STATE OF CONNECTICUT *v.* JULIAN J. LOCKHART
(SC 17773)

Rogers, C. J., and Palmer, Zarella, McLachlan and Gruendel, Js.

Argued December 1, 2009—officially released October 12, 2010

Richard Emanuel, special public defender, with whom, on the brief, was *G. Douglas Nash*, special public

defender, for the appellant (defendant).

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, was *Timothy J. Liston*, state's attorney, for the appellee (state).

Thomas P. Sullivan, pro hac vice, and *Todd D. Fernow* filed a brief for the Innocence Legal Network as amicus curiae.

Susan O. Storey, chief public defender, *Martin Zeldis*, chief of legal services, and *Elizabeth M. Inkster*, senior assistant public defender, filed a brief for the office of the chief public defender as amicus curiae.

Thomas Ullmann filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

Opinion

McLACHLAN, J. The defendant, Julian J. Lockhart, was convicted, following a jury trial, of murder in violation of General Statutes § 53a-54a (a), felony murder in violation of General Statutes § 53a-54c, robbery in the first degree in violation of General Statutes § 53a-134 (a) (1) and (3) and larceny in the third degree in violation of General Statutes § 53a-124 (a) (1). On appeal,[1] the defendant argues that: (1) the United States constitution and the constitution of Connecticut require law enforcement agents to record electronically, whenever feasible, custodial interrogations, *Miranda* warnings[2] and any resulting statements made by the defendant; and (2) the state violated the defendant's right to remain silent by introducing testimony regarding his refusal to sign a *Miranda* rights acknowledgment card, his refusal to provide a written statement, his termination of an interview with police detectives and his assertion of his right to remain silent. We affirm the judgment of conviction.

The jury reasonably could have found the following facts. In May, 2002, the twenty-two year old victim, Robert Glidden, lived in Wallingford and worked as a machinist in Durham. The victim had posted an advertisement in the newspaper offering to sell his 1989 Ford Mustang GT for approximately $6000.

In May, 2002, the defendant lived in Meriden with his mother, and made a living by selling crack cocaine. On May 9, 2002, the defendant and his friend, Leonard Bunch, went to look at the victim's car. Maria Estrada, a friend of the defendant's mother, agreed to give the defendant and Bunch a ride in exchange for crack cocaine. During the drive, the defendant or Bunch called the victim to make arrangements to meet and to get directions.

The defendant, Bunch and Estrada drove to the home of the victim's parents where they met the victim's mother, Elizabeth Glidden, and followed her down Saw Mill Road to the manufacturing company where the victim was working. Glidden left after introducing the defendant to the victim. After Bunch and the defendant examined the vehicle, the victim took the defendant for a test drive. Bunch and Estrada waited in the parking lot of the manufacturing company for fifteen to thirty minutes, and when the defendant had not returned, began to drive back down Saw Mill Road. As Bunch and Estrada were driving, they noticed the victim's vehicle parked on the side of the road. Because neither the defendant nor the victim was in the vehicle, Estrada honked the car horn. Estrada then saw the defendant standing in the woods near the car, waving a stick and telling her to leave. Bunch and Estrada saw the defendant hit the ground with the stick five or six times. Estrada could not see what the defendant was striking

because he was standing in tall grass. The defendant told Bunch to leave, and Estrada and Bunch drove away.

The next day, the defendant called Bunch and told him that he had hit the victim repeatedly and had left him in the woods. He asked for a ride so that he could look for his watch, which he had lost on Saw Mill Road. The defendant later borrowed a car from Bunch's friend. On May 11, 2002, the defendant again called Bunch to ask for a ride, stating that he wanted to move the victim's vehicle, which the defendant had parked one block from his mother's house in Meriden. Bunch agreed and later followed the defendant as he moved the victim's vehicle to a commuter lot in Cheshire. Bunch observed the defendant wipe his fingerprints off the vehicle with a towel.

On May 12, 2002, the state police received a call from a truck driver who had seen the victim's vehicle in a news report about the missing victim. He had noticed the victim's vehicle in the commuter lot, and had observed that it did not have a license plate and that its interior appeared to have been damaged by fire. The following day, the victim's body was discovered in the woods on the side of Saw Mill Road. The police recovered the defendant's watch at the crime scene. Following an autopsy, a deputy chief medical examiner for the state concluded that the victim had died as a result of blunt force trauma to the head. On May 13, 2002, after receiving a call from a state police detective, the defendant took a bus from Hartford to New York City. From there, he went to Georgia, where he lived for more than one year.

On June 6, 2003, the defendant was arrested by Georgia authorities in Decatur, Georgia. Although he provided the authorities with a Georgia driver's license bearing the name Frederick Kelly, they matched his fingerprints to records for Julian Lockhart. On June 18, 2003, two Connecticut state police detectives interviewed the defendant while he awaited extradition. The detectives did not electronically record the interview. The defendant was turned over to the Connecticut state police on July 15, 2003.

The state charged the defendant, by way of information, with one count of murder, one count of felony murder, one count of robbery in the first degree and one count of larceny in the third degree. The defendant entered a plea of not guilty to each count of the information. On April 17, 2006, the defendant filed a motion to suppress the statements he had made to the police while in custody, which the court denied. A jury trial commenced on May 10, 2006, and on June 1, 2006, the jury returned a verdict of guilty as to all counts. Subsequently, the court sentenced the defendant to a total effective term of eighty years incarceration. This appeal followed.

I

The defendant asks us to revisit and overrule our holding in *State* v. *James*, 237 Conn. 390, 434, 678 A.2d 1338 (1996), that the due process clause of our state constitution does not require confessions to be recorded in order to be admissible.[3] Specifically, the defendant argues that the Connecticut constitution requires law enforcement agents, whenever feasible, to record custodial interrogations, *Miranda* warnings and any resulting statements by a defendant. The defendant contends that because the police did not record his interrogation and statements, those statements must be suppressed. In support of his claim, the defendant relies on the due process provisions of article first, §§ 8 and 9, of the constitution of Connecticut,[4] the privilege against self-incrimination, as well as the associated *Miranda* right to consult with counsel prior to and during custodial interrogation, the right to present a defense and the right to confrontation within article first, § 8, of the constitution of Connecticut. The defendant also argues, in the alternative, that this court should exercise its supervisory authority over the administration of justice to establish such a requirement. In response, the state argues that the text and history of the Connecticut constitution, as well as the policy reasons identified in *James*, defeat the defendant's argument. The state also argues that the decisions of appellate courts in other states counsel against such a rule, as only one of the states that has addressed the issue of electronic recording of custodial interrogations since *James* has adopted a recording requirement, which that court has limited to juvenile interrogations. Finally, the state argues that this court has never used its supervisory authority over the administration of justice to impose a rule of criminal procedure upon law enforcement and should not do so now. We conclude that, although there are benefits to be realized by a recording requirement, it is not mandated by our state constitution, and we decline to impose such a requirement pursuant to our supervisory powers.

The following additional facts are relevant to our resolution of this issue. On April 17, 2006, the defendant filed a motion to suppress the statements he had made while in custody on the grounds that they were obtained: (1) without proper advisement and waiver of his *Miranda* rights; (2) in violation of his right to counsel, which had attached by virtue of the extradition proceedings; and (3) in the absence of authority on the part of the officers who were transporting him to issue *Miranda* warnings or to conduct a custodial interrogation. On May 15, 2006, the defendant filed a motion in limine, seeking to preclude the state from introducing any oral statements that he had made while in police custody. The defendant argued that the state, by failing to record the defendant's statement and introducing

only portions of the statement, precluded him from offering additional portions of that statement pursuant to § 1-5 (b) of the Connecticut Code of Evidence,[5] without waiving his right to remain silent. The defendant contended that when law enforcement officials fail to record defendants' statements, they potentially preclude defendants from demonstrating the full context of their statements, as permitted by § 1-5 (b) of the Connecticut Code of Evidence, and that if § 1-5 (b) "is not enforced, law enforcement personnel will continue to selectively transcribe the statements of defendants."

Following a hearing, the court denied both of the defendant's motions. The court first observed that, in *State* v. *Lapointe*, 237 Conn. 694, 735, 678 A.2d 942, cert. denied, 519 U.S. 994, 117 S. Ct. 484, 136 L. Ed. 2d 378 (1996), this court had concluded that there was no constitutional obligation to record interrogations and declined to exercise its supervisory powers in order to create such an obligation. Second, the trial court concluded that the interrogation had not been conducted in violation of the defendant's right to counsel because, pursuant to *State* v. *Pierre*, 277 Conn. 42, 97, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006), the commencement of adversarial proceedings, which would trigger the defendant's sixth amendment right to counsel, had not occurred until the defendant had been presented in court or served with a warrant. Lastly, the court found that the defendant had properly been given his *Miranda* warnings pursuant to a *Miranda* rights card, also known as a blue card, rather than with the customary waiver of rights form. It also found that the defendant implicitly had waived his *Miranda* rights, observing that, pursuant to *State* v. *Barrett*, 205 Conn. 437, 448–49, 534 A.2d 219 (1987), such a waiver need not be explicit. The trial court further found that although the defendant had refused to provide a written statement, he had made admissible oral statements to the police.

"[O]ur standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [When] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct . . . ." (Internal quotation marks omitted.) *State* v. *Stenner*, 281 Conn. 742, 761, 917 A.2d 28, cert. denied, 552 U.S. 883, 128 S. Ct. 290, 169 L. Ed. 2d 139 (2007).

The defendant's claim that our state constitution requires police to record electronically custodial interrogations and statements implicates our duty to interpret the rights and guarantees provided by the Connecticut constitution. See *Moore* v. *Ganim*, 233 Conn. 557, 581, 660 A.2d 742 (1995). We begin our review

with the well established principle that "federal constitutional and statutory law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights." (Internal quotation marks omitted.) *State* v. *Geisler*, 222 Conn. 672, 684, 610 A.2d 1225 (1992). When adjudicating a claim brought pursuant to our own constitution, "our first referent is Connecticut law and the full panoply of rights Connecticut residents have come to expect as their due. . . . In construing the contours of our state constitution, we must exercise our authority with great restraint in pursuit of reaching reasoned and principled results. . . . We must be convinced, therefore, on the basis of a complete review of the evidence, that the recognition of a constitutional right or duty is warranted." (Citations omitted; internal quotation marks omitted.) *Moore* v. *Ganim*, supra, 581. Because the right proposed by the defendant is absent from the plain text of our constitution, we must employ "[t]he analytical framework by which we determine whether, in any given instance, our state constitution affords broader protection to our citizens than the federal constitutional minimum . . . ." (Internal quotation marks omitted.) *State* v. *Ledbetter*, 275 Conn. 534, 560, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006); see also *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 354, 990 A.2d 206 (2010) (*Schaller, J.*, concurring). In *State* v. *Geisler*, supra, 684–85, we set forth six factors to be used in analyzing an independent claim under this state's constitution: (1) the text of the operative constitutional provisions; (2) related Connecticut precedents; (3) persuasive relevant federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of our constitutional forbearers; and (6) contemporary understandings of applicable economic and sociological norms, or as otherwise described, relevant public policies. *State* v. *Michael J.*, 274 Conn. 321, 349–50, 875 A.2d 510 (2005).

As a preliminary matter, we review our decision in *State* v. *James*, supra, 237 Conn. 390. In *James*, the defendant claimed that the due process provision of article first, § 8, of our constitution requires the police, when feasible, to record electronically confessions, interrogations and advisements of *Miranda* rights that occur in places of detention in order for the resulting confession to be admissible at trial. Id., 428. We rejected this argument and concluded, on the basis of the factors enumerated in *Geisler*, that article first, § 8, of the constitution of Connecticut did not require a confession to be recorded as a prerequisite to admissibility. Id., 434. We first acknowledged that "[e]lectronic recording devices are . . . a relatively recent technological advancement, and [therefore] the absence of early historical support for their use in the receipt of confessions

by the police is of little relevance to our inquiry." Id., 429. We then noted that although "[o]ther analogous means of verifying the accuracy . . . of confessions and waivers of constitutional rights were available . . . at the time of the adoption of our due process clause," Chief Justice Swift's commentary on the laws of evidence made no reference to a corroboration requirement for confessions to be admissible at trial. Id., citing Z. Swift, A Digest of the Law of Evidence (1810), p. 131.

Having found no authority to suggest that such a requirement existed at common law, we turned to recent decisions of this court, which revealed no corroboration requirement for the existence and voluntariness of confessions, or the waiver of constitutional rights. *State* v. *James*, supra, 237 Conn. 430–31; see *State* v. *Shifflett*, 199 Conn. 718, 733, 508 A.2d 748 (1986) (law does not require defendant to execute written waiver of *Miranda* rights in order for subsequent incriminating statements to be admitted); *State* v. *Whitaker*, 215 Conn. 739, 756–57, 578 A.2d 1031 (1990) (no requirement for corroborative witness to defendant's waiver of *Miranda* rights or requirement that confession be witnessed by someone other than officer taking statement). We concluded that "[r]ather than establishing per se rules of corroboration for the admissibility of confessions, we consistently have allowed the trier of fact to consider the circumstances of the confession, including any lack of corroboration, in determining the weight, if any, to be afforded that particular piece of evidence." *State* v. *James*, supra, 431.

With regard to the decisions of other states, we found that of the states that had considered a similar claim, only two had adopted a recording requirement, and only one of those had adopted the requirement pursuant to the due process provision of its state constitution. Id., 431–32 and n.35; see *Stephan* v. *State*, 711 P.2d 1156, 1159 (Alaska 1985) (electronic recording of confessions is required, where feasible, under Alaska constitution's due process provision); see also *State* v. *Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (enacting electronic recording requirement pursuant to supervisory power).

We then considered the public policies relevant to the adoption of a recording requirement. *State* v. *James*, supra, 237 Conn. 432. Although we acknowledged that a recording requirement is a "desirable investigative practice, which is to be encouraged"; id., 434; we remained confident in the ability of the trial courts to evaluate the credibility and testimony of each witness with regard to what occurred during the interrogation of a defendant. Id., 433. Moreover, we noted that, in addition to the costs of purchasing the requisite recording equipment, the state would have to bear additional " 'costs,' " such as the risks that a recording requirement might inhibit police from pursuing confessions by constitutionally valid methods and that a defen-

dant might be less willing to speak with police if he or she knew the conversation would be recorded, as well as "the cost of noncompliance with the rule advanced by the defendant, due to negligence or for other reasons, [namely] . . . the loss of otherwise admissible, probative evidence of guilt." Id., 434. Therefore, pursuant to our *Geisler* analysis, we rejected the defendant's claim that the due process clause of our state constitution requires confessions be recorded. Id.; see also *State* v. *Lapointe*, supra, 237 Conn. 735 (rejecting similar claim).

In the present appeal, the defendant asks us to revisit and overrule, in part, *James* and *Lapointe*. We do not lightly overrule our existing precedent. This court repeatedly has acknowledged that because the doctrine of "[s]tare decisis, although not an end in itself, serves the important function of preserving stability and certainty in the law"; (internal quotation marks omitted) *Florestal* v. *Government Employees Ins. Co.*, 236 Conn. 299, 305, 673 A.2d 474 (1996); "a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it." (Internal quotation marks omitted.) Id. "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." (Internal quotation marks omitted.) *Hummel* v. *Marten Transport, Ltd.*, 282 Conn. 477, 494, 923 A.2d 657 (2007).

Turning to the present claim, we first consider "persuasive relevant federal precedents . . . ." (Internal quotation marks omitted.) *State* v. *Rizzo*, 266 Conn. 171, 212, 833 A.2d 363 (2003). As the defendant concedes, and our research reveals, there is no federal precedent in support of the proposition that the federal constitution imposes a recording requirement.[6] The federal Courts of Appeal that have considered a similar claim have uniformly rejected it.[7]

The lack of support for this claim under the federal constitution is relevant to our consideration of the text of the operative state constitutional provisions as well as related Connecticut precedent. See *State* v. *McKenzie-Adams*, 281 Conn. 486, 511, 915 A.2d 822, cert. denied, 552 U.S. 888, 128 S. Ct. 248, 169 L. Ed. 2d 148 (2007). We consider these facts together because analysis of the text of our constitution necessarily includes our prior interpretations of the breadth of those constitutional provisions. On the basis of the text alone, none of the provisions on which the defendant relies provide support for a recording requirement. See footnote 4 of this opinion. More specifically, the defendant relies first on article first, §§ 8 and 9, of the constitution of Con-

necticut, which we have construed to guarantee the citizens of Connecticut due process of law. See *State* v. *Rizzo*, supra, 213. The due process clauses of the state and the federal[8] constitutions are virtually identical. See *State* v. *Ledbetter*, supra, 275 Conn. 562. Although we have stated that this similarity "neither precludes nor favors a determination that [the state constitutional provisions] impose any burden higher than the federal constitution"; *State* v. *Rizzo*, supra, 213; we have also concluded, in construing the due process clause in article first, § 8, of our state constitution that the "similarity between the two provisions . . . support[s] a common source and, thus, a common interpretation of the provisions." (Citations omitted.) *State* v. *Ledbetter*, supra, 562.

With respect to the privilege against self-incrimination within article first, § 8, of the Connecticut constitution, we have declined to construe this provision more broadly than the right provided in the fifth amendment to the United States constitution. *State* v. *Asherman*, 193 Conn. 695, 711–15, 478 A.2d 227 (1984) (reviewing history and common-law origins of right against self-incrimination in article first, § 8, of constitution of Connecticut and rejecting defendant's argument for construing right more broadly than federal provision), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985); accord *State* v. *Castonguay*, 218 Conn. 486, 496, 590 A.2d 901 (1991) (declining to depart from *Asherman*).

The defendant also contends that the right to counsel as guaranteed by our state constitution, mandates that all custodial interrogations be recorded electronically. Because the defendant invokes the right to counsel safeguarded by *Miranda*, that is, his "right to consult with counsel prior to and during custodial interrogation," he appears to rely on our state counterpart to the fifth amendment right to counsel.[9] With respect to the "*Miranda* right to consult with counsel," we inquire whether the text of the due process clause of article first, § 8, of the constitution of Connecticut and the right to *Miranda* warnings that we have associated with that provision, or our related precedent, provide support for the defendant's proposed rule. "Although the *Miranda* warnings were originally effective in state prosecutions only because they were a component of due process of law under the fourteenth amendment . . . they have also come to have independent significance under [article first, § 8, of] our state constitution." (Internal quotation marks omitted.) *State* v. *Medina*, 228 Conn. 281, 288, 636 A.2d 351 (1994), quoting *State* v. *Ferrell*, 191 Conn. 37, 41, 463 A.2d 573 (1983); see also *State* v. *Barrett*, supra, 205 Conn. 447 (*Miranda* warnings are "independently required under the due process clause of article first, § 8, of the Connecticut constitution"). The defendant relies on two cases in which we have held that the due process clause of the

Connecticut constitution provides protections beyond those guaranteed by the federal constitution with regard to *Miranda* rights for custodial suspects. Specifically, the defendant relies on *State* v. *Ferrell*, supra, 41–42, which held that, under article first, § 8, of our state constitution, police may not testify regarding statements that they overheard while the defendant, who was in custody, was speaking with his attorney, and *State* v. *Stoddard*, 206 Conn. 157, 166, 537 A.2d 446 (1988), which concluded that the state constitution requires police to inform a suspect of "timely efforts by counsel to [provide] pertinent legal assistance." Neither *Ferrell*, *Stoddard*, nor any other authority that we have found, however, indicates that our state constitution imposes greater protections with regard to the advisement of *Miranda* rights or requires additional corroboration for admission of testimony describing such an advisement. Our case law, therefore, does not support the defendant's claim that the right to counsel under the state constitution mandates a recording requirement.

The defendant also relies on the right to present a defense encompassed in article first, § 8, of the constitution of Connecticut. Although there are slight textual differences between the state provision and its federal counterpart in the sixth amendment to the United States constitution, we have rejected the assertion that this difference has any practical effect on the parameters of the right to compulsory process. *State* v. *Estrella*, 277 Conn. 458, 488–49 and n.19, 893 A.2d 348 (2006).

Finally, with respect to the right to confrontation within article first, § 8, of our state constitution, its language is nearly identical to the confrontation clause in the sixth amendment to the United States constitution. The provisions have a shared genesis in the common law. See *Crawford* v. *Washington*, 541 U.S. 36, 43, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) ("[t]he founding generation's immediate source of the concept [of the right of confrontation] . . . was the common law"); *State* v. *Torello*, 103 Conn. 511, 513, 131 A. 429 (1925) (purpose of confrontation clause in state constitution was "to mark, preserve, protect and perpetuate a right existing under the common law"). Moreover, we have acknowledged that the principles of interpretation for applying these clauses are identical. *State* v. *Gaetano*, 96 Conn. 306, 310, 114 A. 82 (1921). Therefore, we are not convinced that we should, in this context, construe the confrontation clause of our state constitution to provide greater protections than its federal counterpart.

Accordingly, because the text of the provisions on which the defendant relies makes no reference to a corroboration requirement for the admissibility of confessions and because, according to our case law, those provisions do not provide broader protections than their federal counterparts, these factors do not support the defendant's claim that a recording requirement is

mandated by article first, §§ 8 and 9, of the constitution of Connecticut.

The fourth *Geisler* factor, a historical approach that examines the intent of our constitutional forefathers, also provides no support for the defendant's claim. See *State* v. *Rizzo*, supra, 266 Conn. 212–13. The defendant has failed to identify any persuasive evidence of the intent of the authors of our constitution with regard to a version of a recording requirement for custodial interrogations. As we noted in *James*, "Chief Justice Swift's commentary on the laws of evidence does not indicate that any form of corroboration of the existence and circumstances of statements made by criminal defendants to police traditionally was required in order for such statements to be admissible at trial . . . ." *State* v. *James*, supra, 237 Conn. 429. The defendant, placing great emphasis on our reference to police, argues that the historical record can be viewed as supporting the defendant's claim because, according to the defendant, there were no police in early or colonial Connecticut, including during the time of Chief Justice Swift's writing on the laws of evidence. We also noted in *James*, however, that Chief Justice Swift wrote that "[i]t is a settled rule of common law, that in prosecutions for crimes, the voluntary confession of a prisoner, made to a private person or a magistrate, may be given in evidence against him; and if proved by legal testimony, *though uncorroborated by any other evidence*, is sufficient to convict him . . . ." (Internal quotation marks omitted.) Id., 429–30, quoting Z. Swift, supra, p. 131. Accordingly, we find the defendant's argument unpersuasive.

This fifth *Geisler* factor requires us to examine the persuasive precedents of other state courts. See *State* v. *Rizzo*, supra, 266 Conn. 214. Virtually every state that has considered an argument similar to the defendant's claim has concluded that due process does not require the recording of custodial interrogations.[10] Those states have followed a number of different rationales, many of which we find persuasive. We highlight the decisions that most inform our analysis.

In rejecting the argument that the due process provision of their state constitution mandates a recording requirement, a number of courts have relied on the fact that there is a procedure already in place to determine if a confession is voluntary and therefore admissible. The Supreme Court of Kentucky reasoned that the issue of whether the due process clause of their state constitution mandated a recording requirement implicated the "determinations of reliability traditionally made by trial courts . . . . Due process inquiries require us to assess '[t]he risk of an erroneous deprivation of [liberty] as a consequence of the . . . procedures used.' " *Brashars* v. *Commonwealth*, 25 S.W.3d 58, 62 (Ky. 2000), cert. denied, 531 U.S. 1100, 121 S. Ct. 834, 148

L. Ed. 2d 715 (2001). Noting that trial courts commonly resolve factual disputes and determine, without independent corroboration, issues such as whether the police had the requisite reasonable suspicion necessary to detain a defendant, the court concluded: "[W]e disagree with the [defendant's] contention that fundamental fairness cannot be ensured by [the] trial court's resolution of factual disputes regarding custodial interrogations on the basis of testimony from the persons involved." Id. The Supreme Court of Hawaii used a similar rationale in *State* v. *Kekona*, 77 Haw. 403, 407–408, 886 P.2d 740 (1994), in which the defendant had argued that the state was required to record his custodial interrogation because the recording was necessary to determine whether he validly waived his constitutional rights. The court rejected this claim, concluding that the state's failure to record the interrogation was an issue relating to the credibility of the police and the defendant—which is to be determined by the trial court, rather than a procedure that "was so detrimental to [the defendant's] defense that it necessarily resulted in [an] unfair trial." Id., 409; see also *Starks* v. *State*, 594 So. 2d 187, 196 (Ala. Crim. App. 1991) (unrecorded custodial interrogations admissible if voluntariness is adequately established), cert. denied, 1992 Ala. LEXIS 217 (February 14, 1992); *State* v. *Nicholson*, 174 W. Va. 573, 577, 328 S.E.2d 180 (1985) (recognizing merits of recording requirement but concluding that "on balance, such a requirement is impractical logistically [and] unnecessary given other protections that our system of interviewing suspects already provides"). We find these decisions persuasive because, as we stated in *James*, "we are not prepared to accept the fundamental premise of the defendant's argument that reliance on the trial court to resolve factual issues from the testimony of persons familiar with the events at issue, is, in this context, unacceptable as measured by the flexible concepts of due process. We are not persuaded that determinations of admissibility traditionally made by trial courts are inherently untrustworthy or that independent corroboration of otherwise competent testimonial or documentary evidence regarding the existence and voluntariness of a confession is necessary to comport with constitutional due process requirements." *State* v. *James*, supra, 237 Conn. 433.

In light of our conclusion that the similarities between the due process provisions of our state constitution and the federal constitution support a common interpretation; *State* v. *Ledbetter*, supra, 275 Conn. 562; we also find persuasive decisions concluding that a recording requirement is not mandated by a state due process clause because the protections of that clause mirror those of the federal counterpart. In rejecting the defendant's argument that the due process clause of the Kentucky constitution mandated a recording requirement, the Supreme Court of Kentucky noted that it "has never

held that the procedural due process protections of [the state constitution] extend beyond the protections" of the federal constitution. *Brashars* v. *Commonwealth*, supra, 25 S.W.3d 61; see *Clark* v. *State*, 374 Ark. 292, 302, 287 S.W.3d 567 (2008) (declining to find constitutional right to recordation in absence of evidence that court has viewed admissibility determinations for custodial interrogations more rigorously than federal courts); *People* v. *Holt*, 15 Cal. 4th 619, 664, 937 P.2d 21, 63 Cal. Rptr. 2d 782 (1997) ("we are aware of nothing in the language or history of the California constitutional due process provisions which would support a construction of that charter which mandates a more stringent standard than that of the [f]ourteenth [a]mendment [to the United States constitution]").

Finally, we find persuasive the reasoning of courts that have determined that, where a recording requirement is not mandated by the state constitution, the legislature is better suited to decide whether to establish a recording policy. The Supreme Court of Vermont, for example, concluded that "[t]he most appropriate means of prescribing rules to augment citizens' due process rights is through legislation. . . . In the absence of legislation, we do not believe it appropriate to require, by judicial fiat, that all statements taken of a person in custody be tape-recorded." (Citation omitted.) *State* v. *Gorton*, 149 Vt. 602, 606, 548 A.2d 419 (1988). The Supreme Court of Tennessee expressed a similar view, reasoning that because historically, "[t]he determination of public policy is primarily a function of the legislature . . . the issue of electronically recording custodial interrogations is one more properly directed to the General Assembly." (Citations omitted; internal quotation marks omitted.) *State* v. *Godsey*, 60 S.W.3d 759, 772 (Tenn. 2001); see also *People* v. *Raibon*, 843 P.2d 46, 49 (Colo. App. 1992) ("[w]e decline . . . to mold our particular view of better practice into a constitutional mandate which would restrict the actions of law enforcement agents in all cases"), cert. denied, 1993 Colo. LEXIS 15 (January 11, 1993); *State* v. *Grey*, 274 Mont. 206, 213–14, 907 P.2d 951 (1995) ("[a]lthough [recording interrogations] may be the better practice and would help assure that the accused receives a constitutionally adequate *Miranda* warning while, at the same time, enhancing the prosecution's ability to meet its burden to prove voluntariness, we leave the imposition of any such procedural requirement to the legislature and to individual law enforcement agencies"). This judicial restraint is consistent with our own well established precedent. See *Thibodeau* v. *Design Group One Architects, LLC*, 260 Conn. 691, 715, 802 A.2d 731 (2002) ("primary responsibility for formulating public policy resides in the legislature"); see also *State* v. *Peters*, 287 Conn. 82, 97–98, 946 A.2d 1231 (2008) (where pro rata reduction is not required by federal medicaid law, determination of whether to provide reduction is policy mat-

ter more appropriately addressed by legislature).

Conversely, *only* the Supreme Court of Alaska has concluded that electronic recording is mandated by the due process clause of its state constitution. In *Stephan* v. *State*, supra, 711 P.2d 1159, the court concluded that all custodial interrogations must be electronically recorded whenever feasible, noting that the United States constitution imposes a "heaving burden"; id., 1160; when a defendant claims that his confession is involuntary. The court observed that "[t]he contents of an interrogation are obviously material in determining the voluntariness of a confession"; id., 1161; and reasoned that "recording, in such circumstances, is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self incrimination and, ultimately, his right to a fair trial." Id., 1159–60.

Three other courts have established a recording requirement, in some circumstances, pursuant to their supervisory powers. In *State* v. *Scales*, supra, 518 N.W.2d 591–92, the Minnesota Supreme Court expressed frustration that law enforcement officials had failed to respond to its admonitions, articulated in two previous cases, that electronic recordings should be used to preserve custodial interrogations. See *State* v. *Pilcher*, 472 N.W.2d 327, 333 (Minn. 1991) (urging "law enforcement professionals use [the] technological means at their disposal to fully preserve those conversations and events preceding the actual interrogation" and warning that "[l]aw enforcement personnel and prosecutors may expect that [the] court will look with great disfavor upon any further refusal to heed these admonitions"); *State* v. *Robinson*, 427 N.W.2d 217, 224 n.5 (Minn. 1988) ("recordation of all pre-statement conversations would afford the reviewing court an objective record upon which to rule, rather than one based upon self-serving or subjective assertions of the principals involved"). Notably, the court did not consider whether the due process clause of the Minnesota constitution mandated a recording requirement. *State* v. *Scales*, supra, 592. Similarly, the Supreme Court of Wisconsin imposed a recording requirement for custodial interrogations pursuant to its supervisory power, but limited that rule to the interrogation of juveniles. *In re Jerrell C.J.*, 283 Wis. 2d 145, 172, 699 N.W.2d 110 (2005).

In *State* v. *Cook*, 179 N.J. 533, 847 A.2d 530 (2004), the Supreme Court of New Jersey took yet another route. The court first rejected the defendant's argument that due process requires the recording of all custodial interrogations, stating "[b]ecause there is otherwise fair-minded disagreement concerning the appropriateness of imposing a sweeping requirement of electronic [recording] of custodial statements we hold that [the] defendant's point of error is not of constitutional dimension." (Internal quotation marks omitted.) Id., 559. The

court then established a committee to study electronic recording of custodial interrogations and to make recommendations regarding a recordation rule; id., 562; and pursuant to that committee's recommendations, exercised its supervisory authority to establish a rule requiring electronic recording of all homicides and numerous other felonies. N.J. Court Rules 3:17.[11] These cases, however, provide little support for the defendant's proposed rule in light of more persuasive analysis from other states concluding that the procedures already used to prevent admission of involuntary confessions satisfy a state due process clause that, in these circumstances, offers no greater protections than its federal counterpart.

The last *Geisler* factor requires an examination of the relevant economic and sociological factors as well as public policy. *State* v. *Geisler*, supra, 222 Conn. 685; see *State* v. *Stenner*, supra, 281 Conn. 762 (sixth *Geisler* factor focuses on public policy considerations). The defendant, well supported by the amici curiae, contends that electronic recording of interrogations, by creating an accurate and neutral record of what occurred in the interrogation room, would have benefits across the criminal justice system, including protecting defendants from the admission of involuntary confessions and conserving judicial resources by reducing the need for hearings on motions to suppress. The state argues that whether to mandate electronic recording of interrogations is a public policy matter, consideration of which is better suited to the legislature. Although, as we have already discussed, a majority of state courts have declined to impose a mandatory recording requirement, many of them, including this court; *State* v. *James*, supra, 237 Conn. 432, 434; have noted the benefits of electronically recording interrogations and *Miranda* advisements. See, e.g., *State* v. *Jones*, 203 Ariz. 1, 7, 49 P.3d 273 (2002) (videotaping entire interrogation process, including advice of rights, waiver of rights, questioning and confessions, is better practice than partial recording); *Stoker* v. *State*, 692 N.E.2d 1386, 1390 (Ind. App. 1998) (strongly recommending policy of recording custodial interrogations); *State* v. *Kilmer*, 190 W. Va. 617, 629, 439 S.E.2d 881 (1993) (law enforcement officers would be wise to implement recording policy because it would be beneficial to law enforcement as well as to suspect and court when determining admissibility of confession).

First, and perhaps foremost in the minds of the defendant and amici curiae, recorded interrogations would protect the rights of the accused by creating an objective, reviewable record of the interrogation. Commentators argue that an electronic recording is a court's "best tool" in its voluntariness determination; D. Donovan & J. Rhodes, "Comes a Time: The Case for Recording Interrogations," 61 Mont. L. Rev. 223, 227 (2000); because "recordings are the only way in which the

actual words, actions, tones and other details of interviews may be preserved." T. Sullivan, "Recording Federal Custodial Interviews," 45 Am. Crim. L. Rev. 1297, 1306 (2008). Proponents of mandatory electronic recording argue that, particularly in light of the fact that the memory of each witness fades with time, a recording would provide judges and juries with a more accurate picture of what was said because words convey different meanings depending on the tone or nuance of the speaker. W. Westling, "Something is Rotten in the Interrogation Room: Let's Try Video Oversight," 34 J. Marshall L. Rev. 537, 550 (2000–2001). Advocates of a recording requirement also maintain that a recording would protect defendants from the admission of involuntary or invalid confessions by eliminating the "swearing contests between the police and the defendant regarding what was said." R. Iraola, "The Electronic Recording of Criminal Interrogations," 40 U. Rich. L. Rev. 463, 477 (2006).[12]

Proponents also argue that a recording would benefit police and prosecutors in cases where the defendant made a valid confession or inculpatory statements. As the Supreme Court of New Hampshire observed, "[l]istening to a defendant be inculpated by his or her own voice has a persuasive power unrivaled by contradictory testimonial evidence." *State* v. *Barnett*, 147 N.H. 334, 337, 789 A.2d 629 (2001); see T. Sullivan, "The Time Has Come for Law Enforcement Recordings of Custodial Interviews, Start to Finish," 37 Golden Gate U. L. Rev. 175, 179 (2006) (prosecutors have reported that "proof of confessions or admissions, or evasions and signs of guilty conscience, is immeasurably stronger when established by electronic recordings, rather than by police testimony based on notes, typewritten reports, and testimonial descriptions," increasing both guilty pleas and prosecutor's bargaining power with respect to sentencing).

Additionally, advocates of a recording requirement maintain that electronic recordings would protect police officers from false allegations of misconduct or constitutional violations. The Supreme Court of Alaska observed that "[a] recording, in many cases, will aid law enforcement efforts, by confirming the content and the voluntariness of a confession, when a defendant changes his testimony or claims falsely that his constitutional rights were violated." *Stephan* v. *State*, supra, 711 P.2d 1161; see *In re Jerrell C.J.*, supra, 283 Wis. 2d 170 (recording will protect individual interest of police officers wrongfully accused of improper tactics because suspects will be unable to contradict objective record of interrogation); T. Sullivan, supra, 45 Am. Crim. L. Rev. 1308 ("[r]ecordings eliminate the risk that courts will exclude suspects' statements from evidence because of contradictory and confusing testimony as to what occurred behind closed doors"). Moreover, commentators observe that recording interrogations

would protect police and taxpayers from the costly civil rights claims that stem from false allegations of misconduct. T. Sullivan, supra, 45 Am. Crim. L. Rev. 1310.

Commentators also argue that recording interrogations would benefit police by allowing them to focus on the suspect during the interview rather than take notes and because such a practice would provide a record for officers to refer to during an ongoing investigation. See L. Lewis, "Rethinking *Miranda*: Truth, Lies, and Videotape," 43 Gonz. L. Rev. 199, 222 (2007–2008). Advocates of recording requirements note that videotaped recordings of interrogations would provide an opportunity for supervisors to evaluate officers and to discipline officers when necessary, and could serve as examples in officer training. M. Thurlow, "Lights, Camera, Action: Video Cameras as Tools of Justice," 23 J. Marshall J. Computer & Info. L. 771, 811 (2005). Recordings could also help law enforcement officers identify and eliminate interrogation methods that are more likely to lead to false confessions. W. White, "False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions," 32 Harv. C.R.-C.L. L. Rev. 105, 154–55 (1997); see also G. Johnson, "False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations," 6 B.U. Pub. Int. L.J. 719, 751 (1997) ("without electronic recording [of interrogations] . . . wrongful convictions based on false confessions will needlessly continue").

Significantly, courts have identified the additional benefit that recording interrogations would conserve judicial resources by assisting in the timely resolution of motions to suppress. More specifically, a recording requirement would reduce the number of pretrial suppression motions based on claims that the *Miranda* waiver or confession was involuntary. See *Commonwealth* v. *Diaz*, 422 Mass. 269, 272, 661 N.E.2d 1326 (1996) (recording would eliminate certain challenges to admissibility and aid in resolution of those challenges). "[C]ourts spend an inordinate amount of time and resources wrestling with such slippery matters." *In re Jerrell C.J.*, supra, 283 Wis. 2d 170; see also *State* v. *Godsey*, supra, 60 S.W.3d 772 ("[t]here can be little doubt that electronically recording custodial interrogations would reduce the amount of time spent in court resolving disputes over what occurred during the interrogation"). Supporters claim that electronic recordings would also be a significant aid to appellate courts dealing with the same nuanced and fact specific issues. See L. Lewis, supra, 43 Gonz. L. Rev. 221 (arguing that increased accuracy at trial level will lessen workload of appellate courts).

There are, however, drawbacks to a recording requirement. The financial cost of purchasing, installing

and maintaining electronic equipment, as well as training officers on the proper use of the equipment, would be a significant expenditure. "Police departments, already short on funding, are unlikely to be receptive to further financial outlays for video-recording equipment." E. Sackman, "False Confessions: Rethinking a Contemporary Problem," 16 Kan. J. L. & Pub. Policy 208, 229 (2006–2007). Even proponents of a recording requirement concede that these costs "can be prohibitive." M. Thurlow, supra, 23 J. Marshall J. Computer & Info. L. 797. Additionally, "[r]equiring the police to record all confessions and interrogations in places of detention might severely inhibit the police in pursuing, by constitutionally valid methods, confession evidence. Moreover, a criminal suspect's knowledge that an interview with the police will be recorded might limit his or her willingness to speak with the police. We have noted that it is a common experience of life that in many circumstances persons are willing to convey information orally but are reluctant to put the same thing in writing. *State* v. *Frazier*, [185 Conn. 211, 225, 440 A.2d 916 (1981), cert. denied, 458 U.S. 1112, 102 S. Ct. 3496, 73 L. Ed. 2d 1375 (1982)]; see also *United States* v. *Cooper*, 499 F.2d 1060, 1062 (D.C. Cir. 1974) (same). Similarly, a criminal defendant may be more forthcoming when speaking to the police without the presence of a tape recorder or video camera." (Internal quotation marks omitted.) *State* v. *James*, supra, 237 Conn. 433–34; see also T. Sullivan, supra, 45 Am. Crim. L. Rev. 1321 (federal bureau of investigation has expressed concern that recording interrogations would hinder rapport-building).

We reaffirm our statement in *James* that "the recording of confessions and interrogations generally might be a desirable investigative practice, which is to be encouraged"; *State* v. *James*, supra, 237 Conn. 434; particularly in light of the fact that, by creating an objective, complete reviewable record of the interrogation and *Miranda* warnings, an electronic recording could aid courts in evaluating the reliability and trustworthiness of confessions.[13] Id., 432. In this way, an electronic recording would help to increase both the accuracy and the efficiency of judicial proceedings and, therefore, we would welcome such a resource. In addition to weighing and balancing the benefits and drawbacks of an electronic recording requirement, however, creating a recording mandate requires establishing the parameters of such a rule.[14] For example, the rule could apply only when police officers are interrogating suspects within Connecticut or only when police officers are interviewing juveniles. Additionally, there is a question as to whether the rule should apply to interrogations of individuals suspected of all crimes, including misdemeanors such as shoplifting, or only certain serious offenses such as homicides and sexual assaults. Establishing a recording mandate would also require

determining whether voluntary statements and noncustodial interrogations would be included under such a regime. Moreover, there is the issue of what portion of the interrogation must be recorded. This could include the entire interaction between the suspect and the police, the giving and waiver of *Miranda* rights or everything after the suspect has been given his or her *Miranda* rights. There is also the significant issue of establishing the consequences for failure to record an interrogation, namely, whether the defendant's statements must be suppressed or whether the state may introduce the statements after establishing that the statements were given voluntarily by a preponderance of the evidence. The recording requirements imposed by a number of state legislatures illustrate both the complexity of this issue, as well as the panoply of options in imposing such a rule. See, e.g., D.C. Code Ann. § 5-116.01 (LexisNexis 2009) (police shall record custodial interrogation beginning with first contact between police and suspect once suspect has been placed in interrogation room and shall include warnings of constitutional rights and response of suspect to such warnings); D.C. Code Ann. § 5-116.03 (LexisNexis 2009) (unrecorded statement of defendant is subject to rebuttable presumption that statement was involuntary, which may be overcome by clear and convincing evidence that statement was voluntarily given); 725 Ill. Comp. Stat. Ann. § 5/103-2.1 (f) (West 2006) (oral or written statement by defendant made as result of custodial interrogation presumed inadmissible if interrogation is not electronically recorded, which may be overcome by preponderance of evidence that statement was voluntary and is reliable based on totality of circumstances); Me. Rev. Stat. Ann. tit. 25, § 2803-B (1) (K) (2007), as amended by 2009 Me. Laws 336, § 18 (law enforcement must adopt written policies for digital, electronic, audio, video or other recording of law enforcement interviews of suspects in serious crimes and preservation of investigative notes and records in such cases); M.D. Code Ann., Crim. Proc. § 2-402 (1) (LexisNexis 2008) (law enforcement unit that regularly uses one or more interrogation rooms capable of audiovisual recording of custodial interrogations "shall make reasonable efforts to create an audiovisual recording of a custodial interrogation" of suspect in cases involving murder, rape, sexual assault in first degree or sexual assault in second degree); N.M. Stat. Ann. § 29-1-16 (Cum. Sup. 2008) (custodial interrogation and advisement of constitutional rights must be recorded in entirety when individual is suspected of committing felony offense, unless interrogation takes place outside of state or within correctional facility); N.C. Gen. Stat. § 15A-211 (d) through (f) (2009) (law enforcement officer conducting custodial interrogation in homicide investigation must make electronic recording of interrogation in entirety and failure to comply with requirement shall be considered by court in adjudicating

motions to suppress); Tex. Code Crim. Proc. Ann. art. 38.22 (3) (a) (1) and (2) (Vernon 2005) (statement made during custodial interrogation inadmissible unless statement, advisement of rights and waiver of rights are electronically recorded); Wis. Stat. § 968.073 (2) (2007) (policy of state is to make electronic recording of custodial interrogations of persons suspected of committing felony); Wis. Stat. § 972.115 (2) (a) (2007) (in absence of exception to recording requirement, defendant is entitled, subject to enumerated exceptions, to jury instruction that it is state policy to record custodial interviews and that jury may consider lack of recording when evaluating testimony regarding interrogation).

Similarly, the lack of uniformity among the rules created by high courts of other states, either by way of constitutional interpretation or pursuant to their supervisory power, illustrates the variety of ways in which such a policy may be implemented. See, e.g., *Stephan* v. *State*, supra, 711 P.2d 1162 (due process clause of state constitution requires that entire custodial interrogation, including advisement of *Miranda* rights, be recorded); *State* v. *Barnett*, supra, 147 N.H. 337–38 (establishing pursuant to supervisory authority that electronic recordings of custodial interrogations are only admissible when defendant's statement has been recorded in its entirety); *State* v. *Cook*, supra, 179 N.J. 562 (establishing committee to study electronic recording of custodial interrogations); *In re Jerrell C.J.*, supra, 283 Wis. 2d 172 (establishing recording requirement for custodial interrogations pursuant to supervisory authority).[15]

Determining the parameters of such a rule requires weighing competing public policies and evaluating a wide variety of possible rules. *Clark* v. *State*, supra, 374 Ark. 304 (it would be "difficult task [to draft] a rule that would clearly delineate the parameters of a recording requirement"). In our view, such determinations are often made by a legislative body because it is in a better position to evaluate the competing policy interests at play in developing a recording requirement in that it can invite comment from law enforcement agencies, prosecutors and defense attorneys regarding the relevant policy considerations and the practical challenges of implementing a recording mandate. See *Turner Broadcasting System, Inc.* v. *Federal Communications Commission*, 512 U.S. 622, 665–66, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) ("[a]s an institution . . . Congress is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon an issue as complex and dynamic as that presented here" [internal quotation marks omitted]); *Patsy* v. *Board of Regents*, 457 U.S. 496, 513, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982) ("[T]he relevant policy considerations do not invariably point in one direction, and there is vehement disagreement over the validity of the assumptions underlying many of them. The very difficulty of these

policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable."); *United States* v. *Coades*, 549 F.2d 1303, 1305 (9th Cir. 1977) (need for recording requirement and particular form of rule "are appropriate matters for consideration by Congress, not for a court exercising an appellate function"). Our view that the legislature is better suited to create a recording requirement is informed by the experience of other states, namely, the varying contours of the mandates imposed by other legislatures and courts.[16] Notably, the New Jersey Supreme Court first established a committee "to study and make recommendations on the use of electronic [recording] of custodial interrogations." *State* v. *Cook*, supra, 179 N.J. 562. The court refrained from establishing a recording requirement until it was presented with the committee's recommendations and, as a result of those recommendations, imposed a rule requiring electronic recording of interrogations in investigations of homicides and other serious felonies only. See N.J. Court Rules 3:17. Stated another way, although it is our province to rule on state constitutional matters, this particular question involves factual issues, the gathering and evaluation of which is, in this case, the proper function of the legislature. See also *Craig* v. *Driscoll*, 262 Conn. 312, 352–53, 813 A.2d 1003 (2003) (*Sullivan*, *C. J.*, dissenting) ("the legislature . . . can invite public participation in the analysis of all relevant policy considerations"). Thus, although a recording requirement may be desirable and aid in the fair resolution of criminal matters, "[i]t is emphatically the province and duty of [this court] to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803); see also *Symsbury Case*, 1 Kirby (Conn.) 444, 447 (1785) (declaring legislative enactment void). We cannot construe article first, §§ 8 and 9, of our state constitution to impose such a requirement. We emphasize that, consistent with our view that a recording mandate could yield important benefits and that the legislature is better equipped to define that mandate, the legislature has ordered an evaluation of the pilot program to electronically record interrogations. See Public Acts 2008, No. 08-143, § 2 (a) (2) (P.A. 08-143).

The defendant also argues, in the alternative, that we should adopt a recording requirement pursuant to our inherent supervisory powers. "Appellate courts possess an inherent supervisory authority over the administration of justice. . . . 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." (Citations omitted; internal quotation marks omitted.) *State* v. *Valedon*, 261 Conn. 381, 386, 802 A.2d 836 (2002). The exercise of our supervisory powers 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." (Emphasis in original; internal quotation marks omitted.) *State* v. *Reynolds*, 264 Conn. 1, 215, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 12 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). In exercising our supervisory powers, we must be mindful of the practical considerations set forth previously in this opinion. Moreover, the defendant's claim implicates the scope of our supervisory authority because we normally exercise this power with regard to the conduct of judicial actors. See *State* v. *James*, supra, 237 Conn. 434 n.36. Although imposing a recording requirement would directly effect the admissibility of evidence, which is surely within the authority of this court, it would also directly effect all law enforcement agencies. See *State* v. *Valedon*, supra, 386. Even assuming that the imposition of such a rule falls within the ambit of our supervisory powers, we decline to establish a recording requirement. "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. *Coward*, 292 Conn. 296, 315, 972 A.2d 691 (2009). Given the procedures already in place to prevent the admission into evidence of involuntary or untrustworthy confessions, namely, the voluntariness determination that must be made by the trial court, we are not convinced that the failure of police to record interrogations is a threat to "the integrity of a particular trial . . . [or] the perceived fairness of the judicial system as a whole." (Internal quotation marks omitted.) *State* v. *Marquez*, 291 Conn. 122, 166, 967 A.2d 56, cert. denied, U.S. , 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009).

In sum, we acknowledge, as does the state, that a requirement that the police record all interrogations *could* benefit the criminal justice system.[17] Although we do have supervisory authority over the administration of justice, such power is to be used as an extraordinary remedy only. Because we believe that the legislature is better suited to gather and assess the facts necessary to establishing a recording requirement, we defer to this branch. Indeed, the legislature has acted on its role with regard to this very issue and, in the absence of a determination that such a rule is constitutionally mandated, we decline to exercise any authority we might have in this regard. See P.A. 08-143, § 2 (a) (2).

Therefore, we reject the defendant's claim.

II

The defendant also claims that the trial court improp-

erly allowed the state to elicit testimony from a detective that described the defendant's assertion of his right to remain silent in violation of *Doyle* v. *Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). The defendant argues that this violation of his constitutional right to remain silent requires reversal of his conviction and a new trial. In support of his claim, the defendant points to six instances in which the state allegedly violated his right to remain silent; namely, three references to his refusal to sign the *Miranda* rights card, as well as references to his refusal to give a written statement, his refusal to answer questions and arrogant demeanor, and his statement that he is not a snitch. The state contends that the detective's reference to the defendant's refusal to sign the *Miranda* rights card or to provide a written statement is a constitutionally permissible description of the investigative efforts by the police. The state also argues that testimony regarding the defendant's statement that he is not a snitch is not a *Doyle* violation because the defendant had waived his right to remain silent. The state further argues that the detective's testimony that the defendant was arrogant during the interrogation is a permissible description of the defendant's physical demeanor rather than a reference to the defendant's post-*Miranda* silence. Finally, the state argues that even if the testimony included impermissible comments regarding the defendant's post-*Miranda* silence, the error was harmless beyond a reasonable doubt. We agree with the state.

The record reveals the following additional facts. At trial, Detective Anthony Buglione of the Connecticut state police testified that he and Detective Robert Johnson, also a member of the Connecticut state police, interviewed the defendant on June 18, 2003. Buglione testified that the interview took place at a jail in Atlanta, Georgia, where the defendant was being held. Buglione explained that he had read the defendant his *Miranda* rights from a blue card, that both he and Johnson had initialed, dated and signed the blue card, but the defendant had refused to sign the blue card. After further questioning regarding the initials on the blue card, the prosecutor asked Buglione if, after reading the defendant his *Miranda* rights, he had asked the defendant any questions about those rights. Buglione testified that he had asked the defendant if he would sign the blue card, which the defendant had refused to do, and if he understood the rights, which the defendant had answered by nodding.

Buglione further testified that when he asked the defendant if he wanted to speak with the detectives, the defendant stated that he did not know anything about a murder in Connecticut and was not in the state on May 9, 2002, a date that the detectives had not yet mentioned. Buglione testified that the defendant had proceeded to ask and answer questions regarding the murder investigation. According to Buglione, after the

defendant stated that if anybody saw him at the crime scene or killing anyone, they would be lying, the interviewed ended. Buglione testified that he had asked the defendant if he would provide a written statement, which the defendant declined to do.

The prosecutor then asked Buglione if the defendant had asked the detectives about the status of the investigation. Buglione testified that the defendant had asked whether Bunch had been arrested, that he then told the defendant that Bunch was only a suspect at that time, and asked the defendant if he had any information about Bunch. Buglione explained that the defendant had stated that "he wasn't a snitch . . . [and] wouldn't say anything else."

The prosecutor asked Buglione to characterize the defendant's demeanor as well as his own demeanor and that of Johnson during the interview. Buglione testified that the defendant was "arrogant" and that he and Johnson were "very calm." The prosecutor continued to ask Buglione about the blue card. Buglione explained that he had used the blue card instead of the standard form because he and Johnson had forgotten the standard form. The prosecutor then established that the standard form had a place for suspects to initial that they had received their rights and again asked the detective if he had asked the defendant to sign the blue card. Buglione responded that the defendant had declined to sign the blue card.

Because the defendant's claim is unpreserved, he seeks review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[18] The first two prongs of the *Golding* analysis are easily satisfied in this case because the record is adequate for our review and the defendant's claim that the state violated his right to remain silent is of constitutional magnitude. See, e.g., *State* v. *Alston*, 272 Conn. 432, 439–40, 862 A.2d 817 (2005). We turn to the third and forth prongs.

"In *Doyle* [v. *Ohio*, supra, 426 U.S. 610] . . . the United States Supreme Court held that the impeachment of a defendant through evidence of his silence following his arrest and receipt of *Miranda* warnings violates due process. The court based its holding [on] two considerations: First, it noted that silence in the wake of *Miranda* warnings is insolubly ambiguous and consequently of little probative value. Second and more important[ly], it observed that while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. . . . The court . . . reaffirmed *Doyle*'s reasoning in *Wainwright* v. *Greenfield*, 474 U.S. 284, 290, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986),

in which it held that the defendant's silence following his arrest and receipt of *Miranda* warnings could not be used at trial to rebut his defense of insanity. The court reasoned: The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony." (Internal quotation marks omitted.) *State* v. *Cabral*, 275 Conn. 514, 523–24, 881 A.2d 247, cert. denied, 546 U.S. 1048, 126 S. Ct. 773, 163 L. Ed. 2d 600 (2005).

This court has recognized that it is also fundamentally unfair and a deprivation of due process for the state to use evidence of the defendant's post-*Miranda* silence as affirmative proof of guilt; *State* v. *Kirby*, 280 Conn. 361, 400, 908 A.2d 506 (2006); and has noted that post-*Miranda* silence under *Doyle* "does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted. *Wainwright* v. *Greenfield*, supra, 474 U.S. 295 n.13." (Internal quotation marks omitted.) *State* v. *Cabral*, supra, 275 Conn. 524.

This court has also recognized that "[r]eferences to one's invocation of the right to remain silent [are] not always constitutionally impermissible . . . [and are] allowed . . . in certain limited and exceptional circumstances." (Citation omitted; internal quotations marks omitted.) *State* v. *Alston*, supra, 272 Conn. 441. Specifically, the state is permitted "some leeway in adducing evidence of the defendant's assertion of that right for purposes of demonstrating the investigative effort made by the police and the sequence of events as they unfolded . . . as long as the evidence is not offered to impeach the testimony of the defendant in any way." (Citation omitted; internal quotation marks omitted.) *State* v. *Cabral*, supra, 275 Conn. 525.

The defendant claims that Buglione's testimony regarding his refusal to sign the blue card constituted an impermissible reference to his assertion of his right to remain silent. Specifically, the defendant relies on the decisions of this court in which we have concluded that the invocation of the right to remain silent includes conduct that conveys silence. See, e.g., *State* v. *Jones*, 215 Conn. 173, 183–84, 575 A.2d 216 (1990) (defendant invoked right to remain silent when, after receiving *Miranda* rights, he refused to sign previously transcribed statement). In the present case, however, the defendant's refusal to sign the blue card was not an invocation of his right to remain silent. Significantly, the defendant refused to sign the card, but then began speaking with the detectives. As a result, "[t]he *Doyle* decision . . . is not applicable to [these] facts . . . . The crucial distinction is that, here, the defendant did not remain silent after he was . . . advised of his rights. After being given *Miranda* warnings, the defen-

dant clearly chose to [forgo] his right to remain silent." *State* v. *Talton*, 197 Conn. 280, 295, 497 A.2d 35 (1985); see also *State* v. *Kirby*, supra, 280 Conn. 401 (testimony that defendant stated that he did not want to deal with filling out paperwork and that he " 'knew what he had done was wrong' " did not constitute *Doyle* violation because defendant did not invoke right to remain silent); *State* v. *Joly*, 219 Conn. 234, 257, 593 A.2d 96 (1991) ("[A] defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. . . . Rather than relying on the implicit assurance that silence would carry no penalty . . . the defendant failed to heed the warning that anything said can and will be used against [him] in court." [Citations omitted; internal quotation marks omitted.]).

We similarly may resolve the defendant's claim that Buglione's testimony that, when asked about Bunch, the defendant had stated that he was not a "snitch" and "wouldn't say anything else" was an impermissible reference to the defendant's post-*Miranda* silence. Specifically, the defendant argues that these statements were part of his assertion of his right to remain silent by ending the interrogation. The record, however, is unclear as to when during the interview the defendant made these statements. The testimony about which the defendant complains was elicited as follows:

"[The Prosecutor]: And did [the defendant] say anything else about the case?

"[Buglione]: At that particular point, we really didn't talk about it anymore. I asked him if he'd want to provide a written statement. He said no, he wouldn't provide anything in writing.

"[The Prosecutor]: How long did that conversation last?

"[Buglione]: Ten minutes.

"[The Prosecutor]: Did he ask you about the status of your investigation?

"[Buglione]: He asked us if [Bunch] was also getting arrested. We told him no, he was the only suspect in the matter at this time.

"[The Prosecutor]: And was there a further discussion about [Bunch]?

"[Buglione]: We asked him if he had information about [Bunch], if he played a part in this crime. [The defendant] said he wasn't a snitch, he wouldn't say anything else."

"By speaking, the defendant has chosen unambiguously not to assert his right to remain silent. He knows that anything he says can and will be used against him and it is manifestly illogical to theorize that he might be choosing not to assert the right to remain silent as to part of his exculpatory story, while invoking that

right as to other parts of his story. While a defendant may invoke his right to remain silent at any time, even after he has initially waived his right to remain silent, it does not necessarily follow that he may remain selectively silent." (Internal quotation marks omitted.) *State* v. *Bell*, 283 Conn. 748, 767, 931 A.2d 198 (2007), quoting *State* v. *Talton*, supra, 197 Conn. 295. Because we do not know when, during the course of the interview, the defendant made these statements, we cannot treat them as an assertion of his right to remain silent in view of the fact that he initially waived his *Miranda* rights by speaking with the detectives. See *State* v. *Lytell*, 206 Conn. 657, 662–63, 539 A.2d 133 (1988) (no *Doyle* violation when detective testified regarding defendant's refusal to provide names of alibi witnesses because refusal occurred after defendant had waived *Miranda* rights and spoken to police, but prior to defendant's termination of interrogation). Moreover, because the defendant may not remain " 'selectively silent' "; *State* v. *Bell*, supra, 767; testimony describing his refusal to discuss Bunch did not violate his constitutional rights.

The defendant further argues that the state violated *Doyle* when Buglione testified that the defendant had declined to give a written statement and thereafter ended the interview. We disagree. In *State* v. *Kirby*, supra, 280 Conn. 397, a police officer testified that after the defendant had made a statement, the officer again explained the *Miranda* rights form to him. In response, the defendant "just bowed his head and closed his eyes," after which the officers stopped questioning him. Id. We concluded that this testimony did not constitute a *Doyle* violation, reasoning that "to the extent that any silence by the defendant after he made [the] statement [to police] was implicated," that implication was permissible "evidence of the defendant's assertion of [the right to remain silent] for the purposes of demonstrating the investigative effort made by the police and the sequence of events as they unfolded . . . ." (Internal quotation marks omitted.) Id., 401. Similarly, in the present case, Buglione's testimony was a permissible description of the end of the interview and was not an unconstitutional use of the defendant's post-*Miranda* silence.[19] Compare *State* v. *Alston*, supra, 272 Conn. 441–42 (testimony that defendant terminated interview after police confronted him with evidence conflicting with alibi permissible description of sequence of events) and *State* v. *Cabral*, supra, 275 Conn. 525–26 (testimony that defendant, after initially speaking with police, refused to put statement into writing, invoked right to remain silent and requested attorney did not violate *Doyle* because it was elicited to explain course of events and to place defendant's statement in context), with *State* v. *Morrill*, 197 Conn. 507, 529–31, 538, 498 A.2d 76 (1985) (testimony that defendant did not respond and bowed his head when asked twice if he had killed victim, and that when asked third time, gave

sarcastic response and reiterated that he would not give police information unless deal could be made with prosecutor was *Doyle* violation).

Finally, the defendant argues that the state improperly elicited testimony that the defendant's demeanor during the interview was arrogant because this description was an impermissible use of the defendant's invocation of his right to remain silent. The defendant relies on our conclusions in *State* v. *Montgomery*, 254 Conn. 694, 759 A.2d 995 (2000), and *State* v. *Plourde*, 208 Conn. 455, 545 A.2d 1071 (1988), cert. denied, 488 U.S. 1034, 109 S. Ct. 847, 102 L. Ed. 2d 979 (1989), that the state had violated *Doyle* by introducing testimony describing a defendant's nonverbal actions and demeanor. Those cases, however, are distinguishable from the matter before us.

In *Montgomery*, the state introduced testimony that the police officer's interview of the defendant ended when tears welled up in the defendant's eyes and he signaled for a nurse to terminate the interview. *State* v. *Montgomery*, supra, 254 Conn. 712. Similarly, in *Plourde*, a detective testified that he ceased interrogation when the defendant became visibly shaken and stated that he wanted to call his attorney. *State* v. *Plourde*, supra, 208 Conn. 464–65. In both of these cases, the testimony described the defendant's nonverbal actions and demeanor when he terminated the interview, thereby invoking his right to remain silent. In the present case, Buglione testified, in response to the prosecutor's question regarding the defendant's demeanor *throughout the interview*, that the defendant had seemed arrogant. This characterization was not a description of the manner in which the defendant nonverbally ended the interview or evidenced his intent to invoke his right to remain silent. Therefore, unlike the impermissible testimony in *Montgomery* and *Plourde*, Buglione's description of the defendant's demeanor did not violate *Doyle*.

The judgment is affirmed.

In this opinion ROGERS, C. J., and ZARELLA and GRUENDEL, Js., concurred.

[1] The defendant appealed directly to this court pursuant to General Statutes § 51-199 (b), which provides in relevant part: "The following matters shall be taken directly to the Supreme Court . . . (3) an appeal in any criminal action involving a conviction for a capital felony, class A felony, or other felony, including any persistent offender status, for which the maximum sentence which may be imposed exceeds twenty years . . . ."

[2] See *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1996).

[3] In *James*, the defendant had claimed that his right to due process under the constitution of Connecticut was violated by the admission of his *written* confession. *State* v. *James*, supra, 237 Conn. 428. Our ruling, however, encompassed all interrogations and confessions, and is therefore applicable to the present case, in which the defendant challenges the admission of the statements he made orally during his interrogation. See id., 434.

[4] Article first, § 8, of the constitution of Connecticut provides in relevant part: "In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel . . . to be confronted by the witnesses against

him; to have compulsory process to obtain witnesses in his behalf . . . . No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law . . . ."

Article first, § 9, of the constitution of Connecticut provides: "No person shall be arrested, detained or punished, except in cases clearly warranted by law."

[5] Section 1-5 (b) of the Connecticut Code of Evidence provides: "When a statement is introduced by a party, another party may introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered with it."

[6] Our conclusion that federal precedent does not support a mandatory recording requirement is dispositive of the defendant's claim that the fifth, sixth and fourteenth amendments to the United States constitution require that all interrogations, advisement of *Miranda* warnings and resulting statements made by the defendant be recorded. Ordinarily, we would not consider this claim because the defendant has failed to provide an analysis separate from his state constitutional claim. Because the federal constitutional guarantees always serve as a floor below which we cannot go, however, our analysis of the defendant's state claim logically includes consideration of any federal claim the defendant may have raised. See *State* v. *Ledbetter*, supra, 275 Conn. 560.

[7] See, e.g., *United States* v. *Meadows*, 571 F.3d 131, 147 (1st Cir.) ("no federal constitutional right to have one's custodial interrogation recorded"), cert. denied, U.S. , 130 S. Ct. 569, 175 L. Ed. 2d 394 (2009); *United States* v. *Tykarsky*, 446 F.3d 458, 477 (3d Cir. 2006) ("[w]hatever the merits of the policy arguments in favor of requiring the recording of interrogations may be, it is clear that such recording is not mandated by the United States [c]onstitution"); *United States* v. *Williams*, 429 F.3d 767, 772 (8th Cir. 2005) (constitution does not mandate that police record advisement and waiver of *Miranda* rights); *United States* v. *Cardenas*, 410 F.3d 287, 296 (5th Cir. 2005) ("[n]either this court nor the Supreme Court . . . has ever held that such a requirement is necessary to comply with the [f]ifth [a]mendment's protection against self-incrimination"); *United States* v. *Montgomery*, 390 F.3d 1013, 1017 (7th Cir. 2004) (*Miranda* does not require electronic recording of all interrogations), cert. denied, 544 U.S. 968, 125 S. Ct. 1750, 161 L. Ed. 2d 614 (2005); *United States* v. *Torres-Galindo*, 206 F.3d 136, 144 (1st Cir. 2000) (no merit to defendant's claim that fifth amendment rights were violated by law enforcement's practice of not recording confessions); *Trice* v. *Ward*, 196 F.3d 1151, 1170 (10th Cir. 1999) (no Supreme Court precedent or any other court precedent to support defendant's argument that police were required to electronically record entire interrogation), cert. denied, 531 U.S. 835, 121 S. Ct. 93, 148 L. Ed. 2d 53 (2000); *United States* v. *Toscano-Padilla*, Court of Appeals, Docket No. 92-30247, 1993 U.S. App. LEXIS 15411, *5 (9th Cir. June 16, 1993) (failure to record interrogation does not invalidate information gained from interrogation, mandate suppression or violate due process); *United States* v. *Short*, 947 F.2d 1445, 1451 (10th Cir. 1991) (district court properly denied defendant's motion to suppress statements grounded on failure of police to record conversation), cert. denied, 503 U.S. 989, 112 S. Ct. 1680, 118 L. Ed. 2d 397 (1992); *United States* v. *Yunis*, 859 F.2d 953, 961 (D.C. Cir. 1988) ("no constitutional requirement that confessions be recorded by any particular means"); *United States* v. *Coades*, 549 F.2d 1303, 1305 (9th Cir. 1977) (no authority to support defendant's claim that testimony from law enforcement officer should have been suppressed because interrogation was not recorded); see also R. Iraola, "The Electronic Recording of Criminal Interrogations," 40 U. Rich. L. Rev. 463, 471 (2006) ("[t]he federal courts uniformly have rejected the argument that the [c]onstitution mandates, as a matter of due process, that a defendant's confession be electronically recorded").

[8] The fifth amendment to the United States constitution provides in relevant part: "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

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

[9] Article first, § 8, of the state constitution; see footnote 4 of this opinion; safeguards, inter alia, the right to counsel and has its counterpart in the rights to counsel guaranteed by the fifth and sixth amendments to the federal constitution. The United States Supreme Court has explained that the sixth

amendment right to counsel is analytically distinct from the fifth amendment right created by *Miranda*. *Rhode Island* v. *Innis*, 446 U.S. 291, 300 n.4, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). In his motion to suppress the statements he had made while in custody, the defendant argued that the statements were obtained in violation of *Miranda*, and also that they were "obtained in violation of [his] right to counsel because his right to counsel had already attached due to the initiation of adversary judicial proceedings in Georgia, namely extradition proceedings . . . ." In making this claim, the defendant appears to have relied on the state constitutional right to counsel to the extent that it corresponds with *both* his fifth and sixth amendment rights to counsel. That is, by invoking *Miranda*, the defendant signaled that he was asserting a claim under the state counterpart to the fifth amendment. See *Montejo* v. *Louisiana*, U.S. , 129 S. Ct. 2079, 2090, 173 L. Ed. 2d 955 (2009) ("the doctrine established by *Miranda* . . . is designed to protect [f]ifth [a]mendment, not [s]ixth [a]mendment, rights"). In asserting that his right to counsel had attached because adversary proceedings already had commenced, the defendant suggested that he also relied on our state counterpart to his sixth amendment right to counsel, which, unlike the fifth amendment right to counsel, attaches only upon the commencement of formal legal proceedings. See *Kirby* v. *Illinois*, 406 U.S. 682, 689, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972) (sixth amendment right to counsel attaches only "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment"); *State* v. *Stenner*, supra, 281 Conn. 762, 766 (right to counsel under state constitution triggered at same time as right to counsel afforded by sixth amendment).

On appeal, however, the defendant appears to rely solely on the state constitutional right to counsel insofar as it safeguards his *Miranda* right to consult with counsel prior to and during custodial police interrogation. In other words, the defendant relies on the state constitutional right to counsel that corresponds to the fifth amendment right to counsel. Accordingly, we address the merits of the defendant's claim that his right to counsel derived from the state counterpart to the fifth amendment right to counsel mandates a recording requirement.

To the extent that the defendant's argument on appeal *could* be construed as raising a claim pursuant to the state constitutional right to counsel that corresponds to the sixth amendment right to counsel, that claim would be unavailing. The trial court properly concluded that the defendant's sixth amendment right to counsel had not attached at the time that the defendant made the statements because adversarial proceedings had not begun until the defendant had been presented in court. Although the defendant did not file a motion for reconsideration or a motion for articulation following the court's ruling, his claim would be reviewable pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), because the record is adequate for review and the claim is of constitutional magnitude. As we already have stated, however, the trial court properly concluded that the sixth amendment right to counsel had not yet attached. See *Kirby* v. *Illinois*, supra, 406 U.S. 689; *State* v. *Stenner*, supra, 281 Conn. 766.

[10] Those states are: Alabama; Arizona; Arkansas; California; Colorado; Florida; Georgia; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana; Maine; Maryland; Massachusetts; Michigan; Mississippi; Missouri; Montana; Nevada; New Hampshire; New Jersey; New York; North Carolina; North Dakota; Ohio; Oklahoma; Pennsylvania; Tennessee; Utah; Vermont; Washington; West Virginia and Wyoming. See, e.g., *Starks* v. *State*, 594 So. 2d 187, 196 (Ala. Crim. App. 1991) (unrecorded custodial interrogations admissible if voluntariness established), cert. denied, 1992 Ala. LEXIS 217 (February 14, 1992); *State* v. *Jones*, 203 Ariz. 1, 7, 49 P.3d 273 (2002) (defendant's unrecorded statements made during custodial interrogation admissible); *Clark* v. *State*, 374 Ark. 292, 302, 287 S.W.3d 567 (2008) (no constitutional right to recordation under due process clause of state constitution); *People* v. *Gurule*, 28 Cal. 4th 557, 603, 51 P.3d 224, 123 Cal. Rptr. 2d 345 (2002) (due process clause does not require recordings of all interrogations and *Miranda* warnings in order to determine voluntariness), cert. denied, 538 U.S. 964, 123 S. Ct. 1754, 155 L. Ed. 2d 517 (2003); *People* v. *Holt*, 15 Cal. 4th 619, 664, 937 P.2d 213, 63 Cal. Rptr. 2d 782 (court-made exclusionary rule for unrecorded interrogations would violate state constitution), cert. denied, 522 U.S. 1017, 118 S. Ct. 606, 139 L. Ed. 2d 493 (1997); *People* v. *Raibon*, 843 P.2d 46, 49 (Colo. App. 1992) (court will not create mandatory recording requirement in absence of legislative action because doing so would constitute "judicial fiat"), cert. denied, 1993 Colo. LEXIS 15 (January

11, 1993); *State* v. *DuPont*, 659 So. 2d 405, 408 (Fla. App. 1995) (trial court improperly concluded that police failure to record interview violated defendant's right to due process), cert. denied, 517 U.S. 1190, 116 S. Ct. 1679, 134 L. Ed. 2d 782 (1996); *Coleman* v. *State*, 189 Ga. App. 366, 375 S.E.2d 663 (1988) (failure to record defendant's custodial statement did not violate right to counsel, right against self-incrimination, right to fair trial or right to due process under state constitution); *State* v. *Kekona*, 77 Haw. 403, 408–409, 886 P.2d 740 (1994) (due process clause of state constitution does not require electronic recording of custodial statements); *State* v. *Rhoades*, 121 Idaho 63, 73, 822 P.2d 960 (1991) (state due process clause does not require electronic recording of statements made in custody); *People* v. *Pecoraro*, 175 Ill. 2d 294, 318, 677 N.E.2d 875 (failure to record defendant's custodial interrogation not violative of state due process clause), cert. denied, 522 U.S. 875, 118 S. Ct. 183, 139 L. Ed. 2d 131 (1997); *Stoker* v. *State*, 692 N.E.2d 1386, 1390 (Ind. App. 1998) (state constitution does not require law enforcement officers to record custodial interrogations); *State* v. *Morgan*, 559 N.W.2d 603, 609 (Iowa 1997) (recording of interrogations not mandated by state due process clause); *State* v. *Speed*, 265 Kan. 26, 38, 961 P.2d 13 (1998) (recording of interrogation not necessary for statements to be admissible); *Brashars* v. *Commonwealth*, 25 S.W.3d 58, 60–61 (Ky. 2000) (recording of confessions not necessary under state due process clause), cert. denied, 531 U.S. 1100, 121 S. Ct. 834, 148 L. Ed. 2d 715 (2001); *State* v. *Robertson*, 712 So. 2d 8, 32 (La.) (no due process requirement that statement given to police be recorded), cert. denied, 525 U.S. 882, 119 S. Ct. 190, 142 L. Ed. 2d 155 (1988); *State* v. *Buzzell*, 617 A.2d 1016, 1018–19 (Me. 1992) (rule requiring recording of custodial interrogations not necessary to ensure fair trial and not required under state due process clause); *Baynor* v. *State*, 355 Md. 726, 738–40, 736 A.2d 325 (1999) (recording of custodial interrogations not required for trier of fact to determine whether confession was voluntary); *Commonwealth* v. *Diaz*, 422 Mass. 269, 273, 661 N.E.2d 1326 (1996) (declining to adopt rule that unrecorded custodial interrogations are inadmissible); *People* v. *Fike*, 228 Mich. App. 178, 183, 577 N.W.2d 903 (1998) (due process provision of Michigan constitution does not require police to record interrogations), appeal denied, 590 N.W.2d 64 (Mich. 1999); *Williams* v. *State*, 522 So. 2d 201, 208 (Miss. 1988) (no federal or state requirement that confessions be recorded); *State* v. *Blair*, 298 S.W.3d 38, 51 (Mo. App. 2009) (no constitutional requirement that law enforcement record interrogations); *State* v. *Grey*, 274 Mont. 206, 213, 907 P.2d 951 (1995) (police do not need to electronically record defendant's advisement or waiver of *Miranda* rights); *Jimenez* v. *State*, 105 Nev. 337, 341, 775 P.2d 694 (1989) (concern with regard to lack of recording is reliability of officers' testimony, not constitutional violation); *State* v. *Barnett*, 147 N.H. 334, 337, 789 A.2d 629 (2001) (due process does not require recording of custodial interrogations); *State* v. *Cook*, 179 N.J. 533, 559, 847 A.2d 530 (2004) (due process clause of state constitution does not require recording of all custodial interrogations); *People* v. *Falkenstein*, 288 App. Div. 2d 922, 923, 732 N.Y.S.2d 817 (2001) (no federal or state constitutional requirement that interrogations and confessions be electronically recorded), appeal denied, 97 N.Y.2d 704, 765 N.E.2d 307, 739 N.Y.S.2d 104 (2002); *State* v. *Thibodeaux*, 341 N.C. 53, 61, 459 S.E.2d 501 (1995) (failure of law enforcement officers to electronically record custodial confessions did not violate due process clauses of state and federal constitutions); *State* v. *Goebel*, 725 N.W.2d 578, 584 (N.D. 2007) (criminal defendants have no right under state constitution to electronic recording of custodial interrogations); *State* v. *Smith*, 80 Ohio St. 3d 89, 106, 684 N.E.2d 668 (1997) (neither state nor federal constitution mandates electronic recording of police interviews), cert. denied, 523 U.S. 1125, 118 S. Ct. 1811, 140 L. Ed. 2d 949 (1998); *Chambers* v. *State*, 724 P.2d 776, 779 (Okla. Crim. App. 1986) (unrecorded confession is admissible); *Commonwealth* v. *Craft*, 447 Pa. Super. 371, 377–78, 669 A.2d 394 (1995) (custodial interrogations do not need to be recorded to satisfy state constitution); *State* v. *Godsey*, 60 S.W.3d 759, 771 (Tenn. 2001) (neither state nor federal constitution mandates electronic recording of interrogations); *State* v. *Villarreal*, 889 P.2d 419, 427 (Utah 1995) (contemporaneous recording of confession is not mandated by Utah constitution); *State* v. *Gorton*, 149 Vt. 602, 605–606, 548 A.2d 419 (1988) (state constitution does not mandate recording of suspect's statements); *State* v. *Spurgeon*, 63 Wn. App. 503, 508, 820 P.2d 960 (1991) (Washington constitution does not require electronic recording of custodial interrogations), review denied, 118 Wn. 2d 1024, 827 P.2d 1393 (1992); *State* v. *Williams*, 190 W. Va. 538, 543, 438 S.E.2d 881 (1993) (due process clause of state constitution does include duty of police to electronically record custodial

interrogations); *State* v. *Evans*, 944 P.2d 1120, 1128 (Wyo. 1997) (no requirement that interviews and interrogations must be electronically recorded, rather prosecution must provide evidence sufficient for court to determine question of voluntariness).

[11] The rule established by the New Jersey Supreme Court also provides that the trial court should consider the unexcused failure to record a custodial interrogation when determining whether the state may introduce testimony describing the interrogation. N.J. Court Rules 3:17 (d). Additionally, the court is required to give the jury a cautionary instruction in such cases; N.J. Court Rules 3:17; and a report issued by the New Jersey Supreme Court Special Committee on Recordation of Custodial Interrogations in 2005 recommended an instruction that the jury has "not been provided with a complete picture of all of the facts surrounding the defendant's alleged statement and the precise details of that statement."

Similarly, the Supreme Judicial Court of Massachusetts, after declining to make the electronic recording of the defendant's interrogation a prerequisite to the admissibility of his statement, concluded that defendants are entitled to a cautionary instruction regarding the use of an interrogation when the interrogation was not reliably preserved by a complete electronic recording. *Commonwealth* v. *DiGiambattista*, 442 Mass. 423, 447–49, 813 N.E.2d 516 (2004).

[12] At least one commentator has argued, however, that a fact finder can no better " 'see' " coercion in a filmed confession than when that confession is described by testimony. J. Silbey, "Videotaped Confessions and the Genre of Documentary," 16 Fordham Intell. Prop. Media & Ent. L.J. 789, 802 (2006).

[13] The concurrence makes an impassioned plea for the point that no one in the majority disagrees with, namely, that the recording of confessions is desirable as an aid in evaluating the reliability and trustworthiness of confessions to increase the accuracy and efficiency of judicial proceedings, which we would welcome. *State* v. *James*, supra, 237 Conn. 434. The concurrence supports its argument, in part, with material not in the record, much of which would be inadmissible hearsay, from the Internet and other sources such as the Chicago Tribune, MSN.com and AOL.com. The disagreement then is whether this court should mandate recording and under what terms and conditions. For the reasons set forth fully in this opinion, we believe that this is not an appropriate use of our supervisory powers at this time and a potential usurpation of a legislative initiative presently under way. See Public Acts 2008, No. 08-143, § 2 (a) (2) (P.A. 08-143) (pilot program to record interrogations). In February, 2009, the Advisory Commission on Wrongful Convictions filed a report, pursuant to P.A. 08-143, with the General Assembly regarding the pilot program to electronically record interrogations. See State of Connecticut Advisory Commission on Wrongful Convictions, Report of the Advisory Commission on Wrongful Convictions (February, 2009), available at http://www.jud.ct.gov/Committees/wrongfulconviction/WrongfulConvictionComm Report.pdf (last visited September 29, 2010). The General Assembly has not yet acted on the report.

[14] The discussion of the Supreme Judicial Court of Massachusetts concerning the complexity of deciding the parameters of a recording requirement illustrates the point: "Although appealing in its superficial simplicity (and unquestionably an effective method of convincing law enforcement officials to adopt recording as a standard practice), we still decline to impose such a rule. Among other problems, adoption of a rule excluding evidence of unrecorded interrogations necessitates precise identification of what interrogations will be subject to that rule—does it cover only custodial interrogations, or should it also cover any noncustodial interrogation conducted in particular locations (e.g., at police stations)? If the requirement were to be premised on the custodial (as opposed to noncustodial) nature of the interrogation, what do we do with interrogations that start out as noncustodial but arguably become custodial at some later (and often disputed) point during questioning? A rule of exclusion would also have to allow for justifiable failures to record—e.g., equipment malfunction, or the suspect's refusal to allow recording (or insistence that the tape recorder be turned off at a particular point during the interrogation). . . . With regard to a suspect who is willing to speak to the interrogator but initially unwilling to be recorded, would we need to impose some requirement that the interrogator make a good faith effort to convince the suspect to agree to recording, lest that ostensible 'justification' for not recording too easily become the exception that swallows the rule? Notwithstanding predominantly positive experiences in those jurisdictions that have imposed recording requirements as a prerequisite to admissibility, we are hesitant to formulate a rigid rule

of exclusion, and all its corollary exceptions and modifications (each of which would potentially spark new disputes in motions to suppress)." (Citation omitted.) *Commonwealth* v. *DiGiambattista*, 442 Mass. 423, 445, 813 N.E.2d 516 (2004).

[15] The Supreme Court of New Hampshire, in contrast, responded to the defendant's claim that interrogations must be electronically recorded by using its supervisory authority to impose a rule that tape-recorded interrogations are admissible only when the defendant's statement is recorded in its entirety "[t]o avoid the inequity inherent in admitting into evidence the selective recording of a post-*Miranda* interrogation . . . ." *State* v. *Barnett*, supra, 147 N.H. 337.

[16] As we have discussed previously, the requirement might be imposed only with respect to defendants charged with particular classifications of crimes, such as felonies. In the alternative, such a rule could apply in all circumstances.

[17] Such a rule could also, as we have discussed, have negative repercussions for the administration of justice. In this regard, we emphasize the important difference between a *constitutionally* mandated rule that *all* interrogations must be recorded, and a policy, adopted by the police departments of this state, that recordings must be made whenever feasible and whenever such recording would not inhibit law enforcement agents from obtaining a confession by other constitutionally permissible means.

[18] Pursuant to *State* v. *Golding*, *supra*, 213 Conn. 239–40, a defendant can prevail on an unpreserved claim of constitutional error only if each of four conditions are met: "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt."

[19] The defendant relies on *State* v. *Jones*, supra, 215 Conn. 183, in which the state elicited testimony that on the day of the defendant's arrest, he gave a statement to a police officer claiming that he did not attack the victim. The statement was transcribed and presented to the defendant the next day. Id. The officer read the defendant his rights, and the defendant signed an acknowledgment of those rights, but he refused to sign the transcribed statement. Id. In addition to this testimony, the prosecutor referred to the defendant's refusal to sign the statement twice in his closing argument in order to impeach the defendant and attack his credibility. Id. We concluded that the testimony regarding the defendant's refusal to sign the statement was elicited in violation of *Doyle* because when, after receiving his *Miranda* rights, the defendant "chose not to sign his statement . . . [h]e . . . clearly manifested his exercise of his right to remain silent." Id., 184. In contrast, the defendant in the present case waived his right to remain silent by speaking with the detectives and, thereafter, refused to sign a written statement, invoked his *Miranda* rights and ended the interview. The testimony regarding the defendant's refusal to sign the statement was elicited to explain the course of events and investigative efforts of the police. The prosecutor referred to the blue card generally in his closing argument and subsequently suggested that the defendant had been untruthful when speaking with the police, but did not specifically comment on the defendant's refusal to sign a written statement. In contrast, the impermissible testimony in *Jones* was not elicited to explain the course of events following the defendant's admissible statements. Id., 183. Moreover, the testimony was not an isolated reference to the defendant's post-*Miranda* silence, rather it was used during the closing argument to suggest that the defendant was not credible. Id., 183–84. It is therefore inapposite to the present case.