STATE OF CONNECTICUT *v.* KENNETH LEE MCCOY (SC 19905)

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

Syllabus

Convicted of murder in connection with the shooting death of the victim, the defendant appealed from the trial court's judgment, claiming that he had been deprived of a fair trial as a result of certain prosecutorial improprieties and that the trial court had improperly denied his motion for a new trial for lack of jurisdiction. An eyewitness to the shooting and the state's key witnesses, M, initially told the police that he could not identify the shooter. Subsequently, M gave a second statement to the police implicating the defendant in the shooting. Before trial, the prosecutor asked the trial court whether M's second statement would be admissible as a prior consistent statement. The court deferred its ruling, and, at trial, M testified about these statements without objection. Following that testimony, the prosecutor asked another question pertaining to M's second statement. The trial court sustained defense counsel's objection to that question. After the prosecutor asked another question regarding M's second statement during the same direct examination, the trial court excused the jury and directed the prosecutor not

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

to inquire about the substance of the conversation the defendant had with the police when he gave his second statement without prior permission of the court. On one other occasion, the prosecutor asked M whether, after the shooting, he told the victim's family what had happened. Defense counsel objected, and the trial court sustained that objection. During closing arguments, the prosecutor referenced testimony indicating that M had spoken to his mother after the shooting and then asked the jury to speculate about what was said. The trial court sustained defense counsel's objection to that remark and instructed the jury not to speculate. After the jury found the defendant guilty but before he was sentenced, the defendant filed a motion for a new trial in which he alleged prosecutorial impropriety. At the defendant's sentencing, the parties and the trial court agreed to hear that motion at a later date. Months after the defendant started serving his sentence, he attempted to have his motion for a new trial heard. The trial court denied the motion, without a hearing, on the ground that it had lost jurisdiction upon execution of the defendant's sentence. On appeal, the Appellate Court concluded that, regardless of any improprieties that may have occurred during trial, the defendant was not deprived of his constitutional right to due process. The Appellate Court also concluded that the trial court lost jurisdiction once the defendant's sentence was executed and, therefore, that the trial court did not improperly deny the defendant's motion for a new trial. The Appellate Court affirmed the judgment of conviction, and the defendant, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the claimed prosecutorial improprieties did not deprive the defendant of a fair trial; applying the factors set forth in *State* v. *Williams* (204 Conn. 523), this court could not conclude that the defendant's right to due process was violated because, although the alleged improprieties related to the critical issue of M's credibility and were not induced by either the argument or conduct of defense counsel, and although the state's case was not particularly strong, the improprieties were not severe, as evidence regarding M's second statement already had been admitted into evidence without objection and M never answered the prosecutor's allegedly improper questions, the improprieties were not frequent, as only four claimed improprieties had occurred over the course of a weeklong trial, and the trial court adopted curative measures in response to the alleged improprieties.

2. The Appellate Court correctly concluded that the trial court lost jurisdiction over the defendant's motion for a new trial upon execution of the defendant's sentence but improperly upheld the trial court's denial of that motion because the motion should have been dismissed rather than denied: in light of the long and consistent history underlying the traditional rule that a criminal court loses jurisdiction upon the execution of a sentence in the absence of a constitutional or legislative grant of

authority to act, this court could not conclude that the trial court in the present case retained jurisdiction to decide the defendant's motion for a new trial when it did not act on that motion before the defendant's sentence was executed; moreover, because the trial court lacked jurisdiction to decide the defendant's motion for a new trial and therefore should have dismissed rather than denied that motion, this court concluded that the form of the trial court's judgment was improper, reversed that part of the Appellate Court's judgment upholding the denial of the motion, and remanded the case with direction that the trial court ultimately dismiss the defendant's motion for a new trial.

3. The defendant could not prevail on his claim that the trial court committed reversible error by imposing sentence while his motion for a new trial was pending; even if this court assumed that the trial court violated the rule of practice (§ 42-53 [a]), which governs rulings on motions for a new trial, by imposing sentence before ruling on the defendant's pending motion, the defendant had failed to explain how or why such a violation could have resulted in harm.

4. The defendant was not entitled to have his sentence vacated pursuant to the plain error doctrine: although it was improper for the trial court not to decide the defendant's motion prior to sentencing, in light of certain anomalies in this court's case law concerning a criminal court's jurisdiction over a pending and timely motion for a new trial after sentencing, the trial court's error was not so clear as to necessitate reversal under the plain error doctrine; moreover, even if that error had been clear, this court could not conclude that the trial court's failure to rule on the defendant's motion resulted in manifest injustice, as the claims of prosecutorial impropriety raised in that motion were considered and rejected by both this court and the Appellate Court, and also could be raised through a petition for a writ of habeas corpus.

(*Three justices concurring in part and dissenting in part in one opinion*)

Argued March 28, 2018—officially released May 7, 2019

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Blue, J.*; verdict and judgment of guilty; thereafter, the court denied the defendant's motion for a new trial, and the defendant appealed to this court; subsequently, the appeal was transferred to the Appellate Court, *Beach*, *Sheldon* and *Flynn*, *Js.*, which affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Reversed in part*; *judgment directed.*

Daniel J. Foster, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *Maxine Wilensky*, senior assistant state's attorney, and *Mary Elizabeth Baran*, former senior assistant state's attorney, for the appellee (state).

Opinion

MULLINS, J. In this appeal, the defendant, Kenneth Lee McCoy, challenges the judgment of the Appellate Court affirming the judgment of conviction rendered after a jury trial of one count of murder in violation of General Statutes § 53a-54a (a). On appeal, the defendant contends that the Appellate Court improperly concluded that (1) he was not deprived of a fair trial due to prosecutorial improprieties, and (2) the trial court properly denied his motion for a new trial for lack of jurisdiction. We disagree but conclude that the form of the trial court's judgment is improper in that the trial court should have dismissed rather than denied the motion for a new trial. Accordingly, we reverse in part the judgment of the Appellate Court and remand the case to that court with direction to render judgment consistent with this opinion.

The following underlying relevant facts and procedural history are set forth in the Appellate Court's decision. "During the fall of 2011, the victim, Dallas Boomer, saw both the defendant and Tramont Murray, his close friends, on a daily basis. The three men often conducted drug deals together out of rental cars . . . . During November, 2011, the defendant became estranged from both the victim and Murray. . . .

"On December 6, 2011, at approximately 1 o'clock in the morning, the victim was sitting in the driver's seat of a parked rental car on a residential street in New

Haven. Murray was sleeping in the reclined passenger seat. The victim saw the defendant's car pull over to the side of the road and idle nearby, so he shook Murray awake. Murray instructed the victim to drive away. The defendant then approached the victim's parked vehicle with his hand in his sleeve and began shooting at the windshield. The victim attempted to drive away, but could not. Six bullets struck the rental car, and the victim suffered fatal injuries as a result.

"Immediately after the shooting, Murray, the sole witness, was questioned by the police. When the police asked Murray to identify the shooter, he stated that he had not seen the shooter . . . . Three weeks later, on December 27, Murray made a second statement to the police in which he identified the defendant as the shooter. Murray testified consistently with this statement at the defendant's trial." *State* v. *McCoy*, 171 Conn. App. 311, 312–13, 157 A.3d 97 (2017).

After the jury returned its verdict, but prior to the sentencing date, the defendant filed a motion for a new trial. Id., 323. At the sentencing hearing, the defendant sought to have the motion heard by the trial court; however, the parties and the trial court subsequently agreed to go forward with the sentencing and to hear the motion at a later date. Id., 323–24. As a result, the sentencing hearing went forward, and the court sentenced the defendant to sixty years incarceration. Id., 324.

Months after the sentencing, the defendant attempted to have his motion for a new trial heard. Because the defendant's sentence already had been executed, however, the court denied the motion without a hearing on the ground that it had lost jurisdiction. Id. The defendant then appealed from the judgment of conviction,[1]

[1] The defendant appealed directly to this court pursuant to General Statutes § 51-199 (b) (3), and we subsequently transferred the appeal to the Appellate Court. See General Statutes § 51-199 (c); Practice Book § 65-1.

asserting that the prosecutor had engaged in a series of improprieties that deprived him of his constitutional right to a fair trial and that the trial court improperly denied his motion for a new trial for lack of jurisdiction. Id., 312.

The Appellate Court concluded that, regardless of any improprieties that may have been committed by the state during the trial, the defendant was not deprived of his due process right to a fair trial. Id., 314–23. The Appellate Court also concluded that the trial court lost jurisdiction once the defendant's sentence was executed and, therefore, that the trial court did not improperly deny the defendant's motion for a new trial. Id., 323–27. This certified appeal followed.[2] Additional facts will be set forth as necessary.

I

The defendant first claims that the Appellate Court improperly determined that he was not deprived of a fair trial by prosecutorial improprieties committed during his trial. Specifically, the defendant claims that the Appellate Court improperly concluded that the prosecutor did not deprive him of a fair trial when she (1) violated a court order by attempting on three occasions to elicit inadmissible prior consistent statements made

[2] We granted certification to appeal, limited to the following questions: (1) "Did the Appellate Court properly affirm the trial court's judgment by concluding that, notwithstanding any improper conduct by the state, the defendant was not deprived of a fair trial?" (2) "Did the Appellate Court properly conclude that the trial court lost jurisdiction to hear the defendant's motion for a new trial?" And (3) "In the alternative, did the trial court improperly sentence the defendant while his motion for a new trial was pending?" *State* v. *McCoy*, 325 Conn. 911, 158 A.3d 321 (2017).

Following oral arguments, this court requested supplemental briefing from the parties, limited to the following question: "If we conclude that the trial court lost subject matter jurisdiction upon sentencing the defendant, is the doctrine of plain error applicable to the trial court's failure to have decided the defendant's pending and timely filed motion for a new trial before it sentenced the defendant?"

by Murray, and (2) asked the jury during closing argument to speculate about the contents of a conversation between Murray and his mother that was not in evidence. In response, the state asserts that the Appellate Court properly concluded that these claimed improprieties did not deprive the defendant of his right to a fair trial.[3] We agree with the state.

With respect to the defendant's claim that the prosecutor thrice violated the trial court's order related to the inadmissibility of Murray's prior consistent statements, the Appellate Court's decision sets forth the following relevant facts. "On the first day of trial, outside the presence of the jury, the prosecutor asked the court whether Murray's second statement to the police, in which he identified the defendant as the shooter, would be admissible as a prior consistent statement. The court responded: 'Well, again, without finally ruling on that, the answer is not necessarily because the rule generally is that when a witness is impeached for a prior inconsistent statement, prior consistent statements are not nor-

[3] The defendant also asserts that the Appellate Court improperly concluded that the prosecutor did not violate *State* v. *Singh*, 259 Conn. 693, 793 A.2d 226 (2002), when she made statements during closing arguments suggesting to the jury that, in order to find that the state's key witness had a plea deal with the state, the jury would have to conclude that other witnesses were lying. The state asserts that the defendant's claim alleging a violation of *State* v. *Singh*, supra, 693, is not reviewable because he did not include that issue in his petition for certification to appeal. We agree with the state.

The Appellate Court concluded that the prosecutor did not violate *Singh* and, thus, did not engage in any impropriety regarding this issue. Therefore, the Appellate Court did not consider that alleged impropriety when it concluded that the defendant was not deprived of a fair trial. In his petition for certification to appeal, the defendant did not ask this court to certify a question regarding the alleged violation of *State* v. *Singh*, supra, 259 Conn. 693. Instead, the defendant only sought, and we only granted, certification on the issue of whether the Appellate Court's conclusion that the improprieties, either found or assumed, did not deprive the defendant of a fair trial. See footnote 2 of this opinion. Accordingly, we conclude that the *Singh* claim is not properly before this court.

mally admissible. They can be admissible under the discretion of the court, particularly—and I emphasize particularly—where the prior consistent statement precedes the prior inconsistent statement. . . . [W]e may have to see what develops, but certainly the answer to what you just said is not necessarily.' The court further stated: 'I haven't given my final rulings on this because I have to see what the witness says on direct, obviously, but I think you must be aware of the general way that I look at this so that you are not surprised, and I think that I have said so.' " (Emphasis omitted.) Id., 315–16.

During the state's direct examination of Murray, after establishing that Murray had failed to identify the defendant as the shooter in his initial encounter with the police, the prosecutor engaged in the following colloquy with Murray:

" '[The Prosecutor]: Did there come a time about three weeks later when you went back into the police department and gave another statement?

" '[Murray]: Yes.

" '[The Prosecutor]: And in that statement, did you essentially tell the police what you have testified to today in court?

" '[Murray]: Yes.' " Id., 322 n.4

Defense counsel did not object to this testimony.

After this testimony, the prosecutor committed the first of the alleged improprieties when she asked: " 'Now, with regard to giving that statement [to the police] on December 27, which is essentially what you spoke about today . . . .' Defense counsel objected, and the court sustained the objection, noting that '[t]he contents of the second interview should not be divulged further than they already have been without [express] permission of the court. As you know, there are evidentiary rules pertaining thereto.' " Id., 316.

Later, during that same direct examination, the second alleged impropriety occurred when "the prosecutor asked Murray: 'And let me just ask you this: when you spoke to the police again, what did you tell them with regard to who was the shooter?' The court sua sponte excused the jury and addressed the prosecutor, stating: 'I don't know how many times I have told you on the record, and, I believe, explicitly, that . . . prior consistent statements are not admissible into evidence unless they precede prior inconsistent statements. . . . I have told you, with respect to the second interview, on multiple occasions, multiple occasions do not get into the contents.'

"After the prosecutor indicated that she did not think that the court had been explicit in ruling that Murray's prior consistent statements were inadmissible, the court stated that '[u]nder no circumstances without prior permission of the court . . . may you ask this witness about any prior consistent statement postdating the original inconsistent statement of December 6. You may not ask him about the substance of that without prior permission of the court, that includes, but is not limited to . . . the substance of his statement to the police on December 27. I had thought that I was explicit, but perhaps I was not, and if so, please forgive me.' The court continued, stating: 'I have told you repeatedly not to go there. If you go there again, without prior permission of the court, you are asking—you are basically going to require me to do things that, believe me, I do not want to do. So, don't go there.' " Id., 316–17.

Finally, the prosecutor engaged in the third alleged impropriety related to prior consistent statements. This impropriety occurred when, "after asking Murray whether he had visited the victim's family the day after the victim's murder, the prosecutor asked: 'With regard to what had occurred with [the victim's] murder, did you tell them what happened?' Defense counsel objected,

and the court sustained the objection, instructing the prosecutor to '[a]sk your next question, keeping in mind rulings that the court has already made.' " Id., 317.

With respect to the claim that the prosecutor improperly referred to facts not in evidence, the factual underlayment is as follows. During the trial, the state presented evidence that Murray's mother encountered Murray crying at his girlfriend's home. The prosecutor asked Murray's mother to describe Murray's demeanor as she spoke to him, and she began to tell the jury what Murray had said to her during that encounter. Defense counsel objected. The court sustained the objection and did not permit Murray's mother to testify about what Murray had said. Then, in closing argument, when referring to Murray's encounter with his mother at his girlfriend's home, the prosecutor argued: " 'They talked, and he told her things, I can't say what they were, but I think you can think about it.' Defense counsel objected, and the court instructed the jury that '[t]his is not in evidence. Do not speculate. That is improper argument.' " Id., 319.

In analyzing these alleged improprieties, the Appellate Court assumed that the prosecutor had improperly disregarded the trial court's evidentiary rulings related to Murray's prior consistent statements. Id., 318. As to the prosecutor's closing argument inviting the jurors to speculate about statements not in evidence regarding Murray's conversation with his mother, the Appellate Court determined, consistent with a concession by the state, that this argument was improper. Id., 319. The Appellate Court concluded, however, that these improprieties did not deprive the defendant of a fair trial. Id., 320–21.

In the present appeal, the defendant asserts that the Appellate Court improperly concluded that the alleged

improprieties did not deprive him of a fair trial.[4] We disagree and conclude that the Appellate Court properly determined that the claimed improprieties did not deprive the defendant of a fair trial. Because the Appellate Court either assumed that these actions of the prosecutor were improper or accepted the state's concession to that effect, we need only address whether the Appellate Court properly concluded that these claimed improprieties constituted a violation of the defendant's right to due process.

We begin with the standard of review. "[T]he touchstone of due process analysis in cases of alleged prosecutorial [impropriety] is the fairness of the trial, and not the culpability of the prosecutor. . . . The issue is whether the prosecutor's conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. . . . In determining whether the defendant was denied a fair trial [by virtue of prosecutorial impropriety] we must view the prosecutor's comments in the context of the entire trial." (Internal quotation marks omitted.) *State* v. *Campbell*, 328 Conn. 444, 543, 180 A.3d 882 (2018).

"[O]ur determination of whether any improper conduct by the state's attorney violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams*, [204 Conn. 523, 540, 529 A.2d 653 (1987)], with due consideration of whether that [impropriety] was objected to at trial. . . . Those factors include the extent to which the [impropriety] was invited by

[4] The defendant also asserts that the Appellate Court improperly assumed, without deciding, that the prosecutor improperly attempted to elicit prior consistent statements in violation of the court's evidentiary ruling. The defendant asserts that the Appellate Court should have determined that these actions by the prosecutor were improper. We reject this claim. Indeed, the Appellate Court's decision to assume, without deciding, that these statements were improper afforded it the opportunity to conduct the due process analysis in the same manner it would have if it had decided that the statements were improper.

defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Citation omitted; internal quotation marks omitted.) *State* v. *Campbell*, supra, 328 Conn. 542.

We consider each of these factors in turn. First, there is no dispute that the comments of the prosecutor were not invited by either the argument or conduct of defense counsel.

Second, we conclude that the claimed improprieties were not severe. With respect to the prosecutor's allegedly improper comments regarding Murray's prior consistent statements, the severity of the alleged improprieties is belied by the fact that Murray's prior consistent statement identifying the defendant as the shooter already had been admitted into evidence without objection. Indeed, the jury already had heard that Murray had given a second statement to the police that was consistent with his testimony at trial. The fact that evidence regarding Murray's prior consistent statement was already admitted into evidence without objection demonstrates both that it was not severe, in that it did not elicit an objection when it was first introduced by the state, and that the impact of the prosecutor's allegedly improper questions was lessened by the fact that the jury had already heard evidence pertaining to that statement.

Moreover, it is important to note that Murray did not answer any of the prosecutor's questions. It is axiomatic that questions are not evidence, only the answers to the questions are evidence. In the present case, the fact that the witness did not answer these allegedly improper questions supports the Appellate Court's conclusion that the alleged improprieties were not severe. Accordingly, we conclude that the severity factor weighs in favor of the state.

With respect to the third factor, namely, the frequency of the impropriety, we conclude that this factor also weighs in favor of the state. The defendant points to three instances in which the prosecutor may have improperly referred to Murray's prior consistent statements, and one instance in which the prosecutor improperly commented on statements not in evidence. Therefore, over the course of a weeklong trial, the defendant claims four instances of prosecutorial impropriety. Thus, we cannot conclude that these improprieties were pervasive.

Fourth, we consider whether the claimed improprieties involved a critical issue in the case. We conclude that the statements made by the prosecutor in the present case did involve a critical issue—namely, the credibility of Murray, the state's key witness and the primary source of evidence used to obtain a conviction of the defendant. Accordingly, we conclude that this factor weighs in favor of the defendant.

With respect to the fifth factor, we conclude that the trial court adopted curative measures in response to the alleged improprieties. In response to the prosecutor's improper comments regarding Murray's prior consistent statements, the trial court sustained each of the defendant's objections and once even interjected, sua sponte, to prevent Murray from answering an inappropriate question. Moreover, the trial court provided an instruction prior to jury deliberations as follows: "[i]t is the answer, not the question or the assumption made in the question that is the evidence."

In connection with the prosecutor's improper reference to facts not in evidence during the closing argument, defense counsel immediately objected and the trial court gave a curative instruction. The court instructed as follows: "Do not speculate on this. This is not in evidence. Do not speculate. That is improper

argument." "[W]e have previously recognized that a prompt cautionary instruction to the jury regarding improper prosecutorial remarks or questions can obviate any possible harm to the defendant. . . . Moreover, [i]n the absence of an indication to the contrary, the jury is presumed to have followed [the trial court's] curative instructions." (Citations omitted; internal quotation marks omitted.) *State* v. *Ceballos*, 266 Conn. 364, 413, 832 A.2d 14 (2003). Therefore, we conclude that the strength of the prompt curative measures weighs in favor of the state.

Finally, we consider the sixth factor, namely the strength of the state's case. We cannot conclude that the state's case was particularly strong. There was limited physical evidence, and no murder weapon was ever recovered. Nevertheless, "we have never stated that the state's evidence must have been overwhelming in order to support a conclusion that prosecutorial [impropriety] did not deprive the defendant of a fair trial." (Internal quotation marks omitted.) *State* v. *Stevenson*, 269 Conn. 563, 596, 849 A.2d 626 (2004). Under the circumstances presented in this case, in which the objectionable evidence already was before the jury, the witness was never permitted to answer the improper questions, and prompt curative instructions were given, we simply cannot conclude that the defendant's right to due process was violated. Accordingly, because the majority of the *Williams* factors weigh in favor of the state, we conclude that the claimed improprieties in the present case did not deprive the defendant of a fair trial.

II

The defendant next argues that the Appellate Court improperly upheld the trial court's denial of his motion for a new trial on the ground that the trial court lost jurisdiction upon the execution of the defendant's sentence. In particular, the defendant asserts that a trial

court continues to have jurisdiction over a criminal matter for four months after judgment pursuant to *State* v. *Myers*, 242 Conn. 125, 136, 698 A.2d 823 (1997), and, therefore, should have ruled on the merits of his timely filed motion for a new trial. The state counters that the Appellate Court properly upheld the trial court's denial of that motion because the trial court lost jurisdiction upon execution of the defendant's sentence. We agree with the state's jurisdictional conclusion. In light of that jurisdictional defect, however, we further conclude that, as a matter of form, the trial court should have dismissed rather than denied the defendant's motion for a new trial.

The following additional facts set forth in the Appellate Court's decision are relevant to the defendant's claim. "On March 18, 2013, one week after the defendant was convicted of murder, he filed a motion for a new trial alleging that the prosecutor had 'continually elicited hearsay statements that the court had precluded by an earlier ruling and offered inadmissible hearsay statements during closing [argument].' . . .

"[Subsequently, at] the defendant's sentencing hearing . . . defense counsel attempted to argue the defendant's motion for a new trial, but was stymied by the unavailability of the trial transcript. Both defense counsel and the court agreed to postpone arguments until the transcript became available. Defense counsel stated that, so long as the motion was heard at a later date, he did not have a problem going forward with the defendant's sentencing. The court agreed, stating: '[T]he proper way to consider this argument, which . . . let me just say I view as colorable . . . [i]s to have [defense counsel] file a memorandum with transcript references . . . give the state a fair opportunity to file a memorandum of [its] own with transcript references, and then perhaps schedule argument, you know, at a convenient time. Obviously, there are a lot of family

members here that are here to see the sentencing, and you're not proposing postponing the sentencing. You're just proposing having the—having the motion for [a] new trial heard at a [later] date.' The court then sentenced the defendant to sixty years incarceration.

"Approximately three months later on September 3, 2013, the defendant amended his motion for a new trial to include a claim that the prosecutor had, in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), failed to disclose consideration given to Murray in exchange for his testimony. On September 20, 2013, the court denied the defendant's motion for a new trial for lack of jurisdiction, citing *State* v. *Luzietti*, 230 Conn. 427, 646 A.2d 85 (1994), for the proposition that a trial court loses jurisdiction over a criminal case once the defendant has been sentenced. As a result, the court did not reach the merits of the defendant's motion." (Footnote omitted.) *State* v. *McCoy*, supra, 171 Conn. App. 323–24.

"The defendant [then] filed a motion for reconsideration, arguing that the court retained jurisdiction under *State* v. *Myers*, [supra, 242 Conn. 125]. The court granted the motion for reconsideration, but again denied the motion for a new trial for lack of jurisdiction, stating that *Myers* 'does not address the jurisdictional issue.' " *State* v. *McCoy*, supra, 171 Conn. App. 324–25. The Appellate Court affirmed the judgment of the trial court, concluding that the trial court had lost jurisdiction upon execution of the defendant's sentence and, thus, properly denied the motion for a new trial. Id., 327.

We begin with the standard of review. "Because a determination regarding the trial court's subject matter jurisdiction raises a question of law, our review is plenary." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 326 Conn. 438, 448–49, 165 A.3d 1137 (2017). "The Superior Court is a constitutional court of general

jurisdiction. . . . In the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law."[5] (Internal quotation marks omitted.) *State* v. *Parker*, 295 Conn. 825, 834, 992 A.2d 1103 (2010). There is no legislative or constitutional provision governing when a trial court loses jurisdiction following the execution of a criminal sentence; therefore, the issue is governed by the common law.

The central issue in the present case is whether the trial court lost jurisdiction upon the execution of the

[5] The concurring and dissenting opinion misapprehends the common law related to jurisdiction of a trial court in a criminal case. The concurring and dissenting opinion characterizes the rule "at issue [as] the product of common law; it is a common-law exception to the court's inherent authority to open, correct, and modify judgments. . . . Accordingly, because the rule at issue is a common-law rule, this court has the authority to clarify, develop, and adapt the rule, including limiting its scope and applicability through exceptions." (Citations omitted.) We disagree. This court has explained repeatedly that it must rely on a legislative or constitutional grant of jurisdiction to enable it to have jurisdiction over a criminal judgment after the execution of the sentence. In criminal cases, the well established principle is that "under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the [C]ommissioner of [C]orrection and begins serving the sentence. . . . *Without a legislative or constitutional grant of continuing jurisdiction, however, the trial court lacks jurisdiction to modify its judgment.*" (Emphasis added; internal quotation marks omitted.) *State* v. *Evans*, 329 Conn. 770, 778, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019).

The concurring and dissenting opinion further asserts that the question presented in the present case "is a question of judicial policy . . . ." We disagree. This court has repeatedly explained that "the judiciary cannot confer jurisdiction on itself through its own rule-making power" and that courts are "limited by the common-law rule that a trial court may not modify a sentence if the sentence was valid and its execution has begun." *State* v. *Lawrence*, 281 Conn. 147, 155, 913 A.2d 428 (2007). Instead of being allowed to expand the jurisdiction of a criminal court as a matter of "policy," this court must have a legislative or constitutional grant of continuing jurisdiction. The defendant and the concurring and dissenting opinion do not assert that either of these exists in the present case. Accordingly, we will not contort our well established case law to reach the result that the concurring and dissenting opinion urges this court to adopt.

defendant's sentence. To resolve this issue, some context on the jurisdiction of criminal courts relating to sentencing is helpful.

Early case law explains that a court's jurisdiction over a case ends when the term of that court ends.[6] *State* v. *Pallotti*, 119 Conn. 70, 74, 174 A. 74 (1934) ("[t]he established rule is that a sentence in a criminal case may be modified at any time during the term of court at which it was imposed, if no act has been done in execution of it"). More specifically, early cases recognized that, even when the term had not yet ended, the trial court lost jurisdiction when a person had begun to serve his or her sentence. See *State* v. *Vaughan*, 71 Conn. 457, 461, 42 A. 640 (1899) (noting that common-law power of King's Bench to admit bail belongs to Superior Court and ceases when sentence is executed); *State* v. *Henkel*, 23 Conn. Supp. 135, 138, 177 A.2d 684 (Conn. Cir. 1961) ("[w]hile the established rule is that sentence in a criminal case may be modified at any time during the term of court at which it was imposed, such modification cannot be made after an act has been done in execution of it" [internal quotation marks omitted]); *Commonwealth* v. *Weymouth*, 84 Mass. (2 Allen) 144, 145–46 (1861) (explaining and adopting practice exercised by courts in England that court could modify sentence during court term but could not modify sentence once term was over).

One rationale for this rule was that once sentence was executed, double jeopardy protected a defendant from having his sentence increased. *United States* v. *Benz*, 282 U.S. 304, 307–308, 51 S. Ct. 113, 75 L. Ed. 354 (1931). Another separate, but related, rationale underly-

[6] We have explained previously that, " '[a]t common law, the trial court's jurisdiction to modify or vacate a criminal judgment was also limited to the "term" in which it had been rendered. . . . Since our trial courts no longer sit in "terms," that particular [common-law] limitation no longer has vitality in this state." (Citation omitted.) *State* v. *Parker*, supra, 295 Conn. 834 n.7.

ing this rule is the importance of protecting the finality of judgments. See, e.g., *Carpentier* v. *Hart*, 5 Cal. 406, 407 (1855) (reason for rule that court loses jurisdiction when term of court ends "is obvious . . . [in that] there must be some finality in legal proceedings, and a period beyond which they cannot extend").

In 1934, this court expressly recognized this common-law rule. In *State* v. *Pallotti*, supra, 119 Conn. 74, this court explained that "[t]he established rule is that a sentence in a criminal case may be modified at any time during the term of court at which it was imposed, *if no act has been done in execution of it.*" (Emphasis added.)

Then, in 1962, this court decided *Kohlfuss* v. *Warden*, 149 Conn. 692, 695–96, 183 A.2d 626, cert. denied, 371 U.S. 928, 83 S. Ct. 298, 9 L. Ed. 2d 235 (1962), in which this court again noted its approval of the rule in *Pallotti*, explaining as follows: "Another generally accepted rule of the common law is that a sentence cannot be modified by the trial court, even at the same term, if the sentence was valid and execution of it has commenced. . . . The reason for this rule has been variously assigned. According to one view, the rule rests on the principle of double jeopardy. According to another view, the rule is based on the proposition that the trial court has lost jurisdiction of the case." (Citation omitted.)

Although we recognized the two rationales for this common-law rule, after *Kohlfuss*, case law reveals a movement away from double jeopardy as a primary basis for the rule. See *Wilson* v. *State*, 123 Nev. 587, 591–92, 170 P.3d 975 (2007) (explaining Supreme Court's gradual retreat from prohibition against increasing sentence after defendant had begun to serve it and pointing to *North Carolina* v. *Pearce*, 395 U.S. 711, 721, 89 S. Ct. 2072, 23 L. Ed. 2d 656 [1969], which permitted

court to impose a more severe sentence after reconviction without violating double jeopardy). Additionally, the concerns related to double jeopardy being one of the animating principles behind this rule have lessened over the years, as the law regarding the ability of courts to modify illegal sentences became clearer. See *Benton* v. *Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969) (concluding that concurrent sentences doctrine did not preclude court from exercising jurisdiction over appeal claiming double jeopardy violation).

Nevertheless, the underlying rationale that the rule is supported by the interest in protecting the finality of judgments remains solid. See, e.g., *People* v. *Karaman*, 4 Cal. 4th 335, 348, 842 P.2d 100, 14 Cal. Rptr. 2d 801 (1992) (recognizing common-law rule "that the trial court may change its judgment only during the term in which the judgment was rendered, but not thereafter . . . was established in order to provide litigants with some finality to legal proceedings" [citations omitted; footnote omitted]). Indeed, this court recognized the rule again in 1982, when we reiterated that "[o]rdinarily a sentence may not be modified if any act [has been] done in execution of it." *State* v. *Nardini*, 187 Conn. 109, 123, 445 A.2d 304 (1982).

Notwithstanding this well established rule, in 1986, this court decided *State* v. *Wilson*, 199 Conn. 417, 513 A.2d 620 (1986). In that case, this court addressed whether the trial court could amend its written decision over three years after the defendant was sentenced, in response to a motion for rectification. Id., 432–34. This court explained that "[n]either our General Statutes nor our [rules of practice] define the period during which a trial court may modify or correct its judgment in a criminal case. On the civil side, however, [our rules of practice provide] that any civil judgment or decree may be opened or set aside within four months succeeding the date on which it was rendered or passed. We see

no reason to distinguish between civil and criminal judgments in this respect, and we therefore hold that, for purposes of the [common-law] rule, a criminal judgment may not be modified in matters of substance beyond a period of four months after the judgment has become final." (Emphasis omitted; internal quotation marks omitted.) Id., 437; see also Practice Book § 17-4; Practice Book (1978–97) § 326.

Despite making this pronouncement, this court did not use the four month rule to find that the trial court had jurisdiction. Instead, this court concluded that the trial court in that case was *without jurisdiction* to modify the judgment. *State* v. *Wilson*, supra, 199 Conn. 438. This court explained that "the judgment in this case became final when the defendant was sentenced . . . . The trial court, when it filed its amended memorandum of decision [over three years later] was clearly without jurisdiction to alter its previous finding . . . ." Id., 437. Therefore, this court struck the amended memorandum of decision. Id., 438.

Thereafter, in 1994, this court decided *State* v. *Luzietti*, supra, 230 Conn. 431–32. In *Luzietti*, we addressed whether the trial court had jurisdiction to rule on the defendant's motion for judgment of acquittal, filed six weeks after he began serving his sentence. Id., 428. Despite our decision in *Wilson*, this court did not deem the trial court to have had continued jurisdiction for four months and, thus, the ability to rule on the defendant's motion postsentencing. Id.

Instead, this court once more reiterated its approval of the traditional rule, stating as follows: "It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody

of the [C]ommissioner of [C]orrection and begins serving the sentence."[7] (Citations omitted; footnote omitted.) Id., 431–32. Consequently, because the defendant already had begun to serve his sentence, we held that the court lacked jurisdiction to address his motion.

Three years after *Luzietti*, in 1997, the court decided *State* v. *Myers*, supra, 242 Conn. 125, upon which the defendant in the present case principally relies. In *Myers*, prior to sentencing, the defendant filed a motion for a new trial, claiming juror bias. Id., 129. Without ruling on the motion for a new trial, the trial court sentenced the defendant. Id., 131. Approximately five months after sentencing the defendant, the trial court ruled on the motion for a new trial. The trial court first granted the defendant's motion for a new trial but subsequently vacated that decision, determining that the defendant's claim should have been brought by way of a petition for a new trial. Id., 131–32. This court reversed the judgment of the trial court, concluding

[7] In *Luzietti*, the dissenting justice opined that this court's decision in *Wilson* reflected a movement away from the traditional common-law view that a trial court loses jurisdiction upon the execution of the defendant's sentence and that the majority decision represented a departure from the rule announced in *Wilson*. *State* v. *Luzietti*, supra, 230 Conn. 436–37 (*Katz*, *J.*, dissenting). A majority of this court rejected the dissenting justice's claim.

Given the dissenting opinion in *Luzietti*, the concurring and dissenting opinion's assertion that *Luzietti* was decided "without . . . even discussing *Wilson*" is somewhat misleading. A complete reading of *Luzietti* demonstrates that the dissent in that case took the same position as the concurring and dissenting opinion espouses in the present case—that *Wilson* stood for the proposition that the civil rule allowing a trial court to modify its judgment within four months applies to criminal cases. However, by concluding that "once judgment has been rendered and the defendant has begun serving the sentence imposed, the trial court lacks jurisdiction to modify its judgment in the absence of a legislative or constitutional grant of continuing jurisdiction," the majority in *Luzietti* rejected the dissent's position and its interpretation of *Wilson*. *State* v. *Luzietti*, supra, 230 Conn. 431. Because *Wilson* was explicitly argued by the dissent in *Luzietti*, and the majority's conclusion is completely contrary to *Wilson*, we conclude that the court in *Luzietti* considered the reading of *Wilson* asserted by the concurring and dissenting opinion in the present case and rejected it.

that a motion for a new trial was an appropriate vehicle for a claim of juror bias. Id., 132.

The central point of *Myers* was that a claim of juror bias had to be addressed in whatever form it was raised. Id., 139. Thus, the defendant's motion for a new trial in that case was appropriate. Id. Although the nature of the claim does not appear necessary to its holding that a motion for a new trial is an appropriate vehicle to alert the court to juror bias, the court made the following statement upon which the defendant seizes: "the trial court retained jurisdiction to entertain the motion for a new trial after sentencing because it could have opened the judgment." (Footnote omitted.) Id., 136, citing *State* v. *Wilson*, supra, 199 Conn. 436.

In *Myers*, this court neither acknowledged *Luzietti* nor otherwise discussed any of our well established precedent, including *Vaughan*, *Nardini*, *Pallotti*, or *Kohlfuss*, holding that a trial court loses jurisdiction upon the execution of the sentence. Instead, in support of its conclusion, this court cited *State* v. *Wilson*, supra, 199 Conn. 436, a case that did not even find jurisdiction under the four month rule it had espoused.

Additionally, a close examination of *Myers* reveals serious concerns about both its rationale and the implications of its decision were we to follow it without question. Specifically, although this court relied on the four month rule to find that the court had jurisdiction in *Myers*, the trial court in that case did not rule on the motion for a new trial within four months of the judgment but waited until approximately five months after the judgment to rule on the motion. *State* v. *Myers*, supra, 242 Conn. 131. *Myers* did not address the fact that the ruling on the motion occurred beyond the four month grant of jurisdiction or, more importantly, under what authority the trial court could rule on a motion five months after the sentencing. The concurring and

dissenting opinion in the present case, however, notes the discrepancy but attempts to salvage the reasoning of *Myers* by focusing on the fact that the motion was filed prior to sentencing. Of course, nothing in *Myers* states that it was the fact that the motion was filed prior to sentencing that permitted the trial court to exercise jurisdiction beyond the four month period. Furthermore, even if we were to assume that filing the motion prior to sentencing extended the jurisdiction of the court, it certainly would not be extended in perpetuity. Yet that is precisely what *Myers* and the concurring and dissenting opinion suggest. Indeed, although the court paid lip service to the four month rule in *Myers*, it actually permitted an extension of five months.

Noting this disparity, the concurring and dissenting opinion further attempts to salvage the rationale of *Myers* by explaining that this court "not only applied the four month rule, but determined that the trial court retains jurisdiction over a motion for a new trial as long as it was timely filed prior to sentencing, even if the court did not rule on the motion within the four month time frame." By doing so, the concurring and dissenting opinion no longer relies on *Myers* for its application of the four month rule but seems to assert that, as long as a motion is timely filed prior to sentencing, the trial court retains jurisdiction to modify the sentence at any time to rule on the motion. We disagree.

First, the concurring and dissenting opinion's position is not even supported by *Wilson*. As explained previously in this opinion, in *Wilson*, this court suggested that the civil rule that allows trial courts to reopen or set aside civil judgments within four months of judgment applies to criminal cases. Nothing in *Wilson* or the rule of practice on which that decision relied addresses retaining the limited extension of jurisdiction past a four month period even if the motion was filed before sentencing. Second, if we were to agree with

the concurring and dissenting opinion and adopt its reading of *Myers*, we would essentially give courts an even broader ability to modify criminal judgments than that allowed in civil judgments under the four month rule. We decline to take such a dramatic departure from our well established common law.

Furthermore, over the years following this court's decision in *Myers*, we consistently have reaffirmed the principle that a trial court loses jurisdiction upon the execution of the defendant's sentence, unless it is expressly authorized to act. See *State* v. *Ramos*, 306 Conn. 125, 134–35, 49 A.3d 197 (2012) ("in criminal cases . . . once a defendant's sentence has begun [the] court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act" [emphasis omitted; internal quotation marks omitted]);[8] *State* v. *Parker*, supra, 295 Conn. 835–36 ("a generally accepted rule of the common law is that a sentence cannot be modified by the trial court . . . if the sentence was valid and execution of it has commenced" [internal quotation marks omitted]); *State* v. *Das*, 291 Conn. 356, 361–62, 968 A.2d 367 (2009) (concluding that trial court lacked jurisdiction over defen-

[8] The concurring and dissenting opinion repeatedly quotes from *State* v. *Ramos*, supra, 306 Conn. 133–35, for the proposition that there is a "strong presumption in favor of jurisdiction." Although the concurring and dissenting opinion once notes that "the strong presumption in favor of jurisdiction must be considered in light of the common-law rule at issue," its repeated citation to *Ramos* for the presumption in favor of jurisdiction and consistent analogy to the civil context for this rule misses the mark. Indeed, *Ramos* highlights this critical distinction when it explained that, "*although* this court has recognized the general principle that there is a strong presumption in favor of jurisdiction . . . *in criminal cases*, *this principle is considered in light of the common-law rule that*, *'once a defendant's sentence has begun* [*the*] *court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act.*' " (Emphasis added.) *State* v. *Ramos*, supra, 134–35. Accordingly, *Ramos* is entirely consistent with our position and contrary to the one espoused by the concurring and dissenting opinion.

dant's motion to vacate judgment of conviction and to withdraw plea after sentence had been executed and that no constitutional violation exception existed); *State* v. *Lawrence*, 281 Conn. 147, 155, 913 A.2d 428 (2007) (acknowledging established rule that once defendant's sentence has begun, a court may not take action affecting a defendant's sentence unless it expressly has been authorized to act); *State* v. *Reid*, 277 Conn. 764, 774, 894 A.2d 963 (2006) ("In a criminal case the imposition of sentence is the judgment of the court. . . . When the sentence is put into effect and the prisoner is taken in execution, custody is transferred from the court to the custodian of the penal institution. At this point jurisdiction of the court over the prisoner terminates." [Internal quotation marks omitted.]); *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 37, 779 A.2d 80 (2001) ("[t]his court has held that the jurisdiction of the sentencing court terminates once a defendant's sentence has begun, and, therefore, that court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act"). As these cases demonstrate, post-*Myers*, this court has not wavered from the rule that a trial court's jurisdiction is lost upon the execution of the defendant's sentence. By contrast, we cannot find, and the defendant does not point to, any case in which this court has relied on *Myers* for the proposition that a trial court retains jurisdiction after the defendant's sentence has been executed.

Accordingly, given the long and consistent history of our courts applying the traditional rule that jurisdiction is lost upon the execution of a sentence, we cannot conclude that *Myers* reflects a retreat from that common-law rule. Instead, we acknowledge that *Myers* and *Wilson* are anomalies in this court's case law, and we take this opportunity to clarify and reiterate, as we have consistently done since *Myers*, that a trial court loses

jurisdiction once the defendant's sentence is executed, unless there is a constitutional or legislative grant of authority. *State* v. *Luzietti*, supra, 230 Conn. 431–32. Thus, any reliance on *Myers* by the defendant to extend the jurisdiction of the trial court beyond the point at which his sentence was executed is misplaced.

In the present case, the defendant's motion for a new trial, although filed before his sentence was executed, was not ruled upon before the sentence was executed. Consequently, the trial court lost jurisdiction. A motion for a new trial—even a timely filed motion that is not ruled upon before sentence is executed—is not a special grant of authority that imbues the trial court with jurisdiction until it is ruled upon. We note that this is an unusual circumstance, and not one that makes us question or need to revisit the well established rule that the court loses jurisdiction upon sentencing. Although we acknowledge that the trial court incorrectly failed to rule on the motion for a new trial before sentencing the defendant, we are mindful of the old adage that bad facts make bad law. Therefore, we refuse to expand the jurisdiction of criminal courts in an effort to address the highly unusual circumstances of the present case.

Indeed, the circumstance this case presents is exceedingly rare and unlikely to recur because a mechanism already exists for trial courts to maintain jurisdiction in this type of situation. Specifically, the court simply could have stayed the execution of the sentence until the motion was heard and ruled upon. To be sure, "[t]he common law has long recognized a court's ability to stay the execution of a criminal sentence" in order to "fulfill its duty to implement the penalties dictated by the legislature for criminal offenses and to promote the ends of justice." *Copeland* v. *Warden*, 225 Conn. 46, 49–50, 621 A.2d 1311 (1993). When the court stays

the execution of the sentence, it retains jurisdiction. *State* v. *Walzer*, 208 Conn. 420, 425, 545 A.2d 559 (1988).[9]

In the present case, because the trial court did not stay the execution of the defendant's sentence prior to ruling on his motion for a new trial, however, the court lost jurisdiction. The fact that it was not the intent of the court or the parties to do so does not alter the fact that jurisdiction was lost. Jurisdiction does not turn on the intent of the parties or the court. See, e.g., *State* v. *Das*, supra, 291 Conn. 358 (denying postsentencing motion to vacate judgment of conviction and to withdraw plea of nolo contendere on ground that trial court lost jurisdiction upon sentencing, and concluding that there is no constitutional violation exception).

Accordingly, the trial court, albeit inadvertently, lost jurisdiction over the defendant's case. Although we observe that this was unintentional, we believe the trial court correctly ruled that "the jurisdictional argument is not a matter of my intent . . . . [T]he trial court just

[9] The concurring and dissenting opinion refers to this mechanism as a "work-around" and asserts that it "undercuts not only the finality of the judgment, but also the other policy justification the state offers for the draconian rule the majority adheres to, i.e., that trial judges will take too long to rule on such motions." We disagree. As this court repeatedly has recognized, a judge sitting in the criminal court often finds that it is necessary to stay the execution of a defendant's sentence to ensure that criminal sentences are imposed in the manner intended. See *Copeland* v. *Warden*, 225 Conn. 46, 49, 621 A.2d 1311 (1993). For instance, if a defendant has charges pending in multiple jurisdictions, staying the execution of the sentence in one jurisdiction until the defendant is able to resolve his matters in another jurisdiction enables the defendant to receive appropriate credit for the time served on the charges. Therefore, instead of being a "work-around," as the concurring and dissenting opinion asserts, this is a useful mechanism, which is expressly rooted in case law and routinely utilized by Superior Court judges, and could have been utilized by the trial court in the present case to avoid the result the concurring and dissenting opinion seeks to avoid. Given the fact that a trial court loses jurisdiction in a criminal case upon execution of the defendant's sentence, the well established procedure, which the law has recognized for years, is more properly viewed as a way to promote the ends of justice and efficiency.

plain has no jurisdiction. It's not a matter of intent or good faith or bad faith, or anything else. The court just flat out [has] no jurisdiction."[10] The Appellate Court, therefore, properly concluded that the trial court correctly determined that it had lost jurisdiction over the defendant's case when the defendant began serving his sentence. As we explained previously in this opinion, the trial court denied the defendant's motion for a new trial. Given that it lacked jurisdiction, however, it should have dismissed that motion. Therefore, the trial court's judgment is improper in form, and the case must be remanded to the Appellate Court with direction to remand the case to the trial court with direction to dismiss the defendant's motion for a new trial.

III

The defendant next claims that, if the trial court had lost jurisdiction because it sentenced him, then the trial court erred when it sentenced him while his motion for a new trial was pending. Specifically, the defendant asserts that the trial court violated Practice Book § 42-53, which required the trial court to adjudicate his motion for a new trial. The defendant further claims that, by sentencing him before ruling on the motion, the trial court improperly rendered itself unable to adjudicate the motion because it lost jurisdiction.

Practice Book § 42-53 (a) provides: "Upon motion of the defendant, the judicial authority may grant a new

[10] The concurring and dissenting opinion asserts that, "[e]ven if the majority is correct that *Luzietti* has thrown cold water on *Wilson* and *Myers*, the trial court could have opened the judgment to rule on the new trial motion under the related concept of mutual mistake." The concurring and dissenting opinion then proposes that this court should apply the civil mutual mistake doctrine, which allows a party to file a motion to open or set aside a judgment within four months from the date of judgment if it was obtained because of a mutual mistake. It is important to note that neither of the parties asked this court to adopt this rule, and it was not argued at the trial court or the Appellate Court. Accordingly, we decline to address it. See, e.g., *State* v. *Fauci*, 282 Conn. 23, 26 n.1, 917 A.2d 978 (2007).

trial if it is required in the interests of justice. Unless the defendant's noncompliance with these rules or with other requirements of law bars his or her asserting the error, the judicial authority shall grant the motion: (1) For an error by reason of which the defendant is constitutionally entitled to a new trial; or (2) For any other error which the defendant can establish was materially injurious to him or her." The defendant recognizes that the language of § 42-53 does not expressly require the trial court to rule on all motions for a new trial. Rather, he asserts that the requirement is implicit because it expressly requires that the trial court "shall grant the motion" if certain conditions are met. Practice Book § 42-53 (a).

"It is well settled that [n]ot every deviation from the specific requirements of a Practice Book rule necessitates reversal. . . . Ordinarily, our courts apply a harmless error analysis in determining whether a violation of a rule of practice amounts to reversible error. . . . To the extent that a failure to comply with a rule of practice rises to the level of a constitutional violation, [t]he United States Supreme Court has recognized that most constitutional errors can be harmless." (Citations omitted; internal quotation marks omitted.) *State* v. *Ayala*, 324 Conn. 571, 590–91, 153 A.3d 588 (2017).

In the present case, the defendant does not allege that the trial court's alleged failure to comply with Practice Book § 42-53 constitutes a violation of his constitutional rights to due process. Furthermore, on appeal to this court, the defendant did not establish harm that resulted from the trial court's alleged error in failing to adjudicate his motion for a new trial prior to sentencing him. Instead, the defendant merely asserts that the appropriate remedy for the error is to vacate his sentence so that his motion for a new trial can be adjudicated. We disagree. Even if the trial court violated § 42-53, the defendant has failed to explain how or why that vio-

lation amounts to reversible error. See, e.g., *Adams* v. *Dept. of Correction*, Docket No. M2013-00370-COA-R3-CV, 2014 WL 4536557, *3 (Tenn. App. September 11, 2014) ("[u]nder circumstances where the pending motions would not have affected the outcome, the oversight, or failure to rule on pending motions, has been considered harmless error") Thus, because he has not demonstrated harm, we reject the defendant's claim.

IV

Following oral argument, this court requested supplemental briefing, limited to the following question: "If we conclude that the trial court lost subject matter jurisdiction upon sentencing the defendant, is the doctrine of plain error applicable to the trial court's failure to have decided the defendant's pending and timely filed motion for a new trial before it sentenced the defendant?" Thereafter, the defendant argued that the failure of the trial court to rule on his motion for a new trial prior to sentencing constituted plain error that requires vacating his sentence and remanding the case to the trial court to rule on his motion for a new trial. The state contends that the trial court did not commit plain error, because the mistake was neither so obvious nor so harmful as to constitute manifest injustice. We agree with the state.

We begin with the standard of review and applicable law. An appellant cannot prevail under the plain error doctrine "unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice. . . . It is clear that an appellate court addressing an appellant's plain error claim *must* engage in a review of the trial court's actions and, upon finding a patent error, determine whether the grievousness of that error qualifies for the invocation of the plain error doctrine and the automatic reversal that accompanies it." (Citations

omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Myers*, 290 Conn. 278, 288–89, 963 A.2d 11 (2009).

In the present case, although the trial court delayed hearing the defendant's motion in order to complete the sentencing out of respect for the families of the victim in attendance at the sentencing, we cannot conclude that the trial court had authority to refuse to hear the defendant's motion that was timely filed pursuant to Practice Book § 42-53. See *Ahneman* v. *Ahneman*, 243 Conn. 471, 482, 706 A.2d 960 (1998) ("the trial court lacked authority to refuse to consider the defendant's motions"); *Amato* v. *Erskine*, 100 Conn. 497, 499, 123 A. 836 (1924) ("[i]t is a rule essential to the efficient administration of justice, that where a court is vested with jurisdiction over the [subject matter] upon which it assumes to act, and regularly obtains jurisdiction of the person, it becomes its right and duty to determine every question which may arise in the cause, without interference from any other tribunal" [internal quotation marks omitted]).

Nevertheless, as we explained in part II of this opinion, a thorough review of our case law demonstrates that the well established rule is that a trial court loses jurisdiction upon execution of the defendant's sentence. We acknowledge, however, that *State* v. *Wilson*, supra, 199 Conn. 436, and *State* v. *Myers*, supra, 242 Conn. 136, were anomalies in our case law and may have resulted in some confusion. Accordingly, although we conclude that it was improper for the trial court to neglect ruling on the defendant's motion for a new trial prior to the execution of his sentence, we do not agree that it was so clear an error as to satisfy the first prong of the plain error doctrine.

In any event, even if that error were deemed to be clear, the defendant's claim of plain error fails on the

second prong—namely, whether the error is "so harmful that a failure to reverse the judgment would result in manifest injustice." (Internal quotation marks omitted.) *State* v. *Myers*, supra, 290 Conn. 289. The defendant contends that the trial court's failure to decide his motion for a new trial constitutes manifest injustice because the opportunity to have a trial court review that motion was a unique opportunity and that any other avenue for review would be inadequate. The state argues that the defendant was not harmed by the trial court's failure to review his motion for a new trial because there were other avenues for the defendant to have his claims resolved and, more generally, that a trial court's failure to comply with a rule of procedure is not enough, by itself, to necessitate reversal for plain error. We agree with the state.

We certainly acknowledge the benefits of having the trial judge, as opposed to a reviewing court, decide the motion for a new trial in the first instance. See *State* v. *Smith*, 313 Conn. 325, 347, 96 A.3d 1238 (2014) ("[a]ppellate review of a trial court's decision granting or denying a motion for a new trial must take into account the trial judge's superior opportunity to assess the proceedings over which he or she has personally presided" [internal quotation marks omitted]). Under the circumstances of the present case, however, we simply cannot conclude that the trial court's failure to rule on the defendant's claims was an error so harmful that it resulted in manifest injustice.

In his motion for a new trial, the defendant raised the claim that the prosecutor engaged in impropriety by attempting to elicit previously precluded hearsay and by referring to statements not in evidence during closing arguments. These are some of the same issues that the defendant raised as stand-alone claims of prosecutorial impropriety on direct appeal. Indeed, the Appellate Court and now this court have reviewed the merits

of those claims of impropriety and both courts have concluded that the defendant was not deprived a fair trial.[11] See *State* v. *McCoy*, supra, 171 Conn. App. 314–23; see also part I of this opinion. In other words, the prosecutorial impropriety claims raised in the defendant's motion for a new trial themselves have no merit. We therefore cannot conclude that the trial court's failure to review those claims equates to an error so harmful that it was a manifest injustice necessitating reversal pursuant to plain error review.

[11] The concurring and dissenting opinion asserts that it "would reverse the judgment of the Appellate Court and remand the case to that court with direction to remand the case to the trial court with direction to rule on that motion—a simple solution that [it] cannot fathom our law does not permit." Presumably, in the concurring and dissenting opinion's view, the defendant's conviction would remain intact, and his perfectly legal sentence would remain intact, but this court would send the case back to the same trial judge solely for the purpose of making a ruling on the motion for a new trial. The concurring and dissenting opinion's position ignores the complicated procedural posture of this case.

First, it is not at all clear that the trial court can rule on the motion for a new trial without vacating the defendant's sentence. Second, if the concurring and dissenting opinion is suggesting that we reverse the Appellate Court's judgment and also vacate the defendant's sentence, then it is not entirely clear whether the same trial judge would hear the case on remand. See General Statutes § 51-183c.

Moreover, if the remand to the trial court is to serve any more than a perfunctory purpose, it would seem necessary to not only reverse the judgment of the Appellate Court, but to vacate the decision of the Appellate Court that considered, and rejected, the merits of the same prosecutorial impropriety claims alleged in the defendant's motion for new trial. Otherwise, the trial court would be in the unenviable position of either ignoring the Appellate Court's decision in its entirety or grappling with its determinations on issues that the Appellate Court has determined have no merit. However, it is unclear what authority this court has to vacate the decision of the Appellate Court in these circumstances.

Rather than tackle these procedural complexities, the concurring and dissenting opinion's proposal is to "reverse the judgment of the Appellate Court and remand the case to that court with direction to remand the case to the trial court to rule on the motion for a new trial." Not only does this suggested remand order ignore the defendant's sentence—which was not an illegal sentence—but it disregards the fact that the Appellate Court has considered the merits of the defendant's prosecutorial impropriety claims and found those claims to be meritless.

The concurring and dissenting opinion concludes that "the manifest injustice in this case is not necessarily that the defendant would have prevailed on his claims, but rather that the parties *and this court* have lost the benefit of the trial court's considered views of his claims, especially in light of the fact that the trial judge deemed the defendant's motion for a new trial 'colorable.' "[12] Anytime a trial judge fails to rule on a motion, we are deprived of the trial court's views. That, however, does not by definition result in reversible error. We might agree that the trial court's failure to rule on the defendant's motion in this case could be an error, but that error in itself does not satisfy the separate and distinct prong of the plain error test. "As we have explained . . . the defendant also must demonstrate, under the second prong of the plain error test, that the omission was so harmful or prejudicial that it resulted in manifest injustice. . . . This stringent standard will be met only upon a showing that, as a result of the obvious impropriety, the defendant has suffered harm so grievous that fundamental fairness requires a new trial." (Citation omitted.) *State* v. *Jamison*, 320 Conn. 589, 598–99, 134 A.3d 560 (2016).

As with any error that is not structural—and there is no claim here that the court's failure to rule on the motion for a new trial is structural—a defendant must demonstrate how the error harmed him. As with any trial court error in which we must engage in an analy-

[12] The concurring and dissenting opinion appears to read much into the trial court's statement that the motion for new trial was colorable. We do not believe that this statement tips the scales in any measurable way in favor of the defendant's satisfaction of his burden to show egregious harm. The trial court's unqualified and unexplained statement that the defendant's motion was "colorable" is not enough for us to find that the court's failure to rule on the motion is a harm egregious enough to warrant reversal under the plain error doctrine. This is especially so given that both the Appellate Court and this court have concluded that the claims raised in that motion lack merit.

sis of harm, we are either deprived of the trial court's considered decision or we are reviewing an erroneous decision. We then must take that nonexistent or erroneous ruling and consider the effect that it had on the conviction. In the plain error context, the error must be so harmful as to amount to a manifest injustice requiring a new trial. *State* v. *Myers*, supra, 290 Conn. 289.

To assess the harm, we must look at the substance of the motion to see if it has any merit. Indeed, it would be truly bizarre if a court's failure to rule on a meritless or frivolous motion for a new trial could amount to an error so harmful that a manifest injustice has occurred. That circumstance is what we are presented with here—lack of a ruling on a meritless motion. As we have explained previously in this opinion, the defendant's motion sought a new trial based on the prosecutor's attempts to elicit a prior consistent statement from a witness. We already have found that that claim lacks merit. See part I of this opinion. Indeed, the concurring and dissenting opinion agrees with this conclusion. Thus, unlike the concurring and dissenting opinion, we cannot conclude that the failure to get the trial court's "considered views" of a motion that so obviously lacks merit was an error so harmful that a manifest injustice has occurred.

We are also guided by this court's decision in *State* v. *Myers*, supra, 290 Conn. 278. In that case, the defendant appealed from a judgment of conviction for possession of narcotics. Id., 280–81. On appeal, the defendant alleged that the trial court committed plain error when it did not comply with Practice Book § 42-2 by not affording the defendant a hearing regarding his repeat offender status. Id., 284–85. The Appellate Court agreed, observing that a failure to comply with "applicable rules of practice" was, per se, plain error. (Internal quotation marks omitted.) Id., 285.

On appeal to this court, we observed as follows: "Although we agree with the Appellate Court that the trial court's failure to comply with the procedures of Practice Book § 42-2 was clearly improper, we conclude that the Appellate Court abused its discretion in vacating the defendant's sentence because the [trial court's] error . . . did not 'result in manifest injustice.' . . . Indeed, apart from the trial court's failure to comply strictly with the applicable rule of practice, which we do not condone, the defendant has failed to raise *any* doubt with respect to the validity of his prior conviction. A trial court's failure to comply with a rule of criminal procedure, without more, is insufficient to require reversal for plain error." (Citation omitted; emphasis in original; footnote omitted.) Id., 289–90.

Similarly, although we do not condone the trial court's failure to rule on the motion for a new trial before sentencing the defendant without a stay of execution, its failure to do so, without more, is insufficient to require reversal for plain error. Indeed, in the present case, as in *State* v. *Myers*, supra, 290 Conn. 278, the defendant has failed to raise any doubt with respect to the validity of his conviction, particularly when we have had the opportunity to review, and reject, the very claims of prosecutorial impropriety raised in his motion for a new trial.

Furthermore, we agree with the state that there are other avenues by which a defendant may address such claims of prosecutorial impropriety. For instance, a defendant could (1) pursue a direct appeal from his or her conviction, as the defendant did in the present appeal, or (2) file a petition for writ of habeas corpus.

The defendant further contends that his other claim within the motion for a new trial, namely, the claim that the state violated *Brady* v. *Maryland*, supra, 373 U.S. 83, should be addressed by the trial court because the trial

court is in a unique position to understand the intricacies of the present case. We are not persuaded.

First and foremost, as the state points out, the defendant's *Brady* claim was only added to his motion for a new trial three months after his sentence was executed. As a result, the trial court already had lost jurisdiction over the motion. Consequently, the trial court never had jurisdiction over this claim.

Second, although it is true that this court has recognized the importance of the trial judge's "superior opportunity to assess the proceedings over which he or she has personally presided"; (internal quotation marks omitted) *State* v. *Smith*, supra, 313 Conn. 347; this does not mean that the trial court is the *only* court that can review a *Brady* claim. Indeed, this court has regularly entertained claims of *Brady* violations that were not distinctly raised at trial, as long as those claims satisfied *Golding*.[13] See, e.g., *State* v. *Jordan*, 314 Conn. 354, 369–76, 102 A.3d 1 (2014); *State* v. *Ouellette*, 295 Conn. 173, 185–87, 989 A.2d 1048 (2010). Moreover, as the Appellate Court noted in the present case, newly discovered *Brady* claims may also be brought by way of a petition for a new trial up to three years after sentencing. *State* v. *McCoy*, supra, 171 Conn. App. 328 n.6; see also General Statutes § 52-270. Therefore, we cannot conclude that the trial court's failure to review the defendant's *Brady* claim constitutes manifest injustice. Accordingly, we conclude that the defendant is not entitled to have his sentence vacated pursuant to the plain error doctrine.

The judgment of the Appellate Court is reversed insofar as that court affirmed the trial court's denial of the defendant's motion for a new trial, and the case

[13] See *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989); see also *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying *Golding*'s third prong).

is remanded to the Appellate Court with direction to reverse that ruling and to remand the case to the trial court with direction to dismiss the defendant's motion; the judgment of the Appellate Court is affirmed in all other respects.

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

D'AURIA, J., with whom, PALMER and McDONALD, Js., join, concurring in part and dissenting in part. A jury found the defendant, Kenneth Lee McCoy, guilty of murder. The defendant filed a motion for a new trial within the time prescribed by Practice Book § 42-54, raising grounds that the trial court described as "colorable . . . ." The court scheduled its consideration of the motion for the same day as the defendant's sentencing. Upon beginning to hear argument on the motion, however, the court determined that a trial transcript was necessary and, therefore, continued the hearing on the motion to allow for the transcript's preparation and for the state to file a brief. Both parties consented.

However, to avoid inconveniencing the victim's family, which was in court that day, the trial court conducted the defendant's sentencing proceeding. This, in the words of the Appellate Court, was a "collective mistake"; *State* v. *McCoy*, 171 Conn. App. 311, 328 n.6, 157 A.3d 97 (2017); because it implicated the rule that "the trial court loses jurisdiction upon sentencing . . . ." (Citations omitted.) Id., 327. The import of this rule was not raised until the state, with a further extension of time, filed its brief opposing the defendant's motion for a new trial. Upon discovering this collective mistake, the trial court agreed with the state that it lacked jurisdiction to rule on the motion and denied it.

Like the Appellate Court, the majority today concludes that nothing can be done about what it concedes

was an "unintentional" or "inadvertent" loss of jurisdiction over a timely filed motion for a new trial. I find the court's application of this rule in the present case to prevent a ruling on the defendant's motion so illogical that I cannot believe our law compels this result. In fact, it does not. Rather, there are in my view exceptions to this rule that permitted—in fact, required—the trial court to retain jurisdiction over the defendant's motion for a new trial, which was timely filed prior to sentencing. These exceptions fall within the scope of our existing case law. To the extent that they do not, I believe that under this court's inherent authority to develop the common law, this court should adopt a sensible exception to avoid such an illogical result. Finally, even in the absence of any exception, I would conclude that it was plain error for the trial court not to have ruled on the motion for a new trial before sentencing, and I would reverse the judgment of the Appellate Court and remand the case to that court with direction to remand the case to the trial court with direction to rule on that motion—a simple solution that I cannot fathom our law does not permit. I therefore respectfully dissent.[1]

I

This court has articulated the rule at issue in the present case in this way: "It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed . . . [but] the court loses jurisdiction over the case when the defendant is committed to the custody of the commissioner of correction and begins serving the sentence." (Citations omitted.) *State* v. *Luzietti*, 230 Conn. 427, 431–32, 646

[1] I concur, however, with the conclusion in part I of the majority's opinion that the Appellate Court properly concluded that the alleged prosecutorial improprieties detailed in the motion for a new trial did not deprive the defendant of a fair trial.

A.2d 85 (1994). The parties and the majority take it as a given that this rule, which the trial court concluded prevented it from ruling on the defendant's timely filed motion for a new trial, implicates the trial court's *subject matter* jurisdiction. Although our case law is not clear that this rule implicates subject matter jurisdiction, for purposes of this discussion I will not quarrel with that proposition.[2]

Most of our case law concerning the subject matter jurisdiction of the courts concerns the interpretation of statutes, i.e., whether the legislature has conferred jurisdiction on the courts or limited the jurisdiction of the courts. When a statute seeks to create or expand the court's jurisdiction, we narrowly construe the statute. See *Spears* v. *Garcia*, 263 Conn. 22, 28, 818 A.2d 37 (2003) (statute that creates cause of action that was not available at common law is strictly construed); *H-K Properties, LLC* v. *Planning & Zoning Commission*, 165 Conn. App. 488, 500, 139 A.3d 787 ("to substantially expand appellate jurisdiction, we must construe the statute strictly in accordance with its terms"), cert.

[2] Neither *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 37, 779 A.2d 80 (2001), *State* v. *Myers*, 242 Conn. 125, 698 A.2d 823 (1997), *State* v. *Luzietti*, supra, 230 Conn. 427, nor *State* v. *Wilson*, 199 Conn. 417, 436, 513 A.2d 620 (1986), refer to the rule as one of subject matter jurisdiction, but rather merely of "jurisdiction." Although this court has stated on numerous occasions that a criminal trial court's jurisdiction ends with the sentencing of the defendant, this rule just as easily can be explained as implicating the court's personal jurisdiction over the defendant, rather than subject matter jurisdiction over the case. In fact, although not relied on by the majority, one of the justifications advanced in support of the rule is that upon execution of sentence, the custody of the defendant is transferred from the court to the Commissioner of Correction, which arguably implicates the court's jurisdiction over the defendant's person. See *State* v. *Luzietti*, supra, 432. Of course, if this rule does not implicate subject matter jurisdiction, the parties could have waived any objection to the court's ruling on the motion. Compare General Statutes § 52-212a (providing that civil judgments may be opened or set aside only within four months following judgment, but further providing that "parties may waive the provisions of this section or otherwise submit to the jurisdiction of the court").

granted on other grounds, 322 Conn. 902, 138 A.3d 932 (2016) (appeal withdrawn August 5, 2016). When a statute seeks to limit the court's common-law jurisdiction, however, we strictly construe that statute as well so as to limit jurisdiction only to the extent expressly and explicitly stated by the legislature. See *Sastrom* v. *Psychiatric Security Review Board*, 291 Conn. 307, 324–25, 968 A.2d 396 (2009) (explaining that legislature knows how to expressly limit scope of jurisdiction and if no intent to limit is expressed, then statute does not divest court of jurisdiction). This latter rule of construction is consistent with the general rule that the court's common-law general jurisdiction is broad and that "there is a strong presumption in favor of jurisdiction . . . ." (Citations omitted.) *State* v. *Ramos*, 306 Conn. 125, 134–35, 49 A.3d 197 (2012). If we interpret a court's statutory jurisdiction too broadly or too narrowly, the legislature can direct the judiciary differently. See *Hall* v. *Gilbert & Bennett Mfg. Co.*, 241 Conn. 282, 297, 695 A.2d 1051 (1997) ("the legislature [may instruct] us that we have misconstrued its intentions" [internal quotation marks omitted]).

The rule under consideration in the present case, however, does not implicate the legislative creation, exclusion, or limitation of the court's jurisdiction—subject matter or otherwise. Rather, as the majority acknowledges, we grapple with a principle of *common-law* jurisdiction, and specifically, a rule concerning when a court *loses* common-law jurisdiction it indisputably had—here, the jurisdiction to rule on a timely filed posttrial motion for a new trial, a motion which derives from the common law. See *Zaleski* v. *Clark*, 45 Conn. 397, 404 (1877). In a situation such as this, it is the *courts* that define the contours of their common-law jurisdiction over a common-law motion, not the legislature. See *State* v. *Parker*, 295 Conn. 825, 834, 992 A.2d 1103 (2010) ("The Superior Court is a constitutional

court of general jurisdiction. . . . In the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law." [Internal quotation marks omitted.]). Therefore, the contours of this jurisdictional rule are defined by the decisions of this court, based on experience and sensibility, rather than by a mechanical application of rules without reason. See O. Holmes, The Common Law (P. Pereira & D. Beltran eds., 2011) p. 5 ("The life of the law has not been logic: it has been experience. . . . The law . . . cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.").[3]

As is obvious from our most recent case law, this court has struggled with defining the sensible contours of this common-law jurisdictional rule. Any rule, however, must account generally for the "strong presumption in favor of jurisdiction"; *State* v. *Ramos*, supra, 306 Conn. 133–35;[4] and specifically for the courts' broad common-law jurisdiction to preside over criminal cases. *State* v. *Carey*, 222 Conn. 299, 305, 610 A.2d 1147 (1992) ("[t]he Superior Court hearing a criminal matter acquires subject matter jurisdiction from its authority as a constitutional court of unlimited jurisdiction"

[3] "As this court previously has observed, '[t]he common law is generally described as those principles, usage, and rules of action applicable to the government and security of persons and property which do not rest for their authority [on] any express and positive declaration of the will of the legislature.' . . . *Moore* v. *McNamara*, 201 Conn. 16, 24, 513 A.2d 660 (1986); see also *Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U.S. 92, 102, 21 S. Ct. 561, 45 L. Ed. 765 (1901) ('[a]s distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs')." *State* v. *Courchesne*, 296 Conn. 622, 674 n.36, 998 A.2d 1 (2010).

[4] Although the majority is correct that the strong presumption in favor of jurisdiction must be considered in light of the common-law rule at issue; *State* v. *Ramos*, supra, 306 Conn. 134–35; it is this court that defines the scope of this rule. See part I C of this concurring and dissenting opinion.

[internal quotation marks omitted]). Also as a general principle, the court has the inherent authority to modify its own judgments. See *State* v. *Dayton*, 176 Conn. App. 858, 871 n.13, 171 A.3d 482 (2017) ("[o]ur courts have inherent power to open, correct and modify judgments" [internal quotation marks omitted]). Historically, this includes the authority to grant a motion for a new trial, which is a "common law power [that] the courts . . . have the right to exercise in such a manner as shall best promote justice." *Zaleski* v. *Clark*, supra, 45 Conn. 404.

In *State* v. *Wilson*, 199 Conn. 417, 436–38, 513 A.2d 620 (1986), this court ruled that the trial court was without jurisdiction to modify or correct a judgment, in other than clerical respects, three years after the defendant's sentence. In determining the outside limits of the timing by which a trial court could modify a judgment, we recognized that "[n]either our General Statutes nor our Practice Book rules define the period during which a trial court may modify or correct its judgment in a criminal case. On the civil side, however, Practice Book § [17-4] provides that any civil judgment or decree may be opened or set aside 'within four months succeeding the date on which [notice] was [sent].' " (Emphasis omitted.) Id., 437. We therefore borrowed this four month rule and extended it to judgments in criminal cases, explaining that there was "no reason to distinguish between civil and criminal judgments in this respect, and we therefore hold that, for purposes of the common law rule, a criminal judgment may not be modified in matters of substance beyond a period of four months after the judgment has become final." Id. We concluded, however, in *Wilson*, that even with an extension of the four month rule, the trial court clearly had exceeded its jurisdiction by attempting to amend the judgment three years after sentencing. Id.

Subsequently, in *State* v. *Luzietti*, supra, 230 Conn. 427, without overruling or even discussing *Wilson*, this

court held that in criminal cases, "once judgment has been rendered and the defendant has begun serving the sentence imposed, the trial court lacks jurisdiction to modify its judgment in the absence of a legislative or constitutional grant of continuing jurisdiction." Id., 431. In *Luzietti*, the defendant's sentence had been stayed pending the disposition of his motion for a judgment of acquittal. Id., 429. The trial court denied the motion and the defendant began serving his sentence. Id. Six weeks after he had begun serving his sentence, the defendant filed a motion to reargue the motion for a judgment of acquittal, which the trial court granted and then held a hearing. Id., 429–30. At the hearing, the state argued that the trial court could not grant the motion for a judgment of acquittal because it did not have jurisdiction to vacate the judgment of conviction after the defendant began serving his sentence. Id., 430. The trial court disagreed and granted the motion. Id. The state appealed to the Appellate Court, which held that the trial court lacked jurisdiction to grant the defendant's motion for a judgment of acquittal because it could not modify the judgment after the defendant had begun serving his sentence. Id. In affirming the judgment of the Appellate Court, this court relied on the rule that "the [trial] court loses jurisdiction over the case when the defendant is committed to the custody of the commissioner of correction and begins serving the sentence," absent a statutory or constitutional grant of jurisdiction. Id., 432.

Then, in *State* v. *Myers*, 242 Conn. 125, 698 A.2d 823 (1997), without even mentioning the common-law rule at issue, this court held that the trial court retained jurisdiction to rule on a motion for a new trial filed before sentencing but considered and ruled on after sentencing. Id., 136. In *Myers*, prior to sentencing, the defendant had filed a motion for a new trial on the ground of juror bias. Id., 129. Before ruling on the

motion, the trial court sentenced the defendant without staying the sentence. Id., 131. Approximately five months later, the trial court granted the motion for a new trial; id.; but later vacated its order, determining that it could not rule on the motion after the defendant had been sentenced and that the juror bias claim should have been raised in a petition for a new trial, not in a motion for a new trial. Id., 136. Citing to *Wilson*, but without more, this court reversed the judgment of the trial court, explaining that "the trial court retained jurisdiction to entertain the motion for a new trial after sentencing because it could have opened the judgment." (Footnote omitted.) Id.

Consistent with our existing case law, there are in my view at least two paths to concluding that the trial court in the present case did not lack jurisdiction over the defendant's timely filed motion for a new trial: (1) because our holdings in *Wilson* and *Myers* permit the trial court to hear and rule on a timely new trial motion filed before sentencing or (2) because the exception for mutual mistake applicable in civil cases should apply in this case.[5] At any rate, I have heard no compelling argument that should prevent this court from developing or modifying this common-law rule, which we have the inherent power to do, to recognize an exception to the general axiom for timely motions for a new trial filed before sentencing.

[5] To be clear, my view that the trial court was mistaken that it lost jurisdiction concerns only the grounds raised in the defendant's timely filed motion for a new trial. I do not suggest that the defendant can bootstrap his claim of nondisclosure of evidence pursuant to *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), which was untimely raised for the first time in his amended motion for a new trial three months after sentencing, to his timely filed motion for a new trial. Thus, in my view, although the trial court should retain jurisdiction to decide the timely filed motion for a new trial, the defendant's untimely amendment to the motion, filed after sentencing, would not be properly before the court.

A

There is no dispute that the trial court in the present case originally had jurisdiction to decide the motion for a new trial: "The Superior Court hearing a criminal matter acquires subject matter jurisdiction from its authority as a constitutional court of unlimited jurisdiction. . . . The Superior Court's authority in a criminal case becomes established by the proper presentment of the information . . . which is essential to initiate a criminal proceeding. . . . [U]pon the return to the Superior Court of the indictment [or information] against the accused, it obtained the sole and original jurisdiction of the charge therein made . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Carey*, supra, 222 Conn. 305–306; see *State* v. *Ramos*, supra, 306 Conn. 133–34 ("'The Superior Court is a constitutional court of general jurisdiction. In the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law.' "). Thus, this case does not in my view require us to *expand* the court's jurisdiction, as the majority suggests. Rather, the question is whether the court inalterably *lost* jurisdiction it unquestionably had, preventing it from ruling on the timely filed motion.

The rule at issue is the product of common law; it is a common-law exception to the court's inherent authority to open, correct, and modify judgments. See *State* v. *Dayton*, supra, 176 Conn. App. 871 n.13 ("[o]ur courts have inherent power to open, correct and modify judgments" [internal quotation marks omitted]). The common law is judge made law. See *Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U.S. 92, 102, 21 S. Ct. 561, 45 L. Ed. 765 (1901) ("the common law comprises the body of those principles and rules of action . . . which derive their authority . . . from the judgments and decrees of the courts" [internal quotation marks omitted]). As such, this court has the

inherent authority to develop and adapt it to the circumstances at issue. *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 436, 54 A.3d 1005 (2012) (acknowledging that this court has "authority to adapt the common law to the changing needs of society," although not in sovereign immunity cases).[6] Accordingly, because the rule at issue is a common-law rule, this court has the authority to clarify, develop, and adapt the rule, including limiting its scope and applicability through exceptions.

As discussed, our cases have recognized an exception to the common-law rule that a trial court loses jurisdiction upon sentencing, and have done so in situations that are logical and sensible. See *State* v. *Wilson*, supra, 199 Conn. 437; see also *State* v. *Myers*, supra, 242 Conn. 136. In my view, it requires no extension of our existing case law to hold that such an appropriate and sensible exception to the common-law rule applies in this case. I would not hold that we have overruled those cases sub silentio, or that we should overrule them explicitly now. Rather, the case that the majority holds governs the present situation, *Luzietti*, I find plainly distinguishable.

This court exercised its common-law authority in *Wilson*, holding that the four month rule applicable in civil cases applied equally in criminal cases. In doing so, we created an exception to the general common-law rule that courts lose jurisdiction upon sentencing. See *State* v. *Wilson*, supra, 199 Conn. 437. Under this

[6] The court's inherent authority to develop and adapt the common law is consistent with the nature of the common law: "The common law is not static, but is a dynamic and growing thing and its rules arise from the application of reason to the changing conditions of society. . . . [T]his flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law . . . ." (Citations omitted; internal quotation marks omitted.) *Goodrich* v. *Waterbury Republican-American, Inc.*, 188 Conn. 107, 127, 448 A.2d 1317 (1982).

exception, the trial court in the present case had jurisdiction to rule on the timely filed motion for a new trial, despite the defendant's having begun serving his sentence, because the motion was filed and, even with an extension of time for briefing, was to have been ruled on within four months of the sentencing.[7] Clearly, if a court retains jurisdiction to modify a sentence for up until four months after the judgment, a timely motion for a new trial filed prior to sentencing falls within this four month time frame. Accordingly, under the four month rule espoused in *Wilson*, even after sentencing, the trial court retained jurisdiction to rule on the timely filed motion for a new trial because the motion's filing and the court's ruling both occurred before four months had passed after sentencing.

Then, in *Myers*, this court stated that "the trial court retained jurisdiction to entertain the motion for a new trial [that was timely filed prior to sentencing but not decided until] after sentencing because it could have opened the judgment." (Footnote omitted.) *State* v. *Myers*, supra, 242 Conn. 136. In *Myers*, we cited to *Wilson* and acknowledged, in a footnote, that the four month rule applied equally in criminal and civil cases. See id., 136 n.16. Thus, as a result of the timely filing of the motion prior to sentencing, the four month rule applied to the defendant's motion in *Myers*. The trial court, in *Myers*, however, did not rule on the motion for a new trial within four months of sentencing the defendant. This possibly suggests that *Myers* not only applied the four month rule, but determined that the trial court retains jurisdiction over a motion for a new

[7] The defendant was found guilty on March 11, 2013. Because the five day deadline for filing his motion for a new trial fell on a Saturday, the defendant had until Monday, March 18, 2013, to file his motion, and he filed it on that day. See Practice Book § 7-17. He was sentenced on June 6, 2013. Under the four month rule, the trial court had until at least October 6, 2013, to open or modify the judgment. The trial court denied the motion for a new trial on September 20, 2013, within the time frame of the four month rule.

trial as long as it was timely filed prior to sentencing, even if the court did not rule on the motion within the four month time frame.[8] To the extent that the court in *Myers* misapplied the four month rule in this regard, such an error does not affect the applicability of the four month rule to the present case, in which the trial court did rule on the motion within four months of sentencing. See footnote 7 of this concurring and dissenting opinion. In all other aspects, the procedural posture of the present case is nearly identical to that of *Myers*: a motion for a new trial filed before sentencing and within the time permitted to file such a motion.[9] Accordingly, pursuant to *Myers*, the trial court in the present case retained jurisdiction to decide the defendant's motion for a new trial.

The majority counters that the four month rule does not apply, in essence holding that *Luzietti* and subsequent cases overruled *Wilson* and *Myers* sub silentio. In *State* v. *Luzietti*, supra, 230 Conn. 427, which ignores the four month rule, the defendant timely filed his motion for a judgment of acquittal, and the trial court denied it prior to sentencing. Id., 429. Six weeks after sentencing, the defendant filed a motion for reargument. Id. The trial court granted reargument but denied relief, holding that it could not grant the underlying motion for a judgment of acquittal because it did not have jurisdiction to modify the judgment. Id., 429–30. In *Luzietti*, however, this court was not faced with

[8] The state argues that Practice Book § 42-54 limits a court's ability to entertain such a motion to only prior to sentencing. I disagree. Section 42-54 does not limit the time frame in which the court may rule on a motion for a new trial; it limits only the time within which such a motion may be "made." Once a defendant timely makes a motion for a new trial, nothing in the language of § 42-54 prevents a court from ruling on the motion after sentencing.

[9] To the extent that *Myers* does not rely on the four month rule, but rather recognizes its own exception to the common-law rule at issue, see part I C of this concurring and dissenting opinion.

determining whether the trial court retained jurisdiction to decide a timely filed motion for a new trial that was filed *prior* to sentencing, but rather was faced with a motion for reargument filed *after* sentencing regarding a motion for a judgment of acquittal that already had been denied prior to sentencing.

Similarly, all the other post-*Myers* cases that the majority relies on to reject the four month rule are distinguishable because they involve motions or petitions filed *after* sentencing. See *State* v. *Ramos*, supra, 306 Conn. 128–29 (motion to vacate filed more than three years after judgment); *State* v. *Parker*, supra, 295 Conn. 830 (motion to correct illegal sentence filed after sentencing); *State* v. *Das*, 291 Conn. 356, 360, 968 A.2d 367 (2009) (motion to vacate judgment filed after sentencing); *State* v. *Lawrence*, 281 Conn. 147, 151, 913 A.2d 428 (2007) (motion to correct illegal sentence filed after sentencing); *State* v. *Reid*, 277 Conn. 764, 771, 894 A.2d 963 (2006) (motion to withdraw guilty plea filed after sentencing); *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 35, 779 A.2d 80 (2001) (petition for writ of habeas corpus seeking to correct illegal sentence filed after sentencing). Thus, even if the majority is correct that *Luzietti* and its progeny overrule *Wilson* sub silentio, making the four month rule inapplicable in criminal cases in which a motion is filed *after* sentencing, *Luzietti* does not affect the holding of *Myers*, which permits a court to retain jurisdiction overly a timely filed motion for a new trial filed *prior* to sentencing. I see no reason why this court's decision in *Luzietti* would or should have any effect on our decision in *Myers*.

B

In the civil context, a circumstance such as the present one—the "unintentional" loss of jurisdiction over a timely filed motion—would very likely be called a

"mutual mistake," authorizing the court to open its judgment to rule on the motion. See *Kenworthy* v. *Kenworthy*, 180 Conn. 129, 131, 429 A.2d 837 (1980); *Carabetta* v. *Carabetta*, 133 Conn. App. 732, 735, 38 A.3d 163 (2012). A mutual mistake is a mistake "that is common to both parties and effects a result that neither intended." (Internal quotation marks omitted.) *Terry* v. *Terry*, 102 Conn. App. 215, 229, 925 A.2d 375, cert. denied, 284 Conn. 911, 934 A.2d 931 (2007). In the present case, as the Appellate Court accurately described it, the parties and the trial court made the "collective mistake" of believing that the court would retain jurisdiction over the new trial motion once the defendant had been sentenced. *State* v. *McCoy*, supra, 171 Conn. App. 328 n.6. In my view, even if the majority is correct that *Luzietti* has thrown cold water on *Wilson* and *Myers*, the trial court could have opened the judgment to rule on the new trial motion under the related concept of mutual mistake.

In civil cases, General Statutes § 52-212a permits parties to file a motion to open or set aside the judgment within four months from the date of judgment. There is an exception, however, for cases in which the judgment was based on fraud or mutual mistake: "It is a well-established general rule that even a judgment rendered by the court . . . can subsequently be opened [after the four month limitation] . . . if it is shown that . . . the judgment, was obtained by fraud . . . or because of mutual mistake." (Internal quotation marks omitted.) *In re Jonathan M.*, 255 Conn. 208, 238, 764 A.2d 739 (2001). This authority stems from the courts' "intrinsic powers, independent of statutory provisions authorizing the opening of judgments, to vacate any judgment obtained by fraud, duress or mutual mistake." *In re Baby Girl B.*, 224 Conn. 263, 283, 618 A.2d 1 (1992); see also *In re Samantha S.*, 120 Conn. App. 755, 758 n.3, 994 A.2d 259 (2010) ("[a] common-law motion to

open must be predicated on fraud, duress or mutual mistake"), appeal dismissed, 300 Conn. 586, 15 A.3d 1062 (2011).

"Mutual mistake is an equitable principle that allows for the court to work fairness, equity and justice." (Internal quotation marks omitted.) *In re Santiago G.*, 154 Conn. App. 835, 841 n.6, 108 A.3d 1184, aff'd, 318 Conn. 449, 121 A.3d 708 (2015). Fairness, equity and justice are essential to the justice system as a whole, not just to the civil side of that system. Although this court never has applied the mutual mistake exception in a criminal case, I can think of no policy reason that justifies remedying mutual mistakes in civil cases but not in criminal cases, especially in light of the greater liberty interests at stake in criminal cases. The Appellate Court, in fact, has noted that the exception should apply equally in criminal cases. In *State* v. *Dayton*, supra, 176 Conn. App. 871 n.13, that court explained that in civil cases, there is an exception to the four month rule if the judgment was obtained by fraud or mutual mistake. Citing to *Wilson*, the Appellate Court acknowledged that there was no reason for either the four month rule or the mutual mistake exception not to apply equally to criminal cases. Id.[10]

This court can, and in my view should, exercise its inherent authority to develop and adapt the common-law rule at issue by extending the mutual mistake exception to criminal cases. See part I A of this concurring and dissenting opinion. In exceptional circumstances, as in the present case, where both parties and the court did not realize that application of the rule at issue would deprive the court of jurisdiction, such a mutual mistake

[10] It is noteworthy that in *Dayton*, in which the state claimed to have improperly nolled the case, *it was the state* that argued that both the four month rule and the mutual mistake exception should apply equally to civil and criminal cases. See *State* v. *Dayton*, supra, 176 Conn. App. 862 n.7, 871 n.13.

should not divest the court of jurisdiction to decide a timely filed motion for a new trial. See *State* v. *Brown*, 8 Conn. App. 248, 251, 512 A.2d 965 (1986) ("'[W]hen a court has acquired jurisdiction, no subsequent error or irregularity will oust the jurisdiction thus acquired. It does not lose jurisdiction because it makes a mistake in determining either the facts or the law, or both, in the case before it,' " quoting 22 C.J.S. 423–24, Criminal Law § 165 [1961].). Such an application of the rule is unfair, inequitable and unjust, and I would therefore conclude that the court could have exercised jurisdiction to rule on the motion for a new trial in this case because of mutual mistake.

C

Even if, as the majority suggests, neither of these exceptions apply and our current case law does not permit a trial court after sentencing to rule on a timely filed motion for a new trial, I believe we can and should recognize such a sensible exception to what Holmes would refer to as the "axioms and corollaries [akin to] a book of mathematics." O. Holmes, supra, p. 5. As discussed previously, the rule at issue is a common-law rule. As a common-law rule borne out of experience and sensibility; see id.; this court has the inherent power to define its contours to ensure that its application does not lead to unsensible and unjust results, inherent power that includes the ability to limit its scope and applicability through exceptions to it, such as for timely filed motions for a new trial.

Ultimately, it is a question of judicial policy for this court to determine whether our common-law rule should prevent a timely filed motion for a new trial from being adjudicated when the trial court and the parties mistakenly believed that the court could rule on the motion after sentencing. See *Dacey* v. *Connecticut Bar Assn.*, 184 Conn. 21, 25–26, 441 A.2d 49 (1981) (defining common law as "the prevailing sense of the

more enlightened members of a particular community, expressed through the instrumentality of the courts . . . in view of the particular circumstances of the time" [internal quotation marks omitted]). I would hold that our law should permit a trial court under these circumstances to exercise jurisdiction to rule on the timely filed motion for a new trial. If the trial court denies the motion, the court's judgment and sentence remain the same. If the trial court were to find the motion to have merit, I believe our law should permit the court to "open, correct and modify" its judgment by vacating the sentence and ordering a new trial, just as our court could order if, on appeal, we were to find error. Such an exception would be consistent with this court's holding in *Myers*, to the extent that *Myers* does not rely on the four month rule. It may be unclear from *Myers* whether the court relied solely on the four month rule in holding that the trial court retained jurisdiction over a motion for a new trial that was timely filed prior to sentencing, but not ruled on until after sentencing. See *State* v. *Myers*, supra, 242 Conn. 136. What is clear from *Myers*, however, is that this court held that there was an exception to the common-law rule at issue under such circumstances. Just as in *Myers*, the trial court in the present case originally had jurisdiction over a timely filed motion for a new trial, and the issue is whether the court then accidentally lost jurisdiction. As a matter of law, *Myers* clarified that the common-law rule does not deprive the court of jurisdiction in these circumstances. As a matter of judicial policy, such an exception is necessary to protect a defendant's ability to seek review of his new trial claims from the court that presided over the trial and had the opportunity to view the effect of any alleged improprieties.

The state argues that an unflinching application of the general rule is necessary to ensure eventual finality and to prevent trial judges from dawdling over motions for too long. Both policies are laudable, but, in my view,

neither suffices to justify strict adherence to a supposed general rule at such a cost to defendants.[11]

First, as the state admitted candidly in argument before this court, finality is not achieved in this case: it is an illusion. Namely, the issues raised in the timely motion that the trial court accidentally lost jurisdiction over can and will be raised in postjudgment petitions for a new trial or habeas corpus or a motion to correct an illegal sentence. See *State* v. *Parker*, supra, 295 Conn. 837, 839 ("permitting correction of both illegal sentences and sentences imposed in an illegal manner" and noting that "[t]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process" [internal quotation marks omitted]). The state goes on to argue that while that might be true, there is virtue in moving the case along to the inevitable next step.

Although I cannot disagree with—and perhaps join the state in—the cynical view on which this argument is based (i.e., there will always be a postjudgment challenge), to me, this inevitability should not contribute to the misapplication of a rule to a situation to which it should not apply. Moreover, although this defendant or any other might very well be able to add his new trial claims to any other collateral challenge he brings, as the state well knows, the obstacles to relief for a convicted criminal defendant increase as the burdens of proof heighten in collateral proceedings.[12] Would it

[11] The majority admits that the policy of double jeopardy that originally animated the general rule no longer applies.

[12] To prevail on a motion for a new trial, the defendant must establish that "an occurrence at trial has so prejudiced a party that he or she can no longer receive a fair trial." (Internal quotation marks omitted.) *State* v. *Smith*, 313 Conn. 325, 348, 96 A.3d 1238 (2014). "[A] motion for a new trial is addressed to the sound discretion of the trial court and is not to be granted except on substantial grounds." (Internal quotation marks omitted.) Id., 347–48. Thus, the standard for a motion for a new trial already creates a difficult hurdle to overcome. This difficultly is exacerbated in this case

not have been better for everyone if we had the considered views of the trial judge on these issues (issues the trial judge called "colorable"), whether on direct appeal or on collateral review? In fact, we must defer to the judge who sat through the trial and witnessed the impact on the jury of the prosecutor's actions and the court's rulings. See *State* v. *Smith*, 313 Conn. 325, 347, 96 A.3d 1238 (2014) ("the trial [judge has a] superior opportunity to assess the proceedings over which he or she has personally presided" [internal quotation marks omitted]). Ruling on the issue through a timely filed motion for a new trial, reviewed on direct appeal with deference, very likely removes the issue from among any the defendant might seek to raise in a collateral proceeding.

Additionally, this court previously has rejected arguments that the need for "finality" justifies upholding a judgment obtained through mutual mistake or fraud. In *In re Baby Girl B.*, supra, 224 Conn. 265–66, the commissioner of the Department of Children and Youth Services (commissioner) filed a petition for termination of parental rights on the ground of abandonment pursuant to General Statutes (Rev. to 1991) § 17a-112 (b) (1). Four months after the petition was granted, the respondent mother moved to open the judgment pursuant to § 52-212a. Id., 266. The trial court granted the motion to open and denied the petition for termination of parental rights. Id., 266–67. On appeal, the commissioner argued that the trial court improperly granted the motion to open because § 52-212a did not apply to

if the defendant is required to bring his claim by means of a petition for a writ of habeas corpus, which requires him to establish prejudice; *Strickland* v. *Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); or by means of a petition for a new trial, which requires him to establish that there will be "a different result in a new trial"; *Jones* v. *State*, 328 Conn. 84, 92, 177 A.3d 534 (2018); or by means of direct appeal, in which the appellate courts are deprived of the trial court's views on the matter, especially in light of the fact that it is unknown if the trial court would have granted the "colorable" motion in the present case.

petitions for termination of parental rights and because there was a public policy in favor of finality in cases involving juveniles. Id., 281–82.

This court in *In re Baby Girl B.* rejected the commissioner's position, not only because it was in conflict with the plain language of § 52-212a; id., 282; but also because the commissioner's argument for finality conflicted with the court's statutory *and* "intrinsic powers" to open judgments. Id., 283. Although the court in *In re Baby Girl B.*, was required to interpret § 52-212a, the court's analysis established that a public policy in favor of finality does not necessarily trump the court's inherent authority to open judgments.

Finally, even as the majority applies the jurisdictional rule with exactitude, it tempers the rule with an obvious work-around: the trial court can simply sentence the defendant and stay the sentence until the court gets around to ruling on the motion. See *State* v. *Walzer*, 208 Conn. 420, 424–25, 545 A.2d 559 (1988). In my view this is no rule at all. Although I agree with the majority that staying the proceedings is a "useful mechanism,"[13] it surely does not vindicate the policies the state offers

[13] The majority attempts to distinguish the "useful mechanism" of staying the defendant's sentence from the exception that I suggest our case law permits, or should permit, on the ground that it "is expressly rooted in case law . . . ." Rather than distinguish, the history of staying proceedings bolsters my view that this court has inherent power to develop the common law, including through the creation of exceptions to a common-law jurisdictional rule. A court's power to stay the execution of a sentence derives not from a statute or a constitutional provision. It is an inherent common-law power: "The common law has long recognized a court's ability to stay the execution of a criminal sentence in a variety of contexts. . . . [T]he power to stay the execution of a sentence, in whole or in part, in a criminal case, is inherent in every court having final jurisdiction in such cases, unless otherwise provided by statute. . . . Absent an abuse of discretion or a limiting statute, therefore, a trial court has the ability to stay the execution of a criminal sentence in order to fulfill its duty to implement the penalties dictated by the legislature for criminal offenses and to promote the ends of justice." (Citations omitted; internal quotation marks omitted.) *Copeland* v. *Warden*, 225 Conn. 46, 49–50, 621 A.2d 1311 (1993) (permitting court to stay execution of sentence until after defendant finished psychiatric treatment); see also *State* v. *Leak*, 297 Conn. 524, 537, 998 A.2d 1182 (2010)

in support of the rule. This work-around undercuts not only the finality of the judgment, but also the other policy justification the state offers for the draconian rule the majority adheres to, i.e., that trial judges will take too long to rule on such motions. I am not aware that this is a prevalent problem. If it is, perhaps it is an issue the Rules Committee of the Superior Court can address. But the sanction of the court losing jurisdiction over a timely motion for a new trial that it characterized as "colorable" seems to me to be a solution far out of proportion to a potential problem that is so easily overcome by other means. Better in my view to recognize an exception to the rule than to pay lip service to a rule so easily avoided, especially when an exception would be an equally useful mechanism.[14]

As a result, I find neither of the state's policy justifications persuasive. Rather, on the basis of judicial experi-

(trial court had inherent common-law power to impose on defendant consecutive terms of commitment following insanity acquittals of multiple offenses by staying execution of one term of commitment until expiration of another term of commitment).

It is true that the exception I suggest involves the trial court fulfilling its duty to decide a motion for a new trial after the sentence has been executed, as in *Myers*, while the mechanism of staying the execution of the sentence occurs after sentencing but before execution. This distinction, however, does not justify the majority's conclusion that the court loses subject matter jurisdiction under the former circumstance but not the latter. Under both circumstances, the defendant has been sentenced. The only difference is whether the defendant is in the custody of the Department of Correction. Such a difference appears to implicate personal jurisdiction, not subject matter jurisdiction. See footnote 2 of this concurring and dissenting opinion. As such, both mechanisms are the product of the common law, which this court develops pursuant to its inherent authority.

[14] The majority makes a very fair point in questioning whether the exception that I suggest exists (or should exist) can extend "in perpetuity." I have the same question about the mechanism that the majority says should have been employed. Can the trial court stay the defendant's sentence "in perpetuity" while considering the new trial motion? I imagine that at some point under either scenario an appellate court could be called on to exercise its supervisory authority over the administration of justice to compel a ruling on the motion. See Practice Book §§ 60-2 ("[t]he supervision and control of the proceedings shall be in the court having appellate jurisdiction from the time the appellate matter is filed, *or earlier*, if appropriate" [emphasis added]) and 66-6 (permitting this court to modify trial court order concerning stay upon motion for review).

ence and sensibility; see O. Holmes, supra, p. 5; I believe judicial policy, consistent with this court's holding in *Myers*, favors recognizing an exception under the circumstances at issue in this case. As a result of either accident or the parties' mutual oversight of controlling law, a defendant should not be deprived of his opportunity to have his properly filed common-law motion for a new trial decided by the judge who oversaw his criminal trial, and personally observed the jury and its reaction to evidence and arguments.

II

Even if I were to accept the majority's conclusion that there is no exception under the common law that would permit the trial court to rule on a timely filed motion for a new trial after the defendant had been sentenced, I have no trouble calling the trial court's "unintentional" loss of jurisdiction what it clearly was: plain error. As two erudite commentators have advised: "Plain error is most likely found where the trial court and the parties have overlooked clearly controlling law, be it a constitution, statute, rule, case law or 'established practice.' " C. Tait & E. Prescott, Connecticut Appellate Practice and Procedure (3d Ed. 2000) § 8.7, p. 304. This seems to me to be a textbook—perhaps hornbook—example of plain error: the trial court and the parties overlooked controlling case law when the court, with the parties' agreement, continued the new trial motion and went on to sentence the defendant. More specifically, if both the state and the Appellate Court are correct that the "traditional rule" applies in the present case, ending the trial court's jurisdiction when the sentence was pronounced and executed, with no exception for a timely filed motion for a new trial or the parties' and the court's mutual mistake, in my view it was plain error for the trial court to so pronounce and execute sentence, leaving a properly filed motion to be lost in the oblivion. At the very least, the court should have stayed the defendant's sentence while it considered the

motion, as the majority suggests trial courts do routinely.

I fully recognize that "[t]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . [Previously], we described the two-pronged nature of the plain error doctrine: [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812–13, 155 A.3d 209 (2017).

In my view, the trial court's failure to rule on a timely filed motion for a new trial—perhaps in any case, but surely in a case in which the court has effectively pronounced a life sentence on the defendant—clearly "affects the fairness and integrity of and public confidence in the judicial proceedings."[15] (Internal quotation

[15] The state objects even to our considering this issue as plain error, although it admits that this court may raise an issue as plain error on its own. See Practice Book 60-5. I do not find it a particularly close question that this case involves an exceptional circumstance that justifies raising plain error on our own, i.e., the "unintentional" or "inadvertent" loss of jurisdiction over a motion that is the last step before the trial court was to sentence the defendant to sixty years imprisonment. Given this unique and exceptional circumstance, I see very little risk that significant violence will befall our plain error jurisprudence if we invoke the doctrine in this case.

Additionally, even accepting, as I do, the state's representation before the trial court that its agreement "to continue the motion for briefing and

marks omitted.) Id., 812. Judges have an obligation to rule on motions, certainly timely filed motions that raise "colorable" issues. See *Amato* v. *Erskine*, 100 Conn. 497, 499, 123 A. 836 (1924) ("[it is the court's] right and duty to determine every question which may arise in the cause" [internal quotation marks omitted]); Code of Judicial Conduct, Rule 2.7 ("[a] judge shall hear and decide matters assigned to the judge"). The trial court in this case failed in that obligation by losing jurisdiction over the motion. That it did so accidentally or inadvertently does not make it any more fair to the defendant or impact public confidence any less. I do not read the majority to contend otherwise. Rather, while acknowledging that it was error for the trial court not to rule on the pending motion, the majority concludes that this error was neither so obvious nor so harmful as to constitute "manifest injustice." I do not agree.

As to whether the error was "so clear" or "so obvious," the majority appears to conclude that the error falls in a sweet spot (or, for the defendant, a not so sweet spot). Namely, we are told that the rule that the trial court loses jurisdiction upon sentencing is a "generally accepted" and "well established" jurisdictional and common-law doctrine. Yet, because of what the majority considers to have been "anomalies in this court's case law" that "may have resulted in some confusion," the error was not sufficiently clear to fall within the clear error test. This is a needle I have a hard time threading.

argument" was "not meant to deceive either the defendant or the [trial] court," I fail to understand how the state's position opposing plain error review contributes to " 'public confidence in the judicial proceedings.' " *State* v. *McClain*, supra, 324 Conn. 812. Like the trial court and the defendant, the state quite apparently overlooked controlling law, leading to a loss of the defendant's opportunity to press his "colorable" new trial motion. This collective inadvertence, I believe, quite clearly "affects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *State* v. *McClain*, supra, 812.

The majority's view might be persuasive if, when the trial court sentenced the defendant without ruling on his timely new trial motion, it had sorted among what the majority finds to be anomalous or confusing precedents. But, like the parties, the trial court missed altogether the "loss of jurisdiction" issue, sorting among the precedents only after the horse had left the jurisdictional barn. Thus, the trial court's error was not in determining whether *Luzietti* applied, as opposed to *Wilson* and *Myers*, but rather in not considering the import of the "well established" rule *at all*, at a time when it still could have ruled on the defendant's motion, as it was obliged to, including by putting off the sentencing proceeding or by pronouncing sentence and staying its execution. Whether this error actually affected the court's subject matter jurisdiction was perhaps arguably not clear or obvious, but the fact that the court should have, but did not, rule on the new trial motion prior to sentencing *was* clear and obvious. By not doing so, the defendant was denied an opportunity to seek a new trial pursuant to Practice Book § 42-53. This seems to me exactly the kind of error that the plain error doctrine was designed to address.

As to the second prong of the plain error test, although I agree with the majority that unlike the situation for defendants in structural error cases, the defendant in the present case was required to establish harm that amounts to manifest injustice, I disagree that the defendant failed to do so. The majority concludes that there is no "manifest injustice" because the alleged prosecutorial improprieties detailed in the motion for a new trial are the same improprieties that this court concludes lack merit on direct appeal. What the record in this appeal lacks, however, is the ruling of the trial judge who presided over the defendant's trial. Today's majority essentially declares that that ruling was unnecessary. I do not agree, and I would conclude that the defendant was harmed by not having his motion for a

new trial reviewed first by the trial judge who supervised his criminal trial, notwithstanding our conclusion today affirming the judgment of the trial court on the record presented. See footnote 1 of this concurring and dissenting opinion.

It is well established that a trial judge is in a better position to assess any error or prejudice that occurred during trial. It is the trial judge who viewed the evidence, heard the witnesses' testimony and counsel's arguments, and viewed the jury's reaction. Motions for a new trial provide the best remedy when claims of prosecutorial impropriety are alleged because they permit the trial court to rely on its personal experience at trial, during which the court may have observed the effect and prejudice, if any, the impropriety had on the jury. It is because of this firsthand experience that trial courts are afforded discretion in deciding motions for a new trial, which we then review for abuse of that discretion. See *State* v. *Myers*, 290 Conn. 278, 288–89, 963 A.2d 11 (2009). Thus, the manifest injustice in this case is not necessarily that the defendant would have prevailed on his claims, but rather that the parties *and this court* have lost the benefit of the trial court's considered views of his claims, especially in light of the fact that the trial judge deemed the defendant's motion for a new trial "colorable . . . ." Even if the trial court would have denied the motion, we would have had the benefit of a record of its reasons for doing so, which potentially could impact our review of the claims on direct appeal.

It is the significance of the trial court's discretion that distinguishes this case from the case cited by the majority, *State* v. *Myers*, supra, 290 Conn. 278. In *Myers*, defense counsel waived a trial on part B of the information, which charged the defendant as a repeat offender, and, thus, the trial court did not "accord him a hearing regarding his jeopardy as a repeat offender and . . . make a finding regarding his status as a repeat offender in accordance with Practice Book § 42-2 . . . ." (Inter-

nal quotation marks omitted.) Id., 285. The Appellate Court in *Myers* had held that the trial court's failure to abide by § 42-2 was plain error because "[a] court commits plain error when it fails to implement properly the mandatory provisions of clearly applicable rules of practice." (Internal quotation marks omitted.) Id. This court reversed in part the judgment of the Appellate Court, explaining that "apart from the trial court's failure to comply strictly with the applicable rule of practice, which we do not condone, the defendant has failed to raise any doubt with respect to the validity of his prior conviction. A trial court's failure to comply with a rule of criminal procedure, without more, is insufficient to require reversal for plain error." (Emphasis omitted; footnote omitted.) Id., 290.

The present case is distinguishable from *Myers* because the defendant in *Myers* did not request that the trial court exercise its discretion. The sole issue in *Myers* was the legal question of whether the defendant could waive a hearing on the part B information and bypass Practice Book § 42-2. In the present case, the trial court was required to exercise its discretion to determine whether to grant a new trial on the basis of whether the alleged prosecutorial improprieties prejudiced the defendant.

At great risk of being unduly practical, and understanding that the defendant must demonstrate prejudice, I fail to understand just what the state and the majority fear here. If the trial court denies the defendant's motion, the court has vindicated the defendant's right to a ruling on his timely motion, respected its authority and obligation to rule on that motion, and prevented collateral litigation on the failure of the court to rule on the motion and the failure of the parties to recognize their oversight. If the trial court grants the motion for a new trial, there is no need for this appeal, unless the state seeks and obtains permission to appeal. See General Statutes § 54-96 (state cannot appeal in criminal case unless permitted to do so by trial court).

I further part company with the majority on the issue of manifest injustice in that the majority already has concluded that the trial court could not under any circumstances have granted the motion as a matter of discretion. I reject that notion. It was the trial judge who observed the questions the prosecutor posed, the witnesses' conduct and the jury's reaction, and expressed his own frustration with the prosecutor. See *State* v. *McCoy*, supra, 171 Conn. App. 316. I do not agree that our affirmance of the judgment on the prosecutorial impropriety issues raised; see part I of the majority opinion; means that the trial court's own ruling on those issues was preordained or ineluctable. It is not possible to say that the court would have abused its discretion if the record had been augmented by the court's views and the court had *granted* the motion for a new trial on the basis of the issues the defendant sought to raise in that motion. And if the trial court had granted the motion, there could be no doubt that the defendant had been so harmed as to amount to manifest injustice.

Nor can I agree with the state that the defendant has suffered no manifest injustice because he can always raise his claims in a petition for a new trial or for a writ of habeas corpus. As the state well knows, the burdens of demonstrating prejudice are much steeper in such collateral proceedings. See footnote 12 of this concurring and dissenting opinion. In addition, the defendant would suffer prejudice by virtue of any delay he would endure if he were entitled to prevail, and would have prevailed, on his timely filed motion. In fact, being consigned to having to raise his claims in a collateral proceeding because of the trial court's accidental and inadvertent loss of jurisdiction *is* the manifestation of prejudice that in my view warrants invoking the plain error doctrine. Accordingly, because the error in this case was clear and harmful, I would reverse the judgment of the Appellate Court and remand the case

to that court with direction to remand the case to the trial court to rule on the motion for a new trial.[16]

I therefore respectfully concur in part and dissent in part.

[16] Although I have been unable to find a case with a procedural posture identical to that of the present case, in other unique cases in which the trial court failed to rule on a motion or failed to conduct a hearing, this court has remanded the case to the trial court to rule on the motion or conduct the hearing and then, based on the outcome of those further proceedings, either this court or the trial court has been permitted to vacate the sentence and order a new trial. See *State* v. *Pollitt*, 199 Conn. 399, 416–17, 508 A.2d 1 (1986) (remanding case to trial court to conduct evidentiary hearing in order to have sufficient record to determine claims on appeal, but waiting on whether to vacate conviction and order new trial until court has full record to decide claims); see also *Tough* v. *Ives*, 159 Conn. 605, 607, 268 A.2d 371 (1970) (in case in which trial court refused to rule on motion to set aside verdict, case was "remanded to the Superior Court with direction that it be referred to the judge who presided at the trial, and he is directed forthwith to either grant or deny the March 15, 1968, motion to set aside the verdict and thereafter, forthwith, in accordance with the result of his decision on that motion, to order either that the verdict be set aside or that judgment be rendered on the verdict"); *Alderman* v. *Hanover Ins. Group*, 155 Conn. 585, 590, 236 A.2d 462 (1967) ("the proper judgment in . . . a situation [where the court failed to decide an issue] is to remand the case in order that the court may decide the issue [unless the question is one of law]").

The idea that this court cannot fix a problem of the judiciary's own making makes no sense. This court has the ability to craft a remand order as justice requires, even in the face of unique circumstances. See *In re Final Grand Jury Report Concerning the Torrington Police Dept.*, 197 Conn. 698, 717, 501 A.2d 377 (1985) ("[i]n the interests of justice, we have the power to remand a case for further proceedings even in the absence of reversible error by the trial court"). In fact, I have no doubt that under any of several provisions of our rules of practice the majority could have returned this matter to the trial court for its views on the motion for a new trial, in aid of our review of the prosecutorial impropriety claim. See Practice Book §§ 60-1 ("[t]he design of these rules being to facilitate business and advance justice, they will be interpreted liberally in any appellate matter"); 60-3 ("for . . . good cause shown, the court in which the appellate matter is pending may suspend the requirements or provisions of any of these rules"); 60-5 ("[i]f the court deems it necessary to the proper disposition of the cause, it may order a further articulation of the basis of the trial court's factual findings or decision"); 64-1 (a) (requiring trial court to file a memorandum of decision if it has failed to do so).

STATE OF CONNECTICUT *v.* MICHAEL ANTHONY GUERRERA (SC 19785)

Palmer, McDonald, Robinson, D'Auria, Mullins, Kahn and Ecker, Js.*

Syllabus

Pursuant to *Brady* v. *Maryland* (373 U.S. 83), the state has an obligation to disclose to an accused evidence that is both favorable to the defense and material to the case.

Convicted of the crimes of assault in the first degree, conspiracy to commit assault in the first degree, and tampering with physical evidence, and found in violation of probation, the defendant appealed to the Appellate Court, claiming, inter alia, that the trial court improperly had granted in part motions by the state and the Department of Correction to quash a subpoena issued by the defendant to the department that sought, pursuant to *Brady*, the production of audio recordings made by the department of four codefendants' calls and visits while they all were in the custody of the Commissioner of Correction. The defendant and his four codefendants had been incarcerated in lieu of bail pending trial and, in accordance with department policy, were notified that conversations during all inmate calls and noncontact visits were automatically recorded. Such recordings ordinarily remained in storage for one year, after which time they were automatically erased, unless the department manually preserved them beyond the one year period. Following a request by the office of the state's attorney that the department record the calls and visits of the codefendants, the department assigned a monitor to the case, and, in accordance with department practice, the monitor reviewed approximately 10 percent of the audio recordings of those calls and visits, which represented the calls and visits the department believed to be most likely to bear some relevance to the pending criminal case. If the monitor identified a call or visit that may contain information relevant to the case, the monitor would preserve the recording of that call or visit beyond the one year period and summarize its contents for the state. In response to the defendant's subpoena, the

* This case was originally argued before a panel of this court consisting of Chief Justice Rogers and Justices Palmer, McDonald, Robinson, D'Auria and Espinosa. Thereafter, Chief Justice Rogers and Justice Espinosa retired from this court and did not participate in the consideration of the case. Justices Mullins, Kahn and Ecker were added to the panel and have read the briefs and appendices, and listened to a recording of oral argument prior to participating in this decision.

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

department preserved 1552 recordings of the codefendants' calls and visits that remained in storage. The state and the department claimed in their motions to quash that the defendant's subpoena was issued without any indication that the recordings contained exculpatory information and, further, that producing the recordings would unduly burden the department because its policy required it to review each recording in its entirety prior to its disclosure to an outside party. The state further claimed that the unreviewed recordings were not part of the state's investigation but were identified and ultimately preserved at the express request of the defendant. The trial court granted the motions to quash with respect to the 1552 recordings that were preserved in response to the defendant's subpoena but that had not been reviewed, but ordered the department to provide to the defendant any recordings of the codefendants that the department had reviewed and that concerned the pending case. The trial court rejected the defendant's claim that *Brady* also required the department to provide the 1552 recordings that the department had not reviewed so that he could review them himself. In addressing the defendant's *Brady* claim on appeal, the Appellate Court appeared to assume without deciding that the 1552 recordings, none of which had been reviewed by the department or the state, were part of the state's investigatory file and that the state could be charged with constructive knowledge of their contents. The Appellate Court nevertheless concluded that the state's attorney had no obligation to examine the state's own investigatory file because the defendant had not made an adequate showing that the file contained exculpatory information. On the granting of certification, the defendant appealed to this court. *Held* that, in the absence of an appropriate showing by the defendant of at least some likelihood that the 1552 recordings contained exculpatory information, the state had no obligation, under the particular facts of this case, either to examine those recordings or to obtain and make them available to the defendant for his review, and, accordingly, the Appellate Court correctly concluded that the trial court had properly granted in part the state's and the department's motions to quash the defendant's subpoena: the assumption that the 1552 recordings, none of which was reviewed by the department, were identified and preserved in furtherance of the state's investigation and were thus part of the state's investigatory file was contradicted by the record, there having been no evidence to contradict the monitor's testimony that the 1552 recordings were preserved in accordance with the department's obligation in light of the defendant's subpoena rather than as part of the department's monitoring process as requested by the state's attorney; moreover, because it was undisputed that the department reviewed only 10 percent of the recordings in response to the state's request for monitoring and the state never pursued a request that the department review all of the recordings or undertook to obtain and review any of the remaining recordings, the state's investigation with respect to the recordings in the department's possession was limited to the 10 percent

of the recordings that the department did review, and the trial court correctly determined that the state's obligations under *Brady* extended to those particular recordings.

(*One justice concurring separately*)

Argued September 21, 2017—officially released May 7, 2019

Procedural History

Two substitute informations charging the defendant, in the first case, with the crimes of assault in the first degree, conspiracy to commit assault in the first degree, unlawful restraint in the first degree and tampering with physical evidence, and, in the second case, with the crimes of murder, conspiracy to commit murder, felony murder, kidnapping in the first degree and conspiracy to commit kidnapping in the first degree, and information, in a third case, charging the defendant with violation of probation, brought to the Superior Court in the judicial district of New Britain where the cases were consolidated; thereafter, the court, *Alander*, *J.*, granted in part the motions to quash a subpoena duces tecum filed by the state et al.; subsequently, the first two cases were tried to the jury before *Alander*, *J.*; verdicts of guilty of assault in the first degree, conspiracy to commit assault in the first degree and tampering with physical evidence; thereafter, the court declared a mistrial as to the charges of murder, felony murder, kidnapping in the first degree and conspiracy to commit kidnapping in the first degree and granted the defendant's motion to dismiss the charge of conspiracy to commit kidnapping in the first degree; subsequently, the third case was tried to the court; thereafter, the court rendered judgment revoking the defendant's probation and rendered judgments in accordance with the verdicts, and the defendant appealed to the Appellate Court, *Gruendel*, *Beach* and *Flynn*, *Js.*, which affirmed the trial court's judgments, and the defendant, on the granting of certification, appealed to this court. *Affirmed*.

John L. Cordani, Jr., with whom, on the brief, was *Damian K. Gunningsmith*, for the appellant (defendant).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, *Jonathan M. Sousa*, former special deputy assistant state's attorney, and *John H. Malone*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PALMER, J. It is the policy and practice of the Department of Correction (department) to automatically record the telephone calls and noncontact visits of all inmates, each of whom is given prior notice that such calls and visits are being recorded. The recordings are made for a variety of reasons related to prison safety and administration, and not as part of any investigation into the crimes with which the various inmates have been charged. From time to time, however, the department, upon express request of the state's attorney responsible for prosecuting a particular criminal case, will review some but not all of the calls and visits of those inmates who have been charged in that case. Because the department is acting as an investigative arm of the state in conducting that review, the calls and visits reviewed at the state's attorney's behest are part of the state's investigation into the case such that, like all other material and information gathered or developed as part of the investigation, those calls and visits are subject to the disclosure requirements of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).[1] The sole issue presented by this

[1] In *Brady*, the United States Supreme Court held that the due process clause of the United States constitution requires the state to disclose "evidence favorable to an accused . . . [when] the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* v. *Maryland*, supra, 373 U.S. 87. For an accused to prevail on a claim under *Brady*, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;

appeal is whether the inmates charged in such a case, some of whose calls and visits have been reviewed by the department, are entitled, under *Brady*, to a review of *all* of those calls and visits even though the department has limited its review to only some of the recorded conversations. We conclude that no such review is required under the facts and circumstances of the present case.

The defendant, Michael Anthony Guerrera, and four codefendants were charged with various offenses in connection with the assault and murder of the victim, Dylan Sherman. Following their arrest, they were remanded to the custody of the Commissioner of Correction (commissioner) pending trial, at which time the state requested that the department review the telephone calls and noncontact visits of the defendant and his codefendants. In accordance with its practice, the department reviewed only about 10 percent of those voluminous calls and visits, which represented the calls and visits believed by the department to be most likely to bear some relevance to the pending criminal case. Subsequently, the defendant, shortly before trial, issued a subpoena to the department seeking, under *Brady*, the production of more than 1500 audio recordings of the telephone calls and noncontact visits of the defendant's four codefendants that had been made and retained by the department while those codefendants remained in the commissioner's custody prior to trial.[2] The state and the department moved to quash the subpoena, claiming that it was overbroad in that it failed to provide any reason to believe that the recordings

that evidence must have been suppressed by the [s]tate, either [wilfully] or inadvertently; and prejudice must have ensued." *Strickler* v. *Greene*, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

[2] Although the record is not entirely clear on this point, it does not appear that any of these more than 1500 calls and visits were among the 10 percent of the calls and visits that already had been reviewed by the department at the state's request.

contained exculpatory information and, further, that producing the recordings would place an undue burden on the department because, before any such production, the department would be required to review each recording to determine whether it contained any relevant evidence. The trial court granted in part the motions to quash, concluding, inter alia, that, before the department could be compelled to undertake such an extensive review on the defendant's behalf, the defendant was required, in accordance with *Brady*, to make an appropriate threshold showing that the recordings contain evidence favorable to the defendant, a showing that he concededly could not make. A jury thereafter found the defendant guilty of assault in the first degree in violation of General Statutes §§ 53a-59 (a) (1) and 53a-8, conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-59 (a) (1) and 53a-48 (a), and tampering with physical evidence in violation of General Statutes (Rev. to 2011) § 53a-155 (a) (1), and the trial court rendered judgments in accordance with the verdicts.[3]

On appeal, the Appellate Court affirmed the judgments of the trial court; *State* v. *Guerrera*, 167 Conn. App. 74, 120, 142 A.3d 447 (2016); and we granted the defendant's petition for certification to appeal, limited to the question of whether the Appellate Court properly determined "that the state's attorney's obligation to review [the state's] own investigatory file for *Brady* . . . material . . . applies [only when] the defendant can first make a 'showing' that the file contains exculpatory information . . . ." *State* v. *Guerrera*, 323 Conn.

[3] The defendant, who had been tried under three separate informations consolidated for trial, was acquitted of the charges of unlawful restraint in the first degree and conspiracy to commit murder. The jury was unable to reach a verdict as to the charges of murder, felony murder, conspiracy to commit kidnapping in the first degree, and kidnapping in the first degree, and the trial court declared a mistrial as to those charges. In a trial to the court, the defendant was found in violation of probation.

922, 150 A.3d 1152 (2016). Upon further consideration of the issue presented, however, it is apparent that the certified question is predicated on an assumption that is contradicted by the record, namely, that the recordings at issue were part of the state's investigatory file; they were not a part of the investigation of the state's case against the defendant.[4] Because those recordings were *not* part of that file, we have no cause to answer the question as certified. We must decide, rather, whether the state had an obligation under *Brady* to review the recordings nevertheless.[5] We conclude that the state had no such obligation under the particular facts of this case, and, for that reason, we affirm the judgment of the Appellate Court.

The following undisputed facts and procedural history are relevant to our resolution of the present appeal. On February 22, 2011, the victim was severely beaten and then transported to a wooded area of Terryville where he was bludgeoned to death. His body was found the next day by a hiker, and, soon thereafter, the police developed information that the victim had been murdered by the defendant and his brother, Dennis Guerrera, over a dispute involving money. On February 24, 2011, the two men, along with three others, were arrested and charged with multiple offenses related to the assault and murder of the victim.

[4] As we explain more fully hereinafter, the state's obligations under *Brady* ordinarily extend only to exculpatory information contained in the state's investigatory file, which includes any exculpatory information known to others actively involved in the investigation. See *Strickler* v. *Greene*, 527 U.S. 263, 280–82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). Thus, we use the term "investigatory file" to refer to any and all information obtained in connection with the investigation into a particular criminal case, whether that investigation was undertaken by the state or by others involved in that investigation as an arm of the state.

[5] This court has broad discretion to address any issue within the scope of the certified question, even if the issue was not considered by the Appellate Court. See, e.g., *McManus* v. *Commissioner of Environmental Protection*, 229 Conn. 654, 661 n.6, 642 A.2d 1199 (1994).

Shortly after those arrests, an inspector from the state's attorney's office requested that the department monitor the telephone calls and noncontact visits of the defendant and his four codefendants, all of whom remained incarcerated in lieu of bail pending trial. This request was handled in accordance with department policy, pursuant to which all such inmate calls and visits are automatically recorded with prior notice to every inmate that his or her calls and visits are recorded and subject to monitoring by the department.[6] These recordings are made for prisoner safety and a number of administrative concerns, and are stored for a fixed period of time on servers maintained by an outside vendor. Prior to July, 2012, the vendor preserved the recordings for ninety days, after which time they were automatically erased. Thereafter, however, the department entered into a contract with a new vendor, which was required to preserve the recordings for one year. Both before and after July, 2012, however, to preserve a recording beyond the automatic retention period, the department had to save it to an external drive, which is referred to as "locking" the call.

The department routinely receives requests from the various state's attorney's offices and other investigative agencies to monitor inmate telephone calls. After the receipt of such a request, the department assigns an individual telephone monitor to the case. Because the department maintains that it is not feasible to monitor or review every call of any particular inmate,[7] the department's practice when monitoring calls for such a requesting agency is to focus exclusively on inmate

[6] For ease of reference, we refer hereinafter to the inmate telephone calls and noncontact visits collectively as the calls or recordings.

[7] We note that the record does not reflect whether the department owns or licenses any of the various commercially available software solutions, which are regularly used in the discovery process for civil litigation and in corporate compliance operations, to review or analyze large amounts of digital data at a much faster rate than a human could review the same data.

calls occurring soon after that inmate was arrested and incarcerated and shortly before and after the inmate's court dates because, in the view of the department, those are the calls that typically yield information of value to the requesting agency. The monitor assigned to the request decides which calls to listen to, generally without any input from the requesting agency, and will lock a call only if it appears to contain information related to the case. When such a call has been identified and locked, the monitor summarizes its contents in a written report, which is then forwarded to the requesting agency. If the requesting agency wishes to obtain a copy of any such recording, it may do so upon request to the department in accordance with department policy.

The state's request in the present case was assigned to Officer Donald Lavery, a member of the department's Special Intelligence Unit. In keeping with department practice, Lavery limited his review to those calls that were made shortly after the individuals were incarcerated and before and after their court dates, a review that comprised only about 10 percent of the calls of the defendant and his codefendants. Lavery ultimately prepared notes on only a handful of the calls, and he forwarded those notes to the state's attorney's office. The state, however, never sought to obtain a copy of any of those calls because, after reviewing Lavery's notes, the state's attorney determined that none of the calls was either inculpatory or exculpatory. Moreover, at no time did the state's attorney seek to have the department review additional calls or otherwise undertake to obtain copies of any such additional calls from the department.

On June 27, 2011, defense counsel sent a letter to the department "requesting that all phone calls of [the defendant's codefendants] be recorded and preserved." The letter further stated that, "[a]t some point in the

future, I anticipate issuing subpoenas for the recordings of these inmates' calls." On August 15, 2013, the defendant issued a subpoena to the department, directing it to "produce copies of the [codefendants'] recorded conversations, whether on the telephone or during inmate visits . . . ." The state and the department moved to quash the subpoena on the ground that it had been issued without any indication that the recorded conversations contain exculpatory material. They also maintained that compliance with the subpoena would place a significant and unreasonable burden on the department due to the extensive number of recordings involved, all of which, under department policy, would have to be reviewed in their entirety before they could be disclosed to an outside party, a process that, according to the representations of the state's attorney, could take anywhere from 200 to 1000 hours, depending on the length of the calls.[8]

The defendant filed an objection to the motions to quash in which he asserted, inter alia, that he was in possession of information that, during a recorded prison visit between his brother, Dennis, and their mother, Naomi Ball, Dennis had informed Ball that the defendant was not involved in the victim's murder. On the basis of this information, the defendant claimed that the exculpatory statement allegedly made by Dennis to their mother provided reason to believe that the other codefendants also might have revealed exculpatory information during their phone calls or visits.

At the hearing on the motions to quash, Lavery testified that he had not locked any calls in response to the state's request for monitoring,[9] but, after receiving the

[8] This estimate was so broad because the department had not determined the length of each call.

[9] Although Lavery did provide notes on one or more of the calls he reviewed at the request of the state's attorney, he apparently did not lock those calls, perhaps because they did not contain any evidence deemed to be inculpatory or exculpatory.

defendant's subpoena, he "went back and started locking" all of the codefendants' calls that were still on the server. A total of 1552 calls were ultimately locked.[10] When the court asked whether he had listened to any of the calls after they were locked in response to the subpoena, Lavery responded that he had not. After Lavery's testimony that he had not locked any calls in response to the state's request for monitoring, the trial court expressed confusion, stating that it was under the impression that all of the codefendants' calls were locked as soon as the department received the state's request. Lavery explained that, because calls must be locked "one at a time and it takes a very long time" to lock a call, it is his general practice to lock only calls that he has actually reviewed and that he believes may contain information relevant to the case of interest. The court then asked Lavery: "Oh, so they're not automatically locked? . . . [Y]ou only lock the ones you've listened to if there's something of note?" Lavery responded, "right." The court then stated: "So it's not accurate for me to think, which is what I thought, that once the request comes in every call [is locked]. Nothing like that was done?" Lavery responded, "[n]o." The court then stated, "[s]o [all the older] calls are gone. They're not preserved. If [a call] was made in March of 2011 [when the state requested monitoring] under the old system, it would have [been] held for ninety days. So they don't exist anymore, right?" Lavery responded, "[y]es." Finally, the court asked Lavery again why he had locked the 1552 calls at issue. Lavery responded that he had locked them to comply with the defendant's subpoena "so we wouldn't lose them," to which the court responded: "Okay. Understood."

Following the hearing on the motions to quash, the trial court issued a memorandum of decision granting

[10] The trial court originally estimated the number of those calls to be 1300. Thereafter, however, the court clarified that there were 1552 such calls.

the motions with respect to the 1552 calls that were locked in response to the defendant's subpoena but remained unreviewed. In doing so, the court observed that of the calls that Lavery had reviewed, but which did not include any of the 1552 calls locked in response to the defendant's subpoena, only a few of them contained conversations that referred to the crime or otherwise related in some way to the defendant's case. "Given these statistics," the court stated, "the defendant's request for documents is overbroad. It clearly sweeps up calls that have no demonstrated relevance to the matter before the court. It would also impose a substantial burden on [the department] to review each of these [1552] calls to determine which calls contain relevant statements." In reaching its decision, the court rejected the defendant's contention that, because a few of the calls that Lavery reviewed contained some information that related generally to the case, it was reasonable to infer that some of the 1552 calls would contain exculpatory material. The court stated that the defendant had presented no evidence that the codefendants "did in fact make any other calls containing relevant material, other than those already identified by [the department] and, if [they did], which calls contain [that] material. The defendant seeks to obtain [more than 1500] calls in the blind hope that some of them may contain relevant material. That effort is a classic fishing expedition."

The trial court next addressed the defendant's claim that "he is entitled to obtain copies of all [1552] calls so that he can review [them] for *Brady* material." (Internal quotation marks omitted.) The court observed that, although the department "does not generally act as an investigative arm of the state, it did assist the state's attorney's office in the investigation of the crimes at issue here." Citing *Kyles* v. *Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (prosecutor has duty to learn of any evidence favorable to defendant

that is known to others acting on government's behalf), and *Demers* v. *State*, 209 Conn. 143, 153, 547 A.2d 28 (1988) (same), the court then explained that, for *Brady* purposes, the state's disclosure obligation extends not only to the office of the prosecutor but also to "law enforcement personnel and other arms of the state involved in the investigative aspects of a particular venture." (Internal quotation marks omitted.) The court further observed that, under *United States* v. *Stewart*, 433 F.3d 273, 298 (2d Cir. 2006), "[t]he relevant inquiry for determining whether an individual or entity is an arm of the prosecution for *Brady* purposes is what the person *did*, not who the person is." (Emphasis in original; internal quotation marks omitted.)

The trial court continued: "The state's attorney's office specifically requested that [the department] monitor and review the calls . . . of the [defendant and his] four codefendants. In response to that request, [the department] reviewed approximately 10 percent of [those] calls for any information related to the alleged crimes. In a number of instances, [the department] sent notes to the state's attorney's office detailing the content of calls containing such information. Clearly, [the department] was investigating aspects of the case on behalf of the state's attorney. Consequently, under the facts here, the prosecutor's obligation under *Brady* to disclose exculpatory and favorable information to the defendant extends to information known to [the department]."

Applying these principles to the present case, the court determined that, because Lavery, at the prosecution's request, had reviewed approximately 10 percent of the codefendants' calls, the state's duty under *Brady* to disclose exculpatory information extended to those calls. The court also concluded, however, that the remaining 90 percent of the calls fell outside the state's *Brady* obligations because those calls were

never reviewed by the department or the state as part of the investigation of the defendant's case, and, therefore, those calls could not be *known* to the department, or constructively *known by* the state's attorney. Necessary to this conclusion was the court's implicit finding that those calls were not part of the state's investigatory file.

Accordingly, the court denied the motions to quash in part and ordered the department to provide to the defendant "any recorded calls of the codefendants [that the department] has reviewed and [that] concern the pending case . . . including but not limited to: (1) the recorded call of the visit by . . . Ball with Dennis Guerrera in which [Dennis] Guerrera [purportedly] discusses the involvement or lack of involvement of the defendant in these crimes, and (2) the recorded calls for which [the department] has provided notes to the state's attorney's office outlining the substance of the calls because the calls refer to matters related to [the] case."[11]

The trial court, however, rejected the defendant's contention that *Brady* also required the department to turn over to the defendant the 1552 recordings that Lavery did not listen to so that the defendant himself could review them for possible *Brady* material. The court explained that, even if there were legal authority for the defendant's request, which there is not; see, e.g., *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 59, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) ("A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the [government's]

[11] As we previously noted, the department locked the calls of the defendant's four codefendants in August, 2013, in response to the subpoena issued by the defendant to the department at that time. Because the regular practice of the department prior to July, 2012, was to preserve all calls for only ninety days, it appears that the calls identified in the trial court's order—that is, those that had been reviewed by Lavery—were not preserved. There is no claim by the defendant, however, that any failure to preserve them violated *Brady* or otherwise was improper.

files. . . . [T]his court has never held . . . that a defendant alone may make the determination as to the materiality of the information. Settled practice is to the contrary." [Citations omitted.]); the defendant would still be required to make a threshold showing of materiality before the department could be compelled to produce the recordings, a hurdle that the defendant admittedly could not surmount. See, e.g., id., 58 n.15 ("[a defendant], of course, may not require the trial court to search through the [government's] file without first establishing a basis for his claim that it contains material evidence"); *United States* v. *Brandon*, 17 F.3d 409, 456 (1st Cir.) ("to establish a violation of *Brady*, a defendant must provide the court with some indication that the materials to which he . . . needs access contain material and potentially exculpatory evidence"), cert. denied sub nom. *Granoff* v. *United States*, 513 U.S. 820, 1155 S. Ct. 80, 130 L. Ed. 2d 34 (1994), and cert. denied sub nom. *Ward* v. *United States*, 513 U.S. 820, 1155 S. Ct. 80, 130 L. Ed. 2d 34 (1994); *United States* v. *Pou*, 953 F.2d 363, 367 (8th Cir.) (*Brady* does not permit defendant "to conduct an in camera fishing expedition through the government's files"), cert. denied, 504 U.S. 926, 112 S. Ct. 1982, 118 L. Ed. 2d 580 (1992), and cert. denied sub nom. *Mondejar* v. *United States*, 504 U.S. 926, 112 S. Ct. 1982, 118 L. Ed. 2d 580 (1992), and cert. denied, 504 U.S. 926, 112 S. Ct. 1983, 118 L. Ed. 2d 581 (1992); *United States* v. *Navarro*, 737 F.2d 625, 631 (7th Cir.) ("Mere speculation that a government file may contain *Brady* material is not sufficient to require a remand for in camera inspection, much less reversal for a new trial. A due process standard [that] is satisfied by mere speculation would convert *Brady* into a discovery device and impose an undue burden upon the [D]istrict [C]ourt."), cert. denied, 469 U.S. 1020, 105 S. Ct. 438, 83 L. Ed. 2d 364 (1984), and cert. denied sub nom. *Mugercia* v. *United States*, 469 U.S. 1020, 105 S. Ct. 438, 83 L. Ed. 2d 364 (1984).

Several weeks after the court's ruling on the motions to quash, defense counsel informed the court that he had reviewed the recording of the conversation between the defendant's brother, Dennis, and their mother, which had been turned over to him pursuant to the court's ruling, and that it did not contain exculpatory material as he had been led to believe. At the same time, defense counsel asked that all of the 1552 recordings that had not been turned over to the defense be compiled onto compact discs and marked as an exhibit for purposes of appeal, if necessary. The state opposed the defendant's request, arguing that such an order would place an onerous and undue burden on the department because the department, in accordance with established policy, would be required to review each of the recordings to prevent disclosure of irrelevant, sensitive or personal information, such as inmate medical information. The state also expressed concern that, if the department were to review any recordings not already reviewed, the state could be charged with constructive knowledge of their contents in light of the court's prior ruling that the department was an investigative arm of the state to the extent that it actually had reviewed calls of the codefendants. To address these concerns of the state, the court ordered that the 1552 recordings be filed with the court under seal so as to relieve the department of the need to review them prior to submitting them to the court. The court further stated that, "if [the department], of its own volition, decides to review these 1552 calls for its own administrative purposes, that does not expand the state's attorney's *Brady* obligation because it's not being reviewed for investigative purposes. It's being reviewed for [the department's] own institutional needs."

The case then proceeded to trial, and the defendant was convicted of assault in the first degree, conspiracy to commit assault in the first degree and tampering

with physical evidence, and found in violation of probation. The trial court sentenced the defendant to a total effective sentence of thirty-four years imprisonment, followed by ten years of special parole.

The defendant appealed to the Appellate Court, claiming, inter alia, that, because all 1552 recordings were part of the state's investigatory file, the state had an affirmative duty under *Brady* to review them, irrespective of the defendant's inability to establish a reasonable prospect that they contain exculpatory information. The defendant argued that "[t]he state's *Brady* obligation . . . extended to any exculpatory evidence *produced by its investigation*, *including the* [*1552*] *recordings*," and that the state was deemed to have constructive knowledge of the contents of each of those recordings, "regardless of whether the material [was] actually . . . reviewed by the department or the state . . . ." (Emphasis added.) *State* v. *Guerrera*, supra, 167 Conn. App. 86. The state responded that any of the 1552 calls that remained unreviewed were not "produced by" or otherwise a part of the state's investigation but, rather, were identified and ultimately preserved under seal at the express request of the defendant. See *State* v. *Guerrera*, Conn. Appellate Court Briefs & Appendices, February Term, 2016, State's Brief pp. 18–19. Thus, the state contended, any principal-agent relationship that existed between the state and the department with respect to the calls that the department did review did not extend to those calls. Id., p. 19.

In addressing the defendant's *Brady* claim, the Appellate Court appeared to assume without deciding that the 1552 calls, none of which had ever been reviewed by the department or the state, were part of the state's investigatory file such that the state could be charged with constructive knowledge of their contents. *State* v. *Guerrera*, supra, 167 Conn. App. 88. The Appellate Court explained, however, that, "[s]imply because the

state and the department might be deemed to have constructive knowledge of the contents of the recordings does not necessarily indicate that the recordings in fact contained evidence favorable to the defense, as required by the *Brady* test." (Internal quotation marks omitted.) Id. Specifically, the Appellate Court stated: "[T]here is nothing to indicate that the evidence contained in the recordings is even potentially helpful to the defendant. The defendant provided the court with no evidence that any exculpatory information was recorded at all. Indeed, at the hearing on the motion[s] to quash, counsel for the defendant conceded that 'I can't cite anything exculpatory, [but] there may very well be exculpatory information that is not being turned over because nobody listened to it.' " Id., 90.

In support of its conclusion, the Appellate Court cited *State* v. *Colon*, 272 Conn. 106, 267, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005), in which this court "distinguish[ed] between [a] valid *Brady* violation claim [that] the state with[eld] exculpatory information and [the] claim [of the defendant in *Colon*] that he was entitled to an opportunity to sift through the records of the [O]ffice of the [C]hief [S]tate's [A]ttorney in search of a potential *Brady* violation." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Guerrera*, supra, 167 Conn. App. 89. In light of *Colon*, and because the present case is readily distinguishable from cases, such as *Demers* v. *State*, supra, 209 Conn. 143, that involve the state's obligation to secure the disclosure of *Brady* material located in the files of the police department that conducted the investigation of the case; see id., 153–54; the Appellate Court concluded that the state had no duty "to conduct a more thorough investigation into the voluminous recordings preserved by the department." *State* v. *Guerrera*, supra, 90. The Appellate Court reasoned that, unlike the state's attorney's office in *Demers* that had

ready access to a report generated by the investigating police department, the state in the present case did not have such easy access to the contents of the conversations at issue. "Reviewing an easily available police report; *Demers* v. *State*, supra, [153]; for exculpatory information is a very different venture from ordering the department to listen to more than 1000 phone calls, none of which has been claimed to contain material that would be useful to the defense." (Internal quotation marks omitted.) *State* v. *Guerrera*, supra, 90 n.3.

We granted the defendant's petition for certification to appeal, limited to the issue of whether the Appellate Court correctly determined that the state's attorney had no obligation to examine "[the state's] own investigatory file" for *Brady* material unless the defendant first made an adequate showing that the file contains exculpatory information. *State* v. *Guerrera*, supra, 323 Conn. 922. On appeal, the defendant asserts, inter alia, that the state's attorney had a duty to review all 1552 recordings because "the [department's] choice to lock the calls was made in furtherance of the [department's] investigatory efforts [on behalf of the state] and thus within the scope of the agency found by the trial court." The state argues that the calls were not locked as part of the state's investigation but, rather, were locked in response to the defendant's subpoena, and were never reviewed, and, consequently, they do not fall within the scope of the agency found by the trial court. The state further maintains that the defendant's assertions to the contrary are "misleading and inconsistent with the record," and that this court should reject the defendant's "attempt to support his *Brady* claim . . . with the false notion that the compiling of [the] unreviewed recordings was the state's doing . . . ."

We begin our review of the defendant's claim with a summary of the law governing our disposition of that claim. The state has a duty under *Brady* to disclose to

the accused evidence that is both favorable to the defense and material to the case. E.g., *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 369–70, 71 A.3d 512 (2013). As the state's representative, the prosecutor has a "broad obligation to disclose" *Brady* material because principles of fundamental fairness demand no less. *Strickler* v. *Greene*, 527 U.S. 263, 280–82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). This obligation extends to evidence favorable to the defense that is not in the possession of the individual prosecutor responsible for trying the case; indeed, the obligation may encompass such evidence even if it is not known to the prosecutor. Id., 280–81. More specifically, the prosecutor's duty of disclosure extends to *Brady* material that is "known to the others acting on the government's behalf in [the] case," including, but not limited to, the police. (Internal quotation marks omitted.) Id., 281, quoting *Kyles* v. *Whitley*, supra, 514 U.S. 437; see also *Demers* v. *State*, supra, 209 Conn. 153 ("[t]he [s]tate's duty of disclosure is imposed not only [on] its prosecutor, but also on the [s]tate as a whole, including its investigative agencies" [internal quotation marks omitted]). In other words, the prosecutor is deemed to have constructive knowledge of *Brady* material possessed by those acting on the state's behalf. See, e.g., *Demers* v. *State*, supra, 153 (explaining that, if investigating agency were determined to be in possession of exculpatory material, then court "would be compelled to conclude that, constructively, the [s]tate's attorney had both access to and control over" that material). Thus, the prosecutor has a duty to learn of exculpatory evidence in the possession of any entity that is acting as an agent or arm of the state in connection with the particular investigation at issue. See *Strickler* v. *Greene*, supra, 281. Finally, and importantly, "the propriety of imputing knowledge [of exculpatory evidence] to the prosecution is determined by examining the specific circumstances of the

person alleged to be an arm of the prosecutor." (Internal quotation marks omitted.) *United States* v. *Stewart*, supra, 433 F.3d 298.

Consistent with the state's contention, it is apparent that the certified question is predicated on a fundamental misapprehension of the record, namely, that the 1552 calls—none of which was reviewed by the department—were identified and preserved in furtherance of the state's investigation. When questioned by the trial court about this precise issue, Lavery stated that he had locked the calls solely to comply with the defendant's subpoena, in order to ensure that they would not be erased pending a decision on the motions to quash. Moreover, when Lavery was questioned by the department's counsel, he was asked, "[w]as that part of the regular monitoring process to lock those [1552 calls]?" After Lavery responded "no," he was asked, "[o]r is that specific to the subpoena [the defendant] sent?" Lavery responded, "I did it for the subpoena." There is nothing in the trial court record to contradict or otherwise call into question this clear and straightforward testimony that the calls were preserved in accordance with the department's obligation in light of the subpoena that had been served on the department by the defendant, and not as part of the department's monitoring process as requested by the state's attorney.

Furthermore, it is undisputed that the department reviewed only approximately 10 percent of the calls in response to the state's request for monitoring. Because the state never pursued a request that the department review *all* of the codefendants' calls and never itself undertook to obtain and review any of the remaining calls, the state's investigation with respect to the recordings in the department's possession was limited to the 10 percent of the calls that the department actually did review. Because that review was undertaken by the department at the state's request, the department was

acting as an agent or arm of the state in conducting that review, and, as a result, the recordings actually reviewed must be characterized as part of the state's investigatory file. Consequently, the trial court correctly determined that the state's obligations under *Brady* extended to those particular recordings. There simply is no basis for concluding, however, that the calls that never were reviewed by the department or otherwise obtained by the state, and that were temporarily saved on the department's server for reasons unrelated to the state's investigation, constituted a part of that investigatory file. This is so because, as we have explained, the department was acting as an investigative arm or agent of the state only with respect to the 10 percent of the calls that Lavery reviewed. Put differently, neither the state nor the department took any action with respect to those unreviewed calls that would make the calls part of the state's investigation of the defendant's case; rather, their nature and character as calls recorded solely for the department's internal security and administrative purposes remained unchanged. Accordingly, in the absence of an appropriate showing by the defendant of at least some likelihood that those calls contain exculpatory information, the trial court also correctly determined that the state had no duty under *Brady* either to examine those calls or to obtain them and make them available to the defendant for his review.

On appeal to the Appellate Court, however, the defendant repeatedly argued that the calls *were* locked in response to the state's request for monitoring and, therefore, should be deemed to be part of the state's investigatory file. Specifically, the defendant argued that, "[w]hile the trial court found [the department] subject to *Brady* as an investigative arm of the state's attorney (like the police), it only found that [the department's] *Brady* obligations extended to the recordings [the department] actually reviewed . . . and not to the

calls [*the department*] *collected on behalf of the state's attorney but did not actually review . . . .*" (Emphasis added.) *State* v. *Guerrera*, Conn. Appellate Court Briefs & Appendices, supra, Defendant's Brief p. 9. The defendant further argued that, "[i]n other words, the [department's] actions *on behalf of the state's attorney involved both collection on a compact disc* (*through the 'locking' procedure*) *and review*. Thus, the state's argument [that the department was not acting on behalf of the state when it locked the 1552 calls] fails—the [department] was acting on behalf of the state's attorney in both locking (i.e., preserving) the calls and in reviewing only 10 percent of them." (Emphasis altered.) *State* v. *Guerrera*, Conn. Appellate Court Briefs & Appendices, supra, Defendant's Reply Brief p. 4.

In his appeal to this court, the defendant reasserts his contention that the recordings are part of the state's investigatory file because they were locked in response to the state's request for monitoring.[12] As we discussed

[12] For example, in his petition for certification to appeal, the defendant asserted that, "[a]fter [the defendant] and the codefendants were arrested, the state's attorney contacted the [department]. At the state's request, [Lavery] 'locked' the recordings of prison calls made by [the defendant] and the codefendants. . . . [W]hile Lavery created a file (the compact disc) of all of the call recordings, Lavery only *actually* reviewed about 10 percent of them. The other 90 percent remained within the investigative *file* of the state's attorney's 'investigative arm,' the [department], but [they were] never reviewed by anyone for exculpatory information." (Emphasis in original.) In his brief to this court, the defendant likewise argues that Lavery "lock[ed] [his codefendants'] calls that were still available after receiving the state's attorney's request [for monitoring]"; Lavery "collected on behalf of the [s]tate's [a]ttorney [the 1552 calls] but did not actually review [them]"; "Lavery did 'lock' calls that were still available after receiving the state's attorney's request" and that "[t]he 'locking' process preserves the calls on compact discs, and Lavery was able to lock all the available calls from the codefendants from August, 2012, forward"; "[t]he fact that the [department] chose to lock the calls for later review in furtherance of its investigative efforts does not bring that action outside the scope of the [department's] agency"; and "the [department's] choice to lock the calls was made in furtherance of the [department's] investigatory efforts and thus within the scope of the agency found by the trial court." (Emphasis omitted.)

previously, however, this claim is belied by the uncontested facts. Significantly, the defendant's brief makes no mention of the subpoena that the defendant caused to be served on the department on August 15, 2013. When challenged at oral argument before this court as to the basis for the defendant's assertion that the recordings were locked in response to the state's request for monitoring, his appellate counsel cited Lavery's testimony at the hearing on the motions to quash: "When I receive[d] a subpoena for the phone calls for the other four [co]defendants, I went back and started locking them . . . . I locked [the calls] for the subpoena just so we made sure we had access." It is clear, however, that the subpoena to which Lavery was referring was the *defendant's* subpoena because no other subpoena was served on the department in this case.

The defendant also seeks to characterize the following language from the trial court's memorandum of decision as a factual finding that the department locked the calls in response to the state's request for monitoring: "Lavery locked all calls made by the four codefendants from approximately August, 2012, to the present." This statement, however, merely establishes that the calls were locked, not *why* they were locked. It is clear from the record that the trial court was aware that the calls were locked to comply with the defendant's subpoena. Indeed, this information was elicited from Lavery under questioning by both the court itself and counsel for the department. Lastly, the defendant seeks to characterize the following sentence in the state's brief to this court as an admission by the state that the calls were locked at the state's request: "[U]pon receiving the state's request . . . Lavery . . . took steps to preserve all recorded phone calls and jailhouse visits for all four alleged coconspirators." As we explained, however, this statement is at odds not only

with Lavery's testimony but with all of the state's arguments elsewhere in its brief and in the Appellate Court.[13] Contrary to the defendant's contention, therefore, we do not read the statement as an admission of any sort but merely as an unintended misstatement that is contravened by the entirety of the state's arguments throughout both its briefs and arguments in the trial court, the Appellate Court and this court.

At no time on appeal to the Appellate Court or to this court has the defendant argued that the state had a duty under *Brady* to review the recordings at issue for exculpatory material, even if they were determined *not* to be part of the state's investigatory file. Indeed, in his brief to this court, the defendant takes pains to distinguish the present case from cases such as *United States* v. *Brooks*, 966 F.2d 1500 (D.C. Cir. 1992), which, as the trial court explained, recognized that such a duty

[13] At oral argument, the defendant also directed this court's attention to the testimony of Deputy Warden Armando Valeriano, who testified about the department's policies pertaining to the recording and monitoring of inmate phone calls. The defendant argued that Valeriano's testimony is further proof that the 1552 recordings were locked as part of the state's investigation because Valeriano responded "yes" when asked by the trial court, "[w]hen you get a request from the state's attorney's office, as in this case, to monitor calls, are those recordings then preserved [s]o they won't be destroyed or written over in the normal course of business . . . ?" It is clear, however, that Valeriano was referring to the preservation that occurs automatically, because he then immediately stated that, "[w]ith this new system," inmate calls "are automatically saved for one year. All inmate calls are saved for 365 days," at which time "[t]hat first call drops off. . . . It's automatic through the system." Thus, Valeriano did not testify that the 1552 calls were retrieved from the server and locked for reasons related to the state's investigation. He merely testified that inmate calls are preserved for a period of one year during which time they are available for review if the department should receive such a request. To the extent that there is any ambiguity in Valeriano's testimony, however, the trial court dispelled it later in the hearing, during its colloquy with Lavery, when it asked him: "I'm a little confused. Help me out here. I thought Deputy Warden Valeriano . . . said that once a request comes in all the phone calls are preserved. So when [the state's] request came in [in] March of 2011, [were] all the phone calls [of] the people who you were asked to monitor . . . preserved or not?" Lavery responded that they were not preserved.

may be imposed on the state, even though the alleged *Brady* material is not within the possession of the prosecution or any agency acting on the prosecution's behalf, when the review sought is so limited in scope that it would be "very easy" to accomplish and the defendant is able to establish "a [nontrivial] prospect that the examination might yield material exculpatory information . . . ."[14] Id., 1504; see also *United States* v. *Joseph*, 996 F.2d 36, 41 (3d Cir.) ("We will not interpret *Brady* to require prosecutors to search their unrelated files to exclude the possibility, however remote, that they contain exculpatory information. . . . [W]e hold [rather] that [when] a prosecutor has no actual knowledge or cause to know of the existence of *Brady* material in a file unrelated to the case under prosecution, a defendant, in order to trigger an examination of such unrelated files, must make a specific request for that information—specific in the sense that it explicitly identifies the desired material and is objectively limited in scope." [Citation omitted.]), cert. denied, 510 U.S. 937, 114 S. Ct. 357, 126 L. Ed. 2d 321 (1993). In reaching its decision in *Brooks*, the court surmised that the "willingness [of some courts] to insist on an affirmative duty of inquiry" in light of the particular facts and circumstances involved—ordinarily, an inquiry into files

[14] In *Brooks*, the defendant requested that the government examine certain readily identifiable files of its police department for information relating to the suspicious death of the government's chief witness, a police officer employed by that department whose testimony at an earlier trial, which resulted in a guilty verdict that was overturned when the court granted a motion for new trial, was used to convict the defendant at a second trial. *United States* v. *Brooks*, supra, 966 F.2d 1501–1503. The United States District Court had rejected the defendant's request, and, on appeal from that conviction, the United States Court of Appeals for the District of Columbia determined that the defendant was entitled to an examination of those files by the government due to the unusual circumstances surrounding the witness' death, which gave rise to the possibility that she had work-related problems that might reflect adversely on her credibility. Id., 1503–1504. The District of Columbia Circuit Court of Appeals therefore remanded the case to the District Court so that the government could undertake such an examination. Id., 1504.

"maintained by branches of government closely aligned with the prosecution"—"may stem primarily from a sense that an inaccurate conviction based on government failure to turn over an easily turned rock is essentially as offensive as one based on government [nondisclosure]." (Internal quotation marks omitted.) *United States* v. *Brooks*, supra, 1503.

The defendant argues that *Brooks* is inapposite because "[it] involved a defense request for the prosecution to *affirmatively conduct an investigation* that had not yet been performed by affirmatively searching *general* government files," whereas, in the present case, "[t]he defense was not asking the state's attorney or the [department] to perform an investigation that [it was] otherwise unwilling to conduct. The defense simply wanted the state to review the materials it had already gathered in its [own] investigation . . . ." (Emphasis in original.) Consistent with this contention, the defendant notes that the cases cited in his brief are dissimilar to *Brooks* in that all of them "involve . . . investigatory files linked specifically to [the] case,"[15]

[15] See, e.g., *United States* v. *Price*, 566 F.3d 900, 908–10 (9th Cir. 2009) (prosecutor was charged with constructive knowledge of information known to police officers involved in investigation); *In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 893–96 (D.C. Cir. 1999) (prosecutor had duty to search his own files and police department files for witness cooperation agreements); *United States* v. *Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995) ("[t]he individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation"), cert. denied, 516 U.S. 1165, 116 S. Ct. 1056, 134 L. Ed. 2d 201 (1996); *United States* v. *Martoma*, 990 F. Supp. 2d 458, 462 (S.D.N.Y. 2014) (when prosecutor and another government agency conducted joint investigation, prosecutor had duty to review other agency's investigatory files for exculpatory evidence); *United States* v. *Gupta*, 848 F. Supp. 2d 491, 495 (S.D.N.Y. 2012) ("whe[n] the [g]overnment and another agency decide to investigate the facts of a case together . . . the [g]overnment has an obligation to review the documents arising from those joint efforts to determine whether there is *Brady* material that must be disclosed"); *United States* v. *Salyer*, 271 F.R.D. 148, 155 (E.D. Cal. 2010) (government must review its own file, no matter how voluminous, for *Brady* material); *United States* v. *W. R. Grace*, 401 F. Supp. 2d 1069, 1075–1076 (D. Mont. 2005) (same).

rather than the "general government files" at issue in *Brooks*. (Emphasis omitted.) The defendant's argument founders on the fact that the calls at issue in the present case simply are not part of the state's investigatory file. As in *Brooks*, this case involves a defense request—in the form of a subpoena—for a search of a government agency's general files, namely, the department's server, that would not otherwise have been performed but for the defendant's request. Cf. *Stevenson* v. *Commissioner of Correction*, 165 Conn. App. 355, 364, 368, 139 A.3d 718 (prosecutor had no duty under *Brady* to disclose internal department files that were generated at request of public defender's office for purely administrative purposes, not in conjunction with state's investigation), cert. denied, 322 Conn. 903, 138 A.3d 933 (2016). In stark contrast to *Brooks*, however, it can hardly be said that the review of the calls sought by the defendant is limited in scope—those calls number more than 1500, and it would take hundreds of hours to listen to them—and the defendant has provided no evidence to suggest that any such review would result in exculpatory information.[16]

In sum, the undisputed facts demonstrate that the calls at issue in this case, that is, the 1552 calls that were not reviewed by the department, cannot reasonably be characterized as part of the state's investigatory file. Consequently, the defendant's claim that he was enti-

[16] We do not suggest that, if the state has a disclosure obligation under *Brady* with respect to certain information or materials, that obligation is diminished or reduced depending on how burdensome it may be for the state to discharge that obligation. On the contrary, the state's obligation under *Brady* is the same irrespective of how onerous or difficult it may be for the state to comply with *Brady*'s dictates in any given case. The nature of the burden on the state may be considered only in circumstances, akin to those in *Brooks*, in which the court is asked to require the state to track down information that is not part of the state's investigatory file and otherwise may not fall strictly within the requirements of *Brady* but that, nevertheless, should, in fairness, be made available to the defense given the nature of the information and the ease with which the state can obtain it.

tled to a review of those calls because they were part of the file must fail. In light of the fact that the defendant has provided no other rationale to support his claim of a *Brady* violation, and because we are unaware of any such alternative basis for relief, we reject his assertion that the Appellate Court incorrectly concluded that the trial court properly granted in part the state's and the department's motions to quash.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

McDONALD, J., concurring. I fully agree with the majority's determination that the factual premise of the argument of the defendant, Michael Anthony Guerrera, that the 1552 locked audio recordings in the possession of the Department of Correction were part of the state's investigatory file, is not supported by the record. I write separately solely to address an argument asserted by the state that would have been problematic had the records been part of that investigatory file.

As the majority notes, one ground on which the state and the department sought to quash the subpoena was that compliance with it would place an unreasonable burden on the department. The state represented that the review necessary before the recordings could be released to the defendant could take between 200 and 1000 hours, depending on the length of the calls. Any such burden, however, is inconsequential in relation to a defendant's right to favorable evidence that could potentially result in him avoiding years, not hours, of imprisonment. As the majority notes, the state's obligation under *Brady*[1] does not vary depending on how convenient or inconvenient it is for the state to comply with its duty to provide exculpatory evidence to the

[1] *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

defendant.[2] See footnote 16 of the majority opinion; see, e.g., *Emmett* v. *Ricketts*, 397 F. Supp. 1025, 1043 (N.D. Ga. 1975) (stating, in context of "voluminous mass of files, tapes and documentary evidence" in state's possession, that "the prosecutor retains the constitutional obligation of initially screening the materials before him and handing over to the defense those items to which the defense is unquestionably entitled under *Brady*"). In my view, the state's argument about how unduly burdensome a review of 1552 recordings would be rings particularly hollow in light of the case law that addresses vastly greater numbers of records.

Finally, had the state limited its request to the department to those time periods that were most likely to produce relevant evidence, rather than making an unlimited, open-ended request, any perceived burden could have been greatly reduced without compromising the state's investigation. If the state is concerned about the burden of review, then it should tailor its requests accordingly.

I therefore respectfully concur.

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[2] In the age of electronic records, prosecution records can run into the millions, yet the government is not relieved of its *Brady* obligations merely because the records accumulated in its investigation are voluminous. See, e.g., *United States* v. *Warshak*, 631 F.3d 266, 295 (6th Cir. 2010) (discussing 17 million pages of electronic evidence included in prosecutor's file); *United States* v. *Skilling*, 554 F.3d 529, 576 (5th Cir. 2009) (quantifying prosecutor's case file as "several hundred million pages of documents"), aff'd in part and vacated in part on other grounds, 561 U.S. 358, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010); *United States* v. *W. R. Grace*, 401 F. Supp. 2d 1069, 1080 (D. Mont. 2005) (referencing more than 3 million pages of discovery in prosecution's file).