STATE OF CONNECTICUT *v.* ANDREW SAMUOLIS
(SC 20299)

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

Syllabus

Pursuant to the emergency exception to the warrant requirement of the fourth amendment to the United States constitution, the police are permitted to enter a home without a warrant when they have an objec-

tively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.

Convicted of the crimes of murder, assault in the first degree, and attempt to commit assault in the first degree, the defendant appealed to this court, claiming that the trial court improperly had denied his motion to suppress certain evidence seized by the police as a result of their warrantless entry into his home. Prior to the challenged entry, the defendant's neighbor contacted the police because he and other neighbors were concerned that they had not seen the defendant's father, S, who lived with the defendant, in a long time. Thereafter, two police officers were dispatched to the defendant's residence to check on S's well-being. The officers assessed the exterior of the residence, knocked on the doors, and called into open windows but received no response and concluded that no one was home. Immediately after the well-being check, one of the officers was told by his supervising officer that the defendant had, or possibly had, mental health issues. Four days later, the defendant's neighbor again contacted the police and requested another well-being check. The officers conducting the second well-being check were warned that the defendant was possibly a mentally disturbed person. Upon their arrival, the officers spoke with the neighbor, who told them that, after the previous visit by the police, the defendant covered the lower rear windows with chicken wire. The neighbor also indicated that he noticed a mass of flies around the upper rear window of the residence. One of the officers believed, based on his prior experience, that the sheer number of flies indicated that there might be a dead body inside the house. Using a ladder, one of the officers climbed to the upper rear window, which had been propped open slightly with an air freshener. There were flies everywhere but no odor. The officer looked into the window but was unable to see anything noteworthy. Both officers then contacted their supervisor because they believed that entry into the residence might be necessary for the well-being of both S and the defendant. After arriving at the residence and being apprised of the situation, the supervisor concluded that there was a dead body in the home and that they would need to enter the residence to see if anyone inside needed assistance. One of the officers thereafter cut a screen and entered the residence through an open second floor window. After announcing his presence and not receiving a response, the officer went downstairs and opened the front door. The defendant then shot the officer and fled the residence. Soon thereafter, the defendant was apprehended, and the officers entered the home to secure it and to search for any injured persons. Police officers eventually found a badly decomposed body on the second floor. Thereafter, the police obtained a search warrant, and the defendant voluntarily gave a statement to the police in which he admitted that he had shot S several months earlier and that, when S's body started to smell, he sealed the room in which it was located. In denying the defendant's motion to suppress the seizure

of S's dead body, the trial court concluded, inter alia, that the officers' entry into the home was justified under the emergency exception to the warrant requirement because that entry was objectively reasonable under the totality of the circumstances. On appeal, the defendant claimed, inter alia, that the facts did not provide an objectively reasonable basis for the police officers to conclude that there was an emergency justifying a warrantless entry into his residence. *Held* that, under the totality of the circumstances, it was objectively reasonable for the officers to conclude that there was an emergency justifying their initial entry into the defendant's home, and, accordingly, the trial court properly denied the defendant's motion to suppress: the defendant could not prevail on his claim that it was unclear, in light of the United States Supreme Court's decision in *Caniglia* v. *Strom* (141 S. Ct. 1596), whether a warrantless entry into a home is still permitted to assist a person who is injured or facing imminent injury, as this court found no such ambiguity in that decision and observed that other courts have continued to apply the emergency exception post-*Caniglia*; moreover, although the state did not meet its burden of establishing that it was objectively reasonable for the officers to believe that the defendant required emergency assistance, it did meet its burden of establishing that it was objectively reasonable for the officers to believe that S required immediate emergency assistance, as the record indicated that S was an elderly man who had not been seen by any of his neighbors for at least one month, the family's only vehicle had not been moved since S was last seen, S did not respond to the officers' knocks on the door or shouts into the open windows, and there was an extraordinary infestation of flies around the upper rear window of the residence, which led the officers to believe, on the basis of their past experience, that the most likely explanation for the infestation was the presence of a dead body, and which also left open the possibility that an occupant might be injured rather than dead; furthermore, the defendant's mental condition was a relevant factor in the officers' calculation of whether S needed emergency assistance and what actions were necessary to provide that assistance, as the defendant's conduct in attempting to fortify the home against intruders and in refusing to answer the door would have indicated to the officers that they were not going to be able to obtain timely information from the defendant about the whereabouts or condition of S, and the defendant's failure to remediate the fly infestation in plain view reasonably suggested that his mental condition may have impaired his capacity to appreciate the gravity of the conditions that existed and the need to elicit prompt medical assistance; in addition, there was no merit to the defendant's contentions that the officers' actions in driving to the residence without activating their emergency lights or sirens and waiting for their supervisor's approval before entering the residence indicated that they did not perceive the situation as an emergency, and

that the officers failed to consider alternative explanations for the facts presented that would indicate that no emergency existed.

Argued March 24—officially released August 9, 2022

Procedural History

Three substitute informations charging the defendant, in the first case, with two counts of the crime of attempt to commit assault in the first degree and, in the second case, with two counts of the crime of attempt to commit assault in the first degree and one count of the crime of assault in the first degree, and, in the third case, with the crime of murder, brought to the Superior Court in the judicial district of Windham, where the cases were consolidated; thereafter, the court, *J. Fischer*, *J.*, denied the defendant's motion to suppress certain evidence; subsequently, the charge of murder was tried to a three judge panel, *A. Hadden*, *J. Fischer* and *Solomon*, *Js.*, and the remaining charges were tried to the court, *J. Fischer*, *J.*; judgments of guilty of murder and one count each of attempt to commit assault in the first degree and assault in the first degree, from which the defendant appealed to this court. *Affirmed*.

Jeffrey C. Kestenband, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom were *Andrew J. Slitt*, senior assistant state's attorney, and, on the brief, *Anne F. Mahoney*, state's attorney, for the appellee (state).

Opinion

KELLER, J. Following a trial to the court, the defendant, Andrew Samuolis, was convicted of murder in violation of General Statutes § 53a-54a, assault in the first degree by means of the discharge of a firearm in violation of General Statutes § 53a-59 (a) (5), and attempt to commit assault in the first degree by means of the discharge of a firearm in violation of General Statutes §§ 53a-49 and 53a-59 (a) (5). In his direct appeal to

this court; see General Statutes § 51-199 (b) (3); the defendant challenges only his murder conviction. The sole issue is whether the trial court properly denied the defendant's motion to suppress evidence seized from his home, specifically, the dead body of the defendant's father, John Samuolis, on the grounds that (1) the police officers' warrantless entry into the Samuolis home was justified under the emergency exception to the warrant requirement of the fourth amendment to the United States constitution, or, alternatively, (2) the defendant's alleged actions in shooting at the officers upon their initial entry attenuated the taint from that unlawful initial entry and justified their subsequent reentries into the home. We affirm the trial court's judgment on the basis of the first ground.

The trial court made the following findings of fact. "On [Friday] June 21, 2013, Willimantic Police Officer[s] [Amy] Hartman [and Elvin Salas were] dispatched to 31 Tunxis Lane [in Willimantic] to check on the well-being of John Samuolis [Samuolis], the owner of the property. Earlier in the day, [Salas] had been on routine patrol on the street and hailed by Mark Curtis, who lived next door to Samuolis. Curtis related that he and the neighbors across the street, [Andy and Shirley Lebiszczak], were concerned that they had not seen [Samuolis], who was referred to as the 'old man,' in a long time. . . .

"At about 7:30 that evening, [while it was still light out] . . . Salas and Hartman arrived . . . at [31] Tunxis Lane, which is a split-level style home [on a cul-de-sac] in a residential neighborhood described as 'quiet.' . . . A car . . . was parked in the driveway. Some of the [second floor] windows of the house were open and part[s] of the lawn had been mowed recently. There was no visible accumulation of trash or mail. The officers walked around the house and knocked on the doors, which were locked. They noticed a cat in the

window. Salas called into the open windows announcing their presence, but they received no response. They concluded that no one was home.

"The officers then spoke with Curtis and the Lebiszczaks and learned that the house was occupied by [Samuolis] and his adult son, [the defendant], and that the [defendant's] mother . . . was deceased. The neighbors also noted that [the defendant] was 'a little weird' and 'not all there' and that he might be in the house. . . . The officers intended to return later that evening to recheck the house but . . . other duties . . . prevented them from returning.

"On [the morning of Monday] June 25, 2013 . . . Curtis called the Willimantic Police [Department] and asked them to recheck the Samuolis house because [of changes since the prior visit, namely] there was now chicken wire covering the lower rear windows of the house and there were a huge number of flies massing at an upper rear window. [Officer Kevin] Winkler was dispatched to the scene, and . . . Salas responded as back up when he recognized the address being broadcast. . . . [N]either officer used [his] lights or sirens on [his] way to 31 Tunxis Lane. . . . Since Salas' earlier visit, the weather had been extremely hot and dry.

"Both officers exited their vehicles and walked around the house. They found the doors were all locked and all the curtains were [now] drawn. The front upper windows of the house were open. Salas saw [that] the car was still parked in the same place and ran the [license] plate. The registration came back to 31 Tunxis Lane. Salas did not check to see if any other vehicles were registered to the house.

"The officers also had a short discussion with Curtis, who told them that [the defendant] had put the chicken wire up after the police had left the home [following]

the previous well-being check.[1] Curtis also pointed out the mass of flies at the upper rear window. Salas told Winkler that neither the wire nor the flies had been there earlier. Salas, based on his experience, thought that the sheer number of flies indicated that there might be a dead body in the house.

"Curtis offered the use of a ladder, and Winkler put it in place and climbed up to look into the upper rear window. The window was propped open slightly by an air freshener. There were flies everywhere, but no odor. Winkler looked in but was unable to see anything. The officers did not have a phone number for the house; nor did they ask Curtis [if he had] any contact information. The officers were now concerned for the well-being of the 'old man,' [Samuolis], and his son, [the defendant], due to his possible 'state of mind.'

"Salas and Winkler thought that an entry into the house might be necessary, so they called their supervisor, Sergeant [Roberto] Rosado, and related what they had found. Rosado came to the scene without using his lights and siren, [arriving a few minutes later] . . . . After being apprised of the current situation and what had transpired on June 21, Rosado concluded that there was a dead body in the house and that they would have to make an entry into the house in order to search for it and anyone else who might need help. . . . [T]hese officers . . . did not believe that criminal activity had occurred. . . . Winkler move[d] [the ladder around the house] to the front upper windows to gain entry [into a better lit room].[2] The officers testified that they would

[1] Curtis unambiguously testified that he never saw anyone actually installing the chicken wire on the window. Winkler testified, however, that he received information from dispatch that "the neighbor had observed [the defendant] leaving the residence after law enforcement . . . left on Friday and then affixing chicken wire to the back windows . . . ."

[2] The officers also chose to enter through that upper floor window because doing so would cause the least amount of damage, only requiring them to cut the screen.

have handled the issues differently if they were not in community caretaking mode.[3] . . .

"Winkler then ascended the ladder [and] cut the window screen . . . . He told Rosado and Salas that he would go down and open the front door and let them in. . . . [After he entered the second floor of the residence] Winkler heard a noise from the basement. Winkler stopped and announced his presence as a police officer and waited, but he heard nothing in response. Winkler then went down the stairs to the front door, which was barred by a heavy metal bar. He removed the bar and tossed it . . . toward the basement . . . . Winkler then opened the front door . . . while keeping an eye on the basement . . . .

"At that point, Winkler saw a rifle barrel stick out around the wall at the bottom of the basement stairs carried by a male who was dressed 'for battle' in camouflaged clothing and a ballistic style vest. The male aimed and fired the weapon at Winkler, hitting him in the elbow. This male was later identified as the defendant . . . ."[4] (Footnotes added.)

The officers then fled from the home. Salas saw the defendant run through the backyard of the house carrying the rifle and disappear into the woods. Rosado radioed police dispatch and reported what had occurred, and, thereafter, other officers arrived at the scene to assist. Detective Lucien Frechette received a text message that a Willimantic police officer had been shot and drove to the police station, where "he gathered information about the residence and the family, including a phone number. Frechette donned protective gear and went to the command center, which had been set

[3] The officers testified that they would have done things differently if they had been responding to an active crime.

[4] Testimony indicates that, at the time of the incident, at least two of the three officers believed that the defendant was the shooter.

up a short distance from 31 Tunxis Lane. Frechette asked for and received permission to call the phone number he had, and then he called it from the command center. No one answered the call, and he left a message on a recording device."

At about 12:53 p.m., the state police reported that they had captured the defendant and that he was in their custody. "As soon as Frechette and the other officers learned that the defendant was in custody, he and other [special operations officers] entered the house to secure it and [to] search for any injured parties. This was at about 1:02 p.m. Frechette observed that the door to the rear second floor bedroom was sealed with tape and plastic and a rope. Suspecting [that] it might be booby-trapped, Frechette ordered everyone out of the house . . . .

"Once outside, Frechette went up a ladder to the rear second floor window and raised the window enough to lean inside. The flies were still thick. Frechette saw a badly decomposed body on the floor directly below the window [wrapped in plastic]. He also visually inspected the room for booby traps, but found nothing. No physical evidence was seized during this protective sweep. The Connecticut State Police then procured a search warrant, which was executed later, and physical evidence [including what was later confirmed to be the dead body of Samuolis] was seized."

While these events were unfolding, the defendant waived his rights and voluntarily gave a statement to Connecticut State Police Detective Adam Pillsbury. Prior to taking the defendant's statement, "Pillsbury did not know that [Samuolis] was dead or that his body was still in the house. The defendant told Pillsbury that the police had come to the house to check on his father. The defendant stated that he had shot his father several months before. He further stated that the body was still in the house, and it had started to smell so he sealed

the room. Pillsbury then called his superiors to tell them that there was a body in the house."

The defendant was charged with murder, assault in the first degree, and several counts of attempt to commit assault in the first degree. The defendant filed a motion to suppress the evidence seized from the warrantless entry into his home. The state objected to the motion on the ground that entry was justified under the emergency doctrine and other theories. During the hearing on the motion, testimony was adduced from a number of police officers and Curtis. The trial court expressly found that all of the witnesses were credible and none of their testimony was in substantial conflict.

Because two matters that were the subject of this testimony have particular significance to this case—the information provided to the officers about the defendant prior to entering the home and the nature of the conditions that the officers encountered—we elaborate on the testimony that supported the trial court's findings as to those two matters.[5] With regard to information about the defendant, the officers initially entering the home were specifically made aware that the defendant had, or possibly had, mental deficiencies. Right after the initial well-being check, Salas was told by his supervising officer, who was familiar with the Samuolis family, that the defendant had "[m]ental health issues." The dispatch to the officers for the second well-being check also was coded to indicate that the defendant was a possible "file 18," a code that meant "a possible mentally disturbed or mentally malfunctioning person."

[5] The trial court made generalized findings as to both of these matters, although the finding regarding the defendant's " 'mental issues' " was embedded in the trial court's legal conclusions. The defense did not attempt to discredit the testimony of any of the state's witnesses but, rather, focused on information that had not been ascertained or alternative explanations that had not been considered by the officers prior to entry into the home.

With regard to the changed conditions that the officers encountered since the first visit, witnesses described the upper rear window of the house as follows: "totally caked with flies," you "[c]ouldn't even see glass" because it was "[l]oaded" with flies, and flies were "pretty much infesting the entire . . . window," appearing to be "both inside and out," "seem[ing] like they were coming through the window and siding . . . ." The window directly below that window was now covered with chicken wire and a small hole had been cut in the blinds, which appeared to have been "staged . . . to be able to look outside . . . almost like a spy hole."

The trial court concluded, on the basis of the preceding facts, that the police entry into the home under the emergency doctrine was "objectively reasonable under the totality of the circumstances." The court pointed to the following circumstances: the police went to the home on both occasions to make a welfare check, not to investigate a crime; the presence of flies indicated to the officers the presence of a dead body; the "bizarre" and "inexplicable" act of covering the windows with chicken wire; the " 'old man' " remained missing; and there was a concern for the defendant's state of mind. The court found that the officers did not know for certain that there was a dead body in the home, or if there was, whose body it was, which left them reasonably concerned for the safety of "either an 'old man' or his son who had 'mental issues.' " The court concluded that, given the unsuccessful efforts of the police to make contact at the home and the circumstances presented, it was unnecessary for the police to obtain a telephone number to call the home or residents prior to their entry. Alternatively, the court determined that, even if the initial entry was unlawful, the defendant's alleged shooting of Winkler sufficiently attenuated that unlawful act from the subsequent lawful search and

seizure of evidence. Accordingly, the trial court denied the defendant's motion to suppress.

At his trial to the court, the defendant raised the affirmative defense of lack of capacity to appreciate the wrongfulness of his conduct or to control his conduct due to mental disease or defect, specifically, autism spectrum disorder. The court found the defendant guilty of murder, assault in the first degree, and attempt to commit assault in the first degree. The court imposed a total effective sentence of forty-five years of imprisonment, followed by eight years of special parole. The defendant's direct appeal to this court, challenging only his murder conviction, followed.

The defendant claims that, even if a warrantless entry into a home is permitted to assist someone who is injured or facing imminent injury, there was no emergency justifying entry into his home. He argues that the objective facts did not provide a reasonable basis to believe that someone in the home was dead or in need of immediate aid, and that recovery of a dead body is not an emergency in any event. The defendant further contends that his alleged criminal conduct did not justify the subsequent entries into the home, which resulted in the illegal seizure.

The state claims that all of the entries were part of the same justifiable emergency. It further contends that, if we conclude that an emergency did not exist when the police initially entered the home, we should conclude that it existed as a consequence of the defendant's shooting at the officers after they entered. Alternatively, the state contends that the evidence seized is admissible under the independent source doctrine because the home would have been searched pursuant to the search warrant issued in connection with the assault, or under the inevitable discovery doctrine, because the defendant independently confessed to the killing.

Our analysis begins with the observation that the defendant does not challenge any of the trial court's factual findings. His challenge instead is to the reasonableness of the conclusion drawn from those facts, namely, that they provided an objectively reasonable basis for the officers to conclude that there was an emergency justifying a warrantless entry into his home. See generally *State* v. *Pompei*, 338 Conn. 749, 756, 259 A.3d 644 (2021) ("[w]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights . . . and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence" (internal quotation marks omitted)). Our review of his claim therefore is plenary. See id.; cf. *United States* v. *Porter*, 594 F.3d 1251, 1256 (10th Cir. 2010) (existence of exigent circumstances is mixed question of law and fact, under which "[t]he ultimate question regarding the reasonableness of the search is a question of law which we review de novo" (internal quotation marks omitted)); *State* v. *Davis*, 331 Conn. 239, 246–47, 203 A.3d 1233 (2019) (de novo review was undertaken when factual findings were not challenged and claim was that those findings did not support conclusion that police had reasonable and articulable suspicion that defendant was engaged in criminal activity).

Settled principles of fourth amendment jurisprudence guide this inquiry. "It is a basic principle of [f]ourth [a]mendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. . . . Entry by the government into a person's home . . . is the chief evil against which the . . . [f]ourth [a]mendment is directed." (Citation omitted; internal quotation marks omitted.) *State* v. *Fausel*, 295

Conn. 785, 793, 993 A.2d 455 (2010). "The warrant requirement protects an individual in his home from official intrusion whether the purpose of the search is to further a criminal investigation or the government's enforcement of an administrative regulation. *Camara* [v. *Municipal Court*, 387 U.S. 523, 530, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967)] ('[i]t is surely anomalous to say that the individual and his private property are fully protected by the [f]ourth [a]mendment only when the individual is suspected of criminal behavior . . .')." *State* v. *Vargas*, 213 N.J. 301, 313, 63 A.3d 175 (2013). Thus, "merely because police activities are 'divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute,' *Cady* [v. *Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973)], does not mean that persons have a lesser expectation of privacy in their homes, see *Camara* [v. *Municipal Court*, supra, 534] (concluding administrative searches constituted 'significant intrusions upon the interests protected by the [f]ourth [a]mendment')." *State* v. *Vargas*, supra, 325–26.

"As a result, [w]arrants are generally required to search a person's home . . . unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the [f]ourth [a]mendment. . . . *Brigham City* v. *Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006). Searches conducted pursuant to emergency circumstances are one of the recognized exceptions to the warrant requirement under both the federal and state constitutions. *State* v. *Blades*, 225 Conn. 609, 617–18, 626 A.2d 273 (1993).

"The emergency exception to the warrant requirement allows police to enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury. *Brigham City* v.

Stuart, supra, 547 U.S. 400. . . . [T]he state actors making the search must have reason to believe that life or limb is in immediate jeopardy and that the intrusion is reasonably necessary to alleviate the threat.[6] . . . The test is not [however] whether the officers actually believed that an emergency existed, but whether a reasonable officer would have believed that such an emergency existed." (Citations omitted; footnote added; internal quotation marks omitted.) *State* v. *Fausel*, supra, 295 Conn. 794–95; see also *Michigan* v. *Fisher*, 558 U.S. 45, 47, 130 S. Ct. 546, 175 L. Ed. 2d 410 (2009) (addressing "emergency aid" exception).

"The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. . . . *Mincey* v. *Arizona*, 437 U.S. 385, 392, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978)." (Internal quotation marks omitted.) *State* v. *Fausel*, supra, 295 Conn. 794; see also *United States* v. *Barone*, 330 F.2d 543, 545 (2d Cir.) ("[t]he right of the police to enter and investigate in an emergency without the accompanying intent to either search or arrest is inherent in the very nature of their duties as peace officers, and derives from the common law"), cert. denied, 377 U.S. 1004, 84 S. Ct. 1940, 12 L. Ed. 2d 1053 (1964). "The state bears the burden of demonstrating that a warrantless entry falls within the emergency exception." (Internal quotation marks omitted.) *State* v. *Fausel*, supra, 795.

In the present case, the trial court concluded that the police were confronted with an emergency but also

[6] Another requirement of the emergency exception is that "the search's scope and manner were reasonable to meet the need." (Internal quotation marks omitted.) *United States* v. *Ward*, 716 Fed. Appx. 682, 683 (9th Cir. 2018). See generally 3 W. LaFave, Search and Seizure (6th Ed. 2020) § 6.6 (a), p. 649 ("[a] warrantless search must be strictly circumscribed by the exigencies that justify its initiation" (internal quotation marks omitted)). The scope of the search is not challenged in the present case.

emphasized the fact that the case had commenced as a well-being check and not as a criminal investigation. Although courts have recognized that the emergency aid doctrine has its roots in the police's caretaking function, as opposed to its law enforcement function,[7] this doctrine must be distinguished from what had been called the "community caretaking" exception to the warrant requirement. Many courts, including our own, have interpreted the United States Supreme Court's decision in *Cady* v. *Dombrowski*, supra, 413 U.S. 433, as recognizing a community caretaking warrant exception. See, e.g., *Sutterfield* v. *Milwaukee*, 751 F.3d 542, 553–54, 556–57 (7th Cir.), cert. denied, 574 U.S. 993, 135 S. Ct. 478, 190 L. Ed. 2d 362 (2014); *State* v. *Pompei*, supra, 338 Conn. 758. The court in *Cady* had sustained the warrantless search of an automobile in police custody that was conducted for a routine public safety purpose, noting that police officers frequently "engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady* v. *Dombrowski*, supra, 441. Following *Cady*, courts held that, under the community caretaking doctrine, when the police take actions "not for any criminal law enforce-

[7] See, e.g., *Sutterfield* v. *Milwaukee*, 751 F.3d 542, 558 (7th Cir.) (emergency aid doctrine "recognizes that police play a service and protective role in addition to a law enforcement role"), cert. denied, 574 U.S. 993, 135 S. Ct. 478, 190 L. Ed. 2d 362 (2014); *United States* v. *Najar*, 451 F.3d 710, 714–15 (10th Cir.) ("the emergency aid exigency emerged, informed by the practical recognition of critical police functions quite apart from or only tangential to a criminal investigation"), cert. denied, 549 U.S. 1013, 127 S. Ct. 542, 166 L. Ed. 2d 401 (2006); *State* v. *Kendrick*, 314 Conn. 212, 230, 100 A.3d 821 (2014) ("[t]he emergency doctrine . . . is rooted in the caretaking function of the police"); 3 W. LaFave, Search and Seizure (6th Ed. 2020) § 6.6 (a), p. 625 n.7 ("emergency aid exception is one of many community caretaking functions of the police" (internal quotation marks omitted)).

We note that there does not appear to be any material distinction between courts' use of the terms "emergency aid" doctrine or exception and "emergency" doctrine or exception.

ment purpose but, rather, to protect members of the public . . . searches . . . conducted for the latter purpose are deemed exempt from the [f]ourth [a]mendment warrant requirement." *Sutterfield* v. *Milwaukee*, supra, 553–54; see also id., 553 n.5 (acknowledging overlap and distinction between community caretaking exception and emergency aid exception); *Hunsberger* v. *Wood*, 570 F.3d 546, 554 (4th Cir. 2009) (noting overlap and distinction between community caretaking and exigent circumstances doctrines), cert. denied, 559 U.S. 938, 130 S. Ct. 1523, 176 L. Ed. 2d 113 (2010). State and federal courts have divided, however, over whether the community caretaking exception was limited to automobile searches or extended more broadly to include warrantless entry into a home. See *Sutterfield* v. *Milwaukee*, supra, 556–57 (citing cases).

The United States Supreme Court recently made clear that the mere fact that the police are acting solely for community caretaking purposes is not sufficient, in and of itself, to excuse warrant requirements for entry into a home. *Caniglia* v. *Strom*, U.S. , 141 S. Ct. 1596, 1599, 209 L. Ed. 2d 604 (2021); see id., 1598 (*Cady*'s acknowledgment of police's " 'caretaking' duties" did not create "a standalone doctrine that justifies warrantless searches and seizures in the home"). Significantly for our purposes, the court's majority opinion in *Caniglia*, as well as the three concurring opinions, underscored that the court's decision was not intended to undermine settled law holding that no warrant is required to enter a home when there is a "need to assist persons who are seriously injured or threatened with such injury." (Internal quotation marks omitted.) Id., 1600 (Roberts, C. J., with whom Breyer, J., joins, concurring); see also id., 1599 (majority opinion); id., 1601–1602 (Alito, J., concurring);[8] id., 1603–1604 (Kavanaugh,

[8] Although Justice Alito indicated in his concurring opinion in *Caniglia* that the court's exigency case law had not addressed a situation in which no warrant would have been available even if there had been time to get

J., concurring). The majority opinion made a point of noting that the courts below had relied exclusively on the so-called community caretaker warrant exception.[9] Id., 1599.

Although the defendant asserts in his brief to this court that it is unclear, in the wake of *Caniglia*, whether warrantless entry is still permitted to assist someone who is injured or facing imminent injury, we find no such ambiguity in that decision. Other courts have continued to apply the emergency exception post-*Caniglia*; see, e.g., *United States* v. *Sanders*, 4 F.4th 672, 677 (8th Cir. 2021), cert. denied, U.S. , 142 S. Ct. 1161, 212 L. Ed. 2d 36 (2022); *Gaetjens* v. *Loves Park*, 4 F.4th 487, 492–93 (7th Cir. 2021), cert. denied, U.S. , 142 S. Ct. 1675, 212 L. Ed. 2d 582 (2022); *McCarthy* v.

one, such as to check on a missing person's medical condition, he also expressed the view that courts could deem a warrantless entry under such circumstances reasonable under proper circumstances. *Caniglia* v. *Strom*, supra, 141 S. Ct. 1602 (Alito, J., concurring); see id. ("[p]erhaps [s]tates should institute procedures for the issuance of such warrants, but in the meantime, courts may be required to grapple with the basic [f]ourth [a]mendment question of reasonableness"); see also *Brigham City* v. *Stuart*, supra, 547 U.S. 403 ("the ultimate touchstone of the [f]ourth [a]mendment is 'reasonableness' ").

[9] In *Caniglia*, the police became involved in the matter after receiving a phone call from the petitioner's wife expressing concern that she had been unable to contact the petitioner at their home, that he possessed handguns, and that he had taken actions the prior evening that indicated that he might be suicidal. *Caniglia* v. *Strom*, supra, 141 S. Ct. 1598. The petitioner was on the porch of his home when the officers arrived to assess the situation. Id. He admitted to the officers that his wife had accurately reported his actions of the prior evening but denied that he was suicidal. Id. He agreed to be transported to a hospital for a psychiatric evaluation, allegedly subject to the officers' promise that they would not confiscate his guns. Id. After the petitioner left, however, the officers allegedly secured the wife's consent to enter the home without relaying the petitioner's wishes and removed two handguns. Id. In the decision that was the subject of the appeal, the United States Court of Appeals for the First Circuit expressed doubt that the emergency doctrine would have applied under these circumstances because of the absence of imminent harm. See *Caniglia* v. *Strom*, 953 F.3d 112, 122 n.5 (1st Cir. 2020), vacated on other grounds, U.S. , 141 S. Ct. 1596, 209 L. Ed. 2d 604 (2021).

Commonwealth, 73 Va. App. 630, 642–43, 864 S.E.2d 577 (2021); *State* v. *Ware*, 400 Wis. 2d 118, 127–28, 968 N.W.2d 752 (App. 2021); and the defendant has identified no case in which a court deemed the emergency exception no longer valid.

The issue before us, therefore, is whether there was an objectively reasonable basis for the responding officers to believe that there was a need to render emergency assistance to an injured occupant or to protect an occupant from imminent injury, either the defendant or Samuolis, when Winkler made the initial entry into the home. With regard to the defendant, we disagree that it would have been objectively reasonable for the officers to believe that he needed emergency assistance. There was every reason to believe that, in the days immediately preceding the initial warrantless entry, the defendant had performed tasks around the house. All of the evidence points to the defendant's being present at the home when the police first attempted to make contact with the occupants and thereafter actively seeking to avoid that contact. See *Florida* v. *Jardines*, 569 U.S. 1, 6, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013) ("[a]t the . . . very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" (internal quotation marks omitted)). Without more, odd behavior that might be symptomatic of some sort of mental disability (placing chicken wire over windows, cutting a spy hole in window blinds, and leaving some parts of the lawn unmowed) does not reasonably indicate a need for *immediate* medical assistance, physical or mental. That the facts suggested that the defendant could be living in a house with a dead or decomposing body raises a concern of a different magnitude, no doubt. It is significant that the state has not claimed that the police had reasonable cause to believe that the defendant suffered from a mental condi-

tion that would have permitted them to take him into custody for an emergency examination pursuant to General Statutes § 17a-503 (a),[10] and no specific findings were made to support the application of that statute.[11] Cf. *Sutterfield* v. *Milwaukee*, supra, 751 F.3d 545–46 (factor in assessing whether officers' entry to respond to concern about suicide threat was reasonable was whether officers had complied with statutory emergency detention procedure to provide involuntary treatment to those at risk of suicide); *State* v. *Hyde*, 899 N.W.2d 671, 676–77 (N.D. 2017) (same). Indeed, there

[10] General Statutes § 17a-503 (a) provides: "Any police officer who has reasonable cause to believe that a person has psychiatric disabilities and is dangerous to himself or herself or others or gravely disabled, and in need of immediate care and treatment, may take such person into custody and take or cause such person to be taken to a general hospital for emergency examination under this section. The officer shall execute a written request for emergency examination detailing the circumstances under which the person was taken into custody, and such request shall be left with the facility. The person shall be examined within twenty-four hours and shall not be held for more than seventy-two hours unless committed under section 17a-502."

[11] The fact that the evidence suggested that the defendant was living in a house with a dead or decomposing body could reasonably indicate that the defendant was suffering from a serious psychological impairment. The question before us, however, is whether immediate warrantless entry into the home was justified to provide emergency aid or to prevent injury. We do not believe that the defendant's perceived condition warranted immediate entry under these parameters. Whether the emergency doctrine should be expanded beyond its current limitations to address the defendant's condition in the present case is a question with profound implications that we need not reach in light of our conclusion regarding Samuolis. See C. Slobogin, "Police as Community Caretakers: *Caniglia* v. *Strom*," 2020–2021 Cato Sup. Ct. Rev. 191, 193–94 (interpreting *Caniglia* to leave open possibility that some tasks that go beyond criminal law enforcement do permit warrantless entry, "even when there is time to get a warrant," but suggesting that, "given the potential for police misuse of force and for pretextual actions by the police, warrantless home entries in the absence of real exigency should never be part of policing's mission, even when a 'caretaking' goal can be articulated"); see also id., 194–95 (arguing that statistics show that having police, who are trained to use deadly force and have means to use it, as primary responder to person experiencing mental health crisis is wrong answer to problem).

is no indication that the officers sought to obtain any information that might better inform them as to the nature of the defendant's mental health issues or any concerns that these issues might present. Nor did they make a reasonable attempt to find less intrusive means to make contact with a possibly mentally impaired person, directly or through a friendly third party, than knocking on his door and then breaking into his home. See *Brigham City* v. *Stuart*, supra, 547 U.S. 403 ("the ultimate touchstone of the [f]ourth [a]mendment is 'reasonableness' "). We therefore conclude that the state did not meet its burden of establishing that immediate entry was necessary because the defendant required *emergency* aid. As we explain subsequently in this opinion, however, this does not mean that the defendant's mental condition was irrelevant to the officers' actions.

With regard to Samuolis, although we share some of the defendant's concerns about shortcomings in the officers' investigation prior to their entry into the home, we conclude that there was a reasonably objective basis for believing that an elderly occupant was in need of immediate medical assistance.[12] The "old man," Samu-

[12] Entry into a home for the purpose of rendering emergency aid has been deemed reasonable in connection with a search for "an occupant *reliably* reported as missing." (Emphasis added.) 3 W. LaFave, Search and Seizure (6th Ed. 2020) § 6.6 (a), pp. 638–39; see also *State* v. *Blades*, supra, 225 Conn. 619–20. There was no testimony in the present case indicating whether the officers obtained information from the neighbors reporting Samuolis' absence as to how well they knew Samuolis or the defendant, whether Samuolis had previously been absent for other similar periods of time, or what efforts they had made to make contact with Samuolis or to obtain other information that would validate their concern about his absence. In another case, this lacunae might be fatal. In the present case, it is not, most significantly because of the fly infestation.

We note that the evidence indicates that three neighbors spoke with the police to express concern about Samuolis' absence: Curtis, who lived next door to the Samuolis home, and Shirley Lebiszczak and Andy Lebiszczak, who lived directly across the cul-de-sac from the Samuolis home. Only Curtis testified. He stated that he had lived next door to the Samuolis family for seventeen years at the time of the incident. Curtis indicated that he had minimal direct contact with the family. In the three or four years preceding

olis, had not been seen by any of his neighbors for at least one month, which was unusual enough that his absence was reported to the police. The Samuolis family's only vehicle had not been moved since Samuolis was last seen.[13] Samuolis did not respond to the officers' knocks on the door or shouts into the open windows. None of this would have been sufficient, however, in the absence of the extraordinary infestation of flies amassing around the upper rear window.

Two of the officers testified that, when they previously had encountered similar conditions, a dead body had been found. We need not decide, however, whether the presence of a dead body in a home would constitute an emergency.[14] Although the responding

the incident, following the death of Samuolis' wife, Curtis would see Samuolis driving his car up the road once a week and returning thereafter with a cup of Dunkin' Donuts coffee. Curtis told the officers that he found it odd that the car had not been moved "for some time." It would be reasonable to infer from Curtis' testimony that the car had not been moved in the month or more during which Samuolis had not been seen. It also would be reasonable to infer from the fact that the neighbors were concerned enough about Samuolis' absence to ask the police to investigate that this extended absence was an anomaly.

[13] Winkler testified that one of the neighbors informed the officers that the parked car was the family's only vehicle.

[14] Neither party briefed the issue, before the trial court or this court, of whether a warrant, criminal or administrative, would have been available to retrieve a dead body. We note that there is a statute that provides in relevant part: "The body of each person who dies in this state shall be buried, removed or cremated within a reasonable time after death. The person to whom the custody and control of the remains of any deceased person are granted by law shall see that the certificate of death required by law has been completed and filed in accordance with section 7-62b prior to final disposition of the body. . . . Any person who violates any provision of this section shall be guilty of a class D felony." General Statutes § 7-64. It is unclear whether the criminal penalty applies exclusively to the person assigned custody of the body by law. There is also a statute that provides a penalty for failing to promptly notify the Office of the Chief Medical Examiner of "any death coming to their attention which is subject to investigation by the Chief Medical Examiner under this chapter . . . ." General Statutes § 19a-407; see also General Statutes § 19a-406 (a) (prescribing categories of death that chief medical examiner is required to investigate). The violation of a public health code also could justify issuance of an

officers thought, based on their experience, that the most likely explanation for this fly infestation was the presence of a dead body, they also left open the possibility that an occupant might be injured rather than dead. We cannot say that this supposition was unreasonable. See *State* v. *Scott*, 343 N.C. 313, 329, 471 S.E.2d 605 (1996) (emergency doctrine was applicable when officer investigating missing person report noticed flies accumulating at door to underside of house and smelled odor of decaying flesh, and officer testified that he had previously encountered similar conditions and discovered, upon further investigation, live person with rotting feet). It is well documented that flies can be strongly attracted to uncovered wounds, open sores, and certain bodily excretions.[15] See, e.g., J. Chan & E. Imwinkelried, "The Use of Forensic Entomology in Determining the Time of Death," 45 Crim. L. Bull. 121, 129 (2009); J. Dinulos, Cutaneous Myiasis, (last modified December, 2021), available at https://www.merckmanuals.com/home/skin-disorders/parasitic-skin-infections/cutaneous-myiasis (last visited August 2, 2022). Warrantless entry into the home "has been upheld even when the information reaching the police, if assessed in terms of probabilities, makes it much more probable that the victim is dead than that he is still alive." 3 W. LaFave, Search and Seizure (6th Ed. 2020) § 6.6 (a), p. 633. As long as there is a reasonable possibility that the person remains alive, the situation is an emergency because, in all likelihood, time is of the essence.

administrative warrant to inspect the property under General Statutes § 19a-220. See *State* v. *Saturno*, 322 Conn. 80, 93–94, 139 A.3d 629 (2016).

[15] Examples abound, sadly, in a cursory review of elder and child abuse cases. See, e.g., *Layne* v. *State*, 54 Ala. App. 529, 531, 310 So. 2d 249 (1975); *People* v. *Mattos*, Docket No. C076743, 2016 WL 158014, *1 (Cal. App. January 13, 2016), review denied, California Supreme Court, Docket No. S232311 (March 30, 2016); *Wolf* v. *State*, 246 Ga. App. 616, 616, 540 S.E.2d 707 (2000); *Hug* v. *State*, Docket No. 27A05-1410-CR-478, 2015 WL 1396263, *1 (Ind. App. March 25, 2015) (decision without published opinion, 31 N.E.3d 39); *Johnson* v. *State*, Docket No. W2020-00184-CCA-R3-PC, 2021 WL 4077030, *1–2 (Tenn. App. September 7, 2021).

Courts have concluded that the discovery of other circumstances that may be suggestive of death will not necessarily render the emergency doctrine inapplicable.[16] See, e.g., *People* v. *McGee*, 140 Ill. App. 3d 677, 680–81, 489 N.E.2d 439 (1986) ("In Illinois, appellate decisions have applied the 'emergency' exception to the warrant requirement where [the] police entered a residence without a warrant while investigating a possible missing person and after detecting a stench they believed came from [a] dead body inside . . . and where [the] police investigating a report of a homicide observed from a window flies in one of the rooms. . . . In [one case], the court reasoned that the odor may

[16] There are numerous cases in which courts have recognized that "apparent death may turn out to be barely surviving life, still to be saved." *State* v. *Epperson*, 571 S.W.2d 260, 264 (Mo. 1978), cert. denied, 442 U.S. 909, 99 S. Ct. 2820, 61 L. Ed. 2d 274 (1979); see also *Patrick* v. *State*, 227 A.2d 486, 489 (Del. 1967) ("[f]requently, the report of a death proves inaccurate and a spark of life remains, sufficient to respond to emergency police aid"). These spark of life cases typically involve a report of a dead body from laypersons, who lack medical knowledge to determine whether a person actually is dead or merely appears to be dead but could be revived with prompt medical treatment. See, e.g., *United States* v. *Stafford*, 416 F.3d 1068, 1074 (9th Cir. 2005) (911 call of possible dead body); *United States* v. *Richardson*, 208 F.3d 626, 631 (7th Cir.) (911 caller reported that woman had been raped and murdered), cert. denied, 531 U.S. 910, 121 S. Ct. 259, 148 L. Ed. 2d 188 (2000); *State* v. *Kraimer*, 99 Wis. 2d 306, 328, 298 N.W.2d 568 (1980) (although 911 caller reported that he had shot and killed his wife four days earlier, "the police had no way of knowing this as a verity"), cert. denied, 451 U.S. 973, 101 S. Ct. 2053, 68 L. Ed. 2d 353 (1981). An often quoted passage from former United States Supreme Court Chief Justice (then Judge) Burger in his opinion in *Wayne* v. *United States*, 318 F.2d 205 (D.C. Cir. 1963), cert. denied, 375 U.S. 860, 84 S. Ct. 125, 11 L. Ed. 2d 86 (1963), explains: "Acting in response to reports of 'dead bodies,' the police may find the 'bodies' to be common drunks, diabetics in shock, or distressed cardiac patients. But the business of policemen and firemen is to act, not to speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process. Even the apparently dead often are saved by swift police response." (Emphasis omitted.) Id., 212. Of course, at some point, hope will be extinguished, and we reserve for another day the issue of whether the emergency doctrine remains applicable once a reasonable police officer would perceive no realistic possibility that the person remains alive.

have been caused by rotting flesh of a living person after severe burns or other injury, and the very uncertainty created by the totality of circumstances created a justification and need for the police to take immediate action. . . . In other jurisdictions, the odor of decomposing flesh or reliable information of death have been held to constitute an emergency situation sufficient to justify an immediate warrantless search of [the] premises because the apparent death may turn out to be a barely surviving life, still to be saved." (Citations omitted.)); *Smock* v. *State*, 766 N.E.2d 401, 404–405 (Ind. App. 2002) (rejecting argument that odor of decay precluded belief that someone was in need of aid because such facts show that fatality had already occurred and thus no exigent circumstances existed because presence of odor, along with other evidence indicating that tenant was missing, supported officers' "reasonable belief that someone may have been in need of immediate assistance"); *Hughes* v. *Commonwealth*, 87 S.W.3d 850, 852 (Ky. 2002) (rejecting argument that officer "should have known when he smelled the odor of decomposing human remains that the victim was no longer in need of assistance"); *People* v. *Molnar*, 288 App. Div. 2d 911, 911–12, 732 N.Y.S.2d 788 (2001) (warrantless entry into defendant's apartment was justified under emergency exception when police detected foul odor, and, even though officers did not immediately recognize odor as that of decomposing body ultimately discovered, they forcibly entered apartment "to discover the source of the odor and to render aid if necessary"), aff'd, 98 N.Y.2d 328, 774 N.E.2d 738, 746 N.Y.S.2d 673 (2002); *Rauscher* v. *State*, 129 S.W.3d 714, 723 (Tex. App. 2004) ("even if [the officer] believed the foul odor to be that of a decomposing body, under the circumstances, [the officer] could have reasonably believed that [the victim] might still be alive, but in need of immediate emergency aid").

Although the defendant's mental condition did not indicate his need for emergency assistance, that condition nonetheless would have been a relevant factor in the officers' reasonable calculation of whether Samuolis needed such aid and what actions were necessary to provide that aid. The defendant's conduct in attempting to fortify the home against intruders and refusing to answer the door would have indicated to the officers that they were not going to be able to obtain timely information from the defendant about Samuolis' whereabouts or condition. The defendant's failure to remediate the fly infestation in plain view reasonably suggested that his mental disabilities may have impaired his capacity to appreciate the gravity of the conditions that existed and the need to elicit prompt medical assistance, if such assistance was required.

The defendant's mental condition also bears on the defendant's complaint that the officers' actions—driving to the scene without activating lights or sirens, and waiting for supervisor approval to conduct a warrantless search before entering the home—indicated that they did not perceive the situation as an emergency.[17] The officers clearly recognized the possibility,

[17] Rosado testified that the responding officers were required under Willimantic Police Department policy to obtain their supervisor's approval before entering a home. The facts to which the defendant points involve a delay of a few minutes; Rosado testified that it took him three or four minutes to drive to the scene. Testimony from the officers acknowledging that swifter action might have been taken had they believed that there was an active crime also does not negate the perceived emergency. During an active crime, the police may be seeking to protect someone from sustaining injury, or further injury, not to provide aid for an injury already sustained. As one court explained: "Not all emergencies are the same. In some, a person's life may hinge on the passage of mere seconds, demanding immediate police action. In others, police must act with reasonable swiftness but their response need not be calculated in seconds." *People* v. *Molnar*, 98 N.Y.2d 328, 333, 774 N.E.2d 738, 746 N.Y.S.2d 673 (2002); see also id., 334 ("It would be an ironic result were we to 'punish' the constabulary by suppressing the evidence merely because they took the time to exercise judgment and circumspection before resorting to force. The appropriately measured response of the police should not be declared illegal merely because they thoughtfully delayed entry for a relatively brief time.").

or even the likelihood, that entry into the home could lead to an encounter with a mentally ill individual who did not want them there. The fact that the responding officers waited a few minutes for their supervisor to arrive before entering must be viewed with that factor in mind. See *United States* v. *Jones*, 635 F.2d 1357, 1362 (8th Cir. 1980) ("[w]hen the police have a reasonable suspicion that someone is injured or that the public safety is in jeopardy, but refrain from taking immediate action in an effort to confirm or deny that suspicion, and then act once they have received no indication that the danger has dissipated, the waiting period does not defeat the applicable exception to the warrant rule"); see also id., 1361 ("[a]ny delay that occurred was primarily the result of careful police work").

The defendant nonetheless contends that the officers did not consider the "totality of circumstances," as they were required to do, because they failed to consider alternative explanations for the facts presented that would indicate that no emergency existed.[18] We dis-

[18] The defendant also points to the fact that the officers did not attempt to obtain a telephone number for Samuolis and to call him before initially entering the home. One of the officers reasonably testified that they did not expect to get a response to a call into the house because no one responded to knocking or the officers' announcement of their presence. Although there is evidence that Frechette was able to locate a ten year old telephone number associated with the Samuolis family in the police database, he did not know whether the number was for a landline or a cell phone. Cf. *State* v. *DeMarco*, 311 Conn. 510, 527, 88 A.3d 491 (2014) (citing evidence that defendant's cell phone number was known to animal control officer, but officer did not have number with him when he called police headquarters to request backup to enter house). There was no evidence presented as to how readily that information could be accessed. Frechette could not have provided that information to the officers prior to the initial entry because he was not present at the police station when the officers entered the Samuolis home. Frechette received no answer when he repeatedly called that number following the officers' initial entry into the home. Although the better practice would have been for the officers dispatched for the well-being check to ask the neighbors whether they had a cell phone number for Samuolis, it is fair to infer that the neighbors did not because, if they had, they would have called it prior to reporting him missing and would have informed the police that he had not answered the call.

agree with the significance that the defendant ascribes to the "primary" facts that the officers did not consider—when Winkler climbed the ladder and looked in the window, he did not see anything amiss inside the house or smell an odor of decomposition. Winkler testified that it was difficult to see into the rear bedroom because it was so dark. Although Winkler was never asked whether he detected any odor, he testified that he never put any part of his body (presumably face included) into the window opening. The air freshener wedged in the small opening may have done its job of masking any odor emanating from inside the room. In fact, it was only after the third entry, when one of the officers was able to insert his upper torso into that room, that an odor of decomposition was detected.

The defendant also suggests that there were other reasonable explanations for the fly infestation: a dead animal (e.g., the cat that had been seen in the front window on the prior visit) or rotting food or garbage. The officers indicated in their testimony that they did not consider either scenario as a possible cause of the fly infestation because those explanations did not jibe with the conditions and the officers' past experience. We note that one would similarly expect an odor to be emitted from a dead animal or rotting food or garbage on a hot summer day. The defendant does not explain why it would have been reasonable for the officers to credit either of those explanations when they did not detect an odor but it was unreasonable for the officers to believe that there was an injured or dead person because they did not detect an odor of decomposition.

It defies common sense to conclude that, if there is any plausible, nonemergency explanation for the facts presented, no entry can be made until there is definitive proof that a person is present who is in need of emergency aid. The standard "must be applied by reference to the circumstances then confronting the officer,

including the need for prompt assessment of sometimes ambiguous information concerning potentially serious consequences. As one court usefully put it, the question is whether the officers would have been derelict in their duty had they acted otherwise. This means, of course, that it is of no moment that it turns out there was in fact no emergency." (Footnotes omitted; internal quotation marks omitted.) 3 W. LaFave, supra, § 6.6 (a), pp. 629–31; see also *Michigan* v. *Fisher*, supra, 558 U.S. 49 ("[o]nly when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances"); *United States* v. *Cooks*, 920 F.3d 735, 743 (11th Cir.) ("we must be mindful that the police must act quickly, based on hurried and incomplete information" (internal quotation marks omitted)), cert. denied, U.S. , 140 S. Ct. 218, 205 L. Ed. 2d 137 (2019). The defendant's position could prove especially deadly when an elderly person is the potential victim. See R. Gurley et al., "Persons Found in Their Home Helpless or Dead," 334 New. Eng. J. Med. 1710, 1710 (June, 1996) (study of patients found in their homes helpless determined that such circumstances increased with age and that total mortality was 67 percent for patients who were estimated to have been helpless for more than seventy-two hours, as compared with 12 percent for those who had been helpless for less than one hour).

We conclude that, under the totality of the circumstances, it was objectively reasonable for the officers to conclude that there was an emergency justifying their initial entry into the defendant's home. In light of this conclusion, the subsequent entries were similarly justified. We therefore need not consider the state's alternative arguments that the defendant's criminal conduct subsequent to the initial entry established an emergency that justified the subsequent entries or that the search

and seizure were proper under the inevitable discovery or the independent source doctrines.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* ONAJE RODNEY SMITH (SC 20600)

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

Syllabus

Convicted of various crimes, including first degree robbery, first degree assault, second degree arson, and attempt to commit murder, charged in five cases that were joined for trial, the defendant appealed to this court. The defendant, along with G, P, and another individual, all of whom were fellow gang members, had agreed to rob a food deliveryman. When the deliveryman, H, arrived at the requested location, two men wearing dark clothing and ski masks approached him. One of the men pointed a gun at H's chest and demanded his wallet. After taking the wallet and the food, the two returned to a red hatchback and drove away. Five days after that incident, G's cell phone was used to place a delivery order at a restaurant. When the deliveryman, C, arrived at the requested location, he was approached by two men wearing ski masks and hoodies, one of whom was armed. The armed assailant shot C's phone out of his hand, and, when C requested that the men leave behind his wallet after they took his money, the armed assailant shot C in the leg. Both men then entered C's Toyota Camry and drove away. The red hatchback in which the men arrived followed the Camry. Later that night, the police responded to a report of a burning vehicle described as a burgundy Subaru Forester. A subsequent investigation revealed security camera footage from a nearby gas station showing both the Forester and the stolen Camry pulling into the gas station approximately one-half hour before the police received the report of the burning vehicle. The footage showed the driver of the Camry purchasing gas and then pumping it directly into the backseat of the Forester. Five days later, the defendant was driving with G, P, and another individual in the Camry when they saw F, a rival gang member. The defendant lowered the vehicle's front passenger window and fired a gun toward F, who ran away uninjured. The defendant later spotted F again, and, while wearing a ski mask, the defendant followed F into a convenience store and shot him in the head. The defendant then returned to the Camry, and the group drove away. Six days later, the police observed the Camry and,

after learning that it had been stolen, conducted a stop of the vehicle. Both the defendant and G were apprehended while trying to flee the vehicle. At the time of his arrest, the police seized a cell phone from the defendant. The defendant filed a pretrial motion to suppress the evidence obtained pursuant to both a warrant issued for the search of his cell phone and a warrant issued to his cell phone's service provider for his phone records and cell site location information (CSLI). The trial court denied the motion. On direct appeal from the judgments of conviction, *held*:

1. The trial court improperly denied the defendant's motion to suppress the evidence obtained from the search of his cell phone because the applicable search warrant was not supported by probable cause and did not particularly describe the places to be searched and the things to be seized: the application for the warrant indicated that the defendant's cell phone constituted evidence that a particular person participated in aggravated assault, and the facts contained in the affidavit attached to the application were not sufficient to allow the judge issuing the warrant reasonably to conclude that there was probable cause to believe that evidence of the crime of aggravated assault would be found on the defendant's cell phone because, although the affidavit described in detail the robbery of H, the robbery and shooting of C, the theft of the Camry, the car arson, the shootings involving F, and G's role in those events, it did not mention the defendant's involvement in or connection to those events, and the defendant's cell phone was likewise never tied to the crime of aggravated assault; moreover, even if sufficient probable cause existed, the warrant would fail for lack of particularity insofar as it did not sufficiently limit the search of the contents of the cell phone by a description of the areas within the phone to be searched or by a time frame reasonably related to the crimes.

2. The trial court improperly denied the defendant's motion to suppress the evidence obtained from his cell phone's service provider because the applicable search warrant was not supported by probable cause: the warrant indicated that the defendant's cell phone had been or could have been used as a means of committing the offense of attempt to commit murder, and the issuing judge reasonably could not have concluded that there was a substantial chance that evidence of the shooting of F would be found in the defendant's cell phone records, as nothing in the affidavit submitted in connection with the warrant connected the defendant to the attempt to murder F or demonstrated that his cell phone was either used during the commission of that crime or otherwise contained evidence of it; moreover, the state could not prevail on its claim that, because the affidavit referred to the defendant's arrest warrant that was issued on facts sufficient to constitute probable cause that the defendant was involved in the shooting of F, the judge issuing the search warrant was entitled to rely on the arrest warrant to establish probable cause, as a determination of probable cause for an arrest

requires different findings than a determination of probable cause for a search warrant, and the search warrant affidavit did not contain the factual allegations and evidence that led to the defendant's arrest, which would have enabled the issuing judge to determine whether those allegations established probable cause to believe that evidence of the attempt to murder F existed in the cell phone carrier records at issue; furthermore, this court determined that there was insufficient information to assess the validity of the defendant's claim that the search warrant for the defendant's cell phone records lacked particularity, because, although the warrant identified a specific list of items to be searched and seized, and sought records only for a limited duration that were reasonably connected with the attempt to murder F, there was a lack of information in the affidavit relating to the defendant's role in that crime or the connection between the defendant's cell phone and the crime.

3. Any error in denying the defendant's motion to suppress the evidence obtained pursuant to the two search warrants was harmless with respect to the charges relating to the robbery of H, the shootings involving F, and the defendant's attempt to flee from the Camry to avoid arrest, but was harmful with respect to the charges relating to the robbery and shooting of C, the larceny of the Camry, and the car arson: the evidence against the defendant with respect to the robbery of H was principally derived from P's testimony, and there was no data from the cell phone or the defendant's cell phone service provider relating to that incident; moreover, the state established a motive for the shootings involving F, and video surveillance footage corroborated P's testimony relating to one of the shootings; furthermore, it was highly unlikely that the CSLI from the defendant's phone, which placed him in the area where the stolen Camry was stopped by the police, affected the jury's decision with respect to the charge of interfering with an officer, as the police apprehended the defendant after he attempted to flee from that vehicle and his fingerprints were discovered inside the vehicle; nevertheless, the CSLI was the most concrete and direct evidence placing the defendant at the scene of the robbery and assault of C, where the Camry was also stolen, and the omission of the CSLI would have reduced the certainty that the defendant was involved in the burning of the Forester; accordingly, this court affirmed the defendant's convictions relating to the robbery of H, the shooting of F, and his flight from the police but reversed the defendant's convictions relating to the robbery and shooting of C, the theft of the Camry, and the burning of the Forester.

Argued March 22—officially released August 9, 2022

Procedural History

Substitute information, in the first case, charging the defendant with one count each of the crimes of acces-

sory to robbery in the first degree and conspiracy to commit robbery in the first degree, substitute information, in the second case, charging the defendant with one count each of the crimes of accessory to robbery in the first degree, conspiracy to commit robbery in the first degree, and accessory to assault in the first degree, substitute information, in the third case, charging the defendant with one count each of the crimes of accessory to arson in the second degree and conspiracy to commit arson in the second degree, substitute information, in the fourth case, charging the defendant with two counts of the crime of attempt to commit murder and one count of the crime of conspiracy to commit murder, and substitute information, in the fifth case, charging the defendant with one count each of the crimes of larceny in the third degree and interfering with an officer, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the cases were consolidated; thereafter, the court, *White, J.*, denied the defendant's motion to suppress certain evidence; subsequently, the cases were tried to the jury before *Blawie, J.*; verdicts and judgments of guilty, from which the defendant appealed. *Affirmed in part; reversed in part; new trial.*

Jennifer B. Smith, assistant public defender, with whom, on the brief, was *Mark Rademacher*, senior assistant public defender, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom were *Thadius L. Bochain*, deputy assistant state's attorney, and, on the brief, *Paul J. Ferencek*, state's attorney, and *Michelle Manning*, senior assistant state's attorney, for the appellee (state).

Robert C. Santoro filed a brief for Grayshift, LLC, as amicus curiae.

Marisol Orihuela and *Jim Davy*, pro hac vice, filed a brief for Upturn, Inc., as amicus curiae.

Opinion

KAHN, J. The defendant, Onaje Rodney Smith, appeals directly to this court from the judgments of the trial court convicting him of various crimes arising from five consolidated cases, the most serious of which included first degree robbery, second degree arson, and attempt to commit murder.[1] On appeal, the defendant claims that the trial court improperly denied his motion to suppress evidence discovered during a search of his cell phone and evidence obtained from T-Mobile, his cell phone service provider, because the warrants authorizing those searches were not supported by probable cause and lacked sufficient particularity to comport with the fourth amendment to the United States constitution.[2] The state disagrees with each of these

[1] The judgments of conviction in the present case arose from a consolidated trial of five related criminal proceedings against the defendant. In the first case, which arose out of a robbery in Norwalk on January 9, 2017, the defendant was convicted of robbery in the first degree in violation of General Statutes §§ 53a-8 (a) and 53a-134 (a) (4) and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (4). In the second case, which related to a second robbery in Norwalk on January 14, 2017, the defendant was convicted of robbery in the first degree in violation of §§ 53a-8 (a) and 53a-134 (a) (1), conspiracy to commit robbery in the first degree in violation of §§ 53a-48 (a) and 53a-134 (a) (1), and assault in the first degree in violation of General Statutes §§ 53a-8 (a) and 53a-59 (a) (1). In the third case, which followed the discovery of a burned-out motor vehicle in Stamford shortly after the second robbery, the defendant was convicted of arson in the second degree in violation of General Statutes §§ 53a-8 (a) and 53a-112 (a) (1) (B) and conspiracy to commit arson in the second degree in violation of §§ 53a-48 (a) and 53a-112 (a) (1) (B). In the fourth case, which arose out of the shootings in Stamford on January 19, 2017, the defendant was convicted of two counts of attempt to commit murder in violation of General Statutes §§ 53a-49 (a) (2) and 53a-54a, and one count of conspiracy to commit murder in violation of §§ 53a-48 (a) and 53a-54a. Finally, in the fifth case, which related to the defendant's presence in a stolen vehicle and subsequent flight from the police in Bridgeport on January 25, 2017, the defendant was convicted of larceny in the third degree in violation of General Statutes §§ 53a-8 (a) and 53a-124 (a) (1) and interfering with an officer in violation of General Statutes § 53a-167a (a).

[2] The fourth amendment to the United States constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects,

claims and asserts, in the alternative, that any error was harmless. For the reasons that follow, we agree with the defendant that the trial court erred in denying his motion to suppress the information obtained from the execution of both warrants. We further conclude, however, that this error was harmless with respect to some, but not all, of the crimes alleged. As a result, we affirm in part and reverse in part.

The following facts, which the jury reasonably could have found from the evidence admitted at trial, and procedural history are relevant to our review of the defendant's claims. On January 9, 2017, Tyreik Gantt, Jeremy Middleton, Jaiden Parker, and the defendant, all members of the Milla Death Row gang,[3] went for a drive in Norwalk inside of a stolen red hatchback. During that drive, the group agreed to rob a food deliveryman. At approximately 6:34 p.m., an internet search for "China Moon Norwalk, CT" was conducted on an iPhone owned by Gantt. Parker then used Gantt's pay-as-you-go Tracfone to place an order for food from China Moon Restaurant.

Wuquiang Huang, the deliveryman for China Moon Restaurant, testified that he arrived at 4 Rolling Lane in Norwalk at approximately 7 p.m. to deliver the food. When Huang exited his vehicle to make the delivery, he was approached by two men wearing dark clothing and ski masks. One of the men brandished a black handgun, held it "[a]bout an inch" from Huang's chest,

against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

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

[3] The Milla Death Row gang is a self-identifying faction within the larger Bloods enterprise.

and demanded Huang's wallet. The armed man then took Huang's wallet, which contained a souvenir Chinese bill, while the other masked man took the food that Huang had brought with him. The two men then entered the car they had arrived in, which Huang described as a red vehicle with four doors and "no trunk in the back."[4] A third man, who had been in the driver's seat of the vehicle, then drove away.

On January 14, 2017, at approximately 6:09 p.m., Gantt's iPhone was used to search "China Town Express Norwalk, CT" and two phone calls to that restaurant then were made on his Tracfone. Fen Yen Chen, the deliveryman for China Town Express, drove a 2011 black Toyota Camry with New York license plates to make that delivery at 19 Derby Road in Norwalk. When Chen was unable to locate the address, he called the number listed on the receipt for the order, which was associated with Gantt's Tracfone, and was told by the man who answered that the address was "a house right across from the red car."

Chen parked the Camry near the red car and left it with the engine running. Chen then saw two men wearing ski masks, hoodies, and gloves get out of the passenger side of the red car and approach him. Chen pretended to call 911 when one of those men brandished a gun, but the armed assailant subsequently shot the phone out of his hand. Chen then asked the men to take his money but to leave his wallet. In response, the unarmed assailant told his companion to shoot Chen. The armed assailant then shot Chen in the thigh. Chen fell to the ground and handed the men money from his pocket. Both men then got into Chen's Camry and drove away. The red car in which they had come followed.

[4] The homeowner of 3 Rolling Lane in Norwalk testified that, at approximately 7 p.m. on January 9, 2017, she observed a "red Subaru Forester" parked near her house.

During the ensuing investigation into the crimes against Chen, the police found two .25 caliber shell casings. Forensic testing later determined that those two shell casings were fired from the same gun.

Around 8:15 p.m. that same evening, police officers responded to reports of a burning vehicle on Oakwood Place, a street in Stamford. One of the responding officers described that vehicle as a burgundy Subaru Forester. In the investigation that followed, police officers determined that someone had intentionally lit a fire in the rear passenger seat of that vehicle using gasoline as an accelerant.

Police officers subsequently viewed security camera footage from a Shell gas station located at 243 West Avenue in Stamford from the day of the Chen robbery and vehicle fire. That footage showed the red Subaru Forester pulling into the gas station with the stolen black Camry at approximately 7:44 p.m. on January 14. That same footage showed the driver of the Camry entering the store to purchase gas while a passenger remained in the back seat. After purchasing the gas, the driver of the Camry exited the store and proceeded to pump gas directly into the backseat of the Forester while the Forester's driver stood watch. At trial, Parker identified Gantt as the driver of the Camry who purchased and pumped the gas.

Parker testified that, on January 19, 2017, Gantt and the defendant drove the stolen Camry to pick up Parker and another friend, Shahym Ranero, from their respective residences in Stamford. While driving around Stamford, the group was looking for Gregory Flemming, a rival gang member[5] they "had a beef with." According to Parker, their intention was to "[l]ikely shoot at [Flemming]" or otherwise "deal with [him]." Parker stated

[5] Flemming was a member of the High Street gang, also known as the Project Boys, which is aligned with the Crypts.

that the group eventually spotted Flemming, who had dreadlocks and was wearing florescent striped pants, while they were driving down High Street in the Camry. The defendant then allegedly lowered the window of the front passenger seat and fired a .25 caliber handgun toward Flemming. Flemming, uninjured, then took off running toward West Main Street.[6]

Following the shooting, the group drove to a plaza on West Main Street where Gantt, Parker, and Ranero smoked marijuana. About ten minutes later, the group drove to a convenience store on West Main Street. As they proceeded to the store, the defendant again spotted Flemming and allegedly said, "I'm going to clean [Flemming] up . . . ."

Parker testified that the defendant proceeded to enter the store wearing a face mask and carrying the same .25 caliber gun he had used on High Street. Parker testified that he saw the defendant "put the gun to [Flemming's] head . . . and [pull] the trigger." Although Parker himself witnessed only one shot, he testified that, after the defendant returned to the vehicle, he admitted to "let[ting] off a couple more." The group then drove away in the black Camry.

The police received a call at approximately 7:04 p.m. reporting that a black male with dreadlocks had been shot in the head at a store located at 417 West Main Street in Stamford. Responding emergency personnel observed that Flemming had been shot twice—once in the head and once in the leg. A subsequent review of the store's surveillance footage showed Flemming walking into the store, followed moments later by a

[6] At approximately 6:45 p.m., Stamford police responded to 34 High Street after reports of "shots fired, with a black male running, with dreads . . . south on High Street across West Main Street." Further, video surveillance footage of the vicinity of 34 High Street captured "a four door dark colored sedan" with "an orange plate, believed to be a New York plate" moments before the shooting.

gunman who had emerged from a dark colored four door sedan. The gunman can be seen shooting Flemming in the head and then leaving in the same sedan. The store's surveillance footage showed that the shooter was wearing a black jacket, black shoes, black gloves, dark colored pants, and a mask. Video surveillance footage from an apartment building on Bedford Street approximately one hour before the shooting showed the defendant wearing clothing matching that of the shooter captured on the store's video. Bullet casings from a .25 caliber gun subsequently recovered by the police inside of the store were later matched to the same gun that had been used to shoot Chen.

On January 25, 2017, Keith Hanson, a Bridgeport police officer, observed a four door black Toyota Camry with New York license plates parked in the Beechwood Avenue area of Bridgeport. Hanson asked dispatch about the Camry and learned that it was stolen and had been "used in a carjacking and robbery" in Norwalk. After Hanson radioed for backup, an officer in a marked police vehicle conducted a stop of the Camry. Gantt, the operator of the Camry, tried to drive away but failed after colliding with a pole. Gantt tried to escape on foot but was apprehended. The defendant, a passenger in the Camry, also attempted to flee on foot but was apprehended. As part of a search incident to the arrest, police officers seized two cell phones from the defendant's person, as well as a "dark gray knit hat/face mask."

While searching the Camry later, investigators located the defendant's fingerprints on the right passenger door of the Camry and on a cigar wrapper found inside the car. The investigators also found a phone owned by Gantt, which had a souvenir Chinese bill between the phone and its protective cover. At trial, Huang identified that bill as the one stolen from him on January 9, 2017.

The defendant was charged in five different files. In the first case, the defendant was charged with robbery

in the first degree in violation of General Statutes §§ 53a-8 (a) and 53a-134 (a) (4) and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (4) for the robbery of Huang on January 9, 2017, in Norwalk. In the second case, the defendant was charged with robbery in the first degree in violation of §§ 53a-8 (a) and 53a-134 (a) (1), conspiracy to commit robbery in the first degree in violation of §§ 53a-48 (a) and 53a-134 (a) (1), and assault in the first degree in violation of General Statutes §§ 53a-8 (a) and 53a-59 (a) (1) for the crimes against Chen on January 14, 2017, in Norwalk. In the third case, the defendant was charged with arson in the second degree in violation of General Statutes §§ 53a-8 (a) and 53a-112 (a) (1) (B) and conspiracy to commit arson in the second degree in violation of §§ 53a-48 (a) and 53a-112 (a) (1) (B) for the burning of the Forester on January 14, 2017, in Stamford. In the fourth case, the defendant was charged with two counts of attempt to commit murder in violation of General Statutes §§ 53a-49 (a) (2) and 53a-54a, and one count of conspiracy to commit murder in violation of §§ 53a-48 (a) and 53a-54a for the drive-by shooting and the shooting of Flemming on January 19, 2017, in Stamford. Finally, in the fifth case, the defendant was charged with larceny in the third degree in violation of General Statutes §§ 53a-8 (a) and 53a-124 (a) (1) and interfering with an officer in violation of General Statutes § 53a-167a (a) for being found in the stolen Camry and attempting to evade police capture in Bridgeport on January 25, 2017. The defendant elected to have his cases tried before a jury, and the court, *Blawie*, *J.*, granted the state's motion to join all five of the defendant's files for trial.

On December 19, 2018, the defendant filed a pretrial motion to suppress evidence obtained in connection with two search warrants—one issued on February 16, 2017, for a search of a cell phone seized from the defen-

dant when he was arrested, and another issued on September 19, 2018, for phone records and cell site location information (CSLI) obtained from that cell phone's service provider, T-Mobile. The court, *White*, *J.*, heard argument on the defendant's motion to suppress and denied it in an oral decision.

The jury ultimately returned a verdict finding the defendant guilty on all counts. He was sentenced to a total effective term of imprisonment of thirty-five years, with ten years of special parole.[7] This direct appeal followed. Additional facts and procedural history will be set forth as necessary.

In the present appeal, the defendant claims that the trial court improperly denied his motion to suppress evidence obtained pursuant to (1) the February 16, 2017 search warrant for data on his cell phone, and (2) the September 19, 2018 search warrant for his T-Mobile phone records. Specifically, the defendant claims that both warrants were not supported by probable cause and lacked sufficient particularity. The state disagrees and, in the alternative, argues that any error with respect to the denial of the defendant's motion to suppress was harmless beyond a reasonable doubt. We address the defendant's claims with respect to the validity of these two warrants, respectively, in parts I and

[7] The sentence broke down as follows: (1) twenty years for each of the attempt to commit murder counts and twenty years for the conspiracy to commit murder count, to run concurrently with each other; (2) ten years followed by ten years of special parole for the assault of Chen, and ten years for the robbery and conspiracy to commit robbery of Chen, to run concurrently with the assault sentence but to run consecutively to the sentence imposed for the attempt to commit murder counts; (3) five years for the larceny of the Camry and one year for interfering with an officer, to run concurrently with each other and concurrently with the other sentences imposed; (4) five years each for the robbery and conspiracy to commit robbery of Huang, to run concurrently with each other but consecutively to the sentences previously imposed; and (5) ten years each for arson and conspiracy to commit arson, to run concurrently with each other and concurrently with the other sentences imposed.

II of this opinion. We then address the state's claim of harmless error in part III of this opinion.

I

We begin with the defendant's first claim that the trial court improperly denied his motion to suppress evidence obtained from the search of his Samsung cell phone because the search warrant was not supported by probable cause and did not particularly describe the place to be searched and the things to be seized. For the following reasons, we agree with the defendant on both points.

The following additional undisputed facts and procedural history are relevant to our consideration of this claim. On February 16, 2017, Stamford police officers applied for a search warrant for a white Samsung phone and a black Alcatel flip phone found on the defendant when he was arrested.[8] Specifically, the officers requested permission to "do a data extraction" on the phones and described them by their make, color, and serial number. The application further indicated that the cell phones "constitute[d] evidence . . . that a particular person participated in" aggravated assault in violation of § 53a-59.

The affidavit attached to the application made the following factual assertions. During their investigation into the January 14, 2017 arson of the red Subaru Forester, Stamford police officers learned that the Forester had been stolen during a carjacking in Bridgeport on January 8. The Stamford officers then learned from Norwalk police officers that multiple suspects had used a red Subaru Forester to facilitate an armed robbery of a food deliveryman in Norwalk, who was shot twice and who had his Toyota Camry with New York license plates stolen by the suspects on January 14. Investiga-

[8] Only the search of the white Samsung phone is at issue in this appeal.

tors located two .25 caliber shell casings at the scene of the Norwalk robbery.

The affidavit then discussed how further investigation revealed that, on January 14, 2017, the stolen Camry and Forester were seen on surveillance cameras pulling into a gas station in Stamford together at approximately 7:44 p.m. That footage showed Gantt, who was operating the Camry, exiting that vehicle and pumping gas directly into the backseat of the Forester, while the driver of the Forester stood next to him. Both vehicles left the gas station together and, then, at approximately 7:50 p.m., the Forester was discovered burning nearby.

The affidavit then described the January 19, 2017 drive-by shooting and the subsequent shooting of Flemming. Specifically, the affidavit stated that a "dark colored vehicle . . . with possible New York plates" was used in both shootings. Investigators located multiple .25 caliber shell casings at the scenes of both shootings, all of which were fired from the same gun, which was also the same gun used in the shooting of the food deliveryman on January 14. A reliable, confidential informant then implicated Gantt in the shooting of Flemming.

The defendant in the present case is first mentioned in paragraph seventeen of nineteen paragraphs of the warrant affidavit. It avers that, on January 25, 2017, Bridgeport police officers stopped the stolen Camry and arrested Gantt, the defendant, who was a front passenger in the vehicle, and a third individual, all of whom were subsequently charged with larceny in the second degree and interfering with a police officer. The only other paragraph that mentions the defendant is the final paragraph, which reiterates that, on "January 25, 2017, Bridgeport police stopped a stolen motor vehicle and arrested the occupants, one of [whom] was [the defendant]. . . . [The defendant] was in possession of

two cell phones that were taken as evidence. Stamford police were aware of a 'Facebook' Live video that showed . . . Gantt and [the defendant] talking with each other. Bridgeport police turned over the two cell phones to Stamford police to assist in [their] investigation. [The] Stamford Police Forensic Unit would like to do a data extraction on both cell phones." Other than the reference to Stamford police officers being aware that the defendant and Gantt had appeared together on a Facebook Live video,[9] the affidavit does not describe the date, time, location, device used to record, content of that particular posting, or its relationship to the underlying offense under investigation.

A

We begin by setting forth the applicable standard of review of a trial court's decision on a motion to suppress. "A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial

[9] "Facebook Live is a feature of Facebook, an online social networking platform, that allows users to '[g]o live on Facebook to broadcast a conversation, performance, Q & A or virtual event.' " *State* v. *Segrain*, 243 A.3d 1055, 1059 n.8 (R.I. 2021), quoting Meta, Facebook Live, available at https://www.facebook.com/formedia/solutions/facebook-live (last visited July 29, 2022). This feature allows users to livestream directly to the social network platform and allows viewers to comment or otherwise react to the stream. A recording of the video will be posted to the user's page or profile and can be viewed later. See *United States* v. *Westley*, Docket No. 3:17-CR-171 (MPS), 2018 WL 3448161, *4 n.2 (D. Conn. July 17, 2018) ("Facebook Live is a feature provided by Facebook that allows users to share live video with their followers and friends on Facebook. After the live video ends, the video is published to the user's profile so that the user's Facebook friends can watch it at a later time.").

court's factual findings are supported by substantial evidence. . . . [When] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Brown*, 331 Conn. 258, 271–72, 202 A.3d 1003 (2019). Additionally, "[w]hether the trial court properly found that the facts submitted were enough to support a finding of probable cause is a question of law. . . . The trial court's determination on [that] issue, therefore, is subject to plenary review on appeal." (Internal quotation marks omitted.) *State* v. *Buddhu*, 264 Conn. 449, 459, 825 A.2d 48 (2003), cert. denied, 541 U.S. 1030, 124 S. Ct. 2106, 158 L. Ed. 2d 712 (2004).

Furthermore, the governing law guiding our probable cause analysis is well established. "Both the fourth amendment to the United States constitution and article first, § 7, of the Connecticut constitution prohibit the issuance of a search warrant in the absence of probable cause. . . . Probable cause to search is established if there is probable cause to believe that (1) . . . the particular items sought to be seized are connected with criminal activity or will assist in a particular . . . conviction . . . and (2) . . . the items sought to be seized will be found in the place to be searched. . . . There is no uniform formula to determine probable cause—it is not readily, or even usefully, reduced to a neat set of legal rules—rather, it turns on the assessment of probabilities in particular factual contexts . . . . Probable cause requires less than proof by a preponderance of the evidence . . . . There need be only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause . . . . [T]he relevant

inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts. . . . The task of the issuing [judge] is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." (Citations omitted; internal quotation marks omitted.) *State* v. *Sawyer*, 335 Conn. 29, 37–38, 225 A.3d 668 (2020).

"In our review of whether there was probable cause to support the warrant, we may consider only the information that was actually before the issuing judge . . . and the reasonable inferences to be drawn therefrom. . . . The judge is entitled to rely on his own common sense and the dictates of common experience, although the standard for determining probable cause is an objective one. . . . We review the issuance of a warrant with deference to the reasonable inferences that the issuing judge could have and did draw . . . and . . . uphold the validity of [the] warrant . . . [if] the affidavit at issue presented a substantial factual basis for the [judge's] conclusion that probable cause existed." (Citations omitted; internal quotation marks omitted.) Id., 38.

The question before us is whether, based on the totality of the circumstances described in the affidavit and the reasonable inferences drawn therefrom, the issuing judge reasonably could have concluded that there was probable cause to believe that evidence of aggravated assault would be found in the defendant's cell phone. We do not believe that the affidavit reasonably supports such a conclusion.

The trial court determined that there was adequate probable cause because the defendant was arrested along with Gantt when officers apprehended them in the stolen Camry that was taken during the Norwalk

robbery of Chen and that was used during the arson of the Forester and the shootings of Flemming in Stamford, both on High Street and in the West Main Street store. The trial court also based its conclusion on the fact that the same gun had been used during all of these incidents. Finally, the trial court referenced the Stamford Police Department's knowledge that the defendant and Gantt had engaged in a discussion with one another on Facebook Live.

We conclude that the trial court incorrectly determined that the warrant affidavit contained sufficient facts on which to base a finding of probable cause to search the defendant's cell phone. The facts contained in the warrant affidavit were not sufficient to allow the judge issuing the warrant reasonably to conclude that probable cause existed to believe that evidence of the crime of aggravated assault, which occurred during a robbery on January 14, 2017, would be found on the defendant's cell phone seized on January 25.

First, we note that the facts relating to the defendant in the affidavit are sparse. The averments contained therein show only that the defendant happened to be inside of a stolen vehicle with Gantt, in a different city, several days after the crimes against both Chen and Flemming. Although the warrant affidavit describes in detail the robbery of Huang, the robbery and shooting of Chen, the theft of the Camry, the arson of the Forester, the shootings of Flemming, and Gantt's role in those crimes, it did not mention the defendant's involvement in or connection to those offenses. The only mention of the defendant in the affidavit was in two paragraphs at the end, which stated that he was arrested as the front passenger in the vehicle stolen during the Chen robbery and shooting, and that he was charged with larceny and interfering with an officer. The last paragraph notes that the defendant was in possession of two cell phones, which were taken into evidence,

and that he had been seen on a posted Facebook Live video having a conversation with Gantt at some unknown time and location prior to his arrest in Bridgeport. There was no information in the warrant about the content of that Facebook Live video and its connection or relationship to any of the events leading up to the defendant's arrest.[10] Unlike the information contained in the warrant describing the video of Gantt pumping gas into the Forester and a reliable confidential informant's identification of Gantt from that video, there is no mention or description of the defendant or his connection to those offenses. These facts, in and of themselves, fail to establish a nexus between the defendant and the alleged crime of aggravated assault. See *Warden* v. *Hayden*, 387 U.S. 294, 307, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967) (there must be a "nexus . . . between the item to be seized and criminal behavior").

Moreover, the defendant's Samsung cell phone was likewise never tied to the crime of aggravated assault. There must be more than just probable cause that a crime has been committed; there must also be, within the four corners of the affidavit, facts adequate for a judicial officer to form a reasonable belief that evidence of that crime will be found in a particular place. See, e.g., *State* v. *Colon*, 230 Conn. 24, 34, 644 A.2d 877 (1994)

[10] A recorded Facebook Live video of Gantt and the defendant was introduced at trial. Because the warrant lacks any detail about the Facebook Live video, it is not clear whether the warrant referred to the same video that was ultimately admitted into evidence. At trial, the state offered a recording of a Facebook Live video posted on Gantt's Facebook page, which depicts Gantt and the defendant walking together in Bridgeport within an hour of the shooting of Flemming. In that video, Gantt and the defendant are singing and speaking to a virtual audience. Officer Nicholas Gentz, who was monitoring Gantt's Facebook account shortly after the shooting of Flemming, testified about the content of the posting and his knowledge of the feud between the victim and the defendant's group. On the basis of his expertise and knowledge, he explained that Gantt and the defendant were talking about having been with the opposing group, or their "ops," and having done something to them.

("the information to establish probable cause must be found within the affidavit's four corners"). Other than his presence in the stolen Camry eleven days after the crime, nothing in the warrant affidavit suggested that the defendant was present during the robbery and shooting of Chen, that he used the cell phone during the planning or commission of the aggravated assault, or that he possessed the cell phone at the time of the offense. The warrant application asserts that the Samsung cell phone "constitute[d] evidence" of aggravated assault, but the affidavit attached to it gives no description of how that cell phone was itself evidence of the crime, connected to the crime, or otherwise contained evidence of the crime.[11] For the foregoing reasons, we conclude that the warrant to search the defendant's cell phone was not supported by probable cause.

B

Even if we were to determine that sufficient probable cause existed to search the defendant's cell phone, we would also agree with the defendant that the cell phone warrant would fail for lack of particularity of the places to be searched and the things to be seized.

[11] Such affidavits should generally contain, at a minimum, a description of the device's role in the offense and a summary of the relevant technology. See, e.g., Regional Computer Forensic Laboratory, Cellphone (Mobile Device) Search Warrant Affidavit (July 17, 2018) pp. 2, 4–5, available at https://www.rcfl.gov/north-texas/documents-forms/sample_app_mobile_device.pdf (last visited July 29, 2022). That statement would necessarily describe whether the electronic device was evidence of a crime, contraband, or an instrumentality of the crime in and of itself, and/or whether it contained data falling within one of those descriptions. Id., pp. 4–5. When appropriate and accurate, a law enforcement officer may state that such devices are frequently used by persons engaged in the particular type of criminal conduct alleged. Id., p. 5; see also, e.g., *State* v. *Sayles*, 202 Conn. App. 736, 764, 246 A.3d 1010 (probable cause to seize cell phone was partially based on police officer's general knowledge that coconspirators "often communicate with one another via cell phone, and that these devices may contain evidence that can connect a person to a crime, such as call logs, text messages and GPS data"), cert. granted, 336 Conn. 929, 247 A.3d 578 (2021).

The standard of review for whether a warrant satisfies the particularity requirement of the fourth amendment to the United States constitution is well established. "Whether a warrant is sufficiently particular to pass constitutional scrutiny presents a question of law that we decide de novo." (Internal quotation marks omitted.) *State* v. *Buddhu*, supra, 264 Conn. 467. A search warrant satisfies the fourth amendment's particularity requirement "if it identifies the place or thing for which there is probable cause to search with sufficient definiteness to preclude indiscriminate searches." Id., 458–59. Further, "[t]he particularity requirement has three components. First, a warrant must identify the specific offense for which the police have established probable cause. . . . Second, a warrant must describe the place to be searched. . . . Third, the warrant must specify the items to be seized by their relation to the designated crimes." (Citations omitted; footnote omitted; internal quotation marks omitted.) *United States* v. *Galpin*, 720 F.3d 436, 445–46 (2d Cir. 2013).

In the present case, the trial court found that the cell phone warrant was particular because it was "as specific as it could be" when it asked for a full data extraction and identified the cell phone to be searched as a "Samsung color white" with the associated serial number. We disagree that this was enough to satisfy the fourth amendment's particularity requirement.

The United States Supreme Court has stated that "[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." *Riley* v. *California*, 573 U.S. 373, 393, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). Indeed, the court in *Riley* noted that "nearly [three quarters] of smart phone users report being within five feet of their phones most of the time, with 12 [percent] admitting that they even use their phones in the shower. . . . [I]t is no exaggeration to say that many of the more

than 90 [percent] of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate." (Citations omitted.) Id., 395. The court in *Riley* further described how the quantitative and qualitative differences in electronic devices include the "immense storage capacity" of cell phones; id., 393; their "ability to store many different types of information"; id., 394; their functioning as "a digital record of nearly every aspect of their [owners'] lives"; id., 395; and their ability to "access data located elsewhere . . . ." Id., 397. Industry studies conducted by the Cellular Telecommunications Industry Association (CTIA) indicate that reliance on wireless technology, including mobile devices, increases yearly.[12] Given the privacy interests at stake in a search of a cell phone, as acknowledged in *Riley* and confirmed by the CTIA annual survey, the fourth amendment's particularity requirement must be respected in connection with the breadth of a permissible search of the contents of a cell phone. Accordingly, we conclude that a warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search.

In this case, the cell phone warrant was defective for failing to meet the particularity requirement of the

[12] According to the CTIA's 2021 annual survey, the trend of pervasive cell phone use continues to increase. Indeed, "American consumers have continued to use wireless networks to stay connected, especially while social distancing—we exchanged over 119 billion more messages last year, for a total of 2.2 trillion SMS and MMS messages, driven by a 28 [percent] increase in GIFs, memes, videos, and other MMS messages. Voice traffic saw 2.9 trillion minutes of use." CTIA, 2021 Annual Survey Highlights (July 27, 2021), available at https://www.ctia.org/news/2021-annual-survey-highlights (last visited July 29, 2022). The same report also noted that "[m]obile wireless data traffic had another record year, topping 42 trillion [megabytes]—a 208 [percent] increase since 2016. Over the past decade, Americans have driven a 108 [times] increase in mobile data traffic." Id.

fourth amendment. The warrant not only failed to connect the defendant to the crime of aggravated assault and to establish the probable cause to believe that his cell phone would contain evidence of that crime, it also failed to provide the type of information sought by its authorization. The warrant authorized a search of a "data extraction," which allowed for a search of the entire contents of the cell phone. The warrant failed to list types of data this particular device or cell phones in general contain, and the types of data on the phone the affiants sought to search and seize, such as cell phone call logs, text messages, voice messages, photographs, videos, communications via social media, or other evidence of the crime of aggravated assault.[13]

[13] During oral argument, the state acknowledged that a team had been developing protocols to provide law enforcement with guidance on particularity requirements for cell phone warrants. Additional guidance available to law enforcement recommends that warrants contain information about the "exact brand and model of the device," if they are known, and "tailor a description of its specific capabilities," and indicates that such "information is [often] available from the manufacturer or [online]." See, e.g., Regional Computer Forensic Laboratory, Cellphone (Mobile Device) Search Warrant Affidavit (July 17, 2018) p. 2, available at https://www.rcfl.gov/north-texas/documents-forms/sample_app_mobile_device.pdf (last visited July 29, 2022). If the specific identity of the cellular device is not available, there are generic descriptions that can be used to describe the typical capabilities of cell phones. See id., pp. 2–3 (The use of the following generic description is suggested "as necessary depending on [the] target of warrant . . . [for a cell phone] . . . . A [cell phone] or mobile telephone is a handheld wireless device used primarily for voice communication through radio signals. These telephones send signals through networks of transmitter/receivers called 'cells,' enabling communication with other [cell phones] or traditional 'land line' telephones. A [cell phone] usually includes a 'call log,' which records the telephone number, date, and time of calls made to and from the phone. . . . In addition to enabling voice communications, [cell phones] now offer a broad range of capabilities. These capabilities include, but are not limited to: storing names and phone numbers in electronic 'address books;' sending, receiving, and storing text messages and [e-mail]; taking, sending, receiving, and storing still photographs and moving video; storing and playing back audio files; storing dates, appointments, and other information on personal calendars; and accessing and downloading information from the Internet. [Cell phones] may also include global positioning system . . . technology for determining the location of the device.").

Further, it included no time parameters to cabin the scope of the search but, rather, allowed for the entire contents of the phone to be searched for all time. See, e.g., *United States* v. *Wey*, 256 F. Supp. 3d 355, 387–88 (S.D.N.Y. 2017) (warrants failed, in part, because they did not contain "any relevant [time frame] or dates of interest"). Thus, we conclude that the search warrant did not comply with the particularity requirement because it did not sufficiently limit the search of the contents of the cell phone by description of the areas within the cell phone to be searched, or by a time frame reasonably related to the crimes. Therefore, the trial court improperly denied the defendant's motion to suppress the evidence obtained with respect to the cell phone search warrant.

II

We turn now to the defendant's second claim that the trial court improperly denied his motion to suppress evidence obtained pursuant to a search warrant of his T-Mobile phone records because the warrant was not supported by probable cause and did not particularly describe the places to be searched and the things to be seized. As with the first warrant, we agree with the defendant that this second warrant also was not supported by probable cause, but we lack sufficient information to determine whether the second warrant was sufficiently particular.

The following additional undisputed facts and procedural history are relevant to our consideration of this claim. On September 19, 2018, the court issued a search warrant for various records from T-Mobile, the mobile service provider associated with the defendant's Samsung phone. This warrant was served on and records were obtained from T-Mobile.

Pursuant to this warrant, Stamford police officers requested to search and seize phone records associated

with the defendant's "white Samsung cell phone" between January 7, 2017, at 11:59 p.m., and January 25, 2017, at 11:59 p.m. The warrant identified various categories of information sought, including "subscriber information, [cell phone] information, including call records of incoming and outgoing calls, SMS text messages, [e-mail] information and messages, social media messages, video recordings, digital images, voice mail recordings, GPS data, [g]eo-locator, and any other data/information stored on the [device], internal memory or removable storage media, and/or any data the [device] has access to through a cellular [n]etwork/[Wi-fi]/Bluetooth connection." The warrant further provided that the phone "is possessed, controlled, designed or intended for use or which is or has been or may be used as the means of committing the criminal offense of: [c]riminal [a]ttempt [at] [m]urder [§§] 53a-49/53a-54a."

The affidavit accompanying the warrant made the following factual assertions. During their investigation of the arson of the Forester, Stamford police officers learned that it had been stolen during a robbery in Bridgeport six days earlier. The affidavit then described how Stamford police officers were dispatched to a shooting at a convenience store on West Main Street where they found Flemming with a gunshot wound to his head. The affidavit further alleged that, "during the investigation of [those] crimes, [Gantt] and [the defendant] were developed as potential suspects" and were arrested in Bridgeport on January 25, 2017, "for unrelated crimes," larceny and interfering with a police officer by resisting arrest, resulting in the seizure of the defendant's cell phone. Next, the affidavit stated that, on February 17, 2017, "after an extensive investigation [that] included multiple search warrants and interviews, arrest warrants were applied for and eventually granted for both [Gantt and the defendant] for the shooting of [Flemming] on January 14, 2017." The affidavit then

provided that "the data requested may be of evidentiary value as it may assist with identifying the person/persons who shot [Flemming], the location of [the defendant] at the time of the shooting, and other crimes."

In denying the defendant's motion to suppress the evidence obtained from T-Mobile, the trial court concluded that the warrant affidavit set forth probable cause based on the defendant's and Gantt's being arrested together on January 25, 2017, the defendant's possession of two cell phones at that time, and the fact that the Camry and Forester were "connected with the Norwalk robbery and the Stamford shooting and robbery . . . ." With respect to particularity, the court noted that it was "specific as to the phone, phone number, dates . . . and the contents to be searched."

A

The applicable standard of review and governing law related to a probable cause analysis are the same as we iterated in part I A of this opinion. Therefore, we must determine whether, on the basis of the totality of the circumstances described in the affidavit and the reasonable inferences drawn therefrom, the issuing judge reasonably could have concluded that there was a substantial chance that evidence of the shooting of Flemming would be found in the defendant's phone records. We hold that the affidavit does not reasonably support such a conclusion.

We note that the warrant "must establish probable cause to believe" not only that an item of evidence "is likely to be found at the place to be searched"; *Groh* v. *Ramirez*, 540 U.S. 551, 568, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) (Kennedy, J., dissenting); but also that there is "a nexus . . . between the item to be seized and [the] criminal behavior." *Warden* v. *Hayden*, supra, 387 U.S. 307. As with the first warrant, nothing within the four corners of this affidavit connects the

defendant to the crime mentioned, attempted murder, or shows that his cell phone was either used during the commission of that crime or otherwise contained evidence of it. The affidavit fails to tie the defendant to the crime or even mention that multiple suspects were involved in the commission of the crime.

The trial court found probable cause on the basis of the defendant's arrest with Gantt, the defendant's possession of two cell phones during his arrest, and the fact that the "Toyota and the Subaru were connected with the Norwalk robbery and the Stamford shooting and robbery . . . ." However, this particular affidavit, unlike the affidavit filed in support of the first warrant, did not contain any information about the robberies of Huang or Chen. The eight paragraphs of the warrant on a single page referenced a vehicle fire and a carjacking but not the details contained in the first warrant. It also did not mention the fact that the defendant and Gantt were arrested together in possession of the stolen Camry. With regard to the offense for which the warrant was sought, the attempted murder of Flemming, the warrant contained a single paragraph indicating that the police had reported to a shooting in Stamford and the identity of the victim. Other than a conclusory statement that Gantt and the defendant were developed as suspects for the "said crimes" and that a judge had signed arrest warrants for both men in connection with the shooting of Flemming, there was no factual description of the defendant's role in or connection to the offenses that formed the basis for the arrest warrants. Although the affidavit contained information that the defendant was in possession of a Samsung cell phone with a T-Mobile phone number at the time of his arrest on January 25, 2017, it did not mention how that device was connected to, or otherwise contained evidence of, the offense of attempt to commit murder.

The state argues that, because the warrant affidavit refers to the signed arrest warrant of the defendant that was issued on facts sufficient to constitute probable cause that the defendant was involved in the shooting of Flemming, the judge issuing the search warrant was entitled to rely on the arrest warrant to establish probable cause. We disagree.

A determination of probable cause for an arrest requires different findings than a determination of probable cause for a search warrant. An arrest warrant requires a finding of probable cause that an offense was committed and that the defendant committed the offense. A search warrant requires a finding of probable cause that the particular items sought to be seized are connected to criminal activity or will assist in a particular conviction and that the items sought to be seized will be found in the place to be searched. "In the case of arrest, the conclusion concerns the guilt of the arrestee, whereas in the case of search warrants, the conclusions go [to] the connection of the items sought with crime and to their present location. This distinction is a critical one, and is particularly significant in search warrant cases, for it means that the probable cause determination in that context is a much more complex matter; the need to determine the probable present location of certain items, for example, gives rise to a question concerning the timeliness of the information which is not ordinarily a matter of concern in arrest cases." (Internal quotation marks omitted.) *State* v. *DeChamplain*, 179 Conn. 522, 529–30, 427 A.2d 1338 (1980); see also *State* v. *Heinz*, 193 Conn. 612, 624, 480 A.2d 452 (1984) ("[B]ecause arrests are inherently less apt to be intrusive than are searches, there is a difference in the constitutional standards by which probable cause to arrest and probable cause to search are measured. The probable cause determination in the context of arrest warrants requires inquiries that are less complex consti-

tutionally than are those that pertain to search warrants.") As we noted previously, "the information to establish probable cause must be found within the affidavit's four corners." *State* v. *Colon*, supra, 230 Conn. 34. The facts related to the defendant's arrest for attempted murder were not included in the search warrant affidavit; nor were the contents of the arrest warrant itself. As such, the search warrant did not contain the factual allegations and evidence that led to the defendant's arrest, which would have enabled the reviewing judge to determine whether those factual allegations would establish probable cause to believe that evidence of an attempted murder existed in the T-Mobile records relating to the defendant's Samsung cell phone. We conclude that the search warrant affidavit did not, on its own, contain enough information for the trial court to determine that probable cause existed for the search.

B

Next, even if probable cause had been established, the defendant contends that the T-Mobile records search warrant lacked particularity. Although this warrant is markedly different from the Samsung cell phone warrant, for the reasons stated hereinafter, we lack sufficient information to assess the validity of this claim.

The standard of review and governing law for the particularity of a search warrant are detailed previously in part I B of this opinion. Unlike the first warrant, the T-Mobile search warrant particularly described the types of places to be searched and, more specifically, the phone records associated with a "white Samsung cell phone" with the defendant's phone number. Both the warrant and the incorporated affidavit list the crime under investigation—the attempted murder of Flemming—and that the sought after data would assist the investigation.

Importantly, the search warrant requested records only for a limited duration that were reasonably connected to the attempted murder on January 19, 2017. Specifically, the warrant requested such records for between January 7, 2017, at 11:59 p.m., and January 25, 2017, at 11:59 p.m. These dates correlate to approximately one day before the Huang robbery up until the date the defendant was arrested. Additionally, the warrant identified a specific list of items to be searched and seized, including "call records of incoming and outgoing calls, SMS text messages, [e-mail] information and messages, social media messages, video recordings, digital images, voice mail recordings, GPS data, [g]eolocator, and any other data/information stored on the [device], [i]nternal memory or removable storage media, and/or any data the [device] has access to through a cellular [n]etwork/[Wi-Fi]/Bluetooth connection." These descriptions and time limitation are more likely to satisfy the fourth amendment's particularly requirement. However, given the lack of information in the affidavit relating to the defendant's role in the offense and the device's role in the commission of the offense to establish probable cause to believe that the T-Mobile records would contain evidence of the crime, we are unable to assess the sufficiency of the particularity requirement as it relates to this warrant.

III

The state next argues that, even if both warrants were improper, any resulting error was harmless. We agree with the state that any error was harmless with respect to the charges concerning the robbery of Huang, the shooting of Flemming, and interfering with an officer. We also conclude, however, that the error was harmful with respect to the charges concerning the robbery and shooting of Chen, the related larceny of the Camry, and the charges related to the arson of the Forester.

We begin with the applicable standard of review. "It is well settled that constitutional search and seizure violations are not structural improprieties requiring reversal, but rather, are subject to harmless error analysis. . . . The harmlessness of an error depends [on] its impact on the trier and the result . . . and the test is whether there is a reasonable possibility that the improperly admitted evidence contributed to the conviction. . . . In determining whether illegally obtained evidence is likely to have contributed to the defendant's conviction, we review the record to determine, for example, whether properly admitted evidence is overwhelming or whether the illegally obtained evidence is cumulative of properly admitted evidence. . . . Simply stated, we look to see whether it is clear beyond a reasonable doubt that the outcome would not have been altered had the illegally obtained evidence not been admitted." (Citations omitted; internal quotation marks omitted.) *State* v. *Esarey*, 308 Conn. 819, 832, 67 A.3d 1001 (2013).

The following evidence was introduced at trial from the Samsung cell phone data extraction search warrant: (1) an extraction summary generated by Cellebrite[14] revealing information such as the cell phone's number and the Facebook account linked to the cell phone;[15] (2) a multimedia message service (MMS) message sent by Gantt to the defendant at 3:11 p.m. on January 22, 2017, which contained an attached photograph of Gantt inside the Shell gas station that the Norwalk police had disseminated to the public in an effort to identify Chen's assailant and the person who set fire to the Forester; (3) a text message sent on January 16, 2017, from the

[14] Cellebrite software was used to extract data from the defendant's cell phone and categorized it into separate "container file[s]" by placing, for example, text messages into a text messages folder and call logs into a call logs folder. Once the data is categorized, the police can then search the files to "see what's on the phone."

[15] A Facebook account for "Shellz Row" was linked to the phone.

defendant to Gantt in which the defendant told Gantt to watch a report on the news about a robbery and shooting on Rolling Lane (the scene of the Chen shooting); and (4) a text message conversation between the defendant and Gantt that occurred between 6:58 a.m. and 3:52 p.m. on January 14, 2017. In the January 14 conversation, the defendant and Gantt expressed their admiration for one another, and the defendant asked Gantt to "beat the life" out of someone. Gantt also stated, "I'm going to jail," and Gantt made a reference to being in the Milla Death Row gang.

With respect to the search warrant for the records from T-Mobile, the evidence introduced at trial comprised records from T-Mobile that included the dates and times of calls and text messages made from or received by the defendant's cell phone, and the locations of the cell towers utilized by the cell phone. The call records from the defendant's cell phone were provided to James Wines, a special agent within the Federal Bureau of Investigation. Through historical cell site analysis, Wines created a report plotting the approximate location of cell towers and the defendant's cell phone around the times of the various crimes. Wines' report revealed that the defendant's cell phone activated near the scene of the Chen robbery and shooting in Norwalk, the drive-by shooting and attempted murder of Flemming in Stamford, and the flight from the police officers in Bridgeport. The cell phone did not, however, activate near the scenes of either the Huang robbery in Norwalk or the arson of the Forester in Stamford.

In determining whether an error is harmless beyond a reasonable doubt, various factors are considered, including the importance of the evidence, whether such evidence was cumulative of other evidence, the extent of cross-examination addressing such evidence, and the overall strength of the state's case. See, e.g., *State* v.

Armadore, 338 Conn. 407, 437, 258 A.3d 601 (2021). To determine whether the evidence obtained from the warrants was cumulative and to evaluate the strength of the state's case against the defendant, we must examine the other evidence admitted at trial.

The state called a cooperating witness, Parker, who testified that he personally observed and participated in the Huang robbery in Norwalk, the drive-by shooting, and the subsequent shooting of Flemming in the convenience store. Parker, however, was not present at and did not testify about the Chen robbery or the arson of the Forester. Parker identified the defendant's role in the robberies and the shootings for which Parker was present. Parker testified that he had served as the getaway driver during the Huang robbery, while Gantt and the defendant committed the robbery, as the defendant was holding a .25 caliber gun. Parker also described the drive-by shooting targeting Flemming and identified the defendant as the one who shot Flemming. He testified that the defendant used the same .25 caliber gun that he had used to commit the robbery of Huang in both of the shooting incidents involving Flemming.

The state also introduced evidence of video footage from the evening Flemming was shot, in which Parker identifed the participants. One video from an apartment complex in Stamford shows Gantt, Parker, Ranero, and the defendant riding together in an elevator approximately one hour before the shooting of Flemming. In that video, the defendant can be seen wearing black shoes, black pants, a black hoodie, a black jacket that appears to have a zippered pocket on the left sleeve, and black gloves. The defendant is also wearing a black "skully,"[16] which was consistent with the black face

[16] Parker testified that a "skully" is a ski mask, which would cover the wearer's face, that can be rolled up into a hat that would not obscure the wearer's face. In the video footage from the elevator, the defendant is wearing his skully rolled up into a hat.

mask found on the defendant when he was arrested. The other people in the elevator were wearing clothing distinctive from that worn by the defendant. A second video introduced by the state depicts the West Main Street store where Flemming was shot. In that video, Flemming can be seen standing by the counter of the store and wearing pants with reflective stripes on them, which are also visible in a video the state introduced of Flemming running away from the drive-by shooting. The video depicts a man wearing black shoes, black pants, a black hoodie, a black jacket that appears to have a zippered pocket on the left sleeve, black gloves, and a black ski mask approaching Flemming and shooting him multiple times. In addition to Parker's testimony about the defendant's role as the shooter, the jury was presented with and able to compare the video of the defendant on the elevator with Parker and Gantt about one hour before the shooting with the video of the shooting of Flemming inside the store.

Finally, the state also introduced forensic evidence indicating that .25 caliber shell casings recovered from the scenes of the High Street and 417 West Main Street store shootings in Stamford were fired from the same firearm as shell casings recovered from the January 14, 2017 shooting of Chen in Norwalk.

To begin our analysis, we note that the evidence adduced by the state against the defendant with respect to the Huang robbery was principally derived from Parker's testimony. Neither the CSLI evidence from the defendant's cell phone service provider nor the data recovered from the search of the defendant's phone itself related to that particular offense. As such, we conclude that any error relating to the admission of that evidence was harmless with respect to the charges arising out of that incident.

Second, the video footage from the elevator and the shooting at the store corroborate Parker's testimony

related to the shooting of Flemming. See, e.g., *State* v. *Armadore*, supra, 338 Conn. 455–56 (witness' testimony was bolstered by corroborating evidence). The clothing the defendant wore in the elevator was identical to the clothing worn by Flemming's shooter only one hour later. Parker's testimony was further corroborated by the video of Flemming running away from the drive-by shooting. Parker testified that he and the other occupants of the Camry were able to identify Flemming the night of the shooting by the "reflectors on his sweatpants . . . ." The video evidence clearly shows Flemming wearing clothing matching that description, giving credence to Parker's testimony about the events that evening.

Further, the state established a motive for the shootings by introducing evidence that the Milla Death Row gang, of which the defendant was a member, had a "beef" with Flemming. Therefore, we conclude that the state has met its burden of establishing that the trial court's admission of the evidence obtained from the two search warrants, including the CSLI and the data extracted from the cell phone, was harmless beyond a reasonable doubt with respect to the shootings of Flemming.

Third, the charge of interfering with an officer, in connection with events that had occurred on January 25, 2017, was clearly unaffected by the search warrants because Stamford police officers discovered the defendant as a passenger in the stolen Camry and witnessed him attempt to evade police capture. Moreover, the defendant's fingerprints were discovered on the right rear passenger door of the Camry. It is highly unlikely that the defendant's CSLI putting him in the area where the stolen Camry was stopped would have affected the jury's decision with respect to the charge of interfering with an officer in light of the fact that the police apprehended him after he exited that car.

On the other hand, we find that, insofar as the CSLI was the only evidence placing the defendant at the scene of the Chen robbery and assault, the state has not met its burden of proving that the admission of that evidence was harmless beyond a reasonable doubt with respect to those crimes. Parker testified that he was not at the scene of the Chen robbery on January 14, 2017, and, thus, gave no account of who was present or what occurred. The CSLI is the key, if not the only evidence, placing the defendant at the scene of the Chen robbery, assault, and the subsequent arson of the Forester. The state claims that other evidence serves to prove that the defendant was involved in that scheme, including an argument that the scheme was almost identical to the Huang robbery, Chen's testimony that two perpetrators were involved, the fact that the shell casings were identical to those found at the scene of the Flemming shooting, and the fact that the defendant was found with Gantt in the stolen Camry. Although those pieces of evidence could have influenced the jury's findings, the defendant's CSLI was the most concrete and direct evidence placing the defendant at the scene of those crimes. Accordingly, we cannot conclude that the jury's determination of guilt with respect to either the robbery and assault of Chen, or the subsequent larceny of the Camry, was uninfluenced by the CSLI evidence.

This same logic extends to the arson of the Forester. The evidence offered by the state at trial tends to show that the perpetrators of the crimes against Chen drove directly to the Shell gas station, then set the Forester ablaze. Although Parker was able to identify Gantt in the gas station video footage, there was no identification of the defendant in that video. The omission of the defendant's CSLI from the state's case significantly weakens the evidence tending to show that the defendant was at the scene of the Chen robbery and, thus,

also reduces the certainty that he was involved in the subsequent arson relating to the Forester.

For the foregoing reasons, we affirm the defendant's conviction of (1) robbery in the first degree and conspiracy to commit robbery in the first degree for the robbery of Huang in Norwalk on January 9, 2017, (2) two counts of attempt to commit murder and one count of conspiracy to commit murder for the January 19, 2017 shooting incidents in Stamford involving Flemming, and (3) interfering with an officer in connection with the defendant's flight from the police on January 25, 2017.

We also conclude, however, that the CSLI evidence from the service provider warrant was harmful with respect to the defendant's conviction of (1) robbery in the first degree, conspiracy to commit robbery in the first degree, and assault in the first degree for the robbery and shooting of Chen in Norwalk, (2) larceny in the third degree for the related theft of the Camry, and (3) arson in the second degree and conspiracy to commit arson in the second degree for the defendant's involvement with setting the Forester on fire.[17]

[17] In its brief, the state asserts that the present case should be remanded for a hearing on the inevitable discovery and independent source exceptions to the exclusionary rule. We disagree. Although it may be true that "much of the challenged information could have been obtained through search warrants for the codefendants' phones," that argument cannot logically be extended to the defendant's own CSLI. There was no testimony from Parker or other witnesses that placed the defendant with the codefendants on the date of or at the scene of the Chen robbery and assault, or the arson. Cf. *State* v. *Tyus*, 342 Conn. 784, 805, 272 A.3d 132 (2022) (CSLI of codefendant was admitted into evidence when defendant and codefendant admitted to being together entire evening during which crime was committed). The state's assertion that the Norwalk Police Department would have, at some indeterminate point in the future, obtained a lawful warrant in the course of its own investigation is likewise unavailing. Accepting such a bare argument, without more, would render the protections afforded by the warrant requirement largely illusory.

This court has, on occasion, remanded a case for a hearing related to the application of these exceptions in cases in which the trial court or the parties could not have raised a claim under those doctrines and they are raised for the first time on appeal. See, e.g., *State* v. *Correa*, 340 Conn. 619,

The judgment of conviction of robbery in the first degree, conspiracy to commit robbery in the first degree, and assault in the first degree in the case involving the robbery and shooting of Chen, and the judgment of conviction of arson in the second degree and conspiracy to commit arson in the second degree in the case involving the burning of the Forester are reversed, the judgment of conviction in the case involving the events of January 25, 2017, is reversed with respect to the conviction of larceny in the third degree, and the case is remanded for a new trial with respect to only those offenses; the judgment of conviction of two counts of attempt to commit murder and one count of conspiracy to commit murder in the case involving the shootings of Flemming and the judgment of conviction of robbery in the first degree and conspiracy to commit robbery in the first degree in the case involving the robbery of Huang are affirmed, and the judgment of conviction in the case involving the events of January 25, 2017, is affirmed with respect to the conviction of interfering with an officer.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* DEONDRE BOWDEN (SC 20488)

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

Syllabus

Convicted of numerous crimes, including felony murder, in connection with the shooting death of the victim, the defendant appealed to this court.

635–36, 639, 264 A.3d 894 (2021). The claim the state now raises, however, does not fall under the auspices of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). The state had an adequate opportunity to assert a factual basis for the applicability of these doctrines in responding to the defendant's motion to suppress the evidence that was obtained pursuant to the warrants. Its decision to forgo that opportunity obviates the need for a more limited remand.

Six days after the victim was found dead in a park with a gunshot wound to his head, the police stopped the defendant, who was driving the victim's missing vehicle, and found two of the victim's credit cards in the defendant's pocket. The defendant was arrested, and the police interviewed him and seized his cell phone. While incarcerated, the defendant asked his mother to dispose of the clothes that he was wearing on the night of the murder and asked his sister to dispose of a revolver that was stored at his grandmother's house. The police subsequently executed search warrants at the defendant's residence and his grandmother's house, where they recovered the clothing and the revolver, respectively. The police also obtained a search warrant to extract and search the data on the defendant's cell phone. Prior to trial, the defendant filed a motion to suppress the evidence obtained pursuant to that warrant. The trial court denied that motion, and, at trial, the state admitted evidence of call logs and text messages between the defendant and the victim, call logs and text messages between the defendant and another individual, B, and a photograph of a revolver. The defendant testified in his own defense, denying his involvement in the crimes and stating that, although he had been at the park with the victim, another individual, S, had shot the victim. S denied knowing the victim or being present at the park but testified that, because he did not own a cell phone, B occasionally let him use her phone. From the judgment of conviction, the defendant appealed to this court, claiming that the trial court improperly had denied his motion to suppress because the warrant authorizing the police to extract and search the contents of his cell phone lacked a particular description of the things to be seized and was not supported by probable cause. *Held* that the state satisfied its burden of demonstrating that any error with respect to the trial court's failure to suppress the evidence obtained pursuant to the search warrant was harmless, as such evidence either was not used by the state to implicate the defendant or was cumulative of other evidence, and, accordingly, this court affirmed the judgment of conviction: evidence regarding the phone calls and text messages between the victim's and the defendant's cell phones was otherwise available through the victim's cell phone records, which the police had obtained prior to interviewing the defendant, and the defendant admitted that those records accurately reflected the communications between them; moreover, even without those text messages, there was abundant video and testimonial evidence demonstrating that the defendant and the victim were together on the evening in question; furthermore, B's testimony about receiving certain text messages and phone calls from the defendant on the day in question rendered the evidence of those calls and messages cumulative, and the photograph of the revolver obtained from the defendant's cell phone was cumulative insofar as the revolver itself was introduced at trial; in addition, there was overwhelming evidence of the defendant's guilt, as the defendant was found driving the victim's car and in possession of his credit cards,

which the defendant had been using since the victim's murder, video and testimonial evidence established that the defendant and the victim were together on the evening of the murder, the defendant requested that his sister and mother dispose of incriminating physical evidence, which demonstrated the defendant's consciousness of guilt and undercut his assertion that he was not involved in the charged crimes, and the defendant displayed a consistent lack of credibility by providing several contradictory versions of the events and by acknowledging that he had lied to the police.

Argued February 16—officially released August 9, 2022

Procedural History

Substitute information, in the first case, charging the defendant with the crime of larceny in the third degree, and substitute information, in the second case, charging the defendant with the crimes of murder, felony murder, robbery in the first degree, carrying a pistol without a permit, stealing a firearm, and criminal possession of a pistol or revolver, brought to the Superior Court in the judicial district of Fairfield, where the court, *E. Richards*, *J.*, denied the defendant's motions to suppress certain evidence; thereafter, the cases were tried to the jury; verdicts of guilty of larceny in the third degree, the lesser included offense of manslaughter in the first degree with a firearm, felony murder, robbery in the first degree, carrying a pistol without a permit, stealing a firearm, and criminal possession of a pistol or revolver; subsequently, the court vacated the findings of guilty of manslaughter in the first degree with a firearm and larceny in the third degree and rendered judgment of guilty in the second case of felony murder, robbery in the first degree, carrying a pistol without a permit, stealing a firearm, and criminal possession of a pistol or revolver, from which the defendant appealed to this court. *Affirmed*.

Adele V. Patterson, senior assistant public defender, with whom was *Shanna P. Hugle*, assistant public defender, for the appellant (defendant).

Rocco A. Chiarenza, senior assistant state's attorney, with whom, on the brief, was *Joseph T. Corradino*, state's attorney, for the appellee (state).

Opinion

KAHN, J. The defendant, Deondre Bowden, appeals from the judgment of the trial court convicting him of felony murder in violation of General Statutes § 53a-54c, robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), carrying a pistol without a permit in violation of General Statutes § 29-35, stealing a firearm in violation of General Statutes § 53a-212 (a), and criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c (a) (1). On appeal, the defendant claims that the trial court's denial of his motion to suppress certain evidence from a search of his cell phone violated his rights under the fourth amendment to the United States constitution because (1) the application for the warrant authorizing that search lacked a particular description of the things to be seized,[1] and (2) the affidavit supporting that application failed to establish probable cause. The state disagrees with each of these claims and asserts, in the alternative, that any error was harmless. For the reasons that follow, we agree with the state that any error in the trial court's failure to suppress evidence obtained from the search warrant was harmless.[2] Accordingly, we affirm the judgment of the trial court.

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

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

[2] We note that this appeal raises the same issue regarding the particularity of cell phone warrants that was raised in *State* v. *Smith*, 344 Conn. 229, A.3d (2022), which we also decide today.

The following facts, which the jury reasonably could have found from the evidence admitted at trial, are relevant to our review of the defendant's claims. At approximately 9:25 p.m. on May 24, 2017, the police responded to a dispatch reporting "a victim [lying] in a roadway with blood everywhere" in the vicinity of Went Field Park in Bridgeport. The victim, who was later identified as LaWane Toles, was found with "a . . . large gunshot wound to his head" and was pronounced dead at the scene at 9:30 p.m.

During a subsequent investigation, the police determined that the victim's red Hyundai Sonata was missing and instructed officers to be on the lookout for that vehicle. At around 12:30 a.m. on May 30, 2017, Officer Victor Rodriguez noticed the Sonata being driven on Main Street in Bridgeport with its headlights turned off. Rodriguez called for backup and followed the Sonata until it stopped at an apartment building on Morgan Avenue. The defendant, the sole occupant of the Sonata, exited the vehicle and was placed under arrest for possessing a stolen motor vehicle. The defendant identified himself as Deondre Bowden.

Rodriguez searched the defendant following his arrest and found keys, a wallet, and two credit cards in his pocket. The wallet contained several items bearing the defendant's name, including his short-form birth certificate, social security card, health insurance card, official Connecticut state identification card, and bank card. The two credit cards in the defendant's pocket, however, bore the victim's name. When he saw the credit cards in the victim's name, Officer Robert Pascone, who had arrived at the scene as one of the backup officers, stated, "well, this isn't you." In response, the defendant stated, "I know this looks bad."

Rodriguez testified that, while he was transporting the defendant to the police department, the defendant

began to ramble, stating that he had received the car from his cousin, Dyshawn White, whom he said he had just dropped off at the train station. Police officers, upon investigation, were unable to locate any such individual. At the police department, the defendant gave a two and one-half hour long video recorded statement to the police, during which he offered several inconsistent accounts about both his familiarity with the victim and his whereabouts at the time of the crimes alleged.[3] At the end of this interview, the police seized the defendant's cell phone.

While the defendant was incarcerated at Bridgeport Correctional Center, his communications were monitored. Correctional authorities intercepted a letter in which the defendant informed his sister that "the thing [he] asked of [her] was/or is at [his grandmother's home] in [a] suitcase . . . ."[4] He also indicated in the letter that the suitcase was "[r]ed and [black]" and that "[t]he object [was] at the bottom in a [g]reen and white bag" and that he needed her to "check [out] that object . . . ." The police subsequently obtained a search warrant for the home of the defendant's grandmother in Norwalk and found a .44 Magnum Smith & Wesson revolver and two rounds of ammunition in two white and green plastic bags inside of a red and black suitcase.[5] During a subsequent investigation of the revolver, the police determined that it had been stolen from its original owner during a burglary on March 13, 2008.

[3] For example, the defendant gave several different versions of how he obtained possession of the Sonata, whether and how he knew the victim, and his whereabouts on the night of the murder. In addition, he first told the police that he did not know the victim, eventually admitted to knowing the victim for almost a decade, and finally admitted to being with the victim in Went Field Park immediately prior to the murder.

[4] During a phone call from jail, the defendant asked his mother not to disclose his grandmother's address to the police.

[5] An investigation into the revolver revealed that it was operable and had previously been fired.

Further investigation revealed that the defendant did not possess a pistol permit, despite having that revolver in his possession.

Dollett T. White, the medical examiner responsible for the victim's autopsy, discovered three bullet fragments in the victim's head. The bullet fragments contained two gray lead fragments from the bullet itself and a fragment from a copper jacket. At trial, Marshall Robinson, a firearm and tool mark examiner, testified that the fragments found in the victim's skull were insufficient to permit him to make a comparison and to determine whether those fragments were consistent with a bullet fired from the revolver found in the defendant's suitcase at his grandmother's house. There were no shell casings recovered from the scene of the shooting. The jury was also presented with evidence that one of two bullets discovered in the revolver that was found inside of the defendant's suitcase was a lead bullet with a copper jacket. Marshall Robinson also testified that bullets with copper jackets are commonly available.

During his incarceration, the defendant spoke to his mother on the phone, and, during that phone call, she told the defendant that the police were searching for his grey sweatpants and white T-shirt, the clothing the defendant had been wearing on the night of the victim's murder. In response, the defendant said "remember my . . . sweatpants . . . you know what the garbage can looks like," and "you know how to use it, right?" He then told his mother to "do that tomorrow." The police executed a search warrant at the defendant's residence on Morgan Avenue in Bridgeport and discovered a bag containing the defendant's clothing, as well as a debit card bearing the victim's name.

During the course of their investigation, the police also obtained a search warrant allowing them to conduct a data extraction to search all of the defendant's

cell phone data. The cell phone data revealed call logs andtext messages between the defendant's and the victim's phones, as well as call logs and text messages between the defendant and an individual named Antanesha Brantley. Finally, the cell phone data also contained a photograph showing the .44 Magnum Smith & Wesson revolver.

The defendant was ultimately charged with, among other crimes, murder in violation of General Statutes § 53a-54a (a), felony murder in violation of § 53a-54c, robbery in the first degree in violation of § 53a-134 (a) (2), carrying a pistol without a permit in violation of § 29-35, stealing a firearm in violation of § 53a-212 (a), and criminal possession of a pistol or revolver in violation of § 53a-217c (a) (1).

The defendant filed a pretrial motion to suppress evidence obtained in connection with the search warrant that authorized the police to extract and search the data on his cell phone. The warrant affidavit contained multiple paragraphs detailing the evidence against the defendant, including the facts that he was found inside of the victim's stolen car after the murder, was found with several of the victim's credit cards, and gave multiple, conflicting stories to the police with respect to how and when he obtained possession of the stolen car. The affidavit also averred that the defendant told the police he had been with the victim at Went Field Park on the evening of the murder and how he had communicated with the victim via his cell phone just prior to the murder. The warrant contained a request for data extraction of the cell phone, including "incoming and outgoing calls, text messages, communicating applications, call identifier lists, contact lists, address book, pictures, videos and any information relative to the user's location during calls." The trial court heard argument on the defendant's motion to suppress and denied it in an oral decision.

At trial, Michael Summers identified himself in a still photograph taken from private video surveillance footage on Morgan Avenue approximately fifteen minutes after the victim was shot. That image shows Summers and the defendant standing together outside of the victim's car. Summers testified that he had been with the defendant for only a short time that evening to smoke marijuana at the defendant's home. Summers stated that he did not know the victim and that he had not been to Went Field Park that evening. Summers also testified that he did not have a cell phone at the time but that, sometimes, Brantley, a friend of Summers, would let him use her phone.

After the close of the state's case-in-chief, the defendant testified in his own defense. He indicated that he spent time with the victim two to three times per week and that the victim was his drug dealer. The defendant stated that he had told Summers that he had a connection who could provide drugs and that Summers had indicated his desire to be informed the next time the victim was in town.

The defendant further testified that, on the day of the murder, the victim picked him up at around 4:45 p.m. According to the defendant, after a few hours, the two of them went to visit the victim's friends and family on Olive Street in Bridgeport. Video surveillance footage obtained from a nearby location depicted the defendant and the victim exiting the victim's car at approximately 8 p.m. The defendant testified that he eventually encountered Summers on Olive Street and that he, Summers, and the victim later left the area together in the victim's car.

The defendant testified that he, Summers, and the victim traveled to Went Field Park together and that, after they got there, he saw the victim get out of the car. The defendant told the jury that, as he was gathering

his own belongings to leave, he overheard Summers saying, "[y]o, one of your pockets," indicating that it was a robbery. The defendant testified that he then heard a gunshot, saw the victim lying in the road, and that Summers then said, "oh, shit . . . the shit just went off." The defendant said he saw a black and silver .380 Cobra gun in Summers' hand. The defendant stated that he and Summers then got into the victim's car and drove off. After returning to his home on the evening of the murder, the defendant removed his belongings from the Sonata before driving it to a nearby housing project, where he parked the car and wiped it down. Over the next few days, he went back to the housing project and continued using the car. He discovered the victim's credit cards in the car and used them to buy liquor and other goods. The defendant denied that the gun found in the suitcase at his grandmother's home had been used to kill the victim or that he was involved in either the robbery or the victim's death. Rather, he continued to maintain that Summers had shot the victim and that he had no involvement in the crimes.

Following trial, the jury found the defendant not guilty of murder but guilty of the lesser included offense of manslaughter in the first degree with a firearm. See General Statutes § 53a-55a. The jury also found the defendant guilty of, among other crimes, felony murder, robbery in the first degree, carrying a pistol without a permit, stealing a firearm, and criminal possession of a pistol or revolver.[6] The trial court subsequently rendered judgment of conviction and imposed a total effective sentence of fifty-five years of incarceration.

The defendant raises two claims in the present appeal, both related to the validity of the search warrant

[6] The trial court vacated the jury's finding of guilt on the charges of manslaughter in the first degree with a firearm and larceny in the third degree pursuant to *State* v. *Polanco*, 308 Conn. 242, 245, 61 A.3d 1084 (2013), and sentenced the defendant on the remaining counts of conviction.

authorizing the police to extract and search the contents of his cell phone. First, he claims that the trial court erred in denying his motion to suppress the evidence obtained pursuant to the warrant because the warrant lacked a particular description of the things to be seized. Second, he claims that the trial court also erred in denying his motion to suppress that same evidence because the warrant was not supported by probable cause. The state argues that there was no error in the denial of the defendant's motion to suppress and, in the alternative, that any error was harmless beyond a reasonable doubt. Because we ultimately agree with the state that the admission of the evidence from the cell phone was harmless beyond a reasonable doubt, we need not decide whether the trial court committed error. Although we need not reach the issue of the challenge to the particularity of the cell phone warrant in the present case, we recognize that this claim raises an important issue that was also raised in *State* v. *Smith*, 344 Conn. 229, A.3d (2022), which we also decide today.

We begin with the applicable standard of review. "Whether any error is harmless in a particular case depends [on] a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless [beyond a reasonable doubt]." (Internal quotation marks omitted.) *State* v. *Armadore*, 338 Conn. 407, 437, 258 A.3d 601 (2021). Thus, we begin

our analysis of harmlessness by placing the pieces of inadmissible evidence obtained from the defendant's cell phone in the context of the other evidence properly admitted at trial.

The evidence obtained from the defendant's cell phone data falls into five general categories. First, the state admitted evidence of twenty-two phone calls exchanged between the victim and the defendant. Second, there were approximately one hundred text messages exchanged between the victim's and the defendant's cell phones. Third, there were eleven phone calls exchanged between Brantley's and the defendant's cell phones. Fourth, there were thirty-one text messages exchanged between Brantley's and the defendant's cell phones. Finally, there was a photograph introduced into evidence from the defendant's cell phone, showing the .44 Magnum Smith & Wesson revolver. We address each of these in turn.

We first consider the log showing twenty-two phone calls made between the victim's and the defendant's cell phones. Even if the record of those phone calls may have had an impact on the jury, the police had already obtained the victim's cell phone records by the time the defendant was interviewed by the police. From the victim's records, the police had access to the call logs made between the victim's and defendant's phones. See *State* v. *Correa*, 340 Conn. 619, 667–68, 264 A.3d 894 (2021) ("[i]ndependent source . . . means that the tainted evidence was obtained, in fact, by a search untainted by illegal police activity" (internal quotation marks omitted)). The police showed the defendant the victim's call log records when they interviewed him. The defendant identified his cell phone number and admitted to the accuracy of the communications between himself and the victim. Thus, even if the defendant's cell phone records were excluded from evidence, the jury still would have heard evidence about the same

communications that were recovered from the victim's cell phone and the admissions of the defendant. Further, the same records were available from, and admissible through, the victim's cell phone records. Cf. *State* v. *Armadore*, supra, 338 Conn. 447 (defendant lacked standing to challenge evidence obtained from another individual's cell phone records).

The state's use of the text messages between the victim and the defendant was limited. The prosecutor asked the defendant about the text messages while he was testifying, particularly about certain references to drugs. The prosecutor also inquired about a series of text messages that seemed to indicate that the victim was picking up the defendant from his home on the day of the murder. Even without these communications, however, there was already abundant video and testimonial evidence showing that the defendant and the victim were together that evening. Specifically, video surveillance footage from Olive Street showed the defendant and the victim arriving together in the red Sonata to the gathering on that street on the evening of the murder. Further, two witnesses, who were in attendance at that gathering, testified that the defendant and the victim arrived together and stayed for less than one hour. The defendant also told the police, before they seized his cell phone, that he was with the victim at Went Field Park shortly before the victim was murdered. In addition, the content of the text messages suggested that the defendant and the victim had a positive relationship. Rather than being harmful to the defendant's case, the defense, in closing, actually used these text messages to establish that the defendant and victim were friends in order to suggest a lack of motive.

The state also introduced evidence from the defendant's cell phone showing eleven phone calls and thirty-one text messages between Brantley and the defendant. At trial, Brantley testified that she, at times, permitted

Summers to use her phone and that people would sometimes contact her to reach him. She also testified, however, that the last time she had seen Summers on the day of the victim's murder was around 2 p.m. Brantley testified about various phone calls and text messages that she exchanged with the defendant between 5 and 6 p.m. that day, during which the defendant asked Brantley to tell Summers that the defendant was with the victim.[7] Again, the defendant's proximity to the victim at the time of his death was undisputed at trial. Moreover, even if the records of those communications, which were stored on the defendant's cell phone, were excluded from evidence, Brantley was aware of the substance of those conversations and testified at trial about receiving those messages and calls from the defendant.

Finally, the state introduced a photograph of the .44 Magnum Smith & Wesson revolver obtained from the defendant's cell phone. The police had already found that specific firearm at the home of the defendant's grandmother after the defendant called his sister from prison and asked her to dispose of it. As such, the revolver itself was introduced at trial. As a result, that particular photograph was, in all relevant respects, clearly cumulative of other evidence presented at trial.

The cumulative and relatively insignificant nature of the evidence obtained from the defendant's cell phone must be viewed in contrast to all of the properly admitted evidence, which established a very strong case against him. The defendant was found inside of the victim's car and in possession of two of the victim's credit cards, which he had been using since the victim's murder. A subsequent search of the defendant's residence revealed an additional credit card bearing the

[7] Brantley testified that she never saw Summers that evening and that she did not deliver that message.

victim's name. Videos and testimony offered by the state at trial, including the defendant's own testimony, firmly established that the defendant and the victim were together on the evening of the murder. These facts are compelling, particularly when viewed in combination with the defendant's requests that his sister and mother dispose of various items of incriminating physical evidence—including the likely murder weapon stored at his grandmother's home.

The defendant's assertion that he was not involved in the crimes against the victim was also powerfully undercut by evidence demonstrating his consciousness of guilt. Most prominent, the defendant encouraged both his mother and his sister to throw away the clothing he had worn on the night of the victim's murder and to dispose of the revolver stored at his grandmother's home. See, e.g., *State* v. *Sivri*, 231 Conn. 115, 130, 646 A.2d 169 (1994) (attempted destruction of evidence showed consciousness of guilt). Further, the revolver that was recovered was the type of weapon that did not eject shell casings,[8] which was consistent with the lack of shell casings at the scene of the crime.

Finally, the defendant displayed a consistent lack of credibility by giving several contradictory versions of what happened on the evening in question. Initially, the defendant denied even knowing the victim, but, after giving many different versions of the events, he admitted that he was with the victim in Went Field Park on the evening of the murder. Although the defendant provided an account of the shooting that implicated Summers, the jury heard evidence of his prior inconsis-

[8] During his testimony, the defendant noted that a .380 Cobra pistol, like the one he claimed that Summers had used to shoot the victim, would have ejected a casing when fired. He acknowledged that a revolver, such as the one that was found in the suitcase at his grandmother's home, would not have ejected a casing when fired. We note that no casing or other ballistics evidence was found at the scene of the victim's murder.

tent statements. During his testimony, the defendant repeatedly acknowledged that he lied to the police.[9] By its verdict, the jury clearly did not credit the defendant's testimony denying involvement in the crimes.

The phone calls, text messages, and the photograph of the revolver were either not used by the state to implicate the defendant or were cumulative of other evidence, and, because the state presented overwhelming evidence demonstrating the defendant's guilt, we conclude that the state has met its burden of showing that any error by the trial court in denying the defendant's motion to suppress was harmless beyond a reasonable doubt.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* HAROLD PATTERSON (SC 20349)

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

Syllabus

Convicted of two counts of the crime of murder, the defendant appealed to this court. The defendant was a passenger in a car when the driver stopped to speak to two women on a street in the city of Hartford. When one of two men who had been walking behind the women told the occupants of the car to leave, the defendant shot both men. The police recovered spent cartridge casings at the scene, and, prior to trial, the state filed a motion seeking to present evidence of uncharged misconduct relating to two prior shootings on two different streets in Hartford in support of its claim that the defendant had possessed the means to cause the victims' deaths. Defense counsel objected, claiming that such evidence was inadmissible because it was irrelevant and more prejudicial than probative. The court ruled that the uncharged misconduct evidence was admissible to prove means and identity, but it limited the scope of the evidence to facts that connected the firearm used in

[9] The defendant candidly remarked during trial that it was not his "job" to tell the truth, especially when "it's going to harm [him] . . . ."

the prior shootings to the firearm used during the shooting of the two victims. At trial, the state presented the testimony of S and D, the officers who collected the fired bullets and cartridge casings following the prior shootings that formed the basis of the uncharged misconduct evidence, the testimony of L and W, friends of the defendant who identified him as the shooter in those prior shootings, and J, a firearms expert who testified, to a reasonable degree of scientific certainty, that the cartridge casings from the prior shootings and the murders of the victims were all from the same firearm. The court instructed the jury five times during the trial that the uncharged misconduct evidence was being admitted for the limited purposes of establishing that the defendant had the means to murder the victims and establishing the identity of the shooter of the victims. On appeal, the defendant claimed that the trial court improperly had admitted the evidence of uncharged misconduct because J's testimony was not relevant or material to identity, insofar as J's methodology was not scientifically reliable, and because the prejudicial effect of the prior misconduct evidence outweighed its probative value. *Held* that the trial court did not abuse its discretion in admitting the evidence of uncharged misconduct tying the firearm used in the prior shootings to the firearm used in the murders of the victims to prove that the defendant was the individual who shot the victims: the defendant's claim challenging the relevance of J's testimony in light of its lack of scientific reliability was unavailing, as the defendant's failure to request a hearing pursuant to *State* v. *Porter* (241 Conn. 57) deprived the trial court of the opportunity to assess J's methodology and, thus, the reliability of J's testimony, the defendant's claim on appeal represented an inappropriate effort to avoid the requirement that a challenge to scientific methodology must be raised at trial during a *Porter* hearing, and, in view of the broad definition of relevance, the trial court did not abuse its discretion in admitting J's ballistics evidence tying the prior shootings to the shooting of the victims to prove the identity of the shooter; moreover, any prejudicial effect from the uncharged misconduct evidence was outweighed by its probative value, as the facts of the prior shootings, which were clearly probative of means and identity, were less severe than the facts of the shooting of the victims, and the court limited the extent of the testimony of S and D to their response to the prior shootings and their collection of projectiles at the scene of those shootings, and the testimony of L and W to their witnessing of the defendant shoot a firearm at those locations, so as to ensure that the relevant facts were shorn of prejudicial and irrelevant detail and that the jury was not distracted by matters that were not pertinent to the charges; furthermore, the prior misconduct evidence was not merely cumulative of other evidence but highly probative, as it was the only evidence connecting the defendant directly to the firearm used to shoot the victims, and L's and W's testimony was critical to establishing the shooter's identity; in addition, the fact that the prior shootings occurred less than three months before

the shooting of the victims contributed to the probative value of the uncharged misconduct evidence, and the court instructed the jury no fewer than five times throughout the course of the trial regarding the limited purpose for which the uncharged misconduct evidence could be used.

Argued March 24—officially released August 9, 2022

Procedural History

Substitute information charging the defendant with two counts of the crime of murder, brought to the Superior Court in the judicial district of Hartford, where the court, *D'Addabbo*, *J.*, granted in part the defendant's motion to preclude certain evidence; thereafter, the case was tried to the jury before *Graham*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed*.

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *David L. Zagaja* and *John F. Fahey*, supervisory assistant state's attorneys, for the appellee (state).

Opinion

D'AURIA, J. The defendant, Harold Patterson, directly appeals from the judgment of conviction, rendered after a jury trial, of two counts of murder in violation of General Statutes § 53a-54a. He claims that the trial court abused its discretion in admitting evidence of uncharged misconduct, namely, two prior shootings involving the alleged murder weapon, to prove identity and means. We conclude that the trial court did not abuse its discretion by admitting the uncharged misconduct. Accordingly, we affirm the judgment of conviction.

The jury reasonably could have found the following facts. Early in the morning on August 25, 2008, the defendant and two friends, Willie Walker and Mark Mitchell, were driving in a white Nissan Maxima on Edwards Street in Hartford. Mitchell was driving, with the defendant in the front passenger seat and Walker sitting behind the defendant. The defendant and his friends saw two women walking on the street with two men trailing behind the women. Mitchell then pulled over to speak to the women. One of the men then walked up to the passenger window of the car and told the defendant and his friends to "get the fuck out of here." The defendant replied, "what you mean get the fuck out of here," pulled out a gun, and fired at the men. Mitchell immediately drove away and brought the defendant home.

At approximately 3:15 a.m., Hartford police responded to an emergency call reporting the shooting. Officers who arrived found the bodies of two victims, Carlos Ortiz and Lamar Gresham. Detective Argeo Diaz processed the scene and seized five spent nine millimeter cartridge casings and a copper bullet jacket. Diaz attended the victims' autopsies, where he took possession of a bullet fragment removed from the leg of one of the victims, a bullet removed from the same victim's arm, and a bullet removed from the second victim's chest. Both victims died of gunshot wounds to the chest, lung, and heart. The case went cold for a number of years until a new lead was brought to the attention of detectives with the cold case unit of the Division of Criminal Justice. The defendant was arrested and charged with the crimes in 2016.

Prior to trial, the state filed a motion seeking to present evidence of two prior shootings in Hartford. The state sought to admit evidence of a June 5, 2008 shooting on Acton Street, which resulted in the death of Raymond Hite, as well as evidence of a June 16, 2008 shoot-

ing on Mather Street, which resulted in bullets striking a building and a vehicle. Eyewitnesses from each shooting identified the defendant as the shooter, and an analysis of the casings collected from each shooting revealed that they were fired from the same gun used in the present case. The state offered these prior incidents to support its claim that the defendant possessed the instrumentality or means, as well as the specific intent, to cause the deaths of Ortiz and Gresham.[1]

Defense counsel timely objected to the state's motion, arguing that the trial court should preclude evidence of the uncharged misconduct. Specifically, counsel argued that the prior incidents "are not relevant or material to the issues of intent or means to the case at bar," that "the probative value of the evidence is substantially outweighed by the danger of undue prejudice," and that "admission of the evidence would be unduly cumulative, confusing and time-consuming, and would create distracting side issues that will complicate the main issues in the case at hand." Relying on *State* v. *Raynor*, 181 Conn. App. 760, 189 A.3d 652 (2018), rev'd, *State* v. *Raynor*, 337 Conn. 527, 254 A.3d 874 (2020), the defendant argued that, "[i]n . . . light of recent research on the validity of [ballistics] science, it is no longer appropriate to make absolute, unquestioned statements about what the ballistics findings were," and, therefore, admitting evidence of the prior shootings would be improper.

The trial court, *D'Addabbo*, *J.*, heard oral arguments and issued a preliminary ruling allowing evidence of

[1] Prior to trial, defense counsel alerted the trial court to a third prior shooting that occurred on August 9, 2008, involving the same gun. Two people were shot in the third prior shooting, neither of whom identified the defendant as the shooter. The state limited its direct examination of its firearms expert, Edward Jachimowicz, to the shootings on Mather Street and Acton Street, as those were the two shootings with eyewitnesses identifying the defendant as the shooter. Defense counsel cross-examined Jachimowicz on the third incident.

both prior shootings. The court ruled that the evidence was admissible to prove means and identity but inadmissible to prove intent. The court further limited the scope of the evidence of both shootings to facts "tying the gun to the case at hand." As to the Acton Street shooting, the court precluded testimony that the defendant shot and killed Hite. The court similarly limited evidence of the Mather Street shooting to show only "that a witness observed the defendant in possession of the firearm on that date and that he fired the firearm . . . ." The court also ruled that expert testimony that tied the casings from the prior shootings to the casings found at the Edwards Street shooting was admissible contingent on the state's introducing other evidence that tied the defendant to the prior shootings. The court stated that it would give limiting instructions to the jury when the state offered the uncharged misconduct evidence and that it would "revisit its ruling at the time of the offer and assess it in light of the evidence admitted and the positions of the part[ies]."

At trial, when it planned to offer evidence of the Mather Street shooting, the state asked the trial court, *Graham*, *J.*, to issue a final ruling on the uncharged misconduct evidence. Defense counsel objected to the "whole line of inquiry . . . ." The court adopted Judge D'Addabbo's preliminary ruling that evidence of the uncharged misconduct was admissible to prove means and identity, with the same limitations on the scope of the admissible evidence. Further, the court ruled that, until the state tied the casings from the prior shootings to the same gun that ejected the casings found on Edwards Street, the purpose of the evidence would be limited to proving means.

Prior to the state's offer of evidence of the Mather Street shooting, the trial court instructed the jury: "I anticipate [that] you will hear testimony to the effect that the defendant possessed and fired a firearm on

June 16, 2008, on Mather Street in Hartford. And, as to that evidence, the evidence is being admitted at this time solely to the extent it bears [on the defendant's] having [had] the means to commit the crimes on trial before you. That conduct . . . is not the subject of any criminal charge in this case, and it is not being admitted to prove the bad character of the defendant or any propensity by him to commit crimes. And you may not consider that evidence as establishing a predisposition on the part of [the defendant] to commit crimes or to demonstrate a criminal propensity to commit the crimes charged here."[2]

As to the Mather Street shooting, the state offered the testimony of Officer Brian Sulliman and Stephon Long, a friend of the defendant. Sulliman testified that, on June 16, 2008, at about 2:50 a.m., he responded to an emergency call regarding gunshots fired at a multiunit building on the corner of Mather and Brook Streets. From the scene, Sulliman collected one fired bullet from inside of a car parked in front of the building, one fired bullet from a bedroom in one of the units, and seven spent nine millimeter shell casings from outside of the building. Long testified that, on June 16, 2008, he drove the defendant's Dodge Durango to a building located on the corner of Mather and Brook Streets, where the defendant instructed him to stop. Long saw the defendant fire two or three gunshots at the building. Long believed that the gun was a semiautomatic but could not describe a specific model or the color of the gun. Immediately after Long testified, the trial court again instructed the jury that the evidence "was admitted solely to the extent it bears [on] the [defendant's] having [had] the means to commit the crimes on trial before you."

[2] Each of the trial court's limiting instructions was largely the same as this first instruction.

As to the Acton Street shooting, the state offered the testimony of Diaz and Walker. Diaz testified that, on June 5, 2008, he responded to an emergency call on Acton Street, where he located and seized two fired bullets, a copper bullet jacket, and three spent nine millimeter shell casings. Walker testified that, on June 5, 2008, he drove the defendant's Dodge Durango to Acton Street, where the defendant exited the vehicle and fired a gun. Walker did not know what type of gun the defendant fired but remembered that it was dark in color. Immediately after Walker's testimony, the trial court instructed the jury a third time that the evidence pertaining to the Acton Street shooting was "admitted solely to the extent it bears [on the defendant's] having [had] the means to commit the crimes on trial before you."

Edward Jachimowicz, the state's firearms expert, testified regarding the connection between the bullet casings found at all three shootings. Jachimowicz testified that, based on a microscopic examination and comparison, he concluded that all of the shell casings, bullets, and bullet fragments found at the Edwards Street shooting, where the victims in the present case were found, had been fired from the same semiautomatic weapon. Jachimowicz testified that he entered the shell casings into the NIBIN system,[3] which showed a suspected correlation to casings collected in three prior shootings. Jachimowicz compared the physical evidence from the prior shootings to the casings from the Edwards Street

[3] NIBIN stands for National Integrated Ballistic Information Network. NIBIN is a nationwide investigative system operated by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives that tracks firearms by the "microscopic marks that are left on bullets and fired cartridge cases." Jachimowicz explained that, when a casing is entered into the database, the program reads the marks on the fired cartridge case and assigns it a numerical value. When a similar casing comes in, the database checks it against the old casings and provides a suggestion to compare the casings.

shooting to verify the connection.[4] His opinion, to a reasonable degree of scientific certainty, was that all of the cartridge cases from the previous shootings and Edwards Street were from the same firearm. After Jachimowicz' testimony concluded, the court instructed the jury that the evidence matching the casings from the Edwards Street shooting to the Acton Street and Mather Street shootings was "admitted solely to the extent it bears [on] the identity of the person who committed the Edwards Street shootings." In its final charge, the court again instructed the jury that evidence of the Acton Street and Mather Street shootings was admitted "solely to the extent [the evidence] bear[s] [on the defendant's] having [had] the means to commit the crimes . . . and to the extent [the evidence] bear[s] [on] the identity of the person who shot [the victims]."[5]

[4] At the time of trial in 2018, the projectiles from the Mather Street shooting had been destroyed. The trial court overruled the defendant's objection to Jachimowicz' testimony that relied on these projectiles. The defendant does not raise any issue with this ruling on appeal.

[5] The trial court's entire instruction to the jury about evidence that had been admitted for a particular purpose or pertaining to the defendant's prior conduct was as follows: "Any testimony or evidence which I identified as being limited to a purpose, you will consider only as it relates to the limited purpose for which it was allowed, and you shall not consider such testimony and evidence in finding any other facts as to any other issue.

"The alleged conduct of the defendant on June 5, 2008, on Acton Street in Hartford and June 16, 2008, on Mather Street in Hartford [was] admitted for limited purposes, specifically, solely to the extent they bear [on] the [defendant's] having [had] the means to commit the crimes on trial before you and to the extent they bear [on] the identity of the person who shot Ortiz and Gresham. The court instructed you at that time, and does so again, that you could use that evidence to the extent that you find it should be given weight, only as to those issues and for no other purpose.

"The events of June 5 and June 16, 2008, are not the subject of any criminal charge in this case. This other conduct evidence is not being admitted to prove the bad character of the defendant or any propensity or criminal tendencies of the defendant. You may not consider this evidence as establishing a predisposition on the part of the defendant to commit crimes or a propensity to commit the crimes charged.

"You may consider such evidence if you believe it and further find that it logically, rationally and conclusively supports the issues for which it is being offered by the state, but only as it may bear on the issue of the identity

The jury returned a verdict of guilty on both counts, and the court sentenced the defendant to consecutive terms of fifty years of imprisonment on each count for a total effective sentence of 100 years.

On appeal, the defendant claims that the trial court abused its discretion by admitting evidence of uncharged misconduct. Specifically, he argues that (1) Jachimowicz' expert testimony was not relevant or material to identity, and (2) the probative value of the evidence was "vastly" outweighed by its prejudicial effect. The state responds that the defendant's relevancy claim was not preserved and is therefore unreviewable, and that the trial court did not abuse its discretion in determining that the probative value of the evidence outweighed its prejudicial effect.

"[A]s a general rule, evidence of prior misconduct is inadmissible to prove that a criminal defendant is guilty of the crime of which the defendant is accused. . . . Such evidence cannot be used to suggest that the defendant has a bad character or a propensity for criminal behavior." (Internal quotation marks omitted.) *State* v. *Raynor*, 337 Conn. 527, 561, 254 A.3d 874 (2020). This evidence may be admissible, however, for other purposes. "The well established exceptions to the general prohibition against the admission of uncharged misconduct are set forth in § 4-5 [c] of the Connecticut Code of Evidence, which provides in relevant part that [e]vidence of other crimes, wrongs or acts of a person is admissible . . . to prove intent, identity, malice,

of the person who committed the crimes charged here and/or as it may bear on the issue that the [defendant] had the means to commit the crimes charged here. . . .

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

motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony." (Internal quotation marks omitted.) Id., 561–62.

"We have developed a two part test to determine the admissibility of such evidence. First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions [set forth in § 4-5 (c) of the Connecticut Code of Evidence]. . . . Second, the probative value of the evidence must outweigh its prejudicial effect. . . . Because of the difficulties inherent in this balancing process, the trial court's decision will be reversed only whe[n] abuse of discretion is manifest or whe[n] an injustice appears to have been done. . . . On review by this court, therefore, every reasonable presumption should be given in favor of the trial court's ruling." (Footnote omitted; internal quotation marks omitted.) Id., 562.

The defendant argues that Jachimowicz' testimony connecting the Acton Street and Mather Street shootings to the Edwards Street shooting is not "unassailably relevant" to prove identity.[6] (Emphasis omitted.) Specifically, he argues that, because Jachimowicz' methodology was not scientifically reliable, his testimony failed to connect the two prior shootings to the shooting at issue to establish identity, and, thus, the prior shootings were irrelevant. The defendant concedes that whether Jachimowicz should have been able to testify as an expert in this case is not reviewable by this court, as he did not request a hearing at trial pursuant to *State* v. *Porter*, 241 Conn. 57, 81–90, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645

[6] The defendant does not challenge the relevance of the testimony of the four other witnesses who testified about the prior shootings. The defendant similarly does not challenge the trial court's admission of the evidence of prior misconduct as relevant to prove means.

(1998), and acknowledges that a *Porter* hearing "is the proper way to challenge the admissibility of an expert's opinion based on the validity of the methodology underlying that opinion." Instead, through his relevancy objection to the prior misconduct evidence, the defendant attempts to challenge on appeal Jachimowicz' testimony connecting the Mather Street and Acton Street shootings to the Edwards Street shooting.[7] Specifically, he asks this court to assess the relevancy of Jachimowicz' expert testimony in light of its lack of scientific reliability. This request represents an inappropriate effort to avoid the requirement that a challenge to scientific methodology must be raised at trial via a *Porter* hearing.

This court in *Porter* "followed the United States Supreme Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and held that testimony based on scientific evidence should be subjected to a flexible

[7] In its brief, the state argues that the defense never objected at trial to Jachimowicz' firearm identification testimony on the ground that it was not relevant to prove means or identity because the scientific validity of firearms identification was in doubt. We disagree. In his memorandum of law in opposition to the state's motion to admit prior misconduct evidence, the defendant argued that "the declaration that the prior incidents are relevant to show means and instrumentality may require much more evidence than the ballistics [expert's] simply stating it was the same firearm." The defendant relied on *State* v. *Raynor*, supra, 181 Conn. App. 760, and research challenging the validity of ballistics science to support his argument. At trial, prior to the admission of any evidence of prior misconduct, defense counsel renewed his objection to the "whole line of inquiry" into prior misconduct. Defense counsel again objected to the introduction of any evidence, including the analysis of the casings, related to the Mather Street shooting prior to Jachimowicz' testimony. Each time the state offered ballistics evidence as full exhibits, defense counsel responded that he had no objection that had not already been raised. Although we cannot now on appeal address any issues related to the scientific basis underlying Jachimowicz' expert opinion due to the defendant's failure to request a *Porter* hearing, the defendant did preserve his objection to the relevance of the ballistics testimony as it concerned uncharged misconduct.

test to determine the reliability of methods used to reach a particular conclusion. . . . A *Porter* analysis involves a two part inquiry that assesses the reliability and relevance of the witness' methods. . . . First, the party offering the expert testimony must show that the expert's methods for reaching his conclusion are reliable. . . . Second, the proposed scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered, and not simply be valid in the abstract. . . . Put another way, the proponent of scientific evidence must establish that the specific scientific testimony at issue is, in fact, derived from and based [on] . . . [scientifically reliable] methodology." (Internal quotation marks omitted.) *State* v. *Edwards*, 325 Conn. 97, 124, 156 A.3d 506 (2017).

As this court has made clear, a party's failure to request a *Porter* hearing "results in waiver of that claim and it will not be considered for the first time on appeal." (Internal quotation marks omitted.) *State* v. *Turner*, 334 Conn. 660, 678, 224 A.3d 129 (2020). It is improper for the defense to challenge the scientific methodology underlying an expert witness' opinion on appeal without a trial court's having ruled on the same matter, as a "trial judge . . . [should] serve as a 'gatekeeper' and make a preliminary assessment of the validity of scientific testimony . . . ." *State* v. *Porter*, supra, 241 Conn. 68. The question of whether evidence "casts sufficient doubt on the reliability of the methodology employed by the . . . expert [witness] . . . must be vested, in the first instance, in the sound discretion of the trial court." *State* v. *Raynor*, supra, 337 Conn. 542 n.7.[8] Because the defendant never asked for a *Porter*

[8] Nevertheless, the defendant improperly relies on our decision in *Raynor* to challenge whether Jachimowicz' testimony was relevant to the identity of the shooter in light of what he deems "new law" that "undermines the relevance that firearm and toolmark opinions may bear on establishing a shooter's identity." In *Raynor*, we held that the trial court abused its discretion by "deny[ing] the defendant's motion for a *Porter* hearing without considering the proffered evidence challenging the methodology supporting

hearing, the trial court did not have the opportunity to assess the expert's methodology and, therefore, its reliability. As such, the defendant cannot now on appeal succeed on a relevance challenge based on his contention that the evidence lacks scientific reliability to establish a link to the murder weapon.

Having concluded that it is improper for this court to assess the scientific reliability of Jachimowicz' testimony for the first time on appeal, we now turn to the general relevance of his testimony. When assessing the relevance of an expert witness' testimony, "[a] trial court retains broad discretion . . . ." (Internal quotation marks omitted.) Id., 554. "[S]uch testimony is admissible if the trial court determines that the expert is qualified and that the proffered testimony is relevant and would aid the jury." (Internal quotation marks omitted.) Id. "Within the law of evidence, relevance is a very broad concept. Evidence is relevant if it has *any* tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . Relevant evidence is evidence that has a logical tendency to aid the trier in the determination

toolmark and firearm analysis . . . ." *State* v. *Raynor*, supra, 337 Conn. 544. In doing so, we recognized, as the defendant notes, that "[s]cience . . . is not static . . . [and] [m]ethodologies are continually challenged and improved . . . ." Id., 543. This court did not, however, as the defendant contends, "undermine" the general relevance of firearm analysis. Our holding was limited to the trial court's denial of the defendant's request in *Raynor* that it conduct a *Porter* hearing. See id., 543–44. Because the defendant in the present case did not request a *Porter* hearing, his reliance on *Raynor* is misplaced.

Additionally, Jachimowicz did not, as the defendant argues, "make absolute, unquestioned statements" about his findings. Rather, Jachimowicz properly testified that his opinion was based on "a reasonable degree of scientific certainty . . . ." Although Jachimowicz' testimony may not have been dispositive of the shooter's identity, that is an issue "of degree rather than kind" and in no way makes his testimony inadmissible. *State* v. *Collins*, 299 Conn. 567, 587 n.19, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011).

of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, [as] long as it is not prejudicial or merely cumulative." (Emphasis altered; internal quotation marks omitted.) *State* v. *Collins*, 299 Conn. 567, 587 n.19, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011).

Given the broad definition of relevance, we conclude that the trial court did not abuse its discretion in admitting the ballistics evidence tying the prior shootings to the Edwards Street shooting to prove the identity of the shooter in this case. Indeed, in *Collins*, this court surveyed the decisions of a number of federal and state courts and found that a majority of them "rejected challenges . . . to the use of uncharged misconduct evidence in cases wherein the charged offenses were committed using the same gun that the defendant had utilized in prior shootings." Id., 590.

Having concluded that the trial court did not abuse its discretion in determining that Jachimowicz' testimony was relevant, we turn to the defendant's argument that the prejudicial effect of the evidence of prior misconduct outweighed its probative value. The defendant challenges all testimony related to the prior shootings, not only the expert testimony. He contends that the uncharged misconduct evidence admitted at trial was equally, if not more, severe than the charged crimes because, even though the jury did not hear that one of the prior shootings resulted in Hite's death, the uncharged misconduct still left the jury with the impression that the defendant drove around at night and shot at build-

ings unprovoked.[9] We disagree and conclude that any prejudicial effect of the uncharged misconduct was outweighed by the probative value of the evidence.

"In determining whether the prejudicial effect of otherwise relevant evidence outweighs its probative value, we consider whether: (1) . . . the facts offered may unduly arouse the [jurors'] emotions, hostility or sympathy, (2) . . . the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues, (3) . . . the evidence offered and the counterproof will consume an undue amount of time, and (4) . . . the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it." (Internal quotation marks omitted.) Id., 586–87.

We find significant the degree to which the trial court exercised its discretion to limit the extent of the evidence of the prior shootings it admitted. As to the Mather Street shooting, the court permitted Sulliman to testify only that he responded to a shots fired call on the corner of Mather and Brook Streets at about 2:50 a.m., where he collected one fired bullet from inside of a car parked in front of the building, one fired bullet in a bedroom of one of the units, and seven spent nine

[9] The defendant also argues that, because Jachimowicz' methodology lacked scientific validity, the state could not prove that the firearm involved in the uncharged shootings was the same firearm involved in the present case, thus making the prior misconduct evidence more prejudicial than probative given the tenuous tie between the shootings. As discussed, however, the defendant waived any *Porter* claim, and, thus, to the extent his unpreserved *Porter* claim masquerades as a claim of undue prejudice, we do not review it. Additionally, to the extent the defendant argues that the expert's testimony, even if relevant, was insufficient to establish a link between the shootings, our case law has established that the state does not have to connect the weapon directly to the defendant and the crime charged with absolute certainty. Rather, all that is necessary for the evidence to have probative value is that the state introduces some evidence to link the weapon to the defendant and the charged offense. See, e.g., *State* v. *Edwards*, supra, 325 Conn. 144–45.

millimeter shell casings outside of the building. The court did not permit Sulliman to testify whether anyone was in the bedroom or car where the bullets were found, or if anyone was injured in the shooting. Similarly, Long's testimony was limited to his having driven the defendant to a building on the corner of Mather and Brook Streets, where he witnessed the defendant fire two or three gunshots at the building. Long did not testify about the motive for the shooting or whether the defendant was shooting at a particular individual. Thus, the court took care to limit the impact of the prior misconduct testimony on the emotions of the jurors.

The court also limited evidence of the Acton Street shooting. Diaz' testimony was limited to his having responded to a shots fired call and having collected projectiles at the scene. Walker testified that he drove the defendant to Acton Street, where he witnessed the defendant exit the vehicle and fire a gun dark in color. The trial court did not allow Walker to testify about why he drove the defendant to Acton Street, which would have required a convoluted narrative involving more than five different individuals and multiple locations that would have likely confused the jury and distracted it from the main issue in the case. Most significantly, the court did not allow the state to introduce evidence that Hite was murdered in the Acton Street shooting, recognizing that such testimony could unfairly impact the emotions of the jurors. In limiting the evidence of the prior shootings, the court ensured that the relevant facts were shorn of prejudicial and irrelevant detail and that the jury was not distracted by the need to hold mini-trials regarding matters that were not pertinent to this case.[10]

[10] Additionally, the state repackaged the items of evidence from the Acton Street shooting in new bags because the labels on the original evidence bags identified them as homicide evidence. Although the state did not do this at the trial court's behest, it is a critical factor in assessing actual prejudice to the defendant.

The trial court's actions are significant because "the care with which the [trial] court weighed the evidence and devised measures for reducing its prejudicial effect militates against a finding of abuse of discretion." (Internal quotation marks omitted.) *State* v. *Beavers*, 290 Conn. 386, 406, 963 A.2d 956 (2009); see id., 406, 408 (by excluding "most egregious and prejudicial uncharged misconduct," trial court did not abuse its discretion when it admitted uncharged misconduct evidence); see also *State* v. *Blango*, 103 Conn. App. 100, 111, 927 A.2d 964 (trial court did not abuse its discretion by admitting uncharged misconduct evidence because evidence was limited to showing only that defendant displayed gun in separate incidents), cert. denied, 284 Conn. 919, 933 A.2d 721 (2007).

Because of the trial court's careful limits on the testimony, the evidence the jury heard about the Acton Street and Mather Street shootings, which was clearly probative of means and identity, was much less severe than the evidence of the Edwards Street murders. This court repeatedly has held that "[t]he prejudicial impact of uncharged misconduct evidence is assessed in light of its relative 'viciousness' in comparison with the charged conduct." *State* v. *Campbell*, 328 Conn. 444, 522–23, 180 A.3d 882 (2018). "The rationale behind this proposition is that the jurors' emotions are already aroused by the more severe crime of murder, for which the defendant is charged, and, thus, a less severe, uncharged crime is unlikely to arouse their emotions beyond that point." *State* v. *Raynor*, supra, 337 Conn. 563. In the present case, the jury heard that the defendant fired only three to four bullets in each of the prior shootings and heard no evidence that individuals were injured or killed. Comparatively, the defendant was charged with shooting and killing two people on Edwards Street. The facts of the two prior shootings are less severe, making it less likely that they aroused

the emotions of the jurors. See, e.g., *State* v. *Beavers*, supra, 290 Conn. 405 ("prior misconduct evidence admitted involved only the defendant's actual, claimed or threatened damage of property for personal gain, as compared to the charged crime in the . . . case, which contemplated [an] intentional killing"); *State* v. *Mooney*, 218 Conn. 85, 131, 588 A.2d 145 (seriousness of subsequent crime, larceny, paled in comparison to robbery and felony murder charges for which defendant was standing trial), cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991).

The defendant also argues that the uncharged misconduct evidence was highly prejudicial because of the similarities between the prior shootings and the Edwards Street shooting.[11] He contends that, because each shooting occurred at night, involved the defendant pulling up in a vehicle and firing multiple gunshots either out of the window or after getting out of the vehicle, and ended when he fled in the vehicle, the prior misconduct evidence was too similar to the charged conduct and, therefore, highly prejudicial. We conclude that the uncharged misconduct was not so similar as to have increased any prejudice to the point that it outweighed the probative value of the evidence. The jury heard testimony that the defendant shot at a building on Mather Street and fired gunshots on Acton Street but that, in the present case, two victims on Edwards Street were shot and killed.

The defendant nevertheless contends that the present case is analogous to *Raynor*, in which the defendant

[11] The defendant argues in part that the Acton Street shooting and the shooting in the present case are the same in that he "supposedly drove around and started firing his gun out on the street like a maniac." He attempts to support this contention with a quotation from the prosecutor's rebuttal closing argument to the jury characterizing the defendant as a "hothead . . . ." This argument does not hold water, as the prosecutor, in his rebuttal, was referring to the defendant's motive in the Edwards Street shooting at issue, not the prior misconduct.

was tried and convicted of murder. *State* v. *Raynor*, supra, 337 Conn. 529. At trial, the state offered evidence of a subsequent shooting in which the defendant allegedly used the same weapon. See id., 557–58. Specifically, the subsequent shooting and the charged crime in *Raynor* involved two victims, one male and one female who had been, or currently were, romantically involved and were shot at outside of their own homes at night, with dozens of gunshots having been fired. Id., 563. Unlike the situation in the present case, the subsequent shooting in *Raynor* was more similar to the charged crime with respect to location and the profile of the victims. Additionally, in *Raynor*, evidence of the uncharged shooting was introduced through the victim, who testified beyond the facts of the shooting itself. Id., 564. The victim of the uncharged shooting testified in detail about her feelings of fear during the shooting and her efforts to follow up with the police, in addition to facts outside the scope of the shooting that connected her son and the defendant. Id. This court emphasized how the victim's testimony greatly prejudiced the defendant. See id. Thus, *Raynor* is distinguishable from the present case.

"The question of whether the evidence is unduly prejudicial, however, does not turn solely on the relative severity of the uncharged misconduct. Instead, prejudice is assessed on a continuum—on which severity is a factor—but whether that prejudice is undue can only be determined when it is weighed against the probative value of the evidence." Id., 563. The evidence of the two prior shootings was highly probative in this case. The uncharged misconduct evidence was the only evidence connecting the defendant directly to the firearm used on Edwards Street. Walker's and Long's testimony tied the defendant to the two prior shootings, and Jachimowicz tied the gun from the prior shootings to the charged crimes. The firearm was never recovered in

this case, and the state's witnesses who were with the defendant on the night of the murder were unable to describe the weapon he used.[12] The uncharged misconduct evidence was critical in establishing the identity of the shooter in this case. Therefore, contrary to the defendant's contention, the prior misconduct evidence was not merely cumulative but, rather, was highly probative. Additionally, the two prior shootings occurred less than three months prior to the charged homicides. This temporal proximity contributed to the probative value of the evidence. See id., 566 n.24.

Finally, it is significant that the trial court instructed the jury no fewer than five times about the limited purpose for which the uncharged misconduct evidence could be used, stating that it was being admitted "solely to the extent it bears [on] the [defendant's] having [had] the means to commit the crimes on trial before you." The court gave that instruction on the following occasions: (1) prior to the state's presenting any uncharged misconduct evidence, (2) following Long's testimony regarding the Mather Street shooting, (3) following the testimony of Walker regarding the Acton Street shooting, (4) following the direct examination of Jachimowicz, and (5) in its final charge to the jury. As this court has held, limiting instructions "serve to minimize any prejudicial effect that . . . evidence [of prior misconduct] otherwise may have had . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *James G.*, 268 Conn. 382, 397–98, 844 A.2d 810 (2004).

Considering the manner in which the testimony was limited and the numerous cautionary instructions given to the jury, it is clear that the trial court did not abuse

[12] This is unlike *Raynor*, in which the trial court relied on the fact that a witness previously had identified the recovered murder weapon as the weapon the defendant had purchased prior to the murder and as the gun he used to commit the charged crime. See *State* v. *Raynor*, supra, 337 Conn. 565–66.

its discretion in admitting the uncharged misconduct evidence because the probative value of the evidence outweighed its prejudicial effect.

The judgment is affirmed.

In this opinion the other justices concurred.