BORDEN, J., dissenting. The defendant's first, and principal, claim is that the trial court abused its discretion in limiting his access to the mental health records of the state's witness, E.P.,[1] and in precluding the defendant's counsel from even showing those records to an expert, thereby violating his constitutional right to confront the witnesses against him. The majority bypasses the substance of this claim and concludes, without deciding it or analyzing its merits, that "[a]ny error in the limited disclosure of E.P.'s psychiatric records was harmless," because "the state has met its [constitutional] burden in proving that any error was harmless." I disagree.[2] My independent review of the witness' mental health records leads me to a contrary conclusion. I conclude that: (1) the trial court violated the defendant's constitutional right to confront the witnesses against him in precluding the defendant's access to most of the witness' mental health records and in precluding the defendant's counsel from even showing those records to an expert; and (2) those rulings were not harmless beyond a reasonable doubt.

I first note that it is necessary to discuss the records that are in dispute in some detail because, contrary to the majority's mode of analysis, which moves directly to the question of harm without first addressing the propriety of the trial court's rulings, the records are directly relevant to the question of harm. And indeed, the question of harm cannot be considered in their absence. That is because, as the majority notes but does not apply, where the defendant's confrontation rights have been violated, the question of harm depends on the totality of the evidence at trial. *State* v. *Madigosky*, 291 Conn. 28, 45, 966 A.2d 730 (2009). "If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless." (Internal quotation marks omitted.) Id. The question of harm depends on a number of factors, such as the importance of the witness' testimony, whether it was cumulative, the degree of corroboration or contradiction on material points, the extent of cross-examination permitted, and the strength of the state's case. Id. "*Most importantly*, [*this court*] *must examine the impact of the evidence on the trier of fact and the result of the trial.*" (Emphasis added; internal quotation marks omitted.) Id. Thus, we cannot properly assess the question of harm in this case without also assessing the potential impact on the jury of the failure to disclose the witness' psychiatric records to the defendant's attorney. That obviously requires a detailed examination of the material in question.

Because the majority does not address the propriety of the trial court's ruling, however, it is necessary that

I do so. "A criminal defendant has a constitutional right to cross-examine the state's witnesses, which may include impeaching or discrediting them by attempting to reveal to the jury the witnesses' biases, prejudices or ulterior motives, or facts bearing on the witnesses' reliability, credibility, or sense of perception. *Delaware* v. *Fensterer*, 474 U.S. 15, 19, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985) . . . . Thus, in some instances, otherwise privileged records, like the ones in this case, must give way to a criminal defendant's constitutional right to reveal to the jury facts about a witness' mental condition that may reasonably affect that witness' credibility. . . .

"The need to balance a witness' statutory privilege to keep psychiatric records confidential against a defendant's rights under the confrontation clause is well recognized. . . . The test and the associated burdens imposed on a defendant are equally well chronicled. If, for the purposes of cross-examination, a defendant believes that certain privileged records would disclose information especially probative of a witness' ability to comprehend, know or correctly relate the truth, he may, out of the jury's presence, attempt to make a preliminary showing that there is a reasonable ground to believe that the failure to produce the records would likely impair his right to impeach the witness. . . . If in the trial court's judgment the defendant successfully makes this showing, the state must then obtain the witness' permission for the court to inspect the records in camera. A witness' refusal to consent to such an in camera inspection entitles the defendant to have the witness' testimony stricken. . . .[3]

"Upon inspecting the records in camera, the trial court must determine whether the records are especially probative of the witness' capacity to relate the truth or to observe, recollect and narrate relevant occurrences. . . . If the court determines that the records are probative, the state must obtain the witness' further waiver of his privilege concerning the relevant portions of the records for release to the defendant, or have the witness' testimony stricken. If the court discovers no probative and impeaching material, the entire record of the proceeding must be sealed and preserved for possible appellate review. . . . Once the trial court has made its inspection, the court's determination of a defendant's access to the witness' records lies in the court's sound discretion, which we will not disturb unless abused. . . .

"Access to confidential records should be left to the discretion of the trial court which is better able to assess the probative value of such evidence as it relates to the particular case before it . . . and to weigh that value against the interest in confidentiality of the records. . . . [*T*]*he linchpin of the determination of the defendant's access to the records is whether they sufficiently*

disclose material especially probative of the ability to comprehend, know and correctly relate the truth . . . so as to justify breach of their confidentiality and disclosing them to the defendant in order to protect his right of confrontation." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Slimskey*, 257 Conn. 842, 853–57, 779 A.2d 723 (2001).

On the basis of the disclosure of the four pages of the defendant's psychiatric records that the court did allow defense counsel to examine, defense counsel was able to elicit from the witness that he had been diagnosed with schizoaffective disorder and bipolar disorder, and that he was *presently* taking certain medications *daily*, namely, Lithium, Ativan and Trazadone, but that those medications did not affect his ability to perceive or remember. Of course, the jurors were not told, because there was no expert to tell them, what specifically "schizoaffective disorder" or "bipolar disorder" are, including the symptoms they may display, or what symptoms Lithium, Ativan and Trazadone may carry with them.[4]

I next address, as a preliminary matter, the state's contention that the defendant set forth "a hollow complaint" in asserting that certain medications, dosages and codes provided in the disclosed records were too complicated for counsel to decipher and, therefore, that she needed to show them to and discuss them with an expert. The state argues that "the need for expert consultation is undermined by appellate counsel's demonstrated ability to discover the uses and side effects of the various listed medications by reference to readily available Internet sources . . . [referring to various Internet websites cited in the defendant's brief]." "Likewise," the state asserts, "the 'codes' set forth in the disclosed documents relating to the frequency of medication, for example, 'BID,' and 'QID,' are easily decoded . . . [citing to various other Internet websites]."

It should go without saying that, simply because a search on the Internet (or in a medical dictionary, for that matter) would disclose to defense counsel what a particular medical term may mean, does not mean that counsel would be in a position to use that meaning in a trial without presenting an expert witness to explain it. Counsel, having learned from the disclosed records that the witness had been diagnosed with schizoaffective disorder, and having consulted the Internet to learn what that means, cannot simply stand up and ask something like, "Isn't it true, E.P., that your diagnosis of schizoaffective disorder bipolar type means that you may experience hallucinations, which means seeing, hearing or sensing things that are not there?"[5] If challenged on the grounds that he is basing his question on matters not in evidence, what is he supposed to say? "It's on the Internet"? And even if he could ask such a question, how could the witness answer credibly?

My point here is simply that, although the Internet is a very useful tool for many purposes, its usefulness as an aid to effective—and admissible—cross-examination in a case such as this is quite limited. The Internet can serve only as a starting point for counsel to learn enough to take the necessary next steps in order to conduct an admissible cross-examination or to present expert testimony regarding an adverse witness' credibility. Thus, simply because medical records may contain material that, if explained properly, would affect a witness' credibility, does not mean that defense counsel has been given everything he or she needs to use that material. Having learned something from the Internet does not enable defense counsel to use that information in cross-examination, if she wishes to do so, and does not enable her to bring that information to the ken of the jury. That would require an expert witness' testimony. Consequently, my use of Internet sites in this opinion is limited to its proper purpose: simply to indicate that, had the sealed materials been disclosed to the defendant's counsel, she could have consulted similar sites to learn of their potential side effects bearing on the witness' credibility and then, using that information, consulted with and retained an appropriate expert for purposes of testifying to those side effects. Thus, the court also abused its discretion in precluding the defendant's counsel from even showing the disclosed records to an expert for the purposes of aiding in the cross-examination of the witness.

I now return to the witness' medical records that the court deemed unnecessary to disclose to the defendant. As I indicated previously, "[t]he linchpin of the determination of the defendant's access to [such] records is whether they sufficiently disclose material especially probative of the ability to comprehend, know and correctly relate the truth . . . so as to justify breach of their confidentiality . . . ." (Internal quotation marks omitted.) *State* v. *Slimskey*, supra, 257 Conn. 856–57. The witness' records easily meet that standard.

The trial court examined in camera the entire set of the witness' medical records, including his mental health records that had been subpoenaed from the Department of Correction. After that examination, the court ordered disclosure of four pages of the witness' mental health records to the defendant, which the majority has discussed, and ordered that the rest remain sealed. That sealed portion of the witness' entire set of medical records constitutes 344 pages. In my view, of those 344 pages, no less than seventy-eight, or almost one in four, contain notations that, if shown to the jury and explained by an appropriate expert witness familiar with the terms used therein, could have had a devastating effect on the jury's assessment of the witness' credibility.[6] Thus, at the least, the defendant should have had access to them and been permitted to show them

to an appropriate professional. This would have thereby enabled an effective cross-examination of the witness and presentation to the jury of expert testimony impugning the witness' credibility.

The undisclosed records reveal an undeniable correlation between the witness' diminished mental health and the timing of the underlying crimes and his trial testimony. The crimes in the present case occurred on February 3, 2007, and the witness testified as an eyewitness to those crimes on December 4 and 5, 2008. His medical records begin on April 28, 2006, approximately nine months before the crime, and end on November 17, 2008, only about six weeks before the trial. Thus, they span both the time of the crimes and essentially the time of his testimony.

I first address in detail the witness' course of medications. The records indicate that, during that time span, the witness was on a regular and repeated course of three medications for serious mental illness: Ativan; Lithium; and Trazodone—often all three at the same time. By my count, these were prescribed for and administered to him approximately fifty times, for periods ranging from thirty to ninety days at a time. Ativan has as potential side effects "amnesia, memory impairment, confusion," and "hallucinations . . . ."[7] Lithium has as potential side effects "confusion" and "hallucinations (seeing things or hearing voices that do not exist)."[8] Trazodone has as potential side effects "decreased ability to concentrate or remember things" and "confusion . . . ."[9]

In addition, numerous other entries in the witness' medical records corroborate the notion that defense counsel should have had access to them in order to build a case against his credibility on the basis of his significantly impaired mental state. He was diagnosed with "schizoaffective disorder" and "schizoaffective disorder bipolar type" in several entries, the most telling one on January 24, 2007, less than two weeks before the date of the crimes. The Internet—again—tells us that "[w]hen people with schizoaffective disorder experience psychotic symptoms, they can include: Seeing, hearing, or sensing things that are not there (hallucinations) . . . [and] [b]eing less able to speak or think clearly . . . ."[10] In addition, there are numerous entries in E.P.'s medical records along the following lines: "serious mental illness"; "hallucinations"; "exacerbation of serious mental illness"; "alteration of thought process"; "auditory (particularly command) /visual hallucinations or delusions"; "altered thought process"; "acute, negative, psychotic symptoms"; "history of chronic mental illness resulting in multiple psychiatric hospitalizations"; "claims to hear voices in the past to hurt his cell[mate]"; "alteration in thought process [resulting from] mental illness"; and "need for false belief—delusions—irrational thoughts." Finally, the records indi-

cate that the witness was often actively suicidal, attempting to take his own life on at least five occasions, from 1986 to March, 2007, one month after the crimes to which he testified; and he often voiced suicidal ideation, wanting to cut his wrists, hang himself, and throw himself from his cell block tier.

In sum, here we have medical records of a witness disclosing that, at times directly relevant to both his witnessing of the crimes charged and his testimony, he was taking psychotropic drugs that may have caused him to be hallucinatory, delusional, with amnesia, memory impairment, and confusion. He suffered from schizoaffective disorder, which may bring with it hallucinations and an inability to think clearly. The same records indicate, as a clinical matter, that he suffered from serious mental illness, hallucinations, delusions, altered thought processes, acute psychotic symptoms, and irrational thoughts. And he was actively suicidal and suffered from suicidal ideation. These are the paradigmatic indicators of a potential lack of credibility that a jury needs to have, because they clearly "disclose material especially probative of [the witness'] ability to comprehend, know and correctly relate the truth . . . ." (Internal quotation marks omitted.) *State* v. *Slimskey*, supra, 257 Conn. 856.

The four pages disclosed to defense counsel were insufficient to build such a fortified challenge to the witness' credibility. The pervasiveness of the entries documenting the witness' mental impairments is damaging evidence, in and of itself, not to mention the correlation between these entries and the timing of the underlying crimes and the witness' trial testimony. At some point, I contend, a difference in number becomes a difference in kind, and this is clearly such a case.

The fact, apparently relied upon by the trial court, that the witness denied having any hallucinations or delusions at the time of the crimes and of his testimony, is far from conclusive—any more than a witness who denies he is lying when he describes a crime that he claims to have witnessed, but whose records indicate a pattern of pathological lying. That is the function of cross-examination—to expose the lack of credibility in both the denial of lying and in the underlying lack of truth of the direct testimony—and to permit the jury, not the presiding judge, to decide the credibility of the witness. Similarly, the fact that the trial court listened to the witness and determined that his credibility was not impaired, as the state urges upon us, does not suffice to save its rulings.

First, the trial court itself is not an expert in psychiatry; thus, even though it examined the records in camera, it cannot be deemed to understand the meaning of all of the terms contained therein or the symptoms they implicate. Second, those records are not evidence; thus, the trial court was, presumably, gauging the witness'

credibility in their absence. Third, this was a jury trial; the credibility of the witness was for the jury, not the trial court, to determine. Such a determination could not adequately be done with the witness' psychiatric records sealed in a black box, as it were. The defendant should have had access to these records in order to have had the opportunity to bring to the jury's attention the gross potential defects in the witness' credibility. I conclude that the defendant's right of confrontation was violated by the court's denial of access to the undisclosed records, including the court's ban on showing them to, and discussing them with, an expert.

Having concluded that the defendant's constitutional right of confrontation was violated, I turn next to the question of harm. It is axiomatic that, when a criminal defendant's constitutional rights have been violated, the state bears the burden of establishing lack of harm beyond a reasonable doubt. *State* v. *Galarza*, 97 Conn. App. 444, 450, 906 A.2d 685, cert. denied, 280 Conn. 936, 909 A.2d 962 (2006). In my view, the state has not met that burden in the present case.

I first note that the precise issues for the jury to decide, in light of the defendant's testimony, were whether he stabbed the victim and, if so, whether he did so with the requisite intent, namely, "[with] intent to cause serious physical injury" to the victim. General Statutes § 53a-59 (a).[11] The defendant testified, in essence, that although he intended to fight the victim with his fists and did so, and although he did carry a knife, because he was high on drugs at the time of the fight, he could not recall stabbing the victim and had no intent to do so.

The question of harm depends on the totality of the evidence at trial. *State* v. *Madigosky*, supra, 291 Conn. 45. "If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless." (Internal quotation marks omitted.) Id. In the present case, we must consider both the witness' testimony and the potential effect of the excluded records on that testimony. The question of harm depends on a number of factors, such as the importance of the witness' testimony, whether it was cumulative, the degree of corroboration or contradiction on material points, the extent of cross-examination permitted, and the strength of the state's case. Id. "Most importantly, [this court] must examine the impact of the evidence on the trier of fact and the result of the trial." (Internal quotation marks omitted.) Id.

Contrary to the state's argument, apparently endorsed by the majority, that it presented "a strong case" on both issues—who did the stabbing, and the defendant's state of mind—the record does not bear that out. The crimes took place at a crack house. All of the state's critical witnesses, including the victim, were either convicted felons or crack addicts who were

high on crack at the time and who gave one or more conflicting statements to the police.

The victim, who ultimately testified that it was the defendant who stabbed him, also testified that, when he gave his detailed tape-recorded statement to the police at the hospital, he was heavily medicated and did not remember giving the statement. He also testified that he left out of the statement the names of his assailants, and he initially identified E.P. in a photographic lineup as the one who had assaulted him—not the defendant. He later identified the defendant.

Jolie Shelton, one of the state's witnesses, had multiple felony and larceny convictions and was doing drugs the day of the stabbing. She initially told the police that she did not want to give a statement because she had not seen anything at the time of the crimes. She then testified that she was present, and saw the victim, the defendant, and E.P. scuffling. She also testified that she did not see the stabbing, and did not see a knife during the scuffle.

Frederick Elbert, another of the state's witnesses, also had multiple felony convictions and lied to the police multiple times during the investigation. He initially told the police that he had not seen anything, and that he was in the process of leaving the crack house when the victim entered. Months later, he again told the police that he had not been present when the stabbing took place. In his testimony at trial, he testified for the first time that the defendant was the stabber.

Mala Meekins, another state's witness, was not at the scene when the stabbing took place. She testified that the defendant visited her at a friend's house after the stabbing where she overheard him telling someone on his cell phone that he had stabbed someone. He had red specks on his sneakers, and later she saw him carrying a folding knife.

Finally, the witness, E.P., testified as an eyewitness to the stabbing. He was originally charged with the assault because the victim had named him, not the defendant, as the stabber. He ultimately pleaded guilty to being an accessory to the stabbing, as well as to another, unrelated felony charge, and received a much reduced sentence, as well as the dismissal of eight other charges, as a result of his testimony.

He testified that he had been doing drugs for twenty-four hours straight before the stabbing, and was high when the stabbing took place. He denied the version of events, testified to by the other persons present, that he had been involved in the attack on the victim. He gave the most detailed testimony that the defendant was the stabber.

He was the first person arrested because the victim had named him as the stabber. He initially told the police that he had not even been at the crack house at

the time of the stabbing; later he told them he was there but did not see the stabbing. It was not until he was charged with the crime, on the basis of the victim's statement that he was the stabber, that he implicated the defendant as the stabber. He admitted that he had lied to the police when he had given them a false reason as to why the victim had falsely accused him. He also testified that, while he and the defendant were in a cell awaiting a court appearance, the defendant told him that he, the witness, should not have given the police a statement. There was also evidence, through a correction officer, that the two then fought and had to be separated by officers.

Given the importance of the witness' ultimate testimony to the state's case, as the most detailed account of the stabbing, and containing evidence of a purported guilty admission made by the defendant to the witness, I conclude that the state has not met its burden of establishing the lack of harm beyond a reasonable doubt by the improper sealing of the witness' psychiatric records and the prohibition on showing those records to and discussing them with an expert. The witness' testimony cannot be considered as merely cumulative of other evidence in the case because of his central role in the stabbing, and, although corroborated in some respects, his testimony was also contradicted by his prior statements; the state's case, dependent as it was largely on the testimony of witnesses with significant credibility flaws, was not strong; and the extent of the permitted cross-examination of E.P. cannot come close to what it should have been had the sealed material been made available to the defendant and to an expert of his choice. Considering the likely "impact of the [excluded] evidence on the trier of fact and the result of the trial," the improper denial of access to the witness' psychiatric records "may have had a tendency to influence the judgment of the jury"; therefore, it cannot be considered harmless beyond a reasonable doubt. (Internal quotation marks omitted.) *State* v. *Madigosky*, supra, 291 Conn. 45.

I recognize that there was evidence of the defendant's flight and statements of the defendant as to consciousness of guilt, as the state points out. And I recognize, of course, that, although the state's case was not strong, it was certainly strong enough to have convinced the jury. I cannot escape the conclusion, however, that the refusal of the court to give the defendant access to the witness' devastating psychiatric records "may have had a tendency to influence" its verdict; (internal quotation marks omitted); id.; and therefore cannot be considered harmless beyond a reasonable doubt.

I therefore dissent, and would reverse the judgment of conviction and remand the case for a new trial.

[1] In this dissenting opinion, I refer to E.P. alternatively as "the witness."

[2] I agree with the majority's treatment of the defendant's other claims.

[3] In the present case, the court obtained this consent from the witness

and examined his records in camera.

[4] The state argues that the trial court's ruling did not prevent the defendant from calling an expert to answer hypothetical questions that could be based on defense counsel's examination of the four pages of the witness' records and, therefore, the trial court's ruling precluding her from even showing the records to an expert was a proper balancing of the witness' privacy rights and the defendant's sixth amendment confrontation rights. Although it is certainly true that defense counsel could have done so, it is difficult to consider seriously such a procedure as an adequate surrogate for an effective sixth amendment challenge to the credibility of the witness. Without the ability to examine the records themselves or even to discuss them with the defendant's counsel, the expert would be testifying virtually in a factual vacuum, and would not be able to answer effectively even a hypothetical question about the symptoms that such a witness was likely to display. That, of course, assumes that counsel could glean enough information from her independent review so as to formulate such probative questions. In any event, as I will demonstrate, the impropriety of the trial court's ruling precluding the defense counsel from examining the rest of the records and discussing them with an expert went far beyond the meager four pages that it permitted defense counsel to examine.

[5] See my discussion of this diagnosis, contained in the sealed materials, in the text and footnotes of this opinion.

[6] Rather than cite to and quote from all seventy-eight such entries, I summarize them in the text of this opinion.

[7] National Institutes of Health, U.S. National Library of Medicine, "ATIVAN (lorazepam) tablet" (last modified July, 2010), available at http://dailymed.nlm.nih.gov/dailymed/lookup.cfm?setid=07cae057-a593-4e4d-a478-2d7fc9f06857 (last visited September 30, 2013) (copy contained in the file of this case in the Supreme and Appellate Court clerk's office).

[8] National Institutes of Health, U.S. National Library of Medicine, Lithium, "What side effects can this medication cause?" (last modified September 25, 2013), available at http://www.nlm.nih.gov/medlineplus/druginfo/meds/a681039.html (last visited September 30, 2013) (copy contained in the file of this case in the Supreme and Appellate Court clerk's office).

[9] National Institutes of Health, U.S. National Library of Medicine, Trazodone, "What side effects can this medication cause?" (last modified September 25, 2013), available at http://www.nlm.nih.gov/medlineplus/druginfo/meds/a681038.html (last visited September 30, 2013) (copy contained in the file of this case in the Supreme and Appellate Court clerk's office). I acknowledge that I have not done an Internet search to find out whether being administered these three medications, all at the same time, regularly over a lengthy period of time, would increase the risk of the side effects of hallucinations and other mental disabilities that these medications carry with them. Indeed, that is precisely the type of information that should not be left to the puny efforts of a layperson (in the medical sense) like me, or the defendant's counsel; instead, it should be presented to a medical expert for his or her opinion—which, of course, the defendant's counsel was prohibited from doing by the trial court's unnecessary restriction on even disclosing the records to such an expert.

[10] INVEGA, INVEGA For Schizoaffective Disorder, "What are the psychotic symptoms of schizoaffective disorder?" (last modified August 8, 2013), available at http://www.invega.com/schizoaffective-disorder-psychotic-symptoms (last visited September 30, 2013) (copy contained in the file of this case in the Supreme and Appellate Court clerk's office).

[11] The defendant's principal conviction, and the one on which the court imposed the most lengthy sentence, was for assault in the first degree in violation of § 53a-59 (a), which provides in relevant part: "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 . . . ."