# STATE OF CONNECTICUT *v.* HIRAL M. PATEL (SC 20446)

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

*Syllabus*

Convicted of various crimes, including murder, in connection with a home invasion, the defendant appealed, claiming, inter alia, that the trial court had improperly admitted into evidence a dual inculpatory statement made by a codefendant, C, to E, a fellow prison inmate. The defendant's cousin, N, had included the defendant and C in N's plan to rob the victim, with whom N had previously engaged in drug transactions. N drove the defendant and C to the area of the victim's home, which the defendant and C eventually entered. After encountering the victim, C shot and killed him. While in custody on an unrelated charge, C recounted the events of the home invasion, including the defendant's role, to E, who surreptitiously recorded the conversation. At trial, the recording of C's conversation with E was admitted as a statement against penal interest under the applicable provision (§ 8-6 (4)) of the Connecticut Code of Evidence. In addition, defense counsel, in order to advance a theory of third-party culpability, sought to have the defendant's sister, M, testify about a purported confession that P, N's cousin, made to M. The trial court excluded M's testimony regarding P's confession on the ground that it was not sufficiently trustworthy. The Appellate Court affirmed the judgment of conviction, and the defendant, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the trial court had not abused its discretion in admitting into evidence C's dual inculpatory statement to E:

   a. The admission of C's statement did not violate the defendant's right to confrontation under the United States constitution: in *Crawford* v. *United States* (541 U.S. 36), the United States Supreme Court indicated that statements of a defendant's coconspirator to a fellow inmate inculpating the defendant are nontestimonial, and, subsequently, federal and state courts have consistently rejected claims that the admission of statements between inmates or between an inmate and an informant that inculpate a defendant violate the defendant's right to confrontation; moreover, in determining whether the admission of such statements implicates a defendant's right to confrontation, courts have undertaken an objective analysis of the circumstances surrounding the making of the statements and the encounter during which they were made in order to assess the primary purpose and degree of formality of that encounter; in the present case, C's statement to E was elicited under circumstances in which the objectively manifested purpose of the encounter was not

to secure testimony for trial, as C made his statement in an informal setting, namely, his prison cell, to his cellmate, E, who questioned C in a sufficiently casual manner to avoid alerting C that C's statement was going to be relayed to law enforcement.

b. The admission of C's statement did not violate the defendant's confrontation rights under article first, § 8, of the Connecticut constitution: although the defendant urged this court to depart from the federal standard and to hold, under the state constitution, that a statement qualifies as testimonial if the reasonable expectation of either the declarant or the interrogator/listener is to prove past events potentially relevant to a later criminal prosecution, this court was not convinced that the defendant established the necessary predicates for departing from the federal standard, as an analysis under the six factors set forth in *State* v. *Geisler* (222 Conn. 672) did not support a more protective interpretation under the state constitution; moreover, although this court noted that it might be compelled to reach a different result under a slight variation of the facts, in the present case, the court had a fair assurance that government officials did not influence the content or the making of C's statement, as there was no evidence to suggest any involvement by the state's attorney's office in orchestrating the inquiry or that the police coached E on what questions to ask or what facts they were seeking to learn, and, because the conversation between C and E was recorded, the trial court could ascertain the extent to which, if any, C's answers may have been shaped or coerced by E.

c. The trial court did not abuse its discretion in admitting C's statement under § 8-6 (4) of the Connecticut Code of Evidence as a statement against penal interest: although the fact that the statement was made thirteen months after the commission of the crimes weighed against its admission, and although E and C, who were fellow inmates for only a short period of time, did not share the type of relationship that would support the statement's trustworthiness, C's account of the home invasion was consistent with the physical evidence in almost all material respects, the statement was clearly against C's penal interest, as he cast himself as the principal actor in the commission of the crimes, and C's statement and the circumstances surrounding the making of that statement had none of the characteristics that historically has caused courts to view dual inculpatory statements as presumptively unreliable when offered to prove the guilt of a declarant's accomplice.

2. The Appellate Court correctly concluded that the trial court had properly excluded P's confession to M, which the defendant attempted to offer through M's testimony as a statement against penal interest under § 8-6 (4): the trial court reasonably concluded that P's purported confession, in which he admitted that it was he, and not the defendant, who accompanied C into the victim's home, was not sufficiently trustworthy to be admitted as a statement against penal interest, as much of the evidence that the defendant characterized as corroborative indicated only that P

may have played some role in connection with the home invasion, not that P had been present in the victim's home; moreover, P's confession was made more than one year after the incident, and M claimed to have told no one except the defendant about P's confession for more than three and one-half years after P made the confession, delays that provided M with the opportunity to learn of the details of the prosecution's theory of the case.

Argued February 22, 2021—officially released March 22, 2022

*Procedural History*

Substitute information charging the defendant with the crimes of felony murder, murder, home invasion, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit robbery in the first degree, conspiracy to commit burglary in the first degree, and tampering with physical evidence, brought to the Superior Court in the judicial district of Litchfield and tried to the jury before *Danaher*, *J.*; thereafter, the court denied the defendant's motions to preclude certain evidence; verdict of guilty; subsequently, the court, *Danaher*, *J.*, granted the defendant's motion to vacate the verdict as to the charge of felony murder and vacated the verdict as to the charge of conspiracy to commit robbery in the first degree; judgment of guilty of murder, home invasion, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit burglary in the first degree, and tampering with physical evidence, from which the defendant appealed to this court; subsequently, the case was transferred to the Appellate Court, *Alvord*, *Bright* and *Bear*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

*Richard Emanuel*, for the appellant (defendant).

*Matthew A. Weiner*, assistant state's attorney, with whom, on the brief, was *Dawn Gallo*, state's attorney, for the appellee (state).

*Opinion*

KAHN, J. Following a jury trial, the defendant, Hiral M. Patel, was convicted of murder in violation of General Statutes § 53a-54a, home invasion in violation of General Statutes § 53a-100aa (a) (1), burglary in the first degree as an accessory in violation of General Statutes §§ 53a-101 (a) (1) and 53a-8 (a), robbery in the first degree as an accessory in violation of General Statutes §§ 53a-134 (a) (2) and 53a-8 (a), conspiracy to commit burglary in the first degree in violation of § 53a-101 (a) (1) and General Statutes § 53a-48, and tampering with physical evidence in violation of General Statutes (Rev. to 2011) § 53a-155 (a) (1).[1] The Appellate Court affirmed the judgment of conviction; *State* v. *Patel*, 194 Conn. App. 245, 250, 301, 221 A.3d 45 (2019); and we thereafter granted the defendant's petition for certification to appeal. See *State* v. *Patel*, 334 Conn. 921, 223 A.3d 60 (2020). The defendant's principal challenge relates to the admission into evidence of a codefendant's recorded dual inculpatory statement[2] to a fellow inmate acting at the behest of the state police. The defendant contends that the Appellate Court incorrectly concluded that the statement was nontestimonial and, therefore, did not implicate the defendant's confrontation rights under either the United States constitution or the Connecticut constitution, and that the trial court properly admitted it under the hearsay exception for statements against penal interest. We disagree with the defendant's claims and affirm the Appellate Court's judgment.

[1] The defendant also was convicted of felony murder in violation of General Statutes § 53a-54c and conspiracy to commit robbery in the first degree in violation of §§ 53a-134 (a) (2) and 53a-48. The trial court vacated his convictions on those charges to avoid double jeopardy concerns.

[2] "A dual inculpatory statement is a statement that inculpates both the declarant and a third party, in this case the defendant." (Internal quotation marks omitted.) *State* v. *Camacho*, 282 Conn. 328, 359, 924 A.2d 99, cert. denied, 552 U.S. 956, 128 S. Ct. 388, 169 L. Ed. 2d 273 (2007).

The Appellate Court's decision sets forth the following facts that the jury reasonably could have found. "On June 12, 2012, [the] police arrested Niraj Patel (Niraj), the defendant's cousin, after a motor vehicle stop . . . . [Niraj] was charged with criminal attempt to possess more than four ounces of marijuana, interfering with an officer, tampering with evidence, possession of drug paraphernalia, and motor vehicle charges. Following his arrest, Niraj unsuccessfully attempted to borrow money . . . to pay his attorney.

"Niraj thereafter formed a plan to rob Luke Vitalis, a marijuana dealer with whom Niraj had conducted drug transactions. Vitalis lived with his mother, Rita G. Vitalis . . . in Sharon. [Niraj offered money to Michael Calabrese, a friend, and the defendant to perform the robbery.]

"Niraj knew that Vitalis had sold ten pounds of marijuana from his home on August 5, 2012, and set up a transaction with Vitalis for the following day, with the intention of robbing Vitalis of his proceeds of the previous sale. On August 6, 2012, Niraj drove Calabrese and the defendant to the area of Vitalis' home and dropped them off down the road. Calabrese and the defendant ran through the woods to Vitalis' home. They watched the home and saw Vitalis' mother come home. At approximately 6 p.m., Calabrese and the defendant, wearing masks, bandanas, black hats, and gloves, entered the home, encountered Vitalis' mother, and restrained her using zip ties. Calabrese, armed with a Ruger handgun that he received from Niraj, went upstairs and encountered Vitalis in his bedroom. He struck Vitalis with the handgun and shot him three times, killing him. Calabrese searched the bedroom but could find only Vitalis' wallet with $70 and approximately one-half ounce of marijuana, both of which he took. Calabrese and the defendant ran from the property into the woods, where the defendant lost his cell

phone. Calabrese and the defendant eventually met up with Niraj, who was driving around looking for them. Calabrese burned his clothing and sneakers on the side of Wolfe Road in Warren.

"After freeing herself, Vitalis' mother called 911. State police . . . arrived at the scene at approximately 6:14 p.m. and found Vitalis deceased. Some of the drawers in the furniture in Vitalis' bedroom were pulled out. The police searched the bedroom and found $32,150 . . . 1.7 pounds of marijuana . . . and evidence of marijuana sales." (Footnote omitted.) *State* v. *Patel*, supra, 194 Conn. App. 250–51.

The record reveals the following additional undisputed facts and procedural history. While the police were investigating the Sharon home invasion, Calabrese was arrested and detained on an unrelated charge. While in custody, Calabrese recounted the events that had occurred during the home invasion, including the defendant's role, to a jailhouse informant who was surreptitiously recording the conversation. At trial, the state established that Calabrese had invoked his fifth amendment privilege not to testify and introduced, over defense counsel's objection, the recording of Calabrese's dual inculpatory statement as a statement against penal interest under § 8-6 (4) of the Connecticut Code of Evidence. The state also introduced cell phone site location information, testimony from Calabrese's former girlfriend, and other evidence that tended to corroborate the defendant's presence at, and involvement in, the Sharon home invasion, as well as evidence establishing that friends and family of the defendant had been unable to make contact with the defendant immediately before, during, and after the period during which the Sharon home invasion occurred. See id., 251–52, 262, 284–89.

The defense advanced theories of alibi and third-party culpability. The defendant's older sister, Salony Majmu-

dar, testified that the defendant was visiting her in Boston, Massachusetts, to celebrate an important Hindu holiday when the Sharon home invasion occurred.[3] Defense counsel also sought to have Majmudar testify about a purported confession that had been made to her by Niraj's brother, Shyam Patel (Shyam), in which Shyam admitted that it was he, and not the defendant, who had accompanied Calabrese to Vitalis' home. Defense counsel offered Shyam's statement as a statement against penal interest under § 8-6 (4) of the Connecticut Code of Evidence. The trial court sustained the prosecutor's objection to the admission of the statement, ruling that the statement was insufficiently trustworthy to satisfy § 8-6 (4).

The jury returned a verdict, finding the defendant guilty of murder, home invasion, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit burglary in the first degree, and tampering with physical evidence, among other charges, and the trial court thereafter rendered judgment in accordance with the jury's verdict. See footnote 1 of this opinion. The court imposed a total effective sentence of forty-five years of imprisonment, execution suspended after thirty-five years and one day, and five years of probation.

The defendant appealed from the judgment of conviction, claiming that constitutional and evidentiary errors entitled him to a new trial. See id., 249–50. The Appellate Court affirmed the judgment of conviction. Id., 250,

[3] The holiday, Raksha Bhandana, which celebrates the bond between a brother and sister, or other close male/female relationships, fell on August 2, 2012. The director of Hindu life at Yale University confirmed the holiday's significance and that, although the preferred way to celebrate is in each other's presence, there is flexibility in both the manner and timing of the holiday's observance. Cell phone records established that Majmudar and the defendant had a thirty-seven minute phone call on August 2, 2012, and no phone contact on August 6, 2012.

301. We thereafter granted the defendant's petition for certification to appeal, limited to the following issues: (1) whether the Appellate Court correctly concluded that the admission of Calabrese's dual inculpatory statement (a) did not violate the defendant's confrontation rights under the United States constitution, (b) did not violate the defendant's confrontation rights under the Connecticut constitution, and (c) was proper under our code of evidence as a statement against penal interest; and (2) whether the Appellate Court correctly concluded that the trial court had properly excluded Shyam's confession. See *State* v. *Patel*, supra, 334 Conn. 921 n.22. The defendant's constitutional claims are subject to plenary review; see, e.g., *State* v. *Smith*, 289 Conn. 598, 618–19, 960 A.2d 993 (2008); whereas his evidentiary claims, which challenge the application, rather than the interpretation, of our code of evidence, are reviewed for an abuse of discretion. See, e.g., *State* v. *Pierre*, 277 Conn. 42, 68, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006); see also *State* v. *Saucier*, 283 Conn. 207, 218–21, 926 A.2d 633 (2007) (contrasting standards of review).

I

The defendant challenges the admission of Calabrese's dual inculpatory statement on both constitutional and evidentiary grounds. We agree with the Appellate Court that the trial court properly admitted this statement.

The following additional undisputed facts provide context for our resolution of this issue. Calabrese was arrested on August 29, 2013, on drug charges unrelated to the August 6, 2012 Sharon home invasion. He was initially held in custody at the same correctional facility where Wayne Early was being held following his convictions of attempted burglary in the first degree with a deadly weapon and criminal possession of a firearm.

On September 3, 2013, Early was summoned to the facility's intelligence office. Department of Correction officials there informed Early that Calabrese, whom Early did not know, was going to be moved into Early's cell and asked Early whether he would be willing to wear a recording device. Early previously had made confidential recordings of other cellmates. Early said that he would be willing to record Calabrese, if Calabrese seemed inclined to talk. Late that evening, Calabrese was moved into Early's cell. The two men shared information about the charges for which they were in custody. Early disclosed that he had originally been charged with home invasion, but that charge later was reduced to burglary. Calabrese responded that the police were "looking" at him for the same type of incident and began to talk about the Sharon home invasion.[4] Early changed the subject because he was not yet wearing the recording device.

The following day, Early was brought back to the corrections intelligence office. Early confirmed that he was willing to record Calabrese. A corrections official then placed a call to a state police official, who spoke with Early to establish that he had no knowledge about the incident of interest[5] and directed Early to get details about it if he could. When Early returned to his cell, equipped with a hidden recording device, he gradually turned the conversation to the subject of the home invasion that Calabrese had mentioned the prior night, telling Calabrese that he "want[ed] to hear how that shit went down . . . ." Calabrese volunteered many

[4] In the recorded exchange on September 4, 2013, Calabrese told Early that the police had questioned him about the incident after they reviewed cell phone records for Vitalis, which eventually led them to information about Calabrese's cell phone. The trial court credited Early's testimony that, on the evening of September 3, 2013, Calabrese initiated the topic of the Sharon home invasion.

[5] It is unclear from the record whether Early was told where the incident took place, or how the matter of interest was described to Early.

details, including the fact that the defendant participated, but Early repeatedly asked questions to obtain further details or clarification about the incident.

Calabrese's account ascribed the following actions and intentions to the participants. He and the defendant went to Sharon with the intention of robbing a drug dealer (Vitalis). Calabrese entered Vitalis' home first, because he was the only one with a gun. After they entered and saw Vitalis' mother, Calabrese grabbed her and started to tie her hands. Calabrese directed the defendant to finish the task and to watch her while Calabrese confronted Vitalis upstairs. Calabrese did not plan to shoot Vitalis but did so after Vitalis threatened him with a knife and tried to grab the gun. The defendant fled when he heard the gunshots, allowing Vitalis' mother to make her way to a phone and to call the police. Calabrese's search yielded only $70 and a small amount of marijuana before he had to flee. Calabrese was able to catch up with the defendant because the defendant had stopped to look for his cell phone, which he had dropped while running through a swampy area in the woods and was unable to recover. Niraj, who had planned the robbery, eventually found them and gave Calabrese a change of clothes. Calabrese set fire to his blood soaked clothes and shoes in a wooded area, because he had left a footprint in a pool of Vitalis' blood at the crime scene.

At trial, the state offered the recording of Calabrese's dual inculpatory statement into evidence for its truth; therefore, it indisputably is hearsay. See Conn. Code Evid. § 8-1 (3). Because Calabrese's invocation of his fifth amendment privilege not to testify deprived the defendant of an opportunity to cross-examine Calabrese about that statement, his statement is admissible only if it avoids the constitutional hurdle imposed by the confrontation clauses of the federal and state constitutions; see U.S. Const., amends. VI and XIV, §1; Conn.

Const., art. I, § 8; and the evidentiary hurdle of hearsay rules.[6]

A

The parties disagree as to whether the United States Supreme Court has in fact settled the issue of whether the admission of a hearsay statement to a jailhouse informant inculpating the declarant and a codefendant violates the codefendant's rights under the confrontation clause of the sixth amendment to the United States constitution. The defendant contends that the court answered that question in the negative only in dicta, under distinguishing circumstances, and that subsequent decisions that have expanded the framework of this inquiry by recognizing that the identity and actions of the questioner must be considered. The defendant argues that he prevails under the current framework because Early, acting as an agent of law enforcement, effectively interrogated Calabrese for the primary purpose of obtaining testimony to be used in a criminal prosecution.

There can be no doubt that the court's confrontation clause jurisprudence has vexed courts as applied to

[6] Although several of this court's decisions address the evidentiary issue first; see, e.g., *State* v. *Simpson*, 286 Conn. 634, 650–51, 945 A.2d 449 (2008); *State* v. *Camacho*, supra, 282 Conn. 362–63; *State* v. *Kirby*, 280 Conn. 361, 373–78, 908 A.2d 506 (2006); those cases appear to rely on the jurisprudential policy of constitutional avoidance, which directs courts to decide a case on a nonconstitutional basis if one is available, rather than unnecessarily deciding a constitutional issue. See, e.g., *State* v. *Cameron M.*, 307 Conn. 504, 516 n.16, 55 A.3d 272 (2012) (overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 728 n.14, 754, 91 A.3d 862 (2014)), cert. denied, 569 U.S. 1005, 133 S. Ct. 2744, 186 L. Ed. 2d 194 (2013); *State* v. *McCahill*, 261 Conn. 492, 501, 811 A.2d 667 (2002). This policy is inapplicable, however, to cases in which a defendant raises the constitutional claim based on his right to confrontation. Resolution of the evidentiary claim would not obviate the need to address the constitutional issue because, even if the statement is inadmissible under the hearsay exception relied on, the state would be free on retrial to seek admission of the same statement on a different evidentiary basis. The constitutional issue, therefore, is the appropriate starting point.

particular circumstances, a point we elaborate on in part I B of this opinion. The present case, however, is one in which we have confidence as to how the court would resolve the issue presented, namely, in favor of the state. The federal constitutional issue, therefore, is our starting point. See *State* v. *Purcell*, 331 Conn. 318, 334 n.11, 203 A.3d 542 (2019) (noting that we address federal constitution first when "we can predict to a reasonable degree of certainty how the United States Supreme Court would resolve the issue"); see also *State* v. *Taupier*, 330 Conn. 149, 166 n.14, 193 A.3d 1 (2018) (concluding that it was more efficient to address federal claim first because review of federal precedent would be necessary under state constitutional framework in *State* v. *Geisler*, 222 Conn. 672, 685, 610 A.2d 1225 (1992)), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019).

The sixth amendment's confrontation clause, which is binding on the states through the due process clause of the fourteenth amendment; *Pointer* v. *Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const., amend. VI. Although an "essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination"; (emphasis omitted; internal quotation marks omitted) *Davis* v. *Alaska*, 415 U.S. 308, 315–16, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); this clause has never been interpreted to require the opportunity to cross-examine every hearsay declarant. See, e.g., *Idaho* v. *Wright*, 497 U.S. 805, 813–14, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990); see also *Crawford* v. *Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

In prior cases, we have chronicled the development of the court's confrontation case law, including its sea

change from a focus on whether the hearsay statement bore adequate "indicia of reliability"; (internal quotation marks omitted) *Ohio* v. *Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); to a focus on whether the statement is "[t]estimonial" in nature under *Crawford* v. *Washington*, supra, 541 U.S. 59, and its progeny. See generally *State* v. *Rodriguez*, 337 Conn. 175, 226–27, 252 A.3d 811 (2020) (*Kahn*, *J.*, concurring).[7] Although the court has "labored to flesh out what it means for a statement to be 'testimonial' "; *Ohio* v. *Clark*, 576 U.S. 237, 244, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015); it has deemed the term to include not only ex parte in-court testimony and formalized testimonial materials such as affidavits and depositions but also "[p]olice interrogations . . . ." *Crawford* v. *Washington*, supra, 51–53. The court used that term in its colloquial, rather than its strictly legal, sense to include a "recorded statement, knowingly given in response to structured police questioning . . . ." Id., 53 n.4. Such statements "are testimonial when the circumstances objectively indicate that . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (Internal quotation marks omitted.) *Ohio* v. *Clark*, supra, 244, quoting *Davis* v. *Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

In dicta in *Crawford* and *Davis*, the court indicated that statements of a coconspirator to a fellow inmate and to an undercover agent inculpating the defendant were clearly nontestimonial. The court asserted that its newly adopted testimonial rubric would not alter the results reached in its prior cases. See *Davis* v. *Washington*, supra, 547 U.S. 825–26; *Crawford* v. *Washington*,

[7] See also *State* v. *Sinclair*, 332 Conn. 204, 218–25, 210 A.3d 509 (2019); *State* v. *Slater*, 285 Conn. 162, 169–74, 939 A.2d 1105, cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008); *State* v. *Kirby*, supra, 280 Conn. 378–83.

supra, 541 U.S. 58. Two of the cases cited by the court as examples were *Dutton* v. *Evans*, 400 U.S. 74, 77–78, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) (plurality opinion), and *Bourjaily* v. *United States*, 483 U.S. 171, 174, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987), in which the declarants were unavailable for cross-examination. See *Davis* v. *Washington*, supra, 825; *Crawford* v. *Washington*, supra, 57–58. In *Dutton*, the court had held that the admission of a statement of the defendant's coconspirator to a cellmate, implicating the defendant in a triple homicide, did not violate the defendant's confrontation rights. See *Dutton* v. Evans, supra, 87–89. In *Bourjaily*, the court had held that the admission of a recorded telephone conversation between the defendant's coconspirator and an FBI informant, in which the coconspirator implicated the defendant in a drug selling enterprise, did not violate the defendant's confrontation rights. See *Bourjaily* v. *United States*, supra, 173–74, 183–84.

Post-*Crawford*, federal courts and state courts have consistently rejected claims that the admission of inmate to inmate or inmate to informant statements inculpating a defendant, whether recorded or not, violated his or her confrontation rights. See, e.g., *United States* v. *Veloz*, 948 F.3d 418, 430–32 (1st Cir.), cert. denied, U.S. , 141 S. Ct. 438, 208 L. Ed. 2d 133 (2020); *United States* v. *Dargan*, 738 F.3d 643, 650–51 (4th Cir. 2013); *United States* v. *Dale*, 614 F.3d 942, 954–56 (8th Cir. 2010), cert. denied, 563 U.S. 918, 131 S. Ct. 1814, 179 L. Ed. 2d 774 (2011), and cert. denied sub nom. *Johnson* v. *United States*, 563 U.S. 919, 131 S. Ct. 1814, 179 L. Ed. 2d 775 (2011); *United States* v. *Smalls*, 605 F.3d 765, 778 (10th Cir. 2010); *People* v. *Arauz*, 210 Cal. App. 4th 1394, 1402, 149 Cal. Rptr. 3d 211 (2012); *State* v. *Nieves*, 376 Wis. 2d 300, 326–27, 897 N.W.2d 363 (2017). Courts also have routinely held that statements made unwittingly to a government agent or an undercover officer, outside of the prison context, are nontestimo-

nial.[8] See, e.g., *Brown* v. *Epps*, 686 F.3d 281, 287 and n.35 (5th Cir. 2012) (citing cases reaching this conclusion). Although some of these cases simply relied on the United States Supreme Court's dicta; see, e.g., *United States* v. *Veloz*, supra, 431–32; *United States* v. *Saget*,

[8] We are aware of only two cases to the contrary. In *Cazares* v. *State*, Docket No. 08-15-00266-CR, 2017 WL 3498483, *10 (Tex. App. August 16, 2017, review refused), cert. denied, U.S. , 139 S. Ct. 422, 202 L. Ed. 2d 324 (2018), the court deemed the informant's purpose, which was unknown to the declarant, to be dispositive. In *People* v. *Redeaux*, 355 Ill. App. 3d 302, 823 N.E.2d 268, cert. denied, 215 Ill. 2d 613, 833 N.E.2d 7 (2005), the court took a narrower approach. It suggested that a coconspirator's statements to an undercover officer could be testimonial if elicited pursuant to an "interrogation," meaning formal, structured questioning. (Internal quotation marks omitted.) Id., 306–307. The court in *Redeaux* ultimately concluded that the conversation at issue did not come close to such questioning, pointing to the facts that its purpose was to facilitate a drug transaction, not "a subterfuge to gain information about this or some other crime," and that the undercover officer never asked the coconspirator, a drug dealer, to name his "source," i.e., the defendant. (Internal quotation marks omitted.) Id., 306.

Before and shortly after *Crawford* was decided, a few commentators had advocated for a de facto interrogation approach but limited that term to circumstances in which there was sustained questioning, leading questions, or suggestions made with a preconceived notion of the evidence that the agent or informant wanted to obtain. See M. Berger, "The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model," 76 Minn. L. Rev. 557, 608–609 (1992); M. Seigel & D. Weisman, "The Admissibility of Co-Conspirator Statements in a Post-*Crawford* World," 34 Fla. St. U. L. Rev. 877, 903–904 (2007). Courts have rejected a "de facto" interrogation theory in the context of jailhouse informants acting as agents for the police on the grounds that this circumstance is not an interrogation and would not yield a testimonial statement, even if it could be broadly characterized as an interrogation. See, e.g., *United States* v. *Smalls*, supra, 605 F.3d 779 ("[C]asual questioning by a fellow inmate does not equate to police interrogation, even though the government coordinated the placement of the fellow inmate and encouraged him to question [the defendant's accomplice]. But whether we properly may label [the confidential informant's] encounter with [the defendant's accomplice] as an interrogation in some remote sense is beside the point because *Davis* establishes that not every statement made in response to an interrogation is testimonial. Rather, only in some instances does interrogation tend to generate testimonial responses." (Emphasis omitted; internal quotation marks omitted.)). But see id., 788 (Kelly, J., dissenting) (arguing that history supports confrontation analysis based on declarant with full knowledge of facts, including true identity and purpose of person eliciting information). We explain subsequently in this opinion why both *Cazares* and *Redeaux* are contrary to the United States Supreme Court's most recent case law.

377 F.3d 223, 229 (2d Cir. 2004), cert. denied, 543 U.S. 1079, 125 S. Ct. 938, 160 L. Ed. 2d 821 (2005); many others reasoned that such statements could not have been given for the purpose of proving past facts relevant to a prosecution because the declarant did not know that he was speaking to an informant or an undercover officer. See, e.g., *United States* v. *Dargan*, supra, 646, 650–51; *State* v. *Nieves*, supra, 326–27.

The defendant contends, however, that the court's more recent confrontation clause jurisprudence suggests that the court would now reject this dicta. Our review of this case law confirms, rather than undermines, the vitality of this dicta.

"*Crawford* and *Davis* did not address whose perspective matters—the declarant's, the interrogator's, or both—when assessing the primary purpose of [an] interrogation." (Internal quotation marks omitted.) *Michigan* v. *Bryant*, 562 U.S. 344, 381, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011) (Scalia, J., dissenting). More recent cases have interpreted *Davis* to require consideration of "the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs." Id., 370; see also *Ohio* v. *Clark*, supra, 576 U.S. 246–47 (considering identity of participants as well). A consistent theme echoed in the case law, however, is that this consideration is one based on *objective* facts. See *Davis* v. *Washington*, supra, 547 U.S. 826 ("[t]he question before us in *Davis* . . . is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements"); *Crawford* v. *Washington*, supra, 541 U.S. 52 (testimonial statements would include those "that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" (internal quotation marks omitted)).

This point was underscored and elaborated on in *Michigan* v. *Bryant*, supra, 562 U.S. 344, when the court stated: "The Michigan Supreme Court correctly understood that this inquiry is objective. . . . *Davis* uses the word 'objective' or 'objectively' no fewer than eight times in describing the relevant inquiry. . . . 'Objectively' also appears in the definitions of both testimonial and nontestimonial statements that *Davis* established. . . .

"An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the 'primary purpose of the interrogation.' The circumstances in which an encounter occurs—e.g., at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards—are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, *the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter*, *but rather the purpose that reasonable participants would have had*, *as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred*." (Citations omitted; emphasis added; footnote omitted.) Id., 360.

The court's most recent confrontation clause case exemplifies this objective, totality of circumstances approach, as well as the significance of the formality of the encounter in making that determination. See *Ohio* v. *Clark*, supra, 576 U.S. 237. In *Clark*, the court considered the statements of a three year old child, in response to his teachers' questions, in which he identified his mother's boyfriend as the perpetrator of injuries discovered by the teachers. Id., 240. The teachers were mandated by state law to report suspected abuse to government authorities. Id., 242. These facts required the court to squarely address for the first time the question of whether statements made to individuals who are

not law enforcement officers implicate confrontation rights.Id., 246.

The court first summarized its confrontation clause jurisprudence, noting that the primary purpose test has evolved to require consideration of "all of the relevant circumstances." (Internal quotation marks omitted.) Id., 244. One such circumstance it identified "is the informality of the situation and the interrogation. . . . A formal [station house] interrogation, like the questioning in *Crawford*, is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused." (Citation omitted; internal quotation marks omitted.) Id., 245.

The court in *Clark* recognized that statements to individuals who are not law enforcement officers "could conceivably raise confrontation concerns"; id., 246; but cautioned that "[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." Id., 249. Thus, the fact that the child was speaking to his teachers "remains highly relevant. Courts must evaluate challenged statements in context, and part of that context is the questioner's identity." Id., 249; see also id. ("the relationship between a student and his teacher is very different from that between a citizen and the police").

In concluding that the primary purpose of the encounter was not to gather evidence for the defendant's prosecution but to protect the child, the court in *Clark* pointed to the following facts: "At no point did the teachers inform [the child] that his answers would be used to arrest or punish his abuser. [The child] never hinted that he intended his statements to be used by the police or prosecutors.[9] And the conversation between

[9] The court in *Clark* also observed that its decision was bolstered by the age of the child: "Statements by very young children will rarely, if ever,

[the child] and his teachers was informal and spontaneous. The teachers asked [the child] about his injuries immediately upon discovering them, in the informal setting of a preschool lunchroom and classroom, and they did so precisely as any concerned citizen would talk to a child who might be the victim of abuse. This was nothing like the formalized [station house] questioning in *Crawford* or the police interrogation and battery affidavit in *Hammon* [v. *Indiana*, which was decided together with *Davis* v. *Washington*, supra, 547 U.S. 813]."[10] (Footnote added.) Id., 247.

Consistent with *Bryant*, the court in *Clark* thus relied exclusively on the objectively *manifested* facts—what was said, who said it, how it was said, and where it was said. Nothing indicates that, contrary to *Bryant*, the hidden intentions or identity of the person eliciting the statement would be relevant, let alone dispositive.[11] See *United States* v. *Volpendesto*, 746 F.3d 273, 289–90 (7th Cir.) ("*Bryant* mandates that we not evaluate the purpose of [the] recorded conversation from the subjective point of view of [the coconspirator], who knew he was secretly collecting evidence for the government.

implicate the [c]onfrontation [c]lause. Few preschool students understand the details of our criminal justice system. Rather, [r]esearch on children's understanding of the legal system finds that young children have little understanding of prosecution. . . . Thus, *it is extremely unlikely that a* [*three year old*] *child in* [*this child's*] *position would intend his statements to be a substitute for trial testimony*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Ohio* v. *Clark*, supra, 576 U.S. 247–48.

[10] *Hammon* involved statements given by a domestic violence victim to the police, after being isolated from her abusive husband, which were memorialized in a "battery affidavit." (Internal quotation marks omitted.) *Davis* v. *Washington*, supra, 574 U.S. 820. The court held that the statements in *Hammon* were testimonial. Id., 830.

[11] The court in *Clark* rejected the defendant's reliance on the state's mandatory reporting obligation as a basis to equate the child's teachers with the police and their questions with an official interrogation. See *Ohio* v. *Clark*, supra, 576 U.S. 249. The court observed that "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution." Id.

Instead, we evaluate their conversation objectively. And from an objective perspective, [the recorded] conversation looks like a casual, confidential discussion between [coconspirators].''), cert. denied sub nom. *Sarno* v. *United States*, 574 U.S. 936, 135 S. Ct. 382, 190 L. Ed. 2d 256 (2014), and cert. denied sub nom. *Polchan* v. *United States*, 574 U.S. 936, 135 S. Ct. 383, 190 L. Ed. 2d 256 (2014). *Clark* also underscores the significance of the formality surrounding the questioning, which imparts to the declarant a solemnity of purpose akin to other forms of testimonial statements, such as ex parte testimony, affidavits, and grand jury testimony. See *Ohio* v. *Clark*, supra, 576 U.S. 243 (''[i]n *Crawford* . . . [w]e explained that 'witnesses,' under the [c]onfrontation [c]lause, are those 'who bear testimony,' and we defined 'testimony' as 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact' '' (citation omitted)); see also *State* v. *Sinclair*, 332 Conn. 204, 225, 210 A.3d 509 (2019) (''there is agreement among all of the justices that the formality attendant to the making of the statement must be considered'').

The court's reasoning in *Bryant* and *Clark* thus confirms the court's dicta characterizing the statements in *Dutton* and *Bourjaily* made to persons who harbored secret intentions to obtain evidence to be used at trial as clearly nontestimonial.[12] Like the statements in *Dut-*

[12] The defendant makes much of the fact that the statements in *Dutton* and *Bourjaily* were admitted under the hearsay exception for statements by a coconspirator—historically viewed as inherently reliable—whereas Calabrese's statement was admitted under the exception for statements against penal interest—historically viewed as presumptively unreliable when used to inculpate a codefendant. Even if we were to accept the defendant's characterization; see *United States* v. *Inadi*, 475 U.S. 387, 400, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986) (recognizing that *Dutton* involved state coconspirator rule that admitted broader category of statements than did federal coconspirator rule); the distinction he draws is immaterial. *Bryant* would compel us to reach the same result even in the absence of this dictum. Moreover, the distinction between the hearsay exceptions has no relevance under *Crawford*'s testimonial analytical framework, which abandoned the traditional evidentiary analytical approach, a reliability focused inquiry. See,

*ton* and *Bourjaily*, Calabrese's statement was elicited in circumstances under which the objectively manifested purpose of the encounter was not to secure testimony for trial. Calabrese made his statements in an informal setting, his prison cell, to his cellmate, who undoubtedly actively questioned the defendant but did so in an evidently sufficiently casual manner to avoid alerting Calabrese that his statement was going to be relayed to law enforcement. Cf. *United States* v. *Dargan*, supra, 738 F.3d 650–51 (statements by defendant's coconspirator to cellmate were clearly nontestimonial because they were made "in an informal setting—a scenario far afield from the type of declarations that represented the focus of *Crawford*'s concern" and declarant "had no plausible expectation of 'bearing witness' against anyone"). The admission of Calabrese's dual inculpatory statement, therefore, did not violate the defendant's confrontation rights under the federal constitution.

B

We next turn to the defendant's confrontation clause challenge under article first, § 8, of the Connecticut constitution. The defendant asks this court to hold that, under our state constitution, a statement qualifies as "testimonial" if the reasonable expectation of either the declarant *or the interrogator/listener* is to establish or to prove past events potentially relevant to a later criminal prosecution. (Internal quotation marks omitted.) We are not persuaded that the defendant has established the necessary predicates for departing from the federal standard. We do not, however, foreclose the possibility of departing from the federal standard under appropriate circumstances in a future case, and raise a strong cautionary note about the present circumstances.

e.g., *State* v. *Rivera*, 268 Conn. 351, 365 n.13, 844 A.2d 191 (2004) ("[b]ecause the United States Supreme Court [in *Crawford*] has characterized [the] statement [in *Dutton*] as nontestimonial . . . it would follow that the statement [against penal interest to a fellow inmate] . . . is also nontestimonial").

In *State* v. *Geisler*, supra, 222 Conn. 684–85, this court identified factors to be considered to encourage a principled development of our state constitutional jurisprudence. Those six factors are (1) persuasive relevant federal precedents, (2) the text of the operative constitutional provisions, (3) historical insights into the intent of our constitutional forebears, (4) related Connecticut precedents, (5) persuasive precedents of other state courts, and (6) contemporary understandings of applicable economic and sociological norms, or as otherwise described, relevant public policies. Id., 685; accord *Feehan* v. *Marcone*, 331 Conn. 436, 449, 204 A.3d 666, cert. denied, U.S. , 140 S. Ct. 144, 205 L. Ed. 2d 35 (2019).

The defendant concedes that the first, second, and fifth factors do not support a more protective interpretation under state law. The text of the two clauses are nearly identical. Compare Conn. Const., art. I, § 8 (guaranteeing defendant's right "to be confronted *by* the witnesses against him" (emphasis added)) with U.S. Const., amend. VI (guaranteeing right "to be confronted *with* the witnesses against him" (emphasis added)). The federal and state precedent we have addressed in part I A of this opinion does not support the defendant's proposed standard. To this we would add that we are aware of only one state that has charted an independent course under its state constitution's confrontation clause with regard to this issue.[13] That state did not

[13] There are examples of courts relying on their respective state constitutions to fill gaps in the United States Supreme Court's testimonial framework, at least until the court does so itself. See, e.g., *State* v. *Scanlan*, 193 Wn. 2d 753, 766, 445 P.3d 960 (2019) (concluding that Washington case law articulating comprehensive definition of "testimonial" statements and specific test for applying that definition to statements to nongovernmental witnesses under Washington constitution due to gap in federal jurisprudence was superseded by subsequent decision of United States Supreme Court applying its primary purpose test to statements to nongovernmental witnesses), cert. denied, U.S. , 140 S. Ct. 834, 205 L. Ed. 2d 483 (2020); see also *State* v. *Rodriguez*, supra, 337 Conn. 226–27 (*Kahn*, *J.*, concurring) (filling gap regarding admissibility of forensic evidence with its own test

adopt the defendant's proposed standard; it never adopted *Crawford*'s testimonial standard and continued to adhere to the "adequate indicia of reliability" standard recognized in *Ohio* v. *Roberts*, supra, 448 U.S. 66. See *State* v. *Copeland*, 353 Or. 816, 820–24, 306 P.3d 610 (2013).

With regard to the third and fourth factors, historical insights and Connecticut precedent, the defendant expressly conceded before the Appellate Court that these factors also do not favor his position. This court's first confrontation clause case, in 1921, took the position that "[t]he underlying reasons for the adoption of this right in the [f]ederal [c]onstitution and in [s]tate [c]onstitutions, and the principles of interpretation applying to this provision, are identical." *State* v. *Gaetano*, 96 Conn. 306, 310, 114 A. 82 (1921). We recently reiterated this position. See *State* v. *Lockhart*, 298 Conn. 537, 555, 4 A.3d 1176 (2010) (noting that federal and state provisions are subject to same interpretation because they have "shared genesis in the common law").[14]

The defendant does not expressly concede the third and fourth *Geisler* factors to this court as he did before

under federal constitution); *People* v. *John*, 27 N.Y.3d 294, 312–15, 52 N.E.3d 1114, 33 N.Y.S.3d 88 (2016) (filling gap regarding admissibility of forensic scientific laboratory reports).

[14] Although this court indicated that the federal and state provisions are subject to the same interpretation because of their "shared genesis in the common law"; *State* v. *Lockhart*, supra, 298 Conn. 555; it is important to acknowledge that we have never undertaken an independent examination of the circumstances surrounding the adoption of the federal confrontation clause. This acknowledgement is important because examinations of those circumstances by courts and scholars have not yielded a consensus as to what historical facts matter and what these facts reveal about the intended meaning and application of the confrontation clause.

This inconsistency is reflected in the court's case law; see, e.g., *Crawford* v. *Washington*, supra, 541 U.S. 60–64 (determining that court's previous interpretation of confrontation clause in *Roberts* was wholly incompatible with historical basis for adoption of confrontation clause); as well as in scholarship that, in turn, criticizes *Crawford*'s own historical account. See, e.g., K. Graham, "Confrontation Stories: Raleigh on the Mayflower," 3 Ohio St. J. Crim. L. 209, 209 (2005) ("Justice Scalia's majority opinion [in *Crawford*]

tells a version of the history of the [c]onfrontation [c]lause that would do Hollywood proud"); B. Trachtenberg, "Confronting Coventurers: Coconspirator Hearsay, Sir Walter Raleigh, and the Sixth Amendment Confrontation Clause," 64 Fla. L. Rev. 1669, 1677–78 (2012) (citing sources).

The lack of consensus as to which historical facts motivated the adoption of the confrontation clause and how the clause applies to present circumstances seems to be a product of several factors. No court or scholar has concluded that the confrontation clause is unambiguous and can be interpreted literally. See *State* v. *Torello*, 103 Conn. 511, 513, 131 A. 429 (1925) ("[interpreted] [l]iterally it would prohibit the introduction of the testimony of any witness who was not produced in court"); M. Larkin, "The Right of Confrontation: What Next?," 1 Tex. Tech L. Rev. 67, 67 (1969) ("[t]he precise source of this use of the word 'confront' is obscure"). Ascertaining original intent in the absence of a plain textual meaning is complicated by the lack of any meaningful debate during the drafting and ratification of the federal confrontation clause. See H. Gutman, "Academic Determinism: The Division of the Bill of Rights," 54 S. Cal. L. Rev. 295, 332 n.181 (1981) (debate on confrontation clause lasted five minutes); R. Mosteller, "Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions", 1993 U. Ill. L. Rev. 691, 737 ("Enough of the historical materials surrounding the drafting and the ratification debates survives that we can be relatively confident that no precise meaning was ascribed to the [c]onfrontation [c]lause in either process. Indeed, the clause received only limited attention." (Footnote omitted.)). Case law is of marginal help in ascertaining original intent because criminal cases largely were tried in state courts at the time of the framing and the sixth amendment right of confrontation was not extended to the states until 1965. See R. Friedman, "*Crawford*, *Davis* and *Way* Beyond," 15 J.L. & Policy 553, 553 (2007); K. Graham, supra, 3 Ohio St. J. Crim. L. 210.

In addition, application of the confrontation clause has been complicated by significant historical developments that could not have been foreseen by the framers. Crimes are investigated and prosecuted differently than at the time of the framing. See M. Mannheimer, "Toward a Unified Theory of Testimonial Evidence Under the Fifth and Sixth Amendments," 80 Temp. L. Rev. 1135, 1164 (2007) ("professional police now replicate the investigatory function of the magistrate"); E. Schaerer, "Proving the Constitution: Burdens of Proof and the Confrontation Clause," 55 U. Rich. L. Rev. 491, 494–95 (2021) (noting that, at time of framing, police generally did not initiate investigations on their own based on suspicion of probable crime, and prosecution typically was initiated by crime victims and their families); M. Seigel & D. Weisman, "The Admissibility of Co-Conspirator Statements in a Post-*Crawford* World," 34 Fla. St. U. L. Rev. 877, 906–907 (2007) ("[i]n the [f]ramers' day, there was essentially no such thing as an undercover investigation; indeed, organized, professional police forces did not come onto the scene until around the Civil War" (footnote omitted)). Hearsay exceptions have been expanded significantly; see E. Schaerer, supra, 494–95; and new forms of evidence, e.g., forensic evidence, have developed. See D. Noll, "Constitutional Evasion and the Confrontation Puzzle," 56 B.C. L. Rev. 1899, 1904 (2015).

the Appellate Court, but he acknowledges this case law in his brief to this court. In lieu of an argument regarding the significance of that case law, the defendant emphasizes the historical fact that third-party statements against penal interest constituted inadmissible hearsay at the time of the framing, as well as for an extended period thereafter. See, e.g., *Bruton* v. *United States*, 391 U.S. 123, 128 n.3, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968); *State* v. *Schiappa*, 248 Conn. 132, 147 and n.18, 728 A.2d 466, cert. denied, 528 U.S. 862, 120 S. Ct. 152, 145 L. Ed. 2d 129 (1999). See generally E. Schaerer, "Proving the Constitution: Burdens of Proof and the Confrontation Clause," 55 U. Rich. L. Rev. 491, 494 (2021) ("[a]t the framing, hearsay was more strictly prohibited at trial, and courts recognized few hearsay exceptions"). This fact has no logical connection, however, to the defendant's proposed confrontation standard.[15] The defendant's testimonial standard would not

The defendant advances no argument about the significance of any of these factors, other than the lack of a historical hearsay exception for statements against penal interest, which we address subsequently in this opinion. We acknowledge these factors to make clear that *Gaetano* does not foreclose an argument that the federal courts have misinterpreted the confrontation clause or that the development of our common law may support an independent interpretation in a different context.

[15] In the section of his brief devoted to historical insights and Connecticut precedent, the defendant cites authority for propositions that he also does not connect to the principal question before us—whether our state has ever been more protective of confrontation rights than the federal system or standard—and that do not lend support to the specific testimonial standard that he advances. These authorities state the following propositions: Connecticut has long recognized the importance of cross-examination; see, e.g., 2 H. Dutton, A Revision of Swift's Digest of the Laws of the State of Connecticut (1862) c. XX, § 411, p. 437; and special sensitivity to confrontation clause concerns is appropriate when the testimony of a witness is critical to the state's case against the defendant and the consequences of a conviction based on the absent witness' testimony are grave. See, e.g., *State* v. *Lebrick*, 334 Conn. 492, 507, 512, 223 A.3d 333 (2020) (stating these principles in connection with question of whether state made reasonable efforts to locate witness who purportedly was unavailable to testify, to satisfy federal confrontation clause).

The defendant also cites to one scholarly article in which the author asserts that the testimonial nature of the statement should be established

categorically preclude such statements, whether they were dual inculpatory statements or not; it would only preclude such statements when the declarant is unavailable for cross-examination and the reasonable expectation of either the declarant or the listener is to establish or to prove past events potentially relevant to a later criminal prosecution. Reliance on the lack of a recognized exception for these statements at the time of the framing is also in tension with the defendant's representation that he does not seek to overrule *Crawford*, which rejected the *Roberts* framework, which considered whether the statement fell within a "firmly rooted" hearsay exception. See *Ohio* v. *Roberts*, supra, 448 U.S. 66; see also *State* v. *Nieves*, supra, 376 Wis. 2d 316–19 (citing sources addressing admission of dual inculpatory statements post-*Crawford* and acknowledging that *Bruton*[16] doctrine regarding confrontation violation arising from admission of such statements as against third party survives only as to testimonial statements).

The defendant's state constitutional claim, thus, effectively rests exclusively on the sixth *Geisler* factor, public policy. He identifies the following considerations. First, the defendant argues that the United States Supreme Court is not infallible. The sea change from *Roberts*' reliability standard to *Crawford*'s testimonial standard demonstrates this reality, as does the fact that the court's confrontation clause case law continues to be in flux. Second, the defendant seeks a modified interpretive standard—an additional layer of prophylaxis to

from the perspective of either the speaker or the listener. See M. Pardo, "Confrontation After Scalia and Kennedy," 70 Ala. L. Rev. 757, 782 (2019). The author of this article offers no historical analysis to support this standard and acknowledges doctrinal difficulties in applying it. See id., 782 n.180. Many other commentators reject the defendant's view. See, e.g., M. Mannheimer, supra, 80 Temp. L. Rev. 1192; W. Reed, "*Michigan* v. *Bryant*: Originalism Confronts Pragmatism," 89 Denv. L. Rev. 269, 300–302 (2011).

[16] *Bruton* v. *United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

prevent a significant risk of deprivation of confrontation rights—not the rejection of the court's testimonial, primary purpose framework. The defendant argues that this interpretation fills a gap in the court's case law, which has yet to clarify if a statement is testimonial when the speaker is unaware that the statement may be used as evidence in a criminal prosecution but the listener seeks to obtain the statement for that purpose. He contends that, by adopting a standard under which the perspective of either the declarant or the listener can render the statement testimonial, we would place the emphasis where it belongs—on the testimonial *effect* of the statement, i.e., the jury would believe that the statement is equivalent to testimony and would rely on it to assess guilt or innocence. Third, the defendant argues that the adoption of the "either perspective" approach would serve the public interest by enhancing the perception that our criminal trial proceedings are fair.[17] (Internal quotation marks omitted.)

[17] The defendant's brief has a fourth policy section, from which we have difficulty gleaning a specific policy argument. The defendant asserts that one or more of the participants in the planning and execution of Calabrese's "interrogation" should have known that the recorded statement would be admissible at trial if Calabrese was unavailable to testify, that the sequence of codefendants' trials can affect their availability for cross-examination, and that sequence is a matter of prosecutorial discretion.

There are several flaws in these assumptions. There is no evidence that the police knew that Calabrese was the shooter when they asked Early to record him. Had Calabrese offered an account identifying someone else as the shooter, it is possible that the state would have attempted to use the statement to extract a plea agreement in exchange for Calabrese's testimony against the shooter. Even if Calabrese had been tried first after admitting to being the shooter, there is a strong possibility that he still would have been unavailable to testify at the defendant's subsequent trial. Calabrese's fifth amendment privilege would continue during any pending appeal; see, e.g., *United States* v. *Kennedy*, 372 F.3d 686, 691 (4th Cir. 2004), cert. denied, 543 U.S. 1123, 125 S. Ct. 1019, 160 L. Ed. 2d 1073 (2005); as well as during any possible retrial should he prevail on appeal. We also note that circumstances outside of the state's control (e.g., discovery, availability of witnesses, etc.) may dictate the sequence of codefendants' trials. If a rare case arose in which there was evidence that the state intentionally delayed the declarant's trial so as to ensure the declarant's unavailability for cross-examination,

We are not persuaded that these arguments are sufficient to carry the day under the present circumstances. We previously have relied on policy considerations similar to those mentioned by the defendant but have always cited to other *Geisler* factors that supported the rule we adopted. See, e.g., *State* v. *Purcell*, supra, 331 Conn. 342–46 (explaining that we were adopting broader prophylactic rule not expanding constitutional right, but also citing other *Geisler* factors that supported rule); *State* v. *Linares*, 232 Conn. 345, 379–80, 655 A.2d 737 (1995) (concluding that United States Supreme Court's rationale for departing from prior, more protective standard was unsound but also citing other *Geisler* factors that supported our rule). Although the need to fill a "gap" in the court's confrontation jurisprudence to resolve a case may provide a compelling policy argument, even in the absence of other supporting *Geisler* factors, our discussion in part II explains why the gap identified by the defendant does not exist. None of the defendant's other policy arguments rises to a similar level of necessity. Some of his policy arguments, e.g., that the court does not always reach the correct result, could apply in any case. In sum, it is clear that the defendant cannot prevail under a traditional *Geisler* analysis. His state constitutional claim under the confrontation clause, therefore, fails.[18]

the defendant may have a viable due process claim or argument for the adoption of an equitable rule akin to the forfeiture doctrine, which bars a defendant from objecting to the admission of hearsay statements of a witness whose absence has been procured by the defendant. See T. Lininger, "Reconceptualizing Confrontation After *Davis*," 85 Tex. L. Rev. 271, 300–301 and nn.165–68 (2006) (discussing forfeiture doctrine). We have no occasion to consider either possibility in the present case.

[18] We underscore that we do not intend for this decision to foreclose the possibility of departing from the federal courts' interpretation of the confrontation clause in another context. We are mindful of two concerns that are not implicated in the present case that may, in the future, weigh in favor of an independent course of action. First, there are indications in opinions of various United States Supreme Court justices that the court may adopt more limiting principles than those articulated in *Crawford* and *Davis*. See, e.g., *Williams* v. *Illinois*, 567 U.S. 50, 58–59, 132 S. Ct. 2221,

We end this discussion, however, with a strong note of caution. Although the defendant cannot prevail under our state constitution in the present case, we might be compelled to reach a different result under a slight variation of facts. The circumstances under which Calabrese's statement was elicited implicate several concerns identified by the court in *Crawford* and its progeny. *Crawford* recognized that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . . ." *Crawford* v. *Washington*, supra, 541 U.S. 56 n.7. The court in *Davis* also cautioned that law enforcement officials should not be permitted to circumvent the confrontation clause by intentionally altering the method by which they collect the statement to render the statement nontestimonial. See *Davis* v. *Washington*, supra, 547 U.S. 826 ("we do not think it conceivable that the protections of the [c]onfrontation

183 L. Ed. 2d 89 (2012) (plurality opinion); see also *Ohio* v. *Clark*, supra, 576 U.S. 254 (Thomas, J. concurring). Second, courts are increasingly confronting circumstances in which they are unsure how to assess whether a statement is testimonial. See K. McMunigal, "*Crawford*, Confrontation, and Mental States," 64 Syracuse L. Rev. 219, 220 (2014) (observing that commentators have described contemporary confrontation clause jurisprudence as " 'incoherent,' 'uncertain,' 'unpredictable,' 'a train wreck,' suffering from 'vagueness' and '[doublespeak],' and, simply put, a 'mess' " (footnotes omitted)). This problem is particularly acute in cases in which forensic evidence is at issue. See, e.g., *State* v. *Rodriguez*, supra, 337 Conn. 203–204 (*Kahn*, *J.*, concurring). Even some of the court's justices have complained about the lack of clear direction from the court. See id., 204 (citing cases from various courts raising this concern). Justice Gorsuch, joined by Justice Sotomayor, stated in a recent dissent from the court's denial of certiorari in a confrontation clause case: "Respectfully, I believe we owe lower courts struggling to abide our holdings more clarity than we have afforded them in this area. *Williams* imposes on courts with crowded dockets the job of trying to distill holdings on two separate and important issues from four competing opinions. The errors here may be manifest, but they are understandable and they affect courts across the country in cases that regularly recur." *Stuart* v. *Alabama*, U.S. , 139 S. Ct. 36, 37, 202 L. Ed. 2d 414 (2018) (Gorsuch, J., dissenting from the denial of certiorari). As applied to the facts of the present case, however, the current standard yields a clear result.

[c]lause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition" (emphasis omitted)); see also *Williams* v. *Illinois*, 567 U.S. 50, 133, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012) (Kagan, J., dissenting) (noting that five justices reject proposition that, "[i]f the [c]onfrontation [c]lause prevents the [s]tate from getting its evidence in through the front door, then the [s]tate could sneak it in through the back"). Recruiting an inmate to elicit inculpatory evidence regarding uncharged criminal activity from another inmate suspected of committing such activity, when law enforcement officials would be unable, or were in fact unable, to obtain a confession directly,[19] clearly raises the potential for abuse.[20] Although such

[19] The police affidavit in support of the defendant's arrest warrant reflects that, many months before Calabrese gave the surreptitiously recorded statement, he had given several statements to the police about the Sharon home invasion. Calabrese was approached by the police because of cell phone records connecting him to Niraj. Calabrese provided a statement to the police at that time and later provided additional statements through his attorney. Calabrese initially claimed to have learned about the home invasion only after the fact but later admitted that he was present when Niraj announced the plan. In all of the statements, however, Calabrese disavowed any participation and claimed that the defendant and an unknown third party were the perpetrators.

[20] The fact that Early was recording Calabrese in their prison cell at the behest of law enforcement would not implicate either Calabrese's *Miranda* rights under the fifth amendment to the United States constitution; see *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); because courts do not consider this situation to be a "custodial interrogation"; (internal quotation marks omitted) *Illinois* v. *Perkins*, 496 U.S. 292, 296–98, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990); or his right to counsel under the sixth and fourteenth amendments to the United States constitution, because that right is offense specific and is limited to charged offenses or uncharged offenses that are directly connected to the charged offense. See id., 299; *United States* v. *Basciano*, 634 Fed. Appx. 832, 836 (2d Cir. 2015), cert. denied, U.S. , 136 S. Ct. 2529, 195 L. Ed. 2d 859 (2016). But use of this tactic in other factual scenarios may cross a constitutional line. For example, if Calabrese had been charged in connection with the Sharon home invasion and invoked his right to counsel, the police could not have surreptitiously questioned him through an agent or undercover operative. See, e.g., *Massiah* v. *United States*, 377 U.S. 201, 205–206, 84 S. Ct. 1199,

circumstances do not meet the present legal definition of an interrogation and, hence, do not implicate the confrontation clause, we can envision facts under which eliciting an inculpatory statement in this setting might rise to the level of a violation of due process or a circumstance under which it might be appropriate for this court to consider the extraordinary measure of reversal under the exercise of its supervisory authority. Cf. *Illinois* v. *Perkins*, 496 U.S. 292, 302–303, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990) (Brennan, J., concurring) (expressing concern whether due process may be violated when undercover agent and jailhouse informant "lure [the] respondent into incriminating himself when he was in jail on an unrelated charge," noting that, under such circumstances, state "can ensure that a suspect is barraged with questions from an undercover agent until the suspect confesses").

Our concerns are tempered in the present case, however, for a few reasons. There was no evidence presented suggesting any involvement by the Office of the State's Attorney in orchestrating the recording or directing the inquiry. Nor is there evidence that any police official coached Early on what questions to ask or what facts they were seeking to learn. The trial court did not abuse its discretion by crediting Early's testimony that he was not given any information about the crime and that Calabrese first raised the subject of his involvement

12 L. Ed. 2d 246 (1964) ("Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with [a] crime. . . . [I]f such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse." (Citations omitted; footnotes omitted; internal quotation marks omitted.)). Although Calabrese clearly was a suspect in the Sharon home invasion when Early recorded Calabrese's statements; see footnote 19 of this opinion; there is no claim that there was probable cause to arrest Calabrese in connection with that incident at that time and that a decision was made to delay arrest to circumvent Calabrese's right to counsel.

in the Sharon home invasion.[21] Because the exchange was recorded, the trial court was able to ascertain the extent to which, if any, Calabrese's answers may have been shaped or coerced by Early. See M. Berger, "The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model," 76 Minn. L. Rev. 557, 609 (1992) (noting that recording coconspirators' statements made to government agent or informant will "deter prosecutorial abuse and enhance jury's ability to function"). Recording also eliminates concerns of fabrication by the informant. See id.; cf. *State* v. *Jones*, 337 Conn. 486, 504, 254 A.3d 239 (2020) (noting that special credibility instruction is required when jailhouse informant testifies because such testimony must be reviewed with particular scrutiny in light of witness' powerful motive to falsify his or her testimony). That recording makes clear that Calabrese volunteered most of the inculpatory information with no prompting. We therefore have a fair assurance that the involvement of government officials did not influence the content or the making of the statement.

C

Because we have concluded that the admission of Calabrese's dual inculpatory statement did not violate

[21] The trial court properly raised these concerns at the hearing on the motion in limine in Niraj's trial; its ruling in that case was deemed the law of the case for the defendant's identical motion: "It does, in my mind, create an issue as to whether the recording is testimonial, and that's an issue that really can only be resolved, I believe, with an understanding of what led up to the recording. Who initiated the conversation? My understanding is the topic first came up the day before the recording. What were the circumstances under which, after that conversation, the cooperating individual agreed to record a conversation? What happened on the morning of the conversation before it took place? What interaction did that individual have with law enforcement? Certainly, I believe all that is relevant to a *Crawford* analysis." Neither Niraj nor the defendant called the corrections officials or law enforcement officials who spoke with Early to testify at the hearing on the motion in limine. We note, however, that nothing that Early stated in his conversation with Calabrese suggested any personal knowledge about the facts of the crime.

the defendant's federal or state confrontation rights, the admissibility of the statement is, therefore, limited only by the rules of evidence. See, e.g., *Ohio* v. *Clark*, supra, 576 U.S. 245. Calabrese's statement was admitted under the hearsay exception for statements against penal interest. See Conn. Code Evid. § 8-6 (4). "We evaluate dual inculpatory statements using the same criteria that we use for statements against penal interest." *State* v. *Camacho*, 282 Conn. 328, 359, 924 A.2d 99, cert. denied, 552 U.S. 956, 128 S. Ct. 388, 169 L. Ed. 2d 273 (2007). We conclude that the trial court's admission of Calabrese's statement under § 8-6 (4) was not an abuse of discretion.

Admission of a hearsay statement pursuant to § 8-6 (4) of the Connecticut Code of Evidence "is subject to a binary inquiry: (1) whether [the] statement . . . was against [the declarant's] penal interest and, if so, (2) whether the statement was sufficiently trustworthy." (Internal quotation marks omitted.) *State* v. *Bonds*, 172 Conn. App. 108, 117, 158 A.3d 826, cert. denied, 326 Conn. 907, 163 A.3d 1206 (2017); see also *State* v. *Pierre*, supra, 277 Conn. 67. Only the second part of that inquiry is at issue in this appeal.

Our code of evidence directs trial courts to consider the following factors in assessing the trustworthiness of the statement: "(A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest." Conn. Code Evid. § 8-6 (4). "[N]o single factor . . . is necessarily conclusive . . . . Thus, it is not necessary that the trial court find that all of the factors support the trustworthiness of the statement. The trial court should consider all of the factors and determine whether the totality of the circumstances supports the trustworthiness of the statement." (Citations omitted; internal quotation marks omitted.) *State* v. *Lopez*, 254 Conn. 309, 316, 757 A.2d 542 (2000).

The trial court concluded that the length of the delay between the crimes and the making of the statement, thirteen months, weighed against its trustworthiness but that all of the other factors strongly weighed in favor of admission. The state concedes that the timing of the statement weighs against admission. See, e.g., *State* v. *Pierre*, supra, 277 Conn. 70 ("[i]n general, declarations made soon after the crime suggest more reliability than those made after a lapse of time [when] a declarant has a more ample opportunity for reflection and contrivance" (internal quotation marks omitted)). We therefore focus on the remaining factors. We disagree with the trial court's treatment of one of the factors but conclude that it ultimately did not abuse its discretion in admitting the statement.

The trial court suggested that the fact that the statement was made "to a fellow inmate who appeared to the defendant [to] be a fellow gang member, and one who was facing serious charges," rendered the statement more trustworthy. The record does not support a factual predicate for this conclusion, and the law does not support its reasoning. Calabrese was not a fellow gang member.[22] He unambiguously informed Early that he was not a "blood," although "all [his] boys" belonged to the gang, and he did not join because he "really [didn't] give a shit" about belonging to the gang.

The fact that Early and Calabrese were fellow inmates, in and of itself, does not establish that they shared the type of relationship of trust and confidence that demonstrates the trustworthiness of the statement. Cf. *State* v. *Thompson*, 305 Conn. 412, 435, 45 A.3d 605 (2012) (statement was trustworthy when made to fellow inmate who was known to declarant for several years

[22] It is unclear what the trial court meant when it stated that "Early was facing serious charges." When Calabrese's statement was elicited, Early had already been convicted of attempted burglary in the first degree with a deadly weapon and criminal possession of a firearm.

before incarceration, and with whom declarant had become "reasonably close" in two months of incarceration prior to making of statement (internal quotation marks omitted)), cert. denied, 568 U.S. 1146, 133 S. Ct. 988, 184 L. Ed. 2d 767 (2013); *State* v. *Camacho*, supra, 282 Conn. 361 (statement made "to people with whom [declarant] had a trusting relationship"); *State* v. *Pierre*, supra, 277 Conn. 69 (statement made to friend, with whom declarant "routinely socialized"); *State* v. *Bryan*, 193 Conn. App. 285, 304–306, 219 A.3d 477 (relationship of trust and friendship when declarant had known person to whom he made statement for approximately ten years, had stayed at person's home, and had committed robbery with that person), cert. denied, 334 Conn. 906, 220 A.3d 37 (2019). Our appellate case law indicates that "[s]tatements made by a declarant to fellow inmates have been considered untrustworthy. See *State* v. *DeFreitas*, 179 Conn. 431, 453, 426 A.2d 799 (1980) (declarations against penal interest are untrustworthy when, inter alia, confessions made to fellow inmate); *Morant* v. *State*, 68 Conn. App. 137, 172, 802 A.2d 93 (exclusion of [third-party] confession proper when, inter alia, declarant confided not in close friends but in fellow inmate) (overruled in part on other grounds by *Shabazz* v. *State*, 259 Conn. 811, 830 n.13, 792 A.2d 797 (2002)), cert. denied, 260 Conn. 914, 796 A.2d 558 (2002). The fact that the statements allegedly made by [the declarant] were made to a fellow inmate, *with whom* [*the declarant*] *did not have a close relationship*, weighs against their trustworthiness." (Emphasis added.) *Martin* v. *Flanagan*, 107 Conn. App. 544, 549–50, 945 A.2d 1024 (2008).

*State* v. *Smith*, supra, 289 Conn. 598, on which the state relies, is not to the contrary. In *Smith*, we concluded that the trial court's admission of an inmate's recorded statement, when the court found that it was made in a private manner to a cellmate in whom the

declarant would be likely to confide, was not an abuse of discretion. Id., 630, 632–33. It was not our intention in *Smith* to adopt a blanket rule or presumption that a relationship between inmates, or even cellmates, is one of trust and confidence simply because of their shared circumstance. The inmates in *Smith* were both facing drug charges and had been cellmates for perhaps as long as one month when the statements were made. Id., 615.

In the present case, Early and Calabrese were strangers who were cellmates for less than twenty-four hours when the statement was made. Early's purported status as a gang member could have induced Calabrese to embellish his criminal history to send a message that neither Early nor any of his fellow gang members in the facility should mess with him. There is no basis in the record to conclude that, in this fleeting period, a relationship of trust and confidence developed.

The two remaining factors, however, corroboration and the degree to which the statement was against Calabrese's penal interest, overwhelmingly weigh in favor of trustworthiness. Calabrese's account was consistent with the physical evidence in almost all material respects; the only material inconsistency was his claim that Vitalis had pulled a knife on him when no knife was found at the scene. There are numerous reasons why Calabrese may have intentionally fabricated the existence of the knife.[23] The state also produced independent evidence to corroborate Calabrese's identification of the defendant as his accomplice and Calabrese's presence at the scene—cell phone location information and a statement that Calabrese had made to his girl-

[23] It is immaterial whether Calabrese subjectively, but incorrectly, assumed that he would be less culpable if it was believed that he killed Vitalis in self-defense. "Whether a statement is against a declarant's penal interests is an objective inquiry of law, rather than a subjective analysis of the declarant's personal legal knowledge." *State* v. *Camacho*, supra, 282 Conn. 359.

friend before the crime, among other evidence. Although the defendant points to certain aspects of Calabrese's account that are inconsistent with the evidence (i.e., time of day, which door was the point of entry, etc.), none of these facts is material. It is unsurprising that such inconsequential details could have been misremembered more than one year after the events occurred.

The extent to which the statement is against Calabrese's own penal interest could not be greater. He cast himself as the principal actor—the only perpetrator armed, the person who first restrained Vitalis' mother, the person who shot Vitalis, and the only one who stole property from the scene. He exposed himself to felony murder charges, among other charges. Calabrese's statement and the circumstances of its making have none of the characteristics that had historically caused courts to view dual inculpatory statements as presumptively unreliable when offered to prove the guilt of an accomplice of the declarant. See *Lilly* v. *Virginia*, 527 U.S. 116, 134, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999) (plurality opinion) (concluding that such statements are not within firmly rooted hearsay exception for confrontation clause purposes); see also id., 136–37 (confirming that such statements may nonetheless be admitted if they possess particularized guarantees of trustworthiness). Calabrese neither shifted blame from himself to the defendant nor attempted to share the blame for the murder with the defendant. See *State* v. *Schiappa*, supra, 248 Conn. 155 (citing these factors). Calabrese did not know that his statement was being recorded at the behest of state officials, and, thus, he could not have been making the statement to curry favor with the government. See *State* v. *Rivera*, 268 Conn. 351, 370, 844 A.2d 191 (2004) ("*Lilly*'s main concern was with statements in which, as is common in police station confessions, the declarant admits only what the authorities are already capable of proving against him and

seeks to shift the principal blame to another (against whom the prosecutor then offers the statement at trial)" (internal quotation marks omitted)); *State* v. *Gold*, 180 Conn. 619, 635, 431 A.2d 501 (concern with attempt to "curry favor"), cert. denied, 449 U.S. 920, 101 S. Ct. 320, 66 L. Ed. 2d 148 (1980); 2 R. Mosteller, McCormick on Evidence (8th Ed. 2020) § 319, p. 569 ("federal courts have most frequently admitted [third-party] statements that inculpate a defendant [when] two general conditions are satisfied: (1) the statement does not seek to curry the favor of law enforcement authorities, and (2) it does not shift blame"). Therefore, the trial court clearly did not abuse its discretion by admitting Calabrese's dual inculpatory statement under § 8-6 (4).

II

The defendant's final challenge is to the trial court's exclusion of Shyam's confession to the defendant's sister, Majmudar, which the defendant offered as a statement against penal interest under § 8-6 (4) of the Connecticut Code of Evidence. The defendant contends that the trial court abused its discretion in concluding that Shyam's statement was not trustworthy. We agree with the Appellate Court that the trial court's ruling was not an abuse of discretion.[24]

The principles that we articulated in part I C regarding the hearsay exception for statements against penal interest under § 8-6 (4) of the Connecticut Code of Evi-

[24] The state contends that the trial court also properly excluded Shyam's purported confession on the ground that the defendant failed to establish Shyam's unavailability, a precondition for the admission of a statement against penal interest. See Conn. Code Evid. § 8-6 (4). Although there were several exchanges between defense counsel and the court on this issue, it is not entirely clear whether the trial court conclusively determined that the defendant had failed to meet this condition. Like the Appellate Court, we conclude that it is unnecessary to address Shyam's availability in light of our conclusion that the trial court did not abuse its discretion in determining that Shyam's statement was not trustworthy. See *State* v. *Patel*, supra, 194 Conn. App. 279 n.19.

dence apply equally to the admissibility of Shyam's confession. We assess the trial court's discretion in applying those principles to the following undisputed facts. During the presentation of the defense's case-in-chief, Majmudar testified that her cousin Shyam had made a surprise visit to her Boston home sometime in the last two weeks of September, 2013. When asked what Shyam had said during that visit, the prosecutor objected. In a proffer outside of the jury's presence, Majmudar provided the following testimony. She and Shyam had a close relationship, becoming especially close when Shyam lived with Majmudar's family in Branford, Connecticut, for two years while Majmudar was in high school. When Shyam visited Majmudar in Boston in September, 2013, he told Majmudar that his family was asking relatives for help posting bond for Niraj, and asked whether he could borrow $50,000 from her. Majmudar replied that she could not lend the money because she needed it to help the defendant post bond and pay attorney's fees. Majmudar told Shyam that she knew the defendant was innocent because he had been with her in Boston when the crimes occurred. When Shyam did not appear surprised by this revelation, Majmudar asked him if he knew who had accompanied Calabrese. After further probing, Shyam broke down in tears and admitted that he and Calabrese were the ones who had tried to rob Vitalis. Shyam then provided her with an account of the incident, in which he stated that he had fled the Vitalis home after Calabrese shot Vitalis and later returned in a vehicle with Niraj to pick up Calabrese. Majmudar asked Shyam whether Calabrese had used the defendant's cell phone during the robbery.[25] Shyam responded affirmatively and volunteered

[25] Evidence was presented at trial regarding the movement of cell phones associated with Niraj, Calabrese, and the defendant on August 6, 2012, which placed those phones near the crime scene and often in contact with one another. See *State* v. *Patel*, supra, 194 Conn. App. 285–86. The cell phone associated with the defendant accessed the cell tower located between seven and eight miles from the crime scene for a series of phone calls prior

that he had left his own cell phone at home. Majmudar told Shyam that he needed to come forward and confess, but Shyam said that he could not do that to his parents, as they already faced the risk that Niraj would be taken away from them.

The trial court asked Majmudar who she had told about Shyam's confession. She replied that she had told only the defendant, after he was released on bond.

The court sustained the prosecutor's objection to the admission of the testimony pertaining to Shyam's confession. The court found that, in light of the totality of the circumstances under which the statement was purportedly made, the statement was untrustworthy and particularly lacking in sufficient corroboration. The court cited the following factors. The court pointed out that the alleged confession was made thirteen months after the crime and that Majmudar claimed to have told no one except the defendant about the alleged confession for more than three and one-half years after the statement was made. It reasoned: "Both of these delays provided her with years to learn the details of the prosecution's theory of the case and, if she wished to do so, [to] fabricate the statement. . . . [B]oth the delay in which the statement was supposedly made and the time at which it was revealed, which was yesterday, independently, and, when combined, weigh heavily against the admissibility of the statement. The incriminating statements were, based on the evidence made to date, made to only one person, [Majmudar]; that fact

to 6:04 p.m. See id., 286–87. There were no outgoing calls or messages from the cell phone associated with the defendant after 6:04 p.m. on August 6, 2012, which, the state's expert observed, "indicated 'either that the phone was off or that it was . . . in an area where it could not receive any cell signal,' or that 'something could have happened to the phone that rendered it unable' to receive a [cell] signal." Id., 286. On August 6, 2012, Shyam's phone was used to make several phone calls through a device in his home in Warren.

weighs against admissibility. The concept that [Majmudar] allegedly allowed her parents and her sister to agonize over the emotional and financial burden of this prosecution for the past three and [one-half] years, all the while keeping to herself the supposed confession that would have been of incalculable relief to them, is incomprehensible and weighs against admissibility. The nature of the relationship between [Majmudar] and Shyam . . . weighs heavily against admissibility. The witness is highly motivated to assist her brother, and, even though there may be a strong relationship between these two cousins, Shyam and [Majmudar] . . . Shyam . . . had to know that [Majmudar's] primary loyalty would be to her brother. Unless Shyam . . . wanted his confession to be open and known, he would never have made it to one of the four people on this planet who are most highly motivated above and beyond all others to bring it to the attention of the authorities to save their son, their sibling, from what they would have believed to be a wrongful prosecution."

The court further reasoned that "[t]he details of the statement . . . make it untrustworthy and even bizarre." The court questioned why Shyam would volunteer trivial details such as which vehicle he had driven,[26]

[26] According to Majmudar, Shyam said that he and Niraj had driven "the Pathfinder" back to the woods to find Calabrese. Shyam's family owns a white Pathfinder. Majmudar testified that, when she questioned Shyam as to why the police had seized her parents' two black sport utility vehicles (SUVs), Shyam said that they had used "the black Saab SUV from New York" during the robbery. From the defendant's perspective, these statements identifying the vehicles provide two benefits. The report of the use of the black Saab explains a witness' report of seeing Niraj driving a vehicle fitting the description of the defendant's black Honda CRV about five miles away from Vitalis' home, when no such vehicle was registered to Niraj or to Niraj's family. The report of the use of the Pathfinder, after the murder was committed, in conjunction with evidence that Shyam had access to that vehicle on August 6, 2012, and that the Pathfinder was thoroughly cleaned in the weeks before the police seized it in mid-September, 2013, provides potential physical evidence connecting Shyam to the crime.

and found it "[e]specially suspect" that Majmudar asked Shyam if Calabrese used the defendant's phone during the robbery. See footnote 26 of this opinion. The court noted that there was no evidence explaining how Majmudar would have known that phones played any role in the robbery—"for all she knew, the plan was hatched by coconspirators in a bar, immediately carried out and no phones were used at all." The court found it nonsensical that, if Calabrese and Shyam decided not to use their own phones during the robbery, they would use the phone of someone with whom they are associated or related, instead of untraceable phones.

The court also pointed out that evidence demonstrated that "Vitalis had significant contacts and dealings with Niraj . . . and Shyam . . . which explains . . . at least in part, why Niraj . . . and Shyam . . . did not enter that home, because . . . despite masks, through their voices in the prior context, it would have been readily recognized, and that would explain why Niraj . . . solicited others who [did] not have contact with . . . Vitalis to carry out the robbery. . . . [T]hat evidence alone points more to . . . Calabrese and this defendant than it does to Shyam . . . having been the person to enter the Vitalis home. The circumstances surrounding the event are far more consistent with [the] defendant entering the Vitalis' home than Shyam . . . entering that home."

The Appellate Court agreed that Shyam's statement "was against [his] penal interest to a significant extent, such that this factor weighs in favor of a finding of trustworthiness," but concluded that the trial court had not abused its discretion in concluding that the remaining factors clearly weighed against such a finding. *State* v. *Patel*, supra, 194 Conn. App. 280, 283. We agree that the trial court's exclusion of the statement was not an abuse of discretion.[27]

[27] We observe that several statements made by the trial court in connection with its ruling could be interpreted as comments explaining why Majmudar's

The defendant's arguments for the admission of the statement are unpersuasive. He suggests that, with regard to the temporal factor, it is more important that Shyam's confession was made shortly after the arrests in connection with the Sharon home invasion than the fact that it was made more than one year after the incident. The defendant cites no case law supporting this proposition, and this proposition is contradicted by the rationale for the temporal factor—that a lapse of time following the crime provides a declarant with opportunity for reflection and contrivance. See *State* v. *Pierre*, supra, 277 Conn. 70. The defendant's emphasis on the close relationship between the cousins, Majmudar and Shyam, and on the case law recognizing that a blood relationship may be one of trust; see, e.g., *State* v. *Rivera*, supra, 268 Conn. 369; misses the point. The trial court reasonably pointed to the stronger relationship between the defendant and his sister, and her loyalty to him over Shyam.

Most of the evidence that the defendant characterizes as corroborative indicates only that Shyam may have played some role in connection with the incident, not that Shyam was present in the Vitalis home.[28] We pre-

testimony lacked credibility. "We previously have concluded . . . that a trial court may not consider the credibility of the testifying witness in determining the trustworthiness of a declaration against penal interest." *State* v. *Rivera*, supra, 268 Conn. 372; see also 2 R. Mosteller, supra, § 319, p. 575 ("The federal courts have disagreed on whether the corroboration requirement applies to the veracity of the in-court witness testifying that the statement was made in addition to the clearly required showing that the statement itself is trustworthy. As a matter of standard hearsay analysis, the credibility of the in-court witness regarding the fact that the statement was made is not an appropriate inquiry." (Footnote omitted.)). The defendant did not challenge the trial court's ruling on this basis. Even if the trial court had improperly rested its decision in part on Majmudar's credibility, however, the reasons articulated by the trial court illustrate why a jury would have been highly unlikely to credit her testimony, and any potential error in excluding Shyam's purported confession would have been harmless.

[28] "There was evidence at trial that Shyam sent the following text messages to Niraj at 8:13 p.m. on August 6, 2012: 'U want me to come to the station in [P]athfinder?'; '?'; 'Lemme know . . . I got keys.' A white Pathfinder,

viously have emphasized that "[t]he corroboration requirement for the admission of a [third-party] statement against penal interest is significant and goes beyond minimal corroboration." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Lopez*, supra, 254 Conn. 319. The only evidence that could corroborate Shyam's presence at the Vitalis home invasion is one of the several statements given by Vitalis' mother to the police about the incident. In January, 2016, more than three years after the incident, Rita Vitalis told the police that she believed that one of the masked intruders was an Indian male and believed that this person was Shyam. She knew Niraj and Shyam but not the defendant. In other statements, however, she reported that she believed that both of the intruders were white, that they could be Hispanic, or that she did not know who either intruder was with certainty. The trial court, therefore, reasonably concluded that Shyam's statement was not sufficiently trustworthy to be admitted as a statement against penal interest.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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registered at the home Shyam shared with his parents and, occasionally, Niraj, was seized by [the] police. The vehicle smelled clean and seemingly had new floor mats. A receipt dated August 31, 2012, at 10:40 a.m. from Personal Touch Car Wash in New Milford was found in a bedroom at Shyam's home, and Shyam's cell phone utilized two cell towers in the vicinity of the car wash around the date and time printed on the receipt." *State* v. *Patel*, supra, 194 Conn. App. 282 n.22. "There was [also] evidence at trial that there were Google searches conducted on Shyam's computer for the terms 'conspiracy to commit murder in Connecticut' and 'conspiracy to kill,' along with searches for penalties for those crimes." Id., 282 n.23.

# STATE OF CONNECTICUT *v.* JOSE A. B.*
## (SC 20332)

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

*Syllabus*

Convicted of sexual assault in the first degree, attempt to commit sexual assault in the first degree, sexual assault in the fourth degree, and two counts of risk of injury to a child, the defendant appealed, claiming that the trial court improperly had overruled defense counsel's objections to the prosecutor's use of peremptory challenges to excuse two prospective jurors, C and N, and that his conviction of two counts of risk of injury to a child violated the constitutional prohibition against double jeopardy. C is an African-American, and N is also a member of a racial minority. The prosecutor had explained that the basis for the peremptory challenges to C and N was their stated distrust of law enforcement and/or the criminal justice system. Specifically, the prosecutor relied on N's statements during voir dire indicating that she previously had been convicted of a crime for which she received a pardon, that she had resented the police at the time she was arrested but no longer felt that way, and that her husband's friend had previously pleaded guilty to sexual assault but that she did not believe the truth of the allegations against him. With respect to C, the prosecutor relied on the fact that, although C had disclosed an incident involving a larceny on his juror questionnaire, he also revealed during voir dire an undisclosed conviction resulting from an assault of a police officer, for which C believed he was unfairly prosecuted. Defense counsel objected to the peremptory challenges on the basis of the United States Supreme Court's decision in *Batson* v. *Kentucky* (476 U.S. 79), which prohibits a party from challenging prospective jurors solely on account of their race. The trial court overruled the *Batson* challenges, concluding that the reasons proffered by the prosecutor, namely, N's resentment toward the police and her criminal conviction resulting in a pardon, as well as C's prior arrest for a serious crime for which he believed he was unfairly prosecuted, were race neutral and not a pretext for discrimination. From the judgment of conviction, the defendant appealed. *Held*:

1. The trial court did not commit clear error in determining that the defendant had failed to meet his burden of proving, by a preponderance of the

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

evidence, that the jury selection process in the present case was tainted by purposeful discrimination:

a. The defendant conceded that the distrust of law enforcement and/or the criminal justice system is a race neutral reason for exercising a peremptory challenge under federal constitutional law, and this court declined to conclude, on the basis of the record in the present case, that such negative perceptions constitute a facially discriminatory reason for exercising a peremptory challenge under the Connecticut constitution: although neither the text nor the history of the relevant provisions (article I, §§ 1, 8, 19 and 20, as amended) of the Connecticut constitution shed any light on the scope of permissible reasons for peremptory challenges, federal precedent provided no support for the defendant's claim, and sister state precedent did not provide overwhelming support for that claim, this court's recent decision in *State* v. *Holmes* (334 Conn. 202) signaled a shift in this state's precedent toward ensuring the impartiality of juries by addressing the problems of implicit bias and disparate impact during jury selection; moreover, in *Holmes*, this court recognized that significant public policy and sociological reasons support the conclusion that a negative perception of law enforcement is not a race neutral reason for excluding a prospective juror, considering the disparate impact those reasons have on racial minorities and, to that end, announced in that case the creation of the Jury Selection Task Force to study and propose changes to the jury selection process in Connecticut that would remediate the issue of racial discrimination and implicit bias in jury selection; nonetheless, principles of judicial restraint counseled against this court's making a new constitutional pronouncement on this issue, as the Jury Selection Task Force recently had proposed a new rule of practice to address these concerns, the proposed rule had been submitted to the judges of the Superior Court for consideration, and the rule-making process was ongoing; accordingly, this court declined to hold in the present case that greater protection was warranted under the Connecticut constitution than is provided under the existing federal *Batson* scheme.

b. The trial court's finding that the reasons proffered by the prosecutor for peremptorily challenging C and N were not a pretext for impermissible discrimination was not clearly erroneous; the record indicated that the prosecutor questioned all of the prospective jurors in a similar manner as to whether they, or someone close to them, had ever been arrested or charged with a crime, any affirmative responses to those questions were followed by questions regarding the details of any arrest or charge and whether it would influence the prospective juror, the more extensive questioning of C with regard to his criminal history was reflective of the incomplete answers that he provided in his questionnaire and during voir dire rather than reflective of a racially discriminatory intent, and there was no evidence of a pattern of discrimination by the prosecutor in excluding prospective jurors of a particular race.

2. The defendant could not prevail on his claim that his right to be free from double jeopardy was violated because risk of injury to a child, with which the defendant was charged, is a lesser included offense of sexual assault in the first degree and sexual assault in the fourth degree: even if it was assumed that the offenses in question arose from the same act or transaction, the defendant failed to show that those crimes constituted the same offense for double jeopardy purposes under the test set forth in *Blockburger* v. *United States* (284 U.S. 299), and this court, in a recently decided case, *State* v. *Tinsley* (340 Conn. 425), rejected the defendant's argument that, notwithstanding the distinct elements of each offense charged, a court should consider the facts alleged in the information when determining whether the statutory elements of each offense are the same under *Blockburger*; in the present case, the crimes of sexual assault in the first degree and sexual assault in the fourth degree each required proof of a fact that risk of injury to a child did not, as sexual assault in the first degree required proof that the defendant engaged in sexual intercourse with the victim and was more than two years older than the victim, sexual assault in the fourth degree required proof that the defendant intentionally subjected someone under the age of fifteen to sexual contact, and the particular risk of injury offenses of which the defendant was convicted required proof of neither of those facts; moreover, because the defendant did not argue that that the legislature had intended that risk of injury to a child, on the one hand, and sexual assault in the first or fourth degree, on the other, should be considered the same offense, he could not rebut the presumption that those crimes did not constitute the same offense under *Blockburger*.

Argued February 26, 2021—officially released March 22, 2022

*Procedural History*

Substitute information charging the defendant with two counts of the crime of risk of injury to a child, and with one count each of the crimes of sexual assault in the first degree, attempt to commit sexual assault in the first degree, and sexual assault in the fourth degree, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Doyle*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

*Drew J. Cunningham*, with whom was *Damian K. Gunningsmith*, for the appellant (defendant).

*Timothy J. Sugrue*, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Elena Ricci Palermo*, senior assistant state's attorney, for the appellee (state).

*Harry Weller*, *Peter T. Zarella*, and *C. Ian McLachlan* filed a brief as amici curiae.

*Alinor C. Sterling* and *James J. Healy* filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

*George Welch*, human rights attorney, filed a brief for the Commission on Human Rights and Opportunities as amicus curiae.

*Tadhg Dooley* filed a brief for Professors and Research Scholars at Connecticut's Law Schools as amici curiae.

*William Tong*, attorney general, *Clare Kindall*, solicitor general, and *Joshua Perry*, special counsel for civil rights, filed a brief for the Office of the Attorney General as amicus curiae.

*Christine Perra Rapillo*, chief public defender, and *Adele V. Patterson*, senior assistant public defender, filed a brief for the Office of the Chief Public Defender as amicus curiae.

*David N. Rosen* filed a brief as amicus curiae.

*Georgina Yeomans* filed a brief for NAACP Legal Defense and Educational Fund, Inc., as amicus curiae.

*Opinion*

ROBINSON, C. J. The principal issue in this appeal asks us to revisit our recent decision in *State* v. *Holmes*, 334 Conn. 202, 221 A.3d 407 (2019), and to consider whether, given the disparate impact on minority communities, a prospective juror's negative experience with, or distrust of, the criminal justice system provides a race neutral reason for the exercise of a peremptory

challenge under the Connecticut constitution. The defendant, Jose A. B., appeals[1] from the judgment of conviction, rendered after a jury trial, of three counts of sexual assault or attempt to commit sexual assault and two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2).[2] On appeal, the defendant claims that (1) the trial court improperly overruled his *Batson*[3] objection to the prosecutor's exercise of peremptory challenges to two venirepersons, and (2) his conviction of two counts of risk of injury to a child violates his right to be free from double jeopardy. We disagree, and, accordingly, we affirm the judgment of the trial court.

The record reveals the following relevant facts, which the jury reasonably could have found, and procedural history. The victim lived with the defendant, the defendant's wife, who was the victim's legal guardian, and the victim's brother, from the time the victim was eighteen months old. The victim testified that the defendant sexually assaulted her on numerous occasions between 2000 and 2007, when she was between five and twelve years old.[4]

[1] The defendant appeals directly to this court pursuant to General Statutes § 51-199 (b) (3).

[2] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . ."

Although § 53-21 has been amended numerous times since the defendant's commission of the crimes that formed the basis of his conviction; see, e.g., Public Acts 2007, No. 07-143, § 4; Public Acts 2013, No. 13-297, § 1; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of § 53-21 throughout this opinion.

[3] *Batson* v. *Kentucky*, 476 U.S. 79, 96–98, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

[4] The victim testified that the defendant forcibly kissed her, put his tongue inside her mouth and on her vagina, attempted, but failed, to insert his penis in her vagina, touched her breasts and her outer vaginal area, and made her touch his penis.

The state subsequently charged the defendant with sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2),[5] sexual assault in the fourth degree in violation of General Statutes (Rev. to 2001) § 53a-73a (a) (1) (A),[6] attempt to commit sexual assault in the first degree in violation of § 53a-70 (a) (2) and General Statutes § 53a-49 (a) (2),[7] and two counts of risk of injury to a child in violation of § 53-21 (a) (2). The case was tried to a jury, which found the defendant guilty on all counts. The trial court rendered a judgment of conviction in accordance with the jury's verdict, sentenced the defendant to a total effective sentence of seventeen years of imprisonment, followed by two years of special parole, issued a criminal protective order and ordered sexual offender registration. This direct appeal followed.[8] Additional relevant facts and

[5] General Statutes § 53a-70 (a) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . ."

Section 53a-70 was amended by No. 02-138, § 5, of the 2002 Public Acts and No. 15-211, § 16, of the 2015 Public Acts. Those amendments made certain changes to the statute that are not relevant to this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[6] General Statutes (Rev. to 2001) § 53a-73a (a) provides in relevant part: "A person is guilty of sexual assault in the fourth degree when: (1) Such person intentionally subjects another person to sexual contact who is (A) under fifteen years of age . . . ."

All references to § 53a-73a in this opinion are to the 2001 revision of the statute.

[7] General Statutes § 53a-49 (a) provides in relevant part: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

[8] Following oral argument, this court sua sponte ordered the parties to submit simultaneous supplemental briefs, limited to the following issue: "Whether this court should exercise its supervisory powers to hold, pursuant to the proposal of the Jury Selection Task Force, that, '[t]he denial of an objection to a peremptory challenge shall be reviewed by an appellate court de novo, except [that] the trial court's express factual findings shall be

procedural history will be set forth in the context of each claim on appeal.

## I

## JURY SELECTION CLAIMS

The defendant first claims that his state and federal constitutional rights were violated because the state's peremptory challenges to two venirepersons, N.L. and C.J.,[9] during jury selection violated *Batson* v. *Kentucky*, 476 U.S. 79, 96–98, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The record reveals the following additional facts and procedural history relevant to this claim.

During the prosecutor's voir dire examination of N.L., the following exchange occurred:

"[The Prosecutor]: Do you know of anyone who has ever been accused of a sexual assault besides the one you just told us about?

"[N.L.]: Yes.

"[The Prosecutor]: Tell me a little bit about that.

"[N.L.]: Well, he was actually a friend of my husband's. He used to date this girl, and they had kids together, but

reviewed under a clearly erroneous standard.' Jury Selection Task Force, Report [of the Jury Selection Task Force] to Chief Justice Richard A. Robinson (December 31, 2020) p. 16 [available at https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf (last visited March 15, 2022)]. But see id., pp. 22–23, statement of Judge Douglas Lavine in Opposition."

We also invited amici curiae to file briefs on this issue. We are grateful to the following amici curiae for responding to our invitation with their thoughtful briefs: (1) Harry Weller, Peter T. Zarella, and C. Ian McLachlan; (2) the Office of the Chief Public Defender; (3) the Office of the Attorney General; (4) the Commission on Human Rights and Opportunities; (5) David N. Rosen; (6) NAACP Legal Defense and Educational Fund, Inc.; (7) the Connecticut Trial Lawyers Association; and (8) Professors and Research Scholars at Connecticut's Law Schools.

[9] We note that the record indicates that C.J. is an African-American man. The record does not specify the racial identity of N.L., but it is undisputed that she is a member of a racial minority.

she had a son with someone else, and she didn't have custody of him. The grandparents did. And I guess maybe he wanted to, you know, live with them, and the person got accused of sexually molesting him. . . . I don't know if it happened. And he went to jail, but he's been out of jail for a long time.[10]

* * *

"[The Prosecutor]: Do you think that people [who] are victims of sexual assault should go to the police?

"[N.L.]: Yes.

* * *

"[The Prosecutor]: Now, have you or anyone close to you, besides what you told us, ever been charged or arrested for a crime?

"[N.L.]: Myself, I have.

"[The Prosecutor]: Can you tell me a little bit about that?

[10] The record reveals the following additional colloquy concerning the sexual assault allegations against N.L.'s acquaintance:

"[The Prosecutor]: This was a friend of—

"[N.L.]: My husband's.

"[The Prosecutor]: Do you ever talk to him about any of this?

"[N.L.]: No.

"[The Prosecutor]: Were you personally close to this person?

"[N.L.]: Not close, but I know who he is.

"[The Prosecutor]: Anything about that that would make you think, I can't sit on this case?

"[N.L.]: No. I didn't believe the allegations.

"[The Prosecutor]: Why didn't you believe the allegations?

"[N.L.]: Because of the circumstances, how it was told to me, not me knowing personally, and [I] didn't feel like it was true to me. I felt like he just took it because he's already been convicted of something else, which ha[s] nothing to do with that. And he just—I guess they told him, if he didn't take the deal, this would happen.

"[The Prosecutor]: Anything about that situation with him that you think might impact your decision [in] this case?

"[N.L.]: No."

"[N.L.]: Yeah. It's years ago. I've actually had a pardon. So I don't know if I should talk about it.

"The Court: If you have a pardon—I guess the question would be, is there anything about that experience that might affect your ability to be fair and impartial in this case?

"[N.L.]: I don't think so.

"[The Prosecutor]: You're hesitating a little.

"[N.L.]: No, I don't think so. I think I can separate the two.[11]

* * *

"[The Prosecutor]: Do you think that the fact that you were arrested and then later pardoned, do you think that might make you think you might lean more toward the defense in this case?

"[N.L.]: Not based on that. I would actually have to hear both sides. Then I can make a decision from there.

"[The Prosecutor]: Do you think you would hold it against the state because of what happened?

"[N.L.]: No.

* * *

"[The Prosecutor]: All right. There will . . . probably [be] testimony from at least one police officer in this case. What's your feeling about the police in general?

[11] The record reveals the following additional colloquy about N.L.'s conviction:

"[The Prosecutor]: How long ago was this?

"[N.L.]: '97, '95, '97.

"[Prosecutor]: Did it involve any children?

"[N.L.]: No.

"[The Prosecutor]: Anything about a sexual assault?

"[N.L.]: No."

"[N.L.]: Well, I ha[d] a lot of resentment when I got arrested, but, over time, I've learned that whatever happened was not their fault. It was something that I did. And I actually have members that are police officers.

"[The Prosecutor]: Members of [your] family?

"[N.L.]: Mm-hmm.

* * *

"[The Prosecutor]: So, you held a lot of resentment at one time for the police. And now?

"[N.L.]: No.

"[The Prosecutor]: Have you ever had to call the police yourself for any reason?

"[N.L.]: Yeah.

"[The Prosecutor]: For what?

"[N.L.]: Domestic, when I was like real young." (Footnotes added.)

Upon conclusion of the voir dire examination of N.L., the prosecutor exercised a peremptory challenge. The prosecutor stated, inter alia, that N.L.'s articulated resentment toward the police and her criminal history of a conviction resulting in a pardon warranted the use of a peremptory challenge.[12] Defense counsel then raised a *Batson* objection to the state's peremptory challenge of N.L. The trial court overruled defense counsel's *Batson* objection, concluding that the prosecutor's

[12] The other reasons the prosecutor provided for the peremptory challenge were (1) N.L.'s initial response that she would not be able to convict the defendant based on the testimony of a single witness, (2) her initial response that she would not be able to return a guilty verdict if she were not 100 percent certain, and (3) her disbelief of the allegations of sexual assault against her husband's friend.

proffered reasons for the peremptory challenge of N.L. were race neutral and not a pretext for discrimination.[13]

The prosecutor subsequently conducted a voir dire examination of C.J., during which they discussed C.J.'s arrest history, which C.J. had only partially disclosed in his juror questionnaire:

"[The Prosecutor]: Have you or anyone close to you ever been arrested for any kind of crime?

"[C.J.]: I have been arrested for a crime.

"[The Prosecutor]: For what, sir?

"[C.J.]: Well, a long time ago, coming out [of] my aunt's building, an undercover police officer grabbed my arm, and I'm thinking it's a robbery, so I swung to get him off of me, but then that—then everything took place. Then I find out he was a police officer.

"[The Prosecutor]: Okay. So you were arrested for that?

"[C.J.]: Yes.[14]

[13] The trial court cited the following additional observation regarding N.L.: "There was an additional issue that [the prosecutor] did raise . . . which was when [N.L.] said that she would expect a sexual assault victim to report [the assault] immediately to the police. That's obviously not this case. I do think there were race neutral reasons to remove her at this time."

[14] The record reveals the following colloquy about C.J.'s arrest for the incident with the police officer:

"[The Prosecutor]: And when was that?

"[C.J.]: That was over thirty-five years ago, almost forty years ago, probably. Thirty-five.

"[The Prosecutor]: So did you go to jail?

"[C.J.]: I was already in jail. I never got out.

"[The Prosecutor]: You were in jail for what?

"[C.J.]: Went from the incident, from the time it happened . . . until they gave me that disposition, so, by the time I got the disposition, it was almost like time served.

"[The Prosecutor]: Okay. So how much time do you think you—

"[C.J.]: Sixteen months.

"[The Prosecutor]: Okay. And that was how long ago?

"[C.J.]: That was all the way back in '87.

"[The Prosecutor]: Besides that one time, were you ever arrested any other time?

"[C.J.]: No. All—everything ended over thirty years [ago]. That's it.

* * *

"[The Prosecutor]: You gave a little information on your juror questionnaire, and you . . . put down something about larceny six, but dropped from my job. . . . What's that mean?

"[C.J.]: . . . I worked at Stop and Shop for almost twelve years. All right. We had a hectic night one night. I had my stuff in a carriage, and I was the key holder, so, when I was leaving . . . I grabbed my carriage, but . . . because of the night, I didn't scan those things out, so they put a larceny six, but they dropped it—all that. But that was in 2011.[15]

* * *

"[The Prosecutor]: Okay. Besides that, any other time you or anyone else close to you [has] ever been arrested?

"[C.J.]: No." (Footnotes added.)

The state then questioned C.J. regarding his attitude toward the police and the criminal justice system:

"[The Prosecutor]: That's the only time you were ever arrested?

"[C.J.]: Well . . . everything was in that time period. [Nineteen ninety-seven] was the end, when the charge was done with.

"[The Prosecutor]: Say that again.

"[C.J.]: All of those arrests [were] in that time frame. It was the same thing. Violation of probation to all this stuff right here."

[15] The record reveals the following colloquy with respect to the Stop and Shop incident:

"[The Prosecutor]: That was—

"[C.J.]: That's what I was talking about.

"[The Prosecutor]: That was in 2011?

"[C.J.]: In '11. So that's what I was talking about. It was—but they—that was—I worked for that company.

"[The Prosecutor]: Okay. So—

"[C.J.]: So they—they—that's how. Because I didn't have a receipt for those items, because, through the night . . . I was stocking and everything, rushing. We had two alarm calls, a whole bunch of things [were] happening, and, when I was leaving in the morning, I didn't even pay attention that those didn't get scanned out, so when I went to court, they dropped all that stuff."

"[The Prosecutor]: Do you think the fact that you have been arrested and [that] you've kind of dealt with the criminal justice system, do you think that might play a part in your deliberations if you're a juror?

"[C.J.]: Not really.

"[The Prosecutor]: What do you mean?

"[C.J.]: Because, at the end of the day, all these offense[s] you [are] talking about happened over thirty years ago.

"[The Prosecutor]: Okay. . . . The fact that you were arrested [for] the larceny six that ended up getting dropped. Do you think that you might hold a grudge against the state because of your background?

"[C.J.]: No.

"[The Prosecutor]: Do you think you were fairly prosecuted?

"[C.J.]: Do I think I was fairly prosecuted? Not on the first one, no.

"[The Prosecutor]: No? That was the one with the—

"[C.J.]: The assault—

"[The Prosecutor]: —assault?

"[C.J.]: —on the police officer.

"[The Prosecutor]: And that was in Hartford?

"[C.J.]: That was in Hartford. . . .

"[The Prosecutor]: What's your opinion of the police?

"[C.J.]: I don't have no opinions on [the] police because, in my whole family, there's massive police officers. Chief of police was my uncle, so I don't have [an] opinion on none of them. There's good police, and there's bad police, so I don't have an opinion on that. I treat people as individuals."

The prosecutor first moved to excuse C.J. for cause, given his failure to account completely for his past convictions in his questionnaire by omitting his arrest for assaulting a police officer. Defense counsel objected to the challenge for cause, arguing that C.J.'s recollection had been affected by the length of time that had passed since his arrest. The trial court agreed with defense counsel and denied the state's challenge for cause. The prosecutor then exercised a peremptory challenge, arguing that, in addition to C.J.'s apparent omissions in completing the questionnaire, the charge of assaulting a police officer itself was serious in nature and that C.J. believed that he had been incorrectly and unfairly prosecuted in that instance. In response, defense counsel raised a *Batson* objection. The court overruled the *Batson* objection, finding that "an objectively neutral reason [for the peremptory challenge] would be the fact that he was previously arrested [and] charged with a serious crime, even though it was a long time ago, [and that] he felt he was not fairly treated." The trial court also found that the prosecutor's race neutral reason was not a pretext for discrimination.[16]

Before addressing the defendant's claims in detail, we review the well established general principles under which we consider *Batson* claims. "Voir dire plays a critical function in assuring the criminal defendant that his [or her] [s]ixth [a]mendment right to an impartial jury will be honored. . . . Part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. . . . Our consti-

[16] The trial court found the prosecutor's questioning of C.J. to be consistent with that of the other prospective jurors, noting: "[O]n our first day of jury selection, there was a [prospective] juror . . . who was a white male . . . who had been previously found not guilty but [who] was prosecuted for operating under the influence, and he was not selected by the state. . . . I believe this is a race neutral reason, and I find the questioning so far, from what I observed, to be consistent and nothing pretextual that would warrant the court to take further actions."

tutional and statutory law permit[s] each party, typically through his or her attorney, to question each prospective juror individually, outside the presence of other prospective jurors, to determine [his or her] fitness to serve on the jury. . . . Because the purpose of voir dire is to discover if there is any likelihood that some prejudice is in the [prospective] juror's mind [that] will even subconsciously affect his [or her] decision of the case, the party who may be adversely affected should be permitted [to ask] questions designed to uncover that prejudice. This is particularly true with reference to the defendant in a criminal case. . . . The purpose of voir dire is to facilitate [the] intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause. . . .

"Peremptory challenges are deeply rooted in our nation's jurisprudence and serve as one [state created] means to the constitutional end of an impartial jury and a fair trial. . . . [S]uch challenges generally may be based on subjective as well as objective criteria . . . . Nevertheless, [i]n *Batson* [v. *Kentucky*, supra, 476 U.S. 79] . . . the United States Supreme Court recognized that a claim of purposeful racial discrimination on the part of the prosecution in selecting a jury raises constitutional questions of the utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . The court concluded that [a]lthough a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his [or her] view concerning the outcome of the case to be tried . . . the [e]qual [p]rotection [c]lause forbids [a party] to challenge potential jurors solely on account of their race . . . .

"Under Connecticut law, a *Batson* inquiry involves three steps.[17] First, a party must assert a *Batson* claim

[17] "We note that a *Batson* inquiry under Connecticut law is different from most federal and state *Batson* inquiries. Under federal law, a three step

. . . . [Second] the [opposing party] must advance a neutral explanation for the venireperson's removal. . . . In evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the [e]qual [p]rotection [c]lause as a matter of law. . . . At this stage, the court does not evaluate the persuasiveness or plausibility of the proffered explanation but, rather, determines only its facial validity—that is, whether the reason on its face, is based on something other than the race of the juror. . . . Thus, even if the [s]tate produces only a frivolous or utterly nonsensical justification for its strike, the case does not end—it merely proceeds to step three. . . .

"In the third step, the burden shifts to the party asserting the *Batson* objection to demonstrate that the [opposing party's] articulated reasons are insufficient or pretextual." (Footnote altered; footnote omitted; internal quotation marks omitted.) *State* v. *Holmes*, supra, 334 Conn. 222–24; see, e.g., *State* v. *Edwards*, 314 Conn. 465, 483–85, 102 A.3d 52 (2014).

It is undisputed that the defendant has satisfied the first step of the *Batson* inquiry as to N.L. and C.J. See footnote 9 of this opinion. Turning, then, to the second step of the *Batson* inquiry, we must determine whether

procedure is followed when a *Batson* violation is claimed: (1) the party objecting to the exercise of the peremptory challenge must establish a prima facie case of discrimination; (2) the party exercising the challenge then must offer a neutral explanation for its use; and (3) the party opposing the peremptory challenge must prove that the challenge was the product of purposeful discrimination. . . . Pursuant to this court's supervisory authority over the administration of justice, we have eliminated the requirement, contained in the first step of this process, that the party objecting to the exercise of the peremptory challenge establish a prima facie case of discrimination." (Internal quotation marks omitted.) *State* v. *Holmes*, supra, 334 Conn. 223–24 n.15; see *State* v. *Holloway*, 209 Conn. 636, 646 and n.4, 553 A.2d 166, cert. denied, 490 U.S. 1071, 109 S. Ct. 2078, 104 L. Ed. 2d 643 (1989).

the prosecutor's proffered reason for the peremptory challenges, namely, a prospective juror's distrust of the criminal justice system based on his or her personal experience, was facially race neutral. This is a question of law, over which we exercise plenary review. See, e.g., *State* v. *Holmes*, supra, 334 Conn. 226.

The defendant first argues that, as a matter of Connecticut constitutional law, the prosecutor's proffered reasons for the peremptory challenges were facially discriminatory based on race, given their disparate impact on members of minority groups.[18] We address this argument under the state constitution before turning to the third step of the *Batson* inquiry, namely, the defendant's alternative claim that, even if race neutral, any proffered reason by the prosecutor was a pretext for purposeful discrimination.

A

State Constitutional Claim as to the Second Prong of the *Batson* Inquiry

The defendant claims that certain provisions of the Connecticut constitution, namely, §§ 1, 8, 19 and 20 of article first, as amended,[19] provide broader protection

[18] The defendant concedes that, as a matter of federal constitutional law in the wake of the United States Supreme Court's decision in *Hernandez* v. *New York*, 500 U.S. 352, 362–63, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991), distrust of law enforcement is a facially race neutral reason to exclude a potential juror under the United States constitution. See *State* v. *Holmes*, supra, 334 Conn. 231–33; see also footnote 22 of this opinion and accompanying text.

[19] Article first, § 1, of the Connecticut constitution provides: "All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community."

Article first, § 8, of the Connecticut constitution, as amended by article seventeen of the amendments, provides in relevant part: "In all criminal prosecutions, the accused shall have a right . . . in all prosecutions by information, to a speedy, public trial by an impartial jury. No person shall . . . be deprived of life, liberty or property without due process of law . . . ."

Article first, § 19, of the Connecticut constitution, as amended by article four of the amendments, provides in relevant part: "The right of trial by

than does the federal constitution with respect to the exercise of peremptory challenges and the right to an impartial jury. The defendant contends, therefore, that our state constitution prohibits the exercise of peremptory challenges based on a venireperson's distrust of the criminal justice system or law enforcement.[20] In

jury shall remain inviolate, the number of such jurors, which shall not be less than six, to be established by law . . . . In all civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law. The right to question each juror individually by counsel shall be inviolate."

Article first, § 20, of the Connecticut constitution, as amended by articles five and twenty-one of the amendments, provides: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability."

[20] We note that the defendant did not claim at trial that distrust of the criminal justice system was not a race neutral reason under either the state or federal constitution for the peremptory challenges of N.L and C.J. Although unpreserved, the defendant's constitutional claims nevertheless are reviewable under *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). *Golding* requires the following conditions to be met in order for a defendant to prevail on a claim of constitutional error not preserved at trial: "(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." (Footnote omitted.) *State* v. *Golding*, supra, 239–40; see *In re Yasiel R.*, supra, 781.

The state asserts, however, that the defendant's claim has "no basis in fact" and, thus, is not reviewable under *Golding* because "neither N.L. nor C.J. was excused on the basis of distrust of the criminal justice system born of personal experience." The record does not support this argument. The prosecutor's stated reasons for excusing both N.L. and C.J. expressly included, to some extent, their distrust or resentment of the police or the criminal justice system. In exercising a peremptory challenge to N.L., the prosecutor referenced N.L.'s criminal history and reluctance to discuss her prior arrest, as well as her *resentment* toward the police. Similarly, the prosecutor referenced C.J.'s apparent reluctance to discuss his criminal record, as well as his belief that he was not "correctly accused or rightfully charged" of assaulting a police officer. We therefore disagree with the state's argument that there is no basis in fact for the defendant's claim that both venirepersons were excused because of their distrust of the criminal justice system.

response, the state argues that an absolute bar to challenging any venireperson who expresses distrust in the criminal justice system presents an unworkable approach that is not supported by the text of the applicable state constitutional provisions. The state further argues that we should exercise decisional restraint in light of the recent findings and recommendations of the Jury Selection Task Force (Task Force), including the Task Force's proposed change to the rules of practice, which was pending before the Rules Committee of the Superior Court (Rules Committee) when this appeal was argued and has since been submitted for a public hearing before the judges of the Superior Court. Although the defendant's arguments are compelling in light of recent case law and research concerning the effect of implicit bias, we nevertheless agree with the state that restraint is warranted at this time with respect to the adjudication of this issue as a matter of state constitutional law.

In determining that our state constitution in some instances provides greater protection than that provided by the federal constitution, "we have recognized that [i]n the area of fundamental civil liberties—which includes all protections of the declaration of rights contained in article first of the Connecticut constitution—we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter." (Internal quotation marks omitted.) *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 155–56, 957 A.2d 407 (2008).

"In *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), we enumerated the following six factors to be considered in construing the state constitution: (1) persuasive relevant federal precedents; (2) the text of the operative constitutional provisions; (3) historical insights into the intent of our constitutional forebears;

(4) related Connecticut precedents; (5) persuasive precedents of other state courts; and (6) contemporary understandings of applicable economic and sociological norms, or as otherwise described, relevant public policies. . . .

"The *Geisler* factors serve a dual purpose: they encourage the raising of state constitutional issues in a manner to which the opposing party . . . can respond; and they encourage a principled development of our state constitutional jurisprudence. 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. . . . [N]ot every *Geisler* factor is relevant in all cases. . . . Moreover, a proper *Geisler* analysis does not require us simply to tally and follow the decisions favoring one party's state constitutional claim; a deeper review of those decisions' underpinnings is required because we follow only persuasive decisions. . . . The *Geisler* analysis applies to cases in which the state constitution has no federal analogue, as well as those in which the claim is that the state constitution provides greater protection than does the federal constitution." (Citations omitted; internal quotation marks omitted.) *Fay* v. *Merrill*, 338 Conn. 1, 26–27, 256 A.3d 622 (2021); see, e.g., *Feehan* v. *Marcone*, 331 Conn. 436, 449, 204 A.3d 666, cert. denied, U.S. , 140 S. Ct. 144, 205 L. Ed. 2d 35 (2019).

1

Constitutional Language

We begin with the first *Geisler* factor, namely, the relevant constitutional text. See, e.g., *Feehan* v. *Marcone*, supra, 331 Conn. 450–51; *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 409–10, 119 A.3d 462 (2015). Article first, § 19, of the Connecticut constitution, as amended by article four of the amend-

ments, provides in relevant part: "The right of trial by jury shall remain inviolate, the number of such jurors, which shall not be less than six, to be established by law . . . . In all civil and criminal actions tried by a jury, *the parties shall have the right to challenge jurors peremptorily*, the number of such challenges to be established by law. *The right to question each juror individually by counsel shall be inviolate*." (Emphasis added.) We conclude that this *Geisler* factor does not favor either party because "this generally phrased constitutional language is at best ambiguous with respect to the constitutional issue presented in this appeal." *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 409; see id., 409–10 (concluding that " 'without . . . delay' " language in article first, § 10, was ambiguous as to whether undue delay in administration of justice is unconstitutional).

The defendant argues that, because article first, § 19, of the Connecticut constitution, unlike the applicable provisions of the federal constitution that govern criminal jury trials,[21] specifically references the right to peremptory challenges, a more expansive right to an inclusive jury is available under the state constitution. We agree with the defendant that Connecticut's constitution provides an express right to peremptory challenges, which the federal constitution does not guarantee, and that "[j]ury impartiality is a core requirement of the right to trial by jury guaranteed by the constitution of Connecticut, article first, § 8 . . . ."

[21] The fifth amendment to the United States constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

Section 1 of the fourteenth amendment to the United States constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

(Footnote omitted; internal quotation marks omitted.) *State* v. *Rhodes*, 248 Conn. 39, 46, 726 A.2d 513 (1999). However, even when read in the context of the state constitution's equal protection clause; see Conn. Const. art. I, § 20; the plain language of article first, § 19, sheds no light on the scope of permissible reasons for peremptory challenges under the state constitution; its breadth could also be understood *not* to warrant additional restrictions on a litigant's exercise of that right to exercise peremptory challenges. Put differently, the text of the applicable provisions of the Connecticut constitution does not provide guidance as to whether particular reasons for peremptory challenges are constitutional and, therefore, neutral with respect to whether distrust of law enforcement or the criminal justice system is a constitutionally valid, race neutral reason for the exercise of a peremptory challenge. Accordingly, with the text being not dispositive, we continue with our review of the other *Geisler* factors. See, e.g., *Fay* v. *Merrill*, supra, 338 Conn. 36.

2

Constitutional History

Neither party has cited any historical source that discusses negative perceptions of the criminal justice system or law enforcement as an unconstitutionally discriminatory ground on which to base a peremptory challenge. Although it is of limited value to our inquiry in this case, we now briefly consider the history of voir dire and peremptory challenges under the Connecticut constitution generally. See, e.g., *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 317 Conn. 410–11. The right to a trial by jury was established in Connecticut as early as 1636. See W. Horton, The Connecticut State Constitution (2d Ed. 2012) p. 90. "Prior to the adoption of the fourth amendment to Connecticut's constitution, article first, § 19 provided only that '[t]he right of trial

by jury shall remain inviolate.' In 1971, in response to the increasing congestion of court dockets and mounting court costs, the legislature proposed a constitutional amendment to permit mandatory [six person] juries in place of [twelve person] juries in certain circumstances. . . . In order to preserve what the legislature perceived as the fundamental character of jury trials, however, the proposed amendment contained two provisions guaranteeing that parties would continue to have certain rights, previously granted only by statute, regarding the selection of individual jurors. As adopted by the electors of Connecticut in 1972, the amendment constitutionalized the right of the parties 'to challenge jurors peremptorily' and the right 'to question each juror individually by counsel.' " (Citations omitted; footnote omitted.) *Rozbicki* v. *Huybrechts*, 218 Conn. 386, 391–92, 589 A.2d 363 (1991). This amendment, however, predated the United States Supreme Court's decision in *Batson* by fourteen years.

"The purpose and effect of [article first, §§ 8 and 19] is to preserve . . . as a political right the institution of jury trial, *in all its essential features as derived from our ancestors and* [*existent*] *by force of our common law.*" (Emphasis in original; internal quotation marks omitted.) *State* v. *Griffin*, 251 Conn. 671, 694, 741 A.2d 913 (1999). A discussion by Chief Justice Zephaniah Swift, written in 1822, describes the ways in which an impartial jury may be secured and demonstrates that such challenges to venirepersons were intended to exclude jurors with bias, including bias resulting from favor or enmity toward either party: "Challenges to the polls, or to particular jurors, are [1], the want of qualifications, [2] for crimes, and [3] for partiality. . . .

"[3] A juror may be challenged for suspicion of bias, or partiality, which may be either a principal challenge, or a challenge to the favour.

* * *

"Challenges to the favour, are founded merely on probable circumstances of suspicion, as *particular friendship or enmity to either of the parties*: and where the court has reason to think that there is such a bias or prejudice on the mind of a juror, as renders it probable there will not be a candid and fair trial, they have a discretionary power to dismiss him . . . but they ought not to indulge any unreasonable and groundless suspicion of the party." (Emphasis added; footnotes omitted.) 1 Z. Swift, A Digest of the Laws of the State of Connecticut (1822) pp. 737–38; accord *State* v. *Griffin*, supra, 251 Conn. 693–94. Although Chief Justice Swift's discussion is interesting to the extent that he observes that contemplated sources of unwanted bias, justifying exclusion of a juror from service, could well include enmity toward a party to the case, the value of his insights with respect to the *Batson* inquiry in this case is ultimately diminished by the fact that, in his time, only landowning males were qualified to serve as jurors. See 1 Z. Swift, supra, p. 737. Thus, historical insights into the intentions of our constitutional forebears are not particularly instructive with respect to the defendant's state constitutional claim.

3

Federal Precedent

Federal precedent does not support the defendant's claim with respect to the disparate impact of a peremptory challenge based on a prospective juror's distrust of law enforcement and the criminal justice system. "In *Hernandez* [v. *New York*, 500 U.S. 352, 362–63, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)], the United States Supreme Court concluded that a prosecutor had not violated *Batson* by using peremptory challenges to exclude Latino jurors by reason of their ethnicity when he offered as a race neutral explanation his concern

that bilingual jurors might have difficulty accepting the court interpreter's official translation of multiple witnesses' testimony given in Spanish. . . . In so concluding, the Supreme Court rejected the argument that the prosecutor's reasons, if assumed to be true, were not race neutral and thus violated the equal protection clause as a matter of law because of their disproportionate impact on Latino jurors." (Citation omitted.) *State* v. *Holmes*, supra, 334 Conn. 228. "[T]he only post-*Hernandez* cases we have located on [whether distrust of law enforcement or the criminal justice system is not a race neutral reason under *Batson* for exercising a peremptory challenge] have expressly rejected this disparate impact argument."[22] Id., 231–32. Moreover, the

[22] See *United States* v. *Arnold*, 835 F.3d 833, 842 (8th Cir. 2016) ("[a prospective] juror's bias or dissatisfaction with law enforcement is a [race neutral] reason for striking the juror" (internal quotation marks omitted)); *United States* v. *Brown*, 809 F.3d 371, 376 (7th Cir.) ("we have acknowledged that bias against law enforcement is a legitimate [race neutral] justification"), cert. denied, 578 U.S. 977, 136 S. Ct. 2034, 195 L. Ed. 2d 219 (2016); *United States* v. *Alvarez-Ulloa*, 784 F.3d 558, 567 (9th Cir. 2015) (distrust of law enforcement is valid ground for peremptory strike); *United States* v. *Moore*, 651 F.3d 30, 43 (D.C. Cir. 2011) ("[the prospective juror's] concern about 'rogue police officers,' and a 'bad experience' with law enforcement that '[l]eft a bad taste' . . . provided a [race neutral] explanation for the prosecution's decision to strike her" (citation omitted)), aff'd sub nom. *Smith* v. *United States*, 568 U.S. 106, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013); *United States* v. *Gamory*, 635 F.3d 480, 496 (11th Cir.) (noting that "[the prospective juror] harbored doubts about her ability to be impartial based [on] her belief that her brother had been the victim of police brutality" and that this characteristic "is [not] peculiar to any race"), cert. denied, 565 U.S. 1080, 132 S. Ct. 826, 181 L. Ed. 2d 527 (2011); *United States* v. *Carter*, 111 F.3d 509, 511–12 (7th Cir. 1997) (prior negative experience with law enforcement was race neutral reason to exclude prospective juror); *United States* v. *Rudas*, 905 F.2d 38, 41 (2d Cir. 1990) (prospective juror's potential prejudice against law enforcement was race neutral reason to exclude him); *United States* v. *Thomas*, Docket No. 2:19-cr-00461-LSC-JHE-3, 2021 WL 76562, *5–6 (N.D. Ala. January 8, 2021) (rejecting defendant's argument that fear or distrust of law enforcement is not race neutral reason for peremptory challenge); *Jordan* v. *Lefevre*, 22 F. Supp. 2d 259, 272 (S.D.N.Y. 1998) ("[n]egative experience with law enforcement has been found to constitute a [race neutral] factor for peremptorily challenging a [prospective] juror"), rev'd in part on other grounds, 206 F.3d 196 (2d Cir. 2000).

defendant has not cited any concurrences, dissents, or other federal authority on point. Therefore, this *Geisler* factor does not support the defendant's state constitutional claim.

4

Connecticut Precedent

The defendant begins his analysis of Connecticut precedent with well established case law from this court construing the due process protections under article first, § 8, of the Connecticut constitution not to impose the same meaning and limitations as its federal counterpart. See, e.g., *State* v. *Morales*, 232 Conn. 707, 717–18, 657 A.2d 585 (1995). He then contends that we should extend a greater state constitutional protection against racial bias in the exercise of peremptory challenges. Although we agree with the defendant that our state constitution affords greater protections to peremptory challenges than is provided by the federal constitution, that does not—without more—resolve the question of whether particular reasons for striking jurors are race neutral as a matter of state constitutional law.

As the defendant acknowledges, a line of Connecticut cases has addressed whether a prosecutor's reason for a peremptory challenge is race neutral if there is a disparate impact on jurors of a certain racial group. For instance, in *State* v. *Smith*, 222 Conn. 1, 14, 608 A.2d 63, cert. denied, 506 U.S. 942, 113 S. Ct. 383, 121 L. Ed. 2d 293 (1992), this court recognized that prosecutors commonly seek to exclude from juries those individuals who have had negative interactions with law enforcement "because they fear that such people will be biased against the government." The court "decline[d] to ascribe a racial animus to the state's excusal of a venireperson with an arrest record simply because that venireperson was [B]lack." Id.; see *State* v. *King*, 249 Conn. 645, 666, 735 A.2d 267 (1999) (prosecutor's rea-

sons for striking venireperson were "not motivated by discriminatory considerations" because "it was reasonable for the prosecutor to conclude that [the prospective juror's] concerns about the fairness of the criminal justice system might make it difficult for him to view the state's case with complete objectivity"); *State* v. *Hodge*, 248 Conn. 207, 231, 726 A.2d 531 (venireperson's past experiences with law enforcement and perception that family had been treated unfairly were race neutral reasons for state to exercise peremptory challenge), cert. denied, 528 U.S. 969, 120 S. Ct. 409, 145 L. Ed. 2d 319 (1999); *State* v. *Jackson*, 73 Conn. App. 338, 350–51, 808 A.2d 388 (rejecting defendant's disproportionate impact argument against prosecutor's race neutral explanations), cert. denied, 262 Conn. 929, 814 A.2d 381 (2002), and cert. denied, 262 Conn. 930, 814 A.2d 381 (2002); *State* v. *Morales*, 71 Conn. App. 790, 807, 804 A.2d 902 (prospective juror's "negative opinion concerning police performance" was valid, nondiscriminatory reason for peremptory challenge), cert. denied, 262 Conn. 902, 810 A.2d 270 (2002).

Beyond this line of cases, this court has previously held—in a decision that the defendant asks us to overrule—that there is "nothing in the language of article first, § 8, to suggest that the meaning of the term 'impartial jury' in our state constitution is different from the meaning of that same term in the federal constitution—namely, a jury that is: (1) composed of individuals able to decide the case solely on the evidence and [to] apply the law in accordance with the court's instructions; and (2) properly selected from venire panels comprising a representative cross section of the community." *State* v. *Griffin*, supra, 251 Conn. 691–92; see id., 708–709 ("the death qualification process" does not violate capital defendant's state constitutional right to impartial jury). Moreover, in discussing the purpose of voir dire leading to a challenge for cause or peremptory chal-

lenge, we have observed that, especially with respect to criminal defendants, "[i]f there is any likelihood that some prejudice is in the juror's mind [that] will even subconsciously affect his [or her] decision of the case, the party who may be adversely affected should be permitted questions designed to uncover that prejudice." (Internal quotation marks omitted.) Id., 698–99.

In asking us to overrule or limit this line of cases, the defendant relies heavily on criticisms, in recent opinions of this court and the Appellate Court, of the adequacy of *Batson* as a remedy for disparate impact and implicit bias within the jury selection process.[23] In *Holmes*, we recently stated that, "[a]lthough *Batson* has serious shortcomings with respect to addressing the effects of disparate impact and unconscious bias, we decline to throw up our hands in despair at what appears to be an intractable problem. Instead, we should recognize the challenge presented by unconscious stereotyping in jury selection and rise to meet it." (Internal quotation marks omitted.) *State* v. *Holmes*, supra, 334 Conn. 245; see also *State* v. *Holmes*, 176 Conn. App. 156, 192–93, 169 A.3d 264 (2017) (*Lavine*, *J.*, concurring) (urging reform of *Batson* procedures "because this case brings into sharp relief a serious flaw in the way *Batson*

[23] The defendant also relies on this court's decision in *State* v. *Brown*, 232 Conn. 431, 451, 656 A.2d 997 (1995), which held that the impartial jury provision of article first, § 8, "requires the trial court to ensure that a jury remains impartial and unprejudiced throughout the trial," in tasking our trial judges with "an independent obligation" to investigate by holding an evidentiary hearing when alerted of juror misconduct. That decision was, however, superseded after an en banc rehearing by this court in *State* v. *Brown*, 235 Conn. 502, 525–26, 668 A.2d 1288 (1995), which retreated from the state constitutional analysis and utilized the court's supervisory authority to mandate only a preliminary inquiry into juror misconduct, the scope of which remains within the trial court's discretion. See id., 537–38 (*Berdon*, *J.*, dissenting) (criticizing majority's conclusion that hearing was required under supervisory authority, rather than state constitution, given that "the jury is a bedrock of our democracy" and that "the allegations involved the jury's possible exposure to racist remarks made by the court's own sheriffs").

has been, and can be, applied," which "must be remedied if the jury selection process is to attain the goal of producing juries representing all of the communities in our state and gaining their confidence and trust"), aff'd, 334 Conn. 202, 221 A.3d 407 (2019). We then announced the creation of the Task Force, to be appointed by the Chief Justice; *State* v. *Holmes*, supra, 334 Conn. 250; anticipating that it would "propose meaningful changes to be implemented via court rule or legislation, including, but not limited to (1) proposing any necessary changes to General Statutes § 51-232 (c),[24] which governs the confirmation form and questionnaire provided to prospective jurors, (2) improving the process by which we summon prospective jurors in order to ensure that venires are drawn from a fair cross section of the community that is representative of its diversity, (3) drafting model jury instructions about implicit bias, and (4) promulgating new substantive standards that would eliminate *Batson*'s requirement of purposeful discrimination." (Footnote in original.) Id., 251–52.

Notwithstanding past precedent in this state rejecting disparate impact arguments in the context of jury selec-

[24] "General Statutes § 51-232 (c) provides: 'The Jury Administrator shall send to a prospective juror a juror confirmation form and a confidential juror questionnaire. Such questionnaire shall include questions eliciting the juror's name, age, race and ethnicity, occupation, education and information usually raised in voir dire examination. The questionnaire shall inform the prospective juror that information concerning race and ethnicity is required solely to enforce nondiscrimination in jury selection, that the furnishing of such information is not a prerequisite to being qualified for jury service and that such information need not be furnished if the prospective juror finds it objectionable to do so. Such juror confirmation form and confidential juror questionnaire shall be signed by the prospective juror under penalty of false statement. Copies of the completed questionnaires shall be provided to the judge and counsel for use during voir dire or in preparation therefor. Counsel shall be required to return such copies to the clerk of the court upon completion of the voir dire. Except for disclosure made during voir dire or unless the court orders otherwise, information inserted by jurors shall be held in confidence by the court, the parties, counsel and their authorized agents. Such completed questionnaires shall not constitute a public record.' " *State* v. *Holmes*, supra, 334 Conn. 251–52 n.27.

tion, we conclude that the state precedent factor has recently shifted in light of this court's resolve in *Holmes* to ensure the impartiality of juries by addressing the problems of implicit bias and disparate impact during jury selection. Our recent criticism of the shortcomings of the *Batson* process in *Holmes*, with concrete action taken by the formation of the Task Force, supports the conclusion that Connecticut's case law has squarely identified the ineffectiveness of *Batson* in addressing the effects of implicit bias and disparate impact on the rights of members of minority communities during the jury selection process. This concern remains salient, notwithstanding our conclusion in part I B of this opinion that the prosecutor's reasons for the peremptory challenges at issue in this case were not a pretext for racial discrimination.

5

Sister State Precedent

The defendant does not cite any sister state court decision that has held, as a matter of state constitutional law, that a negative perception of law enforcement or the criminal justice system is a facially discriminatory reason to exclude a venireperson under the second step of *Batson*. Indeed, a review of sister state court decisions reveals the opposite. See *People* v. *Hardy*, 5 Cal. 5th 56, 81, 418 P.3d 309, 233 Cal. Rptr. 3d 378 (2018) ("[a] prospective juror's distrust of the criminal justice system is a [race neutral] basis for his excusal" (internal quotation marks omitted)), cert. denied, U.S. , 139 S. Ct. 917, 202 L. Ed. 2d 648 (2019); *State* v. *Mootz*, 808 N.W.2d 207, 219 (Iowa 2012) ("[Iowa] cases have repeatedly noted that a juror's interactions with law enforcement and the legal system are a valid, [race neutral] reason for a peremptory challenge"); *State* v. *Pendleton*, 725 N.W.2d 717, 727 (Minn. 2007) ("we are not persuaded that the state's reference to the prospec-

tive juror's equivocal feeling toward [the] police, as a result of her negative encounter with the [Willmar, Minnesota] police, is evidence that the state racially discriminated against the prospective juror by exercising a peremptory challenge"); *State* v. *Nave*, 284 Neb. 477, 487–88, 821 N.W.2d 723 (2012) (" 'heightened distrust of law enforcement personnel' " was race neutral reason for peremptory challenge), cert. denied, 568 U.S. 1236, 133 S. Ct. 1595, 185 L. Ed. 2d 591 (2013).

Some states—consistent with our decision in *Holmes*—have elected to address the failings of *Batson* through means other than construing state constitutional provisions to demand other protections. Leading the way is the Washington Supreme Court's decision in *State* v. *Saintcalle*, 178 Wn. 2d 34, 309 P.3d 326, cert. denied, 571 U.S. 1113, 134 S. Ct. 831, 187 L. Ed. 2d 691 (2013), which upheld "the trial court's finding that the prosecutor had not acted with purposeful discrimination in exercising a peremptory challenge, but also [took] the 'opportunity to examine whether [Washington's] *Batson* procedures are robust enough to effectively combat race discrimination in the selection of juries' . . . by convening a work group of relevant stakeholders to study the problem and [to] resolve it via the state's rule-making process, which is superintended by that court." (Citation omitted.) *State* v. *Holmes*, supra, 334 Conn. 246–47. Washington's highest court subsequently adopted a comprehensive rule of practice, Washington General Rule 37, which eliminated *Batson*'s requirement of purposeful discrimination in the use of peremptory challenges. See Wn. Gen. R. 37 (e). Instead, General Rule 37 asks only whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge"; Wn. Gen. R. 37 (e); and lists a number of reasons that are presumptively invalid, including a distrust of law enforcement. See Wn. Gen. R. 37 (h); see also *State* v.

*Holmes*, supra, 334 Conn. 247–49 n.23 (providing full text of General Rule 37). The highest courts of New Jersey and Utah have also recently directed consideration of rule based remedies for disparate impact discrimination in jury selection.[25] See *State* v. *Andujar*, 247 N.J. 275, 317–18, 254 A.3d 606 (2021); *State* v. *Aziakanou*, 498 P.3d 391, 407 n.12 (Utah 2021).

Nevertheless, our independent research has revealed two recent state supreme court decisions that support the defendant's argument. Most recently, in *State* v. *Andujar*, supra, 247 N.J. 275, which was decided after oral argument in this appeal, the New Jersey Supreme Court, while directing a rule based, systemic remedy; see id., 317–18; also relied on the equal protection and jury trial provisions in that state's constitution to conclude that "implicit bias is no less real and no less problematic than intentional bias. The effects of both can be the same: a jury selection process that is tainted by discrimination." Id., 303. The court observed: "From

[25] In this vein, California recently enacted legislation, signed into law on September 30, 2020, similar in substance to Washington's General Rule 37 and the rule proposed by the Task Force, that enumerates presumptively invalid reasons for the exercise of peremptory challenges. See Assembly Bill No. 3070, §§ 2 and 4 (Cal. 2020), codified at Cal. Civ. Pro. Code § 231.7 (Deering Supp. 2021). Similar legislation is pending in Massachusetts, and several other states are studying the issue through task forces or commissions. See Berkeley Law Death Penalty Clinic, "Batson Reform: State by State," available at https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/batson-reform-state-by-state/ (last visited March 15, 2022).

We note that Arizona has gone one step further. The Arizona Supreme Court recently amended that state's civil and criminal rules of practice to eliminate peremptory challenges entirely. See Ariz. R. Civ. Proc. 47 (e); Ariz. R. Crim. Proc. 18.4 and 18.5; see also Berkeley Law Death Penalty Clinic, supra (noting legislation pending in New York to eliminate peremptory challenges); see also *State* v. *Holmes*, supra, 334 Conn. 254 (*Mullins*, *J.*, concurring) (suggesting "substantially restricting the use," or "substantially reduc[ing] the number," of peremptory challenges as "the next best thing" to their elimination while comporting with provision of peremptory challenges in article first, § 19, of Connecticut constitution).

the standpoint of the [New Jersey] [c]onstitution, it makes little sense to condemn one form of racial discrimination yet permit another. What matters is that juries selected to hear and decide cases are chosen free from racial bias—whether deliberate or unintentional." Id. The New Jersey court then concluded that the record demonstrated that the jury selection process in that case had been tainted by implicit bias, given the prosecutor's request of a criminal background check of a minority juror who had been seated the day before over the prosecutor's objection. Id., 312. That background check revealed that the juror had not been entirely truthful in his answers about his personal criminal history, although his criminal record would not have disqualified him from service. See id., 312–14; see also id., 308–309 (invoking supervisory authority to require "any party seeking to run a criminal history check on a prospective juror [to] first get permission from the trial court," emphasizing that "the prosecution or defense should present a reasonable, individualized, [good faith] basis to believe that a record check might reveal pertinent information unlikely to be uncovered through the ordinary voir dire process," with "mere hunches" being insufficient and reasons such as distrust of law enforcement being presumptively invalid, and affording both parties notice and opportunity to be heard).

In *State* v. *Jefferson*, 192 Wn. 2d 225, 249, 429 P.3d 467 (2018), the Washington Supreme Court appeared to exercise its authority to provide greater protections under the state constitution and modified the *Batson* framework, as applied in that state, in order to render the substance of General Rule 37, adopted after that court's decision in *State* v. *Saintcalle*, supra, 178 Wn. 2d 34, applicable in pending appeals.[26] Bearing in mind

[26] We note that the doctrinal basis for the Washington court's decision to change the *Batson* framework in *Jefferson* is not entirely clear. For the authority to do so, the court does not tie its decision to any particular provision of the Washington constitution but, instead, cites its prior decisions in *Seattle* v. *Erickson*, 188 Wn. 2d 721, 733–34, 398 P.3d 1124 (2017), and

"the pervasive force of unconscious bias"; *State* v. *Jefferson*, supra, 251; the court held that "the question at the third step of the *Batson* framework is *not* whether the proponent of the peremptory strike is acting out of purposeful discrimination. Instead, the relevant question is whether 'an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge.' " (Emphasis in original.) Id., 249. Given the objective nature of the new standard, the court also applied de novo review in determining whether race was a factor in the state's exercise of a peremptory challenge. Id., 249–50.

Although there is a persuasive body of recent sister state case law expressing dissatisfaction with the *Batson* framework in combatting implicit bias and disparate impact effects during jury selection, those cases extending state constitutional protections to this area are factually or legally distinguishable—at least at this point. First, the New Jersey and Washington constitutions considered in *Andujar* and *Jefferson*, respectively, do not have a specific guarantee of peremptory challenges like article first, § 19, of the Connecticut constitution. Second, the Washington court's decision in *Jefferson* followed the final adoption of a court rule on this point; it rendered that rule's provisions applicable to pending cases, rather than acting in the first instance. Thus, neither decision provides overwhelming support for an ultimate conclusion that the best remedy

*State* v. *Saintcalle*, supra, 178 Wn. 2d 51. See *State* v. *Jefferson*, supra, 192 Wn. 2d 249. The court's decision in *Erickson* is doctrinally silent with respect to the authority for changing the *Batson* framework, itself citing only to *Saintcalle*. See *Seattle* v. *Erickson*, supra, 733–34. A review of the cited portion of *Saintcalle* reveals that the court discussed, but did need not to choose, given the rules based disposition of that case, several options for altering the *Batson* framework, including both (1) "authority under federal law to pioneer new procedures within existing [f]ourteenth [a]mendment frameworks," and (2) "greater-than-federal *Batson* protections to defendants under the greater protection afforded under [the Washington] state jury trial right . . . ." *State* v. *Saintcalle*, supra, 51.

at this time for the shortcomings of *Batson* lies in state constitutional adjudication.

6

Economic, Sociological, and Public Policy Considerations

"[T]he economic and sociological considerations factor . . . is in essence a public policy analysis . . . ." *Fay* v. *Merrill*, supra, 338 Conn. 50. The public policy arguments set forth by both parties demonstrate the complexity and importance of addressing implicit bias and disparate impact in the jury selection process. As this court previously recognized, there are significant public policy and sociological reasons to support the conclusion that a negative perception or distrust of law enforcement or the criminal justice system is not a race neutral reason to exclude a venireperson, given the disparate impact that such a reason has on racial minorities. See *State* v. *Holmes*, supra, 334 Conn. 236–37. As we stated in *Holmes*, the *Batson* framework has widely been considered "a toothless tiger when it comes to combating racially motivated jury selection . . . ." Id., 236.

The report of the Task Force commissioned in *Holmes* demonstrates the present failings of the *Batson* framework. The report emphasizes the Task Force's conclusion that implicit bias and disparate impact " 'raise extremely serious concerns with respect to the public perception and fairness of the criminal justice system.' " Jury Selection Task Force, Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson (December 31, 2020) p. 19, available at https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf (last visited March 15, 2022), quoting *State* v. *Holmes*, supra, 334 Conn. 234. The Task Force therefore proposed a new rule of practice to address the role of implicit bias and disparate impact insofar as they both contribute to the

exclusion of potential jurors on the basis of race or ethnicity, particularly with respect to the exercise of peremptory challenges.[27] Jury Selection Task Force, supra, p.

[27] The proposed rule provides in relevant part: "(a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based upon race or ethnicity.

"(b) Scope; Appellate Review. The rule applies to all parties in all jury trials. The denial of an objection to a peremptory challenge made under this rule shall be reviewed by an appellate court de novo, except that the trial court's express factual findings shall be reviewed under a clearly erroneous standard. The reviewing court shall not impute to the trial court any findings, including findings of the prospective juror's demeanor, which the trial court did not expressly state on the record. The reviewing court shall consider only reasons actually given and shall not speculate as to, or consider reasons, that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors, who are not members of the same protected group as the challenged juror. Should the reviewing court determine that the objection was erroneously denied, then the error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.

"(c) Objection. A party may object to the use of a peremptory challenge to raise a claim of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the prospective juror.

"(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reason that the peremptory challenge has been exercised.

"(e) Determination. The court shall then evaluate from the perspective of an objective observer, as defined in section (f) herein, the reason given to justify the peremptory challenge in light of the totality of the circumstances. If the court determines that the use of the challenge against the prospective juror, as reasonably viewed by an objective observer, legitimately raises the appearance that the prospective juror's race or ethnicity was a factor in the challenge, then the challenge shall be disallowed and the prospective juror shall be seated. If the court determines that the use of the challenge does not raise such an appearance, then the challenge shall be permitted and the prospective juror shall be excused. The court need not find purposeful discrimination to disallow the peremptory challenge. The court must explain its ruling on the record. A party whose peremptory challenge has been disallowed pursuant to this rule shall not be prohibited from attempting to challenge peremptorily the prospective juror for any other reason, or from conducting further voir dire of the prospective juror.

"(f) Nature of Observer. For the purpose of this rule, an objective observer (1) is aware that purposeful discrimination, and implicit, institutional, and unconscious biases, have historically resulted in the unfair exclusion of potential jurors on the basis of their race, or ethnicity; and (2) is deemed to be aware of and to have given due consideration to the circumstances set forth in section (g) herein.

"(g) Circumstances considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following: (i) the number and types of questions posed to the prospective juror including consideration of whether the party exercising the peremptory

20. The new rule would replace Connecticut's modified, three step *Batson* test with a wholly different methodol-

challenge failed to question the prospective juror about the alleged concern or the questions asked about it; (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the prospective juror, unrelated to his testimony, than were asked of other prospective jurors; (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party; (iv) whether a reason might be disproportionately associated with a race or ethnicity; (v) if the party has used peremptory challenges disproportionately against a given race or ethnicity in the present case, or has been found by a court to have done so in a previous case; (vi) whether issues concerning race or ethnicity play a part in the facts of the case to be tried; (vii) whether the reason given by the party exercising the peremptory challenge was contrary to or unsupported by the record.

"(h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Connecticut or maybe influenced by implicit or explicit bias, the following are presumptively invalid reasons for a peremptory challenge: (1) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; (vii) not being a native English speaker; and (viii) having been a victim of a crime. The presumptive invalidity of any such reason may be overcome as to the use of a peremptory challenge on a prospective juror if the party exercising the challenge demonstrates to the court's satisfaction that the reason, viewed reasonably and objectively, is unrelated to the prospective juror's race or ethnicity and, while not seen by the court as sufficient to warrant excusal for cause, legitimately bears on the prospective juror's ability to be fair and impartial in light of particular facts and circumstances at issue in the case.

"(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection: allegations that the prospective juror was inattentive, failing to make eye contact or exhibited a problematic attitude, body language, or demeanor. If any party intends to offer one of these reasons or a similar reason as a justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A party who intends to exercise a peremptory challenge for reasons relating to those listed above . . . shall, as soon as practicable, notify the court and the other party in order to determine whether such conduct was observed by the court or that party. If the alleged conduct is not corroborated by observations of the court or the objecting party, then a presumption of invalidity shall apply but may be overcome as set forth in subsection (h).

"(j) Review Process. The chief justice shall appoint an individual or individuals to monitor issues relating to this rule." Jury Selection Task Force, supra, pp. 16–18.

ogy, eliminating the necessity of proving purposeful discrimination and considering, instead, whether "the use of the challenge against the prospective juror, as reasonably viewed by an objective observer, legitimately raises the appearance that the prospective juror's race or ethnicity was a factor in the challenge . . . ." Id., p. 16. The Task Force's proposed rule would require trial judges to articulate their reasoning in ruling on peremptory challenges and would deem certain reasons for peremptory challenges presumptively invalid. Id. It also would provide a new standard of appellate review applicable to claims of racial or ethnic discrimination in jury selection. Id.

Principles of judicial restraint counsel against this court making a sweeping constitutional pronouncement when the process of addressing the deficiencies of *Batson* is ongoing through the rule-making process, superintended by the Rules Committee. Cf. *State* v. *Lockhart*, 298 Conn. 537, 561, 4 A.3d 1176 (2010) (declining to impose electronic recording requirement during custodial interrogations that was not mandated by state constitution because legislature is better suited to decide policy). The Rules Committee, which has the ability to conduct hearings and to respond to the positions of the various stakeholders before recommending action by the judges of the Superior Court,[28] "is charged . . . with the responsibility of formulating rules of practice and procedure that directly control the conduct of litigation. It sets the parameters of the adjudicative process that regulates the interactions between individual liti-

[28] "The Rules Committee is a body composed of judges of the Superior Court. Its function is to consider proposed changes in the rules of practice for the Superior Court, and to recommend amendments to the Practice Book, which may be adopted by vote of the Superior Court judges. Once proposed Practice Book amendments have been approved by the Rules Committee, they are published in the Connecticut Law Journal, and are subject to public comment before their adoption by the judges." *Rules Committee of the Superior Court* v. *Freedom of Information Commission*, 192 Conn. 234, 237, 472 A.2d 9 (1984).

gants and the courts." *Rules Committee of the Superior Court* v. *Freedom of Information Commission*, 192 Conn. 234, 246, 472 A.2d 9 (1984). On December 13, 2021, the Rules Committee voted to submit the Task Force's proposed rule for a public hearing prior to consideration by the judges of the Superior Court. See Rules Committee of the Superior Court, Minutes of the Meeting (December 13, 2021) p. 2, available at https://www.jud.ct.gov/Committees/rules/rules_minutes_121321.pdf (last visited March 15, 2022). Thus, although the public policy factor weighs substantially in favor of an alteration to the *Batson* analysis, it does not support the defendant's claim that such a remedy requires us to resort immediately to new constitutional standards. A restrained approach is prudent in these circumstances, particularly given the ongoing rule-making process previously set into motion by the comprehensive report and recommendation of the Task Force.

Having reviewed the relevant case law and materials revealed by our *Geisler* analysis, we are not prepared to conclude, on this record, that a prosecutor's exercise of a peremptory challenge on the basis of a venireperson's negative perceptions or distrust of law enforcement or the criminal justice system constitutes an impermissible, race based reason under the Connecticut constitution pursuant to the second step of the *Batson* inquiry. Without making any final pronouncement on the matter, or issuing a determination applicable to any and all factual scenarios involving the exercise of peremptory challenges on the basis of negative perceptions of this nature, we are disinclined on the present record to hold that greater protection is warranted under the Connecticut constitution than is provided under the existing federal *Batson* scheme.

B

Pretext Analysis Under the Third Prong of *Batson*

We now turn to the third step of the *Batson* inquiry to determine whether the reasons provided by the pros-

ecutor in exercising peremptory challenges were pretexts for purposeful discrimination.[29] See, e.g., *State* v. *Edwards*, supra, 314 Conn. 493. We begin by setting forth the standard of review. "The third *Batson* step . . . requires the court to determine if the prosecutor's proffered race neutral explanation is pretextual. . . . Deference [to the trial court's findings of credibility] is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations. . . . Whether pretext exists is a factual question, and, therefore, we shall not disturb the trial court's finding unless it is clearly erroneous."[30] (Internal quota-

[29] The state argues that "the defendant's claim of pretext is inadequately briefed and deficient because he has failed to demonstrate that [the] trial court's finding of no pretext is clearly erroneous on the basis of the entire . . . record." (Emphasis omitted.) We disagree. The defendant's brief spends several pages analyzing the record and comparing the voir dire of C.J. in particular to that of several other venirepersons in an attempt to establish pretext. But cf. *Getty Properties Corp.* v. *ATKR, LLC*, 315 Conn. 387, 413, 107 A.3d 931 (2015) (claim was inadequately briefed when appellants undertook "no analysis or application of the law to the facts of [the] case"); *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 444 n.40, 35 A.3d 188 (2012) ("Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Citations omitted; internal quotation marks omitted.)).

[30] As we noted previously, after oral argument in this appeal, we ordered supplemental briefing and invited amicus curiae briefs on whether we should adopt the standard of appellate review proposed by the Task Force, which would provide for de novo review of denials of objections to peremptory challenges, with the exception of express factual findings that would remain subject to the clearly erroneous standard of review. See footnotes 8 and 27 of this opinion. Having considered these thoughtful briefs, we are constrained to agree with the state's argument that it would be premature to adopt this standard of appellate review before the judges of the Superior Court take action with respect to the rule of practice proposed by the Task Force, which the Rules Committee has voted to send for a public hearing in advance of action by the judges of the Superior Court. Accordingly, at this time, we decline to adopt the de novo standard of review in the absence of any change to the substantive *Batson* inquiry, and we leave that issue for another day.

tion marks omitted.) *State* v. *Holmes*, supra, 334 Conn. 226.

"In evaluating pretext, the court must assess the persuasiveness of the proffered explanation and whether the party exercising the challenge was, in fact, motivated by race. . . . Thus, although an improbable explanation might pass muster under the second step, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination at the third stage of the inquiry. . . .

"We have identified several specific factors that may indicate that [a party's removal] of a venireperson through a peremptory challenge was . . . motivated [by race]. These include, but are not limited to: (1) [t]he reasons given for the challenge were not related to the trial of the case . . . (2) the [party exercising the peremptory strike] failed to question the challenged juror or only questioned him or her in a perfunctory manner . . . (3) prospective jurors of one race . . . were asked a question to elicit a particular response that was not asked of other jurors . . . (4) persons with the same or similar characteristics but not the same race . . . as the challenged juror were not struck . . . (5) the [party exercising the peremptory strike] advanced an explanation based on a group bias [when] the group trait is not shown to apply to the challenged juror specifically . . . and (6) the [party exercising the peremptory strike] used a disproportionate number of peremptory challenges to exclude members of one race . . . .

"In deciding the ultimate issue of discriminatory intent, the [court] is entitled to assess each explanation in light of all the other evidence relevant to [a party's] intent. The [court] may think a dubious explanation undermines the bona fides of other explanations or may think that the sound explanations dispel the doubt

raised by a questionable one. As with most inquiries into state of mind, the ultimate determination depends on an aggregate assessment of all the circumstances. . . . Ultimately, the party asserting the *Batson* claim carries the . . . burden of persuading the trial court, by a preponderance of the evidence, that the jury selection process in his or her particular case was tainted by purposeful discrimination." (Internal quotation marks omitted.) Id., 224–25.

The defendant first argues that the prosecutor's questioning of both N.L. and C.J. was uniquely targeted in his focus on their respective criminal histories. Specifically, concerning C.J., defense counsel argued during voir dire, echoed in the defendant's brief on appeal, that the prosecutor's questions to C.J. about his convictions and the answers in his juror questionnaire were more extensive than those posed to other jurors. In response, the state argues that the prosecutor's extended questioning of C.J. regarding his criminal history was a product of his incomplete juror questionnaire and the "piecemeal disclosure" of his criminal history. Similarly, the trial court noted that the questioning of C.J. was consistent with the questioning of other jurors.

We conclude that the trial court did not commit clear error in determining that the race neutral reasons proffered by the prosecutor were not a pretext for impermissible discrimination. The record demonstrates that the prosecutor asked each potential juror if they, or someone who was close to them, had ever been arrested or charged with a crime. The state further points out that each affirmative response was followed by questions regarding the details of that arrest or charge and whether it would influence that venireperson in his or her service as a juror. Although the questioning regarding C.J.'s criminal history was more extensive, the record indicates that the more extensive questioning reflected the

incomplete answers that C.J. had provided both during voir dire and in his juror questionnaire.

The defendant further points out that, of the four venirepersons who admitted to having previously been arrested, the state exercised three peremptory challenges, and the court dismissed the fourth for cause. The record does not indicate the races of those venirepersons, other than C.J. and N.L.,[31] and, therefore, it does not support an inference or a pattern of the prosecutor's exclusion of potential jurors of a particular race. Indeed, no *Batson* claim was raised with respect to either of the other jurors with criminal histories excused by the prosecutor's peremptory challenges. Accordingly, we conclude that the trial court did not commit clear error in determining that the defendant failed to meet his burden of proving, by a preponderance of the evidence, that the jury selection process in his case was tainted by purposeful discrimination.

## II

## DOUBLE JEOPARDY CLAIMS

The defendant next claims that his right to be free from double jeopardy was violated as a result of his conviction of two counts of risk of injury to a child in violation of § 53-21 (a) (2), in addition to his conviction of sexual assault in the first degree in violation of § 53a-70 (a) (2), attempt to commit sexual assault in the first degree in violation of §§ 53a-70 (a) (2) and 53a-49 (a) (2), and sexual assault in the fourth degree in violation of § 53a-73 (a) (1) (A).[32] See footnotes 2, 5, 6 and 7 of this opinion (relevant text of statutory provisions). Relying on the Appellate Court's decision in *State* v.

[31] See footnote 9 of this opinion.

[32] Because this double jeopardy claim was not raised at trial, we review it—at the unopposed request of the defendant—pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). See footnote 20 of this opinion.

*Tinsley*, 197 Conn. App. 302, 232 A.3d 86 (2020), rev'd, 340 Conn. 425, 264 A.3d 560 (2021), the defendant asserts that, as charged in the information, it is not possible to commit the offenses of sexual assault in the first and fourth degrees without having already committed risk of injury to a child and, therefore, that risk of injury to a child is a lesser included offense of both sexual assault charges, as described in the information. In response, the state relies heavily on this court's decision in *State* v. *Alvaro F.*, 291 Conn. 1, 10, 966 A.2d 712, cert. denied, 558 U.S. 882, 130 S. Ct. 200, 175 L. Ed. 2d 140 (2009), and argues that, even if it is assumed that the offenses arose out of the same act or transaction, they are not the "same offense" under the well established standard set forth in *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Guided by our recent decision in *State* v. *Tinsley*, 340 Conn. 425, 264 A.3d 560 (2021), which reversed the Appellate Court's decision on which the defendant relies; id., 428; we conclude that the defendant's right against double jeopardy was not violated because the offenses of sexual assault in the first and fourth degrees contain distinct elements from that of risk of injury to a child, rendering them not greater and lesser included offenses.

We first address the appropriate standard of review. "A defendant's double jeopardy claim presents a question of law, over which our review is plenary. . . . The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. The double jeopardy clause [applies] to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial." (Internal quotation marks omit-

ted.) *State* v. *Porter*, 328 Conn. 648, 654–55, 182 A.3d 625 (2018).

"Double jeopardy analysis in the context of a single trial is a [two step] process, and, to succeed, the defendant must satisfy both steps. . . . First, the charges must arise out of the same act or transaction [step one]. Second, it must be determined whether the charged crimes are the same offense [step two]. Multiple punishments are forbidden only if both conditions are met. . . . At step two, we [t]raditionally . . . have applied the *Blockburger* test to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: [When] the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 655; see *State* v. *Miranda*, 260 Conn. 93, 125, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002); *State* v. *Goldson*, 178 Conn. 422, 424, 423 A.2d 114 (1979).

For purposes of the present analysis, we assume, without deciding, that step one of the *Blockburger* analysis is met, that is, that the state alleged in its information that the offenses in question arose from the same act or transaction. We therefore turn to the defendant's argument under step two, that is, that risk of injury to a child is a lesser included offense of sexual assault in the first and fourth degrees.

"Our case law has been consistent and unequivocal" that the second step of *Blockburger* "is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial." (Internal quotation marks omitted.)

*State* v. *Porter*, supra, 328 Conn. 656; see, e.g., *State* v. *Bernacki*, 307 Conn. 1, 9, 52 A.3d 605 (2012), cert. denied, 569 U.S. 918, 133 S. Ct. 1804, 185 L. Ed. 2d 811 (2013). When conducting this analysis, "we are concerned with theoretical possibilities, and do not focus on the evidence presented." (Internal quotation marks omitted.) *State* v. *Mezrioui*, 26 Conn. App. 395, 403–404, 602 A.2d 29, cert. denied, 224 Conn. 909, 617 A.2d 169 (1992).

The defendant argues that, notwithstanding the distinct elements of each offense charged, risk of injury to a child is a lesser included offense of sexual assault in the first and fourth degrees because of how each charge was alleged in the information. We recently rejected this argument in *State* v. *Tinsley*, supra, 340 Conn. 434. In *Tinsley*, we clarified that "the 'manner described in the information' is relevant in determining whether one crime is a lesser included offense of another only to the extent the reviewing court is consulting the information in order to determine whether it alleges distinct elements for each offense, rather than to determine the particular factual predicate of the case." Id., 442. Therefore, we now consider the elements of each charge and consider whether each contains an element that the other does not.

In the present case, the defendant was convicted of first degree sexual assault in violation of § 53a-70 (a) (2), which requires the state to prove that (1) the defendant "engage[d] in sexual intercourse with another person," (2) "such other person is under thirteen years of age," and (3) "the [defendant] is more than two years older than such person . . . ." The defendant was also convicted of fourth degree sexual assault in violation of § 53a-73a (a) (1) (A). The state had to prove that "(1) the defendant intentionally subjected, (2) a person under the age of fifteen years, (3) to sexual contact. The term [s]exual contact for the purposes of § 53a-

73a is further defined as any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person or any contact of the intimate parts of the actor with a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Alvaro F.*, supra, 291 Conn. 10. Finally, the defendant was charged with risk of injury to a child in violation of § 53-21 (a) (2). "To convict the defendant of risk of injury to a child under § 53-21 [a] (2), the state must prove that (1) the defendant had contact with the intimate parts of, or subjected to contact with his intimate parts, (2) a child under the age of sixteen years, (3) in a sexually and indecent manner likely to impair the health or morals of such child." (Internal quotation marks omitted.) Id.; accord *State* v. *Bletsch*, 281 Conn. 5, 28, 912 A.2d 992 (2007).

"Our courts have addressed the relationship between risk of injury to a child and the various degrees of sexual assault in the context of double jeopardy claims on several occasions, each time concluding that the two crimes do not constitute the same offense"; *State* v. *Alvaro F.*, supra, 291 Conn. 7; and we decline to come to a different conclusion in the present case.[33] See id., 9 (convictions of risk of injury to child and fourth degree sexual assault did not violate prohibition against double jeopardy); *State* v. *Bletsch*, supra, 281 Conn. 28–29 (sexual assault in second degree and risk of injury to child are not same offense because language of two statutes makes it possible to have "sexual intercourse" under General Statutes § 53a-71 (a) without touching victim's

[33] As this court noted in *Alvaro F.*, although the prior cases addressing this question involved the pre-1995 amendments to § 53-21, their reasoning remains relevant and persuasive. See *State* v. *Alvaro F.*, supra, 291 Conn. 8–9; see also footnote 2 of this opinion.

"intimate parts" under General Statutes (Rev. to 1999) § 53-21 (2), and vice versa); *State* v. *Ellison*, 79 Conn. App. 591, 602, 830 A.2d 812 (sexual assault in second degree and risk of injury to child are not same offense because sexual assault in second degree does not require contact to be " 'in a sexual and indecent manner likely to impair the health or morals of such child' "), cert. denied, 267 Conn. 901, 838 A.2d 211 (2003); *State* v. *Morris*, 49 Conn. App. 409, 419, 716 A.2d 897 ("the element of 'sexual contact,' included within the offense of sexual assault in the fourth degree, is not necessarily equivalent to the touching of the private parts of a child in a ' "sexual and indecent manner" ' . . . prohibited by the risk of injury to a child statute" (citation omitted)), cert. denied, 247 Conn. 904, 720 A.2d 516 (1998); see also *State* v. *James*, 211 Conn. 555, 586, 560 A.2d 426 (1989) ("[S]pecific intent is not an element of the crime defined in the second part of § 53-21 . . . . Only an intention to make the bodily movement [that] constitutes the act [that] the crime requires, which we have referred to as a general intent, is necessary." (Citations omitted; internal quotation marks omitted.)); *State* v. *Perruccio*, 192 Conn. 154, 162, 471 A.2d 632 ("sexual assault in the fourth degree and risk of injury [to a child] each require proof of an element not required by the other"), appeal dismissed, 469 U.S. 801, 105 S. Ct. 55, 83 L. Ed. 2d 6 (1984); *State* v. *Shaw*, 186 Conn. 45, 51, 438 A.2d 872 (1982) (sexual assault in fourth degree requires additional specific intent element that risk of injury to child does not).

Sexual assault in the first degree in violation of § 53a-70 (a) (2) requires proof that the defendant engaged in sexual intercourse with the victim and was more than two years older than the victim. Sexual assault in the fourth degree in violation of § 53a-73a (a) (1) (A) requires proof that the defendant intentionally subjected someone under the age of fifteen to sexual contact. Risk of injury to a child in violation of § 53-21 (a)

(2) contains neither of those elements. In contrast, that statute requires proof only that the child was under the age of sixteen and that the defendant had contact with the child in a manner likely to impair the child's health or morals. From the statutory language, it is evident that each charge contains an element of proof that the other does not. Therefore, neither of the offenses constitutes a greater or lesser included offense of the other.

"Our analysis of [the defendant's] double jeopardy [claim] does not end, however, with a comparison of the offenses. The *Blockburger* test is a rule of statutory construction, and because it serves as a means of discerning [legislative] purpose the rule should not be controlling [when], for example, there is a clear indication of contrary legislative intent. . . . Thus, the *Blockburger* test creates only a rebuttable presumption of legislative intent, [and] the test is not controlling when a contrary intent is manifest. . . . When the conclusion reached under *Blockburger* is that the two crimes do not constitute the same offense, the burden remains on the defendant to demonstrate a clear legislative intent to the contrary." (Internal quotation marks omitted.) *State* v. *Schovanec*, 326 Conn. 310, 326, 163 A.3d 581 (2017); see *State* v. *Tinsley*, supra, 340 Conn. 445–46. The defendant in the present case, however, does not argue that the legislature intended to treat §§ 53a-70 (a) (2) and 53a-73a (a) (1) (A), on the one hand, and § 53-21 (a) (2), on the other, as the same offense for double jeopardy purposes. Accordingly, we conclude that, because §§ 53a-70 (a) (2) and 53a-73a (a) (1) (A), and § 53-21 (a) (2) are not the same offense for double jeopardy purposes, the defendant's conviction of two counts of risk of injury does not violate his right to be free from double jeopardy.

The judgment is affirmed.

In this opinion the other justices concurred.