IN RE DANIEL D. ET AL.*
(AC 45891)

Alvord, Cradle and Clark, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to her minor children, D and J, who have been in foster care since their discharge from a hospital after their births. The Department of Children and Families had been involved with the mother since she threatened to harm her

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the court.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

daughter L, and the petitioner, the Commissioner of Children and Families, had previously terminated the mother's rights as to L and another child, R. Shortly after D was born, the petitioner filed a motion for an order of temporary custody and a neglect petition, and the order of temporary custody was granted the same day. The trial court ordered specific steps and set goals to facilitate the mother's reunification with D, requiring her, inter alia, to engage in parent and individual counseling. Thereafter, D was adjudicated neglected and committed to the care of the petitioner. Shortly after J was born, the petitioner filed a motion for an order of temporary custody and a neglect petition, and the order of temporary custody was granted the same day. The trial court ordered the same specific goals and set steps as it had set for D, but the goals were more specific in scope and required the mother, inter alia, to identify and to address her history of personal violence, trauma, and threats, as identified by a court-appointed psychologist, as well as to address her use of violent threats against her children. After a consolidated trial, the court adjudicated J neglected and terminated the mother's parental rights as to both D and J. *Held*:

1. The respondent mother could not prevail on her claim that the trial court committed harmful error when it admitted into evidence under a provision (§ 8-4 (a)) of the Connecticut Code of Evidence, the business record exception to the hearsay rule, certain summary reports by a department service provider that it relied on to reach its decision to terminate her parental rights: even if this court were to conclude that the summaries, previously prepared by a department service provider in the context of reunification efforts of the mother as to L, constituted inadmissible hearsay that the trial court improperly admitted, the mother failed to demonstrate that she was harmed by their admission, as the information in the summaries was merely cumulative of other validly admitted evidence of the mother's resistance to the department's recommendations, including the department's two social studies and the report of a court-appointed psychologist, both of which had been admitted into evidence without objection, and the testimony of the department's social worker and the psychologist, and the mother failed to establish that the result of the trial would have been different had the summaries not been admitted into evidence
2. The trial court properly found, by clear and convincing evidence, that the department made reasonable efforts to reunify the respondent mother with J and that she was unwilling to benefit from those efforts as required by statute (§ 17a-112): the mother's claim that the trial court erred in finding that she was unwilling to benefit from the efforts of the department because there was no evidence that parent-child violence or threats remained a concern was without merit, as the record demonstrated that the mother failed to take accountability for the issue of parent-child violence, and the department social worker testified that the mother's failure to address her trauma-related violence rendered

her a continuing threat to her children; moreover, to the extent that there was conflicting testimony regarding the presence of parent-child violence, the trial court was free to credit testimony that the mother did, in fact, still need trauma based therapy, especially in light of the mother's persistent refusal to discuss or even acknowledge her history of threatening to harm her children; furthermore, because the mother persistently had declined the treatment recommended by the department, the trial court properly concluded that she was unwilling to benefit from the department's reunification efforts.

Argued February 27—officially released May 10, 2023**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of Windham, Juvenile Matters at Willimantic, and tried to the court, *Chaplin*, *J.*; judgments granting the petitions, from which the respondent mother appealed to this court. *Affirmed.*

Matthew C. Eagan, assigned counsel, for the appellant (respondent mother).

Evan O'Roark, assistant attorney general, with whom was *Jennifer C. Leavitt*, assistant attorney general, and, on the brief, *William Tong*, attorney general, for the appellee (petitioner).

Opinion

CRADLE, J. The respondent mother, Chrystal P.,[1] appeals from the judgments of the trial court terminating her parental rights as to two of her minor children, Daniel D. and James D.[2] The respondent claims that

** May 10, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The parental rights of the respondent father also were terminated in this action. Because the father has not appealed from the termination of his parental rights, any reference herein to the respondent is to the mother only.

[2] As referenced herein, the respondent has additional children who are not subject to this proceeding. Any reference herein to the minor children is to Daniel and James only.

the court improperly (1) admitted into evidence certain documents under the business records exception to the hearsay rule; and (2) concluded that the Department of Children and Families (department) had made reasonable efforts to reunite her with James[3] or that she was unable or unwilling to benefit from reunification efforts.[4] We affirm the judgments of the trial court.

The following facts and procedural history, as set forth by the trial court, are relevant to our resolution of the claims presented in this appeal. The respondent's involvement with the department dates back to 1997, when the department first became aware of the respondent's conduct of threatening to harm her children. The respondent, on multiple occasions, used these threats of harm to her children as leverage in altercations with their respective fathers. The respondent was arrested after two such incidents in 2017, wherein she threatened to harm her one year old daughter, Lillyanne. Thereafter, the petitioner, the Commissioner of Children and Families, filed a motion for an ex parte order of temporary custody and a neglect petition as to Lillyanne. Since 2017, the department consistently has sought to have the respondent engage in mental health treatment and parenting services to gain insight into the detrimental impact of her mental health and trauma history on her parenting abilities. The respondent has demonstrated a pattern of "dogged resistance" to adjusting her parenting approach in response to professional feedback and she consistently has been "oppositional and confrontational" with department employees and service providers. In 2019, the respondent gave birth to another child,

[3] In her brief to this court, the respondent states that her "claim regarding reasonable efforts is specific to James because, with regard to Daniel, reasonable efforts to reunify were not required because the court had previously approved a permanency plan other than reunification . . . ."

[4] The attorney for the minor children filed a statement adopting the position of the petitioner, the Commissioner of Children and Families.

Richard, who also was adjudicated neglected and committed to the care and custody of the petitioner. In 2021, the respondent's parental rights as to Lillyanne and Richard were terminated on the ground that she failed to achieve an appropriate degree of personal rehabilitation as would encourage the belief that, within a reasonable time, she could assume a responsible position in the children's lives. In affirming the termination of the respondent's parental rights as to Lillyanne and Richard, this court noted that "[t]he court's conclusion that the [respondent] had failed to rehabilitate was predicated on its finding that the respondent . . . had resisted efforts to address the key issues underlying her history of threats or acts of violence against her children and had minimized the nature of the events that led to [their] removal from her care." *In re Lillyanne D.*, 215 Conn. App. 61, 68, 281 A.3d 521, cert. denied, 345 Conn. 913, 283 A.3d 981 (2022).

While the petitioner's case as to Lillyanne and Richard was pending, the respondent gave birth to Daniel, in April, 2020, and to James, in May, 2021. Daniel and James were removed from the respondent's custody shortly after their respective births on the basis of predictive neglect. The department incorporated Daniel and James into the ongoing reunification efforts provided to the respondent as to Lillyanne and Richard.

On April 27, 2020, the petitioner filed a motion for an order of temporary custody and a petition of neglect as to Daniel. An order of temporary custody was issued ex parte the same day. The court ordered specific steps and set goals for the respondent to facilitate her reunification with Daniel. The specific steps required the respondent, inter alia, to engage in parenting counseling and individual counseling. The goals set by the department required the respondent to make progress in the following areas: (1) articulating responsibility for her

parenting choices, how they have impacted her children, and demonstrating an ability to consistently use good decision making and judgment in regard to parenting her children; (2) demonstrating improvement in her parenting skills and adequate knowledge of child development; and (3) demonstrating an understanding of her mental health issues and how they impact her ability to provide for her children.

On April 14, 2021, the court approved a permanency plan of termination of the respondent's parental rights and adoption in the interest of Daniel and found that the petitioner had made reasonable efforts to achieve the plan. On May 20, 2021, Daniel was adjudicated neglected and committed to the care and custody of the petitioner.

On May 28, 2021, the petitioner filed a motion for an order of temporary custody and a neglect petition as to James. An order of temporary custody was issued ex parte the same day. On July 8, 2021, the order of temporary custody was sustained. The court issued the same specific steps and set goals for the respondent to facilitate her reunification with James that it had set for Daniel, but the specific goals were more narrow in scope. The goals set by the department required the respondent, inter alia, to make progress toward (1) identifying and addressing her history of personal violence, traumas, and threats, identified by David M. Mantell, a clinical and forensic psychologist, who had been appointed by the court to evaluate the respondent and provide recommendations with respect to reunification with her children, and engaging in focused treatment for exposure to family violence, both physical and verbal, as well as thoughts about violence and her use of violent threats with at least two marital partners and at least two of her children; and (2) gaining a better understanding of her children's needs for emotional

comfort and support and tactile nurturance and softer parenting techniques.

The petitioner filed petitions to terminate the respondent's parental rights as to Daniel and James on June 17, 2021, and December 15, 2021, respectively, on the ground that the respondent had failed to achieve an appropriate degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the ages and needs of the minor children, she could assume a responsible position in their lives. The termination petitions, along with the neglect petition as to James, were consolidated for trial. The consolidated trial proceeded on May 16 and 19, 2022.

On July 15, 2022, the court filed a memorandum of decision wherein it adjudicated James neglected[5] and terminated the respondent's parental rights as to both Daniel and James. The court found that the department had made reasonable efforts to reunify the respondent with Daniel and James and that the respondent was unwilling to benefit from those efforts. The court concluded that the respondent had failed to achieve an appropriate degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the ages and needs of Daniel and James, she could assume a responsible position in their lives. The court further concluded that the termination of the respondent's parental rights would be in the best interests of Daniel and James. Accordingly, the court terminated the respondent's parental rights as to Daniel and James and appointed the petitioner as their statutory parent. This appeal followed.

I

The respondent first claims that the court improperly admitted into evidence two documents under the business records exception to the hearsay rule[6] and that

[5] The respondent has not appealed from the neglect adjudication.

[6] Section 8-4 (a) of the Connecticut Code of Evidence provides: " 'Any writing or record, whether in the form of an entry in a book or otherwise,

the admission of those documents constituted harmful error because it was necessary for the court to rely on those documents to conclude that the respondent failed to rehabilitate. Without deciding whether the challenged documents were properly admitted into evidence, we conclude that their admission was harmless.

At the termination trial, the petitioner sought to introduce into evidence two written summaries prepared by a United Services, Inc. (USI) staff member in 2018, when the respondent participated in two reunification programs, Therapeutic Family Time and Reunification and Therapeutic Family Time (RTFT).[7] These summaries were prepared in the context of reunification efforts as to Lillyanne. The petitioner did not call the USI staff members who authored or approved the summaries as witnesses at trial but, instead, sought to admit the summaries into evidence during the direct examination of Jennifer L. Andrews, a department social worker assigned to the respondent's case. The respondent objected to the admission of the summaries on the ground that the summaries constituted inadmissible hearsay. The petitioner responded that the summaries fell within the business records exception to the rule against hearsay. The respondent objected "to the records being admitted as full exhibits for any purpose other than to show that the parents participated in the service." The court overruled the respondent's objection and admitted the summaries as full exhibits. The respondent took exception to the court's ruling and

made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter.' "

[7] The department contracts with and provides referrals to USI, which provides reunification and other support services for families involved with the department.

further argued that the documents "contain hearsay to which this witness cannot testify as to the reliability or credibility of any conclusions or statements made therein."

On appeal, the respondent claims that the trial court improperly admitted the summaries under the business records exception to the hearsay rule and that their admission was harmful. Specifically, the respondent argues that the summaries "not only included the [USI] workers' opinions of the [respondent's] progress, but also contained recommendations relevant to the ultimate question of both the previous case and this one, whether the respondent should be reunified with her children." In so arguing, the respondent cites to the following allegedly inadmissible and harmful statements or conclusions in the summaries:[8] the respondent is forceful and unaware of age appropriate expectations; the respondent should continue individual therapy to address trauma; the respondent should engage in couple's therapy to address intimate partner violence; the respondent should continue parenting support services and a reunification assessment; RTFT is not confident in the respondent's ability to meet Lillyanne's needs and to keep her safe; and, if Lillyanne is returned to her, the respondent "will not be willing to implement the strategies taught during the intervention and [will] resort to what [she] feels is best."

[8] Despite the well settled principle that an objection to the admission of a document must specify the portions of the document that are purportedly inadmissible; *State* v. *William C.*, 267 Conn. 686, 704–705, 841 A.2d 1144 (2004) ("[O]nce a report qualifies as a business record, its proponent is not required to show the source of information for each item contained in the record. The burden is on the objecting party to specify objections to the inadmissible parts of the report." (Internal quotation marks omitted.)); the respondent failed to identify to the trial court the specific portions of the summaries that she alleged were inadmissible. Because we conclude that the admission of the summaries was harmless to the respondent, we need not address whether her objection was sufficiently specific to preserve her claim.

Even if we were to conclude that the court improperly admitted the summaries into evidence under the business records exception to the hearsay rule, the respondent has not demonstrated that she was harmed by their admission. "Our standard of review regarding challenges to a trial court's evidentiary rulings is that these rulings will be overturned on appeal only where there was an abuse of discretion and a showing . . . of substantial prejudice or injustice. . . . Additionally, it is well settled that even if the evidence was improperly admitted, the [party challenging the ruling] must also establish that the ruling was harmful and likely to affect the result of the trial." (Internal quotation marks omitted.) *In re Jordan T.*, 119 Conn. App. 748, 762, 990 A.2d 346, cert. denied, 296 Conn. 905, 992 A.2d 329 (2010). "It is well established that if erroneously admitted evidence is merely cumulative of other evidence presented in the case, its admission does not constitute reversible error." *Swenson* v. *Sawoska*, 215 Conn. 148, 155, 575 A.2d 206 (1990). "In determining whether evidence is merely cumulative, we consider the nature of the evidence and whether any other evidence was admitted that was probative of the same issue as the evidence in controversy." (Internal quotation marks omitted.) *DeNunzio* v. *DeNunzio*, 320 Conn. 178, 204, 128 A.3d 901 (2016).

Here, the respondent argues that "the record establishes that the trial court, although never explicitly stating so, relied upon the conclusions contained in the inadmissible hearsay evidence to shape its conclusions and its decision on the ultimate question in this case." She contends that "[t]he conclusion and impression that [she] was intractable and demonstrated 'continued resistance,' which was crucial to the trial court's decision with regard to the failure to rehabilitate, comes from the opinions of the [USI] workers that were improperly admitted into evidence." The respondent's

argument is belied by the record, which is replete with evidence of the respondent's resistance to the department's recommendations.

For example, at the termination trial, the court admitted into evidence two social studies, one as to each child, which were authored by Andrews. In the social studies, which were dated June 17, 2021, and December 15, 2021, Andrews noted that, since Lillyanne came into the care of the department in 2017, the respondent has minimized her mental health issues and the consequent threats that she made to harm Lillyanne. Andrews noted that the respondent had engaged in counseling with Jessica Janczyk for the past two years, but Janczyk was unable to address the respondent's issues because the respondent "refuses to acknowledge [that] there was ever a concern or admit her behaviors." Janczyk reported that she was aware of the respondent's childhood trauma history, but that the respondent continually declined trauma treatment and "would specifically resist any recommendations from the [department]."

Andrews also noted in the social studies that, despite the respondent's participation in some of the recommended services,[9] the respondent "continues to struggle with mental health concerns, has not engaged in any trauma treatment, and continues to demonstrate a lack of coping skills and emotional dysregulation" and that she continues to minimize these concerns. Andrews reported that the respondent continues to resist recommendations by the department and that the respondent often is hostile and confrontational toward department social workers.

[9] Andrews indicated that the department had referred the respondent to numerous treatment services, including individual therapy, couples counseling, mental health and substance abuse treatment, supervised visitation, parenting and reunification services, and psychological evaluation and recommendations.

Andrews also testified at the termination trial. Through her testimony, Andrews detailed the services that were offered to the respondent and highlighted the fact that the "number one identified concern for the department" as to the respondent was her untreated mental health issues. Specifically, Andrews testified that the most important goal for the respondent's treatment has been to "address her previous trauma as a child and then the issues leading to the intimate partner violence and the effects of all of these on her parenting." Andrews indicated that she had communicated with all of the respondent's service providers, including her most recent providers, pertaining to the respondent's need for trauma treatment. She testified that the respondent has maintained that she did not experience any trauma or that, if she did, she has addressed it "in her own way" and she does not feel the need for further trauma treatment. Consequently, in Andrews' opinion, the respondent has not met the primary goal set by the department. Andrews further testified that the respondent similarly has failed to meet the goals focused on the development of emotional regulatory skills, coping skills, and appropriate expectations for parenting.

The court also admitted into evidence, without objection, a report prepared by Mantell, who also testified at trial.[10] In evaluating the respondent, Mantell reviewed

[10] Although the respondent did not object to the admission of Mantell's report at trial, she now seeks to undermine his report on the ground that it constituted "stale evidence" because it was written in 2019, prior to the births of Daniel and James. It is well established that the weight accorded to evidence presented at trial is within the sole province of the fact finder. See *In re Leo L.*, 191 Conn. App. 134, 142, 214 A.3d 430 (2019) ("it is the trial court's role to weigh the evidence presented and determine relative credibility when it sits as a fact finder"). Because Mantell's report was admitted as a full exhibit, without objection, the court was entitled to rely on it to support its findings. See *In re Leilah W.*, 166 Conn. App. 48, 71, 141 A.3d 1000 (2016).

Moreover, we note that, at a case status conference on August 17, 2021, the department requested an updated psychological evaluation with a new provider and the respondent was supposed to provide a response to that

the records of and spoke with other service providers who had worked with the respondent since Lillyanne was removed from her custody in 2017. In his report, Mantell described the contents of both of the challenged summaries, often citing the observations and conclusions of the USI staff members verbatim. After conducting his own evaluation of the respondent, Mantell determined, inter alia, that the respondent "does not take responsibility for statements and behaviors that led to the protective placement of her child out of her care . . . . [S]he does not show a willingness to address her own behaviors or to even acknowledge the concerns that her behaviors [have] caused . . . ."

Because the information contained within the challenged USI summaries was merely cumulative of other validly admitted evidence contained in Mantell's report, the department's social studies, and the testimony of Mantell and Andrews, the respondent has failed to establish that the result of the trial would have been different had the summaries not been admitted into evidence. Therefore, we conclude that their admission was harmless.

II

The respondent also claims that the trial court erred in concluding that the department made reasonable efforts to reunify her with James and that she was unwilling to benefit from those efforts. We are not persuaded.

"[General Statutes §] 17a-112 (j) (1) requires that before terminating parental rights, the court must find by clear and convincing evidence that the department has made reasonable efforts to locate the parent and to reunify the child with the parent, unless the court

request by September 1, 2021. As of December 15, 2021, the respondent had not agreed to participate in a new evaluation.

finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts provided such finding is not required if the court has determined at a hearing . . . that such efforts are not appropriate . . . . Thus, the department may meet its burden concerning reunification in one of three ways: (1) by showing that it made such efforts, (2) by showing that the parent was unable or unwilling to benefit from reunification efforts or (3) by a previous judicial determination that such efforts were not appropriate. . . . [I]n determining whether the department has made reasonable efforts to reunify a parent and a child . . . the court is required in the adjudicatory phase to make its assessment on the basis of events preceding the date on which the termination petition was filed. . . . This court has consistently held that the court, [w]hen making its reasonable efforts determination . . . is limited to considering only those facts preceding the filing of the termination petition or the most recent amendment to the petition . . . .

"Our review of the court's reasonable efforts determination is subject to the evidentiary sufficiency standard of review. . . . Under this standard, the inquiry is whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . The court's subordinate findings made in support of its reasonable efforts determination are reviewed for clear error." (Citations omitted; internal quotation marks omitted.) *In re Ryder M.*, 211 Conn. App. 793, 808–809, 274 A.3d 218, cert. denied, 343 Conn. 931, 276 A.3d 433 (2022).

In the present case, the court found that the department made reasonable efforts to reunify the respondent with James in that it recommended numerous specific steps and identified goals associated with those steps, and in furtherance of those goals, provided several recommended services and programs to facilitate reunification. The court found:[11] "The petitioner made the appropriate service referrals for the respondent parents to engage in intimate partner violence counseling. The respondent parents denied the existence of intimate partner violence issues and, therefore, were deemed inappropriate for the referred service and were then referred to couples counseling. The petitioner made continuous contact with the respondent parents' chosen provider . . . to share treatment goals as identified by the petitioner and to request updates on their progress in treatment. The petitioner obtained a court-ordered psychological evaluation for the respondent . . . to further assist in identifying appropriate services and employed the professional opinion to modify service referrals as necessary. The petitioner made referrals to parental support services for the respondent . . . and a referral for a reunification readiness assessment. The petitioner made referrals for individual counseling for both respondent parents and [was] amenable to changes in providers when the respondent parents were unwilling to engage with providers identified by the petitioner due to the respondent parents' perception that such providers were biased against them simply because these providers were recommended by the petitioner. The petitioner initiated and maintained contact with providers chosen by the respondent parents to inform such providers of the petitioner's identified treatment goals for the respondent parents, to assist

[11] In its memorandum of decision, the court's findings pertain to both of the respondent parents. Because, as noted, the father has not challenged the termination of his parental rights, we address those findings that pertain to either both parents or to the respondent mother only.

providers in treating the respondent parents by sharing information obtained through psychological and neuropsychological evaluations and continued to make efforts to obtain updates on treatment progress despite certain providers having significant delays in responding to such requests. Based on the service referrals made for the respondent parents as ordered in the specific steps, the court finds by clear and convincing evidence that the petitioner has made reasonable efforts to reunify the respondent parents with Daniel and James."

Notwithstanding its finding that the department had satisfied its obligations under § 17a-112 (j) (1), the trial court also concluded that the respondent was unwilling to benefit from the department's efforts to reunify her with James. In so concluding, the court reasoned that "the respondent . . . has resisted all efforts to address the central issue of concern: parent-child threats of violence and parent-child violence. She has repeatedly refused to engage in the trauma focused treatment necessary for her to make progress regarding her parent-child violence issues with multiple providers and, thereby, demonstrated her unwillingness to benefit from the petitioner's efforts to reunify [her] with Daniel and James. . . .

"The record before the court demonstrates that the respondent has cognitive limitations that cause her difficulty in understanding and comprehension. . . . However, there is no evidence in the record that demonstrates that such cognitive impairment has made the respondent . . . unable to benefit from the services offered. The treatment progress made in other areas stands to counter any such concern by the court as it highlights that the respondent . . . has the capacity to understand when appropriate accommodations are made for her and that such accommodations have been employed successfully by numerous providers. Despite

such successful implementation of accommodations, the respondent . . . has drawn a hard line and maintained that hard line whenever the matter of trauma focused treatment is mentioned. The respondent . . . refuses to acknowledge her trauma history and refuses to engage in trauma focused treatment. There is no credible evidence in the record to support a finding that she is unable to benefit from the services provided by the petitioner. For the foregoing reasons, the court finds that the respondent . . . [is] unwilling to benefit from the services provided by the petitioner."

On appeal, the respondent claims that the court erred in finding that the department made reasonable efforts to reunify her with James, and that she was unwilling to benefit from those efforts. As to her unwillingness to benefit from the efforts of the department, the respondent claims that the court erred in so finding because there was no evidence that parent-child violence or threats remained a concern, and that there was conflicting testimony regarding the respondent's need for trauma based treatment.[12] To the extent that there was conflicting evidence, "[i]t is axiomatic that the court is free to accept or reject, in whole or in part, the evidence presented by [the parties]." (Internal quotation marks omitted.) *Cottrell* v. *Cottrell*, 133 Conn. App. 52, 65, 33 A.3d 839 (2012). Here, the court was free to credit testimony that the respondent did, in fact, still need trauma based therapy. Indeed, this notion is buttressed by the respondent's persistent refusal to discuss or even acknowledge her history of threatening

[12] Specifically, the respondent faults the trial court for crediting Mantell's opinion that she has a "significant trauma history that has an incredible impact on her current, overall functioning in a parental role" over the opinion of her individual counselor who testified that she had not observed the respondent exhibiting symptoms of post-traumatic stress disorder or that the respondent's "current functioning was impacted by her past abusive environments."

to harm her children. As to the issue of whether parent-child violence and threats of violence remained a concern, Mantell posited: "Threatening to harm a child is a rare child protection issue. It cannot be considered resolved by not talking about it and by rejecting accountability for its occurrence." Additionally, Andrews also testified that the respondent's failure to address her trauma related violence rendered the respondent a continuing threat to her children. Accordingly, the respondent's argument that there was no evidence that parent-child violence or threats remained a concern is without merit. Because the respondent persistently has declined the treatment recommended by the department, the court properly concluded that she was unwilling to benefit from the department's reunification efforts.[13]

The judgments are affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* BRIAN EBRON
(AC 44738)

Suarez, Clark and Seeley, Js.

Syllabus

The defendant, who had previously been convicted, following a jury trial, of manslaughter in the first degree with a firearm, appealed to this court from the judgment of the trial court dismissing his motion to correct an illegal sentence. In his motion to correct, the defendant, although he was twenty years old at the time he committed the underlying offense, claimed, inter alia, that the sentencing court unconstitutionally failed to consider his youth as a mitigating factor in sentencing him to thirty-two years of incarceration in violation of the principles announced in *Miller* v. *Alabama* (567 U.S. 460) pertaining to the sentencing of juvenile

[13] Because we conclude that there was sufficient evidence in the record to support the court's finding that the respondent was unwilling to benefit from reunification services, we need not address whether the court properly found that the department made reasonable efforts to reunite her with James. See *In re Gabriella A.*, 319 Conn. 775, 777 n.4, 127 A.3d 948 (2015).

offenders. The trial court granted the state's motion to dismiss the defendant's motion to correct on the ground that the imposition of a thirty-two year sentence with the possibility of parole on a defendant who was twenty years old at the time of his offense was not unconstitutional and, therefore, the defendant failed to raise a colorable claim pursuant to the relevant rule of practice (§ 43-22). *Held*:

1. The trial court erred in granting the state's motion to dismiss the defendant's motion to correct an illegal sentence because it considered the merits of the defendant's claims instead of determining whether he had made a colorable claim that his sentence was illegal or imposed in an illegal manner: the defendant's claim that his sentence was illegal because the sentencing court failed to consider his youth as a mitigating factor plainly challenged his sentence and the sentencing proceedings, rather than his underlying conviction, and the jurisdictional and merits inquiries are separate for purposes of determining whether a claim is colorable under Practice Book § 43-22.

2. The defendant's claims failed as a matter of law and a remand for consideration of the merits of those claims would serve no useful purpose: because the defendant was sentenced to a period of thirty-two years of incarceration and because he would be eligible for parole after serving approximately twenty-seven years of his sentence, his claim fell outside of the purview of *Miller* and, thus, even if the defendant were to prevail on his claim that the state constitution provides twenty year olds with the same *Miller* protections afforded to juveniles, his claim would nevertheless fail as a matter of law because he did not receive a sentence that fell within *Miller*'s purview under our state constitution; accordingly, the judgment dismissing the motion to correct was reversed and the case was remanded with direction to render judgment denying the defendant's motion to correct.

3. The defendant could not prevail on his claim that the statutory provisions (§§ 54-91g and 54-125a (f)) requiring the consideration of youth as a mitigating factor and pertaining to parole eligibility for juvenile offenders violated his federal constitutional rights to equal protection because those provisions do not apply to defendants who were over eighteen years of age but under twenty-one years of age at the time of their offense:

   a. Even if this court agreed with the defendant that he is similarly situated to juveniles who fell within the purview of § 54-91g, § 54-91g does not apply to him because that statute does not apply retroactively to any defendant, like the defendant, who was convicted prior to October 1, 2015, the effective date of the statute.

   b. The early parole provisions of § 54-125a (f) do not violate the defendant's right to equal protection because, even assuming arguendo that twenty year old offenders are similarly situated to juvenile offenders for purposes of § 54-125a (f), the legislature had a rational basis for treating the two groups differently, as it could reasonably distinguish between juveniles and adult defendants in the realm of rehabilitation on the basis

that maturity and judgment incrementally improve as one gets older, warranting harsher punishment for those defendants over the age of eighteen.

Argued January 9—officially released May 16, 2023

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford, where the case was tried to the jury before *Mullarkey*, *J.*; verdict and judgment of guilty of the lesser included offense of manslaughter in the first degree with a firearm; thereafter, the defendant filed a motion to correct an illegal sentence; subsequently, the court, *Graham*, *J.*, granted the state's motion to dismiss the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Improper form of judgment*; *reversed*; *judgment directed.*

Tamar Birckhead, assigned counsel, for the appellant (defendant).

Jonathan M. Sousa, assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, *Vicki Melchiorre*, supervisory assistant state's attorney, *Christopher Pelosi*, former senior assistant state's attorney, and *Herbert E. Carlson, Jr.*, former supervisory assistant state's attorney, for the appellee (state).

Opinion

CLARK, J. The defendant, Brian Ebron, appeals from the judgment of the trial court dismissing his motion to correct an illegal sentence pursuant to Practice Book § 43-22. On appeal, he argues that the court erred when it dismissed his motion for lack of subject matter jurisdiction because the motion set forth a colorable claim that his sentence is illegal or was imposed in an illegal manner. Specifically, the defendant, who was twenty

years old when he committed the crime for which he was convicted, argues that his thirty-two year sentence for that conviction violates the prohibition in the eighth amendment to the United States constitution against cruel and unusual punishment, his right to due process under article first, §§ 8 and 9, of the Connecticut constitution and his state and federal constitutional rights to equal protection under the fourteenth amendment to the United States constitution and article first, § 20, of the Connecticut constitution, notwithstanding the fact that he will be parole eligible after serving approximately twenty-seven years of his thirty-two year sentence. We agree with the defendant that the court improperly dismissed his motion to correct on the ground that he failed to state a colorable claim, but we nevertheless conclude that his claims fail as a matter of law. As a result, we reverse the judgment dismissing the defendant's motion to correct an illegal sentence and remand the case with direction to render judgment denying the defendant's motion to correct.

We begin by setting forth the underlying facts that led to the defendant's conviction, which our Supreme Court set out in *State* v. *Ebron*, 292 Conn. 656, 659–60, 975 A.2d 17 (2009), overruled on other grounds by *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011). "Shortly after midnight on November 18, 2003, Tameika Moore went to visit a friend who lived in an apartment at 784–786 Capitol Avenue in Hartford. When she arrived at the apartment, Moore was surprised to find the victim, nineteen year old Shomari Greene, there visiting that same friend. Moore asked the victim to leave and proceeded to escort him down the stairs and out of the building. While passing through the first floor hallway of the building, Moore and the victim encountered Lawanne Harris (Lawanne), the defendant's girlfriend, who lived in an apartment off that hallway with the defendant; her mother, Yolanda Harris (Yolanda); and

her four year old sister, Destiny. The victim and Lawanne argued in the hallway for approximately thirty minutes, and the defendant and Yolanda subsequently joined in the altercation after Lawanne summoned them to tell them about a person who was 'disrespecting' her. Thereafter, the defendant and the victim proceeded to threaten each other, with the victim, who was visibly intoxicated, stating that he had 'people, too' and would come back to 'shoot up the place.' The defendant then pointed a silver revolver at the victim and pulled the trigger, but the gun failed to fire. Moore and the victim then left the building.

"Shortly thereafter, however, the victim walked back to the apartment building and punched a hole in the glass adjacent to the building's front door in an attempt to open that door from the inside, because it had locked automatically behind him. After the victim reentered the front hallway, the defendant then shot the victim in the face with the revolver, causing his death. The defendant then fled from the scene by jumping out of the kitchen window of his apartment into the alley between buildings, pausing in the process to point his gun at Maria Ayala, a neighbor who had heard the initial altercation from her apartment and then had heard the gunshot after leaving her apartment and seeing the victim reenter the building." (Footnotes omitted.) Id.

On January 19, 2006, the defendant was convicted, following a jury trial, of manslaughter in the first degree in violation of General Statutes (Rev. to 2003) § 53a-55a (a). On March 27, 2007, following the defendant's conviction, the court, *Mullarkey*, *J.*, held a sentencing hearing. At that hearing, the court stated: "You have expressed sorrow in the presentence investigation for causing this young man's death. You have a loving girlfriend and a child. Your criminal record has not been violent up to this stage. You had a very difficult upbringing. Although your aunts did their best, as did agencies

of the state . . . to keep you on the straight and narrow, they did not succeed. You have some work history, although it's incredibly minor. On the other side of the ledger, this was a senseless and unnecessary killing. The state proved beyond a reasonable doubt that it was not done in self-defense, to the jury's unanimous satisfaction. A mid to large caliber revolver was used at close range. In fact, it was unlawful for you to be in possession of the revolver since you [were] already a . . . convicted felon. Even if the court were to [credit] your story that it was just a weapon left behind by a cousin and not actually yours, there [was] evidence that it was displayed outside the apartment. The trigger was pulled. It . . . 'clicked' . . . . You went back to the apartment with it. The next time, it worked, unfortunately. . . .

"[A]t the time of this incident, [you] had one felony conviction, a number of misdemeanor convictions, one felony pending. And, then, it looks like . . . a sale [of narcotics] charge on March 24, [2004]. . . .

"[O]n the not helpful side of the ledger, [you were] a chronic marijuana user until arrested. [You were] on probation once, and that was unsatisfactory. . . . So, [your] history up to [your] current age has not been successful . . . . [Your] history at liberty is also not successful. [You have] only completed school until the tenth grade and not gotten [your] GED. [Your] work . . . history would pass . . . in an eye blink. . . .

"Three felony convictions, a number of misdemeanor convictions, maybe [related to] your truancy or failure to [stay in] a group home, but [you spent] eighteen months in Long Lane [School, a juvenile detention facility]. This is a life you wasted. You've taken one. You wasted your own. Absolutely wasted. I know that this is little comfort to the parents, but this is one of the few defendants in whom I see any flicker of remorse.

Whether that remorse is accurate or is really remorse for himself, I don't know."

After considering these factors, the court sentenced the defendant to thirty-two years of incarceration. Pursuant to General Statutes (Rev. to 2003) § 54-125a (b) (2), the defendant is eligible for parole after serving 85 percent of his sentence, which amounts to approximately twenty-seven years.[1]

On May 21, 2019, the defendant, who was self-represented, filed a motion to correct an illegal sentence pursuant to Practice Book § 43-22[2] arguing that, under *Miller* v. *Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the sentencing court "unconstitutionally failed to consider mitigating factors relating to [his] age." He also argued that he was entitled to an evidentiary hearing on his motion to correct pursuant to *State* v. *Miller*, 186 Conn. App. 654, 200 A.3d 735 (2018).[3] Last, he sought appointment of counsel in accordance with our Supreme Court's decision in *State* v. *Casiano*, 282 Conn. 614, 922 A.2d 1065 (2007).

On September 9, 2020, following the appointment of counsel, the defendant filed a second motion to correct an illegal sentence, which was substantially similar to his first motion. He argued that "his thirty-two year sentence is illegal in that it is excessive, considering

[1] General Statutes (Rev. to 2003) § 54-125a provides in relevant part: "(b) . . . (2) A person convicted of an offense . . . where the underlying facts and circumstances of the offense involve the use, attempted use or threatened use of physical force against another person shall be ineligible for parole under subsection (a) of this section until such person has served not less than eighty-five per cent of the definite sentence imposed."

[2] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

[3] For ease of reference, we hereinafter refer to *Miller* v. *Alabama*, supra, 567 U.S. 460, as "*Miller*" and *State* v. *Miller*, supra, 186 Conn. App. 654, as "*Omar Miller*."

the defendant was only twenty years old at the time the offense was committed . . . .'' He acknowledged that *Miller* applies only to defendants under the age of eighteen but argued that his sentence still violated the precepts of *Miller* and its progeny because the protections established in *Miller*—that a sentencing court must consider a juvenile offender's youth before determining that life without parole is a proportionate sentence—should also be applied to offenders under the age of twenty-one who are similarly sentenced. Citing *Omar Miller*, he requested an evidentiary hearing to ''present psychological testimony regarding his underdeveloped brain's reaction to the circumstances [of the offense].''

On September 25, 2020, the defendant filed a revised motion to correct an illegal sentence, which made the same arguments as his prior motions but also cited the fifth and fourteenth amendments to the United States constitution in support of his argument that he was entitled to a new sentencing hearing.[4]

The state filed a motion to dismiss the defendant's revised motion to correct on October 21, 2020, arguing that the court lacked subject matter jurisdiction over the defendant's motion because he failed to state a colorable claim that his sentence was illegal or imposed in an illegal manner. The state argued that *Miller* protections do not apply to individuals who were eighteen or older at the time of their crime, like the defendant, and that, even if *Miller* were extended to the defendant, the sentence in this case would not be illegal because the defendant is not serving an effective life sentence and

[4] The defendant cited to the fourteenth amendment in the opening paragraph of the revised motion to correct. He provided no analysis of that amendment or its application to his sentence however. The defendant conceded in his appellate brief that his equal protection claims are being raised for the first time on appeal.

he is eligible for parole pursuant to General Statutes (Rev. to 2003) § 54-125a (b) (2).

On October 23, 2020, the defendant requested permission to file a second revised motion to correct, asserting claims under the Connecticut constitution. The court granted that motion without objection. The second revised motion to correct an illegal sentence included the same arguments made in each of the prior motions—that *Miller* should be extended to offenders who were under the age of twenty-one at the time of their offense—but also cited article first, §§ 8 and 9, of the Connecticut constitution in support of that argument.

On January 4, 2021, the state filed a motion to dismiss the defendant's second revised motion to correct, incorporating the arguments it raised in its October 20, 2020 motion to dismiss. The defendant objected to that motion on January 8, 2021.

On January 11, 2021, the court heard oral arguments on the state's motion to dismiss. On March 23, 2021, the court, *Graham*, *J.*, issued a memorandum of decision granting the motion, stating that "[t]he defendant's motion to correct may be dismissed, independently, on several grounds, each of which is sufficient in itself. First and foremost, the defendant, then twenty years old, was not a juvenile at the time of the offense. Indeed, [*Miller* and its progeny] are expressly limited to cases in which the defendant was under the age of eighteen at the time of the crime. . . . Consequently, the sentencing court was not required to consider the hallmark features of youthfulness when sentencing [the defendant]. . . .

"Second, the defendant is, and always has been, eligible for parole. . . . [U]nder [*Miller*], a sentencing court's obligation to consider youth related mitigating factors is limited to cases in which the court imposes

a sentence of life, or its equivalent, without parole. . . . The defendant's sentence of thirty-two years with the possibility of parole cannot be considered a life sentence without the possibility of parole or its functional equivalent. . . .

"Finally, the defendant's contention that article first, §§ 8 and 9, of the Connecticut constitution afford greater protection than the eighth amendment to the federal constitution is unpersuasive. The defendant provides no pertinent legal authority in support of this proposition. Our Appellate Court, however, has explicitly held that the mandatory minimum sentence of twenty-five years of incarceration imposed on a juvenile homicide offender does not violate article first, §§ 8 and 9, of the Connecticut constitution. . . . If our Appellate Court held that article first, §§ 8 and 9, of the Connecticut constitution are not violated by a sentence of twenty-five years mandatory minimum imprisonment for murder and conspiracy to commit murder imposed upon an individual who committed said crimes when he was seventeen years old, then, logically, a thirty-two year sentence with the possibility of parole imposed upon a twenty year old offender is also permissible under the state constitution." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.)

On the basis of the foregoing, the court concluded that, "[b]ecause the defendant was over the age of eighteen at the time of the offense, and because he is, and always has been, eligible for parole, he is not entitled to consideration of youth related mitigating factors vis-à-vis his sentence. Nor does the imposition of a thirty-two year sentence with the possibility of parole upon a defendant who was twenty years old at the time of his offense violate article first, §§ 8 and 9, of the Connecticut constitution. The defendant has failed to raise a colorable claim within the scope of Practice Book

§ 43-22." This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first argues that the court erred in granting the state's motion to dismiss because, in so doing, the court considered the merits of his claims instead of determining whether he had made a colorable claim that his sentence was illegal or imposed in an illegal manner. We agree.

"A trial court generally has no authority to modify a sentence but retains limited subject matter jurisdiction to correct an illegal sentence or a sentence imposed in an illegal manner. . . . Practice Book § 43-22 codifies this common-law rule. . . . Therefore, we must decide whether the defendant has raised a colorable claim within the scope of . . . § 43-22 . . . . In the absence of a colorable claim requiring correction, the trial court has no jurisdiction . . . . We have emphasized, however, that [t]he jurisdictional and merits inquiries are separate; whether the defendant ultimately succeeds on the merits of his claim does not affect the trial court's jurisdiction to hear it.

"[A]n illegal sentence is essentially one [that] . . . exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . In accordance with this summary, Connecticut courts have considered four categories of claims pursuant to [Practice Book] § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions

as to which sentencing statute was applicable. . . . We have emphasized that, in order to invoke the jurisdiction of the trial court, a challenge to the legality of a sentence must challenge the sentencing proceeding itself." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Myers*, 343 Conn. 447, 459–60, 274 A.3d 100 (2022).

"[T]o raise a colorable claim within the scope of Practice Book § 43-22, the legal claim and factual allegations must demonstrate a possibility that the defendant's claim challenges his or her sentence or sentencing proceedings, not the underlying conviction. The ultimate legal correctness of the claim is not relevant to our jurisdictional analysis." *State* v. *Ward*, 341 Conn. 142, 153, 266 A.3d 807 (2021). "[T]he jurisdictional and merits inquiries are separate; whether the defendant ultimately succeeds on the merits of his claim does not affect the trial court's jurisdiction to hear it." (Internal quotation marks omitted.) *State* v. *Myers*, supra, 343 Conn. 459. Where a defendant's motion to correct "plausibly [challenges] the defendant's sentence," that claim is "colorable," and the court has subject matter jurisdiction over that claim even where "the . . . [claim has] no merit." Id., 459–60. "The issue of whether a defendant's claim may be brought by way of a motion to correct an illegal sentence, pursuant to Practice Book § 43-22, involves a determination of the trial court's subject matter jurisdiction and, as such, presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *State* v. *Turner*, 214 Conn. App. 584, 589, 280 A.3d 1278 (2022).

The defendant's claims in this case asserted, inter alia, that his sentence was illegal because the sentencing court failed to consider his youth as a mitigating factor. The defendant plainly challenged his sentence and the sentencing proceedings in his motion to correct, rather than his underlying conviction. As a result, and

because the "jurisdictional and merits inquiries are separate" for purposes of determining whether a claim is colorable under Practice Book § 43-22; (internal quotation marks omitted) *State* v. *Myers*, supra, 343 Conn. 459; the court erred in dismissing the defendant's motion to correct. See, e.g., *State* v. *Ward*, supra, 341 Conn. 153, 169.

II

Although we conclude that the defendant set forth a colorable claim for purposes of establishing the court's jurisdiction over his motion to correct, and although we typically remand cases for a consideration of their merits if we determine that they were improperly dismissed for lack of subject matter jurisdiction, where a "defendant's claim fails as a matter of law, a remand for further consideration of the merits would serve no useful purpose." *State* v. *Turner*, supra, 214 Conn. App. 591 n.5. Moreover, where, as here, the trial court "determined that it did not have subject matter jurisdiction precisely *because* it concluded that, on the merits, the defendant had failed to set forth a colorable claim," it is appropriate for this court to consider the merits of the motion on appeal. (Emphasis added.) Id. Consistent with these principles, we conclude that the defendant's claims in this case fail as a matter of law and that a remand for consideration of the merits of those claims would serve no useful purpose. See id.

We begin with the defendant's claim that the prohibition against cruel and unusual punishment and the right to due process under article first, §§ 8 and 9, of the Connecticut constitution required the sentencing court to consider his youth and its attendant characteristics before imposing his sentence.[5] In his brief, the defendant applies the six-pronged analysis articulated in

[5] In his principal brief, the defendant also argues, for the first time on appeal, that the Connecticut constitution's prohibition against cruel and unusual punishment affords all offenders under the age of twenty-one the right to the specific early parole benefits that General Statutes § 54-125a (f)

State v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1993), and concludes that those factors support an interpretation of our state constitution that affords eighteen, nineteen, and twenty year olds the same protections that *Miller* affords to juveniles under the United States constitution.

The defendant fails to recognize, however, that, because he was sentenced to a period of thirty-two years of imprisonment and is parole eligible after approximately twenty-seven years, his claim falls outside the purview of *Miller* under our state constitution *even for those defendants who were under the age of eighteen at the time of their offense*. Our Supreme Court's decision in *State* v. *McCleese*, 333 Conn. 378, 215 A.3d 1154 (2019), is instructive. In *McCleese*, the defendant shot and killed one victim and injured another when he was seventeen years old. Id., 382. He received a total effective sentence of eighty-five years

extends to offenders who were under the age of eighteen at the time of their offense. The defendant fails, however, to provide any meaningful analysis of that claim, such as a discussion of why the state constitution provides *any* defendant with the right to those precise statutory benefits. Because the defendant has not adequately briefed his claim that the state constitution's prohibition against cruel and unusual punishment requires the state to afford him the precise early parole benefits extended to juveniles in § 54-125a (f), we decline to address the merits of that claim. See *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 803, 256 A.3d 655 (2021) ("Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.)).

The defendant also argues for the first time on appeal that General Statutes § 54-91g violates article first, §§ 8 and 9, of the Connecticut constitution because "current norms of decency" require that § 54-91g be extended to eighteen, nineteen, and twenty year olds. As explained more fully in part III A of this opinion, this claim fails as a matter of law because § 54-91g does not apply retroactively to convictions, like the defendant's, that occurred prior to the statute's October 1, 2015 effective date. See *State* v. *Delgado*, 323 Conn. 801, 814, 151 A.3d 345 (2016) (recognizing that § 54-91g became effective October 1, 2015, and does not apply retroactively).

of imprisonment without parole eligibility. Id. The trial court, in sentencing him to the functional equivalent of life without the possibility of parole, did not consider the defendant's age and the hallmarks of adolescence as mitigating factors. Id., 382, 385. After the defendant was sentenced, "the United States Supreme Court in *Miller* held that the eighth amendment's prohibition on cruel and unusual punishments is violated when a juvenile offender serves a *mandatory* sentence of life imprisonment without the possibility of parole because it renders youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence and poses too great a risk of disproportionate punishment. . . . Thus, an offender's age and the hallmarks of adolescence must be considered as mitigating factors before a juvenile can serve this particular sentence." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 382–83. Moreover, our Supreme Court noted that it had previously "interpreted *Miller* to apply not only to mandatory sentences for the literal life of the offender, but also to discretionary sentences and sentences that result in imprisonment for the 'functional equivalent' of an offender's life." Id., 383.

Our state legislature, in response to these newly recognized constitutional requirements, passed No. 15-84 of the 2015 Public Acts (P.A. 15-84), which provides in relevant part that all juvenile offenders sentenced to more than ten years in prison are retroactively eligible for parole. Id., 383. As a result, the defendant in *McCleese* would become eligible for parole after serving thirty years of his sentence, when he would be approximately fifty years old. Id., 384. Following passage of P.A. 15-84, he filed a motion to correct his sentence, alleging a *Miller* claim under the federal constitution and a similar claim under the state constitution. Id., 385. The trial court initially granted the defendant's motion to correct but, a few days later, the United States

Supreme Court decided *Montgomery* v. *Louisiana*, 577 U.S. 190, 212, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), which held that, although *Miller* applied retroactively, a state can remedy a *Miller* violation by granting parole eligibility retroactively to a defendant whose *Miller* rights had been violated at sentencing. *State* v. *McCleese*, supra, 385. Relying on *Montgomery*, the state filed a motion to reconsider the ruling on the defendant's motion to correct, which the trial court granted. Id., 385–86. In light of *Montgomery*, the court concluded that, because the defendant had become eligible for parole under P.A. 15-84, his *Miller* claim was moot under both the federal and state constitutions. Id., 386.

On appeal to our Supreme Court, the defendant in *McCleese* argued that the parole eligibility provisions of P.A. 15-84 were an insufficient remedy for a *Miller* violation under the Connecticut constitution. Id., 387. Specifically, he argued that a court's failure to consider the *Miller* factors when sentencing a juvenile to fifty years or more of incarceration can be remedied only by a new sentencing hearing that complies with *Miller*, regardless of whether the juvenile is, or later becomes, eligible for parole. Id. After analyzing our state constitution pursuant to *State* v. *Geisler*, supra, 222 Conn. 684–86, our Supreme Court disagreed and concluded "that parole eligibility afforded by P.A. 15-84, § 1, is an adequate remedy for a *Miller* violation under the Connecticut constitution." *State* v. *McCleese*, supra, 333 Conn. 409. In rejecting the defendant's additional claim that P.A. 15-84 violates the separation of powers provisions of our state constitution, the court further explained that "parole eligibility under P.A. 15-84, § 1, *negates* a *Miller* violation because the sentence no longer falls within the purview of *Miller*." (Emphasis in original.) Id., 414. The court noted that "P.A. 15-84, § 1, has the legal effect of altering the defendant's punishment so that he no longer will serve life, or its equivalent, in

prison without the possibility of parole." Id. It further noted that, as it had previously stated in *State* v. *Delgado*, 323 Conn. 801, 811, 151 A.3d 345 (2016), "if a defendant has the possibility of parole, there is no *Miller* violation. . . . Thus, resentencing is not required. . . . A punishment that includes parole eligibility no longer falls within the purview of *Miller* . . . . *Miller* simply does not apply when a juvenile's sentence provides an opportunity for parole . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *McCleese*, supra, 414.

The defendant's claim in this case—that his sentence violates the state constitution's prohibition against cruel and unusual punishment because the sentencing court failed to consider his age at the time of sentencing—cannot be reconciled with our Supreme Court's decision in *McCleese*. The defendant in *McCleese*, who was seventeen at the time he committed the offense, received an eighty-five year sentence without the possibility of parole. Id., 382. Public Act 15-84 made him eligible for parole at the age of fifty after serving thirty years of that sentence. Id., 383. Our Supreme Court held that such a sentence, which guaranteed that he would be incarcerated for no less than thirty years and up to eighty-five years, fell outside the purview of *Miller* under our state constitution. Id., 387.

The defendant in this case, who was twenty years old at the time of the offense, was sentenced to thirty-two years of incarceration. Like the defendant in *McCleese*, he will be eligible for parole at the age of fifty after serving approximately twenty-seven years of that sentence. See id. Moreover, the defendant in this case, unlike the defendant in *McCleese*, is guaranteed to be released on this sentence after serving no more than thirty-two years, at which time he will be approximately fifty-five years of age. We therefore conclude that, even if the defendant, who was twenty years old

at the time he committed the offense, were to prevail on his claim that the state constitution provides twenty year olds with the same *Miller* protections afforded to juveniles, his claim would nevertheless fail as a matter of law because, consistent with the sentence at issue in *McCleese*, he did not receive a sentence that falls within the purview of *Miller* under our state constitution.[6]

Accordingly, the defendant's claim fails as a matter of law.

III

The defendant also argues, for the first time on appeal, that the provisions of P.A. 15-84 pertaining to parole eligibility for juvenile offenders and the consideration of youth as a mitigating factor at sentencing violate his equal protection rights under the fourteenth amendment to the United States constitution and article first, § 20, of the Connecticut constitution because

[6] For the same reason, we reject the defendant's related claim that he was entitled to an evidentiary hearing on his claims pursuant to this court's decision in *Omar Miller*. See *State* v. *Miller*, supra, 186 Conn. App. 654. In that case, which was decided prior to our Supreme Court's decision in *McCleese*, this court reversed a trial court's sua sponte denial, without a hearing, of a motion to correct a thirty-five year sentence imposed on a defendant who was nineteen at the time he committed the underlying offense. Id., 655–56. This court held that the trial court erred when it denied the motion to correct without first holding a hearing on that motion. Id., 663–64. In so holding, the court also ordered that, on remand, the defendant was entitled to present evidence in support of his "novel" claim that his sentence, which allegedly was entered without taking into consideration his youth as a mitigating factor, violated our state constitution's prohibition against cruel and unusual punishment. Id., 663. The court expressed no view, however, on the merits of the defendant's claim. Id. In light of our Supreme Court's subsequent decision in *McCleese* and our conclusion that the defendant's sentence in the present case did not trigger *Miller* protections under our state constitution, we conclude that remanding the defendant's motion in this case for an evidentiary hearing would serve no useful purpose. See *State* v. *Turner*, supra, 214 Conn. App. 591 n.5 ("a remand for further consideration of the merits would serve no useful purpose").

those provisions do not apply to defendants who were over the age of eighteen but under the age of twenty-one at the time of their offense. See General Statutes §§ 54-91g and 54-125a (f). He argues that, despite his failure to raise these claims before the trial court, he is entitled to relief pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), in which our Supreme Court stated that "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.)[7] The state argues that the

[7] The state argues that we should not consider the defendant's equal protection claims because they challenge neither the sentence nor the sentencing process and, thus, fall outside a court's limited jurisdiction on a motion to correct an illegal sentence. The state cites *State* v. *Henderson*, 93 Conn. App. 61, 75, 888 A.2d 132, cert. denied, 277 Conn. 927, 895 A.2d 800 (2006), for the proposition that, when a defendant attacks a statute on its face, "he challenges the constitutionality of the legislative enactment itself and not the action of the trial court in applying the proper law in the proper manner. . . . Such challenges are not within the scope of [the] court's expressly authorized jurisdiction for a motion to vacate an illegal sentence." (Internal quotation marks omitted.) See also, e.g., *State* v. *Jin*, 179 Conn. App. 185, 195–96, 179 A.3d 266 (2018); *State* v. *Rivera*, 177 Conn. App. 242, 277–78, 172 A.3d 260 (2017), cert. denied, 333 Conn. 937, 218 A.3d 1046 (2019); *State* v. *Starks*, 121 Conn. App. 581, 592, 997 A.2d 546 (2010). We conclude that the court has jurisdiction over the defendant's claims and that they are reviewable in light of our Supreme Court's decision in *State* v. *McCleese*, supra, 333 Conn. 425 n.23. There, as in the present case, the defendant filed a motion to correct an illegal sentence and then, on appeal, asserted that a resentencing statute violated his right to equal protection because it did not apply to him. Id., 425. Our Supreme Court noted that the defendant failed to raise this equal protection claim before the trial court but stated: "To the extent that the record supports it, we nonetheless review

defendant's equal protection claims fail because adults and juveniles are not similarly situated and because §§ 54-91g and 54-125a (f) pass muster under rational basis review. For the reasons that follow, we conclude that the defendant is not entitled to relief under *Golding* with respect to his equal protection claims brought under the federal constitution.[8]

A

Section 2 of P.A. 15-84, codified at § 54-91g (a) (1), requires a sentencing court to consider, inter alia, "the hallmark features of adolescence," and the differences between the brain development of a child and an adult, before sentencing a defendant who has been convicted of a class A or B felony following a transfer of the case from the juvenile docket of the Superior Court to the regular criminal docket.[9] The defendant argues that the

it under . . . *Golding* . . . ." (Citation omitted.) Id., 425 n.23; see also, e.g., *State* v. *Arnold*, 205 Conn. App. 863, 868 n.9, 259 A.3d 716 ("[b]ecause we are bound by [our Supreme Court's decision in *McCleese*] . . . we will consider the defendant's claim under *Golding*" (citation omitted)), cert. denied, 339 Conn. 904, 260 A.3d 1225 (2021). As such, we will consider the defendant's equal protection claims in this case pursuant to *Golding* because the defendant's claims are of a constitutional magnitude and the record is adequate for our review. See *State* v. *Castro*, 200 Conn. App. 450, 456–57, 238 A.3d 813 (setting forth four *Golding* prongs), cert. denied, 335 Conn. 983, 242 A.3d 105 (2020).

[8] We consider the defendant's equal protection claims under the United States constitution, but we decline to consider his equal protection claims under the Connecticut constitution because he failed to analyze these claims independently from his fourteenth amendment claims. See, e.g., *State* v. *McCleese*, supra, 333 Conn. 425 n.23; *State* v. *Allen*, 289 Conn. 550, 580 n.19, 958 A.2d 1214 (2008).

[9] General Statutes § 54-91g (a) provides: "If the case of a child, as defined in section 46b-120, is transferred to the regular criminal docket of the Superior Court pursuant to section 46b-127 and the child is convicted of a class A or B felony pursuant to such transfer, at the time of sentencing, the court shall: (1) Consider, in addition to any other information relevant to sentencing, the defendant's age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development; and (2) Consider, if the court proposes to sentence the child to a lengthy sentence under which it is likely that the child will die while

statute's exclusion of defendants who were under the age of twenty-one at the time of their offense violates his equal protection rights because eighteen, nineteen, and twenty year olds convicted of lengthy sentences are similarly situated to juveniles who were convicted following a transfer of their case to the regular criminal docket and defendants who were convicted as juveniles and sentenced to a total effective sentence of more than ten years.

The defendant fails to recognize, however, that, even if we agreed with him that he is similarly situated to juveniles who fall within the purview of § 54-91g *and* that the legislature had no rational basis for excluding defendants who were under the age of twenty-one at the time of an offense, the statute does not apply to him for an independent reason that he has failed to address on appeal. Our Supreme Court, in interpreting § 54-91g, has made clear that the statute does not apply retroactively to juveniles convicted prior to October 1, 2015, the effective date of the statute. See *State* v. *Delgado*, supra, 323 Conn. 814; see also *State* v. *Coltherst*, 341 Conn. 97, 114, 266 A.3d 838 (2021) ("[t]his court's previous interpretation of § 54-91g confirms that the legislature did not intend the statute to apply retroactively to defendants who, although under the age of eighteen when they committed their offenses, were initially charged and tried as adults"). In other words, no defendants convicted of crimes committed prior to October 1, 2015, including those who were under the age of eighteen at the time of the offense, are entitled to resentencing under § 54-91g. See *State* v. *Coltherst*, supra, 116–17 ("[o]ur conclusion in *Delgado* that § 54-91g does not apply retroactively is consistent with the plain language of the statute, which . . . limits its

incarcerated, how the scientific and psychological evidence described in subdivision (1) of this subsection counsels against such a sentence."

application, effective October 1, 2015, to children convicted of a class A or B felony following transfer from the docket for juvenile matters to the regular criminal docket of the Superior Court"). The defendant was convicted in 2006 and sentenced in 2007, long before the statute's October 1, 2015 effective date.

As a result, the statute is wholly inapplicable to the defendant, and he has not satisfied his burden under *Golding* of demonstrating that the alleged constitutional violation exists and deprived him of a fair trial.

B

The defendant next argues that the early parole provisions of P.A. 15-84, which are codified at § 54-125a (f), violate his right to equal protection. Section 54-125a (f) (1) provides in relevant part: "(1) . . . [A] person convicted of one or more crimes committed while such person was under eighteen years of age, who is incarcerated on or after October 1, 2015, and who received a definite sentence or total effective sentence of more than ten years for such crime or crimes prior to, on or after October 1, 2015, may be allowed to go at large on parole in the discretion of the panel of the Board of Pardons and Paroles for the institution in which such person is confined, provided (A) if such person is serving a sentence of fifty years or less, such person shall be eligible for parole after serving sixty percent of the sentence or twelve years, whichever is greater, or (B) if such person is serving a sentence of more than fifty years, such person shall be eligible for parole after serving thirty years. . . ."[10]

We first note that "[t]he concept of equal protection [under both the state and federal constitutions] has

[10] As discussed in part II of this opinion, a separate subsection of this statute establishes the defendant's current parole eligibility. See General Statutes (Rev. to 2003) § 54-125a (b) (2); see also footnote 1 of this opinion.

been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. . . . Conversely, the equal protection clause places no restrictions on the state's authority to treat dissimilar persons in a dissimilar manner. . . . Thus, [t]o implicate the equal protection [clause] . . . it is necessary that the state statute . . . in question, either on its face or in practice, treat persons standing in the same relation to it differently. . . . [Accordingly], the analytical predicate [of an equal protection claim] is a determination of who are the persons [purporting to be] similarly situated." (Internal quotation marks omitted.) *State* v. *Dyous*, 307 Conn. 299, 315, 53 A.3d 153 (2012).

We conclude that the defendant's equal protection claim in this case fails because, even if we assume arguendo that twenty year old offenders are similarly situated to juvenile offenders for purposes of § 54-125a (f),[11] the legislature had a rational basis for treating the two groups differently. If a "statute does not touch upon either a fundamental right or a suspect class, its classification need only be rationally related to some legitimate government purpose in order to withstand an equal protection challenge." (Internal quotation marks omitted.) *State* v. *McCleese*, supra, 333 Conn. 427. Rational basis review applies here because the statute

[11] The defendant argues that "offenders under eighteen who are convicted of class A or B felonies and sentenced to more than ten years are similarly situated to offenders who are eighteen, nineteen, and twenty and in the same posture. There is no difference between these two groups other than chronological age." The state argues that the two groups are not similarly situated based on the United States Supreme Court's decisions in *Miller* v. *Alabama*, supra, 567 U.S. 471, *Graham* v. *Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), and *Roper* v. *Simmons*, 543 U.S. 551, 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). "Although perhaps a sufficient distinction, we nonetheless assume, without deciding, that the offenders are similarly situated for equal protection purposes." *State* v. *McCleese*, supra, 333 Conn. 427 n.26.

does not implicate a fundamental right[12] and because age is not a suspect classification. See *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 312–14, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976).

"Under rational basis review, [i]t is irrelevant whether the conceivable basis for the challenged distinction actually motivated the legislature. . . . [The law] must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. . . . [T]he [statutory scheme] is presumed constitutional . . . and [t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *McCleese*, supra, 333 Conn. 427.

Applying this standard to § 54-125a (f), we conclude that there are several rational justifications for treating juveniles differently than adults and, thus, the statute does not violate equal protection. The legislature could reasonably distinguish between juvenile and adult defendants in the realm of rehabilitation on the basis that maturity and judgment incrementally improve as one gets older, warranting harsher punishment for those eighteen years of age and older. Indeed, the United States Supreme Court has noted marked differences between these two groups in this context. In *Graham* v. *Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), for instance, the court noted that

[12] The defendant suggests in his brief that intermediate review should apply because the statute involves " 'a significant interference with [his] liberty,' " citing *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 161, 957 A.2d 407 (2008). As the defendant admits, however, our Supreme Court has consistently rejected the argument that intermediate review should apply to claims that involve interference with liberty as a result of criminal punishment. See, e.g., *State* v. *McCleese*, supra, 333 Conn. 427 n.27; *State* v. *Higgins*, 265 Conn. 35, 66, 826 A.2d 1126 (2003); *State* v. *Wright*, 246 Conn. 132, 140–41, 716 A.2d 870 (1998).

"developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." It also has noted that "[o]nly a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." (Internal quotation marks omitted.) *Roper* v. *Simmons*, 543 U.S. 551, 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). These distinctions alone could conceivably warrant treating juveniles differently than adults for purposes of determining parole eligibility. Thus, because the legislature had a rational basis for limiting § 54-125a (f) to juvenile offenders, the defendant has not satisfied his burden under *Golding* of demonstrating that the alleged constitutional violation exists and deprived him of a fair trial.

The form of the judgment is improper, the judgment dismissing the defendant's motion to correct an illegal sentence is reversed and the case is remanded with direction to render judgment denying the defendant's motion to correct an illegal sentence.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* KERLYN M. TAVERAS (AC 38602)

Cradle, Seeley and Eveleigh, Js.

Syllabus

The defendant appealed from the judgments of the trial court revoking his probation. The defendant previously had pleaded guilty to various crimes under three informations and received a total effective sentence of three years of imprisonment, execution suspended after twelve months, followed by a term of probation. The conditions of the defendant's probation prohibited him from violating any state or federal criminal law. While the defendant was serving his term of probation, he precipitated

an incident at his son's preschool. On the day of the incident, B, the preschool's director, received a phone call from C, one of her staff members, informing her that, after a staff member had called the defendant because he was late to pick up his son, the defendant arrived at the preschool in an escalated emotional state and argued with the staff members. As he was leaving with his son, the defendant warned C that she should "watch [her]self" and "be careful . . . ." The defendant then tried to reenter the preschool but left after his attempt was unsuccessful. Thereafter, B arrived, discussed the incident with her staff, and contacted the police. Following the incident, the state sought revocation of the defendant's probation, claiming that he had violated its terms by committing breach of the peace in the second degree. At the defendant's violation of probation hearing, the trial court overruled the defendant's hearsay objection and permitted B to testify regarding the statements that C had made to her during their phone call, finding that such statements were reliable. C was not called as a witness at the hearing. Thereafter, the trial court found that the state had met its burden of proving that the defendant violated the terms of his probation. Accordingly, the trial court rendered judgments revoking the defendant's probation, and the defendant appealed to this court. During the pendency of the appeal, the defendant filed a motion for articulation with the trial court requesting, inter alia, that it specify the evidence underlying its conclusion that C's statements were reliable, indicate whether it had applied the balancing test set forth in *State* v. *Shakir* (130 Conn. App. 458), and specify any good cause that it had for excusing the state from calling C as a witness. The trial court granted the motion in part, articulating its conclusion regarding the reliability of the hearsay statements. It denied the defendant's request related to *Shakir*, stating that the defendant did not raise any related due process claims, and, as such, the court had no opportunity to consider the merits of *Shakir* in connection with the defendant's violation of probation hearing. This court granted the defendant's motion for review of the trial court's order but denied the relief requested therein. On the defendant's appeal of the revocation of his probation, this court reversed the judgments of the trial court, finding that the defendant's remarks at the preschool were protected under the first amendment to the United States constitution because the state had failed to present sufficient evidence to establish that they constituted fighting words or a true threat. This court remanded the case with direction to render judgments for the defendant and did not address the other claims raised by the defendant in his appeal. On the granting of certification, the state appealed to our Supreme Court, which disagreed with this court's conclusion that the defendant's remarks warranted first amendment protection. It reversed the judgment of this court and remanded the case to this court with direction to consider the defendant's remaining claims on appeal, namely, the admission of B's testimony as to C's hearsay statements on both constitutional and evidentiary grounds. *Held*:

1. The defendant's claim that B's testimony as to C's hearsay statements was admitted in violation of his due process rights was not preserved and was not reviewable pursuant to *State* v. *Golding* (213 Conn. 233), and the claimed error did not require reversal under the plain error doctrine: the defendant failed to raise an objection that provided opposing counsel and the court with fair notice of his claim, as he never argued to the trial court that, pursuant to *Shakir*, it was required to balance his interest in cross-examining C against the state's good cause for not calling C as a witness; moreover, the record was inadequate for review pursuant to *Golding* because, as a result of the defendant's failures, the state did not present evidence regarding its reasons for not producing C as a witness at the hearing and the trial court had no occasion to consider whether there was good cause not to allow confrontation; furthermore, the defendant did not demonstrate an error so obvious that it required reversal under the plain error doctrine.
2. The trial court did not abuse its discretion in admitting B's testimony as to C's hearsay statements because such statements contained some minimal indicia of reliability and were not wholly unsupported by corroborative evidence: although B did not witness the incident at the preschool, she arrived shortly thereafter, observed the demeanor of her staff members, and was present when they gave statements to the police, which were consistent with what she had been told by C over the phone; moreover, in an affidavit that was prepared in support of the violation of probation arrest warrant and was made on the basis of a review of the police reports, the defendant's probation officer set forth an account of the incident that was similar to that described by C in her statements to B; furthermore, contrary to the defendant's claim, the situation was distinguishable from that in *State* v. *Carey* (30 Conn. App. 346) because B's personal observations and familiarity with C provided her with a basis on which she could judge the reliability or accuracy of C's statements.

Argued September 20, 2022—officially released May 16, 2023

Procedural History

Three substitute informations charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Danbury, geographical area number three, where the cases were consolidated and tried to the court, *Russo*, *J.*; judgments revoking the defendant's probation, from which the defendant appealed to this court, *Sheldon* and *Eveleigh*, *Js.*, with *Elgo*, *J.*, dissenting, which reversed the trial court's judgments and remanded the cases with direction to render judgments for the defendant, from which the

state, on the granting of certification, appealed to the Supreme Court, *Mullins*, *Kahn*, *Ecker* and *Keller*, *Js.*, with *Robinson*, *C. J.*, and *D'Auria* and *McDonald*, *Js.*, concurring, which reversed this court's judgment and remanded the cases to this court with direction to consider the defendant's remaining claims on appeal. *Affirmed.*

James B. Streeto, senior assistant public defender, for the appellant (defendant).

Linda F. Rubertone, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott* and *Stephen J. Sedensky III*, state's attorneys, and *Bruce R. Lockwood*, senior assistant state's attorney, for the appellee (state).

Opinion

EVELEIGH, J. This appeal returns to us on remand from our Supreme Court. In *State* v. *Taveras*, 183 Conn. App. 354, 356, 193 A.3d 561 (2018), rev'd, 342 Conn. 563, 271 A.3d 123 (2022), the defendant, Kerlyn M. Taveras, appealed from the judgments of the trial court finding him in violation of his probation and revoking his probation pursuant to General Statutes § 53a-32, following his arrest on a charge of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a). In a divided opinion, this court concluded that the state had failed to present sufficient evidence to establish that the defendant's remarks during an incident at his son's preschool, which formed the basis for the breach of the peace charge and his violation of probation, constituted either " 'fighting words' " or a " 'true threat,' " and, therefore, the remarks were protected under the first amendment to the United States constitution. Id., 358, 381. Accordingly, this court reversed the judgments of the trial court and remanded the cases with direction to render judgments in favor of the defendant. Id., 381. As a result of that conclusion,

this court did not address the other claims raised by the defendant in his appeal. Id., 358 n.4.

After granting the state's petition for certification to appeal, our Supreme Court disagreed with this court's conclusion that the defendant's remarks warranted first amendment protection. *State* v. *Taveras*, 342 Conn. 563, 580, 271 A.3d 123 (2022). Our Supreme Court thus reversed the judgment of this court and remanded the case to us with direction to consider the defendant's remaining claims on appeal. Id.

In accordance with that order, we now consider whether the trial court improperly admitted into evidence at the probation revocation hearing the testimony of Monica Bevilaqua, the director of the preschool where the incident took place, as to statements made to her by Sondra Cherney, the preschool's assistant education manager. The defendant claims that (1) the admission of Bevilaqua's testimony violated his due process right to cross-examine Cherney, and (2) Bevilaqua's testimony concerning Cherney's hearsay statements should have been excluded because the statements were unreliable and uncorroborated.[1] We affirm the judgments of the trial court.

In its decision, our Supreme Court set forth the following relevant procedural history. "The record establishes that the defendant had been previously charged with, and pleaded guilty to, the following offenses in three separate criminal cases: (1) threatening in the second degree in violation of General Statutes [Rev. to 2009] § 53a-62 (a) (3) in connection with an incident that

[1] The defendant also claims that the trial court's finding that he violated his probation was "clearly erroneous" because "Cherney's statements were improperly admitted [and] [s]ince this was the only evidence against the defendant, he should not have been convicted." Because we conclude that the court did not abuse its discretion in admitting Bevilaqua's testimony as to Cherney's statements; see part II of this opinion; the defendant cannot prevail on this claim.

occurred on or about September 17, 2009; (2) assault in the third degree in violation of General Statutes § 53a-61 (a) (1) in connection with an incident that occurred on or about June 30, 2011; and (3) threatening in the second degree in violation of [General Statutes (Rev. to 2011)] § 53a-62 (a) (3) in connection with an incident that occurred on or about July 28, 2011. The trial court accepted those pleas and, on August 22, 2012, imposed a total effective sentence on those charges of three years of incarceration, execution suspended after twelve months, followed by three years of probation. The defendant's term of probation on these charges began on July 1, 2013. On August 28, 2012, and then again on April 25, 2013, the defendant agreed to the standard conditions of probation set forth on Judicial Branch Form JD-AP-110. Those conditions expressly prohibited the defendant from, among other things, 'violat[ing] any criminal law of the United States, this state or any other state or territory.'

"On March 11, 2014, approximately eight months into his term of probation, the defendant precipitated an incident at his son's preschool in Danbury. The evidence contained in the record about that event comes almost exclusively from two distinct sources: (1) testimony from the preschool's director, [Bevilaqua]; and (2) an affidavit from the defendant's probation officer, Christopher Kelly, dated April 17, 2014, requesting the issuance of a warrant for a violation of the defendant's probation.[2] . . .

[2] "Kelly's affidavit was admitted as a full exhibit without objection." *State* v. *Taveras*, supra, 342 Conn. 567 n.2. As we explain subsequently in this opinion, "[a]lthough defense counsel objected to portions of Bevilaqua's testimony on hearsay grounds, the trial court overruled that objection. In a subsequent articulation, the trial court expressed its view that, although Bevilaqua's testimony constituted hearsay, it was nonetheless admissible for the purpose of proving the defendant's violation of probation because it was 'relevant, reliable, and probative.' " Id.

"First, Bevilaqua testified that the defendant's son was one of about four hundred students enrolled at the preschool and that his child's scheduled hours were 8:30 a.m. to 4 p.m. Shortly after 4 p.m. on March 11, 2014, Bevilaqua, who was not then physically present at the preschool, received a call from her staff informing her that the defendant was late for pickup. Pursuant to standard policy, preschool staff had reached out to the defendant by phone to ask where he was. Bevilaqua testified that the defendant was 'not happy' about this call but that he had, nonetheless, told staff that he was on his way.

"According to reports from Bevilaqua's staff, the defendant eventually arrived at the preschool at approximately 4:40 p.m. in an 'already escalated' emotional state, went down to his child's classroom, and then began arguing with staff on his way out. [Cherney], the preschool's assistant education manager, then said something to the defendant as he was exiting the preschool through a set of locked doors. Bevilaqua testified that, in response to Cherney's comment, the defendant turned around and said, 'you better watch yourself, you better be careful . . . .' Bevilaqua indicated that the defendant then 'tried to get back in the door and couldn't, and then he left.'

"Other portions of Bevilaqua's testimony provide the following additional factual context. Bevilaqua indicated that this situation was not the staff's first 'escalated interaction' with the defendant. Although the details of these previous interactions were not expressly drawn out at the hearing, Bevilaqua clearly testified that she herself had previously witnessed the defendant acting in a threatening manner. Indeed, Bevilaqua stated that she made the decision to return to the preschool as soon as she heard that the defendant was going to be late because she 'knew it would get escalated.' When she got to the preschool, she found that

members of her staff were 'shaken up' and 'concerned' by what had transpired. Bevilaqua also stated that, in order to protect those at the preschool, she immediately contacted the police, formally prohibited the defendant from reentering the preschool, began pursuing a restraining order, and hired a police officer for additional security the following day.

"Kelly's affidavit provides the following similar account of events: '[On March 11, 2014, police officers were] dispatched to [a preschool for] a dispute involving [the defendant]. [The defendant] was forty minutes late picking up his child . . . and [was] . . . reminded . . . that he needed to pick his child up on time. [The defendant] became extremely agitated and began to argue with staff. Staff told [the defendant] that he had to leave because he was arguing with staff in the front lobby in front of other children and their parents. [The defendant] then yelled to the staff "you better watch your back." Staff reported . . . that [the defendant] was so enraged and intimidating that the school hired a police officer for security the next morning in the event [the defendant] came back. [The defendant] agreed to meet [police officers] the next morning and was arrested for breach of [the] peace. [The defendant] was advised not to return to the school again, otherwise he would be arrested for criminal [t]respass.'

"The state subsequently sought revocation of the defendant's probation as a result of the defendant's conduct on March 11, 2014. During the hearing that followed, the state proceeded on the theory that the foregoing testimony and evidence were sufficient to prove that the defendant had violated the terms of his probation by committing breach of the peace in the second degree, in violation of . . . § 53a-181 (a).[3]

[3] "General Statutes § 53a-181 (a) provides in relevant part: 'A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or

"On the basis of this testimony, the trial court found that the state had met its burden of proving, by a preponderance of the evidence, that the defendant had violated the standard terms of his probation by violating § 53a-181 (a). In ruling in favor of the state on the adjudicatory phase of the proceeding, the trial court explicitly found that the defendant had exhibited a 'threatening nature and demeanor' and that his conduct had caused Bevilaqua to contact the police. . . . After the dispositional phase of the hearing, the trial court rendered judgments revoking the defendant's various terms of probation and sentenced him to a total effective term of eighteen months of incarceration." (Footnotes altered; footnotes omitted.) Id., 566–70.

The following additional procedural history is relevant to our resolution of the defendant's claims. At the defendant's violation of probation hearing, Bevilaqua testified that she learned about the incident involving the defendant when she received a phone call from Cherney. When the state asked Bevilaqua about what Cherney had told her on the phone and Bevilaqua began to respond, the defendant's counsel objected on the ground that such testimony would constitute inadmissible hearsay.[4] Specifically, the defendant's counsel

threatening behavior in a public place; or . . . (3) threatens to commit any crime against another person or such other person's property . . . . For purposes of this section, "public place" means any area that is used or held out for use by the public whether owned or operated by public or private interests.' " *State* v. *Taveras*, supra, 342 Conn. 569 n.4.

[4] Before the state called Bevilaqua to testify, the parties briefly discussed the admissibility of hearsay evidence at a violation of probation hearing. The defendant's counsel provided the court with a copy of this court's decision in *State* v. *Carey*, 30 Conn. App. 346, 620 A.2d 201 (1993), rev'd on other grounds, 228 Conn. 487, 636 A.2d 840 (1994), and argued that, even though the rule for admitting hearsay evidence was more lenient at a probation hearing than at a criminal trial, not all hearsay evidence was admissible. See id., 354. The prosecutor provided the court with a copy of this court's decision in *State* v. *Giovanni P.*, 155 Conn. App. 322, 110 A.3d 442, cert. denied, 316 Conn. 909, 111 A.3d 883 (2015), and argued that hearsay evidence was admissible if the court found it to be reliable and probative. See id., 327.

argued that "that would be for [Cherney] to come in and testify to" and "this is identical to what happened in [*State* v. *Carey*, 30 Conn. App. 346, 354, 620 A.2d 201 (1993), rev'd on other grounds, 228 Conn. 487, 636 A.2d 840 (1994)], where a probation officer's reading [of] a statement from a police report . . . was deemed to be improper hearsay [that was] let in."

In response, the prosecutor argued that *Carey* was distinguishable because, in that case, "[t]here was no showing of reliability," whereas, in the present case, "Bevilaqua has testified that she's the director of the preschool. That she's had prior dealings with . . . [the defendant]. That this is her staff. That they're calling her to report this incident to her, and that when the police department came and took statements . . . and did an investigation she was present . . . for that piece as well so that she's actually heard these items two times, and that both times the statements from . . . the staff that was present were consistent. . . . I would argue that it does make the reliability prong that's demonstrated in [*State* v. *Giovanni P.*, 155 Conn. App. 322, 338 n.14, 110 A.3d 442, cert. denied, 316 Conn. 909, 111 A.3d 883 (2015)]." The defendant countered that, because the court "knows absolutely nothing" about Cherney, it could not find her to be more reliable than the police reports improperly admitted in *Carey*.

The court overruled the defendant's hearsay objection. The court first concluded that "the reliability threshold has been passed . . . for the statement." The court asked the state about the probative value of the evidence and the prosecutor explained that it was relevant to demonstrate "the particulars of . . . the threat that was made or . . . the exact nature of it would lend more towards the weight that . . . the court may give it." The court responded: "We'll allow the question. I think it is certainly reliable. We'll see what relevance it does have upon [Bevilaqua's] answer."

The prosecutor then asked Bevilaqua: "[W]hat was the nature of the incident reported to you on that telephone call?" Bevilaqua responded: "[T]hat [the defendant's son] had not been picked up on time. That they called [the defendant]. He was coming down. He was not happy. When he had gotten to the school, he entered the doorway, already escalated. That he walked down to the classroom to get [his son]. When he came back down the hallway and got to the doors he had words with staff members. . . . [H]e got out the front door, door shut behind him, and [Cherney] had said something back to him, and he turned and said, 'you better watch yourself, you better be careful,' tried to get back in the door and couldn't, and then he left."

Bevilaqua also explained that when she received Cherney's phone call, she was already on her way back to the school "because knowing what we knew about the family and the situation I knew it would get escalated. . . . So, when I got back moments later, we called the police department." The defendant's counsel did not ask Bevilaqua any questions when provided with the opportunity to cross-examine her, and the state did not call Cherney to testify as a witness at the hearing.

During the pendency of his initial appeal to this court, the defendant filed a motion for articulation with the trial court requesting, among other things, that the court "specify the evidence underlying the conclusion that the statements of Cherney were reliable . . . ." The defendant also requested that the court "[s]pecify whether the balancing test set forth by the Appellate Court in *State* v. *Shakir*, 130 Conn. App. 458, 467, [22 A.3d 1285, cert. denied, 302 Conn. 931, 28 A.3d 345 (2011)], was applied in admitting the hearsay statements of Cherney through the testimony of Bevilaqua" and, "[i]f the *Shakir* test was applied, specify the good cause, if any, [that] justif[ied] excusing the state from

calling Cherney as a witness, and allowing Bevilaqua to testify as to her statements."

The trial court granted the motion in part and issued an articulation elaborating on the factual basis for its conclusion that Bevilaqua's testimony as to Cherney's statements "contained reliable hearsay." In its articulation, the court first summarized the testimony at issue: "Up until the juncture where [Cherney's] statements to [Bevilaqua] were challenged as inadmissible, there was evidence in the record, from [the defendant's] probation officer, that [the defendant] engaged in certain abhorrent behavior at his child's preschool. [Bevilaqua], the director of the preschool, was then called as a witness and further testified that she had a level of familiarity with [the defendant] from past behavior. [Bevilaqua's] interest in the [defendant's] matter on March 11, 2014, was triggered by a telephone call received by her assistant education manager, [Cherney], who contacted [Bevilaqua] as she—Bevilaqua—was en route to the preschool. The sum and substance of the colloquy between the two certainly was the overall behavior of [the defendant]. Within that behavior, however, were concerns that members of [Bevilaqua's] staff may be in harm's way. As a result, when [Bevilaqua] arrived at her work station, the evidence revealed that she debriefed with her coworkers regarding safety issues and was concerned enough that she called the police. This summary was testified to by [Bevilaqua]."

After setting forth the relevance and probative value of Cherney's hearsay statements, the court articulated its conclusion as to the reliability of that evidence: "The few statements made by [Cherney] to [Bevilaqua] were reliable in that the behavior reported was not normal behavior that would normally be exhibited by a parent of a young child and, moreover, was the type of behavior that triggered the responsibilities of a director, who

properly acted as one would where the safety of children or staff was in possible jeopardy. The trial court further notes that there was no evidence of any animus from [Bevilaqua] toward [the defendant], nor was there any indication that [Bevilaqua] had any ulterior motivations to testify other than truthfully, given the gravity, urgency and reliability of the statements provided to her by [Cherney]. Additionally, the defendant was given every opportunity to cross-examine [Bevilaqua] on the content and quality of her testimony. Given the totality of the circumstances, the trial court found that the statements satisfied the standard, namely, that the hearsay statements be relevant, reliable, and probative."

The court denied the motion for articulation in all other respects. As to its denial of the defendant's requests for articulation related to the *Shakir* balancing test, the court explained that "the defendant did not raise any due process claims with regard to *State* v. *Shakir*, [supra, 130 Conn. App. 467]. As a result, the court had no opportunity to hear argument and then consider the merits of . . . *Shakir* in connection with [the defendant's] violation of probation hearings." The defendant subsequently filed with this court a motion for review of the trial court's order denying, in part, the motion for articulation. This court granted the motion for review but denied the relief requested therein.

On appeal, the defendant challenges the admission of Bevilaqua's testimony as to Cherney's hearsay statements on both constitutional and evidentiary grounds.[5] We address each claim in turn.

[5] As explained previously in this opinion, neither this court in *State* v. *Taveras*, supra, 183 Conn. App. 354, nor our Supreme Court in *State* v. *Taveras*, supra, 342 Conn. 563, addressed the defendant's claims challenging the admission of Bevilaqua's testimony as to Cherney's hearsay statements.

I

We first consider the defendant's claim that Bevilaqua's testimony as to Cherney's hearsay statements was admitted in violation of his due process rights. The defendant contends that the court improperly failed to conduct the balancing test pursuant to *State* v. *Shakir*, supra, 130 Conn. App. 467–68, and to determine whether good cause existed for his inability to confront and cross-examine Cherney at the probation revocation hearing concerning the hearsay statements that were admitted through Bevilaqua's testimony. He acknowledges that he did not distinctly raise a due process argument in his objection to the admission of Bevilaqua's testimony, and, in the event that we should find the issue inadequately preserved, he requests review of this claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), or, alternatively, reversal under the plain error doctrine, codified at Practice Book § 60-5. We conclude that the defendant's claim was not preserved, that it is not reviewable pursuant to *Golding*, and that the claimed error is not so obvious that it requires reversal under the plain error doctrine.

We begin our analysis by setting forth the limited due process rights afforded to a defendant in a violation of probation hearing. "Probation revocation proceedings fall within the protections guaranteed by the due process clause of the fourteenth amendment to the federal constitution . . . . Probation itself is a conditional liberty and a privilege that, once granted, is a constitutionally protected interest . . . . The revocation proceeding must comport with the basic requirements of due process because termination of that privilege results in a loss of liberty. . . . [T]he minimum due process

requirements for revocation of [probation] include written notice of the claimed [probation] violation, disclosure to the [probationer] of the evidence against him, the opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses in most instances, a neutral hearing body, and a written statement as to the evidence for and reasons for [a probation] violation. . . . Despite that panoply of requirements, a probation revocation hearing does not require all of the procedural components associated with an adverse criminal proceeding." (Citation omitted; internal quotation marks omitted.) *State* v. *Dunbar*, 188 Conn. App. 635, 650, 205 A.3d 747, cert. denied, 331 Conn. 926, 207 A.3d 27 (2019).

"In *State* v. *Shakir*, [supra, 130 Conn. App. 467], we noted that the due process safeguards are codified in Federal Rule of Criminal Procedure 32.1 and include an opportunity to . . . question any adverse witness unless the court determines that the interest of justice does not require the witness to appear . . . . We further explained that the court must balance the defendant's interest in cross-examination against the state's good cause for denying the right to cross-examine. . . . Specifically, we cited to case law from the United States Court of Appeals for the Second Circuit and stated: In considering whether the court had good cause for not allowing confrontation or that the interest of justice [did] not require the witness to appear . . . the court should balance, on the one hand, the defendant's interest in confronting the declarant, against, on the other hand, the government's reasons for not producing the witness and the reliability of the proffered hearsay." (Citation omitted; internal quotation marks omitted.) *State* v. *Polanco*, 165 Conn. App. 563, 570–71, 140 A.3d 230, cert. denied, 322 Conn. 906, 139 A.3d 708 (2016).

"To properly preserve for appellate review a confrontation claim in this context, our precedent instructs that a defendant must distinctly raise the balancing issue with the court at the probation revocation proceeding. If the defendant fails to do so, the claim is deemed unpreserved." *State* v. *Crespo*, 190 Conn. App. 639, 647, 211 A.3d 1027 (2019); see also *State* v. *Esquilin*, 179 Conn. App. 461, 474, 179 A.3d 238 (2018) (concluding that defendant's claim was unpreserved because he failed to argue that trial court was required to conduct balancing test to determine whether admission of certain evidence denied him right to due process); *State* v. *Tucker*, 179 Conn. App. 270, 278–79 n.4, 178 A.3d 1103 ("a defendant's due process claim is unpreserved where the defendant never argued to the trial court that it was required to balance his interest in cross-examining the victim against the state's good cause for not calling the victim as a witness"), cert. denied, 328 Conn. 917, 180 A.3d 963 (2018); *State* v. *Polanco*, supra, 165 Conn. App. 567, 571 (concluding that defendant's due process claim that author of report had to be present in court and subject to cross-examination for report to be admitted into evidence was unpreserved because defendant never argued to trial court that it was required to conduct balancing test to determine whether his right to due process had been violated).

In the present case, the defendant never argued to the court that it was required to balance his interest in cross-examining Cherney against the state's good cause for not calling Cherney as a witness. Accordingly, the defendant did not preserve this constitutional claim because he failed to raise an objection that provided opposing counsel and the court with fair notice of that claim. See, e.g., *State* v. *Crespo*, supra, 190 Conn. App. 647; see also *State* v. *Randy G.*, 195 Conn. App. 467, 475 n.3, 225 A.3d 702, cert. denied, 335 Conn. 911, 229 A.3d 472 (2020).

It is also on this basis that the record is inadequate to afford the defendant review pursuant to *Golding*.[6] See *State* v. *Randy G.*, supra, 195 Conn. App. 475 n.3; *State* v. *Crespo*, supra, 190 Conn. App. 648. "This court has determined . . . that where the defendant does not request that the court conduct the *Shakir* balancing test, or make a good cause finding, the record is inadequate for review of a due process claim under the first prong of *Golding*." (Internal quotation marks omitted.) *State* v. *Jackson*, 198 Conn. App. 489, 506, 233 A.3d 1154, cert. denied, 335 Conn. 957, 239 A.3d 318 (2020); see also *State* v. *Dunbar*, supra, 188 Conn. App. 650–52; *State* v. *Esquilin*, supra, 179 Conn. App. 475–78; *State* v. *Tucker*, supra, 179 Conn. App. 281–82; *State* v. *Shakir*, supra, 130 Conn. App. 468.

Because the defendant did not object to the admission of Bevilaqua's testimony as a violation of his due process right to cross-examine an adverse witness, and he did not request that the court conduct the *Shakir* balancing test, the court had no occasion to consider whether there was good cause not to allow confrontation. See *State* v. *Giovanni P.*, supra, 155 Conn. App. 338 n.14. Moreover, because the state had no notice of the defendant's due process claim, it did not present evidence regarding its reasons for not producing Cherney as a witness at the hearing. "Under these circumstances, the state was not responsible for the gap in the evidence, and it would be patently unfair to address

[6] Under *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.

the defendant's due process claim on the basis of this record." *State* v. *Tucker*, supra, 179 Conn. App. 281–82; see also *State* v. *Polanco*, supra, 165 Conn. App. 575. Accordingly, we decline to review the defendant's unpreserved due process claim on the basis of an inadequate record.[7]

The defendant similarly cannot prevail under the plain error doctrine. "[The plain error] doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. . . . [T]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly." (Internal quotation marks omitted.) *State* v. *Tucker*, supra, 179 Conn. App. 282. On the basis of our review of the record, we conclude that the defendant has not demonstrated an error so obvious that it requires reversal under the plain error doctrine.

II

We next consider the defendant's claim that the court improperly admitted Bevilaqua's testimony as to Cherney's hearsay statements because those statements

[7] The defendant contends that the *Shakir* standard should be modified to allow for review of unpreserved *Shakir* claims. "To the extent that the defendant's argument suggests that our [holding] in *Shakir* . . . should be overruled as conflicting with [federal] and Connecticut Supreme Court precedent, that is not within the province of a three judge panel of the Appellate Court. We note that this court's policy dictates that one panel should not, on its own, [overrule] the ruling of a previous panel. The [overruling] may be accomplished only if the appeal is heard en banc." (Internal quotation marks omitted.) *State* v. *Jackson*, supra, 198 Conn. App. 507 n.12; see also *State* v. *Tucker*, supra, 179 Conn. App. 279 n.4.

were unreliable and uncorroborated. We conclude that the court did not abuse its discretion in admitting the hearsay evidence.

"[T]he rules of evidence do not apply to probation revocation hearings and, thus, relevant hearsay evidence is admissible at the discretion of the trial court." *State* v. *Maietta*, 320 Conn. 678, 691, 134 A.3d 572 (2016); see Conn. Code Evid. § 1-1 (d) (4). "At the same time, [t]he process . . . is not so flexible as to be completely unrestrained; there must be some indication that the information presented to the court is responsible and has *some minimal indicia of reliability*." (Emphasis added; internal quotation marks omitted.) *State* v. *Jackson*, supra, 198 Conn. App. 508. Thus, "[h]earsay evidence may be admitted in a probation revocation hearing if it is relevant, reliable and probative." *State* v. *Verdolini*, 76 Conn. App. 466, 471, 819 A.2d 901 (2003).

"Hearsay evidence cannot be the basis of probation revocation if it is wholly unsupported by corroborative evidence . . . ." *State* v. *Carey*, supra, 30 Conn. App. 354; see also *State* v. *Maietta*, supra, 320 Conn. 691 (hearsay supported by corroborating evidence was sufficiently reliable for admission at probation revocation hearing).[8] "It is readily apparent from the commentary by the commission appointed to revise the criminal statutes and to adopt the penal code that § 53a-32 was carefully drafted so as to forestall the possibility of basing probation violations on unsupported hearsay.

[8] The state suggests that the standard set forth in *Carey* "has been superseded by more recent cases." See *State* v. *Carey*, supra, 30 Conn. App. 352 n.5; see also id., 354. We are not persuaded. Our review of the relevant case law establishes that, although our courts have not explicitly recited the standard set forth in *Carey*, the existence of corroborating evidence continues to be used by our courts to determine whether hearsay statements are sufficiently reliable for admission at probation revocation hearings. See *State* v. *Maietta*, supra, 320 Conn. 691 (hearsay statement was corroborated and, therefore, reliable).

The commentators noted that '[b]ecause the defendant's continued freedom is likely to be at stake, and because the decision as to the violation may turn on conflicting sets of facts, the right to counsel, to cross-examine witnesses and to present evidence (which rights were often granted in practice anyway) are made clear. The language limiting revocation orders to those supported by "the whole record" and "by reliable and probative evidence" is an attempt to reach a middle ground between the requirement of a full trial-type hearing and allowing revocation simply upon what may be unsupported hearsay information in the probation officer's report.' " (Emphasis omitted.) *State* v. *Carey*, supra, 354–55, quoting Commission to Revise the Criminal Statutes, Penal Code Comments, Connecticut General Statutes (1969), pp. 16–17; see also *State* v. *White*, 169 Conn. 223, 239–40, 363 A.2d 143 ("§ 53a-32 apparently contemplates use of hearsay testimony . . . so long as it is not unsupported and is reliable"), cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 399 (1975).

"Regarding challenges to the trial court's evidentiary rulings, our standard of review is that these rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Internal quotation marks omitted.) *State* v. *Jackson*, supra, 198 Conn. App. 508.

On appeal, the defendant contends that no corroborating evidence was offered to support Cherney's statements to Bevilaqua and that the statements were therefore unreliable. We disagree.

The following facts are relevant to our resolution of this claim. Although Bevilaqua did not actually witness the defendant's conduct at the preschool on that particular day, Cherney called her immediately after the incident had occurred. Bevilaqua arrived at the preschool shortly thereafter, and, accordingly, she personally was able to observe staff members' demeanor close in time to the incident. Bevilaqua observed that staff members were "shaken up" and "concerned" by what had transpired. After Bevilaqua "debriefed with her coworkers" as the trial court noted in its articulation, saw these reactions and "heard from everyone what had happened," Bevilaqua's personal assessment of the situation was such that she took immediate preventative measures to ensure the safety of the staff and the children at the preschool. She contacted the police, formally prohibited the defendant from reentering the preschool, began pursuing a restraining order, and hired a police officer for additional security the following day.

In addition, Bevilaqua testified that she was present as staff members gave statements to the police. Bevilaqua explained that the statements she overheard were consistent with what she had been told on the phone by Cherney as she was on her way back to the preschool. Notably, Kelly, the defendant's probation officer, set forth an account of the incident similar to that described by Cherney in her statements to Bevilaqua in the affidavit he prepared in support of the violation of probation arrest warrant, which was admitted as a full exhibit without objection. This affidavit was based on Kelly's review of the police reports. Accordingly, on the basis of our thorough review of the record, we are persuaded that there is "some minimal indicia of reliability." (Internal quotation marks omitted.) *State* v. *Jackson*, supra, 198 Conn. App. 508.

In support of his claim that Cherney's statements were not corroborated sufficiently, the defendant relies

on *State* v. *Carey*, supra, 30 Conn. App. 346. In *Carey*, this court reversed the decision of the trial court revoking the probation of the defendant because the only evidence presented at the hearing, two hearsay police reports, was insufficient to establish a probation violation. Id., 355–56. In that case, the defendant's probation officer, through whom the two hearsay police reports were admitted, "had not personally observed the defendant's conduct . . . ." Id., 348–49. "She had never met the victim, would not have been able to recognize her, had never seen the defendant in the presence of the victim and had no basis whatsoever upon which to judge the reliability or accuracy of the police reports. She conceded that she had no knowledge of the events and her testimony was limited to her having read the police reports." Id., 354. This court explained that, "[i]f . . . the probation officer had been competent to testify from personal knowledge, it would have been a question of the trial court's discretion as to whether there was sufficient support to allow the hearsay evidence," but, because the two hearsay police reports at issue were "wholly unsupported by corroborative evidence," they should not have been admitted into evidence. Id.

We conclude that *Carey* is distinguishable from the present case. Although Bevilaqua, like the probation officer in *Carey*, did not personally observe the defendant's conduct, Bevilaqua was able to provide some testimony from her personal knowledge, as already described. In addition, unlike the probation officer in *Carey*, who had never met the victim, Bevilaqua was familiar with Cherney, whom she worked with at the preschool. Accordingly, unlike the probation officer in *Carey* who had "no basis whatsoever" on which to judge the reliability or accuracy of the police reports at issue in that case; id.; Bevilaqua's personal observations and familiarity with Cherney provided her a basis on which she could judge the reliability or accuracy of

Cherney's statements. See *State* v. *Verdolini*, supra, 76 Conn. App. 470–71 (hearsay statements made by victim during phone call were properly admitted where testifying witness, who had been victim's probation officer, had interacted with victim sufficiently to determine that she was reliable and credible).[9]

We acknowledge, as our Supreme Court noted, that "the state's decision to present its case against the defendant through Bevilaqua and Kelly, neither of whom actually witnessed the defendant's conduct at the preschool on that particular day, makes this case a harder one." *State* v. *Taveras*, supra, 342 Conn. 579; see also id. ("[i]n the absence of any direct evidence of the defendant's conduct, the trial court was left with only secondhand accounts to decide whether the defendant had crossed [the] line" between "incidents that reflect the normal agitations of life [and] those that are truly injurious to our society").

Nevertheless, making every reasonable presumption in favor of the correctness of the trial court's ruling, Cherney's statements contained "some minimal indicia

[9] The defendant attempts to distinguish *Verdolini* from the present case on the basis that the testifying witness in that case was a probation officer, whom the defendant characterizes as a "neutral party . . . ." The defendant suggests that probation officers conduct an "out-of-court evaluation" during which "the officer will inevitably have brought the information to which he is testifying to the defendant's attention, and asked him for his side of the story." He further contends that "the defendant's position will have been interjected into the evidence already, through the defendant's response to the officer."

We are not persuaded that the distinction drawn by the defendant is a meaningful one. In *Verdolini*, this court did not characterize the testifying probation officer as being "neutral" and did not rely on such a characterization in its analysis. See *State* v. *Verdolini*, supra, 76 Conn. App. 470–71. Moreover, the *Verdolini* decision does not suggest that the probation officer conducted an "out-of-court evaluation" and relayed that information to the court, or that such an evaluation was pertinent to the reliability of the hearsay evidence. Instead, this court mentioned the witness' status as a probation officer to explain how he had interacted with victim sufficiently to determine that she was reliable and credible. See id.

of reliability"; (internal quotation marks omitted) *State* v. *Jackson*, supra, 198 Conn. App. 508;[10] and, thus, on the basis of this record, we cannot conclude that the statements were "wholly unsupported by corroborative evidence . . . ." *State* v. *Carey*, supra, 30 Conn. App. 354.[11] Accordingly, considering our deferential standard of review and the low bar for admitting hearsay evidence during violation of probation hearings, we conclude that the court did not abuse its discretion in admitting Bevilaqua's testimony as to Cherney's hearsay statements.

[10] In *Jackson*, this court considered whether the trial court abused its discretion in admitting testimony from a police officer, Joseph Halt, as to statements made by Detective Kiely, another member of his unit, regarding information Kiely received from a confidential informant. *State* v. *Jackson*, supra, 198 Conn. App. 502, 508. The defendant claimed that no corroborating evidence was offered to support Kiely's statement to Halt and that it was unreliable. Id., 508. This court disagreed, reasoning that when the trial court questioned Halt regarding whether the informant was reliable, Halt responded: " 'Correct or we wouldn't have used it.' " Id., 508–509. Considering this testimony, the fact that the trial court was not presented with any evidence casting doubt on the reliability of Kiely's statement to Halt, and counsel's failure to cross-examine Halt regarding why Kiely had deemed the information from the confidential informant reliable, this court determined that the trial court had been "presented with testimony that contained 'some minimal indicia of reliability,' " and concluded that the court did not abuse its discretion in admitting the hearsay evidence. Id., 509.

[11] The state argues that, in addition to the testimony from Bevilaqua as described previously, Cherney's statements also were corroborated by testimony from Kelly regarding a conversation he had with the defendant. Kelly testified: "[The defendant] and I had a conversation after his breach of peace arrest, that he had been arrested, and that he needed to cool it, and maybe not be as confrontational in situations. So, to be careful not to get arrested again, and that we'd give him a break, this time." The prosecutor then asked Kelly, "[I]n your opinion, from having that conversation with him, it was clear to him that there was a condition that he had violated?" Kelly responded: "Yes."

We are not persuaded that Kelly's testimony regarding his conversation with the defendant corroborates Cherney's statements. Immediately preceding the colloquy between the prosecutor and Kelly, the court explained that it was permitting the prosecutor's line of questioning in connection with the issue of whether the defendant understood the conditions of his probation, and it is unclear to us from this record whether the defendant had

The judgments are affirmed.

In this opinion the other judges concurred.

DARYL VALENTINE *v.* COMMISSIONER OF CORRECTION (AC 44745)

Alvord, Suarez and Palmer, Js.

Syllabus

The petitioner, who previously had been convicted of murder and other crimes in connection with the shooting of three individuals, appealed to this court from the judgment of the habeas court dismissing in part and denying in part his second petition for a writ for habeas corpus. The petitioner had been convicted at a second trial after our Supreme Court reversed the judgment of conviction at his first trial. At the second trial, the defense contended that the prosecutor and the police were part of a conspiracy to convict the petitioner of crimes he did not commit based on knowingly perjured testimony and intentionally elicited false statements from several witnesses. Three women, including C and H, had witnessed the shooting while sitting in their car in the parking lot of the diner where the incident occurred. After the petitioner fired several gunshots that resulted in the deaths of two of the victims, he entered a parked car before shooting R, who had chased after him and approached the petitioner's car. In tape-recorded statements to the police, C and H identified the petitioner as the shooter. Both women recanted their identifications of him at the first trial and testified that the police had threatened and bribed them to elicit those identifications. At the second trial, H maintained that the police had coerced her into making her tape-recorded statement, and C claimed that she could not remember the shooting or having given a recorded statement or testifying in the first trial. In his habeas petition, the petitioner alleged that N, his appellate counsel, and M, his first habeas counsel, had rendered ineffective assistance when they failed to raise claims that the petitioner's right to due process was violated as a result of prosecutorial impropriety during closing argument in the criminal trial. The petitioner also alleged a freestanding due process claim predicated on those alleged improprieties. The habeas court concluded that the prosecutor had made several improper statements during closing argument but that they did not deprive the petitioner of a fair trial. The court further concluded

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acknowledged or made any admissions to Kelly about the actual conduct underlying his arrest.

that the petitioner had procedurally defaulted on his ineffective assistance claim as to N and his due process claim because N and M had not rendered ineffective assistance in failing to raise the due process claim. The court dismissed the habeas petition as to the procedurally defaulted claims and denied it as to the claim that M had rendered ineffective assistance by failing to raise the claim of prosecutorial impropriety. The court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court abused its discretion in denying the petition for certification to appeal; the resolution of the petitioner's claims of prosecutorial impropriety were debatable among jurists of reason, could be resolved by a court in a different manner and were adequate to deserve encouragement to proceed further.

2. The petitioner could not prevail on his claim that he was deprived of his due process right to a fair trial, which was based on his assertion that N and M had rendered ineffective assistance by failing to raise claims of prosecutorial impropriety:

a. Contrary to the petitioner's assertion, under the first part of the test for prosecutorial impropriety set forth in *State* v. *Williams* (204 Conn. 523), the habeas court correctly considered whether certain of the prosecutor's comments were invited by the defense theory that the police had conspired to convict the petitioner; accordingly, the court did not improperly fail to resolve that question under the second part of the *Williams* analysis, which requires the court to determine whether impropriety by the prosecutor deprived the petitioner of a fair trial, as that determination is separate and distinct from the threshold question of whether the challenged statements were improper in the first instance.

b. The petitioner's claim that the prosecutor improperly expressed his personal opinion during closing argument was unavailing: the prosecutor's comment about the possibility that his personal opinion was aligned with the position he was advocating for the state, although inartful, did not cross the line of impropriety, and his remark about the truth of C's testimony was no more than an imprecise use of the first person in arguing that certain portions of her testimony were more credible than others.

c. The prosecutor's isolated use of sarcasm did not constitute improper vouching for the police, as it was part of a legitimate attempt to undercut the petitioner's claim that the police and the prosecutor were following a script for the purpose of falsely incriminating him; moreover, the prosecutor's comment about the testifying police officers' years of service was not, as the petitioner claimed, an attempt to bolster their credibility but, rather, fair argument that urged the jury to infer that their longevity on the police force was reason to believe that they were truthful.

d. Two remarks of the prosecutor that sought to convince the jury that it was required to find the petitioner guilty unless it concluded that the

state's witnesses had lied were improper, although other remarks that the petitioner challenged conveyed no such suggestion to the jury.

e. This court found unavailing the petitioner's contention that the prosecutor argued facts that were not in evidence to persuade the jury that the testimony of C and another witness, G, was the product of threats or intimidation by the petitioner, as the prosecutor merely underscored the state's position that the jury should discredit the testimony of C and G because both had relationships with the petitioner; moreover, the prosecutor's statements did not, as the petitioner claimed, improperly accuse him of frightening C and H into recanting their testimony but, rather, addressed a generalized anxiety about or fear of being a witness in a case involving a double homicide; in the present case, however, because H's testimony contradicted the prosecutor's assertion urging the jury to believe that she had recanted her testimony out of fear, the prosecutor's assertions regarding such fear were improper as to H.

f. Applying the factors set forth in *Williams*, this court could not conclude that the prosecutor's nine improper statements were so serious and harmful as to deprive the petitioner of his right to a fair trial: none of the improper remarks was severe, which was supported by defense counsel's failure to object to all but two of them, they were isolated when viewed in the context of the prosecutor's extensive closing argument, three of the prosecutor's improper remarks were invited by defense counsel, the prosecutor's lone reference to justice requiring a guilty verdict was not a theme of his argument, and any prejudice that resulted from the prosecutor's reference to fear as having caused H to recant her identification of the petitioner was not substantial; moreover, the trial court's curative instructions to the jury were sufficient to remedy any potential prejudice that may have resulted from the prosecutor's reference to facts that were not in evidence, and the court's general jury instructions to the jury likely ameliorated any harm that resulted from improper remarks; furthermore, the strength of the state's case, although not overwhelming, was not so weak as to be overshadowed by the prosecutor's improprieties, as three witnesses who were acquainted with the petitioner identified him as the shooter, the witnesses' statements to the police and their trial testimony were generally consistent in material respects, the jury reasonably could have concluded that the statements C and H gave to the police were truthful and that their recantations lacked credibility, and it was evident that the jury was not persuaded by the petitioner's claim that the police were involved in a conspiracy to frame him for crimes he did not commit; accordingly, the habeas court properly dismissed the petitioner's habeas petition as to his procedurally defaulted claims, the petitioner having failed to establish cause and prejudice for the failure of N and M to raise ineffective assistance and due process claims, and the court properly denied the habeas petition as to the claim that M had rendered ineffective assistance by failing to raise a due process claim based on prosecutorial impropriety.

3. The habeas court did not abuse its discretion in denying the petitioner's motion to open the evidence to allow him additional time to uncover evidence of an undisclosed deal between R and the state for his testimony against the petitioner; the petitioner was aware at his second criminal trial that R had been facing criminal charges that were dropped following his statement to the police identifying the petitioner as the shooter, as defense counsel emphasized these facts in closing argument, and, even though the habeas court had granted the petitioner's motion to reconsider its original decision on his habeas petition, in light of the context of the case, the court was not required to grant the motion to open, which was filed eleven months after the habeas trial concluded.

Argued September 13, 2022—officially released May 16, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Chaplin*, *J.*; judgment dismissing the petition in part and denying the petition in part; subsequently, the court granted the petitioner's motion for reconsideration and set aside its prior decision; thereafter, the court denied the petitioner's motion to open the evidence; judgment dismissing the petition in part and denying the petition in part; subsequently, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

Vishal K. Garg, assigned counsel, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Craig P. Nowak*, senior assistant state's attorney, for the appellee (respondent).

Opinion

PALMER, J. In 1998, a jury found the petitioner, Daryl Valentine, guilty of two counts of murder and other offenses stemming from a 1991 altercation outside a diner in New Haven during which three men were shot, two of them fatally. The petitioner's conviction was affirmed on direct appeal and, thereafter, he filed a

petition for a writ of habeas corpus, which was denied. He subsequently filed the present habeas action, which was dismissed in part and denied in part. Following the denial of his petition for certification to appeal, the petitioner appeals from the judgment of the habeas court, claiming that the court (1) abused its discretion in denying his petition for certification to appeal, (2) improperly concluded, first, that the petitioner's due process rights were not violated by improprieties of the trial prosecutor during closing argument and, relatedly, that he was not deprived of his right to the effective assistance of counsel by virtue of the failure of appellate counsel and first habeas counsel to raise that due process claim on direct appeal and in the first habeas petition, respectively, and (3) improperly denied his motion to open the evidence. We agree with the petitioner that the habeas court abused its discretion in denying the petition for certification to appeal. We nevertheless agree with the respondent, the Commissioner of Correction, that the petitioner has neither established that prosecutorial improprieties deprived him of his right to a fair trial nor has he demonstrated that appellate counsel and first habeas counsel were ineffective in failing to raise that claim. We also conclude that the denial of the petitioner's motion to open the evidence was not an abuse of discretion. Accordingly, we affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of this appeal. In 1994, following a jury trial, the petitioner was convicted of two counts of murder, one count of attempt to commit assault in the first degree and one count of carrying a pistol without a permit. The petitioner appealed from the judgment of conviction to our Supreme Court, which determined that the trial court improperly had precluded the petitioner from adducing certain extrinsic evidence offered to impeach a key witness' identification of the petitioner

as the shooter. *State* v. *Valentine*, 240 Conn. 395, 402–405, 692 A.2d 727 (1997). Concluding that the error was harmful, our Supreme Court reversed the judgment of conviction and remanded the case for a new trial. Id., 419. Following a second trial in 1998, a jury again found the petitioner guilty of the same four charges. *State* v. *Valentine*, 255 Conn. 61, 64, 762 A.2d 1278 (2000). On appeal, our Supreme Court affirmed the judgment of conviction and set forth the following facts, which the jury reasonably could have found from the evidence: "On September 21, 1991, shortly before 3 a.m., Andrew Paisley, [Harry] Poole, and Christopher Roach arrived at the Athenian Diner, located on Whalley Avenue in New Haven. The diner was very busy, and a large crowd of people was waiting outside. As the three men approached the front of the diner, they saw people fighting on the steps of the diner. [Byron] McFadden, a witness for the state, heard an individual whom he identified as Tyrone Adams say: 'Shoot him, shoot him, [expletive] it, shoot him.' Shortly afterward, the [petitioner] came around from the side of the diner and fired several gunshots that hit and fatally wounded both Paisley and Poole. The [petitioner] then ran to a parked car and got into the front passenger seat. Roach chased after him and approached the driver's side of the car. The [petitioner] shot Roach twice in the forearm through the open driver's side window and the car sped away. . . .

"On September 21, 1991, Tara Brock, Regina Coleman, and Kristina Higgins were sitting in a parked car in the Athenian Diner parking lot when they witnessed the shooting. That same day, [Detective Joseph Greene of the New Haven Police Department], the lead detective in the shooting, spoke to Coleman at her home based on a tip that she may have been present during the shooting. Coleman told Greene that she was at a party at the time of the shooting and did not know what

had happened. On September 26, 1991, Higgins provided the police with a tape-recorded statement in which she identified the [petitioner] as the shooter. She also identified the [petitioner] in a photographic array. On September 28, 1991, Greene brought Coleman to the police station for questioning. At the station, Coleman also gave the police a tape-recorded statement in which she identified the [petitioner] as the shooter. She also positively identified the [petitioner] from a photographic array. On October 1, 1991, Higgins signed a typewritten version of her recorded statement. On October 10, 1991, however, Coleman refused to sign a typewritten version of the recorded statement that she had given to the police.

"At the [petitioner's] first trial, both Higgins and Coleman recanted their statements. Higgins testified that she and her two companions were not present during the shooting and that she had lied in her tape-recorded statement. Further, she testified that Greene had threatened her with jail time to elicit the recorded statement, and then afterward had bought her some alcohol and cigarettes and had given her $50 to buy cocaine. The trial court admitted her signed statement for substantive purposes under *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). Coleman similarly testified that her statement had been fabricated due to Greene's influence. She testified that she had told Greene that she was not present at the diner during the shooting and had arrived only afterward, but that Greene had continued to interrogate her and had pressured and bribed her to elicit the statement.

"During the [petitioner's] second trial,[1] Higgins maintained that Greene had coerced her to fabricate her

[1] Our references hereinafter to the petitioner's criminal trial are to the second trial unless otherwise indicated.

tape-recorded statement. The trial court again admitted her statement for substantive purposes under *Whelan* and also admitted her prior trial testimony for impeachment purposes. Coleman testified that she did not remember the shooting or giving a recorded statement. She also testified that she did not recall testifying in the first trial against the [petitioner]. She did, however, acknowledge that she had identified the [petitioner] in a photographic array. The state introduced her statement as a prior inconsistent statement for impeachment purposes. Coleman testified that she did not remember saying that the tape-recorded statement was untrue nor did she remember whether Greene had told her what to say or had pressured her in any way. She also testified that Greene had not offered her any money, although she wished that he had. The trial court admitted her prior testimony for substantive purposes under *Whelan*." (Footnote added; footnote omitted.) *State* v. *Valentine*, supra, 255 Conn. 64–66.

On January 5, 2001, the self-represented petitioner filed his first petition for a writ of habeas corpus. Thereafter, Attorney Thomas P. Mullaney III was appointed to represent the petitioner (first habeas counsel). Following the habeas court's denial of his first habeas petition, the petitioner appealed to this court, which granted the motion to withdraw filed by the petitioner's appellate habeas counsel and, ultimately, dismissed the appeal after no brief was filed.

On August 3, 2012, the petitioner filed his second petition for a writ of habeas corpus, which was amended on October 16, 2017 (amended petition). The amended petition, which is the operative petition for purposes of this appeal, alleges that the petitioner's right to the effective assistance of counsel was violated as a result of the failure of appellate counsel, Attorney G. Douglas Nash of the Office of the Public Defender

(appellate counsel),[2] and first habeas counsel, Mullaney, to raise a claim in the petitioner's direct appeal and in his first habeas petition, respectively, that the petitioner's right to due process was violated as a result of prosecutorial improprieties during the criminal trial. The amended petition also raises a freestanding due process claim predicated on those alleged prosecutorial improprieties.[3]

The respondent filed a return to the amended petition, raising, inter alia, the defense of procedural default. In response, the petitioner filed a reply to the return, asserting, inter alia, that any such procedural default resulting from his failure to raise the claims in his direct appeal and in the prior habeas action was excused by cause and prejudice due to the ineffective assistance of his appellate counsel and first habeas counsel, respectively.

In a memorandum of decision filed March 19, 2021,[4] the habeas court agreed with the petitioner in part and

[2] Nash also represented the petitioner in his first direct appeal, which resulted in the reversal of the petitioner's conviction of all counts and a new trial.

[3] In addition, the amended petition raised claims of ineffective assistance of trial counsel and actual innocence, and alleged, as well, due process violations stemming from the prosecutor's knowing presentation of false testimony and failure to disclose material exculpatory evidence. The habeas court, however, deemed those claims abandoned due to the petitioner's failure to brief them in his posttrial brief and, accordingly, the habeas court did not address them in its memorandum of decision. The petitioner has not challenged that determination of the habeas court and, consequently, those claims are not the subject of this appeal.

[4] The habeas court initially denied the amended habeas petition in a memorandum of decision filed December 15, 2020. The petitioner thereafter filed a motion for reconsideration, claiming that the habeas court, in finding that the petitioner was not prejudiced by any deficient performance of appellate counsel or first habeas counsel, incorrectly focused its analysis on whether trial counsel had performed deficiently, a claim that the petitioner had not raised. The habeas court granted the petitioner's motion and, upon reconsideration, set aside its prior decision and issued the March 19, 2021 decision in its place.

found several instances of prosecutorial impropriety during closing argument. The habeas court also concluded, however, that the improprieties did not deprive the petitioner of a fair trial. In light of that determination, the habeas court further held that the failure of appellate counsel and first habeas counsel to raise a due process claim did not constitute deficient performance or result in prejudice to the petitioner and, therefore, the petitioner could not prevail on his claims of ineffective assistance of those counsel.

With respect to the issue of procedural default, the habeas court stated: "Having found that the petitioner failed to prove that either [appellate counsel] or [first habeas counsel] rendered ineffective assistance of counsel by not raising the due process claim on direct appeal or in the prior habeas corpus proceeding, the court must find that the petitioner failed to demonstrate cause and prejudice for the failure to raise the due process claim either on direct appeal or in his prior habeas proceeding. Therefore, the petitioner's ineffective assistance of appellate counsel claim and due process claim are procedurally defaulted." Moreover, in light of the habeas court's determination rejecting the petitioner's due process and ineffective assistance of appellate counsel claims, the court further concluded that there was no merit to the petitioner's contention that his first habeas counsel was ineffective for failing to raise the prosecutorial impropriety claim. Accordingly, the court dismissed the amended petition in part as to the claims that were procedurally defaulted, namely, the freestanding due process claim and the claim of ineffective assistance of appellate counsel, and denied the amended petition as to the claim of ineffective assistance of first habeas counsel. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court.

I

DENIAL OF PETITION FOR CERTIFICATION TO APPEAL

We first address the habeas court's denial of the petition for certification to appeal. The petitioner contends that his due process and ineffective assistance of counsel claims are not frivolous and, consequently, that the petition for certification should have been granted. We agree.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the [disposition] of his . . . petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he . . . must demonstrate that the denial of his . . . petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he . . . must then prove that the decision of the habeas court should be reversed on its merits. . . .

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of

ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Crenshaw* v. *Commissioner of Correction*, 215 Conn. App. 207, 215–16, 281 A.3d 546, cert. denied, 345 Conn. 966, 285 A.3d 389 (2022).

On the basis of our review of the merits of the petitioner's claims, which is set forth in part II of this opinion, we conclude that the habeas court abused its discretion in denying the petition for certification to appeal. The petitioner has demonstrated that his claims, which ultimately are premised on numerous instances of alleged prosecutorial improprieties—five of which the habeas court itself found to be improper and several more of which we conclude also were improper[5]—are debatable among jurists of reason, could be resolved in a different manner by a court and are adequate to deserve encouragement to proceed further. Accordingly, we proceed to a full review of the merits of the petitioner's appeal.

II

INEFFECTIVE ASSISTANCE OF APPELLATE AND FIRST HABEAS COUNSEL

The petitioner claims that he was deprived of his due process right to a fair trial as a result of prosecutorial improprieties and that his appellate counsel and first habeas counsel were ineffective in failing to raise those claims. Before addressing the merits of the petitioner's arguments, however, we first set forth certain general principles that govern our resolution of claims of ineffective assistance of appellate and habeas counsel.

[5] We discuss these additional statements and the reasons why we conclude they were improper in part II of this opinion.

Whether a habeas court properly dismissed or denied a petition for a writ of habeas corpus gives rise to a question of law over which appellate courts exercise plenary review. See *Cookish* v. *Commissioner of Correction*, 337 Conn. 348, 354, 253 A.3d 467 (2020). "[When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 114 Conn. App. 778, 784, 971 A.2d 766, cert. denied, 293 Conn. 915, 979 A.2d 488 (2009).

"The petitioner's right to the effective assistance of counsel is assured by the sixth and fourteenth amendments to the federal constitution, and by article first, § 8, of the constitution of Connecticut." (Internal quotation marks omitted.) *Pierce* v. *Commissioner of Correction*, 100 Conn. App. 1, 10, 916 A.2d 864, cert. denied, 282 Conn. 908, 920 A.2d 1017 (2007). "Our Supreme Court has adopted [the] two part analysis [set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] in reviewing claims of ineffective assistance of appellate counsel. . . . The first part of the *Strickland* analysis requires the petitioner to establish that appellate counsel's representation fell below an objective standard of reasonableness considering all of the circumstances. . . . [A] court must indulge a strong presumption that counsel's conduct falls within

the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . The right to counsel is not the right to perfect representation. . . . [Although] an appellate advocate must provide effective assistance, he is not under an obligation to raise every conceivable issue. A brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions. . . . Indeed, [e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. . . . Most cases present only one, two, or three significant questions. . . . The effect of adding weak arguments will be to dilute the force of the stronger ones. . . . Finally, [i]f the issues not raised by his appellate counsel lack merit, [the petitioner] cannot sustain even the first part of this dual burden since the failure to pursue unmeritorious claims cannot be considered conduct falling below the level of reasonably competent representation." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 131 Conn. App. 805, 808–809, 29 A.3d 166 (2011).

Our Supreme Court has distinguished the standards of review for claims of ineffective assistance of trial counsel and appellate counsel as they pertain to the prejudice prong of *Strickland*. See *Small* v. *Commissioner of Correction*, 286 Conn. 707, 721–24, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). "For claims of ineffective appellate counsel, the second prong [of *Strickland*] considers whether there is a reasonable probability that, but for appellate counsel's failure to raise the issue on appeal, the petitioner would have

prevailed in his direct appeal, i.e., reversal of his conviction or granting of a new trial. . . . This requires the reviewing court to [analyze] the merits of the underlying claimed error in accordance with the appropriate appellate standard for measuring harm." (Citation omitted; internal quotation marks omitted.) *Williams* v. *Commissioner of Correction*, 169 Conn. App. 776, 793, 153 A.3d 656 (2016). "On appeal, the petitioner must overcome the presumption that, under the circumstances, the challenged action might be considered sound [appellate] strategy. . . . *Otto* v. *Commissioner of Correction*, 161 Conn. App. 210, 226, 136 A.3d 14 (2015), cert. denied, 321 Conn. 904, 138 A.3d 281 (2016); see also *Alterisi* v. *Commissioner of Correction*, 145 Conn. App. 218, 227, 77 A.3d 748 (tactical decision of appellate counsel not to raise particular claim ordinarily matter of appellate tactics and not evidence of incompetency), cert. denied, 310 Conn. 933, 78 A.3d 859 (2013)." (Internal quotation marks omitted.) *Salters* v. *Commissioner of Correction*, 175 Conn. App. 807, 829–30, 170 A.3d 25, cert. denied, 327 Conn. 969, 173 A.3d 954 (2017); see also *Camacho* v. *Commissioner of Correction*, 148 Conn. App. 488, 496, 84 A.3d 1246 ("The determination of which issues to present, and which issues not to present, on an appeal is by its nature a determination committed to the expertise of appellate counsel, and not to his client. . . . [A] habeas court will not, with the benefit of hindsight, second-guess the tactical decisions of appellate counsel." (Citation omitted; internal quotation marks omitted.)), cert. denied, 311 Conn. 937, 88 A.3d 1227 (2014).

With respect to the petitioner's claim of ineffective assistance of first habeas counsel, "[o]ur Supreme Court, in *Lozada* v. *Warden*, 223 Conn. 834, 843, 613 A.2d 818 (1992), established that habeas corpus is an appropriate remedy for the ineffective assistance of

appointed habeas counsel, authorizing what is commonly known as a habeas on a habeas, namely, a second petition for a writ of habeas corpus . . . challenging the performance of counsel in litigating an initial petition for a writ of habeas corpus . . . [that] had claimed ineffective assistance of counsel at the petitioner's underlying criminal trial or on direct appeal. . . . Nevertheless, the court in *Lozada* also emphasized that a petitioner asserting a habeas on a habeas faces the herculean task . . . of proving in accordance with *Strickland* [v. *Washington*, supra, 466 U.S. 687], both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel [or appellate counsel] was ineffective. . . . Any new habeas trial would go to the heart of the underlying conviction to no lesser extent than if it were a challenge predicated on ineffective assistance of trial or appellate counsel. The second habeas petition is inextricably interwoven with the merits of the original judgment by challenging the very fabric of the conviction that led to the confinement. . . .

"Simply put, a petitioner cannot succeed as a matter of law—and, thus, cannot show good cause to proceed to trial—on a claim that his habeas counsel was ineffective by failing to raise a claim against [appellate] counsel or prior habeas counsel in a prior habeas action unless the petitioner ultimately will be able to demonstrate that the claim against [appellate] or prior habeas counsel would have had a reasonable probability of success if raised." (Internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 214 Conn. App. 199, 218–19, 280 A.3d 526, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022).

"[When] applied to a claim of ineffective assistance of prior habeas counsel, the *Strickland* standard requires the petitioner to demonstrate that his prior habeas counsel's performance was ineffective and that

this ineffectiveness prejudiced the petitioner's prior habeas proceeding. . . . [T]he petitioner will have to prove that . . . the prior habeas counsel, in presenting his claims, was ineffective and that effective representation by habeas counsel establishes a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . . Therefore, as explained by our Supreme Court in *Lozada* v. *Warden*, [supra, 223 Conn. 834], a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of [appellate] counsel must essentially satisfy *Strickland* twice: he must prove both (1) that his appointed habeas counsel was ineffective, *and* (2) that his [appellate] counsel was ineffective. . . .

"Furthermore, for any ineffective assistance claim, we also are cognizant that the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . Judicial scrutiny of counsel's performance must be highly deferential. . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Emphasis in original; internal quotation marks omitted.) *Edwards* v. *Commissioner of Correction*, 141 Conn. App. 430, 438–39, 63 A.3d 540, cert. denied, 308 Conn. 940, 66 A.3d 882 (2013).

In addition, because the habeas court determined that the petitioner's due process and ineffective assistance of appellate counsel claims were procedurally defaulted, we must briefly address that doctrine. "Generally, [t]he appropriate standard for reviewability of habeas claims that were not properly raised at trial . . . or on direct appeal . . . because of a procedural

default is the cause and prejudice standard. Under this standard, the petitioner must demonstrate good cause for his failure to raise a claim at trial or on direct appeal and actual prejudice resulting from the impropriety claimed in the habeas petition. . . . [This] standard is designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on direct appeal for reasons of tactics, inadvertence or ignorance . . . . Cause and prejudice must be established conjunctively. . . . If the petitioner fails to demonstrate either one, a trial court will not review the merits of his habeas claim." (Internal quotation marks omitted.) *Streater* v. *Commissioner of Correction*, 143 Conn. App. 88, 99–100, 68 A.3d 155, cert. denied, 310 Conn. 903, 75 A.3d 34 (2013). "Our review of a determination of the application of procedural default involves a question of law over which our review is plenary." (Internal quotation marks omitted.) *Arroyo* v. *Commissioner of Correction*, 172 Conn. App. 442, 461, 160 A.3d 425, cert. denied, 326 Conn. 921, 169 A.3d 235 (2017). Moreover, "[a] successful ineffective assistance of counsel claim can satisfy the cause and prejudice standard so as to cure a procedurally defaulted claim. . . . Indeed, [i]f a petitioner can prove that his attorney's performance fell below acceptable standards, and that, as a result, he was deprived of a fair trial or appeal, he will necessarily have established a basis for cause and will invariably have demonstrated prejudice." (Citation omitted; internal quotation marks omitted.) *McCarthy* v. *Commissioner of Correction*, 192 Conn. App. 797, 810, 218 A.3d 638 (2019). With these principles in mind, we turn to the prosecutor's statements in closing argument that the petitioner alleges were improper.

The petitioner points to seventeen statements that he claims deprived him of a fair trial. At the outset, we note that, at trial, defense counsel objected to only two of the alleged improprieties, both of which pertained

to the prosecutor's references to facts not in evidence,[6] and, in each such case, the trial court sustained the petitioner's objection and gave the jury a curative instruction as requested by the petitioner. As to five of the challenged statements, all of which were made by the prosecutor during rebuttal closing argument and were found by the habeas court to constitute improprieties, the respondent concedes that they were improper. Those five statements by the prosecutor, which include the two remarks to which defense counsel objected, are (1) a comment that "[j]ustice for [the] victims and for society requires that you find the [petitioner] in this case guilty of the murders he committed and the shootings that he did";[7] (2) a remark that "several of you gave looks that said, we don't believe that one,"[8]

[6] These two claimed improprieties concerned the prosecutor's statement that the petitioner's codefendant had been charged with murder and the prosecutor's reference to the petitioner's height and weight.

[7] With respect to this statement, the habeas court concluded that "[t]he relevant legal authority is clear that any indication that justice requires a particularized result is wholly improper in that such . . . statements constitute improper appeals to the jurors' emotions and expressions of the prosecutor's personal opinion as to the guilt of the petitioner." See *State* v. *Thompson*, 266 Conn. 440, 474, 832 A.2d 626 (2003).

In addressing a similar comment in *State* v. *Francione*, 136 Conn. App. 302, 46 A.3d 219, cert. denied, 306 Conn. 903, 52 A.3d 730 (2012), this court explained: "We consider the repeated references to 'justice,' given their context, to be improper. Lawyers frequently invoke 'justice' in arguing their cases. Asking a jury, in a general, amorphous sense, to do 'justice' is not improper. But a lawyer crosses the line when arguing that 'justice' requires a *particular* result in a *particular* case, e.g., conviction of the defendant. This is simply another way of telling a jury that its verdict will be *unjust* if it does not find the defendant guilty. We cannot countenance such an argument. In this case, the comments that the jury 'should do justice for those firefighters who risked their lives' and 'for those neighbors who came out to help that night,' and that 'justice demand[s]' and 'require[s]' the jury to find the defendant guilty amounted to improper appeals to emotions . . . [and therefore] overstepped the bounds of legitimate argument." (Citations omitted; emphasis in original.) Id., 323–24.

[8] The habeas court agreed with the petitioner that this statement was improper, explaining that, in making the statement, "the prosecutor invaded the fact-finding duty of the jury by providing unsworn and unchecked testimony about information outside of the evidence to bolster his credibility

which the prosecutor made in reference to the response of defense witness Brock that the police "just kind of asked [her] to go there" after she was questioned "about why she would go back to the police department after they had been so mean to her the first time [she went there]"; (3) a statement, made immediately after commenting about defense witness Crystal Green[9] and the changes in her life since the time of the shooting, that "I think that I noticed a whole bunch of you being as impressed as I was [with Green]";[10] (4) a comment that the petitioner's codefendant, Adams, "ha[d] been charged with the same murder";[11] and (5) a reference to the petitioner's height and weight, which were not in evidence, when the prosecutor, after recounting the unchallenged testimony of a witness describing the shooter as "brown skinned, 165, or 160 to 165, five foot seven or five foot eight, burgundy colored sweatshirt

argument regarding certain evidence in order to get the jury to find certain facts consistent with his argument. The prosecutor's description of the jurors' assessment of testimony was not evidence properly presented to the jury, and, therefore, any presentation of such information constituted an improper presentation of matters which the jury had no right to consider."

[9] Crystal Green is now known as Crystal Green-Jackson.

[10] The habeas court concluded that, in making this statement, "the prosecutor [was] arguing the credibility of certain portions of Green's testimony and arguing that certain other evidence corroborated those portions of her prior testimony. However, the particular statement in question had no bearing on the legal argument of her credibility and [was] wholly superfluous of the recounting of her life changes as a factor argued to support her credibility. The prosecutor's statement that he was impressed with Green's life changes constituted an expression of his personal opinion and went beyond employing imprecise language in the midst of zealous advocacy pertaining to the credibility of a witness based in the evidence presented to the jury. The prosecutor's statement that he was impressed constituted unsworn and unchecked testimony; however, the prosecutor's statements did not create any implication of secret knowledge about the witness or the evidence related to her life changes. Nonetheless, the prosecutor's expression of his personal opinion constituted impropriety."

[11] This statement was improper because it was not based on any evidence in the record. As previously indicated, however, the trial court sustained defense counsel's objection to the comment and gave the jury a curative instruction.

with a hood and dark pants," stated, "[w]hat a coincidence, the shooter just happens to have the same height, weight, build, and skin tone, and clothing as the [petitioner] had on that night . . . ."[12] In light of the respondent's concession regarding the improper nature of these five comments, we need not consider that issue further. See *State* v. *Thompson*, 266 Conn. 440, 461–62, 832 A.2d 626 (2003) ("[T]he state concedes that some of the remarks of the assistant state's attorney were improper. . . . It is not necessary, therefore, for us to determine whether [those] particular remarks were improper.").

With respect to the remaining challenged statements of the prosecutor, none of which the habeas court found to be improper, the claimed improprieties fall into the following four general categories of proscribed conduct: (1) expressions of personal opinion regarding the credibility of witnesses; (2) bolstering the credibility of the state's witnesses; (3) arguing that the petitioner could be acquitted only if the jury were to conclude that the state's witnesses were lying, in violation of *State* v. *Singh*, 259 Conn. 693, 793 A.2d 226 (2002); and (4) referring to facts not in evidence.

Before addressing those claimed improprieties, we summarize the principles governing claims of prosecutorial impropriety. "In analyzing [such] claims . . . we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether

[12] The prosecutor maintained that this statement was proper because the jury had the opportunity to observe the petitioner in the courtroom during the course of the trial. The trial court rejected the prosecutor's argument, and the respondent does not challenge the court's determination on appeal. As we have noted, the trial court agreed with defense counsel that the comment was objectionable and granted counsel's request for a curative instruction.

it deprived the defendant of his due process right to a fair trial. . . . [W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper . . . .'' (Internal quotation marks omitted.) *State* v. *Sinclair*, 173 Conn. App. 1, 16–17, 162 A.3d 43 (2017), aff'd, 332 Conn. 204, 210 A.3d 509 (2019).

In assessing whether a defendant's right to a fair trial has been violated, appellate courts consider the factors set forth in *State* v. *Williams*, 204 Conn. 523, 529 A.2d 653 (1987) (*Williams* factors). Those factors 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 our Supreme Court has observed, in applying these factors, the reviewing court should be mindful of the fact that ''it is not the prosecutor's conduct alone that guides [the] inquiry, but, rather, the fairness of the trial as a whole.'' (Internal quotation marks omitted.) *State* v. *Weatherspoon*, 332 Conn. 531, 556, 212 A.3d 208 (2019).

Although the petitioner preserved his claims of prosecutorial impropriety with respect to only two of the seventeen statements by the prosecutor that he now challenges on appeal, it is not necessary for this court to apply the four-pronged *Golding* test[13] to his unpreserved claims. As our Supreme Court has explained, ''[t]he

[13] See *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

reason for this is that the defendant in a claim of prosecutorial [impropriety] must establish that the prosecutorial [impropriety] was so serious as to amount to a denial of due process . . . . In evaluating whether the [impropriety] rose to this level, we consider the factors enumerated . . . in *State* v. *Williams*, [supra, 204 Conn. 540]. . . . The consideration of the fairness of the entire trial through the *Williams* factors duplicates, and, thus makes superfluous, a separate application of the *Golding* test." (Footnote omitted; internal quotation marks omitted.) *State* v. *Ciullo*, 314 Conn. 28, 35, 100 A.3d 779 (2014). Nevertheless, that "does not mean . . . that the absence of an objection at trial does not play a significant role in the application of the *Williams* factors. To the contrary, the determination of whether a new trial or proceeding is warranted depends, in part, on whether defense counsel has made a timely objection to any [incident] of the prosecutor's improper [conduct]. When defense counsel does not object, request a curative instruction or move for a mistrial, he presumably does not view the alleged impropriety as prejudicial enough to seriously jeopardize the defendant's right to a fair trial. . . . [Thus], the fact that defense counsel did not object to one or more incidents of [impropriety] must be considered in determining whether and to what extent the [impropriety] contributed to depriving the defendant of a fair trial and whether, therefore, reversal is warranted." (Internal quotation marks omitted.) Id., 36–37.

This court previously has recognized that "[p]rosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . [B]ecause closing arguments often have a rough and tumble quality about them, some leeway must be afforded to the advocates in offering arguments to the jury in final argument. [I]n addressing the jury, [c]ounsel must be allowed a generous latitude in argument, as

the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument." (Citation omitted; internal quotation marks omitted.) *State* v. *Sinclair*, supra, 173 Conn. App. 17. "Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his office, he usually exercises great influence upon jurors. His conduct and language in the trial of cases in which human life or liberty [is] at stake should be forceful, but fair, because he represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice, or resentment. If the accused [is] guilty, he should [nonetheless] be convicted only after a fair trial, conducted strictly according to the sound and well-established rules which the laws prescribe. 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. . . .

"Just as the prosecutor's remarks must be gauged in the context of the entire trial, once a series of serious

improprieties has been identified [appellate courts] must determine whether the totality of the improprieties leads to the conclusion that the defendant was deprived of a fair trial. . . . Thus, the question in the present case is whether the sum total of [the prosecutor's] improprieties rendered the [petitioner's] [trial] fundamentally unfair, in violation of his right to due process. . . . The question of whether the [petitioner] has been prejudiced by prosecutorial [impropriety], therefore, depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties." (Citation omitted; internal quotation marks omitted.) *State* v. *Santiago*, 269 Conn. 726, 734–36, 850 A.2d 199 (2004); see also *State* v. *Courtney G.*, 339 Conn. 328, 340–42, 260 A.3d 1152 (2021).

In the present case, we first address the alleged improprieties, discussing them in the categories previously identified, to determine whether each challenged statement of the prosecutor was, in fact, improper. We then must determine whether any such improprieties, considered in conjunction with the five improprieties conceded by the respondent and under the totality of the relevant circumstances, establish that the petitioner was deprived of a fair trial, which is a necessary antecedent to determining whether the petitioner has met his burden of demonstrating ineffective assistance by first habeas counsel and cause and prejudice for his procedurally defaulted claims.[14] Before we

[14] With respect to the issue of cause and prejudice, we note that the petitioner conceded in the habeas court that his claim of ineffective assistance of appellate counsel could have been raised in the prior habeas proceeding and that his due process claim could have been raised on direct appeal or in the prior habeas proceeding. The petitioner maintained, however, that he had established cause and prejudice for failing to do so because appellate counsel and first habeas counsel rendered ineffective assistance by virtue of their failure to raise a due process claim predicated on the prosecutor's improprieties during closing argument. The habeas court, having found that those alleged improprieties did not deprive the petitioner of a fair trial, concluded that the failure of counsel to raise a due process claim

address the alleged improprieties, however, we briefly must consider a claim raised by the petitioner that the habeas court, in making the threshold determination as to whether improprieties occurred, applied an incorrect standard.

A

Whether Habeas Court Applied Correct Standard

The petitioner contends that the habeas court, in concluding that several of the challenged statements of the prosecutor were not improper, incorrectly based its determination on the fact that the prosecutor made those statements in response to the defense theory of the case.[15] As we discuss more fully hereinafter, that theory was predicated on the claim that the police had conspired to convict the petitioner based on perjured testimony, including the coerced and knowingly false statements and testimony of the purported eyewitnesses to the offenses. According to the petitioner, whether these comments by the prosecutor were invited by the defense is a question to be resolved as part of the second prong of the two part test for reviewing claims of prosecutorial impropriety, which, as we previously discussed, requires an analysis of the *Williams* factors for determining whether the harm flowing from the improper comments deprived a defendant of a fair trial, and is separate and distinct from the threshold question of whether the challenged statement

did not constitute deficient performance, and, therefore, the petitioner could not demonstrate cause and prejudice. Accordingly, the court concluded that the petitioner's ineffective assistance of appellate counsel and due process claims were procedurally defaulted. In reviewing that conclusion, we must determine whether the claimed prosecutorial improprieties violated the petitioner's right to due process. If they did, the petitioner also will have established that the failure of counsel to raise a due process claim constituted ineffective assistance, which, in turn, necessarily would be sufficient to demonstrate cause and prejudice.

[15] We discuss those allegedly improper statements by the prosecutor in part II B of this opinion.

was improper in the first instance. See, e.g., *State* v. *Wilson*, 308 Conn. 412, 434, 64 A.3d 91 (2013) (in reviewing claim of prosecutorial impropriety, court first must determine whether impropriety occurred and, if it did, must then decide separate question of whether impropriety was so harmful as to violate defendant's due process right to fair trial). The petitioner's argument is predicated on the fact that, as we also have explained, one of the *Williams* factors to be considered in the second prong of the analysis of claims of prosecutorial impropriety is whether any such comment was invited by the defendant. See *State* v. *Williams*, supra, 204 Conn. 540 (in determining whether prosecutorial impropriety during closing argument deprived defendant of his right to fair trial, one consideration is "the extent to which the [impropriety] was invited by defense conduct or argument").

The respondent disagrees, asserting that our appellate courts, in evaluating the propriety of a prosecutor's statement during closing argument, consider whether the statement was a fair response to a theory of defense or argument of defense counsel. In support of this contention, the respondent directs our attention to *State* v. *Thompson*, supra, 266 Conn. 440, in which our Supreme Court addressed a claim that the prosecutor improperly had vouched for the credibility of the police by stating, in closing argument, that the police "want to see that the person that killed [the victim] is brought to justice." (Internal quotation marks omitted.) Id., 469. Although observing that it "is improper [for the prosecutor] to suggest that the jury should accord greater weight to the testimony of police officers on account of their occupational status"; id.; the court concluded that, under the circumstances of that case, the prosecutor's statement was not objectionable. As the court explained, the challenged statement was permissible to rebut the defense argument that the police had coerced

witnesses to provide knowingly false testimony against the defendant in order to convict him of crimes he did not commit. Id. In other words, because the prosecutor's argument was a fair response to the defense theory of the case, that argument was proper under the first part of the two part analysis for claims of prosecutorial impropriety.

Our review of the relevant case law reveals that, as in *Thompson*, both our Supreme Court and this court frequently have considered whether a challenged remark of a prosecutor was responsive to a defense theory or argument in determining whether the remark was improper in the first instance. See, e.g., *State* v. *Singh*, supra, 259 Conn. 716 n.22 (concluding that challenged comment of prosecutor was not improper because "comment was invited by defense counsel's argument"); *State* v. *Burton*, 258 Conn. 153, 166–69, 778 A.2d 955 (2001) (rejecting claim that prosecutor improperly vouched for credibility of state's witnesses because challenged statements were made in response to defendant's attack on credibility of victim and victim's friend); *State* v. *Joseph R. B.*, 173 Conn. App. 518, 534, 164 A.3d 718 (challenged comment of prosecutor was invited by argument of defense counsel and, thus, was not improper), cert. denied, 326 Conn. 923, 169 A.3d 234 (2017); *State* v. *Fasanelli*, 163 Conn. App. 170, 176, 182, 133 A.3d 921 (2016) (certain comments by prosecutor that allegedly denigrated defense counsel were not improper because they were based on evidence and "attacked only the theory of defense," not defense counsel); *State* v. *Morgan*, 70 Conn. App. 255, 294–95, 797 A.2d 616 (remarks of prosecutor were not improper because they "were fair descriptions of the evidence presented and fair criticisms of the defendant's theory of defense"), cert. denied, 261 Conn. 919, 806 A.2d 1056 (2002).

Indeed, the determination of a reviewing court as to whether a challenged statement is improper in the first instance cannot be made in a vacuum, without regard for the evidence, testimony and theory of defense presented by the defendant at trial. In the present case, the petitioner's defense rested on the claim that the police intentionally had elicited false statements from several key witnesses for the purpose of convicting the petitioner of a crime that he did not commit. In support of this contention, the petitioner argued that Coleman and Higgins recanted the written statements they had given to the police because those statements were the product of police coercion, a claim that was bolstered by Higgins' own testimony to that effect. In such circumstances, it is fair for the prosecutor to rebut that defense claim by arguing that the police investigation was motivated by the desire to ascertain and apprehend the perpetrator of the alleged offense and did not seek to frame the petitioner for the crime. Accordingly, we agree with the respondent that, in making the threshold determination under the first part of the two part analysis for claims of prosecutorial impropriety as to whether the prosecutor's comments were improper, the habeas court correctly considered the extent to which any such comment was responsive to the petitioner's theory of defense and the evidence relied on by the petitioner in support of that defense.[16]

[16] This conclusion in no way alters the analysis under the two part test for claims of prosecutorial impropriety, nor does it conflict with our Supreme Court's holding in *State* v. *Wilson*, supra, 308 Conn. 440–42. In *Wilson*, the prosecutor used the phrase, "a 'piece of work,' " to describe a defense witness, and, in defending the use of that phrase on appeal, the state argued that, because defense counsel had used the same phrase in reference to a *state's* witness, the prosecutor's use of that phrase was invited and, as a result, not improper. Id., 440–41. Our Supreme Court rejected the state's contention, explaining that "it is well settled that [impropriety] is [impropriety], regardless of its ultimate effect on the fairness of the trial; whether that [impropriety was harmful and thus] caused or contributed to a due process violation is a separate and distinct question . . . . Therefore, insofar as the state claims that the prosecutor's use of the [subject] phrase . . . was not improper because the defendant invited it, the state conflates the

B

Expressions of Personal Opinion Regarding the Credibility of Witnesses

The petitioner claims, first, that the prosecutor improperly indicated to the jury that arguments he made on behalf of the state also were his own personal views "while ostensibly suggesting that he was not doing so," and second, that the prosecutor also improperly expressed his personal opinion that certain testimony of Coleman, a state's witness, was credible. We are not persuaded.

The general rules governing claims of this kind are clear. "[A] prosecutor may not express his own opinion, directly or indirectly, as to the credibility of the witnesses. . . . Nor should a prosecutor express his opinion, directly or indirectly, as to the guilt of the defendant." (Internal quotation marks omitted.) *State* v. *Santiago*, supra, 269 Conn. 735. This prohibition is necessary because "[s]uch expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position." (Internal quotation marks omitted.) Id. "[T]he prosecutor's opinion carries with it the imprimatur of the [state] and may induce the jury to trust the [state's] judgment rather than its own view of the evidence. . . . Moreover, because the jury is aware that the prosecutor has prepared and

first and second steps of the . . . analysis, namely, the finding of an impropriety and its harmfulness." (Citation omitted; internal quotation marks omitted.) Id., 441–42. Our Supreme Court then concluded, in assessing the harmfulness of the prosecutor's improper remarks under the *Williams* factors, that the prosecutor's use of the phrase " 'a piece of work,' " though improper, was invited by defense counsel; id., 448–49; a consideration that mitigated the harm flowing from the prosecutor's use of the phrase. What distinguishes *Wilson* from the present case is that the prosecutor's reference to a defense witness as " 'a piece of work' " in *Wilson* constituted improper name-calling, regardless of whether it was invited. See id., 440.

presented the case and consequently, may have access to matters not in evidence . . . it is likely to infer that such matters precipitated the personal opinions." (Citation omitted; internal quotation marks omitted.) *State* v. *Thompson*, supra, 266 Conn. 462.

It is not improper, however, " 'for the prosecutor to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . . We must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand. The [prosecutor] should not be put in the rhetorical straitjacket of always using the passive voice, or continually emphasizing that he [or she] is simply saying I submit to you that this is what the evidence shows, or the like.' . . .

"A prosecutor's mere use of the words 'honest,' 'credible,' or 'truthful' does not, per se, establish prosecutorial impropriety. In *State* v. *Luster*, [279 Conn. 414, 438 n.7, 902 A.2d 636 (2006)], this court found no prosecutorial impropriety when the prosecutor pointed to a witness' testimony and stated that '"[the witness] was, I think, if you will look at his testimony, honest and open with [us."' This] court reasoned that the prosecutor had not made bald assertions that the state's witnesses had been honest such that his remarks might constitute the 'unsworn and unchecked testimony' suggestive of a prosecutor's 'special position' and his 'access to matters not in evidence,' which a jury may infer to have 'precipitated the [prosecutor's] personal opinions' of the witness' veracity. . . . Id., 435. Instead, the prosecutor in that case had referred to the facts adduced at trial, the witness' demeanor on the witness stand, and testimony indicating that its witness, unlike the other witnesses, had no personal connection to either the victim or the

defendant. Id., 439." (Citation omitted.) *State* v. *Ciullo*, supra, 314 Conn. 41.

Applying these principles to the petitioner's two claims, we agree with the habeas court and the respondent that those claims lack merit. The first challenged statement, made by the prosecutor at the beginning of his initial closing argument, is as follows: "This is my argument about what I believe you should conclude from the evidence. It doesn't have anything to do with what I believe necessarily. It may have a lot to do with that, but that's not what's here and it's improper for me to say you have to believe something." The habeas court found no impropriety with this comment, concluding that "[t]he prosecutor indicated that he had a personal opinion but explicitly stated that he would not share that with the jury and that the jury could not consider such information." We agree with the habeas court. The prosecutor was explaining to the jury, albeit in a somewhat inartful manner, that he would be summarizing the evidence and the conclusions that could be drawn therefrom, and that his comments represented the state's perspective on the evidence and did not necessarily reflect his own personal views. Although it would have been preferable for the prosecutor to have avoided any reference to the possibility that his personal opinion was aligned with the position he was advocating on behalf of the state, we cannot say that his comment, when considered in light of the broader point he was making, namely, that his personal opinion was irrelevant and had no bearing on the jury's consideration of the case, crossed the line of impropriety.

The second statement that the petitioner challenges as an improper expression of personal opinion is the comment, "[w]ell, I think that's true," which the prosecutor made during argument discussing Coleman's testimony that she "didn't want to get involved . . . ." The

habeas court also found no impropriety with respect to this remark, stating: "[T]he prosecutor made this statement in the midst of his argument to the jury about the evidentiary value [the jury] should afford Coleman's prior testimony in light of her testimony at the criminal trial wherein she testified that she was coerced into making the statements that implicated the petitioner in the shooting. The case centered on credibility determinations of several witnesses and certain statements made by those witnesses. Coleman was instrumental to both sides' theories of the case because she was one of the witnesses that identified the petitioner as the shooter in her written statement, but she testified at trial that she was coerced into giving her statement and that she did not remember the substantive portions of her statement. In context, the prosecutor's statement about the truth of her statements amount[s] to no more than imprecise use of the [first] person in arguing the credibility of certain portions of Coleman's prior testimony based on the evidence corroborating that testimony. Moreover, in making this statement the prosecutor is arguing that certain portions of Coleman's prior testimony [are] more credible than others, not that Coleman is more credible than any other witnesses. Accordingly, the court finds that this statement does not constitute an expression of the prosecutor's personal opinion as to Coleman's credibility." We agree with the habeas court's conclusion.

This court has stated previously that " '[t]he mere use of phrases such as "I would think," "I would submit," and "I really don't think," does not transform a closing [argument] into the improper assertions of personal opinion by [a prosecutor].' . . . '[U]se of the personal pronoun I is a normal and ordinary use of the English language. If courts were to ban the use of it, prosecutors would indulge in even more legalese than the average lawyer, sounding even more stilted and

unnatural.' " (Citation omitted.) *State* v. *Tate*, 85 Conn. App. 365, 375, 857 A.2d 394, cert. denied, 272 Conn. 901, 863 A.2d 696 (2004); see also *State* v. *Wickes*, 72 Conn. App. 380, 397, 805 A.2d 142 (prosecutor's statement in rebuttal closing argument—" 'I think there's plenty of motive here' "—was not improper when examined in context in which it was made, that is, in direct response to defendant's closing argument that he had no motive to commit crimes charged, and given "latitude afforded counsel in argument"), cert. denied, 262 Conn. 914, 811 A.2d 1294 (2002). Moreover, as our Supreme Court has explained, "the state may argue that its witnesses testified credibly, if such an argument is based on reasonable inferences drawn from the evidence." *State* v. *Warholic*, 278 Conn. 354, 365, 897 A.2d 569 (2006); see also *State* v. *Wickes*, supra, 388 ("although a prosecutor may not interject personal opinion about the credibility or truthfulness of a witness, he may comment on the credibility of the witness as long as the comment reflects reasonable inferences from the evidence adduced at trial").

Although our Supreme Court has cautioned prosecutors "to avoid using phrases that begin with the pronoun I, such as I think or I believe"; (internal quotation marks omitted) *State* v. *Gibson*, 302 Conn. 653, 660, 31 A.3d 346 (2011); it has recognized that "the use of the word I is part of our everyday parlance and . . . because of established speech patterns, it cannot always easily be eliminated completely from extemporaneous elocution." (Internal quotation marks omitted.) Id. Thus, for example, in *Gibson*, the court concluded that the prosecutor's rhetorical question and answer, " '[d]id the defendant wilfully [fail] to appear in court . . . . I think he did,' " did not constitute an improper expression of personal opinion but, rather, was merely an "[attempt] to persuade the jury to draw this inference from the circumstantial evidence of intent that he had

just recited . . . .'' Id., 661; see also *State* v. *Luster*, supra, 279 Conn. 436 (''if it is clear that the prosecutor is arguing from the evidence presented at trial, instead of giving improper unsworn testimony with the suggestion of secret knowledge, his or her occasional use of the first person does not constitute [prosecutorial impropriety]'').

As we observed previously, we review the propriety of a prosecutor's statements in the context of the entire trial, not in isolation. See *State* v. *Courtney G.*, supra, 339 Conn. 351. In the present case, we agree with the habeas court that the prosecutor's comment, viewed in that broader context, was designed to convince the jury of the state's view of the evidence and, therefore, did not transgress the bounds of proper argument.

C

Bolstering or Vouching for the Credibility of the State's Witnesses

The petitioner next claims that the prosecutor made two comments during rebuttal closing argument that improperly bolstered the credibility of the police officers who testified against the petitioner by effectively vouching for their good faith. We disagree.

The following general principles guide our analysis of this claim. Although it is improper for a prosecutor to convey his personal views regarding the credibility of witnesses; see, e.g., *State* v. *Elmer G.*, 176 Conn. App. 343, 375–76, 170 A.3d 749 (2017), aff'd, 333 Conn. 176, 214 A.3d 852 (2019); it is also well established that ''a prosecutor may argue about the credibility of witnesses, as long as [the prosecutor's] assertions are based on evidence presented at trial and reasonable inferences that jurors might draw therefrom. . . . [I]t is [also] permissible for a prosecutor to explain that a witness either has or does not have a motive to lie.'' (Citation omitted;

internal quotation marks omitted.) *State* v. *Williams*, 200 Conn. App. 427, 440, 238 A.3d 797, cert. denied, 335 Conn. 974, 240 A.3d 676 (2020). Further, "[i]n claims of improper vouching, our Supreme Court has noted that the degree to which a challenged statement is supported by the evidence is an important factor in determining the propriety of that statement. [Thus, our] Supreme Court [has] stated that [a] prosecutor may properly comment on the credibility of a witness where . . . the comment reflects reasonable inferences from the evidence adduced at trial." (Internal quotation marks omitted.) *Ayuso* v. *Commissioner of Correction*, 215 Conn. App. 322, 378–79, 282 A.3d 983, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022).

In the present case, the habeas court concluded that the petitioner failed to establish any such impropriety by the prosecutor. We agree with that conclusion.

1

The petitioner first takes issue with the following statement made by the prosecutor during rebuttal closing argument: "That's this evil case that we're all cooking together to trick you in some way into convicting [the petitioner]; well, come on, you got it all because we gave it to you." According to the petitioner, the statement was an inappropriate use of sarcasm intended to malign the defense theory that the police officers had coerced statements from witnesses to falsely implicate the petitioner. He further argues that "[t]he effect of [the] argument was to align the prosecutor with the police and suggest that, if a conspiracy occurred, the prosecutor would have been involved," and that "it amounted to improper vouching for the officers' credibility . . . ."

In rejecting the petitioner's contention, the habeas court explained: "Upon review of the entire closing argument, it is clear that the defense theory focused

on the prosecutor and the police officers acting out a 'script' with the purpose of wrongfully accusing and convicting the petitioner. Bearing this in mind, it becomes clear to the court that the statement in question demonstrates that the prosecutor responded to the defense theory and addressed a number of the evidentiary assertions made in . . . defense counsel's closing argument. The prosecutor did not of his own accord align himself with the police officers; he sought to rebut the defense theory that he and the police officers were part of a conspiracy to wrongfully accuse and convict the petitioner. The court also rejects the petitioner's argument that this statement made the implication that the prosecutor had personal knowledge outside of the evidence. Considering the prosecutor's comments in context reveals that the prosecutor's comment addressed the lack of evidence in the record to support the defense theory that the purported conspiracy existed. This statement did not imply that the prosecutor had any personal knowledge outside of the evidence before the jury. The court finds that the prosecutor did not improperly align himself with the testifying officers. The court also finds that the prosecutor's use of sarcasm did not violate the bounds of the permissible use of sarcasm as a rhetorical device in closing arguments. See *State* v. *Turner*, 181 Conn. App. 535, 565, 187 A.3d 454 (2018), aff'd, 334 Conn. 660, 224 A.3d 129 (2020)."

"It is well settled that [a] prosecutor may not seek to sway the jury by unfair appeals to emotion and prejudice . . . . [O]ur Supreme Court has recognized that repetitive and excessive use of sarcasm is one method of improperly swaying the fact finder. . . . Additionally, we have recognized that the excessive use of sarcasm may improperly influence a jury. . . . A prosecutor's frequent and gratuitous use of sarcasm can [call on] the jurors' feelings of disdain, and likely sen[d] them the message that the use of sarcasm, rather than

reasoned and moral judgment, as a method of argument [is] permissible and appropriate for them to use. . . . Although we neither encourage nor condone the use of sarcasm, we also recognize that not every use of rhetorical language or device is improper. . . . The occasional use of rhetorical devices is simply fair argument." (Internal quotation marks omitted.) Id. Thus, for example, in *Turner*, this court concluded that a lone sarcastic remark by the prosecutor during rebuttal argument did not rise to the level of impropriety. Id., 566. Likewise, in the present case, we conclude that the prosecutor's isolated use of sarcasm in referring to the defense theory of the case was not improper. The comment was a legitimate attempt by the prosecutor to undercut the petitioner's claim that the police, aided by the prosecutor, were following a script for the purpose of falsely incriminating the petitioner, and despite the sarcastic nature of the remark, it did not constitute improper vouching for the police witnesses.

2

The petitioner next claims that argument by the prosecutor that the police officers involved in the case would not risk their careers by committing perjury improperly bolstered the credibility of the testifying police officers. Specifically, the petitioner challenges the following comment made by the prosecutor during his rebuttal argument: "Twenty-seven years on the force. They are going to perjure themselves for one case where you got three odd witnesses? Doesn't seem real likely, does it?"[17]

In finding no impropriety with the prosecutor's comments, the habeas court explained: "Here, the transcript does not support the petitioner's characterization of the prosecutor's statement as instructing the jury as to

[17] The petitioner claims that this statement also violated the prohibition of *State* v. *Singh*, supra, 259 Conn. 693. See part II D of this opinion.

the credibility of the testifying officers because of their roles as police officers. The prosecutor's comments were responsive to the defense theory that the testifying police officers had taken part in a conspiracy to coerce statements from witnesses to implicate the petitioner and testify falsely to achieve the desired result of the conspiracy, which was to convict the petitioner. . . . 'The prosecutor's remark . . . was a reasonable response to one of the primary theories advanced by the defense in the case, namely, that the *Whelan* statements were the product of police coercion. It was within the realm of proper argument for the prosecutor to suggest, in rebuttal of that theory, that the police were not motivated by a desire to see the [petitioner] convicted regardless of his guilt, but rather were motivated by a desire to apprehend the person actually responsible and bring him to justice.' . . . *State* v. *Thompson*, [supra, 266 Conn. 469]. Considering these statements in context demonstrates that the prosecutor argued the police officers' experience and career longevity to demonstrate their motive to provide truthful testimony, based on the evidence before the jury. See *State* v. *Stevenson*, 269 Conn. 563, 585, 849 A.2d 626 (2004). Therefore, the prosecutor relied upon reasonable inferences of motive to make these statements, rather than his own personal opinion. Accordingly, the court finds that the petitioner failed to persuade the court that the prosecutor instructed the jury that the testifying officers were more credible than lay witnesses because they were police officers."

Before we address the merits of this claim, we take note of the general rule that "[i]t is improper to suggest that the jury should accord greater weight to the testimony of police officers on account of their occupational status." *State* v. *Thompson*, supra, 266 Conn. 469. For that reason, "Connecticut courts routinely instruct juries that they should evaluate the credibility of a

police officer in the same way that they evaluate the testimony of any other witness, and that the jury should neither believe nor disbelieve the testimony of a police official just because he is a police official."[18] (Internal quotation marks omitted.) Id. Nevertheless, not all prosecutorial argument that seeks to bolster the credibility of the police is impermissible. For example, in *Thompson*, the defendant challenged as improper a remark of the prosecutor that the police wanted "to see that justice [was] served" and "that the person that killed [the victim was] brought to justice." (Internal quotation marks omitted.) Id. In evaluating the claimed impropriety, our Supreme Court explained that the remark was an appropriate response to the defense theory of the case that the police had coerced witnesses to testify falsely against the defendant in order to ensure that he was found guilty. Id.

As in *Thompson*, we must evaluate the challenged comment of the prosecutor in the present case in the context in which it was made, including, of course, the defense theory of the case and defense counsel's closing argument. During that argument, defense counsel addressed the testimony of Higgins and her allegations of misconduct by the police, stating in part: "Higgins, she testifies in court she made the statement that's attributed to her. They are their words, not hers, and she explains why. She was addicted to cocaine. She was fed information about the case. She was offered moneys about the case and, in fact, [was] given moneys. By the way, you don't believe that police officers who gave—who, in fact, gave her money would admit to that on the [witness] stand. That's criminal conduct.

[18] Notably, in the present case, the trial court instructed the jury that the testimony of a police officer is entitled to no special weight and that the credibility of police officers should be considered "in the same way and by the same standards as [it] would evaluate the testimony of any ordinary witness."

These are officers, remember, who have been in the department for twenty-five to twenty-eight years." In his rebuttal argument, the prosecutor responded to these remarks of defense counsel by urging the jury to draw a different inference about the testimony of the veteran police officers, that is, that their longevity on the police force was reason to believe that they would be strongly disposed to tell the truth rather than to lie. Under such circumstances, in which defense counsel first suggested that the testifying officers' many years of service militated against their credibility, the prosecutor's responsive comment was fair argument to counter defense counsel's contention.

D

The Claimed *Singh* Violations

The petitioner next points to five statements of the prosecutor that he claims violated the rule set forth in *State* v. *Singh*, supra, 259 Conn. 712, and *State* v. *Williams*, 41 Conn. App. 180, 184–85, 674 A.2d 1372, cert. denied, 237 Conn. 925, 677 A.2d 950 (1996), namely, that it is improper for a prosecutor to assert, in closing argument, that, to find the defendant guilty, the jury must find that witnesses had lied.[19] The five challenged statements (1) "If you conclude that [Detectives Robert] Coffey, Greene, and [Anthony] Dilullo came into this court and right up there perjured themselves in front of you, sworn police officers perjured themselves right

[19] We note that, although *Singh* was decided after the petitioner's direct appeal from his criminal conviction, the parties have not argued that the rule set forth therein does not apply to the present case. Indeed, any such claim would be unavailing because, as our Supreme Court observed in *Singh*, the evidentiary rule that it adopted therein was already well established when *Singh* was decided. See *State* v. *Singh*, supra, 259 Conn. 712. In that regard, this court, in a case decided well before both *Singh* and the trial in the present case, and on which the petitioner also relies in support of his claim, namely, *State* v. *Williams*, supra, 41 Conn. App. 184–85, also made it clear that such argument is improper.

here in court, all three of them, then you have to acquit the [petitioner]. But if they didn't perjure themselves, all three of them, then Coleman and Higgins' statements were the truth";[20] (2) "[I]n order for [the petitioner] to avoid conviction here even . . . McFadden has to be a liar"; (3) "Twenty-seven years on the force. They are going to perjure themselves for one case where you got three odd witnesses"; (4) "And to buy that argument it isn't enough to say the police made mistakes. For his arguments, you have to find that they perjured themselves. . . . They are evil. That's what you have to find"; and (5) "On the other side, remember that everybody has to have lied. Everybody. All the cops, all the eyewitnesses . . . McFadden . . . Roach, and they all have to have lied with a common purpose, and that is to put this innocent man behind bars for killing two people." As claimed by the petitioner, the prosecutor's "repeated arguments linking an acquittal to perjury were improper." We agree with the petitioner's claim as it pertains to the first two challenged comments but reject the claim insofar as the remaining three statements are concerned.

With respect to the alleged *Singh* violations, the habeas court explained: "As presented, the prosecutor's closing argument seems fraught with inflammatory statements, in direct contravention to [*State* v. *Singh*, supra, 259 Conn. 693], and, therefore, wholly improper. However, the petitioner's argument as to these statements attempts to divorce the statements from the context of the defense theory advanced that the prosecutor and the police officers engaged in a coordinated conspiracy to falsely convict the petitioner of the double homicide. In context, however, each statement highlights a portion of the closing argument in which the

[20] The prosecutor made this statement in his initial closing argument, whereas the next four challenged statements were made by the prosecutor in his rebuttal argument.

prosecutor argued the credibility of witness testimony that directly refuted testimony favorable to the defense theory. Additionally, the prosecutor's statements were credibility arguments in which the prosecutor advocated that the jury could believe either the state's theory of the case or the defense theory of the case and, therein, the prosecutor advocated for the jury to believe the state's theory of the case and to make the credibility assessments that would support the state's theory of the case. The court finds that the prosecutor's statements did not distort the state's burden of proof and, pursuant to *Singh*, the prosecutor did not engage in impropriety by arguing that the jury must conclude that one side of conflicting accounts must be wrong. Accordingly, the court finds that the claimed statements do not rise to the level of impropriety."

Our Supreme Court has "admonished prosecutors to avoid statements to the effect that if the defendant is innocent, the jury must conclude that witnesses have lied. . . . The reason for this restriction is that [t]his form of argument . . . involves a distortion of the government's burden of proof. . . . Moreover, like the problem inherent in asking a defendant to comment on the veracity of another witness, such arguments preclude the possibility that the witness' testimony conflicts with that of the defendant for a reason other than deceit." (Internal quotation marks omitted.) *State* v. *Jones*, 320 Conn. 22, 35–36, 128 A.3d 431 (2015). In *Singh*, for example, the prosecutor stated during closing argument: "So everyone else lies. [The witnesses] . . . all must be lying because you're supposed to believe this defendant . . . . Again, remember that if you buy the argument that [the witness] couldn't have done it, couldn't have seen what he says he saw, then you have to conclude that [the witness] lied." (Internal quotation marks omitted.) *State* v. *Singh*, supra, 259

Conn. 705–706. The essence of the prosecutor's argument in *Singh* was "that the only way the jury could conclude that the defendant [committed the offense charged, arson in the first degree] was if it determined that five government witnesses had lied." Id., 710. In rejecting the state's contention that there was nothing wrong with the prosecutor's statements, the court in *Singh* reasoned that such argument precluded the possibility that a witness was simply mistaken rather than deceitful.[21] Id., 710. Similarly, in *State* v. *Thompson*, supra, 266 Conn. 440, our Supreme Court found a violation of *Singh* based upon the following statement of

[21] We note that, in *Singh*, our Supreme Court distinguished that case from one in which "the defendant's theory of the case was that the witness had in fact lied"; *State* v. *Singh*, supra, 259 Conn. 711 n.15; such that, as the court put it, "the *only* possible theory for the jury to consider . . . was whether the testimony conflicted because the witness indeed had lied." (Emphasis in original.) Id. The respondent relies on this language from *Singh* to support his claim that, if the defense theory at trial is one in which the witnesses are liars, and not merely mistaken, then it is not improper for "the state to base its theory of guilt, in whole or in part, on the proposition that the only way the jury could conclude that the defendant [did not commit the crime charged] was if it determined that [the state's] witnesses had lied." (Internal quotation marks omitted.) We do not believe that the respondent's position is consonant with *Singh* and its progeny. For example, in *State* v. *Stevenson*, supra, 269 Conn. 563, a case in which "the defendant himself, by virtue of his defense, claimed that the witnesses against him were lying"; id., 594; the state conceded that the prosecutor had engaged in impropriety by asking the defendant questions on cross-examination that required him to characterize the detectives as liars. Id., 579–80. In examining the *Williams* factors to determine the harmfulness of the impropriety and whether it was severe in nature, the court discussed its holding in *Singh*, stating: "As regards the [prosecutor's] cross-examination questions that led the defendant to characterize the detectives as liars, we held in [*Singh*] that questions and argument that compel the jury to believe that the only way that it can acquit the defendant is to find that opposing witnesses lied are improper, *but that their harm may be ameliorated by the defense's own claim*, be it implicit or explicit, *that the opposing witnesses lied*." (Emphasis added.) Id., 594. Thus, contrary to the respondent's claim, comments by a prosecutor to the effect that, in order to find a defendant not guilty, the jury must believe that the witnesses lied are improper under the prohibition of *Singh*, regardless of whether they are in response to a theory of defense that the state's witnesses had lied; the fact that the comments were responsive to such a

the prosecutor in rebuttal closing argument: " 'For you to believe that the defendant is innocent, you must believe that [two of the witnesses were] both lying. You must believe that when they got up on the stand and took that oath, they committed perjury.' " Id., 470.

In contrast, in *State* v. *Santiago*, supra, 269 Conn. 743–44, the court agreed with the state's contention that the prosecutor did not improperly suggest to the jury that to find the defendant not guilty it had to find that the state's witnesses were lying. In *Santiago*, the prosecutor made the following comment during closing argument: "[D]id [the witness] lie? Did all these witnesses get together and lie? The police lied. That's what they want us to believe." (Emphasis omitted; internal quotation marks omitted.) Id., 744. In distinguishing those remarks from the comments made in *Thompson* and *Singh*, the court in *Santiago* explained that the remarks subject to review in that case were not improper under *Singh* because it was the defendant himself who had initially suggested that the witnesses were lying, and the prosecutor's statements merely summarized the defendant's own contention in that regard. Id.

In the present case, as in *Santiago*, the fourth and fifth challenged statements were merely shorthand summaries of the petitioner's theory of defense and, when considered in the context in which they were made, did not violate *Singh*. In making those comments, the prosecutor did not urge or otherwise encourage the jury to believe that it could find the petitioner not guilty only if it found that the state's witnesses had lied. The challenged comments, rather, were simply responsive to the petitioner's contention at trial that the witnesses were liars. When, as here, the defense is founded on

defense theory is relevant, rather, to determining the extent of any harm that may have resulted from such statements.

the theory that the testimony of the state's witnesses was all a lie, coerced and scripted by law enforcement officials, it is not improper for the prosecutor to acknowledge that theory and attempt to dissuade the jury from crediting it, so long as, in doing so, the prosecutor's comments do not contravene the rule of *Singh*. Similarly, the petitioner's claim of a *Singh* violation with respect to the third challenged comment also fails because it conveys no suggestion that the jury could find the petitioner not guilty only if the state's witnesses were lying.

In contrast, the first and second statements of the prosecutor—his assertion that Coleman and Higgins were telling the truth unless the police witnesses had committed perjury, and his argument that the jury could find the petitioner not guilty only if McFadden was lying—cannot be squared with *Singh*. In each such statement, the prosecutor sought to convince the jury that it was required to find the petitioner guilty, based on the testimony of the state's witnesses, unless it concluded that those witnesses were lying. Because "[a] witness' testimony . . . can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved . . . such as misrecollection, failure of recollection or other innocent reason"; (internal quotation marks omitted) *State* v. *Albino*, 312 Conn. 763, 785, 97 A.3d 478 (2014); those two statements by the prosecutor represent precisely the kind of argument proscribed by *Singh* and, therefore, they were improper. See id., 789 (improper for prosecutor to argue to jury that it had to find that every witness was wrong in order to find defendant not guilty); *State* v. *Sinclair*, supra, 173 Conn. App. 18 (prosecutor's comment that jury was required to find testimony of witnesses mistaken or wrong in order to believe defendant's testimony was improper); *State* v.

Tate, supra, 85 Conn. App. 371–72 (prosecutor's assertion that, in order to find defendant not guilty, jury had to disbelieve state's witnesses, was improper under *Singh*).

E

Arguing Facts Not in Evidence

The petitioner contends that the prosecutor improperly sought to persuade the jury that the petitioner had undertaken to influence witness testimony without any basis in fact for that assertion. The petitioner relies on four statements that the prosecutor made during closing argument to substantiate his claim. Before discussing those statements, we briefly set forth the principles applicable to the petitioner's claim.

"A prosecutor, in fulfilling his duties, must confine himself to the evidence in the record. . . . [A] lawyer shall not . . . [a]ssert his personal knowledge of the facts in issue, except when testifying as a witness. . . . Statements as to facts that have not been proven amount to unsworn testimony, which is not the subject of proper closing argument. . . . [T]he state may [however] properly respond to inferences raised by the defendant's closing argument." (Citations omitted; internal quotation marks omitted.) *State* v. *Singh*, supra, 259 Conn. 717. "A prosecutor may invite the jury to draw reasonable inferences from the evidence; however, he or she may not invite sheer speculation unconnected to evidence. . . . Moreover, when a prosecutor suggests a fact not in evidence, there is a risk that the jury may conclude that he or she has independent knowledge of facts that could not be presented to the jury." (Citations omitted.) Id., 718.

1

The petitioner first claims that the prosecutor argued facts that were not in evidence to cause the jury to

believe that the petitioner coerced or frightened two witnesses, Coleman and Green,[22] into following a script or program that would be helpful to the petitioner's defense. The challenged statements are (1) "[W]hat you're hearing is . . . Coleman not quite getting to the point where she can follow the script that says we were there later," and (2) "Even . . . Green couldn't bring herself to follow the program completely until she was forced by her former testimony from three years ago to say, oh yes, [n]ow I remember."

We agree with the conclusion of the habeas court rejecting the petitioner's claim. With respect to the first statement, the court concluded that "the prosecutor [was] arguing Coleman's credibility by highlighting inconsistencies and reasonable inferences to be drawn therefrom. . . . With respect to [the second] statement, the prosecutor [was] arguing Green's credibility to the jury and referencing evidence that supports his argument of the lack of credibility due to the importance of her testimony to the defense theory. Both statements taken in context amount to no more than witness credibility arguments, which are also attempts to rebut the defense theory that the police officers and the prosecution engaged in a conspiracy to falsely convict the petitioner for a double homicide. Neither statement raises information that can be construed as facts not in evidence, but rather [the statements] address reasonable inferences . . . [which] can be drawn from the evidence presented to the jury and also address reasonable inferences that could be drawn from the evidence presented to the jury to contradict the defense theory."

As the habeas court determined, these statements merely underscored the state's position that the jury

[22] The evidence established that Green is a longtime family friend of the petitioner and the petitioner's family and a cousin to Roach. She testified at the petitioner's second criminal trial that Roach told her he did not see who shot him but stated that "someone has to pay the price."

should discredit the testimony of the two witnesses because they both had relationships with the petitioner that gave them reason to testify falsely on his behalf. Contrary to the petitioner's contention, the statements contain no suggestion that their testimony was the product of threats or intimidation by the petitioner. Moreover, it was defense counsel who first accused the state of presenting scripted testimony to the jury.[23] We conclude, therefore, that the prosecutor's passing reference to the testimony of Coleman and Green as scripted or programmed was not improper.

2

The petitioner also maintains that the following two statements of the prosecutor improperly accused the petitioner of having frightened the witnesses into recanting: (1) "Did Higgins and Coleman watch [the petitioner] shoot the gun towards the diner where Poole and Paisley died and therein recant, take back their statements here out of fear"; and (2) "Your common sense tells you that the only choice you really have is to credit those taped statements, the ones given at the time close to the time of things before [Higgins and Coleman] realized really that they were putting themselves into what they perceived as danger by identifying somebody in a double homicide." The petitioner claims that these statements were objectionable because they were untethered to any "evidence that Coleman and Higgins recanted their statements out of . . . fear, whether it be a generalized fear of being involved in a double homicide case or a particularized fear of the [petitioner]."

[23] For example, in closing argument, defense counsel stated that, "[i]n my opening remarks to you, I indicated that the evidence here would appear more like a script designed to point the finger at the [the petitioner] as the shooter in the case rather than precise evidence proving his guilt beyond a reasonable doubt."

The habeas court disagreed that the prosecutor's comments were improper and explained as follows: "The petitioner argues that these statements claim that the [petitioner] had frightened the witnesses. However, the context in which the statements were made reveals that the prosecutor made no claims that the petitioner engaged in any action to frighten these witnesses. The first statement in context reveals it is a clause in a larger statement as to the credibility battle between recanting witnesses and the police officers who took the initial statements in the double homicide. Both statements spoke to a generalized fear of involvement in a double homicide case and invited the jury to draw a reasonable inference from the evidence presented about witness reluctance to cooperate."

It is apparent that neither statement directly implicates the petitioner in threats or violence against the witnesses intended to induce them to recant their statements to the police. Indeed, the challenged statements may be understood as addressing a generalized anxiety or fear of being a witness in a case involving a double homicide. Moreover, Coleman testified that she "could have" told detectives that she did not want to be involved in the case and was afraid for herself and family, and that "she might have said" to an inspector who had brought her to the courthouse for the petitioner's trial that she was afraid of the petitioner and Adams. In addition, the prosecutor remarked in his rebuttal closing argument that Coleman was afraid "to be involved as an eyewitness in a double homicide" but he immediately followed that statement with the comment, "I don't say that to suggest that the [petitioner] or his family has ever done anything wrong . . . in terms of the witnesses . . . ."

In contrast, however, the prosecutor's assertion urging the jury to believe that Higgins recanted her statement out of fear is contradicted by the only evidence

adduced on that issue. At trial, when asked if she was afraid to be called as a witness in a double homicide, Higgins replied, "[n]o." Although the jury was not required to believe her testimony in that regard, we acknowledge that prosecutorial argument urging the jury to infer that a witness has recanted her testimony out of fear, generalized or otherwise, potentially gives rise to a concern that the jury will place undue weight on such argument, particularly when, as here, the argument expressly links that fear to the "danger" that the witness "realized [she was] putting [herself] in" by testifying against the petitioner in a case involving a double homicide. Although we cannot say that prosecutorial argument referring to a witness' generalized fear of testifying in a murder case is necessarily or inevitably improper, for present purposes, we treat the two assertions of the prosecutor regarding such fear as improper insofar as those references pertained to Higgins.[24]

F

Williams Factors

Having identified nine improper comments by the prosecutor during his initial and rebuttal closing argument, we turn next to the second part of the two part analysis to determine whether those improprieties were so prejudicial as to deprive the petitioner of a fair trial. To summarize, the following statements of the prosecutor were improper: (1) "[j]ustice for [the] victims and for society requires that you find the [petitioner] in this case guilty of the murders he committed and the

[24] We acknowledge, as noted previously in this opinion, that the prosecutor, in the portion of his closing argument in which he addressed Coleman's recantation, stated that he was not suggesting that either the petitioner or his family had done anything to cause the state's "witnesses" to be afraid of testifying. The prosecutor's use of the term "witnesses" would also apply to Higgins. Nevertheless, for the reasons given, we are persuaded to treat as inappropriate the prosecutor's references to Higgins' purported fear of testifying.

shootings that he did"; (2) "several of you gave looks that said, we don't believe that one"; (3) "I think that I noticed a whole bunch of you being as impressed as I was"; (4) the petitioner's codefendant, Adams, "ha[d] been charged with the same murder"; (5) "[w]hat a coincidence, the shooter just happens to have the same height, weight, build, and skin tone, and clothing as the [petitioner] had on that night"; (6) "[i]f you conclude that [Detectives] Coffey, Greene, and Dilullo came into this court and right up there perjured themselves in front of you, sworn police officers perjured themselves right here in court, all three of them, then you have to acquit the [petitioner]. But if they didn't perjure themselves, all three of them, then Coleman and Higgins' statements were the truth"; (7) "in order for [the petitioner] to avoid conviction here even . . . McFadden has to be a liar"; (8) "[d]id Higgins . . . watch [the petitioner] shoot the gun towards the diner where Poole and Paisley died and therein recant, take back [her statement] here out of fear"; and (9) "[y]our common sense tells you that the only choice you really have is to credit those taped statements, the ones given at the time close to the time of things before [Higgins] realized really that [she was] putting [herself] into what [she] perceived as danger by identifying somebody in a double homicide."

As previously noted, our assessment of the degree of harm resulting from the prosecutor's improprieties is guided by the *Williams* factors, which, to reiterate, require us to determine the extent to which the impropriety was invited by the defense; the severity, frequency and centrality of the impropriety; the strength of any curative measures taken by the court; and the strength of the state's case. In conducting that analysis, we are mindful that "the burden is on the defendant to show . . . that, considered in light of the whole trial, the improprieties were so egregious that they amounted

to a denial of due process." (Internal quotation marks omitted.) *State* v. *Ciullo*, supra, 314 Conn. 58. "[T]he touchstone of due process analysis in cases of alleged prosecutorial [impropriety] is the fairness of the trial, and not the culpability of the prosecutor. . . . The issue is whether the prosecutor's conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. . . . In determining whether the defendant was denied a fair trial [by virtue of prosecutorial impropriety] we must view the prosecutor's comments in the context of the entire trial. . . . [I]t is not the prosecutor's conduct alone that guides our inquiry, but, rather, the fairness of the trial as a whole." (Citation omitted; internal quotation marks omitted.) *State* v. *Medrano*, 131 Conn. App. 528, 538–39, 27 A.3d 52 (2011), aff'd, 308 Conn. 604, 65 A.3d 503 (2013); see also *State* v. *Warholic*, supra, 278 Conn. 396 ("[t]he 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" (internal quotation marks omitted)).

1

Whether the Improprieties Were Invited

Of the prosecutor's nine improprieties, three were invited by the petitioner by virtue of his theory of defense that the witnesses had been coerced by the police to provide statements falsely identifying the petitioner as the shooter. The other improprieties, however, were not provoked or otherwise induced by the petitioner.

2

Frequency and Severity of Improprieties

Although the number of improprieties cannot fairly be characterized as insignificant, we nevertheless do

not consider them to be frequent. We reach this conclusion in light of the prosecutor's lengthy and comprehensive initial and rebuttal closing arguments, which span forty-eight transcript pages. Moreover, the prosecutor's objectionable comments were made over the course of those arguments, and so they appear somewhat isolated when viewed in the context of the prosecutor's very extensive closing argument.[25]

We also do not perceive the prosecutor's nine improprieties as severe, a conclusion we reach for several reasons. First, the fact that defense counsel did not object to seven of the prosecutor's improper comments when they were made "suggests that defense counsel did not believe that [they were] unfair in light of the record of the case at the time. . . . Moreover . . . defense counsel may elect not to object to arguments that he or she deems marginally objectionable for tactical reasons, namely, because he or she does not want to draw the jury's attention to it or because he or she wants to later refute that argument. . . . Accordingly . . . counsel's failure to object at trial, while not by itself fatal to a defendant's claim, frequently will indicate on appellate review that the challenged comments [did] not rise to the magnitude of constitutional error . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Stevenson*, supra, 269 Conn. 576. Indeed, our Supreme Court recently has underscored the fact that, "[i]n determining whether the prosecutorial impropriety was severe . . . it [is] *highly significant* that defense counsel failed to object to . . . the improper [remarks], [to] request curative instructions, or [to] move for a mistrial." (Emphasis

[25] In addition, as we previously have noted, the petitioner's claim of prosecutorial impropriety must be viewed in the context of the entire trial; see, e.g., *State* v. *Courtney G.*, supra, 339 Conn. 351; and there is no contention that the impropriety of the prosecutor in the present case extended beyond closing argument.

added; internal quotation marks omitted.) *State* v. *Gonzalez*, 338 Conn. 108, 149, 257 A.3d 283 (2021).

In the present case, it is highly likely that defense counsel opted to forgo objecting to most of the prosecutor's improper comments because those remarks, though ill-advised, were not particularly damaging or harmful to the petitioner. As our Supreme Court has explained: "With respect to the severity of the improprieties, we observe that few of the foregoing improprieties were the subject of contemporaneous objection. To the extent that defense counsel failed to raise an objection, that fact weighs against the defendant's claim that the improper conduct was harmful. . . . Given the defendant's failure to object [to the majority of the improprieties now alleged], only instances of grossly egregious misconduct will be severe enough to mandate reversal." (Citations omitted; internal quotation marks omitted.) *State* v. *Wilson*, supra, 308 Conn. 449; see also *State* v. *Ciullo*, supra, 314 Conn. 59 ("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.)). The prosecutor's improper comments in the present case were not so serious, inflammatory or prejudicial.

Furthermore, with respect to the *Singh* violations, our Supreme Court has stated that the harm from such a violation "may be ameliorated by the defense's own claim, be it implicit or explicit, that the opposing witnesses lied." *State* v. *Stevenson*, supra, 269 Conn. 594. In *Stevenson*, for example, the prosecutor's violation of *Singh* was not deemed harmful because it was invited by the claim of the defense that the state's witnesses were lying. That "lack of harmfulness combined with the defendant's failure to object" led our Supreme Court

to conclude that the impropriety was not severe. Id.; see also *State* v. *Weatherspoon*, supra, 332 Conn. 557 ("[T]he defendant himself, by virtue of his defense, claimed that the witnesses against him were lying. . . . Thus, the prosecutor's attempt[s] to characterize [the defendant's] defense in this manner was invited and, therefore, not harmful under . . . *Singh*." (Citation omitted; internal quotation marks omitted.)); *State* v. *Warholic*, supra, 278 Conn. 399–400 (harm from *Singh* violation ameliorated by claim of defense that witness lied).

Although the prosecutor's comment that justice required the jury to find the petitioner guilty was objectionable both because it appealed to the jurors' emotions and represented an expression of the prosecutor's personal opinion, that lone reference to justice was not a theme of the prosecutor's argument and therefore not likely to have resulted in undue prejudice to the petitioner. The other improprieties also were not severe insofar as they concerned comments about witness testimony that was not key to significant issues in the case,[26] or statements to which counsel objected and curative instructions were given, or remarks that were invited by defense evidence and argument.

3

Centrality to Critical Issues in the Case

Only two of the improprieties related to a critical issue in the case, namely, the credibility of Higgins' recantation of her statement identifying the petitioner as the shooter. In particular, the prosecutor suggested

[26] Although two of the prosecutor's comments improperly suggested a personal belief in the credibility of two witnesses, Brock and Green, Brock's testimony was not a key part of the defense case. Because Green's recantation testimony was important to the petitioner's defense as well as to the state's case, it is difficult to see how the prosecutor's statement bolstering her credibility could have been harmful to the petitioner.

that Higgins had repudiated her statement because of fear despite the absence of evidence to support that assertion. As we have explained, however, the prosecutor never implicated the petitioner in any misconduct toward Higgins and, in fact, he expressly disavowed any claim that the petitioner or his family had done anything to cause the state's witnesses to be afraid. Accordingly, we are satisfied that any prejudice resulting from the prosecutor's reference to fear in the present case was not substantial.

4

Curative Instructions

We next consider the strength of the curative measures taken by the court. In the present case, defense counsel objected to two of the nine instances of improper argument by the prosecutor—each involved a comment about facts not in evidence—and, thereafter, the court promptly instructed the jury to disregard the offending comments. Specifically, when the jury was brought back into the courtroom for final instructions, the court stated: "[J]ust before we begin with the final instructions, ladies and gentlemen, I want to be sure you don't have any misimpressions from the final argument which you heard first. There has been no evidence of the nature of the charges against . . . Adams during the prior proceedings presented to you, and also there has been no evidence presented to you concerning the [petitioner's] height and weight at the time of the . . . alleged offenses." Defense counsel raised no objection to the curative instruction, which is indicative that counsel thought it was adequate. See *State* v. *Lynch*, 123 Conn. App. 479, 505, 1 A.3d 1254 (2010) ("[t]he absence of an objection to the court's curative instruction often is an indication of the instruction's adequacy" (internal quotation marks omitted)). "In the absence of an indication to the contrary, we presume that the jury

followed the [curative] instructions given to it by the court." (Internal quotation marks omitted.) Id., 506. Thus, the court's curative measures were sufficient to remedy any potential prejudice that otherwise might have resulted from those remarks. See *State* v. *Warholic*, supra, 278 Conn. 401 ("recogniz[ing] that a prompt cautionary instruction to the jury regarding improper prosecutorial remarks or questions can obviate any possible harm to the defendant" (internal quotation marks omitted)).

Defense counsel, however, never objected to the remainder of the improprieties, requested curative instructions or sought a mistrial. Those improprieties were not addressed by the court through any curative measures. The petitioner, by failing to bring the prosecutorial improprieties to the attention of the trial court, "bears much of the responsibility for the fact that [they] went uncured." (Internal quotation marks omitted.) *State* v. *Albino*, supra, 312 Conn. 791; see also *State* v. *Yusuf*, 70 Conn. App. 594, 634, 800 A.2d 590 ("It also is noteworthy that the prosecutor's comments that the defendant now claims were improper apparently were not so obviously prejudicial as to evoke a contemporaneous objection from defense counsel at trial. [I]t seems strange that, if the state's comments were as egregious at trial as they have been depicted on appeal, no contemporaneous objection was made." (Internal quotation marks omitted.)), cert. denied, 261 Conn. 921, 806 A.2d 1064 (2002).

Given the petitioner's failure to object to the improprieties at trial, we "may presume that he did not consider [them] to be seriously prejudicial at the time they were made." *State* v. *Satchwell*, 244 Conn. 547, 572, 710 A.2d 1348 (1998). Significantly, our Supreme Court has stated that "[t]he failure by the defendant to request specific curative instructions frequently indicates on appellate review that the challenged instruction did not

deprive the defendant of a fair trial. . . . *State* v. *Stevenson*, supra, 269 Conn. 597–98; see also *State* v. *Ritrovato*, [280 Conn. 36, 68, 905 A.2d 1079 (2006)] (prosecutorial [impropriety] claims [are] not intended to provide an avenue for the tactical sandbagging of our trial courts . . .)." (Footnote omitted; internal quotation marks omitted.) *State* v. *Angel T.*, 292 Conn. 262, 291–92, 973 A.2d 1207 (2009).

Finally, with respect to the prosecutor's *Singh* violations, the court's general jury instructions likely ameliorated any harm resulting therefrom. See *State* v. *Warholic*, supra, 278 Conn. 403–404. For example, the court instructed the jury that it was the sole arbiter of the facts, the weight of the evidence, and the credibility of the witnesses. Because we presume that the jury followed those instructions, it is very doubtful that the *Singh* violations caused any material harm to the petitioner.

5

Strength of State's Case

Finally, we examine the strength of the state's case. Although no physical evidence tied the petitioner to the shooting,[27] three eyewitnesses—all of whom were personally acquainted with the petitioner—identified him as the shooter. At one time or another, however, each such witness disclaimed their identification of the petitioner. Coleman and Higgins initially provided written statements to the police identifying the petitioner as the shooter, but they both recanted those statements

[27] We note that the state adduced evidence at trial that the police had recovered a latent fingerprint from a vehicle observed leaving the scene of the shooting that matched the petitioner's left middle finger, as well as a palm print from the petitioner that was recovered from the right rear side window of the vehicle. The vehicle on which the prints were found, however, belonged to the petitioner's friend, the codefendant Adams, who was also dating the petitioner's sister. There was no evidence presented indicating when the prints were left on the vehicle.

at the petitioner's two trials, claiming that the police had coerced or bribed them to give their statements incriminating the petitioner. Roach, the lone surviving victim from the shooting, testified at the petitioner's first trial that he did not see the shooter and therefore could not identify the perpetrator. In the period between the petitioner's first and second trials, however, Roach was extradited to Connecticut from Georgia on an outstanding warrant. Shortly thereafter, while in police custody, he gave a written statement identifying the petitioner as the shooter and then, following his release from custody after the charges against him had been dropped, he testified at the petitioner's second trial that the petitioner was the shooter. Thus, each of the state's three key witnesses provided two completely contradictory accounts as to whether the petitioner was the shooter. In such circumstances, it cannot be said that the state's case against the petitioner was overwhelming.

Nevertheless, as our Supreme Court has observed, our courts 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. *Courtney G.*, supra, 339 Conn. 365–66. In the present case, the state's evidence, though not extremely strong, "was not so weak as to be overshadowed by the prosecutorial improprieties." (Internal quotation marks omitted.) Id. The statements and testimony of the three eyewitnesses implicating the petitioner in the shootings were generally consistent in material respects. In addition, the jury reasonably could have concluded that the statements that Coleman and Higgins gave to the police were truthful and that their recantations at trial lacked credibility. Indeed, in Coleman's case, her recantation testimony defies credulity: she implausibly stated that she could not recall whether

she testified at the petitioner's first trial, whether she was present when the shootings took place, whether she gave a statement to the police, whether she told the police that a blue vehicle in the police garage looked like the one she saw the petitioner get into at the diner after the shooting, and whether she told her neighbor that she saw the petitioner shoot the victims. It is evident, as well, that the jury was not persuaded by the petitioner's contention that the police were involved in egregious misconduct in furtherance of an elaborate conspiracy to frame the petitioner for crimes he did not commit.

Although all relevant considerations must be evaluated in ascertaining prejudice under the *Williams* factors, our Supreme Court has observed that one such factor "ultimately [may be] dispositive of the issue of harmfulness." *State* v. *Wilson*, supra, 308 Conn. 450. Furthermore, the factors identified in *Williams* for "assess[ing] whether substantial prejudice flowed from the [prosecutorial improprieties] . . . do not serve as an arithmetic test for the level of prejudice flowing from [the improprieties]. The ultimate question is whether the defendant suffered substantial prejudice, and this assessment turns on the unique characteristics of each case." (Citation omitted.) *State* v. *Pereira*, 72 Conn. App. 545, 563, 805 A.2d 787 (2002), cert. denied, 262 Conn. 931, 815 A.2d 135 (2003). In the present case, the determinative consideration is the fact that none of the prosecutor's improper comments was severe, a conclusion that is strongly supported by defense counsel's failure to object to all but two of them. In light of the nature of the prosecutor's improper comments, and based on our review of the full record, we are satisfied that the jury would have returned the same verdict even if the prosecutor had not made any of those comments. We conclude, therefore, that the petitioner has failed to meet his burden of showing that the improprieties

were so serious and so harmful that they deprived the petitioner of a fair trial.

Accordingly, the petitioner has not demonstrated that he was unduly prejudiced by the failure of appellate counsel and first habeas counsel to raise ineffective assistance and due process claims in the petitioner's direct appeal and in his first petition for a writ of habeas corpus. Consequently, we also agree with the habeas court that the petitioner failed to establish cause and prejudice for his procedural default in failing to raise his ineffective assistance of appellate counsel and due process claims in his direct appeal and in his first habeas petition. The habeas court also properly determined that the petitioner failed to establish his claim that his first habeas counsel was ineffective for failing to raise a due process claim based on the prosecutorial improprieties. We conclude, therefore, that the habeas court properly dismissed the amended petition as to the procedurally defaulted claims and denied it as to the claim of ineffective assistance of first habeas counsel.

III

DENIAL OF MOTION TO OPEN EVIDENCE

The petitioner also contends that the habeas court improperly denied his motion to open the evidence. We reject the petitioner's claim.

The following additional facts and procedural history are relevant to this claim. In his amended habeas petition, the petitioner alleged that Roach had received consideration from the state in exchange for testifying against the petitioner and that the state violated his right to due process by (1) failing to disclose information about any benefits that Roach had received and (2) adducing and failing to correct false testimony from Roach about that consideration. The petitioner, however, did not present any evidence concerning those claims at the habeas trial.

The habeas trial in this case was held on February 4, 2020, and, as we have noted, on December 15, 2020, the habeas court issued a memorandum of decision in which it denied the amended habeas petition and deemed abandoned the petitioner's due process claim concerning the state's alleged misconduct pertaining to the consideration received by Roach. See footnote 3 of this opinion. Thereafter, on December 28, 2020, the petitioner filed a motion for reconsideration, which was granted by the habeas court on January 11, 2021. On March 5, 2021, during the pendency of the petitioner's motion for reconsideration but prior to the court's issuance of its second memorandum of decision, the petitioner filed a motion to open the evidence related to his claim concerning the state's favorable treatment of Roach. The court subsequently denied the motion to open and, in its March 19, 2021 memorandum of decision denying the petitioner relief, again deemed abandoned the petitioner's due process claim relating to Roach.

In support of his motion to open, the petitioner asserted, first, that new evidence had come to light that bore on the issue of the state's misconduct pertaining to Roach and that the then recent decision of our Supreme Court in *Gomez* v. *Commissioner of Correction*, 336 Conn. 168, 243 A.3d 1163 (2020), which was issued after the close of evidence in the petitioner's habeas trial, "substantively changed the law in a way that allowed the petitioner to proceed with [these] claim[s]."

With respect to the alleged newly discovered evidence, the petitioner made the following assertions in his motion to open: "Prior to the habeas trial, the undersigned counsel retained a private investigator to look into, inter alia, evidence about whether . . . Roach had been offered consideration in exchange for providing a statement and testifying against the petitioner. At that time, the undersigned counsel had reason to believe

that Roach had been arrested and incarcerated—while the petitioner's criminal case was pending—on charges relating to a shooting on Munson Street in New Haven that Roach committed. The investigation did not uncover any evidence of Roach's arrest or a conviction involving Roach.

"Thereafter, after the evidence had closed at the habeas trial, the petitioner reached out to the New Haven Office of the Public Defender to determine whether it could provide any additional information about Roach's arrest and incarceration. An investigator from the Office of the Public Defender was able to provide the undersigned counsel with Department of Correction records that reflected that Roach was arrested on December 29, 1992, discharged on bond on February 3, 1993, and that he did not return to [the] custody [of the Department of Correction]. As a result of the discovery of this information, the undersigned counsel hired another private investigator, Cristina Lougal, to look into . . . Roach's arrest. The second investigator attempted to obtain records pertaining to . . . Roach's case directly from the clerk's office at geographical area [number twenty-three]. The clerk's office informed . . . Lougal that there was information relating to . . . Roach, but that the information [was] nondisclosable.

"In light of the circumstances, it appears that . . . Roach was arrested and had a criminal proceeding in late 1992 and early 1993, but that the criminal proceeding ended in either a nolle prosequi or a dismissal, which resulted in the records of his arrest and criminal proceeding being unavailable. . . . In light of the seriousness of the charges that . . . Roach was facing, this information strongly lends itself to an inference that the nolle prosequi or dismissal of . . . Roach's case was done in exchange for consideration in the form of

his testimony against the [petitioner]. Further information to confirm that fact would likely be found in the Superior Court record or the transcripts from the proceedings. The Superior Court record is currently unavailable to the petitioner for the reasons stated above. The transcripts are similarly unavailable because, without the Superior Court record, the petitioner cannot know the dates on which . . . Roach's proceeding was heard or the judge before whom it was heard. Without that information, the petitioner cannot order the transcripts." (Citation omitted.)

With respect to his claim of a change in the law, the petitioner asserted: "Prior to *Gomez*, a petitioner who raised a claim that the prosecuting authority had knowingly presented false testimony needed to prove, inter alia, that the prosecution had withheld information from the defense in addition to presenting false testimony. See, e.g., *Hines* v. *Commissioner of Correction*, 164 Conn. App. 712, 727–28, [138 A.3d 430] (2016) (petitioner's false testimony claim failed because state had disclosed information about agreement about which witness testified falsely). Because the petitioner's trial counsel was [deceased and therefore] unavailable to testify at the habeas trial, the petitioner's ability to present that evidence was limited. However, *Gomez* changed the law. Under *Gomez*, a petitioner can succeed on a false testimony claim regardless of whether the falsehood was disclosed to the defense. *Gomez* [v. *Commissioner of Correction*], supra, 336 Conn. 183 ('[t]he fact that a defendant knows that the state is attempting to secure his conviction on the basis of false evidence does not necessarily discharge the prosecutor from his duty to correct the false testimony or immunize the state from a claim that the defendant's right to due process was violated'). The change in the law warrants the reopening of evidence in this case."

The standard of review of a trial court's decision denying a motion to open the evidence is well established. "We review a trial court's decision to reopen evidence under the abuse of discretion standard. In any ordinary situation if a trial court feels that, by inadvertence or mistake, there has been a failure to introduce available evidence upon a material issue in the case of such a nature that in its absence there is a serious danger of a miscarriage of justice, it may properly permit that evidence to be introduced at any time before the case has been decided. . . . Whether or not a trial court will permit further evidence to be offered after the close of testimony in a case is a matter resting in the sound discretion of the court. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done." (Internal quotation marks omitted.) *In re Kameron N.*, 202 Conn. App. 637, 646, 264 A.3d 578 (2021).

Our review of the record reveals that the habeas court did not abuse its broad discretion in denying the petitioner's motion to open, which was filed nearly eleven months after the conclusion of the habeas trial. Notably, the court already had rendered a decision in the matter in December, 2020, and, although it subsequently granted the petitioner's motion to reconsider that decision, the time for taking evidence in the case had long since passed. Furthermore, the record establishes that the petitioner was aware that Roach had been facing criminal charges prior to implicating the petitioner in the shootings and that those charges were dropped following his statement to the police identifying the petitioner as the shooter.[28] Indeed, defense

[28] These facts are reflected in our Supreme Court's opinion reversing the petitioner's conviction on his direct appeal following his first trial. Specifically, the court explained: "At [that first] trial, Roach admitted that he had

counsel emphasized these facts in closing argument, stating to the jury that, when "facing an exposure of some twenty-seven years in prison . . . [t]hat's when he decides to talk in custody [about the petitioner] . . . and what does he get? He gets a get out of jail free card. As soon as he gives the statement, as soon as he testifies, he walks out of jail, and his charges are dropped. End of story. Not a bad deal." Finally, although the petitioner's motion to open expresses the hope that he would uncover evidence of an undisclosed deal between Roach and the state if given some additional time to do so, the court was not required to permit the petitioner that opportunity in the context of the present case in light of the fact that the trial had been completed many months earlier.[29] For all of these reasons, the petitioner has failed to demonstrate that the court's decision denying his motion to open was a manifest abuse of discretion.

IV

CONCLUSION

To summarize, we conclude that the habeas court abused its discretion in denying the petition for certification to appeal. Nevertheless, following our review

been arrested for an incident that had occurred on October 5, 1991, in which the complainant had been . . . Adams. He testified that he had been charged with one count of attempted assault in the first degree, two counts of reckless endangerment in the first degree, one count of unlawful discharge of a firearm, and one count of illegal use of a firearm. He testified further that, if convicted, he would have faced a mandatory minimum sentence of five years and a maximum of twenty-seven years and three months imprisonment. Roach stated that he had been extradited from Georgia to face these charges in Connecticut. He admitted that these charges had been dropped two months after he had made a formal statement to the police identifying the [petitioner] as the shooter in the present case. Roach testified that he had received no promises from the state in return for his testimony." (Footnote omitted.) *State* v. *Valentine*, supra, 240 Conn. 406.

[29] We, however, intimate no view on the merits of any such claim that the petitioner may seek to bring in the future regarding Roach and his relationship with the state.

of the merits of the petitioner's claims on appeal, we conclude that the habeas court properly determined that (1) the petitioner failed to prove his claims of a due process violation and ineffective assistance of appellate counsel, (2) those claims were procedurally defaulted, and (3) the petitioner failed to establish his claim that first habeas counsel was ineffective. Accordingly, the court properly dismissed the amended petition in part as to the claims that were procedurally defaulted and denied the amended petition as to the claim of ineffective assistance of first habeas counsel. The court also did not abuse its discretion in denying the petitioner's motion to open the evidence.

The judgment is affirmed.

In this opinion the other judges concurred.