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SUPREME COURT
of the
STATE OF CONNECTICUT

S.C. 20632

STATE OF CONNECTICUT
v.
LARISE KING

REPLY BRIEF OF THE DEFENDANT-APPELLANT WITH PARTY APPENDIX

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REPLY TO STATE'S ARGUMENTS

Ms. King waived her right to a jury trial in a canvass that provided no information about what that right entailed, and the sparse information that the trial court did provide was misleading. She was convicted of the offenses by two of the three judges based on an inaccurate and overstated portrayal of what the evidence in the case showed. She stood before the trial court, which delivered its lengthy memorandum of decision in less than 19 (including overnight) hours after the close of its deliberations, calling into serious question the fundamental principle that the law "hears before it condemns, proceeds upon inquiry, and renders judgment only after trial." *Winebrenner v. United States*, 147 F.2d 322, 328 (8th Cir. 1945). She then satisfied her obligations on appeal as required by this Court's decision in *State v. Walker*, 319 Conn. 668 (2015), and, over a period of more than five months waited for the trial court to act on her request to clarify its procedures based on the apparent irregularities in the issuance of its decision. She was denied clarification based on a variety of claimed obstacles that disregard the unique circumstances of her case and appear to be aimed at sidestepping the issue. Ms. King did not receive a fair trial, and the state's argument to the contrary should be rejected.

I. 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 Her Jury Trial Right.

The state's argument on this point, boiled down, relies on defense counsel's asserted obligation to inform his client of the material differences between a jury trial and a bench trial even though

our courts have refused to set forth any standards about what those material differences are. See State's Brief at 45. The trial court bears the ultimate responsibility for ensuring a valid waiver. *See Patton v. United States,* 281 U.S. 276, 312 (1930) (duty of trial court in accepting waiver of jury trials "is not to be discharged as a mere matter of rote, but with sound and advised discretion … **and with a caution increasing in degree as the offenses dealt with increase in gravity**.") (Emphasis added). The relevant cases offer scant or negligible guidance to the trial courts regarding the type of record inquiry that should be made in discharging its duty. The result of this avoidance is a fragmented series of decisions holding that waiver is conclusively shown when the record establishes little more than the defendant has been told that he or she is entitled to a "jury trial" with varying descriptions of what that right entails. Ms. King stands by her arguments in her opening brief. The court trial is a creation of statute. A criminal defendant's right to a jury trial is embedded in our state constitution, which guarantees specific procedural rights above and beyond those afforded under the federal constitution, but which our current waiver requirements do not acknowledge or enforce. Defendant addresses the following points from the state's brief.

A. Because our state constitution assigns specific meaning to the right to a jury trial and protects this right as both inviolable and personal to the defendant, the trial court's cursory inquiry in this case was defective.

The state glosses over our state constitutional text while misinterpreting the extratextual sources it does cite. The state argues that the text of our state constitution is "irrelevant" to the standard that applies to waiving the right to a jury trial. State's Brief at 39. The state's argument ignores the longstanding principle that the means of protecting constitutional rights and establishing waiver requirements

are directly related to the rights that one gives up. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (by entering a guilty plea the defendant waived the rights to trial by jury, confrontation, and the right against self-incrimination, **thus due process required that the record affirmatively show that the defendant was aware of his three constitutional rights when waiving them**). Connecticut is the only state in the nation which has constitutionalized the procedural guarantees that fall under the right to a jury trial—the number of jurors, the right to question jurors, and the right to preemptory challenges. *Rozbicki v. Huybrechts*, 218 Conn. 386, 392 (1991). Although in analyzing the federal constitution the United States Supreme Court has been unable "to divine precisely what the word jury imported to the Framers," *Williams v. Fla.*, 399 U.S. 78, 98 (1970),we know exactly what the constitution's use of the term "trial by jury" means in Connecticut.[1] The argument on appeal is a simple one:

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[1] The state relies on *Williams v. Florida*, 399 U.S. 78, 98 (1970) to argue that there is not necessarily a benefit to the 12-person, unanimous jury that Ms. King waived without advisement. See State's brief 38 (claiming, based on *Williams*, that a 12-person jury is not necessarily more beneficial to a defendant than 6-person jury). The state's reliance on *Williams* is curious as the Supreme Court jettisoned *Williams'* thinking in *Ramos v. Louisiana*, 140 S. Ct. 1390, 1401 (2020). To explain, in *Apodaca v. Oregon*, 406 U.S. 404, 410 (1972), the United States Supreme Court relied on the cost-benefit analysis in *Williams* to conclude that a jury verdict in a criminal case does not need to be unanimous. However, in *Ramos*, the court rejected that thinking and held that the Sixth Amendment right to jury trial requires a 12-person unanimous verdict to convict a defendant of a serious offense.

the record must give us some assurance that the defendant has been made aware of those rights before waiving them. *See Boykin v. Alabama*, supra, 395 U.S. at 243. Because our state constitution assigns specific meaning to the right to a jury trial and protects this right as both inviolable and personal to the defendant, the trial court's cursory inquiry in this case was defective.

The state cites Swift's Digest for the proposition that waiver of a jury trial is a feature of our constitutional history. See State's Brief at 38, 40 ("our constitutional history supports both rights to a jury and to waiver of that right."). But the state overlooks Swift's earlier commentary in 1795 with respect to the jury trial right in criminal trials. As Swift explained in A System of the Laws of the State of Connecticut,

> When the prisoner has pleaded not guilty, the clerk of the court will ask him. By whom he will be tried? In cases not capital the proper answer is, "By my country," – but in cases capital, the answer is, "by God and my country." The putting the question to the jury to decide by whom he will be tried. Seems to imply, that he has an option. This was introduced into England at a time when there were various methods of trial, and the prisoner actually had a choice. The practice has been continued here tho[ugh] a person has no such choice: **for the only legal method by which the person accused can be tried, is by jury.** The statute law says, that every person prosecuted for any delinquency before the superior or country courts, shall have liberty of trial by jury, if desired, **but has provided no other mode if desired, nor is any other mode known to the common law.** When therefore a person accused of a crime, wishes to try the question of fact, he must desire a jury; for the

court cannot be judges of fact, unless expressly authorized by some statute, as they are in civil causes.

Z. Swift, A System of the Laws of the State of Connecticut, supra, at pp. 396-397. Swift went on to observe that some courts "seem" to have adopted the principle that they have the power to try a criminal, if they please on his request, but still only for "offenses not capital." *Id.* 397.[2]

Thus, counter to the state's arguments, our common law history, understood in its proper context, and examined specifically with respect to criminal trials, does not "support[] both rights to a jury and to waiver of that right." State's Brief at 40. As Swift explained, no statute or common law principle in Connecticut authorized judges to decide facts in criminal cases, distinguishing the procedure from civil trials. Indeed, because in a criminal case "the only legal method" by which a person could be tried is by jury, it makes sense that our constitution is "silent" on the standard for a valid waiver of a jury in favor of a court trial—the procedure did not become a feature of Connecticut law until later enacted by statute.[3] *See State v. Worden*, 46

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[2] "[S]even crimes—treason, murder, rape, bestiality, sodomy, aggravated mayhem, and arson that endangers life—were punishable by death in Connecticut." *State v. Ross*, 230 Conn. 183, 294 (1994), citing, 2 Z. Swift, A System of the Laws of the State of Connecticut (1796) p. 296.

[3] This is not the case in other states. Many states have jury trial waiver provisions incorporated in their state constitutions. For example, the New York state constitution specifically provides that, "[a] jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open

Conn. 349, 356 (Conn. 1878) (discussing the history of "the establishment of trial by jury in England"—not "our common law tradition" as the state's suggests on page 40 of its brief—and the statute of 1874 authorizing the defendant to elect to be tried by the court instead of a jury).

The state argues that the sibling state and federal authority does not support finding a heightened Connecticut constitutional right to a jury-waiver canvass. State's Brief at 43-44. In advancing this argument, the state again fails to acknowledge that the constitutionalized definition of "the right of trial by jury" in Art. I, §19 is unique to this state. For this reason, the sibling state and federal authority is only relevant insofar as it demonstrates the problems that arise when states fail to define the content of "jury trial." As the

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court before and with the approval of a judge or justice of a court having jurisdiction to try the offense." N.Y. Const. art. I, § 2. It further provides, that "[t]he legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver." Id. Similarly, the California state constitution provides that "[a] jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel." Cal. Const. art. I, § 16. See also Idaho Const. art. I, § 7 ("A trial by jury may be waived in all criminal cases, by the consent of all parties, expressed in open court . . .") Ark. Const. Art. II, § 7 ("As prescribed by law, a jury trial may be waived by the parties in all cases."); Minn. Const. Art. I, § 4 ("A jury trial may be waived by the parties in all cases in the manner prescribed by law."); Wis. Const. Art. I, § 5 ("a jury trial may be waived by the parties in all cases in the manner prescribed by law. . .").

defendant pointed out in her principal brief (Defendant's Brief at 33-35), other courts have encountered difficulties in ascertaining whether defendants have an accurate understanding of the jury trial right, leading them to establish supervisory rules to address the problem.

The state suggests that the defendant "misconstrues" the sister state authority that lends support to her claim, *New Hampshire State v. Hewitt*, 128 N.H. 557 (1986), and its application to this issue. See State's Brief at 43. *Hewitt*, which was authored by Justice Souter when he served on the New Hampshire Supreme Court, dealt with the sufficiency of the defendant's waiver of a 12-person jury under the New Hampshire state constitution. Applying *Boykin*'s principles, the *Hewitt* court found that the record did not reflect that the defendant waived his state constitutional right to a jury of twelve when the 12th juror was excused, and that the defendant was silent when his counsel agreed to proceed with a jury. *Hewitt,* supra, 128 N.H. at 558. The court concluded that "a personal waiver by the defendant, indicating his understanding of the right to a full jury [of twelve], is required to effectuate the constitutional guarantee." *Id.* at 561.[4]

The defendant argues that the Connecticut constitution provides for certain specific constitutional guarantees not enumerated or provided for under the federal constitution. There is nothing on this record to show that the defendant waived those rights. While "not

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[4] Under the state's apparent reading of *New Hampshire State v. Hewitt*, 128 N.H. 557 (1986), the election to forego the entitlement to 12/12 jurors under the state constitution is a distinct analysis from the election to forego the right in its entirety. Ms. King disagrees. Under *Boykin's* principles, the forfeiture of the jury trial right in its entirety, along with its derivative procedural guarantees, carries more weight, thus requiring a particularized canvass.

every constitutionally protected interest rises to the level of a fundamental right demanding the procedural solicitude of the standards set forth in … *Boykin*," *Hewitt,* 128 N.H. at 560, Ms. King argues that the critical importance of the jury trial right, and its derivative constitutional guarantees, demands such procedural safeguards.

B. Relying on a Presumption of Validity to Uphold a Defendant's Waiver Without Articulating Any Uniform Legal Standards is a Failed Experiment.

The state relies on a footnote in *State v. Kerlyn T.*, 337 Conn. 382, 396 n. 10 (2020) and *Gore,* 288 Conn. 770—cases where there was no state constitutional claim or consideration of the rights guaranteed to the citizens of Connecticut—to argue that a supervisory rule is inappropriate.[5] The defendant recognizes that this Court has declined to exercise its supervisory authority to set forth waiver requirements, even while doing so in other contexts involving rights not expressly provided for under our state constitution. *See*, *e.g.*, *In re Yasiel R.*, 317 Conn. 773 (2015) (implementing rules or guidelines for court's cavass as a precondition to waive the right to a trial in a parental termination proceeding). In relying on *Kerlyn T.*, the state ignores the practical difficulties associated with relying on defense counsel to impart the

[5] Importantly, as the *Gore* Court stated: "Because the defendant has not provided a separate analysis of the right under the state constitution, and has not claimed that the state provisions provide greater protection than their federal counterparts, for purposes of this appeal we treat the jury trial rights arising from the state and federal constitutions as coextensive." *State v. Gore*, 288 Conn. 770, 777, 955 A.2d 1, 7 (2008).

necessary information to his client about the jury trial right when our courts have failed to establish any uniform standards. The defendant does not contend that the court's canvass should be "overly detailed or extensive." State's Brief at 29. Consistent with the long-established principle that waiver must be undertaken "with sufficient awareness of the relevant circumstances and likely consequences," *Brady v. United States*, 397 U.S. 742, 748 (1970), the defendant maintains that the canvass should state the basic elements of a jury trial. Such a requirement would cost our courts very little, as demonstrated by the overwhelming sibling state and federal authority adopting rules to address this issue. Simply stating that it is the better practice for the court to ensure that the defendant understands that she has the right to a jury trial has not been effective, as best demonstrated by the disjointed and defective canvass provided here. Ms. King waived her right to a jury trial in a canvass that provided no information about what that right entailed, and the little information that the trial court did provide was misleading.[6]

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[6] The state submits that the defendant fails to give the trial court's language in the canvass regarding mixed verdicts its "natural meaning." State's Brief at 38; see 2/5T.6 (trial court's canvass: "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"). The "natural meaning" of this language may be clear to an appellate lawyer or a judge, it is not clear to a person with no experience in the criminal justice system, like Miss King. Indeed, the defense proposes that if this Court were to survey first and second-year law students concerning what this language means, it would get different answers referencing the possibility of hung juries, mistrials and the like.

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.

II. The Evidence is Insufficient to Sustain the Defendant's Convictions for Murder as an Accessory and Conspiracy to Commit Murder.

The state contends there was sufficient evidence of the defendant's intent to kill Dathan Gray.[7] The state ignores errors in the court's factual findings. It fails to distinguish the cases cited in

[7] The state suggest that the defendant limits her definition of accessory to aiding in the murder. State's Brief at 48, fn. 15. This is not correct. As the defendant made clear in her brief, the state's theory was that "that the defendant solicited her cousin, Oronde Jefferson, and his friend, Andrew Bellamy, to murder Gray," but there was no evidence to support any of the ways in which one can commit the crime of accessory to commit murder, "including soliciting, requesting, commanding, and importuning another person in the commission of the substantive offense of murder," because there was no evidence of the defendant's intent to commit the crime of murder at all. Defendant's brief at 10, 19, 44, 45, 49.

defendant's brief in which this Court has refused to uphold convictions for accessory and/or conspiracy to commit murder on substantially more evidence than presented here, and the cases the state does cite only serve to highlight the lack of evidence here. Even if all favorable inferences that can be drawn from the evidence are indulged, the state's evidence comes up short. The defendant's convictions should be vacated.

On the issue of motive, the state, citing *State v. Peeler*, 267 Conn. 611, 636 (2004), argues that "evidence of a defendant's involvement in a murder is 'buttressed immeasurably' when there is no indication that anyone else had a motive but there is evidence that the defendant and her 'trusted confederates' had reason to want the victim dead." State's Brief at 49. That may have been true in *Peeler*, but here, as the defendant pointed out in her principal brief —and the state fails to address—the trial court premised its finding of guilt on the erroneous conclusion that Miss King was the sole person with a motive to harm the victim. See Defendant's Brief 48-49.[8] The majority's error was important; in failing to acknowledge the evidence showing that the defendant's family harbored ill will toward the victim and had an independent motive to harm him, the majority overlooked the far more plausible theory that Jefferson shot the victim in anger without Ms. King's endorsement. Moreover, on this point, the state, like the majority, ignores the evidence showing that the victim, who was intoxicated and under the influence of methamphetamines, fought with several other people that he encountered that evening giving others an incentive to harm him.

The state cites to *State v. Rosado*, 134 Conn. App. 505, 507 (2012) for the proposition that the defendant's intent and an

[8] Counter to the undisputed evidence at trial, the trial court found that "Jefferson did not have an issue with Mr. Gray." C/A 21.

agreement to commit murder can be inferred from her "presence at critical stages of the conspiracy that could not be explained by happenstance." State's Brief at 49. This case is a far cry from *Rosado*. In *Rosado*, the defendant admitted to being present at a meeting where his drug lord, "Primo," openly discussed placing a $15,000 bounty for the killing of the victim and shared details of the conspiracy immediately before the killing. *Id.* at 512. In addition, forensic testing showed that DNA evidence consistent with Rosado's DNA was on the murder weapon. *Id*. In Ms. King's case, there was no evidence of discussions. There were no admissions by the defendant concerning her awareness of any plan to murder Dathan Gray. There was no evidence to show that Ms. King was even aware that the alleged uncharged co-conspirators possessed a firearm. Counter to the state's arguments, a "linkup" at the crime scene is insufficient to show an intent to commit murder. State's Brief at 49.

On the consciousness of guilt evidence, the state argues that "it is well settled under our law that lies told to the police are evidence that create an inference of guilt." State's Brief at 49-50. The United States Supreme Court has "consistently doubted" the probative value of consciousness of guilt evidence—and for good reason. *Wong Sun v. United States*, 371 U.S. 471, 484 n.10 (1963). Such evidence is susceptible to multiple interpretations and has little to no value when the defendant's intent is at issue and lesser included offenses are charged, as is the case here. *cf. State v. Hinds*, 86 Conn. App. 557, 566-67 (2004) (in assault case, it was error to give instruction due to false statement made to police during motor vehicle stop because no evidence defendant made false statement in connection to assault as opposed to motor vehicle violation).

The state cites *State v. Gosselin*, 169 Conn. 377, 380-81 (1975) for the proposition that the "synchronized behavior" between the

defendant and the uncharged coconspirators shows an agreement between the principals and the defendant as an accessory. State's Brief at 51. The defendant's role in the burglary in *Gosselin* was not limited to "waiting ready" in a car and "picking up principals" as the state suggests in its brief. See State's Brief at 51. The state overlooks the fact that there was cooperator testimony in *Gosselin* establishing that the defendant "asked [his co-conspirators] if they would steal some gold coins," and then drove them to pick up a tire iron to commit the crime. *Gosselin*, supra, 169 Conn. at 380. The "synchronized behavior" that existed in *Gosselin*—coupled with direct testimony of the defendant's role as the architect of the scheme— was absent here.

On the issue of the uncharged co-conspirators, the state parrots from the statutory provisions acknowledged and cited in the defendant's own brief concerning the legality of the accessorial liability and conspiracy charges, while failing to address what this gap in the state's investigation says about the sufficiency of its evidence. *See State v. Gomes*, 337 Conn. 826, 852–53 (2021). Had the state had probable cause to charge the gunmen, it would have. The state's inability to identify the gunmen by anything other than a supposed height difference between the two men that is not even evident in the relevant surveillance footage around the car, their presence in the neighborhood where the state's other witnesses also spent time that evening, and a series of calls without content speaks to the significant problems with its case.[9] The state's failure to charge Jefferson and

[9] As to one discrepancy in the evidence concerning the uncharged gunmen, the mismatched clothing as demonstrated by the footage (which this Court can review), and the court's erroneous findings on this point noted in the defendant's brief at 42, the state argues that the "trier reasonably could determine that the culprits put

Bellamy, and the limited evidence upon which it relied to prove their involvement, belies its arguments concerning their asserted involvement now, and by extension, its arguments concerning the defendant's purported role in enlisting them to carry out the murder.

Finally, the state argues that "had the understanding been that Jefferson would simply 'rough up' the victim, the defendant, who had exhibited no qualms about publicly fighting with him, would have had no reason to sit clandestinely with the car running." State's Brief at 53-54. The state's reasoning on this point is completely speculative. It is well settled that "a claim of insufficiency of the evidence must be tested by reviewing no less than, **and no more than, the evidence introduced at trial.**" *State v. Morelli*, 293 Conn. 147, 153 (2009) (Emphasis added). Even assuming that it could be reasonably inferred that Jefferson and Bellamy fired the fatal shots at Gray, the state failed to present evidence to show that the defendant was complicit in a plan to cause Gray's death, as required to prove the offenses. Resorting to blanket assumptions about the defendant's behavior based on her conduct during a single prior fight involving the victim fails to bridge the gap. The state's references to the defendant's act of

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on hoodies, perhaps retrieved from the trunk." State's brief at 52. The trier could, but it did not. The court's decision in question found that "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 … get out of the rear, passenger seat on the driver's side of the vehicle." C/A 13, 14, SE98 (Camtasia Video) at 4:40. The issue of the mismatched clothing may seem to be a minor point, but it is indicative of the type of confirmation bias that can arise in these cases. See also Issue III.

turning off the headlights are similarly speculative and misplaced—it is not at all clear from the state's brief why turning off the headlights after shots are fired in an urban area is somehow indicative of a premeditated plan to commit murder. If anything, a pre-arranged plan to commit murder and an effort to go undetected would seem to warrant turning the headlights off **before the shooting.**

"The line between permissible inference and impermissible speculation is not always easy to discern. When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation. When that point is reached is, frankly, a matter of judgment." (Internal quotation marks omitted.) *State v. Elsey*, 81 Conn. App. 738, 744-45 (2004).

The state resorts to speculation and conjecture in support of its arguments to uphold the conviction. As to the Accessory to Murder count, the state failed to prove that defendant had "a specific intent to murder Dathan Gray concomitantly with the intent to assist the two gunmen in carrying out the crime." C/A at 23, Dissenting Memorandum of Decision. Further, the state did not "present sufficient evidence to prove beyond a reasonable doubt that the defendant had the specific intent 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." C/A at 23, Dissenting Memorandum of Decision. Defendant's convictions must be vacated.

III. The Rules Set Forth in *State v. Washington*, 182 Conn. 419 (1980), Ensuring the Constitutional Integrity of the Jury's Verdict Should Similarly Apply in Trials Before a Three-judge Panel. This Court Should Order the Trial Court to Supplement the Record.

The state does not address the merits of the defendant's claim, and it is conspicuously silent on whether the timeline of the court's deliberations points to an irregularity. Reasonable inferences can be made that pre-submission deliberations occurred in this case. An order from the Court requiring that the trial court articulate and/or supplement the record in a manner consistent with the defendant's request will foreclose any speculation as to harm. *See State v. Castonguay*, 194 Conn. 416, 437 (1984).

It is imperative that the fact finder maintain impartiality until all of the evidence has been presented and the case has been submitted. While it is not uncommon for judges to prepare written decisions in advance of hearing arguments in other contexts, for example, pretrial and posttrial motions, sentencing proceedings, and even in deciding suppression motions, the thrust of the defendant's claim on appeal is that when the court sits as juror, that practice violates due process principles. Marshaling the evidence and preparing findings, however tentative, forecloses the factfinder's fair analysis and consideration of subsequently introduced evidence and arguments and sets into motion decision-making which should be reserved for the deliberations at the end of the trial. A defendant has a constitutional right to be heard that continues throughout the proceedings and until after closing arguments and the submission of the case. *State v. Washington*, 182 Conn. 419, 425-28 (1980); *see also Herring v. New York*, 422 U.S. 853, 862 (1975) (defendant has a constitutional right to

be heard through counsel in summation of the evidence, even in a bench trial).

The state and Ms. King disagree on *Walker's* application. The defendant's motion for rectification sought to supplement the record to include an existing matter that occurred off the record. *See State v. Walker*, supra, 319 Conn. 681 (A motion for rectification is the appropriate vehicle to supplement the record to include discussions that occurred off the record). The state relies on a cabined interpretation of *Walker* and an emphasis on "known matters" to argue that Ms. King is not entitled to consideration of her claims on appeal. State's Brief at 60. Bafflingly, the state also argues that it was incumbent on the defendant's trial counsel to raise the issue below because "the facts prompting her rectification motion were known at trial." State's Brief at 62. The incongruity in the state's brief demonstrates the problems with its argument. In *Walker*, this Court concluded that the record lacked a factual predicate for the defendant's claims. *Id.* at 677. It concluded that fault lay not with the defendant's failure to request a hearing and develop a record below, but rather with the defendant's failure to rectify the record on appeal to augment the record to include the manner and scope of any off-record discussions pertaining to defense counsel's conflict of interest. *Id.* at 681 ("the record must be modified or augmented in some fashion" by rectification "to include matters that occurred off the record."). The state offers no persuasive reason—and defendant knows of none—why her claim should be treated differently.

The state's argument against remand also fails to address the unique posture of this case, in particular, the fact that this was a bench trial. In this regard, the state points to *State v. Washington*, 345 Conn. 258, 285 (2022) and other cases involving jury trials where there was no defense request for remand to make inapposite arguments

about the defendant's asserted failure to raise this issue below to permit the court an opportunity to "make factual findings" "as needed." See State's Brief at 62. The trial court may supplement the record to include its own recollections concerning the timing and scope of its deliberations in this case, just as it would in response to a request for articulation or any other similar request on remand. This Court routinely remands cases to the trial courts for further elucidation regarding the courts' processes and decision-making, and it is equally necessary that it do so here. *See*, *e.g.*, *State v. Kelly*, 313 Conn. 1, 4 (2014) (ordering the trial court to explain, after the fact, that it had credited certain suppression hearing testimony on which the Appellate Court relied for the first time on appeal resulting in a situation whereby the trial court reconsidered and rewrote prior factual findings with this Court's endorsement); *In re Nevaeh W.*, 317 Conn. 723, 735 (2015) (Ordering the trial court multiple times to "complete the trial court record" by responding to questions concerning its failure to consider required statutory factors that did not appear in its memorandum of decision).

In a similar vein, the state argues that the question of the panel's pre-submission deliberations should have been raised below to permit the trial court the opportunity to "issue a ruling" on the matter. State's Brief at 55, 59, 62. Under the state's imagined course, the judges should have been permitted to rule on this issue as both factfinders and witnesses. This argument makes no sense. The question presented focuses on whether it is appropriate for a judge or judges sitting as fact finders in a murder trial to marshal the evidence and write a decision before the case is submitted and deliberations have commenced—something that would have only been apparent to the defendant **after** the panel had done just that. *Cf. State v. Brown*, 235 Conn. 502, 525 (1995) (**creating a new rule** and remanding for

inquiry into juror misconduct that came to light after the verdict and before sentencing **despite the fact that defense counsel did not request such an inquiry**). It would have been improper for the judges to rule or weigh in on this issue in response to a posttrial motion because it implicates the panel's conduct and their impartiality would be questioned. Rule 2.11(a), Code of Jud. Conduct; Conn. Prac. Book § 1-22 (a).[10]

Counter to the state's arguments, this is not the type of situation in which raising the issue in a posttrial motion would have served any practical end, particularly where the issue of the propriety of pre-submission deliberations in the context of a bench trial is a legal determination that falls to this Court. For this reason, the state's reliance on cases involving the trial court's discretionary decisions in the context of the investigation of jury misconduct claims is misplaced. See State's Brief at 61-62, citing *State v. Owens*, 100 Conn. App. 619, cert. denied, 282 Conn. 927 (2007).

The state argues that a remand "would eviscerate preservation requirements." State's Brief at 63. Our courts, however, review unpreserved claims under *Golding* in the interest of fairness and in expediting resolution of constitutional claims. To the extent that the state rehashes the arguments it made in *State v. Ortiz*, 280 Conn. 686,

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[10] Rule 2.11(a) provides in relevant part: "(a) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned…" Practice Book § 1-22 (a) provides in relevant part that "[a] judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Rule 2.11 of the Code of Judicial Conduct…."

712 (2006) to call into question the appropriateness of such proceedings under *Golding's* first prong, this Court rejected those arguments in *Ortiz* for the same reasons it should reject them now. 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. The defendant was entitled to rely on the trial court's independent obligation to be alert to issues that potentially undermine the fairness of her trial. It would be manifestly unfair to the defendant to kick the proverbial can down the road to habeas proceedings and cause further delay. Her claim should be addressed in a timely fashion while memories are still fresh. *See State v. Ortiz*, supra, 280 Conn. 712 (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).

When the court considers a constitutional claim on appeal, its proceedings must comply with federal due process principles. *See Cole v. Arkansas*, 333 U.S. 196, 201 (1948). An inconsistent application of the rules to foreclose review of her claim violates due process. The defendant has consistently sought access to the timing and character of any off-record pre-submission discussions by the three judges. If, contrary to the available record, no such deliberations occurred, it would cost the judges very little to say so and would assure Ms. King and the public that important interests of procedural fairness have been served. Ms. King's fair trial rights are paramount to any potential concerns about asking the judges to clarify the procedures underlying their decision.

IV. Conclusion

For the reasons set forth in defendant's brief and this reply brief, 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,
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Defendant-Appellant

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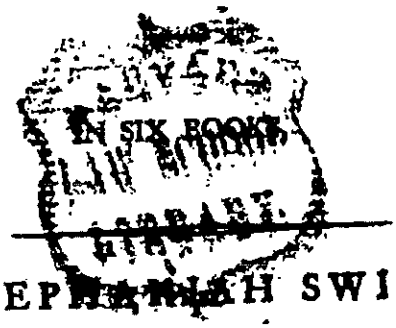
PETER S. DU PONCEAU.

A SYSTEM OF THE LAWS OF THE STATE of CONNECTICUT.



By ZEPHANIAH SWIFT.

VOLUME I.

WINDHAM: PRINTED BY JOHN BYRNE, FOR THE AUTHOR.
1795.-96

againſt a robber on the highway, or a burglarian; but he muſt plead generally not guilty, and give the ſpecial matter in evidence: for ſuch a ſpecial plea not only amounts to the general iſſue, but as in all criminal proſecutions the facts are charged to be done with a criminal intent, which is the giſt of the information, the whole ought to be directly negated: for tho it appears on the trial, that the facts were done, yet if it appears, that they were not done with a criminal intent, the perſon cannot be found guilty. There can therefore, never be a propriety in confeſſing the facts, and then juſtifying, becauſe the mere proof of the fact, without ſhewing the criminal intent, cannot be ſufficient to convict a perſon. The conſequence is, that in every criminal proſecution, the priſoner has the ſame privilege of conteſting the criminality of the intent, as the truth of the facts on the general iſſue, which therefore can only be the proper plea.

CHAPTER TWENTY-FOURTH.

OF TRIAL.

WHEN the priſoner has pleaded not guilty, the clerk of the court will aſk him. By whom he will be tried? In caſes not capital the proper anſwer is, "By my country,"—but in caſes capital, the anſwer is, "By God and my country." The putting the queſtion to the priſoner to decide by whom he will be tried, ſeems to imply, that he has an option. This was introduced into England at a time when there were various methods of trial, and the priſoner had actually a choice. The practice has been continued here, tho a perſon has no ſuch choice: for the only legal method by which the perſon accuſed can be tried, is by the jury. *f* The ſtatute law ſays, that every perſon proſecuted for any delinquency before the ſuperior or county courts, ſhall have liberty of trial by jury, if deſired, but has provided no other mode if deſired, nor is any other mode known to the common law. When therefore a perſon accuſed of a crime, wiſhes to try the queſtion of fact, he muſt deſire a jury: for the court cannot be judges of facts, unleſs expreſsly authoriſed by ſome ſtatute, as they are in civil caſes.

Cur

f Statutes, 93.

Our courts however ſeem to have adopted the principle, that they have the power to try a criminal, if they pleaſe on his requeſt, and have proceeded to try them for offences not capital.

By the uſual mode of trial upon the plea of not guilty, is by jury; which we are to conſider in this chapter, and which would furniſh all the neceſſary information, in caſe the iſſue ſhould be tried by the court.

Before every court, the jury which is returned for civil, is returned for criminal cauſes. When the cauſe is ordered for trial, the jury appear, conſiſting of twelve returned as aforeſaid, or if the number be deficient, they are to be ſupplied as in civil caſes: the priſoner is placed at the bar of the court, and then an opportunity is given him to make his challenges. Challenges are of two kinds; challenges for cauſe, and peremptory challenges.

1. Challenges for cauſe, are for the ſame reaſons in criminal, as in civil cauſes, they are for ſome defect, as want of eſtate, age, or freedom: for ſome crime, as where a perſon has been convicted of ſome crime for which he has received an infamous puniſhment, or for ſome relation to the perſons concerned or intereſted: or for ſome bias, prejudice, or partiality. Theſe challenges are equally allowed to the ſtate and the priſoner in all caſes capital or not capital.

2. Peremptory challenges are without ſhewing any cauſe, and are admitted only in capital caſes. By the common law, the priſoner might challenge peremptorily, thirty five jurors,— [a] but the ſtatute law has limitted the number to twenty. This privilege manifeſts great tenderneſs and humanity to the priſoner: for there are numerous inſtances, where jurors will be returned to try a priſoner, againſt whom he has no legal challenge, and yet there are ſtronger reaſons why he ſhould decline being tried by him, than in thoſe inſtances where the law allows him to challenge. It may ſometimes happen that a challenge for cauſe may be made, and over ruled, which will naturally give the juror ſuch a prejudice, that the priſoner would be unwilling to truſt his fate in his hands. Indeed it is apparent that there will be a thouſand cauſes exiſting, for

[a] 4 Black. Com. 352. [a] Statutes, 67.

When the motion in arreſt is adjudged inſufficien
offered, or the priſoner is convicted on his own confe
of guilty, or when in caſes not capital, on a dem
formation is adjudged ſufficient, then it remains for
render judgment againſt the criminal, that he ſhould ſu
iſhment annexed to the crime by law. In treating
have invariably mentioned the puniſhments. Theſe
or the common law. Whenever a ſtatute creates a
flicts ſome ſpecific puniſhment. The puniſhments at
are fine, impriſonment and pillory.

No judgment, not even death itſelf, ever works a for
eſtate and corruption of the blood of the criminal, exc
ſlaughter, which operates a forfeiture of his goods
crimes where the criminal is ſubjected to a forfeiture
is a ſpecific ſum, and is conſidered to be the puniſhme
not a conſequence of the judgment. In England, the
of rendering judgment of death againſt a criminal, ar
ure of eſtate, and corruption of blood: ſo that no per
rit from him, or trace his line of conſanguinity thro

* But with us, when a perſon is condemned to deat
of proſecution, impriſonment and execution being pai
of his eſtate, ſhall be diſpoſed of according to law. If
ſhall make a will, it will be valid for the diſpoſition
if he ſhould die inteſtate, it would deſcend to his he

Chapter Twenty-Sixth.

OF WRITS OF ERROR, REPRIEVE, AND P

WRITS of Error in all criminal caſes, will lie
Juriſdictions to the ſuperior court, and from the ſupe
the ſupreme court of errors, for all errors apparent o
the record. If the court render an erroneous judgment

* Statutes 3.

CERTIFICATION OF SERVICE AND FORMAT

Pursuant to Practice Book §§ 67-2 and 67-2A(g), the defendant hereby certifies that:

(1) The reply 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 reply 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 defendant;

(3) The reply brief and party appendix filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically;

(4) The reply brief and party appendix comply with Practice Book §§ 67-2 and 67-2A;

(5) The word count of this brief is 6,327 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*

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Assistant Public Defender