STATE OF CONNECTICUT *v.* BRUCE JOHN BEMER (SC 20195)

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

Syllabus

Pursuant to statute (§ 54-102a (a)), a court presiding over a pending case involving a violation of certain sex offenses, including patronizing a prostitute who was the victim of human trafficking, may order that the accused be examined for any sexually transmitted disease (STD).

Pursuant further to statute (§ 54-102a (b)), a court presiding over a pending case involving a violation of certain sex offenses during which a sexual act occurred, including patronizing a prostitute who was the victim of human trafficking, may order that the accused be tested for the presence of the human immunodeficiency virus (HIV), "[n]otwithstanding the provisions of" the statute (§ 19a-582) requiring a person's "general consent" for that person's HIV-related testing.

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

The defendant, who had been charged with the crimes of patronizing a prostitute who was the victim of human trafficking and conspiracy to commit trafficking in persons, appealed from the trial court's order, in response to motions filed by the state and certain of the defendant's alleged victims, requiring that he submit to an examination for STDs pursuant to § 54-102a (a) and HIV testing pursuant to § 54-102a (b). The charges stemmed from the defendant's involvement with a person who had arranged for young males to engage in sexual activities with the defendant in exchange for money. On appeal, the defendant claimed, inter alia, that the trial court had abused its discretion in ordering HIV testing on the ground that the trial court was required to find, before issuing such an order, that there was a clear and imminent danger to the public health or the health of a person and that there was a compelling need for the HIV test result that could not be accommodated by other means, and the state presented no evidence in furtherance of satisfying that standard. The defendant also contended that, to the extent that an examination for STDs and HIV testing could be ordered under § 54-102a (a) and (b), respectively, without a finding of a compelling need, those statutory provisions violated the defendant's constitutional rights. During the pendency of this appeal, the defendant was convicted of the charged crimes. *Held*:

1. The trial court's order was an appealable final judgment, and the defendant's conviction of the charged crimes had no bearing, jurisdictional or otherwise, on this appeal: the court's order terminated a separate and distinct proceeding, as it involved a discrete matter entirely distinct from and independent of the adjudication of the defendant's guilt, and, accordingly, the proceedings concerning the propriety of that order were wholly severable from the proceedings pertaining to the resolution of the defendant's criminal case, which could and did advance separate and apart from this appeal; moreover, although § 54-102a authorizes a trial court to issue an order pursuant to that statute while a case is "pending" in that court, whereas a related statute (§ 54-102b) delineates the circumstances under which a defendant's HIV testing shall be ordered upon motion following conviction, there was nothing in § 54-102a or § 54-102b to suggest that § 54-102b was intended to place a temporal limitation on the execution of an order properly issued pursuant to § 54-102a prior to a conviction, and § 54-102b made no provision for the HIV testing of persons convicted of offenses of which the defendant ultimately was convicted.
2. The trial court did not abuse the discretion conferred on it by § 54-102a (b) in ordering that the defendant submit to HIV testing: there was no merit to the defendant's claim that the trial court was obligated to adhere to the requirement set forth in § 19a-582 (d) (8) that it find, before ordering HIV testing, a clear and imminent danger to the public health or the health of a person and that the person seeking the testing of the defendant has demonstrated a compelling need for the test result that

cannot be accommodated by other means, as a review of the language of § 54-102a (b), its legislative history, and related statutes, as well as the language of § 19a-582, indicated that the legislature did not intend for the requirement of § 19a-582 (d) (8) to apply to an order for HIV testing under § 54-102a (b); accordingly, § 54-102a (b) broadly authorizes a trial court to order HIV testing when, as in the present case, the conditions of that statute—that the defendant has been charged with committing an offense enumerated in that statute, the offense involved a sexual act, and the charge is pending before the court—have been met.

3. To comport with the provision of the Connecticut constitution (art. I, § 7) prohibiting unreasonable searches and seizures, a court is required to make a finding, prior to ordering an examination for STDs pursuant to § 54-102a (a) or HIV testing pursuant to § 54-102a (b), that such an examination or testing would provide useful, practical information to a victim that could not reasonably be obtained in another manner, but this court rejected the defendant's contention that a trial court must find, before issuing an order for such an examination or testing, that there is probable cause to believe that the defendant has an STD or HIV: this court reviewed the factors set forth in *State* v. *Geisler* (222 Conn. 672), which included consideration of federal case law concerning suspicionless searches and the special needs doctrine, sister state case law addressing the constitutionality of statutes that authorize nonconsensual HIV testing of persons charged with certain crimes, and contemporary understandings of applicable economic and sociological norms, and relevant public policies as reflected in the legislative history of § 54-102a, and concluded that the issuance of an order for HIV testing pursuant to § 54-102a (b) based solely on a finding that the conditions of that statute have been met violates a defendant's right to be free from unreasonable searches and seizures under article first, § 7, as, in many cases, such testing would provide no real benefit to the victim, and, under those circumstances, the state's interest in requiring testing is not sufficient to override a defendant's recognized privacy interest; accordingly, this court placed an interpretive gloss on § 54-102a to render it compatible with the requirements of article first, § 7, by requiring a court to find that an examination for STDs or HIV testing would provide useful, practical information to a victim that could not reasonably be obtained otherwise; moreover, because the trial court did not apply the foregoing standard and the state and the victims were not on notice that they were required to satisfy that standard in filing their motions pursuant to § 54-102a (a) and (b), the trial court's order was reversed, and the case was remanded for a new hearing on those motions.

(*Two justices concurring separately in one opinion*)

Argued October 21, 2019—officially released July 14, 2021**

** July 14, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Substitute information charging the defendant with patronizing a prostitute and conspiracy to commit human trafficking, brought to the Superior Court in the judicial district of Danbury, where the court, *Shaban*, *J.*, granted, with certain restrictions, the state's and certain of the alleged victims' motions for an order directing the defendant to undergo an examination for sexually transmitted diseases and testing for the human immunodeficiency virus, from which the defendant appealed. *Reversed*; *further proceedings*.

Wesley W. Horton, with whom were *Brendon P. Levesque* and, on the brief, *Ryan Barry* and *Anthony Spinella*, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *Sharmese L. Hodge*, assistant state's attorney, for the appellee (state).

James J. Healy, *Gerald S. Sack*, *Joel T. Faxon* and *Kevin C. Ferry* filed a brief for the alleged victims as amici curiae.

Opinion

PALMER, J. After the defendant, Bruce John Bemer, was charged with patronizing a prostitute who was the victim of human trafficking in violation of General Statutes (Supp. 2014) § 53a-83 (c) (2) (A)[1] and conspiracy to commit trafficking in persons in violation of General Statutes (Rev. to 2011) §§ 53a-192a and 53a-

[1] This charge was based on conduct that allegedly had occurred between 2012 and 2016. Because the statutory subsection under which the defendant was charged, namely, subsection (c) of § 53a-83, did not go into effect until 2013; see Public Acts 2013, No. 13-166, § 3, we use the version of § 53a-83 that first contained that statutory subsection.

48,[2] the state filed a motion seeking a court order requiring the defendant to submit both to an examination for sexually transmitted diseases pursuant to General Statutes § 54-102a (a) and to testing for human immunodeficiency virus (HIV) pursuant to § 54-102a (b).[3] Thereafter, certain victims of the defendant's allegedly criminal misconduct filed similar motions. The trial court granted the various motions and ordered the defendant to submit to such an examination and testing. The defendant then filed this appeal,[4] claiming that the

[2] The conspiracy to commit trafficking in persons charge also was based on conduct that allegedly had occurred between 2012 and 2016. In the interest of simplicity, we use the statutory revision of § 53a-192a that was in effect at the beginning of that four year period.

[3] General Statutes § 54-102a provides in relevant part: "(a) The court before which is pending any case involving a violation of any provision of sections 53a-65 to 53a-89, inclusive, may, before final disposition of such case, order the examination of the accused person . . . to determine whether or not the accused person . . . is suffering from any sexually transmitted disease . . . .

"(b) Notwithstanding the provisions of section 19a-582, the court before which is pending any case involving a violation of section 53-21 or any provision of sections 53a-65 to 53a-89, inclusive, that involved a sexual act, as defined in section 54-102b, may, before final disposition of such case, order the testing of the accused person . . . for the presence of the etiologic agent for acquired immune deficiency syndrome or human immunodeficiency virus . . . . If the victim of the offense requests that the accused person . . . be tested, the court may order the testing of the accused person . . . in accordance with this subsection and the results of such test may be disclosed to the victim. The provisions of sections 19a-581 to 19a-585, inclusive, and section 19a-590, except any provision requiring the subject of an HIV-related test to provide informed consent prior to the performance of such test and any provision that would prohibit or limit the disclosure of the results of such test to the victim under this subsection, shall apply to a test ordered under this subsection and the disclosure of the results of such test. . . ."

Although the state filed its motion before a 2018 amendment to subsection (a) of § 54-102a replaced the term "venereal disease" with "sexually transmitted disease"; Public Acts 2018, No. 18-168, § 29; we use the current revision of the statute in light of the potential for future litigation under the current statute. The amendment has no bearing on the merits of the defendant's appeal.

[4] The defendant appealed from the trial court's order to the Appellate Court, and we subsequently granted his motion to transfer the appeal to

trial court had abused its discretion in ordering testing under § 54-102a (b) because, the defendant maintains, that statutory subsection incorporates the standard set forth in General Statutes § 19a-582 (d) (8); see footnote 12 of this opinion; which requires the court to find that there is "a clear and imminent danger to the public health or the health of a person and that the person has demonstrated a compelling need for the HIV-related test result that cannot be accommodated by other means" before it may order HIV testing, and the state had presented no evidence in satisfaction of that standard.[5] The defendant further contends that, to the extent that subsections (a) and (b) of § 54-102a purport to authorize the trial court to issue orders thereunder without first making a finding of such compelling justification, they violate his rights under the fourth amendment to the United States constitution[6] and article first, § 7,

this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2. After the appeal was filed, certain of the same victims who had filed motions under § 54-102a in the trial court sought permission to file an amicus curiae brief in this court in support of the state's position, and we granted that request.

[5] The defendant also claims that the trial court abused its discretion in ordering that he submit to testing for sexually transmitted diseases pursuant to § 54-102a (a). The portion of his brief addressing this claim, however, focuses exclusively on § 54-102a (b), and the defendant conceded at oral argument before this court that § 54-102a (a) does not incorporate the standard that he claims applies to § 54-102a (b). Accordingly, we conclude that any claim that the trial court abused its discretion in ordering an examination pursuant to § 54-102a (a) has been abandoned. The defendant has not, however, abandoned his contention that § 54-102a (a) is unconstitutional as applied to him on the ground that the state failed to establish probable cause to believe that examining him for sexually transmitted diseases was required to protect the health of the public or the alleged victims.

[6] The fourth amendment to the United States constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The fourth amendment's protection against unreasonable searches and seizures is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. See, e.g., *Mapp* v. *Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

of the Connecticut constitution.[7] After this appeal was filed, we directed the parties to brief, inter alia, the issue of whether the order for an examination and testing was an appealable final judgment.[8]

We conclude, preliminarily, that the trial court's order is an appealable final judgment. We further conclude that, under article first, § 7, of the Connecticut constitution, the trial court must make a finding that either an examination pursuant to § 54-102a (a) or testing pursuant to § 54-102a (b), or both, would provide useful, practical information to a victim that cannot reasonably be obtained in another manner before it may order such examination or testing, or both. Accordingly, we reverse the trial court's order and remand the case for a new hearing so that the trial court can apply the proper standard.

The record reveals the following undisputed facts and procedural history. On March 28, 2017, the defendant was arrested pursuant to a warrant and charged with patronizing a prostitute who was the victim of human trafficking and conspiracy to commit trafficking in persons. The arrest warrant application indicated that, on August 5, 2016, Danbury police officers interviewed the defendant in connection with their investigation of a prostitution ring involving the sexual trafficking of mentally disabled young men. The defendant told the police that, over the course of the previous twenty

[7] The constitution of Connecticut, article first, § 7, provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

[8] We note that, during the pendency of this appeal, the defendant was convicted, following a jury trial, of the underlying offenses. He has appealed from that conviction, and that appeal is currently pending before this court. As we discuss in greater detail in part I of this opinion, the fact that he has been convicted of those offenses has no bearing on the merits of the present appeal.

to twenty-five years, an individual by the name of Robert King had been arranging for young males to engage in sexual activities with him in exchange for money. The defendant stated that, to the best of his recollection, King had made arrangements for him to engage in sexual activities with eight to ten young men, most of whom the defendant had sex with multiple times. The arrest warrant application also indicated that one of the victims told the police that the defendant had performed fellatio on him.[9] The defendant told the police that the last occasion on which he had had sexual relations with a young man brought to him by King was approximately four months before the date of the interview.

On October 18, 2017, the state filed a motion seeking an examination of the defendant for sexually transmitted diseases under subsection (a) of § 54-102a and HIV testing of the defendant under subsection (b) of § 54-102a. The defendant opposed the motion on the ground that granting it without a prior showing of probable cause to believe that such an examination and testing would promote the health interests of the victims would serve no legitimate medical purpose and would therefore violate the defendant's rights under the fourth amendment and article first, § 7. Thereafter, victims represented by Attorney Joel T. Faxon, victims represented by Attorney Kevin C. Ferry, and victims represented by Attorney Gerald S. Sack filed three separate motions seeking the same relief. The trial court conducted a hearing on the motions, at which the assistant state's attorney and defense counsel appeared, and Faxon also appeared on behalf of certain victims. In addition, Attorneys Jonathan A. Cantor and Monique

[9] The alleged victims contend in their amicus brief that "they were subjected [by the defendant] to much more than oral sex." No evidence as to the nature of the contact between the defendant and the victims, however, was presented to the trial court in connection with the motions for an examination and testing filed pursuant to § 54-102a.

Foley appeared on behalf of the other victims who had not filed motions under § 54-102a. Although the parties adduced no evidence at the hearing, Faxon referred to the contents of the arrest warrant during argument. In addition to a constitutional claim, defense counsel argued at the hearing that § 54-102a (b) and § 19a-582 (d) (8) must be read together to require the state and the victims to establish that the defendant posed a clear and imminent danger to the public health before the court could order HIV testing. Thereafter, the trial court summarily granted the motions.

This appeal followed. The defendant renews his claims that, under the statutory scheme, HIV testing authorized by § 54-102a (b) is conditioned on the showing mandated by § 19a-582 (d) (8), and, in any event, article first, § 7, of the state constitution requires proof of a compelling need for examination under § 54-102a (a) and testing under § 54-102a (b). We address each of these claims in turn.

I

Before doing so, however, we address two threshold issues that implicate this court's jurisdiction to entertain the present appeal: first, whether the trial court's order constituted an appealable final judgment and, second, what effect, if any, does the defendant's conviction have on this appeal.[10] Both the state and the defendant contend that the trial court's order was immediately appealable and that the defendant's conviction has no bearing on this appeal. We agree with the parties.

"[B]ecause our jurisdiction over appeals . . . is prescribed by statute, we must always determine the threshold question of whether the appeal is taken from

[10] We directed the parties to address each of these two issues in supplemental briefs.

a final judgment before considering the merits of the claim . . . . It is well established that [t]he principal statutory prerequisite to invoking our jurisdiction is that the ruling from which an appeal is sought must constitute a final judgment." (Internal quotation marks omitted.) *State* v. *Anderson*, 318 Conn. 680, 698 n.6, 122 A.3d 254 (2015). "The appealable final judgment in a criminal case is ordinarily the imposition of sentence. . . . In both criminal and civil cases, however, we have determined certain interlocutory orders and rulings of the Superior Court to be final judgments for purposes of appeal. An otherwise interlocutory order is appealable in two circumstances: (1) [when] the order or action terminates a separate and distinct proceeding, or (2) [when] the order or action so concludes the rights of the parties that further proceedings cannot affect them." (Citations omitted; internal quotation marks omitted.) *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983).

"The separate and distinct requirement of *Curcio* demands that the proceeding [that] spawned the appeal be independent of the main action. . . . This means that the separate and distinct proceeding, though related to the central cause, must be severable therefrom. The question to be asked is whether the main action could proceed independent of the ancillary proceeding." (Citations omitted; internal quotation marks omitted.) *State* v. *Parker*, 194 Conn. 650, 654, 485 A.2d 139 (1984).

It is clear, as both parties recognize, that the order at issue in the present case terminated a separate and distinct proceeding under *Curcio*'s first prong because that order involves a discrete matter entirely distinct from and independent of the adjudication of the defendant's guilt. As a consequence, the proceedings concerning the propriety of that order were wholly severable from the proceedings pertaining to the resolu-

tion of the defendant's criminal case, which could and did advance separate and apart from this appeal. Cf. *State* v. *Grotton*, 180 Conn. 290, 294–95, 429 A.2d 871 (1980) (questions involving fourth amendment violations must await review until after criminal trial and conviction when there is "a functional link between the consequences of an illegal search and seizure and a later conviction in order to make any putative constitutional error harmful and hence to require reversal"); id., 295 ("[o]rders granting or denying suppression [of illegally seized evidence] in the wake of . . . [suppression] proceedings are truly interlocutory, for the criminal trial is then fairly in train" (internal quotation marks omitted)). Indeed, the defendant's criminal trial concluded during the pendency of this appeal; see footnote 8 of this opinion; whereas the controversy concerning the order issued pursuant to § 54-102a remains unresolved. We conclude, therefore, that that order was an appealable final judgment, and, consequently, it is properly the subject of this appeal.

With respect to the issue of whether the defendant's conviction has any effect on this court's appellate jurisdiction, that issue arises from the fact that § 54-102a authorizes a trial court to issue an order thereunder while a case is "pending" in that court, whereas General Statutes § 54-102b[11] delineates the circumstances pursu-

[11] General Statutes § 54-102b provides in relevant part: "(a) Notwithstanding any provision of the general statutes, except as provided in subsection (b) of this section, a court entering a judgment of conviction or conviction of a child as delinquent for a violation of section 53a-70b of the general statutes, revision of 1958, revised to January 1, 2019, or section 53a-70, 53a-70a, or 53a-71 or a violation of section 53-21, 53a-72a, 53a-72b or 53a-73a involving a sexual act, shall, at the request of the victim of such crime, order that the offender be tested for the presence of the etiologic agent for acquired immune deficiency syndrome or human immunodeficiency virus and the results be disclosed to the victim and the offender. The test shall be performed by or at the direction of the Department of Correction or, in the case of a child convicted as delinquent, at the direction of the Court Support Services Division of the Judicial Department or the Department of Children and Families, in consultation with the Department of Public Health.

ant to which HIV testing of a defendant shall be ordered upon motion following a conviction of certain enumerated offenses. There is nothing in § 54-102a or § 54-102b, or elsewhere in the statutory scheme, to suggest that § 54-102b was intended to place a temporal limitation on the execution of an order properly issued prior to conviction in accordance with § 54-102a. Moreover, § 54-102b applies to HIV testing only, and makes no provision for HIV testing of persons convicted of the offenses of which the defendant was convicted. Consequently, we agree with the parties that the fact that the defendant was convicted during the pendency of the present appeal has no bearing, jurisdictional or otherwise, on this appeal.

II

We now turn to the defendant's claim that the trial court abused its discretion in ordering HIV testing pursuant to § 54-102a (b) because the court did not adhere to the requirement of § 19a-582 (d) (8)[12] that there first

"(b) The provisions of sections 19a-581 to 19a-585, inclusive, and section 19a-590, except the requirement that the subject of an HIV-related test provide informed consent prior to the performance of such test, shall apply to a test ordered under this section. . . ."

[12] General Statutes § 19a-582 provides in relevant part: "(a) Except as required pursuant to section 19a-586, a person who has provided general consent as described in this section for the performance of medical procedures and tests is not required to also sign or be presented with a specific informed consent form relating to medical procedures or tests to determine human immunodeficiency virus infection or antibodies to human immunodeficiency virus. General consent shall include instruction to the patient that: (1) As part of the medical procedures or tests, the patient may be tested for human immunodeficiency virus, and (2) such testing is voluntary and that the patient can choose not to be tested for human immunodeficiency virus or antibodies to human immunodeficiency virus. General consent that includes HIV-related testing shall be obtained without undue inducement or any element of compulsion, fraud, deceit, duress or other form of constraint or coercion. If a patient declines an HIV-related test, such decision by the patient shall be documented in the medical record. The consent of a parent or guardian shall not be a prerequisite to testing of a minor. The laboratory shall report the test result to the person who orders the performance of the test.

must be a finding of "a clear and imminent danger to the public health or the health of a person and that the person has demonstrated a compelling need for the HIV-related test result that cannot be accommodated by other means." As the defendant notes, the state does not claim that the trial court made any such a finding or that the evidence presented at the hearing would have supported that finding. The state contends that § 54a-102a (b) does not incorporate § 19a-582 (d) (8) but, instead, broadly authorizes the trial court to order testing when, as in the present case, the defendant has been charged with committing an offense enumerated in § 54a-102a (b) that involved a sexual act. We agree with the state.

Whether § 54-102a (b) incorporates § 19a-582 (d) (8) is an issue of statutory interpretation. "The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the

* * *

"(d) The provisions of this section shall not apply to the performance of an HIV-related test:

* * *

"(8) Under a court order that is issued in compliance with the following provisions: (A) No court of this state shall issue such order unless the court finds a clear and imminent danger to the public health or the health of a person and that the person has demonstrated a compelling need for the HIV-related test result that cannot be accommodated by other means. In assessing compelling need, the court shall weigh the need for a test result against the privacy interests of the test subject and the public interest that may be disserved by involuntary testing, (B) pleadings pertaining to the request for an involuntary test shall substitute a pseudonym for the true name of the subject to be tested. The disclosure to the parties of the subject's true name shall be communicated confidentially, in documents not filed with the court, (C) before granting any such order, the court shall provide the individual on whom a test result is being sought with notice and a reasonable opportunity to participate in the proceeding if he or she is not already a party, (D) court proceedings as to involuntary testing shall be conducted in camera unless the subject of the test agrees to a hearing in open court or unless the court determines that a public hearing is necessary to the public interest and the proper administration of justice . . . ."

language does so apply. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Ugrin* v. *Cheshire*, 307 Conn. 364, 379–80, 54 A.3d 532 (2012). Furthermore, "[t]he legislature is always presumed to have created a harmonious and consistent body of law . . . [so that] [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction." (Internal quotation marks omitted.) *Sokaitis* v. *Bakaysa*, 293 Conn. 17, 23, 975 A.2d 51 (2009). Because issues of statutory construction raise questions of law, they are subject to plenary review on appeal. See, e.g., *Ugrin* v. *Cheshire*, supra, 379.

We begin with § 19a-582, subsection (a) of which sets forth a general rule broadly requiring consent for HIV related testing.[13] Subsection (d) carves out a number of exceptions to that consent requirement, one of which, set forth in subdivision (8), is a court order issued in compliance with certain very stringent conditions.

Section 54-102a (b) in turn provides in relevant part that, "[n]otwithstanding the provisions of section 19a-

[13] Subsections (b) and (c) of § 19a-582, which pertain to persons administering tests authorized under that section, are not relevant to this appeal.

582," the trial court may, in specified criminal cases, order HIV testing of the defendant. Such testing is also subject to the following proviso: "The provisions of sections 19a-581 to 19a-585, inclusive, and section 19a-590, *except any provision requiring the subject of any HIV-related test to provide informed consent prior to the performance of such test and any provision that would prohibit or limit the disclosure of the results of such test to the victim under this subsection*, shall apply to a test ordered under this subsection and the disclosure of the results of such test." (Emphasis added.) General Statutes § 54-102a (b).

The interpretive issue presented stems from the parties' dispute over the proper reading of the "[n]otwithstanding the provisions of section 19a-582" language contained in the first sentence of § 54-102a (b) in light of the final sentence of that subsection, providing that a range of statutes, including § 19a-582, applies to any HIV testing order issued under § 54-102a (b), "except any provision requiring the subject of an HIV-related test to provide informed consent prior to the performance of such test and any provision that would prohibit or limit the disclosure of the results of such test to the victim under this subsection . . . ." General Statutes § 54-102a (b). The defendant contends that the only way to reconcile these two provisions is to construe the "notwithstanding" clause to apply *only* to the consent requirement of subsection (a) of § 19a-582 and *not* to the various exceptions to that requirement set forth in subsection (d) of § 19a-582. Thus, in the defendant's view, subsection (d) of that statute, which allows testing without consent only under the conditions specifically enumerated therein, including the court order provision specified in subdivision (8), is not excepted from the purview of § 54-102a (b), and, therefore, the rigorous requirements of subdivision (8) of § 19a-582 (d) must be met prior to the issuance of an order for HIV testing

under § 54-102a (b). The state contends, to the contrary, that, because both the first and third sentences of § 54-102a (b) explicitly or implicitly provide that the consent requirement of § 19a-582 (a) does not apply to orders issued pursuant to § 54-102a (b), the *exceptions* to the consent requirement of § 19a-582 (d) also do not apply. In effect, then, the state's interpretation treats § 54-102 (b) like the other exceptions to § 19a-582 (a) that are enumerated in § 19a-582 (d).

Although § 54-102a (b) is not a model of clarity, the interpretation advanced by the state is reasonable, whereas the defendant's is not. First, it is difficult to understand why, if, as the defendant concedes, the consent requirement set forth in § 19a-582 (a) does not apply to persons who are subject to § 54-102a (b), the *exceptions* to that consent requirement set forth in § 19a-582 (d) are nevertheless applicable. We see no logical reason to separate the exceptions to the general rule from that rule itself, at least not without a clear indication from the legislature, in the statutory language or otherwise, that it intended to disconnect the one from the other. In contrast, treating § 54-102a (b) as an exception to the general consent requirement of § 19a-582 (a) affords it a meaning and significance consistent with a commonsense reading of the statutory language, considered in the broader context of the overall purpose of the statutory scheme.

Second, the defendant's proposed construction of § 54-102a (b) renders that provision largely superfluous. Because § 19a-582 (d) preexisted the enactment of § 54-102a (b), it *already* provided the court with authority to order an HIV test upon proof of an imminent danger to health and a compelling need that could not otherwise be met. In fact, the history of the legislation that is now codified as amended at § 54-102a (b); see Public Acts, Spec. Sess., May, 1994, No. 94-6, § 27 (Spec. Sess.

P.A. 94-6);[14] reveals that a number of persons who submitted written testimony to the Judiciary Committee in opposition to its enactment pointed out that sexual assault victims already were allowed to seek such a court order. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 5, 1994 Sess., p. 1577, written testimony of Connecticut Sexual Assault Crisis Services, Inc. ("Connecticut law already allows a victim to seek a court order for the testing of an assailant and, if applicable, disclosure of the assailant's test results"); id., p. 1582, written testimony of Suzanne Mazzarelli, Counselor/Advocate, Susan B. Anthony Project Sexual Assault Crisis Services ("Connecticut law already allows a victim to seek [a] court order for the testing of an assailant, and, if applicable, disclosure of the assailant's test results"); id., p. 1583, remarks of Sarah Wilson, Lobbyist, Connecticut Chapter of the National Organization for Women ("[c]urrent law already allows a victim to seek a court order for the testing of an assailant and, if applicable, the disclosure of these results"). We must presume that the legislature intended to provide something more than what the law already

[14] The legislation that was ultimately enacted as Spec. Sess. P.A. 94-6, § 27, was first introduced as Substitute House Bill No. 5790 during the regular session of the General Assembly in 1994. Substitute House Bill No. 5790 was passed temporarily on the last day of the regular 1994 session. See 37 H.R. Proc., Pt. 21, 1994 Sess., p. 7684; see also Connecticut General Assembly, Glossary—Legislative Terms and Definitions, available at http://www.cga.ct.gov/asp/content/terms.asp (last visited July 13, 2021) (defining "pass temporarily" as "[t]o suspend consideration of a particular bill for a short time, for example to await an amendment or the answer to a question"). During the May, 1994 special session of the General Assembly, legislation identical to the temporarily passed Substitute House Bill No. 5790 was introduced as an amendment to House Bill No. 6010, which the legislature ultimate enacted. See 37 H.R. Proc., Pt. 25, May, 1994 Spec. Sess., p. 9013, remarks of Representative Richard D. Tulisano (proposed legislation "follows in total . . . a bill that passed this House in the last day of the [regular] session"). We refer to the debate on both Substitute House Bill No. 5790 and the amendment to House Bill No. 6010 in our discussion of the legislative history of Spec. Sess. P.A. 94-6, § 27.

provided. See, e.g., *American-Republican, Inc.* v. *Waterbury*, 183 Conn. 523, 529–30, 441 A.2d 23 (1981) ("[w]e cannot assume that the legislature would perform the useless act of correcting a deficiency in the statute [that] did not exist").

Thus, under the defendant's reading of § 54-102a (b), a victim in a criminal case would receive no substantive benefit from the provision. Rather, its utility would be limited to affording such a victim the option of seeking an order under § 19a-582 (d) (8) in the criminal case itself—an alternative that otherwise would not be available to a victim, who, as a nonparty, would lack standing to move for a testing order in the criminal case[15]—instead of doing so in another pending action or in a new proceeding. This interpretation of § 54-102a (b) is manifestly implausible for a number of reasons. First, if providing an alternative forum for a victim requesting an order pursuant to § 19a-582 (d) (8) were all the legislature intended to accomplish by its enactment of § 54-102a (b), it easily could have achieved that result merely by adding a few words to § 19a-582 (d) (8) rather than by enacting an entirely new—and somewhat obtusely worded—statutory provision. And because the relevant language of § 54-102b, pertaining to HIV tests upon the motion of a victim following conviction, is materially identical to that of § 54-102a, we also would have to presume that the legislature opted to enact § 54-102b rather than tweaking the text of § 19a-582 (d) (8) slightly to reflect its purportedly modest intentions. We do not

[15] "It is a basic tenet of the criminal justice system that prosecutions are undertaken and punishments are sought by the state on behalf of the citizens of the state, and not on behalf of particular victims or complaining witnesses. . . . A criminal prosecution is a public matter and not a contest between the defendant and his victims, or their relatives. . . . It is axiomatic, therefore, that [t]he parties to a criminal action are the [state], in whose sovereign name it is prosecuted, and the person accused . . . and *not* the crime victim(s)." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Gault*, 304 Conn. 330, 342–43, 39 A.3d 1105 (2012).

believe that the legislature would have enacted multiple new statutory provisions—which, as we discuss more fully in part III of this opinion, were the subject of extensive legislative discussion and debate—if its intent were to accomplish only the extremely limited objective attributed to it by the defendant.

Another even more compelling reason to reject the defendant's construction of § 54-102a (b) stems from the fundamental purpose of the provision. As we also explain in greater detail in part III of this opinion, the impetus behind both §§ 54-102a (b) and 54-102b was to avert the state's loss of certain federal grant money, the receipt of which was conditioned on the enactment of §§ 54-102a (b) and 54-102b. Construing those provisions as advocated by the defendant—that is, requiring that the category of victims identified in those provisions also satisfy the exceedingly stringent conditions of § 19a-582 (d) (8)—would fly in the face of the decidedly pro victim policy the provisions undisputedly were intended to promote. Thus, no one in the legislature reasonably could have believed that merely enabling a victim to seek an order under § 19a-582 (d) (8) in a criminal case would have afforded the state even the remotest chance of forestalling the loss of federal funding. There is absolutely no reason, moreover, why those provisions would have prompted any legislative discussion at all, let alone the robust debate they did generate, if they were intended only to ensure that a victim could seek an order under § 19a-582 (d) (8) in a criminal case.

In fact, aspects of the relevant legislative history provide clear indication that § 54-102a (b) was not intended to incorporate the clear and imminent danger/compelling need standard of § 19a-582 (d) (8). Representative Robert Farr explained that the person who would be subject to the testing order "would have every right to refuse to take the test, every right protected right now . . . *that a defendant would have on giving a blood*

test for other purposes . . . ." (Emphasis added.) 37 H.R. Proc., Pt. 21, 1994 Sess., p. 7640. When the state seeks a search warrant for a blood sample for the purpose of providing evidence of a defendant's guilt, it need not establish an imminent danger to the public health or a compelling need for the test that cannot be accommodated by other means. Rather, a defendant can be compelled to give a blood sample merely upon a showing of probable cause. See, e.g., *State* v. *Grant*, 286 Conn. 499, 514, 944 A.2d 947, cert. denied, 555 U.S. 916, 129 S. Ct. 271, 172 L. Ed. 2d 200 (2008).

Representative Robert M. Ward stated during the debate that, by enacting the proposed legislation, "[a]ll we're doing is extending the current law as to venereal diseases . . . ." 37 H.R. Proc., supra, p. 7642; see also id., remarks of Representative Ward ("[t]here's no real harm done to the defendant [by ordering an HIV test], and if they can be tested for venereal disease, why not also include in that test a test for . . . [HIV]?"). As the defendant in the present case conceded at oral argument before this court; see footnote 5 of this opinion; the preconditions for ordering an HIV related test under § 19a-582 (d) (8) do not apply to motions for examination for sexually transmitted diseases pursuant to § 54-102a (a) or, presumably, to its predecessors. Representative Ward further stated that the trial court would be able to exercise its discretion in a proceeding on a motion for an HIV test pursuant to the proposed legislation, without giving any indication that there were severe limitations, like those set forth in § 19a-582 (d) (8), on the court's discretion to grant such a motion. See 37 H.R. Proc., supra, p. 7642; see also 37 H.R. Proc., Pt. 25, May, 1994 Spec. Sess., p. 9015, remarks of Representative Ward (testing order is "up to the judge's discretion when he listens to both [the victim and the defendant] and presumably to the state's attorney as well").

Additional considerations support the state's construction of § 54-102a (b). As we noted previously, the pertinent language of § 54-102a (b), pertaining to HIV testing in pending cases, and of § 54-102b, pertaining to HIV testing in cases following the defendant's conviction, is materially identical, such that § 19a-582 (d) (8) either applies to both of those provisions or to neither. Consequently, under the defendant's statutory construction, the extremely strict, clear and imminent danger/compelling need requirement of § 19a-582 (d) (8) also applies to § 54-102b, when the defendant *has been found guilty beyond a reasonable doubt of sexually assaulting the victim*. It simply is impossible to believe that the legislature would have imposed that same exacting standard when the state has already established that the victim was sexually assaulted by the defendant *and* in all other circumstances in which someone is prompted, for whatever reason, to seek an order requiring another person to submit to an HIV test.[16]

[16] In agreeing with the defendant's proposed construction of § 54-102a (b), the concurrence acknowledges that the *sole* effect of interpreting the provision in that manner would be to afford a victim in a criminal case the opportunity to seek a testing order under § 19a-582 (d) (8)—with its exceedingly stringent clear and imminent danger/compelling need requirement—in that criminal case rather than in a new or pending civil action. See footnote 4 of the concurring opinion. Although, as we previously explained, this construction is belied by the far broader and more ambitious purpose of the provision—namely, to provide sexual assault victims in criminal cases with simple and straightforward means of determining whether their alleged assailants have HIV—the concurrence makes no mention of that purpose, which is clearly reflected in the relevant legislative history and manifests the intent of the legislature to promote the strong pro victim policy mandated by the federal government under the threat of loss of certain federal funding. As we also explained, under the statutory construction advanced by the defendant and the concurrence, a victim seeking a testing order for a convicted defendant under § 54-102b would *still* have to satisfy the extremely strict conditions of § 19a-582 (d) (8), even after the defendant has been found beyond a reasonable doubt to have sexually assaulted the victim. It could hardly be more apparent that this construction of §§ 54-102a (b) and 54-102b cannot be squared with the well-defined legislative policy underlying the enactment of those provisions.

Moreover, under § 54-102a (b), the court in a pending criminal case "may" issue a testing order upon the motion of the victim, whereas, under § 54-102b, the court "shall" issue the requested order following the defendant's conviction. This permissive/mandatory distinction makes perfect sense if those provisions are construed as the state contends: the court *may*, in the exercise of its discretion, order the nonconsensual HIV testing of a defendant in a pending criminal case, and *must* issue such an order upon a finding of the defendant's guilt beyond a reasonable doubt. The distinction makes little or no sense, however, if both §§ 54-102a (b) and 54-102b are construed to require a victim to satisfy the stringent requirements of § 19a-582 (d) (8),[17]

Indeed, the thrust of the concurrence seems to be that § 54-102a operates as an unwarranted curtailment of the rights of criminal defendants relative to the protections afforded others who may find themselves the subject of a request for a nonconsensual HIV testing order. The concurrence's quarrel in this regard is with the legislature, not with us, because § 54-102a represents a legislative policy decision—prompted by the potential loss of federal money—to make it appreciably easier for certain sexual assault victims to obtain such an order.

Although § 54-102a certainly achieves that end, the concurrence claims that the provision, as we construe it, truncates the rights of those criminal defendants to whom it applies to a greater degree than it actually does. More specifically, the concurrence suggests that our "holding . . . jettisons the procedural safeguards contained in § 19a-582 (d) (8) (B) through (D)." However, a review of those provisions, which are designed to protect the identity of a party who is subject to an HIV order, reveals that they generally are not relevant to a request for such an order in a criminal case in which the identity of the defendant and the nature of his or her alleged offenses already are a matter of public record. The concurrence also contends that our construction of § 54-102a (b) "leads to an inconsistency in the provision of counseling services, which would be afforded to victims, but not to criminal defendants who test positive for HIV." In fact, the "counseling" services to which General Statutes § 54-102c refers are certain publicly available "educational materials" and "information" obtainable through the Department of Public Health, all of which a defendant, or his or her counsel, may readily obtain upon request.

[17] Thus, under the interpretation of § 54-102a (b) urged by the defendant, the trial court would have discretion to refuse to order an HIV test, *even after finding* that all of the requirements of § 19a-582 (d) (8) have been met—that is, after finding that the defendant poses "a clear and imminent danger to . . . the health" of the victim *and* that the victim "has demonstrated a compelling need for the HIV-related test result that cannot be

and we see no reason why the legislature would have sought to achieve such a bizarre result.[18]

For all the foregoing reasons, we agree with the state's contention that, as long as the conditions set forth in § 54-102a (b) are satisfied, that is, the defendant has been charged with one of the offenses enumerated in the statute, the alleged offense involved a completed sexual act, as defined in General Statutes § 54-102b (c), and the criminal case is pending, the trial court acts within its discretion under the applicable statutory language when it grants a motion for HIV testing.[19] In other words, the legislature did not intend for the requirements of § 19a-582 (d) (8) to apply to an order for testing

accommodated by other means." We see no reason why a court *ever* would decline to issue such a testing order once it has found that these requirements have been satisfied. If, though, the defendant's proposed construction of § 54-102b is correct, the legislature intended to grant the court discretion to decline to order a test in such circumstances because no such discretion is granted under § 54-102a, which is applicable to the testing of convicted defendants and *requires* the court to issue a testing order upon the request of the victim. In contrast to the defendant's interpretation, the two provisions are entirely logical under the construction we adopt: if, as in the present case, the criminal case is pending, then the court has discretion to order a test, whereas the court must do so once the defendant has been found guilty.

[18] We note that the concurrence claims that our reading of § 54-102a (b) would lead to a bizarre and unworkable result in one respect, namely, that, in certain circumstances, a victim would not be able to obtain the very test results that he or she sought under that provision. Although we disagree with this assertion for a number of reasons, it suffices to say that the court has broad authority under § 54-102a (b) both to order testing of the defendant upon the request of the victim and to order that the test results be disclosed to the victim, and there is nothing in the statutory scheme limiting the court's discretion to determine how best to accomplish such disclosure in light of the particular circumstances involved.

[19] Three additional points bear emphasis. First, under the state's construction of § 54-102a (b), the defendant's interest in preventing the unwarranted or inappropriate disclosure of privileged testing information is safeguarded. See, e.g., General Statutes § 19a-583 (a) (subject to certain enumerated exceptions, "[n]o person who obtains confidential HIV-related information may disclose or be compelled to disclose such information"); General Statutes § 19a-583 (b) ("[n]o person . . . to whom confidential HIV-related information is disclosed may further disclose such information, except as

under § 54-102a (b).[20] Because there is no dispute that those conditions have been met in the present case,

provided in this section and sections 19a-584 and 19a-585"); General Statutes § 19a-585 (containing additional safeguards against undue dissemination of HIV related test results or related information). Second, as we discuss in part III of this opinion, article first, § 7, of the state constitution prohibits a court from issuing an HIV testing order under § 54-102a (b) without first finding that such an order would provide useful, practical information to a victim that cannot reasonably be obtained by other means. Finally, as we explained in part I of this opinion, the defendant has the right to immediate appellate review of any order issued pursuant to § 54-102a (b). Thus, a defendant has considerable protection with respect to a court's exercise of its discretion to order an HIV test under § 54-102a (b) and to the use and dissemination of the results of any such test.

[20] We recognize, of course, that, when possible, statutes are to be construed to avoid constitutional infirmity. See, e.g., *Mayer-Wittman* v. *Zoning Board of Appeals*, 333 Conn. 624, 638, 218 A.3d 37 (2019) Reliance on that principle for purposes of the present case, however, is misplaced for several reasons. First, although a constitutional gloss is necessary to preclude such an infirmity under our reading of § 54-102a (b); see part III of this opinion; the very same tenet of construction that directs us to interpret a statute to avoid placing it in constitutional jeopardy—so long as that interpretation is consistent with legislative intent—also directs us to "search for a judicial gloss [on the statute] . . . that will effect the legislature's [intent] in a manner consistent with constitutional safeguards." (Internal quotation marks omitted.) *State* v. *DeCiccio*, 315 Conn. 79, 149, 105 A.3d 165 (2014). Because it is evident, for the reasons previously enumerated, that our construction of § 54-102a (b) is the only reasonable one in light of its text, its relationship to other statutory provisions, and its clear purpose, such a gloss is both necessary *and* fully consistent with our rules of statutory construction.

Furthermore, the canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that [the legislature] did not intend the alternative which raises serious constitutional doubts. . . . *The canon is thus a means of giving effect to* [*legislative*] *intent, not of subverting it*." (Citations omitted; emphasis added.) *Clark* v. *Martinez*, 543 U.S. 371, 381–82, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005). As we explained, the unmistakable intent behind § 54-102a was to facilitate the examination or testing of criminal defendants for sexually transmitted diseases or HIV, respectively, at the request of sexual assault victims. Construing § 54-102a as the defendant asserts it should be construed—that is, by reading § 19a-582 (d) (8) into it and thereby placing the burden on the victim to satisfy the same stringent conditions that existed prior to the enactment of § 54-102a—would not substantively advance the interests of sexual assault victims in any way, let alone in the distinctly pro victim manner intended by the legislature.

In addition, even if we were to interpret § 54-102a (b) to avoid the need for a constitutional gloss on *that* statutory subsection, we still would have to place the identical gloss on its companion subsection, § 54-102a (a),

the trial court did not abuse the discretion conferred by the statute in granting the motions for testing. We turn, therefore, to the issue of whether those statutory requirements are sufficient to satisfy the protections of the state constitution.

III

The defendant claims that subsections (a) and (b) of § 54-102a violate article first, § 7, of the state constitution insofar as they purport to authorize the trial court to order an examination for a sexually transmitted disease or testing for HIV without probable cause to believe that a defendant is suffering from such a disease or virus, without a showing that an examination or testing will assist the state in the criminal case, and without any evidence that it will advance the health interests of the victim or the public.[21] We conclude that,

pertaining to examination for sexually transmitted diseases. See part III of this opinion. We see no legitimate basis for presuming that the legislature was attentive to the need to avoid placing an interpretive gloss on § 54-102a (b) but not on the closely related provisions of § 54-102a (a).

Finally, our refusal to engage in such a presumption finds support in the fact that, when § 54-102a was enacted in 1994, there was no suggestion in case law from this or any other jurisdiction that subjecting a criminal defendant in a sexual assault case to an HIV testing order at the victim's request was constitutionally suspect. Indeed, because the impetus for the legislation was the federal government itself, it is hardly likely that our legislature harbored any concern that such a testing provision was of questionable constitutionality. And even today, more than twenty-five years after the enactment of § 54-102a in this state and the enactment of virtually identical provisions in many other states, we know of no other court that has found such a provision to be unconstitutional or determined that an interpretive gloss was necessary to avoid constitutional infirmity. In these circumstances, the tenet of statutory construction on which the concurrence relies simply has no utility in evaluating legislative intent.

[21] We first address the defendant's claim under the state constitution because there is no clear and binding precedent on the issue of whether a statute authorizing mandatory examinations for sexually transmitted diseases and mandatory testing for HIV of individuals charged with certain sexual offenses is reasonable under the fourth amendment in the absence of a showing of probable cause to believe that testing is necessary to advance the health interests of the victim or the public. See, e.g., *State* v. *Kono*, 324 Conn. 80, 123, 152 A.3d 1 (2016) ("if the federal constitution does not clearly and definitively resolve the issue in the defendant's favor, we turn first to the

under article first, § 7, the trial court is required to make a finding that an examination or testing pursuant to § 54-102a (a) and (b), respectively, would provide useful, practical information to a victim that cannot reasonably be obtained in another manner before it may order such an examination or testing. We reject, however, the defendant's contention that the court must find probable cause to believe that the defendant has a sexually transmitted disease or HIV before an order under § 54-102a may be issued.

"Determining the constitutionality of a statute presents a question of law over which our review is plenary. . . . It [also] is well established that a validly enacted statute carries with it a strong presumption of constitutionality, [and that] those who challenge its constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt. . . . The court will indulge in every presumption in favor of the statute's constitutionality . . . . Therefore, [w]hen a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear." (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 405, 119 A.3d 462 (2015).

To provide context for our state constitutional analysis, we begin with a review of the general principles governing warrantless searches. We note, as a threshold matter, that it is firmly established that "[a] blood test . . . constitutes a search and seizure under the federal and state constitutions." *State* v. *Grotton*, supra, 180 Conn. 293. Accordingly, the state concedes that, as a general rule, it cannot constitutionally compel an individual to submit to a blood test in the absence of proba-

state constitution to ascertain whether its provisions entitle the defendant to relief").

ble cause and a warrant.[22] See, e.g., *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) ("[i]t is well settled under the [f]ourth and [f]ourteenth [a]mendments that a search conducted without a warrant issued upon probable cause is per se unreasonable . . . subject only to a few specifically established and [well delineated] exceptions" (internal quotation marks omitted)).

There are exceptional circumstances, however, in which the government may conduct a search without a warrant, without probable cause and, indeed, without any showing of individualized suspicion. See, e.g., *Skinner* v. *Railway Labor Executives' Assn.*, 489 U.S. 602, 624, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) (in exceptional circumstances, "a search may be reasonable despite the absence of [individualized] suspicion"). Specifically, "[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the [United States Supreme Court] has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable. . . . Those circumstances diminish the need for a warrant, either because the public interest is such that neither a warrant nor probable cause is required . . . or because an individual is already on notice, for instance because of his employment . . .

[22] The defendant does not claim that a warrant would be required in a proceeding under § 54-102a if the trial court were constitutionally required to make a finding of probable cause to believe that an examination or testing is necessary to protect the health interests of the victim. This court previously has held, in the civil context, that an adversarial proceeding at which the party seeking an order to conduct a search must prove probable cause is an acceptable substitute for a warrant, in part because "there are no statutory or regulatory provisions for the issuance of search warrants to facilitate regulatory searches . . . ." (Internal quotation marks omitted.) *Bozrah* v. *Chmurynski*, 303 Conn. 676, 694, 36 A.3d 210 (2012). Similarly, in the present case, because the purpose of an order pursuant to § 54-102a is not to obtain evidence for use at the criminal trial, a search warrant would not be an appropriate mechanism to compel a defendant to provide a blood sample.

or [because of] the conditions of his release from government custody . . . that some reasonable police intrusion on his privacy is to be expected." (Citations omitted; internal quotation marks omitted.) *Maryland* v. *King*, 569 U.S. 435, 447, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013).

Even in such cases, however, a search "must be reasonable in its scope and manner of execution." Id., 448. "To say that no warrant is required is merely to acknowledge that rather than employing a per se rule of unreasonableness, we balance the [privacy related] and [law enforcement related] concerns to determine if the intrusion was reasonable. . . . This application of traditional standards of reasonableness requires a court to weigh the promotion of legitimate governmental interests against the degree to which [the search] intrudes [on] an individual's privacy." (Citation omitted; internal quotation marks omitted.) Id.; see also *Skinner* v. *Railway Labor Executives' Assn.*, supra, 489 U.S. 624.

With this general background in mind, we turn to the defendant's claim that, to the extent that § 54-102a (a) and (b) authorizes the trial court to issue an order for an examination or testing without a showing of probable cause to believe that such examination or testing will advance the health interests of the victim or the public, the statute runs afoul of article first, § 7, of the state constitution. The state contends that, to the contrary, the statute passes constitutional muster because it falls within the "special needs" exception to the probable cause requirement.[23]

"[I]n determining the contours of the protections provided by our state constitution, we employ a multifactor approach that we first adopted in [*State* v. *Geisler*, 222

[23] We note that the defendant does not claim that there is no special needs exception to article first, § 7, of the state constitution. Accordingly, we assume for purposes of this opinion that there is.

Conn. 672, 685, 610 A.2d 1225 (1992)]. The factors that we consider are (1) the text of the relevant constitutional provisions; (2) related Connecticut precedents; (3) persuasive federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of [the] constitutional [framers]; and (6) contemporary understandings of applicable economic and sociological norms [otherwise described as public policies]. . . . We have noted, however, that these factors may be inextricably interwoven, and not every [such] factor is relevant in all cases." (Internal quotation marks omitted.) *State* v. *Kono*, 324 Conn. 80, 92, 152 A.3d 1 (2016).

We begin by addressing the first and second prongs of *Geisler*. With respect to the text of article first, § 7, this court previously has held that, because it is similar to the text of the fourth amendment, that consideration alone provides no reason to depart from the interpretation of the federal constitution by the United States Supreme Court. See, e.g., *State* v. *Miller*, 227 Conn. 363, 381, 630 A.2d 1315 (1993). Despite the linguistic similarity, however, this court has held in a variety of contexts that the state constitution provides greater protection against governmental searches and seizures than does the federal constitution. See id., 382 ("article first, § 7, provides broader protection than does the fourth amendment against warrantless searches of automobiles that have been impounded at police stations, even though probable cause exists"); *State* v. *Oquendo*, 223 Conn. 635, 652, 653, 613 A.2d 1300 (1992) (under state constitution, unlike federal constitution, "what starts out as a consensual encounter becomes a seizure if, on the basis of a show of authority by the police officer, a reasonable person in the defendant's position would have believed that he was not free to leave"); *State* v. *Geisler*, supra, 222 Conn. 690 (in contrast to exclusionary rule under fourth amendment, "the

exclusionary rule under article first, § 7, requires that evidence derived from an unlawful warrantless entry into the home be excluded unless the taint of the illegal entry is attenuated by the passage of time or intervening circumstances"); *State* v. *Marsala*, 216 Conn. 150, 171, 579 A.2d 58 (1990) (unlike exclusionary rule under fourth amendment, "a good faith exception to the exclusionary rule does not exist under [article first, § 7, of the state constitution]"); *State* v. *Dukes*, 209 Conn. 98, 120, 547 A.2d 10 (1988) ("to the extent that [*United States* v. *Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973)] allows unlimited searches in contexts that extend beyond full custodial arrests [under the fourth amendment], we disavow its holding concerning the level of protection to which individuals are entitled against unreasonable searches and seizures under article first, § 7, of the Connecticut constitution"). Although none of these cases involves the specific issue presented by this appeal, we agree with the defendant that they generally support the proposition that article first, § 7, is more protective of the privacy rights of our citizenry than the fourth amendment.

We next consider *Geisler*'s third and fourth prongs, persuasive state and federal precedent. As we previously discussed, the general rule applied by both state and federal courts is that probable cause and a warrant are required for a search in the absence of exceptional circumstances in which the government's " 'special law enforcement needs' " outweigh the intrusion on the individual's constitutional interests. *Maryland* v. *King*, supra, 569 U.S. 447. Although the United States Supreme Court has not addressed the precise question that is the subject of this appeal, a sampling of the court's cases applying the special needs exception provides guidance regarding the nature and scope of the special needs doctrine and its potential applicability to examinations and testing under § 54-102a.

In *Skinner* v. *Railway Labor Executives' Assn.*, supra, 489 U.S. 602, the court considered the constitutionality of federal regulations requiring railroad employees who are involved in certain accidents to submit to blood and urine tests for alcohol and drugs. Id., 606. The regulations also authorized breath and urine tests to be administered to employees who violate certain safety rules. Id. The court concluded that the government's interest in promulgating those regulations fell into the special needs exception to the requirement of probable cause and a warrant because (1) the "covered employees [were] engaged in [safety sensitive] tasks"; id., 620; and were required to "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention [could] have disastrous consequences"; id., 628; (2) " 'the burden of obtaining a warrant [was] likely to frustrate the governmental purpose behind the search' " because "the delay necessary to procure a warrant . . . [could] result in the destruction of valuable evidence," namely, evidence of the level of alcohol and drugs in the employee's bloodstream at the time of the accident; id., 623; (3) testing would deter employees from using drugs and alcohol while on duty because they could not predict the timing of the tests; id., 629; and (4) "[t]he testing procedures . . . help railroads obtain invaluable information about the causes of major accidents . . . and . . . take appropriate measures to safeguard the general public" from recurrences. (Citation omitted.) Id., 630. The court also concluded that the special needs of the government outweighed the employees' privacy interests because (1) the intrusions occasioned by the blood, breath and urine tests were not significant; id., 624–26; and (2) "the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." Id., 627. Accordingly, the court

concluded that the regulations survived fourth amendment scrutiny. Id., 633.

In a second decision issued on the same day as *Skinner*, the United States Supreme Court undertook to determine the constitutionality of a drug testing program that required individuals to submit to drug tests as a condition for placement in any position in the United States Customs Service that involved drug interdiction or the carrying of firearms. See *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 660–61, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989). The court determined that the government had a substantial interest in ensuring that employees were physically fit and that they not be tempted by bribes from drug traffickers or by access to the large amounts of contraband seized by the Customs Service. Id., 669–70. The court further explained that the government had an interest in testing employees who are armed because of the risk of "injury to others that even a momentary lapse of attention" could create. (Internal quotation marks omitted.) Id., 670. With respect to the employees' privacy interests, the court observed that "employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty . . . have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test." Id., 672. The court ultimately concluded that the government's compelling interests in safeguarding the border and public safety outweighed the employees' privacy interests, and, therefore, the drug testing program was reasonable under the fourth amendment. Id., 677.[24]

[24] In his dissenting opinion in *Von Raab*, Justice Scalia distinguished the case from *Skinner*, in which he had joined the majority, on the ground that, in *Skinner*, "the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society." *National Treasury Employees Union* v. *Von Raab*, supra, 489 U.S. 680 (Scalia, J., dissenting). In contrast, because "neither frequency of use nor connection to harm [was] demonstrated or even likely" in *Von Raab*,

Thereafter, in *Chandler* v. *Miller*, 520 U.S. 305, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997), the court considered the constitutionality of a Georgia statute requiring candidates for certain state offices to certify that they had taken a drug test and that the test result was negative. Id., 308. The court observed that its precedents, including *Skinner* and *Von Raab*, "establish that the proffered special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the [f]ourth [a]mendment's normal requirement of individualized suspicion." Id., 318. The court further observed that Georgia had produced no evidence that it had a particular problem with state officeholders abusing drugs or that the testing scheme, which would allow candidates for office to abstain from drug use before testing, would deter candidates who use drugs from seeking office. Id., 319–20. The court concluded that, because "public safety [was] not genuinely in jeopardy, the [f]ourth [a]mendment preclude[d] the suspicionless search, no matter how conveniently arranged." Id., 323.

Finally, and most recently, in *Maryland* v. *King*, supra, 569 U.S. 435, the United States Supreme Court considered whether a Maryland statute authorizing the taking of a DNA sample as part of a routine booking procedure for serious offenses violated the fourth amendment. Id., 440. The court concluded that the state had a significant interest in knowing the identity and criminal history of an arrestee that the state has taken into custody in order to assess the danger that the arrestee poses to the staff of the facility where the arrestee is detained, other detainees and the public. Id., 449–56. The court further concluded that "[t]he special needs cases, though in full accord with the [conclusion

Justice Scalia would have concluded that the drug testing program was unconstitutional. Id., 681 (Scalia, J., dissenting).

that the DNA testing procedure is constitutional], do not have a direct bearing on the issues presented in [the] case, because unlike the search of a citizen who has not been suspected of a wrong, a detainee has a reduced expectation of privacy." Id., 463. In addition, the DNA test was not intended to reveal any private medical information, which "would present additional privacy concerns . . . ." Id., 465. Accordingly, the court rejected the fourth amendment challenge to the statute.[25] Id., 465–66.

We glean the following general principles from these cases. First, under the special needs doctrine, the government interest that is furthered by a suspicionless search must be "substantial . . . ." *Chandler* v. *Miller*, supra, 520 U.S. 318; see id. ("the proffered special need . . . must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the [f]ourth [a]mendment's normal requirement of individualized suspicion"); see also *Maryland* v. *King*, supra, 569 U.S. 448 (characterizing government interest in requiring DNA test as part of routine booking procedure as "[u]rgent"); *National Treasury Employees Union* v. *Von Raab*, supra, 489 U.S. 670 (suspicionless drug testing was permissible under fourth amendment because government had "a compelling interest in ensuring that [frontline] interdiction personnel are physically fit . . . and have unimpeachable integrity and judgment"); *Skinner* v. *Railway Labor Executives' Assn.*, supra, 489 U.S. 624 (suspicionless search may be justified when government interest is "important"). Second, the need for the search cannot be established by conclusory assertions of need

[25] In his dissenting opinion in *King*, Justice Scalia contended that the DNA testing procedure had nothing to do with identifying *arrestees* but was intended to identify the source of the DNA of persons who had committed unsolved crimes. See *Maryland* v. *King*, supra, 569 U.S. 470–76 (Scalia, J., dissenting). Accordingly, he concluded that the DNA testing procedure was an unconstitutional suspicionless search. Id., 481 (Scalia, J., dissenting).

or the desire to send a symbolic message but, rather, must be supported by evidence in the record. See *Chandler* v. *Miller*, supra, 321, 322 (suspicionless drug testing of candidates for state office in Georgia was not reasonable when government presented "no evidence of a drug problem among the [s]tate's elected officials" and the need established was merely "symbolic"). Third, "the government's interest in dispensing with the warrant requirement is at its strongest when . . . the burden of obtaining a warrant [would] likely . . . frustrate [the underlying] governmental purpose . . . ." (Internal quotation marks omitted.) *Skinner* v. *Railway Labor Executives' Assn.*, supra, 623; see also *Chandler* v. *Miller*, supra, 314 (suspicionless search may be reasonable when "an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion" (internal quotation marks omitted)). Fourth, the government's interest must outweigh the privacy interests of the subject of the search. See *National Treasury Employees Union* v. *Von Raab*, supra, 665 ("it is necessary to balance the individual's privacy expectations against the [g]overnment's interests"); see also *Maryland* v. *King*, supra, 448 (court is required "to weigh the promotion of legitimate governmental interests against the degree to which [the search] intrudes [on] an individual's privacy" (internal quotation marks omitted)).

As we indicated, the United States Supreme Court has not yet had occasion to apply these principles to a statute that authorizes HIV testing of persons charged with certain crimes.[26] Several other courts, however, have had the opportunity to do so, and they have uni-

[26] The discussion that follows addresses HIV testing rather than examinations for sexually transmitted diseases because the case law appears to be more developed with respect to the issue of HIV testing. As we explain hereinafter, however, our reasoning and conclusion regarding the propriety of HIV testing under the state constitution are also applicable to examinations for sexually transmitted diseases.

formly concluded that such statutes do not violate constitutionally protected privacy rights. See, e.g., *United States* v. *Ward*, 131 F.3d 335, 342 (3d Cir. 1997) (federal statute authorizing victims to request court order for HIV testing of defendants charged with certain offenses was constitutional); *Johnetta J.* v. *Municipal Court*, 218 Cal. App. 3d 1255, 1260, 1285, 267 Cal. Rptr. 666 (1990) (California statute requiring HIV testing of defendants charged with interfering with peace officer by biting officer was constitutional under federal and California constitutions).[27] A closer examination of these

[27] See, e.g., *Fosman* v. *State*, 664 So. 2d 1163, 1164–67 (Fla. App. 1995) (Florida statute requiring court to order HIV testing of defendant charged with certain offenses was constitutional under fourth amendment); *Adams* v. *State*, 269 Ga. 405, 405, 410, 498 S.E.2d 268 (1998) (Georgia statute authorizing court to order HIV testing of defendants charged with certain offenses was constitutional under fourth amendment); *State in the Interest of J. G.*, 151 N.J. 565, 570, 588, 701 A.2d 1260 (1997) (New Jersey statute requiring juveniles charged with certain offenses to submit to HIV testing was constitutional under fourth amendment and New Jersey constitution in cases in which there had been possible transfer of bodily fluids); *People* v. *Thomas*, 139 Misc. 2d 1072, 1074–75, 529 N.Y.S.2d 429 (1988) (rejecting claim that New York statute authorizing HIV testing of defendants charged with certain crimes violated fourth amendment and granting request for testing order); *State* v. *Houey*, 375 S.C. 106, 109–10, 113, 651 S.E.2d 314 (2007) (South Carolina statute authorizing court to order HIV testing of defendants charged with certain offenses was constitutional under South Carolina and federal constitutions); see also *Harris* v. *Thigpen*, 941 F.2d 1495, 1512 (11th Cir. 1991) (Alabama statute requiring testing of inmates for HIV upon admission to and within thirty days of release from prison did not violate constitutionally guaranteed privacy rights); *Dunn* v. *White*, 880 F.2d 1188, 1197 (10th Cir. 1989) (nonconsensual testing of prisoner for HIV did not violate fourth amendment), cert. denied, 493 U.S. 1059, 110 S. Ct. 871, 107 L. Ed. 2d 954 (1990); *State* v. *Superior Court*, 187 Ariz. 411, 417, 930 P.2d 488 (App. 1996) (Arizona statute allowing victim of delinquent act committed by juvenile that would be sexual offense if committed by adult to request HIV testing of juvenile was constitutional under fourth amendment), review denied, Arizona Supreme Court, Docket No. CV-96-0498-PR (January 14, 1997); *Love* v. *Superior Court*, 226 Cal. App. 3d 736, 746, 276 Cal. Rptr. 660 (1990) (California statute requiring defendants convicted of certain sexual offenses to undergo HIV testing was constitutional under fourth amendment); *People* v. *Adams*, 149 Ill. 2d 331, 333, 351–52, 597 N.E.2d 574 (1992) (Illinois statute requiring court to order HIV testing of defendants convicted of certain crimes was constitutional under fourth amendment and Illinois constitution); *People*

cases reveals that they do not support court-ordered testing under the present circumstances. First, the cases involving HIV testing of defendants who have been convicted or incarcerated are distinguishable from the present case. Although an individual who has been charged with a crime has, in certain respects, diminished expectations of privacy; see, e.g., *Maryland* v. *King*, supra, 569 U.S. 448 (holding that warrantless DNA test of defendant charged with serious offense was constitutional because, among other reasons, "[t]he arrestee is already in valid police custody for a serious offense supported by probable cause"); those privacy expectations are less diminished than those of a defendant who has been convicted. See, e.g., *Harris* v. *Thigpen*, 941 F.2d 1495, 1514 (11th Cir. 1991) ("prisoners' constitutional rights are necessarily subject to substantial restrictions and limitations in order for correctional officials to achieve legitimate correctional goals and [to] maintain institutional security"); *Dunn* v. *White*, 880 F.2d 1188, 1194 (10th Cir. 1989) (defendant's "incar-

v. *C.S.*, 222 Ill. App. 3d 348, 350, 353, 583 N.E.2d 726 (1991) (Illinois statute authorizing HIV testing of defendants convicted of certain drug paraphernalia offenses was constitutional under fourth amendment), appeal denied,146 Ill. 2d 636, 602 N.E.2d 461 (1992); *People* v. *Cook*, 143 App. Div. 2d 486, 487, 532 N.Y.S.2d 940 (court order requiring defendant who had been convicted of first degree rape to undergo testing for presence of acquired immunodeficiency syndrome (AIDS) upon request of victim was constitutional), appeal denied, 73 N.Y.2d 786, 533 N.E.2d 676, 536 N.Y.S.2d 746 (1988); *People* v. *J. G.*, 171 Misc. 2d 440, 451, 655 N.Y.S.2d 783 (1996) (New York statute requiring court to order HIV testing for defendants convicted of certain crimes was constitutional under fourth amendment); *State* v. *Handy*, 191 Vt. 311, 324, 44 A.3d 776 (2012) (Vermont statute allowing victim of sex offense to obtain court order for testing of convicted perpetrator for AIDS was constitutional); *In re Juveniles A, B, C, D, E*, 121 Wn. 2d 80, 98, 847 P.2d 455 (1993) (Washington statute mandating HIV testing for all defendants convicted of certain offenses was constitutional under fourth amendment); cf. *Walker* v. *Sumner*, 917 F.2d 382, 387–88 (9th Cir. 1990) (District Court improperly granted defendants' motion for summary judgment on plaintiff's claim that prison directive ordering mandatory HIV testing of all inmates was unconstitutional when defendants failed to present evidence to establish purpose of testing or that results would be used to further legitimate penological end).

ceration changes the relative weight accorded [to the interests of the government and the defendant]"), cert. denied, 493 U.S. 1059, 110 S. Ct. 871, 107 L. Ed. 2d 954 (1990); *People* v. *Adams*, 149 Ill. 2d 331, 348, 59 N.E.2d 574 (1992) (Illinois statute was constitutional because it "operate[d] only at that point in the proceedings when a defendant no longer enjoys a presumption of innocence but instead stands at the threshold of incarceration, probation, or other significant curtailment of personal freedom").

Although another case relied on by state, *United States* v. *Ward*, supra, 131 F.3d 335, does involve HIV testing, it is distinguishable because, in *Ward*, the federal statute authorizing HIV testing for defendants charged with certain crimes required victims seeking such testing to demonstrate that "the test would provide information necessary for [the] health of the victim of the alleged offense . . . ." (Internal quotation marks omitted.) Id., 339 n.2, quoting 42 U.S.C. § 14011 (b) (2) (1994). The very question before us in the present case is whether the state constitution requires such a finding before HIV testing may be ordered pursuant to § 54-102a (b).

Finally, for the following reasons, we are not persuaded by the reasoning of cases holding that the state has a compelling interest in protecting the health interests of victims that, *under all circumstances*, justifies suspicionless HIV testing of a defendant charged with certain sexual offenses.[28] In *State in the Interest of J.*

[28] We express no opinion as to whether the state may have a significant interest in preventing the spread of HIV in prison populations that outweighs the diminished expectation of privacy of *convicted* defendants. See, e.g., *Dunn* v. *White*, supra, 880 F.2d 1195 ("[t]he prison's interest in responding to the threat of AIDS, or any contagious disease occurring in prison, is obviously strong"); *Harris* v. *Thigpen*, 727 F. Supp. 1564, 1572 (M.D. Ala. 1990) ("the [s]tate's interest in preventing the spread of [AIDS] among prison inmates and prison officials . . . amounts to a controlling [s]tate interest"), vacated in part on other grounds, 941 F.2d 1495 (11th Cir. 1991); *People* v. *Adams*, supra, 149 Ill. 2d 346 ("the purpose of the HIV testing statute [was]

G., 151 N.J. 565, 701 A.2d 1260 (1997), the court noted that the accused juveniles had presented undisputed and unanimous expert testimony that "there would be no medical benefit to the victim, in either treatment or diagnosis, from testing the accused or convicted offender. In [the] view [of the expert witnesses presented by the juveniles], the only appropriate course is for the victim to undergo HIV testing." Id., 583. The court then observed that there was authority for the proposition that, *during the period immediately following the victim's potential exposure to HIV*, testing of the defendant could be useful in determining whether the victim should begin or continue prophylactic treatment; id., 584–85; and could provide psychological benefits to the victim. See id., 586 ("[*i*]*n those cases of sexual assault* [*in which*] *the accused is apprehended relatively soon after the assault*, involuntary testing, with appropriate due process and confidentiality protections for the accused, could mitigate one of the primary ongoing harms of the assault, the survivor's fear and uncertainty about the risk of contracting HIV" (emphasis added; internal quotation marks omitted)). The court ultimately concluded that the New Jersey HIV testing statute was reasonable, and therefore constitutional, as applied to the accused juveniles, despite the fact that they had been charged in 1994 and the case was not decided until 1997.[29] See id., 571, 588–90, 593–94. In our

to protect public health by preventing the spread of AIDS among members of the community"); *In re Juveniles A, B, C, D, E*, 121 Wn. 2d 80, 94, 847 P.2d 455 (1993) ("the [s]tate has a compelling interest in combating the spread of AIDS" by convicted defendant).

[29] See *Johnetta J.* v. *Municipal Court*, supra, 218 Cal. App. 3d 1280–81 ("The experts suggest that a bitten officer would be well advised to have a blood test for clearer information, *but HIV antibodies generally would not develop for three to six months after the bite.* [The HIV testing statute] provides a *prompt* mechanism to obtain some information pertinent to the officer's health, and therefore to the governmental special need." (Emphasis added.)); *Adams* v. *State*, 269 Ga. 405, 409, 498 S.E.2d 268 (1998) (same). Despite recognizing the time limitations on the usefulness of testing defendants for HIV, the courts in both *Johnetta J.* and *Adams* found the HIV testing statutes under review to be constitutional without any limitation on

view, however, the fact that testing the victim does not yield useful medical information during the several months immediately following potential exposure establishes only that there is medical utility in testing the defendant for HIV *during that period*.[30]

Indeed, a number of the courts that have upheld the constitutionality of nonconsensual HIV testing statutes nevertheless have expressly recognized that, when HIV testing of the victim would yield useful information, testing the defendant has little value. For example, although the court in *Johnetta J.* v. *Municipal Court*, supra, 218 Cal. App. 3d 1285, concluded that the California statute authorizing HIV testing was constitutional, the court questioned the wisdom of the statute in light of expert testimony "that the only really effective means of determining HIV infection is for the [potentially

their application. See *Johnetta J.* v. *Municipal Court*, supra, 1285; *Adams* v. *State*, supra, 409–10.

A number of courts that have rejected constitutional challenges to statutes requiring HIV testing of defendants who have been *convicted* of certain crimes have also relied on the court's statement in *Johnetta J.* that HIV testing of defendants can be medically useful and can provide psychological benefits to victims; see *Johnetta J.* v. *Municipal Court*, supra, 218 Cal. App. 3d 1280–81; apparently without recognizing that that observation pertained to the period in which testing the victim would not yield useful results. See *People* v. *J. G.*, 171 Misc. 2d 440, 450, 655 N.Y.S.2d 783 (1996); *State* v. *Handy*, 191 Vt. 311, 324, 44 A.3d 776 (2012); *In re Juveniles A, B, C, D, E*, 121 Wn. 2d 80, 93–95, 847 P.2d 455 (1993).

[30] We note that, in *Government of the Virgin Islands* v. *Roberts*, 756 F. Supp. 898 (D.V.I. 1991), the court noted that, "[f]or up to a year after the attack and perhaps longer . . . a rape victim cannot conclude from her own negative HIV test results that her assailant did not expose her to the virus or that she is not infected and therefore capable of transmitting HIV to others." Id., 903. The court concluded from this fact that "there is considerable medical utility in examining the blood of the putative source of HIV infection, even though the results are not dispositive." (Internal quotation marks omitted.) Id. Accordingly, the court found the court order for HIV testing at issue to be constitutional. Id., 904. It bears emphasis, however, that the assault in *Roberts* took place on October 29, 1990, and the testing order was issued on January 18, 1991; id., 899, 904; well within the period that testing of the defendant could provide results useful to the victim.

infected] concerned public safety employees to undergo their own tests." Id. Similarly, even though the court in *State* v. *Handy*, 191 Vt. 311, 44 A.3d 776 (2012), determined that the Vermont statute at issue, which required certain convicted defendants to submit to HIV testing, was reasonable; see id., 324; it observed that, when testing is not done during the "latency period during which the victim's own testing might not yet reveal the presence of the virus . . . neither a negative nor a positive result from the offender's testing would appear to have any value for the victim. Moreover, any positive test result from the offender would have limited value for the additional reasons that the tests do not indicate when the virus was [acquired] and that the chances of passing the virus . . . to a sexual assault victim are very small. Indeed, even those who testified in support of testing offenders acknowledged that such testing provided little or no medically useful information for victims of sexual crimes." Id., 322; see also id., 321–22 (physician testified before legislative committee considering mandatory HIV testing legislation that "testing sex offenders following conviction offered no medical benefit for victims because health care issues need to be addressed as soon after the sexual assault as possible and, given the normal lag time between the commission of the crime and conviction, the victims will have or should have already been tested themselves for sexually transmitted diseases"); cf. *People* v. *J. G.*, 171 Misc. 2d 440, 450, 655 N.Y.S.2d 783 (1996) (court tended to agree with expert who testified that, when more than two and one-half years have passed since assault, "the only reliable test is one [that] would be performed on the victim herself and that a test on the defendant at such a late date does not have any medical utility"); *State* v. *Handy*, supra, 323 ("[S]exual assault victims do not necessarily consider the issue of testing offenders in a logical way as perceived by nonvictims.

While recognizing that testing victims is the only way to determine definitively whether they have contracted an infectious sexual disease, and in particular [HIV] . . . victims want the peace of mind that would result from also testing the perpetrator and . . . they feel further violated if their attacker[s] [refuse] to submit to the testing of bodily fluids forced [on] them during a sexual assault."). In light of the questionable benefits of testing a defendant for HIV when testing the victim will yield reliable results, we are not persuaded by these cases that the special needs doctrine justifies suspicionless testing during that period.

The sixth prong of *Geisler*, contemporary understandings of applicable economic and sociological norms and relevant public policies in this state, bolsters this conclusion. Section 54-102a (b) was the codification of Spec. Sess. P.A. 94-6, § 27. The bill as originally proposed contained the following provision: "It is the policy of the state of Connecticut that testing for HIV or AIDS status shall be the voluntary act of the person on whom the test is performed, and that the results of such tests shall be disclosed only to the subject of the test. The preferred procedure for determining HIV/AIDS status of sexual assault victims is that the victim should be tested. This act constitutes an exception to that policy for the sole purpose of complying with the requirements of the federal Drug Control and System Improvement Formula Grant Program . . . ."[31] Substi-

[31] Under the federal Drug Control and System Improvement Formula Grant Program, the director of the federal Bureau of Justice Assistance in the United States Department of Justice was "authorized to make grants to states to enable them to enforce state and local laws that establish offenses similar to those in the Controlled Substances Act (21 U.S.C. § 801 et seq.) and to improve how the criminal justice system functions with respect to violent crime and serious offenders." Office of Legislative Research, Bill Analysis, Substitute House Bill No. 5790, 1994 Sess. The director was authorized to deny participating states 10 percent of their authorized funding if they did not enact laws authorizing the testing of defendants convicted of certain sexual offenses to undergo HIV testing. Id.

tute House Bill No. 5790, 1994 Sess., § 1. Representative Ellen Scalettar stated that this provision expressed the current policy of the state; 37 H.R. Proc., Pt. 21, 1994 Sess., p. 7630; and that it was intended to "clarif[y] that no challenge can be brought to the current practices based [on] the new language in this statute which seems to express a contrary policy . . . ." Id., p. 7637. Representative Dale W. Radcliffe expressed concern, however, that, if state policy changed in the future, the provision would make it difficult to implement the new policy. Id., pp. 7630–33; see also id., p. 7637, remarks of Representative Radcliffe (policy provision might "tie the hands of those who have to implement HIV testing . . . who may wish to respond to conditions that we may not be able to foresee at this time"). Representative Radcliffe's view ultimately prevailed, and the provision was deleted. See House Amendment Schedule B to Substitute House Bill No. 5790, 1994 Sess. (passed May 4, 1994); 37 H.R. Proc., Pt. 21, 1994 Sess., p. 7638.

As is clear from the debate on the proposed legislation, however, the policy set forth in the deleted provision reflected the current views of most legislators, at least with respect to testing the defendant during the period when testing the victim would provide useful results. Representative Norma Gyle stated that "none of us wanted this specific policy to allow victims to ask whether . . . they could have their assailant tested for HIV because there is a window that says that if someone is HIV positive, they may not test positive for quite some time and therefore the victim could get a false sense of security. . . . That's why we were reluctant to put this legislation into place." 37 H.R. Proc., Pt. 21, 1994 Sess., p. 7626. Arguing in favor of the provision authorizing HIV testing for defendants who have been charged with certain offenses, Representative Farr stated that "[it] doesn't do an awful lot of good for the victim to find out a year after the assault that the

individual had AIDS. Chances are by then that the victim is going to know whether [HIV] has been transmitted." Id., pp. 7639–40. Representative Richard D. Tulisano opposed the proposed provision on the ground that "the mere fact [that] a negative or positive comes up on the offender is no indication of whether . . . the victim will have a negative or a positive reading, and even if in fact there is a negative reading after [there is a] positive on the offender . . . does not mean because of the latency of the disease, it could not occur again in the future, and since our issues are to protect the victims of sexual assault the best we can, whatever resources we have ought to be . . . given to them so they can be retested." Id., pp. 7648–49. Representative Lenny T. Winkler opposed the provision because a negative test might give a "false sense of security . . . ." Id., p. 7650; see also id., p. 7664, remarks of Representative Scalettar ("the information that would be gained from testing upon conviction is not deemed to be information that would be helpful to the victim of the crime"); id., p. 7668, remarks of Representative Andrea L. Stillman (opposing proposed legislation because it could give victims false sense of security).

In addition, several groups providing services and support to victims of sexual assault opposed the proposed legislation mandating HIV testing of convicted offenders on the ground that testing the defendant generally provides little benefit to the victim. The Connecticut Sexual Assault Crisis Services, Inc., submitted documentation opposing the proposed legislation because "[i]t [could] take up to two years for an offender to be convicted. A victim who is concerned about the possibility of HIV transmission needs information about her HIV status as quickly as possible and should be tested herself. Our concern is that the victim might not take necessary safety precautions in the interim between the assault and the testing of the convicted

offender." Conn. Joint Standing Committee Hearings, supra, p. 1577. Connecticut Sexual Assault Crisis Services, Inc., submitted a memorandum opposing the proposed legislation "because quite simply it does not help victims of sexual assault, and because it misleads victims into believing that testing offenders will give them useful information. Having been misled, victims may not institute safe sex practices and may unknowingly make decisions [that] are deleterious to their health. If the goal of HIV testing is to give medical information or psychological reassurance to the survivor that she was not infected, then the survivor, not the offender, should be offered testing." Id., p. 1578. The Department of Public Health and Addiction Services submitted a memorandum providing that "[l]egislators should be aware that this bill will not provide much help to women who are sexually assaulted. Because of the frequently long delay between the sexual assault and the [conviction] of the offender, a woman will be able to get her own test result before that of the perpetrator. In any case, the victim will need to [be] counseled and tested for HIV and other [sexually transmitted diseases] to determine whether . . . transmission occurred and to obtain medical care. This is because a negative test [of] the perpetrator cannot ensure that he was not HIV infected, since it generally takes about six months after a [newly acquired] infection for the test result to read positive. In addition, a positive test result does not mean that the woman was infected. She still must be tested herself." Id., p. 1581. The Susan B. Anthony Project Sexual Assault Crisis Services opposed the proposed legislation because testing the defendant long after a sexual assault, by which time "[t]he victim should have . . . received information on anonymous testing, been tested (at least once) and practiced safety precautions with partners and family until two HIV tests show negative results," is "pointless." Id., p. 1582. In addition, a

defendant's positive test result "could lead to unnecessary anxiety on the part of the victim (the chance of contracting HIV from one sexual contact is very low), as well as wrong assumptions that the victim is also HIV positive . . . ." Id. The Connecticut Chapter of the National Organization for Women opposed the legislation because, "[i]f a victim is concerned with the possibilities [of] HIV infection she should not wait until the offender is convicted . . . but seek confidential testing immediately and within [six to eight] months after the assault." Id., p. 1583.

Indeed, the legislative history of Spec. Sess. P.A. 94-6, § 27, reveals that the primary purpose of the legislation authorizing HIV testing of defendants charged or convicted of certain sexual offenses was not to provide useful information to the victims of sexual assault, but to ensure that the state would not lose funding under the federal Drug Control and System Improvement Formula Grant Program. See 37 H.R. Proc., Pt. 21, 1994 Sess., p. 7626, remarks of Representative Gyle (reason that legislature wanted to pass legislation was to satisfy requirements for receiving federal funding); see also id., p. 7622, remarks of Representative Scalettar ("the legislation was not proposed due to . . . a change in the policy of the state, but only to allow us to recapture those federal funds"); id., p. 7639, remarks of Representative Farr ("the underlying bill is required by federal law"); id., p. 7647, remarks of Representative Gyle ("[w]e're [enacting the legislation] because the federal government is blackmailing us into doing it"); id., pp. 7664–65, remarks of Representative Scalettar (indicating that proposed legislation would not have been introduced but for federal funding issue because testing is not beneficial to victims); id., p. 7665, remarks of Representative Scalettar (avoiding loss of federal funding "is the sole reason for the bill"); Conn. Joint Standing Committee Hearings, supra, p. 1579, written testimony

of Thomas A. Siconolfi, Director, Policy Development and Planning Division of Office of Policy and Management (enacting legislation "would ensure [s]tate compliance with a federal mandate concerning the [federal] Drug Control and System Improvement . . . block grant and prevent the loss of 10 percent of Connecticut's share of the grant in the next fiscal year"); id., p. 1581, written testimony of Department of Public Health and Addiction Services (giving "reluctant support" to proposed legislation, even though it would provide little benefit to victims, because, "[i]f it is not passed, Connecticut will lose criminal enforcement funds").

We agree with the Supreme Court of Vermont that, "[i]f retaining federal funding were the sole governmental interest supporting the challenged portion of the [Vermont] statute, then the constitutionality of the law would be suspect because there would be no nexus between the law's intrusion on even the diminished privacy interest . . . and the information obtained from that intrusion." *State* v. *Handy*, supra, 191 Vt. 322–23. The state's interest in obtaining funding, standing alone and in the absence of any important special need for specific information, cannot trump an individual's constitutional right to be free from suspicionless searches. To put it more directly, a state cannot lawfully be induced by a payment from the federal government to engage in conduct that violates the constitutional rights of its citizenry. We recognize, however, that a number of legislators believed that, at least within the time period immediately following a sexual assault, when testing the victim would not yield any useful information, testing the defendant could provide a practical benefit to the victim. See 37 H.R. Proc., Pt. 21, 1994 Sess., p. 7651, remarks of Representative Farr ("[T]he purpose of the test is to give some peace of mind to women who are rape victims. . . . I presume that the overwhelming majority of accused in rape cases do not

have [HIV] and that when a woman wants to know whether . . . the accused who had raped her had [HIV], [and] that if she finds out that . . . he doesn't test positive for [HIV], she may have some peace of mind. Admittedly, it isn't perfect because that individual may have [HIV] that . . . doesn't yet show up on testing, but the whole purpose of the amendment is quite simple. It's to give some peace of mind to some [victims]."); id., p. 7652, remarks of Representative Robert R. Simmons ("the main purpose . . . of this amendment [allowing the testing of a defendant who has been charged] is to provide some comfort or some protection to the victim"); id., p. 7659, remarks of Representative Ward (arguing that victims are entitled to information about health status of persons who assaulted them and are capable of making intelligent decisions regarding that information); id., p. 7670, remarks of Representative Alan M. Kyle (arguing that legislation would operate to "dispel one of the very major fears that would be a portion of that psychological trauma [namely] whether . . . at some time after the incubation period of this very horrible disease, [the victim] may wind up carrying [HIV]"); id., p. 7672, remarks of Representative Kyle (testing may relieve victim of fear, even if results are not definitive).

On the basis of the foregoing, we conclude that the granting of a motion for HIV testing pursuant to § 54-102a (b) based solely on a finding that a defendant has been charged with an offense enumerated in a statute that proscribes a sexual act violates the defendant's right to be free from unreasonable searches under article first, § 7, of the Connecticut constitution. The legislative history of § 54-102a (b) and cases from other jurisdictions considering the constitutionality of similar statutes make it clear that, in many cases, such testing would provide no real medical benefit to the victim. When that is the case, the proffered special need is not

sufficient to override a defendant's recognized privacy interest. See, e.g., *Chandler* v. *Miller*, supra, 520 U.S. 318. Moreover, requiring a showing of the practical usefulness of HIV testing to the victim at a hearing on the motion for such testing would in no way frustrate the legitimate purpose of the statute. See, e.g., *Skinner* v. *Railway Labor Executives' Assn.*, supra, 489 U.S. 619. Indeed, doing so would advance the state's public policy that HIV testing should be consensual unless it is necessary to protect the health of another. See General Statutes § 19a-582 (d) (8). Accordingly, we conclude that, in cases in which testing would provide no real practical benefit to the victim, the state's interest in requiring testing does not outweigh the defendant's reasonable privacy expectations. Cf. *National Treasury Employees Union* v. *Von Raab*, supra, 489 U.S. 665–66.

We also conclude, therefore, that we must place an interpretive gloss on § 54-102a (b) to render it compatible with the requirements of article first, § 7. See, e.g., *State* v. *Indrisano*, 228 Conn. 795, 805–806, 640 A.2d 986 (1994) ("[W]e may . . . add [an] interpretive gloss to a challenged statute in order to render it constitutional. In construing a statute, the court must search for an effective and constitutional construction that reasonably accords with the legislature's underlying intent." (Internal quotation marks omitted.)). Specifically, we hold that, before ordering testing pursuant to § 54-102a (b), a court must first make a finding that such testing would provide useful, practical information to a victim that cannot reasonably be obtained otherwise. In making this determination, the court ordinarily may presume that testing during the six month period immediately following the alleged assault, when testing the victim for HIV might not yield useful information, would be of practical benefit to the victim.

In reaching this conclusion, we are mindful that, even after the six month period immediately following the

assault has passed, a defendant's negative test result could establish that the defendant has not exposed the victim to HIV. At that point, however, the defendant's privacy interest ordinarily would outweigh any benefit to the victim because the burden of self-testing on the victim generally would be slight, and, unlike the information obtained from testing the defendant, the information obtained from testing the victim would be definitive. If the victim can establish, however, that, for some reason, the burden of undergoing a test would not be slight and, for example, that a negative test result from the defendant would be definitive of the victim's HIV status because the defendant was the exclusive source of any potential infection, a testing order could be warranted. The court also should consider other relevant facts and circumstances in determining whether testing would provide useful, practical information to the victim after the six month period immediately following the assault has expired.[32]

The foregoing reasoning applies equally to an order for an examination for sexually transmitted diseases pursuant to § 54-102a (a), and, consequently, the same showing that must be made prior to the issuance of an order for testing under § 54-102a (b) also must be made prior to the issuance of an order for an examination under § 54-102a (a). Because of the differences between sexually transmitted diseases and HIV, however, including the fact § 54-102a (a) provides for an examination and § 54-102a (b) provides for testing, we acknowledge that different considerations may well be relevant in

[32] We recognize, of course, that it has been more than four years since the offending sexual contact occurred and, therefore, that it is highly unlikely that the victims can demonstrate that, at this late date, an order under § 54-102a (b) would result in the discovery of useful, practical information that they could not reasonably obtain by self-examination or testing. We nevertheless remand the case for a new hearing because of the possibility, however remote, of circumstances, unknown to us, that might justify such an order.

determining whether that standard has been met under the two statutory subsections.

We therefore conclude that, in the absence of any evidence that an examination under § 54-102a (a) would provide a real practical benefit to the victim that cannot reasonably be obtained in another manner, an order for such an examination would also violate article first, § 7. Thus, a person seeking an order pursuant to § 54-102a (a) must make a showing that an examination would provide useful, practical information to the victim that cannot reasonably be obtained in another manner. Because the record before us contains no information regarding the incubation periods for sexually transmitted diseases or other information that might assist us in providing guidance as to when an examination under § 54-102a (a) would be of practical benefit, we leave the determination as to whether an order for such an examination is warranted to the informed discretion of the trial court.[33]

The state contends that § 54-102a (b) as written satisfies the state constitution because "the government has a compelling interest in testing in furtherance of protecting the health and welfare of its citizens by stemming the spread of HIV/AIDS. Identifying infected individuals allows them to receive treatment for their

[33] We note that when, as in the present case, we have determined that a defendant is entitled to protection under the state constitution, we ordinarily would have no need to address any parallel claim raised under the federal constitution. In the present case, however, the relief that we have afforded the defendant under the state constitution is not the full relief that he has sought under either the state or federal constitution. This is so because the standard that the defendant claims is applicable to an order issued pursuant to § 54-102a is considerably more demanding than the standard that we have concluded is required under the state constitution. Consequently, although highly unlikely, it is at least theoretically possible that, for purposes of § 54-102a, the defendant is entitled to greater protection under the federal constitution than the protection afforded under the state constitution. It is clear, from our review of the relevant federal precedent, however, that, whatever the defendant's rights may be under the fourth amendment, in no event are they greater than his rights under the state constitution.

individual health needs and education for changing behaviors and for preventing infection of others. This identification also permits public health officials, when necessary, to inform partners of the tested individual who, in turn, can undergo testing and, if necessary, treatment." There is no evidence in the record, however, that individuals accused of sexual assault are at greater risk of carrying HIV than members of the general public. Thus, even if we were to assume that the statute was intended to protect not only victims, but also the defendant and the public at large, there is no connection between the diminished privacy expectations of a defendant charged with sexual assault, which derive from the defendant's alleged conduct toward the victim, and the state's desire for information about the defendant's HIV status in order to protect the defendant himself or the public. See, e.g., *State* v. *Handy*, supra, 191 Vt. 322–23 (Vermont's HIV testing statute would be unconstitutional if there were "no nexus between the law's intrusion on even the diminished privacy interest [of the defendant] and the information obtained from that intrusion"); *In re Juveniles A*, *B*, *C*, *D*, *E*, 121 Wn. 2d 80, 104, 105–106, 847 P.2d 455 (1993) (Utter, J., concurring in part, dissenting in part) (arguing that state's interest in combating spread of AIDS did not justify testing of convicted defendant because same rationale would apply to "*any* individual whether charged and convicted or not" and that "[t]he [s]tate's interest in assisting a sexual offender who is potentially HIV positive is no greater than its interest in assisting any other sort of criminal offender" (emphasis in original)); see also *Chandler* v. *Miller*, supra, 520 U.S. 321, 322 (suspicionless drug testing of candidates for state office was not reasonable when Georgia asserted "no evidence of a drug problem among [its] elected officials" and need established was merely "symbolic"). In other words, when a defendant has been charged with

forcibly exposing a victim to his bodily fluids against the victim's will, he cannot reasonably complain if the victim seeks private information about any diseases to which he or she may have been involuntarily exposed, even if the risk that the defendant is infected is no greater than the risk for a member of the general public. We can perceive no reason, however, why a defendant should have a diminished expectation of privacy with respect to information required to protect his own health or the health of individuals who have consensually engaged in intimate contact with him such as to warrant suspicionless testing. If those individuals have reason to believe that the defendant exposed them to HIV and self-testing would not yield useful results, they may seek a testing order pursuant to § 19a-582 (d) (8). Accordingly, we reject this claim.

In summary, we conclude that § 54-102a (b) does not incorporate the standard set forth in § 19a-582 (d) (8). We also conclude, however, that, under article first, § 7, of the state constitution, the trial court was required to make a finding that an examination or testing or both would provide useful, practical information to the victim that could not reasonably be obtained otherwise, before ordering any such examination or testing in accordance with § 54-102a (a) and (b), respectively. It is clear that the trial court did not apply this standard. Because the state and the victims were not on notice that they were required to satisfy this requirement, the case must be remanded for a new hearing on their motions under § 54-102a.

The trial court's order directing the defendant to submit to an examination for sexually transmitted diseases pursuant to § 54-102 (a) and for HIV testing pursuant to § 54-102 (b) is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

In this opinion ROBINSON, C. J., and MULLINS, KAHN and VERTEFEUILLE, Js., concurred.

McDONALD, J., with whom D'AURIA, J., joins, concurring in the judgment. I agree with the majority that the trial court's order is an appealable final judgment. I also agree with the majority that the trial court's judgment granting the motions of the state and the victims that the defendant, Bruce John Bemer, be required to submit to human immunodeficiency virus (HIV) testing pursuant to General Statutes § 54-102a (b) and an examination for sexually transmitted diseases pursuant to § 54-102a (a)[1] must be reversed, and the case remanded to the trial court for further proceedings. I write separately, however, because I strongly disagree with the majority's conclusion that court-ordered HIV testing under § 54-102a (b) does not incorporate the rigorous standard and significant procedural safeguards that the legislature adopted and codified in General Statutes § 19a-582 (d) (8). Before any individual—even a criminal defendant—is forced by the state, against his will and without his consent, to submit to medical testing for HIV, both that high standard and those important safeguards must be adhered to in order for the testing to be lawful.

In my view, when the court was requested, before trial or conviction, to deploy the force of law against the defendant and to order him to be subjected to HIV testing, § 19a-582 (d) (8) required the court, among other things, to find that there is "a clear and imminent danger to the public health or the health of a person and that the person [requesting the testing] has demonstrated a compelling need for the HIV-related test result

[1] Although § 54-102a (a) was the subject of a technical amendment in 2018; see Public Acts 2018, No. 18-168, § 29; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

that cannot be accommodated by other means." General Statutes § 19a-582 (d) (8) (A). Because I conclude that well known principles of statutory construction reveal that the standard set forth in § 19a-582 (d) (8) is incorporated into court-ordered HIV testing under § 54-102a (b)—and because it is well settled that this court has a duty to construe statutes, whenever possible, to avoid the type of constitutional infirmities the majority has discerned in this case—I respectfully concur.

I agree with the majority's recitation of the facts. Accordingly, I turn to the defendant's claim that the trial court abused its discretion in ordering HIV testing pursuant to § 54-102a (b)[2] because the court did not adhere to the requirements of § 19a-582[3] that there first

[2] General Statutes § 54-102a (b) provides in relevant part: "Notwithstanding the provisions of section 19a-582, the court before which is pending any case involving a violation of section 53-21 or any provision of sections 53a-65 to 53a-89, inclusive, that involved a sexual act, as defined in section 54-102b, may, before final disposition of such case, order the testing of the accused person . . . for the presence of the etiologic agent for acquired immune deficiency syndrome or human immunodeficiency virus . . . . If the victim of the offense requests that the accused person . . . be tested, the court may order the testing of the accused person . . . in accordance with this subsection and the results of such test may be disclosed to the victim. The provisions of sections 19a-581 to 19a-585, inclusive, and section 19a-590, except any provision requiring the subject of an HIV-related test to provide informed consent prior to the performance of such test and any provision that would prohibit or limit the disclosure of the results of such test to the victim under this subsection, shall apply to a test ordered under this subsection and the disclosure of the results of such test."

[3] General Statutes § 19a-582 provides in relevant part: "(a) Except as required pursuant to section 19a-586, a person who has provided general consent as described in this section for the performance of medical procedures and tests is not required to also sign or be presented with a specific informed consent form relating to medical procedures or tests to determine human immunodeficiency virus infection or antibodies to human immunodeficiency virus. General consent shall include instruction to the patient that: (1) As part of the medical procedures or tests, the patient may be tested for human immunodeficiency virus, and (2) such testing is voluntary and that the patient can choose not to be tested for human immunodeficiency virus or antibodies to human immunodeficiency virus. General consent that includes HIV-related testing shall be obtained without undue inducement

must be a finding of "a clear and imminent danger to the public health or the health of a person and that the person has demonstrated a compelling need for the HIV-related test result that cannot be accommodated by other means." General Statutes § 19a-582 (d) (8) (A). As the defendant points out, the state does not claim that the trial court made any such finding. Rather, the state contends that § 54-102a (b) does not incorporate the standard set forth in § 19a-582 (d) (8) but, instead, broadly authorizes the trial court to order HIV testing when, as here, the defendant has been charged with committing an offense enumerated in § 54-102a (b) that involved a sexual act.

As the majority correctly notes, whether § 54-102a (b) incorporates the standard contained in § 19a-582

or any element of compulsion, fraud, deceit, duress or other form of constraint or coercion. If a patient declines an HIV-related test, such decision by the patient shall be documented in the medical record. The consent of a parent or guardian shall not be a prerequisite to testing of a minor. The laboratory shall report the test result to the person who orders the performance of the test.

* * *

"(d) The provisions of this section shall not apply to the performance of an HIV-related test:

* * *

"(8) Under a court order that is issued in compliance with the following provisions: (A) No court of this state shall issue such order unless the court finds a clear and imminent danger to the public health or the health of a person and that the person has demonstrated a compelling need for the HIV-related test result that cannot be accommodated by other means. In assessing compelling need, the court shall weigh the need for a test result against the privacy interests of the test subject and the public interest that may be disserved by involuntary testing, (B) pleadings pertaining to the request for an involuntary test shall substitute a pseudonym for the true name of the subject to be tested. The disclosure to the parties of the subject's true name shall be communicated confidentially, in documents not filed with the court, (C) before granting any such order, the court shall provide the individual on whom a test result is being sought with notice and a reasonable opportunity to participate in the proceeding if he or she is not already a party, (D) court proceedings as to involuntary testing shall be conducted in camera unless the subject of the test agrees to a hearing in open court or unless the court determines that a public hearing is necessary to the public interest and the proper administration of justice . . . ."

(d) (8) is a question of statutory interpretation over which our review is plenary. See part II of the majority opinion; see also, e.g., *Smith* v. *Rudolph*, 330 Conn. 138, 142–43, 191 A.3d 992 (2018). This court reviews §§ 54-102a (b) and 19a-582 (d) (8) in accordance with General Statutes § 1-2z and our familiar principles of statutory construction. See, e.g., *Smith* v. *Rudolph*, supra, 143. I am mindful that "the legislature is always presumed to have created a harmonious and consistent body of law . . . . [T]his tenet of statutory construction . . . requires us to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction." (Internal quotation marks omitted.) *Hartford/Windsor Healthcare Properties, LLC* v. *Hartford*, 298 Conn. 191, 198, 3 A.3d 56 (2010).

I begin with § 54-102a (b), which provides in relevant part that, "[n]otwithstanding the provisions of section 19a-582," the trial court may, in specified criminal cases, including this one, order HIV testing of the defendant before the disposition of the case. Such testing is also subject to the following condition: "The provisions of *sections 19a-581 to 19a-585, inclusive*, and section 19a-590, *except any provision requiring the subject of an HIV-related test to provide informed consent prior to the performance of such test and any provision that would prohibit or limit the disclosure of the results of such test to the victim under this subsection, shall apply* to a test ordered under this subsection and the disclosure of the results of such test." (Emphasis added.) General Statutes § 54-102a (b).

Subsection (a) of § 19a-582 sets forth a general rule requiring an individual's informed consent before any HIV related testing. Subsection (d), however, provides several circumstances under which an individual's

informed consent is not required before HIV related testing is performed.[4] Relevant to this case, subdivision (8) of § 19a-582 (d) allows another person to request that a court order involuntary testing of an individual when it has found that there is "a clear and imminent danger to the public health or the health of a person and that the person has demonstrated a compelling need for the HIV-related test result that cannot be accommodated by other means." General Statutes § 19a-582 (d) (8) (A). Subdivision (8) also provides guidance to the trial court in assessing whether there is a compelling need for the HIV test result. Namely, it directs that, "[i]n assessing compelling need, the court shall weigh the need for a test result against the privacy interests of the test subject and the public interest that may be disserved by involuntary testing . . . ." General Statutes § 19a-582 (d) (8) (A).

As the majority explains, the issue in this case "stems from the parties' dispute over the proper reading of the '[n]otwithstanding the provisions of section 19a-582' language contained in the first sentence of § 54-102a (b) in light of the final sentence of that subsection, providing that a range of statutes, including § 19a-582, *applies* to an HIV testing order issued under § 54-102a (b), '*except any provision requiring the subject of an HIV-related test to provide informed consent* prior to the performance of such test and any provision that would prohibit or limit the disclosure of the results of such test to the victim under this subsection . . . .' General Statutes § 54-102a (b)." (Emphasis added.) Part II of the majority opinion. The defendant contends that the only way to reconcile these two provisions is to construe the "[n]otwithstanding" clause to apply only

[4] Subsections (b) and (c) of § 19a-582 pertain to persons administering tests authorized under that section. Subsection (b) addresses limited liability for persons ordering a test without informed consent. Subsection (c) provides for counseling and referrals with the disclosure of test results.

to the informed consent requirement of subsection (a) of § 19a-582 and not to the various exceptions pursuant to which informed consent is not needed, as set forth in subsection (d) of § 19a-582. Thus, the defendant argues, subdivision (8) of § 19a-582 (d), which allows testing without consent only after the court finds a clear and imminent danger and a compelling need for the testing, is not excepted from the purview of § 54-102a (b). Therefore, in the defendant's view, the requirements of subdivision (8) of § 19a-582 (d) must be met prior to the issuance of an order for HIV testing under § 54-102a (b). The state disagrees and contends that, because both the first and third sentences of § 54-102a (b) explicitly or implicitly provide that § 19a-582 does not apply to orders issued pursuant to § 54-102a (b), the trial court was not required to adhere to the standard set forth in § 19a-582 (d) (8) prior to issuing its order.

I agree with the defendant that, when the three sentences that make up § 54-102a (b) are read together; see *Historic District Commission* v. *Hall*, 282 Conn. 672, 684, 923 A.2d 726 (2007) ("[l]egislative intent is not to be found in an isolated sentence; the whole statute must be considered" (internal quotation marks omitted)); the "[n]otwithstanding" language in § 54-102a (b) is properly understood to apply only to those aspects of § 19a-582 that would require the defendant to give his informed consent and any provision that would limit or prohibit the disclosure of the test results to the victims. All other aspects of § 19a-582, including the standard set forth in subsection (d) (8), are still applicable. See General Statutes § 54-102a (b) ("[t]he provisions of *sections 19a-581 to 19a-585*, *inclusive* . . . *shall apply* to a test ordered under this subsection" (emphasis added)). This is consistent with our well settled principle of statutory construction that "specific terms in a statute covering a given subject matter will prevail over the more general language of the same or another

statute that otherwise might be controlling." (Internal quotation marks omitted.) *Branford* v. *Santa Barbara*, 294 Conn. 803, 813, 988 A.2d 221 (2010). Here, the first sentence of § 54-102a (b) generally provides that, "[n]otwithstanding the provisions of section 19a-582," the court may order testing. The final sentence of that statutory provision, however, clearly specifies that it is only those provisions requiring the defendant's informed consent or limiting disclosure that are excepted from the statute. Because § 19a-582 (d) (8) provides for court-ordered testing *without* the defendant's consent and does not limit the disclosure of test results to victims, it is not excepted from § 54-102a (b).

Construing the "[n]otwithstanding the provisions of section 19a-582" language in the first sentence of § 54-102a (b) to apply to the entirety of § 19a-582, as the majority does, denudes the last sentence of § 54-102a (b), which provides in relevant part that "sections 19a-581 to 19a-585, *inclusive* . . . *shall apply*," of any meaning. (Emphasis added.) As discussed, the vitality of those statutory provisions, including § 19a-582, is limited only insofar as any provision within the range of those statutes requires informed consent or limits the disclosure of the test results to the victim. Nothing in § 54-102a (b) excises the imminent danger and compelling need statutory standard contained in § 19a-582 (d) (8). Moreover, of the five statutes specifically incorporated by reference in § 54-102a (b), which span approximately ten pages of our General Statutes, only § 19a-582—nay, one *subsection* of § 19a-582—deals with consent.[5] Because the legislature included § 19a-582 in the list of applicable statutes, it cannot be entirely read out of § 54-102a (b), as the majority concludes. Cf. *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426,

[5] In addition to General Statutes §§ 19a-581 through 19a-585, General Statutes § 19a-590 is also incorporated by reference in § 54-102a (b) and does not deal with consent.

433, 994 A.2d 1265 (2010) ("[I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." (Internal quotation marks omitted.)).[6]

When the applicable statutory provisions are considered together, it is entirely consistent that § 54-102a (b) would provide for court-ordered HIV testing in criminal cases without the defendant's consent provided the court follows the standard and requirements set forth in § 19a-582 (d) (8). Put differently, § 19a-582 (d) (8) supplements and completes § 54-102a (b) by providing a legislatively considered and approved standard that must be met before a court may order a criminal defendant to involuntarily submit to HIV testing under § 54-102a (b). Without it, there would be no standard at

[6] The majority nevertheless concludes, as the state contends, that, if § 54-102a (b) incorporates § 19a-582 (d) (8), § 54-102a (b) would be rendered superfluous. See part II of the majority opinion. I disagree. Although it is true that § 19a-582 (d) (8) preexisted § 54-102a (b), § 54-102a (b) gives victims standing in a criminal proceeding to request a court-ordered HIV test of the defendant that they would not otherwise have had. See General Statutes § 54-102a (b) ("[i]f the victim of the offense requests that the accused person . . . be tested, the court may order the testing of the accused person . . . in accordance with this subsection and the results of such test may be disclosed to the victim"). This provision is one of the very limited circumstances in which a victim has standing in the criminal context to assert his or her own interests. Indeed, we have held that victims do not have standing to assert their own constitutionally protected rights as victims in criminal proceedings when the defendant who perpetrated those crimes is being prosecuted. See, e.g., *State* v. *Gault*, 304 Conn. 330, 342–43, 39 A.3d 1105 (2012); see also, e.g., *State* v. *Skipwith*, 326 Conn. 512, 528, 165 A.3d 1211 (2017) (*McDonald*, *J.*, concurring in the judgment). But for the enactment of § 54-102a (b), the victim could not—as the victims here—rely on the state to seek the court's intervention. Instead, the victim would have to initiate a separate, civil action asserting a claim against the defendant, with all the attendant expenses, in order to seek a similar court order pursuant to § 19a-582 (d) (8).

all. We ought to hesitate, at some length, before we conclude that the legislature intentionally adopted a strict and rigorous standard for nonconsensual HIV testing that would apply in a civil, sexual assault action brought by a victim against a defendant but nevertheless chose to provide no standard at all for the exact same test in a criminal prosecution for the exact same sexual assault. Because §§ 54-102a (b) and 19a-582 (d) (8) can be reconciled with both statutes being given effect, we have an obligation to do so. Cf. *Rainforest Cafe, Inc.* v. *Dept. of Revenue Services*, 293 Conn. 363, 377–78, 977 A.2d 650 (2009) (we attempt to reconcile conflicting statutes in manner that allows for their coexistence).

In addition to its conclusion that the compelling need and imminent harm requirements are inapplicable to court-ordered, involuntary HIV testing under § 54-102a (b), the majority's holding also jettisons the procedural safeguards contained in § 19a-582 (d) (8) (B) through (D). Specifically, these provisions provide privacy protections for the defendant; General Statutes § 19a-582 (d) (8) (B); afford the defendant notice and an opportunity to participate in the proceeding; General Statutes § 19a-582 (d) (8) (C); and provide that the proceedings surrounding the involuntary testing generally must be conducted in camera. General Statutes § 19a-582 (d) (8) (D). Thus, the majority's conclusion that § 19a-582 (d) (8) is inapplicable to HIV testing ordered pursuant to § 54-102a (b) leaves the trial court with no standard to apply or procedural safeguards to follow throughout the proceeding.

Moreover, a review of the broader statutory scheme provides further support for the conclusion that the requirements in § 19a-582 (d) (8) are applicable to an order issued pursuant to § 54-102a (b). General Statutes § 19a-583, which, without question, falls within the ambit of § 54-102a (b), provides guidance on the disclosure of HIV related information. Significantly, subdivi-

sion (10) of § 19a-583 (a) incorporates the same imminent danger and compelling need standard that is included in § 19a-582 (d) (8). Section 19a-583 provides in relevant part: "(a) *No person who obtains confidential HIV-related information may disclose* or be compelled to disclose such information, except to the following:

* * *

"(10) Any person allowed access to such information by a court order which is issued in compliance with the following provisions: (A) *No court of this state shall issue such order unless the court finds a clear and imminent danger to the public health or the health of a person and that the person has demonstrated a compelling need for the test results which cannot be accommodated by other means. . . .*" (Emphasis added.) For example, under General Statutes § 54-102c, when a trial court orders an HIV test pursuant to § 54-102a, a victim may designate a health care provider to disclose the results to the victim. Whether the health care provider can disclose the results to the victim is, in turn, determined based on § 19a-583 (a) (10) because that provision sets the parameters for disclosure of HIV test results and is incorporated into § 54-102a. See General Statutes § 54-102a (b) ("[t]he provisions of sections 19a-581 to 19a-585 . . . shall apply"). Thus, in order for the victim's designated health care provider, or anyone else, to disclose the results of the HIV test to the victim, the provider must ensure that the same standard found in § 19a-582 (d) (8) has been satisfied. See General Statutes § 19a-583 (a) (10).

It would be a bizarre and unworkable result if a criminal trial court, guided by no meaningful standard, could order involuntary HIV tests when, simultaneously, the only way the results could legally be disclosed to the victim would be by ensuring that the imminent danger and compelling need requirements of § 19a-583 (a) (10)

had been employed by the trial court before it issued the order. In other words, the court could order the test, but the victim would not be able to lawfully obtain the results.[7] I would not construe the statutory scheme to create such a bizarre result. See, e.g., *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, 288 Conn. 790, 803, 955 A.2d 15 (2008) ("[i]n construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended" (internal quotation marks omitted)).

The majority's construction of § 54-102a (b), which renders the entirety of § 19a-582 inapplicable under § 54-102a, also leads to an inconsistency in the provision of counseling services, which would be afforded to victims but not to criminal defendants who test positive for HIV. Specifically, § 19a-582 (c) provides for certain counseling services to a defendant, which are designed to, among other things, provide the defendant with assistance to obtain treatment and to notify sexual partners. These critical counseling services would not be available to defendants under the majority's construction of § 54-102a (b) because all of § 19a-582 is inapplicable to HIV testing ordered under subsection (b) of § 54-102a. Pursuant to § 54-102c, however, the victims would be given such counseling services. Thus, the majority's construction would result in victims receiving counsel-

[7] I also note that, unlike in General Statutes § 54-102b, which specifically provides that the results of an HIV test must be disclosed to the offender who is tested after his conviction, there is nothing in the statutory scheme in § 54-102a (b) that provides for the defendant to be notified of the results of his involuntary HIV test taken while he has only been charged with a crime. Compare General Statutes § 54-102b (a) ("court . . . shall . . . order . . . that the results be disclosed to the victim and the offender") with General Statutes § 54-102a (b) ("the results of such test may be disclosed to the victim").

Although § 54-102b was the subject of a technical amendment in 2019; see Public Acts 2019, No. 19-189, § 32; that amendment has no bearing on the merits of this appeal. For convenience, we refer to the current revision of the statute.

ing services but not defendants, who, naturally, should also be encouraged to obtain treatment and to notify their partners of their HIV status.[8] Indeed, this court has previously explained the importance of identifying individuals who are HIV positive in order to provide them with education and treatment. See, e.g., *Doe* v. *Marselle*, 236 Conn. 845, 852, 675 A.2d 835 (1996) ("[the requirements of chapter 368x of the General Statutes] relate principally to the areas of informed consent for HIV testing and confidential treatment of HIV-related information, and are *aimed at helping health care providers to identify those people with the disease, to treat them and to educate them*" (emphasis added)). This concern applies with equal force to both victims and defendants.

The majority, however, claims that § 54-102a (b), which pertains to HIV testing in pending criminal cases, and General Statutes § 54-102b, which pertains to HIV testing in cases following a defendant's conviction, are materially identical, such that § 19a-582 (d) (8) either applies to both provisions or to neither. See part II of the majority opinion. As a result, the majority asserts, under the defendant's construction of § 54-102a (b), the imminent harm and compelling need requirements of subdivision (8) of § 19a-582 (d) also apply to § 54-102b, when the defendant has been found guilty beyond a reasonable doubt. See id. The majority concludes that "[i]t simply is impossible to believe that the legislature would have imposed that same exacting standard when the state has already established that the victim was

[8] The majority asserts that the counseling services provided for by § 54-102c are "certain publicly available 'educational materials' and 'information' obtainable through the Department of Public Health, all of which a defendant, or his or her counsel, may readily obtain upon request." Footnote 16 of the majority opinion. The majority cites to no source of authority obligating the trial court to provide these services and information to the defendant. That the defendant may request it means little if there is no obligation for the trial court to provide it.

sexually assaulted by the defendant and in all other circumstances in which someone is prompted, for whatever reason, to seek an order requiring another person to submit to an HIV test." (Emphasis omitted.) Text accompanying footnote 16 of the majority opinion.

I respectfully disagree. I first note that, when an individual has been *charged* with certain offenses, § 54-102a (b) provides that the court "may" order the HIV testing, whereas, when an individual has been *convicted* of certain offenses, § 54-102b (a) provides that the court "shall," at the victim's request, order HIV testing. It is logical that the trial court would be afforded discretion to order HIV testing when a defendant has only been charged with a crime but is directed to order the testing after the defendant has been convicted.

More important, I find it troubling that the majority construes § 54-102a (b) such that an individual who has not been convicted of a crime and enjoys the presumption of innocence may be subjected to involuntary testing based only on the fact that he was charged with one of the enumerated offenses. Contrary to the majority's conclusion that §§ 54-102a (b) and 54-102b are materially identical, such that subdivision (8) of § 19a-582 (d) either applies to both provisions or it applies to neither, § 54-102b is even clearer than § 54-102a (b) that the provisions of § 19a-582 (d) (8), which provide the standard for obtaining a court-ordered HIV test without the consent of the defendant, are also applicable to a test ordered for someone who has been convicted. Indeed, the issue in this case stems from the parties' dispute over the proper reading of the "[n]otwithstanding the provisions of section 19a-582" language contained in the first sentence of § 54-102a (b). There is no such language in § 54-102b. Rather, § 54-102b provides only that "[t]he provisions of sections 19a-581 to 19a-585, inclusive, and section 19a-590, except the requirement that the subject of an HIV-related test provide informed

consent prior to the performance of such test, shall apply to a test ordered under this section." General Statutes § 54-102b (b). There can be no question that the rigorous standard and procedural safeguards contained in § 19a-582 (d) (8) apply to involuntary HIV testing of a convicted person. It would be illogical to conclude that the more stringent, statutory standard to order an HIV test would apply to someone who has been convicted but that someone who has been merely arrested and charged with a crime could be ordered to have an involuntary HIV test conducted on him under the more lenient, less exacting standard, articulated in part III of the majority opinion.

As I am sure the majority would, I acknowledge that § 54-102a (b) is not a model of clarity, but the interpretation advanced by the state and the majority would permit trial courts to order HIV testing anytime the defendant has been charged with one of the offenses enumerated in the statute, the alleged offense involved a completed sexual act, and the criminal case is pending. As the majority acknowledges in part III of its opinion, this is nearly standardless and requires this court to supply an interpretive gloss to save the constitutionality of § 54-102a (b). "[I]t is well established that this court has a duty to construe statutes, whenever possible, to avoid constitutional infirmities . . . ." (Internal quotation marks omitted.) *Kuchta* v. *Arisian*, 329 Conn. 530, 548, 187 A.3d 408 (2018); see also *State* v. *Cook*, 287 Conn. 237, 245, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008). "[W]hen called [on] to interpret a statute, we will search for an effective and constitutional construction that reasonably accords with the legislature's underlying intent." (Internal quotation marks omitted.) *State* v. *Floyd*, 217 Conn. 73, 79, 584 A.2d 1157 (1991). Given that § 19a-582 (d) (8) supplies the legislatively determined standard for the court to apply when ordering HIV test-

ing under § 54-102a (b), I fail to see why the majority has created a constitutional problem by unnecessarily construing § 54-102a (b) in a manner necessitating an interpretive gloss to save the constitutionality of the statute.[9] As we have explained, "[e]stablished wisdom counsels us to exercise self-restraint so as to eschew unnecessary determinations of constitutional questions. . . . It is nevertheless relevant to our construction of the statute that our interpretation avoids constitutional perils." (Citations omitted; internal quotation marks omitted.) Id., 89–90. Consistent with this principle, I conclude that the "[n]otwithstanding" language in § 54-102a (b) applies only to those aspects of § 19a-582 that would require the defendant's informed consent and any provision that would limit or prohibit the disclosure of the test results to the victims. All other aspects of § 19a-582—including the court procedures and legal standard set forth in subsection (d) (8)—remain applicable to a court order for involuntary HIV testing under § 54-102a (b).

With respect to a court-ordered examination for sexually transmitted diseases pursuant to § 54-102a (a), the majority correctly notes, and the defendant conceded at oral argument, that the requirements for ordering HIV testing under § 19a-582 (d) (8) do not apply to motions for an examination for sexually transmitted diseases under § 54-102a (a). See part II of the majority

[9] The majority also notes that it "know[s] of no other court that has found [a provision like § 54-102a] to be unconstitutional or determined that an interpretive gloss was necessary to avoid constitutional infirmity. In these circumstances, the tenet of statutory construction on which the concurrence relies simply has no utility in evaluating legislative intent." Footnote 20 of the majority opinion. The majority need look no further than the present case, in which the majority itself recognizes that, under its construction of the statute, an interpretive gloss is necessary to save the constitutionality of the statute. Indeed, it is for this reason that I fail to understand how the majority can conclude that its construction is "the only reasonable one"; id.; when that construction renders the statute unconstitutional without its supplied judicial gloss.

opinion. The majority thus states that, "even if we were to interpret § 54-102a (b) to avoid the need for a constitutional gloss on that statutory subsection, we still would have to place the identical gloss on its companion subsection, § 54-102a (a), pertaining to examination for sexually transmitted diseases." (Emphasis omitted.) Footnote 20 of the majority opinion. As a result, the standards for court-ordered testing for HIV and for an examination for sexually transmitted diseases would be different.

To the extent the majority reasons that this court must supply an interpretive gloss to subsection (b) of § 54-102a because subsection (a) of that statute requires one and the two subsections must have the same standard, I disagree. It is reasonable that court-ordered testing for HIV and an examination for sexually transmitted diseases would be treated differently. In fact, the legislature has emphasized that the disclosure of an individual's HIV status can deter future HIV testing and can lead to discrimination. See, e.g., *Doe* v. *Marselle*, supra, 236 Conn. 853–54 (chief of AIDS section for then Department of Health Services testified before legislature, "emphasizing that confidentiality is essential 'to protect people from the discrimination that often comes with the knowledge that a person has AIDS [acquired immune deficiency syndrome] or HIV infection' "). Specifically, in § 19a-583 (a) (10), which sets forth the limitations for the disclosure of HIV related information, the legislature directed courts that, "[i]n assessing compelling need, the court shall weigh the need for disclosure against the privacy interest of the test subject and the public interest which may be disserved by disclosure w*hich deters future testing or which may lead to discrimination*." (Emphasis added.) General Statutes § 19a-583 (a) (10) (A).

It is entirely reasonable to conclude that the legislature treated testing for HIV and an examination for

sexually transmitted diseases differently given the heightened discrimination and stigma that HIV status carries. The persistent, endemic discrimination, and even criminalization, related to HIV is undeniable in our country. People living with HIV face, among other things, significant housing discrimination; see, e.g., The Center for HIV Law & Policy, Housing Rights of People Living with HIV/AIDS: A Primer (March, 2010) p. 3, available at https://www.hivlawandpolicy.org/sites/default/files/housingprimer3.10.pdf (last visited July 13, 2021); and employment discrimination. See, e.g., The Center for HIV Law & Policy, Employment Rights of People Living with HIV/AIDS: A Primer (September, 2010) p. 4, available at https://www.hivlawandpolicy.org/sites/default/files/CHLP%20Employment%20Primer%20sept%202010%20FINAL.pdf (last visited July 13, 2021). Additionally, "[a]s of 2020, [thirty-seven] states have laws that criminalize HIV exposure"; Centers for Disease Control & Prevention, HIV and STD Criminalization Laws (last updated December 21, 2020), available at https://www.cdc.gov/hiv/policies/law/states/exposure.html (last visited July 13, 2021); despite the fact that "empirical studies on the impact of these laws suggest that they do not decrease HIV infections or have any other positive public health impacts," and that these laws may actually result in higher rates of transmission. Z. Lazzarini et al., "Criminalization of HIV Transmission and Exposure: Research and Policy Agenda," 103 Am. J. Pub. Health 1350, 1352 (2013). An individual's HIV status carries with it various stigmas that are not implicated to the same extent as an individual's sexually transmitted disease status. See, e.g., B. Anderson, "HIV Stigma and Discrimination Persist, Even in Health Care," 11 AMA J. Ethics 998, 998 (2009) ("HIV *is* different from many other diseases. Finding out that one has HIV presents complex physical, emotional, social, and legal concerns that do not arise when one is tested for

other conditions, including other communicable diseases." (Emphasis in original.)). As such, it is logical to conclude that a trial court would be required to employ two different standards when ordering involuntary testing for HIV and an examination for sexually transmitted diseases.

Accordingly, I would conclude that the requirements set forth in § 19a-582 (d) (8) must be met prior to the issuance of an order for involuntary HIV testing under § 54-102a (b). The requirements set forth in part III of the majority opinion—namely, that the testing would provide useful, practical information that cannot reasonably be obtained otherwise—would be applicable to a court-ordered examination for sexually transmitted diseases under § 54-102a (a). Because the trial court did not apply either standard, I would reverse the decision of the trial court to grant the motions of the state and the victims that the defendant be required to submit to HIV testing pursuant to § 54-102a (b) and an examination for sexually transmitted diseases pursuant to § 54-102a (a), and remand the case to the trial court for further proceedings.

Accordingly, I concur in the judgment.

STATE OF CONNECTICUT *v.* JOSEPH SILVA
(SC 20266)

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

Syllabus

Pursuant to statute (§ 53a-54b (7)), a person is guilty of murder with special circumstances when such person is convicted of "murder of two or more persons at the same time or in the course of a single transaction" and was eighteen years of age or older at the time of the offense.

Convicted, after a jury trial, of the crime of murder with special circumstances in connection with the shooting deaths of A and J, the defendant appealed to this court, claiming, inter alia, that the trial court had incor-

rectly instructed the jury on the "in the course of a single transaction" element of murder with special circumstances, thereby relieving the state of its burden of proving that element beyond a reasonable doubt. On the night of the murders, the defendant, along with passengers O and R, drove around in the defendant's car looking for J, with whom the defendant had a feud. Upon finding J sitting in the driver's seat of A's car, the defendant stopped, exited his car, and walked toward J, who had exited A's car. When the defendant reached J, he shot him two times and then walked to A's car and fired multiple shots at A, who was seated in the front passenger seat. The operative information charged the defendant with having committed the murders in the course of a single transaction but not at the same time. At trial, the defendant presented a third-party culpability defense implicating O in the murders. Specifically, defense counsel argued during closing argument that only O had the motive, means and opportunity to murder A and J. The trial court instructed the jury, with respect to the "in the course of a single transaction" element of murder with special circumstances, that, to prove that element, the state was required to establish beyond a reasonable doubt either that there was a temporal nexus between the murders of A and J or that there was a plan, motive, or intent common to both murders. Defense counsel did not object to that instruction. *Held*:

1. The defendant did not implicitly waive his unpreserved claim of instructional error under *State* v. *Kitchens* (299 Conn. 447); although the trial court provided the parties with a copy of its revised jury charge and defense counsel did not object to the court's instruction on murder with special circumstances, that court, under the circumstances of this case, did not provide the parties with a meaningful opportunity to review a change that it had made to the instruction on the "in the course of a single transaction" element of murder with special circumstances prior to charging the jury.

2. The defendant could not prevail on his unpreserved claim that the trial court had incorrectly instructed the jury that, if it found that there was a temporal nexus between the two murders, it could find that the state had proven the "in the course of a single transaction" element: contrary to the defendant's assertion, this court did not hold in *State* v. *Gibbs* (254 Conn. 578) that evidence of a common plan, motive, or intent is required to prove that multiple murders occurred in the course of a single transaction but held that a temporal connection alone is sufficient to satisfy the "in the course of a single transaction" element and that, in the absence of a temporal connection, evidence of a common plan, motive, or intent is sufficient to demonstrate a clear connection between multiple murders and to establish that those murders occurred in the course of a single transaction; accordingly, the trial court properly instructed the jury that it could find the "in the course of a single transaction" element proven by evidence of a temporal nexus between the murders of A and J, and, therefore, the defendant's claim of instruc-

tional error failed under the third prong of *State* v. *Golding* (213 Conn. 233).

3. The trial court did not commit plain error by failing to provide the jury, sua sponte, with a special credibility instruction with respect to the testimony of O, who the defendant claimed was the actual perpetrator of the murders of A and J, and, thus, had a strong motive to testify falsely against him: even if the defendant had requested such an instruction, it would not have been plain error for that court to have declined to provide it, as this court has not endorsed, let alone required, such an instruction; moreover, the trial court instructed the jury on O's credibility generally, and defense counsel, during cross-examination and closing argument, highlighted for the jury O's motivations for testifying falsely, including the defense's theory that O was the actual perpetrator of the murders.

4. The defendant could not prevail on his unpreserved claim that the trial court had violated his constitutional rights to counsel and to present a defense by precluding defense counsel from arguing during closing argument that the absence of testimony from V, O's best friend, created reasonable doubt: the trial court reasonably determined that defense counsel was making an improper missing witness argument rather than raising a significant issue or making appropriate comment about V's absence at trial to the extent that V's absence reflected on the weakness of the state's case, as V was not a witness to the murders of A and J and, thus, could not corroborate or dispute the version of events to which various witnesses testified, and there was ample testimony, without the need to discuss V's absence, from which defense counsel could argue to the jury that O had a stronger motive than the defendant, as well as the means and opportunity, to murder A and J; accordingly, the trial court reasonably exercised its discretion in limiting the scope of defense counsel's closing argument to prevent comment on facts that were not in evidence, and, therefore, the defendant's claim failed under the third prong of *Golding*.

Argued January 12—officially released July 15, 2021*

Procedural History

Substitute information charging the defendant with two counts of the crime of murder and one count of the crime of murder with special circumstances, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Gold*, *J.*; verdict and judgment of guilty; thereafter, the court vacated the convic-

* July 15, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

tion of two counts of murder, and the defendant appealed to this court. *Affirmed.*

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

Jonathan M. Sousa, deputy assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, *Gail P. Hardy*, former state's attorney, and *Robin D. Krawczyk*, senior assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. Following a jury trial, the defendant, Joseph Silva, was convicted of two counts of murder in violation of General Statutes § 53a-54a (a)[1] and one count of murder with special circumstances in violation of General Statutes § 53a-54b (7).[2] The trial court vacated the conviction on the murder counts[3] and imposed a mandatory sentence under General Statutes § 53a-35a (1) (B) of life imprisonment without the possibility of release on the murder with special circumstances count. The defendant appealed directly to this court pursuant to General Statutes § 51-199 (b) (3). On appeal, the defendant claims that the trial court (1) incorrectly instructed the jury on the "in the course of a single transaction" element of murder with special

[1] General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person . . . ."

[2] General Statutes § 53a-54b provides in relevant part: "A person is guilty of murder with special circumstances who is convicted of any of the following and was eighteen years of age or older at the time of the offense . . . (7) murder of two or more persons at the same time or in the course of a single transaction . . . ."

[3] The trial court vacated the defendant's conviction on the murder counts pursuant to *State* v. *Roszkowski*, 329 Conn. 554, 563, 188 A.3d 139 (2018) (holding that, under *State* v. *Polanco*, 308 Conn. 242, 245, 61 A.3d 1084 (2013), trial court should have vacated defendant's three murder convictions, rather than merging them into corresponding capital felony convictions, as lesser included offenses of capital crimes).

circumstances, (2) improperly failed to provide the jury, sua sponte, with a special credibility instruction with respect to one of the state's witnesses, who the defendant claimed was the actual perpetrator of the murders, and (3) violated his state and federal constitutional rights to counsel and to present a defense by precluding defense counsel from making an argument in closing argument that the absence of testimony from a certain witness created reasonable doubt. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. On May 16, 2016, the defendant shot and killed the victims, Joshua Cortez and Alysha Ocasio, at the intersection of Campfield Avenue and Cowles Street in Hartford. The defendant and Cortez had a preexisting feud due in part to the fact that, when Cortez worked for the defendant selling marijuana, he had sold customers fake marijuana, prompting customers to complain to the defendant, and because Cortez' friend, Juan Gomez, had had sex with Coraima Velez, with whom the defendant had a child, after Cortez introduced them to each other. As a result, on the night of May 16, 2016, the defendant, joined by passengers Kailei Opalacz, with whom he had been in an on-and-off relationship for several years, and Josue Rodriguez, his friend, drove his car around Hartford looking for Cortez. The defendant found Cortez sitting in the driver's seat of Ocasio's Honda Accord by the intersection of Campfield Avenue and Cowles Street. The defendant stopped and exited his car and walked toward Cortez, who had exited the Accord. When the defendant reached Cortez, he shot him twice, once in the face and once in the top of his head. The defendant then walked over to the driver's side of the Accord and fired multiple shots at Ocasio, who was seated in the front passenger seat.

After shooting the two victims, the defendant ran back to his car, climbed into the driver's seat, and said

to Opalacz and Rodriguez, "That's how Joseph Silva does it" and "I can't believe I just did that . . . ." While speeding away from the murder scene, on a sharp left turn, the front right wheel of the defendant's car detached, immobilizing the car. Opalacz called her best friend, Nyasia Villegas, and told her to come pick them up, which Villegas did immediately. Villegas then drove them to the home of the defendant's mother on Montrose Street in Hartford, where the defendant exited the car and hid the murder weapon under a pile of wood at the rear of the property. The group then drove to a Walmart store in Manchester, where the defendant bought a shirt and a pair of pants, which he changed into in the store's bathroom. During the drive to Walmart, the defendant described for the other passengers how he had killed Cortez and Ocasio. The defendant explained that, after he exited his car and approached Cortez, he said to Cortez, "what up, nigga, what up," before shooting him in the face. The defendant placed his fingers on Villegas' forehead to demonstrate how he shot Cortez in the head. The defendant then described how he then walked over to Ocasio's Accord, opened the door, and shot her in the chest.

On the way back from Walmart, the car was stopped and searched by Hartford police officers, and the passengers were taken to the Hartford police station for questioning. During questioning, Opalacz, Villegas, and Rodriguez all provided statements implicating the defendant in the victims' murders. The following morning, Hartford police officers searched the property of the defendant's mother and found the murder weapon where the defendant had concealed it the night before. The defendant was arrested and charged with two counts of murder and one count of murder with special circumstances.[4]

[4] In November, 2016, Opalacz and Villegas were both charged with hindering prosecution in the second degree in violation of General Statutes § 53a-166 for their actions following the victims' murders. At the time of the

At trial, the defendant presented a third-party culpability defense implicating Opalacz, arguing that she, rather than he, had murdered the victims. Specifically, the defendant adduced evidence that Opalacz and Velez, the mother of his child, had engaged in an escalating feud for the defendant's affections and that Ocasio, Velez' best friend, Ocasio's boyfriend, Cortez, and Villegas had all become embroiled in that feud. As a result of the feud, a week or so before the murders, Velez' brother had smashed the rear window of Opalacz' Nissan Altima with a baseball bat and an unidentified individual threw a rock out of Ocasio's Accord toward Opalacz' Altima. In retaliation, Opalacz and Villegas drove to Ocasio's Accord, and Villegas fired a BB gun at it, damaging the rear, driver's side window. The defendant also elicited testimony from Villegas that the defendant and Opalacz each had paid one half of the purchase price for the murder weapon and that, on May 16, 2016, the night of the murders, Opalacz had held that weapon before leaving with the defendant and Rodriguez to drive around Hartford looking for Cortez. On the basis of this evidence, defense counsel argued during closing argument that Opalacz alone had the motive, means, and opportunity to kill the victims. The jury rejected that defense and found the defendant guilty on all counts. The trial court thereafter rendered judgment in accordance with the jury's verdict, vacated the conviction on the murder counts; see footnote 3 of this opinion; and imposed a sentence of life imprisonment without the possibility of release. This appeal followed. Additional facts and procedural history will be set forth as necessary.

defendant's trial, Opalacz pleaded guilty to that charge and was awaiting sentencing, and Villegas' case was pending. Following the defendant's trial, Opalacz was sentenced to ten years of imprisonment, execution suspended, and five years of probation, and Villegas pleaded guilty to interfering with an officer in violation of General Statutes § 53a-167a and was sentenced to one year of imprisonment, execution suspended, and three years of probation.

On appeal, the defendant claims that the trial court (1) incorrectly instructed the jury that, if it found that there was a temporal nexus between the two murders, it could find that the state has proved the "in the course of a single transaction" element of murder with special circumstances, (2) improperly failed to provide the jury, sua sponte, with a special credibility instruction concerning Opalacz' testimony in light of the evidence implicating her in the victims' murders, and (3) violated his state and federal constitutional rights to counsel and to present a defense by precluding defense counsel from arguing in closing argument that Velez' absence as a witness at trial created reasonable doubt. Because the defendant's claims are unpreserved, he seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015),[5] or, alternatively, for plain error.[6] We conclude that the defendant's first and

[5] Pursuant to *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of *Golding*).

[6] "[T]he plain error doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved [and nonconstitutional in nature], are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very

third claims are reviewable under *Golding* but that his second claim is reviewable only for plain error. For the reasons set forth hereinafter, we reject all three claims.

I

The defendant first claims that the trial court incorrectly instructed the jury as to the "in the course of a single transaction" element of murder with special circumstances, thereby relieving the state of its burden of proving that element beyond a reasonable doubt. Specifically, the defendant argues that, under § 53a-54b (7), the state can prosecute murder with special circumstances in one of two ways: (1) by proving that the murders took place at the same time, or (2) by proving that they took place in the course of a single transaction. The defendant further argues that, under *State* v. *Gibbs*, 254 Conn. 578, 606, 758 A.2d 327 (2000), the state cannot prove that the murders occurred in the course of a single transaction by evidence of a temporal connection alone but, rather, must establish

demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . .

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record.

"Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . [This court previously has] described the two-pronged nature of the plain error doctrine: [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice. . . . [O]ur review . . . with respect to plain error is plenary." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *State* v. *Jamison*, 320 Conn. 589, 595–97, 134 A.3d 560 (2016).

that he "possessed a plan, motive, or intent common to [both] murders." (Internal quotation marks omitted.) Because the court instructed the jury that it could find the single transaction element proven by *either* evidence of a temporal connection *or* a common plan, motive, or intent, the defendant argues that the jury was misled and "almost certainly" chose to find the element satisfied by evidence of a temporal connection because that was "the easier, more direct route to conviction," which allowed the jurors to "avoid the difficult question" of the defendant's common motive or plan for killing both Cortez and Ocasio, or whether he even had such a common motive or plan. The defendant finally argues that, because the state charged him with murder of two people "in the course of a single transaction," rather than "at the same time," and because the jury was instructed that it could find him guilty on the basis of a temporal connection alone, "[t]he court's instructions on murder with special circumstances effectively enlarged count three of the information, allowing him to be convicted of a crime with which he had never been charged . . . ."

In response, the state argues that the defendant's claim fails under the third prong of *Golding* because (1) it was waived implicitly under *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011),[7] and (2) the court's charge accurately instructed the jury that the single transaction element is proven by evidence of "some 'clear connection' or 'logical nexus' between the two [murders]," and, contrary to the defendant's assertion,

[7] In *Kitchens*, this court concluded that, "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." *State* v. *Kitchens*, supra, 299 Conn. 482–83

evidence of either a temporal connection *or* a common plan, motive, or intent is sufficient to prove that element. Specifically, the state argues that, contrary to the assertion of the defendant, "the phrase, 'at the same time or in the course of a single transaction,' does not describe two conceptually distinct alternative acts but, rather, provides two different descriptions of the same prohibited conduct—the commission of multiple murders that are logically connected through time, place, motive, common plan, or a combination of many factors." We conclude that the defendant's claim is reviewable under *Golding* because the record is adequate and it is of constitutional magnitude. See, e.g., *State* v. *Floyd*, 253 Conn. 700, 706–707, 756 A.2d 799 (2000) (defendant's claim that trial court improperly instructed jury on essential elements of crime of accessory murder implicated his due process right to fair trial and, thus, satisfied second prong of *Golding*). We further conclude that, although the defendant did not waive his instructional error claim under *Kitchens*, he cannot prevail on that claim because the trial court correctly instructed the jury that it could find the single transaction element proven with evidence of a temporal connection between the victims' murders.

The following additional procedural history is relevant to this claim. On October 26, 2018, the third to last day of evidence, the court summarized on the record an in-chambers charging conference it had conducted with the parties earlier that day. During its summary, the court noted that the state's long form information charged the defendant with committing two murders only "in the course of a single transaction," not "at the same time," and that it would limit its instruction accordingly. On the afternoon of Saturday, October 27, 2018, the court sent the parties its proposed jury charge. When trial reconvened on the following Monday, the court stated that, since sending the parties the proposed

charge, it had made several changes to it and intended to discuss them with the parties during a free moment. For the remainder of that Monday, however, no such free moment presented itself, and the court did not provide the parties with a copy of its proposed changes. On the morning of Tuesday, October 30, the court provided the parties with a revised copy of a proposed jury charge containing its changes to the proposed charge it had sent the parties over the weekend. Prior to the court's morning recess, the state presented its final witness, the court read the parties' stipulations to the jury, and then the state rested. Thereafter, the defense made an oral motion for a judgment of acquittal, which the court denied, the defendant was canvassed on his decision not to testify, and then the defense rested. The court then took its morning recess, during which it discussed with the parties the changes it had made to its prior proposed jury charge. With respect to the instruction for murder with special circumstances, the court noted that, in defining the single transaction element, it had "augmented some of the language from the standard charge"[8] in accordance with *State* v. *Campbell*, 328 Conn. 444, 180 A.3d 882 (2018), which "indicates that to be in the course of a single transaction the state is required to prove it was *either* a temporal nexus, that is, a continuity between the two murders based on

[8] Instruction 5.5-1, titled "Capital Felony or Murder with Special Circumstance—§ 53a-54b," provides in relevant part: "The second element is that the <*insert number of murders*> murders occurred at the same time or in the course of a single transaction. In order to prove that the murders occurred at the same time or in the course of a single transaction the state must prove beyond a reasonable doubt that the murders occurred at approximately the same time or that the murders were related to a single course of conduct or plan carried out as a series of events with a clear connection. Was there a plan, motive or [intent] common to the <*insert number of murders*> murders? If you find beyond a reasonable doubt that the state has proved that all of the murders occurred as part of a single course of conduct with a clear connection, then you shall find this element to have been proven." Connecticut Criminal Jury Instructions 5.5-1, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited July 13, 2021).

time, *or* a common plan, motive, or intent."[9] (Emphasis added.) After the morning recess, the parties presented their closing arguments, which were followed by the luncheon recess. The court invited the parties to review the changes it had made to its prior proposed charge during that luncheon recess.

Following the luncheon recess, the state made its rebuttal argument, followed immediately by the court's charge to the jury. When instructing the jury on the single transaction element of murder with special circumstances, the court stated: "The second element of murder with special circumstances is that . . . two murders . . . occurred in the course of a single transaction. . . . [I]n order to prove that the two murders occurred in the course of a single transaction, the state must prove beyond a reasonable doubt *either* that there was a temporal nexus between the murders of . . . Cortez and . . . Ocasio, that is, a continuity between them based on time, *or* that there was a plan, motive, or intent common to both murders. If you find beyond a reasonable doubt that the state has proven that the defendant committed two murders as part of a single course of conduct with a clear connection, then you shall find this element of murder with special circumstances to have been proven." (Emphasis added.) Defense counsel did not object to the court's instruction on murder with special circumstances.

As an initial matter, we conclude that, under the circumstances of this case, the court did not provide the parties with a meaningful opportunity to review the change it had made to the instruction on the "in the course of a single transaction" element of murder with

[9] Despite our conclusion that the defendant did not implicitly waive his right to challenge the trial court's instruction on appeal, we commend the court for having taken the time to draft the subtle change to the instruction on the "in the course of a single transaction" element that it deemed necessary as a result of its review of *State* v. *Campbell*, supra, 328 Conn. 444.

special circumstances before charging the jury. As previously indicated, the court first discussed that change, among others, with the parties during a brief morning recess on the day that it charged the jury. Although the court provided the parties with a copy of the revised jury charge prior to the morning recess, the parties did not have a meaningful opportunity to review that charge before the morning recess because of the various trial activities conducted that morning. When the court finally discussed its changes during that morning recess, the parties ability to focus on each change highlighted for them by the court was undoubtedly limited by the fact that they would begin their closing arguments immediately following the recess. Moreover, although the court gave the parties the luncheon recess to review the changes, we do not believe that this was a sufficient allotment of time for the parties to review meaningfully each of those changes, particularly the change to the instruction on the "in the course of a single transaction" element, a technical change warranting this court's review on appeal, and *State* v. *Campbell*, supra, 328 Conn. 444, on which the court had based its change to that instruction. See *State* v. *Lavigne*, 307 Conn. 592, 597 n.4, 57 A.3d 332 (2012) (concluding that defendant did not implicitly waive instructional error claim in lengthy and complex trial when defense counsel had approximately ninety minutes to review court's proposed instructions between conclusion of testimony and beginning of charging conference); see also *State* v. *Kitchens*, supra, 299 Conn. 495 n.28 ("[h]olding an on-the-record charge conference, and even providing counsel with an advance copy of the instructions, will not necessarily be sufficient in all cases to constitute waiver of *Golding* review if defense counsel has not been afforded adequate time, under the circumstances, to examine the instructions and to identify potential flaws"). But cf. *State* v. *Webster*, 308 Conn. 43, 63, 60

A.3d 259 (2013) (concluding that defense counsel, who was given opportunity to review proposed jury instructions overnight following closing arguments, had, under *Kitchens*, "meaningful opportunity" to review those instructions). Accordingly, we conclude that the defendant did not waive implicitly his instructional error claim and turn now to the merits of that claim.

"It is well established that a defendant is entitled to have the jury correctly and adequately instructed on the pertinent principles of substantive law. . . . Moreover, [i]f justice is to be done . . . it is of paramount importance that the court's instructions be clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime. . . . Nevertheless, [t]he charge is to be read as a whole and individual instructions are not to be judged in artificial isolation from the overall charge. . . . In reviewing the charge as a whole, [the] instructions need not be perfect, as long as they are legally correct, adapted to the issues and sufficient for the jury's guidance. . . . The test to be applied to any part of a charge is whether the charge considered as a whole presents the case to the jury so that no injustice will result." (Internal quotation marks omitted.) *State* v. *Blaine*, 334 Conn. 298, 308, 221 A.3d 798 (2019).

In *State* v. *Gibbs*, supra, 254 Conn. 601, this court considered whether the state had proved the "in the course of a single transaction" element of capital felony; General Statutes (Rev. to 1991) § 53a-54b (8) (now murder with special circumstances); despite the fact that it had not presented evidence of temporal proximity between two murders. In that case, the defendant, David A. Gibbs, went to the home of his former girlfriend and her mother to murder both women over their failure to repay money that Gibbs claimed they owed him. *State* v. *Gibbs*, supra, 581–82. Only the mother was home when he arrived, and, after killing her, Gibbs

waited until his former girlfriend returned the next day, at which time he killed her. Id., 582–83. On appeal, Gibbs argued that the state was required to present evidence of a temporal nexus between the murders to establish the elements of the offense of murder of two or more persons in the course of a single transaction, while the state contended that it had to prove only that there was some nexus between the murders, which it claimed to have done by presenting evidence that the murders were connected by a common purpose or plan. Id., 601. This court agreed with the state, explaining that "[a] single transaction is a series of events with a temporal continuity or clear connection." (Emphasis omitted; internal quotation marks omitted.) Id., 603, quoting *In re Michael B.*, 36 Conn. App. 364, 380, 650 A.2d 1251 (1994); see also *State* v. *Campbell*, supra, 328 Conn. 501 ("[t]o constitute a single transaction . . . there must be some clear connection between the murders, so that they may be viewed as part of a series of related but separate events" (internal quotation marks omitted)). The court noted that, although "the relationship [between the separate events] often is a temporal one . . . [that] does not categorically foreclose the possibility that a 'clear connection' between [multiple] murders may be established by some other type of nexus." *State* v. *Gibbs*, supra, 603. Accordingly, the court held that, "although a temporal nexus between multiple murders committed by a defendant may constitute evidence that those murders took place in the course of a single transaction, such a temporal relationship is not an absolute prerequisite to prosecution under [the murder with special circumstances statute]. Rather, the nexus between multiple murders necessary to prove that those murders took place in the course of a single transaction also may be established by proof beyond a reasonable doubt that a defendant possessed a plan, motive or intent common to the murders." Id., 606.

Contrary to the defendant's assertion, this court did not hold in *Gibbs* that evidence of a common plan, motive, or intent was required to prove that multiple murders occurred in the course of a single transaction. We held, rather, that, in the absence of a temporal connection, evidence of a common plan, motive, or intent was sufficient to demonstrate a clear connection between the murders and, thus, to establish that they occurred in the course of a single transaction. Id. In reaching that determination, we also made clear that evidence of a temporal connection alone was sufficient to satisfy the single transaction element. Id., 603 ("a temporal nexus between multiple murders committed by a defendant may constitute a capital felony"); see id. (noting that relationship between separate events occurring in single transaction "often is a temporal one"); id., 606 ("temporal nexus between multiple murders committed by a defendant may constitute evidence that those murders took place in the course of a single transaction").[10] We therefore agree with the state that

[10] Contrary to the defendant's assertion, our conclusion is not undermined by our statement in *Gibbs* that "[t]o construe the amount of time between the murders as *alone* controlling the issue of whether those murders took place in the course of a single transaction would render the first clause ['at the same time'] mere surplusage." (Emphasis added.) *State* v. *Gibbs*, supra, 254 Conn. 602. The defendant argues that, consistent with our reasoning in *Gibbs*, to construe the phrase "in the course of a single transaction" to include murders that occur at the same time but without evidence of a common plan, motive, or intent would render the second clause of § 53a-54b (7) superfluous. We disagree. As we have explained, in *Gibbs*, the issue before the court was whether the phrase "in the course of a single transaction" required proof of a close temporal nexus between the murders. *State* v. *Gibbs*, supra, 601. We concluded that it did not, explaining that the legislature's use of that phrase indicated an intent to make the murder of two or more persons a capital felony not only when the murders occur at the same time but also when they are part of a common plan, motive, or intent; id., 606; as was the case in *Gibbs*. Thus, we explained that, although a single transaction may be established by proof that there was a close temporal nexus between the murders, it also may be established by proof that there was a clear connection between them. Id., 603. Contrary to the defendant's assertion, however, there is nothing in the language or legislative history of § 53a-54b (7) to suggest that the phrase "in the course of a

the trial court did not incorrectly instruct the jury that it could find the "in the course of a single transaction" element proven by evidence of a temporal nexus between the victims' murders. Accordingly, the defendant's claim of instructional error fails under the third prong of *Golding*.[11]

II

The defendant next claims that the trial court improperly failed to provide the jury, sua sponte, with a special credibility instruction concerning Opalacz' testimony. Specifically, the defendant argues that "special credibility instruction[s] [have] roots in the concern that certain witnesses have such a powerful motive to testify falsely that the court should warn jurors to consider carefully their testimony" and that, because the defendant presented evidence that Opalacz possessed the motive,

single transaction" was intended to apply only to murders that occurred in connection with a common plan, motive, or intent, or that the statute was intended to proscribe two conceptually distinct acts of murder—i.e., multiple murders that occur at the same time and those that occur in connection with a common plan, motive, or intent. We agree with the state that our analysis in *Gibbs* makes clear that the phrase "at the same time or in the course of a single transaction" in § 53a-54b (7) merely provides two different descriptions of the same prohibited conduct (the murder of more than two people), with the phrase "at the same time" conceptually subsumed within the meaning of "in the course of a single transaction . . . ." For example, if a motorcyclist were to shoot all the passengers in a vehicle because the driver had just cut him off on the highway, the murders would have occurred as part of a single transaction no less than if the killer, in exacting his revenge, had waited and murdered each of the passengers separately, over the course of several hours.

[11] Because we conclude that the defendant's claim fails under the third prong of *Golding*, we further conclude that his claim of plain error also fails. See *State* v. *Blaine*, supra, 334 Conn. 305 ("plain error review is reserved for only the most egregious errors" (internal quotation marks omitted)); see also *State* v. *Stephens*, 301 Conn. 791, 797, 22 A.3d 1262 (2011) (concluding that defendant's claims, which failed under the third prong of *Golding*, were "not entitled to the extraordinary relief available under the plain error doctrine").

means, and opportunity to kill the victims, the court should have provided a special credibility instruction with respect to her testimony. The state argues that, because the defendant's claim is not of constitutional magnitude, it fails under the second prong of *Golding* and is reviewable only for plain error. The state further argues that this court should reject the defendant's claim of plain error because Opalacz does not fit within any of the existing exceptions to the general rule that a defendant is not entitled to an instruction singling out a state's witness and highlighting their potential motive to testify falsely, and because it is not plain error for the trial court to fail to provide the jury, sua sponte, with a special credibility instruction that has not previously been recognized, let alone required, by Connecticut appellate courts.

We agree with the state that the defendant's claim fails under the second prong of *Golding* because this court repeatedly has held that the failure of a trial court to provide a special credibility instruction is not of constitutional magnitude. See, e.g., *State* v. *Patterson*, 276 Conn. 452, 471, 886 A.2d 777 (2005) (holding that, for purposes of harmfulness analysis, trial court's improper failure to provide jury with special credibility instruction for witness who was jailhouse informant was not constitutional in nature); *State* v. *Brown*, 187 Conn. 602, 613, 447 A.2d 734 (1982) (holding that trial court's failure to give accomplice credibility instruction to jury does not involve violation of constitutional right); *State* v. *Cooper*, 182 Conn. 207, 212, 438 A.2d 418 (1980) (same for complaining witness credibility instruction); see also *State* v. *Diaz*, 302 Conn. 93, 99 n.3, 25 A.3d 594 (2011) ("[t]he defendant concedes that the trial court's failure to give [sua sponte] a special credibility instruction was not of constitutional magnitude and, therefore,

his claim does not qualify for review under [*Golding*]").[12] Accordingly, we conclude that the defendant's claim is reviewable only for plain error. We further conclude that the court's failure to provide the jury, sua sponte, with a special credibility instruction concerning Opalacz' testimony does not constitute plain error.

The following procedural history is relevant to this claim. On October 26, 2018, during its summary of the in-chambers charging conference it had conducted with the parties, the trial court stated that it would provide the jury with a third-party culpability instruction identifying the defense's theory that Opalacz, not the defendant, murdered the victims. The court further stated that, although it had considered providing the jury with an accomplice credibility instruction concerning Opalacz' testimony, it would not do so "because [that instruction] is contrary to the [defense's] theory" that Opalacz was not an accomplice but rather the principal. Defense counsel agreed with the court's decision not to provide an accomplice credibility instruction for Opalacz and did not otherwise request a special credibility instruction concerning her testimony. During its charge to the jury, the court provided a third-party culpability

[12] In arguing that "[t]he compelling facts of [his] case [warrant an] exception to the general rule that the failure to give [a special credibility instruction] is not constitutional error," the defendant cites to *State* v. *Baltas*, 311 Conn. 786, 91 A.3d 384 (2014), in which, he contends, this court applied the constitutional standard for assessing harmfulness following its conclusion that the trial court improperly failed to provide a special credibility instruction. The defendant misreads *Baltas*, which explicitly states that the defendant in that case did not claim "that the trial court's failure to instruct the jury on [a witness'] motive to testify falsely violated any of his constitutional rights, [and, thus, he bore] the burden of demonstrating that the court's error was harmful." Id., 822; see also *State* v. *Cody M.*, 337 Conn. 92, 113 n.17, 259 A.3d 576 (2020) ("[i]f the claim is of constitutional magnitude, the state has the burden of proving the constitutional error was harmless beyond a reasonable doubt" (internal quotation marks omitted)).

instruction,[13] a general credibility instruction,[14] and a specific instruction concerning Opalacz' credibility as a witness who had pleaded guilty to, and had a pending sentencing hearing for, hindering prosecution with respect to the victims' murders.[15] Defense counsel did not object to the court's jury charge.

[13] The court instructed the jury on third-party culpability as follows: "The defendant has offered evidence that a third party . . . Opalacz, and not the defendant, committed the crimes with which the defendant is here charged. This evidence is not intended to prove the guilt of the third party but is part of the total evidence for you to consider. The burden remains on the state to prove each and every element of the offense, including identification, beyond a reasonable doubt. It is up to you and to you alone to determine whether any of this evidence, if you choose to believe it, tends to directly connect . . . Opalacz to the commission of the crimes with which the defendant is charged. If, after a full and fair consideration and comparison of all the evidence, you have left in your minds a reasonable doubt indicating that . . . Opalacz may [be] the individual who committed the crimes that the defendant is charged with committing, then it would be your duty to render a verdict of not guilty as to the defendant before you."

[14] The court instructed the jury on witness credibility in general in relevant part: "[I]n deciding what the facts are, you must consider all the evidence and decide which testimony to believe and which testimony not to believe. You may believe or disbelieve all, none, or any part of any [witness'] testimony. In making that decision, you may take into account a number of factors, including . . . did the witness have any interest in the outcome of this case or any bias or prejudice concerning any party or any matter involved in the case? . . .

"You should size up each witness and then make your own judgment as to his or her credibility and decide what portion, all, some or none of any particular [witness'] testimony you will believe. You should use all of your experiences, your knowledge of human nature, and of the motives which influence and control human conduct, and you should test the evidence against that knowledge."

[15] With respect to Opalacz' testimony, the court instructed the jury on her credibility as a state witness with pending criminal charges as follows: "Now, evidence has been presented that the [witness] . . . Opalacz . . . [was] arrested by [the] police in November of 2016, on the charge of hindering prosecution in the second degree, a felony punishable by up to ten years in prison, for engaging in actions that the state claimed hindered the prosecution of the crimes that are [the] subject of the case now before you. . . . Opalacz had pleaded guilty to that crime and is awaiting sentence. . . . You may consider this evidence in determining the credibility of the [witness], that is, on the issue of the weight that you will give [her] testimony and in determining whether [her] testimon[y] should be believed wholly,

As previously stated, "a defendant is entitled to have the jury correctly and adequately instructed on the pertinent principles of substantive law." (Internal quotation marks omitted.) *State* v. *Blaine*, supra, 334 Conn. 308. "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." (Internal quotation marks omitted.) *State* v. *Patterson*, supra, 276 Conn. 466. "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. . . . This court has held, however, that a special credibility instruction is required for three types of witnesses, namely, complaining witnesses, accomplices and jailhouse informants." (Citation omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Diaz*, supra, 302 Conn. 101–102. As set forth in footnote 6 of this opinion, "[an appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates

partly, or not at all. You should keep in mind that [she], by cooperating with the state, may be looking for more favorable treatment in her ultimate sentencing. . . . As to [this witness], you should, therefore, consider whether she may have an interest in the outcome of the case now before you and the extent to which, if at all, that interest may have colored the testimony she has given.

"Of course, it is important for you also to keep in mind . . . that many, if not most, crimes are of such a nature and are committed under such circumstances that the only persons capable of giving useful testimony as to what occurred are those who may have themselves engaged in some type of criminal conduct at or around the time of the commission of the crime about which they have given testimony. So, for that reason, you must give due consideration to the testimony of . . . Opalacz . . . during your deliberations.

"In the final analysis, it is for you to decide whether you believe or disbelieve the testimony of . . . Opalacz in whole or in part . . . . You should give such weight to these facts that you decide is fair and reasonable in determining the credibility of [Opalacz]. Like all other questions of credibility, this is a determination that you must make based on all the evidence presented before you."

that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) *State* v. *Jamison*, 320 Conn. 589, 597, 134 A.3d 560 (2016).

In *State* v. *Diaz*, supra, 302 Conn. 93, this court considered a claim "that the trial court committed plain error when it failed to instruct the jury, sua sponte, that it must consider with great caution the testimony of [three witnesses], in light of their 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. The defendant in *Diaz* argued that *State* v. *Patterson*, supra, 276 Conn. 469–70, and *State* v. *Arroyo*, 292 Conn. 558, 569, 973 A.2d 1254 (2009), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010), in which this court required that a special credibility instruction be given for jailhouse informants, should be extended to "any witness who is in a position to receive a benefit from the state, even if the witness is not a classic jailhouse informant." *State* v. *Diaz*, supra, 99. This court rejected the defendant's claim of plain error, concluding that for two of the three witnesses, to whom the defendant conceded that the jailhouse informant instruction did not apply because they testified about events surrounding the crime that they had witnessed outside of prison, "the trial court's failure to give a special credibility instruction concerning [their] testimony . . . pursuant to *Patterson* or *Arroyo* would not have been improper even if the defendant had requested such an instruction. A fortiori, its failure to do so sua sponte did not constitute an error that was so obvious that it affect[ed] the fairness and integrity of and public confidence in the judicial proceedings, or of such monumental proportion that [it] threaten[ed] to erode our system of justice and work a serious and manifest injus-

tice on the aggrieved party." (Internal quotation marks omitted.) Id., 104.

In the present case, the defendant claims that the court committed plain error by failing to provide the jury, sua sponte, with a special credibility instruction for Opalacz because evidence was presented at trial that she murdered the victims and, thus, had a strong motive to testify falsely against the defendant. Similar to the defendant in *Diaz*, the defendant here seeks a novel exception to the general rule against singling out a witness and highlighting the witness' motive to testify falsely. See id. (defendant conceded that requiring special credibility instruction for two witnesses who were not jailhouse informants "would be an expansion of *Patterson*"). The defendant failed to request that the court provide such an instruction, but, even if he had done so, it would not have been plain error for the court to decline to provide it, as this court has yet to endorse, let alone to require, trial courts to provide such an instruction. See id., 104 n.8 ("[i]t is axiomatic that the trial court's proper application of the law existing at the time of trial cannot constitute reversible error under the plain error doctrine"). But cf. *State* v. *Moore*, 293 Conn. 781, 824, 981 A.2d 1030 (2009) (concluding that trial court's failure to provide accomplice credibility instruction was "plain or readily discernible error" because this court previously had held that "[when] it is warranted by the evidence, it is the *court's duty* to caution the jury to scrutinize carefully the testimony [of accomplice witnesses]" (emphasis in original; internal quotation marks omitted)), cert. denied, 560 U.S. 954, 130 S. Ct. 3386, 177 L. Ed. 2d 306 (2010). A fortiori, as in *Diaz*, the trial court's failure to provide the instruction, *sua sponte*, cannot constitute plain error.[16] Moreover, because the court instructed

[16] Although we express no opinion on the defendant's proposed special credibility instruction for a witness who may have committed the crime with which a defendant is charged, we reiterate, as we did in *Diaz*, that "it

the jury on Opalacz' credibility; see footnotes 14 and 15 of this opinion; and because the defense, during cross-examination and in closing argument, highlighted for the jury Opalacz' motivations for testifying falsely, including its theory that she was the actual and sole perpetrator of the victims' murders, we further reject the defendant's plain error claim. See *State* v. *Diaz*, supra, 302 Conn. 103 ("trial court's failure to give, sua sponte, a jailhouse informant instruction pursuant to *Patterson* [did] not constitute plain error when the trial court ha[d] instructed the jury on the credibility of witnesses and the jury [was] aware of the witness' motivation for testifying").

III

The defendant's final claim is that the trial court violated his state and federal constitutional rights to counsel and to present a defense by precluding defense counsel from arguing in closing argument that the absence of testimony from Velez created reasonable doubt. Specifically, the defendant argues that the trial court incorrectly determined that defense counsel was making a missing witness argument under *Secondino* v. *New Haven Gas Co.*, 147 Conn. 672, 165 A.2d 598 (1960), overruled in part by *State* v. *Malave*, 250 Conn. 722, 737 A.2d 442 (1999), cert. denied, 528 U.S. 1170,

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. 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." *State* v. *Diaz*, supra, 302 Conn. 113.

120 S. Ct. 1195, 145 L. Ed. 2d 1099 (2000),[17] because he did not encourage the jury to speculate that, had the state called Velez as a witness, her testimony would have been unfavorable to the state. The defendant asserts that defense counsel was, in fact, arguing that the state's theory that he killed Cortez because of a dispute over " 'fake weed' " was not credible and that, in advancing that argument, defense counsel merely was asking the jurors whether, in assessing each parties' theory of motive, "they [would have] want[ed] to hear

[17] "This court articulated the missing witness rule in *Secondino* v. *New Haven Gas Co.*, supra, 147 Conn. 675, which had held that [t]he failure of a party to produce a witness who is within his power to produce and who would naturally have been produced by him, permits the inference that the evidence of the witness would be unfavorable to the party's cause. . . . [T]he jury charge explaining the [missing witness] rule commonly is referred to as the *Secondino* instruction or the missing witness instruction. . . . The legislature abandoned the missing witness instruction in civil cases by adopting General Statutes § 52-216c." (Citation omitted; internal quotation marks omitted.) *State* v. *Santiago*, 305 Conn. 101, 206 n.96, 49 A.3d 566 (2012), superseded in part, 318 Conn. 1, 122 A.3d 1 (2015).

In *State* v. *Malave*, 250 Conn. 722, 730–38, 737 A.2d 442 (1999), cert. denied, 528 U.S. 1170, 120 S. Ct. 1195, 145 L. Ed. 2d 1099 (2000), this court, for reasons of policy, abandoned the missing witness rule in criminal cases. In so doing, however, the court noted that it "[did] not prohibit counsel from making appropriate comment, in closing arguments, about the absence of a particular witness, insofar as that witness' absence may reflect on the weakness of the opposing party's case. . . . So long as counsel does not directly exhort the jury to draw an adverse inference by virtue of the witness' absence, the argument does not fall within the *Secondino* rule, and our holding . . . does not forbid it. . . . Fairness, however, dictates that a party who intends to comment on the opposing party's failure to call a certain witness must so notify the court and the opposing party in advance of closing arguments. Advance notice of such comment is necessary because comment on the opposing party's failure to call a particular witness would be improper if that witness were unavailable due to death, disappearance or otherwise. That notice will ensure that an opposing party is afforded a fair opportunity to challenge the propriety of the missing witness comment in light of the particular circumstances and factual record of the case. Of course, the trial court retains wide latitude to permit or preclude such a comment, and may, in its discretion, allow a party to adduce additional evidence relative to the missing witness issue." (Citations omitted; footnotes omitted.) Id., 739–40.

from Velez about the feud between Opalacz and the victims." We review the defendant's claim under *Golding* because the record is adequate and the claim is of constitutional magnitude. See, e.g., *State* v. *Santiago*, 305 Conn. 101, 207–208, 49 A.3d 566 (2012) (reviewing under *Golding* defendant's claim that "the [trial court's] curative instruction abridged his constitutional right to present a summation in a criminal jury trial"), superseded in part, 318 Conn. 1, 122 A.3d 1 (2015).

In response, the state argues that the trial court did not violate the defendant's constitutional rights to counsel or to present a defense because the court "reasonably concluded that . . . [defense counsel] was insinuating that the state did not want the jury to hear from Velez because she was best friends with Ocasio, with whom Opalacz had a feud, and her testimony would have bolstered the [defense's] theory that Opalacz shot the victims." (Emphasis omitted.) The state further argues that the court did not prevent defense counsel from arguing to the jury the existence of reasonable doubt or the defense's third-party culpability theory based on evidence adduced at trial of the feud between Opalacz and Velez. We agree with the state.

The following procedural history is relevant to this claim. During his closing argument, defense counsel asked the jury: "What about . . . Velez? . . . [B]est friends with . . . Ocasio. Ask yourself, didn't you want to hear from her in this trial?"[18] Before defense counsel could proceed any further with this argument, the prosecutor objected. The trial court sustained the objection,

[18] On October 29, 2018, the trial court stated on the record that, although the defense initially expressed an intention to call Velez as a witness and that she was "in the building" under a defense subpoena, defense counsel since had indicated to the court off the record that the defense had decided "as a matter of tactics and strategy" not to call her as a witness. Defense counsel confirmed the court's summary of the off-the-record discussion and agreed to excuse Velez from the defense subpoena.

stating, "[t]hat's [an] improper argument," and defense counsel responded that he was "[m]oving on." After defense counsel concluded his closing argument, and outside the presence of the jury, the court stated that it had sustained the state's objection because it believed that defense counsel was making a missing witness argument in violation of *State* v. *Malave*, supra, 250 Conn. 722. The court also noted that, on a page of a flip chart utilized by defense counsel during his closing argument, there was reference to Velez' absence from the trial, which it felt had "compound[ed] the problem." The court stated that defense counsel's argument was "particularly inappropriate . . . given the fact that the record will reflect that . . . yesterday . . . Velez was here under defense subpoena, was ready to testify, and [the] defense chose not to put her on." The court declined to provide a curative instruction but invited the prosecutor to respond to defense counsel's argument during the state's rebuttal argument. The prosecutor did so, stating that, "when [defense counsel asked] wouldn't you have liked to have heard from . . . Velez, that was improper argument. You're not allowed to speculate as to why . . . Velez did not testify. And you should know that both sides are free to call witnesses." Defense counsel did not object to the state's sustained objection to his closing argument, the court's permission to the prosecutor to respond to his "improper argument," or the prosecutor's particular response during the state's rebuttal argument.

The following legal principles guide our analysis of this claim. "[T]he right to the assistance of counsel ensures an opportunity to participate fully and fairly in the adversary [fact-finding] process. . . . The opportunity for the defense to make a closing argument in a criminal trial has been held to be a basic element of the adversary process and, therefore, constitutionally protected under the sixth and fourteenth amendments.

. . . Closing argument is an integral part of any criminal trial, for it is in this phase that the issues are sharpened and clarified for the jury and each party may present his theory of the case. Only then can [counsel] . . . argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. . . .

"[T]he scope of final argument lies within the sound discretion of the court . . . subject to appropriate constitutional limitations. . . . It is within the discretion of the trial court to limit the scope of final argument to prevent comment on facts that are not properly in evidence, to prevent the jury from considering matters in the realm of speculation and to prevent the jury from being influenced by improper matter[s] that might prejudice its deliberations. . . . While we are sensitive to the discretion of the trial court in limiting argument to the actual issues of the case, tight control over argument is undesirable when counsel is precluded from raising a significant issue." (Citation omitted; internal quotation marks omitted.) *State* v. *Joyce*, 243 Conn. 282, 305–306, 705 A.2d 181 (1997), cert. denied, 523 U.S. 1077, 118 S. Ct. 1523, 140 L. Ed. 2d 674 (1998).

We conclude that the trial court reasonably determined that defense counsel was making an improper missing witness argument, rather than "raising a significant issue"; id., 306; or making appropriate comment about Velez' absence insofar as her absence reflected on the weakness of the state's case. See *State* v. *Malave*, supra, 250 Conn. 739. Velez was not a witness to the events on May 16, 2016, that surrounded the victims' murders and, thus, could not corroborate or dispute the version of events to which Opalacz, Rodriquez, and Villegas testified. Furthermore, it was the defense, not the state, that initially sought, yet later declined, to call

Velez as a witness. See footnote 18 of this opinion. Accordingly, it was reasonable for the court to conclude that, when defense counsel asked the jury, "[w]hat about . . . Velez? . . . [B]est friends with . . . Ocasio. Ask yourself, didn't you want to hear from her in this trial?" he was not identifying a weakness in the state's case but was, in fact, inviting the jury to speculate that the state declined to call Velez as a witness because, as Ocasio's best friend, she would have provided unfavorable testimony to the state by, for example, supporting the defense's theory that Opalacz murdered the victims. But cf. *State* v. *Ross*, 18 Conn. App. 423, 431, 433–34, 558 A.2d 1015 (1989) (holding that trial court improperly restricted defendant's right to present closing argument by precluding his argument that failure of witness who "was the sole eyewitness to the shooting" to testify created reasonable doubt in state's case). Moreover, there was ample testimony, without the need to discuss Velez' absence at trial, from which defense counsel was able to argue in closing argument that Opalacz had a stronger motive than the defendant, as well as the means and opportunity, to murder the victims. The reasonableness of the trial court's determination is further illustrated by the fact that defense counsel did not provide advance notice to the court or the prosecutor that he would be making a reasonable doubt argument based on Velez' absence; see *State* v. *Malave*, supra, 740; and that, when the court accused him of having made an improper missing witness argument, he did not argue to the contrary. Accordingly, we conclude that the court reasonably determined that defense counsel was making an improper missing witness argument and that it reasonably exercised its discretion by limiting the scope of defense counsel's final argument to prevent comment on facts that were not properly in evidence.[19] See, e.g., *State* v. *Joyce*, supra,

[19] The defendant also argues that the trial court improperly (1) instructed the jury not to consider defense counsel's " 'improper argument' " and that it could not find reasonable doubt in the failure to hear from Velez, and (2)

243 Conn. 305–306. The defendant's claim thus fails under the third prong of *Golding*.[20]

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JERMAIN V. RICHARDS (SC 20490)

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

Syllabus

Convicted of the crime of murder, the defendant appealed, and the Appellate Court upheld the defendant's conviction. On the granting of certification, the defendant appealed to this court, claiming that the evidence was insufficient to support his conviction insofar as the state failed to prove the manner, means, place, cause, and time of the victim's death, and that the inferences that the jury apparently drew from the evidence were unreasonable because the state failed to prove that the defendant had committed or intended to commit any criminal acts. *Held* that the Appellate Court's well reasoned opinion, in which that court determined that the evidence was sufficient to support the defendant's conviction, fully addressed the evidentiary sufficiency issue, and this court adopted that portion of the Appellate Court's opinion as a proper statement of the applicable law concerning that issue; moreover, this court empha-

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permitted the state to argue in closing argument that defense counsel could have called Velez as a witness, which he contends unconstitutionally "shifted the burden of proof to the defense . . . [and] dilute[ed] the reasonable doubt standard . . . ." (Citations omitted.) We reject these arguments because the court properly instructed the jury not to consider defense counsel's speculative missing witness argument and because the state's argument that "both sides are free to call witnesses" was not tantamount to arguing that the defense was *required* to produce evidence of his innocence. The court, moreover, instructed the jury that "[t]he defendant does not have to prove his innocence," an instruction that we presume the jury followed. See, e.g., *State* v. *Reynolds*, 264 Conn. 1, 131, 836 A.2d 224 (2003) ("[i]n the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them"), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004).

[20] As with the defendant's first claim, because this claim fails under the third prong of *Golding*, it also fails under the plain error doctrine. See footnote 11 of this opinion.

sized two facts that were not expressly applied by the Appellate Court in its analysis but that were noted in the Appellate Court's opinion and further supported the jury's conclusion that the defendant intended to cause or did cause the victim's death, namely, that the victim had been seen at the defendant's residence within two hours of the victim's last cell phone communication and was in good health, and the defendant missed his first work shift the day after the victim disappeared but arrived for his second shift later that day.

Argued March 29—officially released July 16, 2021*

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *E. Richards*, *J.*; verdict and judgment of guilty, from which the defendant appealed; thereafter, the Appellate Court, *Keller*, *Prescott* and *Bishop*, *Js.*, affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Norman A. Pattis, for the appellant (defendant).

Kathryn W. Bare, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Ann F. Lawlor*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. In this certified appeal, we must consider whether there was sufficient evidence for the jury to find the defendant, Jermain V. Richards, guilty of murder in violation of General Statutes § 53a-54a (a),[1] despite the absence of evidence of the manner, means, place, cause, and time of the victim's death. The Appel-

* July 16, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person . . . ."

late Court upheld the trial court's judgment of conviction. We now affirm the judgment of the Appellate Court.

The defendant was convicted after a third jury trial, the first two trials having ended in mistrials after hung juries. *State* v. *Richards*, 196 Conn. App. 387, 394, 229 A.3d 1157 (2020). The defendant appealed, and the Appellate Court affirmed his conviction. Id., 413. We granted certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that the evidence adduced at the defendant's trial was sufficient to support his conviction of murder?" *State* v. *Richards*, 335 Conn. 931, 236 A.3d 218 (2020).

The opinion of the Appellate Court thoroughly and accurately reports the facts that the jury might reasonably have found to support the conviction of the defendant. The defendant contends that the jury lacked sufficient evidence to find him guilty of murder. Specifically, he argues that the state failed to prove the manner, means, place, cause, and time of death, and that the inferences the jury apparently drew from the evidence were unreasonable because the state failed to prove any criminal acts committed by the defendant or that he intended to commit such acts.[2]

Our examination of the record and briefs, and our consideration of the parties' arguments, persuades us that we should affirm the Appellate Court's judgment. Because the Appellate Court's well reasoned opinion fully addresses the certified issue, it would serve no purpose for us to repeat the discussion contained in that opinion. We therefore adopt part I of the Appellate Court's opinion as the proper statement of the issue

[2] To the extent the defendant argues that there was no evidence that the victim is, in fact, deceased, we note that the state's chief medical examiner testified that the cause of death was "homicidal violence of an undetermined type" and that the victim's limbs were removed, postmortem, by the use of a sharp instrument. See *State* v. *Richards*, supra, 196 Conn. App. 393.

and the applicable law concerning that issue. See, e.g., *State* v. *Buie*, 312 Conn. 574, 583, 94 A.3d 608 (2014); see also *State* v. *Richards*, supra, 196 Conn. App. 394–407.

Additionally, we emphasize two facts that the Appellate Court did not expressly apply in the analysis section of its opinion (part I), although they were noted in the opinion itself. First, not only was the victim last seen at the defendant's residence, but she was seen there within two hours of her last cell phone communication and was in good health. See *State* v. *Richards*, supra, 196 Conn. App. 393–94. While the evidence analyzed in part I of the Appellate Court's opinion fully satisfies the sufficiency of the evidence standard, this evidence further supports the jury's conclusion that the defendant intended to cause the victim's death and did in fact cause her death. Second, the defendant missed his work shift, which was scheduled for 3 to 11 p.m. on Sunday, April 21, 2013, the day after the victim disappeared, but he arrived for his second shift that same day, which began at 11 p.m. Id., 393. This evidence further supports the jury's conclusion that the defendant caused the victim's death.

The judgment of the Appellate Court is affirmed.

STATE OF CONNECTICUT *v.* BOBBY GRIFFIN (SC 20439)

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

Syllabus

Convicted of the crimes of murder, criminal attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree, and criminal possession of a firearm in connection with the shooting death of the victim, the defendant appealed to this court. Several days after the shooting, a confidential informant told a detective, P, about a conversation he had with the defendant in which the defendant admitted to murdering the victim and wanting to sell the rifle that he had used to

do so. At P's urging, the informant went to the defendant's residence to place a hold on the rifle. During the ride back to the police station, the informant told P that he saw a rifle and ammunition in the defendant's bedroom. P immediately began preparing an application for a search warrant while the police surveilled the defendant's residence. The police became concerned that their presence had been noticed and entered the defendant's residence in order to secure it until the warrant was obtained. During a protective sweep, an officer entered the defendant's attic and saw the rifle in plain view. The search warrant application was then approved on the basis of P's affidavit, in which P averred, inter alia, that the police were relying on an informant whose "information has been proven true and reliable." Thereafter, the defendant was detained and, in the early morning, brought to the station, where he waived his *Miranda* rights. He was then interviewed by two detectives, N and Z, for more than three hours, during which he confessed to the murder. Prior to trial, the defendant filed motions to suppress the rifle and other evidence discovered during the search of his residence and the statements he had made to N and Z during the interrogation. Specifically, he claimed that the rifle was illegally obtained during a warrantless search and that his confession was involuntary as a result of certain coercive interrogation tactics employed by N and Z, namely, interviewing him while he was sleep-deprived, presenting him with false evidence of his guilt, maximizing the consequences of not confessing, threatening his family with arrest, and suggesting that his confession would be met with leniency. The trial court denied both motions, concluding, inter alia, that the defendant's confession was voluntary. With respect to the rifle, the court concluded that exigent circumstances justified the warrantless entry into the defendant's residence and that, even if the entry into the attic was not permitted as part of the protective sweep, the rifle was admissible under the independent source doctrine on the ground that the search warrant that was issued was supported by probable cause independent of any information obtained during the initial entry. *Held*:

1. The defendant could not prevail on his claim that the trial court had improperly denied his motion to suppress the evidence found during the warrantless search of his residence, because, regardless of whether the initial entry and protective sweep were justified by exigent circumstances, the trial court correctly determined that the evidence was admissible pursuant to the independent source doctrine, as that evidence would have been lawfully and inevitably discovered pursuant to the search warrant: the defendant conceded, and this court agreed, that the decision to seek the search warrant, which P was preparing before the initial entry took place, was not prompted by information obtained during the initial entry and protective sweep, and P's affidavit in support of the search warrant, excised of any potentially tainted information from the initial entry, established probable cause to search the defen-

dant's residence; moreover, although P's affidavit did not disclose any details to substantiate his averment that the informant's information had been "proven true and reliable," other aspects of the affidavit established the informant's reliability, as the affidavit made clear that the informant's identity was known to the police, stated that the informant would be willing to testify in court in the future, indicated that P independently corroborated certain information provided by the informant, including the caliber of the firearm used in the shooting, and noted that the information the informant provided to P was based on the informant's firsthand observations while at the defendant's residence.

2. There was no merit to the defendant's claim that the trial court had improperly admitted his statements to N and Z on the ground that those statements were not voluntary and that their admission therefore violated his due process rights under the federal and state constitutions:

a. The trial court correctly determined that the state met its burden under the federal constitution of establishing the voluntariness of the defendant's statements by a preponderance of the evidence, as the record demonstrated that the combined effect of the interrogation tactics employed by N and Z did not cause the defendant's will to be overborne: although N and Z engaged in false evidence ploys by referring to evidence they did not have in order to give the impression that the state's case against the defendant was stronger than it actually was, most of the false evidence claims, viewed in light of the totality of the circumstances, were made during the first hour of the interview and were not particularly egregious, and the defendant demonstrated that he was capable of resisting and pushing back on these claims by falsely accusing another individual, Q, of the murder for more than two hours; moreover, the detectives' statements regarding the defendant's sentencing exposure were an accurate representation of the severity of the consequences that he faced, and, although N inappropriately referred to the death penalty during the interrogation, that was a single, isolated statement, the defendant had no audible reaction to it, and he continued to blame the murder on Q; furthermore, N's comment suggesting that members of the defendant's family would be arrested if he did not confess was not causally related to the confession of the defendant, who apparently recognized the threat as an empty ploy, and certain comments made by the detectives suggesting that the defendant would receive leniency if he confessed and that he could be charged with the lesser crime of manslaughter depending on the statement he gave were not inherently coercive, as N and Z did not make any definitive promise to the defendant or represent that they had the authority to determine the charges against him; in addition, the length of the interrogation was far shorter than other interrogations held not to have been inherently coercive, N and Z never subjected the defendant to physical abuse or threats of such abuse, the defendant twice waived his *Miranda* rights, and, although the defendant showed signs of being tired during the interrogation, he was lucid and responsive

throughout the interview, was able to understand the detectives' questions, communicated clearly and coherently, and pushed back on certain of the interrogation tactics by consistently denying his involvement in the murder, fabricating and maintaining the story that Q committed the murder, and pretending to cry to give credibility to his story.

b. Applying the factors set forth in *State* v. *Geisler* (222 Conn. 672), this court declined the defendant's request to adopt a prophylactic rule under the state constitution requiring Connecticut trial courts to consider whether coercive interrogation tactics, such as those employed in the present case, raise questions about the voluntariness of a confession: the text of the state due process clause did not support the defendant's claim, the defendant did not cite to any federal or Connecticut authority in support of his claim that the state due process clause requires a more stringent analysis regarding the admission of confessions, the only case from another state cited by the defendant was distinguishable, and the defendant did not refer to any evidence that the authors of our state constitution intended to provide greater protection against involuntary confessions; moreover, public policy did not support adopting the prophylactic rule urged by the defendant, as courts already are required to consider the coercive nature of an interrogation under the totality of the circumstances, and defendants are capable of vindicating such concerns by introducing social science evidence or expert testimony to demonstrate that the interrogation tactics employed by interrogators overbore an individual's will.

(*One justice concurring separately*; *one justice concurring in part and dissenting in part*)

Argued June 1, 2020—officially released July 22, 2021*

Procedural History

Substitute information charging the defendant with the crimes of felony murder, murder, criminal attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree, and criminal possession of a firearm, brought to the Superior Court in the judicial district of New Haven, where the court, *Vitale*, *J.*, denied the defendant's motions to suppress certain evidence; thereafter, the first four counts were tried to the jury before *Vitale*, *J.*; verdict of guilty; subsequently, the charge of criminal possession of a firearm was tried to the court; finding of guilty; thereafter, the court

* July 22, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

vacated the felony murder conviction and rendered judgment of guilty of murder, criminal attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree, and criminal possession of a firearm, from which the defendant appealed to this court. *Affirmed.*

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *John P. Doyle, Jr.*, executive assistant state's attorney, and *Sean P. McGuinness*, assistant state's attorney, for the appellee (state).

Maura Barry Grinalds and *Darcy McGraw* filed a brief for the Connecticut Innocence Project et al. as amici curiae.

Opinion

MULLINS, J. On October 14, 2013, the victim, Nathaniel Bradley, was fatally shot by someone who was attempting to rob him. After receiving a tip from a confidential informant, the police focused their investigation on the defendant, Bobby Griffin. The police discovered the rifle used in the murder hidden in the attic of the defendant's residence. After a three hour and thirty-eight minute interrogation, the defendant confessed that he shot and killed the victim while attempting to rob him. The defendant was convicted, following a jury trial, of murder in violation of General Statutes § 53a-54a (a), criminal attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (2) and 53a-49 (a) (2), and conspiracy to commit robbery in the first degree in violation of Gen-

eral Statutes §§ 53a-134 (a) (2) and 53a-48 (a).[1] The defendant also was convicted, following a trial to the court, of criminal possession of a firearm in violation of General Statutes (Rev. to 2013) § 53a-217 (a) (1), as amended by No. 13-3, § 44, of the 2013 Public Acts (P.A. 13-3).[2]

In this direct appeal, the defendant claims that the trial court improperly denied his motions to suppress (1) the firearm and related evidence seized from his residence, which he claims were discovered as a result of an unlawful search, and (2) the incriminating statements he made during his interrogation at the police station, which he claims were involuntary. We disagree with the defendant's claims and, accordingly, affirm the judgment of the trial court.

The fact finder reasonably could have found the following facts. On the evening of October 14, 2013, the defendant was at a social gathering on Goffe Terrace in New Haven with Nathan Johnson, Ebony Wright, and several others. Throughout the evening, the defendant was openly carrying around a Hi-Point nine millimeter assault rifle, which he kept inside of a bag that was slung around his neck. At some point during the evening, the defendant told Johnson that he was looking for someone to rob. Johnson then showed the defendant a list of individuals who previously had sold him marijuana that he kept in his phone. The defendant scrolled through the list and selected the victim as the person he wanted to rob. At the defendant's direction, Wright contacted the victim and arranged for him to meet her

[1] The jury also found the defendant guilty of felony murder in violation of General Statutes § 53a-54c. The trial court subsequently vacated the felony murder conviction pursuant to *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013).

[2] Hereinafter, all references to § 53a-217 in this opinion are to the 2013 revision of the statute, as amended by P.A. 13-3.

on Goffe Terrace under the pretense that she wanted to purchase marijuana from him.

Soon thereafter, the victim pulled up to the curb next to where the defendant, Wright and Johnson were walking, and Wright identified herself as the person who had contacted him. While Wright and the victim were talking, the defendant stepped into a dark alleyway, put on a mask and took out the assault rifle, which he had been carrying in his bag. The defendant approached the victim, who was standing by the trunk of his car, pointed the rifle at him and demanded that he hand over all the valuables he had in his possession. The victim told the defendant that he "could have everything" and began walking away from the defendant toward the driver's seat of his car. The defendant then shot the victim twice in the back at close range. The victim died from his wounds.

The defendant, Johnson and Wright fled the scene on foot. The defendant returned to his residence at 374 Peck Street in New Haven, where he hid the rifle in his attic. Two spent nine millimeter shell casings were left at the scene.

A few days after the shooting, the police received a tip from a confidential informant that the defendant had admitted his involvement in the homicide and was still in possession of the rifle he had used in committing it. Shortly after midnight, on October 20, 2013, the police searched the defendant's residence at 374 Peck Street and discovered the assault rifle, several magazines, one of which had an extended clip, and multiple boxes of ammunition in the attic. A ballistics analysis revealed that the two shell casings found at the scene of the shooting had been fired from the rifle.

Thereafter, the police arrested the defendant and transported him to the New Haven Police Department in the early morning hours of October 20, 2013. At

approximately 10:30 a.m. that morning, two detectives interviewed the defendant. Before questioning the defendant, the detectives advised the defendant of his *Miranda*[3] rights, and he waived those rights. Then, after approximately three hours of questioning, the defendant confessed that he had shot and killed the victim while attempting to rob him. The interview was recorded, as required by state law.

The state charged the defendant with murder, felony murder, criminal attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree, and criminal possession of a firearm. Prior to trial, the defendant filed motions to suppress the evidence discovered during the search of his home and the statements he had made to the police during his interrogation at the police station. After conducting an evidentiary hearing, the trial court issued memoranda of decision denying both motions.

After a trial, the jury found the defendant guilty of murder, felony murder and the robbery counts. The trial court found the defendant guilty of criminal possession of a firearm. After vacating the defendant's felony murder conviction; see footnote 1 of this opinion; the court imposed a total effective sentence of ninety years imprisonment without the possibility of release.

This direct appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the trial court should have suppressed the rifle, ammunition, and magazines found in his home. Specifically, he argues that the police discovered these items as a result of an unlawful search of his residence, in violation of the fourth amendment

[3] *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

to the United States constitution and article first, § 7, of the Connecticut constitution. We disagree.

The following additional facts, as found by the trial court in its memorandum of decision denying the defendant's motion to suppress, are relevant to this claim. On October 18, 2013, Detective Martin Podsiad of the New Haven Police Department received a telephone call from a confidential informant who had served as a source of information for Podsiad in prior criminal investigations. The informant told Podsiad that he had recently had a conversation with the defendant in which the defendant admitted that he murdered the victim and indicated that he wanted to sell the rifle he had used to do so. The defendant sought to sell the rifle to the informant in exchange for cash and a handgun. Podsiad instructed the informant to arrange to purchase the rifle from the defendant with police funds. Podsiad determined, through a search of police department databases, that the defendant resided at 374 Peck Street in New Haven and had multiple felony convictions.

Podsiad believed that, in order to obtain a search warrant, he needed to verify the location of both the rifle and the defendant. At Podsiad's instruction, the informant arranged to meet the defendant at his residence the following evening, on October 19, 2013. At sometime between 6:30 and 8:30 p.m., Podsiad dropped the informant off at 374 Peck Street. Podsiad waited for the informant. The informant reemerged a few minutes later and, on the ride back to the police station, informed Podsiad that he saw a rifle and multiple boxes of ammunition in the defendant's bedroom. As he and Podsiad planned, the informant had given the defendant some money to place a hold on the rifle and told the defendant that he would return shortly thereafter with a handgun to complete the sale.

Podsiad immediately began preparing an application for a search warrant for 374 Peck Street. The police

set up surveillance around the building complex to prevent the defendant from leaving before the warrant could be obtained. They also began coordinating with a SWAT team to make the entry into the defendant's residence when the time came.

At approximately 10:30 p.m., while Podsiad was still preparing the search warrant application, the police stopped a vehicle leaving the parking lot of the 374 Peck Street building complex. The defendant's sister and another individual were in the vehicle. Although the police officers were driving an unmarked vehicle, they became concerned that people in the vicinity would notice their presence or that the occupants of the vehicle they had stopped might alert the defendant. The officers believed that, if the defendant received advance notice of their operation, he could escape with the rifle or begin preparing for a violent confrontation.

In light of these concerns, the officers decided to enter the defendant's residence in order to secure it until the warrant was obtained. They activated the SWAT team, which attempted to enter 374 Peck Street. The SWAT team chose the wrong door, however, and entered the adjacent apartment, 374B Peck Street. The defendant, who was inside his residence at 374 Peck Street, called the informant and told him not to return because the police were raiding the apartment next door.

Their element of surprise lost, the officers used a loudspeaker to order the occupants of 374 Peck Street to exit. The defendant and other occupants exited the residence. After detaining the defendant, the police entered the residence in order to conduct a protective sweep for any individuals who may not have exited. During the sweep, the officers noticed a small hole in the ceiling above the laundry area that led to the attic and thought someone might be hiding up there. An

officer entered the attic and saw the rifle in plain view. The officers then waited for the warrant to issue before conducting any further search of the home.

At approximately 2:30 a.m., on October 20, 2013, a judge approved the search warrant application. Podsiad's affidavit in support of the application consisted of six paragraphs, only the third, fourth, and fifth of which are pertinent to the issue of probable cause.[4] Those paragraphs provide in relevant part: "3. In the last . . . twenty-four hours, this affiant was contacted by a cooperating witness . . . whose information has been proven true and reliable. At this time, the [c]ooperating [w]itness is kept anonymous for her/his safety, but, in the future, [he or she] will be willing to testify in court. The [cooperating witness] had spoke[n] to [the defendant] in the last . . . five days . . . . [The defendant] had told the [cooperating witness] that he was responsible for the homicide [that] took place on [October 14, 2013], on 1617 Ella T. Grasso [Boulevard in New Haven] . . . . [The defendant] also [told] the [cooperating witness] that he still has possession of the firearm [that] he used in the homicide and that he is trying to get rid of it. [The defendant] also told the [cooperating witness] that the firearm is a [nine millimeter]. I contacted [Sergeant Karl] Jacobson, who confirmed that the weapon allegedly used in the homicide was a [nine millimeter].

"4. Within the last . . . twenty-four hours, the [cooperating witness] was inside [the defendant's] residence at 374 Peck [Street] [in] New Haven . . . . The [cooperating witness] confirmed that [the defendant] was in possession of a black, rifle type firearm. The firearm was located in [the defendant's] bedroom on the upper

[4] The first paragraph of the affidavit introduced the police officers' conducting the investigation, the second paragraph described the officers' training and experience, and the sixth paragraph averred that the information in the prior paragraphs established probable cause to believe that the defendant was storing a firearm at 374 Peck Street in violation of § 53a-217.

floor of the two story apartment at 374 Peck [Street]. There were also . . . two magazines in the bedroom, a box containing ammunition, caliber unknown, and drug bags and drug paraphernalia on top of his bed.

"5. At [10:30 p.m.] this evening, during the writing of this search warrant, surveillance teams in unmarked vehicles were stationed around the area of 374 Peck [Street] to [ensure that] no evidence left the residence. While conducting surveillance, the teams observed a subject leave 374 Peck [Street] and enter a [vehicle]. Believing that the subject . . . might be in possession of evidence from 374 Peck [Street], the vehicle was stopped . . . . Inside the vehicle were . . . two subjects, Tyrell Kennedy . . . and Bobbi Griffin . . . . During the stop, it was discovered that Bobbi Griffin is the sister of [the defendant]. Both parties were detained due to the fact that releasing them might afford them the opportunity to contact [the defendant], and evidence may be removed or destroyed. The New Haven Police Department SWAT team made entry into 374 Peck [Street] and secured the residents. Inside the residence was [the defendant, and a criminal records] check revealed [that he] is a convicted felon."

The defendant moved to suppress the rifle and related evidence, asserting that the search was unlawful under both the federal and state constitutions because the search warrant had not yet issued and there were no exigent circumstances justifying the officers' preemptive seizure of his residence. Following an evidentiary hearing, the trial court denied the defendant's motion.

In its memorandum of decision, the trial court concluded that the officers' initial entry into and search of the defendant's residence, although conducted before the search warrant was issued, were justified by exigent circumstances. The court determined that the officers had probable cause to believe that a rifle and ammuni-

tion were inside the residence, as well as "an objectively reasonable belief that immediate, physical entry . . . was necessary to prevent the destruction or removal of evidence, or the flight of the defendant, and that the failure to take such immediate action may have also endangered [their] safety" or that of others. The court further determined that the police were justified in entering the attic as part of a protective sweep of the residence and that, as a result of the protective sweep, the rifle and ammunition were visible in plain view.

Alternatively, the trial court concluded that, even if the entry into the attic was not permitted as part of a protective sweep, it was nonetheless lawful under the independent source and/or inevitable discovery doctrines. The court reasoned that the police were already in the process of obtaining a search warrant and that Podsiad's affidavit established probable cause without relying on any information obtained during the initial entry. The court therefore concluded that the evidence would lawfully have been discovered even if the initial entry was improper.

On appeal to this court, the defendant challenges both bases for the trial court's decision. With respect to the first, the defendant argues, in part, that the exigent circumstances exception is inapplicable in this case because the police created the exigency by stopping the vehicle that was leaving the defendant's residence. As to the second basis, the defendant concedes that, if Podsiad's search warrant affidavit established probable cause, then the seizure of the evidence was lawful under either the independent source or inevitable discovery doctrines, or under both doctrines. The defendant contends, however, that Podsiad's affidavit failed to establish probable cause because it was based on information provided by an informant, rather than Podsiad's own observations, and failed to set forth sufficient facts to establish the informant's reliability. We conclude that

Podsiad's affidavit was supported by probable cause and, therefore, that the trial court properly denied the defendant's motion to suppress based on the independent source doctrine.[5] Accordingly, we need not determine whether the initial warrantless entry and protective sweep were justified by exigent circumstances.

Before addressing the sufficiency of Podsiad's affidavit, we note briefly the relevant principles of the independent source doctrine. "It is well recognized that the exclusionary rule has no application [when] the [g]overnment learned of the evidence from an independent source. . . . Independent source, in the exclusionary rule context, means that the tainted evidence was obtained, in fact, by a search untainted by illegal police activity. . . . In the case of a search conducted pursuant to a search warrant, [t]he two elements that must be satisfied to allow admission [under the independent source doctrine] are: (1) the warrant must be supported by probable cause derived from sources independent of the illegal entry; and (2) the decision to seek the warrant may not be prompted by information gleaned from the illegal conduct." (Citations omitted; internal quotation marks omitted.) *State* v. *Cobb*, 251 Conn. 285, 333, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000).

The defendant concedes, and we agree, that the police did not make their decision to seek the search warrant based on any information obtained during their allegedly unlawful entry and protective sweep because Podsiad had already begun the process of obtaining

[5] Because the present case fits neatly within the contours of the independent source doctrine, we do not address the closely related inevitable discovery doctrine. See, e.g., *State* v. *Cobb*, 251 Conn. 285, 337–38, 743 A.2d 1 (1999) (discussing relationship between independent source and inevitable discovery doctrines), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000).

the warrant when the entry occurred. The remaining question is whether Podsiad's affidavit, excised of any potentially tainted information, established probable cause for the search.[6]

"The determination of whether probable cause exists to issue a search warrant under article first, § 7, of our state constitution,[7] and under the fourth amendment to the federal constitution,[8] is made pursuant to a totality of the circumstances test. . . . Under this test, in determining the existence of probable cause to search, the issuing judge must make a practical, nontechnical decision whether, given all the circumstances set forth in the warrant affidavit, including the veracity and the basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. . . .

"If a search warrant affidavit is based on information provided to the police by a confidential informant, the issuing judge should examine the affidavit to determine whether it adequately describes both the factual basis of the informant's knowledge and the basis on which

[6] The only information in Podsiad's affidavit potentially tainted by the allegedly unlawful initial entry is the statement in paragraph 5 that "[t]he New Haven Police Department SWAT team made entry into 374 Peck [Street] and secured the residents. Inside the residence was [the defendant] . . . ." We therefore consider the adequacy of Podsiad's affidavit "shorn . . . of that information." *State* v. *Cobb*, supra, 251 Conn. 334.

[7] Article first, § 7, of the Connecticut constitution provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

[8] The fourth amendment to the United States constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

the police have determined that the information is reliable. If the warrant affidavit fails to state in specific terms how the informant gained his knowledge or why the police believe the information to be trustworthy, however, the [judge] can also consider all the circumstances set forth in the affidavit to determine whether, despite these deficiencies, other objective indicia of reliability reasonably establish that probable cause to search exists. In making this determination, the [judge] is entitled to draw reasonable inferences from the facts presented." (Citations omitted; footnotes added; internal quotation marks omitted.) *State* v. *Rodriguez*, 223 Conn. 127, 134–35, 613 A.2d 211 (1992). Therefore, although no single factor is dispositive, "the veracity or reliability and basis of knowledge of [the informant] are highly relevant in the issuing judge's analysis of the totality of the circumstances." (Internal quotation marks omitted.) *State* v. *Flores*, 319 Conn. 218, 226, 125 A.3d 157 (2015), cert. denied, U.S. , 136 S. Ct. 1529, 194 L. Ed. 2d 615 (2016); see also *State* v. *Respass*, 256 Conn. 164, 175, 770 A.2d 471 ("an informant's veracity or reliability and basis of knowledge should be regarded as closely intertwined issues that may usefully illuminate the [commonsense], practical question of the existence of probable cause" (internal quotation marks omitted)), cert. denied, 534 U.S. 1002, 122 S. Ct. 478, 151 L. Ed. 2d 392 (2001).

"When [an issuing judge] has determined that the warrant affidavit presents sufficient objective indicia of reliability to justify a search and has issued a warrant, a court reviewing that warrant at a subsequent suppression hearing should defer to the reasonable inferences drawn by the [issuing judge]." (Internal quotation marks omitted.) *State* v. *Rodriguez*, supra, 223 Conn. 135. "[W]e will uphold the validity of [the] warrant . . . [if] the affidavit at issue presented a substantial factual basis for the [issuing judge's] conclusion that probable cause existed. . . . [We] will not invalidate a warrant

. . . merely because we might, in the first instance, have reasonably declined to draw the inferences that were necessary . . . .'' (Citations omitted; internal quotation marks omitted.) *State* v. *Flores*, supra, 319 Conn. 225–26.

In the present case, the defendant's sole challenge to the adequacy of Podsiad's affidavit is that ''it does not provide sufficient information to establish the informant's reliability.'' The defendant's principal argument concerns the lack of any factual basis to indicate that the informant had a track record of providing reliable information. The defendant contends that the assertion in the affidavit that the informant's ''information has been proven true and reliable'' is too general and conclusory to be given any weight. Applying the totality of the circumstances test, we conclude that Podsiad's affidavit established probable cause.

We note at the outset that, although ''an informant's record of providing information that led to arrests and seizures of contraband is sufficient to establish [his or her] reliability''; *State* v. *Smith*, 257 Conn. 216, 224, 777 A.2d 182 (2001); see also *State* v. *Rodriguez*, supra, 223 Conn. 136; a good track record is not an essential prerequisite of reliability. ''[I]t is improper to discount an informant's information simply because he has no proven record of truthfulness or accuracy. . . . [The informant's] veracity can be shown in other ways.'' (Citations omitted; internal quotation marks omitted.) *United States* v. *Canfield*, 212 F.3d 713, 719 (2d Cir. 2000); see, e.g., *State* v. *Flores*, supra, 319 Conn. 226 (noting common factors for determining reliability of ''as yet untested'' informant);[9] *State* v. *Batts*, 281 Conn.

[9] This court explained in *State* v. *Flores*, supra, 319 Conn. 218, that ''[t]hree of the most common factors used to evaluate the reliability of an informant's tip are (1) corroboration of the information by [the] police, (2) declarations against penal interest by the informant-declarant, and (3) the reputation and past criminal behavior of the suspect.'' (Internal quotation marks omitted.) Id., 226.

682, 704 n.9, 916 A.2d 788 ("[w]e disagree . . . that the informant lacked reliability simply because he or she had no established track record with the police"), cert. denied, 552 U.S. 1047, 128 S. Ct. 667, 169 L. Ed. 2d 524 (2007).

Nor do we entirely agree with the defendant that the assertion in Podsiad's affidavit that the informant's "information has been proven true and reliable" was entitled to no weight in the reliability analysis. The issuing judge reasonably could have inferred from this assertion that the informant had provided information to the police in connection with at least one prior criminal matter that proved to be true and reliable. Such an assertion provides at least some information about the informant's past performance.[10] See, e.g., *United States* v. *Woosley*, 361 F.3d 924, 927–28 (6th Cir. 2004) (relying on averment that informant " 'has provided accurate information in the past' " in finding probable cause); *State* v. *DeFusco*, 224 Conn. 627, 643, 620 A.2d 746 (1993) (assertion in search warrant affidavit that informant had been used " 'numerous times in the past for various narcotic[s] cases' " permitted issuing judge reasonably to infer that "the informant had given trustworthy information in the past and, therefore, was reliable").

[10] We recognize, as the defendant points out, that, in *State* v. *DeFusco*, 224 Conn. 627, 620 A.2d 746 (1993), this court explained that "[t]he affiants' assertion that the informant was reliable does not itself give the issuing judge a basis [on] which to infer reliability." Id., 643. Nevertheless, this court further explained that an affiant's statement that an informant had been used in the past does give an issuing judge a basis to infer reliability. Id. The difference between these two types of statements is well recognized. "[A]n assertion that the informant is reliable leaves totally undisclosed the basis on which that judgment was made, while an assertion that . . . his past information was reliable at least indicates that the judgment is based [on] the informant's past performance." 2 W. LaFave, Search and Seizure (5th Ed. 2012) § 3.3 (b), p. 152. Because the affidavit in the present case contained a statement that information provided by the informant in the past had proved reliable, the affidavit provided a basis for the issuing judge to infer reliability.

It is true, however, that the affidavit does not disclose any details to substantiate the averment that the informant's information has been proven true and reliable, such as the nature of the information, whether it led to any seizures, arrests, or convictions, or the number of times the informant provided information that was reliable. The inference of reliability certainly would have been better supported and on firmer footing if the affiant had specified that the informant's information had led to prior seizures, arrests, or convictions. Compare *State* v. *DeFusco*, supra, 224 Conn. 643–44 ("inference [of reliability] would have been better supported by an affirmative statement by the affiants that this informant's information had, in the past, led to arrests and convictions"), with *State* v. *Rodriguez*, supra, 223 Conn. 136 (affidavit specified that information provided by informant in prior cases had "led to arrests and convictions").

Thus, the affidavit in this case favorably characterizes the informant's past performance but "leaves the nature of that performance undisclosed, so that the [issuing judge] making the probable cause determination has no basis for judging whether the [police] officer's characterization of that performance is justified." 2 W. LaFave, Search and Seizure (5th Ed. 2012) § 3.3 (b), p. 152. Accordingly, we conclude that the unsupported assertion that the informant's information has proven to be true and reliable, although not irrelevant, was entitled only to slight weight in the probable cause analysis. See, e.g., *United States* v. *Foree*, 43 F.3d 1572, 1575–76 (11th Cir. 1995) (assertion that informant "has provided reliable information in the past" is " 'entitled to only slight weight' " because it " 'leaves the nature of that [past] performance undisclosed' "); *United States* v. *Miller*, 753 F.2d 1475, 1480 (9th Cir. 1985) (averment that informant had provided federal agent with prior information that agent " 'knows to be true

through investigative activity' " is "both unclear and conclusory" and, therefore, "entitled to only slight weight").

Nonetheless, other aspects of Podsiad's affidavit established the informant's reliability. First, as the defendant acknowledges, the affidavit makes clear that the informant's identity was known to the police. "[A]s this court has repeatedly recognized, [t]he fact that an informant's identity is known . . . is significant because the informant could expect adverse consequences if the information that he provided was erroneous. Those consequences might range from a loss of confidence or indulgence by the police to prosecution for . . . falsely reporting an incident under General Statutes § 53a-180 [c], had the information supplied proved to be a fabrication." (Internal quotation marks omitted.) *State* v. *Flores*, supra, 319 Conn. 228.

According to the affidavit, the informant told Podsiad that he had seen "a black, rifle type firearm," as well as two magazines and a box of ammunition, inside the defendant's bedroom at 374 Peck Street. If a search by the police did not uncover any such evidence, the informant reasonably "could have expected adverse consequences for relaying false information." *State* v. *Flores*, supra, 319 Conn. 228; see, e.g., *United States* v. *Foree*, supra, 43 F.3d 1576 ("[a]s [the informant's] report consisted of facts readily verifiable upon a subsequent search by the police . . . the [informant] was unlikely to be untruthful, for, if the warrant issued, lies would likely be discovered in short order"). Accordingly, it was reasonable for the issuing judge to infer that the informant's claim that he saw the rifle and related evidence in the defendant's bedroom had not been fabricated.

Second, the affidavit avers that, "in the future, [the informant] will be willing to testify in court." As the

Supreme Court of Virginia aptly observed, such an assertion bolsters the reliability of the information provided by the informant: "It is true, as the defendant argues, that the allegation that the informer was 'willing to testify in court' did not bind him to testify. But the average citizen knows that when he does appear in court he must take an oath to tell the truth, he faces a charge of perjury for testifying falsely, and he may be confronted with prior inconsistent statements when cross-examined. With this beforehand knowledge, when one expresses a willingness to testify in court and stand by what he has told the police, an aura of credibility is added to his story which establishes its probability." *McNeill* v. *Commonwealth*, 213 Va. 200, 203, 191 S.E.2d 1 (1972); see, e.g., *United States* v. *Brown*, 93 Fed. Appx. 454, 456 (3d Cir.) ("[t]he affidavit's recitation of the informant's availability to have his veracity tested at all court proceedings also bolstered the reliability of the informant's information"), cert. denied, 542 U.S. 914, 124 S. Ct. 2868, 159 L. Ed. 2d 285 (2004). Although we acknowledge that an informant's willingness to testify in court proceedings may not, on its own, be sufficient to establish reliability, it is nevertheless an appropriate factor for the issuing judge to consider when examining an affidavit.

Third, the affidavit indicates that Podsiad independently corroborated certain information provided by the informant. See, e.g., *State* v. *DeFusco*, supra, 224 Conn. 644 ("corroboration would be a proper ground on which to base an inference of reliability"). In particular, the affidavit asserts that the defendant told the informant that he shot the victim using a nine millimeter caliber firearm, and that Podsiad "contacted [another police officer involved in the investigation], who confirmed that the weapon allegedly used in the homicide was a [nine millimeter]." The corroboration of the caliber of the firearm used in the shooting entitled the issuing

judge to give greater weight to the informant's claim that the defendant admitted to shooting the victim with that same caliber weapon.[11] See, e.g., *State* v. *Rodriguez*, supra, 223 Conn. 137 (assertion in affidavit that informant saw defendant carrying " 'large caliber revolver' " shortly before shooting was corroborated, and thus entitled to reliability, by evidence that "the murders were committed with a large caliber handgun").

Moreover, contrary to the defendant's criticism that the affidavit failed to corroborate any details that "only the shooter might know," it is well settled that "[t]he police are not required . . . to corroborate all of the information provided by a confidential informant. . . . Partial corroboration may suffice." (Citations omitted.) *State* v. *Clark*, 297 Conn. 1, 11, 997 A.2d 461 (2010). We conclude that the corroboration of the weapon's caliber, in conjunction with the aforementioned factors, provided strong evidence of the informant's reliability.

Finally, any doubts as to whether the affidavit establishes the informant's reliability are mitigated by the clear showing of the informant's basis of knowledge. Under *Illinois* v. *Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), an informant's reliability and basis of knowledge are no longer independent requirements for a finding of probable cause; rather, "a defi-

[11] The defendant asserts that the corroboration of the caliber of the firearm used in the shooting is of little significance because "[nine millimeter] is one of the most common ammunition types and appears in many Connecticut homicide cases." This court has questioned whether corroboration of "mundane facts" is entitled to weight in the probable cause analysis. See, e.g., *State* v. *DeFusco*, supra, 224 Conn. 645 n.24 ("we question whether verified information regarding such mundane facts as the defendant's address and the model of his cars, taken by itself, may properly be found to establish the reliability of an informant"). The defendant, however, introduced no evidence at the suppression hearing regarding the prevalence of firearms that fire nine millimeter ammunition. Therefore, we have no basis on which to question the issuing judge's reliance on the informant's corroboration of the caliber of the firearm used in the crimes.

ciency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." Id., 233. "It is clear from *Gates* that, in measuring overall the reliability of a tip, a fair indication of the informant's basis of knowledge may compensate for a less than conclusive demonstration of his credibility." *United States* v. *Laws*, 808 F.2d 92, 102 (D.C. Cir. 1986). Thus, "even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case." *Illinois* v. *Gates*, supra, 234; see, e.g., *State* v. *Johnson*, 286 Conn. 427, 440, 944 A.2d 297 ("the surest way to establish a basis of knowledge is by a showing that the informant is passing on what is to him [firsthand] information . . . [as] when a person indicates he has overheard the defendant planning or admitting criminal activity" (internal quotation marks omitted)), cert. denied, 555 U.S. 883, 129 S. Ct. 236, 172 L. Ed. 2d 144 (2008).

Podsiad's affidavit indicates that the information the informant provided to him was based on the informant's firsthand observations. The affidavit alleges that the defendant admitted to the informant that he shot the victim, and that the informant personally observed the rifle and ammunition inside the defendant's residence. We conclude that the issuing judge could rely on this particularized knowledge to overcome uncertainty as to the informant's reliability or veracity. See, e.g., *State* v. *Smith*, supra, 257 Conn. 225 (noting that informant's overhearing of defendant's planning or admitting criminal activity was " 'highly relevant' " to establishing probable cause under *Gates*); *State* v. *Morrill*, 205 Conn. 560, 566, 534 A.2d 1165 (1987) ("The affidavit states that the informant personally observed the defendant sell [marijuana] and [that] he heard the defendant state

that he had ten pounds to sell. From these statements the [issuing judge] could reasonably have inferred that the defendant was engaged in the ongoing criminal activity of selling [marijuana].").

Based on the totality of the circumstances, we conclude that Podsiad's search warrant affidavit, excised of any potentially tainted information from the initial warrantless entry, established probable cause to search the defendant's residence. Accordingly, the trial court properly denied the defendant's motion to suppress the evidence obtained during the search of his residence based on the independent source doctrine.

II

The defendant next claims that the trial court improperly denied his motion to suppress the statements he made to the police during his interrogation. Specifically, the defendant argues that, because the police officers subjected him to a series of coercive interrogation tactics that had the combined effect of overbearing his will, his statements were involuntary and, thus, should have been suppressed under the due process clause of the federal constitution.

In particular, the defendant asserts that the police officers overbore his will by (1) lying about the evidence they possessed in order to make their case against him seem stronger than it actually was, (2) maximizing the potential consequences if he did not confess by threatening him with lengthy prison sentences and, at one point, intimating that he could receive the death penalty, (3) telling him that his family members may be subject to arrest for possession of the assault rifle discovered during the search of 374 Peck Street, and (4) suggesting that he would face lesser charges or consequences if he did confess. The defendant further asserts that he was especially susceptible to these coercive tactics because he had not slept since the police had searched

his residence the night before. Alternatively, the defendant contends that his statements should have been suppressed under the Connecticut constitution. We disagree with the defendant's claims.

The following facts, which either were found by the trial court or are undisputed,[12] are relevant to this claim. At the time of the October 14, 2013 shooting, the defendant was twenty-one years old. He was in the process of obtaining his general equivalency diploma (GED) and had plans to pursue a degree in culinary arts and business management at Gateway Community College. He was employed full-time as a chef for Chipotle Mexican Grill (Chipotle). He had four prior felony convictions, most recently in September, 2010, for larceny in the third degree in violation of General Statutes § 53a-124. For that conviction, he was sentenced to five years imprisonment, execution suspended after thirty months, and three years of probation.[13]

Shortly after midnight, on October 20, 2013, while the police were conducting the preemptive sweep of the defendant's 374 Peck Street apartment, the defendant was detained on the scene in a police cruiser. The officers read the defendant his *Miranda* rights, which the defendant indicated he understood. Then, while the defendant was detained, Podsiad and an additional officer questioned him for approximately three minutes about the rifle they found in the attic. The defendant admitted that the gun belonged to him.[14]

[12] See *State* v. *Ashby*, 336 Conn. 452, 468, 247 A.3d 521 (2020) (Appellate review of the trial court's resolution of a constitutional claim "is not limited to the facts the trial court actually found in its decision on the defendant's motion to suppress. Rather, [this court] may also consider undisputed facts established in the record, including the evidence presented at trial." (Internal quotation marks omitted.)).

[13] The defendant noted at one point during his interrogation that he "just came home six months ago." Presumably, this was a reference to the thirty month sentence he had served.

[14] The defendant does not challenge the voluntariness of this admission.

Sometime in the early morning hours of October 20, 2013, the defendant was transported to the New Haven Police Department and placed in a holding cell. The defendant was unable to sleep while in the holding cell because it did not have a bed.[15] Later that morning, Detectives Nicole Natale and David Zaweski of the New Haven Police Department asked the defendant if he was willing to speak with them, and the defendant indicated that he was.

At approximately 10:30 a.m., Natale and Zaweski brought the defendant to an interrogation room, where they interviewed him for approximately three hours and thirty-eight minutes. The interview was recorded on video. The interrogation room was approximately fifteen feet by fifteen feet. The detectives sat the defendant at a table facing the camera. Natale sat at the table across from the defendant, and Zaweski sat in a chair against the wall behind Natale. The interview proceeded in a question and answer format. Natale asked most of the questions, with Zaweski interjecting intermittently. Both officers remained seated at all times while questioning the defendant. There were three three to ten minute periods, approximately every hour, during which one or both of the officers left the room and the questioning ceased.

Natale began by advising the defendant of his *Miranda* rights. She handed the defendant a *Miranda* waiver form and had him read his rights out loud from the form. Natale then asked the defendant: "Do you

[15] The only evidence that the defendant had not slept came from his own testimony at trial. The state contends that we cannot rely on this testimony when assessing the voluntariness of the defendant's confession on appeal because it "is self-serving, uncorroborated, and disputed by the state." Because, however, the state has not identified any evidence that contravenes this aspect of the defendant's testimony, we assume for purposes of our analysis that the defendant did not sleep between when he was transported to the police station and when his interview began.

understand that? Are you willing to talk to us?" The defendant responded: "Yes." Zaweski then removed the defendant's handcuffs. The defendant then initialed each line of the waiver form and signed and dated it.[16]

Natale started with questions about the assault rifle and ammunition seized from the defendant's apartment at 374 Peck Street. The defendant claimed that the rifle belonged to a third party, whom he identified as "Quan Bezzle," but that he "took the charge" because he did not want any of his family members to "go down for it . . . ."

Natale then asked the defendant if he had "hear[d] anything about any homicides." The defendant responded that he heard about the one that had just occurred "on the Boulevard." The discussion then turned to the circumstances of the victim's murder. The defendant denied knowing anything about the homicide beyond what he had heard from media reports.

At this point, approximately twenty minutes into the interview, Natale's tone changed from conversational to accusatory. For the remainder of the first hour of questioning, Natale began employing the interrogation tactics that the defendant now complains of on appeal. She confronted the defendant with the "evidence" of his guilt, some of which she had fabricated. Natale falsely told the defendant that two individuals who witnessed the homicide identified him from a photographic array as the shooter. Natale emphasized this false evidence at least six times during the first hour of questioning. Natale also told the defendant, falsely, that fingerprints were found on the shell casings left at the scene of the shooting and speculated that they would

[16] The defendant has never contested the adequacy of the *Miranda* warnings provided to him at the start of the interview or earlier that morning while he was detained in the cruiser. Nor has the defendant ever claimed that he did not knowingly and voluntarily waive his rights on either occasion.

match the defendant's prints when the forensic testing was completed.[17]

In addition, Natale offered the defendant favorable scenarios that could have potentially diminished his culpability and emphasized the severity of the sentence that he could receive for murder. Natale suggested that she thought the defendant "might have just been in the wrong place at the wrong time." Natale later emphasized that the defendant would inevitably be charged with some form of murder and that "the only difference . . . depending on our conversation today . . . is felony murder or being in the wrong place at the wrong time murder. You could either be the shooter, or the person [who] sits there and doesn't know what the fuck was going on, and was just in the wrong place at the wrong time. . . . You potentially don't have a chance to go home for sixty-five years, depending on how the outcome of today goes between me and you . . . ." At one point, Natale told the defendant that the witnesses who identified him had indicated that a second person was with him and that "you could get yourself out of this mess . . . if you tell the truth" about who else was there.

Natale also brought up the defendant's family members, at one point telling him that, although she "probably ha[d] no say in this," "your mom and your sister are probably gonna go down for that gun as well," and "they're probably gonna do warrants for them. Especially [because] you haven't shed any light on what's been going on with this."

[17] Natale also confronted the defendant with actual evidence. She repeatedly referenced the defendant's having recently been "yapping [his] mouth" and "bragging" about his involvement in the homicide, an apparent reference to the confidential informant's telling Podsiad that the defendant had admitted his involvement in the homicide. See part I of this opinion. Natale also pointed out that the assault rifle found in his attic was the same type of firearm used in the shooting and that it could be tested to see whether it matched the shell casings found at the scene.

Despite Natale's tactics, the defendant continued to categorically deny any knowledge of the homicide for the entire first hour of questioning. He pushed back on Natale's false evidence ploys, telling her that he "want[ed] to meet these people" who had supposedly identified him, and that "there ain't none of my fingerprints" on the shell casings. When Natale emphasized the virtual inevitability that the defendant would "go down" for the murder and that he was facing a potential sixty-five year jail sentence, the defendant responded, "I guess I'll take it to trial then," and, "I gotta see how it play[s] out. Hope for the best, pray for the wors[t]." At around forty minutes into questioning, after Natale again brought up the phony identification witnesses, the defendant had the following exchange with Natale:

"[The Defendant]: . . . . I don't be around nobody. I don't do nothing. I don't [know] why people put me in this stuff. . . . I just came home six months ago. Now I'm caught up in fucking bullshit over . . . fucking nothing. Excuse my language.

"Natale: That's why you should start talking. Tell me, what happened?

"[The Defendant]: I'm telling you the best I know.

"Natale: No, you're not. No, you're not. You're willing to go down for this by yourself?

"[The Defendant]: If that's what it takes. Innocent person go down gonna take a long time. I gotta do what I gotta do."

At approximately 11:30 a.m.—one hour into questioning—Natale left the room. When she returned a few minutes later, the defendant asked whether, if he told "the truth about who did it," he could "get some type of protection . . . ." After Natale assured him that he could, the defendant told her that he witnessed "Quan Bezzle" shoot and kill the victim, and that Quan Bezzle

threatened to kill him if he ever told the police. As the defendant said this, he buried his face into his shirt and, as he admitted at trial, pretended to cry. The defendant then emotionally proclaimed that he initially had withheld this information because Quan Bezzle knows where he lives, and he did not want "nothing to happen" to his sister and little niece, who live with him. According to the defendant, after Quan Bezzle shot the victim, the defendant ran to a pharmacy[18] to retrieve his bicycle and then rode his bicycle home. This story included his riding his bicycle from the pharmacy back in the direction of the crime scene and past the victim's lifeless body.

The defendant continued to falsely accuse Quan Bezzle of the murder through nearly two additional hours of questioning, despite Natale's and Zaweski's repeatedly telling him that they knew his story was a lie. Natale and Zaweski continued to remind him of his false story regarding Quan Bezzle and the fingerprint evidence, and they also repeatedly asserted that Wright, whom they had not actually yet spoken to, had told them that she was present at the shooting and that the defendant was there also.[19] They also continued to offer alternative scenarios to the defendant, such as that he shot the victim but did so accidentally or in self-defense. In addition, they continued to emphasize the lengthy prison sentence that the defendant was likely to receive. At one point, Natale made an apparent reference to the death penalty:

"Natale: . . . Do you see all the . . . little things that are gonna go in the report, that are just gonna?

[18] At one point, the defendant claimed that he retrieved his bicycle from CVS Pharmacy. At another point, he said that he retrieved his bicycle from Walgreens.

[19] Wright subsequently did provide a statement to the police in which she implicated the defendant.

"[The Defendant]: I ain't do nothing.

"Natale: Fry you? They're gonna put you in the chair. You gotta at least admit that that story's crazy. Whether it's true or not, doesn't it sound silly?"[20] The defendant had no noticeable or audible response to this statement.

Nevertheless, the defendant stuck to his story that he was innocent and that Quan Bezzle had shot the victim, until approximately 1:30 p.m.—three hours into the interrogation. At that point, the defendant's attempts to fabricate stories about Quan Bezzle and about his whereabouts on the night of the murder, including how he had used his bicycle to ride home after Quan Bezzle shot the victim, had all fallen apart. The following colloquy demonstrates that, immediately prior to confessing, it became apparent that the defendant's multiple lies were crumbling:

"Zaweski: So, you go and you get your bike, and then where do you go?

"[The Defendant]: I go home.

"Zaweski: To where?

"[The Defendant]: Fair Haven.

"Zaweski: And how do you get there?

"[The Defendant]: My bike.

"Zaweski: I know on a bike. How do you, what roads [do] you take?

"[The Defendant]: I go up, um, I go up on the Boulevard. I go up Bellevue.

"Zaweski: Tell me, you did not just say that. How, how do you get home?

[20] At trial, the defendant testified that he had interpreted this statement as suggesting that he would receive the death penalty, specifically, the electric chair, if he did not confess. The defendant testified that he believed that such a sentence would have been possible if he were convicted.

"[The Defendant]: My bike.

"Zaweski: Yeah, what roads do you take?

"[The Defendant]: The Boulevard.

"Zaweski: Okay, so, you went back up past the crime scene?

"[The Defendant]: Mm-hmm.

"Zaweski: You didn't do that.

"Natale: Bobby, you getting tired?

"[The Defendant]: Yeah.

"Natale: 'Cause you're, you're, that's crazy.

"Zaweski: Seriously, you wanna tell us you took your bike back all the way uphill, past the dead guy lying in the street and all the cops that were right there?

"Natale: Bobby, open your eyes."

This conversation continued as the defendant stuck to his story that he rode his bicycle home but was unable to explain which roads he took home and why he rode past the crime scene. Natale commented, "[y]ou can't even keep up with your own lies . . . ." Zaweski then explained: "We're not trying to confuse you, alright, but you're confusing us. You understand that? Everything you're telling us is just not making any sense."

Natale then said: "And you need to figure out what is going on here. Because you are looking at sixty-five years alone. With no conspirator because Quan [Bezzle] did not shoot this guy. Figure it out. And it better be quick 'cause you're digging yourself deeper and deeper. Now you don't know if you're at your girl's house or your mom's house. You're just lying and lying and lying. Covering yourself up. Trying to get out of this. And you're not gonna get out of it. The only thing that you're

gonna do is make it better for yourself in the long run. That's the only thing you're gonna do. I could tell you're a mope. But, you're not a mope 'cause you can't even, you can't even lie. You can't even lie. Look at all the lies. Four pages of lies. You're not a criminal. You're not a killer. First you're at your sister's house. Then you're at CVS, then Walgreens. It, I mean just five pages of, I'm on my sixth page now of complete lies."

A few minutes later, Natale said in relevant part: "I don't think you have any idea of how serious this is. No clue. The choice is yours. Murder, manslaughter. That's your choice. That's what you're looking at. Right now, you're looking at murder, felony murder. Just [because] you're being a knucklehead and not coming to grips that you're fucked if you continue to stick with this story. We have too much against you. Too much against you . . . [for you] to sit here and stick with the story that you're telling us."

The defendant then asked: "So, how much time do I get for manslaughter?" Natale responded: "I wouldn't be worried about time right now. I'd be worrying about . . . what your end result story's gonna be. . . . You have to worry about telling the truth right now and coming clean." The defendant responded, "[a]lright, I'll tell the truth," and proceeded to confess in detail to his role in the murder. He explained how he, Wright, and Johnson lured the victim to the scene and admitted that he shot the victim twice in the back while attempting to rob him but claimed that it "was an accident," and that he "didn't mean to shoot him twice. [He] didn't even press the trigger, actually." The officers concluded the interrogation shortly thereafter. The video recording depicted Natale ordering food for the defendant after the questioning ended, and the defendant eating the food that ultimately arrived.

Prior to trial, the defendant moved to suppress all evidence of the statements he made during the interro-

gation, citing what he claimed were the officers' coercive interrogation tactics, as well as his diminished ability to resist due to a lack of sleep. The trial court conducted an evidentiary hearing, at which the state introduced Zaweski's testimony, as well as the video recording and transcript of the interrogation. The defendant did not offer any evidence in support of his claims at the hearing.

With respect to the general tenor of the interrogation, the trial court found, on the basis of its review of the video recording, that "[the defendant] did not manifest any outward signs of intoxication. . . . The defendant at no point asked [Natale or Zaweski] to stop the interview and at no point asked to speak with an attorney. . . . The tenor of the questioning ranged from conversational to accusatory over the entire length of the interview . . . . The police remained seated during the entirety of the questioning, as did the defendant. The police did not stand up, display their weapons, or invade the 'personal space' of the defendant during their questioning. [Although] the police were at some points contentious in their questioning, at no point did the defendant's demeanor appear to change in response to the aggressive nature of the questioning. The defendant remained largely calm and low-key throughout the interview. He characterized himself, generally, as a 'calm' person. . . . The defendant appeared at ease contesting the accusations being made by the police during the interview . . . . He had no difficultly jousting with his interrogators. . . .

"There is no evidence before the court demonstrating that the defendant suffered from any mental or psychological infirmity, or was susceptible to coercion on the basis of age or education. The [video-recorded] interview demonstrates that the defendant had the capacity to understand his right against self-incrimination and seemed under control emotionally and psychologically.

The defendant, approximately three-quarters into the interview, was asked if he was tired because he closed his eyes. The defendant responded that he was tired, but . . . the remainder of the interrogation did not demonstrate any change in his response time to the questions being asked or his ability to logically communicate. His answers throughout the interview, including after the reference to his tiredness, uniformly had a contextual relationship to the questions being asked. He communicated coherently and rationally. He never manifested any confusion in his communications at any point in the interrogation."

The trial court denied the defendant's motion to suppress in a memorandum of decision, concluding that the state had proven by a preponderance of the evidence that the defendant's statements were voluntary. In reaching this conclusion, the court began by noting that the defendant was advised of and waived his *Miranda* rights on two occasions prior to the interview, which diminished the coercive nature of the interview.

The court then addressed individually the tactics specifically complained of by the defendant, determining that they were not inherently coercive and/or were not in fact causally related to the defendant's decision to confess. First, the court concluded that the officers' false evidence ploys did not render the defendant's statements involuntary because the video recording of the interview demonstrated that this tactic was "ineffectual" on the defendant. The court found that the defendant "demonstrated a large degree of self-savvy and assuredness," as evidenced by the fact that he concocted the Quan Bezzle artifice and "calmly parried with the police in an effort to test their claims" about the evidence they supposedly possessed against him.

Second, the court rejected the defendant's assertions that the officers coerced his statements with impermis-

sible minimization tactics or promises of leniency. The court reasoned that, although Natale and Zaweski mentioned lesser degrees of murder "that could be *available* in the event of an inculpatory statement," they gave him "no specific assurances that giving a statement would affect the manner or outcome of the criminal proceedings." (Emphasis in original.) Moreover, the court found that the officers' comments were not a "motivating cause of [the defendant's] confession."

Third, the court rejected the defendant's claim of impermissible threats of severe punishment. The court determined that, although Natale's reference to the death penalty was "plainly ill-advised," it did not "work to overbear the defendant's will to resist and was not causally related to his ultimate confession." The court noted that it was a "single, isolated" comment made approximately midway through the interview, the video recording demonstrated that it did not prompt any "overt reaction" by the defendant, and the defendant "continued to deny his involvement in the homicide until well after this single comment." Moreover, the court emphasized that, when the defendant did confess, "his voice was calm and deliberate . . . ."

Fourth, the court addressed Natale's comment that the defendant's mother and sister "are probably gonna go down for that gun," "[e]specially [because] you haven't shed any light on what's been going on" with the murder. The court acknowledged that the police "tread on dangerous ground" when they make such comments but ultimately found that Natale's comment "was insufficient to overbear the defendant's will to resist and was not causally related to his confession." The court noted that the defendant was already aware of his family's potential exposure for the rifle because he brought up the issue himself, without any prompting from Natale, at the start of the interview when he said he " 'took the charge' " for the rifle, so that his family

would not " 'go down for it . . . .' " The court found that the defendant "responded dispassionately" and appeared to have "brushed off" Natale's subsequent comment, which "suggests that he recognized [it] as an empty and vacuous ploy."

Finally, addressing the defendant's assertion that his ability to resist was diminished by lack of sleep, the trial court found, based on its review of the video recording of the interrogation, that the defendant was not "suffer[ing] from a lack of mental acuity or physical infirmity as a result of a lack of sleep that rendered his statement[s] involuntary." The court found that the defendant never "manifested any outward signs [that] suggest[ed] he did not understand the questions being asked, [or] the purpose of the interview, or that his will was overborne." To the contrary, the court found that the defendant "had no problem jousting with the police throughout the interview," was able to "communicate clearly and coherently," and generally "demonstrated a capacity to resist police accusations regarding the homicide."

Accordingly, the court denied the defendant's motion to suppress and admitted evidence of the defendant's statements, including the video recording and transcript thereof, at trial.

A

We begin with the defendant's claim under the federal constitution. The defendant argues that the trial court incorrectly determined that the police officers' coercive tactics, coupled with his diminished capacity to resist due to a lack of sleep, did not render his statements involuntary. We are not persuaded.

The governing legal principles are well established. "[T]he use of an involuntary confession in a criminal trial is a violation of due process. . . . [T]he test of

voluntariness is whether an examination of all the circumstances discloses that the conduct of law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined . . . . The ultimate test remains . . . [i]s the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. . . . The determination, by the trial court, whether a confession is voluntary must be grounded [in] a consideration of the circumstances surrounding it. . . .

"Factors that may be taken into account, upon a proper factual showing, include: the youth of the accused; his lack of education; his intelligence; the lack of any advice as to his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment, such as the deprivation of food and sleep. . . . Under the federal constitution, however, coercive police activity is a necessary predicate to the finding that a confession is not voluntary . . . .

"It is well settled that [t]he state bears the burden of proving the voluntariness of the defendant's confession by a preponderance of the evidence. . . . [As for the scope of our review] we note the established rule that [t]he trial court's findings as to the circumstances surrounding the defendant's interrogation and confession are findings of fact . . . which will not be overturned unless they are clearly erroneous. . . .

"[A]lthough we give deference to the trial court concerning these subsidiary factual determinations, such deference is not proper concerning the ultimate legal determination of voluntariness. . . . Consistent with

the well established approach taken by the United States Supreme Court, we review the voluntariness of a confession independently, based on our own scrupulous examination of the record. . . . [A]pplying the proper scope of review to the ultimate issue of voluntariness requires us . . . to conduct a plenary review of the record in order to make an independent determination of voluntariness." (Citations omitted; internal quotation marks omitted.) *State* v. *Andrews*, 313 Conn. 266, 321–22, 96 A.3d 1199 (2014).

We emphasize at the outset that, insofar as the trial court's underlying factual findings were predicated on its review of the video recording of the interrogation, we nonetheless defer to those findings unless they are clearly erroneous. A trial court's findings are entitled to deference, even if they are predicated on documentary evidence that this court is equally able to review for itself on appeal, rather than on the credibility and demeanor of the testifying witnesses. See, e.g., *State* v. *Lawrence*, 282 Conn. 141, 157, 920 A.2d 236 (2007) ("it would be improper for this court to supplant its credibility determinations for those of the fact finder, regardless of whether the fact finder relied on the cold printed record to make those determinations"); see also, e.g., *Skakel* v. *State*, 295 Conn. 447, 487 n.25, 991 A.2d 414 (2010) (rejecting proposition that "a less deferential standard [of review applies to] decisions pertaining to evidence that is not predicated on an assessment of the witness' demeanor"); *Besade* v. *Interstate Security Services*, 212 Conn. 441, 448–49, 562 A.2d 1086 (1989) (same). Accordingly, we are bound by the trial court's interpretation of what is reflected in the video recording unless it is clearly erroneous.[21] See, e.g., *State* v. *Weath-*

[21] This approach is consistent with that taken by the federal courts of appeals and many of our sister state courts. See, e.g., *United States* v. *McNeal*, 862 F.3d 1057, 1061–62 (10th Cir. 2017); *United States* v. *Murphy*, 703 F.3d 182, 188–89 (2d Cir. 2012); *United States* v. *Prokupek*, 632 F.3d 460, 462–63 (8th Cir. 2011); *Muniz* v. *Rovira-Martino*, 453 F.3d 10, 13 (1st Cir. 2006); *United States* v. *Navarro-Camacho*, 186 F.3d 701, 707–708 (6th

ers, 188 Conn. App. 600, 632, 205 A.3d 614 (2019) (holding that clear error review applies to trial court's finding, based on video recording, that defendant was not experiencing mental breakdown at time of crime), aff'd, 339 Conn. 187, A.3d (2021).

Turning to the substantive question of voluntariness, because the totality of the circumstances test "depend[s] [on] a weighing of the circumstances of pressure against the power of resistance of the person confessing"; (internal quotation marks omitted) *Dickerson* v. *United States*, 530 U.S. 428, 434, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000); we begin by addressing the circumstances of the interrogation before turning to the defendant's personal characteristics and the extent to which they enabled him to resist the pressures imposed on him.[22]

Cir. 1999); *Robinson* v. *State*, 5 N.E.3d 362, 365–66 (Ind. 2014); *State* v. *Williams*, 334 S.W.3d 177, 180–82 (Mo. App. 2011); *State* v. *Elders*, 192 N.J. 224, 244–45, 927 A.2d 1250 (2007); *Montanez* v. *State*, 195 S.W.3d 101, 109 (Tex. Crim. App. 2006). But see, e.g., *People* v. *Hughes*, 3 N.E.3d 297, 312–13 (Ill. App. 2013), rev'd in part on other grounds, 69 N.E.3d 791 (Ill. 2015); *Commonwealth* v. *Novo*, 442 Mass. 262, 266, 812 N.E.2d 1169 (2004); *State* v. *Binette*, 33 S.W.3d 215, 217 (Tenn. 2000).

[22] The concurrence and dissent purports to "begin with a more complete picture of the method employed in the defendant's interrogation . . . ." Part I of the concurring and dissenting opinion. Nevertheless, it is undisputed that, in determining whether a defendant's will was overborne, we are required to look at the totality of the circumstances, not just the behavior of the police. The concurrence and dissent makes no mention whatsoever of the multiple lies told by the defendant during the first three hours of the interrogation and, as a result, fails to address how the defendant's lies and his capacity to come up with them inform the question of whether his will was overcome by the officers.

Those are not the only facts that the concurrence and dissent neglects to present or address. There is also virtually no analysis of this defendant's personal characteristics (other than his race, which we will address separately), namely, his age at the time of the interrogation (twenty-one), education, or his experience with criminal proceedings, all of which are relevant to evaluating how the police tactics impacted this particular defendant. By leaving these facts out of the analysis and focusing nearly exclusively on the tactics used by the police, the concurrence and dissent ignores a necessary and crucial aspect of a proper analysis used to determine whether a defendant's will was overborne—to wit, the impact that the police tactics had on this defendant. See, e.g., *McCall* v. *Dutton*, 863 F.2d 454, 460 (6th

Applying this method, and having carefully reviewed the video recording of the interrogation and transcript thereof, we conclude that the trial court correctly determined that the state met its burden of establishing the voluntariness of the defendant's statements by a preponderance of the evidence.

We observe, at the outset, that the defendant was twice advised of his *Miranda* rights prior to being interrogated: first, in the police cruiser outside of 374 Peck Street, several hours before the interview, and second at the start of the interview with Natale and Zaweski. See, e.g., *State* v. *Lapointe*, 237 Conn. 694, 734, 678 A.2d 942 (provision of *Miranda* rights "is relevant to a finding of voluntariness"), cert. denied, 519 U.S. 994, 117 S. Ct. 484, 136 L. Ed. 2d 378 (1996). On both occasions, the defendant indicated that he understood his rights and nonetheless waived them and agreed to speak with the police.

The provision of adequate *Miranda* warnings is significant in our analysis because it has a bearing on both sides of the voluntariness calculus: "It bears on the coerciveness of the circumstances, for it reveals that

Cir. 1988) (when police yelled and pointed guns at accused, court ruled that, because defendant was educated, remained calm, waived his *Miranda* rights and accused someone else of committing crime, "even if [the defendant] had proved police coercion, he would still not prevail because the alleged 'coercion' was simply insufficient to overbear the will of the [defendant]"), cert. denied, 490 U.S. 1020, 109 S. Ct. 1744, 104 L. Ed. 2d 181 (1989).

Instead, the concurrence and dissent intimates that the mere use of these tactics at any point in the interrogation is sufficient to conclude that the defendant's will was overborne by them. This is not sufficient. Instead, it must be shown "that his will was overborne *because* of the coercive police activity in question. If the police misconduct at issue was not the 'crucial motivating factor' behind [the defendant's] decision to confess, the confession may not be suppressed." (Emphasis in original.) Id., 459. We understand the concurrence and dissent's palpable disdain for the police tactics used in this case; some of those tactics we also question. The flaw in the concurrence and dissent's position, however, is the sole focus on the police tactics to the exclusion of the other circumstances of the interview and the characteristics of this defendant.

the police were aware of the suspect's rights and presumably prepared to honor them. And . . . it bears [on] the defendant's susceptibility, for it shows that the defendant was aware he had a right not to talk to the police." 2 W. LaFave et al., Criminal Procedure (4th Ed. 2015) § 6.2 (c), p. 712; see, e.g., *Berkemer* v. *McCarty*, 468 U.S. 420, 433, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (purpose of *Miranda* warning is to "ensure that the police do not coerce or trick captive suspects into confessing . . . [and] to relieve the inherently compelling pressures generated by the custodial setting itself, which work to undermine the individual's will to resist" (emphasis omitted; footnote omitted; internal quotation marks omitted)); *State* v. *Correa*, 241 Conn. 322, 338, 696 A.2d 944 (1997) ("[a] [*Miranda*] warning at the time of the interrogation is indispensable to overcome its pressures and to [e]nsure that the individual knows he is free to exercise the privilege at that point in time" (internal quotation marks omitted)). Therefore, the United States Supreme Court repeatedly has recognized that, although "compliance with *Miranda* [does not] conclusively [establish] the voluntariness of a subsequent confession . . . cases in which a defendant can make a colorable argument that a self-incriminating statement was compelled despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." (Internal quotation marks omitted.) *Berkemer* v. *McCarty*, supra, 433 n.20; see, e.g., *Evans* v. *Dowd*, 932 F.2d 739, 742 (8th Cir.) ("the [*Miranda*] warnings were part of the totality of the circumstances and, thus, it would be difficult to conclude that the police coerced the confession while at the same time warning [the defendant] that he need not say anything"), cert. denied, 502 U.S. 944, 112 S. Ct. 385, 116 L. Ed. 2d 335 (1991).

We are unconvinced that this is one of those rare cases. We disagree with the defendant that the circum-

stances of the interrogation were so coercive as to overbear his will. The defendant takes issue with the following four interrogation tactics utilized throughout the interrogation by Natale and Zaweski: (1) false evidence ploys; (2) maximizing the consequences of not confessing; (3) threatening the defendant's family with arrest; and (4) suggesting that confessing would be met with leniency.[23] We agree with the trial court that the record demonstrates that the combined effect of these tactics did not cause the defendant's will to be overborne.

First, it is undisputed that Natale and Zaweski repeatedly referenced evidence that they did not have in order

[23] Natale and Zaweski employed a series of interrogation tactics from the Reid Technique. The Reid Technique is a method of interrogation pioneered by John E. Reid and Associates. The concurrence and dissent spends a great deal of time discussing and criticizing the Reid Technique. The concurrence and dissent cites to scholarly criticisms of this technique; see part I B of the concurring and dissenting opinion; while also acknowledging that the technique, in and of itself, is not illegal. See part II of the concurring and dissenting opinion. We are unaware of any federal cases, addressing voluntariness under the fourth amendment, that have deemed the Reid Technique illegal or impermissible to employ. We do, however, agree with the observations of the United States District Court for the District of Rhode Island, which noted that there is valid criticism of the technique; see *United States* v. *Monroe*, 264 F. Supp. 3d 376, 392–94 (D.R.I. 2017); and that "it is not difficult to imagine circumstances [in which], depending on how the Reid Technique is employed or misemployed on a juvenile or an individual with an intellectual disability, the tactics would have an impermissible, coercive effect." Id., 393 n.153. The defendant here falls into neither of those vulnerable categories, and we reject the concurrence and dissent's attempt to treat black males, including the defendant here, as if they either fall into one of these categories or should be treated as if they do.

Furthermore, the concurrence and dissent cites to *State* v. *Baker*, 147 Haw. 413, 433–35, 465 P.3d 860 (2020), as an example of a court that found that police use of multiple coercive interrogation techniques in conjunction with each other rendered the defendant's statement involuntary. See part I B of the concurring and dissenting opinion. Despite its reliance on some federal case law, the Hawaii Supreme Court also relied on its state specific case law; see *State* v. *Baker*, supra, 433–35; and, more importantly, concluded that the admission of the defendant's statement violated his *state* constitutional rights. See id., 435 ("the admission of the statement at trial violated [the defendant's] right against self-incrimination under [article one, § 10, of the Hawaii] [c]onstitution").

to give the impression that their case against the defendant was stronger than it actually was. The defendant specifically notes that they falsely claimed that two eyewitnesses to the murder had identified the defendant as the shooter, that fingerprints were found on the shell casings left at the scene of the shooting, and that Wright had given a statement that incriminated the defendant.

In *State* v. *Lapointe*, supra, 237 Conn. 694, this court held that a defendant's incriminating statement had not been obtained involuntarily when the police falsely represented that his fingerprints were found on the handle of the knife used to murder the victim. Id., 731–32. This court observed: "Such statements by the police designed to lead a suspect to believe that the case against him is strong are common investigative techniques and would rarely, if ever, be sufficient to overbear the defendant's will and to bring about a confession to a serious crime that is not freely self-determined . . . ." Id., 732. This court has repeated this observation in subsequent cases. See, e.g., *State* v. *Lawrence*, supra, 282 Conn. 176; *State* v. *Pinder*, 250 Conn. 385, 423, 736 A.2d 857 (1999). The defendant asks us to overrule or limit this aspect of *Lapointe*, not necessarily to "completely prohibit the use of ruses and ploys in interrogations," but, instead, to "discourage the practice by concluding that false statements about evidence, combined with other coercive tactics," may undermine a defendant's will.

Although we do not interpret *Lapointe* as suggesting that false evidence claims can never contribute to the involuntariness of a confession, we take this opportunity to emphasize that misrepresentations by interrogating officers about the strength of their case against a defendant can, under certain circumstances, add to the coercive nature of an interrogation. We decline at this time, however, to categorically condemn the use of such tactics or to adopt any bright-line rules as to their likely impact on the voluntariness of a confession.

The impact of false evidence ploys, if any, must instead be assessed in light of the totality of the circumstances, including the presence or absence of other coercive circumstances and the personal characteristics of the defendant. See, e.g., *United States* v. *Byram*, 145 F.3d 405, 408 (1st Cir. 1998) (noting that certain lies can be coercive depending on type of lie and circumstances); *State* v. *Lawrence*, supra, 282 Conn. 176 ("[i]t is well established . . . that although some types of police trickery can entail coercion . . . trickery is not automatically coercion" (internal quotation marks omitted)); *People* v. *Thomas*, 22 N.Y.3d 629, 642, 8 N.E.3d 308, 985 N.Y.S.2d 193 (2014) ("It is well established that not all deception of a suspect is coercive, but in extreme forms it may be. Whether deception or other psychologically directed stratagems actually eclipse individual will, will of course depend [on] the facts of each case, both as they bear [on] the means employed and the vulnerability of the declarant.").

In the present case, we agree with the trial court that, in light of the totality of the circumstances, the officers' false evidence ploys did not cause the defendant's will to be overborne. Most of the false evidence claims—particularly the claims about the identifying witnesses and fingerprint evidence—were made during the first hour of the interview and were not particularly egregious. The defendant demonstrated that he was perfectly capable of pushing back on these claims. He told Natale that he "want[ed] to meet these people" who had supposedly identified him and that "there ain't none of my fingerprints" on the shell casings. At one point, the defendant indicated, "I guess I'll take [the case] to trial then," and that he wanted to "see how it play[s] out. Hope for the best, pray for the wors[t]."

Most telling, one hour into the interview, the defendant falsely accused Quan Bezzle of committing the murder, even pretending to cry in order to make his

story seem more believable. The defendant maintained this fabricated story for two more hours, despite the officers' continued emphasis on the false evidence. This type of resistant conduct is strong evidence that the defendant's will to resist was not subverted by his interrogators' ploys. See, e.g., *State* v. *Correa*, supra, 241 Conn. 337 ("If the defendant's will was overborne, it is highly unlikely that he would have signed a statement in which he accused another individual of being the killer. The defendant's consistent claims that he had not been involved in the crimes provide strong evidence that his will was not overborne by any police tactics.").

Second, the defendant contends that Natale and Zaweski repeatedly exaggerated the consequences if the defendant did not confess. The defendant relies on the repeated instances in which the officers told the defendant that he could be sentenced to sixty-five years imprisonment or spend the rest of his life in jail. Our review of the video recording of the interrogation discloses at least seven such statements. Further, approximately two and one-half hours into the interview, Natale had the following exchange with the defendant while confronting him with the implausibility of his claims of innocence:

"Natale: . . . Do you see all the . . . little things that are gonna go in the report, that are just gonna?

"[The Defendant]: I ain't do nothing.

"Natale: Fry you? They're gonna put you in the chair. You gotta at least admit that that story's crazy. Whether it's true or not, doesn't it sound silly?"

We disagree that these statements rendered the defendant's confession involuntary. The officers' statements that he was facing sixty-five years in prison were not impermissible because his potential exposure far exceeded that. Indeed, the trial court ultimately imposed

a total effective sentence of ninety years imprisonment without the possibility of release, consisting of sixty years for murder, twenty years for conspiracy to commit robbery in the first degree, and ten years for criminal possession of a firearm, all running consecutively. Accordingly, we cannot conclude that the officers' statements regarding the defendant's potential exposure were unduly coercive because they were an accurate representation of the severity of the consequences that the defendant was facing. See, e.g., *United States* v. *Santos-Garcia*, 313 F.3d 1073, 1079 (8th Cir. 2002) (concluding that police's statement to defendant that his "children would be driving by the time he would be released from prison" was "an accurate [representation] of [the defendant's] predicament" and, therefore, "not unduly coercive" (internal quotation marks omitted)); *United States* v. *Nash*, 910 F.2d 749, 753 (11th Cir. 1990) ("telling the [defendant] in a noncoercive manner of the realistically expected penalties and encouraging [him] to tell the truth [are] no more than affording [him] the chance to make an informed decision with respect to [his] cooperation with the government" (internal quotation marks omitted)).

We also agree with the trial court that Natale's apparent reference to the death penalty did not cause the defendant's will to be overborne. Although we view this statement as inappropriate, as the trial court found, the comment was a single, isolated statement made approximately two and one-half hours into the interrogation. It was never referenced again, and Zaweski quickly changed the subject to more mundane details about the defendant's mode of transportation on the night of the murder. The defendant had no audible reaction to the comment and continued his attempts to pin the murder on Quan Bezzle well after the statement was made.

Third, the defendant contends that Natale made impermissible threats that the defendant's family would be arrested if he did not confess. Specifically, Natale said that, although she "probably ha[d] no say in this," "they're probably gonna do warrants for them. Especially [because] you haven't shed any light on what's been going on with this." We agree with the trial court that the coercive impact of this statement is somewhat diminished in light of the fact that it was the defendant who had previously brought up the potential of his family's criminal exposure for the rifle, thereby indicating that he already was aware of the issue prior to Natale's comment. At the very least, however, Natale's comment apparently was intended to exploit and play on the defendant's previously expressed concern. We therefore do not condone it and acknowledge that such tactics can provide a basis for concluding that a confession is involuntary.

Ultimately, however, we agree with the trial court that this single comment was not causally related to the defendant's confession. As the trial court found, the defendant "responded dispassionately" and appeared to have "brushed off" Natale's comment, which "suggests that he recognized [it] as an empty and vacuous ploy." Further, Natale made the comment very early in the interrogation, and the defendant denied his involvement and blamed Quan Bezzle for more than two hours after this comment was made. See, e.g., *State* v. *Correa*, supra, 241 Conn. 338 (rejecting claim that police statements about immigration status of defendant's family and purported contract on defendant's life overcame his will when "[t]he defendant reacted calmly when these statements were made and exhibited no signs of duress," and "[i]t was several hours later before the defendant himself initiated a statement seeking to exculpate himself and to inculpate [a third party]").

Finally, the defendant contends that the officers engaged in impermissible minimization and suggested that he would receive leniency in exchange for confessing. The video recording and transcript reveal that Natale and Zaweski made a number of such statements throughout the interview. At one point, Natale told the defendant that he would inevitably be charged with some form of murder, and that "the only difference . . . depending on our conversation today . . . is felony murder or being in the wrong place at the wrong time murder. You could either be the shooter, or the person [who] sits there and doesn't know what the fuck was going on, and was just in the wrong place at the wrong time. . . . You potentially don't have a chance to go home for sixty-five years, depending on how the outcome of today goes between me and you . . . ."

On another occasion, Natale said, "you could get yourself out of this mess . . . if you tell the truth . . . ." Later in the interview, Zaweski said: "[I]f you wanna spend the rest of your life in prison and sit there and keep your mouth shut, that's fine. But if you wanna salvage some years later on or explain to people, explain to your mom, that this isn't who you really are. It was an accident. You made a mistake. This is the time you have to do that."

Lastly, just before the defendant confessed to shooting the victim, Natale said: "The choice is yours. Murder, manslaughter. . . . Right now, you're looking at murder, felony murder. Just [because] you're being a knucklehead and not coming to grips that you're fucked if you continue to stick with this story." The defendant responded by asking, "[s]o, how much time do I get for manslaughter?" Natale responded: "I wouldn't be worried about time right now. I'd be worrying about . . . what your end result story's gonna be. . . . You have to worry about telling the truth right now and coming clean." The defendant then said, "[a]lright, I'll

tell the truth," and confessed to having shot the victim, though he claimed he did so accidentally.

This court previously has explained: "[When] [t]he defendant was given no specific assurances that giving a statement would affect the outcome of the criminal proceedings . . . [e]ncouraging a suspect to tell the truth . . . does not, as a matter of law, overcome a confessor's will . . . . Neither is a statement that the accused's cooperation will be made known to the court sufficient inducement so as to render a subsequent incriminating statement involuntary. . . . Several courts have held that remarks of the police far more explicitly indicating a defendant's willingness to make a statement would be viewed favorably do not render his confession involuntary. . . . [A] statement [that the accused's cooperation would be to his benefit] by a law enforcement officer falls *far* short of creating the compelling pressures which work to undermine the individual's will to resist and to compel him to speak [when] he would not otherwise do so freely." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Pinder*, supra, 250 Conn. 424.

Although Natale's comments purported to encourage the defendant to "tell the truth" and even suggested that he could be charged with the lesser crime of manslaughter depending on the statement he gave, neither Natale or Zaweski ever definitively promised the defendant that he would be charged only with manslaughter if he confessed, or that he would receive a lesser sentence for doing so. Nor did the officers ever represent that they had the authority to determine the offense he was charged with, or that the penalties that attach to manslaughter were not severe. Such vague, predictive suggestions that a confession could potentially benefit the defendant or cause a fact finder to view him more

favorably are not inherently coercive.[24] See, e.g., *United States* v. *Jackson*, 608 F.3d 100, 103 (1st Cir.) ("a suggestion that cooperation might induce leniency" does not amount to coercion), cert. denied, 562 U.S. 990, 131 S. Ct. 435, 178 L. Ed. 2d 337 (2010); *Commonwealth* v. *O'Brian*, 445 Mass. 720, 725, 727, 840 N.E.2d 500 (detective's comment that shooting could have been accident did not render defendant's confession involuntary under totality of circumstances, and detective's comment that he would bring defendant's cooperation to prosecutor's attention and that defendant " 'may see the light of day down the road' " did not "coerce the defendant into confessing because the detective did not promise a lesser sentence and did not hold himself out as possessing the authority to enter into a plea with, or reduce the charges for, the defendant"), cert. denied, 549 U.S. 898, 127 S. Ct. 213, 166 L. Ed. 2d 171 (2006).[25]

[24] The concurrence and dissent focuses on the following statement by Natale: "The choice is yours. Murder, manslaughter. That's your choice." The concurrence and dissent asserts that the statement "was not simply a case in which the interrogators falsely indicated that the defendant's confession to an accidental shooting would result in a manslaughter charge, when the choice of charges actually would be a matter left entirely to the prosecutor's discretion (i.e., misrepresentation of fact). Rather, the interrogators affirmatively misled the defendant by telling him that the accident/self-defense narrative proposed to him was relevant and material to his criminal exposure for felony murder, which was untrue as a matter of law." (Emphasis omitted.) Footnote 18 of the concurring and dissenting opinion. This is clearly a stretch. It strains credulity to think that the officers were telling the defendant that he could decide which charges to levy against himself as opposed to telling him that it was his choice whether to tell the truth. Of course, the defendant himself, who had significant, prior experience with the criminal justice system and also testified in this case, never alleged that he interpreted the officers' comments in this way. Furthermore, although the prosecutors could still charge the defendant with felony murder, even if the defendant claimed that the shooting was accidental or in self-defense, the prosecutors could consider that factor when choosing whether to charge the defendant with felony murder.

[25] The concurrence and dissent asserts that Natale's "implied promise that the defendant's confession could result in only a manslaughter charge . . . plainly was the tipping point for the defendant . . . ." Part II of the concurring and dissenting opinion. We disagree with the concurrence and dissent's conclusion that this comment "plainly was the tipping point . . . ." Id.

Additional circumstances of the interrogation lead us to conclude that the officers' tactics, even when considered in combination with each other, did not cause the defendant's will to be overborne. The length of the interrogation that led to his confession—approximately three hours—is far shorter than other interrogations held not to have been inherently coercive. See, e.g., *State* v. *DeAngelis*, 200 Conn. 224, 233, 235, 511 A.2d 310 (1986) (ten and one-half hour interview did not necessarily mean that defendant's admissions were involuntary); *State* v. *Carter*, 189 Conn. 631, 637–38, 458 A.2d 379 (1983) (eight hour detention and interview, "though substantial in duration, does not remotely approach the length of those interrogations held to be so objectionable on that ground . . . as to warrant reversal of a finding by a trial court that a confession was voluntary"); see also, e.g., *Berghuis* v. *Thompkins*, 560 U.S. 370, 387, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010) ("there is no authority for the proposition that an interrogation [that lasted three hours] is inherently coercive"). There also were three three to ten minute periods, approximately every hour, when either one or both of the officers left the room and the questioning ceased.

Additionally, during the interrogation, Natale and Zaweski never subjected the defendant to actual physical abuse or threats of such abuse. Although their tones ranged from conversational to accusatory throughout the interrogation, they both remained seated at all times. They never invaded the defendant's personal space, displayed their weapons or engaged in any other acts of intimidation. Nor did the defendant ever ask for

Instead, we focus on how all of these tactics affected this particular defendant and his will to resist based on the totality of the circumstances. See *Dickerson* v. *United States*, supra, 530 U.S. 434 (totality of circumstances test "depend[s] [on] a weighing of the circumstances of pressure against the power of resistance of the person confessing" (internal quotation marks omitted)).

a break or for the questioning to cease for any reason, make any suggestion that he wanted to invoke his right to silence, or ask for an attorney.

The video recording also provides evidence that the tactics of the interrogators did not affect the demeanor of the defendant, who was familiar with the criminal justice system. The trial court found in relevant part: "[Although] the police were at some points contentious in their questioning, at no point did the defendant's demeanor appear to change in response to the aggressive nature of the questioning. The defendant remained largely calm and low-key throughout the interview. He characterized himself, generally, as a 'calm' person. . . . The defendant appeared at ease contesting the accusations being made by the police during the interview . . . . He had no difficultly jousting with his interrogators."

The concurrence and dissent asserts that "[t]his view conforms to case law that implicitly assumes that a person's external demeanor provides a reliable indication of his or her internal emotional state during an interrogation, and, thus, a calm demeanor suggests the absence of coercion. This unexamined assumption strikes me as dubious at best. We now know that a subject's external appearance may not accurately reflect his or her internal reality." Footnote 21 of the concurring and dissenting opinion. The concurrence and dissent relies on law review articles and studies that are not in the record to argue that the trial court was not situated "to know what psychological, emotional, and cultural factors actually lay behind this defendant's calm demeanor." Id.

It is undisputed, however, that "[a] defendant's calm demeanor and the lucidity of his statements weigh in favor of finding his confession voluntary." *United States* v. *Jacques*, 744 F.3d 804, 809 (1st Cir.), cert. denied,

574 U.S. 853, 135 S. Ct. 131, 190 L. Ed. 2d 100 (2014). The concurrence and dissent seems to assert that a fact finder cannot make inferences from the demeanor of a witness, which is contrary to the well established principle that "[a]n appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; [thus, the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Internal quotation marks omitted.) *State* v. *Lawrence*, supra, 282 Conn. 155. Accordingly, although we are mindful that sometimes one's demeanor can be impacted by psychological, social and cultural factors, that does not mean that one's demeanor cannot be considered at all by a fact finder. Demeanor can be considered as *a factor* in assessing the totality of the circumstances. The inferences drawn from one's demeanor may vary depending on the individual witness or party and the particular circumstances of the case. In this case, we cannot conclude that the trial court erred in making the inference that the defendant's calm demeanor was one factor demonstrating that the defendant's will was not overborne by police tactics.

Perhaps more fundamental, the concurrence and dissent's bald assertion that the defendant's calm and low-key demeanor is consistent with "a substantial body of literature indicating that it is not uncommon for individuals growing up in a violent home or neighborhood, as the defendant in the present case did, to adopt a mask of unemotional fearlessness as a coping mechanism"; footnote 21 of the concurring and dissenting opinion; is belied by the very facts of this interview. The concurrence and dissent explains that the masking behavior is used as a way to show bravado and to avoid vulnerability. See id. But the defendant did just the opposite for a large part of the interview.

If the defendant was ever one of those mask wearing individuals of which the concurrence and dissent speaks, he certainly had no problem shedding that mask when he tried to show fear and vulnerability as he told the Quan Bezzle lie during the interview. He went as far as pretending to cry and telling the officers that he was afraid of Quan Bezzle. The concurrence and dissent does not acknowledge that this defendant either does not fit the concurrence and dissent's picture of someone who wears a "mask of unemotional fearlessness"; id.; or that, even if he did at some point, he shed the so-called mask when he cried and proclaimed fear of Quan Bezzle. By doing so, the concurrence and dissent shows its hand—it does not consider this particular defendant, as is required, and, instead, focuses on the potential, theoretical impact of police tactics on a generalized group of defendants.

Indeed, the defendant's tears and his expression of fear of Quan Bezzle strongly weigh against the concurrence and dissent's theory that this defendant's calm and low-key demeanor was just a coping mechanism. Instead, the defendant's ability to feign an emotional outburst and then return to his calm and low-key demeanor demonstrates that he was in total control of his emotions during the interrogation. Whatever the merit of the concurrence and dissent's tangential argument about what some "individuals [who grow] up in a violent home or neighborhood";[26] id.; do to mask their

[26] Although the concurrence and dissent connects this phenomenon of masking with growing up in violent homes or neighborhoods, the majority of the sources on which the concurrence and dissent relies appear to connect this phenomenon to race and gender—particularly black males. We reject the concurrence and dissent's invitation to apply these race and gender based overgeneralizations to this particular defendant. Instead, we choose to believe the defendant, who not only cried during the interview, but also described himself as, generally, a calm person. Presumably, the defendant knows himself best, notwithstanding the concurrence and dissent's generalizations about males, particularly black males. To be clear, this defendant never claimed at any point in this case—not at the suppression hearing, in his testimony at trial, at the sentencing hearing, in his appellate brief or

emotions, this defendant certainly did not fit that paradigm in the police interview at issue in this case.[27]

Thus, although the concurrence and dissent packages its position as trying to appreciate the plight of individuals who grow up in a violent home or neighborhood, by painting with such a broad brush, the concurrence and dissent's position perpetuates gross overgeneralizations, instead of looking at the individual characteristics of this particular defendant, an individual who freely showed some emotion and fear during the police interview.

Indeed, the record also does not support the defendant's claim that his personal characteristics rendered him especially susceptible to coercion. The defendant was twenty-one years old at the time of his interview. He was gainfully employed full-time as a chef at Chipotle, was in the process of obtaining his GED, and

at oral argument before this court—that he wore a mask of unemotional fearlessness. See footnote 21 of the concurring and dissenting opinion.

[27] The concurrence and dissent asserts that "one of the officers said to the defendant, well into the interrogation, 'I think you're putting a tough guy front on' . . . ." Footnote 21 of the concurring and dissenting opinion. A review of the following colloquy between the defendant and Natale reveals that Natale's comment related to a conversation about whether the defendant had been sleeping:

"Natale: I bet you haven't even slept all week, have you?

"[The Defendant]: Yeah.

"Natale: You have?

"[The Defendant]: I slept.

"Natale: You slept good, after being involved in a murder?

"[The Defendant]: [No response heard].

"Natale: I don't think you have. I think you're putting a tough guy front on.

"[The Defendant]: No, I did. I slept good."

Based on the foregoing, contrary to the concurrence and dissent, we would not conclude that this one comment related to whether the defendant was sleeping, made in the course of an approximately three hour interview, means that the record in the present case supports the concurrence and dissent's hypothesis that the defendant's calm, low-key demeanor was the result of "a mask of unemotional fearlessness" when we consider the entire interview, as we are required to do.

planned to pursue college degrees in culinary arts and business management. There was no evidence presented, either at the suppression hearing or at trial, to suggest that the defendant was not of normal intelligence.[28] Such characteristics, coupled with the valid *Miranda* warnings twice provided and waived by him prior to any questioning, provide strong support for a finding of voluntariness. See, e.g., *State* v. *Ramos*, 317

[28] The defendant and the concurrence and dissent rely on a psychological evaluation report that the defendant submitted to the court at his sentencing hearing as support for his claim that he was susceptible to coercion. See footnote 20 of the concurring and dissenting opinion. This was not the presentence investigation report but, instead, a report from a psychologist hired by the defendant. The report states that cognitive tests revealed that the defendant had a low average intelligence quotient (IQ) of between 80 and 85, had "mild intellectual impairments," and had a "tendency to cede to authority or to social pressure." The state contends that this court cannot consider the assertions in this report in determining whether the defendant's statements were voluntary because the report was submitted at the defendant's sentencing hearing rather than at trial or at the suppression hearing. It is by now well settled that, "in order to determine whether the defendant's constitutional rights have been infringed, [w]e review the record in its entirety and are not limited to the evidence before the trial court at the time the ruling was made on the motion to suppress." (Internal quotation marks omitted.) *State* v. *Edwards*, 299 Conn. 419, 439 n.16, 11 A.3d 116 (2011). However, at the sentencing hearing, the trial court concluded that "[the defendant's] conduct during this crime and the aftermath of the crime, in the court's view, clearly contradicts and undermines [the psychologist's] statements that the defendant, in his words, was likely to be nonassertive and adapt socially to his surroundings. He certainly did not [cede] control to other people based on the court's view of the credible evidence that was presented." The sentencing court placed no temporal limitation on what it meant by the "aftermath of the crime," and it considered all of the evidence at the trial. As this court has explained, appellate review of the record in connection with a constitutional claim "must take account of any undisputed evidence that does not support the trial court's ruling in favor of the state *but that the trial court did not expressly discredit*." (Emphasis added.) *State* v. *Edmonds*, 323 Conn. 34, 39, 145 A.3d 861 (2016). Accordingly, because the trial court expressly rejected the psychologist's conclusion that the defendant was likely to be nonassertive, adapt socially to his surroundings and cede control to other people, we do not consider it on appeal in assessing the voluntariness of the defendant's statements. We can find no basis for the concurrence and dissent's reliance on allegations by the defendant that were rejected by the trial court at the sentencing hearing.

Conn. 19, 32–33, 114 A.3d 1202 (2015) (Confession was voluntary when "[t]he defendant was forty-three years old at the time of his confession. He had obtained his [GED] certificate, was able to read, and was twice read his *Miranda* rights by [the police]. The defendant appeared calm and cooperative throughout his interview. Once he received his *Miranda* warnings, he stated repeatedly that he understood his rights and the implications of waiving them."); *State* v. *Pinder*, supra, 250 Conn. 425 (rejecting argument that defendant was "susceptible to coercion by the police" when defendant "was twenty years old, apparently had completed high school," "was gainfully employed as a car salesman," and expert witness testified that defendant "was of normal intelligence").

As we noted previously in this opinion, the defendant was not a novice to the criminal justice system. He had multiple prior felony convictions and, at the time of his interrogation, had only recently been released from serving a two and one-half year sentence of incarceration. This prior experience suggests not only that the defendant was well equipped to retain his "capacity for self-determination"; (internal quotation marks omitted) *State* v. *Andrews*, supra, 313 Conn. 321; in the face of coercive or deceptive police tactics, but also that he fully understood the nature of his *Miranda* rights and the consequences of waiving (or never invoking) them. Compare *State* v. *Madera*, 210 Conn. 22, 45, 554 A.2d 263 (1989) (defendant's "prior exposure to the criminal justice system, due to some seventeen prior arrests," was relevant to "his knowledge of his [*Miranda*] rights," as well as to whether interrogation tactics had overborne his will), with *People* v. *Thomas*, supra, 22 N.Y.3d 642 (coercive interrogation tactics "were manifestly lethal to self-determination when deployed against [the] defendant, an unsophisticated individual without experience in the criminal justice system").

We also disagree that the record supports the defendant's claim that he was rendered especially susceptible to coercion due to lack of sleep. It is well settled that "tiredness, or even exhaustion, does not compel the conclusion that [the defendant's] will was overborne or [his] capacity for self-determination critically impaired." (Internal quotation marks omitted.) *United States* v. *Calvetti*, 836 F.3d 654, 664 (6th Cir. 2016), cert. denied, U.S. , 137 S. Ct. 1597, 197 L. Ed. 2d 723 (2017); see, e.g., *State* v. *Pinder*, supra, 250 Conn. 425 (fact that defendant had mental deficiency or was upset emotionally "[does not] necessarily render his statements inadmissible" (internal quotation marks omitted)).

Moreover, the trial court specifically found, on the basis of its review of the video recording of the interrogation, that the defendant did not "[suffer] from a lack of mental acuity or physical infirmity as a result of a lack of sleep . . . ." Such a factual finding defeats the defendant's claim that his lack of sleep contributed to the involuntariness of his confession because "[a] diminished mental state is only relevant to the voluntariness inquiry if it made mental or physical coercion by the police more effective." (Internal quotation marks omitted.) *United States* v. *Salameh*, 152 F.3d 88, 117 (2d Cir. 1998), cert. denied sub nom. *Abouhalima* v. *United States*, 525 U.S. 1112, 119 S. Ct. 885, 142 L. Ed. 2d 785 (1999), and cert. denied, 526 U.S. 1028, 119 S. Ct. 1273, 143 L. Ed. 2d 368 (1999), and cert. denied sub nom. *Ayyad* v. *United States*, 526 U.S. 1028, 119 S. Ct. 1274, 143 L. Ed. 2d 368 (1999), and cert. denied sub nom. *Ajaj* v. *United States*, 526 U.S. 1044, 119 S. Ct. 1345, 143 L. Ed. 2d 508 (1999); see, e.g., *United States* v. *Calvetti*, supra, 836 F.3d 664 (defendant's claim that she was tired did not render her statements involuntary when "nothing in the record suggest[ed] she was vulnerable as a result").

After a review of the video recording, we conclude that the trial court's finding was reasonable and, thus, not clearly erroneous. Although the defendant showed signs of being tired during the interview and appeared to begin to doze off whenever the officers would leave the interrogation room, the defendant's performance during the interrogation supports the trial court's finding that such a condition did not diminish his ability to resist. As the trial court found, the defendant was lucid and responsive throughout the interview, was able to understand the officers' questions, and communicated clearly and coherently. In addition, the defendant had the wherewithal to push back at the officers' interrogation tactics, consistently denying his involvement in the shooting, concocting the lie that Quan Bezzle committed the murder and maintaining that lie for multiple hours, and even pretending to cry to give credibility to his story. This was not delirium; by the defendant's own admission, it was calculated. These facts undercut any claim that the defendant's lack of sleep diminished his ability to resist. See, e.g., *State* v. *DeAngelis*, supra, 200 Conn. 234 ("[the officer] was aware that the defendant had said that he had not slept the night before, but he testified [that] the defendant appeared fresh and alert throughout the questioning"); *State* v. *Carter*, supra, 189 Conn. 638 ("despite some sleepiness observed near the end of the conversation with the police, [the defendant] was alert and responsive").

In sum, the totality of the circumstances convinces us that "the defendant did not confess because his will . . . was overborne, but rather that he confessed of his own free will because he believed it would be in his best interest to do so." *State* v. *James*, 237 Conn. 390, 428, 678 A.2d 1338 (1996). Accordingly, we conclude that the state proved the voluntariness of the defendant's statements by a preponderance of the evidence

and that their admission at trial did not violate the due process clause of the federal constitution.

B

Finally, the defendant contends that, even if his confession is voluntary under the federal constitution, we should "set a higher standard under [our] state case law." Specifically, the defendant asks us to "create a prophylactic constitutional rule requiring trial courts to strongly consider whether [the coercive tactics used in this case] raise questions about the voluntariness of a confession." The defendant relies on the settled proposition that "the federal constitution sets the floor, not the ceiling, on individual rights"; *State* v. *Purcell*, 331 Conn. 318, 341, 203 A.3d 542 (2019); and contends that such a step is warranted in light of the multifactor test set forth in *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992).

"In construing the Connecticut constitution to determine whether it provides our citizens with greater protections than the federal constitution, we employ a multifactor approach that we first adopted in [*State* v. *Geisler*, supra, 222 Conn. 684–85]. The factors that we consider are (1) the text of the relevant constitutional provisions; (2) related Connecticut precedents; (3) persuasive federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of [the] constitutional [framers]; and (6) contemporary understandings of applicable economic and sociological norms [otherwise described as public policies]." (Internal quotation marks omitted.) *State* v. *Sawyer*, 335 Conn. 29, 50, 225 A.3d 668 (2020).

We conclude that a review of the *Geisler* factors does not support the defendant's claim that we should adopt a prophylactic constitutional rule requiring trial courts to strongly consider whether coercive tactics raise questions about the voluntariness of a confession. First, the

text of the state due process clause does not support the defendant's claim. See, e.g., *State* v. *Lockhart*, 298 Conn. 537, 551–52, 4 A.3d 1176 (2010) (concluding that similarity between text of federal and state due process clauses supports "a common interpretation of the provisions" (internal quotation marks omitted)); see also footnotes 7 and 8 of this opinion. Second, the defendant fails to point to any Connecticut authority in support of his claim that the state constitutional due process clause requires a more stringent analysis regarding the admission of confessions. To the contrary, this court has declined to require a higher burden for the admission of confessions under the state constitution than the federal constitution. See, e.g., *State* v. *Lockhart*, supra, 543–44 (declining to require recording of confessions as constitutional requirement or under court's supervisory authority). Third, the defendant fails to cite to any federal precedent to support his claim. Fourth, the only case from a sister state cited by the defendant is *Commonwealth* v. *DiGiambattista*, 442 Mass. 423, 436–40, 813 N.E.2d 516 (2004). We find that case unpersuasive because Massachusetts law requires the state to prove the voluntariness of a confession beyond a reasonable doubt; see, e.g., id., 439, 441, 448; and this court has rejected such a requirement. See, e.g., *State* v. *James*, supra, 237 Conn. 412–26 (declining to require state to prove voluntariness of confession beyond reasonable doubt). Fifth, the defendant does not point to any evidence that the authors of our state constitution intended to provide greater protection against involuntary confessions. See *State* v. *Lockhart*, supra, 556.

Furthermore, public policy also does not support adopting the prophylactic rule requested by the defendant. Trial courts are already required to "strongly consider" the coercive nature of an interrogation in determining whether, under the totality of the circumstances, a defendant's statements have been obtained

involuntarily. We trust that our trial courts are perfectly capable of taking into account any available social science in assessing whether particular interrogation tactics combined to overbear a defendant's will, to the extent they deem it appropriate.

Moreover, defendants are capable of vindicating such concerns by introducing, at the suppression hearing or at trial, social science evidence or expert testimony that they believe bears on the likelihood that an interrogation overbore a defendant's will. Defendants may also obtain appropriate jury instructions regarding the likelihood that particular interrogation tactics render a confession unreliable.[29] Accordingly, we decline to adopt a prophylactic rule at this time.

We reiterate that all of the circumstances of an interrogation must be taken into account in determining whether a confession is voluntary. Nevertheless, there are limits and boundaries that the police should not cross when conducting an interrogation. We find some of the tactics in the present case close to that line, and, in certain circumstances, those tactics could very well produce involuntary confessions. In light of these concerns, law enforcement would be ill-advised to read today's decision as condoning the use of all of the tactics employed in this case.

[29] We note that the defendant called such an expert witness, and obtained such an instruction, at trial in the present case. Specifically, the jury was instructed that it must consider the voluntariness of the statement and that "[t]he test of voluntariness is whether an examination of all the circumstances present surrounding the rendering of the statement shows that the conduct of the police was such as to overbear the defendant's will to resist and resulted in a statement that was not truly self-determined. . . . Whether the statement was coerced means considering . . . whether it was forced or compelled out of the defendant by abusive conduct, by promises, implied or direct, or by deceit or artifice by the police [that] overbore the defendant's will to resist and critically impair[ed] his capacity for self-determination and, thus, brought about a statement that was not freely self-determined."

For the foregoing reasons, we conclude that the defendant's statements were voluntary and that the trial court properly admitted them into evidence at trial.

The judgment is affirmed.

In this opinion ROBINSON, C. J., and McDONALD, D'AURIA and KAHN, Js., concurred.

McDONALD, J., concurring. I agree with and join the majority opinion, in which the majority concludes that the trial court correctly determined that the evidence seized from the residence of the defendant, Bobby Griffin, was not discovered as a result of an unlawful search and that the incriminating statements he made during his interrogation at the police station were not involuntary. Although I strongly disapprove of several of the tactics employed by the interrogating police officers and can easily envision a case in which those tactics could work collectively to overbear a suspect's will, my review of the video recording of the interrogation persuades me that this is not such a case, for the reasons identified in the majority opinion. I write separately to add my voice to the view set forth in part III of the concurring and dissenting opinion about the dangers of effectively sanctioning the practice by the police of lying to suspects in interrogations. I, too, would urge our state and local police to abandon this pernicious practice before legislative or judicial action is deemed necessary. In the meantime, I agree that the concerns raised by the concurring and dissenting justice warrant giving greater weight to such lying in assessing the voluntariness of a confession under the totality of the circumstances. Even affording the lies made to the defendant in the present case such weight, I remain convinced that his confession was voluntary.

ECKER, J., concurring in part and dissenting in part.[1] The interrogating police detectives lied to the defendant, Bobby Griffin, about evidence of his guilt, threatened to arrest his family members, falsely indicated that the crime of which he was accused exposed him to the death penalty, and falsely indicated that he would face a lesser charge if he confessed to the theory of the crime proposed to him by the interrogating officers. The majority acknowledges that these types of interrogation tactics can be coercive in some circumstances, and expresses disapproval of some of them, but ultimately concludes that each of these deceptive tactics was noncoercive in the present case. I respectfully disagree. The flaw in the majority's analysis is twofold. First, it gives insufficient weight to the coercive effect of certain tactics used by the police to extract a confession from the defendant. Second, it fails to acknowledge or to appreciate that these tactics were not discrete and unrelated but, rather, integrally coordinated parts of a well established and widely used interrogation method specifically designed to employ psychological manipulation as a means to overwhelm a suspect's will. Seeing the interrogation for what it was—which is to say, assessing the cumulative effect of the numerous coercive tactics employed in the present case in their totality—it is clear that the state did not meet its burden of proving that the defendant's confession was voluntary.

I reach this conclusion by application of settled legal principles in parts I and II of this opinion. At the end of part II, I address the majority's response to this analysis. Part III, although not necessary to the conclusion I reach in this particular case, goes on to discuss in greater detail the particular interrogation tactic of lying about inculpatory evidence and explains why we should

[1] I agree with part I of the majority opinion, in which the majority concludes that the search of the home of the defendant, Bobby Griffin, that resulted in the seizure of the rifle and ammunition was not unconstitutional.

adopt a less tolerant attitude toward this tactic in the future.

I

The United States Supreme Court recognized in its watershed decision, *Miranda* v. *Arizona*, 384 U.S. 436, 445, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), that "[a]n understanding of the nature and setting of this in-custody interrogation is essential to our decisions today." Although the issue presently before us is the voluntariness of a confession following a valid waiver of *Miranda* rights, it is similarly essential to understand how the specific tactics contested by the defendant fit into the well documented interrogation method typically used by law enforcement officers. I begin with a more complete picture of the method employed in the defendant's interrogation, which, as I later explain, reflects a particular application of broadly utilized interrogation techniques. Although there may not be universal consensus as to the propriety or wisdom of these techniques, there is no question that they are designed to work cumulatively to extract a confession from a suspect whom the interrogator believes is guilty.

A

The two police detectives interrogating the defendant initially allowed him to offer his own account of his whereabouts on the night in question, how the gun seized from his house came into his possession, and what he knew about the shooting. For the first couple of hours, the defendant disclaimed any participation in the crime. In response, the interrogators repeatedly asserted that they already had evidence that proved that the defendant was the shooter. The interrogators told the defendant, falsely, that two eyewitnesses had identified him from a photographic array as the shooter and as one of two men who were attempting to rob the victim, that fingerprints had been recovered from shell

casings found at the scene that the police were "gonna match to [the defendant's] prints," and that one of his coconspirators had given a statement that incriminated the defendant. They emphasized the fact that the (nonexistent) eyewitnesses were strangers to the defendant and asserted that, as such, their identification could not be impeached at trial on the basis of a motive to lie or bias.

Because of their purported certitude that the evidence firmly established the defendant's identity as the shooter, the interrogators conveyed the idea to the defendant that the sole purpose of the interrogation was to help him by providing him with an opportunity to explain *why* he had shot the victim. They characterized the victim as just an "asshole drug dealer" and "a mope," who "brought this on himself" by not handing over the drugs and by making a comment about getting his gun. They repeatedly suggested that the shooting was an accident or an act of justifiable self-defense. They told the defendant that, if that was the case, it would make a "[h]uge difference in charges, huge difference in sentencing."

The interrogating officers also informed the defendant that, if he instead exercised his right to remain silent or continued to deny his involvement, things would get "worse" for him.[2] If he did not admit his role

[2] The defendant was told, "if you don't [explain why it happened] and you sit there *and you keep* [*your*] *mouth shut*, it's just gonna get worse, it's gonna get worse and worse," and, "if you wanna spend the rest of your life in prison and sit there *and keep your mouth shut*, that's fine." (Emphasis added.) Although the majority is correct that courts often give significant weight to a valid waiver of *Miranda* rights in assessing the voluntariness of a confession, that waiver should be entitled to less weight when the interrogators effectively attempt to dissuade the defendant from exercising his right to revoke that waiver. See *United States* v. *Harrison*, 34 F.3d 886, 891–92 (9th Cir. 1994) ("there are *no* circumstances in which law enforcement officers may suggest that a suspect's exercise of the right to remain silent may result in harsher treatment by a court or prosecutor" (emphasis in original)); *United States* v. *Leon Guerrero*, 847 F.2d 1363, 1366 n.2 (9th Cir. 1988) ("threatening to inform the prosecutor of a suspect's refusal to

in the accidental or justifiable shooting, he could or would spend sixty-five years in jail or the state would "fry [him] . . . put [him] in the chair." They repeatedly made their point in terms that succinctly emphasized the futility of resistance: if the defendant did not confess, he was "fucked."

The threats made by the interrogators were multifaceted. The defendant was told that, because he had not admitted culpability, his mother and sister probably would be arrested for possession of the rifle recovered from the house. The officers hammered the point that the defendant was not facing a charge of "regular" murder, but felony murder because he and another person had robbed, or attempted to rob, the victim. The defendant was told—falsely, with no basis in fact or law—that "[t]he choice is yours," that it is "up to you" which crime he would be charged with because what he told them, and what the officers in turn reported to the judge, would determine whether he was charged with "felony murder or being in the wrong place at the wrong time murder," "[felony] murder, manslaughter."[3]

cooperate violates [the suspect's] fifth amendment right to remain silent"); *Beavers* v. *State*, 998 P.2d 1040, 1045–46 (Alaska 2000) ("A criminal suspect's right to remain silent in the face of police interrogation represents one of the most fundamental aspects of our constitutional jurisprudence. It includes the right to terminate an interrogation at any time. We regard any potential encroachment upon this right with the utmost concern. A law enforcement officer's threat of harsher than normal treatment—however phrased—essentially conveys to criminal suspects that they will be punished for their silence, including any refusal to give further answers. . . . Suspects are told, in effect, that they must give up their constitutional right to silence or they will suffer greater punishment. We view such threats with disfavor. Where they are used, the resulting confession should be considered involuntary unless the state can show affirmatively that the confession was voluntarily made." (Footnotes omitted.)). See generally 23 C.J.S. 222, Criminal Law § 1269 (2006) ("[a] waiver of [*Miranda*] rights may be revoked"). Plainly put, "*Miranda* warnings do not immunize statements obtained during custodial interrogations from being the product of coercion." *State* v. *Baker*, 147 Haw. 413, 434, 465 P.3d 860 (2020).

[3] The full quote of this statement, set forth in part I B of this opinion, makes clear that the interrogator was contrasting felony murder to manslaughter, not simple murder.

The defendant inquired how much prison time he would get for manslaughter but was not given an answer. Offered this "choice" in the face of the foregoing threats and fabricated evidence of guilt, the defendant ultimately adopted the narrative proposed by the officers and confessed to them that he accidentally had shot the victim during the course of an attempted robbery. The defendant, of course, was not charged with manslaughter; he was charged with felony murder, the very crime that his interrogators told him would be avoided by a confession. It was all a ruse.

B

The interrogation tactics employed against the defendant reflect a particular application of a method, commonly known as the Reid method, that has been the subject of scholarly debate and judicial criticism for decades.[4] See, e.g., *Miranda* v. *Arizona*, supra, 384 U.S. 448–53; *Dassey* v. *Dittmann*, 877 F.3d 297, 320–21 (7th Cir. 2017) (Wood, C. J., dissenting), cert. denied, U.S. , 138 S. Ct. 2677, 201 L. Ed 2d 1072 (2018); *Dassey* v. *Dittmann*, supra, 335–36 (Rovner, J., dissenting); A. Hirsch, Review, "Going to the Source: The 'New' Reid Method and False Confessions," 11 Ohio St. J. Crim. L. 803, 805–808 (2014); S. Kassin, "The Psychology of Confession Evidence," 52 Am. Psychologist 221, 222–24 (1997). The Reid Manual, the most widely used and influential interrogation training manual in the United States, sets forth tactics "for the interrogation of suspects whose guilt, in the *opinion* of the investigator,

[4] Part III of this opinion addresses how training methods are beginning to shift from adversarial, Reid type models to nonadversarial models in light of concerns about the effectiveness of the Reid method and its capacity to cause false confessions. Alan Hirsch, chair of the justice and law studies program at Williams College and author of articles examining the Reid method, testified for the defense at trial as an expert on this type of method and how it can affect the reliability of a confession.

seems definite or reasonably certain."[5] (Emphasis in original.) F. Inbau et al., Criminal Interrogation and Confessions (4th Ed. 2004) p. 209 (Reid Manual); see also id., pp. 5–8 (distinguishing between "nonaccusatory" interview during which guilt or innocence is assessed and "accusatory" interrogation). The Reid Manual sets forth a nine step interrogation model.[6] See id., p. 215.

Professor Richard A. Leo, one of the foremost scholars on interrogation practices,[7] explains that "each step

[5] "An organization called John E. Reid & Associates [Inc.] developed the method in the mid-twentieth century and has since trained more interrogators than any other organization in the world. The Reid Technique is codified in Criminal Interrogation and Confessions (otherwise known as the 'Reid Manual'), a handbook that is frequently termed 'the bible of modern police interrogation training.' Over the past several decades, the Reid Manual's approach to interrogation has shaped 'nearly every aspect of modern police interrogations, from the setup of the interview room to the behavior of detectives.' " (Footnotes omitted.) K. Wynbrandt, Comment, "From False Evidence Ploy to False Guilty Plea: An Unjustified Path to Securing Convictions," 126 Yale L.J. 545, 549 (2016); see also *Dassey* v. *Dittmann*, supra, 877 F.3d 335–36 (Rovner, J., dissenting).

[6] The nine steps are: (1) "The Direct, Positive Confrontation," (2) "Theme Development," (3) "Handling Denials," (4) "Overcoming Objections," (5) "Keeping the Suspect's Attention," (6) "Handling the Suspect's Passive Mood," (7) "Presenting the Alternative Question," (8) "Bringing the Suspect into the Conversation," and (9) "The Written Confession." F. Inbau et al., supra, p. 215.

[7] "Leo is an [a]ssociate [p]rofessor of [l]aw at the University of San Francisco School of Law and formerly a professor of psychology and criminology at the University of California, Irvine. . . . He has written five books and more than fifty articles on police interrogation practices, false confessions, and wrongful convictions. . . . Leo holds both a J.D. and a Ph.D. in [j]urisprudence and [s]ocial [p]olicy (with a specialization in criminology and social psychology)." (Citations omitted.) B. Gallini, "Police 'Science' in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods To Obtain Inadmissible Confessions," 61 Hastings L.J. 529, 570 n.335 (2010). Leo, "a highly respected expert in the area of police interrogation practice, the psychology of police interrogation and suspect [decision making], psychological coercion, false confessions, and wrongful convictions," has also "consulted on more than 900 cases involving disputed interrogations, qualified as an expert witness 168 times in state, federal, and military courts, and has testified for both the prosecution and defense, as well as in civil cases." *Ex parte Soffar*, Docket Nos. WR-29980-03 and WR-29980-04, 2012 WL 4713562, *9 (Tex. Crim. App. October 3, 2012) (Cochran, J.,

of th[is] interrogation process builds on and reinforces the previous one so as to systematically neutralize the suspect's resistance, render him passive and compliant, persuade him to agree to a minimizing scenario of how he could have committed the crime, and then transform his compliance into a full written statement. The [nine step] method emphasizes that interrogation is a lengthy and repetitive process in which the interrogator establishes psychological control over the suspect and gradually elicits a confession by raising the suspect's anxiety levels while simultaneously lowering the perceived consequences of confessing." R. Leo, Police Interrogation and American Justice (2008) p. 113; accord G. Gudjonsson, The Psychology of Interrogations, Confessions and Testimony (1992) p. 62 ("[a]ccording to the [Reid] model, a suspect confesses (i.e., tells the truth) when the perceived consequences of a confession are more desirable than the anxiety generated by the deception (i.e., denial)"); see also *Dassey* v. *Dittmann*, supra, 877 F.3d 321 (Wood, C. J., dissenting).

Courts and commentators have categorized Reid's nine steps as falling into two overarching techniques, frequently referred to as maximization and minimization.[8] See, e.g., *United States* v. *Monroe*, 264 F. Supp. 3d 376, 391 (D.R.I. 2017); *In re Elias V.*, 237 Cal. App. 4th 568, 583, 188 Cal. Rptr. 3d 202 (2015), review denied, Docket No. S228370, 2015 Cal. LEXIS 9243 (Cal. September 23, 2015); *Commonwealth* v. *Cartright*, 478 Mass. 273, 289, 84 N.E.3d 851 (2017); S. Drizin & R. Leo, "The

concurring), cert. denied sub nom. *Soffar* v. *Texas*, 569 U.S. 957, 133 S. Ct. 2021, 185 L. Ed. 2d 885 (2013).

[8] A prefatory step is to place suspects in an unfamiliar, unsupportive, and stressful setting from which they will want to extricate themselves. See *Miranda* v. *Arizona*, supra, 384 U.S. 449–50; S. Kassin, "Inside Interrogation: Why Innocent People Confess," 32 Am. J. Trial Advoc. 525, 532 (2009); M. Kim, "When and Why Suspects Fail To Recognize the Adversary Role of an Interrogator in America: The Problem and Solution," 52 Gonz. L. Rev. 507, 510–11 (2016–2017).

Problem of False Confessions in the Post-DNA World," 82 N.C. L. Rev. 891, 917 (2004); M. Gohara, "A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques," 33 Fordham Urb. L.J. 791, 821–22 (2006); see also A. Hirsch, supra, 11 Ohio St. J. Crim. L. 805 (categorizing steps as confrontation and minimization); R. Leo, supra, pp. 150–55 (categorizing steps as use of positive and negative incentives). The maximization technique is designed to convey "the interrogator's [rock solid] belief that the suspect is guilty and that all denials will fail. Such tactics include making an accusation, overriding objections, and citing evidence, real or manufactured, to shift the suspects' mental state from confident to hopeless." (Internal quotation marks omitted.) *In re Elias V.*, supra, 583; accord M. Kim, "When and Why Suspects Fail to Recognize the Adversary Role of an Interrogator in America: The Problem and Solution," 52 Gonz. L. Rev. 507, 511 (2016–2017). "[T]he interrogator aggressively confronts the suspect with the magnitude of his situation, hoping to convince him that he is in serious trouble and likely to be punished severely." M. Gohara, supra, 821–22. "The minimization technique is the opposite. It is designed to provide the suspect with moral justification and face-saving excuses for having committed the crime in question. This technique includes methods such as lulling suspects into a false sense of security by blaming the victim and downplaying the seriousness of the crime." (Footnote omitted; internal quotation marks omitted.) M. Kim, supra, 511–12; see also M. Gohara, supra, 821. This tactic "communicates by implication that leniency in punishment is forthcoming upon confession." (Internal quotation marks omitted.) *In re Elias V.*, supra, 583.

"[I]nterrogators will . . . commonly [say] that the only way [that the suspect] can help himself is by providing the reasons he committed the crime. Usually, how-

ever, interrogators will first suggest possible reasons or scenarios to get him to admit to it. . . . Interrogators advance scenarios to persuade a suspect that if he admits to the act he can—with the interrogators' help—control how that act is framed to other audiences (e.g., prosecutors, judges, juries, his friends and family, the victim, the victim's friends and family, the media, and so on). In other words, he can explain his motive in a way that will portray him in the most sympathetic light and minimize his social, moral, and legal culpability." (Citation omitted.) R. Leo, supra, pp. 152–53.

"[T]he most significant and effective scenarios are those that offer the suspect legal excuses or justifications for his alleged behavior. These types of scenarios redefine the suspect's mens rea (i.e., mental state) and thus the formal elements of the crime such that the suspect's legal culpability is reduced or eliminated. For example, it is common in murder investigations for interrogators to suggest that the suspect killed the victim in self-defense. Because self-defense is not a crime, the scenario suggests that the suspect will not be charged or punished for admitting to it. It is also common in murder investigations for interrogators to suggest that the suspect killed the victim accidentally, again mitigating the criminality of the act and seemingly lowering the punishment if the suspect agrees to the accident scenario . . . . These scenarios are effective because they 'pragmatically' communicate that the suspect will receive a lower charge or lesser punishment if he agrees to the suggested scenario . . . ." (Citations omitted.) Id., pp. 153–54.

A particular application of one of these minimization or maximization tactics may be deemed so egregious as to be sufficient in and of itself to establish coercion.[9]

[9] See, e.g., *Quartararo* v. *Mantello*, 715 F. Supp. 449, 461 (E.D.N.Y.) ("Evidence . . . procured [by way of a promise of leniency that was the equivalent of a promise of immunity] can no more be regarded as the product of a free act of the accused than that obtained by official physical or psychologi-

See *State* v. *Baker*, 147 Haw. 413, 435, 465 P.3d 860 (2020) ("a single coercive interrogation technique may render a confession involuntary"). Because these tactics, however, are designed to work cumulatively and synergistically to overcome a presumptively guilty suspect's resistance to admit his culpability; see R. Leo, supra, p. 113; their impact cannot be dismissed when individual tactics do not rise to this level. The totality of the circumstances test demands consideration of the cumulative impact of these tactics. See *Dassey* v. *Dittmann*, supra, 877 F.3d 322 (Wood, C. J., dissenting) ("The majority finds some significance in the notion that the detectives' tactics were not per se coercive, but that is a red herring. [The] cases cannot be assessed based on one sentence, or one restroom break, or the comfort (or lack thereof) of one room. The [United States] Supreme Court has instructed that the voluntariness inquiry requires a full consideration of the compounding influence of the police techniques as applied to this suspect." (Emphasis omitted; internal quotation marks omitted.)); *Wilson* v. *Lawrence County*, 260 F.3d 946, 953 (8th Cir. 2001) ("a totality of the circumstances analysis does not permit state officials to cherry-pick cases that address individual potentially coercive tactics, isolated one from the other, in order to insulate themselves when they have combined all of those tac-

cal coercion. . . . This factor alone would make it difficult to conclude that the prosecution sustained its burden of proving by a preponderance of the evidence that the first confession was voluntary." (Citations omitted; internal quotation marks omitted.)), aff'd, 888 F.2d 126 (2d Cir. 1989); *United States* v. *Goldstein*, 611 F. Supp. 626, 632 (N.D. Ill. 1985) ("when the government misleads a suspect concerning the consequences of a confession, his statements are regarded as having been unconstitutionally induced by a prohibited direct or implied promise"); *People* v. *Weiss*, 102 Misc. 2d 830, 831–36, 424 N.Y.S.2d 844 (1980) (recognizing that totality of circumstances determines voluntariness but concluding that specific tactic of threatening defendant with loss of his business rendered statement involuntary). This does not mean that the totality of the circumstances is inapplicable in such a case. For example, there might be evidence that the tactic was not the motivating cause of the confession.

tics in an effort to overbear an accused's will"); *State* v. *Baker*, supra, 423 ("[c]rucially, a court must not analyze the individual circumstances in isolation, but must weigh those circumstances in their totality"); *State* v. *Grey*, 274 Mont. 206, 211, 907 P.2d 951 (1995) ("[s]everal factors can culminate in a totality of circumstances that render a confession involuntary").

The Hawaii Supreme Court's recent decision in *State* v. *Baker*, supra, 147 Haw. 413, is a good example of the proper approach.[10] That court identified seven separate, potentially coercive interrogation tactics that had been employed in that case, none of which was so individually coercive as to overcome the defendant's will.[11] See id., 433–35. The court recognized, however, as have other courts, that "[a]n interrogator's use of multiple

[10] The majority dismisses *Baker* as irrelevant because the Hawaii Supreme Court decided the case under the Hawaii constitution. See footnote 23 of the majority opinion. The case is not so easily swept aside. The Hawaii court, applying a "totality of the circumstances" test, relied on settled *federal* constitutional case law and principles, as well as case law from other jurisdictions relying on the *federal* constitution, to reach its conclusion. See *State* v. *Baker*, supra, 147 Haw. 424–34. I do not rely on *Baker* for any principles grounded in state constitutional law but for the unremarkable proposition, supported by a wealth of authority rooted in the federal law cited in part II of this opinion, that the totality of the circumstances test requires the consideration of the cumulative effect of the interrogation tactics. The majority's rejection of this principle as stated in *Baker*, therefore, requires it to distinguish that federal authority; it has not done so.

[11] The individual tactics identified in *Baker* were "(1) the comments suggesting the public and media would perceive [the defendant] more favorably if he confessed; (2) the implication that [the defendant] would be perceived less favorably in court if he continued to deny guilt; (3) the minimization narratives suggesting the conduct was understandable because of the drugs and alcohol involved; (4) the use of unlawfully discriminatory [gender based] stereotypes to excuse or explain conduct; (5) the use of the false friend technique; (6) the insinuation that [the defendant's] refusal to admit to assaulting the [complaining witness] would be set forth in the detective's report and could adversely affect him; and (7) the detective's false assertion that there was incontrovertible DNA evidence showing that [the defendant] had sex with the [complaining witness], which, as the detective testified at trial, was told to [the defendant] to '[try] to get the truth out of him.' " *State* v. *Baker*, supra, 147 Haw. 433.

coercive interrogation tactics in conjunction can exacerbate the coercive effect of the individual tactics. See [*Commonwealth* v.] *DiGiambattista*, [442 Mass. 423, 438–39, 813 N.E.2d 516 (2004)] (explaining that . . . coercive effect of . . . assertion about irrefutable evidence of guilt is worsened when it is combined with minimization tactics); [*State* v.] *Rettenberger*, 984 P.2d [1009, 1017 (Utah 1999)] ('The significance of the [false friend technique] comes in relation to other tactics and factors.')." *State* v. *Baker*, supra, 433. It ultimately concluded: "All of the tactics used [in *Baker*], except for the improper gender stereotyping, made an implied promise to [the defendant] that he would benefit if he confessed and suffer adverse consequences if he did not. The use of these tactics in conjunction with one another exacerbated their overall coercive effect on [the defendant] because they ultimately presented the same implicit promise of gaining a benefit by confessing—and receiving a detriment by not admitting guilt." Id.

II

I next turn to the voluntariness of the defendant's confession in the present case. It is important to emphasize that not every minimization and maximization tactic is coercive. See, e.g., *Commonwealth* v. *Harris*, 468 Mass. 429, 436–37, 11 N.E.3d 95 (2014) (particular minimization tactics used were not coercive). Several tactics employed in the present case are unchallenged and are widely accepted as within the proper bounds of interrogation. The tactics that are challenged include engaging in false evidence ploys, threatening the defendant's family with arrest, maximizing the consequences of not confessing, and suggesting that confessing would be met with leniency. The majority purports to apply the totality of the circumstances test, but its analysis suffers from two related flaws. When addressing each of the individual tactics, the majority unduly minimizes

its potential effect on the defendant. Then, having concluded that none of these tactics is coercive per se, it reaches the seemingly logical conclusion that they could not have overcome the defendant's will under the totality of the circumstances. I first explain why I take a different view of the coercive nature of the individual tactics and conclude that their cumulative effect rendered the defendant's confession involuntary. Following that explanation, I respond to the majority's critique of this opinion.

I begin with the false evidence of guilt presented to the defendant, principally consisting of the supposed existence of independent eyewitness identifications of the defendant as the shooter and fingerprints on shell casings found at the scene. I agree with the majority that courts generally have not deemed such conduct, *in and of itself*, sufficient to render a confession involuntary.[12] Many courts have, however, recognized that such ploys are a factor that should be considered when determining whether a confession was coerced. See, e.g., *Frazier* v. *Cupp*, 394 U.S. 731, 739, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969) ("[t]he fact that the police misrepresented the statements that [the defendant's companion] had made is, *while relevant*, insufficient in our view to make this otherwise voluntary confession inadmissible" (emphasis added)); *Mara* v. *Rilling*, 921 F.3d 48, 80 (2d Cir. 2019) (misrepresentations regarding existence of eyewitness are "relevant to voluntariness"); *Holland* v. *McGinnis*, 963 F.2d 1044, 1051 (7th Cir. 1992) ("[t]he fact that the officer misrepresented to [the defendant] the strength of the evidence against him, while insufficient [by itself] to make [an] otherwise voluntary confession inadmissible, is one factor to consider among the totality of circumstances in determining voluntariness" (internal quotation marks omitted)),

[12] In part III of this opinion, I address the broader policy concerns and ethical implications of sanctioning police lying in interrogations.

cert. denied, 506 U.S. 1082, 113 S. Ct. 1053, 122 L. Ed. 2d 360 (1993); *Green* v. *Scully*, 850 F.2d 894, 903 (2d Cir.) (noting that falsely informing defendant that his fingerprints matched prints in blood in victims' apartment "is the type of police tactic that makes the issue of voluntariness in this case such a close one" but concluding that defendant's statement revealed that he confessed for entirely different reason), cert. denied, 488 U.S. 945, 109 S. Ct. 374, 102 L. Ed. 2d 363 (1988); *State* v. *Swanigan*, 279 Kan. 18, 32, 106 P.3d 39 (2005) (lies that fingerprints were found at scene and matched to defendant "must be viewed as a circumstance in conjunction with others, e.g., additional police interrogation tactics"); *Commonwealth* v. *Libby*, 472 Mass. 37, 42, 32 N.E.3d 890 (2015) ("the use of false information by [the] police during an interrogation is deceptive and is a relevant factor indicating a possibility that the defendant's statements were made involuntarily" (internal quotation marks omitted)); *Commonwealth* v. *DiGiambattista*, supra, 442 Mass. 433 ("our case law . . . suggests that where the use of a false statement is the *only* factor pointing in the direction of involuntariness, it will not ordinarily result in suppression, but that if the circumstances contain additional indicia suggesting involuntariness, suppression will be required" (emphasis in original)); *State* v. *Allies*, 186 Mont. 99, 113, 606 P.2d 1043 (1979) (lying to defendant about how much is known about his involvement in crimes was one of two variables weighing heavily in court's voluntariness analysis); *State* v. *Register*, 323 S.C. 471, 479, 476 S.E.2d 153 (1996) ("misrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession inadmissible"), cert. denied, 519 U.S. 1129, 117 S. Ct. 988, 136 L. Ed. 2d 870 (1997).

The majority discounts the relevance of the false evidence ploys in the present case because most of the statements regarding false evidence were made in the

first hour of the interrogation, when the defendant continued to deny his involvement and "pushed back" on these claims. Part II of the majority opinion. I find this temporal isolation to be a serious mistake because it ignores the fundamentally integrated nature of the interrogation tactics at issue and the cumulative and synergistic effect, over time, of the various tactics employed by the police. The entire point of the maximization and minimization techniques is that they work together over the course of the interrogation. See *State* v. *Baker*, supra, 147 Haw. 423, 433. It is significant, moreover, that the interrogators not only returned to the importance of the eyewitness identifications after the defendant's initial push back but also cast the false evidence as effectively unimpeachable—an assertion that could only be intended to convince the defendant that resistance would be futile. In addition, simply because the defendant asserted that his fingerprints were not on the shell casings does not mean that he was unconcerned by the lead interrogator's unequivocal statements that the (nonexistent) prints were "gonna" match the defendant's. These lies about the strength of the evidence against the defendant undoubtedly contributed to the pressure on him to "choose" to confess to manslaughter rather than to maintain his disavowal of responsibility and face felony murder charges.[13] The lies played an obvious and essential role in communicating the drumbeat theme of the Reid method, which is that resistance is futile and confession is the only rational choice.

With regard to the threat to arrest the defendant's mother and sister, the majority acknowledges that this threat "apparently was intended to exploit and play on the defendant's previously expressed concern" about his family's criminal exposure for the rifle. Part II A

[13] In part III of this opinion, I give examples of cases in which a false confession was obtained after the police, along with the use of other coercive tactics, lied to the defendant about inculpatory evidence.

of the majority opinion. The majority also refuses to "condone" this tactic and "acknowledge[s] that such tactics can provide a basis for concluding that a confession is involuntary." Id. I agree with each of these statements, although I would have expressed my disapproval of this tactic in far stronger terms. I disagree, however, with the majority's inexplicable decision to overlook the coercive effect of this conduct simply because it was the defendant who had initially raised this matter. The logic of this point escapes me. If anything, the defendant's admitted concern about his family's welfare makes the tactic more coercive because it demonstrates that he was susceptible to his interrogators' exploitation of that fear, and the interrogators used this psychological vulnerability improperly to increase the pressure on the defendant to confess. Given that the defendant had stated from the outset that he would take responsibility for possession of the rifle, and there was no evidence that anyone else in the home knew about the rifle; see *State* v. *Rhodes*, 335 Conn. 226, 234, 249 A.3d 683 (2020); his family members were not actually at risk of criminal exposure, and it was coercive for the interrogators to suggest that the defendant's failure to take responsibility for the shooting put them at such risk. See *People* v. *Dowdell*, 227 Cal. App. 4th 1388, 1401, 174 Cal. Rptr. 3d 547 (2014) ("[a] threat by [the] police to arrest or punish a close relative, or a promise to free the relative in exchange for a confession, may render an admission invalid" (internal quotation marks omitted)), review denied, Docket No. S220560, 2014 Cal. LEXIS 9829 (Cal. October 15, 2014), and review denied sub nom. *In re Lincoln*, Docket No. S220800, 2014 Cal. LEXIS 9837 (Cal. October 15, 2014).

With regard to the interrogators' statements maximizing the consequences of not confessing, I agree in part with the majority's treatment of this conduct. There was nothing improper about telling the defendant that

he could or would face a sixty-five year term of imprisonment if he were convicted of felony murder, or even murder. This was an accurate statement of the law, consistent with the known facts of the crimes. See *State* v. *Evans*, 146 N.M. 319, 328, 210 P.3d 216 (2009) ("[T]hreats that merely highlight potential real consequences, or are adjurations to tell the truth, are not characterized as impermissibly coercive. . . . It is not per se coercive for [the] police to truthfully inform an accused about the potential consequences of his alleged actions." (Citation omitted; internal quotation marks omitted.)). I disagree with the majority, however, that the lead interrogator's reference to the death penalty should not be given meaningful weight in the totality of the circumstances analysis. The threat was emphatically not an accurate statement of the law, but a rank falsehood; the defendant could not have been exposed to a potential death sentence. See *People* v. *Holloway*, 33 Cal. 4th 96, 115–17, 91 P.3d 164, 14 Cal. Rptr. 3d 212 (2004) (contrasting cases in which officers properly and accurately represented that death penalty was available from cases in which officers improperly made false representations regarding death penalty), cert. denied, 543 U.S. 1156, 125 S. Ct. 1302, 161 L. Ed. 2d 122 (2005). Irrespective of the facts that it was "a single, isolated statement" and that the other interrogator immediately thereafter changed the subject; part II A of the majority opinion; it defies common sense to conclude that the possibility of a death sentence was shrugged off or forgotten by the defendant. Cf. *Green* v. *Scully*, supra, 850 F.2d 903 (deeming it significant that improper "scare tactic" of referring to electric chair was not further employed and that petitioner was told several times that "this case was 'not about the chair' ").

The interrogator's statement about the death penalty was not the only misrepresentation of law made to the defendant. The interrogators repeatedly indicated to

the defendant that, without a confession, he would face a felony murder charge, but suggested that, if he admitted that the shooting was accidental or in self-defense, he would face far lesser charges, in particular, manslaughter. Again, none of this is true. Neither accident nor self-defense is relevant when the elements of felony murder are established. See, e.g., *State* v. *Montgomery*, 254 Conn. 694, 734, 759 A.2d 995 (2000); *State* v. *Amado*, 254 Conn. 184, 201–202, 756 A.2d 274 (2000); *State* v. *Lewis*, 245 Conn. 779, 812, 717 A.2d 1140 (1998). The "choice" that the interrogators offered to the defendant between being charged with felony murder (if he refused to admit culpability) or with manslaughter (if he confessed) was completely fabricated and terribly misleading.[14] "Unlike misrepresentations of fact, which generally are not enough to render a suspect's ensuing confession involuntary, [p]olice misrepresentations of law . . . are much more likely to render a suspect's confession involuntary." (Internal quotation marks omitted.) *Johnson* v. *State*, 268 So. 3d 806, 810 (Fla. App. 2019); see also *United States* v. *Lall*, 607 F.3d 1277, 1285 (11th Cir. 2010); *People* v. *Cahill*, 22 Cal. App. 4th 296, 315, 28 Cal. Rptr. 2d 1 (1994), review denied, California Supreme Court, Docket No. S020126 (June 2, 1994); *State* v. *Valero*, 153 Idaho 910, 913, 285 P.3d 1014 (App. 2012); *Commonwealth* v. *Baye*, 462 Mass. 246, 257, 967 N.E.2d 1120 (2012). "Although we do not require a law enforcement officer to inform a suspect of the penalties for all the charges he may face, if he misrepresents these penalties, then that deception

[14] The defendant ultimately was charged with both felony murder and murder. Although treating the shooting as an "accident" would be relevant to the murder charge because the absence of proof of intent to cause death would support only a conviction of manslaughter; see General Statutes §§ 53a-54a and 53a-55; the clear import of the interrogator's comments was that the defendant could also avoid a *felony murder* charge if he admitted that the shooting occurred by accident or in self-defense, as the interrogators proposed. See also footnote 18 of this opinion (addressing false charging choice proposed to defendant). This representation was blatantly false.

affects our evaluation of the voluntariness of any resulting statements." *United States* v. *Young*, 964 F.3d 938, 944 (10th Cir. 2020).

The majority recognizes that the interrogators made many statements suggesting that the defendant would receive leniency in exchange for confessing. It dismisses the coercive effect of these statements because the interrogators did not "definitively" promise leniency, and case law recognizes that it is not coercive to tell a defendant that cooperation would be to his benefit. Part II A of the majority opinion. The first reason, although supported by some authority, ignores reality by failing to acknowledge that an officer's implied promise of leniency may be just as meaningful to a lay defendant as a "definitive" promise of leniency. See S. Drizin & R. Leo, supra, 82 N.C. L. Rev. 917 n.138 (citing psychology research addressing " '[p]ragmatic [i]mplication,' " which "refers to the sending and processing of implicit meanings in communication, as occurs when an individual 'reads between the lines' or when information or meaning is inferred from what a speaker is saying or suggesting"). Many courts have recognized that an implied promise of leniency can convey the same message as an express one.[15] See, e.g., *United States* v. *Craft*, 495 F.3d 259, 263–64 (6th Cir.), cert. denied, 552 U.S. 1052, 128 S. Ct. 679, 169 L. Ed. 2d 532 (2007); *People* v. *Cahill*, supra, 22 Cal. App. 4th 311–15; *Martin* v. *State*, 107 So. 3d 281, 314 (Fla. 2012), cert. denied, 570 U.S. 908, 133 S. Ct. 2832, 186 L. Ed. 2d 890 (2013); *State* v. *Baker*, supra, 147 Haw. 433; *State* v. *Smith*, 162 Idaho 878, 885, 406 P.3d 890 (App. 2017),

[15] John E. Reid & Associates, Inc., has responded to critics of its method in a posting on its website entitled "Clarifying Misinformation about The Reid Technique," which states: "The Reid [t]echnique teaches that the investigator should not offer any direct or *implied* promises of leniency to the subject." (Emphasis added.) John E. Reid & Associates, Inc., Clarifying Misinformation about the Reid Technique, p. 2, available at http://www.reid.com/pdfs/20120311.pdf (last visited July 19, 2021).

review denied, Idaho Supreme Court, Docket No. 44499-2016 (December 21, 2017); *McGhee* v. *State*, 899 N.E.2d 35, 38 (Ind. App. 2008), transfer denied, 915 N.E.2d 995 (Ind. 2009); *State* v. *Nicklasson*, 967 S.W.2d 596, 606 (Mo.), cert. denied, 525 U.S. 1021, 119 S. Ct. 549, 142 L. Ed. 2d 457 (1998); *State* v. *Old-Horn*, 375 Mont. 310, 317, 328 P.3d 638 (2014); *State* v. *L.H.*, 239 N.J. 22, 43–46, 215 A.3d 516 (2019). As the Massachusetts Supreme Judicial Court noted: "We have long recognized that false promises . . . as might excite hopes in the mind of the prisoner, that he should be materially benefitted by making disclosures can undermine a defendant's ability to make an autonomous decision to confess, and are therefore properly regarded as coercive. . . . Such promises may be either expressed or implied."[16] (Citation omitted; internal quotation marks omitted.) *Commonwealth* v. *Baye*, supra, 462 Mass. 257–58; see also *Commonwealth* v. *DiGiambattista*, supra, 442 Mass. 435–36 ("[c]oercion may be readily applied by way of implied threats and promises, just as it is by express threats and promises"); cf. *State* v. *Phelps*, 215 Mont. 217, 224, 696 P.2d 447 (1985) (although confession must not be "obtained by any direct or implied promises, however, slight," alleged promise that is "couched in terms of a mere possibility or an opinion . . . does not constitute a sufficient promise to render a confession involuntary" (internal quotation marks omitted)). The question is not whether the officers spoke in definitive or formally binding contractual terms, but whether a

[16] Massachusetts is one of a handful of jurisdictions that requires the state to prove voluntariness beyond a reasonable doubt rather than by the preponderance of the evidence standard applied by the United States Supreme Court. However, that fact does not negate the relevance of Massachusetts case law regarding what constitutes coercive conduct. See *Commonwealth* v. *Baye*, supra, 462 Mass. 255 n.11 ("[o]ur cases remain broadly consistent with United States Supreme Court precedent on the voluntariness of statements made to [s]tate actors, except that we require the [c]ommonwealth to meet a heightened burden of proof in demonstrating voluntariness").

reasonable person in the defendant's position would have interpreted their statements as a promise of leniency. See *Grades* v. *Boles*, 398 F.2d 409, 412 (4th Cir. 1968) ("[t]he perspective from which the statements must be viewed is that of the defendant"); *People* v. *Conte*, 421 Mich. 704, 739–40, 365 N.W.2d 648 (1984) ("[I]t is from [the] defendant's perspective that we will view the alleged promises. . . . The inquiry will be whether the defendant is likely to have reasonably understood the statements in question to be promises of leniency." (Citations omitted.)).

The second reason cited by the majority to condone the interrogators' false "suggestions" of leniency is that it is permissible to tell a suspect that it would benefit him to cooperate. Part II A of the majority opinion. This is a correct and uncontroversial statement of the law, but the point has no application to the contested statements in the present case. It is true enough that the interrogators properly could tell the defendant that, if he took responsibility—whether claiming accident, self-defense, or simply an intentional but regrettable act—he could likely help himself.[17] They properly could tell him that, by doing so, he *could* face lesser punishment. These would not be false statements. An early admission of responsibility could reduce the sentence ultimately imposed. It is an entirely different matter, however, to falsely convey to the defendant that it was

[17] See *Rogers* v. *State*, 289 Ga. 675, 678–79, 715 S.E.2d 68 (2011) (telling defendant " 'you are not trying to help yourself' " did not make confession involuntary because exhortation to tell truth and telling suspect that truthful cooperation may be considered by others is permissible); *State* v. *Flowers*, 204 So. 3d 271, 280 (La. App. 2016) ("a confession is not rendered inadmissible because officers 'exhort or adjure' an accused to tell the truth"), writ denied, 224 So. 3d 983 (La. 2017); *State* v. *Thomas*, 711 So. 2d 808, 811 (La. App. 1998) ("a mild exhortation to tell the truth, or an indication that if the defendant cooperates the officer will 'do what he can' or 'things will go easier,' will not negate the voluntary nature of a confession"), writ denied, 747 So. 2d 8 (La. 1999).

his "choice" and "up to him" as to whether he was charged with felony murder or a far less serious crime (i.e., a "huge difference in charges").[18] See *United States ex rel. Everett* v. *Murphy*, 329 F.2d 68, 70 (2d Cir.) ("[a] confession induced by [the] police falsely promising assistance on a charge far less serious than the police knew would actually be brought is not to be considered a voluntary confession"), cert. denied, 377 U.S. 967, 84 S. Ct. 1648, 12 L. Ed. 2d 737 (1964); *State* v. *McCoy*, 692 N.W.2d 6, 28 (Iowa 2005) (officer can tell suspect that it is better to tell truth, but, if officer tells suspect what advantage is to be gained or is likely from making confession, officer's statement becomes promise of leniency rendering statement involuntary). This was an implicit promise that the interrogators could not keep, not only because they lacked the authority to make good on any such promise but, more importantly, because the promise had no realistic basis in the law. As such, the promise of leniency in the present case is a highly relevant factor in assessing the voluntariness of the confession. See P. Marcus, "It's Not Just About *Miranda*: Determining the Voluntariness of Confessions in Criminal Prosecutions," 40 Val. U. L. Rev. 601, 621–22 and n.124, 622 n.129 (2006) (citing case law demonstrating that promise of leniency does not, by itself, require suppression of confession but is relevant factor in totality of circumstances analysis, except when promise

[18] The falsity of the representation is especially extreme in the present case because the homicide occurred during the course of a robbery (or attempted robbery), which, as the interrogators correctly informed the defendant, exposed him to a felony murder charge. Consequently, this was not simply a case in which the interrogators falsely indicated that the defendant's confession to an accidental shooting would result in a manslaughter charge, when the choice of charges actually would be a matter left entirely to the prosecutor's discretion (i.e., misrepresentation of fact). Rather, the interrogators affirmatively misled the defendant by telling him that the accident/self-defense narrative proposed to him was relevant and material to his criminal exposure for felony murder, which was untrue *as a matter of law*.

lacks causal connection to decision to confess or promise is kept).

The timing of this particular aspect of the interrogation also warrants consideration because the defendant agreed to give a confession immediately after being presented with this legally baseless "choice." Under the majority's view that temporal proximity to the confession is key in assessing the coercive effect of an interrogation tactic, this tactic should be deemed particularly significant given that the defendant's confession immediately followed his interrogator's implied promise that the defendant's confession could result in only a manslaughter charge. Although the synergistic and cumulative nature of the interrogation method at issue compels me to disagree with the majority's view regarding the importance of temporal proximity generally, this particular aspect of the interrogation plainly was the tipping point for the defendant, and the false information conveyed to the defendant in this respect should also be given significant weight in assessing whether his confession was coerced.

Finally, it is important to consider that the promises of leniency if the defendant confessed were juxtaposed against threats that the judge would be told that the defendant was not cooperating, which would be "worse" for the defendant. The Kansas Supreme Court had this to say about such a tactic: "This court has held that, without more, a law enforcement officer's offer to convey a suspect's cooperation to the prosecutor is insufficient to make a confession involuntary. . . . Kansas appellate courts, however, have not addressed the other side of the same coin . . . i.e., law enforcement conveying a suspect's *lack* of cooperation to the prosecutor. A growing number of courts have disapproved [of] this tactic. Those not finding that it is coercive per se regard it as another circumstance to be considered in determining the voluntariness of the con-

fession." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Swanigan*, supra, 279 Kan. 33–34; see also *State* v. *Rettenberger*, supra, 984 P.2d 1018 ("[p]romises of leniency necessarily imply the threat of harsher punishment").[19]

The interrogators' use of multiple, coercive interrogation tactics plainly exacerbated the coercive effect of each individual tactic. It took close to four hours for the collective effect of these tactics to overbear the defendant's will to resist the interrogators' pressure to confess to accidentally shooting the victim. The fact that the defendant failed to present evidence that he had any specific characteristics that rendered him particularly susceptible to coercion[20] does not negate

[19] The Reid Manual itself provides: "The important question to answer is whether it is human nature to accept responsibility for something we did not do in the face of contrary evidence. . . . Would a suspect, innocent of a homicide, bury his head in his hands and confess because he was told that the murder weapon was found during a search of his home? Of course not! However, consider that such false statements were then used to convince the suspect that regardless of his stated innocence, he would be found guilty of the crime and would be sentenced to prison. Further, the investigator tells the suspect that if he cooperates by confessing, he will be afforded leniency. Under these conditions it becomes much more plausible that an innocent person may decide to confess—not because fictitious evidence was presented against him, but because the evidence was used to augment an improper interrogation technique (the threat of inevitable consequences)." F. Inbau et al., supra, pp. 428–29.

[20] In his motion to suppress his statement, the defendant represented that his suppression hearing would show that he is of limited intelligence and highly susceptible to suggestion. For reasons that are not apparent from the record, the defendant did not present support for this assertion until his sentencing hearing, when he submitted a psychological evaluation indicating that he has an intelligence quotient (IQ) score between 80 and 85—low average—with mild, intellectual impairments, corresponding to a " 'mental age' " equivalency of fourteen years, and a tendency to cede to authority or social pressure. The trial court's only reference to the evaluation was in connection with the characterization of the crime as "an impetuous decision." The court concluded that "[the defendant's] conduct *during this crime and the aftermath of the crime*, in the court's view, clearly contradicts and undermines [the psychologist's] statements [in the evaluation] that the defendant . . . was likely to be nonassertive and [to] adapt socially to his surroundings. He certainly did not [cede] control to other people based on

the coercive effect of this multidimensional strategy.[21]

the court's view of the credible evidence that was presented." (Emphasis added.) The majority infers from the trial court's failure to specify what it meant by "aftermath of the crime" that it means every action taken by the defendant after the crime occurred, including his conduct in the interrogation, and thus the court made a wholesale rejection of the psychologist's opinion. See footnote 28 of the majority opinion. I believe that the context plainly indicates otherwise. I also note that the court made no mention of the psychologist's assessment of the defendant's IQ and mental age.

[21] The trial court and the majority, in assessing the voluntariness of the defendant's confession, ascribe significance to the fact that the defendant maintained a calm demeanor throughout the interrogation. This view conforms to case law that implicitly assumes that a person's external demeanor provides a reliable indication of his or her internal emotional state during an interrogation, and, thus, a calm demeanor suggests the absence of coercion. This unexamined assumption strikes me as dubious at best. We now know that a subject's external appearance may not accurately reflect his or her internal reality. See A. Vrij, Detecting Lies and Deceit: The Psychology of Lying and the Implications for Professional Practice (2000) p. 38 (summarizing scientific evidence showing that observable behavioral cues assumed to indicate deceit do not do so). We also know that cultural differences between the subject and the observer greatly increase the likelihood that the subject's external demeanor will be misconstrued. See J. Simon-Kerr, "Unmasking Demeanor," 88 Geo. Wash. L. Rev. Arguendo 158, 161 (2020) ("Demeanor is understood to be a guide to a [witness'] credibility in the sense that we can 'read' it for clues to a person's truthfulness. Probing behind this assumption reveals it to be both culturally mediated and without basis in science, rather than reflecting a truism about human beings. Other cultures have different expectations about the revelatory nature of demeanor that, in turn, reflect different beliefs about the relationship between the internal and the external.").

One important example of this phenomenon is documented in a substantial body of literature indicating that it is not uncommon for individuals growing up in a violent home or neighborhood, as the defendant in the present case did, to adopt a mask of unemotional fearlessness as a coping mechanism. See, e.g., N. Dowd, "Black Boys Matter: Developmental Equality," 45 Hofstra L. Rev. 47, 93 (2016) ("[b]ravado is particularly the response in high risk neighborhoods for self-protection"); S. Dworkin, "Masculinity, Health, and Human Rights: A Sociocultural Framework," 33 Hastings International & Comp. L. Rev. 461, 474 (2010) ("marginalized men may be [overly reliant] on garnering identity through narrow definitions of masculinity in order to garner status and respect"); M. Thomas, "The African American Male: Communication Gap Converts Justice into 'Just Us' System," 13 Harv. BlackLetter L.J. 1, 9 (1997) ("'[c]ool pose is a distinctive coping mechanism that serves to counter, at least in part, the dangers that black males encounter on a daily basis' "), quoting R. Majors & J. Billson, Cool Pose: The Dilemmas

"[P]olice induce most false confessions from mentally normal adults . . . ." R. Leo, supra, p. 234. The defendant's prior experience with the criminal justice system is a factor that cuts both ways. Although such experience may further bolster the defendant's understanding of his *Miranda* rights, a study has demonstrated that

of Black Manhood in America (1992) p. 5; see also R. Klein, Trial Practice Series: Trial Communication Skills (2d Ed. 2020) § 4:4 ("In truth, the feelings are always there, but for one reason or another, they are masked. With men, an open display of emotion is usually considered a sign of weakness. To be in control, to show no feelings, to act 'cool' in the face of any threat is considered manly."); M. Dargis & M. Koenigs, "Witnessing Domestic Violence During Childhood Is Associated with Psychopathic Traits in Adult Male Criminal Offenders," 41 Law & Hum. Behav. 173, 174 (2017) ("[E]xposure to community violence is directly correlated with callous-unemotional traits in detained juveniles. Moreover, this violence exposure mediates the relationship between callous-unemotional traits and delinquency, suggesting that witnessing violent acts account[s] for the relationship between callous-unemotional traits and heightened risk for engaging in violent behavior."); cf. *State* v. *Purcell*, 331 Conn. 318, 356–57, 203 A.3d 542 (2019) (acknowledging sociolinguistic research concluding that "indirect speech patterns are common within African-American spoken language" and are used as linguistic mechanism to avoid conflict (internal quotation marks omitted)).

I do not profess to know what psychological, emotional, and cultural factors actually lay behind this defendant's calm demeanor. My point is that I have no way to know or even guess, *and neither does the trial court or the majority*. That said, at least two aspects of the record make my alternative scenario plausible. First, one of the officers said to the defendant, well into the interrogation, "I think you're putting a tough guy front on," indicating that the interrogators themselves perceived the defendant to be wearing precisely the type of mask identified in the research studies. Second, the defendant's background places him within the demographic referenced in those studies. He had committed four felonies by the age of eighteen, and he reported "a significant family history of drug addiction and related criminal behavior in [his] first degree relatives" and described "violence in the home [and] exposure to violence as a youth in the streets (including shootings and stabbings) . . . ."

The fact that the latter information was not made known to the trial court until sentencing does not undermine my point, but reinforces it: no judge can even begin to understand the meaning of a defendant's calm demeanor during an interrogation without knowing much more about him or her. As a consequence, there is simply no basis to be confident that the defendant's "cool" demeanor signified internal calm rather than masked distress, and, in my view, it is a mistake to give weight to this consideration under these circumstances.

suspects with prior felony convictions are more vulnerable than others to false evidence ploys. See R. Leo, "Inside the Interrogation Room," 86 J. Crim. L. & Criminology 266, 295 (1996). "While [personal characteristics] are pertinent considerations when assessing whether, in the totality of the circumstances, the defendant's will was overborne . . . their significance is context dependent and diminishes with the severity of the police misconduct at issue . . . ." (Citation omitted.) *Commonwealth* v. *Baye*, supra, 462 Mass. 262; see also *United States* v. *Young*, supra, 964 F.3d 946 ("[the defendant's] personal characteristics are not dispositive, and they do not convince us that [the defendant] could withstand the coercion created by [the federal agent's] legal misrepresentations and promises of leniency"); *Green* v. *Scully*, supra, 850 F.2d 902 (officer's conduct is "[the] most critical circumstance").

Given the nature, variety, and pervasiveness of the coercive tactics employed in the present case, I would conclude that, under the totality of the circumstances, "the conduct of [the] law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined . . . ." (Internal quotation marks omitted.) *State* v. *Andrews*, 313 Conn. 266, 321, 96 A.3d 1199 (2014). "The use of these tactics in conjunction with one another exacerbated their overall coercive effect . . . ." *State* v. *Baker*, supra, 147 Haw. 433. The majority's conclusion to the contrary is not, in my view, a fair assessment of the *totality* of the circumstances.

Before I turn to the question of whether the improper admission of the defendant's confession requires a new trial, it is necessary to respond to several unfounded criticisms leveled by the majority. The majority contends that I have improperly discounted the trial court's finding that the defendant remained " 'calm and low-key' " by failing to give that finding due weight in

assessing whether the defendant's confession was voluntary, as the majority does; part II A of the majority opinion; and by instead acknowledging the possibility, supported by social science research, that psychological, emotional, and cultural factors may cause a person to adopt a mask of calm fearlessness. See footnote 21 of this opinion; cf. *State* v. *Purcell*, 331 Conn. 318, 356–57, 203 A.3d 542 (2019) (drawing on sociolinguistic research not presented at trial to support analysis). I disagree with several of the underpinnings of this argument.[22] First, the issue is not *whether* the defendant appeared to be "calm and low-key" during his interrogation; indeed, contrary to the majority's suggestion, I fully accept this finding. The real question is *what to make of that demeanor*. In my view, the well-known phenomenon of masking and the social science research on that subject—not to mention the interrogating officer's own assessment that the defendant was putting on a "tough guy" facade while being questioned—cast doubt on the trial court's uncritical assumption that the defendant's outward demeanor reflected an inner state of unpressured calmness. Second, the fact that the defendant adopted a different demeanor at one point during the interrogation, pretending to be fearful of Quan Bezzle, supports rather than undermines the possibility that the defendant was engaged in masking. If we believe that the defendant was concealing his true emotions by pretending to be afraid of Bezzle, we must also take seriously the possibility that he was concealing his true emotions by pretending to be calm. The majority does not explain why it chooses to discern one instance of deceptive demeanor but dismiss out of hand the realistic possibility of a second instance of deceptive demeanor by the same person during the same interrogation. Third, the major-

[22] The majority also mischaracterizes my reasoning, but I rely on footnote 21 of this opinion to make my position clear.

ity draws on a well settled but inapt principle, namely, that a fact finder may rely on demeanor, *as one of many factors*, to assess a witness' *credibility*.[23] Because the trial court's determination of voluntariness is not a finding of fact to which we must defer, it is proper to take into account the research regarding masking and record evidence consistent with that research. See *State* v. *Christopher S.*, 338 Conn. 255, 274–75, 257 A.3d 912 (2021) ("[T]he trial court's findings as to the circumstances surrounding the defendant's interrogation and confession are findings of fact . . . which will not be overturned unless they are clearly erroneous. . . . [A]lthough we give deference to the trial court concerning these subsidiary factual determinations, such deference is not proper concerning the ultimate legal determination of voluntariness. . . . [W]e review the voluntariness of a confession independently, based on our own scrupulous examination of the record. . . . Accordingly, we conduct a plenary review of the record in order to make an independent determination of vol-

[23] Even in the context of using demeanor to assess credibility—an assessment made in an adversarial proceeding, not an interrogation—courts have begun to recognize that cultural differences and other factors may impact demeanor and, in turn, our ability to draw accurate inferences from appearances. See, e.g., *Djouma* v. *Gonzales*, 429 F.3d 685, 687–88 (7th Cir. 2005) ("[A]s a foreigner [the asylum applicant's] demeanor will be difficult for the immigration judge to 'read' as an aid to determining the applicant's credibility. . . . The [United States Department of Homeland Security and the United States Department of Justice] seem committed to [case-by-case] adjudication in circumstances in which a lack of background knowledge denies the adjudicators the cultural competence required to make reliable determinations of credibility."); see also *Yang* v. *Lynch*, 832 F.3d 817, 821 (7th Cir. 2016) ("we've commented on the unreliability of demeanor evidence generally . . . and the particular difficulty of using such evidence to evaluate the credibility of witnesses from other cultures" (citations omitted)), citing *United States* v. *Pickering*, 794 F.3d 802, 805 (7th Cir. 2015), and *Djouma* v. *Gonzales*, supra, 687; *Morales* v. *Artuz*, 281 F.3d 55, 61 and n.3 (2d Cir.) (acknowledging that idea that demeanor is useful basis for assessing credibility is "grounded perhaps more on tradition than on empirical data" and citing articles reviewing social science research), cert. denied sub nom. *Morales* v. *Greiner*, 537 U.S. 836, 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002).

untariness." (Internal quotation marks omitted.)) The majority further criticizes this opinion for failing to focus on the defendant's personal characteristics such as his age, educational status, and intellectual functioning. The majority is correct that the defendant was over the age of majority and exhibited no obvious intellectual impairments. See footnote 20 of this opinion. The point of this opinion, however, is that the coercive tactics used by police interrogators are designed to overbear the will of a suspect even without impaired intellect or extreme youth. The statistics cited herein demonstrate this very point.

The majority also seriously misapprehends my point about the interrogators' misrepresentation about the defendant's "choice." The majority states that I interpret "the officers [to be] telling the defendant that he could decide which charges to levy against himself . . . ." Footnote 24 of the majority opinion. I am saying nothing of the kind. My focus is on the following statement made immediately before the defendant's confession: "*The choice is yours. Murder*, *manslaughter. That's your choice.* That's what you're looking at. Right now, you're looking at murder, *felony murder*. Just cuz you're being a knucklehead and not coming to grips that you're fucked if you continue to stick with this story. We have too much against you." (Emphasis added.) In making this statement, the interrogators plainly were not suggesting that the defendant would be drafting the charging instrument or participating in the decision whether to charge himself with manslaughter or murder. The misrepresentation by the officers consisted of telling the defendant that, if he confessed to shooting the victim by accident—a narrative that the interrogators earlier had cast as wholly believable under the known circumstances—his "choice" to confess to that scenario would influence the charging decision and result in a reduction of the charge from felony murder

to manslaughter, i.e., it would make a "[h]uge difference in [the] charges . . . ." See R. Leo, Police Interrogation and American Justice, supra, pp. 153–54 (minimization tactic used by police falsely suggests to "a suspect that if he admits to the act he can—with the interrogators' help—*control how that act is framed to other audiences* (*e.g.*, *prosecutors*, *judges*, *juries* . . .)" and, in doing so, can "*minimize his* . . . *legal culpability*," and scenarios suggesting accident or self-defense " 'pragmatically' communicate that the suspect will receive a lower charge or lesser punishment if he agrees to the suggested scenario" (emphasis added)). The interrogating officer made a gross misrepresentation of applicable law because there was no basis whatsoever to tell the defendant that confessing to the proposed narrative would (or probably would, or even realistically might) result in a manslaughter charge rather than "murder, felony murder" charges.[24] See footnote 18 of this opinion. Although the majority attempts to diminish the effect of the legal misstatement by positing that the prosecutor could "consider [accident or self-defense] when choosing whether to charge the defendant with felony murder," I consider that interpretation to be objectively unreasonable because it simply cannot be derived from what the officer actually said to the defendant. Footnote 24 of the majority opinion. The officer's words explicitly and unambiguously placed the "choice" in the defendant's hands and mentioned nothing whatsoever about prosecutorial discretion. The majority's misreading of this point allows it to knock down a strawman rather than address what this opinion actually says.

[24] The majority interprets the interrogator's statement "[t]he choice is yours" as a simple assertion "that it was [the defendant's] choice whether to tell the truth." Footnote 24 of the majority opinion. The flaw in this interpretation is that it ignores what the officer actually said. The "choice" confronted by the defendant was expressly tied to the charges his "choice" would determine: "The choice is yours. Murder, manslaughter. *That's* your choice." (Emphasis added.)

Ultimately, the majority's view glosses over the paramount fact that the *state* bears the burden of proving that the defendant's confession was voluntary; see *Lego* v. *Twomey*, 404 U.S. 477, 489, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972); which includes the burden of proving that the coercive interrogation tactics employed were not a motivating factor in the defendant's decision to confess. Cf. *Colorado* v. *Connelly*, 479 U.S. 157, 168, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) (government bears burden of proof on threshold issue of whether valid waiver of *Miranda* rights occurred); *United States* v. *Matlock*, 415 U.S. 164, 178 n.14, 94 S. Ct. 988, 39 L.Ed.2d 242 (1974) (preponderance of evidence standard is controlling burden of proof for suppression hearings). I would conclude that the state has not proved that it is more likely than not that, in the absence of the cumulative effective of the coercive tactics employed—lying about inculpatory evidence, threatening to arrest the defendant's family members, falsely indicating that the defendant could face the death penalty, and making false promises of leniency—the defendant still would have confessed.

I would also conclude that the state failed to meet its burden of proving that the improper admission of the defendant's confession was harmless beyond a reasonable doubt. See, e.g., *State* v. *Hafford*, 252 Conn. 274, 297, 746 A.2d 150, cert. denied, 531 U.S. 855, 121 S. Ct. 136, 148 L. Ed. 2d 89 (2000). "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." (Internal quotation

marks omitted.) *Zappulla* v. *New York*, 391 F.3d 462, 473 (2d Cir. 2004), cert. denied, 546 U.S. 957, 126 S. Ct. 472, 163 L. Ed. 2d 358 (2005), quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); see also *Arizona* v. *Fulminante*, supra, 313 (Kennedy, J., concurring in the judgment) ("the court conducting a [harmless error] inquiry must appreciate the indelible impact a full confession may have on the trier of fact"). "[A]n error in admitting the confession should not ordinarily be deemed harmless absent a strong showing by the state that [the defendant's] guilt would have been assured based solely on the other evidence presented at trial." (Emphasis omitted; internal quotation marks omitted.) *Zappulla* v. *New York*, supra, 473–74.

Only "when there is independent overwhelming evidence of guilt" can the state meet its burden of proving that the constitutional error was harmless beyond a reasonable doubt. (Internal quotation marks omitted.) *State* v. *Hafford*, supra, 252 Conn. 297. It cannot meet that burden on this record. There were no eyewitnesses or forensic evidence proving that the defendant was at the scene. But cf. id., 298 (admission of confession was harmless when defendant was seen fleeing crime scene and, when approached by police, volunteered " 'I did it' numerous times," defendant's blood and footprints were found at crime scene, victim's blood was on defendant's clothes and on knife discovered in his car, and defendant's pubic hair was discovered near victim's naked body). No fruits of the robbery were found in the defendant's possession. The state's principal witness and the defendant's purported coconspirator, Nathan Johnson, testified pursuant to a cooperation agreement. The defendant's ambiguous comment about the shooting to the confidential police informant and the presence of the rifle in the defendant's home helped bolster Johnson's testimony, but this evidence was not

direct proof of the defendant's actual participation in the crime itself. I would therefore reverse the defendant's conviction, except for the charge of criminal possession of a firearm, and remand for a new trial.

III

In part II of this opinion, I explained why, under the current legal standard and case law, the majority has incorrectly concluded that the defendant's confession was not involuntary under the federal constitution. In this section, I set forth justifications for reconsidering the treatment historically given to the use of the false evidence ploy in the interrogation process and provide support for an approach under which that ploy is given greater weight in assessing the coerciveness of an interrogation under the totality of the circumstances test than it is currently given.[25]

The view that a false evidence ploy during an interrogation rarely is coercive and has a minimally coercive effect, even when combined with other interrogation tactics, comes from a case that was decided more than one-half century ago. See *Frazier* v. *Cupp*, supra, 394 U.S. 737–39 (1969 case holding that confession was voluntary even though officer falsely told suspect that his admitted companion on night of crime had con-

[25] My conclusion in part II of this opinion makes it unnecessary to decide whether the modest doctrinal reform that I propose in part III could be implemented as a matter of state constitutional law or in the exercise of this court's supervisory authority. I note that several of the considerations discussed in part III bear directly on some of the factors that are employed to determine whether our state constitution affords greater protection than the federal constitution. See *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992) (setting forth six factors that, to extent applicable, are to be considered in construing contours of state constitution). "Although, in *Geisler*, we compartmentalized the factors that should be considered in order to stress that a systematic analysis is required, we recognize that they may be inextricably interwoven. . . . [Moreover], not every *Geisler* factor is relevant in all cases." (Internal quotation marks omitted.) *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 157, 957 A.2d 407 (2008).

fessed to crime).[26] Courts and commentators have begun to recognize that this view is premised on an anachronistic understanding of coercion, formed before the prevalence of false confessions was known. See, e.g., *Dassey* v. *Dittmann*, supra, 877 F.3d 332 (Rovner, J., dissenting) ("[*Frazier* and its progeny] were born in an era when the human intuition that told us that 'innocent people do not confess to crimes' was still largely unchecked. . . . We know, however, that this statement is unequivocally incorrect. Innocent people do in fact confess, and they do so with shocking regularity. . . . In a world where we believed that 'innocent people do not confess to crimes they did not commit,' we were willing to tolerate a significant amount of deception by the police. . . . And so our case law developed in a factual framework in which we presumed that the trickery and deceit used by police officers would have little effect on the innocent." (Citation omitted; footnotes omitted.)); id., 336 (Rovner, J., dissenting) ("[w]hat has changed is not the law, but our understanding of the facts that illuminate what constitutes coercion under the law"); *State* v. *Baker*, supra, 147 Haw. 431 ("in light of the various studies and cases that have emerged . . . we recognize that false claims of physical evidence result in an unsettling number of false or involuntary confessions"); *Commonwealth* v. *DiGiambattista*, supra, 442 Mass. 434 ("[w]hile we adhere to the view that false statements about the evidence against the suspect do not automatically render the suspect's confession involuntary, we note that ongoing research has identified such use of false statements as a significant factor that pressures suspects into waiving their rights and making a confession"); M. Gohara, supra, 33 Fordham Urb. L.J. 794 ("The bedrock cases

[26] In *Frazier*, the one lie told to the defendant was not made in concert with any other potentially coercive tactic, and the defendant confessed approximately one hour after the interrogation commenced. See *Frazier* v. *Cupp*, supra, 394 U.S. 737–38.

sanctioning police deception . . . [predate] the advent of DNA testing and the many exonerations that followed from DNA test results. . . . Examination of actual wrongful convictions and additional empirical data demonstrating the correlation between deceptive interrogation practices and false confessions provide a basis for reconsidering the line of cases that allow[s] [the] police to use trickery to obtain confessions. Such reconsideration is particularly critical because at the time those cases were decided, it was assumed that deceptive interrogations would not lead to false confessions." (Footnote omitted.)); see also *Corley* v. *United States*, 556 U.S. 303, 320–21, 129 S. Ct. 1558, 173 L. Ed. 2d 443 (2009) ("[c]ustodial police interrogation, by its very nature, isolates and pressures the individual . . . and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed" (citation omitted; internal quotation marks omitted)); *State* v. *Purcell*, supra, 331 Conn. 361 (noting that, although United States Supreme Court recognized in *Miranda* possibility of coercive custodial interrogation resulting in false confessions, magnitude of this problem was not known until recently).

There is mounting proof that lying to suspects about evidence against them contributes to false confessions. "False confessions are one of the leading causes of wrongful conviction of the innocent, second only to eyewitness misidentification."[27] M. Godsey, "Shining

[27] "As of June 7, 2016, [t]he National Registry of Exonerations had collected data on [1810] exonerations in the United States since 1989 (that number as of December 4, 2017 is [2132]), and that data [include] 227 cases of innocent people who falsely confessed. This research indicates that false confessions (defined as cases in which indisputably innocent individuals confessed to crimes they did not commit) occur in approximately 25 [percent] of homicide cases." (Footnote omitted.) *Dassey* v. *Dittmann*, supra, 877 F.3d 332 (Rovner, J., dissenting). Interrogators themselves indicate that false confessions are surprisingly frequent. One self-report study of more than 600 professional interrogators found that the interrogators, based on their personal experiences and observations, estimated that, on average,

the Bright Light on Police Interrogation in America," 6 Ohio St. J. Crim. L. 711, 723 (2009); see also S. Kassin et al., "Police-Induced Confessions: Risk Factors and Recommendations," 34 Law & Hum. Behav. 3, 3 (2010) ("research suggests that false confessions and admissions are present in 15–20 [percent] of all DNA exonerations," which does not include false confessions disproved before trial, many that result in guilty pleas, those in which DNA evidence is not available, etc.). There is near universal consensus that the known false confessions represent a tip of the iceberg. See S. Drizin & R. Leo, supra, 82 N.C. L. Rev. 921; M. Godsey, supra, 724–25; A. Hirsch, supra, 11 Ohio St. J. Crim. L. 813; S. Kassin et al., supra, 3.

"From a convergence of three sources, there is strong support for the proposition that outright lies can put innocents at risk to confess by leading them to feel trapped by the inevitability of evidence against them. These three sources are: (1) the aggregation of actual false confession cases, many of which involved use of the false evidence ploy;[28] (2) one hundred-plus years

almost 5 percent of innocent suspects confess. See S. Kassin et al., "Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs," 31 Law & Hum. Behav. 381, 392–93 (2007).

[28] Some examples cited in the literature include: Anthony Gray confessed to rape and murder after a series of interrogations, during which detectives falsely informed him that two other men had confessed to involvement in the crime and had named Gray as the killer and that he had failed two polygraph tests. Gray spent more than seven years in prison "before he was exonerated on the basis of DNA evidence." K. Wynbrandt, Comment, "From False Evidence Ploy to False Guilty Plea: An Unjustified Path to Securing Convictions," 126 Yale L.J. 545, 545–46 (2016).

Marty Tankleff, then seventeen years old, confessed to killing his mother and beating his father after an interrogator lied about the evidence of his guilt, including that his father had said that he did it. His conviction was later vacated, and the charges were dropped. See S. Kassin, "Inside Interrogation: Why Innocent People Confess," 32 Am. J. Trial Advoc. 525, 536 (2009).

John Watkins confessed to rape after the police falsely told him that they had recovered his fingerprints from the crime scene, that the victim had identified him, and that he had failed a voice stress analysis test. He was later exonerated by DNA evidence. See S. Gross et al., National Registry of Exonera-

of basic psychology research, which proves without equivocation that misinformation can substantially alter people's visual perceptions, beliefs, motivations, emotions, attitudes, memories, self-assessments, and even certain physiological outcomes, as seen in studies of the placebo effect; and (3) numerous experiments, from different laboratories, demonstrating that presentations of false evidence increase the rate at which innocent research participants agree to confess to prohibited acts

tions, Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement (September 1, 2020) p. 56, available at https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf (last visited July 19, 2021).

Frank Sterling confessed to murder after officers falsely told him that his brother had implicated him and that he was justified in hurting the victim because she deserved it. Sterling was exonerated by DNA evidence that implicated another man. See id., p. 45.

Robert Miller, later exonerated, confessed after being falsely told by a detective that an eyewitness had seen him leaving the crime scene and that this witness had identified him in a photograph. See B. Garrett, "The Substance of False Confessions," 62 Stan. L. Rev. 1051, 1098 (2010).

In a recent opinion piece in the New York Times by three of the defendants convicted as part of the group known as the "Central Park Five," the authors explain how the interrogators' blatant lies—telling the defendants that the police had matched their fingerprints to crime scene evidence and telling each of them that the others had confessed and implicated each of them in the attack—contributed to their false confessions. See Y. Salaam et al., "Act Against Coerced Confessions," N.Y. Times, January 5, 2021, p. A19.

In a book by a former Washington, D.C., homicide detective, he examined how he could have elicited a confession from a suspect who he later proved could not have committed the crime. See T. Jackman, "Homicide Detective's Book Describes 'How the Police Generate False Confessions,' " Wash. Post, October 20, 2016, available at https://www.washingtonpost.com/news/true-crime/wp/2016/10/20/homicide-detectives-book-describes-how-the-police-generate-false-confessions/ (last visited July 19, 2021). "He realized that implying that [the suspect's] cooperation would get her better treatment from the prosecutors, and minimizing her role in the case to obtain her testimony against [her codefendants], as well as a mistaken handwriting analysis and a bogus 'voice stress test,' got her to confess." Id.; see also M. Gohara, supra, 33 Fordham Urb. L.J. 831 n.239 (providing examples of four other cases in which defendants falsely confessed after police lied about evidence inculpating them).

they did not commit."[29] (Footnote added.) S. Kassin et al., supra, 34 Law & Hum. Behav. 28–29. See generally M. Gohara, supra, 33 Fordham Urb. L.J. 827–31 (providing overview of "[e]mpirical [s]tudies [e]stablishing [t]hat [c]onfronting [s]uspects [w]ith [f]alse [e]vidence [a]nd [o]ther [d]eceptive [i]nterrogation [p]ractices [i]nduces [s]uspects to [c]onfess [f]alsely"); A. Hirsch, supra, 11 Ohio St. J. Crim. L. 805–806 and n.18 (addressing alt key experiment). The Reid Manual itself concedes that, although lying to a suspect about inculpatory evidence in and of itself would not cause a false confession, "it becomes much more plausible that an innocent person may decide to confess" if "such false statements were . . . used to convince the suspect that regardless of his stated innocence, he would be found guilty of the crime and . . . sentenced to prison" but would be afforded leniency "if he cooperates by confessing . . . ." F. Inbau et al., supra, p. 428.

"Psychologists have teased out two causal mechanisms by which the false evidence ploy may give rise to false confessions. . . . First, suspects may falsely confess as an act of compliance when they perceive that there is strong evidence against them.[30] Second,

[29] The doubters argue that the empirical evidence does not demonstrate the frequency of the problem and may not accurately reflect proven cases of innocence; see, e.g., F. Inbau et al., supra, pp. 442–43; L. Magid, "Deceptive Police Interrogation Practices: How Far Is Too Far?," 99 Mich. L. Rev. 1168, 1192 (2001); suggest that false confessions are such a rarity that their risk may not outweigh the benefits of the questioned interrogation practices; see, e.g., *Dassey* v. *Dittmann*, supra, 877 F.3d 318 n.8; or point to the uncontested fact that social science experiments cannot replicate the high stakes context of an interrogation for a serious crime. See, e.g., F. Inbau et al., supra, p. 443; A. Hirsch, supra, 11 Ohio St. J. Crim. L. 805–808; S. Tekin et al., "Interviewing Strategically To Elicit Admissions from Guilty Suspects," 39 Law & Hum. Behav. 244, 251 (2015). These concerns have been addressed to my satisfaction in several sources, including *Dassey* v. *Dittmann*, supra, 331–33 (Rovner, J., dissenting), and A. Hirsch, supra, 806 n.18, 812–13, 825 n.129.

[30] Research also suggests that some innocent individuals may falsely confess voluntarily during police interrogations "because they believe that 'truth and justice will prevail' later even if they falsely admit their guilt." B. Garrett,

innocent suspects confronted with evidence that law enforcement claims to prove their guilt as an incontrovertible fact may falsely confess because they have come to internalize the belief that [they] committed the crime without awareness.

"The key factor underlying each of these psychological processes is the defendant's perception that his or her likelihood of conviction at trial is high . . . . The false evidence ploy enables interrogators to artificially inflate an innocent suspect's estimated likelihood of conviction and thereby make a plea bargain appear rational."[31] (Footnote altered; footnotes omitted; internal quotation marks omitted.) K. Wynbrandt, Comment, "From False Evidence Ploy to False Guilty Plea: An Unjustified Path to Securing Convictions," 126 Yale L.J. 545, 552–53 (2016).

This tactic may be especially effective with those segments of society that are more likely to believe that they, or others in their community, have been treated unfairly by the police and the legal system. See K. Momolu, Gallup, Black Adults More Likely To Know People Mistreated by Police, (August 3, 2020), available at https://news.gallup.com/poll/316526/black-adults-likely-

"The Substance of False Confessions," 62 Stan. L. Rev. 1051, 1100 (2010); see, e.g., id., 1054–56 (Jeffrey Deskovic, exonerated of rape and murder with DNA evidence after making inculpatory statements, later explained that " '[b]elieving in the criminal justice system and being fearful for myself, I told [the police] what they wanted to hear' "). As I explain later in this opinion, this optimistic view of the criminal justice system is not universally shared.

[31] Several of the exonerated "Central Park Five" defendants recently explained: "It's hard to imagine why anyone would confess to a crime they didn't commit. But when you're in that interrogation room, everything changes. During the hours of relentless questioning that we each endured, detectives lied to us repeatedly. . . . It felt like the truth didn't matter. Instead, it seemed as though they locked onto one theory and were hellbent on securing incriminating statements to corroborate it. A conviction rather than justice felt like the goal." Y. Salaam et al., "Act Against Coerced Confessions," N.Y. Times, January 5, 2021, p. A19.

know-people-mistreated-police.aspx (last visited July 19, 2021) (reporting results of 2020 survey reflecting that 71 percent of "[b]lack Americans . . . [report] know[ing] 'some' or 'a lot of' people who were treated unfairly by the police . . . twice the [response] rate among [w]hite Americans," and that 50 percent of black adults, and 61 percent of black Americans between ages eighteen and forty-four "report knowing 'some' or 'a lot of' people who were unfairly sent to jail"); I. Capers, "Crime, Legitimacy, and Testilying," 83 Ind. L.J. 835, 836 (2008) ("[f]or many people of color and members of other politically vulnerable groups, [it] . . . comes as [no] surprise" that police officers misrepresent facts to justify traffic stops); D. Young, "Unnecessary Evil: Police Lying in Interrogations," 28 Conn. L. Rev. 425, 468 (1996) ("Those people who protest their innocence in the face of police lies about overwhelming evidence . . . may genuinely fear that they are being framed with fabricated evidence. While a more sophisticated, educated, and financially secure individual may be confident that he or his lawyer ultimately will be heard and the accusations withdrawn, those not so well situated may fear punishment for wrongs they did not commit. In particular, members of social groups with disproportionately high conviction rates, such as young black men, may despair of release and conclude they must confess to something to escape a worse fate.").

Recognition of the causal connection between deceptive interrogation tactics and false confessions has been a significant factor in a recent shift away from the use of the Reid method, which sanctions lying. One of the nation's largest police consulting firms has repudiated the Reid method; see Wicklander-Zulawski & Associates, Inc., Identify the Truth, available at https://www.w-z.com/truth/ (last visited July 19, 2021) ("[t]he high risk of false confessions, potential for incorrect or unreliable information, and ultimately the misapplication of con-

frontational techniques are all reasons why [Wicklander -Zulawski & Associates, Inc.] has chosen to no longer offer the confrontational approach in its course selections"); as have some foreign countries. See W. Kozinski, "The Reid Interrogation Technique and False Confessions: A Time for Change," 16 Seattle J. Soc. Just. 301, 304 n.16, 333–34 (2017) (noting England's shift from Reid method after concluding that its overly manipulative and coercive tactics caused false confessions and subsequent adoption of England's alternative, nonconfrontational method by United Kingdom, Norway and New Zealand).

The connection between police deception in interrogation and false confessions has also prompted recent legislative action. A bill proposed in New York State, which notes this connection in its statement of purpose, would deem a confession or admission "involuntarily made" when it is obtained from a defendant "by knowingly communicating false facts about evidence to the defendant . . . ."[32] Senate Bill No. S324, § 1, 2021–2022 Leg., Reg. Sess. (N.Y. 2021).

This evidence has led to a call to recognize the coercive effect of lies and deception and give these considerations due weight when assessing whether a confession was voluntary under the totality of the circumstances. See *Dassey* v. *Dittmann*, supra, 877 F.3d 331 (Rovner, J., dissenting) ("[R]eform of our understanding of coer-

[32] A bill also was raised in Connecticut in 2014, which would have established a presumption that a statement made by a suspect as a result of a custodial interrogation is inadmissible if the police knowingly present the suspect with false evidence or knowingly misrepresent the evidence about the case. See Raised Bill No. 5589, 2014 Sess., § 1. Interestingly, in written testimony submitted to the Judiciary Committee, the Division of Criminal Justice successfully urged no action on the bill, suggesting that the courts should address this concern on a case-by-case basis under the current state of the law rather than adopt a per se rule. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 8, 2014 Sess., pp. 3564–65. That is precisely what this opinion advocates.

cion is long overdue. When conducting a totality of the circumstances review, most courts' evaluations of coercion still are based largely on outdated ideas about human psychology and rational [decision making]. It is time to bring our understanding of coercion into the twenty-first century.");[33] *State* v. *Allies*, supra, 186 Mont. 113 ("[L]ying to [the] defendant about how much is known about his involvement in the crimes . . . is particularly repulsive to and totally incompatible with the concepts of due process embedded in the federal and [Montana] constitutions. The effect is particularly coercive . . . .").

False confessions are not the only reason for concern. From another vantage point, it should be immaterial whether there is a basis to believe that the defendant's confession in a given case was false. To the extent that the foregoing evidence demonstrates the realistic potential for coercion associated with lying as an interrogation tactic, the United States Supreme Court has reminded us that the rules that we adopt to prevent the admission of involuntary confessions apply even when it is clear that the defendant confessed to the truth: "[C]onvictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are

[33] Judge Rovner's dissent in *Dassey* is particularly notable because it was joined by two other Seventh Circuit judges. The four judges in the majority did not decide the issue raised in Judge Rovner's dissent because they concluded that that dissent's approach would not apply under the deferential standard that the federal court was required to apply to the review of a state court decision. See *Dassey* v. *Dittmann*, supra, 877 F.3d 302 ("[e]ven if we were to consider the approach in past [United States] Supreme Court decisions outmoded, as the dissents suggest, a state court's decision consistent with the Supreme Court's approach could not be unreasonable under [the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)]"). Chief Judge Wood wrote a separate dissent, arguing that the confession was involuntary despite the deferential standard of the AEDPA. See id., 319–31 (Wood, C. J., dissenting).

unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the [s]tate must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. . . . To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the [d]ue [p]rocess [c]lause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the [f]ourteenth [a]mendment guarantees." (Citations omitted.) *Rogers* v. *Richmond*, 365 U.S. 534, 540–41, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961); see also *Spano* v. *New York*, 360 U.S. 315, 320–21, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959) ("The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.").

These broader concerns about the integrity of the means by which we obtain confessions recognize that

the tactics employed by law enforcement have ramifications beyond the present case. Many courts have expressed disapproval of the use of deception as an interrogation tactic; see, e.g., *Ex parte Hill*, 557 So. 2d 838, 842 (Ala. 1989); *State* v. *Cayward*, 552 So. 2d 971, 973 (Fla. App. 1989), review dismissed, 562 So. 2d 347 (Fla. 1990); *State* v. *Old-Horn*, supra, 375 Mont. 318; *People* v. *Robinson*, 31 App. Div. 2d 724, 725, 297 N.Y.S.2d 82 (1968); *State* v. *Jackson*, 308 N.C. 549, 573, 304 S.E.2d 134 (1983); *State* v. *Galli*, 967 P.2d 930, 936 (Utah 1998); sometimes quite vehemently. See, e.g., *United States* v. *Orso*, 266 F.3d 1030, 1039 (9th Cir. 2001) ("reprehensible"), cert. denied, 537 U.S. 828, 123 S. Ct. 125, 154 L. Ed. 2d 42 (2002); *Ex parte Hill*, supra, 842 ("especially repugnant when used against suspects of diminished intellectual ability"); *State* v. *Phelps*, supra, 215 Mont. 225 ("[w]e cannot overemphasize our strong condemnation" (internal quotation marks omitted)); *State* v. *Register*, supra, 323 S.C. 480 ("a deplorable practice"); *State* v. *Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689 ("reprehensible") (overruled on other grounds by *State* v. *Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019)), cert. denied, 519 U.S. 972, 117 S. Ct. 402, 136 L. Ed. 2d 316 (1996). See generally *State* v. *Jackson*, 308 N.C. 549, 573, 304 S.E.2d 134 (1983) (noting general view that this tactic is "not morally justifiable or a commendable practice" (internal quotation marks omitted)).

These tactics are condemned not only because of their effect on the suspect but because they diminish society's perception of the honesty and legitimacy of the police. See *State* v. *Cayward*, supra, 552 So. 2d 975 ("We must . . . decline to undermine the rapport the police have developed with the public by approving participation of law enforcement officers in practices which most citizens would consider highly inappropriate. We think that for us to sanction the manufacturing

of false documents by the police would greatly lessen the respect the public has for the criminal justice system and for those sworn to uphold and enforce the law."); D. Young, supra, 28 Conn. L. Rev. 471 ("We entrust [the] police with the initial enforcement of our community standards, in the form of our criminal laws. When [the] police themselves misstate and violate the standards, even when that violation does not rise to a criminal level, they undermine their own role within the community."); D. Young, supra, 468–69 ("Police lying also generates a systemic loss of integrity. Research and analysis by ethicists and philosophers [remind] us of the impact of lying on society and societal perceptions of such lying. . . . Truth from doctors, truth from business people, and truth from government officials are essential for us to plan our lives and to maintain control over our choices. We condemn lying in personal affairs and criminalize it in many contexts. . . . We condemn lying in part because we recognize that lying manipulates. If we want people to make free choices, we do not want them manipulated through lying." (Footnotes omitted.)).

Sanctioning lying in interrogations adds fuel to the current crisis in trust and confidence in the police, as reflected in nationwide protests. See S. Klein, "Transparency and Truth During Custodial Interrogations and Beyond," 97 B.U. L. Rev. 993, 998–99 (2017) ("[W]e have reached a point where there is little trust in law enforcement and the criminal justice system writ large. Rioting in Ferguson, Missouri and Charlotte, North Carolina is a serious symptom of this distrust. In fact, only about [one] half of Americans report confidence in the police." (Footnotes omitted.)); K. Momolu, supra (71 percent of black Americans surveyed in 2020 reported "know[ing] 'some' or 'a lot of' people who were treated unfairly by the police").

Legitimizing this unethical conduct also could encourage the police to adopt the pernicious attitude that the end justifies the means, which, in turn, could be used to justify other dishonest acts when the police are equally convinced of a suspect's guilt, such as lying in affidavits to support search or arrest warrants, planting evidence, and offering false testimony.[34] See *State* v. *Cayward*, supra, 552 So. 2d 975 ("[W]ere we to approve the conduct [by the police fabricating false evidence], we might be opening the door for [the] police to fabricate court documents, including warrants, orders, and judgments. We think that such a step would drastically erode and perhaps eliminate the public's recognition of the authority of court orders, and without the citizenry's respect, our judicial system cannot long survive.");[35] *Darity* v. *State*, 220 P.3d 731, 738 n.1 (Okla.

[34] The possibility that an end justifies the means mentality could result in some police officers committing perjury to advance what they perceive to be the greater public good is not hyperbole. Such conduct was sufficiently pervasive in New York City that police officers had their own name for the practice, "testilying"; see J. Goldstein, " 'Testilying' by Police: A Stubborn Problem," N.Y. Times, March 18, 2018, available at https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html (last visited July 19, 2021); and there is evidence that this conduct is not limited to that locale. "Judge Alex Kozinski of the Ninth Circuit has observed that it is 'an open secret long shared by prosecutors, defense lawyers and judges that perjury is widespread among law enforcement officers.' " I. Capers, supra, 83 Ind. L.J. 836–37. "Blue lies are so pervasive that even former prosecutors have described them as 'commonplace' and 'prevalent.' Surveyed prosecutors, defense attorneys, and judges believed perjury was present in approximately [20] percent of all cases. A separate survey of police officers was even more sobering. Seventy-six percent of responding officers agreed that officers shade the facts to establish probable cause; [48] percent believed judges were often correct in disbelieving police testimony." (Footnotes omitted.) Id., 870; see also K. Holloway, "Lying Is a Fundamental Part of American Police Culture," Salon, March 31, 2018, available at https://www.salon.com/2018/03/31/lying-is-a-fundamental-part-of-american-police-culture_partner/ (last visited July 19, 2021); Editorial, "Police Perjury: It's Called 'Testilying,' " Chicago Tribune, July 5, 2015, available at https://www.chicagotribune.com/news/opinion/editorials/ct-police-false-testimony-edit-20150702-story.html (last visited July 19, 2021).

[35] The Florida Appellate Court in *Cayward* made this statement when distinguishing between manufactured evidence and verbal lies, deeming the

Crim. App. 2009) (Chapel, J., dissenting) ("Courts have opened a Pandora's box by sanctioning police lies. The 'ends justify the means' rationale employed by most courts is very difficult to limit, and thus, the circumstances of 'permissible deceit' have increased. So too has the evidence of 'unlawful deceit.' How does a law enforcement officer accept a message that it is permissible to lie to obtain evidence, but not permissible to lie in a suppression hearing when the conviction or release of a murderer is in the balance. Empirical studies demonstrate that police are lying both in and out of court. . . . The consequences penetrate deep into the criminal justice system, as the authority of the courts and legitimacy of their rulings are based largely on integrity and trust." (Citations omitted.)); A. Clemens, Note, "Removing the Market for Lying Snitches: Reforms To Prevent Unjust Convictions," 23 Quinnipiac L. Rev. 151, 192 (2004) ("[A]n officer [may grow] 'convinced that the suspect is factually guilty of the offense, may believe that necessary elements of legal guilt are lacking [and feel] that he/she must supply the missing elements.' For example, one police officer explained how 'it is often necessary to "fluff up the evidence" to get a search warrant or [to] ensure conviction [so this] officer will attest to facts, statements, or evidence [that] never

former coercive per se; see *State* v. *Cayward*, supra, 552 So. 2d 973–75; a distinction adopted by a few other courts. See *State* v. *Patton*, 362 N.J. Super. 16, 31–32, 826 A.2d 783 (App. Div.), cert. denied, 178 N.J. 35, 834 A.2d 408 (2003); *State* v. *Farley*, 192 W. Va. 247, 257 n.13, 452 S.E.2d 50 (1994). I agree with those courts that have rejected the proposition that a verbal lie about evidence will necessarily have less of an effect than presenting that same lie in physical form, i.e., false test results. See, e.g., *State* v. *Baker*, supra, 147 Haw. 431 ("[t]o the suspect, who does not expect the police to lie, there is no meaningful distinction between being given a piece of paper that purports to document guilt and an officer's confident assertion that scientific evidence incontrovertibly establishes the suspect's guilt"); see also M. Gohara, supra, 33 Fordham Urb. L.J. 833 ("Both sorts of official misrepresentation offend traditional notions of due process. Forgery and oral misrepresentation differ from one another only in degree rather than in kind.").

occurred or occurred in a different fashion.' Police officers rationalize these lies, often themselves criminal acts, 'because they are necessary to ensure that criminals do not get off on "technicalities." ' " (Footnotes omitted.)); D. Young, supra, 28 Conn. L. Rev. 463–64 ("The justification of lying for the public good . . . may readily transfer to other lies. The officer wants to convict the criminal, punish him, and protect other potential victims throughout the officer's involvement in the case, not just during interrogation. For example, an officer may extend this justification to lying on a warrant affidavit for a search. . . . The officer's motives may also trigger lies to third parties, such as to encourage consent for a search or to encourage false testimony by others. . . . In an even more egregious application of this justification, an officer may lie at trial, committing perjury to obtain the conviction of someone he believes is guilty. . . . The inherent problem with lying for the public good is that people who believe their entire work is for the public good, as police officers do and should, may use this rationale to justify any and all lies that they tell . . . ." (Footnotes omitted.)).

Beyond concerns about the practical consequences of sanctioning lying, there are moral and ethical concerns. "[S]tate officials, at least in a democracy, must aspire to be relevant epistemic authorities on the law and on at least that aspect of morality embodied in law. We *should* be able to rely on their transmissions about the content of law, legally relevant morality, and legally relevant facts. These ideas would render police misrepresentation—even to a wrongdoer—especially morally problematic. If their role partly involves serving as a reliable epistemic repository, then the police subvert their own role when they misrepresent the content of the law, the moral severity of an offense, or the evidence they have collected. . . . Because their epistemic

responsibilities are bound together with and frame their investigatory aims, the police cannot argue that the mere significance of the end justifies the suspension of the truthfulness presumption." (Emphasis in original.) S. Shiffrin, Speech Matters: On Lying, Morality, and the Law (2014) p. 198; see also *Miranda* v. *Arizona*, supra, 384 U.S. 479–80 (" 'Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our [g]overnment is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the [g]overnment becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this [c]ourt should resolutely set its face.' "), quoting *Olmstead* v. *United States*, 277 U.S. 438, 485, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting).

Despite the aforementioned concerns, there are those who would argue that allowing the police to lie, at least in interrogations, is a necessary evil. Confessions undoubtedly may be essential in some cases. See *Moran* v. *Burbine*, 475 U.S. 412, 426, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) ("[a]dmissions of guilt are more than merely desirable . . . they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law" (citation omitted; internal quotation marks omitted)); see also *McNeil* v. *Wisconsin*, 501 U.S. 171, 181, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991) ("the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good"). But, although confessions may be essential proof in some

cases, it does not follow that lying to obtain those confessions is equally necessary.

There is a wealth of evidence that nonconfrontational interrogation methods, which do not sanction lying to suspects, are at least as effective as inquisitorial, adversarial methods like the Reid method. This evidence is found in empirical research; see *Dassey* v. *Dittmann*, supra, 877 F.3d 335–36 (Rovner, J., dissenting); M. Kim, supra, 52 Gonz. L. Rev. 517; S. Tekin et al., "Interviewing Strategically To Elicit Admissions from Guilty Suspects," 39 Law & Hum. Behav. 244, 244–46 (2015); the practices of other countries that have successfully shifted from the inquisitorial, adversarial Reid method to information gathering, conversational models; see M. Kim, supra, 513 (England); W. Kozinski, supra, 16 Seattle J. Soc. Just. 333–34 (United Kingdom, Norway, and New Zealand); Royal Canadian Mounted Police, The Art of an Effective Interview: Why Non-Accusatory Is the New Normal, (January 13, 2017), available at http://www.rcmp-grc.gc.ca/en/gazette/the-art-an-effective-interview (last visited July 19, 2021) (Canada); and the adoption of rules by foreign courts prohibiting misrepresentation of evidence. See C. Slobogin, "An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation," 22 Mich. J. International L. 423, 443–44 (2001) (English and German courts developed special rules barring deception).[36]

One of our nation's largest police departments, the Los Angeles Police Department, is in the process of abandon-

[36] It should be noted that, although there is evidence that the United Kingdom has a higher or similar rate of confessions as the United States; see C. Slobogin, "Lying and Confessing," 39 Tex. Tech L. Rev. 1275, 1282–83 and nn. 43 and 44 (2007); the United Kingdom permits the police to continue questioning suspects even after they have indicated a desire to remain silent and to tell suspects that their silence may be used against them. Id., 1282–83; see also C. Slobogin, supra, 22 Mich. J. International L. 446.

ing Reid style interrogation methods in favor of nonconfrontational techniques developed by the High-Value Detainee Interrogation Group (known as HIG), a joint effort of the Federal Bureau of Investigation, the Central Intelligence Agency, and the Pentagon, created to conduct noncoercive interrogations. See R. Kolker, The Marshall Project, Nothing but the Truth: A Radical New Interrogation Technique Is Transforming the Art of Detective Work: Shut Up and Let the Suspect Do the Talking (May 24, 2016), available at https://www.themarshallproject.org/2016/05/24/nothing-but-the-truth#.gR9TabJrx (last visited July 19, 2021).

To those who would argue that we must permit lying during interrogations because we sanction lying in other contexts that are necessary for effective law enforcement (i.e., undercover activities, use of informants, etc.); see, e.g., *Sheriff, Washoe County* v. *Bessey*, 112 Nev. 322, 328, 914 P.2d 618 (1996); L. Magid, "Deceptive Police Interrogation Practices: How Far Is Too Far?," 99 Mich. L. Rev. 1168, 1182 (2001); there are fundamental distinctions in those other circumstances that may justify different treatment. Those circumstances do not involve actions by the police presenting themselves as officers of the law, or the use of psychologically coercive tactics to pressure the suspect to make inculpatory statements.[37]

[37] See *Lewis* v. *United States*, 385 U.S. 206, 209, 87 S. Ct. 424, 17 L. Ed. 2d 312 (1966) (The court acknowledged, in the context of information obtained by an undercover agent, "that, in the detection of many types of crime, the [g]overnment is entitled to use decoys and to conceal the identity of its agents. The various protections of the Bill of Rights, of course, provide checks upon such official deception for the protection of the individual."); see also *Hoffa* v. *United States*, 385 U.S. 293, 302, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966) (use of government informant to obtain incriminating statements was not violation of fourth amendment when informant was invited to defendant's hotel suite and was not "a surreptitious eavesdropper," and defendant was relying on his "misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it").

The broad societal harms caused by allowing the police to lie during interrogations, along with the risk of false confessions, may support a per se ban on this practice, whether as a matter of legislation action or the exercise of the court's supervisory authority. The best course of action would be for our state and local police to abandon this tactic before such action is necessary, as some police departments in other states already have done. To be clear, I do not presently suggest that we adopt so extreme a rule as a per se ban. For now, it is sufficient to lay out concerns that should be considered, in a future case, when deciding whether this court should give this particular tactic greater weight in assessing whether the defendant's confession was coerced. For the reasons stated in part II of this opinion regarding the many other coercive tactics applied in the present case in conjunction with the false evidence ploy, I cannot agree with the majority's conclusion that the defendant's confession was voluntary under the totality of the circumstances.

I respectfully dissent in part.