STATE OF CONNECTICUT *v.* WILLIAM CASTILLO (SC 19777)

Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn, Js.*

Syllabus

The defendant, a nearly seventeen year old high school student, was convicted of attempt to commit robbery in the first degree and attempt to commit robbery in the second degree in connection with his role in accosting a group of middle school students. Following an investigation into the crimes that formed the basis for the defendant's conviction, a police officer, F, went to the defendant's apartment to interview him. After determining that the defendant was alone, F did not conduct the interview but left his business card with the defendant and informed him that he would return another time. The defendant later gave the card to his mother, M, thereby alerting her that the police had visited the apartment. When F and another officer returned to the apartment, they were accompanied by an officer who spoke Spanish to assist M, because the defendant had informed F during his initial visit that M did not speak English. After M answered the door, F explained to M the purpose of his visit, and she invited the officers into the living room, where F advised the defendant and M of their juvenile and parental rights, respectively. After the defendant and M signed their rights forms, F verbally advised the defendant that he was free to ask the officers to leave or to stop speaking to the officers, and that he did not have to speak to them at all. The defendant confessed orally and in writing to the events surrounding the attempted robbery and subsequently was arrested pursuant to a juvenile arrest warrant. His case was then transferred to the adult criminal docket. The defendant appealed from the judgment of conviction to the Appellate Court, claiming that the trial court improperly denied his motion to suppress the oral and written statements he made to the police during the interrogation on the ground that he had been given inadequate warnings in accordance with *Miranda* v. *Arizona* (384 U.S. 436), in violation of his constitutional rights. The defendant also claimed that the Appellate Court should have exercised its supervisory authority and issued a prophylactic rule requiring that juvenile waiver forms inform a juvenile that his statements may be used against him not only in juvenile proceedings but also in adult criminal proceedings if the case ultimately is transferred to the adult criminal docket. The Appellate Court concluded that the defendant was not in custody during the interrogation for purposes of *Miranda* and declined to exercise its supervisory authority and issue the requested prophylactic

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

rule. On the granting of certification, the defendant appealed to this court. *Held*:

1. The Appellate Court correctly determined that the defendant was not in custody for purposes of *Miranda* and, therefore, that he was not entitled to *Miranda* warnings before he made his oral and written statements to the police: the Appellate Court correctly determined that, in light of the totality of the circumstances, and with due consideration of the defendant's age, no reasonable person in the defendant's position would have believed that he was in custody for purposes of *Miranda*, as the evidence indicated that the defendant was questioned in the comfort of his own home, with his mother present, and not at a police station or other unfamiliar and inherently coercive location, the defendant had been alerted in advance that the police would be coming to his apartment to question him when his mother was present, the encounter lasted only forty-five minutes, the police did not enter the apartment on their own authority, but, rather, M invited the officers in after F informed her of the purpose of their visit, only three officers were present, one of whom was acting as a translator, and two of whom were wearing plain clothes, the defendant was never threatened with arrest, searched, or handcuffed, and the police took no other action, either verbal or physical, to intimidate the defendant or to restrict his movement or to confine him to a particular room, F informed M that she could end the interview at any time, and the defendant was instructed, before questions were asked, that his presence was voluntary, that he was free to leave and that he did not have to answer any questions; moreover, the defendant's claims that the particular circumstances of the interview transformed his home into a coercive atmosphere and that the presence of M during the interview made him feel less free to leave were unavailing, as there were only three officers present, none of whom wore tactical gear or brandished a weapon, and, although the officers were in close proximity to him during the questioning, they did not restrict his movement or the movement of others in the apartment, and the mere fact that M became upset when she heard the details of the defendant's alleged criminal activity, without more, was insufficient to demonstrate that her presence made the police encounter more coercive.
2. This court declined the defendant's request to invoke its supervisory authority over the administration of justice and to adopt a per se rule requiring that, whenever the police investigating a felony give *Miranda* warnings to a juvenile, those warnings must include a warning that any statement made by the juvenile may be used against the juvenile not only in juvenile proceedings but also in adult criminal proceedings if the case is transferred to the adult criminal docket; the defendant's requested rule went beyond the facts of his case and beyond what was constitutionally required, as the defendant was not in custody at the time he was interrogated and the police were not required to provide him with *Miranda* warnings, the defendant failed to offer any evidence

that there is a pervasive and significant problem that would have justified this court's invocation of its supervisory authority, and the specific juvenile waiver form that the defendant signed appeared to be unique to the city police department that issued it.

(*One justice dissenting*)

Argued November 6, 2017—officially released July 3, 2018

Procedural History

Substitute information charging the defendant with the crimes of attempt to commit robbery in the first degree and attempt to commit robbery in the second degree, brought to the Superior Court in the judicial district of Litchfield, where the court, *Danaher*, *J*., denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the jury before *Danaher*, *J*.; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Keller*, *Prescott* and *Harper*, *Js*., which affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Richard Emanuel, for the appellant (defendant).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *David S. Shepack*, state's attorney, and *Terri Sonnemann*, senior assistant state's attorney, for the appellee (state).

Opinion

KAHN, J. In this certified appeal, the defendant, William Castillo, appeals from the judgment of the Appellate Court affirming the judgment of conviction, rendered after a jury trial, of attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 and 53a-134 (a) (3), and attempt to commit robbery in the second degree in violation of General Statutes §§ 53a-49 and 53a-135 (a) (1) (A).[1] The defen-

[1] Section 53a-135 (a) was amended by No. 12-186, § 1, of the 2012 Public Acts, which made technical changes to the statute that are not relevant to this appeal. In the interest of simplicity, we refer to the current revision of the statute.

dant claims that the Appellate Court improperly (1) concluded that, during his in-home interrogation by the police, he was not in custody for purposes of *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and (2) declined to exercise its supervisory authority "to adopt a new rule governing the admissibility of statements obtained during the interrogation of juveniles." *State* v. *Castillo*, 165 Conn. App. 703, 729, 140 A.3d 301 (2016).[2] Because we con-

[2] We granted the defendant's petition for certification to appeal from the judgment of the Appellate Court, limited to the following three issues: (1) "Did the Appellate Court correctly determine that the defendant was not in custody for *Miranda* v. *Arizona*, [supra, 384 U.S. 478–79] purposes during his in-home interrogation by the police?" (2) "Did the Appellate Court correctly determine that the trial court's factual finding, that the defendant was at home when the police arrived to interrogate him, was not clearly erroneous?" (3) "Did the Appellate Court correctly determine that it was inappropriate or premature for that court to consider the defendant's supervisory claim?" *State* v. *Castillo*, 323 Conn. 903, 150 A.3d 684 (2016).

We need not address the second certified question. At oral argument before this court, the defendant effectively abandoned that claim—that the trial court's finding that the defendant was at home when the police arrived to interrogate him was clearly erroneous. During oral argument before this court, the defendant asserted that an articulation that the trial court had issued subsequent to the grant of certification to appeal had "rendered moot" his challenge to the trial court's factual finding that he was at home when the officers arrived.

Specifically, at the Appellate Court, in support of his claim that the trial court's factual finding was clearly erroneous, the defendant relied on what he characterized as conflicting testimony on the issue of his initial location. Although his mother testified that he was at home, two officers suggested in their testimony that he was not immediately available and had to be contacted and summoned by his family. See *State* v. *Castillo*, supra, 165 Conn. App. 720–21. Following this court's grant of certification to appeal from the judgment of the Appellate Court, the defendant filed a motion for rectification with the trial court, requesting that court to allow additional testimony on the issue of the defendant's location when the police first arrived at his home. The trial court denied the motion for rectification because it concluded that the defendant had not demonstrated that rectification of the record was appropriate.

In response to the motion for rectification, however, the court issued an articulation of the basis for its factual finding that the defendant was in the apartment when the police arrived. The court reviewed the testimony offered at the suppression hearing and clarified that, although the testimony of the

clude that the Appellate Court properly determined that the defendant was not in custody, we affirm the judgment of the Appellate Court. Interpreting the third certified question as a request by the defendant to exercise our supervisory authority to adopt his requested rule, we decline to do so.

The Appellate Court set forth the following relevant facts and procedural history. "On March 23, 2012, the defendant was a student at Torrington High School, and was less than one month from his seventeenth birthday. At about 8:30 p.m. on that date, he and several other teenagers left a high school dodgeball game together in a Jeep Grand Cherokee. The defendant and his friends spotted a group of middle school students leaving a minimart on foot, and they decided to 'jump' the younger boys and steal their money. The older group of teenagers followed the three middle school students, eventually stopping the Jeep in front of them. After exiting the Jeep, the defendant and his friend assaulted the younger boys in an attempt to rob them. The defendant grabbed one of the boys, Liam, and pushed him into a nearby parked vehicle. He held a screwdriver to Liam's abdomen and demanded his money. [When Liam said that he did not have any money on him, the defendant kicked his legs out from under him, causing him to fall to the ground.] When the defendant and his friends

two officers suggested that the defendant was not initially present *in the living room*, neither officer was clear regarding the defendant's precise whereabouts. The defendant's mother, by contrast, testified clearly and unequivocally that the defendant was at home at the time that the officers arrived. Put another way, the officers only testified clearly and unequivocally regarding where the defendant was *not* located—in the living room. That testimony, the trial court explained, did not conflict with the mother's testimony regarding where the defendant *was* located—in the apartment. The trial court explained: "In view of the fact that the officers were not unequivocal and specific about the defendant's whereabouts when they arrived at the apartment, the court elected to credit the one witness who was unequivocal and specific about this issue: the defendant's mother."

discovered that the younger boys had no money, they fled in the Jeep.

"Several neighbors witnessed all or part of the incident and gave statements to the police, who had responded to a report of an assault. Those statements included a description of the Jeep that the defendant and his friends were using and a partial license plate number. The police also later interviewed the victims, who, although unable to identify their attackers because they had disguised themselves by partially concealing their faces with their T-shirts, gave partial descriptions.

"At about the time of the incident in question, other police officers spotted a Jeep traveling at a high rate of speed in the vicinity. They followed the vehicle into an apartment complex at which time they initiated a stop, eventually identifying the passengers, including the defendant. Although the police were aware of the recent assault, they did not believe that they had enough evidence to arrest or otherwise detain the occupants of the Jeep.

"A week or so following the incident, the police received information that led them to believe that the occupants of the Jeep that they had stopped at the apartment complex were the same group that had attempted to rob the middle school boys. Police detectives interviewed each of the occupants [whom] they had previously identified during the traffic stop.

"Detective Todd Fador, the lead investigator, first went to the defendant's apartment at 330 Highland Avenue on April 10, 2012, for the purpose of conducting an interview with the defendant; however, he found the defendant alone at that time. Because of the defendant's age, Fador would not conduct an interview without a parent present. Fador told the defendant that he would return another time and left a business card, which the defendant gave to his mother, Yocasta Monegro,

thereby alerting her that the police had stopped by her home.

"Fador returned to the defendant's home on April 13, 2012, at approximately 5 p.m. Monegro, Monegro's boyfriend, two younger children, and the defendant were home at that time. Fador was accompanied by another detective, Keith Dablaine, and Officer Angel Rios. Fador had brought Rios along because Rios was fluent in Spanish, and, at their initial meeting on April 10, 2012, the defendant had told Fador that Monegro did not speak English.[3] Fador and Dablaine carried sidearms and wore plain clothes with badges around their necks. Rios was dressed in a police uniform and also wore a sidearm.

"Monegro answered the door, at which point Rios explained to her, in Spanish, that the purpose of their visit was to speak with the defendant, who had been identified as a suspect. The interview of the defendant was conducted in the living room. The room had a sofa, a love seat, and a chair. In addition to the main entrance to the room, it had two other doors. The defendant was not immediately present when the police arrived, but Monegro indicated that she would get him. When the defendant entered the room, Fador advised the defendant and Monegro of their juvenile and parental rights, respectively. Rios translated Fador's advisement into Spanish. The defendant was presented with a juvenile waiver form that advised him of his rights, including his right to remain silent, to consult with an attorney, and to stop answering questions at any time. The defendant initialed six separate paragraphs on the form and signed the form. Monegro was given a parental consent form that contained a similar advisement of rights in

[3] Fador testified at the suppression hearing that, when the defendant told him that his mother spoke no English, Fador informed the defendant that he would bring a Spanish speaking officer with him when he returned.

English, which Rios translated for her prior to her initialing and signing the form. The defendant was calm throughout this procedure.

"As the trial court stated in its memorandum of decision denying the motion to suppress, after the waiver forms were signed, Fador 'verbally advised the defendant that he was free to ask the officers to leave, that he was free to stop speaking to the officers, and that he did not have to speak to the officers at all.[4] . . . [T]he defendant did not ask any questions about his rights, he did not appear to be confused, and he said that he understood his rights.'

" 'The defendant agreed to give a statement, asking Fador to write it out. [Fador] did so, stopping every few sentences to give [Rios] an opportunity to translate the defendant's statements to [Monegro]. The defendant was cooperative and did not appear to be worried, although it was apparent that [Monegro] was growing increasingly upset as her son progressed with his statement. . . . After the defendant finished making his statement, he reviewed what [Fador] had written and then signed the statement. . . . The entire visit took between forty-five minutes and one hour. At no time did anyone ask the officers to stop questioning the defendant or to leave the home. . . .'

[4] The defendant emphasizes that the officers expressly informed him that he could ask them to leave the apartment only after he and his mother already had signed the waiver forms. Therefore, the defendant argues, the officers' statement that he was free to ask them to leave does not support a finding that he was not in custody. We are not persuaded. Even if we were to conclude that the officers were required to inform the defendant that he was free to ask them to leave before he signed the waiver forms, the defendant's argument fails for two reasons. First, the juvenile waiver form expressly informed the defendant that he had the right to stop answering questions at any time. Second, Fador testified that when the defendant arrived, the officers explained to the defendant and his mother that, if he chose not to sign the waiver forms, "the interview would be stopped."

" '[N]one of the officers advised the defendant that his involvement in the robbery could ultimately lead to his deportation. . . . [W]hen [Monegro] asked about the risk of deportation, [Rios] replied that such an action is not within his jurisdiction but is, rather, an issue for the Bureau of Immigration and Customs Enforcement.' . . . Although the defendant confessed, first orally and then in writing, to having participated in the events of March 23, 2012, and having attempted to steal money from one of the middle school students, he denied having used any weapon. The defendant was not arrested at that time, and the detectives and Rios left the apartment." (Footnotes added and omitted.) *State* v. *Castillo*, supra, 165 Conn. App. 706–10.

Approximately one month later, on May 10, 2012, the defendant was arrested pursuant to a juvenile arrest warrant and charged with various delinquent acts, including robbery in the first degree in violation of § 53a-134. Because he was charged with committing a class B felony, robbery in the first degree, the case was then automatically transferred to the regular criminal docket pursuant to General Statutes (Rev. to 2011) § 46b-127 (a) and then to the part A docket in the Litchfield judicial district. The defendant subsequently entered pro forma pleas of not guilty to certain of the charges underlying the juvenile arrest warrant. Prior to jury selection, the state filed a long form information charging the defendant in two counts with robbery in the first degree and robbery in the second degree. The defendant entered pleas of not guilty on both counts.

"On August 30, 2013, the defendant filed a motion to suppress his April 13, 2012 oral and written statements to the police, arguing that any waiver of his *Miranda* rights was not knowingly, intelligently, or voluntarily given, and, even if the police satisfied *Miranda*, his statements were obtained involuntarily in violation of his due process rights under the state and federal consti-

tutions. The state filed an opposition arguing that *Miranda* warnings were not necessary in the present case because the defendant was not 'in custody' when the challenged statements were made and there simply was no evidence of any police coercion or other police activity necessary to support the defendant's due process claim. The court, *Danaher, J.*, conducted a hearing on the motion to suppress, at which time the court heard testimony from Fador, Rios, and Monegro. Following the hearing, on September 24, 2013, the court issued a written memorandum of decision agreeing with the arguments of the state and denying the motion to suppress.

"Prior to trial, on September 30, 2013, the state filed a substitute long form information, amending the charges against the defendant to one count of attempt to commit first degree robbery in violation of §§ 53a-49 and 53a-134 (a) (3), and one count of attempt to commit second degree robbery in violation of §§ 53a-49 and 53a-135 (a) (1) (A). The defendant pleaded not guilty to those charges, and the case proceeded to trial, following which the jury found the defendant guilty of both counts. The court sentenced the defendant to a total effective term of five years imprisonment, suspended after eighteen months, with five years of probation." Id., 711–12.

The defendant appealed to the Appellate Court, claiming, inter alia, that the trial court improperly denied his motion to suppress because his statements were obtained in violation of his constitutional rights. Specifically, the defendant claimed that (1) the police subjected him to a custodial interrogation without providing him with adequate *Miranda* warnings, (2) the trial court's finding that he was home when the officers arrived was clearly erroneous, and (3) the Appellate Court should exercise its supervisory authority to issue a prophylactic rule requiring that juvenile waiver forms

inform a juvenile that his statements may be used against him not only in juvenile proceedings, but also in adult criminal proceedings, should his case be transferred.[5] Id., 705–706. The Appellate Court concluded that the trial court properly determined that the defendant was not in custody when he gave the statements and that the finding that the defendant was home when the police arrived to question him was not clearly erroneous. See id., 721–22. The court declined to exercise its supervisory authority to issue a prophylactic rule requiring the waiver forms to warn that any statements could be used against a juvenile in adult criminal proceedings, following a transfer. Id., 729. This certified appeal followed. See footnote 2 of this opinion.

The standard of review for a motion to suppress is well established. "A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record. . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. . . . [W]here the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are

[5] The defendant also claimed that his statements to the police were not voluntary and that they were inadmissible at trial pursuant to General Statutes (Rev. to 2011) § 46b-137 (c). See *State* v. *Castillo*, supra, 165 Conn. App. 705. The Appellate Court concluded that the defendant's reliance on § 46b-137 (c) lacked merit because, "[d]espite the defendant's arguments to the contrary, § 46b-137 has no bearing on the admissibility of statements offered in adult criminal proceedings. Accordingly, it could not have provided an independent basis for granting the defendant's motion to suppress." Id., 728. Because the defendant did not seek certification as to those two issues, they are not before us in this appeal.

legally and logically correct and whether they find support in the facts set out in the memorandum of decision. . . .

"Notwithstanding our responsibility to examine the record scrupulously, it is well established that we may not substitute our judgment for that of the trial court when it comes to evaluating the credibility of a witness. . . . It is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review. As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . We must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *State* v. *Kendrick*, 314 Conn. 212, 223, 100 A.3d 821 (2014).

I

We first address the defendant's claim that the Appellate Court improperly concluded that he was not in custody for purposes of *Miranda*. As a threshold matter, we observe that the trial court's findings as to " 'the historical circumstances surrounding [a] defendant's interrogation [entails] questions of fact . . . .' " *State* v. *Pinder*, 250 Conn. 385, 410, 736 A.2d 857 (1999). Accordingly, and in light of the constitutional implications of the issue and upon our scrupulous examination of the record, those findings will not be disturbed unless they are clearly erroneous. *State* v. *Kendrick*, supra, 314 Conn. 222–23. "The ultimate inquiry as to whether, in light of these factual circumstances, a reasonable person in the defendant's position would believe that he or she was in police custody of the degree associated with a formal arrest . . . calls for application of the

controlling legal standard to the historical facts [and] . . . therefore, presents a . . . question of law . . . over which our review is de novo." (Internal quotation marks omitted.) *State* v. *Mangual*, 311 Conn. 182, 197, 85 A.3d 627 (2014).

"[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question . . . rather, they must provide such warnings only to persons who are subject to custodial interrogation." (Citation omitted; internal quotation marks omitted.) Id., 192. In the present case, it is undisputed that the police were interrogating the defendant. Accordingly, the only question is whether he was in custody. On that issue, the defendant bears the burden of proof. See *State* v. *Pittman*, 209 Conn. 596, 606, 553 A.2d 155 (1989) (defendant bears burden to prove custodial interrogation).

"As used in . . . *Miranda* [and its progeny], custody is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion. . . . In determining whether a person is in custody in this sense . . . the United States Supreme Court has adopted an objective, reasonable person test . . . the initial step [of which] is to ascertain whether, in light of the objective circumstances of the interrogation . . . a reasonable person [would] have felt [that] he or she was not at liberty to terminate the interrogation and [to] leave. . . . Determining whether an individual's freedom of movement [has been] curtailed, however, is simply the first step in the analysis, not the last. Not all restraints on freedom of movement amount to custody for purposes of *Miranda*. [Accordingly, the United States Supreme Court has] decline[d] to accord talismanic power to the freedom-of-movement inquiry . . . and [has] instead asked the additional question [of] whether the relevant environment presents the same inherently coercive pressures as the type of station

house questioning at issue in *Miranda*. . . . Of course, the clearest example of custody for purposes of *Miranda* occurs when a suspect has been formally arrested. As *Miranda* makes clear, however, custodial interrogation includes questioning initiated by law enforcement officers after a suspect has been arrested or otherwise deprived of his freedom of action in any significant way. . . . *Miranda* v. *Arizona*, supra, 384 U.S. 444. Thus, not all restrictions on a suspect's freedom of action rise to the level of custody for *Miranda* purposes; in other words, the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody. . . . Rather, the ultimate inquiry is whether a reasonable person in the defendant's position would believe that there was a restraint on [his] freedom of movement of the degree associated with a formal arrest. . . . Any lesser restriction on a person's freedom of action is not significant enough to implicate the core fifth amendment concerns that *Miranda* sought to address.

"With respect to the issue of whether a person in the suspect's position reasonably would have believed that [he] was in police custody to the degree associated with a formal arrest, no definitive list of factors governs [that] determination, which must be based on the circumstances of each case . . . . Because, however, the [court in] *Miranda* . . . expressed concern with protecting defendants against interrogations that take place in a police-dominated atmosphere containing [inherent] pressures [that, by their very nature, tend] to undermine the individual's [ability to make a free and voluntary decision as to whether to speak or remain silent] . . . circumstances relating to those kinds of concerns are highly relevant on the custody issue. . . . In other words, in order to determine how a suspect [reasonably] would have gauge[d] his freedom of movement, courts must examine all of the circumstances

surrounding the interrogation. . . . Although this court has not been called on to decide whether the totality of the circumstances surrounding the execution of a search warrant at a suspect's home rendered the atmosphere police-dominated for purposes of *Miranda*, the Appellate Court has addressed that issue . . . and we previously have considered whether a suspect was in custody when he invited the police into his home and willingly agreed to speak to them. . . . A review of these and related cases from this state, as well as federal and sister state cases involving the interrogation of a suspect during a police search of his residence, reveals the following nonexclusive list of factors to be considered in determining whether a suspect was in custody for purposes of *Miranda*: (1) the nature, extent and duration of the questioning; (2) whether the suspect was handcuffed or otherwise physically restrained; (3) whether officers explained that the suspect was free to leave or not under arrest; (4) who initiated the encounter; (5) the location of the interview; (6) the length of the detention; (7) the number of officers in the immediate vicinity of the questioning; (8) whether the officers were armed; (9) whether the officers displayed their weapons or used force of any other kind before or during questioning; and (10) the degree to which the suspect was isolated from friends, family and the public." (Citations omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Mangual*, supra, 311 Conn. 193–97. Because the defendant in the present case is a juvenile, his age is a factor that courts must consider in determining whether he reasonably would have believed that he was in custody at the time of the interrogation. *J. D. B.* v. *North Carolina*, 564 U.S. 261, 264, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011).

Our scrupulous review of the record leads us to agree with the Appellate Court that "no reasonable person in

the defendant's position would have believed that he was 'in custody' for purposes of *Miranda*." *State* v. *Castillo*, supra, 165 Conn. App. 716. As the Appellate Court observed, it is significant that "the defendant was not questioned at a police station or other unfamiliar and inherently coercive location, but in the relative comfort and familiarity of his own home,[6] with family present." (Footnote added.) Id., 716–17. Although the court correctly recognized that, under some circumstances, the mere fact that an interrogation takes place in a person's home will not prevent that interrogation from being custodial, it relied on our decision in *Mangual* for the proposition that " 'an encounter with police is generally less likely to be custodial when it occurs in a suspect's home.' " Id., 717, quoting *State* v. *Mangual*, supra, 311 Conn. 206. The facts of the present case, however, are distinguishable from those presented in *Mangual*, in which we concluded that the defendant was in custody when police interrogated her in her home while executing a search warrant. See *State* v. *Mangual*, supra, 212. The Appellate Court explained that, in *Mangual*, "the totality of the circumstances surrounding the execution of the warrant by the police had transformed the defendant's home into the type of police dominated atmosphere that necessitated that the police advise the defendant of her *Miranda* rights prior to questioning her." *State* v. *Castillo*, supra, 717.

We begin by observing that the trial court properly considered the defendant's age in determining whether, in light of the totality of the circumstances, the defendant was in custody during the interrogation. The court noted that, at the time of the interview, the defendant was sixteen years old, and also observed that it was

[6] We observe that the dissent refers to the defendant's home as "his mother's home." That phrase suggests that the defendant was merely a visitor in his mother's home. It is undisputed, however, that the apartment was not only his mother's home, but also his home.

due to his age that Fador did not want to interview the defendant in the absence of his parents. In fact, in the trial court, it was undisputed that the defendant was five weeks short of his seventeenth birthday at the time of the interrogation. Under the facts of the present case, we conclude that the trial court gave sufficient consideration and weight to the defendant's age. The United States Supreme Court has held that, although courts must consider a juvenile's age as one factor in the custody analysis, a child's age will not necessarily be "a determinative, or even a significant, factor in every case." *J. D. B.* v. *North Carolina*, supra, 564 U.S. 277.

There is no question that the Appellate Court also considered the age of the defendant in assessing all of his claims, including the custody analysis. The first factual finding of the trial court that the Appellate Court noted as relevant to its review was: "On March 23, 2012, the defendant was a student at Torrington High School, and was less than one month from his seventeenth birthday." *State* v. *Castillo*, supra, 165 Conn. App. 706. The Appellate Court decision made multiple references to the defendant's age. For example, the court observed that, "[b]ecause of the defendant's age, Fador would not conduct an interview without a parent present." Id., 707–708. The court also noted that, "on May 10, 2012, the defendant was arrested pursuant to a juvenile arrest warrant . . . ." Id., 710. The Appellate Court scrupulously examined the record and concluded that "no reasonable person *in the defendant's position* would have believed that he was 'in custody' for purposes of *Miranda*." (Emphasis added.) Id., 716. The Appellate Court decision also referenced the defendant's age in its analysis of the voluntariness of his statements by noting that "[t]he defendant was nearly seventeen years old at the time he was questioned, and there was no indication that he was poorly educated or developmentally challenged." Id., 724. We conclude,

therefore, that the Appellate Court complied with the holding of *J. D. B.* that courts must consider a juvenile's age as one factor in the custody analysis, and that it is proper in that analysis to consider whether a juvenile is close to the age of majority.[7] See *J. D. B.* v. *North Carolina*, supra, 564 U.S. 277.

The Appellate Court aptly summarized the circumstances that we considered compelling in our custody analysis in *Mangual*. "First, the police had initiated the contact, and were not invited into the apartment by the defendant, but 'entered under the authority of a search warrant, an inherently coercive and intimidating police action.' " Id. We also note that, in *Mangual*, the police encounter was "wholly unexpected" by the defendant. *State* v. *Mangual*, supra, 311 Conn. 199. The Appellate Court additionally observed that, in *Mangual*, this court "considered the action particularly intimidating given

[7] This case stands in sharp contrast to the facts presented in *J. D. B.* v. *North Carolina*, supra, 564 U.S. 261. In that case, the defendant was thirteen years old at the time of his interrogation. Id., 265. He was removed from his seventh grade social studies class by a uniformed police officer who had been assigned to work at the middle school that the defendant attended. Id. The defendant was then brought into a closed conference room in the school, where he was questioned by two police officers in the presence of two school administrators, in the absence of any parent or guardian. Id., 265–66. The court recognized that the parties' submissions injected a degree of ambiguity into the issue of whether the defendant had been informed prior to his confession that he was free to leave and not obligated to speak to the officers; the court also noted that the state supreme court had indicated that the trial court's factual findings indicated that the defendant had not been so informed. Id., 267 n.2. Even under those extreme facts, the court merely remanded the case to the state courts for a determination of whether the defendant was in custody, after applying the proper legal analysis. Id.

In the present case, the defendant was almost seventeen years old and was questioned in the presence of his mother, in his home. He was informed that he was free to ask the officers to leave and was informed that he was not obligated to speak to the officers at all. In *J. D. B.*, the court noted that it is proper to consider that a juvenile is close to the age of majority. Id., 277. Under the circumstances of the present case, we conclude that the trial court's and the Appellate Court's custody analyses complied with the holding of *J. D. B.*

that seven armed officers in tactical vests participated in the execution of the warrant. . . . Second, the officers brandished their weapons when they announced themselves and entered the small, four room apartment, actions that the court deemed an occupant reasonably could have associated with the police effecting an arrest. . . . The court found significant that the officers prohibited the defendant from leaving or otherwise moving about the apartment. In such circumstances, it was reasonable for the defendant to perceive such an imposing display of authority as a clear indication that the police intended to assume and maintain full control over her and her daughters. . . . The court considered the relatively large number of officers, many, if not all of whom were present in the living room when the defendant was questioned, to be a third factor supporting a finding of custody, citing several federal Circuit Courts of Appeals for the proposition that the presence of a large number of visibly armed law enforcement officers goes a long way [toward] making the suspect's home a police-dominated atmosphere. . . . Fourth, the police exercised complete control over the defendant and her surroundings before, during and after her questioning. . . . As soon as the officers entered the apartment, they ordered the defendant to go to the living room, where she was confined to the couch and placed under guard. The court noted that [t]his exercise of total control over the defendant stands in stark contrast to the far more relaxed environment that is a hallmark of interrogations in a suspect's home that have been found to be noncustodial. . . . Finally, the court indicated that the police never explained to the defendant the nature, purpose, or likely duration of her detention." (Citations omitted; internal quotation marks omitted.) *State* v. *Castillo*, supra, 165 Conn. App. 717–18.

We agree with the Appellate Court that the circumstances of the present case stand in stark contrast to

those presented in *Mangual*. The encounter, which lasted a total of forty-five minutes, did not have the hallmarks of coercion that we relied on in *Mangual*. Unlike the defendant in *Mangual*, whose encounter with the police in her home was "wholly unexpected"; *State* v. *Mangual*, supra, 311 Conn. 199; the defendant in the present case had been alerted in advance that the police would be coming to the home to question him. That is, on April 10, 2012, Fador informed the defendant that he would be returning to the home to question him about this incident, when his mother was present.

As the Appellate Court further explained, "[a]lthough the police initiated contact with the defendant and his family, the police did not enter the house on their own authority, such as pursuant to a search warrant, but were invited in by Monegro.[8] The police informed Monegro of the purpose for their visit before she allowed them to enter.[9] There were only three officers present,

[8] We reject the defendant's suggestion that, because the record does not reflect that the officers expressly informed Monegro that she could refuse to let them in to the apartment, she did not "actually" invite them inside.

[9] Although we agree with the Appellate Court that the manner in which the police enter the home is always *relevant* in determining whether, under the totality of the circumstances, an individual would have felt free to terminate the interrogation; see *State* v. *Castillo*, supra, 165 Conn. App. 719; we observe that this fact has only *limited significance* in the present case, as the defendant did not himself invite the police into the home. In particular, his status as a juvenile and the fact that it was his mother who invited the police into the home are relevant to our assignment of minor significance to Monegro's consent to the entry. On the one hand, our law recognizes the unique role that parents play in protecting their children's rights. See, e.g., General Statutes § 46b-137 (c) (conditioning admissibility, in delinquency proceeding, of statement by juvenile on, inter alia, presence of parent). In light of the role that parents play in safeguarding their children's rights, police entry with a parent's consent at least generally renders an encounter less coercive than police entry that is authorized by a warrant. On the other hand, a child's parent is most frequently the person who is the head of the household and is in a position to exercise authority over the child. When the head of the household has consented to the officers' entry, it is reasonable to assign only minimal significance to that fact when determining whether a juvenile would feel free, subsequently, to ask the officers to leave.

one of whom was acting as a translator.[10] The detectives wore plain clothes, not tactical gear. Although the defendant was asked to come into the living room to speak with the police, he was never threatened with arrest or searched, he was never handcuffed, and the police took no other action, either verbal or physical, to intimidate the defendant or to restrict his movement or to confine him to that particular room. The detectives and Rios each carried sidearms, but they were never brandished at any point, nor did any of the officers threaten the use of force on the defendant or his family. Both Fador and Rios informed Monegro that she could end the interview at any time, and the defendant was told more than once that his presence was voluntary, and that he was free to leave and did not have to answer their questions. He was told this orally before any questions were ever asked, and the same instructions were provided to him in writing as part of the waiver form, which he signed prior to giving his oral statement and written confession. Such instructions were not provided to the defendant in *Mangual*. [*State* v. *Mangual*, supra, 311 Conn. 204–205]; see *State* v. *Edwards*, 299 Conn. 419, 437, 11 A.3d 116 (2011) . . . ('a fact finder reasonably might find that a reasonable person would feel free to leave when that person was told repeatedly that he could do so' . . .). There is no evidence in the record that the defendant was overly nervous or intimidated during the encounter." (Footnotes added.) *State* v. *Castillo*, supra, 165 Conn. App. 719.

We also note our agreement with the Appellate Court that, "[i]n terms of whether a reasonable person would feel that his freedom of movement was restrained to the degree associated with a formal arrest and, therefore, that he was 'in custody,' the circumstances sur-

[10] As we already have observed, on April 10, 2012, Fador had notified the defendant that when he returned, he would be bringing an officer with him to serve as a translator. See footnote 3 of this opinion.

rounding the defendant's interview in the present case appear no more coercive or intimidating an atmosphere than was present in other cases in which our Supreme Court determined that a suspect questioned in a residence prior to an arrest was not 'in custody' and, thus, not entitled to *Miranda* [warnings]. See, e.g., *State* v. *Kirby*, 280 Conn. 361, 369–70, 392–94, 396, 908 A.2d 506 (2006) (defendant [was] not 'in custody' for *Miranda* purposes although five police officers arrived at his home at 4:30 a.m. to question him about kidnapping and assault because defendant invited officers into home, defendant knew why police were there, encounter lasted less than fifteen minutes, officers' guns stayed holstered, and defendant [was] not handcuffed until after he admitted to kidnapping); *State* v. *Johnson*, 241 Conn. 702, 714–21, 699 A.2d 57 (1997) (defendant [was] not 'in custody' although confronted by two detectives and uniformed police officer in driveway of father's house prior to consenting to be questioned in kitchen)." *State* v. *Castillo*, supra, 165 Conn. App. 720. In summary, the Appellate Court properly concluded that "the defendant was not 'in custody' at the time he provided his statements to the police and, therefore, was not entitled to *Miranda* warnings." Id., 722.

We are not persuaded by the defendant's arguments that two factors that this court typically has relied on to conclude that a suspect was not in custody support the opposite inference in the present case. First, the defendant suggests that the particular circumstances of the interview transformed his home into a coercive atmosphere. Second, he contends that the presence of his mother during the interview made him feel less free to leave. The defendant therefore contends that both of these factors support the conclusion that he was in custody. We address each of these arguments in turn.

First, the defendant contends that, under the circumstances of the present case, the fact that the questioning

took place in his home supports the conclusion that he was in custody. The defendant suggests that the officers should have given him the option of being questioned at the police station if he had preferred. He does not argue that an interview at the station would have been less coercive. Without providing any authority for the proposition, he appears to suggest that, if the police had offered him the *choice* of a more coercive atmosphere, that may have rendered the interview in the present case less coercive. We reject the defendant's suggestion.

The defendant claims that the particular circumstances of the encounter transformed the living room into a " 'police-dominated atmosphere.' " He places great emphasis on the presence of three officers in the room. We first observe, however, the stark contrast between the number of police officers in the present case as compared to *Mangual*, in which there were seven officers, some of whom wore tactical gear, and some of whom entered the room brandishing weapons. *State* v. *Mangual*, supra, 311 Conn. 186, 199–200. In the present case, there were fewer than one half of the officers who were involved in *Mangual*, and none of them wore tactical gear or brandished weapons. It is also significant that the third officer, Rios, was present specifically for the purpose of translating for Monegro. Another fact that the defendant relies on is that the officers were "within 'arm's length' " of him during the questioning. As we have observed, however, the officers did not in any way restrict the movement of the defendant or others in the apartment. These circumstances differ sharply from those presented in *Mangual*, in which the officers "exercised complete control over the defendant and her surroundings . . . ." *State* v. *Mangual*, supra, 201. Also, as we already have observed, the defendant repeatedly was told that he was free

to ask the officers to leave and was free to end the questioning at any time.

Second, the defendant argues that the presence of his mother made the atmosphere more coercive and, therefore, weighs in favor of concluding that he was in custody. He relies on testimony at the suppression hearing that Monegro appeared "angry," "worried," "nervous," and "upset" over the course of the interview and testimony at trial that, at one point during the interview, she "yelled" at the defendant in Spanish. Although we can envision facts under which the presence of a parent would render a police encounter more coercive; see generally H. Farber, "The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?," 41 Am. Crim. L. Rev. 1277 (2004); the presence of a parent is generally considered to provide greater protection to a juvenile. See, e.g., General Statutes § 46b-137 (c) (conditioning admissibility, in delinquency proceeding, of statement by juvenile on, inter alia, presence of parent). The mere fact that Monegro became upset when she heard the details of the crime of which the defendant was accused, without more, is not sufficient to demonstrate that her presence made the police encounter more coercive.

II

We next address the defendant's claim that the Appellate Court improperly declined to adopt a "per se rule requiring that whenever police investigating a felony give *Miranda* warnings to a juvenile, those warnings must include notice that any statement by the juvenile may be used against the juvenile in adult criminal court if the case is transferred there from juvenile court." *State* v. *Castillo*, supra, 165 Conn. App. 729. As we stated at the outset of this opinion, we understand the defendant to be requesting this court to exercise its supervisory authority to adopt the suggested per se

rule.[11] The defendant contends that the court should exercise its supervisory authority because, even if we agree with the Appellate Court that the defendant was not in custody and, therefore, that his "*Miranda* rights were never implicated in the present case"; id., 730; an "unknown number" of other juvenile suspects over the years may have been misled about the potential " 'adult' " consequences of giving a statement to the police, and others similarly could be misled in the future.

The defendant's request that this court exercise its supervisory authority focuses on the juvenile waiver form that he signed. The defendant notes that, although the document is expressly titled "JUVENILE WAIVER," the form merely informs the defendant that his statements may be used against him "in a court of law." The form does not expressly state that his waiver would apply not only in juvenile proceedings, but also in adult criminal proceedings. The defendant therefore contends that the phrase "in a court of law" was insufficient to alert him that his statements could be used against him in adult criminal proceedings.[12] We agree with the Appellate Court that, under the facts of the present case,

[11] A narrow and literal interpretation of the certified issue as limited to the question of whether the Appellate Court properly declined to exercise any authority it may have to issue the requested prophylactic rule would yield the bizarre result that if this court agreed with the defendant, it would remand the case to the Appellate Court with direction to exercise such supervisory authority. That narrow reading would constitute an improper abdication of this court's duty and authority over the administration of justice.

[12] At oral argument, the state conceded that there were two errors in the parental consent form that Monegro signed. Specifically, the form (1) represented that the defendant's statements could be used against him "during any questioning," rather than "in a court of law," and (2) improperly included the attestation that "I also know that any statement given can be used *for or* against him . . . in a court of law." In response to this court's statement that the form needed to be revised to correct the errors, the state's attorney represented that she already had notified the proper persons.

it would be inappropriate to exercise our supervisory authority to adopt the per se rule requested by the defendant.

"It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . Supervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process." (Citation omitted; internal quotation marks omitted.) *State* v. *Elson*, 311 Conn. 726, 764–65, 91 A.3d 62 (2014).

We are mindful, however, that our "[s]upervisory authority is an extraordinary remedy that should be used sparingly . . . [and that] authority . . . is not a form of free-floating justice, untethered to legal principle. . . . Our supervisory powers are not a last bastion of hope for every untenable appeal. . . . Constitutional, statutory and procedural limitations are generally adequate to protect the rights of the defendant and the integrity of the judicial system. Our supervisory powers are invoked only in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts. . . . Overall, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers. . . . Thus, we are more likely to invoke our supervisory powers when there is a pervasive and significant problem . . . or when the conduct or violation at issue is offensive to the sound administration of justice . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Edwards*, 314 Conn. 465, 498–99, 102 A.3d 52 (2014).

In the present case, because the defendant was not in custody at the time of the interrogation, the police were not constitutionally required to provide him with *Miranda* warnings. See *State* v. *Mangual*, supra, 311 Conn. 192. In support of his claim that this court should adopt a per se rule that goes beyond the facts of the present case and beyond what was constitutionally required, the defendant does not offer any evidence that there is a pervasive and significant problem that would justify the invocation of our supervisory authority. Instead, the defendant merely offers broad assertions and speculation. That is, the defendant claims it is possible that "an unknown number of juvenile suspects . . . may have been misled or deceived about the potential 'adult' consequences of giving a statement to the police." He additionally points to the decisions of the United States Supreme Court and this court recognizing limits on the maximum punishments that can be imposed on juveniles on the basis that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Graham* v. *Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); see also *State* v. *Riley*, 315 Conn. 637, 644, 110 A.2d 1205 (2015) (noting "the unique aspects of adolescence"), cert. denied, U.S. , 136 S. Ct. 1361, 194 L. Ed. 2d 376 (2016). Finally, he offers the sweeping observation that the question of whether the police should be required to issue such warnings presents "an important question of public policy . . . ."

Although we agree with the defendant that the hypothetical question he poses implicates an important question of public policy, we decline to invoke our supervisory authority to issue the requested rule where the facts of the defendant's case did not give rise to the issue and where he has not demonstrated that the claimed problem is a pervasive one. Indeed, we observe

that at the top of the form that the defendant signed, the heading "City of Torrington" appears immediately above what appears to be the city's seal or insignia. On its face, then, the form appears to be unique to the city of Torrington. The defendant's speculation that some juvenile suspects could be misled amounts to an invitation to this court to exercise its supervisory authority to issue an advisory opinion to address facts that were not presented in the defendant's case. That we will not do.

The judgment of the Appellate Court is affirmed.

In this opinion PALMER, McDONALD, ROBINSON and MULLINS, Js., concurred.

D'AURIA, J., dissenting. To navigate our system of justice, citizens are required to not only understand their rights but, also, the consequences of exercising or waiving those rights. This is difficult enough for many citizens. That difficulty can be exacerbated when there are obstacles interfering with citizens' understanding of their rights. The protections mandated by *Miranda* v. *Arizona*, 384 U.S. 436, 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), are intended to guard against "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." These safeguards must be "effective to secure the privilege against self-incrimination." Id., 444.

In this case, the defendant, William Castillo, claims, among other things, that his status as a juvenile, along with the inaccurate or incomplete information provided by the police to him and his mother, who spoke "[v]ery little" English, led him to believe that the statement he gave to officers could be used against him only in a juvenile proceeding, and the police should have informed him his statement could be used against him if

his case were transferred to the regular criminal docket. *State* v. *Castillo*, 165 Conn. App. 703, 705–706, 140 A.3d 301 (2016). The Appellate Court declined to reach the issue of whether the warning given to the defendant and his mother was adequate on the ground that he was not in custody for purposes of *Miranda* when questioned and, therefore, not entitled to warnings in the first place. Id., 722. On appeal to this court, the majority follows suit and, consistent with how this court granted the petition for certification, addresses only the custody question and agrees with the Appellate Court.

Although I admit it is a close question, I would conclude that the defendant was in custody for several reasons, the chief reason among them being that the defendant was a juvenile at the time. Although that factor is not dispositive, it must be considered under *J. D. B.* v. *North Carolina*, 564 U.S. 261, 277, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). I reach the conclusion that the defendant was in custody due to the totality of the circumstances, including because he was a juvenile and because the officers in this case actually issued him warnings before taking his statement—warnings the defendant claims are deficient—and, therefore, I disagree with the majority's conclusion to the contrary.

I also believe that, irrespective of whether he was in custody while interrogated, the defendant's state constitutional claim can be adjudicated, namely, that the police provide juvenile suspects with a warning, regardless of whether they are in custody, that their statements can also be used against them in a case tried on the regular criminal docket. When, pursuant to state law, police officers have actually informed the defendant of his rights and obtained a waiver, and the defendant's claim on appeal includes that those warnings misinformed him about the scope of his rights under our state constitution, I believe a court can entertain that claim. I would therefore reverse and remand this case

to the Appellate Court to decide the defendant's constitutional challenges to the warnings he received.

I

A

Whether a suspect is "in custody" for purposes of *Miranda* requires examination of "all of the circumstances surrounding [any] interrogation" to determine "how a reasonable person *in the suspect's position* would perceive his or her freedom to leave . . . ." (Emphasis added; internal quotation marks omitted.) *J. D. B.* v. *North Carolina*, supra, 564 U.S. 270–71. This "ultimate inquiry . . . calls for application of the controlling legal standard to the historical facts [and] . . . therefore, presents a . . . question of law . . . over which our review is de novo." (Internal quotation marks omitted.) *State* v. *Mangual*, 311 Conn. 182, 197, 85 A.3d 627 (2014). To assist in this inquiry, this court has developed a "nonexclusive list" of ten factors for courts to consider (*Mangual* factors). Id., 196–97.

Appellate review of a claim that a statement was obtained in violation of *Miranda* requires "a scrupulous examination of the record . . . in order to ascertain whether, in light of the totality of the circumstances, the trial court's finding [as to custody] is supported by substantial evidence." (Internal quotation marks omitted.) Id., 197. This examination is not limited to the facts the trial court actually found in its decision on the defendant's motion to suppress. Rather, we may also consider undisputed facts established in the record, including the evidence presented at trial. See *State* v. *Edmonds*, 323 Conn. 34, 39, 145 A.3d 861 (2016) ("in reviewing the record, we are bound to consider not only the trial court's factual findings, but also the full testimony of the arresting officers; in particular, we must take account of any undisputed evidence that does not support the trial court's ruling in favor of the state

but that the trial court did not expressly discredit"); *State* v. *Edwards*, 299 Conn. 419, 439 n.16, 11 A.3d 116 (2011) ("to determine whether the defendant's constitutional rights have been infringed, [w]e review the record in its entirety and are not limited to the evidence before the trial court at the time the ruling was made on the motion to suppress" [internal quotation marks omitted]).

Admittedly, as my introductory paragraphs indicate, my own scrupulous examination of the record leads me to emphasize certain facts or factors not emphasized by the state, the trial court, the Appellate Court or the majority. That courts and litigants will seek to highlight or explain away certain factors, or compare and contrast the relevant factors in one case to those considered in another case, is a predictable result of court developed multifactor tests, including the *Mangual* factors for measuring custody. Although tests of this nature can often be useful, determining whether a suspect is in custody is a " 'slippery' " task; *State* v. *Mangual*, supra, 311 Conn. 193; and "not always self-evident." *State* v. *Januszewski*, 182 Conn. 142, 158, 438 A.2d 679 (1980), cert. denied, 453 U.S. 922, 101 S. Ct. 3159, 69 L. Ed. 2d 1005 (1981). "No definitive list of factors governs a determination of whether a reasonable person in the defendant's position would have believed that he or she was in custody." *State* v. *DesLaurier*, 230 Conn. 572, 577, 646 A.2d 108 (1994). Indeed, a heavy focus on enumerated factors, or comparisons to other precedents, may eclipse the "ultimate inquiry" before the court, which is case specific: "whether a reasonable person in the defendant's position would believe that there was a restraint on [his] freedom of movement of the degree associated with a formal arrest." (Internal quotation marks omitted.) *State* v. *Mangual*, supra, 194.

B

In my view, any analysis of the question of custody in the present case must *begin* with the fact that the defendant was a juvenile at the time. We have not had occasion to consider the question of the custody of a juvenile by the police since the United States Supreme Court's relatively recent decision in *J. D. B.*, a case neither the trial court nor the Appellate Court cited. In fact, age or juvenile status is not among the ten, nonexclusive *Mangual* factors. After *J. D. B.*, it must be. Compare *J. D. B.* v. *North Carolina*, supra, 564 U.S. 277 ("[age] is . . . a reality that courts cannot simply ignore") with id., 288 (Alito, J., dissenting) ("there is no denying that, by incorporating age into its analysis, the [c]ourt is embarking on a new expansion of the established custody standard").

In particular, the United States Supreme Court in *J. D. B.* rejected the state of North Carolina's argument that age "has no place" in an analysis of whether a "reasonable person in the suspect's position would understand his freedom to terminate questioning and leave . . . ." Id., 271 (majority opinion). *J. D. B.* made clear that "courts cannot simply ignore" a juvenile suspect's age. Id., 277. Instead, the court recognized that a juvenile "subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." Id., 272. The court went on to note that age is "more than a chronological fact," as juveniles "generally are less mature and responsible than adults . . often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them [and] are more vulnerable or susceptible to . . . outside pressures than adults . . . ." (Citations omitted; internal quotation marks omitted.) Id.; see also *State* v. *Riley*, 315 Conn. 637, 658, 110 A.3d 1205 (2015) (noting attributes of juveniles, including "immaturity, impetuosity, and failure to

appreciate risks and consequences" [internal quotation marks omitted]), cert. denied, U.S. , 136 S. Ct. 1361, 194 L. Ed. 2d 376 (2016). Any statements given during an encounter that a juvenile would reasonably regard as custodial are less likely to be the product of the person's free choice. See *J. D. B.* v. *North Carolina*, supra, 272–73 ("[n]o matter how sophisticated, a juvenile subject of police interrogation cannot be compared to an adult subject" [internal quotation marks omitted]). If a reasonable juvenile in the suspect's position would feel a restraint on his freedom to the degree of a formal arrest, then the suspect must knowingly and voluntarily waive his rights to remain silent and to have counsel present before any statement he makes may be used against him in court. Id., 268–70; see *Miranda* v. *Arizona*, supra, 384 U.S. 444–45.

These observations, which underpin *J. D. B.*'s rationale, are consistent with, and drawn from, decisions from this court and the United States Supreme Court, including recent cases involving the sentencing of juvenile defendants. See, e.g., *Miller* v. *Alabama*, 567 U.S. 460, 471, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (noting that juveniles are "more vulnerable" to outside influences and have "limited contro[l] over their own environment" [internal quotation marks omitted]); *Graham* v. *Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) ("developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"); *State* v. *Riley*, supra, 315 Conn. 650, 658 (noting differences in maturity of juveniles versus adults).

C

Therefore, my principal disagreement with the decision of the trial court and the opinion of the Appellate Court is that I find little evidence that those courts examined the defendant's circumstances from the posi-

tion of a sixteen year old boy. Perhaps because age is not listed among the *Mangual* factors, the trial court did not manifest its consideration of the defendant's age beyond noting that the defendant was nearing his seventeenth birthday. The court did not explain how this fact might be probative of a suspect, under these particular circumstances, feeling that he was *not* dominated by the police. Certainly, a sixteen year old juvenile might be less susceptible to coercion than a younger juvenile, but that comparison says little about how a sixteen year old would feel as compared to an adult in the same situation. In my view, a sixteen year old being questioned in his mother's living room likely would feel less free to leave or command the officers to leave than an adult questioned in his own house. See *J .D .B.* v. *North Carolina*, supra, 564 U.S. 272–73; see also *Roper* v. *Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) ("[e]ven the normal [sixteen year old] customarily lacks the maturity of an adult" [internal quotation marks omitted]); *State* v. *Riley*, supra, 315 Conn. 660–61 (reversing sentence when trial court did not adequately consider defendant's age and its hallmark features when determining sentence of defendant who was seventeen years old at time of crime). The Appellate Court gave the defendant's age no meaningfully greater attention than the trial court gave, and neither does today's majority.

For example, in concluding that the defendant was not in custody, the Appellate Court, like the majority, compares the facts of the present case to those in *Mangual*. The defendant in *Mangual* was not a juvenile, however. Nor, in my view, was the question of custody in *Mangual* a close case. *Mangual* involved questioning the suspect in a home after seven police officers had entered pursuant to a search warrant and with weapons drawn. *State* v. *Mangual*, supra, 311 Conn. 187 n.3. I do not read *Mangual* to establish a minimum for what

actions may be considered custodial interrogation in the home, especially for a juvenile suspect. The fact that there were more officers present in *Mangual*, for a longer period of time and with weapons brandished does little—but only little—to help answer the question of custody in the present case. Although there were only three officers present in this case versus seven in *Mangual*, is a juvenile likely to know that three officers are not that many or to feel free to ask them all to leave? And although the officers did not threaten or physically restrain the defendant in the present case, does that mean a juvenile would not feel restricted by their presence and their intent to question him after confronting him with evidence against him? And even though the interview in the present case ultimately lasted *only* forty five minutes, the juvenile defendant was not told how long it would last when he began giving his incriminating statements, nor was he told whether he would be formally arrested afterward. In short, even though the circumstances in *Mangual* add up to a clearer case for concluding that the adult defendant was in custody—or that things could have been worse for this young man—that conclusion does not mean that, under the circumstances of *this* case, a juvenile in the defendant's position would not feel that he was in a "police-dominated atmosphere." (Internal quotation marks omitted.) Id., 206–207. In this regard, I find precedents that did not involve juvenile defendants—and especially those decided before *J. D. B.*—are not particularly instructive. See, e.g., *State* v. *Kirby*, 280 Conn. 361, 908 A.2d 506 (2006); *State* v. *Johnson*, 241 Conn. 702, 699 A.2d 57 (1997).

In addition to minimizing the significance of the defendant's age, the trial court and the Appellate Court emphasized factors that, in my view, are not properly considered as part of a custody analysis, while ignoring factors that often contribute to establishing a custodial

setting. For example, the trial court expressly relied on the fact that "[t]he defendant had prior dealings with police, specifically, an encounter with [the uniformed officer]." But testimony at the suppression hearing established only that the *uniformed officer* remembered *the defendant*; the uniformed officer acknowledged in his testimony at the suppression hearing that he did not know whether the defendant had recognized *him*. In fact, the testimony revealed few details about this prior encounter, surely not enough to know whether it was cordial or hostile, or even how a juvenile in the defendant's position might have perceived the encounter. All we know is that previously the uniformed officer, while assisting a school resource officer during a fight at the defendant's school, had escorted the defendant off a school bus, though it is not clear whether the defendant was involved in the fight or whether the officer touched or restrained the defendant when escorting him away.

The relevance of the trial court's references to this incident is not clear to me. There was certainly no evidence presented to suggest that this prior encounter would have put someone in the defendant's position at ease in the uniformed officer's presence or in the presence of other law enforcement officers not known to the defendant. And a hostile prior encounter would likely have left a person in the defendant's position intimidated by the uniformed officer's later appearance in his mother's home. For this reason, prior contact with law enforcement is generally too speculative of a factor to consider in a custody analysis, and, therefore, any reliance by the trial court on the vague circumstances of this prior incident was misplaced. See *Yarborough* v. *Alvarado*, 541 U.S. 652, 668, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004) (explaining it would be "improper" to consider "prior history with law enforcement" because "the relationship between a suspect's

past experiences and the likelihood a reasonable person with that experience would feel free to leave often will be speculative").[1]

The Appellate Court, in explaining why the defendant was not in custody, observed "[t]here is no evidence in the record that the defendant was overly nervous or intimidated during the encounter." *State* v. *Castillo*, supra, 165 Conn. App. 719. But because the question of custody is an objective inquiry, whether *this* defendant was nervous or intimidated is irrelevant when determining how a reasonable juvenile, in the defendant's position, would perceive his freedom of movement. See *J. D. B.* v. *North Carolina*, supra, 564 U.S. 271 ("[t]he test, in other words, involves no consideration of the 'actual mindset' of the particular suspect subjected to police questioning").[2] Although the defendant's behavior might bear on whether he voluntarily relinquished his rights under *Miranda*, it should not be part of a custody analysis. Additionally, the Appellate

[1] In its brief to this court, the state suggests that the defendant's "prior experience with the police," and, particularly, his experience with the uniformed officer in question, "would have lessened the impact of the encounter on him." Even if it were a relevant consideration post-*Yarborough*, given how little is known about the defendant's "prior experience with [law enforcement]" on this record, I cannot draw such an inference. Although *Yarborough* observed that suspects with such experience "may understand police procedures and reasonably feel free to leave unless told otherwise," it also explained that, "[o]n the other hand, they may view [the] past as [a] prologue and expect another in a string of arrests." *Yarborough* v. *Alvarado*, supra, 541 U.S. 668. Thus, because this factor "turns too much on the suspect's subjective state of mind and not enough on the objective circumstances of the interrogation," after *Yarborough* a suspect's prior experience with law enforcement is not a proper factor for determining whether a suspect is in custody. (Internal quotation marks omitted.) Id., 669.

[2] For example, the trial court noted the defendant's " 'mellow' " and "calm" demeanor, based at least in part on the testimony from the uniformed officer and the detectives that he was "mellow," "disengaged," "calm" and had a "like whatever" attitude. These observations about a sixteen year old boy might just as easily be manifestations of false bravado, "immaturity, impetuosity, and failure to appreciate risks and consequences," including which court he will end up in. *State* v. *Riley*, supra, 315 Conn. 658.

Court observed that the encounter was not coercive because "the police did not enter the house on their own authority . . . but were invited in by [the defendant's mother]." *State* v. *Castillo*, supra, 719. The evidence indicates, however, that the defendant was not present in the living room (where the entry door was located) when the police entered the apartment, so a juvenile in his position would have been unaware of how the police had entered the home or under what authority. And more significantly, the encounter was initiated by the police, not the defendant, which is another factor indicating custody. *State* v. *Mangual*, supra, 311 Conn. 199 ("[w]hen the confrontation between the suspect and the criminal justice system is instigated at the direction of law enforcement authorities, rather than the suspect, custody is more likely to exist" [internal quotation marks omitted]).

Although the trial court and the Appellate Court relied on factors that were irrelevant and unsupported by the record, they did not expressly consider certain factors I consider more relevant, including the fact that, as soon as the defendant had finished signing the forms and before being questioned, he was confronted by one of the detectives with the fact that they already had evidence of his involvement from his companions in the car that night. Immediately after obtaining a waiver, the detective seated near the defendant told him that they had already spoken to the others involved, were aware of his role, and that it was "probably in his best interest not to lie about it . . . ." An officer stating that he believes that the suspect committed a crime and has evidence to prove it may lead a person in the suspect's position and hearing those allegations to conclude that the officer will not permit him to leave. See, e.g., *State* v. *Ross*, 230 Conn. 183, 204–205, 646 A.2d 1318 (1994) (although not dispositive, "[a]n officer's [articulated] . . . beliefs concerning the potential culpability of the

individual being questioned, may be one among many factors that bear upon the assessment [of] whether that individual was in custody" [internal quotation marks omitted]), cert. denied, 516 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995), quoting *Stansbury* v. *California*, 511 U.S. 318, 325, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994); *State* v. *McKenna*, 166 N.H. 671, 683, 103 A.3d 756 (2014) ("accusatory statements made by the officers and directed at the defendant also weigh in favor of custody" [emphasis omitted]), cert. denied, U.S. , 135 S. Ct. 1504, 191 L. Ed. 2d 431 (2015).

I am also persuaded that the fact that both the defendant and his mother were advised of his rights, verbally and in writing, and asked by the uniformed officer and the detectives who had come to his home to execute waivers, would contribute to a juvenile in the defendant's position feeling a restraint upon his freedom of movement. "Although giving a *Miranda* warning does not, in and of itself, convert an otherwise [noncustodial] interview into a custodial interrogation, it is a factor to be considered by the court." *United States* v. *Bautista*, 145 F.3d 1140, 1148 (10th Cir.), cert. denied, 525 U.S. 911, 119 S. Ct. 255, 142 L. Ed 2d 210 (1998); see also *Slwooko* v. *State*, 139 P.3d 593, 600 (Alaska App. 2006) ("[c]ourts generally agree that the giving of *Miranda* warnings does not convert a [noncustodial] interview into a custodial one . . . although it is a factor that a court may consider when assessing custody"). One commentator has observed, however, that "an overwhelming majority of suspects feel that they are in custody once the [*Miranda*] warnings are read." A. Maoz, "Empty Promises: Miranda Warnings in Noncustodial Interrogations," 110 Mich. L. Rev. 1309, 1328 (2012). It hardly takes an extrajudicial understanding to conclude, once the defendant and his mother had read and been read his legal rights—a familiar incantation that often accompanies arrest—and been asked by

three officers to sign forms with police letterhead and containing terms such as "lawyer," "police officer" and "court of law," that a sixteen year old would reasonably feel a restraint upon his freedom of movement. See id., 1324 ("[g]iven the strength of the association between the *Miranda* warnings and formal arrest, a person likely would not feel the increased level of freedom associated with noncustodial interrogation—for example, being able to get up and leave the interrogation or make a phone call to a lawyer—after the warnings have been administered"). Although the trial court noted that the detective told the defendant he could ask them to leave, one detective testified that, apparently, he did not mention this to the defendant until after the defendant had begun narrating his statement.

D

Judging the totality of the circumstances, I find the question of custody to be a much closer call than the majority, the Appellate Court, or the trial court. The defendant was a sixteen year old juvenile who was at home in his mother's apartment when his mother or her boyfriend summoned him to the living room to speak to police officers. There were three police officers waiting for him—two plain clothed detectives with badges displayed, and one officer in uniform. The detectives and the uniformed officer carried firearms. The defendant had seen the two detectives a few days earlier when they originally had come by the home to question him but then left when they learned his mother was not at home. They were back, and this time with a third member of the Torrington Police Department, the uniformed officer, to translate for the defendant's Spanish-speaking mother.

The police officers spoke to the defendant in the living room. The defendant and one of the detectives were seated, and the other detective was standing in

the living room, closer to the front door of the apartment. The detective seated near the defendant told him about his right to refuse questioning, with the uniformed officer translating the conversation for the defendant's mother. The detective presented the defendant with a form, entitled "Juvenile Waiver," and explained the form to him. The defendant did not ask any questions, indicated that he understood, and initialed and signed the form. Although the form explained that the defendant could refuse to answer questions, it did not explain whether he was, at that time, under arrest. None of the police officers present told him, at that time, that he was not under arrest, that he was free to leave the room or the home, or that he could ask the officers to leave. Nor did they tell the defendant how long the interview would likely last or what would happen to him at its conclusion. The uniformed officer presented the defendant's mother with a parental consent form, which the officer translated into Spanish for her. She initialed and signed it, allowing the officers to interrogate the defendant.

Once the waivers were signed, the detective seated with the defendant then told him that they were there to discuss his involvement in a robbery, that others involved had given statements to police, and it was "probably in his best interest not to lie about it because [they] had . . . evidence that he was there." The defendant then asked, "[w]hat do you want me to do?" The detective replied that he wanted "a statement of his involvement" because the police had other statements "saying what [his] involvement [was] but it's better to come from [the defendant]." The defendant then gave a statement implicating himself in the robbery, with the detective writing down the defendant's statement for him as he narrated it. While the detective was writing the statement, he informed the defendant that he was free to ask the officers to leave.

At the point when he began giving the statement, would a sixteen year old juvenile— surrounded by three armed police officers who initiated contact with him, and having been read his *Miranda* rights and confronted with the evidence against him—know that he was *not* under arrest? Would this juvenile feel free to go—to get up and leave the room after being summoned there at the request of the police officers? Or would he feel free to ask the officers to leave the apartment after his mother let them in to question him? Or would he believe that the police officers were detaining him, given his involvement in a crime? Because I am persuaded that a reasonable sixteen year old in this situation would feel that he was in police custody, I respectfully dissent from the majority's conclusion to the contrary.

E

The majority makes a somewhat different case—and candidly, in my view, a better case—for custody than the Appellate Court or the trial court, as the majority neither relies on any previous encounter between the defendant and an officer nor relies on the defendant's demeanor or his mother's invitation to the officers to enter her home. Rather, the majority relies principally on the facts that the defendant was questioned at home with his mother present. Although it is not inappropriate for an appellate court undertaking plenary review to reassess and reweigh the totality of the circumstances, such an alternative analysis by a reviewing court does not leave me any more confident that the principal factfinder appropriately sought to view the encounter from the position of a reasonable sixteen year old, as *J. D. B.* demands. See *J. D .B.* v. *North Carolina*, supra, 564 U.S. 281 (not resolving whether juvenile was "in custody when police interrogated him" but remanding case to state court for resolution of that question "this time taking account of all of the relevant circumstances

of the interrogation, including *J. D. B.*'s age at the time"). Moreover, the facts of the present case cast doubt on the ability of the defendant's mother to play the role that the majority envisions—and that state law contemplates—in maintaining a noncustodial atmosphere. Specifically, she was not properly informed about the defendant's rights and the consequences of his providing a statement to officers, and, therefore, in my view, her presence was not sufficient to overcome the police dominated atmosphere the defendant experienced.

To be sure, interrogations inside a suspect's home are significantly less likely to present the pressures of a custodial interrogation. See *In re Kevin K.*, 299 Conn. 107, 128, 7 A.3d 898 (2010). But in the present case, even though the defendant was questioned while sitting in the familiar surroundings of the family living room, he was more or less surrounded by three police officers whom he had not invited into the home. He instead had been summoned to the living room to be questioned by them after they were allowed into the home by his mother. He was then questioned after they told him they had evidence he was involved in a crime and after having been given *Miranda* warnings—likely an intimidating experience for anyone, let alone a sixteen year old. And even though the officers eventually told him that he could leave or ask them to leave, they did not tell him so until after he had begun his statement. I doubt a juvenile in those circumstances would feel free to depart or ask the officers to leave his mother's home after she had allowed them inside.

Besides relying on the fact that the home was the setting for this interrogation, the majority also reasons that the "presence of a parent is generally considered to provide greater protection to a juvenile" who is being interrogated. In support of this proposition, the majority cites General Statutes § 46b-137, which governs the

admissibility, in juvenile proceedings, of confessions made outside the presence of a juvenile's parent or guardian. I agree with the majority that § 46b-137 "recognizes the unique role that parents play in protecting their children's rights." Footnote 9 of the majority opinion. The parent's company may help a juvenile feel less dominated by a police presence. In large part, this is because § 46b-137, including its mandatory advisement of rights, is "designed to ensure that the child and the parent or guardian have made a valid decision to make a voluntary admission." *In re Kevin K.*, 109 Conn. App. 206, 220, 951 A.2d 39 (2008), rev'd on other grounds, 299 Conn. 107, 7 A.3d 898 (2010).

In my view, however, any general presumption that the presence of a juvenile suspect's parent has protected him is less relevant in the present case. First, the presence of a parent often can do as much harm in this regard as good, requiring a closer look at the objective circumstances of the parent's involvement. As the majority acknowledges, sometimes a parent's presence enhances the coerciveness of the situation. See, e.g., H. B. Farber, "The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?," 41 Am. Crim. L. Rev. 1277, 1289 (2004). Moreover, when the parent is misinformed or not fully informed of the child's rights, or the consequences of waiving those rights, reliance on the parent's presence to protect the child and keep him from feeling dominated by the police can be misplaced. See id., 1291.

In the present case, the defendant's mother spoke "[v]ery little" English and, therefore, the forms that the police gave her and the defendant to explain the defendant's rights were translated for her line by line. The forms did not mention whether the defendant was in custody at the time or whether the defendant or his mother was free to ask the officers to leave. In addition, as the state conceded during oral argument before this

court, the form provided to the mother contained errors that gave flawed advice about whether and how any statements the defendant gave could be used against him. See footnote 12 of the majority opinion. The form initially explained that anything the juvenile said "can and will be used against him/her *during any questioning*," suggesting that anything the defendant said would not be used against him outside of the interrogation. (Emphasis added.) Later in the form it explained that "any statement given can be used *for* or against him/her in a court of law," suggesting that an incriminating statement might actually be used to help the defendant in a court proceeding. (Emphasis added.) The mother's ability to assist the defendant would have been influenced by the information she received from the police, through an interpreter, about the scope of the defendant's rights and the consequences of him giving a statement. As one of the detectives later testified, the parent's and the child's forms "go hand in hand. You give the parental consent [form] prior to doing the juvenile waiver, so it's—it's the parents allowing us to interview the child."

More fundamentally, the defendant has challenged the constitutional adequacy of the warnings provided to him, including those contained in the form captioned "Juvenile Waiver," which was presented to him and read to his mother by the detectives through the uniformed officer as the translator. Specifically, he argued to the Appellate Court, on federal and state constitutional grounds, that the warnings he received "were deficient because they failed to inform [him] that any statement or confession could be used against him in an adult criminal prosecution." If the defendant is right about his claim, specifically, that he and his mother should have been informed that any of his statements could be used not just in a juvenile delinquency proceeding but also in an prosecution on the regular criminal

docket—an issue the Appellate Court did not reach and I do not pass upon—then does not the failure to provide this clarity undercut the parent's ability to provide, as described by the majority, "greater protection" to the child and serve the "unique role" that our law, including § 46b-137, contemplates? And does it not also undercut the heavy reliance the state places upon the parent's presence as a factor to maintaining a noncustodial setting?

In light of the defendant's challenge to the adequacy of these forms, and the impact that their alleged inadequacies might have had on the mother's understanding of the defendant's rights or the consequences of him waiving those rights, I have serious reservations about relying on his mother's presence to establish that the defendant would feel free to ask the officers to leave the home, especially when his mother ultimately permitted them to interrogate the defendant after receiving potentially flawed advice.

F

I emphasize that, in reaching my conclusion that the defendant was in custody, I do not mean to suggest that the police officers in the present case did anything untoward. Their conduct in this encounter might well be described as exemplary. Although their forms were flawed, which was likely not of their own doing, they followed state law and the conventions of their department, seeking to interview the defendant only after contacting his mother and permitting her presence. See General Statutes § 46b-137 (b). There is no evidence that they were impolite or used improper force. The presence of the two detectives resulted from department protocol that they work in pairs and, in this situation, they required the uniformed officer as an interpreter for the defendant's mother. Their appearance at the house, presumably in their usual work attire

and with their usual weaponry, was in no way inappropriate. It is not inconsistent to conclude, however, that the encounter might nevertheless seem custodial from the perspective of a sixteen year old.

A conclusion that the defendant was in custody under these particular circumstances merely requires that the officers—in compliance with state law—ensure that a juvenile suspect understands his rights and the officers seek a waiver of those rights before obtaining a statement from him. That is exactly what the officers set out to do. The defendant's challenge to the warnings contained in the forms may well go nowhere, but if a court were to rule that a juvenile is entitled to a warning that his statements can be used should he be prosecuted on the regular criminal docket, and not just in juvenile court, I have no doubt that the officers would comply.

On the state of this record and the law, the trial court had "no hesitation" in concluding under the circumstances that the defendant's waiver was "knowing, voluntary, and intelligent." I would not rely on the issue of custody to avoid review of the important question of whether the warnings were sufficient and whether the defendant's waiver was therefore valid. Accordingly, I would reverse and remand the case to the Appellate Court to consider this claim.

II

In part I of this opinion, I conclude that, because the defendant was in custody for purposes of *Miranda*, we should remand this case to the Appellate Court to address his claim that the warnings given to him were inadequate under the federal and state constitutions. In this part of the opinion, I suggest that, even if the defendant was not in custody, this should not prevent consideration of at least his state constitutional claim that the police should be required to warn juveniles that their statements can be used against them if they

are tried on the regular criminal docket instead of in juvenile court. Rather, largely because of state statute and caselaw, I believe the state constitutional claim the defendant advanced in the Appellate Court arises regardless of his custodial status and should be addressed.

Ordinarily, the need to determine whether the defendant was in custody arises when the defendant was *not* informed of his rights pursuant to *Miranda* because analyzing whether the defendant was in custody dictates whether he was entitled to those warnings in the first place. See *Stansbury* v. *California*, supra, 511 U.S. 322 (*Miranda* warnings required only when suspect is in police custody when interrogated). In the present case, however, the police *did* provide the defendant with warnings before questioning him, irrespective of whether they believed he was in custody or not. The need for these warnings came about because the defendant was sixteen years old when interviewed. Section 46b-137[3] generally provides that admissions, confes-

[3] General Statutes § 46b-137 provides in pertinent part: "(a) Any admission, confession or statement, written or oral, made by a child under the age of sixteen to a police officer or Juvenile Court official shall be inadmissible in any proceeding concerning the alleged delinquency of the child making such admission, confession or statement unless made by such child in the presence of the child's parent or parents or guardian and after the parent or parents or guardian and child have been advised (1) of the child's right to retain counsel, or if unable to afford counsel, to have counsel appointed on the child's behalf, (2) of the child's right to refuse to make any statements, and (3) that any statements the child makes may be introduced into evidence against the child.

"(b) Any admission, confession or statement, written or oral, made by a child sixteen or seventeen years of age to a police officer or Juvenile Court official, except an admission, confession or statement, written or oral, made by a child sixteen or seventeen years of age to a police officer in connection with a case transferred to the Juvenile Court from the youthful offender docket, regular criminal docket of the Superior Court or any docket for the presentment of defendants in motor vehicle matters, shall be inadmissible in any proceeding concerning the alleged delinquency of the child making such admission, confession or statement, unless (1) the police or Juvenile Court official has made reasonable efforts to contact a parent or guardian of the child, and (2) such child has been advised that (A) the child has the

sions, or statements by children under the age of sixteen to a police officer or juvenile court official are inadmissible in a delinquency proceeding unless the child's parent, parents or guardian are present and all have been advised (1) of the child's right to counsel, including appointed counsel, (2) the child's right to refuse to make any statements, and (3) "*that any statements the child makes may be introduced into evidence against the child*." (Emphasis added.) General Statutes § 46b-137 (a). A similar protocol applies to sixteen and seventeen year old juveniles, except that the juvenile's parents or guardians do not need to be present during any interview but, rather, the police officer or Juvenile

right to contact a parent or guardian and to have a parent or guardian present during any interview, (B) the child has the right to retain counsel or, if unable to afford counsel, to have counsel appointed on behalf of the child, (C) the child has the right to refuse to make any statement, and (D) any statement the child makes may be introduced into evidence against the child.

"(c) The admissibility of any admission, confession or statement, written or oral, made by a child sixteen or seventeen years of age to a police officer or Juvenile Court official, except an admission, confession or statement, written or oral, made by a child sixteen or seventeen years of age to a police officer in connection with a case transferred to the Juvenile Court from the youthful offender docket, regular criminal docket of the Superior Court or any docket for the presentment of defendants in motor vehicle matters, shall be determined by considering the totality of the circumstances at the time of the making of such admission, confession or statement. When determining the admissibility of such admission, confession or statement, the court shall consider (1) the age, experience, education, background and intelligence of the child, (2) the capacity of the child to understand the advice concerning rights and warnings required under subdivision (2) of subsection (b) of this section, the nature of the privilege against self-incrimination under the United States and Connecticut Constitutions, and the consequences of waiving such rights and privilege, (3) the opportunity the child had to speak with a parent, guardian or some other suitable individual prior to or while making such admission, confession or statement, and (4) the circumstances surrounding the making of the admission, confession or statement, including, but not limited to, (A) when and where the admission, confession or statement was made, (B) the reasonableness of proceeding, or the need to proceed, without a parent or guardian present, and (C) the reasonableness of efforts by the police or Juvenile Court official to attempt to contact a parent or guardian. . . ."

Court official who is questioning the juvenile must make "reasonable efforts to contact a parent or guardian of the child" and advise the child that he "has the right to contact a parent or guardian and to have a parent or guardian present during any interview . . . ." General Statutes § 46b-137 (b).

The advisement of the child's rights is "not simply a pro forma requirement of the statute but an integral component also designed to ensure that the child and the parent or guardian have made a valid decision to make a voluntary admission." *In re Kevin K.*, supra, 109 Conn. App. 220. Thus, decades before the United States Supreme Court modified a good deal of its constitutional jurisprudence related to juveniles in our criminal justice system, our legislature had acted upon its own "concerns for the special vulnerabilities of juveniles . . . ."[4] *In re Kevin K.*, supra, 299 Conn. 115.

In the half century since the statute's enactment, the United States Supreme Court has recognized that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Graham* v. *Florida*, supra, 560 U.S. 68; see also *Miller* v. *Alabama*, supra, 567 U.S. 471. In particular, and as discussed earlier, on the question of whether a juvenile is in custody for *Miranda* purposes, the United States Supreme Court in *J. D. B.* v. *North Carolina*, supra, 564 U.S. 272, noted that juveniles are generally "less mature and responsible than adults . . . often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them . . . [and] are more vulnerable or suscepti-

[4] The legislative history of § 46b-137 and its predecessor, General Statutes (Rev. to 1968) § 17-66d, indicates that it was passed in response to the United States Supreme Court's decision in *In re Gault*, 387 U.S. 1, 55, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), which held that juveniles, like adults, have certain constitutional rights, including the privilege against self-incrimination. See *State* v. *Ledbetter*, 263 Conn. 1, 17 n.24, 818 A.2d 1 (2003).

ble to . . . outside pressures than adults . . . .” (Citations omitted; internal quotation marks omitted.) “[When] subjected to police questioning [juveniles] will sometimes feel pressured to submit when a reasonable adult would feel free to go.” Id. Thus, as applied to juveniles, the legislative policy codified in § 46b-137 advances the same laudable goal as *Miranda* warnings generally: to guard against “inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.” *Miranda* v. *Arizona*, supra, 384 U.S. 467. For that reason, *Miranda* directed the “use of procedural safeguards effective to secure the privilege against self-incrimination.” (Internal quotation marks omitted.) *State* v. *Edwards*, supra, 299 Conn. 426.

A main difference, however, between *Miranda* and § 46b-137 (b) is that, unlike *Miranda*, the statute’s mandatory advisement of rights applies irrespective of whether the suspect was “in custody.” *In re Kevin K.*, supra, 109 Conn. App. 217–18. It might even be said that under § 46b-137 custody is presumed, or at least irrelevant, when officers are interviewing juveniles and securing statements intended to be used against them.

But what our state law gives, it just as quickly takes away. Paradoxically, it is this progressive state policy—ahead of its time—that in part gives rise to the defendant’s state constitutional claim and, at the same time, creates obstacles to its resolution in the present case and, indeed, in many other cases.

Although § 46b-137 (a) and (b) require that officers—regardless of whether the suspect is in custody—advise the juvenile that “any statement the child makes may be introduced into evidence against the child,” the statute does not specify in which forum that statement may be introduced as evidence against him.

As a practical matter, even though the statute deals with the admission of confessions in juvenile proceedings, at the time the warnings are administered to a juvenile, three things are not known: (1) what charges the juvenile will face, if any; (2) which forum he will defend himself in, juvenile court or on the regular criminal docket; and (3) whether a court will ultimately conclude he was in custody or not when interrogated. Irrespective of these contingencies, however, the juvenile receives the warnings if officers are following the state statute.

If, however, the juvenile's statement results in a qualifying charge—essentially a serious felony charge—as in the present case, "[t]he court shall automatically transfer" the case to the "regular criminal docket . . . ." General Statutes § 46b-127 (a). When the defendant claims that under § 46b-137 he should have been advised that his statement would be admissible in a case on the regular criminal docket—not just juvenile court as § 46b-137 exclusively governs[5] and the "Juvenile Waiver" form the defendant signed arguably connotes—he will be met with the argument, accepted by the Appellate Court in this case; *State* v. *Castillo*, supra, 165 Conn. App. 728; that the statute does not apply to charges on the regular criminal docket. See *State* v. *Ledbetter*, 263 Conn. 1, 11, 818 A.2d 1 (2003) ("the provisions of § 46b-137 [a] do not apply in a case . . . in which the state seeks to use the confession in a proceeding in criminal, rather than juvenile, court"). When the defendant argues alternatively under the state constitution that he had a right to be advised that his statement would be admissible in a case on the regular criminal docket, as the defendant in the present case argued before the Appellate Court, he may be met with the argument that he was not in custody, perhaps largely

[5] The Appellate Court determined that, read as a whole, "§ 46b-137 has no bearing on the admissibility of statements offered in adult proceedings." *State* v. *Castillo*, supra, 165 Conn. App. 728.

because of his parent's presence, and, so, he was not entitled to *any* warnings, even the warnings under § 46b-137 (a) the officers were compelled to give and that the defendant challenges as insufficient.

Included among the claims the defendant made in the Appellate Court was that, under article first, § 8, of the state constitution,[6] a juvenile must be informed of the possibility of adult prosecution before he can make a voluntary, knowing, and intelligent waiver of his privilege against self-incrimination. This was separate and apart from his claims that his *Miranda* waiver was invalid and his confession involuntary under due process principles.[7] As the Appellate Court described the defendant's state constitutional claim, the defendant asserted that the officers interrogating him had "failed to advise him that any statements that he made could be used against him not only in any juvenile proceeding but in an adult criminal prosecution . . . ." *State* v. *Castillo*, supra, 165 Conn. App. 705.[8]

[6] Article first, § 8, of the Connecticut constitution provides in relevant part: "No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law . . . ."

[7] The defendant, quoting *State* v. *Jackson*, 304 Conn. 383, 419 n.27, 40 A.3d 290 (2012), noted accurately that "[w]hether the defendant was in custody . . . and whether the defendant's statements were voluntary are, although related, analytically separate inquiries." There is, however, "considerable overlap" between the two. Id., 421.

[8] The analysis the defendant advanced in the Appellate Court in support of his state constitutional claim reflects many of the same points about juveniles' vulnerabilities recognized by the United States Supreme Court in *J. D. B.* In particular, the defendant cited authority to establish that juveniles lack maturity to meaningfully waive *Miranda* rights; K. King, "Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children From Unknowing, Unintelligent, and Involuntary Waivers of *Miranda* Rights," 2006 No. 2 Wis. L. Rev. 431, 431–33 (2006); that juveniles waive their rights at higher rates than adults; B. Feld, "Behind Closed Doors: What Really Happens When Cops Question Kids," 23 Cornell J.L. & Pub. Pol'y 395, 429 (2013); that recent neuroscience suggests that juveniles do not reason in the same manner as adults and demonstrate immature decision-making skills; K. King, supra, pp. 434–35; and that even sixteen and seventeen year old juveniles do not fully appreciate the concepts involved with the *Miranda* warnings or the consequences of waiving those rights. See B. Feld, supra, pp. 409–410.

Thus, this is not a case in which the defendant argues only that he is entitled to a warning he did not receive—state law directs officers to provide the warnings whether the juvenile suspect is in custody or not should the juvenile's statement be used against him in juvenile court. Rather, the defendant claims that the warning he did receive—which was compelled by state law—was incomplete or misleading under the state constitution. 2 W. LaFave et. al., Criminal Procedure (4th Ed. 2015) § 6.9 (c), p. 925 ("there is an absolute prohibition upon any trickery which misleads the suspect as to the existence or dimensions of any of the applicable rights"). If the defendant is correct that under our state constitution this warning must specifically include an advisement that the statements he makes may be admitted in a case on the regular criminal docket, and not just in juvenile court, it is not clear to me why only juveniles who received a nonspecific warning while in custody would be entitled to that further caution. Statements provided after the giving of this warning may result in charges transferred to the regular criminal docket whether he was in custody or not.

In opposing the defendant's request that we exercise supervisory authority to reach his state constitutional claim, the Appellate Court framed the issue in justiciability terms: "Because we have determined in the present case that *Miranda* warnings were not required because the defendant was not subjected to a custodial interrogation, any further discussion about the content of such warnings would be untethered to any actual controversy and, thus, premature." *State* v. *Castillo*, supra, 165 Conn. App. 730. In the Appellate Court's view, the defendant lacked standing because this claim can, apparently, be brought only by those under the age of eighteen who are interrogated under custodial circumstances. As I argue in part I of this opinion, I

believe this case qualifies because the defendant was in custody for *Miranda* purposes.

However, even if I am wrong about that, I do not believe we are required to exercise our supervisory authority to reach this issue in the present case. See *State* v. *Lockhart*, 298 Conn. 537, 576, 4 A.3d 1176 (2010). Even a defendant who was *not* in custody when interviewed, but who received a warning that he claims was misleading or incomplete about statements he makes that may be introduced against him, in my view, has a justiciable claim.

I do not know how this challenge would come out. It may well fail because the defendant's argument does not compel a conclusion that our state constitution requires such a warning. Or we may conclude, as we did in *State* v. *Perez*, 218 Conn. 714, 722–28, 591 A.2d 119 (1991), that a due process analysis under the federal constitution[9] that takes into account the lack of such a specific warning among the "totality of the circumstances" suffices to protect the juvenile's rights. But if the Appellate Court agreed with the defendant that the warnings given were inadequate under article first, § 8, of our state constitution, in my view, that court could award him relief.

[9] In *State* v. *Perez*, supra, 218 Conn. 714, this court declined to adopt the "rigid rule" the defendant proposed that a "confession is rendered involuntary solely by virtue of the fact that the police did not inform the juvenile that he could be prosecuted as an adult, rather than as a juvenile." Id., 727. This court made clear, however, that because the defendant had failed to provide a cogent state constitutional analysis, it answered this question only as a matter of federal constitutional law. Id., 723. In *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 459, 880 A.2d 160 (2005), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006), we noted that in *Perez* we "left undecided the issue of whether article first, § 8, requires the police to advise juvenile suspects that they may be prosecuted as adults." *Ledbetter* held that the failure of an attorney to raise the issue left open in *Perez* did not constitute ineffective assistance of counsel. Id., 462.

For these reasons, even if I were to conclude that defendant was not in custody, I would reverse the judgment and remand the case to the Appellate Court to consider that state constitutional question. Accordingly, I respectfully dissent.

SIMON WILLIAMS *v.* CITY OF NEW HAVEN ET AL.
(SC 20005)

Palmer, Robinson, D'Auria, Mullins and Kahn, Js.*

Syllabus

Pursuant to statute (§ 31-55bb), "[n]o employee shall be denied the right to pursue, in a court of competent jurisdiction, a cause of action arising under . . . a state statute solely because that employee is covered by a collective bargaining agreement."

The defendant city appealed from the decision of the Compensation Review Board, which affirmed the decision of the workers' compensation commissioner denying the defendant's motion to dismiss the plaintiff employee's claim that he had been wrongfully discharged in retaliation for filing a workers' compensation claim. The plaintiff was injured during the course of his employment and was later released for light duty work by his physician. The defendant gave the plaintiff a light duty assignment that conflicted with his second job, and, at the plaintiff's request, his physician revised his work status report so that he could continue working his second job. The defendant thereafter conducted an investigation and eventually terminated the plaintiff on the basis of workers' compensation fraud. The plaintiff's union filed a grievance that was submitted to arbitration before the State Board of Mediation and Arbitration pursuant to a collective bargaining agreement between the plaintiff's union and the defendant. The mediation and arbitration board determined that the defendant had just cause to terminate the plaintiff, and the plaintiff filed an application to vacate the arbitration award in the Superior Court, which was denied. Meanwhile, the plaintiff filed a claim with the Workers' Compensation Commission, alleging that he had been wrongfully discharged in violation of the statute (§ 31-290a) prohibiting employers from discharging employees for filing a workers' compensation claim. In seeking dismissal of the plaintiff's claim, the defendant asserted that it was barred by collateral estoppel because the issue arising from the claim had been finally decided by the mediation and arbitration board in the prior arbitration. The workers' compensation

---

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

commissioner relied on this court's decision in *Genovese* v. *Gallo Wine Merchants, Inc.* (226 Conn. 475), which held that, under § 31-55bb, principles of collateral estoppel do not bar a claimant, who had previously brought a grievance pursuant to a collective bargaining agreement, from bringing a statutory cause of action in the Superior Court raising the same or a similar issue, in concluding that the doctrine of collateral estoppel did not bar the plaintiff from asserting his claim under § 31-290a before the Workers' Compensation Commission. The Compensation Review Board upheld the commissioner's decision, and the defendant appealed, claiming, inter alia, that this court's holding in *Genovese* did not apply to the present case because the text of § 31-51bb permits statutory causes of action to be pursued "in a court of competent jurisdiction," the employee in *Genovese* had filed his claim under § 31-290a in the Superior Court, and the plaintiff in the present case filed his claim under § 31-290a with the Workers' Compensation Commission rather than the Superior Court. *Held* that the Compensation Review Board correctly determined that § 31-51bb permitted the plaintiff to file his claim under § 31-290a with the Workers' Compensation Commission even though the mediation and arbitration board previously had issued an adverse decision on a similar claim in the arbitration proceeding: because § 31-51bb did not plainly and unambiguously manifest an intent to apply exclusively to claims pursued in the Superior Court, this court considered the statute's legislative history and determined that the legislature had contemplated that employees covered by collective bargaining agreements would have the same right as other employees to raise a statutory claim in an agency, such as the Workers' Compensation Commission, and, therefore, the phrase "in a court of competent jurisdiction," as used in § 31-55bb, was not intended to specify the forum in which such rights could be vindicated but was intended to make clear that the procedures provided for in a collective bargaining agreement would not be the exclusive vehicle by which such employees could vindicate their statutory rights; moreover, because the Workers' Compensation Commission and the Compensation Review Board have greater expertise in the area of workers' compensation, it was unlikely that § 31-55bb was intended to prevent the application of the doctrine of collateral estoppel to workers' compensation claims brought in court but not before the Workers' Compensation Commission; furthermore, the fact that the plaintiff filed an application in the Superior Court to vacate the prior arbitration award did not mean that he already had an opportunity to pursue his statutory claim under § 31-290a in a court of competent jurisdiction within the meaning on § 31-51bb, as the right to file an application to vacate in the Superior Court is not equivalent to the right to file a claim under § 31-290a with the Workers' Compensation Commission, which includes the right to subsequent judicial review under a more liberal standard than that applicable to an application to vacate an arbitration award.

Argued February 20—officially released July 3, 2018

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Third District denying the defendants' motion to dismiss the plaintiff's claim, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the defendants appealed. *Affirmed.*

Anne Kelly Zovas, with whom was *Philip T. Markuszka*, for the appellants (defendants).

William J. Ward, for the appellee (plaintiff).

Opinion

D'AURIA, J. In *Genovese* v. *Gallo Wine Merchants, Inc.*, 226 Conn. 475, 493, 628 A.2d 946 (1993), this court held that, under General Statutes § 31-51bb, principles of collateral estoppel do not bar a claimant, who had previously brought a grievance pursuant to a collective bargaining agreement, from bringing a statutory cause of action in the Superior Court raising the same or a similar issue. We recently affirmed this holding in *Spiotti* v. *Wolcott*, 326 Conn. 190, 199–200, 163 A.3d 46 (2017). In the present case, we are asked to determine whether our holding in *Genovese*, in which the plaintiff brought an action *in the Superior Court* pursuant to General Statutes § 31-290a, applies equally when a plaintiff has opted to bring his claim pursuant to § 31-290a before *the Workers' Compensation Commission* (commission). Specifically, we must determine whether the Compensation Review Board (review board) correctly determined that § 31-51bb permitted the plaintiff, Simon Williams, to file a claim with the commission alleging that the named defendant, the city of New Haven,[1] had

[1] Connecticut Interlocal Risk Management Agency, a nonprofit association that provides workers' compensation insurance coverage to the city, is also a defendant in this matter. In the interest of clarity, and because the Connecticut Interlocal Risk Management Agency has not raised any separate claims on appeal, we refer in this opinion to the city as the defendant.

violated § 31-290a by wrongfully terminating his employment in retaliation for bringing a workers' compensation claim, despite the fact that a related issue previously had been decided by the State Board of Mediation and Arbitration (state board) in an arbitration proceeding brought pursuant to the plaintiff's collective bargaining agreement. We conclude that the review board correctly determined that, under § 31-51bb, the plaintiff's claim brought before the commission pursuant to § 31-290a was not barred by the doctrine of collateral estoppel. Accordingly, we affirm the review board's decision.

The record reveals the following procedural history and facts that either were found by the review board, the Workers' Compensation Commissioner for the Third District (commissioner), or are not disputed. The plaintiff was employed by the city in its refuse division from 1993 until his employment was terminated on November 1, 2012. In January, 2011, the plaintiff injured his left shoulder, neck and back during the course of his employment. Patrick Ruwe, a physician, treated the plaintiff for his shoulder injury, and Shirvinda Wijesekera, also a physician, treated him for his neck and back injuries. On January 19, 2012, Ruwe released the plaintiff for light duty work for eight hours each day effective January 23, 2012.

Pursuant to the city's policy of returning injured employees to work as soon as medically reasonable, the city informed the plaintiff that he was assigned to light duty work at the city's fleet maintenance division. His hours were 7 a.m. to 3 p.m., and his work consisted of transferring handwritten work orders to a computerized database. Upon returning to work, the plaintiff requested that his hours be changed to the hours that he had worked before his injury, 5 a.m. to 1 p.m., because the new schedule interfered with his second job. John Prokop, the city's director of public works,

explained to the plaintiff that the city could not accommodate that request because the location of the plaintiff's light duty assignment did not open until 7 a.m., and the city did not want the plaintiff to work unsupervised.

Upon being informed of this, the plaintiff, later that same day, called Ruwe's office and spoke to his secretary. As a result of this conversation, Ruwe revised his work status report to restrict the plaintiff's hours to four to five hours of work per day. Shortly thereafter, Prokop called Ruwe's office and asked why the plaintiff's hours had been changed just days after he had returned to work. Ruwe then conducted a follow-up examination of the plaintiff and issued a work release form indicating that he had executed the previous form, which restricted the plaintiff's work to four to five hours per day, in order to accommodate the plaintiff's desire to perform his second job and that Ruwe was now lifting that restriction.

The city subsequently filed with the commission a notice of intent to reduce or discontinue the plaintiff's workers' compensation benefits and initiated an investigation of the matter. During the course of the investigation, the plaintiff and Ruwe were deposed. Ruwe testified at his deposition that he had reduced the plaintiff's work hours to accommodate the plaintiff's desire to perform his second job and that there was no medical reason for the restriction. Thereafter, the commissioner granted the city's request to reduce the plaintiff's workers' compensation benefits for the period of January 19 through May 22, 2012.

After giving the plaintiff notice of its intent to do so, the city conducted a pretermination hearing to determine whether the plaintiff's employment should be terminated because he had committed workers' compensation fraud. The city subsequently notified the plaintiff that his employment was being terminated. The

plaintiff's union, the United Public Service Employees Union, Local 424, Unit 34 (union), then filed a grievance pursuant to the collective bargaining agreement between the city and the union, claiming that the plaintiff had been fired without just cause. The parties agreed to bypass the grievance procedure and to proceed directly to arbitration before the state board, as authorized by the collective bargaining agreement. After conducting evidentiary hearings, the state board issued an award in favor of the city, concluding that it had just cause to terminate the plaintiff because his receipt of workers' compensation benefits was "the result of the [plaintiff's] intentional deceit" and his conduct "amounted to theft . . . ." The state board noted that, as defined in The Random House Dictionary of the English Language (2d Ed. 1987) p. 762, "fraud" means, among other things, "deceit, trickery, sharp practice, or breach of confidence, perpetrated for profit or to gain some unfair or dishonest advantage."

The plaintiff then filed an application to vacate the arbitration award pursuant to General Statutes § 52-418 (a) (4). The trial court observed that, because the submission to arbitration was unrestricted, the court's review was limited to determining whether "(1) the award fail[ed] to conform to the submission, or, in other words, [fell] outside the scope of the submission; or (2) the arbitrators manifestly disregarded the law." *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 85, 881 A.2d 139 (2005). The court concluded that the plaintiff had failed to establish either prong of *Harty* and, accordingly, denied the application to vacate the arbitration award.

Meanwhile, the plaintiff filed a claim with the commission, alleging that he had been wrongfully discharged by the city in retaliation for bringing a workers'

compensation claim in violation of § 31-290a.[2] The city moved to dismiss the claim, contending that it was barred by the doctrine of collateral estoppel because the issue had been finally decided in the arbitration proceeding before the state board. The commissioner concluded that, under § 31-51bb,[3] as interpreted by this court in *Genovese* v. *Gallo Wine Merchants, Inc.*, supra, 226 Conn. 493, the plaintiff was entitled to pursue his claim pursuant to § 31-290a despite his prior voluntary submission of a related claim to arbitration pursuant to the collective bargaining agreement. See id. (by enacting § 31-51bb, "the legislature intended to permit an employee, despite his prior voluntary submission of a related claim to final arbitration under a collective bargaining agreement, to pursue a statutory cause of action in the Superior Court"). In addition, the commissioner concluded that the issue raised by the plaintiff in his claim to the commission pursuant to § 31-290a, namely, whether the city had retaliated against him for filing a workers' compensation claim, was separate and distinct from the issue raised in the arbitration, namely, whether there was just cause to terminate the plaintiff because he had engaged in workers' compensation fraud.

The city filed a motion to correct the commissioner's finding and award, arguing that the commission lacked

[2] General Statutes § 31-290a (a) provides: "No employer who is subject to the provisions of this chapter shall discharge, or cause to be discharged, or in any manner discriminate against any employee because the employee has filed a claim for workers' compensation benefits or otherwise exercised the rights afforded to him pursuant to the provisions of this chapter."

[3] 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."

jurisdiction to entertain the plaintiff's claim pursuant to § 31-290a "in light of the prior [state board] ruling that found [the] termination to be lawful and a prior Superior Court ruling that declined to vacate that arbitration panel ruling." The commissioner denied the motion. The city then filed a petition for review with the review board. The review board agreed with the commissioner that, under this court's interpretation of § 31-51bb in *Genovese*, the plaintiff's claim was not barred by principles of collateral estoppel. The review board also agreed with the commissioner that the issue that the plaintiff raised in his claim to the commission pursuant to § 31-290a was different from the issue raised in the arbitration proceeding pursuant to the collective bargaining agreement. Accordingly, the review board affirmed the commissioner's decision.

This appeal followed.[4] The city contends that, contrary to the review board's determination, this court's decision in *Genovese* v. *Gallo Wine Merchants, Inc.*, supra, 226 Conn. 486, which held that, under § 31-51bb, principles of collateral estoppel do not bar an employee covered by a collective bargaining agreement from pursuing a statutory cause of action when a related issue previously has been decided in a proceeding provided for in the agreement, does not apply to the present case because § 31-51bb applies only to statutory causes of action that are pursued "in a court of competent jurisdiction . . . ." General Statutes § 31-51bb. The city points out that, unlike in *Genovese*, in which the plaintiff employee filed his claim pursuant to § 31-290a in the Superior Court; see *Genovese* v. *Gallo Wine Merchants, Inc.*, supra, 479; the plaintiff in the present case did not pursue a statutory cause of action in any court, but filed

[4] The city 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.

his claim pursuant to § 31-290a with the commission.[5] In the alternative, the city contends that the provision of § 31-51bb that permits the plaintiff to pursue a statutory cause of action in a court of competent jurisdiction, despite the fact that his claim previously had been decided by the state board, was satisfied because the plaintiff was permitted to pursue in the Superior Court an application to vacate the arbitration award pursuant to § 52-418. The city further argues that the review board incorrectly determined that the issues the plaintiff raised in his claim to the commission pursuant to § 31-290a were different from the issues raised in the arbitration proceeding pursuant to the collective bargaining agreement.

We disagree with the city's first two claims and conclude that the review board correctly determined that § 31-51bb, as interpreted by this court in *Genovese*, permitted[6] the plaintiff to file his claim pursuant to § 31-290a with the commission, despite the fact that the state board previously had determined that the city did not wrongfully terminate his employment. We further conclude that we need not determine whether the issue that the plaintiff raised in the arbitration proceeding before the state board was different from the issue that

[5] Pursuant to § 31-290a (b), an employee who is subject to alleged discrimination because he or she filed a workers' compensation claim may elect either to bring a civil action in the Superior Court or file a complaint with the chairman of the commission.

[6] We recognize that § 31-51bb does not expressly state that an employee is authorized or is permitted to bring a statutory cause of action even though the claim raised in that action was previously decided by a grievance brought pursuant to a collective bargaining agreement. Rather, the statute provides that "[*n*]*o* employee shall be *denied* the right to pursue" a statutory cause of action under these circumstances. (Emphasis added.) General Statutes § 31-51bb. In the interest of simplicity, however, we use the word *permit* in this opinion to indicate that, under § 31-51bb, an employee *will not be denied* the right to pursue a statutory cause of action by principles of collateral estoppel merely because that issue was previously decided in proceedings pursuant to a collective bargaining agreement.

he raised in his claim to the commission pursuant to § 31-290a because, even if the issues were the same, § 31-51bb would permit the plaintiff to file his claim with the commission.

Whether § 31-51bb permits the plaintiff to file a claim with the commission pursuant to § 31-290a alleging that the city had wrongfully terminated his employment in retaliation for bringing a workers' compensation claim, notwithstanding the fact that the state board previously had decided in a prior arbitration proceeding that the city had not wrongfully terminated the plaintiff's employment, is a question of statutory interpretation subject to plenary review. See, e.g., *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 507, 43 A.3d 69 (2012). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning . . . [General Statutes] § 1-2z directs us first to consider 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." (Internal quotation marks omitted.) Id., 507–508. If, however, when considered in relation to other statutes, the statutory text at issue "is susceptible to more than one plausible interpretation," we may appropriately consider extratextual evidence. (Internal quotation marks omitted.) *Lackman* v. *McAnulty*, 324 Conn. 277, 285–86, 151 A.3d 1271 (2016).

We begin our analysis with the language of § 31-51bb: "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."

As we have indicated, this is not the first time that this court has construed § 31-51bb. In *Genovese* v. *Gallo Wine Merchants, Inc.*, supra, 226 Conn. 480–81, this court observed that § 31-51bb had been enacted in response to our holding in *Kolenberg* v. *Board of Education*, 206 Conn. 113, 121–23, 536 A.2d 577, cert. denied, 487 U.S. 1236, 108 S. Ct. 2903, 101 L. Ed. 2d 935 (1988), that an employee was required to exhaust the grievance and arbitration procedures available to him pursuant to a collective bargaining agreement before he could file a civil action in the Superior Court raising certain constitutional and contractual claims. See id., 123, citing *School Administrators Assn.* v. *Dow*, 200 Conn. 376, 385, 511 A.2d 1012 (1986) (although plaintiff challenging constitutionality of administrative procedure may be permitted in "special circumstances" to bring collateral action without first exhausting administrative remedies, judicial adjudication of constitutional claims "is not warranted when the relief sought by a litigant might conceivably have been obtained through an alternative [statutory] procedure" [internal quotation marks omitted]).[7] We concluded in *Genovese* that § 31-51bb was

[7] The plaintiff employee in *Kolenberg* also raised a claim pursuant to the Teacher Tenure Act, General Statutes (Rev. to 1987) § 10-151. See *Kolenberg* v. *Board of Education*, supra, 206 Conn. 121. This court concluded that claim was barred because "access to the courts under [§ 10-151] is possible only on appeal of a decision of the board of education," and the plaintiff had not filed any such appeal and could not have done so, presumably because he did not file a claim with the board of education. Id., 121. Thus, the claim pursuant to § 10-151 was barred not because the plaintiff had failed to exhaust procedures pursuant to the collective bargaining agreement but because he had failed to exhaust his administrative remedy. See General Statutes (Rev. to 1987) § 10-151 (d) and (f) (giving tenured teacher right

intended not only to permit an employee covered by a collective bargaining agreement to pursue a statutory cause of action without first exhausting the remedies provided for in the agreement but, also, that it was intended "to permit an employee to assert statutory rights in a court action despite a prior adverse determination of the same or similar claim in an arbitration proceeding brought pursuant to a collective bargaining agreement." *Genovese* v. *Gallo Wine Merchants, Inc.*, supra, 486; see also *Spiotti* v. *Wolcott*, supra, 326 Conn. 200, 204 (rejecting claim that legislature overruled *Genovese* when it enacted § 1-2z, which codified plain meaning rule, and declining under principles of stare decisis to overrule *Genovese*).

In the present case, the city does not dispute this holding in *Genovese* or ask us to overrule that case. Rather, the city claims that, although under § 31-51bb the doctrine of collateral estoppel does not bar an employee who has arbitrated a claim pursuant to a collective bargaining agreement from subsequently bringing a statutory claim raising the same issue in "a court of competent jurisdiction," § 31-51bb does not apply to subsequent claims filed in a forum other than the Superior Court. The plaintiff contends that, to the

to administrative hearing following notice that teacher's contract will be terminated and allowing teacher aggrieved by decision thereof to appeal to Superior Court). It is not entirely clear whether this court's decision in *Kolenberg* was intended to require employees to exhaust procedures pursuant to a collective bargaining agreement before filing a statutory cause of action in the Superior Court, but it is reasonable to conclude that the same principle would apply to statutory claims and constitutional claims, i.e., if the relief requested could be obtained pursuant to the procedures provided in a collective bargaining agreement, those procedures must be exhausted. Cf. *School Administrators Assn.* v. *Dow*, supra, 200 Conn. 383 (claim that defendant employer had violated statutory procedures was barred because it was "within the scope of the contractual remedies available" under collective bargaining agreement); but see id., 384 (claim was also barred because plaintiffs had failed to exhaust administrative remedies available pursuant to General Statutes [Rev. to 1987] § 10-151).

contrary, the legislature intended § 31-51bb to ensure that employees covered by collective bargaining agreements do not lose statutory rights available to other employees, and the forum in which the statutory cause of action is pursued has no bearing on whether the statute applies. Under the plaintiff's reading of the statute, the legislature intended the phrase "in a court of competent jurisdiction" simply to clarify that statutory and constitutional claims need not be brought pursuant to the procedures provided in a collective bargaining agreement, and it was not intended to limit the application of the statute to claims pursued in court. General Statutes § 31-51bb.

We acknowledge that the phrase "in a court of competent jurisdiction" occurs hundreds of times in the General Statutes. The plaintiff has not identified, and our research has not revealed, other statutes in which it would clearly appear, at least on the face of the statute, that the phrase includes tribunals other than courts.[8] It is well established, however, that statutory language should not be considered in isolation but must be interpreted in context. See, e.g., *State* v. *Marsh & McLennan Cos.*, 286 Conn. 454, 464–65, 944 A.2d 315 (2008) ("[t]he test to determine ambiguity is whether the statute, when

[8] In some cases, it simply is not clear one way or the other whether "a court of competent jurisdiction" includes tribunals other than the Superior Court, and we are reluctant to hazard a determination as to the scope and meaning of that phrase in a vacuum. See, e.g., General Statutes § 3-62g ("[i]f, after payment or delivery to the Treasurer, any officer . . . of the federal government is compelled by a court of competent jurisdiction to make a second payment, the Treasurer . . . shall refund the amount of such second payment"); General Statutes § 4-61oo (d) ("[n]othing in this subsection or subsection [c] of this section shall be construed to give a hiree or an applicant the right to pursue a cause of action in a court of competent jurisdiction for the violation of any provision of this subsection or subsection [c] of this section"); General Statutes § 4a-101 (e) ("[n]o person . . . shall be held liable . . . unless such person, agency, employee or official is found by a court of competent jurisdiction to have acted in a wilful, wanton or reckless manner").

read in context, is susceptible to more than one reasonable interpretation" [internal quotation marks omitted]); *State* v. *Brown*, 235 Conn. 502, 516, 668 A.2d 1288 (1995) ("[i]t is a basic tenet of statutory construction that the intent of the legislature is to be found not in an isolated phrase or sentence but, rather, from the statutory scheme as a whole" [internal quotation marks omitted]).

We conclude that, when the phrase "in a court of competent jurisdiction" is considered within the context of § 31-51bb, both parties' interpretations of the statute are plausible, and, therefore, the statute is ambiguous. First, § 31-51bb does not expressly provide that employees covered by a collective bargaining agreement can pursue a cause of action arising under the state or federal constitution or a state statute *exclusively* in the Superior Court. Second, it is not unreasonable to conclude that the legislature included the phrase "in a court of competent jurisdiction" in § 31-51bb solely because, in the absence of that phrase, the statute would be entirely unclear as to whether such a cause of action may be pursued in proceedings *other than* those provided for in a collective bargaining agreement, and the legislature was not concerned with specifying the forum in which the cause of action may be brought. Because § 31-51bb does not plainly and unambiguously manifest an intent to apply exclusively to claims pursued in the Superior Court, we may consider extratextual evidence of its meaning, including its legislative history.

As we observed in *Genovese* v. *Gallo Wine Merchants, Inc.*, supra, 226 Conn. 475, Representative Dale W. Radcliffe stated during the debate on Public Acts 1988, No. 88-275, § 1, which was codified at § 31-51bb, that its primary purpose was " 'to [e]nsure that the courts of this state are going to be open to all individuals, regardless of whether they are covered by a collective bargaining agreement. . . . There was some language in [this court's decision in *Kolenberg* v. *Board of Educa-*

tion, supra, 206 Conn. 113] which some felt would prevent an individual covered by a collective bargaining agreement from pursuing [a statutory] cause of action.' 31 H.R. Proc., Pt. 13, 1988 Sess., pp. 4567–68; [see also] Conn. Joint Standing Committee Hearings, Judiciary, Pt. 5, 1988 Sess., p. 1449, remarks of Attorney Ruth Pulda ('[e]ach of these [statutory] causes of action is threatened by the holding of *Kolenberg* . . .'); [Conn. Joint Standing Committee Hearings, supra], p. [1520, written remarks] of Barry Williams of the AFL-CIO [union] ('[a]s I understand it, Connecticut courts have erroneously ruled that a worker covered by a collective bargaining agreement must [adjudicate all claims] through the process established in the contract before seeking a remedy in court')." *Genovese* v. *Gallo Wine Merchants, Inc.*, supra, 482; see also Conn. Joint Standing Committee Hearings, supra, pp. 1448–49, remarks of Attorney Pulda (legislation was intended to protect right to bring cause of action to vindicate state statutory rights, including "the right to be free from race, sex [and] age discrimination, the right to earn at least a minimum wage, and, more recently, the right to report employers' illegal conduct to the appropriate state agency, the right to file workers' compensation claims, and the right to exercise free speech"); Conn. Joint Standing Committee Hearings, supra, p. 1452, remarks of Attorney Pulda ("[t]he right to be free from discrimination [that the legislature] created . . . should exist independently of the union contract and [employees] should have the right to vindicate [that right] in state court and not just be limited to the limited remedies that [they] are allowed in arbitration").

Although Representative Radcliffe referred to "the courts of this state"; 31 H.R. Proc., supra, p. 4567; it is clear to us that the primary problem with which these speakers were concerned was ensuring that generally available statutory *causes of action* would be available to employees covered by collective bargaining

agreements–not with specifying the *forum* in which such actions could be brought. In other words, these remarks support the conclusion that § 31-51bb was intended to ensure that, when there is a generally available statutory or constitutional cause of action or remedy, such employees would have the same right to pursue that cause of action or to invoke that remedy as employees not covered by a collective bargaining agreement. See Conn. Joint Standing Committee Hearings, supra, p. 1450, remarks of Attorney Pulda (legislation "simply restores to union members the causes of action and remedies [for statutory violations] that the legislature originally provided"); id., p. 1454, remarks of William Rudis, director of political legislation for the Connecticut State Council Machinists ("union members are no different than any other members of society . . . and ought not to be discriminated against"); id. ("it is essential that employees in collective bargaining areas be given the same kinds of consistent protections that we see . . . folks everywhere in our society today are given"); id., p. 1528, written remarks of the Connecticut Civil Liberties Union ("[t]his bill . . . would afford employees covered by collective bargaining agreements the same rights as those who are not unionized, a remedy at law or equity for violations of civil or constitutional rights"). Indeed, Attorney Pulda expressly stated in her remarks that the legislation was intended to protect the right to "report employers' illegal conduct *to the appropriate state agency* [including] the right to file workers' compensation claims . . . ."[9] (Emphasis

[9] In this regard, we note that complaints of discriminatory employment practices may be filed with the Commission on Human Rights and Opportunities pursuant to General Statutes § 46a-82. Inasmuch as the legislative history indicates that the statutory right to be free from discrimination is one of the rights that § 31-51bb was intended to protect, it would be anomalous to conclude that the statute does not permit the filing of such claims with the Commission on Human Rights and Opportunities if such a claim was previously decided in proceedings pursuant to a collective bargaining agreement.

added.) Id., p. 1448. Thus, this legislative history supports the conclusion that the legislature contemplated that employees covered by collective bargaining agreements would have the same right to raise a statutory claim in an agency as other employees. Accordingly, it is reasonable to conclude that the phrase "in a court of competent jurisdiction," as used in § 31-51bb, was not intended to specify the forum in which such rights may be vindicated but was intended to make clear that the procedures provided for in a collective bargaining agreement would not be the exclusive vehicle by which employees covered by that agreement may vindicate their statutory and constitutional rights. Indeed, in acting to protect the rights of employees covered by collective bargaining agreements to raise a statutory claim, we can think of no reason why the legislature would distinguish between those who chose to pursue their claims before a state agency and those who chose to pursue their claims in the Superior Court.

The city contends that, to the contrary, the problem that § 31-51bb was intended to address was "that arbitration may be a less effective forum for the final resolution of statutory claims" than proceedings in court because "[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. These concerns carry no weight, the city contends, when an employee has brought a claim before the commission because, pursuant to General Statutes § 31-298, the ordinary rules of procedure and evidence and the ordinary common-law principles also do not apply in proceed-

ings before the commission. The city further contends that § 31-51bb should not apply to claims filed with the commission because the relief that the commissioner can award pursuant to § 31-290a is significantly more limited than the relief that the Superior Court can award pursuant to that statute. See General Statutes § 31-290a (b) (trial court may award reinstatement of employee, payment of back wages, reestablishment of employee benefits to which employee would have been entitled if he had not been discriminated against, and "any other damages caused by such discrimination or discharge," as well as punitive damages and attorney's fees, whereas commissioner is authorized to award only reinstatement, payment of back wages and reestablishment of benefits).

We acknowledge that the particular legislative concerns regarding that fact-finding process in arbitration that this court cited in *Genovese* are addressed only when an employee has brought a claim in a forum that applies the ordinary rules of evidence and procedure. As we have explained, however, the legislative history of § 31-51bb shows that the *primary* purpose of the legislation was not to ensure that the ordinary evidentiary and procedural rules would apply to statutory causes of action pursued by employees covered by a collective bargaining agreement but, rather, to ensure that such employees would have the *same right* as other employees to pursue a statutory cause of action. Thus, when, in a particular case, a statutory cause of action provides employees with the choice of litigating before an agency or in court, we can see no reason why the fact that the remedies that are available in court are more expansive should bar an employee who is subject to a collective bargaining agreement from pursuing the cause of action before the agency. Indeed, it would be inappropriate to focus on the *specific* procedures and remedies available in a proceeding before the commission pursuant to § 31-290a when considering

the *general* question of whether § 31-51bb permits an employee who has obtained a decision from the state board pursuant to a collective bargaining agreement to subsequently pursue a statutory cause of action before an agency. We see no evidence that the legislature intended that this determination would be made on a case-by-case basis that depended on the evidentiary and procedural rules governing the statutory cause of action and the scope of the remedies that may be provided by the tribunal in which the action is pursued.

Moreover, although the ordinary rules of evidence and procedure do not apply in proceedings before the commission, it has expertise in the area of workers' compensation law that the state board does not have, thereby increasing the likelihood of a correct decision in a claim brought pursuant to § 31-290a. Indeed, because the commissioner and the review board have greater expertise in this area than the *courts*, it would be odd if § 31-51bb was intended to prevent the application of principles of collateral estoppel to workers' compensation claims brought in court but not before the commission. See *Luce* v. *United Technologies Corp.*, 247 Conn. 126, 138, 717 A.2d 747 (1998) (reviewing court is "obliged to give consideration to the [review] board's construction" of workers' compensation statutes because "[t]he [review] board . . . obviously has special expertise in workers' compensation matters"). This will generally be the case when the legislature has authorized a cause of action to be pursued before an agency.

In addition, the decisions of the review board are reviewable by the Appellate Court, pursuant to General Statutes § 31-301b, and by this court upon the granting of certification to appeal or the transfer of the appeal from the Appellate Court. See General Statutes § 51-199 (c). In such appeals, the reviewing court "must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the [Workers'

Compensation Act]." (Internal quotation marks omitted.) *Gill* v. *Brescome Barton, Inc.*, 142 Conn. App. 279, 296, 68 A.3d 88 (2013), aff'd, 317 Conn. 33, 114 A.3d 1210 (2015). This is in contrast to the extremely limited judicial review of an arbitrator's decision pursuant to § 52-418 (a) (4). See *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 85 (when submission to arbitration was unrestricted, trial court's review of decision is limited to determining whether "(1) the award fail[ed] to conform to the submission, or, in other words, [fell] outside the scope of the submission; or (2) the arbitrators manifestly disregarded the law").

For this reason, we also reject the city's claim that the provision of § 31-51bb permitting an employee to pursue a statutory cause of action in the Superior Court has been satisfied because the plaintiff filed an application to vacate the arbitrator's decision in the Superior Court pursuant to § 52-418 (a) (4). Again, the purpose of § 31-51bb was to give employees covered by a collective bargaining agreement the same right to bring a statutory cause of action as other employees. As we have just explained, because judicial review of an arbitration award is limited to determining whether the award conformed to the unrestricted submission and whether the arbitrator manifestly disregarded the law, the right to file, in the Superior Court, an application to vacate an arbitration award that resulted from proceedings provided for in a collective bargaining agreement is not equivalent to the right to file a claim with the commission pursuant to § 31-290a, which includes the right to subsequent judicial review under a more liberal standard.

The city also claims that the review board improperly determined that the doctrine of collateral estoppel did not bar the plaintiff from filing a claim pursuant to § 31-290a with the commission because it found that the issue raised in the arbitration proceedings before the state board was different from the issue raised in the

claim pursuant to § 31-290a. This court concluded in *Genovese* v. *Gallo Wine Merchants, Inc.*, supra, 226 Conn. 486, however, that § 31-51bb permits a plaintiff to pursue a statutory cause of action "despite a prior adverse determination of *the same or similar claim* in an arbitration proceeding brought pursuant to a collective bargaining agreement." (Emphasis added.) Accordingly, even if we were to assume that the issue that the plaintiff raised in his claim to the commission pursuant to § 31-290a was the same as the issue that the state board previously had decided in arbitration, the claim to the commission would not be precluded. We conclude, therefore, that the review board correctly determined that § 31-51bb permitted the plaintiff to file a claim with the commission pursuant to § 31-290a, despite the fact that the state board previously had issued an adverse decision on a similar claim in the arbitration proceeding brought pursuant to the plaintiff's collective bargaining agreement.

The decision of the Compensation Review Board is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* LAURENCE V. PARNOFF
(SC 19588)

Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn, Js.*

Syllabus

Convicted of disorderly conduct in connection with his confrontation of two water company employees on his property, the defendant appealed.

---

* This case was originally argued before a panel of this court consisting of former Chief Justice Rogers and Justices Palmer, McDonald, Robinson and D'Auria. Thereafter, Chief Justice Rogers retired from this court and did not participate in the consideration of this decision. Justices Mullins and Kahn were added to the panel and have read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision. The listing of justices reflects their seniority status on this court as of the date of oral argument.

The two employees had entered the defendant's property pursuant to an easement in order to perform fire hydrant maintenance when they noticed that one of the hydrant's caps was missing. The employees found the cap in a shed on the property and determined that someone impermissibly had tampered with it. Shortly thereafter, the defendant approached the employees to confront them about their presence on his property. The defendant was wearing shorts, no shirt, appeared disheveled, and was carrying a can to collect worms for fishing. One of the employees explained to the defendant the reason for their presence and that the cap had been altered. The defendant told the employees that they had no right to be on his property and that, if they did not leave, he was going to go into his house and get a gun to shoot them. On appeal to the Appellate Court, the defendant claimed that there was insufficient evidence to sustain his conviction of disorderly conduct because his comments did not constitute fighting words, that is, speech that is not protected by the first amendment to the federal constitution because it would cause a reasonable addressee to respond with imminent violence under the circumstances. The Appellate Court concluded that the defendant's comments were not fighting words because the state had failed to present sufficient evidence to establish beyond a reasonable doubt that those statements were likely to provoke an immediate violent reaction from the employees. Accordingly, that court reversed the judgment of the trial court and remanded the case with direction to render a judgment of acquittal, and the state, on the granting of certification, appealed to this court. *Held* that the Appellate Court correctly concluded that the defendant's statements were not fighting words, as they were not likely to provoke an immediate and violent reaction from the water company employees, and, thus, there was insufficient evidence to sustain the defendant's conviction: the defendant's threatening words, unaccompanied by effectuating action, were not likely to provoke an immediate and violent reaction from the employees at whom those words were directed, as the objectively apparent circumstances did not indicate the defendant's immediate intent or ability to carry out his threat, given that he appeared unarmed and would need to retrieve his gun from a separate location, which decreased the likelihood that addressees in the employees' positions would consider any danger so imminent that they would feel compelled to react with violence to dispel it; moreover, the improbability of a violent response was further supported by the fact that the two employees, who were readily identifiable as water company employees on the basis of their uniforms, vehicles, and identification badges, were professionals performing within the scope of their duties on behalf of the water company, which included using easements over private land and encountering confrontational property owners, and they would reasonably be expected to exercise a higher degree of restraint than an ordinary citizen and would be unlikely to react violently when faced with an angry property owner; furthermore, a subjective

analysis of the employees' failure to outwardly react or to leave the premises in response to the defendant's statements confirmed this court's independent conclusion that the average water company employee in the position of the employees would not likely be incited to react immediately and violently in response to those statements.

(*One justice concurring separately;*
one justice dissenting)

Argued October 10, 2017—officially released July 3, 2018

Procedural History

Substitute information charging the defendant with the crimes of criminal mischief in the fourth degree and disorderly conduct, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Dennis*, *J.*; verdict and judgment of guilty of disorderly conduct, from which the defendant appealed to the Appellate Court, *Keller*, *Prescott* and *West*, *Js.*, which reversed the trial court's judgment and remanded the case to that court with direction to render a judgment of acquittal, and the state, on the granting of certification, appealed to this court. *Affirmed.*

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Michael A. DeJoseph, Jr.*, senior assistant state's attorney, for the appellant (state).

Norman A. Pattis, for the appellee (defendant).

Opinion

D'AURIA, J. The defendant, Laurence V. Parnoff, uttered threatening words to two water company employees who had entered his property pursuant to an easement to service a fire hydrant—telling them, essentially, that if they did not leave his property, he would retrieve a gun and shoot them. As a result of his statement, the defendant was convicted after a jury trial of disorderly conduct in violation of General Statutes § 53a-182 (a) (1), which criminalizes intentionally or

recklessly causing inconvenience, annoyance, or alarm by way of "violent, tumultuous or threatening behavior . . . ." The defendant appealed to the Appellate Court from the judgment of conviction, arguing that, under principles stemming from the first amendment to the United States constitution, there was insufficient evidence to sustain a guilty verdict as to the disorderly conduct charge. *State* v. *Parnoff*, 160 Conn. App. 270, 274, 125 A.3d 573 (2015). Because the behavior giving rise to his conviction was pure speech and not physical violence, the first amendment forbids the imposition of criminal sanctions unless that speech amounts to so-called "fighting words"—words that would cause a reasonable addressee to respond with imminent violence under the circumstances. (Internal quotation marks omitted.) *State* v. *Baccala*, 326 Conn. 232, 234–35, 251, 163 A.3d 1, cert. denied, U.S. , 138 S. Ct. 510, 199 L. Ed. 2d 408 (2017); see also U.S. Const., amend. I. The Appellate Court reversed the judgment after concluding that the defendant's statement was not fighting words because, although inappropriate, the defendant's words were not likely to provoke an immediate and violent reaction from the water company employees. *State* v. *Parnoff*, supra, 281. We agree with the Appellate Court and affirm its judgment.

The jury reasonably could have found the following facts. On the day of the incident, two employees of the Aquarion Water Company (water company) were sent to the defendant's property to perform fire hydrant maintenance. One of the two employees, Kyle Lavin, was an apprentice level employee working his fourth summer for the water company performing hydrant maintenance. Lavin needed assistance locating a fire hydrant on the defendant's property that he was scheduled to routinely service, and he called fellow water company employee David Lathlean to help him. Lathlean was an experienced employee, having worked for

the water company for approximately ten years. Although the fire hydrant was located on the defendant's private property, the water company had a preexisting easement that spanned a radius of twenty feet beyond the fire hydrant and hydrant pipe.[1]

Lavin and Lathlean arrived at the defendant's property in separate company branded trucks, wearing bright yellow company branded safety shirts and identification badges. They entered the property together and located the hydrant down a long driveway through a wooded area, approximately 100 feet from the defendant's residence. Upon inspecting the fire hydrant, Lavin and Lathlean discovered that one of its caps was missing. They then began to look for the cap in the vicinity of the hydrant, including in an open-ended shed with a canopy roof located several yards away. Lathlean entered the open-ended shed and discovered the hydrant's missing cap, which appeared to have a garden hose fitting welded into it. This indicated to Lathlean that someone had tampered with the hydrant because the water company does not permit the removal or modification of hydrant caps. As a result, the two employees called another water company employee, Beverly Doyle, who handled theft of service investigations.

Shortly thereafter, the defendant's daughter, who had just arrived at the property to visit her parents, and the defendant's wife were approached by the water company employees. Lathlean first spoke to the defendant's daughter, conveying to her that he suspected someone had tampered with the hydrant. The daughter testified that Lathlean was "[n]ot very nice, loud," and "angry."

[1] Lavin admitted that, at one point, he exceeded the bounds of the easement, although, at the time, the defendant never precisely raised this issue to him.

The defendant then appeared and approached Lavin and Lathlean to confront them about their presence on the property. The defendant was wearing shorts and no shirt, and he appeared disheveled. He was also carrying a can that he was using to collect worms from the ground in order to go fishing with his grandson, who was elsewhere on the property. Lavin looked on as Lathlean explained to the defendant that they were employed by the water company to perform hydrant maintenance and had discovered the altered hydrant cap. According to Lavin, the defendant was very upset, throwing his arms up and down, yelling, and he told them to leave his property multiple times.

Despite Lathlean's explanation, the defendant told Lavin and Lathlean that they had no right to be on his property. According to Lathlean, the defendant then told him that, "if [they] didn't get off his property, he was going to get a gun or something like that . . . [t]o shoot [them]." Although the defendant did not speak directly to Lavin, Lavin testified that he heard the defendant say, " 'if you go into my shed, I'm going to go into my house, get my gun and [fucking] kill you.' "[2]

Lathlean called the police, but the two employees remained on the property, even though they were trained by the water company to leave if a property owner became angry. Lathlean gave no outward reaction to the defendant's statement, testifying that "it just bounced right off [of] me" and that "I just stood there and was like, okay then, you know, let's see what happens." Lathlean also testified that he was not frightened by the defendant's words. In fact, when Lathlean called the police, he referred to the defendant as merely " 'a little crabby' " and did not report anything about a gun. Although Lavin testified that the defendant's words

[2] Lathlean's exact testimony was that the defendant said he was going to " 'f'n kill you,' " but Lathlean clarified that he was censoring himself because of his presence in the courtroom.

“[a]bsolutely” caused him alarm and trepidation, like Lathlean, he remained on the property. Nothing in Lavin’s testimony indicated that he believed that the defendant was armed, and, thus, it did not appear that he was immediately capable of carrying out the threat. The defendant made no effort to return to his house to retrieve a gun.

After making the gun comment, the defendant walked away from Lavin and Lathlean and toward a nearby, fenced off animal pen. Lathlean began following the defendant around his property as the defendant continued to search for worms to collect. The defendant continued to repeatedly ask Lavin and Lathlean to leave his property. Around this time, Doyle arrived to investigate possible water contamination as a result of the tampering, and the defendant told her to leave the property too.

After Lathlean called the police, the defendant also called the police himself to report the incident. When the police officers arrived, the defendant admitted he had told Lavin and Lathlean he would shoot them with a gun. The officers repeatedly asked the defendant to step back so that they could privately interview the water company employees. When the defendant repeatedly refused to leave the immediate area, he was arrested. He was later charged with disorderly conduct in violation of § 53a-182 (a) (1) and fourth degree criminal mischief in violation of General Statutes § 53a-117a (a) (1) for tampering with the fire hydrant. The jury found the defendant not guilty of criminal mischief but found him guilty of disorderly conduct.

The defendant appealed to the Appellate Court, which reversed the judgment of conviction, remanded the case to the trial court, and directed that court to render a judgment of acquittal on the disorderly conduct charge. After reviewing the entire record, the Appellate Court concluded that the state had failed to present

sufficient evidence to establish beyond a reasonable doubt that the defendant's statements were likely to provoke an immediate violent reaction, and, thus, they were not fighting words. *State* v. *Parnoff*, supra, 160 Conn. App. 281.

We granted the state's petition for certification to appeal, limited to the following question: "Did the Appellate Court correctly determine, in its de novo review of the record, that there was insufficient evidence to support the defendant's conviction of disorderly conduct pursuant to . . . § 53a-182 (a) (1) because the state's proof of that offense's threat element did not satisfy the first amendment's 'fighting words' doctrine?" *State* v. *Parnoff*, 320 Conn. 901, 901–902, 127 A.3d 185 (2015). Reviewing the record ourselves, we agree with the Appellate Court that there was insufficient evidence to sustain the defendant's conviction.

The defendant was convicted of violating § 53a-182 (a) (1), which provides in relevant part that a person is guilty of disorderly conduct when, "with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . [e]ngages in fighting or in violent, tumultuous or threatening behavior . . . ." The "behavior" giving rise to the conviction can consist of either physical actions or pure speech not accompanied by physical actions. *State* v. *Symkiewicz*, 237 Conn. 613, 618–20, 678 A.2d 473 (1996), citing *State* v. *Indrisano*, 228 Conn. 795, 811–12, 640 A.2d 986 (1994). When the behavior giving rise to the conviction is pure speech, as in the present case, the disorderly conduct statute intersects with the first amendment, which is applicable to the states through the fourteenth amendment to the federal constitution; *State* v. *Moulton*, 310 Conn. 337, 348, 78 A.3d 55 (2013); and prohibits laws "abridging the freedom of speech . . . ." U.S. Const., amend. I.

The first amendment bars the states from criminalizing pure speech, unless that speech falls into one of a few constitutionally *unprotected* categories. *State* v. *Moulton*, supra, 310 Conn. 348–49. Therefore, the disorderly conduct statute can proscribe "[o]nly certain types of narrowly defined speech [that] are not afforded the full protections of the first amendment, including fighting words . . . ." (Internal quotation marks omitted.) *State* v. *Baccala*, supra, 326 Conn. 234.

"Fighting words" are defined as speech that has "a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." (Internal quotation marks omitted.) Id. To qualify as unprotected fighting words, the speech must be "likely to provoke an *imminent* violent response from the [addressee]." (Emphasis added.) Id., 251. The imminence of a response is based on "the likelihood of actual violence, [and] not [merely] an undifferentiated fear or apprehension of disturbance . . . ." (Emphasis omitted; internal quotation marks omitted.) Id., 248. Fighting words must immediately cause the addressee to resort to violence such that the speech is "akin to dropping a match into a pool of gasoline." (Internal quotation marks omitted.) Id., 252.

The first amendment also does not protect speech that qualifies as "[t]rue threats." *State* v. *Pelella*, 327 Conn. 1, 10, 170 A.3d 647 (2017). "True threats encompass those statements [in which] the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group . . . ." (Internal quotation marks omitted.) Id. The state, however, did not pursue a true threats theory of criminal liability.[3] Accordingly, like

[3] Also, the defendant was originally charged with second degree threatening in violation of General Statutes (Rev. to 2011) § 53a-62, disorderly conduct, interfering with an officer in violation of General Statutes § 53a-167a, and first degree criminal mischief in violation of General Statutes § 53a-115. The state later filed a long form information eliminating the threatening and interfering with an officer charges and, instead, alleging fourth degree

the jury, we have no occasion to determine whether the defendant's utterance qualified as a "true threat," and, therefore, we analyze this case solely under the fighting words doctrine.

In assessing whether the defendant's conviction was proper because his statements were fighting words, we undertake a two part sufficiency of the evidence test, which includes an independent review of the record due to the fact that the defendant's first amendment rights are implicated. *State* v. *Baccala*, supra, 326 Conn. 250–51. First, "we construe the evidence in the light most favorable to sustaining the verdict. . . . 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." (Citation omitted.) Id., 250.

In certain cases involving the regulation of free speech, such as this one, we "apply a de novo standard of review [as] the inquiry into the protected status of . . . speech is one of law, not fact. . . . As such, an appellate court is compelled to examine for [itself] the . . . statements [at] issue and the circumstances under which they [were] made to [determine] whether . . . they . . . are of a character [that] the principles of the [f]irst [a]mendment . . . protect [them]." (Internal quotation marks omitted.) *State* v. *Krijger*, 313 Conn. 434, 446, 97 A.3d 946 (2014). Therefore, "an appellate court has an obligation to make an independent examination of the whole record in order to make sure that

criminal mischief, disorderly conduct, and sixth degree larceny by theft of utility service in violation of General Statutes §§ 53a-119 (15) (B) and 53a-125b (a). The larceny charge alleged that the defendant had sought to obtain water service from the water company by tampering with equipment without the consent of the supplier in order to avoid payment, but the trial court dismissed that charge on statute of limitations grounds. Thus, the state filed a substitute long form information and proceeded to trial on only the charges of disorderly conduct and fourth degree criminal mischief.

the judgment does not constitute a forbidden intrusion [in] the field of free expression." (Internal quotation marks omitted.) Id.

This independent scrutiny, however, "does not authorize us to make credibility determinations regarding disputed issues of fact. Although we review de novo the trier of fact's ultimate determination that the statements at issue constituted [fighting words], we accept all subsidiary credibility determinations and findings that are not clearly erroneous." Id., 447. In determining what credibility determinations the jury likely made, we take the version of the facts that most supports the verdict. See id., 447–48. In this case, the jury found the defendant guilty of disorderly conduct, so we may presume that the jury credited either Lavin's or Lathlean's testimony, which was consistent with the defendant's statement to police admitting that he had uttered words of a threatening nature. See *State* v. *Parnoff*, supra, 169 Conn. App. 273–74.

We recently undertook such an analysis and expounded on the scope of the fighting words doctrine in *State* v. *Baccala*, supra, 326 Conn. 238,[4] explaining that "there are no per se fighting words." Instead, we must consider "the quality of the words themselves," as well as "the manner and circumstances in which the words were spoken . . . ." (Internal quotation marks omitted.) Id., 239–40. In *Baccala*, a grocery store customer berated a store manager using extremely vulgar terms, including "fat ugly bitch," "cunt," and "fuck you . . . ." (Internal quotation marks omitted.) Id., 235, 236. We stated that, "[e]ven when words are threatening on

[4] This court in *Baccala* addressed the fighting words doctrine within the context of a conviction of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (5), which prohibits using "abusive or obscene language . . . or . . . an obscene gesture" in a public place in order to cause inconvenience, annoyance or alarm. Although *Baccala* can be distinguished in this respect, our discussion of Connecticut's contemporary fighting words standard in that case nonetheless controls.

their face, careful attention must be paid to the context . . . to determine if the words may be objectively perceived as threatening." (Internal quotation marks omitted.) Id., 246. Our decision in *Baccala* further emphasized that we must undertake a fighting words analysis with a "case-by-case," "contextual" examination; id., 245–46; that requires "consideration of the actual circumstances as perceived by a reasonable speaker and addressee to determine whether there was a likelihood of violent retaliation." Id., 240.

This analysis "necessarily includes a consideration of a host of factors." Id. One factor is "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. . . . Courts have, for example, considered the age, gender, race, and status of the speaker." (Citations omitted.) Id., 241–42. In other words, the reasonable person standard includes an analysis of the "objectively apparent characteristics" of a speaker and addressee that would bear on the likelihood of an imminently violent response to the speaker's words. Id., 243. The context also includes consideration of the "attendant circumstances," such as "the manner in which the words were uttered, [and] by whom and to whom the words were uttered . . . ." Id., 250. Particularly, this objective standard "properly distinguishes between the average citizen"; id., 243; and someone in a position who "would reasonably be expected to . . . exercise a higher degree of restratint . . . ." Id., 245; see id., 250 (concluding that objective "inquiry must focus on the perspective of an average store manager").

Applying these principles to the present case, we are not persuaded that the defendant's threatening words, unaccompanied by any effectuating action, were likely to provoke an imminent and violent reaction from the

water company employees at whom those words were directed.

We examine first the nature and "quality of the words" that the defendant used and how that bears on the likelihood of imminent violence. (Internal quotation marks omitted.) Id., 239. The defendant's statement, even though conditional, could no doubt be understood as threatening. See *State* v. *Pelella*, supra, 327 Conn. 16 n.15 (conditional nature of threat does not preclude it from being considered threat for first amendment purposes). In the context of true threats, conditioning an intentional threat to do harm on some uncertain act or omission does not necessarily cleanse it of its threatening nature. Instead, "[t]o the extent that a threat's conditionality is relevant, we look to whether the threat nonetheless constitutes a serious expression of intent to harm." Id. We believe this proposition is also instructive in the fighting words context, as we examine how a reasonable addressee would have interpreted and reacted to the defendant's utterance. See *State* v. *Baccala*, supra, 326 Conn. 245.

In this case, it is reasonable to presume that an addressee in the position of the water company employees would understand the defendant's statement to be threatening, even though it was conditioned on further action or inaction by the water company employees. The defendant indicated he was going to retrieve a gun and either "shoot" or "[fucking] kill" the employees if they remained on his property or went into his shed. A reasonable person hearing either version would likely recognize its threatening nature. Therefore, we do not doubt that, under certain circumstances, such a statement could provoke a reasonable person to retaliate with physical violence to prevent the threat from being carried out.

Nevertheless, even though threatening, we do not believe that the defendant's statement, considered in

context, was likely to provoke an immediate and violent reaction because the objectively apparent circumstances did not indicate any immediate intent or ability on the part of the defendant to carry out that threat. The evidence established that the defendant was walking around, wearing only shorts, carrying what appeared to be a can of worms, and otherwise appeared to be unarmed. These facts indicate that the defendant would need to retrieve a gun to carry out his threat, suggesting his gun was at a different location and decreasing the likelihood that an addressee would consider any danger so imminent that he would feel compelled to react with violence to dispel it. The defendant was not heading in the direction of his residence, which was located approximately 100 feet away, where, by one account of the defendant's statement, he had said his gun was located. Instead, the defendant began walking toward his animal pen while searching for worms. Given that the defendant was in the presence of his family and did not appear to have the immediate ability to carry out his threat, his utterance was unlikely to constitute a serious expression of intent to harm. Therefore, we doubt that the defendant's statements, considered in context, would be viewed as so threatening that they would incite the average person in the water company employees' positions to imminent violence.

The improbability of a violent response is further supported by examining the "personal attributes of the . . . addressee[s] that are reasonably apparent . . . ." *State* v. *Baccala*, supra, 326 Conn. 241. In this case, Lavin and Lathlean were professionals performing duties on behalf of the water company and acting within the scope of their employment. Their status as employees was readily identifiable, as they wore "bright yellow safety shirt[s]" with "Aquarion Water Company" printed on them and openly visible identification badges. As professionals, the nature of their daily work required them

to service hydrants using easements over private land without prior notice. This could precipitate encounters with confrontational property owners as part of their work. But because they were acting as professionals representing the water company, they "would reasonably be expected to . . . exercise a higher degree of restraint than the ordinary citizen" and, thus, would be unlikely to react violently when faced with angry property owners. *State* v. *Baccala*, supra, 245; see id., 250, 252–53 (concluding that objective "inquiry must focus on the perspective of an average store manager").

Lathlean's and Lavin's heightened level of professional restraint undercuts the state's contention that the average employee in either of their positions would strike the defendant first to either forestall violence or, under the state's more strained argument, to respond to the "humiliating" and "insulting" nature of the threat. In *Baccala*, we noted that the store manager's role required her to handle customer service matters and thus she was "routinely confronted by disappointed, frustrated customers who express themselves in angry terms . . . ." *State* v. *Baccala*, supra, 326 Conn. 253. We then concluded that the average manager would be "expected to defuse hostile situations . . . [and] model appropriate . . . behavior, aimed at de-escalating the situation . . . ." Id. Although the addressees in the present case were not in direct customer service roles, they too would be accustomed to interacting with confrontational property owners—the water company's customers—and, similarly, be expected to model appropriate, de-escalating behavior.

The concurrence contends that our analysis "focuses too heavily" on the "job duties of the addressees . . . effectively extending one of the holdings of *Baccala*," which the concurrence finds "distinguishable from the present case . . . ." See part II of the concurring opinion. We agree with the concurrence that this case is

different from *Baccala* in that the addressees in the present case "had little control over the premises," but we find that difference does not militate against *any* consideration of the addressees' job performance as part of the required contextual analysis. After all, the fighting words doctrine dictates that we consider the context of the speech and the "attendant circumstances" when deciding whether the utterance would cause immediate violence from the average addressees. *State* v. *Baccala*, supra, 326 Conn. 250.[5] Notably, this objective standard "properly distinguishes between the average citizen" and someone in an employment position; id., 243; who "would reasonably be expected to . . . exercise a higher degree of restraint . . . ." Id., 245. Thus, our analysis does not attempt to "equat[e]" the two employment circumstances as the concurrence claims, but, rather, it simply considers—properly—as one of the "objectively apparent characteristics" of the addressees; *State* v. *Baccala*, supra, 243; that they were water company employees, tasked with entering strangers' properties, who would "be expected to . . . exercise a higher degree of restraint," though perhaps to a lesser extent than the average grocery store manager. Id., 244.

The state argues that the average addressee would have reacted with immediate violence because of the secluded, wooded nature of the defendant's property. The state contends this would cause the average addressee to feel "vulnerable" and "exposed," and, thus,

[5] Totality of the circumstances tests can in fact be difficult to administer. In our view, however, the concurrence's observation that consideration of an addressee's employment position can lead to "troubling line drawing issues" might be an argument in favor of abolishing the fighting words doctrine, as some have advocated. See, e.g., W. Reilly, "Fighting the Fighting Words Standard: A Call for Its Destruction," 52 Rutgers L. Rev. 947, 947–49 (2000); Note, "The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for Its Interment," 106 Harv. L. Rev. 1129, 1140–46 (1993). We do not, however, believe this difficulty entitles us to ignore one among the totality of the attendant circumstances.

more likely to strike the defendant to forestall violence. It is true that, in *Baccala*, we considered it significant that the store manager had "a degree of control over the premises where the confrontation took place." *State* v. *Baccala*, supra, 326 Conn. 253. Seclusion alone, however, does not in our view elevate the circumstances in the present case so as to satisfy the imminent violence threshold. An average water company employee working in the field in Connecticut would routinely be present on private property in many settings, including in wooded areas, while interacting with irritable property owners. The mere secluded nature of the defendant's property does not convince us that the employees were likely to react with imminent violence, particularly given that there were two of them present and a third on her way.

The state also contends that the average addressee would have been provoked to violence in order to " 'beat [the defendant] to the punch,' " or, in other words, preemptively forestall the defendant from carrying out his threat. We recognize that, although the imminent violence standard is objective, of course certain individuals might, under these circumstances, physically react to forestall gun violence. Although this type of preemptive self-defense is feasible, so are a variety of other responses, such as retreat or de-escalating the confrontation. Ultimately, we conclude that the defendant's utterance falls short of provoking the *average* person in these workers' positions to react with immediate violence.[6]

A subjective analysis of the addressees' actual reactions confirms our conclusion that it was unlikely that

[6] We note that the concurrence argues "that preemptive self-defense is inconsistent with the fighting words exception in general" and, therefore, would eliminate it entirely from a fighting words analysis. We decline to take a position on whether preemptive self-defense can or should ever be considered as part of the analysis in a fighting words case, as that question is not necessary to resolving this case.

imminent violence would follow from the defendant's words. Though the fighting words standard is an objective inquiry, our decision in *Baccala* underscored that examining the subjective reaction of an addressee, although "not dispositive," may be "probative of the likelihood of a violent reaction." *State* v. *Baccala*, supra, 326 Conn. 254. Here, Lathlean gave no reaction whatsoever—let alone a violent one. He testified that, not only was he not frightened by the defendant's words, but, rather, they "bounced right off" him, stating that, "I just stood there and was like, okay then, you know, let's see what happens." Lathlean then proceeded to follow the defendant around the property, even though he was trained to retreat in the event that he encountered an angry property owner. In fact, when Lathlean called the police, he characterized the defendant as merely " 'a little crabby' " and made no mention at all of the defendant's gun threat. Although Lavin acknowledged that the defendant's words caused him "alarm" and "trepidation," he too did not outwardly react or leave the premises. Given that the addressees' subjective reactions amounted to no reaction at all, their dispassion supports our independent conclusion that average water company employees in Lathlean's and Lavin's circumstances who were confronted by the defendant's threatening words, unaccompanied by any effectuating action, and who are trained to retreat from hostile situations, would not likely be incited to react imminently and violently. Therefore, the defendant's comments do not qualify as unprotected fighting words, and there is insufficient evidence to sustain his conviction.

The state also asserts that the Appellate Court erroneously failed to consider the defendant's visible volatility and, thus, failed to recognize the similarities between this case and, among others, *State* v. *Symkiewicz*, supra, 237 Conn. 613. We recognize that the testimony in this case reflects that the defendant was in fact "irate," "throwing his arms up and down, yelling," and "very

upset." Visible manifestations of anger, however, coupled with the defendant's threatening comments, do not, under these particular circumstances, meet the high threshold of imminence required for the fighting words exception. In *Symkiewicz*, the defendant did make threatening comments that contributed to our conclusion that they were fighting words, but that case is not analogous to the present one because, in *Symkiewicz*, there was additional inflammatory speech and circumstances. *State* v. *Symkiewicz*, supra, 615–16.

In addition to making a threat, the defendant in *Symkiewicz* also loudly cursed, shouted epithets, and sparked significant commotion in a gathering crowd. Id., 615–16, 623. Specifically, the defendant loudly barked "[f]uck you" several times and said, "[y]ou fucking bitch. I hope you burn in hell for all eternity." (Internal quotation marks omitted.) Id., 615–16. The defendant also made a threat, and caused a crowd to form and a commotion among the crowd. Id. Unlike in the present case, it was the "cumulative force" of "[t]he combination" of words and, particularly, the consequent crowd commotion that elevated those comments to fighting words. Id., 623. Notably, these collective elements "could have aroused a violent reaction by not only [the addressee], but also the *crowd*"; (emphasis added) id.; and, thus, the present case is not controlled by *Symkiewicz* despite sharing the common element of threatening words.

We emphasize, as we did in *Baccala*, that we do not suggest that threatening words directed at a water company employee, or anyone else, may never constitute fighting words.[7] *State* v. *Baccala*, supra, 326 Conn.

[7] We recognize, as we have in the past, that our constitutional inquiry does not seek to determine whether the words in question were offensive, reprehensible, or calculated to cause mental harm. *State* v. *Baccala*, supra, 326 Conn. 251–52. Rather, our inquiry focuses squarely on whether the words would tend to provoke a reasonable person in the addressee's position to immediately retaliate with violence under the circumstances. Here, that high threshold is not met.

256. We also do not suggest that these particular threatening words would not otherwise be criminal as a true threat.[8] But given that this utterance was not fighting words and the state did not pursue a true threats theory of liability in the present case, we cannot conclude that the words uttered by the defendant in this context were criminal.

The dissent concludes that the defendant's utterance constitutes fighting words because he "introduced the prospect of firearms into [the] exchange," and, thus, "he escalated the confrontation beyond [servicing the hydrant] to first amendment protection." We agree that the defendant's words are of a different character than those in *Baccala*, and we understand and appreciate the dissent's efforts to signal the potentially criminal nature of gun threats. As we have discussed, a true threat has no value in the marketplace of ideas, and we do not mean to convey that the defendant's words, therefore, necessarily enjoy absolute first amendment protection.

To use the dissent's phrase, however, we are unwilling to force a "square peg [into a] round hole" by using an ill-fitting legal doctrine. See footnote 4 of the dissenting opinion. The state pursued this case as a fighting words case—not a true threats case—and the jury was not charged under the true threats doctrine.[9] See text

[8] The concurrence goes so far as to decide that the utterance was in fact a true threat. We take no position on that issue, as that was not the theory the state pursued at trial or on appeal. See text accompanying footnote 3 of this opinion.

[9] We do not read the dissent to rely on or defer to the jury's determination of whether any violent response by Lathlean and Lavin was likely or immediate. It is worth pointing out, however, that any inclination to defer to the jury in this case is potentially complicated by the trial court's instruction. "[I]t 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); see also *State* v. *Baccala*, supra, 326 Conn. 309 (*Eveleigh, J.*, concurring in part and dissenting in part) (emphasizing that "[t]he federal constitution . . . demands that a finding with respect to . . . whether the speech would provoke an ordinary person . . . to respond with immediate violence . . .

accompanying footnote 3 of this opinion. Whatever vitality remains to the fighting words doctrine; see, e.g., S. Gard, "Fighting Words as Free Speech," 58 Wash. U. L.Q. 531, 580–81 (1980); we conclude that the threat in this particular case—by a shirtless man collecting worms with his wife and daughter nearby— simply did not rise to *Baccala*'s necessarily high standard of being "*likely*" to provoke "*immediate*" violence. (Emphasis added; internal quotation marks omitted.) *State* v. *Baccala*, supra, 326 Conn. 239.

Consistent with the first amendment, therefore, we cannot conclude those statements constituted fighting words. Accordingly, we affirm the judgment of the Appellate Court and its remand order, directing the trial court to render a judgment of acquittal as to the charge of disorderly conduct.

The judgment of the Appellate Court is affirmed.

In this opinion PALMER, McDONALD and MULLINS, Js., concurred.

be made, in the first instance, by a *properly instructed* jury" [emphasis added]). In *Baccala*, the concurring and dissenting opinion deemed "manifestly unjust" the trial court's charge to the jury on fighting words because, among other reasons, it "fail[ed] to convey that the jury must find that such violence be imminent." (Emphasis omitted.) *State* v. *Baccala*, supra, 307–308 (*Eveleigh, J.*, concurring in part and dissenting in part). The justices who joined in the concurring and dissenting opinion in *Baccala*, therefore, would have reversed the defendant's conviction under the plain error doctrine, even though his claim regarding the jury instruction was unpreserved. Id., 302–305 (*Eveleigh, J.*, concurring in part and dissenting in part); see *State* v. *McClain*, 324 Conn. 802, 815, 155 A.3d 209 (2017) (plain error review of jury instruction claim not precluded by waiver pursuant to *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 [2011]). The jury charge in this case arguably suffers from the same flaw. Nor did the state's closing argument communicate to the jury an accurate understanding of either the imminent violence element or, for that matter, against whom the violence might be directed. Like the majority in *Baccala*, we do not consider any instructional issue but, instead, have undertaken our own scrupulous examination of the record, leading us to conclude that the state's evidence did not make out a fighting words case. See *State* v. *Baccala*, supra, 235 n.2.

KAHN, J., concurring in the judgment. I concur in the result reached by the majority, affirming the judgment of the Appellate Court reversing the trial court and remanding the case with direction to render a judgment of acquittal on the charge of disorderly conduct. I also agree with the majority that the statement of the defendant, Laurence V. Parnoff, does not fall within the fighting words exception to first amendment protection because a reasonable person in the position of the addressees would not have been provoked to violent retaliation under the circumstances of the present case.

I write separately, however, to highlight where my reasoning diverges from that of the majority. First, I think that focusing on the threatening nature of the speech to determine if it falls within the fighting words exception conflates two related but distinct exceptions to first amendment protection of speech: fighting words and true threats. Second, I think that the nature of the addressees' employment in the present case is distinguishable from that of the addressee in *State* v. *Baccala*, 326 Conn. 232, 163 A.3d 1, cert. denied, U.S. , 138 S. Ct. 510, 199 L. Ed. 2d 408 (2017), and I therefore would not rely on the scope of the addressees' job duties in concluding that the defendant's statement did not amount to fighting words. I would reach that conclusion based on the content of the statement, under the circumstances of the present case. Third, the correct application of the exception to first amendment protection is not based on the charge or charges leveled against the defendant but, rather, on the state's theory of the case. The state could have relied on the true threats exception because the language of the disorderly conduct statute under which the defendant was charged encompasses true threats. See General Statutes § 53a-182 (a) (1). Nevertheless, by failing to articulate a true threats theory, the state forfeited any such claim. Instead, the state's case erroneously relied on a claim

that the defendant's statement constituted fighting words. Accordingly, I respectfully concur.

I agree with the facts and procedural history as set forth in the majority opinion. The defendant stated to two water company employees either "if you go into my shed, I'm going to go into my house, get my gun and [fucking] kill you," or, that if the addressees did not leave his property, he was "going to get a gun or something like that . . . to shoot" them. Intuitively, both statements are threats. See, e.g., American Heritage College Dictionary (4th Ed. 2007) (defining "threat" as "[a]n expression of an intention to inflict pain, injury, evil, or punishment"). Indeed, the state charged the defendant under § 53a-182 (a) (1), which provides that "[a] person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . [e]ngages in fighting or in violent, tumultuous or *threatening* behavior . . . ." (Emphasis added.) Nevertheless, the state consistently argued that the defendant's statement was exempt from first amendment protection not because it was a true threat, but because it amounted to fighting words, *because* it was threatening.

This convoluted argument has obfuscated the issues in the present case throughout its pendency. For example, in his closing argument before the jury, the prosecutor claimed that "if the conduct consists purely of speech . . . the speech must contain fighting words that would have a direct tendency to inflict injury or cause acts of violence." Accordingly, the trial court instructed the jury on the fighting words exception.[1] At oral argument before this court, the state conceded that

[1] Had the state argued that the defendant's statement was not protected by the first amendment because it was a true threat, the trial court no doubt would have instructed "the jury on the definition of such a threat, as it would have been constitutionally required to do if the state had made such an argument." *State* v. *Sabato*, 321 Conn. 729, 734, 138 A.3d 895 (2016).

its theory of the case was one of fighting words, not true threats. As a result of these rhetorical and strategic choices, the state conflated the fighting words and true threats exceptions to first amendment protection, and effectively swapped a viable exception for an inapplicable one.

In light of this confusion, before setting forth my analysis of the issues presented in this appeal, I will summarize the relevant law and background. First, I note that I concur with the majority's conclusion that the standard of review is de novo.

The state's confusion is understandable, given that true threats and fighting words are closely related in two important respects. First, true threats and fighting words are both exceptions to the protection afforded speech by the first amendment. See U.S. Const., amend. I; *United States* v. *Alvarez*, 567 U.S. 709, 717, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012). Second, both the fighting words and true threats exceptions are grounded in distaste for violence and concern over the effect of words on the listener. Compare *State* v. *Baccala*, supra, 326 Conn. 234 (defining fighting words as those that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed" [internal quotation marks omitted]), and *State* v. *Krijger*, 313 Conn. 434, 449, 97 A.3d 946 (2014) ("a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders" [internal quotation marks omitted]). The exceptions are different in other crucial ways, however, and I provide further exposition on each in turn.

True threats "encompass those statements [through which] the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry

out the threat." (Internal quotation marks omitted.) *State* v. *Krijger*, supra, 313 Conn. 449. "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., 450. "[A] prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." (Internal quotation marks omitted.) Id., 449. In other words, the concern behind the true threats exception is that a threatening statement will cause a listener to fear violence.

In contrast, fighting words are "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.) *State* v. *Baccala*, supra, 326 Conn. 234. Unlike true threats, the fighting words exception is driven by the concern that an offensive statement will cause "violent retaliation" by the listener. Id., 243.

"The fighting words exception was first articulated in the seminal case of [*Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)]." *State* v. *Baccala*, supra, 326 Conn. 237. In *Chaplinsky*, the United States Supreme Court upheld the conviction of Walter Chaplinsky under a New Hampshire statute that criminalized addressing "any offensive, derisive or annoying word to any other person" in a public place. (Internal quotation marks omitted.) *Chaplinsky* v. *New*

Hampshire, supra, 569. On a public sidewalk, Chaplinsky called the complainant a " 'God damned racketeer' " and " 'a damned Fascist . . . .' " Id. The court held that the statements were unprotected fighting words: "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id., 572, 573–74.

Today, "the fighting words exception is intended only to prevent the likelihood of an actual violent response"; *State* v. *Baccala*, supra, 326 Conn. 249; and a "proper contextual analysis requires consideration of . . . whether there was a likelihood of violent retaliation." Id., 240. As a result, "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." Id., 245.

The continuing vitality of the fighting words exception is dubious and the successful invocation of that exception is so rare that it is practically extinct. See id. ("the Supreme Court has not considered the fighting words exception as applied to any addressee in more than twenty-five years"). Indeed, the United States Supreme Court has not upheld a fighting words conviction since *Chaplinsky*. See Note, "The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for Its Interment," 106 Harv. L. Rev. 1129, 1129 (1993) ("[i]n the fifty years since *Chaplinsky*, the [c]ourt has never upheld another speaker's conviction under the 'breach of the peace' prong of the fighting words doctrine").

The Supreme Court has also added additional criteria to the fighting words exception since *Chaplinsky*, "narrow[ing] its scope." Id. Most obvious, the court has seemingly abandoned the suggestion in *Chaplinsky* that there are words that " 'by their very utterance inflict

injury,' " and it has never used that "dictum" to "uphold a speaker's conviction." Id. Thus, statements are fighting words only if they are "likely to provoke violent reaction." *Cohen* v. *California*, 403 U.S. 15, 20, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971). Furthermore, to be fighting words, statements must be directed toward an "individual actually or likely to be present"; id.; and amount to "a direct personal insult or an invitation to exchange fisticuffs." *Texas* v. *Johnson*, 491 U.S. 397, 409, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

Recently, this court narrowed the fighting words exception in *Baccala*, holding 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." *State* v. *Baccala*, supra, 326 Conn. 249. In *Baccala*, the defendant had been convicted of breach of the peace in the second degree in connection with her tirade against an assistant store manager at a supermarket. Id., 233–35. Although the defendant had called the manager a " 'fat ugly bitch' " and a " 'cunt,' " this court concluded that "[s]tore mangers are routinely confronted by disappointed, frustrated customers who express themselves in angry terms, although not always as crude as those used by the defendant." Id., 236, 253. As a result, the fighting words exception did not apply, "[b]ecause the words spoken by the defendant were not likely to provoke a violent response under the circumstances in which they were uttered . . . ." Id., 234. This court reversed the trial court's judgment and remanded the case with direction to render a judgment of acquittal. Id., 257.

Despite the increasing judicial constriction of the fighting words exception, perhaps nothing has diminished the scope of its applicability as much as changing societal norms. See id., 239 (observing that "public discourse has become more coarse" and speculating about

resulting impact on fighting words exception). As certain language is acceptable in more situations, the borders of the fighting words exception contract. See *Eaton* v. *Tulsa*, 415 U.S. 697, 700, 94 S. Ct. 1228, 39 L. Ed. 2d 693 (1974) (Powell, J., concurring) ("[l]anguage likely to offend the sensibility of some listeners is now fairly commonplace in many social gatherings as well as in public performances"). For example, "[w]hile 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." *State* v. *Baccala*, supra, 326 Conn. 239. As "public discourse has become more coarse"; id.; there are fewer combinations of words and circumstances that are likely to fit within the fighting words exception. Indeed, given some of the examples of egregious language that have not amounted to fighting words following *Chaplinsky*, it is difficult to imagine examples that rise to the requisite level today. See, e.g., id., 236 (holding that " 'fat ugly bitch' " and " 'cunt,' " when directed to supermarket manager, did not amount to fighting words); *Owens* v. *State*, 848 So. 2d 279, 279–80 (Ala. Crim. App. 2002) (holding that fighting words exception did not apply where defendant, in Wal-Mart store, called addressees " 'churchgoing hypocrites,' " and said of their terminally ill family member, " '[o]ne of those hypocrites is fixing to bust hell wide open . . . [a]nd it's not gonna be too much longer I hear' "). Thus, for statements to rise to the rarified level of fighting words today, they must be "akin to dropping a match into a pool of gasoline." (Internal quotation marks omitted.) *State* v. *Baccala*, supra, 252.

Yet, against this small and tortured canvas, the fighting words exception resurfaces occasionally. See, e.g., *State* v. *Bahre*, Superior Court, judicial district of Hartford, Docket No. 102107 (April 3, 2008) ("[f]urther, viewing the speech alone, it appears to me that the language

used, considering its tone and the circumstances surrounding its use, falls within the . . . 'fighting words' [exception]"). Although the Supreme Court has not upheld a conviction under the fighting words exception since *Chaplinsky*, it continues to list fighting words among the exceptions to first amendment protection. See *United States* v. *Alvarez*, supra, 567 U.S. 717. Therefore, I assume that the fighting words exception remains valid for now, but I analyze the facts of the present case mindful that the exception is narrowly construed and poses a significant hurdle for the state to overcome.

I

With this background in mind, the first area where my reasoning diverges from that of the majority regards the applicability of the fighting words exception to statements that could prompt preemptive self-defense. The majority correctly concludes that such a theory is unpersuasive in the present case. However, I would go further, and conclude that preemptive self-defense is inconsistent with the fighting words exception in general, because it conflates the true threats and fighting words exceptions, and would expand the disfavored fighting words exception to encompass statements it is not intended to reach.

The state argues that "[t]he defendant's unconditional threat of violence would have brought the average addressee to the cusp of violent intervention to prevent the defendant from carrying out the threat, given the deadly consequences of guessing wrongly that the defendant did not mean what he said." In other words, the state contends that the fighting words exception applies to statements that provoke violence not due to anger, but, instead, out of a perceived need for preemptive self-defense.

After an exhaustive review of fighting words cases, I am aware of no controlling precedent that supports

such an argument.[2] Although fighting words jurisprudence is "concerned with the likelihood of violent retaliation"; *State* v. *Baccala*, supra, 326 Conn. 243; the underlying theory is that fighting words will provoke that violent retaliation by *angering* or *insulting* the addressee. See, e.g., *Texas* v. *Johnson*, supra, 491 U.S. 409 (rejecting application of fighting words exception to burning of American flag at protest because "[n]o reasonable onlooker would have regarded [statement as] . . . a direct personal *insult* or an *invitation to exchange fisticuffs*" [emphasis added]).

[2] The state offers only *People* v. *Prisinzano*, 170 Misc. 2d 525, 648 N.Y.S.2d 267 (1996), in support of its argument. The court in *Prisinzano* concluded that "few words could more readily be classified as 'fighting words' than threats to physically injure the person to whom the words are directed," and that such threats might prompt an addressee to beat the speaker " 'to the punch.' " Id., 532. Although I recognize that this provides persuasive support for the state's theory, I am unpersuaded by that court's reasoning. In addition, the court reached its conclusion in the context of the peculiar circumstances of that case: a heated union protest on a city street, grounded in a dispute with a history of violence possibly connected to organized crime. Id., 527–28, 531. None of these factors exists in the present case. Additionally, at least one of the statements in *Prisinzano* could also be construed as personally insulting: " '[W]hen the cops leave, the blood is going to run off of your bald fucking head.' " Id., 527.

This court has suggested that a threat could fit within the fighting words exception, but has not based that conclusion on a theory of preemptive self-defense. See *State* v. *Baccala*, supra, 326 Conn. 256 (suggesting that addition of threats might have made fighting words out of profane outbursts). For example, in *State* v. *DeLoreto*, 265 Conn. 145, 148, 168, 827 A.2d 671 (2003), this court concluded that statements made to a police officer, such as " 'Faggot, pig, I'll kick your ass,' " were true threats, rather than fighting words. The court observed, however, that "[t]hreatening statements that do not rise to the level of a true threat may nonetheless constitute fighting words . . . ." Id., 168. However, in reaching that conclusion, the court was focused on the offensive nature of the threats, rather than the possibility they could cause preemptive self-defense. Id. (recognizing that words must reach higher level of offensiveness "to provoke a police officer to violence" than they would to provoke "ordinary citizen" to retaliation). I agree that some threats could be so insulting that they amount to fighting words in certain circumstances, but I do not believe that the statement in the present case rises to that level for the reasons outlined in part II of my concurring opinion.

Indeed, it is telling that this court has concluded that the fighting words exception focuses on "whether there [is] a likelihood of violent *retaliation*." (Emphasis added.) *State* v. *Baccala*, supra, 326 Conn. 250. "Retaliation" has long denoted a motivation inconsistent with that of self-defense, and often embodies the idea of pay back or even revenge. See Webster's New World Dictionary (2d College Ed. 1972) (defining "retaliate" as "to . . . *pay back* injury for injury" [emphasis added]); see also Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) (defining "retaliate" as "to return like for like; esp[ecially]: to get revenge"). Illustrative of this distinction, in another context the Connecticut criminal jury instructions clarify that "[t]he law stresses that self-defense *cannot* be retaliatory. It must be defensive and *not* punitive." (Emphasis added.) Connecticut Criminal Jury Instructions 2.8-3, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited June 21, 2018). Thus, this court's use of the word "retaliation" in setting the boundaries of the fighting words exception indicates that the exception is justified by a concern that addressees will respond violently due to anger, and not because of a perceived need for preemptive self-defense.

This is not a matter of mere semantics; identifying the purpose behind the fighting words exception clarifies its doctrinal parameters and the types of speech that may fit within the exception. It is the *true threats* exception that encompasses threatening statements that cause a listener to fear violence; *State* v. *Krijger*, supra, 313 Conn. 449; not the fighting words exception. Thus, allowing the fighting words exception to encompass statements that might cause violent, preemptive self-defense would be inconsistent with the underlying theory of how fighting words work. Statements that are not threatening enough to be true threats or offensive enough to be fighting words would be exempt from

first amendment protection under a nebulous hybrid exception. This is a dangerous proposition given that the exceptions to first amendment protection are limited. See, e.g., *Brown* v. *Entertainment Merchants Assn.*, 564 U.S. 786, 791, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011) ("[f]rom 1791 to the present . . . the [f]irst [a]mendment has permitted restrictions upon the content of speech in a few limited areas, and has never include[d] a freedom to disregard these traditional limitations" [internal quotation marks omitted]).

The present case involves a particularly attenuated chain between the defendant's statement and the application of the fighting words exception, and illustrates the problems inherent in conflating the fighting words and true threats exceptions. The defendant's statement arose out of an exchange with Kyle Lavin and David Lathlean, employees of Aquarion Water Company, who were on the defendant's property to perform fire hydrant maintenance.[3] The defendant confronted Lavin

[3] I observe that the underlying incident occurred on the defendant's private land, and it is unclear to what extent, if any, the fighting words exception applies to statements made in private. See W. Reilly, "Fighting the Fighting Words Standard: A Call for Its Destruction," 52 Rutgers L. Rev. 947, 965 (2000) (speculating on applicability of fighting words exception in home). The fighting words exception has typically been raised in, and arises in, situations that occur in public places. See, e.g., *State* v. *Baccala*, supra, 326 Conn. 235 (summarizing underlying conduct that occurred in supermarket). This court has never had the opportunity to consider whether the fighting words exception applies to statements made in the privacy of one's home or land, and, after an extensive review, I am aware of no Connecticut cases in which the state obtained convictions for speech occurring in private places under a fighting words theory.

The closest this court has come to addressing the issue was in *State* v. *Indrisano*, 228 Conn. 795, 812, 640 A.2d 986 (1994), where this court interpreted the language of § 53a-182 (a) (1), and concluded that the statute is "consistent with the 'fighting words' limitation that must be applied when the conduct sought to be proscribed consists purely of speech." In other words, this court noted that its "holding was consistent with *Chaplinsky*, [and] . . . recognized that § 53a-182 (a) (1) could constitutionally proscribe speech that, under a given set of circumstances, could fairly be characterized as fighting words that portend imminent physical violence." *State* v. *Szymkiewicz*, 237 Conn. 613, 619, 678 A.2d 473 (1996). This conclusion could be interpreted as a suggestion that fighting words can occur in private, because

and Lathlean in an animated manner, and claimed that they had no right to be on his property. The defendant either said, "if you go into my shed, I'm going to go into my house, get my gun and [fucking] kill you," or, that if Lavin and Lathlean did not "get off" his property,

§ 53a-182 (a) (1) does not require that the charged conduct occur in public, unlike the otherwise identically worded breach of the peace statute, General Statutes § 53a-181 (a) (1). Id., 618. It is hardly determinative however, because this court did not hold that the fighting words exception can apply in private. In addition, *Indrisano* was not a fighting words case, as the court concluded that the defendant violated the disorderly conduct statute through his physical conduct. *State* v. *Indrisano*, supra, 811–13.

Few courts have addressed the issue of whether the fighting words exception may be applicable to statements that occur in private, and those courts have reached different conclusions. Compare *State* v. *Poe*, 139 Idaho 885, 904, 88 P.3d 704 (2004) ("there is nothing in [United States Supreme Court precedent] that would indicate the [c]ourt believes that the use of 'fighting words' in or around one's own home should be constitutionally protected"), with *B.E.S.* v. *State*, 629 So. 2d 761, 765 (Ala. Crim. App. 1993) (holding that, "[c]onsidering the circumstances under which these statements were made, including the fact that the statements were made during a private quarrel in the residence occupied by both the speaker and the addressee, we do not think the appellant's statements rise to the level of 'fighting words,' " and observing that similar comments in public settings had been "construed as fighting words" [emphasis omitted]), cert. denied, Alabama Supreme Court, Docket No. 1921984 (December 3, 1993).

It is not obvious that the fighting words exception would apply to comments made in private for two reasons. First, if the private speech occurred in the home, the Supreme Court has held that some otherwise unprotected speech is subject to increased protection. See *Stanley* v. *Georgia*, 394 U.S. 557, 565, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969) (holding that obscenity exception to first amendment protection is insufficient to warrant invasion of "the privacy of one's own home"). Second, the history of the fighting words exception suggests an interest in public order. For example, in *Chaplinsky*, the Supreme Court looked favorably on the statute's limited application to public places in concluding that Chaplinsky's conviction did not violate his first amendment rights. *Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 573 (holding that statute at issue did not violate first amendment because it "is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the *use in a public place of words likely to cause a breach of the peace*" [emphasis added]). Admittedly, subsequent Supreme Court cases have not required that speech be made in a public setting to fit within the fighting words exception, but they have rejected the applicability of fighting words theories for other reasons. See, e.g., *Cohen* v. *California*, supra, 403 U.S. 20 (not imposing or considering public requirement with fighting words exception, but rejecting fighting words theory where statements could not have been construed as "direct personal insult").

he would "get a gun or something like that . . . to shoot" them. The defendant was shirtless, wearing a pair of shorts, and holding a can of worms.

The defendant's comments were conditional threats: either Lavin and Lathlean would leave his property and keep away from his shed, or the defendant would retrieve a gun from elsewhere on the property, come back, and "[fucking] kill" them. An analogous statement to the one made by the defendant, would be, "if you do not do what I demand, I will get you later." Violence in the face of such comments is not the response of a reasonable addressee.

As the majority correctly noted, such threats invite a range of responses in the reasonable person. A reasonable person might have retreated, as Lathlean was trained to do. Alternatively, a reasonable person might have called the police, as Lathlean did in the present case. Given these alternatives, a reasonable person would not have responded violently to the defendant's conditional threat by attacking a shirtless man armed with only a can of worms in order to escape speculative violence. It is unsurprising and telling that neither Lavin nor Lathlean considered responding with violence. Admittedly, it is tempting to ponder whether the fighting words exception would have applied had the threat been more immediate—for example, if the defendant had brandished a gun—but such hypotheticals tend to take the defendant's actions from the category of pure speech that must fit within a first amendment exception, to the realm of conduct in which the first amendment is not implicated. See *State* v. *Indrisano*, 228 Conn. 795, 812, 813, 640 A.2d 986 (1994) (holding that " 'fighting words' limitation . . . must be applied when the conduct sought to be proscribed consists purely of speech," but not applying that limitation to defendant who was convicted for disorderly conduct on basis of physical conduct).

Having concluded that the fighting words doctrine does not encompass threats that might cause preemptive self-defense, I must consider whether the defendant's statement could otherwise rise to the level of fighting words. As I discuss in part II of this concurring opinion, they do not.

II

I agree with the majority that the defendant's statement does not amount to fighting words. The majority reaches this conclusion in part by relying on the job duties of the addressees in the present case, effectively extending one of the holdings of *Baccala*. In that respect, I think *Baccala* is distinguishable from the present case, and I therefore reach the same result through different analysis.

In holding that the statements "fat ugly bitch" and "cunt" were not fighting words when addressed to the assistant manager of a supermarket, this court relied heavily on the nature of the assistant manager's job duties. This court observed that she was "charged with handling customer service matters. . . . 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 . . . the manager in charge of a large supermarket . . . 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." *State* v. *Baccala*, supra, 326 Conn. 252–53. This court further observed that, "[s]ignificantly . . . a store manager . . . would have had a degree of control over the premises where the confrontation took place." Id., 253.

These factors are not evident in the present case, where the addressees were water company employees

tasked with hydrant maintenance. First, unlike the assistant manager in *Baccala*, they had little control over the premises, as their work took them on to the property of another.[4] Second, as the majority observes, "the addressees in the present case were not in direct customer service roles . . . ." It is intuitive that employees whose primary role is customer service would interact differently with members of the public than those who interact with the public as an auxiliary part of their job. I agree with the majority that water company employees may occasionally encounter "confrontational property owners," as the present case illustrates, but I am skeptical that it would be a matter of routine as it was for the assistant manager in *Baccala*. It is not a question of whether the job duties of the addressee should be considered as a factor in assessing the application of the fighting words doctrine. Indeed, I have considered them in the present case, but find the job duties of Lavin and Lathlean distinguishable from those of the addressee in *Baccala*. Equating the job duties in *Baccala* to those of Lavin and Lathlean focuses too heavily on that factor and invites troubling line drawing issues. We would have to accept that other professionals who enter the property of another and occasionally interact with members of the public would be expected to weather extreme verbal abuse. This category could include professionals such as delivery personnel, utility workers, and municipal employees.[5]

[4] I recognize that the water company had an easement over part of the defendant's land, which Lavin and Lathlean may or may not have exceeded, but any such property interest cannot be fairly equated to the control that a managing employee would have over property owned or leased by her employer.

[5] It is this inherent difficulty in line drawing that has led to much of the scholarly criticism of the fighting words exception. See generally note, supra, 106 Harv. L. Rev. 1129 (arguing that fighting words exception provides less protection from offensive language to minorities and women, who may be less likely to respond to offensive language with violence).

I would instead conclude that, in the present case, the defendant's statement did not constitute fighting words because of its content and context. Indeed, when viewed without the obfuscating haze of whether the statement was threatening, there is very little to support its inclusion in the fighting words exception. The defendant's threat would have to be so insulting that "a reasonable person in the position of the actual addressee would have been likely to respond with violence." *State* v. *Baccala*, supra, 326 Conn. 245.

Although there are no per se fighting words, it is impossible to evaluate the applicability of the fighting words exception without considering the content of the defendant's statement. See id., 251–53 (discussing offensiveness of statements in relation to circumstances in which they were made). The defendant's statement was not peppered with insults, epithets, slurs, or jeers; nor was it an "an invitation to exchange fisticuffs." *Texas* v. *Johnson*, supra, 491 U.S. 409. Although the defendant in the present case may have used the word "fucking," "[u]ttering . . . [an] 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." *State* v. *Baccala*, supra, 326 Conn. 252. It is highly unlikely that the addition of that expletive in the defendant's statement would have provoked a violent response in a reasonable person in the position of the addressees. See *Sandul* v. *Larion*, 119 F.3d 1250, 1255–56 (6th Cir.) (holding that "the use of the 'f-word' in and of itself is not criminal conduct," and that, in light of Supreme Court precedent, its use does not amount to fighting words because "the mere words and gesture 'f—k you' are constitutionally protected speech"), cert. dismissed, 522 U.S. 979, 118 S. Ct. 439, 139 L. Ed. 2d 377 (1997). Although I recognize that a threat can be inherently demeaning, and I can imagine hypothetical examples

of threats that are insulting in a manner that also makes them fighting words, the defendant's statement does not fall within that category.[6]

The circumstances surrounding the defendant's statement do not bring its content to the level of fighting words, as evidenced by the reactions of Lavin and Lathlean, who were not angered, let alone brought to the point of violent retaliation. See *State* v. *Baccala*, supra, 326 Conn. 254 (noting that "reaction of the addressee is . . . probative of the likelihood of violent reaction" [citation omitted]). As the majority explains, "[a] subjective analysis of the addressees' actual reactions confirms our conclusion that it was unlikely that imminent violence would follow from the defendant's words." Lathlean testified that the defendant's comment "bounced right off" him, and Lavin testified that the statement caused him "alarm." These staid reactions seriously undermine the state's fighting words theory: the defendant's statement was not "akin to dropping a match into a pool of gasoline." (Internal quotation marks omitted.) *State* v. *Baccala*, supra, 252.

Thus, I would conclude that the state has failed to establish that the content and context of the defendant's statement rose to the high level of offensiveness required for it to fall within the fighting words exception to first amendment protection. Although the defendant's statement was reprehensible, the fighting words exception is a poor fit for the present case. The state's strongest theory relies on an incorrect hybridization of fighting words and true threats, but, once separated, there is little if anything in the defendant's statement that would qualify it as fighting words under these circumstances. This is not to say that such statements

[6] Under such circumstances, it would be the offensiveness of the speech that would justify the application of the fighting words exception, rather than the possibility that its threatening nature might prompt preemptive self-defense.

must be protected by the first amendment, however. The state could have pursued a true threats theory as I explain in part III of my concurring opinion.

III

Although the defendant's statement does not rise to the level of fighting words, it was a true threat. In the present case, the defendant told Lavin and Lathlean that he would shoot them if they did not comply with his demands. With regard to the constitutional parameters of the true threats exception, a reasonable person would foresee that threatening to shoot someone if he refused to follow demands would be interpreted as a serious expression of an intent to harm. See, e.g., *New York ex rel. Spitzer* v. *Cain*, 418 F. Supp. 2d 457, 476 n.12 (S.D.N.Y. 2006) (suggesting that "[t]he statement 'If you don't give me your wallet, I will shoot you in the head' " would be a true threat, even if conditional). Furthermore, true threats may be conditional, like the threat made by the defendant. *State* v. *Pelella*, 327 Conn. 1, 16 n.15, 170 A.3d 647 (2017).

Thus, the defendant's statement fits within the true threats exception. See *State* v. *Krijger*, supra, 313 Conn. 450 ("[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" [internal quotation marks omitted]).

The remaining question is whether the state would have had to charge the defendant with threatening, instead of disorderly conduct, to pursue such a true threats theory.[7] I conclude that the state need not have

[7] The state initially charged the defendant with threatening in the second degree, but eliminated that charge in a subsequent, long form information. At oral argument before this court, the state explained that it considered a true threats theory difficult to establish in the present case.

charged the defendant differently to maintain a true threats theory because the language of § 53a-182 (a) (1), under which the defendant was charged, encompasses speech that could constitute true threats. It provides that "[a] person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . [e]ngages in fighting or in violent, tumultuous or *threatening* behavior . . . ." (Emphasis added.) General Statutes § 53a-182 (a) (1). In construing that statutory provision, this court has held that the phrase "fighting . . . violent, tumultuous or threatening behavior" includes conduct that is physical or that "*portends* imminent physical violence."[8] (Emphasis added; internal quotation marks omitted.) *State* v. *Indrisano*, supra, 228 Conn. 811. This statutory language is "identical" to that of the breach of the peace provision, General Statutes § 53a-181 (a) (1), which this court has held may encompass pure speech, providing that it fits within an exception to first amendment protection. *State* v. *Szymkiewicz*, 237 Conn. 613, 618–20, 678 A.2d 473 (1996). In so holding, this court focused specifically on whether § 53a-181 (a) (1) is consistent with the fighting words exception, but statutory provisions may simultaneously proscribe speech that falls within the true threats or fighting words exceptions. See *State* v. *DeLoreto*, 265 Conn. 145, 168–69, 827 A.2d 671 (2003) (concluding that § 53a-181 (a) (3) not only prohibits speech that constitutes true threats, but also fighting words). It is not the charge that determines which first amendment exception applies to speech, but, rather, the state's theory in responding to the defendant's specific first

[8] I observe that the language this court used in analyzing § 53a-182 (a) (1) applies to the fighting words exception; see, e.g., *State* v. *Szymkiewicz*, 237 Conn. 613, 619, 678 A.2d 473 (1996) ("fighting words . . . portend imminent physical violence"); but it illustrates this court's conclusion that the provision does not apply only to physical conduct, but also to speech that falls within an exception to first amendment protection.

amendment defense to that charge. Thus, I would conclude that § 53a-182 (a) (1) proscribes speech that falls within the true threats exception, and, if the state had pursued such a theory, the defendant would have been culpable under that statutory provision for making a true threat.

The state waived any claim that the defendant's speech constituted a true threat when it chose to argue that it constituted fighting words. As I have explained, the prosecutor, in closing arguments before the jury, conceded that "if the conduct consists purely of speech . . . the speech must contain fighting words that would have a direct tendency to inflict injury or cause acts of violence." Similarly, at oral argument before this court, the state confirmed that its theory of the case was one of fighting words. By failing to articulate how the defendant's statement fit within the true threats exception, the state waived that theory of guilt. See *State* v. *Sabato*, 321 Conn. 729, 733, 138 A.3d 895 (2016) ("[w]e conclude that the state is precluded from arguing that the defendant's text message constituted a true threat because the state never pursued such a theory of guilt at trial").

IV

I do not condone the defendant's statement in the present case—the threat of gun violence is tasteless, shameful, and all too real. Indeed, the statement would have fit within the true threats exception to first amendment protection had the state made that argument. It did not. Furthermore, its attempt to alchemize the defendant's threatening statement into fighting words through a theory of preemptive self-defense is doctrinally and factually unpersuasive. Although I recognize that there may be instances where a true threat is insulting in a manner that also makes it fighting words, that is not the present case. The state simply failed to

raise the claim that the defendant's statement constituted a true threat, rather than fighting words, and, as such, was not protected speech.

For these reasons, I respectfully concur in the judgment.

ROBINSON, J., dissenting. The defendant, Laurence V. Parnoff, said the following to Kyle Lavin, a water company employee servicing a fire hydrant located on the defendant's property: "If you go into my shed I'm going to go into my house, get my gun and [fucking] kill you."[1] Lavin's colleague, David Lathlean, testified similarly, stating that he recalled the defendant telling him and Lavin that "if [they] didn't get off his property he was going to get a gun or something like that . . . [t]o shoot [them]." I respectfully disagree with the majority's opinion, which allows the defendant to use the first amendment to the United States constitution to shield himself from what should be the obvious consequences of this unwarranted threat to two water company employees just doing their jobs. Even under the enhanced contextual focus of our recent decision in *State* v. *Baccala*, 326 Conn. 232, 163 A.3d 1, cert. denied, U.S. , 138 S. Ct. 510, 199 L. Ed. 2d 408 (2017), the defendant's statement that he intended to shoot the water company employees is categorically different from even the most profane or offensive language contemplated in cases like *Baccala* and, therefore, constituted "fighting words" unprotected by the first amendment. Because these fighting words rendered sufficient the evidence supporting the defendant's conviction of disorderly conduct in violation of General

[1] Lavin testified that, in describing the defendant's statement in court, he censored himself out of respect for the court by substituting the term "f'n." I appreciate Lavin's respect for the tribunal, but recite the actual words the defendant used to convey the full gravity of his statements.

Statutes § 53a-182 (a) (1),[2] which is based on a defendant's "fighting or . . . violent, tumultuous or threatening behavior," I would reverse the judgment of the Appellate Court, which reversed the trial court's judgment of conviction. See *State* v. *Parnoff*, 160 Conn. App. 270, 281, 125 A.3d 573 (2015). Accordingly, I respectfully dissent.

I begin by noting my agreement with the facts and procedural history set forth by the majority. I also agree with the standard of review stated by the majority pursuant to *State* v. *Baccala*, supra, 326 Conn. 250–51, and *State* v. *Krijger*, 313 Conn. 434, 446–47, 97 A.3d 946 (2014), requiring independent appellate review of whether the defendant's statements, as established by the facts found by the jury, were subject to first amendment protection. I repeat these points herein only as necessary to explain my resolution of the defendant's claims.

"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." (Internal quotation marks omitted.) *State* v. *Baccala*, supra, 326 Conn. 234.

"Only certain types of narrowly defined speech are not afforded the full protections of the first amendment,

[2] General Statutes § 53a-182 (a) provides in relevant part: "A person is guilty of disorderly conduct 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 . . . ."

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.' . . . *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 573, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)." *State* v. *Baccala*, supra, 326 Conn. 234. In determining whether the words spoken by the defendant were fighting words, this court considers whether they were "likely to provoke a violent response under the circumstances in which they were uttered . . . ."[3] Id.

In this context based analysis, this court considers "the actual circumstances as perceived by a reasonable speaker and addressee to determine whether there was a likelihood of violent retaliation." Id., 240. Specifically,

[3] By way of background, I note that 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 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.' . . .

"Unlike George Carlin's classic 1972 comedic monologue, 'Seven Words You Can Never Say on Television,' it is well settled that there are no per se fighting words. . . . 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' . . . subsequent case law eschewed the broad implications of such a per se approach. . . . Rather, 'words may or may not be "fighting words," depending upon the circumstances of their utterance.' . . .

"This context based view is a logical reflection of the way the meaning and impact of words change over time. . . . 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.' " (Citations omitted; emphasis omitted; footnote omitted.) *State* v. *Baccala*, supra, 326 Conn. 237–39.

this court considers "a host of factors" to determine whether the words spoken "were likely to incite a violent reaction." Id. First, "the manner and circumstances in which the words were spoken bears on whether they were likely to incite a violent reaction," as "[e]ven the court in [*Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 573] acknowledged that words which are otherwise profane, obscene, or threatening might not be deemed fighting words if said with a disarming smile." (Internal quotation marks omitted.) *State* v. *Baccala*, supra, 326 Conn. 240. Second, the "situation under which the words are uttered also impacts the likelihood of a violent response," including "whether the words were preceded by a hostile exchange or accompanied by aggressive behavior . . . ." Id., 241.

In *Baccala*, we also determined that 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. . . . Courts have, for example, considered the age, gender, race, and status of the speaker. . . . 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." (Citations omitted.) Id., 241–42.

"[W]hen 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." Id., 243. "[S]everal 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." Id., 245; see also id., 243–44 (discussing higher standard of restraint for police officers). *Baccala* emphasized that cases requiring inquiry into the position of the addressee "affirm[s] 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 consistent 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." Id., 245–46.

"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." Id., 250.

In *Baccala*, we applied this framework to conclude that there was insufficient evidence to sustain the conviction of a forty year-old physically impaired woman for breach of the peace in the second degree, determining that she had not uttered fighting words when she called a supermarket manager a "fat ugly bitch" and a "cunt," and said, "fuck you, you're not a manager . . . ." (Internal quotation marks omitted.) Id., 251. In concluding that these "reprehensible" and "extremely offensive" words were not "akin to dropping a match into a pool of gasoline"; (internal quotation marks omitted) id., 251–52; we emphasized that the altercation had started with a telephone call a few minutes earlier,

rendering the store manager "reasonably . . . aware of the possibility that a similar barrage of insults, however unwarranted, would be directed at her," particularly given her "position of authority at the supermarket, [which] placed her in a role in which she had to approach the defendant." Id. We also noted that the store manager "was charged with handling customer service matters" and that "[s]tore 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, [she] would be expected to model appropriate, responsive behavior, aimed at de-escalating the situation, for her subordinates . . . ." Id., 252–53. Finally, we observed that the "store manager . . . 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 [the manager] was at risk of losing control over the confrontation." Id., 253; see also id. ("a different conclusion might be warranted if the defendant directed the same words at [the manager] after [she] ended her work day and left the supermarket, depending on the circumstances presented"). Ultimately, we concluded that "the natural reaction of an average person in [the store man-

ager'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 constitute[d] a violation of the first amendment to the United States constitution." (Emphasis added.) Id., 256.

In my view, the majority's application of *Baccala* gives short shrift to the words actually used in concluding that they were not fighting words, notwithstanding its acknowledgment that a "reasonable person hearing [the defendant's statement] would likely recognize its threatening nature."[4] See *State* v. *Krijger*, supra, 313

[4] Like the concurrence, I recognize that there is somewhat of a square peg, round hole aspect to this case. It would seem that the defendant's statements would more typically be prosecuted under a "true threat" theory, insofar as true threats are similarly unprotected by the first amendment. See, e.g., *State* v. *Pelella*, 327 Conn. 1, 10, 170 A.3d 647 (2017); *State* v. *Krijger*, supra, 313 Conn. 449; see also *State* v. *Krijger*, supra, 452–53 (describing most true threat cases as encompassing statements conveying "explicit threat[s]" or expressing "the defendant's intention to personally undertake a course of action that would culminate in" injury to addressee). "True threats encompass those statements [through which] the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." (Internal quotation marks omitted.) *State* v. *Krijger*, supra, 449. "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

Conn. 452 ("[t]he starting point for our analysis is an examination of the statements at issue"). The jury reasonably could have found that the defendant had threatened both water company employees with a gun if they did not leave his property. One of those employees, Lathlean, testified that the defendant had said that "if [they] didn't get off his property he was going to get a gun or something like that . . . [t]o shoot [them]." The other employee, Lavin, testified that the defendant said that "[i]f you go into my shed I'm going to go into my house, get my gun and [fucking] kill you." See footnote 1 of this dissenting opinion. The majority further acknowledges that "it is reasonable to presume that an addressee in the position of the water company employees would understand the defendant's statement to be threatening, even though it was conditioned on further action or inaction by the water company employees," positing that, "under certain circumstances, such a statement could provoke a reasonable person to retaliate with physical violence to prevent the threat from

events and reaction of the listeners." (Internal quotation marks omitted.) Id., 450.

The fact that the prosecutor elected to proceed under a fighting words theory with respect to the defendant's statements in this case is not necessarily fatal to the state's case because the fighting words and true threat theories are not mutually exclusive; a statement could well satisfy either or both doctrines in a given case. See *State* v. *Button*, 622 N.W.2d 480, 486 (Iowa 2001) ("[b]ecause there is no legitimate purpose behind the true threats in these circumstances, the fact that the words may not fall under the category of fighting words is of no consequence"). Thus, I respectfully disagree with the concurrence's contention that the fact that a violent response by the addressee is motivated by a "perceived need for preemptive self-defense," rather than purely by anger at the remark, is sufficient to remove a statement from the ambit of fighting words as a matter of law insofar as "allowing the fighting words exception to encompass statements that might cause violent, preemptive self-defense would be inconsistent with the underlying theory of how fighting words work." In my view, the concurrence's attempt to compartmentalize fighting words and true threats into two neat doctrinal boxes overlooks the fact that a single statement—or different parts thereof—could, and in this matter, does, satisfy both doctrines.

being carried out."[5] See *State* v. *Pelella*, 327 Conn. 1, 16–17, 170 A.3d 647 (2017); see also *People* v. *Prisinzano*, 170 Misc. 2d 525, 532, 648 N.Y.S.2d 267 (N.Y. Crim. 1996) ("the fact that the defendant's threats were conditioned on the police first leaving the area does not rule out the likelihood of imminent violent response" with respect to fighting words). It is, however, at this point that the majority loses sight of the forest through *Baccala*'s trees.

First, the majority concludes that the defendant's statements were unlikely to provoke an immediate and

[5] I respectfully disagree with the concurrence's categorical rejection of what it considers the "preemptive self-defense" theory of liability under the fighting words doctrine. First, although the concurrence posits that there is "no controlling precedent that supports such an argument," it does not cite any cases standing for the proposition that a threatening statement lacking personal insult could not constitute fighting words as a matter of law. Second, I believe that the concurrence's focus on the term "violent retaliation" as conceptually inconsistent with the legal concept of self-defense, does not account for *Chaplinsky*'s definition of fighting words, addressed in *Baccala*, as those that are likely to "cause a breach of the peace by the addressee"; *Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 573; or "to provoke a violent response under the circumstances in which they were uttered . . . ." *State* v. *Baccala*, supra, 326 Conn. 234. Specifically, I understand the courts to use the phrase "violent retaliation" as synonymous with "violent response." See id., 250 ("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." [Emphasis added.]); compare id., 240 ("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"), and id., 243 ("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"), with id., 240–41 (noting that "the manner and circumstances in which the words were spoken bears on whether they were likely to incite a violent reaction" and "[t]he situation under which the words are uttered also impacts the likelihood of a violent response"), and id., 245 ("[T]here 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.").

violent reaction because the objectively apparent circumstances did not indicate any immediate intent or ability on the part of the defendant to carry out the threat. The majority relies on the fact that the defendant appeared to be unarmed, insofar as he was clad only in shorts and carried only what appeared to be a can of worms, and was not heading in the direction of his residence—where he stated that his gun was located—at the time he made the statement. I disagree with this aspect of the majority's analysis. In my view, as soon as the defendant introduced the prospect of firearms into his exchange with the water company employees, he escalated the conflict over the apparent theft of hydrant water far beyond any possible epithets that he could have directed at Lavin and Lathlean. In contrast, the majority also suggests that Lavin and Lathlean were obligated to take the extremely angry defendant at his word—that any gun was stored in the house, well beyond his immediate reach. Indeed, Lavin understood the defendant to be concerned about his shed, which was located far closer to the location of the confrontation, insofar as Lathlean had entered the shed looking for the fire hydrant's cap. Moreover, in contrast to the store manager in *Baccala*, who exercised control over the situation in her store—a fact deemed significant by the majority in that case; see *State* v. *Baccala*, supra, 326 Conn. 253; the water company employees lacked similar control insofar as the confrontation occurred on the defendant's secluded, wooded property.

I also disagree with the majority's reliance on the apparent lack of extreme reaction by Lathlean and Lavin to the threat, insofar as both—in the words of the majority—exercised a "heightened level of professional restraint" and neither reacted violently, nor even left the defendant's property in accordance with water company policy. The lack of reaction by the addressee is "probative," but not "dispositive" of whether the words

were fighting in nature. See, e.g., *State* v. *Baccala*, supra, 326 Conn. 254. Although I agree with the majority that the employees' jobs servicing fire hydrants on land owned by others without prior notice to landowners "could precipitate encounters with confrontational property owners as part of their work," and that they would " 'reasonably be expected to . . . exercise a higher degree of restraint,' " my agreement on that point ends with the water company employees being on the receiving end of vituperative language and epithets such as those in *Baccala*. Once the defendant explicitly introduced the specter of a shooting into the already tense situation—and there was no indication that he was joking or facetious—he escalated the confrontation beyond that subject to first amendment protection. Indeed, both Lathlean and Lavin testified that they notified the police because, in Lavin's words, the "situation was starting to get out of control," given the defendant's anger and his threat to get a gun.[6]

To this end, I find instructive the decision by the Georgia Court of Appeals in *Evans* v. *State*, 241 Ga. App. 32, 32–33, 525 S.E.2d 780 (1999), which rejected a sufficiency challenge to a disorderly conduct conviction on the basis of fighting words rooted in similar threats to shoot an amusement park security officer, who, like a water company employee or store manager, is expected to interact professionally with members of the public who may be behaving very badly. In *Evans*, while at Six Flags, a major amusement park, the defen-

[6] I acknowledge Lathlean's testimony that "I don't really think I reacted to [the threat]. I just was like okay then go ahead. I didn't say that but I was just—it just bounced right off me, you know." Lathlean did, however, also state that it "sounds silly" that he was not frightened by the defendant's threat to get a gun and shoot. Giving weight to the jury's finding of the historical facts, and the fact that the water company employees nevertheless deemed it appropriate to summon the police because of the gun threat, I believe that an objective person in their situation would have deemed a response appropriate to the defendant's threat.

dant, Evans, responded to the officer's "questions about . . . [stolen] cotton candy by repeatedly saying, '[Fuck] that, that does not have [shit] to do with us,' " and most significantly, that " 'he was going to go to his vehicle, get his "pop," while pointing his hand at [the officer] like a pistol [and saying] "pop, pop, pop" . . . . That's when [Evans] started walking [toward] his vehicle.' [The officer] felt threatened, and he called for backup." Id., 33. Citing *Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 568, the Georgia court held that " 'fighting words' can include specific threats to cause violence where they tend to provoke violent resentment." *Evans* v. *State*, supra, 33. As in our decision in *Baccala*, the court emphasized that the "circumstances surrounding the incident are relevant to the determination," and stated that "Evans threatened that he was going to get a gun and shoot [the officer], and [the officer] felt threatened. But more importantly, Evans made a statement which under the circumstances was plainly designed to goad or incite the only officer present who was trying to handle a difficult situation involving several people. A rational juror could find that the statement was disrespectful of, directly challenged, and abused [the security officer's] authority. [The security officer] was a corporal with Six Flags Security and had been in the position for only one and one-half months. The fact that Evans did not get [the officer] to react is not determinative." Id., 34; see *Anderson* v. *State*, 231 Ga. App. 807, 809, 499 S.E.2d 717 (1998) ("[T]he act of appellant in calling the sheriff a 'no-good son of a bitch' and admonishing that she should kick his 'ass' constituted fighting words. Further, the fact that the sheriff might be used to hearing this type of language is not a defense."), abrogated on other grounds by *Golden Peanut Co.* v. *Bass*, 249 Ga. App. 224, 547 S.E.2d 637 (2001), aff'd, 275 Ga. 145, 563 S. Ed. 2d 116, cert. denied, 537 U.S. 886, 123 S. Ct. 32, 154 L. Ed. 2d 146 (2002); *Person* v. *State*,

206 Ga. App. 324, 325, 425 S.E.2d 371 (1992) (concluding that defendant used fighting words when he used profane, abusive language throughout encounter with police officer and screamed in officer's face, " 'I'm not going to any [goddamned] jail and I'm not wearing any mother-[fucking] handcuffs' " and threatened to " 'blow [the officer's] head off' "); cf. *Matter of Welfare of M.A.H.*, 572 N.W.2d 752, 759 (Minn. App. 1997) (statement did not constitute fighting words when juvenile "did not directly insult the police, or overtly threaten them by word or gesture").

In sum, as soon as the defendant explicitly told the two water company employees who were on or near an easement on his property in connection with their official duties, that he would get his gun and shoot them if they did not leave, his statements transcended those of an irritated property owner expressing himself with coarse language to utility company workers who are expected to act professionally, even when the public they serve does not. Although we have stated that what constitutes a fighting word changes over time and that "public sensitivities have been dulled to some extent by the devolution of discourse"; *State* v. *Baccala*, supra, 326 Conn. 254–55; I am not prepared to say that our discourse has devolved to the point that a person's threat to use a gun during a heated confrontation with public utility workers is anything less than a specific threat of violence likely to precipitate an immediate preemptive strike or, in its place, a significant law enforcement response. Cf. *State* v. *Pallanck*, 146 Conn. 527, 530, 152 A.2d 633 (1959) ("Even if the highway employees were, at the time, committing a trespass on the property of the defendant, as claimed by her, her employment of a dangerous weapon would not be warranted. . . . A mere trespass does not justify a landowner in using a dangerous weapon in an effort to eject the trespasser." [Citation omitted.]); see also General

Statutes § 53a-20 (defense of premises). Put differently, for purposes of the fighting words doctrine as explained in *Baccala*, in which this court specifically emphasized that there was a lack of a threat of harm to the store manager; *State* v. *Baccala*, supra, 256; the defendant's warning in the present case that he would resort to gun violence if Lathlean and Lavin did not leave his property was qualitatively different from even the most profane slur he could have directed at them.[7] Accordingly, I conclude that sufficient evidence supported the defendant's conviction of disorderly conduct.

Because I would reverse the judgment of the Appellate Court, which reversed the defendant's conviction of disorderly conduct, I respectfully dissent.

---

[7] I recognize that "it is well settled that there are no per se fighting words." *State* v. *Baccala*, supra, 326 Conn. 238. Accordingly, I do not suggest that any and all references to firearms render the statements at issue fighting words. Cf. *State* v. *Kilburn*, 151 Wn. 2d 36, 39, 84 P.3d 1215 (2004) (juvenile's statement to classmate that he was " 'going to bring a gun to school tomorrow and shoot everyone and start with you' " was not true threat, despite fact that other students and parents were later concerned by it, when statement was made in joking manner while laughing, during conversation about military books, and there was no animosity between juvenile and listener).