in jail. Id. at 128. He typically used a body camera that his wife operated for him, which, when downloaded, allowed him to "see what [he'd] done throughout the day." Id. at 130. He was "not crazy[,]" but did "forget a lot." Id. at 131.

3. The admission of the prior statement did not violate the federal constitution

The defendant first claims that the trial court's admission of Jenkins' prior statement under *Whelan* violated the sixth amendment's confrontation clause because Jenkins' memory loss rendered him functionally unavailable for cross-examination. DB at 25. This claim is meritless because Jenkins took the witness stand, swore an oath, and willingly answered all of the questions put to him on cross-examination.

As noted above, under *Crawford*, 541 U.S. at 68, testimonial hearsay statements may be admitted as evidence against an accused at a criminal trial when (1) the declarant is unavailable to testify, and (2) the defendant has had a prior opportunity to cross-examine the declarant. In deciding *Crawford*, the United States Supreme Court did not define what it means for a witness to be "unavailable" for purposes of the confrontation clause. The court nevertheless spoke in effectively categorical terms "that, when the declarant appears for cross-examination at trial, the [c]onfrontation [c]lause places no constraint

at all on the use of his [or her] prior testimonial statements." *State v. Pierre*, 277 Conn. 42, 78, cert. denied, 547 U.S. 1197 (2006).

In *Pierre*, supra at 86, this court concluded that

> a witness' claimed inability to remember earlier statements or the events surrounding those statements does not implicate the requirements of the confrontation clause under *Crawford*, so long as the witness appears at trial, takes an oath to testify truthfully, and answers questions put to him or her during cross-examination.

Accord, *State v. Cameron M.*, 307 Conn. 504, 516-18 (2012), cert. denied, 569 U.S. 1005 (2013); *State v. Holness*, 289 Conn. 535, 548-49 (2008); *State v. Simpson*, 286 Conn. 634, 651-56 (2008); *State v. George J.*, 280 Conn. 551, 595-96 (2006), cert. denied, 549 U.S. 1326 (2007); see also *Pierre*, 277 Conn. at 83-84 (collecting memory loss cases); accord *Nance v. State*, 331 Md. 549, 573, 629 A.2d 633 (1993); *Diggs v. United States*, 28 A.3d 585, 594 (D.C. 2011) ("memory loss, whether genuine or feigned, does not deprive the defendant of the meaningful opportunity to cross-examine that the [c]onfrontation [c]lause requires"), cert. denied, *Griffin v. United States*, 568 U.S. 909 (2012); *Fowler v. State*, 829 N.E.2d 459, 466 (Ind. 2005) (same), cert. denied, 547 U.S. 1193 (2006); *State v. Delos Santos*, 124 Haw. 130, 145, 238 P.3d 162 (2010) (witness who appears at trial and testifies satisfies confrontation clause, even though witness' lack of memory precludes him or her from testifying about subject matter of out-of-court statement); cf., *State v. Hutton*, 188 Conn. App. 481 (2019) (refusal to provide verbal responses to any questions put by either counsel rendered witness unavailable for cross-examination).[18]

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[18] The witness in *Hutton* was actually or truly unavailable despite his presence in court. That was not the case here. *Nance v. State*, 331

In *Pierre*, supra at 86, this court agreed

> with those jurisdictions that have interpreted "availability for cross-examination" under *Crawford* as needing to be synthesized with the United States Supreme Court's holdings in *United States v. Owens*, [484 U.S. 554, 561–62 … (1988)], and *Delaware v. Fensterer*, [474 U.S. 15, 20 … (1985)]. Specifically, although "availability" was not defined in *Crawford*, *Owens* and *Fensterer* make clear that the right to cross-examination does not imply a right to cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. This theme also runs through the existing cases in Connecticut wherein a witness has been deemed subject to cross-examination at trial for *Whelan* purposes despite a claimed inability to remember the details surrounding his or her prior statement.

State v. Cameron M., 307 Conn. at 517 n.17.

In *Owens*, 484 U.S. at 556, assaultive conduct severely impaired the witness' memory; all he remembered were feeling blows to his head, seeing blood, and identifying Owens as his attacker during an interview with the police that took place in the hospital. He had no memory of seeing his assailant, or of the visitors he received while in the hospital, or whether any such visitor had suggested that Owens was his assailant. Id. Defense attempts to refresh his recollection with a hospital record that indicated that he had attributed the assault to someone other than Owens were unsuccessful. Id. The court rejected Owens' contention that the witness' lack of memory deprived him of a

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Md. at 572 (recognizing distinction between true and functional unavailability); *United States v. Shaffers*, 22 F.4th 655, 662 (7th Cir. 2022) (same).

constitutionally adequate opportunity to cross-examine the witness, and it agreed with the opinion expressed by Justice Harlan in his concurring opinion in *California v. Green*, 399 U.S. 149, 188 (1970), that

> "a witness' inability to 'recall either the events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequences.'"[19]

United States v. Owens, 484 U.S. at 558-59.

"[T]he Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *United States v. Owens*, 484 U.S. at 559. The clause

> includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder reasons for giving scant weight to the witness' testimony.

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[19] In *Green*, 399 U.S. at 157-64, the court found no constitutional violation in the admission of prior testimony given at a preliminary hearing, but declined to decide the admissibility of the same witness' out-of-court statement to police concerning events that the witness was unable to recall. Justice Harlan would have decided the latter issue as well, for which he expressed the conclusion that the court later agreed with in *Owens*. *United States v. Owens*, 484 U.S. at 558.

Id., at 558, quoting *Delaware v. Fensterer*, 474 U.S. at 21-22 (no constitutional violation admitting testimony by expert regarding opinion he formed, but could not recollect basis of).

This is true under the circumstances that existed in *Fensterer*, in which a witness testifies to a current belief but has no memory of the basis for that belief, and under the circumstances which existed in *Owens*, and which exist in the instant case, in which the witness' past belief is introduced and he has no memory of the reason for that belief. *United States v. Owens*, 484 U.S. at 559. *Crawford* neither overruled nor undermined *Fensterer* or *Owens*, and it specifically relied upon *Green* in concluding that a declarant's appearance at trial removes all confrontation clause constraints on the use of prior testimonial statements. *Crawford*, 541 U.S. at 59 n. 9.

In seeking to distinguish *Owens*, *Pierre*, *Cameron M.*, *Simpson* and other similar cases from the instant one, the defendant ignores that the sixth amendment guarantees only an *opportunity* to probe and expose infirmities through cross-examination and, instead, mistakenly focuses on the *success* of that opportunity, which he measures in an individual case by the degree of the witness' memory loss. See e.g. DB at 33 ("[u]nlike in the above … cases, Jenkins had complete memory loss about the incident and the interview.") "[S]uccessful cross-examination[, however,] is not the constitutional guarantee." *Owens*, 484 U.S. at 560. "[T]he traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements." Id.; *Pierre*, 277 Conn. at 83. The defendant was afforded a constitutionally adequate to probe and expose infirmities through cross-examination when Jenkins took the witness stand, swore an oath, and willingly answered every question put to him. Id. The defendant, moreover, succeeded in exposing, facts demonstrating Jenkins' complete memory loss

regarding the events reported in his prior statement, and the giving of the statement, from which the "jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the credibility and reliability of the witness." (Internal quotation marks omitted.) *State v. Pierre*, 277 Conn. at 82. Problems with memory often are "the very result sought to be produced by cross-examination, and can be effective in destroying the force of a prior statement." (Citations omitted; internal quotation marks omitted.) Id. at 81; *Owens*, 484 U.S. at 559.

Given Jenkins' stated memory loss,

> defense counsel was not without resources in his cross-examination because the jury might have been persuaded that [the witness'] prior [statement] was as unreliable as his memory arguably was. The defendant, therefore, was hardly reduced to cross-examining a written statement.

(Internal quotation marks omitted.) *State v. Pierre*, 277 Conn. at 81, quoting *State v. Goodson*, 84 Conn. App. 786, 797, cert. denied, 271 Conn. 941 (2004).

The defendant also was afforded the opportunity to cross-examine Jenkins regarding, and establish a foundation for admitting under *Whelan*, any of Jenkins' prior testimony from the HPC and the first trial that was inconsistent with his asserted lack of memory in the instant trial and/or assertions contained in his prior statement. T.1/12/16 at 65-116 (HPC); 3/30/16 at 94-129 (trial); see *State v. Cameron M.*, 307 Conn. at 528 (well settled that failures of memory and omissions in trial testimony satisfy inconsistency element of *Whelan*). The defendant further was afforded the opportunity to cross-examine Jenkins regarding his stroke. The fact that the defendant elected not to cross-examine Jenkins on these matters does not negate the constitutional significance of their existence. See id. at 520

(because defendant had opportunity to cross-examine witness but chose not to do so, "he cannot claim that he was denied his right of confrontation.").

In sum, because Jenkins appeared at trial, took the witness stand, swore and understand an oath, and willingly answered all of the questions that were put to him, he was available for the purpose of cross-examination, and his prior statement properly was admitted in conformity with the confrontation clause of the sixth amendment.

4. The defendant has failed to demonstrate that the state constitution requires a different rule of availability

Alternatively, the defendant claims that the state constitutional right of confrontation embodies a rule that "a witness is not considered available for cross-examination if, due to a valid medical condition, he has no memory of the incident and making an out-of-court statement about the incident." DB at 37. The requirement would apply only in those situations in which the witness has a "total memory loss due to some … physical or medical condition[,]" but "not [in those] situations where memory loss is feigned or where the witness only remembers the incident or remembers making the statement, but not both." DB at 37, n.7. This claim is meritless because it is unsupported by the defendant's proffered state constitutional analysis under *State v. Geisler*, 222 Conn. 672 (1992).[20] DB at 38.

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[20] The *Geisler* factors 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

Textually, the defendant acknowledges that the federal and state confrontation clauses are "nearly identical[,]" have a "shared genesis in the common law[,]" and that the principles underlying each "are identical." (Internal quotation marks omitted.) DB at 38 (and the cases cited therein).

Related Connecticut precedents are discussed above in subsection B.3, and do not support the defendant's claim. See also *State v. Eaton*, 59 Conn. App. 252, 262-68 (prior statement of witness who had no memory of making statement properly admitted under *Whelan*), cert. denied, 254 Conn. 937 (2000); *State v. Robinson*, 56 Conn. App. 794, 796-801 (same), cert. denied, 253 Conn. 904 (2000); Tait's Handbook of Connecticut Evidence, Sixth Ed. (2019), § 8.27.3 (d) at 607 (summarizing).

The lone federal opinion offered by the defendant is the two-Justice *dissent* in *United States v. Owens*, 484 U.S. at 555 (*Brennan, J.*, dissenting). DB at 39. The defendant identifies one state court that has concluded under its state constitution that a witness' complete memory loss rendered him essentially unavailable for cross-examination. *Goforth v. State*, 70 So.3d 174 (Miss. 2011). More importantly, *Goforth*, supra, at 185, acknowledged that,

> [i]n the wake of *Owens* and *Crawfor*d, many courts have found that a declarant's appearance and subjection to cross-examination at trial are all that is necessary to satisfy the Confrontation Clause, even if his or her memory is

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and sociological norms [otherwise described as public policies]." (Internal quotation marks omitted.)" *State v. Purcell*, 331 Conn. 318, 342 (2019).

faulty. *State v. Holliday*, 745 N.W.2d 556, 566–67 (Minn.2008) (citing cases from various jurisdictions).

"Historically, [this court] has interpreted Connecticut's confrontation clause to provide the same protection as its federal counterpart." *State v. Jones*, 140 Conn. App. 455, 474 (2013), aff'd., 314 Conn. 410 (2014). In its first confrontation clause case, in 1921, this court determined that the "underlying reasons for the adoption of this right in the federal [c]onstitution and in the state constitutions, and the principles of interpretation applying to this provision are identical." *State v. Gaetano*, 96 Conn. 306, 310 (1921).

Lastly, the defendant argues as a matter of policy that his rule is required because the accused "cannot obtain any meaningful information" through cross-examination of a witness who has "a complete memory loss." DB at 42. This factor does not support the defendant's claim because it assumes, without having demonstrated, or even claiming, that the state constitutional right of confrontation guarantees successful cross-examination as opposed to the opportunity to probe for infirmities on cross-examination as discussed. The defendant was afforded that opportunity when Jenkins took the witness stand, swore an oath, and willingly answered all of the questions that were put to him. As has further been demonstrated, the defendant succeeded in obtaining meaningful information in the form of Jenkins' admitted memory loss, which often is "the very result sought to be produced by cross-examination, and can be effective in destroying the force of a prior statement." (Citations omitted; internal quotation marks omitted.) *State v. Pierre*, 277 Conn. at 81. In sum, the defendant cannot prevail under a traditional *Geisler* analysis.

5. The defendant's claim that the trial court abused its discretion is unreviewable

Alternatively, the defendant claims that the trial court abused its discretion when it admitted the prior statement pursuant to *Whelan* because Jenkins (1) could not explain any discrepancies between his prior statement and his testimony, and (2) never acknowledged that he signed the statement. DB at 44. The first contention is unreviewable because there is no ruling to review - the defendant objected to the prior statement on constitutional grounds, and admittedly never asked the trial court to exercise "its discretion on the ground that the statement was not inconsistent" with Jenkins' testimony, which, essentially, is what the first contention amounts to. DB at 47 n.9.

The second contention, alleging an inadequate foundation, is unreviewable because it is evidentiary in nature and was not raised below. *State v. Meehan*, 260 Conn. 372, 389 (2002). To review this contention "for the first time on appeal … would result in a trial by ambuscade of the [State and the] trial judge." (Internal quotation marks omitted.) Id. at 389-90 (declining to review claim that *Whelan* requires finding that memory loss is feigned, not actual, in order for prior statement to constitute inconsistent statement).

6. This court should not exercise its supervisory authority to modify section 8-5 (1) of the code of evidence

Alternatively, the defendant requests that this court adopt a supervisory rule amending section 8-5 (1) of the code of evidence so that it does not apply in situations in which the declarant "has actual memory loss" regarding the prior statement in question (diminished witness) as opposed to situations in which the declarant is "feigning memory loss" (turncoat witness). DB at 47-48. According to the defendant, the testimony of a diminished witness, that he cannot

remember, ***is not*** *inconsistent* with the prior statement because the memory loss is genuine, while the testimony of the turncoat witness, that he cannot remember, ***is*** *inconsistent* with the prior statement because the memory loss is feigned. DB at 47-49. This court should decline this invitation because: (1) the proposed rule relates to a matter of substantive law, not a judicial procedure for the fair administration of justice; (2) the rule is unnecessary because the traditional procedure of a trial court exercising its discretion is adequate to protect criminal defendants; (3) the proffered distinction between the two witnesses has no bearing on the fairness of the judicial system as a whole; (4) the record is inadequate to demonstrate that Jenkins, in fact, is a diminished witness; and (5) the rule would result in an unmanageable trial within a trial every time a witness asserted memory loss. Alternatively, any rule that is adopted should apply prospectively only because: (1) there is no perceived or actual injustice apparent on the record of this case that requires remedying; and (2) the record is inadequate to demonstrate that Jenkins, in fact, is an impaired witness.

This court's supervisory powers

> are not a last bastion of hope for every untenable appeal. They are an *extraordinary* remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole.... Constitutional, statutory and procedural limitations are generally adequate to protect the rights of the defendant and the integrity of the judicial system. [The court's] supervisory powers are invoked only in the rare circumstance

> where these traditional protections are inadequate to ensure the fair and just administration of the courts.

(Emphasis in original; internal quotation marks omitted.) *State v. Coward*, 292 Conn. 296, 315 (2009). "[T]hree criteria must be met before [this court] will consider invoking [its] supervisory authority.... First, the record must be adequate for review.... Second, all parties must be afforded an opportunity to be heard on the issue.... Third, an unpreserved issue will not be considered [when] its review would prejudice a party." (Citations omitted; internal quotation marks omitted.) *In re Aisjaha N.*, 343 Conn. 709, 725 (2022).

This is not an appropriate case to do as the defendant requests because, "[h]istorically, the exercise of this court's supervisory powers has been limited to the adoption of judicial procedures required for the fair administration of justice. [The court] never ha[s] invoked these powers to pronounce on a rule of substantive law…." *State v. Higgins*, 265 Conn. 35, 61 (2003); *State v. Garner*, 270 Conn. 458, 481 (2004). Whether section 8-5 (1) of the code of evidence should be inapplicable in situations in which the declarant is medically or physically suffering from actual memory loss, as opposed to feigning memory loss, is a question of substantive law, and not a simple, prophylactic judicial procedure.

This is not an appropriate case to do as the defendant requests because his rule is unnecessary. The traditional procedure of a trial court exercising discretion is not only adequate to protect a defendant's rights, it is the very essence of evidentiary gatekeeping. *Whelan* requires "[i]nconsistency in effect rather than contradiction in express term," which determination "is properly a matter for the trial court" because "the testimony of a witness as a whole, or the whole impression or effect of what has been said, must be examined." (Internal quotation marks omitted.) *State v. Whelan*, 200 Conn. at 748-

49 n.4.; *State v. Simpson*, 286 Conn. at 649. Inconsistencies may be found in memory loss, omissions, changes in position, and denials. *State v. Cameron M.*, 307 Conn. at 528; *State v. Williams*, 204 Conn. 523, 534-35 (1987). Trial courts are in the best "position to evaluate the 'multitude of factors' that help determine whether a witness's trial testimony is truly inconsistent with his or her prior [out-of-court statement]." *United States v. Gajo*, 290 F.3d 922, 931 (7th Cir.), cert. denied, 537 U.S. 938 (2002)[21]; *McClain v. State*, 425 Md. 238, 254, 40 A.3d 396 (2012) (decision whether lack of memory loss is feigned or actual is "demeanor-based credibility finding that is within the sound discretion of the trial court to make, and such a decision cannot be made from the cold record." (Internal quotations and citations omitted.))

The Appellate Court, perhaps, said it best:

> "[T]he [trial] court [i]s not required to find that [a witness] was feigning his memory loss in order to conclude that his prior statement was inconsistent. *Whelan* and its progeny require no such finding. Rather, *Whelan* plainly states that a claim of memory loss alone can serve as the basis for a finding of inconsistency. *State v. Whelan*, 200 Conn. [at] 747-49 n.4. In considering the total effect of [the witness'] testimony, including both his assertions of complete memory loss and his refutation of his statement to police, the [trial] court properly, and within its discretion, evaluated the issue of inconsistency.

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[21] *Gajo* rejected the dicta contained in *United States v. Palumbo*, 639 F.2d 123, 128 n.6 (3rd Cir.), cert. denied, 454 U.S. 819 (1981) (prior statement should not be admitted if witness' memory loss is genuine), upon which defendant relies. See, DB at 48-49, citing *United States v. Mornan*, 413 F.3d 372 (3rd Cir. 2005).

State v. Rodriguez, 139 Conn. App. 594, 605 (2012), cert. denied, 308 Conn. 902 (2013).

This is not an appropriate case to do as the defendant requests because the distinction between a diminished witness and a turncoat witness has no bearing on the perceived fairness of the judicial system as a whole. *State v. Christopher E.*, 126 Conn. App. 815, 827, cert. denied, 300 Conn. 936 (2011) (refusing to exercise supervisory power because claimed errors did not implicate perceived fairness of judicial system as whole). The principal problem identified by the defendant in support of his proposed rule – i.e., the inability of a witness asserting total memory loss to shed light on, or explain, the incident or prior statement (DB at 50) – exists regardless of whether such loss is actual or feigned. Testimonial inconsistency may come about

> through fear or intimidation. It may be for love or affection. It may be for cold hard cash. It may be because of loss of memory, partial or total, genuine or perjurious, as a result of drugs, alcohol amnesia, senility, mental retardation, the mere passage of time, or for any other reason. It may be out of sheer perversity. It may be for no reason at all. It may be for reasons unknown. The law's only concern is with *what* happens in this regard, not with *why* it happens. The [defendant] seeks to rely on a factor that is immaterial to the admissibility equation.

(Emphasis in original.) *Makell v. State*, 104 Md. App. 334, 656 A.2d 348, 353 (1995); see also *Brown v. State*, 470 S.E.2d 652, 654 (Ga. 1996) (lack of memory inconsistent with prior statements. Reason for lapse appropriately left for cross-examination).

This is not an appropriate case to do as the defendant requests because the record is inadequate to demonstrate that Jenkins, in fact, is a diminished witness. Here, as in *Meehan*, 260 Conn. at 389-90, the defendant did not claim at trial that the distinction between a

diminished witness and a turncoat was legally consequential and mattered. See also *State v. Brunetti*, 279 Conn. 39, 59 (2006) (denouncing trial by ambush), cert. denied, 549 U.S. 1212 (2007). Both parties and the court proceeded on the assumption that Jenkins was suffering from memory loss as a result of a stroke, ignorant of any need to question or challenge that assumption. Absent a finding that Jenkins, in fact, was suffering from actual memory loss as a result of a stroke, and not feigning memory loss on this basis, which finding this court cannot make, the record is inadequate to demonstrate that Jenkins is a diminished witness. See *State v. Chambers*, 296 Conn. 397, 411 (2010) (record inadequate to show existence of factual predicate in support of request to exercise supervisory powers).

Lastly, it is inappropriate to do as the defendant requests because his rule will likely provoke a minitrial when, per the rule, a medical evaluation, medical records or evidence, and/or expert testimony, likely competing (and compelled, if resisted?), is needed to enable the court to answer the question whether "a declarant has actual [and total] memory loss" or is "trying to thwart justice or feigning memory loss[.]" DB at 47. And even if a minitrial is an attractive proposition, the ability of medical science to definitively counter a person's claim of actual and/or total memory loss regarding an event is almost surely lacking.

If the court adopts a rule under its supervisory powers, the rule should only apply prospectively to future cases. First, "there [is] no perceived or actual injustice apparent on the record" that requires remedial action in this case. *State v. Carrion*, 313 Conn. 823, 850 (2014). As demonstrated, the defendant was able to probe Jenkins and expose infirmities during cross-examination which provided strong

support for the defense to argue to the jury that the prior statement was unworthy of belief.[22]

Second, if the inadequacy of the record regarding Jenkins' status as a diminished witness is not sufficient to counsel against the adoption of the proposed rule, it should at least be sufficient to defeat the rule's application to this case – i.e., the defendant should not receive the benefit of a rule that the record in his case fails to establish would even apply here. See *In re Aisjaha N.*, 343 Conn. at 725; *State v. Chambers*, 296 Conn. at 411; see also *State v. Brunetti*, 279 Conn. at 59 (denouncing trial by ambush).

7. Any error was harmless

Alternatively, if the trial court erred in permitting evidence of Jenkins' prior statement to go before the jury, and the error was not of constitutional magnitude, the defendant has failed to demonstrate harm.

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

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[22] In addition to highlighting the credibility problems potentially attending the testimony of any jailhouse informant, defense counsel argued to the jury: "And then Mr. Jenkins. Nothing. This guy comes up. … [A]pparently he had a stroke and forgot and it's sad. But I would suggest to you that you got [sic] to go with what you see and hear and he couldn't totally tell you anything of any importance about Mr. Jacques." T.6/2/22 at 59-62. The State reliance on Jenkins' prior statement in its remarks to the jury was predicated on its submission that material information contained therein was independently corroborated by other evidence. Id. at 29-30, 69-70, 76.

> factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.... Most importantly, we must examine the impact of the ... evidence on the trier of fact and the result of the trial.... [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error.... Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict.

(Internal quotation marks omitted.) *State v. Favoccia*, 306 Conn. 770, 808-09 (2012).

A fair assurance exists that any nonconstitutional error in allowing Jenkins' prior statement to go before the jury did not substantially affect the verdict because: (1) the material facts contained therein - the nature and location of the victim's stab wounds, the placement of her body in a closet, the existence of cuts on both of the defendant's hands - were independently corroborated, and not public knowledge in July, 2015, which evidence underpinned the State's reliance on the prior statement; (2) the confession to killing the victim contained therein was cumulative of Vazquez's testimony (see Section III.C, infra); (3) Jenkins' admitted memory loss, and other testimony, provided strong support for the defense to argue to the jury that his prior statement was utterly unworthy of belief; (4) jurors presumably heeded the court's instruction to carefully scrutinize Jenkins' prior statement before accepting it, and to pay it greater care

and caution than the testimony of an "ordinary witness" (T.6/2/22 at 97-98); and (5) as demonstrated above in Counterstatement of the Facts, and in the Argument section of this brief, the jury had before it a compelling "mountain of evidence" of guilt that was independent of Jenkins' testimony. See e.g., *State v. Kirsch*, 263 Conn. 390, 414 (2003).

C. The trial court did not abuse its discretion when it permitted Danny Vazquez to testify

Lastly, the defendant claims that the trial court erred when it admitted the testimony of Danny Vazquez in accordance with General Statutes § 54-86p.[23] DB at 50. Some additional facts are needed to resolve this claim, which is meritless.

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[23] § 54-86p. Hearing re reliability and admissibility of jailhouse witness testimony in criminal prosecutions

> (a) In any criminal prosecution of a defendant for a violation of section 53a-54a …, upon a motion of the defendant before the start of a trial on any such offense, the court shall conduct a hearing at which hearsay or secondary evidence shall be admissible to determine whether any jailhouse witness's testimony is reliable and admissible. The court shall make a prima facie determination concerning the reliability of such testimony after evaluation of the evidence submitted at the hearing and the information or material disclosed pursuant to subdivisions (1) to (5), inclusive, of subsection (a) of section 54-86o, and may consider the following factors:
>
> (1) The extent to which the jailhouse witness's testimony is confirmed by other evidence;
>
> (2) The specificity of the testimony;

1. Relevant facts

The defendant moved to exclude the testimony of Danny Vazquez on the ground that it was unreliable. CA at 30; T.4/7/22 at 38. A reliability hearing was held pursuant to § 54-86p on April 7, 2022, at which Vazquez was the lone witness. The trial court denied the motion by written memorandum of decision dated June 9, 2022, in which it "credit[ed] the testimony of … Vazquez and f[ound] the following facts based on that testimony": At a time when Vazquez and the defendant were cellmates in prison, the defendant spoke to Vazquez about the death of the victim, and eventually admitted killing her; Vazquez was from the Windham area and unfamiliar with the victim; the defendant

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> (3) The extent to which the testimony contains details known only by the perpetrator of the alleged offense;
>
> (4) The extent to which the details of the testimony could be obtained from a source other than the defendant; and
>
> (5) The circumstances under which the jailhouse witness initially provided information supporting such testimony to a sworn member of a municipal police department, a sworn member of the Division of State Police within the Department of Emergency Services and Public Protection or a prosecutorial official, including whether the jailhouse witness was responding to a leading question.
>
> (b) If the prosecutorial official fails to make a prima facie showing that the jailhouse witness's testimony is reliable, the court shall not allow the testimony to be admitted.
>
> (c) For the purposes of this section, "jailhouse witness" means jailhouse witness, as defined in section 54-86o.

The State does not dispute that Vazquez is a jailhouse witness. General Statutes § 54-86o is reproduced in the State's appendix.

told Vazquez that blood had been found on his sneaker or shoelace, he tried to clean up crime scene blood with a mop, he put the victim's cell phone in a wall in a bathroom, the police said they located the phone by pinging it, but that was impossible because he had removed its SIM card, and another person known as "P.K." was present that night at some point; Vazquez contacted the State's Attorney via letter without previously speaking with police or prosecutors; Vazquez had previously spoken to authorities regarding two other matters, and served the DOC as a source of information, which netted him no benefits, except perhaps in choosing a cellmate; no promises have been made to Vazquez regarding his testimony in this case, but he was "hoping for a little time off his sentence for his cooperation"; information provided by Vazquez regarding blood on the defendant's sneaker, a mop and bucket at the crime scene, a missing "card" from the victim's cell phone, was corroborated by other evidence, would be known to the perpetrator, and would most likely not have been widely shared. CA at 57-59.

Thereafter, the court identified the various factors that the legislature set forth in § 54-86p as guiding its inquiry. CA at 62-63. The court did not articulate findings with respect to any of the factors, nor did it expressly engage in an application of fact to law. Rather, it stated its ultimate conclusion that, "[a]fter careful consideration of the factors set forth in the statute, the court hereby finds that the [S]tate has made a prima facie showing that the jailhouse witness's testimony is reliable." CA at 62-63. The defendant sought no articulation of the court's decision.

2. The defendant has failed to show a clear abuse of discretion

The defendant concedes that the trial court's decision applying § 54-86p is reviewed for an abuse of discretion, and he makes no claim

that any finding that was made by the court is clearly erroneous. DB at 55. He nevertheless contends that the trial court

> was wrong that the [S]tate made a prima facie showing that Vazquez's testimony was reliable. To the contrary, all reasons the court cited in support of its decision show his testimony was unreliable. The court violated the mandatory provisions of section 54-86p (b) by admitting his testimony.

DB at 56. This claim is meritless because it is based on the defendant's de novo review of the evidence, rather than his demonstration of a clear abuse of discretion on the part of the trial court. Where, as here, "the trial court found against the defendant on the ultimate issue without articulation, [this court] may assume that it resolved any underlying factual disputes against him as well." *State v. McCarthy*, 197 Conn. 247, 258 (1985).

A defendant who seeks to overturn the exercise of judicial discretion assumes a heavy burden. *State v. Pieger*, 240 Conn. 639, 648 (1997). Discretion is exercised with respect to issues which do not yield a fundamentally empirical yes or no answer; "[t]he very core consideration of choice in discretion logically means that neither party is absolutely entitled to have that discretion exercised in his favor." *State v. S & R Sanitation Services, Inc.*, 202 Conn. 300, 311 (1987). "The issue, therefore, is not whether [a reviewing court] would reach the same conclusion in the exercise of [its] judgment, but only whether the trial court acted reasonably." *State v. Deleon*, 230 Conn. 351, 363 (1994). As an appellate court, this Court is limited to deciding "'whether the trial court's ruling was arbitrary or unreasonable.'" *State v. Annulli*, 309 Conn. 482, 495 (2013); accord *State v. Cancel*, 275 Conn. 1, 15 (2005). Nor is it the role of this court to substitute its judgment for that of a trial court that has chosen one of several reasonable alternatives, even if it might have decided the matter

differently. *State v. Annulli*, 309 Conn. at 495; see *State v. Reynolds*, 264 Conn. 1, 224 n.192, cert. denied, 541 U.S. 908 (2003).

"In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." *State v. Peeler*, 271 Conn. 338, 416 (2004), cert. denied, 546 U.S. 845 (2005). In reviewing a trial court's exercise of discretion, every reasonable presumption must be given in favor of the correctness of the trial court's actions; *State v. Cancel*, 275 Conn. at 18; the record is read to support, rather than contradict the ruling; *State v. Lugo*, 266 Conn. 674, 690-92 n.16 (2003); which may not be overturned absent a *clear* abuse of discretion. *State v. Coccomo*, 302 Conn. 664, 674 (2011).

The defendant has failed to demonstrate that the trial court's ruling was arbitrary, unreasonable, or amounted to a clear abuse of its discretion. In relation to the factors set forth in § 54-86p, Vazquez's testimony regarding blood on the defendant's sneaker, a mop being at the crime scene, the victim's cell phone with a missing "card" being placed inside of a wall in a bathroom, and the presence at some point of a person known as "P.K.", contained specific and detailed information that was independently corroborated by other evidence.[24] The

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[24] The defendant misperceives the importance of Vazquez's knowledge regarding the condition of the victim's cell phone. DB at 57-58 (discounting Vazquez testimony that phone was missing "SIM" card because other evidence established it was missing "SD" card). For purposes of gauging Vazquez's reliability, the critical importance of his testimony regarding the victim's phone was the fact that it was missing an internal "card," not which card it was missing. The only person who would have known about this was the person who removed the card from the phone. The defendant acknowledges that the trial

information contained details that would likely have been known to the person who killed the victim, and the record is devoid of evidence supporting an inference that Vazquez obtained the information from any source other than the defendant.[25] Vazquez contacted the State's Attorney's Office on his own; no one asked him to obtain information regarding the defendant, or to contact law enforcement regarding the defendant. Contrary to the defendant's assertion, taking note of this fact does not "ignore[ ] the reality that there does not have to be an explicit promise for an inmate to be motivated to give false information…." DB at 59. The trial court plainly understood that, although "[n]o promises ha[d] been made to Vazquez in exchange for his testimony," he admittedly was, "hoping for a little time off his sentence for his cooperation." CA at 59.

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court "presumably relied on this information when making its finding" that Vazquez's testimony was reliable. DB at 58. This is all that matters at this juncture because every reasonable presumption must be given in favor of the correctness of the trial court's actions; *State v. Cancel*, 275 Conn. at 18; and the record must be read to support, rather than contradict its ruling. *State v. Lugo*, 266 Conn. at 690-92 n.16.

[25] The defendant speculates that Vazquez could have obtained the information from other inmates, media accounts of the defendant's first trial, or this court's published decision reversing the judgment of conviction resulting therefrom. DB at 58. Reasonable inferences are properly drawn on the basis of evidence, not speculation. *State v. Little*, 194 Conn. 665, 672 (1984). The evidence of record here does not support the inference that Vazquez obtained his information regarding the murder from a source other than the defendant.

The trial court, moreover, had the benefit of all of the materials that had been disclosed in accordance with § 54-86o relating to (1) Vazquez's criminal history record; (2) the absence of any cooperation agreement with the State, (3) the fact that the State had not provided or offered Vazquez a benefit in exchange for his testimony, and Vazquez's hope of obtaining a sentence reduction; (4) the substance, time and place of the statements that Vazquez attributed to the defendant; (5) the absence of any information demonstrating that Vazquez had ever recanted any of the information that he provided; and (6) information relating to Vazquez's history as an informant. None of the information contained in these materials supports a conclusion that the trial court's finding that the State made a prima facie showing of reliability, based on the entirety of the record before it, was arbitrary, unreasonable, or amounted to a clear abuse of discretion. This claim, therefore, must fail.

3. Any error was harmless

Alternatively, assuming an error occurred, the defendant cannot prevail because he has failed to demonstrate harm. As previously discussed, the proper inquiry asks whether this court has a fair assurance that the error did not substantially affect the verdict. Such an assurance exists with respect to Vazquez's testimony because: (1) as demonstrated above, the same or similar evidence properly was before the jury in the form of Jenkins' prior statement to the police that the defendant confessed to him that he killed the victim; (2) the defendant was afforded an unfettered opportunity to cross-examine Vazquez, and exposed infirmities regarding his credibility; (3) jurors presumably heeded the court's instruction to carefully scrutinize Vazquez's testimony before accepting it, and to pay it greater care and caution than the testimony of an "ordinary witness" (T.6/2/22 at 97-98); and (4) as demonstrated above, the jury had before it a compelling "mountain

of evidence" of guilt that was independent of Vazquez's testimony. See e.g., *State v. Kirsch*, 263 Conn. at 414. The defendant has failed to demonstrate that any error was harmful.

IV. Conclusion

The judgment of conviction should be affirmed.

Respectfully submitted,
The State of Connecticut

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SUPREME COURT

of the

State of Connecticut

Judicial District of New London

S.C. 20781

STATE OF CONNECTICUT

v.

JEAN JACQUES

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Statutory Provisions

General Statutes § 46b-127. Transfer of child charged with a felony to the regular criminal docket. Transfer of youth aged sixteen or seventeen to docket for juvenile matters.

(a) (1) The court shall automatically transfer from the docket for juvenile matters to the regular criminal docket of the Superior Court the case of any child charged with the commission of a capital felony under the provisions of section 53a-54b in effect prior to April 25, 2012, a class A felony, or a class B felony, except as provided in subdivision (3) of this subsection, or a violation of section 53a-54d, provided such offense was committed after such child attained the age of fifteen years and counsel has been appointed for such child if such child is indigent. Such counsel may appear with the child but shall not be permitted to make any argument or file any motion in opposition to the transfer. The child shall be arraigned in the regular criminal docket of the Superior Court at the next court date following such transfer, provided any proceedings held prior to the finalization of such transfer shall be private and shall be conducted in such parts of the courthouse or the building in which the court is located that are separate and apart from the other parts of the court which are then being used for proceedings pertaining to adults charged with crimes.

(2) A state's attorney may, at any time after such arraignment, file a motion to transfer the case of any child charged with the commission of a class B felony or a violation of subdivision (2) of subsection (a) of section 53a-70 to the docket for juvenile matters for proceedings in accordance with the provisions of this chapter.

(3) No case of any child charged with the commission of a violation of section 53a-55, 53a-59b, 53a-71 or 53a-94, subdivision (2) of subsection (a) of section 53a-101, section 53a-112, 53a-122 or 53a-129b, subdivision (1), (3) or (4) of subsection (a) of section 53a-134, section

53a-196c, 53a-196d or 53a-252 or subsection (a) of section 53a-301 shall be transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court, except as provided in this subdivision. Upon motion of a prosecutorial official, the superior court for juvenile matters shall conduct a hearing to determine whether the case of any child charged with the commission of any such offense shall be transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court. The court shall not order that the case be transferred under this subdivision unless the court finds that (A) such offense was committed after such child attained the age of fifteen years, (B) there is probable cause to believe the child has committed the act for which the child is charged, and (C) the best interests of the child and the public will not be served by maintaining the case in the superior court for juvenile matters. In making such findings, the court shall consider (i) any prior criminal or juvenile offenses committed by the child, (ii) the seriousness of such offenses, (iii) any evidence that the child has intellectual disability or mental illness, and (iv) the availability of services in the docket for juvenile matters that can serve the child's needs. Any motion under this subdivision shall be made, and any hearing under this subdivision shall be held, not later than thirty days after the child is arraigned in the superior court for juvenile matters.

(b) Upon motion of a prosecutorial official, the superior court for juvenile matters shall conduct a hearing to determine whether the case of any child charged with the commission of a class C, D or E felony or an unclassified felony shall be transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court. The court shall not order that the case be transferred under this subdivision unless the court finds that (1) such offense was committed after such child attained the age of fifteen years, (2) there is probable cause to

believe the child has committed the act for which the child is charged, and (3) the best interests of the child and the public will not be served by maintaining the case in the superior court for juvenile matters. In making such findings, the court shall consider (A) any prior criminal or juvenile offenses committed by the child, (B) the seriousness of such offenses, (C) any evidence that the child has intellectual disability or mental illness, and (D) the availability of services in the docket for juvenile matters that can serve the child's needs. Any motion under this subdivision shall be made, and any hearing under this subdivision shall be held, not later than thirty days after the child is arraigned in the superior court for juvenile matters.

(c) If a case is transferred to the regular criminal docket pursuant to subdivision (3) of subsection (a) of this section or subsection (b) of this section, or if a case is transferred to the regular criminal docket pursuant to subdivision (1) of subsection (a) of this section and the charge in such case is subsequently reduced to that of the commission of an offense for which a case may be transferred pursuant to subdivision (2) or (3) of subsection (a) of this section or subsection (b) of this section, the court sitting for the regular criminal docket may return the case to the docket for juvenile matters at any time prior to the court or jury rendering a verdict or the entry of a guilty plea for good cause shown for proceedings in accordance with the provisions of this chapter.

(d) Upon the effectuation of the transfer, such child shall stand trial and be sentenced, if convicted, as if such child were eighteen years of age, subject to the provisions of subsection (c) of this section and section 54-91g. Such child shall receive credit against any sentence imposed for time served in a juvenile facility prior to the effectuation of the transfer. A child who has been transferred may enter a guilty plea to a lesser offense if the court finds that such plea is made knowingly

and voluntarily. Any child transferred to the regular criminal docket who pleads guilty to a lesser offense shall not resume such child's status as a juvenile regarding such offense. If the action is dismissed or nolled or if such child is found not guilty of the charge for which such child was transferred or of any lesser included offenses, the child shall resume such child's status as a juvenile until such child attains the age of eighteen years.

(e) Any child whose case is transferred to the regular criminal docket of the Superior Court who is detained pursuant to such case shall be in the custody of the Commissioner of Correction upon the finalization of such transfer. A transfer shall be final (1) upon the arraignment on the regular criminal docket until a motion filed by the state's attorney pursuant to subsection (a) of this section is granted by the court, or (2) upon the arraignment on the regular criminal docket of a transfer ordered pursuant to subsection (b) of this section until the court sitting for the regular criminal docket orders the case returned to the docket for juvenile matters for good cause shown. Any child whose case is returned to the docket for juvenile matters who is detained pursuant to such case shall be in the custody of the Judicial Department.

(f) The transfer of a child to a Department of Correction facility shall be limited as provided in subsection (e) of this section and said subsection shall not be construed to permit the transfer of or otherwise reduce or eliminate any other population of juveniles in detention or confinement within the Judicial Department.

(g) Upon the motion of any party or upon the court's own motion, the case of any youth age sixteen or seventeen, except a case that has been transferred to the regular criminal docket of the Superior Court pursuant to subsection (a) or (b) of this section, which is pending on the youthful offender docket, regular criminal docket of the Superior Court or any docket for the presentment of defendants in motor vehicle

matters, where the youth is charged with committing any offense or violation for which a term of imprisonment may be imposed, other than a violation of section 14-227a, 14-227g or 14-227m or subdivision (1) or (2) of subsection (a) of section 14-227n, may, before trial or before the entry of a guilty plea, be transferred to the docket for juvenile matters if (1) the youth is alleged to have committed such offense or violation on or after January 1, 2010, while sixteen years of age, or is alleged to have committed such offense or violation on or after July 1, 2012, while seventeen years of age, and (2) after a hearing considering the facts and circumstances of the case and the prior history of the youth, the court determines that the programs and services available pursuant to a proceeding in the superior court for juvenile matters would more appropriately address the needs of the youth and that the youth and the community would be better served by treating the youth as a delinquent. Upon ordering such transfer, the court shall vacate any pleas entered in the matter and advise the youth of the youth's rights, and the youth shall (A) enter pleas on the docket for juvenile matters in the jurisdiction where the youth resides, and (B) be subject to prosecution as a delinquent child. The decision of the court concerning the transfer of a youth's case from the youthful offender docket, regular criminal docket of the Superior Court or any docket for the presentment of defendants in motor vehicle matters shall not be a final judgment for purposes of appeal.

General Statutes § 53a-54a. Murder.

(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a

reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a) of this section, on the question of whether the defendant acted with intent to cause the death of another person.

(c) Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a unless it is (1) a capital felony committed prior to April 25, 2012, by a person who was eighteen years of age or older at the time of the offense, punishable in accordance with subparagraph (A) of subdivision (1) of section 53a-35a, (2) murder with special circumstances committed on or after April 25, 2012, by a person who was eighteen years of age or older at the time of the offense, punishable as a class A felony in accordance with subparagraph (B) of subdivision (1) of section 53a-35a, or (3) murder under section 53a-54d committed by a person who was eighteen years of age or older at the time of the offense.

General Statutes § 54-46a. Probable cause hearing for persons charged with crimes punishable by death, life imprisonment without possibility of release or life imprisonment.

(a) No person charged by the state, who has not been indicted by a grand jury prior to May 26, 1983, shall be put to plea or held to trial for any crime punishable by death, life imprisonment without the possibility of release or life imprisonment unless the court at a preliminary hearing determines there is probable cause to believe that the offense charged has been committed and that the accused person

has committed it. The accused person may knowingly and voluntarily waive such preliminary hearing to determine probable cause.
(b) Unless waived by the accused person or extended by the court for good cause shown, such preliminary hearing shall be conducted within sixty days of the filing of the complaint or information in Superior Court. The court shall be confined to the rules of evidence, except that written reports of expert witnesses shall be admissible in evidence and matters involving chain of custody shall be exempt from such rules. No motion to suppress or for discovery shall be allowed in connection with such hearing. The accused person shall have the right to counsel and may attend and, either individually or by counsel, participate in such hearing, present argument to the court, cross-examine witnesses against him and obtain a transcript of the proceedings at his own expense. At the close of the prosecution's case, if the court finds that, based on the evidence presented by the prosecution, probable cause exists, the accused person may make a specific offer of proof, including the names of witnesses who would testify or produce the evidence offered. The court shall not allow the accused person to present such evidence unless the court determines that such evidence would be sufficient to rebut the finding of probable cause.
(c) If, from the evidence presented pursuant to subsection (b) of this section, it appears to the court that there is probable cause to believe that the accused person has committed the offense charged, the court shall so find and approve the continuance of the accused person's prosecution for that offense. A determination by the court that there is not probable cause to require the accused person to be put to trial for the offense charged shall not operate to prevent a subsequent prosecution of such accused person for the same offense.

General Statutes § 54-86o. Jailhouse witnesses in a criminal prosecution.

(a) In any criminal prosecution, upon written request by a defendant filed with the court, but not requiring an order of the court, the defendant may request of the prosecutorial official whether such official intends to introduce testimony of a jailhouse witness. The prosecutorial official shall promptly, but not later than forty-five days after the filing of such motion, disclose to the defendant whether the official intends to introduce such testimony and, if so, the following information and material:

(1) The complete criminal history of any such jailhouse witness, including any charges pending against such witness, or which were reduced or dismissed as part of a plea bargain;

(2) The jailhouse witness's cooperation agreement with the prosecutorial official and any benefit that the official has provided, offered or may offer in the future to any such jailhouse witness;

(3) The substance, time and place of any statement allegedly given by the defendant to a jailhouse witness, and the substance, time and place of any statement given by a jailhouse witness implicating the defendant in an offense for which the defendant is indicted;

(4) Whether at any time the jailhouse witness recanted any testimony subject to the disclosure and, if so, the time and place of the recantation, the nature of the recantation and the name of any person present at the recantation; and

(5) Information concerning any other criminal prosecution in which the jailhouse witness testified, or offered to testify, against a person suspected as the perpetrator of an offense or defendant with whom the jailhouse witness was imprisoned or otherwise confined, including any cooperation agreement with a prosecutorial official or any benefit provided or offered to such witness by a prosecutorial official.

(b) The prosecutorial official may move for an extension of time to make any disclosure pursuant to subsection (a) of this section. The court may agree to such extension of time if the court finds that the jailhouse witness was not known to the prosecutorial official at the time the defendant filed the written request under subsection (a) of this section, and that information or material required to be disclosed pursuant to subsection (a) of this section could not be disclosed with the exercise of due diligence within the period of time required under subsection (a) of this section. Upon good cause shown, the court may set a reasonable extension of time or may, upon the court's own motion, allow such extension.

(c) If the court finds that a disclosure pursuant to subsection (a) of this section may result in the possibility of bodily harm to the jailhouse witness, the court may order that such information or material may only be viewed by the defense counsel, and not by the defendant or other parties.

(d) For the purposes of this section, "benefit" means any plea bargain, bail consideration, reduction or modification of sentence or any other leniency, immunity, financial payment, reward or amelioration of current or future conditions of incarceration offered or provided in connection with, or in exchange for, testimony that is offered or provided by a jailhouse witness; and "jailhouse witness" means a person who offers or provides testimony concerning statements made to such person by another person with whom he or she was incarcerated, or an incarcerated person who offers or provides testimony concerning statements made to such person by another person who is suspected of or charged with committing a criminal offense.

General Statutes § 54-86p. Hearing re reliability and admissibility of jailhouse witness testimony in criminal prosecutions.

(a) In any criminal prosecution of a defendant for a violation of section 53a-54a, 53a-54b, 53a-54c, 53a-54d, 53a-70, 53a-70a or 53a-70c, upon a motion of the defendant before the start of a trial on any such offense, the court shall conduct a hearing at which hearsay or secondary evidence shall be admissible to determine whether any jailhouse witness's testimony is reliable and admissible. The court shall make a prima facie determination concerning the reliability of such testimony after evaluation of the evidence submitted at the hearing and the information or material disclosed pursuant to subdivisions (1) to (5), inclusive, of subsection (a) of section 54-86o, and may consider the following factors:

(1) The extent to which the jailhouse witness's testimony is confirmed by other evidence;

(2) The specificity of the testimony;

(3) The extent to which the testimony contains details known only by the perpetrator of the alleged offense;

(4) The extent to which the details of the testimony could be obtained from a source other than the defendant; and

(5) The circumstances under which the jailhouse witness initially provided information supporting such testimony to a sworn member of a municipal police department, a sworn member of the Division of State Police within the Department of Emergency Services and Public Protection or a prosecutorial official, including whether the jailhouse witness was responding to a leading question.

(b) If the prosecutorial official fails to make a prima facie showing that the jailhouse witness's testimony is reliable, the court shall not allow the testimony to be admitted.
(c) For the purposes of this section, "jailhouse witness" means jailhouse witness, as defined in section 54-86o.

Certification

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2A, that January 17, 2024:

(1) the electronically submitted e-brief and appendix have been delivered electronically to Pamela S. Nagy, Supv. APD, Office of the Chief Public Defender – LSU, 55 W. Main Street, #430, Waterbury, CT 06033, Tel: (203) 574-0029; Fax: (203) 574-0038, Email. Pamela.Nagy@pds.ct.gov; legalservicesunit@pds.ct.gov.

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

(3) a copy of the e-brief and appendix have been sent to each counsel of record in compliance with Section 62-7, on January 17, 2024;

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

(5) the e-brief and appendix are filed in compliance with the e-briefing guidelines and no deviations were requested; and

(6) the e-brief contains **13,136** words; and

(7) the e-brief and appendix comply with all provisions of this rule.

/s/ Timothy J. Sugrue
Assistant State's Attorney