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PALMER, J., dissenting. I agree with the Appellate Court that the trial court violated the confrontation clause rights of the defendant, Dan L. Moore, by declining to strike the testimony that the assistant state's attorney (prosecutor) had adduced during his redirect examination of James Brooks, the state's key witness, after the defense was prevented from recross-examining Brooks because of his invocation of his fifth amendment privilege against self-incrimination during redirect examination. See *State v. Moore*, 103 Conn. App. 1, 6, 926 A.2d 1058 (2007). I also agree with the Appellate Court that this impropriety constituted harmful error requiring a new trial. See *id.*, 10–11. Accordingly, I respectfully dissent.

The undisputed facts and procedural history relevant to this issue are set forth in the majority opinion and require no repetition here. I turn, therefore, to the confrontation clause principles that are applicable when, as in the present case, a state's witness who has testified on direct examination asserts his fifth amendment privilege and refuses to answer questions on cross-examination. As this court previously has observed, “[i]f a defendant's cross-examination is restricted by the competing fifth amendment right of a witness, it may be necessary to strike the direct testimony of that witness.” (Internal quotation marks omitted.) *State v. Roma*, 199 Conn. 110, 116, 505 A.2d 717 (1986). “To reconcile a defendant's rights under the confrontation clause with a witness' assertion of the fifth amendment privilege, a court must initially consider: (1) whether the matter about which the witness refuses to testify is collateral to his or her direct testimony, and (2) whether the assertion of the privilege precludes inquiry into the details of his or her direct testimony. . . . If the court determines that the privilege has been invoked with respect to a collateral matter, or that the invocation does not preclude inquiry into the witness' direct testimony, then the defendant's right to cross-examine has not been impinged and no corrective action is necessary. Conversely, the sixth amendment is violated when a witness asserts the privilege with respect to a non-collateral matter and the defendant is deprived of a meaningful opportunity to test the truth of the witness' direct testimony.”¹ (Citations omitted.) *Bagby v. Kuhlman*, 932 F.2d 131, 135 (2d Cir.), cert. denied, 502 U.S. 926, 112 S. Ct. 341, 116 L. Ed. 2d 281 (1991). I believe that Brooks' invocation of his fifth amendment privilege during his redirect examination by the prosecutor precluded the defense from recross-examining him on matters that were not collateral and prevented the defense from meaningfully probing the testimony that Brooks had given on redirect examination.

For the reasons set forth by the Appellate Court, I agree with its conclusion that the issues that the prosecutor raised during its redirect examination of Brooks were not collateral matters. See *State v. Moore*, supra, 103 Conn. App. 8. The facts surrounding Brooks' agreement to enter into a plea deal with the state and, in particular, the facts relevant to his agreement to testify that the defendant had participated in the robbery, as well as the reason or reasons for his subsequent change in his testimony on cross-examination, were key to the jury's assessment of Brooks' credibility. Because Brooks offered two different and conflicting versions of the events on the night of the robbery—one version, which the prosecutor elicited on direct examination, that implicated the defendant in the robbery, and a second version, which the defense elicited on cross-examination, that vindicated the defendant of any such involvement—the defendant's guilt hinged on which version the jury accepted. Thus, as the Appellate Court observed, “[t]he details of Brooks' plea agreement, which included a promise to testify against the defendant and a recitation of the facts to which he would testify, bore directly on the truthfulness of the testimony, not on his general character or credibility. Conversations with the prosecutor about going to trial also dealt directly with the truth of Brooks' testimony. This testimony was not collateral evidence of *general* bias because it explored more than *general* credibility.” (Emphasis added.) *Id.*, 8–9. In other words, Brooks' testimony on redirect examination did not pertain to collateral matters because that testimony bore on Brooks' credibility in relation to the central issue in the case, that is, whether the defendant had been a knowing participant in the robbery.

The inability of the defense to recross-examine Brooks concerning the information that the prosecutor had elicited on redirect examination also deprived the defense of the opportunity to focus its questioning of Brooks on the issue of how and why he came to enter into his plea agreement with the state and his reasons for telling the state, in connection with the plea negotiations, that the defendant had been involved in the robbery. During direct examination, Brooks equivocated somewhat on the details of how the robbery took place, prompting the prosecutor to elicit testimony from Brooks concerning the fact that the information about the defendant that Brooks had provided to the state indicated that the defendant was, in fact, a participant in the robbery. At this point, however, Brooks' testimony comported with the statements that he had made about the defendant during his pretrial discussions with the state, that is, that the defendant was involved in the robbery. On cross-examination, Brooks testified that he originally had told the state that the defendant was not involved in the robbery but that later, during the course of plea discussions, he had stated that the defen-

dant did participate in the crime. Although, on cross-examination, Brooks initially reaffirmed his testimony on direct examination that the defendant had participated in the robbery, Brooks later changed his testimony and explained that the defendant was not involved in the crime and, further, that his earlier direct and cross-examination testimony to the contrary was the product of pressure by the state related to his plea discussions. On redirect examination, the prosecutor questioned Brooks in much greater detail concerning the facts to which he had agreed in certain statements that he had made before Judge Miano, who presided over the hearing at which Brooks entered his guilty plea pursuant to his plea agreement with the state. In particular, the prosecutor elicited testimony from Brooks that, during his appearance before Judge Miano, he had agreed to tell the truth and, further, that, at that time, he had implicated the defendant in the robbery.

In eliciting Brooks' testimony on redirect examination, the prosecutor attempted to call into question his testimony on cross-examination that the defendant was *not* present during the robbery, essentially asking the jury to infer that Brooks' recantation on cross-examination was not credible. It is this issue—the credibility of Brooks' statements on cross-examination that the defendant was not present at the time of the robbery—that the prosecutor focused on, for the first time, during his redirect examination of Brooks, and that the defense had no meaningful opportunity to probe. Until the prosecutor had undertaken his more thorough questioning of Brooks on redirect examination about Brooks' discussions with the state and his representations to Judge Miano, the defense had no cause or reason to explore those matters. Only after Brooks expressly had abandoned his original inculpatory testimony regarding the defendant's involvement in the robbery did the prosecutor attempt to discredit that recantation, and only then could the defense effectively have cross-examined Brooks on that point. Because the defense was not afforded an opportunity to address the prosecutor's efforts on redirect examination to discredit the testimony that Brooks had given on cross-examination, it cannot be said that the defense was "permitted to expose to the jury the facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness."² (Internal quotation marks omitted.) *State v. Brown*, 273 Conn. 330, 340, 869 A.2d 1224 (2005).

Indeed, the majority's conclusion that the defense, during its cross-examination of Brooks, was obligated to pose any and all questions to him that related to his change in testimony—lest Brooks refuse to testify before any potential recross-examination—effectively required the defense to perform the very impeachment that the prosecutor performed on redirect examination so that the defense could preemptively rehabilitate the

exculpatory testimony elicited on cross-examination. At the time of cross-examination, however, the defense obviously had no way of knowing either that Brooks would invoke his fifth amendment privilege prior to recross-examination or that the prosecutor necessarily would elect to engage in redirect examination of Brooks. At that point, therefore, the defense had no incentive to engage in an in-depth examination of Brooks' changed testimony.

I agree that defense counsel's decision to refrain from cross-examining Brooks on his apparent equivocation during direct examination concerning the defendant's involvement in the crime could be viewed as a form of "trial strategy," which ordinarily forecloses any claim of a violation of the right of confrontation. See, e.g., *State v. Reed*, 174 Conn. 287, 300, 386 A.2d 243 (1978) ("[w]hen a party chooses not to cross-examine a witness in order to avoid the possibility of eliciting harmful testimony, his right to confront and cross-examine that witness as guaranteed by the sixth and fourteenth amendments of the United States constitution is in no way abridged" [internal quotation marks omitted]). Whether a defendant may be deemed to have had a meaningful opportunity to cross-examine a witness about a particular matter, however, necessarily depends on whether that defendant had any reason or basis to do so at the time. As I have explained, the defense in the present case had no such reason prior to the prosecutor's questioning of Brooks on redirect examination. To conclude otherwise would place an unfair burden on a defendant to interrogate a witness about any possibly relevant issue irrespective of the fact that such questioning may prove to be completely unnecessary or even counterproductive, depending on how the prosecutor proceeds, if at all, during his or her redirect examination of that witness. In the present case, the defense had every reason, and every right, to refrain from delving into the details of Brooks' plea arrangement with the state until considering the manner and extent to which the prosecutor addressed that issue during his redirect examination of Brooks.³

My conclusion that the trial court improperly declined to strike Brooks' redirect examination testimony requires a determination of whether that error was harmful. "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends [on] a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted,

and, of course, the overall strength of the prosecution's case." *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

In the present case, I agree with the Appellate Court that the trial court's improper denial of the defendant's motion to strike Brooks' redirect examination testimony was not harmless beyond a reasonable doubt. See *State v. Moore*, supra, 103 Conn. App. 10–11. A review of the record reveals that the opportunity to rehabilitate Brooks following his testimony on redirect examination was potentially vital to the defendant's case. Recross-examination would have permitted the defense to elicit testimony from Brooks explaining why he had changed his story following direct examination and the first part of cross-examination, presumably by explaining the pressure that he felt from the state to implicate the defendant in the robbery. Because the identification of the defendant by the victims of the crime was not particularly reliable,⁴ the testimony of Brooks, the person primarily responsible for initiating and carrying out the robbery, was critical, and recross-examination of Brooks reasonably could have placed in doubt the evidence implicating the defendant in the robbery.⁵ Because the trial court's denial of the motion to strike Brooks' redirect examination testimony was both improper and harmful, I would affirm the judgment of the Appellate Court reversing the judgment of the trial court.⁶ Accordingly, I respectfully dissent.⁷

¹ The state correctly notes that another aspect of the inquiry for determining whether a defendant's right of confrontation has been violated involves consideration of the quality of the entire cross-examination. It is true that the defense in the present case was afforded a full opportunity to cross-examine Brooks following his direct examination, including an opportunity to inquire generally about Brooks' plea agreement with the state. As I explain more fully hereinafter, however, the defense was denied an opportunity to question Brooks with respect to the detailed testimony about the plea agreement that the state had elicited from Brooks on redirect examination. Consequently, the overall quality of defense counsel's cross-examination of Brooks was lacking—through no fault of the defendant, who could not possibly have foreseen that Brooks would invoke his fifth amendment privilege during his redirect examination by the state.

² I disagree with the majority that *United States v. Caudle*, 606 F.2d 451 (4th Cir. 1979), on which the defendant relies in support of his claim, is distinguishable from the present case. In *Caudle*, the United States Court of Appeals for the Fourth Circuit concluded that the District Court improperly had denied the request of the defendants in that case to recross-examine one of the government's witnesses. *Id.*, 456, 459. In so concluding, the Court of Appeals reasoned that, because the government's redirect examination had required the witness to testify in significantly greater detail concerning information that had been the subject of the witness' direct examination testimony, the defendants had a sixth amendment right to question the witness on those details. *Id.*, 459. The Court of Appeals reached this conclusion even though the defendants theoretically could have engaged in such detailed questioning of the witness on cross-examination. Like in *Caudle*, I believe that the redirect examination testimony in the present case concerned new matters about which the defendant had a sixth amendment right to question Brooks.

³ The state also contends that it would have been unfairly prejudiced if the trial court had stricken Brooks' redirect examination testimony. I disagree with this claim. Although it is true that striking Brooks' redirect examination testimony effectively would have foreclosed the state from questioning Brooks about the exculpatory testimony that he had given on cross-examination, that fact does not compel the conclusion that striking that testimony would have been *unfairly* prejudicial to the state. On the contrary, to the extent that the state suffers any prejudice because its own witness changes his story on cross-examination and thereafter refuses to testify, it is the state, and not the defendant, who must bear the risk that the witness will make himself unavailable in that manner. To conclude otherwise would reward the state for a decision that was solely within the

discretion or control of its own witness and, at the same time, seriously jeopardize the defendant's right of confrontation.

⁴ As the Appellate Court observed, “[o]f the seven victims who viewed photographic arrays, including the defendant’s photograph on the night of the robbery, only one victim identified the defendant as an assailant. That victim stated that he thought [that] the defendant was the driver of the van, but this was inconsistent with all other evidence presented.” *State v. Moore*, supra, 103 Conn. App. 11 n.6.

⁵ I note that the majority’s assertion that Brooks’ redirect examination testimony lacks significance is undermined by the state’s claim at trial that striking the testimony would have been unfairly harmful to its interests. Indeed, in essence, the state asserts that Brooks’ testimony on redirect examination was too important to strike but not important enough to have prejudiced the defendant. In concluding both that the state was entitled to the benefit of Brooks’ testimony *and* that the testimony was not significant, the majority effectively endorses this “heads I win, tails you lose” position. In contrast to the majority, I do not believe that the state can have it both ways.

⁶ In my view, there is no question that the trial court should have stricken Brooks’ redirect examination testimony and, therefore, that its refusal to do so was improper. If the trial court had granted the defendant’s motion to strike, the defendant would have no sixth amendment claim—or any other reason to complain—because the defense would have been afforded a full and fair opportunity to cross-examine Brooks about his direct examination testimony. The state also would have no complaint because the prosecutor would have elicited the testimony that he needed from Brooks on direct examination. Furthermore, as I discussed previously; see footnote 3 of this opinion; because Brooks was the state’s witness, striking his redirect examination testimony would not have been unfair to the state. Because there was no justification for the trial court’s denial of the defendant’s motion to strike the challenged testimony, it was an abuse of discretion not to do so. As I have explained, in my view, that abuse of discretion resulted in a violation of the defendant’s right of confrontation.

The majority concludes, however, that the trial court’s denial of the motion to strike Brooks’ redirect examination testimony was not an abuse of discretion because, in the majority’s view, that ruling did not result in a violation of the defendant’s right of confrontation. See part I of the majority opinion (“[i]n light of our determination that there was no constitutional violation, there is no basis for concluding that the trial court abused its discretion in declining to strike Brooks’ redirect [examination] testimony”). I disagree with the majority’s analysis. Whether a trial court’s evidentiary ruling constitutes an abuse of discretion does not depend on whether that ruling also results in a constitutional violation. In other words, an evidentiary ruling may constitute an abuse of discretion but not rise to the level of a constitutional violation. Indeed, that is generally the case when a trial court makes an improper evidentiary ruling. For purposes of its analysis, however, the majority improperly assumes that an evidentiary ruling that does not result in a confrontation clause violation also does not constitute an abuse of discretion. Because the majority fails to engage in a proper analysis of the propriety of the trial court’s ruling, it also fails to engage in the harmless error analysis that is required when a trial court ruling amounts to an abuse of discretion. See, e.g., *State v. Sawyer*, 279 Conn. 331, 357, 904 A.2d 101 (2006) (improper evidentiary ruling that is not constitutional in nature is harmless only if reviewing court “has a fair assurance that the error did not substantially affect the verdict” [internal quotation marks omitted]), overruled in part on other grounds by *State v. DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008).

The majority explains that its failure to engage in this required analysis is predicated on the fact that “the parties did not address in their briefs to this court whether the trial court abused its discretion but confined their arguments to the constitutional question” Part I of the majority opinion. Although the parties focused primarily on the constitutional issue—the issue that the Appellate Court decided in favor of the defendant; see *State v. Moore*, supra, 103 Conn. App. 6—the state, in its brief to this court, also expressly argued that the trial court’s denial of the defendant’s motion to strike Brooks’ testimony was harmless even if that ruling constituted an abuse of discretion that did not rise to the level of a constitutional violation. In any event, given the majority’s conclusion that the Appellate Court decided the constitutional question improperly, it is only fair for this court also to address the issue that necessarily is subsumed in that broader constitutional issue, namely, whether the trial court’s denial of the defendant’s motion to strike, even if not a confrontation clause violation, nevertheless constituted an abuse of discretion and, if so, whether the impropriety warranted a new trial because it substantially affected the verdict.

⁷ Because I would affirm the judgment of the Appellate Court on the ground that that court correctly concluded that the defendant’s right of confrontation was violated, I need not address the defendant’s alternative grounds for affirming the Appellate Court’s judgment.