JAMES A. MITCHELL *v.* STATE OF CONNECTICUT ET AL. (SC 20287)

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

Syllabus

Pursuant to statute (§ 54-95 (a)), "[n]o appeal may be taken from a judgment denying a petition for a new trial unless, within ten days after the judgment is rendered, the judge who heard the case . . . certifies that a question is involved in the decision which ought to be reviewed by the Supreme Court or by the Appellate Court."

The petitioner, who had been convicted of numerous crimes, including attempt to commit murder, conspiracy to commit murder, kidnapping in the first degree, sexual assault in the first degree, and assault in the first degree in connection with an incident in which the petitioner and a coconspirator sexually assaulted the victim at gunpoint and then shot her several times, filed a petition for a new trial based on a claim of newly discovered evidence. Specifically, the petitioner claimed that there was newly discovered evidence in the form of technologically enhanced security camera footage that had been shown to the jury, which made it clear that it was the coconspirator and not the petitioner who had exited the petitioner's car and approached the victim's body after she had been shot, as well as certain impeachment evidence relating to the posttrial arrest and conviction of H, the lead detective in the petitioner's criminal case, in connection with H's involvement in a forgery scheme. The petitioner also claimed that the prosecutor improperly withheld certain exculpatory evidence and introduced false testimony from the victim. The trial court denied the petition for a new trial, concluding, inter alia, that the evidence against the petitioner was overwhelming and that it was not probable that the new evidence regarding the security camera footage or H's conviction would produce a different result at a new trial. The petitioner then appealed to the Appellate Court but did so without first seeking certification to appeal pursuant to § 54-95 (a). After the appeal was pending for almost one year, the Appellate Court notified the petitioner that the requisite certification to appeal was lacking. Accordingly, the petitioner filed in the trial court a request for leave to file a late petition for certification to appeal, in which he explained that he had not been provided notice of the appeal procedures and the certification requirement specific to a petition for a new trial, as is the custom in habeas corpus cases. Before argument proceeded

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

in the trial court on the request for leave, the Appellate Court dismissed the petitioner's appeal for his noncompliance with § 54-95a (a). In denying the petitioner's request for leave, the trial court summarized the reasons why it had rejected the petitioner's enhanced security camera footage claim, indicated that the claim regarding H's posttrial arrest would not have affected the result of the petitioner's criminal trial, and concluded that the petitioner's claims were "meritless and too late." The petitioner again appealed to the Appellate Court, claiming that the trial court had abused its discretion in denying his request for leave to file a petition for certification to appeal because the trial court did not consider the reason for the delay or any other factors relevant to permitting a late filing and, instead, denied his request on the basis of the merits of his appeal. The Appellate Court dismissed the appeal, concluding that, although the trial court had referenced the merits of the petitioner's claims, it also had considered, and largely based its decision on, the length of the petitioner's delay in requesting leave to file a late petition for certification to appeal. On the granting of certification, the petitioner appealed to this court. *Held*:

1. The Appellate Court incorrectly concluded that the trial court had not abused its discretion in denying the petitioner's request for leave to file a late petition for certification to appeal because, in deciding whether to excuse the untimely request, the trial court failed to give due consideration to the petitioner's reason for his late filing: although the trial court considered the length of the petitioner's delay by acknowledging the ten day limit in § 54-95 (a) and stating that the petitioner's claims were "too late," the reason for the delay is a distinct, nontemporal factor that the court must consider separately in deciding whether to excuse an untimely filing, and nothing in the record indicated that the trial court considered the reason advanced by the petitioner, namely, that the custom of providing notice of the certification requirement in habeas cases shows that it is an important procedural hurdle that could be overlooked in the absence of special mention and that he was lulled into error by his prior experience in his habeas case; moreover, this court was not convinced that, if the trial court had considered that reason, it would have denied the petitioner's request, as the petitioner's attorney otherwise diligently pursued the appeal of the denial of his petition for a new trial and complied with the certification requirement in the petitioner's habeas case when he received noticed to do so, the trial court, the Appellate Court and the state all overlooked the petitioner's noncompliance with § 54-95 (a) during the year the appeal was pending, neither the state nor the trial court suggested that the delay resulted in any prejudice, and the petitioner would have no meaningful remedy for his attorney's failure to comply with § 54-95 (a), there being no right to the effective assistance of counsel in connection with a petition for a new trial.

2. The judgment of the Appellate Court was affirmed on the alternative ground that the trial court acted within its discretion in denying the petitioner's request for leave to file a late petition for certification to appeal on the ground that the petition for a new trial did not raise any issue warranting appellate review:

a. With respect to the technologically enhanced security camera footage, the petitioner had raised a similar claim in his habeas petition, and the Appellate Court upheld the habeas court's conclusion that the petitioner was not prejudiced by his counsel's alleged failure to adequately investigate the security camera footage to prove that he did not exit the vehicle; moreover, the enhanced footage was not meaningfully exculpatory, as it showed the petitioner wilfully and actively participating in criminal activity, and it would not have had a significant impeachment effect at trial because, although the enhanced footage contradicted the testimony of the victim and another witness that it was the petitioner who exited the vehicle, it was improbable that the jury would have doubted the other aspects of their testimony merely because they confused the petitioner's and his coconspirator's identities, given that the victim was suffering from life-threatening gunshot wounds and the witness was viewing the incident from a distance.

b. Evidence that, after the petitioner's criminal trial, H was arrested and convicted of forgery in the second degree would not have led to a different result at a new trial, as all of the material activities performed by H in connection with the petitioner's criminal case occurred in the presence of others, and the petitioner's coconspirator was convicted at a trial that occurred after H's crimes were made known and through the testimony of a different detective; moreover, evidence that H had been charged with, but not convicted of, fabricating evidence in other criminal cases, which the petitioner contended would support his theory that H had switched the victim's blood sample to produce a negative toxicology test and, thus, avoid revealing that the victim's perception of the events was impaired by drugs, would not probably yield a different result at a new trial in light of the other evidence establishing that the victim was alert and oriented and that she provided accurate information immediately after the incident and after her subsequent surgery.

c. The trial court did not abuse its discretion in concluding that none of the evidence or newly discovered evidence on which the petitioner relied to demonstrate prosecutorial improprieties would be material at a new trial, and nothing in the record suggested that that conclusion was debatable among jurists of reason, that a court could have resolved the claim in a different manner, or that there were any questions that deserve further proceedings.

Argued May 6, 2020—officially released February 26, 2021**

** February 26, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Amended petition for a new trial following the petitioner's conviction of the crimes of attempt to commit murder, conspiracy to commit murder, kidnapping in the first degree, conspiracy to commit kidnapping in the first degree, sexual assault in the first degree, conspiracy to commit sexual assault in the first degree, assault in the first degree, conspiracy to commit assault in the first degree, and criminal possession of a firearm, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Hon. Edward J. Mullarkey*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment denying the petition, from which the petitioner appealed to the Appellate Court, which dismissed the appeal; thereafter, the court, *Hon. Edward J. Mullarkey*, judge trial referee, denied the petitioner's request for leave to file a late petition for certification to appeal, and the petitioner appealed to the Appellate Court, *Keller*, *Moll* and *Bishop*, *Js.*, which dismissed the appeal; subsequently, the petitioner, on the granting of certification, appealed to this court. *Affirmed*.

Dante R. Gallucci, assigned counsel, for the appellant (petitioner).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Donna Mambrino*, senior assistant state's attorney, and *Gail P. Hardy*, former state's attorney, for the appellee (state).

Opinion

ECKER, J. The petitioner, James A. Mitchell, appealed from the trial court's denial of his request for leave to file a late petition for certification to appeal from the court's judgment denying his petition for a new criminal trial on the ground that the petitioner's claims were "meritless and too late." The Appellate Court rejected

the petitioner's claim that the trial court improperly considered the merits of the petition, rather than the reasons for the delay or any other factors relevant to permitting a late filing, and dismissed the appeal. See *Mitchell* v. *State*, 188 Conn. App. 245, 247, 204 A.3d 807 (2019). We conclude that the trial court abused its discretion by failing to engage in the proper analysis to determine whether to excuse the late petition for certification. We further conclude, however, that the trial court acted within its discretion when it determined that the petition did not raise issues warranting certification and, therefore, affirm the Appellate Court's judgment dismissing the petitioner's appeal on this alternative basis.

I

The record reveals the following procedural history culminating in the present appeal. Following a jury trial, the petitioner was convicted of attempt to commit murder in violation of General Statutes §§ 53a-8, 53a-49 (a) and 53a-54a (a), conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a (a), kidnapping in the first degree in violation of General Statutes §§ 53a-8 and 53a-92 (a) (2) (A), conspiracy to commit kidnapping in the first degree in violation of §§ 53a-48 and 53a-92 (a) (2) (A), sexual assault in the first degree in violation of General Statutes §§ 53a-8 and 53a-70 (a) (1), conspiracy to commit sexual assault in the first degree in violation of §§ 53a-48 and 53a-70 (a) (1), assault in the first degree in violation of General Statutes §§ 53a-8 and 53a-59 (a) (5), conspiracy to commit assault in the first degree in violation of §§ 53a-48 (a) and 53a-59 (a) (5), and criminal possession of a firearm in violation of General Statutes (Rev. to 2003) § 53a-217 (a) (1).[1] See *State* v. *Mitchell*, 110 Conn. App. 305, 307–308, 955 A.2d 84, cert. denied, 289 Conn. 946,

[1] The facts supporting the verdict are addressed in part III of this opinion.

959 A.2d 1012 (2008). The trial court, *Mullarkey*, *J.*, imposed a total effective sentence of fifty-seven years imprisonment. Id., 310. The Appellate Court affirmed the petitioner's conviction on direct appeal. Id., 308, 329.

The petitioner subsequently sought postconviction relief by way of a petition for a new trial and a petition for a writ of habeas corpus. The petitioner was represented by the same attorney in both proceedings. Trial proceeded first on the later filed habeas petition. The habeas court, *Cobb*, *J.*, denied the petition and thereafter granted the petitioner's petition for certification to appeal pursuant to General Statutes § 52-470 (g). The Appellate Court affirmed the habeas court's judgment. *Mitchell* v. *Commissioner of Correction*, 156 Conn. App. 402, 404, 421, 114 A.3d 168, cert. denied, 317 Conn. 904, 114 A.3d 1220 (2015).

Trial then commenced on the petition for a new trial, before the same judge who had presided over the petitioner's criminal trial.[2] On August 22, 2016, the trial court, *Hon. Edward J. Mullarkey*, judge trial referee, rendered judgment denying the petition. On September 12, 2016, the petitioner filed a request for an extension of time to file his appeal, which the trial court granted on September 13. The petitioner then filed his appeal within the extended deadline.

When the petitioner filed the appeal from the trial court's denial of his petition for a new trial, he did so without first obtaining certification to do so in accordance with General Statutes § 54-95 (a),[3] which provides

[2] By this time, Judge Mullarkey had reached the mandatory retirement age of seventy and had become a judge trial referee.

[3] General Statutes § 54-95 (a) provides in relevant part: "Any defendant in a criminal prosecution, aggrieved by any decision of the Superior Court, upon the trial thereof, or by any error apparent upon the record of such prosecution, may be relieved by appeal, petition for a new trial or writ of error, in the same manner and with the same effect as in civil actions. No appeal may be taken from a judgment denying a petition for a new trial unless, within ten days after the judgment is rendered, the judge who heard the case or a judge of the Supreme Court or the Appellate Court, as the

that certification to appeal shall be obtained "within ten days after the judgment is rendered . . . ." See *Santiago* v. *State*, 261 Conn. 533, 543–44, 804 A.2d 801 (2002). That appeal had been pending for almost one year when, on September 5, 2017, the Appellate Court notified the petitioner that the requisite certification to appeal was lacking. On September 8, 2017, prior to the hearing in the Appellate Court to show cause why his appeal should not be dismissed, the petitioner filed in the trial court a request for leave to file a petition for certification to appeal, to which the petition for certification was appended. To explain his failure to seek certification within the statutory time limitation, the petitioner alleged in that request that, "[a]lthough analogous to a petition for certification to appeal in a habeas corpus case, the petitioner was not provided with a written notice of appeal procedures via [Judicial Branch] form JD-CR-84, as is the custom in habeas corpus cases . . . ." The respondent, the state of Connecticut,[4] filed an opposition to the request. Its opposition cited the one year delay in seeking certification and the frivolousness of the grounds raised in the petition for a new trial. Before argument was heard on the request, the Appellate Court dismissed the petitioner's appeal for failure to obtain certification in compliance with § 54-95 (a).

Argument proceeded in the trial court on the petitioner's request for leave to file the petition for certification to appeal. The court orally denied the request at the conclusion of the hearing and subsequently issued a written decision. The decision noted the ten day statutory time limit prescribed for seeking certification to appeal but did not address any particular facts regarding

case may be, certifies that a question is involved in the decision which ought to be reviewed by the Supreme Court or by the Appellate Court. . . ."

[4] Although the petitioner named Sandra Tullius as an additional respondent, that individual is not a party to this appeal.

the petitioner's excuse for failing to meet that requirement or the significance of the procedural nonconformity. Instead, it summarized reasons why the court previously had determined that the principal evidence on which the new trial petition relied would not have changed the outcome had such evidence been available at the criminal trial. It then concluded that the petitioner's claims were "meritless and too late."

The petitioner appealed to the Appellate Court, claiming "that the [trial] court abused its discretion in denying his request because the court, in considering the length of the delay in filing the request, did not consider the reasons for the delay or any other factors relevant to permitting a late filing but, rather, addressed the merits of the petitioner's appeal." *Mitchell* v. *State*, supra, 188 Conn. App. 247. The Appellate Court dismissed the appeal. Id. It reasoned that, "although the petitioner is correct that [the trial court] referenced the merits of the petitioner's claims on appeal, it also made clear that its decision was based in large part on the petitioner's delay . . . ." Id., 250. The Appellate Court acknowledged that the petitioner's request for leave had attributed the delay to not having been provided with a written notice of appeal procedures but concluded that this fact could not excuse the delay because no such notice was required and, even if it were, the failure to afford that notice would not operate as a waiver of the certification requirement. Id. The Appellate Court also acknowledged that the trial court never expressly addressed the notice issue but opined that, "by considering the length of the petitioner's delay, the court afforded due regard to the reasons for the delay, and, thus, the court's denial of the petitioner's request for leave to file a late petition for certification to appeal was not an abuse of discretion." Id.

We granted the petitioner's petition for certification to appeal to this court to decide whether the Appellate

Court correctly concluded that the trial court did not abuse its discretion in denying the petitioner's late petition for certification to appeal. See *Mitchell* v. *State*, 331 Conn. 920, 205 A.3d 567 (2019). The threshold question raised by the certified issue is whether the trial court improperly ignored considerations relevant to assessing whether to excuse a late request for certification to appeal. Because we answer that question in the affirmative, we also consider whether the trial court's decision could be sustained on the basis of its determination that the petition for a new trial raised no claims warranting appellate review. We conclude that this latter determination was not an abuse of discretion.

II

The petitioner contends that the trial court abused its discretion when it denied his request for leave to file the petition for certification because that decision was not made in accordance with this court's direction in *Santiago* v. *State*, supra, 261 Conn. 543. He argues that, in assessing the length of the delay, the trial court improperly failed to discount the period during which he was pursuing the appeal from the denial of his petition. This argument was raised at the hearing before the trial court and in the petitioner's Appellate Court brief, but it was not addressed by the Appellate Court. The petitioner also renews the argument that was rejected by the Appellate Court, namely, that the trial court improperly considered the merits of the petition for certification rather than the reasons for delay and other factors relevant to the timeliness of his request for certification. We agree, in part, with the petitioner's second argument.

A petition for a new trial, like a petition for a writ of habeas corpus, provides a "critical procedural mechanism for remedying an injustice." *Seebeck* v. *State*, 246 Conn. 514, 531, 717 A.2d 1161 (1998). If a new trial

petition is denied, there is a statutory right to appeal, subject to this condition: "No appeal may be taken from a judgment denying a petition for a new trial unless, within ten days after the judgment is rendered, the judge who heard the case or a judge of the Supreme Court or the Appellate Court, as the case may be, certifies that a question is involved in the decision which ought to be reviewed by the Supreme Court or by the Appellate Court." General Statutes § 54-95 (a).

The legislature adopted certification requirements to eliminate frivolous postconviction appeals. *Seebeck* v. *State*, supra, 246 Conn. 531. Certification requirements were concurrently adopted for appeals from the denial of a habeas petition and appeals from the denial of a new trial petition. Id., 530; see also 7 S. Proc., Pt. 5, 1957 Sess., pp. 2936–40, remarks of Senator Elmer S. Watson. Both schemes prescribe a ten day period after judgment is rendered for filing the petition for certification. See General Statutes §§ 52-470 (g) and 54-95 (a).

To determine the contours of the requirements set forth in § 54-95, this court has looked to the more developed body of habeas case law considering the certification requirement in § 52-470. See, e.g., *Santiago* v. *State*, supra, 261 Conn. 537–40; *Seebeck* v. *State*, supra, 246 Conn. 529–33. We held in *Seebeck* that the legislature did not intend for the certification requirement to limit the jurisdiction of the appellate tribunal but only to define the scope of appellate review. See *Seebeck* v. *State*, supra, 533. We also concluded that the same standard of review applied under both statutes, namely, whether the trial court clearly abused its discretion in denying the request for certification to appeal. Id., 533–34. In *Santiago*, we concluded that, although the certification requirement is not jurisdictional in nature, it is nonetheless a mandatory prerequisite to appeal from the denial of a new trial petition because of the essential purpose that certification serves. See *Santiago*

v. *State*, supra, 539–40. We further held that, because this requirement serves important public and institutional policy objectives independent of, and paramount to, the state's particularized interest in any specific case—namely, the conservation of judicial resources—it is not subject to waiver due to the state's failure to move to dismiss the appeal within the time limit prescribed for the dismissal of nonjurisdictional defects under our rules of practice. See id., 543–44, citing Practice Book § 66-8.

Although *Santiago* refused to countenance abject noncompliance with the certification requirement, this court recognized in that case that noncompliance was a defect that could be cured even after the statutorily prescribed time limit. We observed: "In the event that the petitioner does seek certification to appeal from the judgment of the trial court denying his petition for a new trial, that court will be required to decide whether to excuse the petitioner's delay in filing his petition for certification to appeal . . . *with due regard to the length of the delay*, *the reasons for the delay*, *and any other relevant factors*. In considering the length of the delay, the trial court should be mindful of the fact that most of that delay is attributable to the petitioner's efforts to seek direct appellate review from the judgment denying his petition for a new trial. Because the procedural avenue followed by the petitioner in [*Santiago*] appears to have raised an issue of first impression in this state, we do not believe that the delay resulting from the appellate litigation of that issue should be weighed heavily, if at all, against the petitioner."[5] (Cita-

[5] The petitioner in *Santiago* had appealed from the denial of the petition for a new trial without requesting certification to appeal. See *Santiago* v. *State*, supra, 261 Conn. 536. After the appeal had been pending for approximately ten months, the state moved to dismiss the appeal due to this defect, and the Appellate Court granted the motion. Id. On appeal to this court, the petitioner argued that the certification requirement in § 54-95 (a) is not jurisdictional and, accordingly, that the state had waived this defect by failing to file its motion to dismiss within the time limit prescribed by

tion omitted; emphasis added.) Id., 545 n.18. We noted that the decision whether to entertain an untimely request for certification to appeal would be a matter left to the trial court's discretion but again underscored that, "[i]n exercising that discretion, the court should consider the reasons for the delay." Id., 544–45 n.17.

The present case provides our first opportunity since *Santiago* to consider a trial court's exercise of discretion to deny leave to file a late petition for certification under § 54-95.[6] Our consideration of this issue is subject to the general principle that "every *reasonable* presumption should be given in favor of the correctness of the court's ruling." (Emphasis added; internal quotation marks omitted.) *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, 263 Conn. 204, 210, 820 A.2d 224 (2003).

Practice Book § 66-8 for the dismissal of nonjurisdictional defects. Id., 537, 543. Had the petitioner in *Santiago* prevailed on this issue of first impression, he would have been entitled to proceed with his appeal despite his failure to seek certification to appeal.

[6] Section 54-95 contains a novel feature that was not considered in *Santiago* and that has not yet been considered by our appellate courts. Unlike other statutes with certification requirements, § 54-95 vests authority equally in the trial judge and appellate judges to certify the appeal. See General Statutes § 54-95 (a) (vesting authority to certify appeal in "the judge who heard the case or a judge of the Supreme Court or the Appellate Court, as the case may be"). Appellate certification authority also existed at one time under our habeas statute, § 52-470, but has since has been eliminated. See Public Acts 2002, No. 02-132, § 78. Similar authority continues to exist under current federal habeas law. Under federal law, a circuit judge or a federal court of appeals has authority to issue the certificate of appealability, both in the first instance and in the event that a district court denies the certificate. See 28 U.S.C. § 2253 (c) (2018); Fed. R. App. P. 22 (b).

In neither *Santiago* nor the present case did the petitioner request certification from the Appellate Court; nor did that court take upon itself the prerogative to exercise its statutory certification authority. Cf. *Mickens-Thomas* v. *Vaughn*, 355 F.3d 294, 303 (3d Cir. 2004) (noting that it was proper for federal court of appeals to treat timely notice of appeal as request for certificate of appealability and to grant certification on its own). Whether this appellate certification authority affects the standard of review that we apply to a trial court's decision denying leave to file a late petition for certification or denying certification was not considered in *Santiago* and is not an issue that either party has asked us to consider in the present case.

A presumption of correctness will not carry the day when there is evidence that the trial court failed to follow the applicable law. See, e.g., *Rosenblit* v. *Danaher*, 206 Conn. 125, 134, 537 A.2d 145 (1988); *Disciplinary Counsel* v. *Parnoff*, 158 Conn. App. 454, 470, 119 A.3d 621 (2015), aff'd, 324 Conn. 505, 152 A.3d 1222 (2016). In particular, it is an abuse of discretion to rely on "improper or irrelevant factors"; (internal quotation marks omitted) *Georges* v. *OB-GYN Services, P.C.*, 335 Conn. 669, 687, 240 A.3d 249 (2020); accord *State* v. *Holley*, 327 Conn. 576, 628, 175 A.3d 514 (2018); or to fail to consider the reason for an untimely filing, if one is advanced by the petitioner. See *Roberto* v. *Honeywell, Inc.*, 33 Conn. App. 619, 625–26, 637 A.2d 405, cert. denied, 229 Conn. 909, 642 A.2d 1205 (1994); *Segretario* v. *Stewart-Warner Corp.*, 9 Conn. App. 355, 362, 519 A.2d 76 (1986); see also *Alvarado* v. *Commissioner of Correction*, 75 Conn. App. 894, 895–96, 818 A.2d 797 (rejecting argument that trial court had affirmative duty, sua sponte, to inquire into reasons for untimely petition for certification to appeal), cert. denied, 264 Conn. 903, 823 A.2d 1220 (2003).

In addition to these general principles, one further consideration specific to petitions for a new trial bears on the trial court's treatment of an untimely request for certification under § 54-95. In the intervening period since *Santiago*, this court has made clear that, because there is no constitutional or statutory right to counsel in connection with a petition for a new trial, there is no right to effective assistance of counsel in such a proceeding. See *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 701–702, 159 A.3d 1112 (2017). What this means for present purposes is that, if a request for certification to appeal is untimely filed due to counsel's negligence, and the delay is not excused, the petitioner has no recourse in *any* forum. His appellate rights are forfeited, and we are unaware of any means under cur-

rent law by which he can seek relief for counsel's ineffective assistance in the loss of a potentially meritorious appeal.[7] The irremediable and absolute character of the forfeiture in new trial proceedings resulting from a lawyer's failure to comply with a nonjurisdictional time limitation does not compel excusal of every untimely request for certification to appeal. But it does elevate the importance of the trial court's obligation to give "*due regard* to the length of the delay, the reasons for the delay, and any other relevant factors"; (emphasis added) *Santiago* v. *State*, supra, 261 Conn. 545 n.18; and call for a reviewing court to ensure that the record fairly reflects that this obligation has been met. Cf. *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, supra, 263 Conn. 211 (discretion vested in trial court "imports something more than leeway in decision making and . . . should not impede or defeat the ends of substantial justice" (internal quotation marks omitted)).

With this observation and *Santiago*'s directive in mind, we review the trial court's memorandum of decision in the present case denying the petitioner's request for leave to file the late petition for certification. The trial court's decision began by reciting the mechanisms through which the petitioner unsuccessfully had sought a new trial: a direct appeal, a habeas petition, and a petition for a new trial. The trial court noted the substantial overlap in the issues raised in the habeas and new trial petitions, "with the addition of an unsubstantiated claim of newly discovered evidence." It then briefly summarized the reasons why it had rejected the princi-

[7] Even in the habeas context—in which relief *is* available to remedy harm caused by an attorney's negligence—the gravity of the loss of discretionary appellate review due to counsel's failure to timely file a petition for certification has been deemed an "exceptional [circumstance]" that warranted treating such conduct as prejudicial per se for purposes of establishing a claim of ineffective assistance of counsel. See *Iovieno* v. *Commissioner of Correction*, supra, 242 Conn. 706–707.

pal claim in the petition for a new trial regarding security camera still frames and videotape capturing certain parts of the incident giving rise to the criminal charges.

The trial court then turned to the requirement to obtain certification to appeal, stating: "[Section] 54-95 (a) required the petitioner to file within ten days after the judgment is rendered. [The] court, in good conscience, cannot find that the issue(s) raised ought to be reviewed by a higher court. *Santiago* v. *State*, [supra, 261 Conn. 533]." This conclusion was followed by an explanation that apparently referred back to the court's earlier discussion regarding the lack of merit to the security camera issue: "*Similarly*, claims concerning former [Hartford Police Detective] Alfred Henderson's posttrial arrest would not have had any effect on the petitioner's jury trial. The petitioner's coconspirator [Travis Hampton] was tried by the same court four months after the petitioner. Unlike the petitioner, Hampton did not testify and admit [to] being at the scenes of the crimes. He was convicted of nine felonies in a case in which a different detective testified. *State* v. *Hampton*, 293 Conn. 435 [988 A.2d 167] (2009). The petitioner's claims are meritless and too late. *Iovieno* v. *Commissioner of Correction*, 242 Conn. 689 [699 A.2d 1003] (1997).

"Request denied." (Emphasis added.)

We conclude that the trial court's ruling, although adequate in certain respects, fails to fully comport with our direction in *Santiago*.

With respect to *Santiago*'s first requirement, which instructs the trial court to give due consideration to the length of the delay, the only reference to this factor in the trial court's decision is its acknowledgement of the statutorily prescribed time limit and its conclusion that

the petitioner's claims are "meritless *and too late*."[8] (Emphasis added.) Both parties agree that there is no indication that the trial court gave any consideration to the existence or circumstances of the appellate litigation when assessing the length of the delay, an issue raised by the petitioner at the hearing before the trial court. The petitioner argues that *Santiago* directed the trial court to take the appellate litigation into account, whereas the state argues that, under the present circumstances, the appellate litigation was not relevant to the delay in seeking certification.

We do not entirely agree with either party's position. The state is correct that the appellate litigation in *Santiago*, unlike in the present case, was in pursuit of an issue of first impression that, if successful, could have excused the failure to seek certification. See footnote 5 of this opinion. But this reasoning does not make the course and duration of the appellate litigation per se irrelevant in cases arising after *Santiago*. Other facts relating to the appellate litigation were pertinent to assessing the length of the delay in the present case. Specifically, the petitioner's counsel, evidently unaware of the certification requirement in § 54-95 (a), filed what otherwise would have been a timely appeal from the denial of the new trial petition, having obtained an

[8] Given that the only statement in the decision relevant to the length of the delay was the trial court's recitation of the statutory time limit, the court's use of the term "too late" could be understood as nothing more than a nonevaluative truism, that is, a factual observation that the request for certification was filed after the ten day statutory time limit. Such a statement of fact, of course, would be the starting point for the due consideration analysis required by *Santiago* but would not itself provide the necessary substantive analysis. The alternative interpretation understands the phrase "too late" to embody an implied *evaluation* of the length of the delay as excessive. We will assume, as the parties do, that the trial court considered the length of the delay, at least in the sense that the court clearly was aware of the fact that the certification request was filed approximately one year after the new trial petition was denied.

extension of time to file that appeal.[9] The trial court granted that extension, notwithstanding the procedural irregularity that ultimately returned the petitioner to the trial court, and did so without alerting the petitioner to the fact that his appeal could not proceed without certification. The Appellate Court similarly granted the petitioner an extension of time to file his appellate brief, which he then filed in due course; the extension was granted without any notification to the petitioner that the appeal could not proceed without the missing certification. The Appellate Court thereafter granted the state two extensions of time to file its brief but, again, did not notify the petitioner until months later that his appeal could not proceed without certification. No doubt it was the petitioner's responsibility to ensure that he complied with the statutory requirements. Nonetheless, the repeated failure of two different courts to bring this defect to the petitioner's attention, while at the same time approving extension requests, as well as the state's decision to seek extensions of time for filing its appellate brief rather than moving to dismiss the appeal, could well have affected a trial court's assessment of the fairness of holding the petitioner strictly accountable for the entire year's delay in seeking certification.[10]

Notwithstanding our concerns, we cannot say that the trial court failed to give due regard to the length

[9] By "timely," we mean only that the appeal was filed within the period prescribed under our rules of practice, as extended by the trial court. We recognize that, because certification to appeal is a mandatory condition precedent to an appeal, the appeal was defective in the absence of certification.

[10] Although the petitioner never raised this issue, we also question the fairness of counting the entire year against the petitioner when it appears that the Appellate Court had statutory authority to determine on its own initiative whether certification to appeal should be granted. See footnote 6 of this opinion. The trial court alternatively could have considered the appellate litigation as an independent "relevant factor" rather than as part of its assessment of the length of the delay. There is no indication that it did so.

of the delay under the circumstances presented. The petitioner did not draw this particular aspect of the appellate litigation to the trial court's attention; instead, he incorrectly assumed that *Santiago* suggested that the trial court always should discount the period of appellate litigation in assessing the length of the delay. In the absence of any focused argument by the petitioner, it was sufficient for the trial court to acknowledge the statutory time limit and to state a conclusion that the claims were "too late."

We reach a different conclusion with respect to the question whether the trial court gave due regard to the reason for the delay. As the Appellate Court recognized, the petitioner did clearly assert a reason for the delay in his request, namely, the lack of notice to the petitioner of appellate procedures like the notice provided in habeas appeals. The trial court is not entitled to a presumption that it gave due consideration to this claim under the circumstances presented. There is not a single phrase or statement in the record, either during the hearing on the petitioner's request or in the trial court's decision, from which we reasonably could infer that the trial court considered the proffered reason for the delay. The Appellate Court's conclusion to the contrary rested on an untenable assumption—that the trial court considered the *reason* for the delay when it considered the *length* of the delay. This conclusion ignores that the reason for the delay is a distinct, nontemporal factor that must be considered under *Santiago*. It may be that the longer the delay, the more compelling the reason must be to excuse that delay. But, even under such a rationale, consideration of the latter is not subsumed by an assessment of the former in the absence of an indication of any kind that the petitioner's proffered excuse was duly considered.

The record does not even reflect any indication that the trial court understood that it was obligated, as

directed by *Santiago*, to give due regard to the reason for the delay. The factors identified in *Santiago* were never mentioned in the court's decision or in its comments at the hearing.[11] Although the trial court was not required to credit the reason offered by the petitioner, it was required, at a minimum, to give some indication that it had at least considered whether the proffered reason excused the delay under the circumstances. See *Carter* v. *State*, 194 Conn. App. 208, 215, 220 A.3d 886 (2019) (trial court's order sufficiently demonstrated that it had considered petitioner's stated reason for delay in filing petition, as required by *Santiago*, by stating that "the petitioner has failed to establish good cause for a delay of over four months after the expiration of the appeal period" (internal quotation marks omitted)); cf. *Worden* v. *Francis*, 170 Conn. 186, 188, 365 A.2d 1205 (1976) ("[w]ithout repeating all the considerations mentioned by the trial court, it suffices to note that the court fully realized the discretionary power it was called upon to exercise and concluded that '[w]hile the court is empowered to grant the motion [for a late substitution] upon a finding of good cause, good cause has not been shown by the plaintiff' "); *Kendzierski* v. *Goodson*, 21 Conn. App. 424, 427, 574 A.2d 249 (1990) (trial court did not ignore good cause requirement for termination because, "[a]lthough the court did not explicitly use the term 'good cause,' it is clear, from the context of the court's ruling and from its specific finding that the plaintiff proved a desire for a higher rent, that its decision was based on the good cause requirement"). It is especially important to do so when, as here, the consequences of an adverse determination involve the

[11] The court's citations to *Santiago* v. *State*, supra, 261 Conn. 533, and *Iovieno* v. *Commissioner of Correction*, supra, 242 Conn. 689, do not fairly suggest otherwise. The trial court cited those cases as support for propositions wholly unrelated to the petitioner's proffered excuse for filing his petition late, namely, those bearing on the merits of certification.

permanent and irrevocable loss of the petitioner's ability to seek relief.

It may well be appropriate for us to overlook the trial court's failure to consider the reason offered by the petitioner for the delay if that reason could not have provided a basis to excuse the untimely request for certification, had it been considered. However, we are not persuaded that the trial court, giving due consideration to the reason proffered by counsel, would have been compelled to deny the request under these circumstances.

The petitioner's request alleged that, "[a]lthough analogous to a petition for certification to appeal in a habeas corpus case, the petitioner was not provided with a written notice of appeal procedures via [Judicial Branch] form JD-CR-84, as is the custom in habeas corpus cases . . . ."[12] The record indicates that, in his earlier habeas proceedings in which he presumably was afforded such notice, the petitioner filed a timely request for certification to appeal. The petitioner did not argue that there is legal authority requiring similar notice in new trial petition proceedings; nor did he argue that the statutory certification requirement was ambiguous. He thus was effectively making an equitable argument, i.e., that the custom of providing notice of the certification requirement in habeas proceedings demonstrates an awareness that it is an important procedural hurdle that could be overlooked in the absence

[12] There is no statute or rule of practice that requires a habeas petitioner to be given notice of the habeas appeal procedures. The first paragraph of the Judicial Branch's habeas appeal form referenced in the petitioner's request provides notice of both the requirement to seek certification to appeal from a habeas court's decision denying a petition for a writ of habeas corpus and the time limit prescribed by statute for taking that action. See Notice of Appeal Procedures (Habeas Corpus), CT Judicial Branch Form JD-CR-84, available at https://www.jud.ct.gov/webforms/forms/CR084.pdf (last visited February 24, 2021). The Judicial Branch currently does not have a comparable notice form that is given to a party whose petition for a new trial is denied.

of special mention and that he was lulled into error by his prior experience in his habeas case, in which he did comply with the certification requirement after having received notice.[13]

We have not previously considered what constitutes an adequate reason to excuse delay in this context. The petitioner's attorney conceded at oral argument before this court that, regardless of his lack of actual knowledge of the statutory certification requirement, he had a duty to ascertain the pertinent appeal requirements. Attorney negligence generally has not been deemed to constitute good cause for an untimely action in other contexts. See, e.g., *Georges* v. *OB-GYN Services, P.C.*, supra, 335 Conn. 691 (late appeal under Practice Book § 63-1); *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, supra, 263 Conn. 207–209 (same); *Jaquith* v. *Revson*, 159 Conn. 427, 431–32, 270 A.2d 559 (1970) (motion to open judgment of nonsuit rendered for lack of timely compliance with court order); see also *Percy* v. *Lamar Central Outdoor, LLC*, 147 Conn. App. 815, 819–20, 83 A.3d 1212 (motion to set aside default on basis of attorney negligence), cert. denied, 311 Conn. 932, 87 A.3d 580 (2014). In the context of a late filed petition for certification to appeal under § 54-95 (a), however, we discern important distinguishing characteristics that could persuade a trial court, in its discretion, to consider an attorney's negligence as a valid excuse under the present circumstances. In particular, the litigant lacks any meaningful remedy for his attorney's negligence if the delay is not excused, the attorney otherwise diligently pursued the appellate litigation, the courts and the state also apparently overlooked the certification requirement when sanctioning extensions

[13] In his petition for certification to appeal to this court, the caption to one of the petitioner's arguments asserted that notice of appellate procedures is "mandatory." Reading his argument in its entirety, however, indicates that his position is not that there currently exists such a requirement but that such a requirement *should* exist.

of time to pursue the appeal in the absence of a request for or grant of certification, neither the state nor the trial court suggested that the delay resulted in any prejudice to the state or the court system,[14] and a lengthy term of imprisonment is at stake.

Other factors that have been considered in weighing whether to excuse untimely actions in other contexts have taken into account whether the delay was intentional or for strategic advantage; see, e.g., *State* v. *L'Heureux*, 166 Conn. 312, 319–20, 348 A.2d 578 (1974); *Meribear Products, Inc.* v. *Frank*, 193 Conn. App. 598, 606, 219 A.3d 973 (2019); whether the delay could be personally attributed to the client; see, e.g., *Janulawicz* v. *Commissioner of Correction*, 310 Conn. 265, 274 n.11, 77 A.3d 113 (2013); *Ramos* v. *Commissioner of Correction*, 248 Conn. 52, 61–62, 727 A.2d 213 (1999); *Langston* v. *Commissioner of Correction*, 185 Conn. App. 528, 532–33, 197 A.3d 1034 (2018), appeal dismissed, 335 Conn. 1, 225 A.3d 282 (2020); and whether the delay caused prejudice to the opposing party. See, e.g., *Janulawicz* v. *Commissioner of Correction*, supra, 274–75; *Horton* v. *Meskill*, 187 Conn. 187, 194, 445 A.2d 579 (1982); *Meribear Products, Inc.* v. *Frank*, supra, 606; *Warner* v. *Lancia*, 46 Conn. App. 150, 157, 698 A.2d 938 (1997). None of those concerns is implicated in the present case.

We therefore conclude that the trial court abused its discretion when it failed to accord due and proper consideration to the reason for the delay in deciding whether to excuse the untimely request for certification.[15]

[14] To the extent that one purpose of the time limit for requesting certification may be to allow the trial court to reconstruct the reasons that led to its denial of the petition for a new trial while its recall is fresh, there is no indication in the present case that the delay in any way impeded the court's recall or evaluation of the merits.

[15] The appeal as presented does not require us to decide whether it would have been appropriate for the trial court to consider the merits of the appeal, as an additional relevant factor, after giving due regard to the length of the delay and the reason for the delay.

III

Our decision to venture beyond the trial court's procedural holding and to review the merits of the appeal is made easier because there is no dispute that the trial court itself reached a conclusion on the merits of the petition for certification. This fact is clear not merely from the court's final pronouncement that the petitioner's claims are "meritless and too late" but by its statement that, "in good conscience, [it] cannot find that the issue(s) raised ought to be reviewed by a higher court," which mirrors the statutory standard for certification. See General Statutes § 54-95 (a) ("the judge who heard the case . . . certifies that a question is involved in the decision which *ought to be reviewed by the Supreme Court or by the Appellate Court*" (emphasis added)). The trial court's decision sets forth reasons to explain this conclusion as to the principal grounds raised in the petition.

Although the petitioner contends that the trial court improperly considered the merits of his petition as a basis to deny leave to file the petition for certification, we ascribe a different intention to the court in making that determination. We construe the court's decision to conclude, in effect, that (1) the request for certification to appeal was untimely, and, therefore, it would not grant leave to seek certification, and (2) alternatively, even if it were to excuse the untimely request, it would not grant certification to appeal. In light of our conclusion in part II of this opinion, the first ground cannot sustain the court's decision. We therefore consider this alternative ground.[16] We conclude that the trial court

[16] Both parties have addressed in their briefs to this court whether the trial court's conclusion as to the merits was correct. We note that this alternative ground goes to the heart of the purpose of § 54-95 (a), which is to determine whether the petition for a new trial raised any issue that warrants appellate review. For the reasons explained in part II of this opinion, we face a situation in the present case in which the trial court made a determination regarding that substantive matter without engaging in a proper analysis of the threshold procedural issue of whether to excuse the

did not abuse its discretion in finding no merit to the claims and affirm the judgment of the Appellate Court on that basis.

The petitioner sought a new trial on the basis of newly discovered evidence, as well as "for other reasonable cause . . . ." General Statutes § 52-270 (a). To assess whether the trial court correctly concluded that the petitioner raised no claims in his petition for a new trial that warranted appellate review, we begin with the evidence presented at his criminal trial to provide the necessary context. See *Shabazz* v. *State*, 259 Conn. 811, 827, 792 A.2d 797 (2002) (when ruling on petition for new trial, "[t]he trial court must always consider the newly discovered evidence in the context of the evidence presented in the original trial").

A

In the petitioner's direct appeal from his conviction, the Appellate Court set forth the following facts that the jury reasonably could have found, which we have supplemented with additional facts relevant to the present appeal. "On August 23, 2003, following an evening at a nightclub, the victim[17] was dropped off at a friend's house in East Hartford. Wanting to return home, and

petitioner's untimely request for certification. A late request is not, however, a jurisdictional bar to consideration of the merits. Lateness matters only to the extent that it may prevent the petitioner from obtaining a ruling on the merits of his petition. This unusual procedural posture allows us to review the trial court's merits determination.

Of course, if we were to infer from the fact that, by reaching the merits, the trial court excused the lateness of the request for certification; see *Iovieno* v. *Commissioner of Correction*, supra, 242 Conn. 700 n.6 ("[o]nce a court has decided to exercise its discretion and [to] consider an untimely petition [for certification to appeal], it should proceed in the usual manner to consider the merits of the petition"); we necessarily would review the merits of certification.

[17] "In accordance with our policy of protecting the privacy interests of victims of sexual abuse, we do not identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e." *State* v. *Mitchell*, supra, 110 Conn. App. 308 n.1.

with her residence too distant to walk, the victim called the [petitioner] for a ride [after she was unsuccessful in getting a ride from several other friends]. The victim chose to call the [petitioner] because she knew that Denasha Sanders, the mother of one of the [petitioner's] children, had lived in the same building as the victim and that the [petitioner] was frequently in the vicinity. . . .

"The [petitioner] arrived driving a gold Nissan Altima accompanied by another man, unknown to the victim at the time, but later identified as . . . Hampton. The victim agreed to go with the [petitioner] and Hampton to downtown Hartford to get something to eat. [When they arrived at the restaurant, the petitioner remained in the car, speaking to Sanders on his cell phone, while the victim and Hampton went into the restaurant. After they returned to the car], the [petitioner] became violent with the victim, striking her with his cell phone and demanding to know the location of the victim's brother [who had been dating Sanders]. Out of fear that the [petitioner] would harm her [brother], the victim lied to the [petitioner] and told him that her brother was at her grandfather's house. The victim attempted to leave the car, but the [petitioner] pulled her by the hair and locked the doors. During this time, Hampton remained in the backseat of the vehicle.

"The [petitioner] subsequently determined that the victim's brother was not at her grandfather's house. He drove the victim and Hampton to his mother's house in Hartford and ordered the victim out of the car. The victim briefly complied and then returned to the vehicle while the [petitioner] and Hampton entered the house. When the [petitioner] and Hampton returned, the three proceeded to leave the area by car. The [petitioner] apologized to the victim for hitting her and offered her marijuana, which she accepted. Instead of driving the victim [south on Market Street toward her home, however, the petitioner turned north on Market Street and

parked behind a building on Market and Pequot Streets, on the opposite corner from a Citgo gas station]. The [petitioner] told the victim he wanted to have sex with her and proposed that they go to a hotel . . . .

"The victim refused and got out of the car, intending to walk home. The [petitioner] produced a shotgun, which he gave to Hampton, who pointed the weapon at the victim's face. The [petitioner] and Hampton told the victim to remove her pants. The victim [complied, and] the [petitioner then] raped her vaginally from behind [while Hampton pointed the shotgun at her face]. When the [petitioner] was finished, he [regained possession of the shotgun and demanded that] the victim . . . perform fellatio on Hampton. The victim complied briefly, [but when she refused to continue] Hampton [penetrated her vaginally for a moment], while the [petitioner] . . . held the shotgun. [When Hampton stopped, the] victim grabbed her pants . . . yelled at the [petitioner] to let her leave [and promised that she would not tell anyone what had happened]. The [petitioner] told the victim she could [either] get into a nearby dumpster or run. As the victim attempted to run, the [petitioner] shot her in the side of the stomach. The victim [ran across Pequot Street toward the Citgo station but was] followed by Hampton, who now had the shotgun. The [petitioner] pursued the victim in the car and blocked her path. [The victim ran from the Citgo station across Market Street and attempted to hide behind a tree on Market Street, but Hampton found her and shot her several times. At one point, she heard the petitioner say to Hampton '[m]ake sure that bitch is dead.' The victim held her breath and attempted to play dead. The petitioner and Hampton] then left the scene [in the vehicle]. Shortly thereafter, [they] returned briefly [stopped the vehicle close to the victim's location to see if she was dead] and then left the area again. The victim [grabbed her left arm, which was almost

severed by a gunshot blast to her elbow, and] dragged herself to the street, where she was found by a passing driver. The police and paramedics were summoned, and the victim was taken to Hartford Hospital for treatment."[18] (Footnote in original.) *State* v. *Mitchell*, supra, 110 Conn. App. 308–10.

The victim identified the petitioner as the perpetrator shortly after her breathing tube was removed following surgery. He was arrested and charged with attempt to commit murder, conspiracy to commit murder, kidnapping in the first degree, conspiracy to commit kidnapping in the first degree, sexual assault in the first degree, conspiracy to commit sexual assault in the first degree, assault in the first degree, conspiracy to commit assault in the first degree, and criminal possession of a firearm.

At the petitioner's criminal trial, the state offered corroborating forensic and testimonial evidence to establish the version of events described in the preceding paragraphs, although no forensic evidence directly implicated the petitioner. Among other things, the state offered the testimony of two eyewitnesses, who heard gunshots, saw a gold colored vehicle in pursuit of someone on foot, saw someone get out of the vehicle, and watched the vehicle circle back to the victim before leaving. The state also offered a videotape and still photographs from security cameras positioned around Travelers Tower near Market Street. These exhibits provided grainy images of a portion of the incident. The state used this photographic evidence to prove, among other things, that the petitioner's vehicle stopped near the victim's final location and that someone emerged from the vehicle to check to see whether the victim was dead.

[18] The victim sustained serious, permanent injuries as a result of the incident. Each shotgun shell dispelled hundreds of small pellets, which lodged in the victim's head and body. She lost partial sight in one eye, the use of one of her arms, and the ability to bear children.

The petitioner testified at trial and admitted that he was present at the scene. He asserted, however, that he had no knowledge that Hampton was in possession of a gun until Hampton started shooting, that Hampton was the only shooter, and that the victim's perception of the events was impaired by drugs. The petitioner's testimony described a version of events casting Hampton as the lone criminal actor. According to the petitioner, the victim produced and lit up some "dust" (marijuana laced with embalming fluid), which she and Hampton shared in the car. After a stop at the petitioner's mother's house, where the petitioner and the victim had consensual, protected sex[19] on the porch, the two males and the victim left in the car. Hampton then directed the petitioner to take them somewhere so he and the victim could have sex. The victim just sat there "in a daze." Hampton directed the petitioner to stop the car on Market Street, where he and the victim exited the car and went behind a building. When they emerged, the victim, who was holding her pants in hand, attempted to leave on foot rather than get back into the car. Hampton then pursued the victim. The petitioner moved the car near the Citgo station and then dozed off until he was awakened by a loud noise, which he later realized was a gunshot. When he saw that Hampton was firing a gun at the victim, the petitioner attempted to hit Hampton with the car but could not because he encountered a curb. After Hampton got into the car, the petitioner panicked and drove off.

In its closing argument, the state argued that the eyewitness accounts and the photographic evidence proved that the passenger got out of the car and shot

[19] No DNA evidence was recovered from the victim to identify her assailants. There was no semen in the victim's rape kit, but human seminal protein fluid was found on the victim. There was testimony that, if such fluid does not contain sperm, it will not contain DNA. A forensic criminologist testified that the absence of semen on the victim could have resulted from medical personnel cleaning the victim to insert her catheter and breathing tube.

the victim and that the driver—the petitioner—got out of the vehicle, looked at the victim lying on the ground, and got back into the car.

The court instructed the jury that, for all of the substantive charges except unlawful possession of a firearm, it could find that the petitioner had committed the crimes as a principal or an accessory, or could find him guilty on the basis of vicarious liability as Hampton's coconspirator under the *Pinkerton* doctrine.[20] The jury found the petitioner guilty of all of the crimes charged. It found him guilty of the kidnapping charge as a principal or accessory and guilty of the assault and sexual assault charges as a coconspirator under *Pinkerton*.[21]

B

"[T]o obtain a new trial on the basis of newly discovered evidence, the petitioner must establish that the newly proffered evidence (1) is actually newly discovered, (2) would be material in a new trial, (3) is not merely cumulative, and (4) would probably produce a different result in a new trial." *Jones* v. *State*, 328 Conn. 84, 92, 177 A.3d 534 (2018), citing *Asherman* v. *State*, 202 Conn. 429, 434, 521 A.2d 578 (1987). "This strict standard is meant to effectuate the underlying equitable principle that once a judgment is rendered it is to be considered final, and should not be disturbed by post-trial motions except for a compelling reason." (Internal quotation marks omitted.) *Skakel* v. *State*, 295 Conn. 447, 467, 991 A.2d 414 (2010).

[20] In *State* v. *Walton*, 227 Conn. 32, 43, 45–46, 630 A.2d 990 (1993), we recognized the principle of vicarious liability that the United States Supreme Court articulated in *Pinkerton* v. *United States*, 328 U.S. 640, 647–48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946), under which conspirators may be held liable for criminal offenses committed by their coconspirators that are (1) within the scope of the conspiracy, (2) in furtherance of it, and (3) reasonably foreseeable as a necessary or natural consequence of the conspiracy.

[21] The verdict form did not ask the jury to indicate the basis of liability for the attempted murder charge.

In his petition for a new trial, the petitioner alleged that there was newly discovered evidence in the form of (1) technological improvements to the security camera videotape that had been shown to the jury, which made clear that, contrary to the state's claim at trial, it was the vehicle's passenger (Hampton), not the driver (the petitioner), who exited the vehicle to approach the victim's body, and (2) significant impeachment evidence bearing on the credibility of Henderson, the lead detective, involving his posttrial arrest for official misconduct in connection with other cases. The petition also alleged as other reasonable cause for a new trial that the prosecutor had engaged in misconduct by not disclosing exculpatory evidence relating to the videotape, criminal charges brought against Henderson, and other matters, and by adducing false testimony from the victim.

In its decision denying the petition for a new trial, the court characterized the evidence against the petitioner as "overwhelming." It also pointed out that the petitioner's efforts to cast Hampton as the sole wrongdoer ignored the obvious and immovable impediment to the petitioner's exculpation under this theory, namely, the fact that the petitioner could have been convicted on the basis of accessorial or *Pinkerton* liability even if he, himself, had not assaulted or shot the victim. The trial court determined that both the videotape and the evidence related to Henderson failed to satisfy the *Asherman* test in multiple respects, and the court emphasized in particular that neither claim met the fourth prong of *Asherman*, as neither would probably produce a different result in a new trial. The court rejected the claims of prosecutorial misconduct on the grounds that the claims were undefined, unsupported by evidence, and/or lacking in merit. It similarly concluded that an issue not raised in the petition for a new trial but pressed at the related evidentiary hearing—purportedly suspicious circumstances surrounding the

belated testing of the victim's blood sample that yielded negative results for the presence of drugs—would not affect the verdict.

As a threshold to our review of the merits, the petitioner must establish that the trial court abused its discretion in denying certification to appeal from the court's denial of his new trial petition. "A petitioner satisfies that burden by demonstrating: [1] that the issues are debatable among jurists of reason; [2] that a court could resolve the issues [in a different manner]; or [3] that the questions are adequate to deserve encouragement to proceed further." (Emphasis omitted; internal quotation marks omitted.) *Seebeck* v. *State*, supra, 246 Conn. 534; see id. (relying on framework adopted in *Lozada* v. *Deeds*, 498 U.S. 430, 431–32, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), for analyzing certificate of probable cause to appeal under federal habeas corpus statute for petitions for certification to appeal under § 54-95 (a)).[22]

The petition for certification to appeal framed the issue warranting review broadly: "Whether the trial court erred in denying the petitioner's petition for a new trial."[23] The petitioner's original appellate brief, in

[22] The trial court's decision in the present case denying leave to file the late petition did not address *Lozada* explicitly. Nonetheless, the court's determinations that none of the petitioner's claims "ought to be reviewed by a higher court" and that the claims are "meritless" implicitly correspond to a determination that none of the *Lozada* criteria was met. Neither party claims otherwise.

[23] The petition for certification also raised the issue of "[w]hether the trial court erred in failing to admit proffered exhibits into evidence at trial." We do not separately address this issue. The trial court did not address it in its decision concluding that the petitioner had raised no issues that warranted certification, and the petitioner did not request an articulation on this issue. It is not evident from the record that the trial court declined to consider the exhibits at issue or, if it did, the basis for that decision. Ultimately, we are persuaded that none of the exhibits at issue would have likely affected the outcome of the case. We reach this conclusion for essentially the same reasons that have led us to conclude that the trial court did not otherwise abuse its discretion in determining that the petition for a new trial lacked merit.

which he challenged the trial court's decision denying the new trial petition, focused exclusively on whether each piece of evidence offered in support of his new trial petition would have affected the verdict. The trial court's decision denying the petitioner's request for leave to file the petition for certification to appeal reiterated that court's view that the newly discovered evidence was not sufficiently material to have an effect on the verdict. We therefore similarly focus our discussion on whether the trial court abused its discretion by determining, in effect, that no court reasonably could conclude that the newly produced evidence would probably produce a different result in a new trial.

"The burden of proving the probability of a different result is upon the [petitioner], and in determining that issue the trial court exercises a discretion [that] cannot be set aside unless its discretionary power has been abused." *Johnson* v. *State*, 172 Conn. 16, 17, 372 A.2d 138 (1976); cf. *Jones* v. *State*, supra, 328 Conn. 87 (recognizing exception in which de novo review is appropriate when petition for new trial is decided by judge who did not preside over original trial and no fact-finding was necessary because both parties agreed that new evidence was fully credible). The petitioner must overcome a high hurdle to establish such an abuse of discretion. "To meet the fourth element of *Asherman*, [t]he [petitioner] must persuade the court that the new evidence he submits will *probably*, not merely possibly, result in a different verdict at a new trial . . . . It is not sufficient for him to bring in new evidence from which a jury *could* find him not guilty—it must be evidence [that] persuades the judge that a jury *would* find him not guilty." (Emphasis in original; internal quotation marks omitted.) *Jones* v. *State*, supra, 93; see also *Skakel* v. *State*, supra, 295 Conn. 467–68; cf. *Henning* v. *Commissioner of Correction*, 334 Conn. 1, 24–25, 219 A.3d 334 (2019) (discussing less stringent standard

when newly discovered evidence involves knowing production of false testimony).

When examining the trial court's conclusion that the new evidence did not meet this standard, it is important to recognize that the trial judge, who also had presided over the petitioner's criminal trial, made an unchallenged determination that the evidence against the petitioner at the criminal trial was overwhelming. The judge who presided over the petitioner's habeas petition, although not having the opportunity to assess the credibility of the criminal trial witnesses, likewise characterized the state's case as a strong one. Those assessments presumably took into account the evidence previously recited, as well as evidence that the petitioner knew where the shotgun was hidden after the incident (a location to which both the petitioner and Hampton had access), evidence of sixty phone calls between the petitioner and Hampton on the day of the incident and the two days thereafter, and significant evidence demonstrating consciousness of guilt. The trial court's assessment also finds strong support in its observation that the petitioner's claim regarding Hampton's primary responsibility fails to exonerate him due to accessorial/*Pinkerton* liability.

We have fully reviewed the record. The trial court did not clearly abuse its discretion in denying certification to appeal.

1

We begin with the technologically enhanced security camera videotape, which is indisputably clearer than the version offered at the criminal trial. That videotape displays more clearly the direction the vehicle was heading when it stopped and thereby also makes clearer that the passenger, and not the driver, emerged from the vehicle, presumably to approach the critically wounded victim. This fact is consistent with Henderson's testi-

mony at the criminal trial about his observations of the still frames taken from the original videotape shown to the jury. It is inconsistent, however, with the testimony of the victim, as well the testimony of a security guard from a nearby building who had observed the events from a distance, that the petitioner/driver came out of the vehicle.

As the trial court noted in its decision denying the new trial petition, a similar claim regarding this evidence had previously been adjudicated in the habeas proceedings, albeit through the lens of the petitioner's claim of ineffective assistance of counsel. The habeas court's conclusion, upheld on appeal, was that no prejudice resulted from counsel's alleged failure to adequately investigate the videotape evidence to prove that the driver did not exit the vehicle. See *Mitchell* v. *Commissioner of Correction*, supra, 156 Conn. App. 414, 420–21. That conclusion rested on the fact that the videotape and still frames did not capture the entire incident (no security cameras covered the area where the victim claimed that the sexual assaults occurred and the first shot was fired), the videotape and still frames were presented to the jury, and Henderson had testified that the still frames showed the passenger getting out of the car. Id., 409–19. The habeas court also noted the strength of the state's case against the petitioner. Id., 419–20.

To these observations we add that we would not characterize as meaningfully exculpatory the part of the incident that is captured in the enhanced videotape. The enhanced videotape shows that the petitioner brought the vehicle to a stop near the victim to allow Hampton to exit the vehicle, which gave Hampton the opportunity to inflict a fatal gunshot wound if the victim was not already dead or mortally wounded. The fundamental import of the evidence does not change: the petitioner wilfully and actively participated in the rele-

vant criminal activity by stopping the vehicle to allow his passenger to ensure that the victim was dead.

We also are not persuaded that the enhanced videotape would have had a significant impeachment effect at trial. See generally *Adams* v. *State*, 259 Conn. 831, 839, 792 A.2d 809 (2002) ("[N]ew trials [typically] are not granted upon newly discovered evidence which discredits a witness unless the evidence is [both] vital to the issues and . . . strong and convincing . . . . The rule restricting the right to a new trial when one is claimed on the basis of newly discovered evidence merely affecting the credibility of a witness is necessary because scarcely has there been an important trial . . . [after which a] diligent search would not have discovered evidence [to impeach] some witness . . . . Without such a rule, there might never be an end to litigation." (Citation omitted; internal quotation marks omitted.)). Although the enhanced videotape could be used to impeach the testimony of the victim and the security guard that the driver exited the vehicle, it seems exceedingly unlikely that this discrepancy would have undermined the general credibility of either witness. At the time the victim was approached by whoever exited the vehicle, after all, she not only was suffering from the physical effects of life-threatening shotgun wounds, but also was attempting to observe her assailants' actions without giving away that she was still alive. It is farfetched to think that the jury would have doubted other aspects of her testimony merely because she confused the passenger for the driver as the man who approached her to assess her condition after the shooting. The security guard's misperception of the identity of the person exiting the vehicle, likewise inconsequential, is most probably explained by the fact that the vehicle was stopped in the opposite travel lane, so that the passenger's side of the vehicle would be on the side where the driver normally would be.

We are not persuaded that the trial court's findings and conclusions as to the videotape evidence are debatable among jurists of reason, that a court could have resolved this claim in a different manner, or that there are any questions that warrant further proceedings. The trial court did not abuse its discretion in denying certification to appeal with respect to this issue.

2

We next consider the newly discovered evidence of former Detective Henderson's posttrial arrest and conviction. In support of this claim, the petitioner cited *Thomas* v. *State*, 130 Conn. App. 533, 24 A.3d 12, cert. denied, 302 Conn. 945, 30 A.3d 2 (2011), in which the Appellate Court rejected a similar claim that newly discovered evidence of Henderson's arrest and conviction required a new trial in that case. According to *Thomas*, Henderson was arrested in 2006 and charged in a ten count information with larceny in the first degree, forgery in the second degree, fabricating physical evidence, and tampering with a witness.[24] Id., 537. He entered a plea of nolo contendere to one of court of forgery in the second degree. Id. The charges apparently arose from criminal activity dating back to 2000 involving a forgery scheme used by Henderson to obtain money intended to compensate confidential informants. Id., 539.

In the present case, the petitioner raised two claims to explain how he was harmed by the state's failure to disclose evidence of Henderson's illegal conduct. In his petition, he contended that the evidence should have been made available to him for impeachment purposes to attack Henderson's credibility as a witness. At trial

[24] The records offered as exhibits in support of the petition for a new trial in the present case indicate that Henderson was charged only with larceny and forgery. Nothing in the record explains the discrepancy between this exhibit and the facts recited in *Thomas* v. *State*, supra, 130 Conn. App. 537.

on the petition, he contended that the evidence supported his theory that Henderson had obtained a second blood sample from the victim, which was used to produce the negative toxicology test.

The trial court agreed that this evidence could have been used at the petitioner's criminal trial to impeach Henderson's credibility but concluded that it was not probable that a different result would occur if this evidence was available.[25] The court noted that Henderson had undertaken all but two activities relating to the petitioner's case in the presence of others and that neither of those two activities had proved to play a material part in the petitioner's conviction. It further concluded that, because the petitioner's coconspirator, Hampton, was convicted at a trial that occurred after Henderson's crimes were made known, through the testimony of a different detective, it was all but certain that a similar substitution and result would occur in the petitioner's new trial. The trial court's disposition of the petitioner's claim as to the general impeachment effect of this evidence plainly was not an abuse of discretion.

The petitioner's other theory as to the potential effect of evidence of Henderson's arrest, relating to the detective's role involving the blood samples, requires some explanation. A blood sample was taken from the victim in 2003 as part of her rape kit. The kit was sealed and placed in evidence with the Hartford Police Department; no toxicology test was run at that time. In 2005, after the petitioner's criminal trial counsel sought a court order to direct the state forensic laboratory to

[25] Although Henderson's official misconduct occurred before the petitioner's criminal trial, the internal affairs investigation into Henderson's conduct did not commence until several months after the petitioner's criminal trial had concluded. The trial court made no finding as to whether there was some basis on which this evidence could have been disclosed to the petitioner during his trial.

perform a toxicology test on the blood sample, the victim signed a "Consent for Toxicology Screen." At the hearing on the request, the state's attorney acknowledged that the blood sample "probably ha[d] not been refrigerated" and "may not [have been] viable for testing purposes." After the court issued the order, defense counsel wrote to Henderson asking him to deliver the blood sample in the rape kit to the laboratory. The following day, Henderson signed the rape kit out of evidence. Forms from the forensic laboratory reflect that the laboratory received two vials of blood. The toxicology test detected no drugs or metabolites.

From these facts, the petitioner hypothesizes that the evidence of Henderson's criminal activity, if made known to the jury, could have resulted in a different outcome because it would have supported the petitioner's theory that the victim's perception was impaired from smoking "dust." To reach this conclusion, the petitioner relies on the following suppositions: (1) the 2003 blood sample was not viable for testing due to a lack of refrigeration, (2) had the sample been viable, it would have tested positive for the presence of the drugs, (3) the 2005 consent form was executed to obtain a *second blood sample* to ensure that the toxicology test would not detect drugs in the victim's blood, and (4) because Henderson delivered the two vials of blood to the laboratory and had been charged with (but not convicted of) fabricating evidence in an unrelated case, he had switched the 2005 blood sample for the 2003 sample.[26] We are not persuaded.

[26] This theory stemmed in part from a statement made by the victim to the emergency medical technician who reported to the scene to transport her to the hospital that she had been "dragged, drugged, and raped." The petitioner's toxicology expert and the emergency medical technician opined that certain conduct by the victim was consistent with the effects of smoking "dust" but also was consistent with the effects of trauma from excessive blood loss.

There are many reasons why the evidence regarding Henderson's arrest does not give rise to a reasonable probability of a different verdict on the basis of this theory. Two stand out. First, the trial court found that the record demonstrated that the sample that was tested was the same one that was part of the rape kit, and the petitioner has not pointed to anything in the record that indicates otherwise. Contrary to the petitioner's view, the state's attorney's casual reference at the court hearing to a singular "vial" of blood is not evidence that misconduct was afoot when two vials were delivered to the laboratory. Nor does the mere fact that the "Consent for Toxicology Screen" form executed by the victim authorized "the collection . . . of blood samples" for the purpose of detecting the presence of drugs; the form's plural phrasing does not in any way tend to prove that the state used that consent to obtain a second sample. Second, there was compelling evidence from which the jury probably would have concluded that the victim's drug use, even if it had occurred, did not materially impair her perception. The victim admitted that she had no idea whether the marijuana given to her by the petitioner could have contained "dust" but also testified that she had not noticed any difference in how she felt after smoking the joint. When police officers arrived on the scene shortly after the incident, the victim provided them with the accurate color, make, and model of the petitioner's vehicle, accurate information that it was a rental car, and accurate information about the direction in which the vehicle left the scene. The emergency department physician who treated the victim upon her admission declined to order a toxicology test because the physician saw no clinical evidence that the victim was under the influence of drugs. The physician testified that the victim appeared alert and oriented, and the physician confirmed that impression

through testing.[27] The victim told two physicians at the hospital that she knew the person who had inflicted her injuries, and she specifically identified the petitioner as the perpetrator to the police as soon as her breathing tube was removed following surgery.

Under these circumstances, the trial court did not abuse its discretion in effectively concluding that no court would conclude that evidence of Henderson's arrest and conviction probably would yield a different result in a new trial.

3

The petitioner also sought a new trial on the ground that the state withheld exculpatory evidence (i.e., a *Brady*[28] violation) and introduced false testimony from the victim. See *State* v. *McCoy*, 331 Conn. 561, 598, 206 A.3d 725 (2019) ("newly discovered *Brady* claims may . . . be brought by way of a petition for a new trial"); see also *In re Jonathan M.*, 255 Conn. 208, 239, 764 A.2d 739 (2001) ("[t]he causes for which new trials may be granted . . . are only such as show that the parties did not have a fair and full hearing at the first trial; and the words or for other reasonable cause, mean other causes of the same general character" (internal quotation marks omitted)). Specifically, the petitioner contended that the prosecution suppressed (1) selective portions of videotape and photographic evidence that would have been inconsistent with the victim's version

[27] The victim received the highest possible scores on all three parts of the Glasgow Coma Scale, an objective test that assessed her motor skills and verbal abilities, including whether the victim knew what was going on and where she was, and whether she could answer questions correctly and appropriately. The emergency department physician who administered the test also testified: "I didn't feel there was any alteration in her thinking or mental status at all. I didn't feel there was any clinical evidence that she was under the influence of any drugs . . . and didn't feel the necessity to do [a toxicology test] at that time."

[28] Brady v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

of events, (2) materials produced by Angelsea Critical Evidence, the company hired by the state to assess the security camera video and still frames and to produce viewable copies, (3) Henderson's malfeasances that were occurring concurrently with his investigation of the petitioner, (4) evidence relevant to whether a second blood sample was taken, and (5) the dismissal of charges pending against the victim in consideration for her testimony. The petitioner also contended that the prosecution presented false testimony from the victim regarding the petitioner's actions on Market Street.

To prevail on a *Brady* claim, the petitioner must show that the evidence at issue was material, in the sense that there is a reasonable probability that the result would have been different had the evidence been disclosed.[29] See *Demers* v. *State*, 209 Conn. 143, 150, 161, 547 A.2d 28 (1988). "[A] conviction obtained by the knowing use of perjured testimony . . . must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." (Internal quotation marks omitted.) *Henning* v. *Commissioner of Correction*, supra, 334 Conn. 25.

In its decision denying the new trial petition, the trial court concluded that all of the petitioner's prosecutorial impropriety claims failed because there was no evidence or no newly discovered evidence that would be material. With regard to the claims relating to the security camera footage, the court found that the prosecution had provided the defense with a viewable copy of

[29] "[A] trial court's determination as to materiality under *Brady* presents a mixed question of law and fact subject to plenary review, with the underlying historical facts subject to review for clear error. . . . Because the trial judge had the opportunity, however, to observe firsthand the proceedings at trial, including the [examination of witnesses], our independent review nevertheless . . . giv[es] great weight to the trial judge's conclusion as to the effect of nondisclosure on the outcome of the trial . . . ." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Ortiz*, 280 Conn. 686, 720–22, 911 A.2d 1055 (2006).

the videotape, albeit belatedly, and the defense did not request a continuance to investigate it further. With regard to Henderson's misconduct, the court rejected the admissibility and materiality of evidence proffered by the petitioner to show that Henderson had been arrested in Massachusetts on domestic violence charges. With regard to the dismissal of charges against the victim, the court found that there was no evidence to support the petitioner's contention that the victim had received inducements to testify. It noted that the state had entered nolles on a domestic violence charge and a motor vehicle charge against the victim in November, 2003, before preparations for the petitioner's criminal trial began.

We conclude that the trial court did not abuse its discretion in concluding that none of the petitioner's prosecutorial impropriety claims warrants appellate review. There is nothing in the record to suggest that the trial court's findings and conclusions are debatable among jurists of reason, that a court could have resolved this claim in a different manner, or that there are any questions that deserve further proceedings. In addition to the findings and conclusions of the trial court, our previous discussion explains why most of the evidence at issue would not likely result in a verdict of not guilty. We also add, with respect to the nolles of charges against the victim, that it is undisputed that the victim identified the petitioner as one of her assailants shortly after she came out of surgery, well before there could have been any purported inducement to testify. See *State* v. *Ouellette*, 295 Conn. 173, 186–87, 989 A.2d 1048 (2010) (noting that whether defendant established necessary factual predicate to his claim that state's attorney did, in fact, promise to dismiss charges against witness as part of plea agreement "is a fact based claim to be determined by the trial court, subject only to review for clear error").

The trial court did not abuse its discretion in concluding that certification to appeal should be denied. Although we disagree with the Appellate Court's rationale for dismissing the petitioner's appeal, its decision may be affirmed on this alternative basis.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JOSE DIEGO GONZALEZ
(SC 20317)

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

Syllabus

Convicted of the crimes of sexual assault in the first degree, home invasion, and risk of injury to a child, the defendant appealed, claiming, inter alia, that he was deprived of his constitutional rights to present a closing argument and to a fair trial by virtue of the prosecutor's cursory review of the evidence during her initial closing summation followed by a more detailed discussion of the evidence during rebuttal argument. The defendant had entered the ten year old victim's home and sexually assaulted her. At trial, R, an analyst at the state forensics laboratory, testified that the defendant's DNA profile was included in the mixture found in the victim's vaginal swabs that had been taken after the sexual assault. R testified that the expected frequency of individuals who could be included as a contributor to that sample was approximately one in 52 million in the African-American population. In addition, two police detectives testified regarding efforts that the police had made to analyze fingerprints found on a window in the victim's home, and one of those detectives testified that he did not know how long the fingerprints that had been found were present. The Appellate Court affirmed the judgment of conviction, concluding that the prosecutor's closing argument did not prevent the defense from responding to the state's theory of the case and that the prosecutor did not mischaracterize the DNA and fingerprint evidence during her rebuttal argument. On the granting of certification, the defendant appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the structure of the prosecutor's closing argument did not deprive the defendant of his constitutional rights:

a. The prosecutor did not deprive the defendant of his right to present a closing argument: the fact that defense counsel did not know the exact manner in which the prosecutor would marshal inculpatory evidence did not mean that the defendant was denied an opportunity to participate in the adversary process, as the evidence referenced in the prosecutor's rebuttal argument was presented during trial, the role that evidence played in the state's case was apparent, and the prosecutor's specific reliance on R's testimony during her rebuttal argument should have been no surprise because her initial summation made clear that DNA evidence was the cornerstone of the state's case; moreover, defense counsel attacked the reliability of the evidence forming the basis of the prosecutor's rebuttal argument during his closing argument, and, thus, he was aware of the evidence forming the basis of the prosecutor's rebuttal argument and had a fair opportunity to refute it; furthermore, defense counsel made a strategic decision to use his closing argument to question the testimony of the state's eyewitnesses and the reliability of the state's forensic evidence, and chose not to directly address R's testimony.

b. The prosecutor did not deprive the defendant of his due process right to a fair trial: the defendant failed to demonstrate that the prosecutor's substantive discussion of the evidence during rebuttal interfered with the ability of defense counsel to respond to the state's theory of the case, as the prosecutor's rebuttal was predicated on evidence that the prosecutor had presented at trial and on a theory of the case that the prosecutor articulated during her initial closing summation; moreover, given the central role the eyewitness testimony and forensic evidence played in the prosecutor's theory of the defendant's guilt, defense counsel was on notice that the prosecutor would likely rely on that evidence throughout her closing argument.

2. The defendant could not prevail on his claim that his constitutional rights to present a closing argument and to a fair trial were violated by virtue of the prosecutor's alleged mischaracterization of the DNA and fingerprint evidence during her rebuttal argument:

a. The prosecutor's rebuttal argument did not violate the defendant's right to present a closing argument: although defense counsel may have been prevented from directly responding to the prosecutor's contention during rebuttal that the defendant was the only person in Connecticut who could be a contributor to the DNA mixture found on the victim's vaginal swabs, he was not deprived of an opportunity to argue that R's statistical frequency testimony left room for reasonable doubt about the defendant's guilt; moreover, defense counsel did not address during his closing argument R's testimony, and the fact that defense counsel did not object to the prosecutor's characterization of R's testimony demonstrated that he did not believe the statements infringed on the defendant's constitutional rights.

b. Even if the prosecutor's statements regarding the DNA and fingerprint evidence were improper, the cumulative effect of those statements was

harmless and did not deprive the defendant of his right to a fair trial: the prosecutor's statements relating to the DNA and fingerprint evidence were brief and made only once, any impropriety involving the prosecutor's characterization of the DNA evidence was not severe, and the negative impact of the prosecutor's statement explaining the lack of conclusive fingerprint evidence was minimal; moreover, any negative effect that the statements may have caused was likely mitigated by the trial court's general jury instructions, and the overall strength of the state's case against the defendant was strong.

Argued September 16, 2020—officially released March 2, 2021*

Procedural History

Substitute information charging the defendant with three counts of the crime of sexual assault in the first degree, and with one count each of the crimes of home invasion and risk of injury to a child, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Blue*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court; thereafter, the case was transferred to the Appellate Court, *Lavine*, *Keller* and *Bishop*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

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

Laurie N. Feldman, deputy assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *Stacey M. Miranda*, senior assistant state's attorney, for the appellee (state).

Opinion

KAHN, J. This certified appeal requires us to consider whether alleged instances of impropriety during the prosecutor's closing argument deprived the defendant,

* March 2, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Jose Diego Gonzalez, of his federal constitutional rights to present a closing argument under the sixth amendment, and his fourteenth amendment due process right to a fair trial.[1] After a jury trial, the defendant was convicted of three counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), one count of home invasion in violation of General Statutes § 53a-100aa (a) (1), and one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). See *State* v. *Gonzalez*, 188 Conn. App. 304, 307, 204 A.3d 1183 (2019). The trial court rendered judgment in accordance with the jury's verdict and imposed a total effective sentence of sixty-five years of incarceration. Id., 307, 312. The defendant appealed from the trial court's judgment of conviction, claiming, among other things, that the prosecutor deprived him of his constitutional rights to present a closing argument and to a fair trial by (1) reserving her analysis of certain evidence for the rebuttal portion of her closing argument, and (2) mischaracterizing two pieces of evidence during rebuttal.[2] Id., 307, 318. The Appellate Court rejected those claims and affirmed the trial court's judgment. Id., 307, 342. The defendant now renews those same claims in the present appeal. For the reasons set forth in this opinion, we agree with the Appellate Court that neither the structure nor the content of the prosecutor's closing argument deprived the defendant of his constitutional rights and, accordingly, affirm the judgment of the Appellate Court.

[1] The sixth amendment right to counsel is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. See, e.g., *State* v. *Ruffin*, 316 Conn. 20, 28–29 n.4, 110 A.3d 1225 (2015), overruled in part on other grounds by *State* v. *A. M.*, 324 Conn. 190, 152 A.3d 49 (2016); *State* v. *Andrews*, 313 Conn. 266, 272 n.3, 96 A.3d 1199 (2014); see also footnote 8 of this opinion.

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

The Appellate Court's decision sets forth the following relevant facts that the jury reasonably could have found. "The victim[3] was ten years old on October 15, 2014, when the defendant entered her first floor apartment in a three-family house in Meriden at approximately 3:40 a.m. At that time, the victim, her mother, her mother's boyfriend, and the victim's younger siblings and stepsiblings were asleep in their respective bedrooms. The front door, a living room window, and the victim's bedroom window faced the front of the house above the porch that ran across the front of the house. The victim's brother had a bedroom in the rear of the apartment with a window above a hatchway that the defendant could have used to enter the apartment.

"Earlier, at approximately 8 p.m., the victim had fallen asleep in her bed in the room that she shared with her stepsisters. The victim awoke shortly before 3:45 a.m. when she felt someone touch her lower back. She saw a black man with short dreadlocks leaning over her. She did not know him, asked him who he was, and what he was doing there. The defendant did not answer her but asked her how old she was. She stated that she was eight years old, hoping that he would leave her alone. The defendant touched the victim's buttocks beneath her shorts and underwear. The victim pushed herself against the wall to stop him. The defendant took hold of the victim's ankles and put one over each of his shoulders and told her that 'this won't hurt . . . .'

"The defendant pulled the victim's shorts and underwear down to her knees and put a pillow over her face. He pulled down his own pants, and rubbed and licked the victim's vagina before penetrating it with his penis. The victim tried to get away from the defendant, but she

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

could not free herself from his grip. When the defendant finished, he pulled up the victim's underwear and shorts and threatened to kill her if she told anyone what he had done. He covered her with a blanket and told her to go to sleep. The defendant walked out of the victim's bedroom and partially closed the door. The victim watched him walk through the kitchen toward her brother's bedroom. The window in her brother's room was wide open. No one else in the house was aware of the defendant's presence. The victim's sisters remained asleep, and her brother heard nothing.

"The victim's mother had awakened at approximately 3:20 a.m., gone into the kitchen to get a bottle to feed her infant, and returned to her bedroom. She saw no one in the apartment at that time. Later, when the victim's mother went back to the kitchen, she saw the victim standing at her bedroom door. The victim, shaking with fright, ran into the kitchen and stated that there was a 'black guy' in her room. When the victim and her mother entered the victim's bedroom, they saw the defendant peering in the window from the front porch. The victim's mother had never seen the man before. He had dark skin and a braid hanging out of his hoodie. The defendant ran toward the back of the house. The victim's mother tried to pursue him, but she could not keep up with him.

"The victim told her mother what the defendant had done to her. When the victim went to the bathroom, she saw a clear, wet substance on her vagina and asked her mother if she could wash. The victim's mother, who was medically trained, recognized the presence of semen in her daughter's underwear. She instructed the victim not to wipe off anything. The police were summoned." (Footnote added; footnote omitted.) Id., 307–309.

The victim was transported to Yale-New Haven Hospital where Deborah Jane Gallagher, a trained nurse,

utilized a sexual assault evidence collection kit under the supervision of a physician, Gunjan Tiyyagura. Gallagher took samples from the victim using three swabs, two from the victim's vagina and one from the victim's posterior fourchette, which was torn and bleeding. Id., 309. Using one of the swabs, Gallagher prepared a smear on a glass slide. At the end of that examination, the victim was taken to the Department of Children and Families' child sexual abuse clinic for a forensic interview conducted by Theresa Montelli. See id. During the course of that interview, the victim described the physical appearance of the perpetrator, noting that he had a scratch on his left cheek, appeared to be clean shaven, and was approximately forty years old. Id.

On October 17, 2014, the police arrested the defendant in Waterbury. At the time of his arrest, the defendant was twenty-three years old, had a full beard, mustache, and short dreadlocks. Id., 310. The police took a DNA sample from the defendant and sent it to the state forensics laboratory to develop a genetic profile that could be compared to the results of the sexual assault evidence collection kit. The police also recovered fingerprints from the window of the bedroom of the victim's brother; however, some of the fingerprints were insufficiently defined to be evaluated. Id.

At trial, Daniel T. Renstrom, an analyst at the state forensics laboratory, testified regarding his analysis of the samples received by the laboratory. Id. Specifically, Renstrom testified that he created genetic profiles for the victim, the defendant, and the material found on the three swabs contained in the sexual assault evidence collection kit. Id. In order to compare the DNA profiles of the victim and the defendant with the DNA profiles of those swabs, Renstrom separated the material on

the swabs into two separate components, an epithelial-rich fraction and a sperm-rich fraction.[4] Id.

Renstrom was unable to determine whether the defendant was a contributor to the mixture of DNA in the sperm-rich fraction developed from the swab of the victim's posterior fourchette because there was an insufficient amount of DNA present. Id., 310–11. Pursuant to laboratory policy, Renstrom, accordingly, "eliminated" the defendant as a contributor to that sample. Id., 311. Renstrom did conclude, however, that the defendant's DNA profile was included in the DNA mixture found in the sperm-rich fraction of the vaginal swabs. See id. Renstrom testified that the expected frequency of individuals who could be included as a contributor to that sample is approximately one in 52 million in the African-American population, one in 66 million in the Caucasian population, and one in 37 million in the Hispanic population. Id. On redirect examination, Renstrom explained this statement as follows: "[s]o what that statistic is referring to is, if I were to take [the] general population, type those people, and then compare it to the . . . sample . . . the expected frequency of individuals who could be a contributor to that sample . . . is one in 52 million in the African-American population . . . ." The prosecutor then asked Renstrom if the population of Connecticut was three and one-half million, to which Renstrom responded, "[y]es."

[4] Renstrom explained that this process, known as "differential extraction," involves isolating the sperm cells from the epithelial cells found on the swabs. Renstrom explained that, once the cells were isolated, he created sperm-rich and epithelial-rich fractions for both the vaginal swabs and the swab of the posterior fourchette. He then compared the DNA profiles of the known samples taken from the victim and the defendant with the DNA profiles of the sperm-rich and epithelial-rich fractions. Renstrom noted that both epithelial-rich fractions contained the DNA of only one person, the victim, whereas the sperm-rich fractions contained a mixture of DNA from the victim and at least one other person.

In light of the nature of the claims presented in this appeal, we review, in detail, the closing arguments presented to the jury. The prosecutor began the initial portion of her closing argument by explaining that she intended to use her time to "highlight some of [the] evidence" that was presented over the course of the trial. The prosecutor made clear to the jury that its recollection of the evidence controlled, stating, "if you remember it differently, please remember that it's your recollection that counts."

The prosecutor then summarized the evidence concerning the events that transpired in the victim's home on the night of October 15, 2014. The prosecutor recounted the testimony of the ten year old victim, reminding the jury that the victim had testified that she had been awakened in the middle of the night by a strange man "with his hand underneath her pants and her panties, rubbing her lower back and her butt." The prosecutor reminded the jury that the victim had testified that the man told her, "it won't hurt," before he put a pillow over her face and raped her.

The prosecutor then stated that, "[b]ased on the horrific facts described by [the victim], the state has charged the defendant with five crimes: home invasion, three counts of sexual assault in the first degree, and risk of injury to a [child]." The prosecutor then reviewed the various counts of the substitute information, telling the jury that "[t]he judge, again, will have more detailed instructions, and you will have them in the jury room with you, and you will hear from His Honor after our arguments."

The prosecutor continued by stating the following: "[Y]ou're going to hear from the defense, and you're going to hear a lot of things about fingerprints and mistakes by the [laboratory or the police] with those fingerprints. You're also going to hear that . . . [the

victim] and her mother could never pick out the [perpetrator] from [photographs] or in court." The prosecutor then turned to the evidence presented at trial, noting: "You all have heard that these crimes took place in the middle of the night, and [the victim's mother] told you she didn't know who he was, [the victim] told you she didn't know who he was, never seen him before, and [the victim's mother] told you she did not get a good look through the window." She then concluded by stating: "[The victim] saw some things about [the perpetrator] which I will discuss later. She also had a pillow over her face. You will hear all of these things and more from the defense, but while you are listening to their argument, there are three letters you will not be able to forget. There are three letters you will not be able to get out of your head. Those letters are DNA. I look forward to speaking with you."

Defense counsel then presented his closing argument. He began by again reminding the jury that only its recollection of the facts mattered for the purposes of its deliberations and noted that, on request, the jury could receive a transcript of any witness' testimony. He stated that his closing argument was his last opportunity to address the jury, stating: "I don't get two chances to speak to you. I would respond to counsel's . . . rebuttal argument, but that's not the way our system works, so please remember that."

Defense counsel then stated that "[t]he majority of [the] evidence in this case contradicts a piece of evidence that implicates the defendant." Defense counsel urged the jury to consider (1) the weight of contradictory evidence, (2) the absence of corroborating evidence, and (3) various weaknesses in the evidence actually presented. Defense counsel then pointed to the alleged inconsistencies in the evidence, noting the absence of any courtroom identification of the perpetrator and the discrepancies between the physical appear-

ance of the defendant at the time he was arrested and the description the victim provided shortly after the attack.

Defense counsel then turned to the fingerprints that were found on the window of the bedroom of the victim's brother. Reminding the jury that the victim had seen the perpetrator enter her brother's bedroom and that the victim's mother had testified that she found the window open shortly after the attack, defense counsel stated: "It seems logical given the bulkhead . . . that that's the window that the perpetrator went into. It's also logical that, if you're pushing the window up, you might leave some prints there. . . . Could you imagine if his prints were found on that window, what we'd be looking at? . . . [T]he parade of evidence about the fingerprints and every one of them matching up to [the defendant's fingerprints] . . . . But those prints, he's excluded from leaving those prints; they're not his. . . . The state wants you to believe that, maybe, the kids were out there playing. They're not kids' prints. You heard the experts testify about that. [One] hundred years? The windows were there forever? I mean, come on, let's be serious." Defense counsel argued that the lack of fingerprint evidence connecting the defendant to the crime scene was "important" and undermined the state's case.

Defense counsel then turned his attention to the DNA evidence. He began by arguing that "[n]othing" corroborated the DNA evidence presented by the state. He argued that there was no evidence that the state tested the victim's underwear, her bedsheets, or the microscope slide that was prepared using a swab from the sexual assault evidence collection kit.

Defense counsel also attacked the reliability of the DNA evidence that was presented by the state. Arguing that the DNA evidence was "problematic," defense

counsel reminded the jury that the defendant was included as a contributor to a DNA profile developed from one sample but was eliminated as a possible contributor to another. Defense counsel stated, "[s]o, the one [source] that has the most seminal fluid, the one that results in the smear with the sperm, he's eliminated from. That's problematic. This is not a reliable result. If a result is unreliable, then statistics mean nothing."

Defense counsel next addressed the mistakes made in the collection and analysis of the forensic evidence presented at trial. Turning first to the fingerprints collected from the window, defense counsel noted that, even though experienced law enforcement personnel were involved in the recording and storing of the information at issue, fingerprints from an unrelated 2013 case were found to have been inadvertently included on a compact disc used for reviewing the fingerprints recovered from the window.

In his conclusion, defense counsel argued that "[t]he evidence and the lack of evidence doesn't allow you to accept the reliability of the DNA evidence in this case." Characterizing the DNA evidence as "conflicting" and the victim's description of the perpetrator as "contradictory" to the physical appearance of the defendant, defense counsel urged the jury not to decide the case on "blind faith."

The prosecutor began her rebuttal argument by arguing that the state was asking the jury to decide the case on the basis of science, not blind faith. The prosecutor stated that, although "the defendant [did not] leave his prints on the window . . . the evidence shows you he certainly left evidence from another part of his body behind," which "resulted in a DNA profile that only one in 52 million people in the African-American community have." With respect to the lack of fingerprints in particular, the prosecutor argued that "[w]e

don't know where the prints came from or how long they've been there or if they've been there for 100 years. The prints tell us nothing and show you nothing and prove nothing."

The prosecutor then turned to the victim's testimony concerning the incident in question. She once again summarized the victim's account of the attack, her description of the perpetrator, and the events recounted by the victim's mother. The prosecutor then summarized the testimony from Gallagher and Tiyyagura about the administration of the sexual assault evidence collection kit, and reminded the jury that both had testified to the presence of semen on the victim, and to the collection of three separate swabs, one of which was used to create a smear on a microscope slide. The prosecutor then recounted Montelli's testimony, noting that the victim had given the same description of the perpetrator in both the forensic interview and in the courtroom.

The prosecutor, thereafter, addressed the DNA evidence and the testimony of the forensic experts who analyzed the contents of the sexual assault evidence kit. The prosecutor noted that Karen Lamy, a forensic science examiner, testified that she discovered sperm on the microscope slide contained in the sexual assault evidence collection kit, as well as saliva on all three swabs. The prosecutor then described how Renstrom developed the DNA profiles of the victim and the defendant, and how he then compared those profiles with the DNA mixtures found on the vaginal swabs. The prosecutor reminded the jury that the defendant was included as a contributor to one DNA mixture, but was excluded from another due to a limited amount of DNA found in the second sample.

The prosecutor concluded her rebuttal by arguing that Renstrom "attached a statistic to the [number] of

times you would see that profile in a number of people. He told you that you would see the DNA profile of the defendant once in 52 million people in the African-American community. Think about that, ladies and gentlemen. You heard evidence that the whole state of Connecticut is 3.5 million people. If we filled the entire state of Connecticut with 3.5 million African-Americans, 52 million African-Americans would be the population of Connecticut times fourteen. So, if we placed 3.5 million African-Americans in Connecticut and stacked thirteen more states the size of Connecticut on top of that full of African-Americans, we would still only see that profile one time. That, ladies and gentlemen, is proof beyond a reasonable doubt."[5]

The trial court instructed the jury, in relevant part: "You are the sole judges of the facts. . . . You are to recollect and weigh the evidence and form your own conclusions as to what the facts are. You may not go outside the evidence presented in court to find the facts. . . . There are a number of things that may have been seen or heard during the trial that are not evidence and that you may not consider in deciding what the facts are. These include arguments and statements by the lawyers. The lawyers are not witnesses. Their arguments are intended to help you interpret the evidence, but they are *not evidence*. . . . [I]f the facts as you remember them differ in any way from the lawyers' statements, it's your memory that controls." (Emphasis added.)

[5] At the conclusion of the prosecutor's rebuttal argument, and after the jury had left the courtroom, defense counsel raised three objections to statements made by the prosecutor during her closing argument. Defense counsel objected to (1) the prosecutor's statement that the fingerprints could have been on the window for 100 years, (2) the prosecutor's statement that Tiyyagura had testified that the tear in the victim's posterior fourchette could have resulted only from forced penetration, and (3) the prosecutor's statement that no person, including the defendant, could have been identified as a contributor to the DNA sample the defendant was eliminated from. The court overruled those objections.

The jury found the defendant guilty on all counts.[6] Thereafter, the trial court rendered a judgment of conviction in accordance with the jury's verdict. The defendant then appealed, claiming, inter alia, that prosecutorial impropriety during the state's closing argument deprived him of his sixth amendment right to present a closing argument, as well as his right to a fair trial.[7] *State* v. *Gonzalez*, supra, 188 Conn. App. 307, 318. Specifically, the defendant claimed that the prosecutor improperly (1) delayed substantive discussion of evidence until after defense counsel's closing argument, and (2) mischaracterized certain evidence on rebuttal. Id., 318. In a unanimous decision, the Appellate Court concluded that the structure of the prosecutor's closing argument did not prevent the defense from responding to the state's theory of the case and, therefore, did not deprive the defendant of his right to present a closing argument or of his right to a fair trial. Id., 318–30. The Appellate Court also concluded that the prosecutor did not mischaracterize the DNA and fingerprint evidence during rebuttal and that her statements were not improper. Id., 330–38. This certified appeal followed.[8]

[6] The defendant filed a motion for a judgment of acquittal on his conviction of home invasion and a motion for a new trial on the ground that prosecutorial impropriety deprived him of a fair trial. The trial court denied both of those motions. The claims raised by the defendant in his motion for a new trial are not the same as those he now raises on appeal. See *State* v. *Gonzalez*, supra, 188 Conn. App. 312 n.7.

[7] On appeal to the Appellate Court, the defendant also claimed that the state had presented insufficient evidence that he had intended to commit sexual assault by force at the time he entered the victim's home. See *State* v. *Gonzalez*, supra, 188 Conn. App. 307. That claim is not, however, at issue in the present appeal.

[8] This court granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that the defendant's right to due process was not violated by prosecutorial impropriety during closing arguments?" *State* v. *Gonzalez*, 332 Conn. 901, 208 A.3d 280 (2019).

We note that the defendant's sixth amendment claim is within the scope of the certified question because "[a] defendant's right to present a defense is rooted in the compulsory process and confrontation clauses of the sixth amendment . . . [which] are made applicable to state prosecutions through

Additional facts and procedural history will be set forth as necessary.

In the present appeal, the defendant claims that the Appellate Court incorrectly concluded that the structure of the prosecutor's closing argument, as well as her statements regarding certain fingerprint and DNA evidence, did not deprive him of his rights under the federal constitution. First, the defendant claims that the prosecutor's cursory review of the evidence during her initial summation, followed by her more detailed discussion of the evidence during rebuttal, prevented defense counsel from responding to the prosecutor's arguments concerning the defendant's guilt and, as a result, deprived him of his rights to present a closing argument and to a fair trial.[9] Second, the defendant claims that the prosecutor mischaracterized two separate pieces of evidence during her rebuttal argument and that those particular statements amounted to prosecutorial impropriety, which deprived the defendant of his rights to present a closing argument and to a fair trial. The defendant argues that he is entitled to a new trial on the grounds that he has proven that his sixth amendment right to present a closing argument was violated by these statements and that the state has failed to establish that the violation was harmless beyond a reasonable doubt. With respect to his general due process claim, the defendant claims that he is entitled to a new trial on the ground that he has shown that the prosecutor's statements amounted to improper conduct that deprived him of a fair trial.

the due process clause of the fourteenth amendment." (Internal quotation marks omitted.) *State* v. *Andrews*, supra, 313 Conn. 272 n.3; see also footnote 1 of this opinion.

[9] The defendant's brief to this court presents these two constitutional claims simultaneously, citing the degree of "overlap" between them. Because these claims require the application of distinct legal principles, we address them separately in this opinion.

In response, the state argues that the prosecutor's decision to reserve her substantive discussion of certain evidence for rebuttal was appropriate and that the Appellate Court, therefore, correctly concluded that the structure of the prosecutor's closing argument did not deprive the defendant of a fair trial or his right to present a closing argument. The state further argues that the Appellate Court correctly concluded that the prosecutor's statements regarding the DNA and fingerprint evidence were proper and, therefore, did not violate the defendant's constitutional rights.

For the reasons that follow, we conclude that neither the structure nor the content of the prosecutor's closing argument deprived the defendant of a fair trial or his right to present a closing argument. Specifically, we conclude that the prosecutor's decision to reserve her discussion of certain evidence for rebuttal did not deprive the defendant of his right to be heard by counsel at the close of evidence and did not amount to prosecutorial impropriety. Similarly, we conclude that the prosecutor's alleged mischaracterizations of the DNA and fingerprint evidence did not prevent the defendant from presenting a closing argument that was responsive to the state's theory of the case and, therefore, did not deprive the defendant of his right to present a closing argument. Finally, assuming without deciding that the alleged mischaracterizations of the evidence were improper, we conclude that they were not sufficiently prejudicial as to deprive the defendant of a fair trial.

Before turning to the merits of the defendant's prosecutorial impropriety claims, we review the principles and law that govern our resolution of this appeal.[10] In

[10] In light of the Appellate Court's express application of *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), to the claims raised by the defendant; see *State* v. *Gonzalez*, supra, 188 Conn. App. 318–19; we take this opportunity to reiterate that "a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of [*Golding*] and, similarly, it is unnecessary for a reviewing

cases in which a defendant claims that prosecutorial impropriety deprived him of his general due process right to a fair trial, "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 it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an 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 involves a separate and distinct inquiry." (Internal quotation marks omitted.) *State* v. *Jordan*, 314 Conn. 89, 111, 101 A.3d 179 (2014).

The latter part of this two-pronged test is guided by the factors set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). "These factors include . . . the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 561, 34 A.3d 370 (2012). "Under the *Williams* general due process standard, the defendant has the burden to show both that the prosecutor's conduct was improper *and* that it caused prejudice to his defense." (Emphasis added.) *State* v. *A. M.*, 324 Conn. 190, 199, 152 A.3d 49 (2016).

A different standard applies, however, when a defendant claims that prosecutorial improprieties infringed

court to apply the four-pronged *Golding* test." (Citation omitted; internal quotation marks omitted.) *State* v. *Warholic*, 278 Conn. 354, 360, 897 A.2d 569 (2006); see also *State* v. *Payne*, 303 Conn. 538, 560, 34 A.3d 370 (2012); *State* v. *Fauci*, 282 Conn. 23, 34–35, 917 A.2d 978 (2007); *State* v. *Luster*, 279 Conn. 414, 427, 902 A.3d 636 (2006).

a specifically enumerated constitutional right. See, e.g., id., 199–200 (right to remain silent). In such cases, the burden is initially on the defendant to establish that a specifically enumerated constitutional right was violated. Id., 199. If the defendant can establish that such a violation occurred, "the burden shifts to the state to prove that the violation was harmless beyond a reasonable doubt." Id. "This allocation of the burden of proof is appropriate because, when a defendant raises a general due process claim, there can be no constitutional violation in the absence of harm to the defendant caused by denial of his right to a fair trial. The constitutional analysis and the harm analysis in such cases are one and the same."[11] *State* v. *Payne*, supra, 303 Conn. 563–64

In the present case, the defendant claims that three separate instances of prosecutorial impropriety deprived him of his specifically enumerated right to present a closing argument, as well as his general due process right to a fair trial. Because of the nature of these claims, we apply both the harmless error standard called for in *Payne* and the general due process standard articulated in *Williams*. See *State* v. *A. M.*, supra, 324 Conn. 199 (noting "that the *Williams* standard applies only when a defendant claims that a prosecutor's conduct did not infringe on a specific constitutional right, but nevertheless deprived the defendant of his general due process right to a fair trial").

Guided by these distinct constitutional principles, we now address the merits of the defendant's claims related to the structure and content of the prosecutor's closing argument. First, we address the defendant's claim that

[11] The burden is, thus, always on the defendant to show that prosecutorial impropriety resulted in the violation of a constitutional right. See *State* v. *A. M.*, supra, 324 Conn. 199–200; see also *State* v. *Payne*, supra, 303 Conn. 562–63. This is true regardless of whether the defendant claims a violation of his or her general due process right to a fair trial or a violation of a specifically enumerated constitutional right.

the prosecutor violated his federal constitutional rights by reserving the substantive discussion of certain evidence for after defense counsel's closing argument. Second, we address the defendant's claim that the prosecutor violated his federal constitutional rights by mis-characterizing DNA and fingerprint evidence during her rebuttal.

I

We first address the defendant's claims that the prosecutor improperly structured her closing argument by reserving discussion of certain evidence for rebuttal and, in so doing, deprived him of (1) his sixth amendment right to present a closing argument, and (2) his right to a fair trial. For the reasons that follow, we conclude that the Appellate Court properly rejected both of these claims.

A

The defendant contends that the prosecutor, by saving her substantive discussion of evidence for rebuttal, deprived him of his constitutional right to present a closing argument by preventing him from responding to the state's theory of the case. The Appellate Court rejected this claim, concluding that the contents of defense counsel's closing argument demonstrated that the defendant was fully afforded an opportunity to respond to the state's theory of the case and to present his theory of the defense. See *State* v. *Gonzalez*, supra, 188 Conn. App. 328–39. Having reviewed the record before us, we are compelled to agree.

"The right to the assistance of counsel ensures an opportunity to participate fully and fairly in the adversary [fact-finding] process. . . . The opportunity for the defense to make a closing argument in a criminal trial has been held to be a basic element of the adversary process and, therefore, constitutionally protected under

the sixth and fourteenth amendments. . . . Closing argument is an integral part of any criminal trial, for it is in this phase that the issues are sharpened and clarified for the jury and each party may present his theory of the case. . . .

"The right to present a closing argument is abridged not only when a defendant is completely denied an opportunity to argue before the court or the jury after all the evidence has been admitted, but also when a defendant is deprived of the opportunity to raise a significant issue that is reasonably inferable from the facts in evidence. This is particularly so when . . . the prohibited argument bears directly on the defendant's theory of the defense." (Citations omitted; internal quotation marks omitted.) *State* v. *Arline*, 223 Conn. 52, 63–64, 612 A.2d 755 (1992).

"[T]he scope of final argument lies within the sound discretion of the court . . . subject to appropriate constitutional limitations." (Citation omitted; internal quotation marks omitted.) Id., 59. As this court has repeatedly held, "[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. . . . 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." (Internal quotation marks omitted.) *State* v. *Otto*, 305 Conn. 51, 76, 43 A.3d 629 (2012).

Whether a prosecutor infringes on the constitutional rights of a criminal defendant by reserving the bulk of his or her discussion of the evidence for rebuttal is a matter of first impression for this court. With regard to the appropriate scope of rebuttal argument more

generally, this court has previously noted that, in Connecticut, "[t]here is no rigid requirement that a prosecutor's final summation must be limited solely to rebuttal of matters raised in the defendant's argument." *State* v. *Rosa*, 170 Conn. 417, 428, 365 A.2d 1135, cert. denied, 429 U.S. 845, 97 S. Ct. 126, 50 L. Ed. 2d 116 (1976). Practice Book § 42-35 simply provides in relevant part: "Unless the judicial authority for cause permits otherwise, the parties shall proceed with the trial in the following order . . . (4) The prosecuting authority shall be entitled to make the opening and final closing arguments. (5) The defendant may make a single closing argument following the opening argument of the prosecuting authority."

In the present case, the defendant asks us to recognize that his sixth amendment right to present a closing argument prohibited the prosecutor from reserving her discussion of the evidence for rebuttal. According to the defendant, this decision prevented him from knowing how the state would marshal the evidence against him. The defendant contends that, without this knowledge, he was unable to effectively rebut the prosecutor's arguments and was deprived of his "last clear chance to persuade the trier of fact that there may be reasonable doubt of [his] guilt." *Herring* v. *New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975).

The defendant's claim is unavailing for two reasons. First, the defendant's contention that the right to be heard by counsel encompasses a right to respond to the exact manner in which the state has marshaled the evidence is unsupported by case law from either this state or other jurisdictions. Second, the defendant's claim that he was deprived of an opportunity to respond to the state's theory of the case, and its view as to how the evidence proved that theory, is unsupported by the record.

The courts of this state have consistently recognized that the sixth amendment right to present a closing argument protects a criminal defendant's right to present his theory of the defense at the close of evidence. See *State* v. *Arline*, supra, 223 Conn. 64 (noting that "[t]he right to present a closing argument is abridged . . . [if] a defendant is deprived of the opportunity to raise a significant issue that . . . bears directly on the defendant's theory of the defense"); see also *State* v. *Cunningham*, 168 Conn. App. 519, 537, 146 A.3d 1029 (holding that defendant was not deprived of right to present closing argument because, "although the [trial] court precluded the defendant from listing . . . the elements of manslaughter . . . defense counsel was allowed to present . . . his theory of the defense"), cert. denied, 323 Conn. 938, 151 A.3d 385 (2016); *State* v. *Ross*, 18 Conn. App. 423, 433–34, 558 A.2d 1015 (1989) (defendant's right to present closing argument was violated when trial court prevented defense counsel from commenting that state's sole eyewitness did not testify at trial).[12] In order to present a theory of the defense,

[12] The vast majority of federal and state courts have described this right in a manner consistent with our holding in *Arline*. See, e.g., *United States* v. *Miguel*, 338 F.3d 995, 1008 (9th Cir. 2003) (referring to right to present closing argument as "the fundamental right under the [s]ixth [a]mendment to present a relevant theory of the defense"); *Conde* v. *Henry*, 198 F.3d 734, 739 (9th Cir. 1999) ("denying an accused the right to make final arguments on his theory of the defense denies him the right to assistance of counsel"); see also *People* v. *Marshall*, 13 Cal. 4th 799, 855, 919 P.2d 1280, 55 Cal. Rptr. 2d 347 (1996) (no sixth amendment violation when trial court allowed defense counsel to argue that defendant's case "lacked the cruelty and callousness found in other murder cases," but prohibited defense counsel from referring to specific facts of other cases), cert. denied, 520 U.S. 1157, 117 S. Ct. 1338, 137 L. Ed. 2d 497 (1997); *State* v. *Liberty*, 498 A.2d 257, 260 (Me. 1985) (concluding that trial court deprived defendant of right to present closing argument by precluding defendant from discussing exculpatory evidence during summation); *State* v. *Frost*, 160 Wn. 2d 765, 777–79, 161 P.3d 361 (2007) (trial court "infringed upon [defendant's] [s]ixth [a]mendment right to counsel" by precluding defendant from arguing that state failed to prove element of charged offense), cert. denied, 552 U.S. 1145, 128 S. Ct. 1070, 169 L. Ed. 2d 815 (2008).

Moreover, the defendant's interpretation of the right to present a closing argument is discordant with the widely accepted practice of the prosecutor

the defendant must be aware of the state's theory of the case and of the evidence that the prosecutor will argue supports that theory. See *State* v. *Cobb*, 251 Conn. 285, 417, 743 A.2d 1 (1999) (noting that prosecutor's closing argument is bound only by facts in evidence and theory presented in "the information and the bill of particulars"), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000).

In support of his contention that his right to present a closing argument was violated, the defendant relies heavily on the United States Supreme Court's decision in *Herring* v. *New York*, supra, 422 U.S. 853, and our prior decision in *State* v. *Arline*, supra, 223 Conn. 52.[13] Neither the facts nor the principles articulated in those two cases support the defendant's argument.

In *Herring*, the United States Supreme Court invalidated a New York state law that gave judges the discretion to deny criminal defendants in nonjury criminal trials the opportunity to present a closing argument before rendering judgment. See *Herring* v. *New York*, supra, 422 U.S. 853, 862–63. In that case, the court held that a total denial of the defendant's opportunity to

having the final word in closing argument. See, e.g., J. Tanford, "Closing Argument Procedure," 10 Am. J. Trial Advoc. 47, 77–78 (1986) (noting that, "[i]n a majority of states, the prosecution always argues first and last, regardless of who has the burden of proof"); see also *Tucker* v. *Marshall*, Docket No. 08 Civ. 7820 (DLC), 2009 WL 2742603, *20 n.8 (S.D.N.Y. August 27, 2009) ("[I]n federal court, as in New York, the prosecutor is given the last opportunity to speak in closing arguments . . . . [W]e are aware of no precedent to the effect that the [s]ixth or [f]ourteenth [amendment] command[s] that defense counsel be given the opportunity to respond to the response" (Citations omitted.)).

[13] The defendant also cites *State* v. *Hoyt*, 47 Conn. 518, 536 (1880), in support of his sixth amendment claim under the United States constitution. This court's decision in *Hoyt* addressed only the right to present a closing argument under the Connecticut constitution. Id., 535–36. In his brief, the defendant does not independently argue that the alleged improprieties violated his right to present a closing argument under the state constitution. We, therefore, do not address the scope of the state constitutional right in this opinion.

present a final argument violates the right to assistance of counsel guaranteed by the sixth amendment. Id., 858–59; see id., 859 ("a total denial of the opportunity for final argument in a nonjury criminal trial is a denial of the basic right of the accused to make his defense"). Likewise, in *Arline*, we held that a defendant was deprived of his right to present a closing argument when the trial court precluded defense counsel from arguing during final summation that the state's chief witness, the sexual assault complainant, had a motive to fabricate the allegations underlying the state's case. See *State* v. *Arline*, supra, 223 Conn. 55–56, 58. Noting that "the linchpin of the defense was attacking the credibility of [the complainant]," we concluded that the trial court's actions barring the defense from presenting an exculpatory theory during defense counsel's summation deprived the defendant of his right to present a closing argument.[14] Id., 64.

Neither *Herring* nor *Arline* supports the defendant's contention that the right to present a closing argument includes the right to respond to the exact manner in which the state argues the evidence. Unlike the present case, *Herring* and *Arline* involved trial court interference that absolutely precluded both defendants from presenting the theory of their defenses. In the appeal before us, the complained of conduct did not deprive the defense of an opportunity to argue at the close of evidence and did not preclude the defense from presenting an exculpatory theory to the jury. The fact that defense counsel did not know the exact manner in

[14] In *State* v. *Arline*, supra, 223 Conn. 65 n.11, we cited with approval the Maine Supreme Court's reasoning in *State* v. *Liberty*, 498 A.2d 257 (Me. 1985), which described the right protected in the following manner: "In a closing argument, each party should be permitted to summarize the case from the perspective of that party's interpretation of all the evidence in the case and the inferences to be drawn therefrom. It is not for the [judge] to proscribe argument as to a portion of the evidence which the jury has heard." Id., 259.

which the prosecutor would marshal inculpatory evidence does not mean the defendant was denied an "opportunity to participate fully and fairly in the adversary [fact-finding] process." (Internal quotation marks omitted.) *State* v. *Arline*, supra, 223 Conn. 63, quoting *Herring* v. *New York*, supra, 422 U.S. 858. We, therefore, conclude that the defendant's interpretation of the scope of the right to present a closing argument is unsupported by existing case law.

The defendant's claim that he was prevented from addressing the prosecutor's evidentiary arguments due to the structure of her summation is also unsupported by the record. The defendant specifically claims that the structure of the prosecutor's closing argument prevented him from properly framing the following pieces of evidence for the jury: (1) Renstrom's testimony concerning the expected frequency of individuals who could be included as contributors to the DNA mixture found on the vaginal swabs; (2) the defendant's exclusion from the sperm-rich fraction of the DNA sample taken from the victim's posterior fourchette; (3) the fingerprint evidence recovered from the window in the bedroom of the victim's brother; (4) the victim's testimony regarding the perpetrator's physical appearance; and (5) the saliva found on the three swabs contained in the sexual assault evidence collection kit.

Contrary to the defendant's claims, the structure of the prosecutor's closing remarks did not force the defense "into the position of deciding what to address without knowing how the state would attempt to meet its burden." Each of these pieces of evidence was presented to the jury during the course of the trial, and the role that evidence played in the state's theory of the case was readily apparent. The prosecutor's reliance on Renstrom's testimony, in particular, could not have come as a surprise. Although the prosecutor did not refer explicitly to statistical frequencies or differentiate

between swabs during her initial summation, she did make clear that the DNA evidence was the cornerstone of the state's case, stating that, "while you are listening to [defense counsel's] argument, there are three letters you will not be able to forget. . . . Those letters are DNA."

We reach this conclusion, in part, as the result of our review of the substance of defense counsel's own closing argument. During his summation, defense counsel directly attacked the reliability of the evidence that formed the basis of the prosecutor's rebuttal argument. As the Appellate Court's decision aptly noted, defense counsel "pointed out the weaknesses in the state's case: the victim and her mother were unable to identify the perpetrator in court or from photographs, the victim's description of the perpetrator was not consistent with his appearance, there was no fingerprint evidence from the window where the perpetrator supposedly entered the dwelling, the DNA evidence was uncorroborated, and the nurse [had initially testified to using] two swabs to collect DNA from the victim but there were three swabs in the rape kit in the laboratory . . . ." *State* v. *Gonzalez*, supra, 188 Conn. App. 328.

Defense counsel dedicated much of his closing argument to questioning the reliability of the state's DNA evidence and the forensic laboratory's conclusion that the defendant was included in one sperm-rich fraction but not the other. Characterizing the laboratory's conclusions as contradictory, defense counsel argued that the state's DNA evidence, in its entirety, was not reliable, stating: "They come from the same source. They're entered into the same machine. They're all at the same low frequency and outer edges and ranges of validity. They're diametrically opposed results. One he's included, one he's eliminated. Both have mixtures; one he's included, one he's eliminated. . . . So the one that has the most seminal fluid, the one that results in the

smear with the sperm, he's eliminated from. That's problematic. This is not a reliable result. If a result is unreliable, then statistics mean nothing [and] 100 percent of nothing equals nothing."

Contrary to the defendant's assertions, at the time defense counsel presented his closing argument, he was aware of the inculpatory evidence that formed the basis of the prosecutor's closing argument and had a fair opportunity to rebut it. Defense counsel made the strategic decision to use his closing argument to call into question the consistency of the testimony of the state's eyewitnesses and the reliability of its forensic evidence. Indeed, in his brief, the defendant concedes that the defense "chose not to directly address Renstrom's testimony about the expected frequency of individuals that could be included as contributors to the mixture." On the basis of our review of the record and the substance of defense counsel's closing argument, it is clear that the defense was able to argue, and had a fair opportunity to argue, a theory that was responsive to the state's evidence.

In sum, although the structure of the prosecutor's closing argument precluded the defense from responding to the exact manner in which the prosecutor argued the evidence, the defendant was not deprived of the opportunity to present a defense that was responsive to the state's overall theory of the case. The state's case against the defendant and the evidence used to support it were clear and consistent throughout the course of the trial. We conclude that the structure of the prosecutor's summation did not violate the defendant's sixth amendment right to present a closing argument, and, therefore, his first claim of prosecutorial impropriety must fail.

B

We now consider whether the structure of the prosecutor's closing argument deprived the defendant of his

due process right to a fair trial. The defendant argues that the structure of the prosecutor's closing argument was improper and deprived him of a fair trial because it "prevented the defense from meaningfully responding to the [prosecutor's] substantive argument." The state disagrees, arguing that the prosecutor's closing argument was proper and did not implicate the defendant's due process rights. We agree with the state.

Because the defendant's second prosecutorial impropriety claim alleges a violation of his general due process right to a fair trial, we review this claim under the general due process standard articulated in *Williams*. See *State* v. *A. M.*, supra, 324 Conn. 199. As explained previously, the *Williams* general due process standard involves the application of a two step analytical process. "The two steps are separate and distinct: (1) whether [impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial." (Internal quotation marks omitted.) *State* v. *Angel T.*, 292 Conn. 262, 275, 973 A.2d 1207 (2009). The defendant carries the burden of proof under both steps and, therefore, must establish that the complained of conduct was both improper and so egregious that it resulted in a denial of due process. See *State* v. *Payne*, supra, 303 Conn. 562–63.

We have previously recognized that "[p]rosecutorial [impropriety] of constitutional magnitude can occur in the course of closing arguments." (Internal quotation marks omitted.) *State* v. *Otto*, supra, 305 Conn. 76. "In determining whether such [impropriety] has occurred, the reviewing court must give due deference to the fact that [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." (Internal quotation marks omitted.) Id.

"While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider." (Internal quotation marks omitted.) *State* v. *Ciullo*, 314 Conn. 28, 38, 100 A.3d 779 (2014). "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." (Internal quotation marks omitted.) *State* v. *Otto*, supra, 305 Conn. 76.

No statute or rule of practice in this state limits the scope of the prosecutor's rebuttal to issues raised in preceding arguments.[15] See *State* v. *Rosa*, supra, 170 Conn. 428 (noting that "[t]here is no rigid requirement that a prosecutor's final summation must be limited solely to rebuttal of matters raised in the defendant's argument"). Due process considerations, however, necessarily restrict the prosecutor's closing argument to facts in evidence; see *State* v. *Singh*, 259 Conn. 693, 718, 793 A.2d 226 (2002); and the theory of the case disclosed in the pleadings. See *State* v. *Cobb*, supra, 251 Conn. 417 (state's theory of case at closing argument is bounded "by the information and the bill of particulars").

With these principles in mind, we turn to the defendant's claim that the prosecutor deprived him of a fair

[15] General Statutes § 54-88, the only statutory provision relating to closing arguments, provides: "In any criminal trial, the counsel for the state shall be entitled to open and close the argument." As stated previously, Practice Book § 42-35 likewise provides in relevant part: "[u]nless the judicial authority for cause permits otherwise, the parties shall proceed with the trial in the following order . . . (4) The prosecuting authority shall be entitled to make the opening and final closing arguments. (5) The defendant may make a single closing argument following the opening argument of the prosecuting authority."

trial by reserving the bulk of her discussion of the evidence for rebuttal. Viewing the prosecutor's rebuttal argument in the context of the entire trial, we conclude that the structure of the prosecutor's closing argument was not improper and, therefore, did not implicate the defendant's due process rights.

As we explained in part I A of this opinion, the record demonstrates that the prosecutor's analysis of the evidence during her rebuttal argument did not interfere with the ability of the defense to present a closing argument that was responsive to the state's theory of the case. During her rebuttal, the prosecutor did not introduce a new theory or rely on facts not in evidence. Instead, the prosecutor used her rebuttal to analyze the evidence that supported the state's case—namely, that the DNA evidence established the defendant's guilt beyond a reasonable doubt. Defense counsel, at the time of closing, was aware of that argument and had a fair opportunity to address it.[16] As a result, we conclude that the structure of the prosecutor's summation was not improper.

The case law that the defendant cites in support of the opposite conclusion is unavailing. In his brief, the defendant cites various state and federal cases in which appellate courts have reversed criminal convictions on the ground that the prosecuting authority impermissibly

[16] As noted previously in this opinion, defense counsel used his closing argument to call into question the reliability and veracity of the evidence that the prosecutor discussed during her rebuttal, arguing that "[t]he majority of [the] evidence in this case contradicts a piece of evidence that implicates the defendant." Specifically, during closing, defense counsel argued that Renstrom's conclusions regarding the inclusion of the defendant's DNA were contradictory and, therefore, "mean nothing." He argued that the victim's description of the perpetrator on the night of the attack was inconsistent with the defendant's physical appearance at the time of his arrest. Defense counsel also called into question the state's handling of the sexual assault evidence collection kit, arguing that procedural mistakes rendered the DNA evidence unreliable.

reserved the bulk of its argument for rebuttal. The federal cases cited by the defendant turn on the application of statutory and procedural rules that differ from those of our state and are, therefore, inapplicable to our consideration of the defendant's claim.[17]

State court decisions cited by the defendant, some of which turn on constitutional considerations, are likewise distinguishable from the present case. The defendant relies heavily on the Delaware Supreme Court's decision in *Bailey* v. *State*, 440 A.2d 997 (Del. 1982). In *Bailey*, the Delaware Supreme Court concluded that a trial court committed reversible error when it allowed a prosecutor to present a five minute opening summation followed by more than an hour-long rebuttal argument that covered issues not previously raised by either party. Id., 1000–1003. Noting that, "[b]ecause of the brevity of the [s]tate's opening summation, defense counsel was left to guess which issues the [s]tate would discuss in its rebuttal," the Delaware Supreme Court concluded that the prosecutor's strategy struck "a blow to [the] defendant's right to a fair trial" and that reversal was, therefore, warranted.[18] Id., 1003.

[17] The federal cases cited by the defendant turn on the application of Federal Rule of Criminal Procedure 29.1, which has been interpreted by federal courts as limiting the scope of rebuttal argument to issues raised by the defense during its closing. See *United States* v. *Alegria*, Docket No. S 90 Cr. 0450 (RWS), 1991 WL 238223, *11–12 (S.D.N.Y. November 6, 1991); see also *United States* v. *Taylor*, 728 F.2d 930, 937 (7th Cir. 1984) (noting that "limitation on rebuttal is supported by the legislative history of rule 29.1," which "outlines the order of closing arguments in a criminal trial"). Rule 29.1 "does not establish a constitutional doctrine, but rather, provides a uniform rule of federal practice" and is, therefore, irrelevant to our consideration of the defendant's constitutional claims. See *United States* v. *Byrd*, 834 F.2d 145, 147 (8th Cir. 1987); see also *United States* v. *Garcia*, 94 F.3d 57, 63 (2d Cir. 1996).

[18] The Delaware Supreme Court has subsequently limited *Bailey* to its facts. In *Lovett* v. *State*, 516 A.2d 455, 470 (Del. 1986), cert. denied, 481 U.S. 1018, 107 S. Ct. 1898, 95 L. Ed. 2d 504 (1987), the Delaware Supreme Court distinguished *Bailey* and held that a prosecutor's discussion of facts not previously discussed during his opening summation did not deprive the defendant of a fair trial.

Unlike in *Bailey*, the prosecutor's opening summation and presentation of the evidence in the present case provided defense counsel with notice of the state's theory of the case and alerted the defense to the key evidence that the state would rely on in support of its theory. The prosecutor, at the beginning of her initial summation, recounted the victim's testimony concerning the attack that she suffered at the hands of an unknown intruder on the night of October 15, 2014. At the conclusion of her initial summation, the prosecutor made clear how the state would prove beyond a reasonable doubt that the defendant was the unknown intruder who attacked the victim, telling the jury that, as it listened to defense counsel's closing argument, "[t]here are three letters you will not be able to get out of your head. Those letters are DNA." Unlike in *Bailey*, the structure of the state's summation did not leave the defendant "left to guess which issues the [s]tate would discuss in its rebuttal." *Bailey* v. *State*, supra, 440 A.2d 1003. This is not a case in which the prosecutor refrained from engaging in a substantive discussion of the charges, the underlying elements, or the evidence that the state believed supported its case during her initial summation. The state's presentation of the evidence, coupled with the prosecutor's opening summation, made the state's theory of the case abundantly clear and alerted the defendant to how the state would use the evidence to prove that theory. We therefore conclude that the defendant's reliance on *Bailey* is unavailing.[19]

[19] The defendant cites several other cases from our sister states that are similarly distinguishable. See *People* v. *Robinson*, 31 Cal. App. 4th 494, 505, 37 Cal. Rptr. 2d 183 (1995) (holding that state procedural rules do not permit prosecutor to give rebuttal argument ten times longer than opening summation); see also *Presi* v. *State*, 73 Md. App. 375, 377, 534 A.2d 370 (1987) (holding that trial court abused its discretion by allowing prosecutor to raise new issue during rebuttal that was prejudicial to defendant), cert. denied, 312 Md. 127, 538 A.2d 778 (1988); *State* v. *Peterson*, 423 S.W.2d 825, 830–31 (Mo. 1968) (granting new trial when state argued issues relating to appropriate punishment of defendant for first time on rebuttal).

Considering the structure of the prosecutor's closing argument in light of the entire trial, we conclude that the defendant has failed to demonstrate that the prosecutor's substantive discussion of the evidence during rebuttal interfered with his ability to respond to the state's theory of the case. The record reveals that the prosecutor's rebuttal was predicated on the evidence that the state had presented at trial and on the theory of the case that the prosecutor articulated during her opening summation. Given the central role that the eyewitness testimony and forensic evidence played in the state's theory of the defendant's guilt, defense counsel was on notice that the prosecutor would likely rely on that evidence throughout her closing argument. Indeed, as we noted previously, defense counsel addressed the evidence that formed the basis of the state's theory of the case during his closing argument. We therefore conclude that the defendant has failed to show that the structure of the prosecutor's closing argument amounted to prosecutorial impropriety.[20]

II

Having determined that the defendant's claims with respect to the structure of the prosecutor's closing argument must fail, we now turn to the defendant's claims that two particular statements made by the prosecutor

[20] We pause to note that this conclusion should not be taken as a blanket approval of so-called prosecutorial "sandbagging." Rather, we simply conclude that the prosecutor in the present case did not structure her closing argument in a manner that deprived the defense of an opportunity to respond to her evidentiary arguments and to the state's theory of the case, and, as a result, that her conduct did not rise to the level of prosecutorial impropriety. Prosecutors should avoid structuring their closing arguments in a manner that reserves the entirety of their summation for rebuttal, which could implicate a defendant's constitutional rights. Of course, under such circumstances, trial judges have discretion and are in the best position to fashion an appropriate remedy, including providing the defendant with an opportunity to make additional closing arguments to the jury. See Practice Book § 42-35 (providing judges with discretion over order of closing argument).

during her rebuttal deprived him of his right to present a closing argument and, when considered together, had the cumulative effect of depriving the defendant of his general due process right to a fair trial. Specifically, the defendant contends that the prosecutor mischaracterized both the DNA evidence and the fingerprint evidence presented at trial. According to the defendant, the timing and severity of these two alleged mischaracterizations prevented the defense from responding to the prosecutor's arguments.

The following facts and procedural history are relevant to our resolution of these claims. With respect to the DNA evidence, the prosecutor summarized Renstrom's testimony as follows: "Renstrom then attached a statistic to the [number] of times you would see that [DNA] profile in a number of people. He told you that you would see the DNA profile of the defendant once in 52 million people in the African-American community. Think about that, ladies and gentlemen. You hear evidence that the whole state of Connecticut is 3.5 million people. If we filled the entire state of Connecticut with 3.5 million African-Americans, 52 million African-Americans would be the population of Connecticut times fourteen. So, if we placed 3.5 million African-Americans in Connecticut and stacked thirteen more states the size of Connecticut on top of that full of African-Americans, we would still only see that profile one time. That, ladies and gentlemen, is proof beyond a reasonable doubt."

With respect to the fingerprint evidence, testimony was presented at trial from detectives John Cerejo and Steve Burstein of the Meriden Police Department regarding efforts that the police made to remove and analyze the fingerprints found on the window located in the bedroom of the victim's brother. See *State* v. *Gonzalez*, supra, 188 Conn. App. 335. During his testimony, Cerejo stated that a variety of factors, including

sun and rain, can impact the length of time that fingerprints remain detectable on a surface. Id. Burstein testified that the window in question was exposed to the elements and that he did not know how long the fingerprints had been present. Id. Burstein further testified that, although he was not sure when the house had been built, he estimated that it "probably [was] 100 years ago or so . . . ." (Internal quotation marks omitted.) Id. During her rebuttal argument, the prosecutor stated: "We don't know where the prints came from or how long they've been there or if they've been there for 100 years."

The defendant contends that the prosecutor mischaracterized Renstrom's testimony concerning the number of individuals who would be expected to be included in the DNA mixture found on the vaginal swabs. He argues that the prosecutor, by comparing the expected frequency of inclusion with the population of Connecticut, and by stating that the defendant's DNA profile would appear only once per 52 million African-Americans, suggested to the jury that the DNA evidence established that the defendant was the only person in Connecticut whose DNA could match the DNA profile identified in that sample. The defendant argues that this statement is a product of two errors in probabilistic reasoning, the so-called "uniqueness fallacy" and the "probability of another match error." (Internal quotation marks omitted.) According to the defendant, because this statement is the product of probabilistic fallacies, it cannot be considered a reasonable inference from the evidence.

The defendant likewise claims that the prosecutor mischaracterized the testimony of Cerejo and Burstein, and that these mischaracterizations amounted to the introduction of extraneous evidence because no evidence was presented at trial concerning the age of the fingerprints. As with the defendant's claims concerning

the structure of the prosecutor's closing argument, we address separately the impact of these alleged mischaracterizations on (1) the defendant's sixth amendment right to present a closing argument, and (2) his right to a fair trial.

A

We first consider the defendant's claim that the prosecutor's alleged mischaracterizations of the evidence violated the defendant's sixth amendment rights. Specifically, the defendant argues that the prosecutor's alleged mischaracterizations of the DNA and fingerprint evidence during rebuttal prevented him from responding to the prosecutor's arguments and, as a result, deprived him of his sixth amendment right to present a closing argument. The defendant focuses primarily on the prosecutor's characterization of the DNA evidence and claims that, because the statement was made during rebuttal, he was prevented from "putting [the evidence] in context" with his "theory" that the DNA evidence was unreliable due to errors in the collection, preservation, and testing of the items in the sexual assault evidence collection kit. In response, the state argues that the prosecutor's statements did not mischaracterize the evidence and, instead, drew reasonable inferences from Renstrom's testimony. According to the state, because the prosecutor's statements were directly related to testimony presented at trial, the inclusion of the statements in the prosecutor's rebuttal argument did not impact the defendant's ability to present a closing argument that was responsive to the state's theory of the case. We agree with the state.

As we noted previously in this opinion, the sixth amend ment right to assistance of counsel protects a criminal defendant's right to present his theory of the defense at the close of evidence. See, e.g., *State* v. *Arline*, supra, 223 Conn. 55–56. In the present case, the prosecutor's

rebuttal argument concerning the DNA evidence did not deprive the defendant of an opportunity to respond to the state's theory of the case or to present his own defense. At the close of the prosecutor's initial summation, she made clear that she would rely on the DNA evidence to argue that the state had proven the defendant's guilt beyond a reasonable doubt. During his closing argument, defense counsel directly attacked the DNA evidence, arguing that, due to errors in the collection, preservation, and testing of the items in the sexual assault evidence collection kit, the DNA evidence should be disregarded in its entirety. Although defense counsel may have been prevented from directly responding to the prosecutor's contention that the defendant was the only person in Connecticut who could be a contributor to the DNA mixture, he was not deprived of an opportunity to argue that the statistical probabilities presented by Renstrom left some room for reasonable doubt about the defendant's guilt. As we previously noted, defense counsel's decision to refrain from addressing Renstrom's statistical frequency testimony during counsel's closing argument was his decision to make. Put differently, the defendant's ability to frame that evidence for the jury was not impacted by the prosecutor's rebuttal argument.

Furthermore, in considering whether an alleged prosecutorial impropriety violated a specifically enumerated constitutional right, we look to the contemporaneous reaction of defense counsel. See, e.g., *State* v. *Cassidy*, 236 Conn. 112, 131, 672 A.2d 899 (overruled in part on other grounds by *State* v. *Alexander*, 254 Conn. 290, 295, 755 A.2d 868 (2000)), cert. denied, 519 U.S. 910, 117 S. Ct. 273, 136 L. Ed. 2d 196 (1996). As we have noted in prior decisions, we assume that defense counsel will object or seek a curative instruction from the trial court if, at the time of the alleged impropriety, defense counsel believed the conduct was improper and violated the

defendant's constitutional rights. See, e.g., *State* v. *A. M.*, supra, 324 Conn. 207–208. In the present case, the absence of an objection to the prosecutor's characterization of the DNA evidence demonstrates that, at the time of trial, defense counsel did not believe the statement infringed on the defendant's constitutional rights.

For the foregoing reasons, and on the basis of the record before us, we conclude that the prosecutor's characterization of the evidence during her rebuttal argument did not infringe on the defendant's sixth amendment right to present a closing argument. As a result, the defendant's third claim of prosecutorial impropriety must fail.

B

Finally, we address the defendant's claim that the prosecutor's alleged mischaracterizations deprived him of his right to a fair trial. The defendant argues that the Appellate Court incorrectly concluded that the prosecutor's statements relating to DNA and fingerprint evidence were not improper and, therefore, did not violate the defendant's due process rights. Specifically, the defendant argues that these statements, which were made during the prosecutor's rebuttal, rose to the level of prosecutorial impropriety because they mischaracterized the evidence presented at trial and prejudiced him because he was unable to respond to them. The state disagrees, arguing that the prosecutor's characterization of the evidence was proper and did not impact the defendant's right to a fair trial.

Assuming, without deciding, that the prosecutor's statements were improper, we conclude that the cumulative effect of the allegedly improper remarks was harmless and did not deprive the defendant of his right to a fair trial. See, e.g., *State* v. *Grant*, 286 Conn. 499, 542, 944 A.2d 947, cert. denied, 55 U.S. 916, 129 S. Ct. 271, 172 L. Ed. 2d 200 (2008); see also *State* v. *Gibson*,

302 Conn. 653, 663 n.4, 31 A.3d 346 (2011) (noting that "this court occasionally has skipped the first step of [the two step prosecutorial impropriety] analysis when . . . it was clear that there was no due process violation").

In conducting such an analysis, "we ask whether the prosecutor's conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." (Internal quotation marks omitted.) *State* v. *Williams*, supra, 204 Conn. 539. In doing so, "[w]e do not . . . focus only on the conduct of the [prosecutor]. The fairness of the trial and not the culpability of the prosecutor is the standard for analyzing the constitutional due process claims of criminal defendants alleging prosecutorial [impropriety]." (Internal quotation marks omitted.) *State* v. *Fauci*, 282 Conn. 23, 50, 917 A.2d 978 (2007).

"[O]ur determination of whether any improper conduct by the [prosecutor] violated the defendant's fair trial rights is predicated on the factors set forth in [*Williams*] with due consideration of whether that misconduct was objected to at trial." (Citation omitted; internal quotation marks omitted.) *State* v. *Warholic*, 278 Conn. 354, 362, 897 A.2d 569 (2006). In applying the *Williams* factors, "we must determine whether (1) the impropriety was invited by the defense, (2) the impropriety was severe, (3) the impropriety was frequent, (4) the impropriety was central to a critical issue in the case, (5) the impropriety was cured or ameliorated by a specific jury charge, and (6) the state's case against the defendant was weak due to a lack of . . . evidence." *State* v. *Fauci*, supra, 282 Conn. 51.

As we previously noted in this opinion, "prosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however] [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. . . . 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." (Internal quotation marks omitted.) *State* v. *Medrano*, 308 Conn. 604, 611, 65 A.3d 503 (2013).

"We must [also] 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." (Internal quotation marks omitted.) *State* v. *Stevenson*, 269 Conn. 563, 583–84, 849 A.2d 626 (2004). It, therefore, "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." (Internal quotation marks omitted.) *State* v. *Medrano*, supra, 308 Conn. 611.

With these principles in mind, we turn to the application of the *Williams* factors to the allegedly improper statements made by the prosecutor during her rebuttal argument. Viewing the alleged "incidents of misconduct . . . in relation to one another and within the context of the entire trial"; *State* v. *Stevenson*, supra, 269 Conn. 574; we conclude that the two alleged mischaracterizations did not deprive the defendant of his right to a fair trial. Specifically, our review of the record as a whole leads us to the conclusion that, even if the rhetorical devices employed by the prosecutor were technically

imprecise, the negative impact of those statements was limited and, as a result, did not result in a due process violation.

The first and third *Williams* factors are in relative equipoise. Although noting that the defendant was included as a contributor to the DNA profile developed from one sample but excluded from the other, defense counsel attacked the general reliability of the DNA evidence without specifically discussing the statistical probabilities testified to by the DNA expert. Defense counsel also emphasized the fact that the defendant's fingerprints were not found on the window he was suspected of using to enter the apartment. He specifically challenged the prosecutor's claim that the recovered fingerprints were left by children, stating: "They're not kids' prints. You heard the experts testify about that. [One] hundred years? The windows were there forever? I mean, come on, let's be serious." On the one hand, we cannot conclude that the precise manner in which the prosecutor framed the DNA and fingerprint evidence presented at trial was invited in any meaningful way by the defense. It is equally clear, however, that both of the statements at issue were brief and were made only once by the prosecutor.

We next consider whether the alleged improprieties were severe. "In determining whether the prosecutorial impropriety was severe, this court consider[s] it highly significant that defense counsel failed to object to . . . the improper [remark], [to] request curative instructions, or [to] move for a mistrial." (Internal quotation marks omitted.) *State* v. *Fauci*, supra, 282 Conn. 51. In the present case, defense counsel objected to the prosecutor's statement concerning the fingerprint evidence but failed to object to the prosecutor's characterization of Renstrom's statistical frequency testimony. Insofar as the prosecutor's statements concerning the DNA evidence used imprecise language, defense coun-

sel had the opportunity to object or seek a corrective instruction from the trial court but chose not to do so, which suggests that he did not view the statement as overly prejudicial.[21]

"Beyond defense counsel's failure to object, in determining the severity of prosecutorial impropriety, we look to whether the impropriety was blatantly egregious or inexcusable." Id. The prosecutor's argument that the defendant was the only person in Connecticut who could have left the DNA found on the victim's vagina was based on Renstrom's testimony that the expected frequency of inclusion was "one in 52 million in the African-American population . . . ." Although Renstrom did not, in fact, testify that the defendant's genetic profile was necessarily unique in that population, the general argument advanced by the prosecutor was more simplistic: that the jury could infer the defendant's guilt from the fact that it was exceedingly unlikely that someone other than the defendant was the source of the DNA discovered on the victim. See *State* v. *Jones*, 115 Conn. App. 581, 597–600, 974 A.2d 72 (holding that it was not improper for prosecutor to argue that defendant's DNA was contained in DNA mixture found in victim when evidence was presented at trial that defendant was included as contributor to mixture), cert. denied, 293 Conn. 916, 979 A.2d 492 (2009); see also *State* v. *Brett B.*, 186 Conn. App. 563, 584, 200 A.3d 706 (2018), cert. denied, 330 Conn. 961, 199 A.3d 560 (2019). Thus, the prosecutor's comparison of the frequency of inclusion statistic with the population of Connecticut, although imprecise, merely asked the jury to draw a

[21] The defendant argues that, due to the "subtle and clever" nature of the errors in probabilistic reasoning employed by the prosecutor, defense counsel's failure to object to the prosecutor's statement concerning the DNA evidence should not be considered when evaluating the prejudicial nature of the statement. Subtleties are, however, often less severe by nature. As a result, we see no reason to depart from the well established rule relating to the absence of an objection in the present case.

reasonable inference from testimony already in evidence. This fact, coupled with defense counsel's failure to object, leads us to conclude that any impropriety involving the prosecutor's characterization of the DNA evidence should not be characterized as severe.

With respect to the prosecutor's statement concerning the fingerprint evidence, we agree with the Appellate Court that "[t]he obvious point of the prosecutor's argument was that there was no evidence as to whose fingerprints were on the window or when they happened to be put there. With a hyperbolic flourish, the prosecutor incorporated the testimony that the house was estimated to be [100] years old to emphasize that no one knew when or who put fingerprints on the window." *State* v. *Gonzalez*, supra, 188 Conn. App. 336. The force of this rhetorical device was, no doubt, lessened by the fact that defense counsel, in closing, expressly urged the jury to disregard it, stating, "[t]hey're not kids' prints. You heard the experts testify about that. [One] hundred years? The windows were there forever? I mean, come on, let's be serious." We, therefore, conclude that the negative impact of the prosecutor's statement relating to the fingerprint evidence presented at trial was minimal. See *State* v. *Ruiz*, 202 Conn. 316, 329, 521 A.2d 1025 (1987) ("the remarks do not exceed permissible limits for rhetorical hyperbole by counsel engaged in advocating a cause under our adversary system").

Next, we consider whether the claimed improprieties involved a critical issue in the case. This particular factor favors the defendant's claim relating to the use of the DNA evidence because the prosecutor's alleged mischaracterization of Renstrom's testimony clearly implicated the evidentiary cornerstone of the state's case. The fingerprint evidence, by contrast, cannot be considered critical to the state's theory of identity

because the recovered fingerprints did not tie the defendant to the scene of the crime.

Fifth, we consider whether the trial court adopted curative measures to ameliorate the impropriety. Although the trial court did not address the alleged mischaracterizations with specific instructions, it did issue the following general charge to the jury: "You are the sole judges of the facts. . . . You are to recollect and weigh the evidence and form your own conclusions as to what the facts are. You may not go outside the evidence presented in court to find the facts. . . . There are a number of things that may have been seen or heard during the trial that are not evidence and that you may not consider in deciding what the facts are. These include arguments and statements by the lawyers. The lawyers are not witnesses. Their arguments are intended to help you interpret the evidence, but they are *not evidence*. . . . [I]f the facts as you remember them differ in any way from the lawyers' statements, it's your memory that controls." (Emphasis added.) As this court has previously stated, "[i]n the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them." (Internal quotation marks omitted.) *State* v. *Thompson*, 266 Conn. 440, 485, 832 A.2d 626 (2003); see also *State* v. *Collins*, 299 Conn. 567, 590, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011). This instruction likely mitigated any negative impact that the alleged mischaracterizations may have had. This is especially true with respect to the alleged impropriety related to Renstrom's testimony, which was not subject to a specific objection at trial. See *State* v. *A. M.*, supra, 324 Conn. 207 ("in nearly all cases [in which] defense counsel fails to object to and request a specific curative instruction in response to a prosecutorial impropriety, especially an impropriety that we do not consider to be particularly egregious, and the court's

general jury instruction addresses that impropriety, we have held that the court's general instruction cures the impropriety").

Finally, we consider the overall strength of the state's case against the defendant. The jury had before it testimony that the defendant was included as a contributor to a DNA mixture recovered from the victim's vagina. The jury also heard testimony that there was an infinitesimally low probability that a randomly selected person other than the defendant would be expected to be included in that mixture. Furthermore, the jury heard testimony that, shortly after the assault, the ten year old victim provided a physical description of the perpetrator that, in large part, matched the physical appearance[22] of the defendant on the day that he was arrested. Such evidence, although not overwhelming, is particularly strong. See *State* v. *Thompson*, supra, 266 Conn. 483 ("we have never stated that the state's evidence must have been overwhelming in order to support a conclusion that prosecutorial misconduct did not deprive the defendant of a fair trial").

To summarize, the prosecutor's alleged mischaracterizations, even if not invited, were neither frequent nor severe, and any negative impact they may have caused would have been ameliorated by the trial court's general instructions to the jury. We therefore conclude that the defendant was not denied a fair trial under the framework set forth in *Williams*, and reversal of the defendant's convictions is, therefore, unwarranted.

For the foregoing reasons, we conclude that the alleged instances of prosecutorial impropriety did not

[22] The victim stated during her forensic interview that the defendant was clean shaven. The defendant, when he was arrested three days after the attack, had a beard and mustache. The victim, however, also testified that the perpetrator was black and had short dreadlocks and a scratch on his face. The defendant possessed all of these additional characteristics at the time of his arrest.

deprive the defendant of his right to present a closing argument or of his right to a fair trial. We conclude that the structure of the prosecutor's closing argument did not deprive the defendant of his right to present an argument through counsel at the close of evidence and was not improper. Similarly, we conclude that the prosecutor's statements concerning the DNA and fingerprint evidence during rebuttal did not prevent the defendant from presenting a closing argument that was responsive to the state's theory of the case and, therefore, did not deprive the defendant of his right to present a closing argument. Furthermore, assuming without deciding that the alleged mischaracterizations of the evidence were improper, we conclude that they were not sufficiently prejudicial as to deprive the defendant of a fair trial.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.