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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

JOSEPH MATURO, JR. *v.* STATE EMPLOYEES RETIREMENT COMMISSION (SC 19831)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Espinosa and Robinson, Js.*

Syllabus

Pursuant to statute (§ 7-438 [b]), if a member of the municipal employees' retirement system who is retired and has begun to collect a pension, again accepts employment from the same municipality from which he was retired, he shall be eligible to participate, and shall be entitled to credit, in the municipal employees retirement system for the period of such municipal employment, provided such member shall not receive his retirement allowance while so employed, except under certain specified circumstances.

The plaintiff appealed from the judgment of the trial court upholding the declaratory ruling of the defendant retirement commission and dismissing his administrative appeal. The plaintiff retired from his position as a firefighter with the town of East Haven in 1991 and was awarded a disability pension through his membership in the municipal employees retirement system, which is governed by the Municipal Employees' Retirement Act (§ 7-425 et seq.). From 1997 to 2007, the plaintiff served as the elected mayor of East Haven, a full-time, salaried position that the town had not designated for participation in the retirement system. During his tenure as mayor, the plaintiff continued to receive his disability pension, as it was the policy of the commission at that time that a member could continue to collect a pension while reemployed by a participating municipality, provided the member was reemployed in a nonparticipating position. In 2010, the retirement services division of the Office of the State Comptroller, which jointly administers the retirement system with the commission, informed the plaintiff that the commission's prior interpretation of the act was erroneous, and that, pursuant to § 7-438 (b), he no longer would be eligible to collect a disability retirement benefit if he were to be employed in any paid position with the town. When the plaintiff was again elected to the position of mayor of East Haven in 2011, the retirement services division suspended the plaintiff's pension. The plaintiff then appealed to the commission, which issued a declaratory ruling denying reinstatement of the plaintiff's pen-

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Rogers and Justices Palmer, Eveleigh, McDonald, Espinosa and Robinson. Although Justice Robinson was not present when the case was argued before the court, he has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

sion. On appeal to the trial court, the plaintiff claimed, inter alia, that the decision of the commission was inconsistent with the statute (§ 7-432) that authorizes disability pensions because there had been no determination by a medical examining board that he was no longer disabled before his pension was suspended, and further claimed that he had relied to his detriment on the agencies' prior interpretation of the act. The trial court affirmed the commission's decision and rendered judgment dismissing the appeal, from which the plaintiff appealed. *Held:*

1. The trial court properly dismissed the plaintiff's appeal from the decision of the commission, the plain language of § 7-438 (b) having barred the plaintiff from continuing to collect a disability pension while serving as the mayor of East Haven: the plaintiff's claim that the act could be interpreted to exclude elective officers as employees, and that, as mayor, he was not an employee of the town as that term is used in § 7-438 (b), was unavailing, as that interpretation would deprive elective officers who are members of the retirement system from many of the rights and benefits that other members enjoy, and, in the absence of any apparent rationale for such a scheme or a clear statement of legislative intent, this court declined to adopt the interpretation urged by the plaintiff, which would achieve a bizarre outcome.

2. The plaintiff could not prevail on his claim that § 7-438 (b), when read as a whole and in light of the underlying policy rationales, evidenced a legislative intent to preclude a member of the retirement system from receiving a retirement pension only while reemployed in a participating position, and that, because he returned to work in a nonparticipating position, he was entitled to continue collecting his disability pension; notwithstanding the provision in § 7-438 (b) that a member "shall be eligible to participate, and shall be entitled to credit," in the retirement system, a member of the retirement system, such as the plaintiff, who is reemployed in a nonparticipating position is not eligible to participate in the retirement system while so employed, and § 7-438 (b) reasonably may be understood to embody a legislative judgment that a participating municipality should not have to contribute additional funds to a member's retirement pension while at the same time paying the member's salary.

3. There was no merit to the plaintiff's claim that the commission and the trial court improperly interpreted § 7-438 (b) in isolation and did not consider its relationship to § 7-432 (g), which precludes the medical examining board from reconsidering eligibility for a disability pension unless additional facts concerning the member's condition are disclosed: subsection (g) was not added to § 7-432 until 2013, approximately two years after the retirement services division suspended the plaintiff's pension, and § 7-432 previously did not reference the medical examining board but, instead, delegated broad authority to the commission to determine a member's ongoing eligibility for a disability pension.

4. This court was not persuaded by the plaintiff's claim that the commission was bound by, or should have adhered to, its prior interpretation of § 7-438 (b) that permitted elective officials to retain their pensions while reemployed by participating municipalities in light of the fact that the legislature effectively acquiesced in that prior interpretation when it failed to amend the act, and the fact that the attorney general issued a nonbinding opinion letter counseling the commission not to deviate from its prior interpretation in the absence of further legislative direction: the evidence for legislative acquiescence in the commission's prior interpretation of the act was inconclusive and did not compel this court to depart from the plain meaning of the statutory text, and the legislature's failure to address the commission's revised interpretation when the legislature amended § 7-438 in 2011 tended to demonstrate acquiescence in the revised interpretation; moreover, the plaintiff's claim that the attorney general's opinion that the legislature had acquiesced in the commission's prior interpretation and that the revised interpretation might upset retirees' settled expectations was unconvincing, as an administrative agency, such as the commission, that discovers that it has been applying an erroneous interpretation of a statute is obliged, after giving fair notice to affected persons, to conform its policy to the correct interpretation, particularly in light of the provision (§ 7-439h) in the act that requires the commission to correct any erroneous overpayment of benefits.

Argued March 30—officially released July 11, 2017

Procedural History

Appeal from the decision of the defendant determining that the plaintiff was ineligible to receive certain pension benefits, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Schuman*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed. *Affirmed.*

Lawrence C. Sgrignari, for the appellant (plaintiff).

Michael J. Rose, with whom was *Cindy M. Cieslak*, for the appellee (defendant).

Opinion

ESPINOSA, J. The plaintiff, Joseph Maturo, Jr., appeals from the judgment of the trial court upholding the declaratory ruling of the defendant, the State Employees Retirement Commission, and dismissing his

administrative appeal. The plaintiff retired in 1991 from his position as a firefighter with the town of East Haven and was awarded a disability pension through his membership in the municipal employees retirement system (retirement system). He subsequently was elected to the position of mayor of East Haven in 1997, and served in that capacity until 2007, when he lost his reelection bid. During that time, the commission and the retirement services division of the Office of the State Comptroller (collectively, the agencies), which jointly administer the retirement system,[1] interpreted the Municipal Employees' Retirement Act (act), General Statutes § 7-425 et seq., to provide that a retired member, who is reemployed by a municipality that participates in the retirement system, may continue to receive a retirement pension if he or she is reemployed in a position, such as the mayor of East Haven, that the municipality has not designated for participation in the system (nonparticipating position). In 2009, however, the agencies concluded that they had misconstrued the act in this regard and that a retiree cannot continue to collect a pension while reemployed in any full-time position with a participating municipality. Accordingly, when the plaintiff was again elected mayor in 2011, the retirement services division suspended[2] his pension, a decision that both the commission and the trial court, *Schuman*, *J.*, subsequently affirmed. On appeal, the plaintiff's primary contention is that the agencies improperly construed the reemployment and disability

[1] See General Statutes § 5-155a (c); Regs., Conn. State Agencies §§ 5-155-2 and 5-155-7.

[2] Although the plaintiff refers at times to the "termination" of his pension, as do certain of the agencies' decisions, neither party disputes the trial court's conclusion that, under the commission's interpretation of the act, he will be entitled to a resumption of his retirement pension upon completion of his tenure as mayor. Accordingly, we use the term "suspension" rather than "termination."

pension provisions of the act,[3] and that he is not barred from receiving a disability pension while serving as the mayor of East Haven. The plaintiff also challenges the trial court's conclusions that he did not rely to his detriment on the agencies' previous interpretation of the act and that the commission did not violate his rights to equal protection and due process of law. Finding no error, we affirm.

I

FACTS AND PROCEDURAL HISTORY

The following facts and procedural history, as found by the commission and supplemented by the undisputed evidence of record, are relevant to our disposition of the plaintiff's appeal. The plaintiff served as a firefighter for the town of East Haven from 1973 to 1991, during which time he participated as a member of the retirement system. In September, 1991, the town separated the plaintiff from service on the basis of a "service-connected" disability. In a January, 1992 letter, the commission approved his application for early retirement, but informed him that his retirement payments would be suspended if he again accepted employment with the town. In 1993, after the medical examining board confirmed the plaintiff's disability, the commission approved his "service-connected disability retirement," retroactive to October, 1991. A March, 1993 letter from the commission again advised the plaintiff as to the retirement system's reemployment rules, stating that "[his] eligibility for a disability retirement [pension] is contingent on [his] being permanently and totally disabled from performing any gainful employment in the service of [his] former employer [and that he] may not accept reemployment with that municipality."

[3] The text of the relevant statutory provisions is set forth in part II B of this opinion.

In 1997, the plaintiff was elected to the office of mayor of the town of East Haven. At all times relevant to this case, although the town participated in the retirement system, it did not designate the office of mayor as a participating position. The plaintiff served as mayor from 1997 until 2007, when he lost a reelection bid. During that time, in spite of the warnings contained in the January, 1992 and March, 1993 letters, it was the policy of the agencies that a member could continue to collect a pension while reemployed by a participating municipality, so long as the member was reemployed in a nonparticipating position. Accordingly, during his initial ten years as mayor, the plaintiff received a salary from the town and also continued to collect his disability retirement pension.

In June, 2010, in response to information that the plaintiff was again considering running for elective office, Helen M. Kemp, the assistant director and counsel of the retirement services division, wrote to advise him that the commission's prior interpretation of the act was erroneous and that in the future he would not be eligible to collect a disability retirement benefit while employed in any paid position for the town. In a follow-up letter, Mark E. Ojakian, the deputy state comptroller and acting director of the retirement services division, explained that, in 2009, the retirement services division had adopted and begun informing members of this revised interpretation of the act. Despite these warnings, in November, 2011, the plaintiff again campaigned and won the election for the position of mayor of East Haven.

Shortly thereafter, the plaintiff received a letter from Kimberly McAdam, a retirement system supervisor, informing him that he was no longer considered to be disabled under the act because "[t]he fact that [he is] performing the duties of [mayor] indicates that [he is] neither permanently nor totally disabled from engaging

in gainful employment in the service of the municipality." The letter notified the plaintiff that his pension would be "stopped" as of November 19, 2011. In that same time period, the commission sent letters to all disability retirees informing them that they could not collect a disability retirement pension while working for the same municipality from which they had retired, even in a nonparticipating position.

The retirement services division subsequently declined the plaintiff's request to reconsider its decision. The plaintiff then appealed to the commission, which, following what the trial court characterized as "a long and somewhat complicated administrative review process," ultimately issued a declaratory ruling denying reinstatement of the plaintiff's retirement pension.

The plaintiff then appealed to the Superior Court. While proceedings in that court were pending, the General Assembly considered—for the second time in three years—legislation that would have expressly allowed the plaintiff and similarly situated members of the retirement system to continue to collect retirement pensions while reemployed by a participating municipality in a nonparticipating position. See Public Acts 2015, No. 15-188 (P.A. 15-188); Public Acts 2013, No. 13-219 (P.A. 13-219). The legislature unanimously passed each bill but Governor Dannel P. Malloy vetoed each one, and the legislature did not attempt to override the vetoes. See 2 Conn. Public and Special Acts 1478 (2015); 2a Conn. Public and Special Acts 2230 (2013).

The plaintiff made four primary claims before the trial court. First, he argued that the decision of the commission upholding the suspension of his disability pension while he is employed as the mayor of East Haven was inconsistent with various provisions of the act. Specifically, he argued that (1) General Statutes § 7-432, which authorizes disability pensions, does not

allow the retirement services division to suspend a member's pension unless the commission's medical examining board first finds that the member is no longer disabled pursuant to § 7-432 (g), and (2) the provision on which the retirement services division relied in suspending his pension, General Statutes § 7-438 (b), which prohibits members of the retirement system from receiving a retirement pension while reemployed by a participating municipality, does not apply to former members who return to work in nonparticipating positions.

In its memorandum of decision, the trial court found the first argument to be without merit because, although the retirement services division initially had informed the plaintiff that his disability pension was being terminated because his reemployment with East Haven was prima facie proof that he no longer was disabled, the commission itself did not rely on the premise that the plaintiff no longer was disabled. Rather, the commission determined that § 7-438 (b) applies to both disability and ordinary retirements and bars members from collecting either type of pension while reemployed by a participating municipality. The trial court found the plaintiff's second statutory argument to be so incomprehensible as to be effectively abandoned. Nevertheless, the court did attempt to parse and evaluate the argument, which, it concluded, lacked any support in the text of the relevant statutes.[4]

Second, the plaintiff claimed that it was improper for the agencies, after years of construing the act to allow

[4] Because (1) the issue is one of statutory interpretation, (2) the relevant arguments have been fully briefed before this court, and (3) the commission has indicated that it is in need of judicial guidance as to how to apply § 7-438 (b), we will evaluate the plaintiff's statutory claims on the merits despite the trial court's finding that they were abandoned at trial. See *Notopoulos* v. *Statewide Grievance Committee*, 277 Conn. 218, 233 n.12, 890 A.2d 509, cert. denied, 549 U.S. 823, 127 S. Ct. 157, 166 L. Ed. 2d 39 (2006).

the plaintiff and others similarly situated to retain their retirement pension when returning to work in a nonparticipating position, to adopt a new, contrary interpretation of the law. He specifically argued that (1) he had reasonably relied to his detriment on the agencies' pre-2009 interpretation of the act and on a September 30, 2011 letter in which the retirement services division director, Brenda Halpin, advised him to take no action with respect to his current employment status until the retirement services division completed an administrative review of the issue, and (2) the commission should have abided by the advice of Attorney General George C. Jepsen, who counseled in a November 2, 2012 opinion letter (Jepsen opinion) that the commission not deviate from its pre-2009 interpretation of the act in the absence of further legislative direction.

In rejecting the plaintiff's detrimental reliance claim, the trial court noted that the law disfavors claims of estoppel against government entities, which "may be invoked: (1) only with great caution; (2) only when the action in question has been induced by an agent having authority in such matters; and (3) only when special circumstances make it highly inequitable or oppressive not to estop the agency." (Internal quotation marks omitted.) *Chotkowski* v. *State*, 240 Conn. 246, 268–69, 690 A.2d 368 (1997). In the present case, the court determined that that standard was not satisfied because the retirement services division had notified the plaintiff that its prior interpretation of the act was erroneous and that, henceforth, he would not be permitted to receive a disability benefit while employed in any paid position with the town. In addition to concluding that the plaintiff's ongoing reliance on the retirement services division's past interpretation of the act was unreasonable, the court concluded that the plaintiff had failed to demonstrate that his reliance thereon had caused him any detriment. Rather, the court found that the

plaintiff's erroneous receipt of a retirement pension during his previous ten year tenure as mayor had been a "windfall." The court further noted that the Jepsen opinion constituted nonbinding authority and that the opinion was unpersuasive insofar as it did not purport to analyze the statutes at issue or identify any defects in the commission's revised interpretation of the act. As a general matter, the court rejected as untenable the principle that a government agency must continue to adhere to an erroneous interpretation of a statute even when, having discovered its error, it provides fair notice to affected persons that it will change its policy in light of the revised interpretation.

Third, the plaintiff claimed that the commission treated him differently from other, similarly situated persons and thereby denied him equal protection of the law, as guaranteed by the federal and state constitutions. At trial, the plaintiff was unable to identify any other members who had been permitted to retain their retirement pensions after returning to work for participating municipalities.[5] Still, the plaintiff, a Republican, alleged that he had been singled out on the basis of his political affiliation insofar as the agencies (1) sent him an unsolicited letter in 2010, warning him that if he were again elected mayor, his pension would be suspended, (2) closely monitored the results of the East Haven mayoral election, (3) gave a Democrat, the registrar of voters for the town of East Haven, the express choice either to resign from his employment or to have his pension suspended, whereas the plaintiff's pension was simply suspended a few days after he was sworn into office, and (4) initially permitted another Democratic municipal retiree to retain her pension while

[5] The commission represented at trial that it was in the process of identifying any such members and they were being informed that, in the event the commission's interpretation of the act was upheld in this litigation, they could not continue to receive their pensions while reemployed.

reemployed, before ultimately reversing that decision. The plaintiff also introduced testimony by a Republican state senator suggesting that legislative efforts to amend § 7-438 (b) in 2013, to allow persons in the plaintiff's position to retain their pensions while reemployed had been delayed by certain legislators, presumably Democrats, who did not want to help the plaintiff.

The trial court found that the plaintiff also had abandoned this claim by inadequate briefing, insofar as he had failed to allege that any selective treatment was based on impermissible considerations or membership in a protected class. In the alternative, the court rejected the equal protection claim on the merits, finding that the commission had informed all disability pension recipients that they could not collect their pensions while working for the same municipality for which they had previously worked, even in a nonparticipating position. The court further concluded that the aforementioned factual allegations did not constitute selective treatment vis-à-vis other, similarly situated persons.

Fourth, the plaintiff claimed that the commission's decision to provide him with an informal rather than a formal hearing violated both the governing statutes and his right to procedural due process. The trial court, in rejecting this claim, determined that the relevant procedural statutes did not require the commission to hold a formal hearing and that the requirements of due process had been satisfied.

Consistent with these determinations, the trial court affirmed the commission's decision and dismissed the plaintiff's appeal. The plaintiff appealed from the judgment of the trial court to the Appellate Court, raising claims substantially similar to those he raised before the trial court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and

Practice Book § 65-1. Additional facts will be set forth as necessary.

II

ANALYSIS

The plaintiff's primary argument on appeal is that the trial court misinterpreted the reemployment provisions of the act and that § 7-438 (b), when construed in the context of the overall statutory scheme, permits him to continue collecting a disability pension while employed by a participating municipality in a nonparticipating position. The commission disagrees, arguing that the plain language of § 7-438 (b) bars this sort of double recovery. We agree with the commission.

A

We begin our analysis of the plaintiff's claim by setting forth the well established standards that govern judicial review of an agency decision under the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. "Under the UAPA, it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . [Although] this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes . . . [c]ases that present pure questions of law . . . invoke a broader standard of review . . . . [W]hen a state agency's determination of a question of

law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . Even if [an agency's interpretation of a statute has been] time-tested, we will defer to [it] only if it is reasonable . . . [as] determined by [application of] our established rules of statutory construction." (Internal quotation marks omitted.) *Lieberman* v. *Aronow*, 319 Conn. 748, 755–56, 127 A.3d 970 (2015). No deference is warranted when an agency's construction of a statute has been inconsistent or is only of "recent vintage." *Schieffelin & Co.* v. *Dept. of Liquor Control*, 194 Conn. 165, 174, 479 A.2d 1191 (1984).

B

In order to evaluate the plaintiff's claims, we first must describe in some detail the statutory framework that establishes and governs the retirement system. That framework is codified at § 7-425 et seq., which, as previously noted, we have referred to as the Municipal Employees' Retirement Act. See *Lambert* v. *Bridgeport*, 204 Conn. 563, 566, 529 A.2d 184 (1987).

Section 7-425 defines key words and phrases used in the act. That section defines a " '[m]ember' " of the retirement system as, among other things, "any regular employee or elective officer receiving pay from a participating municipality . . . who has been included by such municipality in the pension plan as provided in [§] 7-427 . . . ." General Statutes § 7-425 (5). " 'Pay' " is defined in relevant part as "the salary, wages or earnings of an employee . . . ." General Statutes § 7-425 (6). The terms "employee," "employed," and "employment" are not defined in the act.

General Statutes § 7-427 (a) authorizes each municipality to opt into the retirement system with respect to any department or departments that it chooses to designate for participation. Section 7-427 (a) also per-

mits municipalities to decide whether to allow their elective officers to participate in the system.

General Statutes § 7-428 provides that any member shall be eligible for retirement and to receive a retirement pension upon either completing twenty-five years of aggregate service in a participating municipality or upon reaching the age of fifty-five and having completed five years of continuous service or fifteen years of aggregate service in a participating municipality. General Statutes § 7-429 further provides that an elective officer participating in the retirement system who is separated from service, except for cause or by resignation, after attaining the age of sixty and after completing at least twenty years of continuous service, shall be entitled to a retirement pension "upon reaching the voluntary retirement age . . . ."[6]

Section 7-432 authorizes and establishes the standards governing disability retirements. At the time the plaintiff's retirement pension was suspended in November, 2011, that section provided in relevant part: "Any member shall be eligible for retirement and for a retirement allowance who has completed at least ten years of continuous service if he becomes permanently and totally disabled from engaging in any gainful employment in the service of the municipality. For purposes of this section, 'gainful employment' shall not include a position in which a member customarily works less than twenty hours per week. If such disability is shown to the satisfaction of the Retirement Commission to have arisen out of and in the course of his employment by the municipality, as defined by the Workers' Compensation Act, [General Statutes § 31-275 et seq.] he shall be eligible for retirement irrespective of the dura-

[6] Although the term "voluntary retirement age" is not defined in the act, the commission has construed the phrase to refer to the eligibility standards set forth in § 7-428. See Connecticut Municipal Employees' Retirement Fund B Summary Plan Description (January 1, 1990) p. 5.

tion of his employment. Such retirement allowance shall continue during the period of such disability. The existence and continuance of disability shall be determined by the Retirement Commission upon such medical evidence and other investigation as it requires. . . ." General Statutes (Rev. to 2011) § 7-432, as amended by Public Acts 2011, No. 11-251, § 2.

General Statutes § 7-434a addresses the situation in which a member is elected to serve as an official of the state or any political subdivision thereof. Section 7-434a provides that such member may continue his or her membership in the system for up to ten years while serving in elective office, during which time the member must continue to make contributions to the system.

Finally, § 7-438 establishes the rules that govern a member who, having retired and begun to collect a retirement pension, again accepts public employment in the state. That statute provides as follows: "(a) Any member retired under this part who again accepts employment from this state or from any municipality of this state other than a participating municipality, shall continue to receive his retirement allowance while so employed, and shall be eligible to participate, and shall be entitled to credit, in the state retirement system for the period of such state employment, but any such member shall not be eligible to participate or be entitled to credit in any municipal retirement system for the period of such municipal employment.

"(b) If a member is retired under this part and again accepts employment from the same municipality from which he was retired or any other participating municipality, he shall be eligible to participate, and shall be entitled to credit, in the municipal employees' retirement system for the period of such municipal employment. Such member shall receive no retirement allowance while so employed except if *(1) such*

employment is for less than twenty hours per week, or (2) his services are rendered for not more than ninety working days in any one calendar year, provided that any member reemployed for a period of more than ninety working days in one calendar year shall reimburse the Municipal Employees' Retirement Fund for retirement income payments received during such ninety working days."[7] (Emphasis added.) General Statutes § 7-438.

C

It was the conclusion of both the agencies and the trial court that the plaintiff's case represents a straightforward application of § 7-438 (b). The plaintiff was a member of the retirement system who, having retired pursuant to § 7-432, again accepted employment from East Haven, a participating municipality. Because § 7-438 (b) provides that "[s]uch member shall receive no retirement allowance while so employed," the commission determined, and the court agreed, that the retirement services division did not act improperly in suspending his retirement pension during his tenure in office.

On appeal, the plaintiff identifies what he considers to be four flaws in the commission's statutory analysis. First, the plaintiff contends that his position as the mayor of East Haven does not constitute "employment" and that he is not an "employee" of that town for purposes of the act and, therefore, that § 7-438 (b) does not apply to his case. Second, he contends that § 7-438, when read as a whole, reveals a legislative intent to preclude a member from continuing to receive a retire-

[7] Section 7-438 was amended in 2011 to add the highlighted language, which is not material to the present appeal. See Public Act 11-251, § 3. Although the amendment became effective July 13, 2011, it was made applicable only to members who retired on or after January 1, 2000. Public Act 11-251.

ment pension only while reemployed in a participating position. Third, the plaintiff contends that his case is governed by the disability provisions of the act as well as by its reemployment provisions and that, pursuant to § 7-432, his disability retirement could be discontinued only if the commission's medical examining board determined on the basis of additional medical evidence that he was no longer entitled to receive a disability benefit. Fourth, he contends that the commission is bound by, or should adhere to, its pre-2009 interpretation of the statute, in which the legislature allegedly acquiesced. We consider each argument in turn.

1

The plaintiff's first contention is that § 7-438 (b) does not govern his case because that subsection applies only to retired members who again accept *employment* from a participating municipality, and that the statute precludes members from receiving a retirement pension only while so *employed*. He avers that he is not employed by East Haven, as that term is used in the statute, notwithstanding that he receives a salary to serve as the town's full-time mayor.

When a term is not defined in a statute, we begin with the assumption that the legislature intended the word to carry its ordinary meaning, as evidenced in dictionaries in print at the time the statute was enacted. *State* v. *Wright*, 320 Conn. 781, 802, 135 A.3d 1 (2016); *State* v. *Menditto*, 315 Conn. 861, 866, 110 A.3d 410 (2015). Although the earliest version of the predecessor statute to § 7-438 used the term "appointment" rather than "employment," that statute did provide that a retired member who is reemployed by a municipality "shall receive no retirement allowance while so *employed*." (Emphasis added.) General Statutes (Supp.

1945) § 128h.[8] At the time § 128h was drafted, the word "employed" meant "[e]ngaged by an employer," and an "employee" was defined as "[o]ne employed by another; one who works for wages or salary in the service of an employer . . . ." Webster's New International Dictionary (2d Ed. 1941). The plaintiff cannot and does not seriously contend that his full-time, salaried work as the mayor of East Haven does not qualify as employment, as that term ordinarily has been used.

Instead, the plaintiff argues that the words "employee," "employed," and "employment" are statutory terms of art that have a particular meaning in the context of the act. He notes, for example, that § 7-425 (5) defines a " '[m]ember' " of the retirement system as "any regular employee or elective officer," which, he contends, evinces a legislative intent to distinguish officers such as himself from employees. He further notes that § 7-425 (6) defines " '[p]ay' " as "the salary, wages or earnings of an employee," and finds meaningful the fact that that provision makes no mention of elective officers.[9]

The plaintiff's efforts to distinguish between municipal employees and elective officers, while valiant, are unavailing. We begin by observing that § 7-425 (5) defines a member of the retirement system as "any

[8] General Statutes (Supp. 1945) § 128h provides: "If a member shall be retired under this chapter, and again accepts appointment, except to an elective office, from this state or from a municipality of this state, under which appointment services are to be rendered for more than three months in any year, he shall receive no retirement allowance while so employed."

[9] The other authorities on which the plaintiff relies relate to different statutory schemes and, therefore, do not support his argument that the term "employee" is used as a term of art in the act. See, e.g., General Statutes § 7-467 (2) (distinguishing municipal employees from elective officers solely for purposes of collective bargaining statutes, General Statutes § 7-467 et seq.); *Prudential Mortgage & Investment Co.* v. *New Britain*, 123 Conn. 390, 392, 195 A. 609 (1937) (distinguishing, for purposes of wage garnishment, between elective public officers and contract employees such as teachers).

regular employee or elective officer . . . .'' (Emphasis added.) If the statute had been written solely in terms of ''employee or elective officer,'' the plaintiff's argument might be more convincing. But the legislature's use of the adjective ''regular'' to modify ''employee'' strongly suggests that, for purposes of the retirement system scheme, there are two classes of employees, namely, elective officers and other, regular employees. See *Dautel* v. *United Pacific Ins. Cos.*, 48 Wn. App. 759, 766–67, 740 P.2d 894 (1987) (discussing comparable use of term ''regular''). Thus, we do not read § 7-425 to foreclose the possibility that elective officers are merely a subset of all employees for purposes of the act.

This interpretation is consistent with the fact that many provisions of the act refer only to ''employees'' or related cognate terms; specific mention of elective officers is made only in particular instances when distinct treatment is warranted. Compare, e.g., General Statutes § 7-425 (6) (‘‘ '[p]ay' means the salary, wages or earnings of an employee''), General Statutes § 7-428 (establishing voluntary retirement standards for employees), General Statutes § 7-437 (setting forth conditions under which employees' retirement pensions must be increased in conjunction with Social Security benefits), and General Statutes § 7-442a (using terms ''member'' and ''employee'' interchangeably), with General Statutes § 7-427 (a) (giving municipalities option whether to designate elective officers for participation in retirement system), and General Statutes § 7-430 (exempting elective officers from mandatory retirement rules).

It bears emphasizing in this regard that many provisions of the act that afford rights or benefits to members of the retirement system use only the terms ''employees'' or persons ''employed'' by a municipality, and do not mention elective officers. See, e.g., General Statutes § 7-431 (establishing retirement eligibility for members

separated from service by employing municipality before voluntary retirement age); General Statutes § 7-434 (providing continuity of service benefit for full-time employees); General Statutes § 7-436 (b) (providing that employees and their surviving spouses are entitled to additional cost of living allowance); General Statutes § 7-436b (crediting military service prior to member's date of employment); General Statutes § 7-442b (allowing employees to transfer retirement funds from state or other municipal retirement systems); General Statutes § 7-449 (providing that retirement pensions granted to members formerly employed by municipality shall not be affected by repeal of act); General Statutes § 7-459b (allowing members to participate in deferred retirement option plan adopted by municipality that employs them). If we were to accept the plaintiff's interpretation of the act and conclude that the term "employee" excludes elective officers, then elective officers who are members of the retirement system would be deprived of many of the rights and benefits that other members enjoy. In the absence of any apparent rationale for such a scheme or a clear statement of legislative intent, we decline to adopt an interpretation of the law that would achieve such a bizarre outcome. See *Levey Miller Maretz* v. *595 Corporate Circle*, 258 Conn. 121, 133, 780 A.2d 43 (2001).

Particularly fatal to the plaintiff's theory are those sections of the act that appear to equate elective officers with municipal employees or imply that the former as well as the latter can be "employed" for purposes of the retirement system. Section 7-429, for example, provides in relevant part that "[i]f any member of a participating municipality who is *an elective officer* is separated from the service of the municipality by which he is *employed* . . . he shall be entitled to a retirement allowance . . . ." (Emphasis added.)

Finally, we note that the original version of the reemployment statute barred retired members from collecting a pension while reemployed in any state or municipal position, but expressly exempted elective officers from that prohibition. See General Statutes (1949 Rev.) § 892. The 1973 amendments to the statute eliminated the carve-out for elective officers, suggesting that the legislature intended that they would be treated the same as other public employees with respect to reemployment. See Public Acts 1973, No. 73-519. For all of these reasons, we reject the plaintiff's argument that, by accepting the position of mayor of East Haven, he did not accept employment for purposes of § 7-438 (b).[10]

2

The plaintiff's second statutory argument is that § 7-438, when read as a whole and in light of the underlying policy rationales, evidences a legislative intent to preclude a member from receiving a retirement pension only while reemployed in a participating position. The argument, which is the plaintiff's strongest, is as follows. Section 7-438 envisions two paths by which a retired member may return to full-time public employment.[11] First, a member may be employed by the state or by a municipality that does not participate in the retirement system. Under those circumstances, § 7-438 (a) provides that the member can continue to collect his or her retirement pension, but will not be eligible to earn credit in any other municipality's own retirement

[10] In his reply brief, the plaintiff argues that, if East Haven intended to make the position of mayor that of an employee, the town would have spelled out the benefits attached to that position in the town charter or elsewhere. This argument is purely speculative and, in any event, nothing in the act permits a town to designate its officers or personnel as nonemployees for purposes of the retirement system.

[11] Special exceptions, not relevant to the present case, are made for members reemployed for less than twenty hours per week or not more than ninety days per calendar year. See General Statutes § 7-438 (b).

system.[12] Second, the member can return to service in the same municipality from which he or she retired, or in another participating municipality. Under those circumstances, § 7-438 (b) provides that the member shall receive no retirement pension while so employed, but shall be eligible to participate and be entitled to additional credit in the retirement system. This scheme, the plaintiff contends, is predicated on the assumption that, at any particular time, a retired member will be entitled either to earn additional retirement credit, while reemployed by a participating municipality, or to collect a retirement pension, while not so employed. The member cannot simultaneously earn and collect, but the statute does not envision a scenario in which a retired member can neither collect a pension nor earn new credits. But that is precisely the plaintiff's situation, because, although he returned to work in a participating municipality, he did so in a nonparticipating position. The nub of his argument, then, is that the legislature did not intend that retired members who return to public service would have the worst of both worlds in this regard.

The key to the plaintiff's argument is the provision in § 7-438 (b) that a member who is reemployed by a participating municipality "shall be eligible to participate, and shall be entitled to credit, in the municipal employees' retirement system" (eligibility clause). Despite this provision, the parties agree that a member, such as the plaintiff, who accepts a nonparticipating position in a participating municipality is not in fact eligible to participate in the retirement system while so employed. But see footnote 15 of this opinion. In the face of this apparent contradiction, the commission

[12] The statute does permit a retiree who returns to work for the state to simultaneously collect a municipal retirement pension and earn credits in the state retirement system, which the commission also administers. General Statutes § 7-438 (a).

essentially concedes that the eligibility clause either was inartfully drafted or suggests that the legislature failed to anticipate the type of scenario at issue in this case.

The conundrum we face, then, is that, under the circumstances of the present case, it seems that we must disregard either the eligibility clause, which allows members such as the plaintiff to participate in the retirement system, or the second sentence of § 7-438 (b), which bars such members from collecting a pension while so employed. The commission invites us to choose the former path, the plaintiff the latter. For several reasons, we find the commission's approach to be more sensible.

First, the commission offers a more plausible account of how all the different provisions of § 7-438 (b) can be given effect. See *Southern New England Telephone Co.* v. *Dept. of Public Utility Control*, 274 Conn. 119, 129–30, 874 A.2d 776 (2005) (statute should be construed so as to give effect to every provision). As we already have discussed, the plaintiff's solution to this conundrum—the theory that § 7-438 (b) simply does not apply to elective officers—is unconvincing. See part II C 1 of this opinion. The plaintiff also does not address the problem of nonofficer retirees who return to work in nonparticipating departments of participating municipalities. Various provisions of the act recognize that a participating municipality may choose to designate certain of its departments as nonparticipating; see, e.g., General Statutes §§ 7-427 (a), 7-436a (b), 7-437 and 7-442a; and we are not free to assume that the legislature simply overlooked this possibility when drafting § 7-438 (b). See *Southern New England Telephone Co.* v. *Dept. of Public Utility Control*, supra, 129 ("[w]e pre-

sume that the legislature is aware of existing statutes when enacting new ones").[13]

The commission, by contrast, offers a plausible account of how all the various provisions of the statute can be given effect. Specifically, the commission submits that the eligibility clause reasonably may be understood to mean that a retired member is entitled to earn additional retirement credits *so long as he or she is reemployed in a position for which such credits are available.*[14]

Alternatively, it may well be that the legislature meant exactly what it said, and that retired members such as the plaintiff are eligible to earn additional credits in the retirement system even while reemployed in nonparticipating positions. Although a municipality may opt not to designate its elective officers as participating positions; see General Statutes § 7-427 (a); other provisions of the act nevertheless allow for continued participation by members who leave their positions to work in nonparticipating governmental positions. Most notably, § 7-434a provides that any member who is elected to serve

[13] We note that, at approximately the same time that the legislature amended § 7-438 to add the present language regarding participating municipalities; see Public Acts 1987, No. 87-83, § 2; it also amended General Statutes § 7-444, which expressly addresses the possibility that a participating municipality may withdraw one or more departments from the retirement system. See Public Acts 1987, No. 87-85. Both amendments were drafted in the Labor and Public Employees Committee. Under those circumstances, it is unrealistic to assume that legislators drafted the relevant amendments to § 7-438 unaware that a participating municipality might have employees who do not participate in the retirement system.

[14] This is consistent with the fact that subsection (a) of § 7-438 provides that any member who is reemployed with the state will be eligible to participate in the state employees retirement system. It seems unlikely that the legislature, in crafting the reemployment rules for municipal employees, intended to confer eligibility for state retirement on employees who would not otherwise be eligible for that program. See General Statutes § 5-158 (a) (listing classes of state employees in positions not covered by state retirement system or covered by state retirement system but ineligible to be members).

as an officer of the state or a subdivision thereof may elect to remain in the system and continue to make contributions for up to ten years.[15] See also General Statutes § 7-434 (granting credit for intervening military service).

Second, we are not persuaded that the plaintiff is correct in his assessment of the policy rationales that underlie § 7-438 and, specifically, that the statute embodies a legislative intent that all retired members should be able either to collect a pension or to earn additional retirement credits. On the one hand, the statute allows for certain instances of what the trial court referred to as "double dipping." For example, § 7-438 (a) permits a retired member to continue to collect a municipal retirement pension while also participating in the state employees' retirement system. On the other hand, it is not clear that a retired member should be allowed to receive a retirement pension while also earning a salary from a participating municipality. In 2013 and 2015, Governor Malloy vetoed amendments to the act that would have expressly permitted members who are reemployed in nonparticipating municipal positions to continue to collect a retirement pension. See P.A. 15-188; P.A. 13-219. In his 2015 veto message, the governor articulated a countervailing policy rationale: "I believe this bill would impose an undue burden on municipalities and is inconsistent with the purpose of the municipal retirement system, which is intended to provide assistance to our retirees and not current employees." 2 Conn. Public and Special Acts 1478 (2015). In other words, although it may seem unfair from the member's standpoint that he can neither receive a pension nor earn additional credits while reemployed in a nonparticipating position, § 7-438 (b) reasonably may be under-

[15] We emphasize that, because the plaintiff has not claimed that either § 7-434a or § 7-438 (b) entitles him to eligibility or credit during his service as mayor, we express no opinion as to the potential merits of such a claim.

stood to embody a judgment that a participating municipality should not have to contribute additional funds to a member's retirement pension while at the same time paying his salary. See General Statutes § 7-441 (d) (providing that participating municipalities must make contributions to cost of administration of retirement fund on behalf of retired members receiving benefits, as well as currently employed members).

The plaintiff argues that, prior to 1987, § 7-438 clearly permitted retired members to collect a pension while reemployed with a different department or agency, and that we should hesitate before concluding that, in amending the statute, the legislature intended to curtail the ability of a member such as the plaintiff to return to work in a nonparticipating position. It is undeniable, however, that the legislature chose to substantially broaden the restrictions on reemployment at that time. Prior to 1987, a member could retain his or her pension while reemployed in any position outside the department or agency from which he or she retired. See General Statutes (Rev. to 1985) § 7-438 (a). After 1987, this exception was narrowed to reemployment by the state or a nonparticipating municipality. See Public Acts 1987, No. 87-83, § 2. Accordingly, the plaintiff's second statutory argument is unpersuasive.

3

The plaintiff's third statutory argument takes as its starting point the well established rule that we must "construe a statute as a whole and . . . harmonize its disparate sections within the bounds of reason." *State* v. *Gonzalez*, 210 Conn. 446, 451, 556 A.2d 137 (1989). He faults the agencies and the trial court for having considered § 7-438 (b) in isolation and, in his view, not having paid adequate attention to the relationship between that provision and the disability retirement provisions of § 7-432.

The plaintiff primarily relies on § 7-432 (g), which provides that "[n]o reconsideration of a decision concerning eligibility for a disability retirement allowance or the discontinuance of such allowance shall be made by the medical examining board unless a member, upon application to the medical examining board for a redetermination, discloses additional facts concerning the member's condition." The plaintiff reads this to mean that the only way that his disability pension could be terminated was if the medical examining board, having considered new evidence, determined that he was no longer disabled.

If we were compelled to parse § 7-432 (g) and its relationship to § 7-438 (b), we likely would encounter any number of impediments to the plaintiff's argument.[16] Fortunately, we need not enter those waters. Subsection (g) was not added to the statute until July, 2013, nearly two years after the retirement services division suspended the plaintiff's pension. See Public Acts 2013, No. 13-247, § 385. Prior to that time, § 7-432 made no mention of the medical examining board. Instead, the statute delegated broad authority to the commission to determine a member's ongoing eligibility for a disability pension: "The existence and continuance of disability shall be determined by the . . . [c]ommission upon such medical evidence and other investigation as it requires." General Statutes (Rev. to 2011) § 7-432. Accordingly, the plaintiff's argument is unavailing.[17]

[16] The trial court, for example, was of the opinion that the relevant provisions of § 7-438 (b) are more specific than, and thus prevail over, the provisions of § 7-432 on which the plaintiff relies, and also that the plaintiff's argument leads to irrational and absurd consequences, in that his interpretation of the act would mean that any member retired pursuant to § 7-432 would in effect be exempted from § 7-438 (b).

[17] The plaintiff also argues that he is entitled to retain his disability pension under the 2011 revision of the statute, which provides in relevant part that "[a]ny member shall be eligible for retirement and for a retirement allowance who has completed at least ten years of continuous service if he becomes permanently and totally disabled from engaging in any *gainful employment in the service of the municipality*. . . ." (Emphasis added.) General Statutes

4

The plaintiff's fourth statutory argument is that the commission is bound by, or should adhere to, its prior interpretation of § 7-438. The plaintiff contends that this is especially true in light of the fact that (1) the Jepsen opinion counseled a stay-the-course approach, and (2) during the period from 1987 until 2009, during which the agencies were interpreting the act to permit elective officials such as the plaintiff to retain their retirement pensions, the legislature did not override the agencies by amending the act and, therefore, effectively acquiesced in the prior interpretation. We are not persuaded.

With respect to the plaintiff's legislative acquiescence argument, we frequently have explained that "the legislative acquiescence doctrine requires *actual acquiescence* on the part of the legislature. [Thus, in] most of our prior cases, we have employed the doctrine not simply because of legislative inaction, but because the legislature affirmatively amended the statute subsequent to a judicial or administrative interpretation, but chose not to amend the specific provision of the statute at issue. . . . In other words, [l]egislative concurrence is particularly strong [when] the legislature makes unrelated amendments in the same statute." (Citation omit-

(Rev. to 2011) § 7-432. His argument appears to be that his pension cannot be suspended so long as he is not again gainfully employed in the service of a participating municipality and that, for reasons that are not entirely clear, his position as the full-time, salaried mayor of East Haven does not constitute gainful employment in the service of that town. The trial court found this argument to be abandoned as inadequately briefed. In any event, the plain language of the act will not sustain the tortuous reading to which the plaintiff would affix it.

For similar reasons, we are not persuaded by the plaintiff's apparent argument that he is no longer a member of the retirement system and, therefore, not bound by § 7-438. Among other things, that interpretation is inconsistent with various provisions of the act that make clear that members remain members after retirement. See, e.g., General Statutes § 7-436 (setting forth benefits that "each member" shall receive after retirement); General Statutes § 7-439h (discussing receipt of retirement benefits by members).

ted; emphasis in original; internal quotation marks omitted.) *Stuart* v. *Stuart*, 297 Conn. 26, 47, 996 A.2d 259 (2010).

In the present case, the legislature made no changes to § 7-438 between 1987, when the statute was amended to prohibit members from collecting a retirement pension while reemployed by any participating municipality, and 2009, when the retirement services division announced its revised interpretation of the statute. By the time the legislature did make minor changes to the statute in 2011; see Public Act 11-251, § 3; this revised interpretation had been in effect for several years. Accordingly, the legislature's failure to address the issue in the 2011 amendment demonstrates, if anything, acquiescence in the agencies' *revised* interpretation. Moreover, although we recognize that the legislature voted overwhelmingly in 2013, and again in 2015, to amend § 7-438 to reinstate the pre-2009 interpretation, Governor Malloy vetoed both amendments and the legislature did not attempt an override. Accordingly, we conclude that the evidence for legislative acquiescence in the agencies' pre-2009 interpretation of the act is at best inconclusive and does not compel us to depart from the plain meaning of the statutory text. See *Commission on Human Rights & Opportunities* v. *Board of Education*, 270 Conn. 665, 724–25, 855 A.2d 212 (2004).

Lastly, we consider the plaintiff's argument that the Jepsen opinion, while not binding on this court; see *Wiseman* v. *Armstrong*, 269 Conn. 802, 825, 850 A.2d 114 (2004); nevertheless represents highly persuasive authority to which the trial court should have deferred. As that court recognized, however, the Jepsen opinion neither purported to interpret the statutory language at issue nor concluded that the agencies' pre-2009 interpretation of § 7-438 was in any way superior to their revised interpretation. Rather, the Jepsen opinion concluded that neither interpretation was "clearly wrong."

Ultimately, the only reasons the Jepsen opinion offered in support of its recommendation that the agencies hew to their pre-2009 interpretation were that (1) it believed that the legislature had acquiesced in that interpretation, and (2) adopting a new interpretation might upset retirees' settled expectations.[18] We already have explained why the legislative acquiescence argument is unconvincing. With respect to the reliance argument, we agree with the trial court that, in most instances, an administrative agency that discovers that it has been applying an erroneous interpretation of a statute is obliged, after providing fair notice to affected persons, to conform its policy to the correct interpretation. Cf. *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 808, 93 S. Ct. 2367, 37 L. Ed. 2d 350 (1973). This is particularly true in the present case, insofar as the act expressly requires that the commission correct any erroneous overpayment of benefits. See General Statutes § 7-439h.

For all of these reasons, the plaintiff's statutory arguments are unpersuasive.[19] In addition, we have reviewed the plaintiff's other claims of error and find them to be without merit.[20]

[18] Although the Jepsen opinion also alluded to concerns regarding disparate treatment of members who apply for retirement on different dates, those concerns appear to be directed toward an unrelated issue addressed by that opinion, namely, a change in how the agencies evaluated disability retirement claims. Our understanding is that the agencies' revised reemployment policies will be applied without distinction to both current and future retirees.

[19] Because we conclude that the plain language of § 7-438 (b) bars the plaintiff's claim, we need not delve into the legislative history. See General Statutes § 1-2z. To the extent that any ambiguity remains, however, we note that the limited legislative history material to the questions before us generally favors the commission's interpretation of § 7-438 (b).

[20] With respect to the plaintiff's detrimental reliance claim, we agree with the trial court that (1) the plaintiff failed to establish that he relied *to his detriment* on the agencies' previous, contrary interpretation of § 7-438 (b), (2) once the commission came to understand that the prior interpretation of § 7-438 (b) was incorrect, it was permitted, if not required, to correct the error, at least on a prospective basis, and (3) in light of the fact that the

The judgment is affirmed.

In this opinion the other justices concurred.

DOREEN SPIOTTI *v.* TOWN OF WOLCOTT ET AL. (SC 19691)

Rogers, C. J., and Palmer, Eveleigh, Espinosa, Robinson, D'Auria and Vertefeuille, Js.

Syllabus

The plaintiff police officer sought to recover damages from the defendant town for alleged employment discrimination, claiming that the defendant had violated the statute (§ 31-51q) pertaining to, inter alia, the termination of employees for engaging in protective speech and the statute (§ 46a-60 [a] [4]) pertaining to discriminatory practices against employees who have previously brought a discrimination action. After the plaintiff had been terminated, she filed a grievance pursuant to the

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retirement services division repeatedly warned the plaintiff that he would no longer be allowed to collect a pension if reelected as mayor, the fact that he might have received other, more equivocal guidance from the retirement services division fails to meet the exacting requirements for establishing a claim of detrimental reliance involving public funds. See *Chotkowski* v. *State*, supra, 240 Conn. 268; *Fennell* v. *Hartford*, 238 Conn. 809, 816, 681 A.2d 934 (1996).

With respect to the plaintiff's equal protection claim, we note that the allegedly political motivations of certain legislators in delaying the amendment of § 7-438 do not offend the equal protection clause. See *Hearne* v. *Board of Education*, 185 F.3d 770, 775 (7th Cir. 1999). Moreover, setting aside the innuendo, the plaintiff's equal protection claims against the commission ultimately concern his complaints that (1) whereas the commission expressly gave one Democratic official the option either to resign or to lose his retirement pension, the plaintiff was presented with this same choice only implicitly, and (2) whereas the commission initially allowed another Democratic official to retain her pension before soon changing course and suspending it, the plaintiff's pension was suspended mere days after he assumed office. Even in the constitutional sphere, however, "the law [does not] concern itself with trifles . . . ." *Brandt* v. *Board of Education*, 480 F.3d 460, 465 (7th Cir. 2007).

Lastly, in his principal appellate brief, the plaintiff refers to his due process claims only in passing and fails to list those claims in his statement of issues. Accordingly, we decline to address those claims as inadequately briefed. See *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016).

collective bargaining agreement between the plaintiff's union and the defendant. The state Board of Mediation and Arbitration conducted hearings with respect to the grievance, and, on the basis of its conclusion that the plaintiff had made false statements in her discrimination complaint to the police department's ombudsman and during the department's investigation of that complaint, the board ultimately concluded that the plaintiff had been terminated for just cause. The plaintiff then brought the present action, and the defendant filed a motion for summary judgment, contending, among other things, that the plaintiff's claims under §§ 31-51q and 46a-60 (a) (4) were barred by the doctrine of collateral estoppel because the factual underpinning of those claims had been decided adversely to her by the board. The trial court denied the motion as to those claims, relying on this court's decision in *Genovese* v. *Gallo Wine Merchants, Inc.* (226 Conn. 475), which interpreted the statute (§ 31-51bb) providing that no employee shall be denied the right to pursue a cause of action arising under a state statute or the state or federal constitution solely because the employee is covered by a collective bargaining agreement. The trial court specifically concluded that an adverse determination in an arbitration proceeding pursuant to a collective bargaining agreement should not have a preclusive effect with regard to a subsequent statutory cause of action. On appeal from the trial court's denial of the defendant's motion for summary judgment, the defendant claimed that *Genovese* should be overruled because, subsequent to that decision, the legislature enacted the statute (§ 1-2z) requiring courts to interpret a statute according to its plain and unambiguous language without consulting extratextual evidence of its meaning, and the court in *Genovese* had relied on the legislative history of § 31-51bb when interpreting that purportedly clear and unambiguous statute. The defendant also claimed that the principles of stare decisis did not prevent this court from overruling *Genovese*. *Held* that, even if § 31-51bb was clear and unambiguous and its legislative history was the sole basis for this court's decision in *Genovese*, the legislature did not intend that the enactment of § 1-2z would overrule the prior interpretation of any statutory provision merely because this court previously had failed to apply the plain meaning rule, and, therefore, ordinary principles of stare decisis applied to the defendant's claim; furthermore, this court declined to depart from the principles of stare decisis and to overrule its decision in *Genovese*, as the legislature had not taken action since that decision to suggest that it disagreed with this court's conclusion that § 31-51bb was intended to bar the application of the doctrine of collateral estoppel to claims of statutory and constitutional violations brought after a claim involving the same issues had been finally resolved in grievance procedures or arbitration, and the defendant did not identify any intervening developments in the law, unconscionable results, or irreconcilable conflicts or difficulties in this court's interpretation of § 31-51bb that would justify overruling *Genovese*; moreover, by enacting

§ 31-51bb, the legislature limited an arbitrator's power to determine finally and conclusively factual and legal issues that are critical to an employee's right to pursue a statutory cause of action, and, to conclude that the trial court must defer to the board's findings of fact would be inconsistent with this legislative intent.

Argued May 2—officially released July 11, 2017

Procedural History

Action to recover damages for, inter alia, alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Zemetis*, *J.*, granted the defendants' motion to dismiss the complaint against the defendant Wolcott Police Department and granted in part the defendants' motion to strike; thereafter, the court, *Brazzel-Massaro*, *J.*, denied in part the named defendant's motion for summary judgment, and the named defendant appealed. *Affirmed.*

Michael J. Rose, with whom, on the brief, was *Johanna G. Zelman*, for the appellant (named defendant).

Eric R. Brown, for the appellee (plaintiff).

Opinion

VERTEFEUILLE, J. The primary issue that we must resolve in this appeal is whether this court should overrule its decision in *Genovese* v. *Gallo Wine Merchants, Inc.*, 226 Conn. 475, 486, 628 A.2d 946 (1993), holding that, under General Statutes § 31-51bb,[1] a factual determination made in a final and binding arbitration con-

[1] General Statutes § 31-51bb provides: "No employee shall be denied the right to pursue, in a court of competent jurisdiction, a cause of action arising under the state or federal Constitution or under a state statute solely because the employee is covered by a collective bargaining agreement. Nothing in this section shall be construed to give an employee the right to pursue a cause of action in a court of competent jurisdiction for breach of any provision of a collective bargaining agreement or other claims dependent upon the provisions of a collective bargaining agreement."

ducted pursuant to a collective bargaining agreement does not have preclusive effect in a subsequent action claiming a violation of the state or federal constitution or a state statute. The plaintiff, Doreen Spiotti, was a member of the International Brotherhood of Police Officers, Local 332 (union), and was employed as a police officer in the Wolcott Police Department (department). After the plaintiff filed a complaint with an ombudsman for the department alleging that the department had engaged in retaliatory conduct against her, the department conducted an investigation and concluded that certain statements that the plaintiff had made in her complaint were false. Thereafter, Neil O'Leary, the chief of the department, recommended to the town council of the named defendant, the town of Wolcott,[2] that the plaintiff's employment be terminated. The defendant terminated the plaintiff, who then filed a grievance pursuant to the procedures set forth in the collective bargaining agreement between the defendant and the union. In accordance with those procedures, the Connecticut State Board of Mediation and Arbitration (board of mediation) conducted hearings on the issue of whether the plaintiff's employment had been terminated for just cause, and it ultimately concluded that there was just cause on the basis of its determination that the plaintiff had made false statements in her complaint to the ombudsman and during the department's investigation of that complaint.

Thereafter, the plaintiff brought the present action alleging, among other things, that her termination was in retaliation for bringing a previous action against the defendant alleging sex discrimination in violation of General Statutes § 46a-60 (a) (4), and for engaging in

[2] The department was also named as a defendant in the plaintiff's complaint, but the claims against it were dismissed by agreement of the parties. For the sake of simplicity, in this opinion, we refer to the town of Wolcott as the defendant.

protected speech, namely, the complaint to the ombudsman, in violation of General Statutes § 31-51q.[3] The defendant filed a motion for summary judgment on the ground that the plaintiff's claims were barred by the doctrine of collateral estoppel because the factual underpinnings of those claims had been decided adversely to her by the board of mediation in the arbitration proceedings. The trial court denied the motion for summary judgment as to these claims on the ground that, under this court's interpretation of § 31-51bb in *Genovese*, the doctrine of collateral estoppel does not bar a statutory cause of action that is brought after the same issue has been decided in arbitration pursuant to a collective bargaining agreement. The defendant then filed this appeal.[4] The defendant contends that (1) *Genovese* should be overruled as a result of the legislature's subsequent enactment of General Statutes § 1-2z,[5] and (2) even if *Genovese* should not be overruled as the result of § 1-2z, it should be overruled because it was

[3] In addition, the plaintiff alleged that the defendant had discriminated against her on the basis of her sex in violation of § 46a-60 (a) (1), breached a settlement agreement resulting from the prior action against the defendant and wrongfully terminated her in violation of General Statutes § 31-51m. The trial court granted the defendant's motion for summary judgment as to each of these claims on the ground that they did not raise a genuine issue of material fact and the plaintiff did not establish a prima facie case for discrimination. The plaintiff has not challenged these rulings in this interlocutory appeal. See footnote 4 of this opinion.

[4] The defendant appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. We note that an interlocutory appeal from the denial of a motion for summary judgment based on the doctrine of collateral estoppel is a final judgment for purposes of appeal. See *Convalescent Center of Bloomfield, Inc.* v. *Dept. of Income Maintenance*, 208 Conn. 187, 194, 544 A.2d 604 (1988).

[5] General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

wrongly decided under then existing law.[6] We conclude that *Genovese* is still good law and, therefore, affirm the judgment of the trial court.

Because the underlying facts of this case have little bearing on the issue that is before us, we need not discuss them in further detail, but may proceed directly to our legal analysis. We begin with the standard of review. As we have indicated, the trial court's decision denying the relevant portions of the defendant's motion for summary judgment was premised on this court's interpretation of § 31-51bb in *Genovese* v. *Gallo Wine Merchants, Inc.*, supra, 226 Conn. 486, as barring the application of the doctrine of collateral estoppel to statutory claims brought subsequent to an arbitration in which the underlying issues were determined adversely to the plaintiff. The defendant's claims that *Genovese* should be overruled as the result of the enactment of § 1-2z or that it should be overruled because it was incorrect at the time it was decided involve questions of statutory interpretation subject to plenary review. See *State* v. *Salamon*, 287 Conn. 509, 529, 949 A.2d 1092 (2008) (because whether prior interpretation of statute should be overruled involves construction of statute, review is plenary).

To provide context for our resolution of the defendant's claims, we provide the following overview of this court's decision in *Genovese*. The plaintiff in that case claimed that the trial court improperly had concluded that the doctrine of collateral estoppel precluded his statutory cause of action because an arbitrator previously had determined the underlying factual issue adversely to him. *Genovese* v. *Gallo Wine Merchants*,

[6] The defendant further claims that, if we overrule *Genovese*, we must conclude as a matter of law that the plaintiff's statutory claims raise no genuine issue of material fact because all relevant facts were found adversely to her in the arbitration proceeding. Because we decline the defendant's invitation to overrule *Genovese*, we need not address this claim.

Inc., supra, 226 Conn. 479. After oral argument, this court in *Genovese* sua sponte raised the issue of whether § 31-51bb had any effect on the judgment of the trial court and requested supplemental briefs on that issue. Id., 479–80. The majority in *Genovese* began its analysis of this issue by observing that § 31-51bb was intended to overturn this court's holding in *Kolenberg* v. *Board of Education*, 206 Conn. 113, 123, 536 A.2d 577, cert. denied, 487 U.S. 1236, 108 S. Ct. 2903, 101 L. Ed. 2d 935 (1988), that an "employee's failure to exhaust the grievance and arbitration procedures available under a collective bargaining agreement deprive[s] a trial court of jurisdiction over a cause of action arising from the employment relationship." *Genovese* v. *Gallo Wine Merchants, Inc.*, supra, 480–81. The majority recognized that it did not follow from this fact that, when an employee *has* exhausted grievance procedures and obtained a final decision in an arbitration proceeding, the employee may relitigate issues decided by the arbitrator in a subsequent action raising a statutory claim. Id., 482–83. The majority further recognized that, "ordinarily a factual determination made in final and binding arbitration is entitled to preclusive effect." Id., 483. Nevertheless, it concluded that applying the doctrine of collateral estoppel to preclude employment related statutory claims that previously had been determined in an arbitration pursuant to a collective bargaining agreement would defeat the intent of § 31-51bb, namely, "to ensure that employees covered by a collective bargaining agreement receive the same opportunity to litigate their statutory claims as those employees who are not covered by a collective bargaining agreement." Id., 484.

The majority in *Genovese* further determined that this interpretation was supported by the legislative history of § 31-51bb. Id., 484–85. Specifically, the majority relied on the remarks of Representative Jay B. Levin that the

purpose of the legislation was to codify certain United States Supreme Court decisions that had "refused to give preclusive effect to a prior arbitral decision in a subsequent court action brought to vindicate an employee's statutory rights." Id., 485; see also 31 H.R. Proc., Pt. 13, 1988 Sess., pp. 4565–66, remarks of Representative Jay B. Levin, citing *McDonald* v. *West Branch*, 466 U.S. 284, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984), *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981), and *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974). Relying on the reasoning of these cases, the majority in *Genovese* further observed that "[a]n arbitrator's frame of reference . . . may be narrower than is necessary to resolve [a statutory] dispute because the arbitrator's power is . . . limited by . . . the collective bargaining agreement and the submission of the parties"; *Genovese* v. *Gallo Wine Merchants, Inc.*, supra, 226 Conn. 486–87; employees are represented by their union during grievance procedures, the union's interests may conflict with an employee's interests; id., 488; and "arbitration may be a less effective forum for the final resolution of statutory claims" than a judicial proceeding because the fact-finding process in arbitration is less robust than in judicial proceedings. Id., 489. Accordingly, the majority concluded that "the legislature intended that . . . an adverse determination [in an arbitration proceeding] should not have preclusive effect" with regard to a subsequent statutory cause of action. Id., 484.

The majority in *Genovese* recognized, however, that § 31-51bb was "contrary to the established judicial principle that voluntary recourse to arbitration proceedings allows the prevailing party, after a final arbitral judgment, to raise a defense of collateral estoppel . . . if the losing party thereafter initiates a judicial cause of action," and "also runs counter to the established legis-

lative policy favoring [alternative] methods of dispute resolution . . . .'' (Footnote omitted.) Id., 491–92. In addition, the majority observed that § 31-51bb permits an employee ''to walk away from an unsatisfactory grievance or arbitration outcome,'' while the employer ''is limited to the narrow review afforded by General Statutes [Rev. to 1993] § 52-418 if it concludes that an arbitral result was inappropriate.'' Id., 492. The majority noted that ''[a] similar disparity in access to our courts, in the case of compulsory lemon law arbitration procedures, was held unconstitutional in *Motor Vehicle Manufacturers Assn. of the United States, Inc.* v. *O'Neill*, 212 Conn. 83, 93–98, 561 A.2d 917 (1989), because it violated the open courts provision of our state constitution.''[7] *Genovese* v. *Gallo Wine Merchants, Inc.*, supra, 226 Conn. 492. Accordingly, the majority acknowledged that ''construing [§ 31-51bb] in accordance with its legislative history creates a range of problems that the legislature may not have fully considered . . . .'' Id., 490.

In his dissenting opinion in *Genovese*, Justice Berdon contended that the majority's construction of § 31-51bb was not supported by the plain language of the statute; id., 494; and violated the rule of statutory interpretation requiring that ''a statute should not be construed as altering the [common-law] rule, farther than the words of the statute import, and should not be construed as making any innovation upon the common law which the statute does not fairly express.'' (Internal quotation marks omitted.) Id., 495. He further contended that the majority had ''tipped [the] delicate procedural balance for resolving grievances between organized labor and

[7] But see *Alexander* v. *Gardner-Denver Co.*, supra, 415 U.S. 54 (allowing employee, but not employer, to have statutory discrimination claim considered both in arbitration and subsequent court proceeding not unfair to employer because employee ''is not seeking review of the arbitrator's decision'' by bringing claim in court, but ''is asserting a statutory right independent of the arbitration process,'' while ''[a]n employer cannot be the victim of discriminatory employment practices'' by employees).

management, by giving the employee an advantage not envisioned by the clear mandate of the legislation." Id., 496. Accordingly, Justice Berdon concluded that § 31-51bb did not permit an employee, after voluntarily submitting a claim to arbitration, to pursue a subsequent statutory cause of action involving the same issues. Id., 494.

With this background in mind, we first address the defendant's claim that this court's decision in *Genovese* should be overruled as the result of the subsequent enactment of § 1-2z in 2003.[8] Specifically, the defendant contends that the "plain language [of § 31-51bb] only permits an employee covered by a collective bargaining agreement to *also* pursue statutory and constitutional claims *in addition to* pursuing her grievance rights, even if those grievance rights have not yet been exhausted," and the statute simply does not address the distinct issue of whether the doctrine of collateral estoppel applies to a constitutional or statutory claim involving an issue that previously had been decided pursuant to contractually required grievance procedures. (Emphasis in original.) Because, according to the defendant, the meaning of § 31-51bb is clear and unambiguous, and the sole basis for this court's interpretation of § 31-51bb in *Genovese* was the legislative history of the statute, the defendant contends that *Genovese* should be overruled as a result of the enactment of § 1-2z, which codified the plain meaning rule. See *Kinsey* v. *Pacific Employers Ins. Co.*, 277 Conn. 398, 407–408, 891 A.2d 959 (2006) ("[u]nder § 1-2z, we are precluded from considering extratextual evidence of the meaning of a statute . . . when the meaning of the text of that statute is plain and unambiguous, that is, the meaning that is so strongly indicated or suggested by the [statutory] language as applied to the facts of

[8] Section 1-2z became effective on October 1, 2003. See Public Acts 2003, No. 03-154, § 1.

the case . . . that, when the language is read as so applied, it appears to be *the* meaning and appears to preclude any other likely meaning" [emphasis in original; internal quotation marks omitted]).

We reject this claim. Even if we were to agree with the defendant that § 31-51bb is clear and unambiguous with respect to the collateral estoppel issue and that the sole basis for this court's decision in *Genovese* was the legislative history of the statute, this court previously has held that the legislature did not intend that the enactment of § 1-2z would overrule the prior interpretation of any statutory provision merely because we had failed to apply the plain meaning rule. See *Hummel* v. *Marten Transport, Ltd.*, 282 Conn. 477, 501, 923 A.2d 657 (2007) (rejecting claim that legislature "intended to overrule every . . . case in which our courts, prior to the passage of § 1-2z, had interpreted a statute in a manner inconsistent with the plain meaning rule").[9]

[9] Although the defendant cited *Hummel* in its main brief to this court for the general proposition that a court should not lightly overrule its earlier decisions, the defendant did not discuss the fact that this court in *Hummel* had squarely addressed and rejected the argument, which the defendant renews in the present case, that given the adoption of § 1-2z this court should overrule prior decisions involving statutory interpretation in which we did not apply the plain meaning rule. The plaintiff's brief also did not address this holding in *Hummel*. At oral argument before this court, the defendant was questioned about the effect of *Hummel* on its argument pertaining to § 1-2z. Thereafter, the defendant filed a motion requesting that the parties be permitted to file supplemental briefs on that issue because this court had raised it sua sponte. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 162, 84 A.3d 840 (2014) (reviewing court may raise unpreserved issue sua sponte only in exceptional circumstances and only if court allows parties to brief issue). We do not agree with the defendant's suggestion that this court improperly raised a new "issue" sua sponte when we asked the defendant about the effect of *Hummel* on its claim that *Genovese* should be overruled in light of the adoption of § 1-2z. An attorney has an ethical obligation to disclose to the court controlling precedent that is directly adverse to a claim raised, and to explain why that precedent should be either distinguished or overruled. See Rules of Professional Conduct 3.3 (a) (2) ("[a] lawyer shall not knowingly . . . [f]ail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position

Rather, the ordinary principles of stare decisis apply to this court's interpretations of statutory provisions that predate the enactment of § 1-2z. See id., 494–95 (discussing principles of stare decisis); id., 501–502 (applying principles of stare decisis to statute under review).

Accordingly, we next address the defendant's claim that *Genovese* was incorrectly decided and that the principles of stare decisis should not prevent this court from overruling it. We begin our analysis of this claim with a review of those principles. "The doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. . . . Stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency. . . . It is the most important application of a theory of decisionmaking consistency in our legal culture and . . . is an obvious manifestation of the notion that decisionmaking consistency itself has normative value. . . .

"Moreover, [i]n evaluating the force of stare decisis, our case law dictates that we should be especially wary of overturning a decision that involves the construction of a statute. . . . When we construe a statute, we act not as plenary lawgivers but as surrogates for another

of the client and not disclosed by opposing counsel"). In light of this ethical obligation, we cannot conclude that the existence of binding precedent that is directly on point and dispositive of an issue raised by a party is, in and of itself, an "issue" that the court may not raise sua sponte in the absence of exceptional circumstances and briefing by the parties. Although parties are generally entitled to frame the issues without interference from the courts under our adversarial system of justice; see *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 146; they cannot ignore, or expect the courts to ignore, binding legal authority that directly controls the issues as framed by them. Accordingly, we denied the defendant's request for supplemental briefing.

policy maker, [that is] the legislature. In our role as surrogates, our only responsibility is to determine what the legislature, within constitutional limits, intended to do. Sometimes, when we have made such a determination, the legislature instructs us that we have misconstrued its intentions. We are bound by the instructions so provided. . . . More often, however, the legislature takes no further action to clarify its intentions. Time and again, we have characterized the failure of the legislature to take corrective action as manifesting the legislature's acquiescence in our construction of a statute. . . . Once an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative acquiescence places a significant jurisprudential limitation on our own authority to reconsider the merits of our earlier decision." (Internal quotation marks omitted.) *State* v. *Ray*, 290 Conn. 602, 614–15, 966 A.2d 148 (2009).

Factors that may justify overruling a prior decision interpreting a statutory provision include intervening developments in the law, the potential for unconscionable results, the potential for irreconcilable conflicts and difficulty in applying the interpretation. Id., 615; see also *Payne* v. *Tennessee*, 501 U.S. 808, 849, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) (Marshall, J., dissenting) (justifications for departing from precedent "include the advent of subsequent changes or development in the law that undermine a decision's rationale . . . the need to bring [a decision] into agreement with experience and with facts newly ascertained . . . and a showing that a particular precedent has become a detriment to coherence and consistency in the law" [citations omitted; internal quotation marks omitted]). In addition, a departure from precedent may be justified "when the rule to be discarded may not be reasonably supposed to have determined the conduct of the liti-

gants . . . .'' (Internal quotation marks omitted.) *State* v. *Salamon*, supra, 287 Conn. 523.

We conclude that, in the present case, even if we were to assume that we would reach a different conclusion if we were addressing the issue as a matter of first impression, these principles militate against overruling our decision in *Genovese*. In the twenty-four years since *Genovese* was decided, the legislature has taken no action that would suggest that it disagreed with our conclusion that § 31-51bb was intended to bar the application of the doctrine of collateral estoppel to claims of statutory and constitutional violations brought after a claim involving the same issues had been finally resolved in grievance procedures or arbitration. This is so despite the implicit invitation by the majority in *Genovese* for the legislature to reconsider § 31-51bb. See *Genovese* v. *Gallo Wine Merchants, Inc.*, supra, 226 Conn. 490 (''construing [§ 31-51bb] in accordance with its legislative history creates a range of problems that the legislature may not have fully considered''). Thus, we presume that the legislature acquiesces with that interpretation.[10] See, e.g., *State* v. *Ray*, supra, 290 Conn.

[10] We recognize that this court has held that ''the argument in favor of legislative acquiescence is particularly weak'' when the legislature has not demonstrated ''actual acquiescence,'' i.e., it has amended the statute but has chosen not to amend the particular provision under review. (Emphasis omitted.) *Stuart* v. *Stuart*, 297 Conn. 26, 47, 996 A.2d 259 (2010); see id. (''[T]he argument in favor of legislative acquiescence is particularly weak because the legislative acquiescence doctrine requires *actual acquiescence* on the part of the legislature. [Thus] [i]n most of our prior cases, we have employed the doctrine not simply because of legislative inaction, but because the legislature affirmatively amended the statute subsequent to a judicial or administrative interpretation, but chose not to amend the specific provision of the statute at issue. . . . In other words, [l]egislative concurrence is particularly strong [when] the legislature makes unrelated amendments in the same statute.'' [Citation omitted; emphasis in original; internal quotation marks omitted.]). Upon reflection, we question whether the case for legislative acquiescence must be ''particularly weak'' merely because it is not ''particularly strong.'' (Internal quotation marks omitted.) Id. Even if we were to assume, however, that the argument for legislative acquiescence is particularly weak in the present case because the legislature has not

615. Moreover, the defendant has not identified any intervening developments in the law, unconscionable results, irreconcilable conflicts or difficulties in applying our interpretation of § 31-51bb that would justify overruling *Genovese*.[11] Rather, the defendant has simply repeated the arguments that the parties made and that this court rejected in *Genovese*, which does not justify a departure from principles of stare decisis. See id., 613–14 (rejecting defendant's request to overrule prior interpretation of statute when "all of the defendant's arguments . . . expressly were raised and rejected by this court sixteen years [earlier]"). Finally, to the extent that reliance interests are relevant, they weigh against overruling *Genovese* because it is possible that the plaintiff and the union in the present case may have pursued the plaintiff's claims in arbitration differently than they would have if they had believed that the factual determinations made in those proceedings would have preclusive effect in a subsequent statutory cause of action. We decline, therefore, to overrule our decision in *Genovese*.

Finally, we note that the trial court here suggested repeatedly in its memorandum of decision denying in

amended § 31-51bb since our decision in *Genovese*, the defendant has provided no compelling reason for this court to overrule that case.

[11] The defendant does claim that it would be "outrageous" to reinstate the plaintiff to her position as a police officer when the board of mediation found that she had made false statements in her complaint to the ombudsman and during the investigation of that complaint. This argument, however, ignores the fact that the very reason for this court's decision in *Genovese* was that "[t]he [fact-finding process] in arbitration usually is not equivalent to judicial [fact-finding]. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable." (Internal quotation marks omitted.) *Genovese* v. *Gallo Wine Merchants, Inc.*, supra, 226 Conn. 489. We see nothing outrageous or unconscionable about allowing the plaintiff to litigate her factual claims de novo in court, including her claim that she did not make false statements.

part the defendant's motion for summary judgment that, although the decision of the board of mediation in the arbitration proceeding did not have preclusive effect in the present action, the court was bound by the board's findings of fact. That is not the case. Rather, by enacting § 31-51bb, the legislature limited "an arbitrator's power to determine finally and conclusively *factual* and legal issues that are critical to an employee's right to pursue a statutory cause of action in the Superior Court." (Emphasis added.) *Genovese* v. *Gallo Wine Merchants, Inc.*, supra, 226 Conn. 487; see also id., 489 (concluding that arbitration does not have preclusive effect in subsequent statutory action in part because arbitration is less effective forum for resolution of factual claims than judicial proceeding). To conclude that the trial court must defer to the arbitrator's findings of fact would be inconsistent with this legislative intent. Accordingly, although the board's decision may be admitted as evidence and accorded such weight as the trial court deems appropriate, that court should consider the plaintiff's factual claims de novo. Cf. *Alexander* v. *Gardner-Denver Co.*, supra, 415 U.S. 59–60 ("[T]he federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under [T]itle VII [of the Civil Rights Act of 1964]. The federal court should consider the employee's claim de novo. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate."); see also id., 60 n.21 (discussing factors to be considered in determining weight to be given by court to arbitral decision).

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JERZY G.*
(SC 19641)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Espinosa and Vertefeuille, Js.

Syllabus

The defendant, a Polish citizen who had been charged with sexual assault in the fourth degree, appealed to the Appellate Court from the trial court's orders terminating his participation in a statutory (§ 54-56e) pretrial diversionary program of accelerated rehabilitation and ordering his rearrest, following his deportation from the United States for overstaying the term of his visitor's visa. At the hearing on the application for the diversionary program, the state brought to the court's attention that it had received information from United States Immigration and Customs Enforcement that the defendant had overstayed his visa and that it would commence removal proceedings if the defendant was convicted of the charge. The court did not reference the defendant's immigration status when it granted the defendant's application for accelerated rehabilitation in April, 2012, imposed a two year period of supervision with certain conditions, and released the defendant from custody. The court continued the case until 2014, when the period of probation would terminate upon successful completion of the program. The defendant was deported to Poland in August, 2012, and was prohibited from entering the United States for a period of ten years from his departure date. In November, 2013, when the defendant's deportation was brought to the trial court's attention, the court advanced the date for a determination of whether the defendant had successfully completed the terms of accelerated rehabilitation. Defense counsel asked the court to continue the case or to find that the defendant had successfully completed the program and to dismiss the criminal charge. The trial court found that the defendant had offered no proof that his deportation was solely a consequence of either his arrest, the pendency of the criminal charge or his entrance into the accelerated rehabilitation program, nor did he offer any proof of compliance with the conditions of participation in that program. The court ordered his rearrest and imposed as a condition of release that he post a $5000 bond. On appeal to the Appellate Court, the defendant claimed that the trial court had abused its discretion in denying his motion to dismiss the criminal charge or by refusing to continue the case until he could return to the state to complete the program. The Appellate Court, relying on *State* v. *Aquino* (279 Conn. 293), rejected the defendant's argument that the termination of acceler-

* In accordance with our policy of protecting the privacy interests of the victims of sexual assault, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

ated rehabilitation gave rise to collateral consequences that could satisfy mootness concerns, concluding that, because the defendant had produced no evidence to establish that, in the absence of the termination of accelerated rehabilitation, he would be permitted to reenter, visit, or naturalize, the purported collateral consequences of the termination were too conjectural. The Appellate Court dismissed the defendant's appeal as moot and, therefore, did not reach the merits of the defendant's claims. On the granting of certification, the defendant appealed to this court. *Held* that the Appellate Court improperly dismissed the defendant's appeal as moot, the record having established that it was reasonably possible that the trial court's orders would give rise to prejudicial collateral consequences should the defendant seek to lawfully reenter the United States, from which the court could afford practical relief, and, accordingly, the case was remanded to the Appellate Court to consider the merits of the defendant's appeal; unlike in *Aquino*, the record here established the reason for the defendant's deportation and that this reason did not permanently bar him from reentering the United States, but only barred his reentry for ten years from the date of his departure, and the reasonably possible collateral consequences resulting from the trial court's orders included the fact that there was a pending criminal charge against the defendant that could be a significant factor in dissuading federal immigration officials from admitting him into the country, and that, even if he was admitted, he would be subject to arrest upon entry, for which he would have to post bond in order to obtain release or be imprisoned.

(*One justice dissenting*)

Argued February 21—officially released July 11, 2017

Procedural History

Information charging the defendant with the crime of sexual assault in the fourth degree, brought to the Superior Court in the judicial district of Fairfield, where the court, *Iannotti*, *J.*, granted the defendant's application for accelerated rehabilitation; thereafter, the court, *Arnold*, *J.*, denied the defendant's motion to dismiss and terminated the order of accelerated rehabilitation, and the defendant appealed to the Appellate Court, *Gruendel*, *Mullins* and *Solomon*, *Js.*, which dismissed the appeal, and the defendant, on the granting of certification, appealed to this court. *Reversed; further proceedings.*

Kelly Billings, assistant public defender, with whom was *James B. Streeto*, senior assistant public defender, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Marc R. Durso*, senior assistant state's attorney, for the appellee (state).

James P. Sexton, *Emily Graner Sexton* and *Marina L. Green* filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

Anthony D. Collins, *Meghann E. LaFountain* and *Yazmin Rodriguez* filed a brief for the American Immigration Lawyers Association as amicus curiae.

Opinion

McDONALD, J. In *State* v. *Aquino*, 279 Conn. 293, 298, 901 A.2d 1194 (2006), this court concluded that a deported defendant's challenge to the denial of his motion to withdraw his guilty plea was moot because, in the absence of evidence that the attendant conviction was the sole barrier to the deportee's ability to reenter the United States or to obtain naturalization, the court could not afford the deportee practical relief. In the present case, the Appellate Court concluded that, under *Aquino*, the appeal of the defendant, Jerzy G., from the trial court's order terminating his participation in an accelerated rehabilitation program and ordering his rearrest on the pending criminal charge was rendered moot by his deportation because the reason for his deportation was unrelated to that program or that charge. *State* v. *Jerzy G.*, 162 Conn. App. 156, 161, 164, 130 A.3d 303 (2015). We conclude that *Aquino*, properly construed, does not control the present case because the record establishes the reason for the defendant's deportation and there is a reasonable possibility that the trial court's orders would result in prejudicial collateral

consequences. Accordingly, the Appellate Court improperly dismissed the defendant's appeal as moot.

The record reveals the following undisputed facts. The defendant is a citizen of Poland. In April, 2006, he entered the United States on a nonimmigrant B-2 visitor's visa, which authorized him to remain in this country for a period not to exceed six months. Approximately six years later, in January, 2012, the defendant was charged with one count of sexual assault in the fourth degree, a class A misdemeanor, in violation of General Statutes § 53a-73a (a) (2). The defendant filed an application for the pretrial diversionary program of accelerated rehabilitation, which vests the court with discretion to suspend criminal prosecution for certain offenses and to release the defendant to the custody of the Court Support Services Division for a specified period, subject to conditions the court deems appropriate. See General Statutes § 54-56e (a), (b) and (d). Upon successful completion of the program for the specified period, the defendant would be entitled to dismissal of the charge. See General Statutes § 54-56e (f). The state opposed the application.

At an April, 2012 hearing on the application, the state brought information to the court's attention that it had received from United States Immigration and Customs Enforcement (ICE) regarding the defendant's immigration status. ICE informed the state that the defendant had overstayed his visa. ICE indicated that it would commence removal proceedings if the defendant was convicted of the charge, but was uncertain about what would happen if he was not convicted. The state also informed the court that the complainant, an acquaintance of the defendant, had reported that the defendant has a wife and children who are living in Poland.

Following argument, the trial court, *Iannotti*, *J.*, granted the defendant's application for accelerated

rehabilitation and made no reference to the defendant's immigration status. The court made the requisite statutory findings that the offense was not serious and that the defendant was not likely to reoffend. See General Statutes § 54-56e (a) and (b). The court imposed the maximum statutory period of supervision, two years, and the following conditions: no contact with the complainant; mental health evaluation and treatment as deemed necessary; substance abuse (alcohol) evaluation and treatment as deemed necessary; and seek and maintain full-time employment. The court continued the case until April, 2014, when the two year period of probation would terminate upon successful completion of the program. Thereafter, the defendant was released from custody.

Between May and August, 2012, ICE took steps to remove the defendant from the United States. In May, the defendant was taken into custody by ICE after he was served with a notice to appear. The notice stated that he was subject to removal because he had remained in the United States for a period longer than permitted, without authorization. In June, a United States Immigration Court ordered his removal from the United States. Following that order, the United States Department of Homeland Security issued a notice to the defendant, warning him that he was prohibited from entering the United States for a period of ten years from his departure date because he had been found deportable under § 237 of the Immigration and Nationality Act; 8 U.S.C. § 1227 (2012); and ordered him removed from the United States. In August, 2012, the defendant was deported to Poland.

In November, 2013, the defendant's deportation was brought to the trial court's attention. Upon the request of the Department of Adult Probation, the court, *Arnold*, *J.*, advanced the date for a determination whether the defendant had successfully completed the terms of his

accelerated rehabilitation from April, 2014, to November, 2013. At the hearing, the state sought termination of the program and requested an order for the defendant's rearrest. The defendant's public defender asked the court either to continue the case to allow further investigation or to find that the defendant had successfully completed the program and dismiss the criminal charge. Ultimately, following additional hearings, the court found that the defendant had failed to successfully complete the program, ordered his rearrest, and imposed as a condition of his release that he post a $5000 cash or surety bond.

The court explained its decision in a subsequent memorandum of decision, couching its reasoning in both jurisdictional and substantive terms. It noted that the state had informed the court that the basis for the defendant's deportation was that he had overstayed his visa's term. It thus found that the defendant voluntarily had placed himself in jeopardy for deportation and was aware of this possibility when accelerated rehabilitation was ordered for the two year period. It found that the defendant had offered no proof that his deportation was solely a consequence of either his arrest, the pendency of the criminal charge, or his entrance into the accelerated rehabilitation program. The court further noted that the defendant had not offered any proof of compliance with the conditions of participation in that program. The trial court cited this court's decision in *Aquino* and concluded: "The immigration consequences of the defendant are collateral and beyond the control of this court. The court found that the defendant was unsuccessful in his completion of the . . . program and has terminated his participation in said program."

The defendant appealed to the Appellate Court, claiming that the trial court had abused its discretion by (1) denying his motion to dismiss the criminal charge, or

(2) refusing to continue the case until he could return to the state to complete the program. *State* v. *Jerzy G.*, supra, 162 Conn. App. 158. The Appellate Court did not reach the merits of these claims, concluding that the appeal should be dismissed as moot. Id., 161. The court cited *Aquino* and its Appellate Court progeny as prescribing a rule under which the court cannot grant practical relief unless there is evidence that the challenged decision is the exclusive basis for the deportation. Id., 161–64. Because the defendant conceded that he was deported solely because he had overstayed his visa, a reason independent of his termination from the accelerated rehabilitation program, the Appellate Court reasoned that a favorable decision in his appeal could not afford the defendant practical relief with regard to his deportation. Id., 164–65. The Appellate Court rejected the defendant's argument that the termination of accelerated rehabilitation gave rise to collateral consequences that could satisfy mootness, namely, that the decision could prevent him from reentering this country, visiting this country, or seeking naturalization as a United States citizen. Id., 166. Again relying on *Aquino*, the court concluded that because the defendant had produced no evidence to establish that, in the absence of the termination of accelerated rehabilitation, he would be permitted to reenter, visit, or naturalize, the purported collateral consequences were too conjectural. Id., 166–67. The defendant's certified appeal to this court followed.[1]

[1] We granted the defendant's petition for certification to appeal limited to the following issues: "1. Did the Appellate Court properly dismiss the defendant's appeal as moot under [*Aquino*]?"; and "2. If the answer to the first question is yes, should this court overrule [*Aquino*]?" *State* v. *Jerzy G.*, 320 Conn. 919, 920, 132 A.3d 1093 (2016). We note that the state opposed the defendant's request for certification to appeal on the additional issue of whether the trial court abused its discretion in terminating the defendant's participation in accelerated rehabilitation, arguing that it would be improper for this court to do so because that claim had not been reached by the Appellate Court and is not inextricably linked to the mootness issue that the Appellate Court did decide. We declined to grant certification on the former issue.

On appeal to this court, both parties agree that *Aquino* is distinguishable from the present case. Their principal focus is on the fact that the deportee in *Aquino* had pleaded guilty to a deportable crime, whereas the defendant in the present case has not yet been convicted of any crime but is subject to arrest should he reenter the United States. The parties disagree, however, whether the distinctions between the cases are material with respect to the applicability of *Aquino* to the present case. We conclude that *Aquino* does not apply to the present case. We further conclude that the trial court's orders in the present case gave rise to prejudicial collateral consequences from which this court can afford practical relief. Accordingly, the appeal is not moot.

It is well settled that "[a] case is considered moot if [the] court cannot grant the [litigant] any practical relief through its disposition of the merits . . . ." (Internal quotation marks omitted.) *Moraski* v. *Connecticut Board of Examiners of Embalmers & Funeral Directors*, 291 Conn. 242, 255, 967 A.2d 1199 (2009). Under such circumstances, the court would merely be rendering an advisory opinion, instead of adjudicating an actual, justiciable controversy. *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, 240 Conn. 1, 6, 688 A.2d 314 (1997). Because mootness implicates the court's subject matter jurisdiction, it raises a question of law subject to plenary review. *Moraski* v. *Connecticut Board of Examiners of Embalmers & Funeral Directors*, supra, 255.

In *State* v. *McElveen*, 261 Conn. 198, 802 A.2d 74 (2002), this court engaged in a comprehensive examination of the contours of the collateral consequences doctrine, which provides an exception to the traditional direct injury requirement of mootness. The defendant, Derek McElveen, was found to have violated the condi-

tions of his probation on charges of failure to appear in the second degree due to his arrest in connection with an alleged attempt to commit robbery. Id., 203. McElveen appealed from the judgment revoking his probation and imposing a previously suspended sentence, claiming that there was insufficient evidence to prove that he had engaged in the criminal conduct deemed to violate his probation. Id. Mootness concerns arose because, while his appeal was pending, McElveen completed serving his sentence for the probation violation. Id. We concluded that the completed sentence did not render the appeal moot.[2] Id., 216.

The court began with core principles. "[A] case does not necessarily become moot by virtue of the fact that . . . due to a change in circumstances, relief from the actual injury is unavailable. We have determined that a controversy continues to exist, affording the court jurisdiction, if the actual injury suffered by the litigant potentially gives rise to a collateral injury from which the court can grant relief." Id., 205.

The court then surveyed cases in which it previously had found such prejudicial collateral consequences to exist and gleaned from them the following standard: "[F]or a litigant to invoke successfully the collateral consequences doctrine, the litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur. Accordingly, the litigant must establish these consequences by more than mere conjecture, but need not demonstrate that these consequences are more probable than not. This standard provides the necessary limitations on justiciability

[2] The court ultimately dismissed the appeal as moot due to an additional intervening event—the defendant pleaded guilty to attempt to commit robbery in the third degree while his appeal from the judgment revoking his probation was pending. *State* v. *McElveen*, supra, 261 Conn. 203, 217. The guilty plea to the same criminal conduct that gave rise to the finding of the violation of probation precluded this court from granting relief. Id., 217–18.

underlying the mootness doctrine itself. Where there is no direct practical relief available from the reversal of the judgment . . . the collateral consequences doctrine acts as a surrogate, calling for a determination whether a decision in the case can afford the litigant some practical relief in the future. The reviewing court therefore determines, based upon the particular situation, whether, the prejudicial collateral consequences are reasonably possible." Id., 208.

In addition to articulating for the first time a standard by which to assess collateral consequences, two other aspects of *McElveen* are noteworthy. First, the court rejected the state's argument that we should abandon our long-standing collateral consequences standard requiring a colorably present injury and instead adopt the federal standard requiring an injury-in-fact. Id., 208–209. The state had advocated for the approach taken in *Spencer* v. *Kemna*, 523 U.S. 1, 14–18, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998), wherein the United States Supreme Court determined that the petitioner's challenge to his parole revocation was rendered moot because he had completed his sentence during the pendency of the appeal. In *McElveen*, this court explained: "Unlike in the case of a criminal conviction, in which collateral consequences are presumed to exist, the court [in *Spencer*] determined that a revocation of parole is not presumed to carry detrimental consequences, and that the petitioner would be required to demonstrate the actual existence of collateral consequences to refute a finding of mootness. . . . Specifically, the court rejected the petitioner's assertions that his claim was not moot because his parole violation could be used to his detriment in a future parole proceeding or to increase the petitioner's sentence in a future sentencing proceeding; the court concluded that both claims were predicated on future violations of the law and were not, therefore, *necessary* collateral

consequences. . . . The court also dismissed as too speculative the petitioner's contentions that his parole revocation could be used to impeach him if he were to appear as a witness or litigant in a future proceeding or as a defendant in a future criminal proceeding."[3] (Citations omitted; emphasis in original.) *State* v. *McElveen*, supra, 261 Conn. 211. This court rejected the approach in *Spencer* because it was based on justiciability requirements under article three of the United States constitution that do not constrain our courts, and because the reasoning in *Spencer* was not sufficiently compelling to outweigh stare decisis considerations favoring adherence to our long-standing colorable injury standard. Id., 211–12. We have since renewed our disinclination to adopt the stricter federal standard for matters other than convictions. See *State* v. *Preston*, 286 Conn. 367, 383–84, 944 A.2d 276 (2008); see also *Williams* v. *Ragaglia*, 261 Conn. 219, 227, 802 A.2d 778 (2002) (rejecting argument that record must demonstrate that litigant "will or is likely to suffer specific, foreseeable collateral consequences stemming from the [challenged] decision" [emphasis omitted]).

The second notable aspect of *McElveen* was the court's approach to the question of whether there could be collateral consequences to overcome a charge of mootness even though granting relief would not remove similar prejudice remaining from other sources. Specifically, the court concluded that there was a reasonable possibility of prejudicial collateral consequences arising from the violation of probation because the record of that violation could negatively impact (1) the defendant's ability to obtain a favorable decision concerning

[3] The consequences of a parole violation that the court rejected in *Spencer* as too conjectural would be sufficient, however, to avoid mootness when a conviction was being challenged, because the presumption of collateral consequences would apply. See *Nowakowski* v. *New York*, 835 F.3d 210, 223 (2d Cir. 2016); see also footnote 4 of this opinion.

preconviction bail should he have future involvement with the criminal justice system, (2) his standing in the community in light of the connotation of wrongdoing attendant to a violation of probation, and (3) his future employment prospects. *State* v. *McElveen*, supra, 261 Conn. 213–16. The court noted: "We recognize that the defendant's conviction of attempted robbery in the third degree—the criminal conduct at issue in the trial court's judgment revoking the defendant's probation—creates similar prejudicial collateral consequences. That conviction is but one more strike against the defendant and does not eliminate the collateral consequences arising from the judgment revoking his probation."[4] Id., 216 n.14.

The proposition that the challenged decision did not have to be the sole source of possible prejudice found

[4] This view conforms to federal mootness jurisprudence when a conviction is being challenged. See *Sibron* v. *New York*, 392 U.S. 40, 55–56, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968) ("New York expressly provides by statute that Sibron's conviction may be used to impeach his character should he choose to put it in issue at any future criminal trial . . . and that it must be submitted to a trial judge for his consideration in sentencing should Sibron again be convicted of a crime . . . . [W]e see no relevance in the fact that Sibron is a multiple offender. . . . A judge or jury faced with a question of character, like a sentencing judge, may be inclined to forgive or at least discount a limited number of minor transgressions, particularly if they occurred at some time in the relatively distant past. It is impossible for this [c]ourt to say at what point the number of convictions on a man's record renders his reputation irredeemable. And even if we believed that an individual had reached that point, it would be impossible for us to say that he had no interest in beginning the process of redemption with the particular case sought to be adjudicated." [Citations omitted; footnotes omitted.]).

The United States Court of Appeals for the Second Circuit has explained this case law in light of *Spencer*, noting that because a conviction is presumed to give rise to prejudicial collateral consequences, the court accepts a broader category of consequences that are less certain to occur as sufficient for purposes of avoiding mootness than other matters to which this presumption does not attach. See *Nowakowski* v. *New York*, 835 F.3d 210, 223–24 (2d Cir. 2016). The majority of federal courts treat this presumption as rebuttable, such that once the defendant identifies a collateral consequence, the burden shifts to the state to prove that there is " 'no possibility' " of that collateral consequence. Id., 224.

support in the court's earlier decision in *Housing Authority* v. *Lamothe*, 225 Conn. 757, 765, 627 A.2d 367 (1993). In that case, the appeal of the defendant tenant from a summary judgment of eviction was deemed not to be moot after the defendant voluntarily vacated the premises during the pendency of the appeal in order to have sufficient time to relocate her family. Id. The court deemed prejudicial collateral consequences reasonably possible insofar as the eviction could adversely impact the defendant's eligibility for low income subsidized housing in the future. Id. The court squarely rejected the plaintiff landlord's argument that "because of other problems in the defendant's family, the judgment of eviction would not be the only consideration on which the housing authority might have relied in deciding against her with regard to any future application. We conclude that the existence of other criteria does not undermine the housing authority's ability to rely on the judgment of eviction from low income subsidized housing as a basis for rejecting any future application." Id.

Against this backdrop, we turn to *Aquino*, the deportation case on which the trial court and the Appellate Court relied. The defendant, Mario Aquino, was a Guatemalan national who had illegally entered the United States and remained here as an illegal alien for many years before criminal charges were filed against him. *State* v. *Aquino*, supra, 279 Conn. 295. He initially entered a guilty plea under the *Alford* doctrine; *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); but later moved to withdraw the plea. *State* v. *Aquino*, supra, 294, 297. In the motion, Aquino claimed that his plea was not knowing and voluntary due to ineffective assistance of counsel, in that counsel only had advised him of the possibility, and not the certainty, of deportation as a result of the plea. Id., 297. The motion alleged that, when Aquino had

entered the guilty plea, he had not understood the likelihood that he would be jeopardizing his continuing ability to reside in the United States and his ability to petition for naturalization. Id. The trial court denied the motion to withdraw the plea, and Aquino appealed from the judgment of conviction. Id. While his appeal was pending, Aquino was deported. Id., 298. The Appellate Court concluded that Aquino's deportation precluded practical relief from the direct injury arising from his conviction, but his appeal was not moot because there was a collateral injury from which the court could grant relief. *State* v. *Aquino*, 89 Conn. App. 395, 400, 401, 873 A.2d 1075 (2005). Drawing on the standard articulated in *McElveen*, the court explained: "The defendant argues that, as a collateral consequence of the denial of his motion to withdraw his plea, his ability to petition for naturalization will be gravely impaired. That contention is not mere speculation, but rather is a likely consequence of his guilty plea to the count of attempt to commit assault in the second degree. For that reason, we conclude that subject matter jurisdiction is not a bar to the defendant's present appeal." (Footnote omitted.) Id., 401. Nonetheless, the Appellate Court affirmed the trial court's judgment on the merits. Id., 410.

In the certified appeal that followed, this court concluded that the appeal was moot. *State* v. *Aquino*, supra, 279 Conn. 297, 299. The court explained: "[I]n the absence of any evidence that the defendant's guilty plea was the sole reason for his deportation, the defendant's appeal must be dismissed as moot. . . . There is no evidence in the record as to the reason for his deportation. If it was not the result of his guilty plea alone, then this court can grant no practical relief and any decision rendered by this court would be purely advisory." Id., 298. This court's response to the Appellate Court's collateral injury holding was relegated to a footnote, in which this court summarily dismissed that hold-

ing as follows: "The Appellate Court concluded that the appeal was not rendered moot by the deportation because the defendant's ability to petition for naturalization would be gravely impaired by the guilty plea. . . . Just as there is no evidence in the record before us establishing the reason for the defendant's deportation, however, there is no evidence to suggest that, in the absence of the guilty plea, the defendant would be allowed to reenter this country or become a citizen." (Citation omitted.) Id., 298–99 n.3.

On its face, *Aquino* appears to be inconsistent with our collateral consequences jurisprudence. The opinion makes no express reference to "collateral consequences" or the "reasonable possibility" standard set forth in *McElveen*. Indeed, the suggestion that the defendant must produce evidence that he "would be allowed" to reenter this country or become a citizen; *State* v. *Aquino*, supra, 279 Conn. 298–99 n.3; seems to be in tension with that standard. Similarly, the suggestion that the guilty plea must be the sole reason for the deportation would seem to be in tension with statements in *McElveen* and *Lamothe* that it is not dispositive that similar prejudicial collateral consequences may remain from other sources from which this court cannot grant relief.

Nonetheless, the court must have been aware of the basis of the Appellate Court's decision, which expressly recited the reasonable possibility of collateral consequences as the governing standard. *State* v. *Aquino*, supra, 89 Conn. App. 405–406. Moreover, if this court had determined that this standard was inapplicable, it presumably would have explained the reason for doing so, given that this court has applied the standard in *McElveen* in numerous cases and varied circumstances, without exception. See *Rowe* v. *Superior Court*, 289 Conn. 649, 655, 960 A.2d 256 (2008) (summary judgment of criminal contempt); *State* v. *Preston*, supra, 286

Conn. 382 (violation of probation); *Putman* v. *Kennedy*, 279 Conn. 162, 169–70, 900 A.2d 1256 (2006) (domestic violence restraining order); *In re Allison G.*, 276 Conn. 146, 166–67, 883 A.2d 1226 (2005) (petition seeking adjudication of child neglect); *Wallingford* v. *Dept. of Public Health*, 262 Conn. 758, 761, 767–68, 817 A.2d 644 (2003) (agency's declaratory ruling finding jurisdiction over property); *Williams* v. *Ragaglia*, supra, 261 Conn. 221, 225–26 (foster care license).

There is, however, an important aspect of the court's reasoning in *Aquino* that can explain the holding in a manner that is consistent with earlier precedent. The court emphasized the lack of evidence in the record to establish the reason for Aquino's deportation and, conversely, to establish the lack of any impediment other than the guilty plea that would preclude Aquino's admission to the country. *State* v. *Aquino*, supra, 279 Conn. 298 and nn.2 and 3. Without that information, the court apparently deemed it impossible to determine whether, even if Aquino prevailed on appeal and his conviction was reversed, such a decision would improve his chances of reentry into the country or naturalization. It is a settled principle under both federal and Connecticut case law that, if a favorable decision necessarily could not afford the practical relief sought, the case is moot. Thus, courts have held that when a conviction, other than the one being challenged, results in a deportee's *permanent* ban from reentering this country, the deportee cannot establish collateral injury even if the challenged conviction also is an impediment to reentry. See, e.g., *Perez* v. *Greiner*, 296 F.3d 123, 126 (2d Cir. 2002) ("because [the petitioner] is permanently inadmissible to this country due to his prior drug conviction, collateral consequences cannot arise from the challenged robbery conviction, and the petition is moot"); *St. Juste* v. *Commissioner of Correction*, 155 Conn. App. 164, 181, 109 A.3d 523 (concluding that

appeal challenging assault conviction was moot because petitioner's earlier threatening conviction would bar his admission into country), cert. granted, 316 Conn. 901, 111 A.3d 470 (2015); *Quiroga* v. *Commissioner of Correction*, 149 Conn. App. 168, 174–75, 87 A.3d 1171 ("[e]ven if the immigration court had predicated its deportation order on the [challenged] larceny conviction exclusively, the petitioner still could not prevail" because his prior narcotics conviction would permanently bar admission), cert. denied, 311 Conn. 950, 91 A.3d 462 (2014). Such a circumstance is distinguishable from *McElveen* and *Lamothe* because, although there were other potential sources of prejudice in those cases, those sources were not necessarily dispositive regarding the collateral injury, unlike a conviction resulting in a permanent ban from admission into this country.[5] Cf. *Castle Apartments, Inc.* v. *Pichette*, 34 Conn. App. 531, 534, 642 A.2d 57 (1994) (The court explained that the appeal was moot because "[u]nlike *Lamothe*, the tenant here is barred from challenging the judgment of possession because she failed to file a motion to open or set aside that judgment in the trial court. Regardless of the result of this appeal, the summary process judgment will remain in effect."). We recognize that some Appellate Court cases understandably have construed *Aquino* to require the challenged decision to be the reason, and the only reason, for the deportation. See *Quiroga* v. *Commissioner of Correction*, supra, 173–74; *State* v. *Chavarro*, 130 Conn. App. 12, 18–19, 21 A.3d 541 (2011). Because that limited view renders that case inconsistent with a substantial body of case law, we

[5] We have no occasion in the present case to decide whether these Appellate Court cases were properly decided. Therefore, we need not consider the arguments of the amicus curiae American Immigration Lawyers Association regarding the various circumstances under which the basis for a deportation order may be reconsidered. We acknowledge these cases simply to distinguish the practical effect of an unchallenged conviction that permanently bars admission from a decision that does not have that effect.

opt for the construction that renders *Aquino* consistent with our mootness jurisprudence.[6]

With this view of *Aquino*, we turn to the present case. Unlike *Aquino*, the record establishes the reason for the defendant's deportation—overstaying the term of his visitor visa without permission to do so. Indeed, the defendant's deportation could not have been based in any part on his state criminal charge because prosecution on that charge was suspended until the trial court terminated his accelerated rehabilitation following his deportation. The record also establishes that the ground for the defendant's removal does not permanently bar him from reentering the United States, but only bars his reentry for ten years from the date of his departure (almost one half of that period having already lapsed). Once that period expires, the ground for his removal imposes no legal impediment to reentry. Accordingly, *Aquino* does not control the present case.

We consider, therefore, whether there is a reasonable possibility of prejudicial collateral consequences as a result of the trial court's orders. We conclude that there is a reasonable possibility of prejudicial collateral consequences should the defendant seek to lawfully reenter the United States. The order for the defendant's arrest on a pending criminal charge would not bar his admission into the United States. See 8 U.S.C. §§ 1101 (a) (48) (A) and 1182 (a) (2) (2012). Nonetheless, the fact that there is a pending criminal charge against the defendant could be a significant factor in dissuading federal

[6] We note that *Aquino* appears to have placed the burden on the defendant to prove that there was no other bar to his admission into the country. We question whether, in light of the presumption of collateral consequences applied by this court, the burden should have shifted to the state to prove that there was no reasonable possibility that Aquino would have been barred from admission, similar to the burden shifting approach in the federal courts. See footnote 4 of this opinion. We leave that question, however, for another day.

immigration officials from admitting him into the country, as such a decision would be discretionary. Should it not pose such an impediment to his return, the defendant would be subject to arrest upon entry into the United States. In order to obtain release, he would have to post a $5000 bond. If he was unable to do so, he would be imprisoned. All of these impediments could be removed, however, if the defendant was fully successful on the merits of his appeal.

We are not persuaded by the state's argument that in order to raise the existence of collateral consequences above mere speculation, a deported defendant must affirmatively evince an intent to reenter this country. We have not imposed a similar requirement in any other mootness case, even when a voluntary action by a litigant would expose him or her to the collateral consequences. See, e.g., *State* v. *McElveen*, supra, 261 Conn. 213 (future involvement with criminal justice system); *Housing Authority* v. *Lamothe*, supra, 225 Conn. 765 (application for subsidized housing). To the extent that the Appellate Court cited the defendant's statement during the first hearing on the application for accelerated rehabilitation that he wanted to go to Poland, that statement[7]—a non sequitur—cannot reasonably be interpreted to mean that he had no interest in ever returning to the United States if the legal impediments were removed. See *State* v. *Jerzy G.*, supra, 162 Conn. App. 166 n.5. The fact that the defendant resided in the United States for six years, overstaying the term of his six month visitor's visa, and the lack of evidence that he had planned to return to Poland but for his arrest

[7] The statement was made in the following context, with the defendant aided by a Polish interpreter:

"The Court: If I grant you the program, do you agree to waive your rights under the speedy trial act and the totaling of the statute of limitations?

"The Defendant: I understand, but I would like to go to Poland.

* * *

"The Court: Well, that may happen, but it won't happen today."

and the disclosure of his immigration status suggest that his desire to return is a reasonable possibility.

The state's argument that we should deem this appeal moot to preserve the status quo because the state has a continued interest in bringing a defendant to trial is confounding. The state posits that "[i]f this court concludes that the appeal is not moot and that the status quo should not be maintained, such decision could encourage defendants to waive removal and appeal, rely on a successful appeal resulting in a termination of [accelerated rehabilitation], thus avoiding prosecution and thereafter being eligible for reentry having avoided a conviction." Putting aside the multiple conditions that would have to be met for such circumstances to arise, there is a fundamental flaw in this reasoning. If a defendant has successfully completed accelerated rehabilitation, he or she is statutorily entitled to dismissal of the criminal charge. Thus, the state's real concern is whether it is proper to conclude that the defendant has successfully completed accelerated rehabilitation when he has been deported prior to the termination of the period of supervision under the circumstances presented. By allowing the appeal to proceed on the merits, the state will have the opportunity to make its case on that issue.

Finally, we note that, although the defendant is *legally* entitled to a presumption of innocence on the pending criminal charge, his reputation is subject to the stain associated with an arrest for probable cause of having committed a sexual assault in the court of public opinion, should the pending charge come to light. Thus, if the defendant's appeal is deemed to be moot, he will have been deprived of the only avenue to remove that stain. See *Williams* v. *Ragaglia*, supra, 261 Conn. 233 ("[i]n recognition of the importance of one's good name, this court has determined, when addressing collateral consequences, that an action that stains one's reputa-

tion is an injury that the court can consider in determining whether it may grant practical relief").

Accordingly, we conclude that the present case is controlled by our traditional collateral consequences standard. The record establishes that the defendant's appeal is not moot because it is reasonably possible that prejudicial collateral injury will arise from the trial court's orders. Accordingly, the Appellate Court should consider the merits of the defendant's appeal on remand.

The judgment of the Appellate Court is reversed and the case is remanded for further proceedings.

In this opinion ROGERS, C. J., and PALMER, EVELEIGH and VERTEFEUILLE, Js., concurred.

ESPINOSA, J., dissenting. The majority concludes that the appeal of the defendant, Jerzy G., is not moot pursuant to this court's decision in *State* v. *Aquino*, 279 Conn. 293, 901 A.2d 1194 (2006), because (1) the record establishes that the sole reason for his deportation was that he overstayed the term of his visitor visa without permission, and (2) there is a reasonable possibility that the pending criminal charge against him could be a significant factor in the decision as to whether he should be readmitted into the United States and, if he were readmitted, he could then be subject to criminal proceedings. Accordingly, the majority concludes that the Appellate Court had jurisdiction over the appeal under the collateral consequences doctrine, and it reverses the judgment of that court dismissing the appeal as moot. I would conclude that, to the contrary, the Appellate Court correctly determined that the defendant's appeal is moot because any collateral consequences to the defendant are "merely conjectural." *State* v. *Jerzy G.*, 162 Conn. App. 156, 166–67, 130 A.3d 303 (2015). Moreover, even if I were to agree with the

majority that the appeal is not moot, I would conclude that the trial court did not abuse its discretion when it denied the defendant's motion to dismiss the sexual assault charge against him and terminated his participation in the accelerated rehabilitation program. Accordingly, I dissent.

The collateral consequences doctrine requires the party invoking the doctrine "to demonstrate more than an abstract, purely speculative injury . . . ." *Williams* v. *Ragaglia*, 261 Conn. 219, 227, 802 A.2d 778 (2002). "[F]or a litigant to invoke successfully the collateral consequences doctrine, the litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur. Accordingly, the litigant must establish these consequences by more than mere conjecture, but need not demonstrate that these consequences are more probable than not." *State* v. *McElveen*, 261 Conn. 198, 208, 802 A.2d 74 (2002).

I would note that the majority raises, but does not answer, the question of whether the burden is on the state to prove that there is no reasonable possibility of collateral consequences, "in light of the presumption of collateral consequences applied by this court . . . ." See footnote 6 of the majority opinion. The majority is apparently referring to the discussion in *McElveen* of a United States Supreme Court case distinguishing cases involving criminal convictions, which are "presumed to carry detrimental consequences," and cases involving revocations of parole, in which "the petitioner would be required to demonstrate the actual existence of collateral consequences to refute a finding of mootness." *State* v. *McElveen*, supra, 261 Conn. 211, citing *Spencer* v. *Kemna*, 523 U.S. 1, 12–14, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1988). This court rejected that distinction. *State* v. *McElveen*, supra, 211–12. In doing so, however, the court made it clear that it understood the distinction to be based, not on the party who bears the burden of

proof, but on the degree of probability that collateral consequences will arise. Compare id., 211 (under *Spencer*, when defendant is challenging revocation of parole, he must "demonstrate the actual existence of collateral consequences"), with id., 212 (this court has always "relied upon the reasonable possibility of future adverse collateral consequences to avoid a dismissal on mootness grounds"). Indeed, as I have indicated, this court stated in *McElveen* that the burden of proving a reasonable possibility of future adverse collateral consequences is on the party raising the claim. Id., 208 (litigant invoking collateral consequences doctrine "must show that there is a reasonable possibility that prejudicial collateral consequences will occur"); compare *Perez* v. *Greiner*, 296 F.3d 123, 125 (2d Cir. 2002) (under United States Supreme Court precedent, "a criminal conviction is rendered moot by a release from imprisonment only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction" [internal quotation marks omitted]); see also *State* v. *McElveen*, supra, 211 (this court is not bound by justiciability requirements applicable to federal courts). Accordingly, I do not agree with the majority that this court's decision in *McElveen* creates doubt about who bears the burden of proving the reasonable possibility of collateral consequences in the present case.

In *State* v. *Aquino*, supra, 279 Conn. 298 n.3,[1] this court concluded that, in the absence of evidence that, but for the defendant's guilty plea, he would have been allowed to reenter the country, there was no basis to conclude that his petition for naturalization would be gravely impaired by the plea. Accordingly, the court concluded, that collateral consequence was speculative and did not prevent his appeal from being moot. See

[1] The facts and procedural history of *Aquino* are set forth in the majority opinion.

id. Similarly, in the present case, there is absolutely no evidence that, but for the pending sexual assault charge against the defendant, he would attempt and be permitted to reenter the country. Indeed, defense counsel has conceded that there is no evidence that the defendant has any current desire to do so; see *State* v. *Jerzy G.*, supra, 162 Conn. App. 166 n.5; and, even if he did, there is no guarantee that he will have the same desire after August, 2022, when he will be permitted to apply for reentry, and when he will be in his late sixties. Moreover, there is no way of knowing whether, if the status quo is maintained and the arrest warrant for the defendant on the charge of sexual assault in the fourth degree remains in effect, the defendant would be barred from reentering the country on that ground, particularly when the defendant would be able to explain that he was granted accelerated rehabilitation on the charge, but was terminated from the program only because he was deported. Thus, any injury to the defendant as the result of the trial court's ruling is purely speculative. Accordingly, I would conclude that the defendant's appeal is moot.

I recognize that, because I would conclude that the defendant's appeal is moot, and because the parties have not briefed the merits of the defendant's appeal to the Appellate Court in their briefs to this court, there is no need for me to address the question of whether the trial court abused its discretion. Nevertheless, I feel compelled to observe that, in my view, the trial court acted well within its discretion when it terminated the program of accelerated rehabilitation and ordered the defendant to be rearrested. See *State* v. *Callahan*, 108 Conn. App. 605, 611, 949 A.2d 513 (termination of program of accelerated rehabilitation is subject to review for abuse of discretion), cert. denied, 289 Conn. 916, 957 A.2d 879 (2008); see also *State* v. *Santiago*, 318 Conn. 1, 140–41, 122 A.3d 1 (2015) (*Norcott* and *McDon-*

ald, *Js.*, concurring) (addressing issue that was moot and that had not been briefed by parties because concurring justices "[felt] compelled" to do so). It was perfectly reasonable for the trial court to conclude that the defendant's deportation from this country as the result of his voluntary conduct in overstaying his visa in violation of federal law did not provide a valid excuse for his failure to comply with the conditions of the program of rehabilitation and, therefore, did not warrant either the dismissal of the charges against him based on the fiction that he successfully completed the program or an indefinite continuance of the case on the speculative assumption that he may attempt to return to this country. "The defendant has cited no authority for the proposition that the accelerated rehabilitation program gives criminal defendants the authority to frame the conditions with which they are prepared to comply in order to demonstrate their rehabilitation. To the contrary, the law is clear that the only choice that the statute gives such defendants is to accept and to abide by the conditions set by the court, or to reject the conditions and to face further criminal prosecution." *State* v. *Callahan*, supra, 613. Although it is conceivable that this principle might not apply when a defendant is prevented by circumstances entirely beyond his control, such as a serious injury or illness, from complying with the conditions of a program of accelerated rehabilitation, that is not the case here. In my view, when the defendant chose to stay in this country illegally, he assumed the risk of the adverse consequences of that decision, including the risk that his deportation would deprive him of statutory benefits, such as participation in a program of accelerated rehabilitation pursuant to General Statutes § 54-56e, for which he might otherwise be eligible.[2] In this regard, I

[2] The cases cited by the amicus curiae, American Immigration Lawyers Association, for the proposition that deportation cannot operate to deprive a person of a statutory benefit for which he would otherwise be eligible are easily distinguishable. See *Lari* v. *Holder*, 697 F.3d 273, 278 (5th Cir.

would note that accelerated rehabilitation is not a right, but is purely a matter of judicial discretion. See id. ("Accelerated rehabilitation is not a right at all. It is a statutory alternative to the traditional course of prosecution available for some defendants and totally dependent upon the trial court's discretion." [Internal quotation marks omitted.]). It is clear to me, therefore, that the trial court's ruling was logical, it was based on proper factors and it resulted in no injustice. See *In re Shaquanna M.*, 61 Conn. App. 592, 603, 767 A.2d 155 (2001) (abuse of discretion exists when court "has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors");

2012) (under plain meaning of federal statute, alien's ability to file motion to reconsider removal order is not contingent on presence in United States); *Lin* v. *United States Attorney General*, 681 F.3d 1236, 1238, 1240 (11th Cir. 2012) (federal statute confers authority on federal Board of Immigration Appeals to entertain motion to reopen removal order after movant has been deported, and that authority cannot be eliminated by regulation); *Contreras-Bocanegra* v. *Holder*, 678 F.3d 811, 817–18 (10th Cir. 2012) (same); *Prestol Espinal* v. *Attorney General of the United States*, 653 F.3d 213, 218, 223 (3d Cir. 2011) (same); *Reyes-Torres* v. *Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011) (same); *Luna* v. *Holder*, 637 F.3d 85, 100 (2d Cir. 2011) (same); *Pruidze* v. *Holder*, 632 F.3d 234, 237–38 (6th Cir. 2011) (same); *Marin-Rodriguez* v. *Holder*, 612 F.3d 591, 593–94 (7th Cir. 2010) (same); *William* v. *Gonzales*, 499 F.3d 329, 333–34 (4th Cir. 2007) (same); see also *Judulang* v. *Holder*, 565 U.S. 42, 58–59, 132 S. Ct. 476, 181 L. Ed. 2d 449 (2011) ("comparable-grounds rule" for determining who is eligible to seek discretionary relief from deportation is invalid under federal Administrative Procedure Act as being arbitrary and capricious). These cases from the federal Circuit Courts of Appeals merely stand for the proposition that, under the governing federal statute, the Board of Immigration Appeals has jurisdiction to consider motions to reconsider and to reopen a removal order even after the subject of the order has been deported, and that statutory grant of authority cannot be eliminated by regulation. It does not follow that deportation can *never* be a proper consideration when courts are determining eligibility for statutory benefits. The United States Supreme Court in *Judulang* merely applied the principle that an agency rule cannot be arbitrary and capricious. That principle is not applicable here because no agency rule is under consideration and because a determination that a program of accelerated rehabilitation must be terminated when the participant, as the result of his own voluntary conduct, cannot successfully complete it is neither arbitrary nor capricious.

id., 604 ("[a]n abuse of discretion occurs when an injustice has been done"). Accordingly, there was no abuse of discretion.

STATE OF CONNECTICUT *v.* NINA C. BACCALA (SC 19717)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Espinosa, Robinson and D'Auria, Js.*

Syllabus

Convicted of the crime of breach of the peace in the second degree in connection with the defendant's customer service dispute with a supermarket employee, the defendant appealed, claiming that the evidence was insufficient to support her conviction in accordance with her first amendment rights. The defendant telephoned a supermarket to inquire whether its customer service desk was open, and, after being informed during that call by F, an assistant manager, that the desk had already closed for the evening and that F would be unable to process her money transfer request, the defendant proceeded to utter various swear words. After the defendant arrived at the supermarket, F approached the defendant and again informed her that the customer service desk was closed. The defendant became angry and then proceeded to loudly direct crude and angry comments at F, including "fat ugly bitch, "cunt," and "fuck you, you're not a manager," while making gestures with a cane that she was carrying. F remained professional and wished the defendant a good night, which prompted the defendant to leave the supermarket. Following her conviction, the defendant appealed. *Held* that the defendant's conviction of breach of the peace in the second degree on the basis of pure speech constituted a violation of the first amendment to the United States constitution, as the defendant's speech, unaccompanied by threats, did not fall within the narrow category of unprotected fighting words, the state having failed to prove beyond a reasonable doubt that F was likely to have retaliated with violence in response to the defendant's words under the circumstances in which they were uttered, and, accordingly, the judgment of the trial court was reversed and the case was remanded with direction to render a judgment of acquittal; this court, utilizing the proper contextual analysis that required consider-

* This case was originally argued before a panel of this court consisting of Chief Justice Rogers and Justices Palmer, Eveleigh, McDonald, Espinosa and Robinson. Thereafter, Justice D'Auria was added to the panel and has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

ation of the actual circumstances, as perceived by a reasonable speaker and addressee, concluded that an average store manager in F's position would not have responded to the defendant's remarks with violence, F, having previously heard the defendant's crude tirade during the telephone call, understood that when she approached the defendant to reiterate a message she knew the defendant did not want to hear, would reasonably have been aware of the possibility that a similar barrage of insults would be directed at her, and, as the acting manager of a supermarket, F was expected to model appropriate, responsive behavior aimed at diffusing the situation and would have had a degree of control over the premises where the confrontation took place.

(*Three justices concurring and dissenting in one opinion*)

Argued November 10, 2016—officially released July 11, 2017

Procedural History

Substitute information charging the defendant with two counts of the crime of threatening in the second degree and one count of the crime of breach of the peace in the second degree, brought to the Superior Court in the judicial district of Tolland, geographical area number nineteen, and tried to the jury before *Graham, J.*; verdict and judgment of guilty of breach of the peace in the second degree, from which the defendant appealed. *Reversed; judgment directed.*

Damian K. Gunningsmith, with whom were *John L. Cordani, Jr.*, and, on the brief, *Martin B. Margulies*, for the appellant (defendant).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Andrew R. Durham*, assistant state's attorney, for the appellee (state).

Opinion

McDONALD, J. The defendant, Nina C. Baccala, was convicted of breach of the peace in the second degree

in violation of General Statutes § 53a-181 (a) (5)[1] solely on the basis of the words that she used to denigrate the manager of a supermarket in the course of a customer service dispute. Fundamentally, we are called upon to determine whether the defendant's speech is protected under the first amendment to the United States constitution or, rather, constitutes criminal conduct that a civilized and orderly society may punish through incarceration. The distinction has profound consequences in our constitutional republic. "If there is a bedrock principle underlying the [f]irst [a]mendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

Only certain types of narrowly defined speech are not afforded the full protections of the first amendment, including "fighting words," i.e., those words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." (Internal quotation marks omitted.) *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 573, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). The broad language of Connecticut's breach of the peace statute; see footnote 1 of this opinion; has been limited accordingly. See *State* v. *Indrisano*, 228 Conn. 795, 812, 640 A.2d 986 (1994). Because the words spoken by the defendant were not likely to provoke a violent response under the circumstances in which they were uttered, they cannot be proscribed

[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 the risk thereof, such person . . . (5) in a public place, uses abusive . . . language . . . ." The defendant does not contest the sufficiency of the evidence to support her conviction under the statutory language, but only the sufficiency of the evidence to establish that her speech constituted constitutionally unprotected fighting words. Accordingly, we need not consider the statutory language in connection with our review of the evidence.

consistent with the first amendment. Accordingly, we reverse the judgment of the trial court.[2]

The jury reasonably could have found the following facts. On the evening of September 30, 2013, the defendant telephoned the Stop & Shop supermarket in Vernon to announce that she was coming to pick up a Western Union money transfer so they would not close the customer service desk before she arrived. The defendant spoke with Tara Freeman, an experienced assistant store manager who was in charge of the daily operations at the supermarket, which spanned approximately 65,000 square feet. Freeman informed the defendant that the customer service desk already had closed and that she was unable to access the computer that processed Western Union transactions. The defendant became belligerent, responded that she "really didn't give a shit," and called Freeman "[p]retty much every swear word you can think of" before the call was terminated.

Despite Freeman's statements to the contrary, the defendant believed that as long as she arrived at the supermarket before 10 p.m., she should be able to obtain the money transfer before the customer service desk closed. Accordingly, a few minutes after she telephoned, the defendant arrived at the supermarket, which was occupied by customers and employees. The defendant proceeded toward the customer service desk located in proximity to the registers for grocery checkout and began filling out a money transfer form, even though the lights at the desk were off. Freeman approached the defendant, a forty year old woman who used a cane due to a medical condition that caused severe swelling in her lower extremities, and asked her

[2] Because we conclude there is insufficient evidence to sustain the defendant's conviction for breach of the peace in the second degree, we need not reach her claim that the jury was improperly instructed on that charge.

if she was the person who had called a few minutes earlier. Although the defendant denied that she had called, Freeman recognized her voice. After Freeman informed the defendant, as she had during the telephone call, that the customer service desk was closed, the defendant became angry and asked to speak with a manager. Freeman replied that she was the manager and pointed to her name tag and a photograph on the wall to confirm her status. Some employees, including the head of the cashier department, Sarah Luce, were standing nearby as this exchange took place.

The defendant proceeded to loudly call Freeman a "fat ugly bitch" and a "cunt,"[3] and said "fuck you, you're not a manager," all while gesticulating with her cane. Despite the defendant's crude and angry expressions directed at her, Freeman remained professional. She simply responded, "[h]ave a good night," which prompted the defendant to leave the supermarket.

Thereafter, the defendant was arrested and charged with breach of the peace in the second degree.[4] Following a jury trial, the defendant was convicted of that charge and sentenced to twenty-five days incarceration. The defendant appealed, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

On appeal, the defendant claims that the evidence was insufficient to support her conviction of breach of

[3] In her testimony, Freeman spelled out this word.

[4] The state also charged the defendant with two counts of threatening in the second degree in violation of General Statutes § 53a-62 (a) (2) and (3) for conduct that it alleged had occurred after the incident giving rise to the present appeal. Specifically, the state alleged that after she left the supermarket, the defendant telephoned a second time, told the employee answering the telephone to "come outside," and "that there was a gun waiting for [her]." The jury found the defendant not guilty of one of the threatening counts and was unable to reach a verdict on the other count. The court declared a mistrial on the latter.

the peace in the second degree because the words she uttered to Freeman did not constitute fighting words. Although the defendant asserts that her speech is protected under the first amendment to the federal constitution, her principal argument is that we should construe article first, §§ 4 and 5, of the Connecticut constitution to provide greater free speech protection than the first amendment so as to limit the fighting words exception to express invitations to fight. We conclude that it is unnecessary to decide whether the state constitution would afford greater protection because the evidence was plainly insufficient to support the defendant's conviction under settled federal constitutional jurisprudence.[5]

This court has not considered the scope and application of the fighting words exception for more than two decades. See *State* v. *Szymkiewicz*, 237 Conn. 613, 678 A.2d 473 (1996). Accordingly, it is appropriate for us to consider the exception's roots and its scope in light of more recent jurisprudential and societal developments.

The fighting words exception was first articulated in the seminal case of *Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 568. After noting that the right of free speech is not absolute, the United States Supreme Court broadly observed: "There are certain well-defined and

[5] Although this court recently has explained that it is appropriate to consider a state constitutional claim first "when the issue presented is one of first impression under both the state and federal constitutions"; *State* v. *Kono*, 324 Conn. 80, 82 n.3, 152 A.3d 1 (2016); the issue in the present case is not one of first impression under the federal constitution. Moreover, because the established federal standard is clearly dispositive, to resolve the case on this basis is in accord with jurisprudence under which "we eschew unnecessarily deciding constitutional questions . . . ." (Citations omitted.) *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 560, 964 A.2d 1213 (2009). Finally, we note that the briefs of both parties examine federal jurisprudence on this question. We therefore leave for another day the question of whether the state constitution is more protective of speech than the federal constitution with regard to fighting words.

narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any [c]onstitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." (Footnote omitted.) Id., 571–72.

Unlike George Carlin's classic 1972 comedic monologue, "Seven Words You Can Never Say on Television,"[6] it is well settled that there are no per se fighting words. See *Downs* v. *State*, 278 Md. 610, 615, 366 A.2d 41 (1976). Although certain language in *Chaplinsky* seemed to suggest that some words in and of themselves might be inherently likely to provoke the average person to violent retaliation, such as "God damned racketeer" and "damned Fascist"; (internal quotation marks omitted) *Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 569, 574; subsequent case law eschewed the broad implications of such a per se approach. See *People* v. *Stephen*, 153 Misc. 2d 382, 387, 581 N.Y.S.2d 981 (1992) ("[w]hile the original *Chaplinsky* formulation of 'fighting words' may have given some impression of establishing a category of words which could be proscribed regardless of the context in which they were used, developing [f]irst [a]mendment doctrine in the half century since *Chaplinsky* was decided has continually resorted to analyzing provocative expression contextually"); see also *Texas* v. *Johnson*, supra, 491 U.S. 409; *Gooding* v. *Wilson*, 405 U.S. 518, 525, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972); *Cohen* v. *California*, 403 U.S. 15, 20, 23, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971); L. Tribe, American Constitutional Law (2d Ed. 1988) § 12-10, pp. 850–51. Rather, "words may or may not be 'fighting words,' depending upon the circumstances of their utterance." *Lewis* v. *New Orleans*, 415 U.S. 130, 135,

[6] G. Carlin, Class Clown (Little David Records 1972). We note that two of those seven words were uttered by the defendant in the present case.

94 S. Ct. 970, 39 L. Ed. 2d 214 (1974) (Powell, J., concurring); see *R. A. V.* v. *St. Paul*, 505 U.S. 377, 432, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (Stevens, J., concurring) ("[w]hether words are fighting words is determined in part by their context"); *Hammond* v. *Adkisson*, 536 F.2d 237, 239 (8th Cir. 1976) (first amendment requires "determination that the words were used 'under such circumstances' that they were likely to arouse to immediate and violent anger the person to whom the words were addressed" [emphasis omitted]); *State* v. *Szymkiewicz*, supra, 237 Conn. 620 (considering both "the words used by the defendant" and "the circumstances in which they were used"); *State* v. *Hoskins*, 35 Conn. Supp. 587, 591, 401 A.2d 619 (1978) ("The 'fighting words' concept has two aspects. One involves the quality of the words themselves. The other concerns the circumstances under which the words are used.").

This context based view is a logical reflection of the way the meaning and impact of words change over time. See *R.I.T.* v. *State*, 675 So. 2d 97, 99 (Ala. Crim. App. 1995); *People* v. *Stephen*, supra, 153 Misc. 2d 387; *State* v. *Harrington*, 67 Or. App. 608, 613 n.5, 680 P.2d 666, cert. denied, 297 Or. 547, 685 P.2d 998 (1984); see also *Towne* v. *Eisner*, 245 U.S. 418, 425, 38 S. Ct. 158, 62 L. Ed. 372 (1918) ("[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used"). While calling someone a racketeer or a fascist might naturally have invoked a violent response in the 1940s when *Chaplinsky* was decided, those same words would be unlikely to even raise an eyebrow today. Since that time, public discourse has become more coarse. "[I]n this day and age, the notion that *any* set of words are so provocative that they can reasonably be expected to lead an average listener to immediately respond with physical violence is highly problematic." (Emphasis in

original.) *State* v. *Tracy*, 200 Vt. 216, 237, 130 A.3d 196 (2015); accord *People in the Interest of R.C.*, Docket No. 14CA2210, 2016 WL 6803065, *4 (Colo. App. November 17, 2016). We need not, however, consider the continued vitality of the fighting words exception in the present case because a contextual examination of the circumstances surrounding the defendant's remarks inexorably leads to the conclusion that they were not likely to provoke a violent response and, therefore, were not criminal in nature or form.

A proper contextual analysis requires consideration of the actual circumstances as perceived by a reasonable speaker and addressee to determine whether there was a likelihood of violent retaliation. See *Texas* v. *Johnson*, supra, 491 U.S. 409; *Lewis* v. *New Orleans*, supra, 415 U.S. 135 (Powell, J., concurring); *Gooding* v. *Wilson*, supra, 405 U.S. 528; *Cohen* v. *California*, supra, 403 U.S. 20, 23. This necessarily includes a consideration of a host of factors.

For example, the manner and circumstances in which the words were spoken bears on whether they were likely to incite a violent reaction. Even the court in *Chaplinsky* acknowledged that words which are otherwise profane, obscene, or threatening might not be deemed fighting words if said with a " 'disarming smile.' " *Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 573; see also *Lamar* v. *Banks*, 684 F.2d 714, 718–20 (11th Cir. 1982) (remanding for evidentiary hearing because there was no factual record as to circumstances in which alleged fighting words were made, noting that "the tone of voice may have been jocular rather than hostile, and we do not know . . . what the rest of the conversation was like"); *State* v. *Harrington*, supra, 67 Or. App. 613 n.5 ("Forms of expression vary so much in their contexts and inflections that one cannot specify particular words or phrases as being always fighting. What is gross insult in one setting is crude humor in

another." [Internal quotation marks omitted.]). The situation under which the words are uttered also impacts the likelihood of a violent response. See, e.g., *Klen* v. *Loveland*, 661 F.3d 498, 510 (10th Cir. 2011) (considering that words were spoken in context of plaintiffs' attempts to obtain building permit and that city employee addressees "did not consider the . . . behavior particularly shocking or memorable, given the rough-and-tumble world of the construction trade"); *People* v. *Prisinzano*, 170 Misc. 2d 525, 531–32, 648 N.Y.S.2d 267 (1996) (considering that words were spoken by union worker to several replacement workers during course of labor dispute); *Seattle* v. *Camby*, 104 Wn. 2d 49, 54, 701 P.2d 499 (1985) (en banc) ("Looking at the actual situation presented in this case, we find an intoxicated defendant being escorted out of a restaurant by a mild mannered, unaroused doorman-host with a police officer present. Given the specific context in which the words were spoken, it was not plainly likely that a breach of the peace would occur."). Thus, whether the words were preceded by a hostile exchange or accompanied by aggressive behavior will bear on the likelihood of such a reaction. See *State* v. *Szymkiewicz*, supra, 237 Conn. 615–16; *Landrum* v. *Sarratt*, 352 S.C. 139, 143, 572 S.E.2d 476 (App. 2002); see also *State* v. *James M.*, 111 N.M. 473, 476, 806 P.2d 1063 (App. 1990) (noting that fighting words were uttered during course of hostile argument), cert. denied, 111 N.M. 529, 807 P.2d 227 (1991); *In re S.J.N-K.*, 647 N.W.2d 707, 709 (S.D. 2002) (noting that fighting words were uttered in course of speaker's vehicle tailgating addressee's vehicle as latter drove away from scene).

A proper examination of context also considers those personal attributes of the speaker and the addressee that are reasonably apparent because they are necessarily a part of the objective situation in which the speech was made. See *In re Nickolas S.*, 226 Ariz. 182, 188, 245

P.3d 446 (2011); *State* v. *John W.*, 418 A.2d 1097, 1104 (Me. 1980); *Seattle* v. *Camby*, supra, 104 Wn. 2d 54. Courts have, for example, considered the age, gender, race, and status of the speaker. See, e.g., *Lewis* v. *New Orleans*, supra, 415 U.S. 135 (Powell, J., concurring) ("[i]t is unlikely . . . that the words said to have been used . . . would have precipitated a physical confrontation between the middle-aged woman who spoke them and the police officer in whose presence they were uttered"); *Hammond* v. *Adkisson*, supra, 536 F.2d 240 ("the trier of fact might well conclude . . . that there was no likelihood that a [nineteen year old] young woman's words would provoke a violent response from the particular officer involved"); *In re Nickolas S.*, supra, 188 (determining there was no likelihood of violent response when student addressed coarse remark to teacher in classroom); *In re Spivey*, 345 N.C. 404, 414–15, 480 S.E.2d 693 (1997) (holding that racial slur directed at African-American man by white man will cause "hurt and anger" and "often provoke him to confront the white man and retaliate"). Indeed, common sense would seem to suggest that social conventions, as well as special legal protections, could temper the likelihood of a violent response when the words are uttered by someone less capable of protecting themselves, such as a child, a frail elderly person, or a seriously disabled person.[7]

[7] The defendant did not adduce evidence at trial to establish the extent to which her physical impairment was objectively apparent to Freeman, other than the fact that she carried a cane. In light of special legal protections and societal conventions dictating that violent behavior is more reprehensible when committed against a physically disabled person than against a person without a physical impairment; see, e.g., General Statutes § 53a-59a (a) (1) (creating separate offense for assault in first degree against physically disabled person); a question arises whether the possibility that an average person in Freeman's position would strike a person with such impairments for leveling verbal insults is even more remote than if the person did not have such a disability. Given our conclusion that a person in Freeman's position would not be likely to respond with violence to an ordinary customer under the circumstances, however, we need not express an opinion on this question.

Although the United States Supreme Court has observed that the speech must be of such a nature that it is "likely to provoke the *average* person to retaliation"; (emphasis added; internal quotation marks omitted) *Texas* v. *Johnson*, supra, 491 U.S. 409; when there are objectively apparent characteristics that would bear on the likelihood of such a response, many courts have considered the average person with those characteristics. Thus, courts also have taken into account the addressee's age, gender, and race. See, e.g., *Bethel* v. *Mobile*, Docket No. 10-0009-CG-N, 2011 WL 1298130, *7 (S.D. Ala. April 5, 2011) ("[t]here can be little doubt that repeatedly calling a [thirteen year old] girl a 'whore' and a 'slut' in the presence of the girl's mother serves no purpose other than to provoke a confrontation"); *In re John M.*, 201 Ariz. 424, 428, 36 P.3d 772 (App. 2001) (holding that racial slurs were "likely to provoke a violent reaction when addressed to an ordinary citizen of African-American descent"); *Svedberg* v. *Stamness*, 525 N.W.2d 678, 684 (N.D. 1994) (observing that "it is proper to consider the age of the addressee when determining the contextual setting" and that "[n]o one would argue that a different reaction is likely if a [thirteen year old] boy and a [seventy-five year old] man are confronted with identical fighting words"); see also *People in the Interest of R.C.*, supra, 2016 WL 6803065, *7 (concluding that "the average person—even an average [fourteen year old]—would not be expected to fly into a violent rage upon being shown a photo of himself with a penis drawn over it").

Similarly, because the fighting words exception is concerned with the likelihood of violent retaliation, it properly distinguishes between the average citizen and those addressees who are in a position that carries with it an expectation of exercising a greater degree of restraint. In *Lewis* v. *New Orleans*, supra, 415 U.S. 135, Justice Powell, in concurrence, suggested that "a prop-

erly trained [police] officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fighting words." (Internal quotation marks omitted.) The Supreme Court later recognized the legitimacy of this principle, observing that the fighting words exception "might require a narrower application in cases involving words addressed to a police officer" for the reason articulated by Justice Powell.[8] *Houston* v. *Hill*, 482 U.S. 451, 462, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987). The Supreme Court did not have occasion to formally adopt the narrower standard in either *Lewis* or *Hill* because those cases turned on facial challenges, not as applied challenges that would require analyzing the speaker and the police officer addressee. Nevertheless, a majority of courts, including ours, hold police officers to a higher standard than ordinary citizens when determining the likelihood of a violent response by the addressee. See, e.g., *State* v. *Williams*, 205 Conn. 456, 474 n.7, 534 A.2d 230 (1987); *State* v. *Nelson*, 38 Conn. Supp. 349, 354, 448 A.2d 214 (1982); *Harbin* v. *State*, 358 So. 2d 856, 857 (Fla. App. 1978); *State* v. *John W.*, supra, 418 A.2d 1104.

[8] In *Lewis*, Justice Powell in his concurrence also observed that the Louisiana statute under which the defendant had been convicted "confer[red] on police a virtually unrestrained power to arrest and charge persons with a violation" because for the majority of arrests, which occur in one-on-one situations, "[a]ll that is required for conviction is that the court accept the testimony of the officer that obscene or opprobrious language had been used toward him while in performance of his duties." *Lewis* v. *New Orleans*, supra, 415 U.S. 135. "The opportunity for abuse" was thus "self-evident." Id., 136 (Powell, J., concurring).

Thereafter, the Supreme Court relied on this language in concluding that a Houston, Texas ordinance prohibiting speech that "in any manner . . . interrupt[s]" a police officer was substantially overbroad. (Internal quotation marks omitted.) *Houston* v. *Hill*, 482 U.S. 451, 463–65, 467, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987). The court also noted that "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state"; id., 462–63; but that such freedom could be restricted when the speech constitutes fighting words. See id., 464 n.12.

The Supreme Court has not weighed in on the question of whether positions other than police officers could carry a greater expectation of restraint than the ordinary citizen. Indeed, since *Texas* v. *Johnson*, supra, 491 U.S. 409, the Supreme Court has not considered the fighting words exception as applied to any addressee in more than twenty-five years. Nevertheless, several courts have considered as part of the contextual inquiry whether the addressee's position would reasonably be expected to cause him or her to exercise a higher degree of restraint than the ordinary citizen under the circumstances. See, e.g., *In re Nickolas S.*, supra, 226 Ariz. 188 ("we do not believe that [the student's] insults would likely have provoked an ordinary teacher to 'exchange fisticuffs' with the student or to otherwise react violently"); *In re Louise C.*, 197 Ariz. 84, 86, 3 P.3d 1004 (App. 1999) (juvenile's derogatory language to principal did not constitute fighting words because "[it] was not likely to provoke an ordinary citizen to a violent reaction, and it was less likely to provoke such a response from a school official"); *State* v. *Tracy*, supra, 200 Vt. 238 n.19 (determining that "average person in the coach's position would [not] reasonably be expected to respond to [the] defendant's harangue with violence" where defendant was parent of player on coach's junior high school girls' basketball team); but see *People* v. *Stephen*, supra, 153 Misc. 2d 390 (distinguishing earlier fighting words case involving defendant commenting to both police officer and private security guard, latter being "a civilian from whom [the remarks] might conceivably have evoked a retaliatory response").

In sum, these cases affirm the fundamental principle that there are no per se fighting words; rather, courts must determine on a case-by-case basis all of the circumstances relevant to whether a reasonable person in the position of the actual addressee would have been likely to respond with violence. This principle is consis-

tent with the contextual approach taken when considering other categories of speech deemed to fall outside the scope of first amendment protection, such as true threats and incitement. See, e.g., *State* v. *Krijger*, 313 Conn. 434, 450, 97 A.3d 946 (2014) ("In the context of a threat of physical violence, [w]hether a particular statement may properly be considered to be a [true] threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. . . . [A]lleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." [Internal quotation marks omitted.]); id., 453–54 ("[a]n important factor to be considered in determining whether a facially ambiguous statement constitutes a true threat is the prior relationship between the parties"); *In re S.W.*, 45 A.3d 151, 157 (D.C. 2012) ("[A] determination of what a defendant actually said is just the beginning of a threats analysis. Even when words are threatening on their face, careful attention must be paid to the context in which those statements are made to determine if the words may be objectively perceived as threatening."); see also *Texas* v. *Johnson*, supra, 491 U.S. 409 (in considering whether public burning of American flag constituted unprotected incitement, Supreme Court observed that "we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the *actual circumstances* surrounding such expression, asking whether the expression is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" [emphasis added; internal quotation marks omitted]).

We are mindful that, despite the substantial body of case law underscoring the significance of the actual

circumstances in determining whether the words spoken fall within the narrow fighting words exception, a few courts remain reluctant to take into account the circumstances of the addressee, e.g., occupation, in considering whether he or she is more or less likely to respond with immediate violence. See, e.g., *State* v. *Robinson*, 319 Mont. 82, 87, 82 P.3d 27 (2003) (declining to apply heightened standard to police officers); *State* v. *Matthews*, 111 A.3d 390, 401 n.12 (R.I. 2015) (same). The rationale behind ignoring these characteristics of the addressee is that such a standard would be inconsistent with applying an objective standard contemplating an average addressee. This position is flawed in several respects.

First, these courts misapprehend the objective aspect of the fighting words standard. The " 'average addressee' " element "was designed to safeguard against the suppression of speech which might only provoke a particularly violent or sensitive listener" because "[a] test which turned upon the response of the actual addressee would run the risk of impinging upon the free speech rights of the speaker who could then be silenced based upon the particular sensitivities of each individual addressee." *People* v. *Prisinzano*, supra, 170 Misc. 2d 529. Accordingly, it is not inconsistent with the application of an objective standard to consider the entire factual context in which the words were uttered because "[i]t is the tendency or likelihood of the words to provoke violent reaction that is the touchstone of the *Chaplinsky* test . . . ."[9] *Lamar* v.

[9] Consideration of only those objectively discernible traits of the speaker and the addressee "is consistent with the degree of subjectivity that the [Supreme] Court has used in its police officer cases, in order to avoid some of the pitfalls of requiring the speaker or fact-finder to 'calculat[e] . . . the boiling point of a particular person' in each case. *Ashton* v. *Kentucky*, 384 U.S. 195, 200 [86 S. Ct. 1407, 16 L. Ed. 2d 469] (1966). By specifying only limited and obvious traits, such as the fact that the addressee is a police officer—and the same could be said of the fact that the addressee is a woman or a disabled elderly man—the [c]ourt refines its test of the likelihood

Banks, supra, 684 F.2d 718; see also S. Gard, "Fighting Words as Free Speech," 58 Wash. U. L.Q. 531, 558 (1980) ("[I]t is certainly consistent with an objective [fighting words] test to apply a more specific standard of 'the ordinary reasonable police officer' in appropriate situations. Indeed, the adoption of a standard of the ordinary reasonable professional has never been deemed inconsistent with an objective standard of liability." [Footnote omitted.]); cf. *State* v. *Krijger*, supra, 313 Conn. 450 (describing "objective" standard for analyzing true threats considering "their entire factual context, including the surrounding events and reaction of the listeners" [internal quotation marks omitted]).

Second, it is precisely this consideration of the specific context in which the words were uttered and the likelihood of *actual* violence, not an "undifferentiated fear or apprehension of disturbance," that is required by the United States Supreme Court's decisions following *Chaplinsky*. (Internal quotation marks omitted.) *Cohen* v. *California*, supra, 403 U.S. 23; see also *Gooding* v. *Wilson*, supra, 405 U.S. 528 (declaring statute facially overbroad because, as construed, it was applicable "to utterances where there was no likelihood that the person addressed would make an immediate violent response"). Because the fighting words exception is concerned only with preventing the likelihood of actual violence, an approach ignoring the circumstances of the addressee is antithetical and simply unworkable. For example, applying such an approach in this case would require us to engage in the following legal fiction: although Freeman was insulted on the basis of her gender, appearance, and apparent suitability for her position as a store manager, the fact finder would be

that violence will ensue without requiring difficult litigation of the state of mind of both the speaker and addressee." Note, "The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for Its Interment," 106 Harv. L. Rev. 1129, 1136–37 n.58 (1993).

required to assess how some hypothetical "ordinary" addressee with no apparent gender, appearance, or profession would likely respond. See F. Kobel, "The Fighting Words Doctrine—Is There a Clear and Present Danger to the Standard?," 84 Dick. L. Rev. 75, 94 (1979) (describing average addressee standard, which emphasizes words themselves, as "an attractive one because of its equitable overtones," but nevertheless "inherently faulty" because "[a]bsent from the standard is criteria by which to judge what is average").

Finally, as alluded to previously in this opinion, the fighting words exception is not concerned with creating symmetrical free speech rights by way of establishing a uniform set of words that are constitutionally proscribed. See *Cohen* v. *California*, supra, 403 U.S. 22–23 (rejecting as "untenable" idea that "[s]tates, acting as guardians of public morality, may properly remove [an] offensive word from the public vocabulary"). Rather, because the fighting words exception is intended only to prevent the likelihood of an actual violent response, it is an unfortunate but necessary consequence that we are required to differentiate between addressees who are more or less likely to respond violently and speakers who are more or less likely to elicit such a response. See *Conkle* v. *State*, 677 So. 2d 1211, 1217 (Ala. Crim. App. 1995) ("[P]resumably, statements made to classes of victims who may not be perceived as persons who would likely respond with physical retaliation . . . may seem to require a higher level of 'low speech' to constitute 'fighting words.' However, this possible discrimination as to victims is explainable in that the purpose . . . is to ensure public safety and public order."); A. Wertheimer, note, "The First Amendment Distinction between Conduct and Content: A Conceptual Framework for Understanding Fighting Words Jurisprudence," 63 Fordham L. Rev. 793, 815–16 (1994) (applying standard of reasonable person in position of actual

addressee "is consistent with the idea that words themselves are innocent until exploited in circumstances where particular addressees are likely to retaliate"); note, "The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for Its Interment," 106 Harv. L. Rev. 1129, 1136 (1993) ("[b]ecause the [Supreme] Court is concerned with the likelihood that speech will actually produce violent consequences, it logically distinguishes between addressees who are more or less prone to respond with violence").

Accordingly, a proper contextual analysis requires consideration of the actual circumstances, as perceived by both a reasonable speaker and addressee, to determine whether there was a likelihood of violent retaliation. This necessarily includes the manner in which the words were uttered, by whom and to whom the words were uttered, and any other attendant circumstances that were objectively apparent and bear on the question of whether a violent response was likely. Indeed, one matter on which both parties agree is that our inquiry must focus on the perspective of an average store manager in Freeman's position. With this framework in place to guide a proper, contextual analysis, we turn to the issue in the present case.

In considering the defendant's challenge to the sufficiency of the evidence to support her conviction of breach of the peace in the second degree in accordance with her first amendment rights, we apply a two part test. First, as reflected in the previous recitation of facts, we construe the evidence in the light most favorable to sustaining the verdict. See *State* v. *Cook*, 287 Conn. 237, 254, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008). Second, we determine whether the trier of fact could have concluded from those facts and reasonable inferences drawn therefrom that the cumulative force of the evidence established guilt beyond a reasonable doubt. See id. Accordingly,

to establish the defendant's violation of § 53a-181 (a) (5); see footnote 1 of this opinion; in light of its constitutional gloss, the state was required to prove beyond a reasonable doubt that the defendant's words were likely to provoke an imminent violent response from an average store manager in Freeman's position. Cf. *State* v. *Krijger*, supra, 313 Conn. 448 ("[t]o establish the defendant's violation of [General Statutes (Rev. to 2007)] §§ 53a-62 [a] [3] and 53a-181 [a] [3] on the basis of his statements to [the town attorney], the state was required to prove beyond a reasonable doubt that those statements represented a true threat").

"In cases where [the line between speech unconditionally guaranteed and speech which may be legitimately regulated] must be drawn, the rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see" if they are consistent with the first amendment. (Internal quotation marks omitted.) *State* v. *DeLoreto*, 265 Conn. 145, 153, 827 A.2d 671 (2003); see also *DiMartino* v. *Richens*, 263 Conn. 639, 661, 822 A.2d 205 (2003) ("inquiry into the protected status of . . . speech is one of law, not fact" [internal quotation marks omitted]). We undertake an independent examination of the record as a whole to ensure "that the judgment does not constitute a forbidden intrusion on the field of free expression." (Internal quotation marks omitted.) *State* v. *DeLoreto*, supra, 153.

At the outset of that examination, we must acknowledge that the words and phrases used by the defendant—"fat ugly bitch," "cunt," and "fuck you, you're not a manager"—were extremely offensive and meant to personally demean Freeman. The defendant invoked one or more of the most vulgar terms known in our lexicon to refer to Freeman's gender. Nevertheless, "[t]he question in this case is not whether the defendant's words were reprehensible, which they clearly

were; or cruel, which they just as assuredly were; or whether they were calculated to cause psychic harm, which they unquestionably were; but whether they were *criminal*." (Emphasis in original.) *State* v. *Krijger*, 130 Conn. App. 470, 485, 24 A.3d 42 (2011) (*Lavine*, *J.*, dissenting), rev'd, 313 Conn. 434, 97 A.3d 946 (2014) (adopting Appellate Court dissent's position). Uttering a cruel or offensive word is not a crime unless it would tend to provoke a reasonable person in the addressee's position to immediately retaliate with violence under the circumstances. See *People in the Interest of R.C.*, supra, 2016 WL 6803065, *6–7 (concluding that mere utterance of " 'cocksucker,' " although vulgar and profane, did not constitute fighting words). Given the context of the defendant's remarks, we cannot conclude that the insults were "akin to dropping a match into a pool of gasoline." *State* v. *Tracy*, supra, 200 Vt. 237.

Several factors bear on our conclusion that the state did not prove beyond a reasonable doubt that Freeman was likely to retaliate with violence. We begin with the fact that the confrontation in the supermarket did not happen in a vacuum; it was preceded by a telephone call in which the defendant was belligerent and used many of the "swear word[s]" that she would later say to Freeman in person. After the defendant arrived at the supermarket a few minutes later, Freeman correctly surmised that she was the woman who had just called. Consequently, when Freeman approached the defendant to reiterate a message that she knew the defendant did not want to hear, Freeman reasonably would have been aware of the possibility that a similar barrage of insults, however unwarranted, would be directed at her. Freeman's position of authority at the supermarket, however, placed her in a role in which she had to approach the defendant.

In addition, as the store manager on duty, Freeman was charged with handling customer service matters.

The defendant's angry words were an obvious expression of frustration at not being able to obtain services to which she thought she was entitled. Store managers are routinely confronted by disappointed, frustrated customers who express themselves in angry terms, although not always as crude as those used by the defendant. People in authoritative positions of management and control are expected to diffuse hostile situations, if not for the sake of the store's relationship with that particular customer, then for the sake of other customers milling about the store. Indeed, as the manager in charge of a large supermarket, Freeman would be expected to model appropriate, responsive behavior, aimed at de-escalating the situation, for her subordinates, at least one of whom was observing the exchange.

Significantly, as a store manager, Freeman would have had a degree of control over the premises where the confrontation took place. An average store manager would know as she approached the defendant that, if the defendant became abusive, the manager could demand that the defendant leave the premises, threaten to have her arrested for trespassing if she failed to comply, and make good on that threat if the defendant still refused to leave. With such lawful self-help tools at her disposal and the expectations attendant to her position, it does not appear reasonably likely that Freeman was at risk of losing control over the confrontation.

We recognize that a different conclusion might be warranted if the defendant directed the same words at Freeman after Freeman ended her work day and left the supermarket, depending on the circumstances presented. Given the totality of the circumstances in the present case, however, it would be unlikely for an on duty store manager in Freeman's position to respond in kind to the defendant's angry diatribe with similar expletives. It would be considerably more unlikely for a person in Freeman's position, in the circumstances

presented, to respond with a physical act of violence. Indeed, in keeping with the expectations attendant to her position and the circumstances with which she was confronted, Freeman did not respond with profanity, much less with violence, toward the defendant. Instead, she terminated the conversation before it could escalate further with the simple words, "Have a good night." Although the reaction of the addressee is not dispositive; see *Lamar* v. *Banks*, supra, 684 F.2d 718–19; it is probative of the likelihood of a violent reaction. See *Klen* v. *Loveland*, supra, 661 F.3d 510 ("[t]he reaction of actual hearers of the words constitutes significant probative evidence concerning whether the speech was inherently likely to cause a violent reaction"); *Seattle* v. *Camby*, supra, 104 Wn. 2d 54 ("the addressee's reaction or failure to react is not the sole criteria, but is a factor to be considered in evaluating the actual situation in which the words were spoken"). There is no reason to believe that Freeman's reaction was uncharacteristic of a reasonable professional in a like situation. Therefore, on the basis of our independent review of the record, we cannot conclude that an average store manager in Freeman's position would have responded to the defendant's remarks with imminent violence.

Nonetheless, the state contends that "courts in sister states and in Connecticut have found comparable abusive epithets to constitute 'fighting words' where they have been directed at police officers who, because they are 'properly trained,' 'may reasonably be expected to exercise a higher degree of restraint than the average citizen,' " quoting this court's decision in *State* v. *Szymkiewicz*, supra, 237 Conn. 620 n.12, as one such example. We disagree that this case law is sufficiently relevant or persuasive. We observe that all of the cases cited were decided two or three decades ago, and therefore do not consider case law recognizing that public sensitivities have been dulled to some extent by the

devolution of discourse.[10] With regard to *Szymkiewicz*, a case not involving words directed at a police officer, although there are superficial factual similarities to the present case in that the expletive fuck you was directed at an employee of a Stop & Shop supermarket; id., 615; that is where the similarities end. Significantly, the majority in *Szymkiewicz* pointed to a "heated exchange" that had ensued between the store detective and the defendant after the former accused the latter of shoplifting and to a threatening remark directed to the store detective as part of the "cumulative" evidence supporting the application of the fighting words exception. Id., 623. Thus, the majority's conclusion in that case is consistent with others that considered whether the words at issue were preceded by a hostile exchange or accompanied by aggressive behavior when determining the likelihood of a violent reaction. See *State* v. *James M.*, supra, 111 N.M. 476; *Landrum* v. *Sarratt*, supra, 352 S.C. 143; *In re S.J.N-K.*, supra, 647 N.W.2d 709. Indeed, precisely for these reasons, the defendant in *Szymkiewicz* was convicted under a different subdivision of the breach of the peace statute than the one at issue in the present case; see *State* v. *Szymkiewicz*, supra, 614; requiring the defendant to have engaged "in fighting or in violent, tumultuous or threatening behavior . . . ." General Statutes § 53a-181 (a) (1).

[10] The state cites cases from other jurisdictions in which convictions were sustained when the defendant had shouted "fuck you" to a police officer or called an officer a "fuckhead" or "motherfucker." Those cases are either distinguishable on the facts and procedural posture; see, e.g., *State* v. *Wood*, 112 Ohio App. 3d 621, 628–29, 679 N.E.2d 735 (1996) (state was not required to establish fighting words beyond reasonable doubt because defendant pleaded no contest; prosecutor recited on record that defendant continued using loud and abusive language for several minutes despite several requests to stop); or because the courts did not apply a heightened standard despite the fact that the words were directed at police officers. See, e.g., *C.J.R.* v. *State*, 429 So. 2d 753, 754 (Fla. App.), cert. denied, 440 So. 2d 351 (Fla. 1983); *State* v. *Groves*, 219 Neb. 382, 386, 363 N.W.2d 507 (1985).

Insofar as there is dictum in a footnote in *Szymkiewicz* suggesting that, in order for the heightened expectation of restraint applicable to police officers to apply to another type of addressee, the addressee must have received the same level of training as that of a police officer; see *State* v. *Szymkiewicz*, supra, 237 Conn. 620 n.12; we need not consider the propriety of that conclusion. We do not rest our decision on the nature of the training received by the average supermarket manager; rather, we focus on the expectations attendant to such positions under the particular circumstances of the present case. We observe that the court in *Szymkiewicz* recognized that it did not have the benefit of briefing on this issue, as the defendant had made no such claim. See id. We further observe that the court in *Szymkiewicz* relied on the actual training afforded to the particular store detective, a focus that appears to be in tension with the established objective standard of the average listener in the addressee's position. Cf. *In re Nickolas S.*, supra, 226 Ariz. 188 (considering how ordinary teacher would respond to insults from student in classroom setting). Accordingly, *Szymkiewicz* does not dictate a contrary conclusion.

In sum, the natural reaction of an average person in Freeman's position who is confronted with a customer's profane outburst, unaccompanied by any threats, would not be to strike her. We do not intend to suggest that words directed at a store manager will never constitute fighting words. Rather, we simply hold that under these circumstances the defendant's vulgar insults would not be likely to provoke violent retaliation. Because the defendant's speech does not fall within the narrow category of unprotected fighting words, her conviction of breach of the peace in the second degree on the basis of pure speech constitutes a violation of the first amendment to the United States constitution.

The judgment is reversed and the case is remanded with direction to render a judgment of acquittal.

In this opinion PALMER, ROBINSON and D'AURIA, Js., concurred.

EVELEIGH, J., with whom ROGERS, C. J., and ESPINOSA, J., join, concurring in part and dissenting in part. I respectfully dissent from the majority's conclusion that the speech at issue in the present case did not constitute unprotected fighting words under the first amendment to the United States constitution. In my view, *State* v. *Szymkiewicz*, 237 Conn. 613, 678 A.2d 478 (1996), is binding on this court. Indeed, the facts underlying present case, in my view, provide even stronger support for a breach of peace conviction. Furthermore, the defendant, Nina C. Baccala, represented to this court in her brief that she "does not . . . challenge . . . the scope of the fighting words exception under the first amendment." We should take her at her word. While I acknowledge that the defendant has argued that this court should do its own analysis under the first amendment, she never retracted this position. The briefing was cast in the light of a claim that our state constitution provided greater protection than the federal constitution and, accordingly, contained an analysis pursuant to this court's opinion in *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992). The majority does not deem such an analysis necessary in view of its position that the first amendment controls. I am of the opinion that the briefing of this issue was woefully inadequate for a constitutional claim. Therefore, I would not have reached that issue. Further, after conducting an analysis under *Geisler*, I would conclude that our state constitution does not afford greater protection then the federal constitution. In the final section, I agree with the defendant that the charge was not sufficient on the issue of imminence and, therefore, I

would reverse the trial court's judgment and remand the case for a new trial.

I

FIRST AMENDMENT ANALYSIS

The jury reasonably could have found the following facts. On the evening of September 30, 2013, the defendant drove to a grocery store in Vernon with the intention of retrieving a money transfer. Prior to arriving at the store, the defendant phoned ahead to inquire whether she would be able to retrieve the money transfer.[1] After arriving at the store, the defendant proceeded to the service desk where she began to fill out a money transfer form. Tara Freeman, an assistant manager at the store, approached the defendant and informed her that she would be unable to retrieve her money transfer because she lacked the authority to access the money transfer machine. The defendant became very upset and asked to speak to the manager. Freeman replied that she was the manager, pointing to her name tag and picture on the wall as proof. At this point, the defendant became belligerent, raised her cane toward Freeman,[2] and began directing every swear word "in the book" at Freeman. The defendant said "fuck you" to Freeman, stated that Freeman was not the manager, and called

[1] There is some dispute as to what transpired during this phone call. The defendant testified that she was told that she would be able to retrieve her money transfer if she were to arrive prior to 10 p.m. Tara Freeman, an assistant manager at the store with whom the defendant spoke on the phone, testified that she informed the defendant that it would not be possible for the defendant to retrieve her money transfer because the employee with authority to operate the money transfer machine was not present in the store. Freeman further testified that the defendant told her that "she really didn't give a shit" and proceeded to unleash a tirade of profane language upon Freeman during the phone call. It is unclear which version of the phone conversation was credited by the jury because such a factual finding was not necessary for the jury to reach its verdict.

[2] Freeman testified that the defendant raising her cane perhaps "was part of her talking . . . ."

Freeman a "fat ugly bitch" and a "cunt." The defendant, who did not substantially controvert this account of her tirade,[3] testified that she directed such language at Freeman because she felt hurt as a result of purportedly being misled about the availability of money order services and "was trying to hurt back." Freeman replied by saying "have a good night" to the defendant, who responded by mumbling and saying some "choice words" as she departed the store. The entire encounter lasted between fifteen and twenty minutes.

After an investigation by the police, the defendant was arrested and charged with, inter alia,[4] breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (5). The case was tried to a jury, which rendered a verdict of guilty on that charge. The trial court rendered a corresponding judgment of conviction and sentenced the defendant to twenty-five days of incarceration.

In my view, even if this court were to reach the merits of a claim under the first amendment, it should fail. Indeed, it is readily apparent that the defendant did not raise such a claim under the federal constitution as an

[3] The defendant conceded that she had yelled and cursed at the manager using terms such as "bitch" and "shove it." She testified that she had "probably" used the term "fat fucking bitch" and "might have" said "cunt." She said she "wouldn't doubt" that she had said "fuck you."

[4] The defendant was also charged with two counts of criminal threatening for events that took place after she departed the store. She was acquitted on one of the threatening counts and the state entered a nolle on the remaining threating count after the jury was unable to reach a verdict. At a pretrial hearing, the state clarified that the threatening charges arose out of conduct alleged to have occurred after the defendant walked out of the store. Specifically, the state alleged that the defendant called the store from the parking lot, employed more coarse language and, believing she was speaking to Freeman, told another store employee to come outside where "there was a gun waiting . . . ." With respect to the breach of the peace count pertinent to this appeal, the state confirmed that the conduct giving rise to the count took place solely in the store. Consequently, the facts set forth herein pertain only to the breach of the peace count.

alternative to her state constitutional analysis because *State* v. *Szymkiewicz*, supra, 237 Conn. 613, would be dispositive of such a claim.

The facts of *Szymkiewicz* are strikingly similar to the facts of the present case. In that case, the defendant was shopping at a grocery store in Waterford when she was approached by a store detective. Id., 615. The detective asked the defendant to accompany her to the store manager's office on the mezzanine level. Id. In the office, the detective accused the defendant of shoplifting certain items from the store. Id. Upon hearing the accusation, the defendant "became loud and abusive," and, consequently, the police were called. (Internal quotation marks omitted.) Id. After arriving and conducting a brief investigation, a police officer arrested the defendant for shoplifting. Id. The officer handcuffed the defendant and led her down the stairs. Id. As the defendant was escorted down the stairs from the manager's office by the police officer and the store detective, she said "[f]uck you" several times. (Internal quotation marks omitted.) Id. In addition, she said the following to the store detective: "You fucking bitch. I hope you burn in hell for all eternity." (Internal quotation marks omitted.) Id., 616. She also made an unspecified threat to the store detective. Id. It was also observed that a crowd had begun to form at the bottom of the stairs. Id., 623. On the basis of those facts, the defendant was convicted of violating § 53a-181 (a) (1).[5]

[5] 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 (2) assaults or strikes another; or (3) threatens to commit any crime against another person or such other person's property; or (4) publicly exhibits, distributes, posts up or advertises any offensive, indecent or abusive matter concerning any person; or (5) in a public place, uses abusive or obscene language or makes an obscene gesture; or (6) creates a public and hazardous or physically offensive condition by any act which such person is not licensed or privileged to do. . . ."

In affirming the breach of the peace conviction, this court concluded that the defendant's speech constituted fighting words. Id. This court adumbrated the speech of the defendant and the circumstances in which they occurred and concluded that "the defendant's language could have aroused a violent reaction" by the addressees—namely, the store detective and the crowd. Id. The defendant was described as "heated," made an unspecified threat,[6] and directed her hateful, provocative language to those around her as she was escorted outside. Id. Because the test is whether the speech would have caused an average person to respond with violence, the court did not discuss the circumstances of the addressees or the extent to which such circumstances implicated the likelihood of the addressees to respond with immediate violence. Id., 620–24.

In the present case, even if the defendant had adequately briefed her sufficiency of the evidence claim under the federal fighting words standard, on the basis of *Szymkiewicz*, I would conclude that the evidence is sufficient to sustain a conviction. The defendant, in a belligerent and angry manner, used harsh and scornful language designed to debase Freeman. The defendant insulted Freeman on the basis of her gender, body composition, and apparent suitability for her position as a manager of the store. The defendant said "fuck you" to Freeman and called her a "fat ugly bitch." The defendant also used the word "cunt," which is generally recognized as a powerful, offensive, and vile term. During this encounter, the defendant gesticulated her cane at Freeman. Freeman testified that, as a result of her encounter with the defendant, both inside the store and as the result of a later telephone call, she was provided additional security. I would conclude, consistent with *Szymkiewicz*, that the evidence was sufficient to sustain the defendant's conviction.

[6] It is not clear if the threat was a threat of violence.

The majority, however, despite the fact that the defendant disclaimed a first amendment argument, reverses the judgment of conviction on that basis. I do not dispute that the factual circumstances surrounding the speech at issue are relevant. See *State* v. *Szymkiewicz*, supra, 237 Conn. 620 ("the words used by the defendant here and the circumstances in which they were used classify them as 'fighting words' "). The majority's granular level dissection of the circumstances of the addressee in the present case, however, is inconsistent with our case law and is maladapted to the nature of fighting words. From its inception, the federal fighting words standard has embraced a context based approach to determining whether speech constitutes fighting words. See *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 573, 62 S. Ct. 766, 86 L. Ed. 1031 (1942) (noting that certain speech may constitute fighting words when "said without a disarming smile" [internal quotation marks omitted]). Nevertheless, the test is whether the language would provoke an "average person" to respond with immediate violence. (Internal quotation marks omitted.) *Texas* v. *Johnson*, 491 U.S. 397, 409, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989); see also *State* v. *Szymkiewicz*, supra, 237 Conn. 620. Context is, of course, critical to understanding what the speaker is expressing. First and foremost, the fighting words must be personally provocative. See *Cohen* v. *California*, 403 U.S. 15, 20, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) (noting that speech was not used "in this instance" in personally provocative manner). Directing the words "fuck the draft" to no one in particular and burning a flag are examples of speech that, in context, would not be deemed unprotected fighting words because such speech is not the communication of a personally provocative insult. *Texas* v. *Johnson*, supra, 398; see also *Cohen* v. *California*, supra, 20. When the abusive language is directed to a particular person, the level of

outrage certain words are likely to engender is correlated to how insulting certain words are to that person. Language that targets certain personal attributes that have served as bases for subjugation and dehumanization when directed to individuals with those attributes is among the most harmful. For this reason, racial epithets are more likely fighting words when addressed to a member of the race which the epithet is designed to demean. See *In re Spivey*, 345 N.C. 404, 414, 480 S.E.2d 693 (1997) ("[n]o fact is more generally known than that a white man who calls a black man a 'nigger' within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate"). Context is necessary to determine if and to what extent speech is offensive and provocative to the addressee.

The circumstances of the addressee are not wholly irrelevant to the determination of whether a defendant's speech is protected. For there to be an immediate violent reaction by the addressee, there must be some physical proximity between the speaker and the addressee. See *Hershfield* v. *Commonwealth*, 14 Va. App. 381, 384, 417 S.E.2d 876 (1992) (distance and barriers between defendant and addressee precluded immediate violent reaction); see also *Anniskette* v. *State*, 489 P.2d 1012, 1014–15 (Alaska 1971) (finding abusive language uttered to state police officer over phone not fighting words); *State* v. *Dugan*, 369 Mont. 39, 54, 303 P.3d 755 (holding speech not to be fighting words when defendant called victim services advocate " 'fucking cunt' " over the phone), cert. denied, U.S. , 134 S. Ct. 220, 187 L. Ed. 2d 143 (2013). Without this physical proximity, there is simply no threat of immediate violence from abusive language.

Evaluating whether the circumstances of the addressee are such that he or she would be likely to respond with immediate violence is a more delicate

matter. Although furnished with more than one opportunity, the United States Supreme Court has declined to adopt a rule that the fighting words doctrine applies more narrowly to speech addressed to a police officer. In a concurring opinion, Justice Powell once suggested that "a properly trained officer *may* reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fighting words." (Emphasis added; internal quotation marks omitted.) *Lewis* v. *New Orleans*, 415 U.S. 130, 135, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974). Thirteen years later, Justice Brennan, writing for the court, took note of Justice Powell's suggestion, but couched his language in extreme caution. *Houston* v. *Hill*, 482 U.S. 451, 462, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987). Far from embracing a narrower rule for speech directed at police officers, the court observed that "in *Lewis*, Justice Powell *suggested* that even the fighting words exception recognized in *Chaplinsky* . . . *might* require a narrower application in cases involving words addressed to a police officer, because a properly trained officer *may* reasonably be expected to exercise a higher degree of restraint than the average citizen . . . ." (Emphasis added; internal quotation marks omitted.) Id. The court demonstrated this reluctance for a narrower application despite stressing the importance of individual freedom to challenge police action. See id., 462–63. ("[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state"). Nevertheless, this court has expressly adopted a narrower application of the fighting words standard for speech addressed to police officer, at least with respect to § 53a-181 (a) (3). See *State* v. *DeLoreto*, 265 Conn. 145, 169, 827 A.2d 671 (2003).[7]

[7] "[T]o avoid invalidation of § 53a-181 (a) (3) on grounds of overbreadth, we adopt, by way of judicial gloss, the conclusion that, when a police officer is the only person upon whose sensibilities the inflammatory language could

The reluctance of the United States Supreme Court to embrace an approach that more closely evaluates the circumstances of the addressee is understandable given the fact that that such an approach is maladapted to the nature of fighting words. Fighting words are unprotected speech because they tend to provoke an immediate, visceral response in a face to face situation "because of their raw effect." *State* v. *Caracoglia*, 78 Conn. App. 98, 110, 826 A.2d 192, cert. denied, 266 Conn. 903, 832 A.2d 65 (2003); see also *State* v. *Swoboda*, 658 S.W.2d 24, 26 (Mo. 1983) ("such words must be likely to incite the *reflexive* response in the person to whom, individually, the remark is addressed" [emphasis added]). Ideally, no one would ever respond to abusive speech with violence especially given the likelihood of criminal, professional, or other collateral consequences that could result from violent conduct. Nevertheless, fighting words are so pernicious that they tend to provoke an ordinary person to respond viscerally to scathing insults in a manner that is invariably irrational—that is, with violence. For this reason, a post hoc analysis of the circumstances of the addressee will not accurately

have played, a conviction can be supported only for [e]xtremely offensive behavior supporting an inference that the actor wished to provoke the policeman to violence." (Internal quotation marks omitted.) *State* v. *DeLoreto*, supra, 265 Conn. 169.

The majority relies on *In re Nickolas S.*, 226 Ariz. 182, 188 P.3d 446 (2011), in support of its position that we should consider the addressee's position of a store manager. In that case, the Arizona Supreme Court held that it was not likely an average teacher would respond to a student's "profane and insulting outburst" with violence. Id., 188. Perhaps a compelling case could be made for adopting a narrower rule with respect to speech directed at teachers by their students. Like police officers, teachers hold a unique role in society. Teachers undergo extensive training and certification in order to serve in their role. See General Statutes § 10-144o et seq. Given such training, certification, and public regulation, society could reasonably expect a teacher to "exemplify a higher level of professionalism . . . ." *In re Nickolas S.*, supra, 188. If a case implicating speech directed at a teacher by a student were to arise, perhaps we would consider a categorical rule like the one we adopted with respect to speech directed at police officers in *DeLoreto*. This question, however, does not arise in the present case.

reflect whether an ordinary person would reflexively respond with some degree of violence[8] to a defendant's abusive language.

There is simply no evidence in the record regarding what the average store manager knows or does not know. It is interesting that the majority uses the store as a line of demarcation, noting that "a different conclusion might be warranted if the defendant directed the same words at Freeman after Freeman ended her work day and left the [store], depending on the circumstances presented." Such a demarcation was never mentioned in *Szymkiewicz*. The majority further concludes that "it would be unlikely for an on duty store manager in Freeman's position to respond in kind to the defendant's angry diatribe with similar expletives" and that "[i]t would be considerably more unlikely for a person in Freeman's position . . . to respond with a physical act of violence." It is interesting that the jury in the present case found precisely what the majority deems so unlikely. This is a new test for fighting words directed at the position of the person to whom the words are directed. The United States Supreme Court has not gone this far. In view of the fact that this matter is analyzed under the first amendment, I would follow the case law of the United States Supreme Court and require that the test be restricted to that of the average person. See *Texas* v. *Johnson*, supra, 491 U.S. 409.[9]

II

INADEQUATE BRIEFING

I next turn to whether the evidence was sufficient to sustain the defendant's conviction for violation of § 53a-

[8] Violence, of course, occurs on a spectrum. The test is not whether an ordinary person would immediately kill, pummel, or punch the speaker if addressed with fighting words. It is whether an ordinary person would respond with any immediate violence, even a weak slap or grab.

[9] I reject the majority's attempt to distinguish *Szymkiewicz* on the ground that the defendant in that case was convicted under a different section of

181 (a) (5). The state claims that the evidence is sufficient to sustain the conviction because the defendant's abusive epithets were likely to provoke an ordinary person to respond with immediate violence. The defendant, however, rested her entire sufficiency of the evidence claim on her position that the state constitution protected the defendant's speech because she did not expressly challenge Freeman to a fight. Indeed, the defendant expressly represented that she "does not . . . challenge . . . the scope of the fighting words exception under the first amendment." Thereafter, in a mere footnote, the defendant indicates that she "does not concede" that her speech was unprotected by the first amendment and claims that we must analyze the sufficiency of the evidence under the first amendment standard if that standard is adopted as a matter of state constitutional law. The defendant, however, does not provide such an analysis herself. Similarly, in her reply brief, the defendant claims, without citing a single case, that whether her speech is protected in this case is based on whether an ordinary store manager, rather than an ordinary person, would have responded with immediate violence. Because the defendant has failed to adequately brief the issue of whether the evidence in this case is sufficient under the federal fighting words standard, I would decline to address it.

"We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Citation omitted; internal

the breach of peace statute. Nevertheless, the court still analyzed the case under the fighting words doctrine.

quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016). "Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record." (Internal quotation marks omitted.) *Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016); see also *Getty Properties Corp.* v. *ATKR, LLC*, 315 Conn. 387, 413–14, 107 A.3d 931 (2015).

Moreover, we have recently emphasized the importance of adequate briefing of free speech issues due to the analytic complexity of the subject matter. See *State* v. *Buhl*, supra, 321 Conn. 726. "[F]irst [a]mendment jurisprudence is a vast and complicated body of law that grows with each passing day and involves complicated and nuanced constitutional concepts." (Internal quotation marks omitted.) Id. In *Buhl*, this court affirmed the Appellate Court's decision not to review the defendant's free speech claims because those claims were inadequately briefed. Id. Specifically, we noted that the defendant in that case dedicated one and one-half pages and cited three to six cases for each of two separate expressive liberties issues. Id., 726–27.

In the present case, the defendant provided a thorough and thoughtful *Geisler* analysis in support of her claim that the free speech provisions of the Connecticut constitution provided additional protections that encompassed her speech. As the defendant acknowledges, the federal constitutional standard is the floor for individual rights. *Trusz* v. *UBS Realty Investors, LLC*, 319 Conn. 175, 191, 123 A.3d 1212 (2015). Naturally, if the defendant truly contended this minimum standard was unmet, an analysis of the governing law under the first amendment would be necessary to evaluate that claim. Instead, the defendant simply maintains that she "does not concede" that her language was not protected by the first amendment. In a mere footnote,

she maintains that if this court "concludes that the Connecticut constitution is coextensive with the [United States] constitution, [it] must still decide whether the evidence was sufficient under the standard that it delineates." Similarly, in her reply brief and without citation to any case law, the defendant claims that this court should consider whether an ordinary grocery store manager would have responded to the defendant's speech with imminent violence. The defendant does not, however, cite any case law in support of this formulation of the first amendment standard. Even in her reply brief, after the state had made its claim that the standard under the first amendment is whether an *ordinary person* would respond with immediate violence, the defendant declined to respond with any analysis or authority to the contrary. Given the foregoing circumstances, I would conclude that any federal constitutional claim has been waived as a result of inadequate briefing.[10]

III

GEISLER ANALYSIS

The defendant claims that the evidence was not sufficient to support her conviction of breach of peace. Specifically, the defendant claims that the jury could not have properly determined that her speech fell within the scope of the fighting words exception to the Connecticut constitution's free speech provisions.[11] The

[10] It is of no moment that the state addressed whether the evidence was sufficient under the first amendment standard in its brief. *State* v. *Buhl*, supra, 321 Conn. 728–29 ("[a]n appellant cannot, however, rely on the appellee to decipher the issues and explain them [on appeal]").

[11] The defendant seeks review of her unpreserved state constitutional claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). "Under *Golding*, a defendant may prevail on an unpreserved claim only if the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate

defendant claims that the Connecticut constitution affords broader protection for speech than the United States constitution in that the scope of the fighting words doctrine is narrowly circumscribed under the Connecticut constitution to speech that challenges the listener to fight. According to the defendant, because the record is devoid of any evidence of a challenge to fight, there was not sufficient evidence to support her conviction. The state maintains that the fighting words doctrine under the state constitution is coterminous with the United States constitution and, therefore, the evidence is sufficient to support the defendant's conviction. I agree with the state.

I begin by setting forth this court's standard of review in free speech cases. The "inquiry into the protected status of . . . speech is one of law, not fact." (Internal quotation marks omitted.) *DiMartino* v. *Richens*, 263 Conn. 639, 661, 822 A.2d 205 (2003); see also *Connick* v. *Myers*, 461 U.S. 138, 148 n.7, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). "This [c]ourt's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across the line between speech unconditionally guaranteed and speech which may legitimately be regulated." (Internal quotation marks omitted.) *State* v. *DeLoreto*, supra, 265 Conn. 152–53.

harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Saturno*, 322 Conn. 80, 89–90, 139 A.3d 629 (2016); see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*). The state concedes that the first and second conditions are met in the present case, but maintains that the defendant cannot prevail because she has failed to prove that a constitutional violation exists. In view of the conclusion reached in part III of this concurring and dissenting opinion, I agree with the state that the defendant has failed to prove that a constitutional violation exists under our state constitution.

In cases where the line must be drawn, this court undertakes an examination of the speech at issue, along with the circumstances under which it was made, to see whether it is of a nature which the relevant constitutional free speech provisions protect. See id., 153. This court "must make an independent examination of the whole record . . . so as to [be sure] that the judgment does not constitute a forbidden intrusion on the field of free expression." (Internal quotation marks omitted.) Id. Although the ultimate conclusion with respect to whether the speech at issue constitutes fighting words is subject to de novo review, this court accepts "all subsidiary credibility determinations and findings that are not clearly erroneous." *State* v. *Krijger*, 313 Conn. 434, 447, 97 A.3d 946 (2014).

To the extent that § 53a-181 (a) (5) proscribes conduct consisting of pure speech, this court and the Appellate Court have applied a judicial gloss in order to ensure that the statute comports with the strictures of the first amendment. See *State* v. *Caracoglia*, supra, 78 Conn. App. 110; see also *State* v. *Szymkiewicz*, supra, 237 Conn. 620–21 (applying fighting words construction to § 53a-181 [a] [1], which prohibits "violent, threatening or tumultuous behavior"); cf. *State* v. *Indrisano*, 228 Conn. 795, 812, 640 A.2d 986 (1994) (applying fighting words construction to provision of disorderly conduct statute, General Statutes § 53a-182 [a] [1], prohibiting "violent, threatening or tumultuous behavior").

The fighting words exception to the broad free speech protection afforded by the first amendment was first articulated in *Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 568. In that case, the United States Supreme Court held that states are permitted to punish the use of certain narrow classes of speech, including " 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id., 572. As discussed previously in this concur-

ring and dissenting opinion, fighting words are "speech that has a direct tendency to cause imminent acts of violence or an immediate breach of the peace. Such speech must be of such a nature that it is likely to provoke the average person to retaliation." (Internal quotation marks omitted.) *State* v. *Szymkiewicz*, supra, 237 Conn. 620; see also *Texas* v. *Johnson*, supra, 491 U.S. 409. In order to constitute fighting words, the abusive language must be "directed to the person of the hearer." (Internal quotation marks omitted.) *Cohen* v. *California*, supra, 403 U.S. 20. Accordingly, in order to comport with the requirements of the first amendment, § 53a-181 (a) (5) "proscribes fighting words that tend to induce immediate violence by the person or persons to whom the words are uttered because of their raw effect." *State* v. *Caracoglia*, supra, 78 Conn. App. 110.

"[F]ederal constitutional and statutory law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher level of protection for such rights." (Internal quotation marks omitted.) *Trusz* v. *UBS Realty Investors, LLC*, supra, 319 Conn. 191. In order to determine whether the Connecticut constitution affords broader protection than the national minimum, this court analyzes the familiar *Geisler* factors: "(1) the 'textual' approach—consideration of the specific words in the constitution; (2) holdings and dicta of this court and the Appellate Court; (3) federal precedent; (4) the 'sibling' approach—examination of other states' decisions; (5) the 'historical' approach—including consideration of the historical constitutional setting and the debates of the framers; and (6) economic and sociological, or public policy, considerations." *State* v. *Linares*, 232 Conn. 345, 379, 655 A.2d 737 (1995).[12]

[12] I address each factor somewhat out of order to maintain a logical structure to the analysis of this issue in the present case.

A

I begin my analysis by looking at the text of the relevant constitutional provisions. Article first, § 4, of the Connecticut constitution provides that "[e]very 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 that "[n]o law shall ever be passed to curtail or restrain the liberty of speech or of the press." The defendant contends that the protection of speech "on all subjects" extends to the "profane name-calling" in which the defendant indulged in the present case. The state points out that the protection afforded by article first, § 4, of the Connecticut constitution is not unbounded, but rather is circumscribed by the qualifying language "being responsible for the abuse of that liberty."

Broadly speaking, we have previously observed "that because, unlike the first amendment to the federal constitution: (1) article first, § 4, of the Connecticut constitution includes language protecting free speech on all subjects; [and] (2) article first, § 5, of the Connecticut constitution uses the word ever, thereby providing additional emphasis to the force of the provision . . . and therefore sets forth free speech rights more emphatically than its federal counterpart . . . ." (Citations omitted; internal quotation marks omitted.) *Trusz* v. *UBS Realty Investors, LLC*, supra, 319 Conn. 192–93. Specifically, this court noted that the state constitutional liberty to speak freely *on all subjects* set forth in § 4 "support[ed] the conclusion that the state constitution protects employee speech in the public workplace on the widest possible range of topics, as long as the speech does not undermine the employer's legitimate interest in maintaining discipline, harmony and efficiency in the workplace." Id., 193.

Nevertheless, the liberty to speak freely on all subjects is qualified by the plain terms of article first, § 4, of the Connecticut constitution, which holds each citizen "responsible for the abuse of that liberty." This court has observed that this provision operates as a limitation upon the broad protections otherwise afforded by permitting the enforcement of laws regulating speech that tended to cause a breach of the peace such as defamation or sedition. See *Cologne* v. *Westfarms Associates*, 192 Conn. 48, 64 n.9, 469 A.2d 1201 (1984).[13] Therefore, this court has interpreted the text of § 4 to permit punishment, within certain bounds, of abuse of the freedom of speech. Additionally, the text of §§ 4 and 5 in no way suggests that the legislature's authority to punish abuses of expressive liberties was limited to then prevailing statutory criminal law. Thus, while the language of §§ 4 and 5 provides for broader protection than afforded under the federal constitution, the language of § 4 more directly pertains to the state's authority to punish the abuse of expressive liberties. Accordingly, I find that the text of §§ 4 and 5 does not support the

[13] This interpretation of § 4 is based upon an understanding of the framers' sentiments during constitutional debates. See *Cologne* v. *Westfarms Associates*, supra, 192 Conn. 63–64 n.9. Specifically, this court noted that, although there were some during debate that "would leave out" that provision "consider[ing] the whole purpose of it answered in the next section," there were others that disagreed. (Internal quotation marks omitted.) Id. Specifically, this court took note of the following point made during debate: "Every citizen has the liberty of speaking and writing his sentiments freely, and it should not be taken away from him; there was a very great distinction between taking away a privilege, and punishing for an abuse of it—to take away the privilege, is to prevent a citizen from speaking or writing his sentiments—it is like appointing censors of the press, who are to revise before publication—but in the other case, every thing may go out, which the citizen chooses to publish, though he shall be liable for what he *does* publish [and that] the [section] was important . . . ." (Emphasis in original; internal quotation marks omitted.) Id. In so doing, this court also noted that "[a] broader proposal which prohibited the molestation of any person for his opinions on any subject whatsoever was considered at the convention but rejected." Id., 64 n.9.

defendant's position that our state constitution defines the concept fighting words more narrowly.

B

I turn next to historical analysis to further clarify the scope of the state's expressive rights protections. The historical analysis is the central focus of the defendant's constitutional claim. She advances the theory that the only exceptions to the broad expressive rights protections afforded by the Connecticut constitution are those extant at the time of the ratification of the Connecticut constitution in 1818, and that there was no statute proscribing profane name calling at that time.[14] As a result, according to the defendant, in light of the statutory law at the time of ratification, the state may only punish abusive language that includes a challenge to fight. The state, on other hand, points to preconstitutional records

[14] The defendant claims that fighting words did not fall within the ambit of the extant statutory offenses implicating pure speech at the time of the ratification of the constitution. In her brief, the defendant adumbrates the following closely related statutory offenses: (1) "An Act to prevent the practice of Duelling"; Public Statute Laws of the State of Connecticut (1808) tit. LIII, § 1, p. 241; (2) "An Act against breaking the Peace"; Public Statute Laws of the State of Connecticut (1808) tit. CXXV, § 1, p. 545; and (3) "An Act against profane Swearing and Cursing"; Public Statute Laws of the State of Connecticut (1808) tit. CLVI, § 1, p. 639.

The provision against dueling punished challenging another person to fight with a dangerous weapon. Public Statute Laws of the State of Connecticut (1808) tit. LIII, § 1, p. 241. The provision against profane swearing and cursing proscribed imprecation of future divine vengeance against another person. Public Statute Laws of the State of Connecticut (1808) tit. CLVI, § 1, p. 639; see also *Holcomb* v. *Cornish*, 8 Conn. 375, 380 (1831).

"An Act against breaking the Peace," which the most analogous statute to § 53a-181 (a) (5), made it a crime to "disturb, or break the peace, by tumultuous and offensive carriages, [threatening], traducing, quarrelling, challenging, assaulting, beating, or striking another person . . . ." Public Statute Laws of the State of Connecticut (1808) tit. CXXV, § 1, p. 545. According to the defendant, the dictionary definitions of these key words that comprise the statutory language reveal that only violent conduct or defamation would have been sufficient to make out a violation.

that, in very general terms, support the qualified character of the civil liberties.[15] I agree with the state.

Contrary to the defendant's contention, ratification era constitutional law is not the sole source of state constitutional principles. Indeed, the common law provides valuable insight to inform our understanding of constitutional principles. See E. Peters, "Common Law Antecedents of Constitutional Law in Connecticut," 53 Alb. L. Rev. 259, 264 (1989) ("In defining and enacting constitutional bills of rights, state and national constituencies would, of course, have drawn upon the experience of the common law. . . . Just as the precepts of the common law influence the style of constitutional adjudication in common law courts, so common law case law itself is part of our 'usable past.' " [Footnote omitted.]). In 1828, this court observed that when a person sends a letter containing "abusive language" to another person, it was "an indictable offence, because it tends to a breach of the peace." *State* v. *Avery*, 7 Conn. 266, 269 (1828).[16] The court noted that, while the letter would not constitute libel because it was not published to a third party, it was "clearly an offence of a public nature, and punishable as such, as it tends to create ill-blood, and cause a disturbance of the public peace." Id. This common law offense originated in England where it was observed that sending an "infa-

[15] The state notes that the Ludlow Code of 1650 recognized liberties, but only of "[every] man in his place and proportion . . . ." 1 Colonial Records of Connecticut 1636-1665, p. 509. The state also cites Chief Justice Zephaniah Swift's statement with respect to the qualified nature of individual liberty that human nature cannot "bear total servitude, or total liberty." (Emphasis omitted.) 1 Z. Swift, A System of the Laws of the State of Connecticut (1795) p. 31.

[16] Although *Avery* postdates ratification of the constitution by ten years, this court has previously acknowledged that it is appropriate to look to case law in close temporal proximity to 1818 to better understand the original intent of the constitutional framers. *State* v. *Joyner*, 225 Conn. 450, 462, 625 A.2d 791 (1993); see also *State* v. *Lamme*, 216 Conn. 172, 180–81, 579 A.2d 484 (1990) (relying on case from 1837 for guidance).

mous" letter to another person constituted an "offense to the King, and is a great motive to revenge, and tends to the breaking of the peace . . . ." *Edwards* v. *Wooton*, 77 Eng. Rep. 1316, 1316–17 (K.B. 1655); see also *Hickes's Case*, 79 Eng. Rep. 1240, 1240–41 (K.B. 1682). Chief Justice Zephaniah Swift included the common-law offense of provocation to breach of the peace in the second volume of his digest published in 1823. See 2 Z. Swift, A Digest of the Laws of the State of Connecticut (1823) pp. 340–41.[17] At the very least, Connecticut common law embraced the principle that speech that tended to cause a breach of the peace was illegitimate, even if it did not acknowledge such conduct as a basis for criminal liability.[18] Indeed, this very rationale undergirds the fighting words doctrine. See *Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 573 (noting that it is within domain of state power to punish "words likely to cause a breach of the peace").

Additionally, the defendant has failed to articulate a persuasive rationale for relying strictly upon historical exceptions in any form. The defendant correctly points out that this court previously has recognized that "our

[17] The preface to volume I of Swift's Digest of 1823 notes that the principles cited therein were "the most important principles of the common law applicable in this [s]tate . . . ." The relevant theory of criminal liability was listed under the heading "of Breach of the Peace" and further classified under the subheading "of Libel." 2 Z. Swift, A Digest of the Laws of the State of Connecticut (1823) pp. 337, 340. Swift does state at the beginning of the subpart on the subject of libel that while "the common law on this subject is in force here," prosecutions for libel had not been brought in the state. Id., p. 340. In *Avery*, this court controverted Swift's observation regarding the lack of libel prosecutions, pointing to prosecutions in 1806 and 1818. *State* v. *Avery*, supra, 7 Conn. 269–70.

[18] In 1865, the General Assembly passed a law making the use of abusive language a statutory offense. Public Acts 1865, Chap. LXXXVI, pp. 80–81. The underlying rationale for the statute was that "in the exercise of a malicious ingenuity one person could insult another, injure his character, wound his feelings, and *provoke him to violence*, in a mode against which there existed no precise and adequate provision of law . . . ." (Emphasis added.) *State* v. *Warner*, 34 Conn. 276, 278–79 (1867).

constitution's speech provisions reflect a unique historical experience and a move toward enhanced civil liberties, particularly those liberties designed to foster individuality. . . . This historical background indicates that the framers of our constitution contemplated vibrant public speech, and a minimum of governmental interference . . . ." (Internal quotation marks omitted.) *Trusz* v. *UBS Realty Investors, LLC*, supra, 319 Conn. 206. However, this broad observation about the historical context in which the declaration of rights was adopted does not support any particular analytic framework for delineating the scope of expressive rights doctrine, let alone the one advanced by the defendant. In sum, there is no basis for the 1818 code alone to serve as the lodestar of present day state constitutional expressive rights doctrine. Accordingly, I find this factor supports the state.

C

I next turn to the state precedents factor of the *Geisler* analysis. The defendant contends that, because this court has yet to delineate the scope of the fighting words doctrine under the Connecticut constitution, this court writes on a "clean slate."[19] The state claims that,

[19] The defendant is incorrect that, because of the absence of appellate case law discussing the scope of the fighting words doctrine under the Connecticut constitution, this court simply writes on a blank slate, unguided by state appellate precedents. First, the absence of case law on the matter strongly suggests that this factor does not support the defendant's position. See *State* v. *Skok*, 318 Conn. 699, 709, 122 A.3d 608 (2015) ("because Connecticut courts have not yet considered whether article first, § 7, [of the Connecticut constitution] provides greater protection than the federal constitution with respect to recording telephone conversations with only one party's consent, the second *Geisler* factor also does not support the defendant's claim"). Second, in *Trusz* v. *UBS Realty Investors, LLC*, supra, 319 Conn. 195–97, this court looked to appellate precedents not for controlling authority on the precise legal issue at hand; rather, it looked to appellate authority for broader principles that underpin this state's expressive rights jurisprudence to inform the analysis. In *Trusz*, this court looked to *State* v. *Linares*, supra, 232 Conn. 386, for the state constitutional expressive rights principle of favoring flexible, case-by-case analytic frameworks over rigid, categorical

while this court's cases have expressly held that the Connecticut constitution "bestows greater expressive rights on the public than that afforded by the federal constitution"; see *State* v. *Linares*, supra, 232 Conn. 380; appellate cases discussing state freedom of expression principles evince a philosophy that balances individual expressive liberties and the responsibility not to abuse such liberties.[20] I agree with the state.

This court's more recent state constitutional expressive rights cases show that Connecticut's constitution provides broader freedom of expression protections than the federal counterpart. See, e.g., *Trusz* v. *UBS Realty Investors, LLC*, supra, 319 Conn. 196; *State* v. *Linares*, supra, 232 Conn. 382. In *Linares*, this court was called upon to determine proper state constitutional analytic framework for time, place, and manner restrictions upon expression in a case challenging a statute prohibiting disturbances in the General Assembly. This court rejected the more modern, categorical federal forum analysis in favor of the older, flexible, case-by-case approach set forth in *Grayned* v. *Rockford*, 408 U.S. 104, 115–21, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). Likewise, in *Trusz*, this court rejected the more

tests. See *Trusz* v. *UBS Realty Investors, LLC*, supra, 195. Additionally, this court looked to the Appellate Court decision in *State* v. *DeFusco*, 27 Conn. App. 248, 256, 606 A.2d 1 (1992), aff'd, 224 Conn. 627, 620 A.2d 746 (1993), for the broad proposition that the Connecticut constitution has tended to preserve civil liberty protections previously afforded by the federal constitution, but from which the United States Supreme Court has retreated. See *Trusz* v. *UBS Realty Investors, LLC*, supra, 196–97.

[20] The state also points out that the Appellate Court has incorporated the fighting words doctrine into the expressive rights provisions of the state constitution. See *State* v. *Caracoglia*, supra, 78 Conn. App. 110. In *Caracoglia*, the court held that that § 53a-181 (a) was not facially overbroad under the state constitution. Id., 110–11. In that case, however, the defendant did not appear to advance the theory that the Connecticut constitution afforded broader protection relative to fighting words than the federal constitution. Id. Accordingly, I conclude that case adds little to the analysis of the scope of the fighting words doctrine.

recent—and more restrictive—federal standard analyzing employee expressive rights claims set forth in *Garcetti* v. *Ceballos*, 547 U.S. 410, 418–20, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006), in favor of a modified version of the older, more flexible *Connick/Pickering*[21] standard.[22] As mentioned previously, both *Trusz* and *Linares* denote a state constitutional preference for preserving individual liberties when the United States Supreme Court diminishes the scope of such liberties under the federal constitution. See footnote 19 of this concurring and dissenting opinion. In contrast, in *Cologne* v. *Westfarms Associates*, supra, 192 Conn. 66, this court rejected the novel theory that private shopping malls were required to permit solicitation under the Connecticut constitution. Thus, while it is true that Connecticut's constitution guarantees broad expressive rights—a broader guarantee than the United States constitution—it does not provide additional protection in each and every facet of the broad field of expressive rights.

The appellate case law analyzing state constitutional principles with respect to content based regulation of speech embraces a philosophy that balances the expressive liberties with the responsibility not to abuse such liberties. In *State* v. *McKee*, 73 Conn. 18, 28, 46 A. 409 (1900), this court affirmed the denial of a demurrer

[21] See *Connick* v. *Myers*, supra, 461 U.S. 142 (in determining scope of public employee's right to free speech in workplace, court must seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [s]tate, as an employer, in promoting the efficiency of the public services it performs through its employees" [internal quotation marks omitted]); *Pickering* v. *Board of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) (same).

[22] The standard adopted in *Trusz* is, at least arguably, not quite as permissive as the *Connick/Pickering* test. The test adopted in *Trusz* allows an employee to prevail only if "he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it." (Internal quotation marks omitted.) *Trusz* v. *UBS Realty Investors, LLC*, supra, 319 Conn. 204; but see id., 204 n.19 (discussing whether the test adopted was actually a modification of the *Pickering* test).

challenging, inter alia, the validity of a statute punishing the publication of "criminal news, police reports, or pictures and stories of deeds of bloodshed, lust, or crime." (Internal quotation marks omitted.) Rather than looking to the substantive criminal law extant at the time of ratification of the state constitution in 1818 to determine the validity of this more recent statutory offense as the defendant urges, Justice Hamersley relied on the broader principles of expressive liberty to sustain the statute. Id., 28. Speaking for a unanimous court, he elaborated that expressive liberties are "essential to the successful operation of free government," and acknowledged "free expression of opinion on any subject as essential to a condition of civil liberty." Id. Nevertheless, Justice Hamersley acknowledged the qualified nature of expressive liberties, noting that "[i]mmunity in the mischievous use is as inconsistent with civil liberty as prohibition of the harmless use. Both arise from the equal right of all to protection of law in the enjoyment of individual freedom of action, which is the ultimate fundamental principle." Id., 28–29. He continued, "[f]reedom of speech and press does not include the abuse of the power of tongue or pen, any more than freedom of other action includes an injurious use of one's occupation, business, or property." Id., 29. On this issue, Justice Hamersley concluded that the notion that the state constitution created a refuge for those who sought to abuse expressive liberties to the detriment of society "belittle[d] the conception of constitutional safeguards and implie[d] ignorance of the essentials of civil liberty." Id.

These principles of civil liberty are interwoven into this court's reasoning in subsequent cases rejecting state constitutional free speech challenges to statutes proscribing abuse of expressive liberties. In *State* v. *Pape*, 90 Conn. 98, 103, 96 A. 313 (1916), this court reversed a demurrer that had dismissed an information

filed against the defendant alleging that the defendant had published, if proven untrue, abusive and scurrilous allegations of corruption and breach of office by indicating that a public official "had sold out his constituents and traded their wishes and interests and his own soul for an office." This court reasserted that the legislature may not "curtail the liberty of speech or of the press, guaranteed as it is by our [c]onstitution." Id., 105. The court also noted that expressive rights principles derive from the common law, and that it was a common law principle that "free and fair criticism on any subject reasonably open to public discussion is not defamation and is not libelous . . . ." Id. In other words, "[l]iberty of speech and of the press is not license, not lawlessness, but the right to fairly criticize and comment." Id. The court noted that it was a right for the defendant to fairly comment upon the conduct of the public official, but the defendant would bear the responsibility for the abuse of that right. Id.

Similarly, in *State* v. *Sinchuk*, 96 Conn. 605, 616, 115 A. 33 (1921), this court upheld a seditious libel law[23] challenged on state expressive rights grounds. The defendants advanced the theory that the statute punished expression irrespective of harmful consequence. Id., 607. This court conceded that publication of scurrilous or abusive matter concerning the federal government does not necessarily result in direct incitement to lawlessness, but, nevertheless, the legislature was permitted to declare that such expression endangers public peace and safety unless the court found such conclusion to be plainly unfounded. Id., 609–10. In so

[23] The statute at issue in *Sinchuk* was entitled "An Act Concerning Sedition," and, on its face, appeared "to penalize three classes of publications: (1) disloyal, scurrilous or abusive matter concerning the form of government of the United States, its military forces, flag or uniform; (2) any matter intended to bring them into contempt; (3) or which creates or fosters opposition to organized government." (Internal quotation marks omitted.) *State* v. *Sinchuk*, supra, 96 Conn. 607.

reasoning, the court acknowledged the breadth of legislative authority to regulate speech that may be harmful to public peace. Id.

The defendant correctly points out that the narrow holdings of these early twentieth century expressive rights cases would not likely withstand modern constitutional scrutiny.[24] The defendant is incorrect, however, that because the cases provide no evidence of the scope of expressive rights protection in 1818, that they provide no meaningful insight to our analysis.[25] With respect to the issue at hand, these cases evince a philosophy not dissimilar from that prevailing in 1818—namely, the belief that citizens should be free to express themselves, but that they bear responsibility for the abuse of that right. Moreover, this court's reliance on preconstitutional common-law principles to inform the scope of state constitutional rights undercuts the defendant's theory that early nineteenth century *statutory* criminal law delineates the scope of expressive rights. For these reasons, the state precedents factor favors the state's position.

D

Next, I turn to the sister state precedents factor of the *Geisler* analysis. The defendant urges this court to

[24] Indeed, in *Winters* v. *New York*, 333 U.S. 507, 520, 68 S. Ct. 665, 92 L. Ed. 840 (1948), the United States Supreme Court invalidated a New York statute similar to that at issue in *McKee* on the basis of vagueness. The court noted that the statute at issue in *McKee* was determined by this court to be in conformity with state constitutional expressive rights provisions, but that the law was not challenged under the United States constitution. Id., 512. The narrow holdings of *Pape* and *Sinchuk* are likewise dubious in light of *Brandenburg* v. *Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969), and *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

[25] To the contrary, these cases provide highly relevant insight into the expressive rights principles that animate this state's more modern state constitutional expressive rights jurisprudence. Indeed, in *State* v. *Linares*, supra, 232 Conn. 382, this court favorably cited *State* v. *McKee*, supra, 73 Conn. 28–29, for its insight into the importance of free expression in democratic society.

adopt the approach followed by Oregon. The state does not rely on this factor for its position, but asserts that the Oregon approach is inconsistent with Connecticut constitutional jurisprudence. I agree with the state.

The Oregon Supreme Court has concluded that its constitutional expressive rights provision[26] "forecloses the enactment of any law written in terms directed to the substance of any 'opinion' or any 'subject' of communication, unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *State* v. *Robertson*, 293 Or. 402, 412, 649 P.2d 569 (1982). Applying this test, the Oregon Court of Appeals held a harassment statute under which the defendant had been convicted for calling another person a "fucking nigger" to be unconstitutional because using abusive language was not a historical exception to speech rights at the time of ratification of the Oregon constitution. (Internal quotation marks omitted.) *State* v. *Harrington*, 67 Or. App. 608, 610, 615–16, 680 P.2d 666, cert. denied, 297 Or. 547, 685 P.2d 998 (1984). *Harrington* concluded that the *Chaplinsky* standard employed a balancing test to determine whether speech was protected whereas the Oregon constitution prohibited "restricting the right to speak freely on *any subject whatever*." (Internal quotation marks omitted; emphasis in original.) Id., 614.

The Oregon approach is inapposite to determining the protections afforded by the Connecticut constitution because that state employs a different analytic approach to delineating the scope of state constitutional

[26] Article first, § 8, of the Oregon constitution provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

provisions. The Oregon approach is a mechanistic, single-factor approach that focuses solely on statutory substantive criminal law extant contemporaneously with ratification of its constitution. Connecticut, by relying upon the *Geisler* factors, embraces a "structured and comprehensive approach to state constitutional interpretation . . . ." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 272 n.26, 990 A.2d 206 (2010). This multifactor approach provides a more extensive toolkit to fashion appropriate, principled constitutional rules. See also *Honulik* v. *Greenwich*, 293 Conn. 641, 648, 980 A.2d 845, (2009) (noting that the factors are "to be considered in construing the contours of our state constitution so that we may reach reasoned and principled results as to its meaning"). Additionally, the defendant has done little to persuade why Oregon's historical exception approach, other than her own conclusion that it is "logical," is the appropriate test to delineate the scope of expressive rights under the Connecticut constitution. Nor does the Oregon Supreme Court articulate a persuasive basis for adopting such an approach. Indeed, *Robertson* appears to have adopted it strictly from the plain language of the relevant constitutional provision, which differs at least in form, if not substance, from Connecticut's relevant constitutional text. *State* v. *Robertson*, supra, 293 Or. 412; see also footnote 26 of this opinion.

The only other state to have considered the fighting words doctrine under its own expressive rights provisions is Vermont, and the Vermont Supreme Court determined, in a challenge to the "abusive language" prong of its disorderly conduct statute, that its state constitution does not offer broader protection that the federal constitution with respect to the fighting words doctrine. (Internal quotation marks omitted.) *State* v. *Read*, 165 Vt. 141, 156, 680 A.2d 944 (1996). The court

began its discussion by noting that, while Vermont's constitution "may afford greater protection to individual rights than do the provisions of the federal charter," the court had previously indicated that expressive rights are coterminous under the state and federal constitution but had reserved final judgment on the issue. (Internal quotation marks omitted.) Id., 153. In *Read*, the defendant had made textual, comparative, and historical arguments that his speech was protected. Id., 152–53. The court rejected his argument that the Vermont constitution offers broader protection by virtue of the fact that it contains no fewer than four speech provisions and that none of those provisions qualify expressive rights with the imposition of responsibility for the abuse thereof. Id., 153–54. The defendant in *Read* further contended that Vermont was historically tolerant of abusive language.[27] Id., 154. While the court generally accepted the defendant's characterization of contemporary social norms, it rejected the defendant's historical argument by relying principally upon a statement by the Vermont governor and council, made in response to Kentucky and Virginia resolutions espousing nullification of the Sedition Act, that strongly indicated that Vermont's constitutional expressive rights provisions afforded no broader protection than the first amendment.[28] Id., 155. The court concluded that the defendant

[27] The defendant cited the fact that in early Vermont "the language of profanity was the common dialect" and that the state reelected an incarcerated congressman who was convicted under the Sedition Act of 1798. (Internal quotation marks omitted.) *State* v. *Read*, supra, 165 Vt. 154.

[28] That statement provided in relevant part as follows: " 'In your . . . resolution you . . . severely reprehend the act of [c]ongress commonly called "the [s]edition bill." If we possessed the power you assumed, to censure the acts of the [g]eneral [g]overnment, we could not consistently construe the [s]edition bill unconstitutional; because our own constitution guards the freedom of speech and the press in terms as explicit as that of the United States, yet long before the existence of the [f]ederal [c]onstitution, we enacted laws which are still in force against sedition, inflicting severer penalties than this act of [c]ongress. And although the freedom of speech and of the press are declared unalienable in our bill of rights, yet the railer against the civil magistrate, and the blasphemer of his [m]aker, are exposed

had failed to satisfy its burden of showing that the Vermont constitution protected his speech. Id., 156.

My research reveals that, other than Oregon, no other state's constitution provides additional protection with respect to fighting words. Additionally, I find Oregon law to be unpersuasive. Accordingly, the sister state precedent factor favors the state.

E

I next address the federal precedents factor of *Geisler*. The defendant claims that one of the principal theoretical underpinnings of the fighting words doctrine has diminished since the inception of the doctrine. Specifically, the defendant claims that the United States Supreme Court acknowledges the expressive value of fighting words, whereas the court previously had found fighting words to be of little value at all. The state, on the other hand, points to the fact that the United States Supreme Court has not strayed from *Chaplinsky* and that the doctrine continues to endure. The state also maintains that, while the United States Supreme Court did acknowledge the expressive value of fighting words, it also reasoned that such words may be proscribed because they constitute a " 'nonspeech' element of communication . . . analogous to a noisy sound truck . . . ." *R. A. V.* v. *St. Paul*, 505 U.S. 377, 386, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). Finally, the state points to *Cantwell* v. *Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940), which is the antecedent of *Chaplinsky*, as evidence that the scope of the fighting words doctrine under the state and federal constitutions is coextensive. I find this factor favors the state.

to grievous punishment. And no one has been heard to complain that these laws infringe our state [c]onstitution.' " (Emphasis omitted.) *State* v. *Read*, supra, 165 Vt. 155.

I begin by addressing *Cantwell* v. *Connecticut*, supra, 310 U.S. 296,[29] which arose out of the proselytization activities of a group of Jehovah's Witnesses. See *State* v. *Cantwell*, 126 Conn. 1, 3, 8 A.2d 533 (1939), rev'd, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). The information alleged that a group, a father and his two children, ambulated Cassius Street in New Haven soliciting, without prior approval, the sale of books or donations by offering to play a phonograph recording as part of the pitch. Id. Ninety percent of the residents of the neighborhood were Roman Catholic, and the phonographic recording contained attacks upon the Catholic religion. Id. The defendants in that case were arrested, charged, and convicted of soliciting without a permit and breach of the peace. Id., 2–3 and n.1. The defendants appealed to this court challenging the sufficiency of the evidence supporting the conviction of breach of the peace.[30] Id., 5–6. This court upheld, inter alia, the conviction of one of the three defendants for breach of peace, observing that "[t]he doing of acts or the use of language which, under circumstances of which the person is or should be aware, are calculated or likely to provoke another person or other persons to acts of immediate violence may constitute a breach

[29] I discuss *Cantwell* v. *Connecticut*, supra, 310 U.S. 296, under the federal precedent prong because it is an important foundation of the federal fighting words doctrine. Additionally, the defendants in that case did not make a constitutional claim with respect to the relevant charge, they made a sufficiency of the evidence claim. *State* v. *Cantwell*, 126 Conn. 1, 5–6, 8 A.2d 533 (1939), rev'd, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). Accordingly, with respect to this state's constitutional expressive rights jurisprudence, this case is of little value and does not fit as well with the cases directly implicating state constitutional principles.

[30] The defendants in that case did not challenge the breach of the peace conviction on state constitutional grounds. See footnote 29 of this concurring and dissenting opinion. The absence of even a constitutional argument with respect to that conviction is particularly noteworthy given the fact that, though not relevant to this discussion, the defendants in that case challenged their conviction of solicitation without a permit on state constitutional expressive rights grounds. See *State* v. *Cantwell*, supra, 126 Conn. 4–5.

of the peace. . . . The effect or tendency of words or conduct depends largely upon the circumstances, and is a question of fact. . . . It is apparent from the facts found that the playing for audition by loyal Catholics of a record violently attacking their religion and church could well be found to constitute the offense charged, and they warrant finding [of] guilty." (Citations omitted.) Id., 7.[31] This court noted the constitutional implications of their reasoning by stating that "the right to propagate religious views is not to be denied," but nevertheless concluded that "one will not be permitted to commit a breach of the peace, under the guise of preaching the gospel."[32] (Internal quotation marks omitted.) Id. That defendant then filed a petition for certification to appeal to the United States Supreme Court, which was granted. *Cantwell* v. *Connecticut*, 309 U.S. 626, 626–27, 60 S. Ct. 589, 84 L. Ed. 987 (1940).

On appeal, the United States Supreme Court reversed on the remaining conviction for breach of the peace. *Cantwell* v. *Connecticut*, supra, 310 U.S. 311. The court found that it would be inconsistent with the principles of expressive liberties to punish the defendant for the content of the phonographic recording. Id., 310. The court reasoned that in a diverse society, religious as well as political discourse will produce sharp differences of

[31] Specifically, this court found sufficient evidence to support the breach of peace conviction against one of the defendants, Jessie Cantwell. *State* v. *Cantwell*, supra, 126 Conn. 6–8. This conclusion was based on the following facts: "Jesse Cantwell stopped John Ganley and John Cafferty, both of whom are Catholics, and receiv[ed] permission [to play a] phonograph record . . . which attacked that religion and church. On hearing it, Ganley felt like hitting Cantwell and told him to take his bag and victrola and be on his way. If he had remained he might have received physical violence. Cafferty's mental reaction was to put Jesse [Cantwell] off the street and he warned him that he had better get off before something happened to him." *State* v. *Cantwell*, supra, 126 Conn. 6.

[32] The court overturned the breach of peace conviction of the other two defendants because the record revealed only that they had been engaged in simple canvassing. *State* v. *Cantwell*, supra, 126 Conn. 7–8.

belief. Id. "In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement." Id. Part of the essence of citizenship, the court observed, is the right to express even offensive beliefs. See id. ("[b]ut the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy").

But the United States Supreme Court also acknowledged the state's interest in preserving peace. Id., 311. The court, in striking a balance between the competing interests, acknowledged that in some circumstances it is appropriate for the state to punish certain speech that tends to provoke violence, noting as follows: "One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the [United States constitution], and its punishment as a criminal act would raise no question under that instrument." Id., 309–10. Thus, the United States Supreme Court acknowledged Connecticut's well established authority to regulate speech that tends to provoke violence, but refined that authority to conform to federal free speech principles by permitting regulation of only profane, indecent, or abuse remarks likely to

provoke violence. It was this principle that would become the foundation of the fighting words doctrine in *Chaplinsky*.

The factual background of *Chaplinksy*, as in *Cantwell* v. *Connecticut*, supra, 310 U.S. 296, involves proselytization activity by a Jehovah's Witness. *Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 569. On the busy streets of Rochester, New Hampshire, the defendant was distributing the literature of his religion and denouncing other religions as a "racket." (Internal quotation marks omitted.) Id., 569–70. The crowd complained to the city marshal, who informed the crowd that the defendant was engaged in lawful activity, but also warned the defendant that the crowd was becoming restless. Id., 570. After some time, a disturbance ensued, and a nearby traffic officer escorted the defendant toward the police station. Id. En route, the defendant encountered the marshal who was going to the scene of the disturbance. Id. Upon seeing the marshal, the defendant said "[y]ou are a [g]od damned racketeer and a damned [f]ascist and the whole government of Rochester are [f]ascists or agents of [f]ascists . . . ." (Internal quotation marks omitted.) Id., 569. According to the defendant, before uttering the language that predicated the criminal offense, he complained to the marshal about the disturbance and requested that those responsible be arrested. Id., 570. The defendant was charged and convicted under a state statute making it a crime to address any "offensive, derisive or annoying" words at the person of another.[33] (Internal quotation marks omitted.) Id., 569.

[33] The defendant in *Chaplinsky* was convicted under a statute providing as follows: "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation." (Internal quotation marks omitted.) *Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 569.

In setting forth the applicable expressive rights principles, the United States Supreme Court sketched out their qualified nature. The court observed that it was "well understood that the right of free speech is not absolute at all times and under all circumstances." Id., 571. "There are certain [well defined] and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any [c]onstitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." (Footnote omitted.) Id., 571–72. The court's rationale for exempting certain categories of speech from protection is that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Id., 572. *Chaplinsky* drew further support by quoting *Cantwell* v. *Connecticut*, supra, 310 U.S. 309–10, for the proposition that "[r]esort to epithets or personal abuse" is not protected speech and would raise no question as to its punishment under the constitution. See *Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 572.

Consistent with the principle set forth in *Cantwell*, the court was careful to reiterate that any law punishing pure speech must be narrowly drawn to punish only that speech which tends to cause a breach of the peace. Id., 573. The court noted that the New Hampshire Supreme Court had authoritatively construed the statute in a fashion to conform to this principle by limiting the statute's scope to words that have "direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed," which is to be determined by inquiring whether "men of common intelligence would understand would be words likely

to cause an average addressee to fight." (Internal quotation marks omitted.) Id. With respect to the defendant's speech itself, the court concluded, "[a]rgument is unnecessary to demonstrate that the appellations 'damn racketeer' and 'damn Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace." Id., 574. Thus, the fighting words doctrine itself as articulated in *Chaplinsky* is a step in the evolution of a principle of expressive liberty that draws its very essence from Connecticut, which acknowledges the authority of the state, within narrow limits, to punish pure speech that tends to cause a breach of the peace.

The defendant claims that, since *Chaplinsky*, the United States Supreme Court has viewed the value of fighting words more favorably. Compare *Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 572 ("[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the [c]onstitution" [internal quotation marks omitted]), with *R. A. V.* v. *St. Paul*, supra, 505 U.S. 384–85 ("[i]t is not true that fighting words have at most a de minimis expressive content . . . or that their content is *in all respects* worthless and undeserving of constitutional protection . . . sometimes they are quite expressive indeed" [internal quotation marks omitted; citations omitted; emphasis in original]). Fighting words, like offensive language more generally, has an emotive communicative function. See *Cohen* v. *California*, supra, 403 U.S. 26 ("[i]n fact, words are often chosen as much for their emotive as their cognitive force"). In other words, the use of offensive language serves as a means to convey the passion with which one holds ideas or beliefs he or she seeks to exchange. Even acknowledging this value, the court maintained that fighting words "constitute no essential part of any exposition of ideas." (Internal quotation marks omitted; emphasis omitted.)

R. A. V. v. *St. Paul*, supra, 385. Nevertheless, the federal fighting words doctrine admits the expressive value of abusive words or epithets by protecting such speech and permitting regulation only when such speech would provoke an ordinary person to respond with immediate violence. *Gooding* v. *Wilson*, 405 U.S. 518, 528, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972). On the basis of the foregoing, I conclude that federal precedent does not support the defendant's claim that our state constitution permits the punishment fighting words only if the defendant directly invites a fight.

F

Finally, I turn to the public policy factor of the *Geisler* analysis. The defendant asserts that the fighting words doctrine reflects an archaic conception of honor according to which it is normative for ordinary people to respond to name calling with violence. Additionally, the defendant claims that the Connecticut citizenry is generally peaceable, relying principally upon the state's relatively low incidence of assault for support. In addition, the defendant claims that the fighting words doctrine presents a shifting standard that is ascertained by the "unpredictable" determinations of judges and juries. The state responds that the defendant has failed to sever the connection between abusive language and the likelihood of immediate violence because the statistics she cites do not shed light on the precipitating circumstances of the assaults. Finally, the state claims that the question of whether fighting words actually lead to violent responses is best left to the legislature. I conclude that the fighting words doctrine is consonant with the public policy of the state.

To begin with, abusive language and epithets are not entirely harmless expression. Indeed, there is certain speech that does more than just offend sensibilities or merely cause someone to bristle. One commentator has

observed the following about abusive language: "Often a speaker consciously sets out to wound and humiliate a listener. He aims to make the other feel degraded and hated, and chooses words to achieve that effect. In what they accomplish, insults of this sort are a form of psychic assault; they do not differ much from physical assaults, like slaps or pinches, that cause no real physical hurt. Usually, the speaker believes the listener possesses the characteristics that are indicated by his humiliating and wounding remarks, but the speaker selects the most abusive form of expression to impose the maximum hurt. His aim diminishes the expressive importance of the words." (Footnotes omitted.) K. Greenawalt, "Insults and Epithets: Are They Protected Speech?" 42 Rutgers L. Rev. 287, 293 (1990); see also *Taylor* v. *Metzger*, 152 N.J. 490, 503, 706 A.2d 685 (1998) (" 'The experience of being called "nigger," "spic," "Jap," or "kike" is like receiving a slap in the face. The injury is instantaneous.' "). "It is precisely because fighting words inflict injury that they tend to incite an immediate breach of the peace. Fighting words cause injury through visceral aggression and by attacking the target's rights. Individuals who are injured in this way have a strong tendency to respond on the same level, even though that response may itself be wrongful." (Emphasis omitted; internal quotation marks omitted.) S. Heyman, "Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression," 78 B.U.L. Rev. 1275, 1372 (1998). Indeed, I agree with the Appellate Court's observation that deterring such speech does not limit the freedom of expression, but rather the breach of the peace statute, as limited by the fighting words doctrine, fosters freedom of expression. See *State* v. *Weber*, 6 Conn. App. 407, 416, 505 A.2d 1266 ("[t]he public policy inherent in this statute is not to prevent the free expression of ideas, but to promote a peaceful environment wherein all human endeavors,

including the expression of free ideas, may flourish''), cert. denied, 199 Conn. 810, 508 A.2d 771 (1986).

The defendant claims that the law should not embrace an assumption that reasonable people will respond to abusive language with violence and claims that the people of Connecticut are peaceable, citing a low incidence of assault. This argument has received some traction, principally among commentators. See, e.g., B. Caine, ''The Trouble with 'Fighting Words,' '' 88 Marq. L. Rev. 441, 506 (2004) (noting a lack of evidence to support the ''highly dubious assumption'' that fighting words lead to violence); see also *State* v. *Read*, supra, 165 Vt. 156 (Morse, J., dissenting) (describing fighting words doctrine as ''archaic relic, which found its genesis in more chauvinistic times when it was considered bad form for a man to back down from a fight''). First, as the state points out, the defendant has not severed the connection between abusive language, including epithets, and violence. The assault statistics provided by the defendant shed no light on the precipitating circumstances of the assault cases. In any case, the fighting words doctrine, by requiring the jury to determine whether an *ordinary person* would respond to the abusive language with immediate violence, already contemplates a fluid community standard for fighting words that naturally includes the extent to which the people of this state are peaceable.[34]

Ultimately, I conclude that the fighting words doctrine strikes the appropriate balance. It permits the state to regulate speech that is so abusive and hurtful that it will provoke an immediate violent response, while protecting harsh, but less hurtful speech that has cognizable expressive value. The consequence of limiting the

[34] Additionally, a defendant is protected from punishment for negligently using fighting words by virtue of the fact that the breach of the peace statute has a scienter requirement.

fighting words doctrine to the extent advanced by the defendant would be to protect degrading speech that has the recognized effect of causing palpable impact—enough impact to provoke the listener to immediate violence—in order to preserve, at most, such speech's practical utility as emotive expression. In other words, fighting words are not constitutionally protected merely because they could be used as a tool to express how strongly a speaker feels about an idea or belief. Accordingly, I find that the public policy factor favors the state's position.

G

In resolving this issue, I conclude that the *Geisler* factors do not support the theory advanced by the defendant. This state's constitution expressly contemplates holding a citizen responsible for the abuse of expressive liberty. See Conn. Const., art. I, § 4. As previously discussed in this concurring and dissenting opinion, this state has historically embraced a civil libertarian philosophy that is permissive of government regulation of the abuse of expressive liberties when such abuse tends toward a breach of the peace. The defendant has not advanced a persuasive theory to adopt a historical exception approach to delineating the scope of expressive liberties. Moreover, while there was no statute criminalizing fighting words at the time the Connecticut constitution was ratified, common law principles embraced punishing such abusive language. The defendant's reliance on Oregon case law is unpersuasive because that state employs a different analytic framework to delineate the scope of expressive rights. Also, federal precedents demonstrate that the fighting words doctrine draws its essence from Connecticut law, further supporting a conclusion that protection in this area is coextensive.[35]

[35] The defendant has also suggested that the standard should be a more subjective one, looking at the circumstances of the recipient of the abusive language. The United States Supreme Court has observed that the fighting

Finally, the public policy factor does not demand additional protection for fighting words. I acknowledge that "[t]he Connecticut constitution is an instrument of progress, it is intended to stand for a great length of time and should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens." *State* v. *Dukes*, 209 Conn. 98, 115, 547 A.2d 10 (1988). This progressive principle surely counsels against an interpretation that seeks to apply the mores and norms of yesteryear to modern constitutional law. To be sure, our society's discourse has become progressively coarser. This does not mean, however, that this state's constitution should be converted into a license to gratuitously inflict psychic injury and push people to their limits. The present case makes this point crystal clear. The defendant testified that she

words doctrine may require a narrower scope in cases involving police officers because, in light of their training and experience, they may be expected to exercise a higher degree of restraint. *Houston* v. *Hill*, supra, 482 U.S. 462; *Lewis* v. *New Orleans*, supra, 415 U.S. 135 (Powell, J., concurring); see also Model Penal Code § 250.1, Comment 4 (c) (Tent. Draft No. 13, 1960). Indeed, this court has placed such a judicial gloss on § 53a-181 (a) (3). See *State* v. *DeLoreto*, supra, 265 Conn. 168–69. I conclude that it would not be appropriate to implement a more subjective test. The flaw in such a standard is twofold: (1) it invites the speaker to make value judgments about the proclivity for violence of the individuals involved, and (2) creates corresponding asymmetry in expressive liberty. The first flaw is that it invites the fact finder to make judgments about the circumstances of the individuals involved and the general likelihood that the recipient would respond violently, which invites judgments about the violent tendencies based on traits such as profession, size, age, physical capability, or even gender and race. Second, the asymmetry in expressive liberty is created by virtue of the fact that abusive language against those less likely to respond violently such as the feeble would be protected, whereas abusive language directed against a strong, chauvinistic person would not be protected. See T. Shea, " 'Don't Bother to Smile When You Call Me That'—Fighting Words and the First Amendment," 63 Ky. L.J. 1, 22 (1975); see also K. Greenawalt, supra, 42 Rutgers L. Rev. 297–98. Additionally, a more subjective inquiry would convert the rule from one predicated on a community standard to one that measures free speech protection by the individualized violent proclivities of the recipient of the abusive language, and the touchstone would be whether the recipient did, in fact, respond with violence.

did not believe that her tirade would achieve her original goal of retrieving the money transfer. To the contrary, she explained that she felt hurt by the fact that she was purportedly misled about her ability to retrieve the money transfer and she wanted to hurt Freeman back. Perhaps implicit in her purposely hurtful speech was an emotive expression—the strength of her desire to retrieve her money transfer. Nevertheless, the Connecticut constitution does not demand that citizens should be forced to bear extreme personal denigration—abuse that pushes a person to the brink of violence—so that others may freely employ wanton vilification as a form of expression.

On the basis of the foregoing, I conclude that, under the state constitution, speech directly challenging the listener to a fight is not a necessary element of the fighting words doctrine. Rather, the standard is whether the speech at issue is so abusive that it would provoke an ordinary person to respond with immediate violence.

I next turn to whether the evidence was sufficient to sustain the defendant's conviction under § 53a-181 (a) (5). I conclude that the cumulative force of the evidence in the present case is sufficient to support such a conviction.[36] The defendant, in a belligerent and angry manner, used harsh and scornful language designed to debase Freeman. She insulted her on the basis of her gender, body composition, and apparent suitability for her position as a manager of the store. She utilized the word "cunt," which is generally recognized as a powerfully offensive term. I cannot say that, as a matter of law,

[36] Even though I would reverse the judgment of the trial court on the basis of instructional impropriety; see part IV of this concurring and dissenting opinion; I "must address a defendant's insufficiency of the evidence claim, if the claim is properly briefed and the record is adequate for the court's review, because resolution of the claim may be dispositive of the case and a retrial may be a wasted endeavor." (Internal quotation marks omitted.) *State* v. *Padua*, 273 Conn. 138, 179, 869 A.2d 192 (2005).

this evidence is insufficient to find that the defendant's speech was so offensive that it would provoke an ordinary person to immediately respond with violence.

IV

CHARGE

Next, I address whether the issue of whether the trial court properly instructed the jury on the elements of the fighting words gloss placed on the abusive language prong of § 53a-181 (a) (5). The state claims that the defendant impliedly waived her instructional impropriety claim by pursuant to *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011). The defendant claims that there is insufficient evidence in the record to support an implied waiver under *Kitchens*. Alternatively, the defendant claims that the trial court's failure to properly instruct the jury on the elements of the fighting words doctrine resulted in manifest injustice necessitating reversal under the plain error doctrine. On the basis of this court's recent decision in *State* v. *McClain*, 324 Conn. 802, 155 A.3d 209 (2017), I agree with the defendant that she is entitled to plain error review and a reversal thereunder. Accordingly, I need not decide whether the defendant impliedly waived review under *Kitchens*.

The record reveals the following additional facts. After the jury departed on the first day of the defendant's two day trial, the judge furnished to counsel a first draft of the jury charge. The draft charge was marked as an exhibit and dated September 11, 2014. The judge discussed with counsel an issue pertaining to the jury instruction on the two counts of threatening on which the defendant was ultimately not convicted. See footnote 4 of this concurring and dissenting opinion. The judge indicated that he had drafted additional language regarding those counts over lunch, read the language into the record, and indicated that he would

provide counsel a hard copy of that language the following day. Thereafter, the judge considered a request to charge on the breach of the peace count. Specifically, defense counsel had requested that the jury be instructed that swearing alone is not enough to convict on that count. After a brief colloquy on the issue, the judge stated that his "inclination" was not to give the requested charge and that the "committee charge available online comes at it quite properly . . . ." The judge stated that he was "satisfied that it's sufficient to tell [the jury] what does constitute the crime of breach of the peace." Wrapping up those two issues, the judge stated he had "a pretty good idea of what [his] charge [was going to] consist of." As defense counsel began to raise other issues pertaining to the jury charge, the judge requested that counsel point out any typographical errors in the draft because "[t]he jury [is] getting a copy of this." Defense counsel raised an issue with respect to the instruction on the obscene language prong of § 53a-181 (a) (5). Defense counsel specifically indicated that she was referring to language on page nineteen of the first draft. The judge permitted the jury to be instructed that there was "no evidence of language that meets the legal definition of obscenity . . . ." There was additional discussion regarding the draft instructions and then court adjourned for the day.

The next day, before resuming the presentation of evidence, an off the record supplemental charging conference was held at which a number of the defendant's requests to charge were considered. The defendant's request to charge, a written copy of which was filed with the court that morning, contained citations to the draft charge disseminated the previous day. During the charging conference, the judge discussed with counsel some changes that were made to the first draft and rejected the defendant's requests to charge. The jury instruction relevant to this appeal that was ultimately

provided to the jury was precisely the same as it appeared in the first draft. The challenged instruction is as follows: "Language is 'abusive' if it is so coarse and insulting as to create a substantial risk of provoking violence. The state must prove that the defendant's language had a substantial tendency to provoke violent retaliation or other wrongful conduct. The words used must be 'fighting words,' which is speech that has a direct tendency to cause immediate acts of violence or portends violence. Such speech must be of such a nature that it is likely to provoke the average person to retaliation."

As a threshold matter, I address the proper standard of review for this issue. In her opening brief, the defendant seeks review of her unpreserved claim of instructional impropriety pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). The state claims that the defendant cannot satisfy the third prong of *Golding* in light of her trial counsel's implied waiver of the claim pursuant to our holding in *Kitchens*. The defendant requests in her brief, in the alternative to *Golding* review, that this court review her instructional impropriety claim for plain error. This court recently addressed the question whether a *Kitchens* waiver precludes review under the plain error doctrine. *State* v. *McLain*, supra, 324 Conn. 804. This court answered that question in the negative, concluding that a defendant may seek plain error review of unpreserved claims of instructional impropriety. Id. Because I conclude that the defendant is entitled to relief under the plain error doctrine, I need not decide whether the defendant impliedly waived her right to *Golding* review under *Kitchens*.[37]

[37] The defendant also urges this court to overrule the implied waiver rule set forth in *Kitchens*, incorporating by reference the arguments of the defendant in *State* v. *Herring*, 323 Conn. 526, 147 A.3d 653 (2016). We recently considered the implied waiver rule's continuing vitality in *State* v. *Bellamy*, 323 Conn. 400, 402–403, 147 A.3d 655 (2016). For the reasons set forth therein, I would reject the defendant's request to overrule *Kitchens*.

I begin with a review of the legal principles that govern review of this issue. "[The plain error] doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review." (Internal quotation marks omitted.) *State* v. *Sanchez*, 308 Conn. 64, 76–77, 60 A.3d 271 (2013).

Plain error review is effectuated by application of a two prong test. First, a reviewing court "must determine if the error is indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record." (Internal quotation marks omitted.) Id., 77. Second, "the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain

error unless it has demonstrated that the failure to grant relief will result in manifest injustice." (Internal quotation marks omitted.) Id. In other words, the defendant is not entitled relief under the plain error doctrine unless she "demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis omitted; internal quotation marks omitted.) Id., 78.

"It is . . . constitutionally axiomatic that the jury be [properly] instructed on the essential elements of a crime charged." (Internal quotation marks omitted.) *State* v. *Johnson*, 316 Conn. 45, 58, 111 A.3d 436 (2015). "The due process clause of the fourteenth amendment [to the United States constitution] protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. . . . Consequently, the failure to instruct a jury on an element of a crime deprives a defendant of the right to have the jury told what crimes he is actually being tried for and what the essential elements of those crimes are." (Internal quotation marks omitted.) *State* v. *Padua*, 273 Conn. 138, 166, 869 A.2d 192 (2005). "A jury instruction is constitutionally adequate if it provides the jurors with a clear understanding of the elements of the crime charged, and . . . afford[s] proper guidance for their determination of whether those elements were present." (Internal quotation marks omitted.) *State* v. *Valinski*, 254 Conn. 107, 120, 756 A.2d 1250 (2000).

The constitutional dimension of the instructional impropriety in the present case is magnified by the fact that a precise articulation of the element of the substantive offense is necessary to satisfy the requirements of the first amendment. In order for the state to properly punish pure speech, such speech must fall within one of a few exceedingly narrow classes of speech. *Gooding* v. *Wilson*, supra, 405 U.S. 521–22

("[t]he constitutional guarantees of freedom of speech forbid the [s]tates to punish the use of words or language not within narrowly limited classes of speech" [internal quotation marks omitted]) "Even as to such a class, however . . . the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn . . . ." (Internal quotation marks omitted.) Id., 522. Therefore, it is vital that "[i]n *every case* the power to regulate must be so exercised as not . . . unduly to infringe the protected freedom . . . ." (Citation omitted; emphasis added; internal quotation marks omitted.) Id. Consistent with this principle, the United States Supreme Court has consistently struck down statutes that purported to criminalize speech in excess of first amendment limits. See, e.g., *Houston* v. *Hill*, supra, 482 U.S. 451; *Lewis* v. *New Orleans*, supra, 415 U.S. 130; *Gooding* v. *Wilson*, supra, 522. Properly maintaining a constitutionally adequate boundary between legitimate and illegitimate speech demands the utilization of "sensitive tools . . . ." (Internal quotation marks omitted.) *Gooding* v. *Wilson*, supra, 528.

In the present case, the necessary tool for constitutional consonance is a simple, yet narrowly drawn definition of fighting words: abusive language likely to provoke an ordinary person, as the recipient of such abusive language, to respond with imminent violence. See id. Indeed, *Gooding* explicitly rejected any construction that diminished the imminence and violence aspects of the standard. Id., 526.[38] Consistent with *Good-*

[38] The United States Supreme Court concluded that state appellate authority construing the relevant breach of peace statute was unconstitutional where it was construed as follows: "[W]ords of description, indicating the kind or character of opprobrious or abusive language that is penalized, and the use of language of this character is a violation of the statute, even though it be addressed to one who, on account of circumstances or by virtue of the obligations of office, cannot actually then and there resent the same by a breach of the peace . . . .

"Suppose that one, at a safe distance and out of hearing of any other than the person to whom he spoke, addressed such language to one locked in

ing, the Appellate Court has placed a judicial gloss on § 53a-181 (a) (5) to save the provision from a facial overbreadth attack, concluding that "subdivision (5) proscribes fighting words that tend to induce immediate violence by the person or persons to whom the words are uttered because of their raw effect." *State* v. *Caracoglia*, supra, 78 Conn. App. 110.[39] This authoritative construction of § 53a-181 (a) (5) is succinct, accurate, and comports comfortably with the federal constitutional rule. It is precisely the kind of sensitive tool *Gooding* required to properly punish illegitimate speech. The efficacy of this tool is illusory, however, if it is not implemented in the form of a properly articulated jury instruction. Accordingly, the failure to charge the jury to limit the application of the crime to the constitutional rule deprives the defendant of a fundamental constitutional right. See *State* v. *Anonymous (1978-4)*, 34 Conn. Supp. 689, 695, 389 A.2d 1270 (App. Sess. 1978), overruled on other grounds by *State* v. *Moulton*, 310 Conn. 337, 351–63, 78 A.3d 55 (2013).

Against this backdrop, it is clear that the jury instruction in the present case failed to accurately describe the legal standard for fighting words. The relevant instruction comprises four sentences. While the instruction excels in verbosity, it fails in accuracy. The instruction impermissibly describes the state's burden of proof

a prison cell or on the opposite bank of an impassable torrent, and hence without power to respond immediately to such verbal insults by physical retaliation, could it be reasonably contended that, because no breach of the peace could then follow, the statute would not be violated? . . .

"[T]hough, on account of circumstances or obligations imposed by office, one may not be able at the time to assault and beat another on account of such language, it might still tend to cause a breach of the peace at some future time, when the person to whom it was addressed might be no longer hampered by physical inability, present conditions, or official position." (Internal quotation marks omitted.) *Gooding* v. *Wilson*, supra, 405 U.S. 526, quoting *Elmore* v. *State*, 15 Ga. App. 461, 461–63, 83 S.E. 799 (1914).

[39] The state does not dispute the contours of the federal fighting words doctrine or the substance of the judicial gloss placed on § 53a-181 (a) (5).

to be proof of a broader class of speech than that which would provoke an ordinary person, as recipient of the abusive language, to respond with immediate violence. The second sentence begins the instruction on the legal standard that the state must satisfy with respect to this element of the substantive offense. That sentence starts by stating that "[t]he state must prove that the defendant's language had a substantial tendency to provoke violent retaliation . . . ." If the sentence stopped there, it would be redundant of the first sentence, which defines abusive language to be "so coarse . . . as to create a substantial risk of provoking violence." Instead of stopping there, the instruction impermissibly broadens the scope by indicating that the state could prove the element by showing that the speech tended to provoke "other wrongful conduct." The third sentence does not limit the speech to that which provokes an immediate violent response, but broadens it to speech that "portends violence."[40] The final sentence describes that speech as that which merely provokes "retaliation." Moreover, to the extent the instruction even conveys that the response to the speech must also be violent, it fails to convey that the jury must find that such violence be *imminent*. None of the four sentences that illustrate that standard indicates that a violent response *must* be imminent. The only sentence that does suggest immediacy is the third sentence, but that sentence employs a disjunctive thereby broadening the class of speech.

To a lay juror, the instruction used in the present case describes the legal standard in broad terms. Read together, the jury's instruction was that the state must

[40] Portend is defined as follows: (1) "to give an omen or anticipatory sign of," and (2) "indicate, signify." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003). In other words, the language could be an anticipatory sign or indicate violence from the speaker or others at any time, but not necessarily an immediate violent response from the recipient of the abusive language.

show, at a minimum, that the defendant's language "portend[ed] violence" and was likely to "provoke the average person to retaliation" in the form of "wrongful conduct." In other words, this instruction apprised the jury that it could find that the state met its burden if an ordinary person would respond to the defendant's speech—which could have portended violence by coupling the insulting language with the raising of her cane—with threats or fighting words, not necessarily violence. Therefore, this description of the legal standard that the state must satisfy clearly broadens the class of speech deemed illegitimate beyond constitutionally permissible bounds.[41]

Next, there is no doubt that this jury instruction was manifestly unjust. The harm in permitting a jury to criminally sanction such an impermissibly broad class of speech is readily apparent. It is inimical to our system of justice to punish speech that a properly instructed jury may well have found to be constitutionally protected. The state claims that the language used by the defendant was so abusive that any instructional impropriety was harmless. I disagree. The standard for fighting words is an objective one; it asks the jury to make a finding with respect to the degree of offensiveness of the speech. As previously discussed in this concurring and dissenting opinion, permitting a properly instructed to jury to assess the offensiveness of the speech accounts for the evolution in normative values and culture. See part III G of this concurring and dissenting opinion. In the present case, the dispositive issue for the jury with respect to this count was principally the degree of offensiveness of the defendant's language; the defendant admitted berating Freeman and did not stridently dispute the testimony of the state's

[41] The instruction also fails to expressly state that the speech must provoke a violent response from the person to whom the abusive language was directed.

witnesses regarding the precise language she used. The instruction in the present case apprised the jury of a standard that permitted it to consider an impermissibly broad class of speech sufficient to find guilt. The federal constitution—as well as fundamental fairness—demands that a finding with respect to the degree of offensiveness of the speech—i.e., whether the speech would provoke an ordinary person, as the recipient of the abusive language, to respond with immediate violence—be made, in the first instance, by a properly instructed jury. Accordingly, I would reverse the judgment of the trial court and remand the case to that court for a new trial.

In conclusion, I would decline to review whether there was sufficient evidence to sustain the defendant's conviction under the federal fighting words standard because she has failed to adequately brief her sufficiency claim under this standard. Even if I were to reach the issue, however, I would conclude that the test proposed by the majority—that is, a test that evaluates the individual circumstances of the addressee at a granular level—is not appropriate and is contrary to United States Supreme Court precedent regarding the "ordinary person" test. *Gooding* v. *Wilson*, supra, 405 U.S. 528. Moreover, I would reject the defendant's claim that the Connecticut constitution affords greater protections than the first amendment in this context. Finally, I would conclude that the trial court's failure to properly instruct the jury on the elements of the fighting words doctrine necessitates a new trial.

Therefore, I concur with the majority to the extent that it reverses the judgment of the trial court, but would remand the matter for a new trial.

ORDERS

CONNECTICUT REPORTS

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FEDERAL NATIONAL MORTGAGE ASSOCIATION
v. RICKY MORNEAU ET AL.

The named defendant's petition for certification for appeal from the Appellate Court, 171 Conn. App. 904 (AC 38842), is denied.

Ricky Morneau, self-represented, in support of the petition.

Adam L. Avallone, in opposition.

Decided June 28, 2017

STATE OF CONNECTICUT *v.* CHARLES WILLIAMS

The defendant's petition for certification for appeal from the Appellate Court, 172 Conn. App. 820 (AC 37923), is denied.

Donald F. Meehan, assigned counsel, in support of the petition.

Sarah Hanna, assistant state's attorney, in opposition.

Decided June 28, 2017

MITCHELL DEESSO *v.* ROBERT LITZIE, JR.

The plaintiff's petition for certification for appeal from the Appellate Court, 172 Conn. App. 787 (AC 38046), is denied.

Jeremy C. Virgil and *Denise A. Krall*, in support of the petition.

Decided June 28, 2017

STATE OF CONNECTICUT *v.* MARWAN CHANKAR

The defendant's petition for certification for appeal from the Appellate Court, 173 Conn. App. 227 (AC 37782), is denied.

Jennifer B. Smith, assigned counsel, in support of the petition.

Decided June 28, 2017

STATE OF CONNECTICUT *v.* MITCHELL HENDERSON

The defendant's petition for certification for appeal from the Appellate Court, 173 Conn. App. 119 (AC 38381), is granted, limited to the following issue:

"Did the Appellate Court properly conclude that the defendant's sentence was not illegal, does not violate the double jeopardy clause, and does not run contrary to legislative intent?"

ESPINOSA, J., did not participate in the consideration of or decision on this petition.

Judie Marshall and *Walter Bansley IV*, assigned counsel, in support of the petition.

James M. Ralls, assistant state's attorney, in opposition.

Decided June 28, 2017

WELLS FARGO BANK *v.* PATRICIA BRACA ET AL.

The petition by the defendant John A. Braca, Jr., for certification for appeal from the Appellate Court (AC 40182) is denied.

John A. Braca, Jr., self-represented, in support of the petition.

David M. Bizar, in opposition.

Decided June 28, 2017

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CONNECTICUT APPELLATE REPORTS

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

BANK OF AMERICA, N.A., TRUSTEE *v.* STEVEN CHAINANI ET AL.
(AC 38252)

Keller, Mullins and Harper, Js.

Syllabus

Pursuant to the rule of practice (§ 23-18 [a]), "[i]n any action to foreclose a mortgage where no defense as to the amount of the mortgage debt is interposed, such debt may be proved by presenting to the judicial authority the original note and mortgage, together with the affidavit of the plaintiff or other person familiar with the indebtedness . . . ."

The plaintiff sought to foreclose a mortgage on certain of the defendant's real property after the defendant had defaulted on a promissory note. In the defendant's answer, he denied the debt was in default and averred insufficient knowledge to admit or deny the alleged amount of the debt and left the plaintiff to its proof. At trial, pursuant to § 23-18 (a), the plaintiff submitted two affidavits of debt to establish the amount of the debt owed. The defendant objected that § 23-18 (a) did not apply because he had put forth a defense implicating the amount of the debt. The trial court considered one of the affidavits to establish the amount of the debt, determined the debt to be $3,268,499.34, and rendered a judgment of strict foreclosure, from which the defendant appealed to this court. On appeal, the defendant claimed that the trial court erred in admitting the affidavit of debt into evidence under § 23-18 (a) because he disputed the amount of the debt via his answer that contained responses that were sufficient to bar the affidavit's admission, and thus the affidavit was inadmissible hearsay evidence that deprived the defendant of his right to cross-examine witnesses on the amount of the debt. *Held*:

1. Contrary to the parties' claims that the abuse of discretion standard of review applied to this case, this court clarified that in claims involving an affidavit of debt admitted under § 23-18 (a), the appropriate standard is plenary review; the defendant's claim that the trial court erred in determining that § 23-18 (a) applied is properly characterized as challenging the trial court's determination that an exception to the general prohibition of hearsay applies, and whether an exception to the hearsay rule applies is a question of law over which this court's review is plenary.
2. The trial court did not err in admitting the affidavit into evidence and determining that § 23-18 (a) applied, as the defendant never raised any defense to the amount of the debt sufficient to prohibit the admission of affidavits of debt under that rule of practice; a defense challenging the amount of a debt must be actively made, and the defense must be squarely focused on the amount of the debt rather than other ancillary matters, such as whether the loan is in default, and the defendant's proffered challenges here that he had insufficient knowledge to admit or deny the amount of the debt and that the debt was not in default did not amount to defenses as to the amount of the debt.

Argued January 11—officially released July 11, 2017

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendants JP Morgan Chase Bank, N.A., et al., were defaulted for failure to appear; thereafter, the defendant Webster Bank was defaulted for

failure to plead; subsequently, the court, *Hon. A. William Mottolese*, judge trial referee, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant appealed to this court. *Affirmed.*

Roy W. Moss, for the appellant (named defendant).

Stephen I. Hansen, for the appellee (plaintiff).

Opinion

HARPER, J. In this appeal from a judgment of strict foreclosure after a trial, the defendant, Steven Chainani,[1] challenges the applicability of Practice Book § 23-18 (a),[2] under which the plaintiff, Bank of America, N.A.,[3] was permitted to establish the amount of the debt at issue via an affidavit of debt, rather than through the presentation of live testimony from witnesses. The defendant's arguments implicate two affidavits that were admitted at separate hearings; however, his claims attack only the use of these affidavits to the extent they were used to establish the amount of the debt, for which the court used only the second affidavit.[4] The relevant

[1] The complaint also named as defendants JP Morgan Chase Bank, N.A., Levco Tech, Inc., Webster Bank, and Patriot National Bank. Each of these defendants was alleged to hold a subsequent encumbrance on the subject property. Of these defendants, only Webster Bank filed an appearance. None of these additional defendants are participating in the appeal, and all references to the defendant are references to Steven Chainani.

[2] Practice Book § 23-18 (a) provides that "[i]n any action to foreclose a mortgage where no defense as to the amount of the mortgage debt is interposed, such debt may be proved by presenting to the judicial authority the original note and mortgage, together with the affidavit of the plaintiff or other person familiar with the indebtedness, stating what amount, including interest to the date of the hearing, is due, and that there is no setoff or counterclaim thereto."

[3] The plaintiff in this action is the successor to LaSalle Bank N.A., and is acting as trustee on behalf of the holders of the "Thornburg Mortgage Securities Trust 2007-4 Mortgage Home Loan Pass-Through Certificates, Series 2007-4."

[4] Because the court used only the second affidavit to establish the amount of the debt, we need not consider the defendant's claims regarding the first affidavit. We note that the same legal analysis applies to both affidavits

affidavit was admitted at a hearing to determine the form of the judgment and was used to determine the amount of the debt pursuant to § 23-18 (a). The defendant argues that the trial court erred because § 23-18 (a) was not applicable to this case. He asserts that this was not harmless error because the affidavit was the only evidence offered to establish the amount of the debt. For the reasons that follow, we conclude that the affidavit was admitted properly under § 23-18 (a) and, accordingly, we affirm the judgment of the trial court.

The following procedural history and facts are relevant to our consideration. On July 6, 2007, the defendant executed a promissory note in favor of the Bank of New Canaan in exchange for a loan in the amount of $2,316,000, which was secured by a mortgage on the defendant's real property located at 215 Springwater Lane in the town of New Canaan. Thereafter, on July 13, 2007, the Bank of New Canaan assigned the note to Thornburg Mortgage Home Loans, Inc. (Thornburg), and it was recorded on April 9, 2009. Thornburg, in turn, assigned the note to the plaintiff, as trustee,[5] on February 9, 2011, and it was recorded on February 17, 2011. By virtue of the latter assignment, the plaintiff is now the holder of the note and mortgage. The defendant defaulted on the note, and the plaintiff elected to declare the unpaid balance under the note to be due in full and to foreclose the mortgage securing the note.

On March 5, 2012, the plaintiff commenced this action to foreclose by service of process on the defendant. The defendant filed an answer and special defense. The answer denied that the debt was in default and averred insufficient knowledge to admit or deny the alleged

under Practice Book § 23-18 (a) and that were we to consider the defendant's arguments concerning the first affidavit, we would nevertheless reach the same conclusion, for the same reasons, as we do regarding the second affidavit.

[5] See footnote 3 of this opinion.

amount of the debt and left the plaintiff to its proof.[6] Prior to trial, a joint trial management report was submitted by the parties in which they stated the sole factual and legal issue in dispute was "[w]hether or not [the] [p]laintiff . . . has standing to commence this foreclosure action." The matter was tried to the court on December 17, 2014.

Although we will not consider the defendant's arguments concerning the first affidavit as previously noted; see footnote 4 of this opinion; it is necessary at this point to provide some background on the first affidavit because the defendant's objection to the second affidavit incorporated his arguments as to the first affidavit. At trial, pursuant to Practice Book § 23-18 (a), the plaintiff offered the first affidavit, signed by the plaintiff's vice president, Michelle Simon (Simon affidavit), along with the original note and mortgage.[7] The court admitted the Simon affidavit into evidence over the defendant's objection that § 23-18 (a) did not apply because he had put forth a defense implicating the amount of the debt. At the conclusion of this proceeding, the court reserved judgment in order to consider motions made during trial.[8]

After concluding that the plaintiff had standing to foreclose, the court held a hearing on May 27, 2015, to determine the amount of the debt and the form of the judgment to be rendered. In advance of that hearing, the plaintiff submitted the second affidavit of debt executed by one of the plaintiff's agents, KaJay Williams

[6] The defendant also raised a special defense, which is not at issue in this appeal. The defendant's special defense was that "[the] [p]laintiff failed to comply with preacceleration and preforeclosure notice requirements set forth in the alleged mortgage."

[7] The Simon affidavit averred a debt totaling $3,070,761.34.

[8] The defendant made an oral motion to dismiss the case, and the court provided the defendant with three weeks to file a brief in support of the motion. After the defendant failed to file the brief, the motion was denied on March 19, 2015.

(Williams affidavit), in support of the plaintiff's motion for strict foreclosure. The plaintiff sought to use the Williams affidavit to establish, pursuant to Practice Book § 23-18 (a), that the updated debt, taking into account additional costs, fees, and interest accrued since the Simon affidavit was submitted, was now $3,268,499.34. When the plaintiff offered the Williams affidavit at the hearing, the defendant objected to its admission, stating that his objection was the same as it was to the Simon affidavit, namely, that § 23-18 (a) did not apply because he had put forth a defense implicating the amount of the debt. The defendant did not inform the court of any new legal arguments, evidence, or witnesses that he anticipated presenting to dispute the amount of the debt contained in the Williams affidavit. The trial court overruled the objection on the ground that the Williams affidavit, like the Simon affidavit, was admissible under § 23-18 (a). Thereafter, on July 8, 2015, the court found in favor of the plaintiff, determined the debt to be $3,268,499.34, and rendered a judgment of strict foreclosure. This appeal followed.

The defendant argues that the trial court erred in admitting the Williams affidavit under Practice Book § 23-18 (a) because he had disputed the amount of the debt. He argues that his answer contained responses to the allegations of the plaintiff's complaint that were sufficient to bar admission of the affidavits under § 23-18 (a). Because § 23-18 (a) did not apply, he argued that the affidavit was inadmissible hearsay and its admission deprived the defendant of his right to cross-examine the witness on this issue. The plaintiff counters that nothing in the defendant's answer to the complaint was sufficient to render § 23-18 (a) inapplicable.

The parties have asserted that the abuse of discretion standard of review applies in this case.[9] After carefully

[9] The defendant's brief recites both the plenary and abuse of discretion standards, however, he applies only the abuse of discretion standard in his analysis. The plaintiff's brief acknowledges the defendant's reference to the

reviewing the limited appellate decisions involving Practice Book § 23-18 (a), we cannot agree. There is ambiguity in the case law involving § 23-18 (a) claims, with many decisions not articulating or clearly applying a standard of review.[10] Some decisions apply, as the parties in the present case urge, the abuse of discretion standard.[11] One notable outlier applies the clearly erro-

plenary review standard and states that such standard is not applicable to claims involving Practice Book § 23-18 (a) affidavits. This dispute reveals the necessity for this court to clarify the appropriate standard of review to be applied.

[10] The following cases do not clearly state or apply a particular standard of review in analyzing claims involving Practice Book § 23-18 (a): *Burritt Mutual Savings Bank of New Britain* v. *Tucker*, 183 Conn. 369, 374–75, 439 A.2d 396 (1981) (§ 23-18 [a] inapplicable where defaulted defendant objected to proffered affidavit on ground that amounts claimed were inaccurate and offered his own testimony regarding calculation of debt); *Saunders* v. *Stigers*, 62 Conn. App. 138, 144, 773 A.2d 971 (2001) (counterclaim under Fair Debt Collection Practices Act was separate claim and not defense to amount of debt such that § 23-18 [a] was inapplicable); *Busconi* v. *Dighello*, 39 Conn. App. 753, 771–72, 668 A.2d 716 (1995) (defense to liability for debt is not defense to amount of debt and is insufficient to render § 23-18 [a] inapplicable), cert. denied, 236 Conn. 903, 670 A.2d 321 (1996); *Suffield Bank* v. *Berman*, 25 Conn. App. 369, 372–74, 594 A.2d 493 (challenge to amount of debt need not be disclosed prior to judgment hearing but defense to liability must be disclosed; defense to liability insufficient to prevent application of § 23-18 [a]), cert. dismissed, 220 Conn. 913, 597 A.2d 339, cert. denied, 220 Conn. 914, 597 A.2d 340 (1991); *Connecticut National Bank* v. *N. E. Owen II, Inc.*, 22 Conn. App. 468, 473, 578 A.2d 655 (1990) (claim of insufficient knowledge to admit or deny amount of debt is not defense to amount sufficient to render § 23-18 [a] inapplicable). Additionally, this court's decision in *Patriot National Bank* v. *Braverman*, 134 Conn. App. 327, 38 A.3d 267 (2012), did not state the applicable standard of review, but *Patriot National Bank* perhaps is distinguishable from the others in this list on the fact that, although the court mentioned the issue, it ultimately did not analyze or decide the issue because it determined the defendant was not aggrieved. See id., 331–32.

[11] The following cases apply the abuse of discretion standard in analyzing claims involving Practice Book § 23-18 (a): *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 403–405, 89 A.3d 392 (unsupported challenge to affiant's credentials and qualifications to aver amount of debt and challenge to veracity of affiant's signature are not challenges to amount of debt such that § 23-18 [a] is inapplicable), cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014); *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 186–87, 73 A.3d 742

neous standard.[12] Therefore, we take this opportunity to clarify the appropriate standard of review to be applied in claims involving an affidavit of debt admitted under § 23-18 (a). As will be explained herein, "[t]he scope of our appellate review depends upon the proper characterization of the rulings made by the trial court." (Internal quotation marks omitted.) *Meyers* v. *Livingston*, *Adler*, *Pulda*, *Meiklejohn & Kelly*, *P.C.*, 311 Conn. 282, 290, 87 A.3d 534 (2014).

In this appeal, the proper characterization of the trial court's ruling is clarified by examining the nature of an affidavit of debt and the function of Practice Book § 23-18 (a) in foreclosures. Without question, an affidavit of debt is hearsay evidence because it is an out-of-court statement, by an absent witness, that is offered to prove the truth of the amount of the debt averred in the affidavit. See *Midland Funding*, *LLC* v. *Mitchell-James*, 163

(2013) (objection to affidavit of debt seeking to cross-examine affiant does not state challenge to amount of debt sufficient to defeat applicability of § 23-18 [a]); *National City Mortgage Co.* v. *Stoecker*, 92 Conn. App. 787, 797–99, 888 A.2d 95 (defendant made sufficient challenge to amount of debt to prohibit application of § 23-18 [a] where multiple objections to proffered affidavit of debt sought to cross-examine representative of plaintiff specifically to ascertain what taxes and assessments plaintiff claimed to incur, including when they were paid, by whom, and why), cert. denied, 277 Conn. 925, 895 A.2d 799 (2006); *Webster Bank* v. *Flanagan*, 51 Conn. App. 733, 736–37 and 748–50, 725 A.2d 975 (1999) (affidavit of debt not admissible under § 23-18 [a] may nevertheless be admissible under business record exception to hearsay rule). Additionally, the court in *TD Banknorth*, *N.A.* v. *White Water Mountain Resorts of Connecticut*, *Inc.*, 133 Conn. App. 536, 540 n.6, 37 A.3d 766 (2012), did not reach the issue involving § 23-18 (a) because the claim was not properly raised, but the court described the matter as an evidentiary ruling and presumably, therefore, would have applied the abuse of discretion standard.

[12] In *Bank of America*, *FSB* v. *Franco*, 57 Conn. App. 688, 694–95, 751 A.2d 394 (2000), the defendant, claiming plenary review, argued that there was not sufficient evidence in the record to support the court's findings regarding the amount of debt because the only evidence of the amount had been an affidavit of debt that the defendant claimed was improperly admitted under Practice Book § 23-18 (a). The court characterized this claim as one regarding the adequacy of the evidence in record and employed the clearly erroneous standard of review.

Conn. App. 648, 655, 137 A.3d 1 (2016) ("Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. . . . Unless subject to an exception, hearsay is inadmissible." [Citation omitted.]); *National City Mortgage Co.* v. *Stoecker*, 92 Conn. App. 787, 798–99, 888 A.2d 95 (2006) (when § 23-18 [a] does not apply, proffered affidavit of debt is subject to hearsay rules). As is relevant here, the purpose of § 23-18 (a) is to serve as an exception to the general prohibition of hearsay evidence when appropriate circumstances arise, namely, that the amount of the debt is not in dispute. *National City Mortgage Co.* v. *Stoecker*, supra, 798–99. Therefore, the defendant's claim that the trial court erred in determining that § 23-18 (a) applies is most properly characterized as challenging the trial court's determination that an exception to the general prohibition of hearsay applies to the affidavit of debt.

"A trial court's decision to admit evidence, *if premised on a correct view of the law* . . . calls for the abuse of discretion standard of review. . . . In other words, only after a trial court has made the *legal determination* that a particular statement . . . is subject to a hearsay exception, is it [then] vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Midland Funding, LLC* v. *Mitchell-James*, supra, 163 Conn. App. 653.[13] Therefore, a trial court's legal determination of whether Practice Book § 23-18 (a) applies is a question of law over which our review is plenary.[14] See *Weaver* v.

[13] We note there are situations where a claim that involves Practice Book § 23-18 (a) could require the application of the clearly erroneous standard of review. See footnote 12 of this opinion. The present appeal does not present such a case.

[14] Once the initial legal determination that Practice Book § 23-18 (a) applies is made, the trial court is then faced with the discretionary decision of whether to admit or bar the affidavit based on an appropriate legal ground,

McKnight, 313 Conn. 393, 426, 97 A.3d 920 (2014) (whether hearsay exception applies is legal question demanding plenary review).

The defendant argues that Practice Book § 23-18 (a) does not apply here because he challenged the amount of the debt claimed by the plaintiff. He identifies his answer to the complaint as sufficiently denying the amount of the debt to render § 23-18 (a) inapplicable. Specifically, he asserts that this was achieved by denying that the debt was in default and claiming insufficient knowledge to admit or deny the amount of the debt. He argues that the trial court should have understood these responses to be a challenge to the amount of the debt such that § 23-18 (a) would not apply. The plaintiff rejects these claims and argues that the defendant failed to articulate a defense to the amount of the debt prior to trial.[15]

such as an apparent defect in the affiant's source of knowledge or a defect in the execution of the affidavit that renders it unreliable. *Midland Funding, LLC* v. *Mitchell-James*, supra, 163 Conn. App. 655–56; see also, e.g., *Webster Bank* v. *Flanagan*, 51 Conn. App. 733, 748–49, 725 A.2d 975 (1999) (discussing fact affidavit is witnessed by notary public is one characteristic suggesting reliability). The defendant has not raised any challenges to the discretionary aspect of the trial court's decision to admit the affidavit under § 23-18 (a).

[15] The plaintiff seems to argue that any challenge to the amount of the debt that was not raised prior to trial is not cognizable for the purposes of determining the applicability of Practice Book § 23-18 (a). This position is not supported by the case law. The case law is clear that "defenses relating to the mathematical calculation of the debt need not be disclosed but defenses that go to the issue of the defendant's liability for the debt must be disclosed." *Suffield Bank* v. *Berman*, supra, 25 Conn. App. 374; see also *Burritt Mutual Savings Bank of New Britain* v. *Tucker*, 183 Conn. 369, 374–75, 439 A.2d 396 (1981) (objection to admission of affidavit sufficient where defendant disputed amounts averred regarding principal of loan and charges for interest, taxes, and late payment penalties); *Patriot National Bank* v. *Braverman*, 134 Conn. App. 327, 331–32, 38 A.3d 267 (2012) (motion to open judgment challenging amount of debt was sufficient to impact applicability of § 23-18 [a] and plaintiff consented to reduction of debt by amount claimed by defendant); *Busconi* v. *Dighello*, 39 Conn. App. 753, 771–72, 668 A.2d 716 (1995) (challenges to amount of debt sufficient for § 23-18 [a] may be raised through presentation of evidence or arguments), cert. denied, 236 Conn. 903, 670 A.2d 321 (1996). Moreover, even where a

Practice Book § 23-18 (a) provides that in any foreclosure action "where no defense as to the amount of the mortgage debt is interposed," the amount of the debt may be proved by submission of an affidavit executed by an affiant familiar with the details of the debt. "A defense is that which is offered and alleged by a party proceeded against in an action or suit, as a reason in law or fact why the plaintiff should not recover or establish what he seeks. . . . In a mortgage foreclosure action, a defense to the amount of the debt must be based on some articulated legal reason or fact." (Citation omitted; internal quotation marks omitted.) *Connecticut National Bank* v. *N. E. Owen II, Inc.*, 22 Conn. App. 468, 472–73, 578 A.2d 655 (1990). The case law is clear that a defense challenging the amount of the debt must be actively made in order to prevent the application of § 23-18 (a). "[A] mere claim of insufficient knowledge as to the correctness of the amount stated in the affidavit of debt is not a defense for purposes of [§ 23-18 (a)]." Id., 473.

It is axiomatic that such a defense may be raised by pleading a special defense attacking the amount of the debt claimed, but it may also be raised by objection, supported with evidence and arguments challenging the amount of the debt, upon the attempted introduction of the affidavit in court. See, e.g., *Suffield Bank* v. *Berman*, 25 Conn. App. 369, 372–74, 594 A.2d 493 (challenge to amount of debt, unlike defense to liability, need not be disclosed prior to judgment hearing), cert. dismissed, 220 Conn. 913, 597 A.2d 339, cert. denied, 220 Conn.

defendant has been defaulted for failure to disclose a defense, that defendant has not waived the opportunity to contest the amount of the debt and the plaintiff is not relieved of the obligation to prove its claimed debt. *TD Banknorth, N.A.* v. *White Water Mountain Resorts of Connecticut, Inc.*, 133 Conn. App. 536, 545–46, 37 A.3d 766 (2012); see id., 546 ("the effect of a default [for failure to disclose defenses] is to preclude the defendant from making any further defense in the case so far as *liability* is concerned" [emphasis added]).

914, 597 A.2d 340 (1991). A defense, however raised, must be squarely focused on the amount of the debt rather than other matters that are ancillary to the amount of the debt, such as whether the loan is in default, which is a matter of liability, or challenges that attack the credibility of the affiant or defects in the execution of the affidavit itself. See *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 403–405, 89 A.3d 392 (challenge to affiant's credentials and qualifications are not challenges to amount of debt), cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014); *Busconi* v. *Dighello*, 39 Conn. App. 753, 771–72, 668 A.2d 716 (1995) (defense to liability does not implicate the amount of the debt), cert. denied, 236 Conn. 903, 670 A.2d 321 (1996). Similarly, where a counterclaim is made by a defendant in a mortgage foreclosure action, that counterclaim does not affect the applicability of Practice Book § 23-18 (a) unless it actually challenges in some manner the amount of the debt alleged by the plaintiff. See *Saunders* v. *Stigers*, 62 Conn. App. 138, 144, 773 A.2d 971 (2001) (counterclaim under Fair Debt Collection Practices Act was separate claim and not defense to amount of debt).

The pleadings that the defendant characterizes as challenges to the amount of the debt simply are not defenses to the amount of the debt. Regarding his claim of insufficient knowledge to admit or deny the amount of the debt, the case law is clear that this is not a defense to the debt sufficient to bar application of Practice Book § 23-18 (a). *Connecticut National Bank* v. *N. E. Owen II, Inc.*, supra, 22 Conn. App. 473. Turning to the defendant's denial that the debt was in default, this is similarly not a defense that negates the applicability of § 23-18 (a). To deny that the debt is in default is a defense that goes to liability, not the amount of the debt, because whether a debt is owed—liability—is a separate matter from whether the amount that is claimed to be owed is accurate. See *Busconi* v. *Dighello*, supra, 39 Conn.

App. 771–72 (defense to liability for debt is not defense to amount).

Additionally, on both occasions when the trial court admitted an affidavit of debt over the defendant's objection, he failed to make further argument or explanation that would have supported a challenge to the debt. The defendant could have responded to the court's questions regarding his objections by informing the court that he had new legal arguments, evidence, or witnesses to present that would support his contention that the debt figure averred to in the affidavit was inaccurate. The defendant, however, made no such attempt.

It is clear that the defendant never raised any defense to the amount of the debt sufficient to prohibit the admission of affidavits of debt under Practice Book § 23-18 (a). Accordingly, we conclude that the trial court did not err in its legal determination that § 23-18 (a) applies in this case.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* EVER LEE HOLLEY (AC 38115)

Alvord, Sheldon and Mullins, Js.

Syllabus

Convicted of the crime of possession of narcotics with intent to sell by a person who is not drug-dependent, the defendant appealed to this court, claiming that the trial court improperly instructed the jury on reasonable doubt. Specifically, he claimed that the court improperly instructed the jury that reasonable doubt "is such a doubt as, in serious affairs that concern you, you will heed; that is, such a doubt as would cause reasonable men and women to hesitate to act upon it in matters of importance." He also claimed that the trial court improperly denied his motion to suppress certain evidence that had been seized by police during a warrantless search of his residence. The defendant, who was on parole, claimed that a warrantless search of a parolee's residence that fails

to comply with certain administrative directives of the Department of Correction is unconstitutional, even if the parolee had previously executed an agreement authorizing such searches as a condition of his parole. The trial court rejected that argument and also denied the motion to suppress on the ground that the defendant had orally consented to the search. *Held*:

1. The defendant's claim that the phrase "upon it" in the court's instruction concerning reasonable doubt effectively diluted the state's burden of proof was unavailing; our Supreme Court repeatedly has upheld the use of instructions employing the very language challenged by the defendant, and this court, as an intermediate appellate court, was bound by that controlling precedent.
2. The defendant could not prevail on his claim that the jury was misled by the trial court's instructions regarding proof beyond a reasonable doubt, which was based on his claim that the trial court improperly orally instructed the jury that reasonable doubt is such doubt as "you will heed," rather than "you would heed," as was stated in the court's written instructions; the defendant having failed to object to the discrepancy between the written and oral instructions, his claim was unpreserved, and he failed to demonstrate the existence of a constitutional violation that deprived him of a fair trial pursuant to the third prong of the test set forth in *State* v. *Golding* (231 Conn. 233), as there was no reasonable possibility that the jury was confused by the court's use of "will" instead of "would" when the jury had before it the written instructions, and both sets of charges adequately explained the principles governing burden of proof, the presumption of innocence and reasonable doubt.
3. This court dismissed as moot the defendant's claim that the trial court improperly denied his motion to suppress evidence that was seized in a warrantless search of his residence; there was no practical relief that could be afforded to the defendant with respect to his claim that his constitutional rights were violated when the police did not follow certain administrative regulations concerning searches of a parolee's residence, as the trial court also determined that the defendant had orally consented to the search of his residence, which was an independent basis that supported the trial court's decision to deny the motion to suppress that was not challenged by the defendant on appeal.

Argued February 6—officially released July 11, 2017

Procedural History

Two part information charging the defendant, in the first part, with the crime of possession of narcotics with intent to sell, and, in the second part, with being a subsequent offender, brought to the Superior Court in the judicial district of Middlesex, where the court,

Diana, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the first part of the information was tried to the jury; verdict of guilty; subsequently, the second part of the information was tried to the jury; verdict of guilty; thereafter, the court granted the defendant's motion for a judgment of acquittal on the second part of the information and rendered judgment in accordance with the verdict as to the first part of the information, and the defendant appealed to this court. *Appeal dismissed in part; affirmed.*

Jeremiah Donovan, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, was *Peter A. McShane*, state's attorney, for the appellee (state).

Opinion

MULLINS, J. The defendant, Ever Lee[1] Holley, appeals from the judgment of conviction, rendered after a jury trial, of possession of a narcotic substance with intent to sell by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b). On appeal, the

[1] It appears that there was some confusion in the trial court proceedings regarding the defendant's first name. The state's substituted long form information charged him as "James E. Holley, a.k.a., Ever Lee Holley," but the proceedings in the trial court were captioned as *State* v. *Ever Lee Holley*. In its appellate brief, the state now refers to the defendant as "Ever Lee Holley, also known as James Holley." Conversely, the defendant asserts in his appellate brief that his birth name is actually "James Holley." Specifically, he notes that "[a]t sentencing it was determined that the name on [the defendant's] birth certificate is 'James.' " A review of the sentencing transcript reveals that the defendant appears to assert the opposite of what the presentence investigation report discovered with respect to his first name. The trial court stated at the sentencing hearing: "Several discrepancies have arisen regarding Mr. Holley's name, he's been using his dead brother's name of James as an alias for decades, *but his birth name is Ever Lee Holley*." (Emphasis added.) In any event, because the case was docketed in the trial court and in this court as *State of Connecticut* v. *Ever Lee Holley*, and neither party has filed a motion to correct the defendant's name, the case retains its original caption.

defendant claims that the trial court improperly (1) instructed the jury on reasonable doubt and (2) denied his motion to suppress evidence. We reject both of these claims and, therefore, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On December 11, 2012, the narcotics unit of the Middletown Police Department executed a search and seizure warrant on the residence of Rachel Sweeney at 165 South Main Street in Middletown. Sweeney was arrested on drug possession charges as a result of the search.

At the time the warrant was executed, the defendant and another person were sitting in a car parked in the area behind 165 South Main Street. One officer detained the defendant while others searched Sweeney's residence. After police completed the search, David Skarzynski, a parole officer who had assisted the Middletown officers in executing the warrant, was alerted to the defendant's presence outside the residence. Skarzynski recognized the defendant as a parolee who previously had been under his supervision. Skarzynski asked the defendant for permission to search his residence at 29 Avon Court in Middletown. The defendant consented.

Skarzynski and officers with the narcotics unit traveled to the defendant's residence. Upon conducting a search of the defendant's bedroom, the officers recovered, among other items, 16.529 grams of crack cocaine from a locked safe located underneath the defendant's bed.

The defendant was arrested and charged with possession of a narcotic substance with the intent to sell in violation of § 21a-278 (b). After a jury found the defendant guilty of that offense,[2] the court sentenced him

[2] In a part B information, the state also had charged the defendant with possession of a narcotic substance with the intent to sell as a subsequent

to ten years incarceration, five years of which were mandatory, followed by eight years of special parole. This appeal followed.

I

REASONABLE DOUBT INSTRUCTION

The defendant's first claim is that part of the court's instruction on reasonable doubt was improper. Specifically, he argues that the court erred in describing reasonable doubt as follows: "[Reasonable doubt] is such a doubt as, in serious affairs that concern you, you will heed; that is, such a doubt as would cause reasonable men and women to hesitate to act upon it in matters of importance." The defendant asserts that the language used in this part of the court's charge was defective in two respects. We address both of his linguistic challenges herein.

A

The gravamen of the defendant's first challenge is that the "insertion . . . of the prepositional phrase 'upon it' render[ed] the instruction nonsensical," causing it to "mean the opposite of what it should." He argues that reversal is required because this part of the instruction effectively diluted the state's burden of proof by "muddl[ing] the description of what a reasonable doubt is" and by failing to "impress . . . upon the [jury] the need to reach a subjective state of *near certitude* of [the defendant's] guilt." (Emphasis altered; internal quotation marks omitted.)

The state responds that the defendant concedes that our appellate courts have upheld instructions

offender. Although the jury found the defendant guilty of being a subsequent offender, the court granted the defendant's motion for acquittal with respect to this part of the jury's verdict.

employing the "upon it" language. Therefore, it contends that this court, as an intermediate court, is constrained to following that controlling precedent. We agree with the state.

We begin by identifying our standard of review and outlining the relevant legal principles. "It is fundamental that proof of guilt in a criminal case must be beyond a reasonable doubt. . . . The [reasonable doubt concept] provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law. . . . At the same time, by impressing upon the [fact finder] the need to reach a subjective state of near certitude of the guilt of the accused, the [reasonable doubt] standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself. . . . [Consequently, the defendant] in a criminal case [is] entitled to a clear and unequivocal charge by the court that the guilt of the [defendant] must be proved beyond a reasonable doubt." (Citations omitted; internal quotation marks omitted.) *State* v. *Jackson*, 283 Conn. 111, 116–17, 925 A.2d 1060 (2007).

"Because our system entrusts the jury with the primary responsibility of implementing the substantive protections promised by the reasonable doubt standard, reasonable doubt jury instructions which appropriately convey [the reasonable doubt concept] are critical to the constitutionality of a conviction." *United States* v. *Doyle*, 130 F.3d 523, 535 (2d Cir. 1997). Accordingly, "[a] claim that the court's reasonable doubt instruction diluted the state's burden of proof and impermissibly burdened the defendant is of constitutional magnitude." *State* v. *Alberto M.*, 120 Conn. App. 104, 115, 991 A.2d 578 (2010).

"A challenge to the validity of jury instructions presents a question of law over which this court has plenary

review. . . . It is well settled that jury instructions are to be reviewed in their entirety. . . . When the challenge to a jury instruction is of constitutional magnitude, the standard of review is whether it is reasonably possible that the jury [was] misled. . . . In determining whether it was . . . reasonably possible that the jury was misled by the trial court's instructions, the charge to the jury is not to be critically dissected for the purpose of discovering possible inaccuracies of statement . . . . Individual instructions also are not to be judged in artificial isolation. . . . Instead, [t]he test to be applied . . . is whether the charge . . . as a whole, presents the case to the jury so that no injustice will result." (Citation omitted; internal quotation marks omitted.) *State* v. *Brown*, 118 Conn. App. 418, 428–29, 984 A.2d 86 (2009), cert. denied, 295 Conn. 901, 988 A.2d 877 (2010).

As acknowledged by both parties, our Supreme Court repeatedly has upheld the use of instructions that utilized the very language the defendant challenges. See, e.g., *State* v. *Winfrey*, 302 Conn. 195, 218, 24 A.3d 1218 (2011) (instruction explaining that reasonable doubt is " 'such doubt as would cause reasonable men and women to hesitate to act upon it in matters of importance' " not constitutionally infirm); *State* v. *Mark R.*, 300 Conn. 590, 616–17, 17 A.3d 1 (2011) ("this court has rejected virtually identical claims on multiple occasions"); *State* v. *Johnson*, 288 Conn. 236, 288–90, 951 A.2d 1257 (2008) (rejecting challenge to instruction describing reasonable doubt as " 'such a doubt as would cause reasonable [people] to hesitate to act upon it in matters of importance' "); *State* v. *Delvalle*, 250 Conn. 466, 474 n.11, 473–75, 736 A.2d 125 (1999) (same);[3] see

[3] Additionally, the United States Supreme Court has endorsed a description of reasonable doubt that virtually is identical to the one challenged by the defendant in this case. See *Holland* v. *United States*, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954) (citing with approval instruction given in *Bishop* v. *United States*, 107 F.2d 297, 303 [D.C. Cir. 1939], which defined

also *State* v. *Vazquez*, 119 Conn. App. 249, 258, 259–61, 987 A.2d 1063 (2010) (not improper to instruct jury that reasonable doubt is " 'doubt as would cause reasonable men and women to hesitate to act upon it in matters of importance' "); *State* v. *Hernandez*, 91 Conn. App. 169, 178–79, 883 A.2d 1 (same), cert. denied, 276 Conn. 912, 886 A.2d 426 (2005); *State* v. *Otero*, 49 Conn. App. 459, 470–74, 715 A.2d 782 (same), cert. denied, 247 Conn. 910, 719 A.2d 905 (1998).

"[A]s an intermediate court of appeal, we are unable to overrule, reevaluate, or reexamine controlling precedent of our Supreme Court. . . . As our Supreme Court has stated: [O]nce this court has finally determined an issue, for a lower court to reanalyze and revisit that issue is an improper and fruitless endeavor." (Internal quotation marks omitted.) *State* v. *Brantley*, 164 Conn. App. 459, 468, 138 A.3d 347, cert. denied, 321 Conn. 918, 136 A.3d 1276 (2016).

Accordingly, since our Supreme Court already has determined that the challenged description of reasonable doubt is not improper, we cannot conclude to the contrary.

B

The defendant's second challenge to the court's reasonable doubt instruction concerns the language used in describing reasonable doubt as "a doubt as, in serious affairs that concern you, you *will* heed." (Emphasis added.) His specific contention is that the court erred in using the word *will* instead of "the subjunctive '*would*' "; (emphasis in original); and that this error impermissibly diluted the state's burden of proof. Although we review this unpreserved claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d

reasonable doubt as "doubt [that] would cause reasonable men to hesitate to act upon it in matters of importance to themselves").

823 (1989), we conclude that there is no reasonable possibility that the challenged language misled the jury.

The following additional procedural history is relevant to our resolution of the defendant's claim. At the time it instructed the jury, the court provided the jurors and counsel with typewritten copies of its instructions. The court informed the jury that it would deliver its instructions by reading the typewritten version aloud: "As you see, I'm reading these instructions. I do that because they were prepared in advance, and I want to make sure that I say exactly what I intend to say. Do not single out any sentence or individual point or instruction in my charge and ignore the others. You are to consider all the instructions as a whole, and consider each, in light of all the others." The jurors had copies of the written instructions during their deliberations.

In the typewritten version of the instructions, reasonable doubt was described, in relevant part, as a "doubt, as in serious affairs that concern you, you *would* heed." (Emphasis added.) However, the transcript of the trial court proceedings indicates that the court's oral instruction described reasonable doubt as "a doubt, as in serious affairs that concern you, you *will* heed." The defendant never took an exception to the court's use of the word "will" in its oral instructions.[4] Also, there is no indication in the record that the jury, the court, or counsel noticed the discrepancy between the oral and written instructions. Moreover, the jury did not request clarification as to that discrepancy or on any of the court's instructions pertaining to reasonable doubt and the burden of proof.

[4] Although in closing argument defense counsel described reasonable doubt as a "doubt that, in your own serious affairs, you *would* heed," he did not take an exception or request clarification when the court subsequently used *will* instead of would in its instructions. We also note that the state did not make an argument with respect to either word during its closing argument.

We next set forth our standard of review and the relevant legal principles. "[U]nder *Golding* review, as modified in *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Polanco*, 165 Conn. App. 563, 572, 140 A.3d 230, cert. denied, 322 Conn. 906, 139 A.3d 708 (2016). It is an error of constitutional magnitude to instruct the jury on reasonable doubt in such a manner as to dilute the state's burden of proof. *State* v. *Alberto M.*, supra, 120 Conn. App. 115.

"[I]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge *as a whole* to determine whether it is reasonably possible that the instruction misled the jury. . . . The test is whether the charge *as a whole* presents the case to the jury so that no injustice will result." (Emphasis added; internal quotation marks omitted.) *State* v. *Frasier*, 169 Conn. App. 500, 509, 150 A.3d 1176 (2016), cert. denied, 324 Conn. 912, 153 A.3d 653 (2017).

Reviewing courts are especially hesitant in reversing a conviction on the basis of an inaccuracy in a trial court's oral instruction if the jury was provided with accurate written instructions. See, e.g., *State* v. *Warren*, 118 Conn. App. 456, 464, 984 A.2d 81 (2009) (no constitutional violation where trial court's oral charge suggested written instructions should be used "only . . . as a guide" because "the [*written*] *copy of the charge itself*

correctly guided the jury by stating . . . that the jury was obligated to accept the law as provided by the court" [emphasis added]), cert. denied, 294 Conn. 933, 987 A.2d 1029 (2010); *United States* v. *Rodriguez*, 651 Fed. Appx. 44, 48 (2d Cir. 2016) ("In this case, there is no indication that the jurors were confused by the court's misreading of the instruction. The jury was able to follow along from the correct written instructions during the oral charge, and it had access to those written instructions during its deliberations. . . . [This] mitigated any risk of confusion . . . ."); *United States* v. *Colman*, 520 Fed. Appx. 514, 517 (9th Cir.) ("a [trial] court's misstatement while reading instructions aloud does not constitute reversible error if it provides proper written jury instructions to the jury members"), cert. denied, U.S. , 133 S. Ct. 2817, 186 L. Ed. 2d 876 (2013); *United States* v. *Ancheta*, 38 F.3d 1114, 1117 (9th Cir. 1994) ("The judge provided the jury with proper written instructions. We do not suggest that written instructions necessarily repair an error in oral instructions, since often oral instructions are used to cure typographical and other errors in written instructions. Nevertheless, here there is no reason to suppose that any juror was confused by the judge's slip of the tongue, and probably they understood him to say orally what he meant to say and did say in the written instructions."); *People* v. *Rodriguez*, 77 Cal. App. 4th 1101, 1113, 92 Cal. Rptr. 2d 236 (2000) ("It is generally presumed that the jury was guided by the written instructions. . . . The written version of jury instructions governs any conflict with oral instructions. . . . Consequently, as long as the court provides accurate written instructions to the jury to use during deliberations, no prejudicial error occurs from deviations in the oral instructions." [Citations omitted; internal quotation marks omitted.]).

Additionally, reviewing courts are less willing to conclude that a discrepancy between written and oral

instructions constitutes reversible error where: (1) defense counsel fails to object to the discrepancy; *United States* v. *Ancheta*, supra, 38 F.3d 1117 ("It was incumbent upon defense counsel to object if the judge erroneously instructed the jury . . . because the slip of the tongue could easily have been corrected before the jury retired to deliberate. The absence of objection suggests that the mistake was not noticeable or confusing."); and (2) counsel, the parties, the court, and the jury all fail to notice the discrepancy; *United States* v. *Jones*, supra, 468 F.3d 710 ("The fact that defense counsel as well as the experienced [trial] judge were unperturbed by the error, if they noticed it at all, weighs heavily. . . . If there had been an indication that anyone in the courtroom—counsel, parties, or jurors—was confused, we might find this a more difficult question." [Citations omitted.]).

Here, because the defendant did not object to the discrepancy between the written and oral instructions, his claim is unpreserved. However, his claim is reviewable because the first two *Golding* prongs are satisfied. The record is adequate for review, and the defendant's claim that the instruction diluted the state's burden of proof is of constitutional magnitude. We conclude, however, that the defendant has failed to satisfy *Golding*'s third prong because he has not demonstrated the existence of a constitutional violation that deprived him of a fair trial. When viewed as a whole, the court's oral instruction reasonably would not have misled the jury.

Our review of the record convinces us that there is no reasonable possibility that the jury was confused by the court's use of "will" instead of "would." The court informed the jury that it would be reading its instructions from a written version of the instructions. Copies of those written instructions, which accurately used "would" instead of "will" in describing reasonable doubt, were given to the jury to use during deliberations.

After the court had read its oral instructions, defense counsel did not object to its use of "will." Indeed, there is no indication that defense counsel, the state, or the court itself noticed the errant use of the word "will."

Moreover, after the case was submitted to the jury, the jury did not request any clarification as to the discrepancy relating to "will" and "would," and it did not ask any questions regarding reasonable doubt and the burden of proof. Finally, in reviewing the entirety of the court's oral and written instructions, we conclude that both sets of charges adequately explained the principles governing burden of proof, the presumption of innocence, and reasonable doubt by using several accurate descriptions of those concepts.[5] Accordingly, in the circumstances in this case, we conclude that it was not reasonably possible that the jury was misled by a single word in the court's jury instructions.

II

MOTION TO SUPPRESS EVIDENCE

The defendant's second claim is that the trial court improperly denied his motion to suppress evidence that was seized in a warrantless search of his residence. The defendant contends that such evidence was obtained in violation of the fourth and fourteenth amendments to the United States Constitution[6] and article first, § 7, of

[5] We also note that the United States Court of Appeals for the Second Circuit recently held that an arguably more problematic discrepancy between written and oral instructions did not confuse the jury. *United States* v. *Rodriguez*, supra, 651 Fed. Appx. 47–48 (no constitutional violation where oral charge instructed jury to find defendant not guilty if "*defendant* ha[d] failed to prove [his self-defense claim] beyond a reasonable doubt" because written charge correctly instructed jury that *government* had burden of disproving defendant's claim of self-defense [emphasis in original]).

[6] The fourth amendment to the United States constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

the Connecticut Constitution.[7] Specifically, he contends that a warrantless search of a parolee's residence that fails to comply with administrative directives promulgated by the Department of Correction (department) is unconstitutional, even if the parolee had previously executed an agreement authorizing such searches as a condition of his parole. The state's principal response is that we should not review the defendant's federal and state constitutional claims because they are moot. Specifically, it argues that on appeal the defendant fails to challenge an independent basis supporting the trial court's denial of his motion to suppress, namely, the trial court's finding that the defendant verbally consented to the search. We agree with the state.[8]

The following additional facts and procedural history are relevant to our resolution of this claim. Prior to trial, the defendant filed a motion to suppress evidence that was seized in a warrantless search of his residence, including 16.529 grams of crack cocaine. In that motion, the defendant's principal argument was that the search was unconstitutional because it was made without a warrant and did not comply with administrative directives promulgated by the department. He also asserted that he had not consented, verbally or in writing, to the search. After a two day evidentiary hearing, the trial court made the following factual findings.

The fourth amendment's protection against unreasonable searches and seizures is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. See *Mapp* v. *Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

[7] Article first, § 7, of the constitution of Connecticut provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

[8] The state also argues that the defendant failed to preserve his state constitutional claims by not presenting an analysis pursuant to *State* v. *Geisler*, 222 Conn. 672, 610 A.2d 1225 (1992), to the trial court. Because we conclude that the defendant's state and federal constitutional claims both are moot, we need not address this preservation argument.

"On December 11, 2012, [in the course of executing a search and seizure warrant for the residence of . . . Sweeney, members of the Middletown police force] encountered a vehicle being operated by [the defendant]. . . . Parole Officer Skarzynski, who assisted in the execution of the search and seizure warrant, knew [the defendant,] as [the defendant] was previously on his caseload. . . . [Skarzynski also] was aware that [the defendant] was on lifetime parole. . . . Skarzynski spoke with [the defendant] and obtained his verbal consent to . . . conduct a search of his residence. . . .

"Middletown police officers transported [the defendant] to his residence and room within his boarding house. . . . Skarzynski made a phone call to his . . . supervisor, [the defendant's] current parole officer, and [the supervisor of the defendant's current parole officer,] requesting their authorization to search [the defendant's] room. . . . [A]ll [three] gave their verbal consent. When inside the residence . . . Skarzynski . . . [and] Middletown police detectives . . . conducted a search of [the defendant's] bedroom. [U]nder the bed a safe was located . . . where a large amount of crack cocaine was found."

In a written memorandum of decision, the court denied the defendant's motion to suppress the seized evidence. The court articulated two grounds in support of its ruling. First, it rejected the defendant's argument that a warrantless search of a parolee's residence that fails to comply with the department's administrative directives is unconstitutional, even if the parolee had previously executed an agreement authorizing such searches as a condition of his parole. Beginning with a review of the relevant case law, the court noted that "[a]s a parolee, a defendant has a reduced expectation of privacy which allows a warrantless search of his person and residence by his parole officer." The court then found that the defendant gave written consent to

the search by executing an agreement called "Conditions of Parole," which was submitted by the state as an exhibit. That agreement, which was signed by the defendant on February 25, 2010, provided in relevant part: "You shall be required to submit to a search of your person, possessions, vehicle, business, residence, or any area under your control at any time, announced or unannounced, with or without cause by parole or its agent to verify your compliance with the conditions of your parole."[9]

The court's second ground for denying the defendant's motion to suppress was its finding that the defendant verbally consented to the search: "[The defendant] not only consented in writing to the warrantless search of his residence as a condition of his parole on February 25, 2010, he also gave his verbal consent to . . . Skarzynski on December 11, 2012."

On appeal, the defendant challenges only the first of the trial court's two grounds for denying the motion to suppress. That is, he again presents the argument that a warrantless search of a parolee's residence that fails to comply with the department's administrative directives is unconstitutional, even if the parolee previously had executed an agreement authorizing such searches as a condition of his parole.[10] The defendant does not challenge, however, the court's finding that he verbally consented to the search. Because the finding regarding the defendant's verbal consent constitutes an unchallenged independent basis for the court's ruling, we are compelled conclude that the defendant's claim on

[9] The court also made a finding that the search had in fact "substantially complied with parole regulations" because Skarzynski "obtain[ed] authorization" from "his parole manager and the parole manager of [the defendant's] probation officer" before conducting the search.

[10] The defendant also argues that the court erroneously found that the search was conducted in "substantial" compliance with the department's administrative directives. See footnote 9 of this opinion.

appeal is moot. Accordingly, we decline to review the defendant's claim.

We set forth the relevant legal principles regarding mootness. "Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction. . . . The fundamental principles underpinning the mootness doctrine are well settled. We begin with the four part test for justiciability established in *State* v. *Nardini*, 187 Conn. 109, 445 A.2d 304 (1982). . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by the judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . .

"[I]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from *the determination of which no practical relief can follow*. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way. . . .

"Where an appellant fails to challenge all bases for a trial court's adverse ruling on his claim, even if this court were to agree with the appellant on the issues that he does raise, we still would not be able to provide [him] any relief in light of the binding adverse finding[s] [not raised] with respect to those claims. . . . Therefore, when an appellant challenges a trial court's adverse ruling, but does not challenge all independent bases for that ruling, the appeal is moot." (Citations

omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Lester*, 324 Conn. 519, 526–27, 153 A.3d 647 (2017).

In *State* v. *Lester*, our Supreme Court held that the defendant's appeal from his conviction on the basis of an adverse evidentiary ruling was moot because he did not challenge all of the independent bases supporting the ruling. Id., 528. In that case, the state filed a motion in limine to preclude the defendant from introducing evidence of a supposedly false prior allegation of sexual abuse that the eight year old victim made against another person when she was five years old. Id., 521, 523. "[T]he trial court granted the state's motion . . . to exclude evidence of the victim's prior allegation . . . on the grounds that: it was not admissible under the rape shield statute because the defendant had not provided credible evidence that it was false; it was remote in time; it was dissimilar from the victim's allegation against the defendant; and it was a collateral issue that would confuse the jury." Id., 527.

On appeal, the defendant in *Lester* challenged only one of the four grounds on which the trial court relied in its evidentiary ruling, namely, that evidence of the allegation was inadmissible under the rape shield statute. Id., 524–25. Our Supreme Court reasoned that the other three grounds were independent bases supporting the court's ruling because they were responses to the state's separate and distinct evidentiary objections pertaining to relevancy and probative value. Id., 527–28. Thus, the court concluded that the defendant's failure to challenge those three grounds precluded appellate review of his claim that the trial court incorrectly applied the rape shield statute: "Because there are independent bases for the trial court's exclusion of the evidence of the prior allegation . . . that the defendant has not challenged in this appeal, even if this court were to find that the trial court improperly applied the

rape shield statute, we could grant no practical relief to the defendant." Id., 528; see also *State* v. *A.M.*, 156 Conn. App. 138, 141 n.2, 111 A.3d 974 (2015) (unchallenged independent basis rendered claim on appeal moot where trial court admitted forensic interview of victim under three separate exceptions to hearsay rule but defendant challenged trial court's ruling on two exceptions), aff'd on other grounds, 324 Conn. 190, 152 A.3d 49 (2016).

In the present case, the trial court denied the defendant's motion to suppress on the following two grounds: (1) by executing an agreement authorizing searches of his residence as a condition of his parole, the defendant gave written consent to the warrantless search at issue; and (2) the defendant gave verbal consent to Skarzynski immediately before the warrantless search at issue occurred. Although not challenged by the defendant in this appeal, the second of those grounds, his verbal consent, is an independent basis supporting the trial court's denial of the defendant's motion to suppress. See *State* v. *Nowell*, 262 Conn. 686, 699, 817 A.2d 76 (2003) ("[i]t is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search [or seizure] that is conducted pursuant to consent" [internal quotation marks omitted]); *State* v. *Vaught*, 157 Conn. App. 101, 121, 115 A.3d 64 (2015) (warrantless search of residence constitutional where trial court found that homeowner gave valid verbal consent).

The trial court's finding that the defendant verbally consented to the search is wholly dispositive of the defendant's motion to suppress, regardless of whether it erred in ruling on the defendant's other arguments that the search was unconstitutional. That is, once the defendant verbally consented to the search, the need for law enforcement to obtain a warrant or comply with

the department's administrative directives was obviated. See, e.g., *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) ("a search authorized by consent is *wholly* valid" [emphasis added]). The defendant does not challenge the court's finding that he verbally consented to the search in this appeal. Consequently, because the defendant has failed to challenge that independent basis supporting the trial court's denial of his motion to suppress, even if this court were to rule in his favor on the claim he presents on appeal, we could grant him no practical relief. Accordingly, the defendant's claim is moot.

The appeal is dismissed as moot with respect to the defendant's claim that the trial court improperly denied his motion to suppress evidence; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

JOHN AVERY ET AL. *v.* LUIS MEDINA ET AL. (AC 38689)

Lavine, Alvord and Beach, Js.

Syllabus

The plaintiff landowners brought this action seeking, inter alia, a temporary and permanent injunction requiring the defendant landowners, A and L, to cease construction of a pole barn and a stone wall on certain of their real property. The trial court subsequently rendered judgment denying in part the plaintiffs' request for injunctive relief. The plaintiffs appealed to this court, claiming, in part, that the trial court improperly found that the stone wall was not a prohibited permanent structure pursuant to a restrictive covenant in the defendants' deed. This court agreed with the plaintiffs and reversed the judgment only as to the trial court's finding that the defendants' construction of the stone wall did not violate the restrictive covenant prohibiting the erection of permanent structures within a 100 foot setback area. Subsequently, the trial court, pursuant to direction from this court, rendered judgment for the plaintiffs on their request for injunctive relief requiring the defendants to remove all portions of the stone wall that were within the 100 foot setback area. In 2014, the plaintiffs filed a motion for contempt, which

the trial court granted, finding that the defendants had failed to comply with its prior orders by failing to remove all portions of the stone wall within the setback. Although the defendants did subsequently remove the stone wall, the plaintiffs filed another motion for contempt in 2015, claiming, in part, that the defendants had erected another stone wall in the setback area. The trial court granted in part the plaintiffs' motion for contempt, finding, in relevant part, that L was in contempt as to the stone wall, and ordering L to remove the stone wall and to pay $1500 in attorney's fees to the plaintiffs. On the defendants' appeal to this court, *held*:

1. The defendants could not prevail on their claim that, in granting the plaintiffs' 2015 motion for contempt, the trial court impermissibly modified the substantive terms of its judgment by converting a mandatory injunction into a prohibitive injunction that forbade any structure from being constructed in the setback, not just a permanent structure, which is prohibited by the language of the restrictive covenant; the trial court did not impermissibly alter the terms or the nature of the injunction, but merely ordered the defendants to remove stones that they had placed in the setback area after they had removed the stone wall, which the court did to effectuate its original judgment, and although the stones were not permanently affixed to the land and were lower in height than the original stone wall, they nevertheless formed a prohibited permanent structure because they were intended to remain permanently in their present location to keep trespassers out.
2. The defendants' claim to the contrary notwithstanding, this court's judgment in the prior appeal and the subsequent order of the trial court requiring the defendants to remove all portions of the stone wall within the 100 foot setback, which was prohibited by the clear language of the restrictive covenant in the deed, were clear and unambiguous, and, thus, sufficient to support the contempt finding, and the stones within the setback constituted a permanent structure that violated the restrictive covenant in the defendants' deed.
3. The defendants' claim that the trial court's contempt finding deprived them of a fundamental property right was unavailing; that court did not deprive the defendants of their entire interest in their real property, as the court did not convey the defendants' interest in their land, but merely sanctioned the defendants for disobeying the judgment to remove the stone wall in the setback, and the court granted the plaintiffs' 2015 motion for contempt in order to vindicate its prior judgment ordering the defendants to remove the stone wall within the setback, which was rendered pursuant to the restrictive covenant in the deed that the defendants had voluntarily signed.

The defendants' claim that the trial court abused its discretion by awarding the plaintiffs $1500 in attorney's fees was not reviewable, the defendants having failed to preserve the claim at the contempt hearing by failing to object to the plaintiffs' request for an additional $1500 in attorney's

fees, or to seek to have the plaintiffs present evidence in support of their request for attorney's fees.

Argued February 14—officially released July 11, 2017

Procedural History

Action for, inter alia, a temporary and permanent injunction requiring the defendants to cease construction of a stone wall on certain of their real property, and for other relief, brought to the Superior Court in the judicial district of Litchfield and tried to the court, *Pickard, J.*; judgment denying in part the plaintiffs' request for injunctive relief; thereafter, the plaintiffs appealed to this court, which reversed in part the judgment of the trial court, and remanded the case with direction to render judgment in part for the plaintiffs; subsequently, the court, *Pickard, J.*, granted the plaintiffs' motion for contempt; thereafter, the court, *Pickard, J.*, granted in part the plaintiffs' motion for contempt, and the defendants appealed to this court. *Affirmed.*

Luis A. Medina, self-represented, with whom was *Richard R. Lavieri*, for the appellants (defendants).

Shelley E. Harms, with whom was *David Torrey*, for the appellees (plaintiffs).

Opinion

LAVINE, J. This dispute between the parties, which returns to this court for the third time, concerns the enforcement of a restrictive covenant in the deed to real property in Norfolk that is owned by the defendants, Luis Medina and Amanda Medina. The defendants appeal from the judgment of the trial court finding Luis Medina in contempt of the judgment rendered pursuant to *Avery* v. *Medina*, 151 Conn. App. 433, 94 A.3d 1241 (2014) (*Avery I*). On appeal, the defendants claim that the court improperly (1) modified the *Avery I* judgment by transforming a mandatory injunction into a

prohibitive injunction, (2) exceeded its equitable powers, (3) denied them a fundamental right, and (4) awarded the plaintiffs attorney's fees for which there was no evidence. We affirm the judgment of the trial court.

The relationship among the parties and the underlying history of their ongoing dispute is set forth in detail in *Avery I*. Id., 435–40. The following facts are relevant to the present appeal. In April, 2003, David Torrey, the defendants, and the plaintiffs, John Avery, Elisabeth Avery, and Shelley Harms (collectively, co-owners), purchased 55.72 acres of land in Norfolk.[1] Id., 435–36. The co-owners agreed in writing to subdivide the 55.72 acres into two four acre building lots and one approximately 47 acre lot, which was to be conveyed to the Norfolk Land Trust, Inc. Id., 436–37. John Avery and Elisabeth Avery received one of the four acre lots (Avery lot) and the defendants received the other four acre lot (Medina lot). Id., 437.

Harms, acting on behalf of the co-owners, engaged Michael Sconyers, a lawyer, to draft the deeds to the Avery and Medina lots. Id. Sconyers advised that the language in the deeds should differ in two respects from the language in the co-ownership agreement. "The co-ownership agreement stated that the Avery lot and the Medina lot will contain deed restrictions providing that the lot shall not be further divided, will contain only one single-family dwelling, and not more than two additional outbuildings with a reasonable setback from the road for any structures and will be subject to a right of first refusal for each of the other co-owners . . . . The co-ownership [agreement] was silent as to enforcement of these deed restrictions." (Internal quotation

[1] The co-owners are three married couples. Torrey is married to Harms, but he is not a plaintiff in this action. When the co-owners purchased the 55.72 acres, each couple received a one-third undivided interest in it. *Avery* v. *Medina*, supra, 151 Conn. App. 436.

marks omitted.) Id. Sconyers advised that the "reasonable setback" language "should be made more specific and that there should be persons named to enforce the restrictions." (Internal quotation marks omitted.) Id.

Pursuant to Sconyers' advice, the language in the deeds to the Avery and Medina lots states in relevant part that "any permanent structure erected on the property shall be located at least 100 feet distant from the westerly line of Winchester Road." (Internal quotation marks omitted.) Id. The deed for the Medina lot also states that the restrictions in the deed "shall be enforceable by [the] Grantors, their heirs and assigns *in perpetuity*, as an appurtenance to the property of the Grantors." (Emphasis added; internal quotation marks omitted.) Id., 437–38. The grantors are the co-owners.

The plaintiffs and Torrey signed the deeds on August 8, 2004, and the defendants, who also are lawyers, signed them on August 10, 2004. Id., 438. Subsequently, the defendants constructed a house, a carriage house, and a shed on the Medina lot. Id. In November, 2011, Luis Medina informed Torrey that the defendants were going to build a "pole barn" near the carriage house. (Internal quotation marks omitted.) Id., 439. Torrey advised Luis Medina that the pole barn would be a "third outbuilding" on the lot and a violation of the restrictive covenant in the deed. (Internal quotation marks omitted.) Id. The defendants nonetheless began to construct the pole barn.[2] Id.

The plaintiffs commenced the underlying action to enforce the restrictive covenant in the Medina deed and sought "an injunction prohibiting further construction of the pole barn and an order that it be removed." (Internal quotation marks omitted.) Id. While the action

[2] The defendants failed to secure a building permit for the pole barn, and the town of Norfolk issued them a cease and desist order. *Avery* v. *Medina*, supra, 151 Conn. App. 439.

was pending, the defendants built a stone wall along the southern and eastern borders of the Medina lot, a portion of which was twenty feet from Winchester Road.[3] Id. Consequently, the plaintiffs amended their complaint to allege that the wall was "a new permanent structure in violation of the restrictive covenant in the defendants' deed [that] prohibits new permanent structures within 100 feet of the road." (Internal quotation marks omitted.) Id. The plaintiffs sought injunctive relief and requested costs and punitive damages. Id.

The case was tried to the court, which issued its memorandum of decision on November 12, 2013. The court found that the pole barn violated the restrictive covenant that "limits development on [the defendants'] property to one single-family dwelling and no more than two additional outbuildings . . . ." Id., 440. The court found, however, that the stone wall was not permanent in nature and, therefore, did not violate the restrictive covenant prohibiting permanent structures within 100 feet of Winchester Road. Id. The court ordered the defendants to remove the pole barn in thirty days. Id. The court did not find that the defendants' conduct was wanton or malicious and did not award the plaintiffs punitive damages. Id. The plaintiffs appealed to this court.

On appeal, in *Avery I*, the plaintiffs claimed, among other things, that the court improperly found that the wall was not a permanent structure pursuant to the Medina deed. Id. This court agreed; id., 447; and reversed the judgment "only as to the [trial] court's finding that the defendants' construction of the stone wall did not violate the restrictive covenant prohibiting

[3] "The wall [was] approximately three feet high, with two large, six feet high stone pillars. There [was] a large wooden gate attached to one of the pillars, and a 1.5 foot fence that . . . attached to the top of the wall. The [trial] court found that the wall was large, heavy and immobile." *Avery* v. *Medina*, supra, 151 Conn. App. 447.

the erection of permanent structures within 100 feet of the westerly line of Winchester Road . . . .'' Id., 451. This court remanded the case to the trial court ''with direction to render judgment for the plaintiffs on their request for injunctive relief requiring the defendants to remove all portions of the stone wall that are within 100 feet of the westerly line of Winchester Road.'' Id.

Pursuant to this court's remand order, on August 20, 2014, the trial court rendered judgment for the plaintiffs ''on their request for injunctive relief requiring the defendants to remove all portions of the stone wall that are within 100 feet of the westerly line of Winchester Road.''[4]

On December 3, 2014, the plaintiffs filed a motion for contempt asking the court to find the defendants in contempt for failing to comply with the court's orders

[4] During the course of the plaintiffs' appeal, the conflict between the parties continued. On December 11, 2013, the defendants filed a motion to open the judgment and modify its order to state, ''[w]ithin the next [thirty] days the defendant shall remove from their property one of the outbuildings identified in the [court's] memorandum, leaving two outbuildings on [the defendants'] land.'' The defendants wished to remove the utility shed, which would cost them significantly less than it would cost to remove the pole barn. The plaintiffs objected, arguing in part that the pole barn was an illegal structure in that it was constructed without a building permit, and that the defendants had the opportunity to present evidence as to the cost of removing structures on the Medina lot at trial, but failed to do so.

On February 26, 2014, the court denied the defendants' motion to open, stating, ''[t]he evidence in this case concerned the pole barn, not a shed. The defendant had the option of removing the shed before the pole barn was constructed so as to avoid this problem. It would not be proper for the court to permit the defendant to change the facts under which the case was tried.'' The defendants filed a motion asking the court to reconsider its order denying their motion to open and modify the corrected memorandum of decision on or about March 18, 2014, and the plaintiffs filed an objection to it. On May 19, 2014, the court sustained the plaintiffs' objection to the motion to open and modify. The defendants appealed from the judgment denying their motion to open. This court affirmed the judgment of the trial court in a memorandum decision. See *Avery* v. *Medina*, 153 Conn. App. 909, 100 A.3d 476 (2014) (*Avery II*).

dated November 20, 2013,[5] and August 20, 2014. The plaintiffs stated that although more than thirty days had passed since the court had ordered the defendants to remove the pole barn, the pole barn was still standing on the Medina lot. Moreover, the plaintiffs represented that the defendants failed to remove all portions of the stone wall within the 100 foot setback. The plaintiffs asked the court to find the defendants in contempt for every day they remained in violation of the court's order, and for costs and attorney's fees pursuant to General Statutes § 52-256b. The defendants objected to the motion for contempt, arguing that they were not in wilful noncompliance with the judgment and that they did not have the financial wherewithal to remove the pole barn. On December 19, 2014, the court found Luis Medina to be in contempt of its orders. The court continued the matter to January 5, 2015, "during which period of time the defendant is ordered to fully comply with the court's orders. If the contempt has not been full[y] remedied a fine will be imposed for every day there is noncompliance."

On January 6, 2015, the court ruled on the plaintiffs' motion for contempt, ordering: "The defendants, Luis Medina and Amanda Medina, are found to be in contempt of the orders of the court. The defendants are ordered to remove all the stones from the wall on or before February 1, 2015. Commencing [January 5, 2015], the defendants shall pay the plaintiffs the sum of $100 per day until the stones are removed. The plaintiffs are awarded attorney's fees in the amount of $1,500."

On July 8, 2015, Harms filed an affidavit of noncompliance, attesting that Luis Medina had not fully complied with the court's order because he failed to pay the

[5] Subsequent to issuing its November 12, 2013 memorandum of decision, the trial court issued a corrected memorandum of decision on November 20, 2013.

plaintiffs $100 per day until the stone wall was completely removed. Luis Medina needed six days from, and including, January 5, 2015, to remove the wall, and had paid the plaintiffs only $400, not $600. In addition, Harms attested that Luis Medina had failed to remove the pole barn completely, as one of the pole supports remained standing. Luis Medina filed a counteraffidavit in which he attested that the stone wall was removed within four days of January 5, 2015, and that other stones, not part of the stone wall, were removed two days later. He further attested that he had paid the attorney's fees of $1500.

The plaintiffs filed another motion for contempt against the defendants on September 24, 2015. In that motion, the plaintiffs represented that the defendants had failed to fully remove the pole barn, failed to pay the $200 balance of the fine, and have "reerected a stone wall in the exact area where they were ordered to remove it." The defendants objected, asking the court to deny the plaintiffs' motion for contempt because they had removed the stone wall that the plaintiffs claimed was a permanent structure. The defendants argued that they had removed the stone wall that the plaintiffs alleged was a permanent structure, and that the court's order did not prohibit them from having stones on their property.

The parties appeared for oral argument on the motion for contempt on November 23, 2015. At the hearing, Luis Medina argued that the stone wall to which the plaintiffs were then objecting merely consisted of loose stones along the southern boundary of the defendants' property. A photograph of what Luis Medina termed "loose stones" was placed into evidence. The court rejected the defendants' argument, stating: "If that's not a stone wall, I don't know what it is. . . . There is no question in my mind that the law as laid down by the Appellate Court includes what's shown in that picture

as a stone wall."[6] The court issued its ruling on November 25, 2015, ordering, "[a]s to previously imposed fines, the court does not make a finding of contempt, but does find that Mr. Medina owes $200 to the plaintiffs, which is ordered to be paid by December 11, 2015. As to the remaining pole from the pole barn, the court finds it to be a negligible item that need not be removed, and the court does not make a finding of contempt. As to the stone wall, the court does make a finding of contempt against Mr. Medina. The stones [shown in the photograph that was placed into evidence] are ordered removed on or before [December 11, 2015]. The court orders Mr. Medina to pay $1500 in attorney's fees to the plaintiffs on or before December 11, 2015." The defendants appealed.

"[O]ur analysis of a judgment of contempt consists of two levels of inquiry. First, we must resolve the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . This is a legal inquiry subject to de novo review. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding." (Internal quotation marks omitted.) *Ciottone* v. *Ciottone*, 154 Conn. App. 780, 788–89, 107 A.3d 1004 (2015).

I

On appeal, the defendants claim that in granting the plaintiffs' 2015 motion for contempt, the court impermissibly modified the substantive terms of its judgment

[6] We have reviewed the photograph in the record and conclude that the court's finding is not clearly erroneous. During oral argument before this court, Luis Medina argued that the wall is necessary to keep trespassers

by converting a mandatory injunction into a prohibitive injunction that forbade any structure, not just a permanent structure, from being constructed in the setback. We disagree.

The defendants' claim requires us to examine the judgment rendered pursuant to this court's decision in *Avery I* to determine whether it was clear and unambiguous. "In order to determine the practical effect of the court's order on the original judgment, we must examine the terms of the original judgment as well as the subsequent order. [T]he construction of [an order or] judgment is a question of law for the court . . . [and] our review . . . is plenary. As a general rule, [orders and] judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the [order or] judgment. . . . The interpretation of [an order or] judgment may involve the circumstances surrounding [its] making. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The [order or] judgment should admit of a consistent construction as whole." (Internal quotation marks omitted.) *Lawrence* v. *Cords*, 165 Conn. App. 473, 484–85, 139 A.3d 778, cert. denied, 322 Conn. 907, 140 A.3d 221 (2016).

On the basis of our review of the injunction judgment and the underlying circumstances, we conclude that the court did not impermissibly alter the terms or the nature of the injunction. The facts found at trial reveal that the co-owners purchased the 55.72 acres of land to prevent it from becoming heavily developed and made the majority of the land available to the Norfolk Land Trust. The co-ownership agreement, which the

and hikers on the land conservancy's property from walking on the defendants' land.

defendants signed, provided that there was to be a reasonable setback from the road for any permanent structures. The deed to the Medina lot provided that "any permanent structure erected on the property shall be located at least 100 feet distant from the westerly line of Winchester Road." The defendants signed the deeds on August 10, 2004.

In *Avery I*, this court determined that the wall in question was a permanent structure. After reviewing the trial court's factual findings regarding the size, structure, height, and appearance of the stone wall, and examining the photographic evidence in the record, this court found that "there can be no doubt that the defendants intend for the wall to remain firmly in the same place where it was erected and [not be] moved or relocated on a seasonal basis." (Internal quotation marks omitted.) *Avery* v. *Medina*, supra, 151 Conn. App. 447. For that reason, this court concluded that the wall was a "permanent structure that is *prohibited by the clear language of the restrictive covenant contained in the defendants' deed*." (Emphasis added.) Id. On remand, the court rendered "judgment for the plaintiffs on their request for injunctive relief requiring the defendants to remove all portions of the stone wall that are within 100 feet of the westerly line of Winchester Road," and ordered the defendants to remove the stone wall, which they did. Thereafter, they placed stones lower in height in a similar position within the setback area. The plaintiffs filed a motion for contempt claiming, in part, that the defendants reerected a stone wall in the setback area and therefore failed to comply with the court's orders. The defendants objected to the motion for contempt arguing, in part, that the court did not prohibit any stones on their property. At the hearing on the motion for contempt, Luis Medina argued that there were just loose stones along the southern boundary of the defendants' property. The court rejected that

representation stating: "If that's not a stone wall, I don't know what it is. . . . There is no question in my mind that the law as laid down by the Appellate Court includes what's shown in that picture as a stone wall."

On appeal, the defendants claim that the court modified the judgment whereby they were ordered to remove the stone wall. "A modification is [a] change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact. . . . In contrast, an order effectuating an existing judgment allows the court to protect the integrity of its original ruling by ensuring the parties' timely compliance therewith." (Internal quotation marks omitted.) *Lawrence* v. *Cords*, supra, 165 Conn. App. 484.

The substance of the defendants' claim is that the stone wall that replaced the wall they were ordered to remove is not permanently affixed to the land. This is a distinction without a difference. At oral argument before us, the defendants stated that the stones were necessary to denote the boundary of their land to keep hikers and other trespassers out. Regardless of the height of the stones now in place within the setback, given their purpose to keep trespassers out, they are intended to remain permanently in their present location.

"Courts have in general the power to fashion a remedy appropriate to the vindication of a prior . . . judgment. . . . Having found noncompliance, the court, in the exercise of its equitable powers, necessarily ha[s] the authority to fashion whatever orders [are] required to protect the integrity of [its original] judgment." (Internal quotation marks omitted.) *Gong* v. *Huang*, 129 Conn. App. 141, 154, 21 A.3d 474, cert. denied, 302 Conn. 907, 23 A.3d 1247 (2011). "This is so because [i]n a contempt proceeding, even in the absence of a finding

of contempt, a trial court has broad discretion to make whole a party who has suffered as a result of another party's failure to comply with the court order." (Emphasis omitted; internal quotation marks omitted.) *Fuller* v. *Fuller*, 119 Conn. App. 105, 115, 987 A.2d 1040, cert. denied, 296 Conn. 904, 992 A.2d 329 (2010). For the foregoing reasons, we conclude that the court did not modify the injunction judgment, but merely ordered the defendants to remove the stones in the setback to effectuate its original judgment.

II

The defendants claim that the injunction ordered on remand from *Avery I* was vague and precluded a finding of contempt. We do not agree.

As we set forth previously, an appellate court's analysis of a judgment of contempt consists of two parts, the first of which is to determine whether the underlying order constituted an order that was sufficiently clear and unambiguous to support the contempt judgment. See *Ciottone* v. *Ciottone*, supra, 154 Conn. App. 788–89. In *Avery I*, this court determined that the stone wall was "prohibited by the clear language of the restrictive covenant in the defendants' deed§ because there was no doubt that the defendants intended for it to remain in place where it was erected and not moved on a seasonal basis. *Avery* v. *Medina*, supra, 151 Conn. App. 447. On remand, the trial court ordered the defendants "to remove all portions of the stone wall that are within 100 feet of the westerly line of Winchester Road."

We employ the plenary standard of review when construing a judgment or order of the court. *Lawrence* v. *Cords*, supra, 165 Conn. App. 484. "The determinative factor is the intention of the court as gathered from all parts of the [order or] judgment." (Internal quotation

marks omitted.) Id., 485. On the basis of our examination of this court's judgment in *Avery I* and the subsequent order of the trial court, we conclude that the judgment and order to remove the stone wall were clear and unambiguous. The stones within the setback constitute a permanent structure that violates the restrictive covenant in the Medina deed. The defendants' claim therefore fails.

III

The defendants claim that the court's contempt finding stripped them of a fundamental property right. We disagree.

On appeal, the defendants argue that the court's contempt finding deprives them of the use of 25 percent of their property because it exceeds the "permanent structure" restriction in the deed to the Medina lot by prohibiting stones within the setback area. At the hearing on the plaintiff's motion for contempt, Luis Medina made the same argument to which the court responded: "No, no, no. I'm saying that you cannot put permanent structures within 100 feet of the road. And we went through this one time and it's been found by the Appellate Court that a stone wall, regardless of whether it's cemented or not cemented, is a permanent structure."[7]

[7] The following colloquy also transpired between the court and Luis Medina during the hearing on the plaintiffs' motion for contempt.

"Luis Medina: [Y]ou've made your ruling. I need to clarify it for the record because I have to be able to discern what it is that I'm not able to do on my property.

"The Court: You can't have a permanent structure within 100 feet of the road, you know that.

"Luis Medina: That I understand.

"The Court: The Appellate Court [has] determined that a stone wall is a permanent structure. What you just had your contractor construct in Plaintiffs' Exhibit 2 is in my finding a stone wall.

"Luis Medina: Right.

"The Court: Remove it.

* * *

The defendants rely on *Edmond* v. *Foisey*, 111 Conn. App. 760, 961 A.2d 441 (2008), to support their claim. *Edmond*, however, is not on point with the facts of the present case. In *Edmond*, the trial court conveyed the defendant's entire interest in real property to the plaintiff. Id., 766–67. This court reversed the judgment of contempt, concluding that the trial court abused its discretion by depriving the defendant of her entire interest in her real property. Id., 775–76. In the present case, the court sanctioned the defendants for disobeying the judgment rendered in *Avery I* to remove the stone wall in the setback. It did not convey the defendants' interest in their land.

"Courts have in general the power to fashion a remedy appropriate to the vindication of a prior . . . judgment. . . . Having found noncompliance, the court, in the exercise of its equitable powers, necessarily ha[s] the authority to fashion whatever orders [are] required to protect the integrity of [its original] judgment." (Internal quotation marks omitted.) *Ciottone* v. *Ciottone*, supra, 154 Conn. App. 794.

The deed to the Medina lot contains a restrictive covenant that provides in relevant part: "[a]ny permanent structure erected on the Property shall be located at least 100 feet distant from the westerly line of Winchester Road." In *Avery I*, this court concluded that a stone wall within the 100 foot setback constituted a violation of the restrictive covenant. *Avery* v. *Medina*, supra, 151 Conn. App. 447. The court granted the plaintiffs' 2015 motion for contempt to vindicate its prior judgment, which was rendered pursuant to the restrictive covenant in the deed to the Medina lot. The defendants voluntarily signed the deed and, therefore, they cannot prevail on a claim that they were deprived of a

"The Court: I'm not asking you to do anything other than [not to] violate the restriction in your deed."

fundamental right when the court vindicated its prior judgment by finding Luis Medina in contempt.

IV

The defendants also claim that the court abused its discretion by awarding the plaintiffs $1500 in attorney's fees because there was no evidence to support the award. The defendants failed to preserve this claim at the hearing on the motion for contempt, and we, therefore, decline to review it.

On September 24, 2015, the plaintiffs filed a motion for contempt in which they alleged that the defendants failed to completely remove the pole barn, failed to pay the remaining $200 fine owed to them, and placed a line of stones in the exact place where they were ordered to remove the stone wall. The plaintiffs argued that the defendants had flouted the court's orders and had twice been found in contempt. The plaintiffs asked that the defendants again be found in contempt, and ordered to comply with the court's judgment and to pay costs and attorney's fees pursuant to General Statutes § 52-256b.[8] The defendants filed an objection to the motion for contempt but did not object to the plaintiffs' request for attorney's fees. At the contempt hearing, the plaintiffs asked for "attorney's fees of $1500, the same as [the trial court] ordered on January 6."[9] The defendants

[8] General Statutes § 52-256b (a) provides in relevant part: "When any person is found in contempt of any order or judgment of the Superior Court, the court may award to the petitioner a reasonable attorney's fee . . . such sums to be paid by the person found in contempt."

[9] A hearing on the plaintiffs' December 2014 motion for contempt was held on January 6, 2015. The record reflects the following colloquy.

"Torrey: And, Your Honor, lastly, our motion to request reasonable legal fees for: the appearances, both preparing the motion, appearing the first time, appearing yesterday and appearing today. Right. I spent an hour and a half preparing the motion. I spent two hours on the first hearing. I spent two hours yesterday and whatever time we're spending today. So that's a total of five and a half hours, plus whatever it is today, which is now going on at least an hour and a half. So that's seven hours' worth of legal time. My normal hourly rate is $300 an hour, but . . . I would have no objection to you finding a reasonable hourly rate for that.

did not object or request that the plaintiffs present evidence in support of their request for attorney's fees. The court ordered "another $1500 of attorney's fees."

"It is fundamental that claims of error must be distinctly raised and decided in the trial court." *State* v. *Faison*, 112 Conn. App. 373, 379, 962 A.2d 860, cert. denied, 291 Conn. 903, 967 A.2d 507 (2009). See Practice Book § 5-2 (party intending to raise question of law subject to appeal must state question directly to judicial authority); Practice Book § 60-5 (court not bound to consider claim unless distinctly raised at trial or arose subsequent to trial).

"Although the proponent bears the burden of furnishing evidence of attorney's fees at the appropriate time, once the plaintiffs . . . make such a request, the defendants should [object] or at least [respond] to that request." *Smith* v. *Snyder*, 267 Conn. 456, 480–81, 839 A.2d 589 (2004). An appellate court will not reverse an award of attorney's fees if the defendants fail to object to a bare request for attorney's fees. Id., 481. "In other words, the defendants, in failing to object to the plaintiffs' request for attorney's fees, effectively acquiesced in that request, and, consequently, they now will not be heard to complain about that request." Id.

The judgment is affirmed.

In this opinion the other judges concurred.

"The Court: Anything further?

"Luis Medina: I leave it to the court's decision. I . . . said what I had to say. There was no wilful desire on my part not to comply with the court's order."

STATE OF CONNECTICUT *v.* HEATHER GANSEL (AC 39427)

DiPentima, C. J., and Lavine and Flynn, Js.

Syllabus

Convicted of the crime of larceny in the first degree by embezzlement, the defendant appealed to this court. The defendant, who owned two businesses, helped her grandparents, L and M, to manage their household finances and personal needs. After L died, M gave the defendant power of attorney to be her agent. After M sold her house and moved in with her son, the defendant's uncle, she deposited the proceeds from the sale of her house in a bank account that she jointly owned with the defendant for the purpose of allowing the defendant to have access to the funds to fulfill her duties as M's agent and to use the funds for M's benefit. Thereafter, the defendant transferred approximately $412,400 from the joint bank account into her personal and business accounts, and she used more than $20,000 of M's funds to pay for her own personal and business expenses. After M learned that a significant amount of her funds were missing, the defendant's uncle convened a family meeting at which the defendant admitted to having taken a portion of the missing funds and that she was willing to create a repayment plan to reimburse M. Shortly thereafter, the defendant sent two e-mails to her uncle in which she again admitted to having taken M's funds and reconfirmed her commitment to devising a repayment plan. The defendant also wrote a letter to M in which she promised to repay her the missing funds. On appeal, the defendant claimed that the trial court improperly admitted the inculpatory e-mails into evidence because they were not properly authenticated. *Held* that the defendant failed to show that the admission into evidence of the e-mails was harmful; even if the trial court abused its discretion by admitting the inculpatory e-mails into evidence, any error was harmless, as the e-mails were cumulative of other properly admitted evidence that independently provided a basis for the defendant's conviction, including the testimony of the defendant's uncle at trial that the defendant unequivocally admitted at the family meeting that she unlawfully had taken M's money, and the letter that the defendant wrote to M in which she had promised to repay her the missing funds.

Argued April 17—officially released July 11, 2017

Procedural History

Substitute information charging the defendant with the crime of larceny in the first degree, brought to

the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *White*, *J.*; judgment of guilty, from which the defendant appealed to this court. *Affirmed*.

John R. Williams, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were, *David Cohen*, former state's attorney, *James Bernardi*, supervisory assistant state's attorney, and *Joseph C. Valdes*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Heather Gansel, appeals from the judgment of conviction, following a trial to the court, of larceny in the first degree by embezzlement in an amount more than $20,000 in violation of General Statutes §§ 53a-119 (1), 53a-121 (b), and 53a-122 (a) (2). The defendant claims that the court abused its discretion by admitting into evidence certain inculpatory e-mails because they were not properly authenticated. Because we conclude that an evidentiary error, if any, was harmless, we affirm the judgment of the trial court.

The following facts, which were found by the court in its oral memorandum of decision,[1] and procedural history are relevant to our resolution of the defendant's appeal. The defendant, who was a chiropractor and, for two years, the sole owner of two businesses, lived

[1] The defendant has failed to provide this court with a record that contains a signed transcript of the trial court's oral decision, in accordance with Practice Book § 64-1. The record does, however, contain the unsigned transcript of the October 29, 2015 hearing. On the basis of our review of the unsigned transcript, we are able to locate the portions of the record that constitute the court's orders. Thus, despite the defendant's failure to abide by the rules of practice, we will review her claim. See *Stechel* v. *Foster*, 125 Conn. App. 441, 445–46, 8 A.3d 545 (2010), cert. denied, 300 Conn. 904, 12 A.3d 572 (2011).

with her grandparents, Lou Sabini and Marietta Sabini, in her grandparents' house located in Stamford. Her grandparents had two children: the defendant's mother, Marilyn Gansel, and the defendant's uncle, Louis Sabini. The defendant helped her grandparents manage their household accounts and personal needs. On May 13, 2010, after Lou Sabini had died, Marietta Sabini gave the defendant written power of attorney to act as her agent. Marietta Sabini then sold the Stamford house and moved in with Louis Sabini. The defendant lived elsewhere but continued to manage Marietta Sabini's finances and personal needs.

On June 22, 2010, Marietta Sabini received approximately $592,539 in proceeds from the sale of her house. She deposited the money in a bank account she jointly held with the defendant (Wachovia account). All of the money deposited in the Wachovia account belonged solely to Marietta Sabini, and she only deposited the money in the Wachovia account so that the defendant could access the funds to fulfil her duties as Marietta Sabini's agent and to use the funds for Marietta Sabini's benefit. The two also jointly held a second bank account (ING Direct account). In addition, the defendant had her own personal account and two separate accounts for each of her businesses.

On June 24, 2010, the defendant withdrew $262,720 from the Wachovia account and deposited it into the ING Direct account. Between June 22, 2010 and October 17, 2012, the date of Marietta Sabini's death, the defendant transferred approximately $412,400 from the Wachovia account and the ING Direct account into her personal and business accounts. In addition, she used more than $20,000 of Marietta Sabini's money to pay for her own personal and business expenses, such as catering, family matters, real estate, groceries, gasoline, and student debt.

In August, 2012, Marietta Sabini tried to use her Wachovia debit card at a nail salon, but her card was declined because it had been cancelled. Louis Sabini and Marietta Sabini subsequently went to Wachovia bank and learned that a significant amount of Marietta Sabini's money was missing. On August 22, 2012, Louis Sabini held a family meeting to determine what had happened to the missing money. Six people—Louis Sabini, Louis Sabini's wife, the defendant, Marietta Sabini, Marilyn Gansel, and Marilyn Gansel's husband—attended the meeting. During the meeting, Louis Sabini accused the defendant of stealing $110,000 from Marietta Sabini. She responded: "yes," and "I realize that Louis [Sabini]," but then stated that she had only taken $109,000 and that she was willing to create a repayment plan to reimburse Marietta Sabini.

Shortly thereafter, the defendant sent Louis Sabini two e-mails from her business e-mail address, both of which contained incriminating information against her, including that she regretted "removing" Marietta Sabini's money from her accounts and that she was working with an attorney to devise an affordable repayment plan. The defendant claims that these e-mails were improperly admitted into evidence. On September 21, 2012, the defendant wrote a letter to Marietta Sabini, promising to repay her $283,000. She also wrote, "[i]n this correspondence to you I want to make you aware of my efforts to make things right," "[p]lease be aware that I want to make every effort possible to return all funds to you in an organized, efficient, and consistent manner," and, "I am terribly sorry for my actions and for the pain all of this has caused you. I hope one day you might be able to forgive me."

The defendant was arrested on November 29, 2012. She waived her right to a jury trial, and on October 29, 2015, the court found the defendant guilty of larceny in the first degree by embezzlement in an amount more

than $20,000. The court found that the state had proved all of the elements of larceny in the first degree by embezzlement and stated, "[the defendant] had the specific intent to appropriate [Marietta Sabini's property] to herself or her businesses . . . ." The court sentenced the defendant to ten years incarceration, execution suspended after three years, and five years of probation. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendant claims that the court abused its discretion by admitting into evidence the inculpatory e-mails she had sent to Louis Sabini. She argues that the state failed to properly authenticate the e-mails as being written and sent her because it relied solely on Louis Sabini's testimony to prove their authenticity. She contends that because the court expressly relied on the defendant's admissions in the e-mails to support its judgment, their admission was not harmless. We disagree that the defendant established harm and, therefore, need not decide whether the court abused its discretion.

"[W]hen an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the [court's judgment] was substantially swayed by the error." (Internal quotation marks omitted.) *State* v. *LeBlanc*, 148 Conn. App. 503, 508–509, 84 A.3d 1242, cert. denied, 311 Conn. 945, 90 A.3d 975 (2014).

Assuming, without deciding, that the court abused its discretion in admitting the inculpatory e-mails into evidence, we conclude that the defendant has failed to show that the error was harmful because the state presented ample other evidence, apart from the e-mails, that the defendant unequivocally admitted that she

unlawfully took Marietta Sabini's money. As noted, Louis Sabini testified that at the family meeting, which six family members attended, when he accused the defendant of stealing $110,000 from Marietta Sabini, the defendant responded, "yes," and "I realize that Louis [Sabini]." She also admitted that she "had stolen" "only $109,000" and that she "would come up with some sort of a plan within the next few days" to reimburse Marietta Sabini. Marilyn Gansel, who testified for the defendant, confirmed that this meeting took place. She also testified that the defendant "did borrow some money" and that she "promised to pay all of this money back . . . ."

In addition, the defendant wrote to Marietta Sabini in the September 21, 2012 letter that she "returned a total of $30,500 to the [Wachovia] account," and "[t]o honor my commitment, I will begin to make monthly installments of $500 starting October 15, 2012. My attorney and I have discussed how these funds will be allocated." She indicated that she would transfer $283,000 into two separate trust funds, one of which "will hold your 'living' money ($106,000) and the other trust fund will hold your 'home healthcare' money ($177,000)."

Louis Sabini's testimony and the letter the defendant sent to Marietta Sabini were sufficient evidence to support her conviction. Because the defendant's admissions in the e-mails were cumulative of other evidence that properly had been admitted, and which independently provided the basis for conviction, we conclude that the defendant failed to show the admission of the e-mails was harmful.

The judgment is affirmed.

ANTHONY SANTOS *v.* ZONING BOARD OF APPEALS OF THE TOWN OF STRATFORD ET AL.
(AC 37281)

Sheldon, Mullins and Beach, Js.

Syllabus

The plaintiff landowner brought this action against the defendant town and its zoning board of appeals alleging that, by denying certain requested variances that would have allowed him to construct a home on certain of his real property, the defendants had taken his property through inverse condemnation and had been unjustly enriched thereby. The trial court rendered judgment for the defendants, from which the plaintiff appealed to this court. *Held* that the trial court properly determined that the plaintiff had failed to prove his claim for inverse condemnation: the plaintiff's claim that he had a reasonable investment-backed expectation of use of the property that was thwarted by the defendants' regulations was unavailing, as he conceded that the difficulty occasioned by the deficient width of the building lot could be remedied with little expense by adjusting the building line and inserting a certain limitation in his deed and, accordingly, the application of the zoning regulations did not amount to a practical confiscation of the property or infringe on the plaintiff's reasonable investment-backed expectations of use and enjoyment of the property; moreover, there was no merit to the plaintiff's claim that the defendants had been unjustly enriched by preventing him from developing his property, which abutted certain open space owned by the town, this court having determined that the application of the town's regulations did not result in a taking of the plaintiff's property.

Argued February 2—officially released July 11, 2017

Procedural History

Action to recover damages for, inter alia, the alleged taking by inverse condemnation of certain of the plaintiff's real property, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Radcliffe, J.*; judgment for the defendants, from which the plaintiff appealed to this court. *Affirmed.*

Ian Angus Cole, for the appellant (plaintiff).

Sean R. Plumb, for the appellees (defendants).

Opinion

PER CURIAM. The plaintiff, Anthony Santos, appeals from the judgment of the trial court in favor of the defendants, the town of Stratford (town) and its Zoning Board of Appeals (board). On appeal, the plaintiff contends that the court improperly held that the plaintiff had failed to prove his claims for (1) inverse condemnation and (2) unjust enrichment. We affirm the judgment of the trial court.

The following facts, as found by the court or not contested, are relevant to this appeal. The plaintiff purchased an unimproved parcel of land in Stratford at a tax sale conducted by the town in May, 2002. The prior owner had owned the property for approximately seventeen years, but had never attempted to develop the property. The town had never formally approved the property as a building lot. In noticing the sale of the property, the town included a warning that the property had not been guaranteed to be buildable under the town's current zoning regulations. The property was sold to the plaintiff for approximately one half of its assessed value, and the prior owner made no attempt to exercise his right to redeem the property in the six months following the sale.

After the sale was complete, the plaintiff attempted to develop the property as a residential building lot. Because the property contained wetlands, the plaintiff applied for a permit from the town's Inland Wetlands and Watercourses Commission. He then learned that two variances were required in order to build a home on the lot. One variance was required in order to construct a building near wetlands, and another was required because the lot, by application of the zoning regulations,[1] did not meet the lot width requirement

[1] The property was situated in an RS-3 zone, which, according to § 4.2 of the Stratford Zoning Regulations, required "minimum lot width" of 100 feet. The "line of measurement" of the width was to touch the building line, pursuant to § 1.32 of the regulations. The building line was defined as a

set forth in those regulations. The board denied the requested variances, noting that because the plaintiff's predecessor in title had created the plaintiff's lot in a way that did not conform to the town's zoning regulations, the board lacked the power to grant a variance. The plaintiff appealed, and the trial court affirmed the board's decision, reasoning that the plaintiff had failed to establish that the denial of the variance would cause him an unusual hardship. The plaintiff appealed to this court, and this court affirmed. See *Santos* v. *Zoning Board of Appeals*, 100 Conn. App. 644, 918 A.2d 303, cert. denied, 282 Conn. 930, 926 A.2d 669 (2007).

In 2004, while his appeal from the board's decision was pending, the plaintiff commenced the present action against the defendants alleging that the act of denying the requested variances by the board (1) constituted a taking of his property through inverse condemnation; and (2) resulted in the town's unjust enrichment. The trial court rendered judgment[2] for the defendants, holding that (1) the plaintiff failed to establish his claim for inverse condemnation, in large part because he had failed to demonstrate that he had a reasonable investment-backed expectation in the property; and (2) the plaintiff's claim for unjust enrichment had no basis in the evidence. This appeal followed.

The plaintiff first argues that the court improperly determined that he failed to prove his claim for inverse condemnation. He claims that the court erred in relying on facts irrelevant to an inverse condemnation analysis

"line parallel to the street at a distance equal to the required front yard . . . ." Id., § 1.10. By this standard, the building line was drawn across the property's "panhandle," which abutted the street. By this figuring, the width of the property at that point was approximately fifty feet.

[2] The case was tried twice. The first judgment was vacated because of the trial court's failure to comply with the requirements of General Statutes § 51-183b. See *Santos* v. *Zoning Board of Appeals*, 144 Conn. App. 62, 67, 71 A.3d 1263, cert. denied, 310 Conn. 914, 76 A.3d 630 (2013). The judgment from which the plaintiff appeals was rendered in 2014.

as set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), and in failing to consider facts that were relevant to that analysis. We agree with the court's determination that the plaintiff has failed to prove his claim for inverse condemnation.

As a preliminary matter, we state the standard of review applicable to the resolution of the plaintiff's appeal. In considering a claim for inverse condemnation, "we review the trial court's factual findings under a clearly erroneous standard and its conclusions of law de novo." *Rural Water Co.* v. *Zoning Board of Appeals*, 287 Conn. 282, 298, 947 A.2d 944 (2008).

"[A]n inverse condemnation occurs when either: (1) application of the regulation amounted to a practical confiscation because the property cannot be used for any reasonable purpose; or (2) under a balancing test, the regulation's application impermissibly has infringed upon the owner's reasonable investment-backed expectations of use and enjoyment of the property so as to constitute a taking." Id., 299.

The plaintiff argues that he had a reasonable investment-backed expectation that he would be able to build a residential home on the property. He claims that the board's denial of the requested variances has foiled this expectation, and, therefore, that the defendants have effected a taking of his property. The plaintiff has conceded, however, that he may still be able to build a home on the property. If the plaintiff adjusts the building line by inserting a limitation in his deed such that the lot width deficiency is remedied, and if the board approves a building plan consistent with that adjustment, he will be able to build a home on his property.[3] Both parties

[3] As the plaintiff stated in his reply brief, "the minimum lot width was 100 feet and that lot width is measured at the building line and . . . the regulations allowed him to set, by limitation in his deed, the location of the building line at a distance of 125 feet from the street thus eliminating a potential problem with inadequate lot width and obviating any need to apply for a variance."

conceded this point in their briefs and at oral argument before this court. It is undisputed, then, that the problem could be solved with relatively little expense.[4] In light of the agreement that the difficulty is readily correctible,[5] a conclusion that application of any regulation amounted to confiscation, or that a *reasonable* investment-backed expectation had been thwarted, is obviously untenable.[6]

The application of the zoning regulations to the plaintiff's property did not "infringe upon the owner's reasonable investment-backed expectations of use and enjoyment of the property *so as to constitute a taking*"; (emphasis added) *Rural Water Co.* v. *Zoning Board of Appeals*, supra, 287 Conn. 299; because the plaintiff has not been deprived of any reasonable investment-backed

Section 1.10 of the Stratford Zoning Regulations provides an exception for the place to measure minimum width; although ordinarily it is to be measured at the distance from the required front yard—in this case, twenty-five feet—it may be measured at a greater distance "by limitation in a deed." A width of approximately 200 feet could be found, if the line were farther from the street.

[4] The plaintiff's attorney conceded at oral argument before this court that altering the building line on the deed is "not very complicated" and would take him about half a day's work.

[5] See also *Santos* v. *Zoning Board of Appeals*, supra, 100 Conn. App. 650 n.4 ("The plaintiff contends, however, that the location of the building line under the regulations is not fixed but rather can be set arbitrarily, at any greater distance by the board or the property owner, by limitation in the deed. According to the plaintiff, by inserting a provision in his deed setting the building line at 125 feet from the street, the lot width issue evaporates and no variance is required. Inasmuch as the building line has not been otherwise established by limitation in the deed, we decline to consider this hypothetical scenario.")

[6] The trial court held that no *reasonable* expectation was foiled by regulatory action, because the regulatory situation was ascertainable throughout the relevant period of time, the town had disclaimed any representations as to use of property, the plaintiff's predecessors had created the nonconformity, and the purchase price reflected the speculative nature of the transaction. The court held as well that, in any event, the property was not without value. We do not disagree with the conclusions of the court.

expectation.[7] See id., 302 ("[b]ecause the plaintiff failed to establish either that it had been deprived of all beneficial use of the property or that it had been deprived of a reasonable investment-backed expectation, the trial court properly dismissed the plaintiff's inverse condemnation claim"). We agree with the court's conclusion that there has been no inverse condemnation.

The plaintiff also claims that the court improperly concluded that he failed to prove his claim of unjust enrichment. He argues that because the town has prevented him from developing his property, "[t]he town has essentially added 2.3 acres of [the plaintiff's] land to the ten acres of open space that the town already owns immediately to the east . . . and equity requires that the town compensate [the plaintiff] for the benefit it has derived from preventing [the plaintiff] from developing his property."

As we previously held, the application of the town's regulations did not result in a taking of the plaintiff's property. We have carefully reviewed the record and the arguments of both parties on the unjust enrichment issue, and we find the claim to be without merit.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* JERMAINE E. REDDICK
(AC 38446)

Sheldon, Keller and Prescott, Js.

Syllabus

The defendant, who had been convicted of several offenses that arose from a shooting incident, appealed to this court, claiming that he was deprived

[7] The trial court did not expressly decide the "limitation in the deed" issue, nor did the parties directly assert this ground. The factual issue had been suggested in *Santos* v. *Zoning Board of Appeals*, supra, 100 Conn. App. 650–51, however, and both sides have recognized the available reconciliation.

of his constitutional right to a fair trial as a result of certain allegedly improper comments that the prosecutor made during closing argument to the jury. The defendant asserted, inter alia, that the prosecutor improperly used the defendant's exercise of his right to remain silent as evidence of his guilt, expressed his opinion about a witness' credibility and appealed to the jurors' emotions. The defendant and his girlfriend, G, had argued on their way to G's home after leaving a party that they had attended. When they arrived, G called her mother to ask that she come and pick up G's minor child. G's mother then woke up her brother, the victim, and G's mother and the victim thereafter drove to G's house, where they observed the defendant in the passenger seat of a vehicle that was leaving the premises. The victim approached the vehicle in which the defendant was sitting, and the defendant eventually got out of the vehicle and shot the victim with a handgun. The defendant then got back into the vehicle, which left the premises. A police officer thereafter stopped the defendant's vehicle and arrested him. During a police search of the vehicle, a handgun was found, which the defendant stated belonged to him. During the encounter with the officer, the defendant did not inform him that he shot the victim in self-defense. At trial, the defendant, who previously had been convicted of a felony, claimed that he had shot the victim in self-defense. G, who sustained injuries on the evening of the shooting, gave conflicting accounts through testimony and statements given to the police as to how she sustained those injuries. Although both parties questioned the arresting officer as to the sequence of events pertaining to his stop of the defendant's vehicle, neither the state nor the defendant established when in that sequence the defendant was arrested or if and when the officer informed the defendant his constitutional rights. *Held*:

1. The defendant could not prevail on his claim that his constitutional right to a fair trial was violated when the prosecutor stated during closing argument to the jury that the defendant did not inform the police officer who arrested him that he acted in self-defense when he shot the victim, thereby using his postarrest silence as circumstantial evidence of his guilt: there was no basis on which to conclude that the prosecutor used the defendant's exercise of his right to remain silent as evidence of his guilt, as the record did not establish when the defendant was arrested, whether the arrest preceded or followed the questioning of him by the police officer who stopped the defendant's vehicle, and if and when the officer informed the defendant of his constitutional rights, and there was no evidence that the defendant expressly invoked his right to remain silent during his encounter with the officer.
2. This court found unavailing the defendant's claim that he was deprived of his due process rights to a fair trial when the prosecutor allegedly expressed his opinion during closing argument as to the credibility of G, and appealed to the jurors' emotions by referencing a trend in gun violence and referring to the defendant as a convicted felon and a

predator: contrary to the defendant's claim that the prosecutor expressed his belief that G lied about her injuries, the prosecutor argued that G was biased in favor of the defendant and had a motive to testify favorably for him, and asked the jury to draw reasonable inferences from G's testimony, in which she presented different accounts as to how she was injured on the evening of the shooting; furthermore, although the prosecutor's reference to broader issues of gun violence and certain comments he made about the defendant's prior felony conviction were improper, the court's jury instructions were sufficient to cure any prejudice resulting from the gun violence comment, the prosecutor did not refer to the defendant as a predator, and the defendant failed to demonstrate that, in the context of the entire trial, the challenged comments that were deemed improper were so egregious as to render the trial unfair, as the state's case was strong, the comments were infrequent and the defendant failed to object to the comments at issue.

Argued February 3—officially released July 11, 2017

Procedural History

Substitute information charging the defendant with the crimes of assault in the first degree, criminal possession of a firearm and assault in the third degree, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *B. Fischer*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Robert E. Byron, assigned counsel, for the appellant (defendant).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *Michael Dearington*, former state's attorney, and *Gary W. Nicholson*, supervisory assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Jermaine E. Reddick, appeals from the judgment of conviction, rendered against him after a jury trial in the judicial district of New Haven, on charges of assault in the first degree in violation of General Statutes § 53a-59 (a) (5), criminal

possession of a firearm in violation of General Statutes § 53a-217 (a) (1), and assault in the third degree in violation of General Statutes § 53a-61 (a) (1). On appeal, the defendant claims that his conviction should be reversed on grounds that the prosecutor, in his closing argument to the jury, violated his right to a fair trial by (1) improperly commenting on the defendant's failure to inform police officers at the time of his arrest that he had shot the victim in self-defense; (2) offering his personal opinion as to the credibility of a state's witness; and (3) appealing to the emotions of the jurors by injecting extraneous issues into the trial and commenting on the defendant's prior felony conviction. We affirm the judgment of the trial court.

The jury was presented with the following evidence upon which to base its verdict. In the early morning hours of April 29, 2013, the defendant, along with his girlfriend, Myesha Gainey, and their three year old daughter, J,[1] got a ride home from a party they had attended earlier in the evening. Both the defendant and Gainey had been drinking before the ride. At the start of the ride, the defendant was seated in the front passenger seat, while Gainey sat in the backseat with J. At some point during the ride, however, the defendant reached into the backseat, unbuckled J's seat belt, and lifted her into the front seat, where she remained unbuckled for the remainder of the ride. Upon seeing that J was unbuckled in the front seat of the car, Gainey began to argue with the defendant. The argument continued until the couple reached Gainey's home at 38 Peck Street, New Haven, where the defendant stayed several nights a week.

Upon arriving at 38 Peck Street, Gainey took J up to the second floor of the home. There, she told the

[1] In view of this court's policy of protecting the privacy interests of juveniles, we refer to the child involved in this matter as J. See, e.g., *Frank* v. *Dept. of Children & Families*, 312 Conn. 393, 396 n.1, 94 A.3d 588 (2014).

defendant that she was going to call her mother, Marjorie Tillery, to come over and pick up J.[2] The defendant and Gainey then started to argue again. Shortly before 1 a.m., Marjorie Tillery received a phone call from J, who was crying and sounded distraught. During this phone call, Tillery also spoke with Gainey, who sounded emotional and upset. Although Gainey provided few details to her mother about what was happening, Tillery became concerned for Gainey's and J's safety, and agreed to drive over to Peck Street from her home in West Haven.

Thereafter, Tillery woke up the victim, her brother, Mickey Tillery, who was asleep in another room. She told her brother that the defendant had been hitting Gainey, and thus that she wanted him to accompany her to retrieve Gainey and J from New Haven.[3] The Tillerys then drove together from West Haven to Lombard Street, New Haven, where Gainey had instructed Marjorie Tillery to meet her.[4] After waiting several minutes at that location, the Tillerys left Lombard Street and drove over to Peck Street.[5] When they arrived,

[2] At trial, Gainey claimed that she intended to call her mother because she was too drunk to care for J. Tillery and the victim, her brother, Mickey Tillery, however, stated that Gainey called her mother that evening because the defendant had struck her in front of J.

[3] Marjorie Tillery also testified that she wanted her brother to accompany her "in case [the defendant] wanted to disrespect me in a sense . . . [to make] sure everything would be all right once [we] got there."

[4] At trial, Gainey testified inconsistently regarding the plan to meet at Lombard Street that evening. Gainey first testified that, after she had called her mother, she traveled to Lombard Street and waited with J on the front porch of a friend's house before returning to Peck Street. Upon further questioning, Gainey testified that she never made it to her friend's house, but instead had walked approximately halfway to Lombard Street before she returned to Peck Street. Thereafter, she stated that she had gone to her neighbor's home following her argument with the defendant, and was inside that neighbor's home when her mother arrived at Peck Street.

[5] Although Marjorie Tillery testified that she first traveled to Lombard Street before heading to Peck Street, Mickey Tillery testified that they traveled directly from West Haven to Peck Street, New Haven.

however, they were unable to find parking in the lot behind Gainey's home, and Marjorie Tillery parked her Chevy Tahoe truck in the middle of the parking lot, blocking several occupied parking spaces. At that time, Marjorie Tillery attempted to call Gainey to inform her that they had arrived at Peck Street. Within minutes of the Tillerys' arrival, a grey station wagon began to back out of a parking spot that was partially blocked by Marjorie Tillery's Tahoe. As she was about to move the Tahoe, Marjorie Tillery observed the defendant in the front passenger seat of the station wagon. She then stated to Mickey Tillery, "there go Jermaine right there."

Upon seeing the defendant in the passenger seat of the station wagon, both Tillerys exited the Tahoe and began to approach the station wagon. Although Marjorie Tillery recalled that she "came in peace,"[6] Mickey Tillery admittedly came with the intent to fight the defendant. He testified at trial that, upon seeing the defendant, "I kind of, like, lost it. I jumped out of the truck. I ran over to where he was sitting in the car . . . ." During this initial encounter, the station wagon remained stationary in its parking space, with its doors unlocked and its passenger window partially down.

As he approached the station wagon, Mickey Tillery began to argue with the defendant, saying "something about [how] I'm tired of this with my niece and then . . . like I said, I pushed him, and I just put my hands inside the car and tried to snatch him out and he yanked back." Mickey Tillery also recounted, "I put my hand inside the car so I could snatch him out the car a minute and . . . that's why I opened the [passenger] door, but they locked it and then they [rolled] their windows up, and [so] I stepped away from the car and I was just

[6] At trial, Marjorie Tillery testified that she "just wanted to talk to [the defendant] and ask him, you know, why [the defendant continued] to keep on doing what he [was] doing to my daughter knowing my granddaughter, which is his daughter, is there to see all that."

looking because I couldn't get in now that they [had] hatched the windows up and lock[ed] the door."

After the defendant locked the car's doors and rolled up its windows, Mickey Tillery took several steps away from the station wagon in an effort to lure the defendant out of the car. Several seconds later, Mickey Tillery heard the doors of the station wagon unlock, and, believing that he and the defendant were about to fight, Mickey Tillery backed away from the car to allow the defendant to exit the station wagon. The defendant then opened the front passenger side door, exited the vehicle, produced a nine millimeter semiautomatic handgun and shot Mickey Tillery, who, at the time, was stepping away from the vehicle with his hands up in the air. Mickey Tillery immediately collapsed on the pavement. Fearing that the defendant might shoot her as well, Marjorie Tillery got back into the Tahoe. The defendant then returned to the passenger side of the station wagon and got in, after which the station wagon backed out of the parking space, drove around the Tahoe, and exited the parking lot. Immediately after the station wagon left the area, Marjorie Tillery saw Gainey exiting her neighbor's home. Although Gainey had not witnessed the shooting, Marjorie Tillery told her that the defendant had shot Mickey Tillery, who, by then, was lying unconscious near the passenger side of the Tahoe. Marjorie Tillery also dialed 911 and reported the incident to the police.

Officer Reginald E. McGlotten of the New Haven Police Department arrived first on the scene. After speaking with Marjorie Tillery, McGlotten broadcasted a description of the shooter and the station wagon over his police radio. At the time of that broadcast, Officer Gene Trotman, Jr., who was responding to the initial report of a gunshot fired on Peck Street, observed a station wagon matching the broadcast description of the shooter's vehicle traveling near the intersection of

Chapel and Church Streets in New Haven. Trotman first called for backup units, then initiated a traffic stop of the station wagon. Once backup units arrived, Trotman approached the station wagon with his weapon drawn. The driver of the station wagon was identified as Akeem Whitely, and his passenger was identified as Jermaine Reddick, the defendant. Trotman asked the defendant where he was then coming from. The defendant responded that he was coming from 38 Peck Street. Trotman asked if there were any weapons in the vehicle, and the defendant stated that there were. The defendant and Whitely were then placed under arrest. A subsequent search of the station wagon revealed a nine millimeter semiautomatic handgun between the front passenger seat and the center console. Upon further questioning, the defendant stated that the gun was his and that Whitely was simply giving him a ride.[7]

Contemporaneously with this traffic stop, Officer Keron Bryce arrived at Peck Street to secure the scene with McGlotten. While securing the scene, Bryce found one nine millimeter shell casing on the pavement near Marjorie Tillery's Tahoe.[8] Bryce then interviewed Marjorie Tillery and Gainey about the events preceding the shooting. During these interviews, Bryce saw a laceration on Gainey's face and noticed that she had a swollen lip. Upon further questioning by the officer, Gainey indicated that the defendant had caused her injuries.

[7] As we will discuss more fully, the parties agree that the record does not clearly establish the chronology of Trotman's traffic stop or his questioning of the defendant. Notably, there is no indication of whether the defendant was arrested prior to or after answering Trotman's questions or when, if at all, the defendant received his warnings pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), during this encounter.

[8] On the second day of trial, Jill Therriault, a firearms and toolmark examiner with the state Department of Emergency Services and Public Protection's division of scientific services, testified that forensic testing confirmed that the shell casing discovered at Peck Street was fired from the nine millimeter handgun later recovered in the defendant's possession.

Thereafter, Bryce was notified that Trotman had pulled over a vehicle matching the description given by Marjorie Tillery. Bryce then transported Marjorie Tillery to the intersection of Chapel and Church Streets to conduct a one-on-one showup identification of the suspect.

Once Bryce and Tillery had arrived at Trotman's location, Bryce shined a spotlight on the defendant, who was then sitting in the backseat of a police cruiser. Upon seeing the defendant, Marjorie Tillery positively identified him as the person who had shot her brother. The defendant was then transported to the New Haven Police Department's detention facility for processing. A subsequent background check revealed that the defendant had previously been convicted of a felony.[9]

A few miles away, Mickey Tillery arrived by ambulance at Yale-New Haven Hospital. There, it was determined that the bullet had struck the femoral artery in his right leg and that he was rapidly losing blood. Doctors first performed cardiopulmonary resuscitation on Mickey Tillery, then gave him a "massive [blood] transfusion . . . ." Thereafter, doctors performed reconstructive surgery on his femoral artery to halt the loss of blood. Although the surgery proved successful, Mickey Tillery had to remain in the hospital for the next two weeks. On May 9, 2013, while still recovering in the hospital, Mickey Tillery spoke with members of the

[9] During the state's direct examination of Bryce, the following colloquy occurred:

"Q. Finally, sir, as part of your duties or responsibilities in this case, did you have occasion to do a background check for the defendant, Mr. Jermaine Reddick . . . to determine whether or not he had been previously convicted of a felony? Did you do such a check? . . .

"A. Yes.

"Q. All right. And after doing that check, did you confirm that Mr. Reddick, in fact, had been previously convicted of a felony before that date?

"A. Yes."

The defendant did not object to this line of questioning or request a limiting instruction as to the permissible use of such prior conviction evidence.

New Haven Police Department and agreed to view a photographic array of eight individuals. Upon reviewing the array, Mickey Tillery positively identified a photograph of the defendant as that of the man who had shot him.

Thereafter, by way of a long form information, the state charged the defendant with assault in the first degree in connection with the shooting of Mickey Tillery, assault in the third degree in connection with the assault of Gainey, and criminal possession of a firearm. The defendant elected a trial by jury, which took place from April 21 through April 23, 2015. At trial, the defendant argued that Mickey Tillery had been the initial aggressor in the incident between them and that he had shot Mickey Tillery in self-defense. After several hours of deliberations, the jury found the defendant guilty of all three charges. On July 10, 2015, the defendant was sentenced to a total effective term of twenty-three years in prison followed by three years of special parole. This appeal followed. Additional facts will be set forth as necessary.

I

On appeal, the defendant first claims that the state violated his due process right to a fair trial because the prosecutor, during closing argument, impermissibly commented on the defendant's failure to inform Trotman when he was first interviewed that he had shot Mickey Tillery in self-defense. In support of his claim, the defendant argues that the prosecutor failed to distinguish between the defendant's prearrest and postarrest silence, the latter of which is constitutionally protected. The defendant thus argues that, by commenting on his failure to tell the police when he first spoke with them that he had acted in self-defense, the prosecutor used his postarrest silence as circumstantial evidence of his

guilt, in violation of his privilege against self-incrimination, as applied in *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).[10] The defendant claims that the challenged comments were "so egregious, so deliberate, and so calculated to defeat the constitutional right of the defendant and to abuse the authority of the office of the prosecutor that it merits . . . the reversal of the verdict, even though no objection was made at trial."[11]

The state disagrees, arguing that "the defendant's claim fails on both the law and the facts [of this case]." In support of its position, the state argues that the defendant's pre-*Miranda*[12] silence, unlike his post-*Miranda* silence, is not constitutionally protected, and thus a prosecutor is not prohibited from commenting on a defendant's pre-*Miranda* silence during closing argument. The state further argues that the trial court record does not establish when Trotman read the defendant his *Miranda* rights, and thus there is no basis for concluding that the prosecutor violated the defendant's fifth and fourteenth amendment rights under the rule of *Doyle* v. *Ohio*, supra, 426 U.S. 610. Finally, the state argues that even if the challenged comments were improper, any error based upon them was harmless and

[10] The defendant also claims that the prosecutor's comments violated General Statutes § 54-84 (a), which provides in relevant part: "Any person on trial for crime shall be a competent witness, and at his or her option may testify or refuse to testify upon such trial. The neglect or refusal of an accused party to testify shall not be commented upon by the court or prosecuting official . . . ."

A review of the record, however, demonstrates that the prosecutor never commented on the defendant's decision not to testify during trial. We thus reject this alternative argument.

[11] It is well settled that a defendant may raise a claim of prosecutorial impropriety on appeal even though he failed to object to the alleged impropriety at trial. See, e.g., *State* v. *Stevenson*, 269 Conn. 563, 573–74, 849 A.2d 626 (2004).

[12] See *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

does not warrant reversal of the defendant's conviction. We agree with the state that the record does not establish when the defendant received his *Miranda* warning, and thus there is no basis upon which to conclude that the prosecutor's comments violated *Doyle*.

The following additional facts are necessary for our resolution of this claim. As discussed in the preceding paragraphs, the defendant advanced a claim of self-defense throughout the trial. In support of his claim, he attempted to establish, through his cross-examination of the state's witnesses, that Mickey Tillery was approximately six inches taller than he was and outweighed him by as much as seventy pounds.[13] On cross-examination of Mickey Tillery, the defendant elicited admissions as to his anger toward the defendant and his desire to fight him on the evening of the shooting. Mickey Tillery, in fact, agreed with defense counsel's statement that he "would have . . . beat the crap out of [the defendant]," that he would not have let anyone break up the fight, and that he did not intend to stop fighting with the defendant until he "got tired of hitting him." Defense counsel also sought to emphasize that the defendant had "tried to get away" from Mickey Tillery before the shooting occurred.

As part of its case-in-chief, the state presented the testimony of Trotman, the officer who had stopped the station wagon at the intersection of Church and Chapel Streets. Although both parties inquired of Trotman as

[13] At several points during the trial, the defendant claimed that Mickey Tillery was six feet tall and weighed 240 pounds. On direct examination of Dirk Johnson, a physician at Yale-New Haven Hospital, the state entered into evidence exhibit 25, a medical report dated May 7, 2013, which listed Mickey Tillery's height at five feet, eleven inches and his weight at 219 pounds. On cross-examination, Gainey agreed with defense counsel that the defendant was approximately five feet, six inches tall and weighed 170 pounds.

to the sequence of events during that traffic stop, neither the state[14] nor the defendant[15] established when in that sequence the defendant was arrested, whether the

[14] During the state's direct examination of Trotman, the following colloquy occurred:

"Q. Okay. Now . . . after you stopped the vehicle . . . did you ask Mr. Reddick any questions, sir?

"A. Yes, I asked him where he was coming from.

"Q. Okay. And do you remember what, if anything, he told you about that?

"A. Yes, he said he was coming from 38 Peck.

"Q. Okay. Now, after you discovered the handgun . . . did Mr. Reddick indicate who that gun belonged to?

"A. Yes, he said it was his.

"Q. And concerning Mr. Whitely's involvement in this incident, what did he say, if anything, about Mr. Whitely?

"A. He said Mr. Whitely was just giving him a ride and that the gun belonged to him.

"Q. So, at this point, were both Mr. Whitely and Mr. Reddick . . . were they both detained and placed under arrest, sir?

"A. Yes."

[15] On cross-examination of Trotman, the following colloquy occurred:

"Q. When you spoke to Mr. Reddick, you asked him where he was coming from. Correct?

"A. Yes.

"Q. And he told you 38 Peck Street.

"A. Yes.

"Q. And that's, in fact, where he was coming from. Correct?

"A. Yes.

"Q. And . . . did you ask him whose gun is that?

"A. I don't recall . . . I think it was more . . . that he didn't want the driver to get in trouble for what he did. I don't recall how it came about, but he did say that . . . it was his gun.

"Q. And were you the one that stopped him?

"A. Yes.

"Q. All right. . . . [Did] you have your weapon drawn when you . . . stopped him?

"A. Yes.

"Q. All right.

"A. Yes.

"Q. Did you ask him if he had any weapons in the car?

"A. Yes.

"Q. And did he say yes?

"A. I don't recall.

"Q. Okay. At some point he said yes. Correct?

"A. Yes.

arrest preceded or followed Trotman's questioning of the defendant, whether the defendant was ever given his *Miranda* warnings, and, if so, when those warnings were given in relation to Trotman's questions.

After two days of evidence, the state rested its case-in-chief. The defendant thereafter elected to not testify in his own defense and, after being canvassed by the court as to that decision, rested his case without presenting any defense witnesses. Closing arguments were made the following day.

During closing argument, the prosecutor recounted the events leading up to the shooting, emphasizing, inter alia, that during the initial encounter, the defendant had rolled up the car's windows and locked its doors. The prosecutor then recalled for the jury that Mickey Tillery, who was unarmed, had backed away from the defendant's vehicle after its windows were rolled up. "Suddenly," the prosecutor argued, "he hears the door on the passenger's side unlock and what happens? The defendant comes out, pulls out a gun, aims it at Mickey Tillery, and fires at him, striking him in his upper right leg. . . . I mean, ask yourself, when you shoot somebody who's doing that, is that self-defense? It's not self-defense, ladies and gentlemen."

"Q. He . . . indicated . . . that it was his weapon.

"A. Yes.

"Q. All right. And do you know the person who was shot in this case? Do you know his name? . . .

"A. No, it's not in my notes. I had nothing to do with that part of the investigation.

"Q. Okay. So, all you did was stop him, arrest him, and bring him to . . . Union Station. Correct?

"A. No, I . . . stopped and I waited until the primary officer that was at the scene of the crime—until he came and then he did what he had to do. . . .

"Q. And then . . . you left.

"A. Yes.

"Q. Went on with other things.

"A. Yup."

The prosecutor also discussed, without objection, the defendant's conversation with Trotman following the shooting. More specifically, the prosecutor stated: "[W]hat's said by Mr. Reddick at that time? Well, he tells Officer Trotman that he had been over at 38 Peck Street. He also tells . . . Officer Trotman that the gun was his and that Mr. Whitely was a friend of his and was just giving him a ride. That's what he told Officer Trotman. What didn't he say to Officer Trotman? You know, this is somebody who is going to now claim that he was acting in self-defense. I mean, did he say anything to Officer Trotman, you know, geez, you know . . . I was just accosted by this [madman] and I had to shoot him. Did he mention the shooting at all? He didn't mention the shooting at all. I . . . don't know how he thought he was going to get away this. But he, for whatever reason, was willing to admit that he had been over to Peck Street and that the gun was his, but he never admitted to doing any shooting or . . . that he had to shoot anybody in self-defense, never made . . . any mention of that, whatsoever." Thereafter, the prosecutor concluded his opening closing argument.

At the outset of his closing argument, defense counsel commented that "99 percent of the facts of this case are not disputed. You know what happened; it's just your interpretation of it with a couple of minor twists." Counsel then argued that Marjorie Tillery "was going [to Peck Street] for vengeance. She was going to be a vigilante. She was taking things into her own hands." Thereafter, counsel claimed that Marjorie Tillery "let [Mickey Tillery] loose" on the defendant. Counsel argued that, at that moment, it was the middle of the night, the defendant did not recognize Mickey Tillery,[16] he was being confronted by a larger man who was

[16] Although the defendant's argument suggested that he did not recognize Mickey Tillery, both Tillerys testified that the two men had met each other prior to April 29, 2013.

attempting to pull him out of the car window and that, fearing for his safety, he shot Mickey Tillery in self-defense.

Thereafter, defense counsel argued that the state had failed to carry its burden of proof that the defendant had not acted in self-defense that night. In support of his argument, counsel reminded the jury that it could infer that (1) the defendant reasonably believed that he faced serious physical injury because Mickey Tillery admitted that he intended to seriously injure the defendant; (2) the defendant reasonably believed that Mickey Tillery may have had a weapon in the car; (3) the defendant tried to avoid the fight and "stayed in the car for as long as he could"; and (4) the defendant had not used deadly force because he had shot Mickey Tillery in the leg and fired only once before fleeing the area. Counsel then concluded his argument without addressing the state's characterization of the defendant's interaction with Trotman.

In its rebuttal argument, the state reiterated that the jury should not credit the defendant's claim of self-defense because the defendant had not told officers at the time of his arrest either that he had shot Mickey Tillery or that he had done so in self-defense. More specifically, the prosecutor argued that, "when the defendant was stopped by Officer Trotman, shortly after the shooting, you know, he didn't say, hey, geez, you know, I'm glad . . . you can't believe what just happened to me. This madman was coming at me and I had to shoot him. I thought he was going to kill me. He doesn't even mention to Officer Trotman that he shot anybody. So, this wasn't self-defense. If it was self-defense, he would have told the police right then and there what had happened. He didn't."

Before reaching the merits of the defendant's claims, we first set forth the relevant portions of our law of

self-defense. "Under our Penal Code, self-defense, as defined in [General Statutes] § 53a-19 (a) . . . is a defense, rather than an affirmative defense. . . . That is, [the defendant] merely is required to introduce sufficient evidence to warrant presenting his claim of self-defense to the jury. . . . Once the defendant has done so, it becomes the state's burden to disprove the defense beyond a reasonable doubt. . . . As these principles indicate, therefore, only the state has a burden of persuasion regarding a self-defense claim: it must disprove the claim beyond a reasonable doubt.

"It is well settled that under § 53a-19 (a), a person may justifiably use deadly physical force in self-defense only if he reasonably believes both that (1) his attacker is using or about to use deadly physical force against him, or is inflicting or about to inflict great bodily harm, and (2) that deadly physical force is necessary to repel such attack. . . . [Our Supreme Court] repeatedly [has] indicated that the test a jury must apply in analyzing the second requirement . . . is a subjective-objective one. The jury must view the situation from the perspective of the defendant. Section 53a-19 (a) requires, however, that the defendant's belief ultimately must be found to be reasonable." (Internal quotation marks omitted.) *State* v. *Abney*, 88 Conn. App. 495, 502–503, 869 A.2d 1263, cert. denied, 274 Conn. 906, 876 A.2d 1199 (2005). Under subsection (b) of § 53a-19, however, "a person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety . . . by retreating . . . ." Moreover, under subsection (c) of § 53a-19, "a person is not justified in using physical force when (1) with intent to cause physical injury or death to another person, he provokes the use of physical force by such other person, or (2) he is the initial aggressor, except that his use of physical force upon another person under

such circumstances is justifiable if he withdraws from the encounter and effectively communicates to such other person his intent to do so, but such other person notwithstanding continues or threatens the use of physical force . . . .''

Against this backdrop, ''[w]e set forth the legal principles that guide our analysis [of the defendant's claims] and our standard of review. In *Doyle* [v. *Ohio*, supra, 426 U.S. 610] . . . the United States Supreme Court held that the impeachment of a defendant through evidence of his silence following his arrest and receipt of *Miranda* warnings violates due process. . . . Likewise, our Supreme Court has recognized that it is also fundamentally unfair and a deprivation of due process for the state to use evidence of the defendant's post-*Miranda* silence as affirmative proof of guilt . . . . *Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him. . . . Because it is the *Miranda* warning itself that carries with it the promise of protection . . . the prosecution's use of [a defendant's] silence *prior* to the receipt of *Miranda* warnings does not violate due process. . . . Therefore, as a factual predicate to an alleged *Doyle* violation, the record must demonstrate that the defendant received a *Miranda* warning prior to the period of silence that was disclosed to the jury. . . . The defendant's claim raises a question of law over which our review is plenary.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Lee-Riveras*, 130 Conn. App. 607, 612–13, 23 A.3d 1269, cert. denied, 302 Conn. 937, 28 A.3d 992 (2011); see also *State* v. *Bereis*, 117 Conn. App. 360, 373, 978 A.2d 1122 (2009).

In the present case, the defendant claims that the prosecutor's remarks during his opening and rebuttal closing arguments violated his constitutional rights under the fifth and fourteenth amendments, as applied

in *Doyle* v. *Ohio*, supra, 426 U.S. 610, not to have the exercise of his right to remain silent used against him in a later criminal proceeding. In support of his position, the defendant argues that, although "[p]ostarrest silence is treated differently from prearrest silence," the facts of this case demonstrate that "there was a period under anyone's definition of arrest during which the defendant was silent as to his exculpatory explanation . . . ." The defendant further asserts that the prosecutor failed to distinguish between the defendant's prearrest and postarrest silence, and thus the prosecutor's comments, which "encompassed the entirety of the time the defendant was under the custody of Trotman," violated the defendant's fifth and fourteenth amendment rights to remain silent. Furthermore, although the defendant concedes that Trotman did not testify as to when, if at all, the defendant received his *Miranda* warnings in the course of the traffic stop, he maintains that the right to remain silent is not contingent upon the receipt of *Miranda* warnings, but instead "inheres automatically under the fifth amendment." We are not persuaded.

At the outset, we address two fundamental flaws in the defendant's argument. We first note that, although the defendant is correct in his assertion that the right to remain silent is not contingent upon the receipt of *Miranda* warnings, "[i]t has long been settled that the privilege [against self-incrimination] generally is not self-executing and that a witness who desires its protection must claim it." (Citation omitted; internal quotation marks omitted.) *Salinas* v. *Texas*, U.S. , 133 S. Ct. 2174, 2178, 186 L. Ed. 2d 376 (2013). In the present case, however, there is no evidence to support the notion that the defendant, in the absence of any *Miranda* warning, expressly invoked his constitutional right to remain silent at any time during his encounter with Trotman.

We further note that, in support of his claim that the prosecutor violated the constitutional protections described in *Doyle*, the defendant relies upon the fact that he was either in police custody or under formal arrest when he spoke with Trotman.[17] A review of relevant federal and state case law demonstrates that the defendant's reliance on these facts is misplaced. In *Fletcher* v. *Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982), the United States Supreme Court summarized its evolving jurisprudence under *Doyle* by explaining that the "use of silence for impeachment was fundamentally unfair in *Doyle* because *Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him. . . . [Thus] *Doyle* bars the use against a criminal defendant of silence maintained *after receipt of governmental assurances*." (Emphasis added; internal quotation marks omitted.) Id., 606. In *State* v. *Leecan*, 198 Conn. 517, 504 A.2d 480, cert. denied, 476 U.S. 1184, 106 S. Ct. 2922, 91 L. Ed. 2d 550 (1986), our Supreme Court adopted the rationale of *Fletcher*, holding that "the absence of any indication in the record that the silence of a defendant had been preceded by a *Miranda* warning rendered *Doyle* inapplicable, even though the inquiry of the prosecutor pertained to the time of arrest." Id., 524–25; see also *State* v. *Berube*, 256 Conn. 742, 751–52, 775 A.2d 966 (2001); *State* v. *Plourde*, 208 Conn. 455, 467, 545 A.2d 1071 (1988), cert. denied, 488 U.S. 1034, 109 S. Ct. 847, 102 L. Ed. 2d 979 (1989).

Accordingly, our courts have recognized that the giving of *Miranda* warnings, even in the absence of a

[17] Although "[e]vidence of a defendant's postarrest silence is inadmissible under the principles of the law of evidence . . . a defendant must seasonably object and take exception to an adverse ruling in order to obtain appellate review of his claim of error in this respect." (Internal quotation marks omitted.) *State* v. *Lee-Riveras*, supra, 130 Conn. App. 613 n.7. As the state correctly notes, the defendant has not raised an evidentiary claim regarding the state's use of the defendant's postarrest silence.

formal arrest, entitles the defendant to the *Doyle* protections because such warnings provide governmental assurance, at least implicitly, that the defendant's silence will not be used against him. See *State* v. *Montgomery*, 254 Conn. 694, 715, 759 A.2d 995 (2000). We have, however, distinguished the former cases from cases where no *Miranda* warnings were given. In so doing, we have held that the act of being placed under arrest does not, by itself, provide governmental assurance that the defendant's silence will not be used against him at a later date. E.g., *State* v. *Plourde*, supra, 208 Conn. 466–67. Thus, it is the giving of *Miranda* warnings, not the act of being placed under arrest, that cloaks a defendant with the protections of *Doyle* v. *Ohio*, supra, 462 U.S. 610. See B. Gershman, Prosecutorial Misconduct (2d Ed. 2011–2012) § 10:17, p. 416 ("[c]learly, the operative fact in *Jenkins* [v. *Anderson*, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980)], as in *Doyle*, is the giving of *Miranda* warnings, not the arrest").

As we have long held, if a defendant alleges a constitutional violation, he bears the initial burden of establishing that the alleged violation occurred; it is only then that the state assumes the burden of demonstrating that the constitutional error was harmless beyond a reasonable doubt. See, e.g., *State* v. *Jones*, 65 Conn. App. 649, 654, 783 A.2d 511 (2001); see also *State* v. *Nasheed*, 121 Conn. App. 672, 678–79, 997 A.2d 623, cert. denied, 298 Conn. 902, 3 A.3d 73 (2010). Moreover, when analyzing a defendant's claim that a prosecutor violated the protection set forth in *Doyle*, we have held that "[i]t is essential to know the timing of these conversations because the use at trial of silence *prior* to the receipt of *Miranda* warnings does not violate due process." (Emphasis in original; internal quotation marks omitted.) *State* v. *Berube*, supra, 256 Conn. 751. In the present case, the record is unclear as to when, if at

all, Trotman gave *Miranda* warnings to the defendant. Accordingly, under the present facts, "we are unable to determine whether a *Doyle* violation occurred." *State* v. *Gonzalez*, 167 Conn. App. 298, 302 n.2, 142 A.3d 1227, cert. denied, 323 Conn. 929, 149 A.3d 500 (2016). In light of the foregoing, we conclude that there is no basis upon which to conclude that the prosecutor's comments during closing argument violated the defendant's due process rights pursuant to *Doyle* v. *Ohio*, supra, 426 U.S. 610. In so concluding, we need not address the subsequent question of whether such violation, if established, was harmless beyond a reasonable doubt. Cf. *State* v. *Montgomery*, supra, 254 Conn. 717–18.

II

The defendant's final claim on appeal is that the prosecutor committed several improprieties in closing argument that combined to deprive him of his due process right to a fair trial. More specifically, the defendant argues that the prosecutor impermissibly (1) voiced his personal opinion as to Gainey's credibility; and (2) appealed to the emotions of the jury by referencing the recent trend of increasing gun violence in New Haven and repeatedly referring to the defendant as a "convicted felon" and a "predator . . . ." The defendant claims, on the basis of such alleged improprieties, that he is entitled to the reversal of his conviction on all charges and a new trial.

In response, the state first argues that the defendant misquotes the record and misrepresents the context in which the prosecutor's challenged comments were allegedly made. It thus argues, as a threshold matter, that the prosecutor's comments, when properly understood, were not improper because (1) the comments as to Gainey's credibility were "based in the evidence and the reasonable inferences drawn therefrom"; (2) the comments about gun violence in New Haven only

referred to facts about which the jurors had common knowledge, and the prosecutor never suggested that by finding the defendant guilty, the jury could somehow lessen the problem of gun violence; and (3) the prosecutor's comments regarding the defendant's felony conviction were true in fact, supported by the record, and relevant to a substantive issue in the case. Finally, the state argues that, "to the extent that this court finds any impropriety, the defendant has failed to demonstrate a violation of his right to a fair trial."

Before addressing the defendant's individual claims of impropriety, we set forth our standard of review and governing legal principles. "[W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process. . . . In analyzing whether the prosecutor's comments deprived the defendant of a fair trial, we generally determine, first, whether the [prosecutor] committed any impropriety and, second, whether the impropriety or improprieties deprived the defendant of a fair trial." (Citation omitted; internal quotation marks omitted.) *State* v. *Felix R.*, 319 Conn. 1, 8–9, 124 A.3d 871 (2015). Put differently, "[impropriety] is [impropriety], regardless of its ultimate effect on the fairness of the trial; whether that [impropriety] caused or contributed to a due process violation is a separate and distinct question . . . ." (Internal quotation marks omitted.) Id., 9, quoting *State* v. *Warholic*, 278 Conn. 354, 361–62, 897 A.2d 569 (2006); see also *State* v. *Ciullo*, 314 Conn. 28, 35, 100 A.3d 779 (2014). "[T]he burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they

amounted to a denial of due process." (Internal quotation marks omitted.) *State* v. *Medrano*, 308 Conn. 604, 620, 65 A.3d 503 (2013). "As we have indicated, our determination of whether any improper conduct by the state's attorney violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams*, [204 Conn. 523, 540, 529 A.2d 653 (1987)]."[18] (Internal quotation marks omitted.) *State* v. *Warholic*, supra, 362.

"As we previously have recognized, prosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however] [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury [has] no right to consider." (Internal quotation marks

[18] See part II B of this opinion.

omitted.) *State* v. *Medrano*, supra, 308 Conn. 611–13. With these general principles in mind, we address each of the defendant's arguments.

A

Gainey's Credibility

The defendant first argues that the prosecutor usurped the jury's role in assessing Gainey's credibility, instead "[making] that determination for the jury" by offering his personal belief that she had lied under oath regarding her injuries. The following additional facts are necessary for our resolution of this claim.

From the outset of her direct examination, Gainey admitted, inter alia, that she was still in love with the defendant, she did not wish to testify, and she was testifying only because she had been served with a subpoena. Throughout the course of her examination, she vehemently denied that the defendant had hit her on the evening of the shooting or that he was, in any way, responsible for the bruises and cuts she sustained that evening. Rather, she maintained that, although she could not recall what she had had to drink that evening, she was heavily intoxicated, as a result of which she had fallen down her stairs. Gainey stated that, despite informing the police after the shooting that she had fallen down the stairs, she had been pressured into giving a statement implicating the defendant, and thus had lied in her statements to police.[19] She also denied telling either her neighbor or the police that the defendant had hit her that evening.

After Gainey became increasingly unresponsive to the state's questions during the trial, the court permitted

[19] As we have discussed, the state also called Officer Bryce during its case-in-chief. During his examination, Bryce testified that, while interviewing Gainey that evening, he became interested in locating the defendant in connection with her bruises. Bryce also stated that Gainey never mentioned that she had fallen down the stairs.

the prosecutor to examine her as a hostile witness. Thereafter, the prosecutor introduced into evidence a redacted video[20] of Gainey's April 29, 2013 interview with the New Haven police. In that interview, Gainey told the police, inter alia, that the defendant had struck her several times in the face, and that she had attempted to fight back and, thereafter, had run over to her neighbor's house and told her neighbor about the defendant's physical abuse.

During his initial closing argument to the jury, the prosecutor argued, inter alia, that Gainey had violated her oath to testify truthfully as to the source of her injuries that night. In support of that argument, the prosecutor reminded the jury that Gainey had told the police that the defendant had struck her several times in the face that evening, but she had never mentioned falling down the stairs. The prosecutor then asked the jury to recall Gainey's demeanor while testifying and her admission that she was testifying only because the state had subpoenaed her. In an attempt to explain why Gainey had offered two drastically different accounts as to the source of her injuries, the prosecutor stated, "[w]ell, people don't come into court and lie just for the heck of it. I mean, I guess there . . . are pathological liars that might do that; I'm not claiming that Ms. Gainey is that type of person. You know, she came in here. She admitted that she's in love with the defendant. She has a young daughter by him. The state would submit, use your common sense on that issue. Her motivation for fabricating here in court about how she got hurt was because she was trying to help Mr. Reddick. But, again . . . for you to make that decision, you'd had an opportunity to review and see her actual interview at the New Haven Police Department the night of

[20] Pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986), the court admitted only those portions of the taped interview that concerned the cause of Gainey's injuries on the evening of the shooting.

that incident. She was coherent. She answered questions in a manner that was appropriate. She did not have slurred speech. She never asked to use the bathroom. There was absolutely no evidence whatsoever that during that interview that she was intoxicated or drunk, nothing. So, she came in here and there were some things that had a kernel of truth to it, but for the most part, as far as how she got injured that night, she did not want to blame that on Mr. Reddick because she was trying to protect him and that's what she did. You know, she's a victim of domestic abuse. She'll take a beating and not report it to the police. She's blinded by her love for the defendant and . . . [her] feelings for him. She's unable to protect herself from this abuse. She's . . . unable to prevent her daughter from seeing it happen. But, you know, unfortunately, she's blinded by her feelings for the defendant."

It is well established that, although "[a] prosecutor may not express his [or her] own opinion, directly or indirectly, as to the credibility of the witnesses . . . [i]t is not improper for the prosecutor to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . ." (Internal quotation marks omitted.) *State* v. *Ciullo*, supra, 314 Conn. 40–41. Moreover, we have held that "[i]t is permissible for a prosecutor to explain that a witness either has or does not have a motive to lie." *State* v. *Ancona*, 270 Conn. 568, 607, 854 A.2d 718 (2004), cert. denied, 543 U.S. 1055, 125 S. Ct. 921, 160 L. Ed. 2d 780 (2005). In the present case, the prosecutor's comments did not amount to statements of personal opinion as to whether Gainey was, in fact, lying. Rather, the prosecutor argued that Gainey had presented two drastically different accounts as to how she was injured on the evening of the shooting, that she was biased by her feelings for the defendant, and that she had a motive to testify favorably for the defense. From those facts,

the prosecutor asked the jury to "use [its] common sense on that issue" and to reject Gainey's claim that she had fallen down the stairs that night. Such argument does not amount to prosecutorial impropriety; "instead, the prosecutor's statements, when placed in the context in which they were made, are reasonable inferences the jury could have drawn from the evidence adduced at trial." *State* v. *Ciullo*, supra, 42. Because we conclude that the defendant's first claim does not amount to prosecutorial impropriety, we need not consider whether it "caused or contributed to a due process violation . . . ." (Internal quotation marks omitted.) *State* v. *Warholic*, supra, 278 Conn. 362.

B

Appealing to Jurors' Emotions

The defendant's final argument on appeal is that the prosecutor improperly appealed to the jurors' emotions (1) by arguing that the defendant's conduct was "another example of the unnecessary and senseless gun violence that's become all too common [in] the city of New Haven"; and (2) by engaging in character assassination of the defendant by referring to him as "a predator" and "a convicted felon . . . [who] doesn't care about the law." The state responds that the prosecutor's comments about gun violence in New Haven were not improper or, alternatively, that they did not violate the defendant's right to a fair trial. As to the defendant's remaining claim, the state first argues that the word "predator" was never used to describe the defendant, but instead was used to describe the kind of person, unlike Mickey Tillery, against whom the defendant might have needed to use deadly force in self-defense. The state further argues that the prosecutor's comments about the defendant being a convicted felon properly referred to the evidence presented and the reasonable

inferences that could be drawn therefrom. We address each argument in turn.

We first address the prosecutor's comment regarding general patterns of gun violence in New Haven. At the close of the prosecutor's initial remarks to the jury, the prosecutor summarized the events surrounding the shooting and the defendant's ability, but unwillingness, to leave the area safely before he shot Mickey Tillery. In that regard, the prosecutor stated that "what this case is, *it's another example of the unnecessary and senseless gun violence that's become all too common in the city of New Haven.* That's what this is. This defendant was not justified in using deadly physical force against Mickey Tillery. This was not self-defense, ladies and gentlemen. The defendant didn't shoot Mickey Tillery to protect himself. He was angry at Mickey Tillery for intervening in this domestic abuse situation he had going on with Myesha [Gainey]. He became angry. He was going to teach him a lesson. Mind your own business, stay out of the relationship. He taught him a lesson, all right." (Emphasis added.)

As discussed in the preceding paragraphs, "a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case." (Internal quotation marks omitted.) *State* v. *Medrano*, supra, 308 Conn. 613. Accordingly, "the prosecutor should refrain from injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict . . . ." (Internal quotation marks omitted.) A. Spinella, Connecticut Criminal Procedure (1985) p. 713, quoting *State* v. *Gold*, 180 Conn. 619, 659, 431 A.2d 501, cert. denied, 449 U.S. 920, 101 S. Ct. 320,

66 L. Ed. 2d 148 (1980). Here, we agree with the defendant that the prosecutor's reference to broader issues of gun violence in New Haven was improper because it was extraneous and irrelevant to the issues before the jury.

We turn next to the defendant's argument that the prosecutor engaged in character assassination. We first dispose of the defendant's subsidiary claim that the prosecutor violated his right to a fair trial by referring to the defendant as a "predator" in closing argument. Simply stated, he did not. Instead, as the state has argued, the prosecutor used that word only when he argued as follows: "[T]his is not a typical self-defense claim. You know, typically we think of self-defense, you know, someone minding their own business, doing nothing they shouldn't be doing and *being accosted by some predator* who sets upon them and . . . they have this confrontation with the predator, they're forced to protect themselves. That's not what happened here." (Emphasis added.) It is thus readily apparent that, when using the term "predator" in his closing argument, the prosecutor was not referring to the defendant. Accordingly, we conclude that this comment was not improper.

Finally, we address the prosecutor's references to the defendant's prior felony conviction during his opening and rebuttal closing arguments to the jury. In his opening argument, the prosecutor recalled for the jury that Officer Bryce had testified that he had performed a background check on the defendant and learned "that the defendant had been previously convicted of a felony." When summarizing the evidence supporting count two, criminal possession of a firearm, he argued that the defendant had admitted that it was his gun, the gun was found in an operable condition, and that "Mr. Reddick, who is a convicted felon, had no right to have that weapon that evening." The defendant did not object to these remarks.

In his rebuttal argument, however, the prosecutor made two additional references to the defendant's felony conviction for very different purposes. On the first occasion, he argued that the defendant's claim of self-defense should be rejected because the defendant "created this situation" by assaulting Gainey and then remaining at Peck Street, knowing that Gainey's family "wasn't going to stand for that." "Right after the beating," the prosecutor remarked, "what did [the defendant] do? . . . He arms himself with a nine millimeter semiautomatic pistol, which, originally, had seventeen live rounds. You know, he was ready for trouble. He was locked and loaded.

"He was a convicted felon. He knew he couldn't have that gun. He doesn't care about the law. You think [he] cared about the law when his fists were smashed into his girlfriend's face? He didn't care. He doesn't care. He knew that there was going to be consequences for his actions. . . . [I]f he thought that the family or Myesha [Gainey] were going to call the New Haven police, do you think he would have been sitting with a nine millimeter fully loaded pistol waiting for the New Haven police to show up? I don't think so."

On the second occasion, the prosecutor referenced the defendant's felony conviction while discussing the circumstances immediately preceding the shooting. Specifically, he remarked that the defendant was able to lock the doors and windows to the station wagon, after which "[h]e could have had his buddy drive away" or, alternatively, he could have displayed the pistol and told Mickey Tillery, "look, stay the hell away from me." Had he pursued either of those alternative courses, the prosecutor argued, "[h]e could have went up to his apartment at 38 Peck Street, locked the door, and called the police. Did he do that? No. Well, he's not going to do that because he's a convicted felon in the possession of a pistol." Thereafter, the prosecutor concluded his

closing argument by stating, inter alia: "So I want . . . you to consider all of those things that he could have done. . . . [T]his was not a necessary shooting because this shooting was not self-defense. That's not what the shooting was about. It was motivated by the defendant wanting to teach the Tillery family a lesson." The defendant voiced no objection to any of these comments.

The parties do not dispute that "[e]vidence of other crimes, wrongs or acts of a person is admissible . . . to prove . . . an element of the crime. . . ." Conn. Code Evid. § 4-5 (c); see also, e.g., *State* v. *James*, 69 Conn. App. 130, 135, 793 A.2d 1200, cert. denied, 260 Conn. 936, 802 A.2d 89 (2002); *State* v. *Hanks*, 39 Conn. App. 333, 344, 665 A.2d 102, cert. denied, 235 Conn. 926, 666 A.2d 1187 (1995). In this case, the prosecutor's comments during his opening closing argument merely summarized Bryce's unobjected-to testimony that the defendant had, in fact, been convicted of a felony, which was an essential element of the charge of criminal possession of a firearm.[21] We conclude, therefore, that this remark was wholly proper, and obviously did not constitute prosecutorial impropriety.

We conclude, however, that the prosecutor's further commentary regarding the defendant's prior felony conviction was improper. It is well established that "[a] prosecutor may not appeal to the emotions of the jurors by engaging in character assassination and personal attacks against . . . the defendant . . . ." *State* v. *Warholic*, supra, 278 Conn. 389. As discussed in the

[21] Pursuant to General Statutes § 53a-217 (a): "A person is guilty of criminal possession of a firearm . . . or . . . electronic defense weapon when such person possesses a firearm . . . or . . . electronic defense weapon and . . . has been convicted of a felony . . . ."

We note that although § 53a-217 has been amended since the events at issue here, those amendments are not relevant to this appeal. We therefore refer to the current revision of § 53a-217.

preceding paragraphs, "[The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . His conduct and language in the trial of cases in which human life or liberty [is] at stake should be forceful, but fair, because he represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice, or resentment." (Internal quotation marks omitted.) *State* v. *Medrano*, supra, 308 Conn. 612. Thus, "[a]lthough a state's attorney may argue that the evidence proves the defendant guilty, he may not stigmatize the defendant by the use of epithets which characterize him as guilty before an adjudication of guilt." (Internal quotation marks omitted.) Id., 615.

In its brief to this court, the state attempts to walk a fine line by arguing that the prosecutor's comments did not suggest that the defendant did not care about the law *merely because he was a convicted felon* but, instead, suggested that the defendant did not care about the law because, despite the fact that he had previously been convicted of a felony, he assaulted his girlfriend, illegally armed himself with a nine millimeter pistol, and waited for the eventual confrontation with Mickey Tillery. We are unpersuaded.

As previously discussed, the defendant did not testify in this case, and thus his prior felony conviction could not be used to challenge the veracity of his testimony. See Conn. Code Evid. § 6-7 (b). Accordingly, the prosecutor could only use evidence of the defendant's prior conviction to establish an essential element of a crime or by utilizing another recognized exception under § 4-5 of the Connecticut Code of Evidence. His comments, however, suggested that the defendant, a convicted felon, was not a law-abiding citizen, and thus had a propensity to engage in the type of criminal conduct

for which he had been charged. Our Code of Evidence unequivocally prohibits the use of prior convictions to establish a defendant's propensity for criminal behavior. Conn. Code Evid. § 4-5 (a); see, e.g., *State* v. *Ellis*, 270 Conn. 337, 354, 852 A.2d 676 (2004). We thus agree with the defendant that these comments were also improper.

"Having determined that several of the prosecutor's statements were improper, we now turn to whether the defendant has proven that the improprieties, cumulatively, 'so infected the trial with unfairness as to make the [conviction] a denial of due process.' " *State* v. *Medrano*, supra, 308 Conn. 620. "To determine whether the defendant was deprived of his due process right to a fair trial, we must determine whether the sum total of [the prosecutor's] improprieties rendered the defendant's [trial] fundamentally unfair, in violation of his right to due process. . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety], therefore, depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties. . . . This inquiry is guided by an examination of the following *Williams* factors: the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Internal quotation marks omitted.) *State* v. *Warholic*, supra, 278 Conn. 396.

With respect to the first *Williams* factor, there is nothing in the record before us to suggest that the prosecutor's comments about gun violence in New Haven or the defendant's felony conviction were invited

by the defendant's conduct or argument.[22] Next, with respect to the second *Williams* factor, the severity of the improprieties, we agree with the state that the prosecutor's remarks regarding gun violence in New Haven did not go so far as to "imp[ly] that convicting the defendant would alleviate the gun violence in New Haven." Moreover, although we conclude that the prosecutor's comments regarding the defendant's felony conviction were improper, we are cognizant that the defendant failed to object, at any point, to the remarks now at issue. As we have repeatedly held, "the determination of whether a new trial or proceeding is warranted depends, in part, on whether defense counsel has made a timely objection to any [incident] of the prosecutor's improper [conduct]. When defense counsel does not object, request a curative instruction or move for a mistrial, he presumably does not view the alleged impropriety as prejudicial enough to seriously jeopardize the defendant's right to a fair trial." (Internal quotation marks omitted.) *State* v. *Warholic*, supra, 278 Conn. 361.

With respect to the third *Williams* factor, the frequency of the alleged improprieties, we note that the prosecutor's comment regarding gun violence in New Haven was an isolated remark and was not part of a larger pattern or theme in the state's case. Cf. *State* v. *Ceballos*, 266 Conn. 364, 411, 832 A.2d 14 (2003). As for the frequency of his comments regarding the defendant's felony conviction, these questionable comments occurred only twice, and thus we conclude that the frequency of these comments does not rise to the level

[22] During closing argument, defense counsel argued, "[the prosecutor] may be right. You may feel the same way. You're sick of the gun violence . . . in New Haven. This case is not a referendum on gun violence. It's not. This case is about Mr. Reddick defending himself against someone who was going to cause him serious physical injury." We are cognizant, however, that these comments occurred after, and in response to, the prosecutor's comments in closing argument.

of the frequency of impropriety that was identified and admonished by our Supreme Court in *State* v. *Williams*, supra, 204 Conn. 547.

As to the fourth *Williams* factor, whether the challenged comments touched upon the central issues before the jury, we agree with the state that, with respect to the defendant's claim of self-defense, the central issue was whether the jury credited the Tillerys' account of what transpired on the evening of the shooting. Against that background, we conclude that the prosecutor's comment regarding gun violence in New Haven had little, if any, relation to that issue, and thus did not strike at the central issues of this case. As for his comments regarding the defendant's felony conviction, however, we believe that such comments did touch upon the central issue of self-defense, and thus we resolve the fourth *Williams* factor in the defendant's favor.

As for the fifth *Williams* factor, the strength of the curative measures adopted, we note that the defendant did not request, and the court did not give, any curative instruction to the jury that it should disregard any of the prosecutor's improper comments. Although the court instructed the jury, with respect to the elements of criminal possession of a firearm, that "the state must prove beyond a reasonable doubt, number one, that the defendant possessed a firearm and, number two, that he was prohibited from possessing a firearm at the time because he was convicted of a felony," the court did not provide any limiting instruction concerning the prosecutor's improper remarks about the defendant's felony conviction. With respect to his comments on gun violence in New Haven, the court instructed the jury only generally, that "[y]ou may not go outside the evidence introduced in court to find the facts. This means you may not [resort] to guesswork, conjuncture, or

suspicion, and you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. . . . Arguments by counsel are not evidence. . . . What they have said in their closing arguments is intended to help you interpret the evidence, but it is not evidence." We conclude that these instructions were sufficient to cure any prejudice resulting from the prosecutor's improper comment regarding gun violence in New Haven. See, e.g., *State* v. *Williams*, supra, 204 Conn. 534 ("Absent a fair indication to the contrary, the jury is presumed to follow the court's instructions. . . . There is nothing in this record to suggest that it did not do so." [Citation omitted.]).

Finally, we emphasize that, with respect to the sixth *Williams* factor, the strength of the state's case, the state's case against the defendant was strong. During its case-in-chief, the state presented, inter alia: (1) testimony of two eyewitnesses to the shooting, who testified consistently that Mickey Tillery had his hands raised and was moving away from the defendant and his vehicle when the defendant emerged from the station wagon and shot him; (2) photographic and testimonial evidence demonstrating that the location of Marjorie Tillery's Tahoe did not prevent the station wagon from leaving the parking lot had the defendant attempted to do so; (3) testimony that the defendant made inculpatory statements to the police officers shortly after the shooting; and (4) forensic evidence linking the gun found in the defendant's possession to the shell casing recovered at the scene. As such, the remaining issue to be decided was whether the defendant acted in self-defense. As more fully explained throughout this opinion, however, the facts elicited throughout the state's case-in-chief substantially undercut the defendant's claim that he shot Mickey Tillery in self-defense.[23]

[23] Such facts included, inter alia, the lapse of time between the initial confrontation and the second confrontation between the defendant and Mickey Tillery; Whitely's ability to drive the station wagon around Marjorie

As previously stated, "when a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process." *State* v. *Payne*, 303 Conn. 538, 562–63, 34 A.3d 370 (2012). Considering the strength of the state's case, the infrequency with which the improper comments were made, and the defendant's failure to object to any of the comments with which he now takes issue, we conclude that the defendant has not demonstrated that, "in the context of the entire trial"; *State* v. *Williams*, supra, 204 Conn. 538; the prosecutor's improper comments "rendered the defendant's [trial] fundamentally unfair, in violation of his right to due process." (Internal quotation marks omitted.) *State* v. *Warholic*, supra, 278 Conn. 396; see also *State* v. *Stevenson*, 269 Conn. 563, 571, 849 A.2d 626 (2004).

The judgment is affirmed.

In this opinion the other judges concurred.

Tillery's truck and exit the parking lot; the fact that Mickey Tillery was unarmed; and the fact that Mickey Tillery was backing away from the vehicle with his hands raised when the defendant voluntarily emerged from the station wagon and shot him.

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NOTICES OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Intent to Submit Waiver Renewal

In accordance with the provisions of section 17b-8(c) of the Connecticut General Statutes, notice is hereby given that the Commissioner of Social Services intends to submit a renewal of the Home and Community Supports Waiver for Persons with Autism to the Centers for Medicare and Medicaid Services, to be effective January 1, 2018.

The Department of Social Services proposes the following substantive changes:

1. Change the operating agency for the waiver from the Department of Developmental Services to the Department of Social Services, in accordance with C.G.S. 17a-215 and 17a-215c;
2. Reduce the individual service cost cap from $60,000 per year to $50,000 per year. No current waiver participants are expected to experience a service reduction. While three participants are authorized to receive more than $50,000 in services per year, none of these participants have actually utilized more than $50,000 in services;
3. Require providers to enroll as waiver providers and bill their services directly through the state's Medicaid Management Information System; and
4. Eliminate Community Companion Homes and Live-in Companion services from the waiver as these services have had no utilization since inception of the waiver in January 2013.

A copy of the complete text of the waiver is available, at no cost, upon request to the Department of Social Services, 55 Farmington Ave., Hartford, CT 06105, Attention Shirlee Stoute; or via email to shirlee.stoute@ct.gov. It is also available on the Department's website, www.ct.gov/dss, under ''Latest News.''

All written comments regarding this renewal application may be submitted by August 10, 2017 to the Department of Social Services, Community Options Unit, 55 Farmington Ave., Hartford, CT 06105; Attention: Kathy Bruni, Director; or via email to kathy.a.bruni@ct.gov.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA) Reduction to Primary Care Provider Increased Payments (SPA 17-AC)

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services.

Changes to Medicaid State Plan

Effective on or after August 11, 2017, SPA 17-AC will amend Attachment 4.19-B of the Medicaid State Plan to reimburse at 90% of the calculated 2014 Medicare physician fee schedule facility and non-facility rates for specified primary care services and vaccine administration provided under the Vaccines for Children program. These payments apply to specific primary care services described in the Medicaid State Plan and as identified in Provider Bulletin 2014-75 and which can be accessed by going to http://www.ctdssmap.com; go to ''Information,'' then to ''Publications''.

This SPA is necessary in order to implement the reimbursement methodology update specified in the Governor's Executive Order Resource Allocation Plan that implements Governor Malloy's Executive Order No. 58, which authorizes state expenditures for state fiscal year 2018 in the absence of an appropriations act enacted by the General Assembly. This SPA represents a reduction in reimbursement from the methodology currently in effect, which reimburses at 100% of the calculated 2014 Medicare physician fee schedule facility and non-facility rates for specified primary care services and vaccine administration provided under the Vaccines for Children program.

Pursuant to federal regulations at 42 C.F.R. § 447.205, public notice is required at this time. Accordingly, this public notice reflects proposed changes that are required in accordance with the Governor's Executive Order Resource Allocation Plan. However, this SPA is subject to change based on the terms of a final state budget that is scheduled to be adopted in an upcoming special legislative session.

Fiscal Impact

Based on available information, DSS estimates that this SPA will decrease annual aggregate Medicaid expenditures by approximately $14.4 million in state fiscal year (SFY) 2018 and $18.5 million in SFY 2019.

Compliance with Federal Access Regulations

In accordance with federal regulations at 42 C.F.R. §§ 447.203 and 447.204, DSS is required to ensure that there is sufficient access to Medicaid services, including services where payment rates are proposed to be reduced or where payment rates or methodologies are being restructured in a manner that may affect access to services. Those federal regulations also require DSS to have ongoing mechanisms for Medicaid members, providers, other stakeholders, and the public to provide DSS with feedback about access. In addition to other available procedures, anyone may send DSS comments about the potential impact of this SPA on access to primary care services as part of the public comment process for this SPA. Contact information and the deadline for submitting public comments are listed below.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS web site at this link: http://www.ct.gov/dss. Go to ''Publications'' and then ''Updates.'' The proposed SPA may also be obtained at any DSS field office or the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Medical Policy Unit, Department of Social Services, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105

(Phone: 860-424-5067). Please reference ''SPA 17-AC – Reduction to Primary Care Provider Increased Payments''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than August 10, 2017.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA) Elimination of Home Health Add-On Payments (SPA 17-AD)

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services.

Changes to Medicaid State Plan

Effective on or after August 11, 2017, SPA 17-AD will amend Attachment 4.19-B of the Medicaid State Plan in order to remove the description of home health agency add-on fees in the Medicaid State Plan and also to revise the home health agency fee schedule accordingly to implement the removal of home health agency rate add-ons. All home health add-on fees will be eliminated, which includes the following specific procedure/revenue center codes: 421, 424, 431, 434, 441, 444, G0162, G0163, H0033, S9123, S1924, S5185, T1001, T1002, T1003, T1004, T1016, T1021, T1502, and T1502. In addition to other applicable authority, this SPA implements the elimination of the home health add-on fees in accordance with the Governor's Executive Order Resource Allocation Plan that implements Governor Malloy's Executive Order No. 58, which authorizes state expenditures for state fiscal year 2018 in the absence of an appropriations act enacted by the General Assembly.

Fiscal Impact

DSS estimates that this SPA will decrease annual aggregate Medicaid expenditures by approximately $4.9 million in state fiscal year (SFY) 2018 and $6.0 million in SFY 2019.

Compliance with Federal Access Regulations

In accordance with federal regulations at 42 C.F.R. §§ 447.203 and 447.204, DSS is required to ensure that there is sufficient access to Medicaid services, including services where payment rates are proposed to be reduced or where payment rates or methodologies are being restructured in a manner that may affect access to services. Those federal regulations also require DSS to have ongoing mechanisms for Medicaid members, providers, other stakeholders, and the public to provide DSS with feedback about access. In addition to other available procedures, anyone may send DSS comments about the potential impact of this SPA on access to home health services as part of the public comment process for this SPA. Contact information and the deadline for submitting public comments are listed below.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS web site at this link: http://www.ct.gov/dss. Go to ''Publications'' and then ''Updates''. The proposed SPA may also be obtained at any DSS field office or the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA17-AD – Elimination of Home Health Add-on Payments''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than August 10, 2017.

NOTICE

Small Claims Decentralization

Effective Monday, October 16, 2017, the Centralized Small Claims Office located at 80 Washington Street, Hartford, CT 06106 will be closed. No new small claims writs or any other documents on small claims cases can be filed at the Centralized Small Claims Office in person, by fax or by mail as of that date. The decentralization process will begin in August, 2017, and be completed effective October 16, 2017. The following is a brief summary of the changes. For more information on small claims decentralization, go to the Judicial Branch website at www.jud.ct.gov or a clerk's office, court service center, public information desk or law library.

Effective Friday, September 1, 2017 and after:

1. All small claims cases filed *with the Centralized Small Claims Office* or electronically through Small Claims E-Filing will have an answer date on or after October 16, 2017, and will be transferred to the small claims docket at the appropriate judicial district or housing session.

2. Any existing (pending or post-judgment) small claims case that (1) requires a hearing date after September 1, 2017; or (2) has a final date for compliance ordered by a magistrate after September 1, 2017, will be transferred to the small claims docket in the appropriate judicial district or housing session.

3. When a case is transferred, the court will send to counsel and self-represented parties notice of the court location and a new docket number that must be used on any documents filed with the court for these cases. Paper documents must include the new docket number and be filed with the clerk of the appropriate location. Electronically-filed documents must be filed through *Superior Court E-filing*, using the new docket number.

4. Any new cases, or documents filed on existing cases that have not been transferred, shall be filed electronically through Centralized Small Claims E-Filing or on paper with the Centralized Small Claims Office or at the appropriate court location, until 5:00 p.m. on October 13, 2017.

Effective October 16, 2017, and after:

1. When you are filing a new small claims case after the defendants have been served, you must file the small claims writ with the appropriate judicial district or housing session location clerk's office as set forth in Section 51-345 and 51-346 of the Connecticut General Statutes.

2. If you are filing any document *on paper* (including an application for an execution filed by a self-represented party) on an existing case that has not been transferred to a judicial district or housing session location, you must file the paper document with the appropriate judicial district or housing session clerk's office. The clerk will then have the case transferred from Centralized Small Claims to the appropriate judicial district or housing session location.

3. If you are filing an application for an execution *electronically* on a small claims case that has *not* been transferred and assigned a new docket number, you must use the existing small claims docket number and file it through

Centralized Small Claims E-Filing, not Superior Court E-Filing. Once the execution is filed, the case will be transferred to the small claims docket in the appropriate judicial district or housing session location and assigned a new docket number.

4. If you want to view a file that has not been transferred and assigned a new docket number, you must contact the appropriate judicial district or housing session location for assistance.

For more information on where to file small claims cases, go to the Judicial Branch website:
http://www.jud.ct.gov/directory/directory/directions/smallclaims.htm.