

\*\*\*\*\*

The “officially released” date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the “officially released” date appearing in the opinion. In no event will any such motions be accepted before the “officially released” date.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the electronic version of an opinion and the print version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest print version is to be considered authoritative.

The syllabus and procedural history accompanying the opinion as it appears on the Commission on Official Legal Publications Electronic Bulletin Board Service and in the Connecticut Law Journal and bound volumes of official reports are copyrighted by the Secretary of the State, State of Connecticut, and may not be reproduced and distributed without the express written permission of the Commission on Official Legal Publications, Judicial Branch, State of Connecticut.

\*\*\*\*\*

KATZ, J., concurring. Although I agree with the majority that the judgment of conviction of the defendant, Earl Martin Erickson, must be affirmed, I write separately because I disagree with the majority's conclusion in part I A of its opinion that the trial court properly declined to conduct an in camera review of documents regarding complaints of misappropriation in the personnel file of the complainant, Richard Orr, a state marshal. Instead, I would conclude that the defendant adequately demonstrated that there was a reasonable likelihood that the personnel files contained material relevant to Orr's credibility as a witness and that the defendant was therefore entitled to have the trial court review those documents to determine whether they should be disclosed to him. My independent review of the documents, however, reveals that any impropriety on the part of the trial court was harmless and thus does not necessitate reversal.

The defendant contends that the trial court improperly refused to conduct an in camera review of two groups of documents allegedly present within Orr's personnel file: (1) seven to ten complaints made against Orr in his capacity as a state marshal; and (2) complaints made against Orr on January 16, 2007, and February 2, 2007, for the alleged misappropriation of funds in Orr's trustee account (misappropriation complaints). As to the first group of documents, the majority concludes that the trial court properly declined to conduct an in camera review because the defendant had failed to provide any specific basis to believe that the records would contain prior complaints or disciplinary actions bearing on the defendant's case. As to the second group of documents, the misappropriation complaints, the majority concludes that the trial court acted properly in refusing to conduct an in camera review because the defendant had failed to establish that Orr's prior misappropriation of funds was relevant. I agree with the majority as to the first group, but respectfully disagree as to the second.

When a criminal defendant requests disclosure of confidential information or records, a trial court may be called upon to perform an in camera review in order to determine the contents of those records and to balance the defendant's interest in disclosure of the records against the strong policy interests in confidentiality. See *State v. Januszewski*, 182 Conn. 142, 172–73, 438 A.2d 679 (1980) (“Because discovery of matters contained in a police officer's personnel file involves careful discrimination between material that relates to the issues involved and that which is irrelevant to those issues, the judicial authority should exercise its discretion in determining what matters shall be disclosed.

An in camera inspection of the documents involved, therefore, will under most circumstances be necessary.”), cert. denied, 453 U.S. 922, 101 S. Ct. 3159, 69 L. Ed. 2d 1005 (1981), overruled in part on other grounds by *State v. Ray*, 290 Conn. 602, 966 A.2d 148 (2009). In order to warrant such review, however, a defendant’s request for information must “be specific and should set forth the issue in the case to which the personnel information sought will relate. . . . Any request for information that does not directly relate to legitimate issues that may arise in the course of the criminal prosecution ought to be denied.” (Citation omitted; internal quotation marks omitted.) *State v. Betances*, 265 Conn. 493, 507, 828 A.2d 1248 (2003). Accordingly, a trial court’s refusal to conduct an in camera review of documents or records constitutes an abuse of discretion only when “a sufficient foundation has been laid [by the defendant] to indicate a reasonable likelihood that they contain material relevant to the case or useful for impeachment of a witness.” (Internal quotation marks omitted.) *State v. Colon*, 272 Conn. 106, 264, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005).

In *State v. Januszewski*, supra, 182 Conn. 173–74, this court noted: “It seems to us that in this case, where the defendant’s right to impeach the state’s key witness is involved, an in camera inspection by the trial judge of the witness’ personnel file for material relevant to the issue of credibility would have been appropriate. The trial court’s refusal to do so constituted error.” Indeed, we have emphasized that “[e]vidence tending to show the motive, bias or interest of an important witness is never collateral or irrelevant. It may be . . . the very key to an intelligent appraisal of the testimony of the [witness].” (Internal quotation marks omitted.) *State v. Colton*, 227 Conn. 231, 248, 630 A.2d 577 (1993), on appeal after remand, 234 Conn. 683, 663 A.2d 339 (1995), cert. denied, 516 U.S. 1140, 116 S. Ct. 972, 133 L. Ed. 2d 892 (1996). Accordingly, “[i]mpeachment of a witness for motive, bias and interest may . . . be accomplished by the introduction of extrinsic evidence.” *Id.*, 249. Moreover, “[i]nquiry into a possible financial stake of a witness in the outcome of a case in which the witness is testifying is a proper subject of impeachment.” *Id.*, 250.

During his proffer regarding the personnel records, the defendant contended that the misappropriation complaints would demonstrate that Orr needed money to replenish his trustee account. He further claimed that Orr’s financial status, as demonstrated by the misappropriation complaints, was relevant to show that: (1) Orr had a motive to cross the threshold of the defendant’s residence in order to collect his fee for effectuating service; and (2) Orr had a motive to testify at trial that he had not crossed the threshold of the defendant’s residence in order to bolster a potential civil action

against the defendant.<sup>1</sup> As to the first ground, I agree with the majority that the defense failed to establish a meaningful nexus between the misappropriation complaints and Orr's actions at the time of the incident. Specifically, I agree with the majority that, because the defendant provided no information as to what extent the fee for making in-hand service would have restored the allegedly misappropriated funds, he failed to meet his burden to demonstrate the potential relevance of the requested materials. See *State v. Betances*, supra, 265 Conn. 507. As to the second ground, however, I conclude that the defense did lay a sufficient foundation to warrant an in camera review of the misappropriation complaints.

In the present case, Orr and the defendant testified to radically different versions of the confrontation underlying the charges filed against the defendant. Because there were no eyewitnesses in this case, other than Orr and the defendant, the outcome of the case essentially turned on which man the jury believed. The defendant's proffer established a nexus between records concerning the alleged misappropriation complaints, which could establish that Orr needed funds to replenish his trustee accounts, and his motive to testify falsely in order to enhance the likelihood of prevailing in any potential civil action against the defendant. The complaints were relevant to Orr's financial stake in the outcome of the case, and, accordingly, to his credibility as the state's key witness. See *State v. Colton*, supra, 227 Conn. 250. I therefore would conclude that the trial court abused its discretion by refusing to conduct an in camera inquiry of records related to the misappropriation complaints.

This conclusion, however, does not end my inquiry. Even if we were to assume that the trial court had conducted the in camera review, "the trial court [must] make available to the defendant only information that it concludes is clearly material and relevant to the issue involved. . . . In this regard, the trial court should exercise its discretion in deciding the temporal relevancy or remoteness of material sought. . . . Because the law furnishes no precise or universal test of relevancy, the question must be determined on a case by case basis according to the teachings of reason and judicial experience." (Internal quotation marks omitted.) *State v. Brown*, 273 Conn. 330, 347, 869 A.2d 1224 (2005). My independent review of the documents pertaining to the misappropriation complaints reveals that, in fact, Orr had repaid the trustee accounts in full well before both the incident in question and, therefore, the trial.<sup>2</sup> Accordingly, the requested documents *disproved* the defendant's claim that Orr had a motive to testify falsely in order to rectify any arrearage of his trustee accounts, and therefore were not relevant to the defense.<sup>3</sup> Cf. *State v. Slimskey*, 257 Conn. 842, 857, 779 A.2d 723 (2001) (reversing judgment when "review of

the victim's school records, viewed in conjunction with the entire trial transcript, convinces us that portions of the . . . reports directly relate to [the victim's] credibility and could have created a reasonable doubt of the defendant's guilt"). Nor were they relevant to any other issue implicated in this case.

Accordingly, I concur in the judgment.

<sup>1</sup> In his proffer, defense counsel suggested that the misappropriation complaints would be relevant to whether Orr had "a motive, or vice, or interest . . . to testify falsely here in this case." Upon further questioning by the trial court regarding the relevancy of the documents, defense counsel first noted that, "if there was a financial stake, for which we believe that there was here, that [Orr] has some kind of monetary issue going on in the background here, that . . . certainly would be an issue of relevancy." Defense counsel then explained: "[W]e have information, that will be able to come out through cross-examination that this has been an exercise in seeking some type of financial compensation for the acts for which [Orr] claimed to have been hurt here. I clearly think that that's relevant, specifically if in fact the claim is that in late January, early February [2007], he's misappropriated or taken money out of an account, whether it be him or somebody else, for which he has an obligation under the law to put that money back. But it just so happens that now, three weeks later, now we have an opportunity for [Orr] to, quote/unquote, have a payday here and to reimburse that—to find a way by which to reimburse that money into the account."

<sup>2</sup> I note that, as a general practice, information contained in a confidential file should not be made public as part of appellate review without first giving the witness an opportunity to waive confidentiality. See, e.g., *State v. Webb*, 75 Conn. App. 447, 458, 817 A.2d 122 ("[w]e will not reveal specific details of the result of our in camera review because [on remand] the victim may withhold her consent to the disclosure of that additional material"), cert. denied, 263 Conn. 919, 822 A.2d 244 (2003). In the present case, however, this brief description of the contents of the file ameliorates any harmful effect of this court's necessary acknowledgment of the *existence* of the misappropriation complaints and inures exclusively to Orr's benefit.

<sup>3</sup> The defendant also claims that the trial court improperly prevented him from cross-examining Orr regarding the misappropriation complaints. During the proffer in support of this line of cross-examination, the defendant set forth additional facts concerning the alleged misappropriation complaints and claimed that the complaints were relevant as to Orr's motive to testify falsely in order to bolster a civil action against the defendant. Specifically, defense counsel stated: "Orr in his official capacity as a state marshal was asked to execute a bank execution and a property execution for which he then received funds into his state marshal trustee account. And those funds were . . . removed from his trustee account without the appropriate permission [by] his wife and he was some [\$7000] negative in his state marshal account and began bouncing checks across the board; and failed to pay in a timely fashion to the two attorneys [who] had retained him to execute these two bank executions and property execution. They filed complaints with the [s]tate [m]arshal [c]ommission; there's been a determination of finding of probable cause that he had mishandled funds on behalf of clients and that he had not filed the appropriate accounting provisions for a trustee account.

"Those issues are relevant as to the issues of motive, bias or . . . interest here to testify untruthfully, because there is a financial component that I intend . . . to get into a line of questioning with [Orr] in regards to whether or not he intends to bring a civil action for these injuries he sustained. . . .

"[T]his is potentially a windfall for [Orr] financially in terms of bringing a civil action, and I would intend to ask him whether or not he's still in debt some [\$4000 to \$7000]. And I think that he's got a financial motive here to testify untruthfully . . . ."

The trial court, however, misconstrued the defendant's claim as relating to Orr's motive to cross the threshold of the defendant's residence, and, based on that misconstruction, determined that any cross-examination about the misappropriation complaints would be remote and irrelevant. Specifically, the trial court stated: "This is an assault case, an interfering case, and the question is whether or not [Orr] was assaulted by [the defendant]. The fee that he would receive for this was . . . I think he testified . . . [\$30] thereabout. This is not . . . [your] client's not on trial for a case where it

involves money, funds, banking issues. So, I'm going to make the finding [that] it's irrelevant."

As we have noted previously herein, evidence tending to establish a witness' motive to testify falsely is relevant. *State v. Colton*, supra, 227 Conn. 250. The defendant's proffer clearly established his theory of relevance and how the evidence would tend to support that theory. See *State v. Cecil*, 291 Conn. 813, 825, 970 A.2d 710 (2009) ("[a] clear statement of the defendant's theory of relevance is all important in determining whether the evidence is offered for a permissible purpose"). Accordingly, I would conclude that the trial court abused its discretion in preventing the defendant from cross-examining Orr regarding the misappropriation complaints. I also would conclude, however, that the contents of the documents pertaining to those complaints renders any impropriety harmless. See footnote 2 of this opinion.

---