LAVERY, C. J., dissenting. The majority's opinion is clearly contrary to the United States Supreme Court's holding in *Davis* v. *Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), when the majority upholds the trial court's charge that the jury could not consider the effect of marijuana use on the state's key witness, the only witness who identified the defendant as the shooter. By so doing, the majority denies the jury, as the sole trier of fact and credibility, the right to consider facts from which it could draw inferences about the reliability and credibility of the witness. Thus, I respectfully dissent from the majority's conclusion that the court's instruction[1] that the jury could not consider the effect on the state's key witness of the witness' smoking of five marijuana joints shortly before the shooting did not violate a fundamental constitutional right.

The majority asserts that we may only review the defendant's claim, if at all, under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), because the defendant failed adequately to object to the claimed error in the instruction. Although I would find, as discussed in this dissenting opinion, that the four requirements of *Golding* have been met in this case, I would conclude that the defendant adequately preserved this

claim for direct review by this court, thus obviating the need to resort to *Golding*.

It is undisputed that the codefendant, Duane Clark, objected to the instruction and took an exception at the time the court charged the jury. Our Supreme Court has held, in another case in which only one of two codefendants objected to inappropriate comments by the prosecutor during closing arguments, that "the failure by this defendant fully to challenge the conduct of the prosecutor at trial would not be dispositive, since his codefendant *adequately alerted the trial court to the possibility of error in a timely fashion*." (Emphasis added.) *State* v. *Pelletier*, 196 Conn. 32, 34, 490 A.2d 515 (1985); see also *State* v. *Jones*, 193 Conn. 70, 88, 475 A.2d 1087 (1984) (purpose of requiring party to except is to alert court to alleged impropriety while time exists to correct it without need for new trial). Here, the codefendant's exception to the instructions fully alerted the court to the alleged impropriety. Thus, the failure of *this* defendant to raise the same exception should not deprive him of the ability to challenge the instruction here.

The majority concludes that the defendant's claim that the court improperly instructed the jury not to consider the effect of marijuana use on the credibility of the state's key witness is not reviewable under *Golding* because the instruction did not deprive the defendant of a fundamental constitutional right. I disagree with this characterization of the defendant's claim since the jury instruction at issue violated his right to confront and impeach a witness against him, a right guaranteed both by the sixth amendment to the United States constitution and by article first, § 8, of the constitution of Connecticut.[2]

The majority reasons that not all claims of instructional error are constitutional in nature and cites *State* v. *Dash*, 242 Conn. 143, 152, 698 A.2d 297 (1997), for the proposition that "claimed instructional errors regarding *general principles of credibility* of witnesses are not constitutional in nature." (Emphasis added; internal quotation marks omitted.)

While these two propositions put forth by the majority as its basis for dismissing this claim as nonconstitutional are true, they do not prove the point. First, the error claimed here is not about general principles of credibility of witnesses. The error claimed here concerns *one* instruction about the credibility of *one* witness. Second, the fact that not all instructional errors are constitutional in nature does not mean that *this* instructional error claim is not constitutional in nature.

As the United States Supreme Court stated in *Davis*: "[I]t seems clear . . . that to make any [effort to impeach a witness] effective, defense counsel should [be] permitted to expose to the jury the facts from

which jurors, *as the sole triers of fact and credibility*, could appropriately draw inferences relating to the reliability of the witness.'' (Emphasis added.) *Davis* v. *Alaska*, supra, 415 U.S. 318; see also *State* v. *Santiago*, 224 Conn. 325, 331, 618 A.2d 32 (1992); *State* v. *Lubesky*, 195 Conn. 475, 482, 488 A.2d 1239 (1985).

This court previously has stated that ''a criminal defendant's right to impeach the witnesses against him implicates his constitutional right to confrontation. *State* v. *Rodriguez*, 180 Conn. 382, 393, 429 A.2d 919 (1980). The confrontation clause gives the defendant the right to confront the witnesses against him.'' *State* v. *Menzies*, 26 Conn. App. 674, 684, 603 A.2d 419, cert. denied, 221 Conn. 924, 608 A.2d 690 (1992). ''The denial or undue restriction of the right to confrontation constitutes *constitutional error*. *Davis* v. *Alaska*, [supra, 415 U.S. 318]; *State* v. *Ouellette*, 190 Conn. 84, 101, 459 A.2d 1005 (1983).'' (Emphasis added.) *State* v. *Streater*, 36 Conn. App. 345, 352, 650 A.2d 632 (1994), cert. denied, 232 Conn. 908, 653 A.2d 195 (1995); see also *State* v. *Lee*, 229 Conn. 60, 70, 640 A.2d 553 (1994).

Because the defendant elected a jury trial, he had a right to have all questions of fact decided by the jury, which courts have often referred to as ''the sole triers of fact and credibility . . . .'' *Davis* v. *Alaska*, supra, 415 U.S. 318; *State* v. *Santiago*, supra, 224 Conn. 331; *State* v. *Jones*, 60 Conn. App. 866, 869, 761 A.2d 789 (2000). In its capacity as the trier of fact, the jury ''is the judge of the credibility of all the witnesses and the weight to be given their testimony and, therefore, has the right to accept part or disregard part of a witness' testimony.'' (Internal quotation marks omitted.) *In re Deana E.*, 61 Conn. App. 197, 208, 763 A.2d 45 (2000).

This court previously has stated that the effect of alcohol consumption on a witness' ability accurately to observe and later recall what he observed ''is an effect which is common knowledge and is an inference which is clearly within the ability of the jurors, as laypersons, to draw based on their own common knowledge and experience. The jury may, without the aid of expert testimony, use the consumption of alcohol as a basis on which to *infer* impairment of ability to observe and recall accurately.'' (Emphasis added.) *State* v. *Heinz*, 3 Conn. App. 80, 86, 485 A.2d 1321 (1984), citing *D'Amato* v. *Johnson*, 140 Conn. 54, 58, 97 A.2d 893 (1953) (intoxication and its accompaniments are a matter of common knowledge).

In addition, the state, on prior occasions, has successfully impeached a witness by inviting the jury to draw inferences from the witness' use of marijuana, and our Supreme Court has endorsed such a practice. In *State* v. *Person*, 215 Conn. 653, 577 A.2d 1036 (1990), cert. denied, 498 U.S. 1048, 111 S. Ct. 756, 112 L. Ed. 2d 776 (1991), the state's attorney had questioned a defense witness about his use of marijuana. Justifying this line

of questioning, the state's attorney argued: "It's highly relevant. I claim that as highly relevant. He has testified as far as *perceptions of what he observed, what he heard, what he saw, his observations*. And, my point here is that he was not in complete control of his faculties . . . ." (Emphasis added; internal quotation marks omitted.) Id., 661 n.4. Our Supreme Court noted that the state "sought to raise doubt as to [the witness'] ability to observe and perceive events, an entirely permissible subject . . . ." Id., 661. In addition, our Supreme Court noted in *Person* that "[t]he *prosecutor* may not express his own opinion, either directly or indirectly, as to the credibility of witnesses." (Emphasis added; internal quotation marks omitted.) Id., 666 n.8.

Prior to the Supreme Court's decision in *Person*, this court considered the use of testimony about drug use for impeachment purposes in *State* v. *Person*, 20 Conn. App. 115, 564 A.2d 626 (1989), aff'd, 215 Conn. 653, 577 A.2d 1036 (1990), cert. denied, 498 U.S. 1048, 111 S. Ct. 756, 112 L. Ed. 2d 776 (1991). In *Person*, we stated that, "[t]he prosecutor's initial purpose in questioning [the witness] regarding his use of marijuana was to impeach his credibility by casting doubt on his ability to perceive and recall the events that were the subject of his testimony. The capacity of a witness to observe, recollect and narrate an occurrence is a proper subject of inquiry on cross-examination. . . . *Consumption of alcohol or drugs obviously can impair an individual's ability to perceive and recall accurately* . . . ." (Citation omitted; emphasis added.) Id. 121–22.

Where the issue of impeaching a witness' credibility by his drug or alcohol use has arisen in the past, neither this court nor our Supreme Court has required, as a predicate, that an expert witness instruct the jury as to the effects of alcohol or drugs on the witness' ability to perceive and recall events. This has been true whether the drug in question was alcohol, marijuana or cocaine.

There have been a number of cases in which both this court and our Supreme Court have held that ordinary people, namely, jurors, can judge for themselves whether a witness' admitted use of drugs would, in their opinion, affect that witness' credibility. "The trier of fact *need not close its eyes to matters of common knowledge solely because the evidence includes no expert testimony on these matters*." (Emphasis added.) *Way* v. *Pavent*, 179 Conn. 377, 380, 426 A.2d 780 (1979). In *Way*, the plaintiff had consumed ten glasses of beer and, without any expert testimony, the Supreme Court approved of permitting the jury to draw its own inferences on the effects of that quantity of alcohol, finding it to be a "[matter] of common knowledge . . . ." Id.

If, in 1979, the effects of ten ten-ounce glasses of beer were common knowledge, then it is fair to say that in 2001, the effects of several marijuana cigarettes

are common knowledge. In fact, in 1993, this court approved of a trial court's statement to a jury that "the effect of alcohol on a person and also the effect of marijuana on a person . . . [are] probably within your common knowledge, but [defense counsel] has asked me to allow this to be presented as an exhibit so that he could argue from this what he feels the marijuana and alcohol, what role they played in this case. So . . . it's offered solely for the purpose of explaining to you *something you already know, the effect of marijuana* . . . on a person." (Emphasis added.) *State* v. *Charlton*, 30 Conn. App. 359, 368–69 n.9, 620 A.2d 1297, cert. denied, 225 Conn. 922, 625 A.2d 824 (1993).

I therefore would conclude that it was improper for the trial court to instruct the jury not to draw any conclusions in the absence of testimony, expert or otherwise, as to the probable effects of the witness' smoking of five marijuana joints shortly before the incident on the night of the shooting on his ability to perceive and recall accurately the events. I also would conclude, for the reasons stated previously, that this impropriety was constitutional in nature, as it violated the defendant's fundamental constitutional right to confront his accusers.

Having concluded that the second requirement of *Golding* has been met, I address the other three requirements.[3] There is an adequate record. Although the defendant did not raise the issue at trial, his codefendant did so on several occasions. Because this was a joint trial, any claim by one defendant as to an improper jury instruction, unless the instruction was directed to the jury to apply only to that defendant, which was not the case here, put the trial court on notice of the claimed impropriety in its instructions. The failure by *this* defendant fully to challenge the conduct of the court at trial is not dispositive because his codefendant adequately alerted the court to the possibility of error in a timely fashion. See *State* v. *Pelletier*, supra, 196 Conn. 34.

The third *Golding* requirement, that the alleged violation clearly exists and clearly deprived the defendant of a fair trial, also has been met in this case. The court's instruction precluded the jury from rejecting the witness' testimony as incredible on the basis of his use of marijuana. Absent this instruction, the jury might well have rejected his testimony in whole. Had the jury done so, it would inexorably have reached the conclusion that insufficient evidence existed to convict the defendant of murder as an accessory, since the witness supplied the only evidence that the defendant fired a gun at the scene. Precluding the jury from reaching this conclusion deprived the defendant of a fair trial.

Finally, the fourth *Golding* requirement, that the state has failed to prove the harmlessness of the alleged constitutional violation beyond a reasonable doubt, has

also been met. The witness whose credibility the defendant sought to place in doubt on the basis of his use of marijuana shortly prior to the shooting (a fact admitted by all parties and thus beyond question) provided the most harmful testimony against the defendant. He alone testified to seeing the defendant fire a gun and to hearing the codefendant instruct the defendant to do so. Without this testimony, the jury would have had no evidence that the defendant was in possession of a gun at the scene, the second count on which he was convicted. Without this testimony, the jury would have lacked the evidence the majority rightly points to as the two facts supporting the defendant's conviction of accessory to murder, namely, that the defendant ''fired multiple shots from a nine millimeter handgun at the scene'' and that the defendant ''did this in response to someone saying 'shoot the mother . . . .' '' I cannot say that the alleged constitutional violation was harmless.

Because this action precluded the jury from considering important facts bearing on the credibility of the only witness[4] who placed the defendant at the scene and in possession of a gun, I would find that the instruction was improper and satisfies all of the *Golding* requirements. I therefore would reverse and remand the case for a new trial.

[1] The relevant portion of the court's instruction is as follows: ''Also you have heard testimony that [Leroy] Townsend smoked marijuana the night of the shooting. There is no evidence as to what effect it had on him. Because there is no such evidence, you must not speculate that he was or was not affected by it or how he was affected by it.'' Counsel for the codefendant, Duane Clark, objected to this portion of the charge, and the court declined to reinstruct the jury. See *State* v. *Clark*, 62 Conn. App. 204, A.2d (2001).

[2] 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 . . . .''

Article first, § 8, of the constitution of Connecticut provides in relevant part: ''In all criminal prosecutions, the accused shall have a right . . . to be confronted by the witnesses against him . . . .''

[3] Because the majority concluded that the second prong of *Golding* was not satisfied, it did not analyze the other three prongs, as all four must be satisfied for a claim to be successful.

[4] The witness' credibility was the key factor in the trial. He was impeached with prior felonies and inconsistent statements. He came forward as a witness three weeks after the incident, when he was incarcerated. Further, the witness' own cousin testified that he was a pathological liar.