# STATE OF CONNECTICUT *v.* TREVOR MONROE OUTLAW
## (SC 20729)

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

*Syllabus*

Convicted of murder, carrying a pistol without a permit, and criminal possession of a firearm, the defendant appealed to this court. The defendant claimed, inter alia, that the trial court had abused its discretion when it failed to question or dismiss a juror who appeared to be sleeping during a portion of the trial and when it admitted evidence that the defendant's alleged coconspirator, R, who had testified pursuant to a cooperation agreement, pleaded guilty to conspiracy to commit murder in connection with the victim's murder. *Held*:

Because the trial court's inquiry regarding the allegedly sleeping juror, although limited in scope, adequately addressed the purported juror misconduct, the defendant could not demonstrate that he was deprived of his right to a fair trial.

Although the trial court improperly allowed certain witnesses to testify about their participation in a witness protection program, the defendant did not demonstrate that the admission of that testimony resulted in a manifest injustice requiring reversal.

Any error in the trial court's admission of evidence that R had pleaded guilty to conspiracy to commit murder, among other crimes, in connection with

the victim's murder was harmless, as that evidence did not substantially impact the jury's verdict.

The prosecutor's remark during closing argument that R had taken responsibility for her actions by pleading guilty to conspiracy to commit murder did not violate the defendant's right to a jury trial, as that remark was a part of the prosecutor's argument that R was a reliable, credible witness, rather than an implicit criticism of the defendant's exercise of his right to have his case tried before a jury rather than to plead guilty, as R had done.

(*Two justices concurring in part and concurring in the judgment in one opinion*; *one justice concurring in part and dissenting in part*)

Argued February 14—officially released August 6, 2024*

*Procedural History*

Substitute information charging the defendant with the crimes of murder, conspiracy to commit murder, carrying a pistol without a permit, and criminal possession of a firearm, brought to the Superior Court in the judicial district of New Haven, where the court, *Vitale*, *J.*, denied the defendant's motion in limine to preclude evidence of a witness' plea agreement; thereafter, the charges of murder, conspiracy to commit murder and carrying a pistol without a permit were tried to the jury before *Vitale*, *J.*; subsequently, the court granted the defendant's motion for a judgment of acquittal as to the charge of conspiracy to commit murder; thereafter, verdict of guilty of murder and carrying a pistol without a permit; subsequently, the charge of criminal possession of a firearm was tried to the court, *Vitale*, *J.*; finding of guilty; judgment of guilty in accordance with the jury's verdict and the court's finding, from which the defendant appealed to this court. *Affirmed.*

*Pamela S. Nagy*, supervisory assistant public defender, for the appellant (defendant).

* August 6, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Jonathan M. Sousa*, assistant state's attorney, with whom, on the brief, were *John P. Doyle, Jr.*, state's attorney, and *Seth R. Garbarsky* and *Jason Germain*, supervisory assistant state's attorneys, for the appellee (state).

*Opinion*

DANNEHY, J. In this appeal, the defendant, Trevor Monroe Outlaw, challenges his convictions of murder in violation of General Statutes § 53a-54a, criminal possession of a firearm in violation of General Statutes (Rev. to 2019) § 53a-217 (a) (1), and carrying a pistol without a permit in violation of General Statutes (Rev. to 2019) § 29-35 (a). The defendant claims that (1) the trial court abused its discretion by failing to question or dismiss a juror who appeared to be sleeping during a portion of the first day of evidence, (2) the trial court improperly admitted evidence related to witness protection, (3) the trial court improperly allowed a witness to testify that she had pleaded guilty to conspiracy to commit murder, and (4) the prosecutor improperly commented in closing argument on the defendant's right to a jury trial. We disagree with these claims and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On the night that the victim, Giovanni Rodriguez, was killed, the defendant and his girlfriend, Cheenisa Rivera, asked Loretta Martin to reserve two rooms at the Comfort Inn and Suites in Meriden, one for Rivera and the defendant, and one for Rivera's daughter, Manasia Bennett, and her boyfriend, Freddy Hidalgo. Rivera and the defendant drove to Martin's house, where Martin booked the rooms electronically and Rivera paid her in crack cocaine, and then picked up Bennett and Hidalgo. Upon arriving at the hotel, Rivera checked in, gave Bennett and Hidalgo their room keys, and went with the defendant to park the car that she had rented.

Unbeknownst to the defendant, the victim and his girlfriend, Derrika James, planned to spend the night at the same hotel. While James was in the lobby checking in, she encountered Bennett and Hidalgo. James heard Bennett state that the victim was in a car outside. Although there was no evidence that the defendant and the victim had a personally hostile relationship, they were members of rival gangs. Hidalgo instructed Bennett to call Rivera and warn her and the defendant. James returned to her car, and the victim drove them to the same side of the building where Rivera and the defendant had parked.

While she was standing in the parking lot, Rivera received the call from Bennett and activated her phone's speaker. Rivera and the defendant reentered her rental car, and Rivera drove toward James and the victim, who were near James' car, retrieving their belongings. As James and the victim got closer, the defendant fired a semiautomatic pistol out of the passenger window, striking the victim, who was later pronounced dead at the scene.

The defendant was subsequently charged with murder, conspiracy to commit murder, carrying a pistol without a permit, and criminal possession of a firearm.[1] Rivera was later arrested on unrelated charges and, in connection with the present case, pleaded guilty to conspiracy to commit murder and to hindering prosecution in the first degree. She and Martin testified against the defendant pursuant to cooperation agreements, both of which were admitted into evidence. After the prosecutor rested the state's case-in-chief, the court granted defense counsel's motion for a judgment of acquittal on the conspiracy charge. The jury found the

[1] The defendant elected to have the criminal possession of a firearm charge tried to the court. The court canvassed him as to this decision and found that he knowingly, voluntarily, and intelligently waived his right to a jury trial on that count.

defendant guilty of murder and carrying a pistol without a permit, and the trial court found the defendant guilty of criminal possession of a firearm. The trial court rendered judgment in accordance with the jury's verdict and the court's finding. The trial court thereafter sentenced the defendant to sixty-five years of imprisonment, and the defendant appealed from the judgment of conviction directly to this court pursuant to General Statutes § 51-199 (b) (3). Additional facts and procedural history will be set forth as necessary.

I

We first address the defendant's claim that the trial court should have questioned or dismissed a juror who appeared to be sleeping, and that its failure to do so requires reversal. During a recess on the first day of evidence, the court met with counsel in chambers and informed them that one of the jurors seemed to be having trouble staying awake. During this meeting, defense counsel "emphatically conveyed his desire that [the juror] *not* be removed from the jury at such time," because neither he nor his client had noticed the juror sleeping and because they were apprehensive about removing an African American juror.[2] (Emphasis in orig-

[2] The parties disagreed as to the substance of the in-chambers discussion, particularly whether defense counsel had objected to the removal of the juror in question. After the defendant filed this appeal, this court granted the state permission to file a late motion for rectification of the record. The trial court granted the motion for rectification and subsequently augmented the record with additional facts. Although the trial court recalled defense counsel's use of the word " 'objection,' " it declined to make a definitive finding regarding the use of that term. Nevertheless, the trial court found that "defense counsel's concern was abundantly clear." At oral argument on the motion, defense counsel acknowledged discussing the issue in chambers but maintained that he had taken no position on the juror's removal. Although the defendant argues that the rectification was improper, Practice Book § 66-5 provides that a motion for review pursuant to Practice Book § 66-7 is the sole remedy for a party desiring appellate review of a rectification ordered during the pendency of an appeal. In this instance, the defendant filed such a motion, and, although this court granted review, we denied the relief requested therein. The defendant's claim that we should not consider the augmented record is, thus, unavailing.

inal.) Following the recess, the court stated on the record that one of the jurors had appeared to be asleep from approximately 2:30 to 3:30 p.m., and that it had discussed these observations with counsel in chambers.[3] Both prosecutors also claimed to have seen the juror sleeping and noted that this behavior also appeared to have occurred in the morning session and during the court's introductory remarks. Defense counsel stated that, although he could not say that the juror had *not* been sleeping, neither he nor the defendant had seen him doing so. The court urged defense counsel to observe the juror for the rest of the day and stated that it would not act at that point but would consider excusing the juror if the behavior continued.

After the jury was excused for the day, the prosecutor noted that he had seen the same juror sleeping when testimony resumed following the in-chambers meeting and subsequent discussion on the record. Defense counsel acknowledged that the juror might have been "nodding off," although he added that he was looking at the juror "through three sheets of plastic" and "could barely see the guy . . . ."[4] The court stated that it realized the juror was "African American . . . [and was] sensitive to . . . the defense, with respect to that," expressed that it would continue to watch him, and encouraged counsel to do the same.[5] Defense counsel responded

[3] The court added that the courtroom clerk, the court recording monitor, and at least two of the judicial marshals also claimed that they had observed this behavior.

[4] This case was tried shortly after jury trials resumed following a lengthy statewide suspension prompted by the COVID-19 pandemic. As the trial court observed, "numerous special precautions were undertaken, such as utilizing plexiglass throughout the courtroom . . . and the issuance of special instructions to the jury related to health precautions." The jurors were also wearing masks.

[5] We observe that the trial court's comment expressing its sensitivity to the defendant's position was the only reference to the juror's race during the trial. Indeed, the court expressly stated in its rectification order that, "absent defense counsel's in-chambers concerns, no conceivable reason exists as to why the undersigned would have remarked on the physical characteristics of a juror."

that he understood and did not ask the court to take any further action. At the end of the second day of evidence, the court indicated that it had not seen a recurrence of the juror's behavior, and the issue was not raised again.

Before this court, the defendant argues that he was deprived of a fair trial because the trial court failed to act after the juror in question "looked to be asleep" during the presentation of evidence. The state contends that this claim has been waived because the defense induced the court not to question or remove the juror and that, even if this court does review the claim, the trial court reasonably determined, after conferring with counsel, that no further action was warranted. We conclude that the defendant has not satisfied his burden of showing that his right to a fair trial was infringed.

Although the parties agree that this issue is unpreserved, the defendant claims that it is nonetheless reviewable pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Alternatively, the defendant seeks review under the plain error doctrine. See *State* v. *Blaine*, 334 Conn. 298, 306, 221 A.3d 798 (2019).

"Under *Golding*, a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate [the] harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; internal quotation marks omitted.) *State* v. *Johnson*,

345 Conn. 174, 189, 283 A.3d 477 (2022). "[A] party satisfies the third prong of *Golding* if he or she makes a showing sufficient to establish a constitutional violation." *In re Yasiel R.*, supra, 317 Conn. 780–81. Even if these conditions are met, however, this court has declined to review claims of induced error, which occurs when the complaining party, "through conduct, encouraged or prompted the trial court to make the erroneous ruling." (Internal quotation marks omitted.) *State* v. *Cruz*, 269 Conn. 97, 105 n.8, 848 A.2d 445 (2004).

It is well established that juror misconduct warrants reversal when it has prejudiced the defendant to the extent that he has not received a fair trial. See, e.g., *State* v. *Hughes*, 341 Conn. 387, 417–18, 267 A.3d 81 (2021). A trial court's investigation of juror misconduct "is a delicate and complex task," and, in such instances, the court has "broad flexibility . . . ." (Internal quotation marks omitted.) *United States* v. *Cox*, 324 F.3d 77, 86 (2d Cir.), cert. denied, 540 U.S. 854, 124 S. Ct. 143, 157 L. Ed. 2d 97 (2003), and cert. denied, 540 U.S. 859, 124 S. Ct. 163, 157 L. Ed. 2d 108 (2003). More specifically, "[a] court has considerable discretion in deciding how to handle a sleeping juror . . . ." (Internal quotation marks omitted.) *Johnson* v. *Nicholson*, 349 Fed. Appx. 604, 605 (2d Cir. 2009). The few Connecticut cases that have involved allegations of a sleeping juror are largely inapposite to the circumstances of the present case. Cf., e.g., *State* v. *Payne*, 63 Conn. App. 583, 588–89, 777 A.2d 731 (2001) (discussing whether defendant waived his claim that sleeping juror deprived him of fair trial), rev'd, 260 Conn. 446, 797 A.2d 1088 (2002). Several federal and state appellate courts, however, have held that, once the court becomes aware that a juror may have been sleeping, it has a duty to address the situation. See, e.g., *United States* v. *Barrett*, 703 F.2d 1076, 1083 (9th Cir. 1983) (failing to conduct hearing or investigate when juror reported that he had been sleeping was

abuse of discretion); *People* v. *Franqui*, 123 App. Div. 3d 512, 512, 999 N.Y.S.2d 40 (2014) (court should have conducted "probing and tactful inquiry" when it was informed that juror was sleeping during deliberations (internal quotation marks omitted)), appeal denied, 25 N.Y.3d 1163, 36 N.E.3d 98, 15 N.Y.S.3d 295 (2015). Acknowledging the behavior and taking a "wait and see" approach is not necessarily a sufficient response. See, e.g., *Commonwealth* v. *McGhee*, 470 Mass. 638, 644–45, 25 N.E.3d 251 (2015) (reliable report of sleeping juror "requires prompt judicial intervention," and court erred by failing to conduct any inquiry (internal quotation marks omitted)).

This court has held that a trial court must conduct an inquiry into any allegations of juror misconduct presented in a criminal case, regardless of whether such an inquiry has been requested by counsel. *State* v. *Brown*, 235 Conn. 502, 526, 668 A.2d 1288 (1995). Although the court has broad discretion to shape the inquiry, it typically may discharge its obligation "by notifying the defendant and the state of the allegations, providing them with an adequate opportunity to respond and stating on the record its reasons for the limited form and scope of the proceedings held." Id., 529. In determining its response, courts should consider the defendant's substantial interest in a fair trial, the risk of deprivation of that constitutional right, and the state's interest in the finality of judgments and protecting the integrity of and maintaining public confidence in the jury system. Id., 530–31. Courts are also urged to "give proper weight to the defendant's response" to the allegations. Id., 530.

We begin our analysis of the present case by addressing the state's contention that the defendant waived this claim by inducing the trial court's failure to take further action regarding the allegedly sleeping juror. In its rectification order, the trial court stated

that it withheld judgment "after listening to [defense counsel's] concerns" and concluded that, "*but for* defense counsel's demurral, the court would have considered removing [the sleeping juror] from the jury." (Emphasis in original.) Consequently, the state argues that allowing the defendant to seek reversal on that basis now "would amount to allowing him to induce potentially harmful error, and then ambush the state with that claim on appeal." (Internal quotation marks omitted.) *State* v. *Payne*, supra, 63 Conn. App. 588.

Because the defendant's claim is not limited to the court's failure to remove the allegedly sleeping juror after the in-chambers discussion, we need not address whether a defendant may waive a claim of juror misconduct of this particular nature.[6] In the present case, the defendant argues more broadly that the court should have dismissed *or questioned* the juror. We must decide, therefore, whether the court's entire response to the alleged misconduct gave rise to a constitutional violation, not simply whether one aspect of that response was informed by defense counsel's advocacy. See, e.g., *State* v. *Echols*, 170 Conn. 11, 13, 364 A.2d 225 (1975) (in criminal trials, trial judge is not only "a mere moderator of the proceedings" but also has "responsibility to have the trial conducted in a manner [that] approaches an atmosphere of perfect impartiality" (internal quotation marks omitted)).

Removing the juror is just one remedy that the court could have employed to ensure that the defendant's trial was fair. The court could have questioned the juror

[6] Although this court has not yet had occasion to resolve this issue, we note that federal courts have recognized that a defendant can waive a claim of juror misconduct. For a thorough review of how the various federal appellate courts have approached this issue, see *United States* v. *Dean*, 667 F.2d 729, 734 (8th Cir.) (concluding that "appellant, by not bringing the question of juror misconduct to the attention of the trial court before the verdict was returned, thereby waived his right to a new trial"), cert. denied, 456 U.S. 1006, 102 S. Ct. 2296, 73 L. Ed. 2d 1300 (1982).

without immediately excusing him, and the record contains no indication that the defense discouraged the court from doing so or from taking any remedial action short of removal. The fact that defense counsel asked the court not to take the drastic step of dismissing the juror, consequently, does not suggest that the defendant has waived his right to be tried by a jury that was sufficiently attentive during the proceedings to render a fair and informed verdict. We will therefore address the merits of the defendant's claim.[7]

In light of the foregoing, the question before us is whether the defendant has satisfied the third prong of *Golding* by demonstrating that a constitutional violation occurred.[8] Although we acknowledge the inherent difficulty in determining, on the basis of observation alone, whether an individual is sleeping, awake but inattentive, or closing his eyes while listening carefully, we note at the outset that waiting for approximately one hour before addressing the issue of an apparently sleeping juror is not the better practice.[9] The record reveals, however, that the court did not simply abdicate

[7] We recognize that, in *State* v. *Payne*, supra, 63 Conn. App. 588, the Appellate Court concluded, under somewhat similar circumstances, that the defendant waived any claim concerning an allegedly sleeping juror. But, although defense counsel in *Payne* asked the trial court not to dismiss the juror, that request occurred only after the court had already questioned the juror at defense counsel's suggestion and after defense counsel had repeatedly asserted that the juror had not been sleeping. Id., 588–89. At that point in the proceedings, there was little else that the court could have done except to implement the one remedy that defense counsel had specifically asked it to forgo. Under those circumstances, the Appellate Court appropriately concluded that the defendant had waived any claim that the court should have excused the juror. See id., 588. We conclude that the present case is distinguishable because the less intrusive remedy of questioning the allegedly sleeping juror was still available to the court.

[8] The state does not dispute that the record is adequate for review or that the claim is of constitutional magnitude.

[9] The fact that the jurors were seated behind plexiglass barriers and wearing masks to guard against the spread of COVID-19 inevitably made the task of monitoring their attentiveness even more challenging. See footnote 4 of this opinion.

its responsibility to ensure the integrity of the trial. On the contrary, the court brought the alleged misconduct to the attention of the parties' counsel, solicited their input in chambers, and, on the record, considered the relevant factors, including defense counsel's "[emphatic]" preference for retaining the juror, proposed a plan to monitor the juror, to which the parties agreed, and confirmed, after additional observation, that the juror had not been seen sleeping again. We therefore conclude that the defendant was not deprived of a fair trial.

When the court broached the issue of the inattentive juror with the parties, the discussion that followed elicited inconsistent observations of the juror's behavior. Although the defendant now asserts that "there was no question that the juror was sleeping," at trial, defense counsel first claimed that he had not seen the juror doing so, then acknowledged only that the juror may have been "nodding off." Defense counsel then acceded to the court's plan to continue monitoring the juror without requesting an inquiry that would have established, on the record, that the juror had been asleep for a particular length of time.[10] See, e.g., *State* v. *Collins*, 38 Conn. App. 247, 259, 661 A.2d 612 (1995) (defendant's failure to seek determination of nature and extent of alleged misconduct "seriously undermine[d]" claim that he was deprived of fair trial). The parties' conflicting characterizations of the juror's behavior and defense counsel's desire that the juror remain on the panel further suggest that the alleged misconduct was not so egregious as to compel a more forceful response from the court as a matter of law.

The foregoing considerations necessarily inform our review of the trial court's actions. As we mentioned

[10] We do not find persuasive the defendant's assertion that, because the court initially indicated that it was not inclined to act, it would have been futile to request a more extensive investigation. The record makes clear that the court chose that course, in part, because of defense counsel's own concerns.

previously in this opinion, in *State* v. *Brown*, supra, 235 Conn. 529–31, this court discussed the factors that should guide a court's response to an allegation of juror misconduct. In that case, we highlighted the importance of protecting a defendant's right to be tried by an impartial jury when fashioning that response. Id., 530. We also acknowledged, however, that "a preliminary inquiry of counsel" may be an adequate response to such allegations. Id., 526. Our holding in *Brown*, therefore, did not require the court in the present case either to remove or to directly question the juror.[11]

The court's inquiry during the in-chambers discussion and ensuing conversation on the record, though limited in scope, was sufficient to satisfy its obligation under *Brown*. The court brought the parties' counsel into chambers, informed them that it appeared the juror had been sleeping, and then solicited their input on how to proceed.[12] When the trial resumed, the court gave both counsel an opportunity to be heard on the record. The court acknowledged that it had discussed the issue with the parties' counsel in chambers and that it would contemplate excusing the juror if he appeared to be sleeping again. Later that afternoon, the court heard from the parties' counsel on the issue again before

[11] Establishing a rule requiring the court to question a juror who is suspected of sleeping or other misconduct may seem like a sensible middle ground between removing the juror and doing nothing. We note, however, that even this apparently innocuous practice may have unintended consequences. See *People* v. *Kuzdzal*, 31 N.Y.3d 478, 486, 105 N.E.3d 328, 80 N.Y.S.3d 189 (2018) ("[u]nnecessarily confronting sworn jurors . . . may impact the impartiality of the jury, and mandating such an intrusive procedure regardless of the particular circumstances of a case may only encourage untoward tactics intended to disrupt the proceedings"). Accordingly, we believe that the better course is to leave the appropriate remedy to the discretion of the trial court, on the basis of the particular circumstances of the case, while emphasizing that trial courts must promptly address the issue of a sleeping juror and either voir dire the juror or make a record of the reasons that it chose not to do so.

[12] Nothing in the record suggests that the court simply deferred to defense counsel or allowed him to unilaterally decide the court's response.

explaining its rationale for continuing to monitor, rather than dismiss, the juror. In arriving at its decision, the court contemplated the need to protect the defendant's constitutional rights, the logistical implications of removing the juror, and defense counsel's concern related to the racial composition of the jury, which should not be taken lightly.

Issues of race are complex in our society. They are equally so in this case, in which the record allows for the perception that a possibly sleeping juror was allowed to stay on the jury because he was the only Black person on the panel. As this court has previously observed, there is "great constitutional value in having diverse juries," and research indicates that diverse juries are "significantly more able to assess reliability and credibility, avoid presumptions of guilt, and fairly judge a criminally accused." (Internal quotation marks omitted.) *State* v. *Holmes*, 334 Conn. 202, 235, 221 A.3d 407 (2019). The defense's aversion to removing—in the court's recollection—the lone Black juror, after the parties had completed voir dire and accepted the panel, was well-founded and worthy of the court's consideration. We emphasize, however, that concerns about jury diversity, though laudable, must be secondary to ensuring that all empaneled jurors are up to performing the task before them. Contemporary to the trial in this case, and following the work of the post-*Holmes* Jury Selection Task Force, Connecticut undertook numerous legislative and rule changes to the process by which juries are selected. These changes (1) ensure that the pool from which jurors are summoned reflects the diversity of the judicial district in which each case is tried, and (2) limit the use of reasons that are race neutral on their face but have a disparate impact on minority jurors to sustain the exercise of peremptory challenges to minority jurors. See generally Jury Selection Task Force, Report of the Jury Selection Task Force to Chief

Justice Richard A. Robinson (December 31, 2020), available at https://www.jud.ct.gov/Committees/jury taskforce/ReportJurySelectionTaskForce.pdf (last visited August 2, 2024). We are hopeful that these changes will have the effect of broadening jury pools in a way that assures trial courts that a defendant will receive a trial before a panel of attentive jurors competent to perform the serious task at hand, while also maintaining a jury panel that reflects the racial composition of the judicial district from which it is chosen.[13]

In the present case, the court was indeed mindful of the problems posed by a juror who could not stay awake, noting that "a sleeping juror obviously has not heard all the evidence and that inattentiveness could compromise the defendant's guaranteed right to a jury trial." Furthermore, the court's inquiry did not end there. The record reflects that the court did monitor the juror on the next day of trial and subsequently observed that "there ha[d] not been a reoccurrence of the situation . . . ." Neither defense counsel nor the prosecutor commented or requested that the court take any further action.

The defendant nonetheless urges this court to adopt the position that a conviction must be reversed in any case in which one or more of the jurors was sleeping. In making this argument, he draws heavily on the Massachusetts Supreme Judicial Court's reasoning in *Commonwealth* v. *McGhee*, supra, 470 Mass. 642–46, a case that the concurring and dissenting opinion also finds "particularly persuasive." In *McGhee*, the court con-

[13] We would also be well advised to remember that the task of concentrating on often complex testimony, occasionally in aged buildings with climate control of questionable efficacy, is physically and mentally demanding. This is especially so, given some of the COVID-19 mitigation measures that were in place during this trial. See footnote 4 of this opinion. Trial judges should not hesitate to schedule testimony in a way that allows for sufficient breaks for stretching, movement, and hydration sufficient to allow jurors to maintain their attention on the proceedings.

cluded that "[t]he serious possibility that a juror was asleep for a significant portion of the trial is [a] structural error . . . that so infringes on a defendant's right to the basic components of a fair trial that it can never be considered harmless . . . ." (Internal quotation marks omitted.) Id., 645–46. That case, however, is readily distinguishable. The juror in *McGhee* was alleged to have slept through nearly an entire day of evidence, including testimony from two victims, and multiple jurors reported that he had been snoring loudly and unmistakably. Id., 645. Perhaps even more significant, both the prosecutor and defense counsel asked the court to question the juror, and the court declined to do so because it had not personally observed him sleeping. Id., 643. In the present case, on the other hand, it was the trial court that first raised the issue and reasonably concluded, after a discussion with the parties' counsel, that a more detailed inquiry was not necessary at that time. On the basis of this record, we cannot simply presume on appeal that the juror was unfit to participate in deliberations.[14]

We also emphasize that, despite the defendant's argument to the contrary, continued observation is not nec-

[14] Contrary to the dissent's view, our conclusion that no constitutional violation occurred in the present case is not grounded in the court's failure to make a finding on the record that the juror was, in fact, sleeping but, rather, in the sufficiency of the court's response. That response included bringing the juror's behavior to the attention of the parties' counsel sua sponte, discussing the issue with them in chambers and on the record, weighing the need to protect the defendant's constitutional rights and defense counsel's concern related to the racial composition of the jury, and continuing to monitor the juror. Given those circumstances, we conclude that there was no constitutional violation, particularly not an error that rendered the trial so fundamentally unfair as to require reversal and a new trial. See, e.g., *State* v. *Latour*, 276 Conn. 399, 410, 886 A.2d 404 (2005) ("Structural [error] cases defy analysis by harmless error standards because the entire conduct of the trial, from beginning to end, is obviously affected . . . . These cases contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (Internal quotation marks omitted.)).

essarily an inadequate response to a concern that a juror may have been sleeping. For example, the United States Court of Appeals for the Second Circuit previously determined that the District Court did not abuse its discretion when, after the defendants claimed that one of the jurors had slept through most of the testimony, the court investigated the allegation and chose to carefully observe the juror, rather than to excuse him. *United States* v. *Diaz*, 176 F.3d 52, 78 (2d Cir.), cert. denied sub nom. *Rivera* v. *United States*, 528 U.S. 875, 120 S. Ct. 181, 145 L. Ed. 2d 153 (1999), and cert. denied sub nom. *Millet* v. *United States*, 528 U.S. 875, 120 S. Ct. 314, 145 L. Ed. 2d 153 (1999), and cert. denied sub nom. *Cruz* v. *United States*, 528 U.S. 875, 120 S. Ct. 315, 145 L. Ed. 2d 153 (1999), and cert. denied sub nom. *Morales* v. *United States*, 528 U.S. 875, 120 S. Ct. 315, 145 L. Ed. 2d 153 (1999), and cert. denied sub nom. *Vidro* v. *United States*, 528 U.S. 875, 120 S. Ct. 315, 145 L. Ed. 2d 153 (1999), and cert. denied sub nom. *Roman* v. *United States*, 528 U.S. 957, 120 S. Ct. 386, 145 L. Ed. 2d 301 (1999).

Similarly, in *United States* v. *Freitag*, 230 F.3d 1019 (7th Cir. 2000), the United States Court of Appeals for the Seventh Circuit concluded that there was no abuse of discretion when the District Court, upon being informed by defense counsel late in the trial that a juror apparently had been sleeping earlier in the week, declined to conduct an inquiry as to what the juror may have missed and, instead, directed both counsel to alert the court to any further episodes. Id., 1023. Although the severity of the inattentive juror's behavior in each of these cases varies, the common thread is that keeping a close eye on a juror who is struggling to stay awake—and perhaps asking counsel to do the same—may be a sufficient course of action under the circumstances of the case. Some courts have, indeed, adopted a stricter rule that leaves little room for discretion. See, e.g., *Peo-*

*ple* v. *Simpkins*, 16 App. Div. 3d 601, 601, 792 N.Y.S.2d 170 ("[a] juror who has not heard all the evidence in the case is grossly unqualified to render a verdict"), appeal denied, 5 N.Y.3d 769, 834 N.E.2d 1273, 801 N.Y.S.2d 263 (2005). We are persuaded, however, that the foregoing reasoning reflects an appropriate degree of concern for the integrity of the proceedings and awareness of the trial court's "unique position to ascertain an appropriate remedy . . . ." *United States* v. *Peterson*, 385 F.3d 127, 134 (2d Cir. 2004). In the present case, we likewise conclude that the court, by adopting this measured response, satisfied its mandate to "weigh the relevant factors and determine the proper balance between them." *State* v. *Brown*, supra, 235 Conn. 532.

Because, under these circumstances, the trial court's inquiry adequately addressed the alleged misconduct, the defendant is unable to establish the existence of a constitutional violation, as required under the third prong of *Golding*. In light of that conclusion, a separate review for plain error is unnecessary. See, e.g., *State* v. *Silva*, 339 Conn. 598, 615 n.11, 262 A.3d 113 (2021) (claim of plain error fails when claim fails under third prong of *Golding*).

II

Next, we address the defendant's claim that the trial court improperly allowed the prosecutor to elicit on direct examination and to discuss in his closing argument the fact that two witnesses—Martin and Rivera—had requested witness protection. Defense counsel did not object to that testimony or to the prosecutor's mention of the witness protection program during closing argument. The defendant nonetheless argues on appeal that the references to witness protection were not relevant and were sufficiently prejudicial to warrant reversal of his conviction.

Because this issue is unpreserved, the defendant seeks review pursuant to the plain error doctrine. A court reviewing for plain error applies a two step analysis: the defendant must establish that (1) there was "an obvious and readily discernible error," and (2) the error "was so harmful or prejudicial that it resulted in manifest injustice." (Internal quotation marks omitted.) *State* v. *Blaine*, supra, 334 Conn. 306. "[I]t is not enough for the defendant simply to demonstrate that his position is correct." *State* v. *Coward*, 292 Conn. 296, 307, 972 A.2d 691 (2009). Rather, plain error review is "an extraordinary remedy" for errors "that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice . . . ." (Internal quotation marks omitted.) *State* v. *Blaine*, supra, 305.

We addressed the admissibility of evidence related to a witness' participation in witness protection in *State* v. *Bermudez*, 341 Conn. 233, 257, 267 A.3d 44 (2021). In that case, we made clear that "admitting evidence of a testifying witness' placement in a witness protection program must be handled delicately." (Internal quotation marks omitted.) Id. In that case, the state's key witness had waited for twelve years before implicating her estranged husband and his two brothers in a robbery and murder, having previously corroborated the false alibi that they had devised. Id., 237–38. Her testimony was described by this court as "the linchpin of the state's case," and there was "no question" that the reason for her delay in coming forward would be "the central focus of the defense's attack . . . ." Id., 259. At trial, the witness testified during direct examination that she had been afraid to refute the false alibi because she feared retaliation from her husband, who had abused her for years, and from the gang affiliates of her husband's brother.[15] Id., 241–42. Notably, she also

[15] The defendant in *State* v. *Bermudez*, supra, 341 Conn. 237, was not the witness' estranged husband but one of his brothers, who was tried separately. See *State* v. *Santiago*, 187 Conn. App. 350, 202 A.3d 405, cert. denied, 331 Conn. 902, 201 A.3d 403 (2019).

testified that she and her children were relocated by the state after she provided her statement and that she still had not returned to her home.[16] Id., 255–56. When the defendant claimed on appeal that the trial court had abused its discretion by admitting evidence that the witness had been relocated, this court upheld the trial court's ruling, stating: "Because the trial court knew in advance that [the witness'] purported fear of and need for protection from the defendant and his brothers would be a central focus of the trial and that the defense would argue that [the witness] was lying when she claimed that fear had prevented her from coming forward sooner, we cannot conclude that it was an abuse of that court's wide discretion to allow [the witness] to testify, on direct examination, that she was relocated by the state immediately after giving her statement to the police due to fear of reprisals from the defendant and his brothers." Id., 260.

*Bermudez*, however, does not give prosecutors a free hand to introduce the topic of witness protection any time a witness' credibility is at issue. Even though we upheld the Appellate Court's affirmance of the judgment of conviction, we described that case as the "rare instance" in which it was appropriate for the prosecutor to introduce evidence of a witness' participation in a witness protection program on direct examination, and we cautioned that such evidence "implies to the jury that the witness needed protection from the defendant and tends to bolster the witness' credibility by raising the inference that [her] testimony must be truthful . . . ." Id., 257–59. To that end, we concluded that, "as a general matter . . . the state should not elicit testimony from a witness regarding the witness' participa-

[16] Although the trial court allowed the prosecutor to elicit details pertaining to the witness' relocation, it did not allow the prosecutor or the witness to use the phrase "witness protection program . . . ." (Internal quotation marks omitted.) *State* v. *Bermudez*, supra, 341 Conn. 255. This precaution was not taken in the present case.

tion . . . on direct examination but, rather, should wait until redirect examination to do so, and then only if the defense's cross-examination of the witness opened the door to such testimony." Id., 258. Although we noted that, under some circumstances, prosecutors may do so "in anticipation of a defense attack [on] the witnesses' credibility"; (internal quotation marks omitted) id.; we emphasized that the witness' participation in the program must be directly relevant to answering that anticipated challenge, and that the prosecutor may not exploit this evidence or present it in such a way that suggests the witness required protection because of threats made by the defendant. See id., 258–60; see also *United States* v. *Deitz*, 577 F.3d 672, 689 (6th Cir. 2009) (prosecutor should not refer to witness protection program unless need for protection is "obvious, relevant, [or] made an issue by defense counsel" (internal quotation marks omitted)), cert. denied, 559 U.S. 984, 130 S. Ct. 1720, 176 L. Ed. 2d 201 (2010); *United States* v. *Melia*, 691 F.2d 672, 675 (4th Cir. 1982) (evidence of participation in witness protection program "could easily lead a jury to believe that the defendant is the source of threats" and "should therefore be presented with great caution").

We conclude that, although the court improperly allowed Martin and Rivera to testify about their participation in witness protection, the defendant has not demonstrated that doing so resulted in a manifest injustice requiring reversal. Because there are substantive differences in the witnesses' cooperation agreements, the witnesses' relationship to the events at issue in this appeal, and the way that the relevant evidence was presented, we will address their circumstances separately.

A

Before Martin testified, defense counsel objected to the prosecutor's introduction of Martin's cooperation

agreement into evidence. Defense counsel's objection was based on the agreement's "truthfulness language," which, he argued, "essentially . . . has the prosecutor vouching for the truth of the witness before she testifies . . . ." Defense counsel requested in the alternative that, if the trial court deemed the cooperation agreement admissible, it provide a limiting instruction on that portion of the agreement or redact it altogether. Defense counsel made no mention of the language in the agreement providing that, in exchange for Martin's truthful testimony at the defendant's trial, the state would "make reasonable efforts" to enroll her in the witness protection program and to afford her benefits accordingly. The court overruled the objection.[17]

When the prosecutor introduced the cooperation agreement during direct examination, Martin testified that she was in witness protection and that the state was providing her with room and board, as well as money for expenses. The prosecutor also introduced two memoranda that detailed Martin's witness protection expenditures to date and discussed additional assistance that she had been offered for her "permanent relocation . . . ."[18] These memoranda included no

[17] The court instructed the jury on the cooperation agreements in relevant part: "[N]otwithstanding any language contained in the cooperation agreement signed by . . . Rivera and . . . Martin, it is your exclusive role to determine the credibility and believability of those witnesses. In other words, you and you alone are to determine whether any evidence offered by . . . Rivera and . . . Martin is to be believed wholly, partly, or not at all, irrespective of any language in the cooperation agreement that may suggest otherwise."

[18] Martin signed her agreement on February 16, 2022, the same day that she testified. Defense counsel noted that an unsigned copy was given to him that morning but made no further comment about the timing. It is unclear from the record, therefore, to what extent the defense was familiar with the agreement and how it would be used at trial. Although the agreement provides that the state *would* make reasonable efforts to enroll Martin in the program, the memoranda indicate that she had already received approximately $2500 in benefits and had been offered additional funding to assist in her relocation from the area. Because we assume that these payments were made in compliance with the statutory requirements outlined in General Statutes §§ 54-82t and 54-82u, it appears that the status of the

fewer than ten instances of the phrase "witness protection." Defense counsel did not object to Martin's testimony or to the admission of the memoranda.

On cross-examination, defense counsel did not question Martin about her witness protection arrangement, concentrating instead on her criminal history and history of drug use. During his closing argument, defense counsel noted that Martin had "been getting money all along" and suggested that she had a motive to "come in here and tell you whatever she thinks the state wants to hear." During the prosecutor's rebuttal closing argument, he commented that Martin's testimony had been corroborated and added: "Do you think she was scared? She's in witness protection now." The court instructed the jury that Martin had been "eligible for certain financial and other benefits in connection with her testimony in this case," and that the jury could infer that she had a motive to inculpate the defendant. Defense counsel did not request, and the court did not give, a limiting instruction that the evidence related to witness protection could be used only to assess Martin's credibility.

We are not persuaded that the present case represents the "rare instance" identified in *State* v. *Bermudez*, supra, 341 Conn. 259, in which it would have been appropriate for the prosecutor to elicit testimony on direct examination about Martin's participation in witness protection, as outlined in her cooperation agreement, or to introduce the memoranda outlining the benefits that she received through that program. Although the state makes a cursory suggestion in its brief to this court that Martin had "reservations" about identifying the defendant, this theory is undermined by her own testimony. Unlike in *State* v. *Bermudez*, supra, 246, in which it was all but certain that the defense

state's arrangement with Martin was not accurately reflected in the February 16, 2022 agreement.

would use the witness' twelve year delay in reporting the crime to suggest that she was not reliable and would challenge her claim that her fear prevented her from coming forward sooner, in the present case, Martin had not hesitated to cooperate with law enforcement; in fact, she told the police that she had seen the defendant in Rivera's rental car on the night of the shooting when she was interviewed about one month later. There is also no claim that Martin unexpectedly changed her story in a way that could only be explained by her sudden entry into a protection program, or that the prosecutor and the trial court knew in advance of her testimony that the defense intended to challenge her credibility during cross-examination on the ground that she was receiving protection from the state.

The state argues that Martin's testimony was necessary because the defense would inevitably have used her participation in witness protection to impeach her credibility. Defense counsel, however, never cross-examined Martin about the payments she received or her reason for entering the program, and there was no suggestion before Martin testified that he would do so. Although defense counsel vigorously attacked Martin's credibility on cross-examination, his questions focused on her lengthy criminal history, her extensive drug use, and the inconsistencies between her trial testimony and the statements that she had made to the police. Martin's relocation had no apparent bearing on any of these issues, and it was only in his closing argument that defense counsel mentioned the financial benefits that Martin received in return for her testimony.

On this record, we find no support for the state's assertion that the defense inevitably would have made strategic use of Martin's participation in the witness protection program to impeach Martin's credibility. We made clear in *Bermudez* that evidence of a witness' participation in witness protection should be admitted

with great caution and that prosecutors generally should not elicit that evidence on direct examination, unless there is no question that the defense would use it to impeach the witness or that eliciting such evidence is necessary to counter an argument from the defense about the witness' credibility. Id., 258. Under these circumstances, we conclude that it was an obvious, readily discernible error to allow the prosecutor to proactively present evidence that Martin was in the witness protection program during his direct examination.

These significant concerns notwithstanding, we are unable to conclude that the defendant met his burden of demonstrating that a manifest injustice resulted from the admission of this evidence. The concern underlying the practice of not allowing a jury to hear that a witness is receiving protection is that doing so may suggest that the witness must be kept safe from the defendant. Neither Martin nor the prosecutor, however, stated that the defendant had ever threatened Martin or that she was seeking protection from him.[19] See, e.g., id., 263 (noting that evidence had not been presented in way that suggested witness was in witness protection because of threats by defendant); see also *United States* v. *Vastola*, 899 F.2d 211, 236 (3d Cir.) (recommending that courts assessing prejudicial impact of witness protection testimony consider whether it "specifically inculpates the defendant as the source of threats to the witness"), vacated on other grounds, 497 U.S. 1001, 110 S. Ct. 3233, 111 L. Ed. 2d 744 (1990). We agree that "the potential for prejudice is slight [when the witness protection] testimony only vaguely suggests that the witness was placed in the program because of threats

[19] When Martin was asked on redirect examination why she needed protection, she testified that she was familiar with the defendant's gang affiliation and "definitely" thought that "something would happen" to her if she encountered someone with the same affiliation after testifying. Defense counsel objected to the prosecutor's questioning, and the court struck the exchange from the record.

emanating from the defendant," as in the present case. *United States* v. *Vastola*, supra, 236.

We also note that the prosecutor did not exploit the evidence at issue. Unlike other cases in which the prosecutor elicited "dramatic" and "excessive" testimony about witness protection from multiple witnesses; *United States* v. *Melia*, supra, 691 F.2d 676; the prosecutor's questioning of Martin on that topic was brief. The prosecutor did not mention the expenditure memoranda again after establishing that they documented Martin's benefits, and he referenced her protection arrangement only once in his rebuttal closing argument. Martin's credibility, moreover, had already been called into question on other grounds. Martin admitted that she had been under the influence of drugs on the night of the incident, which affected her ability both to observe and to remember what had taken place, and that she had also been "high" the first time she spoke to the police. Martin also acknowledged on the stand that other statements she made about the shooting were "probably confusing" and likely inaccurate. Consequently, it is doubtful that the fact that Martin received relocation assistance from the state would have been determinative in assessing her reliability as a witness. Moreover, although Martin's testimony that the defendant was in Rivera's rental car that evening was corroborated by other witnesses and was consistent with the physical evidence, she did not witness the shooting itself. Given these circumstances, the defendant failed to meet his burden of proving that allowing the evidence of Martin's participation in the witness protection program resulted in a manifest injustice.[20]

[20] Although the defendant argues that the court should have instructed the jury that it could not use this evidence to demonstrate propensity or character, defense counsel did not request such an instruction. We have previously acknowledged, however, that the "best course" is to give a limiting instruction when admitting such evidence to reduce the potential prejudice to the defendant. *State* v. *Bermudez*, supra, 341 Conn. 262 n.17.

B

Rivera, who was incarcerated at the time of trial on charges related to the victim's murder, was the state's final witness. Rivera also testified pursuant to a cooperation agreement, although hers did not include any reference to witness protection. On direct examination, however, Rivera testified that, "in addition to" her agreement, the state agreed to provide protection to her family.[21] She later testified that the defendant, in reference to the shooting, told her that "he would do the same thing to [her]" if she said anything. Defense counsel cross-examined Rivera about the terms of her cooperation agreement but did not question her about the protection her family was purportedly receiving. During closing argument, the prosecutor referenced Rivera's testimony that the defendant had threatened to kill her if she told anyone what he had done, and indicated that this explained her unwillingness to testify for more than one year after the murder: "[W]hen would you feel safe to testify? When you're locked up, when you feel no one could get to you, or when your family is offered witness protection." During his closing argument, defense counsel suggested that Rivera was not credible because she did not cooperate until the state offered her a plea deal. In response, the prosecutor again brought up the defendant's alleged threat in his rebuttal argument: "Now, she didn't come forward for eighteen months or so . . . Why? Because she saw her boyfriend murder someone in a parking lot. . . . Do you think she was in fear of her own physical safety? She requested that her family be placed in witness protection." The court instructed the jury that Rivera and her family could benefit from her testimony and that

[21] It is unclear from the record when these protective services were offered to Rivera's family members, whether the protection was given in return for Rivera's testimony at trial, and whether those arrangements were formalized in a written agreement, as required by General Statutes § 54-82u (a).

the jury could infer that she had a motive to inculpate the defendant, although no instruction on criminal propensity was given.

We are not persuaded that it was necessary for the prosecutor to elicit, during Rivera's direct examination, that Rivera had asked for her family to be placed in witness protection. Rivera's supposed delay in coming forward was not a central issue in the trial, as was the case in *State* v. *Bermudez*, supra, 341 Conn. 260. It was reasonable to anticipate that the defense would challenge Rivera's credibility on the grounds that she was a coconspirator to the murder and that she stood to benefit from testifying against him. Indeed, defense counsel's cross-examination focused heavily on Rivera's cooperation agreement and the various incentives that she had to identify the defendant as the perpetrator, including a reduction in charges and the right to argue for a lesser sentence. There is nothing in the record, however, to suggest that the prosecutor knew in advance that the defense would attack Rivera's credibility because of the benefit given to her family in the form of witness protection, and the record reveals that such an attack never materialized. The prosecutor suggested in his closing argument that Rivera's reluctance to cooperate with law enforcement was tied to her concern for her family's safety. On cross-examination, however, Rivera testified that she had spoken with the police about the shooting *before* entering into any agreements with the state. Accordingly, allowing Rivera to testify that her family was participating in witness protection, before defense counsel could have opened the door to such testimony on cross-examination, was an obvious, readily discernible error.

Again, however, we have no basis to conclude that allowing this testimony resulted in a manifest injustice. Unlike Martin, who never suggested that she specifically feared the defendant, Rivera testified without

objection that she had watched the defendant shoot and kill a rival gang member and that he had threatened to kill her if she said anything about the murder. As a result, the jury was already aware that Rivera believed that the defendant was dangerous. We note as well that other evidence placing the defendant at the scene of the shooting was entirely consistent with Rivera's testimony to that effect. Multiple witnesses testified that they had seen the defendant in the passenger seat of Rivera's rental car that night. Video surveillance footage from the hotel parking lot captured a man matching the defendant's description exiting the passenger side door of that car and dropping what was later determined to be a Taco Bell wrapper onto the ground. Cell site location data placed Rivera at a nearby Taco Bell shortly before she and the defendant arrived at the hotel, and the defendant's DNA was detected on the wrapper. Given the strength of the evidence pointing to his guilt and the evidence detailing his threats to the witness, the defendant has failed to meet the high bar of proving that the admission of Rivera's testimony related to her family's participation in the witness protection program meaningfully altered the course of the trial. The admission of this evidence, therefore, did not result in a manifest injustice that compels reversal.

In sum, the facts of the present case do not represent one of the "rare instance[s]" in which, under *State* v. *Bermudez*, supra, 341 Conn. 259, it would have been permissible for the prosecutor to elicit testimony on direct examination about a witness' involvement in witness protection. The reasons why a jury might have been expected to doubt the credibility of these witnesses had little to do with their participation in witness protection, and those concerns were unlikely to have been mitigated by a discussion of those facts. Although we outlined in *Bermudez* that evidence related to witness protection warrants caution and sensitivity, that

guidance was not followed in the present case. Id., 258. There was an obvious, discernible error. Because a manifest injustice did not result, however, we will not overturn the defendant's conviction on this ground. See, e.g., *State* v. *Hinckley*, 198 Conn. 77, 87–88, 502 A.2d 388 (1985) (reversal under plain error doctrine is reserved for errors that "[affect] the fairness and integrity of and public confidence in the judicial proceedings").

III

We turn next to the defendant's claim that the trial court abused its discretion by admitting evidence that Rivera had pleaded guilty to, inter alia, conspiracy to commit murder. At the time of the defendant's trial, Rivera faced a maximum sentence of fifteen years of incarceration with the right to argue for less time in exchange for her cooperation. The defendant filed a motion in limine requesting that Rivera be prohibited from identifying the charges to which she pleaded guilty related to the victim's murder. At oral argument on the motion, the prosecutor opposed any limitation on the admissibility of Rivera's cooperation agreement. The court denied the motion, referring to its earlier ruling on the admissibility of Martin's cooperation agreement and stating that its instruction on such agreements would sufficiently balance the concerns of all parties. When Rivera testified, her cooperation agreement was admitted as a full exhibit over defense counsel's objection, and its terms were displayed on a screen and read aloud. Rivera acknowledged that she had pleaded guilty to conspiracy to commit murder and to hindering prosecution in the first degree. During the prosecutor's closing argument, he referred to Rivera as a coconspirator, reminded the jury that she had pleaded guilty to conspiracy to commit murder, and suggested that she was "in a unique position" to describe the details of the murder. The court instructed the jury that it "must not consider

. . . Rivera's guilty plea to an offense connected to the crimes charged here as any evidence of the defendant's guilt" and that "[t]he fact that Rivera has entered a plea of guilty is not evidence of the guilt of any other person."

The defendant contends that the names of the crimes were more prejudicial than probative and that the court effectively allowed Rivera to tell the jury that she and the defendant had agreed to commit murder. Although the defendant acknowledges the need for transparency with respect to cooperation agreements, he argues that this interest would have been satisfied if Rivera simply testified that she had pleaded guilty to *some* offense related to this case and that she was testifying pursuant to a cooperation agreement. In response, the state contends that excluding any part of Rivera's cooperation agreement may have interfered with the jury's ability to assess her credibility and that the court's instruction was sufficient to mitigate any concerns over the prejudicial impact of that evidence.[22] Because we conclude that there was no harm in the admission of evidence concerning the specific crimes to which Rivera pleaded guilty, we need not decide whether it constituted an abuse of the court's discretion.

[22] Although the Connecticut Division of Criminal Justice's policies correctly underscore that cooperation agreements generally should be reduced to writing, signed by the witness, disclosed to the defense, and made part of the trial record; see Division of Criminal Justice, Connecticut Prosecution Standards (1st Ed. 2023) § 2-10.9, p. 78, available at https://portal.ct.gov/-/media/DCJ/07202023DCJ-CT-Prosecution-Standards.pdf. (last visited August 5, 2024); we emphasize that not every aspect of a written cooperation agreement is, per se, admissible. See, e.g., *State* v. *Flores*, 344 Conn. 713, 736, 281 A.3d 420 (2022) ("the state must take care in drafting its cooperation agreements, and trial courts must carefully examine their language before admitting them fully into evidence"). In determining admissibility, a trial court should review the agreement in its entirety to determine if the probative value of each provision outweighs the danger of unfair prejudice and require the state to redact any unfairly prejudicial material. See Conn. Code Evid. § 4-3; see also, e.g., *State* v. *Calhoun*, 346 Conn. 288, 301, 289 A.3d 584 (2023) (recognizing that probative value of gratuitous references to witness' obligation under agreement to tell truth are "negligible and outweighed by their prejudicial effect").

It is well established that "the guilty plea of one or more persons jointly charged with a crime cannot be admitted in the trial of another so charged to establish that the crime was committed." (Internal quotation marks omitted.) *State* v. *Just*, 185 Conn. 339, 348, 441 A.2d 98 (1981). As this court has previously acknowledged, such a plea is "merely a confession of guilt [that], having been made by one of those charged with the crime, can be no more than hearsay as to another who is so charged." *State* v. *Pikul*, 150 Conn. 195, 198, 187 A.2d 442 (1962). A witness' guilty plea is generally admissible, however, when it is offered to affect the credibility of the testifying codefendant or coconspirator. *State* v. *Just*, supra, 348; see also *State* v. *Butler*, 55 Conn. App. 502, 511, 739 A.2d 732 (1999) ("guilty pleas and convictions may be introduced into evidence if the [coconspirator] or [codefendant] testifies at trial, so that the [fact finder] will have appropriate facts on hand to assess the [witness'] credibility" (internal quotation marks omitted)), aff'd, 255 Conn. 828, 769 A.2d 697 (2001). We have also previously advised that, when a plea is admitted under these circumstances, "a proper cautionary instruction to the jury should be given, generally upon [an] objection [that has been] overruled or sua sponte [when] the court views the potential for prejudice as likely."[23] *State* v. *Just*, supra, 348.

Courts in other jurisdictions have discussed the risks of allowing testimony naming the crime to which a coconspirator witness pleaded guilty, while generally

[23] The United States Court of Appeals for the Second Circuit and other federal appellate courts have made the same recommendation. See, e.g., *United States* v. *Prawl*, 168 F.3d 622, 626 (2d Cir. 1999) (district courts "should instruct the jury that the [codefendant's] plea may not be considered as evidence of the defendant's guilt"). Even the lack of such an instruction, however, does not necessarily constitute harmful error, and it is just one factor in a reviewing court's determination of whether a defendant has been unfairly prejudiced. In *Just*, this court suggested that the failure to give the instruction is more problematic if the defense had requested one or had objected to the testimony. *State* v. *Just*, supra, 185 Conn. 348–49.

concluding that such evidence may be admitted for certain limited purposes. Admission of a "guilty plea to a conspiracy charge carries with it more potential harm to the defendant on trial because the crime by definition requires the participation of another." *United States* v. *Gullo*, 502 F.2d 759, 761 (3d Cir. 1974). As the United States Court of Appeals for the Third Circuit has previously observed, a "jury could not fail to appreciate the significance of this and would realize . . . that 'it takes two to tango.' " (Citation omitted.) Id. Those concerns notwithstanding, "[w]hen a [coconspirator] testifies [that] he took part in the crime with which the defendant is charged, his credibility will automatically be implicated." (Internal quotation marks omitted.) *United States* v. *Universal Rehabilitation Services (PA), Inc.*, 205 F.3d 657, 666 (3d Cir. 2000).

The question that is ultimately before this court is whether the admission of this evidence, even if we were to assume it was improper, was harmful. "[W]hen an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [an improper ruling] is harmless in a particular case depends [on] a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a

fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Holley*, 327 Conn. 576, 616–17, 175 A.3d 514 (2018).

For several reasons, we conclude that the evidence specifying the crimes to which Rivera pleaded guilty did not substantially impact the jury's verdict. Most significant, the prosecutor did not offer this evidence to prove that the defendant committed the crimes for which he was being tried. Indeed, the court clearly instructed the jury that it was *not* to consider Rivera's plea as evidence of the defendant's guilt. See, e.g., *United States* v. *El-Battouty*, 38 F.4th 327, 330 (3d Cir. 2022) (suggesting that any prejudicial effect is typically cured by instructing jury that it may not use guilty plea of cooperating witness as evidence that defendant is guilty). In the absence of an indication to the contrary, a jury is presumed to have followed the court's instructions. *State* v. *Hughes*, supra, 341 Conn. 429. The instruction given by the court was consistent with our guidance in *Just* and effectively addressed defense counsel's concern that the jury would infer the defendant's guilt from Rivera's testimony.

The fact that the jury heard the details of Rivera's guilty plea, moreover, does not change the fact that she admitted that she had been present at the time of the crime and had participated in its commission. As the defendant acknowledges, Rivera was the state's key witness and described her own role in the incident in detail. She testified, subject to cross-examination, that she had driven the car from which the fatal shots were fired, that she had put the defendant on notice that a rival gang member was in the parking lot, and that the defendant was the shooter. See *United States* v. *Lombardo*, 582 Fed. Appx. 601, 615 (6th Cir. 2014) ("[e]ven though a [coconspirator's] guilty plea can be especially prejudicial if it is introduced in connection with the conspiracy for which the defendant is charged,

much of the potential for prejudice is negated when the [coconspirator] testifies about the underlying facts"), cert. denied sub nom. *Barkus* v. *United States*, 574 U.S. 1095, 135 S. Ct. 992, 190 L. Ed. 2d 870 (2015), and cert. denied, 574 U.S. 1173, 135 S. Ct. 1442, 191 L. Ed. 2d 397 (2015). As we noted previously in this opinion, Rivera's testimony was corroborated by other witnesses as well as video surveillance footage and physical evidence that placed her and the defendant at the scene. See part II B of this opinion. To the extent that the jury credited Rivera's testimony, they likely did so because that testimony was based on her firsthand knowledge of the events and was consistent with the other evidence, not because it had been told that she had pleaded guilty to the conspiracy charge.

The prosecutor, moreover, did not unduly emphasize Rivera's guilty plea in his closing argument. Although the prosecutor twice referred to Rivera as a "coconspirator," he did so only to highlight that her involvement in the crime made her testimony more credible, and defense counsel later used that same term when he questioned the veracity of her testimony. See, e.g., *State* v. *Ayala*, 333 Conn. 225, 235, 215 A.3d 116 (2019) (manner in which state used evidence in its closing argument is significant when evaluating harm); cf., e.g., *State* v. *Culbreath*, 340 Conn. 167, 195, 263 A.3d 350 (2021) (error was not harmless when prosecutor repeatedly drew jury's attention to defendant's inadmissible statements, arguing that they reflected his guilt). Finally, the defendant's theory was that he was not the passenger in Rivera's rental car, not that there had been no conspiracy between Rivera and her passenger. Whether such a conspiracy existed was not a central issue at trial. Although the defendant was charged with conspiracy to commit murder at the time the court allowed the prosecutor to introduce the names of the crimes to which Rivera pleaded guilty, the court subsequently

granted a judgment of acquittal on that count. Accordingly, the jury was never asked to decide whether the defendant had, in fact, conspired with Rivera to commit the murder. We are therefore confident, on the basis of this record, that the admission of this evidence did not substantially sway the jury's verdict.

IV

Finally, we address the defendant's claim that the prosecutor's remark in his closing argument that Rivera took responsibility for her actions by pleading guilty violated his right to a jury trial. During closing argument, the prosecutor made the following comment: "And [Rivera] did tell you her role in this case. She also told you she pled guilty to conspiracy. She took responsibility for her actions with regards to this case."[24] Defense counsel did not object or ask that the court take remedial action. On appeal, however, the defendant argues that, by highlighting the fact that Rivera pleaded guilty, the prosecutor improperly suggested that the defendant, her alleged coconspirator, should have done the same thing because he, too, was guilty. We disagree.

The right of a criminal defendant to a jury trial is enshrined in both the federal and state constitutions; U.S. Const., amend. VI; Conn. Const., art. I, § 19; and it is also guaranteed by statute. General Statutes § 54-82b.

[24] During trial, the prosecutor represented outside the jury's presence that Rivera pleaded guilty under the *Alford* doctrine. See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). As such, Rivera did not admit her guilt, but she acknowledged that "the state's evidence against [her was] so strong that [she was] prepared to accept the entry of a guilty plea nevertheless." (Internal quotation marks omitted.) *State* v. *Pentland*, 296 Conn. 305, 308 n.3, 994 A.2d 147 (2010). The defendant in the present case has not relied on the nature of Rivera's guilty plea to challenge the prosecutor's comment that Rivera "took responsibility" through it. We note that, by entering an *Alford* plea, "a defendant may be able to avoid formally admitting guilt at the time of sentencing, but he [or she] nonetheless consents to being treated as if he [or she] were guilty with no assurances to the contrary." *State* v. *Faraday*, 268 Conn. 174, 205, 842 A.2d 567 (2004).

In reviewing this claim, we employ the standard set forth by this court in *State* v. *Payne*, 303 Conn. 538, 34 A.3d 370 (2012). When a defendant raises a claim that an instance of prosecutorial impropriety has "infringed a specifically enumerated constitutional right," the defendant first has the burden of establishing the constitutional violation. Id., 563. Once the defendant has done so, "the burden is then on the state to prove that the impropriety was harmless beyond a reasonable doubt." Id. "[A] defendant who fails to preserve claims of prosecutorial misconduct need not seek to prevail under the specific requirements of [*Golding*], and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test." (Internal quotation marks omitted.) Id., 560.

The appropriate test of whether a constitutional violation has occurred is whether the prosecutor's language was "manifestly intended to be, or was . . . of such a character that the jury would naturally and necessarily take it to be a comment" on the defendant's exercise of his right to a fair trial.[25] (Emphasis omitted; internal quotation marks omitted.) *State* v. *A. M.*, 324 Conn. 190, 201, 152 A.3d 49 (2016). Just as "allowing a prosecutor to comment on the defendant's refusal to testify would be equivalent to imposing a penalty for exercising his constitutional right to remain silent"; id., 200; the state may not use a defendant's decision to exercise his right to a jury trial against him. Consequently, it is inappropriate for a prosecutor to comment—either directly or indirectly—on a defendant's exercise of that right. See, e.g., *State* v. *Thompson*, 118 N.C. App. 33, 41, 454 S.E.2d

[25] The " 'naturally and necessarily' " test often is used when a prosecutor is perceived as having commented on a defendant's failure to testify. *State* v. *Jose R.*, 338 Conn. 375, 389, 258 A.3d 50 (2021). Federal courts, however, have applied this test when the alleged violation involves a defendant's right to a jury trial under the sixth amendment to the United States constitution, as it does in the present case. See, e.g., *United States* v. *Ochoa-Zarate*, 540 F.3d 613, 617–18 (7th Cir. 2008).

271 (stating that "prosecutorial argument complaining a criminal defendant has failed to plead guilty . . . is no less impermissible than an argument commenting [on] a defendant's failure to testify" and discerning "no distinction between the two in terms of intrusion [on] a criminal defendant's constitutional rights"), review denied, 340 N.C. 262, 456 S.E.2d 837 (1995).

As other courts have previously observed, a prosecutor's reference to the guilty plea of a witness or codefendant may implicate the defendant's decision to exercise his right to a jury trial. See, e.g., *Brooks* v. *State*, 763 So. 2d 859, 864 (Miss. 2000) (prosecutor's criticism of defendant for rejecting plea offer that was accepted by codefendant suggested that his guilt was "foregone conclusion"). Courts have generally distinguished, however, between comments that invoke a guilty plea as evidence of a witness' credibility, and those that contrast a witness' decision to plead guilty with the defendant's decision to go to trial. In *State* v. *Dillard*, 66 Conn. App. 238, 261–62 and n.25, 784 A.2d 387, cert. denied, 258 Conn. 943, 786 A.2d 431 (2001), for example, the Appellate Court held that the prosecutor's statements that one codefendant had "admitted his responsibility" and that another had "put the case behind him" did not infringe on the defendant's right to a jury trial because their guilty pleas were used solely to bolster their credibility. (Internal quotation marks omitted.) Id., 261–62 and n.25. There is broad agreement, however, that drawing an unfavorable comparison with a defendant who has elected to go to trial—for instance, by adding that the defendant has *not* taken responsibility—is unacceptable. See, e.g., *Gabriel* v. *State*, 254 So. 3d 558, 564 (Fla. Dist. App. 2018) (prosecutor's repeated comparisons to witness who pleaded guilty violated defendant's right to fair trial); *People* v. *Williams*, 158 N.E.3d 1143, 1155 (Ill. App.) (defendant's right to fair trial was violated when prosecutor noted witness' guilty

plea and then accused defendant of not taking responsibility), appeal denied, 147 N.E.3d 696 (Ill. 2020).

In the present case, we are not persuaded that the prosecutor's comment was a veiled suggestion that the defendant should not have gone to trial. Although prosecutors must exercise caution when discussing a witness' guilty plea, such references are not categorically forbidden. Here, the prosecutor never mentioned the defendant's decision to go to trial. But see, e.g., *People* v. *Herrero*, 324 Ill. App. 3d 876, 887, 756 N.E.2d 234 (2001) (prosecutor's assertion that defendant wanted jury trial in hope that one of jurors would be "suckered in" was "outrageous" (internal quotation marks omitted)), appeal denied, 198 Ill. 2d 600, 766 N.E.2d 242, cert. denied, 536 U.S. 967, 122 S. Ct. 2682, 153 L. Ed. 2d 853 (2002). Additionally, the prosecutor's observation that Rivera "took responsibility for her actions" did not juxtapose Rivera's choice to plead guilty with the defendant's choice to go to trial, because the prosecutor did not suggest that the defendant was avoiding accountability; but see, e.g., *United States* v. *Ochoa-Zarate*, 540 F.3d 613, 617 (7th Cir. 2008) ("[The witness has] at least taken responsibility for his own actions. As of today, this defendant still has not." (Emphasis omitted; internal quotation marks omitted.)); or that he, too, should have taken a plea deal. But see, e.g., *Brooks* v. *State*, supra, 763 So. 2d 862–63 (defendant "was offered the same thing [the witness] was" but "took a chance rolling the dice," and was "relying on [the jury] to turn him loose" (internal quotation marks omitted)).

Instead, the prosecutor commented on Rivera's plea as part of his argument that she was a reliable witness whose testimony was consistent with the evidence presented. This discussion focused entirely on Rivera's credibility, which the prosecutor suggested was buttressed by her admitted involvement in the crime. In

highlighting the unique value of eyewitness testimony from coconspirators, the prosecutor briefly referenced Rivera's guilty plea to reinforce that she was such a witness. This statement was particularly relevant in light of the aforementioned questions about Rivera's motivations for testifying, as evidenced by the prosecutor's acknowledgment that "we don't get to pick our witnesses" and that Rivera had "some baggage . . . ." In this context, it is unlikely that the jury would have "naturally and necessarily" perceived the comment that Rivera took responsibility as an implicit criticism of the defendant's exercise of his right to a jury trial. Because the prosecutor confined his remarks to the witness' choice to plead guilty and avoided any negative characterization of the defendant, we conclude that no constitutional violation occurred.

The judgment is affirmed.

In this opinion D'AURIA, MULLINS and ALEXANDER, Js., concurred.

ECKER, J., with whom ROBINSON, C. J., joins, concurring in part and concurring in the judgment. When a juror sleeps for at least one hour during the presentation of evidence in a murder trial, the trial court must do more than simply monitor the sleeping juror and discuss the matter with counsel. As we observed in *State* v. *Brown*, 235 Conn. 502, 668 A.2d 1288 (1995), there are "significant public interests" at stake during a criminal trial, which include not just "the liberty of the accused, but also [protecting] the entire citizenry from overzealous or overreaching state authority." (Internal quotation marks omitted.) Id., 526–27. Given the important public interest in fair and just criminal trials, I agree with Justice McDonald that "it is the duty of the *court*, and not of the *defendant*, to ensure that a preliminary inquiry is conducted," that the trial court's

inquiry in the present case was inadequate, and that, "under *Brown*, a more serious inquiry was required." (Emphasis in original.)

That said, I disagree with Justice McDonald that the trial court's failure to conduct such an inquiry was structural error that deprived the defendant, Trevor Monroe Outlaw, of his constitutional right to a fair trial. See, e.g., *United States* v. *McKeighan*, 685 F.3d 956, 974–75 (10th Cir.) (sleeping juror did not deprive defendant of fair trial), cert. denied, 568 U.S. 1019, 133 S. Ct. 632, 184 L. Ed. 2d 411 (2012); *United States* v. *Fernández-Hernández*, 652 F.3d 56, 74–75 (1st Cir.) (same), cert. denied sub nom. *Gonzalez-Mendez* v. *United States*, 565 U.S. 924, 132 S. Ct. 353, 181 L. Ed. 2d 223 (2011); *United States* v. *Freitag*, 230 F.3d 1019, 1023–24 (7th Cir. 2000) (same). In light of the defendant's legitimate concerns regarding the racial composition of the jury and decision not to ask the trial court to inquire further, the duration of time that the juror was observed sleeping in relation to the overall length of the trial, and the nature of the evidence adduced during that short period of time,[1] I conclude that the absence of a more serious inquiry in this case did not render the defendant's trial fundamentally unfair or the proceedings manifestly unjust. I therefore agree with the majority that "the defendant is unable to establish the existence of a constitutional violation, as required under the third prong of" *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Part I of the majority opinion. Accordingly, I concur in part I of the majority opinion.[2]

[1] It is unclear from the record, but it appears that the sleeping juror may have missed all or part of the testimony of three witnesses: (1) a paramedic who responded to the shooting, (2) a detective who collected physical evidence from the crime scene, and (3) a detective who collected a buccal swab from the defendant.

[2] I agree with and join parts II, III and IV of the majority opinion.

McDONALD, J., concurring in part and dissenting in part. The expectation that jurors will be awake during the presentation of evidence in a criminal trial would seem to be an obvious one. This is because, when a juror is sleeping, the juror cannot possibly hear the testimony, observe the body language of witnesses or view exhibits in the courtroom. It is for this reason that sleeping or inattentiveness is widely considered a form of juror misconduct that warrants reversal when it has denied a criminal defendant a fair trial. See, e.g., *Commonwealth* v. *McGhee*, 470 Mass. 638, 645–46, 25 N.E.3d 251 (2015); see also, e.g., *State* v. *Hughes*, 341 Conn. 387, 417–18, 267 A.3d 81 (2021). This court, in discussing the implications of juror misconduct, has explained that "[a] great deal is at stake in a criminal trial" because "[t]he accused . . . has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." (Internal quotation marks omitted.) *State* v. *Brown*, 235 Conn. 502, 526–27, 668 A.2d 1288 (1995); accord *In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).[1] This court has therefore recognized that, although "the trial court has broad discretion to determine the form and scope of the proper response to allegations of jury misconduct"; *State* v. *Brown*, supra, 523–24; in exercising that discretion, it must "zealously protect the rights of the accused." (Internal quotation marks omitted.) Id., 524. Among those rights is that of a fair trial by a panel of impartial jurors. See, e.g., id., 523. "Jury impartiality is a core requirement of the right to trial by jury guaranteed by the constitution of Connecticut, article first, § 8, and by the sixth amendment to

[1] Similarly, I would posit that the state, as the representative of the people, has a compelling interest in vindicating the rights of the community and the interests of crime victims.

the United States constitution." Id., 522. Today, a majority of this court permits the trial courts in our state to ease up on the vigilance with which they must safeguard the rights of the accused and allows the trial courts to take a decidedly more relaxed approach to ensuring that a criminal defendant receives a fair trial. The majority focuses on the fact that defense counsel failed to protect the defendant's constitutional rights rather than the fact that the trial court, on the basis of its own independent observation of the courtroom proceedings, did not take affirmative measures to address the situation when it observed a juror sleeping for more than one hour during critical testimony in the trial.

The defendant, Trevor Monroe Outlaw, appeals from his conviction of murder, criminal possession of a firearm, and carrying a pistol without a permit to this court. The defendant raises four issues on appeal, namely, that (1) the trial court abused its discretion when it failed to take any action regarding a sleeping juror, (2) the trial court erred by allowing the prosecutors to elicit testimony pertaining to witnesses' involvement in witness protection programs, (3) the trial court erred in admitting evidence that the state's key witness pleaded guilty to conspiracy for the victim's shooting, and (4) the prosecutor improperly commented on the defendant's coconspirator's pleading guilty to conspiracy in violation of the defendant's right to a jury trial. I agree with the majority as to its resolution of the second, third, and fourth issues on appeal. See parts II, III and IV of the majority opinion. I do not agree with the majority's conclusion that the trial court did not abuse its discretion in failing to take appropriate action in investigating the juror misconduct at issue—the sleeping juror—and, accordingly, I respectfully dissent as to that issue. See part I of the majority opinion.

I agree with the majority's summary of the facts that the jury reasonably could have found pertaining to the

crimes at issue in this case. For purposes of this opinion, however, I briefly summarize the facts surrounding the trial court's response to the sleeping juror. During a recess on the first day of trial, the trial court met with counsel and informed them that it had noticed one of the jurors sleeping during the presentation of evidence. Defense counsel stated that he had not observed the behavior and communicated his opposition to immediately removing the juror. Following this conversation, but prior to summoning the jurors, the court stated on the record that it "noted, [at] about 2:30 [p.m.], that [the juror's] eyes had been closed a little bit before that and did [jerk] open, but, essentially, from about 2:30 [p.m.] . . . [until] we recessed at 3:33 [p.m.] or so, he looked to be asleep." The court further noted that "[the court] clerk noticed it as well, as did the monitor, as did, I believe, at least two of the marshals." When the prosecutors were asked whether they had made similar observations, one of the prosecutors responded that both prosecutors had observed the juror sleeping, "not only [during] this afternoon, but also [during] this morning's session" and "during the court's opening remarks before trial commenced." The prosecutor further stated that an "intern [in the state's attorney's office], the victim's family members, as well as several other individuals, witnessed the same behavior." The court then noted that it would "not contemplate any actions at this point" but that it was "contemplating excusing [the juror] if [the court saw] a repeat of that—what appears to be that conduct." That same day, one of the prosecutors mentioned that he again noticed the juror sleeping during the testimony of one or both of the police detectives who had investigated the crimes. After defense counsel again stated that he was not sure whether he had noticed the behavior, the trial court responded that, "[i]f [the court sees that the juror is] doing it again, [the court is] going to take action." The issue was not addressed further during the trial.

On appeal, the defendant asserts that the trial court abused its discretion when it failed to take any action regarding the sleeping juror. The defendant concedes that the issue is unpreserved but argues that it can be reviewed pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), because the record is adequate for review and the claim is of constitutional magnitude. Alternatively, the defendant argues that the issue can be reviewed for plain error. See, e.g., *State* v. *Blaine*, 334 Conn. 298, 305–306, 221 A.3d 798 (2019). In support of these contentions, the defendant argues that inattentiveness by a juror is considered a form of juror misconduct and that the trial court had a duty to act when it noticed the juror sleeping throughout the day. The defendant contends that the trial court has this duty to act even in the absence of a specific request by the defense and that, in this case, "the court utterly failed to protect the defendant's rights." The defendant contends that the trial court's lack of action in this case amounts to structural error that requires a new trial. For its part, the state argues that this court should not review the defendant's claim because defense counsel induced the trial court not to take any further action regarding the juror. Alternatively, the state asserts that the defendant cannot successfully prove a constitutional violation under *Golding* or plain error because the trial court reasonably concluded that no further action was warranted.

"Under *Golding*, a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless

error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Morel-Vargas*, 343 Conn. 247, 253, 273 A.3d 661, cert. denied, U.S. , 143 S. Ct. 263, 214 L. Ed. 2d 114 (2022).

I agree with the majority's conclusion that the first two prongs of *Golding* are satisfied in this case. I part ways with the majority, however, on the question of whether the defendant has satisfied the third prong of *Golding* by demonstrating that a constitutional violation had occurred that deprived him of a fair trial. On this issue, the majority, quoting *State* v. *Collins*, 38 Conn. App. 247, 259, 661 A.2d 612 (1995), contends that the defense's "failure to seek [a] determination of [the] nature and extent of [the] alleged misconduct 'seriously undermine[d]' [the] claim that [the defendant] was deprived of [a] fair trial . . . ." Text accompanying footnote 10 of the majority opinion. This court, in *Brown*, however, explicitly held that it is the duty of the *trial court*, and not of the *defense*, to ensure that a preliminary inquiry is conducted when faced with allegations of jury misconduct. See *State* v. *Brown*, supra, 235 Conn. 526 ("we now hold that henceforth a trial court must conduct a preliminary inquiry, on the record, whenever it is presented with any allegations of jury misconduct in a criminal case, regardless of whether an inquiry is requested by counsel" (footnote omitted)). This court's holding in *Brown*, as the majority points out, finds support in the decisions of federal and state appellate courts. See, e.g., *United States* v. *Barrett*, 703 F.2d 1076, 1083 (9th Cir. 1983) (holding that trial court's failure to "conduct a hearing or [to] make any investigation into the [sleeping juror] question" was abuse of discretion); *People* v. *Franqui*, 123 App. Div. 3d 512, 512, 999 N.Y.S.2d 40 (2014) (holding that "[t]he [trial] court should have conducted a probing and tactful inquiry

. . . into whether, and to what extent, the juror had been sleeping, in order to determine whether this behavior rendered him grossly unqualified" (citation omitted; internal quotation marks omitted)), appeal denied, 25 N.Y.3d 1163, 36 N.E.3d 98, 15 N.Y.S.3d 295 (2015).

I am sensitive to defense counsel's desire, which was adamantly communicated to the trial court, that the sole Black juror not be removed from the jury. I am equally sensitive to the incredibly difficult spot that defense counsel's expressed wishes placed the trial court in—on one hand, the court having to consider the interest of a Black defendant to have at least one member of the jury be of the same race as him, and, on the other hand, the court's obligation to ensure that a jury is fully engaged in, and awake for, the presentation of the evidence. Recognizing the clear conundrum that the trial judge faced in this case, I fully appreciate that the judge tried to do his level best in the moment to navigate those shoals. But I also must note that nothing in this record suggests that defense counsel's wish to have the juror remain was an effort to induce error on the part of the trial court. See, e.g., *State* v. *Cruz*, 269 Conn. 97, 105, 848 A.2d 445 (2004) ("[i]t is well established that a party who induces an error cannot be heard to later complain about that error"). Rather, the record makes clear, and the majority points out as well, that defense counsel did not oppose all actions capable of being taken by the trial court in the present case, such as questioning the juror. See part I of the majority opinion. Furthermore, regardless of what action by the court defense counsel was in favor of, or opposed to, it is ultimately the hard job of the trial judge to ensure that the trial is conducted appropriately, and, thus, it is the trial judge alone who holds the decision-making power in such a difficult circumstance. See, e.g., *State* v. *Robertson*, 254 Conn. 739, 769, 760 A.2d 82 (2000) ("In a criminal trial, the judge is more than a mere moderator of

the proceedings. It is his responsibility to have the trial conducted in a manner which approaches an atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding." (Internal quotation marks omitted.)).

Furthermore, the majority finds much support in our holding in *State* v. *Brown*, supra, 235 Conn. 526, that "a preliminary inquiry of counsel" may be an adequate response to allegations of juror misconduct. See part I of the majority opinion. It is true that, in *Brown*, this court determined that, in some circumstances, a preliminary inquiry of counsel may be all that is necessary for a trial court to "assure itself that a defendant's constitutional right to a trial before an impartial jury has been fully protected." *State* v. *Brown*, supra, 528. I disagree, however, with the majority's conclusion that such an inquiry was all that was required in the present case. In *Brown*, this court stated that, "[t]he more obviously serious and credible the allegations [of jury misconduct], the more extensive an inquiry is required . . . ." Id., 531.

There is no question that, in the present case, the allegation of juror misconduct was credible, as it came from the judge himself, and was apparently confirmed to him by several other court personnel and even the prosecutorial team. As to the seriousness of the allegation, there can be no real doubt that a juror who has potentially missed one hour of testimony, by the judge's own observation, creates a serious threat to the defendant's constitutionally guaranteed right to a fair trial.[2] Common sense dictates the conclusion that a juror who is asleep during the presentation of testimony could not possibly be said to have fairly and impartially con-

[2] In his brief, the defendant points out that the testimony of the police officers heard on the day the juror was sleeping included information on where shell casings, a Taco Bell food wrapper, and a beer can were found, which the state used to place the defendant and the car at the exact location where the shooting occurred.

sidered all of the evidence.[3] Indeed, the trial judge in this case agreed, stating that "a sleeping juror obviously has not heard all the evidence and that inattentiveness could compromise the defendant's guaranteed right to a jury trial." Given the gravity of the potential constitutional violation at play, I would conclude that, under *Brown*, a more serious inquiry was required.

It is highly unlikely that the limited course of action taken by the judge in this case, i.e., inquiring with counsel, could have possibly assured him that the defendant's right to an impartial jury was fully protected, as neither counsel could say whether the juror was, in fact, sleeping. The only person with the information necessary to make a determination as to whether, and for how long, the juror was sleeping, was the juror himself. Because the trial court neglected to question the juror on this issue, it could not possibly have been assured that the defendant had the benefit of an impartial jury or received a fair trial. Therefore, I conclude that the trial court abused its discretion by failing to conduct a more robust inquiry into the misconduct. See, e.g., *State* v. *Brown*, supra, 235 Conn. 524 ("[w]e have limited our role, on appeal, to a consideration of whether the trial court's review of alleged jury misconduct can fairly be characterized as an abuse of its discretion").

Due to the unpreserved nature of this claim, however, the question becomes whether the trial court's abuse of discretion in this case constituted a constitutional violation that "deprived the defendant of a fair trial . . . ." *State* v. *Golding*, supra, 213 Conn. 240; see *In re Yasiel R.*, supra, 317 Conn. 781. I conclude that it did. "[T]he right to a trial by jury guarantees to the

[3] Taken a step further, would a juror who was physically absent from the courtroom for one hour during the presentation of evidence be considered capable of fairly carrying out his or her duty? Of course not. The only meaningful difference in this case is in the fact that the juror remained, in a physical sense, in the courtroom.

criminally accused a fair trial by a panel of impartial, indifferent jurors. . . . A necessary component of the right to an impartial jury is the right to have the jury decide the case solely on the basis of the evidence and arguments given [it] in the adversary arena after proper instructions on the law by the court." (Citations omitted; internal quotation marks omitted.) *State* v. *Hughes*, supra, 341 Conn. 415–16. A juror cannot possibly consider all of the evidence presented if he or she is not *awake* for the presentation of all of that evidence, as the trial judge in this case recognized.[4] As discussed, it was the trial court's responsibility to conduct the appropriate inquiry into the juror misconduct at issue to ascertain whether the defendant's right to a fair trial had been violated.

The majority nevertheless concludes that the trial court's failure to make a specific finding on the record that the juror was, in fact, sleeping requires this court to conclude that the defendant's constitutional rights were not violated. I disagree. The record before us reveals that numerous individuals, including the prosecutors, court clerk, court monitor, two marshals, and the judge himself, observed the juror exhibiting behavior that indicated he was asleep for *at least* one hour of testimony. To conclude that no constitutional violation occurred simply because the trial court failed to properly inquire and make the requisite finding as to the juror misconduct would unfairly punish the defendant for the trial court's own lack of action. This lack of

[4] I also note that the jury has an importance and constitutional status beyond the interests of the defendant alone. See, e.g., *Maldonado* v. *Flannery*, 343 Conn. 150, 161, 272 A.3d 1089 (2022) ("the right to a jury trial is enshrined in our constitution and counts among the most vital checks against governmental overreach"). In the present case, although the question rightly centers on the defendant's constitutional rights, it is also the case that the sleeping juror could not have fulfilled his role in service to the overall criminal justice system and the vindication of the community's interests in a fair trial.

action on the trial court's part deprived the defendant of a fair trial because the court, by its own inaction, failed to ensure that all jurors were awake and capable of hearing all of the evidence presented against the defendant.

As to whether this constitutional violation is subject to a harmless error analysis, I find the Massachusetts Supreme Judicial Court's decision in *Commonwealth* v. *McGhee*, supra, 470 Mass. 645–46, to be particularly persuasive. In that case, the trial judge was notified by a reliable juror that another juror had "slept through important portions of the trial." Id., 645. As in the present case, the trial judge in *McGhee* "conducted no further inquiry to determine whether and, if so, when the identified juror was sleeping," and, as a result, the Supreme Judicial Court concluded that "there [was] serious doubt that the defendant received the fair trial to which he is constitutionally entitled." (Internal quotation marks omitted.) Id. The court then went on to conclude that "[t]he serious possibility that a juror was asleep for a significant portion of the trial is [a] structural error . . . that so infringes on a defendant's right to the basic components of a fair trial that it can never be considered harmless . . . ." (Internal quotation marks omitted.) Id., 645–46. I would similarly conclude that the serious possibility that the juror was asleep during important testimony in this case is a structural error that raises distinct concerns regarding whether the defendant received a fair trial. See, e.g., *State* v. *Lopez*, 271 Conn. 724, 733–34, 859 A.2d 898 (2004) ("Structural [error] cases defy analysis by harmless error standards because the entire conduct of the trial, from beginning to end, is obviously affected . . . . Put another way, these errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as funda-

mentally fair." (Internal quotation marks omitted.)). In this case, the trial court's error in failing to inquire as to whether the juror was sleeping, what testimony the juror had missed, and whether the juror was ultimately fit to deliberate deprived the defendant of basic protections and undermined the reliability of the jury's determination. As such, I would conclude that the trial court's error was structural and not subject to harmless error review.

Ideally, I would remand the case to the trial court for an evidentiary hearing as to whether the juror in question was asleep during the presentation of evidence in this case. See, e.g., *State* v. *Castonguay*, 194 Conn. 416, 436, 481 A.2d 56 (1984) (remanding for evidentiary hearing on whether jurors discussed evidence prior to deliberating). At this point in the litigation, however, I agree with the defendant that "[i]t would be nearly impossible to accurately assess how much of the testimony the juror missed if there were to be an evidentiary hearing years after the trial." I therefore conclude that the defendant's right to a fair trial has been violated, and I would remand the case for a new trial on the murder and carrying a pistol without a permit charges. See, e.g., *State* v. *Hughes*, supra, 341 Conn. 417–18 (juror misconduct requires reversal and new trial when it has denied criminal defendant fair trial); *Commonwealth* v. *McGhee*, supra, 470 Mass. 645–46 (defendant was entitled to new trial when he was denied fair trial due to "[t]he serious possibility that a juror was asleep for a significant portion of the trial").

Accordingly, I respectfully dissent as to this first issue and concur with the majority with respect to the other three issues.

# STATE OF CONNECTICUT *v.* LARISE N. KING (SC 20632)

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

*Syllabus*

The defendant appealed from the judgment of conviction of murder as an accessory and conspiracy to commit murder. The defendant, who had waived her right to a jury trial and elected to be tried by a three judge panel pursuant to statute (§§ 53a-45 (b) and 54-82 (b)), claimed, inter alia, that the evidence was insufficient to support the judgment of conviction and that her jury trial waiver was not made knowingly, intelligently and voluntarily because the canvassing court improperly had failed to explain to her that the three judge panel did not need to be unanimous to convict. *Held*:

The evidence was sufficient to establish the defendant's guilt of murder as an accessory and conspiracy to commit murder.

The fact that the defendant's alleged accomplices and/or coconspirators had not been charged in connection with the victim's homicide did not inherently cast doubt on the sufficiency of the evidence against the defendant.

This court invoked its supervisory authority over the administration of justice to require that a canvassing court specifically advise a defendant who elects to waive his or her right to a jury trial and to be tried by a three judge panel that, unlike with a twelve member jury, which must reach a unanimous verdict in order for a defendant to be convicted, a three judge panel need not be unanimous and that only two members of the three judge panel need to agree for a conviction.

The court concluded that this new rule should apply to the defendant's case and that fairness and justice demanded that it reverse the defendant's conviction and order a new trial.

Even if this court assumed that the three judge panel in the present case engaged in deliberations before the close of evidence and the submission of the case to the panel, a three judge panel, unlike a jury, is not constitutionally prohibited from beginning its deliberations prior to the close of evidence.

Argued December 20, 2023—officially released August 8, 2024*

* August 8, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Procedural History*

Substitute information charging the defendant with the crimes of murder as an accessory and conspiracy to commit murder, brought to the Superior Court in the judicial district of Fairfield and tried to a three judge court, *Richards*, *Hernandez* and *Dayton*, *Js.*; thereafter, the court denied the defendant's motion for a judgment of acquittal; finding of guilty, with *Richards*, *J.*, dissenting; subsequently, judgment was rendered in accordance with the verdict, from which the defendant appealed to this court. *Reversed*; *new trial.*

*Erica A. Barber*, assistant public defender, for the appellant (defendant).

*Laurie N. Feldman*, assistant state's attorney, with whom were *David R. Applegate*, state's attorney, *Tatiana A. Messina*, senior assistant state's attorney, and, on the brief, *Joseph T. Corradino*, state's attorney, for the appellee (state).

*Opinion*

D'AURIA, J. In Connecticut, as in all states in the union, defendants facing serious criminal charges enjoy the constitutional right to a trial by jury. See, e.g., *State* v. *Seekins*, 299 Conn. 141, 158, 8 A.3d 491 (2010). The sixth and fourteenth amendments to the United States constitution, and article first, §§ 8 and 19, of the Connecticut constitution[1] reflect "a fundamental decision

[1] Article first, § 8, of the Connecticut constitution, as amended by article seventeen of the amendments, guarantees defendants "in all prosecutions by information . . . a speedy, public trial by an impartial jury." Article first, § 19, of the Connecticut constitution provides that "[t]he right of trial by jury shall remain inviolate." Connecticut safeguards these rights, but "[t]here is no right to trial by jury in criminal actions where the maximum penalty is a fine of one hundred ninety-nine dollars or in any matter involving violations payable through the Centralized Infractions Bureau where the maximum penalty is a fine of five hundred dollars or less." General Statutes § 54-82b (a).

about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." (Internal quotation marks omitted.) *State* v. *Langston*, 346 Conn. 605, 634, 294 A.3d 1002 (2023), cert. denied, U.S. , 144 S. Ct. 698, 217 L. Ed. 2d 391 (2024). As we have recognized, notwithstanding the silence of these constitutional provisions on the subject, the United States Supreme Court has interpreted the right to a " 'trial by an impartial jury' " to include the "unmistakable" requirement of a unanimous jury verdict before a defendant may be found guilty. *State* v. *Douglas C.*, 345 Conn. 421, 435–36, 285 A.3d 1067 (2022), quoting *Ramos* v. *Louisiana*, 590 U.S. 83, 89–90, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020).

Defendants may, of course, waive their constitutional right to a jury trial and instead elect a trial to the court. See General Statutes § 54-82 (a).[2] Before accepting a defendant's waiver, the trial court must find it to be undertaken knowingly, intelligently, and voluntarily. See, e.g., *State* v. *Gore*, 288 Conn. 770, 778, 955 A.2d 1 (2008). Most cases in which a defendant waives the right to a trial by jury result in a trial before a single judge, who rules on evidentiary and legal questions, but also finds facts and arrives at a final verdict. See 6 W. LaFave et al., Criminal Procedure (4th Ed. 2015) § 24.6 (a), pp. 570–71. However, Connecticut provides a distinct alternative in one category of cases. By virtue of two statutory provisions, when a defendant charged with any crime punishable by life imprisonment, with or without the possibility of release, elects a court trial, "the court shall be composed of three judges . . . .

[2] General Statutes § 54-82 (a) provides: "In any criminal case, prosecution or proceeding, the accused may, if the accused so elects when called upon to plead, be tried by the court instead of by the jury; and, in such case, the court shall have jurisdiction to hear and try such case and render judgment and sentence thereon."

Such judges, or a majority of them, shall have power to decide all questions of law and fact arising upon the trial and render judgment accordingly." General Statutes § 54-82 (b); see also General Statutes § 53a-45 (b). Our research and that of the parties have found these statutes to be unique among the fifty states, not only because they expand the traditional court trial from a single judge to a panel of three judges but because they require only two of the three judges to arrive at a verdict and to render judgment.[3] These provisions depart from the requirement of a unanimous verdict, which is a hallmark of the right to a criminal jury trial in Connecticut and throughout the nation. See *State* v. *Douglas C.*, supra, 345 Conn. 435–36.

In the present case, the defendant, Larise N. King, waived her right to a jury trial and elected to be tried to a three judge court, *Richards*, *Hernandez* and *Dayton*, *Js.*, on charges of murder as an accessory in violation of General Statutes §§ 53a-8 and 53a-54a, and conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a. Two members of the court, *Hernandez* and *Dayton*, *Js.*, found the defendant guilty on both counts and rendered judgment accordingly. The third member of the court, *Richards*, *J.*, dis-

[3] Connecticut's statutory three judge panel appears to be distinct in the nation in that it may find a defendant guilty with only two of the three judges needed to reach that decision. Among the fifty states, Ohio's statute governing trials to a three judge panel is most analogous to § 54-82 (b), providing that, if an accused charged with an offense punishable by death waives the right to a jury trial, "he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges . . . . The judges or a majority of them may decide all questions of fact and law arising upon the trial . . . ." Ohio Rev. Code Ann. § 2945.06 (West 2020). Although Ohio's statute permits a majority of a three judge panel to resolve questions throughout the proceedings, the statute draws a line when it comes to finding a defendant guilty: "the accused shall not be found guilty or not guilty of any offense unless the judges unanimously find the accused guilty or not guilty." Ohio Rev. Code Ann. § 2945.06 (West 2020).

sented and instead would have found the defendant guilty of accessory to manslaughter in the first degree as a lesser included offense of the crime of murder and conspiracy to commit assault in the first degree as a lesser included offense of the crime of conspiracy to commit murder.

The defendant now appeals, arguing that (1) there was insufficient evidence to support the judgment of conviction, (2) the failure of the trial court, *Russo*, *J.*,[4] to explain that the three judge panel did not have to reach a unanimous decision rendered her jury trial waiver involuntary and, thus, unconstitutional, and (3) three judge panels should be prohibited from deliberating until the close of evidence and the submission of the case to the panel, which, the defendant claims, improperly occurred in the present case. Although we conclude that sufficient evidence supported the majority's guilty verdict, we invoke our supervisory authority over the administration of justice and hold that trial courts must canvass defendants who choose to be tried before a three judge panel, rather than before a jury, to ensure that they understand that, although a jury of their peers must be unanimous in reaching a guilty verdict, a three judge panel can properly arrive at a guilty verdict after a decision by a majority vote. The failure of the canvassing court in the present case to explain that critical difference to the defendant requires that we reverse her conviction and remand the case for a new trial. Finally, because the issue may arise at a retrial, we also hold that a three judge panel is not constitutionally prohibited from beginning its deliberations prior to the close of evidence and the submission of the case to the panel because, although judges are not immune from the frailties of human nature, they

[4] We refer to Judge Russo in this opinion as the canvassing judge or the canvassing court.

are held to a higher standard and serve a different role as compared with jurors.

I

The pertinent facts found by the three judge panel, along with the relevant procedural history, can be summarized as follows. The defendant married the victim, Dathan Gray, in 2016. Numerous family members testified that the couple's relationship had been turbulent from the beginning of the marriage. The defendant and Gray separated approximately two years later.

At the time of the murder, the defendant and Gray were both dating other people, and their relationship remained volatile. They often fought via Facebook. Notably, six months before the events in question, the defendant streamed live on Facebook with a message for Gray. In the video, the defendant stated that she would "kick [Gray's] ass" whenever she saw him and that "whatever my family do to you is beyond me . . . . They tired of you."

On the night of July 26, 2019, Gray was working a shift at The Snack Shack in Bridgeport. At about 11:17 p.m., Gray's supervisor called the defendant and asked her to come to the store and "take care of" Gray, who was "drunk" and "acting up . . . ." The defendant's best friend, Janice Rondon, drove the defendant to The Snack Shack. Once there, Rondon initially stayed in the car while the defendant and Gray talked outside of his apartment, which was directly across the street from The Snack Shack. After some time, Rondon got out of the car and approached the defendant and Gray. When Rondon approached, Gray stated: "Why the fuck you over here? Mind your own fucking business, bitch." Gray tried to spit on Rondon, and Rondon spat back at him, triggering an argument and a physical fight between the defendant and Gray. Onlookers, including numerous friends and acquaintances of the defendant

and Gray, remembered there having been a "commotion," with punches thrown and the defendant and Gray rolling on the ground. Nosadee Sampson, a longtime friend of the defendant and Gray, recalled the defendant having told Gray that he was "going to breathe his last breath." Michael Edwards, the defendant's boyfriend at the time, deescalated the situation by separating the defendant from Gray.

At about 1 a.m. on July 27, 2019, Gray and his girlfriend at the time, Sakeryial Beverly, were talking on the sidewalk down the street from The Snack Shack. Sampson, who was standing next to Beverly, saw two men wearing hoodies approach, which struck her as odd because of how hot it was that night. She shouted to Gray that the men wearing hoodies were approaching him, but the men quickly pushed Beverly to the side and shot Gray in the face. Bridgeport's "Shot Spotter" system registered sixteen gunshots in the area at approximately 1:13 a.m. Forensic and medical reports indicate that Gray had sustained eleven gunshot wounds and four graze gunshot wounds. Doctors pronounced Gray dead shortly after his arrival at Bridgeport Hospital.

Sampson could not see what the men wearing hoodies looked like, remembering only that one was taller than the other. She saw the men exchange words with Gray but did not hear the conversation. Sampson testified that the defendant was not one of the shooters.

Sampson also testified that the defendant was wearing a light colored shirt, striped pants, and a printed scarf on the night of the murder. The defendant admitted this when interviewed by the police. Upon reviewing surveillance video of the area, police officers noticed that, at 12:59 a.m., a light colored sport utility vehicle (SUV) picked up a woman matching this description. At about 1:10 a.m., the SUV parked approximately 0.14

miles away from where Gray was murdered. The video depicted two men wearing hoodies getting out of the vehicle. After they exited the SUV, the woman moved from the rear passenger seat into the driver's seat to back up the vehicle. The SUV's headlights were off, but the rear brake lights remained illuminated after the woman backed up the SUV, indicating that her foot was on the brake. Once the men returned to the SUV, the woman turned on the headlights and drove away. Two minutes and twenty-two seconds had elapsed from when the men exited the SUV to when they returned to the SUV.

The defendant first spoke to a police detective on July 28, 2019, about Gray's death. The defendant admitted that she had punched Gray in the face during the evening before the shooting but denied telling him that he would take his last breath. She also maintained that she was at home when the shooting occurred. Following this interview, police detectives reviewed the surveillance video and determined that the license plate number of a white Ford Explorer depicted in the footage had the same features as the SUV near the scene of Gray's death. After checking the license plate number, the police determined that the Ford Explorer was registered to the defendant's cousin, Oronde Jefferson.[5]

On August 1, 2019, police detectives went to the defendant's home to interview her again. Several of the defendant's family members, including her mother and aunt, were present during the interview. Although the defendant's recollection of events on the night in question was largely the same as the version of events she had given the police on July 28, 2019, she added that she had called Edwards because she wanted him to fight Gray. When asked whether she knew anyone who

[5] We note that, throughout the record, Oronde's name has been spelled differently, either as "Oronde" or "Arondae."

owned a white Ford Explorer, the defendant initially stated that she did not. When the detectives mentioned that the surveillance video depicted her entering a white Ford Explorer, she acknowledged that Jefferson owned a similar SUV. She then admitted that Jefferson and one of his friends had picked her up in Jefferson's vehicle on the night of Gray's death. Andrew Bellamy, a friend of Jefferson's, corroborated this statement.[6] The defendant also told the detectives that she did not call Jefferson that night but that they had "linked up out of the blue . . . ." Phone records, however, revealed that, shortly before the shooting at 1:13 a.m., the defendant called Jefferson four times, at 12:44, 12:45, 12:46 and 12:51 a.m., and that, during those calls, her cell phone accessed a cell site in the vicinity of the shooting scene.

The defendant was arraigned on September 23, 2019, and initially invoked her right to a jury trial. On February 5, 2021, the defendant appeared before the canvassing court, waived her right to a jury trial and elected to be tried by a three judge court. During its canvass of the defendant to determine if her waiver was being made knowingly, intelligently and voluntarily, the court explained that, if she elected a court trial, a three judge panel would hear evidence and decide her case. The court did not explain that the panel did not need to be unanimous to find her guilty and that it could do so after a decision by only a majority of the three judges.

After five days of trial before the three judge panel, the case was submitted to it for deliberations on the

[6] Bellamy was subpoenaed to testify before the court but invoked his fifth amendment privilege against self-incrimination. The prosecutor then informed the court, *Russo*, *J.*, of the state's intention to offer Bellamy immunity pursuant to General Statutes § 54-47a (a) and sought an order from the court to compel Bellamy to testify. The court then granted the state's request and ordered Bellamy to testify. When the three judge panel returned to the bench and trial resumed, Bellamy testified that he and Jefferson had picked up the defendant on the night in question but maintained that he was not present when Gray was murdered.

afternoon of May 4, 2021. The defendant appealed from the judgment of conviction directly to this court pursuant to General Statutes § 51-199 (b) (3). We will provide additional facts and procedural history as necessary.

II

We begin with the defendant's claim that there was insufficient evidence for the majority of the three judge court to convict the defendant of murder as an accessory and conspiracy to commit murder because, if we were to agree with her, principles of double jeopardy would prevent the state from retrying her on those charges. See, e.g., *State* v. *Robles*, 348 Conn. 1, 28, 301 A.3d 498 (2023).

In a written decision, the majority emphasized that the defendant and Gray had "regularly and publicly engaged in verbal and physical altercations," including on the night of Gray's death. Within one hour of the defendant's punching Gray in the face and saying that he would take his last breath, Gray was shot and killed. The majority found that these circumstances, combined with the inconsistencies in the defendant's statements to the police about the events leading to the murder, supported its finding that the defendant was guilty of murder as an accessory and conspiracy to commit murder. In particular, the defendant had first told the police that she was at home when the shooting occurred, that she did not know anyone who owned a white Ford Explorer, and that she had not been in communication with her cousin, Jefferson, that evening. Faced with contradictory evidence when questioned by the detectives, she changed her story. Based on the totality of the circumstances and the defendant's own admissions, the majority found that the defendant was the woman who drove the SUV away from the crime scene. The majority also emphasized that the defendant was close enough to the shooting to hear gunshots, yet she did

not flee from the scene as other onlookers did. Rather, she turned the SUV's headlights off and waited, with her foot on the brake, indicating that she was on standby and ready to leave quickly. Considering those facts, the majority stated that it was reasonable to infer that the defendant was a knowing and willing participant in the shooting of Gray.

The defendant argues that the state failed to present evidence demonstrating that she (1) aided Jefferson and Bellamy in the commission of Gray's murder, (2) possessed the requisite intent to murder Gray, and (3) entered into an agreement to kill Gray. The defendant maintains that the evidence was too speculative for a trier of fact reasonably to deduce that she had aided Jefferson and Bellamy in Gray's murder. In particular, the defendant underscores that the state has not yet charged Jefferson or Bellamy with the shooting of Gray, arguing that this demonstrates "fatal weaknesses" in the case against her. The defendant acknowledges that intent is rarely proven through direct evidence but, rather, is most often inferred from the relevant circumstances. Nonetheless, the defendant maintains that the possible inferences do not suffice to prove, beyond a reasonable doubt, that she sought to kill Gray and entered into an agreement with Jefferson and Bellamy to accomplish that objective. Specifically, the defendant argues that it is disputed whether she told Gray that it would be his last day, as she denied making the statement, and witnesses recalled the scene as being too loud to hear what words Gray and the defendant exchanged. The defendant also reasons that, under Connecticut case law, her past disputes with Gray are insufficient to prove that she intended to, and did, enter into an agreement to murder him. Finally, regarding her inconsistent accounts about what occurred in the hours before the shooting, the defendant contends that her conflicting statements fail to establish that she pos-

sessed the intent necessary to be found guilty of the charges against her.

In response, the state explains that, although Jefferson and Bellamy have not been charged in connection with the murder of Gray, this is irrelevant, as General Statutes § 53a-9 establishes that an individual may be found guilty as an accessory, even if other participants in the crime have not yet been prosecuted for the conduct at issue. The state then argues that the totality of the evidence presented was sufficient to find the defendant guilty of both murder as an accessory and conspiracy to commit murder. The state stresses that the trier could infer from the video footage that a coordinated plan was in place to kill Gray. The state agrees that the defendant's inconsistent statements alone are not enough to find her guilty of the charged crimes but maintains that reasonable inferences drawn from the testimony of witnesses as well as from exhibits admitted into evidence provided sufficient evidence of her guilt. We agree with the state.

When reviewing sufficiency of the evidence claims, this court applies a two part test. See, e.g., *State* v. *Taft*, 306 Conn. 749, 755–56, 51 A.3d 988 (2012). "First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) Id. We use this same standard when considering whether sufficient evidence supported the three judge panel's guilty verdict. See *State* v. *Bennett*, 307 Conn. 758, 763, 59 A.3d 221 (2013) ("we undertake the same limited review of the panel's verdict, as the trier of fact, as we would with a jury verdict"). When this inquiry involves circumstantial evidence, "[i]t is not one fact, but the cumulative impact

of a multitude of facts which establishes guilt . . . .'' (Internal quotation marks omitted.) *State* v. *Taft*, supra, 756. Intent is often inferred from ''the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom'' because ''[d]irect evidence of the accused's state of mind is rarely available.'' (Internal quotation marks omitted.) *State* v. *Lewis*, 303 Conn. 760, 770, 36 A.3d 670 (2012). ''[W]e do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [fact finder's] verdict of guilty.'' (Internal quotation marks omitted.) *State* v. *Taft*, supra, 760–61.

''To prove the offense of conspiracy to commit murder, the state must prove two distinct elements of intent: that the conspirators intended to agree; and that they intended to cause the death of another person.'' *State* v. *Pinnock*, 220 Conn. 765, 771, 601 A.2d 521 (1992). In the same vein, to find a defendant guilty of murder as an accessory, the state must prove that the defendant intended to aid the principal offender and to kill the victim. See, e.g., *State* v. *Delgado*, 247 Conn. 616, 621–22, 725 A.2d 306 (1999).

The defendant contends that, because Jefferson and Bellamy have not been charged in connection with the homicide of Gray, there is a ''gaping hole'' in the state's theory of the case, which renders the evidence proffered against her insufficient to find her guilty. The defendant's assertions, however, are contrary to law. The legislature has particularly provided: ''In any prosecution for an offense in which the criminal liability of the defendant is based upon the conduct of another person under section 53a-8 it shall not be a defense that . . . such other person has not been prosecuted for or convicted of any offense based upon the conduct in question . . . .'' General Statutes § 53a-9; cf. *State*

v. *Colon*, 257 Conn. 587, 604, 778 A.2d 875 (2001). Although it might appear counterintuitive to charge only one individual with crimes that required the involvement of multiple individuals, doing so is legally sound, and the lack of charges against Jefferson and Bellamy does not inherently cast doubt on the sufficiency of the evidence against the defendant.

The decisions of the three judge panel diverge on whether there was sufficient evidence to conclude that the defendant possessed the requisite intent to find her guilty of conspiracy and accessory to murder. Judge Richards, in dissent, stated that he disagreed with the majority's conclusion that the state had presented sufficient evidence to prove, beyond a reasonable doubt, that the defendant had the specific intent to murder Gray. He reasoned that the evidence was adequate to support a guilty verdict of only the lesser included offenses of conspiracy to commit assault in the first degree and accessory to manslaughter in the first degree, but he did not detail why he interpreted the evidence differently from the majority. Because Judge Richards concluded that there was sufficient evidence to support a conviction of the lesser included offenses, presumably, he agreed with the majority that the evidence indicated that the defendant had intended to harm Gray, disagreeing only as to the severity of the harm she intended. This question of intent is also the crux of the sufficiency inquiry before us, but, on appeal, we view the evidence in the light most favorable to upholding the verdict. See, e.g., *State* v. *Taft*, supra, 306 Conn. 755–56. The issue does not center around what our findings would have been had we been the triers of fact; rather, we must limit our inquiry to whether there was sufficient evidence for the majority to reasonably reach its decision. See id., 756. Applying this standard of review and considering the defendant's own

statements, we hold that the state presented sufficient evidence to sustain the defendant's conviction.

Although whether the defendant told Gray on the night in question that it would be his last was disputed at trial, the fact finder reasonably could have credited Sampson's testimony that the defendant in fact said that. Moreover, it is undisputed that the defendant had punched Gray that evening and that they had a history of exchanging harsh words on Facebook, with the defendant having previously stated publicly that she would "kick [Gray's] ass . . . ." In a Facebook livestream, the defendant had implied that members of her family might come after Gray because they were tired of him. Although these statements and actions in isolation might not demonstrate specifically that the defendant took part in a coordinated conspiracy to kill Gray, they provide crucial context concerning her acrimonious relationship with him.

Rational inferences the majority could draw from the surveillance video of the defendant, who was only 0.14 miles from the crime scene, lead us to conclude that the evidence was sufficient to find that she was part of a conspiracy to murder Gray. Even though the defendant's presence, in and of itself, might not suffice to infer intent, "a defendant's knowing and willing participation in a conspiracy nevertheless may be inferred from [her] presence at critical stages of the conspiracy that could not be explained by happenstance . . . ." (Internal quotation marks omitted.) *State* v. *Rosado*, 134 Conn. App. 505, 511, 39 A.3d 1156, cert. denied, 305 Conn. 905, 44 A.3d 181 (2012). The surveillance video captured key stages of the conspiracy, including the defendant's actions immediately before, during, and after Gray's murder. Mere moments before Gray was murdered, the men wearing hoodies exited the Ford Explorer, and the defendant moved from the rear passenger seat to the driver's seat. The defendant then proceeded to turn off

the SUV's headlights; the rear brake lights, however, remained illuminated, indicating that she had her foot on the brake. As the majority stressed, rather than calling 911 or leaving the scene when she heard gunshots, the defendant remained in place, only turning on the headlights and driving away once the men wearing hoodies returned and entered the SUV. From this sequence of events combined with Gray's fraught relationship history with the defendant, the majority reasonably could have inferred that the defendant was the getaway driver, which indicated that she had the requisite intent required to find her guilty of conspiracy to commit murder and murder as an accessory. Although a fact finder would not be compelled to draw that inference (as the dissenting judge on the panel apparently did not), it is not an inference that we can overturn on appeal. See, e.g., *State* v. *Hedge*, 297 Conn. 621, 657, 1 A.3d 1051 (2010) ("factual inferences that support a guilty verdict need only be reasonable" (internal quotation marks omitted)).

The defendant's inconsistent statements about the events at issue buttress her culpability. "[M]isstatements of an accused, which a jury could reasonably conclude were made in an attempt to avoid detection of a crime or responsibility for a crime or were influenced by the commission of the criminal act, are admissible as evidence reflecting a consciousness of guilt." (Internal quotation marks omitted.) *State* v. *Moody*, 214 Conn. 616, 626, 573 A.2d 716 (1990).

Given all of the evidence in the record, the reasonable inferences that may be drawn from that evidence, and reading the record in the light most favorable to sustaining the guilty verdict, we conclude that the panel's majority could have reasonably found that the evidence was sufficient to establish the defendant's guilt for both the conspiracy and accessory to murder charges. Accordingly, we uphold the majority's verdict.

III

The defendant was arrested on September 21, 2019. Days later, the court set bond at $1 million, and the defendant was continuously incarcerated until her trial. On January 9, 2020, a public defender entered pleas of not guilty and a jury trial election on the defendant's behalf. Not long after the onset of the COVID-19 pandemic in early 2020, state officials suspended jury trials.[7] On June 15, 2020, new counsel appeared for the defendant. On February 5, 2021, when the defendant appeared remotely by video before the canvassing court and withdrew her prior jury trial election in favor of a courtside trial, the following colloquy occurred between the court and Attorney Michael A. Peck, defense counsel:

"The Court: I understand [the defendant] was brought in here today for a couple of issues. One is the possibility of waiving her constitutional right to a jury trial and possibly electing a courtside trial. Is that still an idea, Attorney Peck?

"Attorney Peck: Yes, Your Honor, primarily because she's coming up to a year and a half, thirty-five years old and there's really no record. I don't know when I could tell her that she'll be—she'd ever have a jury trial . . . .

"The Court: I'm in no better position to do that than you are, sir."

That colloquy reflected the uncertainty facing the judiciary—and courts and other government agencies

[7] "COVID-19, also known as coronavirus, is a respiratory disease caused by a virus that is transmitted easily from person to person and can result in serious illness or death. . . . In 2020, the virus spread rapidly, eventually amounting to a global pandemic. . . . Government officials in Connecticut and virtually everywhere else ordered lockdowns and other measures to abate the rate of infection . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Henderson*, 348 Conn. 648, 666 n.6, 309 A.3d 1208 (2024).

throughout the nation—at that time. "At the height of the pandemic, many governmental operations had to be curtailed significantly, including jury trials." *State* v. *Henderson*, 348 Conn. 648, 666 n.6, 309 A.3d 1208 (2024). After canvassing the defendant about her decision to reject the state's pretrial plea offer, during which the court asked about her background, education, and work experience, the court then canvassed the defendant specifically about her decision to waive her right to a jury trial:

"The Court: . . . Now, statutorily, and you have a constitutional right to what we call a trial by jury, a jury of your peers, ma'am, or we'll go through the process of selecting a jury and a trial will be presented before a jury, a jury will deliberate and will arrive at verdicts. I don't know what those verdicts would be. Those verdicts could be guilty, they could be not guilty or a mix of the two. Do you understand that . . . ?

"The Defendant: Yes, sir.

"The Court: Now, you have a constitutional right and a statutory right, ma'am, to a trial by jury, do you understand that?

"The Defendant: Yes.

"The Court: Similarly, you also have a right to waive that jury trial, and you can elect for what's called a courtside trial. A courtside trial does not involve jurors, as you and I typically understand that. It would involve what we call a three judge panel, three Superior Court judges that would sit as a jury and then would have evidence presented before them, and they would arrive at verdicts, and they would perform a sentencing, if any of the verdicts resulted in a verdict of guilty. Do you understand that, ma'am?

"The Defendant: Yes, I do.

"The Court: Now, I've asked you already the questions involving your ability to understand today's hearing and your school and work history and your relationship with your attorney, Attorney Peck. So, I don't have to ask those questions again because I'm satisfied with your answers, but I do have to ask this question: would you prefer to have a jury trial, ma'am, or would you elect to waive that jury trial and would [you] rather have a trial before a three judge panel?

"The Defendant: I would waive the jury trial. I would rather have the three judge panel.

"The Court: All right, and have you had enough time to discuss that election with Attorney Peck?

"The Defendant: Yes, sir.

"The Court: Now, Attorney Peck, I turn to you, sir, and I ask you, you have consulted—your client has consulted with you on this issue. Are you satisfied, sir, that she understands the election that she has made?

"Attorney Peck: I am satisfied that she is making the election knowingly and voluntarily, yes.

"The Court: All right, anything further from the state?

"The Prosecutor: No, Your Honor.

"The Court: The [court] does find that [the defendant] has had enough time to speak with her attorney, her attorney is present, and her attorney is certainly more than competent to make the representations that he has made this morning, and I also find that [the defendant] is more than competent and understands the proceedings today and understanding—and understands the charge[s] against her, and the court does find that her choice, her election for a courtside trial rather than a jury trial is voluntarily, understandingly made and has been made with the assistance of competent counsel, and a waiver may be recorded."

That colloquy constituted the entire canvass, which the defendant challenges as inadequate because the court did not explain to her that she had a right to a trial before a twelve person jury that would have to reach a unanimous decision to find her guilty and that if she waived that right in favor of a trial to a three judge panel, that panel would not be required to be unanimous to find her guilty. Based on this omission, the defendant argues that her jury trial waiver was not knowingly and intelligently made.

Any discussion of the sufficiency of a court's canvass of a defendant seeking to waive the right to a jury trial in favor of a court trial must begin with *State* v. *Gore*, supra, 288 Conn. 770, and *State* v. *Kerlyn T.*, 337 Conn. 382, 253 A.3d 963 (2020). In *Gore*, this court held that defendants must personally and affirmatively waive their constitutional right to a jury trial. See *State* v. *Gore*, supra, 777–78. Invoking our supervisory authority, we held that, in the absence of a written waiver, trial courts must canvass defendants on the record and confirm that any jury trial waiver is knowing, intelligent, and voluntary. See id., 778. In *Kerlyn T.*, this court indicated that a canvass for a jury trial waiver need not be " 'extensive' "; *State* v. *Kerlyn T.*, supra, 393; reasoning that "competent counsel is capable of explaining [the] basic differences" between a jury trial and a court trial "sufficiently to enable a defendant to make an informed decision when selecting one over the other," including "that a jury of six or twelve, with alternates, comprised of a defendant's peers, selected with the defendant's participation, would have to be unanimous . . . ." Id., 396 n.10. We acknowledged, however, that "a reviewing court must inquire into the totality of the circumstances," including "the background, experience, and conduct of the accused" when considering whether the trial court's canvass and the defendant's jury trial waiver were sufficient. (Internal quotation

marks omitted.) Id., 392. Finally, "[a]lthough not constitutionally required," we recommended that "our trial courts elicit from a defendant proper assurances that he or she, in fact, understands [the] differences" between a jury trial and a trial to a court. Id., 396 n.10. We concluded by stating: "Of course, if circumstances not existing in the . . . case indicate a need for a more particularized judicial explanation of the right being waived, such as a statement by the defendant that counsel has not provided a clear explanation, we recommend that our trial courts adjust the canvass accordingly." Id.

Unlike the situations in *Gore* and *Kerlyn T.*, which involved only noncapital charges and the waiver of a jury trial in favor of a trial before a single judge, the present case required "a more particularized judicial explanation of the right being waived"; id.; as the defendant was facing a charge of murder as an accessory, which is punishable by life imprisonment. See General Statutes §§ 53a-35a, 53a-51 and 53a-54a. She was thus presented with the choice between electing a trial before a twelve member jury[8] that would have to arrive at a unanimous verdict to find her guilty or a trial before a panel of three judges that could find her guilty (as they did here) if only two of them agreed to do so.

The defendant argues that, under the state constitution, Judge Russo's canvass was insufficient, notwithstanding *Gore* and *Kerlyn T.* Specifically, she stresses that, although the courts in *Gore* and *Kerlyn T.* declined to enumerate specific criteria for a trial court's canvass, those cases still require that a defendant's waiver of a constitutional right must be knowing, intelligent, and voluntary. The defendant reasons that her waiver did not satisfy this standard because the canvassing court

[8] A defendant is entitled to a jury of twelve when facing a charge punishable by death, life imprisonment without the possibility of release or life imprisonment. For all other criminal charges, "the accused shall be tried by a jury of six . . . ." General Statutes § 54-82 (c).

did not explain to her that a three judge panel could render a split decision. In the alternative, the defendant urges us to exercise our supervisory authority to require trial courts canvassing defendants who seek to waive the right to a jury trial to inform them that, although a jury must be unanimous to return a guilty verdict, only two judges of a three judge panel are needed to convict the defendant. The defendant claims that, because the trial court failed to inform her of that distinction, she did not grasp "essential, constitutionally protected features" of her right to a jury trial.

It is worthwhile to review the history of the statutes that have given rise to our present system, in which a defendant accused of murder may waive her right to a jury trial in favor of a trial before a three judge panel whose verdict need not be unanimous. See General Statutes §§ 53a-45 (b) and 54-82 (b). The legislature first authorized court trials in criminal cases at the election of the defendant in chapter 56 of the Public Acts of 1874, which was codified in the statutory revision of 1875 and has been carried forward into what is now § 54-82. See *McBrien* v. *Warden*, 153 Conn. 320, 328–29, 216 A.2d 432 (1966). In 1927, the legislature enacted the precursor of § 54-82 (b), chapter 107 of the 1927 Public Acts, which was later codified at General Statutes (1930 Rev.) § 6477. Chapter 107 of the 1927 Public Acts provided that, if an accused charged with a crime punishable by death or life imprisonment elected a trial to the court, a panel of three judges would hear the case[9] and that "[s]uch judges, or a majority of them,

[9] Chapter 107 of the 1927 Public Acts, which was codified at General Statutes (Rev. to 1930) § 6477, provides in relevant part: "If the accused shall be charged with a crime punishable by death or imprisonment in the state prison for life and shall elect to be tried by the court, the court shall be composed of three judges consisting of the judge presiding at the term and two other judges to be designated by the chief justice of the supreme court of errors. Such judges, or a majority of them, shall have power to decide all questions of law and fact arising upon the trial and render judgment accordingly."

shall have power to decide all questions of law and fact arising upon the trial and render judgment accordingly." Public Acts 1927, c. 107. The 1874 provision for court trials in criminal cases, as modified by Public Acts 1927, c. 107, became General Statutes (Rev. 1930) § 6043, which was amended in 1935 by General Statutes (Cum. Supp. 1935) § 1685c to include the following: "[I]f [the defendant] shall be convicted by confession, the court, to be composed of the judge presiding at the session and two other judges to be designated by the chief justice of the supreme court of errors, shall hear the witnesses in such case, and such judges, or a majority of them, shall determine the degree of the crime and render judgment and impose sentence accordingly." See *McBrien* v. *Warden*, supra, 330.

Section 53a-45 (b) likewise has deep roots in Connecticut law. The three judge court it provides for also derives from General Statutes (Cum. Supp. 1935) § 1685c, which ultimately became § 53-9 in 1958. General Statutes (1958 Rev.) § 53-9 described conduct that defined the degree of murder an accused could be charged with for purposes of trial by jury but required that an accused who instead had entered a plea of guilty be presented to a three judge panel that would determine the degree of murder committed before rendering judgment and imposing sentence. Id., 323–24.

When the legislature overhauled Connecticut's criminal statutes in Public Acts 1969, No. 828, which resulted in the enactment of the Penal Code in 1971, General Statutes (1958 Rev.) § 53-9 was repealed. The language of § 45 of Public Acts 1969, No. 828, which ultimately became what is today § 53a-45 (b), simplified matters by providing that an accused charged with murder who waived the right to a jury trial would be tried by a three judge panel that could convict the accused either unanimously or by a majority of the panel.

There is no preserved legislative history, however, that explains *why* the legislature chose to provide the option of a trial before a three judge panel as opposed to a trial before only a single judge. But see id., 329 (noting that Public Acts 1927, c. 107, was enacted when, "[i]n 1927, it came to be felt that the burden of having a murder case tried to the court . . . should not be imposed upon a single judge"). Despite this dearth of legislative history, an examination of available Connecticut cases in which criminal defendants were tried before a three judge panel is particularly informative. First, although we have encountered limits in our ability to review relevant cases,[10] our research reveals that the circumstances in the case before us are rare. In only one reported decision of this court have we considered a challenge to a nonunanimous verdict delivered by a three judge panel. In *State* v. *Bennett*, supra, 307 Conn. 760, the defendant was charged with aiding and abetting murder, felony murder, home invasion, and burglary in the first degree. When first canvassing the defendant about his waiver of the right to a jury trial, the trial court failed to explain that, although a jury of twelve of his peers could find him guilty only if it was unanimous, only two judges on a three judge panel were needed to convict him. See id., 775. The trial court found this omission significant enough that it called the

[10] A great number of appellate decisions involving three judge panels are silent on whether the panel was unanimous in finding the defendant guilty. See, e.g., *State* v. *Roseboro*, 221 Conn. 430, 432–33, 604 A.2d 1286 (1992). Of course, if the three judge panel voted to acquit the defendant by a nonunanimous verdict, there would almost certainly be no appeal by the state; see General Statutes § 54-96; with the result that, likely, no transcript would ever be prepared and the record would be erased. See General Statutes § 54-142a; see also *State* v. *Apt*, 319 Conn. 494, 497 n.1, 126 A.3d 511 (2015) ("[w]henever . . . the accused, by a final judgment, is found not guilty of the charge or the charge is dismissed, all police and court records and records of any state's attorney pertaining to such charge shall be erased upon the expiration of the time to file a writ of error or take an appeal" (internal quotation marks omitted)).

defendant back into the courtroom before he had left the courthouse to inform him of this unanimity distinction and to determine whether he still wished to waive his right to a jury trial.[11] Id. The three judge panel unanimously found the defendant guilty on all but one charge, with only two of the three judges finding him guilty of aiding and abetting murder. Id., 760.

Our review of reported decisions has also led us to three additional cases from this court that did not involve the claim we currently consider but nonetheless reveal the content of the trial court's canvass. See *State* v. *Rizzo*, 303 Conn. 71, 84, 31 A.3d 1094 (2011) ("Two out of three would be enough. But not—obviously, with a jury it has to be unanimous." (Internal quotation marks omitted.)), cert. denied, 568 U.S. 836, 133 S. Ct. 133, 184 L. Ed. 2d 64 (2012); *State* v. *Hafford*, 252 Conn. 274, 302 n.16, 746 A.2d 150 ("In a court trial, if you give up your right to having twelve people decide the case—twelve jurors—and elect to have the judges do it, you will have three judges and you understand that they do

[11] When the trial court in *Bennett* called the defendant back into the courtroom to expand on its initial canvass, defense counsel had already left the courthouse. *State* v. *Bennett*, supra, 307 Conn. 775. In counsel's absence, the defendant was accompanied by a different public defender for the second canvass to answer any questions the defendant had. The trial court addressed the defendant again and stated: "Just to tell you I forgot to ask you one question and that's why—I tried to catch [defense counsel] before he left and I missed him. But he did say that he had explained to you that with a jury verdict it's got to be unanimous with a three judge panel it does not have to be. It could be a majority, two to one. Do you understand that, sir?" (Internal quotation marks omitted.) Id. The defendant responded affirmatively. Id. Twenty days later, with the defendant and his counsel present, the court recounted on the record what had transpired at the initial canvass after defense counsel's departure and then canvassed the defendant again. Id., 776.

On appeal, the defendant argued that his jury trial waiver was insufficient because his counsel was not present when the trial court first discussed the unanimity distinction on the record. Id., 774. This court held that the defendant's jury trial waiver was valid, reasoning that the trial court's approach was appropriate under the circumstances. Id., 776.

not have to be unanimous. In other words, it could be a two-to-one. Either guilty or not guilty, whichever. You understand that?" (Internal quotation marks omitted.)), cert. denied, 531 U.S. 855, 121 S. Ct. 136, 148 L. Ed. 2d 89 (2000); *State* v. *Cobb*, 251 Conn. 285, 368–69, 743 A.2d 1 (1999) ("[I]n a jury trial, of course, the verdict must be unanimous, all twelve would have to agree on the verdict . . . . [W]hen you have three judges, it's a majority. So it would only have to be two out of the three in order for a verdict to be rendered . . . ." (Internal quotation marks omitted.)), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000). Of the reported cases in which we can review the specific canvass, the trial court included in the canvass an advisement that the three judge panel need not be unanimous to find the defendant guilty.[12]

Finally, we have undertaken a search to locate canvasses administered by trial courts throughout the state before accepting a defendant's waiver of the right to a jury trial in favor of a three judge panel, where the canvass was not recounted in any reported decision. Although this search has also had its limitations,[13] the

[12] At the outset of our case law review, we acknowledge this court's decision in *State* v. *Marino*, 190 Conn. 639, 641–42, 462 A.2d 1021 (1983), overruled in part by *State* v. *Chapman*, 229 Conn. 529, 643 A.2d 1213 (1994). Although the trial court's canvass of the defendant in *Marino* did not contain an advisement that the three judge panel did not have to be unanimous to find him guilty, the defendant in *Marino* raised the same claim before us in the present case, contending that his jury trial waiver was insufficient because the trial court's canvass did not describe that a jury of twelve must reach a unanimous verdict but a three judge panel needs only a simple majority to convict a defendant. Id. This court did not address the claim because the panel in *Marino* delivered a unanimous verdict. Further, *Marino* predates our decision in *Gore*, in which we invoked our supervisory authority to require that, in the absence of a written waiver, trial courts canvass defendants who seek to waive the right to a jury trial. See *State* v. *Gore*, supra, 288 Conn. 778. These realities diminish the relevance of *Marino* to the present case.

[13] In an effort to understand the precise language that trial courts typically use when canvassing defendants about how three judge panels function, we have reviewed as many relevant transcripts as were available to us.

results of this search have nonetheless been illuminating.

Of the three judge panel cases for which we have located documentation, we have been able to review the transcripts in seven cases in addition to *State* v. *Marino*, 190 Conn. 639, 462 A.2d 1021 (1983), overruled in part by *State* v. *Chapman*, 229 Conn. 529, 643 A.2d 1213 (1994), *Bennett*, *Rizzo*, *Hafford*, *Cobb* and the present case. The trial courts in five of those seven cases explicitly advised the defendants that, if they elected a trial before a three judge court, the panel's verdict need not be unanimous.[14] None of these canvasses took place prior to 2016. See *State* v. *Maharg*, Superior Court, judicial district of Danbury, Docket No. DBD-CR-19-0159438-S (December 2, 2022) (Even though defense counsel told the trial court that she had advised the defendant of the unanimity distinction off the record, the trial court confirmed that distinction on the record, stating to the defendant, "I mean, it's really two out of three [in] that situation, versus you need all [twelve] at a jury trial. Do you understand that?" Transcript of September 19, 2022, pp. 2–3), appeal filed, Connecticut Supreme Court,

However, practical barriers have limited our search. First, we were able to review documentation in cases no older than 2016. Second, except in unusual circumstances, the Judicial Branch generates transcripts only when a party files an appeal, and, even then, transcripts are prepared only for the proceedings that a party requests. See footnotes 10 and 14 of this opinion. For example, a defendant who does not challenge the voluntariness of his waiver of a jury trial might not order a transcript of the proceeding in which that canvass occurred. These logistical hurdles significantly narrowed the number of transcripts we could access. Nonetheless, among the transcripts we did review, we found striking the regularity with which trial courts advised defendants that the panel does not need to be unanimous under §§ 53a-45 and 54-82.

[14] In one of those seven cases, *State* v. *Samuolis*, 344 Conn. 200, 278 A.3d 1027 (2022), we were unable to determine whether the trial court described the unanimity distinction between trial to a jury and trial to a three judge panel, as the transcripts the defendant ordered in that case did not include the proceeding at which he waived the right to a jury trial and elected to be tried before a three judge panel.

Docket No. SC 20855 (July 17, 2023); *State* v. *Moore*, Superior Court, judicial district of New Haven, Docket No. NNH-CR-15-0157986-T (March 29, 2019) ("If it's [eleven] for guilty and one for not guilty or one who cannot vote for guilty, it's not a guilty verdict . . . . In a three judge panel . . . two out of three would be enough for a guilty verdict." Transcript of September 10, 2018, pp. 4–5), aff'd sub nom. *State* v. *Leroya M.*, 340 Conn. 590, 264 A.3d 983 (2021); *State* v. *Alexander*, Superior Court, judicial district of New Haven, Docket No. NNH-CR-16-0167203-T (January 29, 2019) ("In other words, as opposed to [twelve] jurors having to unanimously find you guilty, with [a] three judge panel, only two judges have to find you guilty. Do you understand that?" Transcript of December 5, 2018, p. 4), aff'd, 343 Conn. 495, 275 A.3d 199 (2022); *State* v. *Weathers*, Superior Court, judicial district of Fairfield, Docket No. FBT-CR-15-0283568-T (December 5, 2016) ("Also, I just want to point out one difference between a jury trial and a trial to three judges is that, in a jury trial, any verdict of the jury has to be unanimous. They all have to agree to any verdict on any charge, whether the verdict is guilty or not guilty." Transcript of November 29, 2016, p. 8), aff'd, 188 Conn. App. 600, 205 A.3d 614 (2019), aff'd, 339 Conn. 187, 260 A.3d 440 (2021); *State* v. *Watson*, judicial district of New Haven, Docket No. NNH-CR-13-0142561-T (September 29, 2016) ("So, you understand you're giving up [twelve] people that unanimously would have to find you guilty, as opposed to two out of three judges." Transcript of August 30, 2016, p. 3), aff'd, 195 Conn. App. 441, 225 A.3d 686, cert. denied, 335 Conn. 912, 229 A.3d 472 (2020).[15]

[15] We take judicial notice of the trial court transcripts in *Maharg*, which appeal is pending before this court, and *Moore*, *Alexander*, *Weathers* and *Watson*. See, e.g., *State* v. *Gore*, 342 Conn. 129, 139 n.9, 269 A.3d 1 (2022) ("[t]here is no question . . . concerning our power to take judicial notice of files of the Superior Court, whether the file is from the case at bar or otherwise" (internal quotation marks omitted)).

We have often stated that our supervisory powers " 'are an extraordinary remedy' "; *Marquez* v. *Commissioner of Correction*, 330 Conn. 575, 608, 198 A.3d 562 (2019); to be invoked sparingly and only "to enunciate a rule that is not constitutionally required but that we think is preferable as a matter of policy." (Internal quotation marks omitted.) *State* v. *Medrano*, 308 Conn. 604, 630, 65 A.3d 503 (2013); see also *State* v. *Pouncey*, 241 Conn. 802, 813, 699 A.2d 901 (1997) (noting that supervisory authority "is not a form of free-floating justice, untethered to legal principle" (internal quotation marks omitted)). Typically, that means we will consider whether to exercise our supervisory authority only after determining that neither the federal nor the state constitution mandates the proposed rule. However, "we on several previous occasions have declined to address a defendant's constitutional claim precisely because we elected to exercise our supervisory authority." *State* v. *Rose*, 305 Conn. 594, 606, 46 A.3d 146 (2012).

In the present case, as in *Rose*, we decline to address the defendant's constitutional claim because we have elected instead to exercise our supervisory authority—and to ultimately grant relief—for two related reasons. First, as discussed previously, we invoked our supervisory authority in *Gore* to require that trial courts canvass defendants on the record to confirm that their waiver of the right to a jury trial is made knowingly, intelligently, and voluntarily. See *State* v. *Gore*, supra, 288 Conn. 778. Second, the rule that the three judge panel's verdict does not have to be unanimous stems from a statute that appears to be unique in the nation and which, having been enacted into law by the legislature, could be amended by the legislature. Accordingly, we see less utility in addressing the defendant's state constitutional claim that the trial court's canvass of her should have included a discussion of unanimity. See, e.g., *State* v. *Patel*, 342 Conn. 445, 455 n.6, 270 A.3d 627

("the jurisprudential policy of constitutional avoidance" directs "courts to decide a case on a nonconstitutional basis if one is available, rather than unnecessarily deciding a constitutional issue"), cert. denied, U.S. , 143 S. Ct. 216, 214 L. Ed. 2d 86 (2022).

We are mindful that "the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers." (Internal quotation marks omitted.) *State* v. *Anderson*, 255 Conn. 425, 439, 773 A.2d 287 (2001). "Thus, a defendant seeking review of an unpreserved claim under our supervisory authority must demonstrate that his claim is one that, as a matter of policy, is relevant to 'the perceived fairness of the judicial system as a whole,' most typically in that it lends itself to the adoption of a procedural rule that will 'guide the lower courts in the administration of justice in all aspects of the criminal process.' . . . In our view, adherence to this unifying principle mitigates against the specter of arbitrary, result oriented, and undisciplined jurisprudence that may be a potential risk of the expansive use of our supervisory powers." (Citations omitted; footnote omitted.) *State* v. *Elson*, 311 Conn. 726, 768–71, 91 A.3d 862 (2014).

It is not unusual for us to exercise our supervisory authority to direct trial courts to undertake a particular canvass of individuals before they waive certain rights. In addition to *Gore*, we invoked our supervisory authority in *Duperry* v. *Solnit*, 261 Conn. 309, 803 A.2d 287 (2002), to require that, when a defendant "pleads not guilty by reason of mental disease or defect, and the state substantially agrees with the defendant's claim of mental disease or defect . . . the trial court must canvass the defendant to ensure that his plea is made voluntarily and with a full understanding of its consequences." Id., 329. In *State* v. *Connor*, 292 Conn. 483, 973 A.2d 627 (2009), we invoked our supervisory authority to require that, "upon a finding that a mentally

ill or mentally incapacitated defendant is competent to stand trial and to waive his right to counsel at that trial, the trial court must make another determination, that is, whether the defendant also is competent to conduct the trial proceedings without counsel." Id., 518–19. Most recently, in *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015), we directed that, in all parental termination proceedings, trial courts must canvass the respondent parent prior to the start of the trial to ensure that the respondent fully understands his or her rights that are protected under law.[16] Id., 795. In *In re Yasiel R.*, we stated that, "by exercising our supervisory authority . . . we are promoting public confidence in the process by ensuring that all parents involved in parental termination proceedings fully understand their right to participate and the consequences of the proceeding." Id., 794–95.

Although our search for and examination of trial court canvasses of defendants who have waived their right to a jury trial in favor of three judge panels cannot possibly be complete in light of the lengthy history of the statute, we find the sample size of recent cases to be significant for the task at hand. This review of available case law and transcripts supports a conclusion that it is more than a common practice, but a nearly unanimous practice, for trial courts to refer specifically

[16] Specifically, in *In re Yasiel R.*, we held that the canvass in termination of parental rights proceedings must cover "(1) the nature of the termination of parental rights proceeding and the legal effect thereof if a judgment is entered terminating parental rights; (2) the respondent's right to defend against the accusations; (3) the respondent's right to confront and cross-examine witnesses; (4) the respondent's right to object to the admission of exhibits; (5) the respondent's right to present evidence opposing the allegations; (6) the respondent's right to representation by counsel; (7) the respondent's right to testify on his or her own behalf; and (8) if the respondent does not intend to testify, he or she should also be advised that if requested by the petitioner, or the court is so inclined, the court may take an adverse inference from his or her failure to testify, and explain the significance of that inference." *In re Yasiel R.*, supra, 317 Conn. 795.

to the possibility of a split verdict, as permitted by §§ 53a-45 and 54-82. In fact, as in *Bennett*, ensuring that the record manifests a defendant's understanding that a three judge panel's verdict does not have to be unanimous, although a jury's verdict must be unanimous, was important enough that one experienced trial judge called the defendant back into the courtroom to make clear that he understood this critical difference. See *State* v. *Bennett*, supra, 307 Conn. 775. We still believe that, as we said in *Kerlyn T.*, competent counsel is more than capable of explaining the "basic differences" between a jury trial and a court trial, but Connecticut's unique statutory scheme exists in a national landscape where a unanimous jury verdict is part and parcel of a defendant's sixth amendment right to a jury trial. *State* v. *Kerlyn T.*, supra, 337 Conn. 396 n.10; see also *Ramos* v. *Louisiana*, supra, 590 U.S. 96. Given this context, we cannot categorize the lack of unanimity specifically permitted in three judge panel cases under §§ 53a-45 (b) and 54-82 (b) as a "basic [difference]" that can be left to counsel to explain to a defendant. *State* v. *Kerlyn T.*, supra, 396 n.10; see, e.g., *Ramos* v. *Louisiana*, supra, 107 (nonunanimous verdicts have not "become part of our national culture" (internal quotation marks omitted)). We therefore conclude that we should exercise our supervisory authority to require that trial courts, when canvassing defendants who want to waive their right to a jury trial in favor of a three judge panel, specifically advise those defendants that, unlike a twelve person jury that must arrive at a unanimous verdict, only two members of a three judge panel need to agree to convict a defendant. This mandatory canvass "is preferable as a matter of policy"; *State* v. *Rose*, supra, 305 Conn. 606; and is necessary to "the perceived fairness of the judicial system as a whole . . . ." (Internal quotation marks omitted.) *State* v. *Elson*, supra, 311 Conn. 768. That so many trial judges have included such

critical information about the tribunal as part of their canvasses convinces us that failing to do so contributes to a perception of arbitrariness in our judicial system rather than inspiring confidence that our courts, "in the administration of justice in all aspects of the criminal process," will treat all defendants equally, no matter the circumstances they encounter. (Internal quotation marks omitted.) Id.

Having decided to exercise our supervisory authority to require such a canvass, our inquiry is not quite finished. We must decide whether this new rule should apply to the present case, resulting in a reversal of the judgment of conviction in this case. Cases in which this court has invoked its supervisory authority "can be divided into two different categories. In the first category are cases [in which] we have utilized our supervisory power[s] to articulate a procedural rule as a matter of policy, either as holding or dictum, but without reversing convictions or portions thereof. In the second category are cases [in which] we have utilized our supervisory powers to articulate a rule or otherwise take measures necessary to remedy a perceived injustice with respect to a preserved or unpreserved claim on appeal." Id., 768 n.30; accord *State* v. *Carrion*, 313 Conn. 823, 850, 100 A.3d 361 (2014). "Our cases have not always been clear as to the reason for this distinction." *State* v. *Diaz*, 302 Conn. 93, 107 n.11, 25 A.3d 594 (2011). But "a review of the cases in both categories demonstrates that, in contrast to the second category, the first category consists of cases [in which] there was no perceived or actual injustice apparent on the record, but the facts of the case lent themselves to the articulation of prophylactic procedural rules that might well avert such problems in the future." *State* v. *Elson*, supra, 311 Conn. 768–69 n.30. "[W]e will reverse a conviction under our supervisory powers only in the rare case [in which] fairness and justice demand it. . . . [The issue

at hand must be] of [the] utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Internal quotation marks omitted.) *State* v. *Reyes*, 325 Conn. 815, 823, 160 A.3d 323 (2017); accord *State* v. *Turner*, 334 Conn. 660, 687, 224 A.3d 129 (2020). "For purposes of the second category of cases—cases in which we reverse a conviction—the defendant must establish that the invocation of our supervisory authority is truly necessary because '[o]ur supervisory powers are not a last bastion of hope for every untenable appeal.' " *State* v. *Carrion*, supra, 851; see also *State* v. *Patterson*, 276 Conn. 452, 470, 491, 886 A.2d 777 (2005) (reversing judgment where trial court declined to instruct jury regarding credibility of jailhouse informant who had been promised benefit in exchange for his testimony).

Our review of the record in the present case, as well as the canvasses provided to defendants in the vast majority of relevant cases that we have been able to examine, convinces us that "fairness and justice demand" that we reverse the defendant's conviction. See *State* v. *Reyes*, supra, 325 Conn. 823. We therefore announce today a rule that defendants electing to waive their right to a jury trial in favor of a trial before a three judge panel must be advised by the court, on the record, that only two of the three judges have to agree to convict them, in contrast to a jury of twelve, which must agree unanimously in reaching a guilty verdict. The defendant in the present case did not receive the benefit of this admonition, waiving her right to a jury trial during a virtual hearing that she attended from the detention center where she had been incarcerated for eighteen months. She then found herself on the losing end of a two-to-one verdict in one of only two nonunanimous verdicts we have been able to locate by a three judge panel and the only nonunanimous verdict involving a

murder charge. We have no trouble concluding that this issue is "of [the] utmost seriousness . . . ." (Internal quotation marks omitted.) *Marquez* v. *Commissioner of Correction*, supra, 330 Conn. 608. In *Gore*, we invoked our supervisory authority in a similar fashion to require trial courts to canvass defendants about their choice to waive the right to a jury trial and then concluded that we must reverse the defendant's conviction and remand the case for a new trial. See *State* v. *Gore*, supra, 288 Conn. 787–88, 790. For the "integrity of [the defendant's] particular trial but also for the perceived fairness of the judicial system as a whole"; *State* v. *Elson*, supra, 311 Conn. 765; we conclude that we must reverse the defendant's conviction and remand the case for a new trial[17] to remedy "a perceived or actual injustice . . . ." Id., 768 n.30.

## IV

Although we have reversed the defendant's conviction and remanded the case for a new trial, because the defendant's final claim is likely to arise at a new trial, we will review it. See, e.g., *State* v. *Juan A. G.-P.*, 346 Conn. 132, 158, 287 A.3d 1060 (2023). In particular, the defendant claims that the three judge panel violated her due process rights because it began deliberations prior to the close of evidence and the submission of the case to the panel. Her claim is in part legal and in part factual. Legally, she asks that we extend our holding in *State* v. *Washington*, 182 Conn. 419, 421, 438 A.2d 1144 (1980), in which we established a constitutional prohibition against jury deliberations until the close of evidence and the submission of the case to the fact finder, to cases involving three judge panels. Factually, the defendant asserts that she has adequately

[17] On remand, the defendant will be entitled to a canvass in accordance with this opinion prior to her election of whether to have her case retried before a jury or a three judge panel.

established that the three judge panel engaged in premature deliberations. Particularly, the defendant argues that she has established a "prima facie claim of premature deliberations" based on "the short time frame from the submission of the case to publication of the decision on the merits (less than twenty-four hours)" and that she is therefore entitled to a remand of the case to develop a fuller factual basis to support her claim pursuant to *State* v. *Castonguay*, 194 Conn. 416, 436, 481 A.2d 56 (1984). She also argues that this court should order the three judge panel to respond to her motion for augmentation and rectification of the record, in which she sought details as to the timing and extent of the three judge panel's deliberations. See footnotes 18 and 19 of this opinion and accompanying text.

In its brief, the state did not respond to the defendant's legal argument, and, when asked repeatedly at oral argument before this court, its appellate counsel expressly declined to take a position as to whether the prohibition established in *Washington* should extend to three judge panels. Instead, the state contends that the defendant failed to establish the factual basis required for us to review her claim that the three judge panel did, in fact, engage in presubmission deliberations. The state also contends that this court should not remand the matter to the three judge panel to develop the facts more fully because the defendant's motion for rectification improperly sought to add new information to the record.

As we will explain, we disagree with the defendant's legal argument that *Washington*'s prohibition on presubmission deliberations should extend to three judge panels. Because of this conclusion, we need not address the parties' arguments about whether to remand the case to the three judge panel for further factual development or to respond to the defendant's request regarding her motion for rectification because, even if we assume,

without deciding, that the three judge panel engaged in presubmission discussions, we conclude that such discussions are not constitutionally prohibited.

The following additional procedural history is relevant to this claim. The evidentiary portion of the trial occurred on April 27, 28, 29 and 30, and May 3, 2021. The parties introduced more than 100 exhibits and elicited the testimony of fifteen witnesses. On May 4, the parties presented closing arguments, the three judge panel heard the playback of certain testimony and then recessed for the day at 5 p.m.[18] Between 11:39 a.m. and 12:06 p.m. on May 5, both the majority and the dissenting judge orally announced their findings of fact, conclusions, and verdicts. At 12:32 p.m., the dissenting judge issued a one page decision that contained findings and conclusions that also were identical to those in his oral decision. At 2:39 p.m. on the same day, the majority issued a twelve page decision, the findings and conclusions of which were identical to those it had announced orally earlier that day.

While this appeal was pending, the defendant filed a motion for rectification of the record, requesting that the panel disclose the manner and scope of any deliberations it had engaged in before the case was submitted for decision. The defendant's motion was motivated by the panel's ability to review the evidence, deliberate, and compose detailed memoranda of decision within twenty-four hours. The state opposed the motion. After hearing arguments, the three judge panel denied the motion for rectification.[19]

[18] The specific timing of these activities derives from the three judge panel's denial of the defendant's motion for rectification of the record, in which the judges stated that they had spoken with the courtroom monitor, who consulted the electronically time-stamped contemporaneous notations. See footnote 19 of this opinion.

[19] The three judge panel did not explicitly confirm or deny that it had engaged in presubmission deliberations but, instead, denied the motion because it sought extraordinary relief not sanctioned by our rules of practice and, in the panel's view, sought to intrude on its deliberative processes. In

We have not had occasion, until now, to consider whether the prohibition in *Washington* on presubmission deliberations by juries applies to three judge panels. To our knowledge, we are the first court in the country to be asked to answer this question. As previously described, § 54-82 (b) is one of a kind in that it permits defendants accused of "a crime punishable by death, life imprisonment without the possibility of release or life imprisonment" to elect to be tried before a three judge panel.[20] Accordingly, we review our reasoning in *Washington* to determine whether to extend it to the present case.

In *Washington*, a jury found the defendant guilty of felony murder, and he appealed from his conviction to this court, raising a constitutional challenge to the trial

its memorandum denying rectification, the three judge panel stated that "the court began its deliberations at 12:25 p.m." on May 4. As support for this statement, the three judge panel indicated that it had spoken with the courtroom monitor, who consulted the electronically time-stamped contemporaneous notations. That does not, however, conclusively establish whether the panel did or did not discuss the evidence before the case was submitted to it for decision.

The defendant sought reconsideration of the denial of her motion for rectification, which the three judge panel denied. The defendant then asked this court for review of the three judge panel's denial of her motion for rectification. We granted review but denied the relief requested without prejudice to allow the parties to renew their arguments in their briefs to this court. In accordance with our order on the defendant's motion for review, the parties' briefs focus on whether the denial of rectification was proper. We do not opine on that issue because we reject the defendant's legal claim that *Washington*'s prohibition on presubmission deliberations by a jury does not extend to three judge panels.

[20] Other states have statutes authorizing three judge panels, but none of those statutes is congruent with § 54-82. See footnote 3 of this opinion; see also N.Y. City Crim. Ct. Act §§ 40 and 42 (repealed 1971); Pa. R. Crim. P. 319A (b). States such as Alaska and Nebraska provide for a three judge panel for sentencing. See, e.g., Alaska Stat. § 12.55.175 (2012); Neb. Rev. Stat. § 29-2520 (3) (Cum. Supp. 2022). Finally, § 20-18-101 of the Tennessee Code mandates that a three judge panel be convened to hear and determine civil actions challenging, inter alia, the constitutionality of a statute, executive order, or administrative regulation. See Tenn. Code Ann. § 20-18-101 (West 2021).

court's jury instructions. *State* v. *Washington*, supra, 182 Conn. 420. Specifically, he claimed that "the trial court's instructions early in the trial granting the jurors permission to discuss in the jury room the evidence heard daily before the termination of the case deprived him of due process under the federal and state constitutions." (Emphasis omitted.) Id., 421. We observed that neither the jurors' oath contained in General Statutes (Rev. to 1973) § 1-25 nor Practice Book (1978–97) § 850 (now § 42-14) prohibited jurors from discussing the evidence prior to the case being submitted to them, and that the "source of the prohibition of such discussions" derived from the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution, which afford the defendant the right to trial by an impartial jury. Id., 424–25.[21] We held that the jury's impartiality is hindered by presubmission deliberations and concluded that it is "improper for jurors to discuss [the] case among themselves until all the evidence has been presented, counsel have made final arguments, and the case has been submitted to them after final instructions by the trial court." Id., 425. We set aside the conviction and ordered a new trial because the trial court's instructions improperly "authorized and encouraged [the jury] to give premature consideration to the evidence presented—consideration unaided by the final instructions of the trial court as to the law to be applied to the facts in the case." Id., 426, 429.

To support this new constitutional rule, we recognized in *Washington* that "it is human nature that an individual, having expressed in discussion his or her view of the guilt or innocence of the defendant, would

[21] Although the court in *Washington* relied on the constitutional right to a fair and impartial jury, it is equally true that a defendant has a constitutional right to a trial before an impartial judge. See, e.g., *Tumey* v. *Ohio*, 273 U.S. 510, 535, 47 S. Ct. 437, 71 L. Ed. 749 (1927).

be inclined thereafter to give special attention to testimony strengthening or confirming the views already expressed to fellow jurors. . . . Because the prosecution presents its evidence first, initial expressions of opinion would generally be unfavorable to the defendant. . . . Also, the human mind is constituted so that what one himself publicly declares touching any controversy is much more potent in biasing his judgment and confirming his predilections than similar declarations which he may hear uttered by other persons. When most men commit themselves publicly to any fact, theory, or judgment they are too apt to stand by their own public declarations, in defiance of evidence. This pride of opinion and of consistency belongs to human nature." (Citations omitted; internal quotation marks omitted.) Id., 426. Likewise, "[o]nce a juror has expressed an opinion on key evidence to his [fellow jurors], the die may well have been cast. . . . [S]uch a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason. He will listen with more favor to that testimony which confirms, than to that which would change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in this case." (Internal quotation marks omitted.) Id., 428.[22]

Accordingly, "[t]he principal evils of permitting premature discussion by jurors are that the jurors may

[22] Following *Washington*, we consistently have reaffirmed the constitutional prohibition on jury discussion prior to the final submission of the case. See, e.g., *Sawicki* v. *New Britain General Hospital*, 302 Conn. 514, 521–22, 29 A.3d 453 (2011); *State* v. *Newsome*, 238 Conn. 588, 627, 682 A.2d 972 (1996); *Spitzer* v. *Haims & Co.*, 217 Conn. 532, 545, 587 A.2d 105 (1991); *State* v. *Castonguay*, supra, 194 Conn. 434. Although an instruction permitting jurors to discuss the case before its submission to them constitutes reversible error, not all juror discussion prior to submission automatically requires a new trial. See *State* v. *Castonguay*, supra, 434. Rather, if, on appeal, there is an indication that the jurors engaged in presubmission discussions, we will remand the case to the trial court for an evidentiary hearing to determine whether that impropriety constituted harmless error. See id., 436.

thereby consider evidence unaided by the court's instructions, and that a juror who has expressed his opinion publicly to his fellow jurors may become irretrievably committed to that point of view despite evidence to the contrary." *Spitzer* v. *Haims & Co.*, 217 Conn. 532, 545, 587 A.2d 105 (1991); see *State* v. *Washington*, supra, 182 Conn. 426. We are not persuaded that these evils plague the presubmission deliberations of a three judge panel.

First, as the defendant's appellate counsel conceded at oral argument before this court, judges are aware of the applicable law prior to the final submission of the case, unlike jurors, who must be instructed. See, e.g., *State* v. *Reynolds*, 264 Conn. 1, 29 n.21, 836 A.2d 224 (2003) ("[i]n the absence of any evidence to the contrary, '[j]udges are presumed to know the law . . . and to apply it correctly' "), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). Thus, discussion among judges while a trial is ongoing does not pose a risk that their views will be skewed by their lack of knowledge of the legal standards governing their decision. See *State* v. *Davis*, 63 Ohio St. 3d 44, 48, 584 N.E.2d 1192 ("[j]udges are trained and expected to disregard any extraneous influences in deliberations"), cert. denied, 506 U.S. 858, 113 S. Ct. 172, 121 L. Ed. 2d 119 (1992). For example, because judges are aware of the rules of evidence, we presume that, when acting as triers of fact, they consider only properly admitted evidence when rendering their decision. See, e.g., *State* v. *Roy D. L.*, 339 Conn. 820, 842, 262 A.3d 712 (2021). Likewise, we have recognized that "judges, who, unlike jurors, are well versed in the rules that govern the arguments of counsel during a trial, are also less likely to be influenced by improper comments or arguments made by counsel during a [court] trial." Id., 844. Jurors, on the other hand, do not hear the evidence with a legal framework in mind and must refrain from deliberating

until after they are instructed by the court at the end of the trial about how the law mandates that they evaluate and weigh the evidence that was presented to them. See *State* v. *Washington*, supra, 182 Conn. 426. In short, we trust judges—sworn constitutional officers and legal professionals whose everyday job is to preside in a courtroom—if they choose to discuss the case prior to the close of evidence because their deliberations are not hampered by their lack of knowledge of how the law will govern their ultimate decision.

Second, we reject the suggestion that presubmission deliberations would result in the judges of a panel refusing to change their initial position. We trust judges to be true to their oaths, training, and role as neutral arbiters to resolve matters in an impartial and unbiased manner. See, e.g., *Munn* v. *Hotchkiss School*, 326 Conn. 540, 577, 165 A.3d 1167 (2017); *State* v. *Milner*, 325 Conn. 1, 12, 155 A.3d 730 (2017); see also General Statutes § 1-25 (prescribing judicial oath and juror oath). To be sure, judges are human beings. They might have initial reactions to evidence, reactions that they might even share with their colleagues on the panel. Judges would violate their duty as neutral arbiters, however, if those initial impressions caused them to become closed-minded, or if they failed to properly engage in the deliberative process. See Code of Judicial Conduct, Rule 2.2 ("[a] judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially"); Code of Judicial Conduct, Rule 2.2, comment (1) ("[t]o ensure impartiality and fairness to all parties, a judge must be objective and open-minded"). We have confidence in the judges of a panel to resist the inclination that might overcome legally untrained laypersons and allow presubmission deliberations to affect their ultimate conclusions. Unlike jurors, judges are experienced legal professionals who are highly sensitive to the risk of prejudgment and acutely aware that they

are bound by the highest standards of impartiality. See, e.g., *Ponns Cohen* v. *Cohen*, 342 Conn. 354, 362, 270 A.3d 89 (2022) (recognizing that "judges are human" but also that "*judges are held to the highest of standards*" (emphasis added)).

Moreover, there is an important and stark difference between a juror's and a judge's responsibilities in our system of justice. Unlike a jury, the sole purpose of which is to serve as a fact finder; see *Maldonado* v. *Flannery*, 343 Conn. 150, 160, 272 A.3d 1089 (2022); a judge on a three judge panel serves a hybrid role as fact finder and legal arbiter. See, e.g., *Saleh* v. *Ribeiro Trucking, LLC*, 303 Conn. 276, 282, 32 A.3d 318 (2011). As part of this hybrid role, judges may be required to begin assessing and discussing the evidence prior to the final submission of the case to them in the likely event that the panel is required to make legal rulings prior to the close of evidence. See, e.g., *State* v. *Watson*, supra, 195 Conn. App. 444 (three judge panel denied defendant's motion for judgment of acquittal filed after conclusion of state's case); see also *State* v. *Crespo*, 246 Conn. 665, 670, 718 A.2d 925 (1998) (same), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999).

Of course, nothing in our decision today *requires* that the members of a three judge panel engage in presubmission deliberations. There might be good reasons for the judges of the panel to agree, prior to trial, to abstain from deliberations until the final submission of the case. We cannot say, however, that a three judge panel's presubmission deliberations would be unconstitutional because that would require us to assume that the judges would violate their oaths and the Code of Judicial Conduct, which "strikes at the very core of judicial integrity and tends to undermine public confidence in the established judiciary." (Internal quotation marks omitted.) *State* v. *D'Antonio*, 274 Conn. 658, 672,

877 A.2d 696 (2005). We rely on trial judges every single day to resolve factual and legal disputes with open minds, and we remain confident that they will continue to do so even if they are permitted to discuss the evidence as it is presented with their fellow panel members.[23] If the defendant has a specific factual basis to assert that the impartiality of a member of a three judge panel might reasonably be questioned, the defendant may move to disqualify the judge pursuant to Practice Book § 1-23. See, e.g., *State* v. *Milner*, supra, 325 Conn. 4–5. Without this specific factual basis, we are not persuaded that we must extend *Washington*'s blanket constitutional prohibition on presubmission jury deliberations to three judge panels.

In sum, the defendant has not offered us a compelling reason to adopt a constitutional prohibition on the three judge panel's presubmission deliberations. We therefore decline to extend *Washington* to cases involving three judge panels.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other justices concurred.

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[23] Notwithstanding our conclusion that there is no constitutional prohibition on a three judge panel's discussing the case before the close of evidence, we note that the better practice is to avoid deliberating on the ultimate issue of the defendant's guilt or innocence until the case is formally submitted to the panel.