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KATZ, J., dissenting. The majority concludes, in reversing the Appellate Court's judgment, that, despite frequent improper remarks by the state's attorney that ''arguably [were] central to the critical issues in the case,'' the defendant, Ryan Thompson, was not deprived of a fair trial. I disagree.

The Appellate Court identified three categories of remarks by the state's attorney in his closing argument as misconduct, which it found to be the most egregious of the improprieties alleged by the defendant.[1] See *State* v. *Thompson*, 69 Conn. App. 299, 304–306, 797 A.2d 539 (2002). In particular, it concluded that certain remarks by the state's attorney, including a remark that certain witnesses '' 'have reserved a place in hell for themselves' ''; id., 306; constituted statements that ''exceeded all bounds of acceptable conduct'' because they were religiously charged and inflammatory statements of the type universally condemned by courts. Id., 307. The Appellate Court further identified several remarks by the state's attorney suggesting that certain witnesses offering testimony favorable to the defendant were facing arrest for the same incident. Id., 308. The court condemned these remarks because although the state had not produced any evidence in support thereof, the remarks suggested that the state had such evidence, thereby diverting the jury from the evidence properly before it. Id., 308–309. Finally, the Appellate Court cited six instances in which the state's attorney had vouched for the veracity of Robert Latour, a key state's witness, creating a further risk that the jury might conclude that the state's attorney had ''access to matters not in evidence'' to support Latour's credibility. Id., 310. The court concluded that these three categories of remarks were sufficiently prejudicial to deprive the defendant of a fair trial.

I fully concur with the Appellate Court's thorough and cogent analysis. Indeed, as the majority notes, the state concedes that the first two categories of remarks were improper. Any doubt that I may have had, however, as to whether the state's attorney's misconduct in this case was sufficiently egregious as to warrant reversal of the defendant's conviction is resolved by resort to the other improprieties acknowledged by the majority. Specifically, the majority identifies as improper the following remarks by the state's attorney.

First, the state's attorney's remark that Jared Gilkenson and David Stebbins were lying when they recanted their previous statements implicating the defendant. The majority concludes that ''[a]lthough it is not improper to comment on a witness' motive to lie, these particular remarks went beyond such permissible argument because they were inextricably linked to the pros-

ecutor's conceded improper comments on the moral character of Gilkenson and David Stebbins . . . .''

Second, the state's attorney's statement that when Gilkenson and David Stebbins gave their initial statements, which they later recanted, they ''truthfully told the police who amongst them was responsible.'' The majority concludes that the comment was improper because it was not tied to any evidence and vouched for those witnesses' testimony.

Third, the state's attorney's numerous comments that, in order to believe that Gilkenson and David Stebbins subsequently had testified truthfully at trial and that the defendant was not guilty, the jury had to believe that the state's witnesses had lied. The majority cites our recent decision in *State* v. *Singh*, 259 Conn. 693, 709–10, 793 A.2d 226 (2002), condemning such conduct, in which we noted that ''[t]his form of argument . . . involves a distortion of the government's burden of proof . . . [and that] such arguments preclude the possibility that the witness' testimony conflicts with that of the defendant for a reason other than deceit.'' (Citations omitted; internal quotation marks omitted.)

Fourth, the state's attorney's repeated reference to the defendant as a ''killer.'' The majority concludes that such references improperly stigmatize a defendant prior to a judgment of guilt.

Fifth, the state's attorney's comments during his closing statement: ''The parents of [the victim] don't want someone arrested for this offense. They want the person that killed their son brought to justice.'' The majority concludes that these remarks ''improperly appealed to the passions of the jurors by suggesting that in order to grant justice to the victim's family, the jurors should find the defendant guilty,'' thereby urging them to decide the issue based on their sympathy to the victim's family, rather than on the evidence.

Finally, the state's attorney's two references to testimony by Erin Whalen, a state's witness, for its substance, in violation of the court's ruling that it was admissible only for impeachment purposes. The majority notes the well established rule that ''[i]t is improper for a prosecutor to use prior oral inconsistent statements substantively.'' *State* v. *Williams*, 204 Conn. 523, 544, 529 A.2d 653 (1987).

I would conclude that these statements, viewed in their totality, were sufficiently egregious so as to have deprived the defendant of a fair trial. Indeed, the majority acknowledges that several of the factors that we consider in evaluating whether the misconduct constituted a violation of due process weigh in favor of the defendant. See *State* v. *Singh*, supra, 259 Conn. 723 (noting that factors to be considered include ''the extent to which the misconduct was invited by defense conduct or argument, the severity of the misconduct, the

frequency of the misconduct, the centrality of the misconduct to the critical issues in the case, the strength of the curative measures adopted and the strength of the state's case''). Specifically, the majority concludes that the remarks were not invited by defense counsel and that the remarks were frequent. The majority further concludes that, while the misconduct was ''arguably central to the critical issues in the case . . . the state's case against [the defendant] was strong'' and the misconduct did not deprive the defendant of a new trial.

As to the factors weighing against reversal of the judgment of conviction, the majority concludes that the state's evidence, ''although not overwhelming, was strong evidence of the defendant's guilt.'' It also notes that the misconduct by the state's attorney ''was not, *for the most part*, severe.'' (Emphasis added.) Finally, the majority concludes that the defendant's failure to object to the improprieties both adversely impacts its ability to determine the severity of the misconduct and the effectiveness of any curative instruction.[2]

Even if I were to accept, arguendo, all of the majority's conclusions, I agree with the Appellate Court that, ''the frequency and gross impropriety of the [state's attorney's] comments caused the defendant substantial prejudice and infringed on his right to a fair trial. 'In Connecticut the appropriate remedy for an unfair trial due to prosecutorial misconduct is to vacate the judgment of conviction and to grant a new trial.' *State* v. *Ubaldi*, 190 Conn. 559, 570, 462 A.2d 1001, cert. denied, 464 U.S. 916, 104 S. Ct. 280, 78 L. Ed. 2d 259 (1983).'' *State* v. *Thompson*, supra, 69 Conn. App. 313–14.

Accordingly, I respectfully dissent.

[1] The Appellate Court identified the following remarks by the state's attorney in his closing argument: '' 'Don't think for one minute that any of these kids is a stand-up enough guy that he's gonna come in there—in here and take the rap for the other. Just as [Jared] Gilkenson and [David] Stebbins would give up [the defendant] to protect themselves, we know [the defendant] would do the same if the shoe had been on the other foot. [The defendant] is not gonna risk a lengthy jail term to protect David [Stebbins] or [Gilkenson]. If he was not the shooter and he knew who was, he would have told you that. This is not Camelot, and there is no chivalry here. . . . These kids will protect themselves first. Then, and only then, will they protect each other. That's what happened in this case. While it was [the defendant's] finger that pulled the trigger, without David Stebbins and [Gilkenson], [the victim] would be alive today. Had either of those individuals been able to put aside their wounded pride, none of us would be in this courtroom today. [The defendant's attorney] says nobody else was arrested but [the defendant]. None of these other kids have been arrested. The operative word is ''yet.'' David Stebbins, [Gilkenson] and Brandy Stebbins have not yet been arrested. When you read the statements of [Gilkenson] and David [Stebbins], it is very obvious that they knew exactly what they were saying. Those statements indicate that both [Gilkenson] and David [Stebbins] know that it is not a crime to sit by and watch as [the defendant] jumped out of the car and shot someone. But all they needed to say was, ''Come on, Ryan. Let's go home. The party's over.'' The fact that they didn't do so is reprehensible. The fact that they would come into court and lie to protect him is even more reprehensible. If neither one of those kids had the moral fortitude to prevent [the victim's] death, do you honestly believe for one minute that their character would prevent them from coming into court and lying to protect their friend? . . . On the day following this shooting, [Gilkenson] and David Stebbins knew that they had taken part in

the killing of another human being. When the police confronted them, they truthfully told the police who amongst them was responsible. Today, they have no conscience. In their twisted world, there is much more shame attached to being a snitch than there is in protecting a killer from justice. And [in] their misguided loyalty to their friend, [the defendant], they have reserved a place in hell for themselves.'' *State* v. *Thompson*, 69 Conn. App. 299, 305–306, 797 A.2d 539 (2002).

The court also noted the following remarks by the state's attorney: '' 'It is only natural that David [Stebbins] and [Gilkenson] would feel guilty about ratting out their friend. However, it's not until [three days after giving their original statements] that either one of these individuals begin to change their stories. It's a very sad commentary on the character [of] David Stebbins and [Gilkenson] that their misguided sense of loyalty would outweigh the apprehension of a killer. It's even sadder to think that the parents would rather see a killer escape justice than to admit to the world or even to themselves that their children had anything to do with this incident.' '' Id., 306.

[2] I note that the majority's approach further underscores a question of fundamental fairness that arises in circumstances in which the defense counsel has failed to object to alleged improprieties at trial. In such circumstances, the defendant first is required to overcome the hurdle for review of unpreserved claims set forth in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). If the defendant overcomes that obstacle, the court imposes a second hurdle not imposed on preserved claims by viewing with heightened skepticism any claims of prejudice. See, e.g., *State* v. *Reynolds*, 264 Conn. 1, 165, 824 A.2d 611 (2003); *State* v. *Andrews*, 248 Conn. 1, 19–20, 726 A.2d 104 (1999); *State* v. *Robinson*, 227 Conn. 711, 745–46, 631 A.2d 288 (1993). Finally, as the present case demonstrates, the defense counsel's failure to object tips the scales against the defendant on two of the factors to be considered in determining whether there was reversible error.

As this court previously has recognized, however, it is ''primarily . . . the responsibility of the defense counsel to protect the rights of his client by taking appropriate action to alert the trial court to claims that those rights are being jeopardized. . . . Nonetheless, in a case of serious and repeated prosecutorial misconduct . . . the trial court has an independent responsibility to intervene, even in the absence of an objection or motion by defense counsel.'' *State* v. *Williams*, supra, 204 Conn. 549; see *Harris* v. *United States*, 402 F.2d 656, 657 (D.C. Cir. 1968). Indeed, as the former Chief Judge of the United States Circuit Court of Appeals for the District of Columbia explained, ''it would be ignoring the realities of criminal practice to place such a heavy emphasis on the adversary system'' by determining the fairness of the trial based on the defense counsel's failure to object. *Harris* v. *United States*, supra, 659 (Bazelon, C. J., concurring).