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KATZ, J., with whom BORDEN, J., joins, concurring and dissenting. I agree with the majority that the abuse of discretion standard governs our review of the claim by the defendant, Michael J.; see footnote 1 of the majority opinion; that the trial court improperly failed to conduct an evidentiary hearing on the issue of whether the assistant state's attorney who tried the case intended to provoke a mistrial. I disagree, however, with the majority's determination in part I of its opinion that the trial court's failure to hold an evidentiary hearing did not meet this standard. Although there may well be cases wherein the trial court's determination as to an allegation of misconduct rightfully will be reached '' 'solely on the basis of the allegations before it' ''; *State* v. *Nguyen*, 253 Conn. 639, 656, 756 A.2d 833 (2000); this is not such a case. Accordingly, I conclude that the trial court should have conducted an evidentiary hearing before deciding whether to grant the defendant's motion to dismiss.[1]

The record reflects the following procedural history. During direct examination, in addition to the complainant's testimony pertaining to the two incidents specified in the state's bill of particulars, she also testified regarding sexual conduct with the defendant and physical beatings inflicted by him. Specifically, the complainant testified that she was fearful of the defendant because she had been told by others that he previously had beaten her and her brothers. Also, she testified that, after performing cunnilingus on her, the defendant had laid on top of her, put his penis on top of her stomach, moving it back and forth, had told her to lay on her stomach, at which point he moved his penis between her stomach and the bed, and finally that he had told her to get on her knees, at which point he put his penis on her buttocks. This testimony was different than information that had been disclosed by the state prior to trial,[2] and included uncharged misconduct evidence that had not been disclosed to the defendant. The testimony also differed from information ordered disclosed to both parties by the trial court upon the defendant's request, specifically, reports prepared by the department of children and families (department) indicating that there had been no prior physical abuse in the family.

As a consequence, the defendant made a motion for a mistrial, reminding the court that it had granted the defendant's motion in limine confining the state to the specific allegations in the bill of particulars. Additionally, the defendant pointed out that there were material inconsistencies between what the complainant had stated before trial and her in-court testimony regarding the incidents that were included in the bill of particu-

lars, and that the state's failure to disclose this exculpatory material was prejudicial. The assistant state's attorney admitted that she was aware of some of the changes in the complainant's story, but contended that these changes were not exculpatory, but, rather, were ''fodder for her cross-examination.'' The assistant state's attorney denied any prior knowledge of the alleged beatings, but acknowledged that the complainant had informed her that the defendant was violent. Because the complainant had testified regarding other acts of misconduct that were not alleged in the bill of particulars and that did not provide the factual basis for those charges, and because this evidence was highly prejudicial, the trial court granted the defendant's motion for a mistrial. When granting the motion, the court commented that there was nothing ''to suggest that the state knew the complainant would so testify as to these additional acts of misconduct.''

Thereafter, the defendant filed a motion to dismiss the case on double jeopardy grounds and, in furtherance of that motion, he sought an evidentiary hearing in order to determine: (1) whether, prior to trial, the assistant state's attorney knew about the totality of the complainant's allegations that she had elicited during the complainant's direct testimony; (2) when that information, if any, had been disclosed to the assistant state's attorney; (3) and what she had done with any such information. The defendant argued that, because the inquiry at issue, as evidenced by his motion, involved conduct that did not occur in the courtroom and otherwise could not be known from the record, an evidentiary hearing was required. Specifically, the defendant asserted that, ''the critical point here is all of what I would be intending to elicit happened outside the presence of the court off-the-record either in terms of investigations, in terms of interviews, or in terms of discussions between the party, and I can't envision another way to make an evidentiary record for the court to consider this claim without having an opportunity to do that.'' He further indicated that the hearing could be concluded within one day.

The state argued in response that it had obtained no benefit from the mistrial and that the trial court's determination, when it granted the mistrial, that the state had not intentionally withheld information, was dispositive. In response to the latter contention, the defendant asserted that the issue before the court in his motion for a mistrial pertained to the fairness of the proceedings, a matter that could be determined based on the record, not the state's intent. By contrast, the defendant's motion to dismiss regarding activity that had occurred outside the presence of the court required an evidentiary hearing to create a factual record upon which the court could make its ultimate determination. The trial court nevertheless denied the defendant's request for the hearing, reiterating the con-

clusion it had made when granting the defendant's motion for a mistrial that, based on its observations and the fact that the defendant had not objected during the complainant's testimony, there was nothing to suggest that the state knew that the complainant would testify to these additional acts of misconduct. Accordingly, the court determined that no evidentiary hearing was necessary.

Thereafter, the defendant asked the trial court to reconsider its decision denying his request for an evidentiary hearing and filed a motion asking that the court include as a part of the record an affidavit from defense counsel stating, inter alia, that: (1) the assistant state's attorney had disclosed to defense counsel that it knew about, but failed to disclose, some of the complainant's inadmissible testimony; (2) prior to the argument on the motion in limine, the assistant state's attorney had expressed to defense counsel that the defendant likely would prevail at trial; and (3) the trial court had ordered disclosed to the parties redacted copies of certain reports by the department that indicated other accusations of abuse by the defendant, including an act of penetration, and that the complainant's mother was going to relay some of that information to the assistant state's attorney. The defendant contended that it was critical to his motion to dismiss to be able to ascertain exactly what the state knew and when it knew it, and that an evidentiary hearing was therefore necessary. The trial court denied the motion on the basis of its earlier finding that the state had not intended to provoke a mistrial. The court refused to take the affidavit into account, but allowed it to be made part of the record.

The majority recognizes that the trial court should have considered the affidavit. The majority nonetheless concludes, on the basis of this record, including the affidavit, that the trial court's failure to hold an evidentiary hearing was not an abuse of discretion. Put another way, it concludes that the trial court properly confined itself to the record to conclude that the state had not intended to provoke a mistrial when it elicited evidence of the defendant's uncharged misconduct. I disagree.

The record in this case is not dispositive of whether the assistant state's attorney engaged in the alleged prosecutorial misconduct. In his attempt to carry his burden to prove a double jeopardy violation on the basis of prosecutorial misconduct, the defendant argued that the assistant state's attorney had made statements outside the courtroom that bore directly on the issues of whether the state had prior knowledge of the incidents about which the complainant improperly testified and whether the assistant state's attorney intentionally may have elicited the testimony. To summarize, in attempting to secure an evidentiary hearing, the defendant offered an affidavit to establish that, prior to the motion in limine, the assistant state's attorney had

expressed her belief that the defendant was likely to prevail, and that the assistant state's attorney knew of some of the complainant's allegations to which she improperly testified despite the court's ruling on the motion in limine.[3] In addition, the record reflects that the assistant state's attorney admitted that she knew about some of this testimony, she asked open-ended questions to the complainant, and she made no effort to rein in the complainant once her testimony dealt with inadmissible matters. The defendant, therefore, sought to elicit from the principal source, namely, the assistant state's attorney, precisely which allegations she had known about prior to trial, when she had gained that knowledge, and what, if anything, she had done with those statements. All of these facts and inquiries, none of which could have been before the court as a basis for its denial of the defendant's motion to dismiss because they took place off-the-record, were sufficient to trigger the defendant's right to an evidentiary hearing so that he could meet his burden of establishing that the state had intentionally sought to gain a mistrial.

In *State* v. *Colton*, 234 Conn. 683, 698, 663 A.2d 339 (1995), cert. denied, 516 U.S. 1140, 116 S. Ct. 972, 133 L. Ed. 2d 892 (1996), we stated: ''To the extent that misconduct allegedly has occurred off-the-record, a defendant must have an opportunity to make a record in some fashion.'' I agree with the majority that the right to an evidentiary hearing is not automatically triggered simply because material that occurred off-the-record is offered. Nonetheless, our statement in *Colton* is consistent with the notion that a good faith offer by the defendant of such material must be taken seriously, and there must be persuasive reasons to affirm a court's ruling denying such a hearing. No such reasons appear in the present case. To the contrary, the defendant's offer and requests provided a reasonable basis for such a hearing.

In deciding that the trial court did not abuse its discretion, the majority relies essentially on four factors. First, the majority relies on the trial court's opportunity to observe the proceedings, including in particular the manner in which the assistant state's attorney posed questions to the complainant and the complainant's demeanor and emotional state in response. Second, the majority points to the representations of the assistant state's attorney that she had no prior knowledge of the uncharged misconduct and concludes that ''the trial court was entitled to credit the prosecutor's assertions . . . .'' Third, the majority concludes that the affidavit by defense counsel did not support an inference of intentional misconduct. Finally, harkening back to its first ground for support, the majority concludes that further inquiry into the assistant state's attorney's ''off-the-record conduct would do no more than 'impugn [her] veracity . . . and impose a staggering burden of time and effort on our already overburdened court system.' ''

I agree that, although the assistant state's attorney was not under oath, and therefore her representations to the trial court did not comprise testimonial evidence; see *Cologne* v. *Westfarms Associates*, 197 Conn. 141, 152–53, 496 A.2d 476 (1985); as an attorney and officer of the court, she was obligated to make truthful representations. Rules of Professional Conduct 3.3; see *Blumenthal* v. *Kimber Mfg., Inc.*, 265 Conn. 1, 8 n.5, 826 A.2d 1088 (2003). I do not agree, however, that her representations are dispositive of the issue.

There was no evidence that, after the trial court had granted the motion in limine to preclude any testimony not directly related to the four counts in the bill of particulars, the assistant state's attorney properly prepared the complainant so that she would not testify regarding the uncharged misconduct. Nor does the testimony reflect any attempt by the assistant state's attorney to restrict or to control the complainant when she began to testify in violation of the court's preclusion order.

The record before the trial court, in conjunction with the affidavit, raised questions as to whether the assistant state's attorney was not being completely candid or whether she may have either intentionally or unintentionally failed to prepare the complainant adequately in light of the motion in limine. I agree that, ultimately, the trial court *could* have made the following inferences favorable to the state: (1) the assistant state's attorney was not being disingenuous and simply did not understand that inconsistent statements can indeed be exculpatory; see *State* v. *McPhail*, 213 Conn. 161, 165, 567 A.2d 812 (1989) (exculpatory evidence consisted of two written statements by state's witness that were inconsistent with her testimony at probable cause hearing and statements made by two other rooming house residents implicating another person); (2) the assistant state's attorney was ignorant of what boundaries should have been imposed on the complainant before she took the stand; (3) despite the fact that additional charges could have been brought against the defendant for the uncharged misconduct, the assistant state's attorney did not understand that this misconduct evidence fell within the parameters of the motion in limine; and (4) on the basis of a department report documenting allegations of other sexual abuse of the complainant by the defendant that ''the complainant's mother was going to relay . . . to the [assistant state's attorney],'' the assistant state's attorney thought that certain incidents alleged in the report were the allegations constituting the uncharged misconduct evidence that had been the subject of the trial court's order, not the incident about which the complainant testified that gave rise to the mistrial.

The inferences favoring the state are all ones that the trial court properly could have drawn *after* the

defendant had had the opportunity to inquire further. Instead, the court relied on a critical finding it had made at a time when the issue of intent was irrelevant and when the defendant would not have been prepared to present evidence as to that issue—in response to the motion for mistrial, a matter that pertained solely to the fairness of the proceedings and that properly could be determined based solely on the record. Indeed, the trial court made no effort to elicit any information from the state's attorney to determine whether an adverse inference as to her intent was warranted.[4] Therefore, I conclude that the record was inadequate to make a proper determination on the defendant's motion to dismiss and, accordingly, that the defendant should have been afforded the opportunity to have an evidentiary hearing in order to demonstrate that it would be unreasonable to draw automatically those inferences favorable to the state.

The majority relies on *State* v. *Nguyen*, supra, 253 Conn. 639. In my view, that reliance is misplaced. In *Nguyen*, we relied on two factors to determine that the trial court had not abused its discretion by failing to conduct an evidentiary hearing before finding that a sequestration order had been violated and disallowing certain testimony. Id., 656–57. First, in response to the trial court's preliminary inquiry, defense counsel had acknowledged the essential facts that gave rise to the state's allegations of a sequestration order violation. Id. In fact, as we noted, ''defense counsel's ultimate characterization of events was not necessarily inconsistent with the prosecutor's assertions. . . . Rather, defense counsel's own representations corroborated that a conversation in fact had taken place between himself and the defendant's wife while [the witness] was present, and that the exchange had related, in some respect, to the testimony previously given by the defendant's wife. In light of this corroboration, the prosecutor's allegations stood effectively uncontested.'' (Citation omitted.) Id., 659. As a consequence, defense counsel's representations provided adequate factual support for the trial court's determination that the discussion at issue undermined the purpose of the sequestration order. Id. Additionally, we considered the fact that, despite having had ample time to request an evidentiary hearing, the defendant failed to make such a request. Id., 660. This failure suggested that the defendant had been persuaded that the trial court's less extensive inquiry had been sufficient and strongly militated against a finding that the failure to conduct an evidentiary hearing was an abuse of discretion. Id. In the present case, the record is not essentially undisputed, and the defendant in this case twice sought an evidentiary hearing and filed an affidavit in support of his request.

Similarly, the majority's reliance on *United States* v. *Pavloyianis*, 996 F.2d 1467 (2d Cir. 1993), is unavailing.

In that case, the Second Circuit Court of Appeals affirmed the decision by the United States District Court for the Southern District of New York denying the defendant's motion to dismiss a subsequent prosecution on double jeopardy grounds. Id., 1475. The District Court had determined that an evidentiary hearing would serve no purpose because, in light of the *strong evidence of the defendant's guilt*, any misconduct was not deliberately engaged in to avoid the possibility of a likely acquittal. Id., 1474–75. The Court of Appeals affirmed, concluding that ''[n]o rule of law requires a hearing in this sort of case where the relevant facts can be ascertained from the record.'' Id., 1475.

I reiterate that I agree with the majority that a hearing is not required in every case, and that this court's statement in *State* v. *Colton*, supra, 234 Conn. 698, that ''[t]o the extent that misconduct allegedly has occurred off-the-record, a defendant must have an opportunity to make a record in some fashion,'' does not dictate otherwise. When, however, the record is not undisputed, some of the evidence that the defendant would require to demonstrate that the assistant state's attorney had engaged in misconduct with the intent to avoid an acquittal was not part of the record, and the evidence in the case distills to a credibility contest between the defendant and the complainant, the defendant should be given the opportunity to meet his difficult burden. As we have recognized, the burden of proving that the alleged prosecutorial misconduct had been undertaken not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct by provoking the defendant into seeking a mistrial, is a heavy one. When there is '' 'not the slightest indication or evidence that the trial prosecutor anticipated an acquittal' ''; *United States* v. *Pavloyianis*, supra, 996 F.2d 1475; or ''[a]ll parties have agreed that the present record suffices for this determination, and that no further testimony or other evidence is needed''; *United States* v. *Mitchell*, 572 F. Sup. 709, 715 (N.D. Cal. 1983); the need for an evidentiary hearing is significantly reduced, if not eliminated entirely. Those are not the circumstances of the present case.

I recognize that, generally, a finding of fact—that the assistant state's attorney did not have the intention to ''goad'' the defendant into moving for a mistrial—which is necessary to trigger a double jeopardy claim, warrants deference. See *Sumner* v. *Mata*, 449 U.S. 539, 547, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981). This principle is not controlling in the present case, however, absent the evidentiary hearing at which the defendant could call defense counsel, the assistant state's attorney and the complainant to testify. The present case is one in which the record, as a matter of law,[5] was inadequate to allow the court to decide the issue.[6]

Finally, I disagree with the majority's reasoning that further inquiry into the assistant state's attorney's ''off-the-record conduct would do no more than 'impugn [her] veracity . . . and impose a staggering burden of time and effort on our already overburdened court system.' '' First, the hearing would have been limited. The defendant represented: ''The evidentiary [hearing] that we're talking about in this case could certainly be done within a day. I don't even envision that it would last the entire day.'' Given the limited scope of the inquiry, I have no reason to doubt that representation. Second, and of even greater importance, is that the entire purpose of the defendant's burden to establish an intentionality on the part of the state in securing a mistrial is to impugn the integrity and veracity of the state in that particular instance. That is why the burden is so heavy and also why the defendant, when he makes a good faith offer to provide off-the-record material that reasonably could support that burden, must be given the opportunity to do so by an evidentiary hearing. Furthermore, the fact that such a hearing will ''burden'' our judicial system is no reason to deny it. One of the fundamental purposes of our judicial system is to shoulder precisely the burden of deciding, by an evidentiary hearing, whether a person's constitutional rights have been violated when that person properly has made a record justifying such a hearing. It simply is impermissible for the defendant's right to a hearing to be outweighed by the system's interest in judicial economy.

Accordingly, I respectfully dissent.

[1] Because I conclude herein that the failure to hold an evidentiary hearing in the present case was an abuse of discretion, I do not reach the issue, addressed in part II of the majority opinion, of whether the assistant state's attorney intentionally provoked the defendant to move for a mistrial. I do, however, agree with the majority's discussion of the doctrine of double jeopardy in part III of its opinion.

[2] Prior to trial, the defendant learned from a report prepared by the department of children and families that the complainant had alleged that, at times other than those noted in the bill of particulars, the defendant had sexually abused her, including one incident of penetration. The defendant filed a motion in limine to preclude such evidence, which the trial court granted.

[3] The fact that the assistant state's attorney asserted that she considered these allegations to be part of the cunnilingus episode does not mean that, as the majority implies, the trial court necessarily would have concluded *after* an evidentiary hearing that her belief was genuine. Indeed, the assistant state's attorney's assertion was made and was credited by the court before defense counsel offered her affidavit that contained sworn statements that undermined that assertion.

[4] Notably, in *United States* v. *Pavloyianis*, 996 F.2d 1467, 1475 (2d Cir. 1993), a case cited by the majority, the United States District Court for the Southern District of New York had obtained additional information from the state before making the critical determination as to the prosecutor's intent in purposely concealing information that was contrary to a witness' trial testimony. See id. (concluding that determination that defendant was not entitled to evidentiary hearing to determine prosecutor's intent was not improper, noting that District Court had reviewed affidavits by prosecutor that court had ordered state to submit). Moreover, in *United States* v. *Neufeld*, 949 F. Sup. 555, 557–58, 560-62 (S.D. Ohio 1996), aff'd, 149 F.3d 1185 (6th Cir.), cert. denied, 525 U.S. 1020, 119 S. Ct. 548, 142 L. Ed. 2d 456 (1998), also cited by the majority, the written decision by the United States District Court for the Southern District of Ohio evidences the careful reflection of the court on the issue of intent, separate and apart from its determina-

tion that the prosecutor's misconduct warranted a mistrial, based on an extensive colloquy as to that issue. Indeed, in *Neufeld*, the prosecutor admitted that he intentionally had elicited the improper, prejudicial testimony, the defendant did not claim that there was other evidence that bore on proving intent to goad a mistrial and thus the trial court properly could draw the adverse inference on the basis of the record before it. Id., 558–59.

[5] The majority misunderstands this conclusion. ''Judicial discretion is always a legal discretion, exercised according to the recognized principles of equity. . . . The action of the trial court is not to be disturbed unless it abused its legal discretion, and [i]n determining this the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did. . . . The trial court's discretion imports something more than leeway in decision making and should be exercised in conformity with the spirit of the law and should not impede or defeat the ends of substantial justice.'' (Citation omitted; internal quotation marks omitted.) *Eldridge* v. *Eldridge*, 244 Conn. 523, 534–35, 710 A.2d 757 (1998). Therefore, when I state that the trial court as a matter of law abused its discretion when it refused to grant the defendant an evidentiary hearing on the issue of whether the assistant state's attorney had intended to provoke a mistrial, it is because I conclude that the court reasonably could not conclude as it did.

[6] I note that, even when the record reveals deliberate indefensible conduct throughout a trial that all but compels the conclusion that the state intended to provoke a mistrial, other courts have determined that the state ''should have an opportunity to present any evidence [it] may have that the prosecutor did not, as a matter of fact, intend to provoke [a defendant's] mistrial motions.'' *Petrucelli* v. *Smith*, 544 F. Sup. 627, 639 (W.D.N.Y. 1982); id. (''Accordingly, if [the prosecutor] wishes to offer such evidence, he is directed to notify the court of his intent within twenty days of the entry of this order. A prompt evidentiary hearing on this issue will then be scheduled. If no hearing request is made, my finding as to the prosecutor's intent will be final.'').