STATE OF CONNECTICUT *v.* MANUEL T.*
(SC 20250)

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

Syllabus

Convicted of risk of injury to a child, sexual assault in the first degree, sexual assault in the second degree, and sexual assault in the fourth degree in connection with his alleged sexual abuse of the victim, J, the defendant appealed to the Appellate Court, claiming that the trial court's admission of a video recording of a forensic interview of J and exclusion of screenshots depicting two text messages purportedly sent by J to the defendant's niece, V, constituted harmful error. The Appellate Court upheld the defendant's conviction, concluding that neither evidentiary ruling was an abuse of the trial court's discretion. The Appellate Court specifically concluded that the statements that J made during the interview were admissible under the medical treatment exception to the hearsay rule and that V's testimony was insufficient to authenticate the text messages and that there was not sufficient additional corroboration of V's testimony. On the granting of certification, the defendant appealed to this court. *Held*:

1. This court rejected the defendant's claim that it should overrule prior Appellate Court precedent and adopt a standard under which statements made by a minor child abuse victim during a forensic interview can be admitted under the medical treatment exception to the hearsay rule only if the victim's primary purpose in making those statements was to obtain a medical diagnosis or treatment.
2. The Appellate Court incorrectly determined that the trial court had not abused its discretion in excluding, for lack of authentication, the screenshots of the text messages purportedly sent by J to V: the defendant established a prima facie case of authentication through V's testimony, and any doubts as to V's credibility or as to the source of the messages went to the weight, rather than to the admissibility, of the text messages; moreover, the exclusion of the text messages was not harmless because the state's case was not particularly strong insofar as there was no physical evidence or contemporaneous observations of the alleged sexual abuse, the only evidence of the abuse came from J's delayed disclosure, and the testimony of J's younger sister called J's veracity and motives into question; furthermore, the text messages, if deemed authentic by the jury, could have been used to impeach one of J's statements

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

during her interview and could have been viewed by jurors as evidence of J's motivation to fabricate her allegations against the defendant; accordingly, the case was remanded for a new trial.

Argued June 3—officially released November 19, 2020**

Procedural History

Substitute information charging the defendant with four counts of the crime of risk of injury to a child, three counts of the crime of sexual assault in the first degree, and two counts of the crime of sexual assault in the second degree, and with one count each of the crimes of sexual assault in the fourth degree and tampering with a witness, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Bentivegna*, *J.*; verdict and judgment of guilty of four counts of risk of injury to a child, three counts of sexual assault in the first degree, two counts of sexual assault in the second degree, and one count of sexual assault in the fourth degree, from which the defendant appealed to this court; thereafter, the case was transferred to the Appellate Court, *Alvord*, *Bright* and *Bear*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Reversed*; *new trial.*

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

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Elizabeth Tanaka*, former assistant state's attorney, for the appellee (state).

Jennifer B. Smith filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

** November 19, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

ROBINSON, C. J. Following a jury trial, the defendant, Manuel T., was convicted of six counts of sexual assault and four counts of risk of injury to a child arising from the sexual abuse of his girlfriend's daughter, J.[1] The defendant now appeals, upon our grant of his petition for certification,[2] from the judgment of the Appellate Court affirming the judgment of conviction. See *State* v. *Manuel T.*, 186 Conn. App. 51, 53, 198 A.3d 648 (2018). On appeal, the defendant claims that the Appellate Court improperly upheld (1) the admission into evidence of a video recording of a forensic interview of J by a nonmedical professional under the medical diagnosis and treatment exception to the hearsay rule, § 8-3 (5) of the Connecticut Code of Evidence, because medical care was not the "primary purpose" of the interview, and (2) the exclusion of screenshot photographs of text messages purportedly sent by J to the defendant's niece on the ground that they had not been sufficiently authenticated. We disagree with the defendant's claim that a primary purpose standard applies to the medical

[1] The defendant was convicted of two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), one count of sexual assault in the first degree in violation of § 53a-70 (a) (2), two counts of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1), one count of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (E), and four counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). The defendant also was charged with one count of tampering with a witness in violation of General Statutes § 53a-151. After the jury was unable to reach a verdict on that count, the state entered a nolle prosequi as to that count.

[2] We granted the defendant's petition for certification to appeal to this court, limited to the following issues: (1) "Did the Appellate Court apply the proper standard in determining that, in a criminal prosecution for sexual abuse of a child, hearsay statements made during a forensic interview of the child complainant are admissible under § 8-3 (5) of the Connecticut Code of Evidence?" And (2) "Did the Appellate Court properly conclude that the trial court did not abuse its discretion by excluding from evidence certain screenshots of text messages?" *State* v. *Manuel T.*, 330 Conn. 968, 200 A.3d 189 (2019).

treatment exception. We agree, however, that the Appellate Court incorrectly concluded that the trial court had properly excluded the text messages, and we further conclude that this evidentiary error requires a new trial. Accordingly, we reverse the judgment of the Appellate Court.

The record reveals the following undisputed facts and procedural history. During all relevant times, J lived with the defendant, whom she considered her stepfather,[3] her mother, her younger sister, and her younger brother. J's biological father was mostly absent from her life, in part due to periods of incarceration.

On March 28, 2014, when J was seventeen years old, she reported to her boyfriend, and then her family, and then the police, that the defendant had sexually abused her over the course of many years. In accordance with police protocol, J was referred to the Greater Hartford Children's Advocacy Center (advocacy center) at Saint Francis Hospital and Medical Center for a forensic interview.[4] On April 1, 2014, J participated in that interview, which was conducted by Lisa Murphy-Cipolla, the clinical services coordinator at the advocacy center. Although Murphy-Cipolla interviewed J alone, their conversation was observed through a one-way mirror by Claire Hearn, a police detective, and Audrey Courtney, a pediatric nurse practitioner. Consistent with the standard practice of the advocacy center, the interview was video recorded.

[3] J referred to the defendant as her stepfather, but also as her mother's boyfriend. Because the defendant also refers to himself as her stepfather, and his legal relationship to J is not relevant to any legal issue in the case, for convenience, we treat his status as J's stepfather.

[4] Although the Appellate Court referred to the advocacy center's interview as a "diagnostic" interview; *State* v. *Manuel T.*, supra, 186 Conn. App. 54; as did the state and the advocacy center's interviewer in her testimony at trial, the statutory scheme designates it as a "forensic" interview. General Statutes § 17a-106a (e). Therefore, we use the statutory term, as we have done in other cases. See, e.g., *State* v. *Maguire*, 310 Conn. 535, 538, 78 A.3d 828 (2013).

During the interview, J reported that the defendant had sexually abused her over an approximate seven year period, after school and while her mother was at work. She told Murphy-Cipolla that, starting when she was eight or nine years old, the defendant had, on numerous occasions, touched her inappropriately underneath her clothes. J also disclosed that, when she turned fifteen years old, the defendant had forced her to have vaginal and anal intercourse with him. The defendant subsequently was arrested and charged with six counts of sexual assault and four counts of risk of injury to a child. See footnote 1 of this opinion.

The trial court held a pretrial hearing to determine whether the video recording of the forensic interview would be admissible at trial. As an offer of proof, the state presented the testimony of Murphy-Cipolla and played a partially redacted version[5] of the video recording. Murphy-Cipolla testified regarding her background, the purposes and process of conducting such interviews, and the circumstances of her interview of J. The state argued that the video recording was admissible pursuant to the medical diagnosis and treatment exception to the hearsay rule. See Conn. Code Evid. § 8-3 (5). It noted that, if necessary, it could establish through Hearn's testimony that J had been referred for a medical evaluation after the interview. The defendant objected to the admission of the video recording, arguing that, except for a couple of J's statements, the interview statements did not satisfy the medical treatment hearsay exception because J was not seeking medical diagnosis or treatment in the interview and her statements were not made to a medical professional.

At the conclusion of the hearing, the court rendered an oral decision overruling the defendant's objection.

[5] The state voluntarily redacted, with the approval of the defendant and the trial court, certain statements, including ones that implicated the rape shield law, General Statutes § 54-86f, and others that were deemed irrelevant.

The court concluded that the statements in the interview satisfied the standard for admission under the medical diagnosis and treatment exception, as recently interpreted by the Appellate Court in *State* v. *Griswold*, 160 Conn. App. 528, 127 A.3d 189, cert. denied, 320 Conn. 907, 128 A.3d 952 (2015). That standard required that the purpose of the interview was "in part" to determine whether J needed medical treatment and that her statements were "reasonably pertinent" to achieving that end. See id., 552–53.

Thereafter, the defendant's case proceeded to a jury trial. The state presented J to testify about the abuse and then, over the defendant's renewed objection, also presented the video recording of the forensic interview.

The defendant's theory of the case was that J had fabricated the allegations of abuse. In support of this theory, the defendant sought to introduce two cell phone screenshots depicting text messages purportedly sent by J to V, the defendant's niece, a couple of months before J reported the abuse. On cross-examination, J denied sending any text messages to V.

The court held a hearing outside the presence of the jury to determine the admissibility of the screenshots. As an offer of proof, the defendant conducted a direct examination of V and produced both screenshots. At the conclusion of the hearing, the court issued an oral decision concluding that the screenshots had not been sufficiently authenticated to be admitted into evidence.

The jury subsequently found the defendant guilty on six counts of sexual assault and four counts of risk of injury to a child. See footnote 1 of this opinion. The court rendered judgment in accordance with the jury's verdict and imposed a total effective sentence of forty years incarceration, execution suspended after thirty years, and thirty-five years probation and lifetime sex offender registration.

The defendant appealed from the judgment of conviction to the Appellate Court, contending that the admission into evidence of the forensic interview and the exclusion of the text messages were harmful error.[6] See *State* v. *Manuel T.*, supra, 186 Conn. App. 53. The Appellate Court concluded that neither ruling was an abuse of the trial court's discretion. Id., 64–65, 72. With regard to the interview, the Appellate Court cited the standard it had articulated in *State* v. *Griswold*, supra, 160 Conn. App. 552–57, and other cases, under which "[s]tatements may be reasonably pertinent . . . to obtaining medical diagnosis or treatment *even when that was not the primary purpose of the inquiry that prompted them, or the principal motivation behind their expression.* . . . Although [t]he medical treatment exception to the hearsay rule requires that the statements be both pertinent to treatment and motivated by a desire for treatment . . . in cases involving juveniles, [we] have permitted this requirement to be satisfied inferentially." (Emphasis altered; internal quotation marks omitted.) *State* v. *Manuel T.*, supra, 61. Applying these principles to the present case, the Appellate Court concluded that the trial court had not abused its discretion in admitting the recording of the interview "because it reasonably can be inferred from the circumstances apparent to [J] that she understood the interview had a medical purpose." Id., 63.

With regard to the screenshots of the text messages, the Appellate Court concluded that the trial court had not abused its discretion in excluding them. Id., 65. The Appellate Court determined that V's testimony was insufficient authentication and that there was not sufficient additional corroboration for her testimony. Id., 70–72. Accordingly, the Appellate Court affirmed the

[6] The defendant initially appealed to this court, and we transferred the appeal to the Appellate Court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

judgment of conviction. Id., 72. This certified appeal followed. See footnote 2 of this opinion. Additional facts and procedural history will be set forth as necessary.

On appeal, the defendant contends that the Appellate Court incorrectly concluded that the trial court did not abuse its discretion in admitting the video recorded interview and excluding the text messages. The defendant contends that both rulings rested on the application of improper standards, to the prejudice of the defendant, requiring a new trial. We agree with the defendant's claim with regard to the text messages and conclude that the trial court's exclusion of this evidence was harmful error.

I

We begin with the defendant's challenge to the admission of the recording of the forensic interview. The defendant, supported by the amicus curiae, the Connecticut Criminal Defense Lawyers Association, asks this court to adopt a standard under which a minor victim's statements in this type of interview are admissible under the medical treatment exception to the hearsay rule, § 8-3 (5) of the Connecticut Code of Evidence, only if the "primary purpose" in making and eliciting those statements is to obtain and/or provide such treatment. The defendant contends that, because a primary purpose standard applies to the admission of such interviews under the tender years exception to the hearsay rule; see Conn. Code Evid. § 8-10; it is both logical and sound policy to apply the same standard to the medical treatment exception. Specifically, the defendant argues that this court previously indicated that the two exceptions would yield the same result in *State* v. *Maguire*, 310 Conn. 535, 78 A.3d 828 (2013), and, therefore, the same standard should control. The defendant also asserts that the rationale for the medical treatment exception—that such statements are reliable because

a person has a strong motivation to be truthful when her health and well-being are at stake—does not apply to an interview involving the police and lacking the confidentiality of the physician-patient relationship. The defendant acknowledges that the Appellate Court squarely rejected this argument in *State* v. *Griswold*, supra, 160 Conn. App. 550, but asks this court to overrule *Griswold*.[7] We are not persuaded that it is necessary or appropriate to limit the medical treatment hearsay exception to statements made for the "primary" purpose of obtaining such treatment.[8]

A

The record reveals the following additional relevant facts. The forensic interview at issue in this case was conducted in accordance with a statutorily prescribed,

[7] Although the state argues that *Griswold* properly was applied by the courts below, its threshold position is that this court should not consider the defendant's claim that a "primary purpose" standard should have been applied because (1) he did not seek application of this standard in the trial court, and (2) as a consequence, the record lacks the necessary findings as to the primary purpose of the interview. The defendant disputes both contentions.

We conclude that it is proper to address the defendant's primary purpose claim, irrespective of any potential preservation concerns or deficiencies in the record. In light of our conclusion in part II of this opinion that the defendant is entitled to a new trial due to the improper exclusion of the text messages, we would address the proper standard for admission of this evidence even if the issue was unpreserved, as it would be likely to arise on remand. See, e.g., *State* v. *Lebrick*, 334 Conn. 492, 521 n.16, 223 A.3d 333 (2020); *In re Taijha H.-B.*, 333 Conn. 297, 312 n.9, 216 A.3d 601 (2019). The proper standard for admission of the evidence is purely a question of law, to which we apply plenary review. See *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007) (proper interpretation of rules of evidence is subject to plenary review); see also *State* v. *Mendez*, 148 N.M. 761, 766, 242 P.3d 328 (2010) (whether primary purpose of interview controls admissibility of all statements made during diagnostic interview under medical treatment hearsay exception is subject to de novo review).

[8] This court previously has held that it has the authority to modify the Connecticut Code of Evidence. See *State* v. *DeJesus*, 288 Conn. 418, 454–62, 953 A.2d 45 (2008) (holding that this court has authority to modify common-law rules of evidence codified in code).

multidisciplinary team approach.[9] See General Statutes § 17a-106a. Murphy-Cipolla, who conducted the interview, is not a medical professional; her professional training is in counseling and family therapy. At the commencement of the interview, she identified herself to J as "Lisa," "one of the interviewers" at the "Children's Center . . . ." Although the interview was observed remotely by a police officer and a pediatric nurse practitioner, Murphy-Cipolla informed J only that "a couple of ladies . . . I work with" could see them through a one-way mirror in the room. Murphy-Cipolla also informed J that the interview was being recorded, explaining that this procedure would avoid J having to repeat her account. Murphy-Cipolla took some background information and then asked J what she had come to talk about, to which J replied: "My stepdad . . . molested me when I was [eight years old] until last year, and I just never said anything, and I just said something [four days ago]." J thereafter described the defendant's sexual abuse. Murphy-Cipolla pressed for details when J's account regarding the abuse was vague and inquired about certain matters that J did not offer, which prompted J to disclose, among other things, the location where particular incidents took place, whether anyone else was present in the house when these incidents occurred, and which brand of condom the defendant had used. J mentioned experiencing physical pain during the incidents of anal intercourse, expressed concern that she could have contracted a sexually transmitted disease, and explained how the abuse and her reporting of it had affected her state of mind. Following

[9] Forensic interviews of child sexual assault victims are designed, by law, to serve dual functions: to investigate child abuse and to treat victims of such abuse. See General Statutes §§ 17a-101, 17a-101h and 17a-106a. By conducting and recording an interview that is available to a multidisciplinary team comprised of law enforcement, medical and mental health professionals, and the Department of Children and Families, the law aims to minimize further trauma to the victim. See General Statutes §§ 17a-101 and 17a-101h.

the interview, J was offered a medical examination,[10] which she declined, she was given a pregnancy test and a test for sexually transmitted diseases, both of which were negative, and she was referred for counseling.

B

Section 8-3 of the Connecticut Code of Evidence provides in relevant part: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (5) A statement made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment. . . ." This rule sets forth, in effect, a two-pronged test. The first addresses the declarant's purpose or motivation in the making of the statement, and the second addresses the pertinence of the statement to that end.[11] See *State* v. *Dollinger*, 20 Conn. App. 530, 535, 568 A.2d 1058 ("[t]he medical treatment exception to the hearsay rule requires that the statements be *both* pertinent to treatment and motivated by a desire for treatment" (emphasis added)), cert. denied, 215 Conn. 805, 574 A.2d 220 (1990).

[10] It is the advocacy center's standard practice to offer a medical examination following these interviews.

[11] In sexual assault cases, this court has held that "testimony pertaining to the identity of the defendant and the nature of the sexual assault [are] . . . pertinent to proper diagnosis and treatment of the resulting physical and psychological injuries of sexual assault." *State* v. *Kelly*, 256 Conn. 23, 45, 770 A.2d 908 (2001); see also *State* v. *Wood*, 208 Conn. 125, 133–34, 545 A.2d 1026 ("medical" encompasses psychological as well as somatic illnesses and conditions), cert. denied, 488 U.S. 895, 109 S. Ct. 235, 102 L. Ed. 2d 225 (1988). Statements made by a sexual assault complainant to someone other than a treating physician or mental health care provider may satisfy this exception if the person receiving that account is found to have been "acting within the chain of medical care" and the other requirements of the exception are met. *State* v. *Cruz*, 260 Conn. 1, 6, 792 A.2d 823 (2002); see id. (statements to social worker were admissible).

We emphasize at the outset that, although at oral argument before this court, the defendant's appellate counsel pointed to a few statements in the interview that he contends have no relevance to medical treatment (e.g., reporting the brand of condoms used by the defendant) and conceded that a few others would be pertinent to such treatment, the defendant's certified appeal does not challenge the admission of particular statements for lack of pertinence to medical treatment. The defendant's claim on appeal is that the entire interview should have been excluded under the purpose prong because we should construe this hearsay exception to require that the interview's primary purpose was to obtain and/or provide medical treatment or diagnosis.

Our analysis begins with the observation that, although many other jurisdictions have adopted a similarly phrased two-pronged medical treatment hearsay exception; see, e.g., Fed. R. Evid. 803 (4); Ind. R. Evid. 803 (4); Ky. R. Evid. 803 (4); Mich. R. Evid. 803 (4); N.M. R. Evid. 11-803 (4); N.C. R. Evid. 803 (4); Ohio R. Evid. 803 (4); neither the defendant nor the amicus has identified a single jurisdiction that has applied a primary medical purpose standard to this exception generally or to its application in this type of interview of minor victims specifically.[12] Our independent research has revealed none.

[12] The amicus brief cites cases from other jurisdictions in which courts have (a) characterized a victim's statements about the defendant's abuse as lacking a medical purpose or motive under the circumstances, (b) effectively determined that, if the child victim was too young to be unaware that his statements would enable a physician to make a diagnosis and provide treatment and thus would not understand the need to speak truthfully, the statements would be inadmissible under the medical treatment exception, and (c) deemed statements identifying the defendant as the abuser inadmissible under this exception.

Although some of this case law relates to the proper *application* of the medical purpose prong of the exception, none is relevant to the specific issue in this certified appeal, namely, whether the victim must have the *primary* purpose of obtaining medical treatment or diagnosis. In the cases falling under (a), the courts determined that there was *no* medical purpose.

One sister state jurisdiction has provided cogent reasons for rejecting the application of a primary purpose standard in a case that, like this one, involved a challenge to the admissibility of an interview of a minor sexual assault victim. The New Mexico Supreme Court first recognized that "[t]he 'primary purpose of the encounter' approach . . . is derived from the United States Supreme Court's [c]onfrontation [c]lause jurisprudence." *State* v. *Mendez*, 148 N.M. 761, 769, 242 P.3d 328 (2010). Under *Crawford* v. *Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the hearsay statements of an unavailable witness that are "testimonial" in nature may be admitted under the sixth amendment's confrontation clause only if the defendant has had a prior opportunity to cross-examine the declarant. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the *primary purpose* of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the *primary purpose* of the interrogation is to establish or prove past events

If the defendant in the present case, on remand, is able to establish that the victim was not motivated by such a purpose even in part, her statements would be inadmissible under our law as it currently exists.

The cases falling under (b) and (c) are no doubt in tension with our state's appellate case law, which has declined to take a strict view of the medical treatment exception. See, e.g., *State* v. *Kelly*, 256 Conn. 23, 45, 770 A.2d 908 (2001). Appellate Court case law has allowed the purpose prong to be satisfied inferentially in cases involving juveniles, even if the victim was too young to have the conscious purpose of obtaining medical treatment to advance her own health. See *State* v. *Dollinger*, supra, 20 Conn. App. 536. This court has held that the abuser's identity is pertinent to medical treatment and diagnosis. See *State* v. *Kelly*, supra, 45. Neither of the issues in (b) or (c) is relevant to the issue in this certified appeal. Moreover, the vitality of case law addressing children too young to form a conscious intent of obtaining medical treatment and to understand the need for truthfulness would have no application to the present case, in which J was seventeen years old at the time of her interview.

potentially relevant to later criminal prosecution." (Emphasis added.) *Davis* v. *Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

The New Mexico Supreme Court then explained: "The hearsay rule and the [c]onfrontation [c]lause are not [coextensive] and must remain distinct. The hearsay rule is intended to ensure that the jury is not exposed to unreliable evidence, even when the declarant testifies at trial and is subject to [cross-examination]. The [c]onfrontation [c]lause guarantees the accused in a criminal trial the right to be confronted with the witnesses against him, regardless of how trustworthy the out-of-court statement may appear to be. [See U.S. Const., amend. VI.] More important for present purposes, the unique dangers each seeks to avoid can be implicated under quite distinct circumstances. As the United States Supreme Court explained in *Crawford*, not all hearsay implicates the [s]ixth [a]mendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the [civil law] abuses the [c]onfrontation [c]lause targeted. On the other hand, ex parte examinations might sometimes be admissible under modern hearsay rules, but the [f]ramers certainly would not have condoned them." (Internal quotation marks omitted.) *State* v. *Mendez*, supra, 148 N.M. 769.

"In *Crawford*, the United States Supreme Court listed several examples of the core class of testimonial statements which trigger [c]onfrontation [c]lause concerns . . . ." (Internal quotation marks omitted.) Id. "What these examples have in common is that they lend themselves to an analysis that focuses largely on surrounding circumstances to separate testimonial from [nontestimonial] statements.

"For example, once an individual prepares an affidavit, the reliability of any single statement is largely irrel-

evant for constitutional purposes because it will *all* be testimonial and inadmissible under the [s]ixth [a]mendment without a prior opportunity for cross-examination. The act of preparing an affidavit evinces the preparer's awareness that each statement could be used at trial." (Footnote omitted.) Id., 770.

"Unlike the [c]onfrontation [c]lause context, in which the surrounding circumstances determine whether the declarant is bearing testimony, the medical or nonmedical purpose of a statement cannot be determined without closely examining the *substance* of the statement. Surrounding circumstances are certainly relevant, but the focus must center on the individual statement." (Emphasis in original; internal quotation marks omitted.) Id.

"The diversion created by [applying a primary medical purpose test to the medical treatment hearsay exception] is that it directs courts to determine the purpose of the encounter, *instead of considering the substance of, and circumstances surrounding, individual statements*. This approach is irreconcilable with previous hearsay opinions in which . . . courts have focused on particular statements, determining in each instance the purpose for which the statement was made." (Emphasis added.) Id., 772.

We agree with the reasoning of the New Mexico Supreme Court in *Mendez*. We disagree with the defendant's argument that our decision in *State* v. *Maguire*, supra, 310 Conn. 535, dictates otherwise. In *Maguire*, this court considered whether the trial court properly admitted the child sexual abuse victim's statements adduced in a forensic interview under the tender years exception to the hearsay rule without making certain findings mandated by law, including that the interview had not been conducted "in preparation of a legal proceeding." Id., 563, citing General Statutes § 54-86*l* (a)

and Conn. Code Evid. (2009) § 8-10 (a).[13] We rejected the state's contention that this court had previously determined that forensic interviews like the one at issue were admissible as a matter of law and, thus, that such a finding was unnecessary. *State* v. *Maguire*, supra, 563–64. We noted that the tender years hearsay exception must be applied "consistently with the sixth amendment bar against testimonial hearsay, as explained in *Crawford* [v. *Washington*, supra, 541 U.S. 68–69]. . . . The prohibition of the tender years exception against statements made in preparation of a legal proceeding is simply another way of saying that, to be admissible, the statement must be nontestimonial for purposes of *Crawford*." (Citation omitted.) *State* v. *Maguire*, supra,

[13] General Statutes § 54-86*l* provides: "(a) Notwithstanding any other rule of evidence or provision of law, a statement by a child twelve years of age or younger at the time of the statement relating to a sexual offense committed against that child, or an offense involving physical abuse committed against that child by the child's parent or guardian or any other person exercising comparable authority over the child at the time of the offense, shall be admissible in a criminal or juvenile proceeding if: (1) The court finds, in a hearing conducted outside the presence of the jury, if any, that the circumstances of the statement, including its timing and content, provide particularized guarantees of its trustworthiness, (2) the statement was not made in preparation for a legal proceeding, (3) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement including the content of the statement, the approximate time, date and location of the statement, the person to whom the statement was made and the circumstances surrounding the statement that indicate its trustworthiness, at such time as to provide the adverse party with a fair opportunity to prepare to meet it, and (4) either (A) the child testifies and is subject to cross-examination at the proceeding, or (B) the child is unavailable as a witness and (i) there is independent nontestimonial corroborative evidence of the alleged act, and (ii) the statement was made prior to the defendant's arrest or institution of juvenile proceedings in connection with the act described in the statement.

"(b) Nothing in this section shall be construed to (1) prevent the admission of any statement under another hearsay exception, (2) allow broader definitions in other hearsay exceptions for statements made by children twelve years of age or younger at the time of the statement concerning any alleged act described in subsection (a) of this section than is done for other declarants, or (3) allow the admission pursuant to the residual hearsay exception of a statement described in subsection (a) of this section."

Section 8-10 of the Connecticut Code of Evidence codifies this provision.

564–65. We explained in *Maguire* that this court had determined in the prior case relied on by the state that the forensic interview of the child sexual assault victim had met "the fact intensive 'primary purpose' test articulated in *Davis* v. *Washington*, [supra, 547 U.S. 822]." *State* v. *Maguire*, supra, 566. We clarified that statements in such interviews are not per se nontestimonial, and, instead, "a victim's statements during a forensic interview may be deemed nontestimonial only if the *essential* purpose of the interview is to provide medical assistance to the victim." (Emphasis added.) Id., 569.

The court in *Maguire* then noted in dictum: "Indeed, statements made in the course of a forensic interview that satisfy the criteria for admission under the tender years exception *are similar to statements made to a physician in the course of medical treatment*, *which are admissible under the medical treatment and diagnosis exception to the hearsay rule*, including statements that reveal the identity of the abuser." (Emphasis added.) Id. This statement has spawned some confusion in our trial courts.

Our Appellate Court correctly recognized in *Griswold* that this statement in *Maguire* was not intended to suggest equivalence between the two hearsay exceptions when considering whether either exception supported the trial court's admission of statements made by child sex abuse victims in forensic interviews. In *Griswold*, the Appellate Court first concluded that the trial court improperly had admitted video recordings of forensic interviews under the tender years exception, as interpreted in *Maguire*, because "the circumstances surrounding the victims' forensic interviews objectively demonstrate[d] that their primary purpose was not to provide the victims with medical diagnosis or treatment, but to [establish] or prov[e] past events potentially relevant to later criminal prosecution." (Internal quotation marks omitted.) *State* v. *Griswold*, supra, 160 Conn. App. 547.

The Appellate Court rejected the defendant's claim, however, that *Maguire* necessarily compelled the conclusion that the trial court also improperly admitted the videos under the medical diagnosis and treatment exception. It began its analysis by underscoring that, "because the victims appeared at trial and were subject to cross-examination by the defendant, *Crawford* and its progeny [did] not apply *directly* to the . . . case." (Emphasis in original.) Id., 550–51. It then reasoned that, because "hearsay that does not fall into one exception to the hearsay rule may still be admissible if it falls within another exception . . . the question of whether the videos and their written summaries [were] admissible under the medical diagnosis and treatment exception require[d] its own analysis independent of the one undertaken pursuant to the tender years exception. Indeed, the Code of Evidence specifically states in the tender years exception that [n]othing in this section shall be construed to . . . prevent the admission of any statement under another hearsay exception. Conn. Code Evid. § 8-10 (b) (1)." (Citation omitted; internal quotation marks omitted.) *State* v. *Griswold*, supra, 160 Conn. App. 551–52. The Appellate Court further explained that, "[i]n the context of a forensic interview, [the medical diagnosis and treatment] standard is substantially less demanding than the one imposed by *Crawford* and incorporated into the tender years exception." Id., 552. In light of these factors, the Appellate Court "decline[d] to construe the court's observation [in *Maguire*] as suggesting that, because some statements *admissible* under both hearsay exceptions are similar in nature, other statements *inadmissible* under one exception are necessarily inadmissible under the other." (Emphasis in original.) Id., 554.

The Appellate Court in *Griswold* did note, however, the following concern: "[B]ecause the standard for admission of forensic interview evidence under the medical diagnosis and treatment exception is less strin-

gent than the standard for admission under the tender years exception, the state in future cases may rely solely on the medical diagnosis and treatment exception, thereby effectively rendering *Maguire* a nullity. This potential anomaly, however, is not for [the Appellate] [C]ourt to address but, instead, is best left for consideration by [the] Supreme Court, either in its adjudicative function or as overseer of the Code of Evidence." Id., 557–58.

We take this opportunity to clarify that, in the context of this type of interview of a minor sexual assault victim, the tender years hearsay exception and the medical treatment exception may substantially overlap in application but nevertheless may also occupy different fields of operation. The tender years exception is not limited to statements that reasonably pertain to "medical diagnosis or treatment" but includes any statement "relating to" a sexual offense committed against that child or an offense involving physical abuse committed against that child by certain persons. As the Appellate Court observed in the present case, the tender years exception considers the purpose of the interview, whereas the medical treatment exception focuses on the declarant's purpose in making individual statements. See *State* v. *Manuel T.*, supra, 186 Conn. App. 62 ("[b]ecause the focus of the medical treatment exception is the declarant's understanding of the purpose of the interview, the inquiry must be restricted to the circumstances that could be perceived by the declarant, as opposed to the motivations and intentions of the interviewer that were not apparent to the declarant"). The mere fact that the state may rely on the medical treatment exception rather than the tender years exception to avoid the more restrictive primary purpose test is not in itself a sound reason to engraft the latter's constitutionally derived primary purpose standard onto the former.

The defendant's concern, at bottom, appears to be one of reliability. See, e.g., *State* v. *Cruz*, 260 Conn. 1, 7, 792 A.2d 823 (2002) ("[t]he rationale underlying the medical treatment exception to the hearsay rule is that the patient's desire to recover his health . . . will restrain him from giving inaccurate statements to a [health care professional] employed to advise or treat him" (internal quotation marks omitted)). We are not persuaded that the proper application of the existing medical treatment hearsay exception does not ensure the reliability of the statements made at a forensic interview. There is a legitimate question as to J's motivation in participating in the interview in the present case and whether all of her statements were reasonably pertinent to medical treatment or diagnosis. The trial court plainly did not assess the admissibility of the statements in the forensic interview individually but in toto. This approach may have been a reflection of the position taken by the parties, both of whom seemed to take an "all or nothing" view of interviews of minor sexual assault victims. Because we conclude in part II of this opinion that the defendant is entitled to a new trial, he will have the opportunity to make specific objections to individual statements should he so choose.[14]

II

We next turn to the defendant's claim that the Appellate Court incorrectly concluded that the trial court did not abuse its discretion in excluding the screenshots of two text messages purportedly authored by J for lack of authentication. The defendant contends that, although the traditional authentication standard was met in the present case, the trial court and, in turn, the Appellate Court improperly applied a heightened

[14] We note that it is not uncommon in these types of cases for a defendant to attempt to impeach the victim through the use of statements made in the forensic interview. In such cases, the court could consider whether the defendant has opened the door to the admission of other parts of the forensic interview as nonhearsay or under another hearsay exception.

standard for the authentication of the electronic communication. He further contends that the exclusion of this evidence was harmful because it would have supported his defense that J fabricated the claims of abuse because she was upset with the defendant for, among other things, failing to buy her a car. We agree.

A

The record reveals the following additional undisputed facts and procedural history. When the defendant cross-examined J during the state's case-in-chief, she denied that she had ever sent text messages to V and specifically denied sending the messages reflected in the defendant's two exhibits. To authenticate the two screenshots taken of the messages, in his rebuttal case, the defendant made an offer of proof through direct examination of V and production of the screenshots.

Outside the presence of the jury, V offered the following testimony. V and J are approximately the same age. They had known each other since they were children and were close during their younger years, but had drifted apart more recently. Sometime in February or early March, 2014, V decided to reach out to J by way of text message. J had given her phone number to V at a previous family function, and V saved it in her telephone contacts under J's name.

In her initial message, V greeted J by name. V received replies, which she believed to be from J because the messages came from the number J had given V, they referred to J's family members by name, and the author of the reply messages expressed herself in a manner as J previously had.

Later, V took screenshots of two of the text messages she received in reply to that exchange. She attested that the screenshots accurately reflected the text messages on her telephone. V was unable to capture the

full exchange in her screenshots because the texts were too long. She attested, however, that the text messages in the two screenshots were part of the same conversation.

By the time of trial, V had replaced the cell phone on which she had received these text messages and could not produce that cell phone. V also had been unable to produce telephone records to demonstrate when the text conversation had occurred between these telephone numbers because her mobile service provider no longer retained records for the February–March, 2014 period.

The first screenshot, which did not fully capture the contact's name, contains a small portion of a message from one party and the following reply: "I didn't forget lol and yes he got himself a new car in a week [and] then sold it for another car in less than a day but when it comes to me he can't get one. Smh[15] his excuse is I don't deserve one cus of my attitude. He broke his promise to me about getting me [one] that's why I don't talk to him anymore he doesn't deserve my kindness I'm sick and tired of BROKEN promises!

"But it is what it is. I'll just buy my own damn car since I buy everything else myself. But what's new with you? Why you all of a sudden hit me up. Lol." (Footnote added.)

The second screenshot revealed the contact to be someone with the same first name as J. The screenshot cut off the top of the message, which continued:[16] "I turn 18 this year . . . I should be happy but I'm scared. And [m]y job is so stressful. This year hasn't been good for me at all it's always something everyday nothing

[15] V testified that "SMH" stands for "[s]haking my head." She stated that J previously had used this phrase, as well as an expression used later in the text about "hitting someone up." V acknowledged on cross-examination that both expressions were common to her generation.

[16] We have excluded emojis from the quoted passage.

good happens to me anymore the ONLY [thing] going good right now is my relationship with [T][17] and my bf.[18] That's it. And same my dad keeps breaking his promises along with my step dad well [M]anny.[19] We don't even talk anymore it's like neither of my fathers are there for me . . . so my mom is all I got. It really hurts to say it but it is what it is.

"And on top of this I've been looking for another job and saving up for a car cus [M]anny is selfish and won't buy me one." (Footnotes added.)

The trial court sustained the state's objection to the admission of the screenshots on the ground that they had not been sufficiently authenticated. The court determined that the defendant had failed to make a prima facie case that J authored the text messages exhibited by the screenshots because the messages were not the complete exchange between the parties, lacked temporal indicators of date and time, and were devoid of distinctive characteristics that would identify J as the author.

In its decision affirming the trial court's judgment, the Appellate Court relied on a recent line of its cases beginning with *State* v. *Eleck*, 130 Conn. App. 632, 23 A.3d 818 (2011), aff'd, 314 Conn. 123, 100 A.3d 817 (2014); *State* v. *Manuel T.*, supra, 186 Conn. App. 69–70; which it characterized as its "seminal decision on the authentication of electronic evidence." Id., 69. The court acknowledged that, "[a]mong the examples of methods

[17] The message used an abbreviated form of a name, consistent with that of J's sister.

[18] "Bf" reasonably could be interpreted to refer either to "boyfriend" or "best friend." The evidence established that J had a boyfriend during the time these messages purportedly were sent. In her interview, J indicated that she did not get along with girls generally, but she testified that she presently had a female best friend.

[19] In the interview, J said that she just called the defendant by his name and noted that he went by "Manny or Manuel."

of authenticating evidence set forth in the official commentary to § 9-1 (a) of the [Connecticut] Code of Evidence is that [a] witness with personal knowledge may testify that the offered evidence is what its proponent claims it to be, and [t]he distinctive characteristics of an object, writing or other communication, when considered in conjunction with the surrounding circumstances, may provide sufficient circumstantial evidence of authenticity." (Internal quotation marks omitted.) Id., 68. It suggested that, although the traditional methods of authentication applied to electronic communications, a more stringent standard of proof would apply because "an electronic communication, such as a Facebook message, an e-mail or a cell phone text message, could be generated by someone other than the named sender . . . ." (Internal quotation marks omitted.) Id. The Appellate Court concluded that the trial court did not abuse its discretion in determining that this standard had not been met in the present case because the screenshots did not capture the complete communication between the parties, there was no proof of the date on which the communication occurred, there were no distinguishing features in the text that would identify J as the author, and J had denied sending the messages. Id., 69–72.

B

The defendant advances two reasons why the Appellate Court incorrectly determined that the trial court did not abuse its discretion in excluding the screenshots: first, the Appellate Court and the trial court improperly applied a heightened standard of authentication and, second, the screenshots met the proper authentication standard. Although the parties analyze this question under the abuse of discretion standard, for the reasons set forth hereinafter, we conclude that it is more properly analyzed as a legal question subject

to plenary review.[20] See, e.g., *Hartford* v. *CBV Parking Hartford, LLC*, 330 Conn. 200, 214, 192 A.3d 406 (2018) ("[w]hether the trial court applied the proper legal standard is subject to plenary review on appeal"); *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007) ("To the extent a trial court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law . . . for an abuse of discretion." (Citations omitted.)). Under the proper, universally applicable standard, the trial court incorrectly determined that the defendant had not met his burden of authenticating this evidence.

"Authentication . . . is viewed as a subset of relevancy, because evidence cannot have a tendency to make the existence of a disputed fact more or less likely if the evidence is not that which its proponent claims." (Internal quotation marks omitted.) *Lorraine* v. *Markel American Ins. Co.*, 241 F.R.D. 534, 539 (D. Md. 2007). Our Code of Evidence provides that "[t]he requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be." Conn. Code Evid. § 9-1 (a). "[A] writing may be authenticated by a number of methods, including direct testimony or circumstantial evidence." (Internal quotation marks omitted.) *State* v. *Garcia*, 299 Conn. 39, 57, 7 A.3d 355 (2010).

"Both courts and commentators have noted that the showing of authenticity is not on a par with the more technical evidentiary rules that govern admissibility, such as hearsay exceptions, competency and privilege.

[20] Even if we were to characterize the trial court's decision as too demanding an application of the correct standard and thus subject to review under the abuse of discretion standard, we would reach the same conclusion.

. . . Rather, there need only be a prima facie showing of authenticity to the court. . . . Once a prima facie showing of authorship is made to the court, the evidence, as long as it is otherwise admissible, goes to the jury, which will ultimately determine its authenticity." (Internal quotation marks omitted.) Id., 57–58. "[C]ompliance with [§] 9-1 (a) does not automatically guarantee that the fact finder will accept the proffered evidence as genuine." Conn. Code Evid. § 9-1, commentary.

It is widely recognized that a prima facie showing of authenticity is a low burden.[21] See *United States* v. *Barnes*, 803 F.3d 209, 217 (5th Cir. 2015) (standard "is not a burdensome one" (internal quotation marks omitted)), cert. denied sub nom. *Hall* v. *United States*, U.S. , 137 S. Ct. 691, 196 L. Ed. 2d 570 (2017); *United States* v. *Tin Yat Chin*, 371 F.3d 31, 38 (2d Cir. 2004) ("minimal standards for authentication"); *Lorraine* v. *Markel American Ins. Co.*, supra, 241 F.R.D. 545 (recognizing "the proponent's light burden of proof in authenticating an exhibit" (internal quotation marks omitted)); *Gagliardi* v. *Commissioner of Children & Families*, 155 Conn. App. 610, 619, 110 A.3d 512 (bar for authentication of evidence is not particularly high), cert. denied, 316 Conn. 917, 113 A.3d 70 (2015); *State* v. *Mrza*, 302 Neb. 931, 938, 926 N.W.2d 79 (2019) ("[the] rule does not impose a high hurdle for authentication"). This is because "[a] proponent of evidence is not required to *conclusively prove the genuineness* of the evidence *or to rule out all possibilities inconsistent with authenticity*." (Emphasis added.) *State* v. *Mrza*,

[21] A similar rule of evidence applies in many other jurisdictions; see, e.g., Fed. R. Evid. 901; and we have considered such sources when determining the contours of our rule. See *State* v. *Swinton*, 268 Conn. 781, 811–12 and n.28, 847 A.2d 921 (2004) (adopting factors utilized under rule 901 of Federal Rules of Evidence for purposes of conducting foundational analysis of computer generated evidence). See generally *State* v. *Foreman*, 288 Conn. 684, 721, 954 A.2d 135 (2008) ("[w]here a state rule is similar to a federal rule we review the federal case law to assist our interpretation of our rule" (internal quotation marks omitted)).

supra, 938; accord *Campbell* v. *State*, 382 S.W.3d 545, 549 (Tex. App. 2012); see also *State* v. *Valentine*, 255 Conn. 61, 77, 762 A.2d 1278 (2000) ("[t]he proffering party must demonstrate to the trial court that there is substantial evidence from which the jury *could* infer that the telephone communication was authentic" (emphasis added)).

The commentary to our rule of evidence makes clear that electronic communications, such as text messages, are subject to the same standard of authentication and the same methods of authentication as other forms of evidence: "As with any other form of evidence, a party may use any appropriate method, or combination of methods, described in this commentary, or any other proof to demonstrate that the proffer is what its proponent claims it to be, to authenticate any particular item of electronically stored information." Conn. Code Evid. (2018) § 9-1, commentary; cf. *State* v. *Hannah*, 448 N.J. Super. 78, 88–89, 151 A.3d 99 (App. Div. 2016) ("Despite the seeming novelty of social [network generated] documents, courts have applied the existing concepts of authentication . . . . We need not create a new test for social media postings." (Citations omitted; internal quotation marks omitted.)).

One such appropriate method of authentication identified in the commentary to our rule, and broadly recognized in other jurisdictions, is that "[a] witness with personal knowledge may testify that the offered evidence is what its proponent claims it to be." Conn. Code Evid. § 9-1, commentary. This is precisely what V's testimony accomplished. V testified: she and J had been close while they were growing up; J provided her phone number to V at a family function; V entered the number in her phone contacts; a couple of months before J reported the abuse, V initiated a text message to that number in which she greeted J by name; V received replies; V believed the replies to be from J

because of their substance and manner of expression; and the screenshots accurately reflected the text messages V received.

The commentary to the code also provides that "[t]he distinctive characteristics of an object, writing or other communication, when considered in conjunction with the surrounding circumstances, may provide sufficient circumstantial evidence of authenticity." Conn. Code Evid. § 9-1, commentary. Although the contents of the text messages do not reveal facts known only to J, they are consistent with having been sent by her. They refer to her age, her job, her family members, her boyfriend, and her biological father's absence, and imply that she had not heard from V in some time, which was consistent with V's testimony. [22]

Although the Appellate Court recited the aforementioned legal principles, it is apparent that neither that court nor the trial court held the defendant to the low burden of establishing a prima facie case of authenticity and, instead, effectively required the defendant to establish that the text messages were in fact what they purported to be. Specifically, the trial court and the Appellate Court deemed the testimony of V insufficient authentication. They pointed to information missing from the screenshots or not provided through corroborative evidence, such as the date of the communication. This conclusion, however, is inconsistent with numerous federal and sister state decisions that have held that comparable testimony sufficiently authenticated text messages or similar electronic communication. See, e.g., *United States* v. *Arnold*, 696 Fed. Appx. 903, 907 (10th Cir. 2017) (rejecting argument that text messages copied into separate document were not sufficiently authenticated

[22] The inquiry in the text message, "[w]hy you all of a sudden hit me up," is consistent with V's account that she had not been in contact with J for some time before she sent J a text message in early 2014.

because they "contained insufficient distinctive identifiers—e.g., dates, phone numbers, and customary text message format"—when proffering party presented witness who testified that he had received original text messages from defendant and testified "as to the general time frame and the order of events that occurred when he received particular messages and groups of messages"); *United States* v. *Ramirez*, 658 Fed. Appx. 949, 952 (11th Cir. 2016) (screenshots of text messages were properly authenticated when party to exchange testified that photographs of messages were from her phone and identified text messages sent between her and purported author, there was testimony that screenshots fairly and accurately represented text messages, and there was evidence that purported author was user of other phone number); *United States* v. *Lanzon*, 639 F.3d 1293, 1300–1301 (11th Cir.) (instant messages transferred to Microsoft Word document were properly authenticated by witness who testified that he participated in online chats and that transcripts were accurate copies of those conversations), cert. denied, 565 U.S. 916, 132 S. Ct. 333, 181 L. Ed. 2d 208 (2011); *Pierce* v. *State*, 302 Ga. 389, 395–96, 807 S.E.2d 425 (2017) (screenshots of text messages on cell phone were properly authenticated, despite facts that proffering party did not introduce cell phone records, that purported author denied sending messages, and that no one testified that they observed him send them, when there was testimony that images were fair and accurate representation of what appeared on cell phone screen and cell phone owner testified that phone number shown for text messages he received was author's phone number and that he exchanged several text messages with author); *People* v. *Ziemba*, 100 N.E.3d 635, 648 (Ill. App. 2018) (finding that text messages were authenticated by "the undercover officer who personally sent and received the text messages"); *State* v. *Tieman*, 207 A.3d

618, 622 (Me. 2019) (Facebook Messenger conversation was authenticated through testimony of person with whom victim was communicating); *State* v. *Roseberry*, 197 Ohio App. 3d 256, 270, 967 N.E.2d 233 (2011) ("in most cases involving . . . texts, instant messaging, and e-mails, the photographs taken of the print media or the printouts of those conversations are authenticated, introduced, and received into evidence through the testimony of the recipient of the messages"); *Commonwealth* v. *Davis*, Docket No. 1055 MDA 2018, 2019 WL 2323815, *5 (Pa. Super. May 31, 2019) (deeming text message authenticated because "there was first-hand corroborating testimony from . . . [the] recipient" (internal quotation marks omitted)), appeal denied, 222 A.3d 1125 (Pa. 2020); *Commonwealth* v. *Danzey*, 210 A.3d 333, 338 (Pa. Super.) ("the proponent of social media evidence must present direct or circumstantial evidence that tends to corroborate the identity of the author of the communication in question, such as testimony from the person who sent or received the communication, or contextual clues in the communication tending to reveal the identity of the sender" (internal quotation marks omitted)), appeal denied, 219 A.3d 597 (Pa. 2019); *Hasan* v. *Board of Medicine*, 242 W. Va. 283, 295, 835 S.E.2d 147 (2019) (concluding that testimony from recipient of text messages that they accurately reflected ones that she had received from purported author was "sufficient to authenticate the text messages" but noting "that there was additional evidence showing distinctive characteristics that link [the parties] to the text messages").

The trial court and the Appellate Court also mistakenly relied on the fact that the screenshots did not capture the complete communication. The rule of completeness is a different rule of evidence; see Conn. Code Evid. § 1-5; that serves different concerns from those of authentication. See *United States* v. *Arnold*, supra,

696 Fed. Appx. 906–907 (rejecting argument that government failed to properly authenticate exhibit reflecting screenshots of text messages because recipient testified that he was not sure whether printed exhibit included all messages exchanged between parties when government never represented at trial that exhibit contained all text messages between parties, and, accordingly, government properly authenticated exhibit "as a document that displayed . . . [screenshots] of the text messages" saved on cell phone); *State* v. *Mrza*, supra, 302 Neb. 939 (noting that defendant's argument improperly "attempts to invoke the rule of completeness under the rubric of authenticity" and that "[t]he rule of authentication did not require the [s]tate to offer all of the Snapchat messages in evidence" (footnote omitted)); *Commonwealth* v. *Hart*, Docket No. 3284 EDA 2016, 2018 WL 2307381, *9 (Pa. Super. May 22, 2018) (resolving authentication issue before turning to completeness claim). Moreover, the present case does not implicate the concern underlying the rule of completeness, because there is no contention that other relevant parts of the text messages exist that would provide a different context for the portion of the messages offered. See, e.g., *State* v. *Jackson*, 257 Conn. 198, 213, 777 A.2d 591 (2001) ("[W]hen one party to a litigation or prosecution seeks to introduce admissions that constitute only a portion of a conversation, the opposing party may introduce other relevant portions of the conversation, irrespective of whether they are self-serving or hearsay. . . . The purpose of this rule is to ensure that statements placed in evidence are not taken out of context." (Citations omitted; internal quotation marks omitted.)). Rather, J simply asserted that she had not sent the messages at issue.

It appears that the trial court and the Appellate Court held the defendant to a higher standard than a prima facie case because the evidence was an electronic com-

munication. The Appellate Court cited its prior cases in expressing the concern that "an electronic communication, such as a Facebook message, an e-mail or a cell phone text message, could be generated by someone other than the named sender . . . ." (Internal quotation marks omitted.) *State* v. *Manuel T.*, supra, 186 Conn. App. 68. Similar concerns, however, may arise even with more traditional forms of communication. In a federal case cited favorably in the commentary to our rule, the court addressed this issue: "The argument is that e-mails or text messages are inherently unreliable because of their relative anonymity and the fact that while an electronic message can be traced to a particular computer, it can rarely be connected to a specific author with any certainty. Unless the purported author is actually witnessed sending the e-mail, there is always the possibility it is not from whom it claims. . . . [A]nybody with the right password can gain access to another's e-mail account and send a message ostensibly from that person. However, the same uncertainties exist with traditional written documents. A signature can be forged; a letter can be typed on another's typewriter; distinct letterhead station[ery] can be copied or stolen. . . . We see no justification for constructing unique rules of admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether . . . there has been an adequate foundational showing of their relevance and authenticity."[23] (Internal quotation marks omitted.) *Lorraine* v. *Markel American Ins. Co.*, supra, 241 F.R.D. 543; see Conn. Code Evid.

[23] See also *Pierce* v. *State*, supra, 302 Ga. 395–96 ("Although there may exist evidence that a specific phone sent a certain text message, that does not prove who used the phone . . . . Every form of electronic communication can be spoofed, hacked, or forged. But this does not and can not mean that courts should reject any and all such communications. Indeed the vast majority of these communications are just as they appear to be—quite authentic. The goal is to supply sufficient, nonhearsay evidence as the identity of the source such that a reasonable [fact finder] could conclude that the evidence is what it is claimed to be." (Internal quotation marks omitted.)).

(2018) § 9-1, commentary. As another court correctly observed, "[q]uestions about the integrity of electronic data generally go to the *weight* of electronically based evidence, *not its admissibility*."[24] (Emphasis added; internal quotation marks omitted.) *State* v. *Tieman*, supra, 207 A.3d 622.

In the present case, the defendant clearly established a prima face case of authentication through V's testimony. Whatever doubts might exist as to V's credibility or as to the reliability of the source of the messages go to the weight, not the admissibility, of the text messages. Therefore, the Appellate Court incorrectly determined that the trial court properly excluded the text messages.

C

The question that remains is whether the improper exclusion of the text messages requires reversal of the judgment and a new trial. The state argues that the exclusion of this evidence was harmless error. We conclude, however, that the defendant has met his burden of proving harmful error, which requires reversal of the judgment.

"[A] nonconstitutional [evidentiary] 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. *Sinclair*, 332 Conn. 204, 233, 210 A.3d 509 (2019). "[W]hether [an improper ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the [defendant'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

[24] Insofar as *State* v. *Eleck*, supra, 130 Conn. App. 632, indicates otherwise, it is overruled.

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." (Internal quotation marks omitted.) Id.

The following factors deprive us of this assurance. The state does not contend that it had a particularly strong case, and it is clear that it did not. The only evidence of the sexual abuse came from J's delayed disclosure. There was no physical evidence of the abuse or contemporaneous observations of other witnesses that would tend to corroborate J's account. Testimony from J's younger sister, the defendant's biological daughter, called J's veracity and motives into question.

The defendant's theory of the case was that J had fabricated the claims of abuse because she wanted to move in with her boyfriend—something that she admitted the defendant would not have allowed and that occurred not long after the defendant was removed from the home following J's disclosure—and because she was angry with him for, among other things, not having bought her a car. The text messages, if deemed authentic by the jury, could have been seen by a juror as powerful evidence of one of those motivations. The evidence also could have been used to impeach J's statement in her interview that, in December, 2013, a few months before she disclosed the abuse, the defendant offered to buy her a car if she agreed to have sex with him. J said in the interview that she had refused the defendant's offer and told him that she would prefer to buy her own car.

Although J's younger sister testified that J had complained on more than one occasion about the defendant's failure to buy her a car, we are not persuaded that this fact renders the excluded evidence cumulative. The text messages, if authentic, were J's own words. Those words could be understood to express hurt feelings and anger that are not equally conveyed by her sister's secondhand account of J's complaints.

We are not persuaded by the state's arguments that the exclusion of this evidence did not affect the verdict. In addition to the sister's testimony, the state points to the fact that defense counsel's closing argument referred to J's anger at the defendant for failing to purchase a car for her. But counsel's argument is not evidence, and the trial court informed the jury of this well settled principle before closing arguments commenced. See, e.g., *State* v. *Ancona*, 270 Conn. 568, 609, 854 A.2d 718 (2004), cert. denied, 543 U.S. 1055, 125 S. Ct. 921, 160 L. Ed. 2d 780 (2005). The state also points to the fact that J stated unequivocally in her forensic interview that she did not like the defendant. In the absence of the text messages, however, the jury was more likely to conclude that her dislike was a natural consequence of the abuse that the defendant had inflicted on her.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to that court for a new trial.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* ALANNA R. CAREY
(SC 20273)

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

Syllabus

Convicted of the crime of murder in connection with the shooting death of the victim, the defendant appealed. The defendant and the victim were in a relationship, which had deteriorated in the weeks preceding the victim's death. On the day of the shooting, the defendant drove to a motel at which the victim had been staying and, several hours later, shot the victim in his motel room. At trial, the defendant asserted a theory of self-defense, claiming that she and the victim had argued in the motel room, that the victim had a knife, and that she feared for her life and had no time to flee. The state called a witness, M, during its case on rebuttal in an attempt to show that the victim had been afraid

of the defendant. Over defense counsel's objection, M testified that, a few weeks before the victim's death, he told M that he had crawled into the defendant's home through a window to retrieve some personal possessions, that the defendant put a gun to his head and threatened him, and that her threats frightened him. On appeal, the Appellate Court affirmed the judgment of conviction, concluding, inter alia, that, even if the trial court had improperly admitted M's testimony, its admission was harmless in light of the overwhelming evidence of the defendant's consciousness of guilt. Thereafter, the defendant, on the granting of certification, appealed to this court. *Held* that the Appellate Court correctly concluded that any error relating to the admission of M's testimony was harmless, as the defendant failed to satisfy her burden of demonstrating that M's testimony substantially affected the jury's verdict: the incident that M recounted to the jury in her testimony was not the primary, or even a significant, basis for the case against the defendant, as the state introduced physical evidence that was inconsistent with the defendant's account of the shooting, evidence undercutting the defendant's claim that the victim had been the aggressor in their relationship, evidence of the defendant's conduct before the shooting that demonstrated her intent to use her gun, and evidence of the defendant's conduct after the shooting that demonstrated her consciousness of guilt; moreover, there was testimony from other witnesses that the defendant had previously displayed aggression toward the victim and that he was fearful of the defendant, and certain aspects of M's testimony supported the defendant's primary theory of the case.

Argued June 3—officially released November 23, 2020*

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of New Britain and tried to the jury before *Keegan*, *J.*; thereafter, the court, *Keegan*, *J.*, denied in part the defendant's motion to preclude certain evidence and denied the defendant's motion for a mistrial; subsequently, verdict and judgment of guilty, from which the defendant appealed to this court; thereafter, the case was transferred to the Appellate Court, *Alvord*, *Sheldon* and *Eveleigh*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

* November 23, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Jennifer B. Smith, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, *John H. Malone*, former supervisory assistant state's attorney, and *David Clifton*, assistant state's attorney, for the appellee (state).

Opinion

KAHN, J. The defendant, Alanna R. Carey, appeals from the judgment of the Appellate Court affirming the trial court's judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a (a). On appeal, the defendant claims that the Appellate Court incorrectly concluded that any error relating to the admission of testimony from a witness called during the state's case on rebuttal, Mark Manganello, was harmless. Specifically, the defendant claims that Manganello's testimony fatally undermined her theory of self-defense and that, as a result, it likely had a substantial effect on the jury's verdict. We disagree and, accordingly, affirm the judgment of the Appellate Court.

The jury could have reasonably found the following facts. The defendant began dating the victim in 1999. In 2008, the victim and his children from a previous marriage began living at the defendant's home in Glastonbury. The relationship between the defendant and the victim was deeply troubled; they often fought, called each other names, and exchanged threats of violence. The two were once engaged but never married. Although the defendant testified that the victim often became agitated, and even physically abusive, their neighbors also testified that the defendant appeared to be the aggressor during arguments and that the victim "most often" would just leave the house when those fights occurred.

The jury heard various pieces of evidence about the victim's activities and character. He was a member of

the James Gang Motorcycle Club, carried multiple knives, used cocaine, drank to excess, and often stayed out late.[1] Testimony offered at trial indicated that the victim wore a "1 percenter" patch on his leather club vest, which signified that he was part of the 1 percent of motorcycle riders who do not obey the law. The defendant sought to show her own subjective fear of the victim by calling a particular witness, David Hillman, who testified that the victim had threatened him at a bar in South Glastonbury, that several men had physically assaulted him, and that the victim had injured him twice with a knife. Other testimony presented to the jury, however, indicated that the James Gang Motorcycle Club included individuals with "regular every day jobs" and that, although the police had some suspicions about their activities, it never led to any arrests.

The relationship between the defendant and the victim deteriorated over the weeks preceding the victim's death. On December 12, 2011, the defendant's sister, Johanna Carey-Lang, discovered the victim with another woman, Jodi D'Onofrio, inside of the defendant's own home. This discovery led the victim to call the defendant and admit his infidelity.[2] This incident did not, however, immediately end their relationship; later that same day, the defendant was cuddling with the victim on the couch and asked Carey-Lang to leave so that they could spend time together.[3] Two days later, the victim moved out of the home, gave his keys to the defendant, and rented room 145 at the Carrier Motor Lodge (motel) in Newing-

[1] Documents and testimony offered during the course of trial indicate that the defendant began, but subsequently abandoned, efforts to evict the victim from her home in both 2009 and the spring of 2011.

[2] According to the defendant, the victim had cheated on her with at least four other women during the course of their relationship.

[3] Carey-Lang testified that this conduct troubled her: "I was disappointed in seeing her with [the victim] cuddling and acting like nothing ever happened. That he was, you know, he was cheating on her and she just accepted it and loved him and wanted to be with him."

ton, the location where the victim later died. At one point, the defendant described this separation to the jury as "a timeout for repeated bad behavior . . . ."

Approximately two weeks prior to the victim's death, there was an incident between the defendant and the victim at the same motel. On December 18, 2011, the defendant brought her gun, but not her cell phone, to the motel, checked into a room, and then called Carey-Lang using the telephone inside of that room in order to ask her to place a three-way call to the victim.[4] The victim answered that call from his own room and, during the course of that conversation, told the defendant that he loved D'Onofrio. D'Onofrio, who was lying in bed with the victim at the time, looked out of the window and saw the defendant's car parked outside. The defendant left a short time later, and the victim then escorted D'Onofrio to her car. The defendant testified that she returned to the motel later that same evening, had sex with the victim, and checked out of her own room the following morning. One of the victim's friends, Jessica Montano, testified that the victim had told her that he was scared by the defendant's actions that day. Specifically, Montano testified that the victim had described the defendant as "more upset than he had ever seen her" and indicated that the defendant "would do anything to get him to stay."

Manganello's testimony, the admission of which is the subject of the present appeal, relates to the victim's out-of-court description of an altercation that allegedly occurred on December 24, 2011. That testimony, which will be reviewed in greater detail subsequently in this opinion, indicated that the victim had entered the defendant's home through a window to retrieve some belongings on that date and was confronted by the defendant,

[4] As a result of this fact, the victim's cell phone showed that the call was coming from the defendant's home.

who allegedly pointed a gun at his head, told him to get out, and threatened to "blow his f'ing brains out" if he ever returned.

Notwithstanding these events, the defendant and the victim continued to interact with one another over the days that followed. On a few occasions, the defendant asked Carey-Lang to leave the home in Glastonbury so that she could spend "alone time" with the victim. The defendant testified, more specifically, that she had sex with the victim on at least three occasions from December 25, 2011, to January 1, 2012.[5] The defendant also recounted various other interactions with the victim during this time relating to his children, laundry, and diabetes.[6]

By January, the defendant believed their relationship was ending. On January 1, 2012, the defendant sent a text message to a friend, stating, "I think he is afraid to have to explain to his friends if he were to come back home. I think that this split is permanent. I asked about therapy, he said it used to be an option. I don't think it is an option any more." The following morning, the defendant asked to accompany Carey-Lang and her boyfriend, Leon Brazalovich, to an indoor shooting range located inside of Hoffman's gun store in Newington. Although Carey-Lang testified that she had planned the trip for Brazalovich's entertainment, only the defendant and Carey-Lang brought their guns and signed into

[5] At 1:47 a.m. on December 31, 2011, the defendant sent a text message to the victim stating, "[s]o sorry. [You] work it fantastically. Please call about product." The following afternoon, the victim replied, "[s]orry about my attitude last [night] . . . ." The defendant then replied, "[i]t's ok. Thank you for apologizing. Can you get what we talked about?" The victim responded, "[h]ow much." The defendant then replied, "2 8s." At trial, the defendant explicitly testified that she had been referring to two size eight boots. This testimony was, however, undercut by the fact that the defendant, on cross-examination by the state the following day, admitted to using cocaine with the victim on January 1, 2012. See footnote 17 of this opinion.

[6] Testimony offered at trial indicated that the victim was a type 2 diabetic.

the range that day.[7] The range safety officer, Steven Wawruck, testified that both of the sisters appeared to be amateurs and that both required assistance when their guns jammed. Wawruck also recalled that the defendant did most of the shooting that day.

Shortly after leaving the shooting range, the defendant spoke with the victim over the phone. The defendant testified that the victim had asked her to bring him lunch because he had run out of money and needed food to regulate his insulin levels. The defendant then drove Carey-Lang and Brazalovich to a nearby restaurant and, along the way, asked Brazalovich to reload the magazines to her gun. When Brazalovich finished, he placed the loaded magazines inside of a zippered case containing the defendant's gun. The defendant then drove to the motel and exited the vehicle with a bag of food, her purse, and that zippered case. Brazalovich and Carey-Lang then took the vehicle and left to go get their own lunch shortly after 2 p.m. It is undisputed that the defendant shot the victim three times around 7:30 p.m. that evening in his motel room and that, as a result, the victim died.

The defendant provided the jury with her own account of the events inside of the victim's motel room that led to his death. She testified that, after lunch on the day of the shooting, the victim began blaming Carey-Lang for catching him with D'Onofrio and became very angry that Carey-Lang and Brazalovich had just been in the motel parking lot.[8] The defendant stated that she eventually succeeded in calming the victim down and

[7] Carey-Lang and the defendant had previously discussed the possibility of such an outing after visiting the store in search of a paintball gun for Brazalovich's nephew. Testimony offered at trial indicated that the defendant was not a frequent visitor to the shooting range.

[8] At 2:46 p.m., Carey-Lang sent a text message to the defendant stating that she was done with lunch. The defendant responded that she needed another hour with the victim. Carey-Lang told the defendant to call when she was done.

that she went into the bathroom with her purse around 3:15 p.m.[9] The defendant testified that, at that time, she took her gun out of her purse, put a magazine into it, chambered a round, and then returned the gun to her purse.[10]

The defendant stated that the conversations with the victim were "up and down" after that. According to the defendant, the victim told her that he wanted to move back in with her, but she told him that it would not be possible without counseling. The defendant stated that this caused the victim's anger to "flare up" again.[11] Starting around 4:20 p.m., the defendant began sending a series of text messages to Carey-Lang asking when she could be picked up. These messages stated, among other things, that the victim was mad, yelling at her, and making threats.[12] Carey-Lang, who had been at a gymnastics class with her daughter, eventually left to pick up the defendant around 6:50 p.m. The defendant testified that, around that time, she had succeeded in calming the victim down a second time and had then, once again, excused herself to use the bathroom. The defendant stated that, while she was out of the room, the victim received a call from D'Onofrio and that, when she returned, the victim was "agitated" and "looking to pick a fight . . . ." The defendant told the jury that a loud argument ensued[13] and that she eventually succeeded in calming the victim down for a third time.

[9] At 3:17 p.m., the victim sent a text message to D'Onofrio, stating "I love the pictures of us you are beautiful and every time I think I couldn't possibly be more in love with you I see you and realize I love [you] more . . . ."

[10] The defendant told the jury that it was her habit to carry her gun with a bullet in the chamber so that she could defend herself quickly in the event of an attack.

[11] At 4:05 p.m., the victim received the following text message from D'Onofrio: "My Monday nights are far more entertaining when you're here with me. Miss you baby."

[12] Specifically, the defendant testified that the victim had said, "I'd like to knock your teeth out" and other things "along those lines . . . ."

[13] An individual who had been staying in the room next door; see footnote 15 of this opinion; testified at trial that he heard gunshots between 7:16 and

The defendant testified that, at this point, the victim was reclined against the headboard of one of the beds with his left leg bent up near his body and his right leg dangling off the side. The defendant indicated that she sat on the same side of the same bed, "practically touching knee to knee" with the victim. The defendant then exchanged another series of text messages with Carey-Lang who, at the time, was waiting in a vehicle with her daughter in the parking lot of a nearby grocery store. The defendant testified that she texted Carey-Lang, "[I'm] [c]oming" at 7:22 p.m., put her phone back inside of her purse, and that everything then "just hit the fan."

The defendant stated that she told the victim that she knew one of his children had recently moved into D'Onofrio's home, and that the victim responded by becoming intensely angry and calling her a "sneaky f'ing cunt." The defendant testified that she then told the victim that she had "met somebody else" and that she "felt it was best" that he pursue his relationship with D'Onofrio. According to the defendant, the victim then said that she would not be leaving him, that "he had already put a hit out on [her] family through his club brothers," and that he "would be taking [her] out personally." The defendant stated that the victim already had a fixed blade knife with a wooden handle in his left hand and that he used his other hand to reach for a second knife located on a nightstand to his right. The defendant testified that she then pulled the gun from her purse, backed up past the end of the bed, pleaded with the victim to let her go, and, moments later, shot

7:38 p.m., but that he did not hear anything else from the room that day. A substantial amount of evidence was adduced by both the state and the defendant in an attempt to show whether arguments such as those described by the defendant would have been heard through the motel room walls. The jury was, of course, free to weigh that evidence as it saw fit and reach its own conclusions. See, e.g., *State* v. *Meehan*, 260 Conn. 372, 381, 796 A.2d 1191 (2002) ("[i]t is axiomatic that evidentiary inconsistencies are for the jury to resolve, and it is within the province of the jury to believe all or only part of a witness' testimony").

him three times. The defendant testified that the victim was going to attack her, that she feared for her life, and that she had no time to flee.

After shooting the victim, the defendant remained in the room, called Carey-Lang, and asked her to come inside without her daughter.[14] The defendant testified that she moved the knife away from the victim's hand and that, once Carey-Lang arrived, they discovered that the victim no longer had a pulse. Carey-Lang then began yelling at the defendant and told her to call 911. The defendant testified that, at that point in time, she felt compelled to leave the room because of her continued fear of the victim. When she left the room, however, the defendant took her phone, her purse, her gun, the shell casings from the floor, the bag that had previously contained their lunch, and a key to the room.[15]

The defendant and Carey-Lang then drove to a house owned by their brother, Joseph Carey, in the nearby town of Wethersfield. Joseph Carey also told the defendant that she needed to go back to the motel and to call 911, and advised her to place everything "back exactly the way it was" in the room.[16] Although the defendant initially agreed to return to the motel during the conversations that followed, Carey-Lang testified that she eventually had to push the defendant out of the car when they approached the motel. The defendant admitted that she went back into the room, placed the knife under the victim's hand, put the bullet casings

[14] Although the defendant testified that she wanted to seek medical attention for the victim, she did not do so.

[15] An individual staying in the room next door; see footnote 13 of this opinion; testified that he had been outside at the time and that he saw the defendant make sure that the door to room 145 was locked before leaving with Carey-Lang.

[16] At trial, Joseph Carey testified that this particular remark was prompted by the bag of food that the defendant had taken from the motel. That bag, however, was not with the defendant when she was arrested. Joseph Carey speculated that it "might have ended up in the back of [his] truck."

back on the floor, and set down her gun. She then called 911 shortly after 10 p.m.

During that call, the defendant stated the following: "My boyfriend and I were, you know, talking and all of a sudden he got real angry, he came at me with a knife, and I was scared, I shot him." Although the defendant never expressly told the 911 dispatcher when the shooting had occurred, some of her language was discordant with the reality that nearly three hours had, in fact, passed since the victim's death. Specifically, the defendant told the dispatcher that she did not know whether the victim was still moving or whether she had been injured. After the police arrived and arrested the defendant, she became nonresponsive and was transported to a nearby hospital for evaluation.[17]

Several pieces of physical evidence relating to the crime scene are particularly noteworthy. The victim was found lying on his right side with his head in between the nightstand and the bed. An autopsy revealed that three bullets had entered his upper body, one of which had damaged his heart. Although the medical examiner was unable to determine the relative positions of the defendant and the victim from the nature of these wounds, a former deputy director of the state forensic science laboratory, Robert O'Brien, testified that the

[17] A physician, Hamid Ehsani, subsequently diagnosed the defendant with "conversion disorder," which he described as "a change in the neurologic status of a patient which cannot be explained easily by any obvious medical condition." Ehsani indicated, however, that he could not rule out "malingering," which he described as "when one acts in a certain way . . . for secondary gain . . . because it suits their purposes at the time." A toxicologist, Mitchell Sauerhoff, testified that, although the defendant tested positive for cocaine, he was unable to determine precisely how much of that drug the defendant had used, when she had taken it, or whether she had been under the influence of that drug at the time of the shooting. See footnote 5 of this opinion. Although the defendant admitted to using cocaine with the defendant in the motel room the day before the shooting, she denied using any cocaine the following day.

absence of gunpowder from the victim's shirt indicated that the muzzle of the defendant's gun was greater than three feet away from the victim at the time of the shooting. The defendant's use-of-force expert, Massad Ayoob, estimated that the victim was initially positioned six feet, seven inches away from the location near the foot of the bed where the defendant had discharged her weapon. Ayoob's research indicated that an individual armed with a knife, sitting in the same position as the victim on the bed, could close that distance and inflict injuries in less than a second and that it would have taken a person in the defendant's position a comparatively greater amount of time to escape. Photographs taken by the police show a large, sheathed knife atop the nightstand near an upright beer bottle. Finally, a detective from the Newington Police Department, Leroy Feeney, testified that the front pocket of the defendant's purse contained a pair of clear, disposable gloves.[18]

The jury deliberated for four days. During that time, the jury asked for the court to play back the defendant's testimony related to the day of the shooting and, more specifically, her account of the events that occurred inside of the motel room. No other testimony was requested. On October 7, 2015, the jury returned a verdict finding the defendant guilty of the crime of murder. The trial court subsequently rendered a judgment of conviction in accordance with that verdict and sentenced the defendant to fifty years of incarceration.

The defendant then appealed, claiming, inter alia, that the trial court improperly had admitted Manganello's testimony.[19] In that appeal before the Appellate Court,

[18] The defendant's DNA was found only on the exterior of those gloves. The defendant testified that she carried them to pump gas. Carey-Lang testified that the defendant used such gloves mostly for cleaning.

[19] The defendant initially appealed to this court, and we then transferred that appeal to the Appellate Court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

the state conceded that the trial court had erred by admitting that testimony under the state of mind exception to the hearsay rule. The state argued, instead, that Manganello's testimony could have been admitted under the residual exception to the hearsay rule and, in the alternative, that any error was harmless. The Appellate Court agreed with the state's latter argument and held that, even if the trial court had erred in admitting Manganello's testimony, that error would have been harmless "in light of the overwhelming evidence of the defendant's consciousness of guilt." *State* v. *Carey*, 187 Conn. App. 438, 450, 202 A.3d 1067 (2019). The Appellate Court focused its analysis of this issue exclusively on events that occurred after the shooting, including the defendant's initial refusal to call the police, her flight from the scene with various pieces of physical evidence, her reluctance to return, and the misleading nature of her statements to the 911 dispatcher. Id., 449–51. The Appellate Court rejected the defendant's remaining claims and, accordingly, affirmed the trial court's judgment of conviction. Id., 466. This appeal followed.[20]

Like the Appellate Court, we assume, without deciding, that the trial court's evidentiary ruling pertaining to Manganello's testimony was in error and focus our analysis on the question of whether the defendant was harmed by its admission.[21] The defendant argues that

[20] We granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that the allegedly improper admission of . . . Manganello's hearsay testimony was harmless?" *State* v. *Carey*, 331 Conn. 913, 203 A.3d 1246 (2019).

[21] In its brief to this court, the state argues that Manganello's testimony was admissible under (1) the residual exception set forth in § 8-9 of the Connecticut Code of Evidence, and (2) the state of mind exception set forth in § 8-3 (4) of the Connecticut Code of Evidence. The defendant, in reply, posits that the state is procedurally barred from arguing the former for various reasons and, in the alternative, that both of those claims fail on their merits. Because we agree with the Appellate Court's conclusion that any error in relating to the admission of the challenged testimony was harmless, we need not address these arguments. See, e.g., *State* v. *Jamison*, 320 Conn. 589, 595, 134 A.3d 560 (2016).

the incident on December 24, 2011, carried unique force and was crucial to the state's theory of the case, particularly because the state's overall case against her was weak. In response, the state argues, among other things, that it had a strong case against the defendant and that Manganello's testimony was cumulative in several respects. For the reasons that follow, we are unable to conclude that the defendant has satisfied her burden of demonstrating that the challenged testimony substantially affected the jury's verdict and, accordingly, affirm the judgment of the Appellate Court.

The following additional facts are necessary to place Manganello's testimony into context with the other evidence presented at trial. The state called Manganello during its case on rebuttal in an attempt to show that the victim had been afraid of the defendant. The state proffered a sworn statement from Manganello indicating that the victim had told him about a particular confrontation during which the defendant had allegedly drawn a gun. The purpose of his testimony, the state argued, was to show that the victim had "a healthy fear" of the defendant and her gun and, therefore, that it was unlikely that he would have chosen to attack her with a knife.

The defendant had filed a motion in limine seeking to suppress parts of Manganello's testimony. At trial, although defense counsel conceded that Manganello permissibly could have testified that the victim was generally afraid of the defendant, he objected to any testimony relating to the victim's account of the specific events giving rise to that fear. The state argued in response that the proffered testimony was relevant to show motive, intent, and the absence of an accident. The state also argued that Manganello's testimony showed the victim's state of mind on the date of his death and that, in any event, his testimony would be admissible under the residual exception to the rule

against hearsay. The trial court agreed with the state and concluded that Manganello's testimony was both relevant and admissible under the state of mind exception to the hearsay rule.

Manganello testified at trial that, on December 27, 2011, the victim told him that he had crawled into the defendant's home through a window to retrieve some personal possessions on December 24, 2011. Manganello stated that the victim did not know that the defendant was home and that, according to the victim's account, she had "put a gun to his head and . . . told him to get the F out of here and if he ever came back, she would blow his f'ing brains out." Manganello testified that, on December 31, 2011, the victim once again stated, "can you believe that bitch said she'd blow my f'ing brains out?" Manganello then testified, generally, that the defendant's threat frightened the victim. On cross-examination, defense counsel attempted to discredit Manganello's testimony by emphasizing the fact that he did not personally witness the confrontation recounted by the victim and by drawing the jury's attention to a series of benign text messages[22] exchanged between the defendant and the victim shortly after the alleged confrontation would have occurred.[23]

In closing, the state pointed to several pieces of evidence in an attempt to demonstrate that the defendant possessed an intent to kill the victim on January 2, 2012. The state argued, among other things, that (1) the defendant's trip to the shooting range[24] and her possession

[22] Those text messages, which related to the exchange of a fruit basket, were sent between 1:08 and 1:21 a.m. on December 25, 2011.

[23] The transcript of Manganello testimony spans thirteen pages. The presentation of evidence in this case, by comparison, took more than three weeks.

[24] The state argued that, because Brazalovich did not bring his gun that day, it would be reasonable to infer that the trip was not planned for his entertainment.

of disposable gloves[25] showed preparation, (2) the shooting did not occur until Carey-Lang was outside waiting for her, (3) the defendant had moved the knife and fled the scene, (4) the absence of gunshot residue on the victim's shirt showed that he was not within three feet of the defendant at the time of the shooting, (5) the defendant's 911 call made it sound as if the shooting had just happened, (6) the defendant had the presence of mind to take her personal belongings, the food bag, and the shell casings with her when she left, and (7) the defendant had staged the scene before calling 911. The state then argued that the defendant had concocted a "story" of self-defense because the victim's call with D'Onofrio could have connected her to the room and a .380 caliber gun was registered in her name.[26] The state argued that the text messages exchanged between the victim and D'Onofrio on the day of the shooting; see footnotes 9 and 11 of this opinion; were inconsistent with the defendant's testimony that the call that the victim received shortly before 7 p.m. had enraged him. Finally, the state asked the jury to infer that the defendant had asked Carey-Lang to place a three way call to the victim on December 18, 2011, so that he would not know that she was at the motel.

The state's most direct response to the defendant's theory of self-defense was derived from the location of the various pieces of physical evidence discovered at

[25] The state highlighted the fact that the defendant and Carey-Lang explained these gloves in a slightly different manner. See footnote 18 of this opinion.

[26] The state buttressed this argument by positing, generally, that the defendant lacked credibility. The state suggested that the defendant seemed rehearsed and confrontational. It then reminded the jury that the defendant had explained that her request for "2 8s" of "product" was a reference to size eight boots. See footnote 5 of this opinion. The state also noted several inconsistencies and ambiguities in the record relating to, among other things, whether the defendant's eyes were closed during the shooting, how long she remained at the gun range that morning, and whether she asked Carey-Lang to leave her home on December 12, 2011.

the crime scene. The following passage from the state's closing argument reflects the importance of this evidence to the state's theory of the case: "[The defendant] says she doesn't move until [the victim] makes that threat and moves. . . . [H]e's pivoting to get this knife and he's lunging toward her and that causes her to move. . . . [S]he's able to stand up. . . . She's able to back up six feet. . . . She's pleading for her life . . . . She draws her gun. . . . She aims at his torso . . . and she fires. . . . We know that [knife on the nightstand] never got taken, right? He never touched it. It's still in its sheath. . . . It's not on the ground with him. . . . She's able to get up, stumble back, get over six feet away . . . draw, aim and fire before his hand can touch that knife right next to him. Does that make any sense? Now let's look at the body position. . . . [The victim's] between the bed and the nightstand. If he is standing and lunging like the defendant claims, she shoots him, why isn't he facedown between the bed and her? . . . You heard . . . Ayoob testify that [someone in the victim's] position could get to someone in the defendant's position in under a second . . . . [The] timing does not match."

The state's closing argument contains, by contrast, only passing references to the substance of Manganello's testimony. The defendant has drawn our attention to only a few instances in which the state argued, summarily, that the incident on December 24, 2011, was credible evidence of the defendant's intent. For example, toward the end of his rebuttal argument, the prosecutor stated: "Maybe [the victim] didn't pick it up, maybe he dismissed it too soon, but . . . when she said if you ever come around here I'm going to blow your head off, he should have been tipped off. That's what her intent was. She brought the gun in there to finish this off the way she wanted."[27]

[27] At the state's request, the trial court included the following instruction relating to Manganello's testimony in its final charge to the jury: "The state

The defendant concedes that the claim raised in the present appeal is evidentiary, rather than constitutional, in nature. The standard of review applicable to such a claim is well established. "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 factors, such as the importance of the . . . 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." (Internal quotation marks omitted.) *State* v. *Ayala*, 333 Conn.

has offered evidence of an act of misconduct of the defendant. This is not being admitted to prove the bad character, propensity or criminal tendencies of the defendant. Such evidence is being admitted solely to show or establish the defendant's intent, malice on the part of the defendant against the decedent, a motive for the commission of the crime alleged, absence of mistake or accident on the part of the defendant. You may not consider such evidence as establishing a predisposition on the part of the defendant to commit the crime charged or to demonstrate a criminal propensity.

"You may consider such evidence if you believe it and further find that it logically, rationally and conclusively supports the issues for which it is being offered by the state, but only as it may bear on the issues delineated herein. On the other hand, if you do not believe such evidence, or even if you do, if you find that it does not logically, rationally and conclusively support the issues for which it is being offered by the state, as previously delineated, then you may not consider that testimony for any purpose.

"You may not consider evidence of other misconduct of the defendant for any purpose other than the ones I've just told you, because it may predispose your mind uncritically to believe that the defendant may be guilty of the offense here charged merely because of the alleged other misconduct. For this reason, you may consider the evidence only on the issues as delineated and for no other purpose."

225, 231–32, 215 A.3d 116 (2019); see also, e.g., *State* v. *Jackson*, 334 Conn. 793, 818, 224 A.3d 886 (2020).

The state presented four categories of evidence in support of its case and in response to the defendant's theory of self-defense, all of which were largely unrelated to Manganello's testimony. First, the state introduced physical evidence that was inconsistent with the defendant's account of the shooting. Second, the state introduced evidence undercutting the defendant's claim that the victim had been the aggressor in their relationship and that she had decided to leave him. Third, the state relied on the defendant's conduct before the shooting as evidence of her intent to use her gun. Finally, the state argued that the defendant's conduct after the shooting demonstrated consciousness of guilt. A review of these points illustrates the strength of the state's case.

The physical evidence at the scene was inconsistent with the defendant's description of the events preceding the shooting. The defendant testified that she had been sitting on the same side of the same bed as the victim and that he was already armed with a fixed blade knife at the time he started to attack her. The defendant stated that the victim reached for a second knife on the nightstand with his other hand while simultaneously lunging toward her. The physical evidence discovered at the scene, however, suggested that the victim succeeded in doing neither. The victim's body was discovered near the head of the bed where he had been sitting, not near the end of the bed where the defendant had been standing. The absence of gunshot residue on the victim's shirt likewise indicates that the barrel of the defendant's gun was greater than three feet away from the victim at the time of the shooting. Although the victim had been sitting right next to the nightstand, the sheathed knife he had

allegedly reached for remained resting there alongside an upright bottle of beer.[28]

Various witnesses other than Manganello testified that the defendant had acted aggressively toward the victim in the past. The defendant's neighbors testified that she appeared to be the aggressor during their arguments and would often yell loudly. They indicated that the victim, on the other hand, would "most often" just leave the house. Likewise, both Montano and D'Onofrio testified that the victim was scared by the defendant's decision to rent her own room at the motel on the day of the prior incident of December 18, 2011. The record also contained evidence to support the conclusion that the victim, and not the defendant, had sought to end the relationship. Carey-Lang testified that, even though the victim was caught cheating, the defendant "just accepted it and loved him and wanted to be with him." See footnote 3 of this opinion. D'Onofrio testified that, on December 18, 2011, the victim told the defendant directly that he loved D'Onofrio. Lastly, both the defendant's description of their separation as a "timeout for bad behavior" and the text message that she sent to her friend on January 1, 2012, indicated that, contrary to her testimony, it was the defendant that wanted to continue their relationship.

The defendant's conduct before the shooting also provided circumstantial evidence relevant to her intent. First, the defendant went to a shooting range that day to practice using her gun and asked someone else to load ammunition into the empty magazine after she was done. Second, the front pocket of the defendant's purse contained a pair of disposable gloves. Third, during the middle of her visit with the victim, the defendant took

[28] In light of this physical evidence, we cannot agree with the defendant's assertion that there was "no evidence that contradicted her testimony," or that the present case was entirely based on her credibility as a witness. Cf. *State* v. *Favoccia*, 306 Conn. 770, 809, 51 A.3d 1002 (2012).

her gun to the bathroom, loaded a full magazine into it, and chambered a round of ammunition. At the same time, the victim was sending a text message to D'Onofrio professing his continued love.

As the Appellate Court's decision noted, the defendant's actions after the shooting provided yet further evidence from which the jury could have inferred the defendant's guilt. See *State* v. *Carey*, supra, 186 Conn. App. 450. Although the defendant testified that she fled the room that evening in a state of abject fear, notwithstanding the fact that the victim no longer had a pulse, she initially chose to remain inside until her sister arrived and then took pains to gather various items from around the room before she left. These items included her purse, the gun, the shell casings from the floor, the bag of food that she brought with her, and a key to the door that she subsequently locked behind her. The defendant also admitted to manipulating the single piece of physical evidence that would have shown the victim had acted in aggression—the knife—not once, but twice. Finally, when she eventually called 911, she chose not to tell the dispatcher that the shooting had, in fact, occurred hours before. Apart from Manganello's testimony, the jury had ample evidence from which it could have determined the defendant's guilt.

In light of this broad range of evidence, we cannot conclude that Manganello's testimony was either crucial to the state's theory of intent or that its overall case against the defendant was particularly weak. The incident recounted to the jury through Manganello's testimony was not the primary, or even a significant, basis for the case against the defendant. The state's closing argument referenced it on a few, brief occasions, and it was not an important point of emphasis. Moreover, although the jury's deliberations took four days, its members sent a note to the court stating that "[w]e are only concerned with the parts of the defen-

dant's testimony [that] directly pertain to what happened in the room." Cf. *State* v. *Moody*, 214 Conn. 616, 629, 573 A.2d 716 (1990) ("a jury's request that testimony be reread indicated that the jury regarded the evidence as important").

We agree with the defendant that the substance of Manganello's testimony was not corroborated by other witnesses and that it was "unique" in that sense, but there was nothing unique about the underlying point of the testimony—the defendant had displayed aggression toward the victim in the past, and he was fearful of her. The defendant herself testified that she had previously threatened the victim with physical violence. As stated previously in this opinion, Montano testified that the victim was generally afraid of the defendant. This evidence was echoed by D'Onofrio, who informed the jury that the victim had specifically expressed fears that the defendant was going to kill him over the weeks preceding his death. Testimony at trial also indicated that the victim knew that the defendant owned a gun and that she would have been carrying it with her for protection. Nor was the incident described by Manganello the only evidence that the jury heard about the defendant's access to a gun. The jury heard that a mere two weeks prior to the shooting, the defendant had taken a gun to, and booked a room at, the same motel where the shooting occurred.

Finally, we note that certain aspects of the incident described by Manganello actually supported the defendant's primary theory of the case. The defendant spent a significant amount of time at trial attempting to demonstrate that the victim was a member of an "outlaw motorcycle gang" and that, as a "1 percenter" patch holder, he was not generally concerned with obeying the law. Manganello's testimony demonstrated, by the victim's own words, that he was an individual who was willing to break into someone's home. Manganello's

testimony cast the victim as a lawbreaker and the defendant as the target of that unlawful conduct. We note, in particular, that the defendant would have been legally justified to draw her gun in response to such an intrusion. See General Statutes § 53a-20. Put differently, this is not a case in which the trial court admitted hearsay evidence that the defendant had previously engaged in unprovoked, gratuitous violence,[29] or that she was prone to threatening others with her gun in the absence of just cause. The specific incident at issue in this appeal would tend to support the defendant's position that she had good reason to be fearful of the victim. Manganello's testimony showed the jury little more than what the defendant herself asserted: that she was willing to draw her gun on the victim in an act of self-defense. As such, the challenged testimony was consistent in certain important respects with the defendant's own theory of the case.

In order to prevail on the evidentiary claim before us, the defendant bears the burden of demonstrating that Manganello's testimony substantially swayed the jury's verdict. For the reasons explained, we are simply unable to conclude that she has satisfied that burden. We therefore agree with the Appellate Court's assessment that any evidentiary error committed by the trial court with respect to the admission of that testimony was necessarily harmless.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

[29] Even if we were to agree with the defendant that Manganello's testimony could have painted her as a "hot tempered" or "violent" individual, the trial court explicitly instructed the jury that it could not use that evidence to "[establish] a predisposition on the part of the defendant to commit the crime charged or to demonstrate a criminal propensity." See footnote 27 of this opinion. In the absence of any indication to the contrary, we assume that the jury followed that instruction. See, e.g., *State* v. *Ramos*, 261 Conn. 156, 167, 801 A.2d 788 (2002), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014).

STATE OF CONNECTICUT *v.* BILLY RAY JONES (SC 20261)

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

Syllabus

In accordance with *State* v. *Patterson* (276 Conn. 452), a trial court in a criminal case must issue a special credibility instruction to the jury when a jailhouse informant testifies about inculpatory statements made by a fellow inmate to the informant while they were incarcerated together.

Convicted, after a jury trial, of the crimes of murder, carrying a pistol without a permit, and criminal possession of a firearm in connection with the shooting death of the victim, the defendant appealed to the Appellate Court, claiming, inter alia, that the trial court improperly denied his request for a special credibility instruction concerning the testimony of jailhouse informants as it related to one of the state's key witnesses, S. At trial, the state presented no physical evidence linking the defendant to the victim's murder or to the firearm used, instead relying on the testimony of S, among other witnesses. S had approached the police more than two years after the shooting while he was in pretrial detention on two felony charges, hoping for a favorable disposition on his pending charges in exchange for information about the victim's murder. S told the police that he had seen the defendant when he was visiting the housing complex where the victim was murdered on the night in question and that, shortly thereafter, had heard gunshots. S also told the police that he and the defendant were watching television together the day after the shooting when S, who was holding a handgun, confessed to shooting the victim. The defendant requested that the trial court give a special credibility instruction concerning S's testimony in accordance with this court's decision in *Patterson*. The trial court denied the defendant's request and, instead, issued a general credibility instruction. On appeal, the Appellate Court affirmed the judgment of conviction, concluding, inter alia, that the defendant was not entitled to the special credibility instruction that he had sought because S did not testify about a confession the defendant made to him while they were fellow inmates but, rather, about events he had witnessed and a confession that had been made outside of the prison environment. On the granting of certification, the defendant appealed to this court. *Held* that the Appellate Court incorrectly determined that the trial court had properly denied the defendant's request for a jailhouse informant instruction: a defendant is entitled to a special credibility instruction regarding jailhouse infor-

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

mants when the informant was incarcerated at the time he approached the police with information regarding a defendant's inculpatory statements and testifies at trial about those statements, regardless of where the statements were made, and, because S was incarcerated when he approached the police about the defendant's confession in exchange for leniency in his own pending criminal matters, he was a jailhouse informant for whom a special credibility instruction was required; moreover, the trial court's denial of the defendant's request to give such an instruction was not harmless, as the state presented no physical evidence linking the defendant to the victim's murder or the firearm used in the commission of that offense, the trial court's general credibility instruction did not fully inform the jury of the factors it could consider in evaluating S's credibility, and the only evidence corroborating S's testimony regarding the defendant's confession was the testimony of another witness who suffered from credibility problems; accordingly, this court reversed the judgment of the Appellate Court and remanded the case for a new trial.

(*One justice concurring separately*; *three justices dissenting in one opinion*)

Argued December 17, 2019—officially released December 1, 2020**

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of murder and carrying a pistol without a permit, and, in the second part, with criminal possession of a firearm, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Kavanewsky, J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Alvord* and *Eveleigh*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Reversed*; *new trial.*

Mark Rademacher, assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, former state's attorney, and *Michael A. DeJoseph, Jr.*, senior assistant state's attorney, for the appellee (state).

** December 1, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

ECKER, J. In *State* v. *Patterson*, 276 Conn. 452, 886 A.2d 777 (2005), we held that a trial court must issue a special credibility instruction when a jailhouse informant testifies because such informants have "a powerful incentive, fueled by self-interest, to implicate falsely the accused," and, "[c]onsequently, [their] testimony . . . is inevitably suspect." Id., 469. A "classic jailhouse informant is a witness who has testified that the defendant has confessed to him or had made inculpatory statements to him while they were incarcerated together." *State* v. *Diaz*, 302 Conn. 93, 99 n.4, 25 A.3d 594 (2011). The question presented in this certified appeal is whether the Appellate Court correctly held "that the special credibility instruction required in *State* v. *Patterson*, [supra, 452], was not applicable to an incarcerated informant who offered his testimony that the defendant confessed to him when they socialized *outside of prison* in exchange for favorable treatment of the informant by the state . . . ." (Emphasis added.) *State* v. *Jones*, 331 Conn. 909, 202 A.3d 1023 (2019). We answer the certified question in the negative and reverse the judgment of the Appellate Court.

The jury reasonably could have found the following facts. On the evening of June 21, 2010, the victim, Michael Williams, was shot to death with a nine millimeter pistol outside of the Charles F. Greene Homes housing complex (Greene Homes housing complex) in Bridgeport. When the police arrived to investigate the shooting, they found twenty to thirty people in the area where the victim's body was found, but these potential witnesses were unwilling to cooperate with the police investigation.[1]

[1] Martin Vincze, a police officer employed by the city of Bridgeport, testified that only one of the witnesses was willing to talk to the police about the shooting. Vincze explained that he was not surprised by the lack of cooperation because "[i]t's a common thing in housing complexes." Angela Teele, a resident of the housing complex at the time of the shooting, con-

Four days after the victim's murder, Bridgeport police detective John Tenn interviewed the defendant, Billy Ray Jones. During the video-recorded interview, the defendant informed Tenn that he had not known the victim and was not in Bridgeport on the night of the victim's murder. The defendant stated that he was in Norwalk on June 21, 2010, visiting his childhood friend, Benjamin Beau. Tenn later questioned Beau, who denied that he was with the defendant on the night in question. Tenn also interviewed the defendant's ex-girlfriend, Chanel Lawson, who informed Tenn that the defendant knew the victim.

There were no further developments in the investigation until years later, when two cooperating witnesses approached the state with information regarding the victim's murder. The first witness, Angela Teele, gave the police information in September, 2012, after she was "picked . . . up" on drug charges. Teele told the police that she had been a resident of the Greene Homes housing complex at the time, a friend of the victim, and an eyewitness to his murder. On the night of June 21, 2010, Teele saw the defendant approach the victim on the playground outside of the Greene Homes housing complex dressed in blue shorts and a black hoodie. The defendant "threw his hood on," walked up to the victim, and shot him once in the back of the head with a pistol. The defendant then "[r]an out [of] the playground."

The second witness, Larry Shannon, approached the police with information regarding the victim's murder in February, 2013, when he was in pretrial detention on two felony charges. Shannon told the police that he was visiting the Greene Homes housing complex on the night of the victim's murder when he saw the defendant, whom he had known for about two or three months,

firmed that, "for the residents in and around the Greene Homes housing project," there is a "general culture of not helping the police" or being a "snitch."

dressed in jeans and a black hoodie. The defendant was "hooded up," which Shannon found to be suspicious because "[i]t was nice outside." Soon afterward, Shannon heard gunshots. He tried to run away, but he fell down due to a recent surgery on his Achilles tendon. Shannon met up with his stepbrother, who was a resident of the Greene Homes housing complex, and they "walked around the corner, and [the victim] was . . . slumped on the . . . playground."

The next day, on June 22, 2010, Shannon encountered the defendant at the Marina Village housing complex in Bridgeport. A "news clip came on the [television] about [the victim's] murder," and the defendant admitted to Shannon that he "did it." According to Shannon, the defendant was holding a silver, nine millimeter Ruger handgun when he confessed to Shannon that he "walked up to [the victim] and said, what's poppin' now," and then fired. No one else was present at the time of this conversation.

The defendant subsequently was arrested and charged with murder in violation of General Statutes § 53a-54a (a), carrying a pistol without a permit in violation of General Statutes § 29-35 (a), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a). At the defendant's jury trial, the state relied primarily on the testimony of Teele and Shannon, as described in the preceding paragraphs, to establish the defendant's commission of the crimes charged. Additionally, the state presented the testimony of Beau and Lawson,[2] as well as portions of the defendant's video-recorded

[2] At trial, Lawson testified that the defendant and the victim knew "of each other, but [did] not know each other like they were friends . . . ." Lawson's prior video-recorded statement to the police, in which she stated that the defendant and the victim knew each other, was admitted into evidence at trial as a prior inconsistent statement under *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). See, e.g., *State* v. *Simpson*, 286 Conn. 634, 641–42, 945 A.2d 449 (2008).

interview with Tenn, to contradict the defendant's statements that he was in Norwalk on the night of the murder and that he did not know the victim. The state did not present any physical evidence linking the defendant to the victim's murder or the firearm used in the commission of the offense, which the police never recovered.

Defense counsel argued to the jury "that this is a case that really comes down to the reliability and believability, or the lack thereof, of two witnesses: Angela Teele and Larry Shannon." In light of the importance of Shannon's testimony, defense counsel cross-examined Shannon extensively regarding his motive for coming forward with information about the victim's murder. Shannon admitted that he had contacted the police in the hope of trading information for "favorable treatment on [his] jail situation . . . ." Shannon further admitted that he received the favorable treatment for which he bargained. Although he was in pretrial detention on two felony offenses, he was released without having to pay a bond shortly after contacting the police. Additionally, Shannon was not sentenced to any jail time in connection with the two felony charges, even though he was on probation when he committed those offenses and someone with Shannon's criminal background typically would receive a more severe sentence.

At the conclusion of the trial, defense counsel requested a special credibility instruction with respect to Shannon's testimony in accordance with *State* v. *Patterson*, supra, 276 Conn. 469–70.[3] The defendant contended that a jailhouse informant instruction was

[3] Defense counsel requested the following special credibility instruction: "A witness who testified in this case, [Shannon], was incarcerated and was awaiting trial for some crimes other than the crime involved in this case at the time he first provided information to [the] police. You should look with particular care at the testimony of this witness and scrutinize it very carefully before you accept it. You should consider the credibility of this witness in the light of any motive for testifying falsely and inculpating the accused.

"In considering the testimony of . . . Shannon, you may consider such things as: [1] [t]he extent to which his testimony is confirmed by other

warranted because Shannon "was incarcerated and awaiting trial for felony charges when he first provided information to the police," testified that he "provided such information to the police because he wanted to get out of jail and because he hoped to receive a favorable disposition [on] his pending criminal charges," and, "in fact, received . . . these benefits as a result of the information he provided to the police in February, 2013." The state did not object to the requested instruction, but the trial court declined to issue it. Instead, the trial court issued a general credibility instruction[4] and

evidence; [2] [t]he specificity of the testimony; [3] [t]he extent to which the testimony contains details known only by the perpetrator; [4] [t]he extent to which the details of the testimony could be obtained from a source other than the defendant; [5] [t]he informant's criminal record; [6] [a]ny benefits received in exchange for the testimony or providing information to the police or [the] prosecutor; [7] [w]hether the witness expects to receive a benefit in exchange for the testimony or providing information to the police or prosecutor, regardless of whether such an agreement actually exists; [8] [w]hether the witness previously provided reliable or unreliable information; [and] [9] [t]he circumstances under which the witness initially provided the information to the police or the prosecutor, including whether the witness was responding to leading questions."

[4] The trial court instructed the jury in relevant part: "I now want to discuss the matter of credibility, by which I mean the believability of [the] witnesses. You have observed the witnesses. The credibility, the believability, of the witnesses and the weight to be given to their testimony are matters entirely within your hands. It is for you alone to determine their credibility. Whether or not you find the fact proven is not to be determined by the number of witnesses testifying for or against it. Again, it is the quality, not the quantity, of testimony [that] should be controlling. Nor is it necessarily so that you have to accept a fact as true because a witness has testified to it and no one contradicts it. The credibility of the witness and the truth of the fact are for you to determine.

"In weighing the credibility of the witnesses, you should consider the probability or improbability of their testimony. You should consider their appearance, conduct and demeanor while testifying and in court, and any interest, bias, prejudice or sympathy [that] a witness may apparently have for or against the state, or the accused or in the outcome of the trial. With each witness, you should consider his ability to observe facts correctly, recall them and relate them to you truly and accurately. You should consider whether and to what extent witnesses needed their memories refreshed while testifying. You should, in short, size up the witnesses and make your own judgment as to their credibility and decide what portion—all, some or none—of any particular witness' testimony you will believe based on these principles. You should harmonize the evidence as far as it can reasonably be done. You should use all of your experience, your knowledge of human

singled out Shannon's testimony for special consideration because he previously had been convicted of felony offenses.[5]

After the case was submitted to the jury for deliberation, the jury asked to review the testimony of Teele and Shannon. The jury also asked the trial court to replay the defendant's June 25, 2010 video-recorded interview with Tenn, as well as Lawson's testimony. After reviewing the requested information and deliberating further, the jury found the defendant guilty of the charged offenses. The trial court rendered judgment in accordance with the jury's verdict and sentenced the defendant to a total effective sentence of fifty years of imprisonment.

nature and of the motives that influence and control human conduct, and you should test the evidence against that knowledge. You should bring to bear upon the testimony of the witnesses the same considerations and use the same sound judgment you apply to questions of truth and veracity, as they present themselves to you in everyday life.

"You are entitled to accept any testimony which you believe to be true and to reject either wholly or in part the testimony of any witness you believe has testified untruthfully or erroneously. The credit that you will give to any testimony offered is something [that] you alone must determine. If you find that a witness has intentionally testified falsely, you should keep that in mind and scrutinize the whole testimony of the witness. But it still remains up to you to accept or reject all or any part of the testimony. If you find that a witness has been inaccurate in some way, and you do not think that the inaccuracy was consciously dishonest, you can consider that inaccuracy in evaluating the rest of [the witness'] testimony. You know that persons sometimes forget things or they get something wrong. The significance you attach to a mistake may vary more or less with the particular fact as to which the inaccuracy existed or with the surrounding circumstances. Give to it that weight which your own mind leads you to think it ought to have, in which you would attach to it in the ordinary affairs of life [when] someone came to you in a matter and you found in some particular, he was inaccurate."

[5] The trial court instructed the jury in relevant part: "There was evidence that one witness, [Shannon], was previously convicted of certain felonies. This evidence is . . . admissible [only] on the question of the witness' credibility, that is, the weight that you will give his testimony. So a felony conviction bears only on [the witness'] credibility. It is your duty to determine whether any witness is to be believed wholly or partly or not at all. You may consider a witness' prior convictions in weighing his credibility, but it is still your duty to decide what weight to give to the convictions as you decide is fair and reasonable in determining the matter of credibility."

The Appellate Court affirmed the defendant's judgment of conviction. *State* v. *Jones*, 187 Conn. App. 752, 754, 770, 203 A.3d 700 (2019). The Appellate Court determined that the defendant was not entitled to a jailhouse informant instruction pursuant to *State* v. *Diaz*, supra, 302 Conn. 101–102, and *State* v. *Salmond*, 179 Conn. App. 605, 627–28, 180 A.3d 979, cert. denied, 328 Conn. 936, 183 A.3d 1175 (2018), on the ground that Shannon "did not testify as to a confession that the defendant made while they were fellow inmates." *State* v. *Jones*, supra, 761. Because "Shannon testified about events that he had witnessed and a confession that took place while both of them were socializing outside of the prison environment"; id., 762; the Appellate Court determined that the trial court's "general credibility instruction [was] sufficient."[6] Id., 764.

On appeal, the defendant contends that he was entitled to a jailhouse informant instruction because Shannon was an incarcerated witness who had a strong incentive to fabricate false testimony regarding the defendant's confession to the commission of the crimes charged.[7] The defendant points out that Shannon was in pretrial detention at the time he approached the police with information and that Shannon expected to—

[6] The Appellate Court also rejected the defendant's claim that "[a] specific instruction on the dangers of eyewitness identification was required in this case"; (internal quotation marks omitted) *State* v. *Jones*, supra, 187 Conn. App. 765; reasoning that, because "both Teele and Shannon had known the defendant prior to seeing him on the night of June 21, 2010," their "identifications of the defendant did not give rise to the risk of misidentification that the defendant's requested instructions were specifically designed to address." (Footnote omitted.) Id., 770. The Appellate Court's holding on this point is not at issue in the present appeal.

[7] Alternatively, the defendant urges this court to "extend the rule of *State* v. *Patterson*, [supra, 276 Conn. 452], to *all* jailed informants who received a benefit for their testimony." (Emphasis added.) Because we agree with the defendant that a jailhouse informant instruction was required in the present case, even though Shannon testified about a confession that occurred outside of the prison context, we need not address the defendant's alternative request for an expansion of the *Patterson* rule.

and, in fact, received—special favor from the state in exchange for his testimony. The state responds that Shannon was not a jailhouse informant for whom a special credibility instruction was required because, unlike "a jailhouse confession, which easily can be fabricated and is difficult to meaningfully cross-examine," testimony about a confession that occurred outside of prison is "not easily fabricated," may be "meaningfully tested by cross-examination, and [is] subject to comparison with other evidence in the case." We agree with the defendant and, therefore, reverse the judgment of the Appellate Court.

The general rule is that "a [criminal] defendant is not entitled to an instruction singling out any of the state's witnesses and highlighting his or her possible motive for testifying falsely." (Internal quotation marks omitted.) *State* v. *Diaz*, supra, 302 Conn. 101. "This court has held, however, that a special credibility instruction is required for three types of witnesses, namely, complaining witnesses,[8] accomplices[9] and jailhouse informants." (Footnotes altered.) Id., 101–102. With respect to jailhouse informants, we have explained that a special credibility instruction is required because "an informant

[8] "'Under the complaining witness exception, when the complaining witness [himself] could . . . have been subject to prosecution depending only upon the veracity of his account of [the] particular criminal transaction, the court should . . . [instruct] the jury in substantial compliance with the defendant's request to charge to determine the credibility of that witness in the light of any motive for testifying falsely and inculpating the accused. . . . In order for [such a] request to be applicable to the issues in the case, there must be evidence . . . to support the defendant's assertion that the complaining witness was the culpable party.' " *State* v. *Diaz*, supra, 302 Conn. 102 n.6, quoting *State* v. *Patterson*, supra, 276 Conn. 467–68.

[9] "'[T]he inherent unreliability of accomplice testimony ordinarily requires a particular caution to the jury [because] . . . [t]he conditions of character and interest most inconsistent with a credible witness, very frequently, but not always, attend an accomplice when he testifies. When those conditions exist, it is the duty of the [court] to specially caution the jury.' " *State* v. *Diaz*, supra, 302 Conn. 102 n.7, quoting *State* v. *Patterson*, supra, 276 Conn. 468.

who has been promised a benefit by the state in return for his or her testimony has a powerful incentive, fueled by self-interest, to implicate falsely the accused. Consequently, the testimony of such an informant . . . is inevitably suspect." *State* v. *Patterson*, supra, 276 Conn. 469. "As the United States Supreme Court observed [almost seventy] years ago, '[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are "dirty business" may raise serious questions of credibility.' " Id., quoting *On Lee* v. *United States*, 343 U.S. 747, 757, 72 S. Ct. 967, 96 L. Ed. 1270 (1952). Accordingly, courts have allowed criminal defendants "broad latitude to probe [informants'] credibility by cross-examination" and to have "the credibility issue [submitted] to the jury *with careful instructions*." (Emphasis in original; internal quotation marks omitted.) *State* v. *Patterson*, supra, 469. These careful instructions include an advisement that the testimony of a jailhouse informant should "be reviewed with particular scrutiny and weighed . . . with greater care than the testimony of an ordinary witness." (Internal quotation marks omitted.) Id., 465.

In *State* v. *Arroyo*, 292 Conn. 558, 567, 973 A.2d 1254 (2009), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010), we held that "*Patterson*'s requirement for a special credibility instruction . . . should be extended to apply to the testimony of all jailhouse informants," regardless of whether the informant has "received a promise of a benefit" from the state. We reasoned that "there have been a number of high profile cases involving wrongful convictions based on the false testimony of jailhouse informants" and that "the expectation of a [r]eward for testifying is a systemic reality . . . even [when] the informant has not received an explicit promise of a reward. In addition, several commentators have pointed out that jailhouse informants frequently have motives to testify falsely that may have nothing to do with the expectation of receiving benefits

from the government." (Citation omitted; footnote omitted; internal quotation marks omitted.) Id., 567–69. "In light of [the] growing recognition of the inherent unreliability of jailhouse informant testimony, we [were] persuaded that the trial court should give a special credibility instruction to the jury whenever such testimony is given, regardless of whether the informant has received an express promise of a benefit." Id., 569. In guiding the jury's assessment of witness credibility in this particular context, we indicated that "the trial court may ask the jury to consider: the extent to which the informant's testimony is confirmed by other evidence; the specificity of the testimony; the extent to which the testimony contains details known only by the perpetrator; the extent to which the details of the testimony could be obtained from a source other than the defendant; the informant's criminal record; any benefits received in exchange for the testimony; whether the informant previously has provided reliable or unreliable information; and the circumstances under which the informant initially provided the information to the police or the prosecutor, including whether the informant was responding to leading questions." Id., 570–71.

Nonetheless, a criminal defendant does not have an automatic or absolute right to the issuance of a jailhouse informant instruction. Although the trial court is required to give such an instruction when a proper request to charge has been submitted, the trial court does not commit plain error if it fails to give the instruction sua sponte, so long as "the court has instructed the jury generally on the credibility of witnesses" and the jury is aware of the witness' motivation for testifying. *State* v. *Ebron*, 292 Conn. 656, 675–76, 975 A.2d 17 (2009), overruled in part on other grounds by *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011); see also *State* v. *Diaz*, supra, 302 Conn. 95 (holding that trial court did not commit plain error when it failed to issue, sua sponte, jailhouse informant instruction regarding

the testimony of three witnesses "who were involved in the criminal justice system and, therefore, may have had a personal interest in testifying for the state").

With these principles in mind, we consider the issue presented by this case, which is whether a trial court properly rejects a criminal defendant's request to charge the jury regarding the special credibility principles governing jailhouse informant testimony when an informant, who was incarcerated at the time he or she approached the police with information regarding the defendant's commission of the crimes charged, testifies at trial as to an alleged confession that the defendant made outside of the prison environment. Although we have not previously addressed this question, we discussed when a jailhouse informant instruction is required in *State* v. *Diaz*, supra, 302 Conn. 99–114, as part of our plain error review and analysis of whether to exercise our supervisory authority. In that case, the defendant, Luis Diaz, was convicted of fatally shooting a man outside of a bar in Bridgeport. Id., 95. Three witnesses offered inculpatory information about the defendant's commission of the crime in exchange for beneficial treatment in their own pending criminal matters. Id., 95–96. Two of the witnesses were eyewitnesses to the shooting. Id., 96–97. The third witness, Eddie Ortiz, testified that he had witnessed the shooting and that Diaz had made inculpatory statements to him while the two men were "placed in the same holding cell . . . ." Id., 96; see id. (Ortiz testified that Diaz "said to him, '[y]ou know what I did' and 'I know where you live at' " and "offered him $5000 not to testify"). With respect to the first two witnesses, we noted that "*Patterson* has not been applied to require a special credibility instruction when an incarcerated witness has testified concerning events surrounding the crime that he or she witnessed outside of prison, as distinct from confidences that the defendant made to the witness while they were incarcerated

together." Id., 102. Accordingly, we observed that it "would be an expansion of *Patterson*" to require a jailhouse informant instruction and opined that the failure to give the special credibility instruction concerning these two eyewitnesses could not have been plain error because it "would not have been improper even if [Diaz] had requested such an instruction." Id., 104. As for Ortiz, who testified both as to events that he observed outside of prison as well as inculpatory statements that Diaz made while the two men were fellow inmates incarcerated together, we explained that, even if we "assume[d] that the trial court's failure to give a special credibility instruction for Ortiz would have been improper under *Arroyo* if [Diaz] had requested such an instruction, the court's failure to do so sua sponte did not rise to the level of reversible plain error under *Ebron* because the trial court gave a general credibility instruction and the jury was made aware of Ortiz' motivation for testifying." Id., 104–105.

We also rejected Diaz' alternative claim "that this court [should] exercise its supervisory power to instruct the trial courts that they must give a special credibility instruction whenever a witness in a criminal case is incarcerated or is serving out a sentence, or otherwise is in a position to receive a benefit from the state in exchange for testifying, as long as there is some additional evidence indicating that the witness is not wholly reliable or that he expects some benefit from this testimony." Id., 106. We acknowledged "that some of the same concerns that gave rise to our decision in *Arroyo* are present whenever a witness is in a position to receive a benefit from the government" but disagreed that "these concerns are as weighty in cases [in which] the witness is not testifying about a jailhouse confession, but is testifying about events concerning the crime that the witness observed. Testimony by a jailhouse informant about a jailhouse confession is inherently

suspect because of the ease with which such testimony can be fabricated, the difficulty in subjecting witnesses who give such testimony to meaningful cross-examination and the great weight that juries tend to give to confession evidence." Id., 109. "In contrast, when a witness testifies about events surrounding the crime that the witness observed, the testimony can be compared with the testimony of other witnesses about those events, and the ability of the witness to observe and remember the events can be tested." Id., 110. This reasoning led us to "decline [Diaz'] request that we exercise our supervisory powers to instruct the trial courts that they must give a special credibility instruction in every such case." Id., 111. We emphasized, however, that "the trial courts . . . have the discretion to give a special credibility instruction" whenever they reasonably believe "that a witness' testimony may be particularly unreliable because the witness has a special interest in testifying for the state and the witness' motivations may not be adequately exposed through cross-examination or argument by counsel." Id., 113. "In determining whether to give such an instruction, the trial court may consider the circumstances under which the witness came forward; the seriousness of the charges with which the witness has been charged or convicted; the extent to which the state is in a position to provide a benefit to the witness and the potential magnitude of any such benefit; the extent to which the witness' testimony is corroborated by other evidence; the importance of the witness' testimony to the state's case; and any other relevant factor." Id.

Diaz delineates a clear distinction between a "classic jailhouse informant," who testifies regarding inculpatory statements that the defendant made while the informant and the defendant were "incarcerated together"; id., 99 n.4; and an incarcerated witness who offers testimony "about events concerning the crime that the wit-

ness observed" outside of prison. Id., 109. For the former category of witnesses, the trial court is required to give a jailhouse informant instruction pursuant to *Patterson* and *Arroyo*, whereas "cross-examination and argument by counsel are far more likely to be adequate tools for exposing the truth" with respect to the latter type of witness, and, consequently, a jailhouse informant instruction is not required. Id., 110.

The witness in the present case, Shannon, fits neither category of witness described in *Diaz* because he is neither the "classic jailhouse informant" nor an incarcerated witness whose testimony is solely about events he observed outside of prison. Whether the holdings in *Patterson* and *Arroyo* apply to Shannon, an incarcerated witness who testified about inculpatory statements that the defendant made outside of prison, is a question of law, over which we exercise plenary review. See, e.g., *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 738–39, 183 A.3d 611 (2018). We conclude that the logic and policy driving our precedent compel the conclusion that *Patterson* and *Arroyo* apply to witnesses, like Shannon, who were incarcerated at the time they offered or provided testimony regarding a defendant's inculpatory statements, regardless of the location where those statements were made.

As the foregoing discussion of *Patterson*, *Arroyo*, and *Diaz* makes clear, a special credibility instruction is required for jailhouse informants because (1) they "have an unusually strong motive to implicate the accused falsely"; *State* v. *Patterson*, supra, 276 Conn. 470 n.11; (2) confession evidence "may be the most damaging evidence of all"; (internal quotation marks omitted) id.; and (3) false confessions are easy to fabricate, but difficult to subject to "meaningful cross-examination . . . ." *State* v. *Diaz*, supra, 302 Conn. 109. These factors coalesce to create an impermissible risk of "wrongful convictions based on the false testimony

of jailhouse informants." *State* v. *Arroyo*, supra, 292 Conn. 567. Indeed, false confession evidence from informants "is *the* leading factor associated with wrongful convictions in capital cases" and "a major factor contributing to wrongful convictions in noncapital cases." (Emphasis in original.) J. Roth, "Informant Witnesses and the Risk of Wrongful Convictions," 53 Am. Crim. L. Rev. 737, 744 (2016). Incarcerated witnesses who trade information regarding a defendant's confession for favorable treatment from the state not only have "deep conflicts of interest" that result in "the least credible type of evidence," but they also offer testimony that is "among the most persuasive to jurors because [they] typically allege to have personally heard defendants confess their guilt to the crimes charged. Introduction of a defendant's confession, from any source, radically changes the complexion of a case, particularly one lacking other evidence that directly implicates the defendant in the crime." R. Covey, "Abolishing Jailhouse Snitch Testimony," 49 Wake Forest L. Rev. 1375, 1375 (2014).

The grave risks posed by false confession testimony from incarcerated informants, and the difficulty of mitigating those risks through meaningful cross-examination, do not depend on the location where the alleged false confession occurs.[10] Regardless of whether a crim-

[10] The dissent points out that some states limit the definition of a jailhouse informant to "those individuals testifying to statements made by the defendant while the witness and the defendant were incarcerated together." See also footnote 2 of the dissenting opinion. This fact is unpersuasive, however, for three reasons. First, the practice of other states in this context varies widely, and there is no consensus; some states have adopted a limited definition of a "jailhouse informant," but many other states and scholarly commentators take a broader view. See, e.g., *Turner* v. *State*, 515 P.2d 384, 386 (Alaska 1973) (special credibility instruction is appropriate for "an interested witness," who "is usually either paid, or hoping for lenient treatment of his own crimes, or both" (internal quotation marks omitted)); *State* v. *Barksdale*, 266 Kan. 498, 513, 973 P.2d 165 (1999) (special credibility instruction is appropriate for "informant," which is statutorily defined as someone "who, in exchange for benefits from the [s]tate, acts as an agent

inal defendant's alleged confession takes place inside or outside of prison, the incarcerated informant offering such testimony has a strong personal motive to fabricate a false confession, which by its nature would be difficult, if not impossible, to undermine effectively through cross-examination. As one scholarly commentator has observed, such false confession evidence is "difficult to impeach effectively because it is invariably of the 'he said-she said' variety. As long as the [incarcerated informant] can plausibly testify that he had an opportunity—no matter how fleeting—to speak with the defendant, the [informant's] claim that the defendant confessed to him is practically unverifiable. Defense counsel can impugn the credibility of the [informant], but many criminal defendants—especially defendants

for the [s]tate in obtaining evidence against a defendant" (internal quotation marks omitted)); A. Burnett, "The Potential for Injustice in the Use of Informants in the Criminal Justice System," 37 Sw. U. L. Rev. 1079, 1079 (2008) (jailhouse informants are "persons in custody or facing criminal prosecution who have an expectation of some reward in the form of reduction of charges, eligibility for bail, leniency in sentencing or better conditions of confinement" (internal quotation marks omitted)). Second, the dissent overlooks the fact that *federal* courts have determined that a special credibility instruction is appropriate for any cooperating witness who "provide[s] evidence against a defendant for some personal advantage or vindication, as well as for pay or immunity." *People* v. *Dela Rosa*, 644 F.2d 1257, 1259 (9th Cir. 1980); see also *United States* v. *Garcia*, 528 F.2d 580, 587–88 (5th Cir.) ("a defendant is entitled to a special cautionary instruction on the credibility of an accomplice or a government informer if he requests it" in order "to [e]nsure that no verdict based solely on the uncorroborated testimony of a witness who may have good reason to lie is too lightly reached"), cert. denied, 429 U.S. 898, 97 S. Ct. 262, 50 L. Ed. 2d 182 (1976), and cert. denied sub nom. *Sandoval* v. *United States*, 426 U.S. 952, 96 S. Ct. 3177, 49 L. Ed. 2d 1190 (1976). See generally 2A C. Wright & P. Henning, Federal Practice and Procedure (4th Ed. 2009) § 490, pp. 478–79 (special credibility instruction should be issued for "[a]n accomplice or informer, including one testifying under a grant of immunity"). Third, we are particularly disinclined to take guidance from the more restrictive practices adopted by a handful of other states when our own legislature has chosen a broader definition, which includes a witness who testifies as to a confession made outside of the prison environment. See Public Acts 2019, No. 19-132, § 6, codified at General Statutes (Supp. 2020) § 54-86o (d).

with a criminal history—go into a jury trial with their own credibility highly suspect and will often be unlikely to come out on top in any swearing contest."[11] Id., 1401–1402.

As the dissent notes, the United States Supreme Court observed, in *United States* v. *Henry*, 447 U.S. 264, 274, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980), that there are " 'powerful psychological inducements to reach for aid when a person is in confinement.' " The dissent focuses too narrowly on how these inducements may prompt an incarcerated defendant "to speak to another inmate about his crimes" when the correct analysis examines the manner in which the self-serving inducements may incentivize an incarcerated witness to fabricate false confession evidence. The dissent's erroneous focus misapprehends the fundamental purpose and function of the special credibility instruction, reflected in our own precedents, which is not to alert the jury to the possibility of an involuntary or coerced confession but, instead, to caution the jury that a jailhouse informant's testimony must "be reviewed with particular scrutiny and weighed . . . with [great] care" in light of the witness' "powerful motive to falsify his or her testimony . . . ." (Internal quotation marks omitted.) *State* v. *Patterson*, supra, 276 Conn. 465, 469; see also *State* v. *Diaz*, supra, 302 Conn. 102–103 ("[t]he rationale for requiring a special credibility instruction . . . is that . . . the testimony of [a jailhouse] informant, like that of an accomplice, is inevitably suspect" (internal quotation marks omitted)); *State* v. *Arroyo*, supra, 292 Conn. 569 (recog-

[11] We disagree with the dissent that a defendant's ability to cross-examine an incarcerated witness regarding "the circumstances surrounding the alleged confession" depends in any significant respect on *where* the alleged confession is heard. Regardless of where the alleged confession occurred, such testimony is "inherently suspect because of the ease with which such testimony can be fabricated, the difficulty in subjecting witnesses who give such testimony to meaningful cross-examination and the great weight that juries tend to give to confession evidence." *State* v. *Diaz*, supra, 302 Conn. 109.

nizing "the inherent unreliability of jailhouse informant testimony").

The inherent unreliability of jailhouse informant testimony, combined with the endemic problems of proof, has prompted "at least eighteen states" to require "some corroboration of jailhouse informant testimony to support a conviction . . . ." *State* v. *Marshall*, 882 N.W.2d 68, 83 (Iowa 2016), cert. denied, U.S. , 137 S. Ct. 829, 197 L. Ed. 2d 68 (2017). Connecticut has now joined many of its sister states by enacting legislation, specifically, No. 19-131 of the 2019 Public Acts (P.A. 19-131), governing the admission of "jailhouse witness" testimony in criminal trials. Justice Palmer's recent concurring and dissenting opinion in *State* v. *Leniart*, 333 Conn. 88, 215 A.3d 1104 (2019), thoroughly describes that legislation and the critical safeguards that it implements: "That legislation, among other things, requires that prosecutors who intend to introduce the testimony of a jailhouse witness disclose certain information to defense counsel, including the complete criminal history of the jailhouse witness, any pending charges, any cooperation agreement between the state and the witness, any benefits offered or provided by the state to the witness, the substance, time and place of any statement allegedly given by the defendant to the witness, the substance, time and place of any statement given by the witness implicating the defendant in the charged offense, whether, at any time, the witness recanted any testimony subject to disclosure, and information concerning any other criminal prosecution in which the jailhouse witness previously testified or offered to testify. See P.A. 19-131, § 1. In addition, the legislation establishes a statewide system for recording and tracking information on the use of jailhouse witnesses. See P.A. 19-131, § 3." *State* v. *Leniart*, supra, 164–65 (*Palmer*, *J.*, concurring in part and dissenting in part).

The legislature's concern regarding reliability in this particular context was great enough to prompt the enactment of heightened procedural safeguards to ensure judicial scrutiny of such testimony as a condition of evidentiary admissibility, as Justice Palmer's concurring and dissenting opinion describes: "[P]erhaps most significantly, under P.A. 19-131, in cases involving murder, murder with special circumstances, felony murder, arson murder, sexual assault in the first degree, aggravated sexual assault in the first degree, and aggravated sexual assault of a minor, and, upon motion of the defendant, the trial court must conduct a hearing to decide whether a jailhouse witness' testimony is sufficiently reliable to be admissible. See P.A. 19-131, § 2. The legislation further provides that, unless the prosecutor can establish by a preponderance of the evidence that the witness' testimony is reliable, the court shall not allow the testimony to be admitted. See P.A. 19-131, § 2. Finally, in making its determination concerning the reliability of the witness' testimony, the court is required to consider the factors enumerated in P.A. 19-131, § 1, as well as the following factors: '(1) [t]he extent to which the jailhouse [witness'] testimony is confirmed by other evidence; (2) [t]he specificity of the testimony; (3) [t]he extent to which the testimony contains details known only by the perpetrator of the alleged offense; (4) [t]he extent to which the details of the testimony could be obtained from a source other than the defendant; and (5) [t]he circumstances under which the jailhouse witness initially provided information supporting such testimony to [the police] or a prosecutorial official, including whether the jailhouse witness was responding to a leading question.' P.A. 19-131, § 2." *State* v. *Leniart*, supra, 333 Conn. 165–66 (*Palmer*, *J.*, concurring in part and dissenting in part).

Of particular importance here is that P.A. 19-131, as amended by No. 19-132 of the 2019 Public Acts (P.A. 19-132), defines a "jailhouse witness" as "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*." (Emphasis added.) P.A. 19-132, § 6, codified at General Statutes (Supp. 2020) § 54-86o (d). Consistent with our holding today, the procedural protections embodied in P.A. 19-131 are not dependent on the location where the defendant's alleged statements occurred; instead, they are applicable regardless of whether an incarcerated witness testifies as to statements the defendant made inside or outside of prison. See id. By concluding that a "jailhouse informant" under *Patterson* and its progeny is the same as a "jailhouse witness" under P.A. 19-131 and P.A. 19-132, we create a harmonious body of law relating to the same subject matter, consistent with the intent of the legislature.[12]

In the present case, Shannon was incarcerated at the time he offered the state information regarding the defendant's confession to the victim's murder in exchange

[12] The dissent believes that it is "unnecessary to harmonize" the legislative definition of a "jailhouse witness" with our understanding of a "jailhouse informant" because the legislature was not "invalidating our case law's definition as to jury instructions." This observation misses the mark. Though it is not *necessary* to harmonize the definitions, it certainly seems preferable to do so unless there is a good reason for us to reject the legislature's underlying policy determination. To be sure, P.A. 19-131 and P.A. 19-132 were not intended to prescribe rules regarding the issuance of special credibility instructions, but it is entirely appropriate that our views of proper instructional language should be informed by the choice made by the legislature to adopt a definition of "jailhouse witness" that is not dependent on the location of the defendant's alleged confession. We can think of no reason to employ a more restrictive definition than the one adopted by the legislature to address precisely the same policy concern, namely, the potential unreliability of a jailhouse witness' testimony concerning statements purportedly made by a criminal defendant. Pursuant to our decision today, the pretrial protections embodied in P.A. 19-131 for the testimony of a "jailhouse witness" will be coextensive with the trial protections afforded by the special credibility instruction for the testimony of a "jailhouse informant."

for leniency in his own criminal case.[13] Because Shannon was an incarcerated informant who offered and provided testimony about a criminal defendant's inculpatory statements, we conclude that he was a jailhouse informant for whom a special credibility instruction was required.[14] The trial court therefore improperly denied the defendant's unopposed request for a jailhouse informant instruction.

This does not end our inquiry, however, because we must determine whether the trial court's failure to charge the jury in accordance with the defendant's

[13] Consistent with the legislative definition of a "jailhouse witness," we conclude that a special credibility instruction is required when a witness is incarcerated at the time he or she either "offers or provides" testimony regarding a defendant's inculpatory statements. P.A. 19-132, § 6. In either circumstance, there is a "need for caution" because the witness is in "the power of the state, is looking to better his or her situation in a jailhouse environment where bargaining power is otherwise hard to come by, and will often have a history of criminality." (Internal quotation marks omitted.) *State* v. *Arroyo*, supra, 292 Conn. 568–69 n.9. We disagree with the dissent that the expectation of "a *future* benefit" is the defining characteristic of a jailhouse informant. (Emphasis in original.) The *timing* of the sought after benefit is not critical because what matters is the witness' incentive to provide false testimony regarding a defendant's inculpatory statements. Indeed, we stated in *Arroyo* that a special credibility instruction is required regardless of whether the defendant has received, or expects to receive, a benefit. *State* v. *Arroyo*, supra, 569. We also disagree with the dissent that "the number of witnesses that would qualify as a jailhouse informant are endless . . . ." To the contrary, we hold today that a special credibility instruction is required only for those limited number of witnesses who are incarcerated at the time they offer or provide testimony regarding a defendant's confession to criminal wrongdoing.

[14] The state points out that Shannon was not only a jailhouse informant, but also an eyewitness who testified about events he personally observed. We agree with the state that Shannon's eyewitness testimony concerning the defendant's presence at the Greene Homes housing complex on the night of the victim's murder "can be compared with the testimony of other witnesses" and tested through cross-examination. *State* v. *Diaz*, supra, 302 Conn. 110. But Shannon did not provide only eyewitness testimony; he also provided jailhouse informant testimony regarding the defendant's confession to the murder of the victim. For the reasons explained in the text of this opinion, Shannon's jailhouse informant testimony does not share the same guarantees of trustworthiness as his eyewitness testimony, and, therefore, a special credibility instruction was required. See id., 96, 104–05 (assuming, without deciding, that "the trial court's failure to give a special credibility instruction for Ortiz," who testified as both eyewitness and jailhouse informant, "would have been improper under *Arroyo* if [Diaz] had requested such an instruction").

request was harmful. "As we previously have recognized, an instructional error relating to general principles of witness credibility is not constitutional in nature. . . . Consequently, the defendant bears the burden of establishing that the error deprived him of his due process right to a fair trial." (Citation omitted.) *State* v. *Patterson*, supra, 276 Conn. 471–72. "[A] nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict. . . . Several factors guide our determination of whether the trial court's failure to give the requested instruction was harmful. These considerations include: (1) the extent to which [the jailhouse informant's] apparent motive for falsifying his testimony was brought to the attention of the jury, by cross-examination or otherwise; (2) the nature of the court's instructions on witness credibility; (3) whether [the informant's] testimony was corroborated by substantial independent evidence; and (4) the relative importance of [the informant's] testimony to the state's case." (Citation omitted; internal quotation marks omitted.) *State* v. *Arroyo*, supra, 292 Conn. 571–72.

The first factor favors the state here because, as the state points out, "the jury was well aware of Shannon's admitted motivational self-interest, the two and one-half year delay in Shannon coming forward, the fact of his incarceration, the pending charges that admittedly drove him to provide the police with information, and the benefits that he admittedly received from the police and the state before he testified, all of which were elicited during his examination and highlighted in the closing arguments of counsel." See *State* v. *Arroyo*, supra, 292 Conn. 572 (concluding that first factor favored state when "defense counsel cross-examined both [jailhouse informants] extensively as to their motive for testifying and addressed their incentive to lie in closing argument"); *State* v. *Slater*, 285 Conn. 162, 190, 939 A.2d 1105 ("the informant's potentially

improper motive for testifying . . . amply was brought to the attention of the jury" because two witnesses testified about informant's deal with state and informant's motive to lie was emphasized by defense counsel during oral argument), cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008); *State* v. *Patterson*, supra, 276 Conn. 472 ("the jury was well aware of the fact that [the jailhouse informant] had been promised certain benefits by the state in return for his cooperation against the defendant" because testimony was elicited on direct examination and cross-examination).

Turning to the second factor, we note that the trial court issued a general credibility instruction, which advised the jury that, when evaluating the credibility of a witness, it should consider, among other things, "any interest, bias, prejudice or sympathy [that] a witness may apparently have for or against the state, or the accused or in the outcome of the trial." Footnote 4 of this opinion. Although the trial court singled out Shannon's testimony for special consideration because he previously had been convicted of certain felonies; see footnote 5 of this opinion; the trial court failed to inform the jury of the other factors that it properly may consider when evaluating Shannon's credibility, namely, "[1] [t]he extent to which his testimony is confirmed by other evidence; [2] [t]he specificity of the testimony; [3] [t]he extent to which the testimony contains details known only by the perpetrator; [4] [t]he extent to which the details of the testimony could be obtained from a source other than the defendant; [5] [t]he informant's criminal record; [6] [a]ny benefits received in exchange for the testimony or providing information to the police or [the] prosecutor; [7] [w]hether the witness expects to receive a benefit in exchange for the testimony or providing information to the police or prosecutor, regardless of whether such an agreement actually exists; [8] [w]hether the witness previously provided reliable or unreliable information; [and] [9] [t]he circumstances under which the witness

initially provided the information to the police or the prosecutor, including whether the witness was responding to leading questions." See also Connecticut Criminal Jury Instructions § 2.5-3, available at https://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited November 27, 2020). The second factor therefore stands in equipoise.

The third and fourth factors, which we consider conjunctively, militate in favor of the conclusion that the trial court's instructional error substantially affected the jury's verdict and deprived the defendant of his right to a fair trial. There was no physical evidence linking the defendant to the victim's murder, and the defendant's confession to Shannon was brief, nonspecific, and did not contain any details known only to the perpetrator. The sole evidence corroborating the defendant's confession was Teele's eyewitness testimony, but Teele suffered from credibility problems of her own in light of her self-interested motives arising from her involvement in the criminal justice system. Teele waited more than two years to inform the police that she had witnessed the victim's murder, and she came forward only after she had been "picked . . . up" on drug charges. Although there is no evidence in the record that the state dropped the charges against Teele in exchange for her testimony against the defendant, we previously have recognized that "there is frequently an implicit understanding that [an informant involved in the criminal justice system] will receive some consideration in exchange for testifying." *State* v. *Diaz*, supra, 302 Conn. 109; see also *Marquez* v. *Commissioner of Correction*, 330 Conn. 575, 603, 198 A.3d 562 (2019) (recognizing state's "practice of [entering into] informal, off-the-record leniency understandings with cooperating witnesses"). Teele was not a jailhouse informant, but her involvement in the criminal justice system raises "some of the same concerns that gave rise to our decision in *Arroyo* . . . ." *State* v. *Diaz*, supra, 109. The only per-

son who corroborated Teele's testimony was Shannon, and the only person who corroborated Shannon's testimony was Teele. Given the interdependence of Teele's and Shannon's testimony, the critical importance of their testimony to the state's case, the long delay precipitating their decision to come forward with information, and the powerful, personal self-interest that both witnesses had to testify against the defendant in light of their own involvement in the criminal justice system, the jury might have viewed both witnesses' testimony differently if it had received proper instructions on evaluating Shannon's credibility. We therefore cannot conclude that the trial court's improper refusal to issue the jailhouse informant instruction requested by the defendant was harmless.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to remand the case to the trial court for a new trial.

In this opinion PALMER, McDONALD and D'AURIA, Js., concurred.

PALMER, J., concurring. I fully agree with the majority opinion. I write separately only to note my belief that, for the reasons previously expressed in *State* v. *Diaz*, 302 Conn. 93, 115, 25 A.3d 594 (2011) (*Palmer*, *J.*, concurring), a special credibility instruction should be given whenever a government informer seeks a benefit from the state in return for his or her testimony. See id., 121–22 (*Palmer*, *J.*, concurring) ("Because informers seeking a benefit from the state have a strong motive to falsely inculpate the accused . . . I agree with those courts that require a special credibility instruction whenever a government informer hopes or expects to receive a benefit from the prosecution. As the Second Circuit Court of Appeals has stated, 'a defendant who makes [a request for a special credibility instruction]

is entitled to a charge that identifies the circumstances that may make one or another of the government's witnesses particularly vulnerable to the prosecution's power and influence . . . and that specifies the ways (by catalog or example) that a person so situated might be particularly advantaged by promoting the prosecution's case.' *United States* v. *Prawl*, 168 F.3d 622, 628 (2d Cir. 1999). In other words, the defendant is entitled to a charge that 'invite[s] focus on individual predicaments of the witnesses' and contains 'mention [of] the incentives that follow from certain transactions with the government.' Id., 628–29 . . . ." (Citations omitted; footnote omitted.)). The defendant in the present case, Billy Ray Jones, however, has made no such claim, and, consequently, the majority has no reason to address it. Because, in my view, the majority correctly analyzes and resolves the claim that the defendant has raised, I join the majority opinion.

ROBINSON, C. J., with whom MULLINS and KAHN, Js., join, dissenting. In *State* v. *Diaz*, 302 Conn. 93, 109–11, 25 A.3d 594 (2011), this court declined to exercise its supervisory authority over the administration of justice to extend its earlier decision in *State* v. *Patterson*, 276 Conn. 452, 470, 886 A.2d 777 (2005), which required a special credibility instruction for jailhouse informants, to all witnesses who are in a position to receive a benefit from the state. In distinguishing jailhouse confessions from testimony about the witness' observations, the court stated that "to require a special credibility instruction for all witnesses who may be in a position to receive a benefit from the state because they are involved in some way with the criminal justice system . . . would [create] an exception that would swallow the rule that the trial court generally is not required to give such an instruction for the state's witnesses." *State* v. *Diaz*, supra, 110. Primarily for this reason, I respectfully disagree with the majority's extension of the meaning of "jailhouse informant" for pur-

poses of the *Patterson* instruction to include incarcerated individuals who cooperate with law enforcement by providing information regarding inculpatory statements made by a defendant who was not incarcerated at the time. Because I would affirm the judgment of the Appellate Court upholding the murder conviction of the defendant, Billy Ray Jones; see *State* v. *Jones*, 187 Conn. App. 752, 754, 770, 203 A.3d 700 (2019); I respectfully dissent.

I agree with the majority's recitation of the facts, procedural history, and background legal principles. "It is a well established principle that a defendant is entitled to have the jury correctly and adequately instructed on the pertinent principles of substantive law. . . . The charge must be correct in the law, adapted to the issues and sufficient to guide the jury. . . . The primary purpose of the charge to the jury is to assist [it] in applying the law correctly to the facts which [it] find[s] to be established. . . . [A] charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law." (Citation omitted; internal quotation marks omitted.) *State* v. *Patterson*, supra, 276 Conn. 466–67.

"Generally, a [criminal] defendant is not entitled to an instruction singling out any of the state's witnesses and highlighting his or her possible motive for testifying falsely." (Internal quotation marks omitted.) Id., 467. In *State* v. *Patterson*, supra, 276 Conn. 470, this court first held that special credibility instructions were required for jailhouse informant witnesses. The court in *Patterson* considered the similar motives of jailhouse informants and other exceptions to the general rule against

special credibility instructions[1] and concluded that, "[b]ecause the testimony of an informant who expects to receive a benefit from the state in exchange for his or her cooperation is no less suspect than the testimony of an accomplice who expects leniency from the state," defendants are entitled to a special credibility instruction in cases involving jailhouse informants. Id. Although *Patterson* did not define which witnesses qualify as jailhouse informants, the witness at issue in that case had been incarcerated with the defendant and testified to statements made by the defendant while they were incarcerated together. Id., 459. Later, in *State* v. *Arroyo*, 292 Conn. 558, 564, 973 A.2d 1254 (2009), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010), this court expanded the *Patterson* rule to include jailhouse informants who have not yet received a benefit from the state. As in *Patterson*, the witnesses at issue in *Arroyo* were individuals incarcerated with the defendant who testified to confessions made by the defendant in a courthouse lockup. Id., 564–65.

Subsequently, in *State* v. *Diaz*, supra, 302 Conn. 93, this court provided a more precise definition of the term "jailhouse informant." In *Diaz*, three witnesses "who had criminal matters pending" testified against the defendant at trial. Id., 95. Two of the witnesses, Corey McIntosh and James Jefferson, testified about events they observed outside of prison that connected the defendant to the crime. Id., 96–97. A third witness, Eddie Ortiz, testified regarding events observed outside of prison as well as the defendant's confession to him while they were in lockup together. Id., 96. The defendant in *Diaz* first argued that it was plain error for the court not to provide a *Patterson* instruction "in light

[1] "This court has held . . . that a special credibility instruction is required for three types of witnesses, namely, complaining witnesses, accomplices and jailhouse informants." (Footnotes omitted.) *State* v. *Diaz*, supra, 302 Conn. 101–102.

of [the witnesses'] involvement in the criminal justice system and the possibility that they would receive some benefit from the government in exchange for their testimony." Id., 99. In rejecting the plain error claim, this court observed: "Typically, a jailhouse informant is a prison inmate who has testified about confessions or inculpatory statements made to him by a fellow inmate. Indeed, this court's decision in *Patterson* was based on that premise. . . . *Patterson* has not been applied to require a special credibility instruction when an incarcerated witness has testified concerning events surrounding the crime that he or she witnessed outside of prison, as distinct from confidences that the defendant made to the witness while they were incarcerated together." (Citation omitted.) Id., 102. Accordingly, the court determined that McIntosh and Jefferson were not jailhouse informants under *Patterson* and *Arroyo*, as they "testified only about the events surrounding the shooting" that they had observed outside of prison. Id., 104. The court then concluded that, although the trial court failed to give a special credibility instruction with regard to the testimony of Ortiz, who qualified as a jailhouse informant, this omission was not plain error requiring a new trial because the court "gave a general credibility instruction and the jury was made aware of Ortiz' motivation for testifying." Id., 105.

The defendant in *Diaz* also requested that we exercise our supervisory authority "to instruct the trial courts that they must give a special credibility instruction whenever a witness in a criminal case is incarcerated or is serving out a sentence, *or otherwise is in a position to receive a benefit from the state in exchange for testifying* . . . ." (Emphasis added.) Id., 106. The court noted the concern, as expressed in *Arroyo*, that a jury may be unaware of the motivations behind a witness' testimony. Id., 109. The court nevertheless disagreed with the defendant's argument "that these concerns

are as weighty in cases [*in which*] *the witness is not testifying about a jailhouse confession*, but is testifying about events concerning the crime that the witness observed. Testimony by a jailhouse informant about a *jailhouse confession* is inherently suspect because of the ease with which such testimony can be fabricated, the difficulty in subjecting witnesses who give such testimony to meaningful cross-examination and the great weight that juries tend to give to confession evidence. . . . In contrast, when a witness testifies about events surrounding the crime that the witness observed, the testimony can be compared with the testimony of other witnesses about those events, and the ability of the witness to observe and remember the events can be tested. Accordingly, cross-examination and argument by counsel are far more likely to be adequate tools for exposing the truth in these cases than in cases involving jailhouse confessions." (Citations omitted; emphasis added.) Id., 109–10. After declining to exercise its supervisory authority, the court emphasized that it remains in the discretion of the trial court "to give a cautionary instruction to the jury whenever the court reasonably believes that a witness' testimony may be particularly unreliable because the witness has a special interest in testifying for the state and the witness' motivations may not be adequately exposed through cross-examination or argument by counsel." Id., 113.

The reasons supporting this court's refusal to exercise its supervisory authority in *Diaz* apply with equal force to the present case. The witness at issue, Larry Shannon, was not testifying about a jailhouse confession made while he was incarcerated with the defendant and, therefore, does not qualify as a jailhouse informant. Connecticut courts have routinely limited the definition of a jailhouse informant to only those individuals testifying to statements made by the defendant while the

witness and the defendant were incarcerated together.[2] See *State* v. *Salmond*, 179 Conn. App. 605, 630, 180 A.3d 979 (concluding that *Patterson* held that "a special credibility instruction is required in situations [in which] a prison inmate has been promised a benefit by the state in return for his or her testimony regarding incriminating statements made by a fellow inmate" while both were incarcerated (internal quotation marks omitted)), cert. denied, 328 Conn. 936, 183 A.3d 1175 (2018); *State* v. *Franklin*, 175 Conn. App. 22, 35 n.14, 166 A.3d 24 ("[the witness] met the definition of a jailhouse informant because he was incarcerated at the time of his testimony at the defendant's trial and his testimony was about a crime that he had not witnessed personally, but a con-

[2] Other states limit the definition of a jailhouse informant in a similar manner, whether by statute or case law. See Cal. Penal Code § 1127a (a) (Deering 2008) (defining "in-custody informant" as "a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution"); *Wright* v. *State*, 30 P.3d 1148, 1152 (Okla. Crim. App. 2001) (concluding that defendant's "statements to [the witness] were not made while he was incarcerated" and, thus, did not qualify witness as jailhouse informant, even though witness was "in jail on unrelated charges at the time he gave his statement to [the] police" (internal quotation marks omitted)); *Hardesty* v. *State*, Docket No. 03-18-00546-CR, 2019 WL 4068564, *3 (Tex. App. August 29, 2019, pet. ref'd) (concluding that witness, who testified to defendant's confession, was not jailhouse informant because they were not incarcerated together as required under Texas statute); see also R. Bloom, "Jailhouse Informants," 18 Crim. Just. 20, 20 (Spring, 2003) ("[u]nlike 'street' informants, jailhouse informants are witnesses who testify as to statements made by a fellow inmate while both are in custody"); J. Roth, "Informant Witnesses and the Risk of Wrongful Convictions," 53 Am. Crim. L. Rev. 737, 748 (2016) ("[T]he typical jailhouse informant claims to have overheard a defendant's inculpatory statement while both are in custody pending trial; it is this statement that is of value to prosecutors and agents. But the jailhouse informant usually does not assert any personal, or prior, knowledge of the offense the defendant is charged with having committed. *By contrast, non-jailhouse informants—even those who already are in custody when they begin to work with law enforcement—typically offer information about crimes they observed, participated in, or otherwise learned about prior to their custody.*" (Emphasis added.)).

fession or inculpatory statements made by the defendant during their incarceration"), cert. denied, 327 Conn. 961, 172 A.3d 801 (2017); *State* v. *Carattini*, 142 Conn. App. 516, 523–24, 73 A.3d 733 (witness testified as to defendant's statements regarding victim's death made outside of prison, so "he did not meet [the] Supreme Court's definition of a jailhouse informant"), cert. denied, 309 Conn. 912, 69 A.3d 308 (2013).

I disagree with the majority's conclusion that the location of the confession does not matter to the jailhouse informant analysis. The United States Supreme Court has noted that the circumstance of incarceration presents an important factor in cases involving inmates working as paid informants who elicit statements for the government: "[The] [c]ourt [in *Miranda* v. *Arizona*, 384 U.S. 436, 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)] noted the powerful psychological inducements to reach for aid when a person is in confinement. . . . [T]he mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover [g]overnment agents." (Citation omitted.) *United States* v. *Henry*, 447 U.S. 264, 274, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980). Any pressures that accompany incarceration that could lead a defendant to speak to another inmate about his crimes were not at play in the present case. See *State* v. *Smith*, 289 Conn. 598, 633, 960 A.2d 993 (2008) (confession to jailhouse informant was made "in light of the camaraderie that arises under such shared circumstances").

Indeed, "[i]n-custody confessions are often easy to allege and difficult, if not impossible, to disprove. To generate a credible confession, a snitch need only learn some basic details about a fellow inmate's case. A lying jailhouse snitch might gather information about a high profile case simply by reading newspaper stories or watching television broadcasts about the case. Snitches

can also obtain details about fellow prisoners' cases by speaking with complicit friends and relatives who can monitor preliminary hearings and other case proceedings and feed details to the aspiring snitch. In some cases, informants share knowledge about case facts with each other, permitting multiple informants to corroborate each other's testimony. Investigators have documented cases in which prison inmates purchased information from others outside of prison in an attempt to trade it for reduced sentences." (Footnotes omitted; internal quotation marks omitted.) R. Covey, "Abolishing Jailhouse Snitch Testimony," 49 Wake Forest L. Rev. 1375, 1380–81 (2014); see *State* v. *Leniart*, 333 Conn. 88, 167, 215 A.3d 1104 (2019) (*Palmer*, *J.*, concurring in part and dissenting in part) (distinguishing "traditional cooperating witnesses," such as coconspirators, from use of jailhouse informant testimony insofar as "the testimony of jailhouse informants is readily fabricated and otherwise particularly suspect for a number of reasons not generally apparent to jurors," particularly because "more traditional cooperating witnesses . . . have not come forward as part of a prison culture that is largely hidden from public view and whose testimony is not so easily concocted"); *State* v. *Diaz*, supra, 302 Conn. 109 (noting that "jailhouse confessions" are challenging to confirm and to successfully cross-examine).

These concerns about jailhouse informants are inapplicable in this case, as Shannon's testimony could be meaningfully validated in ways that a jailhouse confession could not. Shannon testified that (1) he was in Marina Village, a Bridgeport housing complex, the day after the shooting, (2) he saw the defendant there, (3) there was a news clip about the murder on the television, (4) the defendant told Shannon he walked up to the victim, asked "what's poppin' now," and shot the victim, and (5) the defendant showed Shannon a silver, nine millimeter Ruger handgun. Unlike a jailhouse con-

fession, which is difficult to verify, Shannon's testimony could be validated and meaningfully cross-examined by questioning the circumstances surrounding the alleged confession. For example, other witnesses could confirm or disprove elements of the confession, like whether the defendant and Shannon were present at Marina Village the day after the shooting.

For these reasons, I would limit the definition of jailhouse informant testimony to those statements made by the defendant to another inmate while both were incarcerated in order to afford the phrase its customary meaning. Individuals testifying to statements made outside of the incarceration setting are simply informants or cooperating witnesses, as they are not testifying to statements made in a "jailhouse." Shannon is not a jailhouse informant, as jailhouse informants are connected to the defendant only by virtue of their status as an inmate, unlike Shannon, who knew the defendant outside of jail and was present at the scene of the crime to which the defendant confessed to committing. If the definition of jailhouse informant is no longer afforded its customary meaning, the number of witnesses who would qualify as a jailhouse informant are endless, and "we would be creating an exception that would swallow the rule that the trial court generally is not required to give such an instruction for the state's witnesses. It is an unfortunate reality that the government cannot be expected to depend exclusively upon the virtuous in enforcing the law. . . . Rather, the government must often rely on witnesses with a less than impeccable history in order to prosecute criminal activity." (Citation omitted; internal quotation marks omitted.) *State* v. *Diaz*, supra, 302 Conn. 110–11.

Not only was the defendant in the present case not incarcerated at the time he allegedly made the inculpatory statements to Shannon, Shannon also was not incarcerated at the time he testified about those state-

ments. I therefore disagree with the majority's categorization of Shannon as "an incarcerated witness who testified about inculpatory statements that the defendant made outside of prison . . . ." See *State* v. *Diaz*, supra, 302 Conn. 110 ("when a witness is not incarcerated, but is merely on parole or subject to pending charges, the special concerns relating to incarcerated witnesses do not come into play"); *State* v. *Carattini*, supra, 142 Conn. App. 523 (distinguishing witness from jailhouse informant definition in *Diaz* because witness was not incarcerated when he testified). After Shannon reached out to the police in 2013, he testified that the state assisted him by getting his bond lowered. He then pleaded guilty to two felonies in 2014 and did not have to return to jail. Instead, Shannon was on probation when he testified for the state. Although Shannon cooperated with the police while he was incarcerated, this does not transform him into an incarcerated informant at the time of his testimony. This distinction is important because Shannon's testimony is even more credible than the testimony at issue in *Diaz*, in which the witnesses "had criminal matters pending"; *State* v. *Diaz*, supra, 302 Conn. 95; as Shannon had *already* received assistance with his case before testifying and, therefore, had less incentive to testify falsely in order to secure a future benefit from the state. Accordingly, the majority's reliance on the motivations of the "incarcerated informant" are largely inapplicable to Shannon with respect to the motivation to lie in exchange for a *future* benefit that characterizes typical jailhouse informant testimony.[3]

[3] I acknowledge that an informant who is not incarcerated at the time of testimony, but has pending criminal matters or is otherwise facing incarceration, may have a greater incentive to testify falsely than an informant like Shannon, who has no pending criminal matters. For this reason, an individual's custodial status at the time they testify or provide the information to the police should not determine whether they are considered a jailhouse informant. If the custodial status of the witness at those times were the sole determinative factor, then the jury instruction would not be given when an actual jailhouse informant—testifying about communications made while incarcerated—happens to be released prior to testifying or cooperating. Put

Finally, I note my disagreement with the majority's reliance on the definition provided by the legislature in No. 19-131 of the 2019 Public Acts (P.A. 19-131), which sought to address the "problems inherent in the state's use of jailhouse informant testimony" by enhancing the state's disclosure obligations and providing for an evidentiary hearing to establish the reliability of proffered jailhouse informant testimony in the most serious felony cases. *State* v. *Leniart*, supra, 333 Conn. 164–66 (*Palmer*, *J.*, concurring in part and dissenting in part). In my view, the majority's reliance on P.A. 19-131, as amended by No. 19-132 of the 2019 Public Acts (P.A. 19-132), is misplaced. The statutory definition provides: " '[J]ailhouse 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." (Emphasis added.) P.A. 19-132, § 6, codified at General Statutes (Supp. 2020) § 54-86o (d).

Although the first of these definitions in P.A. 19-132 is entirely consistent with our definition in *Diaz*, the second definition is broader, as it does not specifically require the offered statement to be made while both individuals are incarcerated and, therefore, is inconsistent with our existing definition of a jailhouse informant. Yet, this is not an irreconcilable conflict, as one of the included definitions is found in our case law. Also, P.A. 19-131 does not discuss jury instructions and, instead, requires trial courts to conduct hearings to determine the reliability and admissibility of jailhouse informant testimony. See P.A. 19-131, § 2, codified as

differently, the determination of who qualifies to be a jailhouse informant depends on the timing and circumstances of how that individual obtained the information and, specifically, on whether the defendant made the statements at issue to the informant while *both* were incarcerated.

amended at General Statutes (Supp. 2020) § 54-86p. Although Shannon may fall under the second definition provided by the legislature, I do not believe that we should assume that the legislature is invalidating our case law's definition as to jury instructions. See, e.g., *State* v. *Fernando A.*, 294 Conn. 1, 19, 981 A.2d 427 (2009) ("the legislature is presumed . . . to be cognizant of judicial decisions relevant to the subject matter of a statute . . . and to know the state of existing relevant law when it enacts a statute" (internal quotation marks omitted)). Indeed, I am particularly hesitant to act in this area, given this very recent activity by our legislature, which has the " 'primary responsibility' " for the public policy of this state; *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 438, 119 A.3d 462 (2015); and is better equipped to "balanc[e] the various interests and articulat[e] a coherent policy on this matter . . . ." *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 550, 93 A.3d 1142 (2014). Because the legislature was presumed to be aware of our case law's instructional requirements and left them untouched in P.A. 19-131, it is unnecessary to harmonize all of our definitions. In fact, now that the legislature has provided a screening mechanism for jailhouse informant testimony, and only the most reliable evidence will be put before the jury, P.A. 19-131 weighs against the requirement of a special credibility instruction in every instance.

In the present case, I conclude that the trial court appropriately exercised its discretion when it declined to issue a special credibility instruction as to Shannon's testimony.[4] See *State* v. *Diaz*, supra, 302 Conn. 113 (emphasizing "the well established common-law rule

[4] In the present case, twenty to thirty people were present when the officers arrived at the scene of the crime, yet none of these potential witnesses was willing to cooperate with the police. Both Shannon and Angela Teele, another cooperating witness, testified that, in their experience, they are not supposed to cooperate with the police. In fact, Teele testified that she feared for her safety and was putting herself at risk by testifying because

that it is within the discretion of a trial court to give a cautionary instruction to the jury whenever the court reasonably believes that a witness' testimony may be particularly unreliable because the witness has a special interest in testifying for the state and the witness' motivations may not be adequately exposed through cross-examination or argument by counsel"). The jury was well aware of Shannon's motives for testifying, as both the state's attorney and defense counsel had questioned Shannon about the benefits he received for reaching out to the police and his past felony convictions.[5] Defense

"I was told if I said something that things was gonna happen." Shannon also testified that he feared cooperating due to possible retaliation. Incentives from the state encourage witnesses to testify, despite the dangers of providing such testimony. Prosecutors may be required to utilize witnesses, such as Shannon, who are testifying only because they have been assisted by the state, and requiring a special credibility instruction in all such instances may cast significant doubt on an otherwise reliable witness. See *State* v. *Diaz*, supra, 302 Conn. 111 ("the government must often rely on witnesses with a less than impeccable history in order to prosecute criminal activity" (internal quotation marks omitted)). Additionally, as such witnesses are used with some regularity; see G. Harris, "Testimony for Sale: The Law and Ethics of Snitches and Experts," 28 Pepp. L. Rev. 1, 1 (2000) ("[a]ccording to [United States] Sentencing Commission studies, one of every five federal defendants receives a sentencing reduction for 'substantial assistance' to the government"); the special credibility instruction will become less powerful as it will be used more frequently.

[5] Defense counsel rigorously cross-examined Shannon regarding the circumstances that led him to reach out to the police:

"[Defense Counsel]: And now you indicated earlier, you . . . didn't contact the police on the night of [the] shooting, right?

"[Shannon]: Yes.

"[Defense Counsel]: Okay. And, in fact, you didn't contact the police until about two and [one-half] years later, right?

"[Shannon]: Yes.

"[Defense Counsel]: Okay. And, at that time, you were in jail, right?

"[Shannon]: Yes.

"[Defense Counsel]: You were being held at Bridgeport Correctional Center?

"[Shannon]: Yes.

"[Defense Counsel]: Okay. Jail is not a place that you like to be, right?

"[Shannon]: Yes.

"[Defense Counsel]: And you wanted to get out of jail, right?

"[Shannon]: Yes.

counsel also devoted significant portions of his closing argument to Shannon's credibility. As Shannon did not qualify as a jailhouse informant and the jury was well aware of his motivations for testifying, I cannot conclude that the trial court abused its discretion by issuing only a general credibility instruction. Accordingly, I would conclude that the Appellate Court properly upheld the defendant's conviction.

Because I would affirm the judgment of the Appellate Court, I respectfully dissent.

"[Defense Counsel]: Okay. And so it's at that point that you reached out to detectives and said that you have some information about this homicide that occurred on June 21, 2010, right?

"[Shannon]: Yes.

"[Defense Counsel]: And you reached out to them because you were hoping that they could give you some favorable treatment on your jail situation or your . . . criminal charge, right?

"[Shannon]: Yes.

"[Defense Counsel]: In fact, at the time you were . . . charged with a felony, right?

"[Shannon]: Yes.

"[Defense Counsel]: And it carried a maximum penalty of five years in jail, right?

"[Shannon]: Yes."

* * *

"[Defense Counsel]: And, shortly after that, you were released from jail without having to pay a bond, right?

"[Shannon]: Yes.

"[Defense Counsel]: And a bond is money that you have to pay to get out of jail, if you're facing pending charges?

"[Shannon]: Yes.

"[Defense Counsel]: You didn't have the money . . . to get out of jail, right?

"[Shannon]: No.

"[Defense Counsel]: Okay. So you were hoping to trade the information that you ha[d] in order . . . to accomplish that, right?

"[Shannon]: Yes.

"[Defense Counsel]: And, in fact, you were also looking for some favorable treatment on your case, right?

"[Shannon]: Yes."