FLYNN, J., dissenting. This arson conviction arises out of a major house fire that took hours to extinguish and in which several West Hartford firefighters were injured and exposed to other dangers. However serious the crime charged, those who come before this court on appeal deserve review of the issues they properly raise. I respectfully dissent from part IV of the majority opinion.

The court limited the appellant's brief to the fifty-nine pages he requested. Apparently to attempt to avoid exceeding that limit, he incorporated facts from issue II by reference in issue IV of his brief. Specifically, on page fifty-seven, he incorporated factual claims that the trial judge (1) confirmed that nobody ever examined the lawn mower; (2) then asked the rhetorical question if anybody was "ever going to testify that they examined that lawn mower?"; (3) said, in a dialogue of questions about chromatograms: "Let's go back to the lawn mower. . . . [I]f I was a fire investigator and I was investigating a fire in a basement and there was a gas operated lawn mower in there, I think I'd take a good look at it to see if it could be a source contamination," and (4) said that he was "sitting here wondering why [the lawn mower] wasn't in the case-in-chief . . . ." The majority opinion makes no reference to these facts cited in the appellant's brief.

Appellate analysis of the fourth issue needs to address the court's suggestions as to evidence it wanted to hear because they were specifically incorporated by reference by the defendant from the earlier, page forty-three and forty-four, and also mentioned in his analysis. These facts are important because the trial was about whether the fire was due to a furnace malfunction or was intentionally set by the defendant. They are also important because the defendant's brief claims that the court's actions deprived him of a fair trial and due process of law guaranteed by the fifth and fourteenth amendments to the United States constitution. In its case-in-chief, the state's principal forensic witness, Sawyer, admitted he had not examined the lawn mower, about which the court later solicited evidence.

The most crucial appellate issue in the case arises after the court's suggestions as to what evidence it wanted to hear and the state's subsequent calling as a witness in its rebuttal case, Hennessy, a fire investigator. That testimony occurred after the court's lawn mower questions and suggestions. It was crucial because Hennessy opined that a lawn mower in the cellar had a gasoline cap removed and remnants of brown paper appeared to have been inserted into the throat of the gasoline tank. Hennessy's testimony, given after the state had rested, addressed the court's ques-

tions because he testified that he had examined the lawn mower as a source contributing to the fire.

The defendant's brief sets forth the following legal analysis of that sequential testimony as to those facts: " 'Due process requires that a criminal defendant be given a fair trial before an impartial judge and an unprejudiced [fact finder] in an atmosphere of judicial calm. . . . It is [the trial judge's] responsibility to have the trial conducted in a manner which approaches an atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding. . . .' *State* v. *Iban C.*, [275 Conn. 624], 651[, 881 A.2d 1005 (2005)]. This [c]ourt has noted that there is a 'greater risk of prejudice from [a judge's] overintervention than from underintervention,' and 'the judge should avoid trying the case for the lawyers.' *State* v. *Fernandez*, [198 Conn. 1], 11, [501 A.2d 1195 (1985)]. Moreover, '[t]he risk of constitutional judicial misconduct is greatest in cases where the trial court has interceded in the *merits* of the trial.' (Emphasis in original.) *State* v. *Peloso*, 109 Conn. App. 477, 492[, 952 A.2d 825] (2008). That is what occurred here. The court took 'an apparent position of advocacy'; [*State* v.] *Fernandez*, supra, 12; by requesting and soliciting evidence that *it* wanted to hear concerning the lawn mower and gas tank—and then enabling its production by allowing Hennessy to testify as a rebuttal witness. See *State* v. *Peloso*, supra, 492 ('the court may not solicit evidence that is "*essential* to overcome the defendant's presumption of innocence . . . .' ") (Emphasis in original.) The court's actions in soliciting that evidence were not designed for a permissible purpose like 'clarifying' or clearing up a 'misunderstanding' of testimony. Cf. *State* v. *Iban C.*, supra, 651–52. However, even if 'the court's intentions were entirely benevolent'; *State* v. *Smith*, 200 Conn. 544, 553[, 512 A.2d 884] (1986); its actions had the appearance of [partiality], and '[i]t is the effect' of its actions, rather than its 'motivation'; *id.*, that compels the conclusion that the defendant was deprived of a fair trial. This constitutional error was not harmless, because the evidence that the court solicited and encouraged was the same evidence that the court declared to be 'the most important evidence in the case.' " (Emphasis in original.)

I respectfully urge that we review all of what the defendant properly raised. I therefore respectfully dissent from the conclusions set forth in part IV of the majority opinion because they do not rest on facts concerning the lawn mower and gasoline in its tank analyzed in the defendant's brief and its relation of legal principles to them. Particularly, the majority ignores the law established in the holding of this court in *Peloso* that "the court may not solicit evidence that is '*essential* to overcome the defendant's presumption of innocence . . . .' " (Emphasis in original.) *State* v. *Peloso*, supra, 109 Conn. App. 492. Part IV B of the majority's opinion concluded that "[o]n the record before us, we cannot

say that the defendant has established that such a constitutional violation clearly exists and clearly deprived him of a fair trial, as required by [the] third prong [of *State* v. *Golding*, 213 Conn. 239–40, 567 A.2d 823 (1989)]." The defendant in *Peloso* had claimed that the court's inquiry suggesting evidence to be offered crossed the line between impartiality and advocacy in violation of the defendant's right to due process. The *Peloso* court agreed. *State* v. *Peloso*, supra, 494.

The "full review" which the majority has not undertaken would address whether the court's four questions soliciting evidence about the lawn mower and its possible relation to the fire constituted what *Peloso* concluded was " 'evidence that is *essential* to overcome the defendant's presumption of innocence' "; id., 492; which, thus, exceeded the "limits of that power" of the court to question a witness as established by the due process clause of the United States constitution. Id., 490. If analysis revealed that the questions clearly violated due process and clearly deprived the defendant of a fair trial because the evidence sought was " '*essential* to overcome the defendant's presumption of innocence'," then this court needs to determine if the state has demonstrated the lawn mower testimony elicited was harmless beyond a reasonable doubt in relation to the other evidence in the case.

This court in *Peloso* stated that "[t]he thrust of the defendant's claim is that the court exceeded its authority in inviting the state to elicit specific testimony from [the witness], not to clarify previous testimony or to resolve a doubt as to the admissibility of certain evidence, but to set forth additional substantial evidence of the defendant's guilt [and that] even if the court's proposed inquiry was framed in a neutral manner, the substantive nature of the inquiry crossed the line between impartiality and advocacy in violation of the defendant's right to due process. We agree." (Footnote omitted.) Id., 494.

In the present case the court solicited specific testimony from Hennessy, not to clarify previous testimony, but as additional substantive evidence essential to overcome the defendant's presumption of innocence. The court stated that: "All of my questions were designed to elicit information that I thought was important because I was confused or unclear about what the evidence was proving." The court also acknowledged "participat[ing] in the proof" of the case. A constitutional violation clearly exists, satisfying the third prong of *Golding* if the evidence elicited from Hennessy was essential to overcome the presumption of innocence. See *State* v. *Peloso*, supra, 109 Conn. App. 494.

Turning to the fourth prong of *Golding*, namely, whether the "state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt"; *State* v. *Golding*, supra, 213 Conn.

241; I would observe that there is a distinction to be made between a jury trial and a bench trial that informs this prong of *Golding*. If inadmissible evidence is presented to a jury, the court can instruct the jury to disregard it. "The jury are presumed to follow the court's directions in the absence of a clear indication to the contrary." (Internal quotation marks omitted.) *State* v. *Negron*, 221 Conn. 315, 331, 603 A.2d 1138 (1992). This disregarded evidence is presumed to be harmless because the jury is presumed to follow the court's recorded instruction.

This logic limps, however, when there is a bench trial and the judge solicits the evidence. If the judge does not put anything on the record that indicates that he will ignore evidence he improperly sought, a similar harmless presumption cannot be made. In the present case, the judge put no such indication on the record that he would be disregarding this evidence. To the contrary, the judge stated that this solicited evidence was important to the case. Accordingly, the issue deserves full review in light of all of the record as to whether the fourth prong of *Golding* has been satisfied. Unlike the present case, where Hennessy's testimony concerning the lawn mower as the source of the fire was admitted into evidence, the court in *Peloso* found harmlessness because the suggested evidence had not been admitted.

I would therefore conclude that the defendant's brief more than adequately set forth facts, related them to the law and established his entitlement to our full review.