ANDREW CIMMINO *v.* MARIA MARCOCCIA ET AL. (SC 20084)

Robinson, C. J., and Palmer, McDonald, Kahn and Blawie, Js.*

Syllabus

The plaintiff in error, M, filed a writ of error with this court, seeking reversal of the orders of the Appellate Court, the defendant in error, issued in connection with certain attorney misconduct by M. The first of those orders, which was issued after notice and a hearing, declared that M had exhibited a persistent pattern of irresponsibility in handling her professional obligations before the Appellate Court insofar as she failed to meet deadlines, violated the rules of appellate procedure, and filed a frivolous appeal. That order suspended M from the practice of law before the Appellate Court for a period of six months and further required, as a condition precedent to reinstatement, that M take certain remedial steps. One of M's clients in a separate action, W, subsequently filed a grievance against her, alleging certain misconduct arising from an appeal to the Appellate Court. The Chief Disciplinary Counsel thereafter sent a letter to the Chief Clerk of the Supreme and Appellate Courts indicating that M had entered into a written retainer agreement with W for the provision of certain legal services at the Appellate Court level.

* This case was originally argued before a panel of this court consisting of Chief Justice Robinson and Justices Palmer, McDonald, Mullins, Kahn, Ecker and Vertefeuille. Thereafter, Justices Mullins, Ecker and Vertefeuille recused themselves and did not participate in the consideration of the case. Judge Blawie was added to the panel and has read the briefs and appendices, and has listened to a recording of the oral argument prior to participating in this decision.

Specifically, the retainer agreement provided that M would review relevant trial documents and draft W's appellate brief, while another attorney, H, would argue W's appeal before the Appellate Court. M also had drafted a motion to file a late appeal in W's case that H submitted to the Appellate Court. In response to the letter from the Chief Disciplinary Counsel, the Appellate Court, without notice or a hearing, issued a second order clarifying that its first order had precluded M from providing legal services of any kind in connection with any Appellate Court matter until her reinstatement. In her writ of error, M claimed that the Appellate Court's second order constituted an unconstitutional ex post facto law because it retroactively prohibited conduct that was not addressed in the first order, that the Appellate Court engaged in the selective enforcement of attorney disciplinary rules when it issued its first order, and that the Appellate Court engaged in racially disparate and retaliatory treatment of minority attorneys, such as M, by issuing both orders. M also claimed that the Appellate Court's second order violated her federal constitutional right to due process because it retroactively prohibited conduct that was outside the scope of the first order and without prior notice or an opportunity to be heard. *Held* that M could not prevail on her claim that the Appellate Court's orders were unconstitutional, and, accordingly, M's writ of error was dismissed: the Appellate Court's second order did not constitute an ex post facto law because the text of the relevant constitutional provision limits the powers of the legislature and does not, of its own force, apply to the judicial branch of government; moreover, this court declined to review M's claims of selective enforcement and discriminatory and retaliatory treatment, as they were necessarily fact bound, and, therefore, this court was not the appropriate forum to address those claims in the first instance; furthermore, the Appellate Court acted within its discretion in issuing the second order and did not violate M's constitutional right to due process by retroactively prohibiting the conduct at issue because any reasonable attorney would have understood that the terms of the Appellate Court's first order, the unmistakable intention of which was to preclude M from providing any services at the Appellate Court level prior to reinstatement, prohibited M from proffering the retainer agreement signed by W and that undertaking such appellate representation was in defiance of that order, and, in the absence of the imposition of any additional sanction on M in the second order, the Appellate Court did not violate M's due process rights by issuing that order without prior notice or a hearing.

Argued December 19, 2018—officially released July 30, 2019

Procedural History

Writ of error from orders of the Appellate Court suspending the plaintiff in error from the practice of law before the Appellate Court for a period of six months

and also precluding the plaintiff in error from providing legal services of any kind in connection with any Appellate Court matter until she files a motion for reinstatement and that motion has been granted, brought to this court. *Writ of error dismissed.*

Josephine Smalls Miller, self-represented, the plaintiff in error.

Alayna M. Stone, assistant attorney general, with whom, on the brief, was *George Jepsen*, former attorney general, for the defendant in error.

Opinion

BLAWIE, J. On December 9, 2014, after conducting an en banc hearing on an order to show cause, the defendant in error, the Appellate Court, issued an order suspending the plaintiff in error, Josephine Smalls Miller, "from practice before [the Appellate Court] for a period of six months" and barring her from representing "any client before [the Appellate Court] until she files a motion for reinstatement and that motion has been granted" (2014 order). On October 4, 2017, the Chief Disciplinary Counsel sent a letter to the Chief Clerk of the Supreme and Appellate Courts indicating that Miller had been retained to represent a client in an appeal before the Appellate Court. In response, on February 15, 2018, the Appellate Court issued an additional order, stating that it "hereby clarifies that [the 2014 order] precludes . . . Miller from providing legal services of any kind in connection with any . . . Appellate Court matter until she files a motion for reinstatement and that motion has been granted" (2018 order). Miller then filed the present writ of error, claiming that the 2018 order was an unconstitutional ex post facto law in violation of the United States constitution[1] because it retro-

[1] The constitution of the United States, article one, § 10, provides in relevant part: "No state shall . . . pass any . . . ex post facto [l]aw . . . ."

actively prohibited her from engaging in certain conduct. In addition, Miller claimed that the 2014 order was the result of the Appellate Court's selective enforcement of the rules of attorney discipline, and argued that both orders were the result of the court's disparate and retaliatory treatment of minority attorneys who pursue racial discrimination claims on behalf of their clients. After oral argument before this court, we, sua sponte, ordered the parties to submit supplemental briefs on the following issue: "Whether the Appellate Court's order of February 15, 2018, clarifying its order of December 9, 2014, violated [Miller's] constitutional right to due process?" We conclude that the 2018 order did not violate the ex post facto clause and that Miller's claims of selective enforcement and discriminatory and retaliatory treatment are not reviewable by this court. We further conclude that the 2018 order did not violate Miller's constitutional due process rights because, as applied, that order did not prohibit her from engaging in conduct that was not also prohibited by the 2014 order. Accordingly, we dismiss the writ of error.

Many of the underlying facts are set forth in this court's previous decision in *Miller* v. *Appellate Court*, 320 Conn. 759, 761–68, 136 A.3d 1198 (2016). In summary, after Miller, who is an attorney licensed to practice law in this state, repeatedly failed to meet certain deadlines and to comply with the rules of appellate procedure in connection with three appeals that were pending before the Appellate Court, and also filed a frivolous appeal in a fourth case, the Appellate Court issued an order directing her to appear before an en banc panel of that court to show cause why she should not be sanctioned.[2] Id., 761. After the show cause hear-

[2] The four appeals that were the subject of the show cause order were *Addo* v. *Rattray*, Docket No. AC 36837, *Willis* v. *Community Health Services, Inc.*, Docket No. AC 36955, *Cimmino* v. *Marcoccia*, Docket No. AC 35944, and *Coble* v. *Board of Education*, Docket No. AC 36677. See *Miller* v. *Appellate Court*, supra, 320 Conn. 761. The Appellate Court ultimately dismissed all four appeals. See id., 768 (Appellate Court dismissed appeal in *Coble* as

ing, the Appellate Court issued the 2014 order, finding that Miller "has exhibited a persistent pattern of irresponsibility in handling her professional obligations before [the Appellate Court]. . . . Miller's conduct has included the filing of [a] frivolous [appeal] and the failure to file, or to file in timely and appropriate fashion, all documents and materials necessary for the perfection and prosecution of appeals before [the Appellate Court]." The Appellate Court ordered that Miller be suspended "from practice before [the Appellate Court] in all cases . . . for a period of six months," with the exception of one appeal then pending. It also barred her from representing "any client before [the Appellate Court] until she files a motion for reinstatement and that motion has been granted." The 2014 order further specified certain remedial steps for Miller to complete before she would be eligible to be considered for reinstatement. The Appellate Court also directed the Chief Disciplinary Counsel to review these matters and to take further action if appropriate.[3]

frivolous); id., 770 (Appellate Court dismissed appeals in *Addo*, *Willis*, and *Cimmino* as result of Miller's failure to comply with various procedural requirements).

[3] The 2014 order provides: "After reviewing . . . Miller's conduct in [*Coble* v. *Board of Education*, Docket No. AC 36677, *Willis* v. *Community Health Services, Inc.*, Docket No. AC 36955, *Cimmino* v. *Marcoccia*, Docket No. AC 35944, and *Addo* v. *Rattray*, Docket No. AC 36837], the Appellate Court has determined that . . . Miller has exhibited a persistent pattern of irresponsibility in handling her professional obligations before [the Appellate Court]. . . . Miller's conduct has included the filing of frivolous appeals and the failure to file, or to file in timely and appropriate fashion, all documents and materials necessary for the perfection and prosecution of appeals before [the Appellate Court].

"[Miller's] conduct before [the Appellate Court] has threatened the vital interests of her own clients while consuming an inordinate amount of [the Appellate Court's] time and her opponents' resources. . . . Miller has neither accepted personal responsibility for the aforesaid conduct nor offered [the Appellate Court] any assurance that such conduct will not be repeated, based upon either her commitment to improving her knowledge of appellate practice and procedure or her institution of changes in her law practice to monitor her cases more effectively and ensure timely compliance with [the] rules of procedure.

Miller then filed a writ of error in this court, claiming that the Appellate Court had abused its discretion in issuing the 2014 order imposing sanctions on her and referring her to the Chief Disciplinary Counsel without indicating the nature of the inquiry to be conducted. See *Miller* v. *Appellate Court*, supra, 320 Conn. 761, 779–80. This court rejected these claims. Id., 761. With respect to the claim that the referral to the Chief Disci-

"It is hereby ordered that:

"1. [Miller] is suspended from practice before [the Appellate Court] in all cases, except for the case of [*Addo* v. *Rattray*, Docket No. AC 36837], effective immediately for a period of six months from issuance of notice of this order until June 9, 2015.

"2. After June 9, 2015 . . . Miller may not represent any client before [the Appellate Court] until she files a motion for reinstatement and that motion has been granted. The motion for reinstatement shall not be filed until after June 9, 2015. Any motion for reinstatement shall include a personal affidavit in which . . . Miller:

"A. commits herself to discharging her professional responsibilities before [the Appellate Court] in a timely and professional manner;

"B. provides documentary proof of successful completion of a seminar on legal ethics and a seminar on Connecticut appellate procedure;

"C. documents any other efforts since the date of this order to improve her knowledge of appellate practice and procedure; and

"D. offers [the Appellate Court] detailed, persuasive assurances that she has implemented changes in her law practice designed to ensure full compliance with the rules of appellate procedure including a written plan indicating what procedures she has implemented in her office to ensure her compliance with the appellate rules and procedures and to protect her clients' interests.

"3. After June 9, 2015, upon the filing and granting of a motion for reinstatement . . . Miller may resume the practice of law before the Appellate Court if she is otherwise qualified to practice law in the courts of this state.

"4. The [a]ppellate . . . clerk's office is directed not to accept for filing and to return any documents filed in violation of this order.

"5. If . . . Miller violates the provisions of this order she is subject to further sanctions.

"It is further ordered that these matters are referred to the Chief Disciplinary Counsel for review and further action as it is deemed appropriate."

plinary Counsel was improper, this court concluded that, "[a]lthough the order of referral could have been clearer, we do not understand it to be a request for an investigation into the specific conduct giving rise to this writ of error but, rather, a request for a determination of whether Miller's conduct before the Appellate Court was part of a larger pattern of irresponsibility in [her] handling of her professional obligations." Id., 780. This court further concluded that the Appellate Court had acted within its discretion. Id., 780–81. Accordingly, this court dismissed the writ of error. See id., 781.

It is also worth noting that, despite the long past expiration of the six month minimum period of suspension in the 2014 order, the record reveals that Miller has never filed a motion for reinstatement. Nor has she ever provided a personal affidavit, or presented any evidence to the Appellate Court that she has successfully completed or implemented any of the remedial practice measures specified in the 2014 order, all of which remain conditions precedent to any possible reinstatement to appellate practice.

Following the Appellate Court's referral, it came to the attention of the Chief Disciplinary Counsel that one of Miller's clients, Jasmine Williams, had filed a grievance complaint against Miller in 2017, alleging unethical conduct arising from an appeal to the Appellate Court. On October 4, 2017, the Chief Disciplinary Counsel sent a letter to the Chief Clerk of the Supreme and Appellate Courts, stating that "[i]t appears that . . . Miller may be in violation of the [2014 order], which ordered her suspended from practice before the [A]ppellate [C]ourt in all cases," with the exception of one. According to that letter, Miller had entered into a written retainer agreement with Williams on or about October 1, 2016. By the express terms of that retainer agreement, Miller agreed to "*provide legal services at the* [*A*]*ppellate* [*C*]*ourt level*, specifically reviewing of the relevant trial

transcripts, documents and orders, and drafting of the appellate brief." (Emphasis added; internal quotation marks omitted.) In addition, the retainer agreement provided that another attorney, James Hardy, would argue Williams' case before the Appellate Court. At the time that the Chief Disciplinary Counsel notified the Chief Clerk of the Supreme and Appellate Courts, she did not provide a copy of her letter to Miller.

In response to the letter from the Chief Disciplinary Counsel, on February 15, 2018, without prior notice to Miller or an opportunity to be heard on the matter, the Appellate Court issued the 2018 order, which clarified its earlier order but imposed no additional sanctions on Miller. The 2018 order provides in relevant part: "The Appellate Court hereby clarifies that [the 2014 order] precludes [Miller] from providing legal services of any kind in connection with any . . . Appellate Court matter until she files a motion for reinstatement and that motion has been granted . . . ."

Miller then filed the present writ of error, seeking review of both the 2014 order and the 2018 order issued by the Appellate Court. In her brief to this court, Miller argued that (1) the 2018 order constituted an unconstitutional ex post facto law because it retroactively prohibited conduct that was not addressed by the 2014 order, (2) the Appellate Court engaged in the selective enforcement of attorney disciplinary rules when it issued the 2014 order, and (3) the Appellate Court engaged in racially disparate and retaliatory treatment of Miller when it issued both the 2014 order and the 2018 order.

After oral argument, this court, sua sponte, ordered the parties to submit supplemental briefs on the following issue: "Whether the Appellate Court's [2018 order] clarifying its [2014 order] violated [Miller's] constitutional right to due process?" In her supplement brief,

Miller contended that the 2018 order violated due process because it retroactively prohibited her from engaging in conduct that was outside the scope of the 2014 order, and because she was not provided with any notice or opportunity to be heard before the Appellate Court issued the 2018 order. Miller further contended that the 2018 order "resulted in the addition of a fourth count to the presentment that was already pending before the Superior Court in *Office of Chief Disciplinary Counsel* v. *Miller*, [Superior Court, judicial district of Danbury, Docket No. CV-17-6022075-S]. In fact, the presentment judge proceeded, after trial, to issue a one year suspension on this count."

In its supplemental brief, the Appellate Court contended that, to the contrary, the 2018 order did not violate due process because it merely reiterated what was already clearly apparent in the 2014 order, namely, that Miller was barred from representing clients in connection with appeals to the Appellate Court. In addition, the Appellate Court contended that there was no violation of due process because the 2018 order "imposed no new or additional sanctions . . . ." Specifically, the Appellate Court contended, the order "did not change the length of the suspension [from practice before the Appellate Court] or alter the requirements for the personal affidavit that must accompany the motion for reinstatement." We agree with the Appellate Court that the 2018 order did not violate Miller's right to due process because that order has not been improperly applied to any conduct that was also not clearly within the scope of the 2014 order. Having previously upheld the validity of the 2014 order in *Miller* v. *Appellate Court*, supra, 320 Conn. 781, this court sees no reason to revisit its earlier decision, except as it may bear on the resolution of the present writ of error. We also find the balance of Miller's other claims as to the 2018 order to be without merit.

We first address the claims that Miller raised in her initial brief to this court. With respect to her argument that the 2018 order was an unconstitutional ex post facto law because it retroactively expanded the scope of the 2014 order, we reject this claim. "The United States Supreme Court has observed [that], '[a]s the text of the [ex post facto] [c]lause makes clear, it is a limitation upon the powers of the [l]egislature, and does not of its own force apply to the [j]udicial [b]ranch of government.' . . . Nevertheless, 'limitations on ex post facto judicial decisionmaking are inherent in the notion of due process.' " (Citation omitted.) *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 805–806, 950 A.2d 1220 (2008), quoting *Rogers* v. *Tennessee*, 532 U.S. 451, 456, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001). Accordingly, Miller's claims as to the constitutionality of the 2018 order as retroactively expanding the scope of the 2014 order are more properly framed as possibly implicating her right to due process, rather than her right to be free from ex post facto laws.

With respect to Miller's claims that the Appellate Court engaged in the selective enforcement of the rules of attorney discipline and in racially disparate and retaliatory treatment when it issued both the 2014 order and the 2018 order, we conclude that this court is not the appropriate forum in which to raise these fact bound claims in the first instance. It is well established that appellate courts do not decide pure issues of fact or try, or retry, cases on appeal. See *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 310, 112 A.3d 1 (2015); see also Practice Book § 72-1 (a) ("[w]rits of error for errors *in matters of law only* may be brought from a final judgment . . . to the Supreme Court" [emphasis added]).[4]

[4] The Appellate Court also contends that these claims are barred by the doctrine of res judicata because Miller could have raised them in her previous writ of error challenging the 2014 order. See, e.g., *LaSalla* v. *Doctor's Associates, Inc.*, 278 Conn. 578, 590, 898 A.2d 803 (2006) ("claim preclusion prevents the pursuit of any claims . . . which were actually made or *might have*

Having rejected these claims, we next address Miller's claim in her supplemental brief that the 2018 order violated her constitutional right to due process because the 2018 order retroactively expanded the scope of the 2014 order.[5] We begin with the standard of review. "Because a license to practice law is a vested property interest, an attorney subject to discipline is entitled to due process of law." (Internal quotation marks omitted.) *Lewis* v. *Statewide Grievance Committee*, 235

been made" in prior proceeding [emphasis in original]). The claims could not have been raised in that writ of error, however, for the same reason that they cannot be raised here, namely, because they involve issues of fact that are not within the authority of this court to decide in the first instance.

We note that, in the proceeding on her previous writ of error, Miller sought permission to file a supplemental reply brief raising the claim that the Chief Disciplinary Counsel and the Statewide Grievance Committee had engaged in discriminatory and retaliatory conduct in connection with various disciplinary proceedings against her. Although Miller made a passing reference to the "grave and unjust manner in which the Appellate Court . . . sought to sully the thirty-five year spotless reputation of the plaintiff in error," she did not raise any specific allegations of discriminatory or retaliatory conduct by that court. This court thereafter summarily denied the motion.

[5] Miller also contends that the Appellate Court violated due process by failing to provide her with notice and a hearing before issuing the 2018 order. See *Szymonik* v. *Szymonik*, 167 Conn. App. 641, 656–57, 144 A.3d 457 ("[i]t is a fundamental tenet of due process that no court will proceed to the adjudication of a matter involving conflicting rights and interests, until all persons directly concerned in the event have been actually or constructively notified of the pendency of the proceeding, and given reasonable opportunity to appear and be heard . . . in sufficient time to prepare their positions on the issues involved" [internal quotation marks omitted]), cert. denied, 323 Conn. 931, 150 A.3d 232 (2016); see also *Statewide Grievance Committee* v. *Botwick*, 226 Conn. 299, 308, 627 A.2d 901 (1993) ("[b]efore discipline may be imposed, an attorney is entitled to notice of the charges, a fair hearing and an appeal to court for a determination of whether he or she has been deprived of these rights in some substantial manner" [internal quotation marks omitted]). The gist of Miller's claim, however, is that the 2018 order was unconstitutional because it *retroactively* prohibited conduct that would otherwise have been permitted. If Miller were correct, that order would be unconstitutional regardless of whether she was provided with notice and a hearing. On the other hand, if the 2018 order has not been applied to prohibit or punish conduct beyond the scope of the 2014 order, there can be no constitutional violation, regardless of whether Miller was provided with notice and a hearing. Accordingly, the lack of notice and a hearing has no bearing on Miller's claims.

Conn. 693, 705, 669 A.2d 1202 (1996); see also *Statewide Grievance Committee* v. *Botwick*, 226 Conn. 299, 306, 627 A.2d 901 (1993) ("[a] license to practice law is a property interest that cannot be suspended without due process"). "It is well settled that, [w]hether [a party] was deprived of his [or her] due process rights is a question of law, to which we grant plenary review." (Internal quotation marks omitted.) *Commissioner of Environmental Protection* v. *Farricielli*, 307 Conn. 787, 819, 59 A.3d 789 (2013). As we have already noted, limitations on ex post facto judicial decisionmaking are inherent in the notion of due process. See *Washington* v. *Commissioner of Correction*, supra, 287 Conn. 805–806.

Any due process analysis must also recognize the unique character of the historical relationship between the bench and bar. Since the earliest days of the Connecticut colony, attorneys have been subject to judicial control. See *Massameno* v. *Statewide Grievance Committee*, 234 Conn. 539, 554–55, 663 A.2d 317 (1995). It is well established that the Judicial Branch has the inherent power to investigate Miller's professional conduct as an officer of the court. See *Grievance Committee* v. *Broder*, 112 Conn. 263, 273–74, 152 A. 292 (1930); see also Practice Book §§ 2-1 through 2-82. Like a formal disbarment proceeding, a suspension from practice before a court for a period of time "is neither a civil action nor a criminal proceeding, but is a proceeding sui generis, the object of which is not the punishment of the offender, but the protection of the court." (Internal quotation marks omitted.) *Burton* v. *Mottolese*, 267 Conn. 1, 26, 835 A.2d 998 (2003), cert. denied, 541 U.S. 1073, 124 S. Ct. 2422, 158 L. Ed. 2d 983 (2004). The Appellate Court therefore has a legitimate and continuing interest in determining whether Miller has the necessary professional competence to practice law before it. See, e.g., *Baird* v. *State Bar*, 401 U.S. 1, 7, 91 S. Ct. 702, 27 L. Ed. 2d 639 (1971).

Because Miller's claim requires us to construe the scope of the Appellate Court's orders, we next review the legal principles governing their construction. "The construction of a judgment is a question of law for the court. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . *Effect must be given to that which is clearly implied as well as to that which is expressed*. . . . The judgment should admit of a consistent construction as a whole." (Citations omitted; emphasis added; internal quotation marks omitted.) *Lashgari* v. *Lashgari*, 197 Conn. 189, 196–97, 496 A.2d 491 (1985).

As we have indicated, Miller's essential claim is that the 2018 order of the Appellate Court constitutes an unconstitutional *retroactive* prohibition of the conduct that was the subject of the October 4, 2017 letter from the Chief Disciplinary Counsel to the Chief Clerk of the Supreme and Appellate Courts and count four of the presentment action, conduct for which the trial court in the presentment action sanctioned Miller.[6] We therefore limit our review to the question of whether the conduct that gave rise to that letter and count four of the presentment action was clearly prohibited by the 2014 order of the Appellate Court. If it was, there can be no due process violation.

We note preliminarily that Miller makes no claim that the allegations in the letter from the Chief Disciplinary

[6] Miller also contends that the 2018 order "severely hindered her ability to practice law, even beyond appellate practice," because, for example, it could be construed to bar her from filing a motion for articulation or an offer of proof in the trial court in order to ensure an adequate recording in the event of an appeal, from pointing out weak points in the evidence to appellate counsel, or from performing a title search for a party with a pending appeal in a foreclosure action. None of these hypothetical scenarios posited by Miller, however, accurately describes the conduct at issue in this proceeding.

Counsel were untrue. Miller also does not claim that the related factual findings of the trial court in the presentment action with respect to her dealings with Williams and the appellate legal services that she provided pursuant to their retainer agreement were not supported by the evidence.[7] Rather, because she views her conduct as not being expressly prohibited by the terms of the 2014 order, she argues that it cannot constitutionally be sanctioned under the 2018 order. Because Miller relies on the trial court's findings and rulings in the presentment action in support of her claims, we may take judicial notice of the court file in that action. See, e.g., *Davis* v. *Maislen*, 116 Conn. 375, 384, 165 A. 451 (1933) (when court file was examined at request of party and no exception was taken, parties could not complain when court took judicial notice of file).

In its written memorandum of decision, the trial court in the presentment action found the following facts. After Williams' parental rights with respect to her two minor children were terminated by the Superior Court, Williams retained Hardy to file an appeal of that decision on her behalf with the Appellate Court. Even before

[7] Miller has also filed an appeal from the judgment in the presentment action that is currently pending in the Appellate Court. *Office of Chief Disciplinary Counsel* v. *Miller*, AC 42395. As we have indicated, however, she has not claimed in the present case that she intends to challenge in that appeal the underlying factual findings of the trial court regarding her professional dealings with Williams. Rather, she claims only that the 2014 order did not prohibit those dealings. This court recognizes that our analysis and resolution of this proceeding may also be dispositive of one or more claims made by Miller in connection with her pending appeal of the presentment action. This unique procedural circumstance is, however, a necessary consequence invited by Miller herself. Having chosen to pursue a two-pronged legal challenge, i.e., having chosen to file both a writ of error challenging the 2018 order of the Appellate Court, in addition to a direct appeal of the trial court's judgment in the presentment action, it is clearly necessary for this court to revisit the 2014 order in the context of the 2018 order. In particular, it is necessary that we address the question of whether, as the trial court in the presentment action found, the 2014 order prohibited Miller from engaging in the course of conduct that gave rise to the 2018 order of the Appellate Court, the latter of which is the subject of this proceeding. We now resolve that issue against Miller.

Miller was formally retained by Williams, Miller also provided assistance to Hardy with Williams' appeal by drafting an objection, dated September 22, 2016, to a motion to dismiss that appeal. The Appellate Court ultimately granted the motion to dismiss Williams' appeal. At or about the same time, Hardy referred Williams to Miller. The trial court credited Hardy's testimony at the presentment trial when he spoke of his reliance on Miller's appellate expertise. Hardy had told Williams that, "although [he had] handled some appellate matters previously, [such matters did not] make up a majority of [his] practice, and [he] thought, because of [Miller's] supreme knowledge with respect to appellate matters and her expertise and skill set, that she would be better suited at the very least to assist . . . in filing the appeal." (Internal quotation marks omitted.)

On October 1, 2016, Williams executed a retainer agreement that Miller had presented to her. The agreement provided in relevant part that Miller would represent Williams "with respect to the following: A juvenile court termination of parental rights appeal." (Internal quotation marks omitted.) The agreement further provided that Miller would "*provide legal services at the [A]ppellate [C]ourt level*, specifically reviewing of the relevant trial transcripts, documents, and orders, and drafting of the appellate brief. . . . Hardy will be responsible for oral argument of the case." (Emphasis added; internal quotation marks omitted.) The trial court in the presentment action credited Miller's testimony that she had orally advised Williams that "there were some restrictions on her ability to represent [Williams in] the Appellate Court." However, the trial court in the presentment action also concluded that these representations were "completely inconsistent with the express terms of the retainer letter, which made no reference whatsoever as to any limitations placed upon her by the Appellate Court. Such conflicting information

made it impossible for Williams to make an informed decision regarding the respondent's representation of her."

After Williams executed the retainer agreement, Miller reviewed the trial court's decision in the termination of parental rights case and drafted a motion for reconsideration of the Appellate Court's ruling granting the motion to dismiss the appeal from that decision. Miller also advised Hardy and Williams that a motion for permission to file a late appeal should be pursued. She then drafted a motion dated December 6, 2016, and sent it to Hardy so that he could file it with the Appellate Court on his own letterhead.

Because Miller was barred by the terms of the 2014 order from filing an appearance with the Appellate Court on behalf of Williams, she received no notices regarding the status of the case but, instead, was required to rely on Hardy for such information. Thereafter, from late December, 2016, until early January, 2017, Miller left the country, and apparently her contact with Hardy during that time frame was limited. Upon her return, she learned from Hardy that the Appellate Court had since denied the motion to file a late appeal. However, by that time, it was also too late to seek permission to file a certified appeal with this court from the judgment of dismissal.

On the basis of these facts, the trial court in the presentment action, *Shaban, J.*, concluded, in a well reasoned decision, that the Chief Disciplinary Counsel had established by clear and convincing evidence that Miller had violated the terms of the 2014 order of the Appellate Court. It further found that, in doing so, she had engaged in the unauthorized practice of law, in violation of rule 5.5 of the Rules of Professional Con-

duct.[8] In reaching this conclusion, the trial court in that action expressly stated that it was *not* relying on the language of the Appellate Court's 2018 order "clarifying" the 2014 order, "*as the facts are sufficient to establish a violation of the rules based on the language of the original* [*2014*] *order alone*."[9] (Emphasis added.) As a sanction for Miller's violation of the 2014 order, the trial court suspended her from the practice of law in this state for a period of one year. This suspension was to run concurrently with suspensions imposed by the trial court under the first three counts of the presentment, which pertained to misconduct unrelated to the Appellate Court's orders.

We conclude that any reasonable attorney would have understood that the terms of the 2014 order prohibited Miller from proffering the retainer agreement signed by Williams and that undertaking such appellate representation was in defiance of that order. We also conclude that a reasonable attorney would have been aware of such impropriety in the absence of seek-

[8] Rule 5.5 (a) of the Rules of Professional Conduct provides in relevant part: "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction . . . ."

[9] The trial court in the presentment action also stated in its memorandum of decision that Miller acknowledged at trial that the 2018 order "did clarify the original order." The trial court in that action did not suggest, however, and our review of the trial transcript does not support a finding, that Miller had *conceded* at trial that the 2018 order was merely a clarification that did not alter the scope of the 2014 order. Rather, Miller argued that opposing counsel "seem[ed] to be suggesting that just because [Williams] had an appellate matter that I could not advise her on something that did not relate to the Connecticut Appellate Court. That's a real problem that I have with this clarification that came out on [February 15, 2018]." Thus, Miller was contending that the 2018 order was *not* simply a clarification of the 2014 order, but that it prohibited conduct that the earlier order did not prohibit. Indeed, the trial court in the presentment action expressly noted in its memorandum of decision that Miller contended that the 2014 order did not bar her from representing Williams in connection with her appeal because it "only prohibited her from *appearing* before the Appellate Court." (Emphasis in original.)

ing prior reinstatement to practice before the Appellate Court, particularly in light of the facts and circumstances surrounding the issuance of the 2014 order. See *Lashgari* v. *Lashgari*, supra, 197 Conn. 196 ("[t]he interpretation of a judgment may involve the circumstances surrounding the making of the judgment" [internal quotation marks omitted]). The 2014 order clearly stated that Miller's "persistent pattern of irresponsibility in handling her professional obligations" before the Appellate Court had both wasted the time and resources of the court and opposing counsel, and "threatened the vital interests of her own clients . . . ." That "persistent pattern of irresponsibility" included Miller's failure to adequately "monitor her cases . . . and ensure timely compliance with [the] rules of procedure." Moreover, in one of the appeals underlying the 2014 order, Miller was similarly out of the country when a nisi order was issued by the Appellate Court, informing her that the appeal would be dismissed if she failed to comply with certain procedural rules. That appeal was, in fact, dismissed before she returned to Connecticut. See *Miller* v. *Appellate Court*, supra, 320 Conn. 765. The Appellate Court asked Miller at the show cause hearing "what assurance she could provide the court that such lapses would not occur in the future, [and] Miller stated that, because of her limited resources as a solo practitioner, she could assure the court only that she would try to find someone to cover her practice on a pro bono basis if she were to travel again for an extended period of time." Id., 766.

By entering into a retainer agreement with Williams to "provide legal services at the [A]ppellate [C]ourt level," Miller was in violation of the terms of the 2014 order. Effect must be given to the circumstances surrounding the order, to that which is clearly implied and to that which was directly expressed by the Appellate Court. This court does not share the straitened and

overly narrow view of the 2014 order being urged by Miller. Such an interpretation is unreasonable and will not avail to defeat the Appellate Court's intention when that order is read in the context of the attorney disciplinary proceedings that culminated in its issuance. The unmistakable intention of the 2014 order was to prohibit Miller from providing any legal services at the Appellate Court level.

"[T]he power of the courts is left unfettered to act as situations, as they may arise, may seem to require, for efficient discipline of misconduct . . . ." (Internal quotation marks omitted.) *Burton* v. *Mottolese*, supra, 267 Conn. 26. By trying to do indirectly what she could not do directly, Miller failed to make it sufficiently clear to either her client or to Hardy, who relied on her purported "supreme knowledge with respect to appellate matters," that she would *not* assume responsibility for monitoring the status of Williams' appeal. In that case, Miller thereby engaged in the very same "persistent pattern of irresponsibility" that she demonstrated in the four cases that were the subject of the Appellate Court's previous show cause hearing and the 2014 order. The risks to the client's interests inherent in this lack of clarity and oversight became a reality when, as she had done in connection with an earlier appeal that provided the basis for the 2014 order, Miller again left the country. She did so without first making arrangements with Hardy to ensure that he was aware of, and would be responsible for, complying with all applicable procedural rules and deadlines in Williams' appeal. Miller's failure in this regard worked to the detriment of her client, as it resulted in the loss of any opportunity for Williams to file a certified appeal with this court from the Appellate Court's dismissal of her appeal.

To the extent that Miller contends that Hardy should have known, and that she reasonably expected, that he would be solely responsible for monitoring the status of Williams' appeal and complying with all procedural

rules and deadlines because he was the only attorney who had filed an appearance in the Appellate Court, we disagree. Contrary to Miller's suggestion, this is not a case in which she was merely providing background legal assistance to a supervising attorney who was expressly acknowledged by the client to be the sole legal representative with respect to an appeal. Williams never viewed Hardy as having sole professional responsibility for the diligent prosecution of her appeal. Moreover, by suggesting that Williams retain Miller, the inference is also clear that Hardy never viewed *himself* as solely responsible for the diligent prosecution of that appeal. Rather, it is undisputed that Williams had specifically retained Miller to act *as her attorney* in connection with her appeal and that Hardy had recommended Miller to Williams because of her purported expertise in appellate matters.

Thus, Miller failed both to properly express and to reconcile the mutual expectations of two parties—her client, Williams, as well as those of Hardy. It should have been clear to Miller that both were relying on, or reasonably could have relied on, her determination as to what papers needed to be filed in connection with the appeal, and as to any applicable deadlines, notwithstanding the fact that she had not filed an appearance in the Appellate Court on Williams' behalf. The confidence manifested by Williams in hiring counsel to handle her appeal gave her, as the client, the right to expect a corresponding degree of diligence on the part of Miller. As the trial court noted throughout the presentment process, Miller "has not acknowledged any wrongful conduct and has taken no steps to address the issues that led to her suspension by the Appellate Court, despite being given a clear roadmap by that court on how to do so." This court finds that Miller assumed professional duties and responsibilities toward a client in a case before the Appellate Court, and that her dereliction of those duties and obligations worked to the

detriment of her client's interests, wasting the time and resources of the Appellate Court and opposing counsel in the process. These are the very harms that gave rise to the 2014 order, the recurrence of which the Appellate Court sought to prevent by its issuance of that order, and by its further issuance of the 2018 order.

The judiciary maintains the inherent right to define what constitutes the practice of law. See *Massameno* v. *Statewide Grievance Committee*, supra, 234 Conn. 554–55; *State Bar Assn.* v. *Connecticut Bank & Trust Co.*, 145 Conn. 222, 232, 140 A.2d 863 (1958). In the present case, the Appellate Court acted well within its discretion to use the occasion of the referral from the Chief Disciplinary Counsel[10] to elaborate on its definition of what constituted the practice of law before it. In the absence of the imposition of any additional sanctions on Miller, the Appellate Court did not violate due process by issuing the 2018 order without any prior notice or a hearing.

The clear intent of the original 2014 order was *not* to allow Miller to continue to assume the representation of clients in appellate matters as long as her involvement remained sub rosa, and could be masked from the Appellate Court in the absence of an appearance. For Miller to contend otherwise merely highlights her ongoing and obdurate refusal to accept any personal responsibility for her conduct, and to acknowledge the adverse effects that her conduct has had on her own clients, the courts, and opposing counsel. Moreover, Miller has provided no proof that she has undertaken

[10] To the extent that Miller contends that she was entitled to contemporaneous notice of the letter from the Chief Disciplinary Counsel to the Appellate Court, we also reject that claim. In carrying out her important professional oversight responsibilities in this particular context, the Chief Disciplinary Counsel acts not as a third party litigant, but as an arm of the court. See *Miller* v. *Appellate Court*, supra, 320 Conn. 780 (in carrying out duty to investigate allegations of attorney misconduct, attorney disciplinary "bodies act as an arm of the court" [internal quotation marks omitted]); see also General Statutes § 51-90 et seq.

any of the necessary remedial measures specified in the 2014 order to ensure that such misconduct will not be repeated.

For the foregoing reasons, we conclude that Miller's representation of Williams in her appeal to the Appellate Court violated the 2014 order, as it fell within the scope of that original order suspending Miller from practice before that court. Accordingly, we reject Miller's claim that the 2018 order of the Appellate Court violated due process by retroactively prohibiting her from engaging in such conduct. Having also rejected Miller's other claims, we dismiss the writ of error.

The writ of error is dismissed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* KENNETH M. WEATHERSPOON
(SC 20134)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

A prosecutor makes a tailoring argument when he or she attacks the credibility of a testifying defendant by asking the jury to infer that the defendant has fabricated his testimony to conform to the testimony of previous witnesses. A tailoring argument is generic when the prosecutor asks the jury to make the inference solely on the basis of the defendant's presence at trial and his opportunity to fabricate his testimony, whereas a tailoring argument is specific when the prosecutor refers to evidence from which the jury reasonably might infer that the defendant fabricated his testimony to conform to the state's case as presented at the defendant's trial.

Convicted, following a jury trial, of sexual assault in a cohabiting relationship and assault in the third degree, the defendant appealed from the judgment of conviction, claiming that his right to confrontation under article first, § 8, of the Connecticut constitution was violated when the prosecutor made a generic tailoring argument during his closing argument to the jury, and that certain improper remarks by the prosecutor during cross-examination and closing argument violated his due process right

to a fair trial. The defendant's conviction arose out of his alleged attack of the victim, with whom he lived and was in a romantic relationship. The day after the incident, a police officer, C, questioned the defendant about the incident. At the defendant's trial, C testified that the defendant told him that he had been drinking on the day in question and that he did not remember anything that had occurred. C further testified that he asked the defendant if he had consumed enough alcohol to black out, to which the defendant replied in the negative. The victim also testified at trial as to the circumstances surrounding the incident and her belief that the defendant had been drinking heavily before it occurred. The defendant's testimony at the trial conflicted in certain respects with the testimony of C and the victim, both of whom had testified before him. Specifically, the defendant denied telling C that he did not remember what had happened on the day of the incident but, instead, maintained that he remembered what had occurred but had declined to give C a statement due to his apprehension that it would be misconstrued or manipulated by the police. Additionally, the defendant agreed with the prosecutor when the prosecutor asked the defendant, without any objection, if C was wrong when he testified that the defendant had told him that he could not remember the incident. During closing argument, the prosecutor referred to C's testimony that the defendant had no memory of the incident and remarked that the defendant would have the jury believe that C lied about what the defendant had told C regarding his memory of the incident. The prosecutor further urged the jury to assess the credibility of the defendant against that of C and the victim, and argued that the defendant's testimony "was entirely self-serving with the benefit of hearing all the testimony that came before." Defense counsel did not object to any of the prosecutor's remarks during closing argument. *Held*:

1. The defendant could not prevail on his unpreserved claim that the prosecutor's statement during closing argument that the jury should discredit the defendant's testimony because it had been made "with the benefit of hearing all the testimony that came before" constituted impermissible generic tailoring and, therefore, violated his right to confrontation under article first, § 8, of the Connecticut constitution: the prosecutor's tailoring argument, when viewed in the context of his other remarks during closing argument, was specific rather than generic, in that it was based expressly on evidence in the record that, if credited, would support a claim of tailoring, as the challenged statement was immediately preceded by the prosecutor's reference to the conflicting versions of the attack to which the defendant and the victim testified, and was immediately followed by the prosecutor's reference to the discrepancy between C's testimony that the defendant claimed to have no memory of the incident and the defendant's testimony that C was wrong and that he merely had declined to give C a statement; accordingly, because the prosecutor made a specific, rather than a generic, tailoring argument that was linked to the evidence and not to the defendant's mere presence at trial, this

court did not reach the defendant's claim that the prosecutor's generic tailoring argument violated his right to confrontation under the state constitution.

2. This court rejected the defendant's alternative claims that, in light of the prosecutor's statement that the jury should discredit the defendant's testimony because it had been made "with the benefit of hearing all the testimony that came before," his conviction should be reversed on the basis of prosecutorial impropriety, under the doctrine of plain error, or in the exercise of this court's supervisory authority: there was no merit to the defendant's claim that the prosecutor's statement rose to the level of a prosecutorial impropriety, as it was tied to evidence permitting an inference of tailoring; moreover, the challenged statement did not constitute plain error that required reversal of the judgment of conviction, as tailoring arguments are permissible under the federal constitution; furthermore, this court declined the defendant's request to exercise its supervisory authority to reverse his conviction and establish a rule prohibiting generic tailoring arguments, as the defendant failed to establish that the challenged statement constituted a generic tailoring argument or caused him to suffer any injustice.
3. The defendant could not prevail on his claim that the prosecutor deprived him of his due process right to a fair trial when he purportedly conveyed to the jury that it must find that C had lied in order to find the defendant not guilty, because, even if the prosecutor's remarks were improper, there was no reasonable likelihood that the jury would have returned a different verdict in the absence of those improprieties: the prosecutor's remarks were invited by the defendant's assertion at trial that C misrepresented what the defendant had said regarding his memory of the incident and were an attempt to characterize the defendant's claim as such, the improprieties were not frequent or severe, defense counsel did not object to the allegedly improper remarks or ask the court to take any curative measures, the court properly instructed the jury on witness credibility and police officer testimony both before and after the presentation of evidence, although the strength of the state's case was not overwhelming and the alleged improprieties related to the critical issue of witness credibility, the victim's testimony regarding her version of the events directly was corroborated by photographic, video and testimonial evidence, and the fact that the jury found the defendant not guilty of the charge of second degree strangulation demonstrated that it independently assessed the defendant's credibility notwithstanding the alleged improprieties.

Argued October 19, 2018—officially released July 30, 2019

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in a cohabiting relationship, strangulation in the second degree and assault in the third degree, brought to the Superior Court in the judi-

cial district of New London and tried to the jury before *Jongbloed, J.*; verdict and judgment of guilty of sexual assault in a cohabiting relationship and assault in the third degree, from which the defendant appealed. *Affirmed.*

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Lawrence J. Tytla, supervisory assistant state's attorney, with whom, on the brief, was *Michael L. Regan*, state's attorney, for the appellee (state).

Opinion

ECKER, J. The defendant, Kenneth M. Weatherspoon, was convicted after a jury trial of sexual assault in a cohabiting relationship in violation of General Statutes § 53a-70b and assault in the third degree in violation of General Statutes § 53a-61 (a) (1). The defendant testified at trial, and his claims on appeal relate to allegedly improper attacks on his credibility made by the prosecutor during cross-examination and closing argument. First, the defendant contends that the prosecutor made an impermissible "generic tailoring" argument by commenting in closing argument that the jury should discredit the defendant's trial testimony because, among other reasons, it came at the end of the trial, "with the benefit of hearing all the testimony that came before."[1]

[1] A "tailoring argument" is used by a prosecutor to attack the credibility of a criminal defendant by asking the jury to infer that the defendant has fabricated his testimony to conform to the testimony of previous witnesses. See *Portuondo* v. *Agard*, 529 U.S. 61, 73, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000). As we discuss later in this opinion, the case law distinguishes between two types of tailoring arguments, generic and specific. A generic tailoring argument attacks the defendant's credibility solely by reference to the fact of his presence at trial; a claim of specific tailoring, by contrast, expressly references evidence before the jury to support an inference that the defendant tailored his testimony to fit the state's case. See part II A of this opinion.

The defendant claims that this comment violated his confrontation rights under article first, § 8, of the Connecticut constitution.[2] He also asks this court to hold that the prosecutor's tailoring comment (1) constitutes prosecutorial impropriety depriving the defendant of his due process right to a fair trial, (2) requires reversal under the plain error doctrine, and/or (3) should prompt us to exercise our supervisory authority to reverse his judgment of conviction and prohibit generic tailoring arguments. Second, the defendant claims that the prosecutor engaged in impermissible conduct in violation of his due process right to a fair trial pursuant to *State* v. *Singh*, 259 Conn. 693, 793 A.2d 226 (2002), by conveying to the jury that it would need to find that the police officer had lied in order to find the defendant not guilty.

Upon careful review of the record, we affirm the judgment of conviction. We conclude that the prosecutor's tailoring comment constituted a specific, rather than a generic, tailoring argument because it was substantiated by express reference to evidence from which the jury reasonably could infer that the defendant had tailored his testimony. We therefore decline the defendant's request to decide whether generic tailoring arguments violate the state constitution. With respect to the alleged improprieties under *Singh*, for the purposes of our analysis, we assume, without deciding, that *Singh* was violated, but we nonetheless conclude that the defendant was not deprived of his due process right to a fair trial. We therefore affirm the judgment of conviction.

[2] Article first, § 8, of the constitution of Connecticut, as amended by articles seventeen and twenty-nine of the amendments, provides in relevant part: "In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel . . . [and] to be confronted by the witnesses against him . . . . No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law . . . ."

I

We begin by setting forth the pertinent facts and relevant procedural history. The complainant, A,[3] and the defendant met while working for the United States Navy. They dated for a lengthy period and eventually moved into an apartment together. At trial, A testified that, on November 5, 2015, the two began to engage in consensual oral sex in the living room of their apartment. During the encounter, however, the defendant became forceful and aggressive, and he ignored A's request that he stop. The defendant began to bite A's neck and buttocks despite her plea that he was hurting her. He then told her to go into the bedroom, where he continued to physically abuse her despite her efforts to leave the room. The defendant pushed A down on the bed, pulled her legs out from under her when she got up so that she fell, and then held her against the wall while choking her. After he let her go, she fell to the ground, and he began to choke her again. At the end of the altercation, the defendant told A to "[g]et the fuck out of my sight . . . ." A then barricaded herself in the bathroom, where she curled up in the fetal position and cried. She later showered and prepared to go to work, but, as she did so, the defendant renewed his aggressive behavior. He began to intermittently use the camera on his cell phone to film A while interrogating her about their relationship. Before A was able to leave the apartment, the defendant grabbed her by the belt and led her into the living room, where he took off her belt and pants. She told him to stop, but he nonetheless proceeded to penetrate her with his penis, both anally and vaginally.

Upon her arrival at work, A's coworker and supervisor observed marks on her neck. A disclosed to her

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

coworker that her boyfriend had forced her to perform oral sex. After the same coworker overheard A talking on the phone about the assault allegations, he reported the information to his superiors pursuant to Navy protocol. A then spoke with her superior and the Navy's Sexual Assault Response Coordinator. She slept overnight in her superior's office and returned to her apartment on the morning of November 6, 2015, after her shift had ended.

Later that morning, Officers Bridget Nordstrom, Jesse Comeau, and Darren Kenyon, all of the Groton Police Department, arrived at the apartment to investigate the alleged incident. Nordstrom spoke with A in the apartment while Comeau and Kenyon spoke with the defendant on the balcony. The content of the defendant's conversation with Comeau and Kenyon, as set forth in detail later in this opinion, is disputed. The defendant subsequently was arrested and charged with sexual assault in a cohabiting relationship in violation of § 53a-70b, strangulation in the second degree in violation of General Statutes § 53a-64bb, and assault in the third degree in violation of § 53a-61 (a) (1).

At trial, in addition to testifying in detail about the events of November 5, 2015, A explained her belief that the defendant had been drinking heavily before he assaulted her. The jury also heard testimony from A's coworkers about the marks on her neck and her partial disclosure of the incident. Photographs of A's injuries, which corroborated her testimony of the assault, were introduced into evidence, and four video recordings from the defendant's cell phone, taken by him at various times during the incident, were shown to the jury. A further testified that the sexual assault occurred between the third and fourth video, and the jury reasonably could have found that the noticeable change in her appearance between those two videos, specifically her hair being "messed up," supported her story.

At trial, Comeau testified that, on the day after the incident, the defendant told him and Kenyon that he had been drinking the previous day and did not remember what had happened. Comeau explained: "We asked him if he drank enough that he considered himself to be blacked out, and he said no, he didn't think so, but he did not recall any details." Comeau also testified that the defendant "did not recall making the video."

After the state rested, the defendant testified on his own behalf. The defendant acknowledged that he and A had engaged in oral sex on the date in question but said that it was initiated by A. Further, he characterized it as completely consensual in nature and testified that he was not forceful or rough during the oral sex and that at no point did A communicate that she wanted it to stop. The defendant denied the occurrence of any other sexual activity with A that day, or any biting, and he attributed A's injuries to her light skin color and the physical nature of her job. He also explained that A's hair became tousled after the third video because he innocently ruffled her hair, as he had done on prior occasions. The defendant's testimony also differed materially from the version of events as related to the jury by Comeau. On direct examination, the defendant testified that he never told the officers that he could not remember what had happened the prior day. He agreed that the officers asked him if he had consumed enough alcohol to black out, and that he had responded to that inquiry by saying "no." The defendant then testified as follows:

"Q. Did [Comeau] ever ask you to provide any details of the day's events, the day before?

"A. He asked me to—yeah. He said, would you like to speak to me about what happened?

"Q. What did you say?

"A. No.

"Q. Why'd you say no?

"A. Because there's a stigma with the police that if you tell them anything, no matter it be good or bad, it's definitely going to haunt you later.

"Q. Okay.

"A. And without any legal [representation] whatsoever, I wasn't gonna—I wasn't gonna go through that.

"Q. Okay.

"A. Because it's two officers outside and me. They could say I said anything.

"Q. Right. So you thought it [would be] better to keep quiet.

"A. Right."

The defendant acknowledged that he unlocked his phone for the officers so that they could see the videos.

The prosecutor's cross-examination of the defendant involved the following relevant exchange:

"Q. . . . [T]his is [the] first time you've shared your account of what happened on November 5, 2016, publicly, is it not?

"A. With—within this type of environment, yes. I had a lawyer previously before I had [my current trial counsel].

"Q. You never shared any of this information with the police when they were investigating the matter, did you?

"A. No.

"Q. In fact, when the officers took you outside and spoke to you, you told them that you didn't remember anything about what happened the day before; isn't that what you told them?

"A. No.

"Q. That's not what you told them?

"A. No.

"Q. You've seen the police report in the course of your preparation for the case, and now you're telling us that you didn't tell them that you didn't remember?

"A. They're saying that I told them I didn't remember.

"Q. Oh, and you're saying that they're wrong.

"A. Yes.

"Q. And you just chose not to give any details or any account of what happened on November 5, because of this apprehension you have about the police and how they might twist or misconstrue what happened; is that right?

"A. That's exactly what happened, isn't it?

"Q. Now you get to wait and come here and tell us for the first time your account of what happened.

"A. Yes."

The defendant also repeated on cross-examination that he told the police he had been drinking and that the officers had asked him "if [he] had had enough alcohol to have blacked out . . . ." The following exchange occurred at the end of the cross-examination:

"Q. And your testimony is you never told the police that you had no memory of what happened?

"A. Correct.

"Q. You had a memory, you just chose not to share it with them.

"A. Correct.

"Q. Did you lie to them?

"A. No.

"Q. You told them you didn't remember.

"A. They said I told them I didn't remember.

"Q. But that's not what you said?

"A. No. I did not tell them I did not remember.

"Q. Did they ask you to give a statement?

"A. Yes.

"Q. And what was your response to that?

"A. No.

"Q. Did you give them any reason why you didn't want to give a statement?

"A. No."

In closing argument, the prosecutor referenced the testimony of Comeau regarding the defendant's alleged lack of memory of the events at issue, and pointed out that both Comeau and the defendant acknowledged that the officers had asked the defendant whether he had blacked out. The prosecutor told the jury that it made sense that the officers had inquired about blacking out in response to the defendant's statement to them that he could not remember the events of that day. The prosecutor told the jury, "The defendant would have you believe that the officer lied about that. He would have you believe that the officer came in and lied . . . ." The prosecutor continued: "You really have to evaluate all of [the defendant's] testimony and, again, ask yourselves whether it's credible. . . . Ask [yourselves] whether his claim that the officers lied was credible. I submit to you it isn't, and I think his credibility is a good way of evaluating [A's] credibility."

In his rebuttal argument, the prosecutor again attempted to discredit the defendant's testimony. The prosecutor asked the jury to assess the credibility of the defendant and A with regard to their respective versions of events and to assess the relative credibility of the defendant "vis-à-vis" Officer Comeau. The prose-

cutor argued: "Finally, you know, when it comes to the he said/she said, you know, I've talked about that before, but that is really an artificial construct. That is what the defense would like this case to be, because, then, it's a scale and it's he said this, she said that, therefore, we can't have proof beyond a reasonable doubt. There are a couple things I'd like you to keep in mind. Evaluate [A's] demeanor throughout the testimony, evaluate the defendant's. Evaluate how he came across. Look at the details of his testimony, which I would submit to you was entirely self-serving with the benefit of hearing all the testimony that came before.

"You should also think about his interaction with Officer Comeau. Officer Comeau was very emphatic, he was absolutely clear that the defendant said he had no memory of the events of the day before. That's why he asked whether the defendant had a blackout or had had blackouts in the past. Why else would the subject of blackouts even come up? The defendant kind of flatly says no, no, I just didn't want to . . . share any information because, you know, you know how tricky those cops can be. That's why I'm here. You have to evaluate the credibility . . . of the defendant vis-à-vis Officer Comeau." At no point did defense counsel object to any of the prosecutor's questions or comments at issue on appeal.

The jury found the defendant guilty of sexual assault in a cohabiting relationship and assault in the third degree, and not guilty of strangulation in the second degree. He was sentenced to a total of fourteen years of incarceration, execution suspended after nine years, and ten years of probation. The defendant appealed to the Appellate Court and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

II

The defendant's first set of claims on appeal are premised on the contention that the prosecutor made an impermissible generic tailoring argument during closing argument when he suggested that the jury should discredit the defendant's version of events because he had testified "with the benefit of hearing all the testimony that came before." Part A of this section describes tailoring in the context of a criminal trial and examines the case law that has developed in response to past constitutional challenges to this type of argumentation. Part B addresses the defendant's claim that the tailoring argument made by the prosecutor in the present case violated his right to confrontation under article first, § 8, of the Connecticut constitution. Part C discusses the defendant's other appellate claims relating to the tailoring argument.

A

A prosecutor makes a tailoring argument when he or she attacks the credibility of a testifying defendant by asking the jury to infer that the defendant has fabricated his testimony to conform to the testimony of previous witnesses. See *Portuondo* v. *Agard*, 529 U.S. 61, 73, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000). The term most frequently is used to refer to a prosecutor's direct comment during closing argument on the defendant's opportunity to tailor his testimony, although a prosecutor sometimes also will use cross-examination to convey a discrediting tailoring message to the jury.[4] There are two types of tailoring arguments: generic and specific.

[4] For example, in a tailoring case decided by the Colorado Supreme Court, the prosecutor, in addition to making a tailoring argument in her closing rebuttal argument, asked the defendant during cross-examination, "[y]ou've had the advantage of sitting in court today and listening to all the testimony, as well as yesterday; is that correct?" *Martinez* v. *People*, 244 P.3d 135, 137 (Colo. 2010). In the present case, the defendant's claim on appeal relates solely to the prosecutor's tailoring comment in closing argument.

The former occurs when the prosecutor argues the inference solely on the basis of the defendant's "presence at trial and his accompanying opportunity to fabricate or tailor his testimony." *State* v. *Alexander*, 254 Conn. 290, 300, 755 A.2d 868 (2000); see also *State* v. *Daniels*, 182 N.J. 80, 98, 861 A.2d 808 (2004) ("[g]eneric accusations occur when the prosecutor, despite no specific evidentiary basis that [the] defendant has tailored his testimony, nonetheless attacks the defendant's credibility by drawing the jury's attention to the defendant's presence during trial and his concomitant opportunity to tailor his testimony"). A specific tailoring argument, by contrast, occurs when a prosecutor makes express reference to the evidence, from which the jury might reasonably infer that the substance of the defendant's testimony was fabricated to conform to the state's case as presented at trial. See *State* v. *Daniels*, supra, 98 ("[a]llegations of tailoring are specific when there is evidence in the record, which the prosecutor can identify, that supports an inference of tailoring").

The constitutionality of tailoring arguments has been the subject of significant judicial attention over the past twenty-five years. The primary concern under the federal constitution has been whether tailoring arguments unduly burden the defendant's sixth amendment[5] right to confrontation at trial—a fundamental component of the constitutional guarantee that is understood to include "the accused's right to be present in the courtroom at every stage of his trial." *Illinois* v. *Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

[5] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." This right applies to the states through the due process clause of the fourteenth amendment to the federal constitution. See, e.g., *Pointer* v. *Texas*, 380 U.S. 400, 406, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); *State* v. *Munoz*, 233 Conn. 106, 151 n.9, 659 A.2d 683 (1995).

Our court first addressed the constitutionality of tailoring arguments in *State* v. *Cassidy*, 236 Conn. 112, 155, 672 A.2d 899, cert. denied, 519 U.S. 910, 117 S. Ct. 273, 136 L. Ed. 2d 196 (1996). We held in *Cassidy* that generic tailoring arguments violate the sixth amendment's confrontation clause; id., 120; but specific tailoring arguments are constitutionally permissible because they are "linked solely to the evidence and not, either directly or indirectly, to the defendant's presence at trial." Id., 128 n.17.[6] This court's reasoning was straightforward: "Inviting the fact finder to draw an inference adverse to a defendant solely on account of the defendant's assertion of a constitutional right impermissibly burdens the free exercise of that right and, therefore, may not be tolerated." Id., 127. *Cassidy*, however, reassured the state that the prohibition against generic tailoring arguments did not prevent the prosecution from aggressively attacking a testifying defendant's credibility. We stated that "the prosecutor, in his closing argument, was free to challenge the defendant's version of the facts by reference to any evidence properly adduced at trial. . . . [H]owever, he was not free to assert that the defendant's presence at trial had enabled him to tailor his testimony to that of other witnesses. Such argument exceeded the bounds of fair comment because it unfairly penalized the defendant for asserting his constitutionally protected right to confront his accusers at trial." (Footnote omitted.) Id., 128–29.

Four years later, the sixth amendment underpinning of *Cassidy* was removed when the United States

[6] This court in *Cassidy* observed that the prosecutor's generic tailoring argument impermissibly burdened not only the defendant's confrontation rights, but also "the defendant's exercise of his constitutional right to testify in his own behalf, an entitlement rooted in the guarantees of the fifth, sixth and fourteenth amendments to the United States constitution. See *Rock* v. *Arkansas*, 483 U.S. 44, 51–53, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); *State* v. *Paradise*, 213 Conn. 388, 404, 567 A.2d 1221 (1990)." *State* v. *Cassidy*, supra, 236 Conn. 128 n.16. We noted that, "[b]ecause the defendant [did] not [raise] this claim," we did not base our decision on it. Id.

Supreme Court held that generic tailoring arguments do not violate any federal constitutional rights.[7] *Portuondo* v. *Agard*, supra, 529 U.S. 75–76. In *Portuondo*, the court distinguished between a prosecutor's effort to discredit a defendant by commenting on his refusal to testify at trial, which is prohibited because the jury is not allowed to infer guilt on that basis under *Griffin* v. *California*, 380 U.S. 609, 614–15, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), and a tailoring argument, which invites the jury to act on its "natural and irresistible" inclination to make the permissible inference of tailoring from a defendant's presence throughout all of the prior trial testimony. Id., 65, 67–68. The court pointed out that generic tailoring arguments pertain to the defendant's "*credibility as a witness*, and [are] therefore in accord with our [long-standing] rule that when a defendant takes the stand, his credibility may be impeached and his testimony assailed like that of any other witness." (Emphasis in original; internal quotation marks omitted.) Id., 69.

The *Portuondo* majority emphasized that its ruling was limited to federal constitutional grounds and did not address whether generic tailoring arguments were "always desirable as a matter of sound trial practice," which, the court explained, was an inquiry "best left to trial courts, and to the appellate courts which routinely review their work." *Portuondo* v. *Agard*, supra, 529 U.S. 73 n.4. This caveat also was noted in a concurrence by Justice Stevens, in which he expressed the view that generic tailoring arguments "should be discouraged rather than validated," and emphasized that the majority's holding "does not, of course, deprive [s]tates or trial

[7] In addition to holding that generic tailoring arguments do not violate any sixth amendment rights, *Portuondo* also rejected the defendant's claim that such arguments violated his fifth amendment right to testify on his own behalf. *Portuondo* v. *Agard*, supra, 529 U.S. 65–73. The defendant has not raised a claim under our state constitution's analogue to the fifth amendment.

judges of the power . . . to prevent such argument[s]" altogether. Id., 76.[8]

Because *Cassidy* was decided under the federal constitution, *Portuondo* required us to overrule its holding, which we did in *State* v. *Alexander*, supra, 254 Conn. 296. We stated in *Alexander* that generic tailoring comments "on the defendant's presence at trial and his accompanying opportunity to fabricate or tailor his testimony" were permissible under the federal constitution. Id., 300. Although the defendant in *Alexander* raised a state constitutional claim through supplemental briefing, this court was "not persuaded by his argument." Id., 296 n.9.

B

The defendant's constitutional claim rests on two foundational propositions, each of which must prove correct for his claim to succeed. First, the defendant contends that the prosecutor made a *generic* tailoring argument when he asked the jury to "[l]ook at the details of [the defendant's] testimony, which I would submit to you was entirely self-serving with the benefit of hearing all the testimony that came before." Second, the defendant claims that generic tailoring arguments, though permissible as a matter of federal constitutional law under *Portuondo*, nonetheless violate the confrontation right contained in article first, § 8, of the Connecticut constitution, which the defendant says provides broader protection than its federal counterpart. The state disputes the defendant's state constitutional analy-

[8] Justice Ginsburg dissented in *Portuondo* on the basis of her belief that generic tailoring arguments in closing arguments unduly burden a defendant's sixth amendment right to be present at trial and to confront the accusers against him, and do not aid the jury in its truth-seeking function because a "prosecutorial comment . . . tied only to the defendant's presence in the courtroom and not to his actual testimony" does not assist the jury in "sort[ing] those who tailor their testimony from those who do not, much less the guilty from the innocent." Id., 77–78.

sis and also argues as a threshold matter that there is no need to reach the constitutional question because the prosecutor made a permissible *specific* tailoring argument by tying the challenged comment to evidence that would support a claim of tailoring. We agree with the state that the prosecutor's comments constituted specific tailoring, and, therefore, we do not reach the defendant's state constitutional claim.

The defendant did not object to the prosecutor's tailoring comment at trial, and we consequently review the defendant's unpreserved constitutional claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989),[9] because the record is adequate for review and the defendant alleges a violation of a state constitutional right. See, e.g., *State* v. *Harris*, 330 Conn. 91, 114–15 n.16, 191 A.3d 119 (2018) ("[T]he record is adequate for our review of the defendant's state constitutional claim and it is of constitutional magnitude. We therefore consider it in accordance with the principles for appellate review of unpreserved constitutional claims articulated by this court in *State* v. *Golding* . . . ."); see also *State* v. *Peeler*, 271 Conn. 338, 360, 857 A.2d 808 (2004) ("[t]he first two [prongs of *Golding*] involve a determination of whether the claim is reviewable" [internal quotation marks omitted]), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005).

A close examination of the pertinent evidentiary record, as laid out in part I of this opinion, is necessary to understand the context in which the tailoring argu-

[9] Pursuant to *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*).

ment was made. One part of the relevant evidentiary record involved the conflicting testimony of the defendant and the investigating officer, Comeau, regarding the defendant's memory of the incident when interviewed the following day. In addition, there were significant conflicts between the trial testimonies of the defendant and A regarding the underlying events. Most basically, the defendant denied that any sexual activity had occurred other than consensual oral sex, and their testimonies conflicted with regard to certain details of the alleged encounter as well.

During his rebuttal closing argument, the prosecutor urged the jury critically to evaluate the defendant's credibility by reference to both A's testimony and Comeau's testimony. On appeal, the defendant focuses on only one part of a single sentence in the prosecutor's rebuttal argument, in which he stated: "Look at the details of [the defendant's] testimony, which I would submit to you was entirely self-serving *with the benefit of hearing all the testimony that came before*." (Emphasis added.) However, we must view that statement in context to determine the true nature of the prosecutor's argument. The statement was immediately preceded by a reference to the conflicting versions of events offered by A and the defendant at trial, and immediately followed by the suggestion that the defendant's version was fabricated because he actually had no memory of the events, as he had told Comeau the day following the assault. We conclude that the challenged tailoring comment was "specific" rather than "generic" because the suggestion of tailoring was tied to evidence that, if credited by the jury, could have supported such a claim.[10] The prosecu-

[10] The defendant contends that the prosecutor made "a classic generic tailoring argument," rather than a specific tailoring argument, because he explicitly referenced the defendant's presence at trial "with the benefit of hearing all the testimony that came before." We disagree. As we explained in the text of this opinion, specific tailoring occurs when a prosecutor substantiates his or her tailoring argument with express references to the evidence before the jury. See, e.g., *State* v. *Mattson*, 122 Haw. 312, 327, 226 P.3d 482 (2010) ("[b]ecause the prosecution referred to specific evidence

tor's argument contained two different but related evidence-based assertions: first, the discrepancy between the defendant's pretrial statement to Comeau and his in-court trial testimony supports the inference that his in-court testimony is false; and second, the defendant's false testimony about his memory allowed him to conform his recitation of events to that of A's trial testimony, thereby supporting a reasonable inference of tailoring. The tailoring theory could have been articulated more clearly, but it was made, and it amounted to a specific tailoring argument because it was tied to evidence that supported such an inference.

In light of this conclusion, we need not decide whether our state constitution provides broader protection against generic tailoring arguments than does the federal constitution.[11] We emphasize that this holding addresses only the defendant's state constitutional claim and should not be taken to indicate our blanket approval of all tailoring arguments as a matter of proper trial practice, an issue that we take up at greater length in part II C of this opinion.

C

We next address the defendant's claims that, even if the prosecutor's tailoring argument did not violate the

presented at trial *in addition* to referring to [the defendant's] presence at trial, it cannot be said that the prosecutor's remarks during closing argument constituted a 'generic accusation' that [the defendant] tailored his testimony based *solely* on his presence at trial" [emphasis in original]).

[11] The defendant does not raise a claim on appeal that *specific* tailoring arguments violate the state constitution. To the extent that the defendant contends in his reply brief that the Connecticut constitution prohibits the state from making *any* reference to the defendant's presence at trial as part of a tailoring argument, generic or specific, we decline to address this claim because it was raised for the first time in the defendant's reply brief. See, e.g., *State* v. *Devalda*, 306 Conn. 494, 519 n.26, 50 A.3d 882 (2012) (declining to review claim "because it is well settled that claims that are not raised in parties' main briefs, but instead are raised for the first time in reply briefs, ordinarily are considered abandoned").

confrontation clause of the state constitution, this court should reverse his conviction on the basis of prosecutorial impropriety or under the plain error doctrine, or in the exercise of our supervisory authority. We do not find any of these arguments persuasive.

"[I]n analyzing claims of prosecutorial [impropriety], we engage in a two step analytical process. The two steps are separate and distinct: (1) whether [an impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial."[12] (Internal quotation marks omitted.) *State* v. *Ciullo*, 314 Conn. 28, 34–35, 100 A.3d 779 (2014). "[P]rosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider." (Internal quotation marks omitted.) Id., 37–38. As we have explained, the prosecutor's tailoring argument in the present case was tied to evidence permitting an inference of tailoring, and we therefore reject the defendant's claim that it rose to the level of a prosecutorial impropriety.

We also disagree with the defendant's alternative claim that the tailoring argument was plain error.[13] "An

[12] We can review this unpreserved claim because, "under settled law, a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of *State* v. *Golding*, [supra, 213 Conn. 239–40], and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test." (Internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 560, 34 A.3d 370 (2012).

[13] "[T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy." *State* v. *Ruocco*, 322 Conn. 796, 803, 144 A.3d 354 (2016).

appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record. . . . [An appellant] cannot prevail . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017). Because tailoring arguments are permissible under the federal constitution; see *Portuondo* v. *Agard*, supra, 529 U.S. 65–73; *State* v. *Alexander*, supra, 254 Conn. 294–300; we hold that the prosecutor's comment did not constitute plain error that requires reversal of the defendant's judgment of conviction.

Finally, and for similar reasons, we decline the defendant's request that we invoke our supervisory authority to reverse his judgment of conviction and adopt a rule prohibiting generic tailoring arguments. "It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . 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 862 (2014). "Generally, cases in which we have invoked our supervisory authority for rule making have fallen into two categories. . . . In the first category are cases wherein we have utilized our supervisory power to articulate a procedural rule as a matter of policy, either as [a] holding or dictum, but without reversing [the underlying judgment] or portions thereof. . . . In the second category are cases wherein we have utilized our supervisory

powers to articulate a rule or otherwise take measures necessary to remedy a perceived injustice with respect to a preserved or unpreserved claim on appeal." (Citations omitted; footnote omitted; internal quotation marks omitted.) *In re Daniel N.*, 323 Conn. 640, 646–47, 150 A.3d 657 (2016).

Because we do not disapprove of specific tailoring arguments when they are warranted by the evidentiary record, we have no occasion at this time to exercise our supervisory authority to regulate generic tailoring arguments. We see no immediate need to establish a prospective rule. We also see no reason to invoke our supervisory authority to remedy an injustice relating to the prosecutor's targeted use of a specific tailoring argument in the present case; no such injustice occurred here, for the reasons previously discussed. Again, although the prosecutor's allegation of tailoring was not described with optimal clarity, his statement that the defendant's testimony "was entirely self-serving with the benefit of hearing all the testimony that came before," was supported by his explicit reference to specific evidence that could lead to a reasonable inference of tailoring. For that reason, it was not improper.

We pause briefly to qualify our holding in this regard to prevent any future misunderstanding. Our approval of specific tailoring arguments should not be taken as a blanket approval of all tailoring arguments. To the contrary, a tailoring argument does not automatically become appropriate just because a defendant chooses to testify in his or her criminal trial, and prosecutors and trial courts must take care to ensure that any such argument is tied expressly and specifically to evidence that actually supports the inference of tailoring. It is true that the United States Supreme Court held in *Portuondo* that tailoring arguments do not violate the sixth amendment, but the court made equally clear, however, that state courts may prohibit or limit tailoring arguments

by local decree as a matter of sound trial practice. See *Portuondo* v. *Agard*, supra, 529 U.S. 73 n.4; id., 76 (Stevens, J., concurring). Although the present case does not require us to decide at this time whether to adopt a formal rule prohibiting generic tailoring arguments as an exercise of our supervisory authority, such a rule may become necessary if future cases reveal that tailoring arguments are being made indiscriminately and without an appropriate evidentiary basis. Likewise, the fact that generic tailoring arguments do not burden federal constitutional rights does not mean that they pass constitutional muster under our state constitution. We express no view on these issues, but observe that a number of our sister states have determined that generic tailoring arguments are impermissible as a matter of sound trial practice or state law. See, e.g., *Martinez* v. *People*, 244 P.3d 135, 140–42 (Colo. 2010) (generic tailoring arguments are improper); *State* v. *Mattson*, 122 Haw. 312, 327–28, 226 P.3d 482 (2010) (generic tailoring arguments in closing argument are improper under state constitution); *Commonwealth* v. *Gaudette*, 441 Mass. 762, 767, 808 N.E.2d 798 (2004) (generic tailoring arguments in closing argument are impermissible); *State* v. *Swanson*, 707 N.W.2d 645, 657–58 (Minn. 2006) ("although not constitutionally required, the better rule is that the prosecution cannot use a defendant's exercise of his right of confrontation to impeach the credibility of his testimony, at least in the absence of evidence that the defendant has tailored his testimony to fit the state's case"); *State* v. *Daniels*, supra, 182 N.J. 98 (using supervisory authority to hold as impermissible generic tailoring arguments during closing argument); *State* v. *Wallin*, 166 Wn. App. 364, 376–77, 269 P.3d 1072 (2012) (generic tailoring suggestion on cross-examination impermissible).

III

The defendant's other principal claim on appeal relates to a different trial tactic allegedly used by the prosecutor to undermine the defendant's credibility.

The defendant argues that the prosecutor violated his right to a fair trial under *State* v. *Singh*, supra, 259 Conn. 693, by conveying to the jury that, in order to find the defendant not guilty, it must find that Comeau had lied.[14] The state denies that any *Singh* violation occurred and further responds that the defendant was not deprived of his right to a fair trial because the defendant himself "interjected the issue of whether the police testimony was credible" by "suggest[ing] that the police were lying or twisting what he told them . . . ." Additionally, the state claims that "the alleged improprieties, if they existed, were neither severe nor frequent, nor critical to the central issues of the case," and that "the objected-to testimony and argument did not directly relate to evidence of the crime." For purposes of our analysis, we assume, without deciding, that *Singh* was violated, but we nonetheless conclude that the defendant was not deprived of his right to a fair trial.[15]

As we noted previously, when a defendant raises a claim of prosecutorial impropriety, we first "must determine whether any impropriety in fact occurred;

[14] In support of this claim, the defendant points to a number of exchanges on cross-examination between himself and the prosecutor in which the prosecutor challenged the inconsistencies between his and Comeau's testimonies, including, inter alia, the prosecutor's asking whether Comeau's testimony was "wrong," and whether the defendant had declined to give a statement to Comeau due to his apprehension that the police "might twist or misconstrue" what he told them. The defendant also highlights the prosecutor's statement during closing argument that "[t]he defendant would have you believe that the officer lied about [what the defendant told him]. He would have you believe that the officer came in and lied . . . ." He further notes that the prosecutor argued to the jury that it had "to evaluate the credibility . . . of the defendant vis-à-vis Officer Comeau."

[15] Defense counsel did not object to the prosecutor's remarks at trial, and, therefore, we review his claim under the factors set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). See *State* v. *Ciullo*, supra, 314 Conn. 35 ("[t]he consideration of the fairness of the entire trial through the *Williams* factors duplicates, and, thus makes superfluous, a separate application of the *Golding* test" [internal quotation marks omitted]).

second, we must examine whether that impropriety, or the cumulative effect of multiple improprieties, deprived the defendant of his due process right to a fair trial. . . . To [do so], we must determine whether the sum total of [the prosecutor's] improprieties rendered the defendant's [trial] fundamentally unfair . . . . The question of whether the defendant has been prejudiced by prosecutorial [improprieties], therefore, depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties. . . . Accordingly, it is not the prosecutorial improprieties themselves but, rather, the nature and extent of the prejudice resulting therefrom that determines whether a defendant is entitled to a new trial." (Citation omitted; internal quotation marks omitted.) *State* v. *Jones*, 320 Conn. 22, 34–35, 128 A.3d 431 (2015). "[W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived [him] of his constitutional right to a fair trial, the burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process." (Internal quotation marks omitted.) Id., 37.

In order to address whether the defendant was deprived of his due process right to a fair trial, we consider the factors set forth in *State* v. *Williams*, 204 Conn. 523, 529 A.2d 653 (1987), which include, "[1] the extent to which the [impropriety] was invited by defense conduct or argument . . . [2] the severity of the [impropriety] . . . [3] the frequency of the [impropriety] . . . [4] the centrality of the [impropriety] to the critical issues in the case . . . [5] the strength of the curative measures adopted . . . and [6] the strength of the state's case." (Citations omitted.) Id., 540. "As is evident upon review of these factors, it is not the prosecutor's conduct alone that guides our inquiry, but, rather, the fairness of the trial as a whole." *State* v.

Singh, supra, 259 Conn. 701. In addition, the fact that the defendant did not object to the remarks at trial is part of our consideration of "whether a new trial or proceeding is warranted . . . ." (Internal quotation marks omitted.) *State* v. *Ciullo*, supra, 314 Conn. 36. Applying the *Williams* factors to the present case, we conclude that the defendant was not deprived of his due process right to a fair trial.

We begin by assessing whether there were any instances of defense conduct or argument that invited the alleged improprieties. This factor weighs heavily against finding a due process violation in the present case. The prosecutor would have been hard-pressed to avoid confronting, directly and forcefully, the defendant's prominent claim that the police officers misrepresented what he had said to them the day following the incident. "[T]he defendant himself, by virtue of his defense, claimed that the witnesses against him were lying." *State* v. *Stevenson*, 269 Conn. 563, 594, 849 A.2d 626 (2004). Thus, the prosecutor's "attempt[s] to characterize [the defendant's] defense in this manner was invited and, therefore, not harmful under our holding in *Singh*." Id.

In the overall context of the trial, it is fair to say that the alleged improprieties were relatively "limited in frequency." *State* v. *Ritrovato*, 280 Conn. 36, 67, 905 A.2d 1079 (2006); see id., 66–67 (holding that one question regarding victim's credibility answered by expert witness in cross-examination and brief reference to her testimony in closing argument meant that improprieties were not frequent). The comments also were not severe. "In determining whether prosecutorial impropriety is severe, we consider whether defense counsel objected to the improper remarks, requested curative instructions, or moved for a mistrial. . . . We also consider whether the impropriety was blatantly egregious or inexcusable." (Citation omitted; internal quotations marks omitted.) *State* v. *Ciullo*, supra, 314 Conn. 59.

We consider the lack of objection by the defendant to the allegedly improper comments as a strong indication that they did not carry substantial weight in the course of the trial as a whole and were not so egregious that they caused the defendant harm.

Because the defendant took no curative actions, and did not ask for any such measures from the trial court, he "bears much of the responsibility for the fact that [the improprieties went] uncured." Id., 61. We also find some comfort in the instructions that the trial court gave to the jury, both before and after the presentation of evidence, on witness credibility and police officer testimony.[16]

Finally, we take stock of the strength of the state's case as a whole. The outcome at trial was not a foregone conclusion, to be sure, and we do not doubt that the jury's assessment of witness credibility was a significant factor in determining its verdict. But the jury also was presented with substantial physical and testimonial evidence corroborating A's story, including photographs of marks and bruising in the exact places that aligned with her version of events, video footage substantiating her claims, and the testimony of her coworkers. Even if "[t]he state's case may not have been ironclad . . . we have never stated that the state's evidence must have been overwhelming in order to support a conclusion that prosecutorial [impropriety] did not deprive the defendant of a fair trial." (Internal quotation marks omitted.) *State* v. *Stevenson*, supra, 269 Conn. 596. We also derive confidence in the jury's ability to carefully

[16] The jury was instructed that it was the sole judge of witness credibility, and it alone would determine "where the truth lies." After hearing the evidence and closing arguments, the trial court instructed the jury that "[i]t is not [the prosecutor's or defense counsel's] assessment of the credibility of the witnesses that matters, only yours." Further, the court instructed the jury that the defendant's testimony should be evaluated in the same manner as that of any other witness, and that inconsistent statements, including denials of recollection, should be evaluated only as to the credibility of the witness. The court instructed the jury that the testimony of a police officer "is entitled to no special or exclusive weight . . . ."

weigh the evidence, free from prosecutorial overreach, in light of its finding of not guilty of the crime of strangulation in the second degree, which "clearly demonstrat[es] the [jury's] ability to filter out the allegedly improper statements and make independent assessments of credibility." *State* v. *Ciullo*, supra, 314 Conn. 60.

In sum, our examination of the entire record convinces us that any alleged *Singh* violation did not "so [infect] the trial with unfairness as to make the conviction a denial of due process." (Internal quotation marks omitted.) *State* v. *Singh*, supra, 259 Conn. 700. Rather, "the trial as a whole was fundamentally" fair; (internal quotation marks omitted) id.; and we firmly believe that "there is not a reasonable likelihood that the jury's verdict would have been different absent the improprieties." *State* v. *Albino*, 312 Conn. 763, 792–93, 97 A.3d 478 (2014). As such, our analysis of the record pursuant to the *Williams* factors leads us to conclude that the defendant was not denied his due process right to a fair trial.

The judgment is affirmed.

In this opinion the other justices concurred.

AUSTIN HAUGHWOUT *v.* LAURA TORDENTI ET AL.
(SC 20076)

Robinson, C. J., and Palmer, McDonald, Mullins, Kahn, Ecker and Vertefeuille, Js.

Syllabus

The plaintiff, who had been expelled from a state university, sought, inter alia, a writ of mandamus reinstating him as a student. Specifically, the plaintiff alleged that the defendants, certain university officials involved in the decision to expel him, violated his federal constitutional right to free speech. An investigation conducted by university police revealed that the plaintiff had identified a particular student as "first on his hit list," shared digital photographs of a bullet with other students, remarked that he had loose bullets at home and in his truck, made certain comments about "shoot[ing] up" the university, greeted others by pointing

at them with his hand in the shape of a gun, and bragged to others about his guns and ammunition. Although students described the plaintiff's conduct as joking and nonchalant, some of those students indicated a sense of alarm, concern or fear. As a result of his statements and conduct, the plaintiff was suspended on an interim basis. Thereafter, the university commenced formal disciplinary proceedings on the ground that the plaintiff had violated several provisions of the student code of conduct. At a hearing before a panel of school administrators and a professor, the plaintiff largely denied making the statements and gestures attributed to him. The hearing panel found, however, that the plaintiff was responsible for the statements and conduct at issue and expelled him from the university. The hearing panel's decision was upheld after an internal appeal before the university's associate dean for student affairs. In disposing of the plaintiff's free speech claim, the trial court concluded, inter alia, that the plaintiff's statements and gestures were true threats that were not protected under the first amendment to the United States constitution because, in light of various mass shootings at schools and universities around the country, a reasonable person would have interpreted the plaintiff's statements and gestures as serious expressions of an intent to cause harm. The trial court rendered judgment for the defendants, from which the plaintiff appealed. *Held* that the trial court correctly determined that the plaintiff's statements and gestures were true threats that were not protected by the first amendment, and, accordingly, this court affirmed the trial court's judgment: in light of the plaintiff's access to ammunition and weapons and his express statements to that effect, the context provided by the relative frequency of contemporary mass school shootings, and the absence of any facts mooring the plaintiff's statements to political or artistic hyperbole, a reasonable person hearing the plaintiff's statements and viewing his gestures would be more than justified in believing that those expressions constituted a physical threat; moreover, the plaintiff's claim that his expressions lacked sufficient specificity to constitute a true threat was inconsistent with his statement identifying a particular student as being on his hit list, which was communicated directly to that student, and failed to account for the fear of indiscriminate and random death resulting from mass shootings that may be shared by any number of people who frequent a public place that has been the subject of a threat, his claim that contemporaneous listeners characterized his statements as jokes and did not understand them to be a serious expression of an intent to cause harm was undercut by the fact that his statements and conduct were subsequently reported to the university police, and his claim that his statements were benign, political hyperbole was unpersuasive because he had specifically denied making those same statements during the underlying disciplinary proceedings.

Argued October 17, 2018—officially released July 30, 2019

Procedural History

Action seeking reinstatement following the plaintiff's expulsion from Central Connecticut State University, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Hon. Joseph M. Shortall*, judge trial referee, granted in part the defendants' motion to dismiss certain counts of the complaint; thereafter, the case was tried to the court, *Hon. Joseph M. Shortall*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment for the defendants, from which the plaintiff appealed. *Affirmed.*

Mario Cerame, for the appellant (plaintiff).

Ralph E. Urban, assistant attorney general, with whom, on the brief, was *George Jepsen*, former attorney general, for the appellees (defendants).

Rebecca E. Adams filed a brief for the Connecticut Association of Boards of Education as amicus curiae.

Opinion

ROBINSON, C. J. In this appeal, we consider the limits of free speech on a public university campus in light of recent history that has led federal and state courts to describe threats of gun violence and mass shootings as the twenty-first century equivalent to the shout of fire in a crowded theater once envisioned by Justice Oliver Wendell Holmes, Jr.[1] See, e.g., *Ponce* v. *Socorro Independent School District*, 508 F.3d 765, 772 (5th Cir. 2007); *Milo* v. *New York*, 59 F. Supp. 3d 513, 517 (E.D.N.Y. 2014); *In re A.S.*, 243 Wis. 2d 173, 194, 626 N.W.2d 712 (2001). The plaintiff, Austin Haughwout, brought the present action seeking to challenge his expulsion from Central Connecticut State University

[1] *Schenck* v. *United States*, 249 U.S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 470 (1919).

(university). The plaintiff now appeals[2] from the judgment of the trial court in favor of the defendants, Laura Tordenti, Ramón Hernández, Christopher Dukes, and Densil Samuda, the university officials involved in that decision.[3] On appeal, the plaintiff claims that the trial court incorrectly determined that the various statements and gestures with respect to gun violence and mass shootings that led to his expulsion from the university were true threats that are not protected by the first amendment to the United States constitution, rather than hyperbolic and humorous statements on a matter of public concern. Although a public university campus is a unique forum for the free exchange of controversial, unpopular, and even offensive ideas, we nevertheless conclude that the plaintiff's statements and gestures were true threats. Accordingly, we affirm the judgment of the trial court.

The record reveals the following facts, as found by the trial court,[4] and procedural history. "On September 17, 2015, a student at [the university] (complainant) went to the headquarters of the campus police to report a 'suspicious incident' at the student center. [The complainant] provided a written statement in which he said that [the plaintiff] 'made verbal cues discussing the physical harm of another [university] student,' identified the other student as 'first on his hit list,' showed digital [photographs] of a bullet on his cell phone, and

[2] The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[3] At the time of the events underlying the present appeal, Tordenti was vice president for student affairs, Hernández was the associate dean for student affairs, Dukes was the director of student conduct, and Samuda was a detective employed by the university police department.

[4] The trial court did not receive evidence or hear arguments during a formal bench trial in the present case. Instead, with the agreement of the parties, the trial court found facts on the basis of the record of the university's disciplinary proceedings and certain testimony from the plaintiff and Dukes at a pretrial hearing held before the court on August 8, 2016. See footnote 17 of this opinion and accompanying text.

'remarked that he had loose bullets at home and in his truck.' The complainant said he did not know [the plaintiff], but the statements were made in his presence. The complainant further reported that [the plaintiff] had never shown any weapons on his person, and that he has 'a habit of making hand gestures in the shape of handguns as a common gesture.'

"On September 21, 2015, the campus police interviewed another [university] student who had known [the plaintiff] since the spring semester [of] 2015 and hung around with him in a group that met at the student center. That student recounted statements by [the plaintiff] that 'someone should shoot up this school' or 'I should just shoot up this school.' [The plaintiff] was 'always' talking about guns and ammunition and 'greets everyone by pointing at them with his hand in the shape of a gun.' This student reported that [the plaintiff] had said to him that he was [the plaintiff's] 'number one target,' 'number one on my list.' [The plaintiff] 'brags constantly about his guns and ammunition, shows off pictures and boasts about wanting to bring a gun to school.' This student described these statements by [the plaintiff] as made 'jokingly' and that the group in which they hung around dismissed what he said as a joke.

"On the same day, the campus police reinterviewed the complainant, who repeated his allegations of September 17. Although [the complainant], too, described [the plaintiff's] statements as having been made 'jokingly,' he was 'alarmed' by them, had started avoiding [the plaintiff], left the student center when [the plaintiff] arrive[d] and was 'afraid for everyone's safety.'

"On September 22, the campus police interviewed a third student who related that he had heard [the plaintiff] during the preceding week state 'something like "might as well shoot up the place." ' While this student described [the plaintiff's] statement as having been made 'nonchalantly,' he was 'concerned about the con-

text of [the plaintiff's] exclamation' because [the plaintiff] had been 'upset about something' when he made it.

"The campus police interviewed [the plaintiff] on September 22, 2015, as well. While he acknowledged talking about guns a lot, he denied ever saying anything about shooting up the school, stating that 'he knows better than to mention anything like that.' He attributed the complaints against him to his position on gun rights.

"After interviewing [the plaintiff], the campus police called two of the persons they had previously interviewed and inquired why they had not contacted police upon hearing [the plaintiff's] alleged remarks about 'shooting up the school.' One said he had been told by others who heard the remark to 'take it as a joke and ignore [the plaintiff]'; the other stated that [he] 'didn't take it seriously but . . . was kind of concerned.'

"[Samuda], a detective with the campus police, participated in this investigation. At its conclusion, on September 22, he applied for an arrest warrant charging [the plaintiff] with the crime of threatening in the second degree, in violation of General Statutes § 53a-62. The state's attorney declined the application, informing . . . Samuda that probable cause for that crime was lacking.[5] [Samuda] reported the results of his investigation to [Dukes, the university's director of student conduct, and] provided him with copies of the police reports. On October 1, 2015, [the plaintiff] was placed on an interim suspension by Hernández, [the university's associate dean for student affairs, because of] 'alleged behavior within our community.' " (Footnotes added and omitted.)

Following an investigation by Dukes, the university commenced disciplinary proceedings against the plain-

[5] The trial court stated that it "consider[ed] the prosecutor's declination of little moment. The requirements for establishing probable cause for the elements of threatening in the second degree, in violation of § 53a-62, bear no necessary relationship to the requirements for taking disciplinary action for a violation of the [university's student code of conduct]."

tiff on the ground that his actions had violated four separate provisions of the university's student code of conduct prohibiting the following: physical assault, intimidation, or threatening behavior; harassment; disorderly conduct; and offensive or disorderly conduct. A hearing was held before a panel consisting of two administrators and a professor, at which the plaintiff largely denied making the statements and gestures attributed to him. See footnote 18 of this opinion. The hearing panel found, however, that the plaintiff was responsible on all charges, and decided to expel him from the university's campus. The hearing panel's decision to expel the plaintiff from the university[6] was subsequently upheld after an internal appeal.[7]

The plaintiff subsequently brought this action seeking a declaratory judgment, injunctive relief, and damages. The plaintiff also sought a writ of mandamus reinstating him as a student at the university, expungement of misconduct allegations from his record, and a refund of tuition and fees that had been withheld by the defendants. The plaintiff claimed that his expulsion constituted a breach of contract, contravened an implied covenant of duty of good faith and fair dealing, and violated his state and federal constitutional rights to due process of law and to freedom of speech.

After a hearing,[8] the trial court issued a memorandum of decision in which it rejected the plaintiff's contrac-

[6] In addition to his expulsion from the university, the plaintiff was also "permanently banned from returning to," or attending events on, the premises of the other three four year university campuses in the Connecticut State College and University system.

[7] Specifically, the plaintiff appealed from the hearing panel's decision to Tordenti, the university's vice president for student affairs, who, in turn, assigned Hernández to hear the appeal. After a hearing, Hernández issued a decision rejecting the plaintiff's claims that the hearing did not comply with the university's student code of conduct and that "the sanction of [e]xpulsion . . . was not appropriate . . . ."

[8] See footnotes 4 and 17 of this opinion.

tual and due process claims,[9] and further concluded that the defendants did not violate the plaintiff's free speech rights under the federal and state constitutions. The trial court concluded that the plaintiff's "statements and gestures while in the student center at [the university] fit the definition of 'true threats,' " and "were certainly not statements that sought 'to communicate a belief or idea.' "[10] Because the plaintiff had "denied almost all of these statements," and, therefore, "the record contains no direct evidence from him as to his intentions in making them"; see footnote 17 of this opinion; the trial court relied on their content and "his repeated utterances of them in a public place like the student center," and found that the plaintiff "meant to 'communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals' . . . namely, the students at [the university]. Whether he actually intended to carry through on the threat is unknown and immaterial." (Citation omitted.) Given the "spate" of mass shootings at schools and universities around the country, the trial court determined that "a reasonable person . . . would have seen that such repeated statements would be interpreted by the students to whom and in whose presence he made them as 'serious expressions of intent to harm or assault.' . . . And, although some of the students treated [the plaintiff's] statements as a joke, at least some of them who heard these threats were 'alarmed' and 'concerned' about them and in some cases changed their behavior; e.g., coming less often

[9] We note that, on appeal, the plaintiff does not challenge the trial court's determinations that the university's "disciplinary procedures did not violate [his] due process rights under either the federal or state constitution and [that the university] adhered to the disciplinary procedures prescribed by the [university's student code of conduct]," and, therefore, no breach of contract or the duty of good faith and fair dealing occurred in that respect.

[10] A detailed listing of the statements and gestures that the trial court determined were a true threat is set forth in the text accompanying footnote 14 of this opinion.

to the student center because of [the plaintiff's] statements." (Citation omitted; footnote omitted.) Accordingly, the trial court rendered judgment for the defendants. This appeal followed.[11]

On appeal, the plaintiff, emphasizing that the first amendment "doesn't protect just the good jokes," claims that the statements, gestures, and images that he made were not true threats and, therefore, were a constitutionally protected exercise of his right to free speech.[12] Relying heavily on the principles elucidated

[11] On November 16, 2018, after the oral argument in the present appeal, we invited numerous organizations and institutions, namely, the American Civil Liberties Union of Connecticut, the Connecticut Conference of Independent Colleges, the University of Connecticut, several sections of the Connecticut Bar Association, Yale University, and the Connecticut Association of Boards of Education, to file briefs as amici curiae. Only the Connecticut Association of Boards of Education accepted our invitation, and we are grateful for its participation.

[12] We note that the plaintiff, although attempting to reserve and "not [waive]" the right to do so, has specifically declined to brief a claim, in accordance with *State* v. *Geisler*, 222 Conn. 672, 610 A.2d 1225 (1992), that his speech is entitled to greater protection under article first, §§ 4, 5 and 14, of the Connecticut constitution. This absence was based on the "good faith" belief of his counsel that, because "the established federal standard is clearly dispositive on this factual record . . . this case does not provide occasion to define any daylight between the state and federal constitutions on the issue of true threats." Consistent with his attempted reservation, but inconsistent with his no "daylight" assertion, the plaintiff's reply brief raises a claim that, under the state constitution, the speaker must have the specific intent to speak threateningly for a statement to be a true threat, which he casts as a response to an issue that the defendants "pressed" in their brief. As is reflected in our April 4, 2018 order granting the defendants' motion to strike the corresponding pages of the plaintiff's reply brief, we decline to countenance this approach, which violates the well settled principle that claims may not be raised for the first time in a reply brief. See, e.g., *Isabella D.* v. *Dept. of Children & Families*, 320 Conn. 215, 236 n.19, 128 A.3d 916, cert. denied, U.S. , 137 S. Ct. 181, 196 L. Ed. 2d 124 (2016); see also *Bennett* v. *New Milford Hospital, Inc.*, 300 Conn. 1, 32–33, 12 A.3d 865 (2011) (declining to consider claim that statute violates separation of powers provision under state constitution because it was unpreserved and raised for first time under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 [1989], in reply brief).

Beyond this procedural bar to review of the plaintiff's state constitutional claim, we recently rejected its merits in *State* v. *Taupier*, 330 Conn. 149, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019), in which we concluded that neither the federal nor the state

in our decision in *State* v. *Krijger*, 313 Conn. 434, 97 A.3d 946 (2014), as well as the United States Supreme Court's decision in *Watts* v. *United States*, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969), the plaintiff contends that his statements were not true threats but, instead, were protected "jokes" or " 'political hyperbole' " akin to the satiric works of Lenny Bruce, which constituted "dark humor" with long roots in Western literature. The plaintiff emphasizes that, although it was "possible to construe [his] statements as a threat," the "more plausible interpretation is benign," given the context in which "[e]veryone who heard the statements understood them to be made jokingly," and "[n]o contemporaneous listener understood [them] to be a serious expression of an intent to cause harm." Relying on his explanations before the hearing panel to provide additional context, the plaintiff emphasizes that "none [of the listeners] reacted in a manner consistent with a serious expression of an intent to shoot members of the school community" and puts his "[j]oking that someone should shoot up the school" in the same constitutionally protected "nasty bucket as a dead baby joke." The plaintiff further argues that his statements lacked the particularity necessary to be a true threat, and that his statements—whether examined as a whole or in a "more granular way"—were ambiguous and, therefore, not true threats.

In response, the defendants argue that the plaintiff's statements and gestures were true threats under *State* v. *Krijger*, supra, 313 Conn. 434, because "a reasonable hearer or receiver of the expressive conduct would believe [that he] was expressing a serious intent to commit an act of unlawful violence." Relying on, inter

constitution require the speaker to have the specific intent to threaten in order for a statement to be deemed an unprotected true threat. See id., 173–74 (joining those federal courts that have concluded that true threat under first amendment does not require proof of specific intent); id., 174–76 (concluding after *Geisler* analysis that true threat under state constitution does not require proof of specific intent).

alia, *Doe* v. *Pulaski County Special School District*, 306 F.3d 616 (8th Cir. 2002), and *State* v. *DeLoreto*, 265 Conn. 145, 827 A.2d 671 (2003), the defendants contend that the plaintiff's comments and gestures are reasonably understood as a true threat, given his access to weapons and the fact that the students who witnessed them evinced their fear insofar as some stopped going to the student center, others went to the police, and, "while several of them verbally agreed to provide testimony or information at [the plaintiff's] campus disciplinary proceeding, only one showed up, and he became notably agitated and fearful, and refused to appear before the disciplinary panel when he learned [the plaintiff] would be present, leaving abruptly." The defendants argue that, although the plaintiff's threats were directed at particular individuals, including one student whom he had described as his " 'number one target,' " the nature of the threats struck more broadly because they implicated the randomness that is the "fear inducing phenomenon" of mass shootings. The defendants also contend that the record does not support the plaintiff's contention that his statements and gestures were humor, political satire, or political expression with respect to gun control, largely because he "did not make any such claims before the [university's] hearing panel, instead claiming that there was something about his personality that caused people to lie about him and his activities, and that the evidence against him was the result of a personal vendetta by a particular student to have him expelled." Ultimately, the defendants claim that the plaintiff's "words and gestures, as received by reasonable hearers or recipients, did not relate to any important public policy issue, and [the plaintiff's] manner of expression, reasonably heard as true threats, was clearly out of bounds on a college campus . . . ." We agree with the defendants and conclude that the trial court properly found that the plaintiff's statements and

gestures were true threats not protected by the first amendment.

"The [f]irst [a]mendment, applicable to the [s]tates through the [f]ourteenth [a]mendment, provides that Congress shall make no law . . . abridging the freedom of speech. The hallmark of the protection of free speech is to allow free trade in ideas—even ideas that the overwhelming majority of people might find distasteful or discomforting. . . . Thus, the [f]irst [a]mendment ordinarily denies a [s]tate the power to prohibit dissemination of social, economic and political doctrine [that] a vast majority of its citizens believes to be false and fraught with evil consequence. . . .

"The protections afforded by the [f]irst [a]mendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the [c]onstitution. . . . The [f]irst [a]mendment permits restrictions [on] the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (Internal quotation marks omitted.) *State* v. *Krijger*, supra, 313 Conn. 448–49; see also *United States* v. *Alvarez*, 567 U.S. 709, 716, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012) (observing that "content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories [of expression] long familiar to the bar," including "advocacy intended, and likely, to incite imminent lawless action," obscenity, defamation, "speech integral to criminal conduct," "so-called fighting words," child pornography, fraud, true threats, and "speech presenting some grave and imminent threat the government has the power to prevent . . . although a restriction under the last category is most difficult to sustain" [citation omitted; internal quotation marks omitted]).

The first amendment permits states to restrict[13] true threats, which "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. . . .

"Thus, we must distinguish between true threats, which, because of their lack of communicative value, are not protected by the first amendment, and those statements that seek to communicate a belief or idea, such as political hyperbole or a mere joke, which are protected. . . . 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." (Citations omitted; internal quotation marks omitted.) *State* v. *Krijger*, supra, 313 Conn. 449–50; see also *Virginia* v. *Black*, 538 U.S. 343, 359–60, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); *Watts* v. *United States*, supra, 394 U.S. 707–708.

[13] It is undisputed that, given its status as a public institution of higher education, the university's enforcement of its student code of conduct via the commencement of disciplinary proceedings against the plaintiff constituted state action for purposes of the first amendment. See, e.g., *IOTA XI Chapter of Sigma Chi Fraternity* v. *George Mason University*, 993 F.2d 386, 393 (4th Cir. 1993); see also *Furumoto* v. *Lyman*, 362 F. Supp. 1267, 1276–80 (N.D. Cal. 1973) (citing cases and rejecting argument that state benefits and regulation of Stanford University rendered it arm of state for purposes of action under 42 U.S.C. § 1983 claiming that disciplinary action violated students' first amendment rights).

"[T]o ensure that only *serious* expressions of an intention to commit an act of unlawful violence are punished, as the first amendment requires, the state [actor] must do more than demonstrate that a statement *could* be interpreted as a threat. When . . . a statement is susceptible of varying interpretations, at least one of which is nonthreatening, the proper standard to apply is whether an objective listener would readily interpret the statement as a real or true threat; nothing less is sufficient to safeguard the constitutional guarantee of freedom of expression. To meet this standard [the state actor is] required to present evidence demonstrating that a reasonable listener, familiar with the entire factual context of the defendant's statements, would be highly likely to interpret them as communicating a genuine threat of violence rather than protected expression, however offensive or repugnant." (Emphasis in original.) *State* v. *Krijger*, supra, 313 Conn. 460; see also *State* v. *Taupier*, 330 Conn. 149, 173, 193 A.3d 1 (2018) (true threat inquiry is objectively judged from perspective of reasonable listener, and first amendment does not require speaker to have specific intent to terrorize), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019). Because the true threats doctrine has equal applicability in civil and criminal cases, case law from both contexts informs our inquiry. See *New York ex rel. Spitzer* v. *Operation Rescue National*, 273 F.3d 184, 196–97 (2d Cir. 2001).

In determining whether the trial court properly found that the defendant's statements and gestures were true threats, we recognize that, although we ordinarily review findings of fact for clear error, "[i]n certain first amendment contexts . . . appellate courts are bound to apply a de novo standard of review. . . . [In such cases], 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. . . . [I]n cases raising [f]irst [a]mendment issues [the United States Supreme Court has] repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion [in] the field of free expression. . . . This rule of independent review was forged in recognition that a [reviewing] [c]ourt's duty is not limited to the elaboration of constitutional principles . . . . [Rather, an appellate court] must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. . . . Therefore, even though, ordinarily . . . [f]indings of fact . . . shall not be set aside unless clearly erroneous, [appellate courts] are obliged to [perform] a fresh examination of crucial facts under the rule of independent review." (Citation omitted; internal quotation marks omitted.) *State* v. *Krijger*, supra, 313 Conn. 446–47; see also *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284–86, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). We emphasize, however, that "the heightened scrutiny that this court applies in first amendment cases 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 a true threat, we accept all subsidiary credibility determinations and findings that are not clearly erroneous." *State* v. *Krijger*, supra, 447; see id., 447–48 (noting that independent review is applied to version of remarks at issue that fact finder credited).

To frame our independent analysis, we note that the trial court concluded that the student witnesses' statements supported findings that the plaintiff (1) "made frequent shooting hand gestures as a form of greeting

to students in the student center," (2) "with his hand in a shooting gesture, [he] aimed at students and made firing noises as they were walking through the student center," (3) "wondered aloud how many rounds he would need to shoot people at the school and referred to the fact that he had bullets at home and in his truck," (4) "showed off pictures of the guns he owned and boasted about bringing a gun to school," (5) "referred specifically and on more than one occasion to his 'shooting up the school,' " (6) "during a test of the school's alarm system stated that 'someone should really shoot up the school for real so it's not a drill,' " (7) "named as his 'number one target' a particular student in the student center," and (8) "made specific reference to a shooting at an Oregon community college where several students had been killed and wounded, stating that the Oregon shooting had 'beat us.' " Having reviewed the record, we agree with the trial court's conclusion that the totality of the plaintiff's comments and gestures would reasonably be understood to be a true threat of gun violence at the university.[14]

Although most of the plaintiff's comments were individually not an "explicit threat," that phrasing does not render them protected speech, because "rigid adher-

[14] We note that the multiple statements and gestures made at different times in this case differ from those in our previous true threat cases, which considered the import of statements or gestures made in the course of a single incident. See, e.g., *State* v. *Taupier*, supra, 330 Conn. 156–57 (single e-mail to judge containing multiple threatening statements); *State* v. *Pelella*, 327 Conn. 1, 4, 170 A.3d 647 (2017) (single threat made during domestic dispute between brothers); *State* v. *Krijger*, supra, 313 Conn. 439–41 (single in-person reference to injuries previously suffered by listener's son made during angry altercation); *State* v. *Cook*, 287 Conn. 237, 240–41, 947 A.2d 307 (threat with table leg), cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008); *State* v. *DeLoreto*, supra, 265 Conn. 156–58 (statements to police officers on separate occasions formed independent bases for multiple charges). In contrast to these cases, the present case largely turns on the sum of the parts of the plaintiff's statements and gestures made over a relatively extended period of time.

ence to the literal meaning of a communication without regard to its reasonable connotations derived from its ambience would render [statutes proscribing true threats] powerless against the ingenuity of threateners who can instill in the victim's mind as clear an apprehension of impending injury by an implied menace as by a literal threat. . . . Thus, a determination of what a defendant actually said is just the beginning of a threats analysis. Even when words are threatening on their face, careful attention must be paid to the context in which those statements are made to determine if the words may be objectively perceived as threatening." (Citation omitted; internal quotation marks omitted.) *State* v. *Krijger*, supra, 313 Conn. 452–53. Put differently, even veiled statements may be true threats. See *United States* v. *Dillard*, 795 F.3d 1191, 1200–1201 (10th Cir. 2015) (District Court incorrectly concluded that defendant's statement in letter to abortion clinic physician that "an unidentified 'someone' might place explosives under [physician's] car" was not true threat because ambiguous statement without "direct statement of personal intent" may be true threat given other factors, including local history of violence); *United States* v. *Bly*, 510 F.3d 453, 456–59 (4th Cir. 2007) (letter sent by former doctoral student was true threat to university board members and academic officers when it made demands and [1] stated that " 'bullets are far cheaper and much more decisive' " than legal action as " '[a] person with my meager means and abilities can stand at a distance of two football fields and end elements of long standing dispute with the twitch of my index finger,' " [2] stated that " 'it would be a shame to brutalize [thesis advisors] in order to guarantee that I receive a hearing of my story and a form of justice,' " and [3] enclosed "copies of firearms practice targets with bullet holes near their centers," despite disclaimer stating that " '[t]hese comments are not to be interpreted as illegal brandishing of a firearm, blackmail, or

extortion' "); see also *United States* v. *Voneida*, 337 Fed. Appx. 246, 248–49 (3d Cir. 2009) (upholding jury finding that college student transmitted threatening communication in violation of 18 U.S.C. § 875 [c] when he posted, inter alia, following statements on his personal social media page two days after Virginia Tech mass shooting: [1] " 'Someday . . . I'll make the Virginia Tech incident look like a trip to an amusement park' "; [2] "expressed '[shock]' that after the Virginia Tech [shooting] his classmates 'were actually surprised that there are people out there who would shoot them if given the opportunity' "; [3] " 'lost my respect [for] the sanctity of human life' "; and [4] included tributes to Virginia Tech shooter as martyr, with wish that shooter's " 'undaunted and unquenched' wrath would 'sweep across the land,' " particularly given fearful reactions by multiple students at his university and elsewhere who viewed post and contacted police).

Given his express statements that he had access to firearms and ammunition, the plaintiff's statements and gestures—especially when viewed in the context that they provide for each other—are within the realm of those that have been deemed true threats, especially in the contemporary context of school shootings. We find particularly illustrative the decision of the United States Court of Appeals for the Eighth Circuit in *D.J.M.* v. *Hannibal Public School District No. 60*, 647 F.3d 754, 756–57 (8th Cir. 2011), which considered whether statements sent by a public school student to another student via instant message were true threats, rendering his suspension not a first amendment violation. In *D.J.M.*, the court concluded that the following statements, when viewed in their entirety, were reasonably viewed as "serious expressions of intent to harm," rather than "in jest out of teenage frustration": [1] that the student admitted "he was depressed at being rejected by a romantic interest; [2] his 'access to weapons' which made his threats 'believable'; [3] [the instant

message recipient's] report that [the student] said he intended to take a gun to school to shoot everyone he hates and then himself; [4] his expressed 'desire to kill at least five classmates'; [5] his telling [the instant message recipient he] 'wanted [their town] to be known for something'; and [6] [the instant message recipient's] growing concern that caused her to contact a trusted adult about his threats." Id., 762–63. The court rejected the student's reliance on *Watts* v. *United States*, supra, 394 U.S. 705, and held that a reasonable recipient would find these statements threatening—despite the fact that the immediate recipient responded humorously with "lol"[15]—because the student had described individual targets of his threat, indicated his access to a .357 Magnum that he could borrow from a friend, and the recipient was concerned enough to tell a trusted adult, who informed school officials, later resulting in the student's suspension and inpatient psychiatric evaluation. *D.J.M.* v. *Hannibal Public School District No. 60*, supra, 758, 762–64. The Eighth Circuit concluded that, in "light of the [school district's] obligation to ensure the safety of its students and reasonable concerns created by shooting deaths at other schools such as [those in] Columbine and the Red Lake [Indian] Reservation . . . the [school district] did not violate the [f]irst [a]mendment by notifying the police about [the student's] threatening instant messages and subsequently suspending him after he was placed in juvenile detention." Id., 764. Put most succinctly, the court emphasized that the first amendment "did not require the [school district] to wait and see whether [the student's] talk about taking a gun to school and shooting certain students would be carried out." Id.

Numerous other cases support the reasonableness of concern over threats of gun violence in the educational

[15] We note that the abbreviation " 'lol' means the speaker is 'laughing out loud.' " *D.J.M.* v. *Hannibal Public School District No. 60*, supra, 647 F.3d 758.

setting because "knowledge by the target of a threat that the defendant had the means to carry out the threat can support the inference that the target would reasonably interpret the threat to be serious." (Emphasis omitted.) *State* v. *Taupier*, supra, 330 Conn. 183; see *Lovell* v. *Poway Unified School District*, 90 F.3d 367, 372–73 (9th Cir. 1996) (concluding that "any person could reasonably consider the statement '[i]f you don't give me this schedule change, I'm going to shoot you,' made by an angry teenager [to school guidance counselor], to be a serious expression of intent to harm or assault," especially "when considered against the backdrop of increasing violence among school children today"); *People* v. *Diomedes*, 13 N.E.3d 125, 134–39 (Ill. App. 2014) (e-mail sent by student to anti-bullying activist, although " 'an expression of teenage despair,' " was true threat because they did not have confidential therapeutic relationship, student expressed wish for certain "specific individuals to die and suffer," student had history of making at least one prior threat, and there was no indication that statement was made in hyperbole or jest), appeal denied, 39 N.E.3d 1006 (Ill. 2015); *State* v. *Trey M.*, 186 Wn. 2d 884, 888–90, 906–907, 383 P.3d 474 (2016) (concluding that juvenile's statements to his therapist, later repeated to police officer, that he planned to take his grandfather's nine millimeter gun from a cabinet and bring it to school to shoot boys who had bullied and teased him, and if he could not get gun to use bombs, was true threat given specificity of access to weapons, fear expressed by boys who were on juvenile's "hit list," juvenile's confession to making bombs, and communication of time and location of planned shooting), cert. denied, U.S. , 138 S. Ct. 313, 199 L. Ed. 2d 207 (2017); *In re A.S.*, supra, 243 Wis. 2d 182–83, 194 (juvenile's statements, made in "very matter of fact manner" while playing video games at local youth center, that he would bring guns and "do something

similar" to Columbine school shooting, while sparing some classmates and killing and raping certain specified teachers and police officers, were true threats when listeners were frightened, and there was no indication in context or statements that they were "hyperbole, jest, or political dissent"); see also *Feminist Majority Foundation* v. *Hurley*, 911 F.3d 674, 691–92 (4th Cir. 2018) (rejecting university's defense in Title IX case that first amendment "circumscribed" its ability to respond to "online harassment and threats suffered" by member of campus women's organization, because threatening online messages were true threats, including those threatening to " 'euthanize,' " kill, and sexually assault organization's members "where the backdrop of the threatening messages is a campus environment purportedly conducive to sexual assault, and those messages target persons by name and location"); *Walker* v. *Suarez*, United States District Court, Docket No. 15-CV-01960 (RBJ) (D. Colo. January 26, 2016) (threat to shoot down helicopter was true threat when it was made against specific individual on multiple occasions and by person with "access to guns" who had purchased rifle scope on same day), appeal dismissed, United States Court of Appeals, Docket No. 16-1055 (10th Cir. May 02, 2016).

The plaintiff also contends that the requisite particularity is lacking, because "[n]o one indicated a particularized fear. All concern and worry [were] generalized." We disagree. First, this argument is inconsistent with the trial court's finding that the plaintiff had in fact identified one specific student as " 'number one' " on the plaintiff's " 'hit list,' " and the statement had been communicated to that student directly. Although that student believed that the statement was made " 'jokingly,' " he nevertheless was " 'alarmed' " by it and was sufficiently concerned for everyone's safety to contact the university police. Second, this argument reads too

narrowly the boilerplate proposition that a true threat is "a serious expression of an intent to commit an act of unlawful violence to a *particular* individual or group of individuals." (Emphasis added; internal quotation marks omitted.) *State* v. *Krijger*, supra, 313 Conn. 449. The fear of indiscriminate and random death and injury that results from mass shootings, like Sandy Hook, Virginia Tech, and Columbine, transcends any one specific individual and is shared by any one of the many people who must frequent a public place—such as a university student union—that has been the subject of a threat. See *State* v. *Pelella*, 327 Conn. 1, 11, 16–17, 170 A.3d 647 (2017) ("[A] threat need not be imminent to constitute a constitutionally punishable true threat" because "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. . . . Indeed, [t]hreatening speech . . . works directly the harms of apprehension and disruption, whether the apparent resolve proves bluster or not and whether the injury is threatened to be immediate or delayed." [Citation omitted; internal quotation marks omitted.]).

Indeed, the relative frequency of these mass shootings informs the reasonableness of viewing the plaintiff's remarks, which were apparently unmoored to political or other discourse, as true threats. See, e.g., *D.J.M.* v. *Hannibal Public School District No. 60*, supra, 647 F.3d 764 (noting school district's "obligation to ensure the safety of its students and reasonable concerns created by shooting deaths at other schools such as [those in] Columbine and the Red Lake [Indian] Reservation"); *Doe* v. *Pulaski County Special School District*, supra, 306 F.3d 625–26 and n.4 (letter authored by student expressing his "wish to sodomize, rape, and kill" his ex-girlfriend was true threat justifying suspension "in the wake of Columbine and Jonesboro," rendering it "untenable" that school officials learning about

the letter "would not have taken some action based on its violent and disturbing content"). It is no wonder that, especially in an educational setting, threatening statements about mass shootings are the equivalent of, "in the words of [Justice] Holmes, [a cry of] 'fire' in a crowded theater." *In re A.S.*, supra, 243 Wis. 2d 194; see, e.g., *Ponce* v. *Socorro Independent School District*, supra, 508 F.3d 772; *Milo* v. *New York*, supra, 59 F. Supp. 3d 517; see also *State* v. *Parnoff*, 329 Conn. 386, 426, 186 A.3d 640 (2018) (*Kahn, J.*, concurring) (recognizing that, in current times, "the threat of gun violence is tasteless, shameful, and all too real").

The plaintiff argues, however, that "[n]o contemporaneous listener understood the statements to be a serious expression of an intent to cause harm," and that "[e]veryone who heard the statements understood them to be made jokingly." We disagree with the plaintiff's reading of the record. Although the narrative in the police reports that were evidence before the hearing panel indicates that some students elected to treat the plaintiff's remarks as made in jest, that narrative also indicates that some of those same students nevertheless were sufficiently perturbed to contact the university police, with one complaining witness apparently so fearful for his safety that he refused to appear as a witness at the university's disciplinary hearing. Given the objective nature of the inquiry, the listener's reaction of concern or fear need not be dramatic or immediate, and the apparently mixed emotions of the listeners are not dispositive. See *D.J.M.* v. *Hannibal Public School District No. 60*, supra, 647 F.3d 758, 762–63 (teenage recipient of instant message with threats responded "lol," but was also concerned enough to tell trusted adult); *Lovell* v. *Poway Unified School District*, supra, 90 F.3d 372–73 (The court noted that a school guidance counselor had "stated repeatedly that she felt threatened" when confronted, and that "[t]he fact that she chose not to seek help instantly is not dispositive.

She did report the conduct to [an assistant principal] within a few hours, before she went home that day. Exhibiting fortitude and stoicism in the interim does not vitiate the threatening nature of [the student's] conduct, or [the guidance counselor's] belief that [the student had] threatened her."); see also *State* v. *Taupier*, supra, 330 Conn. 158–59, 191–92 (reader of e-mail containing threat to judge mentioned her concern to several people, but waited several days and gathered additional information before disclosing it to attorney for further action).

To this end, we also disagree with the plaintiff's argument that his statements and gestures were ambiguous and more properly interpreted as benign jokes or political hyperbole that are protected by the first amendment, including the numerous innocent explanations that he proffers for them on a more granular basis, such as the existence of a gun emoji to justify his use of images of firearms and ammunition. These arguments reflect the plaintiff's attempts to seek shelter under the United States Supreme Court's landmark decision in *Watts* v. *United States*, supra, 394 U.S. 706, the leading true threats decision in which a Vietnam War protestor, after being drafted, stated at a public rally in Washington, D.C., three years after the assassination of President John F. Kennedy, that, " '[i]f they ever make me carry a rifle the first man I want to get in my sights is L. B. J.' " In concluding that this statement was political hyperbole protected by the first amendment, rather than a true threat, the Supreme Court noted the conditional nature of the statement, and that it was made at a public rally on a matter of great public concern to an audience response of laughter. Id., 707–708. The Supreme Court emphasized that even "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" should not be prohibited given the "background of a profound national commitment to the principle that debate on public issues should

be uninhibited, robust, and wide open . . . ." (Internal quotation marks omitted.) Id., 708; see also *State* v. *Krijger*, supra, 313 Conn. 450. Accordingly, we agree with the plaintiff—in theory—that not all references to school violence necessarily will constitute true threats unprotected by the first amendment.[16]

The plaintiff's attempt to cast the present case as one of political hyperbole and humor akin to *Watts* is particularly unpersuasive in light of his strategy before the trial court and university hearing tribunal. Specifically, the plaintiff expressly elected to forgo a formal

[16] Consistent with *Watts*, our research reveals that not every reference to the topics of violence or shootings in the school setting—even the troubling and offensive ones—will rise to the level of a true threat. Some references are, for example, overtly political speech. See *Ross* v. *Jackson*, 897 F.3d 916, 918, 922 n.7 (8th Cir. 2018) (gun control advocate did not commit true threat by asking, " '[*w*]*hich one do I need to shoot up a kindergarten*' " on Facebook meme with numerous pictures of firearms and their proffered uses because comment "directly paralleled the language of the meme" and "was in the form of a rhetorical question, which identified no school where a shooting would happen" [emphasis added]).

Other school violence references, while disturbing, are made in creative or artistic contexts that lack other indicia of a true threat. See, e.g., *In re George T.*, 33 Cal. 4th 620, 624, 635–38, 93 P.3d 1007, 16 Cal. Rptr. 3d 61 (2004) (poem authored by high school student in honors English class "labeled 'Dark Poetry,' which recites in part, 'I am Dark, Destructive, & Dangerous. I slap on my face of happiness but inside I am evil!! For I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I'm BACK!!' " was not criminal threat because context provided no indicia of threat, such as animosity between author and fellow student to whom he gave poem, or other "threatening gestures or mannerisms"); *In re Douglas D.*, 243 Wis. 2d 204, 213–14, 234–35, 626 N.W.2d 725 (2001) (noting that thirteen year old boy's story depicting teacher's death was not true threat when it was phrased in third person, contained "hyperbole and attempts at jest," and was written in "the context of a creative writing class," and opining that case would be different if boy had "penned the same story in a math class, for example, where such a tale likely would be grossly outside the scope of his assigned work").

Beyond artistic and political statements utilizing the imagery of mass shootings and violence, some references are just sophomoric attempts at humor—which, as the plaintiff points out, are protected as "[d]istasteful and even highly offensive communication does not necessarily fall from [f]irst [a]mendment protection as a true threat simply because of its objectionable nature." *J.S.* v. *Bethlehem Area School District*, 569 Pa. 638, 659, 807 A.2d 847 (2002); see also *Burge* v. *Colton School District 53*, 100 F. Supp. 3d 1057, 1060, 1069 (D. Or. 2015) (eighth grade student's comment on Facebook page, that " 'haha [teacher] needs to be shot,' " was not true threat because settings were not visible to school faculty or staff, and were understood by "audience as critique of [teacher's] skills and not the serious

bench trial by allowing the trial court to rely on the facts found during the university's disciplinary proceedings and an earlier motion hearing that had focused on certain due process issues not relevant to the present appeal.[17] The evidence contained in that record provides

expression of intent to harm her," and because there was no evidence of access to weapons or history of violence); *Murakowski* v. *University of Delaware*, 575 F. Supp. 2d 571, 590–92 (D. Del. 2008) (college student's "racist, sexist, homophobic, insensitive, degrading [online writings that] contain graphic descriptions of violent behavior," such as raping and murdering women "like '[O.J.] Simpson' and kill[ing] through his black gloves," were not true threats because, although they were "sophomoric, immature, crude and highly offensive in an alleged misguided attempt at humor or parody," they were not directed to "specific individuals, a particular group or even to women on . . . campus," and were visible on a public website for more than one year); *State* v. *Metzinger*, 456 S.W.3d 84, 96–97 (Mo. App. 2015) (tweets about sending pressure cookers to Boston and references to Boston Marathon bombing were "tasteless and offensive" but not true threats when context, including hashtags about 2013 World Series and St. Louis Cardinals, "reveal that they were made in the context of [a] sports rivalry, an area often subject to impassioned language and hyperbole"); *C.G.M., II* v. *Juvenile Officer*, 258 S.W.3d 879, 880–83 (Mo. App. 2008) (twelve year old juvenile's statement to friend that " 'he may get dynamite from his dad for his birthday' " and asking if he " 'wanted to help him blow up the school' " was not true threat when friend did not fear that threat would be carried out or that juvenile would get dynamite for his birthday, principal did not learn of statement until five months later, and had no concerns about safety); *J.S.* v. *Bethlehem Area School District*, supra, 657–59 (applying *Watts* and concluding that middle school student's posting on his " 'Teacher Sux' " web page, which asked "why [the teacher] should die, show[ing] a picture of [the teacher's] head severed from her body and solicit[ed] funds for a hitman," was not true threat but, instead, was "sophomoric [and] degrading" humor when considered in "full context," including comedic and profane references, comparison of teacher to Adolf Hitler, lack of forwarding address for solicitation of "$20 to help pay for the hitman," humorous reaction of viewers, absence of direct communication to teacher, inaction by school officials for "extended time period," and lack of any reason to believe that student had ability to carry out threats).

[17] At the on-the-record status conference, which the trial court had convened for scheduling purposes in order to expedite a decision in this matter before the spring semester, the parties confirmed that, in light of the plaintiff's withdrawal of his monetary claims against the state, there was no additional evidence for the court to hear subsequent to the hearing on the plaintiff's motion for a preliminary injunction. Counsel for both parties confirmed that summary judgment was not appropriate given factual issues relevant to the due process claim, but also agreed that there were no outstanding factual issues with respect to the first amendment claim, which the plaintiff's attorney argued "remains clear . . . ." The parties then agreed with the trial court's determination that "the record is closed, as far as evidence is concerned," and that they "believe that they have adequately briefed the legal issues and essentially [are] waiting for a decision . . . ."

virtually no factual support for his claim that his statements were political hyperbole or poorly stated satire. Compounding this is the fact that the record reveals that the plaintiff's elected strategy before the university's hearing panel consisted of (1) denying outright that he made the statements at issue, and (2) framing the university proceedings against him as a political and personal persecution,[18] rather than defending the specific

[18] Specifically, the plaintiff repeatedly denied making the statements at issue in this case, arguing that the accusations against him were "entirely false." The plaintiff repeatedly stated his willingness to wear a body camera on campus, consistent with the "multiple cameras" that he keeps in one of his vehicles, as a result of vendettas and false statements that had been made against him by officers with multiple police departments, which he believed were the politically motivated result of the "flying gun that I had created at my house over the summer."

With respect to the specific allegations, Dukes stated that, during his investigation, the plaintiff had acknowledged having shown digital pictures of bullets to persons on campus and having discussed keeping ammunition inside of a vehicle, but denied making hand gestures in the form of a gun, having a "hit list," or referring to "anyone being his number one target." The plaintiff also stated during the investigation that one of the complaining students made up the allegations in an attempt to have him expelled from school. The plaintiff declined to question Dukes during the hearing.

During his own statement to the hearing panel, the plaintiff acknowledged having taken a picture of a bullet in one of his vehicles and explained that it was the result of having to search that vehicle for knives and ammunition to ensure compliance with university rules. The plaintiff denied making the shooting gestures with his hand, except for a "few occasions" on which one other student made them "in reply to me or has initiated [similar gestures] with me because I'm always talking about guns . . . ." The plaintiff stated that his remarks about the Oregon shooting were not that "they won or anything like that" but "essentially" that "the Oregon shooting's going to be the one discussed in the media because it was a larger shooting than Newtown." The plaintiff then denied saying that he "should shoot up the school" during testing of the school alarm system, stating that "I had not said anything to that effect. What I had said is imagine if there was an actual emergency where they needed to do it or have used it for real at this time because, you know, it's already being used. So if you had to use it for some reason, not suggesting that there would be any reason, but if you had to use it for some reason, how would you go about communicating the emergency." The plaintiff then stated that he showed off the picture of the bullet because he's "very political" and wanted to make the point that gun control legislation had the absurd result of requiring his expulsion for having ammunition in the vehicle, even if he had nothing with which to fire it. Finally, the plaintiff argued that he viewed one complainant's allegations as politically motivated given what the plaintiff had thought was friendly "political banter" in the student center about topics such as gun control or health care.

statements as artistic or political hyperbole.[19] Put differently, the plaintiff's prior disavowal of the statements is inconsistent with his claim that they were spoken to make a political point. Accordingly, the record, although adequate for review of the plaintiff's constitutional claims, simply does not contain factual support for his argument that his statements and gestures would reasonably be understood as political hyperbole or humor, rather than a true threat.[20]

We acknowledge that "[f]reedom of speech needs breathing space to survive. . . . And vigilant protection of [f]irst [a]mendment rights is nowhere more vital than at public universities, which are peculiarly the marketplace of ideas. . . . For those reasons. . . policies that formally or informally suppress protected expression at public universities raise serious [f]irst

[19] We acknowledge the plaintiff's argument that, "[r]eviewing the record as a whole, other statements [therein] indicate the statements were a joke." He cites his "quippish slip [during his opening statement to the hearing panel] comparing the president of the association of schools to a kind of monarch," as a "faux slipup [that] evinces the nuanced intellectual basis for his humor, the libertarian ben[t] that is the motive for the humor, and his dry delivery." This is consistent with the plaintiff's other argument that his statements were akin to Lenny Bruce's satiric observations, insofar as guns were one of his hobbies, he was "politically minded" and always up for a debate on political topics, including the right to bear arms, and had "found the bullets discussed in his vehicle while cleaning it out to comply with school rules" and "showed a picture of a bullet as part of a thoughtful meditation on the substance of gun rights . . . ." The plaintiff further argues that this sense of humor was "consistent with statements [that his father] made to police," noting that the plaintiff was "knowledgeable about many things and guns in particular" but had to be counseled " 'about saying the appropriate things during conversation.' " Although this evidence might well bear on the plaintiff's subjective intent in making the statements at issue, the trial court aptly noted that such evidence is immaterial, insofar as whether the statements constituted a true threat is an objective inquiry not requiring evidence of intent to threaten. See *State* v. *Taupier*, supra, 330 Conn. 173.

[20] We emphasize that our true threat analysis in the present case is limited to this record as reflected by the lower burden of proof in civil cases, and, consistent with the decision of the state's attorney not to prosecute in this case; see footnote 5 of this opinion; we take no position on whether the facts of the present case would have provided a sufficient basis for criminal liability under several potentially applicable statutes; see, e.g., *State* v. *Taupier*, supra, 330 Conn. 154; particularly given the much higher burden of proof in criminal cases. See *In re George T.*, 33 Cal. 4th 620, 639, 93 P.3d 1007, 16 Cal. Rptr. 3d 61 (2004) ("[A] [m]inor's reference to school shootings

[a]mendment concerns. . . . And while we are mindful of universities' obligations to address serious discrimination and harassment against their students, we also are attentive to the dangers of stretching policies beyond their purpose to stifle debate, enforce dogma, or punish dissent."[21] (Citations omitted; internal quotation marks omitted.) *Abbott* v. *Pastides*, 900 F.3d 160, 179–80 (4th Cir. 2018), cert. denied, U.S. , 139 S. Ct. 1292, 203 L. Ed. 2d 428 (2019); see also *Healy* v. *James*, 408 U.S. 169, 180, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972); *NAACP* v. *Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). Nevertheless, in the absence of any facts mooring the plaintiff's statements to political or

and his dissemination of his poem in close proximity to the Santee school shooting no doubt reasonably heightened the school's concern that [the] minor might emulate the actions of previous school shooters. Certainly, school personnel were amply justified in taking action following [a fellow student's] e-mail and telephone conversation with her English teacher, but that is not the issue before us. We decide . . . only that [the] minor's poem did not constitute a criminal threat.").

[21] Some prominent commentators are concerned that "[c]urrent college students are often ambivalent, or even hostile, to the idea of free speech on campus," and have expressed "surprise" about "how much the students wanted campuses to stop offensive speech and trusted campus officials to have the power to do so. A 2015 survey by the Pew Research Institute [indicated] that four in ten college students believe that the government should be able to prevent people from publicly making statements that are offensive to minority groups. The most recent studies demonstrate that students continue to wrestle with how best to value free speech and inclusivity, with more than half of students valuing diversity and inclusivity above free speech, more than half supporting bans on hate speech, and almost a third supporting restrictions on offensive speech." (Footnote omitted.) E. Chemerinsky, "The Challenge of Free Speech on Campus," 61 Howard L.J. 585, 588 (2018); see also, e.g., M. Papandrea, "The Free Speech Rights of University Students," 101 Minn. L. Rev. 1801, 1803 (2017) (Rejecting application of government speech doctrine with respect to student speech because, "[a]though it should be clear that students, particularly college and university students, do not speak for the university, institutions of higher education are increasingly caving to various constituencies inside and outside of the university who believe that they do. Rather than appreciating the traditional role of the university as the quintessential marketplace of ideas, students, alumni, and the public frequently appear to believe that whenever a school tolerates offensive speech, the university is endorsing those viewpoints.").

Given this significant debate with respect to the vitality of freedom of speech on twenty-first century college campuses, it is understandable that the plaintiff attempts to frame his statements and gestures as those of a provocateur arguing in support of the right to bear arms, with his expulsion the result of offending the sensibilities of the university's snowflakes. See

artistic hyperbole, and given his stated access to weapons and ammunition, a reasonable person hearing the plaintiff's statements and viewing his gestures at a school in the same state as Sandy Hook would be more than justified in understanding his statements as a physical threat to the "great bazaars of ideas" themselves. (Internal quotation marks omitted.) *Doe* v. *Rector & Visitors of George Mason University*, 149 F. Supp. 3d 602, 627 (E.D. Va. 2016). Accordingly, we conclude that the trial court correctly determined that the plaintiff's statements were true threats that were not protected by the first amendment.[22]

The judgment is affirmed.

In this opinion the other justices concurred.

Doe v. *Rector & Visitors of George Mason University*, 149 F. Supp. 3d 602, 627 (E.D. Va. 2016) ("In short, controversial and sometimes offensive ideas and viewpoints are central to the educational mission of universities. It follows that university students cannot thrive without a certain thickness of skin that allows them to engage with expressions that might cause distress or discomfort . . . . The coddling of the nation's young adults by *proscribing* any expression on a university campus that is likely to be distressing or discomforting does not protect the work . . . of the school; such rules frustrate the mission of the university." [Emphasis in original; internal quotation marks omitted.]). The record of the present case is, however, squarely devoid of any evidence supporting that interpretation of the facts and, instead, supports the finding that the plaintiff's conduct was, in fact, reasonably interpreted as a true threat. See also footnotes 17 and 18 of this opinion and accompanying text.

[22] We note that the material and substantial disruption of school activities standard articulated in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 513, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), has been used, in connection with the physical safety analysis of the more recent "BONG HiTS 4 JESUS" case; *Morse* v. *Frederick*, 551 U.S. 393, 397, 407–408, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007); to permit administrative response to threats in both public universities and high schools without running afoul of the first amendment, even without consideration of whether those threatening statements rise to the level of true threats. See, e.g., *Ponce* v. *Socorro Independent School District*, supra, 508 F.3d 772 ("[W]hen a student threatens violence against a student body, his words are as much beyond the constitutional pale as yelling 'fire' in crowded theater . . . and such specific threatening speech to a school or its population is unprotected by the [f]irst [a]mendment. School administrators must be permitted to react quickly and decisively to address a threat of physical violence against their students, without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance." [Citation omitted.]); *Wisniewski* v. *Board of Education*, 494 F.3d 34, 38 (2d Cir. 2007) ("Although some courts have

assessed a student's statements concerning the killing of a school official or a fellow student against the 'true threat' standard of *Watts* . . . we think that school officials have significantly broader authority to sanction student speech than the *Watts* standard allows. With respect to school officials' authority to discipline a student's expression reasonably understood as urging violent conduct, we think the appropriate [f]irst [a]mendment standard is the one set forth by the Supreme Court in *Tinker* . . . ." [Citations omitted.]), cert. denied, 552 U.S. 1296, 128 S. Ct. 1741, 170 L. Ed. 2d 540 (2008); *Doe* v. *Rector & Visitors of George Mason University*, 132 F. Supp. 3d 712, 729–30 (E.D. Va. 2015) (after concluding that speaker's threat to shoot himself was not true threat because it did not threaten harm to his ex-girlfriend or "to anyone else besides" himself, court permitted additional discovery and deferred consideration of claim pending development of record regarding whether text message at issue originated on or off campus, and whether university interests as expressed in code of conduct justified expelling student); *J.S.* v. *Bethlehem Area School District*, 569 Pa. 638, 673–75, 807 A.2d 847 (2002) (concluding that offensive student website, although not true threat, caused "actual and substantial disruption of the work of the school," thus permitting school to impose disciplinary action pursuant to *Tinker*).

The defendants' brief and oral argument before this court initially suggested that they asked us to apply the *Tinker* standard in a college setting, which presents a significant question of constitutional law given some potentially unclear language and quotations of *Tinker* in, among other cases, *Healy* v. *James*, supra, 408 U.S. 189. See *Tatro* v. *University of Minnesota*, 816 N.W.2d 509, 519 n.5 (Minn. 2012) (declining to consider issue but noting that "controversy exists over whether the free speech standards that developed in K-12 school cases apply in the university setting"); K. Sarabyn, "The Twenty-Sixth Amendment: Resolving the Federal Circuit Split over College Students' First Amendment Rights," 14 Tex. J. C.L. & C.R. 27, 32 (2008) (discussing circuit split and arguing that twenty-sixth amendment to United States constitution instituted "age-based bright line" for full citizenship for eighteen year olds that "creates, for the purposes of free speech, a corresponding bright line between primary and secondary schools on the one hand, and universities on the other"); compare *McCauley* v. *University of the Virgin Islands*, 618 F.3d 232, 247 (3d Cir. 2010) ("Public universities have significantly less leeway in regulating student speech than public elementary or high schools. Admittedly, it is difficult to explain how this principle should be applied in practice and it is unlikely that any broad categorical rules will emerge from its application. At a minimum, the teachings of *Tinker* . . . and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities."), with *Yeasin* v. *Durham*, 719 Fed. Appx. 844, 852 (10th Cir. 2018) (observing that language from *Healy* "suggests that the Supreme Court believes that [*Tinker*'s material and substantial disruption] test applies in the university setting"), and *Ward* v. *Polite*, 667 F.3d 727, 733–34 (6th Cir. 2012) (suggesting that such standards can account in practice for differing levels of maturity between college and public school students). Having concluded that the trial court correctly determined that the plaintiff's statements and gestures were a true threat, we leave this issue to another day, particularly given the defendants' subsequent clarification at oral argument that they cited *Healy* in their brief only for the proposition that the college setting is a unique part of the factual "constellation" that informs whether the plaintiff's statements may be objectively understood to be a true threat.