STATE OF CONNECTICUT
APPELLATE COURT

A.C. 38809

STATE OF CONNECTICUT
Appellee,
v.
EDWARD F. TAUPIER
Defendant-Appellant.

JUDICIAL DISTRICT OF MIDDLESEX at MIDDLETOWN
(Hon. David P. Gold)

DEFENDANT-APPELLANT'S BRIEF

FOR THE DEFENDANT-APPELLANT

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NATURE OF THE PROCEEDINGS

The defendant was charged in a five-count, long-form information with the following crimes, all in alleged violation of the Connecticut General Statutes, hereinafter "C.G.S.": threatening in the first degree, C.G.S. sections 53a-62(a)(3), 53a-61aa(a)(3), and 53a-61(a)(1)[1]; threatening in the second degree, C.G.S. sections 53a-62(a)(3) and 53a-61(a)(1)[2]; two counts of disorderly conduct, C.G.S. section 53a-182(a)(3)[3]; and breach of peace, C.G.S. sections 53a-181(a)(3) and 53a-61(a)(1)[4]. Appendix,

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[1] A scrivener's error on the court's part left out subsection "a" from 53a-62(a)(3). The statutes read, in pertinent part, as follows:

"A person is guilty of threatening in the second degree when: ... such person threatens to commit such crime of violence in reckless disregard of the risk of causing such terror." C.G.S. 53a-62(a)(3).

"A person is guilty of threatening in the first degree when such person ... commits threatening in the second degree as provided in section 53a-62, and in commission of such offense he ... represents by his words or conduce that he posses a pistol, revolver, shotgun, rifle, machine gun or other firearm." C.G.S. 53a-61aa(a)(3).

The crime of violence was assault in the third degree: "A person is guilty of assault in the third degree when ... with criminal negligence, he causes physical injury to another by means of a deadly weapon, a dangerous instrument or an electronic defense weapon." C.G.S. 53a-61(a)(1).

[2] A scrivener's error on the court's part left our subsection "a" from 53a-62(a)(3). The statutes read, in pertinent part, as follows:

"A person is guilty of threatening in the second degree when ... such person threatens to commit such crime of violence in reckless disregard of the risk of causing terror." C.G.S. 53a-62(a)(3).

The crime of violence was assault in the third degree: "A person is guilty of assault in the third degree when ... with criminal negligence, he causes physical injury to another by means of a deadly weapon, a dangerous instrument or an electronic defense weapon." C.G.S. 53a-61(a)(1).

[3] The statute reads, in pertinent part, as follows:

"A person is guilty of disorderly conduct when, with the intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person ... by offensive or disorderly conduct, annoys or interferes with another person;..." C.G.S. 53a-182(a)(3)

[4] The statutes read, in pertinent part, as follows:

"A person is guilty of breach of peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such hereinafter "App.," p. A5. He waived his right to a jury trial, and, with the assistance of counsel, tried the case to the court before Judge David P. Gold. The trial court found the defendant guilty of all counts except threatening in the second degree, and imposed sentence as the counts threatening in the first degree, disorderly conduct and breach of peace. All but one count had as a victim the Honorable Judge Elizabeth Bozzuto. One count of disorderly conduct had as a victim a lay witness, Jennifer Verraneault.

All of the charges related to an email the defendant allegedly authored and sent privately to non-court personnel. In the email, the state claims, the defendant threatened to shoot a family court judge then overseeing the defendant's contentious divorce and custody action.

The Court heard from 25 witnesses over a period of approximately five weeks, and rendered a written decision on October 2, 2015. The court did not return a verdict as the charge of threatening in the second degree because that charge related to the same incident as supported the threatening in the first-degree conviction. App, p.71.

Thereafter, the trial court held a sentencing hearing, and the defendant was sentenced to a period of imprisonment. The defendant was released after posting an appeal bond.

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person: ... threatens to commit any crime against another person or such other person's property;..." C.G.S. 53a-181(a)(3).

The crime in question was assault in the third degree: "A person is guilty of assault in the third degree when ... with criminal negligence, he causes physical injury to another by means of a deadly weapon, a dangerous instrument or an electronic defense weapon." C.G.S. 53a-61(a)(1).

STATEMENT OF FACTS

A. The Speech At Issue In This Case.

The case revolves around an email[5] the defendant sent to six individuals on August 22, 2014 at 11:24 p.m. Like the defendant, all six of the email recipients had an interest in reform of the family courts. App., p. 74. It read, in pertinent part, as follows:

> Facts: JUST and FYI
> 1) Im still married to the that POS … we own our children, there is no decision … its 50/50 or whatever we decide. The court is dog shit and has no right to shit they don't have to rule on.
> 2) They can steal my kids from my cold dead bleeding cordite filled fists … as my 60 round mag falls to the floor and im dying as I change out to the next 30 rd…
> 3) Bozzuto[6] lives in watertown with her boys and Nanny … there is 245 yrds between her master bedroom and a cemetery that provides cover and concealment.
> 4) They could try and put me in jail but that would start the ringing of a bell that can be undone …
> 5) Someone wants to take my kids better have a f35 and smart bombs … otherwise they will be found and adjusted … they should seek shelter on the ISS (Int. space station).
> 6) BTW a 308 at 250yrd with a double pane drops .5 inches per foot beyond the glass and loses 7% of ft lbs of force @ 250yrds—non armor piercing ball ammunition
> 7) Mike may be right … unless you sleep with level 3 body armor or live on the ISS you should be careful of actions.
> 8) Fathers do not cause cavities, this is complete bullshit.
> 9) Photos of children are not illegal-
> 10) Fucking Nannies is not against the law, especially when there is no fucking going on, just ask Bozzuto … she is the ultimate Nanny fucker.

Id.

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[5] The appellant does not quarrel with the trial court's rendering of the email, and, for ease of interpreting this record, relies upon the court's decision as a source of the quotation. Consistent with the trial court's decision, the undersigned has corrected neither grammar, spelling nor syntax errors.

[6] The reference is to Superior Court Judge Elizabeth A. Bozzuto.

According to the state's Amended Information, the victims in counts one through four and six were Superior Court Judge Elizabeth P. Bozzuto; the victim in count five was Jennifer Verraneault, one of the recipients of the email. App., p. 5.

Neither the defendant nor any of its recipients sent the email on Judge Bozzuto.

B. The Email In The Context Of A Bitter Divorce

Pending before the Superior Court in the Hartford Judicial District at the time the email was sent was the case of *Taupier v. Taupier*, Docket No. FA-12-4018627-S, a case pitting the defendant in the instant case against his wife. Among the issues to be resolved by the family court was the custodial status of the couple's two minor children. App., pp.71-72. The trial court had entered certain orders prior to final judgment in the case, including an agreement that Mr. Taupier surrender his firearms and ammunition to the custody of a designated third party, and tha the children attend elementary school in Ellington, where Ms. Taupier resided, during the 2014-15 school year. Id., pp. 71-73. Given the difficulty of the case, and the length of the time it had been on the court's docket, Judge Bozzuto assumed sole responsibility for management of the case. Id., p. 72.

Mr. Taupier informed his wife in August 2014 that he intended to enroll the children in Cromwell, where he resided. Counsel for Ms. Taupier immediately filed contempt motions in the family court together with a request for an immediate hearing. Id., p. 74.

Upon receiving notice of both the contempt motion and the request for hearing, Mr. Taupier, who was pro se in the family court, sought the advice of several individuals, Ann Stevenson and Michael Nowacki, with experience as litigants in the family courts.

Both Mr. Nowacki and Ms. Stevenson shared with Mr. Taupier an interest in reform of the family courts. Id. Mr. Taupier sent the email referred to in the previous section to the Ms. Stevenson, Mr. Nowacki, Susan Skipp, Sunny Kelly, Paul Boyne and Jennifer Verraneault at 11:24 pm. On August 22, 2014. Id., p. 75.

There is no evidence that anyone read, or responded to, the email until the following morning, August 23, 2014, at no earlier than 7:51 a.m. Id., p.75. Those responses, and Mr. Taupier's reaction to them, will be discussed in second argument Section II of this brief, which challenges the trial court's application of *State v. Krijger*, 313 Conn. 434 (2014).

C. Investigation And Arrest

Law enforcement was not notified about the email until August 28, 2017, nearly one week after it was sent. On that date, Ms. Verraneault, who had alerted an attorney about the general nature of the communication, but not who the identity of the declarant, decided to name Mr. Taupier. She did so after learning of a YouTube video that had shown Ms. Taupier removing the children from the Cromwell school Mr. Taupier in which Mr. Taupier had enrolled them. Ms. Verraneault spoke to the attorney, naming Mr. Taupier as the sender of the email on August 28, 2014, forwarding a screenshot of the defendant's email. App., pp. 76-77.. The attorney forwarded the email to the family court clerk, who referred the matter to the Judicial Marshals Service. Thereafter, Judge Bozzuto was notified. The state police also were promptly notified and immediately began an investigation, applying for a search warrant for Mr. Taupier's home and an arrest warrant for Mr. Taupier on August 29, 2014. The warrants were executed the same day. Officers found 15 firearms in the defendant's home. Id., p. 78. Several of the weapons were capable of firing a shot of the sort described in the email written one week earlier. Id. p. 79.

ARGUMENT

I. The Court Erred In Finding The Speech A "True Threat" By Employing An Objective Standard And Altogether Neglecting The Issue Of Scienter

This case presents a question of first impression in both state and federal constitutional law: whether the First Amendment, and corresponding provisions of the state constitution, impose a scienter requirement before speech may qualify as a "true threat" under *Virginia v. Black*, 538 U.S. 343 (2003)? In prior cases, both the Connecticut and United States Supreme Courts have declined to reach this issue. Connecticut currently relies on a negligence standard and the United States Supreme Court recently rejected this standard on policy—not constitutional—grounds. This case includes an added layer: the allegedly threatened party was a public official and the speech at issue may have also been legal under the First Amendment's protection of violent advocacy speech. The defendant contends the state and federal constitutions demand a specific intent requirement because: (1) a person should not be punished for speech that negligently intimidates a third party, and, (2) as applied to public officials, the negligence standards permits the government to circumvent the First Amendment's protection of violent advocacy and, nonetheless, chill expression under the true threat theory.

A. Nature Of The Claim. The trial court applied a negligence standard of *mens rea* in reliance on *State v. Krijger*, 313 Conn. 343 (2013). This standard was rejected by the United States Supreme Court in *Elonis v. United States*, _ U.S. _, 135 S.Ct. 2001

(2015) on federal statutory grounds. While the trial court was on notice of *Elonis*, it relied on *Krijger's* objective, negligence based standard rather than the higher standard read into 18 U.S.C. §875(c) in *Elonis*. This warrants reversal. First, it was error for the trial court to rely on *Krijger* as a First Amendment case: that violated the defendant's federal free speech rights as well as his rights under Article First, §§ 4, 5, and 14 of the state constitution as evidenced by *Elonis*; second, and alternatively, this court should exercise its inherent supervisory powers to require a specific intent element in in the threatening statutes.

B. Relevant Law And Standard Of Review. This case presents the intersection of several bodies of law: federal and state statutory law as well as the true threat and incitement doctrines of First Amendment jurisprudence.

The question presented is legal and the standard of review is, therefore, plenary. *See e.g. State v. DeMarco*, 311 Conn. 510, 518-19 (2014). "Where the trial court examines an underlying set of facts and draws a legal conclusion from those facts, that legal conclusion is subject to plenary review by an appellate court." *State v. Morales*, 39 Conn.App. 617, 622-23 (1995). It is well settled that the court has plenary powers of review over issues of law.

The first relevant body of substantive law is the "true threat" doctrine which was most recently laid out in *Virginia v. Black*, 538 U.S. 343 (2003)(plurality). The Court reiterated the true threat doctrine:

> 'True threats' encompass those statements where 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 'protects 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.' Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

Id. 360-59. (Internal cites omitted); *see also Watts v. United States*, 394 U.S. 705, 708 (1969)(political hyperbole is not a true threat); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992). *Black* turned on a Virginia cross-burning statute: the statute outlawed cross burning with the intent to intimidate and stated that the burning of a cross was *prima facie* evidence of an intent to intimidate. *Id.* 348. It relied on two fact patterns, consolidated into one appeal: in the first, a leader of the Klu Klux Klan burned a cross at a Klan rally; in the second, a man burned a cross in his black neighbors' yard in retaliation for those neighbors complaining about his use of his back yard as a firing range. The Supreme Court held that there was no doubt that a state could lawfully proscribe cross burning *with the intent to intimidate a person*—hence burning a cross in a black neighbor's yard was illegal. *Id.* 362-63 (majority)(emphasis added). However, a plurality of the Court held that the *prima facie* evidence provision of the statute was unconstitutional because cross burning in the context of a political rally could constitute protected expression. *Id.* 363-68. The question of intent was critical to the *Black* court's analysis.

Connecticut's most recent consideration of the true threat doctrine was *Krijger*. There, the state Supreme Court held that:

> Prosecution under a statute prohibiting threatening statements is constitutionally permissible 'as long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.

Krijger, supra, 313 Conn. at 450 quoting *United States v. Malik*, 16 F.3d 45, 51 (2d. Cir.) cert. denied, 513 U.S. 968, 115 S.Ct. 435, 130 L.Ed.2d 347 (1994). Critically, the state Supreme Court has "traditionally applied" this test as an objective one and declined to "decide whether *Black* requires a subjective test." *Id.* 451 n.10. This is the test, and version of the test, the trial court applied in this case. Under *Krijger*, whether the First Amendment requires a subjective intent element is an open question. 313 Conn. at 451 n.10. The comments at issue in *Krijger* were insufficient to prove a true threat even under the negligence standard the court applied.

The Supreme Court recently opined on the question of intent in *Elonis v. United States*, _ U.S. _, 135 S.Ct. 2001 (2015). It did not reach the First Amendment question. *Id.* 2013. In interpreting 18 U.S.C. §875(c)—"mak[ing] it a crime to transmit in interstate commerce 'any communication containing any threat....to injure the person of another"—the court held that the negligence standard, used by the Third Circuit, was insufficient. The reason was that "[f]ederal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state. That understanding 'took deep and early root in American soil' and Congress left it intact here:..." *Elonis*, 134 S.Ct. at 2012. The Court did not address what mental state should be required under the statute or the First Amendment. *Id.* 2013; see also *id.* 2013-2028, *Alito J.*, dissenting in part, *Thomas, J.*, dissenting in part.

Finally, *Brandenburg v. Ohio*, 395 U.S. 444 (1969)(per curiam) sits on the periphery of the true threat line of cases. A person may advocate violent or lawless overthrow of the government: "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Black*, supra, 538 U.S. at 359 quoting *Brandenburg*, supra, 395 U.S. at 447.

> In the seminal case of *Brandenburg*...the Supreme Court held that abstract advocacy of lawlessness is protected speech under the First Amendment. Although the Court provided little explanation for this holding in its brief *per curiam* opinion, it is evident that Court recognized from our own history that such a right to advocate lawlessness is, almost paradoxically, one of the ultimate safeguards of liberty. Even in a society of laws, one of the most indispensable freedoms is that to express in the most impassioned terms the most passionate disagreement with the laws themselves, the institutions of, and created by, law, and the individual officials with whom the laws and institutions are entrusted. Without the freedom to criticize that which constrains, there is no freedom at all.

Rice v. Paladin Enter., 128 F.3d 233, 243 (4th Cir., 1997). While not an incitement or violent advocacy case *per se*, the *Brandenburg* standard is relevant to this case.

C. Preservation. This claim was preserved. Alternatively, it implicates due process and may therefore be raised pursuant to *State v. Golding,* 213 Conn. 233 (1989).

D. Argument. The law of true threats must include a specific intent requirement lest political speech be criminalized for its inadvertent effects. This is even more the case when the threatened party is a public official. A truly free society cannot impose a negligence standard on speech. One must specifically intend that his statements generate a fear of imminent harm: otherwise, the state Supreme Court has noted, "the risk of criminalizing protected speech increases when the speaker does not intend for his words to convey a real threat." *Krijger*, 313 Conn. at 451. Similarly, the law of *Brandenburg* will be impermissibly diluted if the government can circumvent *Brandenburg* protections on the grounds that its agents feel personally threatened by offensive speech.

1. The law requires a specific intent requirement so it does not criminalize negligently threatening speech.

First, the *Krijger* court's fear was realized in this case. The trial court applied a standard *nearly* and materially identical[7] to the one applied by the district court in *Elonis*. App., p. 42, ("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;" *Elonis*, supra, 135 S.Ct. at 2007 (statement made "under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the make communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual"). In *Elonis*, Justice Roberts observed that, "[t]he Government [was] at pains to characterize its position as something other than a negligence standard...." *Id.* 2012. The state will find itself in an equally insufferable position in this case because the standard applied is substantively the same the district court's standard in *Elonis*.

The state Supreme Court has interpreted other criminal statutes in the same manner and according to the same policies as the *Elonis* court. In *State v. Pond*, 315 Conn. 451 (2015) the Supreme Court read specific intent into the *mens rea* requirement of criminal conspiracy statute, General Statutes § 53a-48(a). Importantly, it did so for some of the same reasons the defendant has invoked here. The *Pond* court said of conspiracy:

[7] To the extent the trial court engaged in any First Amendment analysis, it was wholly lacking. It said "believe[d] that an objective test properly resolves the tension between the first amendment and threatening speech." *Taupier*, at 42 n.17. This statement hardly resolves the question that has divided the Federal Circuit Courts of Appeals and the United States Supreme Court.

> it stands to reason that the legislature would imposes a higher intent requirement for conspiracy than for some substantive crimes because conspiracy, by its very nature, is 'predominantly mental in composition…'…In contrast to most substantive crimes, which are defined principally by their actus rei, or guilty acts, the actual conduct required to establish a conspiracy is relatively minimal.

Pond, 315 Conn. at 475(internal cites omitted). While threatening is a substantive crime, it is not "most substantive crimes" because the *actus rei* may be the relatively thin conduct of speaking one's mind. It stands to reason, here, too that the First Amendment would require a similarly exacting specific intent requirement to insulate against inadvertent criminality: "'The law makes up, as it were, for the deficiency in the actus reus of the crime by insisting on a greater degree of *mens rea*.'" *Id*. 476 quoting J. Stannard, "Making Up for the Missing Element—A Sideways Look at Attempts," 7 Legal Stud. 194, 194 (1987).

Second, the reasonable person standard frustrates the very purpose of constitutional rights and robust First Amendment protections. It is axiomatic that the prototypical "reasonable person" is an incarnation of the majoritarian impulse that governs our political branches. "When a majority is included in a faction, the form of popular government…enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens." J. Madison, "*Federalist Papers: No. 10, The Union As A Safeguard Against Domestic Faction And Insurrection*," (1787) available at http://billofrightsinstitute.org /founding-documents/primary-source-documents/the-federalist-papers/federalist-papers-no-10/ (visited September 15, 2016). Unpopular speech needs the greatest protections against the majoritarian impulse. "A common passion or interest will, almost in every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; *and there is* *nothing to check the inducements to sacrifice the weaker party or an obnoxious individual*[8]." *Id.* (emphasis added). The reasonable person standard fails to check the common will because it is inextricably connected to the prevailing, majoritarian impulse.

Courts must consider the subjective intent of the "weaker parties," the "obnoxious individuals," and "the not very nice people" lest it convict them by way of precisely the characteristics the law purports to protect. The First Amendment protects the unreasonable person just as much as the reasonable person: if unreasonable speech is judged by the reasonable person standard, the speech loses every time. It is no longer protected. There is an unbreakable nexus between the majoritarian point of view and the reasonable person standard: the trial court's interpretation of the law injects a subtle but potent political element into a realm that is supposed to be apolitical.

2. A specific intent requirement will preclude the government from using the true threat doctrine to chill *Brandenburg* speech.

The true threat doctrine cannot take what *Brandenburg* gives: when the true threat doctrine is applied to comments about a public official, it risks criminalizing speech that *Brandenburg* legalizes. But that is precisely what will happen if the trial court's decision stands. While not a *Brandenburg*, or incitement, case *per se*, these facts lend themselves to a *Brandenburg* interpretation. The defendant circulated a missive among his political disciples; it contained a vile and repugnant message; that

[8] Though counsel is unable to find proper attribution, it is widely asserted that Justice Felix Frankfurter wrote, "It is a fair summary of constitutional history that the landmarks of our liberties have often been forged in cases involving not very nice people," in 1950. *See E.g. D.Hudson*, "Landmark Case Set Precedent On Advocating Force," First Amendment News, First Amendment Center (2009) available at http://www.firstamendmentcenter.org/ landmark-case-set-precedent-on-advocating-force (accessed September 15, 2016).

may be interpreted as advocacy of lawlessness. Yet, under *Brandenburg* it is—or at least may be—protected speech.

Brandenburg is meaningless if a person may advocate unlawful overthrow of the government but be prosecuted when the "reasonably foreseeable objective" consequence of that speech is alarm to the personal sensibilities of government officials. Recent headlines, rather than hypotheticals, prove this point. The republican-party presidential nominee recently said of the democratic nominee:

> "If she gets to pick her judges, nothing you can do, folks," [he] said, as the crowd began to boo. He quickly added: "Although the Second Amendment people — maybe there is, I don't know."

N. Corisaniti & M. Haberman, "*Donald Trump Suggests 'Second Amendment People' Could Act Against Hillary Clinton*," N.Y. Times, August 9, 2016 *available at* http://www.nytimes.com/2016/08/10/us/politics/donald-trump-hillary-clinton.html, (visited September 16, 2016). One need look no further to determine whether that comment was a threat than the fact that the United State's Secret Service had "'more than one conversation' on the topic" with the republican candidate. T. Luhby & J. Sciutto, "*Secret Service Spoke To Trump Campaign About 2nd Amendment Comment*," CNN, August 11, 2016, http://www.cnn.com/2016/08/10/politics/trump-second-amendment/(9/16/16). In many contexts, including that in which the comment was made, the Second Amendment is not a legal principle but an exhortation to gun violence. *See United States v. Malik*, 16 F.3d 45 (1994)("[R]igid adherence to the literal meaning of a communication without regard to its reasonable connotations derived from its ambience would render the statute 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"). This is *Brandenburg* speech: it suggests that persons for whom firearms are objects of patriotism or life principle ought to engage in lethal violence against the democratic candidate. *C.f. Watts*, supra, 394 U.S. at 706(Vietnam draftee said "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J."). It is offensive, dangerous, and has an insidious and corrosive effect on our political process. But it is protected by the First Amendment.

The democratic candidate could claim—and would reasonably and foreseeably feel—threatened by this gratuitous exhortation to violence. Were the republican candidate prosecuted according to the objective test applied in this case, the government would likely prevail. But then the courts would be faced with the prospect of incarcerating a major party candidate for *Brandenburg* speech that, incidentally, threatens the other candidate. That would be a significant constitutional crisis. Court's can protect *Brandenburg* from the threat of the true threat doctrine with a specific intent requirement.

3. Article First, §§ 4, 5, and 14 impose a specific intent requirement.

In the event that the Court does not find a specific intent requirement under the First Amendment, it should do so under Article First, § 4, 5, and 14[9] of the state constitution. It is well established that the federal constitution sets a floor, not a ceiling, on individual rights. *See e.g. Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 155 (2008). In construing the state constitution, courts consider the six facts set forth in *State v. Geisler*, 222 Conn. 672, 685 (1992).

Theses factors are: (1) the text of the operative constitutional provision; (2)

[9] The state Supreme Court referred to these provisions collectively as protecting free expression in *Leydon v. Greenwich*, 257 Conn. 318, 347 (2001).

> holdings and dicta of [the state Supreme Court] and the Appellate Court; (3) persuasive and relevant federal precedent; (4) persuasive sister state decisions; (5) the history of the operative constitutional provision, including the historical constitutional setting and the debates of the framers; and (6) contemporary economic and sociological considerations including relevant public policies.

Kerrigan, 289 Conn. at 157. These militate in favor of the defendant.

The text of the operative provisions marginally supports the defendant's position—particularly in the digital age. The Supreme Court noted the textual distinctions in *State v. Linares*, 232 Conn. 345, 380-81 (1995). Specifically, §14 includes a right of remonstrance in addition to a right of petition: the missive in this case fits a liberal definition of "remonstrance."

The holdings and dicta of the state's appellate courts support the defendant. The Supreme Court "explicitly…stated that the Connecticut constitution, under article first, §§ 4, 5 and 14, provides greater protection for expressive activity than that provided by the first amendment to the federal constitution." *Leydon v. Town of Greenwich*, 257 Conn. 318, 347 (2001) citing *Linares*, supra, 232 Conn. at 380-81. While *Leydon* was a public forum case, the court specifically used the phrase "expressive activity" not "expanded public forums." The email at issue here was expressive activity and, therefore, falls within *Leydon's* ambit. While the *Krijger* noted that that it traditionally applied an objective test, that tradition is neither binding nor articulated as holding or dicta of this court. *See* 313 Conn. 451 n.10.

Persuasive, relevant federal precedent is split. The Second Circuit observed that the Federal Courts of Appeals are divided on this issue in *United States v. Turner*, 720 F.3d 411, 420 n.4 (2d Cir.,2013)(noting divide but that the relevant statute in that case imposed a subjective intent element, the issue was not briefed, and subjective intent was clear from evidence). The Ninth Circuit, after analyzing the *Black* plurality and concurrences, concluded "eight Justices agreed that intent to intimidate is necessary and that the government must prove it in order to secure a conviction." *United States v. Cassel*, 408 F.3d 622, 632 (9th Cir.,2005). It was "therefore bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *Id.* 633. The Sixth Circuit claimed that *Cassel* "read too much into *Black*." *United States v. Jeffries*, 693 F.3d 473, 479 (^th Cir.,2012). The Fourth Circuit agreed with this approach in *United State v. White*, 670 F.3d 498, 508-09 (4th Cir. 2009) when it interpreted 18 U.S.C. § 875(c)—the *Elonis* statute. But *Elonis* has since been decided and the Ninth Circuit's subjective—if not specific—intent standard is ascendant and the Ninth Circuit was prescient.[10]

Sister state precedent is sparse and unremarkable. A Washington Court of Appeals recently reversed a stalking conviction based on off-colored Tweets on the grounds that the Tweets did not even meet the negligence standard: though that defendant raised the specific intent issue, the court did not reach it. *State v. Kohonen*, 192 Wn.App. 567, 583 n.9 (2016). The Colorado Court of Appeals, Fifth Division rejected the contention that, following *Black*, the First Amendment required a subjective intent requirement. *State v. Stanley*, 170 P.3d 782, 789 (2007). It preceded *Elonis* and neglected the state constitution.

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[10] The Connecticut Supreme Court compiled these cases in their entirety in *Krijger*, 313 Conn. at 451 n.10. Notably, the majority of circuits that still continued to the apply the objective standard following *Black* included the Third Circuit in *Elonis* lending further support to the defendant's contention that this issue is decided on the quality, rather than quantity, of precedent.

The history and policy considerations require few remarks. The bulk of the sections' history concerns issues of libel, slander, commercial speech, and assembly. *See W. Horton*, "*The Connecticut State Constitution: A Reference Guide*," 44-48, 72-73 (1st Ed., 1993). Contemporary concerns may include the increasingly acrimonious nature of our—perhaps oxymoronic—civil discourse and its symbiotic relationship with the digital age. Incendiary speech, however, may be pernicious to policy but remains a perquisite of liberty.

The text of §14, the *Leydon* holding, and the Ninth Circuit rationale suggest a state constitutional requirement of specific intent under the true threat doctrine.

4. Alternatively, the court should exercise its supervisory authority and impose a specific intent requirement in lieu of United States Supreme Court precedent.

Should the court find itself, for whatever reason, unwilling or unable to reach the constitutional questions in this case, these facts warrant an exercise of this court's supervisory authority. This court has used this authority in doctrinally parallel circumstances. In *State v. Polanco*, 308 Conn. 242, 256 (2013) this court was presented with United Supreme Court authority[11] that was "less than a model of clarity as to what extent its holding was constitutionally based rather than jurisprudentially based or a matter of statutory construction." Here, there is no doubt that *Elonis* was based upon statutory construction. However, the critical factor in overruling the state's prior precedent was that Second Circuit, as a result of Supreme Court precedent, "no longer provid[ed] a jurisprudential foundation for our continued use of the merger approach, and finding no compelling reason to adhere to an approach that is not in

[11] *Rutledge v. United States*, 517 U.S. 292 (1996).

conformity with the approach applied by the other Circuit Courts of Appeals, we conclude that it is an appropriate exercise of this court's supervisory authority to adopt a rule that" was consistent with policy rationales of the state and federal courts. *Id.* 260. *Elonis* makes the policy rationale of the federal courts clear in this context.

Connecticut appellate courts can more easily and legitimately exercise their supervisory authority in this case than in *Polanco*. First, they are unbound by *stare decis*: the *Krijger* court noted that it was not deciding the First Amendment question—this requires no overruling of precedent. That was not true in *Polanco*. 308 Conn. at 260-61. Second, while *Elonis* was clearly not constitutional, any savvy observer will presume that the case was decided on a theory of restraint and foretells the court's inclinations towards the First Amendment issue. *See Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984)("In exercising its power to review the constitutionality of a legislative Act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary"). Similarly and as noted, *supra*, the *Krijger* court noted the problems with the negligence standard that are raised here. This presents and honest and cautious use of this court's supervisory powers and is consistent with theories of restraint.

The jurisprudential underpinnings of *Krijger* are crumbling and it would be neither imprudent nor improper for this Court to exercise its supervisory authority pending further United States Supreme Court action.

E. Conclusion. Based upon the forgoing, this court should hold that the First Amendment and corresponding provisions of state law impose a scienter requirement of specific intent. Under that holding, this conviction is constitutionally infirm. The facts presented are not materially different that the statements made in *Elonis* which were conveyed by way of Facebook over a lengthy period of time. They are not materially different than *Watt's* statement: "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." Nor, as in *Black*, are they materially different than burning a cross at a public rally. None of these convictions survive scrutiny—certainly not under a specific intent theory. This defendant aired his grievances to a group of political acolytes in a group email—which is, essentially, a virtual political rally. Nothing in the record supports a specific intent to intimidate or alarm: this was political hyperbole and it was legal.

II. The Court Misapplied *Krijger* By Reading Into The Email Sentiments And Ideas Expressed After The Email Was Sent, And Conveyed Privately To Persons Other Than Judge Bozzuto, Thus Leading It To Convict Mr. Taupier In The Absence Of Sufficient Evidence.

In analyzing whether the defendant's August 22, 2014 email constituted a "true threat," the trial court relied extensively on *State v. Krijger*, 313 Conn. 434 (2014). While the defendant urges this court to reject the trial court's transformation of the *Krijger* decision into an objective standard devoid of scienter, an argument advanced in the preceding section, the defendant here argues in the alternative: Even if the trial court correctly read the teaching of *Krijger*, the court misapplied *Krijger*, leading it to the erroneous conclusion that Mr. Taupier's email was a true threat. The evidence was insufficient to support a conviction for any of the charges at issue in this case. The trial court's misapplication of *Krijger* transformed a test designed to interpret speech acts into the judicial equivalent of a confession booth. Victim's are not omnipotent. Not every isolated act and omission, regardless of whether it was known to the alleged "victim" at the time the speech was uttered, can be used to contextualize the speech at issue. Mr. Taupier's utterance was not a "true threat" when viewed from an objective standpoint conducted in the manner required by *Krijger*.

B. Standard of Review and Relevant Law

A First Amendment claim challenging sufficiency of the evidence is reviewed under a de novo standard. *DiMartino v. Richens*, 263 Conn. 639, 661-662 (2003).

> [Ordinarily i]n reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] established guilty beyond a reasonable doubt.

State v. Krijger, 130 Conn. App. 470, 477 (2011), citing *State v. DeLoreto*, 265 Conn. 145 (2003).

In cases claiming an abridgement of the First Amendment, the court must also "[examine] the whole record ... so as to assure ... [itself] that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.*, citing, *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964).

C. Additional Facts On Which The Court Improperly Relied

The day after the defendant sent his email to a handful of political fellow travelers dedicated to reform of the family courts, and one week before the email was republished to law enforcement officers and then to Judge Bozzuto, he had a more troubling exchange with one of the original email recipients. The trial court erroneously relied upon this second email in concluding that first email was a true threat.

Eight and one-half hours after receiving the defendant's email, Mr. Nowacki sent him the following private note: "Ted, There are disturbing comments made in this email. You will be well served to NOT send such communications to anyone." Less than an hour later, Mr. Taupier responded with the following:

> Hi Mike: the thoughts that the courts want to take my civil rights away is equally disturbing, I did not have children, to have them abused by an illegal court system.
>
> My civil rights and those of my children and family will always be protected by my breath and hands.
>
> I know where she lives and I know what I need to bring about change …
>
> These evil court assholes and self appointed devils will only bring about an escalation that will impact their personal lives and families.
>
> When they figure out they are not protected from bad things and their families are taken from them in the same way they took yours[12] then the system will change. This past week in FERGESON there was a lot of hurt caused by an illegal act, if it were my son, shot, there would be an old testament response.
>
> 2nd amendment rights are around to keep a police state from violating my families rights.
>
> If they – courts … need sheeple they will have to look elsewhere. If they feel it's disturbing that I will fiercely protect my family with all my life … they would be correct, I will gladly accept my death and theirs protecting my civil rights under my uniform code of justice.
>
> They do not want me to escalate … and they know I will gladly …
>
> I've seen years of fighting go un-noticed, people are still suffering … Judges still fucking sheeple over. Time to change the game.
>
> I don't make threats, I present facts and arguments. The argument today is what has all the energy that has expended done to really effect change, the bottom line is – insanity is defined as doing something over and over and expecting a different outcome … we should all be done … and change the game to get results … that's what Thomas Jefferson wrote about constantly …

[12] Mr. Nowacki is himself no stranger to the disappointments wrought in the family courts. See, *State v. Nowacki*, 111 A. 3d 911 (2015).

> Don't be disturbed ... be happy there are new new minds taking up a fight to change a system.
>
> Here is my daily prayer:
>
> > I will never quit. I persevere and thrive on adversity.
> >
> > My Nation and Family expects me to be physically harder and mentally stronger than my enemies.
> >
> > If knocked down, I will get back up, every time.
> >
> > I will draw on every remaining ounce of strength to protect my FAMILY & teammates and to accomplish our mission.
> >
> > I am never out of the fight. – ML

App., p. 75.

To which Mr. Nowacki promptly responded: "Violence is not a rational response to injustice. Please refrain from communicating with me if you are going to allude to violence as a response." Id. Mr. Taupier had no communication beyond the group email with the other "victim" in this case, Jennifer Verraneault.

The trial court also relied upon a search of the defendant's residence one week after the email was sent. Police found operable firearms capable of firing the rounds mentioned in the offensive email. App., p. 79.[13]

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[13] Although the identity of the sender of the email at the center of this case was never seriously contested, the trial court, correctly, made findings that Mr. Taupier was the sender. It did so in part by relying on a radio interview the defendant gave on January 6, 2015, a transcript was submitted into evidence. App., p. 80. That interview, thought not as inflammatory as the email send to Mr Nowacki, is steeped in emphatic speech about the defendant's sense of outrage over how the family court, and Judge Bozzuto, treated him in his pending litigation. Although discussed ostensibly for purposes of proving identity, the court relied on the contents of this email in determining that Mr. Taupier had uttered a true threat in the email sent months earlier, another clear misapplication of *Krijger*.

D. The *Krijger* Test Was Intended To Contextualize The Speech In Question, Not To Serve As A Confessional-Like Test Of The Speaker's Intentions As Judged From The Perspective Of A Party With Knowledge Of Events Unknown To The "Victim" At The Time The Utterance Was Made.

Our Supreme Court distinguishes true threats from "statements that seek to communicate a belief or idea, such as political hyperbole or a mere joke, which are protected." *State v. Krijger*, 313 Conn. 434, 448-450 (2014), citing, *State v. DeLoreto*, 265 Conn. 145, 155 (2003). "True threats encompass those statements [through which] the speaker means to communicate 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." *Krijger*, at 448-450, citing, *Virginia v. Black*, 538 U.S. 343, 358-360 (2003).

Assuming, arguendo, that an objective test does apply, it was improperly applied here. *Krijger* invited a consideration of ambiguous speech in the context in which the utterance was made; the trial court's analysis here detached the speech from its context, and considered factors unknown, and unknowable, to those who utlimately received the email. The standard is the *actual* context, not omnipotence. The trial court here transformed the objective standard, what a reasonable person hearing the speech might believe, into something far broader, and unheralded, in our law. The objective standard was never intended to be a confessional standard, where all that is known to the reviewing court is both relevant and material, regardless of whether the alleged victims were aware of it. The objective standard is not quasi-priestly.

Krijger invites a trial court to consider the speech alleged to be a true threat "in light of the[...] entire factual context, including the surrounding events and reaction of the listeners." *Krijger*. at 450. The trial court read this to be an invitation to disregard any temporal or existential limitation on what constitutes "context." Speech, not biography, is what must constitute a true threat. The offending speech must be "on its face and in the circumstances in which it is [uttered,] so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." Id. The trial court's abject disregard of this limitation renders the decision here a chilling application of the censor's search for damning facts on the life history of the accused; the trial court's decision is Orwellian in scope.

Among the factors *Krijger* encourages a court to consider are the words themselves, id., at 456, the prior relationship of the parties, id. 454, the circumstances immediately preceding the contested speech, id., the circumstances following the contested speech, id., nature of the alleged threat and the defendant's capacity to carry it out, id., and the reactions of the recipients of the contested speech, id.. However, *Krijger* was careful to impose substantive limits on the context to be considered, narrowing the focus to that of the recipient of the communication who was familiar with the statement's context.

> Surely an equivocal [statement] with equal chance of being interpreted innocuously or harmfully should not, in and of itself, [demonstrate] ... beyond a reasonable doubt that is a threat. But once sufficient extrinsic evidence, capable of showing beyond a reasonable doubt that an ordinary *and reasonable recipient familiar with the context of the [statement]* would interpret it as a threat, has been adduced, the trial court should submit the case to the ... [factfinder].

Id, at 458, (emphasis added; citations and quotation omitted); citing *United States v. Barclay*, 452 F.2d 930, 933 (8th Cir. 1971); *United States v. Malik*, 16 F.3d 45, 50 (2d Cir.), cert. denied, 513 U.S. 968 (1995).

As Judge Lavine noted in his dissent in the Appellate Court decision reversed by the Supreme Court in *Krijger*, there is a danger in "too much surmise, too much reading into the statements, and too much interpretation to conclude beyond a reasonable doubt that a reasonable person would view misguided vitriol as a serious threat to do physical violence, ..." *State v. Krijger*, 130 Conn. App. 470, 490 (2011). The trial court's reliance on a "context" unknown to the alleged victims at the time the speech was uttered is the very sort of "reading into" an utterance that Judge Lavine feared. Clearly, a fellow member of the judiciary deserves the law's protection from potential threats, but not at the price of misapplying the law.

1. *Krijger's* Scope Was Limited To The Context Arising BetweenThe Declarant And The Alleged Victim; The Court Held Mere Hyperbolic Speech, Though Ugly, To Be Insufficient To Support A Conviction Involving A "True Threat."

Krijger's consideration of the speech at issue in that case is instructive.

In *Krijger*, the defendant told a man whose son had been in a serious car accident: "more of what happened to your son is going to happen to you," assuring the man "I'm going to be there to watch it happen." Both the declarant and the listener exchanged obscene remarks before and after this speech. *Krijger* at 439-440.

The speech had no value whatsoever as a means of conveying political ideas: it conveyed no substantive political message, no hope for reform. In a word, it was vile – it could not be called "political hyperbole;" it was mere expressive speech, pure hyperbole. But was it a true threat?

The relationship of the parties mattered a great deal to the *Krijger* court. The declarant was involved in a lengthy dispute with the Town of Waterford's zoning officials. The "victim" was the town attorney. The offensive speech was uttered immediately after the declarant heard the "victim" tell a judge that the town expected to seek financial sanctions against the declarant as the men left the courthouse.

The circumstances immediately preceding the contested utterance involve face-to-face contact between the declarant and the "victim." The two men apparently appeared in court together; the utterance was made as the men left the court after a contested hearing. The speech was uttered directly at the "victim" while the declarant was presumably still in the heat of the moment.

As to the declarant's capacity to carry out the "threat," the *Krijger* court conducted no real analysis, reasoning, perhaps, that the ability to arrange a car accident required no special skill, equipment or training. The *Krijger* court certainly did not do what the court did in Mr. Taupier's case: rely extensively on after-acquired evidence obtained by third-parties who were not recipients of the utterance or present at the very time the utterance was made.

Finally, in *Krijger*, the court noted that the "victim" at first did not seek to file a complaint against the defendant, only later changing his mind and deciding to do so.

This multi-factored analysis in *Krijger* led the Supreme Court to conclude that the declarant's hyperbolic utterance was insufficient to sustain his conviction as it as not a true threat.

2. Applying *Krijger* In This Case Should Yield The Same Result: A Ruling That The Speech In Question Was Not A "True Threat" And Was Therefore Protected Speech.

There is a big-brother like quality to the trial court's application of *Krijger* to this facts of this case that is offensive not just in the context of the First Amendment, but is also deeply flawed as a matter of fundamental fairness. Simply put, the trial court relied upon after-acquired evidence in the form of other speech involving non-victims, evidence seized from the declarant's home days after the utterance in question, and other events occurring long after the offensive speech was uttered to interpret its meaning. *Krijger* never intended to burden isolated speech acts in such a matter, and due process prohibits transformation of an objective standard for evaluating an utterance into a roving eye in the sky capable of seeing all and knowing all, regardless of what the "victims" either perceived, or even had the means to know about.

a. The speech acts in both *Krijger* and the instant case are offensive.

The appellant here concedes that the utterance for which he is charged is ugly, offensive and devoid of substantive political content – it straddles a line the law is entitled to draw. But it does not cross the line separating protected speech from a true threat. Mr. Taupier's speech is identical to that uttered in *Krijger*, it is, as was the speech in *Krijger*, both "offensive" and "repugnant." Yet as in *Krijger*, the speech fails to articulate a true threat, and is therefore protected. Indeed, the speech act in *Krijger* was more threatening by far than the words uttered in the instant case.

First, in *Krijger*, the offensive utterance was made directly to the target. There was nothing ambiguous about the speech. The "victim" would be in a accident similar to the one which injured his son. The declarant would be there to see it. This was not conveyed in the subjunctive. "[M]ore of what happened to your son is going to happen to you," the declarant said. "I'm going to be there to watch it happen," he promised. These words were spoken immediately after the two had confronted one another as adversaries in a courtroom, where the "victim" announced that his client would be seeking financial sanctions against the declarant. The speech was delivered directly to the victim by the accused, in an immediate context rife with tension. No one had to break the news to the victim that an utterance had been made days earlier; not one had to rely upon an interpretive gloss of evidence consisting of other communications, interviews and items seized after the words were uttered.

b. Unlike *Krijger*, the offensive speech was never directed toward the purported "victim," and, when law enforcement officers made the "victim" aware of the speech, many days had passed.

Contrast the speech in *Krijger* with the speech at issue here.

Mr. Taupier did not speak, in any medium, to Judge Bozzuto. He showed no intent to have his email made known to her. Even on a recklessness standard, what evidence is there in this record to suggest he was aware of a risk that his comments would be made known to the judge? The comments were made to third parties in a private setting.

The judge had not announced intentions to cause harm to the defendant, as had the town attorney in *Krijger* – a hearing in Mr. Taupier's case was imminent. He was posturing, venting to friends and fellow travelers. Unlike the case in *Elonis*, in which the Supreme Court cautioned about reading too much into mere speech acts, Mr. Taupier's comments were not published on Facebook, a public site; Mr. Taupier's speech was sent privately, on an email to a discrete list of six people, one of whom, for reasons of her own, saw fit to republish the material to law enforcement. Mr. Taupier's hostile speech did not convey a promise to cause harm; it was expressed in the language of contingencies, and sounds much like drunken bluster:

> "2) They can steal my kids from my cold dead bleeding cordite filled fists ... as my 60 round mag falls to the floor and im dying as I change out to the next 30 rd...
> 3) Bozzuto[14] lives in watertown with her boys and Nanny ... there is 245 yrds between her master bedroom and a cemetery that provides cover and concealment.
> 4) They could try and put me in jail but that would start the ringing of a bell that can be undone ...
> 5) Someone wants to take my kids better have a f35 and smart bombs ... otherwise they will be found and adjusted ... they should seek shelter on the ISS (Int. space station)."

App., p. 74. More than a week passed until this bluster found its way to the judge, and, when it did, it did so not as a result of anything the defendant did, but as a result of law enforcement officers bringing the words to the judge's attention. The contact between declarant and "victim" in this case is attenuated, distant and expressed in the subjunctive. No matter how ugly the speech, it stretches things to suggest that this is a threat directed at the judge.

In *Krijger*, the offensive speech was uttered moments after a hostile interaction between the declarant and "victim." That is unlike the contact here. As the trial court noted, the event apparently precipitating the speech at issue here was a decision by an attorney for Mr. Taupier's wife to file an emergency ex parte order of custody. Mr. Taupier received those papers via email on August 22, 2014. The papers became a subject of email communication between Mr. Taupier and others in his support network that evening. He sent the email for which he was convicted at 11:24 p.m. that evening.

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[14] The reference is to Superior Court Judge Elizabeth A. Bozzuto.

App.,, p. 74. Nothing in the record suggests that the "victim," Judge Bozzuto, was ever even aware that the email was sent until August 28, 2014 – almost one week later -- when a message from a Judicial Marshal informed her. App., p. 79.

c. The Presence Of Operable Firearms In Mr. Taupier's Home And The Email He Sent To A Person Other Than The "Victim" The Day After The Offensive Email Was Sent Shed No Light Whatsoever On What A Reasonable Recipient Familiar With The Context Of The Statement Would Regard As A Threat.

The trial court transformed the reasonable recipient standard into that of a reasonable jurist, armed with a full biography, not a simple statement in the context in which it was uttered. That is not what *Krijger* teaches. Nothing in the trial court's decision, nor in the record, supports the conclusion that Judge Bozzuto was made aware by Mr. Taupier of the fact that there were operable weapons in his home[15], or that he provided a menacing gloss to the email he sent to six friends in the private email he sent the next day to Mr. Nowacki. By including this material in its analysis, the trial court transformed *Krijger* into something unrecognizable, rendering the true threat into an existential evaluation of a speaker at the time a statement is made, rather than an evaluation of whether an utterance would be regarded as a threat to a victim familiar with the context of the speaker's statement. No case law supports such a broad application of *Krijger*.

[15] The weapons were not seized from the defendant's home until August 29, 2014, one week after the email at issue was sent. App., p. 76. Whether the warrant was justified is itself an open question. In the context of this appeal, it a question the court need not reach. The weapons were seized pursuant to a warrant the permitted law enforcement officers to penetrate the defendant's veil of privacy; the things seized in his home a week after he sent a private email were in no way knowable to the victims or the public at large. The items lacked the ability to place speech in context or to intimidate or terrorize anyone.

III. Whether The Mere Sending Of This Email Was Sufficient To Support Either The Charges Of Disorderly Conduct Or Breach Of Peace As To Either Judge Bozzuto Or Ms. Verraneault

A. The Court Repeated The Same Errors In Neglecting Scienter And In Misapplying Krijger As To The Lone Count Involving Ms. Verraneault

The same infirmity both as to the court's discount of scienter and as to the overbroad manner in which *Krijger* was applied as regard the threateining and breach of peace counts counts involving Judge Bozzuto infect court's decision as to the disorderly conduct counts as to Judge Bozzuto and Ms. Verraneault.

B. Standard of Review And Relevant Law

A First Amendment claim challenging sufficiency of the evidence is reviewed under a de novo standard. *DiMartino v. Richens*, 263 Conn. 639, 661-662 (2003).

> [Ordinarily i]n reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] established guilty beyond a reasonable doubt.

State v. Krijger, 130 Conn. App. 470, 477 (2011), citing *State v. DeLoreto*, 265 Conn. 145 (2003).

In cases claiming an abridgement of the First Amendment, the court must also "[examine] the whole record ... so as to assure ... [itself] that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.,* citing, *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964).

C. Additional Facts On Which The Court Relied

Ms. Verraneault was among six recipients of the email sent by Mr. Taupier at 11:24 p.m. on August 22, 2014. App, p. 71. The following morning, Ms. Verraneault sent

Mr. Taupier an email telling him she was worried about him. The appellant did not respond to that email. App., pp 73-74. Over the next several days, Ms. Verraneault discussed the email with Minne Gonzalez, a Connecticut State Representative, and with Attorney Linda Allard. Ms. Verraneault did not identify either the defendant or Judge Bozzuto in those conversations. Id. It was only after being alerted by Rep. Gonzalez on August 27, 2014 that the she had seen a video of the Taupier children being removed from the school in Cromwell that Ms. Verraneault concluded that Mr. Taupier might be driven "over the edge" that she contacted Attorney Allard again, this time identifying Mr. Taupier and Judge Bozzuto by name and sending to Attorney Allard a screen shot of the offensive email. Id. This latter communication, five days after the email was sent, and relying on an extrinsic video unrelated to the utterance in the email precipitated the police investigation. Id.

D. Ms. Verraneault Was Only Alarmed When An Event Unrelated To The Speech At Issue Cast A New Light On The Utterance; This After-Acquired Evidence Sheds No Light On How A Reasonable Recipient Of The Email Days Earlier Would Have Interpreted It.

There is no denying that Mr. Taupier was frustrated by the course his family court case was taking, and that he expressed that frustration in a private email in menacing terms. When he did so, both his identity, and the identity of the judge against whom he railed were known to Ms. Verraneault. She did nothing with that information for five days other than to discuss it in general terms with an attorney and a state representative. It was only when she learned that another event had taken place, an event likely to enrage Mr. Taupier, that she came to regard Mr. Taupier as a loose cannon ready to discharge. Apparently, the email she received was not enough to support that conclusion. That is, no doubt, due to its ambiguity and expressive character. Far from being a threat to do violence, the utterance is emotive speech expressed not in the indicative, but in the subjunctive mood.

Krijger warned about such loose construction of speech. As Judge Lavine noted in the Appellate Court dissent cited with the approval by the Supreme Court, there is a danger that "too much surmise, too much reading into the statements, and too much interpretation [may be required] to conclude beyond a reasonable doubt that a reasonable person would view misguided vitriol as a serious threat to do physical violence, ..." *State v. Krijger*, 130 Conn. App. 470, 490 (2011). That is precisely what happened here. Were Mr. Taupier's speech truly a threat, a sense of menace would have immediately crystallized; it would not have taken subsequent events to precipitate a reaction.

Ms. Verraneault undoubtedly experienced "inconvenience, annoyance or alarm" upon receipt of the email. But, as argued elsewhere in this brief, the utterance was not a true threat, and therefore her tender sensibilities should be of no moment to this court. Clearly upon seeing the words, her first instinct was not to reach out to Judge Bozutto and to warn of a threat to her safety. Rather, she reached out to Mr. Taupier, recognizing that the man was in pain. Even when she finally did disclose his identity some five days after receipt of the email, she did so not because she believed that Judge Bozzuto was in danger, but because she was worried about the defendant.

The emotions generated in contested custody cases are raw and sometimes violent. Mr. Taupier experienced those emotions and expressed them privately to fellow travelers in the valley of despair known as the family courts. He did not utter true threats. The trial court could only reach the conclusion that he had by substituting the perspective of the ominiscient observer for that of the reasonable recipient of the utterance and that recipient's awareness of the context of the speech. This transformation of perspective is a chilling step in the direction of something like censorship, where only safe thoughts can be uttered and the totality of one's experience can be weighed in a balance to make emotive speech look sinister. Who can withstand such a challenge to expressive freedom?

III. CONCLUSION

The appellant requests that this court reverse the judgment of conviction as to all counts and remand the case to trial court for the entry of a judgment of acquittal.

Respectfully submitted,

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CERTIFICATION

The undersigned certifies, in conformity with Connecticut Practice Book § 67-2, that:

1) The electronically submitted copy of this brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom and e-mail address has been provided;
2) The electronically submitted brief and appendix and the filed paper brief has been redacted or does not contain the names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law;
3) A copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of this appeal, in compliance with Practice Book §62-7;
4) The brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and
5) The brief complies with all provisions of this rule.

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