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NORCOTT, J., with whom ZARELLA and VERTEFEUILLE, Js., join, concurring. For nearly 120 years since *State* v. *Fiske*, 63 Conn. 388, 392, 28 A. 572 (1893), Connecticut trial judges have had the discretion, subject to certain constitutional limitations, to instruct jurors that they may consider a criminal defendant's interest in the outcome of the case in determining the credence to be afforded to his testimony, culminating in the charge upheld in *State* v. *Williams*, 220 Conn. 385, 397, 599 A.2d 1053 (1991), and again challenged in this certified appeal. In part II of its opinion, the majority uses our supervisory authority over the administration of justice to overrule this extensive body of precedent sub silentio as it "direct[s] our trial courts in the future to refrain from instructing jurors, when a defendant testifies, that they may specifically consider the defendant's interest in the outcome of the case and the importance to him of the outcome of the trial." Because I respectfully disagree with the majority's rather summary use of the extraordinary remedy that is our supervisory power, I write separately to emphasize: (1) my agreement with the majority that the defendant's interest instruction given in this case[1] did not deprive the defendant, Rafael Medrano, of his right to be presumed innocent or his right to a fair trial under the United States constitution as interpreted by contemporary federal case law;[2] and (2) because of the confusion likely to be created by the majority's new supervisory rule, I would continue to leave our trial judges the discretion to give properly phrased instructions that direct jurors to treat the defendant's testimony like that of any other witness, while evenhandedly acknowledging the reality that, like any other witness, they may consider the defendant's interest in the outcome of the case in evaluating his credibility. Accordingly, I concur in the result reached in part II of the majority's opinion.

I

I agree with the majority's conclusions that the defendant's interest instruction given in this case did not violate his presumption of innocence, right to due process and right to testify under the federal constitution, and that *State* v. *Williams*, supra, 220 Conn. 397, remains good law as a constitutional matter.[3] Nevertheless, I write separately on this point to explore this issue in greater depth—particularly because we have not considered this question in any detail for more than twenty years and significant new authorities have emerged in the meantime.

Thus, I begin by noting that this court has been rejecting challenges to variously worded defendant's interest instructions for more than one century since it decided *State* v. *Fiske*, supra, 63 Conn. 392.[4] In the

interest of *some* brevity, however, I turn first to *State* v. *Bennett*, 172 Conn. 324, 374 A.2d 247 (1977), which I view as our leading defendant's interest charge decision guided by contemporary constitutional norms. In *Bennett*, the defendant challenged an instruction stating: " 'You will consider the importance to him of the outcome of the trial and his motive on that account for *perhaps telling the truth*.' " (Emphasis added.) Id., 334. Observing that the trial court's use of "the word 'perhaps' instead of 'not' the court departed from the usual charge given in such instances," and "was more favorable to the defendant and it clearly was not in any way prejudicial to him," this court noted that "[i]t is well-settled law that '[t]he fact that the witness is a defendant in a criminal prosecution, or is a participant in the offense or in a related offense, creates an interest which affects his credibility.' . . . 'Where a defendant in a criminal case testifies in his own behalf, his interest in the result is a proper matter to be considered as bearing on his credibility, and it *has been considered that his position of itself renders his testimony less credible than if he were a disinterested witness*, *especially where he has a criminal record*. . . . As we said in *State* v. *Guthridge*, 164 Conn. 145, 151, 318 A.2d 87 [1972], cert. denied, 410 U.S. 988, 93 S. Ct. 1519, 36 L. Ed. 2d 186 [1973]:[5] 'The rule is well settled in this state that the court may advise the jury that in weighing the credibility of an accused's testimony they can consider his interest in the outcome of the trial.' We have adhered to this rule in many cases.' " (Citations omitted; emphasis added.) *State* v. *Bennett*, supra, 334–35.

In determining that the defendant's interest instruction in *Bennett* was not improper, this court quoted extensively from *Reagan* v. *United States*, 157 U.S. 301, 304, 15 S. Ct. 610, 39 L. Ed. 709 (1894), noting that, in that case, the United States Supreme Court had considered and rejected a challenge to a defendant's interest instruction as a potential violation of the then new criminal defendants' federal statutory right to testify and, in doing so, approved a charge that stated, inter alia, " '[*t*]*he deep personal interest* which he may have in the result of the suit should be considered by the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit.' " (Emphasis added.) *State* v. *Bennett*, supra, 172 Conn. 334–36. In *Bennett*, this court specifically relied on the Supreme Court's statement in *Reagan* that, " 'the court is not at liberty to charge the jury directly or indirectly that the defendant is to be disbelieved because he is a defendant, for that would practically take away the benefit which the law grants when it gives him the privilege of being a witness. *On the other hand*, *the court may*, *and sometimes ought*, *to remind the jury that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation*, *and that the interest of the defendant in the result of*

the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony. The court should be impartial between the government and the defendant.' " (Emphasis added.) Id., 336–37, quoting *Reagan* v. *United States*, supra, 310; see also *State* v. *Bennett*, supra, 337 (" 'if any other witness for the government is disclosed to have great feeling or large interest against the defendant, the court may, in the interests of justice, call the attention of the jury to the extent of that feeling or interest as affecting his credibility' ").

Justice, later Chief Justice, Bogdanski, as he had in a prior case challenging the defendant's interest instruction; see *State* v. *Jonas*, 169 Conn. 566, 578–80, 363 A.2d 1378 (1975) (*Bogdanski*, *J.*, concurring and dissenting), cert. denied, 424 U.S. 923, 96 S. Ct. 1132, 47 L. Ed. 2d 331 (1976); dissented in *Bennett*. *State* v. *Bennett*, supra, 172 Conn. 338. Justice Bogdanski concluded that the instruction therein "unduly singles out the defendant's testimony and improperly comments on his motives and interest in the outcome of the verdict without similarly commenting on the possible motives and interests of the complaining witnesses." Id., 338–39. Justice Bogdanski observed that this charge "placed a premium on the defendant's decision to testify. It had the effect of relegating his claim of innocence to a less credible testimonial category than that of the complaining witnesses. By creating such a circumstance, the charge undermines the presumption of innocence by attributing a motive to the defendant that can only attach if he is indeed guilty as charged." Id., 339. Justice Bogdanski further concluded that the charge violated *Reagan* v. *United States*, supra, 157 U.S. 305, by "arbitrarily singl[ing] out a defendant's testimony" and "denigrat[ing] the weight to be accorded an accused's testimony . . . ." *State* v. *Bennett*, supra, 339. In reaching these conclusions, Justice Bogdanski observed that "to single out the defendant for exercising his right to testify is equally as repugnant as commenting on the exercise of his right to remain silent," and stated that the "better rule is to limit the charge to a general statement of the elements by which all witnesses' testimony should be weighed: not to single out the defendant's testimony as less trustworthy than that of other witnesses." Id., 340.

Justice Bogdanski's dissents on this issue[6] did not, however, carry the day. Indeed, in *State* v. *Williams*, supra, 220 Conn. 385, this court subsequently upheld a defendant's interest instruction materially identical to the instruction at issue in this certified appeal.[7] Rejecting the defendant's constitutional challenge in *Williams*, this court quoted *State* v. *Mack*, 197 Conn. 629, 637, 500 A.2d 1303 (1985), and observed that " '[w]e must . . . examine the nuances of language, belatedly relied upon by the defendant, only for the purpose of determining whether they are significant enough to have affected the fairness of his trial.' " *State* v. *Wil-*

liams, supra, 397. The court noted that "[w]e have repeatedly approved the use of similar language and we do not find its use here unduly repetitive or transcending the bounds of evenhandedness," and rejected the defendant's claim that "the trial court's three references to the defendant's interest in the outcome of the case were not '[evenhanded] in referring to the defendant's interest as compared with that of other witnesses,' " because in "each instance the trial court prefaced its remarks concerning the defendant's interest in the outcome with comments such as: (1) '[Y]ou should apply the same principles by which the testimony of other witnesses are tested'; (2) the accused 'is entitled to the same consideration and must have his testimony measured in the same way as any other witness . . .'; and (3) 'you should apply the same test to it as you did with the other witnesses . . . .' The continual emphasis was that the jury was to evaluate the defendant's testimony in the same fashion as the testimony of the other witnesses." Id.

Since our approval of the particular instruction given in *Williams*, reviewing courts have repeatedly upheld its use in other cases. See *State* v. *White*, 127 Conn. App. 846, 857–58, 17 A.3d 72, cert. denied, 302 Conn. 911, 27 A.3d 371 (2011); *State* v. *Kendall*, 123 Conn. App. 625, 670–71, 2 A.3d 990, cert. denied, 299 Conn. 902, 10 A.3d 521 (2010); *State* v. *Mann*, 119 Conn. App. 626, 637, 988 A.2d 918, cert. denied, 297 Conn. 922, 998 A.2d 168 (2010); *State* v. *Elson*, 116 Conn. App. 196, 221–22, 975 A.2d 678 (2009), superseded on other grounds, 125 Conn. App. 328, 9 A.3d 731 (2010) (en banc), cert. granted, 300 Conn. 904, 12 A.3d 572 (2011); *State* v. *Smith*, 65 Conn. App. 126, 143–44, 782 A.2d 175 (2001), rev'd on other grounds, 262 Conn. 453, 815 A.2d 1216 (2003); *State* v. *Maia*, 48 Conn. App. 677, 688–90, 712 A.2d 956, cert. denied, 245 Conn. 918, 717 A.2d 236 (1998); *State* v. *Jones*, 44 Conn. App. 476, 489–90, 691 A.2d 14, cert. denied, 241 Conn. 901, 693 A.2d 304 (1997); *State* v. *Scarpiello*, 40 Conn. App. 189, 213–15, 670 A.2d 856, cert. denied, 236 Conn. 921, 674 A.2d 1327 (1996); *State* v. *Colon*, 37 Conn. App. 635, 640–41, 657 A.2d 247, cert. denied, 234 Conn. 911, 660 A.2d 354 (1995). Further, the Appellate Court recently rejected a comprehensive state constitutional challenge to the *Williams* instruction as well. See *State* v. *Mann*, supra, 637–45; cf. *State* v. *Higgins*, 201 Conn. 462, 476–77, 518 A.2d 631 (1986) (rejecting state constitutional challenge embodied in claimed state constitutional right to testify, which is "doubtful . . . because, at the time of the adoption of our state constitution in 1818, a defendant was unable to testify as a witness in his own case because of his interest, a disability that was not removed until 1867, when the common law rule was modified by the statutory predecessor of General Statutes § 54-84").

In determining whether this lengthy body of case law upholding the defendant's interest instructions in

Connecticut is still viable under contemporary federal constitutional standards, I note first that there is no United States Supreme Court decision directly on point, given that *Reagan* v. *United States*, supra, 157 U.S. 301, discussed in *State* v. *Bennett*, supra, 172 Conn. 335–37, was not a constitutionally based decision.[8] Thus, I look to the recent decisions of the United States Court of Appeals for the Second Circuit in *United States* v. *Brutus*, 505 F.3d 80 (2d Cir. 2007), and *United States* v. *Gaines*, 457 F.3d 238 (2d Cir. 2006), as particularly persuasive authority as to the contemporary federal constitutional standard. See *DiMartino* v. *Richens*, 263 Conn. 639, 663 n.17, 822 A.2d 205 (2003); accord, e.g., *People* v. *Brokenbough*, 52 App. Div. 3d 525, 859 N.Y.S.2d 678 (2008) (rejecting constitutional challenge to defendant's interest instruction relying on *Brutus* and *Gaines* as contemporary authority where leading case from New York Court of Appeals, *People* v. *Ochs*, 3 N.Y.2d 54, 143 N.E.2d 388, 163 N.Y.S.2d 671 [1957], was more than fifty years old).

In *Brutus*, the Second Circuit observed that, under "our system of criminal justice, it is 'axiomatic and elementary' that defendants are entitled to a presumption of innocence. . . . 'To implement the presumption,' the Supreme Court has warned, 'courts must be alert to factors that may undermine the fairness of the fact-finding process.' . . . Our adherence to this admonishment has, on more than one occasion, required that we '[place] out of bounds practices that threaten to dilute the presumption of innocence.' " (Citations omitted.) *United States* v. *Brutus*, supra, 505 F.3d 85–86, citing *Estelle* v. *Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976), *Coffin* v. *United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895), and *United States* v. *Gaines*, supra, 457 F.3d 245–46. Applying these general principles, the Second Circuit followed, inter alia, the decision of the United States Court of Appeals for the First Circuit in *United States* v. *Dwyer*, 843 F.2d 60, 62–63 (1st Cir. 1988),[9] and determined that the defendant's interest instructions that highlighted the defendant's " '*deep personal interest* in [the case] . . . possessed by no other witness . . . [which] *create*[*d*] *a motive to testify falsely*' " violated the defendant's presumption of innocence. (Emphasis added.) *United States* v. *Brutus*, supra, 86.

Indeed, the Second Circuit observed in *Gaines* that, "[t]he critical defect in a jury instruction that says the defendant has a motive to lie is its assumption that the defendant is guilty. That defect is not cured by a further charge that a defendant can still be truthful. . . . Accordingly, to prevent a needless threat of dilution of the presumption of innocence, we hereby direct district courts in the circuit not to charge juries that a testifying defendant's interest in the outcome of the case creates a motive to testify falsely." (Citations omitted.) *United States* v. *Gaines*, supra, 457 F.3d 247. The court also

directed district courts not to "instruct juries to the effect that a testifying defendant has a deep personal interest in the case," and emphasized that a "[witness'] interest in the outcome of the case ought to be addressed in the court's general charge concerning witness credibility. If the defendant has testified, that charge can easily be modified to tell the jury to evaluate the defendant's testimony in the same way it judges the testimony of other witnesses."[10] Id., 249. Significantly, however, the Second Circuit declined to "micromanage," and did not totally deprive district courts of the authority to give a defendant's interest charge when "deemed appropriate"—going so far as to set forth a suggested instruction "stripped of the language we find to have prejudiced [the defendant in] *Gaines*."[11] Id.

Under these cases, I conclude that a defendant's interest instruction will pass constitutional muster if it does not: (1) excessively single out a defendant relative to other witnesses in the case; (2) suggest that a defendant has a motive to lie in his testimony; or (3) use language that calls attention to the defendant's interest disproportionately in relation to the credibility or interests of other witnesses in the case that are identified in the jury instructions, such as police officers,[12] accomplices,[13] certain complaining witnesses[14] and jailhouse informants.[15] This is consistent with our "stress [on] the importance of even-handedness in referring to the defendant's interest as compared to that of other witnesses. [Even] technically correct instructions on this subject may violate this principle if repeated unnecessarily or overemphasized in some other manner." *State* v. *Mack*, supra, 197 Conn. 638.

Applying these standards, I conclude that the defendant's interest charge given in this case, and previously upheld in *State* v. *Williams*, supra, 220 Conn. 397, did not violate the defendant's due process rights, his right to testify or his presumption of innocence.[16] Specifically, unlike the instructions held unconstitutional in *United States* v. *Gaines*, supra, 457 F.3d 247, and *United States* v. *Brutus*, supra, 505 F.3d 86, the instruction in this case did not state that the defendant had any motivation or incentive to lie or use descriptive language elevating his interest over that of the other witnesses who testified. Its evenhanded nature is further demonstrated by the trial court's admonition that the defendant's testimony was subject to consideration under "the same principles by which the testimony of other witnesses is tested"[17] and that an "accused person having taken the witness stand, stands before you, then, just like any other witness and is entitled to the same consideration . . . ." Indeed, the instruction was linguistically consistent with the instruction suggested by the Second Circuit; see footnote 11 of this concurring opinion; that eliminated the language that rendered unconstitutional the charges considered in *Gaines* and *Brutus*. Furthermore, the First Circuit, after distin-

guishing more "egregious" examples, rejected a constitutional challenge to a nearly identical instruction. See *United States* v. *Gonsalves*, 435 F.3d 64, 72 (1st Cir. 2006) (upholding instruction that jury " 'should examine and evaluate his testimony just as you would the testimony of any witness with an interest in the outcome of the case,' " noting in particular that it was "immediately followed by the warning that '[y]ou should not disregard or disbelieve [the defendant's] testimony simply because he is charged as a defendant in this case' "). Accordingly, I view the defendant's interest instruction, as upheld in *Williams*, as continuing good law in light of the recent constitutional decisions from the Second Circuit, and I agree with the majority's declination of the defendant's invitation to overrule it.[18]

II

Having determined that the defendant's interest charge given in this case pursuant to *State* v. *Williams*, supra, 220 Conn. 397, did not violate the defendant's constitutional rights, I now turn to whether we should exercise our supervisory authority to preclude trial courts from giving such instructions in the future, as a practical matter overruling *Williams* and its predecessors outlined in footnote 4 of this concurring opinion. "It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . Supervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process." (Internal quotation marks omitted.) *State* v. *Rose*, 305 Conn. 594, 607, 46 A.3d 146 (2012). That the rule is not constitutionally required does not preclude the exercise of our supervisory powers; articulating a rule of policy and reversing a conviction under our supervisory powers "is perfectly in line with the general principle that this court ordinarily invoke[s] [its] supervisory powers to enunciate a rule that is not constitutionally required but that [it] think[s] is preferable as a matter of policy." (Internal quotation marks omitted.) Id., 608.

That being said, "prudence dictates that we invoke our supervisory power sparingly"; id., 607; as it is "an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Constitutional, statutory and procedural limitations are generally adequate to protect the rights of the defendant and the integrity of the judicial system. Our supervisory powers

are invoked only in the rare circumstance where these traditional protections are inadequate to ensure the fair and just administration of the courts." (Internal quotation marks omitted.) *State* v. *Wade*, 297 Conn. 262, 296, 998 A.2d 1114 (2010).

In my view, there is no indication that the traditional constitutional, statutory and procedural limitations are so inadequate as to mandate resort to the supervisory power to in essence overrule[19] our prior case law and ban nearly all defendant's interest instructions—even those that comport with constitutional limitations. First, given the "considerable concern" of the criminal defense bar noted by the defendant, I find it significant that the experienced trial judges who comprise the judicial branch criminal jury instruction committee have issued a revised model jury instruction for use when defendants testify that no longer includes a specific mention of the defendant's interest, while using the instruction's commentary to apprise trial judges who *do* wish to give such an instruction of this court's decision in *State* v. *Williams*, supra, 220 Conn. 397, and the limitations imposed by *United States* v. *Brutus*, supra, 505 F.3d 80.[20] See Connecticut Criminal Jury Instructions § 2.4-7 (4th Ed. 2010), available at http://www.jud.ct.gov/ji/Criminal/part2/2.4-7.htm (last visited May 8, 2013). This would suggest, then, that institutional steps short of the extraordinary exercise of our supervisory power are leading, as a practical matter, to the incremental decline of the defendant's interest instruction.

Finally, the adoption of a supervisory rule precluding the use of all defendant's interest instructions is apt to complicate the appellate review of these claims, which likely will continue to proliferate until the United States Supreme Court resolves the nationwide split in authority on this point. See footnotes 9 and 10 of this concurring opinion. Unless the majority intends its supervisory rule to make the defendant's interest instruction akin to a structural error that is per se reversible because its effect on the fact finder is deemed to be an unquantifiable impropriety that casts doubt on the underlying fairness of the trial proceeding; see, e.g., *State* v. *Rose*, supra, 305 Conn. 612–13 (forcing defendant to stand trial in prison garb requires reversal per se); appellate review of defendant's interest claims will now require the court to engage in two levels of review in order to allocate the burden of proving harm, and will not relieve reviewing courts of the necessity to engage in constitutional analysis. Specifically, the reviewing court will need to determine whether the defendant's interest instruction given comported with the constitutional standards outlined in *Gaines* and *Brutus*. If it did not, the state would then bear the burden of proving harmlessness beyond a reasonable doubt. See, e.g., *State* v. *Osimanti*, 299 Conn. 1, 16, 6 A.3d 790 (2010); accord *United States* v. *Brutus*, supra, 505 F.3d 88–89. If it does, and the instruction merely amounted to a supervi-

sory rule violation, then the impropriety would be nonconstitutional in nature and the defendant would bear the burden of proving harm. See, e.g., *State* v. *Osimanti*, supra, 16–17; see also *State* v. *Bonner*, 290 Conn. 468, 500, 964 A.2d 73 (2009) ("a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict" [internal quotation marks omitted]). So, it is not at all clear to me that the majority's decision to preclude all defendant's interest instructions simplifies matters or provides protection beyond that afforded by the constitution. Accordingly, I would continue to adhere to a traditional constitutional analysis of these claims, and deem the exercise of the supervisory power unnecessary at this time.

Accordingly, I concur in the result reached by part II of the majority's opinion.

[1] After giving an instruction on general principles for evaluating witnesses' credibility; see footnote 17 of this concurring opinion; the trial court instructed the jury: "Again, it's under the umbrella of credibility. The accused in this case took the stand and testified. In weighing the testimony of an accused person, you should apply the same principles by which the testimony of other witnesses is tested. And that necessarily involves a consideration of his interest in the outcome of the case. You may consider the importance to him of the outcome of the trial. An accused person, having taken the witness stand, stands before you, then, just like any other witness and is entitled to the same consideration and must have his testimony measured in the same way as any other witness, including his interest in the verdict which you are about to render."

The trial court further instructed the jury that evidence of the defendant's previous felony conviction was "not admissible to prove the guilt of the defendant in this particular case" and "has been admitted into evidence for the sole purpose of affecting his credibility. You must weigh the testimony and consider it along with all the other evidence in this case. You may consider the conviction of the defendant only as it bears upon his credibility and you should determine that credibility upon the same considerations as those given to any other witness." This aspect of the instruction is not at issue in this certified appeal.

[2] Because the defendant's claim on appeal, although comprehensively briefed, does not include a separate state constitutional argument claiming greater protection under the Connecticut constitution, I, like the majority, confine my analysis to the federal constitution. See, e.g., *In re Melody L.*, 290 Conn. 131, 167–68, 962 A.2d 81 (2009).

[3] I also agree with the majority that this unpreserved claim is reviewable pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).

[4] See, e.g., *State* v. *Williams*, supra, 220 Conn. 397; *State* v. *Smith*, 201 Conn. 659, 665, 519 A.2d 26 (1986); *State* v. *Higgins*, 201 Conn. 462, 477, 518 A.2d 631 (1986); *State* v. *Mack*, 197 Conn. 629, 637–38, 500 A.2d 1303 (1985); *State* v. *Roos*, 188 Conn. 644, 645, 452 A.2d 1163 (1982) (per curiam); *State* v. *Avcollie*, 188 Conn. 626, 636–37, 453 A.2d 418 (1982), cert. denied, 461 U.S. 928, 103 S. Ct. 2088, 77 L. Ed. 2d 299 (1983); *State* v. *Kurvin*, 186 Conn. 555, 570, 442 A.2d 1327 (1982); *State* v. *Maselli*, 182 Conn. 66, 74, 437 A.2d 836 (1980), cert. denied, 449 U.S. 1083, 101 S. Ct. 868, 66 L. Ed. 2d 807 (1981); *State* v. *Mastropetre*, 175 Conn. 512, 525, 400 A.2d 276 (1978); *State* v. *Bennett*, 172 Conn. 324, 336–37, 374 A.2d 247 (1977); *State* v. *Jonas*, 169 Conn. 566, 577–78, 363 A.2d 1378 (1975), cert. denied, 424 U.S. 923, 96 S. Ct. 1132, 47 L. Ed. 2d 331 (1976); *State* v. *Moynahan*, 164 Conn. 560, 574, 325 A.2d 199, cert. denied, 414 U.S. 976, 94 S. Ct. 291, 38 L. Ed. 2d 219 (1973); *State* v. *Guthridge*, 164 Conn. 145, 151, 318 A.2d 87 (1972), cert. denied, 410 U.S. 988, 93 S. Ct. 1519, 36 L. Ed. 2d 186 (1973); *State* v. *Palko*, 122 Conn. 529, 534, 191 A. 320, aff'd, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937); *State* v. *Schleifer*, 102 Conn. 708, 725, 130 A. 184 (1925); *State* v. *Saxon*, 87 Conn. 5, 21–22, 86 A. 590 (1913).

[5] *State* v. *Guthridge*, supra, 164 Conn. 145, appears to be this court's first consideration of an expressly stated constitutional challenge to a defendant's interest instruction. In *Guthridge*, this court rejected the defendant's consti-

tutional challenges to an instruction that had directed the jury to "apply to [the defendant's] testimony the same standards by which testimony of any other witness is measured and tested," and "consider the interest of the accused in the case as you would consider that of any other person who has testified and in that connection you will *consider the importance to the accused of the outcome of this trial. That is, an accused person having taken the witness stand stands before you just like any other witness* and is entitled to the same considerations and must have his testimony measured in the same way as that of any other witness which would include *your consideration of his obvious interest* in the verdict which you are to render." (Emphasis added; internal quotation marks omitted.) Id., 151 n.1. The court disagreed with the defendant's claim that this instruction had "unfairly singled out [the defendant's] testimony for adverse comment, because it was inconsistent with the presumption of innocence and because it suggested that his testimony was entitled to less weight than that of any other witness," noting that "[t]he rule is well settled in this state that the court may advise the jury that in weighing the credibility of an accused's testimony they can consider his interest in the outcome of the trial." Id., 151, citing *State* v. *Palko*, 122 Conn. 529, 534, 191 A. 320, aff'd, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937), and *State* v. *Schleifer*, 102 Conn. 708, 725, 130 A. 184 (1925). In *Guthridge*, the court further emphasized that the instruction to treat the defendant's testimony " 'as that of any other witness' " "was phrased so as not to place the defendant apart, and served to answer any question raised as to the treatment to be accorded his testimony." *State* v. *Guthridge*, supra, 151.

[6] I note that Justice Bogdanski applied his analyses from *Bennett* and *Jonas* in two subsequent dissents from decisions upholding defendant's interest charges. See *State* v. *Maselli*, 182 Conn. 66, 78, 437 A.2d 836 (1980) (*Bogdanski*, *J.*, dissenting) (instruction stating, inter alia, " 'an accused person, having taken the witness stand stands before you just like any other witness and is entitled to the same considerations and must have his testimony measured in the same way as that of any other witness, *which would include your consideration of his obvious interest in the verdict*' " [emphasis in original]), cert. denied, 449 U.S. 1083, 101 S. Ct. 868, 66 L. Ed. 2d 807 (1981); *State* v. *Mastropetre*, 175 Conn. 512, 525–26, 400 A.2d 276 (1978) (*Bogdanski*, *J.*, dissenting) (instruction stating, inter alia, that evaluating defendant's testimony " '*necessarily* involves a consideration of his *great interest* in the *outcome* of this case' " and that accused " 'is entitled to the same consideration and must have his testimony measured by the same tests as applied to other witnesses *including*, *particularly*, his *interest* in the *verdict*, which you may render' " [emphasis in original]).

[7] The defendant's interest instruction in *Williams* stated: " 'In weighing the testimony of an accused person obviously you should apply the same principles by which the testimony of other witnesses are tested. *And that necessarily involves a consideration of his interest in the outcome of the case*. Now an accused person having taken the witness stand stands before you then like any other witness, and is entitled to the same consideration and must have his testimony measured in the same way as any other witness *including however his interest in the verdict which you are asked to render*.' " (Emphasis in original.) *State* v. *Williams*, supra, 220 Conn. 396 n.4.

In *Williams*, "[t]he trial court further stated: 'You are not to disregard the evidence of this accused merely because he was convicted of other crimes. You must weigh the testimony and consider it along with all the other evidence in the case; and you may take into account of course all the evidence that you find to be credible on his part. And the testimony that he has offered to you should be given the same considerations; and you should apply the same test to it as you did with the other witnesses in the course of this trial, *including however*, *consideration of his interest in the outcome of the case*." (Emphasis in original.) Id.

[8] In its 1895 decision in *Reagan* v. *United States*, supra, 157 U.S. 311, the United States Supreme Court determined that trial courts do not burden the defendant's *statutory* right to testify by "charg[ing] the jury that the peculiar and deep interest which the defendant has in the result of the trial is a matter affecting his credibility, and to be carefully considered by them." In my view, the United States Supreme Court's decision in *Reagan* is not controlling on this constitutional question because, unlike later authority from lower federal and sister state courts, it does not consider the constitutional implications of the defendant's interest instruction vis-a-vis the presumption of innocence, right to testify and right to a fair trial. See, e.g., *United States* v. *Gaines*, 457 F.3d 238, 245 (2d Cir. 2006); see also, e.g.,

United States v. *Rollins*, 784 F.2d 35, 37 (1st Cir. 1986) (observing that defendant's interest charge endorsed in *Reagan* was "understandable" because "[a]t that time the fact that a defendant could be allowed to testify was a relatively recent event," but "[s]ince that time . . . the lower courts have been increasingly troubled with the seeming psychological inconsistency of charging in one breath that a defendant is presumed to be innocent, and in the next that his, or her, testimony is peculiarly suspect"); compare *Portuondo* v. *Agard*, 529 U.S. 61, 70–73, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) (rejecting claim that "the prosecutor's comments [about the defendant's opportunity to tailor his testimony] were impermissible because they were 'generic' rather than based upon any specific indication of tailoring," in reliance on *Reagan* for proposition that "this [c]ourt has approved of such 'generic' comment[s] before" in form of "perfectly proper" defendant's interest instruction that is "long tradition that continues to the present day" and was "given in this very case"), with id., 80–81 (Ginsburg, J., dissenting) (challenging majority's reliance on *Reagan* as "a decision which, by its very terms, does not bear on today's constitutional controversy" because it "made no determination of constitutional significance or insignificance, for it addressed no constitutional question").

[9] As the Second Circuit notes in *United States* v. *Gaines*, supra, 457 F.3d 247–48, the United States Court of Appeals for the Eighth Circuit has also disapproved of targeted defendant's interest instructions. See *Taylor* v. *United States*, 390 F.2d 278, 285 (8th Cir.) ("Observ[ing] . . . that the continuing and frequent attack on an instruction of this kind indicates that its use leaves defense counsel with a troubled mind. We suspect that this discomfort would be alleviated if the defendant were included by reference in the court's general instructions as to all witnesses. We would prefer that the defendant not be singled out. His interest is obvious to the jury. A general reference, such as 'including the defendant', should suffice."), cert. denied, 393 U.S. 868, 89 S. Ct. 154, 21 L. Ed. 2d 137 (1968). Indeed, the Eighth Circuit appears to take the hardest line of all the circuits with respect to defendant's interest instructions, deeming improper an instruction relatively similar to the one approved of by this court in *State* v. *Williams*, supra, 220 Conn. 397, namely, that: " 'A defendant who wishes to testify is a competent witness, and his testimony should be judged in the same way as that of any other witness. In determining the degree of credibility that should be accorded by you to the defendant's testimony, you're entitled to take into consideration the fact that he is the defendant and the personal interest he has in the result of your verdict.' " *United States* v. *Bear Killer*, 534 F.2d 1253, 1260 (8th Cir.), cert. denied, 429 U.S. 846, 97 S. Ct. 129, 50 L. Ed. 2d 118 (1976); see also id. (noting that "continued use" of defendant's interest instruction "can cause this [c]ourt to declare, as a per se rule, that the error in giving the instruction can never be considered harmless").

[10] Other circuits view the propriety of the defendant's interest instruction differently than do the First, Second and Eighth Circuits. See, e.g., *United States* v. *Nunez-Carreon*, 47 F.3d 995, 997–98 (9th Cir.) (upholding, with stated reservation, charge permitting jury to "consider any interest the defendant may have in the outcome of the case, his hopes and fears and what he has to gain or lose as a result of your verdict"), cert. denied, 515 U.S. 1126, 115 S. Ct. 2287, 132 L. Ed. 2d 289 (1995); *United States* v. *Jones*, 587 F.2d 802, 806 (5th Cir. 1979) (rejecting challenge to instruction that jurors "were entitled to take into consideration the fact that [the defendant] had a 'very keen personal interest' in the outcome of the suit"). Further, as surveyed in *State* v. *Mann*, supra, 119 Conn. App. 641, there is long-standing division among our sister states with respect to the propriety of certain defendant's interest instructions.

[11] The Second Circuit's suggested defendant's interest charge is as follows: "The defendant in a criminal case never has any duty to testify or come forward with any evidence. This is because, as I have told you, the burden of proof beyond a reasonable doubt remains on the government at all times, and [the defendant] is presumed innocent. In this case, [the defendant] did testify and he was subject to cross-examination like any other witness. *You should examine and evaluate the testimony just as you would the testimony of any witness with an interest in the outcome of the case.*" (Emphasis added; internal quotation marks omitted.) *United States* v. *Gaines*, supra, 457 F.3d 249–50 n.9; see also *United States* v. *Brutus*, supra, 505 F.3d 88 (endorsing same instruction).

[12] See, e.g., *State* v. *Nieves*, 36 Conn. App. 546, 551, 653 A.2d 197 ("The court was careful to instruct the jury that the testimony of the police officers, toxicologist, and expert police witness was to be weighed and balanced as

carefully as that of any other witnesses. While it is preferable to give appropriate emphasis to the instruction on police testimony by devoting a separate instruction to that subject, we cannot say that in this case the charge was deficient merely because it was not given separately."), cert. denied, 232 Conn. 916, 655 A.2d 260 (1995).

[13] "[T]he inherent unreliability of accomplice testimony ordinarily requires a particular caution to the jury [because] . . . [t]he conditions of character and interest most inconsistent with a credible witness, very frequently, but not always, attend an accomplice when he testifies. When those conditions exist, it is the duty of the [court] to specially caution the jury." (Internal quotation marks omitted.) *State* v. *Diaz*, 302 Conn. 93, 102 n.7, 25 A.3d 594 (2011).

[14] "[W]hen the complaining witness [himself] could . . . have been subject to prosecution depending only upon the veracity of his account of [the] particular criminal transaction, the court should . . . [instruct] the jury in substantial compliance with the defendant's request to charge to determine the credibility of that witness in the light of any motive for testifying falsely and inculpating the accused." (Internal quotation marks omitted.) *State* v. *Diaz*, 302 Conn. 93, 102 n.6, 25 A.3d 594 (2011).

[15] "In light of this growing recognition of the inherent unreliability of jailhouse informant testimony, we are persuaded that the trial court should give a special credibility instruction to the jury whenever such testimony is given, regardless of whether the informant has received an express promise of a benefit. As we indicated in [*State* v. *Patterson*, 276 Conn. 452, 465, 886 A.2d 777 (2005)], the trial court should instruct the jury that the informant's testimony must 'be reviewed with particular scrutiny and weighed . . . with greater care than the testimony of an ordinary witness.' " *State* v. *Arroyo*, 292 Conn. 558, 569–70, 973 A.2d 1254 (2009), cert. denied, U.S. , 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010).

I note that this court recently declined to use its supervisory powers to extend the jailhouse informant instruction mandated by *Arroyo* and *Patterson* to *all* witnesses who are in a position to receive a benefit from the government, but "reaffirm[ed] the well established common-law rule that it is within the discretion of a trial court to give a cautionary instruction to the jury whenever the court reasonably believes that a witness' testimony may be particularly unreliable because the witness has a special interest in testifying for the state and the witness' motivations may not be adequately exposed through cross-examination or argument by counsel." *State* v. *Diaz*, 302 Conn. 93, 113, 25 A.3d 594 (2011).

[16] I note that these contemporary constitutional standards render questionable some of the specific defendant's interest instructions that this court previously has upheld against constitutional challenge, in particular references to: (1) " 'the importance to him of the outcome of the trial and his motive, if any, for telling the truth or not telling the truth,' " upheld in *State* v. *Higgins*, supra, 201 Conn. 475 n.6; (2) the defendant's " 'motive on that account for perhaps telling the truth' " upheld in *State* v. *Bennett*, supra, 172 Conn. 334; (3) the defendant's " 'motive on that account for not telling the truth,' " upheld in *State* v. *Jonas*, supra, 169 Conn. 578, and the similar instruction upheld in *State* v. *Mack*, supra, 197 Conn. 637; (4) " 'obvious interest in the verdict' " upheld in *State* v. *Guthridge*, supra, 164 Conn. 151 n.1, the same instruction upheld in *State* v. *Maselli*, 182 Conn. 66, 78, 437 A.2d 836 (1980), cert. denied, 449 U.S. 1083, 101 S. Ct. 868, 66 L. Ed. 2d 807 (1981); (5) " 'great interest in the outcome of this case' " upheld in *State* v. *Mastropetre*, 175 Conn. 512, 525–26, 400 A.2d 276 (1978); and (6) " 'above all . . . take into consideration the fact that he is the accused' " upheld in *State* v. *Fiske*, supra, 63 Conn. 389.

[17] The trial court's general credibility charge instructed the jury that: "In deciding what the facts are, you must consider all the evidence. In doing this, you must decide which testimony to believe and which testimony not to believe. You may believe all, none or any part of any witness' testimony. In making that decision, you may take into account a number of factors including the following: (1) Was the witness able to see or hear or know the things about which that witness testified? (2) How well was the witness able to recall and describe those things? (3) What was the witness' manner while testifying? (4) *Did the witness have an interest in the outcome of this case or any bias or prejudice concerning any party or any matter involved in the case?* (5) How reasonable was the witness' testimony considered in the light of all the evidence in the case? And (6) was the witness' testimony contradicted by what that witness has said or done at another time or by the testimony of other witnesses or by other evidence?

"If you should think that a witness has deliberately testified falsely in some respect, you should carefully consider whether you should rely upon any of his or her testimony. In deciding whether or not to believe a witness, keep in mind that people sometimes forget things. You need to consider, therefore, whether a contradiction is an innocent lapse of memory or an intentional falsehood. And that may depend on whether it has to do with an important fact or with only a small detail.

"These are some of the factors that you may consider in deciding whether to believe testimony. The weight of the evidence presented by each side does not depend on the number of witnesses testifying on one side or the other. You must consider all the evidence in the case and you may decide that the testimony of a smaller number of witnesses on one side has greater weight than that of a larger number on the other side. It is the quality of the evidence and not the quantity of the evidence that you [are to] consider. All of these are matters for you to consider in finding the facts." (Emphasis added.)

[18] Further, the policy arguments endorsed by the defendant, namely, that the "defendant's interest is obvious to jurors from the moment they enter the courtroom" and that "[w]hen a judge states or implies in an instruction that a defendant has a motive to lie, the judge insinuates that the defendant is guilty"; A. Goldenberg, "Interested, But Presumed Innocent: Rethinking Instructions on the Credibility of Testifying Defendants," 62 N.Y.U. Ann. Surv. Am. L. 745, 774–75 (2007); are, in my view, addressed by a more neutrally phrased instruction that eliminates the phrases deemed constitutionally offensive by the Second Circuit.

[19] "This court has repeatedly acknowledged the significance of stare decisis to our system of jurisprudence because it gives stability and continuity to our case law. . . . The doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. . . . Stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency. . . . It is the most important application of a theory of decisionmaking consistency in our legal culture and . . . is an obvious manifestation of the notion that decisionmaking consistency itself has normative value." (Citation omitted; internal quotation marks omitted.) *State* v. *Salamon*, 287 Conn. 509, 519, 949 A.2d 1092 (2008).

I recognize, of course, that, "[t]he value of adhering to [past] precedent is not an end in and of itself . . . if the precedent reflects substantive injustice. Consistency must also serve a justice related end. . . . When a previous decision clearly creates injustice, the court should seriously consider whether the goals of stare decisis are outweighed, rather than dictated, by the prudential and pragmatic considerations that inform the doctrine to enforce a clearly erroneous decision. . . . The court must weigh [the] benefits of [stare decisis] against its burdens in deciding whether to overturn a precedent it thinks is unjust. . . . It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. . . . In short, consistency must not be the only reason for deciding a case in a particular way, if to do so would be unjust. Consistency obtains its value best when it promotes a just decision. . . . Moreover, [e]xperience can and often does demonstrate that a rule, once believed sound, needs modification to serve justice better. . . . Indeed, [i]f law is to have current relevance, courts must have and exert the capacity to change a rule of law when reason so requires. . . . [Thus] [t]his court . . . has recognized many times that there are exceptions to the rule of stare decisis." (Citation omitted; internal quotation marks omitted.) Id., 520–21.

[20] As of December 7, 2007, the judicial branch's model jury instructions provide: "In this case, the defendant testified. An accused person, having testified, stands before you just like any other witness. (He/she) is entitled to the same considerations and must have (his/her) testimony tested and measured by you by the same factors and standards as you would judge the testimony of any other witness. You have no right to disregard the defendant's testimony or to disbelieve the defendant's testimony merely because (he/she) is accused of a crime. Consider my earlier instructions on the general subject matter of credibility and apply them to the defendant's testimony." Connecticut Criminal Jury Instructions § 2.4-7 (4th Ed. 2010), available at http://www.jud.ct.gov/ji/Criminal/part2/2.4-7.htm (last visited May 3, 2013).

The committee commentary cites approvingly, inter alia, *State* v. *Williams*,

supra, 220 Conn. 397, but notes, however, that the "appellate courts have consistently upheld an instruction that referenced the defendant's 'interest in the outcome' of the case, as long as it was accompanied by an instruction to evaluate the defendant's testimony in the same fashion as the testimony of other witnesses"; Connecticut Jury Instructions, supra, § 2.4-7, commentary; observing that the Second Circuit found it improper in *United States* v. *Brutus*, supra, 505 F.3d 80, "to instruct that the defendant's interest in the outcome of the case 'creates a motive to testify falsely.' " Connecticut Jury Instructions, supra, § 2.4-7, commentary.