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SUPREME COURT
of the
STATE OF CONNECTICUT

S.C. 20632

STATE OF CONNECTICUT
v.
LARISE KING

BRIEF OF THE DEFENDANT-APPELLANT WITH PARTY APPENDIX

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PRELIMINARY STATEMENT

The state charged the defendant, Larise King, with Murder as an Accessory, in violation of General Statutes §§ 53a-54a and 53a-8, and Conspiracy to Commit Murder, in violation of General Statutes §§ 53a-48 and 53a-54a, in connection with a shooting that resulted in the death of her former husband, Dathan Gray.

The prosecution claimed that the defendant solicited her cousin, Oronde Jefferson, and his friend, Andrew Bellamy, to murder Gray. No direct evidence implicated the defendant in the shooting, she did not confess, and no witness testified that she was involved in the shooting.

The evidence established that on the night of the incident, Gray's employer called the defendant and asked her to come "deal with" Gray because he was intoxicated and "acting up" at work. 4/29T.26. When the defendant arrived, she and Gray argued, and a physical fight ensued. About an hour later, two men approached Gray outside of his apartment and shot him multiple times, killing him. Surveillance footage and cell cite location information placed the defendant, Jefferson, and Bellamy near the scene at the time of the incident.

Testifying under a grant of immunity, Bellamy testified that he was with the defendant and Jefferson the night of the homicide, but he denied that any of them were involved in the shooting. Although there were eyewitnesses to the shooting, none identified Bellamy or Jefferson. The state did not charge Bellamy and Jefferson in connection with the crime, and it did not present any evidence concerning the circumstances surrounding their alleged agreement or plan with the defendant to murder Gray. Acknowledging that the defendant's intent presented the "pivotal" question in the case, the prosecution asserted that there was sufficient evidence to show "there was some sort of plan." 5/4T.4,12.

Following a court trial before a three-judge panel, Judge Hernandez and Judge Dayton convicted the defendant on both counts. Judge Richards dissented, concluding that the state failed to prove that the defendant had the specific intent to kill Gray, a requisite element of both offenses. The majority imposed a total effective sentence of fifty years imprisonment.

The defendant raises three claims on appeal: (1) the defendant's waiver of her right to a jury trial was invalid under the federal and state constitutions because the trial court's canvass failed to ascertain whether the defendant understood the role of the jury in a criminal case and the consequences of waiving the jury trial right; (2) the evidence was insufficient to prove the crimes of Murder and Conspiracy to Commit Murder beyond a reasonable doubt in that the state failed to prove that the defendant: (a) aided Jefferson and Bellamy in the commission of the murder, which was required to prove accessorial liability for murder; (b) intended that Gray be murdered, which was an essential element of both conspiracy and murder; and (c) agreed to commit the crime of murder, which was required for the conspiracy conviction; and (3) the defendant presented prima facie evidence that the panel deliberated before the defendant's case was submitted, and therefore, pursuant to *State v. Washington*, 182 Conn. 419, 425-28 (1980), the case should be remanded to determine whether any member of the panel "evaluated or stated an opinion on the evidence, in which case a new trial is required." *State v. Castonguay*, 194 Conn. 416, 437 (1984).

STATEMENT OF FACTS AND PROCEEDINGS

1. The Criminal Trial

Over the course of five days of trial testimony, the prosecution presented the following evidence most relevant to the issues on appeal.

Larise King and Dathan Gray married in 2016. 4/28T.92,5/3T.38. They later separated and at the time of the murder, on July 26, 2019, they were both dating other people. Id.,93.4/28T.28, 4/29 T.58. According to the state's theory at trial, the events leading up to the homicide took place over an hour and a half, within a two-block radius of the corner of Newfield Avenue and Revere Street in Bridgeport. In that timeframe, Gray fought with four women: Fatima Woodruff, Janice Rondon, the defendant, and Sakeryial Beverly. 4/28T.64,81. The shooting occurred on Newfield Avenue, a short distance from Gray's apartment and across the street from the Snack Shack, where he worked. 4/28T.40,82. People had gathered in the neighborhood to attend the Father Panik Village reunion party at the BK Lounge, also on Newfield Avenue. 4/28T.79-80.

2. The Homicide

Around 11:20 p.m., Bridgeport Police responded to calls reporting a disturbance near the corner of Revere Street and Newfield Avenue. 4/27T.29. When officers arrived on the scene, "there was quite a big crowd on the street." Id., 29. A man, later identified as Dathan Gray, "was throwing things at people and was pretty irate with a few people in the crowd." Id., 29-30. After calming Gray down, police left the scene, and Gray returned to the Snack Shack. Id.,30-31.

A little after 1 a.m., the shot spotter system alerted police to sixteen gunshots in the same location. Id.,36,38. When police arrived, they found Gray lying in the street, suffering from multiple gunshot wounds. 4/27T.36, SE4. A large crowd had gathered, and a man was attempting to administer CPR. Paramedics transported Gray to the hospital where he was later pronounced dead. Id.,103, 104, 106.

Dr. Jacqueline Nunez conducted the autopsy and identified eleven gunshots wounds to the victim's head, neck, and abdomen and four gunshot wounds that grazed the extremities. 4/28T.4,7,11,12-23.

Police recovered sixteen spent 9 mm caliber shell casings at the scene. Ballistics examination showed that the casings came from the same gun, but a determination of whether the cartridges and the bullets came from the same or multiple firearms could not be made.

Police seized four vials of crack cocaine located next to Gray's body. Id., 79, 89. The toxicology report showed that he had ethanol, THC, and methamphetamines in his system at the time of his death.

3. The Witnesses

Janice Rondon, a friend of the defendant and the victim and maid of honor at their wedding, testified about the events leading up to the shooting. 4/28T.76, 82-83. Rondon received a phone call from the defendant, who said that she had an emergency and needed a ride. 4/28T. 76-77. Gray's employer, Fatima Woodruff, had called the defendant and asked her to come "deal with" Gray because he was "drunk" and "acting up" at work. 4/29T.26.

When they arrived at the Snack Shack, the defendant, who had also been drinking, went to speak with Gray outside the store on Newfield Avenue. 4/28T. 78, 79, 81-82. Rondon remained in the car, on her phone. Id., 81-82. At some point, Rondon approached the defendant and Gray to see what was going on. Id., 83. Gray became angry and stated, "Why the fuck you over here? Mind your fucking business, bitch." Id., 83. Gray tried to spit at Rondon, and she started "spitting back on him." Id., 84. A fight broke out between Gray and the defendant and they exchanged punches. Id., 84-85. Woodruff was also involved in the fight. Id.,86. There was "commotion" and shouting. Id.,85. The defendant and Gray exchanged words, but it was too loud to hear what was said. Id.,86. The defendant's boyfriend, T.J., arrived and separated Gray from the defendant. Id., 87-88.

After the fight, Rondon dropped the defendant at T.J.'s house on Sixth Street. 4/28T. 89. Rondon stayed in the area because she had

plans to meet friends at the reunion at the BK Lounge, a short distance away. Id., 90. Rondon was in her car waiting for her friends to arrive when she heard gunshots. Id.,89-91. She later learned Gray had been shot. Id., 91.

Nosadee Sampson, a childhood friend of Gray and the defendant, testified that she went to the Snack Shack to meet Gray the night of the shooting. 4/29T. 50,52. Sampson planned to join her friends at the reunion, around the corner. Id.,54. When she arrived, yelling prompted her to enter the store, where she found Gray arguing with a woman he worked with, Fatima Woodruff. 4/29T. 53,75,78. Sampson intervened and convinced Gray to leave. Id., 52. Once things settled down, Sampson went to the reunion and Gray remained in Sampson's car, which was parked in his driveway, across the street from the Snack Shack. Id., 54-56.

Sometime later, Sampson's friend "Mookie" told her that Gray was fighting. 4/29T. 56. Sampson ran to her car and found Gray and the defendant fighting and rolling around on the ground. Id., 59-60. Gray was yelling that "he didn't give a fuck," and the defendant stated that Gray was "going to breathe his last breath." Id., 61. Eventually the crowd separated them, and the defendant left. Id., 60-61,83-84.

After the fight, Gray and his girlfriend, Sakeryial Beverly, "were having words with each other." 4/29T. 62. Beverly wanted Gray to go home but he refused. Id., 63,79. As Gray and Beverly continued to argue, Sampson saw two men approach in hooded sweatshirts, one gray and one black. Id., 65. The sweatshirts caught Sampson's attention because it was warm that night. Id., 64. Sampson yelled, "Dathan, they got hoods on," "but it was too late." Id., 63-64. The men pushed Beverly out of the way and one of them exchanged words with Gray before shooting him in the face. Id., 63, 66. One of the suspects

was taller than the other, but Sampson could not provide any other details about their physical appearance. Id., 65, 91.

4. Video Surveillance Footage

Police canvassed the area adjacent to the crime scene and obtained video surveillance footage. 4/28T.35, 4/27T.114. From the footage, police identified a light-colored sport utility vehicle consistent with the make of an older Ford Explorer in the area at or around the time of the shooting. 4/28T.35, 4/27T.139.

Investigators took clips from the relevant timeframe in the surveillance footage, combined them non-sequentially, and introduced the footage as an exhibit at trial, See SE98 (Camtasia), 4/28T. 51-52. At 12:57 a.m., a surveillance camera showed a white SUV turn from Connecticut Avenue onto Sixth Street and then stop in the street. SE98 1:58. A person entered the rear driver's side of the vehicle, which then proceeded toward Stratford Avenue. SE98 1:50. At 1:11 a.m., the vehicle parked on Beardsley Street, and the driver, who appeared to be wearing a white t-shirt, exited the car. SE98 4:39, 4/28T.60, 4/29T. 20. A woman wearing a light-colored shirt, and a scarf in her hair, exited the rear of the SUV and re-entered the vehicle on the front driver's side. SE98 4:52. The woman backed the car up slightly and tapped the brake pedal. SE98 5:28. At approximately 1:12 a.m., surveillance footage captured two people walking from the direction of Beardsley Street toward Newfield Street; one of the men was wearing a gray hooded sweatshirt, and the other a dark hooded sweatshirt. SE98 7:50, 4/28T.61-62. The suspects entered the roadway from between the parked cars and stood on either side of the victim. SE98 8:15. The person wearing the dark sweatshirt opened fire on Gray, who fell to the ground. SE98 8:18. A surveillance camera then showed two men in sweatshirts running back toward Beardsley street. SE98 8:36, 4/28T.68. At 1:15 a.m., the surveillance camera directed at Beardsley

Street showed two people walk toward and enter the SUV. SE98 7:08. The brake lights flashed several times before the SUV pulled away from the curb. SE98 7:21.

5. The Alleged, Uncharged Coconspirators

On or about July 31, police conducted a motor vehicle stop of a 2002 white Ford Explorer, registered to the defendant's cousin, Oronde Jefferson. 4/28T.99-101. The vehicle had similar trim and features to the white SUV depicted in the surveillance footage. After speaking with Jefferson, police interviewed his friend, Andrew Bellamy. 4/28T.7. The interviews with Bellamy were recorded and introduced at trial. SE30.[1]

At trial, Bellamy invoked his Fifth Amendment privilege against self-incrimination and was ordered to testify under a grant of immunity. 4/30T.48, 55-57, CE1. Bellamy, a school bus driver with no criminal record, testified that he had never met the defendant before the night of the shooting, he could not identify her, and he did not know Gray. 4/30T.73, SE30 3:35. Bellamy testified that on the night of the incident, he and Jefferson were in Jefferson's Ford Explorer "hanging out drinking." 4/30T.61, SE30 4:12. Around midnight, they picked Jefferson's cousin up near Sixth Street, between Stratford and Connecticut Avenues. 4/30T.63,64,68, SE30 6:36. They planned to go to the reunion at the BK Lounge, but it was too crowded. SE30 10:30-10:51. Jefferson parked around the corner, on Beardsley Street, and they had a few drinks in the car. 4/30T.63,68,74, SE30 at 11:27. When they left, the defendant drove because she had had less to drink than

[1] The three recordings were admitted under State's Exhibit 30. 4/30T.81-83. Citations in the brief refer to Bellamy's in-person interview at the police station, and the time stamps correspond with the VLC media player.

Jefferson. 4/30T.71, SE30 12:08. Bellamy was questioned about a pedometer application on his phone that purportedly showed that at 1:11 am, around the time of the shooting, his phone traveled 240 steps. 4/30T.78-80. Bellamy denied that he and Jefferson got out of the car, and he did not recall hearing gunshots. Id.,73,76,81,SE30 15:24,18:58. Police searched Bellamy's home and seized two semi-automatic Smith and Wesson firearms, which he had a permit to carry. 4/28T.11,12. 4/30T.60. Ballistics testing excluded the firearms as the murder weapon. Id.,13,4/29T.11,41,44.

Detective Citron testified that he prepared arrest warrants for Bellamy and Jefferson, but the State's Attorney indicated that he was "not ready to prosecute" them. 5/3T.6. Neither were ever arrested in connection with the incident.

6. Defendant's Statements

Detective Citron interviewed the defendant on two occasions following the shooting, and the recorded interviews were admitted into evidence at trial. 4/28T.68, 103, 106, SE113 (7/28 interview), SE114 (8/1 Interview).

The defendant denied involvement in the shooting. SE114 28:03. The defendant told the police that she and Gray argued the night of the shooting, and they exchanged punches. SE113 4:36, SE114 4:11, 5:19. The defendant called her boyfriend, Michael Edwards (T.J.), because she wanted Edwards to fight Gray but he refused. SE114 4:30. The defendant initially denied that she was with Jefferson or that she had called him, and she claimed that she was at home when the shooting occurred. SE113 6:39,11:50, SE114 7:57,16:02,20:07. When confronted with the surveillance footage, the defendant told police that Jefferson and his friend picked her up on Sixth Street, and they drove toward Newfield Avenue to see Jefferson's girlfriend at the reunion. SE 114 17:20,17:51,18:20,18:54,22:33. Jefferson later dropped her off on

Sixth Street. SE114 30:09. The defendant denied that they parked on Beardsley Street. SE114 24:04. Around 1:30 a.m., the defendant received a call from a friend who told her that Gray had been shot. SE114 9:45, 10:01,10:37.

King described the clothing she was wearing the night of the shooting: a pink Nautica t-shirt, black Victoria's Secret pants with a yellow stripe, and a black and white head scarf. SE114 2:29. She also provided Jefferson's cell phone number to the police. Id.,19:27. The defendant told the police that she did not know the name of Jefferson's friend. Id.,18:43,26:35,29:03-29:44.

7. Telephone Records/Cell Site Analysis

The state introduced evidence of phone calls between the defendant's two cellular phones (203-953-8073; 203-859-1845), and Jefferson's cellular phone (203-727-5275). SE126, SE127. The evidence showed that the defendant called Jefferson's phone at 12:44 a.m., 12:45 a.m., 12:46 a.m., and 12:51 a.m. 4/30T.30-31, SE126, SE127. Special Agent James Wines used historical cell-site location information to plot selected calls and communications to show that the defendant and Jefferson were in the vicinity of the crime scene—and the reunion party—at various points during the state's timeline. 4/30T. 2, 25-44, SE 129. The state did not introduce any evidence concerning the location of Bellamy's phone at the time of the shooting.

8. Purported Motive Evidence

The state pointed to a Facebook Live Video as evidence of the defendant's motive to kill Gray. See SE115. The prosecution focused on a portion of the video in which the defendant stated, "Whatever my family do to you is beyond me. . . they're tired of you." 5/4T.29-30. SE115 1:10. The defendant posted the recording in January of 2019, approximately six months before the shooting. SE114 14:35, 15:02,

5/3T.25,28. Defendant told the police that she was upset at the time because Gray "was writing all types of stuff on Facebook," and "it was embarrassing." SE114 14:30.

9. Defense Rebuttal Case

Defendant's mother, Betty Hines, testified that the defendant had no criminal record, she worked several jobs, and provided care and financial support for Gray's children. 5/3T.19,23,24. Hines testified that her daughter loved Gray, but the marriage ended due to his substance abuse problems. Id.,25,26,27.

10. Closing Arguments, Verdict and Sentencing

Defendant's Motion for a Judgment of Acquittal was denied on May 3, 2021. That same day, the state requested that the trial court consider the lesser included offenses of manslaughter in the first degree and conspiracy to commit the crime of assault in the first degree. A81. Defendant's trial counsel filed a parallel request on May 4, adopting the state's charges and additionally requesting that the trial court consider the charge of conspiracy to commit assault in the second degree. A82.

The next day, the parties presented their summations. The state theorized that the defendant enlisted Bellamy and Jefferson to commit a murder or an assault with a deadly weapon. 5/4T.14-15. Defendant argued that the failure to charge either of them with any crime created a reasonable doubt. 5/4T.38-41.[2]

The following morning, the panel announces its verdict. Judge Hernandez and Judge Dayton convicted the defendant on both counts.

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[2] At one point, defense counsel appeared to be under the misapprehension that the state's prosecution rested on a "murder for hire" theory of liability. See 5/4T.41.

Clerk's Appendix ("C/A") 11-22. Judge Richards dissented, concluding that the state failed to prove either offense. Judge Richards indicated that he was prepared to find the defendant guilty of the lesser-included offenses. C/A 23.

On the charge of conspiracy to commit murder, the majority imposed a sentence of 20 years imprisonment. On the charge of accessory to murder, the majority imposed a sentence of 50 years, to run concurrent to the sentence on the conspiracy charge for a total effective sentence of 50 years to serve. C/A 7. Additional facts appear in the relevant sections of the arguments that follow.

I. The Right to Trial by Jury May be Waived if the Waiver is made Voluntarily, Knowingly, and Intelligently and with Sufficient Awareness of the Relevant Circumstances and Likely Consequences. The Record does not Affirmatively Demonstrate a Constitutionally Valid Waiver because the Trial Court's Canvass Failed to Determine that Larise King Understood the Role of the Jury in a Criminal Case and the Consequences of Waiving the Jury Trial Right.

The constitutional guarantee of the right to a jury trial is a fundamental right of criminal defendants and a cornerstone of American democracy. A constitutional waiver must, at a minimum, meet the *Zerbst* criteria for a knowing and voluntary waiver. The record here provides no indication that Ms. King relinquished her Sixth Amendment right to a trial by jury "with sufficient awareness of the relevant circumstances and likely consequences" as required under the federal constitution. *Brady v. U.S.*, 397 U.S. 742, 748 (1970).

Ms. King further claims that her waiver of her right to a jury trial was invalid under the Connecticut constitution, which offers a broader range of procedural rights than those afforded under the federal constitution. When a criminal defendant relinquishes her right to a jury trial, it logically follows that the waiver should reflect the defendant's understanding of the specific constitutional guarantees she has given up. The defendant is entitled to know that she is waiving the right to have twelve of her peers unanimously decide her guilt or innocence, as opposed to a three-judge panel that does not have to be unanimous. Additionally, the defendant is entitled to know that our state constitution permits each party to question each prospective juror individually to identify any potential biases and ensure that a fair cross-section of the community is represented, and to peremptorily challenge any prospective jurors not suitable for service.

A. Relevant Facts

The Defendant was arrested on September 21, 2019. On January 9, 2020, public defender, Attorney Jonathan Demirjian entered not guilty pleas and a jury trial election on Ms. King's behalf. 1/9T.3. On June 15, 2020, privately retained counsel, Attorney Michael Peck, appeared on behalf of the defendant in lieu of Attorney Demirjian. On February 5, 2021, Ms. King appeared remotely before the trial court, *Russo, J.*, to accept or reject the state's plea offer and to withdraw her prior jury trial election. 2/5T.1-8. On that date, nearly eleven months into the COVID-19 pandemic, the trial court asked defense counsel whether the defendant intended to waive her right to a jury trial:

> [COURT]: I understand Ms. King 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, 35 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—

COURT: I'm in no better position to do that than you are, sir. 2/5/21T.1, A66.

Judge Russo first canvassed the defendant on the state's pretrial offer. Ms. King answered the court's questions about her background, education, and work experience. 2/5/21T.3-5, A68. The court then canvassed Ms. King on her decision to waive her right to a jury trial:

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, Ms. King?

DEFENDANT: Yes, sir.

COURT: Now, you have a constitutional right and a statutory right, Ma'am, to a trial by jury, do you understand that?

DEFENDANT: Yes.

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?

DEFENDANT: Yes, I do.

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 rather have a trial before a three Judge panel?

DEFENDANT: I would waive the jury trial. I would rather have the three Judge panel.

COURT: All right and have you had enough time to discuss that election with Attorney Peck?

DEFENDANT: Yes, sir.

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.

COURT: All right, anything further from the State?

STATE: No, your Honor.

COURT: The State does find that Ms. King 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 Ms. King is more than competent and understands the proceedings today and understanding—and understands the charge 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. 2/5T.6-8, A71-73.

B. Preservation

The defendant seeks review under *State v. Golding*, 213 Conn. 233, 239–40, 567 (1989). *See, e.g., State v. Ouellette*, 271 Conn. 740, 748 (2004). The record is adequate for review and the defendant's claim is of constitutional magnitude.

C. Standard of Review

Whether the court's canvass was constitutionally adequate is a question of law subject to plenary review. *See State v. Gore*, 288 Conn. 770, 776 (2008). Courts "indulge every reasonable presumption against waiver of fundamental constitutional rights" and should "not presume acquiescence in the loss of fundamental rights." *State v. Morel-Vargas*,

343 Conn. 247, 260 (2022). A claim that a waiver of a jury trial is invalid is a claim of structural error that is per se prejudicial and therefore the defendant need not satisfy *Golding's* fourth prong. *Gore*, supra, 288 Conn. at 790 n.20.

D. Legal Principles

The Sixth Amendment to the United States Constitution provides in relevant part that "the accused shall enjoy the right to a ... public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law...." U.S. Const., amend. 6. A defendant must voluntarily, intelligently, and knowingly waive her right to a jury before electing a court trial. *Patton v. U.S.* 281 U.S. 276, 312-13 (1930). A waiver is knowing and intelligent if it is made "with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, *supra,* 397 U.S. at 748. The determination of whether there is a valid waiver depends on the particular facts and circumstances of the case, including the background, experience, and conduct of the defendant. *Gore*, 288 Conn. at 776-77; *Johnson v. Zerbst*, 304 U.S. 458 (1938).

Under the federal rules, a criminal defendant may waive her constitutional right to a jury trial if the waiver is made in writing with the consent of the government and the approval of the court. Fed. R. Crim. P. 23 (a). "The general rule is that a showing that the defendant's consent to waive his right to a jury trial was knowing, voluntary and intelligent is a necessary precondition to an effective Rule 23(a) jury trial waiver, one distinct from the requirement that the waiver be written." *U.S. v. Robertson*, 45 F.3d 1423, 1432 (10th Cir. 1995).

Although not constitutionally mandated, to ensure a valid waiver, at least eight Circuits either require or encourage a colloquy

between the defendant and the court explaining the material differences between a bench and jury trial. *See U.S. v. Leja*, 448 F.3d 86, 96 (1st Cir. 2006); *Marone v. U.S.*, 10 F.3d 65, 68 (2d Cir. 1993); *U.S. v. Anderson*, 704 F.2d 117, 119 (3d Cir. 1983); *U.S. v. Boynes*, 515 F.3d 284, 286 (4th Cir. 2008); *U.S. v. Martin*, 704 F.2d 267, 274 (6th Cir. 1983); *U.S. v. Rodriguez*, 888 F.2d 519, 527 (7th Cir. 1989); *U.S. v. Cochran*, 770 F.2d 850, 853 (9th Cir. 1985); *Robertson*, supra, 45 F.3d at 1432.

Connecticut law, on the other hand, is largely silent on the specific advice that must be given to a defendant who seeks a non-jury trial. *See* C.G.S. § 54-82b; Practice Book § 42-1. In *State v. Gore*, 288 Conn. at 786–87, this Court held that, in the absence of a written waiver, the trial court "must canvass the defendant briefly to ensure that his or her personal waiver of a jury trial is made knowingly, intelligently and voluntarily," but declined to "constitutionalize" or endorse "a particular means of demonstrating the legality of the waiver."

E. The Defendant's Waiver of Her Right to a Jury Trial was Not Knowing or Intelligent.

As the United States Supreme Court has stated, the trial judge has a critical role in preserving the defendant's right to a trial by jury and thus, for any waiver to be effective, the court's canvass should not "be discharged as a mere matter of rote" but must be undertaken "with sound and advised discretion." *Patton*, supra, 281 U.S. at 312. The trial court's colloquy in this case, at best, confirmed that the defendant was aware that she had a right to a jury trial. The record gives no indication that Ms. King "fully understood the nature of the right and how it would likely apply **in general** in the circumstances," which this Court has described as the minimum requirement. *State v. Rizzo*, 303

Conn. 71, 102 (2011) (Emphasis in original), quoting *U.S. v. Ruiz*, 536 U.S. 622 (2002).

The Supreme Court's discussion in *United States v. Ruiz*, 536 U.S. 622, highlights the distinction between a constitutionally acceptable waiver that is made with "sufficient awareness of the relevant circumstances and likely consequences," versus an understanding of the "specific detailed consequences" that **may** result, which is not necessary to effectuate a constitutionally valid waiver. *Ruiz* explained:

> [T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply **in general** in the circumstances—even though the defendant may not know the specific detailed consequences of invoking it. A defendant, for example, may waive his right to remain silent, his right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide.

Ruiz, 536 U.S. at 629–30 (emphases in original).

The *Ruiz* Court went on to give other examples of circumstances found not to undermine the knowingness and voluntariness of a plea, for example, a defendant's "misapprehen[sion] of the quality of the state's case" and/or the likely penalties associated with conviction; *Brady,* supra, 397 U.S. at 757; counsel's misjudgment of the admissibility of a confession, *McMann v. Richardson*, 397 U.S. 759, 770 (1970); and counsel's failure to point out a potential defense. *U.S. v. Broce*, 488 U.S. 563, 573 (1989).

Ms. King does not argue here that she was entitled to know every possible "detailed consequence" of waiving her right to a jury

trial, for example, who was likely serve on her jury, *Ruiz*, supra, 563 U.S. at 630, its likely racial composition, or whether court trials, on average, produce more convictions than jury trials. However, Ms. King was entitled to know about the essential features of a jury trial—i.e., that (1) a jury is composed of 12 members of the community, (2) a defendant may participate in the selection of jurors, (3) the jury's verdict must be unanimous, and (4) if a defendant waives a jury trial, a judge or a panel of judges will decide the defendant's guilt or innocence by a verdict that does not need to be unanimous. The trial judge was clearly aware of these fundamental points, which could have been easily conveyed to the defendant, **yet none of them were incorporated in the court's canvass.** *Cf. Colorado v. Spring*, 479 U.S. 564, 573–575 (1987) (valid fifth amendment waiver where defendant received standard *Miranda* warnings about nature of the right but not told the specific interrogation questions to be asked).

The trial court's canvass was flawed—not just in what it failed to state, but in what it included. The court's advisement confusingly referenced the possibility of mixed "verdicts" in a jury trial. See 2/5T.6, A71 ("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"). A layperson could have easily misinterpreted this to mean that the jury did not need to be unanimous in its findings. Complicating matters further, when the court described how a panel of judges reaches a verdict, it gave no indication that there is any difference between the two procedures, specifically, that the panel did not have to be unanimous. *But see* C.G.S. § 53a-45 ("in a bench trial, 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"); C.G.S. § 54-82 (same).

The trial court's failure to inform Ms. King of the critical differences between jury and bench trials deprived her of the purpose of the *Zerbst* waiver requirement: she was not in a position to make an informed risk/benefit calculation weighing the likelihood of twelve members of the community unanimously finding her guilty versus the demonstrably higher likelihood that two of three judges would find her guilty—and that the same result would obtain in the latter scenario. Put simply, she did not know what she was doing—because the trial court failed to provide her with that information.

It is not as if Ms. King otherwise knew, based on her own experience, what the trial court failed to tell her. She had no prior involvement in the criminal justice system that would have aided her in understanding the consequences of relinquishing her rights (5/3T.19,23,24.). *See State v. Kerlyn T.*, 191 Conn. App. 476, 490 (2019) (defendant's prior involvement in criminal cases relevant to court's consideration of the voluntariness of his waiver). Nor should this Court presume that defense counsel properly advised Ms. King of the consequences of electing a court trial when his representations to that effect rested on the vague assurance that he had "consulted" with the client. 2/5/21T.7, A72. Indeed, the only specific statement counsel made on the record wrongly implied that Ms. King had no choice and might **never** obtain a jury trial—a position the trial court ultimately endorsed. 2/5/21T.1, A66. ("I don't know when I could tell her that … she'd ever have a jury trial—").

F. The Defendant did not Waive Her State Constitutional Right to a Jury Trial.

If this Court should decide that the defendant's waiver did not violate her federal constitutional rights, then it should conclude that the trial court's canvass failed to satisfy state constitutional requirements. *State v. Geisler*, 222 Conn. 672, 684-86 (1992), sets forth

the multi-factor test for determining whether our state constitution affords rights beyond those set forth in the federal constitution. The *Geisler* factors are: (1) the operative constitutional text; (2) related Connecticut precedents; (3) persuasive relevant federal precedents; (4) persuasive precedents of other states; (5) historical insights into the intent of our constitutional forebears; and (6) contemporary understandings of applicable economic and sociological norms. *Id.*

1. Constitutional Text/Historical Insight

The Connecticut constitution grants greater procedural protections than those afforded under the United States Constitution in that it specifies the number of jurors; it guarantees the right to challenge jurors peremptorily; and it guarantees the right to question jurors individually. Our state constitution describes these rights as "inviolate," which this Court has suggested "is intentionally strong and reflects the great importance of the jury right in Connecticut." *State v. Langston*, 346 Conn. 605, 626 (2023).

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." The Sixth Amendment does not specify what a "trial by an impartial jury" entails.

Conversely, Art. I, § 8 of our state constitution sets forth a criminal defendant's due process right to an "impartial jury" selected from a fair cross section of the community. *State v. Robinson*, 227 Conn. 711, 717 (1993). Article I, § 19, as amended, gives effect to the right, and provides that: "The right of trial by jury shall remain inviolate, the number of such jurors, which shall not be less than six, to be established by law; but no person shall, for a capital offense, be tried by a jury of less than twelve jurors without his consent. In all civil and criminal actions tried by a jury, the parties shall have the

right to challenge jurors peremptorily, the number of such challenges to be established by law. The right to question each juror individually by counsel shall be inviolate." Conn. Const. art. I, § 19.

"The enactment of article first, § 19, of the Connecticut constitution, as amended, reflects the abiding belief of our citizenry that an impartial and fairly chosen jury is the cornerstone of our criminal justice system." *State v. Griffin*, 251 Conn. 671, 698 (1999). "Thus, the state constitutional guarantee, provided in article first, § 8, of trial by an impartial jury is effectuated not only by correlative rights to challenge a jury array and to challenge prospective jurors for cause, it is also effectuated by the rights, provided in article first, § 19, to individual voir dire and to challenge prospective jurors peremptorily." *Id*. at 699.

Given the express procedural guarantees underlying the personal right to "trial by jury" in Connecticut, and the demand that these rights be held "inviolate," the historical analysis suggests Connecticut's commitment to ensuring that a defendant fully understand what it means to waive her right to a jury trial.

2. Related Connecticut Precedents

This Court held in *State v. Marino*, 190 Conn. 639 (1983), and reaffirmed in *State v. Ouellette*, 271 Conn. 740, 755 (2004) that a valid jury trial waiver does not require the trial court to advise the defendant of the additional, specific rights afforded under our state constitution. *Id.* But *Marino*, and the cases relying on it, are not dispositive of the defendant's claim for at least two reasons.

First, *Marino*, which includes one sentence dismissing the defendant's state constitutional claim, predated *Gore* and therefore relied on the premise that the defendant's waiver could be presumed absent "**some contrary indication.**" *Marino,* 190 Conn. at 646 (emphasis added). *Gore* clarified, however, that the waiver cannot be

assumed when the defendant has failed to claim her right to a jury trial; instead, the record must affirmatively disclose the defendant's waiver. 288 Conn. 782. Although *Gore* declined to set forth the requirements of the court's canvass, it stands to reason that an affirmative record demonstrating the defendant's understanding of the jury trial right requires an indication that the defendant is aware of the essential, constitutionally protected features of the right. *See Geisler*, 222 Conn. at 685 ("Unless there is some clear reason for not doing so, effect must be given to every part of and each word in the constitution.").

Second, *Marino* pre-dated *Geisler* and therefore failed to consider the broader protections provided to criminal defendants under our constitution. Similarly, in *Ouellette*, this Court declined to apply a *Geisler* analysis, concluding that the defendant had "provided no persuasive federal or sister state precedent" calling *Marino* into question. 271 Conn. at 757. "[F]ederal constitutional and statutory law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights." *Rizzo*, supra, 303 Conn. at 136. Absent consideration of the factors unique to our constitution, *Marino* and *Ouellette* fail to address whether independent state law is necessary to protect our citizens. *Langston*, supra, 346 Conn. at 625 (recognizing precedent not dispositive on issue of state constitutional rights where cases failed to apply *Geisler* analysis).

Defendant's argument for the adoption of a modified approach finds support in the cases implementing rules or guidelines for waivers in other contexts; for example, the requirements regarding a canvass and acceptance of a plea; *Boykin v. Alabama*, 395 U.S. 238, 244 (1969); as a precondition to waive the right to a trial in a parental termination proceeding, *In re Yasiel R.*, 317 Conn. 773 (2015); when the court is

presented with an allegation of jury misconduct, *State v. Brown*, 235 Conn. 502, 526 (1995); and with respect to a defendant's election to waive his fifth amendment rights, *Morel-Vargas*, supra, 343 Conn. 247.

"Whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *U.S. v. Olano*, 507 U.S. 725, 733 (1993). Given the significance of the right involved here, this Court should direct trial courts to treat a jury waiver request with at least the same degree of attention as in these other contexts and should mandate specific requirements as a pre-condition to the waiver.

3. Persuasive Federal Precedents

This Court has suggested that our limited canvass requirement is on par with the federal standard for jury waiver set forth in Federal Rule 23 (a) and is therefore "constitutionally adequate." *Marino*, supra, 190 Conn. at 645; *Ouellette*, supra, 271 Conn. at 756. Counter to this Court's holdings, the federal rule requiring that the waiver be in writing is only a starting point, it does not satisfy the requirement that it be knowing and voluntary. *See, e.g.*, *U.S. v. Robertson*, supra, 45 F. 3d at 1432; *see also* Federal Judicial Center, Bench Book for United States District Court Judges 1.09,A76 ("**In addition to satisfying rule 23(a)** … the trial judge should ascertain on the record whether the accused understands that he or she has a right to be tried by a jury; whether the accused understands the difference between a jury trial and a nonjury trial; and whether the accused has been made to understand the advantages and disadvantages of a jury trial," **including the right to participate in jury selection, the right to a jury of twelve, and the unanimity requirement**).

Interpreting this requirement, the federal cases discussed in Section I.D. of defendant's brief are instructive because they emphasize the importance of advising a defendant orally and, in some cases, in

writing, of the specific rights the defendant waives when she elects a court trial. As the Sixth Circuit Court of Appeals has explained:

> At a minimum, a defendant should be informed that a jury is composed of 12 members of the community, he may participate in the selection of jurors, the verdict of the jury must be unanimous, and that a judge alone will decide guilt or innocence should he waive his jury trial right.

Martin, supra, 704 F.2d at 274: *see also U.S. v. Scott*, 583 F.2d 362, 364 (7th Cir.1978) (adopting supervisory rule on jury trial canvass); *U.S. v. Delgado*, 635 F.2d 889, 890 (7th Cir. 1981) (explaining content of the interrogation required by *Scott*); *Cochran*, supra, 770 F.2d at 853 (imploring district courts to inform defendants of the essential differences between a jury and bench trial).

4. Persuasive Precedents of other States

Although most states have not constitutionalized the requirements for a valid waiver, several states have adopted rules or guidelines requiring a more robust advisement as a prerequisite to executing a valid jury trial waiver. *See New Hampshire State v. Hewitt*, 128 N.H. 557, 561 (1986) (Personal waiver by defendant, indicating his understanding of right to full jury required to effectuate constitutional guarantee to jury trial under state constitution); *State v. Blann*, 217 N.J. 517, 518 (2014) (defendant must be advised that (1) a jury is composed of 12 members of the community, (2) defendant may participate in jury selection,(3) all 12 jurors must unanimously vote to convict in order for a conviction to be obtained, (4) if a defendant waives a jury trial, a judge alone will decide her guilt or innocence); *Davis v. State*, 809 A.2d 565, 571-72 (Del. 2002) (same); *Gallimort v. State*, 116 Nev. 315, 320 (2000) (same); *State v. Ellis*, 953 S.W.2d 216, 222 (Tenn. Crim. App. 1997) (same); *State v. West*, 164 Vt. 192, 199 (1995) (same); *State v. Anderson*, 249 Wis. 2d 586 (2002) ("circuit court

must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice, absent threats or promises, to proceed without a jury trial; (2) was aware of the nature of a jury trial, such that it consists of a panel of 12 people that must agree on all elements of the crime charged; (3) was aware of the nature of a court trial, such that the judge will make a decision on whether or not he or she is guilty of the crime charged; and (4) had enough time to discuss this decision with his or her attorney."

Other states have similarly held that courts should confirm the defendant's understanding of the fundamental difference between jury and nonjury trials. *See State v. Stallings*, 658 N.W. 2d 106, 111 (Iowa 2003); *State v. Friedman*, 93 Haw. 63, 69 (2000); *Ciummei v. Commonwealth*, 378 Mass. 504, 509–510 (1979); *Commonwealth v. Williams*, 454 Pa. 368, 373 (1973).

This Court has declined to mandate "a more particularized canvass" including the so-called "litany of facts" delineating the differences between a bench trial and a jury trial. *State v. Kerlyn T.,* 337 Conn. 382, 396 fn. 10 (2020). Procedures in other states demonstrate that, in fact, those differences can be summarized with ease and at little to no cost to the state.

5. Policy Considerations

From a policy perspective, our current procedure is severely lacking, as probably best demonstrated by the litigation this issue continues to generate. Presumably, most citizens understand that they have a constitutional right to a jury trial before they step foot into a courtroom; it is doubtful, however, that these same citizens understand the number of jurors required in each instance, the unanimity requirement, the right to participate in jury selection, and the right to exercise peremptory challenges—all vital aspects of a jury trial that are not shared with defendants under the current rule. Barriers to

understanding the nature and scope of the right are particularly problematic in the criminal justice system, where a disproportionate number of people have lower education levels and/or higher instances of mental disabilities.

Our cases rely on the assumption that defense counsel can adequately bridge the gap, *see, e.g.*, *Kerlyn T.*, supra, 337 Conn. at 396, fn. 10, but that reasoning is flawed for several reasons. First, it assumes that the defense lawyer is capable of providing the client with complete and accurate information, which may not always be the case, especially considering the absence of any uniform standards established by this Court. To this point, when a judge asks a defense attorney whether he has "consulted" with the client, as the judge did here, what does that mean? Absent established guidelines, it means next to nothing. Second, it overlooks the fact that even a competent defense attorney may inadvertently fail to supply his client with all of the necessary information. Finally, it ignores the reality that a defense attorney may advise the client to waive a jury trial as a cost-saving measure, without full explanation of the right.

Individual voir dire in Connecticut, while the fairest way to deliver on the promise of an impartial and representative jury, is a lengthy, costly process that favors defendants who can afford lawyers who can devote a substantial number of hours (and a corresponding portion of the retainer fee) to selecting a jury.[3] A lawyer seeking to maximize limited time or resources may downplay the benefits of a jury trial. Having a judge confirm on the record that the defendant has

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[3] *See End Connecticut's Costly, Cumbersome Way Of Choosing Jurors*, Hartford Courant (February 3, 2011), available at https://www.courant.com/news/connecticut/hc-xpm-2011-02-03-hc-green-blog-voirdire-0203-20110202-story.html.

been made to understand the material differences between a jury and a court trial can help address this concern.

In sum, a clear and uniform test for waiver provides guidelines for defense counsel and judges who are charged with safeguarding the right. It provides reviewing courts with a sufficient basis to determine whether a defendant's waiver is knowing and voluntary. It avoids costly and needless post-conviction litigation, and it reinforces the finality of criminal convictions. *See Martin*, supra, 704 F.2d at 274.

The record in this case fails to support a finding that the defendant intelligently, knowingly and voluntarily waived her federal and state constitutional right to a jury. The court's canvass failed to include even one of the essential features of a jury trial. There is nothing to indicate that the defendant had prior experience with jury trials; in fact, the record suggested the opposite. In sum, the record does not affirmatively demonstrate that Ms. King understood the role of the jury in a criminal case and the consequences of waiving the jury trial right. Reversal is required.

G. Supervisory Authority

As an independent basis for reversal, this Court should exercise its supervisory authority and adopt a rule requiring trial courts to canvass defendants prior to accepting a jury trial waiver. "Appellate courts possess an inherent supervisory authority over the administration of justice." *State v. Santiago*, 245 Conn. 301, 332 (1998). Supervisory powers are exercised "to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." *Brown*, supra, 235 Conn. at 528. A jury trial canvass should, at a minimum, inform the defendant that (1) a jury is composed of 6 to 12 members of the community (depending on the offense), (2) she may participate in the

selection of jurors and exercise preemptory challenges, (3) the verdict of a jury must be unanimous, and (4) that should the defendant waive her right to a jury, a judge or a majority of judges, shall have power to decide all questions of law and fact arising upon the trial and render judgment accordingly. *See* Conn. Const. art. I, § 19; C.G.S. § 53a-45. This Court should apply the rule to this case because a failure to do so here would critically impair the defendant's right to make an informed choice about whether to forego her constitutional right to a jury trial.

II. The Evidence Does Not Sufficiently Establish that Ms. King Conspired with and Aided Two Uncharged Gunmen in Murdering the Victim.

The prosecution argued that there was sufficient evidence to show "there was some sort of plan." 5/4T.12. "Some sort of plan" is not sufficient to show an agreement and the intent to commit murder. Due process forbids upholding a criminal conviction where the evidence does not reasonably support a finding of guilt. The evidence in this case, viewed in its totality and in the light most favorable to the state, is insufficient to sustain the defendant's convictions for murder as an accessory and conspiracy to commit murder.

The key disputed issue in this case was what was in the mind of this defendant on July 26, 2019. The evidence shows that the defendant and Gray had an argument about an hour or so before the shooting. The defendant accompanied her cousin, Jefferson, and his friend, Bellamy, to Beardsley Street, where their friends had gathered to attend a party. One of the men exited the vehicle around the time of the shooting, and two men entered the vehicle a short time later. Even assuming that it could be reasonably inferred from this evidence that Jefferson and Bellamy fired the fatal shots at Gray—which is highly questionable since the state did not even charge them in connection with the shooting incident—that evidence falls short of establishing

that the defendant acted with the conscious objective of causing the victim's death, as required to prove the offenses. There is no evidence before, during or after the shooting to establish the defendant's agreement with anyone, let alone an agreement that contemplated shooting and killing her former husband. The majority resorted to speculation and conjecture to fill in the evidentiary gaps in the state's case in violation of the defendant's due process rights.

A. Standard of Review

The Court undertakes the same review of the majority's verdict as it would with a jury verdict. *State v. Bennett*, 307 Conn. 758, 763 (2013). "First, [courts] construe the evidence in the light most favorable to sustaining the verdict. Second, [courts] determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." *State v. Dawson*, 340 Conn. 136, 146 (2021).

B. The Offenses

Review of a sufficiency claim necessarily includes consideration of the necessary elements. *State v. Knox*, 201 Conn. App. 457, 468 (2020). "[To] conform to due process of law, [defendants are] entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Cole v. Arkansas*, 333 U.S. 196, 202 (1948).

1. Conspiracy to Commit Murder

Under General Statutes § 53a-48 (a) "A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause

the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

Under General Statutes § 53a–54a "(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person...." Conspiracy is a dual mental state offense with the intent divided into two parts: "(1) intent to agree to conspire and (2) intent to commit the offense that is the object of the conspiracy.... Thus, [p]roof of a conspiracy to commit a specific offense requires proof that the conspirators intended to bring about the elements of the conspired offense." *State v. Luciano*, 204 Conn.App. 388, 398 (2021).

Accordingly, to obtain a conviction for conspiracy to commit murder the state was required to prove beyond a reasonable doubt that: (1) the defendant entered into and intended to enter into an agreement; (2) intending to engage in conduct constituting the crime of murder; and (3) the agreement was followed by an overt act in furtherance of the conspiracy by one of the conspirators. *See State v. Green,* 261 Conn. 653, 669 (2002).

2. Murder as an Accessory

To prove accessorial liability under § 53a–8, the prosecution must establish that the defendant had the specific mental state required for the commission of the substantive crime and she knowingly and willfully assisted the principal in carrying it out. *Bennett*, supra, 307 Conn. at 765. Consequently, to convict the defendant of accessory to commit murder, the state was required to prove beyond a reasonable doubt that: (1) another person committed the specific crime with which the defendant was charged; (2) the defendant knew that the murder was to be committed; (3) the defendant knowingly did some act for the purpose of causing the victim's death; and, (4) the defendant acted

with the intention of causing the victim's death. *See* General Statutes §§ 53a-54a and 53a-8; *Bennett*, supra, 307 Conn. at 765.

C. The Evidence Does Not Support the Convictions

The state failed to prove that the defendant: (1) aided Jefferson and Bellamy in the commission of the murder, which was required to prove accessorial liability for murder; (2) intended that the victim be murdered, which was an essential element of both conspiracy and murder; and (3) agreed to commit the crime of murder, which was required for the conspiracy conviction.

There was insufficient evidence that the defendant aided Jefferson and Bellamy in the commission of murder. "[A]nother person's commission of an offense is a condition precedent to the imposition of accessorial liability." *State v. Montanez*, 277 Conn. 735, 756 (2006). The state's theory of liability at trial was that the defendant had a motive to harm Gray, and she recruited Jefferson and Bellamy to either murder Gray or cause him serious physical injury with the use of a deadly weapon. 5/4/21T.7,10,14-15, A81. Thus, to convict the defendant of murder and conspiracy to commit murder, the majority had to speculate that:

- Jefferson and Bellamy were the shooters;
- Defendant, Jefferson, and Bellamy formulated a plan to find and target Gray in the short time that elapsed from the time of the defendant's first phone call to Jefferson at 12:44 a.m. to their arrival on Beardsley Street at 1:11 a.m.;
- Bellamy and/or Jefferson intended to shoot and kill Gray when one of them exited the car at 1:11 a.m.;

- Bellamy and/or Jefferson communicated their intent to shoot and kill Gray to the defendant;[4]
- Defendant agreed and was complicit in the plan to kill Gray.

See C/A 11-22.

The state did not charge Bellamy and Jefferson in connection with the crime. No witness identified Bellamy or Jefferson in connection with the shooting. The state executed search warrants for Bellamy and Jefferson's homes, cellular telephones, and Jefferson's vehicle shortly after the shooting, but it did not introduce evidence to tie them to the shooting, for example, DNA evidence, ballistics evidence, gunshot residue, etc. The murder weapon was not located.

The state claimed that the surveillance footage showed the two men exiting the vehicle, but only one individual who appears to be wearing a white, short sleeved top—not a black hooded sweatshirt, as the majority found— can be made out in the footage exiting the driver's

[4] Under the state's alternative theory of liability alleging that the defendant conspired to commit assault in the first degree in violation of §§ 53a-48 and 53a-59 (a)(1), the state would be required to prove that: (1) the defendant entered into and intended to enter into an agreement, (2) intending to cause serious physical injury to the victim by means of a deadly weapon, and (3) a conspirators committed an overt act in furtherance of the crime agreed upon. There was no evidence that the defendant knew that either Bellamy or Jefferson possessed a gun, and for this reason, the defendant could not have intended and agreed to cause serious physical injury to Gray by use of a deadly weapon. *See State v. Pond*, 315 Conn. 451, 477 (2015); *State v. Luciano*, 204 Conn. App. 388, 398 (2021).

side of the SUV.[5] Two people appeared to enter the car after the shooting, but, again, their clothing does not appear to match the clothing worn by the shooters (SE 7:08)—a discrepancy the majority's decision fails to even acknowledge, much less address.

The state relied on cell phone calls between the defendant and Jefferson to infer an agreement to murder Gray. Putting aside the fact that there was not a shred of evidence introduced about the content of those calls, the evidence established that the defendant and her cousin spoke on the phone several times that day before there was any indication of trouble between the defendant and Gray. See SE126,SE127.

The state gave Bellamy immunity, presumably to fill in the considerable gaps in its case concerning the alleged "plan" to murder Gray, but his testimony refuted the state's theory. Bellamy testified that he never met the defendant before July 26, he did not know Gray, and he denied ever getting out of the car.

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[5] The trial court indicated that the surveillance footage shows the defendant and **one other person** exited the vehicle on Beardsley Street before the shooting, not two other people as the state argued (see 5/4/21T.12). C/A 13-14. The court erroneously found that the second individual in the video was "wearing a dark hooded sweatshirt," and that the individual was "short," presumably to fit the evidence showing that Jefferson was shorter than Bellamy (4/30T.84-85,5/28T.101-102, SE116). C/A 13. The defendant strongly encourages the Court to review the Camtasia video; while the footage is very grainy, the person who exits the driver's side of the vehicle appears to be wearing a white, short-sleeved shirt, and there is no basis to make any determination about the person's height. See SE98 at 4:40; see also SE98 at 7:08 (showing the individuals enter the car).

Even assuming it is reasonable to infer from the evidence that the defendant directed Jefferson and Bellamy to Gray's location and that the two men exited the SUV and shot Gray, at best this supports a conclusion that the defendant had **some** involvement in the events leading up to the victim's death (i.e., "some sort of plan"); it is insufficient to prove that she intended to cause his death, which was an essential element of both conspiracy and murder.

Specific intent to commit murder is a common element to both accessory and the conspiracy to commit murder charge. *See, e.g., State v. Hope*, 215 Conn. 570, 589 (1990) (acquittal of conspiracy to commit murder precluded state from charging defendant with aiding and abetting murder because jury necessarily decided defendant did not have the required intent). In addition, soliciting, requesting, commanding, and importuning another person in the commission of the substantive offense of murder, by definition, requires that the state establish specific intent and an agreement. *Bennett*, supra, 307 Conn. at 765.

While direct evidence of the accused's state of mind is rarely available, and therefore intent is generally inferred from the defendant's conduct and surrounding circumstances, here, those circumstances do not reasonably support the verdict. It is undisputed that the defendant did not participate in and was not present at the shooting. The state presented no evidence that the defendant intended and entered into an agreement to shoot and kill her former husband. There was no evidence that a murder was ever discussed, nor was there any evidence to reasonably infer that such an agreement existed. There was no evidence of any conversation that occurred in the car between the three individuals. There was no evidence that the defendant knew that Jefferson and/or Bellamy possessed a gun.

D. Reasoning Underlying the Majority's Verdict

With no direct evidence to support the state's theory, the majority relied on three categories of evidence to convict the defendant: (1) evidence of the defendant's alleged motive to kill Gray based on the earlier fight; (2) evidence of consciousness of guilt; and (3) evidence of an alleged plan to kill Gray. C/A 11-22. The circumstances identified by the majority, whether viewed independently or collectively, are insufficient to sustain the defendant's convictions.

The majority relied on Nosadee Sampson's testimony—specifically, the defendant's purported threats against Gray as evidence of her intent and the agreement to murder him. Although there was disputed testimony that the defendant exchanged angry words with Gray during the earlier fight (Rondon testified it was too loud to hear what the defendant and Gray said to one another), that evidence is insufficient to infer that the defendant intended and entered a prearranged plan to kill him. *See Green*, supra, 261 Conn. 671-73 (evidence that defendant had prior dispute with victim and fired multiple shots at victim and other members of rival gang in response to someone saying "shoot the motherfuckers" insufficient to show defendant conspired to commit murder); *Bennett*, supra, 307 Conn. 758 (evidence that defendant went to victim's home with a loaded weapon, observed codefendant shoot and kill victim, and threatened victim's girlfriend by holding a gun to her head insufficient to establish intent to commit murder); *State v. Smith*, 36 Conn. App. 483, 487 (1994) (evidence of earlier altercation insufficient to prove defendant intended to commit assault where there was no evidence showing defendant knew his companions were armed and had intent to shoot victim). The idea that the defendant's reaction to Gray punching her and spitting at her friend was to enlist two men to murder him is implausibly

disproportionate—and thus hardly supports the existence of a prearranged plan to murder him.

The majority cited consciousness of guilt evidence in support of its verdict, including evidence of the defendant's conflicting statements to the police and her conduct in the immediate aftermath of the shooting. As a preliminary matter, consciousness of guilt evidence is not an adequate basis for a conviction when the direct evidence of guilt is weak. *See U.S. v. Cassese*, 428 F.3d. 92, 100 (2d Cir. 2005) (consciousness of guilt evidence, combined with weak direct evidence, not sufficient to sustain criminal conviction); *see also United States v. Glenn*, 312 F.3d 58, 69 (2d Cir. 2002) ("Feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt."). A person who behaves in what some might consider a guilty manner following a crime may do so for a number of reasons, not all of which are consistent with their culpability, including protection of a guilty party, fear of being falsely implicated in the crime, fear that they will be unable to prove their innocence, or fear or suspicion of police unrelated to the crime.

Further, the consciousness of guilt evidence sheds no light on the disputed issue of the defendant's intent at the time of the commission of the offense. People do not flee or engage in evasive conduct when they have committed certain crimes but not others. *See State v. Rhodes*, 335 Conn. 226, 287 (2020), (*Ecker, J., concurring in part and dissenting in part*) (inference drawn from an act of flight must take into account the facts of the particular case because consciousness of guilt may arise from "an entirely different crime…") (quoting *U.S. v. Ramon-Perez*, 703 F.2d 1231, 1233 (11th Cir. 1983); *see People v. Anderson*, 70 Cal. 2d 15, 32 (1968) (defendant's evasive conduct following crime "irrelevant to ascertaining defendant's state of mind immediately prior to, or during, the killing. Evasive conduct shows

fear: it cannot support the double inference that the defendant planned to hide his crime at the time he committed it and that therefore defendant committed the crime with premeditation and deliberation."). Put simply, the consciousness of guilt evidence may be probative of whether the defendant committed a crime, but it offers no insight into whether she acted with the intent to commit murder rather than the intent to commit an assault.

The majority proposed that the circumstances established a pre-arranged plan to murder Gray. The state's theory that Jefferson and Bellamy committed the murder at the defendant's request was critical to the majority's conclusions, and yet the state did not charge either of them in connection with the incident. In rejecting the importance of this evidence, the majority relied on Connecticut's unilateral conspiracy statute,[6] but its reasoning fails to address what the state's disparate treatment of the so-called conspirators suggests about the fatal weaknesses in its case. While prosecutors have broad discretion in charging decisions, juries are instructed that lapses in the state's investigation may render the evidence inadequate or unreliable, therefore raising a reasonable doubt. *See State v. Gomes*, 337 Conn. 826, 852–53 (2021). In light of the state's accusations against Ms. King, its failure to charge the alleged coconspirators is more than a "lapse" in the state's investigation—it is a gaping hole.

Based on the allegations, it was necessary for the prosecution to present a coherent theory that someone other than King satisfied the

[6] In addition, although not noted by the majority, prosecution or conviction of the principal is not a legal precondition to the conviction of an accessory. See General Statutes § 53a-9 (2); *State v. Santiago*, 275 Conn. 192, 204 (2005); *State v. Paredes*, 35 Conn. App. 360, 373 (1994).

required elements of the substantive offense at her request. *State v. Carter*, 317 Conn. 845, 854 (2015) (sufficiency of the evidence must be considered in light of the state's theory of guilt at trial). If the state did not have probable cause to charge the men it claimed committed the murder—who allegedly shot the victim 15 times— it is impossible to grasp how there is sufficient evidence to support its related allegation that Ms. King aided and abetted them.

Continuing down this fraught path, the majority speculated that (a) the defendant "directed" the uncharged coconspirators to a "dark side street;" (b) "Jefferson did not have an issue with Gray;" (c) "the manner in which the murder was committed" suggested the defendant's intent; and (d) defendant backed up the car to "giv[e] herself plenty of room to pull out quickly." C/A 21.

Gray was shot in front of his house, across the street from his place of employment at a "hangout spot" on Newfield Avenue (4/28T.79), and he had fought with several other people that night; his location was not a secret. There was no evidence that the defendant directed anyone anywhere, no less to "a dark side street." C/A 21. Bellamy told the police that they went to the area because they planned to go to the reunion party, around the corner.

As to the defendant's so-called singular motive to harm Gray, in fact, the evidence indicated that there was a hostile relationship between Gray and the defendant's family. SE115 1:10 (Defendant's Facebook Video: "Whatever my family do to you is beyond me. . . they're tired of you."). The prosecution argued that the defendant's family was "bitter and angry" toward Gray. 5/4T.9. Assuming that the man in the hooded sweatshirt was in fact Jefferson—which, again, appears to be refuted by this record—**at best**, it may be reasonable to infer that the defendant reported Gray's assault to Jefferson, and he then shot Gray in anger, without the defendant's endorsement. Indeed,

that sort of "heat of passion" killing is far more plausible from the evidence here than is the state's theory that an apparently typical dispute between Ms. King and Gray compelled her to concoct a plan to murder him and enlist (and convince) two men to carry it out.

As to the manner of the shooting, without additional evidence demonstrating a shared unlawful purpose or agreement, it was not reasonable for the majority to infer the defendant's intent from the way in which the shooting was carried out by someone else outside her presence.[7]

Finally, the majority's assertion that the defendant backed up the SUV to affect a quick getaway is not supported by the evidence. The surveillance footage shows that there was nothing at all unusual about the way the SUV pulled away from the curb. See SE98 7:33.

Even if we assume for the sake of argument that the majority's inferences are reasonable, none of them support the conclusion that the defendant intended and entered a prearranged plan to kill Gray, as opposed (for example) to beating him up, or something else short of

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[7] This Court has found insufficient evidence of agreement even where the defendant has acted in concert with others. For example, in *State v. Green*, 261 Conn. 653, 672-673 (2002) this Court considered evidence showing that (1) the defendant and his cohorts simultaneously drew their guns and shot the victim in response to one of them yelling, "shoot the motherfucker;" and (2) evidence that the defendant may have had a prior dispute with the victim, who was a member of a rival gang. On these facts, this Court held that there was insufficient evidence to prove that the defendant conspired to commit murder, concluding that the record was "devoid of any evidence" indicating that defendant had "entered into a prearranged plan" to kill the victim. *Id.* at 671.

causing his death. The circumstances identified by the majority provide nearly equal support for the alternative theory of an intended assault, and therefore, the state failed to prove its case as a matter of law. *See Dawson*, 340 Conn. at 147 ("When the evidence is in equipoise or equal, the state has not sustained its burden of proof ...."); *State v. Stovall*, 316 Conn. 514, 527 (2015) (evidence equally supportive of an inference that defendant intended to sell the drugs outside of the prohibited zone and therefore state failed to satisfy its burden of proof); *State v. Moss*, 189 Conn. 364, 370 (1983) (prosecution's "level of proof must shift substantially out of equipoise in order to support a finding of guilt beyond a reasonable doubt").

Exacting burdens of proof exist in criminal trials to avoid wrongful convictions. *In re Winship*, 397 U.S. 358 (1970). It does not satisfy due process to have the factfinder determine that the defendant is "probably guilty." *Dawson*, supra, 340 Conn. at 147. Taking the cumulative force of all the evidence together and construing it in the light most favorable to sustaining the verdicts does not provide a sufficient basis for the defendant's convictions. The case should be remanded with direction to render judgment of acquittals on both counts.

III. Under *State v. Washington*, 182 Conn. 419 (1980), there is a constitutional prohibition against jury deliberations until the close of all the evidence and the submission of the case to the factfinder. The rules set forth in *Washington* ensuring the constitutional integrity of the jury's verdict should similarly apply in trials before a three-judge panel.

There is prima facie evidence that the three-judge panel discussed and/or examined Ms. King's case off the record prior to the submission of the case. The case should be remanded with instructions to determine whether any member of the panel prejudged the case, in which case a new trial would be warranted.

A. Relevant Facts and Proceedings

The trial court heard closing arguments on May 4, 2021. Following summations, the trial court recessed for lunch until 2 p.m. 5/4T.53 (Judge Richards: "We'll recess, two o'clock. Take an early lunch, and we'll start with that readback."). After the break, the panel listened to playback testimony and later recessed. Id.,59. The following morning, the trial court announced that it had reached a verdict. 5/5T.1-19, C/A 11-22. Judge Hernandez and Judge Dayton convicted Ms. King on both counts. 5/5T.1-19, C/A 11-22. Judge Richards agreed with the majority's factual findings but dissented in its findings of guilt. Judge Richards' one-page dissent was filed at 12:32 p.m. C/A 24. The verdict that Judge Dayton read in open court was identical to the majority's memorandum of decision issued later that afternoon, at 2:39 pm. See 5/5T.1-19, C/A 11-22.

The twelve-page memorandum of decision includes an exhaustive chronology of the state's evidence, quoted testimony from the witnesses and the defendant's recorded interviews with the police, and numerous references to the surveillance footage exhibits introduced into evidence, along with corresponding timestamps. C/A 11-22, Majority Memorandum of Decision, May 5, 2021, A84.

The short timeframe from the submission of the case to publication of the decision on the merits (less than 24 hours) and the degree of focus on the evidence involved, which necessarily required the examination of numerous exhibits (the exhibits in the case numbered over 100), including recorded interviews and surveillance

footage, suggests that the panel or a panel member marshalled the evidence and prepared draft findings of fact before the defendant's case was submitted.

On this basis, the defendant moved to rectify the record, and, consistent with the remand in *Castonguay*, supra, 194 Conn. 416, infra, submitted a series of questions inquiring whether the judges discussed the evidence and whether they may have taken a position on the evidence. A97.

Following a hearing on the defendant's motion, the trial court denied Ms. King's motion, but supplemented the record to include timestamps for various phases of the deliberations which it procured through its independent consultations with the court monitor. Memorandum of Decision, September 13, 2022, A84. The panel set forth substantially the same timeline for its deliberations relied upon in the defendant's motion:

> Trial commenced with the presentation of evidence on April 27, 2021. Evidence was also presented on April 28, 29, and 30, and on May 3, 2021. The defendant's Motion for a Judgment of Acquittal was denied on May 3, 2021. The trial court heard closing arguments on May 4, 2021, and the court began its deliberations at 12:25 p.m. Between approximately 2:09 p.m. and 2:13p.m., the court listened to the playback of certain trial testimony. At 2:13p.m., the court recessed to continue deliberations until the close of business at 5:00p.m. On May 5, 2021, between 11 :39 a.m. and 11:59 a.m., the court, Dayton, J., announced its verdict finding the defendant guilty of both counts, and read its factual findings and conclusions into the record. Between 12:03 p.m. and 12:06 p.m., Judge Richards read his dissenting opinion in which he agreed with the majority's factual findings but dissented in its findings of guilt. Judge

> Richards was prepared to find the defendant guilty of lesser-included offenses. On May 5, 2021, at 12:32 p.m., Judge Richards filed his dissent to the majority decision and verdict. Later, at 2:39p.m., the majority filed its "Majority Memorandum of Decision."

Id.

The defendant filed a motion for review. A181. On April 11, 2023, this Court issued an Order denying the defendant's motion without prejudice, indicating:

> The parties may make any claims about the deliberations of the judges of the three-judge panel as the law supports in their appellate briefs. Without limitation, the parties may include in their briefs arguments that the court should order the trial court to supplement the record by way of articulation, or that any such articulation is unnecessary, inappropriate or contrary to law.

A204.

B. Law Governing Presubmission Deliberations

A criminal defendant has a fundamental due process right to a fair trial that is protected by both federal and state constitutions. U.S. Const., amend. XIV; Conn. Const. art. I, § 8. Due process is "a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial." *Winebrenner v. U.S.*, 147 F.2d 322, 328 (8th Cir. 1945), quoting *Hurtado v. California*, 110 U.S. 516 (1884). The right to the presumption of innocence is embedded in the defendant's right to a fair trial and requires that the defendant's guilt or innocence be decided based solely on the evidence adduced at trial in accordance with the relevant legal principles. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). A presubmission finding or conclusion is

prohibited because "an opinion once formed could only be removed, if at all, by [contrary] evidence." *Winebrenner*, supra, 147 F.2d at 328.

The leading Connecticut case on presubmission deliberations is *State v. Washington*, supra, 182 Conn. 419. In *Washington*, the trial court instructed the jurors that they were permitted to discuss the evidence prior to the submission of the case. In holding that the instruction was improper, the *Washington* court stated, "it is improper for jurors to discuss a 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.* at 425. The due process clause and the right to trial by an impartial jury prohibit such discussions. *Id.* at 424–25. Drawing from principles dating back more than a century, the *Washington* Court explained the rationale for the rule:

> "[I]t is human nature that an individual, having expressed in discussion his or her view of the guilt or innocence of the defendant, would 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. …'"

Id. at 426, quoting *Winebrenner*, supra, 328.

In *State v. Castonguay*, supra, 194 Conn. 416, this Court reiterated the principles underlying *Washington*. In *Castonguay*, as in *Washington*, the trial court instructed the jury that it could discuss the evidence prior to the close of all the evidence and the court's charge, cautioning the jury that it "must refrain from reaching any conclusions because obviously the trial takes a long time." 194 Conn. at 432.

The parties agreed that the court's instruction created a presumption that jurors engaged in presubmission deliberations, but disagreed on the appropriate remedy. *Id*. at 434. The state contended and ultimately prevailed on the position that the opportunity to deliberate, in and of itself, is not sufficient to warrant reversal; the state argued that it had the right to inquire whether "the jurors did in fact discuss the evidence and evaluate it." *Id.* at 436. This court agreed with the state, ordered that the case be remanded to the trial court for additional proceedings, and clarified the appropriate extent of a post-verdict inquiry on the matter. *Id.* at 437.

"The question is whether the misconduct is of such a nature that it probably rendered the juror unfair or partial. In determining the nature and quality of the misconduct we must be mindful that the concerns [are] not simply that the jurors may have discussed the evidence presubmission, but that they may have taken positions on the evidence. Any inquiry into the content of the opinion or the impact it had on the juror is clearly impermissible." *Id.*; *see* Prac. Book § 42–33. Under the *Castonguay* test, it is permissible to ask the jurors if they discussed the evidence, and if the answer is "yes," then it is appropriate to ask "whether anyone evaluated or stated an opinion on the evidence, in which case a new trial is required." *Id.* at 437.

The same principles should control the analysis here.[8] When a defendant waives her right to a jury and elects a court trial "composed of three judges" pursuant to § 54-82(b), "the court is merely given power to decide the facts in addition to its customary power to decide questions of law. . . .Except that the jury verdict must be unanimous, while a majority of the court suffices, the statutory court has neither more nor less power than a court sitting with a jury." *State v. Rossi,* 132 Conn 39, 42 (1945). "Fulfilling the function of the jury, the court determines the guilt or innocence of the accused and is governed in that decision by the same principles as would have governed the jury in passing upon that question." *State v. Frost,* 105 Conn. 326 (Conn. 1926).

Whether tried by jury or jurist, a criminal defendant is entitled to due process, which prohibits prejudgment of the case. When there is a *prima facie* claim of premature deliberations, the case should be remanded to determine whether any member of the panel "evaluated

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[8] Defendant's research has not uncovered a Connecticut case expressly considering whether *Washington's* prohibition on presubmission deliberations applies in trials before a three-judge panel. In *State v. Ames*, 171 Conn. App. 486, 513 (2017), the defendant claimed that a member of the panel's questioning during summation was improper "because it constituted presubmission deliberation" and, further, that the trial court's interference violated her Sixth Amendment right to assistance of counsel. *Ames*, 171 Conn. App. at 513. Without addressing the authority framing the defendant's argument, the Appellate Court concluded that the court's interruptions did not deny defense counsel the opportunity to present the defendant's theory of the case "or otherwise prejudice the defendant." *Id*. at 519.

or stated an opinion on the evidence, in which case a new trial is required." *Castonguay*, 194 Conn. at 437.

C. The Court Should Order the Trial Court to Supplement the Record.

The Court should order the trial court to supplement the record. In *State v. Walker*, 319 Conn. 668, 674 (2015), the defendant claimed that he was entitled to a new trial because his constitutional right to be present at a critical stage of the prosecution had been violated. *Id.* at 674. The factual predicate for the defendant's claim was his asserted absence from an in-chambers discussion that took place concerning defense counsel's potential conflict of interest. *Id.* Defendant argued that it could be inferred that the discussion took place based on a "contextual" reading of the record. *Id.* at 677. Defendant conceded that the issue had not been raised below and sought review under *Golding*. *Id.* at 674. This Court concluded that the defendant's record was inadequate for review:

> "No matter how 'contextual' a reading we apply to the [record] … we are unable to glean … whether any discussion of this matter occurred with the court off the record; the scope of any such discussion; and whether the defendant was in fact absent during any such discussion."

Id. at 677.

In such instances, the Court explained, "the record **must** be modified or augmented in some fashion**"** by rectification **"**to include matters that occurred off the record." *Id.* at 681 (emphasis added); see Prac. Book § 66-5 (upon motion pursuant to § 66-5, the trial court "may make such corrections or additions as are necessary for the proper presentation of the issues."). The court concluded that the defendant's

failure to supplement the record by way of a motion for rectification foreclosed review of his claims on appeal. *Id.*

Under *Walker*, supplementation of the record is appropriate and required. The defendant, relying on the evidence in the available record, seeks access to the trial court's off-record discussions and seeks to determine the scope of any such discussions. *See Walker*, supra, 677. The defendant's claim, like Walker's claim, "is of constitutional magnitude and therefore potentially amenable to *Golding* review, despite not being raised at trial." *Walker,* supra, 676. In such cases, this Court has held that the record **must** be modified to include matters that occurred off the record. *Id.* at 681.

The defendant's request is also consistent with this Court's decision in *State v. Floyd*, 253 Conn. 700 (2000). A *Floyd*/rectification hearing is warranted when defendant produces "prima facie evidence, direct or circumstantial, of a *Brady* violation unascertainable at trial." *State v. Ouellette*, 295 Conn. 173, 182 n. 7 (2010). The government's disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) and the *Washington* rule prohibiting presubmission deliberations are both grounded in procedural due process.[9] If a defendant denied due process under *Brady* is entitled to supplement the record upon a showing of prima facie evidence, then there is no basis to hold that a defendant denied due process as a result of premature deliberations must satisfy a more rigorous standard. Both rules were established to preserve the integrity of the trial process, and therefore, the same standards should apply. In both cases, defendants are entitled to rely

[9] The *Washington* rule is also based on the defendant's independent Sixth Amendment right to a fair and impartial jury. *State v. Washington*, 182 Conn. 419, 424-25 (1980).

on the independent obligations of the state actors involved. Specifically, under *Brady*, the defendant is entitled to rely on the state's independent obligation to disclose favorable evidence. Similarly, in a case involving presubmission deliberations, the defendant is entitled to rely on the trial court's independent obligation to be alert to and raise issues that potentially undermine the fairness of a defendant's trial. *See Brown*, supra, 235 Conn. at 525 (court has sua sponte obligation to inquire about matters impacting fairness of the proceedings).[10]

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[10] In *State v. Ortiz*, 280 Conn. 686, 712 (2006), the state claimed (as it did here) that a rectification procedure which permits additions to the record based on claims unpreserved at trial "is inconsistent with the first prong of *Golding*, which governs the review of unpreserved claims, and requires the defendant to produce a 'record ... adequate to review the alleged claim of error.'" In response, the *Ortiz* Court explained that rectification "hearings to explore claims of potential *Brady* violations are ordered pursuant to the appellate courts' supervisory authority under Practice Book § 60–2, which provides that the Court may 'on its own motion or upon motion of any party, (1) order a judge to take any action necessary to complete the trial court record for the proper presentation of the appeal ... (9) remand any pending matter to the trial court for the resolution of factual issues where necessary." *Id*. at 712. The *Ortiz* Court further rejected the state's argument that factual deficiencies implicated by a *Brady* violation are appropriately resolved via habeas corpus proceedings. *Id*. The court reasoned: "this approach … fosters delay as the proceedings on direct appeal are exhausted prior to the commencement of habeas proceedings, and deprives a trial court already familiar with the matter of the opportunity to address *Brady* claims in a timely fashion.

Further, "a reviewing court may, in the exercise of its authority under Practice Book § 60–2, order rectification of the record regarding an unpreserved claim when the interests of justice so demand." *Walker*, supra, 319 Conn. 683. The interests of justice demand it here. Critical evidence is sought on the basis of a prima facie claim of presubmission deliberations. Supplementation of the record is appropriate through the as yet unanswered questions that the defendant submitted to the trial court. The defendant has consistently sought access to the timing and character of any off-record presubmission discussions by the three judges. If, counter to the available record, no such deliberations occurred, it would burden the judges very little to say so and would assure Ms. King and the public that important interests of procedural fairness have been served.

Under the principles set forth in *Castonguay*, *Walker*, and *Floyd,* and pursuant to this Court's broad authority to rectify the record in the interests of justice, this Court should order the trial court to supplement the record.

D. Refusal to Permit Ms. King to Supplement the Record Constitutes a Violation of her Procedural Due Process Rights.

A criminal defendant is entitled to an adequate record on appeal and to the effective assistance of counsel. *Anders v. California*, 386 U.S. 738, 741–42 (1967); *Evitts v. Lucey*, 469 U.S. 387 (1985). Our rules provide for rectification. *Walker* held that a defendant forfeits her claim when she fails to move for rectification. It is incongruous and

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In contrast, *Floyd* hearings permit the rapid resolution of these fact sensitive constitutional issues and mitigate the effects of the passage of time that would accompany requiring defendants to wait to address these matters until after the conclusion of direct appellate review." *Id.*

constitutionally infirm to condition a criminal defendant's right to review on her invoking § 66-5 while denying her the ability to do so.

The test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976) controls. See *State v. Anderson*, 319 Conn. 288, 315 (2015). Ms. King is 39 years old. She has no prior criminal record. She has been convicted of Murder—the most serious offense in our penal code. She has been sentenced to fifty years imprisonment. There is a compelling liberty interest at stake. The risk of erroneous deprivation of the defendant's liberty interests under the existing procedure is significant. Ms. King should not be denied the ability to pursue this line of inquiry when this Court's precedent acknowledges it is required in similar cases, see ante, *Castonguay*, *Walker,* and *Floyd*. The state's interest is served by supplementation of the record. The state has no interest in upholding unjust procedures or in promoting delay. This issue should be resolved now. *See State v. Ortiz*, 280 Conn. 686, 712 (2006) (Rectification "permits the rapid resolution of … fact sensitive constitutional issues and mitigate[s] the effects of the passage of time" that accompanies waiting to address these matters until after the conclusion of direct appellate review). Ms. King should not be forced to challenge her convictions in a separate, time-consuming habeas proceeding.

CONCLUSION

For the foregoing reasons, the defendant respectfully requests that her conviction for murder and conspiracy to commit murder be vacated, and/or that her convictions be reversed, and the case be remanded for a new trial. If this Court disagrees that the defendant's convictions should be vacated, and/or reversed, this Court should remand the case with instructions to determine whether any member of the three-judge panel prejudged the defendant's case, in which case a new trial would be warranted.

Respectfully submitted,
Larise King
Defendant-Appellant

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Issue III

Constitutional Provisions

Connecticut General Statutes

Rules

FBT-CR19-0332667-T	:	SUPERIOR COURT
THE STATE OF CONNECTICUT,	:	JUDICIAL DISTRICT OF FAIRFIELD
v.	:	AT BRIDGEPORT, CONNECTICUT
LARISE KING,	:	FEBRUARY 5, 2021

BEFORE THE HONORABLE KEVIN RUSSO, JUDGE

A P P E A R A N C E S :

Representing the State of Connecticut:

Attorney David Applegate

Representing the Defendant:

Attorney Michael Peck

Recorded By:
Patricia Pace

Transcribed By:
Patricia Pace
Court Recording Monitor
1061 Main Street
Bridgeport, CT 06604

THE COURT: Good morning, we have the matters of, I believe, Latrice (sic) King, represented by counsel. If the parties can identify themselves for the record, please.

ATTORNEY APPLEGATE: Good morning, your Honor, David Applegate and Tatiana Messina on behalf of the State of Connecticut.

ATTORNEY PECK: Good morning, your Honor, Attorney Michael Peck for Larise King who is hearing by video.

THE COURT: All right, good morning, Ms. King and good morning, Attorney Peck. Welcome.

THE DEFENDANT: I understand Ms. King 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, 35 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.

ATTORNEY PECK: Right, right. So, yes, yes.

THE COURT: Attorney Applegate?

ATTORNEY APPLEGATE: The State will be ready to go whenever your Honor asks us to be ready, so—

I disclosed an expert witness the other day. He typically—it's special agent Jim Dwines, he doesn't usually draft the report, but usually there's a PowerPoint that I get just before the trial. I—that's something that—if Attorney Peck needs time to try to talk to his own expert or to talk to—I always make Agent Wynne's available with any questions that defense counsel might have. I think that could be a real issue in this case in terms of the defendant's whereabouts. So—and this is cellular analysis testimony.

THE COURT: Okay. Well, while we have Ms. King present, let me just ask this other questions as well. Has there been a final offer made that we may be able to question her on also today about a rejection?

ATTORNEY APPLEGATE: Yes, we offered 45 years to serve on a murder.

THE COURT: Okay. I imagine she hasn't been canvassed on that, correct?

ATTORNEY PECK: She could be canvassed on—she hasn't been, of course.

THE COURT: All right.

ATTORNEY PECK: I've informed her of that offer, yes.

THE COURT: Okay, so, I'll do two canvasses this morning with Ms. King. The first will be on the State's offer.

ATTORNEY PECK: Yes.

THE COURT: And the second will be her ability to waive a jury trial and elect for a courtside trial.

ATTORNEY PECK: Yes.

THE COURT: Ms. King, again, this—good morning.

THE DEFENDANT: Good morning.

THE COURT: I just have a series of questions to ask you. First, about the State's pretrial offer, okay?

So, you have been presented with an offer that is 45 years to serve, is that your understanding of the offer, Ma'am?

THE DEFENDANT: Yes.

THE COURT: And I understand you wish to reject that offer today?

THE DEFENDANT: Yes, sir.

THE COURT: Now, are you presently under the influence of alcohol, drugs or medication that would interfere with your ability to understand what is happening today, Ms. King?

THE DEFENDANT: No, sir.

THE COURT: Have you had enough time to speak with your attorney and are you satisfied with his

advice?

THE DEFENDANT: Yes.

THE COURT: Your decision to reject the offer, is it voluntary and of your own free will, Ma'am?

THE DEFENDANT: Yes.

THE COURT: Has anyone forced or threatened you to reject the offer?

THE DEFENDANT: No.

THE COURT: Tell me a little bit about your—either your school history or work history, if you, indeed, have those, Ma'am.

THE DEFENDANT: Up until the arrest, I was working two jobs. I was a manager at a group home—

THE COURT: And was that full time?

THE DEFENDANT: Yes.

THE COURT: Okay.

THE DEFENDANT: I went to school for medical assistant, phlebotomy, but I didn't take it up because I ended—you know, I was working for special needs.

THE COURT: All right, did you—did you go to high school, Ms. King?

THE DEFENDANT: Yes, I graduated.

THE COURT: So, you are a high school graduate and you have a full time—a full time work history, Ma'am.

THE DEFENDANT: Yes, and I went to college for

two years.

THE COURT: All right. Now, returning to the offer for a moment, again, the offer is 45 years and if you're sure that you would like to reject the offer, I want you to know that in most cases, not in all cases, but in most cases, that same offer will not be extended again, do you understand that, Ma'am?

THE DEFENDANT: Yes, I do.

THE COURT: And do you also understand if you do reject the offer and your case is placed on the jury list, it may be tried at a later date by a future Judge, other than myself, and that has nothing to do with the next issue we're going to address, right now we're just talking about the offer. It may be tried on a later in the future by a Judge other than myself and if a sentencing does result from a trial, that sentencing will also be done by another Judge other than myself, do you understand that, Ma'am?

THE DEFENDANT: Yes, sir.

THE COURT: All right. So, I'll ask you again and if you need more time with Attorney Peck, I'll give you whatever time you need, Ms. King, do you wish to reject the offer made to you today?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions of me or your attorney?

THE DEFENDANT: No, sir.

THE COURT: All right, I find Ms. King's choice to reject the offer to be voluntary and understandingly made with the assistance of competent counsel. The offer may be rejected.

Now, there's a second issue that you and I are gong to address now, Ms. King, and that is your election for either a jury trial or a courtside trial.

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, Ms. King?

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 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?

ATTORNEY APPLEGATE: No, your Honor.

THE COURT: The State does find that Ms. King 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 Ms. King is more than competent and understands the proceedings today and understanding—and understands the charge 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.

Now, I suppose we should arrive at a date and then I will have to do some administrative work on my own to let Judicial know that we would need the services of a three Judge panel.

Let's see here, this is a bit of a balancing act, so—

ATTORNEY APPLEGATE: So, I—I'm not sure what kind of motion practice that we have, but I—I'd be happy to have a day carved out to address any motions that either side presents.

I know there was—I believe Attorney Demirjian filed some kind of standard public defender motions. Usually, there's a motion to dismiss, there's—so, I have to go back in my file and check exactly what has been filed but I have no problem putting that down and then if Attorney Peck wants to have any kind of an evidentiary hearing with respect to motions, I'd be happy to have any witnesses lined up for that.

THE COURT: Why don't we do this because I'm just mindful of also the Governor's orders which I believe are set to expire on April 20.

Why don't we set down the actual trial for April 27th and then I will be in touch with our clerk's office and we'll send out a notice for a date earlier than the 27th for any motion practice that's required.

ATTORNEY APPLEGATE: Okay. Okay.

THE COURT: Is that satisfactory, sir?

ATTORNEY PECK: Yes, your Honor.

THE COURT: All right. Ms. King, your attorney will be in touch with you. Thank you for joining us today, Ma'am.

THE DEFENDANT: Thank you.

THE COURT: You're welcome.

(whereupon this matter was concluded)

FBT-CR19-0332667-T	:	SUPERIOR COURT
THE STATE OF CONNECTICUT,	:	JUDICIAL DISTRICT OF FAIRFIELD
v.	:	AT BRIDGEPORT, CONNECTICUT
LARISE KING,	:	FEBRUARY 5, 2021

C E R T I F I C A T I O N

I hereby certify the foregoing pages are a true and correct transcription of the audio recording of the above-referenced case, heard in Superior Court, Judicial District of Fairfield, at Bridgeport, Connecticut, before the Honorable Kevin Russo, Judge, on the 5th day of February, 2021.

Dated this 10th day of November, 2021, in Bridgeport, Connecticut.

Patricia Pace
Court Recording Monitor

Benchbook

for U.S. District Court Judges

SIXTH EDITION

Federal Judicial Center
March 2013

1.09 Waiver of jury trial (suggested procedures, questions, and statements)

Fed. R. Crim. P. 23

[*Note:* Under the Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(2) and (3), any victim of the offense has the right to notice of "any public court proceeding . . . involving the crime . . . of the accused," and to attend that proceeding. It may be advisable to ask the prosecutor if there are any victims and, if so, whether the government has fulfilled its duty to notify them.]

Introduction

Trial by jury is a fundamental constitutional right, and waiver of the right to a jury trial should be accepted by a trial judge only when three requirements are satisfied:

1. the procedures of Fed. R. Crim. P. 23(a) have been followed;
2. the waiver is knowing and voluntary; and
3. the defendant is competent to waive a constitutional right.

Fed. R. Crim. P. 23(a) requires that the accused's waiver of the right to trial by jury be

1. made in writing;
2. consented to by the government; and
3. approved by the court.

Following this rule alone does not satisfy the requirement that the waiver be knowing and voluntary, however.

The trial judge should ascertain on the record

1. whether the accused understands that he or she has a right to be tried by a jury;
2. whether the accused understands the difference between a jury trial and a nonjury trial; and
3. whether the accused has been made to understand the advantages and disadvantages of a jury trial.

Before approving the waiver, a trial judge must consider a defendant's mental capacity to waive a jury trial. A defendant is not competent to waive a constitutional right if mental incapacity or illness substantially impairs his or her ability to make a reasoned choice among the alternatives presented and to understand the nature and consequences of the waiver.

When information available from any source presents a question as to the defendant's competence to waive a jury trial, sua sponte inquiry into that competence must be made.

In any psychiatric examination ordered under the inherent power of the court or under 18 U.S.C. § 4241, the examining psychiatrist should be directed to give an opinion on the defendant's competence to make an intelligent waiver. Whenever any question as to the defendant's competence arises, a specific finding of competence or incompetence should be made.

Finally, if any doubt of competence exists, the judge should order a jury trial.

Suggested procedures and questions

A. Preliminary questions for the defendant

1. The court is informed that you desire to waive your right to a jury trial. Is that correct?
2. Before accepting your waiver to a jury trial, there are a number of questions I will ask you to ensure that it is a valid waiver. If you do not understand any of the questions or at any time wish to interrupt the proceeding to consult further with your attorney, please say so, since it is essential to a valid waiver that you understand each question before you answer. Do you understand?
3. What is your full name?
4. How old are you?
5. How far did you go in school?

   [If you are not sure the defendant understands English, ask:]
6. Are you able to speak and understand English?

   [Ask defense counsel if he or she has been able to communicate with the defendant in English. If you doubt the defendant's capacity to understand English, use a certified interpreter. See 28 U.S.C. § 1827.]
7. What is your employment background?
8. Have you taken any drugs, medicine, or pills, or drunk any alcoholic beverage in the past twenty-four hours?
9. Do you understand that you are entitled to a trial by jury on the charges filed against you?
10. Do you understand that a jury trial means that you will be tried by a jury consisting of twelve people and that all of the jurors must agree on the verdict?
11. Do you understand that you have the right to participate in the selection of the jury?
12. Do you understand that if I approve your waiver of a jury trial, the court will try the case and determine your innocence or guilt?
13. Have you discussed with your attorney your right to a jury trial?

14. Have you discussed with your attorney the advantages and disadvantages of a jury trial? Do you want to discuss this issue further with your attorney?

B. Questions for counsel

In determining whether the accused has made a "knowing and voluntary" waiver and is competent to waive the right to a jury trial, the judge should question both the defense counsel and the prosecutor.

1. Ask the defense counsel:

   (a) Have you discussed with the defendant the advantages and disadvantages of a jury trial?

   (b) Do you have any doubt that the defendant is making a "knowing and voluntary" waiver of the right to a jury trial?

   (c) Has anything come to your attention suggesting that the defendant may not be competent to waive a jury trial?

2. Ask the prosecutor:

   Has anything come to your attention suggesting that the defendant may not be competent to waive a jury trial?

C. Form of waiver and oral finding

1. A written waiver of a jury trial must be signed by the defendant, approved by the defendant's attorney, consented to by the government, and approved by the court.
2. It is suggested that the judge state orally:

   This court finds that the defendant has knowingly and voluntarily waived his [her] right to a jury trial, and I approve that waiver.

3. An appropriate written waiver of jury trial may take the form of the one shown on the next page.

Other FJC sources

Manual on Recurring Problems in Criminal Trials 9–10 (Tucker Carrington & Kris Markarian eds., 6th ed. 2010)

In the U.S. District Court
for the District of [ ]

United States of America	)	
	)	No. Cr _____
v.	)	Waiver of trial
	)	by jury
	)	
[Defendant]	)	

I acknowledge that I was fully informed of my right to trial by jury in this cause. I hereby waive that right, request the court to try all issues of fact and law without a jury, and waive my right to special findings.

Dated at _____, this ____ day of _____, 20__.

_____
Defendant

APPROVED:

_____
Attorney for Defendant

The United States of America consents to the defendant's waiver of a jury trial and waives its right to request special findings.

_____
Assistant U.S. Attorney

I find that the defendant has knowingly and voluntarily waived the right to a jury trial, and I approve the waiver.

_____
Judge

DOCKET NO. FBTCR190332667T	:	SUPERIOR COURT PART A
STATE OF CONNECTICUT	:	JUDICIAL DISTRICT OF FAIRFIELD
VS	:	AT BRIDGEPORT
LARISE KING	:	MAY 3, 2021

STATE'S REQUEST TO CONSIDER LESSER INCLUDED OFFENSES AND APPLICABLE LAW

The State of Connecticut hereby requests that if this Court should find the defendant not guilty of the crime of Murder, in violation of Sections 53a-54a(a) and 53a-8(a) of the Connecticut General Statutes, this Court should consider the lesser included offense of Manslaughter in the First Degree, in violation of Sections 53a-55(a)(1) and 53a-8(a) of the Connecticut General Statutes. This charge is appropriate as a lesser included offense if the evidence suggests at least a possibility that the defendant acted with a lesser intent than the specific intent to kill. Accessory to Manslaughter is a cognizable crime under our law. State v. Harris, 49 Conn. App. 121, 128-129 (1998).

Additionally, the State requests that this Court consider Conspiracy to Commit the Crime of Assault in the First Degree, pursuant to Sections 53a-59(a)(1) and 53a-48 of the Connecticut General Statutes, as a lesser included offense of the crime of Conspiracy to Commit Murder, pursuant to Sections 53a-54a and 53a-48 of the Connecticut General Statutes. This is consistent with the State's alternative theory that the defendant's intent was to cause a serious physical injury to another person and that such injury was caused by means of a deadly weapon or dangerous instrument.

THE STATE OF CONNECTICUT

By: David R. Applegate
DAVID R. APPLEGATE
Senior Assistant State's Attorney

DOCKET NO. FBT-CR19-0332667-T	:	SUPERIOR COURT PART A
STATE OF CONNECTICUT	:	J.D. OF FAIRFIELD
VS.	:	AT BRIDGEPORT
LARISE KING	:	MAY 4, 2021

DEFENDANT'S REQUEST TO CONSIDER LESSER INCLUDED OFFENSES AND APPLICABLE LAW

The Defendant, through her counsel, hereby requests that this Court consider the lesser included offense of Manslaughter in the First Degree, pursuant to Sections 53a-55(a)(1) and 53a-8(a) of the Connecticut General Statutes. This charge is appropriate as a lesser included offense if the evidence suggests at least a possibility that the Defendant acted with a lesser intent than the specific intent to kill. Accessory to Manslaughter is a cognizable crime under our law. State v. Harris, 49 Conn.App. 121, 128-129 (1998).

The Defendant also requests that this Court consider Conspiracy to Commit the Crime of Assault in the First Degree, pursuant to Sections 53a-59(a)(1) and 53a-48 of the Connecticut General Statutes, as a lesser included offense of the crime of Conspiracy to Commit Murder, pursuant to Sections 53a-54a and 53a-48 of the Connecticut General Statutes. This is consistent with the State's alternative theory that the Defendant's intent was to cause a serious physical injury to another person and that such injury was caused by means of a deadly weapon or dangerous instrument.

Additionally, the Defendant requests that this Court consider Conspiracy to Commit the Crime of Assault in the Second Degree, pursuant to Sections 53a-60a(a) and 53a-48 of the Connecticut General Statutes, as a lesser included offense of the crime of Conspiracy to Commit Murder, pursuant to Sections 53a-54a and 53a-48 of the

filed in court
5/4/21
CC, TAC

Connecticut General Statutes. This is consistent with the State's alternative theory that the Defendant's intent was to cause a serious physical injury to another person and that such injury was caused by means of a deadly weapon or dangerous instrument.

DEFENDANT,
LARISE KING

By Michael A. Peck

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NO. FBT-CR19-0332667-T	:	SUPERIOR COURT PART A
STATE OF CONNECTICUT	:	JUDICIAL DISTRICT OF FAIRFIELD
V.	:	AT BRIDGEPORT
LARISE KING	:	MAY 5, 2021

MAJORITY MEMORANDUM OF DECISION

The court makes the following findings of fact.

In October 2016, the defendant, Larise King, and Dathan Gray, a.k.a. "Daedae," got married. They had an acrimonious relationship and were separated approximately two years later. In early 2019, the defendant went on Facebook Live and posted an irate message directed at Mr. Gray. The substance of the message was that the defendant was tired of supporting Mr. Gray and was no longer going to do so. The defendant told Mr. Gray that, "Whatever my family do to you is beyond me. . . They tired of you. They tired of you." The defendant also stated that she was going to "kick [Mr. Gray's] ass" every time she saw him. Finally, the defendant stated that she still loved Mr. Gray, albeit in a very angry tone of voice.

Nosadee Sampson was a very reluctant witness. She and Mr. Gray had been friends for a very long time and Sampson referred to him as her cousin even though they were not related. Sampson and the defendant had also been friends since they were teenagers. When asked if she was closer to Mr. Gray than the defendant, Sampson responded that she loved them both equally but did not see the defendant as often after the defendant and Mr. Gray separated. Sampson testified that on July 27, 2019, at approximately 10 p.m., she drove to the Snack Shack on the corner of Newfield Avenue and Revere Street in Bridgeport to meet Mr. Gray. When Sampson arrived, she heard a female yelling inside the

Snack Shack. She entered the store and saw Fatima Woodruff, who worked at the store, yelling at Mr. Gray. Sampson convinced Mr. Gray to leave. The two walked outside and got into Sampson's car, which was parked in Mr. Gray's driveway. Mr. Gray lived directly across the street from the Snack Shack in the second house from the corner of Beardsley Street and Newfield Avenue.

A short time later, Sampson got out of her car and walked to the BK Lounge to meet some friends and family. The BK Lounge, also located on Newfield Avenue, was a short walk from Mr. Gray's residence. When Sampson went to the BK Lounge, Mr. Gray remained seated in Sampson's car.

At approximately midnight, and while Sampson was still in the BK Lounge, Woodruff called the defendant complaining about Mr. Gray. The defendant called her best friend, Janice Rondon, who also testified at trial, and asked for a ride to the Snack Shack. Rondon picked the defendant up at the defendant's home on Karen Court in Bridgeport and drove her to the Snack Shack. When they arrived, the defendant got out of the car and walked across the street to where Mr. Gray was standing in front of his apartment. Rondon said that from the car she could see Mr. Gray and the defendant talking. Mr. Gray's girlfriend, Sakeryial Beverly, was also standing nearby. Rondon got out of the car and walked over to Mr. Gray and the defendant. As she approached, Mr. Gray stated "Why the fuck you over here? Mind your own fucking business, bitch." Mr. Gray then tried to spit on Rondon. Rondon spat back at Mr. Gray. The defendant and Mr. Gray, both of whom had been drinking earlier in the night, started to fight both verbally and physically.

After the fight started, an individual named "Mookie" approached Sampson, who was still in the BK Lounge, and told her that Mr. Gray wanted her to come outside. Mookie told Sampson that Mr. Gray was involved in a fight near Sampson's car. While Sampson did not want to be involved in the fight, she nonetheless left the BK Lounge and went back to the area near Mr. Gray's residence. There, Sampson saw the defendant and Mr. Gray involved in a verbal and physical altercation. Sampson and others tried

to separate the defendant and Mr. Gray. As they broke up the fight, Sampson heard Mr. Gray repeatedly stating "I don't give a fuck." Sampson also said that the defendant "kept saying" that it was "going to be [Mr. Gray's] last day" and that Mr. Gray was "going to breathe his last breath."

Pole cameras and surveillance cameras in the vicinity of the Snack Shack video recorded part of the altercation. The defendant, who Sampson identified on the video, can be seen pacing around in an agitated manner. The defendant is wearing a light-colored shirt, striped pants, and a scarf on her head. The defendant's hair is hanging over her left shoulder.

Rondon testified that the argument ended when the defendant's new boyfriend, Mike Edwards, a.k.a. "TJ," showed up and was able to calm the defendant down. Rondon then got the defendant back into her (Rondon's) car, drove the defendant to 6th Street to meet with Edwards, dropped her off, and drove back toward the BK Lounge. Rondon never actually made it to the BK Lounge, but instead parked on Stratford Avenue and 6th Street and remained in her car.

Shortly after the altercation, at approximately 12:57 a.m., a surveillance camera recorded a light-colored SUV driving on 6th Street. The SUV stopped across the street from 234 6th Street and picked someone up, whom the court finds, based on the totality of the evidence, including the defendant's admission, was the defendant. The SUV crossed from 6th Street to Newfield Avenue and drove past the Snack Shack, Mr. Gray's residence, and the BK Lounge. At approximately 12:59 a.m., another camera recorded the SUV continuing southbound on Newfield Avenue toward Orange Street. At approximately 1:10 a.m., a camera recorded the SUV driving northbound on Newfield Avenue. The SUV turned onto Beardsley Street and parked on the right side of the street approximately four to five houses from the corner of Newfield Avenue. The SUV was facing westbound toward the I-95 overpass.

After the SUV parked, the video shows a short male wearing a dark hooded sweatshirt get out of the driver's seat and a female wearing a light-colored shirt, striped pants, and a headscarf with her

hair over her left shoulder – whom, based on the totality of the circumstances, the court finds to be the defendant – get out of the rear, passenger seat on the driver's side of the vehicle. The man walked toward the back of the car and continued on Beardsley Street toward Newfield Avenue. The defendant got in the driver's seat of the SUV and backed it up. The court finds that the defendant did this in order to put more room between the SUV and the car parked in front of it in order to facilitate a faster getaway. The defendant kept her foot on the brake causing the rear brake lights to remain illuminated.

Pole and surveillance cameras on Newfield Avenue showed that the short male in the dark hooded sweatshirt was accompanied by a taller man in a grey hooded sweatshirt. The two men rounded the corner onto Newfield Avenue. Sampson saw the two men approaching and saw that they were wearing "hoodies." She immediately knew something was wrong because it was too hot to be wearing hooded sweatshirts. Sampson tried to warn Mr. Gray saying, "They got hoods on; they got hoods on." The two men approached Mr. Gray and his girlfriend. The men pushed Mr. Gray's girlfriend aside. One of the men quickly said something to Mr. Gray and then the shorter man, who was wearing the black hooded sweatshirt, shot Mr. Gray in the face, head, neck, back, shoulder, arm, hip and abdomen. The shooter continued firing even after Mr. Gray was already on the ground.

Shotspotter registered a total of 16 gunshots at approximately 1:13 a.m. The court concludes that the defendant, from where she was waiting on Beardsley Street – approximately 226 meters away – would have heard the gunfire. Notably, rather than driving away or calling the police, the defendant simply turned off the headlights.

The two men ran back to Beardsley Street and got into the waiting SUV. The defendant turned the headlights back on and drove westbound on Beardsley Street and under the I-95 overpass. The time that elapsed from when the two men got out of the SUV to walk toward Newfield Avenue to the time they ran back, got into the SUV, and drove off was two minutes and 22 seconds.

Mr. Gray sustained 11 gunshot wounds and four graze wounds. He died as a result of the gunshot wounds. According to Associate Medical Examiner, Dr. Jacqueline Nunez, who performed the autopsy, other than the graze wounds, each of the other gunshots had "stopping power" meaning that each one was sufficient to incapacitate and/or kill Mr. Gray. Toxicology reports show that at the time of his death, Mr. Gray had ethanol, THC, and a low amount of methamphetamine in his system.

Crime scene detectives recovered 15 cartridge casings, five bullets, and one bullet fragment from the scene of the shooting. Dr. Nunez also removed several bullet fragments and a bullet from Mr. Gray's body. According to Firearms Examiner Marshal Robinson, all of the recovered bullets and casings were 9mm. Robinson determined that all of the casings were fired from one gun and that all of the bullets were fired from one gun. He could not say whether the casings and bullets were fired from the same gun without actually having a gun against which to compare them.

In addition to the bullets and casings, crime scene detectives recovered four small vials of what appeared to be crack cocaine from the ground near where Mr. Gray was shot. There was no evidence as to whom the items belonged. The substance presumptively tested positive for crack cocaine.

The defendant's first statement to the police

On July 28, 2019, Detective Jorge Cintron spoke with the defendant and her father at the Bridgeport Police Department. The defendant stated that at approximately 11:17 a.m. she received a call from Fatima [Woodruff], who was yelling and screaming on the phone and saying something about "Daedae." The defendant could not really hear what Fatima was saying because Fatima was mad. The defendant told Woodruff that she was "coming there." The defendant called Rondon and asked for a ride. Rondon picked the defendant up approximately 30 minutes later and drove her to the Snack Shack.

According to the defendant, when they arrived, she went inside and spoke to Woodruff. The defendant and Woodruff then went across the street to speak with Mr. Gray, who was sitting in the

backseat of someone's car. Mr. Gray's girlfriend was there, as well. The defendant said that Mr. Gray got out of the car and was swearing at her and "disrespecting" her. Rondon stepped in and told Mr. Gray that he was disrespecting the defendant. Mr. Gray responded by spitting at Rondon; Rondon spat back at him. The defendant calmly explained to Detective Cintron, "That's when I just punched him in the face and we started fighting." The defendant said that she and Mr. Gray were fighting about their marriage. She denied telling Mr. Gray that he was going to take his last breath that day.

The defendant continued explaining to Cintron that she called her boyfriend, Michael Edwards, who showed up at the scene, spoke to Mr. Gray, and diffused the situation. The defendant got back into Rondon's car and went to Edwards' family's house on 6th Street. Edwards then drove her home to Karen Street and dropped her off. She denied calling anyone else that night and also maintained that she was at home during the shooting. The defendant claimed that she did not know who killed Mr. Gray.

The continuing police investigation

Following the interview, Detective Cintron with the assistance of other members of the Bridgeport Police Department collected the above-mentioned video footage from several surveillance and pole cameras in the area of the shooting. After reviewing the footage, they concluded that the white Ford Explorer depicted on the videos was involved in the incident. They also reviewed footage from the day prior to the incident and noticed that on July 26, 2019, a white SUV that was the same make and model (Ford Explorer), and had the same body-style, trim, wheels, sunroof, trailer hitch, and luggage rack as the SUV involved in the shooting was recorded driving in the vicinity of Newfield Avenue and Stratford Avenue at approximately 4:53 p.m. The recording from July 26, 2019 captured the license plate of the white Ford Explorer, which was registered to the defendant's cousin, Oronde Jefferson, at 247 6th Street in Bridgeport.

On July 31, 2019, Captain Brian Fitzgerald saw Jefferson's white Ford Explorer driving in the area of Newfield Avenue and Stratford Avenue. Captain Fitzgerald and Detective Cintron conducted a motor vehicle stop. Jefferson was alone in the vehicle. They confirmed that Jefferson's 2002 white Ford Explorer had all of the same external features, i.e., body style, trim, wheels, sunroof, trailer hitch, and luggage rack, as the SUV that was used during the homicide.

The defendant's second statement to the police

On August 1, 2019, Detective Cintron, Detective Laura Acevedo, and Lieutenant Christopher Lamaine went to the defendant's residence to interview her again. Several of the defendant's family members, including her mother and aunt, were present during the recorded conversation. When asked what she was wearing on the day of the shooting, the defendant stated that she was wearing a pink shirt, striped pants, and a scarf tied in her hair. The defendant repeated the version of the events that she gave on July 28, 2019 during her first interview, but added that she actually called Edwards because she wanted him to fight Mr. Gray and that he instead told her that she needed to "stop making a scene in public." The defendant again stated that Edwards drove her home and dropped her off before the shooting occurred. The defendant said that she first learned of the shooting when "Ala Carter" called her via Facebook Messenger at 1:32 a.m.

Officers then asked the defendant if she knew anyone who drove a white Ford Explorer. The defendant said no. They asked if there might be a video of her getting into a white Ford Explorer. Again, the defendant said no. When explicitly told that there was a video of her getting into such a vehicle, the defendant replied, "I did."

The defendant then admitted that her cousin Oronde Jefferson, whom she identified from a photograph, had a white Ford Explorer. The defendant said that Jefferson and one of his friends, who she could not identify, picked her up on 6th Street between Connecticut Avenue and Stratford Avenue.

The defendant got into the back seat behind Jefferson. When asked if she had called Jefferson, the defendant said no. She said that Jefferson was already in Bridgeport and that "he just saw me" and they "linked up out of the blue" despite it being almost 1 a.m. The defendant claimed that she went for a ride with Jefferson and that they drove down Newfield Avenue, turned left on Orange Street, and then returned via Central Avenue to 6th Street.

The officers advised the defendant that the surveillance video showed that they did not drive down Central Avenue. Rather, the video showed that the SUV stopped on Beardsley Street immediately before the shooting. It further showed two men getting out of the front of the car and the defendant getting out of the back seat of the car and into the driver's seat. The defendant denied that she got into the driver's seat. She then stated that she was not in the car and that they had dropped her off on 6th Street. The officers asked the defendant four questions: (1) "Did they tell you where they were going?" (2) "Did they tell you why they were going to get out of the car?" (3) "Did you have any idea?" and (4) "Did they tell you to drive?" The defendant did not respond to any of the questions.

Interview of Andrew Bellamy

Andrew Bellamy very reluctantly testified under a grant of immunity. Bellamy was interviewed three times by the police; twice over the phone and once in person. All three interviews were recorded and were played for the court. Bellamy admitted that he and Jefferson were in Jefferson's white Ford Explorer on the evening of July 26, 2019 and into the early morning hours of July 27, 2019. At some point, they picked up Jefferson's female cousin, who, based on the totality of the circumstances, the court finds to be the defendant. The defendant sat in the back seat of the SUV and the three drove to Newfield Avenue to go to a party at the BK Lounge. According to Bellamy, he, Jefferson, and the defendant were the only three people in the SUV all night. Rather than go to the BK Lounge, Jefferson parked the car on Beardsley Street and the three had some drinks. When asked why the defendant got

out of the back seat and into the driver's seat of the SUV, Bellamy responded that it was likely because she was "nicer," meaning less intoxicated. He later changed that story and said that no one ever got out of the SUV. He maintained that story despite the video footage and despite the fact that Bellamy's cell phone recorded him taking 240 steps right at the time of the homicide. Bellamy also said that after sitting in the parked car for some time, he, Jefferson, and the defendant went to his (Bellamy's) girlfriend's house on Hawthorne Street and stayed there until 5 a.m. on July 27, 2019.

Contemporaneous cellular telephone records contradict the defendant's statements

Special Agent James Wines of the Federal Bureau of Investigation testified regarding cell phone records and cell site location information obtained for the defendant's two cellular telephones (Verizon cell phone 203-953-8073 and Sprint cell phone 203-859-1845) and for Jefferson's cellular telephone (T-Mobile phone 203-727-5275). The court finds based upon Agent Wines' training and experience that he qualifies as an expert in cell site location information technology. The defendant provided the 203-953-8073 phone number to the police during her first interview. She provided the 203-859-1845 phone number, which she referred to as her "job" phone, and Jefferson's phone number to the police during her second interview.

The cell records show that the defendant and Rondon called each other approximately one dozen times between 11:20 p.m. and 11:41 p.m. The cell site location information establishes that during each of these calls, the defendant's Verizon cell phone was accessing a cell site in the vicinity of her residence. Beginning at 12:20 a.m., the defendant made several calls using her Verizon cell phone. Despite the defendant's claim to the contrary, during this time period, she called Jefferson four times – at 12:44 a.m., 12:45 a.m., 12:46 a.m. and 12:51 a.m. The cell site location information establishes that during each of these calls, the defendant's cell phone was accessing a cell site on Newfield Avenue in the East End of Bridgeport in the vicinity of Mr. Gray's homicide. The records further show that during the first three

calls, Jefferson was in the North End of Bridgeport. By the time of the fourth call at 12:51 a.m., Jefferson's phone had begun moving south toward the defendant in the East End of Bridgeport.

At 1:10 a.m., the defendant placed a call to Rondon. During the call, the defendant's Verizon phone accessed the same cell site on Newfield Avenue in the vicinity of Mr. Gray's homicide. At 1:15 a.m., Rondon called the defendant. Once again, the defendant's Verizon phone accessed the cell site on Newfield Avenue in the vicinity of Mr. Gray's homicide. Thereafter, the defendant placed and received several calls on both of her cellular telephones. The cell site location information shows the defendant's telephones accessing cell sites first heading westbound, in the same direction that the defendant and the shooter fled the scene of the shooting and then heading north toward the defendant's residence. Between 1:41 a.m. and 1:46 a.m., the defendant's Sprint phone and Jefferson's cell phone both accessed cell towers in the same locations. From this information and Agent Wines' testimony, the court concludes that the defendant and Jefferson were traveling together toward her residence.

Conclusion

All three judges agree on the facts that were established during trial. However, we differ with respect to the conclusion to be drawn from those facts. Judge Hernandez and I find as follows:

The defendant repeatedly told Mr. Gray that it was his last day and he was going to take his last breath. He was murdered within the hour. The defendant then made numerous false exculpatory statements in an effort to distance herself from the crime. Specifically, she lied about whom she called after the altercation with Mr. Gray. She lied about where she was at the time of the shooting. She lied about knowing anyone who owned a white Ford Explorer. She then lied about being in the Explorer with Jefferson. She lied about driving by Mr. Gray's location ten minutes before the murder. She lied about driving the car away from the scene. And when given the opportunity to deny knowing that Jefferson was going to shoot Mr. Gray, she declined to do so.

The evidence establishes that the defendant was not an unknowing or unwilling participant in the crime. Rather, she called Jefferson four times in a seven minute period right after her fight with Mr. Gray. She was the one who knew where to find Mr. Gray and the only reasonable inference to draw is that she directed Jefferson to Mr. Gray's location. The defendant did not direct Jefferson to stop and beat Mr. Gray up despite claiming that is what she wanted her boyfriend, Michael Edwards, to do earlier. In fact, the evidence is clear that the defendant and Mr. Gray regularly and publicly engaged in verbal and physical altercations, and that the defendant, by her own admission, was the one who punched Mr. Gray in the face earlier in the evening. Instead, she directed Jefferson onto a dark side street. When Jefferson and Bellamy got out of the car, the defendant got into the driver's seat and backed the car up giving herself plenty of room to pull out quickly. She then sat waiting in the car with her foot on the brake while Jefferson went to kill Mr. Gray. Jefferson did not have an issue with Mr. Gray. The defendant had an issue with Mr. Gray – many of them going back several years. Yet Jefferson walked up to Mr. Gray and shot him in the face. He then shot him another 14 times. This was not a spur of the moment decision. It was a plan. Tellingly, when the shots were fired, the defendant did not take off running or drive away like Janice Rondon and everyone else within hearing range of the gunfire. Instead, she turned off the headlights and waited for Jefferson and Bellamy to return.

In short, based upon the defendant's stated threats to Mr. Gray before his murder, and all of the circumstances and events leading up to and immediately following the murder, the defendant's physical acts, the manner in which the murder was committed, and the defendant's serial, false exculpatory statements, the court finds that the defendant and the assailants shared the common intent to cause Mr. Gray's death. Further, based upon the foregoing and the timing of her calls to Oronde Jefferson after the fight and before the murder, the court finds that the defendant solicited, and requested him to commit the murder.

The court has considered the proffered defenses urged by defense counsel. Primarily, counsel argues that the fact that the two suspected assailants, Oronde Jefferson and Andrew Bellamy, have not been arrested and charged raises a reasonable doubt about the defendant's guilt. General Statutes § 53a-48, however, is a unilateral, rather than a bilateral, conspiracy statute, meaning that a conspirator may be prosecuted for conspiracy despite the non-prosecution or acquittal of the alleged co-conspirators. *State v. Colon*, 257 Conn. 587, 600-601 (2001).

Based on the evidence presented, Judge Hernandez and I find that the state has proven beyond a reasonable doubt, each of the elements of Conspiracy to Commit Murder, in violation of Sections 53a-54a and 53a-48 of the Connecticut General Statutes and that the state has proven beyond a reasonable doubt, each of the elements of Murder, in violation of Sections 53a-54a(a) and 53a-8(a) of the Connecticut General Statutes.

Dated this 5TH day of May, 2021 at Bridgeport, Connecticut.

HERNANDEZ, J.

DAYTON, J.

DOCKET NO. FBT-CR19-0332667-T	:	SUPERIOR COURT PART A
STATE OF CONNECTICUT	:	JUDICIAL DISTRICT OF FAIRFIELD
V.	:	AT BRIDGEPORT
LARISE KING	:	MAY 5, 2021

DISSENTING

I am in agreement with the historical facts unanimously found by the trial court and the general legal principles that the majority states. As to the Accessory to Murder count my disagreement lies with the majority's interpretation of the evidence that lead it to conclude that the state proved beyond a reasonable doubt that the defendant had a specific intent to murder Dathan Gray concomitantly with the intent to assist the two gunmen in carrying out the crime.

I do believe however, that the evidence is sufficient to support a conviction of the lesser included offense of Manslaughter in the First Degree on this count.

In addition, I disagree with the majority's opinion that the state presented sufficient evidence to prove beyond a reasonable doubt that the defendant had the specific intent to murder Dathan Gray sufficient to satisfy the conspiracy to murder count. I do believe however, that the evidence is sufficient to support the lesser included offense of Conspiracy to Commit Assault in the First Degree on this count.

As I would have considered the above mentioned lesser included offenses I respectfully dissent from the majority opinion.

Earl Richards
RICHARDS, J.

S.C. 20632/FBT-CR19-0332667-T	**SUPREME COURT**
STATE OF CONNECTICUT	**STATE OF CONNECTICUT**
V.	
LARISE N. KING	**APRIL 4, 2022**

DEFENDANT'S MOTION FOR AUGMENTATION AND RECTIFICATION

Pursuant to Conn. Prac. Bk. §§ 60-2, 61-10 and 66-5, the defendant, through undersigned counsel, respectfully moves for augmentation and rectification of the record for the reasons set forth below. The defendant was convicted of murder and conspiracy to commit murder by a three-judge panel in the Superior Court, Judicial District of Fairfield, Richards, Hernandez and Dayton, JJ.

This appeal raises a question of first impression: whether the constitutional prohibition against jury deliberations until the close of all the evidence and the submission of the case to the factfinder under *State* v. *Washington*, 182 Conn. 419 (1980) similarly applies in trials before three-judge panels.

The record in this case suggests that discussion and/or examination of this matter occurred off the record prior to the trial court's deliberations. The record does not disclose the manner or scope of any such discussions. Accordingly, the defendant moves to rectify the record and seeks access to the timing and character of any off-the-record discussions and/or investigation by the three judges before the defendant's case was submitted. Rectification is necessary so that there is an adequate record for the Supreme Court to review the defendant's claim. This is an important issue that could have implications for future prosecutions in Connecticut.

I. BRIEF HISTORY OF THE CASE

The defendant, Larise King, was arrested and charged with murder, as an accessory, in violation of General Statutes §§ 53a-54a and 53a-8, and conspiracy to commit murder, in violation of General Statutes §§ 53a-48 and 53a-54a in connection with the death of her former husband, Dathan Gray. The defendant pleaded not guilty and elected a jury trial. Subsequently, the defendant withdrew her election and elected to be tried before a three-judge panel in the Superior Court, Judicial District of Fairfield, Richards, Hernandez and Dayton, JJ.

On May 5, 2021, Judge Hernandez and Judge Dayton convicted the defendant on both counts. Judge Richards dissented. The majority imposed a total effective sentence of fifty years imprisonment. This appeal followed. The defendant's appeal was filed on October 27, 2021. The 676-page transcript was completed on December 20, 2021.

II. SPECIFIC FACTS AND LAW IN SUPPORT OF DEFENDANT'S MOTION

The defendant's case was tried over the course of six days. On May 4, 2021, the parties presented their summations. Following summations, the court recessed for lunch until 2 p.m. 5/4/21 Tr. 53. Following the break, the panel listened to playback of Nosadee Sampson's direct testimony and then recessed for the day. Id., 55.

The next morning, the panel announced that it had reached a verdict. 5/5/21 T 1, see attached Exhibit A. Judge Dayton read the verdict in open court. Id., 1. The court's decision summarized the evidence at trial, including, inter alia, an analysis of the defendant's cellular telephone records and the time elapsing between various calls (id., 14-16), the timestamps of different surveillance cameras and the time elapsing between the events depicted in the footage (id., 5-6), an analysis of the defendant's statements to the

police contemporaneous to her cellular telephone records (id. at 11-12), and a summary of the witness testimony (id. at 1-4; 6-8, 13-16).

Judge Richards then read his dissent. Judge Richards stated that he was "in agreement with the historical facts unanimously found by the trial court and the general legal principles that the majority states," but that he disagreed about the inferences that could be drawn from that evidence. 5/5/21 Tr. 19.

Following the verdict, Judge Dayton stated: "We're going to file something written, both the majority and the dissent. That will be done probably within a week; both our factual findings and possibly some legal information as well." 5/5/21 T 20.

Despite this statement, the court's detailed twelve-page memorandum of decision was filed the same day, at 2:39 p.m. See attached Exhibit B. Judge Richards' one-page dissent was filed at 12:32 p.m. See id. The majority memorandum of decision is identical to the verdict and factual findings stated on the record. *Compare* Exhibit A (5/5/21 transcript of verdict) *with* Exhibit B (majority memorandum of decision).

A. Legal Principles Governing Presubmission Deliberations

A criminal defendant has a fundamental due process right to a fair trial that is protected by both federal and state constitutions. U.S. Const., amend. XIV; Conn. Const. art. I, § 8. Due process is "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." *Winebrenner* v. *United States*, 147 F.2d 322, 328 (8th Cir. 1945), quoting *Hurtado* v. *California*, 110 U.S. 516 (1884). The right to the presumption of innocence is embedded in the defendant's right to a fair trial and requires that the defendant's guilt or innocence be decided based solely on the evidence adduced at trial in accordance with the relevant legal principles. *Estelle* v. *Williams*, 425 U.S. 501, 503 (1976). A presubmission finding or conclusion is prohibited because "an opinion once

formed could only be removed, if at all, by [contrary] evidence." *Winebrenner*, 147 F.2d at 328.

The leading Connecticut case on presubmission deliberations is *State* v. *Washington*, 182 Conn. 419 (1980). In *Washington*, the trial court judge instructed the jurors that they were permitted to discuss the evidence prior to the submission of the case. In ruling that the instruction was improper, the court held, "it is improper for jurors to discuss a 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*. at 425. The due process clause and the right to trial by an impartial jury prohibit such discussions. *Id.* at 424–25. Drawing from principles dating back more than a century, the court explained that premature deliberations foreclose fair and impartial consideration of the evidence:

> "[I]t is human nature that an individual, having expressed in discussion his or her view of the guilt or innocence of the defendant, would 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. …'"

Id. at 426, quoting *Winebrenner, supra, 328.*

In *State* v. *Castonguay*, 194 Conn. 416 (1984), the supreme court reiterated the principles underlying *Washington* and defined the proper scope of a post-verdict inquiry in cases involving a claim of presubmission deliberations. It is not permissible to "probe the jurors' mental processes" with respect to the *effect* of any extra-record information or

discussions. *Castonguay*, 194 Conn. at 416; *see also* Practice Book § 42–33 ("no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror nor any evidence concerning mental processes by which the verdict was determined"). Accordingly, where there is a claim of premature deliberations, on remand, the trial court should inquire whether members of the jury discussed the evidence, and whether they may have taken a position on the evidence. *Id.* at 437.

Although this issue has not been considered before in Connecticut, the same principles guide the analysis here.[1] When the defendant waives her right to a jury and elects a trial court "composed of three judges" pursuant to C.G.S § 54-82(b), "the court is merely given power to decide the facts in addition to its customary power to decide questions of law. . . .Except that the jury verdict must be unanimous, while a majority of the court suffices, the statutory court has neither more nor less power than a court sitting with a jury." (Emphasis added) *State* v. *Rossi*, 132 Conn 39, 42 (1945). "Fulfilling the function of the jury, the court determines the guilt or innocence of the accused and is governed in that decision by the same principles as would have governed the jury in passing upon that question." *State* v. *Frost*, 105 Conn. 326 (Conn. 1926).

A criminal defendant, whether tried by jury or jurist, is entitled to due process and a fair trial. By electing a court trial, the defendant never agreed to have the judges decide her

[1] Review of the cases does not reveal a case in which a reviewing court has expressly considered *Washington's* application in a court trial. In *State* v. *Ames*, 171 Conn. App. 486, 513 (2017), a court trial, the defendant claimed that the court's questioning during summation was improper "because it constituted presubmission deliberation" and, further, that the court's interference violated her Sixth Amendment right to assistance of counsel. *Ames*, 171 Conn. App. at 513. Without addressing the presubmission deliberation aspect of the defendant's claim, the Appellate Court concluded that the court's interruptions did not deny defense counsel the opportunity to present the defendant's theory of the case "or otherwise prejudice the defendant." *Id.* at 519.

fate before closing arguments and the submission of the case. Premature deliberations undermine the purpose of our adversarial process, which is designed to ensure that the factfinder reaches the correct result guided by standards and procedures that are regarded by the defendant and the community as fair. *See In re Winship*, 397 U.S. 358, 364 (1970); *State* v. *Brown*, 235 Conn. 502, 527 (1995) (criminal jury trials protect defendants and citizenry "from overzealous or overreaching state authority"), *citing Duncan* v. *Louisiana*, 391 U.S. 145 (1968).

B. Rectification is Necessary for the Supreme Court to Review this Claim

The record suggests that discussion and/or examination of this matter occurred off the record prior to deliberations given the timing of the verdict and the memorandum of decision, see procedural history *ante*. However, the record does not disclose the manner or scope of any such discussions. Accordingly, the record should be augmented to include these facts. Rectification is necessary so that there is an adequate record for the Supreme Court to review the defendant's claim on appeal. The defendant appends questions to this motion seeking access to the timing and character of any off-the-record discussions and/or investigation by the judges before the case was submitted (see page 9).

The defendant means no disrespect in seeking answers to these questions. Our Supreme Court has repeatedly cautioned defendants that it is imperative to supplement a record in a criminal case with such supplemental inquiries via a motion for rectification/augmentation of the record. *See. e.g., State* v. *Walker*, 319 Conn. 668, 681 (2015) (where defendant claimed that he had been excluded from a critical phase of the proceeding, and the record did not indicate whether any discussions occurred off the record or the scope of any such discussions, rectification was required "to include matters that occurred off the record")*; see also* Practice Book § 66-5 (upon motion "the trial court may

make such corrections or additions as are necessary for the proper presentation of the issues.").[2]

Augmentation of the record, at this stage, also promotes principles of judicial economy and fairness. *See State v. Ortiz*, 280 Conn. 686, 712 (2006). Rectification "permits the rapid resolution of … fact sensitive constitutional issues and mitigate[s] the effects of the passage of time that would accompany requiring defendants to wait to address these matters until after the conclusion of direct appellate review." *Ortiz*, 280 Conn. at 712. Further, without the ability to monitor when the judges discuss the case during trial, there is no ability to raise this issue at trial. *See Id.* at 712 (*Brady* violation unascertainable at trial required augmentation of the record on appeal).[3]

In conclusion, the rules provide for supplementation of the record on appeal, our supreme court has indicated that this is the preferred course, and there is no justifiable reason for delay. Rectification of the record permits the panel, having recently decided the defendant's case, the opportunity to address this issue in a timely fashion.

III. CONCLUSION

For the foregoing reasons, the court should grant the defendant's motion for augmentation and rectification of the record. The defendant further requests that this Court hold a hearing on this motion if it deems it necessary.

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[2] As the Court explained, a motion for rectification serves to eliminate factual deficiencies in the record and is appropriate where rectification will assist the reviewing court in reviewing the claim on appeal. *State* v*. Walker*, 319 Conn. 668, 680 (2015).

[3] Judges have an independent obligation to be alert to and raise issues that potentially undermine the fairness of a defendant's trial. *State* v. *Brown*, 235 Conn. 502, 525 (1995) (trial court has *sua sponte* obligation to make preliminary inquiry concerning extraneous prejudicial matters impacting fairness of the proceeding).

Respectfully submitted,

THE DEFENDANT-APPELLANT,
LARISE N. KING

BY: /s/ *Erica A. Barber*___

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QUESTIONS

The defendant, through undersigned counsel, requests that the members of the panel supplement the record as follows:

1. Before the case was submitted, did you review or examine any exhibits when trial was not in session?
2. If the answer is yes, what exhibits did you review?
3. Did you discuss the merits of the case during trial?
4. If the answer is yes, with whom did you discuss the merits of the case?
5. Before the case was submitted, did you do supplemental investigations on the case, either by research, examination of the evidence, or with forensic type investigations?
6. If the answer is yes, what supplemental investigation(s) did you conduct?
7. Did you share your opinion on any aspect of the evidence or inferences to be drawn therefrom before the case was submitted?
8. Did any discussion of the evidence take place during trial without all three judges present?
9. Did you review a transcript of the proceedings before the case was submitted?
10. Did you prepare factual findings before the case was submitted?
11. When was the first time that you were shown a draft of the court's factual findings?
12. When was the memorandum of decision in this case prepared?
13. When was the first time that you were shown a draft memorandum of decision in the case?

ORDER

The foregoing motion is hereby ordered:

GRANTED / DENIED

BY: _____

CERTIFICATION

Pursuant to P.B. §§ 62-7 and 66-3, it is hereby certified that a copy of the foregoing was sent electronically this 4TH day of April, 2022 to: Bruce R. Lockwood, Juris No. 401795, Office of the Chief State's Attorney Appellate Bureau, 300 Corporate Place, Rocky Hill, CT 06067, tel. (860) 258-5807, fax (860) 258-5828, DCJ.OCSA.Appellate@ct.gov; and mailed to my client, Larise King. It is also certified that the defendant-appellant's motion complies with all of the applicable rules of appellate procedure and has been redacted and does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law.

Erica A. Barber
Erica A. Barber

SC 20632; FBT-CR19-0332667-T

STATE OF CONNECTICUT	**:**	**SUPREME COURT**
v.	**:**	**STATE OF CONNECTICUT**
LARISE N. KING	**:**	**APRIL 6, 2022**

STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR AUGMENTATION AND RECTIFICATION

Pursuant to Practice Book § 66-5, the state of Connecticut opposes the defendant's motion for augmentation and rectification on the ground that it is an improper attempt after the close of proceedings to require the trial court to answer a list of questions scripted by the defendant about potential off-the-record judicial activity, in lieu of the defendant having filed a motion in the trial court and given the trial court the opportunity to hold a hearing as it deemed appropriate in its discretion, make any needed factual findings, and issue a ruling suitable for review. Rectification and augmentation are not substitutes for this proper procedure.

I. BRIEF HISTORY OF THE CASE

After a trial to a three-judge panel, the majority of the panel, Hernanez and Dayton, JJ., convicted the defendant of murder and conspiracy to commit murder, with one judge, Richards, J., dissenting, agreeing with the majority's historical fact-finding but finding guilt only of lesser included offenses. The majority imposed sentence of 50 years of incarceration.

On October 27, 2021, the defendant filed her appeal. On March 11, 2022, the defendant filed a motion for permission to file a late Motion for Augmentation and Rectification, which this Court granted on March 29, 2022. The defendant filed a Motion for Augmentation and Rectification ("contested motion") on April 4, 2022.

The contested motion sets forth a time sequence regarding the three-judge panel's

deliberations and verdict, including that: (1) on the afternoon of May 4, 2021, the panel began deliberations and heard playback of certain testimony; (2) on the morning of May 5, 2021, the panel majority orally announced its verdict and factual findings and the dissenting judge stated agreement with the historical facts therein; and (3) on the afternoon of May 5, 2021, the panel majority issued a written 12-page memorandum of decision with the factual findings that had been announced orally, and the dissenting judge issued a written dissent stating agreement with the majority's historical fact-finding. Contested Motion at 2-3.

From this timing of deliberations and issuance of a verdict and findings, the contested motion claims that the record "suggests that discussion and/or examination of this matter occurred off the record prior to the start of the trial court's deliberations." Contested Motion at 1. Because the record "does not disclose the manner or scope of such discussions," however, the contested motion contends that, in order to pursue a claim of premature deliberations, the defendant is entitled to use rectification to obtain a record of the panel's off-the-record conduct. Contested Motion at 1, 6-7. The form through which the defendant proposes to obtain this record is to ask the panel to "supplement the record" with responses to 13 questions she has drafted about their individual and collective conduct. The 13 questions do not pertain to matters of timing that might normally be matters of record – and that are, in fact, on the record here -- such as when deliberations began or when the verdict was announced. Rather, they ask about possible undisclosed conduct, such as whether any judge examined any exhibits when trial was not in session, whether any judge discussed the merits of the case during trial and, if so, with whom, whether any judge conducted supplemental investigation, and "When was the first time that you were shown a draft of the

court's factual findings?" Contested Motion at 9.

II. SPECIFIC FACTS AND LEGAL GROUNDS RELIED UPON

The state oppposes the contested motion.[1] The contested motion is an improper attempt by the defendant to circumvent her failure to file a timely motion for a new trial that would have permitted the trial court to hold a hearing in a manner it deemed appropriate, make any findings it deemed necessary, and issue a ruling suitable for review. The rectification or augmentation sought by the defendant are not appropriate substitutes.

"Our rules of practice … recognize two mechanisms for remedying deficiencies in a record for appellate review: articulation and rectification." State v. Walker, 319 Conn. 668, 679 (2015). Deficiencies, in this context, means errors or omissions in the record that are amenable to correction, or silences or ambiguities as to the basis for a trial court's decision that are amenable to articulation: "A motion seeking corrections in the transcript or the trial court record or seeking an articulation or further articulation of the decision of the trial court shall be called a motion for rectification or a motion for articulation, whichever is applicable." Practice Book § 66-5.

The defendant's contested motion does not purport to ask for an articulation and could not properly do so. Articulation "is appropriate where the trial court's **decision** contains some

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[1] The state does not accept, other than arguendo, the defendant's premise that the record suggests any impropriety by the three-judge panel. Furthermore, the state takes no position at this stage on the merits of the threshold legal question the defendant intends to press on appeal, namely "whether the constitutional prohibition against jury deliberations until the close of all the evidence and the submission of the case to the factfinder under State v. Washington, 182 Conn. 419 (1980) similarly applies to trials before three-judge panels." Defendant's Motion for Permission to File Late Motion For Augmentation and Rectification at 2. Addressing these issues is not necessary at this stage of proceedings.

ambiguity or deficiency" which can be dispelled "by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby sharpening the issues on appeal." (Bold added.) State v. Walker, 319 Conn. at 680. "That an articulation **clarifies** the record presupposes that the factual or legal issue on which clarification is sought related to a matter decided by the trial court." (Emphasis in original) Id. at 683. Because the defendant never obtained a trial court decision regarding possible premature deliberations, articulation is not applicable here.[2]

The defendant's motion asks instead for rectification, but it is an inappropriate mechanism for that as well. Rectification is "the appropriate method of perfecting the record" of **known** events. State v. Walker, 319 Conn. at 681. "'A motion for rectification can be used to make (1) additions to the record, (2) corrections to the record or (3) deletions from the record. The motion cannot be used to add new matters to the record that were not presented at trial." (Footnotes omitted.) C. Tait & E. Prescott, Connecticut Appellate Practice and Procedure (4th Ed.2014) § 6–2:3.3." Id. at 680. Walker cites examples of proper uses of rectification, involving matters that, by contrast to the issue raised here, were known to the parties but not reflected in the record:

> Kalams v. Giacchetto, 268 Conn. 244, 252–53 … (2004) (because plaintiff's request to charge was not contained in court file, court permitted rectification of record to reflect that plaintiff's request to charge had been presented to court in chambers); … State v. Lopez, 235 Conn. 487, 491 … (1995) (rectification to correct court reporter's purportedly inaccurate transcription of trial court's instruction); Nair v. Thaw, 156 Conn. 445, 455 … (1968) (rectification could have been pursued to clarify off record agreement between parties); State v. Benitez, 122 Conn. App.

[2] An example of a proper use of articulation of a three-judge panel's verdict appears in State v. Patterson, 227 Conn. 448, 453–54 (1993), in which, after the panel announced simply that it "unanimously determined that the accused is guilty as charged of murder" without stating factual findings, it later articulated the factual basis for the verdict.

608, 614 … (2010) (defendant should have availed himself of right to seek rectification of record regarding reconstruction of jury visit to crime scene).[3]

State v. Walker, 319 Conn. at 680-81. See also State v. Mejia, 233 Conn. 215, 230–31 (1995) (rectification of steps trial court took in open court with regard to juror note-taking); State v. Williams, 227 Conn. 101, 105-07 (1993) (rectification of proceedings where court reporter's tapes lost); State v. Rosa, 196 Conn. App. 490, 495 (rectification to mark as court exhibits documents that were referenced during hearing), cert. denied, 335 Conn. 920 (2020); Welsh v. Martinez, 157 Conn. App. 223, 236 n.8 (rectification indicating "precisely what was played for the jury during its deliberations"), cert. denied, 317 Conn. 922 (2015). In this case, rather than seeking to perfect the record of known occurrences, the defendant seeks to discover new potential facts on a newly raised issue. That is not rectification.[4]

The defendant also asks for "augmentation" of the record. Contested motion at 1, 7.

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[3] In Benitez, no record had been made when, by agreement of the parties, the jury visited the crime scene. The Appellate Court declined to review a claim that the trial court failed to create a record, because the defendant had failed to "file a motion for rectification of the record and, if necessary, request that the court hold a hearing related to the motion." 122 Conn. App. at 613–14. Unlike this case, Benitez involved the need to rectify a record with matters that occurred in the presence of the parties and the jury.

[4] Walker cited State v. Floyd, 253 Conn. 700, 730–32 (2000), concerning a separate area in which rectification is appropriate to determine whether a state's witness had a plea agreement providing consideration for testifying, in contravention to the witness's trial testimony. Walker, 319 Conn. at 680-81. Although the facts sought for Floyd claims, like here, were not known at trial, the propriety of rectification in the Floyd context turns on the "unusual situation in which a defendant was precluded from perfecting the record due to new information obtained after judgment." State v. Hamlin, 90 Conn. App. 445, 452–53 (2005) (citing Floyd); accord State v. Ortiz, 280 Conn. 686, 712 n.17 (2006). The defendant here raises no newly discovered evidence or other reason for not having developed a record below. Where a defendant was aware at trial of the basis for raising an issue and did not ask the trial court to hold a hearing, make findings, or issue a ruling, rectification is not appropriate. Hamlin, 90 Conn. App. at 452–53.

Augmentation is another term for a rectification in which, by contrast to the situation in this case, matters that occurred in the presence of the parties are added to the record. In a discussion of augmentation, Walker cites these examples:

> State v. Shashaty, 251 Conn. 768, 785 … (1999) (rectification sought to resolve whether matter of defendant being shackled during trial was discussed at in chambers conference), cert. denied, 529 U.S. 1094 … (2000); State v. David M., 109 Conn. App. 172, 176 … (rectification sought to place on record defense counsel's statement to court in chambers that defendant wanted to withdraw his guilty pleas), cert. denied, 289 Conn. 924 … (2008); State v. Pelletier, 85 Conn. App. 71, 76 … ([rectification of fact that defendant was not present for in-chambers discussion did not provide adequate record for review of claimed violation of right to be present in that it did not establish behind-the-scenes matters not evident at trial] such as whether defendant was informed by counsel about meeting in chambers, whether she waived her right to be present at meeting, and whether she consented to court's decision in chambers), cert. denied, 272 Conn. 911 … (2004); In re Christopher G., 20 Conn. App. 101, 107 … (1989) (defendant should have requested trial court to place on record in chambers discussion regarding basis for ruling or should have sought rectification), cert. denied, 213 Conn. 814 … (1990).

State v. Walker, 319 Conn. at 681-82. The defendant here does not seek to place on the record matters that the parties discussed at trial, an appropriate use of augmentation.

The term "augmentation" also can denote a procedure by which an appellate court orders a trial court to find facts necessary to rule on a claim that the trial court erroneously denied without fact-finding. See State v. Pollitt, 199 Conn. 399, 407, 415 (1986) (ordering trial court, which erroneously denied Brady motion, to hold hearing to augment record with factual findings relevant to determining whether state violated Brady). In this case, there is nothing to augment because the defendant did not raise a claim for a ruling below.

By contrast to these proper uses, motions for rectification and augmentation are not vehicles for seeking information for claims that counsel could have raised at trial but did not.

> Practice Book § 66–5 defines a motion for rectification as "a motion seeking **corrections** in the transcript...." (Emphasis added.) … The petitioner cannot use a motion for rectification as a method of introducing new evidence to the habeas court

after the hearing that he knew about during the habeas hearing.

Diaz v. Comm'r of Correction, 152 Conn. App. 669, 681–82, cert. denied, 314 Conn. 937 (2014). Thus, rectification or augmentation are inappropriate in this case, where the defendant did not raise a claim of premature deliberations in the trial court, and now wants to obtain facts for use on appeal without having given the trial court the opportunity to consider his claim. The contested motion suggests without explanation that the defendant "had no ability to raise this issue at trial." Contested motion at 7. That is incorrect. The contested motion raises no newly discovered evidence. Nothing prevented the defendant from filing a timely motion for a new trial claiming premature deliberations. Such a motion would have enabled -- indeed required -- the trial court to respond in the form it deemed appropriate, making factual findings on the record as needed, and issuing a ruling. State v. Asherman, 193 Conn. 695, 735-42 (1984).

Had it been given the opportunity, the trial court could have ruled on two questions that are essential to assessing a claim of premature deliberations: whether anything improper occurred, and, if so, whether the defendant was harmed. State v. Castonguay, 194 Conn. 416, 436 (1984). These necessary questions are not for an Appellate Court to decide as an original matter, as the defendant proposes should occur through use of answers to her scripted "rectification" questions. "In Castonguay, … our Supreme Court determined that the proper remedy in cases of premature jury deliberation is an evidentiary hearing to determine whether the defendant has been prejudiced by the juror misconduct." Bova v. Comm'r of Correction, 95 Conn. App. 129, 136–37 (2006). Seeking a trial court ruling is necessary before claiming error. State v. Lyons, 36 Conn. App. 177, 184-85 (1994) (in response to juror's note suggesting improper deliberations, defendant failed to ask court to inquire rather

than simply instruct jury, and trial court had no sua sponte duty to do so); State v. Castillo, 121 Conn. App. 699, 715-19 (where defendant failed to request inquiry into jury misconduct, trial court did not abuse discretion by not conducting one), cert. denied, 297 Conn. 929 (2010). "We 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." (Internal quotation marks omitted.) Id. at 719.[5]

The fact that this case involves a three-judge panel's deliberations rather than a jury's deliberations does not obviate the need for the defendant to have presented the claim to the court and obtained a ruling. Review of a trier's conclusions "is the same whether the trier is a judge, a panel of judges, or a jury." State v. Perez, 182 Conn. 603, 606 (1981). Even if the defendant believed that any premature deliberations created judicial bias, "[i]t is a well settled general rule that courts will not review a claim of judicial bias on appeal unless that claim was properly presented to the trial court via a motion for disqualification or a motion for mistrial." Gillis v. Gillis, 214 Conn. 336, 343 (1990) (failure to present claim to trial court was a waiver of claim of bias purportedly shown by statement of trial court's intention to rely on allegedly improper consideration).

Our precedents exemplify the need for the defendant to have presented her claim to the trial court and obtained a ruling. In State v. Owens, 100 Conn. App. 619, 627, cert. denied, 282 Conn. 927 (2007), the defendant filed a motion for a new trial in the trial court claiming

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[5] Notably, in making this assessment, "intra-jury communications pose a less serious threat to a defendant's right to an impartial trial than do extra-jury influences, and therefore district courts are entitled to even greater deference in their responses to them than in responses to outside influences." United States v. Bertoli, 40 F.3d 1384, 1394 (3d Cir.1994).

premature jury deliberations. The trial court denied the motion. On appeal, the defendant claimed that the trial court failed in its obligation to investigate what occurred. The Appellate Court noted that the form and scope of the inquiry that a trial court must undertake regarding the possibility of jury misconduct are fact-specific and within the trial court's discretion. Id. Far from itself assessing whether premature deliberations occurred and prejudiced the defendant, the Appellate Court limited its role "'to a consideration of whether the trial court's review of alleged [or possible] jury misconduct can fairly be characterized as an abuse of its discretion'" and found no abuse of discretion. Id. at 627-29.

By contrast, in State v. Gonzalez, 25 Conn. App. 433, 438 (1991), aff'd, 222 Conn. 718 (1992), the trial court answered simply "no, you may not" to a note from a juror asking if she could speak to the judge about improper deliberations. The Appellate Court held that, although a trial court has discretion in deciding how to respond to a suggestion of jury misconduct, the trial court, over defense objection, had failed to gather sufficient facts to exercise that discretion. Id. at 439. Notably, even in that circumstance, the Appellate Court did not usurp the role of determining what occurred, whether it amounted to impropriety, or whether the defendant was prejudiced, as the defendant would have the reviewing court do in this case. Rather, it ordered the trial court to hold a hearing, as it should have done from the start in response to the issue being raised. Id. at 439-40.

The trial court in this case was not given a chance to exercise discretion in how to respond to any claimed impropriety. It did not issue a ruling. Therefore, there is no exercise of discretion and no ruling for this Court to review. Because the defendant's requested rectification involves answering 13 questions with behind-the-scenes information that was

not apparent to the parties or normally a matter of record, a motion for rectification or augmentation cannot be used in place of these essential processes.[6]

In sum, the contested motion seeks rectification and augmentation that would be improper substitutes for a trial court hearing, fact-finding and ruling, and, thus, should be denied.

III. CONCLUSION

For the foregoing reasons, the state opposes the defendant's motion for augmentation and rectification.

Respectfully submitted,
STATE OF CONNECTICUT

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[6] The first prong of State v. Golding, 213 Conn. 233, 239 (1989), requires an adequate record for a review of an unpreserved constitutional claim. Review can occur where a record is adequate despite a claim not having been raised below, but the first Golding prong does not open the door to distort the rectification process so as to compensate for an inadequate record. See State v. Stanley, 223 Conn. 674, 689–90 and 690 n.9 (1992) (reviewing court will not remand for factual findings so as to circumvent inadequacy of record under first prong of Golding; had defendant raised issue in trial court, trial court would have issued ruling that could be reviewed, and if, hypothetically, the ruling had not set forth needed facts, defendant then could have moved for articulation).

CERTIFICATION

Pursuant to Practice Book §§ 62-7 and 66-3, the undersigned attorney hereby certifies that this document does not contain any names or personal identifying information the disclosure of which is prohibited, that it complies with all applicable rules or appellate procedure, and that a copy hereof was sent electronically, with consent to: Erica A. Barber, Assistant Public Defender, Office of the Chief Public Defender, 55 West Main Street, Suite 430, Waterbury, CT 06702, Tel. (203) 574-0029; Fax. (203) 574-0038, email: erica.barber@pds.ct.gov; legalservicesunit@jud.ct.gov, on April 6, 2022.

/s/_____
LAURIE N. FELDMAN
Deputy Assistant State's Attorney

DOCKET NO. FBT-CR19-0332667-T	:	SUPERIOR COURT PART A
STATE OF CONNECTICUT	:	JUDICIAL DISTRICT OF FAIRFIELD
V.	:	AT BRIDGEPORT
LARISE KING	:	SEPTEMBER 13, 2022

MEMORANDUM OF DECISION

Based upon the reasons and findings set forth below, defendant-appellant Larise King's ("defendant") April 4, 2022, "Motion for Augmentation and Rectification" ("Def. Motion") is DENIED.

I. PROCEDURAL BACKGROUND

During the evening of July 26, 2019, the defendant and her ex-husband, Dathan "Daedae" Gray, had a verbal and physical altercation on the streets of Bridgeport in the presence of numerous onlookers. During the fight, the defendant threatened Gray, vowing, "you going to take your last breaths tonight." In the early morning hours of July 27, 2019, the defendant and two hooded gunmen drove back to the area in which the fight occurred and parked the defendant's car around the corner. The gunmen emerged from the car, walked around the corner, approached Mr. Gray, and shot him to death. The gunmen ran back to the defendant's car, got in, and she drove them away from the scene.

An investigation by Detectives of the Bridgeport Police Department uncovered evidence linking the defendant to Gray's murder, including witness interviews, video recordings by local businesses and homeowners, electronic communications data, cell site information, and the defendant's demonstrably false, exculpatory statements.

On September 20, 2019, the Superior Court, Alexander, J., authorized an arrest warrant charging the defendant with Conspiracy to Commit Murder and Accessory to Murder, in violation of General Statutes §§ 53a-54a and 53a-48, and §§ 53a-54a and 53a-8, respectively.

On January 9, 2020, the defendant, represented by an attorney from the Office of the Public Defender, waived her right to a probable cause hearing, entered a not guilty plea, and elected to be tried by a jury.

On June 15, 2020, retained counsel filed his Notice of Appearance.

On February 5, 2021, during a remote pretrial hearing, the defendant rejected the State's plea offer, waived her right to a jury trial, and elected to be tried by a three-judge panel.

On April 6, 2021, the Chief Court Administrator transmitted letters to the Clerk of the Court appointing a three-judge panel to try the case. The panel was comprised of Superior Court Judges Earl B. Richards, III (presiding), Alex V. Hernandez, and Tracy Lee Dayton.

On April 23, 2021, the State filed an Information charging the defendant with Conspiracy to Commit Murder and Accessory to Murder.

Trial commenced with the presentation of evidence on April 27, 2021. Evidence was also presented on April 28, 29, and 30, and on May 3, 2021. The defendant's Motion for a Judgment of Acquittal was denied on May 3, 2021. The trial court heard closing arguments on May 4, 2021, and the court began its deliberations at 12:25 p.m. Between approximately 2:09 p.m. and 2:13 p.m., the court listened to the playback of certain trial testimony. At 2:13 p.m., the court recessed to continue deliberations until the close of business at 5:00 p.m.

On May 5, 2021, between 11:39 a.m. and 11:59 a.m., the court, Dayton, J., announced its verdict finding the defendant guilty of both counts, and read its factual findings and conclusions into the record. Between 12:03 p.m. and 12:06 p.m.,[1] Judge Richards read his dissenting opinion in which he agreed with the majority's factual findings but dissented in its

[1] The times referenced above are not reflected on the docket sheet but were secured by speaking with the courtroom monitor whose contemporaneous notations are electronically time-stamped.

findings of guilt. Judge Richards was prepared to find the defendant guilty of lesser-included offenses.

On May 5, 2021, at 12:32 p.m., Judge Richards filed his dissent to the majority decision and verdict. Later, at 2:39 p.m., the majority filed its "Majority Memorandum of Decision."

The defendant's trial counsel did not object to the timing or the way the trial court rendered and recorded its verdict and did not move for a new trial. Trial counsel also did not request that the trial court supplement the record in any manner.

On June 30, 2021, the court conducted a sentencing hearing at which it heard from several of the victim's and the defendant's family members, as well as from counsel for the defendant and the state. Again, defendant's trial counsel did not raise any issue regarding the court's deliberations, verdict, or the issuance of its opinion. The court then sentenced the defendant as follows: Count One, Conspiracy to Commit Murder, 20 years' imprisonment; Count Two, Accessory to Murder, 50 years' imprisonment. The terms were ordered to run concurrently to one another for a total effective sentence of 50 years' imprisonment. The defendant is presently serving that term of imprisonment.

On October 27, 2021, the defendant filed an appeal. On March 11, 2022, the defendant filed a motion for permission to file a late Motion for Augmentation and Rectification, which the Appellate Court granted on March 29, 2022. On April 4, 2022, the defendant filed a "Motion for Augmentation and Rectification" that was referred to the Superior Court. On April 6, 2022, the state filed its opposition.

The three-judge panel of the Superior Court held oral argument on the subject motion on June 3, 2022.2

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[2] A copy of the transcript of that hearing is appended hereto as Exhibit A. References to the transcript are designated "Tr." followed by the relevant page numbers.

II. THE DEFENDANT'S CLAIMS

The defendant seeks Augmentation and Rectification pursuant to Practice Book §§ 60-2, 61-10, and 66-5. In substance, the defendant asserts that the detailed factual findings read into the record when Judge Dayton announced the court's verdict, followed shortly thereafter by the filing of its Memorandum of Decision, raises – in defendant's appellate counsel's mind – the question of whether the trial court began deliberations before the case was submitted. Thus, counsel argues, the trial court should be required to answer her interrogatories, submitted in the form of 13 questions. See Def. Motion, 9.

III. THE STATE'S OPPOSITION

The State filed its Opposition to the Defendant's Motion ("State Opp.") on April 6, 2022, focusing on Practice Book § 66-5. The State observed that defendant's trial counsel failed to move the trial court for relief in the form of a motion for clarification of the record, a motion for a new trial, or any other motion to challenge the propriety of the trial court's deliberations. Thus, the state concluded that the defendant's motion represents an improper use of § 66-5 because "[r]ectification and augmentation are not substitutes for [] proper procedure." State Opp. 1. The state also observed that the questions that defendant's appellate counsel seeks to have answered do not relate to matters of timing, or other issues that are a matter of record. Instead, the questions seek information regarding the factfinders' deliberative process. State Opp. 2.

IV. ORAL ARGUMENT

Oral argument was held on the defendant's motion on June 3, 2022. During the hearing, the defendant's appellate counsel ("App. Counsel") conceded that there was no evidence to support the instant claim of pre-submission deliberations:

APP. COUNSEL: Well, the claim that this – the focus of this motion is obviously the one that I've set forth which is that I think that there is a reasonable inference that there was discussion regarding the case.

J. HERNANDEZ: What evidence do you have to support that?

APP. COUNSEL: Well, I don't, Your Honor, and that's why I'm here. I mean, I-I think that there's a good faith basis based on the timing.

J. HERNANDEZ: When you say the timing, what are you referring to?

APP. COUNSEL: In terms of the close of – closing arguments, the verdict coming out the next day. It's a detailed memorandum of decision. I have worked on quite a few appeals in three judge panels, typically the decision follows within two to three weeks.

Tr. 5

Appellate counsel also failed to take steps to determine how long the panel deliberated:

J. HERNANDEZ: Do you know how long the Court deliberated on May 5th? Did you take any steps to verify that, for example, with the court reporter where the transcripts are time stamped in their electronic records?

APP. COUNSEL: I did not, Your Honor.

Tr. 7.

When asked, counsel could not estimate an appropriate length of time for deliberations and then stated that the length of deliberations was not important:

J. RICHARDS: What is reasonable in your opinion, Counsel? What is appropriate in your opinion?

APP. COUNSEL: Your Honor-

J. RICHARDS: Two hours? Four hours? Eight hours? Ten Hours? Two days?

APP. COUNSEL: It's not the length of the deliberations that I think is important.

J. RICHARDS: But you just indicated that the length of the deliberations were key in your belief that there was something untoward done in terms of discussing the case before all the evidence was in before we heard all the arguments of counsel.

Tr. 8.

Indeed, counsel later conceded that the proffered claims of pre-submission deliberations where wholly speculative and based on her personal experience rather than on the record:

APP. COUNSEL: - I could be – I'm a slow writer, so obviously viewing this from my own – my own perspective....[B]ut in terms of speculation, yeah, I'll agree that based on the record we have, it is speculation. I - I don't - I don't have the answers. I don't know when the case was assessed, or the evidence was weighed or when the memorandum of decision was written and so it seemed like I had an obligation to my client to ask and the rules afford me that opportunity and I –

Tr. 9-11.

Finally, counsel conceded that the procedural rules cited in support of the subject motion do not apply to this situation.

J. HERNANDEZ: All right. When you say it's a unique issue, would you agree that none of these Practice Book sections apply squarely to the situation that's presented here.

APP. COUNSEL: No, Your Honor, they do not apply squarely. There has not been – as I put forth in my motion, as far as I'm aware, there's only one pre-submission deliberation claim that came out of the Supreme Court. I believe it was a case that was then transferred back to the Appellate Court where the defense had raised the issue of a pre-submission deliberation claim because there was interference with closing arguments.

J. HERNANDEZ: All right.

APP. COUNSEL: So, no, the –

J. HERNANDEZ: And –

APP. COUNSEL: - Court did not address this issue.

J. HERNANDEZ: All right. And just so that I understand your argument, you're not claiming, are you, that rectification or further explanation of the opinion - the opinion and decision of the Court needs to be rectified or clarified in any way?

APP. COUNSEL: No, Your Honor.

J. HERNANDEZ: You would agree that the facts and the analysis are clear and, if you read from beginning to end, you would understand exactly what facts the Court relied upon and the reasoning and analysis that the Court applied to those facts?

APP. COUNSEL: Yes, Your Honor. If I –

J. HERNANDEZ: You would?

APP. COUNSEL: - had an issue with the opinion, I would file a motion for articulation, the –

J. HERNANDEZ: Or rectification.

APP. COUNSEL: - appropriate - well, I think Walker does get into that at some length in terms of an ambiguity but yes, I suppose there could be a situation where you'd file a motion for rectification if there was a fact that you would've assumed was relied upon that somehow was not included in the opinion but no, that's not the claim here.

Tr. 13-14.

V. APPLICABLE LEGAL STANDARDS

Section 66-5 of the Rules of Appellate Procedure provides in relevant part as follows.

> A motion seeking *correction in the transcript or the trial court record or seeking an articulation or further articulation of the decision of the trial court* shall be called a motion for rectification or a motion for articulation, whichever is applicable. Any motion filed pursuant to this section shall state with particularity the relief sought and shall be filed with the appellate clerk.

Id., emphasis added.

A plain reading of § 66-5 reveals that it applies solely to errors or omissions in the trial record or deficiencies in a trial court decision that require further explanation. It does not support granting the extraordinary relief sought here – inquiring into the confidential, deliberative proceedings of the factfinder – especially where there is no claim of misconduct. See Tr. 2 ("There's no claim here of misconduct"); Tr. 8 ("And, again, this is not a claim of misconduct" and "I don't think there's any suggestion here that it's untoward"). On that ground

alone, the defendant's motion should be denied. While this common sense reading and application of the rule should suffice, not surprisingly, case law also favors denial of the motion.

"Our rules of practice . . . recognize two mechanisms for remedying deficiencies in a record for appellate review: articulation and rectification." *State v. Walker*, 319 Conn. 668, 679, 126 A.3d 1087 (2015). "Deficiency," in this context, means errors or omissions in the record that are amenable to correction, or silences or ambiguities as to the basis for a trial court's decision on a particular matter that are amenable to articulation. Neither circumstance is present here.

The defendant's motion does not seek an articulation. "It is well established that [a]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification. . . . [P]roper utilization of the motion for articulation serves to dispel any . . . ambiguity by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby sharpening the issues on appeal." (Internal quotation marks omitted.) *State v. Walker*, supra, 319 Conn. 680. "That an articulation *clarifies* the record presupposes that the factual or legal issue on which clarification is sought related to a matter decided by the trial court." (Emphasis in original) Id., 683.

Here, there is no trial court decision relating to what amounts to the entirely speculative claim that the trial court engaged in pre-submission deliberations. In other words, "[t]he record is not lacking the factual or legal basis upon which the trial court rendered any ruling or decision supporting the judgment." Id., 681. In fact, appellate counsel appears to argue the contrary – that the factual and legal basis outlined in the trial court's decision was too detailed and therefore must have been the product of pre-submission deliberations.[3] Thus, articulation is not

[3] Appellate counsel makes this argument absent any factual or evidentiary basis, having acknowledged that she failed even to consult the record.

applicable because there is no underlying trial court decision to be articulated, clarified, or explained.[4] See also Tr. 13-14.

The defendant's motion for rectification is similarly unavailing. "A motion for rectification can be used to make (1) additions to the record, (2) corrections to the record or (3) deletions from the record. The motion cannot be used to add new matters to the record that were not presented at trial." (Footnotes omitted.) C. Tait & E. Prescott, Connecticut Appellate Practice and Procedure (4th Ed. 2014) § 6-2:3.3." *State* v. *Walker*, supra, 319 Conn. 680. In *Walker*, the Supreme Court provided several examples where rectification was appropriate. For example, in *Kalams* v. *Giacchetto*, 268 Conn. 244, 252-53, 842 A.2d 100 (2004), a motion for rectification was granted to add the plaintiff's request to charge to the court file so as to reflect that the request had been presented to the trial court in chambers. In *State* v. *Lopez*, 235 Conn. 487, 491, 668 A.2d 360 (1995), a motion for rectification was granted to correct an inaccurate trial transcript.

In *State* v. *Floyd*, 253 Conn. 700, 730-32, 756 A.2d 799 (2000), a motion for rectification was granted to determine whether a witness, who had pending charges at the time he testified, had an implied agreement with the state providing consideration for testifying at trial, contrary to his testimony. The propriety of rectification in the *Floyd* context turned on the "unusual situation in which a defendant was precluded from perfecting the record due to new information obtained after judgment." *State* v. *Hamlin*, 90 Conn. App. 445, 452-53 (2005) (citing *Floyd*); accord *State* v. *Ortiz*, 280 Conn. 686, 712 n.17, 911 A.2d 1055 (2006). That is, in *Floyd*, the witness testified at trial that he did not have an agreement with the state. However,

[4] A proper example of articulation in connection with a three-judge panel's verdict appears in *State* v. *Patterson*, 227 Conn. 448, 453-54 (1993). There, the panel simply announced that it "unanimously determined that the accused is guilty as charged of murder." The court later articulated the factual basis for the verdict.

after Floyd's trial, his counsel learned that the state had given the witness favorable treatment with respect to his pending charges. That information was not disclosed prior to trial.

No such situation exists here. The defendant's claim does not involve newly discovered evidence. Rather, according to appellate counsel, the trial record contains all the necessary information for such a claim to have been raised. Specifically, the defendant's motion asserts that "[t]he *record* suggests that discussion and/or examination of this matter occurred off the record prior to deliberations given the timing of the verdict and the memorandum of decision." (Emphasis added) Def. Motion, 6. Despite the alleged obvious nature of the issue, trial counsel failed to preserve this claim in any manner, as required by Practice Book §§ 60-5 and 61-10, at the time of trial or at any time prior to sentencing. Incredibly, appellate counsel justifies this failure claiming that trial counsel "had no ability to raise this issue at trial," yet fails to explain why that is so. See Def. Motion, 7.

Therefore, while Practice Book § 61-10(b) permits the review of unpreserved claims in limited circumstances, it only applies when an appellant has failed to seek *articulation* to further clarify or explain a trial court's ruling. Section 61-10(b) does not apply to motions for rectification. As the Supreme Court explained, § 61-10(b) "was not intended to provide a safety net for unpreserved claims" where the alleged discrepancy relates to a claim that a relevant portion of the record "is incomplete or missing altogether," as is the contention here, and the issue could have been addressed by an appropriately timed objection and motion for rectification. See *State* v. *Walker*, supra, 319 Conn. 682.

Finally, it appears that appellant counsel's motion may have been filed for a purpose unrelated to augmentation or rectification. During argument, counsel opined that three-judge panels should be governed by the same rules of deliberation as juries. Tr. 3 ("we submit that those same principles should apply to a three-judge panel"). Counsel acknowledged that the

motion was "an opportunity, I believe, for our reviewing courts to weigh in and give litigants and defendants a better sense of what – what are the variations between a jury trial and bench trial" and to mandate that such information be included in the jury waiver advisement. Tr. 4. Finally, counsel explained that "this is an interesting issue to me, again, because I do think that there is a void in terms of what we understand about how these trials are conducted in terms of what the expectations of defendants are or should be in terms of the procedural regularities, and if I can present that issue, if there's a factual basis to present that issue to the Supreme Court, then I would like to be able to do it." Tr. 10. Appellate counsel's desire for an advisory opinion on the rules governing jury waivers and three-judge panels are not properly addressed through a motion for articulation or rectification.

VI. CONCLUSION

As set forth above, a plain reading of § 66-5 and relevant case law establishes that there is no basis in the rule for the relief sought. Counsel's claims were not investigated prior to bringing the motion and are self-admittedly speculative. Moreover, a motion for articulation and/or rectification is not an appropriate vehicle to bring an issue to the attention of the reviewing courts, especially where the claim was not preserved and there is no suggestion of misconduct. Accordingly, the motion is DENIED.

Dated this 13th day of September, 2022, at Bridgeport, Connecticut.

Richards, J.

Dayton, J.

Hernandez, J.

Earl B. Richards, III, J., Tracy Lee Dayton, J., and Alex V. Hernandez, J., participated in this decision.

NO: FBT-CR19-0332667-T	:	SUPERIOR COURT
STATE OF CONNECTICUT	:	JUDICIAL DISTRICT OF FAIRFIELD
v.	:	AT BRIDGEPORT, CONNECTICUT
LARISE N. KING	:	JUNE 3, 2022

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE EARL B. RICHARDS,
THE HONORABLE TRACY L. DAYTON,
AND THE HONORABLE ALEX V. HERNANDEZ, JUDGES

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JUDGE RICHARDS: All right.

COURT MARSHAL: Good afternoon, Your Honors.

JUDGE RICHARDS: Good afternoon.

JUDGE DAYTON: Good afternoon.

JUDGE HERNANDEZ: Good afternoon.

JUDGE RICHARDS: Before we begin, since I was in the minority, I'm going to give the reigns over to Judge Hernandez in terms of presiding on this particular portion of the proceeding, but we will hear you now, Counsel. Who's - your motion, Counsel, so we'll hear it.

JUDGE HERNANDEZ: All right.

Appearances, please.

ATTY. BARBER: Yes, Your Honor, Erica Barber, Assistant Public Defender on the behalf of Larise King.

ATTY. COSTELLO: Good afternoon, Your Honors, Timothy Costello, Senior Assistant State's Attorney from the Appellate Bureau, Office of the Chief State's Attorney for the State.

JUDGE HERNANDEZ: Thank you for joining us, Counsel.

Go right ahead, Attorney Barber.

ATTY. BARBER: Thank you, Your Honor. We are here on the defendant's motion for augmentation and rectification which was filed on April 4th. I know the Court is familiar with what I've set forth in the

motion. I just want to briefly address a few points.

This case does present an issue of first impression, I want to make that clear from the get-go. There's no claim here of misconduct. The standard is not clear, this is a three-judge panel, we don't have the same rules in terms of the common law rule governing jury deliberations goes back 200 years and we have a series of cases that stem from that; Winebrenner, Washington and Connecticut, and Castonguay primarily. The principles, we would submit, that animate those decisions also do apply to three-judge panels, specifically a defendant's due process right to have the case heard in its entirety with respect to the evidence, closing arguments, and all the judges then meet with a clean slate, so to speak, to discuss the evidence, deliberate, and reach an appropriate result. That said, we acknowledge that there are clearly differences between a three-judge panel and a jury trial. Specifically, obviously where the Court sits as the finder of fact and law. The Court sits on suppression motions routinely unless the defense has the wherewithal to file a motion to bifurcate it, but typically I've seen that quite a few times where judges are deciding motions to suppress throughout the trial through the three-judge panel and so they're asked to consider evidence that may not ultimately be admissible and to

render judgments upon that.

Also, in terms of Washington and Winebrenner, one of the principals in those cases is that jurors sit in a different position because of the instructions. Obviously, a Court issues instructions, so one of the theories behind not allowing jurors to deliberate is that they're not in a position, having not heard the instructions, to then apply the law to the facts. That said, in terms sort of the principles, in terms of the social science and, you know, we've had a lot of talk about subconscious biases and how they play in and particularly, what Winebrenner speaks to, the Eighth Circuit case, which all of these cases are modeled after, is that when someone takes a position on the evidence whether it's through, you know, rendering an opinion or discussing it in any way or prejudging it in any sense, that you do form opinions whether you're aware of them or not. And so, one of the principles that we try to protect in deliberations is that everyone is coming at this with a clean slate and that biases somehow cancel each other out and we submit that those same principles should apply to a three-judge panel, for the same reasons as in those decisions.

And another point I do want to make, and this is in terms of the law being so unclear, as I'm sure

Your Honors are aware, in Federal Court we have a lot more specific advisement when a defendant gives up a right to a jury trial and, in fact, I believe the prosecution has to even agree to that waiver. In Connecticut, we have very few rules about what has to be said on the record for the - for the Court to be assured or a reviewing court to be assured that the defendant knew what he or she was giving up when they waived the right to a jury trial. So, this is an opportunity, I believe, for our reviewing courts to weigh in and give litigants and defendants a better sense of what - what are the variations between a jury trial and bench trial 'cause I'm not sure it's clear. I'm not sure it's clear even to the judges. And so -

JUDGE HERNANDEZ: Well, Counsel -

ATTY. BARBER: Yes.

JUDGE HERNANDEZ: Pardon me for interrupting.

ATTY. BARBER: No. Thank you.

JUDGE HERNANDEZ: You're addressing now the question of whether what the procedure is for a knowing and voluntary waiver of a jury trial, but that's not really the focus of your motion.

ATTY. BARBER: No, it's not, Your Honor, I just think the two do tie in together so I'm trying to make it clear why I think the rectification is important.

JUDGE HERNANDEZ: Well, how does that tie in into the claim that you're making?

ATTY. BARBER: Well, the claim that this - the focus of this motion is obviously the one that I've set forth which is that I think that there is a reasonable inference that there was discussion regarding the case.

JUDGE HERNANDEZ: What evidence do you have to support that?

ATTY. BARBER: Well, I don't, Your Honor, and that's why I'm here. I mean, I - I think that there's a good faith basis based on the timing.

JUDGE HERNANDEZ: When you say the timing, what are you referring to?

ATTY. BARBER: In terms of the close of - closing arguments, the verdict coming out the next day. It's a detailed memorandum of decision. I have worked on quite a few appeals in three judge panels, typically the decision follows within two to three weeks.

JUDGE HERNANDEZ: Well, we thank you for noting the alacrity at which we approached this. How long did the three-judge panel deliberate on May 4th?

ATTY. BARBER: I believe, Your Honor, that as I've set forth in the motion, there was closing arguments that ended, what, at approximately 2:30 and then the Court listened to playback testimony of

Nosadee Sampson and then the jury was delivered the next morning.

JUDGE HERNANDEZ: All right.

Because I checked with the court reporter and the court reporter informed me that closing arguments were concluded and the Court began deliberations at 12:25 PM.

ATTY. BARBER: Okay. So, the -

JUDGE HERNANDEZ: Did you check with the court reporter on that?

ATTY. BARBER: I looked at the transcript. It just said the Court recessed for lunch until 2 PM. That was at 5/4/21.

JUDGE HERNANDEZ: All right.

Well, do you think that that - that knowing how long the three-judge panel actually deliberated is an important piece of information that you would've needed before you filed this motion?

ATTY. BARBER: Well, Your Honor, if - I think it's a straightforward issue. Either the Court -

JUDGE HERNANDEZ: Well, that - well, I think you're changing the point now. Do you agree that knowing how long the three-judge panel actually deliberated is important information that you probably should've had before you filed this motion?

ATTY. BARBER: Well, Your Honor, I mean 90 minutes? I mean, that's the difference between

12:30 and 2 PM. So, if the Court deliberates -

JUDGE HERNANDEZ: Well -

ATTY. BARBER: - at -

JUDGE HERNANDEZ: Well, 90 minutes is a long time and that's - there's a pretty big gulf between the claims that you're making and knowing whether you have your facts straight on how long the Court deliberated.

ATTY. BARBER: Well, Your Honor, we always deal with the record.

JUDGE HERNANDEZ: How long did the Court deliberate on May 5th? Do you know?

ATTY. BARBER: I spoke with Counsel, Your Honor -

JUDGE HERNANDEZ: Do you know how long the Court deliberated on May 5th? Did you take any steps to verify that, for example, with the court reporter where the transcripts are time stamped in their electronic records?

ATTY. BARBER: I did not, Your Honor.

JUDGE HERNANDEZ: All right.

Go ahead with your argument, Counsel.

ATTY. BARBER: So, again, I think based on the facts as I understood them, which was that the Court began deliberating midday and issued a decision the next morning, that there was a good faith basis to ask the question as to whether or not something was

prepared or discussed. And, again, this is not a claim of misconduct. This is - I'm trying to figure this out as well, which is what's appropriate, what do we expect in these cases, and -

JUDGE RICHARDS: What is reasonable in your opinion, Counsel? What is appropriate in your opinion?

ATTY. BARBER: Your Honor -

JUDGE RICHARDS: Two hours? Four hours? Eight hours? Ten hours? Two days?

ATTY. BARBER: It's not the length of the deliberations that I think is important.

JUDGE RICHARDS: But you just indicated that the length of the deliberations were key in your belief that there was something untoward done in terms of discussing the case before all the evidence was in and before we heard all the arguments of counsel.

ATTY. BARBER: Again, I did not say untoward because, again, I've consulted with other judges on this and many of the judges I spoke with suggested that they would not know necessarily that the same rules would apply to a three-judge panel. So, I don't think there's any suggestion here that it's untoward. The question is - and it's not so much the length of the deliberations, it is the detail set forth in the memorandum of decision which I believe it provides us with a good faith basis to ask the

question which I have, and I fully expected that the Court could just say, no, we didn't.

JUDGE HERNANDEZ: Counsel, isn't - I don't know if ironic or what is the right word to use here, but you're requesting rectification or more information and one of the bases for your claim is that the Court's ruling was so detailed. Aren't those kind of at odds with each other?

ATTY. BARBER: No. I don't think that they are.

JUDGE HERNANDEZ: Well, help me to understand -

ATTY. BARBER: I mean -

JUDGE HERNANDEZ: - why they're not.

ATTY. BARBER: - I could be - I'm - I'm a slow writer, so obviously viewing this from my own = my own perspective. Your Honor, there's nothing wrong with the decision being detailed or - or the Court having weighed the evidence carefully, you know, as I set forth in my motion, it's very clear that there was a lot of analysis in terms of the cell phone calls that were made, the surveillance footage, in terms of how those incidents lined up, in terms of how those facts coalesced in terms of reaching an opinion and, having gone through the record a number of times, it struck me after the third or fourth round that it was something I was not used to seeing in other three judge panel cases and that I think gave me a good faith basis to simply ask was

there - was there a discussion of the evidence, was there an analysis of the evidence before - before the parties ended their closing arguments. And in terms of the rectification procedure, again, if there is no issue with respect to pre-submission deliberations, then I don't need to waste anyone's time. I don't need to waste your time and I don't need to waste the Supreme Court's time, but this is an interesting issue to me, again, because I do think that there is a void in terms of what we understand about how these trials are conducted in terms of what the expectations of defendants are or should be in terms of the procedural regularities, and if I can present that issue, if there's a factual basis to present that issue to the Supreme Court, then I would like to be able to do it having perfected a record. And in terms of the motion for rectification, State v. Walker lays this out at length. Defense lawyers or Appellate attorneys are - are constantly in a position of having to make sure that they have all their ducks in order in terms of having a record that's adequate for review. This is a Constitutional issue, so obviously it's reviewable under Golding, but in terms of speculation, yeah, I'll agree that based on the record we have, it is speculation. I - I don't - I don't have the answers. I don't know when the case was assessed, or the evidence was

weighed or when the memorandum of decision was written and so it seemed like I had an obligation to my client to ask and the rules afford me that opportunity and I -

JUDGE HERNANDEZ: Well, that - well, you say the rules afford you that opportunity. Can you explain to me how the relief which you're seeking falls under Practice Book Sections 60-2, 61-10 and 66-5, and whether you have any case law which supports your claim under those sections?

ATTY. BARBER: Yes, Your Honor. So, I think probably most relevant to our discussion here is 66-5 which is, if any party requests it and it's deemed necessary by the trial court, the trial court shall hold a hearing at which arguments may be heard, evidence taken, or stipulation of counsel received and approved and the trial court may make such corrections or additions as are necessary for the proper presentation of the issues on appeal. And, again, State v. Walker flushed this out, I think, and did a very good job. In that case, there was a suggestion of - there was a slight suggestion from the transcript that there had been some conversation between defense counsel, the prosecution, and the court. I assume it would surmise that that conversation happened in chambers based on, you know, customary state practice and, in that particular

case, the Supreme Court took a rather novel approach which is to say that it's not clear from this record that any discussion occurred and you were obligated to rectify the record to supplement it so that we have an issue to review and that's the primary authority that I'm relying and also, as I've stated in my motion, State v. Floyd, State v. Ortiz.

Floyd hearings are commonplace, I've been involved in them, so when something comes up on an appeal and there's a suggestion of, say a nondisclosure in terms of Brady violation, the proper procedure is to file a motion for rectification and request a Floyd hearing which the Supreme Court has said is authorized under its supervisory authority and the reason for that, as I've suggested in my motion, is because if we can promote judicial economy and if we can address these issues in a timely fashion so that they don't get, you know, kicked down the road to any number of collateral proceedings, that we should and I'm relying on that as well in terms of justice delayed. I always get my quotes wrong, so I shouldn't even be using them, but if I have an obligation under the rules to make the record and if my client can have her issue presented now as opposed to 5 to 6 years from now, her interests are served as well, and as far as I'm concerned in terms of judicial economy, I think those interests are

served too because this is a unique issue and I think the Court would acknowledge this, that this is not like I'm claiming some evidentiary issue that wasn't raised at trial or that the State could've responded to at the trial level and they're somehow prejudiced now. This is actually a - a good forum for this because we have and intermediary which is the Appellate Court, and this is a Constitutional issue and it's also a novel issue that they would need to decide anyway.

JUDGE HERNANDEZ: All right.

When you say it's a unique issue, would you agree that none of these Practice Book sections apply squarely to the situation that's presented here?

ATTY. BARBER: No, Your Honor, they do not apply squarely. There has not been - as I put forth in my motion, as far as I'm aware, there's only one pre-submission deliberation claim that came out of the Supreme Court. I believe it was a case that was then transferred back to the Appellate Court where the defense had raised the issue of a pre-submission deliberation claim because there was interference with closing arguments.

JUDGE HERNANDEZ: All right.

ATTY. BARBER: So, no, the -

JUDGE HERNANDEZ: And

ATTY. BARBER: - Court did not address this

issue.

JUDGE HERNANDEZ: All right.

And just so that I understand your argument, you're not claiming, are you, that rectification or further explanation of the opinion - the opinion and decision of the Court needs to be rectified or clarified in any way?

ATTY. BARBER: No, Your Honor.

JUDGE HERNANDEZ: You would agree that the facts and the analysis are clear and, if you read from beginning to end, you would understand exactly what facts the Court relied upon and the reasoning and analysis that the Court applied to those facts?

ATTY. BARBER: Yes, Your Honor. If I -

JUDGE HERNANDEZ: You would?

ATTY. BARBER: - had an issue with the opinion, I would file a motion for articulation, the -

JUDGE HERNANDEZ: Or rectification.

ATTY. BARBER: - appropriate - well, I think Walker does get into that at some length in terms of an ambiguity but yes, I suppose there could be a situation where you'd file a motion for rectification if there was a fact that you would've assumed was relied upon that somehow was not included in the opinion but no, that's not the claim here.

JUDGE HERNANDEZ: Okay.

Anything else, Counsel?

ATTY. BARBER: No, Your Honor, I think I think that covers it. Thank you.

JUDGE HERNANDEZ: It's Costello?

ATTY. COSTELLO: Yes, Your Honor.

JUDGE HERNANDEZ: Attorney Costello, is the State relying on their written opposition?

ATTY. COSTELLO: The State is relying on its written opposition. I would add just simply one caveat based upon Your Honor's earlier statements regarding consultation with the court reporter and what my learned opponent has just said now. Rectification or articulation is only required when it is necessary. An initial threshold question in a rectification or articulation proceedings is whether or not the current state of the record is adequate to review any claims of error. If the nature of the course of deliberations are already accurately reflected in the record, there is no need for articulation or rectification and, on that basis, the motion could be denied but beyond that, everything that the defendant is asking for is really, with all respect to Counsel, a bit of a fishing expedition hoping the Court will provide a basis for a claim, but if the record is itself already a good statement of the nature of the course of deliberations, nothing is required further by this Court.

JUDGE HERNANDEZ: All right.

Thank you, Attorney Costello.

Attorney Barber, did you want to respond at all to Counsel's argument?

ATTY. BARBER: No, Your Honor.

JUDGE HERNANDEZ: All right.

Do any of my fellow members of the panel have any questions for Counsel?

JUDGE DAYTON: No.

JUDGE RICHARDS: No.

JUDGE HERNANDEZ: All right.

Thank you, Counsel. We'll deem this submitted. Thank you.

ATTY. BARBER: Thank you.

ATTY. COSTELLO: Thank you, Your Honor.

(Whereupon the matter concluded.)

NO: FBT-CR19-0332667-T	:	SUPERIOR COURT
STATE OF CONNECTICUT	:	JUDICIAL DISTRICT OF FAIRFIELD
v.	:	AT BRIDGEPORT, CONNECTICUT
LARISE N. KING	:	JUNE 3, 2022

C E R T I F I C A T I O N

I hereby certify the foregoing pages are a true and correct transcription of the audio recording of the above-referenced case, heard on the 3rd of June 2022, in Superior Court, Judicial District of Fairfield, Bridgeport, Connecticut, before the Honorable Earl B. Richards III, the Honorable Tracy L. Dayton, and the Honorable Alex V. Hernandez, Judges.

Dated this 8th day of June 2022, in Bridgeport, Connecticut.

Michelle K. Perruzzi
Court Recording Monitor

S.C. 20632/FBT-CR19-0332667-T	**SUPREME COURT**
STATE OF CONNECTICUT	**STATE OF CONNECTICUT**
V.	
LARISE N. KING	**SEPTEMBER 20, 2022**

MOTION FOR RECONSIDERATION OF TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR AUGMENTATION AND RECTIFICATION

The defendant, Larise King, through his undersigned attorney, respectfully moves this court pursuant to Practice Book §§ 60-1 and 66-5, 71-5, 71-6 for reconsideration of the trial court's decision denying the defendant's motion for rectification. (September 13, 2022) (Richards, Hernandez and Dayton, Js.).

The defendant-appellant respectfully requests that the trial court reconsider its denial of the defendant's motion for augmentation and rectification of the record filed on April 4, 2022. The defendant's motion sought to rectify the record and sought access to the timing and character of any off-the-record discussions and/or investigation by the three judges before the defendant's case was submitted. Rectification is necessary so that there is an adequate record for the Supreme Court to review the defendant's claim on appeal that the constitutional prohibition against jury deliberations until the close of all the evidence and the submission of the case to the factfinder under *State v. Washington*, 182 Conn. 419 (1980) similarly applies in trials before three-judge panels.

Reconsideration is warranted because there is a factual basis for the defendant's request. In addition, contrary to the trial court's determination, pursuant to *State v. Walker*, 319 Conn. 668 (2015) and our rules of practice, there is an ample legal basis for rectification in this case.

I. BRIEF HISTORY OF THE CASE

The defendant, Larise King, was arrested and charged with murder, as an accessory, in violation of General Statutes §§ 53a-54a and 53a-8, and conspiracy to commit murder, in violation of General Statutes §§ 53a-48 and 53a-54a in connection with the death of her former husband, Dathan Gray. The defendant pleaded not guilty and elected a jury trial. Subsequently, the defendant withdrew her election and elected to be tried before a three-judge panel in the Superior Court, Judicial District of Fairfield, Richards, Hernandez and Dayton, JJ.

On May 5, 2021, Judge Hernandez and Judge Dayton convicted the defendant on both counts. Judge Richards dissented. The majority imposed a total effective sentence of fifty years imprisonment. This appeal followed. The defendant's appeal was filed on October 27, 2021. The 676-page transcript was completed on December 20, 2021. On March 11, 2022, the defendant filed a motion for permission to file a late Motion for Augmentation and Rectification, which our Supreme Court granted on March 29, 2022. On April 4, 2022, the defendant filed a "Motion for Augmentation and Rectification" that was referred to the Superior Court. On April 6, 2022, the state filed its opposition. On June 3, 2022, the three-judge panel of the Superior Court held oral argument on the defendant's motion. On September 13, 2022, the court issued a memorandum of decision denying the defendant's motion. In its decision denying the defendant's request for rectification, however, the trial court did augment the record to include timestamps for various phases of the deliberation process which it procured through independent consultations with the court monitor. MOD p. 2.

II. SPECIFIC FACTS AND LAW RELIED UPON

A. Reconsideration is Warranted Because there is a Factual Basis for Rectification.

In her motion for rectification the defendant set forth the following timeline for the court's deliberations. On May 4, 2021, the parties presented their summations. Following

summations, the court recessed for lunch until 2 p.m. 5/4/21 Tr. 53. Following the break, the panel listened to playback of Nosadee Sampson's direct testimony and then recessed for the day. Id., 55. The next morning, the panel announced that it had reached a verdict. 5/5/21 T 1. Judge Dayton read the verdict in open court which was identical to the memorandum of decision the majority issued later that day at 2:39 pm. Id., 1, MFR p. 2, See also 6/3/22 Tr. 7 (rectification hearing) (defense counsel: "court began deliberating midday and issued a decision the next morning" providing "good faith basis" for defendant's inquiry).

In its memorandum of decision, the trial court set forth the same timeline, augmenting the record to include timestamps for various phases of the deliberation process which it procured through independent consultations with the court monitor. MOD p. 2.

> Trial commenced with the presentation of evidence on April 27, 2021. Evidence was also presented on April 28, 29, and 30, and on May 3, 2021. The defendant's Motion for a Judgment of Acquittal was denied on May 3, 2021. The trial court heard closing arguments on May 4, 2021, and the court began its deliberations at 12:25 p.m.[1] Between approximately 2:09 p.m. and 2:13p.m., the court listened to the playback of certain trial testimony. At 2:13p.m., the court recessed to continue deliberations until the close of business at 5:00p.m.
>
> On May 5, 2021, between 11 :39 a.m. and 11:59 a.m., the court, Dayton, J., announced its verdict finding the defendant guilty of both counts, and read its factual findings and conclusions into the record. Between 12:03 p.m. and 12:06 p.m., Judge Richards read his dissenting opinion in which he agreed with the majority's factual findings but dissented in its findings of guilt. Judge Richards was prepared to find the defendant guilty of lesser-included offenses.
>
> On May 5, 2021, at 12:32 p.m., Judge Richards filed his dissent to the majority decision and verdict. Later, at 2:39p.m., the majority filed its "Majority Memorandum of Decision."

MOD p. 2-3.

The timeline is susceptible to one of two interpretations. First, it suggests that the panel members deliberated amongst themselves, reviewed the testimony of Nosadee Sampson,

[1] The docket entries also confirm that the case was submitted.

reached a split decision, drafted a memorandum of decision marshalling the relevant evidence, reviewed the same for substantive and nonsubstantive edits, i.e., transcript citations, references to exhibits (the total exhibits admitted in the case exceeded 100), etc., before reconvening on the record the following morning and reading the decision into the record. Alternatively, the compressed timeline suggests that the panel or a panel member marshalled the evidence and prepared draft findings of fact before the case was submitted.

In the absence of any current authority or rule that prohibits three-judge panels from engaging in pre-submission deliberations, and consistent with the principle that "'the simplest of competing theories should be preferred over more complex and subtle ones;" *State v. Hinds*, 344 Conn. 541, 560 (2022) (prosecutor's comments about Occam's razor in summation amounted to an argument about how to assess circumstantial evidence in finding guilt beyond a reasonable doubt); undersigned counsel inferred that it was much more likely that the latter occurred in this case, particularly given the detailed nature of the majority's decision. As counsel identified at the hearing on the defendant's motion (although not referenced anywhere in the court's memorandum of decision) there is a good faith basis to inquire whether pre-submission deliberations occurred in this case.[2]

The court claims lack of investigation to support rectification (MOD p. 12), but what the court appears to be saying is that the defendant lacks direct evidence to support the defendant's request. Rectification does not require direct evidence. *See, e.g., State v. Ouellette*, 295 Conn. 173, 182 n. 7 (2010) (*Floyd*/rectification hearing is warranted when defendant produces "prima facie evidence, direct or circumstantial, of a *Brady* violation unascertainable at trial."). Nor would such a standard make any sense as the specific conduct by the court constituting pre-submission deliberations is appropriately explored through rectification, i.e., through the questions submitted by the defense to the court that

[2] It is not uncommon for judges to prepare written decisions in advance of hearing arguments in other contexts, for example, pre and posttrial motions, sentencing proceedings, and even suppression hearings. The thrust of the defendant's claim on appeal, however, is that when the court sits as juror, that practice is not appropriate.

remain unanswered. In essence, the panel relies on information that is not known to the defendant to conclude there is not an adequate basis for rectification, while simultaneously denying access to information that is known to the panel.

2. Reconsideration is Warranted Because there is Ample Legal Basis for the Rectification.

Reconsideration is warranted because contrary to the court's decision there is ample legal basis for rectification. Practice Rule 66-5 "provides two mechanisms to remedy deficiencies in the record. The first is an articulation, which serves to clarify an ambiguity in the factual or legal basis for a decision. The second is a rectification, which augments or modifies the record to make additions, corrections, or deletions to the record." W. Horton & K Bartschi, Connecticut Practice Series: Connecticut Rules of Appellate Procedure (2016-2017 Ed) p. 185, citing *State v. Walker*, 319 Conn. 668 (2015).

The panel devotes considerable attention to the grounds for articulation—a motion that was not made by the defendant and would not be appropriate in this instance. To reiterate, defendant is not claiming ambiguity in the trial court's decision. Consequently, articulation was not requested. Relatedly, *State v. Walker*, 319 Conn. 668, where the defendant *did argue* that his claim was reviewable pursuant to the rules governing articulation and failed to move for rectification does not support the court's denial of the defendant's motion in this case. In fact, *Walker*, which spells out counsel's obligation to move to rectify to cure any factual deficiencies, supports the defendant's request.

In *State v. Walker*, 147 Conn. App. 1 (2015), the defendant claimed that he had been excluded from a critical stage of the proceeding. The factual predicate for the defendant's claim was his absence from an alleged in-chambers discussion regarding defense counsel's possible conflict of interest. *Id.* at 15. The Appellate court declined to review the defendant's claim. Specifically, the Appellate Court held that the defendant's failure to "**request a hearing** before the trial court to establish a factual predicate for appellate review" resulted in an inadequate record on appeal. (Emphasis added.) *Id.*

In his certified appeal before the Supreme Court, the defendant made two arguments. First, the defendant argued that a "contextual" reading of the record suggested that such a discussion took place and therefore the record was adequate for review. *Walker,* 319 Conn. at 675. Alternatively, the defendant argued that the Appellate Court's failure to review his claim conflicted with Practice Book § 61-10 (b), which provides that the failure of any party to seek articulation pursuant to Section 66-5 shall not be the sole ground upon which the court declines to review any issue on appeal. *Id.* at 675*; see* Practice Book § 61-10 (b).[3] Specifically, the defendant argued that if the existing record lacked the necessary facts to review the defendant's claim, then under § 61-10b, the Appellate Court was required remand the case back to the trial court to make any necessary factual findings. *Walker,* supra, 319 Conn. at 675.

As to the defendant's claim that the existing record was sufficient the Supreme Court disagreed. Specifically, according to the *Walker* Court, the record did not indicate "whether any discussion of this matter occurred with the court off the record; the scope of any such discussion; and whether the defendant was in fact absent during any such discussion." *Id.* at 677.

As to the defendant's alternative claim, the court reasoned "that the deficiencies in the present record are not amenable to articulation, **but rather should have been remedied by rectification.**" *Id.* at 681 (Emphasis added.). "The record is not lacking the factual or legal basis upon which the trial court rendered any ruling or decision supporting the judgment. Rather, the record could have been augmented to include matters that occurred off the record. In such circumstances, rectification is the appropriate method of

[3] Practice Book Rule § 61-10 (b) "abolished the forfeiture practice the appellate courts had adopted for many years if a litigant failed to move for articulation pursuant to 66-5 of an arguably ambiguous decision," then the court would refuse to consider it. W. Horton & K Bartschi, Connecticut Practice Series: Connecticut Rules of Appellate Procedure (2016-2017 Ed) p. 102.

perfecting the record." *Id*. The court therefore concluded that the defendant's claim was unreviewable based on appellate counsel's failure to file a motion for rectification to augment the record. *Id.*[4]

In addressing *Walker* and the possible grounds for rectification, the trial court reasons that "[w]hile Practice Book § 61-10 (b) permits the review of unpreserved claims in limited circumstances, it only applies when an appellant has failed to seek articulation to further clarify or explain a trial court's ruling. Section 61-10 (b) does not apply to motions for rectification." The court is correct but that point is completely irrelevant here. Ms. King, unlike the defendant in *Walker,* does not argue that her claim should be remanded under § 61-10 (b). Ms. King seeks to do what the defendant in *Walker* failed to do and what our Supreme Court has said she must do which is to rectify the record to cure any possible factual deficiencies.

The trial court's focus on the preservation requirement is similarly misplaced. The preservation requirement seeks to prevent trial by ambush. *State v. Benedict*, 313 Conn. 494, 506 (2014). The principle of "ambuscade" of the court is not applicable here. The defendant presents a claim of constitutional magnitude potentially reviewable under

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[4] *Walker's* principles are consistent with longstanding rules of practice. "Our rules of practice afford a procedural remedy [under Practice Book § 66-5] to an appellant who wants to rectify a record for purposes of appeal; the defendant ha[s] the right to file a motion for rectification of the record and, if necessary, request that the court hold a hearing related to the motion." *State v. Benitez*, 122 Conn. App. 608, 613-14, 998 A.2d 844 (2010); Pract. Bk. § 66-5.

Similarly, our reviewing courts have the authority to remand any case to the trial court for the purpose of resolving any factual issues necessary to advance a defendant's claim on appeal. See Practice Book § 60–2 ("[t]he court . . . on its own motion or upon motion of any party, (1) order a judge to take any action necessary to complete the trial court record for the proper presentation of the appeal . . . (9) remand any pending matter to the trial court for the resolution of factual issues where necessary. . . ."); *see, e.g., State v. McGinnis*, 83 Conn. App. 700, 706, 851 A.2d 349 (2004) (remanding defendant's case with direction to make requisite determination as to defendant's motion to suppress); *Johnson v. Sourignamath*, 75 Conn. App. 403, 406, 816 A.2d 631 (2003) (ordering trial judge to take further evidence and make further findings).

Golding, **despite not being raised at trial**. In such instances, only a valid waiver precludes relief. *State v. Frazier*, 181 Conn. App. 1, 36, 185 A.3d 621, cert. denied, 328 Conn. 938, 184 A.3d 268 (2018) (defense counsel's affirmative acquiescence to trial court's order below precluded relief under Golding). There was no such waiver in this case.[5] Further, as our supreme court has made clear, under the related doctrine of the plain error rule, "we do not subject trial courts to reversal by ambuscade" by reversing judgments that implicate considerations of manifest unfairness "rather than technical violations of rules of practice." *State v. D'Antonio*, 274 Conn. 658, 674, 877 A.2d 696 (2005) (reviewing defendant's unpreserved claim that automatic reversal is required when a trial court presides over a defendant's trial after having participated in the plea-bargaining negotiations).

A far greater concern that gives rise to the preservation requirement is the possible ambush of a party when that party is prevented from making an adequate record for appeal. *State v. Fernando A.*, 294 Conn. 1, 35, 981 A.2d 427 (2009). Here, the state is not prejudiced because it has the opportunity to raise any relevant arguments on appeal or seek any necessary rectification.[6]

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[5] On this point, the trial court's assertion that defendant's motion should be denied because counsel purportedly seeks an "advisory opinion" on account of the fact that she referenced the interplay between a defendant's jury trial waiver and the issue presented on appeal demonstrates a fundamental misunderstanding of the controlling issues in the case. MOD pp. 10-11. As the defendant argued in her motion for rectification, nothing in our jurisprudence suggests that when the defendant waived her right to a jury trial and elected to be tried by the court, she waived her right to have her case decided "by the same principles as would have governed the jury in passing upon … [the] question of [guilt or innocence]." *State v. Frost*, 105 Conn. 326 (Conn. 1926). Mot. for Rect. pp. 5-6. For the same reasons, Ms. Kind did not waive her right to have her unpreserved constitutional claim considered on appeal.

[6] The preservation requirement is predicated on the rule that an appeal should not be used to decide an issue that should first be decided by the trial court. This case presents an issue of first impression concerning the constitutional propriety of pre-submission deliberations in a bench trial. Respectfully, the panel is not in the position to conduct a post hoc review of the constitutional propriety of its own deliberations. *See, e.g., State v. Gradzik,* 193 Conn. 35, 47, 475 A.2d 269 (1984) (in the context of plea

Finally, contrary to the trial court's decision, the defendant does not inquire into the confidential deliberations of the court. Consistent with "the well settled limitation on inquiring into the mental processes of jurors"; *State v. Johnson*, 288 Conn. 236, 261 1257 (2008), the defendant's motion does not inquire about the effe*ct* of any pre-submission deliberations on the verdict. Instead, consistent with the remand in *State v. Castonguay*, 194 Conn. 416, 437 (1984), which provides a template for this case, the defendant seeks access to the timing and character of any off-the-record discussions by the three judges.

V. Conclusion

For the foregoing reasons, the court should reconsider its decision and grant the defendant's motion for augmentation and rectification of the record.

Respectfully submitted,

THE DEFENDANT-APPELLANT,
LARISE KING

BY: ___*/s/ Erica A. Barber*_____

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negotiations, disapproving of the practice of criminal pretrial judges presiding over criminal trials, noting that such dual obligations are "likely to impair the trial court's impartiality"); *State v. Alexander,* 343 Conn. 495, 507, 275 A.3d 199 (2022) (where three-judge panel concluded that defendant argued that the three-judge panel was not in the position to judge the prejudicial impact of evidence improperly admitted at trial or the fairness of its own verdicts, the supreme court conducted its own harmless error analysis and arrived at its conclusion of harmlessness on the basis of its independent review of the record).

CERTIFICATION

Pursuant to P.B. §§ 62-7 and 66-3, it is hereby certified that a copy of the foregoing was sent electronically this 23rd day of September, 2022 to: Timothy Costello, Juris No. 401795, Office of the Chief State's Attorney Appellate Bureau, 300 Corporate Place, Rocky Hill, CT 06067, tel. (860) 258-5807, fax (860) 258-5828, DCJ.OCSA.Appellate@ct.gov; and mailed to my client, Larise King. It is also certified that the defendant-appellant's motion complies with all of the applicable rules of appellate procedure and has been redacted and does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law.

*Erica A. Barber*_____
Erica A. Barber

S.C. 20632/FBT-CR19-0332667-T	:	**SUPREME COURT**
STATE OF CONNECTICUT	:	**JUDICIAL DISTRICT OF FAIRFIELD**
v.	:	**STATE OF CONNECTICUT**
LARISE N. KING	:	**OCTOBER 18, 2022**

STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION OF TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR RECTIFICATION AND AUGMENTATION OF THE RECORD

Pursuant to Practice Book § 66-5, the state of Connecticut opposes the defendant's Motion For Reconsideration of Trial Court's Denial of Defendant's Motion for Augmentation and Rectification because the trial court correctly denied the defendant's motion.

I. BRIEF HISTORY OF THE CASE

After a trial to a three-judge panel, on May 5, 2021, the majority of the panel, *Hernanez and Dayton, JJ.*, convicted the defendant of murder and conspiracy to commit murder, with one judge, *Richards, J.*, dissenting, agreeing with the majority's historical fact-finding but finding guilt only of lesser included offenses. On June 21, 2021, the majority imposed sentence of 50 years of incarceration.

On October 27, 2021, the defendant filed an appeal. On April 4, 2022, the defendant filed a Motion for Augmentation and Rectification ("the contested motion"). The state filed an opposition. The Supreme Court referred the contested motion to the three-judge panel that presided over the trial, which heard oral argument on June 3, 2022. On September 13, 2022, the panel issued a Memorandum of Decision ("9/13/22 MOD") denying the contested motion. The defendant has now filed a Motion for Reconsideration, claiming that the panel erred.

II. FACTUAL BACKGROUND

In the trial court, the defendant raised no claim of improper deliberations or verdict,

did not move for a new trial, and did not ask the trial court to place anything on the record with regard to pre-submission deliberations.

The contested motion filed by the defendant's appellate counsel sought rectification and augmentation pursuant to Practice Book §66-5, which provides: "A motion seeking corrections in the transcript or the trial court record or seeking an articulation or further articulation of the decision of the trial court shall be called a motion for rectification or a motion for articulation, whichever is applicable." The contested motion set forth this time sequence:

- On the afternoon of May 4, 2021, the three-judge panel began deliberations and heard playback of certain testimony;
- On the morning of May 5, 2021, the majority orally announced its verdict and factual findings and the dissenting judge stated agreement with the historical facts therein; and
- On the afternoon of May 5, 2021, the majority issued a written 12-page Memorandum of Decision with the factual findings that had been announced orally, and the dissenting judge issued a written dissent stating agreement with the majority's historical fact-finding.

The contested motion claimed that this time sequence "suggests that discussion and/or examination of this matter occurred off the record prior to the start of the trial court's deliberations." The motion contended that, in order to pursue a claim of premature deliberations on appeal, the defendant was entitled to obtain a record of the panel's off-the-record conduct by requiring the three judges to "supplement the record" with responses to thirteen questions drafted by the defendant. The thirteen questions ask about possible undisclosed conduct of the judges, including whether any judge examined exhibits before the case was submitted and, if so, which judge and which exhibit; whether any judge discussed the merits of the case during trial and, if so, with whom; whether any judge conducted

"supplemental investigations"; whether all discussions of the evidence took place when all three judges were present; "When was the first time that you were shown a draft of the court's factual findings?"; and "When was the memorandum of decision in this case prepared?" Contested Motion at 9 ("Questions").

III. THE PANEL'S RULING DENYING THE MOTION

In the 9/13/22 Memorandum of Decision, the panel supplemented the time-frame noted in the contested motion. First, it added that, on May 3, 2021, the panel denied a motion for judgment of acquittal. 9/13/22 MOD at 2. Second, it provided electronically time-stamped notations that it obtained from the courtroom monitor. *Id.* at 2 n.1. Those notations show that, on **May 4, 2021**, the panel

- began deliberations at **12:25 p.m.**;
- listened to a playback of testimony between about **2:09 p.m. and 2:13 p.m.**; and
- recessed to continue deliberations until about **5:00 p.m.**;

and, on **May 5, 2021**,

- from **11:39 a.m. to 11:59 a.m.**, Judge Dayton read the penal majority's verdict and factual findings;
- from **12:03 p.m. to 12:06 p.m.**, Judge Richards read his dissenting opinion agreeing with the majority's factual findings but dissenting from the finding of guilt of murder, while finding sufficient evidence of a lesser included offense;
- at **12:32 p.m.**, Judge Richards filed his dissent; and,
- at **2:39 p.m.**, the majority filed its "Majority Memorandum of Decision" with written factual findings.

9/13/22 MOD at 2-3.

Citing to a transcript of oral argument on the contested motion, the panel noted the following points. Appellate defense counsel at oral argument: agreed that the court's verdict and memorandum of decision did not themselves need clarification or rectification; disavowed any claim of misconduct by the court under existing law but sought to develop a

record for raising a legal claim of first impression regarding procedures for a three-judge-panel's deliberation; acknowledged that she had no evidence of pre-submission deliberations in this case but maintained that there was a good faith basis for speculation that such deliberations occurred by reason of the timing of the verdict and memorandum of decision; based this inference on her own experience as a "slow writer"; and acknowledged that none of the Practice Book rules squarely applied to require rectification in these circumstance. 9/13/22 MOD at 5-7.

Turning to its legal analysis, the panel determined that the contested motion fell outside the plain meaning of Practice Book § 66-5, in that it did not seek a "correction in the transcript" or a "further articulation" of the trial court's decision. 9/13/22 MOD at 7. Rather, it sought the "extraordinary relief" of "inquiring into the confidential, deliberative proceedings of the factfinder," which it deemed particularly extraordinary where there was "no claim of misconduct." *Id.* The court concluded that, because the contested motion fell outside the parameters of Rule 66-5, it should be denied. *Id.* at 8.

The court found support for this reading of the rule in case law on appropriate uses of Practice Book § 66-5 motions. First, the court determined that what the contested motion sought is not an "articulation" as defined by case law. 9/13/22 MOD at 8-9. Next, the court determined from case law that rectification is not appropriate in this circumstance. *Id.* at 9-10. It quoted from *State v. Walker*, 319 Conn. 668, 680 (2015), which in turn quoted Tait and Prescott's treatise on Connecticut Appellate Practice, for the principle that rectification is not a vehicle to "'add matters to the record that were not presented at trial.'" 9/13/22 MOD at 9. By contrast, the court noted that examples of proper rectification cited in *Walker* involved

matters known to the parties at trial but not reflected in the transcript. *Id.* The court distinguished one contrary example, *State v. Floyd*, 253 Conn. 700, 730-32 (2000), where rectification of a matter not known during trial was proper only because the defendant had been precluded from perfecting the record during trial due to the state's improper withholding of information. The panel noted that, in this case, the defendant presented no newly discovered evidence, claimed no impropriety, and based the contested motion on purported suggestions from the record itself. 9/13/22 MOD at 10.

Finally, the court rejected the notion that defense counsel had a right to obtain this information to make a record from which to pursue a novel legal claim that three-judge-panels should be governed by the same rules that apply to juries. 9/13/22 MOD at 10-11. The court explained that information about the judges' off-the-record conduct, sought to create a record for an otherwise speculative appellate claim, is not properly obtained through articulation or rectification. *Id.* at 11.

Accordingly, the court denied the contested motion. 9/13/22 MOD at 12.

IV. THE DEFENDANT'S MOTION FOR RECONSIDERATION

The defendant claims in her motion for reconsideration that rectification[1] is necessary to create an adequate record for review of a claim that the constitutional prohibition against jury pre-submission deliberations applies to three-judge panels. Motion for Reconsideration at 1. She claims that both a factual and a legal basis support a right to rectification. *Id.*

Regarding the factual basis, the defendant suggests that the timeline, as augmented

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[1] The defendant clarifies that she does not seek articulation, which, she agrees, would not be appropriate in this case. Motion for Reconsideration at 5.

by the time-stamp notations, is still susceptible to two interpretations: one not involving pre-submission deliberations and the other involving pre-submission deliberations. Motion for Reconsideration at 3-4. Given the absence of Connecticut authority prohibiting the judicial panel from engaging in pre-submission deliberation and the detailed nature of the panel majority's Memorandum of Decision, the defendant suggests that pre-submission deliberations is more likely, and she contends that such likelihood creates a factual basis for requiring rectification of the record to include the judges' off-the-record conduct. *Id.* The defendant further claims that the panel failed to recognize that rectification is proper because the information she seeks is known to the panel but not to the defendant. *Id.* at 4-5.

Regarding the legal basis for rectification, the defendant claims that the panel failed to view this case as akin to *State v. Walker*, 319 Conn. at 681, in which the Supreme Court declined to review a claim for lack of a record of whether its factual predicate occurred – that being that the defendant was absent from an in-chambers proceeding that included discussion of a particular matter -- which lacunae could have been remedied by rectification. Motion for Reconsideration at 5-7. The defendant claims that her failure to preserve this claim at trial is irrelevant because it is potentially reviewable under *State v. Golding*, 213 Conn. 233, 239 (1989), or the plain error doctrine of Practice Book § 60-5, but, to obtain such review, she must perfect the record. *Id.* at 7-8. The defendant contends that the policy of requiring parties to obtain decisions in the first place by the trial court to avoid ambuscade does not apply here because "the panel is not in the position to conduct a post hoc review of the constitutional propriety of its own deliberations," citing cases in which a court has a conflict of interest in reviewing its own actions. *Id.* at 8 n.6.

Finally, the defendant claims that, contrary to the court's understanding, what she seeks is not information about confidential deliberations, but, rather, "access to the timing and character of any off-the-record discussions by the three judges." *Id.* at 9.

V. RECONSIDERATION IS UNNECESSARY

The defendant fails to establish a need for reconsideration because she does not show that the panel wrongly determined that rectification is inappropriate to obtain information that she did not seek at trial. While this case was pending in the trial court and during the proceedings when the three-judge panel announced its verdict, issued its findings, and imposed sentence, the defendant raised no claim of improper deliberations or verdict, did not move for a new trial, and did not ask the trial court to add anything to the record. Under these circumstance, the panel correctly determined that a rectification "'motion cannot be used to add new matters to the record that were not presented at trial.' (Footnotes omitted.) C. Tait & E. Prescott, Connecticut Appellate Practice and Procedure (4th Ed.2014) § 6–2:3.3." *State v. Walker*, 319 at 680.

Contrary to the defendant's argument, the panel correctly determined that *State v. Walker* does not support her claim. *Walker* endorsed rectification as a method of perfecting the record of events known to the parties, such as (in *Walker* itself) whether the defendant was present and what was discussed in an in-chambers conference attended by the court and counsel, or matters such as the wording of the court's instruction to the jury or what occurred during a jury visit to the crime scene. 319 Conn. at 680-81. *Accord State v. Mejia*, 233 Conn. 215, 230–31 (1995) (rectification of steps trial court took in open court with regard

to juror note-taking); *State v. Williams*, 227 Conn. 101, 105-07 (1993) (rectification of proceedings where court reporter's tapes lost); *Welsh v. Martinez,* 157 Conn. App. 223, 236 n.8 (rectification of "precisely what was played for the jury during its deliberations"), *cert. denied*, 317 Conn. 922 (2015). In this *case*, however, the defendant does not seek to make a record of known occurrences. Instead, she seeks to discover new facts, unknown to the parties, on an issue she did not raise below.

As the panel noted, the exception cited in *Walker*, *State v. Floyd*, 253 Conn. at 730–32, is inapplicable, because the propriety of rectification there arose from the fact that the defendant was precluded from perfecting the record at trial because he did not obtain information that the state should have disclosed. As the panel here noted, the defendant raises no newly discovered evidence, impropriety, or other reason for not having developed a record below. Where a defendant was aware at trial of the basis for raising an issue and did not ask the trial court to hold a hearing, make findings, or issue a ruling, rectification is not appropriate. *State v. Hamlin*, 90 Conn. App. 445, 452–53 (2005).

The defendant's purported justifications for using rectification in lieu of having made a record below fail to show error in the denial of the contested motion. First, she bootstraps the question into her desired answer by claiming that rectification is necessary because she has a right under *State v. Golding* to raise an unpreserved issue of pre-submission deliberations but must present an adequate record to do so. *Golding* creates an exception to the normal preservation requirement, conditioned on the presence of an adequate record to review the claim; *Golding*, 213 Conn. at 240; but it does not create a vehicle or right to perfect a record. Indeed, "the first prong of *Golding* was designed to **avoid remands** for the purpose of

supplementing the record." (Bold added; internal quotation marks omitted.) *State v. Ortiz*, 280 Conn. 686, 712 n.17 (2006). The same is true of the plain error doctrine: "An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily discernable **on the face of a factually adequate record**[.]" (Bold added; internal quotation marks omitted.) *State v. Blaine*, 334 Conn. 298, 305 (2019).

The defendant shows nothing that prevented her from (1) moving in limine to preclude the panel from engaging in pre-submission deliberations, (2) upon receiving the verdict and the Memorandum of decision, claiming that the timing suggested a violation of her purported right against pre-submission deliberations, and/or (3) filing a timely motion for a new trial claiming premature deliberations. Such actions would have enabled the trial court to respond in a form it deemed appropriate, making factual findings on the record if and as needed, and issuing a ruling. *State v. Asherm*an, 193 Conn. 695, 735-42 (1984). The contested motion instead demands answers to thirteen questions the defendant has scripted about the judges' individual and collective off-the-record conduct. The panel correctly declined to accede to that demand.

The defendant's attempt to justify her inaction at trial by arguing that the panel could not have ruled fairly on the propriety of its own conduct is unpersuasive. At oral argument the defendant eschewed any claim of misconduct under current law. Raising a novel issue *in limine* or upon receiving the verdict would have been a routine claim as to what procedure the law requires and whether the court followed it, and would have left the panel to decide the appropriate form and detail of response. Contrary to the defendant's contention, trial courts regularly rule in the first instance on claims that they failed to follow proper procedures.

See State v. Milner, 325 Conn. 1, 5 (2017) (claim that trial court should disqualify itself should be presented to trial court for development of adequate factual record); *State v. Jorge P.*, 308 Conn. 740, 758 (2013) (defendant cannot avoid preservation requirement by presuming that trial court will deny motion); *State v. Owens*, 100 Conn. App. 619, 627-29 (trial court properly ruled on motion claiming it failed to respond adequately to claim of improper jury deliberations), *cert. denied*, 282 Conn. 927 (2007). Even if the defendant believed that any premature deliberations created judicial bias, which she does not claim, "[i]t is a well settled general rule that courts will not review a claim of judicial bias on appeal unless that claim was properly presented to the trial court via a motion for disqualification or a motion for mistrial." *Gillis v. Gillis*, 214 Conn. 336, 343 (1990) (failure to present claim to trial court was a waiver of claim of bias purportedly shown by statement of trial court's intention to rely on allegedly improper consideration). The defendant presents no reason for requiring rectification to be used in an improper manner to remedy her failure to raise this issue properly below.

VI. CONCLUSION

In sum, because the panel properly denied the contested motion, reconsideration is unnecessary.

Respectfully submitted,

STATE OF CONNECTICUT

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CERTIFICATION

I hereby certify that this document complies with Practice Book §§ 62-7, 66-2, 66-3, 71-5, and all applicable rules of appellate procedure; that it has been redacted and/or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and that it has been delivered electronically, on October 18, 2022, to: Erica A. Barber, Assistant Public Defender, Office of the Chief Public Defender, 55 West Main Street, Suite 430, Waterbury, CT 06702, Tel. (203) 574-0029; Email: erica.barber@pds.ct.gov; legalservicesunit@jud.ct.gov.

/s/ Laurie N. Feldman
Assistant State's Attorney

NO. FBT-CR19-0332667-T	:	SUPERIOR COURT PART A
STATE OF CONNECTICUT	:	JUDICIAL DISTRICT OF FAIRFIELD
V.	:	AT BRIDGEPORT
LARISE KING	:	OCTOBER 31, 2022

ORDER

Based upon the reasons and findings set forth below, counsel for the defendant is directed to file a supplemental memorandum of law addressing the procedural issues arising from its September 20, 2022 "Motion for Reconsideration of Trial Court's Denial of Defendant's Motion for Augmentation and Rectification" ("Defendant's Motion").

I. PROCEDURAL BACKGROUND

The procedural background to this case is set forth in the Court's Memorandum of Decision dated September 13, 2022 and the reader's familiarity with that history is assumed by this memorandum.

The instant Defendant's Motion, filed pursuant to Practice Book §§ 60-1, 71-5 and 71-6, seeks reconsideration of this Court's September 13, 2022 Memorandum of Decision. As set forth below, it appears that none of the Practice Book Sections relied upon by the defendant apply to the Superior Court.

II. LEGAL PROVISIONS

The Rules of the Superior Court are set forth in the Practice Book in Chapters 1 through 44. Practice Book § 1-1(a) provides that "[t]he rules for the Superior Court govern the practice and procedure in the Superior Court . . . in all criminal proceedings . . ."

The Rules of Appellate Procedure are set forth in the Practice Book in Chapters 60 though 86. All of the Practice Book Sections upon which the defendant relies in support of the instant motion – §§ 60-1, 71-5 and 71-6 – fall within the Rules of Appellate Procedure.

Thus, it appears that there is no basis within the Practice Book for the relief sought by the defendant in the trial court.

While the instant motion is styled as a motion for reconsideration, a procedure specifically provided for in Practice Book § 71-5, there exists no such rule or analogue in the Rules of the Superior Court.

The provision of the Practice Book governing the Superior Court which most nearly addresses the substance of the review sought by the instant motion is a motion for reargument.

Practice Book § 11-12(a) provides in relevant part, "[a] party who wishes to reargue a decision or order rendered by the [Superior] court shall . . . file a motion to reargue setting forth the decision or order which is the subject of the motion . . . and the specific grounds for reargument upon which the party relies."

"Reargument may be used to address alleged inconsistencies in the trial court's memorandum of decision as well as claims of law that the [movant] claimed were not addressed by the court . . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple or to present additional cases or briefs which could have been presented at the time of the original argument." (Citation omitted.) *State Marshal Assn. of Connecticut, Inc. v. Johnson*, 198 Conn. App. 392, 426–27, 234 A.3d 111, 135 (2020). "[T]he purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts." (Internal quotation marks omitted.) *Jaser v. Jaser*, 37 Conn. App. 194, 202, 655 A.2d 790 (1995). "A motion to reargue, like a motion to open a judgment, should not be readily granted nor without strong

reasons, [but] ought to be [granted] when there appears cause for which the court acting reasonably would feel bound in duty so to do . . . ." *Paniccia v. Success Village Apartments, Inc.*, Superior Court, judicial district of Fairfield, Docket No. CV-16-5031432-S, 2020 WL 6121374, at *1 (September 24, 2020, *Jacobs, J.*). "As a general matter, in the absence of the discovery of some new facts or new legal authorities that could not have been presented earlier, the denial of a motion for reargument is not an abuse of the discretion of the trial court." *Doyle v. Abbenante*, 89 Conn. App. 658, 665, 875 A.2d 558, cert. denied, 276 Conn. 911, 886 A.2d 425 (2005). "[F]or evidence to be newly discovered, it must be of such a nature that [it] could not have been earlier discovered by the exercise of due diligence." *Durkin Village Plainville, LLC v. Cunningham*, 97 Conn. App. 640, 656, 905 A.2d 1256 (2006).

III. DISCUSSION

Where, as here, it appears that the Defendant's Motion for relief in the form of reconsideration by the Superior Court is not supported or provided for by the Practice Book, counsel for the defendant is directed to file a supplemental memorandum of law addressing this Court's jurisdiction to consider the defendant's motion.

SO ORDERED.

Dated this 31st day of October, 2022, at Bridgeport, Connecticut.

RICHARDS, J.

DAYTON, J.

HERNANDEZ, J.

S.C. 20632/FBT-CR19-0332667-T	**SUPREME COURT**
STATE OF CONNECTICUT	**STATE OF CONNECTICUT**
V.	
LARISE N. KING	**NOVEMBER 10, 2022**

SUPPLEMENTAL MEMORANDUM RE: DEFENDANT'S MOTION FOR RECONSIDERATION

The defendant, Larise King, through her undersigned attorney, respectfully submits this supplemental memorandum in response to the trial court's order dated October 31, 2022. (October 31, 2022) (Richards, Hernandez and Dayton, Js.)

I. BRIEF HISTORY OF THE CASE

The defendant, Larise King, was arrested and charged with murder, as an accessory, in violation of General Statutes §§ 53a-54a and 53a-8, and conspiracy to commit murder, in violation of General Statutes §§ 53a-48 and 53a-54a in connection with the death of her former husband, Dathan Gray. The defendant pleaded not guilty and elected a jury trial. Subsequently, the defendant withdrew her election and elected to be tried before a three-judge panel in the Superior Court, Judicial District of Fairfield, Richards, Hernandez and Dayton, JJ.

On May 5, 2021, Judge Hernandez and Judge Dayton convicted the defendant on both counts. Judge Richards dissented. The majority imposed a total effective sentence of fifty years imprisonment. This appeal followed. The defendant's appeal was filed on October 27, 2021. The 676-page transcript was completed on December 20, 2021. On March 11, 2022, the defendant filed a motion for permission to file a late Motion for Augmentation and Rectification, which our Supreme Court granted on March 29, 2022. On April 4, 2022, the defendant filed a "Motion for Augmentation and Rectification" that was referred to the

Superior Court. On April 6, 2022, the state filed its opposition. On June 3, 2022, the three-judge panel of the Superior Court held oral argument on the defendant's motion. On September 13, 2022, the court issued a memorandum of decision denying the defendant's motion. In its decision denying the defendant's request for rectification, however, the trial court did augment the record to include timestamps for various phases of the deliberation process which it procured through independent consultations with the court monitor. MOD p. 2.

On September 21, 2022, the defendant filed a motion for reconsideration. The state filed its response on October 18, 2022. On October 31, 2022, the Court issued an order directing Counsel to provide a supplemental memorandum addressing a procedural issue it identified as arising from the defendant's motion; specifically, whether the Court has jurisdiction to consider the defendant's motion styled as a motion for reconsideration, rather than as a motion for reargument.

II. SPECIFIC FACTS AND LAW RELIED UPON

A. The Court has jurisdiction to reconsider its prior decision

A misidentification of the appellant's motion does not implicate the court's jurisdiction. "Where a party captions its motion improperly, [the Court] look[s] to the substance of the claim rather than the form." Machado v. Taylor, 326 Conn. 396, 402, 163 A.3d 558 (2017); see, e.g., Novak v. Levin, 287 Conn. 71, 79, 951 A.2d 514 (2008) (court properly construed defendant's motion as a motion to file late despite not invoking that Practice Book provision; Practice Book provisions are rules of the court, compliance with which is not necessary for the court to exercise jurisdiction). Moreover, "[i]t is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.). Id. at 79. Finally, the design of the rules is to facilitate business and advance justice; "they will be interpreted liberally in any case where it shall be manifest that a strict adherence to them will work surprise or injustice." Practice Book § 1-8.

Where, as here, the Court has indicated that it has construed the defendant's motion as having the effect of a motion to reargue, which in substance does not differ in any material way from a motion for reconsideration and/or reargument filed in the Appellate Court[1], and the parties have briefed the issues on the merits, this Court retains the discretion to reconsider its prior decision.

Practice Book § 11-12 (a) provides in relevant part, "[a] party who wishes to reargue a decision or order rendered by the [Superior] court shall . . . file a motion to reargue setting forth the decision or order which is the subject of the motion ... and the specific grounds for reargument upon which the party relies." Practice Book § 11-12. "A motion for reconsideration is merely a request that the court reconsider its original ruling on the basis of the information that was before it when that ruling was made." State v. MacPherson, No. H12MCR070211103, 2014 WL 7714324, at *1 (Conn. Super. Ct. Dec. 15, 2014), citing Weinstein v. Weinstein, 275 Conn. 671, 737, 882 A.2d 53 (2005). A motion for reconsideration and/or reargument is appropriate to address factual and/or legal inconsistencies in the trial court's memorandum of decision. Opoku v. Grant, 63 Conn. App. 686, 692, 778 A.2d 981 (2001).

B. Grounds for Reconsideration and/or Reargument

The specific grounds for reconsideration and/or reargument are cited in the defendant's prior motion for reconsideration and are summarized as follows:

1) State v. Walker, 319 Conn. 668 (2015) stands for the proposition that deficiencies in the record that implicate an unpreserved constitutional claim must be remedied by appellate counsel by way of a motion for rectification filed pursuant to Practice

[1] Compare State v. Roszkowski, No. FBTCR06218479T, 2009 WL 5698408, at *1 (Conn. Super. Ct. Dec. 23, 2009); State v. MacPherson, No. H12MCR070211103, 2014 WL 7714324, at *1 (Conn. Super. Ct. Dec. 15, 2014); with Opoku v. Grant, 63 Conn. App. 686, 692, 778 A.2d 981 (2001); State v. Tenay, 156 Conn. App. 792, 796, 114 A.3d 931 (2015).

Book § 66-5. In that case, the state claimed, and the court ultimately held, that appellate counsel failed to exhaust the available trial remedies by not moving to rectify the record with extrinsic proof thus foreclosing review of the defendant's claim. Id. at 681. Walker involved an unpreserved constitutional claim that the defendant was excluded from a critical phase of the trial. Id. at 670. There is no tenable basis to assert that appellate counsel had a legal obligation to rectify the record in that case, but that no such obligation exists here.

2) The Court's decision denying the defendant's motion for rectification appears to suggest that the defendant lacks direct evidence to support her request for rectification. Rectification does not require direct evidence. See, e.g., State v. Ouellette, 295 Conn. 173, 182 n. 7 (2010) (Floyd/rectification hearing is warranted when defendant produces "prima facie evidence, direct or circumstantial, of a Brady violation unascertainable at trial.").

3) State v. Castonguay, 194 Conn. 416, 437 (1984) provides a template for the defendant's motion for rectification and dictates the relief requested here. The question of whether the pre-submission deliberations of a three-judge panel are "improper" is a question of law and the Supreme Court can readily decide that issue. The question of whether the defendant was prejudiced by such pre-submission deliberations, however, is subject to harmless constitutional error analysis under Castonguay and that issue does require rectification. See State v. Castonguay, supra, 194 Conn. at 436.

4) The Court plainly has the authority to rectify the record to address any factual deficiencies presented by the appellant's claim, as demonstrated by the fact that the Court did rectify the record to include timestamps for various phases of the deliberation process. See MOD p. 2.

5) In its decision, the Court states that "[w]hile Practice Book § 61-10 (b) permits the review of unpreserved claims in limited circumstances, it only applies when an appellant has failed to seek articulation to further clarify or explain a trial court's ruling. Section 61-10 (b) does not apply to motions for rectification." MOD p. 10. To the extent

that the Court deemed this observation in Walker as limiting its ability to rectify the record in this case, the defendant reiterates that the rules governing articulation as it pertains to the defendant's failure to exhaust trial remedies via rectification in Walker do not apply here.

The defendant further submits that a refusal by the Court to permit the defendant to make an adequate record implicates issues of due process and her right to the effective assistance of counsel, raising appealable issues beyond the merits of her underlying pre-submission deliberations claim. A criminal defendant is entitled to an adequate record on appeal and to the effective assistance of appellate counsel. Anders v. California, 386 U.S. 738, 741–42 (1967); Evitts v. Lucey, 469 U.S. 387 (1985). The rules provide for rectification. Our Supreme Court held in State v. Walker, supra, 319 Conn. 668 that a defendant forfeits her claim when she fails to move for rectification. It is both incongruous and constitutionally infirm to condition a defendant's right to appellate review on her invoking § 66-5, while denying her the ability to do so.

V. Conclusion

For the foregoing reasons, the Court should grant the defendant's motion. The defendant further requests that this Court hold a hearing on the defendant's motion if it deems it necessary.

Respectfully submitted,

THE DEFENDANT-APPELLANT,
LARISE KING

BY: *__/s/ Erica A. Barber_____*

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CERTIFICATION

It is hereby certified that a copy of the foregoing was sent electronically this 10th day of November, 2022 to: Laurie N. Feldman, Office of the Chief State's Attorney Appellate Bureau, 300 Corporate Place, Rocky Hill, CT 06067, tel. (860) 258-5807, fax (860) 258-5828, DCJ.OCSA.Appellate@ct.gov; and mailed to my client, Larise King. It is also certified that the defendant-appellant's motion complies with all of the applicable rules of procedure and has been redacted and does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law.

Erica A. Barber
Erica A. Barber

NO. FBT-CR19-0332667-T : SUPERIOR COURT PART A

STATE OF CONNECTICUT : JUDICIAL DISTRICT OF FAIRFIELD

V. : AT BRIDGEPORT

LARISE KING : DECEMBER 5, 2022

ORDER

Based upon the reasons and findings set forth below, the defendant's September 20, 2022 "Motion for Reconsideration of Trial Court's Denial of Defendant's Motion for Augmentation and Rectification" ("Defendant's Motion") is denied.

The instant Defendant's Motion, filed pursuant to Practice Book §§ 60-1, 71-5 and 71-6, seeks reconsideration of this Court's September 13, 2022 Memorandum of Decision. As set forth below, provisions of the Practice Book Sections relied upon by the defendant do not apply to the Superior Court.

The Rules of the Superior Court are set forth in the Practice Book in Chapters 1 through 44. Practice Book § 1-1(a) provides that "[t]he rules for the Superior Court govern the practice and procedure in the Superior Court . . . in all criminal proceedings . . ."

The Rules of Appellate Procedure are set forth in the Practice Book in Chapters 60 though 86. All of the Practice Book Sections upon which the defendant relies in support of the instant motion – §§ 60-1, 71-5 and 71-6 – fall within the Rules of Appellate Procedure. The Court finds, therefore, that there is no basis within the Practice Book for the relief sought by the defendant in the trial court.

In its "Supplemental Memorandum" dated November 10, 2022, defendant's counsel substantially concedes that the "Defendant's Motion for Reconsideration" is a motion for reargument as provided for by Practice Book § 11-12(a) which provides in relevant part, "[a] party who wishes to reargue a decision or order rendered by the [Superior] court shall . . . file a

motion to reargue setting forth the decision or order which is the subject of the motion . . . and the specific grounds for reargument upon which the party relies."

"Reargument may be used to address alleged inconsistencies in the trial court's memorandum of decision as well as claims of law that the [movant] claimed were not addressed by the court . . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple or to present additional cases or briefs which could have been presented at the time of the original argument." (Citation omitted.) *State Marshal Assn. of Connecticut, Inc. v. Johnson*, 198 Conn. App. 392, 426–27, 234 A.3d 111, 135 (2020). "[T]he purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts." (Internal quotation marks omitted.) *Jaser v. Jaser*, 37 Conn. App. 194, 202, 655 A.2d 790 (1995). "A motion to reargue, like a motion to open a judgment, should not be readily granted nor without strong reasons, [but] ought to be [granted] when there appears cause for which the court acting reasonably would feel bound in duty so to do . . . ." *Paniccia v. Success Village Apartments, Inc.*, Superior Court, judicial district of Fairfield, Docket No. CV-16-5031432-S, 2020 WL 6121374, at *1 (September 24, 2020, *Jacobs, J.*). "As a general matter, in the absence of the discovery of some new facts or new legal authorities that could not have been presented earlier, the denial of a motion for reargument is not an abuse of the discretion of the trial court." *Doyle v. Abbenante*, 89 Conn. App. 658, 665, 875 A.2d 558, cert. denied, 276 Conn. 911, 886 A.2d 425 (2005). "[F]or evidence to be newly discovered, it must be of such a nature that [it] could not have been earlier discovered by the exercise of due diligence." *Durkin Village Plainville, LLC v. Cunningham*, 97 Conn. App. 640, 656, 905 A.2d 1256 (2006).

Treating the Defendant's Motion as a motion for reargument, the Court finds that the reasons set forth in the defendant's pleadings do not support reargument. Accordingly, the defendant's Motion is denied.

SO ORDERED.

Dated this 5th day of December, 2022, at Bridgeport, Connecticut.

HERNANDEZ, J.

DAYTON, J.

RICHARDS, J.

S.C. 20632/FBT-CR19-0332667-T **SUPREME COURT**

STATE OF CONNECTICUT

V.

LARISE N. KING **DECEMBER 21, 2022**

DEFENDANT'S MOTION FOR REVIEW

The defendant, Larise King, through her undersigned attorney, respectfully moves this Court pursuant to Practice Book §§ 60-1, 60-5, 61-10, 66-5, 66-6, for review of the trial court's memorandum of decision denying the defendant's Motion for Augmentation and Rectification. (Richards, Hernandez and Dayton, Js.) Appendix ("A") 59.

The defendant's appeal raises the following issue of first impression:

> Under *State v. Washington*, 182 Conn. 419 (1980), there is a constitutional prohibition against jury deliberations until the close of all the evidence and the submission of the case to the factfinder. Do the rules set forth in *Washington* ensuring the constitutional integrity of the jury's verdict similarly apply in trials before a three-judge panel?

The record in Ms. King's case suggests that discussion and/or examination of this matter occurred off the record prior to the trial court's deliberations. The record does not disclose the manner or scope of the discussions. Accordingly, the defendant moved to rectify the record and sought access to the timing and character of any off-the-record discussions by the three judges before the defendant's case was submitted. Rectification is necessary to ensure that there is an adequate record for this Court to review the defendant's claim on appeal.

I. BRIEF HISTORY OF THE CASE. The defendant was arrested and charged with murder, as an accessory, in violation of General Statutes §§ 53a-54a and 53a-8, and conspiracy to commit murder, in violation of General Statutes §§ 53a-48 and 53a-54a in connection with the death of her former husband, Dathan Gray. The state alleged that Ms.

King conspired with two gunmen whom it claimed carried out the shooting. Although the state identified the gunmen, it elected not to charge them in connection with the incident.

Judge Dayton, who would later preside over Ms. King's criminal trial, also presided over her bail hearing. Judge Dayton ordered that Ms. King's bail be set at $1,000,000 cash or surety "as it was set on the warrant," and the case was transferred to Part A. 9/23/19T.3.

On January 9, 2020, Ms. King pleaded not guilty and elected a jury trial. On February 5, 2021, the defendant, withdrew her jury trial election and elected to be tried before a three-judge panel. 2/5T.1-8. The evidentiary portion of Ms. King's trial commenced on April 27, 2021, and continued on April 28, April 30, and May 3, 2021. The parties presented closing arguments on May 4. The following morning, Judge Hernandez and Judge Dayton convicted Ms. King on both counts. A1. Judge Richards dissented. A20. The majority imposed a total effective sentence of fifty years imprisonment.

The defendant's appeal was filed on October 27, 2021. The transcript was completed on December 20, 2021. On March 11, 2022, the defendant filed a motion for permission to file a late Motion for Augmentation and Rectification which this Court granted on March 29, 2022. On April 4, 2022, the defendant filed her motion, and it was referred to the trial court. A38. On April 6, 2022, the state filed its opposition. A48. On June 3, 2022, the trial court held a hearing on the defendant's motion. A72. On September 13, 2022, the trial court issued a memorandum of decision denying the defendant's motion. A59. On September 23, the defendant filed a motion for reconsideration of the court's denial of the motion for rectification. A90.[1] The state filed its response on October 18. A100. On October 31, the trial court issued an Order directing Counsel to provide a supplemental memorandum addressing a procedural issue it identified as arising from the defendant's motion, specifically, whether the court had jurisdiction to consider the defendant's motion. A111.

[1] Defendant filed her motion in this Court on September 23. The same day, she emailed the motion to the Superior Court clerk and the panel. The motion filed in this Court was subsequently returned.

The court questioned whether it had jurisdiction on the stated basis that the defendant's motion was styled as a "motion for reconsideration," rather than as a "motion for reargument" under Practice Book 11-12. A112. The defendant filed a responsive memorandum on November 10, 2022. A114. The state did not file a response. On December 5, 2022, the trial court issued an Order denying the motion for reconsideration: "Treating the Defendant's Motion as a motion for reargument, the Court finds that the reasons set forth in the defendant's pleadings do not support reargument." Order at 2, A122. Notice was provided to the parties by email on December 6, 2022.

Defendant's motion for review, filed ten days from the notice of the trial court's decision on the motion for reconsideration, is timely. The trial court had jurisdiction to decide the motion for rectification. A court has the discretion to reconsider any decision that is contrary to existing facts or law. Opoku v. Grant, 63 Conn. App. 686, 692 (2001); see State v. Roszkowski, No. FBTCR06218479T, 2009 WL 5698408, at *1 (Conn. Super. Ct. Dec. 23, 2009). A motion for reconsideration, which seeks to alert the Court to controlling issues that may have been overlooked, should stay the period for review, as it does in other contexts. See, e.g., Practice Book §§ 71-5, 71-6.[2]

II. SPECIFIC FACTS AND LAW RELIED UPON

A. Applicable Law – Presubmission Deliberations. The defendant first sets forth the law governing pre-submission deliberations, which she argues should apply to trials presided over by a three-judge panel. A criminal defendant has a fundamental due process right to a fair trial that is protected by both federal and state constitutions. U.S. Const., amend. XIV; Conn. Const. art. I, § 8. Due process is "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." Winebrenner v. United States, 147 F.2d 322, 328 (8th Cir. 1945), quoting Hurtado v.

[2] Assuming undersigned counsel erred and the motion is untimely, it is well-settled law that a claim of defect in the process is not jurisdictional, and therefore, the defendant requests that this Court exercise its powers under Practice Book §§ 60-1, 60-2 (5), and 60-3.

California, 110 U.S. 516 (1884). The right to the presumption of innocence is embedded in the defendant's right to a fair trial and requires that the defendant's guilt or innocence be decided based solely on the evidence adduced at trial in accordance with the relevant legal principles. Estelle v. Williams, 425 U.S. 501, 503 (1976). A presubmission finding or conclusion is prohibited because "an opinion once formed could only be removed, if at all, by [contrary] evidence." Winebrenner, supra, 147 F.2d at 328.

The leading Connecticut case on presubmission deliberations is State v. Washington, 182 Conn. 419 (1980). See A123. In Washington, the trial court instructed the jurors that they were permitted to discuss the evidence prior to the submission of the case. In holding that the instruction was improper, the Washington court held, "it is improper for jurors to discuss a 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. at 425. The due process clause and the right to trial by an impartial jury prohibit such discussions. Id. at 424–25. Drawing from principles dating back more than a century, the Washington Court explained the rationale for the rule:

> "[I]t is human nature that an individual, having expressed in discussion his or her view of the guilt or innocence of the defendant, would 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. …'"

Id. at 426, quoting Winebrenner, supra, 328.

In State v. Castonguay, 194 Conn. 416 (1984), this Court reiterated the principles underlying Washington, and defined the proper scope of a post-verdict inquiry in cases involving a claim of presubmission deliberations. See A129. According to Castonguay, it is not permissible to "probe the jurors' mental processes" with respect to the effect of any extra-record information or discussions. Castonguay, 194 Conn. at 416; see Practice Book § 42–33. Accordingly, when there is a claim of premature deliberations, on remand, the trial court should inquire whether members of the jury discussed the evidence, and whether they may have taken a position on the evidence. Id. at 437.

Ms. King contends that the same principles guide the analysis here. When a defendant waives her right to a jury and elects a trial court "composed of three judges" pursuant to General Statutes § 54-82(b), "the court is merely given power to decide the facts in addition to its customary power to decide questions of law. . . ." State v. Rossi, 132 Conn 39, 42 (1945). "Fulfilling the function of the jury, the court determines the guilt or innocence of the accused and is governed in that decision by the same principles as would have governed the jury in passing upon that question." State v. Frost, 105 Conn. 326 (Conn. 1926). A criminal defendant, whether tried by jury or jurist, is entitled to due process. By electing a court trial, Ms. King never agreed to have the judges decide her fate before closing arguments and the submission of the case.

B. Factual Basis for Rectification. In her motion for rectification, Ms. King set forth the following timeline for the trial court's deliberations. On May 4, 2021, following summations, the court recessed for lunch until 2 p.m. 5/4/21T.53 (Judge Richards: "We'll recess, two o'clock. Take an early lunch, and we'll start with that readback."). Following the break, the panel listened to playback testimony and then recessed. Id., 59. The following morning, the panel announced that it had reached a verdict. 5/5/21T.1, A1. Judge Dayton read the verdict in open court which was identical to the memorandum of decision the majority issued later that day at 2:39 pm. Id.,A1; Compare A1 with A25.

The twelve-page memorandum of decision includes a chronology of the state's evidence, quoted testimony from the witnesses and the defendant's recorded interviews with the police, and references to the surveillance footage exhibits introduced into evidence, along with corresponding timestamps. A25-A36. Judge Richards' one-page dissent was filed at 12:32 p.m. A37.

In its decision denying Ms. King's motion for rectification, the trial court set forth substantially the same timeline, but it augmented the record to include timestamps for various phases of the deliberation process which it procured through its independent consultations with the court monitor. MOD p. 2, A60.

> Trial commenced with the presentation of evidence on April 27, 2021. Evidence was also presented on April 28, 29, and 30, and on May 3, 2021. The defendant's Motion for a Judgment of Acquittal was denied on May 3, 2021. The trial court heard closing arguments on May 4, 2021, and the court began its deliberations at 12:25 p.m. Between approximately 2:09 p.m. and 2:13 p.m., the court listened to the playback of certain trial testimony. At 2:13 p.m., the court recessed to continue deliberations until the close of business at 5:00 p.m. On May 5, 2021, between 11 :39 a.m. and 11:59 a.m., the court, Dayton, J., announced its verdict finding the defendant guilty of both counts, and read its factual findings and conclusions into the record. Between 12:03 p.m. and 12:06 p.m., Judge Richards read his dissenting opinion in which he agreed with the majority's factual findings but dissented in its findings of guilt. Judge Richards was prepared to find the defendant guilty of lesser-included offenses. On May 5, 2021, at 12:32 p.m., Judge Richards filed his dissent to the majority decision and verdict. Later, at 2:39 p.m., the majority filed its "Majority Memorandum of Decision."

MOD p. 2-3, A60-61.

The timeline, which appears to be undisputed, is susceptible to one of two interpretations. ***First***, it suggests that the panel deliberated, listened to playback testimony, reviewed the exhibits (which numbered more than 100), reached a split decision, prepared

a draft memorandum of decision marshalling the relevant evidence, and reviewed the same for substantive and nonsubstantive edits—i.e., references to exhibits, etc.—before reconvening on the record the following morning and reading the decision into the record.

Alternatively, the timeline suggests that the panel or a member of the panel marshalled the evidence and prepared draft findings of fact before the case was submitted. In the absence of any current authority or rule that prohibits three-judge panels from engaging in presubmission deliberations, and consistent with the principle that "'the simplest of competing theories should be preferred to the more complex," undersigned counsel inferred that it was likely that the latter occurred in this case. Occam's razor, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/Occam% 27s% 20razor (last visited December 15, 2022); see State v. Hinds, 344 Conn. 541, 560 (2022). As counsel identified at the hearing on the defendant's motion for rectification, there is a good faith basis to inquire whether presubmission deliberations occurred in this case. See 6/3/22T.7, A79. Accordingly, undersigned counsel moved to rectify the record, and submitted a series of questions, modeled after the Castonguay remand, 194 Conn. 437, inquiring whether the judges discussed the evidence, and whether they may have taken a position on the evidence. See rectification questions, A46.

C. Grounds for Rectification. The trial court claims lack of investigation to support rectification (MOD at 8,12,A66, A70), but what the trial court seems to suggest is that Ms. King lacks direct evidence to support her request. Rectification does not require direct evidence. For example, a Floyd/rectification hearing is warranted when defendant produces "prima facie evidence, direct or circumstantial, of a Brady violation unascertainable at trial." State v. Ouellette, 295 Conn. 173, 182 n. 7 (2010). Brady and the Washington rule prohibiting presubmission deliberations are both grounded in procedural due process.[3] There is no reasonable basis to hold that a defendant denied due process under Brady is

[3] The Washington rule is also based on the defendant's independent Sixth Amendment right to a fair and impartial jury. State v. Washington, 182 Conn. 419, 424-25 (1980).

entitled to rectification upon a showing of prima facie evidence, whereas a defendant denied due process as a result of premature deliberations is not entitled to rectification and/or must satisfy a more rigorous standard. Both rules were established to preserve the integrity of the trial process, and therefore, the same standards should apply. In both instances, defendants are entitled to rely on the independent obligations of the state actors involved. Specifically, under Brady, the defendant is entitled to rely on the state's independent obligation to disclose favorable evidence. Similarly, in a case involving presubmission deliberations, the defendant is entitled to rely on the trial court's independent obligation to be alert to and raise issues that potentially undermine the fairness of a defendant's trial. See State v. Brown, 235 Conn. 502, 525 (1995) (court has sua sponte obligation to inquire about matters impacting fairness of proceeding).

The conduct by the court that the defendant submits constitutes presubmission deliberations is appropriately explored through rectification—i.e., through the questions submitted to the court that remain unanswered. Here, the panel relies on information that is not known to the defendant to conclude there is not an adequate basis for rectification, while simultaneously denying access to information that is known to the panel.

1. The trial court misinterprets State v. Walker, 319 Conn. 668 (2015) to deny the defendant relief. See MOD at 9-10, A67-68. In State v. Walker, 147 Conn. App. 1 (2015), the defendant claimed that he had been excluded from a critical stage of the proceeding. The factual predicate for the defendant's claim was his absence from an alleged in-chambers discussion regarding counsel's possible conflict of interest. Id. at 15. The Appellate Court declined to review the claim, reasoning that the defendant's failure to "request a hearing before the trial court to establish a factual predicate for appellate review" resulted in an inadequate record on appeal. Id. This Court ultimately agreed. A142. According to the Court, the record was deficient in that it did not indicate "whether any discussion of this matter occurred with the court off the record; the scope of any such discussion; and whether the defendant was in fact absent during any such discussion." 319

Conn. at 677. “The record could have been augmented to include matters that occurred off the record**. In such circumstances, rectification is the appropriate method of perfecting the record.”** Id. (Emphasis added.) This Court concluded that the defendant’s claim was unreviewable based on appellate counsel’s failure to move for rectification. Id. Ms. King seeks to do what the defendant in Walker failed to do and what this Court has said she must do, which is to rectify the record to cure any possible factual deficiencies.

The question of whether the presubmission deliberations of a three-judge panel are improper is a question of law and this Court can decide that issue. The question of whether the defendant was prejudiced by such presubmission deliberations, however, is subject to harmless constitutional error analysis under Castonguay and that issue does require rectification.194 Conn. at 436.

2. The trial court wrongly reasons that the defendant’s motion seeks information concerning “its confidential, deliberative proceedings.” MOD at 4,7, A62, 65. Consistent with “the well-settled limitation on inquiring into the mental processes of jurors,” Castonguay, 194 Conn. at 416, Ms. King does not inquire about the **effect** of any pre-submission deliberations on the verdict. Her questions are consistent with Castonguay, in that they are limited to the timing/procedure of off-the-record discussions by the judges, specifically, whether the panel discussed the evidence, and/or whether any panel member may have taken a position on the evidence before the case was submitted, for example, by drafting a statement of facts and/or an opinion before the submission of the case.

3. The trial court wrongly relies on the preservation requirement to deny defendant relief. MOD at 10, A68. The defendant, like the defendant in Walker, presents a claim of constitutional magnitude reviewable under Golding, despite not being raised at trial. In such instances, only a valid waiver precludes relief. State v. Frazier, 181 Conn. App. 1, 36 (2018). There was no waiver here. Moreover, the state is not prejudiced because it can raise any relevant arguments on appeal or seek any necessary rectification. See State v. Fernando A., 294 Conn. 35 (2009) (Schaller, J. concurring).

4. Refusal to Permit Ms. King to Rectify the Record Constitutes a Violation of her Procedural Due Process Rights. Refusal by the Court to permit the defendant to make an adequate record implicates issues of procedural due process and her right to the effective assistance of counsel. A criminal defendant is entitled to an adequate record on appeal and to the effective assistance of appellate counsel. Anders v. California, 386 U.S. 738, 741–42 (1967); Evitts v. Lucey, 469 U.S. 387 (1985). Our rules provide for rectification. Walker held that a defendant forfeits her claim when she fails to move for rectification. It is incongruous and constitutionally infirm to condition the defendant's right to appellate review on her invoking § 66-5 while denying her the ability to do so.

The test set forth in Mathews v. Eldridge, 424 U.S. 319 (1976) controls. See State v. Anderson, 319 Conn. 288, 315 (2015). Ms. King is 38 years old. She has no prior criminal record. She has been convicted of Murder—the most serious offense in our penal code. She has been sentenced to fifty years imprisonment in prison. There is a compelling liberty interest at stake. The risk of erroneous deprivation of the defendant's liberty interests under the existing procedure is significant. Ms. King should not be denied the ability to rectify the record when this Court's precedent acknowledges it is required in similar cases, *see ante,* Walker and Castonguay. The state's interest is served by rectification; it has no interest in upholding unjust procedures or in promoting delay. This issue should be resolved now, not after years of costly collateral attacks. See State v. Ortiz, 280 Conn. 686, 712 (2006) (Rectification through Floyd hearing "permits the rapid resolution of … fact sensitive constitutional issues. . . ").

V. Conclusion. For the foregoing reasons, this Court should grant the Defendant's Motion for Review and remand the case to the trial court with direction to respond to the questions set forth in the defendant's motion. See A72. Alternatively, this Court should craft whatever relief it deems necessary for the proper presentation of the issues on appeal.

Respectfully submitted,

THE DEFENDANT-APPELLANT,
LARISE KING

BY: ___*/s/ Erica A. Barber*_____

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CERTIFICATION

Pursuant to P.B. §§ 62-7 and 66-3, it is hereby certified that a copy of the foregoing was sent electronically this 21st day of December, 2022 to: Timothy Costello, Juris No. 401795, Office of the Chief State's Attorney Appellate Bureau, 300 Corporate Place, Rocky Hill, CT 06067, tel. (860) 258-5807, fax (860) 258-5828, DCJ.OCSA.Appellate@ct.gov; and mailed to my client, Larise King. It is also certified that the defendant-appellant's motion complies with all of the applicable rules of appellate procedure and has been redacted and does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law.

Erica A. Barber
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SC 20632 / FBT-CR19-0332667-T

STATE OF CONNECTICUT	**:**	**SUPREME COURT**
v.	**:**	**STATE OF CONNECTICUT**
LARISE N. KING	**:**	**DECEMBER 29, 2022**

STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR REVIEW

Pursuant to Practice Book §§ 66-5 and 66-7, the state of Connecticut opposes the defendant's Motion For Review of the trial court's denial of the defendant's Motion for Augmentation and Rectification ("the contested motion").

I. BRIEF HISTORY OF THE CASE

After a trial to a three-judge panel, on May 5, 2021, the majority, *Hernanez and Dayton, JJ.*, found the defendant guilty of murder and conspiracy to commit murder, with one judge, *Richards, J.*, dissenting, agreeing with the majority's historical fact-finding but finding guilt only of lesser included offenses. On June 21, 2021, the majority imposed sentence of 50 years.

On October 27, 2021, the defendant filed this appeal. On April 4, 2022, the defendant filed the contested motion, which this Court referred to the three-judge panel. After oral argument, on September 13, 2022, the panel issued a Memorandum of Decision ("9/13/22 MOD") denying the contested motion. The defendant filed a Motion for Reconsideration pursuant to Practice Book §§ 60-1, 71-5 and 71-6. On October 31, 2022, the panel ordered the defendant to file a brief addressing its jurisdiction. After receiving the defendant's brief, on December 5, 2022, the panel denied the motion for reconsideration.

II. FACTUAL BACKGROUND

A. The Contested Motion

In the trial court, the defendant raised no claim of improper deliberations or improper

verdict, did not ask the trial court to place anything on the record with regard to its off-the-record conduct during trial or deliberations, and did not move for a new trial.

After filing this appeal, the defendant filed the contested motion, seeking rectification and augmentation pursuant to Practice Book §66-5. The contested motion set forth the following time sequence, which, it claimed, "suggests that discussion and/or examination of this matter occurred off the record prior to the start of the trial court's deliberations":

- On the afternoon of May 4, 2021, the three-judge panel began deliberations and heard playback of certain testimony;
- On the morning of May 5, 2021, the majority orally announced its verdict and factual findings and the dissenting judge stated agreement with the historical facts therein; and
- On the afternoon of May 5, 2021, the majority issued a written 12-page Memorandum of Decision with the factual findings that had been announced orally, and the dissenting judge issued a written dissent stating agreement with the majority's historical fact-finding.

The contested motion contended that, in order to pursue a novel claim that the due process right with regard to juries extends to and precludes a three-judge panel from deliberating prior to submission of the case, the defendant was entitled to obtain a record of the panel's conduct when court was not in session, by requiring the judges to answer thirteen questions drafted by the defendant. The questions require disclosure of off-the-record conduct including whether any judge examined exhibits before the case was submitted and, if so, which judge and which exhibit; whether any judge discussed the merits of the case during trial and, if so, with whom; whether any judge conducted supplemental investigations; whether all discussions of the evidence took place with all judges present; "When was the first time that you were shown a draft of the court's factual findings?"; and when the memorandum of decision was prepared. Contested Motion at 9 ("Questions").

B. The panel's ruling denying the contested motion

In its 9/13/22 MOD, the panel supplemented the time-frame noted in the contested motion. First, it added that, on May 3, 2021, the panel denied a motion for judgment of acquittal. 9/13/22 MOD at 2.[1] Second, it provided electronically time-stamped notations obtained from the courtroom monitor. *Id.* at 2 n.1. Those notations show that:

On **May 4, 2021**, the panel

- began deliberations at **12:25 p.m.**;
- listened to a playback of testimony between about **2:09 p.m. and 2:13 p.m.;** and
- continued deliberations **from 2:13 p.m**. **until about 5:00 p.m.**;

and, on **May 5, 2021**,

- from **11:39 a.m. to 11:59 a.m.**, Judge Dayton read the penal majority's verdict and factual findings;
- from **12:03 p.m. to 12:06 p.m.**, Judge Richards read his dissenting opinion agreeing with the majority's factual findings but dissenting from the finding of guilt of murder, while finding sufficient evidence of a lesser included offense;
- at **12:32 p.m.**, Judge Richards filed his dissent; and,
- at **2:39 p.m.**, the majority filed its "Majority Memorandum of Decision" with written factual findings.

9/13/22 MOD at 2-3.

The panel next noted the following facts about the position taken by the defendant at oral argument. Appellate defense counsel (1) agreed that the court's verdict and memorandum of decision on the merits did not themselves need clarification or rectification; (2) disavowed any claim of misconduct by the court under existing law but sought to develop a record for a legal claim of first impression regarding procedures for a three-judge-panel's

[1] Although the panel did not spell out implications of this fact, it can be inferred that ruling on this motion entailed discussion of the evidence amongst the panel members.

deliberation; (3) acknowledged that she had no evidence of pre-submission deliberations but maintained that there was a good faith basis for speculation that such deliberations occurred by reason of the time sequence; (4) based this inference on her own experience as a "slow writer"; and (5) acknowledged that none of the Practice Book rules squarely applied to require rectification in these circumstance. 9/13/22 MOD at 5-7.

In its legal analysis, the panel determined that the contested motion fell outside the plain meaning of Practice Book § 66-5, in that it did not seek a "correction in the transcript" or a "further articulation" of the trial court's decision. 9/13/22 MOD at 7. Rather, it sought the "extraordinary relief" of "inquiring into the confidential, deliberative proceedings of the factfinder," which the panel deemed particularly extraordinary where there was "no claim of misconduct." *Id.* The panel concluded that, because the contested motion fell outside the parameters of Rule 66-5, it should be denied. *Id.* at 8.

The panel found further support for this reading of the rule in case law on appropriate uses of Practice Book § 66-5 motions. The court determined that what the contested motion sought is not an "articulation" as defined by case law. 9/13/22 MOD at 8-9. The court determined that case law shows that rectification is not appropriate in this circumstance. *Id.* at 9-10. It quoted from *State v. Walker*, 319 Conn. 668, 680 (2015), which in turn quoted Tait and Prescott's treatise on Connecticut Appellate Practice, for the principle that rectification is not a vehicle to "'add matters to the record that were not presented at trial.'" 9/13/22 MOD at 9. The court noted that examples of proper rectification cited in *Walker* involved matters to which the parties were privy at trial but that were omitted in the transcript. *Id.* The court distinguished one contrary example, *State v. Floyd*, 253 Conn. 700, 730-32 (2000), where

rectification of information not known to the defense during trial was proper only because the state had withheld the information until after trial. The panel noted that, in this case, the defendant presented no newly discovered evidence and claimed no impropriety under existing law. 9/13/22 MOD at 10.

Finally, the court rejected the notion that defense counsel had a right to obtain this information about the judges' off-the-record conduct so as to create a record for a novel appellate claim based in speculation. The court ruled that such information is not properly obtained through articulation or rectification. 9/13/22 MOD at 10-11.

Accordingly, the court denied the contested motion. 9/13/22 MOD at 12.

C. The denial of the defendant's motion for reconsideration

The defendant filed a motion for reconsideration on September 20, 2022. This motion suggested that the time-stamp notations obtained by the panel were still susceptible to two interpretations, one of which involved pre-submission deliberations, creating a factual basis for rectification. The defendant claimed that the panel erred in failing to treat *State v. Walker*, 319 Conn. at 681 as controlling, because in *Walker*, this Court declined to review a claim for lack of a record of the existence of its factual predicate, that the defendant was absent from a proceeding, which could have been determined by rectification. The defendant claimed that her failure to raise and preserve this claim at trial was irrelevant because the claim is potentially reviewable on appeal under *State v. Golding*, 213 Conn. 233, 239 (1989), or the plain error doctrine of Practice Book § 60-5, but, to obtain such review, she must perfect the record. Motion for Reconsideration at 1-9.

The panel ordered the defendant to file a brief addressing its jurisdiction to review this

motion. 10/31/22 Order. After receiving a brief from the defendant, the panel issued an order denying the motion for reconsideration on the ground that the Practice Book Rules of Appellate Procedure relied on by the defendant, §§ 60-1, 71-5, and 71-6, do not apply to the Superior Court. Even treating the motion as a motion for reargument under Practice Book § 11-12(a), the court found that the reasons set forth in the motion did not support reargument, and, therefore, denied the motion. 12/5/22 Order.

On December 21, 2022, the defendant filed the instant Motion for Review. This motion sets forth law regarding pre-submission deliberation by juries, and postulates that the same rules should apply to three-judge panels. Motion for Review at 3-5. The motion contends that the record as it stands is "susceptible to one of two interpretations," one involving the panel or members thereof marshalling the evidence and preparing draft findings of fact before the case was submitted. *Id.* at 6-7. Thus, the motion argues that a good faith basis exists to probe the conduct of the judges when court was not in session. *Id.* at 7. It claims that the defendant's failure to raise the claim in the trial court does affect her right to use rectification to gain the information because *Golding* review might still be available for the unpreserved claim, but only upon an adequate record. *Id.* at 9. The motion claims that the defendant has a constitutional right to rectification as a component of her right to an adequate record on appeal and effective assistance of appellate counsel. *Id.* at 10.

III. REVIEW IS UNNECESSARY

The defendant fails to establish a need for review because she does not show that the panel wrongly determined that rectification is inappropriate to obtain information that she did not seek at trial. Practice Book § 66-5 provides, "A motion seeking corrections in the transcript

or the trial court record or seeking an articulation or further articulation of the decision of the trial court shall be called a motion for rectification or a motion for articulation, whichever is applicable." While this case was pending in the trial court and during the proceedings when the three-judge panel announced its verdict, issued its findings, and imposed sentence, the defendant raised no claim of a right to preclude pre-submission deliberations by the panel, did not suggest that improper deliberations or verdict had occurred, did not move for a new trial, and did not ask the trial court to add anything to the record. Under these circumstance, the panel correctly determined that a rectification "'motion cannot be used to add new matters to the record that were not presented at trial.' (Footnotes omitted.) C. Tait & E. Prescott, Connecticut Appellate Practice and Procedure (4th Ed.2014) § 6–2:3.3." *State v. Walker*, 319 at 680.

Contrary to the defendant's argument, the panel correctly determined that *State v. Walker* does not support her claim. *Walker* endorsed rectification as a method of perfecting the record of events known to the parties, such as (in *Walker* itself) whether the defendant was present and what was discussed in an in-chambers conference attended by the court and counsel, or the wording of the court's instruction to the jury or what occurred during a jury visit to the crime scene. 319 Conn. at 680-81. *Accord State v. Mejia*, 233 Conn. 215, 230–31 (1995) (rectification of steps trial court took in open court with regard to juror note-taking); *State v. Williams*, 227 Conn. 101, 105-07 (1993) (rectification of proceedings where court reporter's tapes lost); *Welsh v. Martinez,* 157 Conn. App. 223, 236 n.8 (rectification of "precisely what was played for the jury during its deliberations"), *cert*. *denied*, 317 Conn. 922 (2015). In this *case*, however, the defendant does not seek to make a record of known

occurrences. Instead, she seeks to discover new facts, unknown to the parties, about judges' conduct when court was not in session, on an issue she did not raise below and did not give the panel an opportunity to address as it saw fit in its discretion.

As the panel noted, the exception cited in *Walker*, *State v. Floyd*, 253 Conn. at 730–32, is inapplicable, because the propriety of rectification there arose from the fact that the defendant was precluded from perfecting the record at trial because he did not obtain information that the state should have disclosed. As the panel here noted, the defendant raises no newly discovered evidence, impropriety, or other reason for not having developed a record below. Where a defendant was aware at trial of the basis for raising an issue and did not ask the trial court to hold a hearing, make findings, or issue a ruling, rectification is not appropriate. S*tate v. Hamlin*, 90 Conn. App. 445, 452–53 (2005).

The defendant's purported justifications for using rectification in lieu of having made a record below fail to show error in the denial of the contested motion. First, she bootstraps the question by claiming that rectification is necessary because she has a right under *State v. Golding* to raise an unpreserved issue of pre-submission deliberations but must present an adequate record to do so. *Golding* creates an exception to the normal preservation requirement, conditioned on the presence of an adequate record to review the claim; *Golding*, 213 Conn. at 240; but it does not create a vehicle or right to perfect the record. Indeed, "the first prong of *Golding* was designed to **avoid remands** for the purpose of supplementing the record." (Bold added; internal quotation marks omitted.) *State v. Ortiz*, 280 Conn. 686, 712 n.17 (2006). The same is true of the plain error doctrine: "An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent

[or] readily discernable **on the face of a factually adequate record**[.]" (Bold added; internal quotation marks omitted.) *State v. Blaine*, 334 Conn. 298, 305 (2019).

The defendant shows nothing that prevented her from (1) moving in limine to preclude the panel from engaging in pre-submission deliberation that, she contends were not precluded by current law, so as to avoid error or at least so as to obtain a ruling that the panel disagreed with her claim of right and thereby stake her claim; (2) upon receiving the verdict and the panel's Memorandum of Decision, claiming that the timing suggested a violation of a right against pre-submission deliberations, and/or (3) filing a timely motion for a new trial claiming premature deliberations. Such actions would have enabled the panel to respond in a form it deemed appropriate, making factual findings on the record if and as needed, and issuing a ruling. *State v. Asherma*n, 193 Conn. 695, 735-42 (1984). The contested motion instead demanded answers to thirteen questions the defendant scripted about the judges' individual and collective off-the-record conduct. The panel correctly declined to accede to that demand.

Raising this issue *in limine* or upon receiving the verdict would have been a routine method of claiming that the law required, or should require, a certain procedure, and determining whether the court agreed and followed it, and would have left the panel to decide the appropriate form and detail of response. Trial courts regularly rule in the first instance on claims that they failed to follow procedures necessary to protect a defendant's rights. *See State v. Milner*, 325 Conn. 1, 5 (2017) (claim that trial court should disqualify itself should be presented to trial court for development of adequate factual record); *State v. Jorge P.*, 308 Conn. 740, 758 (2013) (defendant cannot avoid preservation requirement by presuming that

trial court will deny motion); *State v. Owens*, 100 Conn. App. 619, 627-29 (trial court properly ruled on motion claiming it failed to respond adequately to claim of improper jury deliberations), *cert*. *denied*, 282 Conn. 927 (2007). Even if the defendant believed that any premature deliberations created judicial bias, which she does not claim, "[i]t is a well settled general rule that courts will not review a claim of judicial bias on appeal unless that claim was properly presented to the trial court via a motion for disqualification or a motion for mistrial." *Gillis v. Gillis*, 214 Conn. 336, 343 (1990) (failure to present claim to trial court was a waiver of claim of bias purportedly shown by statement of trial court's intention to rely on allegedly improper consideration). The panel properly determined that the defendant presented no reason for requiring rectification to be used in an improper manner to remedy her failure to raise this issue properly below.

Finally, the defendant's claim that her due process rights to an adequate record and counsel require rectification is misplaced. Motion at 10. "The defendant bears the responsibility for providing a record that is adequate for review of his claim of constitutional error. If the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the defendant's claim." State v. Golding, 213 Conn. at 240.

IV. CONCLUSION

In sum, because the panel properly denied the contested motion, review is unnecessary.

Respectfully submitted,
STATE OF CONNECTICUT

By: /s/_____

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CERTIFICATION

I hereby certify that this document complies with Practice Book §§ 62-7 and 66-3 and all applicable rules of appellate procedure; that it has been redacted and/or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and that it has been delivered electronically, with consent, this 29th day of December, 2022, to: Erica A. Barber, Assistant Public Defender, Office of the Chief Public Defender, 55 West Main Street, Suite 430, Waterbury, CT 06702, Tel. (203) 574-0029; Fax. (203) 574-0038, email: erica.barber@pds.ct.gov, legalservicesunit@jud.ct.gov.

/s/_____

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Order On Motion for Review SC 220139

Docket Number: SC20632
Issue Date: 4/12/2023
Sent By: Supreme/Appellate

Order On Motion for Review SC 220139

SC20632 STATE OF CONNECTICUT v. LARISE N. KING

Notice Issued: 4/12/2023 9:51:57 AM

Notice Content:

Motion Filed: 12/21/2022
Motion Filed By: Larise N King
Order Date: 04/11/2023

Order: Other

Review is granted and the relief requested therein is denied without prejudice. The parties may make any claims about the deliberations of the judges of the three-judge panel as the law supports in their appellate briefs. Without limitation, the parties may include in their briefs arguments that the court should order the trial court to supplement the record by way of articulation, or that any such articulation is unnecessary, inappropriate or contrary to law.

ALEXANDER, J., did not participate in the consideration of or the decision on this motion.

By the Court
Cicchetti, Carl D.

Notice sent to Counsel of Record

Hon. Earl B. Richards, Iii., Hon. Tracy Dayton, Hon. Alex V. Hernandez

Clerk, Superior Court, FBTCR190332667T

Constitutional Provisions

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article first, § 8

In all Criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law, except in the armed forces, or in the militia when in actual service in time of war or public danger.

Article first, § 19

The right of trial by jury shall remain inviolate, the number of such jurors, which shall not be less than six, to be established by law; but no person shall, for a capital offense, be tried by a jury of less than twelve jurors without his consent. In all civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law. The right to question each juror individually by counsel shall be inviolate.

§ 53a-8. Criminal liability for acts of another

(a) A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender.

(b) A person who sells, delivers or provides any firearm, as defined in subdivision (19) of section 53a-3, to another person to engage in conduct which constitutes an offense knowing or under circumstances in which he should know that such other person intends to use such firearm in such conduct shall be criminally liable for such conduct and shall be prosecuted and punished as if he were the principal offender.

§ 53a-9. Lack of criminal responsibility; absence of prosecution or conviction not a defense

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: (1) Such other person is not guilty of the offense in question because of lack of criminal responsibility or legal capacity or awareness of the criminal nature of the conduct in question or of the defendant's criminal purpose or because of other factors precluding the mental state required for the commission of the offense in question; or (2) such other person has not been prosecuted for or convicted of any offense based upon the conduct in question, or has been acquitted thereof, or has legal immunity from prosecution therefor; or (3) the offense in question, as defined, can be committed only by a particular class or classes of persons, and the defendant, not belonging to such class or classes, is for that reason legally incapable of committing the offense in an individual capacity.

§ 53a-45. Murder: Penalty; waiver of jury trial; finding of lesser degree

(a) Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a unless it is a capital felony committed prior to April 25, 2012, punishable in accordance with subparagraph (A) of subdivision (1) of section 53a-35a, murder with special circumstances committed on or after April 25, 2012, punishable as

a class A felony in accordance with subparagraph (B) of subdivision (1) of section 53a-35a, or murder under section 53a-54d.

(b) If a person indicted for murder or held to answer for murder after a hearing conducted in accordance with the provisions of section 54-46a waives his right to a jury trial and elects to be tried by a court, the court shall be composed of three judges designated by the Chief Court Administrator or his designee, who shall name one such judge to preside over the trial. 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.

(c) The court or jury before which any person indicted for murder or held to answer for murder after a hearing conducted in accordance with the provisions of section 54-46a is tried may find such person guilty of homicide in a lesser degree than that charged.

§ 53a-48. Conspiracy. Renunciation

(a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

(b) It shall be a defense to a charge of conspiracy that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

§ 53a-54a. Murder

(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a) of this section, on the question of whether the defendant acted with intent to cause the death of another person.

(c) Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a unless it is (1) a capital felony committed prior to April 25, 2012, by a person who was eighteen years of age or older at the time of the offense, punishable in accordance with subparagraph (A) of subdivision (1) of section 53a-35a, (2) murder with special circumstances committed on or after April 25, 2012, by a person who was eighteen years of age or older at the time of the offense, punishable as a class A felony in accordance with subparagraph (B) of subdivision (1) of section 53a-35a, or (3) murder under section 53a-54d committed by a person who was eighteen years of age or older at the time of the offense.

§ 53a-59. Assault in the first degree: Class B felony

(a) A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or (2) with intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such person or to a third person; or (3) under circumstances evincing an extreme indifference to human life he recklessly engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person; or (4) with intent to cause serious physical injury to another person and while aided by two or more other persons actually present, he causes such injury to such person or to a third person; or (5) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of the discharge of a firearm. (b) Assault in the first degree is a class B felony provided (1) any person found guilty under subdivision (1) of subsection (a) shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court and (2) any person found guilty under subsection (a) shall be sentenced to a term of imprisonment of which ten years of the sentence imposed may not be suspended or

reduced by the court if the victim of the offense is a person under ten years of age or if the victim of the offense is a witness, as defined in section 53a-146, and the actor knew the victim was a witness.

§ 54-82. Accused's election of trial by court or by jury. Number of jurors

(a) 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.

(b) If the accused is charged with a crime punishable by death, life imprisonment without the possibility of release or life imprisonment and elects to be tried by the court, the court shall be composed of three judges to be designated by the Chief Court Administrator, or the Chief Court Administrator's designee, who shall name one such judge to preside over the trial. 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.

(c) If the accused does not elect to be tried by the court, the accused shall be tried by a jury of six except that no person charged with an offense which is punishable by death, life imprisonment without the possibility of release or life imprisonment, shall be tried by a jury of less than twelve without such person's consent.

§ 54-82b Right to trial by jury

(a) The party accused in a criminal action in the Superior Court may demand a trial by jury of issues which are triable of right by a jury. There 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.

(b) In criminal proceedings the judge shall advise the accused of his right to trial by jury at the time he is put to plea and, if the accused does not then claim a jury, his right thereto shall be deemed waived, but if a judge acting on motion made by the

accused within ten days after judgment finds that such waiver was made when the accused was not fully cognizant of his rights or when, in the opinion of the judge, the proper administration of justice requires it, the judge shall vacate the judgment and cause the proceeding to be set for jury trial.

(c) In any criminal trial by a jury, except as otherwise provided by law, such trial shall be by a jury of six.

Practice Book Provisions

Sec. 42-1. Jury Trials; Right to Jury Trial and Waiver

The defendant in a criminal action may demand a trial by jury of issues which are triable of right by jury. If at the time the defendant is put to plea, he or she elects a trial by the court, the judicial authority shall advise the defendant of his or her right to a trial by jury and that a failure to elect a jury trial at that time may constitute a waiver of that right. If the defendant does not then elect a jury trial, the defendant's right thereto may be deemed to have been waived.

Sec. 42-33. Impeachment of Verdict

Upon an inquiry into the validity of a verdict, no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror nor any evidence concerning mental processes by which the verdict was determined. Subject to these limitations, a juror's testimony or affidavit shall be received when it concerns any misconduct which by law permits a jury to be impeached.

Sec. 60-2. Supervision of Procedure

The supervision and control of the proceedings shall be in the court having appellate jurisdiction from the time the appellate matter is filed, or earlier, if appropriate, and, except as otherwise provided in these rules, any motion the purpose of which is to complete or perfect the record of the proceedings below for presentation on appeal shall be made to the court in which the appeal is pending. The court may, on its own motion or upon motion of any party, modify or vacate any order made by the trial court, or a judge thereof, in relation to the prosecution of an appeal. It may also, for example, on its own motion or upon motion of any party: (1) order a judge to take any action necessary to complete the trial court record for the proper presentation of the appeal;

(2) consider any matter in the record of the proceedings below necessary for the review of the issues presented by any appeal, regardless of whether the matter has been included in any party appendix; (3) order improper matter stricken from a brief or appendix; (4) order a stay of any proceedings ancillary to a case on appeal; (5) order that a party for good cause shown may file a late appeal, petition for certification, brief or any other document unless the court lacks jurisdiction to allow the late filing; (6) order that a hearing be held to determine whether it has jurisdiction over a pending matter; (7) order an appeal to be dismissed unless the appellant complies with specific orders of the trial court, submits to the process of the trial court, or is purged of contempt of the trial court; (8) remand any pending matter to the trial court for the resolution of factual issues where necessary; or (9) correct technical or other minor mistakes in a published opinion which do not affect the rescript.

Sec. 66-5. Motion for Rectification; Motion for Articulation

A motion seeking corrections in the transcript or the trial court record or seeking an articulation or further articulation of the decision of the trial court shall be called a motion for rectification or a motion for articulation, whichever is applicable. Any motion filed pursuant to this section shall state with particularity the relief sought and shall be filed with the appellate clerk. Any other party may oppose the motion by filing an opposition with the appellate clerk within ten days of the filing of the motion for rectification or articulation. The trial court may, in its discretion, require assistance from the parties in providing an articulation. Such assistance may include, but is not limited to, provision of copies of transcripts and exhibits.

The appellate clerk shall forward the motion for rectification or articulation and the opposition, if any, to the trial judge who decided, or presided over, the subject matter of the motion for rectification or articulation for a decision on the motion. If any party requests it and it is deemed necessary by the trial court, the trial court shall hold a hearing at which arguments may be heard, evidence taken or a stipulation of counsel received and approved. The trial court may make such corrections or additions as are necessary for the proper presentation of the issues. The clerk of the trial court shall list the decision on the trial court docket and shall send notice of the court's decision on the motion to the appellate clerk, and the appellate clerk shall issue notice of the decision to all counsel of record.

Nothing herein is intended to affect the existing practice with respect to opening and correcting judgments and the records on which they are based. The trial court shall file any such order changing the judgment or the record with the appellate clerk.

Corrections or articulations made before the clerk appendix is prepared shall be included in the clerk appendix. Corrections or articulations made after the clerk appendix is prepared but before the appellant's brief is prepared shall be included in the appellant's party appendix. Corrections or articulations made after the appellant's brief has been filed, but before the appellee's brief has been filed, shall be included in the appellee's party appendix.

The sole remedy of any party desiring the court having appellate jurisdiction to review the trial court's decision on the motion filed pursuant to this section or any other correction or addition ordered by the trial court during the pendency of the appeal shall be by motion for review under Section 66-7.

Upon the filing of a timely motion pursuant to Section 66-1, the appellate clerk may extend the time for filing briefs until after the trial court has ruled on a motion made pursuant to this section or until a motion for review under Section 66-7 is decided.

Any motion for rectification or articulation shall be filed at least ten days prior to the deadline for filing the appellant's brief, unless otherwise ordered by the court. If a final order has been issued for the appellant's brief, no motion for rectification or articulation shall be filed without permission of the court. No motion for rectification or articulation shall be filed after the filing of the appellant's brief except for good cause shown.

A motion for further articulation may be filed by any party within twenty days after issuance of notice of the filing of an articulation by the trial judge. A motion for extension of time to file a motion for articulation shall be filed in accordance with Section 66-1.

Federal Rules

Fed. R. Crim. P. 23. Jury or Nonjury Trial

(a) Jury Trial. If the defendant is entitled to a jury trial, the trial must be by jury unless:

(1) the defendant waives a jury trial in writing;

(2) the government consents; and

(3) the court approves.

(b) Jury Size.

(1) In General. A jury consists of 12 persons unless this rule provides otherwise.

(2) Stipulation for a Smaller Jury. At any time before the verdict, the parties may, with the court's approval, stipulate in writing that:

(A) the jury may consist of fewer than 12 persons; or

(B) a jury of fewer than 12 persons may return a verdict if the court finds it necessary to excuse a juror for good cause after the trial begins.

(3) Court Order for a Jury of 11. After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror.

(c) Nonjury Trial. In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion.

CERTIFICATION OF SERVICE AND FORMAT

Pursuant to Practice Book §§ 67-2 and 67-2A(g), the petitioner hereby certifies that:

(1) The brief and party appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law;
(2) A copy of the brief and party appendix was sent electronically to: Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Tel. (860) 258-5807, email: ocsa.appellate.dcj@ct.gov; and mailed to the petitioner;
(3) The brief and party appendix filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically;
(4) The brief and party appendix comply with Practice Book §§ 67-2 and 67-2A;
(5) The word count of this brief is 15,367 words, in accordance with the Court's Order dated June 21, 2023, granting an additional 2,000 words;
(6) No deviations from this rule were requested or approved; and
(7) The electronic brief is filed in compliance with the guidelines.

By: *Erica A. Barber*

Erica A. Barber
Assistant Public Defender