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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.

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KATZ, J., concurring and dissenting. I agree with part II of the majority opinion in its rejection of the challenge by the defendant, Dante DeLoreto, to General Statutes § 53a-181 (a) (3)[1] as being unconstitutionally vague as applied to him and unconstitutionally overbroad. I agree only in part, however, with part I of the majority opinion addressing the defendant's free speech challenges under the federal and state constitutions[2] to his conviction under § 53a-181. Specifically, with respect to the defendant's incident involving Robert Labonte, a Wethersfield police sergeant, I agree with the majority's conclusion that the defendant's conduct was not constitutionally protected, but I would not apply the true threats doctrine; see *United States* v. *Orozco-Santillan*, 903 F.2d 1262, 1265–66 (9th Cir. 1990); because a narrower constitutional ground is applicable. With respect to the defendant's incident involving Andrew Power, also a Wethersfield police sergeant, I agree with the majority that the true threats doctrine applies, but would remand the case to the trial court for the necessary factual determinations.

With respect to the defendant's incident with Labonte, I would not turn to the true threats doctrine, which this court previously has not adopted, because it is unnecessary to do so. Instead, I would affirm the judgment of the trial court on the breach of the peace count involving Labonte on the narrower ground that the defendant violated subsection (a) (1) of § 53a-181, because that provision prohibits ''threatening behavior in a public place . . . .'' See footnote 1 of this concurring and dissenting opinion. Applying § 53a-181 (a) (1), we can resolve the issue based solely on the defendant's threatening *physical* conduct, i.e., his erratic driving near Labonte, who was jogging at the time of the incident, his attempt to cut off Labonte with his car, his swinging of his car door in the direction of Labonte, and his subsequent advance toward Labonte with his fists raised, without resort to the defendant's speech.

It is well settled ''that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses . . . .'' *R.A.V.* v. *St. Paul*, 505 U.S. 377, 385, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). In the present case, although the defendant contends that there is a nonthreatening interpretation to his *statements*, he does not defend similarly his *conduct*. Accordingly, I disagree that the true threats doctrine should be applied to the defendant's incident with Labonte, but nevertheless I would affirm the trial court's judgment as to the breach of the peace count involving Labonte as threatening behavior under § 53a-181 (a) (1).

On the other hand, I do agree with the majority that the true threats doctrine properly may be applied to

the defendant's incident with Power. Unlike the incident with Labonte, the defendant's conduct toward Power consisted principally of verbal, rather than physical, conduct. Nonetheless, I do not agree with the majority's application of the true threats doctrine to the present case. In my view, because application of the doctrine requires a fact-intensive inquiry, we must remand the case for further proceedings, as *the trial court*, and not this court, is the fact finder.

Whether a reasonable person would believe that the defendant's threats were mere hyperbole or jokes "in light of their entire factual context, including the surrounding events and reaction of the listeners"; *United States* v. *Orozco-Santillan*, supra, 903 F.2d 1265; is not a question that this court can decide as a matter of law. The issue in this appeal is not whether there was sufficient evidence in the record to support a determination that the defendant's statements constituted a true threat. Compare *State* v. *Smith*, 262 Conn. 453, 473, 815 A.2d 1216 (2003) (reviewing facts in sufficiency of evidence claim). Because that question never was presented in this case, there has been no factual determination in this regard. Therefore, we are left with a test set forth by the majority that depends upon factual determinations that never have been made.

It is well settled, however, that "[i]t is not the role of this court to make . . . a factual determination. It is in the sole province of the trier of fact to evaluate . . . testimony, to assess its credibility and to assign it a proper weight. . . . Since this is a case of first impression and since the governing standard is one that we have not previously articulated, the trial court is free to consider any additional evidence that the parties may want to present on the issue . . . ." (Citations omitted.) *State* v. *Jarzbek*, 204 Conn. 683, 706–707, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988); see also *United States* v. *Merrill*, 746 F.2d 458, 462–63 (9th Cir. 1984) ("[a] few cases may be so clear that they can be resolved as a matter of law . . . but most cases arising under [18 U.S.C. § 871, threatening the life of the president of the United States] present widely varying fact patterns that should be left to the trier of fact" [citation omitted]); *United States* v. *Carrier*, 672 F.2d 300, 306 (2d Cir.), cert. denied, 457 U.S. 1139, 102 S. Ct. 2972, 73 L. Ed. 2d 1359 (1982) (whether speaker's language constitutes threat is matter to be decided by trier of fact).

Therefore, I disagree with the majority's conclusion that it is appropriate for this court to examine the defendant's conduct in the incident with Power and to determine what a reasonable person would believe in this case. Rather, I would remand the case to the trial court for a new trial, at which time the issue of whether the defendant's speech to Power constituted true threats could be litigated against the entire *factual* background

at issue.[3]

Accordingly, I respectfully concur in part and dissent in part.

[1] General Statutes § 53a-181 (a) provides in relevant part: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place . . . or (3) threatens to commit any crime against another person or such other person's property . . . ."

[2] The first amendment to the United States constitution, made applicable to the states through the fourteenth amendment, provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

Article first, § 4, of the Connecticut constitution provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

Article first, § 5, of the Connecticut constitution provides: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press."

Article first, § 14, of the Connecticut constitution provides: "The citizens have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance."

[3] I note that, in determining whether the defendant's statements were true threats, the majority cites as a relevant fact the defendant's "history of confrontational behavior"—relying on his "giving the finger" to Power, as well as the defendant's lawsuit pending against various Wethersfield police officers. This "confrontational behavior," however, arguably is constitutionally protected speech. I would caution the fact finder, therefore, that, although the entire factual context is to be considered; *United States* v. *Orozco-Santillan*, supra, 903 F.2d 1265; prior constitutionally protected conduct should not serve as the principal basis for determining the threatening nature of the defendant's subsequent statements.